FEDERAL ELECTION COMMISSION

PETITION FOR RULEMAKING: ELECTIONEERING COMMUNICATION AND GRASSROOTS LOBBYING EXEMPTION

Introduction

Pursuant to 11 C.F.R. Part 200, and in light of *Wisconsin Right to Life, Inc. v. Federal Election Commission*, 546 U.S. _____, 126 S. Ct. 1016 (2006), petitioners respectfully urge the Commission to initiate a rulemaking proceeding in order to promulgate an exemption for at least some forms of grassroots lobbying from the Federal Election Campaign Act's (the Act) proscription of union- and corporate-financed "electioneering communications." Because the relevant periods of time when the Act's proscription attaches are already upon us, we request that the Commission issue a notice of availability, establishing a period of 10 days for public comments and, as promptly as possible thereafter, issue a notice of proposed rulemaking.

Previous Rulemaking

The term "electioneering communication" includes a television, radio or satellite broadcast that refers to a clearly identified federal candidate either 60 days before a general election or 30 days before a primary election or nominating caucus or convention, and can be received by 50,000 persons within the candidate's electorate. 2 U.S.C. § 434(f)(3)(A)(i); 11 C.F.R. §§ 100.29(a)(1-3). In adding this concept to the Act and imposing related funding proscriptions and disclosure requirements in the Bipartisan Campaign Reform Act (BCRA),

Congress both recognized several explicit exemptions and delegated authority to the Commission to promulgate others by regulation in order to "ensure the appropriate implementation" of the new requirements, with the sole caveat that the exemption could not include a communication "described in" 2 U.S.C. § 431(20)(A)(iii), that is, one that "promotes or supports" or "attacks or opposes" (PASO) a "candidate." See 2 U.S.C. § 434(f)(3)(B)(iv).

In its original rulemaking proceeding to implement this aspect of BCRA, the Commission issued a notice of proposed rulemaking (NPRM) that presented four alternative formulations to exempt lobbying-type communications from the definition of "electioneering communication." *See* NPRM, "Electioneering Communications," 67 Fed. Reg. 51131, 51145 (Aug. 7, 2002). The Commission received comments and held a public hearing on the overall proposal, including these alternative exemptions. Nonetheless, the Commission declined at that time to adopt any lobbying communications exemptions. Final Rule, "Electioneering Communications." 67 Fed. Reg. 65190, 65201-02 (Oct. 23, 2002).

McConnell v. Federal Election Commission

The following year, the Supreme Court rejected facial First Amendment overbreadth and under-inclusiveness challenges to the "electioneering communications" provisions of BCRA. See *McConnell v. Federal Election Commission*, 540 U.S. 93, 189-93, 203-11 (2003). In doing so, however, the Court provided only limited guidance as to what specific kinds of advertisements falling within the statutory definition could be constitutionally proscribed. Eschewing a detailed analysis of that record, the Court observed that "the precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection time spans but had no electioneering purpose is a matter of dispute

between the parties and among the judges on the District Court.... Nevertheless, the vast majority of ads clearly had such a purpose." *Id.* at 206. The Court held that the plaintiffs' overbreadth argument "fails to the extent that the issue ads" covered by the proscription are "the functional equivalent of express advocacy," that is, "intended to influence the voters' decisions and hav[ing] that effect, *id.* at 207, and the Court similarly stated that non-express advocacy ads are "functionally identical" to express advocacy ads if they are "used to advocate the election or defeat of a clearly identified candidate," *id.* at 126 (echoing the original formulation in *Buckley v. Valeo*, *see* 424 U.S. 1, 80 (1976) (footnote omitted)), and "are specifically intended to affect election results...." 540 U.S. at 127.

The Court referred to very few specific ads or classes of ads in the record in support of these conclusions. In referring generically to ads that "although...not urg[ing] the viewer to vote for or against a candidate in so many words, ...are no less clearly intended to influence the election," *id.* at 193 (footnote omitted), the Court illustrated them with a "striking example," namely, a 1996 Montana ad that compared a congressional candidate's alleged assault of his wife and failure to pay child support with his legislative voting record. *See id.* at 193 n. 78. The Court also attributed a "vote-for" message to ads that "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" *See id.* at 127 (footnote omitted). But the Court did not directly discuss either other kinds of ads or any other particular advertisements in the record. *McConnell* suggests, then, that a particular "electioneering communication" is the "functional equivalent of express advocacy," and therefore constitutionally subject to regulation, if it both pertains to an individual's candidacy or an election and seeks to persuade a voter to make a particular voting decision with respect to that candidate.

Wisconsin Right to Life, Inc. v. Federal Election Commission

In 2004, in the absence of a Commission-crafted exemption for lobbying communications that are neither "the functional equivalent of express advocacy" nor otherwise subject to the PASO exception, the Commission defended a constitutional challenge brought by Wisconsin Right to Life, Inc. (WRTL) to protect its right to broadcast advertisements calling upon Wisconsin's two Senators to oppose filibusters of President Bush's judicial nominees. *See Wisconsin Right to Life, Inc. v. Federal Election Commission*, 126 S. Ct. 1016 (2006). The Commission contended that the *McConnell* decision foreclosed all as-applied challenges to the "electioneering communication" proscription. *See* Brief for the Appellee at 18-25.

In a unanimous decision issued just six days after oral argument, the Court rejected this reading of *McConnell*, explaining that the decision "did not purport to resolve future as-applied challenges." *Id.* at 1017. The Court then remanded the case to the district court to consider WRTL's as-applied challenge on its merits because it was "not clear" that the district court had intended to do so in its decision under review. *Id.* at 1018. Notably, in its brief discussion of the background of the case, the Court noted:

> Although the FEC has statutory authority to exempt by regulation certain communications from BCRA's prohibition on electioneering communications, § 434(f)(3)(B)(iv), at this point, it has not done so for the types of advertisements at issue here.

Id.

Grounds for a Regulatory Exemption

Petitioners respectfully urge the Commission to exercise its statutory authority noted in the *WRTL* decision in order to define by regulation a class of lobbying communications that are exempt from the "electioneering communications" definition. There are compelling reasons for the Commission to do so.

First, although the Court's decision in *WRTL* did not reach the merits of WRTL's particular challenge, it did confirm that there is a class of legislative "genuine issue ads," in *McConnell*'s terminology, *see* U.S. 540 at 206 n. 88, that remain constitutionally immune from regulation. But absent a regulatorily defined exemption for at least those ads[1], unions and corporations that are subject to the funding proscription cannot know, without bringing or defending costly and possibly lengthy litigation, what communications they may undertake. *Second*, the Commission has strong institutional reasons to promulgate an exception. As the *WRTL* litigation itself demonstrates, if the scope of a lobbying exemption is left to constitutional adjudication, then the Commission's resources will be repeatedly expended in addressing the inevitable administrative complaints against particular ads, and in dealing with injunctive proceedings brought by groups that wish to broadcast particular ads. A rulemaking, as Congress contemplated, would be a far more economical and orderly approach.

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[1] The Commission need not confine its exemption of "electioneering communications" to ads that it believes are constitutionally immune from regulation, for BCRA broadly authorizes it to promulgate regulatory exemptions in order to "ensure the appropriate implementation" of the "electioneering communications" provision, subject only to the PASO exception.

Third, the Commission has ample room for the development of an exemption that is consistent with the PASO condition. In promulgating an exemption for lobbying communications the Commission need not purport to definitively explicate what PASO *is*, but simply demarcate one category of such communications that PASO is *not*, for purposes of union and corporate "electioneering communications." PASO, properly applied, does not reach all issue advocacy directed toward named government officials. PASO by it terms applies to the promotion of candidates as *candidates*: it is a standard by which electoral speech, not issues speech, is restricted in the service of the Act's campaign-related purposes. Indeed, Congress explicitly imported PASO into its exemption provision from the BCRA definition of "federal election activity" (FEA). In reviewing the provisions governing FEC, the Supreme Court held that the PASO standard is not unconstitutionally vague only as applied to "potential *party* speakers" (emphasis added), because "actions taken by political parties are presumed to be in connection with election campaigns." S*ee id.* at 170 n. 64. This presumption is not lawfully or appropriately extended beyond the electoral context and political organizations for which it was established.

Principles of a Proposed Exemption

Petitioners recommend that the Commission promulgate an exemption from the definition of "electioneering communication" for a communication that reflects 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.

We believe that these principles are reasonably derived from the Court's analysis in *McConnell* and *WRTL*, and that their incorporation into an exemption would properly shape a reasonable and constitutionally informed interpretation of the PASO exception to the Commission's exemption authority. This standard would "ensure the appropriate implementation" of BCRA's "electioneering communications" restrictions by exempting from regulation advertisements that in every pertinent respect are essentially legislative in nature and that eschew other election-related characteristics. The proposed exemption allows for corporate and union funding of communications that refer to a candidate in his or her

incumbent officeholding capacity in taking particular official action, but this allowance would not extend to the funding of even those communications if they also include references to candidacy, an election, a political party or the character of the candidate.

This exemption comprises a carefully tailored safe harbor that balances the relevant statutory and constitutional considerations.[2] The proposed standard is administratively practicable because it turns almost entirely upon the text of the communication, requiring an examination of context only to determine whether or not the issue discussed in the ad is a "particular current legislative or executive branch matter."

In light of the imminent electoral calendar and the ongoing federal executive and legislative dockets that are replete with profoundly important matters of national and international security and economic and other domestic policy, which petitioners and others subject to the "electioneering communications" proscription may wish to address in broadcast advocacy , petitioners respectfully request that the Commission grant their petition and schedule an expedited rulemaking.

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[2] As may readily be discerned, this proposed exemption is narrower than the proposal recently rejected by the Commission to exempt *all* non-PASO communications from the definition of "electioneering communication." *See* Final Rules, "Electioneering Communications," 70 Fed. Reg. 75713, 75716 (Dec. 2, 2005).

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