United States District Court
District of Columbia

Wisconsin Right to Life, Inc. *Plaintiff*, *v.* **Federal Election Commission,** *Defendant*, *and* **Sen. John McCain et al.,** *Intervenors-Defendants.*	Civil Action No. **04-1260 (DBS, RWR, RJL)** THREE-JUDGE COURT

Plaintiff's Memorandum in Compliance with The Court's April 17, 2006 Scheduling Order

In its April 17, 2006 Scheduling Order (Docket #69), the Court ordered the parties to file memoranda addressing (1) "the live controversy" and (2) what "the Supreme Court's remand require[s]." Wisconsin Right to Life, Inc. ("WRTL") responds under these three headings: (**I**) What Was Before the Supreme Court, (**II**) What Is the Live Controversy, and (**III**) What the Remand Requires.

I. What Was Before the Supreme Court.

What the United States Supreme Court remanded was necessarily what was before it. It had before it two issues, as set out in WRTL's *Brief for Appellant* (available online at http://www.abanet.org/publiced/preview/briefs/pdfs/05-06/ 04-1581_Petitioner.pdf):

Questions Presented

> 1. Whether as-applied challenges are permitted to the prohibition on corporate disbursements for electioneering communications at 2 U.S.C. § 441b after *McConnell v. FEC*, 540 U.S. 93 (2003).
>
> 2. If so, whether the prohibition on electioneering communications is unconstitutional as applied to the facts of this case, and particularly
>
> (a) the three specific grassroots lobbying broadcast communications sponsored by Wisconsin Right to Life, Inc. here and/or
>
> (b) grassroots lobbying communications generally,
>
> with any communications to be funded either from a general corporate account or, alternatively, from a separate bank account to which only qualified individuals may donate, as defined in 2 U.S.C. § 434(f)(2)(E).

Id. at i. The first issue (the as-applied question) was decided affirmatively. The second (the merits question) was remanded for decision. The second issue expressly sought consideration of both the three specific advertisements and grassroots lobbying communications generally.

Moreover, in the Statement of the Case, WRTL stated that "[t]he present case is a constitutional challenge to the prohibition as applied to grassroots lobbying," *id.* at 2, not just the three specific ads. The Summary of the Argument concluded with these words: "Thus, the electioneering communication prohibition cannot be constitutionally applied to the grassroots lobbying ads in this case or to grassroots lobbying generally." *Id.* at 10. WRTL began its argument on the second issue as follows:

> Should incumbent politicians be able to insulate themselves from lobbying about upcoming votes in Congress through campaign finance regulations? WRTL believes not and seeks relief as to (1) its three broadcast ads specifically *and/or* (2) grassroots lobbying generally.

Id. at 15 (emphasis in original). In the thirty-six pages of the Argument portion of its opening merits brief, WRTL spent six pages on the first issue (the as-applied question), *id.* at 10-15, and devoted the remainder to the issue before this Court on remand (the merits question). *Id.* at 11-44. WRTL certainly made reference to the details of the three specific ads, *see id.* at 4

n.4 (setting out "details of WRTL's broadcast ads" by category), and it plainly argued that the three specific ads were "not electioneering," *id.* at 33-44, but it also argued generally that genuine grassroots lobbying is neither the same as the sham issue advertising at issue in *McConnell* nor the functional equivalent of express advocacy." *Id.* at 25-32. And WRTL discussed some tests that would distinguish genuine grassroots lobbying (not just the specific details of the three ads) from sham issue advertising. *Id.* at 21 & n.17, 24 n.19. *See also* Reply Brief for Appellant at 16-20. In its Reply, WRTL expressly addressed both the three ads and the importance of a broader test:

> Actually, no test is required here because the proposed broadcast ads are plainly grassroots lobbying and the prohibition fails strict scrutiny as applied to them. This Court could simply declare the prohibition unconstitutional as applied to the broadcast ads in this case and leave for future cases the identification of factors essential to an as-applied grassroots lobbying exception.
>
> But WRTL believes a decision establishing more general guidelines would be helpful and has requested that this Court distill the factors vital to its decision, as it did in *MCFL*. 479 U.S. at 263-64. So WRTL returns to discussing appropriate elements for such a test. *See* WRTL Br. 21.

Id. at 18 (footnote omitted).

This dual focus on the three specific ads and the need for a broader rule has been present from the beginning of this case, when WRTL stated in its complaint that "[t]his case seeks declaratory and injunctive relief permitting WRTL to run both the current grass-roots lobbying advertisements (Exhibits A, B, and C) and materially similar ads in the future." Amended Verified Complaint for Declaratory and Injunctive Relief at ¶ 15. WRTL declared that it intended to run "materially similar ads" in 2004, *id.* at ¶ 14, and "materially similar grass-roots lobbying ads falling within the electioneering communication prohibition periods before future primary and general elections in Wisconsin." *Id.* at ¶ 16. In both counts of the

Complaint, WRTL made this dual focus clear, which was summed up in the following quote from the Prayer for Relief (the odd numbers referring to grassroots lobbying in general and the even numbers referring to the three specific ads):

> 1. a declaratory judgment declaring 2 U.S.C. § 441b and 11 C.F.R. §§ 114.2 and 114.14 unconstitutional as applied to electioneering communications by WRTL that constitute grass-roots lobbying;
>
> 2. a declaratory judgment declaring 2 U.S.C. § 441b and 11 C.F.R. §§ 114.2 and 114.14 unconstitutional as applied to the electioneering communications by WRTL contained in Exhibits A, B, and C;
>
> 3. a preliminary and permanent injunction enjoining defendant FEC from enforcing 2 U.S.C. § 441b and 11 C.F.R. §§ 114.2 and 114.14 against WRTL for any electioneering communications by WRTL that constitute grass-roots lobbying;
>
> 4. a preliminary and permanent injunction enjoining defendant FEC from enforcing 2 U.S.C. § 441b and 11 C.F.R. §§ 114.2 and 114.14 against WRTL for broadcasting the electioneering communications contained in Exhibits A, B, and C[.]

Id. at 14.

The dual focus was also evident in the briefing before the United States Supreme Court when WRTL addressed mootness:

> While the 2004 election is past, this case is not moot because WRTL intends to do similar grass-roots lobbying in the future, with a reasonable likelihood that the need will recur during a prohibition period. Amended Verified Complaint for Declaratory and Injunctive Relief ¶ 16. [FN 2] Further, election cases are classic examples of the exception to the mootness doctrine for cases that are capable of repetition yet evading review. [FN 3]
>
> > [FN 2] In addition to ongoing judicial filibusters, WRTL has an interest in grass-roots lobbying as to a broad range of currently hot social issues that the legislative and executive branch often deal with in periods before elections, including embryonic stem cell research, cloning, abortion (including partial-birth abortion), fetal pain legislation, Medicare policy, foreign aid policy, nutrition/hydration withdrawal, health-care rationing, assisted suicide, euthanasia, non-discrimination in medical training and practice, and campaign finance reform. *Id.*
> >
> > [FN 3] *See Norman v. Reed*, 502 U.S. 279, 287-88 (1992); *Meyer v.*

> *Grant*, 486 U.S. 414, 417 n.2 (1988); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978); *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1095 n.4 (9th Cir. 2003); *Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003); *Florida Right to Life v. Lamar*, 273 F.3d 1318, 1324 n.6 (11th Cir. 2001); *Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379, 390 n.3 (4th Cir. 2001); *Stewart v. Taylor*, 104 F.3d 965, 969-70 (7th Cir.1997); *New Hampshire Right to Life v. Gardner,* 99 F.3d 8, 18 (1st Cir.1996); *Kansans for Life v. Gaede*, 38 F. Supp. 2d 928, 932 (D. Kan. 1999).

Jurisdictional Statement at 7 & nn. 2 and 3 (cited in Brief of Appellant at 9 n.8).

II. What Is the Live Controversy.

From the foregoing, it is clear that the Supreme Court was fully aware of the dual nature of WRTL's claim, i.e., that the claim not only concerned the three specific ads but also included a broader claim as to materially similar ads in 2004 and in the future. Consequently, when the Court said that the present case sought "a judgment declaring BCRA declaring BCRA unconstitutional as applied to several broadcast advertisements that it intended to run during the 2004 election," *Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016, 1017 (2006) (per curiam), it was merely applying a shorthand description of the case, not making some sort of finding or holding as to the scope of relief sought there or to be considered in the remand. It must be recalled that this was a per curiam decision issued within six days of oral argument, so there would be no expectation that the Court intended its opinion to capture every detail of the case. Rather, the purpose of the decision was to quickly decide the first issue so the second issue could be promptly remanded for an expeditious contribution by this Court on the second issue. And that is what the Court did when it concluded: "We therefore vacate the judgment and remand the case for the District Court to consider the merits of WRTL's as-applied challenge in the first instance." *Id.* at 1018.

So the answer to this Court's first question as to "what is the live controversy," Order at 1, there is a live controversy as to declaratory judgment with respect to (a) WRTL's three specific ads and materially similar ads that it intended to run in 2004 and (b) genuine grass-roots lobbying more generally, including (without limitation) the materially similar ads that WRTL intends to run in the future. The declaratory judgment action remains live as to ads proposed to be run in 2004 because of the exception to the mootness doctrine for matters that are capable of repetition yet evading review. *See supra.* WRTL sees no reason for this Court to issue an injunction retroactive to 2004, but if this Court declares that the prohibition is unconstitutional as to three specific ads and materially similar ads, then an appropriate prospective injunction should be issued. And if this Court declares that the prohibition is unconstitutional as applied to grassroots lobbying more generally, under a court-adopted rule along the lines of what the Supreme Court did in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (recognizing an exception to the prohibition on corporate expenditures for express advocacy for *MCFL*-corporations), then an appropriate prospective injunction should issue.

The task of formulating an appropriate rule for distinguishing genuine grassroots lobbying from the sham issue ads at issue in *McConnell* is the self-evident centerpiece of the remand. The Supreme Court could readily have decided whether the specific ads before it were constitutionally protected from the electioneering communications prohibition once it decided that as-applied challenges were permissible because that very decision eliminated by necessary implication most of Defendants' arguments in support of such an application of the prohibition and the proposed ads were far from where the Constitution likely imposes a

protective boundary for genuine grassroots lobbying. On the other hand, if the Supreme Court envisioned creating an *MCFL*-type rule to separate genuine from sham issue ads in the context of protecting the right to petition, the Supreme Court would benefit greatly from the learned, considered constitutional analysis of the members of this panel. So the remand, seeking this Court's assistance "in the first instance," seems focused precisely on the formulation of a proper rule for a grassroots lobbying exception.

III. What the Remand Requires.

In specific answer to this Court's second question, Order at 2, which WRTL understands to be whether this Court is "require[d]" to consider grassroots lobbying more generally than the specific ads proposed, the answer is that this Court is not *required* by the remand to go beyond WRTL's specific ads. As discussed above, WRTL argued before the Supreme Court that the Court could either simply consider the ads at issue (which option would require multiple as-applied challenges, which are for now limited to this Court, in order to establish the limits of a rule) or it could decide that the ads were constitutionally protected and point to the constitutionally-significant criteria that were necessary to its decision as the Supreme Court did in *MCFL*, thereby creating a more general rule to guide the regulated public (and to reduce the need for multiple as-applied cases in order to establish the boundary line between genuine and sham where the right to petition is involved). As discussed above, however, the purpose of the remand seems self-evidently to be to assist the Supreme Court by doing the initial line-drawing analysis.

This raises the second part of this Court's question, Order at 2, namely, what in addition to the 2004 advertisements, would be the basis for creating a rule? That has been the subject

of prior briefing by WRTL and will be the focus of the upcoming summary judgment briefing, and WRTL does not understand the Court to be seeking full briefing on the subject at this point. WRTL has argued from the beginning of this case that the required strict-scrutiny, constitutional analysis (in which the Defendants have the burden) demonstrates that on the facts of this case the prohibition is unconstitutional as applied to WRTL's three specific ads and the materially similar ads that it wished to run because the prohibition is not narrowly tailored to a compelling governmental interest with respect to such communications. That analysis shows that there is little or no governmental interest supporting a limitation on the people's right to participate in self-government in our democratic Republic by exercising their right to petition by employing genuine grassroots lobbying, and in any event there is no narrow tailoring in the broad-brush, bright line that Defendants attempt to defend in an area where the Supreme Court has expressly eschewed bright lines designed for FEC convenience. But an appropriate rule need not have all of the criteria of the three specific ads. For example, the ads do not mention the Senators' position on the grassroots-lobbying issue, but there is no constitutionally defensible reason why they could not. In fact, another panel of this Court is considering another challenge to the prohibition as applied to grassroots lobbying, and in that case the proposed advertisement at issue does state the position of the Senators. *Christian Civic League of Maine v. FEC*, No. 06-0614. So in addition to the three specific ads, this Court should assist the Supreme Court by providing "in the first instance" a helpful constitutional analysis of where and why a constitutionally defensible rule may be identified. This involves considering the objective criteria that might constitute such a rule.

Various rules have been proposed suggesting such objective criteria. For example, Senator McCain et al., intervenors in the present case, proposed a rule for a grassroots lobbying exception to the FEC in a rulemaking, which has previously been recited to this Court in briefing and was recited to the Supreme Court. Brief of Appellant at 24 n.19. That rule would not have allowed the actual naming of a legislator, but would have permitted him or her to be clearly identified by inviting hearers to contact "your Senator." That is the sort of constitutional analysis in which this Court must engage, i.e., is there a compelling interest to permit clear identification of a legislator but not naming him or her? Is permitting the former but not the latter narrowly tailored? As noted to the Supreme Court, *id.* at 44 n.31, Judge Leon made specific findings about the necessity of actually using a name when grassroots lobbying. *McConnell v. FEC*, 251 F. Supp. 2d 176, 794 (D.D.C. 2003). The Internal Revenue Code has a test, which could be the basis for developing an appropriate rule. *See* 26 C.F.R. § 56.4911-2(b)(2)(i)-(ii). Sen. McCain and prime sponsors of campaign finance reform legislation have proposed bills to regulate grassroots lobbying in which they provided definitions. *See*, *e.g.*, S. 2128 (available online at http://thomas.loc.gov/cgi-bin/bdquery/D?d109:58:./temp/~bdO8mc::|/bss/d109query.html|). In fact, WRTL even offered to agree to stay all proceedings in this case and then settle this case if the FEC would issue a statement of policy, and then promulgate a rule, implementing a grassroots lobbying exception to the electioneering communication prohibition that was proposed by a broad-spectrum coalition to the FEC for an expedited rulemaking. The FEC has published the rule proposed to it in Notice 2006-4, entitled "Rulemaking Petition: Exception for Certain 'Grassroots Lobbying' Communications From the Definition of 'Electioneering Communication." 71 Fed. Reg.

13557. The petition sought an expedited rulemaking

> to revise 11 C.F.R. 100.29(c) to exempt from the definition of "electioneering communication" certain "grassroots lobbying" communications that reflect all of the following principles: 1. The "clearly identified federal candidate" is an incumbent public officeholder; 2. The communication exclusively discusses a particular current legislative or executive branch matter; 3. The communication either (a) calls upon the candidate to take a particular position or action with respect to the matter in his or her incumbent capacity, or (b) calls upon the general public to contact the candidate and urge the candidate to do so; 4. If the communication discusses the candidate's position or record on the matter, it does so only by quoting the candidate's own public statements or reciting the candidate's official action, such as a vote, on the matter; 5. The communication does not refer to an election, the candidate's candidacy, or a political party; and 6. The communication does not refer to the candidate's character, qualifications or fitness for office.

In its settlement offer, WRTL said:

> While we do not believe that this rule goes as far as the U.S. Constitution would extend protection to grassroots lobbying, we believe that the proposed rule is a very good rule that balances the concerns of all sides and provides a workable test. It would provide the ability to engage in useful grassroots lobbying, and it would eliminate any realistic concerns about such grassroots lobbying being employed as the functional equivalent of express advocacy. Therefore, we are willing to compromise and make the following offers.

The FEC declined the settlement offer, but the proposed rule contains precisely the sort of objective criteria on which the parties and this Court need to join issue in the present litigation so as to assist the United States Supreme Court, which sought such analysis "in the first instance."

Respectfully submitted,

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