IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPUBLICAN NATIONAL COMMITTEE, *et al.*, **Plaintiffs,**	
v.	**Civ. No. 02-874 (CKK, KLH, RJL)**
FEDERAL ELECTION COMMISSION, *et al.*, **Defendants.**	**All consolidated cases.**

OPPOSITION OF REPUBLICAN NATIONAL COMMITTEE TO DEFENDANTS' AND INTERVENORS' MOTIONS FOR STAY PENDING APPEAL

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Defendants and Intervenors have moved for a stay, pending appeal to the United States Supreme Court, of this Court's judgment permanently enjoining enforcement of major provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155. Defendants have also moved for an "administrative stay" while this Court considers the pending motions for a stay pending appeal. The Republican National Committee ("RNC"), Republican Parties of Colorado, New Mexico, and Ohio, Dallas County (Iowa) Republican County Central Committee, and Michael Duncan (the "RNC Plaintiffs") urge this Court to deny these motions, insofar as they relate to Title I of the BCRA.[1]

For six months, the RNC Plaintiffs have operated in compliance with a regime that deprives them of their First Amendment rights of speech and association. This Court's judgment invalidates at least some of those restrictions. Now, in less than six months -- on November 4 of this year -- five states will hold state and local elections, and three of those five will elect governors. In addition, citizens in numerous other states will go to the polls to vote for their local governments -- mayors, city councils, school boards, and other officials that have an immediate effect on their daily lives. Plaintiff Republican Parties of Colorado, New Mexico, and Ohio all have mayoral elections scheduled to take place in their states on November 4. Since its founding in 1856, the RNC has been intimately and continuously involved in these state and local elections, but under Title I of BCRA its ability to assist state and local parties and candidates was restricted at best and prohibited at worst. Remarkably, despite extensive briefing by the RNC Plaintiffs on this very issue of national party participation in off-year elections, Defendants completely ignore the issue in seeking full enforcement of Title I at a time when

[1] The RNC and its co-plaintiffs have not challenged the "electioneering communications" provisions of BCRA's Title II and therefore do not address herein the separate motions filed by various plaintiffs in the other consolidated actions that seek a stay limited to those provisions.

there is simply no cognizable federal interest in doing so. Once again, Defendants have confirmed their world view that all election activity -- state and local, as well as federal -- is subject to total *federal* regulation.

Having won from this Court their freedom once again to associate freely with state and local parties and candidates as well as to engage in core political speech without fear of criminal prosecution, the RNC Plaintiffs oppose in the strongest terms any effort to continue BCRA's infringements of these precious freedoms.

FACTS

As found by this Court, five states -- Kentucky, Louisiana, Mississippi, New Jersey, and Virginia -- have state and local elections in odd-numbered years when there are no federal candidates on the ballot, including this November. *See* Op. of Henderson, J. at 151, Findings ¶ 71(c)(2)(A); Op. of Leon, J. at 151, Findings ¶ 58. All of the money raised and spent by the state and local parties and candidates in those elections is raised, spent, and reported consistent with state, not federal, law. This money is, accordingly, "*nonfederal money*."

A critical part of the mission of the national party committees is to work with state and local parties, and state and local candidates, to design and implement voter mobilization programs (called "Victory Plans" by the Republicans and "Coordinated Campaigns" by the Democrats) in these off-year elections. Yet Section 323(a) severely impedes the ability of national party personnel to work with state and local parties and candidates on these voter mobilization plans without fear of civil or even criminal liability. It is far too easy for a zealous prosecutor or a political opponent to allege that advising and providing direction in the construction and implementation of such a "Victory Plan" constitutes "direct[ing]" or "spend[ing]" nonfederal money. It is noteworthy indeed that Defendants in this action have

never denied that RNC participation in these plans is severely curtailed by new Section 323(a). These voter mobilization plans for the November 2003 election are being developed right now, and under this Court's ruling there is no question that the RNC may cooperate fully with and assist Republican state and local parties, and state and local candidates in implementing them. In all likelihood, these plans will be completed and perhaps even fully implemented before the Supreme Court is able to act.

This Court's decision largely ameliorates concerns about whether national party personnel can legally work with state and local parties and candidates on their voter mobilization plans, without fear of committing a federal crime. As the RNC Plaintiffs understand the decision, RNC personnel may freely meet with state and local party officials and candidates to advise them on how to spend, allocate and raise their resources in these upcoming elections, just as they did before BCRA became effective. Whereas such consultation would, under Section 323(a) as drafted, subject RNC personnel to possible felony prosecution for "direct[ing] . . . [or] spend[ing]" nonfederal money, the Court's decision will allow political parties to participate fully in the November 2003 state and local election campaigns without fear of prosecution. The RNC Plaintiffs respectfully submit that there can be no countervailing justification favoring a return to BCRA's oppressive restrictions that would be weighty enough to preclude unfettered national party participation in these imminent state and local elections. This concern alone strongly militates against entry of the requested stay.

ARGUMENT

The granting of a stay pending appeal is "an extraordinary remedy." *Cuomo* v. *U.S. Nuclear Reg. Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985). The moving party bears a "heavy burden" to establish its entitlement to a stay. *See In re Verizon Internet Services, Inc.*,

2003 WL 1946489, at *19 (D.D.C. Apr. 24, 2003) (denying stay pending appeal); *see* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2904 ("Because the burden of meeting this standard is a heavy one, more commonly stay requests will not meet this standard and will be denied.").

Under the familiar rules of this Circuit, to obtain a stay pending appeal, Defendants and Intervenors must show (1) that they have a substantial likelihood of success on the merits, (2) that they will suffer irreparable injury if the stay is denied, (3) that issuance of the stay will not cause substantial harm to other parties, and (4) that the public interest will be served by issuance of the stay. *See United States* v. *Philip Morris*, 314 F.3d 612, 617 (D.C. Cir. 2003). For the reasons described below, they cannot meet this heavy burden here.

I. DEFENDANTS' EFFORT TO REARGUE THE MERITS CANNOT JUSTIFY A STAY.

Defendants' and Intervenors' arguments for a stay largely reiterate the arguments this Court has already carefully considered and rejected. Moreover, it is highly unlikely that the claimed public cynicism would be exacerbated by allowing the RNC Plaintiffs to exercise their rights of association and speech in formulating and implementing voter mobilization plans together with state and local parties and candidates in the five states and numerous localities holding off-year elections. As the majority of this Court recognized, participation in nonfederal elections during an off year presents no prospect of corruption or apparent corruption of federal officials. Since the Supreme Court will undoubtedly decide this case well before the 2004 federal elections, a ruling by the Supreme Court reviving Title I (however unlikely) would come in time for the 2004 elections when both federal and state candidates will be on the same ballot.

This Court's decision clearly establishes that the RNC Plaintiffs, not Defendants, enjoy a substantial likelihood of success on the merits, with regard to Title I. The RNC Plaintiffs

incorporate herein by reference their briefing on the merits. It suffices to note that after careful consideration of the elaborate record in this case, the Court found that Title I's interference with political parties' participation in state and local elections through unified party building programs for all its candidates restricts their First Amendment rights in a manner that is not closely drawn to serve the government's interest in preventing corruption or apparent corruption of federal candidates or officeholders. Judge Henderson would have gone further and struck down Title I in its entirety. (Neither Judge Henderson nor Judge Leon needed to address the RNC's substantial arguments based on federalism or equal protection; Defendants will, of course, need to overcome these hurdles, as well as this Court's First Amendment rulings, in the Supreme Court in order to resurrect Title I.) In light of the Court's decision, and the ample support for that decision as recounted at length by Judges Henderson and Leon, it can hardly be claimed that Defendants and Intervenors are likely to succeed on the merits. To the contrary, all indications are that they are likely to fail.

II. DEFENDANTS CANNOT MEET THE REMAINING REQUIREMENTS FOR A STAY.

A. A Stay Will Impose Immediate and Irreparable Injury on the RNC Plaintiffs.

It is the RNC Plaintiffs, not the Government or the Intervenors, who will suffer irreparable injury if this Court stays its judgment enjoining enforcement of Title I. This year's state and local election campaigns are already underway. State and local parties and candidates are looking to the RNC for the strategic advice and assistance the national party historically provides in devising and implementing effective plans for registering and turning out Republican voters. It is well-settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *See Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). Every day that the RNC is constrained from speaking freely and closely

associating with state and local parties and candidates, the RNC Plaintiffs and their millions of supporters suffer irreparable injury. Because a stay would "cause substantial harm" to the RNC Plaintiffs, Defendants and Intervenors cannot satisfy the third prong of the standard for issuance of a stay.

Nor would denial of a stay cause Defendants and Intervenors irreparable injury. Notwithstanding their claim that absent issuance of a stay, "uncertainty" would result and the FEC's job of administering the Federal Election Campaign Act would be complicated, neither of these exaggerated concerns could possibly outweigh the immediate injury to political parties' First Amendment freedoms and the irreparable effect of that injury on this year's state and local elections -- an effect that Defendants and Intervenors studiously ignore in their papers. To the extent that the FEC believes it must reinstate its pre-BCRA reporting and "allocation" regulations, nothing is stopping the FEC from doing so, whether by formal, interim rulemaking or by issuance of a policy statement. Indeed, as Intervenors note, the Chairman of the FEC is already on record as stating that the FEC would likely issue "guidelines to the political community" and that the FEC "will try to get guidance out as quickly as possible." *See* Intervenors' Motion for Stay, at 4 n. 3 (quoting BNA Today, May 6, 2003). The interim administrative action apparently already planned by the FEC would address Defendant's purported concerns *without* reinstating BCRA's oppressive restrictions on political speech in the heat of state and local election campaigns. Intervenors' suggestion that a stay would, in fact, be helpful to Plaintiffs by obviating "the prospect of adjusting to several separate sets of campaign finance laws in roughly a year's time," (Intervenors' Motion for Stay, ¶ 9), is a nonsensical makeweight. This purported concern did not dissuade the Intervenors from filing their challenges to the Federal Election Commission's ("FEC") regulations implementing BCRA,

even though those very challenges ensured that some uncertainty would surround enforcement of federal election laws by the FEC. More fundamentally, although it is true that Section 323(a) could not be more clear in its extreme breadth and unforgiving scope, it is perverse to rely upon that clarity and overbreadth as a basis for justifying the continued abridgment of First Amendment rights.

B. The Public Interest Disfavors a Stay.

The public interest here strongly favors denial of a stay. Enforcement of First Amendment rights is always in the public interest, especially so when political speech at the heart of the First Amendment is at issue. *See People for the Ethical Treatment of Animals, Inc.* v. *Gittens*, 215 F. Supp. 2d 120, 127 (D.D.C. 2002) (granting preliminary injunction enforcing First Amendment rights because "the public interest favors a preliminary injunction whenever First Amendment rights have been violated."); *Freethought Soc'y* v. *Chester County*, 194 F. Supp.2d 437, 441 (E.D. Pa. 2002); *Gay Lesbian Bisexual Alliance* v. *Sessions*, 917 F. Supp. 1558 (M.D. Ala. 1996) (denying stay pending appeal of judgment enforcing First Amendment rights, and noting public interest served because "vital First Amendment speech principles are at stake here"). Here issuance of a stay would preclude the political parties from playing their traditional role in this year's state and local elections. Neither in their merits briefing nor in their stay papers have Defendants been able to postulate -- much less prove -- any adverse effect on the public interest from the RNC's participation in the development and implementation of Victory Plans in this year's nonfederal elections. The public interest favors allowing the elections to proceed unfettered by the artificial and unconstitutional associational and speech constraints imposed by BCRA.

CONCLUSION

For the foregoing reasons, the RNC Plaintiffs respectfully urge this Court to deny the motions for stay with regard to Title I.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Robert K. Kelner, a member of the bar of this Court, certifies that he caused a copy of the foregoing Opposition of Republican National Committee to Motion for Stay Pending Appeal to be served on all counsel required to be served on this 12th day of May, 2003, by the means indicated below:

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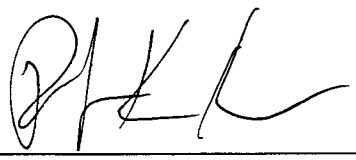

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