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 LAW IN SUPPPORT OF MOTION OF INTERVENING DEFENDANTS TO STAY INJUNCTION PENDING APPEAL

Pursuant to Federal Rule of Civil Procedure 62(c), Intervening Defendants Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords move that the Court stay the effect of its judgment issued May 2, 2003, pending review on appeal by the Supreme Court of the United States.

The Intervening Defendants respectfully submit that the Court's judgment enjoining enforcement of certain provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, should be stayed in all respects. Without such a stay, the parties, candidates (including those Intervening Defendants seeking re-election in 2004), and the public

will face an ever-shifting set of rules regarding the conduct of the 2004 federal elections – a result that Congress sought to avoid and that is at odds with the public interest.[1]

Background

1. On March 27, 2002, President George W. Bush signed BCRA into law. Enactment of BCRA was preceded by years of legislative investigation and debate. *See* Per Curiam Op. at 42-50.

2. In order to avoid potential disruption of the federal election process, Congress (a) delayed the effective date of BCRA until after the 2002 federal election cycle, (b) provided a right of direct appeal to the Supreme Court, and (c) required expedited review of all constitutional challenges to the law. *See* BCRA § 402(a)(1) (effective date); *id.* at § 403(a)(3) (right of appeal); and *id.* at § 403(a)(4) (expedited review).

3. In a further step to avoid disruption and uncertainty during the 2004 federal election cycle, BCRA required that the Federal Election Commission ("FEC") issue final rules on the new soft money provisions within 90 days, and final rules on all other provisions of the law within 270 days, of the date of enactment. *See* BCRA § 402(c). The FEC heard from more than 120 interested parties, held public hearings, and issued final rules and explanations totaling over 200 pages in length.[2]

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[1] On May 7, 2003, the National Rifle Association ("NRA") filed a motion seeking a stay solely with respect to the constitutionality of the definitions of "electioneering communications" contained in Title II of BCRA. *See* NRA Mot. at 1. Although the Intervening Defendants agree that the public interest would be served by issuance of a stay, they respectfully submit that such a stay should not be issued selectively on an issue-by-issue basis. Disruption of the 2004 federal election cycle will be minimized only by staying this Court's judgment in its entirety, pending Supreme Court review.

[2] *See* Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates; Interim Final Rule, 68 Fed. Reg. 3970 (Jan. 27, 2003); Coordinated and Independent Expenditures; Final Rules, 68 Fed. Reg. 421 (Jan. 3, 2003);

4. With exceptions not relevant here, BCRA took effect on November 6, 2002. At no time during litigation of this case before this Court did any party argue that BCRA should not be allowed to take effect. Thus, for over six months, BCRA has defined many of the principal rules of federal campaign finance regulation, and the parties have been subject to those rules.

This Court's Decision

5. On May 2, 2003, this Court issued its decision, upholding portions of BCRA and declaring other provisions of the law unconstitutional. The Court entered an injunction permanently enjoining the defendants from enforcing those portions of BCRA that the Court held unconstitutional.

6. The number of complex issues addressed, "the variety of positions and voting combinations taken by the three judges on this District Court," Per Curiam Op. at 5, and the sheer volume of the opinions issued by the Court will inevitably invite disagreement among the parties and other participants in the political process regarding the implications of the Court's decision. Moreover, in light of this uncertainty, and because of the need to clarify the rules governing the 2004 elections, the FEC has indicated that it might be required to provide interim

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Bipartisan Campaign Reform Act of 2002 Reporting; Final Rules, 68 Fed. Reg. 404 (Jan. 3, 2003); BCRA Technical Amendments; Final Rules, 67 Fed. Reg. 78679 (Dec. 26, 2002); Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds; Final Rules, 67 Fed. Reg. 76962 (Dec. 13, 2002); Contribution Limitations and Prohibitions; Final Rules, 67 Fed. Reg. 69928 (Nov. 19, 2002); FCC Database on Electioneering Communications; Interim Final Rules, 67 Fed. Reg. 65212 (Oct. 23, 2002); Electioneering Communications: Final Rule, 67 Fed. Reg. 65190 (Oct. 23, 2002); Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rules, 67 Fed. Reg. 49064 (July 29, 2002).

Although some of these rules are the subject of an ongoing challenge under the Administrative Procedure Act, *see Shays v. FEC*, CA No. 02-CV-1984 (D.D.C.) (Nov. 8, 2002), the rules remain in place (to the extent not effected by this Court's May 2 judgment) pending a decision in that case.

guidance regarding the effect of the Court's decision on the campaign finance laws.[3] Any such guidance, however, will take weeks or months to prepare and circulate. It is unlikely, moreover, that the FEC will be able to implement this Court's decision by amending its regulations, pursuant to the Administrative Procedure Act, before the Supreme Court issues its decision in this case. As a result, as long as this Court's judgment remains in effect, substantial uncertainty exists regarding the interplay between that judgment and the regulations that have already been promulgated under the law as it was enacted.

Supreme Court Review

7. Several parties, including the Intervening Defendants, have noticed appeals of this Court's judgment to the Supreme Court of the United States. Given the importance of the issues presented, and the statutory grant of appellate jurisdiction to the Supreme Court, there can be little doubt that the Supreme Court will review substantial portions of this Court's decision. *Cf. New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 (1977) (Rehnquist, J., in chambers).

8. If this Court's judgment is not stayed, there will be widespread confusion about the state of federal election law until the Supreme Court issues its decision on the merits. Some may seek to take advantage of this uncertainty by testing the limits of the law. Some may also seek to raise and spend substantial sums of soft money – before the Supreme Court issues a ruling that the Intervening Defendants believe will all of BCRA – with the hope of influencing the 2004 federal elections. Indeed, the Court's decision creates an incentive to spend soft money

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[3] *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.'").

more quickly and in greater amounts than might otherwise be the case, since, if the Supreme Court sustains the national party soft money ban in its entirety, the principal national party organizations (*i.e.* the Democratic National Committee and the Republican National Committee) will not be permitted to spend soft money contributions that they might (lawfully or unlawfully) raise in the interim.

9. Moreover, if this Court's judgment is not stayed pending appeal, the Nation will face the prospect of adjusting to several separate sets of campaign finance laws in roughly a year's time. Before November 6, 2002, the Federal Election Campaign Act of 1971 ("FECA"), as amended, applied. After November 6, 2002, FECA, as amended by BCRA, applied. If this Court's decision is not stayed, that decision will dictate yet another set of rules. But, if the Supreme Court sustains BCRA in its entirety or renders a decision that otherwise differs in material respects from that of this Court, the interested parties will then have to shift back to the set of rules enacted by Congress in BCRA or to yet another variant thereof.

Argument

10. Unlike the typical case in which a party seeks to stay an injunction pending appeal, special considerations apply where a court has "invalidated part of an Act of Congress." *Marshall v. Barlow's Inc.*, 429 US. 1347, 1348 (1977) (Rehnquist, J., in chambers). In particular, "[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). Here, this is particularly true, since there is no doubt that the Supreme Court will promptly consider the merits of this case; this Court was substantially divided in its consideration of the various challenges

presented; BCRA was adopted only after years of consideration and debate before Congress — including substantial attention to the constitutional issues presented in this case; enforcing the Court's judgment pending Supreme Court review will inject unnecessary uncertainty into the ongoing 2004 federal election cycle; and the questions presented go to the fundamental nature of our democracy.

11. Even if this case did not involve the constitutionality of an Act of Congress and did not present issues of such great moment, this Court should stay its judgment. Typically, in considering whether to stay a judgment pending appeal, the Court must consider four factors: "(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? . . . (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest?" *Washington Met. Area Transit Comm'n v. Holiday Tours* 559 F.2d 841, 843 (D.C. Cir. 1977) (citation omitted); *see also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). These factors "interrelate on a sliding scale and must be balanced against each other." *In re Verizon Internet Services, Inc.*, -- F. Supp. 2d --, 2003 WL 1946489, at *19 (D.D.C. Apr. 24, 2003) (quoting *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998)). Here, the balance of factors weighs in favor of a stay.

12. Likelihood of Success on the Merits. Although it can never be determined with "mathematical certainty" how each Justice might rule in a case,[4] there is a substantial prospect that the Supreme Court will reverse some portions of this Court's judgment striking down provisions of BCRA, including the Court's invalidation of portions of the soft money rules

[4] *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.").

contained in Title I. Pursuant to this Court's Order of May 8, 2003, the Intervening Defendants incorporate by reference their prior briefing on the merits and will not repeat their contentions here. Many of the findings of this Court, moreover, substantially support the Intervening Defendants' position, including the Court's findings that the soft money system has been used to inject hundreds of millions of federally unregulated dollars into federal elections,[5] and that these large political contributions have given rise to broad public cynicism about the integrity of those elections and those who hold federal office.[6] In light of these and other findings, the substantial factual record developed before this Court, and the Supreme Court's recognition that courts should not "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared," *FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982), it is likely that the Intervening Defendants will prevail on appeal.[7]

13. Risk of Irreparable Harm Without Relief. Absent a stay, both the parties to this litigation and the public as a whole will suffer at least three forms of irreparable harm:

a. The uncertainty engendered by the Court's decision – particularly in the absence of implementing regulations and given the likelihood of yet further change before the end of this federal election cycle – will inevitably affect the conduct of the 2004 federal elections and may even determine who wins and loses those elections.

b. Regardless of actual electoral outcomes, this uncertainty will undermine public confidence in the democratic process, as will any renewed injection of soft money into

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5 *See* Leon, J., Op. at 53, 55, 121, 124-26; Kollar-Kotelly, J., Op. at 19-31.

6 *See* Leon, J., Op. at 19-20, 243-50; Kollar-Kotelly, J., Op. at 179-190.

7 Moreover, there is, without question, "a fair prospect that a majority of the Court may vote" to uphold BCRA in its entirety. *American Stores Co.*, 492 U.S. at 1306 (O'Connor, J., in chambers); *see also Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers).

elections for federal office. As the Supreme Court has held, "[c]onflict of interest legislation is 'directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.'" *Crandon v. United States*, 494 U.S. 152, 165 n.20 (1990) (citation omitted).

c. The act of setting aside a duly enacted statute – even for a short period of time – irreparably injures both the government and the beneficiaries of that law. Thus, "any time a State is enjoined by a court from effectuating statutes . . . 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. Walters v. National Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers); *Marshall v. Barlow's, Inc.*, 429 U.S. 1347, 1348 (1977) (Rehnquist, J., in chambers).

14. Risk of Harm to Other Interested Parties. Although this case involves contentions that BCRA violates the First Amendment, courts have granted stays in First Amendment cases where the standard for issuance of a stay is otherwise met. *See, e.g., Newdow v. U.S. Congress*, 2002 U.S. App. LEXIS 12826, at *1 (9th Cir. June 27, 2002) (staying decision in Pledge of Allegiance case pending rehearing); *Ashcroft v. North Jersey Media Group, Inc.*, 536 U.S. 954 (2002) (staying district court preliminary injunction awarded on First Amendment grounds). Here, special considerations mitigate any risk of harm to other interested parties.

a. The uncertainty engendered by enforcing this Court's opinion while this case is pending before the Supreme Court will not serve the interests of any party to the litigation. Those who err on the side of caution may find themselves at an electoral disadvantage, for example, while those who err on the side of overstepping the limits of the law may face enforcement proceedings. In short, as the political parties and interest groups plan and fundraise in earnest for the 2004 election cycle, they can only be helped by consistency and certainty in the applicable campaign finance rules, pending a ruling by the Supreme Court. At this stage, uniformity and certainty are best served by staying this Court's judgment.

b. As shown by its motion, the NRA believes that issuance of a stay will *benefit* many of those alleging First Amendment violations. To stay only some portions of this Court's judgment, however, would magnify the uncertainty regarding the state of the law and would ignore the weighty interest of the public and candidates for federal office in avoiding unnecessary disruption of the 2004 federal elections.

15. Public Interest. As noted above, the factors for issuance of a stay "interrelate on a sliding scale." *In re Verizon Internet Servs., Inc.*, 2003 WL 194689, at *19 (quoting *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998)). Here, the public interest in granting a stay is overwhelming and tips the scale decidedly in favor of granting a stay.

a. Notably, Congress expressly considered the public interest in avoiding disruption during the 2004 federal election cycle and took dramatic steps to avoid precisely this problem. Congress required that the parties, this Court, and the Supreme Court litigate and decide this case – and required that the FEC adopt regulations – with extraordinary dispatch in order to avoid uncertainty during the 2004 election cycle. *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.").

b. If this Court's judgment is not stayed, federal candidates, political parties, and the public will face substantial uncertainty. The FEC, presumably, will not be able to complete a new notice-and-comment rulemaking for many months, and any such regulatory process could easily be overtaken by a decision from the Supreme Court. And, those who have planned their campaign activity based on the standards set forth in BCRA and its implementing regulations will need to decide whether to recast those plans in the immediate future, only to face the prospect of revising them yet again once the Supreme Court rules.

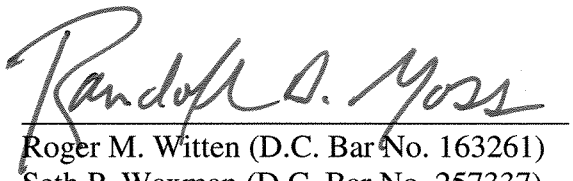
c. BCRA put a stop to a variety of serious abuses of the federal campaign finance law. To the extent this Court's decision has temporarily suspended certain of those reforms, it risks generating renewed public cynicism in the electoral process. "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000).

Conclusion

For the foregoing reasons, the Intervening Defendants respectfully request that the Court enter an order staying its judgment enjoining enforcement of certain provisions of BCRA pending appellate review before the Supreme Court of the United States.

Dated: May 8, 2003.

Respectfully submitted,



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