UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

SECOND DECLARATION OF DENISE MITCHELL

1. I am the Special Assistant for Public Affairs to AFL-CIO President John J. Sweeney. I have held this position since November 1, 1995. In this capacity I have exercised the primary responsibility for overseeing all public relations activities of the AFL-CIO, including all AFL-CIO use of broadcast and print media. I am responsible for making the operational decisions as to both the substance and the method of communication of the AFL-CIO message to union members and the general public. I make the strategic and logistical decisions regarding AFL-CIO media buys and, within policy guidelines, the editorial decisions regarding the content of our communications.

2. In this litigation I prepared a declaration that was submitted to the Court on October 4, 2002. Exhibit 1 to that declaration is a substantially accurate list of all AFL-CIO-paid broadcast advertisements from 1995 to 2001; Exhibits 2-22 are copies of the tapes and compact discs of those advertisements that are retained in the AFL-CIO's files. As these records demonstrate, during non-federal election years - - to date, 1995, 1997, 1999 and 2001 - - the

AFL-CIO has routinely and often broadcast advertisements that address policy and legislative issues and that refer to federal officeholders, most of whom were then already "candidates" for reelection within the broad meaning of that term under the Federal Election Campaign Act. More specifically:

a. During 1995 the AFL-CIO broadcast seven advertising "flights" (contemporaneous groups of ads with the same or similar text but for the name of the officeholder referred to) during April, July, August, September, October and December.

b. During 1997 the AFL-CIO broadcast 10 advertising flights during April, May, June, July, September and October.

c. During 1999 the AFL-CIO broadcast six advertising flights during July, September, October, November and December.

d. During 2001 the AFL-CIO broadcast four advertising flights during July, October and November.

3. As the advertisements themselves reflect, and as described in my first declaration and in my deposition testimony, these advertisements were broadcast in response to legislative and other public events in order to advance the AFL-CIO's legislative and policy agenda. All advertisements involved efforts by the AFL-CIO to influence the congressional debate and decision-making and in particular the positions and official conduct of the officeholders named and otherwise described in the advertisements. Also common to these flights of ads is the fact that they were not planned well in advance, but were considered and commissioned as the need arose and as our budget permitted in light of unpredictable legislative circumstances. These

public communications have been vital aspects of the AFL-CIO's overall policy and legislative program, and the AFL-CIO has devoted considerable resources to them; for example, in direct costs comprised of third-party payments alone, the AFL-CIO spent on broadcast advertising $3,757,193 in 1997, $3,065,187 in 1999, and $3,490,069 in 2001.

4. The AFL-CIO's broadcast budget for 2003 enables us to engage in broadcast advocacy comparable to that undertaken during previous non-election years. Moreover, I consider it to be a certainty that the AFL-CIO will decide to broadcast advertisements that refer to a particular federal officeholder on many occasions between now and December 2003, in light of the fact that Congress is now and will continue for the rest of the year to consider a host of issues of critical importance to the AFL-CIO, including tax policy, appropriations and workplace standards.

5. I understand that this Court's majority decision of May 2, 2003 determined that the definition of "electioneering communications" in the Bipartisan Campaign Reform Act was constitutional insofar as it prohibits corporations and labor organizations, such as the AFL-CIO, from broadcasting messages that "promote, support, attack or oppose a candidate for [federal] office (regardless of whether the communication expressly advocates a vote for or against a candidate)." I have read the portions of Judge Leon's Memorandum Opinion that explain this standard and that illustrate it by reference to advertisements that are contained in the record of this case - - namely, pages 50-68, 88-95, 251-82, 329-46. Many of these advertisements were sponsored by the AFL-CIO, including all six "[r]epresentative [e]xamples of [g]enuine [i]ssue [a]dvertisements" at pages 339-44 that the court evidently considers would not be prohibited under its approved definition of "electioneering communications," and all three "[r]epresentative

[e]xamples of [c]andidate-[c]entered [i]ssue [a]dvertisements" at pages 344-46 that the Court evidently considers would be prohibited under that definition. I also understand that this definition applies at all times, including now.

6. I do not completely understand the distinction between permissible and prohibited language set forth in Judge Leon's opinion, including the line that divides language that is "neutral" from language that is "not neutral," as the opinion characterizes it. If this vague and imprecise line marks the applicable standard, there is no question that the AFL-CIO will be severely inhibited in crafting broadcast messages that refer in any manner to officeholders, regardless of the urgency of the matter at hand and the utility of crafting a message that has the power to influence legislators and the public and that justifies the considerable expense entailed when the AFL-CIO undertakes broadcast advocacy.

7. Even looking solely to the Court's "[r]epresentative [e]xamples" as presenting some precise formulations of messages that would fall on either side of the line of prohibition, there is also no question that the AFL-CIO will be prevented from broadcasting messages of the type that we have broadcast many times, including during non-election years, and that express our perspective in a manner that we deem accurate and necessary in order to shape public policy and influence legislators and the public. The "promote/support" and "attack/oppose" tests will also make it impossible for AFL-CIO to use broadcast advertisements to hold federal officeholders accountable by highlighting their votes on issues of importance to working people.

8. It is entirely possible that insofar as the definition approved by the Court has a known meaning, and insofar as it is otherwise so imprecise as to create significant doubt as to its meaning, the AFL-CIO will undertake no broadcast advertising whatsoever that refers, or can be

construed to refer, to an officeholder who is a federal candidate.

9. One aspect of this matter that presents a particularly acute problem concerns the AFL-CIO's ability to broadcast messages that take issue with the policies of President George W. Bush. For over two years the AFL-CIO has found itself consistently at odds with Bush Administration policies, and the record already includes a flight of advertisements in 2001, "Track," that coupled references to President Bush with references to particular Members of Congress in urging those Members to vote against the trade policy commonly known as "fast track" that was (and remains) championed by the President. I anticipate with certainty that the need will arise again this year to broadcast advertisements that refer to the President and take issue with one or more of his policies or legislative proposals. I am informed that he is not now a "candidate" for reelection but that he could become one at any time merely by taking certain registration steps with the Federal Election Commission or raising or spending $5,000 in support of his candidacy for reelection. Clearly, President Bush could take either step at any time. At that point the AFL-CIO would be criminally precluded from broadcast commentary that was "not neutral," whatever that means, regarding President Bush, an untenable and utterly intimidating situation.

10. Finally, I understand that the "back-up" definition of "electioneering communication" in BCRA provided that a broadcast advertisement was not unlawful unless it was "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." This phrase was stricken from the statute by a majority of the Court because it is vague and unclear, a conclusion with which I strongly agree. This phrase would not make it easier for me to determine which advertisements may or may not be run by the AFL-CIO because

it merely adds additional uncertainty to the already vague language of the statute.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 9th day of May 2003.

Denise Mitchell