

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Senator Mitch McConnell, <i>et al.</i> ,)	
)	
Plaintiffs,)	Case No. 02-0582 (CKK, KLH, RJJ)
v.)	<i>All consolidated cases.</i>
)	
Federal Election Commission, <i>et. al.</i> ,)	
)	
Defendants.)	
)	

**Brief in Support of Madison Center Plaintiffs’
Motion to Alter or Amend the Judgment**

Plaintiffs National Right to Life Committee, Inc., National Right to Life Educational Trust Fund, National Right to Life Political Action Committee, Libertarian National Committee, Inc., Club for Growth, Inc., Indiana Family Institute, Inc., U.S. Representative Mike Pence, Alabama Attorney General William H. Pryor, Barret Austin O’Brock, and Trevor M. Southerland (“Plaintiffs”) have moved this Court to alter or amend its Final Judgment of May 1, 2003 (“Final Judgment”), because it only “**ORDERED** that the Defendants and their agents are permanently enjoined from enforcing, executing or otherwise applying those sections of BCRA found unconstitutional by this three-judge District Court.” Final Judgment at 6 (emphasis in original).

The Plaintiffs contend that this Order does not provide them with adequate relief because the Court’s Order does not extend beyond the named Plaintiffs to include all those similarly situated to the Plaintiffs and because it could be interpreted as not effecting activities conducted

outside the District of Columbia. Organizational Plaintiffs' state affiliates and other similar affiliated advocacy organizations are fully subject to the BCRA because they were not party to this action. Moreover, the Defendant Federal Election Commission ("FEC") have regarded similar injunctions to be effective only within the jurisdiction of the court issuing the decision. As a consequence, the Plaintiffs remain threatened by the FEC if they conduct otherwise enjoined activities outside the District of Columbia.

Thus, the Plaintiffs request this Court to alter or amend its Final Judgment of May 1, 2003, to order that the Defendants and their agents are permanently enjoined from enforcing, executing, or otherwise applying those sections of BCRA found unconstitutional by this three-judge District Court anywhere in the United States against any Plaintiff or similarly situated person or entity.

I. Amendment of this Court's Final Judgment to Extend Injunctive Protection to Similarly Situated Persons and Entities Is Just and Necessary Under the Circumstances of this Case.

This Court's Final Judgment did not explicitly state against whom the Defendants were enjoined to enforce the offending provisions of the BCRA, but provided only that "Defendants and their agents are permanently enjoined from enforcing, executing, or otherwise applying those sections of the BCRA found unconstitutional by this three-judge District Court." Nevertheless, under Fed. R. Civ. P. 65(d), a court's order ordinarily "is binding only on the parties to the action. . . ." Following this Rule, the Court's injunction forbids the Defendants from applying the unconstitutional provisions of the BCRA against only particular Plaintiffs to this action. The FEC may enforce the entire BCRA against other, similarly situated persons and entities that are not parties to this litigation.

Organizational Plaintiffs, such as National Right to Life Committee and the Libertarian National Committee, are associated with separate, affiliated organizations throughout the United States that also conduct activities contrary to unconstitutional provisions of the BCRA. Unless this Court's injunction is extended to encompass such other similarly situated entities and persons, each of these local affiliates will thus also be required to bring separate suit in the District Court for the District of Columbia before a three-judge panel in order to seek the same protection secured by the Plaintiffs here. Numerous similar suits by other non-parties¹ would likewise be necessary unless this Court's Final Judgment is amended to also explicitly enjoin enforcement of the unconstitutional provisions of the BCRA by the Defendants against any person or entity similarly situated to the Plaintiffs.

Such an amendment is justified both by the particular nature of the BCRA and in the interests of judicial economy. The sweeping scope of the BCRA justifies such a sweeping injunction. Congress implicitly sanctioned injunctive relief on behalf of those similarly situated to the Plaintiffs by enacting a statute that touches on virtually every aspect of electioneering and campaign finance for every federal candidate and party or entity that seeks to support such a candidate. And, in providing for the particular standards for judicial review of section 403 of the BCRA, Congress could not reasonably have sought to compel every potentially complaining party in the United States to follow the path of the Plaintiffs toward this Court in the District of Columbia in order to seek the same relief that the Court has already provided to the Plaintiffs.

This would obviously create a considerable hardship on the multitude of potential plaintiffs throughout the United States deprived of access to their local federal courts by BCRA

¹An minor person in America that wants to contribute to a federal candidate or political party would also have to file their own suit.

and forced to journey to the District of Columbia to seek relief. Moreover, it would transform this Court into a nationwide arbitrator of local disputes with the BCRA, burdening the Court with numerous suits by non-parties to this case against aspects of the BCRA that the Court has already held unconstitutional as applied to the particular Plaintiffs of this case. Considerations of judicial economy and administration thus strongly militate in favor of amending this Court's Final Judgment to extend to parties and entities similarly situated to the Plaintiffs.²

II. Amending this Court's Final Judgment Is Necessary Because the FEC Has Taken the Position That It is Not Bound by a Judgment Outside the Jurisdiction of the Deciding Court.

It is the policy of Defendant FEC and the position that they have adopted in other similar cases, that the FEC rules and regulations that have been struck down will nevertheless be enforced by the FEC in other jurisdictions.³ See *Virginia Society for Human Life v. Federal Election Commission*, 263 F.3d 379, 382 (4th Cir. 2001) (“*VSHL*”); *Right to Life of Dutchess County, Inc. v. Federal Election Commission*, 6 F. Supp. 2d. 248, 252-53 (S.D. N.Y. 1998). Consistent with this policy, the Final Judgment of this Court would be binding on the FEC only

²Congress has provided that the “Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651 (a). The power to issue injunctions is within the authority to issue writs provided by this statute. See, e.g., *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (per Chief Justice Rehnquist, as Circuit Judge). Plainly, therefore, this Court has authority to grant the Amendment to its Final Judgment requested by the Plaintiffs here. Amending this Court's Final Judgment in favor of similarly situated non-parties is also clearly contemplated by Fed. R. Civ. P. 71, which provides that “[w]hen an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party”

³Similarly, the “FEC has in the past prosecuted groups in the judicial districts where they distributed advertising materials, as opposed to the states where they are chartered or headquartered.” *Virginia Society for Human Life v. Federal Election Commission*, 263 F.3d 379, 389 (4th Cir. 2001) (citing *FEC v. Pub. Citizen, Inc.*, 64 F. Supp. 2d 1327 (N.D. Ga. 1999); *FEC v. Nat'l Conservative Political Action Comm.*, 647 F. Supp. 987 (S.D. N.Y. 1986)).

in the District of Columbia, leaving the FEC free to enforce the enjoined provisions of BCRA in jurisdictions other than the District of Columbia. The *VSHL* court in effect sustained the FEC's policy, reversing a district court decision granting a nationwide injunction against the FEC regulation at issue in that case. 263 F.3d at 392-93.

The Plaintiffs believe that the FEC policy and the *VSHL* holding are in error. Under 5 U.S.C. § 706(2)(A), an agency action can be entirely set aside if it is "not in accord with the law," including in particular when an agency action is found "contrary to constitutional right." 5 U.S.C. § 706 (2)(B). This plainly justifies injunctive relief beyond the scope of any particular jurisdiction, especially when First Amendment rights are at issue and the "very existence [of a statute] may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

Nevertheless, in view of FEC policy, the present state of the law, and the present silence of this Court in its Final Judgment on the geographical scope of its injunction, the Plaintiffs have every reason to believe that the FEC will, consistent with its policy, enforce the provisions of the BCRA enjoined by this Court in other jurisdictions. This threatens and severely chills Plaintiffs' conduct in jurisdictions other than the District of Columbia. For example, organizational Plaintiffs – such as National Right to Life Committee, Inc., National Right to Life Educational Trust Fund, and Club for Growth, Inc. – have in the past, are now, and intend in the future to run broadcast advertising in other jurisdictions. Yet they justifiably fear that the FEC will take action against them for violating otherwise enjoined provisions BCRA outside the District of Columbia.

Therefore, notwithstanding any usual rule against providing injunctive relief beyond a federal court's jurisdiction, if such general rule exists, the Plaintiffs argue that the circumstances

of this case warrant a nationwide injunction. The BCRA is obviously intended to apply nationwide. It is an Act of Congress, and section 403 of the BCRA provides special rules for judicial review for actions brought on constitutional grounds, intervention by Members of Congress, and challenges brought by Members of Congress brought prior to December 31, 2006.

In particular, section 403(1) of the BCRA provides that suit for declaratory and injunctive relief may only be brought in the United States District Court for the District of Columbia. Thus, if a rule limiting the scope of injunctive relief to the jurisdiction of the federal court providing the relief applied, neither the Plaintiffs nor any other Plaintiff in this case could seek effective relief in any other jurisdiction – yet the FEC could freely enforce the provisions of the BCRA that this Court held unconstitutional in other jurisdictions. This is fundamentally unfair: It cannot be the intent of Congress to provide for piecemeal enforcement of BCRA, requiring plaintiffs to seek injunctive relief anew for every other jurisdiction in which they choose to engage in activities prohibited by the BCRA – yet forbidding this Court from granting plaintiffs effective relief that extends beyond the boundaries of the District of Columbia.⁴

Such a scenario can only certainly be avoided by amending this Court’s Final Judgment to explicitly enjoin the Defendants from enforcing the offending provisions anywhere in the United States. While “injunctive relief should be no more burdensome to the defendant than

⁴The policy bases for a federal inter-jurisdictional non-enforcement policy do not exist here. Limitations on the jurisdictional scope of the federal court decisions are ordinarily favored because a contrary policy would “substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue” and would also deprive the Supreme Court of the benefit of decisions from several courts of appeals. *United States v. Mendoza*, 464 U.S. 154, 160 (1984). In this case, however, because no constitutional case may be filed against BCRA in any federal jurisdiction other than the District of Columbia, there can be no potentially valuable development of law in other jurisdictions, nor can there be a variety of decisions in lower courts that might benefit the Supreme Court on final review.

necessary to provide complete relief to the plaintiffs,” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), an explicit nationwide injunction against the unconstitutional provisions of the BCRA is, in fact, “necessary” under the circumstances of this case to provide the Plaintiffs with complete relief.

Conclusion

On the basis of the foregoing, the Plaintiffs thus request this Court to grant its Motion to Alter or Amend its Final Judgment by ordering that the Defendants be enjoined from enforcing any unconstitutional provision of the BCRA against the Plaintiffs or any similarly situated person or entity anywhere in the United States.

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