No. 02-__

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL RIFLE ASSOCIATION, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL APPELLANTS' RESPONSE TO THE NATIONAL RIFLE ASSOCIATION'S EMERGENCY APPLICATION TO THE CHIEF JUSTICE FOR A TEMPORARY STAY

The Solicitor General, on behalf of the Federal Election Commission (FEC), the individual Commissioners of the FEC in their official capacities, the United States of America, the United States Department of Justice, John Ashcroft, Attorney General of the United States, and the Federal Communications Commission (collectively, the federal appellants), responds as follows to the Emergency Application to Stay the Judgment of the United States District Court for the District of Columbia Pending Review (Emergency Application) filed by

the National Rifle Association (NRA) with the Chief Justice of the United States.

1. The federal appellants have appealed to this Court from the district court's May 2, 2003, decision and final judgment in this case invalidating major provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81. On May 12, 2003, the federal appellants filed a Jurisdictional Statement with this Court explaining the substantial questions presented by their appeal.

2. On May 9, 2003, the federal appellants asked the district court to stay its final judgment in its entirety pending the resolution of the multiple appeals to this Court, and to issue a temporary administrative stay of its final judgment in its entirety during the period that it takes the district court to act on the parties' stay requests. Those requests are currently pending before the district court. A stay of the district court's highly fractured ruling in this case would leave in place the presumptively valid scheme established by Congress in BCRA and implemented by the FEC while this Court resolves the appeals in this case in the expedited fashion called for by BCRA (§ 403(a)(3)). Moreover, a temporary stay of the order in its entirety would permit the orderly handling of the

multiple motions filed in the district court for a stay or injunction.

Three factors in particular support staying the decision below in its entirety. First, BCRA, "like all Acts of Congress, is presumptively constitutional" and, "[a]s such, it 'should remain in effect pending a final decision on the merits by this Court.'" Turner Broadcasting Sys., Inc. v. FCC, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers) (quoting Marshall v. Barlow's, Inc., 429 U.S. 1347, 1348 (1977) (Rehnquist, J., in chambers)). Second, the traditional reluctance to give effect to a judicial decision invalidating an Act of Congress pending an appeal to this Court has all the more force where, as here, the lower court is unable to reach a consensus on the rationale for invalidating the Act of Congress, and where the legal regime that would take effect in the place of Congress's is one that effectively must be stitched together from separate opinions resting on conflicting rationales. Third, allowing the district court's decision in this case to take effect during an appeal to this Court would have tumultuous consequences for the Nation's federal electoral system. BCRA substantially amended the laws governing the financing of federal elections; the district court's decision in this case essentially overhauls BCRA as enacted;

and this Court's decision in this case is likely to differ in material respects from the district court's decision, changing the rules for a third time.

3. The NRA has asked the Chief Justice to issue a stay "pending the district court's final determination of whether to stay its judgment pending this Court's review." Emergency Application at 1. That request, however, is directed only to one facet of the district court's final judgment -- the ruling concerning the constitutionality of Title II of BCRA's "electioneering communications" provision. As explained in the federal appellants' Jurisdictional Statement (at 18-19), the district court invalidated BCRA's primary definition of "electioneering communications" and upheld (in significant part) the statute's fallback definition of that term. Because BCRA's primary definition of "electioneering communications" is limited to communications made 60 days before a federal general election or 30 days before a federal primary election, see BCRA § 201 (amending 2 U.S.C. 434(f)), the issue advertisements that the NRA claims that it intends immediately to air -- more than six months in advance of any federal general or primary election -- would not be covered "electioneering communications" under BCRA's primary definition.

The NRA filed a similar request before the district court. In

response, the federal appellants asked the district court for a temporary stay of the district court's ruling in its entirety to allow for the orderly handling of the stay requests. The district court has not yet acted on those requests.

4. In the absence of any temporary relief from the district court, the federal appellants support the NRA's request for a temporary stay of the district court's final judgment until the district court acts on the parties' requests for a stay pending appeal. However, such a temporary stay should apply to the final judgment in its entirety, not just the part of the judgment concerning BCRA's "electioneering communications" provision. Staying the entire judgment is supported by the strong presumption in favor of the constitutionality of an Act of Congress which applies to all of the challenged provisions of BCRA; the inability of the district court itself to reach virtually any consensus on the grounds for invalidating provisions of BCRA; and the compelling public interest in maintaining the greatest stability possible in the rules governing campaign finance as the Nation enters a new federal election cycle. Conversely, little would be gained, especially in the brief interim during which the district court considers the parties' stay requests, from subjecting the campaign finance system not to the rules that

were carefully established by Congress and implemented by the FEC, but to the rules that are the byproduct of the divided district court decision in this case.

A partial stay of a judgment pending appeal is itself somewhat unusual. Nor is a provision-by-provision analysis of a judgment necessary in deciding whether to grant a temporary administrative stay simply for the purpose of facilitating the consideration of requests for a stay pending appeal. Such a piecemeal approach also would not provide the temporary breathing room offered by a full administrative stay for the orderly processing of such stay requests, some of which in this case themselves seek a stay of the final judgment in its entirety. And staying the district court's final judgment on a piecemeal basis is likely only to engender additional confusion over what parts of BCRA are still valid and applicable. Accordingly, while the district court considers the parties' multiple requests for a stay, the Chief Justice should issue a temporary stay of the district court's ruling in this case in its entirety. Such an order would afford the NRA the immediate relief that it seeks and, at the same time, permit the district court in the first instance to consider whether any piecemeal approach to a stay is warranted in this case, and obviate the need for this Court to wade into the

merits of the district court's extraordinary, 1600-page decision in the "emergency" posture in which the NRA's application is presented.

5. The Madison Center plaintiffs have asked the Chief Justice to deny the NRA's request for a temporary stay and, instead, to follow one of several alternative options. That request should be rejected. As explained above, if the district court's final judgment is stayed in its entirety, BCRA's primary definition of "electioneering communications" would continue to govern. That definition does not apply to advertisements that are aired more than 60 days before a federal general election and 30 days before a federal primary election. Any harm that the Madison Center plaintiffs claim will result from application of that definition (to advertisements that would air more than six months from now) is entirely speculative and provides no basis whatever for declining to stay the district court's final judgment at this time.*/

* * * * *

* The Madison Center plaintiffs state (at 6 (emphasis added)) that a federal runoff election has been "tentatively set for June 7, 2003." The possibility that such a runoff will occur does not support any of the alternative approaches suggested by the Madison Center plaintiffs. Nor have the Madison Center plaintiffs even asserted that they intend to run advertisements in connection with the "tentative[]" runoff to which they refer.

Accordingly, the federal appellants respectfully urge the Chief Justice to grant the NRA's application for a temporary administrative stay, but to make clear that that stay applies to the district court's final judgment in its entirety.

Respectfully submitted.

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