IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL RIFLE ASSOCIATION et al.,	)	
Plaintiffs,	)	
	)	
v.	)	Civ. No. 02-0581
	)	(CKK, KLH, RLL)
FEDERAL ELECTION COMMISSION et al.,	)	
Defendants.	)	

EMILY ECHOLS et al.,	)	
Plaintiffs,	)	
	)	
v.	)	Civ. No. 02-0633
	)	(CKK, KLH, RLL)
FEDERAL ELECTION COMMISSION et al.,	)	
Defendants.	)	

PLAINTIFFS' NATIONAL RIFLE ASSOCIATION AND EMILY ECHOLS REPORT ON SCHEDULING AND PROCEDURAL CONFERENCE

Pursuant to this Court's Order of April 14, counsel for plaintiffs' National Rifle Association *et al.* ("NRA") and Emily Echols *et al.* ("Echols") in the above-captioned cases, and counsel for Senator Mitch McConnell *et al.*, in the case *McConnell et al. v. FEC*, 02CV582, met and conferred with counsel for the named defendants in each of these three cases and with the putative defendant-intervenors on Friday,

April 19. During that meeting, counsel discussed the procedural issues of intervention and consolidation, as well as the issue of the need for scheduling of any possible discovery, and for the filing of dispositive motions.

Counsel were not able to reach sufficient agreement on these various procedural matters to make the filing of a joint report practicable. Accordingly, the plaintiffs in the NRA and Echols cases have agreed to submit a report that sets forth their views on the various procedural matters discussed by the parties pursuant to the Court's Order.

1. Intervention:

A. Congressional Intervenors

On April 2, 2002, a motion to intervene as defendants to support the constitutionality of the Bipartisan Campaign Reform Act ("BCRA") was filed on behalf of Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords ("Congressional Intervenors"). This motion was filed as a motion to intervene in the *NRA et al. v. FEC et al.* case, 02cv581.

As indicated in the April 2 motion, the NRA consented to the intervention motion filed by the Congressional Intervenors.

At the present time, no applications for intervention in the *Echols* case have been filed. Until such applications have been made, counsel for the *Echols* plaintiffs takes no position on intervention.

B. Possibility of Future Intervention

The NRA and the Echols plaintiffs are not aware of any possible parties who could claim the ability to intervene as of right in either of their cases, respectively, under FED. R. CIV. P. 24(a).

With respect to permissive intervention under FED. R. CIV. P. 24(b), the NRA and the Echols plaintiffs respectfully submit to the Court that any future effort at permissive intervention be considered in light of the statutory duty to expedite the resolution of these cases, found in Section 403 of BCRA. In light of that duty, and in light of the fact that this Court has announced its intention to issue a scheduling order consistent with that statutory directive as of Tuesday April 23, the NRA and the Echols plaintiffs submit that any future effort at intervention should be considered untimely and therefore denied. Alternatively, any future attempt at intervention would at a minimum be required to represent that the putative intervenors would be willing to comply with the Scheduling Order to be issued by this Court on April 23. Failure to so represent would cause the putative intervenors to be untimely under FED. R. CIV. P. 24(b).

2. Consolidation:

The NRA and Echols plaintiffs have challenged several specific provisions of BCRA. These targeted claims were intended to ensure that plaintiffs' First Amendment claims would be resolved as expeditiously as possible and would not become bogged down in issues arising in an omnibus challenge to BCRA. As detailed below, consolidation of these cases with the sweeping challenge offered by Senator McConnell will jeopardize the NRA's and the Echols plaintiffs' ability to avail themselves of their statutory right to expeditious resolution of their counts. Moreover, consolidation among these or any other, further cases raises the prospect of a conflict of interest among the plaintiffs in the cases challenging BCRA. Thus, while it may make sense for certain discovery and briefing schedules to be commonly coordinated, any motion for consolidation should be denied.

FED. R. CIV. P. 42(a) provides that "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions;

it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." It is well-established that "[t]he district court is given broad discretion to decide whether consolidation would be desirable and the decision inevitably is contextual." 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil 2d § 2383 at 437-38 (1995) (citations omitted). It is therefore also well-settled that a district court is not required to order consolidation simply because there is a common issue of law or fact, and that among the reasons for denying consolidation are a concern that consolidation may cause a delay in the processing of one or more of the cases. *See id.* at 440. In addition, consolidation is generally not granted "if it aligns a party in a portion of the litigation with other parties with whom he or she has a conflicting interest in other portions of the consolidated litigation." *Id*. at 445-46 (citations omitted).

At present, three separate cases have been filed challenging the constitutionality of various aspects of BCRA. Some of the claims raised in these three cases appear to raise common questions of law, whereas other claims raised in some of these cases are not commonly shared among all three cases. Thus, there is some level of "overlap" between the six claims advanced in the NRA Complaint, the six claims advanced in the Echols Complaint, and the fourteen claims advanced by the various plaintiffs who are parties to the McConnell Complaint.

The NRA and Echols plaintiffs do not see any justification for formally consolidating all three cases into a single case. Specifically, the NRA and Echols plaintiffs believe that their separately filed actions should be respected as separate cases, with claims that were deliberately cast to reflect the specific concerns of those parties, and which those parties have a right to brief and argue independently. Moreover, consolidation of all the cases challenging BCRA (or of all such challenges filed before a

particular time) has the potential of causing delay to the manner in which any one particular case proceeds toward final resolution. For example, if the claims advanced in the NRA or Echols case require less discovery than do the claims set forth in other cases with which they are consolidated, the NRA or Echols plaintiffs may be prevented from filing for summary judgment and achieving a final disposition of their claims at the trial court level. In addition, based upon D.C. Circuit precedent, it may be the case that even if the claims in a narrower complaint were disposed of in their entirety, the fact that the complaint was consolidated with several others would preclude that final resolution from constituting a "final decision []" under 28 U.S.C. § 1291, absent an express determination under FED. R. CIV. P. 54(b).

Such delay would be directly at odds with the statutory command to expedite any action filed to challenge the constitutionality of BCRA. Indeed, Section 403 of BCRA applies specifically to "any action," and must therefore be understood to apply separately to each of the separate cases filed with this Court to challenge the constitutionality of BCRA. *See* FED. R. CIV. P. 3. Thus, this Court has a duty to provide for the most expeditious resolution possible of each particular case based upon the time needed to resolve the claims advanced in that particular case, without regard to any claims advanced in other cases challenging the constitutionality of other aspects of BCRA.

In addition, the NRA and Echols plaintiffs also object to the notion that their cases should be consolidated due to an apprehension that additional lawsuits may be filed at some point in the future that also challenge the constitutionality of some aspect of BCRA. It may well be the case that additional Complaints will be filed, either in this Court or in other district courts, but that fact should not affect the rights of any plaintiff who chose to challenge the statute as soon as it was passed in order to obtain, consistent with Congress's clear mandate, the most expeditious declaration possible of its

unconstitutionality. Indeed, while the NRA and the McConnell plaintiffs filed their lawsuits on the very day that the statute was signed into law, and while those lawsuits received substantial publicity, the only group to step forward promptly with an additional suit in the four weeks since those cases were filed is the group of plaintiffs represented in the Echols Complaint, which was filed within one week of the statute's enactment. Thus, especially in light of this background, forcing the plaintiffs who have promptly filed their constitutional challenges to wait for, and to become consolidated with, additional cases that might potentially be filed in the future would contradict the clear directive in Section 403 of BCRA to expedite the resolution of "any action" challenging the act's constitutionality.

Finally, the NRA also objects to consolidation on the grounds that it may align the NRA with entities whose interests conflict with the NRA's challenge to BCRA. For example, it was represented at the parties' conference on Friday April 19 that an additional complaint was likely to be filed in the very near term on behalf of the National Association of Broadcasters. If that case were consolidated with the NRA's suit, the NRA would be put in a position of having to argue that the media exception which provides favorable treatment to broadcasters is unconstitutional, even while sharing its "consolidated plaintiff" status with the trade association that represents all those entities who directly benefit from the very provision the NRA would seek to have declared invalid.

This potential for conflict of interests arising among the plaintiffs underscores the need for the NRA and the Echols plaintiffs to be able to file their own briefs and to present oral argument to this Court. In the event the Court consolidates all three cases challenging BCRA, we urge the Court to permit counsel for the NRA and the Echols plaintiffs each to file separate briefs addressing the counts of their respective complaints, and to present oral argument on those counts.

The NRA and the Echols plaintiffs recognize that there are obvious efficiencies attendant in joint consideration of the common issues raised by all three complaints, such as the challenges to BCRA's prohibition on "electioneering communications." Accordingly, we would not object to the Court scheduling a "joint hearing" on specific common issues of law that may be raised by claims asserted in more than one case. A common schedule of this sort would allow for the efficient resolution of the common challenges without the difficulties attending formal consolidation. We note, however, that resolution of the narrow claims set forth in our complaints should not be delayed pending the resolution of other counts brought by Senator McConnell or by any other plaintiff. To the extent Senator McConnell insists on all of his claims being resolved at one time, such a request should not operate to forestall the resolution of our claims.

If the Court were to consolidate these cases, the NRA and Echols plaintiffs respectfully request that any "consolidation" of the various challenges to BCRA be made pursuant to an Order that explicitly provides that each separately filed case shall be entitled to proceed through to final resolution by both the District Court and by the Supreme Court through the immediate appeal as of right provided by Section 403(a)(3) of BCRA in as expeditious a fashion as if there had been no consolidation of any kind. In addition, any such Order should make explicit that the "consolidation" for certain procedural purposes should not be understood to in any way cast doubt on the understanding that the final disposition of all the claims in any one case will constitute a final judgment under 28 U.S.C. § 1291, and that it will therefore not be necessary for a party whose claims have all been resolved to move for certification of a final judgment under FED. R. CIV. P. 54(b). *Cf. Cablevision Sys. Dev. Co. v. Columbia Pictures Indus.*, 808 F.2d 133, 136 (D.C. Cir. 1987) ("[A]n order deciding fewer than all of several cases consolidated for all purposes does not become a final judgment, absent an express determination to that effect pursuant to Rule

54(b). . . .”). Finally, as noted above, we strongly request that any such consolidation order permit the NRA and Echols plaintiffs to file their own briefs and to present oral argument before this Court on their claims. Counsel for both the McConnell plaintiffs and the defendants have represented that even though they may favor some form of consolidation, they do not oppose this right of the NRA and Echols plaintiffs to submit separate arguments on their respective claims.

3. Scheduling:

Consistent with the statutory mandate set forth in Section 403, the NRA and Echols plaintiffs respectfully submit that each case should be resolved in the most expeditious manner possible based on the claims advanced in that particular case, and based upon a determination of the amount of discovery, if any, required to resolve any of those claims. In that regard, the NRA wishes to report specifically its objection to any proposal that seeks to maintain that the constitutional challenges to Title II should be subjected to a longer period of discovery than should the constitutional challenges to any other part of BCRA. Based on the conference on Friday, April 19, such a proposal might be based either upon the proposition that more discovery is needed to resolve challenges to Title II, or that the provisions in Title II do not have as immediate an impact following the effective date of BCRA as do other provisions. The NRA wishes to report its objections to each of these propositions:

A. Impact of Title II

BCRA takes effect on November 6, 2002. As of that date, all of its provisions will apply as a matter of law. Any argument that the Title II provisions will have a lesser impact during the first year of BCRA's operability (i.e., 2003) should be rejected for the following reasons.

First, there is simply nothing in the statutory directive to expedite these cases that refers in any way to the nature of the impact various provisions will have as of BCRA's effective date. The directive is straightforward and applies to all claims brought against all parts of the statute.

Second, even if it were relevant to consider the nature of the impact of the challenged provisions as of the effective date, the actual fact is that Title II will have a substantial impact immediately as of November 7, 2002 (if not before), and all arguments to the contrary should be rejected. To begin with, hundreds if not thousands of the organizations who will be prevented from engaging in certain kinds of issue advertising during specified electioneering periods set forth in BCRA will have to change the way in which they fundraise in response to the prohibitions set forth in BCRA. Many of these organizations also have political committees which BCRA will continue to permit to engage in "electioneering communications," so the passage of BCRA presents the very real, and very immediate problem for these organizations of having to change their fundraising plans since expenditures that were once permissible will be banned, and will only be allowed if channeled through the more highly regulated framework of political committees. For those corporations without political committees, the uncertainty surrounding the constitutionality of BCRA will force them to expend the resources necessary to establish such a fund if they wish to engage in "electioneering communications."

Moreover, and perhaps most importantly, there is a very high likelihood that there will be special elections held in 2003. There have been twenty special elections held since the beginning of 1997, and there

were *seven* different special elections for congressional seats held in 2001 alone.[1] BCRA will prohibit certain kinds of speech during the run-up to those elections, and will therefore have an immediate impact on the NRA's constitutional rights as of that time. The combination of these imminent affects of BCRA may very well lead to the NRA and the Echols plaintiffs having to seek a preliminary injunction at some point in 2003 if the prospect for prompt final resolution appears sufficiently dim at that stage.

The coordination provisions of BCRA, which the NRA challenges, will also have an immediate impact on plaintiffs. These provisions remove the requirement that in order to find coordination, there be an agreement or collaboration between political candidates and entities such as the NRA that are engaged in the political process. Given the sweeping nature of this provision, the NRA's ability to petition the government will be immediately effected upon BCRA's becoming effective.

Finally, under the schedule originally proposed by the defendants, this Court would not hear oral argument on summary judgments motions filed under the Title II issues until January 2003. Under that timeline, it is possible the Supreme Court would not reach a final resolution in this case until its October 2003 term, a prediction that was averted to at one stage during the April 19 conference. It is simply not acceptable for the NRA to risk having its case addressed by the Supreme Court no earlier than the fall of 2003, at which stage the 2004 election cycle, including primaries scheduled for the beginning of that year, would already be imminent. Indeed, the New Hampshire primary is set for January 2004, and thus BCRA will apply to political speech in December 2003. The government has suggested that its schedule will permit the Supreme Court to resolve the constitutionality of BCRA by June of 2003, but this prediction assumes that the Court will rule

[1] *See* http://clerkwebhouse.gov/mbrcmtee/vacantoffice/index.htm

within 30 days of oral argument. Given the amount of discovery that defendants and the intervenors seem intent on taking and the volume of the record they will presumably submit to the Court, the government's proposal places this Court under extremely circumscribed time constraints that are both artificial and unnecessary.

Accordingly, there is no sound basis in either fact or law for basing a discovery schedule on the assumption that Title II provisions will not practically take effect until much later in time than will the provisions in Title I.

B. Discovery Needs of Title II Claims

The NRA and one of the Echols plaintiffs, Reverend Patrick Mahoney, have advanced a claim that BCRA's prohibition on "electioneering communications" prohibits political speech in a manner that violates the First Amendment. The minor plaintiffs in the Echols suit claim that the ban on political donations by persons under the age of 18 also prohibits political speech in a manner violative of the First Amendment. These claims present facial challenges to the constitutionality of the prohibitions, and are based upon the established First Amendment jurisprudence in the area of campaign finance law that, in the view of the NRA and the Echols plaintiffs, prohibits BCRA's ban on electioneering communications and on donations by minors. These challenges are therefore legal challenges to the statute that the NRA and the Echols plaintiffs believe are likely to be resolved by this Court on summary judgment.

The defendants and the Congressional intervenors have not articulated with any specificity what facts they believe will be material to the resolution of the NRA's and Mahoney's challenge to the ban on electioneering communications or to the minor plaintiffs' challenge to the ban on donations by minors, nor why those facts will be likely to be disputed. The defendants and intervenors have stated, however, their belief that it will be necessary to build a substantial record with respect to their defense of the Title II

provisions, and have stated that a reason for this is Congress's failure to make findings or to hear testimony with respect to the ban on electioneering communications, as contrasted with Congress's more extensive development of a record with respect to the provisions found in Title I of BCRA. In addition, counsel for the Federal Election Commission has stated the opinion that Count II in the NRA's Complaint is likely to require extensive discovery, because it alleges that BCRA must have an exception for organizations such as the NRA, which is described in Count II as "a voluntary, not-for-profit public policy organization, organized and operated for ideological purposes and not for business purposes."

The NRA and the Echols plaintiffs understand the concern on the part of the defendants and intervenors to develop a factual record in this case, but in light of the statutory command to expedite, the NRA and the Echols plaintiffs resist the notion that this concern should require more than three months of discovery. That is essentially the period of discovery proposed by the defendants for the litigation of the challenges to Title I, and that would appear to be more than ample time to take discovery on any possible factual issues raised by the NRA's and the Echols plaintiffs' purely facial challenges to Title II. Indeed, absent knowing more about why there are likely to be any factual issues in the purely facial challenge, three months may even be in excess of what is required to resolve the facial challenges to Title II. Moreover, the NRA and the Echols plaintiffs respectfully urge this Court not to endorse the proposition that the defendants are entitled to more time to develop their factual defense of the provisions in Title II than for their defense of Title I merely because Congress failed to make any factual findings with respect to Title II. Any such argument would seem to be at odds with the proposition that the Government cannot justify an infringement on constitutionally protected rights through *post hoc* rationalizations, since "[t]he justification

must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

In short, there is no reason to believe that the discovery needs for the litigation of the challenges to Title II of BCRA should be any more substantial than the discovery needs for the litigation of the Title I challenges. Thus, consistent with the duty to expedite its case, the NRA and the Echols plaintiffs endorse a discovery schedule, set forth below, that provides for no more than three months of discovery.

C. Proposed Schedule:

The NRA and Echols plaintiffs agree that the schedule that follows below should be adopted with respect to the claims in each of their respective cases. The proposed schedule largely tracks what is expected to be submitted by the McConnell plaintiffs, but with two significant exceptions. First, as discussed above in the section concerning consolidation, the NRA and Echols plaintiffs reject a period of further delay in commencing discovery so as to allow other parties to file their separate complaints. Waiting for hypothetical plaintiffs before commencing this litigation would be in plain derogation of the clear statutory command to expedite constitutional challenges to BCRA to swift conclusion.

Second, the schedule proposed by the NRA and Echols plaintiffs explicitly provides for a period of four weeks for the preparation of rebuttal expert reports. This differs from the proposed schedule to be submitted by the McConnell plaintiffs, which does not explicitly speak to the timing of rebuttal expert reports. It also differs markedly from the schedule that we understand is to be submitted by the government. Under its proposed schedule, affirmative expert reports on the Title II claims would not be required to be served until October 11--more than six months after the complaints were filed in these above-captioned cases. The deadline for serving rebuttal expert reports, by contrast, would be a mere

two and one half weeks later (October 28).

Such a regime would be both inefficient and grossly unfair. At this stage, both the NRA and the Echols plaintiffs view their claims as legal challenges which do not require expert evidence in order to be resolved on summary judgment. By contrast, the government has announced its intention to develop a substantial evidentiary record, apparently including affirmative expert reports. Thus, it is the government who will have six months to prepare its affirmative expert report, and it is the plaintiffs who will then be placed in a position of having to develop rebuttal expert reports within a mere two and a half weeks of receiving the government's affirmative reports. Aside from being patently unfair on its face, it is also wholly at odds with the notion of how expert discovery ordinarily operates. Under FED. R. CIV. P. 26, it is ordinarily contemplated that a party will have at least 60 days to produce a rebuttal expert report. As reflected below, the NRA and Echols plaintiffs are willing to produce expert reports in half that amount of time in order to act consistently with their duty to expedite, and have therefore proposed a one-month rebuttal period. In any event, whether the NRA and Echols proposal is accepted, the government's grossly unbalanced proposal must be rejected.

Thus, based on the foregoing principles, the NRA and Echols plaintiffs jointly propose the following schedule:

April 24, 2002	Begin General Discovery

May 1, 2002	Deadline for amendment of pleadings or joinder of additional parties
May 6, 2002	Deadline for answers of all defendants2
May 10, 2002	Deadline for service of interrogatories and document requests
June 17, 2002	Deadline for service of affirmative expert reports and lay witness statements or affidavits
July 17, 2002	Deadline for service of rebuttal expert reports and lay witness statements or affidavits
July 22, 2002	Deadline for request for admissions
August 2, 2002	Discovery ends
August 16, 2002	Parties file briefs in support of cross-motions for summary judgment
September 6, 2002	Parties file opposing briefs
September 13, 2002	Parties file reply briefs
September 25, 2002	Oral argument

CONCLUSION

The NRA and Echols plaintiffs therefore respectfully submit the foregoing report on scheduling and procedural issues raised by this Court's April 16 Order.

2 Although the government ordinarily would get 60 days to answer complaints against it (from March 27 in the NRA case and from April 4 in the Echols case) May 6 is a reasonable deadline for answers in this expedited litigation. The proposed deadline allows more than the 30 days to which private parties are normally entitled and comes five days after the deadline for any amendments to pleading or joinder of additional parties.

Dated: April 22, 2002

Respectfully submitted,

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**Not Admitted this Jurisdiction*
+Motion for Admission pro hac vice pending

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CERTIFICATE OF SERVICE

I hereby certify that, on April 22, 2002, I served a true and correct copy of the foregoing Plaintiffs' National Rifle Association And Emily Echols Report On Scheduling And Procedural Conference on each of the following by facsimile and e-mail:

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