No. 05-1447

In the Supreme Court of the United States

CHRISTIAN CIVIC LEAGUE OF MAINE, INC.,
APPELLANT

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM FOR THE FEDERAL ELECTION COMMISSION

LAWRENCE H. NORTON
General Counsel
RICHARD B. BADER
Associate General Counsel
DAVID KOLKER
Assistant General Counsel
HARRY J. SUMMERS
Attorney
Federal Election Commission
Washington, D.C. 20463
(202) 694-1650

PAUL D. CLEMENT
Solicitor General
Counsel of Record
GREGORY G. GARRE
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether appellant's appeal from the denial of a preliminary injunction is moot.

2. Whether the three-judge district court abused its discretion in denying appellant's request for a preliminary injunction against enforcement of the federal statutory prohibition on the use of corporate treasury funds to finance "electioneering communications."

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OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-13a) is reported at 433 F. Supp. 2d 81.

JURISDICTION

The decision of the three-judge district court was filed on May 9, 2006. A notice of appeal and the jurisdictional statement were filed on May 12, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

This case concerns the "electioneering communication" provision of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, § 203, 116 Stat. 91-

92. The provision prohibits corporations from using their general treasury funds to pay for any "electioneering communication,"defined as a communication that refers to a candidate for federal office and is broadcast within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running. BCRA § 203, 2 U.S.C. 441b(b)(2) (Supp. III 2003). This Court has sustained BCRA § 203 against a facial constitutional challenge, see *McConnell* v. *FEC*, 540 U.S. 93, 203-209 (2003), but has held that the provision is subject to as-applied challenges, see *Wisconsin Right to Life, Inc.* v. *FEC*, 126 S. Ct. 1016, 1018 (2006) (*WRTL*) (per curiam). Appellant filed suit in federal district court, arguing that BCRA's restrictions on the financing of "electioneering communications" are unconstitutional as applied to appellant's own broadcast advertisements. The three-judge district court denied appellant's request for preliminary injunctive relief. J.S. App. 1a-13a.

1. The Federal Election Commission (Commission or FEC) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431-455 (2000 & Supp. III 2003), and other federal campaign-finance statutes. See J.S. App. 2a. The Commission is empowered to "formulate policy" with respect to the FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(a)(8) and (d) (2000 & Supp. III 2003); and to issue written advisory opinions concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. a. Federal law has long prohibited both for-profit and nonprofit corporations from using their general treasury funds to finance contributions and expenditures in connection with federal elections. See *FEC* v. *Beaumont*, 539 U.S. 146, 152-154 (2003). The FECA makes it "unlawful * * * for any corporation whatever * * * to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). However, the FECA permits a corporation to establish a "separate segregated fund," commonly called a political action committee or PAC, to finance those disbursements. 2 U.S.C. 441b(b)(2)(C) (2000 & Supp. III 2003). The fund "may be completely controlled" by the corporation, and it is "separate" from the corporation "'only in the sense that there must be a strict segregation of its monies' from the corporation's other assets." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 200 n.4 (1982) (quoting *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 414 (1972)). The fund may solicit and accept donations voluntarily made for political purposes by the corporation's stockholders or members and its employees, and the families of those individuals. 2 U.S.C. 441b(b)(4)(A)-(C). The money in a corporation's separate segregated fund can be contributed directly to candidates for federal office, and it may be used to pay for independent expenditures to communicate to the general public the corporation's views on such candidates.

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), this Court held that Section 441b's prohibition on the use of corporate treasury funds to finance independent expenditures for campaign-related speech could not constitutionally be applied to a corporation that (1) was "formed for the

express purpose of promoting political ideas, and cannot engage in business activities"; (2) had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and [had a] policy not to accept contributions from such entities." *Id.* at 264; see *McConnell*, 540 U.S. at 210; 11 C.F.R. 114.10 (implementing the *MCFL* exception). Corporations possessing the characteristics identified in that case are commonly referred to as "*MCFL* organizations." See, *e.g.*, *McConnell*, 540 U.S. at 210.

The Court in *MCFL* also adopted a narrowing construction of 2 U.S.C. 441b even as applied to corporate entities that do not qualify as *MCFL* organizations. In interpreting Section 441b's prohibition of corporate "expenditure[s]," the Court noted that the FECA definition of "expenditure" encompassed "the provision of anything of value made 'for the purpose of influencing any election for Federal office.'" *MCFL*, 479 U.S. at 245-246 (quoting 2 U.S.C. 431(9)(A)(i)) (emphasis omitted). To avoid problems of vagueness and overbreadth, the Court construed Section 441b's prohibition of independent expenditures from corporate treasuries to reach only the financing of communications that expressly advocate the election or defeat of a clearly identified candidate. *Id.* at 248-249; see 2 U.S.C. 431(17) (pre-BCRA law). The Court had previously introduced the concept of express advocacy in *Buckley* v. *Valeo*, 424 U.S. 1, 43-44, 77-80 (1976), when it narrowly construed other FECA provisions regulating independent campaign expenditures. *Buckley* provided examples of words of express advocacy, such as "vote for," "elect," "support," "defeat," and "reject." *Id.* at 44 n.52.

b. Based on its assessment of evolving federal campaign practices, Congress subsequently determined that, "[w]hile the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." *McConnell*, 540 U.S. at 126. In the wake of *Buckley*, corporations and labor unions crafted political communications that avoided the so-called magic words of express electoral advocacy and financed those communications with "hundreds of millions of dollars" from their general treasuries. *Id.* at 127. Indeed, even the advertisements aired by federal candidates themselves rarely included express exhortations to vote for or against a particular candidate. See *id.* at 127 & n.18, 193 & n.77. "[T]he conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." *Id.* at 127.

"Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at 194. BCRA § 203 amended 2 U.S.C. 441b(b) to bar any corporation or union from paying for an "electioneering communication" with money from its general treasury. 2 U.S.C. 441b(b)(2) (2000 & Supp. III 2003). The term "electioneering communication" is defined in pertinent part as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate for federal office; (2) is made within 60 days before a general election, or within 30 days before a primary election for the office sought by the candidate; and (3) is "targeted to the relevant electorate." BCRA § 201(a), 116 Stat. 88

(2 U.S.C. 434(f)(3)(A)(i) (Supp. III 2003)).[1] The prohibition on the use of corporate funds for electioneering communications does not apply to "*MCFL* organizations." See *McConnell*, 540 U.S. at 209-211. A corporation or union remains free, moreover, to establish a separate segregated fund and to pay for any electioneering communications that it would like from that fund. See 2 U.S.C. 441b(b)(2)(C) (2000 & Supp. III 2003).

3. In *McConnell*, this Court upheld against a facial constitutional challenge BCRA § 203's ban on the use of corporate or union treasury funds for electioneering communications. See 540 U.S. at 203-209. The Court observed that, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view [BCRA § 203] as a 'complete ban' on expression rather than a regulation." *Id.* at 204 (quoting *Beaumont*, 539 U.S. at 162); see *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990). "The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *McConnell*, 540 U.S. at 204 (quoting *Beaumont*, 539 U.S.

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[1] BCRA excludes from the definition of "electioneering communication" "(i) a communication appearing in a news story, commentary, or editorial distributed through" a broadcasting station; (ii) a communication that is an expenditure or independent expenditure under the Federal Election Campaign Act; (iii) a candidate debate or forum; and (iv) any other communications the Commission exempts by regulation, consistent with certain requirements. BCRA § 201(a), 2 U.S.C. 434(f)(3)(B)(i)-(iv) (Supp. III 2003). The definition also does not encompass print communications such as billboards, newspaper and magazine advertisements, brochures, and handbills, and it does not cover telephone or Internet communications. See *McConnell*, 540 U.S. at 207.

at 163). The Court also noted that its campaign-finance jurisprudence reflects "respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205 (citations and internal quotation marks omitted).

The Court in *McConnell* further held that the compelling governmental interests that support the requirement that corporations finance express advocacy through a PAC apply equally to corporate financing of electioneering communications. 540 U.S. at 206. Based on its examination of the record before the district court, the Court concluded that the "vast majority" of prior advertisements encompassed by BCRA's definition of the term "electioneering communications" were intended to influence electoral outcomes. *Ibid.* The Court further observed that, "whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Ibid.*

4. In *Wisconsin Right to Life, Inc.* v. *FEC*, 126 S. Ct. 1016 (2006) (*WRTL*) (per curiam), this Court considered an as-applied constitutional challenge to BCRA § 203's prohibition on the use of corporate treasury funds to finance electioneering communications. The three-judge district court in *WRTL* had construed this Court's decision in *McConnell* as foreclosing all such as-applied challenges. *Id.* at 1017-1018. This Court vacated the judgment of the district court, stating that *McConnell* "did not purport to resolve future as-applied challenges" to BCRA § 203. *Id.* at 1018. The Court remanded the case to the district court to consider the merits of the plaintiff corporation's as-applied challenge in the first

instance. *Ibid.* That case is currently pending before the three-judge district court.[2]

5. Appellant Christian Civic League of Maine, Inc., is a nonprofit, nonstock Maine corporation. J.S. App. 1a. Appellant's complaint asserts that it is tax-exempt under Section 501(c)(4) of the Internal Revenue Code (26 U.S.C.), and that it is interested in "laws protecting traditional marriage" and other public issues. Compl. paras. 16, 20; see J.S. App. 1a. Appellant asserts that it does not qualify for any exception that would permit it to finance electioneering communications with corporate funds, alleging in particular that it is not a "qualified nonprofit corporation" under 11 C.F.R. 114.10, which implements the *MCFL* exception. Compl. para. 22.

Appellant's complaint in the instant case was filed on April 3, 2006. Appellant alleged that it planned to run a particular radio advertisement "between May 10 and early June." Compl. paras. 11, 13. The text of the advertisement (known as the "Crossroads" advertisement) is as follows:

> Our country stands at the crossroads—at the intersection of how marriage will be defined for future generations. Marriage between a man and a woman

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[2] After this Court's remand in *WRTL*, the district court on April 17, 2006, set a schedule for expedited discovery and briefing. Discovery lasted approximately two months, including depositions of the defendants' expert witnesses, although a motion to compel is currently pending before the court. Summary judgment briefing will be completed by August 18, 2006, and oral argument in the district court is scheduled for September 18, 2006. In its April 17 scheduling order, the district court also ordered the parties to address what "live controversy" the court must adjudicate on remand, and the parties filed memoranda in response on May 1, 2006.

> has been challenged across this country and could be declared unconstitutional at any time by rogue judges. We must safeguard the traditional definition of marriage by putting it beyond the reach of all judges—by writing it into the U.S. Constitution. Unfortunately, your senators voted against the Marriage Protection Amendment two years ago. Please call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June. Call the Capitol switchboard at 202-224-3121 and ask for your senators. Again, that's 202-224-3121. Thank you for making your voice heard.

J.S. App. 1a-2a. Because "Senator Snowe [was] a candidate in a primary election scheduled for June 13, 2006," *id.* at 2a, the effect of specifically mentioning Senator Snowe under BCRA's electioneering-communications provisions was that the advertisement in question could not be financed with appellant's treasury funds if it was broadcast in Maine between May 14 and June 13, 2006.

The complaint in this case further alleged that appellant "intends to run materially similar grass-roots lobbying ads * * * when there are pending matters in the legislative or executive branch that similarly require referencing a clearly identified candidate for federal office in broadcast communications to the citizens of Maine." Compl. para. 16. Appellant alleged that it "is concerned about a range of issues * * * that regularly have and will become issues in the legislative and executive branch." *Ibid.* Appellant alleged that, "[b]ecause the legislative and executive branches often deal with important legislative and executive branch issues in the periods before elections, there is a strong likelihood that [appellant's] need to broadcast grass-roots lobbying ads

will again coincide with the electioneering communications blackout periods." *Ibid.* Appellant sought preliminary and permanent injunctive relief against enforcement of BCRA § 203 with respect to both the specific advertisement referenced in the complaint and any other "electioneering communications by [appellant] that constitute grass-roots lobbying." Compl. 13. A three-judge district court was convened pursuant to BCRA § 403(a)(1), 116 Stat. 114.

6. On May 9, 2006, the district court denied appellant's request for a preliminary injunction against enforcement of BCRA's restrictions on the financing of the "Crossroads" advertisement. J.S. App. 1a-15a.[3] The court concluded that "each of the four preliminary injunction factors counsels against the grant of the requested injunction." *Id.* at 8a.

In holding that appellant had failed to establish a likelihood of success on the merits, the district court observed that BCRA "does not bar the proposed advertisement; it only requires that [appellant] fund it through a political action committee." J.S. App. 9a. The court found that the "ability to form and administer sep-

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[3] In a footnote, the district court observed that appellant's request for a preliminary injunction extended beyond the "Crossroads" advertisement to "encompass 'any electioneering communications by [appellant] that constitute grass-roots lobbying.'" J.S. App. 3a n. 1 (quoting Compl. 13). The court observed, however, that appellant had "fail[ed] to define 'grassroots lobbying' (other than as including its proposed advertisement) or to identify any necessity for the application of such a broader injunction." *Ibid.* The court concluded on that basis that appellant's "request for the broader preliminary injunction [was] unwarranted." *Ibid.* The remainder of the court's opinion therefore addressed appellant's request for preliminary injunctive relief only insofar as that request pertained to the "Crossroads" advertisement. See *ibid.*

arate segregated funds . . . has provided corporations . . . with a constitutionally sufficient opportunity to engage in express advocacy." *Ibid.* (quoting *McConnell*, 540 U.S. at 203). The court further explained that appellant could have financed the advertisement with corporate treasury funds if it had used a non-broadcast medium or had refrained from clearly identifying Senator Snowe. See *ibid.*

The district court also noted that appellant's advertisement

> appears to be functionally equivalent to the sham issue advertisements identified in *McConnell*. * * * [T]he advertisement might have the effect of encouraging a new candidate to oppose Senator Snowe, reducing the number of votes cast for her in the primary, weakening her support in the general election, or otherwise undermining her efforts to gather such support, including by raising funds for her reelection.

J.S. App. 10a (citation omitted). The court observed that a newsletter published by appellant had "already sounded an enthusiastic note regarding a potential challenger to Senator Snowe." *Ibid.* In addition, the court concluded that appellant's proposed "grassroots lobbying" exception to the coverage of BCRA § 203 "would seriously impair the government's compelling interest in protecting the integrity of the electoral process" because "candidates or their allies could easily schedule an issue for 'legislative consideration' during the run-up to an election as a pretext for broadcasting a particular subliminal electoral advocacy advertisement." *Id.* at 10a-11a.

The district court also held that appellant had failed to demonstrate that it would suffer irreparable harm absent a preliminary injunction because, notwithstanding BCRA's restrictions on "electioneering communications," the various alternative means the court had described were available for communicating appellant's views concerning the Marriage Protection Amendment. J.S. App. 11a. The court further concluded that issuance of the requested preliminary injunction would substantially injure the Commission and would disserve the compelling public interest in the enforcement of BCRA. *Id.* at 12a-13a.

7. On May 12, 2006, appellant filed a jurisdictional statement in this Court and moved for expedited disposition of its appeal. In its Motion to Expedite and Consolidate Briefing (Mot. to Expedite), appellant stated that a Senate vote on the Marriage Protection Amendment was expected to occur "on or about June 5, 2006." *Id.* at 2. The motion further stated that appellant "only wants to run the ['Crossroads'] ad until the vote occurs and not thereafter." *Ibid.* The FEC opposed that motion, arguing that expedited consideration was unwarranted even though "the question whether the district court should have issued a *preliminary* injunction is likely to become moot before the Court can resolve the merits of [appellant's] current appeal." FEC Opp. to Mot. to Expedite 5.

On May 15, 2006, this Court denied appellant's motion to expedite the appeal. 126 S. Ct. 2062. On June 7, 2006, a vote to invoke cloture on the proposed Marriage Protection Amendment failed in the United States Senate, effectively terminating Senate consideration of the measure. See 152 Cong. Rec. S5534 (daily ed).

8. Since May 15, 2006, the parties have, inter alia, filed a joint report and memoranda about how the case should proceed before the district court, including various scheduling and discovery proposals. Although appellant moved that proceedings in the district court be held in abeyance pending this Court's disposition of the jurisdictional statement, the district court denied that motion. The Commission subsequently answered appellant's complaint regarding the "Crossroads" advertisement and moved to dismiss appellant's claims concerning future, hypothetical "grassroots lobbying." The intervenors moved for partial judgment on the pleadings. On June 23, 2006, the court stayed discovery, set a schedule for addressing jurisdictional issues, and ordered the parties to address the question whether the "Crossroads" portion of the case is moot. A hearing on the jurisdictional questions was held on August 8, 2006.

ARGUMENT

Appellant challenges the district court's denial of a preliminary injunction, arguing that BCRA § 203's ban on the use of corporate treasury funds to finance "electioneering communications" is unconstitutional as applied to the "Crossroads" advertisement and to "genuine grassroots lobbying generally." See J.S. i. Because appellant's request for a preliminary injunction is now moot, the appeal should be dismissed. In the alternative, the judgment of the district court denying a preliminary injunction should be affirmed.

1. a. "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Because appellant previously disavowed any intent to broadcast the "Crossroads" advertisement

after the Senate vote on the Marriage Protection Amendment, and that vote has now occurred, the question whether the district court abused its discretion in denying preliminary injunctive relief with respect to the "Crossroads" advertisement is moot and is therefore no longer suitable for judicial resolution. See *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000) ("Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins * * * [this Court's] mootness jurisprudence."). "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Lewis*, 494 U.S. at 477 (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain [this Court's] jurisdiction * * * it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals." *Id*. at 477-478.

In moving for expedited consideration of its appeal, appellant specifically represented to this Court that a Senate vote on the proposed Marriage Protection Amendment was expected in early June and that appellant "only wants to run the ['Crossroads'] ad until the vote occurs and not thereafter." Mot. to Expedite 2. The Senate has now terminated its consideration of the Marriage Protection Amendment, and no subsequent Senate vote on that measure is expected to occur in the foreseeable future. And because appellant chose not to run the "Crossroads" advertisement during the 30-day period before the June Senate primary election in Maine, it is not subject to any potential future Commission enforcement action whose validity might turn on the

determination whether BCRA's financing restrictions are constitutional as applied to that advertisement. Accordingly, appellant's request for a preliminary injunction against FEC enforcement of BCRA § 203 with respect to the "Crossroads" advertisement at issue in this case is no longer the subject of a live controversy.

b. This Court has recognized an exception to mootness principles for disputes that are "capable of repetition, yet evading review." See *Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). The Court has applied that exception, however, only when "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Lewis*, 494 U.S. at 481 (internal citation omitted) (quoting *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982)). For an alleged wrong to be considered "capable of repetition," "there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy*, 455 U.S. at 482 (quoting *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975)). Accord, *e.g.*, *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 774 (1978).

That exception provides no basis for this Court to review the district court's denial of *preliminary* injunctive relief in this case. Appellant's request for a *permanent* injunction against enforcement of BCRA § 203's financing restrictions is currently pending before the district court, which is required by BCRA § 403, 116 Stat. 113, to give expedited consideration to appellant's constitutional challenge. If appellant can establish a live controversy as to its request for a permanent injunction—*i.e.*, if appellant can demonstrate a likelihood that

it will again seek to finance the "Crossroads" advertisement during the 30- or 60-day period before a Maine election in which Senator Snowe or Senator Collins is a candidate—then it presumably may obtain a district court ruling on the merits of its constitutional challenge, subject to review by this Court.

Thus, if the current dispute is indeed capable of repetition, there is no reason to suppose that it will evade review. On appeal from a final judgment, moreover, the question of BCRA § 203's constitutionality as applied to the "Crossroads" advertisement would be squarely presented, without regard to the other factors that bear on the propriety of the district court's denial of temporary relief.[4] And if petitioner cannot establish a sufficient

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[4] If this Court were to note probable jurisdiction over appellant's current appeal, its consideration of the underlying constitutional question could be complicated by the applicability of an abuse-of-discretion standard; by the need to consider the additional factors that supported the district court's denial of preliminary relief; and by the inadequacy of the evidentiary record that was before the district court at the time that court denied preliminary relief. As the government explained in the district court and in our opposition to appellant's motion to expedite the appeal, the Commission seeks to compile a record addressing a narrow range of topics concerning the purpose and likely effect of appellant's planned advertisement, such as the organization's decision about where, when, and how to run the advertisement; appellant's prior use of broadcast and other media for its public communications; the relationship between matters raised in the "Crossroads" advertisement and Senator Snowe's candidacy for reelection; and appellant's prior expressions of support for or opposition to Senator Snowe. In addition, the Commission may seek expert testimony as to the likely effect of appellant's advertisement in Maine's electoral climate, the importance of identifying office holders in grassroots lobbying advertisements, and whether a grassroots lobbying exemption like the one appellant now seeks would likely enable political consultants to craft electioneering advertisements that would circum-

likelihood that it will again seek to broadcast the "Crossroads" advertisement in circumstances that render BCRA § 203 applicable, it cannot invoke the "capable of repetition, yet evading review" exception to mootness principles in any event.

c. The mootness defect is not an unforeseen development. In its opposition to appellant's extraordinary request for expedited review, the FEC explained that denial of that request would likely result in appellant's appeal of the denial of preliminary injunctive relief becoming moot before the Court could resolve the merits of that appeal. See FEC Opp. to Mot. to Expedite 5.

2. If the Court concludes that this appeal is not moot, it should affirm the three-judge district court's order denying appellant's request for a preliminary injunction. In determining whether to issue a preliminary injunction, a district court considers the plaintiff's likelihood of success on the merits, whether the plaintiff will suffer irreparable injury in the absence of an injunction, the prospect of injury to other parties if an injunction is entered, and the public interest in granting or withholding temporary relief. J.S. App. 7a-8a; see *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). This Court reviews the district court's application of the preliminary-injunction factors under an abuse-of-discretion standard. See *id.* at 931-932; *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211, 1219 (2006). The district court correctly held that "each of the four preliminary injunction factors counsels against the grant of the requested injunction." J.S. App. 8a. At

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vent regulation during the "electioneering communication" periods defined by the Act. Factual development with respect to such considerations could be important to the ultimate disposition of appellant's as-applied challenge.

a bare minimum, the district court did not abuse its discretion in concluding that interim relief was unwarranted.

a. In contending that the district court abused its discretion by denying preliminary injunctive relief against enforcement of BCRA § 203, appellant bears a particularly heavy burden. Appellant's effort to alter the status quo by seeking an exemption from BCRA's coverage is contrary to the established principle that "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981). In addition, this Court's holding in *McConnell* that BCRA § 203 is constitutional on its face greatly strengthens "[t]he presumption of constitutionality which attaches to every Act of Congress." *Walters* v. *National Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). In denying an injunction pending appeal against enforcement of BCRA with respect to a particular set of political advertisements, Chief Justice Rehnquist recently explained that "[a]n injunction pending appeal barring the enforcement of an Act of Congress would be an extraordinary remedy, particularly when this Court recently held BCRA facially constitutional." *Wisconsin Right to Life, Inc.* v. *FEC*, 542 U.S. 1305, 1305-1306 (2004) (in chambers) (citing *McConnell*, 540 U.S. at 189-210).

b. As the district court correctly held (J.S. App. 8a-11a), appellant is not likely to succeed on the merits of its contention that BCRA § 203 is unconstitutional as applied to the "Crossroads" advertisement.

i. The fact that the "Crossroads" advertisement is phrased as a request that citizens contact their repre-

sentatives to express a view on a pending legislative matter does not insulate the advertisement from BCRA's "electioneering communications" provision. In discussing the sorts of pre-BCRA advertisements that were intended to influence federal elections but avoided words of express advocacy, the Court in *McConnell* observed that "[l]ittle difference existed * * * between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 126-127. The Court thus treated an appeal to citizens to contact their elected representative, when targeted to the relevant electorate and issued during the 30- and 60-day periods preceding federal primary and general elections, as a *paradigmatic* example of the advertisements that BCRA's "electioneering communication" provisions were intended to address. The record before the district court in *McConnell* likewise reflected the understanding of current and former Members of Congress that such advertisements were routinely used to influence electoral outcomes. See, *e.g.*, *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 532-533 (D.D.C. 2003) (Kollar-Kotelly, J.).

Moreover, Congress specifically opted for a bright-line definition of "electioneering communication" that would give speakers clear notice of what communications must be funded through a separate segregated account. That definition avoids the sort of intractable line-drawing that a less determinate standard would require. It is undisputed that the "Crossroads" advertisement falls within the Act's definition of an "electioneering communication."

ii. In upholding BCRA § 203 against a facial constitutional attack, the Court in *McConnell* explained that

corporations and unions could "finance genuine issue ads during [pre-election] time-frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." 540 U.S. at 206. In the instant case, the district court relied in part upon the existence of those alternatives in concluding that appellant was unlikely to prevail on the merits of its as-applied challenge. See J.S. App. 9a. Appellant contends (J.S. 26) that this aspect of the district court's analysis "ignores the plain implication of" *WRTL*. Appellant's reliance on *WRTL* is misplaced. The Court in *WRTL* held only that as-applied challenges to BCRA § 203 are not categorically precluded by *McConnell*. See 126 S. Ct. at 1018. The Court did not define the circumstances, if any, under which such challenges could succeed, but instead remanded the case to the district court to consider the merits of WRTL's constitutional claim in the first instance. See *ibid.*

iii. In concluding that appellant was unlikely to prevail on the merits of its constitutional claim, the district court did not simply rely on this Court's holding in *McConnell* that BCRA § 203 is constitutional on its face. Rather, the court examined the specific advertisement that appellant proposed to run and concluded that the "Crossroads" advertisement "appears to be functionally equivalent to the sham issue advertisements identified in *McConnell*." J.S. App. 10a. The district court explained that "[appellant's] advertisement—which characterizes Senator Snowe's past stance on the Marriage Protection Amendment as '[u]nfortunate[]'—is the sort of veiled attack that [this] Court has warned may improperly influence an election." *Ibid.* (citing *McConnell*, 540 U.S. at 126-127). The district court observed that "the advertisement might have the effect of encouraging

a new candidate to oppose Senator Snowe [or] reducing the number of votes cast for her in the primary." *Ibid.* The court noted as well that appellant's newsletter had previously "sounded an enthusiastic note regarding a potential challenger to Senator Snowe." *Ibid.*[5]

iv. BCRA §§ 201 and 203 establish a bright-line, objective standard for identifying the broadcast communications that are subject to the Act's financing restrictions. That clarity serves compelling governmental interests and was critical to the Court's upholding of the restriction against the First Amendment challenge. See *McConnell*, 540 U.S. at 194. Appellant's approach, by contrast, would reintroduce the indeterminacy that Congress and this Court have sought to dispel.

In support of its contention (J.S. 25) that the "Crossroads" advertisement is "not express advocacy or its functional equivalent," appellant identifies (J.S. 25-26) several aspects of the advertisement's text. Appellant does not explain, however, whether it views all of those factors as necessary to establish entitlement to a constitutional exemption from BCRA's coverage, or how or whether the factors should be weighed against each other. And while appellant asserts (J.S. 24 n.12) that

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[5] The "Crossroads" advertisement's characterization of Senator Snowe's prior vote as "[u]nfortunate[]" renders it analogous to the "Jane Doe" advertisement described in *McConnell*. See 540 U.S. at 126-127; p. 19, *supra*. Although appellant describes this feature of the advertisement as a "mild statement about the differing positions of [appellant] and the Senators on the constitutional amendment" (J.S. 27), appellant has identified no workable standard for distinguishing among advertisements based on the level or intensity of criticism they contain. And while Senator Snowe ran unopposed in the June primary election, nothing in *McConnell* suggests that the constitutionality of BCRA § 203 as applied to a particular advertisement turns on the likelihood that the advertisement will be outcome-determinative.

"this Court could adopt a bright-line test for grass roots lobbying that is every bit as bright as the exception for *MCFL*-type corporations created in *MCFL*," appellant makes no effort to articulate such a standard. Appellant's approach would encourage politically motivated pre-election as-applied challenges (with an attendant right of direct appeal to this Court) involving advertisements meeting the definition of "electioneering communication"; it would blur the bright lines drawn by Congress; and it would markedly subvert Congress's compelling interest in avoiding "the vagueness concerns that drove [the Court's] analysis in *Buckley*." *McConnell*, 540 U.S. at 194.

c. As the district court correctly held (J.S. App. 11a-12a), appellant failed to demonstrate that it would suffer irreparable harm from the denial of a preliminary injunction. Although BCRA prohibits the use of corporate treasury funds to finance electioneering communications, corporations remain free to finance such communications through a PAC, see *McConnell*, 540 U.S. at 204, and they may use treasury funds to run advertisements in other media and to "finance genuine issue ads during [pre-election] timeframes by simply avoiding any specific reference to federal candidates," *id.* at 206. It is undisputed that those avenues remain open and available to appellant.

The minimal nature of BCRA's impact on issue advertising is particularly apparent in the circumstances presented here. Appellant has represented that the cost of the proposed "Crossroads" advertising campaign would have been $3992, and that one individual donor had committed to pay for the campaign in its entirety. See J.S. App. 6a. Because the projected cost of the campaign was lower than the $5000 annual limit on individ-

ual donations to PACs (see 2 U.S.C. 441a(a)(1)(C) (2000 & Supp. III 2003)), appellant's donor could have become a member of the corporation and could then have been solicited to direct his donation to appellant's political action committee rather than to its general treasury.

Indeed, because BCRA's restrictions on the financing of electioneering communications do not apply to individuals, appellant's prospective donor could simply have paid for the advertisement himself without using the corporation as a conduit. See J.S. 14 (recognizing that "the individuals who make up [appellant] could engage in electioneering communications," and that even BCRA's disclosure requirements apply only if an individual's spending "exceeds $10,000 in a calendar year"). The practical concern on which appellant's constitutional claim is premised—*i.e.*, that individuals should not be hindered from pooling their resources to "form themselves into an effective advocacy group for lobbying" (*ibid.*)—therefore is not implicated on the facts of this case. Regardless of the legal significance of the availability of the various alternative means of communication with respect to the ultimate merits of appellant's as-applied challenge, the existence of those alternatives is directly relevant at this preliminary-injunction stage of the case because they underscore that appellant has failed to establish any basis for overturning the district court's finding of no irreparable harm.[6]

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[6] The circumstances under which this lawsuit was initiated further suggest that the denial of preliminary injunctive relief places insubstantial constraints on appellant's own communicative freedoms. As the FEC explained in its opposition to appellant's motion for a preliminary injunction (at 6-7), appellant filed this lawsuit ten days after an official of the Colorado group Focus on the Family sent an e-mail to leaders of a number of organizations, including appellant's executive director. No

d. The district court also correctly held (J.S. App. 12a-13a) that issuance of a preliminary injunction would cause irreparable harm to the Commission and would disserve the public interest. Enforcement of BCRA (and federal campaign-finance laws generally) is entrusted by statute to the FEC, and an injunction that barred the Commission from performing its statutory duties would substantially injure the agency. See *id.* at 12a.

Such an injunction would likewise subvert the public interest in the enforcement of duly enacted laws. As Chief Justice Rehnquist explained in staying a district court injunction against enforcement of a different statute:

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record evidence suggests that appellant had previously planned to finance broadcast advertising this year. The subject line in that March 24, 2006, e-mail was "Possible legal action needed." Appellant Opp. to Motion for Preliminary Injunction Exh. B. The e-mail explained that the particular recipients had been selected "because [they were] in [states] that could be affected by McCain-Feingold restrictions on Marriage Amendment lobbying ads that target U.S. senators who are on the ballot." Approximately one hour later, appellant's executive director responded by e-mail with a message stating, "I will run an ad in that period of time mentioning Olympia Snowe." *Id.* at Exh. C. Focus on the Family subsequently provided appellant with the text of the advertisement that is at issue in this case.

The funding arrangement that appellant contemplated (see pp. 22-23, *supra*), whereby the advertisement was to be paid for not with pooled contributions, but with a donation from an individual who could have lawfully financed the advertisement himself, reinforces the inference that the planned advertising campaign is primarily a mechanism for engendering litigation. That fact does not necessarily impact the merits of the constitutional question, but it informs any judicial assessment of irreparable injury because it calls into question the true urgency of this matter to appellant itself and the likely harm that denial of preliminary relief would entail to its purported grassroots lobbying.

> The presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of [the government] in balancing hardships. Given the presumption of constitutionality granted to all Acts of Congress, it is * * * appropriate that the statute remain in effect pending such review.

Bowen v. *Kendrick*, 483 U.S. 1304, 1304-1305 (1987) (Rehnquist, C.J., in chambers) (citations and internal quotation marks omitted); see p. 18, *supra*. The public interest in enforcement of BCRA § 203's financing restrictions is especially strong in light of this Court's holding in *McConnell* that those restrictions are valid on their face.

3. The preliminary injunction sought by appellant would have barred enforcement of BCRA § 203 not only with respect to the "Crossroads" advertisement, but also with respect to "any electioneering communications by [appellant] that constitute grass-roots lobbying." Compl. 13; see J.S. App. 3a n.1. The district court denied that aspect of appellant's request for preliminary injunctive relief on the ground that appellant had "fail[ed] to define 'grassroots lobbying' (other than as including its proposed advertisement) or to identify any necessity for the application of such a broader injunction." *Ibid.* Appellant's jurisdictional statement identifies no basis for concluding that the district court abused its discretion in that regard. To the contrary, appellant's continuing failure to articulate a clear and administrable definition of the term "grassroots lobbying" underscores the impropriety of any preliminary injunction incorporating that term. See Fed. R. Civ. P. 65(d)

("Every order granting an injunction * * * shall be specific in terms * * * [and] shall describe in reasonable detail * * * the act or acts sought to be restrained.").

CONCLUSION

The appeal should be dismissed as moot. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
GREGORY G. GARRE
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General

LAWRENCE H. NORTON
General Counsel
RICHARD B. BADER
Associate General Counsel
DAVID KOLKER
Assistant General Counsel
HARRY J. SUMMERS
Attorney
Federal Election Commission

AUGUST 2006