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VICTORY!

U.S. Supreme Court Protects Grassroots Lobbying from McCain/Feingold Broadcast Blackout Periods

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In a tremendous victory for citizens and citizen organizations, the U. S. Supreme Court today created a safe harbor for grassroots lobbying from the blackout period created by the "electioneering communication" prohibition in McCain-Feingold. The opinion in *FEC v. Wisconsin Right to Life* (No. 06-969, consolidated with *McCain v. Wisconsin Right to Life*, No. 06-970) is available on the Supreme Court's website at <http://www.supremecourtus.gov>

and at www.jamesmadisoncenter.org along with other case documents.

"Today, the U.S. Supreme Court restored the right of citizens and citizen organizations to engage in grassroots lobbying through the use of broadcast communications," said Barbara Lyons, Executive Director of Wisconsin Right to Life. "The Court soundly rejected the attempts by Senators McCain and Feingold and their allies to silence Wisconsin Right Life's efforts to inform the public regarding an important issue pending in Congress and to urge citizens to contact their elected officials regarding that issue. This is a tremendous victory for all citizens and citizen organizations."

James Bopp, lead counsel for WRTL, states, "The Supreme Court has given meaning to its recognition, in *McConnell*, that there are 'genuine issue ads,' which incumbent politicians could not silence. Grassroots lobbying is important to citizens involvement in their own government and it has nothing to do with elections. The Court has now restored to the people the most effective means, broadcast ads, for efforts to influence incumbent politicians when they pass laws to tax and regulate us."

Bopp adds, "Incumbent politicians have no constitutional authority to quash criticism of their conduct in office. The American Revolution was fought, and the First Amendment enacted, precisely to protect the people's right to criticize the government. The Court today has rejected the audacious attempt by Senator McCain and his allies to overturn the First Amendment's protection and empower incumbent politicians with the power to ban public criticism--even ban ads that contain no such criticism."

History of the case:

McCain-Feingold (the Bipartisan Campaign Reform Act of 2002 or "BCRA") prohibited corporations and unions from using general funds for electioneering communications, which are essentially broadcast ads within 30 days of a primary and 60 days of a general election that simply mention the name of a federal

candidate. In 2003, the U. S. Supreme Court upheld the law *on its face* in *McConnell v. FEC*.

In July 2004, Wisconsin Right to Life began running grassroots lobbying ads asking Wisconsin citizens to call their Senators, Kohl and Feingold (then a candidate), and ask them to oppose the burgeoning filibusters of President Bush's judicial nominees.

Here is the text of one of those ads:

"There are a lot of judicial nominees out there who can't go to work. Their careers are put on hold because a group of Senators is filibustering-- blocking qualified nominees from a simple 'yes' or 'no' vote. Its politics at work and it's causing gridlock. Contact Senators Feingold and Kohl and tell them to oppose the filibuster. Visit: BeFair.org"

The BeFair.org website was specially created for the anti-filibuster campaign and contained information about the Senate confirmation process, the filibusters, federal courts, the judicial emergency caused by too few judges, and press releases about the anti-filibuster grassroots lobbying campaign. The website set out the Senators' positions on the filibusters, but contained no advocacy for or against either Senator as a *candidate*, no reference to the upcoming election and no statement urging the election or defeat of either Senator.

Because Sen. Feingold had chosen to run for re-election, Wisconsin Right to Life's ads would have become forbidden electioneering communications from August 15 to November 2, 2004 (79 continuous days because the primary and general election prohibition overlapped). Meanwhile, Congress remained in session and it was widely predicted that there would be a "fall showdown" on the filibuster issue. WRTL filed suit so that it would be able to continue running its ads during the blackout period.

WRTL's suit claimed that the blackout period could not be constitutionally applied to grass roots lobbying about upcoming votes in Congress. The right to petition the government is a protected right in the First Amendment and grassroots lobbying has nothing to do with elections. WRTL argued that incumbent politicians should not be able to prohibit citizens from lobbying their representatives through campaign finance laws.

In 2004, the district court denied Wisconsin Right to Life's request and dismissed the case in 2005, based on its belief that when the Supreme Court upheld the blackout provision on its face in *McConnell* it precluded such as-applied challenges. In 2006, the U.S. Supreme Court unanimously reversed the district court, ruling that as-applied challenges could be brought against the blackout period, and remanded the case for a decision on Wisconsin Right to Life's as-applied challenge.

In December 2006, the district court held the electioneering communication prohibition unconstitutional as applied to Wisconsin Right to Life's 2004 ads. It found that there was "no link" between the ads that Wisconsin Right to Life wanted to continue running and Sen. Feingold's character or fitness for office. (i.e., his role as a *candidate* as opposed to his role as a *legislator*).

In its Supreme Court appeal, Senator McCain and the other co-sponsors of the McCain-Feingold law argued that broadcast ads could be prohibited if they "took a *critical* stance regarding a candidate's position on an issue." While WRTL's ads did not criticize either Senator Feingold or Senator Kohl, McCain claimed they did

by just bringing up the filibuster issue during an election.

In today's decision, the Supreme Court went beyond merely affirming the district and created a constitutional safe harbor for grassroots lobbying. It stated that, if the communications meet certain specific criteria, they could be broadcast during the blackout periods.

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