**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| SENATOR MITCH McCONNELL, et al., Plaintiffs, v. FEDERAL ELECTION COMMISSION, et al., Defendants. | Civ. No. 02-0582 (CKK, KLH, RJL) **All consolidated cases.** |

**REPLY MEMORANDUM IN SUPPORT OF GOVERNMENT DEFENDANTS' MOTION FOR A STAY OF FINAL JUDGMENT PENDING APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

Defendants Federal Election Commission (FEC), 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, respectfully file this reply memorandum in support of their Motion for a Stay of Final Judgment Pending Appeal to the Supreme Court of the United States.

As explained in our previous filings, the Court should stay its judgment in its entirety and leave the statute that Congress enacted in effect during the interim period that it takes for the Supreme Court to resolve the parties' pending appeals on an expedited basis. In opposing such a stay, plaintiffs ignore the traditional reluctance of the courts to displace an Act of Congress pending an appeal to the Supreme Court and make exaggerated assertions of harm that would largely persist whether or not a stay is granted. Moreover, plaintiffs assume that because they prevailed in part before this Court, they will prevail to at least the same extent before the Supreme Court, despite the

gravity of the arguments in support of the statute and the inability of this Court itself to reach a consensus on the reasons for invalidating key provisions of BCRA. Plaintiffs contend that an Act of Congress should be rendered inoperative during the pendency of the appeals in this case because First Amendment interests are at stake. But plaintiffs ignore important countervailing interests that support the validity of the statute and weigh in favor of a stay pending the expedited appeals to the Supreme Court from this Court's fractured decision.

1. Plaintiffs' claim of harm largely derives from their asserted fear of enforcement actions in the event that they choose to violate BCRA during the pendency of the appeals. But that harm will persist whether or not a stay is issued. In the absence of a stay, the parties' legal obligations would be highly uncertain. Although this Court's judgment would purportedly authorize plaintiffs to take action contrary to the provisions of BCRA that the Court invalidated, any such conduct could later become the basis for an enforcement action in the event of reversal by the Supreme Court. The Supreme Court's ruling as to the scope and validity of the statute will have retroactive effect and will therefore govern conduct that occurs during the pendency of the appeals. See Harper v. Virginia Department of Taxation, 509 U.S. 86, 96 (1993) ("a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law"). Accordingly, to the extent that the Supreme Court holds that BCRA is constitutional, the FEC would at least be free to consider enforcement actions for conduct occurring during the pendency of the appeals that violated the statute. See Suster v. Marshall, 149 F.3d 523, 527 (6th Cir. 1998) (citing Edgar v. MITE Corp., 457 U.S. 624, 647-54 (1982) (Stevens, J., concurring in part and concurring in the judgment)), cert. denied, 525 U.S. 1114 (1999).

The agency could choose to forego such enforcement actions as a matter of sound discretion. Nonetheless, until the Supreme Court provides a definitive ruling as to the validity of the statute, plaintiffs will incur some risk of liability if they violate the statute, with or without a stay. Thus, the injury that plaintiffs allege arises principally from the existence of the statute, not the grant or denial of a stay. Moreover, although "this Court's decision applies with equal force to all," McConnell Resp. at 4, not all parties can be expected to respond to the interim regime in the same manner if a stay is denied. As explained above, political actors are not free to act with impunity in reliance upon the district court's injunction during the pendency of the appeals. Yet some parties can be expected to take advantage of loopholes opened by this Court's decision in order to obtain political advantage over those who proceed within the boundaries established by BCRA until the Supreme Court resolves the appeals. A stay would minimize those disparities by ensuring that an established set of administrable rules governs all participants in the 2004 election cycle.

2. Plaintiffs' arguments opposing a stay are fundamentally misconceived for the reasons explained above. They also fail for several additional reasons.

a. The California Democratic Party, the California Republican Party, and the Republican National Committee contend that this Court's soft money rulings will be less confusing to administer than Title I of BCRA. See CDP/CRP Opp. at 8; RNC Opp. at 6. Contrary to plaintiffs' suggestions, it would be extremely difficult for the FEC to "reinstat[e] the regulatory regime under which the political parties have operated for many years (taking into account the restrictions upheld by the Court)." CDP/CRP Opp. at 8. And it is incorrect to assert that "this Court's decision simply returns the law to its familiar posture prior to BCRA." Id. at 5. As explained in our stay filing (Mem. of Points and Auth. at 9-11) , this Court's decision creates a number of uncertainties with respect to

Title I. For example, although plaintiffs suggest that "the recently repealed or super[s]eded allocation regulations, applicable to the national parties * * * can easily be reinstated," CDP/CRP Opp. at 8, it is not at all clear that doing so would be consistent with Judge Leon's governing decision. See J. Leon Op. at 26-37 (holding that the use of nonfederal funds for "mixed" purposes is not regulable by Congress). Nor is it even clear that the FEC would be permitted to issue regulations immediately (without prior public notice and comment) to implement this Court's decision during the pendency of Supreme Court review.

b. The primary harm that plaintiffs allege would result from a stay of this Court's rulings on Title I is that national, state, and local party committees will be "increasingly prevented" from undertaking collective planning for elections scheduled as early as this year. See CDP/CRP Opp. at 6; see also RNC Opp. at 2-3. As explained at length in our merits briefs (Def. Opp. Br. at 23-31, Def. Reply Br. 29-31 & n. 34), however, BCRA does not prevent representatives of national, state, and local party committees from conferring about spending priorities or any other issues. The FEC's regulations make clear that, contrary to the RNC's representation (RNC Opp. at 2-3), discussions of the creation, funding, and implementation of Victory Plans would not involve the "directing" of soft money within the meaning of the statute. See 11 C.F.R. 300.2(n). RNC's assertion that "Defendants in this action have never denied that RNC participation in these plans is severely curtailed by new Section 323(a)," RNC Opp. at 2-3, is therefore inexplicable. In any event, because BCRA does not prevent party committees from conferring with each other, a stay likewise would not prevent party committees from conferring with each other.

c. The Madison Center and AFL-CIO plaintiffs contend that they will be irreparably harmed if a stay reinstates BCRA's primary definition of "electioneering communications." But 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 those plaintiffs allege 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. That is particularly true given that the Supreme Court is likely to resolve the expedited appeals before the primary definition is triggered. The same plaintiffs further contend that application of BCRA's "electioneering provisions" to Title II to a special election in Texas that is "tentatively" scheduled for early June (Madison Center Opp. at 8; see also AFL-CIO Opp. at 4 n.4) would cause irreparable injury. But those plaintiffs do not even assert that they intend to run advertisements in connection with this "tentative[]" runoff election.

In any event, plaintiffs' allegations with respect to Title II are premised on an exaggerated assessment of their likelihood of success on the merits as well as their alleged injury. As explained at length in our briefs, the primary definition of "electioneering communication" is clear and objective and fully consistent with the Constitution. Congress's choice of that definition reflects its informed judgment that advertisements having the specified characteristics are typically intended to influence electoral outcomes and are likely to have that effect. That legislative judgment was based in large measure on Members' direct observations of the use of such communications to circumvent pre-BCRA restrictions on corporate and union campaign spending, and it is entitled to considerable judicial respect. And the scope of the provision is limited. A union or corporation that wishes to distribute covered advertisements may finance them from a separate segregated fund; it may disseminate them outside the narrow window of time immediately preceding the relevant federal election or through alternative media; or it may modify the content of such advertisements by

deleting express references to a particular federal candidate. Indeed, as the AFL-CIO recognizes (Opp. at 8), the primary definition "has had little or not practical impact because of the almost complete absence of federal elections" since the statute took effect.

d. The Echols plaintiffs argue that a stay should be denied with respect to the Court's ruling on section 318 of BCRA, which prohibits persons less than 18 years old from making contributions to federal candidates or to political parties. Notwithstanding this Court's decision, there is a strong likelihood that the Supreme Court will uphold Section 318. That provision is a valid means of preventing adults from circumventing FECA's contribution limits by making surrogate contributions through minors under their control, and it is consistent with longstanding restrictions on minors' ability to control and dispose of property. Moreover, any First Amendment interests that minors may have in participating in the financing of federal elections is substantially limited by the fact that minors have no constitutional right to vote in such elections. See U.S. Const. Amend. XXVI.

The grant of a stay will cause no significant injury to the Echols plaintiffs. A stay would delay, but would not deny, plaintiffs the opportunity to make campaign contributions. In the event that the Supreme Court ultimately concludes that Section 318 is unconstitutional, plaintiffs should still have ample opportunity to make contributions during the ongoing 2004 election cycle. Moreover, allowing the statute that Congress enacted to remain in effect pending Supreme Court review would leave minors entirely free to engage in any other form of political activity, including volunteering their services to a candidate or political committee, making unlimited independent expenditures to express their views, and contributing to independent political committees.

e. Contrary to the contentions of the National Association of Broadcasters (NAB), a stay of this Court's ruling with respect to Section 504 of the BCRA is also warranted. The Supreme Court

is likely to uphold Section 504, which requires broadcast stations to maintain and make publicly available specified categories of requests to purchase broadcast time. Section 504 applies only to television and radio broadcast stations and cable television systems, and the Supreme Court has upheld more intrusive regulation of those media than of any other form of communication. Section 504 does not impose significant additional burdens on broadcasters. Indeed, Federal Communications Commission regulations have long required broadcast stations to disclose candidate "requests" to purchase broadcast time. See 47 C.F.R. 73.1943 (broadcast stations); 47 C.F.R. 76.1701 (cable television systems), and have required disclosure of the sponsors of broadcasts concerning "controversial issue[s] of public importance," see 47 C.F.R. 73.1212(e); see also 47 C.F.R. 76.1701(d) (cable television).

The balance of harms also favors a stay. Although, as explained above, the statute imposes few significant additional burdens on broadcasters, allowing Section 504 to remain in effect will ensure that the public has access to important information concerning the amounts that individuals and groups are prepared to spend to broadcast messages on political matters of national importance, as well as the sums actually spent on such broadcasts. And requiring disclosure of those who make requests, and the broadcasters' dispositions of those requests, also enables the public to evaluate whether broadcasters are processing requests in an evenhanded fashion. There is no basis for shielding that information from the public during the pendency of the parties' expedited appeals.

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In sum, unless it is stayed, the Court's judgment invalidating and enjoining provisions of an important Act of Congress will introduce substantial and unnecessary uncertainty for the 2004 election cycle by in effect requiring the Nation to go through three sets of rule changes in the year

proceeding that election cycle: from the rules established by Congress in BCRA; to the rules effectively established by this Court's divided decision; to the rules ultimately established by the Supreme Court's decision in this case. The vital interest of all concerned in ensuring a stable set of rules to govern the financing of federal elections decidedly outweighs plaintiffs' exaggerated claims of injury. And that is particularly true in light of the expedited timetable that Congress mandated for the resolution of the appeals in this case to the Supreme Court. The Court accordingly should stay its judgment in its entirety until the Supreme Court resolves the pending appeals.

## CONCLUSION

For the foregoing reasons, and those stated in our stay motion and supporting memorandum, the Court should stay the effect of its May 2, 2003 Final Judgment pending disposition of the pending appeals by the Supreme Court of the United States.

Respectfully submitted,

THEODORE B. OLSON
Solicitor General

LAWRENCE H. NORTON
General Counsel

ROBERT D. McCALLUM, JR.
Assistant Attorney General

RICHARD B. BADER
Associate General Counsel

PAUL D. CLEMENT
Deputy Solicitor General

STEPHEN E. HERSHKOWITZ
Assistant General Counsel

MALCOLM L. STEWART
GREGORY G. GARRE
Assistants to the Solicitor General

DAVID KOLKER
Assistant General Counsel

*Counsel for Defendant*
*Federal Election Commission*

JOSEPH H. HUNT
THEODORE C. HIRT
JAMES J. GILLIGAN
TERRY M. HENRY
RUPA BHATTACHARYYA
ANDREA GACKI
MARC L. KESSELMAN
SERRIN TURNER
Attorneys
U.S. Department of Justice
20 Massachusetts Ave, N.W.
Washington, D.C. 20044
Tel: (202) 514-3358

*Counsel for Defendants United States of America, John Ashcroft, Attorney General of the United States, the U.S. Department of Justice, and the Federal Communications Commission*

Dated: May 14, 2003

**CERTIFICATE OF SERVICE**

I hereby certify that on May 14, 2003, copies of the foregoing document were served (1) upon all counsel known to be designated by the parties for service by electronic mail, by electronic mail, (2) upon the following by facsimile:

| | | | |
|---|---|---|---|
| David A. Wilson | 202.942.8484 | John Bonifaz | 617.368.9101 |
| Kenneth W. Starr | 202.879.5200 | Charles J. Cooper | 202.220.9601 |
| James M. Henderson, Sr. | 202.337.3167 | James Bopp, Jr. | 812.235.3685 |
| Donald J. Mulvihill | 202.862.8958 | | |

(3) upon the following by first-class mail, postage prepaid:

Jan Witold Baran
**Wiley Rein & Fielding LLP**
1776 K Street, N.W.
Washington, D.C. 20006

Bobby R. Burchfield
**Covington & Burling**
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Charles J. Cooper
**Cooper & Kirk PLLC**
1500 K Street, N.W., Ste. 200
Washington, D.C. 20005

Laurence E. Gold
**AFL-CIO**
815 Sixteenth Street, N.W.
Washington, D.C. 20006

James Matthew Henderson, Sr.
**American Center for Law and Justice**
205 Third Street, S.E.
Washington, D.C. 20003

Donald J. Mulvihill
**Cahill Gordon & Reindel**
1990 K Street, N.W.
Washington, D.C. 20006

John Bonifaz
**National Voting Rights Institute**
One Bromfield St. 3rd Floor
Boston MA 02108

William J. Olson
**William J. Olson, P.C.**
8180 Greensboro Dr., Ste. 1070
McLean, VA. 22102-3823

Joseph E. Sandler
**Sandler, Reiff & Young, P.C.**
50 E St., S.E. #300
Washington, D.C. 20003

Kenneth W. Starr
**Kirkland & Ellis**
655 Fifteenth Street, N.W.
Washington, D.C. 20005

David A. Wilson
**Hale and Dorr L.L.P.**
1455 Pennsylvania Ave., N.W.
10th Floor
Washington, D.C. 20004

Sherri L. Wyatt
**Sherri L. Wyatt, PLLC**
International Square Bldg.
1825 I Street, N.W.
Suite 400
Washington, D.C. 20006

G. Hunter Bates
1215 Cliffwood Drive
Goshen, Kentucky 40026

James Bopp, Jr.
**James Madison Center For Free Speech**
Bopp, Coleson & Bostrom
1 South Sixth Street
Terre Haute, Indiana 47807

Floyd Abrams
**Cahill Gordon & Reindel**
80 Pine St.
New York, NY 10005

Mark J. Lopez
**American Civil Liberties Union**
125 Broad Street 17th Fl.
New York, N.Y. 10004

Roger M. Witten
Randolph D. Moss
**Wilmer, Cutler & Pickering**
2445 M Street, N.W.
Washington, DC 20037

Frederick A.O. Schwarz, Jr.
E. Joshua Rosenkranz
**Brennan Center for Justice**
161 Avenue of the Americas, 12th Floor
New York, NY 10013

_____
JAMES J. GILLIGAN