

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN FEDERATION OF LABOR)
AND CONGRESS OF INDUSTRIAL)
ORGANIZATIONS)
815 16th Street, NW)
Washington, DC 20006)
and)
AFL-CIO COMMITTEE ON POLITICAL)
EDUCATION POLITICAL CONTRIBUTIONS)
COMMITTEE)
815 16th Street, NW)
Washington, DC 20006,)
Case No. _____)
Plaintiffs,)
v.)
FEDERAL ELECTION COMMISSION)
999 E Street, NW)
Washington, DC 20463)
and)
FEDERAL COMMUNICATIONS)
COMMISSION)
445 12th Street, SW)
Washington, DC 20554,)
Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. The American Federation of Labor and Congress of Industrial Organizations (AFL-

CIO@, on its own behalf and on behalf of its members, and the AFL-CIO Committee on Political Education Political Contributions Committee (ACOPE@), on its own behalf and on behalf of its contributors, ask the Court to declare that various provisions of the Bipartisan Campaign Reform Act of 2002 (ABCRA@), which substantially amends the Federal Election Campaign Act of 1971 (AFECA@), violate fundamental rights guaranteed to plaintiffs and their members by the First and Fifth Amendments to the Constitution of the United States, and to enjoin the government defendants permanently from administering and enforcing these provisions. A person's breach of any of the provisions of the BCRA subjects the violator to civil enforcement through civil penalties and injunctive relief, or criminal enforcement through fines and imprisonment.

Plaintiffs challenge three aspects of the BCRA:

a. **The Ban on Core Political Speech.** The BCRA seeks to ban core political speech by labor organizations (as well as corporations) through primary and fallback restrictions, both of which are unconstitutional.

i. **Blackout Periods and Zones.** For a period that may range from 30 days to more than a full year preceding a Federal election, the BCRA makes it a crime for all labor organizations to refer[] to a clearly identified candidate@ in certain broadcast communications. During the blackout periods and in substantial geographic blackout zones, the candidates who cannot be referred to will include virtually the entire membership of the United States House of Representatives, about one-third of all United States Senators, often the President and Vice-President, and all non-incumbent individuals who are candidates for Federal office. During the blackout period, labor organizations will face civil enforcement or criminal prosecution for public broadcasts that, for example,

inform the public that such elected officials and candidates support or oppose pending legislation, or that otherwise comment on officeholders' or other candidates' conduct. Merely using common ways of referring to pending legislation, such as the "Shays-Meehan," "McCain-Feingold," "Tauzin-Dingell" or "Kennedy-Kassebaum" bills, may expose labor organizations to criminal penalties. Such a draconian system of regulation, violating established Supreme Court doctrine that only speech that expressly advocates the election or defeat of a clearly identified candidate may be regulated, will seriously impair plaintiff AFL-CIO's First Amendment rights to speak out on public issues, to associate for public purposes and to petition for a redress of grievances.

ii. **Fallback Blanket Prohibition of Certain Communications.** The BCRA further provides that if this prohibition on "refer[ring] to candidates is held unconstitutional insufficient, then, as a fallback, the same labor organizations will be prohibited -- at all times and in all places -- from financing any broadcast communication that "promotes or supports . . . or attacks or opposes a candidate" and "also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." This vague yet sweeping ban will apply "regardless of whether the communication expressly advocates a vote for or against a candidate." Forcing plaintiff AFL-CIO to predict what statements will be deemed to contain such a forbidden message would severely chill its exercise of core First Amendment rights and violate the Due Process Clause of the Fifth Amendment.

b. **The Coordination Ban.** The BCRA expands and obscures the existing FECA ban on labor organization speech that is "coordinated" with a candidate, campaign or political party. The BCRA applies this ban to speech that does not expressly advocate the election or defeat of a candidate. Moreover, the BCRA repeals the regulatory definition of "coordination" adopted by the

Federal Election Commission (AFEC@), but it adopts no substitute and instead instructs the FEC to issue a new regulation that conforms with vague and intrusive standards as to what contacts with candidates - - including federal officeholders acting in their official capacities -- and campaigns and parties constitute proscribed Acoordination.@ Plaintiffs and their members, who regularly deal with government and political party officials on significant legislative and policy matters, thus must curtail such activities to steer clear of anything that arguably might be deemed Acoordination@so as not to subject their future political, legislative and advocacy activities and speech on a wide range of subjects to civil or criminal enforcement proceedings. These restrictions violate the First and Fifth Amendments.

c. **Compelled Disclosures of Possible Future Communications.**

The BCRA substantially revises and augments the reporting and disclosure requirements of the FECA by compelling disclosures of planned and prospective communications by labor organizations and political committees before, and irrespective of whether, the communications are actually transmitted. Compelling labor organizations and political committees to make such disclosures chills their speech and creates a regimen of required registration before transmitting communications in violation of the First Amendment. The vague and overbroad standards contained in these BCRA provisions violate the Due Process Clause of the Fifth Amendment as well.

PARTIES

2. Plaintiff American Federation of Labor and Congress of Industrial Organizations is a labor organization within the meaning of Section 315(a) of the FECA. The AFL-CIO is comprised of 66 national and international labor union affiliates, 50 state labor federations and over 500 local labor bodies, representing 13 million working men and women in the United States. The AFL-CIO is exempt

from taxation under Section 501(c)(5) of the Internal Revenue Code.

a. The AFL-CIO engages in substantial legislative and issue advocacy on matters of particular concern to working families, such as Social Security, Medicare, education, labor standards, health care, retirement plans, workplace safety and health, trade, immigration, employees' right to organize, regulation of union governance and the role of unions, corporations and others in electoral politics.

b. The AFL-CIO also makes substantial efforts to familiarize union households with these and other issues, the performances of officeholders in addressing them, and the positions candidates for public office have taken on them. The AFL-CIO regularly encourages its members and other citizens to register and vote.

c. The AFL-CIO uses every means of communication, including membership meetings, workplace leafleting, newsletters, mail, the Internet and both paid and free broadcast and print media -- including, sometimes, referring to individuals who are candidates for federal office -- to articulate issues of concern to working families. The AFL-CIO builds coalitions with allied organizations, such as civil rights groups, when it advocates on behalf of workers. And, the AFL-CIO regularly communicates and works with incumbent legislators, candidates and political parties, in pursuit of its policy goals.

d. The AFL-CIO intends to continue to engage in all of these activities.

3. Plaintiff AFL-CIO Committee on Political Education Political Contributions Committee (ACOPE) is a federal political action committee sponsored by the AFL-CIO. COPE is a political committee within the meaning of Section 301(4) of the FECA and is registered as such with the FEC.

COPE is also a political organization within the meaning of Section 527(e)(1) of the Internal Revenue Code. COPE regularly makes contributions to federal candidates and is entitled under the First Amendment and FECA to make independent expenditures that expressly advocate the election or defeat of federal candidates.

4. Defendant Federal Election Commission (FEC) is an agency of the United States Government that has direct responsibility for enforcing substantial portions of the BCRA, including Sections 201, 202, 203, 212 and 214.

5. Defendant Federal Communications Commission (FCC) is an agency of the United States Government that has direct responsibility for enforcing certain provisions of the BCRA, including Sections 201 and 504.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this case pursuant to 28 U.S.C. ' ' 1331 and 2201. Venue is proper in this Court pursuant to 28 U.S.C. ' 1391(e) and Section 403 of the BCRA. Under Section 403(a)(1) of the BCRA, this case is to be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.

COUNT I

BAN ON CORE SPEECH OF LABOR ORGANIZATIONS (BCRA ' ' 201 AND 203)

7. Section 201(a) of the BCRA amends Section 304 of the FECA by adding Section 304(f), which introduces and defines a new statutory term, electioneering communication. As

amended, Section 304(f)(3)(A) of the FECA defines **electioneering communication** as **any** broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office . . . 60 days before a general, special, or runoff election for the office sought by the candidate; or . . . 30 days before a primary or preference election, or a convention or 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.⁸ In turn, amended Section 304(f)(3)(C) of the FECA defines the term **targeted to the relevant electorate** to mean that it **can** be received by 50,000 or more persons⁹ within the jurisdiction the **refer**¹⁰ to candidate seeks to represent.

8. Section 203(a) of the BCRA amends Section 316(b)(2) of the FECA by prohibiting all labor organizations (as well as for-profit and non-profit corporations, including incorporated membership organizations) from engaging in **electioneering communications**.¹¹ Section 203(b) of the BCRA adds a new Section 316(c)(1) to the FECA, which prohibits any person from engaging in **electioneering communications** using funds donated by a labor organization.

9. Section 203 establishes blackout time periods covering substantial portions of each federal election cycle and blackout geographic zones covering some or all of the United States, as times and places where labor organizations are barred from making or financing (knowingly or unknowingly) speech in the broadcast, cable or satellite media that refers to any clearly identified federal candidate (**broadcast speech**).¹²

10. These blackout periods and zones are both far-reaching and of imprecise scope, and accordingly they will chill and entrap labor organizations that attempt to comply with Sections 201 and

203. And, although the BCRA mentions blackout periods of 60 and 30 days, in fact the blackout periods often will extend for as long as a full year, and often far beyond the location of the electoral jurisdiction. For example:

a. In a House or Senate election, the various political parties often hold primaries, conventions, caucuses or similar events to nominate candidates on different dates. Each such event will trigger the ban on broadcast speech by labor organizations referring to candidates for the preceding 30 days; and, the blackout period will then extend to the 60 days before the general election, and will extend for another 60 days if there is a runoff election. The ban will apply even as to nominating events involving a single, unopposed candidate.

b. In a House or Senate election, the blackout zone can extend far beyond the geographic confines of the electoral jurisdiction because electioneering communications are prohibited, regardless of where they originate, if their transmission by broadcast, cable or satellite can be received by 50,000 or more persons in the electoral jurisdiction. Numerous terms used in this provision -- such as communication and can be received -- are undefined; person is defined by Section 301(11) of the FECA to include not only individuals (regardless of age, citizenship or voting eligibility status) but also labor organizations, corporations, associations, partnerships, political committees or any other group of persons. Many broadcast stations span multiple congressional districts and states; broadcast, cable and satellite transmissions typically have multi-state and even national reach; radio and television broadcasts may be streamed over the Internet; and, it may be difficult or impossible for a speaker to know whether its speech is in fact targeted in a prohibited manner.

c. In a presidential election, the blackout period will extend nationwide for nearly a

full year, since primaries and caucuses ordinarily are conducted between January and June of the election year, triggering a blackout period beginning during the previous December, and a preference election can take place even before then, commencing the blackout period even earlier. Each such nominating event will trigger a 30-day nationwide blackout because the BCRA includes no targeting restriction for a presidential election. After the primaries conclude, the Democratic and Republican parties, and both before and after the primaries conclude myriad other parties, typically hold conventions and other nominating events, extending the nationwide blackout through July and August -- even if by then the major party candidates are no longer opposed for nomination -- and that blackout period will then extend throughout the 60-day period before the November general election date. The Section 203 prohibition can be expected to criminalize every broadcast by a labor organization that refers to an incumbent President or Vice President for nearly a year before a presidential election; indeed, the last time neither the incumbent President nor Vice President was a national general election nominee -- let alone a candidate who sought but failed to secure such a nomination -- was 1952.

11. As amended by the BCRA, Section 304(f)(3)(B)(i) of the FECA exempts from the term electioneering communication any communication appearing in a news story, commentary or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by a political party, political committee, or candidate.

12. By banning speech that does not expressly advocate the election or defeat of a clearly identified candidate, Sections 201 and 203 burden plaintiff AFL-CIO's rights of free speech, association and petition for a redress of grievances in violation of the First Amendment.

13. By imposing prohibitions and limitations on broadcast speech by labor organizations

while allowing other entities such as unincorporated organizations, including membership organizations, and corporations that own news-media facilities to engage in such speech without such restrictions, Sections 201 and 203 violate plaintiff AFL-CIO's rights under the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment.

14. Expressly acknowledging that the definition of "electioneering communication" may be declared unconstitutional, Section 201(a) provides a fall-back definition: "Any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." Unlike the primary definition, this fall-back definition has no temporal or geographic limitations whatsoever.

15. This fall-back definition does not define the key terms "promotes," "supports," "attacks," "opposes," "plausible" or "exhortation," and it explicitly forbids any construction that requires express advocacy content. The fall-back definition also does not define the term "suggestive," and fails to specify the person to whom the "suggesti[on]" must appear or whether the "suggesti[on]" must arise from the language of the communication or may be implied from other content of the communication or surrounding circumstances.

16. By rejecting the constitutionally mandated "express advocacy" standard and imposing a vague and overbroad standard that applies if the primary standard is held unconstitutional, the BCRA violates plaintiff AFL-CIO's rights under the First and Fifth Amendments and compounds the violations alleged in paragraphs 7-13 above.

COUNT II

COMPELLED ADVANCE DISCLOSURES RELATING TO ELECTIONEERING COMMUNICATIONS (BCRA ' 201(a))

17. Section 201(a) of the BCRA amends Section 304 of the FECA by adding a requirement that any person that disburses or executes a contract to disburse an aggregate of more than \$10,000 during a calendar year for the direct costs of producing and airing electioneering communications must file a statement with the FEC within 24 hours of reaching each such \$10,000 increment. In its statement the person must specify its identity and that of any person sharing or exercising direction or control over the person's activities, the amount and recipient of any disbursement over \$200; the election to which the electioneering communication pertains; and the candidates identified or to be identified by the communication.

18. Section 201(a) also requires the person making the electioneering communication to identify the names and addresses of all contributors of \$1,000 or more to the person; or, where the disbursements are made from the person's segregated bank account that consists of funds contributed solely by individuals for electioneering communications, Section 201(a) requires the person to identify the names and addresses of all individuals who contributed \$1,000 or more to that account.

19. Section 304(11)(B) of the FECA, as amended by Section 501 of the BCRA, requires that the FEC make such statements available to the public on the Internet within 24 hours of the FEC's receipt of it, and Section 201(b) of the BCRA also requires the FCC to compile and make such information available to the public on the FCC's website.

20. Plaintiff COPE can lawfully make electioneering communications under the BCRA and will be subject to the Section 201(a) disclosure requirements. If the prohibitions in Sections 203 of the BCRA are invalidated, then plaintiff AFL-CIO will also lawfully be able to make electioneering communications and will be subject to the Section 201(a) disclosure requirements.

21. In requiring a person to file the statement when the person reaches the \$10,000 increment by either (or both) making disbursements for producing and airing electioneering communications or executing a contract to make such disbursements, Section 201(a) requires that the statement be filed, and therefore become publicly available, before, and irrespective of whether, the person's electioneering communication actually is transmitted. By requiring such advance disclosures of possible future communications, Section 201(a) burdens plaintiffs' rights of free speech, association and petition for a redress of grievances in violation of the First Amendment.

COUNT III

THE FORCED CHOICE BETWEEN CONSULTATION WITH FEDERAL OFFICIALS AND CANDIDATES AND SPEECH ON MATTERS OF PUBLIC CONCERN (BCRA ' ' 202 and 214)

22. Section 316(a) of the FECA prohibits any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any Federal election.

23. Section 315(a)(7) of the FECA provides that expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents shall be considered to be a contribution to such a candidate. Because labor organizations are prohibited from making contributions to federal candidates, this

provision bars labor organizations altogether from undertaking such coordinated expenditures at peril of both civil and criminal penalties. This prohibition applies to expenditures for communications by broadcast, print and other means.

24. Section 214(a) of the BCRA amends Section 315(a)(7)(B) of the FECA by inserting a new subsection (ii) that extends the present-law ban on coordination with candidates to coordination with any national, State, or local committee of a political party as well.

25. Section 202 of the BCRA amends Section 315(a)(7) of the FECA by inserting a new subsection (C) that provides that any disbursement for any electioneering communication that is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or officer of any such candidate, party, or committee . . . shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party Thus, the BCRA bars labor organizations from making any disbursement for a coordinated electioneering communication, a prohibition that will remain in effect if the general prohibitions of labor organization electioneering communications in Section 203 of the BCRA are invalidated.

26. By treating as coordinated expenditures communications that do not expressly advocate the election or defeat of a clearly identified candidate, Section 202 of the BCRA violates plaintiffs' rights of free speech, association and petition for a redress of grievances in violation of the First Amendment.

27. In 1999 this Court held that Section 315(a)(7) must be narrowly construed in order to avoid interfering with the right of citizens to petition their elected officials and other rights protected by the First Amendment. See *Christian Coalition v. F.E.C.*, 52 F. Supp. 2d 45. In response to that

decision, the FEC issued regulations defining in some detail when public communications by labor organizations, corporations and individuals are coordinated for purposes of Section 315(a)(7).

28. Section 214(b) of the BCRA repeals these FEC regulations, effective as of December 23, 2002, the date by which Section 402(c) of the BCRA requires the FEC to promulgate new regulations. Repeal of the existing regulations is not conditioned on timely issuance of new regulations. Section 214(c) of the BCRA mandates that any new FEC regulations shall not require agreement or formal collaboration to establish coordination, and directs the FEC to address in its new regulations four specific issues, including payments for the use of a common vendor, payments for communications directed or made by persons who previously served as an employee of a candidate or a political party, and payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.

29. By repealing the FEC regulations defining coordinated expenditures and mandating that any replacement regulations shall not require agreement or formal collaboration to establish coordination, Section 214 of the BCRA violates plaintiffs' rights of free speech, association and petition for a redress of grievances in violation of the First Amendment.

30. By establishing a vague and overbroad standard of coordination that deprives labor organizations and political committees of sufficient guidance as to when they may communicate with the President, Members of Congress, and other federal candidates and officeholders without jeopardizing their rights to engage in otherwise permissible political and legislative activities, Sections 202 and 214 of the BCRA violate plaintiffs' rights of free speech, association and petition for a redress of grievances in violation of the First Amendment and the Due Process Clause of the Fifth Amendment.

COUNT IV

COMPELLED DISCLOSURE OF POSSIBLE FUTURE INDEPENDENT EXPENDITURE COMMUNICATIONS (BCRA ' 212(a))

31. Under Section 301(17) of the FECA, as amended by Section 211 of the BCRA, an independent expenditure is an expenditure by any person expressly advocating the election or defeat of a clearly identified candidate . . . that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents. This definition includes such express advocacy communications transmitted by any means or media, including print and broadcast.

32. Section 212(a) of the BCRA amends Section 304 of the FECA by adding a requirement that any 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 must file a report with the FEC within 24 hours of the making of, or contracting for, the expenditure. As with all reports of independent expenditures under Section 304(b)(6)(B)(iii) of the FECA, this report must disclose the name and address of any recipient of \$200 or more from the person; the date, amount and purpose of the expenditure; a statement indicating whether the expenditure supports or opposes a candidate; that candidate's name and office sought; and a certification, under penalty of perjury, whether the expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion, of any candidate or any authorized committee or its agent.

33. Section 212(a) of the BCRA further amends Section 304 of the FECA by adding an

identical reporting requirement for a person that makes or ~~A~~contracts to make~~@~~ independent expenditures aggregating \$10,000 or more at any time until and including the 20th day before the date of an election. For these expenditures and contracts, the FEC report must be filed within 48 hours.

34. Plaintiff COPE is among the ~~A~~persons~~@~~ that lawfully may make independent expenditures, and that will be subject to Section 212(a).

35. Section 212(a)~~s~~ requirements that a political committee file detailed reports with the FEC within 24 or 48 hours, as the case may be, of ~~A~~contract[ing] to make~~@~~ independent expenditures, will require that these reports be filed, and therefore publicly available, before, and irrespective of whether, any such expenditure actually is made or the communication contracted for actually is transmitted. By requiring such advance disclosures of planned and prospective communications, including communications that ultimately are never made, Section 212(a) burdens plaintiff COPE~~s~~ rights of free speech and association in violation of the First Amendment.

COUNT V

COMPELLED DISCLOSURE OF REQUESTS TO BROADCAST CERTAIN COMMUNICATIONS (BCRA ' 504)

36. Section 504 of the BCRA amends Section 315 of the Federal Communications Act by adding a requirement that broadcast licensees collect and make publicly available records of ~~A~~request[s]~~@~~ by any person to purchase broadcast time for communications ~~A~~relating to any political matter of national importance,~~@~~ including communications relating to ~~A~~a legally qualified candidate,~~@~~ ~~A~~any election to Federal office,~~@~~ or ~~A~~a national legislative issue of public importance.~~@~~

37. Section 504 requires such recordkeeping and disclosures not when or after such communications are actually broadcast, but when any person has made a request to purchase broadcast time. The required records must reflect whether or not the request was accepted or rejected, and other information, including the name of the person and a list of its chief executive officers and the members of its executive committee or board of directors; the date and time of the communication; the rate charged; and the name of either the candidate and office sought, the election, or the issue to which the communication refers, as the case may be.

38. By requiring these disclosures, Section 504 violates plaintiffs' rights of free speech, association and petition for a redress of grievances in violation of the First Amendment.

39. By requiring disclosures about requested communications relating to any matter of national importance, including a national legislative issue of public importance, Section 504 is vague and overbroad in violation of the First Amendment and the Due Process Clause of the Fifth Amendment.

IRREPARABLE INJURY

40. As described above, the BCRA is inflicting irreparable injury on the plaintiffs and their members by impairing their rights to free speech, association, petition, due process and equal protection. This injury will continue and increase unless the unconstitutional provisions of the BCRA are declared unconstitutional and enjoined.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs request that this Court grant all appropriate relief for the constitutional violations alleged above, including:

- a. An order and judgment declaring the aforementioned provisions of the BCRA unconstitutional;
- b. An order and judgment enjoining defendants from enforcing the aforementioned provisions of the BCRA;
- c. Attorneys= fees and costs pursuant to any applicable statute or authority; and
- d. Any other relief that this Court in its discretion deems just and appropriate.

Respectfully submitted,

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