

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHRISTIAN CIVIC LEAGUE : CV 06-00614
 OF MAINE, INC., : April 24, 2006
 :
 Plaintiff, : 2:00 p.m.
 :
 v. : Washington, DC
 :
 FEDERAL ELECTION COMMISSION, :
 :
 Defendant. :
 :

TRANSCRIPT OF MOTION HEARING
 BEFORE THE HONORABLE LOUIS F. OBERDORFER,
 HONORABLE COLLEEN KOLLAR-KOTELLY,
 UNITED STATES DISTRICT JUDGE, and
 JUDGE JUDITH W. ROGERS,
 UNITED STATES CIRCUIT JUDGE

APPEARANCES :

For the Plaintiff: JAMES BOPP, JR., ESQ.
 BOPP COLESON & BOSTROM
 1 South Sixth Street
 Terre Haute, IN 47807-3510
 (812) 232-2434

For the Defendant: DAVID BRETT KOLKER, ESQ.
 ASSISTANT GENERAL COUNSEL
 RICHARD BADER, ESQ.
 FEDERAL ELECTION COMMISSION
 999 E Street, NW
 Washington, DC 20463
 (202) 694-1650

For the Movants: DANIEL R. ORTIZ
 University of Virginia School of Law
 580 Massie Road
 Charlottesville, VA 22903
 (434) 924-3127

Court Reporter: EDWARD HAWKINS, RMR
 Official Court Reporter
 Room 6806, U.S. Courthouse
 Washington, D.C. 20001
 (202) 682-2555

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by computer-aided transcription

PROCEEDINGS

1
2 JUDGE OBERDORFER: I think counsel are familiar with
3 the timing arrangement and the clerk has arranged to signal you
4 when the clock runs out, Mr. Bopp.

00:00:16

5 THE DEPUTY CLERK: Civil Action 06-614, Christian Civic
6 League of Maine, Inc. versus the Federal Election Commission.

7 Counsel please introduce themselves to the court.

8 MR. BOPP: Jim Bopp representing the plaintiffs.

00:00:35

9 MR. KOLKER: David Kolker for the Federal Election
10 Commission.

11 MR. ORTIZ: Daniel Ortiz for the intervenors.

12 JUDGE OBERDORFER: You may proceed, Mr. Bopp.

13 MR. BOPP: Thank you, Your Honor. May it please the
14 the court.

00:00:46

15 Before this court today is a motion for a preliminary
16 injunction brought to this court by the Christian Civic League
17 of Maine, a 501(c)(4) lobby group organized in the State of
18 Maine in 1897.

00:01:03

19 One of the principal concerns of the Christian Civic
20 League is the preservation of what they view to be traditional
21 marriage, and over the last ten years they have engaged in
22 extensive grassroots lobbying on this issue, including mounting
23 two referendum campaigns in 2000 and 2005. And in 2004, when
24 for the first time the Federal Marriage Amendment was introduced

00:01:24

25 in Congress, they engaged in a grassroots lobbying campaign that

1 included broadcasting a radio ad in July of 2004 --

2 JUDGE OBERDORFER: Have you ever supported a candidate?

3 MR. BOPP: No. And the organization has never endorsed

4 a candidate for public office, nor have they expressly advocated

00:01:45 5 the election defeat of any candidate.

6 JUDGE KOTELLY: But in these broadcast ads for 2004 and

7 2005, did you mention in those ads any of the Senators' names?

8 MR. BOPP: Yes, we did. In the 2004 ad regarding the

9 Federal Marriage Amendment, the ad says, quote, The Christian

00:02:03 10 Civic League of Maine has organized a campaign to let Senator

11 Snowe and Collins know that we support the Federal Marriage

12 Amendment. If you want homosexual marriage banned in our

13 country -- if you do not -- excuse me.

14 If you want homosexual marriage banned in our country,

00:02:20 15 we need to contact your Senators and ask them to support

16 traditional marriage. For more information on this amendment,

17 please see our website at WWW.CCLMaine.org, or call us at our

18 Augusta office 622-7634. Thank you for preserving the purity of

19 life and protecting the future of our nation.

00:02:43 20 JUDGE OBERDORFER: And that ad didn't suggest how the

21 Senators had previously voted?

22 MR. BOPP: No, because there had been no previous votes

23 on the Federal Marriage Amendment.

24 JUDGE OBERDORFER: Or otherwise expressed themselves?

00:02:54 25 MR. BOPP: At that point they had not voted, and we

1 were hopeful -- the plaintiff was hopeful -- that through
2 extensive lobbying, that they would support the position and so
3 they did not refer to any votes because no votes had taken
4 place.

00:03:11

5 JUDGE OBERDORFER: And did that ad attract the
6 attention of the Commission?

7 MR. BOPP: The Commission? No, because it was legal.
8 The McCain-Feingold electioneering communication

00:03:26

9 prohibition on use of general treasury funds for such ads only
10 applies within 30 days of a primary and 60 days of a general
11 election.

12 JUDGE OBERDORFER: So it wasn't in the black-out
13 period?

00:03:36

14 MR. BOPP: So there was no black-out period at the time
15 this ad was run in 2004, and this ad was run leading up to the
16 vote in Congress on the Federal Marriage Amendment, and in that
17 vote both Collins and Snowe voted no, against the amendment.

00:04:02

18 Now, in -- of course now, this year, the Federal
19 Marriage Amendment has been scheduled by the Majority Leader for
20 a vote on June the 5th, so the Christian Civic League is again
21 renewing its extensive grassroots lobbying effort to urge
22 support for that amendment by its two U.S. Senators and as part
23 of that campaign, as in 2004, they want to broadcast an ad,
24 radio ad called Crossroads.

00:04:26

25 JUDGE KOTELLY: Before you get to that, just to clarify

1 the one last sort of point.

2 Did you also have a broadcast ad in 2005? I'm looking
3 at Mr. Heath's deposition and the statement. It wasn't clear to
4 me whether they were in both those years. Was there one in 2005
5 as well?

00:04:42

6 MR. BOPP: Yes, and let me explain.

7 In 2000 and 2005 there were state referendums on the
8 marriage issue, and through their connected PAC they engaged in
9 extensive grassroots lobbying in both of those years with

00:05:02

10 respect to those referendums, which included broadcast ads,
11 specifically radio ads.

12 So on at least three different occasions in the last
13 six years they have done broadcast ads on the marriage
14 amendment, either state or federal, depending upon the context.

00:05:22

15 And, of course, referendums are the quintessential
16 example of lobbying efforts because it is a vote of the people
17 who decide what the law is in that example.

18 JUDGE OBERDORFER: And following up on Judge Kotelly's
19 question. There was no occasion -- and you didn't mention

00:05:42

20 either Senator's name?

21 MR. BOPP: No, not in 2000 or 2005, because it wasn't
22 relevant. They were state referendums where there was a vote of
23 the people with respect to a particular provision of law and so
24 it was not pertinent, but it, of course, is pertinent in 2004

00:06:02

25 and in 2006 because these two U.S. Senators are the ones who

1 will be voting on the Federal Marriage Amendment in Congress.

2 JUDGE KOTELLY: And you used a state PAC for both the
3 2000 and 2005 funding? Is that what you said?

00:06:21

4 MR. BOPP: Yes. Because state law in Maine requires
5 the creation of a state PAC in order to conduct state referendum
6 campaigns and so they complied with that law.

7 JUDGE ROGERS: Is that regardless of your source of
8 funding?

00:06:38

9 MR. BOPP: Yes. But the state requirements are much
10 less onerous than federal requirements.

00:06:57

11 The state PACs in Maine can receive, for referendum
12 purposes, contributions from corporations and also the
13 contributions are not limited in amount. Where, of course,
14 under federal law if the lobbying that CCL wishes to do here now
15 was required to do by its federal PAC, there could be no
16 federal -- there could be no corporate contributions to that PAC
17 for that purpose and any contributions from individuals are
18 limited.

00:07:12

19 JUDGE ROGERS: At what limit?

20 MR. BOPP: At 5,000.

21 So the burdens of PAC -- of conducting lobbying as if
22 its political activity under a PAC is much greater.

00:07:25

23 JUDGE ROGERS: Are you speaking of burdens in terms of
24 the contribution limits or the administrative requirement
25 establishing a PAC?

1 MR. BOPP: Well, they are all burdens. And of course
2 the Supreme Court in *Citizens Against Rent Control vs Berkeley*
3 held that it's unconstitutional to impose contribution limits on
4 lobbying activities.

00:07:40

5 And the Supreme Court in *Austin* held that the panoply
6 of recordkeeping and reporting and other limitations under PACs
7 requires a compelling governmental interest narrowly tailored --
8 in other words, strict scrutiny -- in order to require a First
9 Amendment activity to be shifted from general treasury funds to

00:08:03

10 a PAC.

11 So, requiring something to be done in a PAC subject to
12 contribution limits has been held both in *Austin* and, for that
13 matter, in *MCFL* and in *Citizens Against Rent Control vs Berkeley*
14 as requiring a governmental interest, and the contribution

00:08:23

15 limits cannot -- for lobbying cannot be sustained under strict
16 scrutiny.

17 JUDGE OBERDORFER: So would you have time to form a PAC
18 between now and your critical date?

19 MR. BOPP: No. The -- in order -- well, forming a PAC
20 can readily occur. The problem would be the fund raising.

00:08:41

21 That is, federal law limits the people who can be
22 solicited for contributions to a PAC to the already-existing
23 members of that PAC.

24 The facts indicate here that there are 300 members of
25 the Christian Civic League and, of course, they would have to

00:09:00

1 engage in fund raising specifically for this purpose to the
2 federal PAC in order to raise the money necessary to engage in
3 the activity.

4 JUDGE ROGERS: That's an e-mail to your members?

00:09:17

5 MR. BOPP: Well, an e-mail to your members would be one
6 way of raising the funds, but they have to raise \$4,000.

7 They already have a donor who has agreed to give them
8 the money to -- the \$4,000, to conduct this and add to their
9 (c)(4).

00:09:34

10 JUDGE ROGERS: Have you identified who that donor is?

11 MR. BOPP: No.

12 JUDGE ROGERS: Is it a corporate donor?

13 MR. BOPP: No. It's an individual.

14 JUDGE ROGERS: Individual donor?

00:09:41

15 MR. BOPP: Yes, but we have objected when asked the
16 identity.

17 Now, of course there's another problem for the
18 Christian Civic League, and that is that the Christian Civic
19 League, many of their donors are churches, who of course would

00:09:56

20 be prohibited from contributing to a federal PAC; and
21 furthermore, because of the religious views of many of its
22 adherents, there is theological objection to supporting -- to
23 contributing money for the purposes of supporting or opposing
24 candidates, which of course a federal PAC can do, which would

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25 further inhibit the ability of the organization to raise the

1 funds necessary.

2 JUDGE ROGERS: And what is CCL's relationship with the
3 Christian Education League?

4 MR. BOPP: They are affiliated or connected
5 organizations.

6 JUDGE ROGERS: And that means that the league can
7 funnel corporate funds to CCL?

8 MR. BOPP: Well, to answer your question, the Christian
9 Education League is a 501(c)(3). It is affiliated.

10 And certainly the Christian Education League does
11 receive business corporation contributions, and from time to
12 time that (c)(3) gives grants to the (c)(4) for specific
13 educational activities. In other words, writes them a check.

14 And so, of course, we have alleged that this certainly
15 under the regulations appears to us to be an indirect support by
16 business corporations of the Christian Civic League, which would
17 mean that that's just one of several reasons why it does not
18 qualify, you know, as the type of corporation that could
19 otherwise do this ad. That is, they are not a qualified -- a

20 qualified corporation, not-for-profit corporation that is
21 permitted to do these ads even though it is a corporation.

22 JUDGE ROGERS: And under CCL's relationship with the
23 Education League, are there any restrictions in terms of amount
24 or purpose for which the league can give grants to CCL?

25 MR. BOPP: No. Well, yes, as to purpose, not as to

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1 amount.

2 In other words, the purpose has to be a qualified
3 (c)(3) charitable purpose, and the (c)(4) identifies specific
4 activities of the (c)(4) that they believe are qualified as a
5 charitable -- you know, qualified charitable purpose or
6 activity, and they seek grants from the Education League in
7 order to fund those activities when funds are available in the
8 Education League to do so.

9 Now, of course, the problem for CCL is that there is a
10 scheduled primary on June the 13th in Maine, and Senator Snowe,
11 even though she is unopposed, is a candidate in that -- on the
12 ballot in that primary.

13 And the electioneering communication prohibition
14 communication on use of general treasury funds containing the
15 McCain-Feingold now creates a black-out period beginning on May
16 the 14th for this organization. And they have already, as I've
17 mentioned, raised the funds. They've already determined the
18 four-week buy that will begin on May 10th and extend for well
19 into the black-out period because of the vote on June the 5th on
20 the Federal Marriage Amendment.

21 JUDGE OBERDORFER: Mr. Bopp, help me with this.
22 I gather that the donor that was identified as an
23 individual -- is that correct?

24 MR. BOPP: I'm sorry. I didn't hear your question.

25 JUDGE OBERDORFER: The donor, in response to --

1 JUDGE ROGERS: My question.

2 JUDGE OBERDORFER: The question asked by my colleague,
3 the donor is an individual.

4 MR. BOPP: Yes.

00:13:45 5 JUDGE OBERDORFER: Then why are these corporate funds?

6 MR. BOPP: Well, we don't intend to use corporate
7 funds, except the corporate funds of CCL.

8 In other words, just because the donor -- the donor is
9 going to write a check to CCL. CCL is going to pay for the ads.

00:14:03 10 So, it is CCL that is doing the ads. CCL is a corporation.

11 It doesn't matter what the source of funds is for this
12 prohibition in the electioneering communications, it just
13 requires that whoever is paying for the ads be a corporation,
14 and that will in fact be so.

00:14:21 15 And, CCL wants to do this. I mean, if the donor wanted
16 to do it, the donor could. The donor would have to identify
17 themselves as the person who is conducting this activity. It
18 wouldn't be CCL. And CCL, you know, they are the ones that want
19 to do this activity.

00:14:39 20 JUDGE KOTELLY: Why is it necessary to have the
21 Senators' names in there if, as the FEC has indicated, you could

22 leave the ad as it's presently constituted, including the

23 "Unfortunately your Senators voted against the Marriage

24 Protection Amendment two years ago. Tell them about the vote."

00:14:58 25 They appear to, in the FEC, to indicate that you can even ask

1 for your Senators. You would simply take out the names of
2 Senator Snowe and, I guess, Collins, although Collins doesn't
3 seem to be up for reelection. Why it necessary to have their
4 names there?

00:15:15 5 MR. BOPP: Well, a couple of reasons.

6 One, if you do say "your Senators," if you look at the
7 definition of clearly identified in the FECA, I think that is a
8 clear identification.

9 JUDGE KOTELLY: Well, we will ask the FEC since their
00:15:26 10 paper seems to indicate you could do it, so we'll take that out.

11 But let's assume whether you took that out or not,
12 let's just focus on having the names. Why is it necessary to
13 your message if, as you argue, you are not doing any kind of
14 electioneering, why is it necessary to have the specific names
00:15:44 15 as opposed to all of the rest of the information which gets out
16 your message, indicates that the Senators have voted against
17 this, indicates your position, which is that it's unfortunate
18 that they did this, and you have them calling the switchboard in
19 terms of "and the time they have as to vote." Why do you need
00:16:07 20 the Senators' names in terms of getting your message across?

21 MR. BOPP: Well, regrettably many people do not even
22 know the names of the Senators, and so it is helpful to the
23 persons who are calling to know who they are talking to.

24 And it's also -- I mean, you look like a fool. Why
00:16:26 25 would the Christian Civic League ask people in Maine to look

1 foolish and to call the capitol switchboard and not know the
2 names of their Senators?

3 JUDGE ROGERS: They say "I want to speak to a Senator
4 from Maine."

00:16:39 5 MR. BOPP: That's right, because you don't know the
6 name of the Senator and that makes you look foolish, and we
7 don't want people to look foolish.

8 JUDGE ROGERS: What evidence is there of that? We hear
9 all the time, "Call your Congressperson."

00:16:50 10 MR. BOPP: I think that's common sense, that if you
11 don't know the name of your Senator, then you look in some
12 people's eyes as foolish.

13 JUDGE KOTELLY: To the switchboard operator? You don't
14 have any facts on this, but it does seem to me that they must
00:17:06 15 fairly frequently get -- you're not calling the particular
16 office, you're calling a switchboard and then you're asking for
17 whoever it is that you wish to speak to.

18 Is that the -- this goes obviously to the irreparable
19 damage. They would look foolish, that is the reason why it's
00:17:24 20 necessary to have it in there?

21 MR. BOPP: Well, that's one reason. But for the
22 government to control what a person says, there has to be a
23 compelling governmental justification. So this is circular.

24 I mean, this is like saying, Well, the government can
00:17:39 25 control your speech as long as it doesn't do it too much, but

1 the problem is, is for the government to control your speech, is
2 that it's required to be justified by a compelling governmental
3 interest.

00:17:52 4 JUDGE KOTELLY: Let us look at it in the context of a
5 preliminary injunction and part of it is the irreparable damage.

6 If there's something as simple, and you're indicating
7 it's not electioneering on the part of this organization, that
8 that's not their intent, then it doesn't -- excuse me?

00:18:08 9 MR. BOPP: Senator Snowe is not even opposed in this
10 primary.

11 JUDGE KOTELLY: It doesn't matter. It's obviously
12 during this period of time. It may have an effect at a later
13 point. She is up for reelection, is she not?

14 MR. BOPP: Of course she is. She's a candidate.

00:18:20 15 JUDGE KOTELLY: But let's get back to in the context of
16 irreparable damage. Isn't the issue in terms of whether you
17 have another easy alternative, that you're not irreparably
18 damaged if all you need to do is take out the two names, leave
19 everything else in there in terms of your ad? And you basically
00:18:37 20 get your message across. You tell them that the Senators have
21 voted against it, that your organization is not happy with that,
22 and you tell them where to call.

00:18:54 23 MR. BOPP: Well, Judge Leon discussed this very issue
24 extensively in the District Court decision in *McConnell* and we
25 identified ourselves with that.

1 JUDGE KOTELLY: Yes, but I looked at that, but that was
2 in the context of the fall back definition, the fall back
3 definition which was not adopted by the Supreme Court.

4 MR. BOPP: But the --

00:19:06 5 JUDGE KOTELLY: -- you indicated it was being
6 un rebutted.

7 I would say to you that, having gone back and looked,
8 although not fully, but it seems to me that his argument was in
9 the context of the fall back definition which the Supreme Court
00:19:20 10 has not adopted, and therefore I -- and I don't remember what
11 Judge Henderson did -- but I certainly didn't discuss the fall
12 back definition.

13 So you're talking about something that didn't get
14 adopted by the Supreme Court. They specifically sent it back.
00:19:34 15 So I don't know that that gives you the argument in terms of
16 being able to rely on Judge Leon for it as being un rebutted.

17 MR. BOPP: In all respect, Judge, I do not agree with
18 that characterization.

19 He was talking about and identified genuine issue ads,
00:19:48 20 and he explained -- he was explaining how it makes sense to
21 identify the names of people who you want to have lobbied.

22 JUDGE KOTELLY: In the context of the fall back
23 definition, that the Supreme Court didn't adopt.

24 MR. BOPP: But his rationale was not dependent on that
00:20:07 25 context. His rationale was straight-forwardly explaining why it

1 makes sense and is appropriate in the context of lobbying to
2 identify who you want the public to lobby. That was what he was
3 saying. And so I don't think that the context is relevant.

4 Now, the --

00:20:25

5 JUDGE ROGERS: What is the court to make of the fact
6 that this organization, according to the record, never planned
7 to run this ad in connection with this resolution?

8 And I'm not getting into the fact that it got the ad
9 from someone else, but in terms of the organization's view of

00:20:48

10 how it perceived to effectively communicate its message?

11 MR. BOPP: Well, first, they used radio ads, including
12 on the Federal Marriage Amendment in the past. The only other
13 time they did a grassroots lobbying campaign on the Federal
14 Marriage Amendment they did a radio ad.

00:21:04

15 So, the first point is, of course, they have always
16 felt that it is an effective -- one effective tool to use
17 grassroots lobbying, including in this context.

18 Secondly, it's really not up to the government to say
19 which means of communication is appropriate, but we have

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20 answered that issue by saying that radio advertising is more
21 cost effective, it reaches more people for less cost, which is
22 why they are doing it in this instance.

23 Now, of course, one of the dilemmas that this court
24 has, and the U.S. Supreme Court in the unanimous decision of

00:21:46

25 *Wisconsin Right to Life vs FEC* has asked another panel of this

1 court to resolve, and that is to resolve the tension that exists
2 between two Supreme Court cases.

3 One is *First National Bank vs Bellotti* which held in
4 the mid-'70s that corporations are constitutionally protected
5 under the First Amendment in their -- in conducting lobbying
6 either of Legislative or Executive Branch, that -- and, of
7 course, the other is *Austin vs Michigan Chamber of Commerce*,
8 which held that with respect to electioneering communications --
9 those that advocate the election or defeat of a candidate --

10 corporations can be prohibited from engaging in that speech.

11 So we have two U.S. Supreme Court decisions, one saying
12 lobbying is 100 percent constitutionally protected, the other
13 says that election-related speech can be prohibited.

14 JUDGE OBERDORFER: And there's no Supreme Court case
15 about when somebody is trying to do both at the same time?

16 MR. BOPP: Well -- or I think more particularly here is
17 when one is doing one but not the other, and -- and I think --

18 JUDGE OBERDORFER: Consider my hypothetical, if you
19 want to call it a hypothetical, it might be this case, but what

20 if an applicant was trying to do both at the same time, to lobby
21 and to electioneer?

22 MR. BOPP: I don't know what you mean because --

23 JUDGE OBERDORFER: You don't?

24 MR. BOPP: Well, I think first is you have to look at
25 the ad.

1 JUDGE OBERDORFER: I'm giving you a hypothetical.

2 MR. BOPP: I'm trying to explain or elucidate your
3 hypothetical. I'm sorry if I don't understand it.

4 JUDGE OBERDORFER: Well, just take it where I leave it.

00:23:38

5 If found as a fact that the ad does both, what is the legal
6 consequence?

7 MR. BOPP: I think that the legal consequence would be
8 that the ad could be done, and that is because the people of the
9 United States have a constitutionally protected right to

00:23:55

10 petition their government, separately listed in the First
11 Amendment.

12 And I don't think that we should allow election-
13 related -- and I don't think the First Amendment allows --
14 election-related activity to be prohibited if it falls within
15 that category of grassroots lobbying.

00:24:14

16 Look, anything and everything can affect elections.
17 So, should we prohibit anything and everything? I mean, that
18 would be one -- I mean, if equally so that it was lobbying about
19 an upcoming vote in Congress, it is true that it may affect an
20 election. That is true.

00:24:32

21 JUDGE OBERDORFER: And if there were such a proposal
22 and the Election Commission was troubled by it, it would be
23 possible to drop out the electioneering which is not protected
24 by the constitution.

00:24:54

25 MR. BOPP: I'm trying to think of how that would be

1 done.

2 JUDGE OBERDORFER: Just change the ad.

3 MR. BOPP: Well -- but what elements of the ad?

4 In other words, I think that there are well -- there

00:25:03 5 are several accepted and proposed ways of determining what is a
6 grassroots lobbying ad.

7 The IRS has a very useful definition that they apply in
8 what they allow organizations to do and not do, so it's the same
9 general context, do or not do.

00:25:21 10 And so I think it requires a judgment, you know. Is
11 the ad a grassroots lobbying ad because it focuses on the issue,
12 not the candidate? It's only talking about individuals who are
13 incumbent officeholders, not -- incumbent officeholders. It
14 does not reference an election. It doesn't reference a

00:25:42 15 particular candidate's character or fitness for office like the
16 Yellowtail ad did.

17 So -- you know, so to reconcile this dilemma, I think
18 you simply go to the concurrence of Justice Stevens in *Austin*,
19 and there he explained -- he explained the distinction. He

00:26:05 20 explained and reconciled *Austin* in *First National Bank vs*
21 *Bellotti*.

22 And that is it's a much different thing to be
23 regulating the corporate speech that influences election from
24 corporate speech that is engaged in lobbying. He feels that
00:26:21 25 there is a distinction that is constitutionally sustainable.

1 Now, in *McConnell*, in footnote 88 that very distinction
2 is carried through. And, of course, as we know, Justice Stevens
3 and O'Connor wrote that opinion.

4 And in footnote 88 the court explains that, quote, We
5 assume that the interests that justify the regulation of
6 campaign speech might not apply to the regulation of genuine
7 issue ads.

8 And then they go on to discuss *First National Bank vs*
9 *Bellotti* and conclude with the distinction between what they
10 were holding in *McConnell* and what was held in *Bellotti* and, for
11 that matter, in *McIntyre*.

12 JUDGE ROGERS: What lesson do you draw from the
13 language in the *McConnell* decision, the majority decision that
14 essentially one might read to say that during the black-out
15 periods there is a presumption that if there is an incumbent and
16 someone who is up for reelection, that there is a presumption
17 that you are engaged in political electioneering conduct?

18 MR. BOPP: Well, first, there's no presumptions that
19 favor regulation of speech, and so when you're an as-applied
20 challenge, the burden is on the government to satisfy strict
21 scrutiny as applied to this ad.

22 But, secondly, *McConnell* recognized that there were
23 sham issue ads and that there were genuine issue ads.

24 Now, they upheld the prohibition on its face because
25 they found that the vast majority of the ads in the time period

1 were the, quote, functional equivalent of express advocacy, and
2 this was based upon a study called Buying Time where people
3 looked at the specific ads that were being broadcast during that
4 period of time.

00:28:23 5 JUDGE OBERDORFER: Your time has expired. You can save
6 it for your rebuttal.

7 MR. BOPP: I'm sorry. I didn't recognize the signal.
8 Thank you.

9 MR. KOLKER: May it please if court, I'm David Kolker
00:28:39 10 for the Federal Election Commission.

11 Before hitting my main theme, I would like to respond
12 to your question, Judge Oberdorfer. I think if you have an ad
13 that has both electioneering and lobbying in it, we have the
14 answer from that, and that is from the *Massachusetts Citizens*
00:28:57 15 *for Life* case.

16 You cannot immunize electioneering by throwing in some
17 lobbying. In that case we had a newsletter that -- whose most
18 prominent exhortation was to vote pro-life, to take that
19 position, but because the Supreme Court found that that
00:29:13 20 newsletter went beyond issue advocacy to include express
21 advocacy, it fell within the prohibition of 441(d).

22 The *Bellotti* case that has been referred to
23 distinguishes candidate elections. That was about a
24 state ballott referendum. And *McConnell* itself distinguished
00:29:32 25 *Bellotti* by saying that the BCRA amendments were true to the

1 kind of regulation that were constitutionally permissible.

2 In this case, CCL wants an extraordinary remedy in the
3 form of a preliminary injunction, but it has not met its burden
4 on any of the four relevant factors.

00:29:48

5 In *McConnell* the Supreme Court explained that there are
6 constitutionally-sufficient options available to corporations
7 like CCL who wish to make broadcast communications.

00:30:05

8 And plaintiff has failed to demonstrate that it is
9 likely to succeed on the merits in showing that those options
10 are unconstitutional as applied to its ads, let alone has it
11 shown irreparable harm by following the options spelled out by
12 the Supreme Court.

00:30:21

13 One of the key debates in the *McConnell* case was
14 whether the definition of electioneering communication was so
15 broad that it included too much genuine issue advocacy that
16 would render it unconstitutional.

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17 Now, the court, as we know, upheld that provision on
18 its face. In so holding the court did not say that every ad
19 that met the definition of electioneering communication was in
20 fact election related. Instead, the court recognized the
21 definition may in fact cover some genuine issue ads.

00:31:00

22 But the court upheld the definition, despite that, and
23 explicitly discussed the fact that in the future corporations
24 might have to take certain minimally burdensome steps to comply
25 with BCRA's new provision.

1 And I quote from you at page 206 where the court says,
2 "Moreover, whatever the percentage may have been in the past, in
3 the future corporations and unions may finance genuine issue ads
4 during those time frames by simply avoiding any specific
5 reference to federal candidates or in doubtful cases by paying
6 for the ad from a segregated fund."

00:31:18

7 JUDGE ROGERS: Do you read the court as saying those
8 are the minimal requirements?

9 MR. KOLKER: I read the court as saying that if there's

00:31:31

10 going to be an as-applied -- I don't think the court was
11 directly addressing as-applied challenges, but having upheld it
12 on its face and pointed out a specific way that genuine issue
13 ads could be dealt with in the future, I think the burden is now
14 on CCL to demonstrate why those two options are unconstitutional
15 as applied to it.

00:31:51

16 JUDGE ROGERS: Well, I assume that the plaintiff will
17 respond by saying something along the line that, It has come up
18 with a proposal. The burden is on the government to show that
19 there's a compelling governmental interest, it's narrowly
20 tailored, that demonstrates why that proposal cannot go forward.

00:32:10

21 MR. KOLKER: Well, I think we're beyond that, Your
22 Honor.

23 JUDGE ROGERS: Why?

24 MR. KOLKER: Well, because *McConnell* upheld this
25 provision on its face and because *McConnell* specifically said

00:32:21

1 that in the future there are these two things corporations can
2 do.

3 JUDGE ROGERS: But it didn't say if a corporation in
4 the future wants to do issue advertising, here are the ways it
5 can do it and these are the only ways it can do it.

6 I mean, clearly, that language isn't in the opinion.
7 Maybe that's what the court meant by the language. It didn't
8 say it that way, did it?

9 MR. KOLKER: Well, it came awfully close. It said in
10 the future --

11 JUDGE ROGERS: Close is -- you know, a miss is as good
12 as a mile the argument would be in a First Amendment context.

13 MR. KOLKER: But I think it certainly sets up a
14 presumption. I would draw an analogy to what happened in the
15 *Buckley* case and in the *Brown vs Socialist Workers' Party* case,
16 where the court upheld the disclosure provisions in *Buckley* even
17 as applied to minor political parties and said, there may be an
18 as-applied challenge in the future.

19 Now, of course, in *McConnell* they didn't even say that
20 specifically. But then in the *Brown* case that came several
21 years later, the court did find that that group was entitled to
22 a constitutional as-applied exemption. But if you read the
23 opinion, the burden was on the socialist workers to show that
24 they met the kind of test that the court had laid out in

25 *Buckley*.

1 And, in fact, they were able to show that they were --
2 the property was destroyed, there were harassments from the
3 police. And I think we have the same paradigm here, where you
4 have the Supreme Court decision, not specifically addressing
5 as-applied challenges per se as it did in *Buckley*, but
6 nevertheless stating that in the future with regard to genuine
7 issue ads there are these other ways --

8 JUDGE ROGERS: But isn't all of the court's
9 jurisprudence based on the notion that you have a First
10 Amendment right, and there are certain limited exceptions, and
11 those are the exceptions discussed in *Buckley*, et cetera, and so
12 the burden is always with the government to show that speech has
13 to be limited.

14 MR. KOLKER: I think that is true the first time it's
15 litigated, but we now have a decision from *McConnell* that takes
16 us beyond that. It upheld it on its face and it addressed this
17 explicit situation, so-called genuine issue ads, and there are
18 these two other options.

19 Regarding CCL and the PAC option, we know that it has
20 two state PACs, but its executive director testified at his
21 deposition that they've never even considered creating a federal
22 PAC.

23 We know that they have a donor who is willing to give
24 \$4,000. There is no reason why that donor couldn't give that
25 money to a PAC. If it were to create a federal PAC tomorrow,

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1 the individual could give the \$4,000 to the PAC.

2 JUDGE ROGERS: Let me ask you this so I understand it.

3 If I want to create a PAC, I file an application or I

4 just file a document with the FEC?

00:35:15 5 MR. KOLKER: You have to register -- there's a form to

6 figure out. You have to register with the FEC.

7 JUDGE ROGERS: There's what? A 24-hour turn around,

8 72-hour turnaround?

9 MR. KOLKER: That level of detail may be beyond my

00:35:25 10 expertise. I don't believe there's any delay, but I'm not

11 certain, Your Honor.

12 JUDGE ROGERS: But it has to be approved by the FEC?

13 MR. KOLKER: No, it doesn't have to be approved.

14 JUDGE ROGERS: Just the filing.

00:35:40 15 MR. KOLKER: Well, I don't. I don't -- it does have to

16 be approved. Oh, I'm sorry.

17 JUDGE ROGERS: We don't know whether it has to be --

18 MR. KOLKER: I'll stand by my answer. It does not have

19 to be approved.

00:35:47 20 JUDGE ROGERS: Literally, you just fill out the form

21 and go about your business.

22 MR. KOLKER: Yes.

23 JUDGE ROGERS: Then if somebody wants to challenge

24 whether or not you have lawfully established a PAC or you have

00:35:58 25 complied with a PAC and that complaint is filed with the FEC and

1 then the FEC responds?

2 MR. KOLKER: Yes.

3 JUDGE ROGERS: I see.

4 JUDGE KOTELLY: Can I just ask one question since we've

00:36:08 5 got a little pause in your argument here, and going back to the

6 issue of whether, under the regulations, they would be able to,

7 say, ask for the -- call the capitol switchboard, et cetera, et

8 cetera, and ask for your Senators.

9 MR. KOLKER: Your Honor, I don't --

00:36:28 10 JUDGE KOTELLY: It raised an issue saying you couldn't

11 do it under the regulations, you had argued that they could, and

12 I was wondering what the actual position of the FEC --

13 MR. KOLKER: I don't believe the Commission has taken a

14 definitive position on "Your Senators." That might be the kind

00:36:40 15 of thing where an advisory opinion would be the best way to go.

16 I think -- I don't mean to split hairs, but if you

17 said, "Your Senator," there's more ambiguity than the plural

18 because we have more than one Senators. I think they could just

19 say, "Call the Senate." There are various ways -- I'm not a

00:37:00 20 political consultant, Your Honor. I think there are various

21 ways to get the message across.

22 JUDGE OBERDORFER: How long would it take to get a

23 ruling like that?

24 MR. KOLKER: Pardon?

00:37:07 25 JUDGE OBERDORFER: How long would it take to get a

1 ruling on that issue by the Commission?

2 MR. KOLKER: I believe the Commission is required to
3 respond to advisory opinion requests within 60 days.

4 Now, with this particular --

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5 JUDGE OBERDORFER: Can that time be shortened?

6 MR. KOLKER: It can be, yes.

7 JUDGE OBERDORFER: Is there a procedure for shortening
8 it?

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9 MR. KOLKER: I don't believe there's a procedure
10 established by regulations. Somebody could always ask for an
11 expedited ruling.

12 With this particular plaintiff we know that in the past
13 they've run ads that didn't mention candidates by name.

00:37:46

14 If you look at Exhibit A-6, that was a print ad that
15 they ran. It was directed, quote, to every public servant,
16 elected or appointed, who will debate and decide before God and
17 country the critical issue of marriage in the United States.

18 So this plaintiff has run ads before that have omitted
19 the name of a candidate.

00:38:05

20 JUDGE KOTELLY: I realize that you've made an argument
21 that the burden is on the plaintiffs in terms of -- and that you
22 don't have to show a compelling government interest based on the
23 *McConnell* decision, if I understood your argument, but is there
24 an argument from your perspective that there is a compelling

00:38:21

25 government interest?

1 MR. KOLKER: Well, I believe *McConnell* said that this
2 provision, in general, serves a compelling government interest
3 and applies in this case as well.

4 I certainly think it's the case that if an exemption
5 were created along the lines that they are suggesting, that it
6 would seriously erode the electioneering communications'
7 provision. The provision is a bright-line rule, obviously.
8 That's part of the reason Congress adopted it, one of the
9 reasons that the Supreme Court upheld it.

10 Its bright-line quality furthers First Amendment
11 interests. There is nothing vague about this definition, and it
12 therefore solves the problem that originally led to the express
13 advocacy definition.

14 There's no uncertainty among speakers. They know
15 whether or not they have to use PAC money or their corporate
16 treasury funds when they run ads that mention candidates.

17 The crucial legal point here is that *McConnell* has
18 taught us that this provision is not substantially overbroad.

19 So if an exception were created that allowed a lot of this
20 speech to go unregulated, it would be in direct conflict of the
21 holding of *McConnell*.

22 JUDGE ROGERS: I thought on the facial challenge under
23 the First Amendment what has to be shown, the statute is to be
24 upheld, is that there are instances in which it could be
25 constitutionally applied. There's no percentage test.

1 MR. KOLKER: Well, I'm really thinking of the Supreme
2 Court's own words. They said that the vast majority of the ads
3 were the functional equivalent of expressed advocacy.

00:39:56

4 JUDGE ROGERS: Suppose this is one of the ads,
5 hypothetically, that the Supreme Court is not too sure about,
6 then what?

7 MR. KOLKER: Well, I think as I've indicated, the court
8 said they could be paid for with the PAC.

00:40:07

9 But in response to Judge Kollar-Kotelly's question, I
10 think the danger of creating an exception that would exempt this
11 ad is that it would create such a large loophole that there
12 wouldn't be much left of the provision, and that's what would
13 fly in the face of *McConnell* which said that it is not
14 substantially overbroad.

00:40:21

15 JUDGE ROGERS: Back to Judge Kotelly's question.
16 A number of the Supreme Court cases, including *MCFL*,
17 *Austin*, talk about the conduit concern. In other words,
18 corporations could evade the PAC limitations by contributing to
19 nonprofits, others thereby indirectly accomplish what they want
20 to directly.

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21 Now, is that the nature of a compelling governmental
22 interest at issue in this type of ad where, let's assume, you
23 don't have an *MCFL*-type organization?

00:41:03

24 MR. KOLKER: Well, the Supreme Court has made it very
25 clear in *McConnell* and *Beaumont* that even as applied to

1 nonprofit corporations, that it is constitutionally sufficient
2 for express advocacy and electioneering communications to be
3 made from a PAC.

00:41:19

4 JUDGE ROGERS: Counsel, you know as well as I do that
5 since *McConnell* some courts have looked at this a little
6 differently and talked about, well, they're minimaling corporate
7 contributions, minimal business activity. That doesn't fall
8 within the prohibition of BCRA. That's what I'm trying to
9 explore with you.

00:41:38

10 MR. KOLKER: Okay, if I may. I think perhaps you're
11 mixing apples and oranges.

00:41:54

12 I believe you're referring to the NRA decision, the
13 decision out of the Eighth Circuit about what it takes to
14 qualify for *MCFL* status. And I think it is true that some of
15 the circuit courts have interpreted the *MCFL* exemption more
16 broadly than the Commission has in its regulation. I would
17 argue --

00:42:08

18 JUDGE ROGERS: Although I thought the Commission's
19 statement here was it hadn't really addressed this minimal
20 business activity issue.

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21 MR. KOLKER: Well, we suggested that an advisory
22 opinion would be appropriate here because in terms of CCL itself
23 the evidence is quite sketchy about whether they do or do not
24 qualify for *MCFL* status. And, we're not really sure they do. I
25 can't tell you how the Commission would vote on that.

1 JUDGE KOTELLY: Because it gets to an issue of
2 standing.

3 Based on the record we have now with the reply and the
4 statement that Mr. Heath made as opposed to the deposition,
00:42:42 5 would you not, based on that, indicate that they appear on the
6 record we have at this point that they are not an *MCFL* or would
7 you not take a position? Since it goes to standing, obviously
8 it's moot.

9 MR. KOLKER: Your Honor, we got an affidavit on Friday
00:42:58 10 afternoon. It wasn't something we had a chance to respond to.
11 It certainly wasn't something we had a chance to test in
12 discovery.

13 I think I would stand by the position in the brief,
14 that given these circumstances an advisory opinion would be
00:43:09 15 appropriate. I'm not prejudging how the Commission would come
16 out. They may very well -- I don't know how they would decide
17 it. I'm just saying it's an open question and I wouldn't
18 concede it one or the other.

19 JUDGE ROGERS: Go back to my question about what is the
00:43:22 20 compelling governmental interest here?

21 MR. KOLKER: Could I finish about the *MCFL* status?

22 Yes, there are circuit court decisions who have -- for
23 example, in the *NRA* decision in this circuit I believe they
24 ruled if you only got \$1,000 in business income in a year, that
00:43:40 25 was not enough to disqualify you from the *MCFL* exemption.

1 But functionally the way this works is, you either
2 qualify for the exemption or you don't. And what the Supreme
3 Court has made clear is once you don't qualify, you've got to
4 use your PAC.

00:43:53

5 And *McConnell* is absolutely clear on this, because the
6 so-called Wellstone amendment and the Snowe-Jeffords' amendment
7 specifically dealt with the issue about whether nonprofits would
8 continue to be required to use a PAC for electioneering
9 communications. And the court said yes, even nonprofit

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10 corporations are subject to this limit and that is
11 constitutional.

12 What I was trying to finish about the compelling
13 interest. I did want to talk generally, because we've got the
14 kind of ads here that fits a paradigm of the one discussed by

00:44:27

15 the Supreme Court in *McConnell*. This is what I referred to as a
16 call-and-tell ad.

17 And what the Supreme Court referred to described it
18 hypothetically as an ad where they said that, quote, little
19 difference existed, for example, between an ad that urged

00:44:42

20 viewers to vote against Jane Doe and one that condemned Jane
21 Doe's record on a particular issue before exhorting viewers to
22 call Jane Doe and tell her what you think.

23 And here, we've got exactly that paradigm. We've got
24 an ad that extols the virtues of traditional marriage and then

00:44:58

25 states, "Unfortunately, your Senators voted against the Marriage

1 Protection Amendment two years ago. Please call Senator Snowe
2 and Collins immediately and urge them to support the Marriage
3 Protection Amendment when it comes to a vote in early June."

00:45:15

4 JUDGE ROGERS: So if the ad simply said, The two
5 Senators have voted against this in the past, period, not the
6 same problem? Not the paradigm?

7 MR. KOLKER: Well, it may not match it quite as closely
8 as what was in *McConnell*.

00:45:32

9 I still think there is a field day to be had by
10 political consultants once you start saying, Well, this ad is
11 exempt, because it allows for exactly the kind of mischief that
12 took place when we were living under the express advocacy
13 standard.

00:45:46

14 JUDGE ROGERS: The Supreme Court left that open in
15 *McConnell*. It said there were some issue ads that would pass
16 muster.

17 MR. KOLKER: I don't understand, Your Honor.

00:46:01

18 JUDGE ROGERS: Well, it upheld the restriction saying
19 that even if this sweeps in the general issue ads -- you quoted
20 back to me the analysis, well, most of the ads we've seen are
21 electioneering, but that language clearly leaves open -- I mean,
22 the remand in the Wisconsin case clearly leaves open the
23 opportunity for some ads to escape the limitation.

00:46:21

24 MR. KOLKER: But the remand in Wisconsin just didn't go
25 very far. The decision by the three-judge panel in Wisconsin

1 focused on a sentence from *McConnell* saying that we're upholding
2 all applications, and that was a large part of what the --

3 JUDGE ROGERS: You think it was just a useless gesture,
4 the remand?

5 MR. KOLKER: I don't think it was a useless gesture. I
6 think what it was, was just reversing the categorical bar on
7 even looking at as-applied challenges. Because the three-judge
8 panel had focused on that line from *McConnell* and the decision
9 in Wisconsin itself focused on that line in *McConnell* saying, We

00:46:53 10 did not mean by that sentence to say that we're precluding all
11 as-applied challenges from even being looked at.

12 But it went no further than that, and it left in tact
13 all of *McConnell's* other reasoning, specifically the line that
14 I've quoted for you about the options available to corporations
00:47:11 15 in the future when they need to run genuine issue ads.

16 JUDGE OBERDORFER: Is there a value at stake which you
17 could address to have a bright-line?

18 MR. KOLKER: Well, I think that's part of what I have
19 been talking about, Your Honor.

00:47:24 20 I believe it furthers First Amendment interests because
21 speakers know ahead of time what ads have to be financed in
22 which particular way. CCL doesn't question, for example, that
23 it does fall within the electioneering communications
24 definition.

00:47:44 25 JUDGE OBERDORFER: And you're saying that's a

1 compelling government interest in this situation?

2 MR. KOLKER: Yes, I do.

3 And I believe that the *Hill v Colorado* case which we

4 cite goes to that, where once you start down the road of each

00:47:57 5 time parsing out facts, you destroy the rule, which is

6 admittedly prophylactic. Just as we believe that the *Buckley*

7 decision when it said that we assume that most people give more

8 than a thousand dollars probably do not have some sort of easel

9 intent -- those aren't quite the words -- but, nevertheless,

00:48:17 10 we're going uphold the rule. And I don't think anybody could

11 come in nowadays and say, I want to give \$10,000 and I'm a good

12 guy and here is why, because the rule would just fall apart. It

13 wouldn't cease to function any further.

14 JUDGE ROGERS: So under your interpretation of

00:48:30 15 *McConnell*, it would be futile for CCL to ask for an advisory

16 opinion whether its ad is permissible?

17 MR. KOLKER: Well, we suggested that they ask for an

18 advisory opinion about whether they are an MCFL corporation.

19 JUDGE ROGERS: I'm asking you on advisory opinion as to

00:48:49 20 a particular ad.

21 MR. KOLKER: Again, I can't prejudge what the

22 Commission would say, but --

23 JUDGE ROGERS: You're representing the Commission's

24 position here that *McConnell* has held that the only way that the

00:49:00 25 corporation could proceed is either through a PAC or eliminate

1 the names of the two Senators.

2 MR. KOLKER: Well, the Commission is empowered by BCRA
3 to create exemptions to the electioneering communications
4 provision but only by regulation, so that's not something it
5 could do by advisory opinion.

6 JUDGE OBERDORFER: Mr. Kolker, your time has expired.

7 MR. KOLKER: Thank you, Your Honor.

8 MR. ORTIZ: Good afternoon, Your Honor.

9 May it please the court, my name is Daniel Ortiz and I

10 represent the intervenors in Christian Civic League of Maine,
11 Incorporated versus FEC.

12 Your Honors, in an ordinary case a preliminary
13 injunction is an extraordinary remedy; in this case it's even
14 more extraordinary.

15 The statute in this case has been upheld against facial
16 challenge by the United States Supreme Court in *McConnell*. It
17 appears that CCL planned to run the ad primarily in order to
18 test the law, not genuinely to mobilize its members and citizens
19 of Maine in favor of the Marriage Protection Amendment. And CCL

20 is seeking to change the status quo with the preliminary
21 injunction, not preserve it.

22 JUDGE OBERDORFER: Counsel, if you want the reporter to
23 record this and me to hear it, slow down.

24 MR. ORTIZ: Sorry, Your Honor.

25 In particular, Your Honor, CCL has made no clear

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1 showing of any of the four elements necessary for a preliminary
2 injunction.

3 It does not demonstrate substantial likelihood of
4 success on the merits, that it will suffer irreparable harm,
00:50:32 5 that such preliminary injunction would be in the public
6 interests, and that the granting of a preliminary injunction
7 would not harm the interests of other parties.

8 Your Honors, CCL's requested preliminary injunction is
9 breathtakingly broad. CCL is asking this court to carve out an
00:50:48 10 exemption that BCRA's electioneering communications' provision
11 for, first, Crossroads in the pre-primary period.

12 Crossroads later, if there is still a vote to be had on
13 the Marriage Protection Amendment.

14 Third, materially similar ads in future primary and
00:51:07 15 general elections without ever saying in what respects they will
16 be materially similar.

17 Fourth, it asks this court to extend the preliminary
18 injunction to so-called grassroots lobbying ads, which CCL
19 defines and suggest definitions of various different ways but
00:51:23 20 seems primarily to focus on the IRS definition which -- thank
21 you, Your Honor -- which is not a definition which would be of
22 any real use here. CCL, Your Honor, is basically asking for a
23 blank check.

24 This approach taken would allow any business
00:51:42 25 corporation to engage in unlimited sham issue advocacy

1 immediately before any federal election what BCRA shut down so
2 long as the corporation tied its ads to a particular piece of
3 legislation.

4 Now, CCL's proposed IRS definition would exempt any
00:52:03 5 electioneering communication that, one, refers to the specific
6 legislation; two, reflects a view on such legislation; and
7 three, asks the recipient of the communication to take some
8 action with respect to the legislation.

9 JUDGE ROGERS: All right. At that point do you think
00:52:17 10 *McConnell* has ruled on that as to whether that is a genuine
11 issue ad?

12 MR. ORTIZ: I'm sorry, Your Honor?

13 JUDGE ROGERS: You listed three characteristics of an
14 ad. Do you think *McConnell* has outlawed that type of ad?

00:52:32 15 MR. ORTIZ: *McConnell* has outlawed that type of ad
16 within the periods before elections in the particular kind of
17 media that BCRA's electioneering communications provisions --

18 JUDGE ROGERS: All you mentioned, as I understood it,
19 was they had a position, they wanted to talk about legislation,
00:52:49 20 and they wanted their listeners to call their representatives.

21 MR. ORTIZ: Yes, but the ads, to be covered by BCRA's
22 electioneering communications' provision, have to actually
23 clearly reference a federal candidate shortly before a federal
24 candidate election.

00:53:09 25 JUDGE ROGERS: All right. My point is your position is

1 that an ad with those first three characteristics does not run
2 into a BCRA prohibition.

3 MR. ORTIZ: No, Your Honor. I'm sorry. I must have
4 misspoken.

00:53:21

5 My idea is that under the IRS def -- you could satisfy
6 the IRS definition, an advertisement could have those three
7 characteristics and still be a covered electioneering
8 communication under BCRA which would be subject to all the
9 reasonable regulation --

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10 JUDGE ROGERS: Because?

11 MR. ORTIZ: Because it's so easy to use such a
12 communication to influence federal candidate elections.

13 JUDGE ROGERS: Let me just be clear.

00:53:52

14 If I'm an organization that feels very strongly about
15 issue A, and if the Senate is about to vote on a bill that
16 affects issue A, BCRA prohibits me as a corporation without a
17 PAC from running an ad that says, "The Senate is going to vote
18 on issue A. We feel strongly in favor of issue A. We want you
19 to call your representatives and tell them that you want them to
20 support issue A"?

00:54:27

21 MR. ORTIZ: Only if they mention the representative's
22 name.

23 JUDGE ROGERS: You don't want to answer my question.

24 Answer -- I'm just trying to get a direct answer so I

00:54:40

25 understand the intervenor's position.

1 That ad, with those three characteristics you have
2 identified, is not barred under BCRA?

3 MR. ORTIZ: It is not barred under BCRA if it does not
4 specifically identify a federal candidate within those
5 periods --

6 JUDGE ROGERS: And the first three characteristics do
7 not, as you name them.

8 MR. ORTIZ: No. But, Your Honor, an ad could satisfy
9 those three conditions and at the same time fall under BCRA's
10 electioneering communications' coverage. These aren't two
11 mutually --

12 JUDGE ROGERS: I understand that, but you just gave me
13 three characteristics of an ad, and I want to know if that's
14 permissible under BCRA.

15 MR. ORTIZ: Some of those ads would be permissible --
16 some of the ads meeting --

17 JUDGE ROGERS: There's no mention of any Senator's
18 name.

19 MR. ORTIZ: That would be permissible under BCRA.

20 JUDGE ROGERS: All right. That's my question.

21 MR. ORTIZ: I'm sorry.

22 In fact, Your Honor, the question I think reveals the
23 difficulty here, which is that with only minor changes, cosmetic
24 changes, nearly all the ads that were before the court in

25 *McConnell* could satisfy this definition of grassroots lobbying.

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1 Instead, telling Senator so and so -- instead of saying
2 Senator so and so has taken a particular position and asking
3 viewers to call Senator so and so and tell Senator so and so to
4 take a different position, all the advertiser would have to do
5 is hook the ad up to a specific piece of legislation.

00:56:12

6 It's still call and tell, which the Supreme Court found
7 to be the functional equivalent of expressed campaign advocacy.
8 As the court put it, little difference exists between an ad that
9 urges viewers to vote against Jane Doe and one that condemns
10 Jane Doe's record on a particular issue and exhorting viewers to
11 call Jane Doe and tell her what you think.

00:56:31

12 In fact, the notorious *Yellowtail* ad in *McConnell*, the
13 one ad that the Supreme Court specifically focused on, could
14 easily be changed, just two or three words, to meet this
15 definition of grassroots lobbying.

00:56:48

16 Your Honors, exempting the Crossroads' ads itself is
17 also unwarranted. Not only is the preliminary injunction way
18 too broad, but even covering this particular ad or exempting
19 this particular ad could cause problems.

00:57:04

20 It states Senator Snowe's position on the issue. It
21 condemns that position, both expressly by referring to it as
22 "unfortunate," and by implication, by throwing Senator Snowe
23 into the company of quote/unquote roque judges, and it then asks
24 the viewers to call and tell Senator Snowe what the viewer
25 thinks. This is exactly the kind of call-and-tell type

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1 advertising that *McConnell* said Congress could regulate as it
2 did.

3 CCL plans to serve up traditional candidate advocacy in
4 the guise of legislative lobbying or at least the test that it
00:57:36 5 proposes would.

6 JUDGE ROGERS: As I understand it, the history of this
7 legislation is Congress was concerned about soft money and
8 attack ads. So any time there -- in the latter category, any
9 time there is an ad that expresses a view of an incumbent's
00:58:00 10 position, that is tantamount to an attack ad?

11 MR. ORTIZ: No, Your Honor. It's not the intervenors'
12 position that that's what the legislation was premised on or
13 really represents.

14 The intervenors would argue, instead, that this part of
00:58:16 15 BCRA in particular is really meant to come to terms with the
16 corruptive threat of corporate -- direct corporate funding in
17 federal candidate elections.

18 JUDGE ROGERS: That was a soft election issue.

19 MR. ORTIZ: It's both, Your Honor.

00:58:32 20 JUDGE ROGERS: All right.

21 MR. ORTIZ: It's both because --

22 JUDGE ROGERS: I'm just quoting the members of Congress
23 and what they said they thought the legislation was about.

24 MR. ORTIZ: No, no, Your Honor. There may have been
00:58:41 25 members of Congress on the floor who spoke in these terms, but

1 it's not the intervenors' position today that that's what BCRA
2 represents.

3 Also, Your Honor, granting CCL's proposed injunction
4 would harm other parties and the public interests. It enjoins
5 an act of Congress that is designed to protect the political
6 process from the improper influence of corporate money.

7 This has already been upheld on its face, this
8 provision, in *McConnell*. It would basically reopen the door for
9 corporations and unions to fill the airwaves on the eve of an
10 election with ads funded from their general treasuries referring
11 to specific federal candidates.

12 Even if these ads mention specific pending legislation,
13 they can be still the functional equivalent of advocacy
14 expressly calling for the election or defeat of particular
15 candidates.

16 For all these reasons, Your Honor, intervenors
17 respectfully ask this court to deny plaintiff's motion for a
18 preliminary injunction.

19 Thank you.

20 JUDGE OBERDORFER: Thank you, sir.

21 Mr. Bopp.

22 MR. BOPP: Thank you, Your Honor.

23 The FEC's position is you can either remove the name
24 or, secondly, you can do it by your PAC and they say *McConnell*
25 requires that. That is exactly the end of this paragraph that

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1 makes that statement, and then they append footnote 88.

2 Footnote 88 begins, As Justice Kennedy emphasizes in
3 dissent, we assume that the interests that justified regulation
4 of campaign speech might not apply to the regulation of genuine
5 issue ads.

01:00:22

6 That is exactly the issue that you are asked to decide.

7 And, surely, the U.S. Supreme Court, when faced with the very
8 same argument in January that *McConnell* precluded the
9 consideration of any as-applied challenges to this law, had a

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10 ready vehicle to shut the door as the FEC is claiming *McConnell*
11 shut the door.

12 Well, in fact, it did not shut the door. It invited
13 the consideration of whether or not genuine issue ads, which
14 they recognized exists, were supported by the constitutional
15 interests in *Bellotti* and *McIntyre* that footnote 88 specifically
16 points to.

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17 I mean, lobbying is about the essence of self-
18 government. I mean, it is one thing to say the corporations
19 when they directly tried to influence federal elections can be

01:01:17

20 barred, but it's quite another thing to use campaign finance
21 rules to prohibit citizens from lobbying their Senators about
22 upcoming votes in Congress. That is a different right that must
23 be justified.

24 Now, the FEC will try to shift the burden but, of

01:01:36

25 course, they've lost that. They lost that in MCF -- in *MCFL* in

1 1986 where an as-applied challenge was being made to the
2 corporate prohibition, the FEC says it's the plaintiff's burden,
3 and the Supreme Court held that they must justify it by strict
4 scrutiny.

01:01:55 5 JUDGE OBERDORFER: Mr. Bopp.

6 MR. BOPP: I feel my time is up.

7 JUDGE OBERDORFER: Let me just ask a question.

8 This ad not only mentions the Senator's name but has
9 what is arguably a pejorative comment.

01:02:10 10 MR. BOPP: It has a comment that expresses the view of
11 the portion on the vote that was taken.

12 JUDGE OBERDORFER: That was a comment about the view of
13 the Senator, and it has a comment about the behavior of the
14 Senator.

01:02:27 15 MR. BOPP: It has a comment about the vote of the
16 Senator, yes, that it was unfortunate that the Senator voted --
17 Senators --

18 JUDGE OBERDORFER: It's more than that.

19 MR. BOPP: That's all it is.

01:02:35 20 JUDGE OBERDORFER: They had an adverb in there.

21 MR. BOPP: Well, I think the meaning of that sentence
22 you're referring to is not talking about the Senators, it's
23 talking about their vote. And so that's the essence of issue
24 advocacy, is to talk about the votes of congressmen and Senators
01:02:52 25 in office.

1 Now, of course, the third argument that they make is
2 that, well, we need a bright-line. And of course the
3 bright-line here is to justify more regulation of speech, but
4 again the FEC lost that issue in *MCFL* also.

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5 They argued that, well, we need a bright-line to
6 prohibit corporations from ever doing anything related to
7 federal elections, and the Supreme Court held that even though
8 it's a desirable thing, that you still have to determine whether
9 or not the interests justify the regulation and they granted the

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10 as-applied exemption from the corporate prohibition.

11 Now, so with all due respect --

12 JUDGE OBERDORFER: Your time --

13 MR. BOPP: -- I think that the U.S. Supreme Court has
14 invited the very consideration that is before this court, and

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15 that is whether or not the interests identified in *McConnell* to
16 justify the regulation of election-related speech is sufficient
17 to justify lobbying, and I think not.

18 Thank you.

19 JUDGE OBERDORFER: The matter is submitted.

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20 **(Proceedings concluded at 3:04 p.m.)**

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CERTIFICATE

I, EDWARD N. HAWKINS, Official Court Reporter, certify
that the foregoing pages are a correct transcript from the
record of proceedings in the above-entitled matter.

Edward N. Hawkins, RMR