

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. |) | |
| |) | REPLY IN SUPPORT OF |
| |) | MOTION TO COMPEL |
| |) | |
| |) | |
| FEDERAL ELECTION COMMISSION, |) | |
| |) | |
| Defendant, |) | |
| |) | |
| and |) | |
| |) | |
| SEN. JOHN MCCAIN, <u>et al.</u> , |) | |
| |) | |
| Intervenor-Defendants. |) | |

**DEFENDANT’S AND INTERVENOR-DEFENDANTS’ REPLY IN SUPPORT OF
THEIR MOTION TO COMPEL PRODUCTION OF DOCUMENTS, REQUESTS TO
ADMIT, AND RESPONSES TO INTERROGATORIES**

This Court should compel Wisconsin Right to Life (“WRTL”) to respond to the discovery requests that are the subject of the motion to compel of the Defendant Federal Election Commission (“Commission” or “FEC”) and Intervenor-Defendants Senator John McCain, Representative Tammy Baldwin, Representative Christopher Shays, and Representative Martin Meehan (collectively “defendants”). In response to the defendants’ motion to compel, WRTL presents little more than sweeping arguments about why virtually no discovery is appropriate in this case, thereby ignoring this Court’s April 17, 2006, Scheduling Order (“Order”), which has already made clear that the defendants are entitled to the information they seek. As explained below, WRTL also makes almost no attempt to address the specific discovery requests at issue

here, relying instead upon broad, flawed arguments that do not meet the substance of defendants' arguments.

I. THE DEFENDANTS ONLY SEEK EVIDENCE CONSISTENT WITH THE SUPREME COURT'S DECISION IN THIS CASE AND THIS COURT'S DISCOVERY ORDER

A. The Defendants Are Entitled to Seek Evidence That Is Relevant to Their View of the Legal Issues in This Case

As explained in our opening memorandum (at 2-5), the defendants are merely seeking to complete the discovery process by gathering the facts that are relevant to their legal theories. WRTL erroneously claims that the Supreme Court established two narrow issues for resolution on remand: defining a standard for identifying grass roots lobbying and deciding whether the text of WRTL's proposed ads meet such a standard. Opp. at 4-5. The Supreme Court's remand decision, however, said no such thing. Rather, the Court merely explained that it was not sure whether this Court's decision rested "on the alternative ground that the facts of this case 'suggest that WRTL's advertisements may fit the very type of activity McConnell [v. FEC], 540 U.S. 93 (2003),] found Congress had a compelling interest in regulating.'" WRTL v. FEC, 126 S. Ct. 1016, 1018 (2006) (quoting District Court Mem. Op., slip op. at 6). The Court then specifically remanded the case "for the District Court to consider the merits of WRTL's as-applied challenge in the first instance." Id. There is absolutely nothing in this language remotely suggesting the Supreme Court has 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." Rather, this Court is to consider such issues "in the first instance." As part of that inquiry, it will be necessary for this Court to determine, inter alia, whether WRTL has met its burden of demonstrating that the options identified in McConnell, 540 U.S. at 206, are constitutionally insufficient for its advocacy.

In presenting their defense, the defendants have a right to gather evidence that supports their own view of the case, without being circumscribed by WRTL's narrow vision of what is relevant under its opposing legal theory. The Supreme Court said nothing in its short remand decision limiting discovery and, in any event, this Court's scheduling order expressly provides that "discovery shall be allowed into the purpose and effect of plaintiff's 2004 advertisements for the 2004 campaign ... and the burdens BCRA places upon plaintiff's expression, including the limits of PAC fundraising, the effectiveness of using other media, and the option of employing alternative text for the intended advertisements." Order at 2.

WRTL's resistance to defendants' discovery turns a blind eye to the plain language of this Order. Relying upon its unsupported legal conclusion that using a PAC is a per se constitutional burden, WRTL states (Opp. at 7) that, "as to discovery, any information about the burden of using a PAC is necessarily irrelevant." Thus, WRTL simply ignores the Court's Order explicitly allowing discovery into the "limits of PAC fundraising." Order at 2. Likewise, despite this Court's express allowance of discovery into the "effectiveness of using other media," *id.*, WRTL refuses to produce information related to the effectiveness of non-broadcast media arguing "[t]here were no findings in McConnell indicating that choosing to use broadcast ads, as opposed to print ads, was somehow any indication of wrongdoing ... there is no relevant issue as to the use of, or reasons for choosing any other type [of media]." Opp. at 6. WRTL's continued insistence that "the Court's Order limited the scope of discovery to the ads themselves" (Opp. at 10), that this case "Depends Only on the Expression Itself[.]" and that "discovery aimed at

uncovering the intent or effect of WRTL's ads does not uncover relevant information" (Opp. at 8), shows a level of intransigence toward this Court's orders that should not be countenanced.¹

Finally, WRTL also argues that "additional responses would be cumulative or duplicative" and that defendants "have had ample opportunity to obtain discovery." Opp. at 4. However, WRTL fails to cite even one example where any of the defendants' requests seeks information redundant to something that has already been established. WRTL's conclusory assertion on this point does not establish any basis for declining to compel the discovery sought by this motion.²

B. WRTL Should Produce Information Relevant to the Purpose and Effect of WRTL's 2004 Advertising Campaign

The defendants have requested information about WRTL's advocacy efforts in 2004 that were made in conjunction with the three specific advertisements for which WRTL seeks a constitutional exemption. Motion at 2, 4-5.³ Because such advocacy may shed light on the

¹ This intransigence is exacerbated by WRTL's recitation, in a half-page footnote (Opp. at 8 n.5), of a long list of evidence it believes supports its view that the purpose of its ad campaign was not electioneering. WRTL apparently has no objection to presenting evidence of purpose and intent supporting its side of the case, even while denying the defendants the opportunity to gather evidence that might support their side of the story. In any event, an obvious purpose of the discovery process is to test the evidence upon which the opposing side intends to rely.

² Likewise, WRTL's conclusory assertion (Opp. at 2) that the defendants' discovery is relevant only to the "subject matter" of this case, rather than WRTL's "claim[s]," is untrue. See Fed. R. Civ. P. 26(b)(1). The defendants seek discovery into the purpose and effect of WRTL's 2004 advertisements during the 2004 campaign, as well as the other options available to WRTL in 2004 as identified in McConnell and recognized as relevant by this Court's Scheduling Order. These requests are not broadly directed at the general subject matter of electioneering communications, judicial filibusters, or "grass roots lobbying."

³ Specifically, the defendants have moved to compel the following discovery related to the purpose and effect of WRTL's advocacy: First Set of Document Requests, Number 4 (documents regarding support or opposition to Feingold in 2004) and Number 5 ("Campaign Finance" campaign that was an integrated component of WRTL's purported grass roots lobbying campaign), Number 6 ("News Bulletin" advertisement, also an integrated component of WRTL's purported grass roots lobbying campaign); and Requests for Admissions 15, 20, 23, 24, 58, and 59 (all address advocacy about Feingold).

purpose and effect of WRTL's purported grass roots lobbying and because it is within the scope of this Court's discovery order, WRTL should be compelled to produce it. Similarly, in Defendants' First Request for Production of Documents, Request Number 4, as narrowed by agreement, the defendants seek documents "communicating WRTL's (including WRTL PAC's) support of or opposition to United States Senator Feingold or one of his opponents" during 2004, which is directly relevant to WRTL's related advocacy concerning Senator Feingold. If, for example, WRTL made other public communications that supported or opposed Senator Feingold or his opponents in that election year and discussed the filibuster issue, those communications would be relevant in understanding the purpose and effect of the broadcast ads at issue here. Likewise, if WRTL was communicating its opposition to Senator Feingold as part of its efforts to raise funds to pay for its broadcast advertisements, WRTL's representations during its fundraising would also be relevant in evaluating the purpose of the broadcast advertising.

In its opposition, WRTL claims that "the Court's Order limited the scope of discovery to the ads themselves, and expressly excluded as improper for discovery 'historical or planned advocacy by plaintiff.'" Opp. at 10. This argument, again, ignores the plain language of the Order, which did not limit discovery to the four corners of the "the ads themselves," excluding their context. This argument is also part of WRTL's extraordinarily strained interpretation of "planned advocacy," which it claims excludes from discovery the "Campaign Finance" ads and similar communications that were part of an integrated, ongoing advocacy campaign with the three specific ads for which WRTL claims the electioneering communication provision is unconstitutional.

Moreover, the defendants have requested production of the survey material WRTL used to create the very advertisements at issue in this case.⁴ The survey was conducted to “[u]ncover effective message strategies/propositions” for the advertising WRTL was producing. See Exh. 9. In its opposition (at 10), WRTL claims this material is not within the scope of the Court’s order and is proprietary. However, the information in this survey is the basis upon which WRTL calculated the likely “effect” of the particular broadcast ads that are at issue in this case and, therefore, it is hard to imagine more relevant information regarding the ads’ purpose and effect. (To the extent that WRTL may be relying upon broad principles of the First Amendment to withhold this information, see infra section III.)

Finally, some of the information sought concerning the purpose and effect of WRTL’s ads is requested in the form of Requests for Admissions (“RFAs”). WRTL does not discuss or even mention these RFAs in its opposition to the motion to compel and, in particular, fails to address the exceptionally minimal burden these RFAs impose on WRTL. For example, RFA Number 15 simply requests that WRTL admit “WRTL PAC made independent expenditures opposing Feingold’s 2004 reelection campaign.” WRTL objects that this has to do with “historical advocacy” and is thus out of bounds. Plainly it is relevant to the purpose and effect of WRTL’s proposed broadcast advertising if its PAC was simultaneously supporting or opposing one of the Senators that was a subject in the ads. This is contemporaneous, not “historical” advocacy.

⁴ Specifically, the defendants have requested that the Court compel responses to the Second Set of Document Requests, Request Number 8, which seeks “documents related to the proposed ‘Statewide Survey.’” See Motion at 10-11. The defendants have also moved to compel a response to RFA Number 52, which addresses the survey.

C. WRTL Should Produce Information Relevant to the Alleged Burdens of PAC Fundraising

The discovery the defendants seek to compel tests the allegations WRTL has made regarding the burdens associated with PAC fundraising.⁵ As explained above, WRTL has argued (Opp. at 7) that such discovery is “necessarily irrelevant,” in direct contradiction of the explicit language of the Court’s Order. One obvious way to discover whether WRTL faces an unconstitutional burden by having to raise money through its PAC is to compare WRTL Inc.’s fundraising with that of its PAC.

II. THE INTERROGATORIES PROPOUNDED BY THE DEFENDANTS ARE WELL WITHIN THE ALLOWABLE NUMBER

The defendants have shown in their motion to compel three independent reasons why the 16 interrogatories propounded to WRTL did not exceed the 25 interrogatory limit in Fed. R. Civ. P. 33. Motion at 18-22. In its opposition brief (Opp. at 16), WRTL fails to address those arguments and instead claims that the format of the interrogatory request is controlling. This view improperly places form over substance and is unsupported by any authority.

WRTL claims that because the discovery requests “were signed by counsel for both the FEC and Intervenor-Defendants” and “listed FEC counsel first in the signature block” that they should all be counted solely against the Commission’s limit. Opp. at 16. The format of the interrogatories does nothing to support WRTL’s position and, to the contrary, demonstrates that WRTL was on notice that defendants jointly issued the interrogatories. WRTL explains that the Intervenor-Defendants “have ample and apt representation and could have served interrogatories

⁵ The defendants have requested that the Court compel responses to Defendant’s First Set of Interrogatories, Number 5, which seeks a description of the source of any donation over \$1,000 that WRTL received during 2004, and to Defendants’ Second Set of Interrogatories, Numbers 7 through 9 (see Motion at 21-22), which focus primarily on corporate donations to WRTL.

completely on their own” but presents no argument why these considerations trump the plain language of Rule 33 and case law explaining the rule’s standard application. See Motion at 19. All parties’ resources have been conserved by the fact that the Commission and the Intervenor-Defendants avoided duplication and overlap by coordinating their interrogatory requests, instead of issuing them separately; there is no reason the defendants should be penalized for this effort at streamlining discovery.

In their motion the defendants first showed that because the Commission and the Intervenor-Defendants’ are each entitled to propound 25 interrogatories, the combined interrogatory limit is no less than 50. Motion at 18-19. By either side’s count, the 16 interrogatories propounded by the defendants do not come anywhere close to exceeding that limit. WRTL fails to explain why this Court should reach a different conclusion from the court in St. Paul Fire and Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP., 217 F.R.D. 288, 289 (D. Mass. 2003), which held that a local court rule that limited “each side” in a case to only 25 interrogatories was unenforceable in the face of Rule 33(a), which permits each defendant to serve 25 interrogatories without asking leave of court. Indeed, it is not uncommon for multiple parties to a lawsuit to each propound 25 interrogatories. See, e.g., Trevino v. ACB American, Inc., 232 F.R.D. 612, 614 (N.D. Cal. 2006) (“plaintiffs have jointly served 32 interrogatories on Hilco and 34 on ACB. The court will treat the first 25 interrogatories as served by plaintiff Trevino. The next 12 against Hilco and 14 against ACB will be treated as served by plaintiff Rios”).⁶ Since the total number of interrogatories propounded by the defendants is well within

⁶ Under different circumstances it might be possible to argue multiple named parties are really one in the same and should share a single interrogatory limit. Such is not the case here. The Members of Congress that constitute the group of defendant-intervenors have an identity that is quite distinct from the Commission. Indeed, just this week Congressmen Shays and Meehan have sued the Commission for the third time in four years over its interpretation of the

their combined limits, there is no reason to analyze this dispute further and the Court should compel WRTL to respond to defendants' second set of interrogatories.

Second, even if the Court were to count all of the interrogatories toward the Commission's 25 interrogatory limit and evaluate the individual interrogatories to determine whether they contain impermissible subparts, WRTL has not shown that the 16 interrogatories subject to this motion actually exceed the limit. "What little case law there is on the subject supports the common sense conclusion that an interrogatory may only contain multiple parts that are 'logically or factually subsumed within and necessarily related to the primary question.'" United States v. Diabetes Treatment Centers Inc., 2006 WL 1515914 *6 (D.D.C. 2006) (quoting Trevino, 232 F.R.D. at 614). The Comment to Rule 33 contains the example of "a question asking about communications of a particular type [that] should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication." Diabetes Treatment Centers Inc., 2006 WL 1515914 *6 (quoting 8 A. Wright, A. Miller & M. Kane, Federal Practice and Procedure, Rule 33 (1994)). Along these lines, the defendants have requested in interrogatory number one that WRTL identify certain board members and employees. See Banks v. Office of Senate Sergeant-At-Arms, 222 F.R.D. 7, 10 (D.D.C. 2004) (when "all the questions relate to a single topic ... it would be unfair and draconian to view each [subpart] as a separate interrogatory"); Willingham v. Ashcroft, 226 F.R.D. 57, 59 (D.D.C. 2005) (only when "a subpart of an interrogatory introduces a line of inquiry that is separate and distinct from the inquiry ... that precedes it" should it be considered a separate interrogatory for counting purposes). Breaking apart the

Act. See Shays v. FEC, No. 06-1247 (D.D.C., filed July 11, 2006); see also Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005); Shays v. FEC, 424 F.Supp.2d 100 (D.D.C. 2006). Even in this litigation, the Members of Congress are submitting their own briefs and have taken positions at variance with the Commission on questions of justiciability and procedure.

details of the defendants' identification interrogatory would be the equivalent of counting the request for "communications" in the example from the Rule 33 Comment as a separate interrogatory for each communication. The authority cited above and the Comment to Rule 33 expressly disapprove of such an approach.⁷

Third, the defendants have shown that WRTL waived its objections to the subparts in defendants' first set of interrogatories because it did not object when it responded to them as required by Rule 33. Motion at 20-21. WRTL does not address this waiver argument. Instead, WRTL argues (Opp. at 18 n.14) that its objections to the second set of interrogatories were timely enough. However, WRTL did not claim that any of the interrogatories in the second set had impermissible subparts; instead, WRTL only made new and untimely objections to the form of the first set of interrogatories in its response to the second set of interrogatories. The result of this approach is that the subpart objection to the first set of interrogatories is untimely and no objection to the 9 interrogatories in the second set has been made. Accordingly, WRTL should be compelled to answer all of the interrogatories in full.⁸

⁷ WRTL cites the same "communication" example from the comments to Rule 33 and summarily asserts that the canon of statutory interpretation "Expressio unius est exclusio alterius" dictates that "all other subparts are questions seeking information about discrete separate subjects" and therefore should be treated as separate interrogatories. Opp. at 17 (emphasis in original). Setting aside the fact that "expressio unius" is a canon for construing statutes and regulations, not commentary, it is plain that the example was included in the comment as an illustrative guide to application of the rule, not as the exclusive type of subpart that is allowed by the rule. WRTL's claim that the "communication" example is the only allowable type of subpart is unsupported by any authority.

⁸ WRTL argues that its supernumerary objection preserved its right to make other untimely objections at some unspecified future date. Opp. at 18 n.15. This is incorrect. See Safeco Ins. Co. of America v. Rawstrom, 183 F.R.D. 668, 671 (C.D. Cal. 1998) ("grounds for objection must be stated in a response filed within the period allowed for response"). WRTL distorts the holding of Cahela v. Bernard, 155 F.R.D. 221, 227 (N. D. Ga. 1994), when it argues that the case supports the erroneous proposition that any objection preserves an open-ended opportunity to object further. That case merely allowed an objecting party to clarify its objection twenty days

III. THE FIRST AMENDMENT IS NOT A BAR TO THE DEFENDANTS' DISCOVERY REQUESTS

The First Amendment poses no barrier to the defendants' discovery here. WRTL has brought an as-applied challenge to a federal statute claiming that the Constitution entitles it to relief from the application of that statute to its specific activities. By doing so, WRTL has directly put those very activities at issue and cannot resist discovery into them by invoking the First Amendment.

WRTL's reliance on FEC v. Machinists Non-Partisan Political League ("Machinists"), 655 F.2d 380 (D.C. Cir. 1981), and AFL-CIO v. FEC ("AFL"), 333 F.3d 168 (D.C. Cir. 2003), is misplaced. Both Machinists and AFL differ fundamentally from this case. First, Machinists and AFL involved law enforcement investigations, not discovery under the Federal Rules of Civil Procedure. Second, WRTL initiated this lawsuit. It was not — and is not — the target of an investigation, as the non-governmental parties in Machinists and AFL were. Third, the question raised in the defendants' motion to compel is whether the information sought is relevant to the constitutional issues before the Court, not, as in Machinists and AFL respectively, the FEC's statutory jurisdiction or the validity of a Commission regulation. Finally, as we explain below, in both Machinists and AFL, the courts did not question the Commission's right to obtain information that was relevant to matters within the Commission's enforcement jurisdiction.

Rather than recognizing a First Amendment privilege against discovery, as WRTL argues (Opp. at n.10), Machinists supports the defendants' position here: If the information sought falls

after its initial timely objection. Id. at 227 n.4. Specifically, the court allowed a party to clarify that its overbreadth objection encompassed an excessive burden objection. Id. Here, WRTL attempts (Opp. at 18) to reserve the right to interpose entirely new objections. The attempt to delay final resolution of discovery disputes is particularly indefensible in a case in which WRTL has demanded, and obtained, a strict time limit on the defendants' opportunity to obtain discovery.

within the subject matter of the Commission's jurisdiction, compelling interests support its discovery. In Machinists, the D.C. Circuit examined whether the Commission had statutory jurisdiction over the substance of the investigation in which a subpoena was issued — not whether the information sought was privileged — before enforcing discovery into First Amendment activities. The court tellingly explained that “[w]e do not ... demand of the FEC that it show a compelling interest before it may obtain the information it seeks. Instead, we may assume arguendo that if the FEC has statutory jurisdiction to conduct this investigation, then a compelling interest for the subpoenaed information can be shown.” Id. at 389.

WRTL relies upon AFL to argue that the discovery sought by the defendants here would infringe on its First Amendment rights by “revealing to their opponents activities, strategies and tactics.” (Opp. at 9-10, quoting AFL, 333 F.3d at 177). But in AFL, the D.C. Circuit found impermissible a Commission regulation that required the public release of all investigatory file materials not exempted by the Freedom of Information Act at the conclusion of a law enforcement investigation. The Court explained that “when combined with the Commission’s broad subpoena practices, the automatic disclosure regulation ‘encourages political opponents to file charges against their competitors to serve the dual purpose of ‘chilling’ the expressive efforts of their competitor and learning their political strategy so that it can be exploited to the complainant’s advantage.’” Id. at 178 (citation omitted). Such concerns are entirely absent here.⁹ WRTL sued the Commission. No political competitor of WRTL filed an administrative

⁹ WRTL asserts (Opp. at 10 & n.9) that “[g]overnment agency investigation are especially threatening in this regard” because agency personnel may leave the government and find employment with a political competitor. Of course, in this case the government is a defendant; it did not initiate an investigation into WRTL’s activities. Nonetheless, taken to its logical conclusion, WRTL’s argument would grind all manner of government investigations to a halt: for example, EPA investigations involving accused polluters thwarted by the possibility that agency personnel may some day find employment with an environmental group, or FCC

complaint with the Commission in order to “chill” its speech or unearth its strategies, and WRTL’s own decision to bring a preenforcement as-applied challenge is not behavior that could be repeated by a political competitor to manipulate the civil discovery process. Finally, in AFL the court was particularly concerned about disclosing the strategic files of an entity that had become subject to investigation against its will and regarding which “allegations of wrongdoing [had been] rejected” by the Commission. 333 F.3d at 178. Again, WRTL initiated this litigation itself, and there were no “allegations of wrongdoing” lodged against it.

It should be emphasized that the defendants are not seeking the identities of any individuals who contributed to WRTL. Rather, the only identities sought by the defendants are WRTL’s largest corporate contributors. It has long been settled that “corporations can claim no equality with individuals in the enjoyment of a right to privacy,” California Bankers Ass’n v. Shultz, 416 U.S. 21, 65 (1974), and do not have “an unqualified right to conduct their affairs in secret.” United States v. Morton Salt, Inc., 338 U.S. 632, 652 (1950); see also DKT Memorial Fund Ltd. v. AID, 887 F.2d 275, 294 (D.C. Cir. 1989) (“Neither this Court nor the Supreme Court has held that the Constitution protects rights of association between two organizations”).

Although WRTL asserts (Opp. at 11) that information related to donor identities is First Amendment privileged, none of the cases relied upon by WRTL involves discovery into the identity of corporate donors to organizations, let alone corporate donors to an organization that has brought an as-applied challenge to a provision of federal law upheld, in part, as a “permissibl[e] hedge against circumvention” of corporate contribution limits. McConnell, 540 U.S. at 205. In none of these cases, moreover, did the courts address whether corporate donors to organizations would be subject to harassment or threats if their identities became known.

investigations into alleged broadcast indecency frustrated because commission employees may some day work for an organization that promotes “family values.”

Although a party resisting disclosure “need not prove to a certainty that its First Amendment rights will be chilled[,]” it must show, at a minimum, “that there is some probability that disclosure will lead to reprisal or harassment.” Black Panther Party v. Smith, 661 F.2d 1243, 1267-68 (D.C. Cir. 1981), vacated as moot, 458 U.S. 1118 (1982) (citing, *inter alia*, NAACP v. Alabama, 357 U.S. 449, 462 (1958); Buckley v. Valeo, 424 U.S. 1, 72-73 (1976)).¹⁰ WRTL has not submitted any evidence that the corporate donors to its ad campaign will face any such risks if it reveals their identities.

Even in the context of a law enforcement investigation, courts have routinely upheld more intrusive discovery than merely asking for the identity of corporate donors. In Jones v. Unknown Agents of FEC, 613 F.2d 864 (D.C. Cir. 1979), the D.C. Circuit held that interviews of individual contributors to a presidential campaign committee did not violate the First Amendment because that information was relevant to determine whether the committee had submitted a false application for matching funds. Similarly, in FEC v. GOPAC, Inc., 897 F.Supp. 615 (D.D.C. 1995), the district court sustained against a First Amendment challenge the Commission’s right to make telephone calls to GOPAC contributors to help obtain evidence about whether GOPAC’s major purpose was to influence federal elections.

As the defendants explained (Mot. at 22), inquiry into whether WRTL’s largest corporate donors through their PACs made expenditures or contributions in the 2004 Senate campaign relates directly to the purpose and effect of WRTL’s ad campaign, and the fundraising for that

¹⁰ WRTL relies on Buckley and AFL to aver (Opp. at 11 n.10) that no concrete evidence of retaliation is required to invoke a First Amendment associational privilege against disclosure. Buckley and AFL, however, involved (respectively) a facial challenge to the constitutionality of FECA disclosure provisions and the Commission’s disclosure of closed investigatory files concerning a respondent that had been “cleared of wrongdoing,” 333 F.3d at 178; neither case addressed First Amendment privileges raised to bar discovery of relevant evidence under the Federal Rules of Civil Procedure in an as-applied challenge to the Act.

campaign, particularly in light of the Supreme Court's concern with circumvention of the Act's limitations on corporate contributions. See McConnell, 540 U.S. at 205 (“[R]ecent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against ‘circumvention of [valid] contribution limits’”) (quoting Beaumont v. FEC, 539 U.S. 146, 155 (2003)).

In any event, WRTL's concerns can be adequately addressed, if necessary, by a protective order limiting the use and custody of the information WRTL will provide. The parties have jointly sought such an order regarding a document described by WRTL as a 2004 “projected planning document for fundraising appeals.” Joint Motion for Entry of Protective Order, filed with Court June 28, 2006 (Docket Entry 78).

IV. THE NOERR-PENNINGTON DOCTRINE IS NOT A BAR TO THE DEFENDANTS' DISCOVERY REQUESTS

WRTL's reliance upon Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and its progeny is misplaced. WRTL argues at length (Mot. at 12-16) that the defendants' discovery requests are irrelevant, and perhaps impermissible, because it believes that the Noerr-Pennington doctrine establishes “that unless WRTL's grassroots lobbying ads themselves are objectively without merit as exercising the right to petition, then any finding of a subjective intent to influence elections would not be enough to deny the ads immunity from the electioneering communication prohibition” (Opp. at 15). This argument is a red herring and, for a number of reasons, wholly without merit.

The discovery that is the subject of the defendants' motion is directed either towards the alleged burdens of PAC fundraising or objective indicia of the purpose and effect of WRTL's 2004 ad campaign. Discovery directed towards PAC fundraising obviously has nothing to do with the intent of the ads, but with the option identified in the Supreme Court in McConnell for

WRTL to pay for its broadcast ads. See 540 U.S. at 206. Thus, even under WRTL's own flawed theory about Noerr's applicability to the discovery controversy before the Court, that case is utterly irrelevant to discovery requests about the alleged burdens of PAC fundraising.

Regarding the defendants' remaining discovery requests at issue here, none of them seeks to explore the subjective motivations behind WRTL's ad campaign. These discovery requests inquire into WRTL's and its PAC's other advocacy in support or opposition to Senator Feingold, WRTL's media efforts that were integrated in a single media campaign with the three particular ads for which it seeks a constitutional exemption, WRTL's statewide public opinion survey, and the role of the filibuster issue in the 2004 election. This information provides a context to assess the three ads' objective purpose and effect, and the public opinion survey may provide direct empirical evidence of the ads' effects. Accordingly, WRTL's invocation of the Noerr-Pennington doctrine to bar inquiry into WRTL's subjective intent is simply inapposite.

More generally, however, the Noerr-Pennington doctrine simply has no application to this case, which is an as-applied constitutional challenge to a statute regulating the financing of certain federal election activity. The Noerr line of cases involves only a principle of statutory construction, and WRTL has not cited a single case in which that doctrine has ever been found relevant to determining the constitutionality of a statute, facially or as applied. In the Noerr cases, the Supreme Court construed the antitrust statutes, and later the National Labor Relations Act, as not intended to regulate political speech. While the Court's narrow statutory construction was certainly motivated in part by a desire to avoid constitutional issues, "[t]his doctrine ... rests ultimately upon a recognition that the antitrust laws, 'tailored as they are for the business world, are not at all appropriate for application in the political arena.'" City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380 (1991) (quoting Eastern Railroad Presidents

Conference v. Noerr Motor Freight, Inc., 365 U.S. at 141). Accord, Andrx Pharmaceuticals, Inc. v. Biovail Corp. Int'l, 256 F.3d 799, 817 (D.C. Cir. 2001).

Unlike the antitrust and labor statutes, BCRA was written to regulate the financing of campaign speech, not business activities, and the Court has explicitly contrasted its narrow construction of statutes regulating business activities from statutes designed to regulate politics. Omni, 499 U.S. at 378-379 (“Congress has passed other laws aimed at combating corruption in state and local governments,” citing Hobbs Act, 18 U.S.C. 1951, but “[i]nsofar as [the Sherman Act] sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity” (quoting Noerr, 365 U.S. at 140)). Because WRTL has conceded that BCRA unambiguously applies to the broadcast ads WRTL seeks to run, there is plainly no room in this case to construe the statute not to apply to its activities, as the courts did in the Noerr line of cases. See, e.g., NOW, Inc. v. Scheidler, 510 U.S. 249, 263 (1994) (Souter & Kennedy, JJ, concurring) (“The argument is meritless in this case, though, for this principle of statutory construction applies only when the meaning of a statute is in doubt, see Noerr, supra, and here ‘the statutory language is unambiguous’”). As a result, the Noerr-Pennington doctrine, and the tests for identifying activity exempt from statutes regarding business activities which were developed in application of that doctrine, is simply unavailing as a means to avoid the discovery this Court has authorized.

Although the Noerr-Pennington doctrine was nowhere mentioned in McConnell, WRTL invokes the discussion of “sham” lawsuits in the Noerr cases as if this were a definition of the “sham” issue advertisements referred to in McConnell. Of course, McConnell did not indicate in any way that BCRA could not be applied to “electioneering communications” unless they were “sham”; it only used that word as part of its analysis of why the “express advocacy” test had

proven inadequate to serve Congress's compelling interests in regulating the financing of electoral communications. But even where Noerr is applicable, its application and the definition of what is "sham" vary depending upon the particular circumstances. See Petrochem Insulation, Inc. v. NLRB, 240 F.3d 26, 32 (D.C. Cir. 2001) ("Perhaps the Supreme Court will one day create a uniform standard for sham litigation governing both NLRA and non-NLRA cases"). See also Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 504 (1988) ("[T]he Noerr immunity of anti competitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity"); Andrx Pharmaceuticals, Inc. v. Biovail Corp. Int'l, 256 F.3d at 818 ("Whether conduct falls within '[t]he scope of this [Noerr] protection depends, however, on the source, context, and nature of the anticompetitive restraint at issue") (second brackets added).

Finally, WRTL claims (Opp. at 15) that Noerr requires that its advertisements be considered presumptively immune from application of the statute — and that the defendants' discovery be barred — unless the "ads themselves are objectively without merit as exercising the right to petition." It is not clear what WRTL means by an ad that is "objectively without merit as exercising the right to petition" (Opp. at 15). This phrase appears to be adapted from antitrust and labor cases concluding that the Noerr-Pennington doctrine does not exclude from those statutes sham lobbying campaigns or lawsuits mounted merely to harass opponents rather than to obtain legislative or judicial results. Here, of course, one of the key contentions between the parties is the extent to which WRTL's ads are "lobbying" and/or "electioneering" ads, and WRTL is essentially asking the Court to rule that it has already won this battle to cut off the discovery that the defendants need to present their case. In any event, it is worth noting that even if the Noerr-Pennington doctrine were transferable to constitutional challenges to the FECA, and

even if the defendants' discovery requests sought to inquire into WRTL's subjective intent, the cases WRTL relies upon do not create an absolute bar to obtaining such evidence. See Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49, 60-61 (1993) (quoted by WRTL, Opp. at 14). Since McConnell has already held that the "vast majority of ads" that met the definition of electioneering communication in the past "clearly had [an electioneering] purpose," 540 U.S. at 206, it would stand that decision on its head to bar the defendants from obtaining the discovery they seek simply because WRTL's ads also contain a reference to legislative activity. For all of these reasons, WRTL's attempt to invoke the Noerr-Pennington doctrine to defeat discovery in this case, which is governed instead by McConnell, must fail.

V. THE DEFENDANTS' MOTION TO COMPEL IS TIMELY AND DOES NOT UNFAIRLY PREJUDICE WRTL

WRTL's claim (Opp. at 18-19) that the defendants' motion to compel is untimely pursuant to the Scheduling Order is entirely without merit. The expedited discovery schedule has no formal close of discovery as such, but instead sets final days for seeking particular types of discovery. While the Order set June 12, 2006, as the last day to take depositions, WRTL is mistaken to assume that any discovery motion filed after that date is untimely. Indeed, any discovery motion necessitated as a result of a deposition taken on June 12, 2006, necessarily would have to be filed after that date.

Neither the Order nor Rule 37 specifies a deadline for filing a motion to compel. "[T]he court has discretion to determine, in the absence of a deadline fixed by an order of the court, whether a motion to compel is untimely." United States v. MWI Corp., 232 F.R.D. 14, *17 (D.D.C. 2005). The operative question here is whether the motion is made within a reasonable time after a party fails to respond to a discovery request. Only if the moving party has "unduly

delayed” may the court find that the motion is untimely. 8A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2285 (2d ed. 1987).

Here, when faced with WRTL’s incomplete discovery responses, the defendants first attempted to obtain the necessary information through alternative discovery mechanisms and then, based on those results, were able to make a single, streamlined motion addressing only a limited number of WRTL’s deficient responses. This approach is efficient for the parties and the Court. See Riley v. United Airlines, 32 F.R.D. 230 (S.D.N.Y. 1962) (finding six-week delay in bringing the motion was reasonable, given the plaintiff’s attempt to obtain the withheld information through depositions). The court in Riley reasoned that, “it would not be wise, in terms of the economy of judicial administration, to require a party to make an immediate motion to compel further answers when the information he seeks might be available through other discovery devices.” Id. at 233. In this case, with the parties laboring under an expedited schedule, it would have been wasteful and impractical to file immediate motions to compel after each round of written discovery, document production, or deposition, while defendants were simultaneously pursuing the necessary information through alternative discovery mechanisms. Filing a single motion is also efficient because it permits the defendants to determine which information withheld by WRTL — viewed in the context of the entirety of evidence gathered to date — warranted a motion to compel. See Blair, 1990 WL 171058, at *2 (“efforts to obtain ... information through discovery devices prior to filing a motion to compel should not be punished”).

WRTL is also incorrect when it argues generally (Opp. at 18-19) that it made all its objections in its responses to the First Set of Document Requests on May 5, 2006, and suggests that if the defendants were to move to compel that would have been the appropriate point to do

so. For example, WRTL deleted references to the “campaign finance” portion of its advocacy campaign at that time as “not responsive” to the document requests. See Mot. to Compel Exh. 1. The defendants then followed up the first set of document requests with additional document requests that made it clear that the defendants were seeking documents related to the “campaign finance” portion of WRTL’s integrated campaign. See Mot. to Compel at 6-10. It only became clear that WRTL would try to support its redactions and withholding of documents about its “campaign finance” advocacy on the additional ground that such materials were beyond the scope of the Court’s scheduling order when WRTL responded on June 2, 2006. The defendants filed their motion to compel just 14 days after it became clear that WRTL was not going to produce material no matter how it was requested.

The defendants’ motion, filed just four days after the last deadline to take discovery, is prompt under any reasonable standard. WRTL fails to cite any authority for its extreme position that such a prompt discovery motion should be denied. Much to the contrary, the authority on this point suggests that only extreme delays should result in the denial WRTL seeks. See, e.g., Blair v. United States, 1990 WL 171058, at *2 (D. Kan. 1990) (deeming one-year delay not unreasonable); Suntrust Bank v. Blue Water Fiber, L.P., 210 F.R.D. 196 (E.D. Mich. 2002) (denying motion to compel discovery filed eighteen months after close of discovery); American Motorists Ins. Co. v. General Host Corp., 162 F.R.D. 646 (D. Kan. 1995) (denying motion to compel filed two years after discovery deadline in an eleven-year-old case).

Finally, WRTL cannot, and does not, claim any specific prejudice as a result of the timing of this motion. All of the information the defendants seek is already in WRTL’s possession; therefore, WRTL cannot be unfairly surprised by any of its contents. Furthermore, although summary judgment briefing is underway, the parties’ proposed findings of fact are not

due until September 1, 2006. The factual material that is produced as a result of this motion may be addressed by either side in that filing, and WRTL's tardily-produced factual material need not disrupt the summary judgment process.

In sum, the defendants' motion to compel was brought within a reasonable time after WRTL failed to respond properly to the defendants' discovery requests, and granting this motion will not disrupt the scheduling order that controls this proceeding.

CONCLUSION

For the foregoing reasons and those explained in the defendants' opening memorandum, the defendants' motion to compel should be granted.

Respectfully submitted,

/s/

Lawrence H. Norton
General Counsel

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

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

Harry J. Summers
Greg J. Mueller
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 # 163261)
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

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

Daniel R. Ortiz
UNIVERSITY OF VIRGINIA SCHOOL OF LAW*
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

* For affiliation purposes only.

/s/

Seth P. Waxman (D.C. Bar # 257337)
Randolph D. Moss (D.C. Bar # 417749)
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 663-6000

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

Trevor Potter
J. Gerald Hebert
CAMPAIGN LEGAL CENTER
1640 Rhode Island Avenue, N.W., Suite 650
Washington, DC 20036(202) 736-2200

FOR INTERVENING DEFENDANTS
SENATOR JOHN MCCAIN,
REPRESENTATIVE TAMMY BALDWIN,
REPRESENTATIVE CHRISTOPHER
SHAYS, AND REPRESENTATIVE MARTIN
MEEHAN

July 13, 2006