UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al., Plaintiffs, v. FEDERAL ELECTION COMMISSION, et al., Defendants.	Civ. No. 02-582 (CKK, KLH, RKL
NATIONAL ASSOCIATION OF BROADCASTERS, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.,* Defendants.	Civ. No. 02-751 (CKK, KLH, RKL)

MEMORANDUM OF THE NATIONAL ASSOCIATION OF BROADCASTERS IN RESPONSE TO DEFENDANTS' MOTIONS FOR A STAY OF THIS COURT'S MAY 2, 2003 JUDGMENT CONCERNING SECTION 504 OF THE BIPARTISAN CAMPAIGN REFORM ACT, PENDING APPEAL TO THE SUPREME COURT OF THE UNITED STATES

This memorandum is respectfully submitted by the National Association of Broadcasters ("NAB") in response to the motions of the Intervening Defendants and the Government Defendants (filed respectively on May 8 and May 9, 2003) for a stay of this Court's May 2, 2003 Judgment concerning Section 504 of the Bipartisan Campaign Reform Act ("BCRA"), pending appeal to the Supreme Court of the United States. The NAB takes no position on defendants' motions as they relate to provisions of BCRA other than Section 504.

On May 2, 2003 this Court struck down Section 504 of BCRA as unconstitutional. While the Court was fractured with respect to many other provisions of BCRA, its deci-

sion striking down Section 504 was unanimous. The Court's reasoning was clear. It held that the government lacked a "constitutionally acceptable justification" to support the requirements of Section 504.[1] *See* Memorandum Opinion of Judge Leon at 114; *see also* Memorandum Opinion of Judge Kollar-Kotelly at 614 (agreeing with Judge Leon); Memorandum Opinion of Judge Henderson at 230 (holding that Section 504 "impermissibly abridge[s] protected speech by inhibiting in an overbroad fashion the airing of near-election broadcasts containing only issue advocacy" and that, in any event, Section 504 does not "serve any of the three interests discussed in *Buckley*"). Despite the court's unanimous ruling, the defendants now claim — without even specifically addressing Section 504 —that since the Court's decision has "fundamentally altered the statutory scheme established by Congress," the *entire* decision should be stayed to avoid "significant confusion" and "tumultuous consequences." *See Government Brief in Support of Stay* at 4, 5; *see also Intervenors' Brief in Support of Stay* at 10 (without a stay, "federal candidates, political parties, and the public will face substantial uncertainty").

Defendants' arguments in favor of a *complete* stay of the Court's decision are belied by the fact that the requirements of Section 504 are barely related to, and in fact stand apart from, the complex set of requirements contained in the rest of BCRA. Unlike the soft money rules of Title I and the ban on so-called "electioneering communications" in Title II, Section 504 only applies to broadcasters, and imposes no requirements on candidates, political parties, interest groups, labor unions or non-broadcast corporations. Thus, even if the defendants are correct

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[1] Section 504 compels broadcasters to collect and disclose records of all "requests" to purchase broadcast time for communications that "relat[e] to any political matter of national importance," including but not limited to communications relating to any "election to Federal office" or any "national legislative issue of public importance."

that the Nation's electoral system would be left in a state of virtual chaos without a stay of the Court's decision on Titles I and II, the defendants' logic simply does not apply with respect to Section 504.

In fact, each of the four factors to be considered on a motion to stay weighs heavily *against* a stay of the Court's decision on Section 504. Those factors are "(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 Commission*, 772 F.2d 972, 974 (D.C. Cir. 1985) (*citing Washington Metro. Area Transit Commission* v. *Holiday Tours, Inc*., 559 F.2d 841, 843 (D.C. Cir. 1977)).

First, there is virtually no likelihood that the defendants will prevail on their appeal of the Court's decision striking down Section 504. Despite so much disagreement in its four lengthy opinions, the Court saw fit to unanimously strike down Section 504 as facially unconstitutional, finding that the defendants "provided *no evidence* that Section 504 serves *any* of the government interests" for compelled disclosure of communications about federal candidates. *See* Memorandum Opinion of Judge Leon at 112 (emphasis added); *see also* Memorandum Opinion of Judge Kollar-Kotelly at 614 (agreeing with Judge Leon); Memorandum Opinion of Judge Henderson at 236-37 ("Even if *Buckley's* express advocacy test were not constitutionally required, [Section 504] would not survive 'exacting scrutiny' because [it does] not serve *any* of the three 'subordinating interests' mentioned in *Buckley*.") (emphasis added). Likewise, the Court found that Section 504's disclosure requirements for noncandidate-focused communications "are *even more* difficult to justify." *Id*. at 113 (emphasis added); *see also* Memorandum Opinion of

Judge Kollar-Kotelly at 614; Memorandum Opinion of Judge Henderson at 236-37. Second, there is virtually no likelihood that the defendants will be irreparably harmed if the Court's decision on Section 504 is allowed to stand pending appeal. Without "any" valid interests in the disclosures mandated by Section 504, it is difficult, if not impossible, to see how the defendants could claim irreparable harm absent a stay. *Id*. at 112; *see also* Memorandum Opinion of Judge Kollar-Kotelly at 614; Memorandum Opinion of Judge Henderson at 236-37.[2] Third, if the Court's decision is stayed and the requirements of Section 504 are revived, broadcasters and others will necessarily face serious and possibly imminent harm. As Judge Leon held, Section 504 is not only "onerous" for broadcasters, but also "infringes the associational rights of groups and their members who engage in broadcasting" and "potentially curtails political speech invaluable to an informed electorate." *Id*. at 114; *see also* Memorandum Opinion of Judge Kollar-Kotelly at 614; Memorandum Opinion of Judge Henderson at 236-37. Likewise, because Section 504 fails to serve "any" valid governmental interest, and because its requirements will harm broadcasters and others, the public interest in granting a stay of the Court's decision is weak, if not imaginary. *Id*. at 114; *see also* Memorandum Opinion of Judge Kollar-Kotelly at 614; Memorandum Opinion of Judge Henderson at 236-37.

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[2] In fact, in their three underlying briefs, the defendants failed to identify a specific governmental interest to support the requirements of Section 504 Instead, they claimed only that the required disclosures would "provide[] voters with important additional information." *See e.g* Defendants' Opening Brief at 218. Unable to identify even a single legitimate governmental interest in the disclosures, surely the defendants will suffer no irreparable harm absent a stay of the Court's decision on Section 504.

CONCLUSION

The motions of the Intervening Defendants and the Government Defendants for a stay of the Court's May 2, 2003 decision should be denied insofar as they seek to stay the Court's unanimous decision that Section of 504 of BCRA is unconstitutional.

Dated: May 12, 2003

Respectfully submitted,

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