

United States District Court
District of Columbia

| | |
|--|--|
| <p>Wisconsin Right to Life, Inc., <i>Plaintiff,</i></p> <p>v.</p> <p>Federal Election Commission, <i>Defendant,</i></p> <p><i>and</i></p> <p>Sen. John McCain et al., <i>Intervenor-Defendants.</i></p> | <p>Civil Action No. 04-1260 (DBS, RWR, RJL)</p> <p>THREE-JUDGE COURT</p> <p>Oral Argument Requested</p> |
|--|--|

**WRTL's Memorandum (1) in Opposition to Summary Judgment Motions
of Defendant FEC and Intervenor-Defendants and
(2) in Reply Supporting WRTL's Summary Judgment Motion**

M. Miller Baker, D.C. Bar # 444736
Michael S. Nadel, D.C. Bar # 470144
McDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, D.C. 20005-3096
202/756-8000 telephone
202/756-8087 facsimile
Local Counsel for Plaintiff

James Bopp, Jr., D.C. Bar #CO0041
Richard E. Coleson
Jeffrey P. Gallant
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/234-3685 facsimile
Lead Counsel for Plaintiff

August 4, 2006

Table of Contents

| | |
|--|----|
| Table of Authorities | ii |
| Statement Concerning the Facts | 1 |
| Argument | 18 |
| I. Defendants Seek to Relitigate the Applicable Supreme Court Decisions. | 19 |
| A. Defendants Seek to Relitigate <i>McConnell</i> | 19 |
| 1. <i>McConnell</i> Recognized the Existence of “Genuine Issue Ads.” | 19 |
| 2. <i>McConnell</i> Employed and Requires a “Functional Equivalent” Analysis. ... | 20 |
| 3. <i>McConnell</i> Did Not Say that Genuine Issue Ads or Genuine Grass Roots Lobbying Are the Functional Equivalent of Express Advocacy. | 22 |
| B. Defendants Seek to Relitigate <i>Austin</i> , Which Already Held that Where the PAC Option Is the Only Option Defendants Must Meet the Strict Scrutiny Burden. ... | 23 |
| C. Defendants Seek to Relitigate <i>WRTL</i> , Which Already Rejected the Argument that the Facial Decision Decided Everything. | 24 |
| D. Defendants Seek to Relitigate <i>MCFL</i> , Which Already Rejected Sacrificing First Amendment Liberty to a Bright-Line Test for FEC Convenience. | 25 |
| E. Defendants Seek to Relitigate <i>Buckley</i> , Which Held that Intent and Effect Cannot Be a Standard for Restricting Free Expression. | 26 |
| II. Strict Scrutiny Requires an As-Applied Exception for <i>WRTL</i> ’s Past and Materially Similar Future Ads and Is the Tool for Crafting a General Rule. | 28 |
| A. Strict Scrutiny Reveals that the Prohibition Is Unconstitutional As Applied. | 31 |
| B. Strict Scrutiny Provides the Tool for Constructing a General Rule. | 31 |
| Conclusion | 37 |

Table of Authorities

Cases

**Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990) 17, 18, 23, 24

**Buckley v. Valeo*, 424 U.S. 1 (1976) 18, 20, 26, 28

City of Ladue v. Gilleo, 512 U.S. 43 (1994) 17

Edenfield v. Fane, 507 U.S. 761 (1993) 26

FEC v. Christian Action Network (“CAN”), 894 F. Supp. 946 (W.D. Va. 1995) 27

**FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) 17, 18, 24-26, 31, 32

Florida Star v. B.J. F., 491 U.S. 524 (1989) 17

In re Primus, 436 U.S. 412 (1978) 26

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

Meyer v. Grant, 486 U.S. 414 (1988) 4

Republican Party of Minnesota v. White, 536 U.S. 765 (2002) 17

Riley v. National Federation of the Blind, 487 U.S. 781 (1988) 26

United States v. Robel, 389 U.S. 258 (1967) 26

**Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (2006) (“*WRTL*”). 18, 24, 25, 29

Constitution, Statutes & Rules

11 C.F.R. § 100.29(c) 34

11 C.F.R. § 100.29(b)(2) 36

116 Stat. 91 20

U.S. Const. amend. I *passim*

Other Authorities

67 Fed. Reg. 51131 34

67 Fed. Reg. 65190 34

Robert F. Bauer, *Wisconsin Right to Life in the Supreme Court: The Prospects for Salvaging
“As Applied” Challenges to BCRA*, [http://moresoftmoneyhardlaw.com/articles/
20040913.cfm](http://moresoftmoneyhardlaw.com/articles/20040913.cfm). 22

Statement Concerning the Facts¹

In an apparent effort to paint the anti-filibuster ads as a subterfuge, the FEC mischaracterizes the testimony of Barbara Lyons as to the origin of the idea for its anti-filibustering broadcast ads. It claims that she “was unable to state who originated the idea” for the ads, FEC Mem. 6, when, in fact, she testified that while she could not name the specific *person* with whom the idea of running the ads originated, “the idea was internal to Wisconsin Right to Life.” SUF 263.

Likewise, in an attempt to cast aspersions on the ads, the FEC also claims that Susan Armacost, the Legislative/PAC Director, had no part in WRTL’s 2004 anti-filibuster broadcast ads, FEC Mem. at 7, and, apparently, that the campaign was therefore somehow suspicious. But Mrs. Armacost testified that at the time the broadcast ads were proposed, the legislative department, under her direction and with her personal efforts, had already been e-mailing WRTL supporters, urging them to contact their senators regarding the filibusters of judicial candidates. Deposition of Susan Armacost 104:22-105:18 (Docket # 81-2 116-150 (FEC Exhibit 4)). She also testified that the purpose of the email campaign and the ads were the same, to contact the Wisconsin Senators’ constituents to “urg[e] them to allow an up or down vote on President Bush’s judicial nominees.” *Id.* 108:23-109:11. She saw the ads as a natural result of the WRTL-wide view on the filibuster issue and the ads as a means of reaching the maximum number of people. *Id.* 111:4-8.

¹So as not to burden the Court with needless repetition, WRTL incorporates here by reference the “Case & Facts” statement of its opening memorandum on these cross-motions for summary judgment, WRTL Mem. 1, and supplements that statement herein.

The undisputed facts set out by WRTL are readily sufficient for a grant of summary judgment in WRTL’s favor and a denial of Defendants summary judgment motions. There is no “genuine issue as to any *material fact*,” and WRTL “is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c) (emphasis added). If the Court decides that summary judgment is not possible, WRTL objects to a “paper trial.”

The FEC claims that Barbara Lyons intimated to Jason Vanderground, the account executive at the advertising agency Hanon McKendry, who handled the ads, that “WRTL intended to run advertisements ‘during a certain time when the ads couldn’t run’ and that the planned advertisements would lead to a lawsuit.” FEC Mem. 7 (quoting Vanderground Dep. 41-43). However, the testimony that the FEC cites for this allegation was Mr. Vanderground’s recollection of Mrs. Lyons explaining how the electioneering communication prohibition might affect the broadcast schedule for the ads: “She felt like that she understood that Campaign Finance Reform [sic] said that there was a certain time when the ads couldn’t run” Vanderground Dep. 41:22-42:7 (Docket # 81-2, 151-190 (FEC Exhibit 5)). To Vanderground’s recollection, the point made in Barbara Lyon’s explanation was that WRTL understood that unless an injunction were granted, the ads couldn’t run at a certain time because the electioneering communication prohibition would apply, not that WRTL intended to run them when they were prohibited or wanted to plan the ads’ broadcast to result in a lawsuit. When counsel for the FEC asked Mr. Vanderground, point blank, if Mrs. Lyons “or other people from Wisconsin Right to Life” indicated that she expected the ad campaign to result in a court case, he answered “she told me that she was hopeful that we would be able to continue to running the campaign.” Vanderground Dep. 41:22-42:2. Contrary to the FEC’s characterizations, the record shows that WRTL’s focus was on running the ads effectively and that it was cautiously hopeful that the broadcasts would not have to be interrupted. WRTL’s explanation of the law’s effect was accurate and offering it to the person responsible for the planning and broadcast of the ads was unremarkable. Again, Mr. Vanderground did not understand Mrs. Lyons or anyone at WRTL to communicate or give the impression that the anti-filibuster ads or their broadcast were to be developed in such a way as to lead to a court challenge to the electioneering communication prohibition. *Id.* 43:19-44:19.

The FEC claims that WRTL timed its ads to the Senate election instead of to filibuster votes. FEC Mem. 7. This claim, and its implication that the purpose of the ads was to affect the Senate election, contradicts verified statements made by WRTL in its Verified Complaint and declarations of Barbara Lyons, its executive director. *See, e.g.* SUF 101-105. And the record shows that affecting the Senate election was never communicated to anyone as a purpose of the ads. It would be difficult to time such a complicated campaign to affect the elections if no one involved knew that as its purpose. Jason Vanderground testified that WRTL's initial contact with his agency made clear that it was to be a campaign "addressing the Senate's filibustering of judicial nominees, Vanderground Dep. 38:1, 39:16 and that he never "looked into" the Senate race as part of his research in preparation for the campaign. *Id.* 45:25-46:2. He was never told by WRTL that the ad campaign had any purpose of affecting the Senate race in Wisconsin in 2004, and there was no discussion about what the likely impact of the ad campaign would be on the Senate race in Wisconsin in 2004 – not even an offhand comment anywhere. Vanderground Dep. 63:14-64:2. June Weiss of CDG, who was engaged specifically to raise funds for the ad campaign, testified that WRTL told her that the purpose of the campaign was "to deal with the issue of filibustering," and no candidates were ever mentioned. Deposition of June Weiss 14:10-20; 15 (Docket # 81-2, 191-202 (FEC Exhibit 6)) (no mention of Sen. Feingold's name). When contacting possible donors for the project, Ms. Weiss encouraged them to give for the ad campaign because it "would be in the interest of good government . . . fostering a process or supporting a process that would eventually end up doing away with the filibuster . . . [and for no other reason]." *Id.* 23:11-25. Sue Armacost, the legislative and PAC director, repeatedly testified that the purpose of the anti-filibuster campaign was to inform members and supporters about the filibusters going on in Congress. Armacost Dep. 104:22-105:1, 105:6-7, 108:25-109:11, 109:23-110:5, 110:13-111:3. If

the ads were to affect the Senate election, no one involved was aware of this. Nor did the actual timing of the ads suggest that to be their purpose.

In an effort to show that the ads were timed badly for a grassroots lobbying effort, the FEC mischaracterizes the situation facing organizations wishing to affect the filibuster of federal judiciary nominations and twists the ad agency consultant's view on the preferable timing of the anti-filibuster advertising relative to legislative votes. FEC Mem. 8. But before turning to the details of why the timing was actually good, it is important to note an overarching constitutional principle: "The First Amendment protects [WRTL's] right not only to advocate [its] cause but also to select what [it] believe[s] to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). So even if WRTL's means and scheduling don't make sense to Defendants, WRTL's constitutional rights are not affected by that fact.

**The Anti-Filibuster Ad Campaign Was Geared Toward
Affecting the Senators' Votes in the "Fall Showdown."**

To anyone interested in the issue, the fall of 2004 promised to be the "showdown" over filibustering federal judiciary nominees. In the summer of 2004, the Republican leadership had made another attempt at ending the filibuster of stalled nominations, ending with the twentieth failed attempt. SUF 16. On July 21, 2004, the U.S. Senate failed to garner a three-fifths majority to invoke cloture to close debate and end 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. SUF 17. Senate "Judiciary Chairman Orrin Hatch . . . predicted that the number of Democratic filibusters would hit double digits before the Senate adjourns in the fall" and a Roll Call article predicted "*Fall Showdown Seen on Judges.*" SUF 18. In fact, the number of filibusters hit double digits on

July 22, when three more judicial nominees were denied up-down votes by a Democrat filibuster. SUF 19.

Accordingly, at the time it filed its original complaint, WRTL understood and believed that the Senate Republican leadership planned this predicted “Fall Showdown,” i.e., the leadership intended to bring up for vote additional judicial nominees throughout the fall, and WRTL decided to run ads urging the Wisconsin Senators’ constituents to lobby the Senators to end the filibusters in anticipation of this “Fall Showdown” which, according to WRTL’s best information, was expected to be around September 2004. SUF 101, 222, 223, 230-33, 237-42.

**The Ads Were Produced and Broadcast as Soon as Possible
After WRTL Decided to Run Them.**

The ads were created and broadcast as soon as possible after WRTL decided to run them. Mr. Vanderground, the account executive of the advertising agency hired to create and broadcast the ads, testified that the launch of the anti-filibuster ad campaign was determined in part by the time needed to develop the “on the ground” components of the campaign. SUF 230. Hanon McKendry’s planning of WRTL’s anti-filibuster ads allowed for their creation and airing before the filibuster votes would take place, while, at the same time, because it was large and integrated and scheduled for summer months when necessary personnel had scheduled vacations, it required a relatively long lead time. *See, e.g.* SUF 231. Mr. Vanderground testified that, while ads sometimes can be up and running in two weeks, where the campaign is large and a higher level of quality (higher quality spots, a good strategy, adequate creative development and qualified personnel) is desired (as with WRTL’s August 2004 ads), considerable lead time is required. SUF 232.

While Defendants complain that the ads ran too late, at the same time, the FEC and Intervenors seem to assign an amazing prescience to WRTL when it comes to financing such a campaign. They complain that because “the judicial filibuster issue . . . had been . . . a public issue in Wisconsin since as early as January 2003,” FEC Mem. 23, WRTL should have had PAC funding in place by the summer of 2004. But the relevant time period for fundraising did not begin with January 2003, when the issue appeared on the horizon, but when WRTL *decided to run ads*, which, the record shows, correlated with what everyone thought was to be the “Fall Showdown” of 2004. Given the short time allowed by events, WRTL relied on fundraising from major donors, a prohibited funding source for its federal PAC.²

**August 2004 Was Also an Appropriate Time to Run the Ads
Because Public Interest in Judicial Filibusters was at a Sustained Peak.**

In alleging that the ads were timed badly for a grassroots lobbying effort, the FEC mischaracterizes the ad agency consultant’s view on the preferable timing of advertising urging the public to affect their Senators’ votes on the filibustering of judicial nominations.

As to whether it is important to run grassroots lobbying advertising shortly before legislative votes occur, *see* FEC Mem. 8, Jason Vanderground answered that “[i]t could be . . . [but] [n]ot necessarily.” SUF 260. He explained:

. . . a lot of times you’re timing it more around when the issue has some attention, when it’s a natural time to direct people’s attention to it, and so it would – if it was an issue that was being addressed in the public sector, it would make sense to have the campaign run then irregardless of whether or not there was a specific vote on a specific day or a specific week. . . . We have an issue, people are talking about that issue, and so it makes sense to address that issue right now, and just because an environmental situation may change and then may change and then may change again, that doesn’t necessarily mean that you would completely

²Nor did WRTL believe that it could constitutionally be forced to fund the ads through its federal PAC. Regardless of the legal questions, though, it is simply easier to raise funds for the general fund, in part because it does not labor under the same amount limitations. SUF 80-86.

change what you're doing as a campaign just because one element of that may take a different shape. SUF 261.

See also SUF 233 (the prevalence of the issue at the time was an important consideration in the actual scheduling of the anti-filibuster campaign). *See also* SUF 262 (as an ad consultant, Vanderground considered when the issue "was a topic of significant conversation" in advising when to schedule the ads). According to WRTL's experienced consultant, timing the ads to coincide with already existing public interest was as advisable as timing them to run "shortly before" legislative votes.

And while Sue Armacost, WRTL's on-staff legislative lobbyist, agreed in her deposition with counsel's unremarkable postulation that the grassroots efforts should occur "fairly close in time to when the votes actually would occur" as opposed to *after* those votes, Armacost Dep. 112:14-15, this does not conflict with the view that the timing of the ads should be steered mainly by already-present public interest, as advised by Mr. Vanderground. The record shows that such interest did, in fact, drive the timing of the anti-filibuster ads' broadcast.

From March 2003 to June 2004, when WRTL decided to run the anti-filibuster ads, Senate Democrats had blocked confirmation votes sixteen times, SUF 14, creating strong public interest at this time. And as events unfolded, there was no reason to suppose that public interest had waned, nor, accordingly, to adjust the schedule for the ads. During July and August of 2004, the publicity surrounding judicial filibustering was at a crescendo. The Republican leadership held four votes on stalled nominations between July 20 and 22, ending with the twentieth failed attempt. SUF 16. On July 21, 2004, the U.S. Senate voted 53 to 44 in favor of a motion to invoke cloture, but the motion failed to garner the required three-fifths vote to invoke cloture. SUF 17. The Senate Judiciary Chairman publicly predicted that judicial filibusters would mount before

fall adjournment. SUF 18. Thus, there was no reason to adjust the schedule for the ads and the fact that WRTL did not do so suggests, if anything, only that WRTL took the advice of its advertising agency.

The FEC complains that WRTL did not run anti-filibuster ads in the spring of 2005, when, it opines that “the controversy actually reached its peak.” FEC Mem. 8-9. But, as Barbara Lyons has testified, the debate in the spring of 2005 was whether the Senate leadership could garner enough Republican votes to change the U.S. Senate rules to preclude judicial nominee filibusters, not whether judicial filibusters were good or bad per se or whether the Wisconsin Senators should be supporting them. The FEC’s expert, Charles H. Franklin, III, similarly testified that at that time what “came to a head” was the debate over the use of the so-called nuclear option:

The Republican leadership had signaled clearly that it was ready to bring an end to the democratic filibuster through the so-called nuclear option, to change the rules to require only 51 votes to end debate on judicial nominations. . . . in the March to May time frame, it was clear that it was going to be scheduled. . . . it was clear that it was coming to a head . . .

SUF 255. Thus, the issue was different that it had been in August of 2004. Accordingly, it says nothing about WRTL’s willingness to run ads urging constituents to tell the Senators not to filibuster because the issue was whether the Republicans would vote to change the rules for invoking cloture. And it would have done no good to lobby Wisconsin’s two Democrat Senators to vote that way when no Senate Democrats were voting to change the rules. SUF 21.

This reasoning does not conflict with counsel’s explanation before the Supreme Court in January 2006 as to why the ads were not run after November, when the blackout period no longer prohibited WRTL’s ads, nor Jason Vanderground’s testimony about why WRTL did not run ads again in the spring of 2005, when the FEC says the issue “actually reached its peak.” FEC Mem. 8-9. First, the reasons the FEC lists as given by WRTL and “its agents” are not mutually-

exclusive alternatives. Running anti-filibuster ads in the spring of 2005 would have been inadvisable because it was pointless, as Barbara Lyons testified, *and* because “higher priorities” for WRTL had overtaken the filibuster issue as the FEC claims counsel for WRTL offered at oral argument before the Supreme Court, FEC Mem. 8, *and* because it “arose too fast in the spring of 2005,” as it claims Jason Vanderground testified. FEC Mem. 9. Moreover, when accurately described, the reasons given by Mr. Vanderground and counsel for not running ads in the spring of 2005 and the fall of 2004, respectively, are essentially the same.

The FEC spins Mr. Vanderground’s opinion as to why it may not have been advisable for WRTL to have run ads again in the spring of 2005. Mr. Vanderground testified that he was unfamiliar with “how the judicial scenario developed in the spring of 2005,” Vanderground Dep. 146:1-2, and did not know whether public interest in the judicial filibuster issue had reached a suitable level then to make an ad campaign viable.³ *Id.* 146:3-11. When counsel for the FEC instructed Mr. Vanderground to assume that at that time, “the country was paying . . . *a lot of* attention to the issue,” *id.* 146:12 (emphasis added), Vanderground was still unable to agree that it “would . . . have made sense” to “resurrect” WRTL’s campaign. *Id.* 146: 12-16. When counsel for the FEC offered that the attention the issue garnered in the spring of 2005 *should have* matched that of August of 2004, Vanderground did not agree that it had necessarily reached a comparable crescendo: “It could be. My – my recollection of the situation that you’re describing was that it became an issue, very quickly it heated up, and then there was an agreement, and then it really – *it became an issue with much less focus*, and that the whole scenario happened relatively quickly.” *Id.* 146:23-147:2 (emphasis added). His opinion was that the public interest

³Mr. Vanderground had testified that the level of already-present public interest should be a major consideration in the timing of ads aimed at compelling constituents to contact their legislators regarding an issue before them. *See infra*; Vanderground Dep. 61:23-62:18.

in the issue in the spring of 2005 reached a suitable level only for a very short time, making it a poor candidate for an ad campaign that could take considerable time to mount.⁴ In short, the advertising consultant's opinion, accurately described, was that an ad campaign in the spring of 2005 would not have been advisable because the public interest in the issue of judicial filibusters did not endure at a suitable level.⁵

And the colloquy between WRTL counsel and certain Justices of the Supreme Court in January 2006 about running ads after the November election elicited the same rationale. When asked by Justice Ginsburg why the ads were not run after the election in November, counsel for WRTL explained to the Court that "*the filibuster issue*, as it related to that session of Congress, it was thought that it was going to come to a head in – in October . . . but it did not." Supreme Court Oral Argument Transcript, Jan. 17, 2006 (Docket # 81-2, Exhibit 48) 9:8-12 (emphasis added). Legislative actions are an issue when they are openly and widely debated. Saying that filibusters were an issue is saying that they have created some level of public attention and

⁴It is Mr. Vanderground's testimony that the question of whether and, generally, when to run grassroots lobbying ads is largely decided by whether public interest in the issue they address is sufficient to make them efficacious. Vanderground Dep. 59:15-18; 61:6-8; 61:23-62:18; 91:18-25. Whether those ads and other communications could be assembled and broadcast within the time constraints dictated by the rise and fall of public interest is a separate but important logistical question. *See, e.g.* Vanderground Dep. 88:9-16 (The August 2004 campaign, which was large and integrated and scheduled for summer months when necessary personnel had scheduled vacations, required a relatively long lead time). He testified that while ads can be up and running in two weeks, where, as with the August 2004 ads, the campaign is large and a higher level of quality (higher quality spots, a good strategy, adequate creative development and qualified personnel) is desired, considerable lead time is required. *Id.* 89:17-90:9.

Accordingly, Mr. Vanderground's testimony that the situation that unfolded in the spring of 2005 may not have presented a good opportunity for an ad campaign, even as characterized by the FEC as simply because it "arose too fast," FEC Mem. 9, is no shift from his opinion that public interest should drive plans for grassroots lobbying ads, nor from the reason counsel provided in January 2006.

⁵Not finding his opinion on this to their liking, counsel for the FEC quickly tried to discredit it. *Id.* 147:11-21.

interest. Because the attention and interest did not actually reach critical mass in November 2004, ads would have been less effective and, therefore, less advisable. When Justice Scalia asked why the ads were not continued after November *if it was still an issue*, *id.*, 9:14-16, counsel offered that “each organization has to make an assessment with respect to the different issues that they want to be lobbying on and the – *their pressing nature*.” *Id.* 9:17-20 (emphasis added). Counsel’s explanation was that given the other issues and situations WRTL addresses, after the fall election in November, 2004, the anti-filibuster issue did not have sufficient public interest to justify committing its resources at that time. Likewise, as Mr. Vanderground opined in his testimony, the issue did not have sufficient sustained public interest in the spring of 2005 to make an ad campaign advisable.

Finally, the record shows that when sufficient public interest was sustained long enough to allow preparation time, and its available resources allow, WRTL has run anti-filibustering ads. WRTL ran an anti-filibuster grassroots lobbying ad in January, 2006, when a filibuster of Supreme Court nominee Samuel Alito was threatened. It is the opinion of WRTL and of Barbara Lyons, based on her many years of experience in legislative matters, that the ad affected Senator Kohl’s vote for cloture. SUF 118.

**The Experts’ Testimony About the Effect of WRTL’s Ads
on the Senate Election is Not Credible.**

The FEC takes great pains to shore up its argument that, regardless of WRTL’s “effort to avoid overt electioneering in the actual ad text,” the ads would have had an effect on the 2004 Senate election had they run during the blackout period, relying on the testimony of political consultant Douglas L. Bailey and Charles H. Franklin, III, Ph.D. FEC Mem. 30. However, the testimony of Mr. Bailey and Dr. Franklin is not credible as to what factors in a communication

make it regulable electioneering because their standard for gauging the effect of communications on a candidate election is grossly overbroad and thus conflicts with the constitutional standard of protection afforded speech. *See* WRTL Mem. 41-46.

While Mr. Bailey admits that groups can do grassroots lobbying (which he calls “public lobbying advertising”) when the position of an officeholder is undecided, SUF 164, and that WRTL’s ads were public lobbying advertising, SUF 167, he insists that, because the “Waiting” ad was “presented by an[] organization which . . . ha[d] already stated its opposition to Senator Feingold’s opposition to this,” the ad was a “campaign ad.” SUF 256. As noted in WRTL’s opening memorandum, WRTL Mem. 28, Bailey also found that the six ads found to be genuine issue advocacy in *McConnell* were “all campaign ads” and would “inevitably . . . have some impact, maybe a little, maybe a lot, on an election that is in process, sure.” SUF 158.

Mr. Bailey said that the “Waiting” ad was “obviously” a campaign ad “in terms of its timing, its content and its obvious intent,” SUF 257, despite saying that it did not “promote[] support[], attack[] or oppose[] the candidate Feingold.” SUF 173. Mr. Bailey is of the opinion that “ads that . . . raise issues in relation to candidates are putting in the minds of the voters, candidates and issues which potentially has an impact on elections, so it becomes a campaign ad.” SUF 176.

Mr. Bailey’s opinion bounces from acknowledging genuine grassroots lobbying to disagreeing with the *McConnell* experts about genuine issue ads to applying a context standard of varying breadth to discern effect to merely insisting that he knows a campaign ad when he sees one. But even more troubling is his overarching theory that the *less* a communication is like express advocacy, the more the prohibition on electioneering communications is narrowly tailored to it. SUF 160, 162 (the more “subtle” it is the more effective it is), SUF 259 (the “Waiting” ad is a

more effective campaign ad than the Yellowtail ad because it didn't refer to the character or integrity of Sen. Feingold and referred to a specific issue).

Dr. Franklin admits that from the outset, he “thought that advertising does have effects in campaigns” without reference to any particular advertisement, let alone any specific content. SUF 244. Examination of Dr. Franklin at the deposition also revealed that this predilection hampered/prevented research into and consideration of the ads at issue here or other communications claimed to be grassroots lobbying. In his research for the testimony he now offers, he spent around 100 hours⁶ considering a wide array of contextual information: WRTL's press releases and emails from WRTL to supporters, information on the target audience and the costs of the advertising buys, internal communications about the goals of the advertising, the “history of the Feingold elections” from 1992 to 2004, and news stories about the campaign and about WRTL's “involvement in Wisconsin politics.” SUF 246. Yet he found irrelevant information about ads in other campaigns in which the filibuster debate figured prominently. SUF 247. He also ignored information on ads that ran in the filibuster debate in the spring of 2005 because he thought that “the specific content of the individual ads was irrelevant” for his purposes. SUF 247.

When asked why he did not research grassroots lobbying efforts generally or of WRTL specifically, if (as he admitted) he was aware that WRTL viewed the ads as grassroots lobbying to affect upcoming votes in Congress, he answered: “I saw that as outside of the questions that I was asked to address. I was asked to address the broad role of, or the broad context of the 2004 election and to situate Wisconsin Right to Life within that and within Wisconsin politics.” SUF 248. He did not research the effectiveness of grassroots lobbying ads in affecting Congressional votes, he said, because he was not asked by the FEC to consider that question, but only “the

⁶SUF 245.

effects of advertisements such as the Wisconsin Right to Life advertisements might be expected to have *on an election*.” *Id.* (emphasis added). It should be noted, therefore, that none of his opinion on the effectiveness of advertisements on the election of candidates, Franklin Dep. 76-86, Franklin Decl. 11-29,⁷ is based on examination of grassroots lobbying ads in particular, where the desired effect is a change in a legislator’s vote on a measure before Congress. Dr. Franklin’s report was not reviewed by any peer experts, Franklin Dep. 91:19-21, and he was apparently “guided” in his research in a way that compromised objectivity and tended to result in an opinion coinciding with the FEC’s position.

Yet Dr. Franklin agrees that communications that have three elements – they relate to specific legislation, reflect a point of view on the legislation’s merits, and encourage the general public to contact legislators – “appear within grassroots lobbying,” and offers that a definition should include “efforts to mobilize supporters” and “efforts to persuade the public” on a specific issue as grassroots lobbying as well. SUF 30. He admits, in other words, that grassroots lobbying exists as a discernible form of communication apart from electioneering.

⁷But the lack of research into grassroots lobbying advertisements did not deter Dr. Franklin from offering an opinion on WRTL’s ads any way. He extrapolates the effect of WRTL’s anti-filibuster ads from the findings of studies that did not address ads aimed at affecting legislative votes. Franklin Decl. 29 (“the direct attribution of responsibility for voting on the issue to Senators Feingold and Kohl [in the WRTL ad] parallels the experimental results in which responsibility is primed). And elsewhere he bootstraps a basis for his claims of the effect of the ads: the proposition that “increasing the salience of an issue can . . . increase the constraint among issue perceptions . . .” predicts the effects of WRTL’s anti-filibuster ad because “[e]mpirical evidence of this phenomenon is available which links directly to the substance of [the ad].” *Id.*

After admitting that the studies he consulted did not address grassroots lobbying ads, which he concedes exist, *infra* above, Dr. Franklin opines on the effect of WRTL anti-filibuster ads by looking at other ads and claiming that because he sees a direct link between the “phenomenon” of “increased constraint” and the substance of WRTL’s ads his theory “provides *evidence as to the likely effects* of the WRTL ads.” *Id.* (emphasis added).

But, ultimately, according to Dr. Franklin, the *effect* of grassroots lobbying “would depend in part on the setting and the nature of the effort beyond this.” SUF 249. In his opinion, “one can imagine the same elements being literally present in one context and having a very different impact or effect or purpose than having the same elements in another.” SUF 251. In other words, one must look beyond the content of the advertisement in order to determine whether it has an electoral effect and is, therefore, at least according to the FEC, regulable under the electioneering communication prohibition. But Dr. Franklin’s view of what makes an advertisement electoral, and therefore regulable advocacy, goes far beyond what any court has considered constitutionally permissible.

A fair summary of the report he provided for the FEC in this case is that “the discussion of public policy issues can affect an election,” even if particular candidates or public officials are not identified. SUF 189. Any communication to members of the public through any means can have an effect on an election: telemarketing, phone calls, newspaper advertising, direct mail, web site information, radio and television advertising, even discussions on radio talk shows or news broadcasts, even when not mentioning a candidate or officeholder, can have an electoral impact. SUF 190-193; 200; 252 (“any advertising, whether it’s called grassroots ad or issue ad or electioneering, would have electioneering effects” but “[w]ithout empirical research, it’s difficult to say *how much* [effect] any one of [these communications] would [have].”). According to Dr. Franklin, any of these communications could affect an election, and if it “deals with politically relevant issues [it] need not mention the candidates in order to have an electorally relevant impact.” SUF 193.

Dr. Franklin also believes that the impact of ads on voters depends in large part on characteristics of the voters: their attentiveness to politics and their predispositions, partisan or ideologi-

cal, affect both how exposed they are to advertising and the extent to which they accept the ad's message. SUF 196. Dr. Franklin is of the opinion that if an ad is not countered by an opposing view, it is more likely that its message "will have a net effect on public opinion or vote choice." SUF 243. So under this view, a would-be speaker must ascertain whether his message is opposed adequately in order to gauge whether his communication is electorally effective and therefore regulable. Moreover, because he believes that all communications, regardless of source, affect an election and that the net effect of such communications depends on the "baseline" or "salience" established by earlier communications, SUF 25, Dr. Franklin's standard would require a group to survey the entire field of public communications to ascertain what effect a proposed communication might have. *See, e.g.*, SUF 254 (press releases of state Sen. Welch, comments of two other candidates and the Wisconsin State Republican Chairman, as reported in a news article, made the subject of judicial nominations a "partisan issue.").

The FEC argues that WRTL's ads are constitutionally regulable because they would have had an effect on the 2004 Wisconsin Senate election regardless of whether they are genuine grassroots lobbying. FEC Mem. 18-21. In support, it offers the report of an expert who has testified that the effect of a communication does not depend on its content, its mode, or even the intent of its creator. A sincere intent to affect a policy position can still have an "overt . . . electioneering consequence." SUF 250. A communication has an electoral effect or "electorally relevant impact" whenever it "deals with politically relevant issues." Franklin Dep. 65:7-10. Accordingly, the FEC argues, allowing such communications would "undermin[e] the basic purpose of the electioneering communication restrictions recognized as compelling in *McConnell*." FEC Mem. 19.

WRTL rejects the argument that the First Amendment allows a test that depends on discerning the intent of the speaker or the hearers' subjective judgment about the effect of a communication. *See* WRTL Mem. 40-46. But the FEC's experts go further in their First Amendment incursions: a communication can have an electoral effect regardless of its creator's intent and depending on myriad circumstances of which the speaker may not even be aware (e.g., that another had previously made the issue a "partisan" one). Accepting such a standard to determine the effect and, hence, the regulability of a communication would turn the First Amendment protection of political speech on its head. In the view of Franklin and Bailey, that which affords a communication heightened First Amendment protection, politically relevant content, itself makes the communication electoral and, accordingly, regulable.

Forcing WRTL to fund grassroots lobbying with funds raised under the standards applicable to PACs is a legally cognizable burden on the exercise of First Amendment rights subject to strict scrutiny. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 657-58 (1990); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252-55 (1986) ("*MCFL*"). The interests that the FEC cites as supporting the application of the electioneering communication prohibition to the ads at issue here are "the imperatives of preserving the integrity of candidate elections, preventing corruption of elected officials, and sustaining citizens' active participation and confidence in government." FEC Mem. 18. But if an electoral effect gives rise to those interests, and (as Defendants' experts have testified) virtually any communication addressing an issue of political relevance has an electoral effect, then the electioneering communication prohibition is "woefully underinclusive." *Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002); *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994) (underinclusiveness "diminish[es] the credibility of the government's rationale for restricting speech"); *Florida Star v. B.J. F.*, 491 U.S. 524,

541-542 (1989) (Scalia, J., concurring in judgment) (“[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited” (internal quotation marks and citation omitted)).⁸

Argument⁹

In their opening/opposition memoranda, Defendants try to relitigate all of the applicable United States Supreme Court decisions – *McConnell*,¹⁰ *Austin*,¹¹ *WRTL*,¹² *MCFL*,¹³ and *Buckley*.¹⁴ Parts I addresses these flawed attempts seriatim. Part II summarizes why strict scrutiny both (A)

⁸Contrary to the FEC’s representation that *McConnell* has already decided that there is no underinclusiveness, FEC Mem. 21 n.6, examination of *McConnell* reveals that the Supreme Court only decided that there was no underinclusiveness “because [the prohibition] does not apply to advertising in the print media or on the Internet.” 540 U.S. at 207. The Court also decided that the prohibition did not “unconstitutionally discriminate[] in favor of media companies,” but this was not styled as an underinclusiveness analysis. *Id.* at 208. The position of Defendants’ experts is much broader than the narrow underinclusiveness claim ruled on in *McConnell*, so that an underinclusiveness claim such as *WRTL* presently makes was plainly not ruled upon.

⁹To avoid burdening the Court with needless repetition, Wisconsin Right to Life (“*WRTL*”) incorporates by reference the arguments made in its opening memorandum in support of summary judgment (Docket #76) in opposing Defendants’ present motions and asks the Court to consider all of its briefing on the cross-motions for summary judgment together. In addition, some arguments have been included where relevant in the preceding Statement Concerning the Facts and will not necessarily be repeated.

¹⁰*McConnell v. FEC*, 540 U.S. 93 (2003).

¹¹*Austin*, 494 U.S. 652.

¹²*Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (2006).

¹³*MCFL*, 479 U.S. 238.

¹⁴*Buckley v. Valeo*, 424 U.S. 1 (1976).

reveals that an exception for WRTL's past and materially similar future ads is constitutionally mandated and (B) provides the tool for crafting a general rule.

I. Defendants Seek to Relitigate the Applicable Supreme Court Decisions.

Applicable Supreme Court precedents govern this case and determine an outcome in favor of WRTL. But Defendants attack stare decisis by attempting to relitigate these cases here.

A. Defendants Seek to Relitigate *McConnell*.

The first decision that Defendants attempt to relitigate is *McConnell*.

1. *McConnell* Recognized the Existence of "Genuine Issue Ads."

As set out in WRTL's opening memorandum, (a) there is a distinction between genuine grassroots lobbying and electioneering; (b) the term "genuine issue ad" was a term of art in the *McConnell* litigation for a type of advertisement that is distinguishable from "sham issue ads"; and (c) genuine grassroots lobbying ads are "genuine issue ads," not "sham issue ads. WRTL Mem. 22-33.¹⁵ So when the Supreme Court plainly recognized the existence of "genuine issue ads" in *McConnell*, by stating that "we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," 540 U.S. at 206 n.88, that statement had a specific meaning and context in the expert testimony, arguments, and decisions in that case. It also means that *McConnell* may not be employed as authority for the proposition that there is no such thing as a "genuine issue ad." Rather, the purpose of the present remand is to apply the recognized concept of "genuine issue ad" to WRTL's past and materially similar future ads and to a general rule governing grassroots lobbying. In other words, are WRTL's ads within this recognized class of "genuine issue ads" and how may the people's rights

¹⁵These genuine issue ads do not implicate *McConnell*'s concerns. WRTL Mem. 34-35, and residual concerns can be eliminated by the less-restrictive, more narrowly tailored alternative of a segregated bank account to which corporations could not donate. WRTL Mem. 36-38.

to self-government, petition, expression, and association best be protected by a general rule assuring that their grassroots lobbying communications are within this recognized category of “genuine issue ads”?

Defendants try to pretend that the Supreme Court in *McConnell* never recognized that there are “genuine issue ads” and that the analysis of *McConnell* somehow precludes the possibility of “genuine issue ads.” But *McConnell* has already recognized that a category of communications called “genuine issue ads” exists, and Defendants may not relitigate *McConnell* in this case.

2. *McConnell* Employed and Requires a “Functional Equivalent” Analysis.

Defendants also try diligently to avoid the holding of *McConnell* that the electioneering communication prohibition¹⁶ survived strict scrutiny only “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.” 540 U.S. at 206. Instead, Defendants try to rely on the next sentence which speaks of “intent and effect.” *Id.* But the reference to “intent and effect” is merely a description of those ads proven in *McConnell* to be “the functional equivalent of express advocacy,” which the Court said it assumed excluded “genuine issue ads.” 540 U.S. at 206 n.88. And as discussed below in Part I.E., *McConnell*’s mention of “intent and effect” must be understood in the context of a prior holding of the Court (*Buckley*), which *McConnell* did not purport to reverse (rather the Court took care to work within its framework) and which expressly held that free expression cannot be subjected to an intent and effect test.

¹⁶In *McConnell*, the Supreme Court expressly referred to the ban on electioneering communications as a “prohibition,” 540 U.S. at 203, as did Congress, 116 Stat. 91 (BCRA § 203), so referring to the ban as a “prohibition” is correct, even though a PAC alternative may exist for some organizations (although it is an inadequate alternative in many factual situations, such as the present one, and nonprofit corporations organized under IRC § 501(c)(3) may not even have a PAC).

Defendants also attempt to dodge their strict scrutiny burden by asserting that *McConnell*'s "in the future" statement¹⁷ was really in the nature of explaining how corporations could obtain an exception to disclosure requirements as in those approved situations where disclosure would result in harassment and harm to donors. *See, e.g.*, FEC Mem. 15. But this is belied by simply examining the first part of the sentence, which states: "Moreover, whatever the precise *percentage* may have been in the past" 540 U.S. at 206 (emphasis added). This relates to the Court's earlier statement about the substantiality of the overbreadth: "The precise *percentage* of issue ads that clearly identified a candidate and were aired during those relatively brief preelection time spans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court." *Id.* (emphasis added). It relates to the Court's holding on substantiality which comes between these two sentences: "Nevertheless, the *vast majority* of ads clearly had such a purpose." *Id.* (emphasis added). All of these statements relate to the conclusion that immediately follows to the effect that the *McConnell* plaintiffs had not met their burden of proving substantial overbreadth under First Amendment facial challenge jurisprudence. This conclusively demonstrates that the Court was simply doing substantial overbreadth analysis and demonstrating that the overbreadth was not sufficiently substantial to strike the prohibition on its face when it spoke of "in the future" and was not sub silentio carving out a new rule that flies in the face of all First Amendment jurisprudence. In any event, WRTL's ads do not fall into the "doubtful" category at all, so the PAC option is not appropriate for them.¹⁸

¹⁷"Moreover, whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *McConnell*, 540 U.S. at 206.

¹⁸The sort of grass-roots lobbying ads proposed here would not fall into the category of "doubtful" because they in no way promote, support, attack, or oppose a candidate. There are

So *McConnell* required Defendants to meet the strict-scrutiny burden of proving that the electioneering communication prohibition is narrowly tailored to asserted compelling interests as applied to the sort of grassroots lobbying ads at issue herein by proving that WRTL's past and materially similar future ads, as well as genuine grassroots lobbying under a general rule, are the functional equivalent of express advocacy. Defendants may not relitigate *McConnell* here.

3. *McConnell* Did Not Say that Genuine Issue Ads or Genuine Grass Roots Lobbying Are the Functional Equivalent of Express Advocacy.

Nowhere in *McConnell* did the Supreme Court say that "genuine issue ads" are the functional equivalent of express advocacy. Rather, the Court expressly said that it assumed the opposite. 540 U.S. at 206 n.88. As explained in WRTL's opening memorandum, the recognized class of "genuine issue ads" in the *McConnell* litigation referred to a specific record that included genuine grassroots lobbying and throughout the litigation genuine grassroots lobbying was considered different in kind from electioneering. WRTL Mem. 28-33. Defendants' efforts to say that the Supreme Court already held that genuine grassroots lobbying may be prohibited because such communications were argued in the *McConnell* litigation is without merit because

conceptually three types of "genuine issue ads":

1. genuine issue ads that omit reference to a federal candidate, and thus present no problem under the electioneering communication provision.
2. genuine issue ads that include a reference but also present no problem – for example, because they contain no words that could conceivably be construed to involve "promoting, supporting, attacking, or opposing a federal candidate."
3. genuine issue ads that include such a reference but raise some question of how they might be read: i.e., those making up the "doubtful cases." In this last case, laboring under this doubt, the organization might pay for the ad with a PAC.

Robert F. Bauer, *Wisconsin Right to Life in the Supreme Court: The Prospects for Salvaging "As Applied" Challenges to BCRA*, <http://moresoftmoneyhardlaw.com/articles/20040913.cfm> (*More Soft Money Hard Law Web Updates*) (visited Feb. 16, 2005).]

The "doubtful" category is third in this list, but WRTL's ads fall into the second category.

McConnell was decided on a substantial overbreadth analysis, which expressly left open for another day the issue of “genuine issue ads,” 540 U.S. 206 n.88, which included in the *McConnell* record genuine grassroots lobbying. Defendants may not relitigate *McConnell* here. Moreover, as noted in Part I.C, it would be more than strange for the Supreme Court to remand the present case to this Court to consider “in the first instance” the as-applied challenge if that as-applied challenge had already been decided in *McConnell*.

B. Defendants Seek to Relitigate *Austin*, Which Already Held that Where the PAC Option Is the Only Option Defendants Must Meet the Strict Scrutiny Burden.

The central core of Defendants’ analysis is an effort to dodge strict scrutiny and lift from their shoulders the burden of proof to justify the prohibition as applied to the form of “genuine issue ad” known as grassroots lobbying. Instead they insist that WRTL has the burden of proving that the PAC alternative is insufficient. In so doing they attempt to relitigate *McConnell*, which employed a strict-scrutiny, substantial-overbreadth analysis in that facial challenge, 540 U.S. at 205-06, and *Austin*. 494 U.S. 652. As set out in WRTL’s opening brief, WRTL Mem. 48, *Austin* plainly held that where the PAC alternative is required, the government has the burden to justify such a burden under strict scrutiny, even if the organization’s PAC has substantial funds¹⁹:

These [PAC compliance] hurdles “impose[d] administrative costs that many small entities [might] be unable to bear” and “create[d] a disincentive for such

¹⁹Note that even though the Chamber had substantial PAC funds available, the Supreme Court did not say it should just use those funds. Instead the Court engaged in strict scrutiny as to whether the Chamber was constitutionally *required* to use those funds. This completely undercuts Defendants’ argument that a corporation must prove that the PAC option is inadequate. In the present case, the fact that WRTL did not have PAC funds available and had inadequate time to raise much PAC money after deciding in June 2004 to run its anti-filibuster ads before the “Fall Showdown” merely shows the inadequacy of the PAC option in application. Debate over available PAC money or efforts to obtain it is no substitute for the required strict scrutiny as to whether Congress could constitutionally *require* WRTL to use PAC money for its genuine grassroots lobbying.

organizations to engage in political speech.” Ibid; see also *id.*, at 265-266 (O’CONNOR, J.).

Despite the Chamber’s success in administering its separate political fund, see, *e.g.*, Tr. 443 (Chamber expected to have over \$140,000 in its segregated fund available for use in the 1986 elections), Michigan’s segregated fund requirement still burdens the Chamber’s exercise of expression because “the corporation is *not* free to use its general funds for campaign advocacy purposes.” MCFL, 479 U.S., at 252 (plurality opinion). The Act imposes requirements similar to those in the federal statute involved in MCFL: a segregated fund must have a treasurer, § 169.221; and its administrators must keep detailed accounts of contributions, § 169.224, and file with state officials a statement of organization, *ibid*. In addition, a nonprofit corporation like the Chamber may solicit contributions to its political fund only from members, stockholders of members, officers or directors of members, and the spouses of any of these persons. § 169.255. Although these requirements do not stifle corporate speech entirely, they do burden expressive activity. See MCFL, 479 U.S., at 252 (plurality opinion); *id.*, at 266 (O’CONNOR, J.). Thus, they must be justified by a compelling state interest.

Austin, 494 U.S. at 658 (emphasis in original). The Supreme Court in *Austin* did not shift the burden to the Chamber to show that the PAC option was inadequate, and *McConnell* did not overrule *Austin* in any way. The burden is not on WRTL to prove the PAC option and other alternatives are inadequate. Rather, the strict scrutiny burden is on Defendants to provide a strict-scrutiny justification of the prohibition as applied to genuine grassroots lobbying.

Defendants must not be permitted to relitigate both *McConnell* and *Austin* in the present case. Moreover, as set out in Part II below, Defendants’ effort to avoid their strict scrutiny burden is telling because it is an implicit concession that they could not meet the burden if they had attempted it.

C. Defendants Seek to Relitigate *WRTL*, Which Already Rejected the Argument that the Facial Decision Decided Everything.

Defendants’ continued effort to argue in several ways that *McConnell* somehow already resolved the present as-applied challenge is a clear effort to relitigate *WRTL*, 126 S. Ct. 1016, which effort must be rejected. If *McConnell* precluded the present as-applied challenge – *e.g.*, by

requiring a bright-line rule, or by holding that it is impossible to distinguish genuine issue ads from sham issue ads, or by already ruling on grassroots lobbying because it was raised in that facial-challenge litigation, or by holding that the PAC option (or avoiding the prohibition periods, broadcast media, or naming a candidate) was sufficient, or that any communication that somehow might affect an election may be prohibited – then there would have been no remand. Defendants have already lost the argument that *McConnell* precludes this as applied challenge, and their effort to relitigate their loss in *WRTL* is another concession of the weakness of their strict scrutiny justification of the prohibition as applied to genuine grassroots lobbying.

D. Defendants Seek to Relitigate *MCFL*, Which Already Rejected Sacrificing First Amendment Liberty to a Bright-Line Test for FEC Convenience.

Defendants' insistence that there can be no exception for genuine grassroots lobbying to the electioneering communication prohibition because of the need for a bright-line rule not only attempts to relitigate *WRTL* (which necessarily rejected the argument), but it also seeks to relitigate *MCFL*. 479 U.S. 238. As noted in *WRTL*'s opening brief, *WRTL* Mem. 35, the Supreme Court has already held that strict scrutiny, not prophylactic bright-line rules, must govern any restriction on the rights of the people to engage in self-government by employing their free expression and association rights:

[t]he rationale for restricting core political speech in this case is simply the desire for a bright-line rule. This hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom. While the burden on *MCFL*'s speech is not insurmountable, we cannot permit it to be imposed without a constitutionally adequate justification. In so holding, we do not assume a legislative role, but fulfill our judicial duty – to enforce the demands of the Constitution.

MCFL, 479 U.S. at 263 (emphasis in original). Strict scrutiny’s narrow tailoring requirement is the very antithesis of prophylaxis.²⁰ The Supreme Court’s holding in *MCFL* is directly on point as to the requirement of a PAC option where there is already full disclosure (WRTL does not challenge the electioneering communication disclosure requirements, only the prohibition) in the context of the regulation of express advocacy, and the Supreme Court required strict scrutiny and rejected the FEC’s argument for a prophylactic bright line. Defendants may not relitigate that controlling precedent.

E. Defendants Seek to Relitigate *Buckley*, Which Held that Intent and Effect Cannot Be a Standard for Restricting Free Expression.

Defendants also seek to relitigate *Buckley* by an insistence on an intent and effect analysis in place of *McConnell*’s actual use of a strict scrutiny analysis requiring the “functional equivalent of express advocacy.” As noted in WRTL’s opening memorandum, the Supreme Court has squarely rejected an intent and effect test in the campaign finance restriction context. WRTL Mem. 42-43. Thus, *McConnell*’s language must be interpreted in light of this clear, on-point holding of the Supreme Court excluding intent and effect as elements of any test for permissible

²⁰The Supreme Court has recently reiterated that narrow tailoring excludes prophylaxis:

[N]arrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored. *E.g.*, *Consolidated Edison Co.*, 447 U.S. at 537-38. “Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” *NAACP*, 371 U.S. at 438 (citations omitted).

Riley v. National Federation of the Blind, 487 U.S. 781, 801 (1988). *See also In re Primus*, 436 U.S. 412, 432-33 (1978) (cautioning that “First Amendment freedoms need breathing space to survive, [and] government may regulate in [this] area only with narrow specificity”); *Edenfield v. Fane*, 507 U.S. 761, 777 (1993); *United States v. Robel*, 389 U.S. 258, 266 (1967). Defendants’ reliance on cases governing abortion and lawyer advertising do not displace the directly on-point holding of *MCFL* and the interests asserted in those types of cases pale in comparison to the peoples’ fundamental self-government right of petition at issue in the present case.

restrictions on free expression. Similarly, under the right to petition, the Supreme Court has rejected any intent test unless there is no genuine effort to employ the right to petition. WRTL Mem. 43-46.²¹ Defendants may not relitigate these binding precedents here.²²

In any event, as noted in the factual discussion, *supra*, and in WRTL's opening memorandum, WRTL Mem. 27-28, the prohibition must be held unconstitutionally underinclusive if the proper test is whether there might be some potential, remote effect on an election because (as Defendants' own experts say) there are many things that might affect an election, and so the failure to regulate them all undercuts the government's asserted interest in regulating things that might affect elections.

Finally, the sort of reliance on experts to establish intent and effect that Defendants advance here has been rejected, in a case involving the FEC, by another federal court. In *FEC v. Christian Action Network* ("CAN"), 894 F. Supp. 946 (W.D. Va. 1995), the FEC called in experts in attempt to prove that a CAN communication was actually express advocacy. The FEC and its experts argued that all of CAN's communications must be viewed together, that not only the

²¹Defendants' response to the constitutional force of the right to petition in the present analysis, as developed from the case law, is woefully inadequate and unpersuasive. For example, the FEC argues that "the Sherman Act" is for the business world, not the political arena. FEC Mem. 17. But the *right to petition* is at issue, not "*the Sherman Act*," and the right to petition is at the very core of self-government by the people and of our system of *representative* government. Defendants are unable to alter the controlling fact that in whatever context the right to petition has arisen (even the business-world, Sherman-Act context) it has received extraordinarily high protection because of its foundational importance to our system of government.

²²Even if an "intent" element were a proper part of the strict scrutiny analysis, the FEC conceded before the Supreme Court that the electioneering communication definition "correlates *closely*, though admittedly *not precisely*, with intent to influence elections." Brief for the Appellee at 15. Narrow tailoring mandates "precisely," not just "closely." (A copy of the FEC's brief before the Supreme Court is available at the James Madison Center website, <http://www.jamesmadisoncenter.org/>, under the tab entitled "Wisconsin Right to Life's McCain-Feingold Challenge." The brief is absent from LexisNexis and the Supreme Court's online collection of briefs in cases before it (provided by the ABA).)

words of the communication at issue but a broad context of factors must be considered in determining express advocacy, and that an expert could ferret out the elusive express advocacy – the sort of arguments advanced in the present case by Defendants. The district court responded:

The court finds the expert’s analysis unpersuasive for several reasons. First the fact that an expert was needed to enlighten the court on the message conveyed by the communications strongly suggests that they did not directly exhort the public to vote. Second, the concepts used by the FEC’s expert contradict his claim that a clear message was conveyed. For example, the term “codeword” cannot, by its very definition, be said to express a direct message. Lastly, nowhere in the expert’s analysis does he state the *legal* standard or test on which he basis his opinion that the ads constituted “express advocacy.”

CAN, 894 F. Supp. at 956 n.14 (emphasis in original). The court noted that *Buckley* had rejected an approach to regulating free expression that depended on the variety of meanings that an audience might place on a communication. *Id.* at 957. And the court concluded, as should the present Court, that “[w]hile the approach . . . proposed by the Commission is resourceful, the court cannot accept it.” *Id.*

II. Strict Scrutiny Requires an As-Applied Exception for WRTL’s Past and Materially Similar Future Ads and Is the Tool for Crafting a General Rule.

WRTL’s brief before the Supreme Court in this case contained two issues. That Court’s disposition of the first issue, in the face of arguments that Defendants attempt to relitigate here, resolves most of Defendants’ present arguments. And the Supreme Court’s remand instruction as to the second issue eliminates the remainder of Defendants’ arguments.

The first issue before the Supreme Court was as follows:

1. Whether as-applied challenges are permitted to the prohibition on corporate disbursements for electioneering communications at 2 U.S.C. § 441b after *McConnell v. FEC*, 540 U.S. 93 (2003).

Brief for Appellant at i (available at 2006 U.S. S. Ct. Briefs LEXIS, 2004 U.S. Briefs 1581, and online at http://www.abanet.org/publiced/preview/briefs/pdfs/05-06/04-1581_Petitioner.pdf).

The Supreme Court quickly decided the first issue, holding unanimously that *McConnell* did not preclude the present challenge seeking recognition of constitutional protection for genuine grassroots lobbying. *WRTL*, 126 S. Ct. 1016. In doing so, the Supreme Court rejected several arguments that will sound familiar from their attempted relitigation in the present briefing. The FEC argued to the Supreme Court that the present challenge must be rejected because of the need for a prophylactic, bright-line approach. *See* Brief for the Appellee at III, 14-15, 17-25. It argued that

appellant has made no effort to articulate an objective and determinate standard for identifying those advertisers or advertisements as to which the BCRA financing restrictions are unconstitutional. . . . [A]ppellant’s ad hoc approach would require the sort of formless and unpredictable inquiry into a corporate advertiser’s subjective purpose that Congress and this Court have sought to avoid. In addition, it would invite fact-intensive litigation and would require federal courts to parse the content of political advertisements and assess the likely intent of the political advertisers in preliminary-injunction or temporary-restraining-order hearings conducted on the eve of federal elections.

Brief for Appellee at 15. It argued that a grassroots lobbying ad “may be intended to induce citizens both to contact their elected representatives and to vote in a particular manner.” Brief for Appellee at 16. It argued that “a group that feels strongly enough about an issue to air an advertisement on it in the months before an election – particularly a group, such as appellant, that has publicly opposed a candidate mentioned in its advertisements [citation omitted] – will invariably have a view as to which candidates may be more favorably disposed to the group’s point of view.” Brief for Appellee at 16. And it argued that even a genuine grassroots lobbying ad may be barred if it otherwise qualifies as an electioneering communication because it “is likely to have a significant *effect* on voting behavior.” Brief for Appellee at 38 (emphasis in original). But none of these arguments were persuasive to the Supreme Court as reasons not to recognize

constitutional protection for an exception for genuine grassroots lobbying to the electioneering communication prohibition. Nor should they be considered by this Court.

The Supreme Court then remanded this case for this Court “to consider *the merits* of WRTL’s as-applied challenge in the first instance.” 126 S. Ct. at 1018 (emphasis added). The merits issue was the second question presented, which was stated as follows:

2. If so, whether the prohibition on electioneering communications is unconstitutional as applied to the facts of this case, and particularly
 - (a) the three specific grassroots lobbying broadcast communications sponsored by Wisconsin Right to Life, Inc. here and/or
 - (b) grassroots lobbying communications generally,with any communications to be funded either from a general corporate account, or, alternatively, from a separate bank account to which only qualified individuals may donate, as defined in 2 U.S.C. § 434(f)(2)(E).

Brief for Appellant at i. The remand instruction is to decide “the merits,” not to reconsider arguments as to why exceptions may not be permitted that have already been rejected.²³ The remand is to give this Court the opportunity to assist the Supreme Court by first doing the required strict scrutiny analysis to see if the government has met its strict scrutiny burden. In other words, whether, as applied to WRTL’s past and materially similar future grassroots lobbying, the prohibition is the least restrictive means and is narrowly tailored to a compelling governmental interest. Second, this Court is provided the opportunity to assist the Supreme Court by employing strict scrutiny to consider what elements are essential to a general rule distinguish-

²³Intervenor-Defendants have argued both mootness and lack of ripeness, which do not correlate with the Supreme Court’s instruction to decide “the merits.” In fact, WRTL briefed in the Supreme Court the fact that this case was not moot due to the exception to the mootness doctrine for cases capable of repetition yet evading review, so that issue was before the Court. Jurisdictional Statement 7 (available online at <http://www.jamesmadisoncenter.org/> under the tab entitled “Wisconsin Right to Life’s McCain-Feingold Challenge.”). The exception to the mootness doctrine would cease to exist if all cases within the exception were removed from the exception by being then considered unripe. The present case is neither moot nor unripe.

ing and permitting grassroots lobbying in a way that will protect the people's liberty, protect the integrity of the electoral process, and promote judicial economy.

A. Strict Scrutiny Reveals that the Prohibition Is Unconstitutional As Applied.

Instead of joining debate on the remand assignment “to consider the merits of WRTL’s as-applied challenge,” which required Defendants to join issue on the sort of specific factors that would be required in making a grassroots lobbying exception narrowly tailored, Defendants have instead tried every way possible to avoid strict scrutiny and the burden that properly belongs on their shoulders. Consequently, they have not carried their strict scrutiny burden of proving narrow tailoring for the reasons set out herein and in WRTL’s opening memorandum. This Court should declare the prohibition unconstitutional as applied to WRTL’s past and materially similar future communications and issue an appropriate injunction. But the Court ought to go further. It should follow the Supreme Court’s example and summarize its strict scrutiny analysis in the form of a general rule.

B. Strict Scrutiny Provides the Tool for Constructing a General Rule.

In *MCFL*, after engaging in a strict-scrutiny analysis of whether the kind of nonprofit corporations now known as *MCFL* corporations could be required to employ the PAC option when they wished to make express-advocacy “independent expenditures for communications, the Supreme Court provided a great service to the regulated ideological advocacy community by restating its analysis in the form of a general rule. It summed up as follows: “In particular, *MCFL* has three features essential to our holding that it may not constitutionally be bound by § 441b’s restriction on independent spending.” 479 U.S. at 263-64. The Court listed the three features, with a brief recap of why those features made asserted governmental interests not constitutionally cognizable.

This Court would provide a great service to the Supreme Court, which may well consider this case next, and the people, whose citizen watchdog groups look to this case for guidance, by similarly summarizing its strict scrutiny analysis as a general rule. Because WRTL urged before the Supreme Court the need for a rule of general application, it is likely that the Supreme Court had in mind that this Court would assist it in creating such a rule when it remanded with instructions “to consider the merits of WRTL’s as-applied challenge in the first instance.” *WRTL*, 126 S. Ct. at 1018. The required strict scrutiny is the appropriate tool for fashioning such a rule. Just as the Supreme Court did in *MCFL*, this Court may create a rule by simply summarizing which factors are essential to recognition of an exception for genuine grassroots lobbying. Instead of focusing on the nature of WRTL, this Court would instead state that WRTL’s advertisements have certain features that are essential to the holding that WRTL may not constitutionally be bound by § 441b’s restriction on electioneering communications when making such communications. Then it would list those essential features of the ads, along with a brief explanation of why those features eliminate any cognizable government interest in restricting such communications.

In its strict-scrutiny analysis, the Court should be guided not only by the particular facts of WRTL’s ads, but also by prior efforts to state a rule that takes into account the appropriate constitutional considerations. WRTL suggested a general rule in its reply brief before the Supreme Court, but the Court asked this Court to first consider such a merits question.²⁴ It

²⁴Before the Supreme Court, **WRTL proposed the following description** of an appropriate general rule:

Preliminarily, WRTL has never proposed a test based on the unique “details of WRTL’s broadcast ads,” WRTL Br. 4 n.4, so the FEC’s claim, FEC Br. 15, that WRTL proposes a “16-factor test” is wrong. Rather, WRTL cited the IRS definition of “grass roots lobbying communication,” which is “any attempt to

permits the clear identification of the candidate by name and contains elements that (1) make the communication grassroots lobbying and (2) limit electoral concerns. Some of the intervening Defendants herein suggested a rule to the FEC as part of an earlier FEC rulemaking (which yielded no exception for grassroots lobbying) that permitted a corporation to clearly identify, but not name, the incumbent targeted by the grassroots lobbying communication.²⁵ What the FEC itself has proposed as options for a rule permitting grassroots lobbying exception is instructive.

influence any legislation through an attempt to affect the opinions of the general public or any segment thereof” and has three “required elements”: (1) “refers to specific legislation,” (2) “reflects a view on such legislation,” and (3) “encourages the recipient of the communication to take some action with respect to such legislation.” 26 C.F.R. § 56.4911-2(b)(2)(i)-(ii). Since a general grassroots lobbying exception should apply to both legislative and executive branch actions, this should be made clear in any rule. Further, to prevent any risk of an attempt to influence an election, a grassroots lobbying communication should not mention the pending election, the incumbent politician’s candidacy, or the identity of any challenger. This would provide a workable definition for grassroots lobbying and avoid *McConnell*’s concerns about “sham issue ads.”

Reply Brief for Appellant at 18-19 (available at 2004 U.S. Briefs 1581, 2006 U.S. S. Ct. Briefs LEXIS 130, and online at http://www.abanet.org/publiced/preview/briefs/pdfs/05-06/04-1581_AppellantReply.pdf).

²⁵The **rule proposed by Sen. McCain**, Sen. Feingold, et al. is set out with citation in WRTL’s opening memorandum, WRTL Mem. 25 n.11, and is reproduced here for convenience:

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; and (iii) the communication refers to the candidate only by use of the term “Your Congressman,” “Your Senator,” “Your Member of Congress” or a similar reference and 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.

See 67 Fed. Reg. 51131 (Aug. 7, 2002) (Notice of Proposed Rulemaking), 67 Fed. Reg. 65190 (Oct. 23, 2002) (final rules explaining that there was no grassroots lobbying exception). Another rule has been set before the FEC more recently by a broad-spectrum coalition requesting an expedited rulemaking.²⁶ WRTL does not believe that this latter rules permits as much as the Constitution would permit, but believes it is a very good rule (and even offered to settle the case on the basis of this rule).²⁷

²⁶The **rule proposed by the broad-spectrum coalition** is set out with citation in WRTL's opening memorandum, WRTL Mem. 25 n.10, and is reproduced here for convenience. The petition sought an expedited rulemaking

to revise 11 C.F.R. 100.29(c) to exempt from the definition of "electioneering communication" certain "grassroots lobbying" communications that reflect all of the following principles: 1. The "clearly identified federal candidate" is an incumbent public officeholder; 2. The communication exclusively discusses a particular current legislative or executive branch matter; 3. The communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so; 4. If the communication discusses the candidate's position or record on the matter, it does so only by quoting the candidate's own public statements or reciting the candidate's official action, such as a vote, on the matter; 5. The communication does not refer to an election, the candidate's candidacy, or a political party; and 6. The communication does not refer to the candidate's character, qualifications or fitness for office.

²⁷On August 3, 2006, FEC Commissioner von Spakovsky circulated a proposed interim final rule largely incorporating the broad-spectrum coalition's rule, but adding an element that would require that the communication not promote, attack, support, or oppose ("PASO") the named candidate in the grassroots lobbying communication. (The document is available on the FEC's website at <http://www.fec.gov/agenda/2006/mtgdoc06-53.pdf>.) However, no PASO element should be included in a general rule because (a) if the communication meets the other elements, it would already not PASO the candidate, so the PASO element is superfluous, and (b) the PASO test introduces an element of vagueness and uncertainty, especially in light of the FEC's extreme arguments in the present case that WRTL's ads, which are objectively non-PASO communications, are really about opposing Sen. Feingold and supporting his opponents and in light of the FEC's position that it can engage in oppressive, chilling investigations into all of an organization's activities in order to determine whether a communication is a PASO communication under its broad "intent and effect" theory.

These proposed rules for a general exception contain different elements. What this Court should do is to consider whether Defendants have met their burden of proving that the prohibition is narrowly tailored to a compelling governmental interest as to a grassroots lobbying communication that meets the described criteria.

For example, the broad-spectrum coalition proposed rule contains the following elements: (1) target is incumbent, (2) only subject is current legislative/executive matter, (3) asks incumbent to take position or asks public to ask incumbent to take position, (4) may recite official action or quote candidate's publicly-stated position, (5) no reference to election, candidacy, or political party, and (6) no reference to incumbent's character, qualifications, or fitness for office. The strict scrutiny analytical question is whether Defendants have met the burden of proving that the prohibition is narrowly tailored to any cognizable compelling constitutional interest as applied to a communication fitting these elements.

The WRTL proposal in the Supreme Court similarly begins by limiting the communication to the scope of grassroots lobbying, employing an existing IRS definition, and then prevents any risk of an attempt to influence an election by eliminating any mention of the pending election, the incumbent politician's candidacy, or the identity of any challenger. This proposal permits more discussion of the position of the incumbent on the issue, although the ads that WRTL has done don't actually state the position of either the candidate or non-candidate on the issue. Again, the strict scrutiny analysis should ask whether Defendants have meet their burden as to this difference.

The rule proposed by Sen. McCain and other prime BCRA sponsors would, inter alia, permit grassroots lobbying that said something like "call Senator Kohl and your other Senator" but not

“call Senators Kohl and Feingold.” *See supra* n. 25.²⁸ It would not permit any statement as to the position of the incumbent on the issue. Is there a strict-scrutiny justification for not allowing a grassroots lobbying communication to make any sort of reference to an incumbent’s position or to name the public official that the people wish to influence? In answering this question, the Court should note that WRTL has provided evidence of the need to name an incumbent who is the subject of grassroots lobbying while Defendants, who have the burden of defending the prohibition as applied, have failed to put on any evidence as to why naming the incumbent should not be permitted or why the people should not be able to discuss an incumbent’s record or position on an issue.

The Court can also apply strict scrutiny to determine if there is a constitutionally cognizable distinction between an organization using general funds (which may include corporate donations) to pay for grassroots lobbying and using a separate fund to which only individuals may donate. However, it may not need to reach this issue because the Defendants have not met their strict scrutiny burden of demonstrating that WRTL’s ability to use general fund is not constitutionally protected.²⁹

²⁸Notably, current law would not even permit the first one of these two options because “call Senator Kohl and your other Senator” would be clearly identifying a candidate for public office, i.e., Senator Feingold. *See* 11 C.F.R. § 100.29(b)(2) (clearly identifying a candidate includes such references as “your Congressman” or “the incumbent”).

²⁹Defendants’ responses to the segregated fund option are ineffectual. The FEC complained that WRTL has received business corporation contributions in its general fund, FEC Mem. 10, but then the Intervenor argued against a less-restrictive means of eliminating concerns about the use of business corporation money for the communications at issue by saying that corporate and non-corporate funds are somehow “fungible.” Intervenor’s Mem. 23. Of course, individuals and corporations are not “fungible” in campaign finance law. The FEC then says that Congress rejected just such a “segregated bank account” option, FEC Mem. 38, which statement is not a strict scrutiny argument. It is only an acknowledgment that Congress refused to choose a less-restrictive option that was readily available to it. And *McConnell* did not consider the less-restrictive option in the context in which it is presently presented, so it is incorrect to say that

Conclusion

For the reasons set out herein and in WRTL's opening brief, this Court should grant WRTL's summary judgment motion and deny Defendants' summary judgment motions.

Respectfully submitted,

M. Miller Baker, D.C. Bar # 444736
Michael S. Nadel, D.C. Bar # 470144
McDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, D.C. 20005-3096
202/756-8000 telephone
202/756-8087 facsimile
Local Counsel for Plaintiff

/s/ James Bopp, Jr.
James Bopp, Jr., D.C. Bar #CO0041
Richard E. Coleson
Jeffrey P. Gallant
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/234-3685 facsimile
Lead Counsel for Plaintiff

McConnell has already decided the matter as the FEC suggests. FEC Mem. 39. The Intervenor's argue that the issue is hypothetical "[b]ecause WRTL did not pay for or seek to pay for its ads with non-corporate dollars." Intervenor's Mem. 23. They are wrong. Because WRTL was never permitted to engage in electioneering communications, only running its ads before the prohibition period, it never ran electioneering communications with either corporate or non-corporate funds. And it did in fact seek to run its ads with funds from a segregated bank account (without corporate funds), if that was necessary to receive the injunctive relief it requested. This was plainly set out in the Complaint and all subsequent briefing.