No. 02-A951

In the Supreme Court of the United States

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NATIONAL RIFLE ASSOCIATION et al., *Appellants*

v.

FEDERAL ELECTION COMMISSION et al., *Appellees*,

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Appeal from 02-581 et al. (consolidated cases) in the United States District Court for the District of Columbia

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Madison Center Plaintiffs' Response to the NRA's *Emergency Application to Stay the Judgment of the United States District Court for the District of Columbia Pending Review*

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TO: THE CHIEF JUSTICE

Chief Justice of the United States and
Circuit Justice for the Fourth Circuit

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May 12, 2003

NRA's Motion Before the Court

On May 12, 2003, the National Rifle Association (NRA) filed in this Court its *Emergency Application to Stay the Judgment of the United States District Court for the District of Columbia Pending Review*.

Background on Consolidated Cases and Petitioners

The *NRA v. FEC* case was consolidated below with a number of cases, including *McConnell v. FEC*, No. 02-94 (02-0582 in the district court), for which a *Motion for Leave to File Typewritten Jurisdictional Statement* and appended *Jurisdictional Statement* were filed in this Court on May 2, 2003, and assigned No. 02-A951.

Plaintiffs represented by the James Madison Center for Free Speech (JMC) – Club for Growth, Inc., Indiana Family Institute, Inc., National Right to Life Committee, Inc., National Right to Life Educational Trust Fund (hereinafter "JMC Parties")– filed a motion for an injunction pending appeal in the trial court and opposed several motions for a stay pending appeal (none of these have been ruled on), including that of the NRA.

These JMC Parties file the present opposition to the NRA's stay application to protect their interests, which are quite similar to the NRA's interests, but the JMC Parties argue herein that (1) there are several options to resolve the problem the NRA identifies and (2) there are better solutions than the one the NRA advocates.

Argument

The Bipartisan Campaign Act of 2002 (BCRA) prohibits corporations from engaging in an "electioneering communication." The National Rifle Association has moved to stay the district court's judgment with respect to the primary definition of "electioneering communication," Bipartisan Campaign Act of 2002 (BCRA), § 201(f)(3)(A)(i), so that it goes back into effect, thereby suspending the backup definition as truncated by the district court. BCRA, § 201(f)(3)(A)(ii).

The NRA makes compelling arguments as to why the truncated backup definition of "electioneering communication" is unconstitutional and should be enjoined. And the JMC Parties understand the burden the NRA faces because some of them are in the same situation of needing to engage in issue advocacy but being chilled by the district court's manufactured definition of "electioneering communication" that is well described by the NRA. They understand the NRA's belief that it is faced with a Hobson's choice, which compels the NRA to want the primary definition of "electioneering communication" in place to buy time for activity they wish to do right now.

However, the JMC Parties oppose a stay of the district court's injunction against the primary "electioneering communication" definition because such a stay would also pose irreparable harm. The JMC Parties have instead moved below for an injunction pending appeal preventing enforcement of the truncated backup definition of "electioneering communication" (which motion

they do not presently bring before this Court). The AFL-CIO also filed a motion for a stay pending appeal, supporting the JMC Parties' position in asking the district court to enjoin pending appeal its truncated backup definition of "electioneering communication."

Plaintiff National Right to Life Committee, Inc. (NRLC) is in the midst of a congressional legislative battles to ban human cloning, to pass the Unborn Victims of Violence Act, and to pursue other legislative interests.[1] As part of these campaigns, NRLC plans to run broadcast advertisements in the congressional districts of key members of Congress, naming the members of congress, many or all of whom are candidates (i.e., have transacted $5,000 in "contributions" or "expenditures"), and could be viewed as attacking/opposing their positions on these legislative issues. The ads will be paid for with general corporate funds and will be similar to the AFL-CIO advertisement, "No Two Way," that Judge Leon below found "not neutral" because "it attacks [the candidate's] position on the federal budget." *Leon Memorandum Opinion* at 92. Consequently, they will be "electioneering communications." Therefore, NRLC will not broadcast these communications unless it obtains the protection of the requested injunction pending appeal.

Absent the requested protection, NRLC will suffer irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The

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[1] *See, e.g.*, <http://www.capwiz.com/nrlc/issues/alert/?alertid=1366326&type=CO> (NRLC legislative action page urging contacts with legislators) (visited May 7, 2003).

loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Virginia v. American Bookseller's Ass'n Inc.*, 484 U.S. 383, 393 (1988) (self-censorship "[i]s a harm that can be realized even without actual prosecution"); *Elam Construction, Inc. v. Regional Transportation District*, 129 F.3d 1343, 1347 (10th Cir. 1997) ("chilling effect" on "First Amendment rights" "constitutes irreparable harm").

If the relief requested below is not granted, NRLC will likely forever lose its opportunity to promote its position on these legislative interests through such broadcast advertisements, even if this Court should issue an opinion by early in 2004. By that time, Congress may well have voted on these legislative issues removing forever NRLC's opportunity to influence that vote.

Similarly, Club for Growth, Inc. (CFG) has been running broadcast advertisements in support of President Bush's proposed tax cut. An advertisement that has been running in Ohio as recently as May 7, 2003, depicts Ohio Senator George Voinovich and has the following text:

> President Kennedy cut income taxes and the economy soared.
> President Reagan cut taxes more, and created fifteen million new jobs.
> President Bush knows tax cuts create jobs, and that helps balance the budget.
> But senator George Voinovich opposes the president.
> Ohio has lost thousands of jobs, and president Bush has a plan to help.

> Tell George Voinovich to support the Kennedy, Reagan, Bush tax policy that will bring jobs back to Ohio.[2]

Senator Voinovich is presently a candidate for federal office.[3] While CFG believes that their advertisement is "neutral" and lawful, it depicts a federal candidate and could be considered, by someone, as not "neutral" under Judge Leon's criterion for "electioneering communication," for the reasons just discussed *supra*, and so could be considered as "attacking or promoting" a candidate under the vague definition.

CFG plans to continue running these advertisements but fears that it will have to defend against unwarranted complaints and FEC investigations against it under the truncated backup definition of "electioneering communication." Absent the relief presently requested below, CFG is presently at risk but chooses to continue so as not to forever lose this opportunity to affect the public policy debate on these matters.

While the JMC Parties' request below for an injunction pending appeal of the truncated backup definition of "electioneering communication," resolving the harm presently felt by NRA and similar advocacy corporations, the NRA's present request would leave in place the primary definition of

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[2] *See* <http://clubforgrowth.org/advertising/presidents-ohio-script.php> (visited May 7, 2003) (containing text of advertisement and permitting viewing of the video clip).

[3] *See* <http://herndon1.sdrdc.com/cgi-bin-cancomsrs/> and <http://herndon1.sdrdc.com/cgi-bin/fecimg/?C00309419> (visited May 7, 2003) (FEC websites showing recent contributions received by Sen. Voinovich).

"electioneering communication," which the district court has already held to be unconstitutional.

The NRA believes this is helpful because that provision would have no effect until December of this year (30 days before the primary seasons begin). But even assuming this Court hears oral argument on this case at the beginning of its term in early October, that would leave only two months before the 30-day gag period of the primary definition would be activated by the beginning of a series of primaries in early 2004. The district court took five months after oral arguments to decide the present case and draft the opinions. It is unreasonable to expect this Court to do so in two months.

And the Court's attention is drawn to the fact that there is a federal runoff election tentatively set for June 7, 2003, in Texas, which means that the 60-day gag period would immediately be in effect if the unconstitutional primary definition of "electioneering communication" is resuscitated. *See The Green Papers: Texas 2003 Off Year Election*, <http://thegreenpapers.com/G03/TX.phtml> (visited May 8, 2003).

Moreover, issue advocacy groups such as the JMC Parties need planning time. A decision from this Court in December, if it were possible, would not allow the JMC Parties time to make plans for their issue advocacy during the critical primary period. And if politicians know that they will be protected from criticism by issue advocacy groups during the rolling primary periods, they could schedule votes on crucial legislation to the disadvantage of JMC Parties, since this could shield vulnerable incumbents

from criticism during the 30-day gag periods. Issue advocacy groups need time to plan alternative avenues of bringing pressure to bear on such politicians during the legislatively intense period of the primaries.

This Court could respond to the NRA's present application in several ways. First, the Court could deny the application. That would protect the JMC Parties from being harmed by the primary definition of "electioneering communication."

Second, the Court could withhold a decision on the application until the district court rules on all stay and injunction pending appeal motions, which may obviate the need for this Court to rule, although the JMC Parties are sympathetic to the NRA's need for a prompt resolution of its harm.

Third, the Court could grant the NRA's motion for the limited time until the district court responds to the pending stay and injunction pending appeal motions, which would give the NRA protection now and not ultimately harm the JMC Plaintiffs' interests.

Fourth, the Court could issue the requested stay pending appeal, but limit its effect to the NRA for now, which would provide the NRA its relief and not impose the impending harm of the primary definition of "electioneering communication" on others.

The JMC Parties urge the Court to choose one of these options over granting the NRA's stay application.

CONCLUSION

For the reasons stated, the JMC Parties urge the Court not to grant the NRA application, but to choose one of the alternatives noted just previously in text.

Respectfully submitted,

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