No. 02-A_____

In the Supreme Court of the United States

SENATOR MITCH MCCONNELL et al., ***Appellants***

v.

FEDERAL ELECTION COMMISSION et al., ***Appellees*****,**

Appeal from No. 02-581(and consolidated cases) in the
United States District Court for the District of Columbia

Application of Club for Growth, National Right to Life Committee, Libertarian National Committee, Libertarian National Committee et al.* to Vacate the District Court's General Stay

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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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**[Full list of applicants at footnote 1.]*

May 22, 2003

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Application of Club for Growth, National Right to Life Committee, Libertarian National Committee, et al. to Vacate the District Court's General Stay[1]

To the Honorable William H. Rehnquist, Chief Justice of the United States and Circuit Justice for the District of Columbia Circuit.

This Application seeks to protect American citizens and citizen groups from immediate and short term harm to their First Amendment free expression rights as a result of the district court's decision to stay its judgment and lifts its injunction against certain provisions found unconstitutional by the lower court. Applicants will suffer irreparable harm to the exercise of their First Amendment rights, already adjudicated by the lower court, until the time that this Court decides this case on the merits.

As a companion to this Application, Club for Growth and three other corporations among the present Applicants have also sought an injunction pending appeal to protect their rights with respect to the truncated backup "electioneering communication" definition described therein and *infra*. For full comprehension of the situation, the two applications should be read together.

The U.S. District Court for the District of Columbia decided *McConnell v. FEC*, No. 02-582, 2003 WL 2010983 (D.D.C. May 1, 2003) (and consolidated cases), dealing with constitutional challenges to the Bipartisan Campaign Reform Act of 2002 (BCRA).[2] BCRA provides for direct appeal to this Court. § 403(a)(3).

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[1]The James Madison Center for Free Speech represents the following ten Plaintiffs-Appellants in this Application: U.S. Representative Mike Pence, Alabama Attorney General Bill Pryor, Libertarian National Committee, Inc., Club for Growth, Inc., Indiana Family Institute, Inc., National Right to Life Committee, Inc., National Right to Life Educational Trust Fund, National Right to Life Political Action Committee, Trevor M. Southerland, and Barret Austin O'Brock.

[2]Court orders and opinions, party motions and memoranda, and the BCRA are available in PDF format at <http://www.law.stanford.edu/library/campaignfinance/>.

Certain other plaintiffs in the present case have already filed a Jurisdictional Statement in this Court (No. 02-M94). The Chief Justice has been introduced to the "electioneering communication" prohibition in dealing with a stay application by the National Rifle Association and a response by the present Applicants (No. 02-A951).

In the district court, the Plaintiffs here, represented by the James Madison Center for Free Speech (hereinafter "JMC Applicants"), opposed motions to stay the court's judgment pending appeal. On May 19, 2003, the district court granted a blanket stay, leaving BCRA in effect as enacted, despite the lower court's holdings that many provisions violate the First Amendment rights of Plaintiffs and are unconstitutional. *See Memorandum Opinion* (May 19, 2003) (Order and Memorandum Opinion attached as *Exhibit A*).

The JMC Applicants move for protection from the harm caused by this stay and ask the Chief Justice to vacate the general stay of the lower court that permits the following provisions (found unconstitutional) to remain in effect:

- the *primary* "electioneering communication" definition (banning corporate communications naming a federal candidate for 60 days before an election (or 30 days before primaries)),
- the prohibition on contributions by minors to candidates or parties, and
- the prohibition on political party receipt and expenditure of so-called "soft money" for any purpose.[3]

[3]The district court held this prohibition unconstitutional except as to the use of soft money to fund communications that "promote, oppose, attack or support a specific federal candidate." *Memorandum Opinion* at 6.

Relevant BCRA Provisions & District Court Dispositions[4]

Prohibition of "Electioneering Communications"

BCRA § 203 adds a new prohibition to 2 U.S.C. § 441b(b)(2) for corporate and labor union communications that include "any applicable electioneering communication."

BCRA § 201(f)(3) defines "electioneering communication":

> ELECTIONEERING COMMUNICATION.—For purposes of this subsection—
> (A) IN GENERAL.—(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which—
> (I) refers to a clearly identified candidate for Federal office;
> (II) is made within—
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.
> (ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

The district court declared the primary, 30/60-day blackout definition unconstitutional by a 2-1 vote and enjoined its enforcement. *Per Curiam Memorandum Opinion* (May 1, 2003) at 8, 2003 WL 2010983 at *3. It upheld the backup definition by a 2-1 vote, but without the final clause,[5] which Judge Leon found unconstitutionally vague. *Id.* Consequently, the operative definition of "electioneering communication" is a corporate or labor union broadcast communication that "promotes or supports . . . or attacks or opposes a

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[4]Pub. L. No. 107-155, 116 Stat. 81 (2002). Text of the BCRA inserted into the Federal Election Campaign Act is available at <http://www.bna.com/moneyandpolitics/bcra_feca.pdf> (prepared by the FEC).

[5]The excised clause was: "and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate."

candidate," without temporal, geographical, or contextual[6] limit and without any requirement that the candidate be clearly identified or even identified at all in the communication. To be a "candidate," one need only have received a $5,000 contribution or made a $5,000 expenditure.

The district court granted a stay, resurrecting the primary definition that it had held unconstitutional, but denied the JMC Applicants' motion for an injunction pending appeal against the truncated backup definition. *Order* (May 19, 2003) at 5.

Prohibition on Contributions by Minors

BCRA § 318 added to the FECA a provision that "[a]n individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution or donation to a committee of a political party." The district court unanimously held this unconstitutional, *Per Curiam Memorandum Opinion* (May 1, 2003) at 11, 2003 WL 2010983 at *4, but then stayed its decision, allowing this provision to remain in effect. *Order* (May 19, 2003) at 5.

Prohibition on Party Soft Money

BCRA § 101 adds to FECA a new Section 323(a) that bans national parties from soliciting, receiving, directing, transferring, and spending funds not regulated by FECA (i.e., non-federal funds or "soft money"). The district court declared this provision unconstitutional, 2-1, except for the ban on national parties from using non-federal funds for "federal election activity," as defined in FECA § 301(20)(A)(iii), which is the definition of "electioneering communication" (i.e., the truncated backup definition discussed *supra*). *Per Curiam Memorandum Opinion* at 5-6, 2003 WL 2010983 at *1. The district court stayed its final judgment, *Order* (May 19, 2003) at 5.

Standard for a Stay

[6]The removal of the final clause by the district court means there is no requirement that the "attacking" or "promoting" be linked to "an exhortation to vote" or even to an election.

On stay applications, a Justice is "to determine whether four Justices would vote to grant certiorari, to balance the so-called 'stay equities,' and to give some consideration as to predicting the final outcome of the case in this Court." *Gregory-Portland Indep. School Dist. v. United States*, 448 U.S. 1342 (1980) (Rehnquist, J., in chambers). Because BCRA provides direct appeal, the questions are whether there is a fair prospect that a majority will hold the appealed decision erroneous, whether irreparable harm would result from denial, and whether balancing the equities favors a stay. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980).

Argument

The flaws of the **stay pending appeal** granted by the district court will be discussed in general and with respect to three provisions resurrected from the unconstitutional graveyard that especially harm JMC Applicants.

The Stay Should Be Vacated Generally, and Especially as to Three Particularly Problematic Provisions.

The district court stayed its injunctions, leaving in effect provisions declared unconstitutional by the lower court. Since the same supposedly "irreparable harm" to the Government and Intervening Defendants who sought the blanket stay is the same for all provisions, as is the balance of harms in a general way, these will be considered generally before turning to the chances that certain provisions will pass constitutional muster.

The district court gave a one sentence of explanation for its blanket stay: "This Court's desire to prevent the litigants from facing *potentially three different regulatory regimes* in a very short time span, and the Court's recognition of the *divisions among the panel* about the constitutionality of the challenged provisions of BCRA, counsel in favor of granting a stay of this case." *Memorandum Opinion* (May 19, 2003) at 8 (emphasis added).

On a general level is the question of whether the holdings of an Article III court should mean anything or are meaningless, weightless nothings. Does a federal court's declaration that Congress has violated fundamental, democratic rights of citizens in the

highly-protected First Amendment context of core political speech have any value? The blanket stay treats the holdings of the district court as meaningless, weightless, valueless. However, it has weight: a federal court has now adjudicated the rights of citizens and found those rights violated. It doesn't matter that there were disagreements among the panel; this is common among multi-judge panels. And the decision as to contributions by minors was unanimous. The court decided and that decision should be entitled to respect.

In fact, when a stay is sought after judgement, the burden on the moving party, here the Government and Intervenors, is higher.

> [A] movant seeking a stay pending review on the merits of a district court's judgment will have greater difficulty in demonstrating a likelihood of success on the merits. In essence, a party seeking a stay must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal.

Michigan Coalition of Radioactive Material Users v. Griepentroc, 945 F.2d 150, 153 (6th Cir. 1991). As discussed below, both generally and with regard to certain specific provisions, the Government cannot possibly met this test.

Further, the JMC Applicants and other plaintiffs are precisely the public that is affected by changes in the "regulatory regimes," *and these Applicants sought, and continue to seek, the very changes in the regulatory regime that would have resulted absent the stay.* But the district court used the prospect of change in the regulatory regime against the Plaintiffs, insisting that it is in the Plaintiffs' interest for the regulatory changes – which the Plaintiffs themselves sought – not to go into effect. But these regulatory changes are necessary to protect the constitutional rights of the Plaintiffs and Plaintiffs sought those regulatory changes for precisely this reason. And if this Court's decision results in a third "regulatory regime," this is just the natural consequence of changes of law that flow from newly enacted statutes, subject to court review.

The burden of complying with the regulatory regime of the BCRA is the result of the sheer volume, complexity, and questionable constitutionality of the BCRA itself and the

decision of Congress that it go into effect before the inevitable constitutional challenges are resolved. But the district court's decision, if not stayed, has the effect of reducing this complexity and confusion by striking down so many provisions of BCRA and limiting the effects of others. The BCRA spanned 90 pages and the FEC has written over 1,000 pages of regulations and explanations of it. And the end result of the lower court's decision is less regulation and, therefore, less complexity, since the public will not have to comply with so many regulations. The stay, however, resurrects unconstitutional provisions, restoring complex rules that the American public must now follow.

Thus, "the litigants," that the lower court referred to that would benefit by the stay, must really be the Defendants. The Defendants below argued that the FEC would have to revise their regulations – that they worked so hard to enact – and this would cause a burden. But should the First Amendment rights of Americans really be sacrificed to governmental convenience? Administrative convenience is no justification for burdening constitutional rights:

> Although administrative convenience constitutes a legitimate state interest where rational basis scrutiny of regulatory enactments is involved, such convenience is insufficient to justify state action that triggers any level of heightened scrutiny. *See, e.g., Craig v. Boren,* 429 U.S. 190, 198 (1976) (citing decisions that "rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications").

Beaumont v. FEC, 278 F.3d 261, 274 (4th Cir.) (holding that "a rationale of administrative convenience cannot successfully be advanced to sustain [2 U.S.C.] § 441b(a) and the FEC's sweeping regulatory ban at issue in this case"), *cert. granted,* 123 S. Ct. 556 (2002).[7]

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[7]In *Harman v. City of New York*, 140 F.3d 111, 124 (2d Cir. 1998), the Second Circuit struck down a city policy requiring employees of a particular agency to receive agency permission before talking to the press, because "the agencies' asserted need to provide employees with "additional information" before they speak to the press amounts to mere convenience, and is not the kind of justification that can outweigh the employees' and the public's interest in allowing freewheeling debate on matters of public concern."

In declining to enjoin a ban on marching in front of the United Nations to protest the war against Iraq, the Second Circuit held that

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Furthermore, administrative convenience hardly constitutes the irreparable harm that is the Government's burden as the moving party for the stay. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (one factor in issuing a stay is "whether the *applicant* will be irreparably injured absent a stay." (emphasis added)).

Of course, complexity does create confusion, and changing rules creates more confusion. But ultimately, this is a result that flows from government regulation. The Framers of our Constitution sought to lift "complexity" and "confusion" from citizens' participation in our democracy by their First Amendment mandate that: *Congress shall make no law . . . abridging the freedom of speech.* Thus, ultimately, the constitutional error here *is inherent in any governmental regulation of the speech and association rights of the people.* And the cure is not to reimpose restrictions that have already held unconstitutional on that participation, but to ensure that such restrictions are never imposed. There is no "complexity" or "confusion" about freedom.

Thus, the harms claimed by the government do not justify the burdens on core First Amendment speech imposed by the blanket stay. This is also true when one examines various provisions individually. For the JMC Applicants, the most pressingly problematic provisions, that are resurrected by the stay, are (1) the *primary* "electioneering communication" definition, (2) the prohibition on contributions by minors to candidates or parties, and (3) the prohibition on political party receipt and expenditure of so-called "soft money" for any purpose, which are dealt with next in turn.

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[7](...continued)

> while short notice, lack of detail, administrative convenience and costs are always relevant considerations in the fact-specific inquiry required in all cases of this sort, these factors are not talismanic justifications for the denial of parade permits. Likewise, simply offering an alternative of a stationary demonstration does not end the analysis. The availability of such a demonstration may not completely serve the constitutional interest here at issue. *See, e.g., Connecticut State Federation of Teachers v. Bd. of Educ.,* 538 F.2d 471, 482 (2d Cir.1976).

United for Peace and Justice v. City of New York, 323 F.3d 175, 178 (2d Cir. 2003).

I. The Stay Should Be Vacated as to the Primary "Electioneering Communication" Definition.

The primary "electioneering communication" definition provides for a 30/60-day blackout period when no corporate or labor union communications may be made that names a federal candidate. BCRA, § 201(a)(i). As noted *supra*, only one judge considered this constitutional. Similar "name or likeness" tests have been regularly struck down by lower federal courts and none have been upheld. *See*, *e.g.*, *Perry v. Bartlett*, 231 F.3d 155, 159 (4th Cir. 2000); *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376, 389-90 (2d Cir. 2000); *Right To Life of Michigan, Inc. v. Miller*, 23 F. Supp. 2d 766 (W.D. Mich. 1998); *Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F. Supp. 2d 740 (E.D. Mich. 1998). These federal courts have consistently pointed to this Court's express advocacy test as controlling over such "name or likeness" tests.

The BCRA primary "electioneering communication" definition flouts the holding of this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), and reaffirmed in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*), that a communication must expressly advocate the election or defeat of a clearly identified candidate for federal office in order to be subject to any government regulation. *Cf. Application of Club for Growth, National Right to Life Committee, National Right to Life Educational Trust Fund, and Indiana Family Institute For Injunction Pending Appeal* at 12-16 (discussing the express advocacy test at length with respect to vagueness).

Buckley set out the express advocacy test as the essential bright-line test to eliminate vagueness in the highly-protected First Amendment area of election-related speech and issue advocacy. 424 U.S. at 43, 44 n.52.[8] To avoid vagueness, this Court in *Buckley* narrowly

[8]In footnote 52, the Court called its test an "*express words of advocacy*" test, and indicated that it is not a so-called "magic words" test (i.e., involving only the words listed), because the examples are introduced by "such as." *Id.* at 44, n.52 (emphasis added). The fact that all the examples given in footnote 52 would occur within a communication itself without reference to

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construed "any expenditure . . . relative to a clearly identified candidate" to mean "advocating the election of a candidate." 424 U.S. at 41-42. But the Court immediately declared that this construction merely "refocuses the vagueness question." *Id.* at 42. More was needed because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.* In other words, the express advocacy test was also required to protect against overbreadth, namely, regulating issue advocacy.

A decade later, in *MCFL*, 479 U.S. 238, this Court was again faced with the need to construe a statute that bordered on the protected ground of issue advocacy. The Court reiterated the discussion mentioned *supra* about how "[t]he distinction between discussion of issues . . . and advocacy of election or defeat . . . may often dissolve in practical application." *Id.* at 249 (internal quotation marks and citation omitted). In *Buckley*, the Court made the quoted statement in the context of a "refocuse[d] . . . vagueness question." 424 U.S. at 42. The *MCFL* opinion clarified that the vagueness problem in *Buckley* had to be resolved not only to avoid vagueness but also "to avoid the problems of overbreadth" that would occur if government were permitted to tread on issue advocacy's protected territory. 479 U.S. at 248. *MCFL* reaffirmed that the express advocacy test governs all contexts that operate next to issue advocacy and was not simply a helpful way to identify "express advocacy" nor just one way of describing a vagueness resolution in *Buckley*. *MCFL* authoritatively declared the now broadly binding test to be precisely the one declared in *Buckley*. *MCFL*, 479 U.S. at 249.

Plainly, wherever a regulation shares a border with issue advocacy, vagueness and overbreadth converge and the o*nly* resolution of the constitutional problem of protecting issue advocacy is the precise language of the express advocacy test. Therefore, any legisla-

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[8](...continued)
external context, reemphasizes the Court's earlier insistence that the explicit words examined must be "part of the communication." *Id.* at 43.

tion bordering on issue advocacy must, positively, conform to the precise language of the express advocacy test, which includes, negatively, not being dependent on factors external to the terms of the communication or on the subjective understanding of the hearer. In short, a bright line is required to eliminate hedging and trimming and to resolve the vagueness problem.

The primary "electioneering communication" definition does establish a bright line, unlike the backup definition (especially as truncated by the district court). But the bright line has the clarity of a gag, not of liberty. While this Court in *Buckley* expressed its concern that the term *advocating* involves "a question both of intent and effect" and could be defined to depend on "the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning," 424 U.S. at 43 (internal quotation marks and citation omitted), the reason it was concerned was to protect robust public debate: "Such a distinction offers no security for free discussion . . . [because] it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." *Id.* (internal quotation marks and citation omitted). The purpose of the express advocacy test was to protect free speech in the most vital context of political debate.

But BCRA shows no such solicitude for the need to avoid "hedging and trimming" by speakers or for "security for free discussion." BCRA would either gag public discussion at a most critical time in public life or impose such "hedging and trimming" that "free discussion" would wither and die. Neither "electioneering communication" definition adopts this Court's "express words of advocacy test," and the backup definition expressly eschews it in explicit words. In light of this Court's holding that the "only" way, *id.*, to protect free expression and the public discussion of vital issues from vagueness and overbreadth is the express advocacy test, the question occurs whether those who enacted BCRA really care about free expression and public discussion of the vital issues of the day at the most critical time in public life, i.e., when the public is most attuned to things political at election time.

However, this Court has consistently stood as a bulwark in protection of the right of free people to freely say what they want about politicians, *especially* when incumbents are running for reelection with their poll-driven, focus-group-tested, carefully-scripted, campaign commercials being broadcast at a time when the last thing in the world they want is some pesky citizen group telling the public where those politicians stand on nettlesome issues such as abortion, tax cuts, economic policy, globalization, trade, unions, ecology, foreign policy, and the like. Consequently, there is an excellent chance that this provision will be declared unconstitutional by this Court.

While resurrecting the unconstitutional 30/60-day blackout definition seems to buy some time for some issue advocacy groups, it has a bite now since there is a federal runoff election tentatively set for June 7, 2003, in Texas, which means that the 60-day gag period is already in effect there. *See The Green Papers: Texas 2003 Off Year Election*, <http://thegreenpapers.com/G03/TX.phtml> (visited May 8, 2003). And with rolling caucuses and primaries beginning in January 2004, the 30-day gag period will kick in during December 2003, weeks and likely months before this Court issues its decision in this case. The primary "electioneering communication" definition thus does not solve the First Amendment violations posed by the truncated backup definition, it merely reframes them. It will affect the American people, causing them irreparable harm[9] – and it is unconstitutional, if district court decisions have any meaning.

II. The Stay Should Be Vacated as to Contributions by Minors.

As noted *supra*, the district court panel was unanimous in holding that the prohibition on contributions to candidates and political parties by minors is unconstitutional. It is

[9]Of course, since the Government and Intervenors are the moving parties for the stay, *they* have the burden of showing irreparable harm to *them* that justifies the stay. Further, the Court must consider "whether issuance of a stay will substantially injure the other parties interested in the proceeding." *Hilton*, 481 U.S. at 776. Here, the harm to Plaintiffs is irreparable, not just substantial.

difficult to imagine a different outcome in this Court. This harms the JMC Applicants who are minors.

Applicant Trevor M. Southerland is a minor living in Georgia. He is Affiliate Development Director of the Libertarian Party of Georgia and, as such, is a member of the Libertarian Party of Georgia State Executive Committee. He has in the past and intends in the future to pay his annual membership dues of $25 to the Libertarian Party of Georgia, which transfers a portion of his dues to the Libertarian National Committee so that he will be and remain a member of both parties. Under BCRA, Trevor is prohibited from contributing "hard money" dues to the Libertarian National Committee, dues contributed as "soft money" to the Georgia Libertarian Party cannot be transferred to the national Libertarian Party, and the Libertarian Committee Party cannot accept "soft money" dues under the BCRA. So Trevor is effectively barred from membership in the Libertarian National Committee.

The district court held both that minors could not be barred from making contributions to a political party and that political parties could receive non-federal money for all purposes other than "electioneering communication." This solved Trevor's problem, but the blanket stay promptly snatched from him what he had won by being a Plaintiff in this case.

Applicant Barret Austin O'Brock is a minor living in Louisiana. He declared his general intention to contribute to federal candidates in future elections, including the 2002 and 2004 elections. Specifically, he stated his intention to contribute at least $20 of his own money (not received from any other person for purposes of the contribution) to John Milkovich, candidate for U.S. Representative for the Fourth Congressional District of Louisiana, prior to the November 2002 general election. Barret knows candidate Milkovich personally because the candidate was Barret's Sunday School teacher for two years.

Barret's plan to make contributions to federal candidates running for election after 2002, who like his Sunday School teacher share his views on the issues, became possible with his unanimous victory in the trial court. However, the blanket stay snatched away his

opportunity to participate in democracy precisely at a time when incumbents and aspirants are declaring their candidacies and gearing up for primaries starting in January and the fall 2004 elections.

The irreparable harm these young men face because of the blanket stay is as palpable as the disappointment of having hard-won, unanimously declared rights first vindicated and then snatched away by a general stay that in no way fits these young men and the provision that bars their way to democratic participation. Because the decision was unanimous, the trial court's mention of a divided panel is meaningless. There is no administrative inconvenience to the Government at all because no rulemaking is required, and there is no complexity to this issue, either minors can contribute or they cannot. The blanket stay simply deprives these young men of their First Amendment rights without any justification.

III. The Stay Should Be Vacated as to Party Soft Money Not Used for "Electioneering Communications."

As noted *supra*, the district court also struck down the prohibition on "soft money" contributions to national political parties by a 2-1 vote, except for the use of non-federal money for an "electioneering communication." A blanket stay deprives Applicant Libertarian National Committee of constitutionally permissible contributions and deprives donors who would like to contribute of the opportunity to do so. This lack of soft money contributions is ongoing irreparable harm in ways that are greater for the Libertarian Party than for the two major parties, as noted in the following description based on uncontested evidence in the district court.

The impact of BCRA on the Libertarian National Committee ("LNC") is significantly greater than on the Democratic National Committee ("DNC") or Republican National Committee ("RNC"). The Libertarian Party is much smaller than either of the major parties. Declaration of Stephen L. Dasbach, Ronald Crickenberger, and Dominick Dunbar of the Libertarian National Committee ("LNC" Declaration") at ¶ 5; www.lp.org; www.fec.gov. In

size and administrative sophistication, the LNC is similar to a typical state affiliate of the RNC or DNC. *Id.* The LNC does not seek, accept, or use any federal funds to conduct its campaigns.

The basic administrative burden imposed by Federal Election Campaign Act ("FECA") are the same on all political parties, regardless of size, so that the LNC must expend a relatively higher percentage of its resources on compliance with FECA than the RNC or DNC – a situation exacerbated by BCRA. *Id.* at ¶ 6. Moreover, the LNC has less relative expertise and sophistication, a greater likelihood that it will commit errors in administering the requirements of FCA, and will have greater administrative duties advising state affiliates as the result of BCRA – all to the further relative detriment of the LNC. *Id.* at ¶¶ 6-8. Considerable administrative expenses will be incurred and changes in the infrastructure of the Libertarian national and state parties will be required in order to comply with BCRA. *Id.* at ¶¶ 21-24, 25-27, 40-44.

Only 10-15% of LNC funds are placed in its "soft money" account, a far lower percentage than for the RNC or DNC, which place more than half their funds in "soft money" accounts. *See* www.fec.gov. At present, the LNC has three principle sources of soft money: 1) list rental fees, 2) dues paid through state affiliates and forwarded from the state affiliates to the LNC, and 3) advertising in the LNC's newspaper, the *Libertarian Party® News* and elsewhere. LNC Declaration at ¶ 9. Only seven (7) of the 51 state affiliates of the national Libertarian Party have registered as political committees with the FEC, subject to FECA requirements. *See* www.fec.gov. Very little money received by LNC is from any corporate source (if funds from renting lists or advertising in the *Libertarian Party® News* are discounted) or from large individual contributions. LNC Declaration at ¶ 9. In 2002, for example, only one individual contribution exceeded $20,000. *Id.* During the past six years, no more than four donors to the LNC have exceeded this limit in any one year. *Id.*

No federal officeholder has been a candidate of the Libertarian Party, and no candidate of the Libertarian Party has ever won a race for federal office. *Id.* at ¶¶ 9-10. Libertarian Party federal candidates know that they have only a remote chance to win federal office, and they use their candidacies for running educational/issue advocacy campaigns that concentrate on advancing libertarian principles. *Id.* at ¶ 11. Libertarian Party federal candidate campaigns are also focused on fostering party growth and gaining and maintaining ballot access in order to assure that there will be an electoral forum in which federal candidates might advocate libertarian principles. *Id.* at ¶ 14.

The Libertarian Party sometimes raises issues without any express reference to any Libertarian Party federal candidate when major party candidates are not addressing them. Thus, early in 2002, using soft money, the Libertarian Party ran anti-drug war advertisements in *USA Today* and the *Washington Times* to lampoon advertisements being run by the federal government in an attempt to link the drug-war to anti-terrorism efforts. *Id.* at ¶ 12.

The LNC publishes a monthly newspaper, the *Libertarian Party® News*. *Id.* at ¶ 18 . The LNC accepts subscriptions for its newspaper from corporation libraries, advertising from corporations and from state and local candidates for office, and subscriptions paid by one person on behalf of another. *Id.* at ¶¶ 19-23. The LNC also presently rents its membership list through a corporate broker to both individual and corporate third-parties. *Id.* at ¶¶ 24-27.

The LNC stages bi-annual conventions of the Libertarian Party. Libertarian Party conventions held in years when there are no federal presidential elections are solely devoted to discussion and advocacy of issues; no candidates for public office are nominated for or selected to run as Libertarian Party candidates at these conventions. They are financed by attendance fees from adults and minors and, in significant part, by space rentals, advertising in the convention program, and sponsorships of the program and various events by individuals and corporations. *Id.* at ¶¶ 28-29. Corporations may be employed to administer and to take in receipts for off-year conventions. *Id.* During presidential election years, the Libertarian Party

conventions are managed by the LNC rather than by a host committee as would be effectively required by the BCRA and FECA. *Id.* at ¶ 31.

The LNC produces educational materials on libertarian issues for sale to the general public and to state and local Libertarian Parties and candidates. *Id.* at 32.

The national Libertarian Party is a membership organization that requires the regular payment of dues from all members to the LNC. *Id.* at ¶¶ 33-34. Dues are frequently paid to state-affiliated Libertarian Parties, with a portion to be distributed to the national Libertarian Party, so that those who pay dues will be members of both the state and national parties. Dues are often paid by one person on behalf of another and are often paid with delays in forwarding them to the LNC. In these circumstances, the funds are appropriately deposited in state affiliates' soft money accounts. *Id.*

Using soft money, the LNC conducts numerous issue advocacy campaigns unrelated to any federal candidacy. *Id.* at ¶¶ 12, 35-36 (and exhibits of documents re gun rights, social problems, drug policy, tax policy, safe neighborhoods, etc.).

Soft money is presently used by the LNC for ballot access campaigns that do not solely involve candidacies for federal office, but also implicates state and local candidacies. Access to the ballot is essential for efficient advocacy of libertarian principles and advocacy of its views on issues. *Id.* at ¶ 37. Using soft money, the LNC intends to purchase or build a national office building. *Id.* at ¶ 38. The LNC presently receives and uses soft money contributions for use on non-federal campaigns and intends to continue to do so. Id. at ¶ 39.

The national Libertarian Party presently has many minor members. *Id.* at ¶ 45 (such as Applicant Trevor M. Southerland). The Libertarian Party also has had several minors elected Convention Delegates in the past. *Id.* at ¶ 46. Minor members must pay dues; minor delegates must pay admission to conventions. *Id.* at ¶¶ 45-47. Many state affiliate party committees have a unified membership structure that requires state members to also contribute to the LNC and become national Libertarian Party members. *Id.* Some state party affiliates require state party

members to be members of the national party in order to participate as officers or board members in the state or local party. *Id.* at ¶ 48. There are no known cases in which minors have been used as conduits to enable others to exceed limits on contributions made to the LNC; none of LNC's large contributors are minors. *Id.* at ¶ 49.

Probably like all other political parties, LNC doesn't care about the potential for three "regulatory regimes" during this election cycle. The stay took away the right to non-"electioneering communication" soft money that LNC won back by being a Plaintiff in this law suit without any justification of why a one-size fits none approach should be applied to the unique situation of the LNC. LNC's ongoing loss of income and resultant limit on its First Amendment activities is unjustified and clearly cognizable irreparable harm.

CONCLUSION

Applicants have met their burden of proving that the general stay of the injunction against unconstitutional provisions of BCRA should be vacated, and in particular the provisions relating to the primary "electioneering communication" definition, the prohibition on contributions by minors, and the prohibition on contributions of non-federal money to national political parties for other uses than "electioneering communications." Therefore, the relief requested should be granted pending the final determination of the merits of this case by this Court.

Respectfully submitted,

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No. 02-A_____

In the Supreme Court of the United States

SENATOR MITCH MCCONNELL et al., ***Appellants***

v.

FEDERAL ELECTION COMMISSION et al., ***Appellees*****,**

Appeal from No. 02-581(and consolidated cases) in the
United States District Court for the District of Columbia

Certificate of Service

I, James Bopp, Jr., a member of the bar of this court, certify that on May 22, 2003, I served a copy of the *Application of Club for Growth, National Right to Life Committee, Libertarian National Committee, et al. to Vacate the District Court's General Stay* by email, facsimile and first-class mail upon the following persons, per arrangements in an agreed order in the district court, and that all person required to be served have been served:

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