

**United States District Court  
District of Columbia**

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**Wisconsin Right to Life, Inc.**

*Plaintiff,*

**v.**

**Federal Election Commission,**

*Defendant.*

**Civil Action No. 04-1260 (DBS, RWR, RJL)**

**THREE-JUDGE COURT**

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**Plaintiff's Reply Memorandum in Support of  
Its *Motion to Reinstate, Order Supplemental Briefing on,  
and Expedite Cross-Motions for Summary Judgment***

James Bopp, Jr.  
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*

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*

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## Argument

At oral argument in the United States Supreme Court, Chief Justice Roberts called the FEC's argument that *McConnell v. FEC*, 540 U.S. 93 (2003), precluded as-applied challenges in the present case a "bait and switch":

In *McConnell* against FEC, you stood there and told us that this was a facial challenge and that as-applied challenges could be brought in the future. This is an as-applied challenge and you're telling us that it's already been decided. It's a classic bait and switch.

Transcript 25:12-17 (available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts.html](http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html)). The Supreme Court unanimously rejected that bait and switch in a mere six days. *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. \_\_\_, No. 04-1581, 2006 U.S. Lexis 1070, at \*1 (Jan. 23, 2006) (per curiam bench opinion).

The FEC now attempts another bait and switch. As set out below, the FEC fully briefed its own cross-motion for summary judgment — including the merits issue now before this Court on remand — acknowledging that this matter could be resolved without discovery. Having thus asserted that there were no material facts in dispute and the matter was ripe for legal resolution, and having fully briefed WRTL's summary judgment motion without asserting that the FEC could not do so until discovery was completed, and having failed to ask the Supreme Court not to reach the merits issue because discovery had not been completed, the FEC now wants to switch and do the discovery that it waived for most of a year, from July 28, 2004 (complaint) until May 10, 2005 (dismissal). It should be estopped from asserting now that discovery is required.<sup>1</sup>

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<sup>1</sup>Where a party has argued clearly inconsistent positions and has persuaded a court to rely on the former (especially where that party would gain an unfair advantage thereby), courts have

Although the FEC pays lip service to the congressional mandate to expedite this case, Opp. 1, it tries to switch the meaning of “expedite *to the greatest possible extent*,” BCRA § 4-3(a)(4), 116 Stat. at 114 (emphasis added), to ‘there’s no big rush, August is six months away.’<sup>2</sup> However, that is an exceedingly short amount of time for a decision by this Court and for timely review (if required) by the United States Supreme Court, which normally ends its term at the end of June. Moreover, if WRTL is permitted to make its electioneering communications only from a special account to which only individuals may contribute, as it argues for in the alternative, the time is exceedingly short for fundraising into that account.<sup>3</sup> And Supreme Court Justices indicated by their questioning at oral argument that they view this as a case of national importance, which it is, affecting non-profit citizen groups not at bar, so this case involves not just a question about WRTL and three ads in 2004. *See* Transcript 29 (Roberts, CJ), 33 (Breyer, J.). Electioneering communication blackouts begin in February and are widespread between now and August, as already noted. Mem. 3 (¶ 8).

The only way to expedite this case “to the greatest possible extent” is to return to the

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employed judicial estoppel to deny reliance on the second, inconsistent argument. *See New Hampshire v. Maine*, 532 U.S. 472 (2001); *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469 (6th Cir. 1988); *Fieldwork Boston, Inc. v. United States*, 344 F. Supp. 2d 257 (D. Mass. 2004).

<sup>2</sup>The FEC relies on a remark in floor debate by Sen. Feingold that the expedition mandate would not preclude discovery. Opp. 6. Of course, the remark of a legislator, even a sponsor, does not change the plain meaning of a statute, which mandates expedition to the “greatest possible extent,” which on the facts of the present case (not in any way addressed by Sen. Feingold) does preclude further discovery.

<sup>3</sup>Senator Kohl is up for reelection in 2006, *see* <http://www.herbkohl.com/> (official reelection campaign website), and WRTL has declared in its *Amended Complaint* that it intends to broadcast similar grassroots lobbying communications in the future and that it is highly likely that some of these will qualify as electioneering communications again, given the wide scope of WRTL’s interests that intersect with activity in Congress. *Amended Complaint* ¶ 16.

status quo immediately before the dismissal, when this case had already consumed nearly ten months and there were fully-briefed cross-motions for summary judgment before the Court. This would not deprive the FEC of anything. It already had the opportunity of fully briefing the cross-motions (and WRTL proposes a supplemental brief). It already had the option of deciding whether to file its own summary judgment motion, based on the already-established facts, and engaging those facts and the very merits issue now before this Court in its briefing. It already had the option of pursuing discovery, but it chose to waive that option for nearly a year and to file its own summary judgment motion, based on the existing factual record. To now allow the FEC to turn the calendar back to July 28, 2004 (complaint) instead of May 10, 2005 (dismissal, Docket #49) would not “expedite *to the greatest possible extent*” this case. And it would reward the FEC for engaging in yet another bait and switch.<sup>4</sup>

There already is a full record, with ample facts already in the record about the merits issue that the FEC has argued to this Court and the Supreme Court, such as the fact that WRTL has a PAC, that the PAC opposed Sen. Feingold, that the judicial filibustering was a campaign issue, etc. The FEC thought the record was full enough to (1) file a motion for summary judgment, (2) brief WRTL’s summary judgment motion, (3) not ask the Supreme

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<sup>4</sup>The FEC relies on *FEC v. Colorado Republican Fed. Campaign Comm. v. FEC*, 96 F.3d 471 (10th Cir. 1996), which reliance is misplaced. That case involved a remand from the U.S. Supreme Court and the question of whether the Tenth Circuit should expedite and decide the case on the merits or remand the case to the district court to consider the remand issues “in the first instance,” which it chose to do. *Id.* at 473. But there was no discussion in the opinion of a statutory mandate to “expedite to the greatest extent possible”; no mention of a looming election requiring expedition; no pre-existing, fully-briefed motions for summary judgment to which the court might turn for speedy resolution of the case; and no waiver of discovery by the FEC by sitting on its rights to discovery for nearly a year and by briefing the remand issue on the merits on cross-motions for summary judgment and in the United States Supreme Court. The cited opinion’s only relevance is to show by the contrasts that the present case should be expedited and discovery should be denied on the basis of these fundamental differences.

Court to avoid the merits issue because the record was not sufficiently full, and (4) brief and argue the merits before the Supreme Court on this very record.

The additional areas that the FEC proposes for discovery are not relevant to any manageable test that this Court might formulate in response to the Supreme Court's direction to consider the merits of WRTL's claim. Most of the areas identified have to do with subjective intent, but subjective intent is not properly a part of any other similar test in the First Amendment area. As discussed below, there is no intent requirement in determining whether a communication is an "independent expenditure" or an "electioneering communication." Nor does "actual malice" include subjective ill will in defamation cases. Nor is subjective intent a factor in the *Noerr-Pennington* cases. The FEC should not be permitted to engage in a punitive, scorched-earth policy (by requiring of an organization thousands of dollars of legal fees and lost productivity and weeks or months of being subjected to FEC prying into private, First Amendment-protected details of an organization's inner workings), with regard to anyone wanting to engage in grassroots lobbying in an attempt to prove the group's 'real intent.' As to discovery having to do with context, that is also irrelevant, but in any event there is already a full record on which the FEC has relied to indicate that filibusters were a campaign issue, that WRTL PAC had opposed Sen. Feingold, and so on. There is no need for irrelevant and merely cumulative discovery.

Most importantly, any rule to distinguish genuine grassroots lobbying from sham issue ads cannot be based on subjective intent. Such a rule would be judicially unmanageable (in addition to violating First Amendment rights). Basing a rule on subjective intent would permit the FEC to engage in scorched-earth discovery tactics every time a citizen group dared

to do genuine grassroots lobbying. Cases based on such a theory would tie up this and other federal courts for extended periods of time. Both the FEC and WRTL agreed in briefing before the Supreme Court that an intent-based test would be unworkable. *Brief for the Appellee* 39 (The FEC said: “A constitutional standard that turned on the subjective sincerity of a speaker’s message would likely be incapable as a workable application; at a minimum, it would invite costly, fact-dependent litigation.”); *Reply Brief for Appellant* 16-17 (“WRTL has never proposed an *intent* test and rejects such a test as truly unworkable; it would lead to the ‘fact-intensive’ litigation that the FEC claims to despise.”). The FEC’s attempt to assert an intent theory of relevance to get discovery now is yet another bait and switch to be rejected.

Contrary to the FEC’s argument, the Supreme Court did not invite development of a fuller record. The FEC deceptively argues that the Court did so based on its use of the words “the facts of this case” and “in the first instance.” Opp. 4. But when the Supreme Court spoke of “the facts of this case” it was merely citing what *this* Court said in its *Memorandum Opinion and Order* (Aug. 17, 2004), namely, that “[t]he facts suggest WRTL’s advertisements may fit the very type of activity that *McConnell* found Congress had a compelling interest in regulating.” *See WRTL*, 2006 U.S. Lexis 1070, at \*1. The facts that this Court referenced were those already before it, not some additional facts to be dredged up through discovery. So there is no support in this reference by the Supreme Court for further discovery. The Supreme Court’s statement, “We . . . remand the case for the District Court to consider the merits of WRTL’s as-applied challenge in the first instance,” makes absolutely no reference to discovery and provides no indication of an intention that there be such.

It is much more likely that the Supreme Court did *not* intend further discovery and delay, but rather that this Court expeditiously decide the fully-briefed cross-motions for summary judgment. WRTL expressly called to the Supreme Court's attention the existence of these motions, *Jurisdictional Statement* 3, 8, 30, *Brief for Appellant* 7 n.7, and expressly requested, as an alternative to the Supreme Court deciding the merits, that it summarily reverse this Court on the as-applied issue and remand so this Court could expeditiously decide those motions. *Jurisdictional Statement* 3, 8, 30. While the Supreme Court did not summarily reverse on the first issue, it decided it very quickly after briefing and argument and remanded, most likely with the understanding that this Court would act with similar expedition in deciding those existing dispositive motions. This path complies with the mandate to expedite this case "to the greatest possible extent" and permits this Court the opportunity to "in the first instance" fashion a manageable standard for a grassroots lobbying exception, giving the Supreme Court the benefit of its consideration.

The following discussion expands on these arguments as follows: Part I explains how further discovery would be irrelevant to the required objective, content-based standard for the exception for grassroots lobbying. Part II addresses more fully the FEC's waiver of discovery.

**I. A Manageable Grassroots Lobbying Standard Must Be Based on Objective Criteria and the Content of the Communication, So Further Discovery Would Be Irrelevant.**

The remand presents two central issues on the merits: (1) what is the standard for identifying genuine grassroots lobbying and (2) whether WRTL's proposed ads fit the standard. This Court does not need to establish the precise details of the standard for purposes of the present motion (or whether WRTL's ads meet the standard), but it is crucial to

consider the *nature* of the standard now to determine what sort of facts are relevant. Discovery should not be permitted that would only gather facts irrelevant to any legitimate issue.

This is evident from a case in the *Noerr-Pennington* line of cases. This line of cases is analytically very close to the present case because the cases distinguish “genuine” from “sham” in protecting grassroots lobbying, *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), and other legitimate activity from the Sherman Act antitrust restrictions. In *Noerr*, the Supreme Court rejected the district court’s reliance on a finding that “the railroads’ sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors,” *id.* at 138, because “[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend on their intent in doing so.” *Id.* at 139. In another *Noerr-Pennington* case, the Court held that whether litigation asserted to be anticompetitive was “sham” must be determined by a two-part test:

First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. [footnote omitted] Only if challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals “an attempt to interfere *directly* with the business relationship of a competitor” through the “use [of] the governmental process — as opposed to the *outcome* of that process — as an anticompetitive weapon.”

*Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49, 60-61 (1993) (citations omitted; emphasis in original). The Court held that discovery as to possible underlying “motivations in bringing the suit” was properly denied because they “were rendered irrelevant by the objective legal reasonableness of the litigation.” *Id.* at 65-66.

These two holdings provide important guidance here.

What sort of standard would best distinguish genuine grassroots lobbying from the sort of “sham” issue ads identified as the problem in *McConnell*? 540 U.S. at 193, n.78 (example of “sham” ad). First, the standard must be faithful to the First Amendment’s guarantees of free expression, association, and petition (so that it must be narrowly tailored to compelling governmental interests, promote robust public debate, and leave breathing room) and the Fourteenth Amendment’s protection against vagueness. Second, while constitutional mandates clearly outweigh FEC convenience<sup>5</sup> or judicial manageability, a proper standard must give sufficient guidance to the regulated community so that the FEC does not embroil citizen groups in intensive discovery to determine their true ‘intent’ and this Court is not inundated with eve-of-election litigation. This is best accomplished by an objective legal test that focuses on the activity at issue instead of extraneous activity and eliminates irrelevant discovery.

The needs described above require a standard that is sufficiently bright to protect the communicator’s rights and that is based on readily-identified, objective criteria and on the content of the communication itself. The two most relevant examples of how this sort of standard is done in the election law context are the standards for determining whether a communication is an “independent expenditure” or an “electioneering communication.” The determinations are made on the basis of the communications themselves, not the subjective intent of the speaker.

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<sup>5</sup>The Supreme Court has held that where constitutional justification is absent, the FEC’s “desire for a bright-line rule. . . . hardly constitutes the compelling state interest necessary to justify any infringement on First Amendment freedom.” *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 263 (1986) (“*MCFL*”) (emphasis in original).

An independent expenditure is determined by looking to the communication itself, not the speaker's intent. "'Independent expenditure' means an [uncoordinated] expenditure by a person . . . expressly advocating the election or defeat of a clearly identified candidate . . . ." 2 U.S.C. § 431(17). "'Clearly identified' means that—(A) the name of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by unambiguous reference." 2 U.S.C. § 431(18). So whether a communication constitutes an independent expenditure turns solely on whether the communication itself contains explicit words expressly advocating a clearly identified candidate's election or defeat. Intent is not a factor, nor is what an organization's PAC said, what the organization's press releases said, and whether some candidate cares about the same issue so as to make it a campaign issue are not part of the analysis. There is express advocacy, or there is not, based on the communication itself. *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (express advocacy "limited to communications that include explicit words of advocacy . . .").

As to electioneering communications, the law again requires examination of the communication itself, not the subjective intent of the speaker. "Electioneering communication" is defined as a "communication" meeting certain criteria. 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.29. Nowhere in the definition is there any instruction to see what the organization's intent was, or whether the organization's PAC said anything, or what the organization's press releases said. In fact, *McConnell* upheld the definition because it introduced none of the vagueness posed by the statute at issue in *Buckley*. *McConnell*, 540 U.S. at 192, 194. The problem identified in *Buckley* was how to separate electioneering from participatory democracy. *Buckley* noted that "[c]andidates, especially incumbents, are intimately tied to

public issues involving legislative proposals and governmental actions.” 424 U.S. at 42. The Court pointed out the standard in the First Amendment context, namely, that there could not be a test that depended on intent or the hearers’ subjective judgment:

(W)hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. . . . Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

*Id.* at 43 (internal quotation marks and citation omitted).

As to the relevance of WRTL PAC’s activity, the very statutory prohibition at issue in this case, expressly excludes any consideration of PAC activity in determining whether a corporation has made an independent expenditure or an electioneering communication. 2 U.S.C. § 441b(b)(2)(C) (“shall not include . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes” (emphasis added)). The courts have never held that what a citizen group says through a PAC is attributable to its connected corporation or is a factor in determining whether a communication made with general treasury funds constitutes express advocacy, or its functional equivalent.<sup>6</sup> If what a PAC says is attributable to a connected corporation itself, then every PAC’s independent expenditure and electioneering communication would

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<sup>6</sup>In *MCFL*, MCFL had a PAC, 479 U.S. at 255 n.8, but the Supreme Court never asked what the PAC had said or done in its analysis of whether MCFL’s communication contained express advocacy. *Id.* at 249. MCFL had engaged in various legislation-oriented activities, including grassroots lobbying. *Id.* at 242. But the Court never considered any such activity in determining whether there was an independent expenditure. Instead the Court noted that the “Special Edition” of MCFL’s newsletter said to vote prolife and then identified which candidates were prolife. *Id.* at 249. So the Court said that if A=B and B=C, then A=C. But the sole focus was on the particular communication in the newsletter and what its words said, not MCFL’s other activities.

constitute a violation by the corporation of the prohibition on corporate independent expenditures and electioneering communications at 2 U.S.C. § 441b. The PAC is legally and logically separate from the corporation. It's actions are not attributable to its connected corporation.

*Buckley* and *McConnell* both stand for the proposition that express advocacy and its functional equivalent must be determined by a bright-line test to protect the speaker's fundamental freedoms and involvement in the core functions of participatory democracy. There can be no vagueness, and introducing subjective criteria, such as the speaker's subjective intent or things said in an unrelated prior press release, reintroduces vagueness.

First Amendment protections in the libel context also provide guidance for a proper standard. If a speaker allegedly libeled an incumbent politician who was running for office, the Supreme Court has held that the First Amendment requires that the politician prove that the statement was false, that it referred to the politician, and that it was made with "actual malice," which it defined as scienter, not as some actual 'intent' (i.e., ill will, hatefulness):

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

*New York Times v. Sullivan*, 376 U.S. 254, 280-81 (1964). The Supreme Court approvingly quoted a Kansas Supreme Court opinion showing the scope of the speaker's "privilege":

In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes matters of public concern, public men, and candidates for office.

*Id.* at 281-82 (quotation marks and citation omitted). If a candidate cannot delve into a

speaker's subjective intent in making an allegedly libelous statement, neither the candidate nor the FEC ought to be able to delve into the speaker's subjective intent for other claims operating in the realm of First Amendment protection.

And as mentioned above, the *Noerr-Pennington* line of cases provide further support for the notion that genuine grassroots lobbying and litigation are protected, despite possible effects that might otherwise be regulable, by an objective, legal examination of the activity itself, not extraneous activity of the entity involved. These examples all demonstrate the problems with, and the need to avoid creating, any standard that would examine a communicator's subjective intent, or depend on the hearer's subjective evaluation of what has been said, or on contextual criteria beyond the communication itself.

A proposed test for a grassroots lobbying exception to the electioneering communication prohibition was provided by the prime sponsors of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Note that their test focuses objectively on the communication itself so that it provides bright-line guidance and can be decided as a matter of law without resort to irrelevant discovery into the communicator's subjective intent or other activities:

The term "electioneering communication" does not include any communication that:

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(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.

*Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russ Feingold, Representative Christopher Shays, Representative Marty Meehan, Senator Olympia Snowe, and Senator James Jeffords* at 10 (copy on file with authors) (attached to Letter from Sen. John McCain, Sen. Russell D. Feingold, et al. to Ms. Mai T. Dinh of the FEC (Aug. 23, 2002) (copy on file with authors)). Both documents are available at the FEC's website, <http://www.fec.gov/law/Rulemaking Archive.shtml> (select "Electioneering Communications" then "Comments on This Rulemaking"). While these prime sponsors of the electioneering communication prohibition are wrong about the need to actually name the incumbent politician who is the requested target of grassroots lobbying, they saw clearly the need for an objective test that focuses on the communication itself and not subjective factors.

The Supreme Court rejected the FEC's assertion in the present case that the logic of BCRA's electioneering communication prohibition meant that no line could be drawn between "genuine" and "sham" issue ads so that as-applied challenges must be rejected categorically. This remand, then, necessarily seeks this Court's initial guidance in establishing such a line.

This is especially appropriate because this Court invested an enormous amount of time in understanding and identifying the distinction between "sham" and "genuine" issue ads, so that when the Supreme Court used those terms in its *McConnell* opinion it did so based on the meaning this Court had provided to those terms. Some of Judge Leon's headings are particularly instructive as to the success of that effort. One states that "*Candidate-Centered 'Issue Advertisements' That Do Not Contain Words of Express Advocacy Are Distinguishable*

from ‘Genuine’ Issue Advertisements.” *McConnell v. FEC*, 251 F. Supp. 2d 176, 881 (2003) (italics in original). Under that heading he set out the record evidence that true issue advocacy exists and that naming a candidate is often necessary.<sup>7</sup> Another of Judge Leon’s headings states that “*Genuine Issue Advertisements About Legislation and Public Policy Issues Are Run During the Sixty Days Before a Federal Election Notwithstanding the Competition for Air Time With Candidate-Centered Advertisements.*” *Id.* at 910 (italics in original). Under that heading he rejected the notion that proximity to an election was necessarily evidence of intent to advocate for against a candidate and found that other factors, such as the focused

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<sup>7</sup>Judge Leon in *McConnell* singled out grassroots lobbying as being of special concern, providing a rationale from the record as to why it is necessary to *name* a legislator in such situations:

The mere fact that these issue advertisements mention the name of a candidate (i.e., the elected representative in whose district the advertisement ran) does not necessarily indicate, let alone prove, that the advertisement is designed for electioneering purposes. To the contrary, the testimony of various plaintiffs’ witnesses indicates that, in their experience, there are many reasons why it is helpful, if not necessary, to mention a candidate’s name in these advertisements in order to focus the public’s attention on a particular pending piece of legislation. For example, Paul Huard of NAM states “[t]here are many reasons that an issue ad may need to refer to the name of an elected official or candidate. Many bills are identified with particular sponsors and may be known by the sponsors’ names. Also, both incumbents and candidates may be prominent people whose support or opposition to a bill or policy may have important persuasive effect. . . . Also, if an issue ad is used to explain why a legislative position of a particular Member of Congress is good for his or her district or state, the member generally must be mentioned. *The same is true if the purpose of the ad may be to induce viewers to contact the Member and communicate a policy position.*” Huard Decl. ¶ 12 (emphasis added); *see also* Finding 293. Similarly, Denise Mitchell, Special Assistant for Public Affairs to the AFL-CIO, concurred, explaining that it is often necessary to refer to a federal candidate by name because “[t]he express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is . . . especially effective by showing them how they can personally impact the issue debate in question.” Mitchell Decl. ¶ 11; *see also* Finding 293.

*McConnell*, 251 F. Supp. 2d at 794 (emphasis in original).

attention of the public on public policy issues and “[t]he legislative calendar,” could “necessitate the running of issue advertisements during the final days of an election campaign.” *Id.* at 910-14. Judge Leon set out examples of genuine issue ads from the record, run during the blackout periods, in a section entitled “*Representative Examples of Genuine Issue Advertisements Aired Within 30 Days of a Primary Election, or 60 Days of a General Election, and Mentioning the Name of a Candidate,*” *id.* at 914-18, and he then set out examples of sham issue ads run during that period, under the heading “*Representative Examples of Candidate-Centered Issue Advertisements Aired Within 30 Days of a Primary Election or 60 Days of a General Election.*” *Id.* at 918. It is worth observing in passing that in this litigation the FEC has made much of the fact that WRTL’s ads referred the viewer to [www.befair.org](http://www.befair.org), which provided contact information for Senators Kohl and Feingold, instead of providing a telephone number in the ads. WRTL has argued that the website name was more memorable than a typical phone number. But it should be noted that Judge Leon listed six genuine issue ads that mentioned a candidate within the blackout period and three provided a phone number in the message while three did not. *Id.* at 914-18. (Even the BCRA prime sponsor’s proposed standard for electioneering communications made no phone number requirement. *See supra.*)

For present purposes, it is important to note that Judge Leon’s findings were based on an objective examination of the contents of the communications themselves and employed criteria established even by the *McConnell* defendants’ own experts (excluding genuine grassroots lobbying as sham), and not on subjective factors. And it should be emphasized that this objective, content-based analysis was done in this Court precisely in the face of the sort

of arguments the FEC is now making and precisely in the face of the testimony of Douglas Bailey, whose testimony Judge Leon expressly noted, *id.* at 884, and whom the FEC would now like the Court to hear from again.

Applying these principles to the question of whether further discovery should be permitted reveals that it should not be permitted. The FEC's proposed discovery falls into three main categories: (1) intent, (2) context, and (3) effect. Opp. 3-4. None are relevant.

*Intent.* Evidence about WRTL's subjective intent or purpose in running its grassroots lobbying ads when they were not prohibited (the only time they were run) is clearly irrelevant and totally outside FEC regulation. Similarly irrelevant is any evidence of its intent in wanting to extend the broadcasting of the ads into the blackout period (which it never did) because intent is not relevant to permissible regulation of communications under First Amendment protection and so is an inappropriate standard for an exception to the grassroots lobbying prohibition. Creating an intent factor would constitutionally doom any standard this Court might create, and would permit the FEC to engage in scorched-earth discovery against persons attempting to employ the created standard — just as the FEC is attempting to do in this case with WRTL.<sup>8</sup> In addition, it must be noted that the FEC *already* believes that it has sufficient intent evidence to strip WRTL's ads of constitutional protection, as it argued vigorously both here and in the Supreme Court. Expedition should not be denied for adding possible additional evidence that thus would be merely cumulative.

*Context.* The same applies to 'context' evidence. It should be irrelevant under a properly

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<sup>8</sup>As noted above, *supra* at 5, the FEC argued before the Supreme Court that a subjective intent test would be unworkable because it would lead to fact-intensive litigation, of the sort the FEC now attempts to impose.

constitutional and manageable standard, so discovery to obtain it should not be permitted.

But in any event, the FEC already has asserted before this Court and the Supreme Court that it has enough contextual evidence to scuttle WRTL's ads. Expedition should not be denied for mere cumulative evidence.

*Effect.* The FEC also asserts that it should be permitted to put on "evidence as to the electoral effects of such ads in the pre-election political environment," citing to an amicus curiae brief by Douglas Bailey that submitted in this case before the Supreme Court. Opp. 4. As noted above, Mr. Bailey has already been heard by this Court on the subject of genuine issue ads and expressly noted in Judge Leon's opinion. This Court is, of course, free to read Mr. Bailey's amicus brief if it chooses and he is welcome to submit another, but Mr. Bailey should remain as an amicus and not be converted into an expert witness in this case. Procedurally, the time for the FEC to put forward any arguments of Mr. Bailey in other than an amicus status was when the FEC filed its own summary judgment motion and responded on the merits to WRTL's summary judgment motion. Having failed to employ Mr. Bailey for the purpose of an expert declaration at that point, the FEC has waived the opportunity. Substantively, Mr. Bailey simply rehashes arguments made in the *McConnell* case, namely that grassroots lobbying will have an effect on elections. That adds nothing to the present analysis because the whole reason that the Supreme Court facially upheld the electioneering communication prohibition was based on some possible effect on elections. The present issue is the legal issue of whether the possibility of an effect on citizens at election time (which may be remote, speculative, and widely variant) justifies stripping citizens of their rights to free expression, association, petition, and participation in self-government through grassroots

lobbying at critical legislative times, especially where the possibility of an electoral effect would be seriously limited by an appropriate standard that this Court (and perhaps the Supreme Court) will fashion in this case. And the FEC has already conceded at oral argument before the Supreme Court in this case that the mere fact that grassroots lobbying might have *some* effect on an election is an inadequate basis for a prohibition on genuine grassroots lobbying.<sup>9</sup> It cannot now switch on that position, too. Neither Congress nor the FEC may constitutionally regulate everything that might have an effect on elections.

In sum, further discovery would be irrelevant to the required objective, content-based standard that this Court is invited by the Supreme Court to fashion “in the first instance.” In any event, there already is a full record on the sort of external factors that the FEC seems intent on arguing instead of joining prompt debate on the wording of the proper standard, as the Supreme Court clearly envisioned would happen expeditiously.

**II. The FEC Has Waived Any Further Right to Discovery by Fully Briefing this Issue on Cross-Motions for Summary Judgment and Arguing the Merits to the Supreme Court without Reservation.**

The FEC’s argument that this Court should ignore the mandate to expedite this case “to the greatest possible extent” and turn the clock back to the beginning of the case (July 2004) with regard to discovery also ignores the fact that the FEC has filed and briefed its own motion for summary judgment (which addressed the merits, not just the as-applied issue), responded fully to WRTL’s own summary judgment motion (which addressed the merits, not

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JUSTICE SCALIA: You think Congress has the power to prohibit any First Amendment contact — conduct that might have an impact on the election? I mean, is that the criterion for whether it — it can be prohibited?

GENERAL CLEMENT: No, Justice Scalia, it’s not. . . .

Transcript 31:4-9.

just the as-applied issue), and fully briefed both the as-applied issue and the merits of an as-applied exception for grassroots lobbying in the United States Supreme Court without even suggesting that the Court should not consider that issue because discovery was yet required. In fact, a search employing Adobe Acrobat of the PDF version of the FEC's *Brief for the Appellee* reveals that the term "discovery" was not even mentioned to the Supreme Court.

In summary judgment briefing before this Court, the FEC tried to have it both ways, by engaging in summary judgment argumentation on the merits of this case (in cross-motions) while trying to preserve a second bite at the apple in case things did not go its way. WRTL objected at the time as follows:

The Court has before it all the facts and arguments needed to decide this case in WRTL's favor on summary judgment. However, having (a) joined issue in legal arguments on the merits, (b) responded to WRTL's statement of facts, and (c) submitted its own statement of facts (which WRTL assumes was intended to apply to both motions as it was timely filed for responding to WRTL's motion), the FEC makes the strange assertion that "WRTL's summary judgment should be denied. No discovery has yet taken place in this case. Thus, if the legal issues the parties have briefed are not dispositive, the Commission should be permitted to take discovery . . . ." FEC Mem. at 7.

If the FEC means that if the cross-motions for summary judgment fail to resolve this matter then the usual procedure of proceeding to trial should be followed, WRTL does not object. The FEC's language indicates that this is its position. But given that there are adequate facts without "genuine issue," Fed. R. Civ. P. 56, to decide this case and that there are cross-motions for summary judgment that address the dual issues of whether as-applied challenges are permitted and whether an exception is required, this case should be decided on summary judgment.

If, however, the FEC means that it has no affidavit evidence to submit in opposition to WRTL's statement of the facts because discovery has not occurred and that consideration of the substantive aspect of WRTL's motion must be deferred, then WRTL strongly objects. The summary judgment rule requires "affidavits of a party opposing the motion" from which "it appear[s] . . . that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition" before "the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions taken or discovery to be had . . . ." Fed. R. Civ. P. 56(f). The FEC has in no way complied with this rule nor even asserted what the rule requires to be asserted. The FEC could not have it both ways by joining issue on both

the threshold and substantive summary judgment issues and then insisting that if things might go in WRTL's favor it would need more discovery. The FEC has had since July 28, 2004, to engage in discovery, which it has not done. The time has come and gone for it to allege that it needs more discovery before WRTL's summary judgment motion may be fully considered (or for that matter its own motion, which addresses both the threshold and substantive issues).

*Plaintiff's Reply Memorandum in Support of its Summary Judgment Motion* 19-20.<sup>10</sup>

That objection continues, strengthened by the noted fact that the FEC continued its summary judgment argument on the merits into the Supreme Court. The time for the FEC to ask for further discovery was before it engaged in cross-motion arguments on the merits of summary judgment. It is time for the FEC to join debate on the real issue, namely, what is the appropriate standard for an exception for grassroots lobbying.

### **Conclusion**

For the reasons stated above, WRTL's motion requesting that this Court reinstate the fully-briefed cross-motions for summary judgment, permit one supplemental brief, and expedite consideration of those summary judgment motions and this case should be granted.

Respectfully submitted,

James Bopp, Jr.  
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*

/s/ Michael S. Nadel  
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*

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<sup>10</sup>In *Plaintiff's Second Memorandum Addressing Dismissal*, WRTL argued for decision of the cross-motions for summary judgment instead of dismissal. *Id.* at 3.