

Supreme Court Orders District Court to Reconsider Campaign “Reform” Case

BY Dave Andrusko

Acting with unusual dispatch, on January 23 a unanimous Supreme Court told the government and a federal district court panel that the justices had not foreclosed future challenges to the so-called “Bipartisan Campaign Reform Act of 2002,” more commonly known as the McCain-Feingold law after its authors. The three-page ruling came only six days after the justices heard oral arguments in the case of *Wisconsin Right to Life v. FEC*.

In 2003, in *McConnell v. FEC* the High Court upheld the core of *McCain-Feingold* in a split 5-4 decision. But Wisconsin RTL challenged a portion of the law that dealt with “electioneering communication”—what *McCain-Feingold* calls broadcast ads that refer by name to a federal candidate within 30 days before a primary election or 60 days before a general election.

In 2004, Wisconsin Right to Life (WRTL) wanted to broadcast TV ads during these “blackout periods” to urge viewers to contact their two United States senators to urge them not to support the filibuster of President Bush’s judicial nominees. One of those senators—Russ Feingold (D)—was running for re-election.

A federal district court ruled that the ads were “electioneering,” and thus subject to *McCain-Feingold*’s disclosure requirements and spending limits. (Under the provision, corporations and labor unions must use money from their political action committees to pay for the advertisements.)

The district court held that the Supreme Court in *McConnell* had precluded all so-called “as applied” challenges—lawsuits based on application of the electioneering communication prohibition to specific circumstances.

But on January 16 NRLC General Counsel James Bopp, Jr. and Wisconsin Right to Life told the justices that *McConnell* did not preclude “as applied” challenges. Bopp maintained that what WRTL did with its television ads was not electioneering but grassroots lobbying.

The nine justices quickly held that *McConnell* “did not purport to resolve” all future challenges as to how campaign-finance legislation is applied. They directed the district court to determine whether the Constitution requires an exception to the electioneering communication ban for grassroots lobbying ads and whether WRTL’s ads are permissible.

What is going on? As the New York Times correctly observed, some came away from the oral arguments persuaded that four justices were uncomfortable with the lower court decision. With Justice Sandra Day O’Connor about to depart, that meant the justices could have been split 4-4, thus the decision to send the case back to the three-judge district panel. Theoretically, the case could be back before the justices later this fall.

WRTL Executive Director Barbara Lyons and Bopp were elated. “We welcome with great excitement a proper review of the merits of our appeal and are optimistic that free speech will once again be

recognized in the United States,” Lyons told the Associated Press.

“The lower court must now confront the real merits of this case, namely, that there is no constitutional justification for prohibiting grassroots lobbying about upcoming votes in Congress, just because we are in an election season,” said Bopp. “The First Amendment prohibits incumbent politicians from shielding themselves from grassroots lobbying through campaign finance laws.”