

No. 02-1676 and consolidated cases

IN THE SUPREME COURT OF THE UNITED STATES

FEDERAL ELECTION COMMISSION, *et al.*, Appellants

v.

SENATOR MITCH McCONNELL, *et al.*, Appellees

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

RESPONSE OF EMILY ECHOLS, *et al.*,
AND OF BARRET AUSTIN O'BROCK, *APPELLEES*,
TO MOTIONS FOR ARGUMENT AND DIVIDING OF TIME FOR ARGUMENT

MAY IT PLEASE THE COURT:

The minor Appellees have pending before the Court a motion for division of argument and allocation of time for argument on their behalf by their counsel. The grant of that motion by this Court is consistent with and not controverted by any of the other pending motions for division of argument or allocation of time for argument.

Pursuant to S. Ct. Rule 28 and the instructions of the Clerk related to motions on oral argument in these cases, Emily Echols, *et al.*, and Barret Austin O'Brock – minor appellees who successfully challenged the constitutionality of Section 318 of BCRA – tender this response to the motions for argument and for division of argument.

SUMMARY OF PENDING MOTIONS

There are, pending before this Court, seven motions regarding division of argument and allocation of time for argument. In brief summary, those motions propose the following:

- ▶ The minor Appellees group proposes that this Court allow 10 minutes for argument on each side on the fourth question presented in the FEC's Jurisdictional Statement.

▶ The NRA proposes that any time allocated by this Court for the argument of Title II (electioneering communications) issues be divided equally between its counsel, arguing on behalf of grassroots advocacy corporations supported by the donations of individuals, and counsel for other (corporations and unions) challengers. Alternatively, the NRA proposes that any time allocated by this Court for the argument of Title II issues be further subdivided to provide separate time for counsel for labor unions, as well.

▶ The Paul group requests at least 20 minutes in which to make their unique press arguments.

▶ The Adams group proposes that they be allotted 15 minutes of time in which to make their unique arguments opposing increases in contribution limits under FECA.

▶ The McConnell group proposes that the two hours of time for argument by parties that were Plaintiffs in the District Court be divided into four blocks: two 20-minute blocks and two 40-minute blocks. With respect to the allocation of that time, the McConnell group proposes that two attorneys, Ken Starr and Bobby Burchfield address questions related to Title I of the BCRA for 20 and 40 minutes respectively, and that two other attorneys, Floyd Abrams and Laurence Gold, address questions related to Title II of the BCRA for 40 and 20 minutes, respectively. The McConnell group states its opposition to the argument motions by the Adams, Paul and NRA groups. The McConnell group does not oppose time for the minor Appellees but makes no allocation within the presently scheduled four hours of argument for such argument. Finally, the McConnell group does not propose any arrangement of the time for argument of the parties that were Defendants in below.

▶ The Solicitor General proposes that the time on the Government's and Intervenor-Defendant's side be equally divided among the Solicitor General, the Principal Deputy, and counsel for the Intervenor-Defendants. The Solicitor General also proposes that time be allocated by the Court according to subject matter: one hour and 30 minutes for Title I; 30 minutes for Section 213; one

hour and 30 minutes for Title II (other than Section 213); and 30 minutes for the challenged provisions contained within Titles III-V.

► The Intervenor-Defendants join in the Government's motion regarding division of argument and note that argument on their behalf will be made by Seth Waxman.

MINOR APPELLEES RESPONSE TO PENDING MOTIONS

The minor Appellees respond to the motions regarding argument and division of argument as follows:

(1) The minor Appellees do not object to allocation of times for argument based upon subject matter. In such an allocation, minor Appellees respectfully request that 10 minutes per side be allocated for argument on Section 318, with time on the Plaintiffs' side being granted to counsel for the minor Appellees.

(2) Every pending motion requests that counsel for the movants be allocated time for argument. Should all the motions be granted in that respect this Court would hear argument from eleven separate attorneys: eight for the Plaintiffs below, three for the Defendants and Interveners. Such division of argument time and proliferation of voices in argument contrasts with with Rule 28.4, providing that only one attorney be heard for each side in a case. *See* Rule 28.4 (“Divided argument is not favored”).

(3) Nonetheless here, the minor Appellees expressly contend that it is impossible to insure that justice is both done and *seen to be done*¹ by allocating all time on the Plaintiffs' side to a single attorney. Perhaps the best evidence of this fact is provided by positing whether counsel for

¹*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 172 n.19 (1951) (quoting *Rex v. Justices of Bodmin*, [1947] 1 K. B. 321, 325); *see also* 341 U.S. at 172 n.19 (quoting Daniel Webster) (citation omitted) (“In a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done”).

the NRA or for Senator McConnell or for the minor Appellees can properly stand before this Court and make the necessary arguments for either the Paul claimants, with their unique press arguments, or the Adams claimants, with their unique opposition to increased donation limits. The unfairness of defending the arguments of others has been noted.²

(4) The minor Appellees do not object to division of argument among counsel for the various interests represented by the separate legal challenges filed in the District Court. The minor Appellees respectfully request, in the making of such division, that this Court allow argument in defense of the judgment below that Section 318 is unconstitutional to be made by their counsel, and not another.

* * * * *

This Court has noted probable jurisdiction over, and consolidated for hearing, twelve separate appeals. The breadth of these appeals, the issues presented by them, is extraordinary. The minor Appellees respectfully suggest that if accommodation of the competing time and division of argument requests require that it be done, this Court possesses the necessary authority to enlarge the time for argument or provide otherwise to insure that justice is done and seen to be done.

²See Transcript of Oral Argument, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, No. 91-2040, 1992 U.S. Trans. Lexis 149, *48 (argued Feb. 24, 1992) (noting potential unfairness of question requiring counsel for one respondent to defend argument made in brief by counsel for a different respondent).

CONCLUSION

The motion of the minor Appellees should be granted. To the extent that the remaining six motions are consistent therewith, the minor Appellees do not oppose those motions.

RESPECTFULLY SUBMITTED,

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