Order Code RS21551
June 20, 2003

Campaign Finance: Issues Before the U.S. Supreme Court in *McConnell v. FEC*

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Summary

Shortly after the Bipartisan Campaign Reform Act of 2002 (BCRA), P.L. 107-155 (H.R. 2356, 107th Cong.) was enacted in March 2002 (also known as the McCain-Feingold campaign finance reform legislation), Senator Mitch McConnell and others filed suit in U.S. District Court for D.C. against the Federal Election Commission (FEC) and the Federal Communications Commission (FCC) arguing that provisions of the law are unconstitutional. Ultimately, eleven suits challenging BCRA were brought by more than 80 plaintiffs and consolidated into one lead case, *McConnell v. FEC.* On May 2, 2003, the U.S. District Court for the District of Columbia issued its decision in *McConnell v. FEC,* No. 02-CV-0582 striking down some key provisions of the law as unconstitutional, but on May 19, it issued a stay of its ruling, which leaves BCRA, as enacted, in effect until the Supreme Court issues a decision. (For information about the decision, see CRS Report RS21511, *Campaign Finance: Brief Overview of McConnell v. FEC*.)

Under the BCRA expedited review provision, the court's decision will be reviewed directly by the U.S. Supreme Court, which scheduled oral argument for September 8, 2003. This report provides a summary of the issues, as presented by the 12 groups of appellants in their jurisdictional statements, that the Supreme Court will be considering in this case. For more information *see,* the Supreme Court's BCRA cases web page [http://www.supremecourtus.gov/bcra/bcra.html] and the Campaign Finance Reform Oversight CRS page [http://www.congress.gov/erp/legissues/html/isele2.html].

Background

On March 27, 2002, the President signed into law the Bipartisan Campaign Reform Act of 2002 (BCRA), P.L. 107-155 (H.R. 2356, 107th Cong.), which was also known as the McCain-Feingold campaign finance reform legislation prior to enactment. Most provisions of the new law became effective on November 6, 2002. Shortly after President Bush signed BCRA into law, Senator Mitch McConnell and others filed suit in U.S. District Court for the District of Columbia against the Federal Election Commission

(FEC) and the Federal Communications Commission (FCC). Ultimately, eleven suits challenging the campaign finance reform law were brought by more than 80 plaintiffs and were consolidated into one lead case, *McConnell v. FEC*, No. 02-CV-0582. In summary, the McConnell complaint for declaratory and injunctive relief argued that portions of BCRA violate the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution. On May 2, 2003, the U.S. District Court for the District of Columbia issued its decision striking down some key provisions of the law.[1] On May 19 the district court issued a stay of its ruling, which leaves BCRA, as enacted, in effect until the Supreme Court issues a decision.[2] Under the BCRA expedited review provision,[3] the court's decision will be reviewed directly by the U.S. Supreme Court, which scheduled oral argument for September 8, 2003.

Summary of Issues Before the Supreme Court

The following provides a summary of the issues, as presented by the 12 groups of appellants in their jurisdictional statements,[4] that the Supreme Court will be considering in this case.

Senator Mitch McConnell, et al., Appellants. (1) Whether the district court erred by upholding portions of the ban on party soft money for public communications that "refer" to a clearly identified federal candidate – regardless of whether a state or local candidate is also mentioned or identified – and that "promotes or supports" or "attacks or opposes" a candidate for that office, "regardless of whether the communication expressly advocates a vote for or against a candidate" (section 101 of BCRA, P.L. 107-155) because it constitutes an invalid exercise of Congress' power to regulate elections under Article I, Section 4 of the Constitution; violates the First Amendment or the equal protection component of the Fifth Amendment, or is unconstitutionally vague. (2) Whether the district court erred by upholding portions of the "electioneering communications" provisions (sections 201, 203, 204, and 311) which regulate advertisements other than express advocacy, in both the primary and back-up definitions, because they violate the First Amendment or the equal protection component of the Fifth Amendment, or are unconstitutionally vague. (3) Whether the district court erred by holding non-justiciable (not issuing a ruling) challenges to, and upholding, portions of the disclosure requirements for electioneering communications and certain independent expenditures (sections 201, 212) because they violate the First Amendment. (4) Whether the district court erred by holding non-justiciable challenges to, and upholding, the "coordination" provisions (sections 202, 211, and 214) because they violate the First Amendment. (5) Whether the district court erred by holding non-justiciable challenges to, and upholding, the limitation on the availability of lowest unit charge for candidates attacking the opposition (section 305) because it violates the First Amendment.

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[1] McConnell v. FEC, No. 02-CV-0582 (D.D.C., May 2, 2003). For information about the decision, *see*, Campaign Finance: Brief Overview of *McConnell v. FEC*, CRS Report RS21511.

[2] Chamber of Commerce, *et al.* v. FEC, Civ. No. 02-751 (D.D.C., May 19, 2003)(granting motions to stay all or part of the court's May 1, 2003 final judgment in McConnell v. FEC).

[3] P.L. 107-155 § 403, codified at 2 U.S.C. § 437h note (2002).

[4] For access to the appellants' jurisdictional statements, *see*, the U.S. Supreme Court BCRA cases web page [http://www.supremecourtus.gov/bcra/bcra.html].

National Rifle Association, et al., Appellants. (1) Whether Congress restricted corporate and union "electioneering communications" that refer to candidates in order to serve a compelling governmental purpose, as required by the First Amendment. (2) Whether Congress, in regulating identical speech differently depending on the medium through which it travels and the speaker who utters it, adequately tailored the definitions of "electioneering communications" to serve the anti-corruption purpose proffered in support of the definitions. (3) Whether Congress adopted the least restrictive means of regulating political speech by prohibiting "electioneering communications" by both non-profit Internal Revenue Code (IRC) § 501(c)(4) corporations and for-profit corporations instead of permitting § 501(c)(4) corporations to fund such communications exclusively with individual contributions. (4) Whether the back-up definition of "electioneering communications," in its original form or as modified by the district court, comports with the First Amendment. (5) Whether Congress violated the equal protection guarantee of the Fifth Amendment by granting a special exemption for political speech by corporations that own broadcast facilities (section 201), as opposed to all other corporations whose identical speech constitutes prohibited "electioneering communications."

Federal Election Commission, et al., Appellants. (1) Whether the limits on political party soft money (section 101) are constitutional. (2) Whether the funding limits and disclosure requirements for "electioneering communications" (sections 201, 203) are constitutional. (3) Whether the limits imposed on coordinated expenditures by political parties (section 213) are constitutional. (4) Whether the prohibition on contributions to candidates and political parties by minors (section 318) is constitutional. (5) Whether the reporting and record-keeping requirements for broadcast stations (section 504) are constitutional.

Senators John McCain and Russell Feingold; Representatives Christopher Shays and Martin Meehan; and Senators Olympia Snowe and James Jeffords, Appellants. Whether the district court erred in invalidating, under the First Amendment, portions of BCRA, including provisions addressing: (1) the raising, directing, transferring, and use of funds by political parties, federal candidates, and officeholders (section 101); (2) the use of funds from corporate and labor union general treasuries to finance broadcast advertisements that are intended or likely to influence federal elections, and disclosure requirements for all such broadcast ads (sections 201, 203, 204); (3) the ability of political parties to make both "independent" and "coordinated" expenditures to support the campaigns of candidates they have nominated to seek federal office (section 213).

Republican National Committee, et al., Appellants. (1) Do the restrictions imposed upon national, state, and local political parties (title I) violate Article I, Section 4 of the U.S. Constitution, the First, Fifth, and Tenth Amendments, and principles of federalism? (2) Does the requirement that the FEC promulgate a definition of "coordination" that does not require proof of an "agreement" violate the First Amendment? (3) Do the "millionaire provisions," which require political parties to provide different treatment to similarly situated candidates, violate the equal protection components of the First and Fifth Amendments?

National Right to Life Committee, Inc., et al., Appellants. (1) Whether the prohibition on the solicitation, receipt, redirection, or use of "soft money" by any national

political party for any communication that "promotes or supports ... or attacks or opposes" a federal candidate (section 101), violates the First and Fifth Amendment and principles of federalism. (2) Whether the prohibition on federal officeholders and candidates soliciting, receiving, directing, transferring or spending soft money (section 101) violates the First Amendment. (3) Whether the prohibition on state officeholders and candidates soliciting, receiving, transferring, or spending "soft money" in connection with an election for federal office (section 101) violates the First Amendment. (4) Whether the back-up definition of "electioneering communication" (section 201) or its construction by the district court, violates the First Amendment. (5) Whether the requirements that "disbursements" and "expenditures" be reported as occurring when contracted for, rather than when made, (sections 201, 212) are justiciable and violate the First Amendment. (6) Whether the district court injunction should extend to activities outside the District of Columbia. (7) Whether the provision permitting Members of Congress to intervene (section 403(b)) and the permitted intervention by intervenor-defendants without regard to whether they have Article III standing violates the Constitution.

American Civil Liberties Union, et al., Appellants. (1) Whether the district court erred by upholding broad new restrictions on "electioneering communications" (sections 201, 203, 204). (2) Whether the district court erred by upholding aspects of the broad new "coordination" rules (sections 202, 214) and dismissing the challenge to other aspects of those rules as non-justiciable.

Victoria Jackson Gray Adams, et al., Appellants. Did the district court err in ruling that a challenge to the increased "hard money" contribution limits (sections 304, 307, 319) is non-justiciable due to lack of cognizable injury, even though the increases will give greater electoral power to wealthy donors and will effectively exclude candidates and voters without access to large donors from electoral participation, in violation of the equal protection guarantees incorporated by the due process clause of the Fifth Amendment.

Congressman Ron Paul, et al., Appellants. (1) Whether the district court erred by dismissing appellants' freedom of the press challenge to various provisions of BCRA on the ground that, in the area of campaign finance regulation, the First Amendment's freedom of the press guarantee does not contain greater rights than the rights conferred by the guarantees of free speech and association. (2) Whether the district court erred by upholding the BCRA exemptions to the regulation of "electioneering communications" enjoyed by the "institutional press" and the contribution limits applicable to appellants, on the ground that Congress may grant greater rights to the "institutional press" than to the "general press." (3) Whether the district court erred by holding that, regardless of the constitutional guarantee of freedom of the press, the back-up definition of "electioneering communications," (title II) as modified by the court, and the accompanying prohibitions and regulations, are constitutional as applied to the appellants as members of the "general press," even though the institutional press and other FEC-licensed press activities are exempted? (4) Whether the district court erred by holding that, regardless of the freedom of the press guarantee, those appellants who are federal officeholders or candidates must, as members of the "general press" submit to the FEC's licensing power and editorial control under BCRA (section 101(a)), including limiting their ability to assist candidates and causes they support, whereas members of the "institutional press" are exempt. (5) Whether the district court erred by holding that, regardless of the freedom of the press guarantee, those appellants who are state office

candidates must, as member of the "general press" submit to the FEC's licensing power and editorial control under BCRA (section 101(a)), if they refer to a federal office candidate in a communication and the FEC determines that the communication constitutes "promotion or support," whereas members of the "institutional press" are exempt. (6) Whether the district court erred by holding that, regardless of the freedom of the press guarantee, appellant Congressman and federal office candidates, as members of only the "general press," had no standing to challenge the constitutionality of the limits on individual contributions to federal campaigns and the disclosure requirements of contributor identities and donations, (section 307(a)), despite its impact on the editorial function of their campaigns, and by dismissing appellant candidates' press challenge to the statute's limits and requirements.

California Democratic Party, et al., Appellants. Do the restrictions imposed upon state and local political parties and party officers (title I) violate Article I, Section 4 of the Constitution, the First, Fifth, and Tenth Amendments, and principles of federalism?

AFL-CIO, et al., Appellants. (1) Whether the prohibition of certain broadcast communications by labor unions and corporations, (section 203), insofar as it incorporates the back-up definition of "electioneering communications," (section 201), with the last clause of the definition severed, abridges the First Amendment. (2) Whether the provisions prohibiting coordinated expenditures (sections 201, 214(a)) are constitutional in light of BCRA's mandate that no definition of "coordination" may require proof of "agreement or formal collaboration."

U.S. Chamber of Commerce, National Association of Manufacturers, and Associated Builders and Contractors, Inc., et al., Appellants. (1) Whether the "electioneering communications" provisions (sections 201, 203, 204, 311) violate the right of business corporations and those who wish to hear their independent speech and associate with them under the First Amendment. (2) Whether the "coordination" provisions of BCRA (sections 202, 214) violate the First Amendment rights of business corporations and those who wish to hear their speech and associate with them.