Bob Bauer's thinks it is "frighteningly wrong-headed" for the Campaign Legal Center and the Federal Election Commission to be critical of criticize election law attorney Jim Bopp for going on a nationwide search to find a plaintiff willing to run an ad (that he would draft) critical of a sitting senator up for election. But that' s just the beginning of the story. Working through the Colorado Springs Focus on the Family (another client of Bopp's), the group set out to find someone who would be willing to serve as the named plaintiff based on a set of facts largely manufactured by counsel. Turns out the group that volunteered to serve as the plaintiff guinea pig was the Christian Civic League of Maine-a group that has never taken out broadcast ads before, and a group that had no funds to run such ads in 2006 (indeed they have been laying off staff due to financial woes). They didn't draft the ad that is the subject of the lawsuit in which they are serving as plaintiff. The ad is critical of Sen. Olympia Snowe and Sen. Susan Collins by name, saying that they unfortunately voted against the marriage protection amendment when it arose two years ago.

In the complaint Mr. Bopp drafted, he alleges that CCL is a nonprofit, nonstock Maine corporation interested in "laws protecting traditional marriage" and other public issues. At deposition, their executive director said the group's main purpose was "to elect honest and competent public officials." The lawsuit was filed a week after Mr. Bopp went about his national search for a plaintiff through an email blast orchestrated by Mr. Bopp and Focus on the Family. There is no evidence that CCL intended to run the concocted ad before being contacted by Focus on the Family. In his email to Focus on the family, Mr. Bopp had offered to seek a federal court injunction at no charge on behalf of "any group" that planned a "grass roots lobbying" ad during the electioneering communication periods. The problem of course, is that CCL had not planned to run such an ad. But that didn't stop Mr. Bopp from writing one for them anyway. Does this sound like an actual case or controversy to you? Mr. Bopp, it appears, went about this search after coming to the conclusion that another similar suit, Wisconsin Right to Life v. FEC, which is also pending in the DC court, would not be resolved quickly enough. Anxious to get a test case back before the Supreme Court as quickly as possible, Mr. Bopp put the Maine case together quickly and got his complaint filed. But there's more.

The complaint alleges "If CCL does not obtain the requested injunctive relief, CCL will not broadcast the ad at Exhibit A after May 14, because it is prohibited from doing so and because of its fear of enforcement by the FEC. As a result, CCL will be deprived of its constitutional rights under the First Amendment to the United State Constitution and will suffer irreparable harm." Of course, CCL's executive director testified that it had no intention of running such an ad until contacted by Mr. Bopp and the Focus on the Family group. In his deposition, CCL's executive director admitted that CCL has not spent a single penny on the ad, that CCL currently lacks the $5,000 to $10,000 Focus on the Family estimates will be required to broadcast the ad, and CCL has no firm commitments from donors to pay for the ad campaign. CCL's executive director also testified at his deposition that nothing had been done to record or produce the broadcast ad, that he did not know how much that would cost, that CCL has not contacted any radio stations, and that he

could not say where or how often the ads would run.

It is hard to see how CCL will suffer irreparable harm for not being allowed to run an ad they never intended to run have no funds to broadcast, and have no fundraising plan to pay for the ad. (And of course, CCL could run the ad by forming a PAC, so there is no "blackout period" before the election as claimed by Mr. Bopp. CCL administers two state level PACs.)

The complaint also alleges that CCL "intends" to run "materially similar grass-roots lobbying ads" falling within the electioneering communications definition "on a range of issues in addition to laws protecting traditional marriage" in the electioneering communication periods prior to the November 7 general election and prior to later elections. Here again, the true facts don't quite match up to the allegations. CCL's executive director testified that CCL currently has no specific plans to run any other broadcast ads about the marriage amendment or any other issue (although CCL does plan to communicate about the marriage amendment through the non-broadcast media which, like the PAC option, is another avenue available to it).

There is not a shred of evidence that has yet come to light showing CCL itself has previously run any broadcast advertisements about the federal marriage amendment or any other policy issue. In fact, the record in the case shoes CCL's only broadcast ads in recent years have been radio ads on Christian stations for what its executive director described as "events, banquets that we have annually." CCL's Executive Director could recall no broadcast ads financed by CCL that had identified a federal candidate during his tenure.

I think these circumstances rebut most of what Bob Bauer has to say in defense of Mr. Bopp's test case. But one final word. Bob notes that there is a rich history of such test cases, many of which were landmark cases that brought about improvements to our society, such as an end to segregated schools. But the difference between those cases and this one is that the people who served as plaintiffs in those cases were being harmed by the conduct in the suit they served as plaintiffs in. Linda Brown was being subjected to a separate and unequal school in Topeka, Kansas, and the racial segregation she suffered was real and actual. That is a far cry from the claimed injury concocted in CCL v. FEC.

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