UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al., Plaintiffs, v. FEDERAL ELECTION COMMISSION, et al., Defendants.	Civ. No. 02-582 (CKK, KLH, RJL) All consolidated cases.

OPPOSITION OF THE AFL-CIO AND AFL-CIO COPE TO THE MOTIONS FOR A STAY PENDING APPEAL OF THE COURT'S ORDER ENJOINING ENFORCEMENT OF BCRA'S PROHIBITION ON ELECTIONEERING COMMUNICATIONS

The American Federation of Labor and Congress of Industrial Organizations and its federally registered political committee, AFL-CIO Committee on Political Education (collectively, "AFL-CIO"), plaintiffs in Civ. No. 02-754, submit this Opposition, pursuant to the Briefing Order entered May 8, 2003. The AFL-CIO opposes the Motion of Intervening Defendants To Stay Injunction Pending Appeal and The Government Defendants' Motion For Stay of Final Judgment Pending Appeal To the Supreme Court Of The United States insofar as these motions seek to stay the portion of the Court's Final Judgment enjoining enforcement of BCRA's primary definition of "electioneering communication," BCRA § 201(a), 2 U.S.C. § 434(f)(3)(A)(i) (hereinafter the "primary definition.").

Argument

Although intervenors and defendants attempt to demonstrate that they have a strong likelihood of success on the merits of their appeal concerning the constitutionality of BCRA's primary definition of "electioneering communication," we doubt whether the Court's position has changed with respect to this issue in the ten days since it issued its Opinions and Final Judgment. To the extent that this factor is relevant at all to *this* Court's consideration of the stay motions,[1] we rely upon and incorporate the extensive arguments made by plaintiffs in support of their arguments that the primary definition is facially invalid under *Buckley v. Valeo,* 424 U.S. 1 (1976), and is overbroad. in violation of the First Amendment. We therefore address the two principal questions facing the Court with respect to this part of the stay motions: whether plaintiffs such as the AFL-CIO will suffer irreparable injury if the Court's injunction is lifted and whether the public interest will be served by leaving BCRA in place pending appeal.

I. THE AFL-CIO AND OTHER CORPORATIONS AND UNIONS WILL BE IRREPARABLY INJURED IF THE PRIMARY DEFINITION IS ALLOWED TO TAKE EFFECT

Section 203(a) of BCRA makes it unlawful for any corporation or labor organization to expend treasury funds to pay for any broadcast, cable or satellite communication which refers to a clearly identified candidate for Federal office; is made within 60 days before a general, special, or run-off

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[1] The cases cited address the standards to be applied by appellate courts in deciding whether to stay a lower court's injunctive order. An appellate court may conclude that an appeal from a lower court's decision is likely to be successful on the merits; a trial court that has recently issued a comprehensive opinion after long consideration, is highly unlikely to reach this conclusion.

election for the office sought by the candidate or 30 days before a primary or preference election, or a caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and, in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate. A majority of this Court correctly held that this prohibition is unconstitutional either because it plainly constrains protected political speech of the kind protected by *Buckley* or because it is unconstitutionally overbroad.

The initial, and in our view the most important, issue raised by the motions to stay this portion of the Final Judgment is whether organizations such as the AFL-CIO who regularly engage in broadcast communications of the kind banned under BCRA's primary definition will suffer irreparable harm if the Court reinstates the primary definition pending appeal, given that broadcast communications are only barred under the primary definition if they are aired within 60 days of a general election or 30 days of a primary election. Defendants and intervenors have made little attempt to rebut the fact that the AFL-CIO and other organizations would be irreparably injured if a stay is granted, a conclusion which is compelled by a number of facts.

First, the requests to stay this portion of the Court's decision only serve some purpose if defendants' and intervenors themselves believe that the primary decision will come into play before the Supreme Court is able to decide the appeal in this case. We assume that movants have some reason for asking the Court to grant the extraordinary remedy of a stay pending appeal and are not simply wasting the Court's time on a hypothetical possibility.

Second, unlike the moving parties, e.g., Memorandum of Points and Authorities in Support of the Government Defendants' Motion For Stay of Final Judgment Pending Appeal to the Supreme

Court of the United States ("Gov. Defs. Mem"). at 12 ("...the primary definition ... may not even be triggered prior to the Supreme Court's resolution of the parties' appeals"); Memorandum of Law In Support of Motion of Intervening Defendants to Stay Injunction Pending Appeal ("Intervng Defs. Mem") at 5 (¶ 10) ("...there is no doubt that the Supreme Court will promptly consider the merits of this case"), we do not pretend to know when the Supreme Court will decide even to hear arguments in this case, let alone when it might issue a decision on the merits.[2] But, to the extent that educated guesses may be pertinent, it seems much more likely than not that the Court's decision will come *after* the primary definition takes effect next December with respect to the Presidential primaries and caucuses.[3] Moreover, if the stay is lifted, the primary definition would be applicable with respect to at least one special election for Congress that will take place on June 7, 2003[4] and, possibly, to other special elections that may arise in 2003 and early 2004, including two special elections Colorado brought about by redistricting. The record contains detailed information demonstrating that the AFL-CIO has aired numerous broadcast communications in non-election years that would have been barred under the primary definition of "electioneering communications," see Second Declaration of Denise

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[2] The fact that Congress mandated "expedited Supreme Court review," Gov. Defs. Mem. at 8, does not, of course, require the Court to issue a decision on the merits by any specific date, and the voluminous record, opinions, and findings certainly are not conducive to quick action.

[3] While the status of a proposed District of Columbia presidential primary on January 13, 2004 is still in doubt, the Iowa caucus is scheduled for January 19, 2004, the New Hampshire primary is scheduled for January 27, 2004 and a number of other primaries are scheduled for February 3, 2004.

[4] A Special General Election to fill a vacancy in the 19th Congressional District of Texas was held on May 3, 2003. According to the Federal Election Commission, a Special Runoff Election must be held under state law if no candidate won a majority of the votes cast on May 3, see FEC Record at 4 (April 2003), and we understand that the run-off will be held on June 7, 2003.

Mitchell, ¶ 2; Declaration of Denise Mitchell, Exhibit 1. Irreparable harm of the gravest kind exists when citizens are prevented from making communications protected by the First Amendment. *Virginia v. American Bookseller's Ass'n*, 484 U.S. 383. 393 (1988); *Elrod v. Burns,* 427 U.S. 347, 373 (1976); *Elam Construction, Inc. v. Regional Transportation District,* 129 F.3d 1343, 1347 (10th Cir. 1997).

Finally, even in the unlikely events that the Supreme Court were to decide this case on the merits prior to December, 2003 and no additional special elections were to take place before then, a stay of the Final Judgment relating to the primary definition would irreparably injure the AFL-CIO and perhaps other organizations because of the budget and planning realities facing such organizations. The AFL-CIO presently has budgeted sufficient funds to allow it to air significant broadcast communications during 2003, but it does not have unlimited funds for this purpose. Based on previous years and the current legislative agenda, the organization would reserve some of those funds to run ads later in the year when legislative issues present the opportunity and need. If, however, BCRA's primary definition remains in effect, thereby prohibiting such ads, the organization will likely use all of its available funds to run ads in the earlier period leading up to the 60-day window, rather than risk the possibility that the case will not be resolved in time for it to run ads later. Prohibiting a labor organization from airing its political communications at times and in places that are of its own choosing, rather than the choosing of Congress, is surely irreparable injury that must be avoided by this Court.

II. THE PUBLIC INTEREST WILL NOT BE SERVED BY A BLANKET STAY OF THE ENTIRE FINAL JUDGMENT

Defendants and intervenors make little effort to demonstrate that they will be irreparably harmed unless a stay is granted.[5] Rather they rest their requests on the perceived benefit to the public from having BCRA remain in effect in its entirety until the Supreme Court decides the case on the merits. In making this argument, defendants and intervenors make no distinction as to any separate provisions of BCRA; in their view, every provision of BCRA struck down by the Court should remain in effect regardless of the differing interests involved in each such provision. E.g., Intervng Defs. Mem. at 2 n. 1 (Court should not issue a stay on an issue by issue basis but should stay the judgment "in its entirety.") This blanket approach is unfair to the different groups of plaintiffs in this case, and would allow movants to avoid their burden of justifying a stay as to each provision held unconstitutional.

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[5] Defendants do argue that "invalidation of an Act of Congress itself inflicts a unique public injury," Gov. Defs. Mem. at 14, and they point to the record evidence supporting Congress' determination to limit issue advertisements as a means of combating "the appearance and reality of corruption," *id.* at 13, a determination which they contend is presumptively correct and entitled to deference. Plaintiffs have demonstrated elsewhere that the record in this regard is not what defendants contend it to be. But, more importantly for present purposes, it is important to recognize that virtually all of the evidence put forward by defendants/intervenors and their experts concerning the ban on electioneering communications relates to the 60-day period prior to a general election, not to the 30-day periods prior to federal primary elections. See, e.g., Opinion of Leon, J. at 83 ("In addition, I would note that the *Buying Time 2000* study did not analyze advertisements run in the 30 days preceding a primary or preference election, even though such ads aired during that period are entirely regulable by BCRA's primary definition."); Leon Findings of Fact, No. 316 (CMAG data relied on by defendants' experts do not track advertisements aired prior to primary elections). It is far more likely that the Supreme Court will decide the appeals in this case before the 60-day period preceding the 2004 general election takes effect in early September 2004, than that it will decide the case in time for the presidential primaries, many of which are now "front-loaded" into the first two months of 2004. Even if the Court were to believe that the record in this case supports imposition of the primary definition on an interim basis with respect to the 2004 general election, it cannot find support in the record for applying the primary definition on an interim basis with respect to the primaries, which as a practical matter is the only real question presented by the pending requests of the defendants and intervenors for a stay of the injunction regarding the primary definition.

The plaintiffs in this case represent a wide variety of interests and bring a large number of different claims to the court. Not all plaintiffs challenge every provision of BCRA or even every provision struck down by the Court in its Final Judgment. The AFL-CIO, for example, challenged only certain aspects of Title II and a single provision of Title V; we sought no relief with respect to Titles I or III, which were the principal focus of the party plaintiffs and many of the candidate plaintiffs. The minor plaintiffs similarly challenge only the provision in Title III which prohibits persons under the age of 18 from making contributions to candidates and parties. The issue of irreparable injury is very different with respect to each of these provisions, however. Even if a stay were to be granted, the minor plaintiffs, for example, would not be permanently barred from making contributions in connection with the 2004 election if the Supreme Court ultimately decides in their favor. Similarly, the application of BCRA to the soft-money fundraising of the national and state political parties raises different issues than are raised by the primary definition of "electioneering communications."[6] Our point is not that a stay is appropriate with respect to Title I or Title III, but not as to Title II, but that, in the interest of fairness, each of the groups of plaintiffs is entitled to have the stay requests determined with respect to the specific provisions that they, and not other plaintiffs, have successfully challenged. When the claimed benefits to the public are considered with respect to the primary definition of "electioneering communication," as opposed to the supposed benefit of reinstating BCRA as a whole, the benefit of a stay to the public is grossly overstated by both the defendants and intervenors. Thus, it is patently

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[6] Even if, as defendants allege, groups are already "mobilizing to take advantage of the soft-money limits invalidated by this Court's decision," Gov. Defs. Mem. at 9, or groups are seeking "to amass political war chests of soft-money funds," *id.*, this should have no bearing on whether the Final Judgment regarding the primary definition of "electioneering communications" should be lifted.

wrong to suggest, as defendants and intervenors repeatedly do, that the primary definition should remain in effect in order to avoid applying different rules in the pre-May 2 and post-May 2 periods, when, as to Title II at least, there has been no significant application of the statute to date.[7] See Gov. Defs. Mem. at 4 ("The Federal Election Commission (FEC) and regulated participants in the federal electoral process have been adapting to BCRA's major reforms over the past year."); Intvng Defs. Mem. at 2 (without a stay the parties, candidates and the public will "face an ever-shifting set of rules regarding the conduct of the 2004 federal elections."); *id.* at 3 (¶ 4) ("Thus, for over six months, BCRA has defined many of the principal rules of federal campaign finance regulation, and the parties have been subject to those rules."); *id.* at 5 (¶ 5) (if the judgment is not stayed pending appeal, "the Nation will face the prospect of adjusting to several separate sets of campaign finance laws in roughly a year's time.") While the primary definition technically took effect on November 6, 2002, in reality it has had little or no practical impact because of the almost complete absence of federal elections during this period.[8]

Similarly, the notion that regulatory clarity would be achieved if the primary definition remains in

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[7] Again, it should be noted that the issue of uniform application may be different with respect to other provisions of BCRA for which a stay is requested, although we leave it to the plaintiffs affected by these provisions to address this issue fully.

[8] There have been no presidential primaries since BCRA took effect, of course, and, to our knowledge, the primary definition was in effect during the 60-day period prior to only two special congressional elections. An organization that wanted to run electioneering communications in connection with one of these special elections, Hawaii, obtained an injunction from this Court allowing it to do so on non-constitutional grounds. See *Hawaii Right to Life, Inc. v. FEC,* No.1:02CV02313 (D.D.C. Nov. 26, 2002)(order granting TRO), (Dec. 16, 2002)(final judgment). The other instance was the special election in the 19th Congressional District of Texas held on May 3, 2003. See, note 4, *supra.* Title II's lack of practical impact also explains why the Title II plaintiffs never argued that the prohibition on electioneering communications should not take effect while the litigation proceeded in the district court. See, Intervng Defs. Mem at 3 (¶ 4).

effect pending appeal is belied by the fact that the Federal Election Commission has left unresolved important issues about the application of the primary definition, including, most importantly, how the regulated community is to determine whether specific broadcast communications are "targeted to the relevant electorate."[9]

Hyperbole aside, it is impossible to fathom any of the "tumultuous consequences for the Nation's federal electoral system," Gov. Defs. Mem. at 4, or "potential chaos in the vital realm of the conduct and financing of federal elections," *id.* at 5, predicted to occur if the primary definition remains stricken during the period pending appeal. BCRA created an entirely new category of prohibited political speech, "electioneering communications," which had previously been treated as protected under the First Amendment by almost every federal and state court that has addressed the issue. See, e.g., Memorandum in Support of Certain Madison Center Plaintiffs' Motion for Injunction Pending Appeal, 13 n. 11 (citing cases). That new prohibition has been effectively dormant during the months since BCRA was passed. Defendants' solicitous concern for "political organizations [which] already have restructured their operations and planned their activities for the 2004 elections in compliance with

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[9] An electioneering communication is " targeted to the relevant electorate" where it "can be received by 50,000 or more persons in the district or State the candidate seeks to represent. 2 U.S.C. 434(f)(3)(C). In its notice of proposed rulemaking regarding BCRA's electioneering communications provisions, the FEC recognized that the targeting requirement could only be enforced if the regulated community was provided information about which broadcast stations meet the statutory definition, a task which the FEC asked the FCC to perform. Both agencies have acknowledged that the creation of such a data base "will be a difficult and complicated undertaking," Interim Final Rules, "FCC Database on Electioneering Communications," 67 Fed. Reg 65212, 65213 (Oct. 223, 2002), and no database yet has been created to assist the regulated community. Until the database is published, corporations, unions and other persons who wish to determine whether their broadcast communications are covered must apply a complicated and subjective set of interim rules. 11 C.F.R. § 100.29(b)(6)(ii) (2003).

BCRA's scheme," Gov.,Defs. Mem. at 5, surely does not apply with respect to the primary definition of "electioneering communications"; political organizations will not be inconvenienced, let alone disrupted, if they are allowed to air broadcast communications without regard to the overly broad and unconstitutional primary definition, even if, as defendants' hope, the Supreme Court ultimately upholds that definition with respect to future elections.[10] Furthermore, even if defendants are correct about the need for interim reporting requirements for soft-money donations to the national parties if a stay of the Court's decision regarding Title I is not granted, Gov. Defs. Mem. at 9-10, this argument has no relevance to the definition of electioneering communications in Title II, since the Court upheld in all but one respect BCRA's reporting requirements for "electioneering communications," and, to our knowledge, none of the plaintiffs is seeking an injunction pending appeal with respect to those reporting requirements.

The "disagreement" in the Court's opinions noted by defendants and intervenors, Gov Defs. Mem. at 6-8, Intervng Defs. Mem. at 3 (¶ 6), also is of no consequence as to the primary definition of "electioneering communications." Judge Henderson and Judge Leon agreed that the primary definition is unconstitutional, albeit for different reasons which have no bearing on the ultimate meaning or interpretation of the Final Judgment. Contrary to the intervenors' contention, the different reasoning of

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[10] We agree with defendants, however, that as to the fall-back definition, the Court has indeed "created a novel regulatory regime that in key respects bears scant resemblance to BCRA as enacted," Gov. Defs. Mem. at 5, and for this reason have joined with the Madison Plaintiffs in seeking a limited injunction pending appeal of the back-up definition as recrafted by Judge Leon. The fact that the substitute definition adopted by the Court has serious constitutional difficulties of its own, however, is no reason to put back into effect an equally suspect and damaging rule enacted by Congress. Nor should the fall-back definition be allowed to take effect with its unconstitutional last clause in tact, because it would prohibit speech immediately and for the entire period under the Supreme Court rules.

the two judges cannot lead to confusion on the part of the enforcement agencies or the regulated community as to what conduct is protected and what conduct is not. See, Intervng Defs. Mem. at 3 (¶ 6) (opinions will "inevitably invite disagreement among the parties and other participants in the political process regarding the implications of the Court's decision.") Both of the opinions making up the majority on this issue unambiguously held that the primary definition is facially unconstitutional in its entirety and cannot be enforced in any respect. There can be no confusion on this point.[11]

Finally, the very real problems created by the fall-back definition of "electioneering communications" as modified by Judge Leon, Gov. Defs. Mem. at 12, provide no logical basis for reinstating the primary definition; instead, the problems with the modified fall-back definition acknowledged by defendants, including the fact that "on its face [it] includes no temporal or geographical limitations," *id.*, offer further support for the separate motions of the AFL-CIO and the Madison Plaintiffs for an injunction pending appeal of the modified fall-back definition.[12] Moreover, the FEC should not be heard to complain that it might have to issue new regulations or advisory opinions implementing the back-up definition, Gov. Defs. Mem. at 12, when it eschewed the opportunity to

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[11] Similarly, there can be no "uncertainty" with respect to the FEC's regulations implementing the primary definition, as intervenors suggest. Intervng Defs. Mem. at 4 (¶ 6). Those regulations are as void and unenforceable as the statute on which they are based, and any argument to the contrary by the agency would be fanciful at best.

[12] For these reasons, the AFL-CIO respectfully disagrees with the decision of plaintiff National Rifle Association to seek a stay of the injunction as to the primary definition of "electioneering communications" as a means of avoiding application of the equally offensive fall-back definition. While we agree with the NRA's critique of the fall-back definition as modified by Judge Leon, we see nothing to be gained in the long run by replacing one unconstitutional rule with another, and, for the same reasons, we strongly disagree with intervenors' self-serving suggestion that reinstating the primary definition "will *benefit* many of those alleging First Amendment violations," Intervng. Defs. Mem. at 9 (¶ 15b) (emphasis in original).

clarify the back-up provision in a timely manner as part of its BCRA rulemaking.[13]

Respectfully submitted,

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Dated: May 12, 2003

[13] The AFL-CIO and others specifically requested that the Federal Election Commission issue regulations to implement the back-up definition of "electioneering communications" in the event, now upon us, that the primary definition was struck down and the back-up definition upheld. See http:/www.fec.gov/pdf/nprm/electioneering_comm/comments/afl-cio.pdf. The agency refused to do so. Final Rules, "Electioneering Communications," 67 Fed. Reg. 65190, 65191 (Oct. 23, 2002). Thus, the substantial confusion as to the meaning of the fall-back definition is in part of the agency's own making and hardly supports a stay which would so significantly encroach on the First Amendment rights of citizens throughout the country.

CERTIFICATE OF SERVICE

This is to certify that I caused a copy of the foregoing **Opposition of The AFL-CIO And AFL-CIO Cope To The Motions For a Stay Pending Appeal of The Court's Order Enjoining Enforcement of BCRA's Prohibition on Electioneering Communications** be served on all counsel required to be served, on May 7, 200, by the means indicated below:

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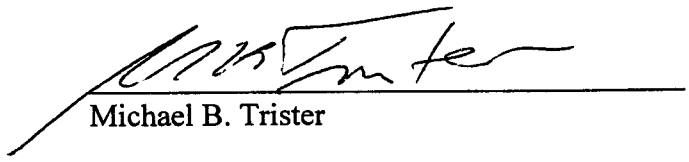

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