IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY ECHOLS, a minor child,	)	Civil Action No.
by and through her next friends,	)	02-cv-633-KLH-CKK-RJL
TIM AND WINDY ECHOLS, *et al.*,	)	
	)	*consolidated with*
Plaintiffs,	)	02-cv-582-KLH-CKK-RJL (lead case)
	)	
-vs-	)	*and*
	)	02-cv-581-KLH-CKK-RJL
FEDERAL ELECTIONS COMM'N,	)	02-cv-751-KLH-CKK-RJL
et al.,	)	02-cv-753-KLH-CKK-RJL
	)	02-cv-754-KLH-CKK-RJL
Defendants.	)	02-cv-781-KLH-CKK-RJL
	)	02-cv-874-KLH-CKK-RJL
	)	02-cv-875-KLH-CKK-RJL
	)	02-cv-877-KLH-CKK-RJL
	)	02-cv-881-KLH-CKK-RJL

NOTICE OF FILING

PLEASE TAKE NOTICE that the Plaintiffs in Civil No. 02-cv-633 have caused this day to be filed in the Office of the Clerk of the United States District Court their Opposition to the Government Defendants' motion to stay and emergency motion to stay temporarily, and to the Intervenor Defendants' motion for stay

DATED: May 12, 2003.

Respectfully submitted,

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ECHOLS PLAINTIFFS' OPPOSITION TO THE STAYS SOUGHT BY THE GOVERNMENT DEFENDANTS AND THE INTERVENOR DEFENDANTS

The Echols Plaintiffs, by counsel undersigned, present their Opposition to the Stay Motions filed by the Government Defendants and the Intervenor Defendants.[1]

1. Because the relief sought in them would not stay this Court's judgment regarding the unconstitutionality of Section 318, the Echols Plaintiffs do not oppose:

– the motion to alter or amend filed by certain Madison Center Plaintiffs;

– the limited stay by the NRA, respecting the "electioneering communications" provisions of the BCRA;

– the administrative stay sought by the NRA, respecting the "electioneering communications" provisions of the BCRA, pending this Court's determination of their limited stay motion;

– the limited injunction sought by certain Madison Center Plaintiffs, respecting the "electioneering communications" provisions of the BCRA; or,

– the open hearing motion by certain Madison Center Plaintiffs, respecting their motion for injunction pending appeal.

INTRODUCTION

The Defendants' papers illustrate the collision between a statutory provision that came from "who knows where" and arguments that cannot, even with diligent search, be found. All the Defendants seek a stay of this Court's judgment pending decision on the appeals to the Supreme Court. In addition, the Government Defendants seek an emergency stay pending determination of the stay motion.

Bearing the heavy burden of justification for such stays, all of the Defendants have shirked their duty regarding a defense of the request to stay the judgment as to Section 318. They omit any justification for staying its judgment regarding Section 318 in their papers. Consequently, this Court should not grant the requested stays.

ARGUMENT

The applicable standard for consideration of requests for stays pending appeal strongly militates against the grant of the Motions with respect to this Court's judgment that Section 318 is unconstitutional.

To obtain injunctive relief, the Defendants must demonstrate:

- that they are likely to prevail in their appeal from this Court's judgment regarding the constitutionality of Section 318;
- that they are likely to be irreparably harmed without the stay;
- that others will not be harmed by the grant of the stay; and,
- that the public interest is served by granting the stay.

See Cuomo v. NRC, 772 F.2d 972, 974 (D.C. Cir.). It is not the duty of the Plaintiffs to disprove these factors in the first instance. Yet the Defendants entirely fail to argue each, or even any, of

these points with particularity regarding Section 318. For this reason, the motions are all due to be denied.

A. THE GOVERNMENT DEFENDANTS' NOVEL, "DEEPLY DIVIDED" COURT RATIONALE DOES NOT SUPPORT THE CONCLUSION THAT THEY WILL PREVAIL IN THEIR APPEAL FROM THIS COURT'S JUDGMENT THAT SECTION 318 IS UNCONSTITUTIONAL; THE COURT CONCLUDED THAT SECTION 318 FAILED CONSTITUTIONAL SCRUTINY REGARDLESS OF THE STANDARD APPLIED.

In their motions, all the Defendants entirely omit to demonstrate why it is likely that this Court's judgment regarding Section 318 will be overturned on appeal by the Supreme Court. For that reason alone, their motions are not well-taken with respect to Section 318.

Moreover, the Government Defendants omit any argument in the particular for their likelihood of success on appeal regarding any provision of BCRA. Instead, they offer the novel proposition that because this Court was deeply divided on a variety of questions presented in these consolidated cases, a stay should issue. Instead of demonstrating likelihood of success, their argument is something of a "bait and switch." Proving the existence of deep divisions in a panel decision, on points of law other than ones relevant to a particular case, does not prove likelihood of success on any point.

Unlike other provisions of this Court's judgment, the judgment regarding Section 318 is secured by the shared view of all members of the panel that the provision was unconstitutional. Thus, the principal argument generally offered by all the Defendants for finding a likelihood of success on appeal – the deep division of the Court – is inapposite to their request that this Court stay its judgment that Section 318 is unconstitutional. Moreover, all the Defendants are wrong about the constitutionality of Section 318 for the reasons stated in the trial briefing filed by the Plaintiffs in

the consolidated cases, which arguments are expressly incorporated herein.

B. THE BALANCE OF HARMS TIPS DECIDEDLY TO THE ECHOLS PLAINTIFFS.

The Echols Plaintiffs expressly incorporate herein the evidence in the record regarding the harm to them should Section 318 be given effect by a stay of the Court's judgment. See Echols Proposed Findings of Fact ¶¶ 44-48. Because of the operation of Section 318, the Echols Plaintiffs were silenced, as to speech in the form of campaign and party contributions and donations, from the effective date of the Act until May 2, 2003. This Court's judgment regarding Section 318 makes the Echols Plaintiffs whole.

On the other side of the scale, however, the Defendants have omitted argument on any alleged harm that will result to them as a consequence of the invalidation of Section 318. (The Defendants do offer arguments regarding the soft money and electioneering communications issues, but curiously omit any argument on why a stay of Section 318 would harm them.) The Intervenor Defendants argue that uncertainty about the effect of this Court's judgment on other provisions of the statute may jeopardize others not party to these consolidated cases. Of course, no such uncertainty results from this Court's judgment regarding Section 318. This Court did not construe that provision, or narrow it by such construction. This Court struck that provision in toto. No possible confusion erupts from such a clear holding. Consequently, the Defendants have identified no particular injury to be balanced against the patent injury to the Echols Plaintiffs if this Court's judgment regarding Section 318 is stayed.[2] Staying that judgment for purposes of a futile appeal

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2. The Intervenor Defendants invoke a string of in-chambers opinions granting stays. Those decisions, reflecting the judgment of a single Justice, however, are not precedential in value; they bound only the parties in the cases; moreover, they do not embody the decision of a majority of the justices in

any of the cases cited. Moreover, the cases cited by the Intervenor Defendants are distinguishable in every relevant way from the present case, even though the Intervenor Defendants omit to mention, despite their blank citation to those stay orders, the considerable hurdles they erect between them and success on this motion.

The Intervenor Defendants cite to and invite this Court's reliance upon Marshall v. Barlow's Inc., 429 U.S. 1347 (1977) (Rehnquist, J.) (in chambers). In Marshall, although the Intervenor Defendants omit any mention of this salient fact, then-Justice Rehnquist noted that the stay requested by the Solicitor General would not have affected the respondent because the Solicitor specifically limited his request to a stay of the order barring enforcement of the OSHA statute to those not parties to the litigation. 429 U.S. at 1348. But neither the Intervenor Defendants nor the Government Defendants have so limited their request in this action. If the stays sought by the Defendants in this case were limited so as not to apply to the Echols Plaintiffs, Marshall might be instructive.

The Intervenor Defendants likewise cite to and invite this Court's reliance upon Walters v. National Association of Radiation Survivors, 468 U.S. 1323 (1984). In Walters, although the Intervenor Defendants omit any mention of these salient facts, then-Justice Rehnquist explained the grounds for staying the judgment pending appeal in terms of direct relevance here, and a candid examination of then-Justice Rehnquist's explanation there shows why the Intervenor Defendants could not have relied on the specific grounds for granting the stay there:

> It would take more than the respondents have presented in their response, however, to persuade me that the action of a single District Judge declaring unconstitutional an Act of Congress that has been on the books for more than 120 years should not be stayed pending consideration of the jurisdictional statement of applicants by this Court.

468 U.S. at 1324. Of course, here, the stay sought by the Defendants is of a judgment by a statutory three judge District Court, not of a "single District Judge." And Section 318, the provision declared unconstitutional by this Court, is not one that "has been on the books for more than 120 years." Rather, it has scarcely been on the book more than 150 ***DAYS***. Moreover, as then-Justice Rehnquist noted, the Supreme Court had, within the previous decade, summarily affirmed the judgment of a three judge District Court upholding the statute against constitutional attack. Id. No such pedigree of judgments and affirmations suggests the vulnerability of this Court's judgment that Section 318 is unconstitutional.

Finally, the Intervenor Defendants cite to and invite this Court's reliance on New Motor Vehicle Board v. Orrin W. Fox Co., 434 U.S. 1345 (1977) (Rehnquist, J.) (in chambers). In New Motor Vehicle Board, however, the right at stake was not so clearly established as the right to make a donation even in a token amount to a candidate or party of one's preference. As then-Justice Rehnquist noted, "the District Court . . . decided that an automobile manufacturer has a 'liberty' interest protected by the Due Process Clause of the Fourteenth Amendment to locate a dealership wherever it pleases . . . ." 434 U.S. at 1347-48. The decision to stay the judgment reflected in no small part Justice Rehnquist's conclusion that the District Court had erred in that conclusion. There is no comparably questionable constitutional claim here by the Echols Plaintiffs. Instead, the injury they claim is to a direct exercise of the right to freedom of speech and of association by their donations to candidates and parties, even if only permitted to be in token amounts. Moreover, neither the Echols Plaintiffs nor this Court wove that right out of the sort of

will not make the Defendants whole, because they suffer no cognizable injury from the exercise of constitutionally protected freedoms by these minors.

C. THE PUBLIC INTEREST IS SERVED BY THE JUDGMENT THAT SECTION 318 IS UNCONSTITUTIONAL.

The public interest is never well served by giving effect to an unconstitutional statutory burden on protected expression. Were it otherwise, judgments that statutes restricting freedom of expression were unconstitutional would not lead ineluctably to their invalidation. But see, e.g., Boos v. Barry, 485 U.S. 312, 322-24 (1988) (striking statutory prohibition on bringing foreign dignitaries into public disrepute, despite interest in protecting foreign emissaries and dignitaries in the United States). Nor is the public interest ever well served by staying enforcement of a judgment preserving and protecting the exercise of constitutional rights from infringement under such an unconstitutional statute. Preserving robust, uninhibited and wide-open debate on the important political questions of the day serves well the public interest. See New York Times v. Sullivan, 376 U.S. 254, (1964) ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). Allowing abridgements of the First Amendment to continue in effect when none of the Defendants could not be bothered to amass a record justifying a ban on contributions by minors does not serve the public interest at all.

Finally, the Intervenor Defendants assert that the public interest will be served by a stay because the BCRA "put a stop to a variety of serious abuses of the federal campaign finance law."

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whole cloth as did the District Court in New Motor Vehicle Board. Instead, as we argued in the briefing of this matter and as this Court knows, the Supreme Court expressly recognized that the right to donate one's own money as an exercise of a pristine constitutional right.

Intervenor Defendants' Memorandum supporting Motion to Stay at 11. The Intervenor Defendants ignore the dearth of evidence before Congress regarding any problem of serious abuses related to campaign or party contributions by minors. And they ignore their own failure and the Government Defendants' failure to provide a record of evidence supporting Section 318. Thus, the "stopping serious abuses" argument in inapposite.

CONCLUSION

For the reasons set forth herein, the Defendants' motions to stay the judgment and the Government Defendants' emergency motion to stay should be denied.

DATED: May 12, 2003

Respectfully submitted,

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(PROPOSED) ORDER

This matter is before the Court on the Government Defendants' and the Intervenor Defendants' motions for a stay and the Government Defendants' emergency motion for a temporary stay pending the determination of their motion for a stay. The Court has considered the papers submitted by the Defendants and the Echols Plaintiffs, and the argument of counsel thereon. The premises considered,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED

that the Government Defendants' emergency motion for a stay pending this Court's determination of the motion to stay pending appeal is denied with respect to this Court's judgment that Section 318 of the Bipartisan Campaign Reform Act of 2002 is unconstitutional. And

IT IS HEREBY ORDERED, ADJUDGED AND DECREED

that the Government Defendants' and the Intervenor Defendants' motions for a stay are

denied with respect to this Court's judgment that Section 318 is unconstitutional.

IT IS SO ORDERED this ___ day of __________, 2003.

____
KAREN LECRAFT HENDERSON
United States Circuit Judge

____
COLLEEN KOLLAR-KOTELLY
United States District Judge

____
RICHARD J. LEON
United States District Judge

CERTIFICATE OF SERVICE

This is to certify that on May 12, 2002, I caused a copy of the foregoing Notice of Filing and Statement of Points and Authorities in Opposition, and Proposed Order to be served by first-class mail upon the following persons, by depositing same, sufficient postage affixed, in the United States mail, addressed as follows:

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