IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al., Plaintiffs, v. FEDERAL ELECTION COMMISSION, et al., Defendants.	Civil Action No. 02-582 (CKK, KLH, RJL)
NATIONAL RIFLE ASSOCIATION, et al., Plaintiffs, v. FEDERAL ELECTION COMMISSION, et al., Defendants.	Civil Action No. 02-581 (CKK, KLH, RJL)
EMILY ECHOLS, et al., Plaintiffs, v. FEDERAL ELECTION COMMISSION, et al., Defendants.	Civil Action No. 02-633 (CKK, KLH, RJL)
CHAMBER OF COMMERCE OF THE UNITED STATES, et al., Plaintiffs, v. FEDERAL ELECTION COMMISSION, et al., Defendants.	Civil Action No. 02-751 (CKK, KLH, RJL)

NATIONAL ASSOCIATION OF BROADCASTERS, Plaintiff, v. FEDERAL ELECTION COMMISSION, et al., Defendants.	Civil Action No. 02-751 (CKK, KLH, RJL)
AFL-CIO, et al. Plaintiffs, v. FEDERAL ELECTION COMMISSION, et al., Defendants.	Civil Action No. 02-754 (CKK, KLH, RJL)
CONGRESSMAN RON PAUL, et al., Plaintiffs, v. FEDERAL ELECTION COMMISSION, et al., Defendants.	Civil Action No. 02-781 (CKK, KLH, RJL)
REPUBLICAN NATIONAL COMMITTEE, et al., Plaintiffs, v. FEDERAL ELECTION COMMISSION, et al., Defendants.	Civil Action No. 02-874 (CKK, KLH, RJL)

CALIFORNIA DEMOCRATIC PARTY, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 02-875 (CKK, KLH, RJL)
FEDERAL ELECTION COMMISSION, et al.,	)	
Defendants.	)	
VICTORIA JACKSON GRAY ADAMS, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 02-877 (CKK, KLH, RJL)
FEDERAL ELECTION COMMISSION, et al.,	)	
Defendants.	)	
BENNIE G. THOMPSON, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 02-881 (CKK, KLH, RJL)
FEDERAL ELECTION COMMISSION, et al.,	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE GOVERNMENT DEFENDANTS' MOTION FOR STAY OF FINAL JUDGMENT PENDING APPEAL TO THE SUPREME COURT OF THE UNITED STATES

INTRODUCTION

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

Commission, respectfully request the Court to stay its Final Judgment of May 2, 2003, pending final disposition by the Supreme Court of the United States of the parties' appeals. Although, as explained below, a stay is warranted under the traditional factors looked to by this Court, several additional considerations uniquely compel the grant of a stay pending an appeal in this case.

First, the Final Judgment of this Court invalidates key provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) and permanently enjoins the defendants and their agents from "enforcing, executing or otherwise applying those sections of BCRA." Final Judgment at 6. 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 [the Supreme] Court.'" Turner Broadcasting Sys., Inc. v. FCC, 507 U.S. 1301, 1302 (1993) (Rehnquist, J., in chambers) (quoting Marshall v. Barlow's, Inc., 429 U.S. 1347, 1348 (1977) (Rehnquist, J., in chambers)). All parties agree that this case presents issues of extraordinary national importance concerning the conduct and financing of federal elections. Until the Supreme Court has an opportunity to consider the important issues presented by this case, the statutory scheme established by Congress should remain in place. The fact that BCRA (§ 403(a)(4)) calls for expedited Supreme Court review of this Court's decision only bolsters the case for leaving Congress's enactment in place in the interim during such expedited review.

Second, allowing the decision in this case to go into effect during an appeal would have tumultuous consequences for the Nation's federal electoral system. BCRA substantially amended the laws governing the financing of federal elections. The Federal Election Commission (FEC) and regulated participants in the federal electoral process have been adapting to BCRA's major reforms over the past year. The FEC has issued comprehensive regulations construing and implementing BCRA and, during the last six months, has sought to educate political participants concerning the

new statutory and regulatory scheme. Many political organizations already have restructured their operations and planned their activities for the 2004 elections in compliance with BCRA's scheme. By invalidating key provisions of BCRA, this Court has fundamentally altered the statutory scheme established by Congress and implemented by the FEC and, in effect, created a novel regulatory regime that in key respects bears scant resemblance to BCRA as enacted.

Allowing this Court's decision to take immediate effect would create significant confusion for the FEC and those subject to its regulation by requiring them to readapt, again, from the rules enacted by Congress in BCRA to the rules established by this Court's decision. That confusion would be compounded if, as is likely to happen, the Supreme Court in reviewing this Court's decision changes the rules governing campaign financing – a third time – while the 2004 congressional and presidential campaigns are in full swing next fall. Particularly when Congress has called for expedited review of this Court's decision in the Supreme Court, the threat of engendering such potential chaos in the vital realm of the conduct and financing of federal elections alone counsels strongly in favor of staying this Court's decision pending such Supreme Court review. Indeed, the fact that parties on both sides of this Court's rulings have requested a stay underscores that the public would be served by leaving BCRA's congressionally enacted scheme in effect until the Supreme Court has an opportunity to review this Court's decision on an expedited basis.

Third, this Court's decision not only substantially revises the existing statutory scheme, but does so by way of a deeply fractured ruling comprised of four separate opinions spanning some 1600 pages. Even where a majority of the Court agreed that a particular provision of BCRA was invalid, the members often accounted for their conclusions through a different rationale. The traditional reluctance to give effect to a court decision invalidating an Act of Congress during the pendency of

an appeal to the Supreme 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. Indeed, in this case, conducting that kind of analysis results in a novel yet detailed regulatory regime that is far removed from the one that Congress enacted in BCRA after years of careful consideration and debate.

For these exceptional reasons alone, a stay pending appeal is warranted in this case. But as explained below, the traditional factors looked to by this Court point to the same conclusion.

DISCUSSION

The propriety of a stay pending appeal typically turns on: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985) (citing Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)). Accord Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Each of those factors weighs heavily in favor of a stay in this case.

A. The Substantial Disagreement Among Members Of This Court On The Constitutionality Of BCRA Counsels In Favor Of A Stay

As explained in detail in our briefs on the merits, the challenged provisions of BCRA are fully consistent with the Constitution. Although the Court has invalidated several provisions of the statute, each panel member filed a separate opinion explaining at great length the member's analysis. One member of the Court, Judge Kollar-Kotelly concluded that BCRA is constitutional in the major

respects challenged in this case; another member, Judge Henderson, concluded that BCRA is unconstitutional in the major respects challenged in this case; while another member, Judge Leon, concluded that BCRA was constitutional in some major respects but not in others.[1] The reasoning set forth in the individual opinions of the Court varies widely even when two or more members agreed that a particular provision was constitutional, or not. The extraordinary discordance among the individual opinions issued by this Court underscores that there remain substantial arguments on the constitutionality of the key provisions of BCRA challenged in this case.

Although the purpose of this memorandum is not to reargue the merits, there are plainly serious arguments in support of the constitutionality of BCRA. As explained in the government's merits briefs, the Supreme Court has repeatedly recognized Congress's authority to protect the integrity of federal elections and prevent corruption of federal officeholders. See, e.g., FEC v. Colorado Republican Federal Campaign Comm., 533 U.S. 431 (2001); FEC v. National Right to Work Comm., 459 U.S. 197 (1982); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1972); United States v. Automobile Workers, 352 U.S. 567 (1957); United States v. CIO, 335 U.S. 106 (1948). Many of the panel members' findings and conclusions strongly support the constitutionality validity of BCRA. See, e.g., J. Leon Op. at 58-60, 88-89, 121, 245-50; J. Kollar-Kotelly Op. at 19, 181-90, 480. And the "burgeoning problems with federal campaign finance laws" recognized by this Court (Per Curiam Op. at 42; see

[1] Judge Kollar-Kotelly found only three of the challenged provisions (BCRA §§ 213, 318, and 504), which she described as "not central to [BCRA's] core mission," to be unconstitutional. See J. Kollar-Kotelly Op. 11. Judge Henderson, by contrast, expressed the view that BCRA "is unconstitutional in virtually all of its particulars." J. Henderson Op. 5. Thus, with respect to the disposition of most of the constitutional claims before the Court, Judge Leon's vote was controlling.

J. Leon Op. at 4-5; J. Kollar-Kotelly Op. at 1-6, 109-110) underscore the soundness of Congress's judgment that reform was critically needed in this area. The likelihood of success on the merits supports the government's request for a stay. But in any event, the inability of this Court itself to reach a consensus on the constitutionality of BCRA's major provisions strongly favors leaving BCRA in place during the interim period in which the Supreme Court has had an opportunity to consider and decide the appeals in this case on an expedited basis.

B. The Balance Of Harms Heavily Favors A Stay

The balance of hardships also strongly favors a stay. The Court's decision imposes a new regulatory regime on the parties that would create significant confusion and hardship if permitted to take effect prior to definitive resolution of these issues by the Supreme Court. At the same time, the fact that BCRA calls for expedited Supreme Court review minimizes any hardship that may be created by staying this Court's decision and leaving BCRA in place pending appeal. Moreover, as the stay request filed by the National Rifle Association demonstrates, granting a stay of this Court's judgment invalidating BCRA would address some plaintiffs' perceived irreparable injuries alleged to flow from the Court's ruling concerning BCRA's "electioneering communications" provision.

a. The national party soft money ban in Title I of the BCRA was "intended to be comprehensive at the national party level." 148 Cong. Rec. H408-09 (Feb. 13, 2002). In place of the comprehensive ban that Congress enacted, the Court has substituted an alternative version that only prohibits national party committees from using soft money to fund any "public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the

communication expressly advocates a vote for or against a candidate)." 2 U.S.C. 431(20)(A)(iii). It is likely that some groups are already be mobilizing to take advantage of the soft-money limits invalidated by this Court's decision. This substantial curtailment of Title I alone could have a large effect on soft-money collections or expenditures leading up to the 2004 elections. And allowing groups to amass political war chests of soft money funds is in many respects just as likely to create the appearance or fact of corruption that Congress sought to prevent as the expenditure of such funds in connection with federal elections.

The Court similarly altered BCRA's restrictions on the use of soft money by state-level party committees. BCRA generally prohibits state-level committees from using soft money for "Federal election activity," as defined in BCRA § 101(a). The apparent effect of the Court's decision, however, is to authorize state party committees to use soft money for any purpose other than to fund a communication that "promotes or supports" or "attacks or opposes" a specifically identified candidate for federal office, 2 U.S.C. 323(b)(2)(B)(iii) (as added by BCRA § 101(a)), including voter registration and get-out-the-vote activity that plainly has an impact on federal elections.

The Court's soft-money rulings introduce substantial uncertainty for the FEC and those subject to its regulation. For example, in the absence of a stay, millions of dollars of soft-money transactions by the national party committees might go unreported to the FEC should the national parties choose to rely on the Court's opinion. Before BCRA's enactment, national party committees were required to report all of their receipts and disbursements, including disbursements made with soft money. Under BCRA, however, national party committees are not permitted to engage in any soft money transactions. Last year, in accordance with BCRA's requirements, the FEC amended its regulations, its reporting forms and electronic filing software to eliminate soft-money reporting

requirements for national party committees in recognition of the fact that those committees, under BCRA, are not permitted to have soft money. This Court's decision, however, opens the door for national party committees again to raise and spend soft money for certain activities. The net result is that, unless interim reporting requirements can be put in place, national committees may be able to spend soft money free of the accountability ensured by reporting and disclosure requirements.

Moreover, it is uncertain exactly which national party committees are covered by the Court's soft-money ruling. In particular, press reports indicate that there appears to be confusion in the regulated community over what impact the decision has on the four congressional campaign committees – the Democratic Congressional Campaign Committee, Democratic Senatorial Campaign Committee, National Republican Congressional Campaign Committee, and National Senatorial Campaign Committee. See, e.g., Amy Keller & Damon Chappie, Reform Ruling Sparks Spin War, ROLL CALL, May 7, 2003. It could be argued that those committees, like the RNC and DNC, are covered only by the national party soft money ban in Section 323(a), and, to the extent that provision has been invalidated, they are now free to raise soft money as permitted under this Court's decision. Others, however, point out that those four committees, despite being national party committees, are also uniquely creatures of federal officeholders and are established, maintained and controlled only by federal officeholders. As a result, the four congressional campaign committees might still be banned from engaging in any soft money transactions under section 323(e).

In addition, the FEC repealed its pre-BCRA regulations that required party committees to allocate the funding of certain election activity that affected both state and federal elections with a combination of hard and soft money. See 11 C.F.R. 106.5 (2002); 67 Fed. Reg. at 49,077-49,078 (July 29, 2002). BCRA rendered such allocation rules largely unnecessary by eliminating the soft-

money accounts of national party committees. This Court, however, has revived the ability of national party committees to raise and spend soft money, while leaving unresolved whether, and to what extent, the FEC can require such allocation in the future. The Court's ruling, if allowed to remain in effect while the Supreme Court considers the case, would require the FEC to attempt to develop a new and workable set of rules to implement this Court's judgment.

Moreover, while numerous parties might seek guidance from the FEC with respect to the new soft-money rules created by this Court's decision (or other aspects of BCRA in the wake of this Court's decision) by requesting an advisory opinion from the Commission, it is not clear that the FEC even could furnish such an opinion. The Federal Election Campaign Act states that the Commission must issue an advisory opinion within 60 days after receiving "a complete written request concerning application of" the Act (including the provisions of the Act amended and displaced by BCRA) and within 20 days for pre-election requests from candidates. 2 U.S.C. 437f (emphasis added), but the Court's Final Judgment in this case permanently enjoins the FEC from "enforcing, executing or otherwise applying" the sections of BCRA invalidated by the Court. Final Judgment at 6 (emphasis added). If the FEC is enjoined from "applying" BCRA in rendering advisory opinions on the Act then the regulated public will be denied the "safe harbor" (2 U.S.C. 437(c)) that such opinions afford to those who obtain the Commission's guidance at a time when there may be unprecedented confusion in the regulated community about what rules apply.

b. The Court also reformed Title II of BCRA by invalidating the primary definition of "electioneering communication," see 2 U.S.C. § 434(f)(3)(A)(i), and adopting a modified version of the alternative definition of that term included in the statute, see J. Leon Op. at 93-95. The Court's modified definition has a significant and immediate impact on the FEC and regulated

entities, who must report their electioneering communications within 24 hours of airing such communications. See 2 U.S.C. § 434(f)(1). Unlike the primary definition of "electioneering communications" invalidated by this Court, which applied only to communications broadcast within 30 days of a primary election and 60 days of a general election, see 2 U.S.C. § 434(f)(3)(A)(i), the modified definition crafted by this Court (like the backup definition in its original form) takes effect immediately and on its face includes no temporal or geographical limitations. See 2 U.S.C. § 434(f)(3)(A)(ii); J. Leon Op. at 93-95.

In the absence of a stay, the FEC will be required to implement a new standard that Congress did not enact and the Supreme Court may never adopt. And, as the National Rifle Association states in its separate stay motion, that standard will immediately trigger significant reporting obligations for regulated parties. Moreover, corporations and unions will be required to evaluate whether particular communications that they seek to broadcast must be funded through separate segregated funds rather than from their general treasuries. The FEC, in turn, will be called upon to provide reliable guidance on these issues through its advisory opinion process, to the extent that it may render such opinions in accordance with this Court's Final Judgment. See 2 U.S.C. § 437f. Neither the FEC nor regulated parties should be forced to expend their limited resources to determine the contours of an interim legal regime that reflects the reasoning of a single member of this Court and is open to serious challenge on appeal. The proper course is to allow the parties to proceed under the statute that Congress enacted until the Supreme Court completes its review of the case. Indeed, in light of the congressional mandate in BCRA for expedited judicial review, the primary definition of "electioneering communications" enacted by Congress may not even be triggered prior to the Supreme Court's resolution of the parties' appeals because that definition only applies to

communications that, inter alia, occur within 30 days of a federal primary election and within 60 days of a federal general election. BCRA § 201(a)(i)(II); see 2 U.S.C. 434(f)(3)(A).

c. As explained above, the Court's ruling creates significant harm for the government and regulated entities alike by virtue of the confusion that it would create if it is allowed to take effect during the period of Supreme Court review. BCRA overhauled the Nation's campaign-financing laws in major respects; this Court's decision overhauls BCRA in significant respects; and, in all likelihood, the Supreme Court's decision is likely to differ materially from this Court's decision, as underscored by the inability of this Court itself to reach a consensus on the constitutionality of BCRA's key provisions. To minimize the potential chaos to which the Nation's campaign-financing system is subjected in the critical period leading up to 2004 elections, the Court should leave BCRA in place while the Supreme Court is considering the parties' appeals.

C. The Public Interest Will Be Furthered By Granting A Stay

A stay also is in the public interest. Congress enacted BCRA to address the "burgeoning problems with federal campaign finance laws" (Per Curiam Op. 42) and, in particular, to combat the appearance and reality of corruption that has resulted from the rise of soft money and issue advocacy. See id. at 135 ("[T]he record before the Court clearly demonstrates that * * * the evolving present use of issue advertisements, specifically the use of 'issues' to cloak supportive or negative advertisements clearly identifying a candidate for federal office, 'threaten the purity of elections.'"). Unlike the members of this Court, members of Congress occupy a unique vantage point in which to evaluate the existence and threat of corrupting influences in elections in which they themselves are candidates. The public has a vital interest in ensuring that Congress's presumptively valid judgment about how to address the undeniable and, as this Court found, "burgeoning" (Per Curiam Op. at 42)

problems that face our federal electoral system is given effect. Indeed, the Supreme Court "has never * * * doubted" the importance of the government interest in protecting federal elections from the threat of "real or apparent corruption." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788 n.26 (1978); see National Right to Work Comm., 459 U.S. at 207, 209-210.

Furthermore, the invalidation of an Act of Congress itself inflicts a unique public injury. As the Chief Justice has admonished, "[t]he presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships." Walters v. National Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers); see also New Motor Vehicle Board v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("It also seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). The time-honored reluctance to discard an Act of Congress has particular force here, where displacing the statutory scheme enacted by BCRA with a scheme that is cobbled together from this Court's voluminous opinions would create grave uncertainties for the FEC and all those participating in the upcoming 2004 congressional and presidential election campaigns.

Granting a stay also would eliminate potential enforcement concerns. Leaving BCRA in place during the expedited appeal in this case would enable participants to plan their 2004 election activities, including raising money and reporting their activities, with the knowledge that complying with the statute as written by Congress does not violate the law, even if the Supreme Court ultimately agrees with this Court that provisions of BCRA must be set aside. But if a stay is not granted, participants who seek to take advantage of the regime created by the decision in this case will at least

be in jeopardy of violating provisions of the statute that – while invalidated by this Court – ultimately are upheld by the Supreme Court. Likewise, unless the Court stays its decision, it is possible that thousands if not millions of dollars in soft money transactions by the national committees will not be reported to the FEC in accordance with the requirements of Title I (invalidated by this Court). And, as a practical matter, such soft money may never be reported to the FEC – and the public – before the 2004 elections in the event that the Supreme Court upholds Title I on appeal because of the difficulty in attempting to recreate the initial reporting of such funds.

CONCLUSION

For the foregoing reasons, 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,

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Dated: May 9, 2003

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 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:

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