IN THE SUPREME COURT OF THE UNITED STATES

Nos. 02-1674, et al.

SENATOR MITCH MCCONNELL, ET AL., APPELLANTS/CROSS-APPELLEES

v.

FEDERAL ELECTION COMMISSION, ET AL.,
APPELLEES/CROSS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY OF THE APPELLEES/CROSS-APPELLANTS FEDERAL ELECTION COMMISSION, ET AL., WITH RESPECT TO THE MOTION FOR EXPEDITED BRIEFING SCHEDULE

On May 23, 2003, the Solicitor General, on behalf of the Executive Branch appellees/cross-appellants Federal Election Commission, et al. (appellants in No. 02-1676), moved that the Court consolidate the pending appeals in this case and establish an expedited briefing schedule. Responses to that motion have since been filed by five groups of plaintiffs: (1) Senator Mitch McConnell, et al. (appellants in No. 02-1674); (2) Republican National Committee (RNC), et al. (appellants in No. 02-1727); (3) Emily Echols, et al; (4) Chamber of Commerce, et al; and (5) Victoria Jackson Gray Adams, et al. (appellants in No. 02-1740).

Those responses provide no persuasive reasons for refusing to grant the Executive Branch parties' motion.[1]

1. The first four groups of plaintiffs listed above oppose our suggested four-round briefing schedule (which the McConnell plaintiffs refer to as a "two-round" schedule, see McConnell Resp. 3, 4).[2] Those plaintiffs urge instead that the Court adhere to the three-round briefing format traditionally employed in cases, such as this one, in which the lower court's decision

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[1] Since the date of the Executive Branch parties' motion for expedited briefing schedule, four additional jurisdictional statements have been filed in this case. See Republican National Committee v. Federal Election Commission, No. 02-1727; National Right to Life Committee, Inc. v. Federal Election Commission, No. 02-1733; American Civil Liberties Union v. Federal Election Commission, No. 02-1734; Victoria Jackson Gray Adams v. Federal Election Commission, No. 02-1740. The Chamber of Commerce plaintiffs have indicated that they intend to file a jurisdictional statement on June 2, 2003. See Chamber of Commerce Resp. 1 n.1. We agree with the RNC plaintiffs (RNC Motion 1 n.1) that whatever briefing schedule the Court adopts for the previously-filed jurisdictional statements should also apply to those appeals.

In the district court, the Echols plaintiffs challenged only Section 318 of BCRA, which prohibits minors from making contributions to federal candidates or to political parties. The district court ruled in plaintiffs' favor on that claim. See 02-1676 J.S. 19-20. In light of that favorable ruling, the Echols plaintiffs have indicated that they do not intend to file a jurisdictional statement seeking review of any portion of the district court's judgment. See Echols Resp. 3. Those plaintiffs have, however, filed a motion for summary affirmance of the district court's judgment with respect to Section 318. See pp. 6-7, infra.

[2] The Adams plaintiffs agree that this Court should note probable jurisdiction over all pending appeals in this case at its June 5, 2003, conference, but they take no position with regard to the Court's choice of an appropriate briefing schedule. See Adams Resp. 1.

is neither wholly favorable nor wholly unfavorable to the parties seeking this Court's review. Under that format, the Executive Branch parties would (1) file a topside brief as appellants addressing only the issues on which the district court's ruling was unfavorable to the Executive Branch parties, (2) subsequently file a bottomside brief as appellees addressing only the issues on which the disposition below was favorable (and responding to the arguments on those issues made by opposing parties in their topside filings), and (3) ultimately file a reply brief, again addressing only the issues on which the district court's ruling was adverse. The McConnell, RNC, and Chamber of Commerce plaintiffs, who were successful in part and unsuccessful in part in the district court proceedings, would likewise file a brief in each of the three rounds of that schedule. See McConnell Resp. 7; RNC Motion 2, 3.

None of the plaintiffs offers any persuasive response, however, to the Executive Branch parties' explanation (see Motion 4-6) of why the usual format is unsuitable for this case. It is true, as the McConnell plaintiffs observe (Resp. 4), that "the mere fact that there may be some overlap between the subject matter of the appeals and cross-appeals is neither unusual nor problematic." As compared to the typical case involving an appeal and cross-appeal, however, there is in this case an unusually close connection between BCRA provisions that were declared invalid by the district court and provisions that were sustained. In order to address those issues in separate opening

briefs, the Executive Branch parties would be required either (a) to set forth substantially duplicative arguments in their briefs as appellants and as cross-appellees, or (b) to divide and cross-reference closely related arguments between the two briefs in a manner that the Court may find confusing. Most of the plaintiffs would encounter similar difficulties. There is little reason to add this difficulty unnecessarily to the briefing of a case that involves an unusual number of parties challenging an unusual number of statutory provisions. And because the district court's holdings as to many issues must be abstracted from a comparison of different panel members' separate opinions, there is less than the usual justification for adopting a briefing format that attaches primary significance to a party's status as appellant or appellee with respect to a particular constitutional claim.

Contrary to plaintiffs' contentions, the Executive Branch parties do not seek "to ignore the district court decision" (RNC Motion 2) or to "deprive [the plaintiffs] unfairly of their hard-won victories below" (McConnell Resp. 6). Under our proposed briefing format, all parties would of course remain entitled to rely upon the findings and legal analysis of the district court or of individual panel members for whatever legal or persuasive value those findings and analysis might have. The structure of the briefs, however, should not be driven by individual parties' status as appellants or appellees with respect to particular issues. The justification for the

traditional briefing format in appeal/cross-appeal cases is not that it rewards parties for their successes in the lower courts, but that it is typically conducive to this Court's efficient resolution of complicated cases. Where, as here, an alternative format is likely to facilitate more coherent presentation of the relevant issues to this Court, that format should be adopted.

2. The McConnell and RNC plaintiffs contend that our proposed briefing schedule affords the plaintiffs inadequate time for preparation of their opening briefs. See McConnell Resp. 4-5; RNC Motion 2. Since the date (May 2, 2003) that the district court issued its ruling, however, it has been a foregone conclusion that the decision would be the subject of multiple appeals. Although our proposed schedule would require the plaintiffs to file opening briefs 22 days after the date (June 5, 2003) on which we urge the Court to note probable jurisdiction, the plaintiffs would as a practical matter have considerably more than three weeks for preparation of their briefs.

3. The McConnell, RNC, and Chamber of Commerce plaintiffs urge that, if this Court adopts a schedule under which each party's briefing deadlines are premised on its status as plaintiff or defendant (rather than as appellant and/or appellee), the defendants rather than the plaintiffs should file their opening briefs first, largely on the ground that the government bears the burden of justifying a statute that "substantially burdens First Amendment rights." McConnell Resp. 5; see RNC Motion 3; Chamber of Commerce Resp. 2. That argument

lacks force. As the Chief Justice recently reaffirmed in denying a request to vacate the district court stay in this case, BCRA comes to this Court with a presumption of constitutionality, notwithstanding the plaintiffs' assertion of First Amendment challenges. And as a practical matter, it would be difficult for the defendants to explain why plaintiffs' disparate constitutional challenges to numerous BCRA provisions lack merit before the plaintiffs have refined and articulated those challenges in this Court. That is so whether the district court decision is regarded (see McConnell Resp. 5-6) as on the whole more favorable to the plaintiffs or to the defendants.[3]

4. The Echols plaintiffs prevailed in the district court on their First Amendment challenge to Section 318 of BCRA. See note 1, supra. The Executive Branch parties have challenged that ruling. See 02-1676 J.S. 28; Echols Resp. 4. In their response to the Executive Branch parties' motion for expedited briefing schedule, the Echols plaintiffs urged (Resp. 3) that the Court set a date later than June 5, 2003, for its consideration of the pending jurisdictional statements, in order to afford those plaintiffs additional time to move for summary affirmance of the district court's ruling that Section 318 is unconstitutional.

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[3] Notwithstanding the substantial theoretical and practical difficulties with a four-round briefing schedule that requires the defendants to file first, such a schedule would be preferable to the three-round format that plaintiffs advocate. Such a four-round schedule, like the format proposed in our motion, would at least allow each set of plaintiffs and defendants to address all relevant BCRA provisions in a single opening brief.

Subsequent to the filing of that response, the Echols plaintiffs filed a motion for summary affirmance of the district court's Section 318 ruling.

The Echols plaintiffs identify no case in which this Court has summarily affirmed a lower court decision striking down a provision of an Act of Congress. Respect for a coordinate Branch strongly suggests that such a course would be appropriate, if at all, only in extraordinary circumstances. The remote possibility that this Court might summarily affirm the district court's decision with respect to Section 318 is an insufficient basis for delaying the Court's consideration of the wide range of other issues presented in this case, particularly in light of the statutory mandate that the appeal be expedited "to the greatest possible extent." BCRA § 403(a)(4), 116 Stat. 114. The Executive Branch parties intend to respond to the motion for summary affirmance by June 3, 2003, so that the Court may act on that motion at its June 5, 2003, conference if it wishes to do so.

The Echols plaintiffs also state (Resp. 4) that "[n]othing about the proposal by the Government accomplishes greater coherence regarding the presentation of questions related to Section 318." The rationale for the Executive Branch parties' proposed briefing format, however, is not that any individual issue presented in this case is insusceptible to coherent briefing under a traditional three-round schedule. Rather, it is that the combination of rulings encompassed within the district

court's opinions would make this case difficult to brief under a standard format.

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For the foregoing reasons, and for those stated in the Motion To Set Expedited Briefing Schedule, the motion should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
Counsel of Record

MAY 2003