IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Benjamin Bluman, et al.

Plaintiffs,

v.

Federal Election Commission,

Defendant.

Civil Action No. 10-1766 (RMU)

THREE JUDGE COURT

PLAINTIFFS' REPLY IN SUPPORT OF
APPLICATION FOR THREE-JUDGE COURT

Section 403 of BCRA provides that in any case challenging "the constitutionality of any provision of this Act or any amendment made by this Act," the party filing the action may elect to have it heard by a three-judge court. The Federal Election Commission cannot—and does not—dispute that Plaintiffs here are challenging the constitutionality of 2 U.S.C. § 441e(a), which was enacted into law in its entirety by a provision of BCRA (namely, § 303). And Plaintiffs have indisputably elected, as is their right, to have the action adjudicated by a three-judge court. That should be the end of the matter. Nonetheless, the Commission is resisting, on two principal grounds, the application for appointment of such a court.[1] Neither of their arguments has merit, and a three-judge court must therefore be appointed.

[1] The Commission also argues that the application should be rejected "to the extent it asks for claims regarding the Commission's regulations to be referred to such court." (Opp. at 10.) But Plaintiffs have not brought any *independent* challenge to the Commission's regulations, which simply parrot the statutory provision enacted by § 303 of BCRA. Of course, if Plaintiffs' challenge succeeds, the regulations will necessarily fall along with the statute, but that hardly deprives the three-judge court of jurisdiction to hear the challenge to the statute.

I. A THREE-JUDGE COURT WOULD HAVE AUTHORITY TO REDRESS PLAINTIFFS' INJURIES.

The Commission's first argument is that, even though Plaintiffs are plainly challenging a provision of law enacted by BCRA, a three-judge court would be unable to redress their injuries. The argument appears to rest on two premises: (i) that, "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" (Opp. at 5 (emphasis added)); and (ii) that, if those prior prohibitions "remain in place," a three-judge court would have "no authority to address" them (Opp. at 5), thus leaving Plaintiffs' injuries intact. Each of these necessary premises is wrong, and so the Commission's argument fails doubly.

A. If the three-judge court concludes that 2 U.S.C. § 441e(a) cannot constitutionally be applied to Plaintiffs, that hardly means that the prohibitions of "pre-BCRA § 441e"—*which were repealed over eight years ago*—would somehow be revived. The only extant law prohibiting the conduct Plaintiffs seek to engage in is the current version of 2 U.S.C. § 441e(a), which was enacted into law by § 303 of BCRA. If the court were to conclude that the statute violates the First Amendment as applied to Plaintiffs, that would not resuscitate a predecessor statute that has been off the books for nearly a decade.

The Commission's argument to the contrary appears to assume that Plaintiffs seek the invalidation of § 303 on its face, and that such relief would cause the "pre-BCRA" version of § 441e(a) to spring back into being in the United States Code. Neither is true. Plaintiffs simply seek to enjoin the Government from applying § 441e(a) to *them*; they have not asked to have the law facially invalidated. And they certainly have not challenged the repeal of the predecessor version of § 441e(a). Thus, granting Plaintiffs the relief they seek would not strike § 441e(a) from the United States Code. Moreover, even if it did, that would *not* cause the long-repealed,

pre-BCRA analogue to § 441e(a) to suddenly spring back into law. *Cf.* 1 U.S.C. § 108 (providing that the repeal of a repealing statute does not revive the original law). Therefore, a ruling that § 441e(a) may not constitutionally be applied to Plaintiffs would free them to engage in the prohibited speech, fully redressing their injuries.

The only case cited by the Commission, *McConnell v. FEC*, 540 U.S. 93 (2003), is easily distinguishable. There, the plaintiffs sought to challenge "the contribution limits imposed by BCRA § 307, *together with the individual and political action committee contribution limitations of FECA § 315*" and exemptions granted by FECA to the "institutional media." *Id.* at 228 (emphasis added). The Government asked the Court to dismiss the challenge because the plaintiffs' injury derived not from BCRA, but rather from FECA's separate "contribution limit applicable to political committees other than political parties," which BCRA had "left . . . unchanged." Brief for the FEC et al. at 126 n.53, *McConnell*, 540 U.S. 93 (2003) (No. 02-1674). The Court agreed that even if it struck down the cited provision of BCRA, "the limitations imposed by FECA and the exemption for news media would remain unchanged." *Id.* at 229. In other words, there were other, *extant* provisions of law—*i.e.*, "the limitations imposed by FECA and the exemption for news media"—that were causing the plaintiffs' alleged injury, and which could not be remedied by a decision on the constitutionality of the BCRA provision.

By contrast, the only law being challenged here, and the only law prohibiting Plaintiffs' proposed conduct, is 2 U.S.C. § 441e(a), which was enacted *in full* by BCRA § 303. There is no other extant provision of law causing or contributing to their injury. The only other provision to which the Commission points is the *predecessor* to § 441e(a), which—as the Commission concedes—was "struck" by BCRA *in its entirety* (Opp. at 4) and no longer exists. *See* BCRA § 303. A repealed statute is hardly a barrier to the redress of Plaintiffs' injuries.

B. Even if finding the current, BCRA-enacted 2 U.S.C. § 441e(a) unconstitutional as applied to Plaintiffs could somehow revive the pre-BCRA version of the same statute, the three-judge court would have the power to apply its constitutional holding to that law too. Nothing in BCRA § 403 *limits* the jurisdiction of the three-judge court, or its remedial authority. *See Allee v. Medrano*, 416 U.S. 802, 812 & n.8 (1974) (holding that three-judge court has jurisdiction to grant ancillary relief); *see also Philbrook v. Glodgett*, 421 U.S. 707, 712 n.8 (1975) (affirming that three-judge court may decide, and Supreme Court may review by direct appeal, supplemental claims not independently entitled to review by a three-judge court).

The only reason why the Supreme Court in *McConnell* could not consider challenges to the constitutionality of the FECA provisions responsible for the plaintiffs' injury was "because challenges to the constitutionality of FECA provisions are subject to direct review before an appropriate en banc court of appeals, as provided in 2 U.S.C. § 437h." 540 U.S. at 229. Section 437h *requires* that certain challenges to FECA "shall" be referred to the "appropriate en banc court of appeals." The existence of that mandatory, alternative review scheme precluded the three-judge court (and the Supreme Court) in *McConnell* from considering the challenges to FECA in the ordinary course of its own review. However, as the Commission itself admits, "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." (Opp. at 8 n.8.) Accordingly, there would be no mandatory alternative procedure preventing the three-judge court from considering the ancillary issue (were it even to arise) of whether the repealed version of 2 U.S.C. § 441e(a) violated the First Amendment.

Both premises of the Commission's argument are necessary to support its position, yet both are erroneous. A three-judge court should therefore be appointed to hear this action.

II. PLAINTIFFS HAD NO DUTY TO CONFER WITH THE COMMISSION.

The Commission also complains that Plaintiffs failed to comply with this Court's Local Rule 7(m), which requires a party filing a nondispositive motion to confer with opposing counsel beforehand. But there was no such duty in the context of this application.

Plaintiffs' application for a three-judge court was filed pursuant to Local Rule 9.1, which refers to such a request as an "application," not a "motion." And the Local Rules reinforce the commonsense notion that these distinct terms are to be treated separately. *See* LCrR 6.1 (referring to a "motion *or* application filed in connection with a grand jury subpoena" (emphasis added)). Therefore, the duty imposed by Rule 7(m)—which applies only to "motions"—is inapplicable.

Nor is any other interpretation tenable, given that Rule 9.1 requires the application for three-judge court to be filed *contemporaneously* with the Complaint. At that point in time, of course, no opposing counsel has yet made an appearance, because no defendant has yet been served. There could not possibly be any duty to confer with unknown counsel about a yet-to-be-filed lawsuit—which is presumably why similar applications in other cases have likewise omitted any statement of compliance with Rule 7(m), apparently without consequence. *E.g.*, Dkt. #2, *Nw. Austin Mun. Utility Dist. No. One v. Mukasey*, No. 06 Civ. 1384 (D.D.C. Aug. 4, 2006); Dkt. #2, *Davis v. FEC*, No. 06 Civ. 01185, 501 F. Supp. 2d 22 (D.D.C. June 28, 2006); Dkt. #2, *Augusta County, Virginia v. Gonzales*, No. 05 Civ. 1885 (D.D.C. Sept. 23, 2005).[2]

* * *

[2] Even if this Court were to conclude for the first time in this case that a Rule 9.1 "application" should be treated as a "motion" under Rule 7(m), it would be inequitable to impose the heavy sanction of a denial for Plaintiffs' failure to anticipate such a holding.

The creative lengths to which the Commission has gone in its opposition make clear that it does not believe the appointment of a three-judge court would be desirable in this case. But Congress has given Plaintiffs the right to elect such a court, and they have done so. This is not the Commission's decision to make.

Dated: November 9, 2010

Respectfully submitted,

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