

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC.,)	
)	
Plaintiff,)	No. 1:04cv01260 (DBS, RWR, RJL)
)	(Three-Judge Court)
v.)	
)	
)	
)	SUPPLEMENTAL BRIEF
)	
FEDERAL ELECTION COMMISSION,)	
)	
Defendant,)	
)	
and)	
)	
SEN. JOHN MCCAIN, <u>et al.</u> ,)	
)	
Intervenor-Defendants.)	

**DEFENDANT FEDERAL ELECTION COMMISSION'S
SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION
FOR SUMMARY JUDGMENT**

Newly produced discovery materials confirm that Wisconsin Right to Life, Inc. (“WRTL”) should not be granted a constitutional exemption from the Federal Election Campaign Act’s (“Act”) prohibition on the use of corporate treasury funds to finance WRTL’s 2004 anti-filibuster broadcast advertisements. WRTL wrongfully redacted and withheld documents and other discovery responses based in part on a misreading of this Court’s scheduling order. Following a motion to compel by defendants, the Court ordered WRTL to respond fully to all but a few of the defendants’ discovery requests and permitted the parties to submit a supplemental brief “that addresses the discovery obtained as a result of” the Court’s order. Order, Aug. 18, 2006 at 4 [Docket # 91]. Pursuant to that order, the Commission submits the following

supplemental brief summarizing the additional evidence that confirms that the Commission's motion for summary judgment should be granted.

I. NEWLY OBTAINED EVIDENCE CONFIRMS THAT WRTL'S ADVERTISEMENTS WERE DESIGNED AT LEAST IN PART TO AFFECT SENATOR FEINGOLD'S ELECTION

The evidence that WRTL had withheld or redacted confirms that opposing Senator Feingold's re-election was at least one of the purposes and likely effects of WRTL's planned 2004 advertisements. WRTL used the judicial filibuster as an election campaign issue in 2004 even more extensively than the Commission has already shown and, if successful in obtaining a preliminary injunction, WRTL intended to push the boundaries of such relief: WRTL had a contingency plan to seek further permission from this Court to run additional purported grassroots lobbying ads just before the election that would single out Senator Feingold, criticize him explicitly, and not mention Senator Kohl.¹

A. WRTL Campaigned Extensively Against Feingold's Election and Highlighted His Opposition to Judicial Filibusters in its Electoral Advocacy

WRTL's explicit campaigning against Feingold using the filibuster issue was even more extensive than defendants had been able to demonstrate previously without the materials recently provided by WRTL. In March of 2004, WRTL endorsed Feingold's three prominent opponents through its PAC, and cited each candidate's opposition to judicial filibusters as a reason for its endorsement in each of its endorsement letters for the candidates. Exh. 72. In a July 15, 2004

¹ From the outset, WRTL's advertising campaign was multi-faceted, and by early June 2004, WRTL had already developed a detailed calendar for rolling out the campaign's different phases. The first major component was the "Anti-Judicial Nominee Filibuster" campaign, scheduled to go public on August 1; the other major component was the "Campaign Finance" campaign, scheduled to go public on August 15. Exh. 79, WRTL, "Weekly Activity for Each Campaign Component." As discussed *infra* pp. 4-7, 9-11, the overall campaign also included contingency planning, depending upon whether or not WRTL was successful in gaining a preliminary injunction to run its anti-filibuster advertisements.

“E-Update” email to its supporters, WRTL — not its PAC — stated that when voting on Bush judicial nominees, “Feingold has voted to filibuster those nominees 16 out of 16 times!” Exh. 70, WRTL, E-Update, July 15, 2004 at WRTL-S2-185 – 86. WRTL noted that its PAC would “vigorously support whichever of the 3” prominent Republican candidates wins the primary, in part because all three had “pledged to allow an up or down vote on the President’s judicial nominees.” Id. WRTL then noted several other positions of its three endorsed candidates and concluded that “**Russ Feingold has the opposite position on all of those issues!**” Id.

In its magazine that is circulated to approximately 35,000 people, WRTL also repeatedly cited Feingold’s position on judicial filibusters as a reason to defeat him. WRTL’s cover story on its spring 2004 edition of its quarterly magazine was “RADICALLY PRO-ABORTION FEINGOLD MUST GO!” Exh. 73, Life Without Limits, Spring 2004 at 1-2. In the article, which indicated that it was paid for by WRTL’s PAC, WRTL discussed the filibuster of judicial nominees, pointed out that “Feingold has been active in his opposition to Bush’s judicial nominees,” noted that all three WRTL-endorsed opponents of Feingold “would oppose a filibuster of a judicial nominee if that nominee receives a favorable or neutral recommendation from the Senate Judiciary Committee,” and concluded that “FEINGOLD MUST GO!” Exh. 73, Life Without Limits, Spring 2004 at 1-2.

The cover story of WRTL’s Summer 2004 magazine was “Nothing More Important: Re-Electing Pro-Life President Bush and Defeating Pro-Abortion Russ Feingold.” Exh. 74, WRTL, Life Without Limits, Summer 2004 at 1. The article indicated that the “top election priorities” for WRTL’s PAC were to elect President Bush and “defeat radically pro-abortion U.S. Senator Russ Feingold.” Id. WRTL wrote:

One of Wisconsin’s current U.S. Senators, pro-abortion Russ Feingold, faces re-election in the 2004 elections. Feingold has done everything he can to thwart a number of the President’s federal judicial nominees at lower court levels and this

is only a preview of what Feingold and others would do to defeat President Bush's nominees to the U.S. Supreme Court. The right-to-life community in Wisconsin must do all it can to defeat Feingold and replace him with an individual who will consider President Bush's judicial nominees in a fair manner.

Id. at 2. WRTL also profiled the three Republican candidates, for whom WRTL PAC was "prepared to do all it can to assist the election" of "[w]hichever of these fine candidates should win the September primary," and noted that all three candidates held a position on judicial filibusters contrary to the way WRTL described Senator Feingold's. Id.

This new evidence provides further confirmation that the judicial nomination issue "was raised early and often as a partisan issue with the Republican candidates and Wisconsin Right to Life citing it as a reason to defeat Sen. Feingold." Exh. 1, Franklin Rept. at 9. In part due to WRTL's own efforts to make judicial filibusters a partisan issue, WRTL's 2004 ads would have been likely to help mobilize Republicans to participate in the Senate election and vote against Senator Feingold. Id. at 35-36.

B. WRTL Also Hoped to Run Purported Grassroots Lobbying Ads that Singled Out Senator Feingold Right Before His 2004 Election

WRTL's attempt to run its anti-filibuster ad naming both Senator Kohl and Senator Feingold was only the first step in the electioneering it hoped to finance with its corporate treasury funds. If successful in obtaining a preliminary injunction from this Court regarding its three anti-filibuster ads, WRTL planned to seek this Court's permission to run advertisements during the electioneering communications period that focused exclusively on Senator Feingold. FEC's Proposed Findings of Fact ("PFF") ¶¶ 151-53. WRTL's intent was therefore not to target both of Wisconsin's Senators equally, but to use its treasury funds to finance advertisements that focused criticism solely on then-candidate Feingold.

Throughout its planning in the summer of 2004, WRTL included a contingency plan for an advertisement referring to campaign finance reform and singling out Senator Feingold.² At a July 9, 2004 meeting, for example, WRTL decided to “[c]reate another filibuster ad which asks Feingold to sponsor legislation to allow lobbying ads in an election cycle to test if we win in court with the first ads.” Exh. 98, Filibuster Project Notes, Meeting, July 9, 2004. If it obtained a preliminary injunction regarding its first series of ads, WRTL planned to “[r]equest permission from U.S. District Court to air campaign finance reform spots that call on Senator Feingold to remedy the situation.” Exh. 96, “Key Legal Dates & Scenarios.” See also Exh. 97, “Revised On-air Schedule”; Exh. 99, “Wisconsin Right to Life Action Plan/Timeline” (plan after favorable decision was to “[s]eek approval for second flight of ads”).

During polling that preceded its advertising campaigns, WRTL specifically tested several questions that focused solely on Senator Feingold in order to learn the public’s “Opinions About Senator Feingold.” Exh. 103, Robert K. Autry, NMB Research, “What Wisconsin Thinks About Campaign Finance Reform and the Filibustering of Judicial Nominees,” July 9, 2004, Slides 57-62. Although its poll covered several topics, WRTL tested messages that would specifically target Senator Feingold as part of its special judicial filibuster/BCRA effort:

Having heard more information about this one part of the new campaign finance reform law, do you believe it was the intention of Senator Russ Feingold to prevent citizens from being able to lobby their own Member of Congress on important upcoming votes in Congress during the election campaign?

And, do you believe Senator Russ Feingold SHOULD or SHOULD NOT sponsor a bill in the Senate to allow citizen groups to express their views to Members of Congress on important upcoming votes in Congress regardless of when those votes are occurring?

² In addition to judicial filibusters, Senator Feingold’s opponents made his focus on campaign finance reform an issue in his 2004 election. See, e.g., Exh. 105, Jennifer Koons, Michels Taunts Feingold’s Focus on CFR in Wisconsin, Nat’l J., Sept. 29, 2004; Exh. 106, Jennifer Koons, Candidates Squabbling Over CFR Continues in Wisconsin, Nat’l J., Oct. 13, 2004.

Exh. 102, Wisconsin Statewide Benchmark Study, June 29-30, 2004, at WRTL-S2-202.³

In preparation for the contingency of a favorable decision from this Court on the judicial filibuster advertisements, WRTL's advertising agency drafted a script for a later advertisement that criticized Senator Feingold exclusively. The television advertisement discussed campaign finance reform and concluded, "More restrictions on free speech. Less information. Was that the intent of campaign finance reform? If this doesn't sound right to you, ask Senator Feingold [sic] to fix the problems with campaign finance reform that he helped to create... Visit BeFair.org." Exh. 100, "Reform Patrol" (Version C), Aug. 3, 2004. Thus, although WRTL has tried to disavow any electoral intent by relying upon the fact that its original three ads mention both Senator Kohl and Senator Feingold, the facts show that the next stage of WRTL's plan was to use its treasury funds to run ads, if permitted by the Court, that mentioned only Senator Feingold and explicitly criticized his record.

WRTL's contingency plan is unsurprising. "[I]t is the inherent nature of political advertising to make the most of any opportunity. Any exemption will inevitably be tested to the limit." Exh. 1, Franklin Rept. at 41. See McConnell v. FEC, 540 U.S. 93, 144 (2003) ("[T]he First Amendment does not require Congress to ignore the fact that 'candidates, donors, and parties test the limits of the current law,'" quoting FEC v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431, 457 (2001)). If this Court were to grant WRTL the broad, amorphous constitutional exemption from federal law that it seeks, WRTL and other interest groups would likely exploit the exemption to undercut the Congressional purpose of prohibiting the expenditure of corporate treasury funds in connection with federal elections. See Exh. 1,

³ The polling company that WRTL hired was Public Opinion Strategies, although the company used the name "NMB Research" for purposes of the WRTL project. FEC Exh. 5, Vanderground Dep. at 94-95. Public Opinion Strategies had been employed by the Wisconsin Republican Party for the previous eight years to conduct polls about Senator Feingold and was also employed in 2004 by one of Feingold's opponents. FEC Exh. 18; FEC Exh. 5, Vanderground Dep. at 94-95.

Franklin Rept. at 39 (“Political advertising is a highly imitative medium and once an exempt construction that nonetheless accomplishes electioneering purposes is found it will quickly become the norm rather than the exception.”).

C. WRTL Shut Down Its Special Website as the Filibuster Controversy Was Peaking in the Spring of 2005

As we have shown (SJ Br. at 7-9, 30), the timing of WRTL’s ads — near the election and not before any Senate votes — helps demonstrate their electoral purpose. When the filibuster controversy reached its peak in the spring of 2005 — and the electioneering communication provision was inapplicable — not only did WRTL choose not to run any broadcast advertising, it also closed down BeFair.org, the special website with judicial filibuster information that WRTL had created and to which the public was directed in WRTL’s broadcast ads. Unredacted documents show that WRTL decided to close down the site on February 11, 2005, and to allow the domain name of the website to expire on May 3, 2005. Exh. 107 (email printouts); Exh. 7, Franklin Dep. at 26-27. On February 9, 2005, WRTL’s advertising consultant emailed WRTL to find out whether WRTL wanted to shut the website down, writing that “[o]ur portion of the campaign has really run it’s [sic] course.” Exh. 107 at FM S098.⁴ WRTL’s advertising agency considered its “portion of the campaign” over because the only time that WRTL had ever considered airing advertisements that were purportedly about action in the Senate was in the months leading up to Senator Feingold’s election, not in the spring of 2005 when the filibuster controversy actually reached its peak.

⁴ WRTL improperly redacted that single sentence in its original document production. Compare Exh. 107 at FM S098 with Exh. 108.

II. NEW DISCOVERY MATERIALS CONFIRM THAT THE ALTERNATIVE COMMUNICATION OPTIONS IDENTIFIED IN McCONNELL ARE NOT UNCONSTITUTIONALLY BURDENSOME AS APPLIED TO WRTL'S ADS

A. The PAC Option

As the Commission has shown, WRTL appears to have abandoned fundraising efforts in 2004 for its PAC and instead made a special effort to raise funds for its corporate treasury to pay for the anti-filibuster campaign. FEC SJ Reply Br. at 6 n.2; PFF 118-36. Although WRTL claims to be unable to identify which of its contributions were raised as part of its specific effort to raise money for the filibuster ads, it has now provided a list of all contributions to its general fund that were in amounts of \$1,000 or more. Exh. 78, Plaintiff WRTL's Responses to Defendants' Interrogatories, Response No. 7 & "Contributions to General Fund" attachment. In the 2003-2004 election cycle, WRTL's corporate treasury received 35 contributions of \$1,000 or more from individuals. Id. If WRTL had been making an effort to enroll these large contributors as members and to raise money for its PAC rather than its general treasury, it likely would have had ample funds to pay for the filibuster advertisements through its PAC. WRTL also raised additional money from its 52,000 members in amounts less than \$1,000, including through telemarketing calls specifically for the anti-filibuster ads (PFF ¶ 129). Again, WRTL offers no reason why it could not have made essentially the same fundraising pitch to solicit its members to direct their donations to the PAC to pay for the ads. In sum, the newly provided evidence offers additional proof that WRTL has failed to establish that it would be unconstitutionally burdensome for it to "pay[] for the ad[s] from a segregated fund." McConnell, 540 U.S. at 206.

B. Omission of Candidate Reference

New evidence about WRTL's other advertising that it considers grassroots lobbying also demonstrates that it would not be unconstitutionally burdensome for WRTL to have "simply avoid[ed] any specific reference to federal candidates" (540 U.S. at 206) in its anti-filibuster ads during the electioneering communications timeframe. During the "campaign finance" component of its 2004 advertising campaign, WRTL spent almost \$60,000 to run a radio advertisement without naming any federal officeholders as part of its campaign to urge the public to contact their Senators about a legislative issue.

From its inception, WRTL's multi-faceted campaign included a contingency plan to be used if WRTL were unsuccessful in gaining a preliminary injunction. In that case, WRTL planned to broadcast TV and radio ads that were critical of the electioneering communication provision of BCRA but that did not name any federal officeholders. Exh. 80, "Key Legal Dates & Scenarios" (in the event of an unfavorable ruling, plan was to "[b]egin airing ad that ties filibustering and campaign finance reform together (combo) without identifying Senator Feingold (generic)"); Exh. 81, "Wisconsin Right to Life Action Plan/Timeline" (plan after unfavorable decision was to "[a]ir generic ad"); Exh. 82, Filibuster Project Notes, Meeting, July 9, 2004 ("Create a generic ad mentioning both issues to air when the blackout period is in effect and the court is deciding or we have lost in court.").

WRTL had its advertising agency draft a number of TV and radio ads that did not contain any reference to federal officeholders. See Exhs. 83-86 (draft ads); Exh. 87, Working Budget, July 13, 2004 (WRTL had budgeted for "two :30 campaign finance reform TV spots" and "two :60 campaign finance reform radio spots"); Exh. 88, Hanon McKendry Job Summaries (over fifty hours spent by advertising agency for "Phase 2" TV and radio spot production). The

“generic” ads urged action on federal campaign finance reforms without mentioning any federal officeholders and directed viewers to WRTL’s filibuster/BCRA website. One ad, for example, closed with the following:

More restrictions on free speech. Less information. Was that the intent of campaign finance reform? If this doesn’t sound right to you, let’s get Washington to fix the problems they created with campaign finance reform... Visit BeFair.org.

Exh. 84 at HM-S2-088, “Reform Patrol” (Version B). See also Exh. 89, “Technical Difficulties” (Version C), Aug. 10, 2004 (alternative draft). WRTL could just as easily have drafted its anti-filibuster ads in a similar manner, closing the ad: “If this doesn’t sound right to you, let’s get Washington to oppose filibusters... Visit BeFair.org.” Instead, WRTL chose not to run any ads focused on the judicial filibuster issue, if it could not include Senator Feingold’s name.

WRTL ultimately chose to spend a little more than \$7,000 to produce different versions of the “campaign finance reform” ad and paid approximately \$50,000 to air one ad during the electioneering communications period in 2004. Exh. 91, Invoice, Aug. 1, 2004; Exh. 92, “Radio Media Plan As Placed, 8/16/04 – 8/22/04”; Exh. 93, “WRTL Radio Media Plan As Placed, 8/23/9/12/2004”; Exh. 94 (radio station invoices). The ad was called “Technical Difficulties” while being drafted and was later called “News Bulletin.” It criticized recent “campaign finance reform” without naming any federal candidates (referring only to “Washington”) and encouraged listeners to visit the website that WRTL set up for its judicial filibuster/BCRA challenge campaign (“BeFair.org”). Exh. 90 at FM S045; Exh. 32. At that site, WRTL urged Wisconsin residents to contact their Senators in order to “ask them to permanently fix the problems with campaign finance reform that they helped to create” and support a specific bill then-pending in Congress, the “First Amendment Restoration Act.” Exh. 95, WRTL, “Ask Your Senators to Fix the Problem.”

Thus, despite WRTL's position before this Court that it would be an unconstitutional burden to omit Senator Feingold's name from its anti-filibuster ads right before an election, WRTL did precisely that in another related ad with a purported grassroots lobbying purpose. WRTL's executive director and advertising consultant, the very same people who have claimed in testimony to this Court that it was essential to include the name of Senator Feingold in what was claimed to be a grassroots lobbying ad (Exh. 3, WRTL Dep. (Lyons) at 119-21; Exh. 5, Vanderground Dep. at 129-30), apparently believed that a different ad could successfully achieve its alleged grassroots lobbying objective by referring listeners to its website without specifically mentioning the Senator's name.⁵ WRTL's actions speak louder than its words and undermine its attempt to refute the Supreme Court's determination in McConnell that "genuine issue ads" may be aired in the future "by simply avoiding any specific reference to federal candidates."

McConnell, 504 U.S. at 206.

III. WRTL'S RECEIPT OF LARGE CONTRIBUTIONS FROM BOTH INDIVIDUALS AND BUSINESS CORPORATIONS IN 2004 DEMONSTRATES THE POTENTIAL FOR CIRCUMVENTION OF THE ACT'S SPENDING AND CONTRIBUTION LIMITS

WRTL has now produced a slightly more complete picture of its general fund receipts in the 2003-2004 election cycle. Permitting WRTL to fund its electioneering communications from its treasury funds would enable WRTL and its contributors to circumvent several provisions of the Act. As the Commission has pointed out, WRTL raised more than \$315,000 from corporations for its general fund in 2004, amounting to nearly one-fourth of its total revenues that year, and the "vast majority" of those corporate donations came from business corporations.

⁵ WRTL's Executive Director Barbara Lyons, sitting for deposition as WRTL's corporate representative under Rule 30(b)(6), falsely testified that the "News Bulletin" did not actually air. Exh. 3, WRTL Dep. (Lyons) at 99-101. WRTL has never corrected the record on this, and it had carefully redacted or withheld all the relevant documents demonstrating that the ad had actually been broadcast.

PPF ¶ 118. New discovery responses by WRTL show that it raised approximately \$300,000 in corporate contributions in increments of \$1,000 or more and approximately \$260,000 of those corporate funds were from business corporations rather than non-profit corporations. Exh. 78, Plaintiff WRTL's Responses to Defendants' Interrogatories, Response No. 7 & "Contributions to General Fund" attachment. Business corporations made donations to WRTL in 2004 that were as large as \$50,000 and \$140,000. Id. WRTL's intended use of these donations to run its filibuster ads demonstrates that this as-applied challenge directly threatens Congress's ban on corporate expenditures to influence elections. If its request for relief had been granted in 2004, WRTL would have served as a conduit for business corporations' political spending. See Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 664 (1990); McConnell, 540 U.S. at 209-11.

New information about WRTL's receipt of large contributions from individuals also shows that permitting WRTL to fund its advertising from its general treasury poses a danger of circumvention of the Act's limits on contributions by individuals. WRTL's general fund received eight contributions from individuals that by themselves would have exceeded the \$5,000 annual limit for each individual's contributions to a multicandidate political committee such as WRTL's PAC. See 2 U.S.C. 441a(a)(1)(C). Specifically, WRTL received contributions from individuals in amounts as large as \$25,000, \$50,000, and \$100,000. Exh. 78, Plaintiff WRTL's Responses to Defendants' Interrogatories, Response No. 7 & "Contributions to General Fund" attachment.

CONCLUSION

The new evidence produced by WRTL and its vendors confirms that the Commission is entitled to summary judgment. For the reasons set forth above and in the Commission's two prior summary judgment briefs, the Court should dismiss this case with prejudice.

Respectfully submitted,

/s/ Kevin Deeley

Lawrence H. Norton
General Counsel

Richard B. Bader
Associate General Counsel
(D.C. Bar # 911073)

David Kolker
Assistant General Counsel
(D.C. Bar # 394558)

Harry J. Summers
Kevin Deeley
Steve N. Hajjar
Attorneys

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650
(202) 219-0260 (FAX)

September 11, 2006