INTRODUCTION

Plaintiffs National Rifle Association ("NRA") and NRA Political Victory Fund ("PVF") return to this Court for urgent but limited relief under an extraordinary -- and cruelly ironic -- circumstance. This Court's modification of Title II's definition of "electioneering communications" has left the NRA and the other Title II Plaintiffs in a perverse predicament. Although Plaintiffs hasten to reaffirm their position that Title II *as enacted* violates the First Amendment and, when it becomes effective, will visit grave injury on the NRA, the restrictions on electioneering communications as written by Congress at least had one -- if only one -- virtue: they would have had little practical impact on free speech until December of this year, when the 2004 election campaign season begins and by which time a resolution by the Supreme Court could reasonably be expected. But the district court's decision effectively strips Title II of all temporal and geographic limits, thus rendering the statute's criminalization of political speech effective *now*. That immediately threatens the NRA's speech in support of gun legislation now pending in Congress.

The NRA therefore moves this Court to stay its decision with respect to Title II pending review in the Supreme Court. Such preservation of the status quo is manifestly in the public interest: (1) Title II's definition of electioneering communications as enacted by Congress would remain in force to serve Congress's legislative goals; and (2) Congress's plan for deliberate but expedited judicial review of BCRA *prior to its application in a federal election* would be resurrected. Such a stay would also serve the fundamental public value of preserving freedom of speech pending plenary review by the Supreme Court.[1]

[1] The NRA and PVF, and several of the McConnell Plaintiffs, have already filed separate jurisdictional statements with the Supreme Court, as contemplated by Section 403 of BCRA.

STATEMENT

Title II of BCRA, *inter alia*, criminalizes the funding of any "electioneering communication" from corporate or union general treasury funds.[2] *See* Section 203 (prohibiting corporate and union "electioneering communications"); Section 312 (authorizing imprisonment of up to five years for a violation). Under Title II's primary definition of "electioneering communications," corporations and unions cannot fund

> any broadcast, cable, or satellite communication which—
>
> > (I) refers to a clearly identified candidate for Federal office;
> >
> > (II) is made within . . . 60 days before a general, special, or runoff election for the office sought by the candidate[,] or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
> >
> > (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

See Section 201(revising 2 U.S.C. § 434(f)). Congress included a fallback definition of "electioneering communication," which takes effect only if the primary definition is struck down as "constitutionally insufficient." *Id*. According to that fallback definition, "electioneering communication" means "any broadcast, cable, or satellite communication which promotes or supports a candidate for [Federal] office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." *Id*. Thus, in contrast to the primary definition's approach, the fallback defini-

tion includes no explicit temporal or targeting limitations on its scope, but does limit its prohibition to speech that has "no plausible meaning" apart from electioneering.

This Court's holding with respect to the constitutionality and construction of Title II's definition of "electioneering communications" is effectively controlled by the memorandum opinion of Judge Leon: Judge Leon joins Judge Henderson in striking down the primary definition of "electioneering communication" because of its overbreadth, *see* Leon, J., Mem. Op. 86-87; he then upholds the fallback definition, joined by Judge Kollar-Kotelly, adopting a saving construction striking the "final clause" that would otherwise render it "unconstitutionally vague." *Id*. at 93. In doing so, Judge Leon excises the crucial clause that would have limited (however vaguely) the temporal and geographic reach of the fallback definition, leaving that definition to criminalize any paid broadcast, at *any* time, in *any* part of the country that references *any* candidate for federal office in a manner that is, in the words of Judge Leon, "*not* neutral." *Id*. at 92.

Application of this new, judicially amended version of Title II will have an immediate and irreparable impact on the NRA's speech. In the course of defending the constitutional rights of its members, the NRA has always engaged in political speech on issues of vital importance to its mission. It has done so as part of a robust, ongoing, and consistently heated debate over national firearms policy, particularly the meaning of the Second Amendment and the protections to which gun owners are constitutionally entitled. The NRA's frequent references to candidates for federal office are an integral part of its contribution to this debate. Wholly apart from influencing elections, these references enable it to respond to pointed attacks that candidates themselves frequently direct against the NRA, to educate the general public about the Second Amendment and those who would threaten it, and to attract members, raise funds, and persuade other Ameri-

[2] In addition, BCRA imposes disclosure obligations upon persons who fund "electioneering

cans to support its cause. *See* Henderson, J., Mem. Op. 107-10, ¶ 51; Kollar-Kotelly, J., Mem. Op. 324 & nn.103-04; LaPierre Decl. (Attachment 1) Ex. A at 1-23, ¶¶ 3-55.

The NRA now faces another crucial battle in defense of the Second Amendment, as explained in the attached declaration of Wayne LaPierre, the NRA's Executive Vice President:

> The NRA has long been a proponent of legislation that would protect gun manufacturers from frivolous and vexatious litigation that is designed to put them out of business and thereby destroy the firearms industry. In recent weeks, the House of Representatives passed such legislation by a vote of more than two to one. The same bill, S.659, is now coming before the Senate with 52 co-sponsors and support from the White House. Anti-gun politicians such as Senators Charles Schumer, Diane Feinstein, and Frank Lautenberg have announced their intention to try to thwart the will of the majority of their colleagues by trying to kill the bill with a filibuster. The NRA is prepared to do everything in its power to prevent that from happening; this means taking its message to America *immediately*.

LaPierre Decl. at 3-4, ¶ 8; *see also id.* at Ex. B. As Mr. LaPierre explains, the NRA plans to run a series of 60-second radio ads in crucial States whose Senators have yet to decide where they stand on S.659. It plans to begin running these broadcast ads immediately. These ads will refer to Senator Charles Schumer of New York, by name, as a prominent, devoted opponent of the legislation. Different versions of the ads will urge listeners to contact four named Senators -- John McCain of Arizona, Evan Bayh of Indiana, George Voinovich of Ohio, and Tom Daschle of South Dakota – and urge these Senators to support the bill. *See id.* at 4-5, ¶¶ 11-12. Each of these Senators is a "federal officeholder" as defined in 2 U.S.C. § 431(3) as well as a "candidate" under 2 U.S.C. § 431(2).[3]

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communications." *See* Section 201.

[3] An individual elects to become a "candidate" under 2 U.S.C. § 431(2) by filing a statement of candidacy and registering a principal authorized campaign committee pursuant to 11 C.F.R. §§ 101.1 and 102.12. Alternatively, an individual may be deemed a federal candidate by operation of law under 2 U.S.C. § 431(2) and 11 C.F.R. § 100.3(a) if he has raised or spent in excess of $5,000 for the purpose of seeking nomination or election to a federal office, subject to the reporting and disclosure provisions of the Act, regardless whether he has filed a statement of candidacy

These NRA ads are intended to influence legislation, not an election. Yet because the Senators referred to are official candidates for reelection in 2004, and because the NRA's planned radio ads are "*not* neutral" as to them, airing the ads will be criminal under this Court's ruling. Although BCRA as written by Congress will visit severe injury upon the NRA, it will not do so for several more months. Accordingly, the NRA implores this Court to stay its decision so that it may speak without fear of criminal penalties, pending review by the Supreme Court.

ARGUMENT

The standards that govern this Court's decision whether to grant a stay are "familiar to both the bench and bar in this Circuit." *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842 (D.C. Cir. 1977). "A district court may grant a stay pending appeal pursuant to FED. R. CIV. P. 62(c) upon a showing by the applicant (1) of a likelihood of success on the merits; (2) that it will be irreparably harmed if a stay is not granted; (3) that a stay will not injure any other parties to the lawsuit; and (4) that the stay furthers the public interest." *United States v. Judicial Watch*, 241 F. Supp. 2d 15, 16 (D.D.C. 2003) (citations omitted). Each of these factors weighs heavily in favor of granting a stay.

1. Likelihood Of Success On The Merits.

As demonstrated in our briefs and as two members of this Court found, Title II as written by Congress is unconstitutional. We reincorporate by reference all of our merits arguments, but we rest our application for a stay upon a different ground: the invalidity of the definition of "electioneering communications" resulting from this Court's decision.

Over and above the fatal vagueness problems inherent in the fallback definition of electioneering communications that Congress actually enacted, the Court's own truncated version of

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with the FEC. Each of these Senators is not only a federal officeholder but qualifies as an offi-

that definition will not survive Supreme Court review. Congress plainly did not intend the fallback definition to prohibit *all* communications that "promote," "support," "attack," or "oppose" a candidate for Federal office – only the subset of those communications that would be "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." By judicially deleting that limitation, the Court has impermissibly expanded the fallback definition beyond the subset of political speech that Congress intended to prohibit, and (perhaps inadvertently) created a ban on so-called "electioneering communications" that is far broader than anything envisioned in *either* of BCRA's definitions of "electioneering communications."

The Court excised the "electioneering" requirement from the fallback definition of "electioneering communications." It did so in an effort to overcome a vagueness problem, but it created an even graver overbreadth problem than existed under BCRA's primary definition. As originally written, the fallback definition would necessarily have taken into account whether a particular broadcast communication was so temporally and geographically removed from an election that it could not "plausibly" be understood as an "exhortation to vote for or against" the referenced candidate. As rewritten by the Court, however, the fallback definition bans *all* communications that "promote," "support," "attack," or "oppose" a candidate for Federal office, even if aired at a time and place that are vastly distanced from a candidate's election.

For example, the NRA plans to air a radio communication in Arizona that will "oppose" positions articulated by Senator Charles Schumer on certain types of lawsuits against gun manufacturers, and that "attacks" him for trying "to drive out of business the very companies that equip America's military and law enforcement." *See* LaPierre Decl. Ex. C. Senator Schumer is currently a "federal candidate" in New York but the election is not for another 18 months, and

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cial candidate for reelection as defined by the Act.

the radio listeners of Arizona will have absolutely nothing to say about whether or not he is elected. Thus, the *only* "plausible meaning" that the NRA's proposed communication could "suggest" regarding Senator Schumer is one that is "*other than* an exhortation to vote for or against" him. For that reason, the fallback provision that Congress enacted could not possibly have prohibited this communication. Nor would BCRA's primary definition have prohibited the NRA from making this communication, since it is not targeted at the "relevant electorate" and is not being made within the 60-day or 30-day time periods set forth in the primary definition. Nevertheless, while legal under both BCRA's primary and secondary definitions, airing this advertisement would be a criminal offense under the rule of law created by the Court's decision.

Ironically, the Court's creation of a ban that is broader than that envisioned by BCRA arises from the Court's well-founded concern over the vagueness of the fallback provision. Judge Leon correctly held that "[w]hether an ad is suggestive of no plausible meaning other than an exhortation to vote depends on a number of variables such as the context of the campaign, the issues that are the centerpiece of the campaign, the timing of the ad, and the issues with which the candidates are identified." He also correctly reasoned that this vagueness would cause speakers " 'to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas are clearly marked.' " Leon, J., Mem. Op. 93 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)). In this case, however, both Congress and the Court have concluded that the "unlawful zone" (*i.e.*, the political speech that may be regulated) covers only those communications that are intended to influence an election. That is why the Court invalidated the primary definition of "electioneering communications," *see id*. at 88 (emphasizing the need for a "link between the identified federal candidate and his election to [federal] office"), and that is why Congress included in the fallback definition the requirement that the communication must be

"suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate."

That is also why Judge Leon explicitly describes the protected speech that might be chilled by the vagueness of the fallback definition as "political discourse *unrelated* to federal elections." *Id.* at 94. But in seeking to protect that speech, Judge Leon deleted from the statute the only language possibly capable of offering such protection. For while it is vague, the requirement that the communication be "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate" is at least theoretically intended to protect communications that are "*unrelated* to federal elections," even though they "support" or "attack" a federal candidate. By deleting and severing this provision, the Court's decision *flatly bans* many of the very same "nonelectoral" communications that Judge Leon was concerned *might have been chilled* by the statute as originally enacted.

We are not aware of any case that has sought to cure a vagueness problem by construing a statute broadly so as to expand a speech prohibition, nor can it make sense to do so here. It is well-established that courts seek to avoid vagueness problems only by narrowly construing statutes so as to limit the burdens on speech. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976). Indeed, as Judge Leon writes, "a statute's vagueness exceeds constitutional bounds only when . . . 'the statute is [not] readily subject to a *narrowing* construction.' " Leon, J., Mem. Op. 91 (emphasis added) (alteration in original) (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976)). There is no authority for trying to cure a vagueness problem by creating a "bright-line" rule that bans substantially *more* speech than did the original provision, even if it does so in a way that is clear and precise.

Even if there were such authority, the Court's construction of the fallback definition is

not clear and precise enough to cure the unconstitutional vagueness inherent in that provision. Precisely because of "variables such as the context of the campaign, the issues that are the centerpiece of the campaign, the timing of the ad, and the issues with which the candidates are identified," it is not possible for a speaker to know whether a communication "supports" or "opposes" a federal candidate based solely upon its script. Once again, consider the NRA's proposed communication attached as Exhibit C to Mr. LaPierre's declaration. There, the NRA describes a bill currently pending before Congress that would protect gun manufacturers from suit, and asks "where does Senator John McCain stand on this important bill? He isn't saying." It concludes by exhorting the listeners to "Tell John McCain to stand with freedom-loving Arizonans and not with Chuck Schumer. Tell John McCain to support S. 659." A "person of ordinary intelligence" might conclude that this communication "attacks" Senator McCain, or might not. It would depend upon a number of different variables, including how likely it is that Senator McCain will end up agreeing with the NRA and supporting the bill, a fact that cannot be known now. All that can be known now is that the Court's revised version of BCRA's fallback prohibition *might* make airing this reference to Senator McCain a criminal offense. That possibility, borne of the vague standard that survives the Court's decision, is enough to chill this speech.[4] And where core political speech is being chilled, it is no answer to hold, as Judge Leon does, that speakers may either censor themselves, or subject themselves to the prior restraint of allowing the FEC to review their proposed speech and to act as their censor. *See* Leon, J., Mem. Op. 95. Indeed, these two roads to censorship do not "minimize" the chilling effect of the Court's deci-

[4] Of course, to the extent the Court believes that its revised version of the fallback definition clearly prohibits the ad's reference to McCain, that provides yet another vivid demonstration of the fatal overbreadth of the Court's rendition of "electioneering communications." Once again, the Court would be prohibiting speech that even BCRA's most zealous sponsors recognized to be non-electioneering.

sion; they *are* the chilling effect of the Court's decision.

Finally, this Court did not have authority to sever the final clause of the fallback definition to accomplish a result that Congress clearly did not intend. Judge Leon wrote that he was applying a "saving construction" to the fallback definition, and explained that "[b]ecause the offending phrase is simply appended to the end of the definition, it can be excised without rewriting the entire definition." *Id*. at 93-94. That is not correct. The ability to sever an entire clause from a statute does not depend upon whether that clause may be neatly excised because it was written at "the end" (or, for that matter, "the beginning") of the statute, or instead would require awkward constructions because it was inserted in the middle of the statute. Rather, it is well-settled that the question whether to sever a portion of a statute "is exercised on the basis of the Court's assessment as to whether Congress would have enacted the remainder of the law without the invalidated provision." *Miller v. Allbright*, 523 U.S. 420, 457 (1998) (Scalia, J., concurring) (citing *New York v. United States*, 505 U.S. 144, 146 (1992)). *See also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) ("[t]he inquiry into [severability] is essentially an inquiry into legislative intent") (citation omitted); *Buckley v. Valeo*, 424 U.S. at 108 (severability depends upon whether "Legislature would not have enacted those provisions which are within its power, independently of that which is not").[5]

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[5] To be clear, while Judge Leon articulates his opinion as providing a "saving" construction rather than as "severing" an invalid provision, it seems clear that the decision to judicially excise an entire clause from a statutory provision is not "statutory construction," but instead is "invalidation and severance." In any event, the underlying inquiry into legislative intent is the same either way. *See, e.g.*, Leon, J., Mem. Op. 94 (quoting *Commodity Futures Trading Comm'n*, 478 U.S. at 841 (" 'Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of statute . . . or judicially rewriting it.' "); *see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (Court will not employ saving construction where "such construction is plainly contrary to the intent of Congress").

The reason the test focuses exclusively upon legislative intent is grounded in fundamental "separation of powers concerns." *Reno v. ACLU*, 521 U.S. 844, 885 n.49 (1997). Courts have no authority to rewrite the statute "to give it an effect altogether different" from what Congress intended. *Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936) (internal quotation and citation omitted). This concern is particularly acute where the invalidated provision operates effectively as an "exception" to a general prohibition, since the invalidation of that exception operates " 'to extend the scope of the law . . . so as to embrace [situations] which the legislature passing the statute had, by its very terms, expressly excluded.' " *Legal Serv. Corp. v. Velasquez*, 531 U.S. 533, 561 (2001) (Scalia, J., dissenting from Court's refusal to reach the severability issue) (quoting *Frost v. Corp. Comm'n of Okla.*, 278 U.S. 515, 525 (1929)). Thus, "when an 'excepting proviso is found unconstitutional the substantive provisions which it qualifies cannot stand.' " *Id.* In this case, the clause invalidated by the Court clearly operated as an "excepting proviso" that limited the scope of the fallback definition, and it therefore should not have been severed once invalidated, because doing so clearly "extend[ed] the scope of the law."

It is also clear from the legislative record that Congress would never have enacted the BCRA provision created by Judge Leon's decision. As explained above, the Court's revised definition of electioneering communications stretches far beyond anything Congress intended to prohibit, creating even more serious overbreadth concerns than those which led the Court to invalidate the primary definition. As a matter of mere commonsense, Congress would never have intentionally created a "fallback definition" that is inherently more constitutionally suspect than the primary definition. Unsurprisingly, therefore, the legislative history confirms that the whole purpose of the fallback definition was, in the words of its principal sponsor, to

ensure "that the bill will survive constitutional challenge under the *Buckley v. Valeo* decision." 147 CONG. REC. S3084, S3118 (daily ed. Mar. 29, 2001)(statement of Sen. Specter). Thus, the Court had no authority to create a broader and more constitutionally tenuous rule than Congress intended for its supposedly safe "fallback."

The legislative record also confirms that this fallback definition was pulled straight out of the Ninth Circuit's decision in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), which explicitly held that to be regulable as express advocacy, speech must "be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *Id.* at 864; *see generally* 147 CONG. REC. S2700, 2704-13 (daily ed. Mar. 22, 2001) (citing *Furgatch* as basis for amendment as proposed); 147 CONG. REC. S3118-23 (citing *Furgatch* as basis for amendment as passed). The provision was first introduced not as a fallback, but as an additional test that would incorporate that particular aspect of *Furgath* into the original definition set forth in McCain-Feingold in an effort to ensure that it would pass constitutional muster. 147 CONG. REC. S2706 ("All we are doing is adding to the definition of an electioneering message to provide a solid basis for Supreme Court review to conclude that this legislation would deal with advocacy ads."). The fact that it was originally enacted as an addition rather than a replacement to the primary definition shows that Congress never contemplated that the *Furgatch* test would sweep within it communications that are temporally or geographically far removed from any possible electioneering.[6] More generally, the repeated references to the *Furgatch* test as signifying the "susceptible of no other reasonable interpretation" rule shows that the most important part of the fallback definition, and the one which its sponsors empha-

[6] Indeed, the only reason why the *Furgatch* test was ultimately included as an alternative definition (rather than an additional test) was out of a concern that the primary definition might be unconstitutional. *See* 147 CONG. REC. S2712-13; 147 CONG. REC. S3119.

sized whenever they explained it, is precisely the one deleted by the Court's opinion. *See generally* 147 CONG. REC. S3119 (statement of Sen. Specter) ("where we are now is to satisfy all the parties that . . . if the Snowe-Jeffords test is held to be unconstitutional by a final judicial decision, then the modified *Furgatch* test will be applied to define an advocacy advertisement which will satisfy *Buckley v. Valeo* that the advertisement 'is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.' ").

Thus, it is clear that "Congress would [not] have enacted the [fallback definition] without the invalidated provision," *Miller v. Allbright*, 523 U.S. at 457; it was therefore wholly inappropriate for the Court to fashion sweeping new legislation in this delicate area of precious First Amendment freedoms, as it did by severing the invalidated clause.[7]

2. Irreparable Harm.

There is no doubt that the harm to the NRA outlined above and in Mr. La Pierre's declaration is immediate and irreparable. The deprivation of one's right to speak under the First Amendment is, by its very nature, irreparable; and that harm is vastly compounded by the pressing, and potentially fleeting, nature of the legislative proposal on which the NRA plans to inveigh. *See* La Pierre Decl. at 3-4, ¶¶ 7-9. In circumstances such as this, where "First Amendment interests [a]re either threatened or in fact being impaired[,] . . . [t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."

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[7] While there is a severability clause in BCRA, the Supreme Court has made clear that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *Jackson v. United States*, 390 U.S. 570, 586 n.27 (1968). Consistent with this admonition, the Supreme Court has recently refused to sever invalidated provisions from statutes that contained severability clauses. *See generally Reno v. ACLU*, 521 U.S. 844, 883-84 (1997); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality). This irreparable injury that the NRA stands to suffer itself warrants a stay.

3. Interests Of Other Parties And the Public.

There simply is no countervailing interest on the other side of the scale. Quite the contrary, the equities of this case overwhelmingly favor of a stay of this Court's mandate with respect to Title II.

First, if not stayed, the Court's decision will authorize the immediate suppression of speech by force of criminal sanction. When it comes to freedom of speech, the equities always favor speech over regulation, because even the temporary deprivation of this fundamental freedom constitutes irreparable harm, as explained above.

Second, the speech being suppressed here is not billboard advertising or nude dancing, but political speech about public officials and proposed legislation. This is the very core of the First Amendment. This speech is essential to the process of self-government. There can be no greater public interest than preserving the free exchange of ideas that makes democracy possible.

Third, the voices that will be suppressed here are not those of one or two privileged corporate media behemoths, but those of *millions* of Americans united by their membership in an organization committed to a specifically well-articulated, well-known political mission. The NRA is the voice of four million citizens of modest means who have pooled their resources in order to make themselves heard in the halls of government. This Court's decision imperils the speech rights of countless similar grassroots advocacy organizations, as well as the rights of hundreds of millions of other Americans who constitute the audience for those speakers. The

public interest therefore favors a stay because it is *the public's* rights that are also threatened here.[8]

The scale in which this Court must weigh the equities crashes to the table in favor of a stay *because there is absolutely nothing in the scale on the other side of the balance.* Even if we assume, *arguendo*, that Congress correctly found that Title II's restrictions on speech were justified by the compelling governmental purpose of sanitizing federal elections of "electioneering communications," the relief we seek restores Congress's handiwork by putting BCRA's provisions back in effect. Title II by its own terms would not have practical effect until December of this year. Congress did not deem Title II's weighty public purposes to be implicated except during election campaigns, which is why Congress restricted Title II's speech regulations to 60 days prior to an election and 30 days prior to a primary. This Court's decision eliminated that restriction and made Title II's speech ban applicable 365 days a year.

Furthermore, Congress cabined its speech regulation with temporal and geographic limits in Title II's primary definition of electioneering communication, and imposed similar (albeit implicit) limits in the narrowing final clause of Title II's alternative definition. But this Court's decision jettisoned those limits and enacted a new definition of "electioneering communications," never contemplated by Congress, that criminalizes all broadcasts containing "non-neutral" references to federal candidates. In short, the public interests on which Congress relied to enact Title II cannot justify immediate enforcement of this Court's decision pending appeal because this Court's decision wholly undid Congress's handiwork.

Congress itself has determined that the public interest is best served by its primary defini-

[8] Additionally, under Judge Leon's new definition, a federal officeholder need only file a Statement of Candidacy for reelection to inoculate himself against citizen criticism of his legislative activities for the duration of his entire term of office.

tion of "electioneering communications," and that definition would be reinstated, pending review by the Supreme Court, should this Court stay its decision with respect to Title II. Section 201 of BCRA, instituting the primary definition unless it "is held to be constitutionally insufficient," specifies as much. Accordingly, there can be no doubt that the interests even of the Government Defendants in this case, as well as those of the public writ large, will be best served by the entry of a stay with respect to Title II until the Supreme Court has completed its review.

There is, moreover, a final consideration. Congress was well aware that Title II raised serious constitutional questions and took great care to ensure probing and deliberate judicial review of those questions *before* Title II's restrictions on speech had practical effect. Congress thus provided that the statute would not take effect until after the 2002 election and mandated that the courts expedite review. But Congress's carefully crafted two-year window for review of Title II has been slammed shut by this Court's decision to strike down the 60- and 30-day periods, which makes restrictions on electioneering communications applicable *now* rather than next year. The only way to preserve Congress's program for thorough judicial review of Title II – not to mention the only way to preserve the status quo and the plaintiffs' First Amendment Rights – is to stay this Court's mandate pending hearing by the Supreme Court. This factor alone compels a stay.

* * * * * *

Although months may pass before this case is definitely resolved by the Supreme Court of the United States, appellate review is both certain and imminent, as recognized by all parties to these proceedings. This Court's construction of Title II's definition of "electioneering communications" markedly departs from that passed by Congress, and poses grave, irreparable, and imminent harm to the core First Amendment rights of the NRA *right now* and in the days, weeks,

and months ahead. The interests of Plaintiffs, Defendants, and the general public are all aligned with respect to Title II: This Court should stay its mandate and restore Congress' primary definition of "electioneering communications" pending plenary review by the Supreme Court of Title II's constitutionality.

CONCLUSION

For the foregoing reasons, the Court should, pursuant to FED. R. CIV. P. 62(c), stay its May 2, 2003 judgment with respect to the constitutionality of the definitions of "electioneering communications" contained in Title II of the BCRA, pending plenary review by the United States Supreme Court.

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