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MEMORANDUM

Significance of McConnell v. FEC as Related to Student Free Speech

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On December 10, 2003, the Supreme Court of the United States, in a unanimous decision, upheld the lower court's decision in our favor concerning the unconstitutional restriction on free speech of students contained in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Section 318. BCRA §318 prohibits individuals 17 years old or younger from making contributions to candidates and contributions or donations to political parties.

We challenged the constitutionality of this provision for two reasons. First, the ability to make donations and contributions to campaigns should be deemed protected speech even for minors. Second, the concern was the chilling effect that a ruling denying participation to minors would have on their overall rights to engage in political campaigns. Specifically, we were concerned that Congress might deem it within their jurisdiction to prohibit even student volunteers from participating in political campaigns if §318 was deemed constitutional.

Chief Justice Rehnquist, writing for a unanimous Supreme Court, held that §318 was unconstitutional. Specifically, Chief Justice Rehnquist wrote: "The McConnell and Echols plaintiffs challenge the provision (318); they argue that §318 violates the First Amendment rights of minors. We agree." McConnell v. Fed. Election Comm'n, No. 02-1674 et al., 2003 U.S. LEXIS 9195, at *245 (Dec. 10, 2003).

The Court then held the following:

1. "Minors enjoy the protection of the First Amendment." Id. at *245-46. The Court cited for the proposition that students are entitled to free speech rights, the Supreme Court case of Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). This case stands for the proposition that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Id. at 506. While this decision and aspect of Tinker is frequently cited by lower courts, the Supreme Court, in previous years, has been rather reluctant to utilize it in its own jurisprudence. In McConnell v. FEC, the Supreme Court did, in fact, use Tinker as the basis to establish that minors do enjoy the protection of the First Amendment. This will have implications far broader than political campaigns. We will be able to

utilize this opinion to, once again, re-establish that students are, in fact, protected on their school campuses for free speech, including religious activities.

2. Contributions are Protected Activity. "Limitations on the amount that an individual may contribute to a candidate or political committee impinge on the protected freedoms of expression and association." McConnell, 2003 U.S. LEXIS 9195, at *246. This is the most direct statement that the Supreme Court has ever made concerning the constitutionally protected nature of contributions to political campaigns. What is particularly helpful here is that Justice Stevens has signed on to this aspect of the opinion. In years past, Justice Stevens has been reluctant to acknowledge that contributions to political campaigns are, in fact, protected speech.

3. Level of Scrutiny. The Court also held that "[w]hen the Government burdens the right to contribute, we apply heightened scrutiny." Id. This means that in order for limitations on student free speech rights to be deemed constitutional, they would have to, at a minimum, be closely drawn to match a sufficiently important governmental interest.

4. Lack of Governmental Interest Justifying the Ban. The Court rejected each and every argument put forward by the government in support of the prohibition on political participation by minors. The Court recognized that the issue was "whether there is a 'sufficiently important interest' and whether the statute is 'closely drawn' to avoid unnecessary abridgment of First Amendment freedoms." Id.

"The government asserts that the provision protects against corruption by conduit; that is, donations by parents through their minor children to circumvent contribution limits applicable to the parents." Id. at *246-47. This was a focal point of our oral argument where we presented to the Court the fact that existing FEC rules and regulations prohibit any conduit gifts, including conduit gifts made by parents through minor children. The Supreme Court unanimously rejected the government's argument that §318 was necessary in order to prevent conduit giving. The Court held: "[T]he government offers scant evidence of this form of evasion. Perhaps the Government's slim evidence results from sufficient deterrence of such activities by §320 of FECA, which prohibits any person from 'making a contribution in the name of another person' or 'knowingly accepting a contribution made by one person in the name of another.'" Id. at *247 (quoting 2 U.S.C. § 441f). During the oral argument and in the briefing process, we stressed that the three-judge panel that heard the case determined that there was insufficient evidence to justify the prohibition. In fact, one of the district court judges held that the evidence was so thin as to "doom" the statute. McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 718 (D.D.C. 2003). The Supreme Court picked up on this argument noting that: "Absent a more convincing case of the claimed evil, this interest is simply too attenuated for 318 to withstand heightened scrutiny." McConnell, 2003 U.S. LEXIS 9195, at *247.

5. Lack of Narrow Tailoring. In the reply brief that we prepared on behalf of the minor students, we asserted that the government's drafting of the statute was overinclusive and, therefore, not appropriately tailored to meet constitutional scrutiny. The Supreme Court agreed: "Even assuming, arguendo, the

Government advances an important interest, the provision is overinclusive. The states have adopted a variety of more tailored approaches—e.g., counting contributions by minors against the total permitted for a parent or family unit, imposing a lower cap on contributions by minors, and prohibiting contributions by very young children. Without deciding whether any of these alternatives is sufficiently tailored, we hold that the provision here sweeps too broadly." Id. at *248. The Court concluded by striking down §318 as unconstitutional.

In our legal briefs, we asserted that the states have more narrowly tailored restrictions on contributions, but at the same time, allowed minors to participate by engaging in campaign activity as well as making contributions. The Supreme Court relied on this issue in determining that BCRA §318 was unconstitutional.

6. Conclusion. The impact on the rights of students to engage in free speech activities, including speech involving the proclamation of the Gospel is not to be understated. This was a sweeping victory for student free speech rights. Specifically, the utilization by the Supreme Court of the Tinker decision is not only significant but unanimous. We have already put this decision to use on behalf of students whose free speech rights are being violated.