IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL RIFLE ASSOCIATION OF AMERICA, et al.,	
Plaintiffs,	
v.	Civil Action No. 02-0581 (CKK, KLH, RJL)
FEDERAL ELECTION COMMISSION, et al.,	
Defendants.	

DEFENDANTS' REPORT IN RESPONSE
TO THE COURT'S ORDER OF APRIL 16, 2002

In accordance with the Court's Order dated April 16, 2002, defendants Federal Election Commission ("FEC"), FEC Commissioners David W. Mason, Karl J. Sandstrom, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas, and Darryl R. Wold, John Ashcroft, Attorney General of the United States, and the Federal Communications Commission, submit this report addressing various procedural matters that pertain both to this action, and to the related cases styled McConnell v. FEC, No. 02-CV-0582, and Echols v. FEC, No. 02-CV-0633. Intervenor-movants in this case and the McConnell suit, Senator John McCain, Senator Russell Feingold, Senator Olympia Snowe, Senator James Jeffords, Representative Christopher Shays, and Representative Martin Meehan, concur in the views expressed herein.

by the Congress, to prevent the abuse of unregulated "soft" money by political parties, corporations, and labor unions as a means to circumvent and exceed the limits on campaign contributions that the Supreme Court sustained in Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), as a "necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." Id. at 38.

In brief, Title I of the BCRA , § 101(a), restores the integrity of the campaign finance system that Congress envisioned under the Federal Election Campaign Act of 1971 (the "FECA"), and which the Supreme Court sustained in Buckley, by prohibiting national political parties and candidates for federal office from soliciting or receiving so-called "soft" money, funds that are not subject to the limitations, prohibitions and reporting requirements of the FECA. To the same end, § 101(b) prohibits the state and local committees of political parties from expending or disbursing soft money for federal election activity. Similarly, Title II of the Act, § 203, seeks to prevent the evasion of long-standing and constitutionally approved prohibitions on the use of corporate and labor union treasuries to influence federal elections, by requiring that corporations and labor organizations finance "electioneering communications," as defined under the BCRA, using the "hard" money sources (so-called "segregated funds") already prescribed under the FECA. The plaintiffs in the three related cases at bar challenge these and nearly twenty other provisions of the BCRA in a broadside attack on the Act's constitutionality, invoking the First Amendment, and related principles of vagueness, overbreadth, and equal protection.

tional challenge to its provisions. Second, the Act postpones the effective date of most of its provisions to November 6, 2002, BCRA, § 402(a)(1), many of which do not apply, as a practical matter, until a considerably later time. For example, the Act's rules relating to "electioneering communications" apply only to TV or radio advertisements that air within 60 days prior to a general election, or 30 days before a primary election. Id., § 201 (adding 2 U.S.C. § 434(f)(3)(A)). The next regularly scheduled federal primary election is not until 2004.

Finally, the Act requires that the FEC expeditiously promulgate regulations implementing the law. BCRA, § 402(c). Recognizing that certain provisions of the law will, in practice, take effect well before others, the law establishes staged deadlines for those provisions, mandating that the FEC promulgate regulations implementing the ban on "soft" money "[n]ot later than 90 days after the date of enactment of the Act," i.e. by June 25, 2002, id., § 402(c)(2), and that the Commission promulgate rules respecting all other provisions of the Act within 270 days of its enactment, i.e. by December 22, 2002. Id., § 403(c)(1). Under a proposed rulemaking calendar developed by the General Counsel of the FEC (and adopted as a preliminary schedule by the Commission), final rules implementing the BCRA's provisions on electioneering communications would not be published before September 25, 2002 (with rules regarding coordinated expenditures and the so-called "millionaire's amendments" to follow on October 2 and 29, 2002, respectively).

Taking into consideration each of these provisions, and the overall goal of a just, expeditious and

preme Court to make a final determination of the issues by the close of its October 2002 term. Under the first track, the challenges to the soft money provisions of Title I of the Act (McConnell Amended Complaint, Counts X-XIV), together with the challenges to § 318 of the Act, prohibiting contributions by minors to candidates for federal office or to political parties (McConnell Amended Complaint, Count VIII; Echols Complaint, Count I), would be fully presented to the Court by October 7, 2002. Under the second track, the remaining challenges -- to the Act's provisions on electioneering communications, §§ 201, 203, 204 (NRA Complaint, Counts I-V; McConnell Complaint, Counts I-IV; Echols Complaint, Count I, II, IV, V), coordinated expenditures, §§ 202, 213, 214 (NRA Complaint, Count VI; McConnell Complaint, Count V; Echols Complaint, Count III), and others, §§ 304, 305, 316, 319, 504 (McConnell Complaint, Counts VI, VII, IX) -- move forward in parallel to the litigation of the soft money and minors' contribution issues, but would be presented to the Court by January 6, 2003. Both tracks envision a "paper trial" of the issues, whereby the Court resolves any material issues of disputed fact on the basis of the affidavits, depositions, and other documentary evidence submitted by the parties, without need of taking live testimony.

Pursuant to the Court's April 16 Order, the parties in all three cases (including the intervenor-movants) have met and conferred to discuss the matters identified by the Court -- intervention, consolidation, the need for and scheduling of discovery, and the submission of dispositive motions. The parties have not succeeded, however, in reaching complete agreement on these subjects, particularly on matters of scheduling, where the McConnell plaintiffs have proposed a unitary schedule calling for the submission of

separate report to the Court, and respectfully request that the Court adopt the attached schedule for the just and expeditious resolution of this enormously important litigation.

DISCUSSION

I. INTERVENTION AND CONSOLIDATION

So far as intervention and consolidation are concerned, the United States intends to move shortly to intervene in the McConnell case, where, in contrast to this action and Echols, the Attorney General has not been named as a defendant. It is also the intention of the intervenor-movants in this case and McConnell to seek intervention in the Echols case as well. Defendants believe that the three cases in question should be consolidated, and, in anticipation that additional cases challenging the constitutionality of the BCRA may be filed in the near future, defendants believe that these additional cases should also be consolidated with the cases already at bar, at least to the extent practicable. However, defendants agree with the McConnell plaintiffs that the Court should establish a deadline, May 7, 2002, after which no further challenges to the Act could be consolidated with this litigation, and no additional parties could be joined or seek to intervene. This deadline for intervention, consolidation, and joinder will avoid the situation where the filing of additional cases, or the appearance of additional parties, might disrupt the efficient progress of the litigation at an advanced stage of the proceedings.

II. DISCOVERY, SCHEDULING, AND THE SUBMISSION OF DISPOSITIVE MOTIONS

The Court should adopt the two-track schedule proposed by the defendants, because, unlike that submitted by the McConnell plaintiffs, defendants' schedule provides for a prompt resolution of the litigation

challenges in light of interpretive regulations to be promulgated by the FEC before year's end, and allows a minimally reasonable period for the development of the factual record that could prove to be crucial to this Court's, and the Supreme Court's, determination of the BCRA's constitutionality.

First, defendants' two-track schedule complies with the Act's directive for expedited consideration of these cases, considering the practical effective dates of the BCRA's substantive provisions. The non-soft money provisions whose constitutionality is to be litigated on track two, although technically effective on November 6, will have no immediate impact on regulated parties. For example, the new rules relating to electioneering communications will have no practical application until approximately 30 days prior to the next scheduled federal primary election. Thus, barring a special election (and it is highly speculative, and unlikely, that a special election would be held before January 2003), they will not operate to infringe upon any plaintiff's freedom of expression until sometime in the spring or fall of 2004. This being the case, the technical effective date of the statute creates no imperative for a decision on the constitutionality of the non-soft money issues by November 6. Accordingly, defendants' proposed schedule, allowing for the Supreme Court's determination of all the issues presented for decision in these cases by the summer of 2003, satisfies any practical requirement for expedition so far as these provisions of the Act are concerned. At the same time, defendants recognize that, following November 6, the soft money provisions (including the prohibition on contributions by minors), arguably will have an immediate practical impact on regulated parties who wish to solicit, and donate, campaign contributions for the next cycle of federal elections. Under track one,

In addition, the "trial on the papers" envisioned by defendants will best promote the goal of expedition by avoiding the pitfalls of the summary judgment approach suggested by plaintiffs. Under the McConnell plaintiffs' proposal, if the Court determines that material issues of disputed fact preclude a disposition of the case by summary judgment, then a trial must follow, involving further burden, delay, and duplication of effort, and the possibility of motions for preliminary injunctive relief if a trial cannot be completed by November 6.[1] Defendants' approach avoids this unnecessary multiplication of the proceedings while sacrificing little in terms of the Court's fact-finding, as it is difficult to foresee how the constitutionality of the BCRA could turn substantially on determinations of witnesses' credibility.

Second, defendants' proposed schedule permits the Court to take into its consideration of the BCRA's validity the regulations that the FEC has been directed to promulgate for the purpose of implementing the very provisions of the Act that are the targets of the plaintiffs' constitutional attack. In all three of the pending cases, plaintiffs have leveled charges of vagueness and overbreadth at the statute, particularly the new statutory rules regarding electioneering communications. E.g., McConnell Complaint, ¶¶ 50, 67, 68. In evaluating facial challenges based on the asserted vagueness or overbreadth of a statute, a federal court must take into consideration any limiting construction of the statute that the agency charged with its

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[1] Among the facts that in all likelihood will be hotly disputed by the parties are (i) the extent to which political parties solicit and spend soft money with the intent of evading the FECA's contribution limits, (ii) the extent to which federal candidates and office holders solicit, and political parties receive, large soft money donations with the expectation that these funds will be spent for the purpose of influencing federal

enforcement has proffered. Ward v. Rock Against Racism, 491 U.S. 781, 795-96 (1989) (citations omitted); Kolender v. Lawson, 461 U.S. 352, 355 (1983) (same). For example, under § 201 of the Act (adding 2 U.S.C. § 434(f)(3)(B)), the FEC is authorized by regulation to exempt certain communications from the BCRA's definition of electioneering communications, thus potentially narrowing the scope of those provisions to which the definition applies. Yet, whereas the FEC's soft money regulations are required under § 402(c) of the BCRA to be promulgated by June 25, 2002, well in advance of the November 6 effective date, the remaining regulations implementing the electioneering communications, coordinated expenditure, and other challenged provisions of the Act are not statutorily required to be published until December 22. Even the ambitious (but tentative) rulemaking schedule proposed by the FEC's General Counsel, see supra at 3, does not allow sufficient opportunity for the parties and the Court to assess the impact of these forthcoming regulations on the issues of vagueness, and overbreadth, in time for a ruling on the constitutionality of the non-soft money provisions by November 6. Under the second track of defendants' proposed schedule, however, the Court need not attempt to discharge its tremendous responsibility of adjudicating the BCRA's constitutionality without the benefit of the FEC regulations that may shed light on, and perhaps eliminate, the questions of vagueness and overbreadth that plaintiffs have raised.

Finally, although Congress has instructed in § 403 of the Act that the Court expedite consideration of these and other cases challenging the BCRA's constitutionality to the greatest possible extent, the legislative history of § 403 establishes that Congress did not wish to compromise informed and deliberate

> *take the time necessary to develop the factual record and hear relevant testimony, if necessary* * * * This case will be one of the most important that the Court has heard in decades, with ramifications for the future of our political system for years to come. By expediting the case, *we in no way want to rush the Court into making its decision without the benefit of a full and adequate record . . ..*

147 Cong. Rec. S3189 (March 30, 2001) (remarks of Sen. Feingold) (emphasis added). See also id. at S3189-90 (remarks of Sen. Dodd).

The development of a "full and adequate" factual record for the decision of these cases, as Congress envisioned, will entail extensive discovery between the parties, and with third parties. Although plaintiffs may characterize much of their case as a "facial" challenge to the BCRA's constitutionality, recent Supreme Court jurisprudence makes clear that, even in the context of a facial challenge, the Court will look to the record of the case for evidence substantiating the governmental interests asserted in support of legislation said to violate the First Amendment. See Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 664-68 (1994); Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 618-19 (1996) (plurality opinion) ("Colorado I"); Colorado Republican Fed. Campaign Comm. v. FEC. 96 F.3d 471, 473 (10th Cir. 1996). For example, in FEC v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431, 121 S. Ct. 2351 (2001) ("Colorado II"), the existence of "adequate evidentiary grounds" was pivotal to the Court's determination that FECA's limitations on the expenditures a political party may make in coordination with a candidate for federal office do not offend First Amendment values. Id. at 456-60; 121 S. Ct. at 2366-69.[2]

The parties and the Court must realistically anticipate wide-ranging discovery in these cases to explore the increasing and systematic reliance of political parties, corporations, and labor organizations on soft money, and counterfeit "issue" advertisements, to influence federal elections and evade the FECA's contribution and expenditure limits. For example, a meaningful defense of the rules regarding electioneering communications will require document and deposition discovery of the many organizational plaintiffs that challenge these rules (as well as third parties, such as labor unions, that also claim to engage in pure issue advocacy), in order to explore such topics as the intended purpose of their advertising in general, and of specific advertisements; the timing and targeting of their ads; and decisions to name certain candidates in their advertisements, but not others. Plaintiffs' overbreadth challenge may also require discovery from the plaintiffs and others of their past advertisements, patterns of advertising conduct, and plans for future "issue" advertising campaigns, to assess the real extent to which the BCRA's regulation of electioneering communications can be said to inhibit genuine issue advocacy, rather than thinly disguised attempts to affect the outcome of pending federal elections.

Furthermore, if any of the plaintiffs claim that the provisions relating to electioneering communications cannot constitutionally be applied to their expenditures because they satisfy the criteria established in FEC v. Massachusetts Citizens for Life ("MCFL"), 479 U.S. 238 (1986) (holding that non-profit corporations meeting certain criteria cannot constitutionally be prohibited from making independent expenditures in connection with a federal election), then discovery of each such plaintiff will be necessary to determine

disagree with the former are still likely to participate in the latter." FEC v. National Rifle Ass'n, 254 F. 3d 173, 191 (D.C. Cir. 2001). Discovery would also be necessary to determine "the absolute amount of corporate money [the plaintiff] has to spend in the political process." Id. at 192. Thus, any as-applied challenge to the BCRA's electioneering provisions will necessitate substantial discovery of the plaintiff's activities, members and finances for each election cycle that the plaintiff claims that MCFL applies.[3]

To explore the use of soft money as a tool to evade the FECA's contribution limits, defendants will require, for example, documentary and testimonial evidence from both the plaintiff parties, and state and national party organizations that have not joined the litigation, regarding their past plans for raising, and for the use of, soft money. Defendants will also require discovery of their communications with federal office-holders and candidates, party donors, and each other, regarding the solicitation, transfer, and expenditure of soft money. To assess any claim that a ban on soft money contributions will prevent political parties from amassing the financial resources necessary for effective political advocacy, defendants also must pursue discovery from the plaintiff parties, and others, concerning their current strategies and projections for fund-raising and spending under the BCRA's limitations. Defendants anticipate that much of the discovery described above will be greeted by vociferous objection from the parties and non-parties to which it is

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[3] Indeed, it appears that the facts relevant to whether the plaintiff organizations are entitled to MCFL treatment during the 2004 elections, the first in which the BCRA will apply, cannot be determined

directed, meaning that any discovery schedule ordered by this Court will have to make allowance for the resolution of numerous disputes over the proper scope, timing and extent of the discovery to be sought.

This is all so notwithstanding the existence of an extensive legislative record supporting the BCRA and its provisions. In Turner Broadcasting, the government initially relied on extensive evidence assembled by Congress as support for the so-called "must carry" provisions that were challenged there, but the Supreme Court concluded that the legislative record left a number of important factual questions unresolved, and remanded the matter to the district court for development of a more thorough factual record. 512 U.S. at 667-68. There followed "another 18 months of factual development on remand yielding a record of tens of thousands of pages of evidence," Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180, 187 (1997) (citation and internal quotations omitted), which the Court surveyed at length before concluding that the must-carry legislation passed constitutional muster. Id. at 196-211. It is therefore incumbent on the parties and the Court to invest at this stage of the proceedings the needed time and effort to develop a suitable record for review of the BCRA's constitutionality, in order to avoid the disruption and delay that would ensue if shortcomings in the record of this litigation occasioned a remand by the Supreme Court, as in Turner Broadcasting, for additional factual development.

Because the immense legislative record that Congress amassed after nearly a decade of deliberation over campaign finance reform focuses largely, if not principally, on the soft money issues, defendants estimate that the discovery and other factual development necessary to create an adequate evidentiary

allows an additional three months' time for discovery pertaining to these issues, albeit a minimally sufficient time, considering the anticipated breadth and contentiousness of the discovery to be completed, and far less time, defendants observe, than the 18 months permitted for additional fact-finding in Turner Broadcasting. By the same token, because the legislative record focuses to the greatest extent on the soft money issues, thus reducing (but not eliminating) the anticipated need for additional factual development pertaining to those issues, defendants estimate (as reflected in their proposed schedule) that sufficient discovery on the soft money issues can be completed on an even more expedited basis, in time for the Court to resolve those issues by the November 6 effective date of the soft money provisions.

CONCLUSION

For the foregoing reasons, the Court should adopt the schedule for the discovery and disposition of these actions proposed by the defendants.

Dated: May 10, 2002

Respectfully submitted,

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