

Do Corporations Have a Constitutional Right to Run “Genuine Issue Ads” Before Elections Despite McCain-Feingold?

by Richard L. Hasen

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ISSUES

Are “as-applied” constitutional challenges to the “electioneering communications” provisions of the McCain-Feingold law permitted following *McConnell v. FEC*?

If so, may the plaintiff successfully bring an “as applied” challenge to that portion of the McCain-Feingold law that barred it from broadcasting an advertisement in the period before Senator Feingold was to be considered for reelection, urging the senator not to filibuster judicial nominees?

FACTS

Editor’s note: This analysis was prepared before the government had filed its Brief on the Merits in this case.

In 2002, Congress passed the Bipartisan Campaign Reform Act of 2002 (BCRA), more commonly referred to as the McCain-Feingold law for its two Senate sponsors, John McCain (R-AZ) and Russ Feingold (D-WI). BCRA was the most extensive revision of federal campaign finance laws in a genera-

tion, since the post-Watergate amendments to the Federal Election Campaign Act (FECA). Although BCRA made many changes in the law, the changes most relevant for purposes of understanding this case concern BCRA’s “electioneering communications” provisions.

The FECA required those who spent money on activity related to federal elections to disclose their contributions and spending to the Federal Election Commission (FEC), and law predating FECA prevented corporations and unions from spending general treasury funds on election-related activities. FECA allowed corporations and unions to set up separate political committees (commonly referred to as PACs) to spend money on federal election campaigns, and limited who could be solicited to contribute to these PACs.

By the 1990s, many people viewed FECA as increasingly ineffective because of an interpretation of the statute by the Supreme Court. In *Buckley v. Valeo*, 424 U.S. 1 (1976),

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WISCONSIN RIGHT TO LIFE, INC. v.
FEDERAL ELECTION COMMISSION
DOCKET NO. 04-1581

ARGUMENT DATE:
JANUARY 17, 2006
FROM: THE D.C. CIRCUIT

Case at a Glance

This case concerns a question left open by *McConnell v. FEC*, 540 U.S. 93 (2003): Do corporations and unions have a First Amendment right to use general treasury funds to broadcast “genuine issue ads” ostensibly not intended to influence the outcome of federal elections? Plaintiffs wanted to run an ad in Wisconsin in the period before Sen. Russ Feingold was to be considered for reelection, urging the senator not to filibuster judicial nominees, but the ad was barred by the McCain-Feingold law.





the Supreme Court considered First Amendment challenges to various aspects of the FECA. The Court held that, to avoid constitutional problems of vagueness and overbreadth with portions of the law, its provisions should be interpreted to reach only election-related activity containing express words of advocacy, such as “Vote for Smith.”

In the 1990s, individuals began running “issue ads” that appeared aimed at influencing the outcome of federal elections but that escaped FECA regulation through an avoidance of words of express advocacy. Thus, although those who spent money on “Vote against Smith” ads had to disclose their sources and those ads could not be paid for by corporate or union general treasury funds, there were no such limitations on ads that appeared intended to influence federal elections but avoided the “magic words.” Many of these “sham issue ads” looked exactly like campaign ads, but ended with a tag line such as, “Call Senator Smith, and tell him to stop scaring seniors.” Spending on such ads was increasing dramatically.

BCRA sought to close this “issue advocacy loophole” by creating a new “electioneering communications” provision. Electioneering communications are broadcast (not print or Internet) advertisements that feature a candidate for federal election and are broadcast to the relevant electorate 30 days before a primary or 60 days before a general election. Anyone making electioneering communications must *disclose* contributions funding the ads and spending to the FEC, and corporations and unions *cannot spend general treasury funds* on such advertisements (though their PACs could spend money on such advertisements).

One of the many challenges brought by a coalition of plaintiffs in the *McConnell* case concerned the con-

stitutionality of the electioneering communications provisions. The main argument against the provisions was that they were constitutionally overbroad. In particular, plaintiffs raised the concern that many “genuine issue ads” would be swept up in the provision. For example, the electioneering communications provision would prevent a union from using general treasury funds to run broadcast advertisements in the two months before a presidential election, urging the president to intervene in a nasty labor dispute.

By a 5-4 vote, the Supreme Court in *McConnell* upheld the limit on corporate and union spending on electioneering communications, holding that although some “genuine issue ads” would be swept up in the law, the law was not *substantially overbroad*. By an 8-1 vote, the Court in *McConnell* upheld the disclosure laws aimed at electioneering communications.

The current case follows up on this aspect of *McConnell*. In the summer of 2004, Wisconsin Right to Life, Inc., (WRTL) filed a motion for a preliminary injunction before a three-judge court in Washington, D.C., seeking a judgment that it would be unconstitutional for the FEC to enforce the limit on corporate electioneering communications against it for a broadcast advertisement it planned to air in the period before Sen. Feingold was to be considered for reelection, urging the senator not to filibuster judicial nominees. The case was heard by a three-judge court pursuant to a special provision of BCRA, which also provides for direct appeal (rather than writ of certiorari) to the Supreme Court.

WRTL is a non-stock, ideological corporation opposed to abortion. Although the Supreme Court in *Federal Election Commission v.*

Massachusetts Citizens for Life [MCFL], 479 U.S. 238 (1986), recognized that certain ideological corporations cannot be constitutionally subject to the limits on corporate spending on election-related speech, WRTL stated it did not qualify for the so-called “MCFL exemption,” apparently because it takes funds from for-profit corporations.

As early as September 2003, candidates opposed to Sen. Feingold had made Feingold’s support of Senate filibusters of judicial nominees a campaign issue. WRTL had a separate PAC, which had endorsed three candidates opposing Feingold and announced that defeat of Feingold was a priority. WRTL then stated its interest in running broadcast ads that referred to and identified Feingold and urged him to oppose the filibuster of judicial appointees. WRTL stated that it does not have sufficient funds in its PAC (and is hampered by requirements for PAC fund-raising) to finance the advertisements through the PAC. Because the ads would be considered electioneering communications under BCRA, WRTL sought a preliminary injunction barring the FEC from enforcing those provisions against it.

On August 17, 2004, the court (D.C. Circuit Judge David B. Sentelle and District Court Judges Richard W. Roberts and Richard J. Leon) denied WRTL’s motion for a preliminary injunction. First, the court held that WRTL was unlikely to prevail on the merits, viewing the claim as foreclosed by the Supreme Court’s decision in *McConnell*. The court also found that the specific facts of this case “suggest that WRTL’s advertising may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating.” The court also believed the hardship faced by WRTL was not great, given that it could channel its spending on such advertisements through its PAC.

WRTL appealed the denial of the preliminary injunction to Chief Justice Rehnquist, who denied a request for a preliminary injunction pending appeal, 542 U.S. 1305 (2004) (Rehnquist, J., in chambers). On May 10, 2005, the three-judge court issued its final judgment, relying upon its earlier analysis denying the preliminary injunction. WRTL appealed to the Supreme Court, and on Sept. 27, 2005, the Supreme Court noted probable jurisdiction in the case and set it for argument.

CASE ANALYSIS

Much of the dispute between the parties turns on the proper reading of the Supreme Court's earlier opinion in the *McConnell* case. At issue is whether the Supreme Court, in deciding to uphold the electioneering communications provision against a *facial challenge* (that is, a challenge arguing that a law is unconstitutional in all of its applications), intended to foreclose *as-applied challenges* as well (that is, a challenge arguing that a law is unconstitutional as applied to a particular circumstance). If as-applied challenges are foreclosed, WRTL's case fails under *McConnell*.

The government in its motion to affirm points to three different places in the Supreme Court's opinion in *McConnell* where the Court, in the government's view, precluded an as-applied challenge. "First, the Court noted that BCRA contains two alternative definitions of the term 'electioneering communication'. ... The Court stated that because it had upheld 'all applications of the primary definition' against plaintiffs' constitutional challenge, the Court 'accordingly ha[d] no occasion to discuss the backup definition'" (emphasis added). Second, in summarizing its treatment of the electioneering communications provision, "[t]he Court described its analysis of that provision as 'uphold-

ing stringent restrictions on all election-time advertising that refers to a candidate because such advertising will *often* convey [a] message of support or opposition'" (emphasis added). Finally, in addressing plaintiffs' overbreadth claim in *McConnell*, "the Court expressly held that BCRA's financing restrictions are constitutional even as applied to 'genuine issue ads.'" The government quotes from *McConnell's* statement that "whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." The district court also noted that in the *McConnell* opinion discussing other parts of BCRA, the Court expressly left open the possibility of as-applied challenges, suggesting it did not mean to do so as to the electioneering communications provisions.

In its brief on the merits, WRTL takes issue with the government's characterization of *McConnell*. It argues that the government misreads the statements in *McConnell*, and points to a different part of *McConnell* where "[t]he Court acknowledged that '[t]he interests that justify the regulation of campaign speech *might not apply* to the regulation of genuine issue ads,'" ... (emphasis added). WRTL further argues that Article III courts necessarily have jurisdiction over and should entertain as-applied constitutional challenges, a point confirmed by *Broadrick v. Oklahoma*, 413 U.S. 601 (1974). It also points out that the FEC already has authority to deal with as-applied questions under the statute. Finally, WRTL notes that in briefing in the *McConnell* case, the government had argued that the cure for possible overbreadth with the election-

eering communications of BCRA was future as-applied challenges (a point acknowledged by the government in footnote 2 of its motion to affirm).

But WRTL spends most of its time arguing that an as-applied challenge is constitutionally required because it is engaged in "grassroots lobbying" (a term derived from tax law definitions; see WRTL brief on the merits at 21). The First Amendment protects not just speech and association, but the right to petition the government for grievances. WRTL contends that preventing it from running advertisements urging an incumbent federal official to take a certain legislative action is unconstitutional because it interferes with the right to petition the government, even if it is constitutional to limit ads whose true purpose is electioneering.

We can expect the government to respond to the "grassroots lobbying" argument by arguing that most grassroots lobbying is unaffected by the electioneering communications provisions of BCRA; that the BCRA provision affects only broadcast ads; and that the PAC alternative is sufficient to deal with any First Amendment concerns. The government might also argue that concerns about corporate dominance of the electoral process that allow for limits on corporate election spending similarly justify limits on lobbying by corporations.

If the Supreme Court agrees that *McConnell* did not foreclose as-applied challenges, it will likely determine whether WRTL is entitled to an as-applied exemption. The three-judge court expressed skepticism in this regard, viewing the ad as having an electioneering purpose (or at least an electioneering effect). "Here WRTL and WRTL's PAC used

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other print and electronic media to publicize its filibuster message—a campaign issue—during the months prior to the electioneering blackout period, and only as the blackout period approached did WRTL switch to broadcast media. This followed the PAC endorsing opponents seeking to unseat a candidate whom WRTL names in its broadcast advertisement.” In its motion to affirm, the government adds the contention that WRTL “provides no evidence that it has run [similar] advertisements after last November’s elections or that it has specific plans to do so, notwithstanding the fact that the issue discussed in the advertisements (Senate filibusters of judicial nominees) was a focus of particularly intense public interest during the spring of 2005 and remains a topic of widespread public concern.”

In response, WRTL argues that its ads are genuine issue advertisements. “As to *topic*, they concerned only a legislative matter that was specific and dealt with an issue in which WRTL had a clear and long-held interest. As to *timing*, the legislative action was under active consideration by the Senate then in session; the filibuster problem was coming to a head at the time; the timing was beyond the control of the communicator; and the ads were run outside the prohibition period as well as being planned to run within it. As to candidate *reference*, the only reference to a clearly identified federal candidate was a statement urging the public to contact the candidate and to ask that he take a particular position on the legislative matter; the ads contained a link to contact information for the Senators (by reference to a website); and the ads identified two incumbent Senators, only one of which was up for election, and referred to the candidate and non-candidate equally. As to *tone*, the ads contained no reference to any

political party, to the candidate’s record or position on any issue, to the candidate’s character, qualifications, or fitness for office, or to the candidate’s election or candidacy; and they contained no words that promoted, supported, attacked, or opposed the candidate.”

There are two other possible resolutions of this case, though not urged by either party here. First, the Court could broaden its *MCFL* exemption for ideological corporations like WRTL, finding that such corporations, even if they accept some for-profit corporate money, do not raise the same dangers to the electoral process as for-profit corporations. That holding would allow the Court to sidestep the as-applied question though it is likely to recur in other cases. (The AFL-CIO’s amicus brief urges the Court to reach the issue even if it holds WRTL is entitled to the *MCFL* exemption). The other possible resolution is that the Court reverses *McConnell* and some earlier precedent, holding that it violates the First Amendment to limit corporate and union spending in elections (a point on which the Court divided 5-4 in *McConnell*). The Chamber of Commerce amicus brief invites the Court to revisit this question in an appropriate case.

SIGNIFICANCE

This case could turn out to be very significant. It is the first foray into the campaign finance area by the Roberts Court, with the second opportunity coming in February with a look at the constitutionality of Vermont’s candidate spending limits. (*Randall v. Sorrell* (Nos. 04-1528, 04-1530, and 04-1697.)) Coupled with the Court’s recent decision to hear the Texas redistricting cases in March, the Court continues to handle high-profile election law cases even in the wake of *Bush v. Gore*.

The case is being argued just a few days before the expected scheduled vote on the nomination of Judge Samuel Alito to fill Justice O’Connor’s seat. Justice O’Connor is expected to be on the bench for the argument in *WRTL*, but if Judge Alito is confirmed she will not be on the Court for a decision. Justice O’Connor was the crucial fifth vote in *McConnell*, upholding the limits on corporate and union spending in federal elections. With her departure, it would not be surprising for the Court to split 4-4 on some of the issues in *WRTL*, which would require reargument of the case with the new justice on the bench. If Chief Justice Roberts and Justice O’Connor’s replacement side with Justices Kennedy, Scalia, and Thomas in these cases, there could be a new Court majority to hold that the First Amendment trumps many of the campaign finance laws that the Supreme Court had upheld in recent years. *WRTL* may not be the case where a Court majority reverses *McConnell* on the constitutionality of limits on corporate and union spending in the political process, but it could show a shift in the Court’s direction toward that result.

If the Court allows plaintiffs to bring as-applied challenges, lower courts will pay a great deal of attention to the test that the Court uses to separate “genuine issue ads” from electioneering ads. Fact-specific, multi-factor tests could leave the FEC and lower courts with a flood of election-time requests for exemptions from the electioneering communications provisions of BCRA. The Court will likely be considering the administrability of any rule it announces when it decides how to handle this appeal.

There are also implications for the *disclosure* of electioneering communications. Although WRTL indicates



that it plans to comply with all disclosure requirements and seeks only exemption from spending corporate treasury funds, some future spenders may ask for anonymity under the ruling of the case as well if WRTL prevails.

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