**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| SENATOR MITCH McCONNELL, *et al.*, | |
| Plaintiffs, | Civ. No. 02-582 (CKK, KLH, RKL |
| v. | |
| FEDERAL ELECTION COMMISSION, *et al.*, | |
| Defendants. | |

**MEMORANDUM OF CERTAIN PLAINTIFFS IN *MCCONNELL, et. al. v. FEC, et al.* IN RESPONSE TO MOTIONS TO STAY ALL OR PART OF THIS COURT'S FINAL JUDGMENT OF MAY 2, 2003**

This memorandum is respectfully submitted on behalf of Senator Mitch McConnell; Southeastern Legal Foundation, Inc.; Representative Bob Barr; Center for Individual Freedom; National Right to Work Committee; 60 Plus Association, Inc.; U.S. d/b/a Pro English and Thomas McInerney (the "McConnell Plaintiffs") in response to the various motions filed with this Court seeking a stay of all or part of this Court's final judgment entered on May 2, 2003. As more fully set forth below, the McConnell Plaintiffs oppose the motions of the defendants and defendant-intervenors for a stay of the *entire* judgment and support plaintiffs' motions for a stay of so much of this Court's judgment as established a new definition of "electioneering communications."

The request of the defendants and defendant-intervenors that this Court should simply reinstate BCRA in its entirety ignores that, at its core, this case is about the rights of the nation's citizens to exercise their First Amendment rights to engage in core political speech without interference from the federal government. It is not enough to say, as defendants and in-

tervenors do, that it would be administratively convenient to reinstate BCRA as passed. Def. Mem. at 4-5; Int. Mem. at 3-5. It is not enough to say, as defendants and defendant-intervenors do, that it will be less confusing to proceed under BCRA's contemplated scheme. *Id*. at 4-5; Int. Mem. at 4. Each of this Court's rulings striking down various provisions of BCRA was driven by demands of the First Amendment, demands that cannot simply be swept under the rug on the ground that it would be more convenient or more tidy to do so.

The government's answer is simply to recite that because Acts of Congress are presumptively constitutional, BCRA should be permitted to remain in full force and effect until the Supreme Court has issued its final decision. The argument ignores the Congressional command vesting this Court with the responsibility to rule on BCRA's constitutionality in the first instance and ignores that where First Amendment rights are clearly impacted by federal legislation, there is no "presumption" of constitutionality. As the Supreme Court observed in *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803 (2000):

> When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. . . . It is rare that a regulation restricting speech because of its content will ever be permissible. Indeed, were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas.[1]

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[1] In support of its argument that BCRA is presumptively constitutional, the government cites to Chief Justice Rehnquist's in chambers opinion declining to grant a stay in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 507 U.S. 1301 (1993) (Rehnquist, J., in chambers). Yet as the opinion makes clear, the Act at issue — the Cable Television Consumer Protection and Competition Act of 1992 — had been *upheld* by the three-judge court. Moreover, as the Chief Justice noted, at the time he was asked to issue a stay, the Court had not yet decided whether the cable medium was entitled to the fullest protections of the First Amendment. *Id*. at 1303. Here, of course, there is no dispute that BCRA seeks to regulate core political speech subject to the most stringent of constitutional protections.

*Id*. at 817-818.

We address the provisions at issue in turn.

Provisions Unanimously Struck Down. At the outset, this Court should reject the plea of the defendants and the intervenors that this Court should not separately consider the statutory provisions declared unconstitutional by this Court in determining whether any stay should be granted.[2] Although the briefs of the government and the intervenors studiously avoid the issue, four of the sections challenged by plaintiffs were unanimously struck down by this Court.[3] Defendants and intervenors offer no justification whatsoever as to why this Court's unanimous determination that those provisions are unconstitutional should simply be swept aside. If, for example, a minor has a First Amendment right to participate in the political process by making contributions to federal candidates, as every member of this Court held, there is no reason — and certainly no reason consistent with the Constitution — to continue to deprive that minor of his clearly established rights while this case proceeds on appeal. In sum, there is no basis whatsoever for staying this Court's judgment insofar as it enjoins defendants from enforcing sections 201(5), 213, 318 and 504 of BCRA.

Title I Provisions. The McConnell Plaintiffs also oppose the motions of the defendants and intervenors insofar as they ask this Court to stay so much of its judgment as struck

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[2] It is wholly predictable that the sponsors of BCRA would make such an argument; their only interest is to ensure that the statute they sponsored remains in force as enacted.

[3] Specifically, the Court unanimously struck down: Section 201(5) (Disclosure of "Contracts to Disburse"); Section 213 ("Independent Versus Coordinated Expenditure by Party"); Section 318 ("Prohibitions of Contributions By Minors"); and Section 504 ("Public Access to Broadcasting Records").

down provisions of Title I of BCRA (BCRA § 101: new FECA sections 323(a), 323(b), 301(20)(A)(i), (ii), (iv) and 323(d)). The principal grounds offered for a stay of BCRA's ban on soft money are nothing more than a repetition of the arguments that a majority of this Court has already rejected and hardly provide a basis for this Court to conclude that the defendants and intervenors are likely to succeed on the merits of the claims at issue. As an alternative, defendants and intervenors also posit that it would be "unfair," "confusing," "chaotic," "disruptive" and "uncertain" for parties, candidates and regulators to be forced to comply with this Court's ruling. Def. Mem. at 5, 8, 11, 13; Int. Mem. at 3-4, 7, 9. But the argument ignores that this Court's decision applies with equal force to all; no party can claim that it will "suffer" more than any other. In any event, no claim of "confusion" can trump the fact that a majority of this court has concluded that the provisions at issue cannot be sustained consistent with the First Amendment. The court should decline to grant the request to stay its judgment striking down new FECA sections 323(a), 323(b), 301(20)(A)(i), (ii), (iv) and 323(d)).

Title II Provisions. The Madison Center Plaintiffs and the AFL-CIO Plaintiffs have moved this court for an order staying the newly crafted "fallback" definition of electioneering communications and an injunction barring enforcement of the primary definition, a definition that a majority of this Court has already concluded is unconstitutional. The NRA Plaintiffs and the ACLU, both of which are understandably concerned about the risks they incur at this time under the new test fashioned under Judge Leon's opinion, have sought a stay of the new "fallback" definition, reluctantly recognizing that the effect of what they ask would be to reinstate, for the time being, the principal definition. While the McConnell Plaintiffs prefer the relief sought by the Madison Center and the AFL-CIO (as would, we expect, the ACLU and NRA themselves) they have concluded that, at the very least, steps must be taken to stay the immediate

application of the new "fallback" definition of "electioneering communications." It bears emphasizing in this respect that every party that has filed a motion for a stay, including the government and the intervenors, agree that the newly crafted "fallback" definition should not be given effect.

As the NRA Plaintiffs have aptly observed, the motions for a stay of this Court's ruling with respect to Title II of BCRA pose a "cruelly ironic" choice since *both* definitions of "electioneering communications" are not only unconstitutional, but an affront to core First Amendment principles.

The primary definition offered by Congress is, as two members of the Court concluded, sweepingly overbroad. That is the least that can be said of any law that criminalizes, in the 30 to 60 days before a federal election, the mere reference to a candidate for federal office in an advertisement broadcast on television or radio in that candidate's district, regardless of what that advertisement otherwise says or communicates. No nation that protects freedom of speech can possibly countenance such a law.

The same is true of the "fallback" definition set forth in the statute. As revised by Judge Leon, the law criminalizes *at any time* and *in any district*, the expression of views by corporations (the ACLU and NRA, to name two), labor unions and any other entity using even the smallest amount of corporate or union funds, which "attack" or "promote" a candidate for federal office. *See* Def. Mem at 12 (acknowledging that the revised "fallback" definition "takes effect immediately and on its face includes no temporal or geographical limitations"). For example, public criticism by such an organization of Senator John McCain — one of the sponsors of BCRA and a candidate for reelection in 2004 — for his position on this legislation itself, not to

say other issues, risks the same fate: the imposition of criminal sanctions on the critics. Indeed, even the defendants concede that the revised "fallback" definition is one "that Congress did not enact and that the Supreme Court may never adopt." *Id.*

Choosing between these provisions is the constitutional version of Poe's "*The Pit and the Pendulum*." Neither choice is acceptable; both are lethal. Forced to choose, however, we believe the NRA Plaintiffs and the ACLU have correctly identified the one feature of the primary definition that makes it less intolerable *at this time* than the newly crafted fallback definition: it only takes effect in the month or two before elections. It is no less unconstitutional because of that — banning speech when it matters most hardly provides insulation against constitutional scrutiny — but it at least provides some time period before the statute becomes meaningfully effective. In light of this and our expectation that the Supreme Court will resolve the issue sufficiently in advance of the time that the principal definition will be triggered, we support the motion to stay the new "fallback" definition.

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Respectfully submitted,


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