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NEWSLETTER

New Life for Corporate Speech—*Wisconsin Right to Life*

July 2007

Political speech by corporations and labor unions during election periods received a major boost in the U.S. Supreme Court's June 25, 2007, decision in *FEC v. Wisconsin Right to Life, Inc*. Wiley Rein's *amicus curiae* brief on behalf of the U.S. Chamber of Commerce was mentioned by the controlling opinion as a sign of the importance of the case.

Corporations and unions still may not expressly advocate the election or defeat of clearly identified candidates or coordinate their ads with candidates. However, they now may refer to candidates while independently broadcasting issue ads during election periods, unless "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

The test is narrowly and strictly applied. It focuses on what is said, rather than the speaker's subjective intent or the likely effect of the speech. Advocacy cannot be forbidden solely because it addresses issues relevant to the election. The speech must be allowed if it has any reasonable meaning other than advocating a candidate vote. And if there is room for debate "the tie is resolved in favor of protecting speech."

Chief Justice Roberts wrote the controlling opinion, joined by Justice Alito. Justices Scalia, Kennedy, and Thomas joined in a concurring opinion that wanted to go even further to overrule previously sustained limits on corporate speech. Significantly, Justice Alito indicated he would be willing to go along if the present holding proves unworkable. The remaining four justices dissented.

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In the 2003 *McConnell v. FEC* decision, five justices (including the four current dissenters) held that a new statutory limit on corporate and labor union broadcasts that mentioned candidates in the months before elections—"electioneering communications"—was not invalid on its face. The new decision does not squarely overrule that holding. Instead, it establishes that the facially valid standard may not constitutionally be applied to speech that has any meaning other than a call to vote for or against a specific candidate. But the dissenters explained that the practical effect of the new "as applied" standard is to reinstate the "express advocacy" test Congress sought to replace by enacting the "electioneering communication" provision. This, Justice Scalia noted in his concurring opinion, "effectively overrules *McConnell* without saying so."

How exactly advertisers should apply this new standard—"the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"—in light of the opinions by Justice Souter and Scalia is not immediately apparent. Press reports indicate that the FEC is currently studying its options which may include rulemaking proceedings to provide clearer guidance.

One lesson of the new case is that corporations charged with improper electoral speech should carefully consider an "as applied" challenge to whatever standard is being applied. Also, in an appropriate case, consideration should be given to squarely challenging existing restrictive precedent that slights the First Amendment.