United States District Court
District of Columbia

Republican National Committee, et al., ***Plaintiffs*,** ***v.*** **Federal Election Commission**, ***Defendant*.**	Case No. 1:08-cv-1953-RJL THREE-JUDGE COURT

Motion to Expedite
Summary Judgment Briefing Schedule

Plaintiffs Republican National Committee ("RNC"), Robert M. (Mike) Duncan, California Republican Party, and Republican Party of San Diego County respectfully request that this case be expedited on the docket to the greatest possible extent. Plaintiffs intend to immediately begin soliciting donations and making expenditures to conduct a wide variety of political activities unrelated to federal campaigns, which include issue advocacy advertisements, advertisements supporting candidates for state office, get-out-the-vote and voter registration drives for state elections, and advocacy related to state ballot initiatives. *See Complaint* (Dkt. 1) ¶¶ 16-28. But Plaintiffs are prohibited from conducting any of these planned activities because § 101 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, 82-86, which added a new § 323 (entitled "Soft Money of Political Parties") to the Federal Election Campaign Act ("FECA"), makes them a crime. So Plaintiffs cannot undertake

Motion to Expedite

their intended First Amendment activities, many of which involve upcoming 2009 state elections, until they receive the requested judicial relief. Therefore, for the reasons stated in the attached *Memorandum of Points and Authorities*, Plaintiffs move this Court to set an expedited schedule for summary judgment adjudication. Plaintiffs propose the following schedule:

- Status conference to be held with three-judge court as soon as practical.
- Cross motions for summary judgment, along with briefs and all supporting documents, be filed no later than December 15, 2008.
- Opposition briefs be filed no later than January 12, 2009.
- Reply briefs be filed no later than January 26, 2009.
- Hearing on motions before three-judge court as soon as practical.

Plaintiffs have conferred with legal counsel for the FEC regarding this motion and the FEC opposes it. LCvR 7(m).

Respectfully submitted,

/s/ James Bopp, Jr.

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Memorandum of Points and Authorities
in Support of Motion to Expedite

Plaintiffs bring an as-applied challenge to BCRA's prohibition on soliciting, receiving and spending funds not subject to the source and amount limitations of the Federal Election Campaign Act ("FECA"). This prohibition, codified at 2 U.S.C. § 441i, will herein be called the Federal Funds Restriction. The Federal Funds Restriction was upheld on its face in *McConnell v. FEC*, 540 U.S. 93 (2003), but Plaintiffs argue that the application of the Federal Funds Restriction to their intended activities, which are entirely unrelated to any federal candidate or campaign, is unconstitutional. As set out in the Complaint, (Dkt. 1), Plaintiffs intend to immediately begin soliciting, receiving and expending funds for a variety of activities involving state elections, state ballot initiatives, and grassroots lobbying. However, the Federal Funds Restriction prohibits them from undertaking any of these activities absent judicial relief.

In recognition of the First Amendment interests at stake, Congress has mandated that a constitutional challenge to BCRA is to be "advance[d] on the docket and. . . expedite[d] to the

greatest possible extent." BCRA § 403(a)(4), 116 STAT 113-14. Because Plaintiffs bring a constitutional challenge, and because they have elected that the provisions of BCRA § 403 apply to this action, *see* BCRA § 403(d)(2), expedition is statutorily required.

Furthermore, Plaintiffs' as-applied challenge must be adjudicated under the principles set out in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL II*"). Just like the present case, *WRTL II* was an as-applied challenge to a prohibition in BCRA that had been facially upheld in *McConnell,* 540 U.S. 93. *WRTL II* mandated that as-applied challenges be workable and highly protective of First Amendment rights in order to make them an adequate remedy—to avoid the necessity of overturning *McConnell*'s facial upholding of the prohibition at issue. *Id*. at 2666-67. The principles underlying that mandate apply to the present case, which should receive the same treatment for future as-applied challenges required by *WRTL II*.

WRTL expressly asked the Supreme Court in *WRTL II* to overrule its facial upholding of the electioneering communication prohibition in *McConnell*, 540 U.S. 93, unless the Court provided the relief of both (a) stating a generally-applicable test to reduce the need for litigation and (b) making as-applied challenges an adequate remedy for protecting the First Amendment liberties of groups by limiting the burdens of litigation. Brief for Appellee at i, 62, 65-70, *WRTL II*, 127 S. Ct. 2652.

WRTL described to the Supreme Court how the as-applied remedy had been wholly inadequate in vindicating its First Amendment rights due to the heavy burdens of expensive and intrusive discovery and litigation, with relief coming only long after the effective opportunity to run its ads had passed. *Id.* WRTL described the numerous depositions to which it was subjected and the fact that it "was required to produce a substantial volume of documents about its inner

workings, plans, and finances—all information that an ideological group would otherwise keep private." *Id.* at 10 n.19. And WRTL summarized the future inadequacy of the as-applied remedy—unless the Supreme Court's holding made it adequate by limiting how future litigation should be conducted—as follows:

> So any citizen group having the temerity to want to run future ads must (1) plan well in advance to allow ample litigation time (problematic because the need for grassroots lobbying frequently arises on short notice), (2) retain a lawyer, (3) endure the invasion of its privacy by a discovery investigation at the hands of the FEC and Intervenors (which often will include their political opponents), and (4) pay the legal expenses and costs to endure the scorched-earth litigation practices of the federally-funded FEC and the statutorily-permitted Intervenors in order to get prior permission from a court to run a constitutionally-protected communication at the core of our system of self-governance by the people.

Id. at 66. The Supreme Court took explicit notice of the "chill" resulting from "'costly, fact-dependent litigation,'" 127 S. Ct. at 2665-66 (*quoting* Brief for Appellee [FEC] at 39, *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*")), and set out the example of the burden of litigation imposed on WRTL in attempting to vindicate its First Amendment liberties:

> Consider what happened in these cases. The District Court permitted extensive discovery on the assumption that WRTL's intent was relevant. As a result, the defendants deposed WRTL's executive director, its legislative director, its political action committee director, its lead communications consultant, and one of its fundraisers. WRTL also had to turn over many documents related to its operations, plans, and finance. Such litigation constitutes a severe burden on political speech.

Id. at 2666 n.5.

In response to these identified problems, *WRTL II* (a) stated a First Amendment-protective test, *id.* at 2667, and (b) prescribed how as-applied challenges must be conducted to assure adequate protection for vital First Amendment liberties. *Id.* at 2666-67. *WRTL II* said that "the proper standard . . . must be objective, focusing on the substance of the communication."

127 S. Ct. at 2666. There must be "minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation." *Id.* There must not be "open-ended . . . factors" that result in "'complex argument in a trial court and a virtually inevitable appeal.'" *Id.* (citation omitted). The litigation "must give the benefit of any doubt to protecting rather than stifling speech." *Id.* at 2667 (citation omitted). *See also id.* at 2669 n.7 (restating test and limitations on conduct of as-applied litigation). Because the stated goal for as-applied challenges is "to resolve disputes quickly without chilling speech through the threat of burdensome litigation," *id.* at 2666, whatever threatens burdensome litigation must be eliminated.

These as-applied litigation mandates apply with special force to the present situation, which presents purely legal questions. Plaintiffs have been prohibited by the Federal Funds Restriction from doing *any* of the activities that they have alleged their intent to do. So there is no justification for any discovery as to these nonexistent activities. The issues are concise legal questions of whether there is constitutional authority for the Federal Funds Restriction as applied to Plaintiffs' activities. The government simply needs to meet its burden, if it is able, of proving that the Restriction meets the unambiguously-campaign-related requirement and survives the appropriate level of scrutiny, as applied to the various activities that Plaintiffs seek to do, in order to justify its serious burdens on First Amendment rights of free expression and association. And in light of *WRTL II*, the Court should entertain no novel arguments about an as-applied challenge being precluded, *id.* at 2659, or the facial upholding shifting burdens from the FEC to Plaintiffs, *id.* at 2663-64, or some other novel arguments based on bits of *McConnell*, 540 U.S. 93, plucked from their context and twisted in their meaning without regard to the underlying First

Amendment-protective analysis. *See WRTL I*, 546 U.S. at 411 (rejecting FEC's reading of footnote out of context and without regard to its plain meaning). This case should be expeditiously decided as a matter of law, based on the simple legal issues presented.

So an expedited schedule for summary judgment is appropriate here to comply with statutorily required expedition and to ensure this as-applied challenge may be adjudicated without extended and burdensome litigation, which deprives Plaintiffs of their First Amendment rights of expression and association. Plaintiffs respectfully request an expedited summary judgment briefing schedule to adjudicate their claims.

Respectfully submitted,

/s/ James Bopp, Jr.

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Certificate of Service

I certify that on November 19, 2008, I served a copy of the foregoing document upon the below listed persons by first-class US Mail, postage prepaid, and by email to the following addresses:

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