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

MEMORANDUM OF INTERVENING DEFENDANTS IN REPLY TO CERTAIN PLAINTIFFS' OPPOSITION TO A COMPREHENSIVE STAY

Intervening Defendants Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords submit this Reply to the Opposition Papers filed by the AFL-CIO, AFL-CIO-COPE, the California Democratic Party and the California Republican Party, *Echols* Plaintiffs, Plaintiffs represented by the Madison Center, certain Plaintiffs in *McConnell v. FEC*, the National Association of Broadcasters, and the Republican National Committee.

In a cacophony of voices, various Plaintiffs have urged this Court to stay various portions of its opinion. The NRA and certain (but not all) of the *McConnell* Plaintiffs urge the Court to stay the back-up definition of electioneering communications but leave the principal definition in

effect.[1] Some (but not all) Madison Center Plaintiffs and the AFL-CIO seek to have both the principal and back-up electioneering communications provisions declared unconstitutional through an injunction issued by this Court.[2] The National Association of Broadcasters "takes no position on Defendants' motions as they relate to provisions of BCRA other than Section 504," but asks that a stay not issue with respect to that particular section of BCRA.[3] The *Echols* Plaintiffs request that a stay not issue with respect to the Minors' Provision.[4] The RNC and California Political Parties offer no opinion on the merits of a stay of the Title II provisions, but ask that the Court's opinion with respect to Title I not be stayed.[5] In short, many of the Plaintiffs ask this Court to pick and choose from among its rulings and stay some while refusing to stay others, while other Plaintiffs oppose issuance of a stay at least as to the issues that concern them.

The Plaintiffs' request that only various *parts* of the district court's injunction be stayed would create confusion and disruption by creating four classes of rules in BCRA – those upheld by this Court and still in effect; those invalidated but at least temporarily still in effect pending the Supreme Court's decision; those sustained by this Court but enjoined; and those invalidated and (perhaps temporarily) not in effect until the Supreme Court's final decision. Any piecemeal stay of the opinion would add additional uncertainty to an already difficult process. The balance of harms and the public interest overwhelmingly support the issuance of a stay of the entirety of the district court's judgment in this case.

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1 *See* McConnell Opp. at 1; *see also* NRA Motion Seeking Stay at 1.

2 *See* Madison Center Opp. at 1-2; AFL-CIO Opp. at 1-2.

3 *See* NAB Opp. at 1.

4 *See* Echols Opp. at 2.

5 *See* CDP/CRP Opp. at 2, RNC Opp. at 1-2.

ARGUMENT

Acts of Congress Are Presumptively Constitutional. Plaintiffs' detailed briefing on their likelihood of success before the Supreme Court is essentially a reenactment of their case in chief. Although it cannot be determined with "mathematical certainty" how each Justice might rule in a case,[6] there is at minimum a "fair prospect" that this Court will reverse substantial parts of the district court's judgment invalidating provisions of the BCRA, including its invalidation of portions of the soft money rules contained in Title I. Due to the complexity of the case, there were few issues on which the judges of this panel were able to agree. At times, moreover, the judges applied different rationales. In such a situation, a court should rely on the presumption that acts of Congress are constitutional. As the Supreme Court has held, "[t]he presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). Plaintiffs' argument that this presumption is reversed in First Amendment cases, *see, e.g.,* McConnell Opp. at 2, is simply a recapitulation of their arguments on the merits. The courts have granted stays in First Amendment cases where the standards for issuance of a stay were otherwise met. *See Ashcroft v. North Jersey Media Group, Inc.*, 536 U.S. 954 (2002) (staying district court preliminary injunction awarded on First Amendment grounds); *see also Secretary of Interior v. Community for Creative Non-Violence*, 464 U.S. 989 (1983) (declining to vacate stay of court of appeals' mandate in First Amendment case).

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[6] *California v. American Stores Co.*, 492 U.S. 1301, 1306 (1989) (O'Connor, J., in chambers) ("Although I cannot, of course, predict with mathematical certainty my colleagues' views on this subject, . . . plausible arguments exist for reversing the decision below and . . . there is at least a fair prospect that a majority of the Court may vote to do so.").

Irreparable Harm. Plaintiffs significantly exaggerate the harm they will suffer if BCRA remains in effect until the Supreme Court issues its ruling. BCRA has been the law for the past six months, and Plaintiffs have offered no evidence of harm during that time. Plaintiffs themselves concede that "many of the most onerous of the Title I provisions . . . have not yet taken full effect" and will not take effect until late in 2003.[7] Various political party Plaintiffs claim that if BCRA is not stayed they will be prevented from "normal election planning activity,"[8] and that state and local parties will not be able to receive the "strategic advice and assistance the national party historically provides."[9] These concerns are greatly exaggerated. BCRA does not prevent the national parties from conferring with state and local parties. BCRA does not even prevent national parties from spending money to assist state and local parties – they can spend all the federal or "hard" money they wish. The AFL-CIO and Madison Center argue that if the Court issues a complete stay of its ruling, a "60 day gag period" could possibly apply to at least one special election.[10] Neither has carried its burden of demonstrating that any entity they represent is actually planning to run an advertisement in any upcoming special election to which this Court's decision would apply. They also neglect to mention that during this so called "gag-period" they can run any advertisement they like anywhere they please – the only restriction is that they must use "hard" money. Before the district court's decision, the parties and candidates were obligated to adhere to the rules of BCRA, including the ban on soft money, and none of the Plaintiffs sought to prevent those rules from coming into effect before issuance of the district court's final decision. It is too late in the day for Plaintiffs to claim that

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7 *See* CDP/CRP Opp. at 5.

8 *Id.* at 6.

9 *See* RNC Opp. at 5.

10 *See* Madison Center Opp. at 8 (60 day "gag period" could apply to June run-off election in Texas); *see also* AFL-CIO Opp. at 4.

they will now be "irreparably harmed" if the statue remains in effect while the Supreme Court considers the case.

In contrast, the Defendants will suffer irreparable harm if a complete stay does not issue. The act of setting aside a duly enacted Act of Congress – even for a short period of time – irreparably injures both the government and the public. Thus, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. Of Calif. V. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). Similarly, where a lower court enjoins enforcement of an Act of Congress, the harm to the public is immediate; and if that judgment is later reversed on appeal, the harm incurred is irreparable. *Cf. National Ass'n of Radiation Survivors*, 468 U.S. at 1324 (Rehnquist, J., in chambers).

The Court's opinion, if not stayed in its entirety, will engender significant uncertainty. The FEC has already repealed certain pre-BCRA regulations and issued others to ensure the smooth administration of BCRA after it went into effect.[11] This Court's ruling, if left unstayed or partially stayed, would leave a void in these regulations, which the FEC might only partially and belatedly fill through the issuance of interim guidance regarding the effect of the lower court's decision on the campaign finance laws.[12] Any such guidance will certainly take weeks or months to prepare, thus prolonging the uncertainty that currently reigns.

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[11] *See* Mem. in Supp. of Govt. Mot. for Stay at 9-10.

[12] *See, e.g.*, BNA Today, May 6, 2003 (FEC is "considering issuing guidelines to the political community about how the nation's new campaign finance law will be enforced in light of a federal court decision that drastically changes some of the law's key provisions"); *id.* (statement by FEC Chair Ellen Weintraub that the FEC is "'sensitive to the need of the regulated community for some clarity. . . . We're reviewing it as quickly as possible and we will try to get guidance out as quickly as possible.'") (Attachment A).

The Public Interest. As outlined above, the Plaintiffs do not agree on precisely which portions of the Court's opinion they would like to have stayed pending appeal. Instead, each explains how the stay they seek would benefit their own interests.[13] As a result, a selective stay could be viewed as bestowing competitive advantage on certain political actors – an approach this Court should reject.

The public interest speaks forcefully in favor of a stay of the entirety of the district court's injunctive order – and not just a part of it. Congress expressly considered the public interest in avoiding disruption of federal elections and took steps to avoid that problem when it delayed the effective date of BCRA until after the November 2002 election and directed any constitutional challenge to BCRA to be litigated on an expedited basis. Until now, the parties have operated under the rules of the BCRA, and no unfairness would be worked by maintaining those rules in effect until the Supreme Court issues its decision in this case. A piecemeal approach to Congress's actions does not promote the public interest and should be rejected.

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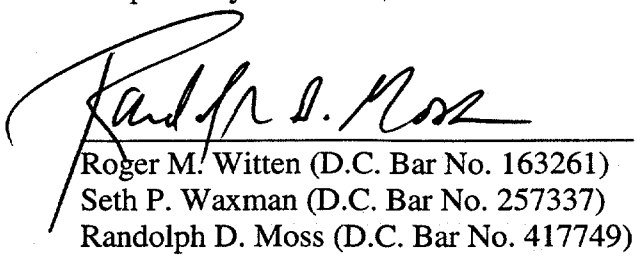
[13] *See, e.g.,* RNC Opp. at 7 ("Here issuance of a stay would preclude the political parties from playing their traditional role . . . .").

CONCLUSION

For the foregoing reasons, the injunctive order entered by this Court in this case should be stayed in its entirety pending the Supreme Court's final disposition of all appeals from that order.

Dated: May 14, 2003

Respectfully submitted,



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ATTACHMENT

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BNA, Inc.

Daily Report for Executives

No. 87
Tuesday May 6, 2003
ISSN 1523-567X

Regulation & Law

Campaign Finance
FEC Considers Issuing New Guidance As Lawyers Ponder Effect of BCRA Ruling

The Federal Election Commission is considering issuing guidelines to the political community about how the nation's new campaign finance law will be enforced in light of a federal court decision that drastically changes some of the law's key provisions, FEC officials told BNA May 5 (*McConnell v. FEC,* D. D.C., No. 02-582, 5/2/03).

The FEC's task is complicated by the complexity of the new court decision and the fact that the changes the court made in the Bipartisan Campaign Reform Act could be overturned on appeal to the U.S. Supreme Court, possibly by the end of this year.

The FEC and the Justice Department are considering simply asking for a court stay to block the effect of the lower court decision until the Supreme Court decides the BCRA case, officials said. Also considering a request for a stay are attorneys for BCRA's congressional sponsors, as well as the law's challengers. Both supporters and opponents of the law are unhappy with the recent district court decision, though for different reasons.

Election attorneys following the BCRA case said initial pronouncements of a court victory for the law's challengers were eroding as the 1,600-plus page ruling was read more carefully. For example, while the court overturned a complete ban of unlimited "soft money"--a central provision of BCRA--it left intact tough restrictions on who can ask for soft money and how it can be spent. That left it far from clear whether the national Democratic and Republican parties would seek to capitalize on the ruling by immediately going out and raising soft money.

Party Plans Uncertain

The special three-judge court reviewing the constitutionality of the new campaign finance law issued a massive written opinion May 2, striking down some parts of the law and upholding others (86 DER A-18, 5/5/03) . BCRA--enacted in March 2002 and in effect since last November's congressional elections--bans unlimited soft money contributions to the political parties.

The law also prohibits corporate- and union-sponsored "issue ads"--known in the law as "electioneering communications"--which mention federal candidates 30 days before a primary or 60 days before a general election. Supporters say the new law is needed to restore limits to federal campaign finance while opponents say BCRA violates First Amendment guarantees of free speech.

A written statement issued May 2 by Republican National Committee Chairman Marc Racicot made no mention of plans to raise soft money in light of the court decision. Racicot's statement said the district

court decision was a "positive first step" but emphasized that "the Supreme Court will have the final word" about whether BCRA is constitutional.

Democratic National Committee General Counsel Joseph Sandler told BNA May 5 that the DNC had not yet decided whether to renew efforts to raise soft money, though such a move "is being talked about." Sandler suggested the DNC would discuss options with other party committees and watch the moves of others involved in the litigation before deciding how to respond to the BCRA ruling.

BCRA supporters were disappointed with the court ruling allowing party committees again to accept soft money. However, the reform supporters noted that, even under the decision, the parties would be limited in what they could use soft money for and who could help raise it. The court decision bars use of soft money for ads promoting or attacking specific candidates and it upholds BCRA's prohibition on federal officeholders and candidates soliciting soft money.

Whether to Ask for a Stay?

Campaign reformers were considering asking for a stay of the district court's ruling on soft money, while the BCRA challengers were debating whether to ask for a stay of the court's decision regarding so-called issue ads that refer to a candidate. The district court also approved a "back-up" provision governing issue ads that seems even more restrictive than the primary BCRA provision, attorneys agreed. The primary provision restricted such ads only in the weeks before an election, while the back-up provision is in effect at all times.

Attorneys said the provision backed by the court could restrict such ads being aired today--depending on who is targeted. It could, for example, apply to ongoing ad campaigns criticizing Republican senators who have opposed President Bush's tax-cut plan. These include Sen. George Voinovich (R-Ohio), who is up for re-election next year.

Such ads "could be construed as election ads" under the new court decision, according to attorney Cleta Mitchell, who helped represent the BCRA challengers. Mitchell criticized this part of the ruling as antithetical to First Amendment free speech guarantees. She said a suggestion by the court that ad sponsors ask for an FEC advisory opinion about particular ads was equivalent to a requirement to "ask the government for permission to speak."

Another representative of the BCRA challengers, Republican election attorney James Bopp, said the issue-ad provision upheld by the district court was "more pernicious, more evil" than the "blackout" period struck down by the court. That provision barred corporate- and union-sponsored issue ads referring to a candidate within 30 days of primary and 60 days of a general election.

Bopp said he was pleased with other parts of the court decision, especially a ruling that a ban on campaign contributions by minors is unconstitutional.

Mitchell and Bopp both said the BCRA challengers are discussing whether to seek a stay of the district court's decision on issue ads

FEC Considering Response

FEC Chairwoman Ellen Weintraub told BNA May 5 that the commission has begun discussing how to respond to district court ruling. The FEC commissioners met in closed session on the first workday after the massive, 1,600-page court opinion was released. The six commissioners, however, came to no final decisions, according to Weintraub and others.

"We're sensitive to the need of the regulated community for some clarity" in the aftermath of the court decision, Weintraub said. "We're reviewing it as quickly as possible and we will try to get guidance out as quickly as possible."

Notice of appeal has already been filed by the FEC in the case, and the Supreme Court is widely considered certain to agree to review the matter. But, the timing remains a question mark. Many observers believe the court will schedule the case for argument next October, with a ruling possible next December or January. Some have said the high court could move even sooner.

The comments of Weintraub, a Democrat, were echoed by the FEC's Republican Vice Chairman Bradley Smith, who said in a separate telephone interview that the commission is "digesting the [district court] decision and examining all options."

Noble Urges Policy Statement

Exactly what form new FEC guidelines might take is not yet clear, according to Weintraub. She did say, however, that the FEC would not attempt a wholesale rewrite of BCRA regulations on soft money and issue ads, which it adopted last year. She said that it would not make sense to write new rules so soon, especially when the lower court decision might be overturned by the Supreme Court.

Short of rewriting its rules, observers suggested, the FEC could simply issue a statement regarding enforcement. Larry Noble, executive director and general counsel of the Center for Responsive Politics noted that the FEC in previous cases has warned the political community to tread cautiously while a legal question is still unsettled.

Noble, a former FEC general counsel, recalled the that the commission issued a statement regarding a federal appeals court decision in *FEC v. Colorado Republican Federal Campaign Committee.*. Rules limiting party contributions to candidates were struck down by the U.S. Court of Appeals for the Tenth Circuit, but the FEC said those rules would be enforced if they were upheld eventually by the Supreme Court. The high court did uphold the rules when it reviewed the case--known as *Colorado Republican II*--in 2001.

"Candidates and parties should tread carefully if they decide to engage in campaign practices in strict accordance with [the district court] decision," Noble said in a written statement. "If the Supreme Court winds up reversing parts of the law the court struck down, it is possible that violators of those sections could face an enforcement action or prosecution."

By Kenneth P. Doyle

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I hereby certify that on May 14, 2003, I caused a true and accurate copy of Intervening Defendants' Memorandum in Reply to Certain Plaintiffs' Opposition to a Comprehensive Stay to be served upon the following individuals by email and by first class mail:

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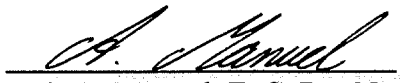

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