

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<hr/>)	
Wisconsin Right to Life, Inc.,)	
)	
	Plaintiff,)	
)	
	v.)	Case No. 04-1260 (DBS, RWR, RJL)
)	THREE-JUDGE COURT
)	
Federal Election Commission,)	
)	
	Defendant)	
)	
	and)	
)	
Senator John McCain, Representative Tammy)	
Baldwin, Representative Christopher Shays,)	
Representative Martin Meehan,)	
)	
	Intervening Defendants)	
<hr/>)	

MEMORANDUM OF INTERVENOR-DEFENDANTS SENATOR JOHN MCCAIN AND REPRESENTATIVES TAMMY BALDWIN, CHRISTOPHER SHAYS, AND MARTIN MEEHAN IN SUPPORT OF DEFENDANT FEDERAL ELECTION COMMISSION’S RULE 16 PROPOSAL FOR DISCOVERY AND SUMMARY JUDGMENT BRIEFING

Intervening Defendants join in the request of Defendant Federal Election Commission (“the Commission”) that this Court permit the parties to take discovery for a period running from the entry of the Court’s order to July 10, 2006. During this period, the parties will serve and respond to written discovery, prepare and exchange any expert reports, and conduct expert and fact-witness depositions. The Intervening Defendants respectfully submit that permitting the

parties to develop a full factual record will assist this Court in its resolution of the case and will ensure that there exists a complete record for the Supreme Court, should a subsequent appeal ensue. As in *McConnell v. FEC*, 540 U.S. 93 (2003), while expedition is important, it should not come at the cost of depriving the parties and the Court of a proper record.

In *McConnell*, the three-judge court correctly concluded that discovery was appropriate and set a schedule that permitted the parties to develop a substantial record. See Attachment A. As the Commission notes, that factual record proved essential to resolution of the case—both before the three-judge court and before the Supreme Court. Indeed, in upholding the “electioneering communications” provisions of the Bipartisan Campaign Reform Act (“BCRA”), the *McConnell* Court relied substantially on the factual record developed before this Court. See, e.g., *McConnell*, 540 U.S. at 193 (“And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election”); see also *McConnell v. FEC*, 251 F. Supp. 2d 176, 875, 882 (D.D.C. 2003) (Leon, J.) (considering expert testimony on how the public views pre-election communications, and that an election advertisement’s effect must be examined in context).

To be sure, *McConnell* involved a facial challenge to BCRA, while this case involves an as-applied challenge. Yet, as the term “as-applied” itself suggests, the facts are, if anything, *more* important in an as-applied challenge than in a facial challenge. Indeed, because the Supreme Court has previously rejected a broad attack on the constitutionality of the “electioneering communications” provisions of BCRA, the sole question that can be presented here is whether *the particular facts involved in this case* justify departing from that holding. WRTL’s contention that that question can be answered without a full record is seriously mistaken.

For the foregoing reasons, Intervening Defendants respectfully request that this Court deny Plaintiff's Motion to Reinstate, Order Supplemental Briefing on, and Expedite Cross-Motions for Summary Judgment and direct the parties to proceed with discovery as the Commission proposed in the Joint Report of the Parties Pursuant to LCvR 16.3(d).

Dated this 27th day of March, 2006.

Respectfully submitted,

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

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

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

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

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