United States District Court
District of Columbia

Republican National Committee et al., ***Plaintiffs,*** ***v.*** **Federal Election Commission** et al., ***Defendant.***	**Case No.** 08-1953 (BMK, RJL, RMC) THREE-JUDGE COURT

Plaintiffs' Supplemental Reply Memorandum in Support of Summary Judgment

In accordance with this Court's May 5, 2009 order, Plaintiffs Republican National Committee et al. respectfully file this supplemental reply memorandum in support of their Motion for Summary Judgment (Dkt. 21). In previous briefing, Plaintiffs explained that:[1]

(a) Campaign finance laws may only regulate speech that is unambiguously campaign related (*Pls.' Mem.* at 7-18; *Pls.' Reply Mem.* at 1-10);

(b) Plaintiffs' intended activities are not unambiguously campaign related, and furthermore, as applied to Plaintiffs' intended activities the Federal Funds Restriction is not narrowly tailored or closely drawn to any compelling or important government interest in preventing corruption or its appearance (*Pls.' Mem.* at 30-45; *Pls.' Reply Mem.* at 10-25; *Pls.' Op.* at 4-8);

[1]Plaintiffs incorporate by reference their *Memorandum in Support of Summary Judgment* ("*Pls.' Mem.*") (Dkt. 21), *Reply Memorandum in Support of Summary Judgment* ("*Pls.' Reply Mem.*") (Dkt. 50), and *Memorandum in Opposition to Defendant Federal Election Commission's Motion to Dismiss* ("*Pls.' Op. to FEC Mot. to Dis.*") (Dkt. 27), *Memorandum in Opposition to Defendant FEC's Motion for Summary Judgment* ("*Pls.' Op.*") (Dkt. 61), and *Supplemental Memorandum in Opposition to Defendant FEC's Supplemental Motion to Dismiss* ("*Pls.' Supp. Op. to FEC Mot. to Dis.*") (Dkt. 80).

(c) Plaintiffs' intended activities do not directly benefit any federal candidate or officeholder (*Pls.' Mem.* at 30-45; *Pls.' Reply Mem.* at 12-18; *Pls.' Op.* at 8-13);

(d) For any gratitude on the part of federal candidates or officeholders to give rise to corruption or its appearance, the candidates or officeholders must receive a direct benefit, which here they do not (*Pls.' Reply Mem.* at 21-24; *Pls.' Mem.* at 24-27);

(e) To the extent *McConnell v. FEC*, 540 U.S. 93 (2003), found that contributions to national political parties were "suspect," irrespective of their end use, it premised this conclusion on the historical practice of national parties to provide large donors of non-federal funds with preferential access to federal candidates and officeholders (*Pls.' Mem.* at 21-24; *Pls.' Reply Mem.* at 18-21);

(f) The RNC will not provide donors of non-federal funds or state funds with preferential access to any federal candidate or officeholder and will not involve federal candidates or officeholders in the solicitation of such funds (*Pls.' Mem.* at 21-23; *Pls.' Reply Mem.* at 18-21);

(g) Plaintiffs' intended activities are too far removed from federal candidates and federal elections to be regulated (*Pls.' Mem.* at 30-45; *Pls.' Reply Mem.* at 12-18).

Plaintiffs respond here to the issues of fact asserted in Intervenor-Defendant Van Hollen's Supplemental Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment ("*Van Hollen Supp. Opp.*") (Dkt. 83).

Before arguing the facts, Van Hollen argues that *McConnell* precludes Plaintiffs' claims which "therefore fail as a matter of law." *Van Hollen Supp. Opp.* at 1. *McConnell* was, of course, a facial analysis that did not distinguish whether various uses of non-federal funds were

unambiguously campaign related. So it did not consider the as-applied question here. *See also, infra* at 7.

Van Hollen asserts that the RNC's intended redistricting, state activities (in New Jersey and Virginia), and grassroots lobbying will "affect" or "have an impact on future elections." *Van Hollen Supp. Opp.* at 2. But any such possible affect/impact is too remote and speculative to be cognizable, as evidenced by the actual test for regulable activity, i.e., government may only regulate "spending that is *unambiguously* related to the *campaign* of a *particular* federal candidate," *Buckley v. Valeo*, 424 U.S. 1, 80 (1976) (emphasis added). Van Hollen points to no *particular* candidate whose *campaign* is, or will be, *unambiguously* affected/impacted by these activities. In fact, Chairman Steele specifically testified that the state activities might have no impact on RNC's fortunes, FEC Exh. 42, *Steele Dep.* at 98:14-99:4, which is a far cry from the required *unambiguous* relation to the *campaign* of a *particular* federal candidate.

That this unambiguously-campaign-related analysis controls, instead of some amorphous potential "effect", is clear from *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL-II*") (Roberts, C.J., joined by Alito, J.) (stating holding). *WRTL-II* noted that "[t]he FEC, intervenors, and the dissent below contend that *McConnell* [*v. FEC*, 540 U.S. 93 (2003),] already established the constitutional test for determining if an ad is the functional equivalent of express advocacy: whether the ad is intended to influence elections and has that effect." *Id.* at 2664. *WRTL-II* observed that "*Buckley* had already rejected an intent-and-effect test for distinguishing between discussions of issues and candidates" because, given "the difficulty of distinguishing between discussion of issues on the one hand and advocacy of election or defeat of candidates on the other, . . . analyzing the question in terms of intent and of effect would afford no security for

free discussion." *Id.* at 2665 (quotation marks and citations omitted). *WRTL-II* also rejected any intent-and-effect test. *Id.* As *WRTL-II* was plainly applying the unambiguously-campaign-related principle as a means of protecting issue advocacy, it rejected any intent-and-effect test as part of it. That analysis extends to all activity to be analyzed under the unambiguously-campaign-related principle. In fact *Buckley* employed the unambiguously-campaign-related analysis precisely to narrow overbroad tests that would look at "'any expenditure . . . *relative to* a clearly identified candidate,'" 424 U.S. at 42 (citation omitted) (emphasis added), or "'for the purpose of . . . *influencing*' the nomination or election of candidates for federal office," *id.* at 77 (citation omitted) (emphasis added). With *WRTL-II*'s affirmance of *Buckley*'s rejection of any intent-and-effect test and tests based on some vague "relati[on]" or "influenc[e]," it is too late in the day for the FEC and intervenor to be reasserting a vague effect/impact test based on some amorphous notion of possible, but uncertain, relation to or influence upon some potential, unparticularized candidate's future campaign.

WRTL-II was simply following the unambiguously-campaign-related analysis asserted and adopted in *McConnell*, 540 U.S. 93. In *McConnell*, the campaign-finance reformers (McCain-Feingold's primary sponsors and supporting counsel) argued that, although the electioneering-communication definition went beyond express advocacy, it was a constitutional "adjustment of the definition of which advertising expenditures are campaign related." *Brief for Intervenor-Defendants Senator John McCain et al.* at 57, *McConnell*, 540 U.S. 93 ("*Reformers' Brief*") (*available at* http://supreme.lp.findlaw.com/supreme_court/briefs/02-1674/02-1674.mer.int.cong.pdf). The reformers meant *unambiguously* "campaign related," arguing that the "[d]isclosure rules . . . 'shed the light of publicity on spending that is unambiguously campaign

related but would otherwise not be reported.'" *Id.* at 58 (*quoting Buckley v. Valeo*, 424 U.S. 1, 81 (1976).[2] They urged approval of electioneering-communication regulation based on *Buckley*'s unambiguously-campaign-related analysis:

> Two general concerns emerge from the Court's discussion: Statutory requirements in this area should be clear rather than vague, in part so they will not 'dissolve in practical application,' 424 U.S. at 42; and they should be 'directed precisely to that spending that is *unambiguously related to the campaign of a particular federal candidate*,' *id*. at 80; *see id*. at 76-82. Those are *precisely the precepts to which Congress adhered in framing Title II*.

Id. at 62 (*quoting Buckley*) (emphasis added).

So Senators McCain and Feingold, the reform community, and Congress itself recognized (a) the dissolving-distinction problem and (b) the unambiguously-campaign-related analysis as identifying regulable communications. Their "precepts" are that the regulation be neither (1) vague nor (2) overbroad (beyond unambiguously-campaign-related activity). Counsel for the present Intervenor argued this in *McConnell*. *See Reformers' Brief* at inside cover (counsel list).[3]

That the unambiguously-campaign-related analysis was correct is confirmed by the fact that *McConnell* adopted the reformers' analysis to approve regulation of "electioneering

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[2]The reformers conceded the necessity of bright-line tests, arguing that their new "standards for defining which ads will be treated as campaign-related squarely serve a compelling interest in using clear and objective lines to frame any rule that affects speech." *Id.*

[3]To rely on the unambiguously-campaign-related principle then and eschew it now is the sort of bait and switch that Chief Justice Roberts denounced in *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*"): "In McConnell against FEC, you stood there and told us that this was a facial challenge and that as-applied challenges could be brought in the future. This is an as-applied challenge and now you're telling us that it's already been decided. It's a classic bait and switch." Transcript at 25 (*available at* http://www.supremecourtus.gov/oral_arguments/argument_ transcripts/04-1581.pdf).

communications" in addition to express advocacy. *See* OB–25-27. *McConnell* said the constitutional analysis required "avoid[ing] . . . vagueness and overbreadth," 540 U.S. at 192, and this "overbreadth" precept was "'[t]o insure that the reach' of the disclosure requirement was 'not impermissibly broad'"—citing the *Buckley* passage to which the reformers pointed for the unambiguously-campaign-related precept, *id.* at 191 (citation omitted).[4]

In sum, the unambiguously-campaign-related principle controls all of campaign-finance law.[5] And it requires the analysis to be based upon whether campaign-finance laws are restricted

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[4]This unambiguously-campaign-related analysis has been expressly recognized by FEC Commissioners. In their *Statement of Reasons* (Dec. 16, 2003) in Matters Under Review ("MURs") 5024, 5154, and 5146 (*available at* www.fec.gov), Chair Weintraub and Commissioners Thomas and McDonald noted that *Buckley* expressed concern about reporting provisions "that might be applied broadly to communications discussing public issues which also happened to be campaign issues," and so imposed the express-advocacy construction. *Id.* at 2. "[T]he *Buckley* Court explained the purpose of the express advocacy standard," they declared, which "was to limit application of the . . . reporting provision to 'spending that is *unambiguously related* to the campaign of a particular federal candidate.'" *Id.* (emphasis in *Statement*) (*quoting Buckley*, 424 U.S. at 80). The Commissioners quoted 424 U.S. at 82: "[u]nder an express advocacy standard, the reporting requirements would 'shed the light of publicity on spending that is *unambiguously campaign related* . . . .'" *Statement* at 2 (emphasis in *Statement*). A January 22, 2009 *Statement of Reasons* in MUR 5541 (November Fund) by Vice Chair Petersen and Commissioners Hunter and McGahn emphasized the need to "fully incorporate important principles in recent judicial decisions," including *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL-II*"), "and the Fourth Circuit's persuasive decision in . . . [*North Carolina Right to Life v.*] *Leake*[, 525 F.3d 274 (4th Cir. 2008)]." *Id.* at 2 (citations omitted).

[5]The most recent decision to recognize the unambiguously-campaign-related analysis is *Broward Coalition of Condominiums v. Browning*, No. 4:08-cv-445, 2009 WL 1457972 (N.D. Fla. May 22, 2009) (order granting summary judgment to Plaintiffs). *Broward*—applying strict scrutiny to an "electioneering communications" provision imposing PAC-style burdens on groups doing ballot-initiative (and candidate) advocacy—recognized the major-purpose test, the unambiguously-campaign-related analysis, and the fact that only two types of communications may be regulated (express-advocacy and federally-defined "electioneering communications"). It held that because *WRTL-II* said the Court had "'never recognized a compelling interest in regulating ads . . . that are neither express advocacy nor its functional equivalent,'" neither would it. 2009 WL 1457972, at *5 (*quoting WRTL-II*, 127 S. Ct. at 2671).

to "spending that is *unambiguously* related to the *campaign* of a *particular* federal candidate," *Buckley*, 424 U.S. at 80 (emphasis added). The effort of the FEC and the Intervenor to revert to a long-rejected amorphous analysis must be rejected.

Not only is the unambiguously-campaign-related principle a constitutional first-principle that must be satisfied as a threshold matter in campaign-finance law (so that it overrides other analyses), but any potential "appearance of corruption" as to activities that are not unambiguously campaign related is entirely too remote to be cognizable for constitutional analysis. As the opinion stating the holding in *WRTL-II* put it when faced with a similar stretching of "corruption" to unrecognizable lengths, "Enough is enough," *id.* at 2672 (opinion of Roberts, C.J., joined by Alito, J.). And in *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*"), the Supreme Court unanimously rejected the notion that a broadly-worded *McConnell* holding precluded an as-applied challenge, which is the essence of the FEC's recycled argument here. If there is one obvious thing that *WRTL-I* and *WRTL-II* teach, it is that a facial *McConnell* holding does not preclude an as-applied holding that significantly narrows the facial holding. And in *Citizens United v. FEC* (No. 08-205), the Supreme Court has just ordered reargument as to whether the electioneering-communication prohibition as narrowed in *WRTL-II* is adequately protecting issue advocacy as applied or whether *McConnell*'s facial upholding of the electioneering-communication prohibition must be overruled, perhaps along with *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990) (upholding corporate "expenditure" prohibition). *See* http://origin.www.supremecourtus.gov/docket/08-205.htm (Supreme Court docket with order showing topics of reargument).

Van Hollen also asserts that the new evidence supports his initial summary judgment opposition (Dkt. 41). However, the new evidence does not contradict Plaintiffs' original position. Van Hollen points to Chairman Steele's statement that Plaintiffs' intended activities regarding redistricting, state elections and grassroots lobbying affect federal elections, but that sort of effect has no more to do with the requisite unambiguously-campaign-related analysis than other things that might remotely "affect" elections. For example, RNC has a prolife plank, which if implemented as law in a particular state might conceivably "affect" population numbers upwards and so "affect" redistricting, which in turn could "affect" elections in a remote sense. But if the RNC wants to run ads promoting the prolife position, government may not restrict that issue advocacy on the basis that it is unambiguously campaign related. Similarly, the RNC could run issue ads opposing legislation that, say, imposes disproportionate energy costs on the heartland states, thereby wrecking their economy and encouraging citizen migration and discouraging people from having children, thereby depressing population numbers and thus remotely affecting redistricting, but it would not be a constitutionally cognizable effect for the unambiguously campaign related analysis.

In addition to arguing that Plaintiffs' intended activities would directly impact federal elections, Van Hollen asserts that, because money is fungible, any contribution to the RNC for its intended activities would in turn free up other money that the RNC could use to directly benefit federal candidates. *Van Hollen Supp. Opp.* at 2. Van Hollen's attempted scare tactic fails for a number of reasons. First, the reach of Van Hollen's argument is stunning. Such an expansive justification would allow federal regulation of nearly all state and local election activities, including contributions to the campaigns of state and local candidates.

Second, the "other money" would be federal money, which the RNC may use for federal activities, see 2 U.S.C. § 441i(a), and government may not limit spending for political speech here. *See Randall v. Sorrell*, 548 U.S. 230, 240-46 (2006); *Buckley*, 424 U.S. at 54-58. Third, Van Hollen ignores the fact that the RNC is not doing many of the activities for which it would use state and non-federal money, because (1) the RNC may raise only federal money, 2 U.S.C. § 441i(a), (2) federal money is harder to raise than other money, and (3) federal money is needed in other areas. See *FEC Mem*. Exh. 1, *Josefiak Dep.* at 141:13-144:14; see also *FEC Mem*. Exh. 4. Therefore, the RNC's receiving and spending of non-federal money will hardly result in any more federal money for the RNC to spend on activities directly benefitting federal candidates. Instead, it will enable the RNC to engage in additional non-federal activities. More fundamentally, the fungibility argument is clever, but it has no stopping point. *Cf. United States v. Lopez*, 514 U.S. 549, 600 (1995) (Thomas, J., concurring). Under this argument, no organization with an account for federal money could establish a non-federal account, because that would allow the organization to spend more of its federal money on federal activities. But the law already contemplates organizations other than national party committees having federal and non-federal accounts for federal and non-federal activities. *See* 11 C.F.R. § 102.5.

Conclusion

For the reasons stated, Plaintiffs' motion for summary judgment should be granted.

Respectfully submitted,

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