No. 02-1675

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.

_____

On Appeal From The United States
District Court For The District of Columbia

_____

BRIEFING PROPOSAL

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Plaintiffs-Appellants National Rifle Association and NRA Political Victory Fund (collectively, the "NRA") hereby respond to this Court's instruction of June 5, 2003, to propose coordinated briefing of common issues in these consolidated cases.

The NRA's constitutional challenge to the Bipartisan Campaign Reform Act ("BCRA") is limited, both here and in the court below, to the restrictions contained in Title II. In the proceedings before the district court, the eight sets of plaintiffs challenging Title II made an effort to coordinate their briefing and argument in order to minimize duplication. While not entirely successful, this coordination effort resulted in the NRA

(1) deferring to its fellow plaintiffs' presentations on a number of important common issues and (2) making the sole presentation to the district court on three important arguments challenging the constitutionality of Title II. This informal allocation of briefing responsibilities among the Title II plaintiffs is reflected in the parties' jurisdictional statements: only the NRA's jurisdictional statement presents to this Court the constitutional issues that it raised and briefed in the district court. Accordingly, as more fully outlined below, the NRA respectfully proposes to confine its briefing in this Court to the specific Title II issues that the NRA was responsible for arguing below and that it has specifically raised in its jurisdictional statement.

1. On many important issues, the NRA's interests and positions are aligned with those of its fellow Title II Plaintiffs-Appellants. Although Plaintiffs-Appellants in these consolidated cases regrettably have not been able to arrive at a unified proposal designating certain Plaintiffs-Appellants to be responsible for arguing specific common positions, the NRA will defer to its fellow Title II Plaintiffs-Appellants for the briefing on the following common positions:

a. The common position that neither the primary nor the fallback definition of "electioneering communications" in Title II can, consistent with this Court's decision in *Buckley*

v. Valeo, 424 U.S. 1 (1976), regulate speech that does not expressly advocate the election or defeat of a federal candidate;

b. The common position that the *Buying Time* studies relied upon by Congress in passing BCRA demonstrate the impermissible overbreadth of Title II's primary definition of "electioneering communications";

c. The common position that Title II's fallback definition of "electioneering communications" is unconstitutionally vague;

d. The common position that Title II is unconstitutionally underinclusive in exempting electioneering communications carried in certain media (*e.g.*, print materials and the internet) and in exempting electioneering communications outside the blackout period; [1]

e. The common position that the disclosure requirements of Title II are unconstitutional because they impermissibly burden speech and associational freedoms;

f. The common position that the provisions of Title II regulating "coordination" of expenditures are unconstitutional.

2. The NRA proposes to confine its merits briefs to the

[1] The NRA would separately address the underinclusiveness of Title II only to the extent it is probative of what the NRA contends is Congress's illegitimate purpose to suppress disfavored speech.

following issues:

a. The NRA will brief the question whether enactment of Title II of BCRA was animated by an impermissible purpose to stifle political speech that Congress deems objectionable because it contains "negative attack" content criticizing federal officeholders. *See* JURISDICTIONAL STATEMENT ("NRA JS") at i, 13-16, *NRA v. FEC*, No. 02-1675.

b. The NRA will also argue that there is a less restrictive alternative to Title II's restrictions on electioneering communications. *See* NRA JS at i, 16-18. Defendants posited below that Title II's speech restrictions were intended to remedy the problem identified in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990): that corporations distort the political process when their speech is funded by market profits which "have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660-61. As explained in the NRA's jurisdictional statement, the original Snowe-Jeffords provision of Title II, Section 203, allowed 501(c)(4) corporations such as the NRA to broadcast electioneering communications funded by *donations from individuals*, but it was effectively repealed by the Wellstone Amendment, Section 204. A ruling invalidating the Wellstone Amendment would restore the original Snowe-Jeffords provision as a less restrictive means for achieving Congress's purported goal of preventing

Austin-type corruption of the political process.

c. The NRA will also argue that the unconstitutional overbreadth of Title II's primary definition of "electioneering communications" is dramatically demonstrated by the NRA's own political speech. *See* NRA JS at 18-22. In the 2000 election cycle, the NRA paid for more speech on television -- over 300,000 minutes -- than all other issue advocacy groups and unions combined. The NRA broadcasts the vast bulk of its speech in the form of 30-minute news programs, rather than the typical 30-second and 60-second ad spots, and because the NRA's news programs ran for a full half-hour and contained numerous references to federal candidates, Title II would now proscribe them as "electioneering communications." Finally, the NRA demonstrated below its unique need to refer to specific federal candidates for important reasons apart from influencing elections, including responding to direct attacks upon the NRA by candidates campaigning for federal office. None of the *Buying Time* studies upon which Congress relied in enacting BCRA considered the NRA's 30-minute news broadcasts, and thus the Court's consideration of the potential overbreadth of Title II would not be complete without consideration of that speech.[2]

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[2] The NRA expects other Plaintiffs-Appellants challenging Title II, including the Madison Center Plaintiffs (No. 02-1733), ACLU (No. 02-1734), AFL-CIO (No. 02-1755), and Chamber of Commerce (No. 02-1756), separately to address particular aspects of their

d Finally, the NRA intends to brief the question whether Title II violates Equal Protection by specially exempting media corporations from its coverage. *See* NRA JS at i-ii 23-25 Only the NRA introduced record evidence on this point in the district court, arguing that media corporations no longer play a special societal role, distinct from that of all other corporations, in informing the public so as to justify Congress' decision to grant media corporations a special license to engage in "electioneering communications."[3]

3. The NRA believes that the 50 pages for an opening brief and the 20 pages for a reply brief "presumptively provided" in this Court's rules, *see* Rule 33.1, will be adequate and warranted for the treatment of these important issues.

Respectfully submitted,

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own political speech that bear upon this Court's analysis of Title II's overbreadth.

[3]Although the McConnell plaintiffs did not argue in their briefs below that the media exception was unconstitutional, their jurisdictional statement suggests that they may argue this point in their merits brief. *See* McConnell Jurisdictional Statement at 14.

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