UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC.,	)	
	)	
Plaintiff,	)	No. 1:04cv01260 (DBS, RWR, RJL)
	)	(Three-Judge Court)
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	MEMORANDUM
	)	
Defendant,	)	
	)	
and	)	
	)	
SEN. JOHN McCAIN *et al.*,	)	
	)	
Intervening Defendants.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM ADDRESSING QUESTIONS POSED IN THE COURT'S APRIL 17, 2006, SCHEDULING ORDER

In its Scheduling Order issued on April 17, 2006, this Court directed the parties to file memoranda addressing, first, what "live controversy" the Court must adjudicate, particularly whether the Court is to consider declaratory and injunctive relief as to advertisements plaintiff Wisconsin Right to Life, Inc. ("WRTL") planned to air in 2004, and second, whether the Supreme Court's remand requires this Court to consider WRTL's requests for such relief for "grass-roots lobbying" beyond the 2004 advertisements.[1]

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[1] The Court's Scheduling Order framed the issues as follows:

1. Precisely what is the live controversy that this Court must adjudicate and why is it live? Particularly, is this Court to:

   a. declare the lawfulness vel non of BCRA as applied to the advertisements the plaintiff intended to air in 2004?

I. WRTL'S PROPOSED 2004 BROADCAST COMMUNICATIONS MAY NOT PRESENT A LIVE CONTROVERSY FOR THIS COURT TO ADJUDICATE

Under the "case or controversy" requirement of Article III of the Constitution, federal courts "may only adjudicate actual, ongoing controversies." Honig v. Doe, 484 U.S. 305, 317 (1988). A moot issue is not an "actual, ongoing controvers[y]." 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 … our mootness jurisprudence"); Spirit of the Sage Council v. Norton, 411 F.3d 225, 230 (D.C. Cir. 2005) (accord). "A case is moot if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" Pharmachemie B.V. v. Barr Labs., Inc., 276 F.3d 627, 631 (D.C. Cir. 2002) (internal citation omitted).

A. Mootness

WRTL no longer has any plans to run the advertisements it alleged it intended to air in 2004. When it filed its complaint, WRTL alleged that it intended to finance three specific broadcast advertisements with corporate treasury funds during the 30-day period before the September 2004 primary in which Senator Russell Feingold was seeking his party's nomination and during the overlapping 60-day period before the November 2004 general election. Amended Verified Complaint ¶¶ 12-14 & Exhibits A-C thereto. The Bipartisan Campaign Reform Act's ("BCRA") financing restrictions for electioneering communications would have applied to

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b. consider enjoining defendant from enforcing BCRA against plaintiff for intended 2004 conduct?

2. Does the Supreme Court's remand require this Court to consider plaintiff's request for a declaratory judgment concerning electioneering communications by WRTL that constitute grass-roots lobbying and an injunction regarding any electioneering communications by WRTL that constitute grass-roots lobbying? If so, what, if not the 2004 advertisements, would decisions on those requests be based?

WRTL's proposed ads in Wisconsin only during those periods in 2004. WRTL did not in fact run the broadcast advertisements during those periods in 2004 or at any time thereafter; indeed, according to WRTL's counsel, plaintiff has "abandoned" this ad campaign.[2]

It is now 2006, and the issue whether it was constitutional to apply the electioneering communications provision to the advertisements that WRTL proposed to broadcast in 2004 is moot. "'[E]vents have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" Pharmachemie B.V., 276 F.3d at 631 (citation omitted). Moreover, because WRTL chose not to run its advertisements during the electioneering communication time windows, it now faces no possibility of any future Commission enforcement proceedings against it for ads it never ran.

B. The "Capable of Repetition, Yet Evading Review" Exception

The Supreme Court has recognized an exception to the mootness doctrine for situations that are "capable of repetition, yet evading review." See Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911), and its progeny. The wrong or issue raised by a party must satisfy "both prongs" of this test to come within "this narrow exception." Pharmachemie B.V., 276 F.3d at 633. Although it is a close question whether WRTL's as-applied challenge regarding its planned 2004 advertisements falls within the "capable of repetition, yet evading review" exception, there are grounds on which the Court could conclude that it does not. "The burden is on [the plaintiff] to show that these requirements are met." Southern Co. Servs., Inc. v. FERC, 416 F.3d 39, 43 (D.C. Cir. 2005). Accord Public Utilities Comm'n of Calif. v. FERC, 236 F.3d 708, 714 (D.C. Cir. 2001).

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[2] See Transcript of statement of WRTL's counsel at oral argument in the Supreme Court, http://www.supremecourtus.gov/oral_arguments/ argument_transcripts/04-1581.pdf, at 9-10.

Under the first prong of the test, for an alleged wrong to be considered "capable of repetition," "there must be a 'reasonable expectation' or 'demonstrated probability' that the same controversy will recur involving the same complaining party." Murphy v. Hunt, 455 U.S. 478, 482 (1982). Accord, e.g., First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 774 (1978); Spirit of the Sage Council, 411 F.3d at 229-30. The alleged wrong at issue "must be defined in terms of the precise controversy it spawns" and "in terms of the legal questions it presents for decision." PETA v. Gittens, 396 F.3d 416, 422-23 (D.C. Cir. 2005). The Supreme Court "has never held that a mere physical or theoretical possibility was sufficient to satisfy the test…. If this were true, virtually any matter of short duration would be reviewable." Murphy v. Hunt, 455 U.S. at 482.

As-applied challenges sometimes can fall within this exception, Storer v. Brown, 415 U.S. 724, 737 n.8 (1974), but there are many material circumstances in this case that would have to happen again for "the same controversy" with WRTL to recur.[3] When this Court denied WRTL's request for a preliminary injunction, it noted a number of facts about WRTL's and its PAC's previous advocacy and candidate endorsements, as well as their patterns and practices of using various types of media to publicize their advocacy, that were relevant to the legal determination of whether WRTL's advertising was of the type at which the statute was properly directed. Among those facts were WRTL's history of opposition to Senator Feingold; WRTL PAC's history of independent expenditures against Senator Feingold and endorsement of his opponents; WRTL's efforts to make judicial filibusters a campaign issue; WRTL's use of non-

[3] In Storer, 415 U.S. at 737 n.8, the Court found the exception applicable because the "construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges…." In this case, however, there is no dispute about the construction of the statute or how it operates, and McConnell v. FEC, 540 U.S. 93 (2003), has already provided substantial guidance about the constitutionality of the electioneering communication provision.

broadcast media before the electioneering communication period and its sudden change to broadcast media just before that period began; and the omission from the planned advertisements of any information about how to contact the Senators named in the ads. Senator Feingold is no longer running for election, and it is speculative whether WRTL will seek to broadcast advertisements during the narrow electioneering communication periods in future elections in circumstances that are sufficiently similar to those set out above that an as-applied constitutional challenge would present the "same controversy." Spirit of the Sage Council, 411 F.3d at 229-30. See PETA, 396 F.3d at 424 (in "fact-specific" First Amendment challenge, "[t]o conclude that a dispute like this would arise in the future requires us to imagine a sequence of circumstances too long to credit"). Cf. Bellotti, 435 U.S. at 774 (circumstances were capable of repetition in light of legislature's having placed the issue on the ballot on four previous occasions).

"Under the evading review prong, the question is whether 'the challenged activity is by its very nature short in duration, so that it could not, or probably would not, be able to be adjudicated while fully alive.'" Pharmachemie B.V., 276 F.3d at 633 (internal citation omitted; emphasis in original). Even if the Court were to find that the wrong alleged by WRTL is capable of repetition under the test discussed above, it appears that such a controversy would be capable of being adjudicated while still alive. BCRA § 403 explicitly provides for the expedition of constitutional challenges to "any provision" of the statute.[4] The three-judge court that hears such a case has "the duty … to advance on the docket and to expedite to the greatest possible extent the disposition of the action." BCRA § 403(a)(1), (4). Review of a final decision by that court bypasses the court of appeals and goes "directly to the Supreme Court," which also has a duty to

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4 BCRA, Pub. L. No. 107-155, Title IV, § 403, 116 Stat. 81, 113 (2002); Note, 2 U.S.C. 437h ("Judicial Review").

expedite. BCRA § 403(a)(3), (4). In addition, Congress shortened the usual time for filing the notice of appeal and a jurisdictional statement. Compare BCRA § 403(a)(3) with Sup.Ct. R. 18.[5]

It appears that WRTL could have obtained expedited resolution of this case if it had not waited to the last minute to file suit. Even though WRTL had opposed the Senate filibuster against judicial nominees for many months, it delayed filing its as-applied challenge until only a few weeks before the beginning of the electioneering communications period. See Docket Entry #1 (initial complaint); Docket Entry #30 (amended complaint) ¶¶ 12, 14. This Court expedited consideration of WRTL's motion for a preliminary injunction and issued its order before the electioneering communications period began (Aug. 12, 2004). However, WRTL then took its appeal to the wrong court: the United States Court of Appeals for the District of Columbia Circuit instead of the United States Supreme Court. See WRTL v. FEC, No. 04-5292 (D.C. Cir. Sept. 1, 2004) (order dismissing appeal). This error prevented the Supreme Court from considering the requested injunction as quickly as the statutory scheme permits. Several courts have found such circumstances relevant to whether a claim of this kind is likely to evade judicial review. See, e.g., Iowa Protection and Advocacy Servs. v. Tanager, Inc., 427 F.3d 541, 544 (8th Cir. 2005) ("When a party has these legal avenues available, but does not utilize them, the action is not one that evades review"; internal citation and quotation marks omitted); Fischbach v. New Mexico Activities Ass'n, 38 F.3d 1159 (10th Cir. 1994) (finding no exception to mootness doctrine where appellant "did not attempt to expedite an appeal of the preliminary injunction" given to plaintiffs).

[5] But cf. Bellotti, 435 U.S. at 774. Although Bellotti found that 18 months was "too short a period of time for appellants to obtain complete judicial review," that case did not involve a statutory requirement of expedited judicial review.

C. Because WRTL Never Executed Its Plans To Run Its Advertisements During The Electioneering Communications Period In 2004, The Court Has No Basis For Enjoining The Commission From Enforcing That Provision Regarding Such Advertisements

As explained above, WRTL did not in fact broadcast its planned advertisements during the times that the electioneering communications provisions of BCRA would have applied — the 30-day period before the September 2004 primary election in Wisconsin or the 60-day period before the November 2004 general election. Because WRTL did not broadcast advertisements violating the electioneering communication provisions, there is plainly no occasion for the Commission to pursue a remedy for conduct that never took place. Accordingly, there is no prospective action by the Commission with respect to WRTL's 2004 advertisements for the Court to enjoin. Cf. Natural Resources Defense Council v. Pena, 147 F.3d 1012, 1022 (D.C. Cir. 1998) ("'Because injunctions regulate future conduct, a party has standing to seek injunctive relief only if the party alleges, and ultimately proves, a real and immediate — as opposed to merely conjectural or hypothetical — threat of future injury.'") (quoting Church v. City of Huntsville, 30 F.3d 1332, 1337 (11th Cir. 1994)); American Library Ass'n v. Barr, 956 F.2d 1178, 1194 (D.C. Cir. 1992) (plaintiff not entitled to injunctive relief in pre-enforcement constitutional challenge to statute because plaintiff failed to "demonstrate a credible threat of prosecution" under the statute).

II. THIS COURT SHOULD NOT CONSIDER PLAINTIFF'S GENERAL CLAIMS ABOUT HYPOTHETICAL "GRASS-ROOTS LOBBYING" ADVERTISING AS PART OF THIS AS-APPLIED CHALLENGE

The second issue this Court raised is whether the Supreme Court's remand requires it to "consider plaintiff's requests for a declaratory judgment concerning electioneering communications by WRTL that constitute grass-roots lobbying and an injunction regarding any electioneering communications by WRTL that constitute grass-roots lobbying." Scheduling

Order of April 17, 2006, at 2. The Court further asked, "If so, what, if not the 2004 advertisements, would decisions on those requests be based?" Id.

This Court should not entertain WRTL's general claims regarding broad classes of "grass-roots lobbying" beyond the 2004 ads. Such claims are beyond the scope of the Supreme Court's remand, are not ripe, and are too speculative and hypothetical to be justiciable under Article III. Even if they were technically justiciable, the Court should exercise its broad discretion to withhold declaratory judgment and dismiss those claims.

In its decision in this case, the Supreme Court noted that WRTL filed this action "seeking a judgment declaring BCRA unconstitutional as applied to several broadcast advertisements that it intended to run during the 2004 election," and an injunction "barring the FEC from enforcing BCRA against those advertisements." WRTL, 126 S.Ct. 1016, 1017 (2006) (emphasis added). The Court described WRTL's claim as being that BCRA could not be "constitutionally applied to its particular communications" because they were "'grassroots lobbying advertisements.'" Id. (emphasis added).

The Supreme Court explained that it was remanding the case because of its uncertainty about whether this Court's dismissal of the case rested on an alternative rationale. The Supreme Court was uncertain whether, in addition to this Court's legal conclusion that as-applied challenges were foreclosed by McConnell, this Court also dismissed the case because it concluded that WRTL's 2004 advertisements fit "'the very type of activity McConnell found Congress had a compelling interest in regulating.'" WRTL, 126 S.Ct. at 1018 (quoting this Court's Mem. Op. dated Aug. 17, 2004, slip op. at 6). Because of this uncertainty about whether there existed a second, independent basis for this Court's decision, the Supreme Court stated it was "remand[ing] the case for the District Court to consider the merits of WRTL's as-applied

challenge in the first instance." Id. This discussion makes it clear that the remand was focused on the particular electoral purpose and effect of WRTL's proposed 2004 advertisements. Indeed, the Supreme Court's opinion does not contain a word about any general as-applied challenge beyond the particular advertisements WRTL wanted to run in 2004.

Moreover, any claims by WRTL regarding a broad class of hypothetical communications beyond the specific 2004 advertisements are not ripe.

> [One] component of justiciability which is particularly relevant for preenforcement review of statutes is "ripeness," which focuses on the timing of the action rather than on the parties seeking to bring it. In deciding whether a case is ripe for adjudication, federal courts generally consider the hardship to the parties of withholding court resolution ... and the fitness of the issues for judicial resolution... See Abbott Laboratories [v. Gardner, 387 U.S. 136, 149 (1976), overruled on other grounds by Califano v. Sanders, 430 U.S. 99, 105 (1977)]. By refusing to hear disputes which are not yet ripe, federal courts avoid becoming entangled in "abstract disagreements," [Abbott Laboratories, 387 U.S. at 148], enhance judicial economy, and ensure that a record adequate to support an informed decision exists when the case is heard.

Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997). These concerns apply fully here. In this pre-enforcement review of BCRA's application to undefined hypothetical advertisements that WRTL might some day want to air, WRTL invites the court to address just such an "abstract disagreement," and to resolve a constitutional issue without a "record adequate to support an informed decision." Indeed, there is no record at all about any particular future advertisements.

In Renne v. Geary, 501 U.S. 312 (1991), the Supreme Court found a lack of ripeness in a comparable constitutional challenge about restrictions on political speech. In Renne, plaintiffs challenged a state constitutional provision barring political parties from endorsing candidates for nonpartisan office.

> We also discern no ripe controversy in the allegations that respondents desire to endorse candidates in future elections.… Respondents do not allege an intention

> to endorse any particular candidate, nor that a candidate wants to include a party's or committee member's endorsement in a candidate statement. We possess no factual record of an actual or imminent application of [the state constitutional provision] sufficient to present the constitutional issues in "clean-cut and concrete form." [Citations omitted.] We do not know the nature of the endorsement, how it would be publicized, or the precise language petitioners might delete from the voter pamphlet [that they distribute]. To the extent respondents allege that a committee or committee member wishes to "support" or "oppose" a candidate other than through endorsements, they do not specify what form that support or opposition would take.

Id. at 321-22. Similarly, in this case the Court has no concrete factual record as to what candidate(s) WRTL may wish to identify in future broadcast ads, what the text of such ads might be, what legislative issues they might discuss, where or when the ads might run, or the nature of the electoral environment in which the ads might air. Without such concrete information, the Court has no facts to which it can apply the law; it can only opine on "abstract disagreements." Abbott Laboratories, 387 U.S. at 148. Thus, because the answer to the second part of this Court's second question — "[W]hat, if not the 2004 advertisements, would decisions on those requests be based?" — is "nothing," the Court should dismiss WRTL's claims concerning hypothetical grass-roots lobbying in the future.

Indeed, WRTL's claim about its unspecified future activities is so speculative and hypothetical that it amounts to a request for an advisory opinion, not a justiciable "case or controversy" under Article III. The "case or controversy" requirement is "no less strict" in actions seeking declaratory judgments than in other actions, and "[i]n order to meet this threshold requirement, there must be a 'real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" Federal Express Corp. v. Air Line Pilots Ass'n, 67 F.3d 961, 963-64 (D.C. Cir. 1995) (quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937)). The "'federal courts established pursuant to Article III of the Constitution do

not render advisory opinions.'" Rafferty v. Judicial Council for the District of Columbia, 131 F.3d 219, 221 (D.C. Cir. 1997) (quoting United Public Workers v. Mitchell, 330 U.S. 75, 89 (1947)). See also Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990) ("Article III ... confines … [the courts] to resolving real and substantive controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."). It is "well established that Article III requires a plaintiff seeking declaratory judgment to demonstrate a possibility of future injury which is of 'sufficient immediacy and reality.'" Davis v. Liberty Mut. Ins. Co., 871 F.2d 1134, 1137 n.3 (D.C. Cir. 1989) (quoting Golden v. Zwickler, 394 U.S. 103, 109 (1969)).

In Golden, the plaintiff had sought a declaratory judgment as to the constitutionality of a state statute making it a crime to distribute anonymous literature in connection with an election campaign. Even in the context of public speech about elections, the Supreme Court concluded that it was

> not enough to say, as did the District Court, that [plaintiff had] a "further and far broader right to a general adjudication of unconstitutionality ... (in) (h)is own interest as well as that of others who would with like anonymity practise free speech in a political environment..." The constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance.

Golden, 394 U.S. at 109-10 (citation omitted). In the current case, WRTL has made similarly vague, hypothetical assertions about purported "grass-roots lobbying" that it may do in the future, as well as the supposed need to adjudicate those claims in order to serve the future interests of itself and others across the nation. See WRTL's Amended Verified Complaint ¶ 16; Memorandum in Support of WRTL's Position as to LCvR 16.3(d) Report, filed March 27, 2006, at 2. However, like the plaintiff in Golden, 394 U.S. at 109, WRTL has failed to present its broad claims "in the context of a specific live grievance."

Even if WRTL's claims were technically justiciable under Article III, this Court has broad discretion to withhold a declaratory judgment, and it should exercise that discretion to decline to entertain plaintiff's constitutional claims about hypothetical future conduct.

> Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants.… Congress sought to place a remedial arrow in the district court's quiver: it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants. Consistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close.

Wilton v. Seven Falls Co., 515 U.S. 277, 286, 288 (1995). See Jackson v. Culinary School of Washington, Ltd., 59 F.3d 254, 256 (D.C. Cir. 1995) ("The Supreme Court in Wilton took great pains to emphasize the singular breadth of the district court's discretion to withhold declaratory judgment."). "Where it is uncertain that declaratory relief will benefit the party alleging injury, the court will normally refrain from exercising its equitable powers," and "[t]his is especially true where the court can avoid the premature adjudication of constitutional issues." Penthouse Int'l, Ltd. v. Meese, 939 F.2d 1011, 1020 (D.C. Cir. 1991). In fact, "'[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.'... It has long been the Court's 'considered practice not to decide abstract, hypothetical or contingent questions ... or to decide any constitutional question in advance of the necessity for its decision....'" Clinton v. Jones, 520 U.S. 681, 690 n.11 (1997) (citations omitted, second ellipsis added). WRTL's speculative claims regarding future advertisements raise "a constitutional issue of first impression" — whether the electioneering communications provisions can constitutionally be applied to an as yet undefined class of "grass-roots lobbying" advertisements

— and the Court "should wait to decide [that] issue until it is squarely presented." Penthouse Int'l, 939 F.2d at 1020.

Respectfully submitted,

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