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 Reconsider and Deny Motion to Intervene
&
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 reconsider and deny the February 16, 2006 intervention motion of Sen. McCain et al. (Docket #56), which motion was granted March 23, 2006. The intervention is inconsistent with *WRTL II*'s clear mandate as to how as-applied challenges to the electioneering communication prohibition should be conducted in order to make as-applied challenges an effective remedy to protect the First Amendment liberties of groups seeking to broadcast genuine issue ads trapped by the electioneering communication prohibition.

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. The Intervenors object to this motion.

Points and Authorities

1. The controlling opinion in *WRTL II* set out standards for deciding as-applied challenges to the electioneering communication prohibition that (a) are necessary to make as-applied challenges an adequate remedy to protect First Amendment activity and (b) are incompatible with the intervention of activist campaign finance "reform" legislators supported by lawyers and funds from the "reform" lobby.

2. On appeal, WRTL expressly asked the Supreme Court to overrule its facial upholding of the electioneering communication prohibition in *McConnell v. FEC*, 540 U.S. 93 (2003), 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 seeking to broadcast genuine issue ads by limiting the burdens of litigation. Brief for Appellee at i, 62, 65-70.

3. 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, burdensome, and intrusive discovery and litigation, with relief coming only long after the effective opportunity to run WRTL's ads had passed. *Id.* WRTL described the numerous depositions to which it was subjected in this case and the fact that WRTL "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.

4. WRTL further advised the Supreme Court of the burden caused by the intervenors:

> Since Sen. McCain et al. were permitted to intervene, WRTL has been required to respond to double briefing and extra discovery requests. The docket below shows that the FEC has 10 attorneys working on the case on the case and the Intervenors have enjoyed the full support of the campaign finance reform lobby and counsel associated with them. See, e.g., Intervenors' Br. (listing 19 attorneys). In sum, there has been a substantial investment of time and money by WRTL in this case that could have been put to advancing ideological causes by speech and petition had it not been required to vindicate constitutional rights to do so. No attorneys fees are awarded in lawsuits against the FEC, as would be the case when states violate constitutional rights.

Id. at 10 n.19.

5. The Supreme Court's controlling opinion took explicit notice of the "chill" resulting from "'costly, fact-dependent litigation,'" *WRTL II*, No. 06-969, 2007 WL 1804336, at *13 (opinion of Roberts, C.J., joined by Alito, J.) (quoting the FEC's own brief in *Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (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 *13 n.5.

6. In response to these identified problems, the Supreme Court's controlling opinion both (a) stated a general rule to create a safe harbor for "genuine issue ads," *id.* at *14, and (b) specifically prescribed how future as-applied litigation should be conducted in an attempt to assure that the as-applied remedy is effective in protecting vital First Amendment liberties. *Id.*

7. As to the general rule, the Supreme Court said that "an ad is the functional equivalent of express advocacy [and so subject to the electioneering communication prohibition] only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* Note that the test's presumption is against prohibition. This is because "[t]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it," *id.* at *7, and "[w]e give the benefit of the doubt to speech, not censorship." *Id.* at *20. Thus, "issue advocacy," *id.* at *7, *19, is specially protected.

8. As to the conduct of future litigation, the Supreme Court said that because "the proper standard . . . must be objective, focusing on the substance of the communication," 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

[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

. . . 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).

9. Because the Supreme Court's stated goal for as-applied challenges is "to resolve disputes quickly without chilling speech through the threat of burdensome litigation," *id.* at *14, whatever threatens burdensome litigation must be eliminated. This includes the intervention of activist campaign finance "reform" legislators supported by lawyers and funds from the campaign finance "reform" lobby.

10. If small, nonprofit ideological advocacy groups are compelled to go up against the vast resources of the campaign finance reform lobby (from large foundations and trusts) and their numerous lawyers—in addition to the substantial, tax-funded resources of the FEC and the numerous lawyers that it devoted to this case—they will without question be burdened and chilled. Evidence for the chill that *WRTL II* sought to eliminate is readily apparent from the fact that WRTL had numerous amici curiae in the Supreme Court (from all across the ideological spectrum), *see id.* at *20 (listing some of amici curiae), but none of these amici was willing to sustain the burden of bringing an as-applied challenge.

11. If WRTL and similar advocacy groups are forced to deal with the campaign finance reform lobby as parties in this and every as-applied challenge to the electioneering communication prohibition—bearing the burden of responding to double briefing, extra discovery, and the sort of novel and complex arguments asserted and rejected in this case—then the as-applied

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for discovery or a broader inquiry of the sort we have just noted raises First Amendment concerns." *Id.* at *17.

remedy will be inadequate and it will be necessary to reconsider the facial upholding of the electioneering communication prohibition in *McConnell*. 540 U.S. 93.

12. While three Justices would have overruled *McConnell* in *WRTL II*, No. 06-969, 2007 WL 1804336, at *21 (opinion of Scalia, J., joined by Kennedy and Thomas, JJ), the Chief Justice and Justice Alito, as noted *supra*, instead worked to provide a workable test and standard for future litigation in an effort to make as-applied challenges an adequate remedy to protect the First Amendment rights of issue advocacy groups. But implicit in the Chief Justice's opinion and explicit in Justice Alito's concurring opinion is the position that if the as-applied remedy remains inadequate to protect the First Amendment rights of groups seeking to broadcast genuine issue ads trapped by the electioneering communication prohibition, then *McConnell*'s facial upholding of the prohibition will need to be reconsidered. As Justice Alito put it, "If it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech, we will presumably be asked in a future case to reconsider the holding in *McConnell* [] that § 203 is facially constitutional." *Id.* at *21 (citations omitted). The present motion deals with this "implementation of the as-applied standard."

13. In light of *WRTL II*'s description of what the present litigation should have been like, permitting Sen. McCain et al. to intervene was not only too burdensome and chilling, but it also should have been denied for the reasons set out in *Plaintiff's Memorandum in Opposition to Motion of Sen McCain et al. to Intervene* (Docket # 58). WRTL incorporates that prior Memorandum by reference herein to avoid burdening the Court with cut-and-paste repetition, but notes the following key points. WRTL argued that Sen. McCain et al. had been dilatory, that there was no need for their intervention, and that intervention would be prejudicial to WRTL.

Memorandum at 3-5. WRTL argued that it "has a statutory right to expedition, and permitting intervention at this late date prejudices that right, especially as Movants indicate they intend to seek discovery instead of prompt resolution of the cross-motions for summary judgment [then pending]." *Id.* at 5. In light of *WRTL II*, WRTL was correct because the case should have been resolved promptly on summary judgment without any delay for discovery.

14. WRTL also argued that Sen. McCain et al. should be denied intervention "because Article III standing is required in this Circuit for intervention, . . . and Movants lack Article III standing." *Id.* (citation omitted). *See also id.* at 5-9. In light of *WRTL II*'s holding that WRTL had a constitutional right to run its genuine issue ads and the Court's creation of a test for genuine issue ads that is more expansive even than WRTL's ads, the Movants' alleged injury is nonexistent. That alleged injury was to an interest "'in running in elections, participating in a political system, and serving in a government in which all participants comply with the reasonable restrictions placed on "electioneering communications" and in which corporate funds are not used to influence federal elections.'" *Id.* at 7 (*quoting* Movants' Memorandum at ¶ 9). But since WRTL's ads were fully constitutionally protected, Sen. McCain et al. can have no interest in "running," "participating," and "serving" free of them.

15. What remains in this case is the expedited 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 ad is materially similar to the three ads found to be constitutionally protected from the electioneering communication prohibition in *WRTL II*. Moreover, under the *WRTL II* test, it is surely protected 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. And if there could possibly be any doubt as to whether the CCPA Ad is exempt from the prohibition, the Supreme Court says that "[t]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it," *id.* at *7, and "[w]e give the benefit of the doubt to speech, not censorship." *Id.* at *20. Consequently, Sen. McCain et al. have no interest in "running," "participating," and "serving" in a world free of ads like the CCPA Ad, and they have no Article III standing to remain in the case.

For the foregoing reasons, this Court should reconsider the intervention motion of Sen. McCain et al. and deny it. This case should be finalized without the burdensome and chilling presence of activist campaign finance "reform" legislators supported by lawyers and funds from the campaign finance "reform" lobby.

Respectfully submitted,

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