UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Defendants.

Civ. No. 02-582
(CKK, KLH, RJL)

NATIONAL RIFLE ASSOCIATION, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Defendants.

Civ. No. 02-581
(CKK, KLH, RJL)

EMILY ECHOLS, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Defendants.

Civ. No. 02-633
(CKK, KLH, RJL)

(N)

15.

CHAMBER OF COMMERCE OF THE UNITED STATES, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Defendants.

Civ. No. 02-751 (CKK, KLH, RJL)

NATIONAL ASSOCIATION OF BROADCASTERS,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Defendants.

Civ. No. 02-753 (CKK, KLH, RJL)

AFL-CIO, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Defendants.

Civ. No. 02-754 (CKK, KLH, RJL)

CONGRESSMAN RON PAUL, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Defendants.

Civ. No. 02-781
(CKK, KLH, RJL)

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civ. No. 02-874
(CKK, KLH, RJL)

CALIFORNIA DEMOCRATIC PARTY, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Defendants.

Civ. No. 02-875
(CKK, KLH, RJL)

VICTORIA JACKSON GRAY ADAMS, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civ. No. 02-877
(CKK, KLH, RJL)

BENNIE G. THOMPSON, *et al.*,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Defendants.

Civ. No. 02-881
(CKK, KLH, RJL)

ORDER DENYING MOTION OF CALIFORNIA DEMOCRATIC PARTY AND CALIFORNIA REPUBLICAN PARTY TO COMPEL RESPONSES TO REQUESTS FOR ADMISSIONS

(September 25, 2002)

The California Democratic Party and California Republican Party (collectively, CDP) move the Court to compel the Department of Justice and the Federal Election Commission (collectively, defendants) to respond to the requests for admissions that CDP served on August 26, 2002. The defendants have refused to respond to the requests and

oppose the motion because, they contend, the requests impermissibly seek the defendants' legal interpretations of the Bipartisan Campaign Reform Act (BCRA) "based on hypothetical facts." Opp'n at 7 (capitalization altered). We agree and therefore deny the CDP's motion *in toto*.

Although the CDP correctly points out that the Federal Rules of Civil Procedure permit requests for admission "of the truth of any matters . . . that relate to statements or opinions of fact *or of the application of law to fact*," Fed. R. Civ. P. 36(a) (emphasis added), it fails to acknowledge the simple point that each of its 28 requests asks the defendants (1) to assume a *post*-BCRA election scenario that of course has not yet occurred and is therefore, by definition, hypothetical; and (2) to draw a legal conclusion therefrom (e.g., that particular conduct will constitute "Federal election activity" within the meaning and reach of BCRA section 101 or that, after it goes into effect, BCRA will restrict party funding of a certain advertisement).[1] As the defendants demonstrate, *see* Opp'n at 4-5, 7-

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[1] Request number 1 is typical of the remarkably uniform requests that follow it:

> [Request] No. 1 refers to [an advertisement shown in] Exhibit A ("Don't Let These Bills Become Law . . . . Byron Sher for State Senate"). If the California Democratic Party wishes to do a mass mailing of [the advertisement] by mail in support of Byron Sher for State Senate after BCRA goes into effect, admit the following:
>
> (a) If the mailer is done in connection with a special election at which no federal candidates will appear, it can be paid for completely with non-federal money subject only to California law;
>
> (b) If the exact same mailer is done, but the special election is held in conjunction with the State primary at which federal candidates will appear, this mailer will be considered federal election activity and

9, the case law interpreting Rule 36 manifests that requests seeking legal conclusions—especially those based entirely upon events that have not yet occurred[2]—fall beyond the pale of the Rule and impose obligations beyond its scope. *See, e.g.*, *Abbott v. United States*, 177 F.R.D. 92, 93 (N.D.N.Y. 1997) (attempt to solicit response to legal question "unconnected to the facts of the case at bar" improper under Rule 36); *Fulhorst v. United Techs. Auto., Inc.*, 1997 WL 873548, at *3 (D. Del. Nov. 17, 1997) ("Defendant asks Plaintiff to assume that [a] device is used in a certain manner, and then asks Plaintiff to admit that the device, if used in such a manner, infringes on Plaintiff's patent. . . . Defendant is [thereby] improperly asking Plaintiff to draw a legal conclusion, which is not permitted by Rule 36."); *Golden Valley Microwave Foods, Inc. v. Weaver*

> must be paid for either completely with federal contributions or with a combination [of] federal and Levin Amendment contributions.

Pls. First Set of Reqs. for Admis. at 5.

[2] The CDP insists that its requests do not reference "obscure . . . situations made up to test the limits of the BCRA" but rather "pieces of mail actually sent, 'doorhangers' actually distributed to voters, phone scripts actually used, advertisements actually run in newspapers, or on radio or television, contributions actually made, etc." Mot. at 5; *see also id.* at 5 n.4. The CDP's assertion, even if correct, is beside the point. Although the requests refer to events that might recur—that is, they refer to pieces of mail that may be sent, advertisements that might be run and contributions that might be made *after* BCRA takes effect—the events cannot be said to constitute "facts" because they have not yet occurred (BCRA does not take effect until November 6). Indeed, to the extent the plaintiffs' constitutional challenges to BCRA are facial, we do not have before us in these consolidated actions *any* "facts" in the traditional sense.

Popcorn Co., 130 F.R.D. 92, 96 (N.D. Ind. 1996) (requests seeking "bald legal conclusion[s]" invalid under Rule 36).

Accordingly, it is this 25th day of September, 2002 hereby **ORDERED** that the CDP's motion to compel responses to its requests for admissions [#38] is **DENIED**.[3]

SO ORDERED.

Karen LeCraft Henderson
KAREN LECRAFT HENDERSON
United States Circuit Judge

Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
United States District Judge

Richard J. Leon
RICHARD J. LEON
United States District Judge

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[3] Defendant Department of Justice further objects to the CDP's requests for admissions on the grounds that "[they] seek information protected by the work product doctrine or privilege[,] . . . they do not narrow relevant issues in this case[,] . . . they go beyond the scope of the Court's Order of August 15, 2002[,] and . . . they are unduly burdensome as a whole." Opp'n at 11 n.4; *see* Objections of United States Department of Justice to Pls.' First Set of Reqs. for Admis. at 2. Because we deny the motion on the ground that the requests impermissibly seek legal interpretations based upon hypothetical facts, we need not address the merits of any other objections.