AFL-CIO PLAINTIFFS' OPENING BRIEF: TITLE II ISSUES

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and its federally registered political committee, AFL-CIO Committee on Political Education Political Contributions Committee ("AFL-CIO COPE"), substantially adopt the arguments of plaintiffs' omnibus brief relating to the constitutionality of Title II of BCRA. The AFL-CIO plaintiffs here explain how its provisions adversely and unconstitutionally interfere with the AFL-CIO's long-standing and extensive broadcast advertising and legislative lobbying programs.

I. THE ELECTORAL AND ADVOCACY ROLE AND RIGHTS OF LABOR ORGANIZATIONS

Unions and their members have as much stake in public affairs as other institutions and citizens. "[U]nions ha[ve] historically expended funds in the support of political candidates and issues." Ellis v. Brotherhood of Railway and Airline Clerks, 466 U.S. 435, 447 (1984). "It is not true in life," Justice Felix Frankfurter said, "that political protection is irrelevant to, and insulated from, economic interests. It is not true for industry or finance. Neither is it true for labor." International Ass'n. of Machinists v. Street, 367 U.S. 740, 814-15 (1961) (dissenting opinion). Justice Frankfurter further observed, "[t]o write the history of the [railroad] Brotherhoods, the United Mine Workers, the Steel Workers, the Amalgamated Clothing Workers, the International Ladies Garment Workers, the United Auto Workers, and leave out their so-called political activities and expenditures for them, would be sheer mutilation." Id. at 800.

Citing Justice Frankfurther's observations, the Supreme Court has held that the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq., protects workers when they engage in

concerted political activity to protect their employment interests. "Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context," and "employees' appeals to legislators to protect their interests as employees" are among the forms of "mutual aid and protection" workers engage in through their unions under the protective mantle of the NLRA. Eastex, Inc. v. NLRB, 437 U.S. 556, 565-66 (1978). Indeed, unions have just as great and legitimate an interest in public elections involving candidates and ballot measures, which determine lawmaking and public policy, as they do in collective bargaining and the legislative process.

The core associational relationships among a union's officers and members, including partisan communications, enjoy constitutional protection. U.S. v. C.I.O., 335 U.S. 106, 121 (1948). The Supreme Court has plainly stated that "allowing [unions and corporations] to communicate freely with members and shareholders on any subject" by using their general treasuries -- and not just solicited "hard money" contributions, as federal law permits for use for *external* political activity -- was "'required by sound policy *and the Constitution.*'" Pipefitters Local 502 v. U.S., 407 U.S. 385, 431 (1972), quoting Rep. Hansen (emphasis added). FECA reflects this command. See 2 U.S.C. § 441b. A union engaged in political activities is "an archetype of an expressive association" protected by the First Amendment. Kidwell v. Transportation Communications International Union, 946 F.2d 283, 301 (4th Cir. 1991), cert. denied, 503 U.S. 1005 (1992).

Even so, the Court has recognized "crucial differences between unions and corporations" that can justify less regulation of union activity than corporate activity in public affairs. Specifically, employees can decline to be union members and avoid paying for union political

expenditures while still receiving the benefits of union representation; contrary to what a corporation may require of its shareholders, "a union may not compel employees to support financially 'union activities beyond those germane to collective bargaining, contract administration, and grievance adjustments . . .'" Id. at 665, quoting Communications Workers of America v. Beck, 487 U.S. 735, 745 (1988). As a result, the funds available for a union's political activities more accurately reflect members' support for the organization's political views than does a corporation's general treasury. Austin v. Michigan State Chamber of Commerce, 494 U.S. 652, 665-66 (1990).

II. BCRA'S BROADCAST BAN WILL SUBSTANTIALLY IMPAIR THE AFL-CIO'S EFFORTS TO INFLUENCE LEGISLATION AND POLICY AND TO ENGAGE THE PUBLIC ON WORKING FAMILY ISSUES

A. Overview of the AFL-CIO's Policy, Legislative and Political Programs

Over the years, the labor movement has led crusades for enactment of the minimum wage and the forty-hour work week, and for social welfare law such as Medicare, and laws assuring the security of pension and prohibiting invidious discrimination in employment. Shea Dec., ¶ 12. Consistent with its historic activities, in recent years a core mission of the AFL-CIO[2] continues to be providing an effective political voice to workers on public issues that affect their lives and

---

[2] The AFL-CIO was formed in 1955 by the merger of its two predecessor confederations of unions, the American Federation of Labor, and the Congress of Industrial Organizations. Declaration of Gerald M. Shea, ¶ 3 (hereinafter "Shea Dec.") The AFL-CIO is comprised of 66 national and international labor unions with, collectively, approximately 13 million members who are also members of the AFL-CIO. These members work, and are represented for purposes of collective bargaining, in thousands of occupations in virtually every industry in the United States. *Id.* The AFL-CIO also includes 51 state labor federations that coordinate with local unions and other labor organizations, id., ¶ 6, nearly 580 area and central labor councils, id., ¶ 7, and numerous trade and industrial departments that coordinate activities of affiliated unions arising from their representation of workers in common lines of business. Id., ¶ 19

fighting for an agenda for working families at all levels of government. Id., ¶ 4(b). In carrying out its policy mission, the AFL-CIO maintains an active lobbying program aimed at influencing federal and state legislation and executive branch decisions affecting workers and their families.[3] Id., ¶¶ 12-56. In addition to policy issues directly affecting the activities of unions, such as the right to organize, labor-management relations, and government intervention in labor disputes, the AFL-CIO's lobbying activities focus on a broad range of domestic and foreign policy matters of importance to union members, non-union workers, retirees and their families, including health care, trade and industrial policy, tax fairness, budget priorities, Social Security and retirement protection, Medicare, wage and hour and workplace safety standards, civil rights, immigration and campaign finance and election reform.[4] Id., ¶¶ 13-14. Virtually all of these matters are perpetually the subjects of popular debate, prospective legislation and regulation, and federal government enforcement policies. Id., ¶ 13.

Meanwhile, the AFL-CIO also carries out an extensive political program. This program consists largely of efforts that mobilizes union members and their families throughout the Nation

---

[3] The AFL-CIO's policy agenda and activities since 1994 are amply documented in reports to the AFL-CIO's governing conventions, resolutions adopted by those conventions and the AFL-CIO's Executive Council, and in annual AFL-CIO "scorecards" that retrospectively highlight and rate the voting records of Members of Congress on the most critical or exemplary votes of importance to the labor movement. Shea Dec., ¶¶ 15-17 and Exhs. 2-18.

[4] Defendants' expert David B. Magleby opined that the topics covered in broadcast advertisements "illustrate the electioneering intent of their sponsors because often they focus on issue [sic] that are not of prime concern to the sponsor's mission," and cited as a prime example two AFL-CIO advertisements in 1998 that focused on tax cuts proposed to be paid for by raiding the Social Security Trust Fund. Expert Report of David B. Magleby on Behalf of Intervenor Defendants, 27. Cross-examination laid bare Mr. Magleby's abject ignorance of the legislative role and policy interests of the AFL-CIO, which utterly impeached his premises and conclusions about the "intent" of AFL-CIO advertising. See Magleby Deposition, p. ___.

to engage them on issues, register them as voters, encourage them to vote, and recommend their support of or opposition to specific candidates and ballot measures on the basis of their positions on working family issues. Declaration of Steven Rosenthal ("Rosenthal Dec."), ¶¶ 8- 9.[5]

The AFL-CIO's extensive use of broadcast advertising to support its legislative and policy agenda dates back to early 1995, when the organization's new leadership resolved to oppose the efforts of Rep. Newt Gingrich and the Republican-controlled 104th Congress to enact the so-called "Contract with America" and cut back numerous federal benefits and protections of great importance to workers and their families.[6] Shea Dec., ¶¶ 21-22 and Exh. 20. In a series of radio and television ads broadcast from April to October, 1995, the AFL-CIO sought to mobilize union households and others among the general public to oppose attempts by the Republican Congress to cut federal funding for jobs, wages, health and safety, housing, school lunches and the Medicare and Medicaid programs. Id., ¶¶ 20, 23-27 and Exhs. 21-24, 27-28. In December 1995, after President Clinton vetoed a draconian budget proposal adopted by the Republican Congress and the federal government shut down, the AFL-CIO broadcast television and radio advertisements supporting the President's position and opposing congressional budget cuts.

---

[5] Throughout this period, the AFL-CIO has not undertaken any partisan broadcast communications as part of its political program. Declaration of Steven Rosenthal ("Rosenthal Dec.") ¶¶ 19, 25, and in fact its political department has played virtually no role in the broadcast communications program. Id. ¶¶ 30-33.

[6] A comprehensive summary of the AFL-CIO's television and radio advertisements from 1995 through 2001 is attached as Exhibit 1 to the Declaration of Denise Mitchell ("Mitchell Dec."), the director of the AFL-CIO's Public Affairs Department. More than any other evidence in this case, this list demonstrates the extent to which the AFL-CIO is engaged year-round in using broadcast media to advocate governmental policies concerning issues affecting workers and their families. The actual ads themselves are contained in Exhs. 2-22 to the Mitchell Declaration.

Mitchell Dec., ¶¶ 30-32 and Exhs. 26-31; Shea Dec., ¶ 27 and Exh. 28. Virtually all of these ads identified Members of Congress by name and urged viewers or listeners to urge them to oppose the cuts. See Mitchell Dec., Exh. 1.

The AFL-CIO broadcast advertising program continued into 1996, focusing initially on the continuing budget controversy and then shifting to a successful union-led effort to get Congress to consider and then pass an increase in the federal minimum wage. Id., ¶¶ 34-36 and Exhs. 33-46; Shea Dec., ¶¶ 30-34 and Exhs. 38-41. Other ads sponsored by the AFL-CIO addressed the continuing efforts by the Republican Congress to reduce Medicare and Medicaid benefits, Mitchell Dec., ¶¶ 37-38 and Exhs. 47-56, a recent proposal to protect the retirement savings of working families, id., ¶ 40 and Exhs. 57-58, and another struggle over the federal budget. Id., ¶ 42 and Exhs. 59-61.

As explained in both AFL-CIO witness testimony and in many contemporaneous documents, the 1995-96 broadcast efforts were key elements in an overall labor movement strategy to establish a working families issue agenda for the Congress and throughout the 1996 election year by advocating particular policies and pressuring Members of Congress to confront and assert policy positions and cast particular votes. See id., ¶¶ 33-44 and Exhs. 1, 32-76; Shea Dec., ¶¶ 27-35, 38-39, 42 and Exhs. 28-45; Rosenthal Dec., Exhs. 1-6. Even though an intent, in full or in part, to deploy this advertising in order to elect or defeat particular candidates would have no legal significance under Buckley v. Valeo, 424 U.S. 1 (1976), in fact the AFL-CIO broadcast effort was dedicated to furthering its policy goals, albeit surely in a political environment suffused with electoral considerations.

The AFL-CIO continued its broadcast advocacy program throughout the next two

Congresses, during 1997-1998 and 1999-2000. These television and radio advertisements have both sought to shape and to respond to the legislative agenda in Congress. For example, a large number of the AFL-CIO's ads in these years have focused on trade issues of great importance to workers, such as legislation giving the President so-called "fast track" trade authority and providing most favored nation trade status to China. Mitchell Dec., ¶¶ 49, 53, 57, 69 and Exhs. 90, 116, 127-136, 154-158 ; Shea Dec., ¶¶ 46-50. AFL-CIO advertising over the 1995-2001 period can be thematically summarized as also addressing federal budget priorities; tax fairness; Social Security and retirement; Medicare funding and prescription drug coverage; health care; minimum wage and overtime standards; workplace health and safety; and education. See generally Mitchell Dec., Exhs. 1-22.

The almost universal format of these advertisements has been to name individual Members of Congress and urge viewers or listeners to contact them with a particular policy message. Not a single ad has commented on any Member's or candidate's personal qualities or qualifications - - not that they couldn't. And, every AFL-CIO ad - -with the exception of the tiny handful produced as part of a coalition with other established organizations - - has expressly stated the AFL-CIO's sponsorship. See generally Mitchell Dec., Exhs. 1-22.

In selecting the "targets" of its advertising over the years, the AFL-CIO has relied on substantive and tactical factors: the nature of the issue; the Member"s voting record, committee assignments and legislative role; whether the Member's response to an ad would generate "free media" influencing other Members; the presence among the viewership or listenership of substantial numbers of union members; and, to be sure:

> where elections for the House and Senate are likely to be close

> because our experience has shown, and the advice we have received has indicated, that the public and policymakers are far more likely to pay attention to our message where elections are competitive and the advertising could influence public perceptions of their official conduct and policy commitments than where on candidate is regarded as a shoo-in for election.

Mitchell Dec., ¶¶ 12, 14.

As this brief summary makes clear, the AFL-CIO's broadcast advertising serves fundamental organizational purposes of advancing union positions on issues, often embodied in legislation, educating the public about these issues and the positions of officeholders, including candidates, on these issues, and influencing those officeholders and candidates in their official conduct or policy preferences. As Buckley aptly perceived, 424 U.S. at 42, no hard line can be drawn between issues and electoral politics in the realm of issue advocacy, and the AFL-CIO recognizes that its broadcast issue advocacy can have electoral efforts:

> I realize that AFL-CIO advertising could affect how citizens vote. If our advertisements succeed in educating the public about working families issues, and influence the actions, votes, positions and policy commitments of legislators and candidates, they may in some cases have an indirect effect on election outcomes, just as virtually every legislative and other activity undertaken by the AFL-CIO on behalf of workers that is conveyed to the public may have such an effect. This, however, has never been the point of our broadcast advertising program, within or outside the 30- and 60-day periods.

Mitchell Dec., ¶ 70.

B. The Impact of BCRA on the AFL-CIO's Broadcast Advertising Program

BCRA's prohibition on the use of union treasury funds to support "electioneering communications" will make it impossible for the AFL-CIO to conduct a substantial portion of its

broadcast program in the future.[7] Contrary to studies cited by BCRA's sponsors and some of "the experts" in this case,[8] a substantial number of the AFL-CIO's lobbying ads that identified Members of Congress have been run within 60 days prior to a general federal election. For example,

> - "No Two Way," a radio and television advertisement focusing on an incipient budget fight in Congress ran between September 5 and 17, 1996 in media markets serving approximately 35 congressional districts. Mitchell Dec., ¶ 41.
>
> - "Deny," a radio and television advertisement broadcast, ran between September 10 and 23, 1998, shortly before the Senate was scheduled to vote on an HMO reform bill that the AFL-CIO considered weak. Mitchell Dec., ¶ 51. "Deny" targeted approximately 17 Senators whom the AFL-CIO and its allies believed could be persuaded to vote for a stronger version of the bill; 13 of these Senators were not candidates in the imminent 1998 election, but four were.[9] *Id.*

---

[7] The records available to the AFL-CIO do not include sufficient information from which it can be determined whether any specific broadcast advertisement could be received by 50,000 or more persons within the state or congressional district in which an election was held. Mitchell Dec., ¶ 6. Also, such information does not appear to be available currently. See Interim Final Rules With Requests for Comments, "FCC Database on Electioneering Communications," 67 Fed. Reg. 65212, 65214 (Oct. 23, 2002). This discussion assumes that most, if not all, of the AFL-CIO's television and radio advertisements would fall within the 50,000-person requirement in BCRA.

[8] The disparity is the result of a number of factors. In some cases the studies simply did not pick up all of the AFL-CIO's advertisements, either because the ads were not run in media markets covered by the studies or because of errors by the vendor in capturing ads run in those markets. See, e.g., Mitchell Dec., ¶¶ 64-66. In other cases, an "expert" simply arbitrarily decided that an advertisement had an "electioneering" purpose, as plaintiffs' omnibus brief relates.

[9] "Deny" is an example where a textually identical ad ran in a large number of jurisdictions with only the name of the officeholder changed from jurisdiction to jurisdiction. See Mitchell Dec., ¶ 11. Although the Buying Time 1998 students originally coded these as "electioneering" ads, the authors of the study ultimately concluded that they could not have had an electioneering purpose where the Senator named was not a candidate. The authors also

- "Barker," an AFL-CIO radio advertisement, was broadcast in EIGHT congressional districts beginning September 21, 1998 after a vote on "fast-track" legislation was hastily scheduled for September 25. Mitchell Dec., ¶ 53; Shea Dec., ¶ 47.

- "Job," a television advertisement, was broadcast between September 13 and 25, 2000 that targeted 14 Representatives who had voted to prevent an important OSHA regulation from being implemented; President Clinton had threatened to veto the Labor-HHS budget bill if it retained the rider removing the regulation. Mitchell Dec., ¶ 61.

Numerous other AFL-CIO ads have been broadcast within 30 days of a primary election in which a federal incumbent was a candidate, including a 1996 ad that mentioned then-candidate President Clinton. Mitchell Dec., ¶ 32. For example, during Spring 1996 the AFL-CIO sponsored several flights of television ads in order to pressure the Republican House leadership to allow a vote on an increase in the minimum wage.[10] Three of these ads targeted Members who coincidentally were candidates in a primary election within the next 30 days. Id., ¶¶ 34, 35, 36. See also id., ¶¶ 37-39 (ads targeting at least 12 Representatives), ¶ 40 (ads targeting at least 11 Representatives), ¶ 50 (ads targeting one Representative and one Senator), ¶ 57 (ads targeting five Representatives), ¶ 58 (ads targeting three Representatives) ¶ 59 (ads targeting 12 Representatives). As these advertisements well illustrate, many important legislative issues arise in Congress prior to general and primary elections, and organizations seeking to influence the

---

recognized that, given the identity between the ads run in the non-candidate jurisdictions and the ads run in the four candidate jurisdictions, the latter ads also should not have been classified as having an "electioneering" purpose. Unfortunately, BCRA makes no such distinction, so the identical ads run in the four states would be prohibited as potential crimes.

[10] This effort was successful, with the House enacting its first increase in the minimum wage since 1991 in July, 1996. Shea Dec., ¶s 30-34. At least ten Members targeted in the AFL-CIO ads who had voted in March not to bring up the bill for a vote voted in favor of final passage. Shea Dec., ¶ 33.

outcome of these issues have strong reason to broadcast during this period; forcing them to forgo such advertising through the arbitrary prohibitions of BCRA cannot be reconciled with the First Amendment.[11]

BCRA provides enfeebled content options for AFL-CIO advertising, because naming Members of Congress is a key element of an advertisment's potency and effectiveness:

> Members of Congress and Senators must be held accountable for how they vote on issues of importance to union members and working families; based on my experience, advertisements on policy and legislative issues have far less impact when they do not mention a policymaker by name. The express or implied urging of viewers or listeners to contact the policymaker regarding the issue is also especially effective by showing them how they can personally impact the issue debate in question.... While ... ads [that do not identify a policymaker by name] add resonance to an issue debate and emphasize the AFL-CIO's role as a working families advocate, they have little legislative impact and we rarely use them.

Mitchell Dec., ¶ 11.

And, more fundamentally, broadcast is the most potent medium available in this electronic age, which is precisely why BCRA seeks to decisively impair groups' access to it. Print advertising, telephone banks, direct mail and other forms of non-broadcast communications pale in comparison as mass communications outlets. Id., ¶¶ 28, 29.

Accordingly, for all these reasons and those in plaintiffs' omnibus brief, the BCRA prohibition of "electioneering communications" should be stricken.

---

[11] In this respect, the AFL-CIO's experience and the facts flatly contradict the absurd assertion in Buying Time 2000 that "most votes on key decisions occur... before Labor Day." See Buying Time 2000, 58. At least one of defendants' experts strongly disputed that notion. See Deposition of Thomas Mann, p.____.

III. BCRA'S EXPANSIVE AND VAGUE COORDINATION PROVISIONS WILL SUBJECT UNIONS AND OTHER GROUPS TO EXTENSIVE AND INTRUSIVE INVESTIGATIONS

As set forth in plaintiffs' omnibus brief and the Chamber of Commerce plaintiffs' brief, BCRA §§ 202 and 214 will chill the exercise of free speech and free association by groups that participate in both legislative and electoral activities. That chill will be compounded by the prospect of massive and intrusive FEC investigations into protected political activities. As the AFL-CIO's own experience demonstrates, the potential for mischievous complaints about alleged coordination by one's political opponents followed by a destructive investigation is especially great in the area of "coordinated" campaign activity.

In response to the AFL-CIO's unprecedented broadcast advertising in 1995 and early 1996, the National Republican Congressional Committee ("NRCC") and other Republican entities filed a series of complaints with the Federal Election Commission principally alleging, that the AFL-CIO had coordinated its advertising with the Democratic Party or individual Democratic candidates. The complainants announced their filings with much public fanfare and then brandished them in demanding that broadcast stations cease running the AFL-CIO's ads. See Mitchell Dec., ¶ 23 and Exhs. 24-25.

Although the AFL-CIO and other respondents ultimately were absolved of any formal liability, see General Counsel's Report, In the Matter of American Federation of Labor and Congress of Industrial Organizations, MURs 4291, *et al.,* (June 9, 2000), the intrusion and expense of responding to the FEC's investigation was punishment enough.[12] In addition to the

[12] As noted above, FEC investigations are and remain confidential. We therefore confine our description of the FEC investigation of the AFL-CIO's 1996 activities to information in the public domain, primarily as reflected in the decision of the district court, in AFL-CIO v.

AFL-CIO and several of its individual officers and employees, more than 150 other individuals and entities were either joined as respondents in the case or subpoenaed as third party witnesses, including more than 100 Members of Congress and other federal candidates, the White House, the Clinton/Gore '96 Campaign, the Democratic Senatorial Campaign Committee, the Democratic Congressional Campaign Committee, and the AFL-CIO's media buyer and political consultants. AFL-CIO v. FEC, 177 F. Supp. 2d at 53 n.7. For over three years, the FEC enforcement staff used multiple subpoenas to identify, and inquire into, the details of virtually every contact between the AFL-CIO and several of its affiliated unions, and their officers, members and allies, with Members of Congress and the Democratic Party. All told, the FEC subpoenaed between 45,000 and 55,000 pages of documents. Id. at 53 n.7.[13]

The information demanded and produced comprised "extraordinarily sensitive political information that would not be available in the absence of an investigation of complaints filed with the FEC," including "plans and strategies for winning elections, materials detailing political and associational activities, and personal information concerning hundreds of employees, volunteers and members of" the AFL-CIO and its co-plaintiff, the Democratic National Committee ("DNC"). Id. at 51. BCRA's vague and overbroad coordination standards will inevitably spur more such wide-ranging and burdensome investigations. The Court should reject them.

Federal Election Commission, 177 F. Supp. 2d 48 (D.D.C. 2001), appeal pending, No. 02-5069 (D.C.Cir.).

[13] The AFL-CIO's experience in this investigation is not unique. The record in Federal Election Commission v. Christian Coalition, 52 F. Supp. 2d 45 (D.D.C. 1999), reveals an intrusive investigation of that interest group's political activities, and the separate brief of the Chamber of Commerce plaintiffs documents the similar far-ranging investigation conducted by the FEC into the 1996 advertising communications of business groups.

Finally, the BCRA § 202 ban on coordinated "electioneering communications" inevitably will criminalize efforts by the AFL-CIO to coordinate legislative public advocacy with Members of Congress, and interfere with ordinary and necessary lobbying contacts and the AFL-CIO's use of them to plan broadcast and other advocacy. See Shea Dec. ¶¶ 57-59. For that reason alone, § 202 violates the First Amendment.

IV. BCRA'S ADVANCE DISCLOSURE REQUIREMENTS FOR ELECTIONEERING COMMUNICATIONS AND INDEPENDENT EXPENDITURES VIOLATE THE FIRST AMENDMENT

Although the AFL-CIO plaintiffs do not challenge BCRA's requirements that actually aired electioneering communications and independent expenditures be reported by individuals and entities who are permitted to engage in such communications, the AFL-CIO plaintiffs do challenge these requirements insofar as they require disclosure to take place *before* -- and irrespective of whether -- an electioneering communication or an independent expenditure is aired.[14]

---

[14] The specific provisions of BCRA challenged here are § 201(a), adding 2 U.S.C. § 434(f)(1),(4) and (5) (requiring every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year to file a report with the FEC within 24 hours of each "disclosure date," defining "disclosure date" as the date on which "disbursements" have been made for the direct costs of "producing or airing" electioneering communications, and treating a person as having made a disbursement "if the person has executed a contract to make the disbursement"); § 212(a)(2), adding 2 U.S.C. § 434(g)(1) (requiring a person that "makes or contracts to make" independent expenditures aggregating $1,000 or more after the 20th day, but more than 24 hours, before the date of an election to file a report describing the expenditure within 24 hours); and § 212(a)(2), adding 2 U.S.C. § 434(g)(2)(requiring 48-hour reports whenever a person "makes or contracts to make" independent expenditures aggregating $10,000 or more at any time up to an including the 20th day before the date of an election).

If the BCRA § 203 prohibition of union-sponsored "electioneering communications" is struck down, plaintiff AFL-CIO would be subject to the § 201(a) disclosure requirement for those lawful communications. Plaintiff AFL-CIO COPE PCC is subject to the § 212 requirements effective today.

In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court upheld a statutory requirement that any person, other than a political committee or a candidate, making independent expenditures aggregating over $100 in a calendar year in connection with a federal election must report those expenditures *after the fact* to the Federal Election Commission. Id. at 74-82. Buckley, however, did not approve the kind of advance disclosure mandated in BCRA, and the lower federal courts have uniformly struck down advance disclosure requirements similar to those involved here.

Thus, in Citizens for Responsible Government State Political Action Committee v. Davidson, 236 F. 3d 1174, 1196-97 (10th Cir. 2000), the court considered a Colorado statute requiring persons to provide written notice to the Secretary of State within 24 hours after "obligating funds" for independent expenditures exceeding $1,000, specifying the amount, a "detailed description" of its use, and the name of the candidate whom the expenditure "is intended to support or oppose." The court struck down this notice requirement as "patently unreasonable," for it was "a far cry from being narrowly tailored" and served "[n]one of the State's compelling interests in informing the electorate, preventing corruption and the appearance of corruption, or gathering data." Id. at 1197.

Similarly, in Florida Right to Life, Inc. v. Mortham, 1998 U.S. Dist. LEXIS 16694 (M.D. Fla. 1998), the court struck down a similar provision requiring any person to give notice to every candidate in the race within 24 hours after "obligating any funds," for an independent expenditure in excess of $1,000. Noting that Buckley had only approved "an after-the-fact reporting requirement for independent expenditures," the court concluded that "a prior disclosure

requirement is not necessary to satisfy the state's interests, as articulated in Buckley," Id. at 30.[15] The court likewise invalidated a requirement that any group that intends to endorse or oppose a candidate for state office by means of broadcast or other political advertisements to file, prior to making the communication, a detailed statement concerning the organization and the manner in which it selected the candidate. Mortham, 1998 U.S. Dist. Lexis 16694, at *31. See also Rosen v. Port of Portland, 641 F.2d 1243, 1247-50 (9th Cir. 1981) (city ordinance requiring one day's advance notice to airport manager of intention to distribute literature burdens and chills speech in violation of First Amendment). Cf. Watchtower Bible and Tract Society v. Village of Stratton, 122 S. Ct. 2080 (2002) (village ordinance requiring door-to-door canvassers engaged in promoting any "cause" first to register with mayor and secure permit violates First Amendment).

Like the provisions struck down in these cases, the advance disclosure provisions of BCRA serve no governmental interest and will chill the exercise of free speech by forcing groups such as the AFL-CIO to disclose ongoing and confidential political strategies and decision-making processes, and by giving adversaries the opportunity to try to thwart broadcasts or counter them with their own messages. Mitchell Dec., ¶ 24. Indeed, this is no abstract concern: Republican Party officials, even *after* AFL-CIO ads have begun to broadcast, have threatened or pressured broadcasters to cease running them, sometimes with success. See Mitchell Decl. ¶ 23, and Exh. 24.

Notably, during its still-pending BCRA rulemakings, defendant FEC has acknowledged

---

[15] Indeed, compelled disclosure of only a plan or intention to speak -- which may never be carried out -- serves none of those interests (summarized by the Tenth Circuit in Davidson), namely, informing the electorate "as to where campaign money comes from"; "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures," and "gathering the data necessary to detect violations of the contributions limits . . ." Buckley, 424 U.S. at 66-68. For, each of these interests is served only by disclosures as to communications actually made.

that "until a person or entity actually airs an electioneering communication, it is impossible to know with certainty that the person or entity ever will air a communication that constitutes an electioneering communication under BCRA; accordingly, to require reporting beforehand could lead to speculative and even inaccurate reporting through no fault of the reporting person or entity." NPRM, "Electioneering Communications," 67 Fed. Reg. 51131, 51141 (Aug. 7, 2002). And, the FEC has acknowledged that "constitutional issues" could be implicated by compelling disclosure of potential electioneering communications before they are finalized and aired, "particularly when such disclosure could force reporting entities to divulge confidential information, and could force them to report information, under the penalty of perjury, that later turns out to be misleading or inaccurate if the reporting entity does not subsequently air any electioneering communications."[16] Id. See also NPRM, "Coordinated and Independent Expenditures," 67 Fed. Reg. 60042, 60045-46 (Sept. 24, 2002) (same concerns suggested as to reporting of independent expenditures.)

For all these reasons, sections 201(a) and 212(a) of BCRA are unconstitutional insofar as they require reporting of electioneering communications and independent expenditures before -- and irrespective of whether -- they are actually publicly disseminated, and each requirement should be struck down.

---

[16] However, the FEC has not yet promulgated final reporting requirements for electioneering communications or other provisions of BCRA. Its current proposal does predicate disclosure on actual public distribution due to "legal and practical issues associated with compelling disclosure of potential electioneering communications before they are finalized and publicly distributed." See NPRM, "Bipartisan Campaign Reform Act of 2002; Reporting," 67 Fed. Reg. 64555, 64557, 64559 (Oct. 21, 2002). But no party knows now how this rulemaking will conclude, and, in any event, given the statutory text at issue plaintiffs have no assurance as to how the FEC will interpret or enforce it in the future. Cf. Citizens for Responsible Government v. Davidson, 236 F. 3d at 1192-93 (recognizing plaintiffs' standing to challenge campaign finance law provisions given plain statutory language, absence of narrowing regulations, and non-binding nature of state's representations as to statute's meaning and state's intent not to prosecute plaintiffs or similar organizations).