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) All consolidated cases.

MOTION OF PLAINTIFF AFL-CIO
FOR AN INJUNCTION PENDING APPEAL

Plaintiff AFL-CIO respectfully moves the Court for an injunction against enforcement of the so-called "backup" definition of electioneering communications at 2 U.S.C. § 434(f)(3)(A)(ii), as modified by this Court in its May 2, 2003 order, pending a final decision by the Supreme Court of the merits of the AFL-CIO's and other plaintiffs' challenges to the lawfulness of that provision and the so-called "primary" definition of "electioneering communications" at 2 U.S.C. § 434(f)(3)(A)(i).

Plaintiffs' motion is supported by the accompanying Memorandum and the Second Declaration of Denise Mitchell.

Respectfully submitted,

Laurence E. Gold
(DC Bar No. 336891)
Associate General Counsel
AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5130

Michael B. Trister
(DC Bar No. 54080)
Lichtman, Trister & Ross
1666 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 328-1666

Attorneys for Plaintiffs

Larry P. Weinberg
(DC Bar No. 129619)
Robert D. Lenhard
(DC Bar No. 406930)
1101 17th Street, N.W.
Washington, D.C. 20036
(202) 775-5900

Of Counsel

Dated: May 9, 2003

CERTIFICATE OF SERVICE

This is to certify that I caused a copy of the foregoing **Motion of Plaintiff AFL-CIO for an Injunction Pending Appeal** and **Memorandum of AFL-CIO in Support of Motion For an Injunction Pending Appeal** be served on all counsel required to be served, on May 9, 200, by the means indicated below:

By First Class Mail, Postage Pre-Paid

Kenneth W. Starr
Kirkland & Ellis
655 15th Street, NW
Suite 1200
Washington, DC 20005

Valle Simms Dutcher
Southeastern Legal Foundation, Inc.
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, GA 30326

James Bopp, Jr.
James Madison Center for Free Speech
1 South Sixth Street
Terre Haute, IN 47807

Mark J. Lopez
American Civil Liberties Union
125 Broad Street
New York, NY 10004

G. Hunter Bates
1215 Cliffwood Drive
Goshen, KY 40026

Charles J. Cooper
Cooper & Kirk, PLLC
1500 K Street, NW
Suite 200
Washington, DC 20005

James Matthew Henderson, Sr.
The American Center for Law and Justice
205 Third Street, SE
Washington, DC 2003

Jan Witold Baran
Thomas W. Kirby
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Floyd Abrams
Cahill, Gordon & Reindel
80 Pine Street
Room 1914
New York, NY 10005-1702

William J. Olson
William J. Olson, PC
8180 Greensboro Drive
Suite 1070
McLean, VA 22102-3860

Joseph E. Sandler
Sandler, Reiff & Young, PC
50 E Street, S.E.
Suite 300
Washington, DC 20003

John C. Bonifaz
National Voting Rights Institute
27 School Street
Suite 500
Boston, MA 02108

Sherri L. Wyatt
Sherri L. Wyatt, PLLC
1017 12th Street, N.W.
Suite 300
Washington, DC 20005-4061

Bobby R. Burchfield
Covington & Burling
1201 Pennsylvania Ave., NW
Washington, DC 20004

By Hand Delivery

James J. Gilligan
Trial Attorney
U.S. Department of Justice
Civil Division
901 E Street, NW
Room 816
Washington, DC 20004

Randolph D. Moss
Wilmer, Cutler & Pickering
2445 M Street, NW
Washington, DC 20037-1420

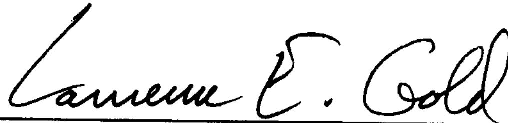
Steven Hershkowitz
Benjamin Streeter
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

By Overnight Delivery

E. Joshua Rosenkranz
Brennan Center for Justice
161 Avenue of the Americas
12th Floor
New York, NY 10013

By E-Mail

On all counsel who have entered appearances or who have requested such service.



Laurence E. Gold

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al., Plaintiffs,	)	Civ. No. 02-582 (CKK, KLH, RJL)
v.	)	All consolidated cases.
FEDERAL ELECTION COMMISSION, et al., Defendants.	)	

MEMORANDUM OF AFL-CIO IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL

A majority of this Court has ruled that the so-called "primary" definition of an "electioneering communication" in the Bipartisan Campaign Reform Act of 2002, at 2 U.S.C. § 434(f)(3)(A)(i), is unconstitutional, and a different majority has held that the so-called "backup" definition, at 2 U.S.C. § 434(f)(3)(A)(ii), is unconstitutional except for its first clause. What remains is a formulation that Congress never enacted or intended, and that is broader than both the primary definition at least temporally, and broader than the full "backup" definition inasmuch as its excised clause comprised a further condition on its application.

The definition now in effect is, we submit, plainly unconstitutional, and, unlike the primary definition, applies to plaintiff AFL-CIO right now. In the brief time since this Court issued its May 2, 2003 opinions, the AFL-CIO has carefully considered what law most appropriately should apply pending the Supreme Court's final determination of the "electioneering communication" issue.

In our view, with this Court having found, correctly, that the primary definition is unconstitutionally overbroad, and, correctly again, that the phrase "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate" is unconstitutionally vague, and in light of the vital First Amendment rights at stake, it would be intolerable for this Court to restore either definition pending the Supreme Court's final determination of the various appeals. Additionally with respect to the primary definition, although its full and ongoing effect would not commence until some time in December, there is no guarantee that the Supreme Court will have issued its decision by then, and in the interim one or more special congressional elections is virtually certain to be held.

That leaves the "promote, support, attack or oppose" formulation that now comprises the full definition of an "electioneering communications." We generally concur with the legal arguments regarding the constitutional deficiency of this formulation by plaintiffs National Rifle Association, at pages 5-13 of its memorandum in support of its motion for a stay pending appeal, and by the Madison Center plaintiffs at pages 4-15 of their memorandum in support of their motion for an injunction pending appeal.

We add only that both defendant Federal Election Commission (FEC) and defendant intervenors are already on record as to the vagueness of this formulation. In its recent rulemaking on "electioneering communications," the FEC declined to adopt any regulation exempting from the primary definition communications that do not "promote," "support," "attack" or "oppose" a candidate, as 2 U.S.C. §§ 434(f)(2)(B)(iv) and 431(20)(A)(iii) permit, because it could not be certain whether *any* reference to a candidate could be immune from such an interpretation. See "Electioneering Communications," 67 Fed. Reg. 65190, 65200-02 (Oct.

23, 2002). And, the defendant-intervenors in this litigation urged the FEC not to include this phrase in any exception because it was "subjective," would "create[] uncertainty about whether a communication will be covered by the law," and would "undermine[] the bright line test" of the primary definition, which Congress enacted "because entities that are not political committees must be able to easily tell whether their communications will be covered." Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe and Senator James Jeffords, at 8, 6 (August 23, 2002).
www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf. Certainly, if this phrase is inadequate to provide a sufficient "bright line" for unions, corporations and membership organizations if included in an exception to the principal definition of "electioneering communications," then it cannot fully comprise the definition itself.

Our legal position in this regard is no abstract matter. As set forth in the attached Second Declaration of Denise Mitchell, it is a certainty that between now and December the AFL-CIO will find it necessary to broadcast advertisements that refer to candidates in a manner that may violate the definition now in effect, and that the definition otherwise will severely inhibit the AFL-CIO's ability to determine what other forms of broadcast messages would be lawful, and could result in the AFL-CIO refraining from broadcasting anything at all. Accordingly, the definition approved by the Court exacts irreparable harm on the AFL-CIO; and, particularly, in light of the Court's order requiring all parties to seek a stay, if at all, by noon today -- which, we believe, makes it more than prudent for the AFL-CIO to seek injunctive relief by that deadline -- that showing should suffice to satisfy the irreparable harm standard despite the happenstance that

the AFL-CIO has no imminent plans certain to undertake such broadcasts.

CONCLUSION

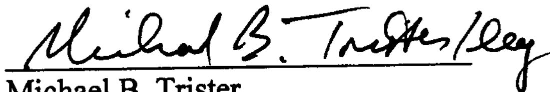
Accordingly, for the reasons set forth above, plaintiff AFL-CIO respectfully requests that its motion be granted.

Respectfully submitted,

Laurence E. Gold
(DC Bar No. 336891)
Associate General Counsel
AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5130

Larry P. Weinberg
(DC Bar No. 129619)
Robert D. Lenhard
(DC Bar No. 406930)
1101 17th Street, N.W.
Washington, D.C. 20036
(202) 775-5900

Of Counsel



Michael B. Trister
(DC Bar No. 54080)
Lichtman, Trister & Ross
1666 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 328-1666

Attorneys for Plaintiffs

Dated: May 9, 2003