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IN THE SUPREME COURT OF THE UNITED STATES

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WISCONSIN RIGHT TO LIFE, INC. :
Petitioner, :
v. : No. 04-1581
FEDERAL ELECTION COMMISSION. :
- - - - -X

Washington, D.C.
Tuesday, January 17, 2006

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:13 a.m.

APPEARANCES:
JAMES BOPP, JR., ESQ., Terre Haute, Indiana; on behalf
of the Petitioner.
PAUL D. CLEMENT, ESQ., Solicitor General, Department of
Justice, Washington, D.C.; on behalf of the
Respondent.

1 P R O C E E D I N G S

2 (10:13 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first today in No. 04-1581, Wisconsin Right to Life,
5 Incorporated v. Federal Election Commission.

6 Mr. Bopp.

7 ORAL ARGUMENT OF JAMES BOPP, JR.

8 ON BEHALF OF THE PETITIONER

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

11 This case involves the fundamental First
12 Amendment question of whether the Government can shield
13 lawmakers from grassroots lobbying about upcoming votes
14 in Congress through campaign finance laws.

15 This Court has distinguished the regulation
16 of corporate electioneering from efforts to influence
17 lawmaking, finding sufficiently compelling
18 governmental interests in regulating electioneering,
19 but not grassroots lobbying.

20 JUSTICE SOUTER: Mr. Bopp, right -- right
21 there I guess I -- I have a problem with -- with your
22 argument, and I just want to get it out. I went back
23 and looked at some of the examples that were given at
24 -- in -- in the McConnell case for parallels between
25 what we -- what we thought was covered in those cases

1 and -- and yours -- your case. And the -- the one
2 which I -- I guessed was probably the closest was the --
3 was the advertisements there in -- in the McConnell
4 case on the -- the lobbying on the Chinese trade
5 relations. The basic message in -- in that case was
6 China uses forced labor. The Congress of the United
7 States is about to make it easier for -- for Chinese
8 goods to get in here and for China to have a
9 respectable trade status. And -- and it said, call
10 Congressman Myrick, I think it was, in any case, a
11 Member of Congress, and -- and say what you think.

12 In this case, you're -- you're talking about
13 a -- a filibuster, and you say, you know, they're
14 filibustering nominees and they're not coming up to --
15 to a vote. Tell the two Senators in this State, Kohl
16 and Feingold, that -- that you don't like this.

17 The only difference that I could see
18 basically between the two kinds of ads was that in the
19 first one -- in -- in the Myrick ad, they actually gave
20 the number of the -- of the congressional office to
21 call and say, hey, don't do this.

22 In this case, your clients did not give a --
23 a number. They gave a Web site to an organization.
24 Insofar as I know, it doesn't have a number.

25 Which gets me to the question. If the -- the

1 Chinese trade relations ad was presumably validly
2 subject to the act, I don't see why your client's ad is
3 not, for the same reason, subject to the act and for
4 the further reason that it doesn't even give a phone
5 number to call -- to -- to lobby the people. So it seems
6 to me that on stare decisis grounds, unless we're going
7 to go back and simply reexamine McConnell to -- to --
8 from -- from scratch, that your clients fall within the
9 general rule as -- as we held it in McConnell. So why
10 doesn't precedent foreclose this?

11 MR. BOPP: Well, there -- there is a few
12 specifics about the -- about our ad that -- that I
13 would like to remind the Court of.

14 First, it was not -- the call to action at
15 the end of the ad was not just call them up and tell
16 them what you think. The call to action was to call
17 the Senators and ask them to oppose the filibuster. So
18 it was specific.

19 JUSTICE SOUTER: Yes, but you didn't even
20 give their phone numbers.

21 MR. BOPP: Well, and then it refers to a Web
22 site, befair.org, which contained prominently on the
23 first page the phone numbers and addresses and all
24 contact information for these two Senators. The
25 decision was made by the speaker here that it would be

1 more likely that the recipient of the ad would remember
2 the phrase, *befair.org*, and seek the information on
3 that Web site than to have a -- you know, a -- a phone
4 number that is just simply more difficult to -- to
5 remember.

6 JUSTICE SOUTER: Okay. So if we accept that
7 extra step, that's -- that gets you -- if -- if we
8 accept the extra step that gets you parallel to the --
9 to the ad that we considered in *McConnell*.

10 MR. BOPP: Well, it -- it doesn't, the one
11 that you mentioned, because it was just call them up
12 and --

13 JUSTICE BREYER: If -- if it's the fact that
14 you go to the Web site and that's what's supposed to
15 make this what it was in *McConnell* which, by the way,
16 we said was illegal, what they -- the first thing
17 they're going to see when they get to the Web site,
18 which I agree with you -- four times in 3 of the 12
19 sentences of this ad -- in 3 of the 12 -- it says,
20 *befair.org*, visit *befair.org*, go to *befair.org*. And
21 the first thing that they're going to see when they get
22 to *befair.org* is a big headline in bold -- gold -- bold
23 letters which says, Feingold and Kohl continue to
24 support unprecedented filibusters of judicial nominees.
25 So, in fact, if *befair.org* is brought into the

1 picture, that makes this ad look much more like an
2 effort to -- to defeat Senator Feingold than the ad
3 that we considered in our previous case.

4 MR. BOPP: Well, it --

5 JUSTICE BREYER: Doesn't it?

6 MR. BOPP: No. In your previous case, there
7 were certainly genuine issue ads. This Court
8 recognized that it -- that there were genuine issue ads
9 that were not for the purpose of influencing an
10 election. I believe that these ads are at the very
11 core of what a genuine issue ad is. It involves a -- a
12 pending legislative issue, and the only reference to
13 the Senator -- and it was both Senators, not just the
14 one up for election -- was to contact them about --
15 about how -- whether to support or oppose that specific
16 initiative.

17 JUSTICE O'CONNOR: Yes, but in McConnell --

18 JUSTICE SOUTER: But if you are right --

19 JUSTICE O'CONNOR: -- in McConnell, the Court
20 said corporations and unions may finance genuine issue
21 ads during election blackout periods by simply avoiding
22 any specific reference to Federal candidates or, in
23 doubtful cases, by paying for the ad from a segregated
24 fund. Now, that language indicates, to me at least,
25 that the Court was saying there are no genuine issue

1 ads meeting the definition as you would have us apply
2 it here.

3 MR. BOPP: Well, that -- that part of the
4 opinion needs to be read in light of the footnote,
5 which is attached to those very words, which said in
6 footnote 88 that the interests that support regulation
7 of electioneering may not apply to genuine grassroots
8 lobbying and distinguished the McConnell case from
9 Bellotti and McIntyre.

10 So we do have to recognize that there's two
11 things going on here. There -- there is an election,
12 but also Congress is in session. The Government is
13 engaging in its lawmaking function.

14 JUSTICE GINSBURG: Mr. Bopp, to what extent
15 can we take into account the surrounding circumstances?
16 One thing that you advocate is to look at this ad in
17 isolation. But if you add to it that your organization
18 made it clear that it opposed the candidacy of Senator
19 Feingold and that it supported his opponents, that your
20 organization also connected, as Justice Breyer just
21 brought out, Senator Feingold with this filibuster, and
22 then if the filibuster was such an important thing for
23 grassroots lobbying, why was it that when the election
24 was over, this ad was not repeated?

25 MR. BOPP: Well, of course, the final point

1 is -- is in the record, that -- that is, it was -- the
2 -- it was supposed to come to a head in November and
3 then it did not. It was abandoned.

4 But the -- but the point is you cannot -- I
5 don't think that the Government can condition --

6 JUSTICE SCALIA: I -- I don't -- I don't
7 understand what you just said.

8 MR. BOPP: Well -- well, the -- the
9 filibuster issue, as it related to that session of
10 Congress, it was thought that it was going to come to a
11 head in -- in October -- excuse me -- but it -- but as
12 a -- but it did not. So that is the reason why it was
13 -- it would not have been run after November.

14 JUSTICE SCALIA: No, but I mean, once it didn't
15 come to a head in November and it was still an issue, why
16 didn't you continue to run it?

17 MR. BOPP: Well, each organization has to
18 make an assessment with respect to the different issues
19 that they want to be lobbying on and the -- their
20 pressing nature. And --

21 CHIEF JUSTICE ROBERTS: I thought your point
22 was that it was not an issue after the election.

23 MR. BOPP: Well -- well, it was in the -- in
24 the next session of Congress and has been an -- an
25 issue. But each -- a lobby organization makes a

1 decision about the priorities that they have and
2 whether or not their lobbying efforts will most likely
3 affect legislative action. So --

4 CHIEF JUSTICE ROBERTS: Were you taking a
5 position on this issue prior to the election time
6 frame?

7 MR. BOPP: Yes. The --

8 CHIEF JUSTICE ROBERTS: Had you taken out
9 advertisements prior to that time frame?

10 MR. BOPP: Yes. Yes, and in fact these radio
11 and television ads were continuing up until the
12 blackout period and it was the blackout period that
13 triggered the case.

14 JUSTICE BREYER: But the basic question I
15 think is this. All of us -- or almost all of us who
16 are here -- spent an entire summer reading through one
17 of the longest set of opinions I've ever seen from the
18 lower courts and going through a record that they had
19 compiled over months reflecting 6 years of
20 congressional effort. And what that record showed with
21 dozens, hundreds I think, of examples was the basis for
22 Congress' conclusion that there's simply no way to know
23 whether an ad like yours is a genuine issue ad or
24 isn't. And the only way that we have a hope of
25 stopping rich people or corporations or labor unions

1 from simply trying to defeat candidates by writing sham
2 ads is to have the rule that we had.

3 Now, you have a very good argument, but it's
4 an argument that I heard right in that case. And we
5 considered right in that case issues like yours, just
6 ads like yours, ads that were even less sham-like than
7 yours, if you want to call yours a sham -- I don't mean
8 to be pejorative. But we considered all that, and then
9 we used them as an example. And of course, it was
10 close. 5 to 4 this Court said ads that are even more
11 apparently neutral on their face than yours, Congress
12 can impose this requirement.

13 Now, what's different about your ad than the
14 ads we put right in that opinion as examples of what
15 we'd allow Congress to control? What's different now
16 or are you asking us to go back only a year later and
17 undo what we did?

18 MR. BOPP: No. I'm asking you to give
19 meaning to the holding of this Court that there were
20 genuine issue ads that were broadcast during that
21 period of time. The Government conceded 7 percent,
22 asked you to do a Broadrick analysis upholding the
23 statute on its face, reserving as-applied challenges to
24 genuine issue ads in subsequent cases. That is what
25 this case is about.

1 And the difference here is that as Judge Leon
2 -- the record of the case -- in Judge Leon's opinion,
3 he went for a number of pages explaining what genuine
4 issue ads in his view were, and what -- and he said
5 that if the ad discusses a current legislative issue
6 and refers to the Member of Congress in calling on him
7 or her to take a particular action on that issue, that
8 constitutes a genuine issue ad.

9 JUSTICE GINSBURG: Can we return to --

10 MR. BOPP: These people are lawmaking.

11 JUSTICE GINSBURG: Mr. Bopp, then can we
12 return to my question? Do we view the ad in isolation,
13 and do we discount the connection by your organization
14 of this Senator with the filibuster that you said was
15 a very bad thing?

16 MR. BOPP: And I'm sorry. I was interrupted.
17 I wasn't able to get to that question.

18 And the -- the Government cannot condition
19 the exercise of one right on exercising another.
20 There's a First Amendment right for the PAC of
21 Wisconsin Right to Life to support or oppose
22 candidates. That's different than what its lobby group
23 does. Its lobby group is primarily involved in
24 influencing current lawmaking. And so that is why, in
25 the First Amendment, petition is separately listed.

1 JUSTICE GINSBURG: But the electorate will
2 know that this issue is presented to them in connection
3 with this Senator and that your organization has linked
4 the two very clearly.

5 MR. BOPP: But, you know, the -- the effect
6 on an election is remote and speculative and not proven
7 by -- in terms of genuine issue ads in this record.
8 But these people are lawmaking now. So there's a
9 pressing need and, indeed, right for people today to
10 influence the Government's lawmaking regardless of the
11 incidental, remote, speculative, and unproven effect
12 that that genuine issue ad may have on an election.

13 There -- there is simply -- we just cannot
14 get away from the fact that the most important thing
15 that Government does is lawmaking, and because they've
16 scheduled an election should not immunize the
17 incumbents from being lobbied about that very law-
18 making function that they're engaged in today.

19 JUSTICE SOUTER: Then why didn't we have to
20 go the other way in the Chinese trade relation example?
21 I mean, everything --

22 MR. BOPP: Well, I don't think you --

23 JUSTICE SOUTER: -- unless I'm missing
24 something in your argument, everything you are saying
25 in this argument could have been said with respect to

1 that ad and, as Justice Breyer said, to a couple of
2 others.

3 MR. BOPP: Well that may very well have been
4 a genuine issue ad in the mind of this Court. You only
5 cited one ad, which was on page 193, which was the
6 Yellowtail ad, as an example of sham issue advertising.

7 JUSTICE SOUTER: Yes.

8 MR. BOPP: And there, you know --

9 JUSTICE SOUTER: And -- and we -- we cited
10 some other examples as -- as examples that, on the face
11 of it and on the face of the record, would -- would
12 lawfully fall within the -- the general rule that we
13 said Congress could prescribe.

14 MR. BOPP: Well -- well, the Yellowtail ad,
15 which you cited and quoted as a example of sham issue
16 ad, said that the -- Mr. Yellowtail had taken a swing
17 at his wife and he justified that because he said he
18 didn't hit her.

19 JUSTICE SOUTER: No, but the point --

20 MR. BOPP: And then it said basically call
21 him up and yell at him.

22 JUSTICE SOUTER: But I -- I don't want to cut
23 you off from your Yellowtail argument, if -- if you
24 want to make it, but it seems to me that the problem in
25 this case is that your ad is very much like a non-

1 Yellowtail ad. And the problem that we would have in
2 accepting your argument is, number one, a problem of
3 precedent and, number two, the problem that Justice
4 Breyer raised that, again, we had dealt with in the
5 prior case.

6 MR. BOPP: How could it be --

7 JUSTICE SOUTER: No, no. Let me just finish
8 my question.

9 MR. BOPP: Sorry.

10 JUSTICE SOUTER: Once you get out of the
11 sphere of -- of kind of sham ads that just hit you in
12 your face, there isn't a practical way to tell the
13 difference. There isn't a kind of magic formula. We
14 rejected the magic word, or Congress rejected the magic
15 word's approach. And therefore, Congress came up with
16 a rule that it did within certain time limits,
17 identified candidates, identified audiences. You can't
18 do it within this period of time unless you do it
19 through a PAC.

20 What is different in your case from those
21 paradigm examples in -- in McConnell?

22 MR. BOPP: Well, as I was describing, the
23 Yellowtail ad was --

24 JUSTICE SOUTER: But Yellowtail --

25 MR. BOPP: -- which involves very --

1 JUSTICE SOUTER: -- is -- is an ad of -- an
2 obviously sham ad. The problem that we're dealing with
3 --

4 JUSTICE SCALIA: Mr. Bopp, did -- did the
5 opinion refer to --

6 JUSTICE SOUTER: May -- may I finish?

7 JUSTICE SCALIA: -- sham ads?

8 JUSTICE SOUTER: Excuse me. May I -- may I
9 finish my question?

10 JUSTICE SCALIA: Did the opinion refer to --

11 CHIEF JUSTICE ROBERTS: Justice Souter.

12 JUSTICE SOUTER: May I finish my question?

13 The -- the -- no one is saying that your ad
14 in this case is an obviously sham ad like Yellowtail.
15 Your ad in this case is one of those ads that it's
16 difficult to deal with fairly. You can say, well, you
17 know, it's an electioneering ad and you can say it's --
18 it's a lobbying ad. And -- and Congress decided how to
19 deal with them. We said that's okay. Why doesn't --

20 MR. BOPP: Only on a facial challenge.

21 JUSTICE SOUTER: Yes, but why doesn't your ad
22 fall within the reasoning that we used in approving --
23 on the facial challenge, in approving the statute?

24 MR. BOPP: Because the Broadrick facial
25 challenge analysis that you engaged in in McConnell is

1 not completed because that includes future as-applied
2 challenges. The Government argues that there were --

3 JUSTICE SOUTER: No -- no question about it.

4 MR. BOPP: -- 7 percent --

5 JUSTICE SOUTER: But your -- your as-applied
6 --

7 MR. BOPP: -- genuine issue ads --

8 JUSTICE SOUTER: -- challenge has got to have
9 something different about it, something unusual that
10 says this is why my ad does not fall within the general
11 rule. And that's what I'm trying to get at.

12 MR. BOPP: Well, I -- I will repeat. The --
13 it involves a currently pending legislative issue. It
14 does not talk --

15 JUSTICE SOUTER: Wasn't the Chinese trade
16 issue currently pending?

17 MR. BOPP: Yes, it was, and you know, the
18 Chinese --

19 JUSTICE SOUTER: So that's no difference.

20 MR. BOPP: But -- but, Your Honor, the
21 Chinese example was not cited by this Court. It was in
22 the record. And it may be a -- a genuine issue ad.

23 JUSTICE SOUTER: Sure.

24 MR. BOPP: Okay? And -- and the Government
25 argued there were 7 percent genuine issue ads really

1 trying to exercise the constitutional right to petition
2 Government, because Government is regulating us right
3 now in terms of their votes and their actions. And, of
4 course, that's why in the First Amendment, it doesn't
5 just say speech and -- and association and press. It
6 -- it says --

7 JUSTICE STEVENS: May I --

8 MR. BOPP: -- petition the Government.

9 JUSTICE STEVENS: -- may I ask one question
10 just to find out? Are you contending that there is a
11 sharp distinction? There's a category of issue ads and
12 a category of election ads that are mutually exclusive?

13 MR. BOPP: I think you can create objective
14 criteria, just like this Court has --

15 JUSTICE STEVENS: No. If you can answer my
16 question yes or no. Are -- are you arguing there are
17 two mutually exclusive categories, or are there ads
18 that fit somewhat in both?

19 MR. BOPP: Well, I -- I think that you can
20 adopt objective criteria as you have in the Noerr v.
21 Pennington doctrine to separate the two.

22 JUSTICE STEVENS: Are you able to answer my
23 question yes or no?

24 MR. BOPP: I -- I would say no.

25 JUSTICE STEVENS: You're not claiming there

1 are separate categories.

2 MR. BOPP: Then I misunderstood your
3 question, Your Honor. I am saying that they are
4 separate categories. This Court --

5 JUSTICE STEVENS: So it's either -- it's
6 either an issue ad or it's a candidate ad.

7 MR. BOPP: Yes. And I'm not saying at the --
8 at the margins there -- there may not be doubtful
9 cases, but what I'm saying is that this Court in *Noerr*
10 *v. Pennington* doctrine has recognized and adopted
11 objective criteria to distinguish between genuine
12 efforts to influence the Government, which is not
13 subject to the Sherman Act, and sham issues -- efforts
14 to regulate --

15 CHIEF JUSTICE ROBERTS: Does the -- does the
16 FEC draw -- distinguish between sham ads and genuine
17 issue ads?

18 MR. BOPP: No, the -- no, they haven't. But
19 right before the 2004 election -- excuse me -- they
20 gave an exception to an auto dealership that wanted to
21 continue to run the name of the owner of the
22 dealership, despite the fact that he was a Senator -- a
23 candidate for United States Senate, during the blackout
24 period. And the commercial interests at stake there
25 were sufficient for the FEC to grant an as-applied

1 exception even though there may have been some
2 incidental effect on the election. So the FEC has
3 recognized that there is interests which are sufficient
4 and -- and also that the -- the possible impact on an
5 election is so remote that -- that the interests are --
6 are sufficient.

7 JUSTICE BREYER: All right. So what is the
8 test? Because I -- my vague recollection from a year
9 and a half ago is that there was in that testimony
10 political consultants who said if you really want to
11 defeat a Senator, here's how you do it.

12 MR. BOPP: Yes.

13 JUSTICE BREYER: Run an ad that just speaks
14 about a group of Senators. It's plain that they're
15 bad, and then put in some words that mention his name
16 and everybody will get the point. They said that's
17 even better than saying, vote against.

18 And then our opinion said there is little
19 difference between an ad that urges voters to vote
20 against Jane Doe and one that condemns Jane Doe's
21 record on a particular issue while exhorting viewers to
22 call Jane Doe and tell her what you think. That was
23 the opinion.

24 So, now, what's your test to decide whether
25 that's what's going on or whether this is a genuine

1 issue ad?

2 MR. BOPP: I think that you would look at,
3 one, whether the -- the ad discusses a current
4 legislative issue; two, whether or not it made any
5 reference to the legislator beyond lobbying him or her
6 about that specific issue. So there should not be any
7 references to the election or the candidacy of the
8 incumbent or any of those type references. And if you
9 had that, you would have a bona fide, genuine effort to
10 lobby.

11 They are voting. They're taxing us. They're
12 regulating us. And as we know, the record reflects
13 that usually most of the -- of these issues are decided
14 in the context of this blackout period at the end of --
15 end of Congress.

16 So I know it is difficult to balance these
17 interests, but there is more interest among the people
18 than simply the remote and speculative effort to
19 influence an election. There is an immediate need to
20 influence how Government is regulating and taxing us.
21 So that is the interest that is presented here. That
22 is the interest that the Court in McConnell recognized
23 when the Court said there are genuine issue ads and --
24 and only engage in what the Government urged was a
25 Broadrick facial challenge analysis.

1 The Government said in McConnell, well, any
2 of these genuine issue ads can be dealt with in an as-
3 applied challenge. Now, they have switched sides here,
4 having asked the Court and the Court engaging in a
5 Broadrick facial challenge analysis -- are now saying
6 that even though Broadrick would allow as-applied, that
7 you are not to entertain any as-applied. I just don't
8 see --

9 JUSTICE O'CONNOR: Now, this ad could have
10 been run by your clients by a segregated fund.

11 MR. BOPP: Yes. Yes, that is true. And --
12 and, of course, as -- as this Court has recognized --

13 JUSTICE O'CONNOR: It just ran out of money.
14 Is that the deal?

15 MR. BOPP: Well, that was only part of it.
16 They -- they didn't raise money with the anticipation
17 of doing their lobbying with it. In other words, they
18 raised all their lobbying money in their -- in their
19 general treasury. The -- the only funds they raised in
20 their PAC is to advocate the election or defeat of
21 candidates or give money to candidates, which -- which
22 this Court has recognized is a proper way of directly
23 affecting an elections.

24 But making lobbying into a PAC means that,
25 number one, you're going to have to identify that

1 effort to influence a vote -- about an upcoming vote in
2 Congress, you're going to have to identify that as a
3 political activity.

4 JUSTICE BREYER: All right. If you can do
5 this, can a labor union do it?

6 MR. BOPP: Yes.

7 JUSTICE BREYER: And a corporation?

8 MR. BOPP: Yes. Of course, the prohibition
9 we're attacking is against corporations --

10 JUSTICE BREYER: All right. Well, then --
11 then we're back to -- I mean, I've heard this. This is
12 very familiar music to me and I think you raise a tough
13 issue. I just thought we perhaps had decided it.

14 But the -- the reason that this was so tough
15 was then these very, very wealthy individuals -- and
16 since I once read through the list, I know who they
17 are. And they -- they say, I'm going to give \$15
18 million. You know, I'm going to give \$15 million. So
19 they hire this genius political consultant that's there
20 in the record. And what happens is ads that look an
21 awful like this, and this consultant says, hey, we have
22 \$15 million to pay for it from this one person. And
23 they run them all over the country. And Senator after
24 Senator is boom, boom, boom, boom.

25 MR. BOPP: Yes, but --

1 JUSTICE BREYER: It becomes a question of
2 motive and how do we know what the motive is?

3 MR. BOPP: That's not what advocacy groups
4 are doing. You know, people who want -- the wealthy
5 people you're talking about have gone into giving money
6 to 527 unincorporated groups that -- that are using
7 issue ads lawfully through that vehicle.

8 But, you know, before this all happened, the
9 1996 and the record of McConnell where, all of a
10 sudden, there were more of these issue ads, the record
11 also reflects that there had been issue ads, you know,
12 throughout history. And -- and, of course, those were
13 all these efforts to influence the upcoming votes in
14 Congress. So that occurred before this effort with
15 sham issue ads. It -- it would occur now except that
16 genuine issue advocacy through grassroots lobbying is
17 now swept in under the reason that it might have an
18 incidental effect on elections.

19 This Court just simply needs to recognize
20 that there's more to Government than elections, and
21 even more importantly than elections is the lawmaking
22 function and that -- that people should not be disabled
23 from using most effective means to influence that law-
24 making with -- on the basis that simply there's an
25 election coming up.

1 I'd like to reserve the balance of my time.

2 CHIEF JUSTICE ROBERTS: Thank you, Mr. Bopp.

3 General Clement, we'll hear now from you.

4 ORAL ARGUMENT OF PAUL D. CLEMENT

5 ON BEHALF OF THE RESPONDENT

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

8 In McConnell against FEC, this Court upheld
9 title II's definition and regulation of electioneering
10 communications by corporations and unions as defined in
11 the act.

12 CHIEF JUSTICE ROBERTS: In McConnell against
13 FEC, you stood there and told us that this was a facial
14 challenge and that as-applied challenges could be
15 brought in the future. This is an as-applied challenge
16 and now you're telling us that it's already been
17 decided. It's a classic bait and switch.

18 GENERAL CLEMENT: No. In -- in fairness, Mr.
19 Chief Justice, in the McConnell case at pages 105 and
20 106 of our brief, we said that as-applied challenges
21 would arguably be available. But the principal
22 argument we stressed in the brief and in oral argument
23 was that, in a sense, overbreadth analysis here and
24 even as-applied challenges, though we didn't put it in
25 those terms, are a little bit beside the point because

1 of the nature of the regulatory structure here.

2 CHIEF JUSTICE ROBERTS: Is there any other
3 case that you can cite where we've upheld a facial
4 challenge and then later said that an as-applied
5 challenge was barred by our ruling on the facial
6 challenge?

7 GENERAL CLEMENT: Well, Mr. Chief Justice, I
8 will answer it, and I -- and I think actually --

9 CHIEF JUSTICE ROBERTS: Like Justice Stevens,
10 I think that's a yes or no.

11 (Laughter.)

12 GENERAL CLEMENT: Okay. Yes. Yes.

13 CHIEF JUSTICE ROBERTS: What --

14 GENERAL CLEMENT: Lane and Hibbs. I can't
15 imagine after those two decisions which upheld in
16 facial challenges the statutes at issue there and said
17 that there was not too much prophylaxis for purposes of
18 section 5 of the Fourteenth Amendment --

19 JUSTICE KENNEDY: I -- I beg your pardon. I
20 didn't hear the names of the cases.

21 GENERAL CLEMENT: Lane and Hibbs. Tennessee
22 against Lane and Nevada against Hibbs. I can't imagine
23 after those decisions that somebody --

24 CHIEF JUSTICE ROBERTS: Well, that's a very
25 different question. That's interpreting the scope of

1 Congress's power under section 5 of the Fourteenth
2 Amendment. The issue is whether it's limited to the
3 constitutional violations or sweeps more broadly. If
4 you conclude that it sweeps more broadly, it's not
5 suggesting that an as-applied challenge can be brought
6 by someone who's covered by the broader sweep. That's
7 a very different question.

8 Is there any First Amendment case where we've
9 said this is facially valid and then said as-applied
10 challenges can't be brought?

11 GENERAL CLEMENT: I don't think this Court has --

12 CHIEF JUSTICE ROBERTS: Well, it would be
13 like in any of those cases where you have a -- a broad
14 prohibition and you say, yes, there may be situations
15 where it's unconstitutional, but the statute is valid
16 on its face. And then someone comes in and says, well,
17 my situation is one where it's unconstitutional. We've
18 never said, well, it's too bad because it's valid on
19 its face, have we?

20 GENERAL CLEMENT: Well, I think the case really
21 hasn't arisen because generally when this Court clearly
22 identifies an area where Congress can regulate in
23 prophylactic terms, somebody doesn't come back in and
24 try to bring the exact same challenge. And if I could
25 give you two examples.

1 If somebody after Burson against Freeman,
2 which you may remember is the case where this Court
3 upheld a 100-foot buffer zone around a polling place --
4 if somebody came in after that decision and said, well,
5 that can't apply to me in an as-applied challenge
6 because I only want to stand 90 feet away, I think they
7 would have gotten laughed out of Court because this
8 Court already said that a 100-foot buffer zone was
9 sufficient.

10 I think in a similar way --

11 JUSTICE KENNEDY: Well, it might have been
12 that 90 feet included a public street and you couldn't
13 go down a public street without -- so -- and so --

14 GENERAL CLEMENT: Well, Justice Kennedy --

15 JUSTICE KENNEDY: It -- it does seem strange
16 to me in a speech case to say we're foreclosing as-
17 applied challenges.

18 GENERAL CLEMENT: And -- and, Justice Kennedy,
19 please understand me. I don't mean to suggest that
20 McConnell somehow magically jurisdictionally foreclosed
21 as-applied challenges. And I suppose if somebody could
22 come in after Burson and give a good reason why their
23 situation is very different, that there's a super
24 highway 90 feet away or that all they were talking
25 about is a bumper sticker on a car, well, then maybe

1 that --

2 JUSTICE O'CONNOR: Well, I suppose you can
3 say, yes, you can have an as-applied challenge, but
4 this one doesn't meet the test.

5 GENERAL CLEMENT: Exactly, Justice O'Connor.
6 And again, it's not because it's foreclosed. It's
7 because the reasoning of this Court in McConnell
8 forecloses the decision.

9 CHIEF JUSTICE ROBERTS: So let's say you had
10 an organization that every month of every year it took
11 out an ad the first week of every month, and it said
12 the same thing and it said, contact your Senators.
13 This issue is important to us. And they do that every
14 month. All of a sudden, their ad's nature changes
15 because an election is -- happens to be coming up and
16 it's illegal the month before the election, even though
17 it was clearly something that they did without regard
18 to the election.

19 GENERAL CLEMENT: Mr. Chief Justice, that
20 would be a better as-applied challenge. I still think
21 that with respect to the ads in the 30 days before the
22 primary and the 60 days before the -- the general
23 election, that corporation could look at this Court's
24 decision in McConnell and say, oh, I understand. Our
25 remedy is not an as as-applied challenge. Our remedy --

1 CHIEF JUSTICE ROBERTS: If we want to place
2 an ad in October, the solution is to place an ad
3 November through September, and then we're okay. And
4 the only reason we're going to do it November through
5 September is so we can do it in October?

6 GENERAL CLEMENT: No, no.

7 CHIEF JUSTICE ROBERTS: That's a pretty broad
8 definition of a sham.

9 GENERAL CLEMENT: No, no. The point would be in
10 October either -- do exactly what this Court said at
11 page 206 of the McConnell opinion: either make the ad
12 in terms that doesn't expressly refer to the candidate
13 which, if you're not interested in influencing the
14 candidate election, shouldn't be a problem, or fund
15 that one advertisement through a separate, segregated
16 fund.

17 CHIEF JUSTICE ROBERTS: But on an issue like
18 this, the filibuster, it's the Senators who are doing
19 it, and their ad referred to not only the Senator who
20 was up for election, but the one who was not.

21 GENERAL CLEMENT: I understand that, Mr. Chief
22 Justice, but I think if you focus in on this particular
23 ad, you will see that whatever the true intent of the
24 advertisers here, this is the kind of ad that clearly
25 would have an impact on the election. I mean, it talks

1 about the -- the filibusters in colorful terms,
2 associates them with gridlock and with a state of
3 emergency, and then associates it with a candidate.

4 JUSTICE SCALIA: You think Congress has the
5 power to prohibit any First Amendment contact --
6 conduct that might have an impact on the election? I
7 mean, is that the criterion for whether it -- it can be
8 prohibited?

9 GENERAL CLEMENT: No, Justice Scalia, it's not.
10 But I think what this Court very clearly did in
11 McConnell is it rejected an argument that said that the
12 only thing that Congress could regulate is that which
13 was unambiguously targeted at candidate elections.

14 JUSTICE KENNEDY: So you think there is a
15 compelling interest in preventing people from thinking
16 about an issue and then calling their Senator during
17 the blackout period. That's the compelling interest
18 that, in effect, you are arguing for.

19 GENERAL CLEMENT: No, Justice Kennedy. What
20 we're arguing for stems from the observation that this
21 Court made in McConnell, which is that when you get up
22 between 60 days before an election and you look at the
23 ads that are run, most of the ads, in fact, are
24 designed to influence candidate elections. It's very
25 difficult to figure out exactly which ones, and there

1 are very serious problems with adopting a very vague
2 intent standard.

3 JUSTICE KENNEDY: Are -- are Web sites and
4 chat rooms covered by the McCain-Feingold?

5 GENERAL CLEMENT: No, they're not, Justice
6 Kennedy. The Internet is not covered.

7 JUSTICE KENNEDY: But certainly under your
8 view, they ought to be. If you funded a Web site which
9 was very popular or a chat room, I certainly think it
10 should come within your proscription so that we can't
11 talk about issues during an election.

12 GENERAL CLEMENT: No, Justice Kennedy. I
13 think the fact that there are alternative methods
14 available to communicate these ideas in these ads is a
15 virtue, not a defect with this regulatory structure.

16 And I would like to focus in on these ads
17 because while it is true that --

18 JUSTICE KENNEDY: Well, why -- why not?
19 Suppose -- suppose most people look at the Web site and
20 they don't listen to the -- listen to the radio. I
21 think certainly McCain-Feingold should be extended to
22 that under your view.

23 GENERAL CLEMENT: Well, Justice Kennedy, I --
24 I'm not sure you really do think that -- that McCain-
25 Feingold should be extended to that.

1 (Laughter.)

2 GENERAL CLEMENT: And I do think that this is
3 an area where this Court, in fairness, has recognized
4 that -- that any effort to regulate in this area
5 effectively has to avoid three pitfalls. And it's a very
6 difficult task for Congress. It has to avoid being vague.
7 It has to avoid being overbroad. And as your question
8 suggests, it also has to avoid being so under-inclusive
9 and easy to evade that it can simply be circumvented in
10 a way that Congress can't achieve its purpose.

11 JUSTICE BREYER: What is the difference with
12 this? I mean, in my mind are possible as-applied
13 challenges. Bread for the City. Never supported the
14 candidate, worried about the hurricane in Louisiana.
15 Vote for relief for New Orleans. Write your Senator,
16 Senator X.

17 Organization two. Never supported a
18 candidate one way or the other, but has an issue
19 they're always interested in, and they run ads cycle
20 after cycle after cycle and they don't want to pull
21 them just because October has come along.

22 All right? Now, think of those organizations
23 where I think maybe, sure, maybe they'd win their as-
24 applied challenge. And here, you're not arguing it --
25 he doesn't have a right to bring it. You're arguing,

1 of course, he can bring an as-applied challenge. He's
2 just going to lose given our rationale. All right?

3 Why?

4 GENERAL CLEMENT: Well, I -- I want to be
5 responsive and I think the way to respond is that this
6 Court's decision recognized that these ads were going
7 to be difficult to classify and that you needed some
8 kind of bright line rule and that the consequences of
9 having a bright line rule in this consequence -- in
10 this area weren't terrible because there were
11 alternative ways for them to communicate either through
12 a separate, segregated fund which served the interests
13 of the statute or by avoiding the kind of references
14 that would raise serious questions about tying the ad
15 to a candidate election.

16 And I think if you look at -- if -- if you
17 want to keep the possibility open of some as-applied
18 challenge and you focus on these ads, these are ads
19 that clearly, I think, would implicate the concerns of
20 Congress.

21 JUSTICE SCALIA: What was the bright line
22 rule that -- that you think the -- the opinion
23 established? I thought the bright line rule was
24 whether it's an issue ad or -- or, rather, a phony
25 issue ad. I thought that was the -- the line that --

1 that the opinion was trying to -- to draw. You -- you
2 say that the opinion drew the line between what? All
3 issue ads are out?

4 GENERAL CLEMENT: I think all issue ads that
5 come within the statutory prohibition are permissibly
6 regulable. I think --

7 JUSTICE SCALIA: No issue ads during the --
8 the blackout.

9 GENERAL CLEMENT: Sure, you can run issue ads
10 as long as you either fund them through a separate,
11 segregated fund or you --

12 JUSTICE SCALIA: No --

13 GENERAL CLEMENT: -- omit the reference to the
14 candidate.

15 JUSTICE SCALIA: Oh, of course, I know.

16 GENERAL CLEMENT: And -- and --

17 JUSTICE SCALIA: And stand on your head. But
18 the --

19 (Laughter.)

20 JUSTICE SCALIA: Within -- within the
21 framework of the statute, you think the clear line that
22 is established by the opinion is no issue ads without
23 this special funding during the blackout. You think
24 that's what the opinion says?

25 GENERAL CLEMENT: I think that this -- I do

1 think that is what the opinion says and stands for. And
2 I think this Court recognized --

3 JUSTICE SCALIA: Why does it speak about sham
4 issue ads?

5 GENERAL CLEMENT: Well, Justice Scalia, for one
6 thing, I think it's important to recognize that the
7 discussion about sham versus genuine issue ads was
8 really a factor of the fact that necessarily in looking
9 at the record there, what the Court had to do is look
10 at ads that were run in previous election cycles where
11 this regulatory structure wasn't in place and try to
12 classify those ads. And as I understand it, sort of
13 genuine versus sham was a way of capturing whether or
14 not it was an ad that seemed primarily focused on an
15 issue or primarily focused on a candidate election.

16 JUSTICE SCALIA: Why did you say there were 7
17 percent of these that -- that are probably okay?

18 GENERAL CLEMENT: I'm not sure which figure Mr.
19 Bopp is referring to as the 7 percent figure. I don't
20 -- I don't remember conceding that 7 percent of the ads
21 were okay.

22 And I think what we very clearly said -- and
23 if you go back and look at our briefs, as I did, I
24 think you'll see this. What we very clearly said --
25 and the Court picked up on it in that line on page 206

1 that Justice O'Connor read earlier -- is that whatever
2 was true about a retrospective analysis of ads that
3 were run in an election cycle that wasn't governed by
4 the statute, that in the future corporations could
5 avoid the -- the strictures of the statute by simply
6 doing one of two things: either avoiding making an
7 express reference to the candidate, which ought not to
8 be too difficult if you're really just engaged in issue
9 advocacy, not trying to influence a candidate election,
10 or alternatively, you can fund it through the separate,
11 segregated fund.

12 JUSTICE SCALIA: I -- I deny the first thing,
13 that it's easy to do issue ads without naming the
14 candidate. The -- the point of an issue ad is to put
15 pressure on -- on the candidate that you want to vote
16 your way. Without -- without telling people to call --
17 not the candidate -- the -- the incumbent that you want
18 to vote your way -- without telling people to call the
19 office of that incumbent, you're not doing very much.

20 GENERAL CLEMENT: Well, Justice Scalia, they
21 didn't even do that in this ad, as has already been
22 pointed out. And if they would have said find out what
23 you can do to stop judicial filibusters, visit
24 befair.org, and avoided a reference to Senator
25 Feingold, they could have run this through their

1 general treasury funds. But they couldn't resist the
2 temptation to mention Senator Feingold in this context
3 --

4 JUSTICE O'CONNOR: Could they have said in
5 the ad, call your elected representatives, not naming
6 any names?

7 GENERAL CLEMENT: Yes, Justice O'Connor, they
8 also could have done that.

9 And I think that the very fact that they
10 couldn't resist the temptation to link the filibuster
11 issue to Senator Feingold is not that surprising --

12 JUSTICE KENNEDY: General --

13 CHIEF JUSTICE ROBERTS: That may be because
14 the people who were doing the filibuster were the
15 Senators. It's not -- it's not a surprising thing to
16 link the Senators to that issue.

17 GENERAL CLEMENT: Well, and again, Mr. Chief
18 Justice, though, I mean, fair enough, but I think you
19 also have to keep in mind that this is a context where
20 this filibuster issue isn't some idiosyncratic interest
21 of the appellant here. This is an issue that was
22 identified as a campaign issue by the -- by -- by the
23 candidates opposing Senator Feingold, by the Wisconsin
24 Republican Party, and by appellant's own PAC. And to
25 the extent you're trying to figure out whether this was

1 really designed to influence the pending legislative
2 votes or the election, the timing of this ad strongly
3 suggests it was designed to influence the election.

4 CHIEF JUSTICE ROBERTS: The fact that it
5 mentions both -- the fact that it mentions both
6 Senators strongly suggests to me that it's concerned
7 about the issue because one of the Senators wasn't up
8 for election.

9 GENERAL CLEMENT: Well, Mr. Chief Justice, that
10 gets back to Justice Stevens' question as to whether or
11 not these categories are mutually exclusive. I'm not
12 here to tell you that appellants weren't genuinely
13 issued about -- genuinely interested about the
14 filibuster issue. I think they were also, as their
15 political action committee press release shows,
16 genuinely interested in sending Senator Feingold
17 packing. And they had an opportunity to run this ad
18 and effectively get a twofer by naming Senator
19 Feingold. Now, they could have resisted that and only
20 gotten the influence on the -- the filibuster issue, if
21 they had taken the --

22 JUSTICE KENNEDY: And they -- and they could
23 have -- they could have named Senator Kohl, I take it.

24 GENERAL CLEMENT: They -- they could have,
25 Senator Kennedy.

1 JUSTICE KENNEDY: It's such an odd calculus.
2 Who is the person more likely to be influenced with an
3 issue ad? The person who's running or the person who's
4 not going to run for 4 years? Obviously, the former.

5 GENERAL CLEMENT: Obviously --

6 JUSTICE KENNEDY: And that's -- and that's
7 the one area where the ad is prohibited.

8 GENERAL CLEMENT: Obviously, you're right,
9 Justice Kennedy, but obviously, there are concerns that
10 are implicated when somebody is running in cycle and
11 the ad has targeted the electorate in the immediate
12 run-up to the election that aren't present there with
13 Senator Kohl and, therefore, the Congress has -- has
14 struck a different balance in that case.

15 But just to focus on the timing of these ads,
16 they were run on day 4 of a 45-day August recess of the
17 Senate. Now, that timing, if what you were trying to
18 do, is to influence a pending legislative vote, is
19 very, very odd timing. It could hardly be worse. If,
20 on the other hand, you're trying to influence the
21 upcoming election, the timing of that ad makes a great
22 deal of sense.

23 CHIEF JUSTICE ROBERTS: Well, if you're
24 trying to influence the Senators who are presumably or
25 possibly in their home State during a recess, that's

1 perfect timing to influence the Senators who are the
2 ones engaging in the filibuster --

3 GENERAL CLEMENT: I'm not sure I would --

4 CHIEF JUSTICE ROBERTS: -- without regard to
5 whether they're running for election or not.

6 GENERAL CLEMENT: With respect, Mr. Chief
7 Justice, I'm not sure I'd pick day 4 of the August
8 recess to do that. Maybe 14 days before they're going
9 back, something like that, would be an appropriate time
10 to catch their attention in a -- in a period where
11 they're going to remember it when they go and vote.
12 But I think day 4 of a 45-day recess is probably not
13 when I would pick to start running these ads.

14 I don't suggest, though, the timing factor or
15 any other one factor ought to be dispositive. I think
16 what it goes to show is how difficult it would be to
17 try to get into a fact-intensive as-applied analysis of
18 these various issues. And all of that presumably would
19 have to be done in the context of TRO hearings and
20 preliminary injunction hearings on the eve of
21 elections.

22 CHIEF JUSTICE ROBERTS: I've lost track of
23 it. Your -- your answer to Justice Breyer's
24 hypothetical about Bread for the City and the hurricane
25 and all that is that that would be an illegal ad?

1 GENERAL CLEMENT: Well, no, I think my answer to
2 that would be that we'd still be here suggesting that
3 that's controlled. I think my answer was also that
4 that would be a far better as-applied challenge than
5 the one that this Court has before it.

6 And I think, you know, in -- in one sense we
7 make this point in the brief. I mean, contrasting this
8 case with a case like MCFL I think is quite
9 instructive. There, you're not focused on the content
10 or intent of specific ads. You look at the
11 organization as a whole and come up with fairly bright
12 lines. And once you've made a determination about the
13 organization in an as-applied challenge, you're done
14 with the issue.

15 Here, the kind of --

16 JUSTICE KENNEDY: So you do -- you do an
17 ideological history, an ideological pedigree of various
18 speakers. You think that's consistent with the First
19 Amendment? That -- that was the ACLU's suggestion
20 which, it seems to me, shows you how far we've gone
21 down this road.

22 GENERAL CLEMENT: Well, I mean, that may speak
23 about where the ACLU is going. I don't think it speaks
24 about where this Court is going because this Court
25 hasn't adopted that test. The test that this Court

1 adopted in MCFL would -- did not get into that kind of
2 inquiry. What it did is it focused on three relatively
3 bright line factors about whether you accept corporate
4 money, whether you have other sources of income from
5 the corporation, and whether or not you were formed
6 expressly for political views but without any sort of
7 censorship or inquiry into what kind of political
8 views. And that I think this Court has found
9 administrable.

10 JUSTICE BREYER: But --

11 GENERAL CLEMENT: The FEC administers that.
12 That's --

13 JUSTICE BREYER: That's what I want to know
14 exactly. I didn't think -- I thought Congress
15 considered this impossible question. I thought that 7
16 percent figure was from a study, in fact, dozens of
17 studies, where these people who were experts, quote,
18 decided that about 7 percent of the ads like this one
19 distinguishing between really interested in issues or
20 interested in issues but, in significant part,
21 defeating the Senator. In the latter, of course, it's
22 campaign and it's part of the regulation of campaign
23 funds.

24 But they didn't think we could do it. They
25 thought first they could do it, and then they told the

1 FEC to go and produce a set of regs that would, in
2 fact, try to screen out that legitimate 7 percent. Am
3 I wrong about how the statute was supposed to work?

4 GENERAL CLEMENT: No, you're not wrong, Justice
5 Breyer. And I would say that the --

6 JUSTICE BREYER: Well, why haven't they done
7 it?

8 And I had thought also that they were
9 supposed to control 527's by having regs or individual
10 cases that would decide whether there was a mix of
11 personnel between the campaign and the 527, whether
12 they talked to people and planned their strategy. Have
13 there been those regs written?

14 GENERAL CLEMENT: Well, Justice Breyer, let me
15 answer both questions.

16 As to the 527 issue, as I understand it, the
17 commission has decided to proceed on case-by-case
18 inquiries and has not tried to have a broad regulatory
19 approach yet.

20 Now, on to the issue of electioneering
21 communications, you're absolutely right that there is a
22 statutory authorization to create exceptions. But the
23 regulatory authority of the commission is limited, and
24 it's limited in the sense that they can't approve an
25 exception that would allow for ads that engage -- that

1 -- that fairly read, engage in promoting, attacking,
2 supporting, or opposing a candidate.

3 And what the FEC has found in practice is
4 that it's very difficult to create that kind of
5 regulatory exception because, as this Court recognized
6 in Buckley and in McConnell, one does not want to
7 naively underestimate the creativity of corporate
8 spenders or political consultants. And if you create a
9 bright line and say, all right, if you do this, that's
10 grassroots lobbying, that's not electioneering
11 communication, they're going to be able to drive a
12 truck through that kind of exception --

13 JUSTICE GINSBURG: General --

14 GENERAL CLEMENT: -- unless you're exceedingly
15 careful.

16 JUSTICE GINSBURG: General Clement, if you
17 could clarify for me some -- a response that Mr. Bopp
18 gave. Did this ad run, was it broadcast or televised
19 before the blackout period?

20 GENERAL CLEMENT: Well, Justice Ginsburg, as I
21 understand the record, the first effort to broadcast
22 this ad was on, I think, July 26th, and that was sort
23 of a few days before the -- the cutoff period would
24 kick in. So there was an effort by a matter of weeks
25 to broadcast this ad. But I think, you know, whether

1 one views that as setting the stage for this litigation
2 or being kind of an independent decision, I'll -- I'll
3 leave to others.

4 What I think is important, though, is that
5 although they were engaged on this issue before then,
6 up until that point, they had found it perfectly
7 satisfactory to engage on the issue without engaging in
8 broadcast advertisement.

9 JUSTICE GINSBURG: May I ask you one other
10 thing about the setting? When you went to the Web site
11 to get further information, what was conveyed about
12 Senator Feingold when you went to get that further
13 information?

14 GENERAL CLEMENT: Well, Justice Ginsburg, I
15 -- I don't have as good an answer for that as I would
16 like because the -- the Web site is now defunct. And
17 so maybe Mr. Bopp can answer that in rebuttal.

18 As I understand it, consistent with what
19 Justice Breyer said, that there was sort of additional
20 arguments about the Feingold record on -- on
21 filibusters and Senator Kohl's record on filibusters,
22 and then there was -- there was information about how
23 to contact them.

24 But I think, again, as -- as Mr. Bopp has
25 said, if -- if you don't find the broadcast medium a

1 particularly effective way to convey the phone numbers
2 and you have to reference people to the Web site
3 anyways, the very fact that you could reference them to
4 the Web sites without naming the candidates' names and
5 avoid the strictures entirely seems like the kind of
6 thing that this Court had in mind when it said on page
7 206 that there were ways to deal with this problem
8 prospectively and that you didn't need a as-applied
9 challenge like this one.

10 And again, I think you can't overestimate the
11 difficulties here because --

12 JUSTICE SCALIA: General Clement, you --
13 you've pointed out the difficulties, but I don't know
14 any other area where we said, well, you know, the --
15 the -- when you're dealing with important -- important
16 freedoms, important guarantees, where we shrug our
17 shoulders and say, well, the only way to accomplish
18 what the Government wants to do is to ride right --
19 right over those guarantees. I mean, we say, we -- we
20 cannot bust up this -- this drug conspiracy unless we
21 use warrantless searches. So, you know, whatever it
22 takes. We don't -- we don't operate that way. And
23 here, you're -- you're dealing with a very fundamental
24 guarantee --

25 GENERAL CLEMENT: Justice Scalia --

1 JUSTICE SCALIA: -- the -- the right which I
2 think applies to corporations, as well as to anybody
3 else, and for individuals to associate with one another
4 to bring to bear influence on the legislative process.
5 That's a fundamental guarantee. And it doesn't
6 satisfy me to say, well, there's no other way to stop
7 people from criticizing incumbents during -- during the
8 election blackout period. Maybe you can't do entirely
9 what you want to do.

10 GENERAL CLEMENT: Well, I hope that's not the
11 case, Justice Scalia. Let me give you two other First
12 Amendment examples: the first admittedly involving
13 intermediate scrutiny; the second, a strict scrutiny
14 case.

15 The first thing I have in mind is the
16 contribution limits themselves. This Court has fully
17 admitted that it doesn't have a scalpel to probe the
18 difference between \$2,000, \$1,000, \$4,000 as a
19 contribution limit. And it's perfectly willing to
20 admit in its opinions that not every high-value donor
21 is going to be involved in an effort at corruption.
22 Yet, this Court approved the approach of the
23 contribution limits, which are hard to understand as
24 anything other than prophylactic limits. Now, that's
25 an example from intermediate scrutiny.

1 Even in the strict scrutiny context, though,
2 a case like *Burson*, I mean, this Court understood and
3 said in the opinion, we can't tell whether 75 feet
4 would be precisely okay or whether 90 feet or 100 feet.
5 We don't have a scalpel to probe that either. But
6 we're going to approve 100 feet because it's a basic
7 way of dealing with this problem, identifying the area
8 of potential concern, and people can do their
9 electioneering 101 feet away. They can do it here on
10 the 61st day. They can do it through the segregated
11 fund. I think that is an approach that this Court has
12 found acceptable, even in the First Amendment area, in
13 dealing with these intractable problems.

14 And I think *Buckley* --

15 CHIEF JUSTICE ROBERTS: But both of those
16 examples, of course, are quantities, and once you -- I
17 think it was *Holmes* who said, once you admit the
18 necessity of drawing a line, you know, you can always
19 find something on one side or the other. It's quite
20 different between \$1,000 and \$2,000 or 100 feet and 75
21 feet and advocacy with respect to an election and
22 advocacy with respect to an issue. It's an entirely
23 different quality of a distinction, it seems to me.

24 JUSTICE KENNEDY: And -- and the difference
25 -- the difference is this is a content-based inquiry.

1 GENERAL CLEMENT: Well but, Justice Kennedy,
2 precisely because you can't engage in just a formless
3 content-based inquiry and precisely because there isn't
4 any neat division between issue ads and candidate ads,
5 that is why you need to have a different regulatory
6 approach. I mean, this Court recognized --

7 JUSTICE STEVENS: I think the real bottom
8 line for the -- your opponent is that even a pure
9 election ad should get the same constitutional
10 protection as an issue ad, which is something we've
11 rejected.

12 GENERAL CLEMENT: Absolutely, Justice Stevens.
13 And of course, an even position one step intermediary
14 from that or one step backtracking from that would be
15 to say that all Congress can do in this area is
16 regulate those ads that are unambiguously election
17 oriented. And, of course, what's the class of those
18 ads? Well, that would be express advocacy.

19 And the one thing that I think is clear from
20 this Court's decision in McConnell is this Court made
21 clear that express advocacy is not a constitutional
22 line. Congress is not disempowered to go after mixed
23 ads that are -- yes, they have a component of issue
24 ads, but you bet you they're intended to influence the
25 election. Those ads are what are at issue here, and I

1 think in order to be able to regulate those in a way
2 that makes sense, the key is to regulate in a way
3 that's not vague, that's not overbroad, but is not so
4 under-inclusive that it can be easily evaded.

5 And I think Buckley shows how hard that is.
6 It's a tall order. In Buckley, this Court had a
7 provision of FECA that prohibited independent
8 expenditures related to a candidate election. The only
9 way the Court could save that provision from the
10 vagueness concern was to limit it to express advocacy.

11 But having done that, the Court said, well, it's so
12 limited, it's so easy to evade, we're going to find
13 that it fails strict scrutiny.

14 In McConnell, this Court said that in BCRA,
15 after careful study, Congress had actually found out a
16 way to avoid those three pitfalls. All of the proposed
17 alternatives of -- of appellants run headlong into one
18 or more of those obstacles. Look at the tests they've
19 proposed. They've proposed looking at 16 factors, 4
20 details. They disclaim any interest intent, but any of
21 those tests I think would be vague and unworkable.

22 In contrast, they pluck a definition from the
23 IRS regs that is designed to deal with 501(c)(3)
24 corporations in a completely different context or a
25 modification of a proposal by BCRA's sponsors, and they

1 -- and they put those tests out there. And those would
2 be very, very easy to evade in practice.

3 In fact, I think if you use some of the tests
4 that they propose or their amici proposed and you look
5 at the body of ads that were before this Court in
6 McConnell, you'd end up finding that a substantial
7 percentage of them were grassroots lobbying.

8 Well, if one thing has to be inconsistent
9 with this Court's decision in McConnell, it's the
10 conclusion that a substantial amount of the ads covered
11 by this definition are unconstitutionally regulated
12 because this Court clearly rejected a substantial
13 overbreadth claim.

14 The one thing I would say in -- in closing is
15 to understand that Congress, having sort of avoided
16 these very difficult pitfalls of vagueness,
17 overbreadth, and easy evasion, came up with this
18 definition in title II. But as this Court recognized
19 in McConnell, title II of the statute does not stand
20 alone. It is part and parcel of the broader regulatory
21 regime here. And without title II, title I's
22 limitations on soft money contributions to parties will
23 succeed only in taking that soft money and directing it
24 to corporations that are closely aligned with
25 candidates or with the parties themselves.

1 This statutory as-applied challenge that you
2 have before it -- you strikes at the heart of the
3 McConnell decision and at the heart of BCRA's title II.

4 This Court should reject the invitation to revisit the
5 McConnell decision and should give Congress' effort in
6 this area a fair chance at success.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, General.

9 Mr. Bopp, you have 4 minutes remaining.

10 REBUTTAL ARGUMENT OF JAMES BOPP, JR.

11 ON BEHALF OF THE PETITIONER

12 MR. BOPP: Thank you, Mr. Chief Justice.

13 What this -- what plaintiffs are relying upon
14 here is the distinction that this Court has made
15 between lobbying, on the one hand, and political
16 campaigns on the other. As summarized by Justice
17 Stevens' concurrence in *Austin*, quote, there is a vast
18 difference between lobbying and debating public issues,
19 on the one hand, and political campaigns for election
20 to public office on the other hand. And that is
21 because that the interests that have justified the
22 regulation of corporate electioneering do not apply to
23 corporate --

24 JUSTICE STEVENS: There is a vast difference,
25 but the question I have is whether Congress has any

1 voice in trying to draw the line that divides the two
2 categories.

3 MR. BOPP: I think they do, and they drew a
4 line that was upheld on its face because the vast
5 majority of ads --

6 JUSTICE STEVENS: And -- and if we are in a
7 gray area that there's some who could say it's issue
8 and some could say it's electioneering, do we owe any
9 deference to Congress' test that it has drafted?

10 MR. BOPP: I -- I don't think you owe
11 deference to the test. Under strict scrutiny, you owe
12 the fidelity of the Constitution, and the Constitution
13 concludes the right to petition.

14 So it is a difficult question. It's fact-
15 intensive, as all as-applied questions are.

16 JUSTICE STEVENS: So your position basically
17 would say we should take all of these cases on a case-
18 by-case basis and not give any presumptive weight to
19 what -- what Congress has done.

20 MR. BOPP: No. I think that you can draw a
21 rule that relies on objective criteria, just as you
22 have in the Noerr-Pennington doctrine, to distinguish
23 between illegitimate efforts to -- for predatory
24 anticompetitive practices or monopolies, to distinguish
25 between those and -- and -- the Court has even used the

1 phrase, genuine efforts to influence Congress with
2 respect to -- or any governmental agency with respect
3 to the adoption of laws.

4 That has been based on objective criteria as
5 the Court has explained. You have adopted objective
6 criteria to distinguish lawsuits that fall within the
7 right to a petition or those that were brought
8 illegitimately for anticompetitive reasons.

9 It's not that this is -- this exercise is an
10 easy exercise, but it is demanded by the fact that the
11 -- the Congress adopted a very broad statute. The only
12 content in this electioneering communication provision
13 -- the only content requirement is that you name the
14 candidate. And the reality is that those candidates
15 often are incumbents and they are engaged in lawmaking
16 functions during these election periods.

17 I mean, there is a difference like in
18 Britain. You know, Parliament is dissolved so that
19 there -- there is a bright line distinction between an
20 election and Parliament actually exercising
21 governmental power. But when these things overlap and
22 when the Constitution demands the recognition of the
23 right to petition, then that needs to be dealt with in
24 this as-applied challenge.

25 Now, there's a vast -- there's a huge number

1 of -- of lobby groups. They have made a conscious
2 decision that it is more important to them to influence
3 what Government does today than to influence in a
4 speculative and remote manner who is going to be
5 exercising that power next year through elections.
6 Wisconsin Right to Life, in the face of these
7 restrictions, have still decided that it's more
8 important to lobby than it is to advocate the election
9 or defeat of candidates and give money to candidates.
10 The -- this is just the reality of our complex
11 Government. It's the reality of the freedoms that
12 individuals have to participate in that Government.
13 It's not just about elections. It's more importantly
14 about lawmaking and citizens have a robust right to
15 participate in that lawmaking power, and as a result,
16 this Court should recognize an as-applied exception for
17 grassroots lobbying.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, Mr. Bopp.

20 The case is submitted.

21 (Whereupon, at 11:10 a.m., the case in the
22 above-entitled matter was submitted.)
23
24
25