Issue Ads During Election Season

Christian Civic League of Maine, Inc. v. FEC
(Louis F. Oberdorfer, D.D.C. 1:06-cv-614)

On Monday, April 3, 2006, the Christian Civic League of Maine (CCL) filed an action against the Federal Election Commission in the U.S. District Court for the District of Columbia claiming that it was a violation of CCL's First Amendment rights for the Bipartisan Campaign Reform Act of 2002 (BCRA)[1] to proscribe CCL's issue advertisement during the 30 days preceding Maine's June 13, 2006, primary elections.[2] The radio ad that CCL wished to air extolled the sanctity of heterosexual marriage, criticized Maine's Senators Olympia Snowe and Susan Collins for voting against a proposed Marriage Protection Amendment in 2004, and encouraged listeners to urge them to vote the other way in June.[3] The statute forbade a corporation from using general corporate funds for a broadcast, cable, or satellite communication that clearly identifies a candidate for federal office during the 30 days preceding a primary election or the 60 days preceding a general election.[4] Senator Snowe was up for reelection in 2006.[5] CCL sought declaratory and injunctive relief in favor of (1) its intended ad and (2) similar communications, which CCL referred to as "grass-roots lobbying."[6] With its complaint, CCL filed a motion for a preliminary injunction,[7] an application pursuant to BCRA for a three-judge court,[8] and a motion to expedite the case.[9]

On Wednesday, Judge Louis F. Oberdorfer granted the application for a three-judge court and the motion to expedite the case, and Judge Oberdorfer ordered briefing on the preliminary injunction motion completed by Friday, April 21.[10] The three-judge court was named on Friday, April 7, including District Judge Colleen Kollar-Kotelly, but on the following Monday Circuit Judge Judith W. Rogers replaced Circuit Judge Karen L. Henderson.[11]

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1. Pub. L. No. 107-155, 116 Stat. 81 (2002); *see* 2 U.S.C. § 441b (2010) (regulating corporate electioneering).

2. Complaint, Christian Civic League of Maine, Inc. v. FEC, No. 1:06-cv-614 (D.D.C. Apr. 3, 2006), D.E. 1; Christian Civic League of Maine, Inc. v. FEC, 433 F. Supp. 2d 81, 84–85 (D.D.C. 2006); *see* David Farmer, *Christian Civic League Files Suit Over Election Law*, Lewiston Sun J., Apr. 19, 2006, at A2; Bart Jansen, *League Targets Snowe, Ad Limits*, Portland Press Herald, Apr. 23, 2006, at C2.

3. Exh. A, Complaint, *supra* note 2; *Christian Civic League*, 433 F. Supp. 2d at 84; *see* Farmer, *supra* note 2; Jansen, *supra* note 2.

4. *Christian Civic League*, 433 F. Supp. 2d at 84.

5. *Id.*; *see* Farmer, *supra* note 2 (reporting also that Senator Snowe co-authored the anti-electioneering legislation); Jansen, *supra* note 2 (same).

6. Complaint, *supra* note 2, at 13.

7. Preliminary Injunction Motion, *Christian Civic League*, No. 1:06-cv-614 (D.D.C. Apr. 3, 2006), D.E. 4.

8. Application, *id.* (Apr. 3, 2006), D.E. 3; *see* Pub. L. No. 107-155, 116 Stat. 81 § 403 (2002), 2 U.S.C. § 437h note (2010).

9. Motion, *Christian Civic League*, No. 1:06-cv-614 (D.D.C. Apr. 3, 2006), D.E. 5.

10. Order, *id.* (Apr. 5, 2006), D.E. 8.

11. Docket Sheet, *id.* (Apr. 3, 2006).

On April 17, five members of Congress—two Senators and three Representatives—moved to intervene to defend the statute.[12] Judge Oberdorfer's former law firm, which Judge Oberdorfer left in 1977, represented the interveners.[13] Judge Oberdorfer notified the parties of this fact and stated that he ordinarily disqualified himself from cases under such circumstances, but Judge Oberdorfer stated that his recusal was not required and his recusal might be disruptive in this expedited case, but any party was free to make a confidential motion with the clerk for his recusal.[14] The record does not reflect a recusal motion,[15] and the court granted the motion to intervene on April 20.[16]

The court heard oral argument on the preliminary injunction motion on April 24[17] and denied the motion on May 9,[18] five days before the primary election blackout on corporate electioneering in Maine.

On June 7, the Senate held a cloture vote on the Marriage Protection Amendment.[19] The amendment failed to advance with a vote of 49 favoring cloture and 48 opposed.[20] Senators Snowe and Collins opposed cloture.[21]

On September 27, the three-judge court determined that claims pertaining to the proposed radio ad were moot and claims pertaining to grass-roots lobbying were too speculative to be justiciable.[22]

CCL's May 12 interlocutory appeal to the Supreme Court on denial of its preliminary injunction motion was dismissed as moot on October 2.[23] CCL's October 26 appeal from dismissal of its complaint resulted in a June 29, 2007, remand for reconsideration[24] in light of an intervening Supreme Court case, *Federal Election Commission v. Wisconsin Right to Life, Inc.*,[25] which was decided on June 25, 2007.

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12. Intervention Motion, *id.* (Apr. 17, 2006), D.E. 18.

13. Notice to Counsel, *id.* (Apr. 19, 2006), D.E. 21; Intervention Motion, *supra* note 12; Federal Judicial Center Biographical Directory of Federal Judges, http://www.fjc.gov/history/home.nsf/page/judges.html.

14. Intervention Motion, *supra* note 12.

15. Docket Sheet, *supra* note 11.

16. Order, *Christian Civic League*, No. 1:06-cv-614 (D.D.C. Apr. 20, 2006), D.E. 25; *see* Christian Civic League of Maine, Inc. v. FEC, 433 F. Supp. 2d 81, 85 (D.D.C. 2006).

17. Transcript, *Christian Civic League*, No. 1:06-cv-614 (D.D.C. Apr. 24, 2006, filed Apr. 26, 2006), D.E. 28.

18. *Christian Civic League*, 433 F. Supp. 2d 81; *see* Bart Jansen, *Christian Group to Appeal for Right to Air Political Ad*, Portland Press Herald, May 11, 2006, at B1.

19. Status Report at 1, *Christian Civic League*, No. 1:06-cv-614 (D.D.C. June 25, 2006), D.E. 40.

20. *See* Chris Casteel, *Marriage Amendment Falls Short in Senate*, Oklahoman, June 8, 2006, at 1A; Carolyn Lochhead, *Same-Sex Marriage Ban Rejected by Senate*, S.F. Chron., June 8, 2006, at A1.

21. http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00163.

22. Opinion, *Christian Civic League*, No. 1:06-cv-614 (D.D.C. Sept. 27, 2006), D.E. 52, *available at* 2006 WL 2792683.

23. Christian Civic League of Maine, Inc. v. FEC, 549 U.S. 801 (2006).

24. Christian Civic League of Maine, Inc. v. FEC, 551 U.S. 1160 (2007).

25. 551 U.S. 449 (2007).

In *Wisconsin Right to Life*, Chief Justice Roberts and Justice Alito determined that BCRA could proscribe "campaign advocacy," but it could not proscribe "issue advocacy," absent narrow tailoring to serve a compelling interest.[26] Justices Scalia, Kennedy, and Thomas would have struck down the proscription on corporate electioneering altogether.[27] All five of these justices agreed that cases similar to CCL's "fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review."[28]

CCL's case came to a close on August 21, 2007.[29] The three-judge court determined that BCRA could not proscribe CCL's proposed 2006 radio ad, but CCL's other claims were still too speculative for relief.[30]

26. *Id.* at 456–57, 464–76 (opinion by Roberts, joined by Alito); *see* Robert Barnes, *5-4 Supreme Court Weakens Curbs on Pre-Election TV Ads*, Wash. Post, June 26, 2007, at A1.

27. *Wisconsin Right to Life*, 551 U.S. at 483–504 (opinion by Scalia concurring in part and concurring in the judgment, joined by Kennedy and Thomas); *see* Barnes, *supra* note 26; Linda Greenhouse & David D. Kirkpatrick, *Justices Loosen Ad Restrictions in Campaign Law*, N.Y. Times, June 26, 2007, at A1.

28. *Wisconsin Right to Life*, 551 U.S. at 462 (opinion by Roberts, joined by Scalia, Kennedy, Thomas, and Alito).

29. Docket Sheet, *supra* note 11.

30. Order, Christian Civic League of Maine, Inc. v. FEC, No. 1:06-cv-614 (D.D.C. Aug. 21, 2007), D.E. 61.