

No. 06-\_\_\_\_\_

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In the Supreme Court of the United States

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FEDERAL ELECTION COMMISSION, *Appellant*

v.

WISCONSIN RIGHT TO LIFE, INC., *Appellee*

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Appeal from Civil No. 04-1260 (DBS, RWR, RJL) (Three-Judge Court) in the  
United States District Court for the District of Columbia

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### **Motion To Expedite and to Advance on the Docket**

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#### **Facts and History of the Case**

In the Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. 107-155, 116 Stat. 81, Congress defined “electioneering communications” as targeted, broadcast communications that reference a clearly identified candidate within 60 days before general (or special or runoff) elections and 30 days before primaries (or nominating conventions or caucuses). 2 U.S.C. §434(f)(3). Congress prohibited corporations from using general treasury funds to pay for electioneering communications. 2 U.S.C. § 441b(a)-(b)(2) (“prohibition”). The Federal Election Commission considered creating an exception to this prohibition for grass-roots lobbying broadcasts in its regulations implementing BCRA but decided it was beyond the exception-making authority granted it by Congress to do so.

In *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court upheld this

prohibition against a First Amendment facial challenge, not being “persuaded that plaintiffs ha[d] carried their heavy burden of proving that [the prohibition] [wa]s [substantially] overbroad.” *Id.* at 207. The present case is a constitutional challenge by Wisconsin Right to Life, Inc. (“WRTL”) to the prohibition as applied to grassroots lobbying, brought under the First Amendment guarantees of free speech, association, and petition and under the inherent, reserved constitutional right of the sovereign people in a republican system of government to communicate with citizens urging them to contact their representatives concerning pending legislative matters.

On July 28, 2004, WRTL filed its verified complaint and sought a preliminary injunction in the United States District Court for the District of Columbia to permit continued running of its grassroots lobbying ads past the August 15th beginning of the electioneering communication prohibition period. (Case No. 04-1260), Docket 1, 4. A three-judge court was convened pursuant to BCRA § 403(a)(1). Docket 3, 9, 10. WRTL’s preliminary injunction motion was denied August 12, 2004, Docket 23, with a *Memorandum Opinion and Order* issued August 17th. Docket 26. Pursuant to WRTL’s declaration that it would not continue broadcasting its three ads beyond August 15, 2004, absent injunctive relief, WRTL ceased broadcasting its grassroots lobbying ads because they were then prohibited and for fear of enforcement by the FEC against WRTL.

On September 16, 2004, the district court sua sponte ordered briefing on whether the case should be dismissed. Docket 32. On March 14, 2005, WRTL moved for summary

judgment. Docket 41. On March 28, the FEC did the same. Docket 43. The cross-motions were denied as moot in the dismissal order. Docket 49. The *Order* and the *Memorandum and Order* dismissing this case were filed May 10, 2005. The court did so both on the bases that (a) *McConnell* precluded all as-applied challenges and (b) in any event (based on factors beyond the communications at issue), WRTL's activity might be of the sort targeted by Congress in BCRA and so should not be recognized for an exception to the electioneering communications prohibition.

WRTL noticed appeal on May 12, 2005, and the Supreme Court noted probable jurisdiction on September 27, 2005. After full briefing and oral argument (Jan. 17, 2006), the Court unanimously decided (Jan. 23, 2006) that as-applied challenges could be brought and remanded the case to the district court to decide the second issue, namely, whether the Constitution requires an exception to the electioneering communication prohibition for the sort of grass roots lobbying at issue here. *Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (2006) (per curiam) (“*WRTL*”).

On December 21, 2006, the district court granted the motion for summary judgment of WRTL in *Wisconsin Right to Life, Inc. v. FEC*, No. 04-1260, 2006 WL 3746669 (D. D.C. Dec. 21, 2006). The court ruled that BCRA's “electioneering communication” prohibition was unconstitutional as applied to grassroots lobbying advertisements that WRTL proposed to run in 2004.

Unsure of whether the Order was a “final decision” under § 403(a)(3) of BCRA,

and thereby eligible for direct, expedited review of this Court, the FEC filed a Motion for Clarification on December 26. On December 28, the court ordered that, “there being no just reason to delay an appeal,” the Order granting summary judgment “is a final appealable order as to those issues decided in the opinion accompanying that order.” Order, Dec. 28, 2006 at 2. Defendants and Intervening Defendants filed notices of appeal on December 29, 2006. WRTL moves this Court to expedite consideration and, as necessary, disposition of the Defendants’ appeal of the district court’s grant of WRTL’s motion for summary judgment.

**Expedition and Advancing on the Docket is Required by the Statute Itself.**

Recognizing the need for authoritative guidance with respect to a statute affecting core First Amendment rights, Congress provided in the BCRA that as to any “final decision” the Court is required “to advance on the docket and to expedite to the greatest possible extent” the disposition of appeals. BCRA § 403(a)(4), 116 Stat. at 113-14 (Public Law 107-155).<sup>1</sup> Under BCRA’s terms, notice of appeal must be given within ten

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<sup>1</sup>Sec. 403. Judicial Review

(a) Special Rules for Actions Brought on Constitutional Grounds. – If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and to the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal

days of a final decision rather than within 30 days, and the jurisdictional statement to be filed within 30 days of filing a notice of appeal, rather than allowing the normal 60 days. The FEC filed its notice of appeal eight days after the district court's order was filed, and WRTL, for reasons more fully shown herein, submits that this Court should order expedited briefing on whether it should hear this appeal and, as necessary, an expedited schedule for briefing and oral argument on the merits.

**The Court Should Provide Authoritative Guidance on the Electioneering Communication Prohibition's Application in Anticipation of Upcoming Blackout Periods.**

If the Court decides to take the FEC's appeal in the case, it would be desirable to have that decision this term, well before the electioneering communication prohibition period begins in December of 2007.<sup>2</sup> It is likely that grassroots lobbying ads similar to those proposed by WRTL in 2004 will be proposed by groups wishing to affect legislators' votes during these prohibition periods. If this appeal is not considered at the

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directly to the Supreme Court of the United States. Such appeal shall be taken by filing a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

<sup>2</sup>2008 will be a presidential election year and one third of the Senate will also be seeking reelection. The first presidential caucus is Iowa's Democratic caucus, which is scheduled to begin on January 14, 2008. BCRA's prohibition period will begin on December 14, 2007, and rolling prohibition periods will continue throughout late 2007 and the spring and summer of 2008.

Court's January 19<sup>th</sup> conference, it is unlikely that sufficient time would remain for the case to be fully briefed and heard this term should the Court ultimately decide to hear the appeal. If the appeal is thus not resolved until the fall term, the impending prohibition period will demand that the Court expedite the matter. Expedition now by the parties, who have thoroughly briefed the issues below, will allow ample time for a resolution and make better use of the Court's resources.

Furthermore, without clear direction from this Court as to the constitutional application of the electioneering communication prohibition to grassroots lobbying ads, would-be speakers will be forced to file emergency actions seeking relief to allow them to air their ads, or, worse, they will be forced to forgo the opportunity to petition their government and decide to be silent rather than risk an enforcement action.

In light of the expedition that this matter requires, WRTL respectfully proposes the following schedule in lieu of that contained in Rules 18.3, 18.6 and 18.8:

- the FEC will file its jurisdictional statement on or before January 9, 2007.
- WRTL will file and serve its opposition to the FEC's motion on or before January 12, 2007, allowing distribution of the briefs at the Court's January 19<sup>th</sup> conference.

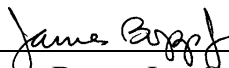
Because the issues in this case are straightforward and have been thoroughly briefed below, this briefing schedule should not be burdensome to the FEC.

Counsel for WRTL notified by electronic mail the Office of the Solicitor General and counsel for Intervening Defendants of its motion to expedite the hearing and

disposition of this matter, including the proposal that preliminary briefing be filed in time to allow the Court to take up consideration of hearing the FEC's appeal at its January 19<sup>th</sup> conference. The Solicitor General's office has responded, but is not able to give a substantive answer at the time of this filing. Counsel for Intervening Defendants has not responded at the time of this filing.

Respectfully submitted,

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