

AFL-CIO PLAINTIFFS' OPENING BRIEF: TITLE V ISSUES

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,



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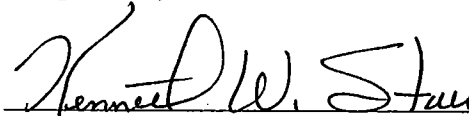
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**IN THE UNITED STATES DISTRICT COURT
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SENATOR MITCH McCONNELL, et al.,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, et al.,
Defendants.

Civ. No. 02-0582
(CKK, KLH, RKL)

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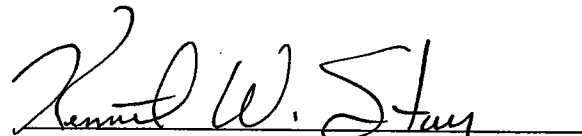
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