TITLES III AND V: CLAIMS AGAINST THE FCC

PRESENTATION BY THE UNITED STATES DEFENDANTS

I. SECTIONS 305 AND 504 OF BCRA ARE CONSTITUTIONAL.

A. Background

Sections 305 and 504 of BCRA impose disclosure requirements with respect to certain political broadcasts on radio or television. Those requirements were enacted against the backdrop of a long history of federal regulation of political broadcasts, beginning with the Radio Act of 1927, 44 Stat. 1162, and the Communications Act of 1934, 47 U.S.C. 151 et seq. The Communications Act requires broadcast stations to provide equal opportunities for air time to legally qualified candidates for the same office, 47 U.S.C. 315(a), and to grant reasonable access to legally qualified candidates for federal office, 47 U.S.C. 312(a)(7); see CBS, Inc. v. FCC, 453 U.S. 367 (1981) (upholding "reasonable access" requirement). The Act also prohibits broadcast stations from charging candidates more for air time than "the charges made for comparable use of such station by other users," 47 U.S.C. 315(b)(2), and requires a station to sell broadcast time to a qualified candidate at the "lowest unit charge of the station for the same class and amount of time for the same period" during the period immediately prior to an election (45 days preceding a primary or 60 days preceding a general election). 47 U.S.C. 315(b)(1).[153] During other times, the station can charge no more than the rate applicable to other advertisers for "comparable use." 47 U.S.C. 315(b)(2).

These provisions, mandating reasonable access and equal opportunities for air time for legally qualified candidates and providing legally qualified candidates with access to the "lowest

[153] The "lowest unit charge" provision was added in 1972 by FECA, "which had the dual purpose of reducing the costs of campaigns and increasing candidates' access to the broadcast media." Miller v. FCC, 66 F.3d 1140, 1142 (11th Cir. 1995) (citing S. Rep. No. 92-96, at 20, reprinted in 1972 U.S.C.C.A.N. at 1774).

unit charge," further Congress's goal of promoting "full and unrestricted discussion of political issues by legally qualified candidates." Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525, 529 (1959). In conjunction with those provisions, Congress and the FCC have imposed comprehensive disclosure obligations on candidates and advocacy groups using the broadcast media for political programming. The Communications Act requires identification of the sponsors of all advertisements, including political advertisements, at the time of broadcast. See 47 U.S.C. 317; 47 C.F.R. 73.1212(e) (broadcast stations); 47 C.F.R.76.1615(a), (c) (cable television systems). The broadcast station must exercise "reasonable diligence" in making the sponsorship announcement. See 47 U.S.C. 317(c); Loveday v. FCC, 707 F.2d 1443, 1449 (D.C. Cir. 1983).

Since at least 1939, the FCC also has required broadcast stations to maintain a complete record of all requests for broadcast time made for a political candidate, including the disposition of the request and the charges made. See 47 C.F.R. 3.104 (1939); see also 47 C.F.R. 3.90(a)(3) (1939). Current regulations require stations to maintain a "political file" for public inspection, which must include "all requests for broadcast time made by or on behalf of a candidate for public office" along with the disposition of such requests and charges made or if free time is provided for use. See 47 C.F.R. 73.1943 (broadcast stations); 47 C.F.R.76.1701 (cable television systems).

In addition, since 1944, the FCC has imposed detailed requirements for disclosure of sponsorship of paid broadcasts on broadcast stations. See Loveday, 707 F.2d at 1453-54. Any paid broadcast must include an announcement disclosing "fully and fairly . . . the true identity of" the sponsor. 47 C.F.R. 73.1212(e); see also 47 C.F.R.1615(d) (disclosure of "true identity" of sponsor on cable television). Where the paid broadcast is "political matter or matter involving the discussion of a controversial issue of public importance," and a corporation or other entity is paying for the

matter, a list of the entity's chief executive officers or members of the executive committee or board of directors must be made available for public inspection. 47 C.F.R. 73.1212(e); 47 C.F.R. 76.1701(d) (cable television). Such lists must be available for public inspection for two years. Id.

The FCC has issued legal guidance on political broadcasting issues, The Law of Political Broadcasting and Cablecasting: A Political Primer, 100 F.C.C.2d 1476 (1984) ("Political Primer"), and has codified its political programming policies, In re Codification of the Commission's Political Programming Policies, Report and Order, 7 F.C.C.R. 678 (1991), on reconsideration, 7 F.C.C.R. 4611 (1992). The FCC is available to answer inquiries from broadcast stations, candidates, and political parties about their rights and obligations, and it is not uncommon for the agency to mediate disputes that arise among stations, candidates, and political parties.

Sections 305 and 504 of BCRA amend Section 315 of the Communications Act to require disclosures about the source and sponsorship of political messages broadcast on television or radio. Section 305 places restrictions on a candidate's eligibility to obtain the "lowest unit charge" under 47 U.S.C. 315(b). The provision requires a candidate to provide written certification to a broadcast station that neither the candidate nor any authorized committee of the candidate will make any "direct reference to another candidate for the same office, in any broadcast" unless the broadcast satisfies certain requirements. For a television broadcast, the statute requires, for at least four seconds at the end, a "clearly identifiable photographic or similar image" of the candidate, and "a clearly readable printed statement, identifying the candidate and stating that the candidate has approved the broadcast and that the candidate's authorized committee paid for the broadcast." For a radio broadcast, the statute requires "a personal audio statement by the candidate that identifies the

candidate, the office the candidate is seeking, and indicates that the candidate has approved the broadcast."

Section 305 leaves candidates "totally free . . . to say anything they want about their opponent." 147 Cong Rec. S2693 (Mar. 22, 2001) (Sen. Wyden). It only modifies the conditions under which federal law entitles a candidate to obtain air time at the "lowest unit charge." If a candidate mentions his or her opponent in a broadcast, the candidate cannot qualify for the "lowest unit charge" unless he or she states approval of the broadcast in accordance with the requirements of Section 305. See 147 Cong. Rec. S2694 (Mar. 22, 2001) (Sen. Levin) ("[I]f [federal candidates] want [the] lowest unit rate . . . if they want to take advantage of that benefit which is conferred . . . they [must] at least put their name and their face at the end of the ad they are funding."); see also 148 Cong. Rec. S2174-02 (Mar. 20, 2002) (Sen. Wyden).

Section 504 of BCRA requires a broadcast station to maintain and make publicly available a "political file" containing a complete record of requests to purchase broadcast time "made by or on behalf of a legally qualified candidate for public office" or to broadcast a "message relating to any political matter of national importance," including "a national legislative issue of public importance." The record created by the licensee must include "the name of the person purchasing the time, the name, address, and phone number of a contact person for such person, and a list of the chief executive officers or members of the executive committee or of the board of directors of such person." The information must be placed in the political file and retained for at least two years.

B. Plaintiffs Lack Standing to Challenge the Constitutionality of Section 305, and Present No Ripe Controversy with Respect to That Provision.

Plaintiffs' challenge to Section 305 of BCRA is not justiciable. Only the Second Amended McConnell Complaint, ¶¶ 94-96, includes a challenge to that provision and, because Section 305 applies exclusively to candidates for federal elected office, Senator McConnell and Representative Pence are the only plaintiffs conceivably affected by the provision. But neither Senator McConnell nor Representative Pence has alleged any "actual or imminent" injury from Section 305. In the absence of a concrete and particularized injury, plaintiffs lack Article III standing. See Lujan, 504 U.S. at 560-61.

Plaintiffs bear the burden to demonstrate standing and, at this stage of the case, to set forth "specific facts," id., to support their claim of "specific present objective harm or a threat of specific future harm," Laird v. Tatum, 408 U.S. 1, 14 (1972). In their challenge to Section 305, plaintiffs have wholly failed to discharge their burden.

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— Neither Senator McConnell

nor Representative Pence has stated whether they intend to run ads referring to their possible opponents in future elections.

Even if plaintiffs had made a credible showing of future injury, any injury from Section 305 would not be sufficiently imminent to satisfy standing or ripeness requirements. Senator McConnell is a candidate for reelection in November 2002, before BCRA takes effect. Assuming that he is reelected, Senator McConnell will not face another senatorial campaign for six years. Thus, the earliest that Senator McConnell could experience any effect from Section 305 is before the Republican primary in 2008, when the "lowest unit charge" would be available under 47 U.S.C. 315(b). And Section 305 could cause a legally cognizable injury to Senator McConnell only if he intends to broadcast an advertisement that refers to his opponent without the requisite acknowledgment. Similarly, the earliest that Section 305 could apply to Representative Pence is during his primary race in 2004 under the same caveats. In these circumstances, plaintiffs' challenge to Section 305 is premature. See United Public Workers v. Mitchell, 330 U.S. 75, 90-91 (1947).

C. Sections 305 and 504 of BCRA Satisfy the First Amendment.

In raising a facial challenge to Sections 305 and 504, plaintiffs bear "a heavy burden," Rust v. Sullivan, 500 U.S. 173, 183 (1991); facial invalidation "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort." Broadrick, 413 U.S. at 613. As explained below, the disclosure requirements under Sections 305 and 504 are fully consistent with the First Amendment.

The Supreme Court has long recognized the important role of public disclosure in preventing fraud and corruption. The Court in Buckley upheld FECA's reporting and disclosure

requirements on political committees and federal candidates and on persons acting independently of a federal candidate or his committee. The Court explained that the Government has a substantial interest in providing the electorate with information regarding the sources of political campaign funds and how candidates spend those funds. Such information allows voters "to place[] each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches." 424 U.S. at 67. In addition, "[t]he sources of a candidate's financial support . . . alert the voters to the interest to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." Id. Disclosure also deters "actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures to the light of publicity." Id.

Similarly, the Court in Buckley determined that the disclosure of independent expenditures furthers a "substantial governmental interest" in increasing "the fund of information concerning those who support the candidates," and "help[ing] voters to define more of the candidates' constituencies." Id. at 81. Such disclosure "shed[s] the light of publicity on spending that is unambiguously campaign related but [that] would not otherwise be reported." Id.

Two years later, in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), the Supreme Court recognized that mandatory disclosure of the source of corporate advertising on political issues served the Government's interest in allowing "the people . . . to evaluate the arguments to which they are being subjected." Id. at 792 n.32 (citing Buckley, 424 U.S. at 66-67). The Court reasoned that "[c]orporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible" and that the public is assisted in evaluating the relative merits of conflicting arguments by considering "the source and credibility of the advocate." Id. The

Court also reiterated its pronouncement in Buckley that disclosing sources of communication has the "prophylactic effect" of preventing corruption or the appearance of corruption. Id.; see also Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 202-03 (1999) (approving state-law provisions requiring disclosure of names of initiative sponsors and amounts spent); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 298-99 (1981) (recognizing municipality's legitimate goal of "identifying the sources of support for and opposition to ballot measures").

Sections 305 and 504 readily withstand scrutiny under Buckley v. Valeo and its progeny. By requiring disclosure of whether a candidate approved a broadcast that refers to his opponent, Section 305 provides voters with important additional information to consider in evaluating that candidate. And requiring the disclosure to be made with the candidate's face and voice ensures that this vital information is transmitted to viewers and listeners in a way that sufficiently distinguishes it from the remaining parts of the broadcast so that the information is communicated effectively.[154/] Section 504 also provides public access to important information about political broadcasts. Evidence suggests that voters currently have difficulty identifying the true sponsors of issue ads on television or radio, and determining whether those sponsors are related to a candidate's campaign. Organizations that sponsor issue ads frequently are front groups for trade associations, labor unions, and wealthy individuals. This lack of disclosure creates greater opportunities for political corruption. See Magleby Expert Rep. at 18-19, 28-30; Krasno & Sorauf Expert Rep. at 71-72, 73-74 ("Secrecy is one of the outstanding characteristics of issue ads, especially those financed by interest groups. ... This secrecy, by itself, creates enormous opportunities for wrongdoing, for favors

[154/] This is not the first time that standards of clarity have been imposed on sponsors of political broadcasts. See 47 C.F.R. 73.1212(a)(2)(ii) ("In the case of any television political advertisement concerning candidates for public office, the sponsor shall be identified with letters equal to or greater than four percent of the vertical picture height that air for not less than four seconds.")

to be exchanged between issue advocates and public officials."). Thus, Sections 305 and 504 prevent the appearance and reality of corruption.

Not only do Sections 305 and 504 further an important government interest, but their scope is narrow. Both provisions apply only to television and radio broadcast stations and cable television systems. Courts have upheld more intrusive regulation of those media than any other form of communication. See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969); NBC v. United States, 319 U.S. 190 (1943); compare Talley v. California, 362 U.S. 60 (1960) (ban on anonymous leaflets invalid) and Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating state law providing right of reply to political candidate attacked by newspaper) with Red Lion, 395 U.S. at 393-94 (upholding FCC's Fairness Doctrine and implementing rules); CBS v. FCC, 453 U.S. 367 (1981) (upholding statute providing federal political candidates right of reasonable access to broadcast stations and FCC's implementation of statute); Turner Broad., 512 U.S. at 653-57 (rejecting First Amendment challenge to cable television "must-carry" regulations required by statute and noting that attempted analogy to Tornillo ignored "important technological differences between newspapers and cable television [systems]").

Indeed, the federal courts have upheld significant regulation of political discourse on broadcast media that result in far greater intrusions on broadcasters than the requirements of Sections 305 and 504. The Supreme Court, for example, has rejected a First Amendment challenge to 47 U.S.C. 312(a)(7), which requires broadcasters to provide reasonable access for federal candidates. See CBS, 453 U.S. at 396-97. The Court also sustained the FCC's Fairness Doctrine, which required that broadcast stations air discussion of controversial public issues and provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues. See Red Lion, 395 U.S. at

369, 389-90.[155] And the D.C. Circuit has upheld 47 U.S.C. 315(a), which requires equal opportunities for broadcast time for all legally qualified candidates where time is made available to any candidates for the office. Branch v. FCC, 824 F.2d 37, 48-50 (D.C. Cir. 1987).

Moreover, unlike political discourse in other fora, political broadcasts have traditionally been subject to significant disclosure requirements. As explained above, Congress has long required the disclosure of those who sponsor paid broadcasts, including political advertisements. See 47 U.S.C. 317. And the FCC has ruled that issue ads that do not disclose true sponsors violate its sponsorship identification rules, and the agency has cautioned stations to exercise reasonable diligence in determining the true sponsor of the ad and displaying the sponsor on the ad. See Trumper Comm., 11 F.C.C.R. 20,415, 1996 WL 635821 (Oct. 29, 1996). Moreover, the Fifth Circuit has rejected a First Amendment challenge to a state statute requiring sponsors of political broadcast advertisements to identify themselves. See KVUE, Inc. v. Moore, 709 F.2d 922, 937 (5th Cir. 1983), aff'd, 465 U.S. 1092 (1984).

Sections 305 and 504 are no different for First Amendment purposes than these restrictions that the courts have upheld. Section 305 applies only to advertisements by federal candidates; it is limited to the period immediately before an election, when the Communications Act requires broadcasters to offer the "lowest unit charge" benefit to federal candidates, see 47 U.S.C. 315(b); 47 C.F.R. 73.1942 (broadcast stations), 76.206 (cable television systems); and it applies only when the candidate seeks the "lowest unit charge" benefit. Much like the required statement of sponsorship under prior law, section 305 merely requires that, as a condition of receiving the benefit of "lowest

[155] The FCC eliminated the Fairness Doctrine in 1987. See Syracuse Peace Council, 2 FCC Rcd 5043 (1987), recon. denied, 3 F.C.C. 2d 2035 (1988). The D.C. Circuit affirmed the Commission's determination that the Fairness Doctrine no longer served the public interest. See Syracuse Peace Council v. FCC, 867 F.2d 654, 669 (D.C. Cir. 1989).

unit charge," candidates state their approval of broadcasts referring to their opponent. This ensures that the federal benefit itself is not used to subsidize speech that might mislead the public. Cf. Regan v. TWR, 461 U.S. 540, 545-46, 547-51 (1983). Indeed, even outside the broadcasting context, the Supreme Court has upheld a disclosure provision analogous to Section 305. In Lewis Pub. Co. v. Morgan, 229 U.S. 288, 316 (1913), the Court rejected a First Amendment challenge to a federal statute that requires newspapers to publish and provide to the Postmaster General a statement of the names and address of their editors, publishers, business managers, and owners in order to qualify for preferential postage rates. See 39 U.S.C. 3685.

Section 504 is also narrowly targeted to ensure an informed public. As the legislative record demonstrates, the sponsors of a wide range of political advertisements broadcast on radio and television have kept their identities secret from the public. See supra at 42-43, 46-47. Section 504 requires public disclosure of those sponsors, a requirement that is not meaningfully different for First Amendment purposes from preexisting FCC regulations that compel disclosure of the sponsors of broadcasts concerning "controversial issue[s] of public importance." See 47 C.F.R. 73.1212(e); see also 47 C.F.R. 76.1701(d) (cable television). Broadcasters have complied with this longstanding provision without difficulty. See National Association of Broadcasters, Political Broadcast Catechism (2000). Just as reasonable access, equal opportunity for air time, and sponsorship identification have withstood First Amendment scrutiny, Sections 305 and 504, which reach no more broadly, also pass constitutional muster.

Plaintiffs' contention that Section 504 is unconstitutionally vague and overbroad lacks merit. The statutory text describes in explicit detail the information that must be included in the political file, and broadcasters should have no difficulty complying with it. Indeed, the provision is similar to

existing requirements. As explained above, stations are already required to maintain a "political file" for public inspection that includes "all requests for broadcast time made by or on behalf of a candidate for public office." 47 C.F.R. 73.1943, 76.1701. And paid broadcasts must already "fully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or other entity by whom or on whose behalf such payment is made." 47 C.F.R. 73.1212(e), 76.1615(d).

Moreover, contrary to plaintiff's argument, section 504's reference to broadcasts concerning "political matter[s] of national importance" is not unduly vague. The Communications Act and the FCC's implementing regulations are replete with language that is at least as broad as the text of Section 504. The Act directs the FCC to consider the "public interest" in granting licenses. See 47 U.S.C. 307(a), 309(a). The Act also directs broadcasters to operate "in the public interest" and to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." See 47 U.S.C. 315(a). The Act authorizes the FCC to require additional sponsorship announcements for "any political program or any program involving the discussion of any controversial issue." 47 U.S.C. 317(a)(2). Disclosure obligations are triggered by the transmission of "any political broadcast matter or any broadcast matter involving the discussion of a controversial issue of public importance." See 47 C.F.R. 73.1212(d),(e) ("station shall . . . require that a list of the chief executive officers or members of the executive committee or of the board of directors . . . shall be made available for public inspection"); see also 47 C.F.R. 76.1701(d) (disclosure where cablecasting material is "a political matter or matter involving the discussion of a controversial issue of public importance"). Moreover, as described above, the FCC routinely assists

broadcasters, candidates, and others with questions about political broadcasts on radio or television and about record-keeping by broadcast stations and cable systems.

CONCLUSION

For the foregoing reasons, the motion of the Governmental Defendants and the Defendant-Intervenors for judgment should be granted, and plaintiffs' claims dismissed, with prejudice.