United States District Court
District of Columbia

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

Motion to Set Summary Judgment Briefing Schedule
&
Memorandum of Points and Authorities in Support Thereof

Motion

The United States Supreme Court has affirmed this Court's holding that the electioneering communication prohibition is unconstitutional as applied to the three genuine issue ads that Wisconsin Right to Life, Inc. ("WRTL") sought to broadcast in 2004. *FEC v. Wisconsin Right to Life*, No. 06-969, 2007 WL 1804336 (U.S. June 25, 2007) ("*WRTL II*").

In light of *WRTL II*, WRTL moves the Court to set a briefing schedule for WRTL's motion for summary judgment (Docket #122) concerning a grassroots lobbying communication in support of the Child Custody Protection Act ("CCPA Ad"), which WRTL sought to run in 2006. WRTL asks the Court to set the following schedule: (1) WRTL's memorandum of points and authorities and statement of material facts as to which there is no genuine issue will be due on or before the thirtieth day after this Court issues its scheduling order; (2) an opposition memorandum and statement will be due on or before the thirtieth day after WRTL's memoran-

dum and statement are filed; (3) a reply memorandum will be due on or before the fifteenth day after an opposition memorandum and statement is filed.

As required by local rule, counsel for WRTL have consulted with opposing counsel concerning this motion. LCrR 7(m). The Commission has stated that it has had insufficient time to consider plaintiff's motion, is unable to state a position at this time, and will file a timely response. Intervenors do not oppose the setting of a briefing schedule and will provide the Court with any further views in a timely manner.

Points and Authorities

1. What remains in this case is the resolution of WRTL's motion for summary judgment (Docket #122) concerning a grassroots lobbying communication in support of the Child Custody Protection Act ("CCPA Ad"), which WRTL sought to run in 2006. The issue is whether the electioneering communication prohibition, 2 U.S.C. § 441b, is also unconstitutional as applied to the CCPA Ad (as it was as applied to WRTL's 2004 anti-filibuster ads) because "the ad is susceptible of [a] reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, No. 06-969, 2007 WL 1804336, at *13.

2. With its Third Motion for Summary Judgment, WRTL filed a supporting memorandum and factual statement (Docket #122), but this was opposed with a Rule 56(f) motion seeking discovery (Docket #131).

3. Such further discovery is precluded by *WRTL II*, which set out "the proper standard for an as-applied challenge to BCRA § 203," requiring that it "must be objective, focusing on the substance of the communication," and there should be "minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome

litigation." *WRTL II*, No. 06-969, 2007 WL 1804336, at *14 (opinion of Roberts, C.J., joined by Alito, J.) (citation omitted).[1] There should be no "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.* (citation omitted). *See also id.* at *17 n.7 (restating the Court's functional equivalence test and restating limitations on the conduct of future litigation).

4. Therefore, there should be no further discovery and briefing on the merits should proceed promptly. Because WRTL's memorandum and factual statement supporting its Third Summary Judgment Motion were written without the benefit of *WRTL II* and there has yet been no opposition brief, it will best serve logic and all involved for WRTL to simply submit a new memorandum and factual statement rather than rely on its previous ones with a supplemental memorandum explaining the effect of *WRTL II*. Opposition and reply memoranda may be submitted according to the approved schedule.

5. As to expedition, the Bipartisan Campaign Reform Act of 2002 ("BCRA") specified that in reviewing constitutional challenges, such as the present one, "[i]t shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal." BCRA § 403(a)(4), Pub. L. 107-155, 116 Stat. 81, 114. If an election were imminent, with electioneering communication prohibition periods looming, a very fast

[1]The controlling *WRTL II* opinion said that courts may certainly take judicial notice of "basic background information . . . to put an ad in context—such as whether an ad [is about a current legislative issue]—but the need to consider such background should not be an excuse for discovery or a broader inquiry of the sort we have just noted raises First Amendment concerns." *Id.* at *17.

briefing schedule would be required. However, in light of the facts that (a) prohibition periods will not begin until late 2007 and (b) the Supreme Court has already stated a rule protecting genuine issue ads that WRTL believes would allow it to run the CCPA Ad and materially similar ads, and (c) this Court will not likely require much time to decide this motion and issue an opinion, WRTL believes that the schedule proposed in the motion is sufficient expedition.

For the foregoing reasons, this Court should establish a briefing schedule as set out in the motion.

Respectfully submitted,

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