AFL-CIO PLAINTIFFS' OPENING BRIEF: TITLE V ISSUES

V. SECTION 504 IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD, AND, BY REQUIRING ADVANCE DISCLOSURE OF PROSPECTIVE SPEECH, FURTHER VIOLATES THE FIRST AMENDMENT

Section 504 of BCRA amends Section 315 of the Federal Communications Act, 47 U.S.C. § 315 ("Section 315"), to require broadcast licensees to compile and to disclose to the public "as soon as possible" extensive information about "request[s] to purchase broadcast time" by anyone to communicate a "message relating to any political matter of national importance," "including" -- and so, not limited to -- "a national legislative issue of public importance," "a legally qualified candidate" or "any election to Federal office."[1] Section 504 is both unconstitutionally vague and overbroad under the Fifth Amendment Due Process Clause and the First Amendment, and, because it requires disclosure of a "request" that is merely preparatory to making a communication, and regardless whether any communication ever results, Section 504 further violates the First Amendment. We concur with the argument concerning §504 in plaintiffs' omnibus brief, but add here that its adverse impact falls not just on broadcasters but on unions, corporations and other groups that routinely "request to purchase broadcast time."

Section 504 is unconstitutionally vague because its key concept -- "any political matter of national importance" -- and one of its three illustrative examples -- "a national legislative issue of public importance" -- simply defy definition and fail to give clear notice as to what they cover. No person that seeks to broadcast any message, even on a matter that appears only local in scope, can know for certain whether or not its "request" to purchase time triggers a disclosure

---

[1] Section 504 covers every "request" without exception, whether written or oral and whether fulfilled or not. The information to be disclosed includes the requester's name, a list of its chief executive officers or executive committee or board members, and either the name of the candidate and office, the election or the issue to be referred to.

obligation. See generally Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

Section 504 is unconstitutionally overbroad because the matter to be disclosed, however vague the definition, surely strays far beyond what the government has a sufficient interest to require. The First Amendment requires that the disclosure requirements of Section 504 be subject to strict scrutiny. See Buckley, 424 U.S. at 64-66. Strict scrutiny applies "even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." Id. at 65.

Thus § 504 must be "narrowly tailored" to serve a compelling interest. Id. at 80. Buckley holds that the government may compel disclosure, in the context of campaign-related speech, of spending for either speech by candidates or speech by others that "expressly advocate[s]" the election or defeat of a clearly identified candidate. See id. And, the FCC regulations implementing former Section 315, before its amendment by Section 504, are so limited and require broadcasters to maintain a "political file" of requests for broadcast time only "by or on behalf of a legally qualified candidate." See 47 C.F.R. § 73.1943(a).

Section 504 of BCRA codifies this requirement applicable to candidates and their agents, but, as described above, goes far beyond this requirement and applies it to requests by anyone to purchase broadcast time concerning matters ranging far beyond anything pertaining to candidates or elections. Section 504 thus expands the scope of the disclosure requirements in two impermissible ways -- it mandates disclosure of conduct that has no spending component, and it covers the very issue-oriented speech that Buckley explicitly sheltered.

Buckley acknowledged that disclosure requirements in the campaign finance arena are justifiable only when they inform the electorate "as to where campaign money comes from"; "deter

actual corruption and avoid the appearance of corruption"; and "gather[ ] data necessary to detect violations of the [FECA] contribution limits." Id. at 68-68, 81. By requiring intrusive disclosure merely due to a person's "request" for broadcast time on any "political matter of national importance," any "national legislative issue of public importance," or even "any legally qualified candidate," Section 504 fails to bear any, let alone a significant, relationship to advancing this interest. As an example, there is no plausible argument that an AFL-CIO *request* to schedule an issue advertisement it *might* decide to run in support of an increase in the minimum wage -- whether or not it exhorts an incumbent officeholder who happens to be a candidate to vote for the measure -- implicates corruption or the appearance of corruption in the electoral process, or serves any other Buckley disclosure interest.

Moreover, for the reasons set forth above regarding the unconstitutionality of the advance disclosure aspects of BCRA §§ 201(a) and 212(a), § 504 likewise violates the First Amendment by compelling public disclosure of mere plans to speak, and regardless even of whether they are ever carried out.

The inevitable consequences of all these infirmities in § 504 are set forth in the unrebutted declaration of the AFL-CIO's director of public affairs, who has overseen the AFL-CIO's broadcast advertising for seven years. As she testified, the requirements of § 504 would be "chilling and burdensome" in forcing exposure of the AFL-CIO's confidential ongoing and preliminary broadcast plans and decision-making, thereby deterring the AFL-CIO from requesting broadcast time; and, even where the AFL-CIO nonetheless proceeded to make such requests, § 504 would enable its adversaries to seek to pressure broadcasters to refuse to carry its messages and otherwise to thwart the effectiveness of that prospective speech. Mitchell Decl. ¶¶ 24-26.

Accordingly, for these reasons and those set forth in plaintiffs' omnibus brief, § 504 is unconstitutional and should be struck down.

CONCLUSION

For the foregoing reasons, the above-cited provisions of BCRA should be declared unconstitutional.

Respectfully submitted,

Floyd Abrams (*pro hac vice*)
Susan Buckley (*pro hac vice*)
Brian T. Markley
CAHILL GORDON & REINDEL
80 Pine Street
New York, NY 10005
(212) 701-3000

Attorneys for Senator Mitch McConnell and National Association of Broadcasters

Kathleen M. Sullivan (*pro hac vice*)
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-9875

Attorney for Senator Mitch McConnell

Valle Simms Dutcher (*pro hac vice*)
L. Lynn Hogue (*pro hac vice*)
Harry W. MacDougald (*pro hac vice*)
SOUTHEASTERN LEGAL FOUNDATION, INC.
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, GA 30326
(404) 365-8500

Attorneys for Southeastern Legal Foundation, Inc.; Representative Bob Barr; Center for Individual Freedom; National Right to Work Committee; 60 Plus Association, Inc.; and U.S. d/b/a Pro English

Kenneth W. Starr (Bar No. 273245)
Edward W. Warren (Bar No. 88740)
Kannon K. Shanmugam (Bar No. 474304)
Grant M. Dixton (Bar No. 478221)
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

Attorneys for Senator Mitch McConnell; Southeastern Legal Foundation, Inc.; Representative Bob Barr; Center for Individual Freedom; National Right to Work Committee; 60 Plus Association, Inc.; and U.S. d/b/a Pro English

Jan Witold Baran (Bar No. 233486)
Thomas W. Kirby (Bar No. 915231)
Lee E. Goodman (Bar No. 435493)
WILEY, REIN & FIELDING LLP
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7000

Attorneys for Senator Mitch McConnell; Associated Builders and Contractors, Inc.; Associated Builders and Contractors Political Action Committee; Chamber of Commerce of the United States; National Association of Manufacturers; U.S. Chamber Political Action Committee; California Republican Party; Shawn Steel; Timothy Morgan; Barbara Alby; Santa Cruz Republican Central Committee; and Douglas R. Boyd, Sr.

Alan P. Dye (Bar No. 215319)
Heidi K. Abegg (Bar No. 463935)
WEBSTER, CHAMBERLAIN & BEAN
1747 Pennsylvania Avenue, N.W.
Suite 1000
Washington, DC 20006
(202) 785-9500

Attorneys for Representative Mike Pence; Alabama Attorney General Bill Pryor; Libertarian National Committee, Inc.; Club for Growth, Inc.; Indiana Family Institute, Inc.; National Right to Life Committee, Inc.; National Right to Life Educational Trust Fund; National Right to Life Political Action Committee; Trevor M. Southerland; and Barrett Austin O'Brock

Jay Alan Sekulow (*pro hac vice*)
THE AMERICAN CENTER FOR LAW AND JUSTICE
1000 Regent University Drive
P.O. Box 64429
Virginia Beach, VA 23464
(757) 226-2489

Attorney for Emily Echols; Hannah McDow; Isaac McDow; Jessica Mitchell; Daniel Solid; and Zachary C. White

G. Hunter Bates (*pro hac vice*)
1215 Cliffwood Drive
Goshen, KY 40026
(502) 473-7557

Attorney for Senator Mitch McConnell and Senator Thomas E. McInerney

James Bopp, Jr. (*pro hac vice*)
Thomas J. Marzen (*pro hac vice*)
Richard E. Coleson (*pro hac vice*)
BOPP, COLESON & BOSTROM
James Madison Center for Free Speech
1 South Sixth Street
Terre Haute, IN 47807
(812) 232-2434

Attorneys for Senator Mitch McConnell; Representative Mike Pence; Alabama Attorney General Bill Pryor; Libertarian National Committee, Inc.; Club for Growth, Inc.; Indiana Family Institute, Inc.; National Right to Life Committee, Inc.; National Right to Life Educational Trust Fund; National Right to Life Political Action Committee; Trevor M. Southerland; and Barrett Austin O'Brock

James Matthew Henderson, Sr. (Bar No. 452639)
Colby M. May (Bar No. 394340)
THE AMERICAN CENTER FOR LAW AND JUSTICE
205 Third Street, S.E.
Washington, DC 20003
(202) 546-8890

Attorneys for Emily Echols; Hannah McDow; Isaac McDow; Jessica Mitchell; Daniel Solid; and Zachary C. White

Benjamin L. Ginsberg (Bar No. 370658)
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, DC 20037
(202) 457-6000

Attorney for Republican National Committee; Mike Duncan; Republican Party of Colorado; Republican Party of Ohio; Republican Party of New Mexico; and Dallas County (Iowa) Republican County Central Committee

Bobby R. Burchfield (Bar No. 289124)
Thomas O. Barnett (Bar No. 426840)
Kevin C. Newsom
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 662-6000

Attorneys for Republican National Committee; Mike Duncan; Republican Party of Colorado; Republican Party of Ohio; Republican Party of New Mexico; and Dallas County (Iowa) Republican County Central Committee

Thomas J. Josefiak
Charles R. Spies
REPUBLICAN NATIONAL COMMITTEE
310 First Street, S.E.
Washington, DC 20003
(202) 863-8500

Attorneys for Republican National Committee; Mike Duncan; Republican Party of Colorado; Republican Party of Ohio; Republican Party of New Mexico; and Dallas County (Iowa) Republican County Central Committee

Michael A. Carvin (Bar No. 366784)
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Attorney for Republican National Committee; Mike Duncan; Republican Party of Colorado; Republican Party of Ohio; Republican Party of New Mexico; and Dallas County (Iowa) Republican County Central Committee

Charles H. Bell, Jr. (*pro hac vice*)
Alison R. Hayward (Bar No. 449693)
BELL, MCANDREWS, HILTACHK & DAVIDIAN, LLP
455 Capitol Mall
Suite 801
Sacramento, CA 95814
(916) 442-7757

Attorneys for California Republican Party; Shawn Steel; Timothy Morgan; Barbara Alby; Santa Cruz Republican Central Committee; and Douglas R. Boyd, Sr.

Lance H. Olson (*pro hac vice*)
Deborah B. Caplan (*pro hac vice*)
OLSON, HAGEL & FISHBURN LLP
555 Capitol Mall
Suite 1425
Sacramento, CA 95814
(916) 442-2952

Attorneys for California Democratic Party; Art Torres; and Yolo County Democratic Central Committee

Joseph E. Sandler (Bar No. 255919)
Neil P. Reiff (Bar No. 448170)
John Hardin Young (Bar No. 190553)
SANDLER, REIFF & YOUNG, P.C.
50 E Street, S.E.
Suite 300
Washington, DC 20003
(202) 479-1111

Attorneys for California Democratic Party; Art Torres; and Yolo County Democratic Central Committee

Steven R. Shapiro (*pro hac vice*)
Mark J. Lopez (*pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
(212) 549-2611

Attorneys for American Civil Liberties Union

Cleta Mitchell (Bar No. 433386)
FOLEY & LARDNER
3000 K Street, N.W.
Suite 500
Washington, DC 20007
(202) 295-4081

Attorney for National Rifle Association of America and National Rifle Association Political Victory Fund

Joel M. Gora (*pro hac vice*)
BROOKLYN LAW SCHOOL
250 Joralemon Street
Brooklyn, NY 11201
(718) 780-7926

Attorney for American Civil Liberties Union

Brian S. Koukoutchos
COOPER & KIRK, PLLC
28 Eagle Trace
Mandeville, LA 70471
(985) 626-4409

Attorney for National Rifle Association of America and National Rifle Association Political Victory Fund

Charles J. Cooper (Bar No. 248070)
David H. Thompson (Bar No. 450503)
Hamish P.M. Hume (Bar No. 449914)
Derek L. Shaffer (Bar No. 478775)
COOPER & KIRK, PLLC
1500 K Street, N.W.
Suite 200
Washington, DC 20005
(202) 220-9600

Attorneys for National Rifle Association of America and National Rifle Association Political Victory Fund

Michael B. Trister (Bar No. 54080)
LICHTMAN, TRISTER, SINGER & ROSS
1666 Connecticut Avenue, N.W.
Suite 500
Washington, DC 20009
(202) 328-1666

Attorney for the American Federation of Labor and Congress of Industrial Organizations; and AFL-CIO Committee on Political Education Political Contributions Committee

Laurence E. Gold (Bar No. 336891)
AFL-CIO
815 Sixteenth Street, N.W.
Washington, DC 20006
(202) 637-5130

Attorney for the American Federation of Labor and Congress of Industrial Organizations

Larry P. Weinberg (Bar No. 129619)
Robert D. Lenhard (Bar No. 406930)
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES
1101 17th Street, N.W.
Suite 900
Washington, DC 20036
(202) 775-5900

Attorneys for the American Federation of Labor and Congress of Industrial Organizations; and AFL-CIO Committee on Political Education Political Contributions Committee

Stephen A. Bokat (Bar No. 175919)
Robin S. Conrad (Bar No. 342774)
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for the Chamber of Commerce of the United States

Jan Amundson (Bar No. 953083)
THE NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Suite 600, North Lobby
Washington, DC 20004
(202) 637-3055

Attorney for the National Association of Manufacturers

Sherri L. Wyatt (Bar No. 390314)
Cherlyn Freeman-Watkins
SHERRI L. WYATT, PLLC
International Square Building
1825 I Street, N.W.
Suite 400
Washington, DC 20006
(202) 429-2009

Attorneys for Representative Bennie G. Thompson and Representative Earl F. Hilliard

November 6, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al., Plaintiffs, **v.** **FEDERAL ELECTION COMMISSION, et al.,** Defendants.	Civ. No. 02-0582 (CKK, KLH, RKL)

CERTIFICATE OF SERVICE

I hereby certify that, on November 6, 2002, I served true and correct copies of the foregoing Consolidated Brief for Plaintiffs on the following by electronic mail and hard copy by hand or by facsimile:

Floyd Abrams
Cahill Gordon & Reindel
80 Pine Street
New York. NY 10005
(212) 701-3621 – telephone
(212) 269-5420 – fax

G. Hunter Bates (waived facsimile service)
1215 Cliffwood Drive
Goshen, KY 40026
(502) 216-9625 – telephone
(502) 473-8338 – fax

Jan Witold Baran (waived facsimile service)
Thomas W. Kirby (waived facsimile service)
Wiley Rein & Fielding
1776 K Street, N.W.
Washington, DC 20006
(202) 719-7330 – telephone
(202) 719-7049 – fax

James Bopp, Jr.
Richard E. Coleson
Bopp, Coleson & Bostrom
1 South Sixth Street
Terre Haute, IN 47807
(812) 232-2434 – telephone
(812) 235-3685 – fax

Cleta Mitchell (waived facsimile service)
Foley & Lardner
Suite 500
3000 K Street, N.W.
Washington, DC 20007
(202) 295-4081 – telephone
(202) 672-5399 – fax

Sherri L. Wyatt
Sherri L. Wyatt PLLC
1825 I Street, N.W.
Suite 400
Washington, DC 20006
(202) 529-9450 – telephone
(202) 429-9574 – fax

Charles J. Cooper
Cooper & Kirk
1500 K Street, N.W.
Suite 200
Washington, DC 20005
(202) 220-9600 – telephone
(202) 220-9601 – fax

Valle Simms Dutcher (waived facsimile service)
Southeastern Legal Foundation, Inc.
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, GA 30326
(404) 365-8500 – telephone
(404) 365-0017 – fax

Laurence E. Gold (waived facsimile service)
AFL-CIO
815 Sixteenth Street, N.W.
Washington, DC 20006
(202) 637-5130 – telephone
(202) 637-5323 – fax

William J. Olson (waived facsimile service)
William J. Olson, PC
8180 Greensboro Drive
Suite 1070
McLean. VA 22102
(703) 356-5070 – telephone
(703) 356-5085 – fax

Mark J. Lopez (waived facsimile service)
ACLU Foundation
125 Broad Street
New York, NY 10004
(212) 549-2608 – telephone
(212) 549-2651 – fax

James Matthew Henderson, Sr.
The American Center for Law and Justice
205 Third Street, S.E.
Washington, DC 20003
(202) 719-7330 – telephone
(202) 337-3167 – fax

Joseph E. Sandler
Sandler, Reiff & Young PC
50 E Street, S.E.
Suite 3000
Washington, DC 20003
(202) 479-1111 – telephone
(202) 479-1115 – fax

John C. Bonifaz (waived facsimile service)
National Voting Rights Institute
One Brodield Street
Boston, MA 02108
(617) 368-9100, x10 – telephone
(617 368-9101 – fax

James J. Gilligan
U.S. Department of Justice
901 E Street, N.W.
Washington, DC 20004
(202) 514-3358 – telephone
(202) 616-8460 – fax

Stephen E. Hershkowitz
Federal Election Commission
999 E Street, N.W.
4th Floor
Washington, D.C. 20463
(202) 694-1650 – telephone
(202) 219-0260 – fax

Seth P. Waxman
Roger M. Witten
Randolph D. Moss
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6640 – telephone
(202) 663-6363 – fax

Frederick A.O. Schwarz, Jr. (waived facsimile service)
E. Joshua Rosenkranz (waived facsimile service)
Brennan Center for Justice
161 Avenue of the Americas, 12th floor
New York, NY 10013
(212) 998-6730 – telephone
(212) 995-4550 – fax

Bobby R. Burchfield (waived facsimile service)
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-5350 – telephone
(202) 778-5350 – fax

Service via e-mail only:

Richard O. Wolf
Moore & Lee LLP
1750 Tysons Boulevard
Suite 1450
McLean, VA 22102

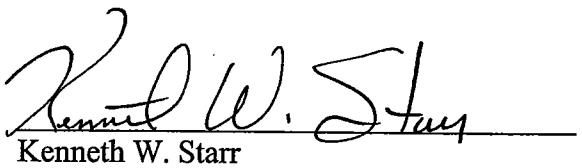
David J. Harth
Heller, Ehrman, White & McAuliffe
One East Main Street Suite 201
Madison, WI 53703

Bradley S. Phillips
Munger, Tolles & Olson LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071

Donald J. Mulvihill
Cahill Gordon & Reindel
1990 K Street, N.W.
Washington, DC 20006

Alan P. Dye
Heidi K. Abegg
Webster, Chamberlain & Bean
1747 Pennsylvania Avenue, N.W.
Suite 1000
Washington, DC 20006

Lance H. Olson
Olson, Hagel, Waters & Fishbum
555 Capitol Mall
Suite 1425
Sacramento, CA 95814



Kenneth W. Starr