Nos. 06-969 & 06-970

In The

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *Appellant*
v.
WISCONSIN RIGHT TO LIFE, INC., *Appellee*

SEN. JOHN MCCAIN ET AL., *Intervenor-Appellants*
v.
WISCONSIN RIGHT TO LIFE, INC., *Appellee*

On Appeal from the United States District Court
for the District of Columbia

Application of Wisconsin Right to Life, Inc. for Leave to File in Excess of Page Limits

TO: THE CHIEF JUSTICE
Chief Justice of the United States and
Circuit Justice for the District of Columbia Circuit

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Jeffrey P. Gallant
Raeanna S. Moore
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
812/232-2434
812/235-3685 (facsimile)
Lead Counsel for WRTL

M. Miller Baker
Michael S. Nadel
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, DC 20005-3096
202/756-8000
202/756-8087 (facsimile)
Counsel for WRTL

March 7, 2006

Corporate Disclosure Statement

Wisconsin Right to Life, Inc. has no parent corporation and is a nonstock company, so no publicly held company owns ten percent or more of its stock. Rule 29.6.

Application

Wisconsin Right to Life, Inc. ("WRTL") requests leave to file an appellee brief in excess of page limitations. These consolidated appeals arise from the remand in *Wisconsin Right to Life v. FEC*. 546 U.S. 410 (2006) (holding that *McConnell v. FEC*, 540 U.S. 93 (2003), did not preclude as-applied challenges to the electioneering communication prohibition at 2 U.S.C. § 441b (the "prohibition") and remanding for consideration of the as-applied challenge on the merits).

The appeals involve review of the district court's holding that the prohibition on corporate expenditures for electioneering communications (defined at 2 U.S.C. § 434(f)(3)) is unconstitutional as applied to three grassroots lobbying advertisements (mentioning Wisconsin Senators Kohl and Feingold, the latter being a candidate) that WRTL sought to run in 2004 opposing Senate filibusters of judicial nominees. In addition to this merits issue, the court has ordered briefing on whether the underlying case is within the exception to mootness for matters capable of repetition yet evading review.

The Solicitor General (for the FEC) and the Intervenors have each filed an opening merits brief (of 50 and 43 pages respectively) and there were four amici curiae briefs filed in support (but making some different and unique arguments). WRTL's appellee brief is due on or before 2 p.m., Friday, March 23, 2007. By rule it may not exceed 50 pages.

WRTL needs extra pages for several reasons. **First**, because (a) the district court made no findings of fact and (b) Appellants have urged this Court to examine certain alleged facts purportedly proving that WRTL's true intent in running its ads was really to affect the election of Senator Feingold, WRTL must devote several pages to refuting these allegations with record material. It is WRTL's position that the district court was correct in its holding that the content of a communication must be the focus in determining whether it is the "functional equivalent" of express advocacy, *McConnell v. FEC*, 540 U.S. 93, 206 (2003), or is instead a "genuine issue ad." *Id.* at 206 & n.88. Of course there is, in addition to the communication's content, a relevant context. This includes (1) the elements of the election-eering communication definition itself (i.e., whether the public official named is a candidate, whether the ad was broadcast, whether it was aired within the 30- and 60-day blackout periods before primary and general elections, and whether it was targeted to the official's constituents) and (2) the question of whether the topic of the grassroots lobbying was a current executive or legislative branch matter.

But Appellants insist that the district court's content and relevant-context approach is erroneous and insist that this Court should consider whether the speaker intended to influence an election and whether the communications might do so, despite this Court's rejection of an intent-and-effect test in the free-expression cases of *Thomas v. Collins*, 323 U.S. 516, 535 (1945), *Buckley v. Valeo*, 424 U.S. 1, 42 (1976), and in the *Noerr-Pennington* line of cases regarding the right to petition. *See Eastern R.R. President Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961); *Professional Real Estate Investors v. Columbia*

Pictures Industries, 508 U.S. 49, 60-61 (1993). As is typical in such a situation, it takes far fewer words to allege intent with a few selected record cites than it does to refute the allegation with other record cites. WRTL has sought to be efficient in its responses to factual allegations in its statement of the case, but it has of necessity expended several pages setting the factual record straight, for example, discussing at some length the reasons for the timing of its ads.

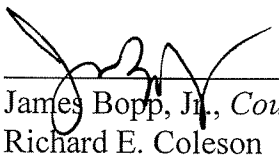
Second, WRTL will be briefing a third issue (in addition to mootness and the merits of the lower court's decision) that Appellants themselves have raised by their arguments. The FEC insists that WRTL ads are squarely in the "heartland" of what Congress sought to ban with the electioneering communication prohibition. *See* FEC Br. at 18 ("the advertisements at issue in this case fall comfortably within the heartland of 'electioneering communications' that Congress may permissibly regulate"), 35 (the "advertisements . . . , when fairly considered, are in the heartland of the advertisements that Congress intended to and did reach in BCRA § 203"), 36 n.9 (the ads are "squarely within the heartland of the concerns that BCRA § 203is intended to address"). The Intervenors insist the same. Intervenor's Brief at 16 ("WRTL's ads plainly fall at the core of Section 203's constitutional application . . . ."). If WRTL's ads are in the "heartland" or "core" of what Congress intended to prohibit, as opposed to being the peripheral "genuine issue ads" that a facial challenge analysis held were only insubstantially affected and as-applied challenges were intended to protect, then the facial upholding of the prohibition in *McConnell v. FEC*, 540 U.S. 93, 203-07 (2003), has been put squarely at issue by the Appellants and must be reconsidered.

Reconsideration of *McConnell* is also required because the experiences in this case and in *Christian Civic League of Maine, Inc. v. FEC* (No. 06-589, the other grassroots lobbying case on appeal to this Court) reveal that as-applied challenges are an inadequate remedy to protect genuine issue ads. *McConnell* employed a facial analysis that determines whether the asserted overbreadth is substantial and then leaves to as-applied challenges the task of safeguarding constitutionally-protected speech. The assumption and expectation is that the as-applied challenge remedy will be adequate. Given the expedited situations in which such cases arise, the intent-and-effect discovery required by Appellants, procedural problems, and court burdens—all as revealed in these two cases—the as-applied remedy is inadequate. This requires reconsideration of the facial upholding of the prohibition in *McConnell*. These arguments require several pages in WRTL's brief.

Third, in accordance with this Court's instruction on page nine of the *Guide for Counsel*, WRTL argues in its brief that these are "appropriate cases" in which to "suggest to the Court that [a] bright-line rule[] should be adopted and suggest[s] what [it] should be." WRTL has asked for a general judicial test from the beginning of this case and requires several pages in which to make the argument for such a test and what form it should take.

For the foregoing reasons, WRTL requests approval for additional pages in its brief. WRTL believes that an additional thirty pages would be appropriate in order to assist the Court in deciding these matters by adequately making the necessary arguments, so it requests that number of pages. In the alternative, WRTL seeks whatever additional pages the Chief Justice deems appropriate.

Respectfully submitted,



James Bopp, Jr., *Counsel of Record*
Richard E. Coleson
Jeffrey P. Gallant
Raeanna S. Moore
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
Michael S. Nadel
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, D.C. 20005-3096
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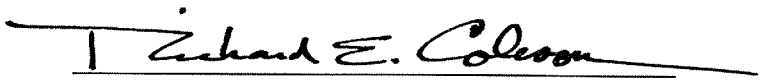
Certificate of Filing & Service

I, Richard E. Coleson, a member of the bar of this court, certify that on March 7, 2007, I filed a copy of the *Application of Wisconsin Right to Life, Inc. for Leave to File in Excess of Page Limits*, by faxing the same to Ms. Denise McNerney, Merits Case Clerk, and by sending an original and required copies of the same by FedEx priority overnight service to the Clerk of the Court. I further certify that I served a copy of said *Application* by FedEx priority overnight service upon the following persons and that all persons required to be served have been served:

Paul D. Clement, Solicitor General
Department of Justice
Washington, DC 20530-0001
Ph. 202/514-2217

Seth P. Waxman
Wilmer Cutler Pickering Hale and Dorr, LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
Ph. 202/663-6000

Lawrence H. Norton
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20436
Ph. 202/694-1630



Richard E. Coleson
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/234-3685 facsimile