No. 06-589

IN THE

Supreme Court of the United States

THE CHRISTIAN CIVIC LEAGUE OF MAINE, INC.,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee,

and

JOHN MCCAIN, RUSSELL FEINGOLD, CHRISTOPHER SHAYS, MARTIN MEEHAN, AND TOM ALLEN,
Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM OF INTERVENOR-APPELLEES SENATOR JOHN MCCAIN, SENATOR RUSSELL FEINGOLD, REPRESENTATIVE CHRISTOPHER SHAYS, REPRESENTATIVE MARTIN MEEHAN, AND REPRESENTATIVE TOM ALLEN

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QUESTIONS PRESENTED

1. Whether the three-judge district court correctly concluded that plaintiff's claim that Title II of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, is moot and not "capable of repetition, yet evading review" in the particular circumstances present here.

2. Whether the three-judge district court correctly concluded that plaintiff's unspecified claim that Title II of BCRA is unconstitutional as applied to advertisements that it might someday decide to run is not ripe.

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INTRODUCTION

In this appeal, plaintiff Christian Civic League of Maine, Inc. (CCL) challenges the unanimous decision of a three-judge district court dismissing its complaint for declaratory and injunctive relief for lack of a justiciable case or controversy within the meaning of Article III of the Constitution.

CCL brought an as-applied constitutional challenge to the electioneering communications provisions of the Federal Election Campaign Act (FECA or Act), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA). It alleged that the Act unconstitutionally prohibited CCL from using its general treasury funds to broadcast, within 30 days of Maine's June 13, 2006 Republican primary election, a radio advertisement that referred to a clearly identified candidate in that election and criticized her position on a controversial issue (the "Crossroads" advertisement). CCL further alleged that the Act unconstitutionally restricted its ability to run, at some unspecified time in the future, unspecified "grassroots lobbying" ads that are "materially similar" to the "Crossroads" advertisement and relate potentially to a "range of issues."

CCL initially sought a preliminary injunction permitting it to finance broadcasts of the "Crossroads" advertisement with unrestricted funds from May 14, 2006, when the ad became an "electioneering communication" under FECA, until June 5, 2006, the scheduled date of a Senate vote on the federal Marriage Protection Amendment, which CCL's advertisement discussed. The three-judge district court declined to grant the preliminary injunction, and this Court, on May 15, 2006, denied CCL's request to expedite its appeal of that order. On June 7, 2006, the Senate considered and defeated the Marriage Protection Amendment. CCL never ran the proposed advertisement, and it has expressly disavowed any concrete plan to do so in the future. Nonetheless, it sought immediate review in this Court, which dismissed CCL's initial appeal as moot on October 2, 2006.

Meanwhile, CCL continued to seek declaratory and permanent injunctive relief before the three-judge district

court. After briefing and argument, the three-judge court concluded that CCL's claims with respect to the "Crossroads" advertisement were moot, and that they were not saved by the "capable of repetition, yet evading review" exception. As to CCL's claim relating to hypothetical non-"Crossroads" advertisements that CCL might seek to run at some unspecified date in the future, the three-judge court concluded that CCL's claim was not ripe.

These conclusions were correct. The purported injury that CCL sought to avoid—losing the opportunity to broadcast its "Crossroads" advertisement using the corporation's general treasury funds prior to the Senate vote—has passed. This Court cannot turn back the clock, nor can it somehow undo the alleged "irreparable injury" that CCL sought to avoid through emergency relief. Because "[n]o order of this Court could affect the parties' rights with respect to the injunction [it is] called upon to review," *Honig* v. *Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985) (per curiam), there is no justiciable case or controversy under Article III. Nor is there any basis for applying the "capable of repetition, yet evading review" exception to CCL's request. CCL has failed to establish that the same controversy involving the same parties is likely to recur in the foreseeable future.

To the extent CCL seeks relief to run yet-to-be-defined "non-Crossroads" ads at some unspecified date in the future, that claim is too speculative and hypothetical to satisfy the ripeness requirement. CCL has admitted that it has no concrete plans to run any future ads, and CCL's allegation that it might run ads "materially similar" to the "Crossroads" advertisement does not make CCL's claim sufficiently concrete. As the district court recognized, CCL's claim as to future ads is so broad and amorphous that it amounts to nothing more than a facial challenge to BCRA—a challenge that this Court rejected in *McConnell* v. *FEC*, 540 U.S. 93 (2003).

Because plenary review of the three-judge court's dismissal would not resolve any substantial federal question, this Court should summarily affirm the decision below. CCL

identifies no basis for this Court to revisit the well-settled mootness and ripeness rules that the three-judge district court applied in this case. The three-judge court correctly applied those rules in concluding that CCL's claim relating to the "Crossroads" advertisement was moot and not "capable of repetition," and that its claim relating to future advertisements was not ripe for adjudication.

Finally, even were this Court to conclude that some portion of CCL's claims were justiciable, it should resist CCL's invitation to reach the merits of those claims in the absence of a developed factual record, lower court briefing of the issue, or a lower court opinion addressing the merits of CCL's claims. CCL's request that this Court reach the merits of its as-applied challenge—notwithstanding the absence of lower court consideration—is particularly unnecessary given that a different three-judge district court recently addressed the merits of a similar challenge. *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-1260, 2006 WL 3746669 (D.D.C. Dec. 21, 2006). As a result, this Court will likely have the opportunity to entertain plenary review of an as-applied challenge to Title II of BCRA and to do so in a case with a factual record and lower court consideration of the merits of the dispute. This Court should summarily affirm the lower court's decision.

STATEMENT

1. The "electioneering communication" provisions contained in FECA prohibit corporations and labor unions from using their general treasury funds to pay for any "broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and that is broadcast within either 30 days of a federal primary election or 60 days of a general election in the jurisdiction in which the named candidate is running. 2 U.S.C. §§ 441b(2), 434(f)(3); *see also* 11 C.F.R. § 100.29 (defining "electioneering communication"). This Court upheld the constitutionality of those provisions against a facial challenge in *McConnell* v. *FEC*, 540 U.S. 93 (2003). Noting its longstanding "respect for the legislative judgment that the special characteristics of the cor-

porate structure require particularly careful regulation," the Court "easily" concluded that compelling governmental interests support the prohibition on electioneering communications financed with general corporate funds. *Id.* at 205 (internal quotation marks omitted).

In *Wisconsin Right to Life, Inc.* v. *FEC*, 126 S. Ct. 1016 (2006) (per curiam), this Court clarified that its decision in *McConnell* upholding the electioneering communications provisions against facial attack "did not purport to resolve future as-applied challenges." *Id.* at 1018. The Court therefore left open the possibility that constitutional issues might arise from application of those provisions to "particular communications." *Id.* at 1017.

2. a. CCL commenced this action on April 3, 2006. According to the complaint, CCL intended to broadcast in early June 2006 a radio advertisement that referred to Senator Olympia Snowe, a candidate in Maine's June 13, 2006 Republican primary. The advertisement, entitled "Crossroads," began by warning listeners that "[m]arriage between a man and a woman has been challenged across this country and could be declared unconstitutional at any time by rogue judges." J.S. 1 n.1 (quoting Compl. Ex. A). The advertisement then condemned Senator Snowe's position on that issue by stating that she "[u]nfortunately" "voted against the Marriage Protection Amendment two years ago." *Id.* The advertisement continued by urging listeners to "call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June." *Id.*

The complaint conceded that this advertisement constituted an "electioneering communication" within the meaning of FECA, and therefore that the law prohibited CCL from using general treasury funds to finance the advertisement's broadcast within 30 days of the primary election. Compl. ¶ 14. CCL, however, sought a judgment declaring those provisions unconstitutional as applied to the advertisement. CCL also sought preliminary and permanent injunctive relief permitting it to broadcast the "Crossroads" ad to Maine

voters until the Senate's June 2006 vote on the Marriage Protection Amendment. *Id.* at 13.

The complaint also alleged that CCL intends to run advertisements "materially similar" to the "Crossroads" advertisement "before future primary and general elections in Maine" (Compl. ¶ 16) and sought declaratory and injunctive relief with respect to such hypothetical "electioneering communications by CCL that constitute grass-roots lobbying" (*id.* at 13). Neither the complaint nor the record contains any indication of the content of any such future ads or the circumstances in which CCL might wish to broadcast them.

b. With respect to the request for preliminary relief, the three-judge court permitted abbreviated discovery, lasting approximately one week and including one deposition. The few facts that emerged in that period revealed that CCL's interest in sponsoring the "Crossroads" ad arose only after it was contacted by another group, Focus on the Family. On March 24, 2006, that organization sent to a broad list of groups nationwide an email solicitation entitled "Possible legal action needed." FEC Opp. to Mot. for Prelim. Inj. Ex. B. The email stated that it was sent to certain groups "because [they were] in [states] that could be affected by the McCain-Feingold restrictions on Marriage Amendment lobbying ads that target U.S. senators who are on the ballot." *Id.* Attached to the email was a message from counsel, who offered to seek a federal court injunction at no charge on behalf of "any group" that would "step up" by running a "grass roots lobbying" ad during the electioneering communications period. *Id.* Counsel further noted that "[t]his may even involve an appeal to the U.S. Supreme Court (which would result in a landmark ruling.)" *Id.* The email directed any recipient "willing to assist in this matter" to contact counsel directly. *Id.*

Within an hour of receiving that email, CCL's executive director responded to counsel, stating, "I will run an ad in that period of time mentioning Olympia Snowe." FEC Opp. to Mot. for Prelim. Inj. Ex. C. Focus on the Family then

sent CCL "hypothetical" information on advertising rates in Maine radio markets and also supplied CCL with the text of the "Crossroads" ad that was attached to the complaint CCL filed several days later in the court below. Heath Dep., FEC Opp. to Mot. for Prelim. Inj. Ex. A 46, 51, 59; Ex. D ("Heath Dep.").

On April 13, 2006—ten days after this suit commenced—Mr. Heath testified that CCL lacked the approximately $4,000 it estimated would be required to broadcast the "Crossroads" advertisement, had done nothing to record or produce it, had not contacted a single radio station about buying time to broadcast the ad, and did not know where or how often the ad would run. Heath Dep. 50-52, 54, 65-68, 70. Eight days later, CCL filed a supplemental declaration of Mr. Heath stating that CCL had located a single donor willing to contribute approximately $3,900 to finance the ad's broadcast. Heath Decl., Attachment to Pl.'s Reply in Supp. of Mot. for Prelim. Inj. 5. Federal law permits a separate segregated fund to accept contributions of up to $5,000 from a single member, and CCL identified no law that would have precluded it from establishing a separate segregated fund to accept the $3,900 contribution.[1] Had it done so, that affiliated entity could have paid for the advertisements at issue.

3. On May 9, 2006, following expedited briefing, the three-judge district court unanimously denied CCL's motion for a preliminary injunction. The court concluded, as to the "Crossroads" advertisement, that CCL had not demonstrated a likelihood of success on the merits because, "[p]articularly after *McConnell*, there can be no question that the governmental interest in maintaining the integrity of the electoral process is compelling" and FECA is "narrowly tailored" to serve that interest "with respect to [CCL's] proposal to pay for the broadcast of its advertisement from its corporate funds." *Christian Civic League of Me., Inc.* v. *FEC*, 433 F. Supp. 2d 81, 88 (D.D.C. 2006). The

[1] *See* 2 U.S.C. § 441a(a)(1)(C); 11 C.F.R. § 110.1(b).

court further found that CCL failed to establish irreparable injury because CCL could easily comply with FECA (by, among other things, directing the single donation for the "Crossroads" advertisement through a separate segregated fund or choosing a different medium for its advertisement) and granting preliminary relief would disserve the public interest by injuring the Commission in its efforts to enforce federal law. *Id.* at 89. As to future non-"Crossroads" advertisements to be run at some unspecified time in the future, the court found an injunction unwarranted because CCL had failed to identify the content of such future communications or to establish any necessity for preliminary relief. *Id.* at 84 n.1.

4. a. CCL noticed an interlocutory appeal on May 11, 2006, and the following day filed both a jurisdictional statement and a request that this Court review the decision below on a highly expedited schedule. Such expedition was necessary, CCL argued, because if the appeal were heard in the usual course, "the League will lose its opportunity to speak before the anticipated June 5 Senate vote [on the Federal Marriage Protection Amendment] forever." 05-1447 J.S. 12. Asserting that it hoped to run the advertisement prior to the vote, CCL contended that it would be irreparably injured if it could not obtain a final decision before that date. *Id.* at 28. This Court denied the motion to expedite on May 15, 2006.

b. On May 22, 2006, pursuant to an order issued in conjunction with the denial of preliminary injunctive relief, the parties jointly submitted a statement containing their respective positions on further administration of the case. Both the FEC and Intervenor-Defendants urged the court to "use the time now available to build a [full factual] record so that this case is ready for a final decision at the earliest feasible time." Joint Report Pursuant to May 9, 2006 Order 5. CCL sought a stay of the three-judge court proceedings, asserting that because "CCL presently has no concrete plans to run ads" in the future, "there is no longer any pressing need" for "resolution by this Court of the questions pre-

sented." *Id.* at 8. The three-judge district court denied CCL's request for a stay and, following a status conference on June 5, 2006, ordered the parties to file discovery plans.

c. Before the court acted on the resulting proposals,[2] it *sua sponte* issued an order expressing its view that "the 'Crossroads' portion of the case . . . appears moot unless the 'capable of repetition[,] yet evading review' exception applies." June 23, 2006 Order 1. "That exception may not apply," the court further suggested, "because the 'Crossroads' advertisement portion of the case—particularly in this fact-centered, as-applied challenge—may not be 'capable of repetition.'" *Id.* The court therefore ordered CCL to "show cause . . . why the 'Crossroads' portion of the case should not be dismissed as moot" and directed the FEC and Intervenor-Defendants to file papers addressing the same issue. *Id.* at 2.

CCL argued in response that the "Crossroads" claim was not moot because it fell within the "capable of repetition, yet evading review" exception, contending that it intended in the future to run what it called "materially similar" ads. Pl.'s Resp. to June 23, 2006 Order 1. CCL could specify nothing about those hypothetical advertisements, however, and acknowledged that it had no concrete plans to develop or broadcast them. Instead, CCL stated that by "materially similar" ads, it "means that the ads' text, placement and timing would put them in contravention of the electioneering communication prohibition, just as the text, placement, and timing of the Crossroads ad put it in contravention of the electioneering communication prohibition." Pl.'s Opp. to FEC Mot. to Dismiss 6-7.

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[2] The FEC and Intervenor-Defendants proposed two alternative schedules: either six or nine weeks of discovery commencing on June 26, 2006, followed by summary judgment briefing on an expedited basis. Joint Report Pursuant to June 5, 2006 Order 3-5. CCL reiterated that because it "currently has no specific plans to run [any 'grassroots lobbying'] ads between now and election day" (*id.* at 2), "radical expedition is no longer warranted in this case" (*id.* at 7).

In their response to the district court's directive to address the mootness issue, Intervenor-Defendants observed that CCL had not made a sufficient showing that the controversy was "capable of repetition."[3] As a threshold matter, CCL had conceded on more than one occasion that it had no concrete plans to run *any* advertisements beyond the "Crossroads" advertisement about *any* policy issue. Intervenor-Defs.' Resp. to June 23, 2006 Order 4-5. Intervenor-Defendants did not rule out the possibility that the present controversy would be capable of repetition if CCL demonstrated the existence of a real prospect that it would run the "Crossroads" advertisement or a sufficiently similar advertisement in "materially similar circumstances" sometime in the foreseeable future. *Id.* at 6. What plainly did not suffice, however, was CCL's general allegation of an intent to run advertisements that are "materially similar" to the "Crossroads" advertisement only in the sense that they meet FECA's definition of an "electioneering communication": such allegations would support only the *facial* challenge that this Court already resolved in *McConnell* and therefore could not establish that the *as-applied* challenge presented by the "Crossroads" claim was "capable of repetition." *Id.* at 6-7 & n.1; Aug. 8, 2006 Tr. 18-20. And, where CCL only sought to run its advertisement after receiving a solicitation from a third party, and where it conceded that it had no concrete plans for the future, CCL could not show that the present dispute would recur. Intervenor-Defs.' Resp. to June 23, 2006 Order 7-8.

On September 27, 2006, the three-judge court granted the Partial Motion to Dismiss of Defendants and the Partial Motion for Judgment on the Pleadings of Intervenor-Defendants. The court concluded that with respect to the non-"Crossroads" advertisement, CCL's claims were "not ripe and/or too speculative and hypothetical to be justicia-

[3] The FEC likewise indicated in its submission that, although it was a difficult and "close question" whether the "capable of repetition, yet evading review" exception applied to the "Crossroads" claims (FEC Resp. to June 23, 2006 Order 3; Aug. 8, 2006 Tr. 11), the exception did not apply.

ble." J.S. App. 2a. And, as to the "Crossroads" advertisement, the court explained that that claim was "moot and not saved by the 'capable of repetition, yet evading review' exception to that doctrine." *Id.* Applying established Supreme Court precedent, the three-judge court found that CCL had not established a "reasonable expectation or a demonstrated probability that the *same* controversy will recur involving the same complaining party." *Id.* at 11a (quoting *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam) (internal quotation marks omitted)). The three-judge court further explained that even if CCL had satisfied the "same controversy" prong of the analysis, it had not demonstrated that the type of controversy would evade review. Accordingly, it concluded that CCL's claims with respect to the "Crossroads" advertisement were moot. *Id.* at 13a.

ARGUMENT

I. PLENARY REVIEW IS UNWARRANTED AND THE UNANIMOUS DECISION OF THE THREE-JUDGE COURT SHOULD BE SUMMARILY AFFIRMED

Plenary review of the three-judge court's dismissal would not resolve any substantial question as to the constitutionality of Title II of BCRA, but instead would turn on settled principles under the ripeness and mootness doctrines. Indeed, the decision below was based solely on the ground that the case is not justiciable, and the three-judge district court reached each of its conclusions by properly applying firmly established Supreme Court precedent to the unique facts of this case. This Court should not revisit these settled doctrines but instead should summarily affirm the three-judge district court's dismissal of both CCL's claim regarding hypothetical future advertisements and CCL's claim regarding the advertisement it sought to run in the Spring of 2006.[4]

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[4] CCL's right to appeal to this Court does not immunize it from the requirement of demonstrating a substantial constitutional question worthy of this Court's plenary review. *See* Stern & Gressman, *Supreme*

A. As to its conclusion that CCL's claims concerning hypothetical future advertisements were not ripe, the three-judge district court pointed to this Court's admonition that "Article III . . . confines . . . [the courts] to resolving real and substantive controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." J.S. App. 6a (alterations in original) (quoting *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (internal quotation marks omitted)); *see also Renne* v. *Geary*, 501 U.S. 312 (1991) (holding non-justiciable a First Amendment challenge to a California election law provision on the basis of plaintiffs' failure to allege a present intention to endorse a particular candidate).

The three-judge court was correct in concluding that CCL was unable to identify any concrete controversy requiring judicial intervention. Indeed, in the face of the allegation in CCL's complaint that it intended to run "materially similar grass-roots lobbying ads . . . on a range of issues in addition to laws protecting traditional marriage," CCL's own executive director testified that CCL had no specific plans to run any such broadcast advertisements. *See* Heath Dep. 74-75, 82-83. Even CCL's counsel "forthrightly confirmed this lack of plans in a May 22, 2006 report to the court and at a June 5, 2006 status conference." J.S. App. 6a, (citing Joint Report pursuant to May 9, 2006 Order 8 ("no concrete plans to run ads") and June 5, 2006 Status Conference Tr. 14 ("We have no current plan to do an ad . . . .")).

This complete absence of concrete plans to run any future advertisements is unsurprising: prior to this lawsuit, CCL had apparently run only one broadcast advertisement about the federal marriage amendment or any other policy

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Court Practice 473, 483 (8th ed. 2002) (observing that, aside from the notice of appeal, "the procedure in appeals and certiorari cases is virtually identical" and the appellant should demonstrate a question "'so substantial as to require plenary consideration, with briefs on the merits and oral argument'" (quoting former S. Ct. R. 15.1(h))).

issue in its 110-year history. Yet, despite this history and the admissions of its Executive Director and counsel, CCL continued to argue that it intended to run "materially similar" advertisements in the future. By "materially similar," however, CCL made clear that it simply meant that "the ads' text, placement and timing would put them in contravention of the electioneering communication prohibition, just as the text, placement, and timing of the Crossroads advertisement put it in contravention of the electioneering communication prohibition." Pl.'s Opp. to FEC Mot. to Dismiss 6-7. Finding that CCL's hypothetical advertisements were not ripe for review, the three-judge court correctly recognized that CCL's attempt to define "material similarity" so broadly "would simply devolve into a facial challenge to the relevant statutory provision—a challenge that the Supreme Court has already rejected." J.S. App. 8a, (citing *McConnell* v. *FEC*, 540 U.S. 93, 189-194, 203-211 (2003)). Given the opportunity to identify any more specific "similarity" between the "Crossroads" advertisements and some advertisement that it might decide to run at some future date, CCL repeatedly declined to do so.

Taking those facts into account, the three-judge district court looked to this Court's decision in *Renne*, 501 U.S. at 321-322 (concluding that plaintiffs' First Amendment challenge was not ripe given plaintiffs' failure to assert a present intention to endorse a candidate), and found that CCL similarly lacked any sufficiently imminent or concrete injury to invoke Article III jurisdiction.[5] The lower court's conclusion that the claim concerning the hypothetical future advertise-

[5] Instructively, in a recent decision by a separate three-judge court, Wisconsin Right to Life brought an as-applied challenge not only with respect to specific advertisements run prior to the 2004 elections, but also with respect to future hypothetical "grassroots lobbying" advertisements. *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-1260, 2006 WL 3746669 (D.D.C. Dec. 21, 2006) (*WRTL*). The court, citing the decision by the three-judge court in this case, found WRTL's intent to run such advertisements "too speculative and thus not sufficiently concrete to state a cognizable claim." *Id.* at *5.

ments was not ripe is correct and should be affirmed by this Court.

B. As to the "Crossroads" advertisement, CCL's request for injunctive and declaratory relief no longer presents a live controversy. The proposed injunction and request for declaratory relief concerned a specific communication and a specific time period: CCL sought an order permitting it to broadcast the "Crossroads" advertisement from May 14, 2006, when that advertisement became an "electioneering communication" under Title II of BCRA, until June 5, 2006, when the Senate had scheduled a vote on the federal Marriage Protection Amendment. That time period expired, and CCL explicitly disavowed any plans to broadcast the "Crossroads" advertisement in the future. The Senate defeated the Marriage Protection Amendment on June 7, 2006, and no additional vote on that legislation is currently contemplated. Following that vote, CCL informed the three-judge court that it "presently has no concrete plans to run ads beyond what it began on May 10." Joint Report Pursuant to May 9, 2006 Order 8; Joint Report Pursuant to June 5, 2006 Order 2 (stating that CCL "currently has no specific plans to run [any 'grass-roots lobbying'] advertisements between now and election day (November 7)" that would be considered electioneering communications under the Federal Election Campaign Act).

The alleged "harm" that CCL sought to avoid through injunctive relief—losing the opportunity to broadcast its "Crossroads" advertisement prior to the Senate vote—has thus occurred and is irrevocable. *See* Joint Report Pursuant to June 5, 2006 Order 7 (noting that "[b]ecause the FEC was not enjoined from enforcing the electioneering communication prohibition against the broadcast of [Crossroads], the opportunity for the exercise of the commensurate First Amendment rights of speech and petition were irreparably lost"). A forward-looking injunction cannot address historical events; accordingly, "[n]o order of this Court could affect the parties' rights with respect to the injunction [it is] called upon to review." *Honig* v. *Students of Cal. Sch. for the*

Blind, 471 U.S. 148, 149 (1985) (per curiam); *see also DeFunis* v. *Odegaard*, 416 U.S. 312 (1974). Similarly, declaratory relief regarding the "Crossroads" advertisement would not redress CCL's asserted injury, and the request for it cannot revive an otherwise moot claim. Thus, the three-judge district court correctly relied upon this Court's admonition that a claim is moot when the court "cannot grant any effectual relief whatever." J.S. App. 10a (quoting *Calderon* v. *Moore*, 518 U.S. 149, 150 (1996) (per curiam)) (internal quotation marks omitted).

The lower court was also correct in concluding that, on the record below, the exception to the mootness doctrine for disputes that are "capable of repetition, yet evading review" does not apply. J.S. App. 11a-13a. As this Court recently explained, "[t]he 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) (emphasis added; internal citation and quotation marks omitted); *see also Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (quoting *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). Thus, CCL had the burden, at a minimum, of demonstrating a "reasonable expectation" that it would seek to run an advertisement materially similar to the "Crossroads" advertisement, under materially similar circumstances, in the foreseeable future. Given the opportunity to assert such an intention, however, CCL admitted during discovery that it "presently has no concrete plans to run ads beyond what it began on May 10." Joint Report Pursuant to May 9, 2006 Order 8. This failure is especially significant given CCL's extremely limited history of prior activity resembling the kind of advertisement that it sought to run here and the unique circumstances under which it proposed to run even this advertisement.

Attempting to place itself within the exception despite this void, CCL argues that it need only assert that it might run future advertisements that fall within the general scope of BCRA's prohibition on the use of general treasury funds to finance "electioneering communications." But that is not what the doctrine requires. *See Lewis*, 494 U.S. at 481 (dispute is capable of repetition only if there is "a reasonable expectation that the same complaining party would be subjected to *the same action* again" (emphasis added) (quoting *Murphy*, 455 U.S. at 482)).

CCL's jurisdictional statement contends that the three-judge court took an overly restrictive view of the "capable of repetition" exception (J.S. 9) but the lower court did no more than apply the doctrine as defined by this Court. *See id.* at 11a (quoting *Murphy*, 455 U.S. at 482, for the proposition that CCL must establish a "reasonable expectation or a demonstrated probability that the *same* controversy will recur involving the same complaining party" (internal quotation marks omitted)). Indeed, the doctrine's requirement of similarity is particularly applicable here, for the merits of the action are highly dependent on circumstances that CCL has not alleged will recur. Specifically, the content of the "Crossroads" advertisement as well as the context surrounding its creation—including the ready availability of other means of conveying CCL's desired message and the circumstances of the campaign—are important to the ultimate resolution of the case. *See Public Utils. Comm'n of Cal.* v. *FERC*, 100 F.3d 1451, 1460 (9th Cir. 1996) ("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.").

Nor does the recent holding of a separate three-judge court in *Wisconsin Right to Life, Inc.* v. *FEC*, No. 04-1260, 2006 WL 3746669 (D.D.C. Dec. 21, 2006), support CCL's contention that the present controversy meets the "capable of repetition, yet evading review" exception to the mootness doctrine. In that case, on remand from this Court to consider the merits of a separate as-applied challenge to the ap-

plication of the "electioneering communications" rules to three specific 2004 advertisements that WRTL sought to run in the Wisconsin mid-term elections, the court found that WRTL's intention to run future advertisements covered by BCRA—while too speculative to render justiciable WRTL's claim as to any future, hypothetical "grassroots lobbying" advertisements—was nonetheless sufficient to render WRTL's challenge as to the 2004 ads "capable of repetition, yet evading review." *Id.* at *4 (internal quotation marks omitted).

That decision, involving a completely different context, cannot help CCL satisfy the "capable of repetition" exception here. WRTL, after running the 2004 advertisements, attempted to run a different broadcast advertisement during the "electioneering communications" period in 2006. That fact was critical in convincing the three-judge district court that there was a "reasonable expectation" that WRTL's 2004 ads would be "subject to the same action again." 2006 WL 3746669, at *4 & n.15 (internal quotation marks omitted). CCL, in marked contrast, admitted in statements postdating its application for preliminary relief that it had "no current plans to broadcast any advertisements about any issue" other than the "Crossroads" advertisement. J.S. App. 5a. CCL confirmed this fact in a May 22, 2006 report to the three-judge court and at a June 5, 2006 status conference. *Id.* at 6a. CCL had neither intent nor funds to run even the "Crossroads" advertisement until it was approached by another organization with a message from counsel, who sought to build a test case around the advertisement. Whatever the ultimate merits of the *WRTL* decision (which is likely to be subject to review by this Court), CCL has done nothing to demonstrate that there exists a "reasonable expectation" that its claim will recur. *Spencer*, 523 U.S. at 17-18 (internal quotation marks omitted).

II. IF THIS COURT FINDS THE CLAIMS TO BE JUSTICIABLE, IT SHOULD REMAND TO THE THREE-JUDGE COURT IN THE FIRST INSTANCE FOR A DECISION ON THE MERITS

Even if this Court were to find that CCL's as-applied claims are justiciable, the merits of those claims should be considered by the three-judge district court in the first instance, after the development of a proper record.

Reaching the merits of CCL's claims prematurely would violate the "fundamental principle" of "exercising [the Court's] powers of judicial review only as a matter of necessity." *Sanks* v. *Georgia*, 401 U.S. 144, 151 (1971). Such restraint is particularly justified in the "obvious cases in which lower court rulings have forestalled development of a trial record." 17 Wright & Miller, *Federal Practice and Procedure* § 4036, at 38-39 (2d ed. 1988); *see also National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) ([W]e do not decide in the first instance issues not decided below. (citing *Roberts* v. *Galen of Va., Inc.*, 525 U.S. 249, 253-254 (1999); *United States* v. *Bestfoods*, 524 U.S. 51, 72-73 (1998))).

The three-judge district court has not had occasion to address the merits of CCL's fact-intensive, as-applied claims and has not provided the parties with the opportunity to develop the record necessary to do so. Shortly after the June 2006 Senate vote referenced in CCL's "Crossroads" advertisement had come and gone, the lower court, recognizing that CCL's claims may not be justiciable, ordered the parties to brief the issue of mootness and directed CCL to "show cause . . . why the 'Crossroads' portion of this case should not be dismissed as moot." June 23, 2006 Order 2. The court stayed all merits discovery pending briefing. *Id.* Thus, no fact-development has taken place beyond the very limited one week of discovery in connection with CCL's preliminary injunction motion. Under these circumstances, this Court should not consider the merits of this case in the first instance.

This Court should instead take the same course it took earlier this year in *WRTL*, 126 S. Ct. 1016 (2006). That case, discussed above, involved another fact-intensive, as-applied

challenge to BCRA's "electioneering communications" provisions. After holding that the district court incorrectly construed a footnote in *McConnell* as foreclosing any "as-applied" challenge, the Court remanded the case for the three-judge district court to consider the merits in the first instance. *Id.* at 1018.[6]

CCL requests in its jurisdictional statement that this Court consider this case together with *WRTL*. That request, made prior to the recent decision on the merits in *WRTL*, fails to address the jurisdictional and procedural deficiencies discussed above. Indeed, if anything, the fact that it is likely that *WRTL* will be appealed to this Court counsels in favor of affirming the present case. *WRTL* will present the Court with the opportunity, if it deems it appropriate, to consider the merits of an as-applied challenge to Title II of BCRA. It will do so, moreover, in the context of a case with a factual record and in which the lower court addressed the merits of the dispute after briefing by the parties.[7] As a

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[6] CCL, in arguing that so-called "grassroots lobbying" ads can somehow be distinguished from electioneering, mischaracterizes this Court's holding in *WRTL*. The Court did not "approve[]" the bringing of a "grassroots lobbying" challenge; nor did it "highlight[]" the FEC's authority to provide by rule a grassroots lobbying exception." J.S. 12, 20, 24. This Court held only that *McConnell* "did not purport to resolve future as-applied challenges" to BCRA's electioneering communications provision. *WRTL*, 126 S. Ct. at 1018 (citing 540 U.S. at 190 n.73). Moreover, although CCL purports to find support for a "grassroots lobbying" exception in comments that the principle sponsors of BCRA submitted to the FEC in the rulemaking implementing Title II of BCRA (J.S. 24) CCL fails to note that the FEC rejected the proposal (and other proposals) because it found that they would have exempted communications that "could well be understood to promote, support, attack, or oppose a Federal candidate," 67 Fed. Reg. 65,190, 65,201 (Oct. 23, 2002). Nor does CCL explain how a proposed (and rejected) regulatory standard could possibly mandate a constitutional standard.

[7] The *WRTL* three-judge court did not conduct a trial, and the dissenting judge concluded that the case was not properly resolved on summary judgment. 2006 WL 3746669, at *11, 17 (Roberts, J., dissenting). Nonetheless, the parties developed a substantial factual record on sum-

result, *WRTL* merely serves to highlight why this Court should not grant plenary review to CCL's claims in the first instance. At most, if the three-judge decision in *WRTL* is appealed to this Court, the Court should hold CCL's jurisdictional statement pending its review of the *WRTL* appeal.

CONCLUSION

For the above reasons, this Court should summarily affirm the decision of the three-judge district court dismissing CCL's complaint for lack of a justiciable case or controversy.

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mary judgment, which would aid this Court in its review of the lower court's decision.