

**United States District Court
District of Columbia**

<p>Wisconsin Right to Life, Inc. 10625 W. North Ave, Suite LL Milwaukee, WI 53226, <i>Plaintiff,</i></p> <p style="text-align: center;">v.</p> <p>Federal Election Commission, 999 E Street, NW Washington, DC 20463, <i>Defendant.</i></p>	<p>Case No. _____</p>
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Preliminary Injunction Motion

Plaintiff Wisconsin Right to Life, Inc. (“WRTL”) moves for a preliminary injunction. Fed. R. Civ. P. 65. WRTL files concurrently its *Verified Complaint for Declaratory and Injunctive Relief and Memorandum in Support of Preliminary Injunction Motion*.

As set out fully in the *Complaint* and *Memorandum*, WRTL complains against the prohibition (codified at 2 U.S.C. § 441b(b)(2)) on corporate disbursements for “electioneering communications” (defined at 2 U.S.C. § 434(f)(3)(A)(i)) as applied to (a) electioneering communications by WRTL that constitute grass-roots lobbying and (b) the electioneering communications by WRTL contained in Exhibits A, B, and C of the *Complaint*.

WRTL submits that it has established probable success on the merits, it will be irreparably harmed, a preliminary injunction will not substantially harm Defendant Federal Election

Commission (“FEC”), a preliminary injunction is in the public interest, and there is no adequate remedy at law.

Pursuant to Local Rule of Civil Procedure 7(m), WRTL has conferred with legal counsel for the FEC regarding whether the electioneering communication prohibition should be preliminarily enjoined as so applied. The response of the FEC has been separately submitted to the Court in the *Notice of Consultation on Motions With Opposing Counsel*, which conveniently consolidates opposing counsel’s positions on all motions being filed contemporaneously with this one.

Because a preliminary injunction presents no monetary risks to the FEC, WRTL requests that bond be set at \$1. Fed. R. Civ. P. 65(c).

For the reasons stated in the accompanying *Memorandum*, WRTL requests that the Court grant its preliminary injunction motion and preliminarily enjoin the FEC from enforcing the prohibition on corporate expenditures for electioneering communications at Section 203 of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), codified at 2 U.S.C. § 441b(b)(2) of the Federal Election Campaign Act (“FECA”), as applied to (a) electioneering communications by WRTL that constitute grass-roots lobbying and (b) the electioneering communications by WRTL contained in Exhibits A, B, and C of the *Complaint*, until a final hearing on the merits.

Dated: July 28, 2004

Respectfully submitted,

/s/ M. Miller Baker

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**Pro Hac Vice Motion filed July 28, 2004*

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Memorandum In Support of Preliminary Injunction Motion

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Introduction

This case is about drawing a careful line to protect both the American system of participatory democracy – guaranteed in large part by the First Amendment protections of speech, association, and petitioning government – and the integrity of our federal election campaigns.

This fact-sensitive line was not drawn by the Supreme Court in *McConnell v. FEC*, 124 S. Ct. 619 (2003), because that case involved a *facial* challenge to the Bipartisan Campaign Reform Act of 2002 (“BCRA”). As detailed below, the Supreme Court expressly employed a facial overbreadth analysis to uphold BCRA’s prohibition on using corporate funds for “electioneering communications.” *McConnell* painted background hues with a broad brush and left the finer details to be filled in by the time-honored judicial process of as-applied challenges.

This is such an as-applied challenge. It challenges as unconstitutional the prohibition on using corporate funds for “electioneering communications” (hereinafter “the prohibition”) contained in § 203 of the BCRA, Pub. L. No. 107-155, 116 Stat. 81, 91-92, and codified at 2 U.S.C. § 441b(b)(2), as applied to grass roots lobbying and specifically as applied to the three broadcast advertisements attached to the *Complaint* as Exhibits A, B, and C.

Grass-roots lobbying is one of the most important and effective ways citizens petition the government. It is essential to any government “of the people, by the people, and for the people.” Abraham Lincoln, *Gettysburg Address*. As shown below, ordinarily (a) incorporated groups are free to use corporate funds for grass-roots lobbying and (b) limits on contributions in the grass-roots lobbying context are not constitutionally warranted. The need for, and

importance of, participatory democracy does not diminish in importance in the days before elections. Rather, this case demonstrates that the people's interest may increase at such times as legislators hurry to finish important work before recessing at the fall election time.

In considering the electioneering communications prohibition, Congress and the Supreme Court wrestled with the need to distinguish what the Court called "true" or "genuine" issue ads from what it called "bogus," "sham," or "so-called" issue ads. *See infra* at note 3 and accompanying text. The Court focused on "sham" ads in upholding the broad-brush prohibition against facial attack. This case demonstrates that a more discerning line can, and should, be drawn in the factual context of this case. The facts of this case demonstrate that the ads at issue in this case are not the sort of campaign-speech ads that Congress and the Court considered "sham." Consequently, as applied to bona fide grass-roots lobbying and the ads at issue herein, the prohibition is not narrowly tailored to a compelling governmental interest.

Significantly, the key sponsors of BCRA agreed, in rule-making comments to the FEC, that a grass-roots lobbying exception to the prohibition would be appropriate. As shown below, the elements for an exception that they proposed are consistent with the facts of this case in all but one detail. And as shall be demonstrated, that detail is rationally and constitutionally indefensible.

Facts

The facts of this case are set out in the *Verified Complaint for Declaratory and Injunctive Relief* and verified there by the long-time executive director of Wisconsin Right to Life, Inc. ("WRTL"). They are restated here for the Court's convenience.

As presently applicable, “‘electioneering communication’ means any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office [and] is made within . . . 60 days before a general . . . election for the office sought by the candidate; or . . . 30 days before a primary . . . election . . . for the office sought by the candidate; and . . . is targeted to the relevant electorate.” 2 U.S.C. § 434(f)(3)(A)(i). *See also* 11 C.F.R. § 100.29 (definition of “electioneering communication”).

The prohibition provides that “[i]t is unlawful . . . for any corporation whatever . . . to make a contribution or expenditure in connection with any [Federal] election. . . . For purposes of this section . . . , the term ‘contribution or expenditure’ includes . . . any applicable electioneering communication” 2 U.S.C. § 441b(a)-(b); *see also* 11 C.F.R. §§ 114.2 and 114.14 (regulatory ban on corporate funding of electioneering communications).

WRTL is a nonprofit, nonstock, Wisconsin, ideological corporation recognized by the Internal Revenue Service as tax exempt under § 501(c)(4) of the Internal Revenue Code. *Complaint* ¶ 19. WRTL is the Wisconsin state affiliate of the National Right to Life Committee, Inc. and was organized and exists for the ideological purpose of promoting respect for, and legal protection of, innocent individual human life from the time of fertilization until natural death. *Complaint* ¶ 21.

WRTL does not qualify for any exception permitting it to pay for electioneering communications from corporate funds because (a) it is not a “qualified nonprofit corporation” (QNC) within the definition of 11 C.F.R. § 114.10 so as to qualify for the exception found at 11 C.F.R. § 114.2(b)(2) to the electioneering communication prohibition and (b) its advertisements are “targeted” so that it does not fit the exception for § 501(c)(4) organizations as

described in 2 U.S.C. § 441b(c)(2). 2 U.S.C. § 441b(c)(6)(A). *Complaint* ¶ 22.

Defendant FEC is the government agency charged with enforcing the relevant provision of the Federal Election Campaign Act (“FECA”), as amended by the BCRA. *Complaint* ¶ 20. The FEC considered creating an exception to this prohibition in its regulations implementing BCRA for grass-roots lobbying broadcasts but decided it was beyond the exception-making authority granted it by Congress to do so. *Complaint* ¶ 7 (citing 67 Fed. Reg. 65190, 65200-02).

This case challenges the prohibition *as applied* to grass-roots lobbying on the facts of this case, which involves broadcast advertisements (true and accurate transcripts of current versions of the ads are attached to the *Complaint* as Exhibit A, B, and C) that are paid for by WRTL and that encourage Wisconsin listeners to contact their U.S. Senators (Sen. Russell Feingold and Sen. Herb Kohl) and to ask them to oppose anticipated filibusters of President Bush’s federal judicial nominees that occur during the electioneering communication blackout periods this summer and fall. *Complaint* ¶ 6.

On July 21, 2004, the U.S. Senate voted 53 to 44 in favor of a motion to invoke cloture that would have closed debate and stopped the filibuster of a confirmation vote on the nomination of William Gerry Myers III to be a United States Circuit Judge for the Ninth Circuit. Because a three-fifths vote to invoke cloture was required, the motion failed and the filibuster continues. *Complaint* ¶ 8 (citing 150 Cong. Rec. S8459-60).

On information and belief, the filibuster of William Myers was the 17th time such a filibuster has prevented an up or down vote on a federal judicial nominee since March 2003, and Senate “Judiciary Chairman Orrin Hatch . . . predicted that the number of Democratic

filibusters would hit double digits before the Senate adjourns in the fall.” *Complaint* ¶ 9 (quoting Paul Kane, *Fall Showdown Seen on Judges*, Roll Call, July 21, 2004, at 1).

In fact, the number of filibusters of judicial nominees reached “double digits” just a day after the cited Roll Call article, on July 22, when three more judicial nominees were denied up-down votes by a filibuster: nominees Henry W. Saad, Richard A. Griffin, and David W. McKeague. *Complaint* ¶ 10 (citing Helen Devar, *Senate Democrats Block 3 More Bush Judicial Nominees*, Washington Post, July 23, 2004, at A05).

On information and belief, the Senate leadership intends to bring up for vote additional judicial nominees throughout the fall and “by year’s end Democrats could have to filibuster as many [as] 16 nominees for the entire 108th Congress.” *Complaint* ¶ 11 (quoting Paul Kane, *Fall Showdown Seen on Judges*, Roll Call, July 21, 2004, at 1).

WRTL began broadcasting a radio advertisement (*Complaint* Exhibit A) on July 26 and are in the process of producing a second radio ad (*Complaint* Exhibit B) and a television ad (*Complaint* Exhibit C), which WRTL intends to run throughout August, for the purpose of influencing the votes of Senators Feingold and Kohl regarding filibusters of judicial nominees expected this fall before Congressional adjournment. Although the ads mention Sen. Feingold, who is a candidate in the upcoming primary and general elections, they are not presently electioneering communications because they are not within the electioneering communication blackout periods before the Wisconsin primary, to be held on September 14, or the general election, to be held on November 2. *Complaint* ¶ 12.

Because of the timing of anticipated Senate filibusters and votes to invoke cloture concerning motions to confirm judicial nominees, WRTL intends to run the three ads

(*Complaint* Exhibits A, B, and C) and materially similar ads between now and the adjournment of Congress, including within the blackout periods if WRTL obtains the relief sought herein. The timing of these events is beyond the control of WRTL. *Complaint* ¶ 13.

From August 15 to September 14 (30 days before the primary) and from September 3 to November 2 (60 days before the general election), the current ads (*Complaint* Exhibits A, B, and C) and materially similar ads will become electioneering communications as to Wisconsin Senatorial candidate Russell Feingold and WRTL will be prohibited from running these ads. *Complaint* ¶ 14. WRTL's ongoing advertisements will become electioneering communications from August 15 to November 2, because they meet the statutory and regulatory definitions found at 2 U.S.C. § 434(f)(3) and 11 C.F.R. § 110.29. *Complaint* ¶ 23.

Specifically, the advertisements at *Complaint* Exhibit A, B, and C, and planned future advertisements, are being, and will continue to be, broadcast for a fee on television and radio. 2 U.S.C. § 434(f)(3)(A)(i); 2 C.F.R. § 100.29(a). *Complaint* ¶ 24. These advertisements will be broadcast within 30 days before the Wisconsin primary and/or within 60 days before the general election. 2 U.S.C. § 434(f)(3)(A)(i)(II); 2 C.F.R. § 100.29(a)(2). *Complaint* ¶ 25. These advertisements “refer to,” and will continue to refer to, “a clearly identified candidate for Federal office.” 2 U.S.C. § 434(f)(3)(A)(i)(I); 2 C.F.R. § 100.29(a)(1). *Complaint* ¶ 26.

The advertisement entitled “Wedding” (Exhibit A) is a radio broadcast ad presently being broadcast for a fee paid by WRTL that clearly references federal candidate Sen. Feingold by mentioning his name and asking listeners to contact him (and Sen. Kohl) and to urge them to oppose the filibustering of judicial nominees. *Complaint* ¶ 27. The advertisement entitled “Waiting” (Exhibit C) is a television broadcast ad to be broadcast for a fee paid

by WRTL beginning August 2 that clearly references federal candidate Sen. Feingold by mentioning his name and asking listeners to contact him (and Sen. Kohl) and to urge them to oppose the filibustering of judicial nominees. *Complaint* ¶ 28.

The advertisements at Exhibits A, B, and C, and planned future advertisements, are, and will continue to be, “targeted to the relevant electorate,” 2 U.S.C. § 434(f)(3)(A)(i)(III); 2 C.F.R. § 100.29(a)(3), meaning that the broadcast ads “can be received by 50,000 or more persons . . . in the State [Sen. Feingold] seeks to represent.” 2 C.F.R. § 100.29(a)(3).

Complaint ¶ 29. The advertisements at Exhibits A, B, and C, and planned future advertisements, are being, and will be, “publicly distributed,” i.e., “aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system or satellite system.” 2 C.F.R. § 100.29(a)(3). *Complaint* ¶ 30. On August 15, when the electioneering communication blackout period begins, WRTL will be broadcasting a total of three radio and television ads, Exhibits A, B, and C, so that they will be “publicly distributed” on that date. 11 C.F.R. § 100.29(b)(3)(i). *Complaint* ¶ 31.

On August 15, WRTL will have spent or contracted to spend more than \$10,000 “for the direct costs of producing or airing one or more electioneering communications.” 11 C.F.R. § 104.20(a)(1)(i). *Complaint* ¶ 32. The public distribution and disbursement amount will trigger a “disclosure date” for WRTL on August 15, requiring it to file a report of its electioneering communication activity on FEC Form 9 “by 11:59 p.m. Eastern Standard/Daylight Time” on August 16. *Complaint* ¶ 33.

WRTL intends to comply with all record keeping and reporting requirements for its electioneering communications as set out in the Federal Election Campaign Act (“FECA”)

and FEC regulations, 2 U.S.C. § 434(f); 11 C.F.R. § 104.20, providing accurate disclosure information as to the source and disbursement of funds at the levels at which Congress asserted a disclosure interest. *Complaint* ¶ 34. WRTL is also complying with, and will continue to comply with, the applicable disclaimer requirements for electioneering communications. 2 U.S.C. § 441d; 11 C.F.R. § 110.11. This may be seen on the advertisement scripts at Exhibits A, B, and C, providing disclosure of the fact that WRTL is paying for the ads, that they are not authorized by any candidate or candidate's committee, and providing a World Wide Web address where a person hearing or viewing the ads may find contact information for WRTL and the Senators. *Complaint* ¶ 35. WRTL does not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using its corporate funds for its grass-roots lobbying advertisements. *Complaint* ¶ 36.

The ads at Exhibits A, B, and C express an opinion on pending Senate legislative activity, which is imminently up for a vote, and urge listeners to contact their Senators and to urge them to vote a certain way in this upcoming vote, so that these ads constitute bona fide grass-roots lobbying. *Complaint* ¶ 37. The ads deal with concrete, imminent, legislative issues, beyond the timing and control of WRTL, with which the two incumbent Senators are dealing and must shortly deal with further. *Complaint* ¶ 38.

The ads refer to both a candidate and a non-candidate and deal with them equally. *Complaint* ¶ 39. The ads deal exclusively with the legislative issue. *Complaint* ¶ 40. They focus on the legislative issue in question, not on any candidate. *Complaint* ¶ 41. They do not refer to any political party. *Complaint* ¶ 42. They deal with an issue with which WRTL has a clear and long-held interest. *Complaint* ¶ 43. They do not expressly advocate the election or

defeat of a clearly identified candidate for federal office. *Complaint* ¶ 44. They contain no words that promote, support, attack, or oppose a candidate. *Complaint* ¶ 45. They do not reveal a candidate’s record or position on the issue. *Complaint* ¶ 46. They do not comment on a candidate’s character, qualifications, or fitness for office. *Complaint* ¶ 47. They do not mention any upcoming election. *Complaint* ¶ 48. The ads are broadcast independent of any candidate or political party in that they are not “made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or their agents, or a political party committee or its agents.” 11 C.F.R. § 109.20(a). *Complaint* ¶ 49.

Broadcast advertisements are the most effective form of communication for the present grass-roots lobbying campaign, and non-broadcast communications would not provide WRTL with sufficient ability to reach the people of Wisconsin with WRTL’s message. *Complaint* ¶ 50. If WRTL does not obtain the requested injunctive relief, WRTL will not continue broadcasting the ads at *Complaint* Exhibits A, B, and C beginning August 15, because it is prohibited from doing so and because of its fear of enforcement by the FEC. As a result, WRTL will be deprived of its constitutional rights under the First Amendment to the United State Constitution and will suffer irreparable harm. There is no adequate remedy at law. *Complaint* ¶ 51.

Argument

Four factors govern preliminary injunctions:

in considering a plaintiff’s request for a preliminary injunction a court must weigh four factors: (1) whether the plaintiff has a substantial likelihood of success on the merits; (2) whether the plaintiff would suffer irreparable injury

were an injunction not granted; (3) whether an injunction would substantially injure other interested parties; and (4) whether the grant of an injunction would further the public interest. *See, e.g., Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir.1998).

Al-Fayed v. CIA, 254 F.3d 300, 303 (D.C. Cir. 2001). As seen next, WRTL meets these requirements, so preliminary injunctive relief should be granted.

I. WRTL Has a Substantial Likelihood of Success on the Merits.

WRTL has a substantial likelihood of success on the merits of this as-applied challenge. Corporations may normally engage in grass-roots lobbying, i.e., asking people to vote a certain way on a ballot measure or asking them to contact their legislators to ask them to vote a certain way on pending legislative action. As discussed in detail *infra*, the prime sponsors of BCRA agreed in comments to the FEC that a grass-roots lobbying exception would be appropriate under facts that square with all of the facts of this case with the exception of one curious factor, which WRTL will demonstrate is constitutionally indefensible.

A. Corporations May Lobby With Corporate Funds and Without Contribution Limits.

Corporations may ordinarily use corporate funds to engage in lobbying. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). And contribution limits on organizations engaged in lobbying to support or oppose ballot measures violate the First Amendment rights of association and expression. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981). So there is no justification for requiring bona fide grass-roots lobbying to be done with funds subject to the source, amount, and disclosure requirements for “political committee” (“PAC”) funds that are imposed by the FECA. There must be a principled line drawn to create an exception to the prohibition on corporate disbursements for electioneering commu-

nications that constitute bona fide grass-roots lobbying. The Supreme Court did not draw that line in *McConnell*, but left this line drawing for future cases.

B. *McConnell* Left Open the Possibility of As-Applied Challenges, Such as This One for Grass-Roots Lobbying.

In *McConnell*, the United States Supreme Court upheld the prohibition against using corporate funds for electioneering communications against a *facial* constitutional challenge, not an *as-applied* challenge. 124 S. Ct. at 694-97.¹

McConnell followed the proposal by Intervenors Sen. John McCain, Sen. Russell Feingold, and other prime BCRA sponsors to leave as-applied challenges as the solution for sorting out communications, such as grass-roots lobbying that urge constituents to contact their legislators about pending legislation, that are undeniably issue advocacy and central to American democratic participation in government.² Consequently, the Court brushed aside

¹The following discussion about the facial versus as-applied nature of *McConnell* is adapted from James Bopp, Jr. & Richard E. Coleson, *The First Amendment Is Still Not a Loophole: Examining McConnell’s Exception to Buckley’s General Rule Protecting Issue Advocacy*, 31 N. Kentucky L. Rev. 289, 307-13 (2004). The Court is respectfully referred to the full article for a careful analysis of what the Supreme Court did and did not do in upholding portions of BCRA. Inter alia, the article demonstrates that the Supreme Court in *McConnell* rejected a balancing analysis, choosing instead to reaffirm both the strict scrutiny and express advocacy analyses of *Buckley v. Valeo*, 424 U.S. 1 (1976), with an exception for “functional equivalents” of express advocacy that have been demonstrated by substantial evidence. The authors were counsel in *McConnell* for the following plaintiffs: U.S. Representative Mike Pence, Alabama Attorney General Bill Pryor, Libertarian National Committee, Inc., Club for Growth, Inc., Indiana Family Institute, Inc., National Right to Life Committee, Inc., National Right to Life Educational Trust Fund, National Right to Life Political Action Committee, Trevor M. Southerland, and Barret Austin O’Brock.

²[Redacted] Brief for Intervenors at 64, *McConnell*, 124 S. Ct. 619 (No. 02-1674) (“Title II poses little risk of the sort of chilling effect that can justify the facial invalidation of an overbroad law. . . . These corporat[ions] . . . are not likely to be chilled in their speech, or to be unable to assert their rights if and when there is a realistic threat that the Act may be applied to them in some unconstitutional way. In these circumstances, awaiting *as-applied*

concerns about “genuine issue ads” in *McConnell’s* facial challenge and focused solely on what it called “sham issue ads,” calling them the “functional equivalent” of express advocacy. 124 S. Ct. at 696 (argument that constitution protects electioneering communications “fails to the extent that the issue ads . . . are the functional equivalent of express advocacy”).³

The fact that the Court left open the option of as-applied challenges is clear in how it treated the overbreadth challenge to the electioneering communication ban. After the *McConnell* majority decided there was a compelling interest, the next step in its strict scrutiny analysis was to decide whether Congress had narrowly tailored the ban to effect only the established interest. But the Court didn’t use the term “narrow tailoring.” Instead the Court said that “plaintiffs . . . challenge the [electioneering communications ban] on the ground that it is . . . *overbroad*,” 124 S. Ct. at 695 (emphasis added), because “the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications.” *Id.* at 696.

challenges, arising in specific factual contexts, is by far the wiser course.” (emphasis added)).

³As to “sham issue ads” being the primary focus of the *McConnell* Court, this point is evidenced by a whole section of the opinion entitled “Issue Advertising” in which the Court repeatedly refers to the ads as “so-called issue ads,” 124 S. Ct. at 650-52, followed by a section entitled “Senate Committee Investigation” in which the Court focused on the problem of what it called “sham issue ads.” *Id.* at 652-54. There were no sections devoted to a discussion of bona fide grass-roots lobbying. Simple comparison of the frequency of pejorative terms for issue ads as compared to discussion of bona fide issue ads further confirms the point. *Cf.* 124 S. Ct. at 650 (two references to “so-called issue ads”), 651 (same), 652 (same with an added reference to “bogus issue advertising”), 653 (“issue advertising designed to influence federal elections”; “sham issue advocacy”), 675 (“bogus issue advertising”), 684 (“sham issue ads”; “sham issue advertising”), 689 (“so-called issue advocacy”), 695 (“so-called issue advocacy”), 696 (same) *with id.* at 689 (“true issue ad”), 696 (two references to “genuine issue ads”).

By simply referring to an *overbreadth* challenge, without more precision, the Court obscured its analysis of the second prong in a strict scrutiny analysis, i.e., narrow tailoring (whether a means that Congress has chosen to regulate speech that may be regulated also regulates speech that may not be regulated). *Cf. Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) (“The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.”).

But BCRA’s plaintiffs did *not* just allege that the ban was “overbroad,” as the Court stated. They were very clear in their insistence that the electioneering communication was not *narrowly tailored* to a compelling governmental interest, as is required under strict scrutiny for such an abridgement of core political speech. For example, the “Business Plaintiffs” had a section plainly titled “The Electioneering Communication Standard Is Not Narrowly Tailored.” Opening Brief of the “Business Plaintiffs” Chamber of Commerce et al. at 36, *McConnell*, 124 S. Ct. 619 (No. 02-1755). The AFL-CIO had a section captioned, “The Primary Definition Is Not Narrowly Tailored.” Brief of AFL-CIO Appellants/Cross-Appellees at 16, *McConnell*, 124 S. Ct. 619 (No. 02-1755).

It is true that plaintiffs often complain that a statute is “overbroad” when they mean that it is not narrowly tailored to effectuate only its compelling interest.⁴ In *Austin v. Michigan State Chamber of Commerce*, the Supreme Court did the same when it was conducting a

⁴*Cf.*, Brief for Appellants/Cross-Appellees Sen. Mitch McConnell et al. at 50, *McConnell*, 124 S. Ct. 619 (No. 02-1674). (“the ‘electioneering communications’ provisions are so overbroad that they cannot be sustained under any theory consistent with the First Amendment”).

narrow tailoring analysis under strict scrutiny and spoke at one point of its analysis in overbreadth terminology. *Austin*, 494 U.S. 652, 655, 657, 660-61 (1990).

But using “overbroad” to mean “not narrowly tailored” can be confusing because in First Amendment jurisprudence there is also the “substantial overbreadth” doctrine, which has to do with facial challenges and permits a form of third party standing. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601 (1973). It is necessary to keep them distinct, and much ink has been expended in sorting out the differences, although an exhaustive study is beyond the scope of this memorandum.⁵

The narrow-tailoring version of “overbreadth” was described in *SUNY v. Fox*, 492 U.S. 469 (1989), where the Supreme Court said that “[t]he person invoking the . . . narrow-tailoring rule asserts that the acts of his that are the subject of the litigation fall outside what a properly drawn prohibition could cover.” *Id.* at 482 (emphasis omitted). The facial-challenge (and standing) variety of “overbreadth” arises when a defendant whose conduct may be regulated (e.g., he has been charged for publishing obscene material) argues that, while his activity may be regulable, the statute under which he is charged is written so broadly that it reaches substantial amounts of the activity of others, not before the court, that is not regulable (e.g., librarians making available to library patrons photographs of Michelangelo’s nude paintings in the Sistine Chapel). In the example given, the obscenity publisher is allowed to raise the rights of librarians in what amounts to (for them) a facial challenge. And because

⁵*See, e.g.,* Alfred Hill, *Some Realism about Facial Invalidation of Statutes*, 30 Hofstra L. Rev. 647 (2002); Richard Fallon, *As-Applied and Facial Challenges and Third Party Standing*, 113 Harv. L. Rev. 1321 (2000); Mark E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359 (1990).

constitutional challenges need not await enforcement proceedings to be brought as facial challenges, a substantial overbreadth facial challenge may be brought by someone arguably affected by the challenged statute (establishing standing) without there ever being an enforcement action or a declaration of whether the plaintiff's own conduct may be restricted.⁶

Returning to the *McConnell* case, a proper strict scrutiny analysis places the burden on the *government* to prove that its restriction on free expression is narrowly tailored to a compelling governmental interest. *See, e.g., Austin*, 494 U.S. at 675. In a substantial overbreadth facial challenge, the burden is on the *plaintiff* to prove that the statute has so many unconstitutional applications that it must be struck on its face. *Broadrick*, 413 U.S. at 613.

One might expect that if the Supreme Court was going to engage in a strict scrutiny analysis it would first finish that analysis before moving on to a substantial overbreadth analysis, i.e., establish first whether there were *any* applications of the ban that were unconstitutional before asking whether those applications were a substantial part of the reach of the ban. It certainly seems logically required to first determine if there *are* any unconstitutional applications (and what they might be) before determining whether the lack of narrow tailoring is substantial enough to permit a statute to be struck facially.

BCRA's sponsors argued things in this sequence. They first argued in their brief, in a section entitled "Title II Is Narrowly Tailored To Serve Compelling Public Interests," [Redacted] Brief for Intervenor-Defendants at 56, *McConnell*, 124 S. Ct. 619 (No. 02-1674),

⁶An example is *Free Speech Coalition*, 535 U.S. 235, which was a pre-enforcement facial challenge to a federal anti-pornography statute that was declared unconstitutional due to its substantial overbreadth because it would reach films with artistic merit.

that the electioneering communication ban passed constitutional muster because it was narrowly tailored to a compelling interest. *Then* they argued, in a section entitled “Facial Invalidation Of Title II Would Be Especially Inappropriate,” *id.* at 62, and in a subsection entitled “Plaintiffs Have Not Demonstrated Substantial Overbreadth,” *id.* at 64, that facial invalidation would be inappropriate absent proof of substantial overbreadth.

But the Supreme Court in *McConnell*, conflated the two analyses by saying that the plaintiffs’ challenge was about overbreadth (without distinguishing which kind), then declaring that there was a compelling interest (the first step of strict scrutiny), then moving on to an “overbreadth” analysis that concluded with the words, “We are therefore not persuaded that plaintiffs have carried their heavy burden of proving that [the electioneering communication ban] is overbroad.” 124 S. Ct. at 695-97. Since plaintiffs don’t bear the burden of proving narrow tailoring, the Court obviously slid past the narrow tailoring prong of the strict-scrutiny analysis and right into a substantial overbreadth analysis.⁷

The Court’s action and discussion plainly indicate that it decided to treat this case only as a facial challenge case and it was declining to deal with whether various applications of the ban were narrowly tailored. The Court conceded that the ban reaches protected speech that Congress may not regulate (thereby implying that the tailoring was not narrow), but it

⁷That engaging in the appropriate tailoring question was the proper next step was demonstrated by the Supreme Court itself. It is puzzling that the Court employed formal tailoring analysis when answering the argument that § 323(b) “is substantially overbroad because it federalizes activities that pose no conceivable risk of corrupting or appearing to corrupt federal officeholders,” *id.* at 673, but did not do so in answering the similar argument that “the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communication.” *Id.* at 696.

wanted to deal with such issues on an as-applied basis, i.e., the Court did not believe the facial overbreadth was substantial.⁸

The Court did this first by declaring that plaintiffs' lack-of-narrow-tailoring argument, which the Court reclassified as a facial overbreadth challenge, "fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." *McConnell*, 124 S. Ct. at 696 (emphasis added). Of course, this was only demonstrated with respect to what the Court styled as "sham issue ads" and not as to such other public communications as grass roots lobbying.

Because a radio ad run by WRTL asking listeners to call a legislator who happens to be a candidate to vote a certain way on a motion being considered in Congress in a few days is not a "sham issue ad" and was never of a type proven to be the "functional equivalent" of express advocacy, banning such an ad is unsupported by any governmental interest and barring WRTL from running it with corporate funds would be unconstitutional.

Second, the Court acknowledged that there was an evidentiary dispute as to "[t]he precise percentage of issue ads that clearly identified a candidate and were aired during those . . . time spans but had no electioneering purpose," insisting that "the vast majority of ads

⁸In *Mills v. Alabama*, 384 U.S. 214 (1966), the Court struck down a ban on speech that affected only one day, i.e., only .27% of possible annual days of speech. The *McConnell* record evidence in this court was that between 7% and 64% of the communications during the applicable period before the 1998 elections were not "sham" at all, or, in other words, that the regulation of as little as 36% of the ads encompassed by BCRA was supported by the interests proffered by the government. *McConnell v. FEC*, 251 F. Supp. 2d 176, 309-10 (D.D.C. 2003) (Henderson, J.). But in any event, since the Supreme Court focused on "sham issue ads," the precedential effect is limited to the same.

clearly had such a purpose.” *Id.* at 696. This of course acknowledges that there are *some* issue ads that may not constitutionally be regulated by Congress but that under a facial challenge the ban must be upheld because the overbreadth had not been proven to be “substantial.” The necessary implication is that those other issue ads must be the subject of as-applied challenges.

Third, the Court acknowledges in footnote 88 that it “assume[s] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issues ads.” *Id.* at 696 n.88. Consequently, the Court has decided that questions about those “genuine issue ads” would not be sorted out in *McConnell* but would be carved out a chip at a time in as-applied litigation until the full outline of permissible regulation under *McConnell*’s exception to the express advocacy test takes visible shape.

The Court added that “whatever the precise percentage may have been in the past [of the electioneering communication ban’s impingement on ‘genuine issue ads’], in the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific references to federal candidates, or in doubtful cases by paying for the ad from a segregated fund.” 124 S. Ct. at 696. This bit of obiter dictum makes sense in the context of the sort of issue ads the Court apparently had in mind, e.g., ads promoting or opposing in general ways such issues as the environment, globalism, free trade, abortion, gay marriage, and the like. But the Court’s dictum makes no sense as applied to grass roots lobbying during the electioneering communication blackout periods, in which, e.g., it is necessary to quickly contact an undecided legislator’s constituents asking them to call their legislator and urge her to vote for legislation to be voted on within a week. This is such core

First Amendment activity in American democracy that it cannot be brushed aside so blithely.

It is no good to say, “Use newspaper ads or mail letters.” The most effective means of reaching constituents quickly and getting their attention is by broadcast advertising on their favorite TV shows and commuting radio programs.

It is no good to say, “Don’t incorporate.” The most effective means of gathering, analyzing, and disseminating the necessary legislative information is through watchdog groups, which range all across the political and social spectrum on issues that constituents find vital and want information about from the groups with which they have chosen to associate. The most effective form of existence for these citizen groups is the nonprofit corporate form (for protection from individual liability of its board of directors and officers, not for acquiring capital from business activities).

It is no good to say, “The communication can be made sooner or later than the blackout periods.” If it is a week before a crucial legislative vote, there is no other available time than that week in which the voters can receive the necessary information when it matters.

It is no good to say, “Don’t mention the name of the legislator and candidate.” Grass roots lobbying is impossible without telling constituents to whom their call should be made. Often, only one or two members of Congress in a state having several members differs from the others as to a position on legislation and so would be the object of grass-roots lobbying. Further, the sad fact is that many citizens do not know the names of their members of Congress, so would not know whom to call. A statute requiring that grass-roots lobbying ads ask listeners to simply “Call your member of Congress,” without naming a specific legislator who needs calls, would strip grass lobbying of its effectiveness.

And it is no good to say, “Use your PAC.” By their charter or nature, some corporations cannot have a PAC. And if a legislative issue arises on short notice, there simply is no time for corporations without a PAC to organize one, go through the time-consuming, cumbersome process of acquiring FECA-compliant “members” (who must fit certain criteria to qualify for solicitation), and then raise money from the members. The PAC alternative in such situations is a complete ban and amounts to having to obtain an advance government license before being permitted to speak, which ought to be considered an unconstitutional condition and prior restraint. And even for organizations that have a PAC, as discussed below, the governmental interests advanced by use of a PAC are not advanced on the facts of this as-applied challenge.

Most tellingly, the fact that grass roots lobbying was argued strenuously to the Court, *see, e.g.*, Brief of Plaintiffs-Appellants/Cross-Appellees National Right to Life Committee et al. at 24, *McConnell*, 124 S. Ct. 619 (No. 02-1733) (filed July 8, 2003), and the Court utterly ignored the argument indicates that such considerations were left for another, as-applied challenge. The Court concluded its discussion of the “overbreadth” challenge to the electioneering ban with a statement that again contains the implicit recognition that the ban reaches some “pure issue ads” but that sorting those out awaits another day: “Far from establishing that BCRA’s application to *pure issue ads* is substantial, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion.” 124 S. Ct. at 697 (emphasis added).

While as-applied challenges require of those doing “genuine issue ads” the heavy burden of pursuing further expensive litigation to protect their rights to participate in American

democracy, the Court's message is clear that as-applied challenges such as this one must be permitted.

C. Congressional Intent Is Indicated by the Support of BCRA's Prime Sponsors for a Grass-Roots Lobbying Exception Nearly Identical to This Case.

BCRA is commonly known by the names of its prime sponsors, "McCain-Feingold" in the Senate and "Shays-Meehan" in the House. In a sixteen-page combination letter and comments to the FEC, these four prime sponsors, along with Senators Olympia Snow and James Jeffords, commented on proposed rulemaking implementing BCRA. Letter from Sen. John McCain, Sen. Russell D. Feingold, et al. to Ms. Mai T. Dinh of the FEC, Aug. 23, 2002 (hereinafter "McCain-Feingold Comments") (it is posted on the FEC's website at http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf) (visited July 26, 2004) along with other comments on the proposed rules).

The Comments are important because they indicate the intent of the prime sponsors as to the scope of BCRA and because the grass-roots lobbying exception they proposed so closely parallels the facts of this as-applied challenge. The Comments acknowledged the propriety of "exemptions for categories of ads that 'plainly and unquestionably' are 'wholly unrelated' to an election. *See* Cong. Rec. H410-411 (Feb. 13, 2002) (statement of Rep. Shays)." McCain-Feingold Comments at 2. The letter urged that if the FEC "determine[d] that an exemption for what might be called 'true issue ads' [wa]s needed," the FEC should "give strong consideration to the exemption that we propose in our comments." *Id.*

The McCain-Feingold Comments were reacting, inter alia, to four different formulas the FEC had proposed for a possible grass-roots lobbying exception. These are set out here

because they represent the FEC's thoughts on the sort of considerations that might be proper in crafting a grass-roots lobbying exception and so that they might be compared with the facts of this case. As set out in the FEC's comments accompanying the final rules, the four formulas (here lettered A-D) for a grass-roots lobbying exception are as follows:

- A. any communication devoted exclusively to urging support for or opposition to particular pending legislation or executive matters, where the communication only requests recipients to contact an official without promoting, supporting, attacking, or opposing a candidate or indicating the candidate's position on the legislation in question.
- B. any communication concerning only a pending legislative or executive matter, in which the only reference to a Federal candidate is a brief suggestion that the candidate be contacted and urged to take a particular position, and no reference to a candidate's record, position, statement, character, qualifications, or fitness for an office or to an election, candidacy, or voting is included.
- C. any communication that does not include express advocacy, and that refers either to a specific piece of legislation or to a general public policy issue and contains contact information for the person whom the communication urges the audience to contact.
- D. any communication that urges support of or opposition to any legislation or policy proposal and only refers to contacting a clearly identified incumbent candidate to urge the legislator to support or oppose the matter, without referring to any of the legislator's past or present positions.

67 Fed. Reg. 65201 (Oct. 23, 2002).

The FEC added that “[s]ome commenters urged the Commission to promulgate another proposal that shares most of the elements of Alternative [B]” and is here lettered E:

- E. (A) The communication is devoted exclusively to a pending legislative or executive branch matter and (B) its only reference to a clearly identified Federal candidate is a statement urging the public to contact the Federal candidate or a reference that asks the candidate to take a particular position on the pending legislative or executive branch matter.

Id.

The FEC ultimately decided it could not create a grass-roots lobbying exception under any of the formulations because its rulemaking authority from Congress had been expressly limited to exceptions that couldn't promote, support, attack, or oppose a candidate:

The Commission conclude[d] that communications exempted under any of the alternatives for this proposal could well be understood to promote, support, attack, or oppose a Federal Candidate. Although some communications that are devoted exclusively to pending public policy issues before the Congress or the Executive Branch may not be intended to influence a Federal election, the Commission believes that such communications could be reasonably *perceived* to promote, support, attack, or oppose a candidate in some manner. The Commission has determined that all of the alternatives for this proposed exemption, including those proposed by the commenters, do not meet this statutory requirement.

67 Fed. Reg. 65201-02 (emphasis added).

Of course, as the FEC noted Congress only authorized it to make exceptions that do not “promote, support, attack or oppose” any candidate, 2 U.S.C. § 434(f)(3)(B)(iv), and the FEC steered far clear of that standard by rejecting ads that might be so “perceived” (regardless of the plain text of the communication itself), but that is not the constitutional test to be applied here. In fact, the FEC rejected the BCRA prime sponsor’s own grass-roots lobbying exemption proposal, discussed next, under the “perceived” promote/support/attack/oppose standard, although the prime sponsors clearly stated that their test passed the promote/support/attack/oppose test, McCain-Feingold Comments at 11, and presumably considered it appropriate under BCRA and the Constitution. As discussed *infra*, the constitutional test is whether applying the electioneering communication prohibition to the present facts and ads is narrowly tailored to a compelling state interest.

BCRA’s prime sponsors argued in their Comments to the FEC that, instead of the FEC’s

proposed alternatives, which they rejected on various grounds,⁹ the following exception for grass-roots lobbying would be permissible:

The term “electioneering communication” does not include any communication that:

(x)(A) Meets all of the following criteria: (i) the communication concerns only a legislative or executive branch matter; (ii) the communication’s only reference to the clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter; (iii) the communication refers to the candidates only by use of the term “Your Congressman,” “Your Senator,” “Your Member of Congress” or a similar reference that does not include the name or likeness of the candidate in any form, including as part of an Internet address; and (iv) the communication contains no reference to any political party.

(B) The criteria in Paragraph (A) are not met if the communication includes any reference to: (i) the candidate’s record or position on any issue; (ii) the candidate’s character, qualifications or fitness for office; or (iii) the candidate’s election or candidacy.

McCain-Feingold Comments at 10. The prime sponsors explained why they thought this worked:

⁹BCRA’s prime sponsors boiled the problems they perceived with the FEC’s proposals down to two main ones:

As the discussion above makes clear, there are two significant problems with these alternatives. The first is that political parties can easily be used as a proxy for the candidate in order to make comments about the candidate’s views and positions. The second is that allowing the use of the candidate’s name in a communication that runs within the 30 or 60 day window makes it almost impossible to assure that the communication “plainly and unquestionably” is “wholly unrelated” to an election.

McCain-Feingold Comments at 10 (quoting Cong. Rec. H410-411 (statement of Rep. Shays)). Of course, the WRTL ads at issue do not mention a political party and, as shown in text, insisting that a legislator not be named is irrational and not narrowly tailored to a compelling state interest in the context of bona fide grass-roots lobbying.

This formulation allows individuals and entities concerned about legislation to run true issue ads with a legislative objective and a request to contact an elected official during the 30 or 60 day windows. Permitting the use of “Your Congressman” and similar expressions that clearly identify the person or persons to be contacted, but continuing to prohibit the use of a candidate’s name makes it less likely that the exemption will be used to accomplish an electoral objective. This proposal also guards against critiques of a political party being used as a proxy for attacking a candidate. This exemption would be an appropriate use of the Commission’s authority under [authorizing statute].

McCain-Feingold Comments at 10-11.

At this point, it will assist the analysis to set out the facts that BCRA’s prime sponsors declared to the FEC were important in an exception, along with other factors considered by the FEC, and compare them with the facts of this case.

Grass-Roots Lobbying Exemption Elements	In McCain-Feingold Comments	Suggested in FEC Scenarios	In As-Applied Facts
1. “[C]oncerns only a legislative or executive branch matter”	Yes (quoted)	Yes	Yes
2. “[O]nly reference to a clearly-identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the legislative or executive branch matter”	Yes (quoted)	Yes	Yes
3. “[R]efers to the candidate only by use of the terms ‘Your Congressman,’ . . . or a similar reference that does not include the name or likeness of the candidate in any form”	Yes (quoted)	No	No
4. “[C]ontains no reference to any political party”	Yes (quoted)	No	Yes
5. No “reference to . . . the candidate’s record or position on any issue”	Yes (quoted)	Yes	Yes

6. No “reference to . . . the candidate’s character, qualifications or fitness for office”	Yes (quoted)	Yes	Yes
7. No “reference to . . . the candidate’s election or candidacy.”	Yes (quoted)	Yes	Yes
8. Focus only on particular or specific, pending legislation or legislative action or executive action as opposed to a general issue.	No	Yes	Yes
9. No words that promote, support, attack, or oppose a candidate.	No	Yes	Yes
10. “[O]nly reference to a Federal candidate is a brief suggestion that the candidate be contacted and urged to take a particular position.”	No	Yes (quoted)	Yes
11. “[C]ontains contact information for the person whom the communication urges the audience to contact.”	No	Yes (quoted)	Yes (at cited website)
12. Candidate must be “an incumbent.”	No	Yes (quoted)	Yes
13. Ads name two incumbent Senators.	No	No	Yes
14. Ads refer to a candidate and non-candidate and deal with them equally.	No	No	Yes
15. Ads deal with currently ongoing legislative action that is imminently coming to a head during the blackout period and the timing is beyond the control of the communicator.	No	No	Yes
16. Ads deal with an issue in which the communicator has a clear and long-held interest.	No	No	Yes
17. Ads were run outside the blackout periods as well as within them.	No	No	Yes
18. Ads may be run only with money from a “segregated bank account” under 2 U.S.C. § 434(f) (only contributions from qualified individuals) if necessary to obtain injunctive	No	No	Yes

relief.

As may be seen from the above “Elements Chart,” the numerous indicia verifying that WRTL’s ads are bona fide grass-roots lobbying, and not electioneering speech, go far beyond anything the prime sponsors thought necessary, and beyond even the brainstorming creativity of FEC staff members.

The sole bone of contention with BCRA’s prime sponsors, who intervened in *McConnell* to defend BCRA, is #3 on the chart – whether the candidate may be named. At first blush, one might think that the prime sponsors are saying that the candidate may not be clearly identified, which would result in the ludicrous proposition that an exception be created that would not constitute an electioneering communication. But #2 on the chart makes it clear that the candidate may be clearly identified, just not identified with a name or likeness. That’s something not even the fertile minds at the FEC dreamed up.

In other words, BCRA’s prime sponsors say that it would be okay for WRTL to run an electioneering communications just like the ones it is running that substitute the following for Sen. Feingold’s name: “Call Senator Kohl and your other Senator and tell them to vote against filibustering judicial nominees.” Or maybe these: “Call Senators Kohl and the other one . . . ,” or “Call your Senators, one of whom is named Herb Kohl,” Or maybe this one: “Call Senator Herb Kohl and Senator R.F” Initials would clearly identify but would not be a name or likeness. Perhaps the following would help the people to understand the circumlocution and why they can’t receive important information about how to participate in American government: “Call Senator Kohl and the Senator we can’t name because the prohibition against naming him is narrowly tailored to a compelling governmental interest

...,” but it’s a bit long for a 30-second ad and not very convincing.

So it all seems to boil down to the fact that the BCRA’s sponsors do not want a member of Congress to be named, *even while clearly identified*. The reason is obsession with elections: “allowing the use of the candidate’s name in a communication that runs within the 30 or 60 day window makes it almost impossible to assure that the communication ‘plainly and unquestionably’ is ‘wholly unrelated’ to an election.” McCain-Feingold Comments at 10 (quoting Cong. Rec. H410-411 (statement of Rep. Shays)). But naming a member of Congress in a bona fide grass-roots lobbying ad about an imminent upcoming vote in Congress is “plainly and unquestionably” “wholly unrelated” to an election. Congress scheduled this vote during the blackout period and the fact that the vote occurs during this blackout period is an unrelated, but unfortunate or fortuitous (depending on your perspective), happenstance.

But what the BCRA’s prime sponsors really feel is that “continuing to prohibit the use of a candidate’s name makes it less likely that the exemption will be used to accomplish an electoral objective.” McCain-Feingold Comments at 11. That means that not using Sen. Feingold’s name makes the ad less effective as a communication vehicle and, therefore, less likely to be used. But that would also be true as to the effectiveness of a grass-roots lobbying ad. There is no constitutional justification for a rule that says that citizen groups can run grass-lobbying ads so long as they aren’t very effective.

And with the list of elements demonstrating that WRTL’s ads are bona fide grass-roots lobbying, the ads are clearly about what’s going on in Congress, not in any election, so that there is little likelihood that the ads “will be used to accomplish an electoral objective.” Even

if there were some peripheral effect on elections, that effect would have to be accommodated for the sake of protecting the core American value of participatory democracy.

In sum, Sen. Feingold must be “clearly identified” or the ads won’t be an “electioneering communication” to begin with. For those that know that “the other Senator” is Sen. Feingold, trying to draw a line between his name and some substitute is an exercise in futility. For those that don’t know who the “other Senator” is, it is vitally important to the effectiveness of the grass-roots lobbying activity that he be identified. Thus, this distinction fails rational basis scrutiny without getting to compelling interest analysis.

But most decisive to the constitutional analysis herein, the grass-roots lobbying advertisements of WRTL are most emphatically not the “functional equivalent” of “expressly advocating the election or defeat of a clearly identified candidate.” 124 S. Ct. at 696 (argument that constitution protects electioneering communications “fails to the extent that the issue ads . . . are the functional equivalent of express advocacy”).

But this Court doesn’t have to draw a general line suitable for separating all bona fide grass-roots lobbying from other electioneering communications. This is an as-applied challenge. In the time-honored tradition of painting in the constitutional details after a broad-brush outline, other facts await another day. This Court needs only to note the authenticating elements of the as-applied facts in the “Elements Chart” above and hold that, on the facts of this case, WRTL’s ads are bona fide grass-roots lobbying and it would be unconstitutional to apply the electioneering communication prohibition to WRTL’s ads or any of WRTL’s grass-roots lobbying.

D. Requiring WRTL to Use PAC Funds for These Ads Is Not Narrowly Tailored to a Compelling Governmental Interest.

On the facts of this case, requiring WRTL to fund its ads with PAC money is not narrowly tailored to a compelling governmental interest, whether applied to grass-roots lobbying with WRTL (a) general corporate funds or (b) funds “out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) directly to this account for electioneering communications.” 2 U.S.C. § 434(f); 11 C.F.R. § 104.20(c)(7).

1. WRTL May Constitutionally Run Its Ads With General Funds.

What are the distinctive features of PAC funds that are supposed to eliminate threats to the electoral system? And how many of those apply to WRTL’s ads on the facts of this case? PAC funds are distinguished by source, amount, and disclosure requirements.

Disclosure was a concern mentioned in *McConnell*’s section entitled “Issue Advertising.” The Court said that “[b]ecause FECA’s disclosure requirements did not apply to so-called issue ads, sponsors of such ads often used misleading names to conceal their identity.” *McConnell*, 124 S. Ct. at 651. But the disclosure interest plays no part here. WRTL is not challenging the disclaimer and reporting requirements and will comply with them, so the people will know that WRTL paid for the ads. And expenditures for the ads and the donors to WRTL will be revealed at the level at which Congress asserted an interest in disclosure. So there is no reason to require PAC funds for disclosure purposes.

As to source, PAC money cannot be from corporate (or labor union) sources, 2 U.S.C.

§ 441b, and WRTL would have to solicit it only from “members.” 2 U.S.C. § 441b(b)(4)(C). As to amount, PAC money is subject to contribution limits. 2 U.S.C. § 441a. As previously noted, there is nothing inherently corrupting about the use of corporation money for lobbying. Corporations may ordinarily use corporate funds to engage in lobbying. *First National Bank of Boston v. Bellotti*, 435 U.S.765 (1978). And contribution limits on organizations engaged in lobbying to support or oppose ballot measures violate the First Amendment rights of association and expression. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981). And if it is permissible for a corporation to use its own or other corporate money for grass-roots lobbying, there is no justification that solicitations for these corporate funds be only to “members.” So if WRTL’s ads are bona fide grass-roots lobbying, which they are, all concerns that would require the use of PAC funds are eliminated.

2. Alternatively, WRTL May Constitutionally Fund Its Ads With a “Segregated Bank Account.”

WRTL believes it should be free to run these ads with a choice of either its general funds or the use of a “segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) directly to this account for electioneering communications.” 2 U.S.C. § 434(f); 11 C.F.R. § 104.20(c)(7).

But WRTL has plead in the alternative that it is willing to forego the choice of which funds to use and agree to use the segregated bank account if necessary to obtain the injunctive relief it desires. Use of the segregated bank account takes away the possibility of WRTL

using its own corporate fund or donations from corporation or unions for the grass-roots lobbying disbursements, just as using PAC funds would do.

With all concerns about corporate funds removed, that leaves only contribution limits and solicitation from “members” as the bases for requiring the disbursements to be done with PAC funds. But as already noted, if the line drawn by the facts of this case truly identifies grass-roots lobbying, then contribution limits are inappropriate and so is any limitation on raising funds only from its “members.”

But even if there is some residual concern about large contributions in this context that might somehow rise to the level of being compelling, which there is not, the electioneering communication prohibition would still be unconstitutional because it is not a narrowly-tailored solution. The as-applied facts *are* the narrowly tailored solution. WRTL agrees to provide full disclosure as to its sponsorship and funding of the ads under the electioneering communications statutes and regulations. WRTL agrees to provide full disclosure as to the relevant donations and disbursements at the level at which Congress has asserted any disclosure interest. These disclosures will be done quickly, as required, and will be put on the FEC website for the whole world to peruse. If WRTL chooses the general fund route, any corporate donors would be disclosed to the public at the levels required. If WRTL chooses the segregated bank account route, there will be no corporate funds to be concerned about. If full disclosure is made, the people can assign what value is appropriate to WRTL’s communications on the basis of how WRTL funded its communications.

The facts of this case constitute one of the careful lines to be drawn by this Court to protect both the American system of participatory democracy – guaranteed in large part by

the First Amendment protections of speech, association, and petitioning government – and the integrity of our federal election campaigns. *McConnell* focused on “sham issue ads,” which these are not, and it focused on free speech and association rights in the context of political campaigns, which this is not. This case begins the time-honored process of working out the delicate line drawing in the area of core constitutional rights and interests. The line to be drawn here is one careful, measured step beyond *McConnell*’s broad-brush background work. It protects the American system of participatory democracy, at the core of which is the right of the people to petition government officials.

II. WRTL Will Suffer Irreparable Injury Without the Injunction.

WRTL is currently barred by BCRA from engaging in grass-roots lobbying communications that refer to Senator Feingold from August 15, 2004, until November 2, 2004, which is precisely the time when WRTL needs to run its ads encouraging opposition to the filibusters of judicial nominees. Without injunctive and declaratory relief, WRTL’s ability to make these communications will be irreparably lost. Loss of First Amendment rights is automatically irreparable harm. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Therefore, this required element for temporary and preliminary injunctive relief is met.

III. The Injunction Will Not Substantially Injure Others.

WRTL has been freely able to run its ads, and may continue to freely do so up until August 15, without any constitutionally cognizable harm to anyone. On August 15, WRTL may continue to run its ads calling on Sen. Kohl not to filibuster judicial nominees without any cognizable harm to anyone. No harm to Sen. Feingold will magically arise at the stroke

of midnight when August 14 becomes August 15. This is so because WRTL's ads are about Sen. Feingold's job as a Senator, accountable to the people of Wisconsin year-round, and not about his position as a candidate. It is so because rallying constituents on an urgent, important legislative issue is not a harm to a legislator – it is part of his job to be petitioned by the people. It is so because it is part of the American system of participatory democracy. It is so because gagging the people right before vital legislative action is not narrowly tailored to any compelling governmental interest. Therefore, there will be no constitutionally cognizable harm to others if the requested injunctive relief issues.

IV. The Injunction Furthers the Public Interest.

It is clearly in the public interest for Americans to be able to associate in citizen groups, such as WRTL, to more effectively involve themselves in the American system of participatory government by expressing themselves on imminently pending legislative matters and calling on other citizens to petition government officials. It is in the public interest for citizens to know about the issue of judicial confirmations and the ongoing filibustering that is now coming to a head in ways not seen before. Therefore, the requested injunctive relief serves the public interest.

Conclusion

The electioneering communication prohibition is unconstitutional as-applied to WRTL's grass-roots lobbying activities and as-applied to WRTL's broadcast ads found in Exhibits A, B, and C. All the required elements for preliminary injunctive relief are met. This Court should expeditiously grant the requested injunctive relief., assuring it is in place prior to August 15.

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Respectfully submitted,

/s/ M. Miller Baker

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