SUPREME COURT OF THE UNITED STATES

Nos. 02–1674, 02–1675, 02–1676, 02–1702, 02–1727, 02–1733, 02–1734, 02–1740, 02–1747, 02–1753, 02–1755, AND 02–1756

MITCH MCCONNELL, UNITED STATES SENATOR, ET AL., APPELLANTS
02–1674 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

NATIONAL RIFLE ASSOCIATION, ET AL., APPELLANTS
02–1675 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

FEDERAL ELECTION COMMISSION, ET AL., APPELLANTS
02–1676 *v.*
MITCH MCCONNELL, UNITED STATES SENATOR, ET AL.;

JOHN MCCAIN, UNITED STATES SENATOR, ET AL., APPELLANTS
02–1702 *v.*
MITCH MCCONNELL, UNITED STATES SENATOR, ET AL.;

REPUBLICAN NATIONAL COMMITTEE, ET AL., APPELLANTS
02–1727 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

NATIONAL RIGHT TO LIFE COMMITTEE, INC., ET AL., APPELLANTS
02–1733 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

AMERICAN CIVIL LIBERTIES UNION, APPELLANTS
02–1734 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

VICTORIA JACKSON GRAY ADAMS, ET AL., APPELLANTS
02–1740 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

RON PAUL, UNITED STATES CONGRESSMAN, ET AL., APPELLANTS
02–1747 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

CALIFORNIA DEMOCRATIC PARTY, ET AL., APPELLANTS
02–1753 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, ET AL., APPELLANTS
02–1755 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

CHAMBER OF COMMERCE OF THE UNITED STATES, ET AL., APPELLANTS
02–1756 *v.*
FEDERAL ELECTION COMMISSION, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[December 10, 2003]

JUSTICE BREYER delivered the opinion of the Court with respect to BCRA Title V.*

We consider here the constitutionality of §504 of the Bipartisan Campaign Reform Act of 2002 (BCRA), amending the Communications Act of 1934. That section requires broadcasters to keep publicly available records of politically related broadcasting requests. 47 U. S. C. A. §315(e) (Supp. 2003). The McConnell plaintiffs, who include the National Association of Broadcasters, argue that §504 imposes onerous administrative burdens, lacks

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*JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SOUTER, and JUSTICE GINSBURG join this opinion in its entirety.

any offsetting justification, and consequently violates the First Amendment. For similar reasons, the three judges on the District Court found BCRA §504 unconstitutional on its face. 251 F. Supp. 2d 176, 186 (DC 2003) *(per curiam)* (case below). We disagree, and we reverse that determination.

I

BCRA §504's key requirements are the following:

(1) A "candidate request" requirement calls for broadcasters to keep records of broadcast requests "made by or on behalf of" any "legally qualified candidate for public office." 47 U. S. C. A. §315(e)(1)(A) (Supp. 2003).

(2) An "election message request" requirement calls for broadcasters to keep records of requests (made by anyone) to broadcast "message[s]" that refer either to a "legally qualified candidate" or to "any election to Federal office." §§315(e)(1)(B)(i), (ii).

(3) An "issue request" requirement calls for broadcasters to keep records of requests (made by anyone) to broadcast "message[s]" related to a "national legislative issue of public importance," §315(e)(1)(B)(iii), or otherwise relating to a "political matter of national importance," §315(e)(1)(B).

We shall consider each provision in turn.

II

BCRA §504's "candidate request" requirements are virtually identical to those contained in a regulation that the Federal Communications Commission (FCC) promulgated as early as 1938 and which with slight modifications the FCC has maintained in effect ever since. 47 CFR §73.1943 (2002); compare 3 Fed. Reg. 1692 (1938) (47 CFR §36a4); 13 Fed. Reg. 7486 (1948) (47 CFR §§3.190(d),

3.290(d), 3.690(d)); 17 Fed. Reg. 4711 (1952) (47 CFR §3.590(d)); 19 Fed. Reg. 5949 (1954); 23 Fed. Reg. 7817 (1958); 28 Fed. Reg. 13593 (1963) (47 CFR §73.120(d)); 43 Fed. Reg. 32795 (1978) (47 CFR §73.1940(d)); 57 Fed. Reg. 210 (1992) (47 CFR §73.1943). See generally Brief in Opposition to Motion of Appellee National Association of Broadcasters for Summary Affirmance in No. 02–1676, pp. 9–10 (hereinafter Brief Opposing Summary Affirmance).

In its current form the FCC regulation requires broadcast licensees to "keep" a publicly available file "of all requests for broadcast time made by or on behalf of a candidate for public office," along with a notation showing whether the request was granted, and (if granted) a history that includes "classes of time," "rates charged," and when the "spots actually aired." 47 CFR §73.1943(a) (2002); §76.1701(a) (same for cable systems). These regulation-imposed requirements mirror the statutory requirements imposed by BCRA §504 with minor differences which no one here challenges. Compare 47 CFR §73.1943 with 47 U. S. C. A. §315(e)(2) (see Appendix, *infra*).

The McConnell plaintiffs argue that these requirements are "intolerabl[y]" "burdensome and invasive." Brief for Appellants/Cross-Appellees Senator Mitch McConnell et al. in No. 02–1674 et al., p. 74 (hereinafter Brief for McConnell Plaintiffs). But we do not see how that could be so. The FCC has consistently estimated that its "candidate request" regulation imposes upon each licensee an additional administrative burden of six to seven hours of work per year. See 66 Fed. Reg. 37468 (2001); *id.,* at 18090; 63 Fed. Reg. 26593 (1998); *id.,* at 10379; 57 Fed. Reg. 18492 (1992); see also 66 Fed. Reg. 29963 (2001) (total annual burden of one hour per cable system). That burden means annual costs of a few hundred dollars at most, a microscopic amount compared to the many millions of dollars of revenue broadcasters receive from can-

didates who wish to advertise.

Perhaps for this reason, broadcasters in the past did not strongly oppose the regulation or its extension. Cf., *e.g.*, 17 Fed. Reg. 4711 (1952) ("No comments adverse to the adoption of the proposed rule have been received"); 43 Fed. Reg. 32794 (1978) (no adverse comments). Indeed in 1992, "CBS" itself "suggest[ed]" that the candidate file "include a record of all requests for time." 57 Fed. Reg. 206 (1992); cf. 63 Fed. Reg. 49493 (1998) (FCC "not persuaded that the current retention period [two years] is overly burdensome to licensees").

In any event, as the FCC wrote in an analogous context, broadcaster recordkeeping requirements "'simply run with the territory.'" 40 Fed. Reg. 18398 (1975). Broadcasters must keep and make publicly available numerous records. See 47 CFR §73.3526 (2002) (general description of select recordkeeping requirements for commercial stations); see also §§73.1202, 73.3526(e)(9)(i) (retention of all "written comments and suggestions [including letters and e-mail] received from the public regarding operation of the station" for three years); §73.1212(e) (sponsorship identification records, including the identification of a sponsoring entity's executive officers and board-level members when sponsoring "political matter or matter involving the discussion of a controversial issue of public importance"); §73.1840 (retention of station logs); §73.1942 (candidate broadcast records); §73.2080 (equal employment opportunities records); §§73.3526(e)(11)(i), (e)(12) ("list of programs that have provided the station's most significant treatment of community issues during the preceding three month period," including "brief narrative describing [the issues, and] time, date, duration, and title"); §§73.3526(e)(11)(ii), (iii) (reports of children's program, and retention of records sufficient to substantiate "compliance with the commercial limits on children's programming"); §73.3613(a) (network affiliation contracts);

§§73.3613(b), 73.3615, 73.3526(e)(5) (ownership-related reports); §73.3613(c) ("[m]anagement consultant agreements"); §73.3613(d) ("[t]ime brokerage agreements"). Compared to these longstanding recordkeeping requirements, an additional six to seven hours is a small drop in a very large bucket.

The McConnell plaintiffs also claim that the "candidate requests" requirement fails significantly to further any important governmental interest. Brief for McConnell Plaintiffs 74. But, again, we cannot agree. The FCC has pointed out that "[t]hese records are necessary to permit political candidates and others to verify that licensees have complied with their obligations relating to use of their facilities by candidates for political office" pursuant to the "equal time" provision of 47 U. S. C. §315(a). 63 Fed. Reg. 49493 (1998). They also help the FCC determine whether broadcasters have violated their obligation to sell candidates time at the "lowest unit charge." 47 U. S. C. §315(b). As reinforced by BCRA, the "candidate request" requirements will help the FCC, the Federal Election Commission, and "the public to evaluate whether broadcasters are processing [candidate] requests in an evenhanded fashion," Brief Opposing Summary Affirmance 9, thereby helping to assure broadcasting fairness. 47 U. S. C. §315(a); *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 390 (1969). They will help make the public aware of how much money candidates may be prepared to spend on broadcast messages. 2 U. S. C. A. §434 (main ed. and Supp. 2003); see *ante*, at 87–93 (joint opinion of STEVENS and O'CONNOR, JJ.) (hereinafter joint opinion). And they will provide an independently compiled set of data for purposes of verifying candidates' compliance with the disclosure requirements and source limitations of BCRA and the Federal Election Campaign Act of 1971. 2 U. S. C. A. §434; cf. *Adventure Communications, Inc.* v. *Kentucky Registry of Election Finance*, 191 F. 3d 429, 433

(CA4 1999) (candidate compliance verification); 63 Fed. Reg. 49493 (1998) (FCC finding record retention provision provides public with "necessary and adequate access").

We note, too, that the FCC's regulatory authority is broad. *Red Lion*, *supra*, at 380 ("broad" mandate to assure broadcasters operate in public interest); *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 219 (1943) (same). And we have previously found broad governmental authority for agency information demands from regulated entities. Compare *United States* v. *Morton Salt Co.,* 338 U. S. 632, 642–643 (1950); *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 209 (1946); *Donovan* v. *Lone Steer, Inc.,* 464 U. S. 408, 414–415 (1984).

THE CHIEF JUSTICE suggests that the Government has not made these particular claims. But it has—though succinctly—for it has cross-referenced the relevant regulatory rules. Compare *post*, at 12–13 (opinion of REHNQUIST, C. J.), with Brief Opposing Summary Affirmance; Brief for McConnell Plaintiffs 73–74; Brief for FEC et al. in No. 02–1674 et al., pp. 132–133. And succinctness through cross-reference was necessary given our procedural requirement that the Government set forth in a 140-page brief *all* its arguments concerning each of the *20* BCRA provisions here under contest. 251 F. Supp. 2d, at 186–188.

In sum, given the Government's reference to the 65-year-old FCC regulation and the related considerations we have mentioned, we cannot accept the argument that the constitutionality of the "candidate request" provision lacks evidentiary support. The challengers have made no attempt to explain away the FCC's own contrary conclusions and the mass of evidence in related FCC records and proceedings. *E.g.*, 57 Fed. Reg. 189 (1992); cf. s*upra*, at 4–5; *ante*, at 117–118 (joint opinion) (upholding BCRA's coordination provision based, in part, on prior experience

under similar provision). Because we cannot, on the present record, find the longstanding FCC regulation unconstitutional, we likewise cannot strike down the "candidate request" provision in BCRA §504; for the latter simply embodies the regulation in a statute, thereby blocking any agency attempt to repeal it.

III

BCRA §504's "election message request" requirements call for broadcasters to keep records of requests (made by any member of the public) to broadcast a "message" about "a legally qualified candidate" or "any election to Federal office." 47 U. S. C. A. §§315(e)(1)(B)(i), (ii) (Supp. 2003). Although these requirements are somewhat broader than the "candidate request" requirement, they serve much the same purposes. A candidate's supporters or opponents account for many of the requests to broadcast "message[s]" about a "candidate." Requests to broadcast messages about an "election" may include messages that favor one candidate or another, along with other messages that may be more neutral.

Given the nature of many of the messages, recordkeeping can help both the regulatory agencies and the public evaluate broadcasting fairness, and determine the amount of money that individuals or groups, supporters or opponents, intend to spend to help elect a particular candidate. Cf. *ante*, at 100–101 (joint opinion) (upholding stringent restrictions on *all* election-time advertising that refers to a candidate because such advertising will *often* convey message of support or opposition). Insofar as the request is to broadcast neutral material about a candidate or election, the disclosure can help the FCC carry out other statutory functions, for example, determining whether a broadcasting station is fulfilling its licensing obligation to broadcast material important to the community and the public. 47 U. S. C. §315(a) ("obligation . . . to afford rea-

sonable opportunity for the discussion of conflicting views on issues of public importance"); 47 CFR §73.1910 (2002); §§73.3526(e)(11)(i), (e)(12) (recordkeeping requirements for issues important to the community).

For reasons previously discussed, *supra*, at 4–5, and on the basis of the material presented, we cannot say that these requirements will impose disproportionate administrative burdens. They ask the broadcaster to keep information about the disposition of the request, and information identifying the individual or company requesting the broadcast time (name, address, contact information, or, if the requester is not an individual, the names of company officials). 47 U. S. C. A. §315(e)(2) (Supp. 2003). Insofar as the "request" is made by a candidate's "supporters," the "candidate request" regulation apparently already requires broadcasters to keep such records. 43 Fed. Reg. 32794 (1978). Regardless, the information should prove readily available, for the individual requesting a broadcast must provide it to the broadcaster should the broadcaster accept the request. 47 CFR §73.1212(e) (2002). And as we have previously pointed out, the recordkeeping requirements do not reach significantly beyond other FCC recordkeeping rules, for example, those requiring broadcasting licensees to keep material showing compliance with their license-related promises to broadcast material on issues of public importance. See, *e.g.*, §§73.3526(e)(11)(i), (e)(12) (recordkeeping requirements for issues important to the community); *supra*, at 4–5 (collecting regulations); *Office of Communication of United Church of Christ* v. *FCC*, 707 F. 2d 1413, 1421–1422 (CADC 1983) (describing FCC rules, in force during 1960–1981, that required nonentertainment programming in 14 specific areas and mandated publicly available records detailing date, time, source, and description to substantiate compliance). If, as we have held, the "candidate request" requirements are constitutional, *supra*, at 7, the

"election message" requirements, which serve similar governmental interests and impose only a small incremental burden, must be constitutional as well.

IV

The "issue request" requirements call for broadcasters to keep records of requests (made by any member of the public) to broadcast "message[s]" about "a national legislative issue of public importance" or "any political matter of national importance." 47 U. S. C. A. §§315(e)(1)(B), (e)(1)(B)(iii) (Supp. 2003). These recordkeeping requirements seem likely to help the FCC determine whether broadcasters are carrying out their "obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance," 47 CFR §73.1910 (2002), and whether broadcasters are too heavily favoring entertainment, and discriminating against broadcasts devoted to public affairs, see *ibid.;* 47 U. S. C §315(a); *Red Lion*, 395 U. S., at 380.

The McConnell plaintiffs claim that the statutory language—"political matter of national importance" or "national legislative issue of public importance"—is unconstitutionally vague or overbroad. Brief for McConnell Plaintiffs 74–75. But that language is no more general than the language that Congress has used to impose other obligations upon broadcasters. Compare 47 U. S. C. A. §315(e)(1)(B) (Supp. 2003) ("political matter of national importance") and §315(e)(1)(B)(iii) ("national legislative issue of public importance") (both added by BCRA §504), with 47 U. S. C. §315(a) ("obligation . . . to operate in the public interest" and to afford reasonable opportunity for discussion of "issues of public importance"); §317(a)(2) (FCC disclosure requirements relating to any "political program" or "discussion of any controversial issue"); cf. 47 CFR §73.1212(e) (2002) ("political matter or . . . a controversial issue of public importance"); and 9 Fed. Reg. 14734

(1944) ("public controversial issues"); *ante*, at 117–118 (joint opinion) (noting that the experience under long-standing regulations undermines claims of chilling effect). And that language is also roughly comparable to other language in BCRA that we uphold today. *E.g.*, *ante*, at 61–62, and n. 64 (joint opinion) (upholding 2 U. S. C. A. §431(20)(A)(iii) (Supp. 2003) ("public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office")), *ante,* at 117–118 (upholding 2 U. S. C. A. §441a(a)(7)(B)(ii) (Supp. 2003) (counting as coordinated disbursements that are made "in cooperation, consultation, or concert with, or at the request or suggestion of [a political party]") against challenge and noting that an "agreement" is not necessary for precision).

Whether these requirements impose disproportionate administrative burdens is more difficult to say. On the one hand, the burdens are likely less heavy than many that other FCC regulations have imposed, for example, the burden of keeping and disclosing "[a]ll written comments and suggestions" received from the public, including every e-mail. 47 CFR §§73.1202, 73.3526(e)(9) (2002); see also *supra*, at 4–5. On the other hand, the burdens are likely heavier than those imposed by BCRA §504's other provisions, previously discussed.

The regulatory burden, in practice, will depend on how the FCC interprets and applies this provision. The FCC has adequate legal authority to write regulations that may limit, and make more specific, the provision's potential linguistic reach. 47 U. S. C. §315(d). It has often ameliorated regulatory burdens by interpretation in the past, and there is no reason to believe it will not do so here. See 14 FCC Rcd. 4653, ¶25 (1999) (relaxing the recordkeeping requirements in respect to cable systems that serve fewer than 5,000 subscribers); 14 FCC Rcd. 11121, ¶¶20–22

(1999) (requiring candidates to inspect the political file at a station rather than requiring licensees to send out photocopies of the files to candidates upon telephone request). The parties remain free to challenge the provisions, as interpreted by the FCC in regulations, or as otherwise applied. Any such challenge will likely provide greater information about the provisions' justifications and administrative burdens. Without that additional information, we cannot now say that the burdens are so great, or the justifications so minimal, as to warrant finding the provisions unconstitutional on their face.

The McConnell plaintiffs and THE CHIEF JUSTICE make one final claim. They say that the "issue request" requirement will force them to disclose information that will reveal their political strategies to opponents, perhaps prior to a broadcast. See *post*, at 14–15 (dissenting opinion). We are willing to assume that the Constitution includes some form of protection against premature disclosure of campaign strategy—though, given the First Amendment interest in free and open discussion of campaign issues, we make this assumption purely for argument's sake. Nonetheless, even on that assumption we do not see how BCRA §504 can be unconstitutional on its face.

For one thing, the statute requires disclosure of names, addresses, and the fact of a request; it does not require disclosure of substantive campaign content. See 47 U. S. C. A. §315(e)(2) (Supp. 2003). For another, the statutory words "as soon as possible," §315(e)(3), would seem to permit FCC disclosure-timing rules that would avoid any premature disclosure that the Constitution itself would forbid. Further, the plaintiffs do not point to—and our own research cannot find—any specific indication of such a "strategy-disclosure" problem arising during the past 65 years in respect to the existing FCC "candidate request" requirement, where the strategic problem might be expected to be more acute. Finally, we today reject an

analogous facial attack—premised on speculations of "advance disclosure"—on a similar BCRA provision. See *ante*, at 94 (joint opinion). Thus, the "strategy disclosure" argument does not show that BCRA §504 is unconstitutional on its face, but the plaintiffs remain free to raise this argument when §504 is applied.

V

THE CHIEF JUSTICE makes two important arguments in response to those we have set forth. First, he says that we "approac[h] §504 almost exclusively from the perspective of the broadcast licensees, ignoring the interests of candidates and other purchasers, whose speech and association rights are affected." *Post*, at 11 (dissenting opinion). THE CHIEF JUSTICE is certainly correct in emphasizing the importance of the speech interests of candidates and other potential speakers, but we have not ignored their First Amendment "perspective."

To the contrary, we have discussed the speakers' interests together with the broadcasters' interests because the two sets of interests substantially overlap. For example, the speakers' vagueness argument is no different from the broadcasters', and it fails for the same reasons, *e.g.*, the fact that BCRA §504's language is just as definite and precise as other language that we today uphold. See *supra*, at 10.

We have separately discussed the *one and only* speech-related claim advanced on behalf of candidates (or other speakers) that differs from the claims set forth by the broadcasters. See *supra*, at 11–12. This is the claim that the statute's disclosure requirements will require candidates to reveal their political strategies to opponents. We just said, and we now repeat, that BCRA §504 can be applied, in a significant number of cases, without requiring any such political-strategy disclosure—either because disclosure in many cases will not create any such risk or

because the FCC may promulgate rules requiring disclosure only after any such risk disappears, or both.

Moreover, candidates (or other speakers) whom §504 affects adversely in this way (or in other ways) remain free to challenge the lawfulness of FCC implementing regulations and to challenge the constitutionality of §504 as applied. To find that the speech-related interests of candidates and others may be vindicated in an as-applied challenge is not to "ignor[e]" those interests.

Second, THE CHIEF JUSTICE says that "the Government, in its brief, proffers no interest whatever to support §504 as a whole," adding that the existence of "pre-existing unchallenged agency regulations imposing similar disclosure requirements" cannot "compel the conclusion that §504 is constitutional," nor somehow "relieve the Government of its burden of advancing a constitutionally sufficient justification for §504." *Post*, at 12–13 (dissenting opinion).

Again THE CHIEF JUSTICE is correct in saying that the mere *existence* of similar FCC regulation-imposed requirements—even if unchallenged for at least 65 years—cannot prove that those requirements are constitutional. But the existence of those regulations means that we must read beyond the briefs in this case before holding those requirements unconstitutional. Before evaluating the relevant burdens and justifications, we must at least become acquainted with the FCC's own view of the matter. We must follow the Government's regulation-related references to the relevant regulatory records, related FCC regulatory conclusions, and the FCC's enforcement experience. We must take into account, for example, the likelihood that the *reason* there is "nothing in the record that indicates licensees have treated purchasers unfairly," *post*, at 13 (REHNQUIST, C. J., dissenting), is that for many decades similar FCC regulations have made that unfair treatment unlawful. And, if we are to avoid disrupting

related agency law, we must evaluate what we find in agency records and related experience before holding this similar statutory provision unconstitutional on its face.

Even a superficial examination of those relevant agency materials reveals strong supporting justifications, and a lack of significant administrative burdens. And any additional burden that the statute, viewed facially, imposes upon interests protected by the First Amendment seems slight compared to the strong enforcement-related interests that it serves. Given the FCC regulations and their history, the statutory requirements must survive a *facial* attack under any potentially applicable First Amendment standard, including that of heightened scrutiny.

That is why the regulations are relevant. That is why the brevity of the Government's discussion here cannot be determinative. That is why we fear that THE CHIEF JUSTICE's contrary view would lead us into an unfortunate—and at present unjustified—revolution in communications law. And that is why we disagree with his dissent.

The portion of the judgment of the District Court invalidating BCRA §504 is reversed.

It is so ordered.