UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WISCONSIN RIGHT TO LIFE, INC.,	)	
	)	
Plaintiff,	)	No. 1:04cv01260 (DBS, RWR, RJL)
	)	(Three-Judge Court)
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	MEMORANDUM
	)	
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS RULE 16 PROPOSAL FOR DISCOVERY AND SUMMARY JUDGMENT BRIEFING

I. INTRODUCTION

The Supreme Court has remanded this case so that this Court can "consider the merits of WRTL's as-applied challenge in the first instance," Wisconsin Right to Life, Inc. v. FEC, 546 U.S. ___, No. 04-1581, 2006 WL 152676, at *1 (Jan. 23, 2006) (per curiam). The Court should adopt an expedited schedule that will permit the parties to develop a full factual record and to submit thorough briefing of the law as applied to that record. The Commission seeks to supplement the sparse, existing record with the kind of evidence that the Supreme Court relied upon in McConnell v. FEC, 540 U.S. 93 (2003), but on a much more limited scale involving only one organization and a single ad campaign. This Court also found this kind of evidence relevant when it previewed the merits, examined the purpose and effect of these ads, and denied Wisconsin Right to Life's ("WRTL") request for a preliminary injunction.

WRTL bears the burden of demonstrating why the regulation of electioneering communications in the Bipartisan Campaign Reform Act ("BCRA") is unconstitutional as applied to specific advertisements it planned to run before the 2004 election. As explained

below, that determination may turn on the purpose and effect of those ads, an inquiry that necessarily looks beyond the four corners of the advertisements' texts. Moreover, because the Court in McConnell upheld the electioneering communication provisions in part because they leave corporations and unions free to "finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or … by paying for the ad from a segregated fund," 540 U.S. at 206, WRTL also bears the burden of demonstrating why those options are unconstitutional as applied to its ad campaign. Although WRTL has submitted an affidavit addressing its alleged fundraising burdens, the Commission has had no opportunity to test those factual assertions.

The fundamental flaw in WRTL's argument is that it conflates the relevant evidence in this case with what might be an appropriate test, if any, for defining "grassroots lobbying." See WRTL Reply in Support of Motion to Reinstate ("WRTL Reply"), filed Feb. 14, 2006, at 4. The issue before this Court is whether WRTL's ads are entitled to a constitutional exemption; the Supreme Court did not instruct this Court to develop a test for a constitutional exemption, but only to consider in the first instance whether there is any merit to WRTL's as-applied challenge. While the parties may agree that a test for grassroots lobbying, if any, should be easily administrable, there is no reason why the evidence relevant to whether such a test is necessary or what it would comprise should be limited to WRTL's view of what the test criteria should be. As in McConnell, when both the district court and Supreme Court reviewed a wide array of evidence to evaluate the bright-line definition of electioneering communication, WRTL's challenge cannot be reviewed properly without a fully developed record.

II. THE COMMISSION IS ENTITLED TO DISCOVER THE SAME KIND OF EVIDENCE RELIED UPON IN McCONNELL AND IN THIS COURT'S DECISION DENYING A PRELIMINARY INJUNCTION

By remanding this case for this Court to consider the merits of WRTL's as-applied challenge "in the first instance," the Supreme Court made it clear that a more developed factual record was expected. If the texts of the ads were the only facts that mattered, the Court would have had no reason to remand the case; that text was already before the Court. It is critical that both this Court and the Supreme Court have a factual record that will allow a final resolution of this case. See FEC v. Colorado Republican Fed. Campaign Comm., 96 F.3d 471, 473 (10th Cir. 1996) ("It seems inevitable that not only this court but the Supreme Court itself will have to address these issues. We will both benefit by the parties fleshing out the record with any evidence they and the district court deem relevant...").

A. This Court and the Supreme Court Have Previously Found Relevant the Kind of Evidence the Commission Seeks to Discover

In McConnell, when the Court upheld the constitutionality of BCRA's bright-line definition of "electioneering communication," it concluded that the definition was not overbroad after examining far more than the text of various past advertisements. It examined the purpose and effect of those advertisements by relying upon contextual factors such as the timing of the ads' broadcast: "the conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a

federal election." 540 U.S. at 127.[1] The electoral nature of such activity cannot be analyzed in a vacuum. As experienced political consultants testifying before the district court in McConnell explained, the public views pre-election communications as part of a larger "Cajun stew" of information, and the purpose and effect of an election ad cannot be determined without knowledge of the context in which it was run. See, e.g., McConnell v. FEC, 251 F.Supp.2d 176, 875, 882 (D.D.C. 2003) (Leon, J.).

This Court itself plainly recognized the need for contextual evidence in evaluating whether WRTL's ads are election-related when it denied a preliminary injunction in August 2004. In its findings of fact, the Court found that candidates opposing Senator Russell Feingold had "made [his] support of Senate filibusters against judicial nominees a campaign issue" as early as September 2003, that WRTL's PAC had endorsed three opponents of Senator Feingold in March 2004 and announced that defeating Sen. Feingold was "a priority," and that WRTL had "criticized Senator Feingold's record" on the filibusters in a July 2004 news release. WRTL, District Court Memorandum Opinion, No. 04-1260 (D.D.C.), Aug. 17, 2004, Findings of Fact 5, 7, 8, 9, slip op. at 2. In addition, in support of its conclusion that the "facts suggest that WRTL's advertisements may fit the very type of activity McConnell found Congress had a compelling interest in regulating," this Court found that WRTL and its PAC had "used a variety of non-broadcast communications to convey its criticism" of the filibusters "in the months leading up to

[1] See also id. at 128 ("the ads were attractive to organizations and candidates precisely because they were beyond FECA's reach, enabling candidates and their parties to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out of money"); at 193 ("And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election"); at 193 n.78 ("The notion that this advertisement was designed purely to discuss the issue of family values strains credulity"); at 206 ("The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect….").

August 2004," but had only switched to broadcast as the election campaign period approached. Id., slip op. at 6. Thus, the Court relied on a variety of evidence as to the general context of the 2004 election, the options available to and used by WRTL to disseminate its advocacy, the interrelationship between the messages of WRTL and its PAC, as well as other parties' advocacy that made the filibuster controversy a campaign issue.

The district court opinions cited by the Supreme Court in McConnell in upholding BCRA § 203 are also replete with examples of the kind of contextual evidence the Commission seeks to develop here. In particular, the district court judges cited a wealth of evidence as to the purpose and effect of the pre-election broadcast advertisements under review. See, e.g., 251 F.Supp.2d at 539-52, 610-13 (Kollar-Kotelly, J.) (evidence from organization officials, their media consultants and pollsters, outside experts, candidates, political opponents, and elsewhere shows that "issue ad" campaigns of the AFL-CIO, the Coalition, Citizens for Better Medicare, the National Rifle Association, and Club for Growth were intended to affect federal elections); at 567-68 (Kollar-Kotelly, J.) (evidence from political consultants shows that the real purpose of an ad cannot be determined without looking at the context; for example, an ad run in the 1998 North Carolina Senate campaign about fighting trial lawyers' efforts to expand health care liability may have seemed like an "issue ad" to an outside observer who did not know that one candidate's status as a trial lawyer was an important campaign issue); at 878-79 (Leon, J.) (quoting the statement of a former chair of a major advocacy organization who explained that her organization "really hoped people would vote for" a Congressman, not just "thank him," even though its ads only expressly asked viewers to do the latter); at 885-87 (Leon, J.) (evidence from organization officials, pollsters and consultants shows that influencing federal elections was a "consideration" in "issue ad" campaigns by both the AFL-CIO and the Chamber of Commerce); at 889-90 (Leon, J.)

(evidence that some groups run ads about issues outside their organizational focus, such as an EMILY's List's ad about guns, reveals that the ads are intended to affect election results). Indeed, WRTL itself quotes material from Judge Leon's McConnell opinion as to the advertising intent and tactics of officials from the AFL-CIO and the National Association of Manufacturers to support WRTL's current arguments about the alleged need to identify federal candidates in running "lobbying" ads whose ostensible purpose is only to affect legislation. See WRTL Reply at 14 n.7. WRTL cannot have it both ways: if such evidence is relevant to show that an ad is truly a lobbying ad, similar evidence is equally relevant to show that an ad is election-related.

Moreover, McConnell also held that the electioneering communication provision is constitutional because corporations like WRTL have the option under BCRA of "avoiding any specific reference to federal candidates" or "paying for the ad from a segregated fund." 540 U.S. at 206. Thus, WRTL's as-applied challenge cannot succeed without demonstrating that these options are unconstitutional as applied to its advertisements, and the Commission has the right to discover evidence about the burdens, if any, that these options would place on WRTL.

Although at the preliminary injunction stage the Commission was able to find some publicly available evidence as to the electoral nature of WRTL's advertisements, the Commission is entitled to develop the record more fully now that the Supreme Court has clarified its holding in McConnell and remanded the case for a factual examination of WRTL's particular as-applied challenge. As explained in our Opposition to Plaintiff's Motion to Reinstate, filed Feb. 7, 2006, at 3-4, the Commission seeks limited discovery covering a narrow range of topics concerning WRTL and its 2004 advertisements: the purpose and effect of those advertisements; WRTL's decisions about where, when, and how to run them; WRTL's historic use of broadcast and other media for its public communications; the relationship between matters

raised in WRTL's ads and Senator Feingold's candidacy for reelection, in particular the role of the judicial filibuster issue; and WRTL's history of opposition to Senator Feingold. We anticipate that the sources of this evidence may include, for example, WRTL, WRTL's PAC, and WRTL's political and media consultants. In addition, the Commission anticipates that it may rely upon expert testimony as to the likely impact of WRTL's ads in the 2004 Wisconsin pre-election environment, WRTL's alleged need to identify office holders in its grassroots lobbying advertisements, and the effect that a grassroots lobbying exemption like the one WRTL now seeks would likely have in future electoral contests, including whether it would enable political consultants to craft electioneering ads that would circumvent regulation during the "electioneering communication" periods of BCRA § 203.[2]

Finally, in light of the two options identified in McConnell, 540 U.S. at 206, for corporations like WRTL, the Commission seeks to discover further information about the burden of using alternative advertising text that would fall outside the definition of "electioneering communication," as well as the finances and fundraising of WRTL and its PAC, including WRTL's attempts, if any, to raise funds for its PAC to pay for its advertisements. Indeed, on this latter point, WRTL itself placed this issue before the Court as factually relevant when it submitted an affidavit from Barbara Lyons, whose testimony focused primarily on the alleged

[2] In upholding BCRA § 203, the Supreme Court found that the definition of "electioneering communication" is not substantially overbroad. Although the Court recognized that some "genuine issue ads" would be covered by the definition, it found that in the past the "vast majority of ads" that clearly identified a candidate and aired during the "brief preelection time spans" "clearly had" an "electioneering purpose." 540 U.S. at 206. This finding necessarily means that, even if some exemption for grassroots lobbying were constitutionally required, it cannot be so broad as to deregulate a substantial amount of the communications that fall within the definition; otherwise, such an exemption would swallow up the definition and be inconsistent with McConnell's holding that the definition is facially valid precisely because it is not substantially overbroad. Expert testimony may be useful in explaining whether certain criteria for exempting grassroots lobbying would likely have that kind of impermissible effect and thus be precluded by the holding in McConnell.

burdens of raising money for a PAC. The Commission has had no opportunity to explore her conclusory assertions through discovery.[3]

B. The Commission Is Entitled to Seek Evidence That Is Relevant to Its View of the Legal Issues in This Case

At this juncture, the Commission is merely seeking to proceed with normal discovery: to gather the facts that it believes are relevant to support its legal theories. By seeking access to such facts, the Commission is not arguing that an exemption for grassroots lobbying — even if the Court should find that any such exemption is constitutionally required — should be framed in terms of a corporation's subjective intent. To the contrary, there is a fundamental difference between a test or standard for defining grassroots lobbying (or other speech) and the evidence or rationale relevant to support or oppose any such standard. For example, in McConnell, the courts reviewed BCRA's objective, bright-line definition of "electioneering communication" by relying upon evidence that was multi-faceted and complex. That evidence went far beyond the text of the ads and included evidence about advertisements' context, purpose, and effect. In any event, the task for this Court on remand is not to formulate a general, quasi-legislative exemption for "grass roots lobbying," as plaintiff claims, see WRTL Reply at 20. Rather, the task is, inter alia, to use all relevant evidence to evaluate whether WRTL's specific conduct falls within "'the very type of activity McConnell found Congress had a compelling interest in regulating.'"

---

[3] During the parties' negotiations pursuant to Rule 16, WRTL appeared to agree that a limited subset of these topics were proper subjects for discovery, and offered to stipulate to some facts, although the Commission never received a full list of those facts. See Joint Report of the Parties Pursuant to LCvR 16.3(d) at ¶2. Because the limited discovery WRTL appears to envision would not provide a full factual record sufficient to bring this case to a final resolution, the parties were unable to agree on the scope of appropriate discovery. Moreover, although the Commission agrees that factual stipulations on some issues may help to streamline discovery, it cannot agree in advance to forego critical discovery simply on the basis that WRTL has made general assurances that it will later provide some stipulations and relevant information.

WRTL, 2006 WL 152676, at *1 (quoting District Court Mem. Op., slip op. at 6), and to determine whether WRTL can meet its burden of demonstrating that the options identified in McConnell, 540 U.S. at 206, are constitutionally insufficient for its advocacy. In presenting the government's side of this case, the Commission has a right to gather evidence that supports its own view of the case, without being circumscribed by plaintiff's narrow vision of what is relevant.

WRTL's extensive complaint (see WRTL Reply at 4-18) about the supposedly "subjective" nature of this evidence, and the alleged burden of producing it, is a straw man.[4] As explained supra pp. 3-6 & n.1, the Supreme Court in McConnell repeatedly referred to the "intent" of the ads at issue, and the McConnell district court specifically relied upon evidence of what various groups running pre-election broadcast advertisements were actually trying to achieve. Most of this evidence, however, provided objective indications of such intent. Although the Commission is not proposing that subjective intent be part of a test, if any, for defining grassroots lobbying, evidence of the actual motivations and objectives of WRTL in crafting its ads may well be relevant in determining whether applying the statute to its ad campaign serves the compelling interests the McConnell Court found to justify the statute.

[4] WRTL's reliance on the Noerr-Pennington doctrine (Reply at 4, 7-8, 12) and libel law (id. at 11-12) is also misplaced, because both areas of law allow for some inquiry into subjective intent. The Noerr-Pennington case on which plaintiff chiefly relies, Professional Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49, 60-61 (1993), lays out a two-part test for determining whether litigation is anticompetitive: "[I]f challenged litigation is objectively meritless[, then] … a court [may] examine the litigant's subjective motivation." Likewise, the defamation standard of "actual malice" that plaintiff discusses (Reply at 11) from New York Times v. Sullivan, 376 U.S. 254, 280-81 (1964), plainly contemplates an inquiry into the speaker's state of mind, i.e., a showing of knowledge of falsity or reckless disregard of the truth.

III. THE COMMISSION HAS NOT WAIVED ITS RIGHT TO OBTAIN ADEQUATE DISCOVERY AND TO PROVIDE THE COURT WITH FULL BRIEFING

There has been no discovery in this case, and WRTL's argument (Reply at 18-20) that it is too late for the Commission to seek discovery is baseless. This case began with WRTL's request for a preliminary injunction, which this Court denied in August 2004 slightly more than two weeks after WRTL filed its complaint. That decision rested largely on the Court's "reading of McConnell that as-applied challenges to § 441b are foreclosed" as a matter of law, District Court Mem. Op., slip op. at 6, a holding that made it unnecessary to pursue a fully developed factual record while that holding was binding on the parties.

WRTL immediately appealed the Court's denial of a preliminary injunction, and on August 17, 2004 (and September 16), this Court, sua sponte, ordered the parties to file briefs addressing whether plaintiff's complaint (and amended complaint) should be dismissed. The parties did so. However, while dismissal was still under consideration, WRTL moved for summary judgment on March 14, 2005. The Commission opposed that motion and filed its own summary judgment motion, specifically noting that if the legal issues the parties had briefed were not dispositive, it should be permitted to take discovery of the types of matters discussed above. See FEC Memorandum in Support of Motion for Summary Judgment (March 28, 2005), at 7; FEC's Opposition to Plaintiff's Motion to Reinstate, at 3-4. In light of the Court's legal holding in August and its request for briefing on dismissal, there was little reason for the Commission to pursue discovery at that time. Indeed, the parties never conferred about scheduling or discovery, the Court never issued a Rule 16 scheduling order, and it appeared that even initial disclosures under Rule 26 were premature. More generally, unless the Court had intended to revisit its legal holding from August 2004, it would have been a waste of the parties'

and the Court's resources to pursue discovery. As it turned out, this Court indeed dismissed the case on May 10, 2005, without needing further factual development. Now that the Supreme Court has ruled that the holding in McConnell does not foreclose as-applied challenges to the prohibition on electioneering communications, however, the relevant legal landscape has changed and factual development is critically important.

The Commission did not waive the right to discovery by filing its own motion for summary judgment in response to WRTL's motion; indeed, a defending party may move for summary judgment at any time on the basis of a potentially dispositive threshold issue, see Fed. R. Civ. P. 56(b), and doing so is no waiver of the right to seek discovery, since "each side concedes that no material facts are at issue only for purposes of its own motion." Sherwood v. Washington Post, 871 F.2d 1144, 1147 n.4 (D.C. Cir. 1989) (quoting McKenzie v. Sawyer, 684 F.2d 62, 68 n.3 (D.C. Cir. 1982)). WRTL appears to argue (Reply at 19-20) that the Commission waived the right to seek discovery by not filing affidavits in opposition to plaintiff's motion. However, Rule 56 does not require a defending party to file affidavits to defeat such a motion or to preserve a right to later discovery. See Rule 56(c) (opposing party "may" serve affidavits but motion is assessed based on pleadings, discovery materials, and "affidavits, if any"). Indeed, the D.C. Circuit has held that such an affidavit is not required of a party opposing summary judgment so long as other documents, such as opposing motions, are sufficient to inform the court of the need for further discovery. See First Chicago Int'l v. United Exch. Co., Ltd., 836 F.2d 1375, 1380-81 (D.C. Cir. 1988). Here, it was sufficient for the Commission to rely primarily upon the Court's legal holding of August 2004, but to point out the obvious fact that there had been no discovery in this case to date, which would be necessary if that legal holding

were changed, and to explain the basic nature of the discovery that would then be needed.[5] See FEC's Memorandum in Support of Motion for Summary Judgment, at 7. Functionally, that is exactly where the parties find themselves, now that the Supreme Court has held that as-applied challenges are not foreclosed.

The Commission seeks an abbreviated schedule that will enable discovery to be completed by July 10, 2006, and briefing to be completed by September 11, 2006. See Joint Report of the Parties Pursuant to LCvR 16.3(d) at ¶¶6, 8. To expedite the case, the Commission has also proposed shortening the time normally permitted for key discovery tasks and otherwise streamlining the discovery process. Id. at ¶8. WRTL repeatedly claims (Reply at 4, 16) that the Commission is engaging in a "scorched-earth" discovery strategy, but the Commission has not yet served any discovery requests, and plaintiff's remedy for any allegedly improper discovery is to object if and when it actually occurs. The Commission's discovery and briefing proposal balances expedition with the need to develop an adequate factual and legal record in this important constitutional case.

For similar reasons, the parties should be permitted full briefing on the merits. If the Court adopts the streamlined discovery proposal the Commission has requested, the parties will need to address the products of that discovery as part of what will likely be the final briefing of the case before it returns to the Supreme Court. In addition, because the Supreme Court's decision remanding the case resolved only one threshold legal issue, there will be a need to address other legal issues in far more depth than was necessary in the briefing papers before this Court a year ago. At that time, the Commission focused primarily on that one threshold issue,

---

[5] When this Court ruled in May 2005 that the parties' summary judgment motions were moot, the Court implicitly agreed with the Commission that additional factual development was not necessary to render judgment in the Commission's favor, given the Court's understanding of McConnell at that time.

because this Court had adopted an interpretation of McConnell in August 2004 that was also dispositive on the merits. Thus, even if the Court were to deny the Commission's request for discovery, the parties would still need full briefing in order to explore adequately these key legal issues. To promote expedition, the Commission has proposed a staggered briefing schedule that includes only two briefs per side, and has requested only the usual page limits that LCvR 7(e) provides for opening memoranda and replies (45 and 25 pages respectively). See Joint Report of the Parties Pursuant to LCvR 16.3(d) at ¶6.

CONCLUSION

For the foregoing reasons, plaintiff's Motion to Reinstate, Order Supplemental Briefing on, and Expedite Cross-Motions for Summary Judgment should be denied, and the Court should direct the parties to proceed with discovery and briefing as the Commission has proposed in the Joint Report of the Parties Pursuant to LCvR 16.3(d).

Respectfully submitted,

_____/s/_____
Lawrence H. Norton
General Counsel

_____/s/_____
Richard B. Bader
Associate General Counsel
(D.C. Bar # 911073)

_____/s/_____
David Kolker
Assistant General Counsel
(D.C. Bar # 394558)

_____/s/_____
Harry J. Summers
Attorney

_____
Benjamin A. Streeter III
Attorney

_____/s/_____
Steve N. Hajjar
Attorney

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

March 27, 2006