UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENJAMIN BLUMAN, ET AL.,	
Plaintiffs,	Civ. No. 10-1766 (RMU)
v.	OPPOSITION
FEDERAL ELECTION COMMISSION,	
Defendant.	

FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFFS' APPLICATION FOR THREE-JUDGE COURT

Plaintiffs have requested appointment of a three-judge court pursuant to a special judicial review provision designed eight years ago to quickly resolve serious questions about the constitutionality of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81. Under dispositive Supreme Court precedent, however, a three-judge court should not be convened to adjudicate plaintiffs' claims because their proposed conduct was already unlawful before BCRA's enactment.

Plaintiffs Benjamin Bluman and Dr. Asenath Steiman are foreign nationals who temporarily reside and work in the United States for terms of three years; they are neither United States citizens nor permanent residents. They claim that the longstanding prohibition in the Federal Election Campaign Act ("FECA") on certain involvement by foreign nationals in United States elections, 2 U.S.C. § 441e, is unconstitutional as applied to them. BCRA amended FECA and includes a provision, Section 403, 116 Stat. at 113-14, authorizing the convening of a three-judge district court to hear claims that provisions of BCRA are unconstitutional. Although

BCRA reworded and strengthened the foreign national prohibition, plaintiffs' intended activities were unlawful before BCRA's amendment. As we explain below, under *McConnell v. FEC*, 540 U.S. 93, 229 (2003), plaintiffs' alleged injuries therefore cannot be redressed by a three-judge court convened under BCRA § 403. Accordingly, the Court should reject plaintiffs' application and decline to convene a three-judge court to hear their claims.

BACKGROUND

BCRA § 403 establishes special procedures for actions brought on constitutional grounds challenging "any provision" of BCRA or "any amendment made by" it. BCRA § 403(a), 116 Stat. at 113-14. Before December 31, 2006, all such actions were required to be filed in the United States District Court for the District of Columbia and heard by a three-judge district court convened pursuant to 28 U.S.C. § 2284, which provides that "[a] district court of three judges shall be convened when . . . required by Act of Congress." Section 403 further provides that final decisions of such three-judge courts are reviewable only by direct appeal to the Supreme Court. BCRA § 403(a)(3), 116 Stat. at 114. The special procedural rules do not apply to actions filed after December 31, 2006, "unless the person filing such action elects such provisions to apply to the action." BCRA § 403(d)(2), 116 Stat. at 114. BCRA's legislative history suggests that Congress's primary purpose in enacting BCRA § 403 was to ensure that the serious constitutional issues raised by BCRA would be resolved promptly. *See* 148 Cong. Rec. S2142 (Mar. 20, 2002) (statement of Sen. Feingold) (BCRA's expedited judicial review rules will "assist [in] an orderly transition from the old system to the new system" of campaign finance through a "prompt and efficient resolution of the litigation"); 147 Cong. Rec. S3189 (Apr. 2, 2001) (statement of Sen. Hatch) (BCRA "supporters and opponents alike[] stand to gain by a prompt and definite determination of the constitutionality of many of the bill's controversial

provisions"; "it is imperative that we afford the Supreme Court the opportunity to pass on the constitutionality of this legislation as soon as possible").

Plaintiffs specifically allege that they wish to engage in eight different transactions encompassing five different types of activities: contributing to four federal candidates (Representative Inslee, Senator Coburn, President Obama, and President Obama's eventual opponent in the 2012 general election), contributing to a national political party committee (the National Republican Senatorial Committee), donating to a political committee that independently advocates for candidates (Club for Growth),[1] contributing to a state candidate (New York State Senator Diane Savino), and making independent expenditures on behalf of a candidate (printing and distributing flyers on behalf of President Obama). (Compl. ¶¶ 13, 18.) Plaintiffs anticipate wanting to make "similar contributions and expenditures" in other years. (Compl. ¶¶ 14, 19.)

Plaintiffs allege that applying the foreign national prohibition and the Commission's implementing regulations, 11 C.F.R. 110.20, to their intended future activities would violate their First Amendment rights. The foreign national prohibition, now codified at 2 U.S.C. § 441e, was initially enacted by Congress in 1966 as an amendment to the Foreign Agents Registration Act of 1938 ("FARA"), 80 Stat. 244 (1966). In 1976 Congress deleted the foreign national prohibition from the FARA and reenacted it as part of FECA. 90 Stat. 486, 493, 496 (1976). Until it was amended by BCRA in 2002, subsection (a) of the foreign national prohibition provided that

> It shall be unlawful for a foreign national directly or through any other person to make any contribution of money or other thing of value, or to promise expressly

[1] FECA defines a "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A). Any organization that qualifies as a political committee must register with the Commission and file periodic reports for disclosure to the public of all receipts and disbursements to or from a person in excess of $200 in a calendar year (and in some instances, of any amount). *See* 2 U.S.C. §§ 433-34.

> or impliedly to make any such contribution, in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office . . . .

2 U.S.C. § 441e(a) (2001). In 2002, BCRA § 303, 116 Stat. 96, amended the foreign national prohibition. In relevant part, BCRA § 303 struck the then-existing foreign national prohibition and replaced it with current subsection (a)(1):

> It shall be unlawful for . . . a foreign national, directly or indirectly, to make —
>
> (A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election;
>
> (B) a contribution or donation to a committee of a political party; or
>
> (C) an expenditure, independent expenditure, or disbursement for an electioneering communication . . . .

2 U.S.C. § 441e(a)(1) (2010).[2]

ARGUMENT

I. A THREE-JUDGE COURT WOULD HAVE NO AUTHORITY TO ADJUDICATE PLAINTIFFS' CLAIMS REGARDING THE CONSTITUTIONALITY OF FECA AND THEREFORE COULD NOT REDRESS PLAINTIFFS' ALLEGED INJURIES

The Supreme Court's decision in *McConnell* forecloses plaintiffs' request for a three-judge court under BCRA § 403. In *McConnell*, a set of plaintiffs challenged BCRA § 307, which increased and indexed for inflation certain FECA contribution limits; those plaintiffs alleged that the contribution limits violated the Freedom of the Press Clause of the First Amendment. On direct appeal from a three-judge court, the Supreme Court observed that BCRA § 307 "merely increased and indexed for inflation certain FECA contribution limits." *McConnell*,

[2] Both before and after BCRA amended section 441e, the foreign national prohibition has not applied to United States citizens or to those lawfully admitted for permanent residence. 2 U.S.C. § 441e(b).

540 U.S. at 229.[3] The Court also explained that it had "no power to adjudicate" a challenge to FECA's contribution limits because challenges to FECA were not subject to review in a three-judge district court or on direct appeal to the Supreme Court pursuant to BCRA § 403. *Id*. The Court thus held that it could not redress plaintiffs' alleged injuries even if it were to rule on the amendments BCRA § 307 made to the pre-existing contribution limits. "[I]f the Court were to strike down the increases and indexes established by BCRA § 307," the Court reasoned, it would not remedy the plaintiffs' alleged injury because the limits imposed by FECA "would remain unchanged." *Id*. "A ruling in the . . . plaintiffs' favor, therefore, would not redress their alleged injury, and they accordingly lack standing." *Id*.

For the same reasons, any three-judge court convened here could not redress plaintiffs' alleged injuries: Such a court would have no authority to address FECA's pre-BCRA prohibitions on foreign nationals' activity. Thus, even if plaintiffs were to obtain a favorable ruling on their challenges to BCRA § 303, the prohibitions on foreign nationals' activity in pre-BCRA § 441e would remain in place, plaintiffs' alleged injuries would not be redressed, and plaintiffs therefore would lack standing.

Pre-BCRA § 441e, among other things, barred plaintiffs from making contributions to all their intended recipients: federal and state candidates, the federal (or "hard-money") account of national political party committees, and political committees that independently advocate for candidates. Pre-BCRA § 441e prohibited contributions by foreign nationals "in connection with an election to any political office." 2 U.S.C. § 441e(a) (2001). BCRA clarified and strengthened

[3] For example, BCRA § 307 increased the limits on contributions from individuals to candidates from $1,000 to $2,000, and increased by $5,000 the amount individuals could contribute to a national party committee. BCRA § 307 also indexed most of FECA's contributions limits to the consumer price index. *See McConnell*, 251 F. Supp. 2d 176, 219-20 (D.D.C. 2003) (per curiam opinion for Kollar-Kotelly, J. and Leon, J.).

section 441e by making it explicit that the ban reached the "soft money" accounts of the political parties and adding additional banned activities such as making disbursements for electioneering communications. With respect to all of the plaintiffs' proposed activities, however, those activities would have fallen within FECA's pre-existing prohibitions, and BCRA merely enumerated the contributions and indirect assistance that were activities "in connection with an election to any political office" and eliminated the redundant listing of "primary election, convention, or caucus." *See* 2 U.S.C. § 441e(a) (2001). "Under established canons of statutory construction, it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." *Finley v. United States*, 490 U.S. 545, 554 (1989) (internal quotation marks omitted).

In the years before the enactment of BCRA in 2002, the Commission — and on occasion the courts when called upon — repeatedly interpreted section 441e to prohibit the various types of activities in which plaintiffs wish to engage. The Commission interpreted section 441e to prohibit contributions from foreign nationals to candidates. *See*, *e.g.*, FEC Advisory Op. 1998-14, 1998 WL 493079 (concluding that committee of United States Senate candidate may not accept contributions from foreign nationals residing in certain Pacific island territories). The Commission has also "consistently interpreted § 441e as applicable to federal, state, and local elections since 1976." *United States v. Kanchanalak*, 192 F.3d 1037, 1049 (D.C. Cir. 1999); *see also* FEC Advisory Op. 1999-37, 1998 WL 493079 ("Unlike most of the other provisions of the Act, section 441e applies to any election for any political office, including state and local offices."). Accordingly, pre-BCRA § 441e would have prohibited foreign national contributions to state candidates and federal candidates, and would have barred plaintiffs' planned

contributions to Representative Inslee, Senator Coburn, President Obama and his opponent in 2012, as well as New York State Senator Diane Savino.

The pre-BCRA foreign national prohibition also proscribed contributions to political committees and the federal accounts of political party committees. *See, e.g.*, FEC Advisory Op. 2000-20, 2000 WL 1358629 (stating that non-connected political committees may not solicit contributions from foreign nationals); FEC Advisory Op. 1999-37, 2000 WL 180366 (same); FEC Advisory Op. 1995-09, 1995 WL 247474 (advising that political committee's website should explicitly state that it could not accept contributions from foreign nationals); *United States v. Trie*, 23 F. Supp. 2d 55, 59-61 (D.D.C. 1998) (holding that section 441e would apply to allegations that defendant foreign national had made "hard money" contributions to the Democratic National Committee).[4] Plaintiff Steiman's planned contributions to the National Republican Senatorial Committee and the Club for Growth would have thus been unlawful before BCRA amended section 441e.[5]

---

[4] BCRA arguably altered existing law by making clear that "donations" to the non-federal or "soft money" accounts of state or local political party committees were unlawful. *Campaign Finance Reform: Hearing Before the Comm. on House Admin.*, 107th Cong. (May 1, 2001) (testimony of Rep. Christopher Shays), at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=f:87390.wais.pdf at 32; *see also id*. at 2001 WL 499463 (prepared statement of Reps. Christopher Shays and Marty Meehan) (noting that "the 1974 Federal Election Campaign Act . . . made it illegal for foreign nationals to contribute to any political campaign" but that soft money provided by "corporations, labor unions, and even foreign governments" have been used to finance campaign advertising). After BCRA, national political parties, such as the National Republican Senatorial Committee, cannot accept non-federal funds from any source, BCRA § 101, 116 Stat. at 82 — a restriction upheld in *McConnell*, 540 U.S. at 134-61. Thus, Steiman's planned contribution would be a hard-money contribution to the NRSC.

[5] Entities operating under the Club for Growth umbrella include a corporation organized under section 501(c)(4) of the Internal Revenue Code; a "political organization" under section 527 of the Internal Revenue Code; and Club for Growth PAC, a political committee that is registered with and reports to the Commission under FECA. *See* Steve Weissman & Suraj Sazawal, *Soft Money Political Spending by 501(c) Nonprofits Tripled in 2008 Election*, Campaign Finance Institute, Tables 1-2 (Feb. 25, 2009),

Plaintiff Bluman's proposed expenditures would also have been unlawful before BCRA. He alleges that he seeks to print and distribute flyers in Central Park supporting the reelection of President Obama. But since 1990, the Commission's regulations have specified that foreign nationals could not make expenditures of any kind. 11 C.F.R. § 110.4(a) (2001); FEC, *Contributions and Expenditures; Prohibited Contributions*, 54 Fed. Reg. 48580-81 (Nov. 24, 1989). [6] The pre-BCRA regulation provided that "a foreign national shall not . . . make a contribution, or an expenditure."[7] 11 C.F.R. § 110.4(a) (2001).

In sum, if a three-judge court were to strike down BCRA § 303 pursuant to its limited grant of authority, pre-BCRA FECA would still proscribe all of plaintiffs' intended activities. There is thus no reason for this Court to approve a three-judge court because it would not be able to redress plaintiffs' alleged injuries. *McConnell*, 540 U.S. at 229.[8] Ordinary judicial review would also be "consonant with the overriding policy . . . of minimizing the mandatory docket of

---

http://moneyline.cq.com/flatfiles/editorialFiles/moneyLine/reference/20090225cfi.pdf (referring to spending by Club for Growth's 501(c)(4) and 527 and to the existence of its PAC). It is thus not entirely clear to which Club for Growth organization plaintiff Steiman plans to contribute $100. Because plaintiffs allege that they will "donate to independent political committees" (Compl. ¶ 2), and "political committee" is a term of art under FECA, *see supra* p.3 n.1, however, it appears that plaintiff Steiman wishes to make a contribution to Club for Growth PAC.

[6] After BCRA amended section 441e, the Commission's foreign national prohibition was amended and moved from 11 C.F.R. § 110.4(a) to 11 C.F.R. § 110.20. FEC, *Contribution Limitations and Prohibitions,* 67 Fed. Reg. 69928 (Nov. 19, 2002).

[7] Although BCRA § 303 clarified that disbursements by foreign nationals for "electioneering communication[s]" were also prohibited, plaintiff Bluman's proposed spending on printed material to advocate the reelection of President Obama would not fall within the definition of "electioneering communication," which applies only to television and radio communications. *See* 2 U.S.C. § 434(f)(3)(A). Thus, this BCRA amendment is inapplicable here.

[8] Persons may bring constitutional challenges to FECA through ordinary district court review or, as the Court noted in *McConnell*, 540 U.S. at 229, certain types of plaintiffs may elect to seek review before the en banc court of appeals under 2 U.S.C. § 437h. Plaintiffs here are not eligible to elect section 437h as that provision may be invoked only by the Commission, national party committees, or eligible United States voters. 2 U.S.C. § 437h.

[the Supreme] Court in the interests of sound judicial administration." *Gonzalez v. Automatic Employees Credit Union,* 419 U.S. 90, 98 (1974); s*ee also Goldstein v. Cox*, 396 U.S. 471, 478 (1970) ("This Court has more than once stated that its jurisdiction under the Three-Judge Court Act is to be narrowly construed since any loose construction of the requirements of [the Act] would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket.") (internal quotation marks omitted).

II. A THREE-JUDGE COURT WOULD HAVE NO AUTHORITY TO ADJUDICATE PLAINTIFFS' CLAIMS REGARDING THE CONSTITUTIONALITY OF THE COMMISSION'S REGULATIONS

A three-judge court convened under BCRA § 403 would have no authority to adjudicate plaintiffs' claims regarding the Commission's regulations. The plain language of that provision provides jurisdiction to a three-judge court to decide only constitutional challenges to the statute itself. BCRA § 403(a) ("If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act . . ."). Moreover, in another portion of *McConnell*, certain plaintiffs challenged BCRA § 214, which directed the Commission to promulgate certain regulations. 251 F. Supp. 2d at 186, 261-64. After briefing was completed and the three-judge court convened under BCRA § 403 heard argument, the Commission promulgated regulations implementing section 214. *Id*. at 261. The three-judge court held that because the recently promulgated regulations "affected the contours of the dispute between the parties," the claims regarding this provision of BCRA were not ripe for review. *Id*. at 239 n.72, 261-64. The court went on to explain that the proper venue to challenge the new regulations would be in a single-judge court under the Administrative Procedure Act, rather than in a three-judge court under BCRA § 403. *Id*. at 262.

When this issue reached the Supreme Court, the Court affirmed the district court's reasoning: "As the District Court explained, issues concerning the regulations are not appropriately raised in this facial challenge to BCRA, but must be pursued in a separate proceeding." 540 U.S. at 223. Because a three-judge court here would "lack[] the jurisdiction to rule on the regulations," 251 F. Supp. 2d at 264, this Court should reject plaintiffs' application to the extent it asks for claims regarding the Commission's regulations to be referred to such court.

III. THE COURT SHOULD DENY PLAINTIFFS' APPLICATION BECAUSE THEY VIOLATED LOCAL RULE 7(m) BY FAILING TO CONFER WITH THE DEFENDANT BEFORE FILING THEIR NONDISPOSITIVE MOTION

Local Rule 7(m) requires counsel for a moving party to confer with opposing counsel before filing a nondispositive motion. Plaintiffs' counsel here did not confer with counsel for the Commission before requesting a three-judge court. "If a party files a nondispositive motion without certifying its compliance with Rule 7(m), the motion will be denied." *Ellipso, Inc. v. Mann*, 460 F. Supp. 2d 99, 102 (D.D.C. 2006). Plaintiffs' application should thus be denied.

For the foregoing reasons, defendant Federal Election Commission respectfully asks this Court to deny plaintiffs' application and decline to convene a three-judge court pursuant to BCRA § 403.

Respectfully submitted,

Phillip Christopher Hughey
Acting General Counsel
chughey@fec.gov

David Kolker
Associate General Counsel
dkolker@fec.gov

Kevin Deeley
Assistant General Counsel
kdeeley@fec.gov

/s/ Steve N. Hajjar
Steve N. Hajjar
Attorney
shajjar@fec.gov

Adav Noti
Attorney
anoti@fec.gov

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, DC 20463
(202) 694-1650

November 5, 2010

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENJAMIN BLUMAN, ET AL., Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 10-1766 (RMU) PROPOSED ORDER

PROPOSED ORDER

The Court, upon consideration of the submissions of the parties, hereby ORDERS that Plaintiffs' Application for Three-Judge Court is DENIED.

IT IS SO ORDERED.

Dated: _____

_____
RICARDO M. URBINA
United States District Judge