United States District Court
District of Columbia

Wisconsin Right to Life, Inc. 10625 W. North Ave, Suite LL Milwaukee, WI 53226, ***Plaintiff***,	
v.	**Case No.** 04-1260 (DBS, RWR, RJL)
Federal Election Commission, 999 E Street, NW Washington, DC 20463, ***Defendant.***	THREE-JUDGE COURT

Amended Verified Complaint for Declaratory and Injunctive Relief

Wisconsin Right to Life, Inc. (WRTL) complains as follows:

Introduction

1. This is a First Amendment as-applied constitutional challenge to the prohibition on the use of corporate funds for "electioneering communications" (hereinafter "the prohibition") contained in § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, 91-92, and codified at 2 U.S.C. § 441b(b)(2).

2. As presently applicable, "'electioneering communication' means any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office [and] is made within . . . 60 days before a general . . . election for the office sought by the candidate; or . . . 30 days before a primary . . . election . . . for the office sought by the

candidate; and . . . is targeted to the relevant electorate." 2 U.S.C. § 434(f)(3)(A)(i). *See also* 11 C.F.R. § 100.29 (definition of "electioneering communication").

3. The prohibition provides that "[i]t is unlawful . . . for any corporation whatever . . . to make a contribution or expenditure in connection with any [Federal] election. . . . For purposes of this section . . . , the term 'contribution or expenditure' includes . . . any applicable electioneering communication . . . ." 2 U.S.C. § 441b(a)-(b); *see also* 11 C.F.R. §§ 114.2 and 114.14 (regulatory ban on corporate funding of electioneering communications).

4. In *McConnell v. FEC*, the United States Supreme Court upheld the prohibition against a *facial* constitutional challenge. 124 S. Ct. 619, 694-97 (2003).

5. The United States Supreme Court has held that corporations may use corporate funds to engage in lobbying. *First National Bank of Boston v. Bellotti*, 435 U.S.765 (1978).

6. This case challenges the prohibition *as applied* to grass-roots lobbying on the facts of this case, which involves broadcast advertisements (true and accurate transcripts of current versions of the ads are attached as Exhibit A, B, and C) that are paid for by WRTL and that encourage Wisconsin listeners to contact their U.S. Senators (Sen. Russell Feingold and Sen. Herb Kohl) and to ask them to vote against anticipated filibusters of President Bush's federal judicial nominees that occur during electioneering communication prohibition periods this summer and fall. More specific as-applied facts are provided *infra*.

7. The Federal Election Commission considered creating an exception to this prohibition in its regulations implementing BCRA for grass-roots lobbying broadcasts but decided it was beyond the exception-making authority granted it by Congress to do so. 67 Fed. Reg. 65190, 65200-02.

8. On July 21, 2004, the U.S. Senate voted 53 to 44 in favor of a motion to invoke cloture, which would have closed debate and stopped the filibuster of a confirmation vote on the nomination of William Gerry Myers III to be a United States Circuit Judge for the Ninth Circuit. Because a three-fifths vote to invoke cloture was required, the motion failed and the filibuster continues. 150 Cong. Rec. S8459-60.

9. On information and belief, the filibuster of William Myers is the 17th time such a filibuster has prevented an up or down vote on a federal judicial nominee since March 2003, and Senate "Judiciary Chairman Orrin Hatch . . . predicted that the number of Democratic filibusters would hit double digits before the Senate adjourns in the fall." Paul Kane, *Fall Showdown Seen on Judges*, Roll Call, July 21, 2004, at 1.

10. In fact, the number of filibusters of judicial nominees reached "double digits" just a day after the cited Roll Call article, on July 22, when three more judicial nominees were denied up-down votes by a Democrat filibuster: nominees Henry W. Saad, Richard A. Griffin and David W. McKeague. Helen Devar, *Senate Democrats Block 3 More Bush Judicial Nominees*, Washington Post, July 23, 2004, at A05.

11. On information and belief, the Senate leadership intends to bring up for vote additional judicial nominees throughout the fall and "by year's end Democrats could have to filibuster as many [as] 16 nominees for the entire 108th Congress." Paul Kane, *Fall Showdown Seen on Judges*, Roll Call, July 21, 2004, at 1.

12. WRTL began broadcasting a radio advertisement (Exhibit A) on July 26 and is in the process of producing a second radio ad (Exhibit B) and one television ad (Exhibit C), which WRTL intends to run throughout August, for the purpose of influencing the votes of

Senators Feingold and Kohl regarding filibusters of judicial nominees expected this fall before Congressional adjournment. Although the ads mention Sen. Feingold, who is a candidate in the upcoming primary and general elections, they are not presently electioneering communications because they are not within the electioneering communication blackout periods before the Wisconsin primary, to be held on September 14, or the general election, to be held on November 2.

13. Because of the timing of anticipated Senate filibusters and votes to invoke cloture concerning motions to confirm judicial nominees, WRTL intends to run the three ads (Exhibits A, B, and C) and materially similar ads between now and the adjournment of Congress, including within the blackout periods if WRTL obtains the relief sought herein. The timing of these events is beyond the control of WRTL.

14. From August 15 to September 14 (30 days before the primary) and from September 3 to November 2 (60 days before the general election), the current ads (Exhibits A, B, and C) and materially similar ads will become electioneering communications as to Wisconsin Senatorial candidate Russell Feingold, and WRTL will be prohibited from running these ads.

15. This 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.

16. WRTL intends to run materially similar grass-roots lobbying ads falling within the electioneering communication prohibition periods before future primary and general elections in Wisconsin when there are pending matters in the legislative or executive branch that similarly require referencing a clearly identified candidate for federal office in broadcast

communications to the citizens of Wisconsin. WRTL is concerned about a range of issues – such as embryonic stem cell research, cloning, permissive abortion, fetal pain legislation, unborn victims of crime legislation, abortion clinic regulations, partial-birth abortion, abortion funding, abortion in government facilities, government funding of abortion, abortion programs in foreign aid policy, infanticide, Medicare policy, health-care rationing, withdrawal of nutrition and hydration, assisted suicide, euthanasia, judicial appointments, judicial filibusters, non-discrimination policies with respect to medical training and practice, and the freedom to advance its issues in the public forum – that regularly have and will become issues in the legislative and executive branch. Because the legislative and executive branches often deal with important legislative and executive branch issues in the periods before elections, there is a strong likelihood that WRTL's need to broadcast grass-roots lobbying ads will again coincide with the electioneering communications blackout periods. And given the limited funds in WRTL's PAC account, it is also highly likely that WRTL will at such times not have adequate PAC funds to pay for such ads and will be unable to raise the funds in the usual short time span available when hot issues are coming to a head.

17. Recognizing the serious constitutional questions the BCRA raises, the law provides for immediate expedited judicial review by a three-judge panel of this Court of any constitutional action for declaratory or injunctive relief, with expedited appellate review by the Supreme Court of the United States of final decisions. BCRA § 403, 116 Stat. at 113-14.

JURISDICTION AND VENUE

18. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 2201.

19. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and BCRA § 403,

116 Stat. at 113-14.

PARTIES

20. Plaintiff Wisconsin Right to Life, Inc., is a nonprofit, nonstock, Wisconsin, ideological corporation recognized by the Internal Revenue Service as tax exempt under § 501(c)(4) of the Internal Revenue Code.

21. Defendant Federal Election Commission (FEC) is the government agency charged with enforcing the relevant provision of the Federal Election Campaign Act, as amended by the BCRA.

ADDITIONAL AS-APPLIED FACTS

22. WRTL is the Wisconsin state affiliate of the National Right to Life Committee, Inc. and was organized and exists for the ideological purpose of promoting respect for, and legal protection of, innocent individual human life from the time of fertilization until natural death.

23. WRTL does not qualify for any exception permitting it to pay for electioneering communications from corporate funds because (a) it is not a "qualified nonprofit corporation" (QNC) within the definition of 11 C.F.R. § 114.10 so as to qualify for the exception found at 11 C.F.R. § 114.2(b)(2) to the electioneering communication prohibition and (b) its advertisements are "targeted" so that it does not fit the exception for § 501(c)(4) organizations as described in 2 U.S.C. § 441b(c)(2). 2 U.S.C. § 441b(c)(6)(A).

24. WRTL's ongoing advertisements will become electioneering communications from August 15 to November 2, because they meet the statutory and regulatory definitions found at 2 U.S.C. § 434(f)(3) and 11 C.F.R. § 110.29.

25. Specifically, the advertisements at Exhibit A, B, and C, and planned future advertisements, are being, and will continue to be, broadcast for a fee on television and radio. 2 U.S.C. § 434(f)(3)(A)(i); 2 C.F.R. § 100.29(a).

26. The advertisements at Exhibit A, B, and C, and planned future advertisements, will be broadcast within 30 days before the Wisconsin primary and/or within 60 days before the general election. 2 U.S.C. § 434(f)(3)(A)(i)(II); 2 C.F.R. § 100.29(a)(2).

27. The advertisements at Exhibit A, B, and C, and planned future advertisements, "refer to," and will continue to refer to, "a clearly identified candidate for Federal office." 2 U.S.C. § 434(f)(3)(A)(i)(I); 2 C.F.R. § 100.29(a)(1).

28. The advertisement entitled "Wedding" (Exhibit A) is a radio broadcast ad presently being broadcast for a fee paid by WRTL that clearly references federal candidate Sen. Feingold by mentioning his name and asking listeners to contact him (and Sen. Kohl) to oppose the filibustering of judicial nominees.

29. The advertisement entitled "Waiting" (Exhibit C) is a television broadcast ad to be broadcast for a fee paid by WRTL beginning August 2 that clearly references federal candidate Sen. Feingold by mentioning his name and asking listeners to contact him (and Sen. Kohl) to oppose the filibustering of judicial nominees.

30. The advertisements at Exhibits A, B, and C, and planned future advertisements, are, and will continue to be, "targeted to the relevant electorate," 2 U.S.C. § 434(f)(3)(A)(i)(III); 2 C.F.R. § 100.29(a)(3), meaning that the broadcast ads "can be received by 50,000 or more persons . . . in the State [Sen. Feingold] seeks to represent." 2 C.F.R. § 100.29(a)(3).

31. The advertisements at Exhibits A, B, and C, and planned future advertisements, are being, and will be, "publicly distributed," i.e., "aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system or satellite system." 2 C.F.R. § 100.29(a)(3).

32. On August 15, when the electioneering communication prohibition period begins, WRTL will be broadcasting a total of three radio and television ads, Exhibits A, B, and C, so that they will be "publicly distributed" on that date. 11 C.F.R. § 100.29(b)(3)(i).

33. On August 15, WRTL will have spent or contracted to spend more than $10,000 "for the direct costs of producing or airing one or more electioneering communications." 11 C.F.R. § 104.20(a)(1)(i).

34. The public distribution and disbursement amount will trigger a "disclosure date" for WRTL on August 15, requiring it to file a report of its electioneering communication activity on FEC Form 9 "by 11:59 p.m. Eastern Standard/Daylight Time" on August 16.

35. WRTL intends to comply with all record keeping and reporting requirements for its electioneering communications as set out in the Federal Election Campaign Act ("FECA") and FEC regulations, 2 U.S.C. § 434(f); 11 C.F.R. § 104.20, providing accurate disclosure information as to the source and disbursement of funds at the levels at which Congress asserted a disclosure interest.

36. WRTL is also complying with, and will continue to comply with, the applicable disclaimer requirements for electioneering communications. 2 U.S.C. § 441d; 11 C.F.R. § 110.11. This may be seen on the advertisements' scripts at Exhibits A, B, and C, providing disclosure of the fact that WRTL is paying for the ads, that they are not authorized by any

candidate or candidate's committee, and providing a World Wide Web address where a person hearing or viewing the ads may find contact information for WRTL and the Senators.

37. WRTL does not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using its corporate funds for its grass-roots lobbying advertisements.

38. The ads at Exhibits A, B, and C express an opinion on pending Senate legislative activity, which is imminently up for a vote, and urge listeners to contact their Senators and to urge them to vote a certain way in this upcoming vote, so that these ads constitute bona fide grass-roots lobbying.

39. The ads deal with concrete, imminent, legislative issues, beyond the timing and control of WRTL, with which the two incumbent Senators are dealing and must shortly deal with further.

40. The ads refer to both a candidate and a non-candidate and deal with them equally.

41. The ads deal exclusively with the legislative issue.

42. The ads focus on the legislative issue in question, not on any candidate.

43. The ads do not refer to any political party.

44. The ads deal with an issue with which WRTL has a clear and long-held interest.

45. The ads do not expressly advocate the election or defeat of a clearly identified candidate for federal office.

46. The ads contain no words that promote, support, attack, or oppose a candidate.

47. The ads do not reveal a candidate's record or position on the issue.

48. The ads do not comment on a candidate's character, qualifications, or fitness for

office.

49. The ads do not mention any upcoming election.

50. The ads are broadcast independent of any candidate or political party in that they are not "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents." 11 C.F.R. § 109.20(a).

51. Broadcast advertisements are the most effective form of communication for the present grass-roots lobbying campaign, and non-broadcast communications would not provide WRTL with sufficient ability to reach the people of Wisconsin with WRTL's message.

52. If WRTL does not obtain the requested injunctive relief, WRTL will not continue broadcasting the ads at Exhibits A, B, and C after August 15, because it is prohibited from doing so and because of its fear of enforcement by the FEC. As a result, WRTL will be deprived of its constitutional rights under the First Amendment to the United State Constitution and will suffer irreparable harm. There is no adequate remedy at law.

COUNT 1

53. Plaintiff realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

54. Section 203(a) of BCRA amended section 316(b)(2) of FECA to prohibit corporations and labor unions from engaging in "electioneering communications." This prohibition is codified at 2 U.S.C. § 441b.

55. The United States Supreme Court has decided that corporations may use corporate

funds to engage in lobbying. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

56. The United States Supreme Court has held that contribution limits on organizations engaged in lobbying to support or oppose ballot measures violate the First Amendment rights of association and expression. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981).

57. As applied to WRTL's disbursements for the advertisements at Exhibits A, B, and C, and for materially similar future advertisements, the broadcast ads are bona fide grass-roots lobbying and are not the "functional equivalent of express advocacy." *McConnell*, 124 S. Ct. at 696.

58. Because WRTL's grass-roots lobbying advertisements are not the functional equivalent of express advocacy, there is no constitutional justification for the corporate prohibition at 2 U.S.C. § 441b on these particular electioneering communications, requiring that such activities be done through a political action committee (PAC).

59. PAC compliance burdens have been held as only justified in the election campaign context, which has nothing to do with the sort of bona fide grass-roots legislative lobbying at issue here, so that the prohibition on electioneering communications should be held unconstitutional to grass-roots lobbying broadcasts.

60. Because corporations are permitted to lobby with corporate funds, there is no justification for imposing the PAC requirement on corporations making grass-roots lobbying broadcasts.

61. Because contribution limits on organizations engaged in lobbying are unconstitutional, there is no justification for imposing the PAC requirement of a $5,000 annual

contribution limit on contributors to a corporation making grass-roots lobbying broadcasts. 2 U.S.C. § 441a(a)(1)(C).

62. As applied to grass-roots lobbying broadcasts and to the broadcast advertisements contained in Exhibits A, B, and C, BCRA § 203 is not narrowly tailored to a compelling governmental interest.

63. As applied to grass-roots lobbying broadcasts and to the broadcast advertisements contained in Exhibits A, B, and C, BCRA § 203 unconstitutionally burdens the rights of free speech, free association, and petitioning the government, all in violation of the First Amendment.

COUNT 2

64. Plaintiff realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

65. In the alternative to Count 1, which focuses on the use of general corporate funds for electioneering communications that constitute bona fide grass-roots lobbying communications, WRTL also asserts that BCRA § 203 is not narrowly tailored to a compelling state interest where the electioneering communications are made "out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or law-fully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) directly to this account for electioneering communications." 2 U.S.C. § 434(f); 11 C.F.R. § 104.20(c)(7).

66. If disbursements for grass-roots lobbying communications that constitute electioneering communications are made from such a segregated bank account, there will still

be full disclosure at the level at which Congress asserted a disclosure interest, but all concerns about the use of corporate funds for electioneering communications will be absent.

67. The only remaining restrictions on PACs that would not apply to disbursements for grass-roots lobbying electioneering communications made from a segregated bank account are (a) the annual PAC contribution limit and (b) the requirement that a corporation first acquire "members" and then solicit funds only from these members. 2 U.S.C. § 441b(b)(4)(C). But as noted above, contribution limits are unconstitutional in the context of grass-roots lobbying because there is no potential for corruption, *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981), and any donors contributing in excess of $1,000 to the account would be disclosed to the public.

68. WRTL believes it is constitutionally entitled to make the grass-roots lobbying disbursements at issue from general corporate funds, but if necessary to gain the requested relief to make the disbursements, WRTL will make such disbursements from a segregated bank account.

69. As applied to disbursements from a segregated bank account under 2 U.S.C. § 434(f) for grass-roots lobbying broadcasts and for the broadcast advertisements contained in Exhibits A, B, and C, BCRA § 203 is not narrowly tailored to a compelling state interest and so it unconstitutionally burdens the rights of free speech, free association, and petitioning the government, all in violation of the First Amendment.

PRAYER FOR RELIEF

Wherefore, WRTL prays for the following relief:

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;

5. costs and attorneys' fees pursuant to any applicable statute or authority; and

6. any other relief this Court in its discretion deems just and appropriate.

VERIFICATION

I, Barbara Lyons, declare as follows:

1. I am the long-time Executive Director of Wisconsin Right to Life, Inc.

2. I am familiar with the facts about Wisconsin Right to Life and its activities set forth in the foregoing *Amended Complaint*.

3. I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 1, 2004.

/s/ Barbara L. Lyons
Barbara L. Lyons, Executive Director
Wisconsin Right to Life, Inc.

Respectfully submitted,

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