

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,)	OPPOSITION
)	
Defendant.)	

**DEFENDANT FEDERAL ELECTION COMMISSION'S
OPPOSITION TO PLAINTIFF'S MOTION
TO REINSTATE, ORDER SUPPLEMENTAL BRIEFING ON,
AND EXPEDITE CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Defendant Federal Election Commission (“the Commission”) opposes plaintiff Wisconsin Right to Life’s (“WRTL’s”) premature effort to preclude discovery and truncate summary judgment briefing in this as-applied constitutional challenge, in which only one threshold legal issue has been resolved. While expedition is required by the Bipartisan Campaign Reform Act (“BCRA”), the abbreviated, single-brief schedule WRTL now seeks is inconsistent with the Supreme Court’s remand of 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) (“WRTL”). It is also contrary to the requirements of the Federal Rules of Civil Procedure, and the intent of Congress in providing for judicial review of BCRA. No discovery has occurred in this case, yet a detailed factual record may be critical to its ultimate resolution. Therefore, once this Court has received the Supreme Court’s opinion and judgment pursuant to Supreme Court Rule 45.3 and regains

jurisdiction, this Court should adopt a schedule for completing discovery and for filing summary judgment briefs that give the parties an opportunity to respond to each others' arguments, in accord with the Federal Rules of Civil Procedure.

ARGUMENT

As an initial matter, plaintiff's motion was premature. Supreme Court Rule 45.3 provides that, 25 days after the entry of the judgment in a case on review from a lower federal court, the Clerk of the Supreme Court sends the clerk of the lower court a copy of the opinion or order and a certified copy of the judgment. The purpose of this delay in returning the case to the lower court is to allow time to file a petition for rehearing before the Supreme Court, an act that would extend the Supreme Court's proceeding and stay any proceedings in the court below. See United States v. Willis, 202 F.3d 1279, 1281 (10th Cir. 2000). The judgment of the Supreme Court in this case is dated January 23, 2006, so the status hearing the Court has scheduled for February 17, 2006, falls appropriately on the 25th day.

In any event, the Supreme Court's opinion makes clear that the Court has remanded the case for a full evaluation of plaintiff's as-applied challenge with respect to its planned 2004 advertisements, including the development of the factual record necessary to resolve such challenges if they are not precluded as a matter of law. After holding that McConnell v. FEC, 540 U.S. 93 (2003), did not purport to foreclose courts from considering all future as-applied challenges to BCRA's primary definition of "electioneering communication," the Supreme Court turned to this Court's statement that "the facts of this case 'suggest that WRTL's advertisements may fit the very type of activity McConnell found Congress had a compelling interest in regulating.'" WRTL,

2006 WL 152676, at *1 (quoting District Court Memorandum Opinion, No. 04-1260, Aug. 17, 2004, App. to Juris. Statement 8a). The Supreme Court found it unclear whether this was intended to be an alternative ground for this Court's dismissal of this case, so it vacated the judgment and remanded for this Court "to consider the merits of WRTL's as-applied challenge in the first instance." WRTL, 2006 WL 152676, at *1.

In essence, the Supreme Court's opinion said only that McConnell does not preclude all as-applied challenges to BCRA's electioneering communication financing provision, then remanded the case for the resolution of the remainder of the case. This Court must now decide whether WRTL's specific as-applied challenge is controlled, in whole or in part, by the rationale of McConnell under the usual principles of stare decisis, or if not, whether the facts WRTL presents require a constitutional exemption. It is critical that the Commission be permitted to build a factual record to address the latter question for further review. The parties have not even had a scheduling conference under Rule 26(f), made any initial disclosures under Rule 26(a)(1), or had a scheduling conference with the Court under Rule 16. WRTL has offered no basis for ignoring these requirements. Once discovery is completed, the case is likely to be decided on summary judgment, pursuant to the Federal Rules and this Court's local rules.

The Commission stressed in its March 2005 motion for summary judgment that it should be permitted adequate discovery if the legal issues the parties had briefed were not dispositive. The Commission stated that it should be permitted "to take discovery of, inter alia, the following topics that would elucidate the alleged burden BCRA § 203 has placed on WRTL: the history of WRTL's use of broadcast advertising, the nature and timing of the decision to initiate the anti-filibuster broadcast ads, the ways in which

WRTL communicated with the public before the broadcast campaign it has described in its complaint, fundraising by WRTL's PAC, the sources of the funds in WRTL's corporate treasury, and the history of WRTL's and WRTL PAC's opposition to Senator Feingold." FEC's Memorandum in Support of Motion for Summary Judgment, March 28, 2005, at 7. Further potential topics for discovery include the public events surrounding WRTL's 2004 filibuster ads naming Senator Feingold (e.g., the role of the issue in public communications by other Feingold opponents and the media) and evidence as to the electoral effects of such ads in the pre-election political environment. See, e.g., Brief for Amicus Curiae Douglas L. Bailey in Support of Appellee, WRTL (No. 04-1581), 2005 WL 3543093 (Dec. 19, 2005). How expeditiously this discovery can be completed depends largely upon the scope of plaintiff's initial disclosures and its cooperation in responding fully and promptly to the Commission's discovery requests.

The schedule plaintiff proposes would preclude discovery and adequate briefing, and thereby prevent this Court from completing the task the Supreme Court envisioned in its opinion remanding the case. In its ruling, the Supreme Court held only that the McConnell opinion itself was not intended to resolve all as-applied challenges. Nothing in this brief opinion suggests that any such challenges will necessarily be successful, much less the one before this Court. Nor did the Supreme Court, as plaintiff claims, "recognize[] the need for expedition [by] deciding the first issue of this case in less than a week after oral argument." WRTL Mem. at 3. On the contrary, the Court's references to "the facts of this case" and the need to resolve WRTL's challenge "in the first instance" underline the need to develop a full factual and legal record for likely ultimate review by that Court. Indeed, the importance of such a record in constitutional challenges to key

federal campaign finance legislation is well-settled. See, e.g., Colorado Republican Fed. Campaign Comm. v. FEC, 96 F.3d 471, 473 (10th Cir. 1996) (denying motion for expedited briefing on remand from Supreme Court, because both 10th Circuit and Supreme Court would “benefit by the parties fleshing out the record with any evidence they and the district court deem relevant to the issues’ resolution and by the district court’s resolution of the legal issues in the first instance”). In this case, where there is no intermediate review between this Court and the Supreme Court, the need for such a record is even more pressing.

As-applied challenges are by their nature fact-specific, and not normally an effective vehicle for the formulation of broad rules or general guidelines. If the Supreme Court had really contemplated using this case as a means to provide general “guidance” before the 2006 election, as plaintiff asserts (Mem. at 3), it undoubtedly would have addressed those issues itself, rather than remanding for further proceedings. BCRA, which has been in effect for years and continues in effect, already provides guidance about the requirements of the law. Any other parties in other states who may believe the statute may be unconstitutional as applied to their own planned activities can obtain review by this Court on their own, if they so desire, without plaintiff’s assistance. As for WRTL itself, the Supreme Court has remanded the case for an examination of the advertising it planned to run in Wisconsin in 2004, and WRTL has not even asserted an interest in running similar anti-filibuster ads during the electioneering communication period in 2006. Even if it did so, the applicable pre-election period in Wisconsin does not begin until mid-August, as plaintiff concedes (Mem. at 3), which should leave sufficient

time to complete discovery and responsive briefing that would assist this Court in the important task of resolving an issue of constitutional stature.

Congress required that cases like this be expedited, but it did not direct the courts to ignore the need to act with care in evaluating constitutional challenges to the statute that it passed after years of legislative effort. On the contrary, as one of BCRA's principal Senate sponsors stated during the floor debate on Section 403:

Finally, and most importantly, although [§ 403] provides for the expedition of these cases to the greatest possible extent, we do not intend to suggest that the courts should not take the time necessary to develop the factual record and hear relevant testimony, if necessary. . . . By expediting the case, we in no way want to rush the Court into making its decision without the benefit of a full and adequate record...

147 Cong. Rec. S3189 (March 30, 2001) (remarks of Sen. Feingold) (emphasis added).

See also id. at S3189-90 (remarks of Sen. Dodd). This case implicates exactly these concerns, and it is critical that the courts have such a "full and adequate" record to support their decisions.

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 initial disclosures and discovery after the status hearing the Court has scheduled for February 17, 2006.

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

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

February 7, 2006