IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

WISCONSIN RIGHT TO LIFE, INC. :

Petitioner, :

v. : No. 04-1581

FEDERAL ELECTION COMMISSION. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, January 17, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:13 a.m.

APPEARANCES:

JAMES BOPP, JR., ESQ., Terre Haute, Indiana; on behalf of the Petitioner.

PAUL D. CLEMENT, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

ORAL ARGUMENT OF	PAGE
JAMES BOPP, JR., ESQ.	
On behalf of the Petitioner	3
PAUL D. CLEMENT, ESQ.	
On behalf of the Respondent	25
REBUTTAL ARGUMENT OF	
JAMES BOPP, JR., ESQ.	
On behalf of the Petitioner	53

P R O C E E D I N G S

(10:13 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in No. 04-1581, Wisconsin Right to Life, Incorporated v. Federal Election Commission.

Mr. Bopp.

ORAL ARGUMENT OF JAMES BOPP, JR.

ON BEHALF OF THE PETITIONER

MR. BOPP: Thank you, and Mr. Chief Justice, and may it please the Court:

This case involves the fundamental First Amendment question of whether the Government can shield lawmakers from grassroots lobbying about upcoming votes in Congress through campaign finance laws.

This Court has distinguished the regulation of corporate electioneering from efforts to influence law-making, finding sufficiently compelling governmental interests in regulating electioneering, but not grassroots lobbying.

JUSTICE SOUTER: Mr. Bopp, right -- right there I guess I -- I have a problem with -- with your argument, and I just want to get it out. I went back and looked at some of the examples that were given at -- in -- in the McConnell case for parallels between what we -- what we thought was covered in those cases

and -- and yours -- your case. And the -- the one which I -- I guess was probably the closest was the -- was the advertisements there in -- in the McConnell case on the -- the lobbying on the Chinese trade relations. The basic message in -- in that case was China uses forced labor. The Congress of the United States is about to make it easier for -- for Chinese goods to get in here and for China to have a respectable trade status. And -- and it said, call Congressman Myrick, I think it was, in any case, a Member of Congress, and -- and say what you think.

In this case, you're -- you're talking about a -- a filibuster, and you say, you know, they're filibustering nominees and they're not coming up to -- to a vote. Tell the two Senators in this State, Kohl and Feingold, that -- that you don't like this.

The only difference that I could see basically between the two kinds of ads was that in the first one -- in -- in the Myrick ad, they actually gave the number of the -- of the congressional office to call and say, hey, don't do this.

In this case, your clients did not give a -- a number. They gave a Web site to an organization. Insofar as I know, it doesn't have a number.

Which gets me to the question. If the -- the

Chinese trade relations ad was presumably validly subject to the act, I don't see why your client's ad is not, for the same reason, subject to the act and for the further reason that it doesn't even give a phone number to call -- to -- to lobby people. So it seems to me that on stare decisis grounds, unless we're going to go back and simply reexamine McConnell to -- to -- from -- from scratch, that your clients fall within the general rule as -- as we held it in McConnell. So why doesn't precedent foreclose this?

MR. BOPP: Well, there -- there is a few specifics about the -- about our ad that -- that I would like to remind the Court of.

First, it was not -- the call to action at the end of the ad was not just call them up and tell them what you think. The call to action was to call the Senators and ask them to oppose the filibuster. So it was specific.

JUSTICE SOUTER: Yes, but you didn't even give their phone numbers.

MR. BOPP: Well, and then it refers to a Web site, befair.org, which contained prominently on the first page the phone numbers and addresses and all contact information for these two Senators. The decision was made by the speaker here that it would be

more likely that the recipient of the ad would remember the phrase, befair.org, and seek the information on that Web site than to have a -- you know, a -- a phone number that is just simply more difficult to -- to remember.

JUSTICE SOUTER: Okay. So if we accept that extra step, that's -- that gets you -- if -- if we accept the extra step that gets you parallel to the -- to the ad that we considered in McConnell.

MR. BOPP: Well, it -- it doesn't, the one that you mentioned, because it was just call them up and --

JUSTICE BREYER: If -- if it's the fact that you go to the Web site and that's what's supposed to make this what it was in McConnell which, by the way, we said was illegal, what they -- the first thing they're going to see when they get to the Web site, which I agree with you -- four times in 3 of the 12 sentences of this ad -- in 3 of the 12 -- it says, befair.org, visit befair.org, go to befair.org. And the first thing that they're going to see when they get to befair.org is a big headline in bold -- gold -- bold letters which says, Feingold and Kohl continue to support unprecedented filibusters of judicial nominees. So, in fact, if befair.org is brought into the

picture, that makes this ad look much more like an effort to -- to defeat Senator Feingold than the ad that we considered in our previous case.

MR. BOPP: Well, it --

JUSTICE BREYER: Doesn't it?

MR. BOPP: No. In your previous case, there were certainly genuine issue ads. This Court recognized that it -- that there were genuine issue ads that were not for the purpose of influencing an election. I believe that these ads are at the very core of what a genuine issue ad is. It involves a -- a pending legislative issue, and the only reference to the Senator -- and it was both Senators, not just the one up for election -- was to contact them about -- about how -- whether to support or oppose that specific initiative.

JUSTICE O'CONNOR: Yes, but in McConnell --

JUSTICE SOUTER: But if you are right --

JUSTICE O'CONNOR: -- in McConnell, the Court said corporations and unions may finance genuine issue ads during election blackout periods by simply avoiding any specific reference to Federal candidates or, in doubtful cases, by paying for the ad from a segregated fund. Now, that language indicates, to me at least, that the Court was saying there are no genuine issue

ads meeting the definition as you would have us apply it here.

MR. BOPP: Well, that -- that part of the opinion needs to be read in light of the footnote, which is attached to those very words, which said in footnote 88 that the interests that support regulation of electioneering may not apply to genuine grassroots lobbying and distinguished the McConnell case from Bellotti and McIntyre.

So we do have to recognize that there's two things going on here. There -- there is an election, but also Congress is in session. The Government is engaging in its law-making function.

JUSTICE GINSBURG: Mr. Bopp, to what extent can we take into account the surrounding circumstances? One thing that you advocate is to look at this ad in isolation, but if you add to it that your organization made it clear that it opposed the candidacy of Senator Feingold and that it supported his opponents, that your organization also connected, as Justice Breyer just brought out, Senator Feingold with this filibuster, and then if the filibuster was such an important thing for grassroots lobbying, why was it that when the election was over, this ad was not repeated?

MR. BOPP: Well, of course, the final point

is -- is in the record, that -- that is, it was -- the -- it was supposed to come to a head in November and then it did not. It was abandoned.

But the -- but the point is you cannot -- I don't think that the Government can condition --

JUSTICE SCALIA: I -- I don't -- I don't understand what you just said.

MR. BOPP: Well -- well, the -- the filibuster issue, as it related to that session of Congress, it was thought that it was going to come to a head in -- in October -- excuse me -- but it -- but as a -- but it did not. So that is the reason why it was -- it would not have been run after November.

JUSTICE SCALIA: I mean, once it didn't come to a head in November and it was still an issue, why didn't you continue to run it?

MR. BOPP: Well, each organization has to make an assessment with respect to the different issues that they want to be lobbying on and the -- their pressing nature. And --

CHIEF JUSTICE ROBERTS: I thought your point was that it was not an issue after the election.

MR. BOPP: Well -- well, it was in the -- in the next session of Congress and has been an -- an issue. But each -- a lobby organization makes a

decision about the priorities that they have and whether or not their lobbying effort will most likely affect legislative action. So --

CHIEF JUSTICE ROBERTS: Were you taking a position on this issue prior to the election time frame?

MR. BOPP: Yes. The --

CHIEF JUSTICE ROBERTS: Had you taken out advertisements prior to that time frame?

MR. BOPP: Yes. Yes, and in fact these radio and television ads were continuing up until the blackout period and it was the blackout period that triggered the case.

JUSTICE BREYER: But the basic question I think is this. All of us -- or almost all of us who are here -- spent an entire summer reading through one of the longest set of opinions I've ever seen from the lower courts and going through a record that they had compiled over months reflecting 6 years of congressional effort. And what that record showed with dozens, hundreds I think, of examples was the basis for Congress' conclusion that there's simply no way to know whether an ad like yours is a genuine issue ad or isn't. And the only way that we have a hope of stopping rich people or corporations or labor unions

from simply trying to defeat candidates by writing sham ads is to have the rule that we have.

Now, you have a very good argument, but it's an argument that I heard right in that case. And we considered right in that case issues like yours, just ads like yours, ads that were even less sham-like than yours, if you want to call yours a sham -- I don't mean to be pejorative. But we considered all that, and then we used them as an example. And of course, it was close. 5 to 4 this Court said ads that are even more apparently neutral on their face than yours, Congress can impose this requirement.

Now, what's different about your ad than the ads we put right in that opinion as examples of what we'd allow Congress to control? What's different now or are you asking us to go back only a year later and undo what we did?

MR. BOPP: No. I'm asking you to give meaning to the holding of this Court that there were genuine issue ads that were broadcast during that period of time. The Government conceded 7 percent, asked you to do a Broadrick analysis upholding the statute on its face, reserving as-applied challenges to genuine issue ads in subsequent cases. That is what this case is about.

And the difference here is that as Judge Leon -- the record of the case -- in Judge Leon's opinion, he went for a number of pages explaining what genuine issue ads in his view were, and what -- and he said that if the ad discusses a current legislative issue and refers to the Member of Congress in calling on him or her to take a particular action on that issue, that constitutes a genuine issue ad.

JUSTICE GINSBURG: Can we return to --

MR. BOPP: These people are law-making.

JUSTICE GINSBURG: Mr. Bopp, then can we return to my question? Do we view the ad in isolation, and do we discount the connection by your organization of this Senator with the filibusters that you said was a very bad thing?

MR. BOPP: And I'm sorry. I was interrupted. I wasn't able to get to that question.

And the -- the Government cannot condition the exercise of one right on exercising another. There's a First Amendment right for the PAC of Wisconsin Right to Life to support or oppose a candidate. That's different than what its lobby group does. Its lobby group is primarily involved in influencing current law-making. And so that is why, in the First Amendment, petition is separately listed.

JUSTICE GINSBURG: But the electorate will know that this issue is presented to them in connection with this Senator and that your organization has linked the two very clearly.

MR. BOPP: But, you know, the -- the effect on an election is remote and speculative and not proven by -- in terms of genuine issue ads in this record. But these people are law-making now. So there's a pressing need and, indeed, right for people today to influence the Government's law-making regardless of the incidental, remote, speculative, and unproven effect that that genuine issue ad may have on an election.

There -- there is simply -- we just cannot get away from the fact that the most important thing that Government does is law-making, and because they've scheduled an election should not immunize the incumbents from being lobbied about that very law-making function that they're engaged in today.

JUSTICE SOUTER: Then why didn't we have to go the other way in the Chinese trade relation example? I mean, everything --

MR. BOPP: Well, I don't think you --

JUSTICE SOUTER: -- unless I'm missing something in your argument, everything you are saying in this argument could have been said with respect to

that ad and, as Justice Breyer said, to a couple of others.

MR. BOPP: Well that may very well have been a genuine issue ad in the mind of this Court. You only cited one ad, which was on page 193, which was the Yellowtail ad, as an example of sham issue advertising.

JUSTICE SOUTER: Yes.

MR. BOPP: And there, you know --

JUSTICE SOUTER: And -- and we -- we cited some other examples as -- as examples that, on the face of it and on the face of the record, would -- would lawfully fall within the -- the general rule that we said Congress could prescribe.

MR. BOPP: Well -- well, the Yellowtail ad, which you cited and quoted as a example of sham issue ad, said that the -- Mr. Yellowtail had taken a swing at his wife and he justified that because he said he didn't hit her.

JUSTICE SOUTER: No, but the point --

MR. BOPP: And then it said basically call him up and yell at him.

JUSTICE SOUTER: But I -- I don't want to cut you off from your Yellowtail argument, if -- if you want to make it, but it seems to me that the problem in this case is that your ad is very much like a non-

Yellowtail ad. And the problem that we would have in accepting your argument is, number one, a problem of precedent and, number two, the problem that Justice Breyer raised that, again, we had dealt with in the prior case.

MR. BOPP: How could it be --

JUSTICE SOUTER: No, no. Let me just finish my question.

MR. BOPP: Sorry.

JUSTICE SOUTER: Once you get out of the sphere of -- of kind of sham ads that just hit you in your face, there isn't a practical way to tell the difference. There isn't a kind of magic formula. We rejected the magic word, or Congress rejected the magic word's approach. And therefore, Congress came up with a rule that it did within certain time limits, identified candidates, identified audiences. You can't do it within this period of time unless you do it through a PAC.

What is different in your case from those paradigm examples in -- in McConnell?

MR. BOPP: Well, as I was describing, the Yellowtail ad was --

JUSTICE SOUTER: But Yellowtail --

MR. BOPP: -- which involves very --

JUSTICE SOUTER: -- is -- is an ad of -- an obviously sham ad. The problem that we're dealing with --

JUSTICE SCALIA: Mr. Bopp, did -- did the opinion refer to --

JUSTICE SOUTER: May -- may I finish?

JUSTICE SCALIA: -- sham ads?

JUSTICE SOUTER: Excuse me. May I -- may I finish my question?

JUSTICE SCALIA: Did the opinion refer to --

CHIEF JUSTICE ROBERTS: Justice Souter.

JUSTICE SOUTER: May I finish my question?

The -- the -- no one is saying that your ad in this case is an obviously sham ad like Yellowtail. Your ad in this case is one of those ads that it's difficult to deal with fairly. You can say, well, you know, it's an electioneering ad and you can say it's -- it's a lobbying ad. And -- and Congress decided how to deal with them. We said that's okay. Why doesn't --

MR. BOPP: Only on a facial challenge.

JUSTICE SOUTER: Yes, but why doesn't your ad fall within the reasoning that we used in approving -- on the facial challenge, in approving the statute?

MR. BOPP: Because the Broadrick facial challenge analysis that you engaged in in McConnell is

not completed because that includes future as-applied challenges. The Government argues that there were --

JUSTICE SOUTER: No -- no question about it.

MR. BOPP: -- 7 percent --

JUSTICE SOUTER: But your -- your as-applied --

MR. BOPP: -- genuine issue ads --

JUSTICE SOUTER: -- challenge has got to have something different about it, something unusual that says this is why my ad does not fall within the general rule. And that's what I'm trying to get at.

MR. BOPP: Well, I -- I will repeat. The -- it involves a currently pending legislative issue. It does not talk --

JUSTICE SOUTER: Wasn't the Chinese trade issue currently pending?

MR. BOPP: Yes, it was, and you know, the Chinese --

JUSTICE SOUTER: So that's no difference.

MR. BOPP: But -- but, Your Honor, the Chinese example was not cited by this Court. It was in the record. And it may be a -- a genuine issue ad.

JUSTICE SOUTER: Sure.

MR. BOPP: Okay? And -- and the Government argued there were 7 percent genuine issue ads really

trying to exercise the constitutional right to petition Government, because Government is regulating us right now in terms of their votes and their actions. And, of course, that's why in the First Amendment, it doesn't just say speech and -- and association and press. It -- it says --

JUSTICE STEVENS: May I --

MR. BOPP: -- petition the Government.

JUSTICE STEVENS: -- may I ask one question just to find out? Are you contending that there is a sharp distinction? There's a category of issue ads and a category of election ads that are mutually exclusive?

MR. BOPP: I think you can create objective criteria, just like this Court has --

JUSTICE STEVENS: No. If you can answer my question yes or no. Are -- are you arguing there are two mutually exclusive categories, or are there ads that fit somewhat in both?

MR. BOPP: Well, I -- I think that you can adopt objective criteria as you have in the Noerr v. Pennington doctrine to separate the two.

JUSTICE STEVENS: Are you able to answer my question yes or no?

MR. BOPP: I -- I would say no.

JUSTICE STEVENS: You're not claiming there

are separate categories.

MR. BOPP: Then I misunderstood your question, Your Honor. I am saying that they are separate categories. This Court --

JUSTICE STEVENS: So it's either -- it's either an issue ad or it's a candidate ad.

MR. BOPP: Yes. And I'm not saying at the -- at the margins there -- there may not be doubtful cases, but what I'm saying is that this Court in Noerr v. Pennington doctrine has recognized and adopted objective criteria to distinguish between genuine efforts to influence the Government, which is not subject to the Sherman Act, and sham issues -- efforts to regulate --

CHIEF JUSTICE ROBERTS: Does the -- does the FEC draw -- distinguish between sham ads and genuine issue ads?

MR. BOPP: No, the -- no, they haven't. But right before the 2004 election -- excuse me -- they gave an exception to an auto dealership that wanted to continue to run the name of the owner of the dealership, despite the fact that he was a Senator -- a candidate for United States Senate, during the blackout period. And the commercial interests at stake there were sufficient for the FEC to grant an as-applied

exception even though there may have been some incidental effect on the election. So the FEC has recognized that there is interests which are sufficient and -- and also that the -- the possible impact on an election is so remote that -- that the interests are -- are sufficient.

JUSTICE BREYER: All right. So what is the test? Because I -- my vague recollection from a year and a half ago is that there was in that testimony political consultants who said if you really want to defeat a Senator, here's how you do it.

MR. BOPP: Yes.

JUSTICE BREYER: Run an ad that just speaks about a group of Senators. It's plain that they're bad, and then put in some words that mention his name and everybody will get the point. They said that's even better than saying, vote against.

And then our opinion said there is little difference between an ad that urges voters to vote against Jane Doe and one that condemns Jane Doe's record on a particular issue while exhorting viewers to call Jane Doe and tell her what you think. That was the opinion.

So, now, what's your test to decide whether that's what's going on or whether this is a genuine

issue ad?

MR. BOPP: I think that you would look at, one, whether the -- the ad discusses a current legislative issue; two, whether or not it made any reference to the legislator beyond lobbying him or her about that specific issue. So there should not be any references to the election or the candidacy of the incumbent or any of those type references. And if you had that, you would have a bona fide, genuine effort to lobby.

They are voting. They're taxing us. They're regulating us. And as we know, the record reflects that usually most of the -- of these issues are decided in the context of this blackout period at the end of -- end of Congress.

So I know it is difficult to balance these interests, but there is more interest among the people than simply the remote and speculative effort to influence an election. There is an immediate need to influence how Government is regulating and taxing us. So that is the interest that is presented here. That is the interest that the Court in McConnell recognized when the Court said there are genuine issue ads and -- and only engage in what the Government urged was a Broadrick facial challenge analysis.

The Government said in McConnell, well, any of these genuine issue ads can be dealt with in an as-applied challenge. Now, they have switched sides here, having asked the Court and the Court engaging in a Broadrick facial challenge analysis -- are now saying that even though Broadrick would allow as-applied, that you are not to entertain any as-applied. I just don't see --

JUSTICE O'CONNOR: Now, this ad could have been run by your clients by a segregated fund.

MR. BOPP: Yes. Yes, that is true. And -- and, of course, as -- as this Court has recognized --

JUSTICE O'CONNOR: It just ran out of money. Is that the deal?

MR. BOPP: Well, that was only part of it. They -- they didn't raise money with the anticipation of doing their lobbying with it. In other words, they raised all their lobbying money in their -- in their general treasury. The -- the only funds they raised in their PAC is to advocate the election or defeat of candidates or give money to candidates, which -- which this Court has recognized is a proper way of directly affecting an election.

But making lobbying into a PAC means that, number one, you're going to have to identify that

effort to influence a vote -- about an upcoming vote in Congress, you're going to have to identify that as a political activity.

JUSTICE BREYER: All right. If you can do this, can a labor union do it?

MR. BOPP: Yes.

JUSTICE BREYER: And a corporation?

MR. BOPP: Yes. Of course, the prohibition we're attacking is against corporations --

JUSTICE BREYER: All right. Well, then -- then we're back to -- I mean, I've heard this. This is very familiar music to me and I think you raise a tough issue. I just thought we perhaps had decided it.

But the -- the reason that this was so tough was then these very, very wealthy individuals -- and since I once read through the list, I know who they are. And they -- they say, I'm going to give $15 million. You know, I'm going to give $15 million. So they hire this genius political consultant that's there in the record. And what happens is ads that look an awful like this, and this consultant says, hey, we have $15 million to pay for it from this one person. And they run them all over the country. And Senator after Senator is boom, boom, boom, boom.

MR. BOPP: Yes, but --

JUSTICE BREYER: It becomes a question of motive and how do we know what the motive is?

MR. BOPP: That's not what advocacy groups are doing. You know, people who want -- the wealthy people you're talking about have gone into giving money to 527 unincorporated groups that -- that are using issue ads lawfully through that vehicle.

But, you know, before this all happened, the 1996 and the record of McConnell where, all of a sudden, there were more of these issue ads, the record also reflects that there had been issue ads, you know, throughout history. And -- and, of course, those were all these efforts to influence the upcoming votes in Congress. So that occurred before this effort with sham issue ads. It -- it would occur now except that genuine issue advocacy through grassroots lobbying is now swept in under the reason that it might have an incidental effect on elections.

This Court just simply needs to recognize that there's more to Government than elections, and even more importantly than elections is the law-making function and that -- that people should not be disabled from using most effective means to influence that law-making with -- on the basis that simply there's an election coming up.

I'd like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Bopp.

General Clement, we'll hear now from you.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE RESPONDENT

GENERAL CLEMENT: Mr. Chief Justice, and may it please the Court:

In McConnell against FEC, this Court upheld title II's definition and regulation of electioneering communications by corporations and unions as defined in the act.

CHIEF JUSTICE ROBERTS: In McConnell against FEC, you stood there and told us that this was a facial challenge and that as-applied challenges could be brought in the future. This is an as-applied challenge and now you're telling us that it's already been decided. It's a classic bait and switch.

GENERAL CLEMENT: No. In -- in fairness, Mr. Chief Justice, in the McConnell case at pages 105 and 106 of our brief, we said that as-applied challenges would arguably be available. But the principal argument we stressed in the brief and in oral argument was that, in a sense, overbreadth analysis here and even as-applied challenges, though we didn't put it in those terms, are a little bit beside the point because

of the nature of the regulatory structure here.

CHIEF JUSTICE ROBERTS: Is there any other case that you can cite where we've upheld a facial challenge and then later said that an as-applied challenge was barred by our ruling on the facial challenge?

GENERAL CLEMENT: Well, Mr. Chief Justice, I will answer it, and I -- and I think actually --

CHIEF JUSTICE ROBERTS: Like Justice Stevens, I think that's a yes or no.

(Laughter.)

GENERAL CLEMENT: Okay. Yes. Yes.

CHIEF JUSTICE ROBERTS: What --

GENERAL CLEMENT: Lane and Hibbs. I can't imagine after those two decisions which upheld in facial challenges the statutes at issue there and said that there was not too much prophylaxis for purposes of section 5 of the Fourteenth Amendment --

JUSTICE KENNEDY: I -- I beg your pardon. I didn't hear the names of the cases.

GENERAL CLEMENT: Lane and Hibbs. Tennessee against Lane and Nevada against Hibbs. I can't imagine after those decisions that somebody --

CHIEF JUSTICE ROBERTS: Well, that's a very different question. That's interpreting the scope of

Congress's power under section 5 of the Fourteenth Amendment. The issue is whether it's limited to the constitutional violations or sweeps more broadly. If you conclude that it sweeps more broadly, it's not suggesting that an as-applied challenge can be brought by someone who's covered by the broader sweep. That's a very different question.

Is there any First Amendment case where we've said this is facially valid and then said as-applied challenges can't be brought?

GENERAL CLEMENT: I don't think this Court has --

CHIEF JUSTICE ROBERTS: Well, it would be like in any of those cases where you have a -- a broad prohibition and you say, yes, there may be situations where it's unconstitutional, but the statute is valid on its face. And then someone comes in and says, well, my situation is one where it's unconstitutional. We've never said, well, it's too bad because it's valid on its face, have we?

GENERAL CLEMENT: Well, I think the case really hasn't arisen because generally when this Court clearly identifies an area where Congress can regulate in prophylactic terms, somebody doesn't come back in and try to bring the exact same challenge. And if I could give you two examples.

If somebody after Burson against Freeman, which you may remember is the case where this Court upheld a 100-foot buffer zone around a polling place -- if somebody came in after that decision and said, well, that can't apply to me in an as-applied challenge because I only want to stand 90 feet away, I think they would have gotten laughed out of Court because this Court already said that a 100-foot buffer zone was sufficient.

I think in a similar way --

JUSTICE KENNEDY: Well, it might have been that 90 feet included a public street and you couldn't go down a public street without -- so -- and so --

GENERAL CLEMENT: Well, Justice Kennedy --

JUSTICE KENNEDY: It -- it does seems strange to me in a speech case to say we're foreclosing as-applied challenges.

GENERAL CLEMENT: And -- and, Justice Kennedy, please understand me. I don't mean to suggest that McConnell somehow magically jurisdictionally foreclosed as-applied challenges. And I suppose if somebody could come in after Burson and give a good reason why their situation is very different, that there's a super highway 90 feet away or that all they were talking about is a bumper sticker on a car, well, then maybe

that --

JUSTICE O'CONNOR: Well, I suppose you can say, yes, you can have an as-applied challenge, but this one doesn't meet the test.

GENERAL CLEMENT: Exactly, Justice O'Connor. And again, it's not because it's foreclosed. It's because the reasoning of this Court in McConnell forecloses the decision.

CHIEF JUSTICE ROBERTS: So let's say you had an organization that every month of every year it took out an ad the first week of every month, and it said the same thing and it said, contact your Senators. This issue is important to us. And they do that every month. All of a sudden, their ad's nature changes because an election is -- happens to be coming up and it's illegal the month before the election, even though it was clearly something that they did without regard to the election.

GENERAL CLEMENT: Mr. Chief Justice, that would be a better as-applied challenge. I still think that with respect to the ads in the 30 days before the primary and the 60 days before the -- the general election, that corporation could look at this Court's decision in McConnell and say, oh, I understand. Our remedy is not an as as-applied challenge. Our remedy --

CHIEF JUSTICE ROBERTS: If we want to place an ad in October, the solution is to place an ad November through September, and then we're okay. And the only reason we're going to do it November through September is so we can do it in October?

GENERAL CLEMENT: No, no.

CHIEF JUSTICE ROBERTS: That's a pretty broad definition of a sham.

GENERAL CLEMENT: No, no. The point would be in October either -- do exactly what this Court said at page 206 of the McConnell opinion: either make the ad in terms that doesn't expressly refer to the candidate which, if you're not interested in influencing the candidate election, shouldn't be a problem, or fund that one advertisement through a separate, segregated fund.

CHIEF JUSTICE ROBERTS: But on an issue like this, the filibuster, it's the Senators who are doing it, and their ad referred to not only the Senator who was up for election, but the one who was not.

GENERAL CLEMENT: I understand that, Mr. Chief Justice, but I think if you focus in on this particular ad, you will see that whatever the true intent of the advertisers here, this is the kind of ad that clearly would have an impact on the election. I mean, it talks

about the -- the filibusters in colorful terms, associates them with gridlock and with a state of emergency, and then associates it with a candidate.

JUSTICE SCALIA: You think Congress has the power to prohibit any First Amendment contact -- conduct that might have an impact on the election? I mean, is that the criterion for whether it -- it can be prohibited?

GENERAL CLEMENT: No, Justice Scalia, it's not. But I think what this Court very clearly did in McConnell is it rejected an argument that said that the only thing that Congress could regulate is that which was unambiguously targeted at candidate elections.

JUSTICE KENNEDY: So you think there is a compelling interest in preventing people from thinking about an issue and then calling their Senator during the blackout period. That's the compelling interest that, in effect, you are arguing for.

GENERAL CLEMENT: No, Justice Kennedy. What we're arguing for stems from the observation that this Court made in McConnell, which is that when you get up between 60 days before an election and you look at the ads that are run, most of the ads, in fact, are designed to influence candidate elections. It's very difficult to figure out exactly which ones, and there

are very serious problems with adopting a very vague intent standard.

JUSTICE KENNEDY: Are -- are Web sites and chat rooms covered by the McCain-Feingold?

GENERAL CLEMENT: No, they're not, Justice Kennedy. The Internet is not covered.

JUSTICE KENNEDY: But certainly under your view, they ought to be. If you funded a Web site which was very popular or a chat room, I certainly think it should come within your proscription so that we can't talk about issues during an election.

GENERAL CLEMENT: No, Justice Kennedy. I think the fact that there are alternative methods available to communicate these ideas in these ads is a virtue, not a defect with this regulatory structure.

And I would like to focus in on these ads because while it is true that --

JUSTICE KENNEDY: Well, why -- why not? Suppose -- suppose most people look at the Web site and they don't listen to the -- listen to the radio. I think certainly McCain-Feingold should be extended to that under your view.

GENERAL CLEMENT: Well, Justice Kennedy, I -- I'm not sure you really do think that -- that McCain-Feingold should be extended to that.

(Laughter.)

GENERAL CLEMENT: And I do think that this is an area where this Court, in fairness, has recognized that -- that any effort to regulate in this area effectively has to avoid three pitfalls. And it's a very difficult task for Congress. It has to avoid being vague. It has to avoid being overbroad. And as your question suggests, it also has to avoid being so under-inclusive and easy to evade that it can simply be circumvented in a way that Congress can't achieve its purpose.

JUSTICE BREYER: What is the difference with this? I mean, in my mind are possible as-applied challenges. Bread for the City. Never supported the candidate, worried about the hurricane in Louisiana. Vote for relief for New Orleans. Write your Senator, Senator X.

Organization two. Never supported a candidate one way or the other, but has an issue they're always interested in, and they run ads cycle after cycle after cycle and they don't want to pull them just because October has come along.

All right? Now, think of those organizations where I think maybe, sure, maybe they'd win their as-applied challenge. And here, you're not arguing it -- he doesn't have a right to bring it. You're arguing,

of course, he can bring an as-applied challenge. He's just going to lose given our rationale. All right?

Why?

GENERAL CLEMENT: Well, I -- I want to be responsive and I think the way to respond is that this Court's decision recognized that these ads were going to be difficult to classify and that you needed some kind of bright line rule and that the consequences of having a bright line rule in this consequence -- in this area weren't terrible because there were alternative ways for them to communicate either through a separate, segregated fund which served the issue of the interests of the statute or by avoiding the kind of references that would raise serious questions about tying the ad to a candidate election.

And I think if you look at -- if -- if you want to keep the possibility open of some as-applied challenge and you focus on these ads, these are ads that clearly, I think, would implicate the concerns of Congress.

JUSTICE SCALIA: What was the bright line rule that -- that you think the -- the opinion established? I thought the bright line rule was whether it's an issue ad or -- or, rather, a phony issue ad. I thought that was the -- the line that --

that the opinion was trying to -- to draw. You -- you say that the opinion drew the line between what? All issue ads are out?

GENERAL CLEMENT: I think all issue ads that come within the statutory prohibition are permissibly regulable. I think --

JUSTICE SCALIA: No issue ads during the -- the blackout.

GENERAL CLEMENT: Sure, you can run issue ads as long as you either fund them through a separate, segregated fund or you --

JUSTICE SCALIA: No --

GENERAL CLEMENT: -- omit the reference to the candidate.

JUSTICE SCALIA: Oh, of course, I know.

GENERAL CLEMENT: And -- and --

JUSTICE SCALIA: And stand on your head. But the --

(Laughter.)

JUSTICE SCALIA: Within -- within the framework of the statute, you think the clear line that is established by the opinion is no issue ads without this special funding during the blackout. You think that's what the opinion says?

GENERAL CLEMENT: I think that this -- I do

think that is what the opinion says and stands for. And I think this Court recognized --

JUSTICE SCALIA: Why does it speak about sham issue ads?

GENERAL CLEMENT: Well, Justice Scalia, for one thing, I think it's important to recognize that the discussion about sham versus genuine issue ads was really a factor of the fact that necessarily in looking at the record there, what the Court had to do is look at ads that were run in previous election cycles where this regulatory structure wasn't in place and try to classify those ads. And as I understand it, sort of genuine versus sham was a way of capturing whether or not it was an ad that seemed primarily focused on an issue or primarily focused on a candidate election.

JUSTICE SCALIA: Why did you say there were 7 percent of these that -- that are probably okay?

GENERAL CLEMENT: I'm not sure which figure Mr. Bopp is referring to as the 7 percent figure. I don't -- I don't remember conceding that 7 percent of the ads were okay.

And I think what we very clearly said -- and if you go back and look at our briefs, as I did, I think you'll see this. What we very clearly said -- and the Court picked up on it in that line on page 206

that Justice O'Connor read earlier -- is that whatever was true about a retrospective analysis of ads that were run in an election cycle that wasn't governed by the statute, that in the future corporations could avoid the -- the strictures of the statute by simply doing one of two things: either avoiding making an express reference to the candidate, which ought not to be too difficult if you're really just engaged in issue advocacy, not trying to influence a candidate election, or alternatively, you can fund it through the separate, segregated fund.

JUSTICE SCALIA: I -- I deny the first thing, that it's easy to do issue ads without naming the candidate. The -- the point of an issue ad is to put pressure on -- on the candidate that you want to vote your way. Without -- without telling people to call -- not the candidate -- the -- the incumbent that you want to vote your way -- without telling people to call the office of that incumbent, you're not doing very much.

GENERAL CLEMENT: Well, Justice Scalia, they didn't even do that in this ad, as has already been pointed out. And if they would have said find out what you can do to stop judicial filibusters, visit befair.org, and avoided a reference to Senator Feingold, they could have run this through their

general treasury funds. But they couldn't resist the temptation to mention Senator Feingold in this context --

JUSTICE O'CONNOR: Could they have said in the ad, call your elected representatives, not naming any names?

GENERAL CLEMENT: Yes, Justice O'Connor, they also could have done that.

And I think that the very fact that they couldn't resist the temptation to link the filibuster issue to Senator Feingold is not that surprising --

JUSTICE KENNEDY: General --

CHIEF JUSTICE ROBERTS: That may be because the people who were doing the filibuster were the Senators. It's not -- it's not a surprising thing to link the Senators to that issue.

GENERAL CLEMENT: Well, and again, Mr. Chief Justice, though, I mean, fair enough, but I think you also have to keep in mind that this is a context where this filibuster issue isn't some idiosyncratic interest of the appellant here. This is an issue that was identified as a campaign issue by the -- by -- by the candidates opposing Senator Feingold, by the Wisconsin Republican Party, and by appellant's own PAC. And to the extent you're trying to figure out whether this was

really designed to influence the pending legislative votes or the election, the timing of this ad strongly suggests it was designed to influence the election.

CHIEF JUSTICE ROBERTS: The fact that it mentions both -- the fact that it mentions both Senators strongly suggests to me that it's concerned about the issue because one of the Senators wasn't up for election.

GENERAL CLEMENT: Well, Mr. Chief Justice, that gets back to Justice Stevens' question as to whether or not these categories are mutually exclusive. I'm not here to tell you that appellants weren't genuinely issued about -- genuinely interested about the filibuster issue. I think they were also, as their political action committee press release shows, genuinely interested in sending Senator Feingold packing. And they had an opportunity to run this ad and effectively get a twofer by naming Senator Feingold. Now, they could have resisted that and only gotten the influence on the -- the filibuster issue, if they had taken the --

JUSTICE KENNEDY: And they -- and they could have -- they could have named Senator Kohl, I take it.

GENERAL CLEMENT: They -- they could have, Senator Kennedy.

JUSTICE KENNEDY: It's such an odd calculus. Who is the person more likely to be influenced with an issue ad? The person who's running or the person who's not going to run for 4 years? Obviously, the former.

GENERAL CLEMENT: Obviously --

JUSTICE KENNEDY: And that's -- and that's the one area where the ad is prohibited.

GENERAL CLEMENT: Obviously, you're right, Justice Kennedy, but obviously, there are concerns that are implicated when somebody is running in cycle and the ad has targeted the electorate in the immediate run-up to the election that aren't present there with Senator Kohl and, therefore, the Congress has -- has struck a different balance in that case.

But just to focus on the timing of these ads, they were run on day 4 of a 45-day August recess of the Senate. Now, that timing, if what you were trying to do, is to influence a pending legislative vote, is very, very odd timing. It could hardly be worse. If, on the other hand, you're trying to influence the upcoming election, the timing of that ad makes a great deal of sense.

CHIEF JUSTICE ROBERTS: Well, if you're trying to influence the Senators who are presumably or possibly in their home State during a recess, that's

perfect timing to influence the Senators who are the ones engaging in the filibuster --

GENERAL CLEMENT: I'm not sure I would --

CHIEF JUSTICE ROBERTS: -- without regard to whether they're running for election or not.

GENERAL CLEMENT: With respect, Mr. Chief Justice, I'm not sure I'd pick day 4 of the August recess to do that. Maybe 14 days before they're going back, something like that, would be an appropriate time to catch their attention in a -- in a period where they're going to remember it when they go and vote. But I think day 4 of a 45-day recess is probably not when I would pick to start running these ads.

I don't suggest, though, the timing factor or any other one factor ought to be dispositive. I think what it goes to show is how difficult it would be to try to get into a fact-intensive as-applied analysis of these various issues. And all of that presumably would have to be done in the context of TRO hearings and preliminary injunction hearings on the eve of elections.

CHIEF JUSTICE ROBERTS: I've lost track of it. Your -- your answer to Justice Breyer's hypothetical about Bread for the City and the hurricane and all that is that that would be an illegal ad?

GENERAL CLEMENT: Well, no, I think my answer to that would be that we'd still be here suggesting that that's controlled. I think my answer was also that that would be a far better as-applied challenge than the one that this Court has before it.

And I think, you know, in -- in one sense we make this point in the brief. I mean, contrasting this case with a case like MCFL I think is quite instructive. There, you're not focused on the content or intent of specific ads. You look at the organization as a whole and come up with fairly bright lines. And once you've made a determination about the organization in an as-applied challenge, you're done with the issue.

Here, the kind of --

JUSTICE KENNEDY: So you do -- you do an ideological history, an ideological pedigree of various speakers. You think that's consistent with the First Amendment? That -- that was the ACLU's suggestion which, it seems to me, shows you how far we've gone down this road.

GENERAL CLEMENT: Well, I mean, that may speak about where the ACLU is going. I don't think it speaks about where this Court is going because this Court hasn't adopted that test. The test that this Court

adopted in MCFL would -- did not get into that kind of inquiry. What it did is it focused on three relatively bright line factors about whether you accept corporate money, whether you have other sources of income from the corporation, and whether or not you were formed expressly for political views but without any sort of censorship or inquiry into what kind of political views. And that I think this Court has found administrable.

JUSTICE BREYER: But --

GENERAL CLEMENT: The FEC administer that. That's --

JUSTICE BREYER: That's what I want to know exactly. I didn't think -- I thought Congress considered this impossible question. I thought that 7 percent figure was from a study, in fact, dozens of studies, where these people who were experts, quote, decided that about 7 percent of the ads like this one distinguishing between really interested in issues or interested in issues but, in significant part, defeating the Senator. In the latter, of course, it's campaign and it's part of the regulation of campaign funds.

But they didn't think we could do it. They thought first they could do it, and then they told the

FEC to go and produce a set of regs that would, in fact, try to screen out that legitimate 7 percent. Am I wrong about how the statute was supposed to work?

GENERAL CLEMENT: No, you're not wrong, Justice Breyer. And I would say that the --

JUSTICE BREYER: Well, why haven't they done it?

And I had thought also that they were supposed to control 527's by having regs or individual cases that would decide whether there was a mix of personnel between the campaign and the 527, whether they talked to people and planned their strategy. Have there been those regs written?

GENERAL CLEMENT: Well, Justice Breyer, let me answer both questions.

As to the 527 issue, as I understand it, the commission has decided to proceed on case-by-case inquiries and has not tried to have a broad regulatory approach yet.

Now, on to the issue of electioneering communications, you're absolutely right that there is a statutory authorization to create exceptions. But the regulatory authority of the commission is limited, and it's limited in the sense that they can't approve an exception that would allow for ads that engage -- that

-- that fairly read, engage in promoting, attacking, supporting, or opposing a candidate.

And what the FEC has found in practice is that it's very difficult to create that kind of regulatory exception because, as this Court recognized in Buckley and in McConnell, one does not want to naively underestimate the creativity of corporate spenders or political consultants. And if you create a bright line and say, all right, if you do this, that's grassroots lobbying, that's not electioneering communication, they're going to be able to drive a truck through that kind of exception --

JUSTICE GINSBURG: General --

GENERAL CLEMENT: -- unless you're exceedingly careful.

JUSTICE GINSBURG: General Clement, if you could clarify for me some -- a response that Mr. Bopp gave. Did this ad run, was it broadcast or televised before the blackout period?

GENERAL CLEMENT: Well, Justice Ginsburg, as I understand the record, the first effort to broadcast this ad was on, I think, July 26th, and that was sort of a few days before the -- the cutoff period would kick in. So there was an effort by a matter of weeks to broadcast this ad. But I think, you know, whether

one views that as setting the stage for this litigation or being kind of an independent decision, I'll -- I'll leave to others.

What I think is important, though, is that although they were engaged on this issue before then, up until that point, they had found it perfectly satisfactory to engage on the issue without engaging in broadcast advertisement.

JUSTICE GINSBURG: May I ask you one other thing about the setting? When you went to the Web site to get further information, what was conveyed about Senator Feingold when you went to get that further information?

GENERAL CLEMENT: Well, Justice Ginsburg, I -- I don't have as good an answer for that as I would like because the -- the Web site is now defunct. And so maybe Mr. Bopp can answer that in rebuttal.

As I understand it, consistent with what Justice Breyer said, that there was sort of additional arguments about the Feingold record on -- on filibusters and Senator Kohl's record on filibusters, and then there was -- there was information about how to contact them.

But I think, again, as -- as Mr. Bopp has said, if -- if you don't find the broadcast medium a

particularly effective way to convey the phone numbers and you have to reference people to the Web site anyway, the very fact that you could reference them to the Web sites without naming the candidates' names and avoid the strictures entirely seems like the kind of thing that this Court had in mind when it said on page 206 that there were ways to deal with this problem prospectively and that you didn't need a as-applied challenge like this one.

And again, I think you can't overestimate the difficulties here because --

JUSTICE SCALIA: General Clement, you -- you've pointed out the difficulties, but I don't know any other area where we said, well, you know, the -- the -- when you're dealing with important -- important freedoms, important guarantees, where we shrug our shoulders and say, well, the only way to accomplish what the Government wants to do is to ride right -- right over those guarantees. I mean, we say, we -- we cannot bust up this -- this drug conspiracy unless we use warrantless searches. So, you know, whatever it takes. We don't -- we don't operate that way. And here, you're -- you're dealing with a very fundamental guarantee --

GENERAL CLEMENT: Justice Scalia --

JUSTICE SCALIA: -- the -- the right which I think applies to corporations, as well as to anybody else, and for individuals to associate with one another to bring to bear influence on the legislative process. That's a fundamental guarantee. And it doesn't satisfy me to say, well, there's no other way to stop people from criticizing incumbents during -- during the election blackout period. Maybe you can't do entirely what you want to do.

GENERAL CLEMENT: Well, I hope that's not the case, Justice Scalia. Let me give you two other First Amendment examples: the first admittedly involving intermediate scrutiny; the second, a strict scrutiny case.

The first thing I have in mind is the contribution limits themselves. This Court has fully admitted that it doesn't have a scalpel to probe the difference between $2,000, $1,000, $4,000 as a contribution limit. And it's perfectly willing to admit in its opinions that not every high-value donor is going to be involved in an effort at corruption. Yet, this Court approved the approach of the contribution limits, which are hard to understand as anything other than prophylactic limits. Now, that's an example from intermediate scrutiny.

Even in the strict scrutiny context, though, a case like Burson, I mean, this Court understood and said in the opinion, we can't tell whether 75 feet would be precisely okay or whether 90 feet or 100 feet. We don't have a scalpel to probe that either. But we're going to approve 100 feet because it's a basic way of dealing with this problem, identifying the area of potential concern, and people can do their electioneering 101 feet away. They can do it here on the 61st day. They can do it through the segregated fund. I think that is an approach that this Court has found acceptable, even in the First Amendment area, in dealing with these intractable problems.

And I think Buckley --

CHIEF JUSTICE ROBERTS: Both of those examples, of course, are quantities, and once you -- I think it was Holmes who said, once you admit the necessity of drawing a line, you know, you can always find something on one side or the other. It's quite different between $1,000 and $2,000 or 100 feet and 75 feet and advocacy with respect to an election and advocacy with respect to an issue. It's an entirely different quality of a distinction, it seems to me.

JUSTICE KENNEDY: And -- and the difference -- the difference is this is a content-based inquiry.

GENERAL CLEMENT: Well but, Justice Kennedy, precisely because you can't engage in just a formless content-based inquiry and precisely because there isn't any neat division between issue ads and candidate ads, that is why you need to have a different regulatory approach. I mean, this Court recognized --

JUSTICE STEVENS: I think the real bottom line for the -- your opponent is that even a pure election ad should get the same constitutional protection as an issue ad, which is something we've rejected.

GENERAL CLEMENT: Absolutely, Justice Stevens. And of course, an even position one step intermediary from that or one step backtracking from that would be to say that all Congress can do in this area is regulate those ads that are unambiguously election oriented. And, of course, what's the class of those ads? Well, that would be express advocacy.

And the one thing that I think is clear from this Court's decision in McConnell is this Court made clear that express advocacy is not a constitutional line. Congress is not disempowered to go after mixed ads that are -- yes, they have a component of issue ads, but you bet you they're intended to influence the election. Those ads are what are at issue here, and I

think in order to be able to regulate those in a way that makes sense, the key is to regulate in a way that's not vague, that's not overbroad, but is not so under-inclusive that it can be easily evaded.

And I think Buckley shows how hard that is. It's a tall order. In Buckley, this Court had a provision of FECA that prohibited independent expenditures related to a candidate election. The only way the Court could save that provision from the vagueness concern was to limit it to express advocacy. But having done that, the Court said, well, it's so limited, it's so easy to evade, we're going to find that it fails strict scrutiny.

In McConnell, this Court said that in BCRA, after careful study, Congress had actually found out a way to avoid those three pitfalls. All of the proposed alternatives of -- of appellants run headlong into one or more of those obstacles. Look at the tests they've proposed. They've proposed looking at 16 factors, 4 details. They disclaim any interest intent, but any of those tests I think would be vague and unworkable.

In contrast, they pluck a definition from the IRS regs that is designed to deal with 501(c)(3) corporations in a completely different context or a modification of a proposal by BCRA's sponsors, and they

-- and they put those tests out there. And those would be very, very easy to evade in practice.

In fact, I think if you use some of the tests that they propose or their amici proposed and you look at the body of ads that were before this Court in McConnell, you'd end up finding that a substantial percentage of them were grassroots lobbying.

Well, if one thing has to be inconsistent with this Court's decision in McConnell, it's the conclusion that a substantial amount of the ads covered by this definition are unconstitutionally regulated because this Court clearly rejected a substantial overbreadth claim.

The one thing I would say in -- in closing is to understand that Congress, having sort of voided these very difficult pitfalls of vagueness, overbreadth, and easy evasion, came up with this definition in title II. But as this Court recognized in McConnell, title II of the statute does not stand alone. It is part and parcel of the broader regulatory regime here. And without title II, title I's limitations on soft money contributions to parties will succeed only in taking that soft money and directing it to corporations that are closely aligned with candidates or with the parties themselves.

This statutory as-applied challenge that you have before it -- you strikes at the heart of the McConnell decision and at the heart of BCRA's title II. This Court should reject the invitation to revisit the McConnell decision and should give Congress' effort in this area a fair chance at success.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, General.

Mr. Bopp, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF JAMES BOPP, JR.

ON BEHALF OF THE PETITIONER

MR. BOPP: Thank you, Mr. Chief Justice.

What this -- what plaintiffs are relying upon here is the distinction that this Court has made between lobbying, on the one hand, and political campaigns on the other. As summarized by Justice Stevens' concurrence in Austin, quote, there is a vast difference between lobbying and debating public issues, on the one hand, and political campaigns for election to public office on the other hand. And that is because that the interests that have justified the regulation of corporate electioneering do not apply to corporate --

JUSTICE STEVENS: There is a vast difference, but the question I have is whether Congress has any

voice in trying to draw the line that divides the two categories.

MR. BOPP: I think they do, and they drew a line that was upheld on its face because the vast majority of ads --

JUSTICE STEVENS: And -- and if we are in a gray area that there's some who could say it's issue and some could say it's electioneering, do we owe any deference to Congress' test that it has drafted?

MR. BOPP: I -- I don't think you owe deference to the test. Under strict scrutiny, you owe the fidelity of the Constitution, and the Constitution includes the right to petition.

So it is a difficult question. It's fact-intensive, as all as-applied questions are.

JUSTICE SCALIA: So your position basically would say we should take all of these cases on a case-by-case basis and not give any presumptive weight to what -- what Congress has done.

MR. BOPP: No. I think that you can draw a rule that relies on objective criteria, just as you have in the Noerr-Pennington doctrine, to distinguish between illegitimate efforts to -- for predatory anticompetitive practices or monopolies, to distinguish between those and -- and -- the Court has even used the

phrase, genuine efforts to influence Congress with respect to -- or any governmental agency with respect to the adoption of laws.

That has been based on objective criteria as the Court has explained. You have adopted objective criteria to distinguish lawsuits that fall within the right to a petition or those that were brought illegitimately for anticompetitive reasons.

It's not that this is -- this exercise is an easy exercise, but it is demanded by the fact that the -- the Congress adopted a very broad statute. The only content in this electioneering communication provision -- the only content requirement is that you name the candidate. And the reality is that those candidates often are incumbents and they are engaged in law-making functions during these election periods.

I mean, there is a difference like in Britain. You know, Parliament is dissolved so that there -- there is a bright line distinction between an election and Parliament actually exercising governmental power. But when these things overlap and when the Constitution demands the recognition of the right to petition, then that needs to be dealt with in this as-applied challenge.

Now, there's a vast -- there's a huge number

of -- of lobby groups. They have made a conscious decision that it is more important to them to influence what Government does today than to influence in a speculative and remote manner who is going to be exercising that power next year through elections. Wisconsin Right to Life, in the face of these restrictions, have still decided that it's more important to lobby than it is to advocate the election or defeat of candidates and give money to candidates. The -- this is just the reality of our complex Government. It's the reality of the freedoms that individuals have to participate in that Government. It's not just about elections. It's more importantly about law-making and citizens have a robust right to participate in that law-making power, and as a result, this Court should recognize an as-applied exception for grassroots lobbying.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Bopp.

The case is submitted.

(Whereupon, at 11:10 a.m., the case in the above-entitled matter was submitted.)