IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Senator Mitch McConnell, et al.,

Plaintiffs,

v.

Federal Election Commission, et al.,

Defendants,

and

Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, Senator James Jeffords,

Intervening Defendants.

Civil Action No.:
02-CV-582 (CKK, KLH, RJL)
ALL CONSOLIDATED CASES

RESPONSE OF INTERVENING DEFENDANTS TO THE NRA'S MOTION FOR ADMINISTRATIVE STAY

For the reasons set forth in the Intervening Defendants' Motion to Stay, filed on May 8, 2003, the Intervening Defendants respectfully submit that the public interest would be served by staying this Court's judgment in its entirety pending expedited review before the Supreme Court of the United States. The same reasoning applies to the motion of the National Rifle Association ("NRA") and the National Rifle Association Political Victory Fund ("NRA Victory Fund") for a temporary, administrative stay: A stay should issue, but the stay should not attempt to differentiate between different portions of this Court's judgment. Rather, as requested by the Government Defendants, the administrative stay should suspend the effect of this Court's

judgment in its entirety, pending resolution by this Court or the Supreme Court of the various stay applications currently under submission.

For the reasons set forth in the motions of the United States and the Intervening Defendants for a stay pending appeal, a stay of this Court's judgment *in its entirety* will serve the substantial public interest in minimizing disruption of the 2004 federal election cycle, which is already underway. Granting a stay as to only particular portions of this Court's judgment, however, would have just the opposite effect, and would risk *increased* confusion regarding the state of the federal campaign finance laws. And, a partial stay would do nothing to address the public interest in preventing unnecessary disruption of the ongoing federal election cycle. In enacting BCRA, Congress recognized that the public interest would be served by an "orderly transition" from one set of campaign finance rules to the next.[1] Issuance of a stay would further this clearly expressed public policy.

Without relitigating the merits of the case before this Court, moreover, it is safe to say that not all parties see the prospects of reversal on appeal or the risk of irreparable injury, *as to each particular issue*, in the same light. Indeed, although the NRA and the NRA Victory Fund

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[1] *See, e.g.*, 148 Cong. Rec. S2096, S2142 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold) ("This expedited judicial review process will assist an orderly transition from the old system to the new system under this bill. Furthermore, the FEC is charged with promulgating soft money regulations well before the date that the soft money ban will take effect. In short, with enactment of the bill, promulgations of key regulations, and a prompt and efficient resolution of the litigation, we will be in a position in which a new campaign finance system can be implemented in a certain and sure fashion for the 2004 elections."); 148 Cong. Rec. S2096, S2142 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (responding to a question about the "effective date" provision, and stating "[b]ecause of the delay in getting the bill through the House, it became clear that there would be a number of very complicated transition rule issues and implementation problems if we were to try to put the bill into effect for the 2002 elections. We reluctantly determined that it would simply not be practical to apply new rules in the middle of the election cycle. To change the rules in the middle of the campaign would have created uncertainty and potential unfairness, particularly since primaries are imminent in some States.").

argue that, if this Court's decision is not stayed, they will be unable to broadcast certain advertisements, they cannot escape the fact that BCRA does not prohibit *any* group from expressing its views in *any* advertisements. Rather, the sole restriction is that corporations and unions may only engage in "electioneering communications" if they are financed through the corporations' or unions' separate segregated funds or "political action committees." As a result, even if the NRA cannot finance certain advertisements with its general treasury funds, there is no reason that the NRA Victory Fund cannot fund them.[2]

In contrast, as explained in the motions of the United States and the Intervening Defendants, there are compelling reasons to believe that, absent a stay of this Court's judgment on Title I of BCRA, the integrity of the 2004 federal elections will be called into question – both on the ground that repeated changes in the law, and uncertainty regarding its contours, might affect the election, and on the ground that the public will continue to question the integrity of federal elections and federal officeholders. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000).

The Intervening Defendants are not asking, for purposes of the present motion, that this Court accept their view of the record and law, and reject the NRA's view. In litigation of this sort, a stay application should not be used as an occasion to relitigate the merits of the case, but

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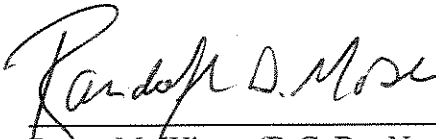
[2] The NRA also does not address the question, which the parties stipulated to address separately from the constitutional challenges resolved in this Court's decision, whether it qualifies for the *MCFL* exception to Section 203 of BCRA. Of course, if the NRA falls within the *MCFL* exception, it is not subject to any of the injuries it alleges. *See* 148 Cong. Rec. S2096, S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) ("[BCRA] does not purport in any way, shape, or form to overrule or change the Supreme Court's construction of [FECA] in *MCFL*. Just as an *MCFL*-type corporation, under the Supreme Court's ruling, is exempt from the current prohibition on the use of corporate funds for expenditures containing 'express advocacy,' so too is an *MCFL*-type corporation exempt from the prohibition in the Snowe-Jeffords amendment on the use of its treasury funds to pay for 'electioneering communications.'").

rather to determine whether the public interest would be best served by suspending the Court's judgment pending expedited Supreme Court review. As to that issue, as we have explained, the public interest strongly supports a stay of this Court's decision in all respects pending Supreme Court review.

The same holds true with respect to the administrative stay that the NRA and the NRA Victory Fund now seek. For that reason, the Intervening Defendants concur in the motion of the United States for an administrative stay. Any stay of this Court's decision, whether only for a few days or until the Supreme Court renders its judgment, should apply to all portions of this Court's judgment. Accordingly, the Intervening Defendants do not oppose the pending motion for an administrative stay, so long as any stay that this Court enters applies equally to all portions of this Court's judgment.

Dated: May 9, 2003.

Respectfully submitted,



Roger M. Witten (D.C. Bar No. 163261)
Seth P. Waxman (D.C. Bar No. 257337)
Randolph D. Moss (D.C. Bar No. 417749)
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

David J. Harth
Charles G. Curtis, Jr.
HELLER EHRMAN WHITE &
MCAULIFFE LLP
One East Main Street, Suite 201
Madison, WI 53703

Bradley S. Phillips
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071

Prof. Burt Neuborne
Frederick A.O. Schwarz, Jr.
BRENNAN CENTER FOR JUSTICE
161 Avenue of the Americas, 12th Floor
New York, NY 10013

Fred Wertheimer
DEMOCRACY 21
1825 Eye Street, N.W., Suite 400
Washington, DC 20006

Trevor Potter
THE CAMPAIGN AND MEDIA LEGAL CENTER
1101 Connecticut Ave., N.W.,
Suite 330
Washington, DC 20036

E. Joshua Rosenkranz
HELLER EHRMAN WHITE &
MCAULIFFE LLP
120 West 45th Street
New York, NY 10036

Alan B. Morrison
Scott Nelson
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington D.C. 20009

Counsel for the Intervening Defendants