

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FEDERAL ELECTION COMMISSION, :

4 Appellant :

5 v. : No. 06-969

6 WISCONSIN RIGHT TO LIFE, INC. :

7 - - - - - x

8 SENATOR JOHN McCAIN, ET AL., :

9 Appellants :

10 v. : No. 06-970

11 WISCONSIN RIGHT TO LIFE, INC. :

12 - - - - - x

13 Washington, D.C.

14 Wednesday, April 25, 2007

15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United States
17 at 10:14 a.m.

18 APPEARANCES:

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21 in No. 06-969.

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24 JAMES BOPP, JR., ESQ., Terre Haute, Ind, on behalf of
25 the Appellee.

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P R O C E E D I N G S

(10:14 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in case 06-969, Federal Election Commission versus Wisconsin Right to Life, and case 06-970, Senator McCain versus Wisconsin Right to Life. General Clement.

ORAL ARGUMENT OF GEN. PAUL D. CLEMENT

ON BEHALF OF APPELLANT FEDERAL ELECTION COMMISSION

GENERAL CLEMENT: Mr. Chief Justice, and may it please the Court:

In McConnell against FEC this Court upheld Title II's restrictions on electioneering communications by unions and corporations against facial attack. In doing so, this Court reviewed a voluminous record and concluded that the vast majority of the ads that had been run in previous cycles and came within the statutory definition could constitutionally be regulated by Congress. Accordingly, this Court rejected the overbreadth challenge and upheld the statute on its face. To be sure, the last time this case was before the Court, the Court made clear that nothing in McConnell foreclosed an opportunity for as-applied challenges to the statute and the Court remanded the case for that purpose. But to be consistent with McConnell's

1 overbreadth decision, any as-applied challenge cannot
2 have the effect of calling into question a substantial
3 percentage of the statute's applications. Yet the
4 district court's decision below has precisely that
5 forbidden effect.

6 There is nothing atypical about the three
7 ads that are before this Court. Indeed, they closely
8 resemble the Jane Doe hypothetical ads that this Court
9 identified at page 127 as the prototype of ads that,
10 although they took the form of issue ads, nonetheless
11 were functionally equivalent to express advocacy.

12 JUSTICE SCALIA: Maybe we were wrong last
13 time.

14 GENERAL CLEMENT: Well, Justice Scalia, I
15 don't think you were wrong, and I suppose that obviously
16 you thought the rest of the Court was wrong in
17 McConnell, and if the Court wants to reconsider that
18 decision -- I mean, that's an option the Court can take
19 in the appropriate case.

20 I would suggest that this is not the
21 appropriate case for a number of reasons, not the least
22 of which is that I think it was briefed in this case
23 really as something of an afterthought, not as a
24 principal focus of the briefing. In the McConnell case
25 this Court, as you well remember, had an unbelievably

1 exhaustive record before it in making a judgment about
2 the facial constitutionality of the law.

3 JUSTICE SCALIA: Well, we didn't have a
4 concrete case such as this one, in which the assertions
5 of the other side are very appealing as far as the
6 rights of citizens to -- band together for an issue ad,
7 even an issue ad that names somebody who's up for
8 election within -- within 90 days. We didn't that have
9 appealing case before us. Now that we have it before us
10 and now that you tell us that this is a typical case,
11 maybe we were wrong about the overbreadth challenge
12 before.

13 GENERAL CLEMENT: With respect, I don't
14 think you were. And although you didn't have this case
15 before you, you had many, many concrete cases before you
16 that are really indistinguishable from this case. You
17 had the --

18 CHIEF JUSTICE ROBERTS: How are we supposed
19 to decide whether this case -- if you think it's
20 important to our resolution -- how are we supposed to
21 decide whether this particular case is typical or not?

22 GENERAL CLEMENT: Well, I guess it's hard
23 for me to say how you would decide whether it's typical.
24 I'm not sure that's the question.

25 CHIEF JUSTICE ROBERTS: I think it's very

1 hard to determine. Therefore, I think it's hard to
2 determine in the abstract whether it's inconsistent with
3 the conclusion in McConnell that a vast majority of the
4 cases would not be covered or if it's inconsistent with
5 it.

6 GENERAL CLEMENT: Well, Mr. Chief Justice,
7 let me try to come at it this way, which is to say I
8 would have thought that if you're not going to overturn
9 McConnell, you're just going to apply it and say, well,
10 what kind of as-applied challenges are left? I would
11 have thought that what you would have in mind is ads
12 that had an identifiable characteristic that marked them
13 as being outside of the mainstream and somehow different
14 from most of the ads. And so --

15 CHIEF JUSTICE ROBERTS: That gets back to my
16 same question: How do we know that this is or is not
17 outside the mainstream? We have just the three ads that
18 are at issue here. It's not as if we have a survey of
19 all the ads that are run during the blackout periods in
20 particular election cycles. How can we tell whether
21 this is within the mainstream or not?

22 GENERAL CLEMENT: One strong indicator that
23 these are in the mainstream is how close they are to the
24 Jane Doe hypothetical that this Court identified as the
25 prototype of the kind of ads that, although they took

1 the form of issue ads, they looked like issue ads, they
2 really were indistinguishable from, and the functional
3 equivalent of, express advocacy.

4 JUSTICE GINSBURG: General Clement, that
5 Jane Doe ad was in the record last time. There were
6 others, weren't there, the issue ads?

7 GENERAL CLEMENT: There were hundreds. I
8 mean, as you well remember, there were hundreds of ads
9 in the record. And this Court was able to draw
10 conclusions about them both by looking at some of the
11 specifics, but also looking at the forest, if you will.
12 And one of the things they recognized, for example, is
13 that these ads weren't turning up uniformly wherever
14 issues were being debated. These ads were turning up in
15 the close elections, in the close races. And they were
16 --

17 CHIEF JUSTICE ROBERTS: Counsel, the Court
18 in McConnell used the term, as you've used this morning,
19 "vast majority." What is that? Is 70 percent a vast
20 majority, so that 30 percent of the ads are going to be
21 outside of that and would be candidates for this
22 as-applied challenge?

23 GENERAL CLEMENT: No, no, Mr. Chief Justice,
24 because the Court used "vast majority," and I mean, you
25 know, that could mean 70 percent, it could mean 80

1 percent, it could mean 90 percent. Equally importantly,
2 on page 207 of the opinion, when it was specifically
3 addressing overbreadth, it made the argument -- it made
4 the conclusion, that both in absolute and relative terms
5 this statute was not substantially overbroad.

6 And it seems to me then at a minimum for any
7 as-applied challenge to be consistent with that
8 overbreadth determination, it can't have the effect of
9 opening up the statute wide open such that on a
10 going-forward basis the majority, certainly a
11 substantial number, percentage, inconsistent with an
12 overbreadth holding, of the ads that would be run by
13 unions and corporations within the last 60 days of the
14 election would qualify for the exception. That just
15 seems inconsistent with the overbreadth holding.

16 JUSTICE SCALIA: But did -- did that
17 statement refer only to issue ads, or did it refer to
18 all ads?

19 GENERAL CLEMENT: It referred to all ads
20 that would come within the statutory prohibition.

21 JUSTICE SCALIA: All ads. Right, and here
22 we are dealing with a subset of all ads and that is
23 issue ads. So that statement doesn't necessarily speak
24 to whether, you know, a vast majority of all issue ads
25 have to be --

1 GENERAL CLEMENT: But with respect,
2 Justice Scalia, there were so many issue ads in the
3 record in McConnell that if issue ads were an
4 appropriate category for as-applied challenges, it would
5 have been impossible for this Court to reject the
6 substantial overbreadth burden.

7 JUSTICE SCALIA: I don't know if that's so.
8 So long as that statement applied to the totality of
9 ads, many of which were ads just directed at defeating
10 particular candidates, I don't see how you can say that
11 we're bound by that statement.

12 GENERAL CLEMENT: Well, Justice Scalia, the
13 only other obvious candidate that you could carve out
14 would be express advocacy. And the Court was clear in
15 footnote 18 of the opinion what percentage that was, 4
16 to 5 percent. So as to the 95 percent of the ads that
17 didn't engage in express advocacy, this Court still had
18 no difficulty concluding that the vast majority of them
19 were within Congress's conception of the purposes of the
20 statute --

21 JUSTICE SCALIA: Everything that is not
22 express advocacy is an issue ad? The world is divided
23 into express advocacy and issue ads?

24 GENERAL CLEMENT: I mean, that's one way to
25 divide it. I mean, you're using the term "issue ad." I

1 don't think, unfortunately --

2 JUSTICE SCALIA: I wouldn't divide it that
3 way. I would think there are a lot of express advocacy
4 ads. I think there are a lot of non-express advocacy
5 ads that are not issue ads.

6 GENERAL CLEMENT: Justice Scalia, you're
7 using the term "issue ad" as if it's self-defining. I
8 don't view it that way. And I mean, even Appellee has
9 tried to narrow it to grassroots lobbying. Now, of
10 course there's a problem with the grassroots lobbying
11 argument and that is it was made to this Court in
12 McConnell, and at that time the nature of the argument
13 wasn't, oh, grassroots lobbying, that's a sort of
14 idiosyncratic or atypical application that would give
15 rise to a narrow as-applied exception.

16 No, the argument there, and a great
17 illustration is Appellee's national affiliate, National
18 Right to Life. At pages 6 and 7 of the reply brief in
19 McConnell, they argued about grassroots lobbying and
20 they said, boy, this statute applies to grassroots
21 lobbying; therefore, it's substantially overbroad.

22 CHIEF JUSTICE ROBERTS: Counsel, it seems to
23 me you're suggesting the district court decision is
24 inconsistent with McConnell. But it seems that your
25 approach today is inconsistent with our decision last

1 year that you can have as-applied challenges. You're
2 suggesting that if we allow this as-applied challenge to
3 go forward that we have to facially strike down the
4 section.

5 GENERAL CLEMENT: Oh, Mr. Chief Justice, I'm
6 not saying that. My point is that not all as-applied
7 challenges are created equal.

8 CHIEF JUSTICE ROBERTS: So tell me what
9 one -- an ad that would succeed in an as-applied
10 challenge looks like, or what the standard would be that
11 we would apply in a way that you think would not call
12 into question the decision in McConnell about section
13 203.

14 GENERAL CLEMENT: Well, let me give you a
15 couple of examples of as -- I mean, look, my job is to
16 defend the constitutionality of the statute on its face
17 and as applied. So I'm not suggesting that any of these
18 as-applied challenges would necessarily succeed or I
19 wouldn't be up here trying to make some argument in
20 defense of the statute.

21 But let me give you --

22 CHIEF JUSTICE ROBERTS: What you're saying,
23 though, is if this as-applied challenge succeeds you're
24 saying the only way we can do that is if we think that
25 the statute is facially unconstitutional. I'm just

1 trying to see if there's a way of --

2 GENERAL CLEMENT: Sure.

3 CHIEF JUSTICE ROBERTS: -- approaching this
4 as-applied challenge in a way that doesn't require us to
5 revisit that prior opinion.

6 GENERAL CLEMENT: Absolutely.

7 JUSTICE SCALIA: It doesn't help your case,
8 with me at least, for you to tell us that it is your job
9 to say that no as-applied challenge will suffice.

10 GENERAL CLEMENT: Well then, let me give you
11 an --

12 JUSTICE SCALIA: I mean, that doesn't
13 inspire me with confidence in what you're telling us.

14 GENERAL CLEMENT: Let me give you some
15 inspirational as-applied challenges --

16 (Laughter.)

17 GENERAL CLEMENT: -- that would be better
18 as-applied challenges than this one. A challenge by a
19 501(c)(3) corporation that has difficulty setting up a
20 separate segregated fund. Much better as-applied
21 challenge. The challenge that was brought in the Maine
22 case that you have before you in another -- in another
23 petition or another appeal -- that was a challenge to an
24 ad that was run in an unopposed primary. That starts to
25 sound like a pretty good as-applied challenge.

1 JUSTICE SCALIA: No. There is -- there is a
2 claim here that there -- that there was difficulty in
3 setting -- setting up a fund in time to do what had to
4 be done with respect to this issue, which was a
5 distinctive issue that had come up and they said we
6 didn't have time to set up a - a - a - a separate PAC
7 that, that would effectively meet the problem. Why
8 isn't that distinctive enough?

9 GENERAL CLEMENT: With respect,
10 Justice Scalia, it would be a better case if that were
11 the claim. There's no doubt that Appellee has a -- a
12 PAC, a separate segregated fund. So their claim isn't
13 that they didn't have one. Their claim is it was
14 underfunded vis-a-vis what it would cost to fund these
15 ads. But that itself is clearly a conscious decision,
16 because if you look at how much money they had in their
17 PAC in 2000, they had \$155,000 or something like that in
18 their PAC. Plenty to pay for this ad. This time around
19 they had 13,000. Now why is that? It's pretty clear
20 from the record that they shifted their emphasis not to
21 getting money for their PAC, but to get money in their
22 general corporate treasury to fund these ads. And so
23 they raised 300 million dollars in corporate funds. But
24 that's not -- that doesn't make this a good as-applied
25 challenge.

1 CHIEF JUSTICE ROBERTS: Can I -- can I
2 understand you to suggest that we ought to draw a
3 distinction in as-applied challenges between a 501(c)(3)
4 organization and a corporation?

5 GENERAL CLEMENT: I think --

6 CHIEF JUSTICE ROBERTS: That is not a
7 501(3)(3) corporation?

8 GENERAL CLEMENT: I think -- I think a
9 501(c)(3) corporation has a much better as-applied
10 challenge if they can bring it. And that's the
11 as-applied challenge that's sort of been discussed in
12 some of the amicus briefs. The problem is Appellee is
13 not in a position to do that, because they are a
14 501(c)(4) corporation. Another example of a better
15 challenge would be the Chief Justice's hypothetical from
16 the earlier argument which would be a corporation that
17 runs a series of ads and then wants to continue to run
18 them during the election cycle.

19 Well, that's not this case, but it well
20 could be. The filibuster issue isn't something that
21 came like a bolt out of the blue on the eve of the
22 election. Throughout 2003, there were filibusters in
23 the Senate on a pretty regular basis. 16 out of 16
24 times.

25 JUSTICE KENNEDY: We all -- we all know --

1 maybe -- I think, I think it's accepted -- that the
2 public only tunes in to the political dialogue shortly
3 before the election. That's the time in which you -- in
4 which you reach the public. So the fact that the
5 filibuster has been going on for a long time is -- I
6 don't think answers the question as to how speech can be
7 the most effective.

8 GENERAL CLEMENT: Well, Justice Kennedy, I
9 don't -- you may be right that certainly people do tend
10 to focus on issues in the context of an election. But I
11 think the record in this case does not bear out the
12 conclusion that people only care about them at those
13 times or that groups don't bother running ads at other
14 times. And if you look at the 2005 timeframe, the
15 record reflects that a number of groups, not Appellee,
16 but a number of groups had issue ads addressing the
17 filibuster issue. And what's interesting about that to
18 me is if you look at joint appendix 45 and 46 for the
19 examples, they were able to do it in terms of tag line,
20 "Earth, call the Senate." And if -- if Appellee had run
21 those same ads which would capture the issue, then they
22 wouldn't even have come within the statute. So it does
23 illustrate both that this is an issue that drew enough
24 public interest to generate ads at different time
25 periods, not just in the reelection context, and even

1 when did it that, it was possible to engage on the issue
2 without coming within the confines of the statute. So
3 it just seems like --

4 JUSTICE KENNEDY: Are -- are there frequent
5 issues -- instances in the political process, do you
6 think, in which the public runs an ad against a, a
7 candidate knowing the candidate is probably going to win
8 anyway, he or she is from a safe district, or very ahead
9 in the polls. But they want to run the ad anyway in
10 order to affect his conduct or her conduct once they're
11 reelected, so that they'll take a different position, a
12 second look.

13 GENERAL CLEMENT: Justice Kennedy --

14 JUSTICE KENNEDY: It -- it seems to me
15 logically that's possible. I just don't know if that,
16 if that happens very often.

17 GENERAL CLEMENT: Justice Kennedy, it's
18 certainly possible. I don't think it's common, though.
19 And the reason I say that is just to go back to the
20 record in McConnell, the one thing the record there made
21 pretty clear is that when you got to the period 60 days
22 before the election, these ads were not being ran in a
23 way that would have some random distribution that you
24 might expect if they were just interested in the issues
25 or just interested uniformly in all reelections. These

1 ads were really concentrated in the close districts. I
2 mean one of the lines that stick out in my mind from the
3 record is in trying to fund money for these so-called
4 issue ads, the Club for Growth executives said "we need
5 money for these issue ads because they make all the
6 difference in close elections."

7 JUSTICE SCALIA: Well now -- but -- yes, it
8 may make the difference in a close election but it is
9 also -- it is also likely to be more effective with
10 regard to the Senator that you -- whose vote you want on
11 the issue. Are you -- are you going to waste your --
12 waste your money in -- in those districts where the
13 Senator is not going to vote the way you want no matter
14 what? The situation you pose is precisely the one where
15 you would want your issue ad to run.

16 GENERAL CLEMENT: Well, Justice Scalia, if
17 your point is that there may be an interest in trying to
18 leverage the upcoming election to get somebody's
19 attention --

20 JUSTICE SCALIA: Of course --

21 GENERAL CLEMENT: -- I think that's probably
22 --

23 JUSTICE SCALIA: To get the Senator's
24 attention.

25 GENERAL CLEMENT: Sure.

1 JUSTICE SCALIA: The Senator who is -- who
2 is at risk is likely, is likely to listen. The Senator
3 who has a safe seat is not.

4 GENERAL CLEMENT: No doubt that's true. But
5 I think it also implicates the -- the interests of
6 Congress in the statute that this Court recognized and
7 upheld on its face. When -- when the whole point is,
8 we're not just interested in this issue in the abstract,
9 and we're not running this issue just because there's a
10 pending vote in Congress; we're interested in running
11 this ad because it's a pretty effective vehicle both to
12 defeat this candidate's reelection chances, but if we
13 don't succeed on that maybe we'll convince him to change
14 his mind.

15 JUSTICE SCALIA: You can't tell which of the
16 two they had in mind. Whether they wanted the Senator
17 defeated or they wanted to put enough pressure on the
18 Senator that he would change his vote with regard to the
19 filibuster. I would think that the latter is more
20 likely the motive than the former. And why do you
21 assume the worst?

22 GENERAL CLEMENT: Well -- I don't know, the
23 fact that by the time they ran these ads Senator
24 Feingold had voted 20 times out of 20 to filibuster
25 suggests to me that they probably concluded that the

1 best way to get a Wisconsin Senator who wouldn't
2 filibuster was to change Senators, not to change Senator
3 Feingold's mind.

4 JUSTICE GINSBURG: What about the relevance
5 of this same group having a poll strongly opposed
6 Feingold every time he ran for election? It was no
7 secret that they were opposed to his candidacy.

8 GENERAL CLEMENT: No. That's absolutely
9 right, Justice Ginsburg. And obviously the statute
10 itself in its clear, bright line test doesn't make you
11 get into those kind of inquiries. But if their claim is
12 to come into court and say well, we had a pure heart; we
13 didn't have an intent to affect the election --

14 JUSTICE SCALIA: But this is -- this is the
15 First Amendment. We don't make people guess whether
16 their speech is going to be allowed by Big Brother or
17 not. If you are going to cut off the speech, there
18 ought to be a clear line. Not whether -- whether I, I
19 had ads against Feingold in the past or whether Feingold
20 voted 20 times against this or -- or half of the time
21 against this. It seems to me you need a clear First
22 Amendment line. And you're not giving us any.

23 GENERAL CLEMENT: Sure I am, Justice Scalia.
24 I'm giving you the statute, on its face, which couldn't
25 be clearer. If you want to have as-applied exceptions,

1 if you want to go down the road, to quote the Chief
2 Justice in dissent in MCFR, of creating "barely
3 adumbrated exceptions," you may inject some vagueness.
4 Now that may be necessary. And there may be as-applied
5 challenges out there that do the trick without creating
6 vagueness. But I don't think this is the one. And just
7 because the first as-applied challenge you see is a
8 problematic one doesn't mean there aren't better
9 as-applied challenges out there.

10 If I could reserve the balance of my time.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 General Clement.

13 Mr. Waxman.

14 ORAL ARGUMENT OF SETH P. WAXMAN,
15 ON BEHALF OF APPELLANTS SENATOR JOHN McCAIN, ET AL.

16 MR. WAXMAN: Mr. Chief Justice, and may it
17 please the Court:

18 I'd like to -- I'd like to address three
19 points that came up at the earlier part of the argument.
20 First of all, I'd like to, I think just with respect
21 correct a premise of one of Justice Scalia's questions.
22 Then I would like to address the two questions that I
23 think I heard the Chief Justice ask, which is how do we
24 know that this is an atypical ad, and what would the
25 standard -- what standard would a court apply in

1 adjudicating as-applied challenges?

2 And then finally, assuming there's time
3 permitting, I'd like to address the question of why we
4 shouldn't revisit McConnell which I think was posed both
5 by the Chief Justice and by Justice Scalia.

6 First, as to the premise, Justice Scalia,
7 and it relates to what the predicate was of the now
8 famous "vast majority" reference. I'm quoting from --
9 it's entirely clear from this Court's opinion and I
10 believe it's on page 207 that the referent was issue
11 ads. In fact, what this Court said was: "The precise
12 percentage of issue ads that clearly identified a
13 candidate and were aired during those relatively brief
14 preelection time spans but had no electioneering purpose
15 is a matter of dispute between the parties and among the
16 judges on the district court." Nevertheless, the "vast
17 majority" of ads clearly had such a purpose.

18 CHIEF JUSTICE ROBERTS: Is that -- is that
19 your test, if it has any electioneering purpose?

20 MR. WAXMAN: We think the test is whether or
21 not it is -- as this Court indicated, I think -- whether
22 it's the functional equivalent of express advocacy. It
23 doesn't use the "magic words" but does it have the same
24 effect, that is, the test that this Court should -- not
25 this Court, a district court adjudicating an as-applied

1 challenge that is based on the content of the ad, not
2 the sort of as-applied challenge that was brought in
3 MCFL or Brown versus the Socialist Workers Parties that
4 relate to the nature of the speaker, but one that's
5 based on the content requires the challenger to show
6 okay, in a context of a statute that is facially valid
7 and can constitutionally be applied to the vast majority
8 of ads that are covered by the definition of
9 "electioneering communications," he needs to come in and
10 show that with respect to this ad, it has
11 characteristics such that no reasonable voter could view
12 it as promoting, attacking, supporting or opposing a
13 candidate.

14 CHIEF JUSTICE ROBERTS: Do we -- do we
15 usually place the burden when we're applying strict
16 scrutiny under the First Amendment on the challenger to
17 prove that they're allowed to speak, as opposed to the
18 Government to prove -- to carry the burden that they can
19 censor the speech?

20 MR. WAXMAN: Well, you -- I think the rule
21 is quite clear that you never do that. This strict
22 scrutiny clearly applies here. But in the context of
23 a -- the application of a statute that has already been
24 upheld as facially constitutional in the vast majority
25 of applications, the Government doesn't have the burden

1 of reconvincing the district court the -- what the --
2 the very things that the Supreme Court has already
3 decided.

4 JUSTICE SCALIA: That vast majority thing,
5 is that a -- was that the holding of the case? I mean
6 --

7 MR. WAXMAN: It --

8 JUSTICE SCALIA: Every -- every -- every
9 word that we uttered in that prior case is law? I mean,
10 what if -- am I free to think -- is a lower court free
11 to think that maybe it is really not the vast majority?
12 But just because we said vast majority, it is like
13 writing it in a statute?

14 MR. WAXMAN: It's -- well, we would have an
15 awful lot of laws if everything that you wrote
16 constituted law and a holding.

17 JUSTICE SCALIA: Yes.

18 MR. WAXMAN: But that statement and a
19 statement that follows shortly after it on the following
20 page were essential to this Court's decision that
21 applying the strictest possible scrutiny, this law was
22 very narrowly tailored.

23 JUSTICE ALITO: But the test as to any ad is
24 whether any reasonable person could view the ad as -- as
25 an electioneering ad?

1 MR. WAXMAN: I think -- well, an
2 electioneering ad, Justice Alito, I think puts too much
3 of a burden on it.

4 JUSTICE ALITO: Any reasonable person could
5 view it as what?

6 MR. WAXMAN: I think that what a district
7 court would say is could a reasonable voter in the
8 targeted electorate have understood that this ad was in
9 part promoting, attacking, supporting, or opposing?
10 The -- the acronym is PASO.

11 JUSTICE ALITO: Let's say a group has long
12 had ads on a particular issue, and let's say a
13 particular candidate's position on the issue is very
14 well known to people who pay attention to public
15 affairs. And let's say we're in the blackout period and
16 now an important vote is coming up in Congress on that
17 very issue. If the group continues to run the ad on
18 that issue, that -- a reasonable person could view that
19 as, as saying something about the election, couldn't it?
20 Couldn't that person?

21 MR. WAXMAN: I, I would think so. It --

22 JUSTICE ALITO: And that would be
23 prohibited?

24 MR. WAXMAN: Well, it would depend, as your
25 question suggests, on the context in which the ad is

1 run. Now I want to make two points with respect to your
2 inquiry. Number one, as this Court has reiterated,
3 we're not talking about a ban here. Any one of these
4 ads can be run so long as it is funded the same way that
5 the election law requires them all to be funded. That
6 is, with money that --

7 JUSTICE ALITO: What do you -- what do you
8 make -- what do you make of the fact that there are so
9 many advocacy groups that say this is really
10 impractical?

11 MR. WAXMAN: I -- I love it. And I'm going
12 to give you the ACLU as an example because many -- their
13 brief is quite powerful. They and the other amici who
14 provide a groaning table of amicus briefs every time
15 this issue comes up, have never, ever, brought their own
16 as-applied challenge, although these groups are not shy
17 to litigate when they think important rights are in
18 effect. There have been in the three years since this
19 Court decided McConnell, and in the year since this
20 Court made clear what I think we had assumed, which is
21 this statute is -- it is open season on as-applied
22 challenges. There have been precisely two as as-applied
23 challenges brought, both brought by the counsel in this
24 case. The ACLU's brief which is as representative as
25 any other says look at these ads that we've been running

1 about really important issues: The war in Iraq,
2 Guantanamo, et, cetera, etcetera; here is the text of
3 the ad. If we had put onto a tag line of that ad,
4 please call Senator so and so and tell him no, we
5 wouldn't be allowed to do it.

6 Well, you know what? With one exception
7 that I'll explain in a minute, in its 90-year history,
8 the ACLU has never -- way before BCRA was passed, even
9 outside the 60-day period -- they never put that line
10 on. And you know why? It's because they have pledged
11 to their members and to the public that they will not
12 engage in electioneering of any sort. They are
13 completely nonpartisan and they don't ever want to be
14 understood to the contrary, and so they never include
15 those words.

16 CHIEF JUSTICE ROBERTS: But other groups
17 would think it's an important part of their exercise of
18 First Amendment rights to petition their Senators and
19 Congressmen, and to urge others to -- as in these ads --
20 contact your Senators, contact your Congressmen. Just
21 because the ACLU doesn't do that doesn't seem
22 particularly pertinent to me.

23 MR. WAXMAN: Well, though, I mean, I think
24 it does demonstrate a few things. First of all, it is
25 entirely possible, as this Court reiterated in

1 McConnell, for the exact same message or an equally
2 effective message to be given at any particular time.
3 If the ACLU or the National Rifle Association or any of
4 the other groups that never wants to actually bring an
5 as-applied challenge but always wants to say oh no, no,
6 no, this is horrible, wants to run an ad, as this
7 Court has -- they can establish a separate segregated
8 fund. And if they come in and convince a court that
9 that's impractical or impossible, maybe they get an
10 as-applied challenge.

11 JUSTICE SCALIA: Is this true of the NRA
12 also? Is it the case that they have never targeted, so
13 to speak, a particular legislator?

14 MR. WAXMAN: I don't think anybody would
15 claim that. Even --

16 JUSTICE SCALIA: I don't think anybody would
17 either. Why pick on the ACLU?

18 MR. WAXMAN: I'm not -- I wasn't -- I don't
19 mean to pick on the ACLU. I think highly of both
20 organizations and many of the amici that are arrayed
21 against me. The point is that I use the ACLU as an
22 example because the reason they never put, they never
23 name a congressman is because they don't want their ads
24 to be perceived as breaking faith with what they tell
25 the public.

1 As for the NRA, the NRA actually did bring a
2 challenge against the FEC in the D.C. Circuit and said,
3 we don't really qualify under MCFR because we take some
4 corporate funds, but it's de minimis and we think that's
5 what the Supreme Court had in mind. And you know what?
6 They won. But they can't take yes for an answer. They
7 want to establish that this law is facially
8 unconstitutional. And that does go to the point I
9 think, if I may, as to why -- well, it -- why you
10 shouldn't reexamine McConnell from first principles.

11 But let me just say in response to your very
12 first question, Mr. Chief Justice, that the reason that
13 we know that this ad is typical is, as this Court
14 created, articulated the paradigm of an electioneering
15 communication that -- the test in the Jane Doe
16 example -- and this case is materially indistinguishable
17 from the Jane Doe ad. That is one that, quote,
18 "condemns Jane Doe's record on a particular issue before
19 exhorting viewers to call Jane Doe." Here we've got an
20 ad that denounced the, quote, "group of Senators who had
21 filibustered judicial nominees" -- may I finish my
22 sentence?

23 CHIEF JUSTICE ROBERTS: Please.

24 MR. WAXMAN: The only thing that
25 distinguishes that statement from Jane Doe is knowing

1 that Senator Feingold was part of that group, and
2 reasonable listeners in the context of the ad itself and
3 the website would certainly have known that. Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Mr. Waxman.

6 Mr. Bopp.

7 ORAL ARGUMENT OF JAMES BOPP, JR.

8 ON BEHALF OF THE APPELLEE

9 MR. BOPP: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 I think the Government's problem here is
12 that they are repudiating the very studies and expert
13 witness testimony that this Court relied upon in
14 recognizing a distinction between sham issue ads and
15 genuine issue ads. That was a methodology that the
16 Government created and this Court relied upon. Now they
17 are converting genuine issue ads which they identified
18 in the record through their expert testimony and their
19 studies. These ads are contained in the joint appendix
20 on pages 159 to 167.

21 Their expert based upon their studies
22 testified that these were genuine issue ads. Now they
23 refused to state, as they do here, refused to state a
24 test to determine what's a genuine ad. So we are left
25 trying to comply with this law and mount the as-applied

1 challenges that this Court said is available to us to
2 look at these ads and determine what essential features
3 there are of these ads. And as I will explain further
4 later, these are grassroots lobbying ads of the type not
5 like Jane Doe or Yellowtail, but as -- but exactly the
6 type of the PBA ad, for instance, which we have focused
7 on, which is on page 166 of the joint appendix. So in
8 these studies, and these experts, they only looked at
9 the text of these ads to determine whether they were
10 genuine or sham.

11 There was no testimony about the subjective
12 intent of the speaker. There was no testimony about the
13 particular groups who ran these ads on whether or not
14 their PAC was supporting a particular candidate. No
15 expert in McConnell speculated about the possible effect
16 of any particular ad to determine whether it was genuine
17 or sham.

18 JUSTICE BREYER: How could you tell? I
19 rather liked the one --

20 MR. BOPP: I'm sorry.

21 JUSTICE BREYER: I rather liked the one we
22 had before about Senator Faircloth, and his ad was,
23 Senator Faircloth is against the trial lawyers and their
24 efforts to increase liability laws, so write him. Now,
25 testimony all over the place. That is the advocacy

1 candidate ad of the century. And you couldn't possibly
2 know that without having known that one of the parties
3 had spent millions trying to paint Faircloth's opponent,
4 Senator Edwards, as the creature of the trial lawyers,
5 that anyone -- that anyone in North Carolina knew it.
6 So they read those words and they understand precisely
7 what's at stake. They're saying vote against Edwards,
8 vote for Faircloth. Now you just tell me how anyone
9 could know such a thing without looking at the context.

10 MR. BOPP: There was no testimony in
11 McConnell that that ad, it -- for those that determined
12 whether or not it was sham or genuine, that ad was sham
13 or genuine. There was no testimony, no reference in an
14 expert report --

15 JUSTICE BREYER: I thought people offered to
16 bring in such facts as -- there is a website address
17 here. It says, indeed oddly, don't phone the Senator.
18 Go look at the website. And if you look at that
19 website, it says defeat him, defeat him, defeat him. I
20 mean, that sounds as if they have defeat in mind.

21 So certainly, there are about four or five
22 things which they said to look at outside the four
23 corners. So I'm not certain what it is in the law that
24 says that you only look to the four corners. I mean, I
25 read the opinion below. Did you read, by the way, the

1 1,000-page opinion? I bet you did, the 1,000-page
2 opinion of the district court?

3 MR. BOPP: I did indeed.

4 JUSTICE BREYER: Good. Then you know like I
5 know -- and it took me a week, and it probably took you
6 less -- but you know what that record was like in the
7 case, don't you?

8 MR. BOPP: Yes.

9 JUSTICE BREYER: Thousands and thousands of
10 pages that as I read it, I drew one conclusion. The one
11 conclusion was if there's a law, and it's a good law
12 under the Constitution, if it is, that corporations and
13 labor unions cannot give money to political campaigns.
14 And if it is true, as it is true, that what political
15 campaigns are about now is television. And if it is
16 true, as it is true, that these are the single lion's
17 share, the single best way to get somebody defeated or
18 elected, then if you open the gates and say corporations
19 and rich givers or whatever can contribute by writing
20 these ads and paying for them, forget the first two
21 premises. Forget the rule that says corporations can't
22 contribute.

23 Now, I put all that in front of you.
24 Because it seems to me what you're asking for is for us
25 to overturn McConnell and to say either in practice or

1 in theory, McCain-Feingold campaign finance law is
2 unconstitutional.

3 JUSTICE SCALIA: You are asking for that
4 among other things, aren't you?

5 MR. BOPP: Well, if there's no workable test
6 --

7 JUSTICE BREYER: And you are asking for
8 nothing else?

9 MR. BOPP: If there is no workable test that
10 is reasonably ascertainable by small grassroots
11 organizations that separates genuine issue ads from sham
12 issue ads -- this Court in Ashcroft said you cannot
13 throw out the protected speech in order to target
14 unprotected speech. And the line of argumentation that
15 the Government is presenting simply ignores the fact
16 that at least we have a dilemma, we have Congress in
17 session during the blackout periods, voting on items.
18 And we have in the First Amendment one of the four
19 indispensable freedoms, your right to petition the
20 Government.

21 JUSTICE BREYER: I agree with you it's
22 exactly as Justice Scalia said. If we agree with you in
23 this case, goodbye McCain-Feingold. Maybe we should do
24 it up front. That's what you advocate. Very well.
25 Will you address that? Why should this Court only a

1 year or two after it upholds McCain-Feingold, accept a
2 position that either in fact or in theory overturns that
3 case?

4 MR. BOPP: Because facial upholdings can
5 only be sustained constitutionally if as-applied
6 challenges are adequate to protect the protected speech.
7 And this case demonstrates that that is probably
8 impossible. It is certainly demonstrating that when the
9 Government has changed its criteria, it is using
10 criteria that it rejected previously now to say genuine
11 issue ads which we asked this Court to rely upon in
12 their testimony and studies as genuine issue ads, that
13 they are repudiating those.

14 JUSTICE SCALIA: Why do you say that those
15 issue ads are inconsistent with the Government's
16 position here?

17 MR. BOPP: Well, because they --

18 JUSTICE SCALIA: You haven't explained that.
19 You're just --

20 MR. BOPP: Yes. The Wisconsin Right to Life
21 ads are in every material respect indistinguishable from
22 these six grassroots lobbying ads.

23 JUSTICE SOUTER: You're taking this because,
24 in effect on a four corners facial criterion.

25 MR. BOPP: Yes. I think --

1 JUSTICE SOUTER: One of the issues in this
2 case is whether that is an appropriate methodology, so
3 will you address that?

4 MR. BOPP: Well, this Court has consistently
5 rejected the idea of looking to, you know, outside the
6 message of the speaker such as subjective intent or --

7 JUSTICE SOUTER: We're not talking about
8 subjective intent here. We're talking about what
9 Justice Breyer raised a moment ago.

10 And that is, we are looking for the public
11 political context in which the ad is run. He gave the
12 example of the Faircloth-Edwards ads. Anyone in North
13 Carolina knew what they meant. Someone in Idaho or New
14 Hampshire probably did not, because they did not know
15 the context.

16 Your argument, it seems to me is, ignore the
17 context. And my question is, why should we ignore --
18 why should we do that?

19 MR. BOPP: Well, that test that has been
20 articulated by the Government would invite ads to be
21 prohibited based upon the varied understandings of the
22 listener, and that --

23 JUSTICE SOUTER: Well, doesn't any
24 communication depend upon the understanding of the
25 listener? Can we even sensibly talk about what a

1 statement means or an advertisement means without
2 understanding the context in terms of the listener's
3 understanding?

4 MR. BOPP: You do that all the time based
5 upon the -- the test is, what do the words say? What
6 does the ad say? What does the speech say?

7 JUSTICE SOUTER: No. The question is, what
8 do the words mean.

9 MR. BOPP: Yes, what do they mean.

10 JUSTICE SOUTER: And it is impossible to
11 know what the words mean without knowing the context in
12 which they are spoken.

13 JUSTICE SCALIA: When the Government put
14 these exhibits, were those exhibits complete with
15 context?

16 MR. BOPP: No. There was no --

17 JUSTICE SCALIA: I didn't think so. They
18 just -- they just -- what the ads were.

19 MR. BOPP: They did two big studies on -- in
20 '98 and 2000 -- and there was absolutely no testimony
21 about the --

22 JUSTICE SOUTER: My question is, why should
23 we ignore the context? How can we tell what something
24 means without the context?

25 MR. BOPP: Well, there is relevant context,

1 such as the person named, the incumbent is a candidate.
2 That would be a relevant context. It is broadcast
3 within 60 days of a general election, in which he is a
4 candidate as well as a voting member of the Senate.
5 That would be context.

6 JUSTICE SOUTER: But that -- those don't go
7 to meaning in the sense of, for example, the Faircloth
8 Edwards example does. Why should we ignore the aspects
9 of context which determine meaning, i.e., the
10 understanding that a listener would have?

11 MR. BOPP: Because it simply -- it would
12 prohibit all speech because no one would know in advance
13 whether or not there would be --

14 JUSTICE SOUTER: You mean the people in
15 North Carolina were unaware of the Edwards position,
16 they were unaware of the distinction between Faircloth
17 and Edwards?

18 MR. BOPP: I have no idea.

19 JUSTICE SOUTER: Of course they knew that.

20 MR. BOPP: I have no idea.

21 JUSTICE SOUTER: Of course they knew that.
22 And just as presumably, you knew the position of Senator
23 Feingold in these advertisements, and the people in the
24 State knew because of your other -- because of your
25 other public statements.

1 MR. BOPP: Because of one or two press
2 releases?

3 JUSTICE SOUTER: Why should those things be
4 ignored?

5 MR. BOPP: There's absolutely no evidence
6 that anyone in Wisconsin knew his position on the
7 filibuster.

8 JUSTICE SOUTER: Do you think they're dumb?

9 MR. BOPP: No.

10 JUSTICE SCALIA: My experiences --

11 JUSTICE SOUTER: You have a website. You
12 have a website that calls their attention, and you think
13 nobody's going to it?

14 MR. BOPP: But we can't run the ads, we
15 can't --

16 JUSTICE SOUTER: Nobody's paying attention
17 to what the Senator is doing?

18 MR. BOPP: If we can't run the ads, we can't
19 draw people's attention to the website.

20 JUSTICE SOUTER: You think the only source
21 of information about Senator Feingold is your
22 advertisement?

23 MR. BOPP: No, but I don't think --

24 JUSTICE SOUTER: Then if your advertisement
25 is not the sole source of information, why do you assume

1 that no one in Wisconsin knows what the senator has been
2 doing when he votes?

3 MR. BOPP: Look, polls show that a majority
4 of the people don't even know who the Vice President of
5 the United States is. So to suggest that they know a
6 particular position --

7 JUSTICE SOUTER: So your argument is that we
8 ignore context because no one -- because the voters
9 aren't smart enough to have a context?

10 MR. BOPP: No, that we be allowed to speak
11 so we can give that information to the voters.

12 JUSTICE BREYER: But that's -- that's the
13 point, because that's where I get into my chain. You
14 have an argument. I'm not denying that. I understand
15 it. But it's sort for me deja vu all over again. We've
16 heard it.

17 MR. BOPP: Yes, but you said they were
18 genuine issue ads --

19 JUSTICE BREYER: And what happened before --
20 either you can distinguish this, which I don't see how
21 frankly, or you're back into the chain, and if you want
22 to say one more thing about the chain, I didn't draw it
23 to the final ending there, if I think most of the ads --
24 and that's what that Kollar-Kotelly opinion was about.
25 That's what that 1,000-page record is about. That's

1 what the 10,000 pages of testimony were about. That's
2 what McCain-Feingold was about, and all those witnesses.
3 They said in today's world these are the kinds of ads
4 people run just to defeat people. And then they said,
5 moreover, most of the campaign money goes on them. And
6 then they said, moreover, if you let corporations and
7 labor unions contribute to these, well, then they can
8 contribute to the campaign. And the only thing I left
9 out before was, if you're prepared to say the
10 Constitution requires us to let corporations and unions
11 buy these kinds of ads, well, how could it be
12 constitutional to have a statute that forbids them to
13 contribute directly to the candidate, something that's
14 been in existence only since I guess 1904? But how
15 could that be constitutional if they can just give this
16 money directly? Why can't they give this same money to
17 the candidate?

18 MR. BOPP: Well, because of your decision in
19 Beaumont, which creates a distinction between
20 contributions and independent speech, and this is
21 independent speech.

22 JUSTICE SCALIA: It's pretty easy to tell
23 whether you're giving the money to the candidate or not,
24 isn't it?

25 MR. BOPP: Very readily.

1 JUSTICE SCALIA: It's a fairly bright line
2 that you don't have to worry about stepping over the
3 wrong side of it.

4 MR. BOPP: That's right.

5 JUSTICE SCALIA: Whereas this one,
6 especially if you adopt a context determination that
7 requires a 1,000-page district court opinion, who knows.

8 JUSTICE BREYER: Is that right? I mean,
9 1,000 -- what we have here, is we happen to have three
10 criteria, absolutely clear: Does it mention the
11 candidate? Does it run within 30 or 60 days before the
12 election? And is it targeted to an electorate? Now,
13 that's clear.

14 Now, if you're prepared to say that's
15 unclear, I don't understand it, you don't need a
16 1,000-page record about that. All you need is a record
17 where you have your organization to come in and show how
18 yours is significantly different from the mine run of
19 cases. What's the problem?

20 MR. BOPP: The problem is you're not giving
21 force to the other conclusion of all three district
22 court judges that there were genuine issue ads.

23 JUSTICE BREYER: Oh, yes. Yes, I see you
24 could distinguish.

25 MR. BOPP: Of the grassroots lobbying type.

1 And that these ads, you know, fall under a different
2 line of cases. First National Bank versus Bellotti has
3 held that corporate efforts to influence legislative and
4 executive branch officials --

5 JUSTICE STEVENS: Mr. Bopp, are you trying
6 to convince us the purpose of these ads was to convince
7 Senator Feingold to change his position on filibusters?

8 MR. BOPP: It was indeed. It was to lobby
9 him about the upcoming vote.

10 JUSTICE STEVENS: Do you really think they
11 had much chance of -- did you think that was a realistic
12 goal?

13 MR. BOPP: Yes, as it turns out, because in
14 2006 we ran the same sort of anti-filibuster ads and
15 Senator Kohl, now up for reelection, changed his
16 position on the filibuster. So these things happen. In
17 other words, people -- people's positions are affected
18 by grassroots lobbying, and at least people should have
19 the opportunity to engage in grassroots lobbying.

20 JUSTICE KENNEDY: Is that called democracy?

21 (Laughter.)

22 MR. BOPP: We are hopeful, Your Honor. And
23 that our part -- our system of self-government is based
24 upon the self-government of the people and their ability
25 to influence the actions of governmental officials.

1 CHIEF JUSTICE ROBERTS: Mr. Bopp, your
2 argument that McConnell's facial holding should be
3 overturned appears on page 62 of your brief. I take it
4 you have at least 61 pages arguing that your as-applied
5 challenge can succeed without overturning McConnell's
6 position?

7 MR. BOPP: Yes. Yes, we have, which would
8 require the adoption of a reasonably ascertainable test,
9 one that people would not be subject to three years of
10 litigation, scorched earth litigation tactics, intrusive
11 discovery into every aspect of their organization for
12 decades. It would have to be clear, simple, and
13 objective and be able to be implemented on short notice,
14 because things pop up, like the filibuster of a Supreme
15 Court nominee in January of 2006.

16 JUSTICE SCALIA: What's your test? Their
17 test is fuzzy, I agree with you. What's yours? You
18 have a clear one that does not invalidate the whole
19 statute?

20 MR. BOPP: Well, based on their evidence in
21 McConnell and these grassroots -- and these genuine
22 issue ads, I think there are three key or essential
23 features of those ads that we are satisfied would
24 protect grassroots lobbying and genuine issue ads. The
25 first is based upon the content of the communication,

1 they focus on a current legislative matter, take a
2 position on it, urge people to contact them, their
3 Congressmen and Senators, to take a particular action or
4 position.

5 Secondly --

6 JUSTICE SCALIA: That says what's good.
7 What is your test for what's bad?

8 MR. BOPP: Second, the ads do not mention an
9 election, candidacy, political party, challenger, or the
10 official character, qualifications, or fitness for
11 office. That was the key link the district court found,
12 that these ads were not, as Buckley said -- and of
13 course McConnell was litigated under Buckley -- is that
14 they were not unambiguously candidate-related.

15 JUSTICE SOUTER: But that's -- give us the
16 third one. I want to go back to --

17 MR. BOPP: The third one is, as long as the
18 ad meets this pattern, that the fact that the ad -- ours
19 does not -- but the fact that the ad mentions the name
20 or the position of a public official on an issue and
21 praises or criticizes him or her for that does not
22 affect its genuineness.

23 JUSTICE SOUTER: Okay. May I go back to
24 your second criterion? It seems to me that your second
25 criterion is simply the injection of magic words back

1 again. You're saying if we don't use certain magic
2 words it's okay. That's a magic words test.

3 MR. BOPP: You're not looking for any
4 particular word. You're looking for the meaning and
5 thrust of the -- of the item.

6 JUSTICE SOUTER: No, but you said if we
7 don't mention the election and the candidacy of this
8 person for the election, that is one of the
9 sufficient -- one of the conditions with the other three
10 which would be sufficient to justify the, on First
11 Amendment grounds, justify running the ad. That seems
12 to me simply to be reinjecting magic words in a negative
13 form.

14 MR. BOPP: Well, in a much more expansive
15 and comprehensive test which looks to three features of
16 the ad. But in any event, you look at the words all the
17 time. Is it fighting words? You look at what are the
18 words, what are they saying?

19 JUSTICE KENNEDY: We look at fighting words
20 in a context.

21 MR. BOPP: And I think we have a relatively
22 --

23 JUSTICE KENNEDY: It's one thing to say
24 something in a bikers' bar and another thing in an
25 exclusive club.

1 MR. BOPP: And I think we have a relevant
2 context. As I --

3 JUSTICE KENNEDY: Really? Are there many
4 cases where we look just at the words?

5 MR. BOPP: Well, you certainly have in --

6 JUSTICE KENNEDY: You can't shout "Fire" in
7 a crowded theater; it has to be a crowded theater.

8 MR. BOPP: Well, relevant context, that
9 there is an election upcoming, so it's within 60 days.
10 The person's a candidate. These are relevant -- and for
11 that matter, whether the matter is a current Legislative
12 Branch matter or likely to arise in the near future.

13 JUSTICE SCALIA: Mr. Bopp, you do not have
14 to establish, do you, that the test you propose will get
15 at every bad ad, that it will be sure to get at every ad
16 that is not a genuine issue ad?

17 Is that the burden on you?

18 MR. BOPP: I don't believe so, Your Honor.

19 JUSTICE SCALIA: I thought when we're
20 dealing with the First Amendment we give wide scope to
21 the principle that it is -- it is better to allow, you
22 know, some bad speech than it is, in the effort to get
23 rid of that bad speech, to eliminate any good speech
24 that is justified.

25 So even if there is something that might

1 sneak through that does achieve what Congress didn't
2 want to achieve, the answer in the First Amendment is
3 that's too bad. There's some stuff you just can't get
4 at. There's a lot of bad speech that is allowed all the
5 time because you can't get at it without suppressing the
6 good speech.

7 MR. BOPP: I think that's the standard.

8 JUSTICE SOUTER: Mr. Bopp, I thought your
9 point --

10 JUSTICE BREYER: I thought that in fact this
11 isn't the First Amendment totally on one side. Isn't
12 this if we wanted -- isn't this a case where the courts
13 held that there are very significant constitutional
14 interests on both sides of the equation, which is what
15 makes this kind of thing difficult. Isn't that so?

16 MR. BOPP: And so giving meaning to one side
17 was upholding it facially. Now your job is to give
18 meaning to the other side, which is genuine issue ads
19 that are to be protected as applied.

20 JUSTICE BREYER: I'm just suggesting why a
21 pure First Amendment test doesn't necessarily answer the
22 question and why we've upheld McCain-Feingold.

23 MR. BOPP: But even if you use balancing,
24 you've already used it. You upheld it on its face,
25 because you said the vast majority were shams. At the

1 same time, you said there were genuine issue ads. You
2 reserved the question of whether or not the interest is
3 sufficient, the governmental interest is sufficient, to
4 prohibit genuine issue ads in footnote 88. You know,
5 they refuse to give the test. They refuse to tell us
6 what is the standard. And they change --

7 JUSTICE SOUTER: But your test, as I
8 understand it, is the test to determine whether you fall
9 within this sort of heartland of the statute which we
10 upheld on facial challenge. Yours is a test where
11 exclusion from the facial rule; isn't that correct?
12 That's -- that was why you were giving the answer to
13 Justice Scalia that you gave?

14 MR. BOPP: I did --

15 JUSTICE SOUTER: In other words, you're
16 saying, I have three criteria and if I satisfy those
17 criteria, then the -- then the facial validity of the
18 statute is not an answer to my claim. That's basically
19 what you're saying.

20 MR. BOPP: Yes.

21 JUSTICE SOUTER: And of course, if you
22 succeed in that you're saying, okay, the Government then
23 has a burden of satisfying strict scrutiny. That's the
24 reason for your test, isn't it, to get you out of
25 McCain-Feingold -- I mean, to get you out of the holding

1 in McConnell?

2 MR. BOPP: We're not trying to get out of
3 the holding in McConnell.

4 JUSTICE SOUTER: Sure. You're saying this
5 is an applied challenge which is different in some
6 relevant respects, so that the facial holding in
7 McConnell shouldn't apply to us, it shouldn't bar,
8 shouldn't justify the Government barring our ad. Isn't
9 that your logic?

10 JUSTICE SCALIA: You could say yes to that,
11 I think.

12 (Laughter.)

13 MR. BOPP: Thank you.

14 But the -- we're trying to -- actually --

15 JUSTICE SOUTER: You want to go further than
16 that, I know. But that's your first step.

17 MR. BOPP: No, our first --

18 JUSTICE SOUTER: That's what you were
19 getting at.

20 MR. BOPP: Our first step is we want to give
21 meaning to the promise of McConnell that there were
22 genuine issue ads that could be protected by as-applied
23 challenge.

24 JUSTICE SOUTER: And the way to do that is
25 to say, there's something different about my case from

1 the case which was taken as typical in upholding the
2 statute against facial challenge.

3 JUSTICE SCALIA: He fears the Greeks even
4 when they bear gifts.

5 (Laughter.)

6 MR. BOPP: Yes, we have. We have
7 demonstrated how these ads are materially identical to
8 the genuine issue ads this Government presented to this
9 Court and you relied upon that representation. We have
10 demonstrated why and their experts have agreed that the
11 Yellowtail ad, the Jane Doe ad, is completely different
12 than our ads. Their experts say that our ads are
13 grassroots lobbying ads.

14 Now, we are faced with a change in position
15 of the Government. I mean, in McConnell the Government
16 said naming a candidate is critical. Now their experts
17 say it doesn't matter if you name a candidate or not,
18 any genuine issue, any ad, can influence an election if
19 you mention an issue.

20 JUSTICE SOUTER: But your -- your principal
21 concern at this point is getting yourself out from the
22 holding of McConnell, in other words, by saying we have
23 a case which was not the typical case in McConnell,
24 that's why it's an as-applied challenge and that's why
25 this is a new ball game. And I take it your principle

1 argument for that in criticizing the Government's
2 position is that the Government didn't used to say that
3 there's something significant or something insignificant
4 about naming the candidate, and now they do.

5 That it seems to me -- if I understand your
6 argument -- goes back to this context argument or not.
7 Because the argument that's being made is, in context we
8 know perfectly well what's going on.

9 MR. BOPP: I just think that misrepresents
10 --

11 JUSTICE SOUTER: You're saying you shouldn't
12 look at the context.

13 MR. BOPP: I think that simply misstates the
14 effect of this ad. If anybody wanted to influence an
15 election with this ad, this was the most remote,
16 attenuated, speculative way.

17 JUSTICE SOUTER: Then why did you refer them
18 to the website? There's nothing remote or speculative
19 about what happens when they look at the website.

20 MR. BOPP: And that has been also misstated
21 in the briefing here. There was absolutely nothing on
22 the website about anything other than the filibuster
23 issue. There was nothing about the PAC or what the PAC
24 was doing. It was all about the filibuster.

25 JUSTICE SOUTER: Anything about Senator

1 Feingold?

2 MR. BOPP: Well, of course. It was about
3 Senator Feingold's position. It was, the one change --

4 JUSTICE SOUTER: Did the website indicate
5 the -- the Wisconsin Right to Life's position on Senator
6 Feingold?

7 MR. BOPP: Only on the filibuster, yes. It
8 identified -- the ads don't, the website does --
9 identified the position of Senator Feingold on the
10 filibuster and criticizes him for that.

11 Now, if that is to be -- you know, number
12 one, the whole First Amendment was adopted to allow
13 criticism --

14 JUSTICE SOUTER: That's part of the context,
15 isn't it? In other words, you're supplying some --

16 MR. BOPP: No.

17 JUSTICE SOUTER: -- context for the ad.
18 You're saying, if you want to know the context in which
19 we're saying this, look at the website.

20 MR. BOPP: No. We don't believe that that's
21 part of the context.

22 JUSTICE SOUTER: You don't think that's what
23 you are doing?

24 MR. BOPP: The FEC doesn't even regulate
25 what's on the Internet. You can do anything you want on

1 the Internet

2 JUSTICE SOUTER: The FEC doesn't regulate
3 anything else in the broader political context except
4 what the statute allows. My point is, it seems to me
5 you are referring to context. Why therefore is it
6 illegitimate for a court to look to context?

7 MR. BOPP: We have not referred to context.

8 JUSTICE SOUTER: Okay.

9 MR. BOPP: We are not importing in our
10 analysis --

11 JUSTICE STEVENS: May I ask this rather
12 basic question? Do you agree that the Constitution
13 permits Congress to pass a statute that prohibits your
14 using electioneering ads that use magic words?

15 MR. BOPP: Yes.

16 JUSTICE STEVENS: And would it also prohibit
17 you from using -- urging everyone to look to a website
18 that used the same magic words?

19 MR. BOPP: Would it?

20 JUSTICE STEVENS: Yes.

21 MR. BOPP: Perhaps, yes.

22 JUSTICE STEVENS: So that if your website
23 used the magic words, then your ad would be -- could be
24 regulated?

25 MR. BOPP: You're talking about the

1 constitutionality of a Federal statute that incorporates
2 the cited to websites. You know, perhaps. But that's
3 much different than a constitutional standard on what
4 this Court is going to look to. We have no notice of
5 this.

6 JUSTICE STEVENS: So that you would agree
7 that the statute could be validly applied to an ad that
8 says look at this website, and the website then uses the
9 magic words?

10 MR. BOPP: Perhaps. I'm not certain of
11 that. And I'm sorry that I don't have a considered
12 response to that question.

13 But that is much different than what we are
14 faced with. We are faced with ad hoc criteria that is
15 being used by the Government. They reject examining
16 subjective intent because it's unworkable. Now they
17 want to examine subjective intent. They disclaim to
18 this Court and Justice Scalia's question about, well,
19 anything that might influence an election, can we
20 regulate it? They said no. Well now they are claiming
21 that, that anything that might influence an election --

22 JUSTICE STEVENS: Would you agree that the
23 First Amendment would not be violated by an ad that was
24 the functional equivalent of one that contained magic
25 words?

1 MR. BOPP: Well, I disagree with that
2 holding of the McConnell --

3 JUSTICE STEVENS: Then why should there be a
4 constitutional difference between two ads that convey
5 the same message?

6 MR. BOPP: Well, I don't believe they have
7 the same --

8 JUSTICE STEVENS: If they're the functional
9 equivalent, by hypothesis, they convey the same message.

10 MR. BOPP: Well, Your Honor, I lost that
11 argument in this Court. So you know, I'm not trying to
12 relitigate McConnell. I'm trying to give meaning to
13 McConnell. I mean, you talked about genuine issue ads;
14 this Court did. Their experts identified genuine issue
15 ads. They said, as this Court said in Wisconsin Right
16 to Life I, as-applied challenges can be brought. And so
17 we're trying to give meaning to that, that there --

18 JUSTICE BREYER: Is this with the ad itself
19 on the website, in your opinion, would have been okay?
20 You turn to the website three months before the
21 election. It says 16 times out of 16 in the past two
22 years, Feingold and Kohl have voted to filibuster
23 certain of the President's nominees. Feingold and Kohl
24 are putting politics into the court system, creating
25 gridlock and costing taxpayers money. Now three months

1 before the election you put -- write that in your ad.
2 Now, is that in your opinion constitutionally protected,
3 gets it out of McCain-Feingold?

4 MR. BOPP: In the -- as a broadcast ad?

5 JUSTICE BREYER: Yes. What you did, suppose
6 instead of what you ran, you know, in a broadcast ad.

7 MR. BOPP: Yes.

8 JUSTICE BREYER: You think that is
9 protected?

10 MR. BOPP: Yes. Because whether you praise
11 or criticize a Government official's action in office
12 has nothing to do with whether it falls under the First
13 Amendment's protection of petitioning. In fact that's
14 the, you know, the kind of information -- we didn't do
15 that. But that's the kind of information that's very
16 relevant to the constituent's effort to petition.

17 CHIEF JUSTICE ROBERTS: Thank you, Mr. Bopp.
18 General Clement, you have two minutes
19 remaining.

20 REBUTTAL ARGUMENT OF GEN. PAUL D. CLEMENT
21 ON BEHALF OF APPELLANT FEDERAL ELECTION COMMISSION

22 GENERAL CLEMENT: Thank you, Mr. Chief
23 Justice. Just a few points in rebuttal. First, I would
24 like to stress the virtue of as-applied challenges. You
25 might wonder in the abstract, wasn't there a problem

1 with the statute that applies to a group that's running
2 a series of ads and then one of them falls in the
3 period. But then you look at an as-applied challenge and
4 you see that didn't happen here. In fact, the opposite
5 did. This issue was percolating since March of 2003.
6 These ads were run some 500 days after the first
7 filibuster vote. Both before and after Senator
8 Feingold's reelection cycle, they addressed this --

9 JUSTICE SCALIA: Does that go to their
10 meaning or to the intent of -- is that what governs?
11 It's the intent of the person who puts it on? I thought
12 -- I thought you were focusing on the meaning of it,
13 what it conveys to the public.

14 GENERAL CLEMENT: Justice Scalia, if you're
15 looking for an as-applied challenge that's going to
16 identify a genuine issue ad, I would think that it would
17 go somewhat to intent. And I would think the
18 reason that --

19 JUSTICE SCALIA: That's new to me. I
20 thought you were asking us to look at the meaning. What
21 does it mean to the --

22 GENERAL CLEMENT: No. Our position is
23 slightly different than intervenors on that point. And
24 I think the reason that the series-of-ads hypothetical
25 is beguiling is because it suggests that because they

1 run the same issue ad all the time, they must be
2 interested in the issue, not the election, and the
3 opposite is true here.

4 They run ads about this issue, they run --
5 they have communications about this issue outside of the
6 period of Senator Feingold's reelection. They don't
7 rely on broadcast ads. They rely on e-alerts when it's
8 not during the election cycle. But when it's during the
9 election cycle, all of a sudden they start running
10 broadcast ads. And I think it shows what the timing
11 suggests. The timing here suggests an intent to
12 influence the election, not an intent to engage on the
13 issue.

14 JUSTICE ALITO: How long will the blackout
15 period be during the upcoming year for the presidential
16 candidates?

17 GENERAL CLEMENT: Well, I think that in
18 various places it will be 30 days before the primary and
19 then obviously 60 days before the general.

20 JUSTICE SCALIA: It could be as long as 200
21 days; isn't that correct?

22 GENERAL CLEMENT: Not in any one place. And
23 if there's an argument, though, that because of the way the
24 the various broadcast media affect Manchester, New
25 Hampshire, that's a great as-applied challenge. The

1 virtue of as-applied challenges are that you get a
2 concrete record and you don't have to speculate, wow,
3 you know, is it possible to address the filibuster issue
4 --

5 JUSTICE SCALIA: You have to speculate
6 before you try to put the ad on.

7 GENERAL CLEMENT: No, you don't.

8 JUSTICE SCALIA: You have to speculate
9 whether the Court is going to say well, since you're in
10 the zone of three different radio stations or television
11 stations, a different rule applies. Doesn't the person
12 who wants to speak have to speculate, roll the dice?

13 GENERAL CLEMENT: No, they don't, Justice
14 Scalia, and one of the arguments that's made to try to
15 suggest that there should be a reconsideration of
16 McConnell is as-applied challenges don't work. How can
17 you say that? In the two cases that have been brought,
18 there were preliminary-injunction proceedings that were
19 completed before the blackout period began. So in that
20 case, bring your preliminary injunction if you have a
21 question.

22 But the virtue of as-applied challenges, and
23 the last thing I'll say, is the virtue of as-applied
24 challenges, they're not all created equal. Just because
25 this as-applied challenge fails doesn't mean the statute

1 isn't open to them. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you, General.

3 The case is submitted.

4 (Whereupon, at 11:16 a.m., the case in the
5 above-entitled action was submitted.)

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