IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF BROADCASTERS, 1771 N Street, N.W. Washington, D.C. 20036, Plaintiff, - against - **FEDERAL ELECTION COMMISSION,** 999 E Street, N.W. Washington, D.C. 20463, and **FEDERAL COMMUNICATIONS COMMISSION,** 445 Twelfth Street, S.W., Washington, D.C. 20554, Defendants.	)	Case No. ____________

COMPLAINT OF NATIONAL ASSOCIATION OF BROADCASTERS

Plaintiff National Association of Broadcasters brings this action for declaratory and injunctive relief, alleging as follows:

INTRODUCTION

1. This is an action challenging provisions of the Bipartisan Campaign Reform Act of 2002, Public Law No. 107-155 (BCRA) as violating the United States Constitution. The BCRA limits and criminalizes speech and related activities touching on the widest range of public issues. In doing so, it dramatically extends the scope of the Federal Election Campaign Act of 1971 (FECA) and the Communications Act of 1934 ("Communications Act") in a manner that violates several provisions of the Constitution.

2. Central to the BCRA is its effort to regulate and, in good part, to criminalize core political speech set forth in political advertising that is broadcast on television and radio. When such speech, long and correctly viewed as entitled to the highest degree of First Amendment protection, is broadcast in the form of an "issue advertisement" on television or radio and merely mentions a federal officeholder or candidate in the months leading up to an election, it can be a crime, with penalties of up to five years in prison. When the BCRA becomes effective, criminal punishments can be meted out to those who submit such advertising to broadcasters simply for urging an identified Member of Congress to vote yes or no on pending proposals to raise the minimum wage, to expand the federal hate crimes law, to regulate speech on the Internet, or to abolish the Electoral College and provide for direct popular election of the President.

3. The scope of the statutory bar is vast. While the blackout periods referred to in the statute refer to time periods of 60 days (for general, special or runoff elections) and 30 days (for primaries, preference elections, conventions and caucuses), those periods can eat up much of the year before the nomination and election of candidates. With regard to presidential nominations, for example, the blackout period will extend for nearly a full year, since primaries and caucuses are generally conducted between January and June of an election year, each one of which will trigger a 30-day nationwide blackout, then followed by the 60-day blackout before the election itself. For the entire lengthy period in which the presidential nominations are being determined, therefore, the blackout will bar political advertising praising or condemning the leading figures in American political life, including a sitting President.

4. By creating what is nothing less than a new crime of incitement to political action, the BCRA contravenes more than a quarter century of unbroken Supreme Court and lower court precedent. In *Buckley v. Valeo,* for example, the Supreme Court held that the federal government could regulate spending for purposes of engaging in core political speech only when the speech "in express terms advocate[s] the election or defeat of a clearly identified candidate for federal office."[a] By purporting to regulate spending for core political speech when such speech merely "refers to a clearly identified Federal candidate," the BCRA ignores *Buckley*'s express holding,

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a 424 U.S. 1, 44 (1976).

sweeps well beyond the permissible scope of regulation under the First Amendment, and criminalizes vast quantities of fully protected speech that is broadcast on television and radio. The alternative definition offered in the statute of what may *not* be contained in political advertisements broadcast on television and radio is also flatly contrary to the terms of *Buckley v. Valeo*, and later governing case law.

5. The BCRA not only criminalizes constitutionally protected speech broadcast on television and radio but does so in a particularly constitutionally destructive manner, barring speech on television and radio that the statute permits to be published in the print media. Congress lacks power under the First Amendment to bar such speech in any medium of communication and cannot, in any event, selectively choose to bar it in one form of media while allowing it in another.

BACKGROUND

6. On February 14, 2002, and March 20, 2002, the House and Senate passed the BCRA. On March 27, 2002, the President signed the BCRA into law.

7. Title II, entitled "Noncandidate Campaign Expenditures," prohibits corporations, labor unions and others from using funds not raised subject to the FECA's limitations to pay for so-called "electioneering communication" — that is, for broadcast, cable, or satellite communications that refer to a clearly identified federal candidate and are made within sixty days of a general election or thirty days of a primary. The BCRA provides a "fall-back" definition of "electioneering

communications" in the event that the primary definition is held to be unconstitutional. Notwithstanding rulings of the United States Supreme Court in *Buckley v. Valeo*, and later cases that expressly afford First Amendment protection to issue advertisements unless they contain express advocacy of the election of a candidate for federal office, both definitions seek to criminalize communications broadcast on television and radio containing issue advocacy which does not expressly advocate the election or defeat of clearly identified federal candidates.

8. Title V, titled "Additional Disclosure Provisions," imposes additional disclosure obligations, including burdensome disclosure obligations on broadcasters with respect to political advertisements.

9. The BCRA dramatically enhances the criminal penalties for violations of the FECA. It increases the maximum prison sentence from one to five years and eliminates language capping the amount of any fine. The BCRA also lengthens the limitations period and orders the United States Sentencing Commission to promulgate sentencing guidelines for FECA violations.

10. The BCRA becomes effective on November 6, 2002. Recognizing the serious constitutional questions the BCRA raises, the law provides for immediate judicial review by a three-judge panel of this court of any constitutional action for declaratory or injunctive relief, with expedited appellate review by the Supreme Court of the United States.

JURISDICTION AND VENUE

11. 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. § 139(e) and section 403 of the BCRA.

12. Plaintiff National Association of Broadcasters ("NAB") is a non-profit, incorporated trade association of radio and television stations and broadcasting networks. NAB serves and represents the American broadcasting industry and has approximately 5800 members throughout the country. All of NAB's voting members are broadcast licensees within the meaning of the Communications Act. NAB members regularly broadcast a substantial amount of advertisements taking positions on public issues, including ones defined as "electioneering communications" under section 201(a) of the BCRA. NAB members will be directly and adversely impacted by the unconstitutional provisions of the BCRA both economically and through the substantially increased reporting requirements of that Act.

13. Defendants Federal Election Commission ("FEC") and Federal Communications Commission ("FEC") are government agencies charged with enforcing relevant provisions of the BCRA.

COUNT I

Broadcast Censorship Provisions That Criminalize "Electioneering Communications" of Corporations and Labor Unions

14. Plaintiff realleges and incorporates by reference all the allegations contained in all preceding paragraphs.

15. Section 201(a) of the BCRA adds new section 304(f) of the FECA, which defines an "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."

16. Anticipating that this definition of "electioneering communication" is likely to be declared unconstitutional, section 201(a) provides a fall-back definition. It defines "electioneering communication" as "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."

17. Section 203(a) of the BCRA amends section 316(b)(2) of the FECA to prohibit corporations and labor unions from engaging in "electioneering communications," that are, *inter alia,* disseminated by any broadcaster. Section 203(b) of the BCRA adds new section 316(c)(1) to the FECA, which prohibits any other persons from engaging in "electioneering communications" using funds donated by corporations or labor unions.

18. By prohibiting or limiting speech as set forth above that is broadcast, notwithstanding that the speech does *not* expressly advocate the election or defeat of a clearly identified candidate, either under the original definition or the fall-back definition of "electioneering communication", sections 201 and 203 burden the right of free speech in violation of the First Amendment.

19. By specifying in so vague and overbroad a manner what speech is prohibited or limited, sections 201 and 203 violate the First Amendment and the Due Process Clause of the Fifth Amendment.

COUNT II

Broadcast Censorship Provisions That Criminalize "Electioneering Communications" of Non-Profit and Political Organizations

20. Plaintiff realleges and incorporates by reference all the allegations contained in all preceding paragraphs.

21. Section 203(a) of the BCRA bars incorporated non-profit organizations, as defined by I.R.C. § 501(c)(4), and political organizations, as defined by I.R.C. § 527, from making disbursements for "electioneering communications," just as it bars corporations and labor unions from doing so. Section 203(b) contains a narrow exception seemingly allowing section 501(c)(4) and section 527 organizations to make "electioneering communications" if the communications are paid for exclusively out of funds provided directly by individuals. However, section 204 of the BCRA, adding section 316(c)(6) to the FECA, then appears to shut the door on this exception, stating that "electioneering communications" (which, according to the primary definition in section 201, must be "targeted") cannot be "targeted," or broadcast to voters for the named candidate. Like corporations and labor unions, therefore, section 501(c)(4) and section 527 organizations appear to be precluded altogether by the BCRA from broadcasting "electioneering communications."

22. Because sections 201, 203 and 204 bar or severely restrict section 501(c)(4) and section 527 organizations from engaging in speech on television and radio that does not expressly advocate the election or defeat of a clearly identified candidate, they burden the right of free speech in violation of the First Amendment.

COUNT III

Censorship Provisions That Distinguish Between Materials That Are Broadcast and Those That Are Printed

23. Plaintiff realleges and incorporates by reference all the allegations contained in all preceding paragraphs.

24. By limiting disbursements for broadcast, cable, and satellite communications but allowing disbursements for other forms of communications, including the print press, sections 201 and 203 violate the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment.

COUNT IV

Compelled Disclosure of Requests To Broadcast Certain Communications

25. Plaintiff realleges and incorporates by reference all the allegations contained in all preceding paragraphs.

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

27. Section 504 requires such record-keeping 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 (among other materials) the name of the person making the request, a list of its chief executive officers and members of its executive committee or board of directors, the date and time of the communication; the rate charged; and the issue to which the communication “refers,” as the case may be.

28. By requiring these disclosures, Section 504 burdens the rights of free speech of broadcast licensees in violation of the First Amendment.

29. 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.

PRAYER FOR RELIEF

Wherefore, plaintiff prays for the following relief:

1. an order and judgment declaring the aforementioned provisions of the BCRA unconstitutional;

2. an order and judgment enjoining defendants from enforcing the aforementioned provisions of the BCRA;

3. costs and attorneys' fees pursuant to any applicable statute or authority; and

4. any other relief as this Court in its discretion deems just and appropriate.

Dated: April 22, 2002
Washington, D.C.

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