United States District Court
District of Columbia

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

Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction

Wisconsin Right to Life, Inc. ("WRTL") moves for (1) a temporary restraining order and (2) a preliminary injunction concerning a proposed grassroots lobbying ad (the "CCPA Ad"), which would be a prohibited electioneering communication and which WRTL wishes to run beginning in September 2006. Fed. R. Civ. P. 65. In support of this motion, WRTL files contemporaneously its *Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction*. A draft order is provided. LCvR 7(c). Oral argument on this motion is requested. LcCvR 7(f).

As required by LCvR 65.1(a), the undersigned, James Bopp, Jr., certifies that late in the day on August 24, 2006, he sent an email to counsel of record for Defendant FEC and Intervenor-Defendants Sen. McCain et al. advising them (1) that WRTL wished to run the CCPA Ad (which was provided) beginning in September and (2) that WRTL planned to file the present motion on August 25, 2006. In addition, these counsel were provided courtesy digital copies of

the motion and accompanying documents before the filing of this motion and they will receive automatic notification of available copies as filed through the electronic filing system of this Court in this ongoing case.

Pursuant to LCvR 7(m), Mr. Bopp has also conferred by phone with opposing counsel of record on August 25th as to whether they object to this motion, which they do. As to scheduling, the parties have agreed that Defendants' opposition memorandum will be due on Thursday, August 31, at 4 p.m., unless the Court sets a hearing on the TRO earlier than Friday, September 1, in which case the opposition memorandum will be due at noon on the day before the hearing.

Respectfully submitted,

/s/ James Bopp, Jr.

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Memorandum in Support of WRTL's Motion for Temporary Restraining Order and Preliminary Injunction

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August 25, 2006

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Introduction

Wisconsin Right to Life, Inc. ("WRTL") has moved for a temporary restraining order and a preliminary injunction concerning an advertisement (the "CCPA Ad") that it plans to broadcast by radio beginning in September 2006 if WRTL is granted the requested injunctive relief. This memorandum is submitted in support of both motions.

The CCPA Ad is a grassroots lobbying communication about an imminently pending matter that has suddenly arisen in the U.S. Senate. The CCPA Ad asks Wisconsin constituents to contact their representatives, Senators Kohl and Feingold, to ask them to support final approval of the Child Custody Protection Act ("CCPA"). Because Sen. Kohl is a candidate and because of the proximity to the September 12 primary election and the November 7 general election, the CCPA Ad will be an electioneering communication and WRTL will be prohibited from paying for it with general treasury funds. WRTL should be afforded injunctive relief, as requested, to permit the broadcasts.

Because WRTL has already extensively briefed aspects of this case in its summary judgment briefing (beginning with Document #76-1), WRTL will here incorporate by reference that prior briefing (generally and as set out specifically below) in order to avoid burdening the Court with unnecessary repetition. Instead, WRTL will focus on the unique facts surrounding the CCPA Ad and the reasons why injunctive relief should be granted.

Facts

As to general facts about WRTL, the FEC, and prior matters in this case, WRTL incorporates by reference the statement of the Case & Facts in its summary judgment memoranda (Document #76-1 at 9-25; Document #87 at 5-22) along with the accompanying Plaintiff's

Statements of Undisputed Material Facts (Document #76-1 at 63-115; Document 88). Proposed Findings of Fact will be submitted on September 1, which should also be considered with the present motions.

As to specific facts about the present need for WRTL to engage in grassroots lobbying concerning the Child Custody Protection Act ("CCPA), WRTL incorporates by reference the accompanying Third Affidavit of Barbara L. Lyons ("3rd Aff."). Some key facts from her affidavit are set out here.

On August 14, 2006, just days ago, WRTL received an email (the "Action Request") from the National Right to Life Committee, Inc. ("NRLC") calling for grassroots lobbying of the Senate concerning the CCPA, which was passed in July by a vote of 65-34. 3rd Aff., Exh. B. The House passed a companion bill by a substantial margin, but there are differences that normally would be resolved by a conference committee. However, the Democratic leadership has objected to the appointment of a conference committee, and there is a danger that the bill (which is the culmination of an enormous amount of work and the political opportunity for which may never rise again) will die before the election unless sixty senators vote to give final approval to the bill and bypass the current roadblock. A vote is projected for around September 11 or shortly thereafter. There is concern that the necessary sixty votes will not be available without grassroots lobbying pressure on the Senators.

WRTL has already been involved in a grassroots lobbying campaign concerning passage of the CCPA and the subject of the Action Request, i.e., the sudden appearance of an unforseen effort to "run out the clock" on finalizing the CCPA. Attached as Exhibit C to the Third Lyons Affidavit are true and accurate copies of materials that WRTL has published in support of the

Act's passage and the need now to finalize the process. WRTL intends to continue publishing materially-similar, nonbroadcast communications about the imminent vote on the CCPA.

WRTL did not believe that it was necessary to run radio ads before because the CCPA and the companion House bill were very popular, enjoyed overwhelming support, and seemed certain of passage. While WRTL did do grassroots lobbying by nonbroadcast means, WRTL has limited funds and must invest them where it is most advantageous at any given time. WRTL did not believe that spending money on the more effective, albeit more expensive, broadcast ads was warranted at that time. WRTL now believes that it is vital to engage in grassroots lobbying concerning the CCPA by radio given (a) the short time available, (b) the need to reach as many people as possible, (c) the need for a very effective communication medium, (d) the vital importance of this unique opportunity, and (e) the projected closeness of the vote.

However, Senator Kohl is now a candidate (although Sen. Feingold is not, as he was in 2004 when WRTL also asked for injunctive relief as to anti-judicial filibuster ads) and the ads will need to be run during the electioneering communication prohibition period. This is just the sort of grassroots lobbying need that WRTL has said in prior briefing often crops up on short notice, and often during periods just before elections, and would likely require WRTL to engage in grassroots lobbying again during an electioneering communication prohibition period with ads materially similar to its anti-judicial filibuster ads.

WRTL has prepared the CCPA Ad, which it plans to broadcast with general treasury funds[1]

[1]In the alternative, if necessary to obtain injunctive relief, WRTL will both raise funds into and pay for broadcasting the CCPA Ad from "a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence directly to this account for electioneering communications," as described in Count 2 of WRTL's Amended Verified Complaint. Document #30 at 12-13. 3rd Aff. ¶ 24.

if it obtains the requested injunctive relief. *See* 3rd Aff., Exh D. The text of the CCPA Ad is as follows:

Child Custody Protection Act Ad: 60 Seconds

> Listen up, parents. Wisconsin requires parental consent before your minor daughter can have an abortion. But, she can be taken to Illinois for an abortion that is kept secret from you. Imagine, your daughter can be taken across state lines for a major surgical procedure without your knowledge or consent.
>
> The U.S. Senate recently passed a bill to protect parents from secret abortions. Fortunately, Senator Kohl voted for the rights of parents. But, sadly, Senator Feingold did not.
>
> Your help is urgently needed because some Senators are holding up further action on the bill.
>
> Please call Senators Kohl and Feingold at 202-224-3121 and urge them to stop efforts by the Senate Democratic leadership to hold up a bill which will prevent secret abortions. That's 202-224-3121.
>
> Paid for by Wisconsin Right to Life, which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

The ad is genuine grassroots lobbying because it identifies a pending legislative matter and encourages constituents to contact their representatives and ask them for specific action on the matter. It provides contact information, and it includes a disclaimer providing the required disclosure for electioneering communications.

As to tone, the Ad does not single out Sen. Kohl, but treats him the same as Sen. Feingold, in a senatorial capacity and not as a candidate. The Ad faithfully recites the Senator's legislative acts, stating that Sen. Kohl voted for the CCPA and Sen. Feingold voted against it. It expresses WRTL's viewpoint on the issue with the use of "[f]ortunately" and "sadly" as well as urging support for the CCPA. It does not say anything about the Sen. Kohl as a candidate, and specifically does not say anything about his character or fitness for office or anything about the pending election.

WRTL has in the past opposed Senator Kohl in various communications. However, WRTL has not endorsed Senator Kohl's present opponent in the current Senate primary election campaign. Senator Kohl is running effectively unopposed in the coming primary vote because his opponent has gained insufficient public support to be of any real threat to Sen. Kohl. Senator Kohl has a Republican opponent in the coming November election for Senate, but WRTL-PAC has not endorsed him and has no plans to do so.

WRTL does not intend to affect the election of Senator Kohl by broadcasting the CCPA Ad, only to affect his and Senator Feingold's actions concerning taking final action on the CCPA. WRTL believes that the CCPA Ad will have no effect on the election of Senator Kohl.

WRTL does not believe that anyone has made the CCPA itself nor present Democratic leadership efforts to block a conference committee to finalize the legislation a campaign issue for Senator Kohl or any opponent of his in the coming primary and general elections. Senator Kohl has not been criticized by WRTL in any way concerning the CCPA, rather WRTL has praised him for his vote in favor of CCPA. Nor has WRTL accused him of, or criticized him for, any possible involvement in Democratic leadership efforts to block a conference committee to finalize the legislation.

WRTL-PAC does not have sufficient money to run the ads. WRTL focused its 2006 fundraising on raising the general treasury funds that are required to carry on the organization. WRTL has found PAC fundraising difficult in any event. But more importantly, WRTL objects to being compelled to misrepresent its CCPA Ad as being about elections, which it is not. WRTL has no position on the present reelection campaign of Senator Kohl, and complying with PAC disclosure requirements would compel WRTL to speak in ways that are both inconsistent with

this position and untrue. First, running the CCPA Ad with PAC funds would require a disclaimer declaring that this communication is "political" (i.e., having to do with elections) because it was made by a political committee, when in reality the CCPA Ad has nothing to do with elections. Second, using PAC funds would compel WRTL to file a PAC report stating that the expenditure for the CCPA Ad was either for or against the reelection of Sen. Kohl, when in truth it is neither.

Naming the Senators in the CCPA Ad is especially imperative here because Sen. Kohl voted for the CCPA and Sen. Feingold voted against it, so constituents need to know that context in order to communicate effectively with their representatives on this issue.

Standards

The standard for a temporary restraining order is as follows:

> The Court must consider four factors in an application for a temporary restraining order: (1) whether there is a substantial likelihood that the plaintiff will prevail on the merits; (2) whether the plaintiff will suffer irreparable injury if the temporary restraining order does not issue; (3) the hardship to the defendants if the temporary restraining order is granted is balanced against the hardship to the plaintiff if the temporary restraining order is not granted; and (4) whether the public interest favors granting the preliminary relief requested.

Boehringer Ingelheim Corporation v. Shalala, 993 F. Supp. 1 (D.D.C. 1997). *See also Isong v. Apex Petroleum Corp.*, 273 F. Supp. 2d 1 (D.D.C. 2002) (same). The standard for preliminary injunction contains the same four elements. *See Serono Lab. v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998).

Argument

The federal rules provide for temporary restraining order and preliminary injunctions for a good reason, which is not always to preserve the status quo. Fed. R. Civ. P. 65. Preliminary injunctions are often essential to protect legal rights. Where there is a dispute over ownership of

an historic building that is about to be demolished, a preliminary injunction is vital to preserve the status quo until ownership can be established. If the ultimately proven owner wanted the building preserved, her legal victory would be hollow if during litigation the building was demolished.

Where a law abridging First Amendment rights of free expression and petition is involved, there is also a valuable thing that can be destroyed during litigation, namely a timely moment to speak and petition. Where citizens participate in self-government by petitioning their representatives on imminent legislative or executive branch matters, the time before the pending action is crucial. If the people's rights are abridged at that crucial time, the opportunity is forever lost. The preliminary injunction decision effectively decides the whole case. In such situations, preliminary injunctions cannot merely preserve the status quo (understood here to mean that the law is given effect) because doing so would render the constitutional guarantees a nullity. Rather, preliminary injunctions must be available to protect the prior status quo, i.e., the situation before the law was enacted and only the First Amendment was in effect ("Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to . . . petition the Government . . . .").

Preliminary injunctions have been used in election law cases to preserve the people's rights. For example, in *Faucher v. FEC*, 743. F. Supp. 64 (D. Me. 1990), *aff'd,* 928 F.2d 468 (1st Cir. 1991), *cert. denied*, 502 U.S. 820 (1991), the district court set a hearing on the motion for preliminary injunction, and at that time consolidated the preliminary injunction hearing with the hearing on the merits, deciding that the FEC's regulations that restricted Maine Right to Life's ability to publish voter guides were unconstitutional. And *McConnell v. FEC*, 540 U.S. 93

(2003), did not preclude preliminary injunctions by eliminating irreparable harm (because the PAC option is always available as are use of alternative media etc.) for the same reasons that the same alternative options did not preclude as-applied challenges, which argument the Supreme Court unanimously rejected in *Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (2006) ("*WRTL*").

I. Success on the Merits

In Parts I-IV of its WRTL's opening summary judgment brief (Docket #76-1 at 25-61), incorporated herein by reference, WRTL argued that (I) the Constitution specifically protects genuine grassroots lobbying in the First Amendment right to petition; (II) grassroots lobbying is not the functional equivalent of express advocacy, but rather is one of the "genuine issue ads" recognized as a term of art by experts and both the district court and Supreme Court; (III) WRTL's are not electioneering; and (IV) other options are inadequate. That material need not be repeated, but it is applicable here. WRTL also incorporates its summary judgment memorandum in opposition and reply (Document #87), which answers Defendants arguments that will be raised again here.

For present, it is important to note what the facts concerning the present need for grassroots lobbying and the CCPA Ad bring to the analysis of this case. The Intervenors have attempted to eliminate the exception to the mootness doctrine for matters capable of repetition yet evading review by (a) ignoring the proper focus on the likelihood of a similar situation repeating and (b) trying to fracture the exception into past acts that they claim are moot and projected future acts that they claim are not ripe. While the Intervenors' novel analysis is flawed on its face for its improper focus and for effectively eliminating the widely-recognized exception, the present

situation readily reveals that the situation is in fact capable of repetition, so that the usual exception must be recognized and applied in this case. The present situation and the materially-similar ad (to the anti-judicial filibuster ads) that WRTL wants to run are precisely what WRTL predicted in its Amended Verified Complaint (¶ 16) would recur.

Defendants have relied on the argument that WRTL's anti-judicial filibuster ads the sort of sham ads that were really the approved target of *McConnell* because they were not really about the filibusters but were a veiled effort to negatively affect Sen. Feingold's reelection possibilities. WRTL has explained in a variety of ways how this is erroneous in its summary judgment briefing, which need not be repeated and is incorporated herein by reference. But the present situation and the CCPA demonstrate that Defendants efforts were wide of the mark. Just as in the anti-filibuster ads, the true target of WRTL's CCPA Ad is the legislation, not the legislator, and clearly not the candidate.

In the prior and the present situations, there was imminent legislation action and WRTL encouraged constituents to contact their two Senators and ask them to vote in a certain way. In both situations, WRTL had in the past issued communications opposing the Senator who happened to be a candidate. In the present situation, WRTL has also issued communications praising Sen. Kohl because he voted the way that WRTL preferred on the CCPA. In the CCPA Ad itself, WRTL notes that Kohl voted in the way that WRTL preferred (while Feingold did not). So there is no question here that the CCPA Ad is some veiled effort to defeat Sen. Kohl's election by attacking him (as a candidate or as a legislator). On the other hand, neither does the Ad promote Kohl in any way in his role as a candidate. This is not surprising because the Ad is about Kohl's votes in Congress, not the election. The Ad is clearly not about Sen. Kohl as a

candidate, but it is about him as a legislator. The same was true of the anti-judicial filibuster ads, but it just so happened that then-candidate Feingold had voted in favor of filibusters.

In the present case, no one has made either the CCPA or the efforts of Democratic leaders to block final approval of it a campaign issue in Sen. Kohl's campaign. The filibusters were a campaign issue. But neither that situation nor the present one was under the control of WRTL, and its First Amendment rights should not be held hostage because some candidate or other person also thinks any issue is of sufficient importance to warrant debate in the marketplace of ideas. Again this demonstrates that the ads are about legislation, not legislators. Defendants' reliance on such mere coincidences is not the stuff of strict scrutiny proof under the First Amendment.

The facts of this present situation go to the very core of Defendants' theory of the case and show it to be fatally flawed. WRTL has a likelihood of success on the merits.

II. Irreparable Harm

Clearly WRTL has a unique opportunity to exercise its First Amendment rights of expression, association, and petition in a time window that will slam shut if WRTL does not receive the requested injunctive relief. The United States Supreme Court has held that deprivation of First Amendment rights, even for a brief period, constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Self-censorship "[i]s a harm that can be realized even without actual prosecution." *Virginia v. American Bookseller's Ass'n Inc.*, 484 U.S. 383, 393 (1988). "Here, plaintiff has sufficiently proven a chilling effect upon its First Amendment rights. This constitutes irreparable harm. *Elam Construction, Inc. v.*

Regional Transportation District, 129 F.3d 1343, 1347 (10th Cir. 1997)." *Kansans for Life v. Gaede*, 38 F. Supp. 2d 928, 938 (D. Kan. 1999). While merely alleging a violation of First Amendment rights, without more, does not satisfy the irreparable injury prong of the preliminary injunction framework, here, it is undisputed that 2 U.S.C. § 434(f)(3)(A)(i) made continued running of grassroots lobbying ads subject to criminal penalty. See *Chaplaincy of Full Gospel Churches v. England*, 2006 U.S. App. LEXIS 16952 at * 26-2 7 (D.C. Cir. 2006) ("movants must show that their 'First Amendment interests are either threatened or in fact being impaired at the time relief is sought'") (citations omitted).

McConnell, 540 U.S. 93, did not alter this, merely holding that the PAC alternative was adequate as to "express advocacy." 540 U.S. at 203. The CCPA Ad is plainly not express advocacy nor its functional equivalent, so the PAC alternative has not been held to be an adequate accommodation of WRTL's First Amendment rights. Rather, under *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658 (1990), the government must justify under compelling scrutiny the imposition of the PAC alternative. Because Defendants cannot prove that the CCPA Ad is the functional equivalent of express advocacy, 540 U.S. at 206, the justification for regulating the sham issue ads at issue in *McConnell* is inapplicable and there is irreparable harm if WRTL is denied injunctive relief and loses forever this unique opportunity for grassroots lobbying on an issue of vital importance to WRTL's core interests.

III. Balance of Harms

The balance of harms favors WRTL, which stands to lose a unique opportunity having an important bearing on legislation that the pro-life movement has worked long and hard to achieve. The Defendants will trot out their familiar argument that the FEC will be harmed by being denied

the opportunity to enforce a law passed by Congress, and they will argue that there is a presumption of constitutionality.

As to the presumption, the mandatory strict scrutiny analysis itself is a presumption against the constitutionality of any law, such as the electioneering prohibition, that regulates the content of speech. A presumption that an act of Congress is constitutional has no place where First Amendment rights are abridged. *American Library Ass'n v. Reno*, 308 U.S. App. D.C. 233 (D.C. Cir. 1994) ("'Content-based regulations are presumptively invalid.'" (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992))). Strict scrutiny is the antithesis of a presumption of constitutionality. And the Supreme Court's speedy and unanimous reversal of this Court's unanimous holding in *WRTL*, 126 S. Ct. 1016, that *McConnell* precluded as-applied challenges (based on the same sort of arguments that Defendants continue to urge now) necessarily precludes a presumption that the electioneering communication prohibition is constitutional as applied to genuine grassroots lobbying. *WRTL* removed that presumption, if one existed in the First Amendment context, and replaced it with at best an open question as to the constitutionality of the prohibition. In fact, the Supreme Court stated in *McConnell* that it "assume[d]" that the interests upholding the electioneering communication prohibition "might not apply to genuine issue ads." 540 U.S. at 206 n.88. As WRTL has demonstrated in prior briefing (*see* Document #76-1 at 36-41), genuine issue ads were a term of art that included genuine grassroots lobbying. So if there is any presumption to apply here, it is against the constitutionality of the prohibition as applied to the CCPA Ad.

The FEC can have no weighty interest in enforcing a law in a situation in which the Supreme Court assumed that it might not be constitutionally supportable. And if the FEC's interest in

enforcing the law always precluded preliminary injunctions, there would never be any preliminary injunctions against the FEC. But that cannot be the law, and it is not for there have been preliminary injunctions against FEC enforcement. *See Faucher* 743. F. Supp. 64.

IV. Public Interest

Defendants will doubtless argue that there is a strong public interest in enforcing a presumedly valid law. But as just show, that presumption proves to be weightless in the balance pan. The people have a powerful interest in liberty and self-government, particularly as protected by the First Amendment guarantees of free expression, association, and petition, which are at issue when citizen groups are silenced at the most crucial legislative times without powerful constitutional warrant proven under strict scrutiny. And as noted in the preceding discussion, if the mere enactment of a law precludes preliminary injunctions as to its constitutionality, then preliminary injunctions should be removed from the rule book. They cannot occur. But of course, that is not the law. They do occur, even against the FEC, and for good reason. *Faucher*, 743. F. Supp. 64.

Conclusion

For the reasons stated, this Court should enter a temporary restraining order to prevent the FEC from enforcing the electioneering communication prohibition as applied to broadcasting the CCPA Ad prior to the November 7, 2006, general election and should then enter a preliminary injunction to the same effect.

Respectfully submitted,

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