

## COURTSIDE

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In this issue we feature two First Amendment cases pending in the Supreme Court.

### ***FEC v. Wisconsin Right to Life, Inc.***

Before the 2004 election, a corporation called Wisconsin Right to Life, Inc. (“WRTL”) planned to run television advertisements encouraging viewers to contact Senator Russ Feingold, who was then running for reelection, to oppose filibusters of President Bush’s judicial nominees. Those advertisements will be the subject of an upcoming Supreme Court argument in, *Federal Election Comm’n v. Wisconsin Right to Life, Inc.* (No. 06-969. Jan. 19, 2007).

The case offers the Court the chance to revisit its landmark 2003 landmark campaign finance ruling in *McConnell v. Federal Election Comm’n*.<sup>1</sup> The potential exists that one of *McConnell*’s core holdings could be narrowed substantially, a holding in which the now-retired Justice O’Connor provided the fifth vote.

In *McConnell*, the Court upheld the constitutionality of the Bipartisan Campaign Reform Act of 2002 (“BCRA”). One of BCRA’s most controversial provisions is its ban on “electioneering communications.” In *Buckley v. Valeo*,<sup>2</sup> the Court had limited campaign finance restrictions to advertisements that employed “explicit words of advocacy of election or defeat of a candidate.” In contrast, political advertisements that did not expressly endorse or criticize a candidate were “issue ads” that the state lacked a sufficient interest in regulating.

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When Congress enacted BCRA, it concluded that the express advocacy limitation was porous, in that advertisements advocating or opposing a candidate would simply bypass the magic words of endorsement. As a result, Congress expanded the definition of a prohibited electioneering communication in § 203 of BCRA to include any advertisement sponsored by a corporation or union aired sixty days before a general election that merely mentions the name of a candidate for federal office. Advertisers who made electioneering communications were required either not to mention the name of the candidate, or to pay for the advertisement from a segregated fund.

In *McConnell*, the Supreme Court upheld the constitutionality of § 203 against a facial attack by a five-to-four vote. In doing so, the Court credited Congress’s finding that “advertisers can easily evade the line [between express advocacy and sham issue advertisements] by eschewing magic words.”<sup>3</sup>

In 2004, WRTL filed suit in district court against the Federal Election Commission seeking to enjoin § 203 as applied to its advertisements encouraging voters to contact Senator Feingold, urging him to oppose judicial filibusters. A three-judge district court, empanelled under BCRA’s provisions, dismissed WRTL’s complaint as a matter of law, finding that under *McConnell*, § 203 constitutionally barred WRTL from running advertisements that mentioned Senator Feingold by name within sixty days of the election.

The Supreme Court, pursuant to BCRA’s procedures, noted probable jurisdiction of an appeal from the dismissal of the complaint. At oral argument, there was vigorous questioning of both sides, with the *McConnell* majority suggesting that the case was controlled by the earlier opinion, and the new Chief Justice questioning whether the earlier opinion established the Act’s constitutionality as to all advertisements. The result was a brief

unanimous per curiam opinion that remanded the case stating that “[i]n upholding § 203 against a facial challenge [in *McConnell*] we did not purport to resolve future as-applied challenges.”

On remand in 2006, a divided three-judge district court held § 203 unconstitutional as applied to the Feingold advertisements. The majority opinion first asked whether the advertisements were “expressive advocacy or its functional equivalent,” and thus subject to regulation under *McConnell*. Limiting its inquiry to the four corners of the advertisements, the majority concluded that the WRTL advertisements were not intended to influence voters’ decisions, noting that they did not mention an election, or comment on Senator Feingold’s candidacy or fitness for office. The majority thus found that they did not fall within *McConnell*’s purview. The court then went on to assess whether such “non-sham” advertisements could be constitutionally restricted under § 203, and found that there was no adequate state interest that could support regulation of such advertisements.

The government, joined by a group of Senators who had intervened in the case, appealed the decision, and the Supreme Court noted probable jurisdiction in January 2007. As the case returns to the Supreme Court, it is unclear how searching an inquiry the Court will permit. Complicating matters is the fact that Justice O’Connor, who provided the fifth vote to uphold § 203, has been succeeded by Justice Alito, whose views on campaign finance and the First Amendment are not yet known.

### ***TSSAA v. Brentwood Academy***

In No. 06-427, *Tennessee Secondary School Athletic Ass’n v. Brentwood Academy*, the Supreme Court will consider whether an interscholastic athletic association’s recruiting rules violated the First Amendment by restricting a member school’s ability to communicate with potential student athletes. This

is the second time the nearly ten-year long dispute has reached the Supreme Court. The current appeal provides the Court with the opportunity to consider what standard should be used to evaluate athletic recruiting rules and other speech restrictions imposed as part of contractual relationships between private parties and the government.

TSSAA is a voluntary athletic association of public, independent, and parochial schools in Tennessee. Brentwood Academy, a member of TSSAA, is an independent school in Tennessee that boasts a successful football team with a history of outperforming competitors from larger schools in the association. In 1997, TSSAA found that Brentwood had violated recruiting rules by sending a letter to eighth grade athletes who were not yet enrolled at Brentwood and by giving two eighth grade students at other schools free tickets to Brentwood football games. After an internal hearing and an appeal before the TSSAA's Board of Control, TSSAA imposed several penalties on Brentwood, including placing the school on probation, excluding certain Brentwood teams from the playoffs, and assessing a \$3,000 fine.

Brentwood then sued TSSAA and its executive director in federal court for violations of its First and Fourteenth Amendment rights. In 2001, the Supreme Court decided in a five-to-four decision that, although TSSAA is technically a private entity, it is sufficiently "entwined" with the state board of education to qualify as a state actor.<sup>4</sup> As a result, the Court concluded that TSSAA's conduct must comply with the First and Fourteenth Amendments and that TSSAA could be held liable for damages under 42 U.S.C. § 1983. The Court noted that its decision "does not, of course, imply anything about the merits of Brentwood's complaint; the issue here is merely whether Brentwood properly names the Association as a § 1983 defendant, not whether it should win on its claim."<sup>5</sup>

On remand, the Sixth Circuit concluded that TSSAA's recruiting rules were content neutral "time, place, and manner" regulations and should be evaluated under "intermediate scrutiny"

to determine whether they are narrowly tailored to serve a substantial governmental interest. Applying that standard, the district court determined after a bench trial that, as applied to Brentwood, TSSAA's enforcement of its recruiting rule violated the First Amendment. On appeal, a divided panel of the Sixth Circuit affirmed that conclusion.<sup>6</sup>

Writing for the majority, Judge Gibbons rejected TSSAA's argument that its recruiting rule should be analyzed under the more deferential standards that courts use when the government limits the speech of its employees or independent contractors. Instead, the majority concluded that TSSAA was acting as a governmental regulator and that "[t]he applicability of the First Amendment to regulation of speech by the government in this context does not vary depending on whether the speech relates to a matter of public concern or whether the relationship between the government and the speaker is voluntary or contractual."<sup>7</sup>

Applying the intermediate scrutiny test, the panel concluded that although TSSAA has a substantial governmental interest in protecting student athletes from exploitation, TSSAA's rule was not sufficiently "narrowly tailored" in these circumstances. The court pointed out that, although the eighth grade students contacted by Brentwood's coach were not yet enrolled at the school, they have already been admitted to Brentwood and had signed enrollment contracts for the coming year. The panel concluded that because TSSAA could not produce evidence that the coach's letter resulted in student exploitation, the association's substantial interests would not be served by punishing Brentwood.

Judge Rogers dissented, arguing that Brentwood has no more of a First Amendment claim than "a coach who is thrown out of a game for talking back to a referee."<sup>8</sup> In its petition for certiorari, TSSAA echoed Judge Rogers' dissent and argued that the Sixth Circuit applied the wrong doctrinal framework. TSSAA argued that that the government can set certain speech restrictions as a condition of participating in voluntary governmental programs. TSSAA contended that the recruiting rule should,

therefore, be evaluated under the more deferential *Pickering* test used to protect the speech of government employees. Under that framework, a court would first determine whether Brentwood's speech was on a matter of public concern, and if that threshold is met, a court would then balance the interests of the speaker against TSSAA's interests in administering the program.

TSSAA also argued that even if its recruiting rule is evaluated as a time place and matter regulation, the Sixth Circuit erred in requiring TSSAA to show explicit proof of actual injury in every individual case that the rule is enforced. Finally, TSSAA asked the Supreme Court to reconsider its earlier conclusion that the association qualifies as a state actor. According to TSSAA, the "entwinement" test has proved confusing and unworkable for the lower courts and should be abandoned. Now that Justice O'Connor has retired and been replaced by Justice Alito, only four of the Justices who joined the initial five-to-four majority opinion remain on the Court.

The Court will hear oral arguments on April 18, 2007. If TSSAA persuades the Court to overrule its 2001 decision that the association is a state actor, then the Court will be able to sidestep the dispute over which First Amendment test should apply. If the Court reaches the merits of Brentwood's First Amendment claim, it will have the opportunity to clarify what standards should be used to evaluate speech restrictions in this novel context. 

## Endnotes

1. 540 U.S. 93 (2003).
2. 424 U.S. 1 (1976).
3. 540 U.S. at 193.
4. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001).
5. *Id.* at 305.
6. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 442 F.3d 410 (6th Cir. 2006).
7. *Id.* at 424.
8. *Id.* at 444 (Rogers, J., dissenting).