No. 02-1676

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, ET AL., APPELLANTS

v.

SENATOR MITCH MCCONNELL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION OF APPELLEE NATIONAL ASSOCIATION OF BROADCASTERS FOR SUMMARY AFFIRMANCE

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Section 504 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, requires a broadcast station to maintain and make publicly available a complete record of requests to purchase broadcast time "made by or on behalf of a legally qualified candidate for public office." BCRA § 504, 116 Stat. 115 (adding 47 U.S.C. 315(e)(1)(A)). Section 504 also requires disclosure of requests to purchase broadcast time in order to "communicate[] a message relating to any political matter of national importance," including "a legally qualified candidate," "any election to Federal office," or "a national legislative issue of public importance." BCRA § 504, 116 Stat. 115 (adding 47 U.S.C. 315(e)(1)(B)). The record created by the licensee must include, *inter alia*, "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." BCRA § 504, 116 Stat. 116 (adding 47 U.S.C. 315(e)(2)(G)).

Appellee National Association of Broadcasters has moved for summary affirmance of the three-judge district court's holding that Section 504 is unconstitutional. That motion should be denied. Section 504 is a valid means of ensuring that the public has access to adequate information about those who seek to utilize broadcast and cable media to disseminate information about political matters of national importance. Federal Communications Commission (FCC) regulations have long required disclosures similar to those mandated by Section 504. Appellee cites no decision of any court holding comparable requirements to be unconstitutional. In any event, summary affirmance is inappropriate where, as here, a lower court has declared a provision of an Act of Congress to be invalid.

A. Section 504 Is Not Unconstitutionally Vague

Appellee contends that Section 504 "suffers from unconstitutional vagueness" because the statutory phrase "any political matter of national importance" (BCRA § 504, 116 Stat. 115 (new 47 U.S.C. 315(e)(1)(B))) is "wholly ambiguous." Mot. to Aff. 9; see *id.* at 5, 9-10. For two independent reasons, appellee's vagueness argument provides no basis for affirmance of the district court's decision holding Section 504 to be facially invalid.

1. Appellee does not contend that broadcasters will have difficulty identifying requests to purchase broadcast time that are made "by or on behalf of a legally

qualified candidate for public office." BCRA § 504, 116 Stat. 115 (adding 47 U.S.C. 315(e)(1)(A)). Nor does appellee assert that Section 504 is impermissibly vague insofar as it applies to requests for broadcast time to communicate messages regarding "a legally qualified candidate" or "any election to Federal office." BCRA § 504, 116 Stat. 115 (adding 47 U.S.C. 315(e)(1)(B)(i) and (ii)). As applied to those categories of requests to purchase broadcast time, Section 504 would be valid and could serve its intended purposes even if this Court found the phrase "any political matter of national importance" to be impermissibly vague. See BCRA § 401, 116 Stat. 112 (severability provision). Appellee's vagueness argument therefore provides no basis for affirming the judgment of the district court, which struck down Section 504 in its entirety.

2. In any event, the term "any political matter of national importance" is not "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997). Longstanding FCC regulations impose disclosure requirements with respect to the sponsorship of broadcast matter "involving the discussion of a controversial issue of public importance." 47 C.F.R. 73.1212(d) and (e); see 47 C.F.R. 76.1701(d) (same standard used in disclosure regulation governing cablecasting). Essentially the same standard has appeared in the FCC's sponsorship regulations since 1944, see *Loveday* v. *FCC*, 707 F.2d 1443, 1453-1454 & n.15 (D.C. Cir.), cert. denied, 464 U.S. 1008 (1983), and does not appear to have been the subject of any prior vagueness challenge. The apparent absence of significant uncertainty regarding the application of those FCC rules strongly suggests that the broadcasting industry has achieved a workable understanding of

the regulatory language. There is no reason to suppose that the phrase "any political matter of national importance" will be more difficult to comprehend.

In addition, the FCC is available to respond to inquiries from broadcast stations, candidates, and political parties about their rights and obligations under Section 504. Even if the application of Section 504 to particular communications is occasionally unclear, broadcasters may simply err on the side of caution and require that the specified information be provided, without subjecting either themselves or persons who seek to purchase broadcast time to substantial burdens. There is consequently no basis for concluding that Section 504 is unconstitutionally vague on its face.

B. Section 504 Assists The Public Both In Evaluating Political Advertising And In Assessing The Conduct Of Broadcasters, And It Is Not Significantly More Burdensome Than Longstanding And Unchallenged FCC Regulations

The district court struck down the record-keeping and disclosure requirements imposed upon broadcast stations by Section 504. See Per Curiam op. 11-12, 15. The panel members found that the government had failed to demonstrate a public interest sufficient to justify the burdens that Section 504 places upon broadcasters and on those who purchase political advertisements. See Henderson op. 234-238; Kollar-Kotelly op. 614; Leon op. 111-115. Appellee contends that "laws compelling disclosure of campaign information must be reviewed under 'exacting scrutiny,'" Mot. to Aff. 6 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 66 (1976) (per curiam)), and that the government's asserted interests "cannot justify such deep intrusions into the rights of broadcasters and political speakers" as are imposed by

Section 504, Mot. to Aff. 7. Those arguments lack merit.

1. The public and governmental interests served by Section 504 are apparent and substantial. Broadcast and cable communications are intended to reach a mass audience. Identification of the persons actually responsible for those communications can assist the public in evaluating the message transmitted. Although that interest is likely at its height when the message directly relates to "a legally qualified candidate" or an "election to Federal office" (47 U.S.C. 315(e)(1)(B)(i) and (ii) (added by BCRA § 504)), the FCC's longstanding regulations reflect an appropriate recognition that the legitimate public interest in disclosure is not exhausted by information that directly relates to a candidate or candidate election. Cf. *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 792 n.32 (1978) (State may require disclosure of sponsor of corporate advertisement regarding referendum proposal; Court explained that "[c]orporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible," and "[i]dentification of the source of advertising may be required * * * so that the people will be able to evaluate the arguments to which they are being subjected"); *Buckley* v. *American Constitutional Law Found., Inc.*, 525 U.S. 182, 202-203 (1999) (State may require disclosure of the names of ballot initiative petition sponsors and the amounts paid to gather support for the initiatives.).[1]

[1] In helping to facilitate public awareness of the identities of those who broadcast advertisements on political matters of national importance, Section 504 serves purposes similar to those advanced by Section 201(a) of BCRA, 116 Stat. 88-90 (adding 2 U.S.C. 434(f)), which establishes disclosure requirements applicable to "electioneering communications." In light of those similar

2. The disclosure provisions that were examined and upheld in *Buckley* were not targeted at the use of particular media of communication, but applied broadly to all "contributions" and "expenditures" having the requisite connection to federal elections. See 424 U.S. at 62-64. In holding that those disclosure provisions were subject to "exacting scrutiny," *id.* at 64; see *id.* at 75, the Court therefore had no occasion to consider the government's distinct interests in regulation of broadcast and cable media. Section 504, by contrast, applies only to television and radio broadcast stations and cable television systems, and this Court has upheld more intrusive regulation of those media than of any other

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purposes, it would make little sense to consider the constitutionality of Section 504 in isolation from the other provisions of BCRA. Sections 201(a) and 504 are not, however, duplicative of each other. BCRA's primary definition of "electioneering communication" is limited to communications that "refer[] to a clearly identified candidate for Federal office" and are aired within the 60-day period before a federal general election or the 30-day period before a primary election. BCRA § 201(a), 116 Stat. 89 (adding 2 U.S.C. 434(f)(3)(A)(i)(I) and (II)). Section 504's reference to communications regarding a "political matter of national importance" encompasses, but is not limited to, communications that refer to a specific candidate. The applicability of Section 504, moreover, is not limited to the period immediately preceding a federal election. On the other hand, individuals or organizations who make "electioneering communications" totaling more than $10,000 in a calendar year must disclose not only their own identities, but the identities of their major contributors as well. See BCRA § 201(a), 116 Stat. 88-89 (adding 2 U.S.C. 434(f)(2)(E) and (F)) (requiring disclosure of "the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to [the person or account from which the 'electioneering communications' are funded] during the period beginning on the first day of the preceding calendar year and ending on the disclosure date"). Section 504 contains no comparable requirement.

form of communication. See, *e.g.*, *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637, 656 (1994); *CBS, Inc.* v. *FCC*, 453 U.S. 367, 394-397 (1981); *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 386 (1969). In holding that statutory "must-carry" requirements applicable to cable television operators were not subject to strict scrutiny, for example, the Court in *Turner Broad.* distinguished its prior decision in *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241 (1974), on the ground that "the asserted analogy to *Tornillo* ignores an important technological difference between newspapers and cable television." 512 U.S. at 656; see *id.* at 653-657. The standard of review announced in *Buckley* therefore cannot mechanically be applied to the record-keeping and disclosure requirements imposed by Section 504.

3. Appellee contends (Mot. to Aff. 8) that Section 504 "differs fundamentally from the disclosure requirements already imposed on broadcasters by the FCC." That is incorrect. Section 504 serves principally to codify longstanding regulatory requirements—requirements that appellee simply ignores—and does not substantially expand broadcast and cable stations' record-keeping and disclosure obligations.

The FCC has long required broadcasters to identify the true sponsors of communications "involving the discussion of a controversial issue of public importance," and it has more recently imposed similar requirements upon cable operators. See p. 3, *supra*. The range of information required to be disclosed under Section 504 is comparable to the disclosures mandated by pre-existing FCC rules. Compare 47 U.S.C. 315(e)(2)(G) (added by BCRA § 504) (record must include "a list of the chief executive officers or members of the executive committee or of the board of directors of" the entity making the request) with 47 C.F.R.

73.1212(e) (broadcast station shall "require that a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group, or other entity shall be made available for public inspection"); 47 C.F.R. 76.1701(d) (same for cablecasting). Appellee does not attempt to show that Section 504's requirements are more onerous than the FCC's longstanding rules, nor does it contend that the pre-existing agency regulations are themselves unconstitutional.[2]

4. In one respect, Section 504 does expand the record-keeping and disclosure obligations of broadcast and cable operators beyond those previously imposed by FCC rules. Section 504's requirements apply to a "*request* to purchase broadcast time that * * * communicates a message relating to any political matter of national importance," BCRA § 504, 116 Stat. 115 (emphasis added); see Mot. to Aff. 2-3, whether or not such time is ultimately purchased. The pre-existing regulatory requirements applicable to "discussion[s] of a controversial issue of public importance," by contrast, are triggered only by actual broadcasts. But there is nothing novel, let alone unconstitutional, about making legitimate reporting requirements contingent on a request for, as opposed to purchase of, broadcast time. The FCC has long required broadcast stations to disclose *candidate* "requests" to purchase broadcast time, "together with an appropriate notation showing the

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[2] Appellee briefly mentions (and appears to accept the validity of) FCC regulations dealing with candidate requests for broadcast time, see Mot. to Aff. 8, but it ignores the agency's longstanding rules applicable to communications "involving the discussion of a controversial issue of public importance."

disposition made by the licensee of such requests." 47 C.F.R. 73.1943(a) (broadcast stations); see 47 C.F.R. 76.1701(a) (similar for cable television systems). Congress's decision that the reporting requirements applicable to communications regarding a "political matter of national importance" (BCRA § 504) should likewise be triggered by a request to purchase broadcast time raises no serious First Amendment concerns. Requiring disclosure of the identities of those who make requests, and the broadcasters' dispositions of those requests, assists the public to evaluate whether broadcasters are processing requests in an evenhanded fashion.

C. Summary Affirmance Is Inappropriate

Appellee identifies no case in which this Court has summarily affirmed a lower court decision striking down a provision of an Act of Congress. Respect for a coordinate Branch strongly suggests that such a course would be appropriate, if at all, only in extraordinary circumstances. FCC regulations have for over half a century imposed disclosure requirements similar to those contained in Section 504, and appellee cites no decision suggesting that persons who purchase or seek to purchase broadcast time have a constitutional right to conceal their identities from the public. Quite apart from the reasons set forth above for sustaining Section 504 against constitutional attack, the absence of squarely controlling precedent in appellee's favor is by itself a sufficient basis for denial of appellee's motion.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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