UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC.,	)	
	)	
Plaintiff,	)	No. 1:04cv01260 (DBS, RWR, RJL)
	)	(Three-Judge Court)
v.	)	
	)	
	)	MOTION FOR SUMMARY
	)	JUDGMENT
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
SEN. JOHN MCCAIN, et al.,	)	
	)	
Intervenor-Defendants.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, Defendant Federal Election Commission ("the Commission") hereby moves this Court for summary judgment. Pursuant to Local Civil Rules 7 and 56.1, a memorandum of law, a Statement of Material Facts, and a proposed Order are submitted herewith. The Commission respectfully moves that this Court grant this Motion for Summary Judgment, as outlined in the memorandum which accompanies this Motion.

Respectfully submitted,

_____/s/_____
Lawrence H. Norton
General Counsel

_____/s/_____
Richard B. Bader
Associate General Counsel
(D.C. Bar # 911073)

_____/s/_____
David Kolker
Assistant General Counsel
(D.C. Bar # 394558)

_____/s/_____
Harry J. Summers
Attorney

_____/s/_____
Kevin Deeley
Attorney

_____/s/_____
Steve N. Hajjar
Attorney

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

July 14, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC.,	)	
	)	
Plaintiff,	)	No. 1:04cv01260 (DBS, RWR, RJL)
	)	(Three-Judge Court)
v.	)	
	)	MEMORANDUM IN SUPPORT
	)	OF MOTION FOR SUMMARY
	)	JUDGMENT
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
SEN. JOHN MCCAIN, et al.,	)	
	)	
Intervenor-Defendants.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Lawrence H. Norton
General Counsel

Richard B. Bader
Associate General Counsel

David Kolker
Assistant General Counsel

Harry J. Summers
Kevin Deeley
Steve N. Hajjar
Attorneys

FOR THE DEFENDANT
FEDERAL ELECTION
COMMISSION

July 14, 2006

TABLE OF CONTENTS

PAGE

STATEMENT OF THE CASE....1

A. Procedural History....1

B. Plaintiff Wisconsin Right to Life, Inc., and the 2004 Senate Election in Wisconsin....3

1. The 2004 Wisconsin Senate Election Was Expected to Be Competitive, and Judicial Filibusters Were a Campaign Issue....4

2. One of WRTL's Two Most Important Election Priorities in 2004 Was to "Send Feingold Packing!"....5

3. The Origin of the Specific Advertisements at Issue in This Case....6

4. WRTL Planned to Time its Advertisements to the Election, Not To Any Filibuster Votes....7

5. WRTL's Advertisements Were Likely to Have Had an Effect on the Senate Election Had They Run During the Electioneering Communications Period....9

6. WRTL Received A Significant Amount of Funding From Business Corporations in 2004, and Appears to Have Significantly Scaled Back Its Efforts to Raise Funds for Its Federal PAC....10

ARGUMENT....11

I. THE COURT SHOULD GRANT SUMMARY JUDGMENT FOR THE COMMISSION....11

A. McConnell Clearly Envisioned That BCRA's Electioneering Communication Restrictions Could Be Applied Constitutionally To Political Advertisements That WRTL Calls "Grass Roots Lobbying"....11

B. The Rational Of McConnell Supports The Application Of BCRA's Electioneering Communication Restrictions To WRTL's Political Advertisements....13

C. WRTL IS NOT ENTITLED TO ANY CONSTITUTIONAL EXEMPTION FOR ITS "GRASS ROOTS LOBBYING" THAT MEETS THE DEFINITION OF "ELECTIONEERING COMMUNICATION" 16

1. The Constitution Requires No General "Grass Roots Lobbying" Exemption from BCRA § 203 16

2. WRTL Cannot Immunize Its Electioneering Communications From Regulation By Including In Them Advocacy About Legislation....18

3. WRTL Has Not Demonstrated That the Communication Options Identified in McConnell and Other Alternatives Available To It Are Constitutionally Burdensome 21

4. WRTL's Advertisements Are Sufficiently Election-Related So That They Do Not Require A Constitutional Exemption From BCRA's Regulation Of Electioneering Communications....26

D. BCRA'S BRIGHT-LINE RULE FURTHERS FIRST AMENDMENT INTERESTS AND WOULD BE SUBVERTED BY WRTL'S AS-APPLIED CHALLENGE 32

E. WRTL'S OFFER TO FINANCE ITS ADVERTISEMENTS FROM A SEGREGATED BANK ACCOUNT DOES NOT ALTER THE CONSTITUTIONAL ANALYSIS 38

II. CONCLUSION

TABLE OF AUTHORITIES

Cases

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) 12, 23, 24

Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982).....22

Buckley v. Valeo, 424 U.S. 1 (1976).....13, 17, 19, 22, 23, 34, 35, 35, 36

California Medical Ass'n v. FEC, 453 U.S. 182 (1981).....36

Christian Civic League of Maine, Inc. v. FEC, ___ F.Supp.2d ___,
2006 WL 1266408, at *5 (D.D.C.) (May 9, 2006) 22, 25, 28, 32

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 35

Dombrowski v. Pfister, 380 U.S. 479 (1965) 33

Eastern Railroad Presidents Conference v. Noerr, 365 U.S. 127 (1961).....17, 34

FEC v. Beaumont, 539 U.S. 146 (2003).....12, 13, 22

FEC v. Massachusetts Citizens for Life, Inc.,
479 U.S. 238 (1986).....13, 19, 23, 34, 35, 38

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 18

Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995).....37

Goland v. United States, 903 F.2d 1247 (9th Cir. 1990) 36

Heffron v. International Society for Krishna Consciousness,
452 U.S. 640 (1981).....37

Hill v. Colorado, 530 U.S. 703 (2000).....33, 36

McConnell v. FEC, 540 U.S. 93 (2003) .....passim

McConnell v. FEC, 251 F.Supp.2d 176 (D.D.C. 2003).....4, 14, 20, 25, 27, 35

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).....18

Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988).....33

WRTL v. FEC, 546 U.S. ___, No. 04-1581, 126 S.Ct. 1016 (2006)
(Jan. 23, 2006) (per curiam).....3, 15

WRTL v. FEC, 2004 WL 3622736 (D.D.C. 2004).....1, 2, 22, 25, 26, 27, 29

Statutes and Regulations

Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155,
116 Stat. 81, 91-92 (2002) 1

Federal Election Campaign Act, 2 U.S.C. 431-55.....12

2 U.S.C. 434(f)(2)(E).....12, 16, 38

2 U.S.C. 434(f)(3).....1, 12, 16

2 U.S.C. 441a(a)(1)(c) 22, 39

2 U.S.C. 441b.....13

2 U.S.C. 441b(a) 12

2 U.S.C. 441b(c)(2).....38

2 U.S.C. 441b(b)(2)(C).....12

2 U.S.C. 441b(b)(4) 22, 39

2 U.S.C. 441b(c) (6).....38

Miscellaneous

BCRA § 403(a)(1), 116 Stat. 114 35

Rev. Rul. 2004-6, Internal Revenue Bulletin 2004-4 (Jan. 26, 2004),
available at http://www.irs.gov/irb/2004-04_IRB/ar10.html.....33

Edward B. Foley, 'Narrow Tailoring' Is Not the Opposite of
'Overbreadth': Defending BCRA's Definition of 'Electioneering
Communications,' 2 Election L.J. 457, 465-66 (2003) 33

148 Cong. Rec. S2117 (daily ed. Mar. 20, 2002) 33

Plaintiff Wisconsin Right to Life, Inc. ("WRTL") seeks a constitutional exemption to use money from its general corporate treasury to finance what it calls "grass roots lobbying" communications that fall within the definition of "electioneering communication" under 2 U.S.C. 434(f)(3), a provision of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, 91-92 (2002). Plaintiff specifically seeks an exemption for its 2004 broadcast of three ads urging Senator Russell Feingold to oppose judicial filibusters, an issue that WRTL and the opposing candidates its PAC endorsed had repeatedly used in publicly criticizing Senator Feingold during his 2004 re-election campaign. However, WRTL cannot immunize its electoral communications from the application of BCRA simply by combining its electoral message with what it calls "grass roots lobbying." In McConnell v. FEC, 540 U.S. 93 (2003), the Supreme Court identified options for corporations like WRTL to communicate their views, and WRTL fails to demonstrate why they are unconstitutionally burdensome as applied to the facts of this case. The amorphous exemption WRTL seeks would also threaten the bright-line statutory provision upheld against a facial challenge in McConnell and, by creating uncertainty and an avenue for circumvention, undermine important First Amendment interests and the protection of the integrity of federal elections. Accordingly, the Commission's motion for summary judgment should be granted, and WRTL's should be denied.

STATEMENT OF THE CASE

A. Procedural History

On July 28, 2004, WRTL filed suit seeking declaratory and injunctive relief, alleging that BCRA's prohibition on the use of corporate treasury funds for electioneering communications is unconstitutional as applied to its advertising disbursements. Amended Complaint. WRTL "anticipate[d] that its ongoing advertisements [would] be considered electioneering communications for purposes of federal statutory and regulatory definitions ... during the period between August 15, 2004 and November 2, 2004." Wisconsin Right to Life, Inc. v. FEC, 2004 WL

3622736 (D.D.C. Aug. 17, 2004) ("WRTL I"), at *1. WRTL's three ads show examples of people waiting or being delayed and claim that "a group of Senators" are filibustering, or "blocking qualified nominees from a simple 'yes' or 'no' vote." Am. Ver. Complt. Exhs. A-C. The ads attribute the filibusters to "politics at work," argue that the filibusters have caused "gridlock" and created a "state of emergency" in the courts, and then urge viewers to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." Id.

This Court denied a preliminary injunction. The Court held that WRTL had not established a likelihood of success on the merits because "the reasoning of the McConnell Court leaves no room for the kind of 'as applied' challenge WRTL propounds before us." WRTL I, 2004 WL 3622736, at *2. See id. at *2-3. The Court explained, however, that this was "but one reason [the Court] f[ou]nd little likelihood of success on the merits." Id. at *3. The Court also found that the specific facts of this case "suggest that WRTL's advertisements may fit the very type of activity McConnell found Congress had a compelling interest in regulating." Id. The Court explained:

> In 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. Here, WRTL and WRTL's PAC used other print and electronic media to publicize its filibuster message — a campaign issue — during the months prior to the electioneering blackout period, and only as the blackout period approached did WRTL switch to broadcast media. This followed the PAC endorsing opponents seeking to unseat a candidate whom WRTL names in its broadcast advertisements, and the PAC announcing as a priority "sending Feingold packing."

Id. (citations omitted). This Court later dismissed WRTL's complaint, holding, "for the reasons set forth in [the preliminary injunction] opinion," that WRTL's as-applied challenge was "foreclosed by the Supreme Court's decision in McConnell." Mem. Op. (May 9, 2005).

On appeal, the Supreme Court held that McConnell did not purport to foreclose courts from considering all future as-applied challenges to BCRA's primary definition of

"electioneering communication." WRTL v. FEC, 126 S.Ct. 1016 (2006) (per curiam). The Court found it unclear whether the statement that WRTL's advertisements may have been the very type of activity that was properly regulated under McConnell was intended to be an alternative ground for the dismissal of the case, so it vacated the judgment and remanded for this Court "to consider the merits of WRTL's as-applied challenge in the first instance." WRTL, 127 S.Ct. at 1017.

Following the remand, the parties filed memoranda addressing the continuing justiciability of this matter. See Scheduling Order, April 17, 2006. The Commission has argued that WRTL's claims about unspecified future advocacy are not ripe and will not repeat those arguments here.

B. Plaintiff Wisconsin Right to Life, Inc., and the 2004 Senate Election in Wisconsin

Wisconsin Right to Life is a "very active force in Wisconsin state politics" with "a strong grass-roots organization" which is "often effectively mobilized in elections." Exh. 1, Franklin Rep. at 9-10. "[T]he influence of WRTL in turning out pro-life voters is unquestioned by state political observers." Id. at 11. WRTL has approximately 500,000 supporters and approximately 52,000 of them are members of the organization. Id. at 9; Exh. 4, Armacost Dep. at 23. WRTL has demonstrated its ability to raise substantial sums of money from its members into its federal PAC. Exh. 10, Lyons Aff. ¶ 7.

WRTL has a long history of opposition to Senator Feingold, making independent expenditures against him through its federal PAC in his 1992 and 1998 campaigns. Exhs. 11-12. In 1998, WRTL spent more than $60,000 on independent expenditures that urged voters to vote against Feingold and for his opponent, distributing thousands of brochures and doing extensive phone-calling. Exh. 11.

WRTL and its federal PAC make the vast majority of their communications through

media other than paid broadcast advertising. WRTL has a website; sends out mass emails to thousands of recipients; provides its staff for appearances on TV and radio news shows; publishes op-eds in newspapers; provides quotes for print media stories; holds press conferences; publishes a magazine; distributes brochures, church bulletins, and voter guides; sends out direct mail letters; and pays for automated telephone calls. Exh. 3, WRTL Dep. (Lyons) at 89-115. Other than educational spots run through its 501(c)(3) organization, WRTL had not run any television advertising before it ran the television ad at issue in this case. Defendant Federal Election Commission's Statement of Material Facts as to Which There Is No Genuine Issue ("Facts") ¶¶ 10-12.

1. The 2004 Wisconsin Senate Election Was Expected to Be Competitive, and Judicial Filibusters Were a Campaign Issue

Throughout most of the 2004 election cycle, Senator Feingold appeared to be vulnerable, with less than 50% approval ratings. Exh. 1, Franklin Rep. at 3-4. Competitive races are far more likely to attract interest group spending, particularly expensive television advertising. See, e.g., McConnell, 251 F. Supp. 2d at 305; (Henderson, J.); id. at 565-67, 633, 726 (Kollar-Kotelly, J.); id. at 878, 881, 908 (Leon, J.). Four candidates vied to be the Republican challenger to Senator Feingold: Bob Welch, Tim Michels, Russ Darrow, and Robert Lorge. Exh. 1, Franklin Rep. at 5.

The Republican Party of Wisconsin and all four of the Republican candidates made Senator Feingold's support of filibusters against judicial nominees a campaign issue. Facts ¶¶ 18-28. In a November 11, 2003 press release, for example, Bob Welch "called on Senator Russ Feingold to end his support of the filibuster of four of President Bush's judicial nominees" and argued that "[t]he gridlock caused by Russ Feingold's partisanship is appalling.... Because of his obstructionism the wheels of justice are in danger of grinding to a halt." Exh. 1, Franklin Rep. at 8. It was reported that Tim Michels promised that he would support giving every judicial

nominee a vote and asserted that "[t]his issue is rising on people's radar screens." Exh. 15 at 4. It was reported that Russ Darrow called Feingold "a leader in the stonewalling effort," said "it's the worst kind of politics," and argued that "[i]t's why many Americans want a new face." Id. at 4-5. Darrow's website listed "not hold[ing] judicial nominations hostage" as one of his main issues. Exh. 16.

The Republican Senate candidates frequently discussed the issue at their campaign stops. Exh. 1, Franklin Rep. at 8. The issue was addressed during an August 17 debate among the Republican candidates, with Robert Lorge claiming that he would be the most effective candidate at getting judicial nominees approved. Exh. 17. The Republican Party of Wisconsin also highlighted Senator Feingold's "obstruction of President Bush's judicial nominees" on its website as one of four reasons "why Russ Feingold should be voted out of office." Exh. 18. At campaign rallies in September and October of 2004, Vice President Cheney also urged that "a good way to deal with the problem of the Democratic filibuster in the Senate is to elect some good Republicans like Tim Michels from Wisconsin." Exh. 19 at 5; Exh. 20 at 5.

2. One of WRTL's Two Most Important Election Priorities in 2004 Was to "Send Feingold Packing!"

Wisconsin Right to Life itself — not its PAC — issued a press release on March 26, 2004 emphasizing its "resolve to do everything possible to win Wisconsin for President Bush and to send Russ Feingold packing!" Exh. 21. The heading of the news release labeled these the "Top Election Priorities for Right to Life Movement in Wisconsin." Id. A few weeks earlier, WRTL announced through its PAC its endorsement of the three prominent Feingold opponents: Welch, Michels, and Darrow. Exh. 1, Franklin Rep. at 5-6. In the release, WRTL's PAC Chair, Bonnie Pfaff, "stressed the importance of defeating radically pro-abortion Russ Feingold in the U.S. Senate race," and stated that "[w]e do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees." Exh. 22.

In a prominent article in WRTL's quarterly magazine, "A Strong Finish in 2004: Bush Wins, Feingold Loses," Barbara Lyons, WRTL's executive director, wrote that the organization's "greatest challenge for 2004" was "to finish strongly in the elections," by winding "up in the win column for President Bush and to retire Senator Feingold." Exh. 24 at 5. She urged readers "to vote November 2 for President Bush and Tim Michels." Id. Judicial filibusters were one of the five issues highlighted in the voter guide WRTL distributed on the Senate race, a copy of which was included in the magazine. Id. at 15. The voter guide asserted that Michels "has pledged to allow the Senate to vote on President Bush's judicial nominees" whereas Feingold "has voted approximately 20 times since March 2003 to prevent a vote on President Bush's judicial nominees." Id. WRTL distributed thousands of voter guides, including to the approximately 35,000 recipients of its magazine. Exh. 3, WRTL Dep. (Lyons) at 104, 107-10. Through its PAC, WRTL also paid for radio advertising in August or September of 2004 calling explicitly for Feingold's defeat. Exh. 3, WRTL Dep. (Lyons) at 128-31; Exh. 4, Armacost Dep. at 126-27.[1]

3. The Origin of the Specific Advertisements at Issue in This Case

In the spring of 2004, WRTL began a campaign on the issue of judicial filibusters using its usual means of communications: mass emails and press releases. Exh. 4, Armacost Dep. at 104-05. The broadcast advertising campaign that led to this lawsuit was "distinct from the other activities of e-mailing [WRTL's] supporters" and was a "whole different matter." Exh. 4, Armacost Dep. at 105. However, WRTL's designated deponent under Rule 30(b)(6) was unable to state who originated the idea and refused to answer whether the idea had originated with counsel. Exh. 3, WRTL Dep. (Lyons) at 22-24. Ms. Armacost, who has been involved in all of WRTL's other grass roots lobbying campaigns in her 19 years there, did not develop the idea to

[1] The Commission is not able to furnish the Court with copies of WRTL PAC's advocacy at this time due because WRTL has refused to produce it in discovery.

run the broadcast ads, "had no role in getting it started," and had "nothing to do with the planning of it or the execution of it." Exh. 4, Armacost Dep. at 5-6, 105-10, 113, 115.

In her earliest contacts with an advertising agency about a broadcast media campaign on the filibuster issue, Barbara Lyons indicated that WRTL intended to run advertisements "during a certain time when the ads couldn't run" and that the planned advertisements would lead to a lawsuit. Exh. 5, Vanderground Dep. at 41-43. Jason Vanderground, the consultant at the advertising agency who coordinated the ads, researched the "legal parameters," including how many households the broadcast advertising had to reach in order to be subject to the statute's restrictions. Exh. 5, Vanderground Dep. at 46-50. On a number of occasions, WRTL's vendors appeared to be under the impression that the focus of their activities was as much on challenging BCRA as on conducting a campaign on the judicial filibuster issue. See Facts ¶¶ 53-54. Moreover, WRTL made an effort to make the test case advertisements and publicity about them more appealing by avoiding explicit negativity in their content. Facts ¶¶ 61-64.

From the outset, WRTL planned a multi-faceted campaign coupling the filibuster advertising with an extensive plan to criticize proponents of the McCain-Feingold law. Facts ¶¶ 57-60. This included a contingency plan, should WRTL be unsuccessful in gaining a preliminary injunction to run its filibuster advertisements, for broadcast advertisements attacking the McCain-Feingold law without naming any officeholders. Facts ¶¶ 58-60. In early June, WRTL had already developed a detailed calendar for rolling out different phases of its advertising. Fact ¶ 58. On August 16, WRTL staff were emailing draft copies of the press release describing the "campaign finance" advertisements that did not name any officeholders, but the ads were pulled at the last minute. Exh. 32.

4. WRTL Planned to Time its Advertisements To the Election, Not To Any Filibuster Votes

WRTL decided early in its campaign that it would run radio and television

advertisements close to Senator Feingold's election, with little regard to when actual judicial filibuster votes (motions to invoke cloture) would occur. Facts ¶¶ 67-75. In the beginning of June, WRTL had already determined that its anti-filibuster campaign would launch around August 1, 2004. Exh. 31; Exh. 5, Vanderground Dep. at 63. WRTL's radio advertisements began on July 26 and its television advertisement began on August 2. Exh. 3, WRTL Dep. (Lyons) at 65. The advertisements began a few days after four judicial filibuster votes had occurred and the Senate had departed for a six-week recess. See Exh. 35 at 4 (motions to invoke cloture on four judicial nominees on July 20 and July 22); Days in Session Calendars, http://thomas.loc.gov/home/ds/s1082.html (Senate recessed on July 22 and returned on September 7); Exh. 2, Bailey Decl. ¶ 23.

In general, both WRTL's employee in charge of grass roots lobbying and its advertising agency lead consultant believe that it is important to run grass roots lobbying advertisements shortly before legislative votes are to occur. Exh. 4, Armacost Dep. at 112 (running ads after votes would be "a waste of time"); Exh. 5, Vanderground Dep. at 30-31. Nevertheless, WRTL stuck to the schedule it had planned for months, which was to air the advertisements at a time that was close to the election and would lay the groundwork for a lawsuit. Facts ¶¶ 66-72, 82-83. There were no judicial filibuster votes during the rest of 2004. See Exh. 35.

After the 2004 election, WRTL did not broadcast any anti-filibuster advertisements in the spring of 2005 when the controversy actually reached its peak. Exh. 3, WRTL Dep. (Lyons) at 101-03; Fact ¶ 129. "It was clear" at that time that the filibuster issue was "coming to a head," and groups then spent more than $8.5 million on advertising on both sides of the issue. Exh. 7, Franklin Dep. at 26-27. WRTL and its agents have offered shifting rationales for why WRTL did not run any advertising when filibuster votes were planned outside the election season. Facts ¶¶ 131-33. Counsel for WRTL told the Supreme Court that other issues were higher priorities

for WRTL after the election. Exh. 48. WRTL's advertising consultant testified that the issue arose too fast in the spring of 2005 for the group to run advertising (Exh. 5, Vanderground Dep. at 146-48), even though the issue actually "had been discussed at some length for some number of months before that." Exh. 7, Franklin Dep. at 27. WRTL's latest explanation is that it did not run advertising at that time because the primary issue then was whether to change the Senate rules to bar filibustering and it was certain that Wisconsin's Democratic Senators would not support such a change. 2nd Lyons Aff. ¶ 9 (WRTL's Sum. Judg. Mot., Exh. 2).

5. WRTL's Advertisements Were Likely to Have Had an Effect on the Senate Election Had They Run During the Electioneering Communications Period

WRTL's radio and television ads ran for a substantial amount of air time. Exh. 1, Franklin Rep. At 35. The radio ads ran approximately 1100 times on 21 stations in Milwaukee, Green Bay and LaCrosse-Eau Claire. Exh. 1, Franklin Rep. At 35; Exh. 3, WRTL Dep. (Lyons) at 45. The television ad ran for two weeks in the same three markets, airing approximately 430 times. Exh. 1, Franklin Rep. at 35; Exh. 3, WRTL Dep. (Lyons) at 45; Exh. 41. According to WRTL's own calculations, the advertisements made approximately 18 million contacts with the public. Exh. 42 at 7. Had WRTL obtained a preliminary injunction, it would have spent some $100,000 to continue running its advertisements within the electioneering communications window. Exh. 10, Lyons Aff. ¶ 12.

WRTL's advertisements would likely have had a significant electoral effect had WRTL run the ads during the electioneering communications period. Facts ¶¶ 90-103. As explained by longtime political consultant Doug Bailey, the ads imply that Senator Feingold "supports the filibuster, and thinks that 'politics' are more important than saving courts from a 'state of emergency' or allowing qualified candidates to serve in the federal judiciary." Exh. 2, Bailey Decl. ¶ 17. The ads "portray Senator Feingold in a negative light and clearly would influence the outcome of the election for which he was campaigning." Id. ¶ 19. The WRTL ad would have

been one of the many messages that created an impression about Senator Feingold in the weeks before the election that would have informed voters' decisions in the upcoming election. Id. ¶¶ 7-8.

Mr. Bailey's conclusions are supported by strong empirical evidence in the political science literature. See Facts ¶¶ 94-103. Ads like WRTL's have the "agenda setting" effect of increasing the salience of particular issues, an important aspect of election campaign strategy. Fact ¶ 94. WRTL played an important role in increasing the salience of the judicial filibuster issue, an issue that Feingold's opponents used as a campaign issue. See supra pp. 4-6. The ads also would have "primed" the issue by "making a direct connection between the issue and the basis of evaluation of a candidate." Facts ¶¶ 96-97. By mentioning Feingold in the advertisement, WRTL made it more likely that voters would attribute responsibility to him and "increase[d] the importance of the issue in evaluations of the candidate." Id. The ads' inclusion of particular office holders also would have had a polarizing effect, making voters more partisan on the filibuster issue. Facts ¶¶ 99-100; Exh. 1, Franklin Rep. at 23, 29-34. Because WRTL and the Republican candidates were already issuing election campaign messages on the filibuster issue, the WRTL ads would likely have advantaged the Republican candidates and made "the issue more influential in voters[']' evaluations of the candidates." Exh. 1, Franklin Rep. at 35. See Facts ¶¶ 100-01.

6. WRTL Received A Significant Amount of Funding From Business Corporations in 2004, and Appears to Have Significantly Scaled Back Its Efforts to Raise Funds for Its Federal PAC

WRTL raised over $315,000 from corporations for its general fund in 2004, the "vast majority" from business corporations. Exh. 3, WRTL Dep. (Lyons) at 147-51; Exh. 60. Corporate donations were as large as $50,000 and $140,000. Id. Between five and ten business corporations, some from outside Wisconsin, donated a total of more than $50,000 — perhaps more than $100,000 — specifically to finance the advertisements in this case. Exh. 3, WRTL

Dep. (Lyons) at 143-45, 150.

Rather than being unable to raise money for its federal PAC in 2004, it appears that WRTL ceased raising money for that account and shifted its fundraising efforts toward its general treasury. Facts ¶¶ 112-21. Although WRTL's PAC raised approximately $155,000 in the 1999-2000 election cycle, it received less than $13,000 in 2001-02 (Exh. 10, Lyons Aff. ¶ 7), and less than $17,000 in 2003-04. WRTL Dep. (Lyons) at 155. WRTL has yet to raise any money at all for its federal PAC during the current election cycle. See Exh. 47. WRTL claims generically to have attempted to raise money in the same ways in 2004 that it did in 2000 and that raising PAC money has gotten harder during that period of time. Exh. 3, WRTL Dep. (Lyons) at 154-64. However, PAC receipts nationally increased approximately 50% during that period, Facts ¶¶ 114-15, and WRTL has provided no reason why fundraising was harder for its PAC than for everyone else.

Had WRTL simply raised for its PAC the same amount of money in 2004 that it did in 2000, it would have had more than enough to pay for the additional $100,000 that it intended to spend on the ads that are at issue here. Exh. 10, Lyons Aff. ¶ 12. WRTL, however, never considered the possibility of funding its electioneering communications through its PAC. Exh. 3, WRTL Dep. (Lyons) at 157. Indeed, WRTL did not even spend most of the $14,000 in its PAC at the time of its motion for preliminary injunction, and it has no explanation for why it did not. Id.

ARGUMENT

I. THE COURT SHOULD GRANT SUMMARY JUDGMENT FOR THE COMMISSION

A. McConnell Upheld BCRA's Requirement That Corporations Pay For Electioneering Communications With Separate Segregated Funds

Federal law has long prohibited corporations, whether for-profit or not-for-profit, from using their general treasury funds to finance contributions and expenditures in connection with

federal elections. See, e.g., FEC v. Beaumont, 539 U.S. 146, 152-54 (2003); 2 U.S.C. 441b(a). The Federal Election Campaign Act ("FECA" or "Act"), 2 U.S.C. 431-55, does not, however, ban any corporation from speaking. Rather, it permits a corporation to establish a "separate segregated fund," commonly called a political action committee or PAC, to finance such activities. 2 U.S.C. 441b(b)(2)(C).

BCRA § 203(a) amended 2 U.S.C. 441b(b)(2) to prohibit corporations and unions from using their general treasury funds to finance "any applicable electioneering communication." In pertinent part BCRA § 201(a), codified at 2 U.S.C. 434(f)(3)(A)(i), defines "electioneering communication" as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate for federal office; (2) is made within 60 days before a general election, or within 30 days before a primary election for the office sought by the candidate; and (3) is "targeted to the relevant electorate."

In McConnell v. FEC, 540 U.S. 93 (2003), the Supreme Court upheld the electioneering communication provision at issue in this case against constitutional challenge. The Court found that whether a "compelling governmental interest" justified BCRA's burden on First Amendment expression was "easily" resolved by its prior decisions, id at 205. The Court noted that it had "repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" Id. (quoting Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990)).

The Court observed that, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view … [BCRA § 203] as a 'complete ban' on expression rather than a regulation." McConnell, 540 U.S. at 204 (citations omitted). "'The PAC option allows corporate political participation without the temptation to use corporate

funds for political influence, quite possibly at odds with the sentiments of some shareholders or members.'" Id. (quoting Beaumont, 539 U.S. at 163). The Court also noted that its campaign finance jurisprudence reflects "respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." Id. at 205 (citations and internal quotation marks omitted). The Court concluded that the compelling governmental interests that support requiring corporations to finance express advocacy communications from a PAC apply equally to their financing of electioneering communications. Id. at 206.[2]

The Court in McConnell also held that the constitutional inquiry did not turn on the "precise percentage of [past] issue ads that clearly identified a candidate and were aired during those relatively brief preelection time spans but had no electioneering purpose." 540 U.S. at 206. The Court stated that "the vast majority of ads" run during the 30- and 60-day intervals before federal primary and general elections "clearly had such a purpose." Id. The Court found it decisive, however, that, "whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." Id.

B. THE RATIONALE OF MCCONNELL SUPPORTS THE APPLICATION OF BCRA'S ELECTIONEERING COMMUNICATION RESTRICTIONS TO WRTL'S POLITICAL ADVERTISEMENTS

Creating the amorphous exemption that WRTL seeks for what it describes as "grass roots

---

[2] In FEC v. Massachusetts Citizens for Life, Inc. ("MCFL"), 479 U.S. 238, 263-64 (1986), the Supreme Court construed section 441b's prohibition of independent expenditures from corporate treasuries to reach only the financing of communications that expressly advocate the election or defeat of a clearly identified candidate. 479 U.S. at 248-49. The Court had introduced the concept of express advocacy in Buckley v. Valeo, 424 U.S. 1, 43-44, 77-80 (1976). In addition, the Court in MCFL held that section 441b's regulation of corporate independent expenditures could not constitutionally be applied to a subgroup of non-profit corporations having three "essential" features. In McConnell, 540 U.S. at 209-11, the Court construed BCRA § 203 to be inapplicable to MCFL organizations, thus also allowing such corporations to pay for electioneering communications with general treasury funds.

lobbying" communications would undermine the bright-line prophylactic standard that Congress crafted in BCRA and the Supreme Court upheld in McConnell. Indeed, the record in McConnell was replete with advertisements that purported merely to lobby about an issue rather than advocate a particular electoral result. See, e.g., McConnell v. FEC, 251 F.Supp.2d 176, 574-79 (D.D.C. 2003) (Kollar-Kotelly, J.). The Court was thus directly confronted with the contention that BCRA § 203 is unconstitutional because of its potential to burden lobbying or other issue advertisements that may not be intended to influence federal elections. Nevertheless, the Court squarely held the provision constitutional, even though it might encompass some "genuine issue ads," McConnell, 540 U.S. at 206. In reaching that conclusion, the Court recognized that BCRA § 203 imposes only a modest burden on speakers who wish to discuss issues of public concern but do not intend to influence federal elections, including the kind of advertisements with mixed messages that WRTL describes as "grass roots lobbying": issue ads that discuss legislative concerns but also influence federal elections. [3]

Indeed, the kind of communications that WRTL describes was squarely before the Court in McConnell, and the majority did not question the application of its holding to such ads. In dissent, Justice Kennedy gave a hypothetical example of a few Senators who, eager to impress logging industry constituents just before an election, proposed a law that would "harm the environment by allowing logging in national forests." 540 U.S. at 334. Justice Kennedy objected that under BCRA an "environmental group" would find it difficult to "form and fund a PAC in the short time required" and would be "unable to run an ad referring to these Senators" in

[3] As we explain herein, there is no recognized definition of "grass roots lobbying" in campaign finance jurisprudence, and WRTL does not offer the Court any specific definition that it believes is constitutionally required. Although groups certainly do sometimes broadcast advertisements to encourage citizens to contact their elected representatives regarding prospective legislation, recognizing that fact does not necessarily mean that the Constitution requires that such advocacy be identified as a distinct category of speech that enjoys greater protection from regulation than other forms of issue advocacy.

the relevant jurisdictions, and he argued that BCRA forces such groups to "contend with faceless and nameless opponents." Id. at 334-35. The Court did not dispute Justice Kennedy's conclusion that its decision upholding BCRA would have this effect, but instead found adequate the options just discussed. See id. at 206. If the majority opinion had agreed with Justice Kennedy's view that such ads must be exempt from the statutory requirements, there would have been no need for Justice Kennedy to dissent on this ground.

Far from suggesting that BCRA's financing restrictions were unconstitutional as applied to "genuine issue ads," the Court in McConnell held that the statute's minimal impact on issue advertising was constitutionally acceptable: Corporations and unions could comply with the law without losing the ability to address issues during the pre-election period, since they could still "finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." McConnell, 540 U.S. at 206. This holding necessarily means that, even if some exemption to the electioneering communication definition were constitutionally required, it could not be so broad as to deregulate a substantial amount of the communications that fall within the statutory definition. Otherwise, such an exemption would swallow up the definition itself and contradict McConnell's holding that the definition is facially valid precisely because it is not substantially overbroad. This holding also means that to succeed in an as-applied challenge, a claimant must demonstrate why it would be an unconstitutional burden for it to "avoid[] any specific reference to federal candidates" in its ads or to "pay[] for the ad from a segregated fund."[4]

[4] Even though the Supreme Court in WRTL explained that its prior decision in McConnell had not purported to foreclose all as-applied challenges to the electioneering communication provision, the Supreme Court's decision in WRTL did nothing to erode the rationale of McConnell in upholding that provision on its face. When the Court remanded the case "for the District Court to consider the merits of WRTL's as-applied challenge in the first instance," 126 S. Ct. at 1018, it did not suggest that it had already decided that any particular as-applied challenge will succeed, that a grass roots lobbying exception is necessary, or that the task of this Court is to define "grass roots lobbying."

BCRA authorizes the Commission to promulgate regulations that exempt certain communications from the definition of "electioneering communication" so long as they do not promote, attack, support, or oppose an identified federal candidate. 2 U.S.C. 434(f)(3)(B)(iv). To date, the Commission has not promulgated any such exemption for "lobbying communications." See 67 Fed. Reg. 65190, 65201-02 (Oct. 23, 2002). Although the Commission could one day promulgate such a regulatory exemption through quasi-legislative administrative rulemaking, see, e.g., 71 Fed. Reg. 13,557 (March 16, 2006) ("Rulemaking petition: Notice of availability"), its statutory discretion to fashion a "lobbying" exemption that serves the purposes of the statute does not mean that such an exemption is constitutionally required. WRTL's broad and amorphous proposal to exempt everything it considers "grass roots lobbying," regardless of its electoral impact, is contrary to the purposes of the Act and to the constitutional interest in clear rules governing speech.

C. WRTL Is Not Entitled To Any Constitutional Exemption For Its "Grass Roots Lobbying" That Meets The Definition Of "Electioneering Communication"

1. The Constitution Requires No General "Grass Roots Lobbying" Exemption from BCRA § 203

Lobbying has no higher First Amendment status than electoral advocacy. McConnell emphasized that it was upholding the electioneering communication provisions, not because "'[a]dvocacy of the election or defeat of candidates … is … less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation,'" but because of the compelling interest in fighting corruption and preserving the integrity of the electoral process.[5] 540 U.S. at 205 (citation omitted). WRTL is therefore correct (Br. 19-21, 34-38) that any federal interest in regulating corporate issue advocacy as

[5] Thus, WRTL is simply wrong when it argues without support (Br. 17) that the "right to petition is protected strictly in whatever context it arises and was not raised or considered in McConnell."

such is of considerably less magnitude than the interest in regulating corporate campaign-related spending. But any restrictions that BCRA imposes on the financing of advertisements addressing issues are simply the unavoidable, incidental byproduct of Congress's efforts to prevent corporate treasury funds from being used to influence federal candidate elections.

WRTL's reliance (Br. 19-20, 43-46) upon Eastern Railroad Presidents Conference v. Noerr, 365 U.S. 127 (1961), and related cases is misplaced for several reasons. First, Noerr concerned only the "proper construction," id. at 132 n.6, of the Sherman Anti-Trust Act, not whether that statute was constitutional. McConnell unequivocally rejected a similar attempt to convert a statutory construction adopted to avoid First Amendment questions into an overriding substantive constitutional restriction on congressional power to regulate. 540 U.S. at 190 ("the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law"); id. at 103 ("Buckley and MCFL were specific to the statutory language before the Court and in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech"). Second, the Sherman Act's "proscriptions…, tailored as they are for the business world, are not at all appropriate for application in the political arena," including lobbying the legislature by means of a public publicity campaign. Id. at 141. Thus, the Court's construction of the Sherman Act is not "transferable," as WRTL argues (at 46), to BCRA, which was designed to regulate the "political arena." Third, the statutory provisions at issue in the Noerr line of cases would have had a much more onerous impact on First Amendment activities, since application of those statutes would have entirely prohibited the petitioning and advocacy activities at issue. See Noerr, 365 U.S. at 143-144 (since attempts to influence legislation always carry the prospect of injury to the interests of some, "[t]o hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns"). In contrast, BCRA does not

prohibit WRTL from engaging in grass roots lobbying, even during pre-election periods, but merely restricts how certain broadcast advertisements are financed during those times.

Plaintiff relies (Br. 26) upon a footnote in McConnell (540 U.S. at 206 n.88), in which the Court "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." That assumption, however, does not suggest that the right to engage in issue advocacy overrides the incidental impact resulting from Congress's legitimate regulation of corporate and union financing of election advocacy that may also address issues. Rather, the Court was merely emphasizing that its jurisprudence has recognized two general categories of speech, and that the interests that justify a statute regulating one type might not apply to a statute regulating the other. In that context, the Court distinguished two decisions that found unconstitutional statutory restrictions on advocacy regarding ballot measures, not candidate elections. The McConnell decision reiterated the Court's longstanding view that the imperatives of preserving the integrity of candidate elections, preventing corruption of elected officials, and sustaining citizens' active participation and confidence in government are interests of the highest importance. 540 U.S. at 206 n.88 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788-89 (1978)). The Court then explicitly stated that "BCRA's fidelity to those imperatives sets it apart from the statute[s] in Bellotti" and McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995), 540 U.S. at 206 n.88, even though BCRA may regulate some "genuine issue ads," id. at 206. Thus, even if Congress lacks a substantial independent interest in regulating corporate issue advocacy itself, the marginal and incidental impact of BCRA § 203 on issue advocacy contained in pre-election broadcast ads that discuss candidates does not require a constitutional exemption for WRTL's advertisements.

2. WRTL Cannot Immunize Its Electioneering Communications From Regulation By Including In Them Advocacy About Legislation

WRTL stresses (Br. 10, 39) that its ads address the filibuster issue about which it has an

established interest, but it cannot shield its electioneering communications from regulation simply by including in them a "lobbying" message. Most electoral advertisements discuss issues of public importance, and "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." Buckley, 424 U.S. at 42. In MCFL, the newsletter's most explicit exhortation was to "VOTE PRO-LIFE," 479 U.S. at 243, yet because this issue advocacy was in a brochure that separately identified the positions of particular candidates on this issue, the Court concluded that the newsletter went "beyond issue discussion to express electoral advocacy" that "falls squarely within § 441b," id. at 249-50. The Court thus confirmed that the presence of "issue discussion" does not immunize an election-influencing communication from regulation. Cf. McConnell, 540 U.S. at 123, 166 (FECA definition of "contribution" properly includes activities that simultaneously influence both federal and nonfederal elections because the influence on federal elections is not negated by such a dual purpose).

WRTL devotes a substantial portion of its argument (Br. 22-35, 38-40) to trying to create an artificial division between "grass roots lobbying" and "electioneering," when in fact there are many communications that combine elements of each. Thus, the fact that the Commission's experts agree that WRTL's ads contain a message about a legislative issue is unremarkable — and beside the point. What matters here is that the expert testimony in this case confirms that political advertising commonly includes both electoral and issue-related elements, and that permitting an exemption for ads simply because they include grass roots lobbying would encourage widespread evasion of BCRA, undermining the basic purpose of the electioneering communication restrictions recognized as compelling in McConnell.

Professor Charles Franklin explained in detailed, unrebutted testimony how and why

political advertising that discusses policy issues, which is common prior to elections, influences elections. See Exh. 1, Franklin Report at 23-38; supra p. 10. Veteran political consultant Douglas Bailey (whose testimony was relied upon in McConnell, see 540 U.S. at 193 n.77; 251 F.Supp.2d at 305 (Henderson, J.), at 528-29 (Kollar-Kotelly, J.), and at 874, 880 (Leon, J.)), explained that ads like WRTL's that are run shortly before elections and tell the audience to contact candidates almost always have the purpose and effect of influencing elections (Exh, 2, Bailey Decl. at 4-6), and that the exemption WRTL requests would enable campaign professionals to create "ostensible issue ads [that] would have a profound and direct impact on candidate elections," id. at 9. Bailey testified that skilled ad consultants could craft electioneering ads satisfying WRTL's vague "grass roots lobbying" definition that are "much more vitriolic, insidious, and emotive" than those provided here in linking identified candidates to specific issues, just as consultants did with pre-BCRA "issue ads." Id. at 10. See id. at 10-12.

In its effort to suggest that "grass roots lobbying" and "electioneering" are two mutually exclusive categories, WRTL relies (Br. 22-23) upon the differing regulation of "grass roots lobbying" and "political intervention" under the Internal Revenue Code. Although the Internal Revenue Service's regulatory definitions are not directly relevant to the constitutional question before this Court, the IRS in fact recognizes that political advertising may include both electoral and issue-related speech. "Because public policy advocacy may involve discussion of the positions of public officials who are also candidates for public office, a public policy advocacy communication may constitute an exempt function" — i.e., a communication deemed to be influencing or attempting to influence an election. Rev. Rul. 2004-6, Internal Revenue Bulletin 2004-4 (Jan. 26, 2004), available at http://www.irs.gov/irb/2004-04_IRB/ar10.html. This ruling clearly reflects the common sense understanding that a public communication can have the purpose and effect of influencing an election, even if it also includes grass roots lobbying.

Finally, WRTL caricatures (Br. 27-32) the unrebutted testimony of Mr. Bailey by suggesting that his opinion is that the most subtle ads are the most deserving of regulation; in fact, he merely explained that subtle ads can be very effective electoral advocacy.[6] See Exh. 8, Bailey Dep. 40-42. Neither Mr. Bailey nor the Commission has argued that every communication that could possibly affect federal elections is, or should be, regulated under BCRA. Rather, McConnell upheld the line Congress drew in regulating certain targeted broadcast communications in the weeks before a federal election, and WRTL's ads are within that narrow subset. As we explain infra pp. 26-32, there are also numerous factual indications that WRTL's ads actually have an electoral purpose and effect, despite whatever "lobbying" message they might also contain, to foreclose WRTL's claim that application of BCRA to these ads does not serve the statute's compelling governmental purposes.

3. WRTL Has Not Demonstrated That the Communication Options Identified in McConnell and Other Alternatives Available To It Under BCRA Are Unconstitutionally Burdensome

In holding that the electioneering communication provision was constitutional, McConnell relied on the fact that corporations like WRTL have the option under BCRA of publicizing their views on issues without "any specific reference to federal candidates" in, or "paying for the ad from a segregated fund." 540 U.S. at 206. Thus, WRTL's as-applied challenge cannot succeed without demonstrating that these statutory options are unconstitutional as applied to its advertisements, by offering persuasive evidence as to the particular burdens, if

[6] The Supreme Court quoted Mr. Bailey approvingly, when he explained, "All advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their throat." 540 U.S. at 193 n.77 (citing 251 F.Supp.2d at 305 (Henderson, J.); internal quotation marks omitted). WRTL also derides Mr. Bailey (Br. 28) for stating that "even talk shows and news programs affect elections," and suggests that, if they do, BCRA is unconstitutionally underinclusive. It is common sense that media programming can affect elections, but McConnell has already upheld BCRA against a facial challenge based on such alleged underinclusiveness, citing the longstanding role of the press. 540 U.S. at 208-09.

any, that these options would place on WRTL. Plaintiff has not done so.[7]

First, the Supreme Court has already concluded that separate segregated funds provide corporations like WRTL with a "constitutionally sufficient" means of financing electioneering communications. See McConnell, 540 U.S. at 203-06.[8] WRTL fails to show why it has a particular need to run these ads with corporate treasury funds, with funds raised from outside its member class as defined in 2 U.S.C. 441b(b)(4), or with funds raised in amounts greater than the existing annual $5,000 PAC contribution limit in 2 U.S.C. 441a(a)(1)(c). Indeed, when this Court denied a preliminary injunction, it stressed that the option of financing WRTL's ads through its PAC was one of the reasons why the "actual limitation on plaintiff's freedom of expression … is not nearly so great as plaintiff argues." WRTL I, 2004 WL 3622736, at *4. Accord Christian Civic League of Maine, Inc. v. FEC ("CCLM"), __ F.Supp.2d __, 2006 WL 1266408, at *6 (D.D.C.) (May 9, 2006).

WRTL has been raising PAC funds with contributions from its members for more than

---

[7] Contrary to WRTL's suggestion (see Br. 48 n.19) that the government bears the burden of proving that the options identified by the Supreme Court are constitutional as applied to WRTL's ads, it is now — in light of McConnell — WRTL's burden to demonstrate why these options are unconstitutionally burdensome to it. The instant litigation follows the blueprint of Buckley and Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982). In Buckley, 424 U.S. at 74, after upholding the FECA's disclosure provisions on their face, the Court provided specific guidance as to what the "evidence offered [by minor parties] need show" to demonstrate that "compelled disclosure will subject them to threats, harassments, or reprisals." When the Court later addressed such an as-applied challenge in Socialist Workers, it followed Buckley and based its decision on the party's "proof of specific incidents of private and government hostility toward the [minor party] and its members." 459 U.S. at 99. Likewise, after McConnell's explicit explanation of the options that are generally sufficient to narrow the statute's burdens on corporate issue advocacy, it is up to WRTL to demonstrate why those options are not constitutionally sufficient for its ads.

[8] WRTL attacks (Br. 48 & n.19) this Court's prior reliance on Beaumont and attempts to relitigate the question of whether the burden of using a PAC is justified by a compelling governmental interest. McConnell, however, has already decided these questions. Although Beaumont involved the "PAC option" as applied to contributions, the Court in McConnell explicitly relied upon Beaumont's reasoning when it upheld the PAC option as applied to the financing of electioneering communications. 540 U.S. at 204-05; supra pp. 11-13.

two decades, and its public disclosure reports show that no donor in the 2004 election cycle gave its PAC more than $1,000. See Exh. 44. WRTL argues generally (Br. 49-50) that raising PAC funds is difficult, but it provides no specific evidence that it even tried to raise PAC funds to pay for the ads at issue. Rather, the evidence indicates that WRTL did not even consider using its PAC to finance this advertising campaign, perhaps because that would not have provided a basis for filing this lawsuit. See supra pp. 6-7. It made no special effort in 2004 to raise additional PAC funds or recruit new members; instead, WRTL hired an outside fundraiser to solicit funds from a relatively small number of donors to pay for these ads through its general treasury. Exh. 3, WRTL Dep. (Lyons) at 140-45, 153-54, 161-62. WRTL also argues (Br. 49) that some legislative issues — including the one at issue here — arise so quickly that an organization without a PAC would have difficulty forming one in time. But those abstract assertions are irrelevant in this as-applied challenge, since WRTL has had an active federal PAC since 1983, Exh. 9, and the judicial filibuster issue in this case had been, in part because of WRTL's own activities, a public issue in Wisconsin since as early as January 2003. See WRTL Br. at 3.

In any event, if WRTL cannot convince its 52,000 individual members to contribute annually up to the $5,000 limit, or if it cannot attract new members to give to its PAC, that is a direct reflection of the limits of WRTL's success in the marketplace of ideas, not an unconstitutional burden created by BCRA § 203. See Austin, 494 U.S. at 660 (corporate PAC requirement "ensures that expenditures reflect actual public support for the political ideas espoused by corporations"); McConnell, 540 U.S. at 204. See also Buckley, 424 U.S. at 21-22 (effect of any contribution limit "is merely to require candidates and political committees to raise funds from a greater number of persons…").

WRTL could have chosen to structure itself as an MCFL organization, see 479 U.S. at 263-64, which would allow it to pay for electioneering communications from its general treasury

funds, see McConnell, 540 U.S. at 209-11, but decided instead to accept contributions from business corporations. In 2004 WRTL raised more than $300,000 — nearly one-fourth of its total revenues — from corporations, the vast majority from business corporations. Exh. 3, WRTL Dep. (Lyons) at 147-51; Exh. 60. In particular, WRTL's executive director testified that WRTL financed the filibuster campaign at issue here in part with large donations from business corporations, donations that probably amounted to more than $50,000 and may have totaled more than $100,000. Exh. 3, WRTL Dep. (Lyons) at 143-45, 150. The fact that WRTL apparently used such donations to broadcast its ads about Senator Feingold's support for the filibuster shows exactly why Congress created, and the Supreme Court approved, the PAC option as a way to prevent the use of non-profit corporations as conduits to circumvent the ban on corporate contributions. See Austin, 494 U.S. at 664 (non-profit corporation's acceptance of funds from for-profit corporations could enable it to "serve as a conduit for corporate political spending"). See also McConnell, 540 U.S. at 205 ("recent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against circumvention of [valid] contribution limits") (citations and internal quotation marks omitted).

Second, WRTL has failed to show that it could not adequately express its position on the filibuster issue through the first method identified by the Court in McConnell, 540 U.S. at 206, "simply avoiding any specific reference to" Senator Feingold during the brief electioneering communication periods. There are many ways for WRTL to encourage the people of Wisconsin to lobby their Senators in a broadcast ad without identifying the Senators. These include directing the audience to the Senate's own extensive website (www.senate.gov), whose home page's upper right corner has a search box stating "Find Your Senators"; urging the audience to "call the Senate at 202-224-3121 and tell them to stop the filibuster"; or directing the audience to WRTL's own website "for more information about how to make your voice heard in

Washington." Indeed, WRTL itself argues here that the "use of a website, such as BeFair, is much more memorable than a phone number" (Br. 15). In any event, after McConnell the relevant question is not whether it may sometimes be useful to clearly identify a targeted office holder in a lobbying ad, but whether other options are so ineffective as to be unconstitutionally burdensome. As the record in McConnell demonstrated, many legislation-focused ads, such as those broadcast by Citizens for Better Medicare, simply asked viewers to contact Congress or take similar action. See McConnell, 251 F.Supp.2d at 545-47 (Kollar-Kotelly, J.). Indeed, in the specific context of judicial filibuster ads, groups have broadcast advertisements outside of the electioneering communications period that did not clearly identify the Senators that viewers were being urged to lobby. See, e.g., Exh 64 (2005 advertisements that contained the sign-offs "Urge the Senate to give John Roberts a fair up-or-down vote," "Like past nominees, Harriet Miers deserves a fair up-or-down vote in the U.S. Senate," and "Urge the Senate to give Samuel Alito a fair up or down vote").

Finally, as this Court noted in denying a preliminary injunction, "WRTL also has alternative methods available to communicate its message in addition to using PAC funding for broadcast ads, namely, using print media, such as newspaper or magazine advertisements, press releases, pamphlets, informational mailings, and billboards; using electronic communications, such as e-mailing and internet posting; and placing telephone calls." 2004 WL 3622736, at *4 n.1. See also CCLM, 2006 WL 1266408, at *5 (corporation may disseminate its communication naming Senate candidate Olympia Snowe without implicating BCRA's electioneering communication restrictions by using a non-broadcast medium such as newspapers, leaflets, e-mails, or telephone banks). WRTL asserts (Br. 50) that broadcast is the "most effective" media and that other media are "inadequate" for expressing its views on the filibusters of judicial nominees, but it made liberal use of other media — including the www.befair.org website

dedicated solely to this campaign — in lieu of broadcasts for months in pursuing the filibuster issue. Facts ¶¶ 104-07. In fact, it was only with the coming of the "electioneering communication" periods that WRTL decided it needed broadcast ads to publicize its views on this issue, as this Court noted in denying a preliminary injunction. WRTL I, 2004 WL 3622736, at *3. The suddenness of this change in WRTL's tactics suggests that it was based on the issue's perceived value as a campaign issue, and perhaps a litigation vehicle, rather than on any inadequacy in the alternative media.

4. WRTL's Advertisements Are Sufficiently Election-Related That Applying BCRA's Regulation Of Electioneering Communications Serves The Statute's Compelling Governmental Interests

In McConnell, the Supreme Court explained that the "justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." 540 U.S. at 206.[9] The three advertisements that WRTL proposed to run just prior to the 2004 federal elections in Wisconsin are such ads. They presented different scenarios stressing the unfairness and "state of emergency" caused by the filibusters of judicial nominees by a "group of Senators," and then urged the audience to contact Senators Feingold and Kohl to urge them to oppose the filibusters. Even without expressly stating Senator Feingold's position, WRTL's ads reinforced strong concurrent public criticism of the Senator on the filibuster. It was a high-profile issue in his re-election campaign in part because of WRTL's own aggressive efforts, as well as those of the candidates opposing him — three of whom WRTL had endorsed — to publicize the controversy. While WRTL's ads

[9] If WRTL is suggesting (Br. 27, 38-39) that McConnell erected a "functional equivalent of express advocacy" test for constitutional application of the statute, it is mistaken. Although the Court used that phrase when it explained why BCRA's regulation of "electioneering communications" is not overbroad, 540 U.S. at 206, it never suggested that it was replacing Congress's definition of electioneering communication, which the Court explicitly upheld, with a different test. Rather, the Court merely explained that the category of ads identified by Congress fairly approximated those containing express advocacy because they generally intended to influence voter's decisions and had that effect.

may have been intended in part to affect congressional activity, even though Congress was not addressing judicial nominees when they would have run (see supra pp. 7-9), the evidence indicates that electoral influence was at least one of the purposes and effects of these ads. They were financed by a group whose stated priority was to "'send[] Feingold packing,'" WRTL I, 2004 WL 3622736, at *3, and whose PAC made independent expenditures against Senator Feingold in 1992, 1998, and again in 2004, running radio ads opposing him during the same electioneering communication period in which it sought to broadcast its alleged grass roots lobbying. See supra pp. 3, 5-6, 9-10.

Despite plaintiff's insistence (Br. 40-47) that the only proper measure of an ad's purpose and effect is its text, both this Court and the Supreme Court have recognized that the overall electoral context in which such communications are made can be critical in evaluating the validity of applicable financing restrictions. Indeed, the record in McConnell amply supports the finding that pre-election advertisements can have a significant electoral effect even if they do not expressly discuss a candidate's record. The district court found, in a portion of its opinion relied on by the Supreme Court in concluding that the vast majority of past ads that would have been covered by BCRA had an electioneering purpose, that it was "unrebutted that advertisements naming federal candidates, targeted to their electorate, and aired in the period before the election, influence voters." McConnell, 251 F.Supp.2d at 573 (Kollar-Kotelly, J.). See 540 U.S. at 206. This finding was based in part on testimony by a prominent political consultant that he did "not believe there are issue ads run immediately before an election that mention[] the candidate that aren't important in the decision-making process of the voter." 251 F.Supp.2d at 573 (Kollar-Kotelly, J.).

> Without even mentioning an upcoming election, the media consultant can count on the electoral context and voters' awareness that the election is coming. Voters will themselves link your ad to the upcoming election. When viewed months or years after the election a particular ad might look like pure issue advocacy unrelated to a federal election. However, during the election, political ads —

> whether candidate ads, sham issue ads, true issue ads, positive ads, negative ads or whatever — are each seen by voters as just one more ingredient thrown into a big cajun stew.

McConnell, 251 F.Supp.2d at 875 (Leon, J.) (quoting Raymond Strother).[10] As explained supra pp. 9-10, expert testimony in this case confirms that political advertising commonly includes both electoral and issue-related elements, and that candidate-specific ads run just prior to elections affect the elections.[11]

The likely electoral purpose and effect of WRTL's 2004 advertisements is even more pronounced in the specific context of this case. The evidence strongly suggests that the three ads at issue here were actually one part of a broader effort by WRTL to use the filibuster issue against Senator Feingold in the 2004 campaign, consistent with its strong electoral focus and interest, and in particular its aggressive history of electoral opposition to the Senator since 1992. See generally Exh. 1, Franklin Report at 1-8; Facts ¶¶ 30-40.

As an initial matter, the filibuster issue that WRTL's ads discuss cannot easily be separated from electoral politics. Evidence indicates that the July 2004 filibuster votes that occurred shortly before WRTL's advertising were scheduled by the Senate leadership "to rally conservative voters in th[e] election season." Fact ¶ 77. In this context, where even the legislative action may be timed for its electoral impact, "[t]he notion that [WRTL's] advertisement[s] were designed purely to discuss the issue of [filibustering of judicial nominees] strains credulity." McConnell, 540 U.S. at 193-94 n.78. See also CCLM, 2006 WL 1266408,

---

[10] See also McConnell, 540 U.S. at 193 n.77 (relying on this consultant and others for the proposition that "magic words" of express advocacy are not required for an electoral ad).

[11] Moreover, under the broad exemption WRTL seeks, nothing would stop a corporation like WRTL from condemning the position of a candidate like Senator Feingold in high-profile broadcast grass roots lobbying ads, and then immediately following those ads with hard-hitting PAC ads that use the same theme in expressly calling for the candidate's defeat. In fact, WRTL's PAC did run independent expenditure radio ads against Senator Feingold prior to the 2004 elections, and WRTL has refused to disclose in discovery the content of those ads. See Defendants' and Intervenor-Defendants' Motion to Compel (June 16, 2006).

at *6 ("candidates or their allies could easily schedule an issue for 'legislative consideration' during the run-up to an election as a pretext for broadcasting a particular subliminal electoral advocacy advertisement").

WRTL itself suggests (Br. 3) that the Senate filibusters became a public issue as early as January 2003. Starting later that year, all three of Senator Feingold's leading Republican challengers and the Wisconsin Republican Party harshly criticized Senator Feingold for his participation in the filibusters. See supra pp. 4-5. Then, as this Court noted in denying a preliminary injunction, in 2004 WRTL actively publicized the filibuster issue, while its PAC worked to see Senator Feingold defeated at the polls. See WRTL I, 2004 WL 3622736, at *3. In March 2004, WRTL's PAC endorsed all three of the Republican primary candidates vying for Senator Feingold's seat. Exh. 1, Franklin Rep. at 5-6. Its press release stated: "Top Election Priorities: Re-elect President Bush … Send Feingold Packing" (emphasis in original). Exh. 22. The release also stated that all three endorsed candidates had stated that they "would oppose a filibuster of a judicial nominee" with a positive or neutral Judiciary Committee recommendation. Id. On March 26, 2004, WRTL itself — not its PAC — issued a press release headed: "Feingold's, Kohl's and Kerry's Votes Against Unborn Victims Bill Demonstrates [sic] an Utter Disrespect for Human Life! Top Election Priorities for Right to Life Movement in Wisconsin: Re-elect George W. Bush … Send Feingold Packing!" Exh. 21. In July 2004, WRTL issued a flurry of press releases and "urgent e-alerts" criticizing Senator Feingold for his role in the filibusters. See Exhs. 25-28. At the same time, WRTL's main website, www.wrtl.org — which was linked from the www.befair.org site, created for its filibuster campaign, to which the WRTL ads directed viewers and listeners — was full of the press releases, "e-alerts" and other materials excoriating Senator Feingold on the filibuster issue. See Exh. 54, 57-59.

Senator Feingold's role in the filibusters of judicial nominees remained a major campaign

issue as Election Day approached. See Exh. 1, Franklin Report at 9 (filibusters raised "early and often as a partisan issue" in the campaign); id. at 8-9. Senator Feingold's Republican opponents continued to criticize him on the issue. See Facts ¶¶ 21, 24, 26-27. Even Vice-President Cheney used the filibuster issue in campaigning against Senator Feingold in September and October. See Fact ¶ 29.

WRTL planned to run its ads at a time that was close to Senator Feingold's election. It spent about $260,000 on its 2004 anti-filibuster campaign, using a variety of public and non-public tools; enlisting the services of an advertising agency, a website creator, pollsters, and a publicist; and drawing on a wide variety of non-broadcast media for publicity. See Exh. 56, Request Nos. 56-57. Most of the funds were spent to broadcast the three ads at issue in this case. Facts ¶¶ 85, 88. WRTL began to air them at the beginning of a six-week Senate recess a few days after four judicial filibuster votes had taken place, calling into question its claim that its sole objective was to influence votes in Congress. Facts ¶¶ 66-75. The ads aired over a three-week period from about July 26 to August 14, 2004, just prior to the start of the electioneering communications period. Facts ¶¶ 68, 82-83. WRTL had never before run broadcast advertisements on the filibuster issue (and also did not run the advertisements when more judicial filibuster votes were scheduled in the spring of 2005, after the election).[12] Facts ¶¶ 10-12, 128-35.

Professor Franklin and Mr. Bailey provided unrebutted testimony that, regardless of WRTL's effort to avoid overt electioneering in the actual ad text, WRTL's ads would likely have influenced the election if broadcast during the 2004 electioneering communication periods.

[12] WRTL planned its broadcast campaign on the filibusters in the spring of 2004, and the evidence suggests that the ads were in part designed to create a test case for this litigation. To the extent the ads were designed for that purpose rather than to pursue a bona fide lobbying effort, it further calls into question whether WRTL would suffer any First Amendment harm by following one of the options identified in McConnell. See supra pp. 6-7.

Professor Franklin explained that the "substantial" amount of advertising WRTL ran in 2004 likely increased the salience of the judicial filibuster issue, making it more likely that voters would use the issue in their electoral decisions relating to the Senate race, and that it also likely served to inform and mobilize pro-life voters, who would favor Senator Feingold's opponents, an effect that Franklin noted would likely "be larger the closer ads were run to the election." Exh. 1, Franklin Report at 35-36. Mr. Bailey testified that, based on his campaign experience, WRTL's ads would clearly have influenced Senator Feingold's election if broadcast during the electioneering communication periods. See Exh. 2, Bailey Decl. at 6-9. He noted that the ads linked Senators Feingold and Kohl to the filibusters, and that in the surrounding context of an electoral environment in which WRTL and Feingold's opponents had been steadily criticizing him on the same issue, they would clearly have influenced the race. Id. at 6-7. At the same time, Bailey explained, if WRTL were really interested only in affecting the longstanding filibuster issue, it would have made far more sense to: (1) not run the ads near the election, when the airwaves were overrun with competing messages; (2) provide contact information to help the audience reach the Senators directly, such as a Senate phone number or Internet address; and (3) start running the ads well before July 26, since several filibusters had just occurred and the Senate had left for its summer recess on July 22. See id. at 8-9; supra pp. 7-9.

WRTL's ads reached a majority of the voters in Wisconsin. Fact ¶ 84. The television ad alone had reached approximately 60% of Wisconsin's households more than five times. Id. WRTL made some effort to target its ads towards an older, more public policy-aware audience with a male skew, a demographic that is more likely to include people who could be mobilized to vote against Senator Feingold than a less policy-aware audience. Exh. 1, Franklin Rep. at 36. WRTL argues (Br. 39-40) that its additional ads would have been unlikely to affect Feingold's re-election significantly because the target audience would be unlikely to change its political

views based on the ads. WRTL ignores, however, the wide reach that its continuing ads would have had and their likely effect on motivating or suppressing voter turnout and other election-related activity. See Exh.1, Franklin Rep. at 35-36 (ads would likely inform and mobilize pro-life voters); CCLM, 2006 WL 1266408, *5 ("advertisement might ... undermin[e] [Senate candidate's] efforts to gather … support, including by raising funds for her reelection"). Even express advocacy may be unconvincing to many viewers, but an election may be affected if each of a variety of ads influence the votes of a small number of people. In any event, nothing in McConnell suggests that an ad's intention to "influence the voters' decisions," 540 U.S. at 206, or the "conclusion that [certain] ads were specifically intended to affect election results," id. at 127, turns on whether they would, in themselves, be outcome-determinative.

In sum, the facts suggest that WRTL planned an extensive effort to raise funds from major donors nationwide, including business corporations, to finance a high-profile campaign with the specific purpose of naming Feingold in powerful, negative television and radio ads and other communications exploiting a key campaign issue just prior to his election. In light of WRTL's actions in 2004, its history of opposition to Senator Feingold, and the political environment in which the filibuster ads were to run, the electoral component of the ads is inescapable.

D. BCRA'S BRIGHT-LINE RULE FURTHERS FIRST AMENDMENT INTERESTS AND WOULD BE SUBVERTED BY WRTL'S AS-APPLIED CHALLENGE

Recognition of the ill-defined constitutional exception that WRTL seeks would substantially undermine Congress's effort to develop an objective bright-line rule for identifying the election-related advertisements that may not be financed with corporate and union treasury funds. One of BCRA's compelling purposes is to avoid any constitutional chill that could arise from uncertainty about whether a particular communication is an "electioneering communication." Thus, in addition to advancing the government interest in protecting the integrity of federal elections, the line drawn in BCRA §§ 201 & 203 furthers First Amendment interests that

would be seriously eroded by creating an exemption for advertisements like WRTL's.

"A bright-line prophylactic rule may be the best way…, by offering clear guidance and avoiding subjectivity, to protect speech itself." Hill v. Colorado, 530 U.S. 703, 729 (2000). "[A] … prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms." Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). See also Riley v. National Fed'n of the Blind, 487 U.S. 781, 793-94 (1988). BCRA §§ 201 & 203 were designed to give speakers clear guidance and thus avoid the uncertainty that could cause potentially unconstitutional chilling. See Edward B. Foley, 'Narrow Tailoring' Is Not the Opposite of 'Overbreadth': Defending BCRA's Definition of 'Electioneering Communications,' 2 Election L.J. 457, 465-66 (2003). The definition's "bright line" quality itself thus serves compelling governmental interests and was critical to the Court's upholding of the restriction against the First Amendment challenge. See McConnell, 540 U.S. at 194. It was also a key concern of Congress when it enacted this definition. See 148 Cong. Rec. S2117 (daily ed. Mar. 20, 2002) (statement of Sen. Jeffords) ("the care we took in crafting these clear and narrow requirements").

Plaintiff's approach would reintroduce the indeterminacy and the potential chill to political speech that Congress and the Supreme Court have sought to dispel. Plaintiff argues (Br. 38-40) that its ad is "not express advocacy or its functional equivalent" by pointing to several fact-specific aspects of its ads; it argues for no other legal standard to be applied to determine whether its ad is entitled to a constitutional exemption from the Act. Although WRTL discusses several facts about itself and its ad, it does not explain whether it views all of these factors as necessary to establish entitlement to a constitutional exemption, or how or whether the factors should be weighed against each other. Plainly, many of these factors are matters of judgment on which reasonable minds might differ depending upon the circumstances: For example, how

would a court determine (WRTL Br. 39) whether an issue was a "long-time, natural concern" of a corporation, or whether an ad "dealt with an unprecedented issue of vital national importance that was just then coming to a head"?[13] Moreover, some of these factors do not depend solely on the text of the ads, but on elements of the surrounding context, such as the status of an issue in the national political landscape and the past conduct of the advertiser — the same kind of contextual information plaintiff elsewhere claims has no place in the proper analysis of the purpose and effect of an ad.

Under WRTL's approach, the permissibility of corporate and union disbursements would turn on the same sort of unstructured, ad hoc inquiry that the Court in Buckley found constitutionally problematic, and that Congress in enacting BCRA carefully sought to avoid. Without offering any specific bright-line test of its own, WRTL asserts (Br. 35 n.12) that this Court "could adopt a bright-line test for grass roots lobbying that is every bit as bright as the exception for MCFL-type corporations created in MCFL." In two distinct respects, however, plaintiff's approach would create difficulties far greater than those entailed by the existing constitutional exemption for MCFL organizations. First, because plaintiff's as-applied challenge rests largely on the content of specific advertisements, its approach necessarily focuses on the particular speech at issue, rather than on the general characteristics of an entity, and thus every advertisement would provide a new opportunity for litigation. Moreover, even the same advertisements might be subject to differing constitutional treatment if, for example, one speaker alleges that it has a "long-time, natural concern" for an issue or that it will run the "same ads outside the blackout periods" (WRTL Br. 39), but another speaker does not. The exemption recognized in MCFL, on the other hand, turns on an objective assessment of the organization's

[13] WRTL also does not explain why, for example, lobbying communications on an issue of "national importance" are entitled to greater constitutional protection that those for business goals, which was the subject of the Noerr line of cases on which it relies.

structure and overall activities, designed to identify a class of corporations for which a separate segregated fund for campaign-related expenditures is unnecessary to achieve Congress's ends. See MCFL, 479 U.S. at 263-64.

Second, because WRTL has made no effort to articulate an objective and determinate standard for identifying those corporate advertisements to which the BCRA financing restrictions cannot constitutionally be applied, the resolution of each such challenge would involve a complex and fact-bound inquiry centered on judicial analysis of the meaning and intent of the content of specific ads, rather than the application of a clear, easily followed rule. Plaintiff's approach would thus multiply litigation, blur the bright lines drawn by Congress, and markedly subvert Congress's compelling interest in avoiding "the vagueness concerns that drove [the Court's] analysis in Buckley." McConnell, 540 U.S. at 194. Cf. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) (rejecting construction of statute that would introduce "complexity and uncertainty" and thereby "undermin[e] ... the [statute's] ... purposes and 'breed[] litigation from a statute that seeks to avoid it'").[14]

In addressing constitutional challenges to other FECA provisions, the Supreme Court has recognized the value of bright-line rules in preventing evasion of the statute's purposes and in furnishing clear guidance to regulated entities. In Buckley, for example, the Court "assumed" that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29. The Court held, however, that the difficulty of isolating

[14] Moreover, most of this factbound litigation would occur in the context of preliminary injunction hearings on the eve of elections and would enmesh the federal courts in political debate, since BCRA § 201(a)'s definition of "electioneering communication" is limited to advertisements that, inter alia, are aired in the 30- or 60-day window before a federal election and clearly identify a federal candidate. The fact that as-applied challenges would likely arise shortly before federal elections would also require the courts to attempt to expedite the suits, multiplying the complexity and costs of the litigation for all involved. And under BCRA § 403(a) and (d), 116 Stat. 113-114, each plaintiff would be entitled to have the action heard by a three-judge district court, with a right of appeal directly to the Supreme Court.

suspect contributions and Congress's interest in guarding against the inherent appearance of abuse justified universal application of the $1,000 individual contribution limit. Id. at 29-30. The Court's analysis clearly portends the likely failure of as-applied challenges to the contribution limits by well-intentioned contributors who might seek to prove that their own contributions, though in excess of the statutory caps, would be made without any intent to obtain special influence.[15] See also California Medical Ass'n v. FEC, 453 U.S. 182, 198-99 (1981) (contributions to a political committee are subject to FECA restrictions even if earmarked for administrative support, rather than for influencing elections); Goland v. United States, 903 F.2d 1247, 1258-59 (9th Cir. 1990) (contributions are subject to FECA restrictions even if a contributor keeps his identity a secret by using straw donors, allegedly precluding the opportunity to exert undue influence).

More generally, such clarity is critical to the operation of prophylactic statutory rules, whose efficacy cannot depend upon an in-depth analysis of the extent to which the interests underlying them are served in each particular situation. In Hill v. Colorado, for example, the statute banned "unwelcome demonstrators" from coming closer than eight feet to people entering health care facilities. The Court recognized that the statute's "prophylactic approach … will sometimes inhibit a demonstrator whose approach in fact would have proved harmless," 530 U.S. at 729, just as the Court in McConnell recognized that some "genuine issue ads" would have to be reworded or financed with PAC funds under BCRA, 540 U.S. at 206. The Court in Hill nonetheless upheld the statute, explaining that the very exercise of engaging in a case-by-case factual analysis would thwart the rule's effectiveness and limit free expression (530 U.S. at 729):

---

[15] The Court rejected an exception for contributions from "immediate family members," although the "risk of improper influence is somewhat diminished," Buckley, 424 U.S. at 53 n.59.

> But the statute's prophylactic aspect is justified by the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior, demanding in each case an accurate characterization (as harassing or not harassing) of each individual movement within the 8-foot boundary. Such individual characterization of each individual movement is often difficult to make accurately.

Similarly, in Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995), the Court upheld Florida Bar rules prohibiting lawyers from sending targeted mail solicitations to victims and their relatives for 30 days following an accident or disaster. Id. at 620. The Court did not question the claims of the challengers that the injuries or grief of some victims are "relatively minor," but stressed instead that making case-specific judgments would entail "drawing difficult lines" as to the severity of different kinds of "grief, anger, or emotion." Id. The Court thus found the bright-line, 30-day rule was "reasonably well tailored to its stated objective of eliminating targeted mailings" that had caused many Floridians "to lose respect for the legal profession." Id.[16] See also Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 654 (1981) ("any such exemption [from a rule fixing the physical location of First Amendment activity] cannot be meaningfully limited to [the appellant], and as applied to similarly situated groups would prevent the State from furthering its important concern"). In these cases, the Supreme Court has upheld objective, prophylactic rules that it acknowledged would regulate some speech that might not implicate the government interests involved in order to pretermit the practical difficulty and chilling effect of case-by-case analysis. The Court thus has recognized that when as-applied challenges to bright-line, prophylactic rules would undermine Congress's interest in clarity and predictability, the First Amendment is often better served by adhering to the bright-line rule.

[16] BCRA's 30- and 60-day rule, concerning broadcasts targeted to specific portions of the electorate, bears a striking resemblance to the restriction in Florida Bar. Further, both regulatory schemes allow "many other ways" for the respective speakers to make their messages heard. Florida Bar, 515 U.S. at 633-34.

At a minimum, in light of these precedents, the Court should not accept an as-applied constitutional challenge to BCRA's bright-line prophylactic rule in the absence of an objective, readily discernible standard that could both identify an allegedly unconstitutional application and prevent continual case-by-case adjudication involving judicial analysis of the content and circumstances of each communication. WRTL has plainly failed to identify such a basis for concluding that BCRA § 203 cannot constitutionally be applied to its advertisements.

E. WRTL'S OFFER TO FINANCE ITS ADVERTISEMENTS FROM A SEGREGATED BANK ACCOUNT DOES NOT ALTER THE CONSTITUTIONAL ANALYSIS

WRTL asserts that it does not in this case challenge the reporting and disclaimer requirements for electioneering communications and that, if necessary, it is willing to finance electioneering communications from a "segregated bank account" containing only funds raised from individuals, as provided in 2 U.S.C. 434(f)(2)(E). See Complaint ¶¶ 64-69; Br. 34-38. Since WRTL actually financed its ads in large part with donations from business corporations, see supra pp. 10-11, this hypothetical suggestion has no application to this case. In any event, after careful deliberation Congress chose to require non-MCFL corporations to finance "electioneering communications" through a PAC, and it specifically rejected the segregated account alternative WRTL proposes.[17] As explained in McConnell, BCRA § 203 (in what were known as the "Snowe-Jeffords" provisions) appeared to grant a limited exemption for certain non-profit organizations to finance electioneering communications with funds collected only from individuals, but BCRA § 204 then effectively withdrew the exemption. See 540 U.S. at 209 n.90; 2 U.S.C. 441b(c)(2), (6). Snowe-Jeffords would have permitted a nonprofit

[17] WRTL's claim (Br. 37) that it is "in fact quite like" an MCFL organization — despite receiving over $300,000 in corporate donations in 2004 — is contrary to MCFL. In that case, the Court explained that one of the three "features essential to [the Court's] holding that [MCFL] may not constitutionally be bound by § 441b's restriction on independent spending" was the fact that it had a "policy not to accept contributions from" business corporations or labor unions. 479 U.S. at 263-64.

corporation like WRTL to finance "electioneering communications" from a segregated account that — unlike a corporation's PAC — could contain funds solicited from individuals who are not its members (see 2 U.S.C. 441b(b)(4)) in amounts that could exceed the $5,000 annual contribution limit of 2 U.S.C. 441a(a)(1)(C). BCRA § 204 reflects an explicit congressional determination, sustained by McConnell, that WRTL's proposed "segregated bank account" alternative affords insufficient protection against corporate electoral activity.

II. CONCLUSION

For the reasons above, the Court should grant the Commission's motion for summary judgment, and deny the plaintiff's motion for summary judgment.

Respectfully submitted,

_____/s/_____
Lawrence H. Norton
General Counsel

_____/s/_____
Richard B. Bader
Associate General Counsel
(D.C. Bar # 911073)

_____/s/_____
David Kolker
Assistant General Counsel
(D.C. Bar # 394558)

_____/s/_____
Harry J. Summers
Attorney

_____/s/_____
Kevin Deeley
Attorney

_____/s/_____
Steve N. Hajjar
Attorney

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

July 14, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC.,	)	
	)	
Plaintiff,	)	No. 1:04cv01260 (DBS, RWR, RJL)
	)	(Three-Judge Court)
v.	)	
	)	
	)	
	)	FEC's Statement of Material Facts
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
SEN. JOHN MCCAIN, et al.,	)	
	)	
Intervenor-Defendants.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Fed. R. Civ. P. 56(c) and Local Civil Rule 7(h) (D.D.C.), defendant Federal Election Commission ("Commission" or "FEC") presents the following statement of material facts as to which there is no genuine issue and that entitle the Commission to judgment as a matter of law:

I. Plaintiff Wisconsin Right to Life, Inc.

1. Wisconsin Right to Life ("WRTL") describes itself as a nonprofit, nonstock Wisconsin corporation that is tax exempt under 501(c)(4) of the Internal Revenue Code. Am. Ver. Complt. ¶¶ 19, 21.

2. Wisconsin Right to Life is a "very active force in Wisconsin state politics" with

"a strong grass-roots organization" which is "often effectively mobilized in elections." Defendant Federal Election Commission's Exhibit Submitted in Support of Its Motion for Summary Judgment, July 14, 2006 ("Exh.") Number 1, Franklin Rep. at 9-10.

3. "[T]he influence of WRTL in turning out pro-life voters is unquestioned by state political observers." Exh. 1, Franklin Rep. at 11.

4. WRTL has approximately 500,000 supporters and approximately 52,000 of them are considered members of the organization. Exh. 1, Franklin Rep. at 9; Exh. 4, Armacost Dep. at 23.

5. WRTL administers its own separate segregated fund, the Wisconsin Right to Life Political Action Committee ("PAC"). The fund is registered with the Commission as a multicandidate political committee under the FECA. See Exh. 9, WRTL PAC Statements of Organization; 2 U.S.C. 431(4), 441a(a)(4), 441b(b)(2)(C).

6. WRTL has demonstrated its ability to raise substantial sums of money from its members into its federal PAC, raising nearly $155,000 during the presidential election year of 2000. Exh. 10, Lyons Aff. ¶ 7.

7. WRTL has a long history of opposition to Senator Feingold, making independent expenditures against him through its federal PAC in his 1992 and 1998 campaigns. Exhs. 11-12.

8. In 1998, WRTL spent more than $60,000 on independent expenditures that urged voters to vote against Feingold and for his opponent, including the distribution of thousands of brochures and extensive phone-calling. Exh. 11. Many of those independent expenditures mentioned candidates in other races as well. Exh. 11; Exh. 1, Franklin Rep. at 2.

9. WRTL and its federal PAC make the vast majority of their communications through media other than paid broadcast advertising. WRTL has a website; sends out mass

emails to thousands of recipients; provides its staff for appearances on TV and radio news shows; publishes op-eds in newspapers; provides quotes for print media stories; holds press conferences; publishes a magazine; distributes brochures, church bulletins, and voter guides; sends out direct mail letters; and pays for automated telephone calls. Exh. 3, WRTL Dep. (Lyons) at 89-115.

10. WRTL had never run a TV or radio ad on the issue of judicial filibusters before it created the advertisements at issue here. Exh. 3, WRTL Dep. (Lyons) at 82.

11. Neither Wisconsin Right to Life Inc. nor its federal or state PAC had ever run any television advertising before the summer of 2004. Exh. 4, Armacost Dep. at 51, 115.

12. The only branch of the WRTL organization that had run television advertising before WRTL ran the TV ad at issue in this case was its 501(c)(3) education fund, which runs educational advertisements discouraging women from getting abortions. Exh. 4, Armacost Dep. at 12-13; WRTL, Veritas Society TV Commercials, http://www.wrtl.org/veritas_tv.htm; Exh. 3, WRTL Dep. (Lyons) at 105-06, 137.

II. The 2004 Wisconsin Senate Election Was Expected to Be Competitive, and Judicial Filibusters Were a Campaign Issue

13. Throughout most of the 2004 election cycle, Senator Feingold appeared to be vulnerable, with less than 50% approval ratings. Exh. 1, Franklin Rep. at 3-4.

14. During the fall of 2004, the widely respected Cook Political Report classified the race as one of the most competitive races involving a Democratic incumbent. Exh. 1, Franklin Rep. at 4-5.

15. Competitive races are far more likely to attract interest group spending, particularly expensive television advertising. See, e.g., McConnell, 251 F. Supp. 2d 176, 305 (D.D.C. 2003) (Henderson, J.); id. at 565-67, 633, 726 (Kollar-Kotelly, J.); id. at 878, 881, 908 (Leon, J.).

16. Four candidates vied to be the Republican challenger to Senator Feingold: Bob Welch, Tim Michels, Russ Darrow, and Robert Lorge. Exh. 1, Franklin Rep. at 5.

17. The Republican Party of Wisconsin and all four of the Republican candidates made Senator Feingold's support of filibusters against judicial nominees a campaign issue. Facts 18-28, infra.

18. In September, 2003, Bob Welch issued a press release harshly criticizing Senator Feingold for his participation in the "partisan filibuster" that he said led to the withdrawal of one judicial nominee. Exh. 13.

19. In press releases in September and November of 2003, Bob Welch "called on Senator Russ Feingold to end his support of the filibuster of four of President Bush's judicial nominees" and argued that "[t]he gridlock caused by Russ Feingold's partisanship is appalling.... Because of his obstructionism the wheels of justice are in danger of grinding to a halt." Exh. 1, Franklin Rep. at 8.

20. On January 16, 2004, a Bob Welch press release stated that "[r]efusing to allow qualified jurists like Miguel Estrada, Priscilla Owen, Charles Pickering and others to ever have an up-or-down vote on the Senate floor is back room partisan politics at its worst." Exh. 1, Franklin Rep. at 8.

21. At the end of July, Bob Welch's campaign website noted that many "clearly qualified" judicial nominees had their nominations "stonewalled or killed by Russ Feingold" and his Senate allies. Exh. 14 at 6.

22. It was reported that Tim Michels promised that he would support giving every judicial nominee a vote and asserted that "[t]his issue is rising on people's radar screens." Exh. 15 at 4.

23. It was reported that Russ Darrow called Feingold "a leader in the stonewalling

effort," said "it's the worst kind of politics," and argued that "[i]t's why many Americans want a new face." Exh. 15 at 4-5.

24. Darrow's website listed "not hold[ing] judicial nominations hostage" as one of his main issues. Exh. 16.

25. The Wisconsin Republican Senate candidates frequently discussed the filibuster issue at their campaign stops. Exh. 1, Franklin Rep. at 8.

26. It was reported that the filibuster issue was addressed during an August 17 debate among the Republican candidates, with Robert Lorge claiming that he would be the most effective candidate at getting judicial nominees approved. Exh. 17, Xiao Zhang, Four Republican U.S. Senate Candidates Debate in Milwaukee, Wis. State J. (Assoc. Pr.), Aug. 18, 2004.

27. The Republican Party of Wisconsin also highlighted Senator Feingold's "obstruction of President Bush's judicial nominees" on its website as one of four reasons "why Russ Feingold should be voted out of office." Exh. 18.

28. It was reported that the Chairman of the Wisconsin Republican Party criticized Feingold on the filibuster issue. Exh. 15.

29. At campaign rallies in September and October of 2004, Vice President Cheney urged that "a good way to deal with the problem of the Democratic filibuster in the Senate is to elect some good Republicans like Tim Michels from Wisconsin." Exh. 19 at 4, Office of the Vice President, Vice President's Remarks at a Victory 2004 Rally in Eau Claire, Wisconsin, Sept. 28, 2004 at 5; Exh. 20, Office of the Vice President, Vice President's Remarks in Ashwaubenon, Wisconsin, Oct. 21, 2004, at 5.

III. One of WRTL's Two Most Important Election Priorities in 2004 Was to "Send Feingold Packing!"

30. WRTL considered the 2004 Senate election a "key federal race." Exh. 4, Armacost Dep. at 100-01.

31. Defeating Senator Feingold was one of WRTL's top two election priorities in 2004. Facts 32, 35, infra.

32. Wisconsin Right to Life itself — not its PAC — issued a press release on March 26, 2004 emphasizing its "resolve to do everything possible to win Wisconsin for President Bush and to send Russ Feingold packing!" Exh. 21. The heading of the press release labeled these the "Top Election Priorities for Right to Life Movement in Wisconsin." Id.

33. WRTL through its PAC endorsed Feingold's three prominent opponents: Welch, Michels, and Darrow. Exh. 1, Franklin Rep. at 5-6.

34. In a press release, WRTL's PAC Chair, Bonnie Pfaff, "stressed the importance of defeating radically pro-abortion Russ Feingold in the U.S. Senate race," and stated that "[w]e do not want Russ Feingold to continue to have the ability to thwart President Bush's judicial nominees." Exh. 22. The release also stated that all three endorsed candidates had stated that they "would oppose a filibuster of a judicial nominee" with a positive or neutral Judiciary Committee recommendation. Id. Pfaff urged that "the defeat of Feingold must be uppermost in the minds of Wisconsin's right to life community in the 2004 elections." Exh. 1, Franklin Rep. at 6.

35. In a prominent article in the fall 2004 edition of WRTL's quarterly magazine, "A Strong Finish in 2004: Bush Wins, Feingold Loses," Barbara Lyons, WRTL's executive director, wrote that the organization's "greatest challenge for 2004" was "to finish strongly in the elections," by winding "up in the win column for President Bush and to retire Senator Feingold." Exh. 24, WRTL, Life Without Limits, Fall 2004 at 3. She urged readers "to vote

November 2 for President Bush and Tim Michels." Id. That particular page of WRTL's magazine was paid for by WRTL's federal PAC. Id.

36. An article in WRTL's fall 2004 magazine featured comments from the federal legislative director for National Right to Life discussing the importance of "a single senator [being] defeated in a race in which political observers saw credible evidence that the obstruction of judicial nominees played a significant role in the senator's defeat." Exh. 24, WRTL, Life Without Limits, Fall 2004, at 5.

37. Judicial filibusters were one of the five issues highlighted in the voter guide WRTL distributed on the Senate race, a copy of which was included in WRTL's magazine. Exh. 24, WRTL, Life Without Limits, Fall 2004, at 15. The voter guide asserted that Michels "has pledged to allow the Senate to vote on President Bush's judicial nominees" whereas Feingold "has voted approximately 20 times since March 2003 to prevent a vote on President Bush's judicial nominees." Id. WRTL distributed thousands of the voter guides, including to the approximately 35,000 recipients of its magazine. Exh. 3, WRTL Dep. (Lyons) at 104, 107-10.

38. Through its PAC, WRTL also paid for radio advertising in August or September of 2004 calling explicitly for Feingold's defeat. Exh. 3, WRTL Dep. (Lyons) at 128-31; Exh. 4, Armacost Dep. at 126-27.

39. At the same time that WRTL and its PAC were identifying Feingold's participation in judicial filibusters as a reason to defeat him in the election, WRTL was sending out a flurry of "e-alerts" and press releases decrying the role of Senators Kohl and Feingold in the filibusters and urging recipients to tell them to stop the filibusters. Exhs. 25-28.

40. In the 2004 Senate race, the judicial nomination issue "was raised early and often as a partisan issue with the Republican candidates and Wisconsin Right to Life citing it as a

reason to defeat Sen. Feingold." Exh. 1, Franklin Rep. at 9; Facts 30-39, supra.

IV. The Origin of the Specific Advertisements at Issue in This Case

41. In the spring of 2004, WRTL began a campaign on the issue of judicial filibusters using its usual means of communications: mass emails and press releases. Exh. 4, Armacost Dep. at 104-05.

42. The idea to start the campaign originated with Susan Armacost, the Legislative/PAC director who is in charge of WRTL's grassroots lobbying; Mary Klaver, another employee in the Legislative/PAC Department; and Barbara Lyons, WRTL's executive director. Exh. 4, Armacost Dep. at 104-05; Exh. 23 (Armacost Dep. Exh. 1), PAC/Legislative Director job description, Dec. 15, 2005 (one of Armacost's job responsibilities is to "[s]upervise the development and maintenance of a grassroots structure for political activity").

43. The broadcast advertising campaign that led to this lawsuit was "distinct from the other activities of e-mailing [WRTL's] supporters" and was a "whole different matter." Exh. 4, Armacost Dep. at 105.

44. WRTL's designated deponent under Rule 30(b)(6) was unable to state who originated the idea of broadcasting the ads at issue in this case and refused to answer whether the idea had originated with counsel. Exh. 3, WRTL Dep. (Lyons) at 22-24.

45. In another case that has been filed, Christian Civic League of Maine, Inc. v. FEC, Civ. No. 06-614 (D.D.C. filed Apr. 3, 2006), counsel for WRTL solicited prospective clients to file an additional lawsuit in an effort to get a more expedited ruling than in this case and "potentially clear the way for everyone to do such grass roots lobbying." Exh. 29, Email from John Paulton (Focus on the Family) to Michael Heath (Christian Civic League), et al. (March 24, 2006) (enclosing message from counsel for WRTL).

46. Ms. Armacost, who has been involved in all of WRTL's other grass roots

lobbying campaigns in her 19 years there, did not develop the idea to run the broadcast ads, "had no role in getting it started," and had "nothing to do with the planning of it or the execution of it." Exh. 4, Armacost Dep. at 5-6, 105-10, 113, 115.

47. Barbara Lyons began conversations with an advertising agency about executing a broadcast media campaign on the filibuster issue in early- to mid-May. The talks led to the advertising agency doing research and then sending a detailed written proposal to WRTL on June 9. Exh. 5, Vanderground Dep. at 86-89.

48. Democratic filibusters of judicial nominees had occurred since the spring of 2003 but WRTL had not run any broadcast advertisements on the issue before Lyons initiated talks with an advertising agency. Exh. 3, WRTL Dep. (Lyons) at 82.

49. In her earliest contacts with the advertising agency about a broadcast media campaign on the filibuster issue, Barbara Lyons indicated that WRTL intended to run advertisements during "a certain time when the ads couldn't run" and that the planned advertisements would lead to a lawsuit. Exh. 5, Vanderground Dep. at 41-43.

50. As early as June 8, 2004, the day before the advertising agency presented a written proposal to handle WRTL's campaign that would challenge the law, someone at the agency was researching the likely discovery battles that would occur in litigation and printed out an article about the discovery that occurred during the McConnell litigation. Exh. 30, CFIF.org, Following the Bouncing (and Deflating) Ball in the Discovery Phase of Campaign Finance Litigation, HM-01-111, HM-01-113 (printed on June 8, 2004 at 2:19 p.m.).

51. Jason Vanderground, the consultant at the advertising agency who coordinated the ads, researched the "legal parameters," including how many households the broadcast advertising had to reach in order to be subject to the statute's restrictions. Exh. 5, Vanderground Dep. at 46-50.

52. On a number of occasions, WRTL's vendors were under the impression that the focus of their activities was as much on challenging the Bipartisan Campaign Reform Act ("BCRA") as on conducting a campaign on the judicial filibuster issue. See Facts 53-54, infra.

53. According to WRTL's website vendor's contract, it was asked to design a website "to promote greater public awareness and involvement in challenging campaign finance reform measures and opposing congressional filibusters." Exh. 49 (Vanderground Dep. Exh. 5), Estimate Hanon McKendry Wisconsin Right to Life Website Design and Development, July 7, 2004.

54. A public relations firm's initial draft of its contract with WRTL listed the objective of the project as "[t]o raise awareness among the general voting public regarding the violation of the First Amendment Right to Freedom of Speech as a result of judicial filibustering." Exh. 50 (Vanderground Dep. Exh. 6), Public Relations, HM-01-294. The final contract, dated July 9, 2004, described the overall objective as to "[r]aise awareness among the general public regarding the filibustering of the President's judicial nominees, as well as the restrictions placed on citizen groups by the Bipartisan Campaign Reform Act. Exh. 51, (Vanderground Dep. Exh. 7), Straightline Wisconsin Right to Life Public Relations Proposal, HM-01-315.

55. In its magazine, WRTL has referred to its advertisements as being "commercials on McCain-Feingold challenge" rather than as on the judicial filibuster issue. Exh. 42, WRTL, Accomplishments: 2004, Life Without Limits, Winter 2005, at 7, http://www.wrtl.org/Winter05LifeWithoutLimits.pdf.

56. From the outset, WRTL planned a multi-faceted campaign coupling the anti-filibuster advertising with an extensive plan to criticize proponents of the McCain-Feingold law. Facts 57-60, infra.

57. WRTL's advocacy plan included a contingency plan, should WRTL be unsuccessful in gaining a preliminary injunction to run its filibuster advertisements, for broadcast advertisements attacking the McCain-Feingold law without naming any officeholders. Facts 58-60, infra.

58. In early June, WRTL had already developed a detailed calendar for rolling out different phases of its advertising. WRTL planned its weekly activity for every week from June 13 through the end of August on both the "Anti-Judicial Nominee Filibuster" campaign component and the "Campaign Finance" component. The judicial filibuster component was scheduled to go public on August 1 while the campaign finance component was scheduled to go public on August 15. The campaign finance component included TV or radio ads that were scheduled to be shot the week of August 1 through 7. Exh. 31, Wisconsin Right to Life, Weekly Activity for Each Campaign Component, WRTL 02-74 – 75.

59. On August 16, WRTL staff were emailing draft copies of the press release describing the "campaign finance" radio advertisement that did not name any officeholders, but the ads were pulled at the last minute. Exh. 32, Aug. 16, 2004 WRTL Email, WRTL-02-39 – 40.

60. WRTL's long-planned campaign finance ad criticized recent "campaign finance reform," obviously referring to the McCain-Feingold law, and encouraged listeners to visit the website that WRTL set up for its judicial filibuster/BCRA challenge campaign. Exh. 32, Aug. 16, 2004, WRTL Email, WRTL-02-39 – 40.

61. In crafting the advertisements to form the basis of this test case and the accompanying publicity campaign, WRTL sought to ensure that the ads did not contain too

much overt "negativity" and had a "tone" that was very "reasonable" and "respectful." Facts 62-64, infra; Exh. 5, Vanderground Dep. at 134-35.

62. The sign-off on the ads was changed from "Tell Feingold and Kohl to stop filibustering and start playing fair" to its final incarnation of "Contact Senators Feingold and Kohl and tell them to oppose the filibuster." Compare Am. Ver. Complt. Exhs. A-C with Exh. 52 (Vanderground Dep. Exh. 15), Waiting, HM-01-411.

63. Handwritten notes from the files of the advertising consultant contain "No negativity about Kohl + Feingold" immediately following notes about campaign finance law. Exh. 33, handwritten notes, HM-01-58 – 59 at 58.

64. Lyons removed language from one draft press release that characterized the advertising campaign as "denouncing the actions of Democratic Senators Russell Feingold and Herbert Kohl," explaining to the public relations consultant that "This is a no-no." Exh. 33, Fax from Barbara Lyons to Peggy Howard, July 26, HM 01-45 – 50 at 48.

65. Part of WRTL's motivation in creating its judicial filibuster advertisements was to create a vehicle for a test case that would challenge BCRA's electioneering communications provision. Facts 41-64, supra.

V. WRTL Planned to Time its Advertisements To the Election, Not To Any Filibuster Votes

66. WRTL decided early in its campaign that it would run radio and television advertisements close to Senator Feingold's election, with little regard to when actual judicial filibuster votes (motions to invoke cloture) would occur. Facts 67-75, infra.

67. In the beginning of June, WRTL had already determined that its anti-filibuster campaign would launch around August 1, 2004. Exh. 31, Wisconsin Right to Life, Weekly Activity for Each Campaign Component, WRTL-02-75 – 76; Exh. 5, Vanderground Dep. at

86089.

68. WRTL's radio advertisements began on July 26 and its television advertisement began on August 2. Exh. 3, WRTL Dep. (Lyons) at 65.

69. The advertisements began a few days after four judicial filibuster votes had occurred and the Senate had departed for a six-week recess. See Exh. 3, WRTL Dep. (Lyons) at 65; Exh. 35, U.S. Senate Roll Call Votes, 108th Congress – 2nd Session (2004), at 4, http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_108_2.htm (motions to invoke cloture on four judicial nominees on July 20 and July 22); Days in Session Calendars, http://thomas.loc.gov/home/ds/s1082.html (Senate recessed on July 22 and returned on September 7); Exh. 2, Bailey Decl. ¶ 23.

70. In general, both WRTL's employee in charge of grass roots lobbying and its advertising agency lead consultant believe that it is important to run grass roots lobbying advertisements shortly before legislative votes are to occur. Exh. 4, Armacost Dep. at 112 (running ads after votes would be "a waste of time"); Exh. 5, Vanderground Dep. at 30-31.

71. Both WRTL's employee in charge of grass roots lobbying and its advertising agency lead consultant were allegedly tracking the Senate's schedule because of WRTL's planned anti-filibuster campaign. Exh. 4, Armacost Dep. at 120-21; Exh. 5, Vanderground Dep. at 54-56.

72. The ad agency that WRTL used for this lawsuit's advertisements is generally able, when necessary, to create and air radio advertisements in a week and television advertisements in two weeks. Exh. 5, Vanderground Dep. at 24-25. WRTL made no effort, however, to air its advertisements in advance of the judicial filibuster votes that occurred. Exh. 5, Vanderground Dep. at 54-56, 62-63. See also Exh. 5, Vanderground Dep. at 86-92.

73. WRTL stuck to the schedule it had planned for months, which was to air the

advertisements at a time that was close to the election and would lay the groundwork for a lawsuit, and did not air the advertisements before the filibuster votes that occurred. Facts 66-72, supra; Facts 82-83, infra.

74. During this litigation, WRTL has repeatedly claimed that it relied on a July 21 news story in setting the schedule for its advertising even though WRTL had essentially determined its schedule more than a month and a half earlier. Compare Am. Ver. Complt. ¶ 3; WRTL Mem. in Support of Prelim. Inj. Mot. at 5 [Docket #4]; WRTL Summary Judgment Mot. at 4 & Stmt. of Undisputed Facts, Facts 18-19; with Exh. 31, WRTL-02-74 – 76 (advertising schedule from early June); Exh. 5, Vanderground Dep. at 54-63. See also Exh. 37, Filibuster Project Notes, July 9, 2004, HM-01-323 – 24 (final start dates picked by July 9).

75. There were no judicial filibuster votes when the Senate returned following its six-week recess or during the rest of 2004. See Exh. 35, U.S. Senate Roll Call Votes, 108th Congress – 2nd Session (2004), http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_108_2.htm.

76. The scheduling of the judicial filibuster votes that occurred before the recess was largely for the particular purpose of mobilizing voters in the election. Facts 77-79, infra.

77. It was reported that the judicial filibuster votes were scheduled in order to mobilize conservative voters in the fall election. As one wire story explained, "Republican aides said the move is intended . . . to rally conservative voters in this election season." Exh. 38, UPI, Senate Dems Block More Bush Judges, July 22, 2004.

78. On the day that some of the judicial filibuster votes occurred, it was reported that Senator John Cornryn "said the GOP will make judicial nominations an issue in the election." Exh. 39, Dee-Ann Durbin, U.S. Senate Democrats Block Votes on Michigan Judges, July 22, 2004, AP Alert.

79. According to an article in the Washington Times, "Republicans vowed to make Democratic obstruction of judicial nominees an issue in the November elections," and Senate Majority Leader Bill Frist "made that point clear … by scheduling a vote" on a judicial nominee. Exh. 40, Charles Hurt, Democrats Block 6th Judge Pick, Washington Times, July 21, 2004 at A4.

VI. WRTL's Advertisements Were Likely to Have Had an Effect on the Senate Election Had They Run During the Electioneering Communications Period

80. WRTL's radio and television ads at issue in this case ran for a substantial amount of air time before the statutory electioneering communication period began on August 15, 2004. Exh. 1, Franklin Rep. at 35.

81. WRTL's ads show examples of people waiting or being delayed and claim that "a group of Senators" are filibustering, or "blocking qualified nominees from a simple 'yes' or 'no' vote." Am. Ver. Complt. Exhs. A-C. The ads attribute the filibusters to "politics at work," argue that the filibusters have caused "gridlock" and created a "state of emergency" in the courts, and then urge viewers to "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." Id.

82. WRTL's radio ads ran approximately 1100 times on 21 stations in Milwaukee, Green Bay and LaCrosse-Eau Claire. Exh. 1, Franklin Rep. at 35; Exh. 3, WRTL Dep. (Lyons) at 85; Exh. 41 (WRTL Dep. (Lyons) Exh. 9), Wisc. Right to Life, Radio Media Plan As Placed, 7/23/04.

83. WRTL's television ad ran for two weeks in the same three markets, airing approximately 430 times. Exh. 1, Franklin Rep. at 35; Exh. 3, WRTL Dep. (Lyons) at 86; Exh. 41 (WRTL Dep. (Lyons) Exh. 9), Wisc. Right to Life, Radio Media Plan As Placed, 7/23/04.

84. The markets of Milwaukee, Green Bay, and LaCrosse-Eau Claire reach almost 70% of Wisconsin households. Exh. 41, (WRTL Dep. (Lyons) Exh. 9), Wisc. Right to Life,

Radio Media Plan As Placed, 7/23/04 at WRTL-02-55. Based on its number of gross ratings points, WRTL's television ad likely reached more than 85% of the households in those markets and provided an average of more than five exposures to the ad for each household during the two weeks that it ran. Exh. 1, Franklin Rep. at 35. By reaching more than 85% of the households in those three markets, WRTL was able to reach approximately 60% of the households in Wisconsin five times.

85. WRTL spent approximately $70,000 to create the advertisements at issue in this case, about $78,000 to air the radio ads, and about $86,000 to air the television ad. Exh. 3, WRTL Dep. (Lyons) at 33-37, 44-46, 50, 56.

86. According to WRTL's own calculations, its advertisements made approximately 18 million contacts with the public. Exh. 42, WRTL, Accomplishments: 2004, Life Without Limits, Winter 2005, at 7, http://www.wrtl.org/Winter05LifeWithoutLimits.pdf.

87. Had WRTL obtained a preliminary injunction, it would have spent some $100,000 to continue running its advertisements within the electioneering communications period. Exh. 10, Lyons Aff. ¶ 12.

88. Not counting production costs, WRTL spent approximately $160,000 to air its radio and TV ads prior to the electioneering communications period, making 18 million contacts with the public and getting its TV ad played in 60% of Wisconsin's homes. Had WRTL spent an additional $100,000 to run the ads inside the electioneering communications period, it would have made millions of contacts with the public and reached a substantial number of Wisconsin's homes. Facts 81-87, supra.

89. WRTL's advertisements would likely have had a significant electoral effect had WRTL run the ads during the electioneering communications period. Facts 90-103, infra.

90. The ads imply that Senator Feingold "supports the filibuster, and thinks that

'politics' are more important than saving courts from a 'state of emergency' or allowing qualified candidates to serve in the federal judiciary." Exh. 2, Bailey Decl. ¶ 17.

91. The ads "portray Senator Feingold in a negative light and clearly would influence the outcome of the election for which he was campaigning." Exh. 2, Bailey Decl. ¶ 16.

92. The WRTL ad would have been one of the many messages that created an impression about Senator Feingold in the weeks before the election that would have informed voters' decisions in the upcoming election. Exh. 2, Bailey Decl. ¶¶ 7-8.

93. Ads like WRTL's that are run shortly before elections and tell the audience to contact candidates about an issue almost always have the purpose and effect of influencing elections. Exh. 2, Bailey Decl. ¶¶ 9-14.

94. Exposure to a political issue in the mass media increases the salience of that particular issue, encouraging voters to see the issue as an important political problem. Exh. 1, Franklin Rep. at 24-27. This effect is known as "agenda setting," whereby voters are more likely to see issues prominently discussed in the mass media as politically important. WRTL's ads, for example, presented the delay in confirmation of judges as a serious political problem. Exh. 1, Franklin Rep. at 24. The electoral significance of agenda setting is that candidates are differently advantaged by different topics. Therefore, an important aspect of election strategy is defining what topics the election is about. Exh. 1, Franklin Rep. at 27.

95. WRTL's ads increased the salience of the judicial filibuster issue and made it more likely that voters would connect the issue to their evaluation of candidates, and to Senator Feingold in particular. Exh. 1, Franklin Rep. at 35-36

96. By calling attention to an issue, even if not clearly identifying a candidate's position, ads can increase the weight voters give that issue in evaluating a candidate. This is called "priming": voters primed for an issue will evaluate candidates increasingly on the basis of

the candidates' views on that issue. Exh. 1, Franklin Rep. at 28-29. Ads that mention a candidate in connection with that "primed" issue make it more likely that voters will blame, or attribute responsibility to, that candidate for his or her position on the issue. Exh. 1, Franklin Rep. at 23.

97. In the case of WRTL's ads, blaming Senator Feingold for his position on the filibuster issue would have increased the importance of this issue to voter evaluations of him. Exh. 1, Franklin Rep. at 29.

98. The mass public is generally inconsistent across issue positions, taking liberal positions on some issues, conservative positions on others. Exh. 1, Franklin Rep. at 29. "Constraint" refers to the extent to which voters develop consistent positions across issues and connect issues to partisan positions. Exh. 1, Franklin Rep. at 29. Political advertising increases constraint. Exh. 1, Franklin Rep. at 31.

99. One effect of increasing the salience of a particular issue can be to increase the "constraint" effect, making voters more consistent in their position on the issue relative to other issues and linking their position on the issue more clearly to party. Exh. 1, Franklin Rep. at 29. Political advertising increases constraint or polarization by causing voters to become more consistent across issues. Exh. 1, Franklin Rep. at 32.

100. Even before WRTL broadcast its ads, the partisan connection between the filibuster issue and Senator Feingold had been forged through WRTL's public statements criticizing Senator Feingold on the issue, press releases of the Republican candidates for Senate, and media reports on the use of the filibuster issue against Senator Feingold. Because of this preexisting connection, WRTL's advertisements would have increased the salience of the filibuster issue, an issue that any potential Republican nominee could have been expected to press further. Exh. 1, Franklin Rep. at 34-35. Thus, WRTL's ads increased constraint on the

filibuster issue and increased partisan alignment on the issue. Exh. 1, Franklin Rep. at 35-36.

101. WRTL's ads were likely to act as a mobilizing force for pro-life voters and WRTL's supporters in the state, and any increase in turnout among this segment of voters would have clearly favored the Republican candidate. Exh. 1, Franklin Rep. at 36.

102. WRTL made some effort to target its ads towards an older, more public policy-aware audience with a male skew, a demographic that is more likely to include people who could be mobilized to vote against Senator Feingold than a less policy-aware audience. Exh. 1, Franklin Rep. at 35-36.

103. Had they been broadcast during the electioneering communication period, WRTL's ads should have been expected to have electoral effects on the campaign, regardless of their purported purpose. Exh. 1, Franklin Rep. at 24.

VII. WRTL Also Used Other Means of Communication to Get Its Message Out

104. WRTL employed a number of means of communication in addition to its broadcast advertisements in its judicial filibuster campaign. Facts 105-07, infra.

105. WRTL sent letters to Senators Kohl and Feingold, issued press releases, published op-eds in newspapers, and sent mass emails to 5,000-6,000 recipients. It sent approximately 100,000 automated phone messages, created a dedicated website, published articles in its magazine, held press conferences, appeared on television and radio programs, had staff quoted in newspapers and magazines, distributed voter guides addressing the issue (including through direct mail), and made telemarketing calls using the issue to raise funds. Exh. 3, WRTL Dep. (Lyons) at 61-63, 89-115; Exh. 4, Armacost Dep. at 111-12; Exh. 36 (WRTL Dep. (Lyons) Exh. 15), Barbara L. Lyons, Unprecedented Filibusters Are Un-American: Senators Feingold and Kohl Should Oppose Gridlock, WRTL-02-19 – 20; Barbara Lyons, Nominees Deserve a Vote, Milwaukee Journal Sentinel, Aug. 6, 2004; Exh. 54, WRTL Dep. (Lyons) Exh. 16, WRTL Press

Releases and E-Alerts; Exh. 24, WRTL, Life Without Limits, Fall 2004, at 3, 5, 7, 15; Exh. 37, Filibuster Project Notes, July 9, 2004, HM-01-323 – 24 (decision to place 100,000 IVR or automated calls); Exh. 55, Email from Barbara Lyons, Jul 21, 2004, FM-01-80 – 81 (100,000 phone calls scheduled to begin August 1).

106. WRTL spent about $260,000 on its 2004 anti-filibuster campaign, using a variety of public and non-public tools; enlisting the services of an advertising agency, a website creator, pollsters, and a publicist; and drawing on a wide variety of non-broadcast media for publicity. Exh. 56, Plaintiff WRTL's Response to Defendants' Requests for Admissions, Request Nos. 56-57.

107. In July 2004, WRTL's main web site, www.wrtl.org, was full of the press releases, "e-alerts" and other materials criticizing Senator Feingold on the filibuster issue. This website was linked to the www.befair.org site, created for its filibuster campaign, to which the WRTL ads directed viewers and listeners. See Exh. 54 (WRTL Dep. (Lyons) Exh. 16), WRTL Press Releases and E-Alerts; Exhs. 57-59.

VIII. WRTL Received A Significant Amount of Funding From Business Corporations in 2004, and Appears to Have Significantly Scaled Back Its Efforts to Raise Funds for Its Federal PAC

108. WRTL raised more than $315,000 from corporations for its general fund in 2004, the "vast majority" from business corporations. This amounted to nearly one-fourth of its total revenues that year. Exh. 3, WRTL Dep. (Lyons) at 147-51; Exh. 60 (WRTL Dep. (Lyons) Exh. 23), Corporate Contributions to General Fund 1/1/04 through 12/31/04.

109. Corporate donations to WRTL in 2004 were as large as $50,000 and $140,000. Exh. 3, WRTL Dep. (Lyons) at 147-51; Exh. 60 (WRTL Dep. (Lyons) Exh. 23), Corporate Contributions to General Fund 1/1/04 through 12/31/04.

110. Between five and ten business corporations, some from outside Wisconsin,

donated a total of more than $50,000 — perhaps more than $100,000 — specifically to finance the advertisements in this case. Exh. 3, WRTL Dep. (Lyons) at 143-45, 150.

111. Rather than being unable to raise money for its federal PAC in 2004, it appears that WRTL ceased raising money for that account and shifted its fundraising efforts toward its general treasury. See Facts 112-21, infra.

112. Although WRTL's PAC raised approximately $155,000 in the 1999-2000 election cycle, it received less than $13,000 in 2001-02, Exh. 10, Lyons Aff. ¶ 7, and less than $17,000 in 2003-04, Exh. 3, WRTL Dep. (Lyons) at 155.

113. Although the yearly limit on individual contributions to a multicandidate political committee such as WRTL's PAC is $5,000, from January 2003 through June 2004 WRTL's PAC received contributions from no individual that totaled more than $1,000. Exh. 44.

114. Receipts by PACs in general increased by 13% from the 1999-2000 election cycle to the 2001-02 election cycle. Exh. 45, FEC, PAC Activity Increases for 2002 Elections, Mar. 27, 2003, http://www.fec.gov/press/press2003/20030327pac/20030327pac.html.

115. Between the 2001-02 election cycle and the 2003-04 election cycle, the aggregate annual limit on federal contributions that an individual could make were substantially increased by BCRA § 307, and receipts by PACs in general increased by 34%. Exh. 46, FEC, PAC Activity Increases for 2004 Elections, Apr. 13, 2005, http://www.fec.gov/press/press2005/20050412pac/PACFinal2004.html.

116. WRTL has yet to raise any money at all for its federal PAC during the current election cycle. See Exh. 47, WRTL April 2006 Quarterly Disclosure Report.

117. PAC receipts nationally increased approximately 50% during the period between the 1999-2000 election cycle and the 2003-04 election cycle, Facts 114-15, supra, and WRTL has provided no reason why fundraising was harder for its PAC than for everyone else, Exh. 3,

WRTL Dep. (Lyons) at 154-64.

118. WRTL had planned to attempt to raise $58,000 in 2004 for its federal PAC through telemarketing. Exh. 61 (Armacost Dep. Exh. 5), Federal PAC 2004 Budget.

119. WRTL made no special effort in 2004 to raise additional PAC funds or recruit new members. Exh. 3, WRTL Dep. (Lyons) at 153-54, 161-62.

120. The only special effort WRTL made in 2004 to raise funds was to hire an outside fundraiser to solicit funds from a relatively small number of donors to help pay for the ads at issue in this case through its general treasury. Exh. 3, WRTL Dep. (Lyons) at 140-45.

121. WRTL also raised funds for its 2004 filibuster campaign through telemarketing. Exh. 3, WRTL Dep. (Lyons) at 112-15 & Exh. 17.

122. Had WRTL simply raised for its PAC the same amount of money in 2004 that it did in 2000, it would have had more than enough to pay for the additional $100,000 that it intended to spend on the ads that are at issue here and for a portion of the production costs for the advertisements. Exh. 10, Lyons Aff. ¶ 12.

123. WRTL never considered the possibility of funding its 2004 electioneering communications through its PAC. Exh. 3, WRTL Dep. (Lyons) at 157.

124. In 2004, WRTL did not spend most of the $14,000 it had in its PAC at the time it sought a preliminary injunction in this case, and it has no explanation for why it did not. Exh. 3, WRTL Dep. (Lyons) at 157.

125. WRTL and its local chapters have communicated with the public in the past using means that it did not employ to publicize its anti-filibuster campaign, including running advertisements in the print media, distribution of brochures, and purchasing billboards. Exh. 3, WRTL Dep. (Lyons) at 96-97, 106-07, 115.

126. The only written documentation that WRTL produced in support of its contention that non-broadcast communications would not be as effective as broadcast in disseminating WRTL's grassroots lobbying messages was a fax from its current advertising agency that was faxed to it a few days before its discovery response was due in 2006. It did not have the document in its possession at the time it planned to run its 2004 advertisements. Exh. 3, WRTL Dep. (Lyons) at 118-19.

127. When WRTL was not successful in getting a preliminary injunction permitting it to run additional broadcast advertising for its judicial filibuster campaign, it did not even consider putting additional resources into non-broadcast methods of getting its message out. Exh. 5, Vanderground Dep. at 127.

IX. WRTL Did Not Run Any Advertisements on the Judicial Filibuster Issue When the Issue Became Prominent in the Spring of 2005

128. WRTL did not broadcast any anti-filibuster advertisements in the spring of 2005, when the judicial filibuster controversy actually reached its peak. Exh. 3, WRTL Dep. (Lyons) at 101-03; Fact 129, infra.

129. "It was clear" in the spring of 2005 that the filibuster issue was "coming to a head," and groups then spent more than $8.5 million on advertising on both sides of the issue. Exh. 7, Franklin Dep. at 26-27.

130. WRTL and its agents have offered shifting rationales for why WRTL did not run any advertising when filibuster votes were planned outside the election season. Facts 131-33, infra.

131. Counsel for WRTL told the Supreme Court that other issues were higher priorities for WRTL after the election. Exh. 48, Supreme Court Oral Argument Transcript, Jan. 17, 2006, http://supremecourtus.gov/oral_arguments/argument_transcripts/04-1581.pdf at 8-10.

132. WRTL's advertising consultant testified that the issue arose too fast in the spring

of 2005 for the group to run advertising, Exh. 5, Vanderground Dep. at 146-48, even though the issue actually "had been discussed at some length for some number of months before that." Exh. 7, Franklin Dep. at 27.

133. WRTL's latest explanation is that it did not run advertising at that time because the primary issue then was whether to change the Senate rules to bar filibustering and it was certain that Wisconsin's Democratic Senators would not support such a change. 2nd Lyons Aff., Exh. 2 to WRTL's Motion for Summary Judgment, ¶ 9.

134. The advertising that groups other than WRTL ran in the spring of 2005 was on the subject of the filibusters themselves, as well as the proposed Senate rule change. See, e.g., Exh. 62 (scripts of five advertisements that ran in the spring of 2005 on the filibuster of judges, not the proposed Senate rule change).

135. Cloture motions on nominees were expected to be voted on in the spring of 2005 and were in fact voted on. See Fact 134, supra; Exh. 63, U.S. Senate Roll Call Votes, 109th Congress – 1st Session (2005), at 13-14 (cloture motion votes on judicial nominees on May 24 and June 7-8) http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_109_1.htm.

136. During the Supreme Court oral argument in this matter Justice Ginsburg, Justice Scalia, and Chief Justice Roberts all asked WRTL's counsel questions about WRTL's decision not to run any judicial filibuster ads after the 2004 election. Exh. 48, Supreme Court Oral Argument Transcript, Jan. 17, 2006, http://supremecourtus.gov/oral_arguments/argument_transcripts/04-1581.pdf at 8-10. Wisconsin Right to Life then broadcast a radio ad on the filibuster issue approximately ten days after the Supreme Court oral argument. 2nd Lyons Aff., Exh. 2 to WRTL's Motion for Summary Judgment, Exh. A (radio ad dated Jan. 27, 2006). That advertisement was the first ad on the judicial filibuster issue that it broadcast since it had ceased running the ads at issue here.

Exh. 3, WRTL Dep. (Lyons) at 101-03.

X. Many Legislation-Focused Ads Do Not Clearly Identify Particular Members of Congress But WRTL Never Considered Running Such an Ad

137. Many legislation-focused ads, such as those broadcast by Citizens for Better Medicare, simply ask viewers to contact Congress or take similar action. See McConnell v. FEC, 251 F.Supp.2d 176, 545-47 (D.D.C. 2003) (Kollar-Kotelly, J.).

138. In the context of judicial filibuster ads, groups have broadcast advertisements outside of the electioneering communications window that did not clearly identify the Senators whom viewers were being urged to lobby. Facts 139-41, infra.

139. In 2005, a group financed an advertisement discouraging a filibuster of John Roberts which did not clearly identify any individual Senators and contained the sign-off "Urge the Senate to give John Roberts a fair up-or-down vote." Exh. 64, "Brilliant" script.

140. In 2005, a group financed an advertisement discouraging a filibuster of Harriet Miers which did not clearly identify any individual Senators and contained the sign-off "Like past nominees, Harriet Miers deserves a fair up-or-down vote in the U.S. Senate." Exh. 64, "Trailblazer" script.

141. In 2005, a group paid to run an advertisement against the filibuster of Samuel Alito which did not clearly identify any individual Senators and contained the sign-off "Urge the Senate to give Samuel Alito a fair up or down vote." Exh. 64, "Alito" script.

Respectfully submitted,

/s/
Lawrence H. Norton
General Counsel

/s/
Richard B. Bader
Associate General Counsel
(D.C. Bar # 911073)

/s/

David Kolker
Assistant General Counsel
(D.C. Bar # 394558)

Harry J. Summers
Kevin Deeley
Steve N. Hajjar
Attorneys

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650
(202) 219-0260 (FAX)

July 14, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC.,	)	
	)	
Plaintiff,	)	No. 1:04cv01260 (DBS, RWR, RJL)
	)	(Three-Judge Court)
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	STATEMENT OF
	)	GENUINE ISSUES
Defendant,	)	
	)	
and	)	
	)	
SEN. JOHN McCAIN, et al.,	)	
	)	
Intervenor-Defendants.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S AND INTERVENOR-DEFENDANTS' STATEMENT OF GENUINE ISSUES

Pursuant to Local Civil Rules ("LCvR") 7(h) and 56.1, defendant Federal Election Commission ("FEC" or "Commission") and Intervenor-Defendants Senator John McCain, Representative Tammy Baldwin, Representative Christopher Shays, and Representative Martin Meehan (collectively "Defendants") submit the following Statement of Genuine Issues and Objections to Plaintiff's Statement of Material Facts, filed June 23, 2006 ("Plaintiff's Statement"). This statement contains the Defendants' responses and objections to the evidence adduced by plaintiff in support of its June 23, 2006 motion for summary judgment. These responses and objections are presented below in numbered paragraphs tracking the numbering scheme in Plaintiff's Statement.

1-2. No response.

3. 2 U.S.C. 441b(b)(2) speaks for itself. The Defendants object to this paragraph because it is a legal conclusion that is not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts). In any event, the Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), codified at 2 U.S.C. 431-455.

4-7. The Defendants object to these paragraphs because they present legal conclusions that are not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts).

8-9. No response.

10. The Defendants object to the characterization of these ads as "grass-roots lobbying" with no electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC's Statement of Material Facts ("FEC Facts") ¶¶ 80 - 103. The Defendants further object to the use of the phrase "electioneering communication prohibition periods," which is not an accurate characterization of the electioneering communication regulation in FECA. See McConnell v. FEC, 540 U.S. 93, 204-06 (2003). A time period in which the plaintiff can use its general treasury funds for advertising in print media, the Internet, billboards and

other public signs, direct mail, and telephone banks, or fund its proposed broadcast advertising from its political action committee, is not a "prohibition period."

11. This paragraph describes a notice in the Federal Register, which speaks for itself. To the extent any factual allegation is presented, the Defendants object based on a lack of foundation because the declarant attesting to the Amended Verified Complaint cited in this paragraph lacks personal knowledge regarding the statement presented.

12-16. No response.

17. To the extent this paragraph relies upon the Amended Verified Complaint, the Defendants object based on a lack of foundation because the declarant attesting to the Amended Verified Complaint cited in this paragraph lacks personal knowledge regarding the statement presented. The Defendants further object because the citation to the Congressional Record as to the July 20, 2004 Senate cloture vote does not support the statement that "the filibuster continues."

18-19. To the extent these paragraphs rely upon the Amended Verified Complaint, the Defendants object based on a lack of foundation, because the declarant attesting to the Amended Verified Complaint cited in this paragraph lacks personal knowledge regarding the statements presented.

20. No response.

21. The Defendants object on the grounds that this paragraph is speculative and lacks foundation because the declarant cited lacks personal knowledge as to what the "central question" in the "national debate" in 2005 over judicial filibusters was, which Senators nationwide might have supported the "so-called 'nuclear option,'" and whether there was "no senator to lobby" on the issue in Wisconsin.

22. No response.

23. The Defendants object that the paragraph mischaracterizes the record and the testimony of Professor Franklin. Professor Franklin stated that "[a]t least according to [the] National Journal" the 2005 ads in question were broadcast primarily in the states of Senators they named. Exh. 7, Franklin Dep. 29:6-10. The Defendants object to the implication that only ads naming Senators have the purpose or effect of influencing Senate votes, as the record shows that ads that do not name office holders, including some specific 2005 filibuster-related ads, can have the purpose and effect of influencing Congressional votes. See Exh. 7, Franklin Dep. 18:17 – 19:8, 26:14 – 32:3; McConnell v. FEC, 251 F.Supp.2d 176, 545-47 (D.D.C. 2003) (Kollar-Kotelly, J.).

24. The Defendants object that the paragraph mischaracterizes the record and the testimony of Professor Franklin. Professor Franklin stated that the 2005 ads that "may have been more aimed at public opinion generally" had the characteristics plaintiff states. See also Response to Proposed Material Fact 23.

25. No response.

26. The Defendants object on the grounds that the proposed fact is unintelligible.

27. The Defendants object that the paragraph mischaracterizes the record and the testimony of Professor Franklin. The cited passage cuts off the end of Professor Franklin's response, in which he stated that the distinction between the two types of ads he is discussing is "vague." Exh. 7, Franklin Dep. 33:12-18. The Defendants further object to the characterization of ads that may be termed "grass roots lobbying" ads or "issue ads" as lacking electoral focus, which is controverted in the record. The record,

including the testimony of Professor Franklin, shows that when viewed in context, such ads can have the purpose and effect of influencing elections. See Exh. 1, Franklin Rep. 38-41; FEC Facts ¶¶ 80 - 103.

28. No response.

29. The Defendants object that the paragraph's characterization of "grassroots lobbying" and "issue advocacy" is vague and undefined.

30. No response.

31. The Defendants object that the paragraph's characterization of "[g]rassroots lobbying" is vague and undefined.

32. No response.

33. The Defendants object that the paragraph is speculative and mischaracterizes the record in that Professor Franklin limited his testimony to "the past, before these issues before us came up." Exh. 7, Franklin Dep. 39:14-20. The Defendants further object to the characterization of ads that may be termed "grass roots lobbying" ads as lacking electoral focus, which is controverted in the record. The record shows that when viewed in context, such ads can have the purpose and effect of influencing elections. See Exh. 1, Franklin Rep. 38-41; FEC Facts ¶¶ 80 - 103.

34. The Defendants object to the characterization of ads that may be termed "grassroots lobbying" ads as lacking electoral focus, which is controverted in the record. The record shows that when viewed in context, such ads can have the purpose and effect of influencing elections. See Exh. 1, Franklin Rep. 38-41; FEC Facts ¶¶ 80 - 103.

35. The Defendants object that the phrase "the predicted confrontation" is vague, ambiguous, and without record support.

36. The Defendants object that the cited pages of Professor Franklin's testimony do not support the proposition stated in the paragraph. The burden is on "the parties, not on the court, to identify the pertinent parts of the record…." Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 (D.D.C. 2000) (internal quotation marks omitted).

37. The Defendants object to the use of the phrase "electioneering communication blackout periods," which is not an accurate characterization of the electioneering communication regulation in FECA. See McConnell v. FEC, 540 U.S. 93, 204-06 (2003). The Defendants object to the characterization of the "purpose" of these ads as lacking electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC Facts ¶¶ 80 - 103. The Defendants object to this paragraph because it contains legal conclusions that are not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts).

38. The Defendants object to the assertions that the "timing of anticipated Senate filibusters and votes" was driving the plaintiff's decision making and that the timing of the advertising campaign was "beyond WRTL's control," because these statements are controverted in the record. The record shows that the Senate filibuster of judicial nominees was a longstanding issue for WRTL and suggests that the timing of WRTL's initiation of broadcast advertising was driven by electoral concerns. See FEC Facts ¶¶ 34 - 40, 60 - 79. The Defendants further object to the use of the phrase

"blackout periods," which is not an accurate characterization of the electioneering communication regulation in FECA. See McConnell v. FEC, 540 U.S. 93, 204-06 (2003). The Defendants further object that the statement that plaintiff "intended" to run "materially similar ads" before Congress adjourned is speculative, vague, ambiguous, and conclusory.

39-40. No response.

41. The Defendants object to this paragraph because it contains statements not within the personal knowledge of the cited declarant, and legal conclusions that are not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts). The Defendants object to the statement that plaintiff "would be prohibited" from running the ads attached to its complaint, because that is not an accurate characterization of the electioneering communication regulation in FECA. See McConnell v. FEC, 540 U.S. 93, 204-06 (2003).

42-45. The Defendants object to these paragraphs because they contain legal conclusions that are not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts). To the extent these paragraphs describe statutes and regulations, those provisions speak for themselves. The Defendants object to plaintiff's description of its speculative and contingent future plans as to the November 2004 election, an election that in any event has now occurred.

46. The Defendants object that Exhibit A to plaintiff's complaint speaks for itself.

47. The Defendants object to plaintiff's description of its speculative and contingent future plans as to the November 2004 election, an election that in any event has now occurred.

48-49. See Response to Proposed Material Fact Nos. 42-45.

50. See Response to Proposed Material Fact Nos. 42-45. The Defendants further object to the phrase "electioneering communication prohibition period," which is not an accurate characterization of the electioneering communication regulation in FECA. See McConnell v. FEC, 540 U.S. 93, 204-06 (2003).

51. See Response to Proposed Material Fact Nos. 42-45.

52. The Defendants object to this paragraph because it contains statements not within the personal knowledge of the cited declarant, and legal conclusions that are not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts). The Defendants object to plaintiff's description of its speculative and contingent future plans as to the November 2004 election, an election that in any event has now occurred.

53-54. The Defendants object to these paragraphs because they contain legal conclusions that are not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts). To the extent these paragraphs describe statutes and regulations, those provisions speak for themselves. The Defendants object to plaintiff's description of its speculative and contingent future plans, to the extent that it is offered as purported evidence of how plaintiff actually will act in

the future. The Defendants object that the phrase "at the levels at which Congress asserted a disclosure interest" in Plaintiff's Statement ¶ 53 is vague, ambiguous, and not within the personal knowledge of the cited declarant.

55. This paragraph describes the plaintiff's Amended Verified Complaint, a document that speaks for itself and is not a "material fact" within the meaning of LCvR 7(h). The Defendants object to the characterization of these ads as "grass-roots lobbying" with no electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC Facts ¶¶ 80 - 103.

56. The Defendants object because the record controverts plaintiff's purported fact that its advertising expressed an opinion on "pending Senate legislative activity" that was "imminently up for a vote[.]" Plaintiff has provided no record evidence to support this assertion. See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 (D.D.C. 2000) (alleged facts for which no record citation is provided are deficient). The Defendants object to the characterization of these ads as "grass-roots lobbying" with no electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC Facts 80 - 103. Plaintiff has provided no authority setting out a legal definition of "grass-roots lobbying" that could support the conclusory assertion that its advertisements constitute "bona fide grassroots lobbying."

57. The Defendants object to this paragraph because it contains statements not within the personal knowledge of the cited declarant. The Defendants object because the record controverts plaintiff's purported fact that its advertising expressed an opinion on

"imminent" legislative issues "with which two incumbent Senators were dealing and would have to shortly deal with [sic] further." Plaintiff has provided no record evidence to support this assertion. See Waterhouse v. District of Columbia, 124 F. Supp. 2d 1, 4 (D.D.C. 2000) (alleged facts for which no record citation is provided are deficient).

58-60. The Defendants object to the characterizations of the WRTL ads as purely legislative ads with no electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC Facts 80 - 103.

61. The Defendants object to this paragraph as immaterial to any claim before the Court.

62. The Defendants object to this purported fact as vague and ambiguous.

63-64. The Defendants object to these paragraphs because they contain statements not within the personal knowledge of the cited declarant, and legal conclusions that are not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts).

65-66. The Defendants object to these facts because they are controverted by the text of the ads, see Plaintiff's Exhibits ("Pl. Exh.") A-C, which implicitly convey the candidates' "record and position on the issue" and comment on a federal candidate.

67. The Defendants object to this fact as immaterial to plaintiff's cause of action.

68. The Defendants object to this paragraph because it contains a legal conclusion that is not properly included in a statement of material facts under Local Rule

7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts).

69. The Defendants object to the non-expert opinion testimony presented in this paragraph. The Defendants further object that the cited declarant lacks the requisite foundation to make the claim from personal knowledge. Furthermore, the record controverts this fact because it shows WRTL routinely uses non-broadcast media and generally makes little use of broadcast media. See FEC Facts ¶¶ 8 – 12, 35 – 37, 41, 43, 48, 125. The Defendants object to the characterization of these ads as "grass-roots lobbying" with no electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC Facts 80 - 103.

70. This paragraph describes the plaintiff's Amended Verified Complaint, a document that speaks for itself and is not a "material fact" within the meaning of LCvR 7(h). The Defendants object to the characterization of these ads as "grass-roots lobbying" with no electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC Facts ¶¶ 80 - 103.

71. The Defendants object to this paragraph because it describes the plaintiff's Amended Verified Complaint, a document that speaks for itself, and because it contains the legal conclusion that WRTL "was prohibited" from running advertising, which is not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts). The Defendants further object to the statement

that plaintiff "was prohibited" from running the ads attached to its complaint, because that is not an accurate characterization of the electioneering communication regulation in FECA. See McConnell v. FEC, 540 U.S. 93, 204-06 (2003).

72. The Defendants object to this paragraph's assertions of what is "likely" in the future, and the phrase "materially similar," as speculative, vague, and ambiguous. The Defendants further object to this fact as immaterial to plaintiff's cause of action. The Defendants further object to the use of the phrase "electioneering communication prohibition periods," which is not an accurate characterization of the electioneering communication regulation in FECA. See McConnell v. FEC, 540 U.S. 93, 204-06 (2003).

73. No response.

74. The Defendants object to any implication that Ms. Lyons has the requisite foundation to make all of the statements in her affidavit from personal knowledge. The Defendants further object that the phrase "the following statements of fact" is vague and ambiguous.

75. The Defendants have no response to the first sentence. As to the second sentence, the Defendants object because it contains a legal conclusion that is not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts).

76-77. The Defendants object to these paragraphs because they contain legal conclusions that are not properly included in a statement of material facts under Local

Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts).

78. The Defendants object to this purported fact with regard to how WRTL and its PAC would prefer to spend funds as immaterial to plaintiff's cause of action. The Defendants object that the term "unpredictable" is vague and ambiguous. The Defendants object that this paragraph's descriptions of plaintiff's alleged plans to raise and spend funds are vague and contradicted by the record, which indicates that WRTL made no significant effort to raise PAC funds in the 2003-2004 cycle. See FEC Facts ¶¶ 108 - 124. In the 1999-2000 election cycle, WRTL raised more than $155,000 in PAC funds. See FEC Fact ¶ 112.

79. The Defendants object to this purported fact with regard to how WRTL-PAC would prefer to spend funds as immaterial to plaintiff's cause of action. The Defendants further object that the paragraph's use of the term "excess funds" is vague and ambiguous.

80-82. The Defendants object on the grounds that the statements in these paragraphs are speculative, and because the declarant cited in these paragraphs lacks personal knowledge regarding the statements presented. The record controverts these facts to the extent the facts suggest that contribution limits in 2 U.S.C. 441(a)(a)(1)(C) or 2 U.S.C. 441a(a)(3)(B) in any way limited WRTL's fundraising ability. During the 2003-2004 election cycle, no donor to WRTL-PAC made an annual contribution of more than $1,000. See FEC Fact ¶ 113. The Defendants further object to these paragraphs because they contain legal conclusions that are not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124

F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts). The Defendants object to this paragraph in that it is controverted by the record, which indicates that WRTL made no significant effort to raise PAC funds in the 2003-2004 cycle. See FEC Facts ¶¶ 108 - 124. In the 1999-2000 election cycle, WRTL raised more than $155,000 in PAC funds. See FEC Fact ¶ 112.

83. The Defendants object to this paragraph in that it is controverted by the record, which indicates that WRTL made no significant effort to raise PAC funds in the 2003-2004 cycle. See FEC Facts ¶¶ 108 - 124. In the 1999-2000 election cycle, WRTL raised more than $155,000 in PAC funds. See FEC Fact ¶ 112. The record also shows that PAC receipts in general have increased in recent election cycles. See FEC Facts ¶¶ 114 - 117.

84-85. The Defendants object on the grounds that the statements in this paragraph are speculative, and because the declarant cited lacks personal knowledge regarding the statements presented. The record controverts these facts to the extent they suggest that contribution limits in 2 U.S.C. 441(a)(a)(1)(C) or 2 U.S.C. 441a(a)(3)(B) in any way limited WRTL's fundraising ability. During the 2003-2004 election cycle, no donor to WRTL-PAC made an annual contribution of more than $1,000, and the record indicates that WRTL made no significant effort to raise PAC funds in that cycle. See FEC Facts ¶¶ 108 - 124. In the 1999-2000 election cycle, WRTL raised more than $155,000 in PAC funds. See FEC Fact ¶ 112. The record also shows that PAC receipts in general have increased in recent election cycles. See FEC Fact ¶¶ 114 - 117. The Defendants further object to these paragraphs because they contain legal conclusions that are not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v.

District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts).

86. No response.

87. The Defendants object to the use of the term "usual" in this paragraph as vague and ambiguous.

88. The Defendants object on the grounds that the statements in this paragraph are speculative.

89. The Defendants object on the grounds that the statements in this paragraph are speculative, and because the declarant cited in the paragraph lacks personal knowledge regarding the statements presented. The record controverts these facts to the extent the facts suggest that contribution limits in 2 U.S.C. 441(a)(a)(1)(C) or 2 U.S.C. 441a(a)(3)(B) in any way limited WRTL's fundraising ability. During the 2003-2004 election cycle, no donor to WRTL-PAC made an annual contribution of more than $1,000. See FEC Fact ¶ 113.

90. The Defendants object on the grounds that the statements in the paragraph are speculative, and because the declarant cited in the paragraph lacks personal knowledge regarding the statements presented. The Defendants object to the characterization of these ads as "grass-roots lobbying" with no electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC Facts ¶¶ 80 - 103.

91-94. The Defendants object on the grounds that the statements in these paragraphs are speculative and conclusory, and because the declarant cited in these paragraphs lacks personal knowledge regarding the statements presented.

95. The Defendants object to this paragraph because it contains a legal conclusion that is not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts). The Defendants further object that the record controverts this paragraph to the extent it suggests WRTL could not have raised more PAC funds, as the record indicates that WRTL made no significant effort to raise PAC funds in the 2003-2004 cycle. See FEC Facts ¶¶ 108 - 124. In the 1999-2000 election cycle, WRTL raised more than $155,000 in PAC funds. See FEC Fact ¶ 112.

96. The Defendants object that the paragraph mischaracterizes the record. Ms. Lyons testified that WRTL "probably" first learned of the judicial filibuster issue from news reports and from the National Right to Life Committee. Exh. 3, WRTL Dep. (Lyons) 20:23 – 21:1.

97. The Defendants object that the paragraph is vague and ambiguous as to the nature and timing of the "grassroots lobbying ads" it describes, and to the extent the paragraph refers to the three advertisements at issue in this case, the Defendants object to the characterization of these ads as "grassroots lobbying" with no electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC Facts ¶¶ 80 - 103.

98. No response.

99. The Defendants object to the paragraph to the extent it suggests that the three ads at issue in this case had only a legislative focus, which is controverted in the record. The record shows that when considered in context the referenced ads had the purpose and effect of influencing Senator Feingold's re-election campaign. See FEC Facts ¶¶ 30 - 40, 66 - 103. The record also indicates that the referenced ads had the purpose of serving as a vehicle for the filing of this lawsuit. See FEC Facts ¶¶ 44 - 45, 49 - 65.

100. The Defendants object to the paragraph to the extent it suggests that the three ads at issue in this case had only a legislative focus, which is controverted in the record. The record shows that when considered in context the referenced ads had the purpose and effect of influencing Senator Feingold's re-election campaign. See FEC Facts ¶¶ 30 - 40, 66 - 103. The record also indicates that the referenced ads had the purpose of serving as a vehicle for the filing of this lawsuit. See FEC Facts.

101. The Defendants object to the paragraph to the extent it suggests that the three ads at issue in this case had only a legislative focus, which is controverted in the record. The record shows that when considered in context the referenced ads had the purpose and effect of influencing Senator Feingold's re-election campaign. See FEC Facts ¶¶ 30 - 40, 66 - 103. Moreover, the Defendants note that WRTL did not alter its broadcasting schedule even though several filibuster votes occurred several days before it began to air its ads on July 26, 2004. See FEC Fact ¶ 69. The record also indicates that the referenced ads were timed to serve as a vehicle for the filing of this lawsuit. See FEC Facts ¶¶ 44 - 45, 49 - 65.

102. The Defendants object that the paragraph is vague and ambiguous in that the scope of the cited testimony is unclear. In particular, it is not clear whether the cited testimony encompasses discussion with those outside WRTL, including consultants and counsel.

103. The Defendants object to the paragraph to the extent it characterizes the three ads at issue in this case as "grassroots lobbying" with no electoral focus, which is controverted in the record. The record shows that when considered in context the referenced ads had the purpose and effect of influencing Senator Feingold's re-election campaign. See FEC Facts 30 - 40, 66 - 103. The record also indicates that the referenced ads had the purpose of serving as a vehicle that would enable this lawsuit to be filed. See FEC Facts 44 - 45, 49 - 65.

104. The Defendants object that the paragraph mischaracterizes the record. Ms. Lyons testified that WRTL and Hanon McKendry "most likely" came to the stated decision collectively. Exh. 3, WRTL Dep. (Lyons) 60:18-22. The record also indicates that the referenced ads had the purpose of serving as a vehicle that would enable this lawsuit to be filed. See FEC Facts ¶¶ 44 - 45, 49 - 65. The Defendants note that Ms. Lyons testified that counsel for WRTL participated in the June 21, 2004 WRTL board meeting and that a legal challenge was discussed. See Exh. 3, WRTL Dep. (Lyons) 27:14 – 28:12.

105. The Defendants object that the cited portion of the record does not fully support the paragraph. The burden is on "the parties, not on the court, to identify the pertinent parts of the record…." Waterhouse v. District of Columbia, 124 F. Supp.2d 1, 4 (D.D.C. 2000) (internal quotation marks omitted).

106. The Defendants object to the paragraph to the extent it characterizes the three ads at issue in this case as "grassroots lobbying" with no electoral focus, which is controverted in the record. The record shows that when considered in context the referenced ads had the purpose and effect of influencing Senator Feingold's re-election campaign. See FEC Facts 30 - 40, 66 - 103.

107. The Defendants object to this paragraph to the extent it characterizes the three ads at issue in this case as "grassroots lobbying" with no electoral focus, which is controverted in the record. The record shows that when considered in context the referenced ads had the purpose and effect of influencing Senator Feingold's re-election campaign. See FEC Facts 30 - 40, 66 - 103. The record also indicates that the referenced ads had the purpose of serving as a vehicle that would enable this lawsuit to be filed. See FEC Facts 44 - 45, 49 - 65.

108-09. The Defendants object to these paragraphs to the extent they characterize the three ads at issue in this case as "grassroots lobbying" with no electoral focus, which is controverted in the record. The record shows that when considered in context the referenced ads had the purpose and effect of influencing Senator Feingold's re-election campaign. See FEC Facts 30 - 40, 66 - 103.

110. The Defendants object that the cited portion of the record does not fully support the paragraph. The burden is on "the parties, not on the court, to identify the pertinent parts of the record…." Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 (D.D.C. 2000) (internal quotation marks omitted).

111. The Defendants object to this paragraph as mischaracterizing the record. Although Plaintiff's Statement does not provide Ms. Lyons's full testimony on the

matter, she testified that WRTL's "state organization" generally does not run print advertisements, but that its affiliated "local chapters" do run many different print ads. Exh. 3, WRTL Dep. (Lyons) 96:22 – 97:9.

112. The Defendants object that the phrases "grassroots lobbying" and "very short window of opportunity" are vague and ambiguous.

113. The Defendants object that the phrase "grassroots lobbying" is vague and ambiguous.

114. No response.

115. The Defendants object that the phrase "grassroots lobbying" is vague and ambiguous. The Defendants further object to this paragraph because it contains a legal conclusion that is not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts). The Defendants further object to the use of the term "prohibition period" because that is not an accurate characterization of the electioneering communication regulation in FECA. See McConnell, 540 U.S. 93, 204-06 (2003).

116. The Defendants object to this paragraph on the grounds that it lacks record support, in that the cited exhibit is not attached to the materials plaintiff has submitted. The burden is on "the parties, not on the court, to identify the pertinent parts of the record…." Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 (D.D.C. 2000) (internal quotation marks omitted).

117. The Defendants object to this paragraph on the grounds that it is speculative and lacks foundation, and that it contains statements not within the personal

knowledge of the cited declarant. The Defendants further object to this paragraph on the grounds that it lacks record support, in that the cited exhibit is not attached to the materials plaintiff has submitted. The burden is on "the parties, not on the court, to identify the pertinent parts of the record…." Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 (D.D.C. 2000) (internal quotation marks omitted).

118. The Defendants object to this paragraph on the grounds that it is speculative and lacks foundation, and that it contains statements not within the personal knowledge of the cited declarant.

119. No response.

120. The Defendants object to the statement that WRTL is "a television-oriented organization," which is contradicted in the record. The record indicates that the August 2004 filibuster ad was the first television ad plaintiff had ever run, aside from educational advertisements run by its 26 U.S.C. 501(c)(3) affiliate. See FEC Facts ¶¶ 10 - 12.

121. The Defendants object that the term "supplementary" is vague and ambiguous, and that to the extent it suggests that plaintiff has run more television than radio advertising, it is contrary to the record. The record indicates that the August 2004 filibuster ad was the first television ad plaintiff had ever run, aside from educational advertisements run by its 26 U.S.C. 501(c)(3) affiliate. See FEC Facts ¶¶ 10 - 12.

122. The Defendants object that the "general industry surveys" mentioned in the paragraph are not identified or provided in the record.

123. The Defendants object to the paragraph's characterization that WRTL does "a lot of broadcasting," which is vague and conclusory. With respect to television

advertising, it is also contravened by the record. The record indicates that the August 2004 filibuster ad was the first television ad plaintiff had ever run, aside from educational advertisements run by its 26 U.S.C. 501(c)(3) affiliate See FEC Facts ¶¶ 10 - 12.

124. The Defendants object to this paragraph on the grounds that the exhibit discussed is immaterial in that Ms. Lyons testified that it was "just sent" to her prior to her deposition, so WRTL did not have it in 2004, when it planned and broadcasted the ads at issue in this case. See Exh. 3, WRTL Dep. (Lyons) 119:1-5. The Defendants further object that the term "superiority" is vague and does not accurately describe the cited exhibit, in that the exhibit describes positive features of television and radio but does not state that any medium is "superior" in an overall sense. See Exh. 3, WRTL Dep. (Lyons) Exh. 18.

125. The Defendants object on the grounds that the statements in this paragraph are speculative, and because the declarant cited lacks personal knowledge regarding the statements presented. The Defendants further object that the paragraph is contradicted by the record, which shows that ads that do not name office holders, including some specific 2005 filibuster-related ads, can have the purpose and effect of influencing Congressional votes. See Exh. 7, Franklin Dep. 18:17 – 19:8, 26:14 – 32:33; McConnell v. FEC, 251 F.Supp.2d 176, 545-47 (D.D.C. 2003) (Kollar-Kotelly, J.). The Defendants object that the term "grassroots lobbying" is vague and ambiguous.

126. The Defendants object on the grounds that the statements in this paragraph are speculative and conclusory, and because the declarant cited lacks personal knowledge regarding the statements presented. The Defendants further object to the characterization of ads that plaintiff calls "grass roots lobbying" as lacking electoral focus, which is

controverted in the record. The record shows that when viewed in context, such ads can have the purpose and effect of influencing elections. See Exh. 1, Franklin Rep. 38-41; FEC Facts ¶¶ 80 - 103. The Defendants object that the phrase "same reasons as in the preceding statement of fact" is vague and ambiguous.

127. The Defendants object on the grounds that the statements in this paragraph are speculative, and because the declarant cited lacks personal knowledge regarding the statements presented. The Defendants further object to the characterization of ads that plaintiff labels "grass roots lobbying" as lacking electoral focus, which is controverted in the record. The record shows that when viewed in context, such ads can have the purpose and effect of influencing elections. See Exh. 1, Franklin Rep. 38-41; FEC Facts ¶¶ 80 - 103.

128. No response.

129-30. Although the quotations of the witness are accurate, the material in these paragraphs is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

131. The Defendants object that this paragraph mischaracterizes the witness's testimony, which concerned only mention of the "names of candidates," rather than any mention of "candidates." The Defendants object that the phrase "the principle in the immediately preceding statement of fact" is vague and ambiguous. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

132. Although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

133. No response.

134. The Defendants object that the cited evidence does not support this paragraph. The burden is on "the parties, not on the court, to identify the pertinent parts of the record…." Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 (D.D.C. 2000) (internal quotation marks omitted). The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

135. No response.

136. The Defendants object that, although the quoted material is an accurate quotation from the witness's declaration in this case, the deposition passage cited in this proposed statement of fact is a statement of counsel, not testimony of the witness.

137. The Defendants object that the cited evidence does not fully support this paragraph. The burden is on "the parties, not on the court, to identify the pertinent parts of the record…." Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 (D.D.C. 2000) (internal quotation marks omitted). The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

138. Although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

139-40. The Defendants note that the material in these paragraphs is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

141. The Defendants object that the paragraph mischaracterizes the witness's testimony, in that he testified that there "were undoubtedly instances" in which Handgun Control, Inc. did "public lobbying advertising." The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

142. The Defendants object to the use of the term "conceded" as mischaracterizing the witness's testimony and constituting argument that is not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts). The witness simply described the nature of his work for Floridians Against Casinos.

143-45. Although the quotations of the witness are accurate, the material in these paragraphs is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

146. The Defendants object that the paragraph is unintelligible, and ambiguous as to the context in which candidates or office holders would be "mention[ed]."

147. Although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

148. No response.

149. Although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

150. The Defendants object that the paragraph misquotes the question the witness was asked. See Exh. 8, Bailey Dep. 43:21 – 44:4. The Defendants further object that the phrase "agreed again" is not fully supported by the cited material.

151. The Defendants object that the phrase "agreed again" is not fully supported by the cited material. Although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

152. No response.

153. The Defendants object to the use in this case of the quoted material from the 2002 Goldstein report in McConnell v. FEC because the analytical standards applied in the political science research described in the report, including examination of numerous ad storyboards by student coders without significant contextual information, is inappropriate for use in this as-applied constitutional challenge. The Defendants further object to the implication that ads that Professor Goldstein may have described as "genuine issue ads" lack an electioneering purpose or effect. The record shows that when viewed in context, such ads can have the purpose and effect of influencing elections. See Exh. 1, Franklin Rep. 38-41; FEC Facts ¶¶ 80 – 103. The Defendants also object to the characterization of Kenneth Goldstein as "Intervenor Defendants' expert." Professor Goldstein is not an expert witness in this litigation. The Defendants further object that, although plaintiff provides a single page of Professor's Goldstein's report in McConnell,

see Pl. Exh. 16, it does not provide a copy of the entire report for the record. See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 (D.D.C. 2000) (alleged facts for which no record citation is provided are deficient). Although the quotation from the Goldstein report is accurate, the material in this paragraph is taken out of context and a proper understanding of the material requires an examination of the surrounding context of the material.

154. The Defendants object to the statement that Professor Goldstein "decided" the six ads were "genuine issue ads" because that statement is contradicted by McConnell v. FEC, 251 F.Supp.2d 176, 748 (D.D.C. 2003) (Kollar-Kotelly, J), and Goldstein's report, see Amended Expert Report of Kenneth Goldstein, McConnell v. FEC, at 26 n.21, available at <http://www.campaignlegalcenter.org/attachments/690.pdf>. Goldstein considered five of the six ads to be "clearly intended to support or oppose the election of a candidate." 251 F.Supp.2d at 748 (quoting Goldstein Report at 26 n.21). As for the sixth ad, run by the National Pro-Life Alliance, the Defendants note that although the student coders had coded the ad as a "genuine" issue ad, and Goldstein himself concluded that it was during the McConnell litigation, in 2000 Goldstein had been "certain" that it was "not genuine," an opinion shared by Buying Time 2000 co-author Craig Holman, who concluded that it was an "electioneering issue ad.'" 251 F.Supp.2d at 312 (Henderson, J) (citations and internal quotation marks omitted). See 251 F.Supp.2d at 748 (Kollar-Kotelly, J.). See also Response to Proposed Material Fact No. 153.

155. See Responses to Proposed Material Fact Nos. 153, 154.

156-57. No response.

158. Although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

159. No response.

160. Although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

161. The Defendants object that the phrase "material content" does not appear in the cited portion of the deposition transcript, and that it is vague and ambiguous.

162. The Defendants object that the paragraph mischaracterizes the witness's testimony insofar as the witness stated that WRTL's "Waiting" ad was "probably more effective." See Exh. 8, Bailey Dep. 42:10-18. The Defendants further object that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

163. The Defendants object that the phrase "WRTL's ad" is vague and ambiguous. The Defendants further object that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

164. The Defendants object that the phrase "indicted his belief" is vague and unintelligible. The Defendants object that the phrase "again agreed" is not fully supported by the cited material. Although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

165. The Defendants object to the use of the term "insisted" as mischaracterizing the witness's testimony and constituting argument that is not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts). The witness simply expressed his view that WRTL's "Waiting" ad was what he described as a "campaign ad." See Exh. 8, Bailey Dep. 44:5 – 45:13. Although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

166. The Defendants object that the cited material does not fully support the paragraph, and that the paragraph contains argument that is not properly included in a statement of material facts under Local Rule 7(h). See Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 n.3 (D.D.C. 2000) (legal argument is not proper in a statement of material facts). Although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

167. The Defendants object that the paragraph mischaracterizes the witness's testimony. The witness described the cited advertising as "public lobbying advertising," not "public policy advertising." The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony. Specifically, the Defendants note that the witness in the cited passage testified that "a public lobbying advertisement can be a campaign ad." Exh. 8, Bailey Dep. 47:17-19.

168. Although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

169-70. No response.

171. Although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

172. No response.

173. The Defendants object that the paragraph mischaracterizes the testimony of the witness. The witness testified that WRTL's "Waiting" ad is "more specific" than the Yellowtail ad and "relates to a more specific issue," but not that the WRTL ad "mentions" a "specific legislative matter." Exh. 8, Bailey Dep. 52: 8-11, 54:1-3. In response to the question whether "Waiting" contains no words that "promote, support, attack, or oppose" the candidate but the Yellowtail ad does contain such words, the witness stated: "I think that's generally correct." Exh. 8, Bailey Dep. 54:10-15. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

174. The Defendants object that the citation to the record does not fully support the paragraph. The burden is on "the parties, not on the court, to identify the pertinent parts of the record…." Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 (D.D.C. 2000) (internal quotation marks omitted).

175. The Defendants object to the use of the phrase "electioneering communication blackout period," which was not used in the cited portion of the deposition transcript and is not an accurate characterization of the electioneering communication regulation in FECA. See McConnell v. FEC, 540 U.S. 93, 204-06 (2003).

176. The Defendants object that the word "it" is vague and ambiguous. Although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

177-79. The Defendants object that the citations to the record do not fully support these paragraphs. The burden is on "the parties, not on the court, to identify the pertinent parts of the record…." Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 (D.D.C. 2000) (internal quotation marks omitted).

180-81. No response.

182-85. The Defendants object that it is immaterial what the witness believed the documents described in these paragraphs "appeared" or "purported" to be. The documents speak for themselves. The Defendants further object that the term "grassroots lobbying" is vague and ambiguous.

186. The Defendants object that the term "grassroots lobbying" is vague and ambiguous.

187. The Defendants object that it is immaterial what the witness believed the document described in this paragraph "purported" to be.

188. No response.

189. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

190. The Defendants object that the paragraph's use of the phrase "such a public communication" and its use of an ellipsis in text that is not a quotation is vague and ambiguous. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

191. The Defendants object that the paragraph is vague and ambiguous, and that it mischaracterizes the testimony of the witness. Professor Franklin did not testify that the effect of a public communication is "not dependent on the mode of communication," but instead testified that such an effect "would surely vary" by mode, exposure, and repetition. Exh. 7, Franklin Dep. 63:17 - 64:2. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

192. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

193. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

194. The Defendants object that the phrase "grassroots lobbying" is vague and ambiguous. The Defendants further object that the paragraph mischaracterizes the

witness's testimony. Professor Franklin testified that WRTL has characterized the purpose of its 2004 filibuster ad campaign as affecting votes in the U.S. Senate, but that he understood the campaign also had the purpose of challenging the electioneering communication restrictions in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, 91-92 (2002). Exh. 7, Franklin Dep. 72:7 - 73:4. The Defendants further object to the paragraph insofar as it states that plaintiff's sole purpose in broadcasting the advertisements at issue in this case was to affect votes in the U.S. Senate, which is contravened in the record. The record shows that when considered in context the referenced ads had the purpose and effect of influencing Senator Feingold's re-election campaign. See FEC Facts ¶¶ 30 - 40, 66 - 103. The record also indicates that the referenced ads had the purpose of serving as a vehicle for the filing of this lawsuit. See FEC Facts ¶¶ 44 - 45, 49 - 65. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

195. The Defendants object that the paragraph's use of the phrase "in a time period of greater than two weeks" is vague and ambiguous.

196. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

197. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony. Specifically, plaintiff conflates an extended

answer that addresses the impact of conflicting advertising on two separate segments of the public and distorts the deponent's response. Professor Franklin also explained:

> The people who are predisposed to the pro side can be stimulated, can become more, find the issue more salient as a result of messages from either side of the debate, okay? And so the implication is that in a high stimulus case with two sets of competing messages, partisan predisposition should be enhanced and so potential supporters of the pro side are, in fact, more likely to absorb the pro message, incorporate it and become more aligned on that basis even in the presence of competing anti messages.

Exh. 7, Franklin Dep. 81:16 - 82:4.

198. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony. See Response to Proposed Material Fact No. 197.

199. The Defendants object that the paragraph's use of the phrases "such advertisements" and "throughout a time period" are vague and ambiguous. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

200. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

200. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

201. The Defendants object that the paragraph mischaracterizes the testimony of the witness. Professor Franklin actually testified that "[i]f" WRTL was targeting

"public policy aware adults," then it was "less likely" that the ads would change the opinions of persons in that group, though the ads should reinforce the views of those persons on the judicial nominations issue. The Defendants object that the paragraph suggests that persons in this group were the only ones in the target audience of the ads at issue in this case, which is contravened in the record. The record reflects that the ads reached a large audience in Wisconsin. See FEC Facts ¶¶ 82 - 88. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

202. The Defendants object that the paragraph's use of the phrases "this," "you," and "the issue" is vague and ambiguous. Although the quotation of the witness is accurate, the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony. See Response to Proposed Material Fact No. 201.

203. The Defendants object that this paragraph is vague and ambiguous, and that it mischaracterizes the testimony of the witness. Professor Franklin testified that he was not familiar with the referenced report, but following counsel's statement that the report was "found on the Wisconsin Advertising Project web site," Professor Franklin stated that what counsel described as "this type of report" would be "a credible source of information." Exh. 7, Franklin Dep. 99:15 – 100:4.

204. The Defendants object that the citation to the record does not fully support the paragraph. The burden is on "the parties, not on the court, to identify the pertinent parts of the record…." Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 (D.D.C. 2000) (internal quotation marks omitted). The Defendants further object to the

characterization of the ads at issue in this case as "grassroots lobbying" with no electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC Facts ¶¶ 80 - 103.

205. The Defendants object that the citation to the record does not fully support the paragraph. The burden is on "the parties, not on the court, to identify the pertinent parts of the record…." Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 (D.D.C. 2000) (internal quotation marks omitted).

206. No response.

207. The Defendants object on the grounds that the paragraph relies on inadmissible hearsay. See Gleklen v. DCCC, 199 F.3d 1365, 1369 (D.C. Cir. 2000) (on summary judgment, hearsay that would be inadmissible at trial "counts for nothing").

208. No response.

209. See Response to Proposed Material Fact No. 204.

210. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony. In particular, the witness testified that he would recommend using other media for certain purposes. See Exh. 5, Vanderground Dep. 15:3 – 17:5.

211. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony. In particular, the witness testified that direct mail

was a "very efficient" way of communicating "if you have a list that is consistent with your target audience." See Exh. 5, Vanderground Dep. 15:3-19.

212. The Defendants object that the citation to the record does not fully support the paragraph. The burden is on "the parties, not on the court, to identify the pertinent parts of the record…." Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 (D.D.C. 2000) (internal quotation marks omitted).

213. No response.

214. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

215. The Defendants object to the statement that Vanderground was unaware that WRTL expected him to develop the filibuster advertising campaign in a way that would lead to a court challenge, which is contravened by the record. The record reflects that Vanderground and Hanon McKendry were well aware that WRTL was specifically planning to run the advertising at a time when it would implicate BCRA in order to support this lawsuit. See FEC Facts ¶¶ 47 - 65. The Defendants further object to the characterization of the ads at issue in this case as "grassroots lobbying" with no electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads were likely to have an electoral effect during Senator Feingold's re-election campaign. See FEC Facts ¶¶ 80 - 103.

216. No response.

217. The Defendants object that the citation to the record does not fully support the paragraph. The burden is on "the parties, not on the court, to identify the pertinent

parts of the record…." Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 (D.D.C. 2000) (internal quotation marks omitted).

218. The Defendants object that the citation to the record does not fully support the paragraph. The burden is on "the parties, not on the court, to identify the pertinent parts of the record…." Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 (D.D.C. 2000) (internal quotation marks omitted).

219. The Defendants object that the citation to the record does not fully support the paragraph. The burden is on "the parties, not on the court, to identify the pertinent parts of the record…." Waterhouse v. District of Columbia, 124 F.Supp.2d 1, 4 (D.D.C. 2000) (internal quotation marks omitted). The Defendants further object to the characterization of the ads at issue in this case as lacking electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads had the purpose and likely effect of influencing Senator Feingold's re-election campaign. See FEC Facts ¶¶ 30 - 40, 66 - 103.

220. The Defendants object that the paragraph is vague, ambiguous, and unintelligible.

221-26. No response.

227. The Defendants object that the paragraph's use of the phrase "that audience" is vague and ambiguous.

228. The Defendants note that the material in this paragraph is taken out of context and a proper understanding of the testimony requires an examination of the surrounding context of the testimony.

229. No response.

230. The Defendants object to the paragraph's statement that August 1, 2004, was the "first date possible to launch" WRTL's 2004 anti-filibuster campaign, which is controverted by the record. The same witness cited in this paragraph testified that WRTL's consultants, Hanon McKendry, had been working on the project since at least early June 2004 and were capable of creating radio advertisements in one week and television advertisements in two weeks. See Exh. 5, Vanderground Dep. 25:5-23, 88:17 – 89:20.

231. The Defendants object to the paragraph's statement that August 1, 2004, was the earliest date WRTL could launch its 2004 anti-filibuster campaign, which is controverted by the record. The same witness cited in this paragraph testified that WRTL's consultants, Hanon McKendry, had been working on the project since at least early June 2004 and were capable of creating radio advertisements in one week and television advertisements in two weeks. See Exh. 5, Vanderground Dep. 25:5-23, 88:17 – 89:20.

232. No response.

233. The Defendants object to the implication in the paragraph that Vanderground was unaware that WRTL expected him to develop the anti-filibuster advertising campaign in a way that would lead to a court challenge, which is contravened by the record. The record reflects that Vanderground and Hanon McKendry were well aware that WRTL was specifically planning to run the advertising at a time when it would implicate BCRA. See FEC Facts ¶¶ 47 - 65.

234. The Defendants object to the implication in the paragraph that the filing of this lawsuit played no role in WRTL's decision to identify Senator Feingold in the ads at

issue in this case, which is contravened by the record. The record reflects that Vanderground and Hanon McKendry were well aware that WRTL was specifically planning to create advertising that would implicate BCRA. See FEC Facts ¶¶ 47 - 65.

235-38. No response.

239. The Defendants object to this paragraph to the extent it characterizes facts beyond the cited declarant's personal belief and contains statements not within the personal knowledge of the declarant. The Defendants object to the characterization of the ads at issue in this case as lacking electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads had the purpose and likely effect of influencing Senator Feingold's re-election campaign. See FEC Facts ¶¶ 30 - 40, 66 - 103.

240. The Defendants object to this paragraph because it contains statements not within the personal knowledge of the cited declarant. The Defendants further object to the characterization of the ads at issue in this case as lacking electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced ads had the purpose and likely effect of influencing Senator Feingold's re-election campaign. See FEC Facts ¶¶ 30 - 40, 66 - 103.

241. The Defendants object to this paragraph to the extent it characterizes facts beyond the cited declarant's personal belief and contains statements not within the personal knowledge of the declarant. The Defendants further object to the characterization of the ads at issue in this case as lacking electoral focus, which is controverted in the record. The record shows that when viewed in context the referenced

ads had the purpose and likely effect of influencing Senator Feingold's re-election campaign. See FEC Facts ¶¶ 30 - 40, 66 - 103.

242. No response.

Respectfully submitted,

/s/
Lawrence H. Norton
General Counsel

/s/
Richard B. Bader
Associate General Counsel
(D.C. Bar # 911073)

/s/
David Kolker
Assistant General Counsel
(D.C. Bar # 394558)

Harry J. Summers
Kevin Deeley
Steve N. Hajjar
Benjamin A. Streeter III
Attorneys

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650
(202) 219-0260 (FAX)

FOR THE INTERVENOR-DEFENDANTS:

Roger M. Witten (D.C. Bar No. 163261)
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

/s/
Seth P. Waxman (D.C. Bar No. 257337)
Counsel of Record
Randolph D. Moss (D.C. Bar No. 417749)
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

Donald J. Simon (D.C. Bar No. 256388)
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLC
1425 K Street, N.W.
Suite 600
Washington, DC 20005
(202) 682-0240

Fred Wertheimer (D.C. Bar No. 154211)
DEMOCRACY 21
1875 I Street, N.W.
Suite 500
Washington, DC 20006
(202) 429-2008

J. Gerald Hebert (D.C. Bar No. 447676)
CAMPAIGN LEGAL CENTER
1640 Rhode Island Avenue, N.W.
Suite 650
Washington, DC 20036
(202) 736-2200

July 14, 2006