



**WISCONSIN LEGISLATIVE COUNCIL
INFORMATION MEMORANDUM**

**U.S. Supreme Court Case on Campaign Finance:
*Federal Election Commission v. Wisconsin Right to Life***

On June 25, 2007, the U.S. Supreme Court released its latest decision on the constitutionality of the Bipartisan Campaign Reform Act of 2002 (BCRA). Section 203 of BCRA prohibits a corporation or labor union from funding an “electioneering communication” (also known as an “issue ad”) from its general treasury. *In Federal Election Commission (FEC) v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), the Court, in a five to four decision, held BCRA s. 203 unconstitutional as applied to specific Wisconsin Right to Life (WRTL) ads. However, the principal opinion stopped short of overruling the U.S. Supreme Court’s decision in *McConnell v. FEC*, 540 U.S. 93 (2003), that upheld the constitutionality of BCRA s. 203. In *McConnell*, BCRA s. 203 was challenged on its face, that is, the case did not arise from the application of BCRA to specific communications.

This memorandum describes BCRA, the Court’s decision, and the implications of the decision for campaign finance reform in Wisconsin.

BCRA

BCRA prohibits a corporation or labor union from funding an “electioneering communication” from its general treasury. [BCRA s. 203, as codified at 2 U.S.C. s. 441b (b) (2) and (c).] However, a corporation or labor union may fund an “electioneering communication” through a political action committee (PAC). [2 U.S.C. s. 441b (b) (2).]

2 U.S.C. s. 434 (f) (3) (A) (i) defines “electioneering communication,” with some exceptions, as:

[A]ny broadcast, cable, or satellite communication which –

(1) refers to a clearly identified candidate for Federal office;

(2) is made within –

a. 60 days before a general, special, or runoff election for the office sought by the candidate; or

- b. 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
- (3) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

The limitation on the funding of “electioneering communications” by corporations and labor unions, along with other provisions of BCRA, was upheld in *McConnell* as facially constitutional. [For more information on *McConnell*, see “U.S. Supreme Court Case on Campaign Finance: *McConnell v. FEC*,” Wisconsin Legislative Council, LM-2003-6, December 19, 2003.]

THE COURT’S DECISION

WRTL Ads

On July 26, 2004, WRTL began running a series of television and radio ads that discussed the filibustering of judicial nominees by U.S. Senators. The ads invited viewers or listeners to “[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster.” [127 S. Ct. at 2660.] Senator Feingold was a candidate for the U.S. Senate in 2004. WRTL planned to run the ads throughout August 2004, and, as such, the ads would have run in the 30 days before the primary election. In addition, WRTL planned to fund the ads from its general treasury. Consequently, the WRTL ads were prohibited by BCRA s. 203. On July 28, 2004, WRTL filed a lawsuit against the FEC, alleging that BCRA s. 203 is unconstitutional as applied to its ads.

The Court’s majority held BCRA s. 203 unconstitutional as applied to the WRTL ads but differed in the reasons for holding the application unconstitutional. Specifically, the majority split on the treatment of *McConnell*. Chief Justice Roberts and Justice Alito, in the principal opinion, declined to reconsider the decision in *McConnell* that upheld BCRA s. 203. Justices Scalia, Kennedy, and Thomas, in a concurring opinion, argued that the Court should overrule the *McConnell* decision. In the dissenting opinion, Justices Souter, Stevens, Ginsburg, and Breyer argued that the Court’s decision effectively overrules the *McConnell* decision and that BCRA s. 203 is not a complete ban on speech.

PRINCIPAL OPINION

The Court found that although *McConnell* upheld BCRA s. 203 as facially constitutional, the application of BCRA s. 203 to specific communications may, nonetheless, be an unconstitutional violation of the freedom of speech provision of the First Amendment. The application of BCRA s. 203 to a specific communication must survive strict scrutiny to be upheld as constitutional. Strict scrutiny requires that the government demonstrate that its application of BCRA s. 203 to the WRTL ads is narrowly tailored to further a compelling government interest. In *McConnell*, the Court held that, on its face, BCRA s. 203’s regulation of express advocacy or its functional equivalent survives strict scrutiny.

The principal opinion noted that if the WRTL ads fit the description of express advocacy or its functional equivalent in *McConnell*, the application of BCRA s. 203 to the ads automatically

satisfies strict scrutiny. If the WRTL ads do not fit that description, then the Court must apply the strict scrutiny review. The principal opinion then proceeded to define a standard for the “functional equivalent of express advocacy.” The principal opinion rejected a standard based on the intent and effect of the communication, and, instead, adopted the following standard: “an ad is the functional equivalent of express advocacy *only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.*” [127 S. Ct. at 2667.]

Using this standard, the principal opinion found that the WRTL ads are not express advocacy or its functional equivalent. First, the WRTL ads are consistent with genuine issue ads because the WRTL ads highlight a legislative issue and advocate a position on the issue. Second, the WRTL ads do not mention an election, political party, candidacy, or challenger.

Because the WRTL ads do not fit the description of express advocacy or its functional equivalent in *McConnell*, the principal opinion addressed whether the application of BCRA s. 203 survives strict scrutiny. The two compelling interests often used to justify regulation of election campaigns are the prevention of: (1) corruption or the appearance of corruption; and (2) the distorting effects of substantial accumulations of wealth. The principal opinion reasoned that these compelling interests do not justify the burden that BCRA s. 203 has on WRTL’s speech.

Therefore, the Court held BCRA s. 203 unconstitutional as applied to the WRTL ads, but the principal opinion declined to revisit the *McConnell* decision.

CONCURRING OPINION

The concurring opinion argued that the Court should overrule the decision in *McConnell* that upheld BCRA s. 203.

According to the concurring opinion, the standard adopted by the principal opinion and other standards based on perception that are used to determine whether a communication is the functional equivalent of express advocacy are vague and not sufficient to protect First Amendment rights. The concurring opinion noted that had a broader standard existed, the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), would have adopted it, rather than adopting a “magic words” test. The *Buckley* “magic words” test allows the government to regulate only communications that use the “magic words” of “vote for,” “vote against,” “elect,” “reject,” or similar words.

Given the vagueness and insufficiency of alternative standards, the concurring opinion stated that BCRA s. 203 creates an unworkable and unconstitutional system and that the government should either eliminate the restrictions on independent expenditures or confine the restrictions to communications that use *Buckley’s* “magic words” or their equivalent.

DISSENTING OPINION

The dissenting opinion argued that the Court’s decision overrules the decision in *McConnell* that upheld BCRA s. 203.

The dissenting opinion stated that the principal opinion inverts the *McConnell* decision. In *McConnell*, the Court pointed to a hypothetical “Jane Doe” ad, which is an ad that condemns Doe and invites viewers or listeners to contact Doe and tell her what they think, as the functional equivalent of express advocacy. As the dissenting opinion argued, the WRTL ads are similar to the “Jane Doe” ad, and, as such, if BCRA s. 203 is unconstitutional as applied to the WRTL ads, then BCRA s. 203 is unconstitutional as applied to the “Jane Doe” ad.

Additionally, the dissenting opinion described the importance of considering a communication’s context in determining whether the communication is the functional equivalent of express advocacy. The principal opinion, the dissenting opinion argued, removes context from consideration and replaces it with a standard that effectively reinstates the *Buckley* “magic words” test.

Lastly, the dissenting opinion argued that BCRA s. 203 is not a complete ban on WRTL’s speech for several reasons. First, WRTL can fund its ads through its PAC, rather than from its general treasury. Second, WRTL can avoid referring to a specific candidate in its ads. Third, WRTL can utilize the safe harbor for nonprofit advocacy corporations, which requires that WRTL not accept contributions from corporations. Fourth, WRTL can communicate through media other than broadcast, satellite, or cable.

CONCLUSION

Regardless of the majority’s split, the effect of the Court’s decision is to limit the application of BCRA s. 203. Although the decision in *McConnell* that upheld BCRA s. 203 as facially constitutional remains intact, the principal opinion’s standard for express advocacy or its functional equivalent may require that a communication use *Buckley’s* “magic words” or their equivalent to be regulated under BCRA s. 203. In addition, the concurring opinion advocates that restrictions on independent expenditures be eliminated or that the restrictions be confined to communications that use *Buckley’s* “magic words” or their equivalent. Therefore, it appears that the government may be limited to applying BCRA s. 203 to communications that use words such as “vote for,” “vote against,” “elect,” “reject,” or similar words.

IMPLICATIONS OF THE COURT’S DECISION FOR WISCONSIN CAMPAIGN FINANCE REFORM

In the Wisconsin Legislature, proposals to regulate “issue ads” have been introduced in several sessions. Many of the proposals are similar to BCRA s. 203. On May 9, 2007, one such bill, 2007 Senate Bill 77, passed the state Senate on a vote of Ayes, 26; Noes, 7.

Senate Bill 77 imposes reporting and registration requirements on any organization that or individual who makes any communication, by means of communications media, that refers to a candidate for state office, a state office to be filled, or a political party within 60 days preceding an election. In addition, Senate Bill 77 prohibits a corporation from funding such a communication from its general treasury.

Although Senate Bill 77 is similar to BCRA s. 203, the following differences exist:

- BCRA s. 203 governs communications by corporations and labor unions, while Senate Bill 77 governs communications by corporations only.
- BCRA s. 203 governs communications that refer to a candidate for federal office and, except for communications that refer to a candidate for President or Vice-President, target the relevant electorate. Senate Bill 77 governs communications that refer to a candidate for state office, state office to be filled, or political party and are not required to target the relevant electorate.
- BCRA s. 203's time period is 60 days before a general election and 30 days before a primary election, while Senate Bill 77's time period is 60 days before an election.
- Broadcast, satellite, and cable communications are included in BCRA s. 203, while newspaper, periodical, billboard, radio, and television communications are included in Senate Bill 77.

Despite these differences, BCRA s. 203 and Senate Bill 77 have the effect of prohibiting a corporation from funding from its general treasury "issue ad" communications that identify a candidate within a specified period of time.

Given the Court's decision, it appears that the prohibition on the funding of "issue ad" communications in Senate Bill 77 or similar legislation may be upheld as facially constitutional, but may be held unconstitutional as applied to some communications. Communications such as the WRTL ads may come under the purview of Senate Bill 77, and a court would likely find Senate Bill 77's prohibition on the funding of "issue ad" communications unconstitutional as applied to this type of communication. Such a result may limit the application of Senate Bill 77 to communications with "magic words" or their equivalent, effectively making Senate Bill 77's prohibition on the funding of "issue ad" communications ineffective. Therefore, the Court's decision may significantly limit the options for "issue ad" reform in Wisconsin. It should be noted, though, that the Court's decision does not address the constitutionality of reporting and registration requirements for "issue ad" communications, such as those in Senate Bill 77.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

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