IN THE SUPREME COURT OF THE UNITED STATES

Nos. 02-1674, 02-1675, 02-1676, 02-1702

SENATOR MITCH MCCONNELL, ET AL., APPELLANTS/CROSS-APPELLEES

v.

FEDERAL ELECTION COMMISSION, ET AL.,
APPELLEES/CROSS-APPELLANTS

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

MOTION OF THE APPELLEES/CROSS-APPELLANTS FEDERAL ELECTION COMMISSION, ET AL., FOR EXPEDITED BRIEFING SCHEDULE

The Solicitor General, on behalf of the Executive Branch appellees/cross-appellants Federal Election Commission, et al. (appellants in No. 02-1676), respectfully moves that the Court establish an expedited briefing schedule. Appellees/cross-appellants Senator John McCain, et al. (appellants in No. 02-1702) have authorized us to state that they join in this motion. We have been unable to determine whether appellants/cross-appellees Senator Mitch McConnell, et al. (appellants in No. 02-1674) and appellants/cross-appellees National Rifle Association, et al. (appellants in No. 02-1675) consent to or oppose this motion.

1. In order to facilitate expeditious resolution of this complicated and critically important case, this Court should note probable jurisdiction on June 5, 2003, in Mitch McConnell, United States Senator v. Federal Election Commission, No. 02-1674; National Rifle Association v. Federal Election Commission, No. 02-1675; Federal Election Commission v. Mitch McConnell, United States Senator, No. 02-1676; and John McCain, United States Senator v. Mitch McConnell, United States Senator, No. 02-1702. The Court should at that time order that the cases be consolidated and should issue one of the following schedules for briefing and argument.

a. If the Court wishes to hold oral argument in early September, we propose the following schedule: (1) The opening brief for each set of parties who were plaintiffs in the district court will be limited to 100 pages and will be filed and served by 3 p.m. on June 27, 2003. (2) The opening brief for each set of parties who were defendants in the district court will be limited to 100 pages and will be filed and served by 3 p.m. on July 18, 2003. (3) The reply brief for each set of plaintiffs will be limited to 40 pages and will be filed and served by 3 p.m. on August 5, 2003. (4) The reply brief for each set of defendants will be limited to 40 pages and will be filed and served by 3 p.m. on August 22, 2003. (5) Oral argument will be held on September 5 or 8, 2003.

b. If the Court wishes to hold oral argument during the week of September 29, 2003, we propose the following schedule:

(1) The opening brief for each set of parties who were plaintiffs in the district court will be limited to 100 pages and will be filed and served by 3 p.m. on July 2, 2003. (2) The opening brief for each set of parties who were defendants in the district court will be limited to 100 pages and will be filed and served by 3 p.m. on July 29, 2003. (3) The reply brief for each set of plaintiffs will be limited to 40 pages and will be filed and served by 3 p.m. on August 22, 2003. (4) The reply brief for each set of defendants will be limited to 40 pages and will be filed and served by 3 p.m. on September 15, 2003. (5) Oral argument will be held during the week of September 29, 2003. If the Court wishes to hold argument on the first scheduled argument date (October 7, 2003) of the October 2003 Term, additional time could be allotted for the parties' reply briefs.

2. Given the number and complexity of the questions presented, and the length of the district court opinions, the brief lengths proposed above are reasonable. We note, moreover, that the briefing scheme we propose will not lead to a substantial increase, and may even result in a decrease, in the total volume of briefing. If each of the various appeals from the district court decision were briefed in accordance with Rules 25 and 33(g) of the Rules of this Court, the Executive Branch parties would be entitled to file a 50-page opening brief and a 20-page reply brief in connection with our own appeal (No. 02-1676). The Executive Branch parties would also be entitled to file a 50-page brief as appellees to defend the district court's

judgment to the extent that the court held various BCRA provisions to be constitutional. Indeed, under the usual briefing regime established by the Rules of this Court, the Executive Branch parties would appear to be entitled to file a separate 50-page brief as appellees with respect to each of the several appeals that are likely to be taken by the various groups of plaintiffs.

3. The schedule we propose would enable the parties to brief the questions presented in the most coherent manner possible and would thereby assist the Court in its consideration of the case. The district court upheld several provisions of BCRA and invalidated several others. In this Court, most of the parties to the case will likely be appellants as to some issues and appellees as to other questions. Some BCRA provisions that the district court held unconstitutional are very closely related to provisions that the court sustained. For example, the district court struck down the primary definition of the term "electioneering communication" in BCRA § 201, and the attendant ban on the use of corporate and union general treasury funds to finance "electioneering communications" as so defined, while upholding Section 201's backup definition of the same term (with the final clause of the backup definition severed). See 02-1676 J.S. 18-19.

If the Executive Branch parties are required to address such closely related issues in separate opening briefs -- e.g., to challenge the district court's invalidation of Section 201's

primary definition of "electioneering communication" in our opening brief as appellants, while defending the constitutionality of the backup definition in our opening brief as appellees -- our ability to provide a coherent and succinct explanation and defense of the statutory scheme as a whole is likely to be impaired. The plaintiffs would encounter comparable difficulties under such a briefing regime. All parties will likely be able to present their arguments in a more coherent and logical manner under a schedule in which the plaintiffs first set forth all their constitutional challenges to BCRA, and the defendants then set forth their defense of the statute as a whole. Such an approach would ensure that both plaintiffs and defendants can brief the various constitutional issues in the order that is most conducive to an understandable presentation (e.g., by discussing the various BCRA provisions in the order in which they appear in the statute), rather than having the structure of the briefs determined by whether a party is technically an appellant or an appellee with respect to a particular constitutional claim. In addition, because the three-judge court did not produce a unified opinion, an approach to briefing that encourages the parties to focus primarily on the statute rather than on the interaction of the three judges' opinions may prove more useful to this Court. Because most parties to this case (whether plaintiffs or defendants) are likely to be appellants with respect to a significant range of issues, it is essential that both plaintiffs and defendants

retain the right to file reply briefs that they would possess if the appeals were briefed in the ordinary manner. In the alternative, this Court should order an appropriate briefing schedule for the various appeals from the district court's decision, under which three rounds of briefing would be permitted for each appeal and all appellants would be entitled to file reply briefs, in accordance with the Court's usual practice. Cf. pp. 3-4, supra.[1]

4. In Buckley v. Valeo, 424 U.S. 1 (1976), this Court allotted a total of four hours for oral argument. The Executive Branch parties anticipate that this case will likewise require more than the standard allotment of argument time. Until it is clear how many parties will file jurisdictional statements, however, and whether the Court will note probable jurisdiction in all such cases and as to all issues raised by the jurisdictional statements, it is difficult to determine precisely how much additional argument time will be necessary. The Executive Branch parties expect to file a motion at a later date suggesting a proposed allotment of time for oral argument, after it is clear what parties and issues will be before the Court.

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[1] If the Court wishes to hold argument on September 5 or 8, 2003, an appropriate three-round briefing schedule would be as follows: (1) Appellants' briefs will be filed and served by 3 p.m. on July 8, 2003. (2) Appellees' briefs will be filed and served by 3 p.m. on August 4, 2003. (3) Appellants' reply briefs will be filed and served by 3 p.m. on August 22, 2003.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
Counsel of Record

MAY 2003