IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Madison Center Plaintiffs' Opposition to Stay Motions of the Government, Intervenors, NRA, and ACLU

Plaintiffs represented by the James Madison Center for Free Speech (JMC)[1] oppose the stay motions of the Government, Intervenors, NRA, and ACLU. Moreover, certain JMC Plaintiffs have requested an injunction pending appeal solely as to enforcement of the truncated backup definition of "electioneering communication," a position now joined by the AFL-CIO (whose arguments Madison Center Plaintiffs also join). This latter requested relief is in accord with the First Amendment values at stake here, but the stay requested by the Government, Intervenors, NRA, and ACLU is not.

The Government and Intervening Defendants have filed motions requesting a comprehensive stay of this Court's judgment, and the Government also has requested a temporary stay while this Court is deciding the other stay motion. A comprehensive stay would leave in place several provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) that have been found

[1]The Madison Center represents the following 10 Plaintiffs: 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 Barret Austin O'Brock;

unconstitutional. The NRA and ACLU request a stay of the decision by this Court striking the primary definition of "electioneering communication," which this Court found unconstitutional, with the result that any broadcast ads mentioning the name of a federal candidate would be prohibited within 30/60 days of federal elections, including the current runoff election in Texas.

A Comprehensive Stay Should Be Denied

The Intervening and Government Defendants seek a wholesale stay leaving in effect unconstitutional BCRA provisions. (The "electioneering communication" aspect of this is dealt with *infra*.) The gravamen of Defendants' argument is that "[w]ithout such a stay, the parties, candidates . . . , and the public will face an ever-shifting set of rules regarding the conduct of the 2004 federal elections." Intervenor Mem. at 1-2.

But it is the JMC Plaintiffs that have to comply with shifting federal rules and they are not complaining about the rules shifting. They are complaining about having to comply with rules that violate the First Amendment – which protects the "four indispensable democratic freedoms" necessary for the participation of citizens and citizens' groups in our democratic Republic.

JMC Plaintiffs assert rather that the complexity of which Defendants complain is a problem of the Intervenors' own making when they sponsored and pushed to enactment a voluminous, complex law with constitutionally questionable provisions and made it go into effect on November 6, 2002.

They could have had BCRA go into effect in November 2004, leaving a reasonable time for the courts to process BCRA's massive complexity. Instead, the Intervenors demanded expedition of the courts and the FEC and truncated the appeals process, seeking to force all to do the near impossible.

Certainly the JMC and other Plaintiffs did not delay in challenging BCRA – suits were brought on the very day the law was signed. And this Court did in five months what might ordinarily have required years. And the FEC has done excellent work in dealing quickly with the

herculean task handed it, in spite of Congressionally repealed FEC regulations, killer deadlines, and a current lawsuit against some of the new FEC regulations by Intervenors.

But now Intervenors want to punish Plaintiffs who have had their constitutional rights vindicated by this Court because of a situation of Intervenors' own making. Intervenors and the Government Defendants – and, in effect, the NRA and ACLU (as to the primary definition of "electioneering communication") – want unconstitutional laws to remain in effect for the sake of convenience. That is not the mandate of the First Amendment.

Intervenors' complaint about the "sheer volume," "complex[ity]," and timing of this Court's opinions, Intervenor Mem. at 3-4, rings hollow in light of the Intervenors' aggressiveness in flouting First Amendment values with the sheer volume, complexity, and questionable constitutionality of the BCRA and their insistence that it go into effect before the inevitable constitutional challenges are resolved. It was clearly foreseeable that the present situation would occur – from which the Intervenors seek to benefit at the expense of the American people.

Furthermore, this Court has reduced the complexity of this law by striking down so many provisions of BCRA and limiting the effects of others. The BCRA spanned 90 pages, the FEC has written over 1,000 pages of regulations and explanations, and this Court's decision runs 1,600 pages. But the end result is less regulation and, therefore, less complexity. The Defendants, however, want to resurrect unconstitutional provisions, restoring complex rules that the American public must now follow.

While complaining about "complexity" and resulting "confusion," some of the Intervenors have brought suit themselves against three sets of the FEC's regulations implementing the BCRA. *Shays v. FEC*, No. 02-CV-1984 (D.D.C.) (First Amended Complaint filed January 21, 2002). If this litigation is successful, the FEC will have to repeal the old regulations and then adopt new ones, *in the midst of this election cycle*. If the Intervenors were really concerned about reducing complexity and confusion, the Intervenors would not be seeking to change the rules themselves.

Of course, complexity does create confusion, and changing rules creates more confusion. But ultimately, this is a result that flows from government regulation. The Framers of our Constitution sought to lift "complexity" and "confusion" from our citizens' participation in our democracy by their First Amendment mandate that: *Congress shall make no law . . . abridging the freedom of speech.* Thus, ultimately, the constitutional error here *is inherent in any governmental regulation of the speech and association rights of the people.* And the cure is not to reimpose restrictions on that participation that this court has already held unconstitutional, but to ensure that such restrictions are never imposed. There is no "complexity" or "confusion" about freedom.

Likelihood of Success on the Merits

Intervenors argue that their position merits special consideration because a federal law has been invalidated and that this Court should apply a presumption of constitutionality to federal law. Intervenor Mem. at 5.[2]

But this Court has already entertained and applied this presumption and, even in the light of it, has found certain provisions of the BCRA unconstitutional. Thus, this court has carefully examined these provisions, heard their advocates' best arguments, and have now held some of them unconstitutional. Defendants have been unable to cite any case by the Supreme Court, or any federal court, that holds that a federal law declared unconstitutional by a federal court is, in any event, *constitutional,* until a higher court also agrees to strike it down. This Court's holding that certain BCRA provisions are unconstitutional has meaning and legal effect. This is an Article III court, specially convened as a 3-judge panel by mandate of the Congress of the United States to decide whether any of the provisions of the BCRA are constitutional. It is not just a speed bump on the way to the Supreme Court.

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[2]Intervenors even suggest that there is "without question, a fair prospect" that BCRA will be upheld "in its entirety." Intervenor Mem. at 7 n.7 (internal quotation mark omitted). In the light of this Court's analyses and the many obvious flaws in the BCRA, that is a bold argument, but it indicates that skepticism of Defendants' arguments is warranted.

As to the two definitions of "electioneering communications" that reject the Supreme Court's express advocacy test, the sole federal appellate court that Defendants claim rejected the Supreme Court's formulation of the express advocacy[3] in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), has now affirmed that it fully embraces the *Buckley* formulation, by declaring that "a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit *words* of advocacy." *California Pro-Life Council v. Getman*, 2003 WL 21027288 at *7 (9th Cir. 2003) (emphasis in original). This ruling deprives the Defendants of any arguable federal circuit court support for their contextual approach, which is contained in their two alternate definitions of "electioneering communication." With this decision, the likelihood of success on the merits in the Supreme Court of the 30/60-day gag rule and the "attack or promote" alternative just dropped lower than the near-zero position it previously held.

And this Court decided some issues unanimously, further reducing the likelihood that these issues will be reversed on appeal. If a three-judge federal court unanimously holds that the First Amendment guarantees the right of minors to make contributions to federal candidates and political parties, the Governments' convenience is hardly the substantial justification needed to now strip minors of that constitutional rights. Intervenor Mem. at 4, 10 (FEC rules "might" be needed and could take weeks); Gov. Temp. Mem. at 4 ("potential regulatory chaos"); Gov. Mem. at 5. The same applies to two other provisions that were unanimously struck down.

In any event, no amount of administrative convenience can outweigh the First Amendment.

> Although administrative convenience constitutes a legitimate state interest where rational basis scrutiny of regulatory enactments is involved, such convenience is insufficient to justify state action that triggers any level of heightened scrutiny. *See, e.g., Craig v. Boren,* 429 U.S. 190, 198 (1976) (citing decisions that "rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications").

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[3]The Supreme Court's express advocacy test was first articulated in *Buckley v. Valeo*, 424 U.S. 1 (1976), then reaffirmed and reapplied in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*).

Beaumont v. FEC, 278 F.3d 261, 274 (4th Cir.) (holding that "a rationale of administrative convenience cannot successfully be advanced to sustain [2 U.S.C.] § 441b(a) and the FEC's sweeping regulatory ban at issue in this case"), *cert. granted,* 123 S. Ct. 556 (2002).[4]

In addition, Defendants' arguments against "issue-by-issue" determinations regarding a stay, Intervenor Mem. at 2 n.1, ignores the fact that, while the volume and complexity of the BCRA was Intervenors' creation, this Court is bound by the United States Constitution, not governmental convenience. While avoiding issue-by-issue decisions as to the motions for stay and injunction pending appeal might be convenient, convenience is not a cognizable issue where core First Amendment values are at issue – as this court has demonstrated in considering each provision of the BCRA on an issue-by-issue basis.

The special solicitude that must be afforded First Amendment cases is evident in cases in which federal courts grant injunctions pending appeal when a district court upholds a statute that violates plaintiffs' First Amendment rights.[5] If injunctions pending appeal are granted in such

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[4]In *Harman v. City of New York*, 140 F.3d 111, 124 (2d Cir. 1998), the Second Circuit struck down a city policy requiring employees of a particular agency to receive agency permission before talking to the press, because "the agencies' asserted need to provide employees with "additional information" before they speak to the press amounts to mere convenience, and is not the kind of justification that can outweigh the employees' and the public's interest in allowing freewheeling debate on matters of public concern."

In declining to enjoin a ban on marching in front of the United Nations to protest the war against Iraq, the Second Circuit held that

> while short notice, lack of detail, administrative convenience and costs are always relevant considerations in the fact-specific inquiry required in all cases of this sort, these factors are not talismanic justifications for the denial of parade permits. Likewise, simply offering an alternative of a stationary demonstration does not end the analysis. The availability of such a demonstration may not completely serve the constitutional interest here at issue. *See, e.g., Connecticut State Federation of Teachers v. Bd. of Educ.,* 538 F.2d 471, 482 (2d Cir.1976).

United for Peace and Justice v. City of New York, 323 F.3d 175, 178 (2d Cir. 2003).

[5]*See Jaffreee v. Board of School Com'rs of Mobile County*, 459 U.S. 1314, 1315-16 (1983) (Powell, J., in chambers) (enjoining school prayer statute); *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243-45 (10th Cir. 2001) (enjoining campaign-spending limits); *cf. Florida Business-men for Free Enterprise v. City of Hollywood*, 648 F.2d 956, 958 (5th Cir. Unit B 1981) (enjoining advertising provision).

cases to protect First Amendment rights, how much more should a federal court protect First Amendment rights by refusing to place in effect provisions that it has already held to be unconstitutional, in some cases unanimously.

As to the truncated backup definition of "electioneering communication" that was established by the severing vote of one judge, the Government adds its vote that this decision has little likelihood of success on the merits. Gov. Mem. at 12 ("no temporal or geographical limitations"; "standard that Congress did not enact"; "reflect the reasoning of a single member of this Court and is open to serious challenge on appeal"). This, of course, supports the JMC Plaintiffs' motion for injunction pending appeal on the truncated backup definition. But the infirmity of the truncated backup definition does not justify restoring the primary definition, after this court has already held it to be unconstitutional.

Risk of Irreparable Harm Without Relief

Two of the Defendants' arguments have already been dealt with *supra*, i.e., (1) uncertainty, which was foreseeable and engendered by the Intervenors themselves, and (2) the Defendants' appeal to administrative convenience.

Intervenors add a third, "undermining public confidence in the democratic process." Intervenor Mem. at 7. But surely public confidence would be most shaken by the notion that core First Amendment values are disposable – that statutes declared unconstitutional can be reinstated for the convenience of the government. Americans take their constitutional rights far more seriously, and these rights themselves are a result of the democratic process. This democratic process made them the supreme law of the land and supreme over any act of Congress. Failure to accord constitutional rights the supremacy, with which the people have endowed them, would be a profound violation of the democratic process.

Further, there is no immediate public harm from enjoining provisions of a federal statute, Intervenor Mem. at 8, where that statute is unconstitutional. Under our system, harm occurs from putting in effect an unconstitutional statute.

Risk of Harm to Other Interested Parties

Defendants argue that the public interest is also best met by having "uniformity and certainty," Intervenor Mem. at 9, which to them means setting aside the declarations of this Court that certain laws are unconstitutional. But neither BCRA nor this Court's holding is likely to be identical to what the Supreme Court eventually holds. The public interest is in freedom, as the First Amendment mandates and, where this Court has held provisions unconstitutional, it is unfair and wrong to strip members of that public of their rights.

The Intervenors seek to support their argument for a wholesale stay on the NRA's and ACLU's request for a stay of the court's ruling that the primary definition of "electioneering communication" is unconstitutional. These two requests clearly do not mean that all those affected agree to so sacrifice their rights, and some have vigorously objected.

When looking at the rights of the public, it must be remembered that there is a federal runoff election tentatively set for June 7, 2003, in Texas, which means that the 60-day gag period would immediately be in effect if the unconstitutional primary definition of "electioneering communication" is resuscitated. *See The Green Papers: Texas 2003 Off Year Election*, <http://thegreenpapers.com/G03/TX.phtml> (visited May 8, 2003). And with rolling caucuses and primaries beginning in January 2004, the 30-day gag period will kick in during December 2003, weeks and likely months before the Supreme Court issues its decision in this case. The primary "electioneering communication" definition thus does not solve the First Amendment violations posed by the truncated backup definition, it merely reframes them. It will affect the American people, causing them irreparable harm – and it is unconstitutional, as this Court held.

Finally, Defendants assert that "BCRA put a stop to a variety of serious abuses." Intervenor Mem. at 11. But what Intervenors call "abuse" is in many cases activity protected by the First Amendment, such as mentioning the name of a candidate in a broadcast advertisement within 30/60 days of a federal election. This Court's suspension of Congress's abuse of the First Amendment will be lauded by the public. Citizens would only have "renewed public cynicism" if this Court failed to protect the First Amendment rights that it itself has already recognized.

Conclusion

For the foregoing reasons, this Court should deny all the pending motions for a stay of its judgment pending appeal.

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