

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FEDERAL ELECTION COMMISSION, :

4 Appellant :

5 v. : No. 06-969

6 WISCONSIN RIGHT TO LIFE, INC. :

7 - - - - - x

8 SENATOR JOHN MCCAIN, ET AL., :

9 Appellants :

10 v. : No. 06-970

11 WISCONSIN RIGHT TO LIFE, INC. :

12 - - - - - x

13 Washington, D.C.

14 Wednesday, April 25, 2007

15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United States
17 at 10:14 a.m.

18 APPEARANCES:

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20 Justice, Washington, D.C.; on behalf of the Appellant
21 in No. 06-969.

22 SETH P. WAXMAN, ESQ., Washington, D.C., on behalf of the
23 Appellants in No. 06-970.

24 JAMES BOPP, JR., ESQ., Terre Haute, Ind, on behalf of
25 the Appellee.

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

2 (10:14 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 06-969, Federal Election
5 Commission versus Wisconsin Right to Life, and Case
6 06-970, Senator McCain versus Wisconsin Right to Life.
7 General Clement.

8 ORAL ARGUMENT OF GEN. PAUL D. CLEMENT

9 ON BEHALF OF APPELLANT FEDERAL ELECTION COMMISSION

10 GENERAL CLEMENT: Mr. Chief Justice, and may
11 it please the Court:

12 In McConnell against FEC this Court upheld
13 Title II's restrictions on electioneering communications
14 by unions and corporations against facial attack. In
15 doing so, this Court reviewed a voluminous record and
16 concluded that the vast majority of the ads that had
17 been run in previous cycles and came within the
18 statutory definition could constitutionally be regulated
19 by Congress. Accordingly, this Court rejected the
20 overbreadth challenge and upheld the statute on its face.
21 To be sure, the last time this case was before the Court
22 the Court made clear that nothing in McConnell
23 foreclosed an opportunity for as-applied challenges to
24 the statute and the Court remanded the case for that
25 purpose. But to be consistent with McConnell's

1 overbreadth decision, any as-applied challenge cannot
2 have the effect of calling into question a substantial
3 percentage of the statute's applications. Yet the
4 district court's decision below has precisely that
5 forbidden effect.

6 There is nothing atypical about the three
7 ads that are before this Court. Indeed, they closely
8 resemble the Jane Doe hypothetical ads that this Court
9 identified at page 127 as the prototype of ads that,
10 although they took the form of issue ads, nonetheless
11 were functionally equivalent to express advocacy.

12 JUSTICE SCALIA: Maybe we were wrong last
13 time.

14 GENERAL CLEMENT: Well, Justice Scalia, I
15 don't think you were wrong, and I suppose that obviously
16 you thought the rest of the Court was wrong in
17 McConnell, and if the Court wants to reconsider that
18 decision -- I mean, that's an option the Court can take
19 in the appropriate case.

20 I would suggest that this is not the
21 appropriate case for a number of reasons, not the least
22 of which is that I think it was briefed in this case
23 really as something of an afterthought, not as a
24 principal focus of the briefing. In the McConnell case
25 this Court, as you well remember, had an unbelievably

1 exhaustive record before it in making a judgment about
2 the facial constitutionality of the law.

3 JUSTICE SCALIA: Well, we didn't have a
4 concrete case such as this one, in which the assertions
5 of the other side are very appealing as far as the
6 rights of citizens to band together for an issue ad,
7 even an issue ad that names somebody who's up for
8 election within, within 90 days. We didn't that have
9 appealing case before us. Now that we have it before us
10 and now that you tell us that this is a typical case,
11 maybe we were wrong about the overbreadth challenge
12 before.

13 GENERAL CLEMENT: With respect, I don't
14 think you were. And although you didn't have this case
15 before you, you had many, many concrete cases before you
16 that are really indistinguishable from this case. You
17 had the --

18 CHIEF JUSTICE ROBERTS: How are we supposed
19 to decide whether this case -- if you think it's
20 important to our resolution, how are we supposed to
21 decide whether this particular case is typical or not?

22 GENERAL CLEMENT: Well, I guess it's hard
23 for me to say how you would decide whether it's typical.
24 I'm not sure that's the question.

25 CHIEF JUSTICE ROBERTS: I think it's very

1 hard to determine. Therefore, I think it's hard to
2 determine in the abstract whether its inconsistent with
3 the conclusion in McConnell that a vast majority of the
4 cases would not be covered or if it's inconsistent with
5 it.

6 GENERAL CLEMENT: Well, Mr. Chief Justice,
7 let me try to come at it this way, which is to say I
8 would have thought that if you're not going to overturn
9 McConnell, you're just going to apply it and say, well,
10 what kind of as-applied challenges are left, I would
11 have thought that what you would have in mind is ads
12 that had an identifiable characteristic that marked them
13 as being outside of the mainstream and somehow different
14 from most of the ads. And so --

15 CHIEF JUSTICE ROBERTS: That gets back to my
16 same question: How do we know that this is or is not
17 outside the mainstream. We have just the three ads that
18 are at issue here. It's not as if we have a survey of
19 all the ads that are run during the blackout periods in
20 particular election cycles. How do we tell whether this
21 is within the mainstream or not?

22 GENERAL CLEMENT: One strong indicator that
23 these are in the mainstream is how close they are to the
24 Jane Doe hypothetical that this Court identified as the
25 prototype of the kind of ads that, although they took

1 the form of issue ads, they looked like issue ads, they
2 really were indistinguishable from and the functional
3 equivalent of express advocacy.

4 JUSTICE GINSBURG: General Clement, that
5 Jane Doe ad was in the record last time. They were
6 others, weren't there, the issue ads?

7 GENERAL CLEMENT: There were hundreds. I
8 mean, as you well remember, there were hundreds of ads
9 in the record. And this Court was able to draw
10 conclusions about them both by looking at some of the
11 specifics, but also looking at the forest, if you will.
12 One of the things they recognized, for example, is that
13 these ads weren't turning up uniformly wherever issues
14 were being debated. These ads turning up in the close
15 elections, in the close races. And there was --

16 CHIEF JUSTICE ROBERTS: Counsel, the Court
17 in McConnell used the term, as you've used it this
18 morning, "vast majority." What is that? Is 70 percent
19 a vast majority, so that 30 percent of the ads are going
20 to be outside of that and would be candidates for this
21 as-applied challenge?

22 GENERAL CLEMENT: No, no, Mr. Chief Justice,
23 because the Court used "vast majority," and I mean, that
24 could mean 70 percent, it could mean 80 percent, it
25 could mean 90 percent. Equally importantly, on page 207

1 of the opinion, when it was specifically addressing
2 overbreadth, it made the argument, it made the
3 conclusion, that both in absolute and relative terms
4 this statute was not substantially overbroad.

5 And it seems to me then at a minimum for any
6 as-applied challenge to be consistent with that
7 overbreadth determination, it can't have the effect of
8 opening up the statute wide open such that on a going
9 forward basis the majority, certainly a substantial
10 number, percentage, inconsistent with an overbreadth
11 holding, of the ads that would be run by unions and
12 corporations within the last 60 days of the election
13 would qualify for the exception. That just seems
14 inconsistent with the overbreadth holding.

15 JUSTICE SCALIA: Well, did that statement
16 refer only to issue ads, or did it refer to all ads?

17 GENERAL CLEMENT: It referred to all ads
18 that would come within the statutory prohibition.

19 JUSTICE SCALIA: Right, and here we are
20 dealing with a subset of all ads and that is issue ads.
21 So that statement doesn't necessarily speak to whether,
22 you know, a vast majority of all issue ads have to be --

23 GENERAL CLEMENT: But with respect,
24 Justice Scalia, there were so many issue ads in the
25 record in McConnell that if issue ads were an

1 appropriate category for as-applied challenges, it would
2 have been impossible for this Court to reject the
3 overbreadth burden.

4 JUSTICE SCALIA: I don't know if that's so.
5 So long as that statement applied to the totality of
6 ads, many of which were ads just directed at defeating
7 particular candidates, I don't see how you can see that
8 we're bound by that statement.

9 GENERAL CLEMENT: Well, Justice Scalia, the
10 only other obvious candidate that we could carve out
11 would be express advocacy. And the Court was clear in
12 footnote 18 of the opinion what percentage that was, 4
13 to 5 percent. So as to the 95 percent of the ads that
14 didn't engage in express advocacy, this Court still had
15 no difficulty concluding that the vast majority of them
16 were within Congress' conception of the purposes of the
17 statute --

18 JUSTICE SCALIA: Everything that is not
19 express advocacy is an issue ad? The world is divided
20 into express advocacy and issue ads?

21 GENERAL CLEMENT: That's one way to divide
22 it. You're using the term "issue ad."

23 JUSTICE SCALIA: I wouldn't divide it that
24 way. I would think there are a lot of express advocacy
25 ads. I think there are a lot of non-express advocacy

1 ads that are not issue ads.

2 GENERAL CLEMENT: Justice Scalia, you're use
3 the term "issue ad" as if it's self-defining. I don't
4 view it that way. And I mean, even Appellee has tried
5 to narrow it to grassroots lobbying. Now, of course
6 there's a problem with the grassroots lobbying argument
7 and that is it was made to this Court in McConnell, and
8 at that time the nature of the argument wasn't, oh,
9 grassroots lobbying, that's a sort of idiosyncratic or
10 atypical application that would give rise to a narrow
11 as-applied exception.

12 No, the argument there, and a great
13 illustration is Appellee's national affiliate, National
14 Right to Life. At pages 6 and 7 of the reply brief in
15 McConnell, they argued about grassroots lobbying and
16 said, boy, this statute applies to grassroots lobbying,
17 therefore it's substantially overbroad.

18 CHIEF JUSTICE ROBERTS: You're suggesting
19 the district court decision is not consistent with
20 McConnell. But it seems that your approach today is
21 inconsistent with our decision last year that you can
22 have as-applied challenges. You're suggesting that if
23 we allow this as-applied challenge to go forward that we
24 have to facially strike down the section.

25 GENERAL CLEMENT: Oh, Mr. Chief Justice, I'm

1 not saying that. My point is that not all as-applied
2 challenges are created equal.

3 CHIEF JUSTICE ROBERTS: So tell me what one,
4 an ad that would succeed in an as-applied challenge
5 looks like, or what the standard would be that we would
6 apply in a way that you think would not call into
7 question the decision in McConnell about Section 203?

8 GENERAL CLEMENT: Well, let me give you a
9 couple of as -- I mean, look, my job is to defend the
10 constitutionality of the statute on its face and as
11 applied. So I'm not suggesting that any of these
12 as-applied challenges would necessarily succeed or I
13 wouldn't be up here trying to make some argument in
14 defense of the statute.

15 But let me give you --

16 CHIEF JUSTICE ROBERTS: What you're saying,
17 though, is if this as-applied challenge succeeds you're
18 saying the only way we can do that is if we think that
19 the statute is facially unconstitutional. I'm just
20 trying to see if there's a way of --

21 GENERAL CLEMENT: Sure.

22 CHIEF JUSTICE ROBERTS: -- approaching this
23 as-applied challenge in a way that doesn't require us to
24 revisit that prior --

25 GENERAL CLEMENT: Absolutely.

1 JUSTICE SCALIA: It doesn't your case, with
2 me at least, for you to tell us that it is your job to
3 say that no as-applied challenge will suffice.

4 GENERAL CLEMENT: Well then, let me give you
5 an --

6 JUSTICE SCALIA: I mean, that doesn't
7 inspire me with confidence in what you're telling us.

8 GENERAL CLEMENT: Let me give you some
9 inspirational as-applied challenges that would be better
10 as-applied challenges than this one. A challenge by a
11 501(c)(3) corporation that has difficulty separating up
12 a separate segregated fund. Much better as-applied
13 challenge. The challenge that was brought in the Maine
14 case that you have before you in another -- in another
15 petition or another appeal, that was a challenge to an
16 ad that was run in an unopposed primary. That starts to
17 sound like a pretty good as-applied challenge.

18 JUSTICE SCALIA: No. There is -- there is a
19 claim here that there -- that there was difficulty in
20 setting, setting up a fund in time to do what had to be
21 done with respect to this issue, which was a distinctive
22 issue that had come up and they said we didn't have time
23 to set up a - a - a - a separate PAC that, that would
24 effectively meet the problem. Why isn't that
25 distinctive enough?

1 GENERAL CLEMENT: With respect,
2 Justice Scalia, it would be a better case if that were
3 the claim. There's no doubt that appellee has a, a PAC,
4 a separate segregated fund. To their claim isn't that
5 they didn't have one. Their claim is it was underfunded
6 vis a vis what it would cost to fund these ads. But
7 that itself is clearly a conscious decision, because if
8 you look at how much money they had in their PAC in
9 2000, they had 155,000 or something like that in their
10 PAC. Plenty to pay for this ad. This time around they
11 had 13,000. Now why is that? It's pretty clear from
12 the record that they shifted their emphasis not to
13 getting money for their PAC, but to get money in their
14 general corporate treasury to fund these ads. And so
15 they raised 300 million dollars in corporate funds. But
16 that's not hat doesn't make this a good as-applied
17 challenge.

18 CHIEF JUSTICE ROBERTS: Can I, can I
19 understand you to suggest we ought to draw a distinction
20 in as-applied challenges between a 501(c)(3)
21 organization and a corporation?

22 GENERAL CLEMENT: I think --

23 CHIEF JUSTICE ROBERTS: That is not a
24 501(3)(3) corporation?

25 GENERAL CLEMENT: I think, I think a

1 501(c)(3) corporation has a much better as-applied
2 challenge if they can bring it. And that's the
3 as-applied challenge that's sort of been discussed in
4 some of the amicus briefs. The problem is Appellee is
5 not in a position to do that, because they are a
6 501(c)(4) corporation. Another example of a better
7 challenge would be the Chief Justice's hypothetical from
8 the earlier argument which would be a corporation that
9 runs a series of ads and then wants to continue to run
10 them during the election cycle.

11 Well, that's not guilty this case, but it
12 well could be. The filibuster issue isn't something
13 that came like a bolt out of the blue on the eve of the
14 election. Throughout 2003, there were filibusters in
15 the Senate on a pretty regular basis.

16 JUSTICE KENNEDY: We all -- we all know --
17 maybe -- I think, I think it's accepted, that the public
18 only tunes in to the political dialogue shortly before
19 the election. That's the time in which you -- in which
20 you reach the public. So the fact that the filibuster
21 has been going on for a long time is -- I don't think
22 answers the question as to how speech can be the most
23 effective.

24 GENERAL CLEMENT: Well, Justice Kennedy, I
25 don't see -- you may be right that certainly people do

1 tend to focus on issues in the context of an election.
2 But I think the record in this case does not bear out
3 the conclusion that people only care about them at those
4 times or that groups don't bother running ads at other
5 times. I mean if you look at the 2005 time frame, the
6 record reflects that a number of groups, not Appellee,
7 but a number of groups had issue ads addressing the
8 filibuster issue. And what's interesting about that to
9 me is if you look at joint appendix 45 and 46 for the
10 examples they were able to do it in terms of tag line,
11 "Earth, call the Senate." And if, if Appellee had run
12 those same ads which would capture the issue, then they
13 wouldn't even have come within the statute. So it does
14 illustrate both that this is an issue that drew enough
15 public interest to generate ads at different time
16 periods, not just in the reelection context, and even
17 when did it that, it was possible to engage on the issue
18 without coming within the confines of the statute. So
19 it just seems like --

20

21 JUSTICE KENNEDY: Are, are there frequent
22 issues -- instances in the political process, do you
23 think, in which the public runs an ad against a, a
24 candidate knowing the candidate is probably going to win
25 anyway, he or she is from a safe district, or it's very

1 difficult. But they want to run the ad anyway in order
2 to affect his conduct or her conduct once they're
3 reelected, so that they'll take a different position, a
4 second look.

5 GENERAL CLEMENT: Justice Kennedy --

6 JUSTICE KENNEDY: It -- it seems to me
7 logically that's possible. I just don't know if that,
8 if that happens very often.

9 GENERAL CLEMENT: Justice Kennedy, it's
10 certainly possible. I don't think it's common, though.
11 And the reason I say that is just to go back to the
12 record in McConnell, the one thing the record there made
13 pretty clear is when you got to the period 60 days
14 before the election, these ads were not being ran in a
15 way that would have some random distribution that you
16 might expect if they were just interested in the issues
17 or just interested uniformly in all reelections. These
18 ads were really concentrated in the close districts. I
19 mean one of the lines that stick out in my mind from the
20 record is in trying to fund money for these so-called
21 issue ads, the Club for Growth executives said "we need
22 money for these issue ads because they make all the
23 difference in close elections."

24 JUSTICE SCALIA: Well now -- but -- yes, it
25 may make the difference in a close election but it is

1 also, it is also likely to be more effective with regard
2 to the Senator that you -- whose vote you want on the
3 issue. Are you, are you going to waste your, waste your
4 money in, in those districts where the Senator is not
5 going to vote the way you want no matter what? The
6 situation you pose is precisely the one where you would
7 want your issue ad to run.

8 GENERAL CLEMENT: Well, Justice Scalia, if
9 your point is that there may be an interest in trying to
10 leverage the upcoming election to get somebody's
11 attention --

12 JUSTICE SCALIA: Of course.

13 GENERAL CLEMENT: -- I think --

14 JUSTICE SCALIA: To get the Senator's
15 attention.

16 GENERAL CLEMENT: Sure.

17 JUSTICE SCALIA: The Senator who is, who is
18 at risk is likely, is likely to listen. The Senator who
19 has a safe seat is not.

20 GENERAL CLEMENT: No doubt that's true. But
21 I think it also implicates the, the interests of
22 Congress in the statute that this Court recognized and
23 upheld on its face. When, when the whole point is,
24 we're not just interested in this issue in the abstract,
25 and we're not running this issue just because there's a

1 pending vote in Congress; we're interested in running
2 this ad because it's a pretty effective vehicle both to
3 defeat this candidate's reelection chances, but if we
4 don't succeed on that maybe we'll convince him to change
5 his mind.

6 JUSTICE SCALIA: You can't tell which of the
7 two they had in mind. Whether they wanted the Senator
8 defeated or they wanted to put enough pressure on the
9 Senator that he would change his vote with regard to the
10 filibuster. I would think that the latter is more
11 likely the motive than the former. And why do you
12 assume the worst?

13 GENERAL CLEMENT: Well -- I don't know, the
14 fact that by the time they ran these ads Senator
15 Feingold voted 20 times out of 20 to filibuster suggests
16 to me that they probably concluded that the best to get
17 a Wisconsin Senator who wouldn't filibuster was to
18 change senators not to change to change Senator
19 Feingold's mind.

20 JUSTICE GINSBURG: The relevance of this
21 same group having a poll strongly opposed Feingold every
22 time he ran for election. It's no secret that they were
23 opposed to his candidacy.

24 GENERAL CLEMENT: No. That's absolutely
25 right, Justice Ginsburg. And obviously the statute

1 itself in its bright line test doesn't make you get into
2 those kind of inquiries. But if their claim, if they
3 come into court and say well, we had a pure heart; we
4 didn't have an intent to affect the election --

5 JUSTICE SCALIA: But this is -- this is the
6 First Amendment. We don't make people guess whether
7 their speech is going to be allowed by Big Brother or
8 not. If you are going to cut off the speech, there
9 ought to be a clear line. Not whether -- whether I, I
10 had ads against Feingold in the past or whether Feingold
11 voted 20 times against this or, or half of the time
12 against this. It seems to me you need a clear First
13 Amendment line. And you're not giving us any.

14 GENERAL CLEMENT: Sure I am, Justice Scalia.
15 I'm giving you the statute, on its face, which couldn't
16 be clearer. If you want to have as-applied exceptions,
17 if you want to go down the road, to quote the Chief
18 Justice in dissent in MCFL, of creating "barely
19 adumbrated exceptions," you may inject some vagueness.
20 Now that may be necessary. And there may be as-applied
21 challenges out there that do the trick without creating
22 vagueness. But I don't think this is the one. And just
23 because the first as-applied challenge you see is a
24 problematic one doesn't mean this aren't better
25 as-applied challenges out there.

1 If I could reserve the balance of my time.

2 CHIEF JUSTICE ROBERTS: Thank you,

3 General Clement.

4 Mr. Waxman.

5 ORAL ARGUMENT OF SETH P. WAXMAN,

6 ON BEHALF OF APPELLANTS SENATOR JOHN MCCAIN, ET AL.

7 MR. WAXMAN: Mr. Chief Justice, and may it
8 please the Court.

9 I'd like to -- I'd like to address three
10 points that came up at the earlier part of the argument.
11 First of all, I'd like to, I think just with respect
12 correct a premise of one of Justice Scalia's questions.
13 Then I would like to address the two questions that I
14 think I heard the Chief Justice ask, which is how do we
15 know that the this is an atypical ad, and what would the
16 standard -- what standard would a court apply in
17 adjudicating as-applied challenges?

18 And then finally, assuming there's time
19 permitting I'd like to address the question of why we
20 shouldn't revisit McConnell which I think was posed both
21 by the Chief Justice and by Justice Scalia.

22 First, as to the premise, Justice Scalia,
23 and it relates to what the predicate was of the now
24 famous vast majority reference. I'm quoting from --
25 it's entirely clear from this Court's opinion and I

1 believe it's on page 207 that the referent was issue
2 ads. In fact, what this Court said was the precise
3 percentage of issue ads that clearly identified a
4 candidate and were aired during those relatively brief
5 pre-election time spans but had no electioneering
6 purpose is a matter of dispute between the parties and
7 among the judges on the district court. Nevertheless,
8 the "vast majority" of ads clearly had such a purpose.

9 Chief Justice ROBERTS: Is that, is that
10 your test, if it has any electioneering purpose?

11 MR. WAXMAN: We think the test is whether or
12 not it is as this Court indicated, I think, whether it's
13 the functional equivalent of express advocacy. It
14 doesn't use the magic words but does it have the same
15 effect, that is, the test that this Court should -- not
16 this Court, a district court adjudicating an as-applied
17 challenge that is based on the content of the ad not the
18 sort of as-applied challenge brought in MCFL or Brown
19 versus the Socialist Workers Parties that relate to the
20 nature of the speaker, but one that's based on the
21 content requires the challenger to show okay, in a
22 context of a statute that is facially valid and can
23 constitutionally be applied to the vast majority of ads
24 that are covered by the definition of electioneering
25 communications, he needs to come in and show that with

1 respect to this ad, it has characteristics such that no
2 reasonable voter could view it as promoting, attacking,
3 supporting or opposing a candidate.

4 Chief Justice ROBERTS: Do we, do we usually
5 place the burden when we're applying strict scrutiny
6 under the First Amendment on the challenger to prove
7 that they're allowed to speak, as opposed to the
8 Government to prove -- to carry the burden that they can
9 censor the speech?

10 MR. WAXMAN: Well, you -- I think the rule
11 is quite clear that you never do that. This strict
12 scrutiny clearly applies here. But in the context of
13 a -- the application of a statute that has already been
14 upheld as facially constitutional in the vast majority
15 of applications, the Government doesn't have the burden
16 of reconvincing the district court the -- what the --
17 the very things that the Supreme Court has already
18 decided.

19 JUSTICE SCALIA: That vast majority thing,
20 is that a -- was that the holding of the case? I mean
21 --

22 MR. WAXMAN: It --

23 JUSTICE SCALIA: Every -- every -- every
24 word that we it uttered in that prior case is law? I
25 mean, what if -- am I free to think -- is the lower

1 court free to think that maybe it is really not the vast
2 majority? But just because we said vast majority, it is
3 like writing it into the statute?

4 MR. WAXMAN: It's -- well, we would have an
5 awful lot of laws if everything you wrote constituted
6 law and a holding.

7 JUSTICE SCALIA: Yeah.

8 MR. WAXMAN: But that statement and a
9 statement that follows shortly after it on the following
10 page were essential to this Court's decision that
11 applying the strictest possible scrutiny, this law was
12 very narrowly tailored.

13 JUSTICE ALITO: But the test as to any ad is
14 whether any reasonable person could view the ad as -- as
15 an electioneering ad?

16 MR. WAXMAN: I think -- well, an
17 electioneering ad, Justice Alito, I think puts too much
18 of a burden on it.

19 JUSTICE ALITO: Any reasonable person could
20 view it as what?

21 MR. WAXMAN: I think that what a district
22 court would say is could a reasonable voter in the
23 targeted electorate have understood that this ad was in
24 part promoting, attacking, supporting, or opposing?
25 The, The acronym is PASO.

1 JUSTICE ALITO: The same group has long had
2 ads on a particular issue, and let's say a particular
3 candidate's position on the issue is very well known to
4 people who pay attention to public affairs. And let's
5 say we're in the black out period and now important vote
6 is coming up on Congress on that very issue. If the
7 group continues to run the ad on that issue, that -- a
8 reasonable person could view that as, as saying
9 something about the election, couldn't it? Couldn't
10 that person?

11 MR. WAXMAN: I, I would think so. If it --

12 JUSTICE ALITO: That would be prohibited?

13 MR. WAXMAN: Well, it would depend, as your
14 question suggests, on the context in which the ad is
15 run. Now I want to make two points with respect to your
16 inquiry. Number one, as this Court has reiterated,
17 we're not talking about a ban here. Any one of these
18 ads can be run so long as it is funded the same way that
19 the election law requires them all to be funded. That
20 is, with money that --

21 JUSTICE ALITO: What do you -- what do you
22 make -- what do you make of the fact that there are so
23 many advocacy groups that say this is really
24 impractical?

25 MR. WAXMAN: I -- I love it. And I'm going

1 to give you the ACLU as an example because many -- their
2 brief is quite powerful. They and the other amici who
3 provide a growing table of amicus briefs every time this
4 issue comes up, have never, ever, brought their own
5 as-applied challenge, although those these groups are
6 not shy to litigate when they think important rights are
7 in effect. They have been in the three years since this
8 Court decided McConnell, and in the year since this
9 Court made clear what I think we had assumed, which is
10 this statute is -- it is open season on as-applied
11 challenges. There have been precisely two as as-applied
12 challenges brought, both brought by the counsel in this
13 case. The ACLU's brief which is as representative as
14 any other says look at these ads that we've been running
15 about really important issues: The war in Iraq,
16 Guantanamo, etcetera, etcetera, here is the text of the
17 ad. If we had put onto a tag line of that ad, please
18 call Senator so and so and tell him no, we wouldn't be
19 allowed to do it.

20 Well, you know what? With one exception
21 that I'll explain in a minute, in its 90-year history,
22 the ACLU has never -- way before Bickler was passed,
23 even outside the 60-day period, they never put that line
24 on. And you know why? It's because they have pledged
25 to their members and to the public that they will not

1 engage in electioneering of any sort. They are
2 completely nonpartisan and they don't ever want to be
3 understood to the contrary, and so they never utter
4 those words.

5 CHIEF JUSTICE ROBERTS: I think it's an
6 important part of their exercise of First Amendment
7 rights to petition their senators and congressmen, and
8 to urge others to -- as in these ads -- contact your
9 senators, contact your congressmen. Just because the
10 ACLU doesn't do that doesn't seem particularly pertinent
11 to me.

12 MR. WAXMAN: Well, though, I mean, I think
13 it does demonstrate a few things. First of all, it is
14 entirely possible, as this Court reiterated in
15 McConnell, for the exact same message or an equally
16 effective message to be given at any particular time.
17 If the ACLU or the National Rifle Association or any of
18 the other groups that never wants to actually bring an
19 as-applied challenge but always wants to say oh no, no,
20 no, this is horrible, wants to run an ad, as this
21 Court has -- they can establish a separate segregated
22 fund. And if they come in and convince a court that
23 that's impractical or impossible, maybe they get an
24 as-applied challenge.

25 JUSTICE SCALIA: Is this true of the NRA

1 also? Is it the case that they have never targeted, so
2 to speak, a particular legislator?

3 MR. WAXMAN: I don't think anybody would
4 claim that. Even the --

5 JUSTICE SCALIA: I don't think they would
6 either. Why pick on the ACLU?

7 MR. WAXMAN: I'm not -- I wasn't -- I don't
8 mean to pick on the ACLU. I think highly of both
9 organizations and many of the amici that are arrayed
10 against me. The point is that I use the ACLU as an
11 example because the reason they never put, they never
12 name a congressman is because they don't want their ads
13 to be perceived as breaking faith with what they tell
14 the public.

15 As for the NRA, the NRA actually did bring a
16 challenge against the FEC in the D.C. Circuit and said,
17 "we don't really qualify under MCFL because we take some
18 corporate funds, but it's de minimis and we think that's
19 what the Supreme Court had in mind. You know what?
20 They won. But they can't take yes for an answer. They
21 want to establish that this law is facially
22 unconstitutional. And that does go to the point I
23 think, if I may, as to why -- well, it -- why you
24 shouldn't reexamine McConnell for first principles.

25 But let me just say in response to your very

1 first question, Mr. Chief Justice, that the reason that
2 we know that this ad is typical is, as this Court
3 created, articulated the paradigm of an electioneering
4 communication, the test in the Jane Doe example, and
5 this case is materially indistinguishable from the Jane
6 Doe ad. That is one that, quote, "condemns Jane Doe's
7 record on a particular issue before exhorting viewers to
8 call Jane Doe." Here we've got an ad that denounced
9 the, quote, "group of Senators who had filibustered
10 judicial nominees" -- may I finish my sentence?

11 CHIEF JUSTICE ROBERTS: Please.

12 MR. WAXMAN: The only thing that
13 distinguishes that statement from Jane Doe is knowing
14 that Senator Feingold was part of that group, and
15 reasonable listeners in the context of the ad itself and
16 the web site would certainly have known that. Thank
17 you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 Mr. Waxman.

20 Mr. Bopp?

21 ORAL ARGUMENT OF JAMES BOPP, JR.

22 ON BEHALF OF THE APPELLEE

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

25 I think the Government's problem here is

1 that they are repudiating the very studies and expert
2 witness testimony that this Court relied upon in
3 recognizing a distinction between sham issue ads and
4 genuine issue ads. That was a methodology that the
5 Government created and this Court relied upon. Now they
6 are converting genuine issue ads which they identified
7 in the record through their expert testimony and their
8 studies. These ads are contained in the joint appendix
9 on pages 159 to 167.

10 Their expert based upon their studies
11 testified that these were genuine issue ads. Now they
12 refused to state, as they do here, refused to state a
13 test to determine what's a genuine ad. So we are left
14 trying to comply with this law and mount the as-applied
15 challenges that this Court said is available to us to
16 look at these ads and determine what essential features
17 there are of these ads. And as I will explain further
18 later, these are grassroots lobbying ads of the type not
19 like Jane Doe or yellow tail, but as -- but exactly the
20 type of the PBA ad, for instance, which we have focused
21 on, which is on page 166 of the joint appendix. So in
22 these studies, and these experts, they only looked at
23 the text of these ads to determine whether they were
24 genuine or sham.

25 There was no testimony about the subjective

1 intent of the speaker. There was no testimony about the
2 particular groups who ran these ads on whether or not
3 their PAC was supporting a particular candidate. No
4 expert in McConnell speculated about the possible effect
5 of any particular ad to determine whether it was genuine
6 or sham.

7 JUSTICE BREYER: How could you tell? I
8 rather liked the one --

9 MR. BOPP: I'm sorry?

10 JUSTICE BREYER: I rather liked the one we
11 had before about Senator Faircloth, and his ad was,
12 Senator Faircloth is against the trial lawyers and their
13 efforts to increase liability laws, so write him. Now,
14 testimony all over the place. That is the advocacy
15 candidate ad of the century. And you couldn't possibly
16 know that without having known that one of the parties
17 had spent millions trying to paint Faircloth's opponent,
18 Senator Edwards, as the creature of the trial lawyers,
19 that anyone -- that anyone in North Carolina knew it.
20 So they read those words and they understand precisely
21 what's at stake. They're saying vote against Edwards,
22 vote for Faircloth. You just tell me how anyone could
23 know such a thing without looking at the context.

24 MR. BOPP: There was no testimony in
25 McConnell that that ad, it -- for those that determined

1 whether or not it was sham or genuine, that ad was sham
2 or genuine, there was no testimony, no reference --

3 JUSTICE BREYER: I thought people offered to
4 bring in such facts as -- there was a web site address
5 here. It says, indeed oddly, don't phone the Senator.
6 Go look at the web site. And if you look at that web
7 site, it says defeat him, defeat him, defeat him. I
8 mean, that sounds as if they have defeat in mind.

9 So certainly, there are about four or five
10 things which they said to look at outside the four
11 corners. So I'm not certain what it is in the law that
12 says that you only look to the four corners. I mean, I
13 read the opinion below. Did you read it, by the way,
14 the 1,000-page opinion? I bet you did, the 1,000-page
15 opinion of the district court?

16 MR. BOPP: I did indeed.

17 JUSTICE BREYER: Good. Then you know like I
18 know, and it took me a week, and it probably took you
19 less, but you know what that record was like in the
20 case, don't you?

21 MR. BOPP: Yes.

22 JUSTICE BREYER: Thousands and thousands of
23 pages that as I read it, I drew one conclusion. The one
24 conclusion was if there's a law, and it's a good law
25 under the Constitution, if it is, that corporations and

1 labor unions cannot give money to political campaigns.
2 And if it is true, as it is true, that what political
3 campaigns are about now is television. And if it is
4 true, as it is true, that these are the single lion's
5 share, the single best way to get somebody defeated or
6 elected, then if you open the gates and say corporations
7 and rich givers or whatever can contribute by writing
8 these ads and paying for them, forget the first two
9 premises. Forget the rule that says corporations can't
10 contribute.

11 Now, I put all that in front of you. It
12 seems to me what you're asking for is for us to overturn
13 McConnell and to say either in practice or in theory,
14 McCain-Feingold campaign finance law is
15 unconstitutional.

16 JUSTICE SCALIA: You are asking for that
17 among other things, aren't you?

18 MR. BOPP: Well, if there's no workable test
19 --

20 JUSTICE BREYER: And you are asking for
21 nothing else.

22 MR. BOPP: If there is no workable test that
23 is reasonably ascertainable by small grassroots
24 organizations that separates genuine issue ads from sham
25 issue ads -- this Court in Ashcroft said you cannot

1 throw out the protected speech in order to target
2 unprotected speech. And the line of argumentation that
3 the Government is presenting simply ignores the fact
4 that at least we have a dilemma, we have Congress in
5 session during the blackout periods, voting on items.
6 And we have in the First Amendment one of the four
7 indispensable freedoms, your right to petition the
8 Government.

9 JUSTICE BREYER: I agree with you it's
10 exactly as Justice Scalia said. If we agree with you in
11 this case, good-bye McCain-Feingold. Maybe we should do
12 it up front. That's what you advocate. Very well.
13 Would you address that? Why should this Court only a
14 year or two after it upholds McCain-Feingold, accept a
15 position that either in fact or in theory overturns that
16 case?

17 MR. BOPP: Because facial upholdings can
18 only be sustained constitutionally if as-applied
19 challenges are adequate to protect the protected speech.
20 And this case demonstrates that that is probably
21 impossible. It is certainly demonstrating that when the
22 Government has changed its criteria, it is using
23 criteria that it rejected previously now to say genuine
24 issue ads which we asked this Court to rely upon in
25 their testimony and studies as genuine issue ads, that

1 they are repudiating those.

2 JUSTICE SCALIA: Why do you say that those
3 issue ads are inconsistent with the Government's
4 position here?

5 MR. BOPP: Well, because they --

6 JUSTICE SCALIA: You haven't explained that.
7 You're just --

8 MR. BOPP: Yes. The Wisconsin Right to Life
9 ads are in every material respect indistinguishable from
10 these six grassroots lobbying ads.

11 JUSTICE SOUTER: You're taking this because,
12 in effect on a four corners facial criterion.

13 MR. BOPP: Yes.

14 JUSTICE SOUTER: But one of the issues in
15 this case is whether that is an appropriate methodology,
16 so will you address that?

17 MR. BOPP: Well, this Court has consistently
18 rejected the idea of looking to, you know, outside the
19 message of the speaker such as subjective intent or --

20 JUSTICE SOUTER: We're not talking about
21 subjective intent here. We're talking about what
22 Justice Breyer raised a moment ago.

23 That is, we are looking for the public
24 political context in which the ad is run. He gave the
25 example of the Faircloth Edwards ads. Anyone in North

1 Carolina knew what they meant. Someone in Idaho or New
2 Hampshire probably did not, because they did not know
3 the context.

4 Your argument, seems to me is, ignore the
5 context. And my question is, why should we ignore --
6 why should we do that?

7 MR. BOPP: Well, that test that has been
8 articulated by the Government would invite ads to be
9 prohibited based upon the varied understandings of the
10 listener, and that --

11 JUSTICE SOUTER: But doesn't any
12 communication depend upon the understanding of the
13 listener? Can we even sensibly talk about what a
14 statement means or an advertisement means without
15 understanding the context in terms of the listener's
16 understanding?

17 MR. BOPP: You do that all the time based
18 upon the -- the test is, what do the words say? What
19 does the ad say? What does the speech say?

20 JUSTICE SOUTER: No. The question is, what
21 do the words mean.

22 MR. BOPP: Yes, what do they mean.

23 JUSTICE SOUTER: And it is impossible to
24 know what the words mean without knowing the context in
25 which they are spoken.

1 JUSTICE SCALIA: When they put these
2 exhibits, were those exhibits complete with context?

3 MR. BOPP: No.

4 JUSTICE SCALIA: I didn't think so. They
5 just -- just like the ads were.

6 MR. BOPP: There were two huge big studies
7 on -- two in '98 and 2000, and there was absolutely no
8 testimony about the --

9 JUSTICE SOUTER: My question is, why should
10 we ignore the context? How can we tell what something
11 means without the context?

12 MR. BOPP: Well, there is relevant context,
13 such as the person named, the incumbent is a candidate.
14 That would be a relevant context. It is broadcast
15 within 60 days of a general election, in which he is a
16 candidate as well as a voting member of the Senate.
17 That would be context.

18 JUSTICE SOUTER: But that -- those don't go
19 to meaning in the sense of, for example, the Faircloth
20 Edwards example does. Why should we ignore the aspects
21 of context which determine meaning, i.e., the
22 understanding that a listener would have?

23 MR. BOPP: Because it simply -- it would
24 prohibit all speech because no one would know in advance
25 whether or not there would be --

1 JUSTICE SOUTER: You mean the people in
2 North Carolina were unaware of the Edwards position,
3 they were unaware of the distinction between Faircloth
4 and Edwards?

5 MR. BOPP: I have no idea.

6 JUSTICE SOUTER: Of course they knew that.

7 MR. BOPP: I have no idea.

8 JUSTICE SOUTER: Of course they knew that.

9 And just as presumably, you knew the position of Senator
10 Feingold in these advertisements, and the people in the
11 state knew because of your other -- because of your
12 other public statements.

13 MR. BOPP: Because of one or two press
14 releases?

15 JUSTICE SOUTER: Why should those things be
16 ignored?

17 MR. BOPP: There's absolutely no evidence
18 that anyone in Wisconsin knew his position on the
19 filibuster.

20 JUSTICE SOUTER: You think they're dumb?

21 MR. BOPP: No.

22 JUSTICE SOUTER: You have a web site. You
23 have a web site that calls their attention, and you
24 think nobody's going to it?

25 MR. BOPP: But we can't run the ads, we

1 can't --

2 JUSTICE SOUTER: Nobody's paying attention
3 to what the Senator is doing?

4 MR. BOPP: If we can't run the ads, we can't
5 draw peoples attention to the web site.

6 JUSTICE SOUTER: You think the only source
7 of information about Senator Feingold is your
8 advertisement?

9 MR. BOPP: No, but I don't --

10 JUSTICE SOUTER: Then if your advertisement
11 is not the sole source of information, then why do you
12 assume that no one in Wisconsin knows what the senator
13 has been doing when he votes.

14 MR. BOPP: Look, polls show that a majority
15 of the people don't even know who the Vice President of
16 the United States is. So to suggest that they know a
17 particular position --

18 JUSTICE SOUTER: So your position is that we
19 ignore context because no one -- because the voters
20 aren't smart enough to have a context?

21 MR. BOPP: No, that we be allowed to speak
22 so we can give that information to the voters.

23 JUSTICE BREYER: But that's, that's the
24 point, because where I get into my chain. You have an
25 argument. I'm not denying that. I understand it. But

1 it's sort for me deja vu all over again. We've heard
2 it.

3 MR. BOPP: Yes, but you said --

4 JUSTICE BREYER: And what happened before --
5 either you can distinguish this, which I don't see how
6 frankly, or you're back into the chain, and if you want
7 to say one more thing about the chain, I didn't draw it
8 to the final ending there, if I take most of the ads --
9 and that's what that Kollar-Kotelly opinion is about.
10 That's what that 1,000-page record is about. That's
11 what the 10,000 pages of testimony were about. That's
12 what McCain-Feingold was about, and all those witnesses.
13 They said in today's world these are the kinds of ads
14 people run just to defeat people. And then they said,
15 moreover, most of the campaign money goes on them. And
16 then they said, moreover, if you let corporations and
17 labor unions contribute to these, well, then they can
18 contribute to the campaign. And the only thing I left
19 out before was, if you're prepared to say the
20 Constitution the Constitution requires us to let
21 corporations and unions buy these kinds of ads, well,
22 how could it be constitutional to have a statute that
23 forbids them to contribute directly to the candidate,
24 something that's been in existence only since I guess
25 1904? But how could that be constitutional if they can

1 just give this money directly? Why can't they give this
2 same money to the candidate?

3 MR. BOPP: Well, because of your decision in
4 Beaumont, which creates a distinction between
5 contributions and independent speech, and this is
6 independent speech.

7 JUSTICE SCALIA: It's pretty easy to tell
8 whether you're giving money to the money to the
9 candidate or not, isn't it?

10 MR. BOPP: Very readily.

11 JUSTICE SCALIA: That's a fairly bright line
12 that you don't have to worry about stepping over the
13 wrong side of it.

14 MR. BOPP: That's right.

15 JUSTICE SCALIA: Whereas this one,
16 especially if you adopt a context determination that
17 requires a 1,000-page district court opinion, who knows.

18 JUSTICE BREYER: Is that right? I mean,
19 1,000 is what we have here, is we happen to have three
20 criteria, absolutely clear: Does it mix the candidate?
21 Does it run within 30 or 60 days before the election?
22 And is it targeted to an electorate? Now, that's clear.

23 Now, if you're prepared to say that's
24 unclear, I don't understand it, you don't need a
25 1,000-page record about that. All you need is a record

1 where you have your organization to come in and show how
2 yours is significant different from the mine run of
3 cases. What's the problem?

4 MR. BOPP: The problem is you're not giving
5 force to the other conclusion of all three district
6 court judges that there were genuine issue ads.

7 JUSTICE BREYER: Oh, yes. Yes, I see you
8 could distinguish.

9 MR. BOPP: And that these ads, you know,
10 fall under a different line of cases. First National
11 Bank versus Bellotti has held that corporate efforts to
12 influence Legislative and Executive Branch officials --
13 -

14 JUSTICE STEVENS: Are you trying to convince
15 us the purpose of these ads was to convince Senator
16 Feingold to change his position on filibusters?

17 MR. BOPP: It was indeed. It was to lobby
18 him about the upcoming vote.

19 JUSTICE STEVENS: Do you think they had much
20 chance? Do you think that was a realistic goal?

21 MR. BOPP: Yes, as it turns out, because in
22 2006 we ran the same sort of anti-filibuster ads and
23 Senator Kohl, now up for reelection, changed his
24 position on the filibuster. So these things happen. In
25 other words, people -- people's positions are affected

1 by grassroots lobbying, and at least people should have
2 the opportunity to engage in grassroots lobbying.

3 JUSTICE KENNEDY: Is that called democracy?

4 MR. BOPP: We are hopeful, Your Honor. And
5 that our part -- our system of self government is based
6 upon the self- government of the people and their
7 ability to influence the actions of governmental
8 officials.

9 CHIEF JUSTICE ROBERTS: Mr. Bopp, your
10 argument that McConnell's facial holding should be
11 overturned appears on page 62 of your brief. I take it
12 you have at least 61 page arguing that your as-applied
13 challenge can succeed without overturning McConnell's
14 position?

15 MR. BOPP: Yes. Yes, we have, which would
16 require the adoption of a reasonably ascertainable test,
17 one that people would not be subject to three years of
18 litigation, scorched earth litigation tactics, intrusive
19 discovery into every aspect of their organization for
20 decades. It would have to be clear, simple, and
21 objective and be able to be implemented on short notice,
22 because things pop up, like the filibuster of a Supreme
23 Court nominee in January of 2006.

24 JUSTICE SCALIA: What's your test? Their
25 test is fuzzy, I agree with you. What's yours? Do you

1 have a clear one that does not invalidate the whole
2 statute?

3 MR. BOPP: Well, based on their evidence in
4 McConnell and these grassroots, and these genuine issue
5 ads, I think there are three key or essential features
6 of those ads that we are satisfied would protect
7 grassroots lobbying and genuine issue ads. The first is
8 based upon the content of the communication, they focus
9 on a current legislative matter, take a position on it,
10 urge people to contact them, their congressmen and
11 senators, to take a particular action or position.

12 Secondly --

13 JUSTICE SCALIA: That says what's good.
14 What is your test for what's bad?

15 MR. BOPP: Second, the ads do not mention an
16 election, candidacy, political party, challenger, or the
17 official character, qualifications, or fitness for
18 office. That was the key link the district court found,
19 that these ads not, as Buckley said -- and of course
20 McConnell was litigated under Buckley -- is that they
21 were not unambiguously candidate- related.

22 JUSTICE SOUTER: That's -- give us the third
23 one. I want to go back to --

24 MR. BOPP: The third one is, as long as the
25 ad meets this pattern, that the fact that the ad -- ours

1 does not -- but the fact that the ad mentions the name,
2 the position of a public official on an issue and
3 praises or criticizes him or her for that does not
4 affect its genuineness.

5 JUSTICE SOUTER: Okay. May I go back to
6 your second criterion? It seems to me your second
7 criterion is simply the injection of magic words back
8 again. You're saying if we don't use certain magic
9 words it's okay. That's a magic words test.

10 You're not looking for any particular word.
11 You're looking for the meaning and breadth of the, of
12 the item.

13 JUSTICE SOUTER: Well, but you said if we
14 don't mention the election and the candidacy of this
15 person for this election, that is one of the
16 sufficient -- one of the conditions with the other three
17 which would be sufficient to justify the, on First
18 Amendment grounds, justify running the ad. That seems
19 to me simply to be reinjecting magic words in a negative
20 form.

21 MR. BOPP: Well, in a much more expansive
22 and comprehensive test which looks to three features of
23 the ad. But in any event, you look at the words all the
24 time. Is it fighting words? You look at what are the
25 words, what are they saying?

1 JUSTICE KENNEDY: We look at fighting words
2 in a context.

3 MR. BOPP: And I think we have a relatively
4 --

5 JUSTICE KENNEDY: It's one thing to say
6 something in a bikers bar and another thing in the --

7 MR. BOPP: And I think we have a relevant
8 context.

9 JUSTICE KENNEDY: Are there many cases where
10 we look just at the words?

11 MR. BOPP: Well, you certainly have in --

12 JUSTICE KENNEDY: You can't shout "Fire" in
13 a crowded theater; it has to be a crowded theater.

14 MR. BOPP: Well, relevant context, that
15 there is an election upcoming, so it's within 60 days.
16 The person's a candidate. These are relevant -- and for
17 that matter, whether the is a current Legislative Branch
18 matter or likely to arise in the near future.

19 JUSTICE SCALIA: Mr. Bopp, you do not have
20 to establish, do you, that the test you propose will get
21 at every bad ad, that it will be sure to get at every ad
22 that is not a genuine issue ad?

23 Is that the burden on you?

24 MR. BOPP: I don't believe so, Your Honor.

25 JUSTICE SCALIA: I thought when we're

1 dealing with the first amendment we give wide scope to
2 the principle that it is, it is better to allow, you
3 know, some bad speech than it is, in the effort to get
4 rid of that bad speech, to eliminate any good speech
5 that is justified.

6 So even if there is something that might
7 sneak through that does achieve what Congress didn't
8 want to achieve, the answer in the First Amendment is
9 that's too bad. There's some stuff you just can't get
10 at. There's a lot of bad speech that is allowed all the
11 time because you can't get at it without suppressing the
12 good speech.

13 MR. BOPP: I think that's the standard.

14 JUSTICE BREYER: In fact this isn't the
15 First Amendment totally on one side. Isn't this, isn't
16 this a case where the courts held that there are very
17 significant constitutional interests on both sides of
18 the equation, which is what makes this kind of thing
19 difficult. Isn't that so?

20 MR. BOPP: And so giving meaning to one side
21 was upholding it facially. Now your job is to give
22 meaning to the other side, which is genuine issue ads
23 that are to be protected as applied.

24 JUSTICE BREYER: I'm just suggesting why a
25 pure First Amendment test doesn't necessarily answer the

1 question and why we've upheld McCain-Feingold.

2 MR. BOPP: But even if you use balancing,
3 you've already used it. You upheld it on its face,
4 because you said the vast majority were shams. At the
5 same time, you said there were genuine issue ads. You
6 reserved the question of whether or not the interest is
7 sufficient, the governmental interest is sufficient, to
8 prohibit genuine issue ads in footnote 88. You know,
9 they refuse to give the test. They refuse to tell us
10 what is the standard.

11 JUSTICE SOUTER: But your test, as I
12 understand it, is the test to determine whether you fall
13 within this sort of heartland of the statute which we
14 upheld on facial challenge. Yours is a test where
15 exclusion from the facial rule; isn't that correct?
16 That's -- that was why you were giving the answer to
17 Justice Scalia that you gave?

18 MR. BOPP: I did --

19 JUSTICE SOUTER: What you're saying: I have
20 three criteria and if I satisfy those criteria, then
21 the, then the facial validity of the statute is not an
22 answer to my claim. That's basically what you're
23 saying.

24 MR. BOPP: Yes.

25 JUSTICE SOUTER: And of course, if you

1 success in that you're saying, okay, the Government then
2 has the burden of satisfying strict scrutiny. That's
3 the reason for your test, isn't it, to get you out of
4 McCain-Feingold -- I mean, to get you out of the holding
5 in McConnell?

6 MR. BOPP: We're not trying to get out of
7 the holding in McConnell.

8 JUSTICE SOUTER: Sure. You're saying this
9 is an applied challenge which is different in some
10 relevant respects, so that the facial holding in
11 McConnell shouldn't apply to us, it shouldn't bar,
12 shouldn't justify the Government barring our ad. Isn't
13 that your logic?

14 JUSTICE SCALIA: You could say yes to that,
15 I think.

16 MR. BOPP: Thank you.

17 But the -- we're trying to -- actually --

18 JUSTICE SOUTER: You want to go further than
19 that, I know. But that's your first step.

20 MR. BOPP: No, our first --

21 JUSTICE SOUTER: That's what you were
22 getting at.

23 MR. BOPP: Our first step is we want to give
24 meaning to the promise of McConnell that there were
25 genuine issue ads that could be protected by as-applied

1 challenge.

2 JUSTICE SOUTER: The way to do that is say,
3 there's something different about my case from the case
4 which was taken as typical in upholding statute against
5 facial challenge.

6 JUSTICE SCALIA: He fears the Greeks even
7 when they bear gifts.

8 (Laughter.)

9 MR. BOPP: Yes, we have. We have
10 demonstrated how these ads are materially identical to
11 the genuine issue ads this Government presented to this
12 Court and you relied upon that representation. We have
13 demonstrated why and their experts have agreed that the
14 Yellowtail ad, the Jane Doe ad, is completely different
15 than our ad. Their experts say that our ads are
16 grassroots lobbying ads.

17 Now, we are faced with a change in position
18 of the Government. I mean, in McConnell the Government
19 said naming a candidate is critical. Now their experts
20 say it doesn't matter if you name a candidate or not,
21 any genuine issue, any ad, can influence an election if
22 you mention an issue.

23 JUSTICE SOUTER: But your, your principle
24 concern at this point is getting yourself out from the
25 holding of McConnell, in other words, by saying we have

1 a case which was not the typical case in McConnell,
2 that's why it's an as-applied challenge and that's why
3 this is a new ball game. And I take it your principle
4 argument for that in criticizing the Government's
5 position is that the Government didn't use to say that
6 there's something significant or something insignificant
7 about naming the candidate, and now they do.

8 That it seems to me -- if I understand your
9 argument -- goes back to this context argument or not.
10 Because the argument that's being made is, in context we
11 know perfectly well what's going on.

12 MR. BOPP: I just think that misrepresents
13 --

14 JUSTICE SOUTER: You're saying you shouldn't
15 look at the context.

16 MR. BOPP: I think that simply misstates the
17 effect of this ad. If anybody wanted to influence an
18 election with this ad, this was the most remote,
19 attenuated, speculative way.

20 JUSTICE SOUTER: Then why did you refer them
21 to the web site? There's nothing remote or speculative
22 about what happens when they look at the web site.

23 MR. BOPP: And that has been also misstated
24 in the briefing here. There was absolutely nothing on
25 the web site about anything other than the filibuster

1 issue. There was nothing about the PAC or what the PAC
2 was doing. It was all about the filibuster.

3 JUSTICE SOUTER: Anything about Senator
4 Feingold?

5 MR. BOPP: Well, of course. It was about
6 Senator Feingold's position. It was, the one change --

7 JUSTICE SOUTER: Did the web site indicate
8 the -- the Wisconsin Right to Life's position on Senator
9 Feingold?

10 MR. BOPP: Only on the filibuster, yes. It
11 identified -- the ads don't, the website does --
12 identified the position of Senator Feingold on the
13 filibuster and criticizes him for that.

14 Now, if that is to be -- you know, number
15 one, the whole First Amendment was adopted to allow --

16 JUSTICE SOUTER: That's part of the context,
17 isn't it? In other words, you're supplying some --

18 MR. BOPP: No.

19 JUSTICE SOUTER: -- context for the ad.
20 You're saying, if you want to know the context in which
21 we're saying this, look at the website.

22 MR. BOPP: No. We don't believe that that's
23 part of the context.

24 JUSTICE SOUTER: You don't believe that's
25 what you are doing.

1 MR. BOPP: But see, the FEC doesn't even
2 regulate what's on the Internet. You can do anything
3 you want on the Internet

4 JUSTICE SOUTER: The FEC doesn't regulate
5 anything else in the broader political context except
6 what the statute allows. My point is, it seems to me
7 you are referring to context. Why therefore is it
8 illegitimate for a court to look to context?

9 MR. BOPP: We have not referred to context.

10 JUSTICE SOUTER: Okay.

11 MR. BOPP: We are not importing in our
12 analysis --

13 JUSTICE STEVENS: May I ask a rather basic
14 question? Do you agree that the Constitution permits
15 Congress to pass a statute that prohibits your using
16 electioneering ads that use magic words?

17 MR. BOPP: Yes.

18 JUSTICE STEVENS: Would it also prohibit you
19 from using -- urging everyone to look to a web site that
20 used the same magic words?

21 MR. BOPP: Would it?

22 JUSTICE STEVENS: Yes.

23 MR. BOPP: Perhaps, yes.

24 JUSTICE STEVENS: So that if your web site
25 used the magic words, then your ads would be -- could be

1 regulated.

2 MR. BOPP: You're talking about the
3 constitutionality of the Federal statute that
4 incorporates the cited to website. You know, perhaps.
5 But that's much different than a constitutional standard
6 on what this Court is going to look to. We have no
7 notice of this.

8 JUSTICE STEVENS: No, but you would agree
9 the statute could be validly applied to an ad that says
10 look at this website, and the web site then uses the
11 magic words?

12 MR. BOPP: Perhaps. I'm not certain of
13 that. And I'm sorry that I don't have a considered
14 response to that question.

15 But that is much different than what we are
16 faced with. We are faced with ad hoc criteria that is
17 being used by the Government. They reject examining
18 subjective intent because it's unworkable. Now they
19 want to examine subjective intent. They disclaim to
20 this Court and Justice Scalia's question about, well,
21 anything that might influence an election, can we
22 regulate it? They said no. Well now they are claiming
23 that, that anything that might influence an election --

24 JUSTICE STEVENS: Well, do you believe that
25 the First Amendment would not be violated by an ad that

1 was the functional equivalent of one that contained
2 magic words?

3 MR. BOPP: Well, I disagree with that
4 holding of --

5 JUSTICE STEVENS: There might be an
6 upholdable constitutional difference between two ads
7 that convey the same message.

8 MR. BOPP: Well, I don't believe they have
9 the same functional --

10 JUSTICE STEVENS: If they're the functional
11 equivalent, by hypothesis, they convey the same message.

12 MR. BOPP: Well, Your Honor, I lost that
13 argument in this Court. So you know, I'm not trying to
14 relitigate McConnell. I'm trying to give meaning to
15 McConnell. I mean, you talked about genuine issue, as
16 this Court did. Their experts identified genuine issue
17 ads. They said, as this Court said in Wisconsin Right
18 to Life I, as-applied challenges can be brought. And so
19 we're trying to give meaning to that, that there --

20 JUSTICE BREYER: The theory is that the ad
21 itself on the web site, in your opinion, would have been
22 okay? You turn to the web site three months before the
23 election. It says 16 times out of 16 in the past two
24 years, Feingold and Kohl have voted to filibuster
25 certain of the President's nominees. Feingold and Kohl

1 are putting politics into the court system, creating
2 gridlock and costing taxpayers money. Now three months
3 before the election you put -- write that in your ad.
4 Now, is that in your opinion constitutionally protected,
5 gets it out of McCain-Feingold?

6 MR. BOPP: In the -- as a broadcast ad?

7 JUSTICE BREYER: Yes. What you did, suppose
8 instead of what you ran, you know, in a broadcast ad.

9 MR. BOPP: Yes.

10 JUSTICE BREYER: You think that is
11 protected?

12 MR. BOPP: Yes. Because whether you praise
13 or criticize a Government official's action in office
14 has nothing to do with whether it falls under the First
15 Amendment's protection of petitioning. In fact that's
16 what, you know, the kind of information -- we didn't do
17 that. But that's the kind of information that's very
18 relevant to the constituent's effort to petition.

19 CHIEF JUSTICE ROBERTS: Thank you, Mr. Bopp.
20 General Clement, you have two minutes
21 remaining.

22 REBUTTAL ARGUMENT OF GEN. PAUL D. CLEMENT
23 ON BEHALF OF APPELLANT FEDERAL ELECTION COMMISSION

24 GENERAL CLEMENT: Thank you, Mr. Chief
25 Justice. Just a few points in rebuttal. First, I would

1 like to stress the virtue of as-applied challenges. You
2 might wonder in the abstract, wasn't there a problem
3 with the statute that applies to a group running a
4 series of ads and then one of them falls in the period.
5 But then you look at an as-applied challenge and you see
6 that didn't happen here. In fact, the opposite did.
7 This issue was percolating since March of 2003. These
8 ads were run some 500 days after the first filibuster
9 vote. Both before and after Senator Feingold's
10 reelection cycle, they addressed this --

11 JUSTICE SCALIA: Does that go to their
12 meaning or to the intent of -- is that what governs?
13 It's the intent of the person who puts it on? I thought
14 -- I thought you were focusing on the meaning of it,
15 what it conveys to the public.

16 GENERAL CLEMENT: Justice Scalia, if you're
17 looking for an as-applied challenge that's going to
18 identify a genuine issue ad, I would think that it would
19 go somewhat to intent. And I would think the
20 reason that --

21 JUSTICE SCALIA: That's new to me. I
22 thought you were asking us to look at the meaning. What
23 does it mean to the --

24 GENERAL CLEMENT: No. Our position is
25 slightly different than intervenors on that point. And

1 I think the reason that the series of ads hypothetical
2 is beguiling is because it suggests that because they
3 run the same issue ad all the time, they must be
4 interested in the issue, not the election, and the
5 opposite is true here.

6 They run ads about this issue, they run --
7 they have communications about this issue outside of the
8 period of Senator Feingold's reelection. They don't
9 rely on broadcast ads. They rely on e-alerts when it's
10 not during the election cycle. But when it's during the
11 election cycle, all of a sudden they start running
12 broadcast ads. And I think it shows what the timing
13 suggests. The timing here suggests an intent to
14 influence the election, not an intent to engage on the
15 issue.

16 JUSTICE ALITO: How long will the blackout
17 period be during the upcoming year for the presidential
18 candidates?

19 MR. BOPP: Well, I think that in various
20 places it will be 30 days before the primary and then
21 obviously 60 days before the general.

22 JUSTICE SCALIA: It could be as long as 200
23 days; isn't that correct.

24 MR. BOPP: Not in any one place. And if
25 there's an argument, though, that because of the way the

1 various broadcast media affect Manchester, New
2 Hampshire, that's a great as-applied challenge. The
3 virtue of as-applied challenges are that you get a
4 concrete record and you don't have to speculate, wow,
5 you know, is it possible to address the filibuster --

6 JUSTICE SCALIA: You have to speculate
7 before you try to put the ad on.

8 GENERAL CLEMENT: No, you don't.

9 JUSTICE SCALIA: You have to speculate
10 whether the Court is going to say well, since you're in
11 the zone of three different radio stations or television
12 stations, a different rule applies. Doesn't the person
13 who wants to speak have to speculate, roll the dice?

14 GENERAL CLEMENT: No, they don't, Justice
15 Scalia, and one of the arguments that's made to try to
16 suggest that there should be a reconsideration of
17 McConnell is, as-applied checks don't work. How can you
18 say that? In the two cases that have been brought,
19 there were preliminary injunction proceedings that were
20 completed before the blackout period began. So in that
21 case, bring your preliminary injunction if you have a
22 question.

23 But the virtue of as-applied challenges, and
24 the last thing I'll say, is the virtue of as-applied
25 challenges, they're not all created equal. Just because

1 this as-applied challenge fails doesn't mean the statute
2 isn't open to them.

3 CHIEF JUSTICE ROBERTS: Thank you, General.
4 The case is submitted.

5 (Whereupon, at 11:16 a.m., the case in the
6 above-titled action was submitted.)

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