No. 02-

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL RIFLE ASSOCIATION, *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Appellees.

EMERGENCY APPLICATION TO STAY THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA PENDING REVIEW

TO: THE CHIEF JUSTICE

Chief Justice of the United States and
Circuit Justice for the Fourth Circuit

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EMERGENCY APPLICATION TO STAY THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA PENDING REVIEW

To the Honorable William H. Rehnquist, Chief Justice of the United States and Circuit Justice for the District of Columbia Circuit:

Applicant National Rifle Association ("NRA") respectfully moves this Court for an admittedly unusual emergency order, one staying a portion of the judgment of the District Court for the District of Columbia in the above-referenced case, pending the district court's final determination of whether to stay its judgment pending this Court's review. This urgent request is necessitated by the district court's judgment and post-judgment procedural orders, which operate to silence the NRA's political speech now, although the Bipartisan Campaign Reform Act ("BCRA") as enacted would not restrict such speech for several months.

Specifically, the district court's patently unconstitutional "saving" construction of the term "electioneering communication" contained in Title II of BCRA, Pub. L. No. 107-155, 116 Stat. 81, effectively rewrote the statute to prohibit the NRA's core political speech right now, thus precluding the organization from effectively participating in a national political debate on a critical legislative measure at a critical moment in its consideration by Congress. Because the district court's Title II ruling posed immediate, irreparable harm to

NRA's core speech rights under the First Amendment, NRA promptly sought from the district court a stay of its Title II decision pending this Court's review. The district court, however, did not act on the motion, but rather established a week-long briefing schedule for the motion and any other such motions that might be filed. NRA immediately sought an emergency administrative order staying the district court's Title II ruling pending the district court's consideration and resolution of the NRA's stay request. (The government defendants sought such an emergency administrative stay of the district court's entire judgment). The district court has not yet acted on that motion, thus leaving NRA no recourse but to seek emergency temporary relief from the Circuit Justice for the District of Columbia Circuit.

Relevant Statutory Provisions

1. Title II of BCRA, *inter alia*, criminalizes the funding of any "electioneering communication" from corporate or union general treasury funds.[1] *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

[1] In addition, BCRA imposes disclosure obligations upon persons who fund "electioneering communications." *See* Section 201.

> 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.* (emphasis added). Thus, in contrast to the primary definition's approach, the fallback definition 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.

2. NRA filed its Jurisdictional Statement in this Court on May 6, 2003, arguing that Title II, as enacted, violates the First Amendment and will visit grave injury upon the NRA once it takes practical effect during the federal election campaigns in coming months. NRA will not here repeat its merits arguments concerning the language of Title II as enacted, but rather will focus on the manifest infirmities of the provision as construed by the court below.

Background

1. On Friday, May 2, 2003, the three-judge district court issued its decision in this case (order appended hereto at Tab 1). The district 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, the relevant excerpt of which is appended hereto at Tab 2. 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, after adopting a saving construction that strikes as "unconstitutionally vague" the "final clause" limiting Title II's prohibition to speech "suggestive of no plausible

meaning other than an exhortation to vote" for or against a specific candidate. *Id.* at 93. In doing so, Judge Leon excises the crucial clause that would have limited (albeit implicitly) 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.

2. Application of this new, judicially amended version of Title II has already visited irreparable harm on NRA's core political speech. In the course of defending the constitutional rights of its members, 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. 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 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 Americans to support its cause. *See* Henderson,

J., Mem. Op. 107-10, ¶ 51; Kollar-Kotelly, J., Mem. Op. 324 & nn.103-04; Declaration of Wayne LaPierre dated October 4, 2002, Ex. A at 1-23, ¶¶ 3-55. (LaPierre's October 2002 declaration, which was submitted to the district court in support of NRA's stay motion, is appended hereto at Tab 7).

NRA now faces another crucial legislative battle in Congress over a proposed measure of critical significance to the organization and its membership. As explained in the May 7, 2003, 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 measure 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's airways <u>immediately</u>.

Declaration of Wayne LaPierre dated May 7, 2003, at 3-4, ¶ 8 (appended hereto at Tab 6); *see also* "Gun Firms on Verge of Winning New Shield," Washington Post, May 5, 2003, (appended hereto at Tab 8). As Mr. LaPierre further explains, the NRA seeks to run a series of 60-second radio ads in crucial States whose

Senators have yet to declare their position on S.659. The current script for these ads is appended hereto at Tab 9. NRA had planned to purchase broadcast time for this past weekend, but it was prevented from doing so by the district court's order. It will begin running these broadcast ads as soon as it is freed from the district court's order. Every moment that NRA is silenced by the district court's order, it suffers irreparable harm to its First Amendment right to speak out on a legislative measure of overriding importance to its four million members.

3. 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 other named Senators -- such as Tom Daschle of South Dakota -- and urge those Senators to support the bill. *See* Tab 6 at 4-5, ¶¶ 11-12. Each of the named 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).[2]

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[2] 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 with the FEC. Each of these Senators is not only a federal officeholder but qualifies as an official candidate for reelection as defined by the Act.

These NRA ads are intended to influence legislation, not an election. Yet because the referenced Senators are official candidates for reelection in 2004, and because the NRA's planned radio ads are apparently "not neutral" as to them, airing the ads likely will be criminal under the district court's ruling. Although BCRA as written by Congress will, to be sure, visit severe injury upon NRA when it becomes applicable, it will not do so for several more months.

3. On Wednesday, May 7, NRA moved the district court for a stay, pursuant to FED. R. CIV. P. 62(c), of the district court's judgment pending this Court's review. NRA demonstrated that the district court's judgment posed immediate and irreparable harm to its rights under the First Amendment.

4. The following day, Thursday, May 8, the district court issued an order, appended hereto at Tab 4, prescribing a briefing schedule for resolution of all stay applications. According to the district court's order, all stay applications must be filed by noon on Friday, May 9; any oppositions are due by noon on Monday, May 12; and any replies are due by noon on Wednesday, May 14. Later that same day, NRA moved for an emergency administrative stay that would preliminarily stay the district court's Title II judgment pending the district court's adjudication of NRA's stay application (appended hereto at Tab 5). In its motion for the administrative stay, NRA acknowledged "the

interests of judicial economy and practical administration that are at work in a case of this complexity and magnitude" and noted its appreciation for the "extremely expedited" briefing schedule. "But Plaintiffs, with all respect to the [Three-Judge District] Court, cannot abide even for a few days irreparable injury to their rights under the First Amendment." NRA's Motion and Memorandum of Points and Authorities for Administrative Stay (May 8, 2003) at 2 (appended hereto at Tab 5). Likewise on that same day, Defendant Intervenors -- members of Congress who sponsored BCRA -- moved the Court to stay its entire judgment regarding the constitutionality of BCRA.

5. On Friday, May 9, the Federal Election Commission and other government defendants moved the district court for a stay of its entire judgment regarding the constitutionality of BCRA, and also moved for an emergency stay pending the district court's adjudication of all stay motions. Plaintiff American Civil Liberties Union sought a stay of the Court's Title II ruling pending this Court's review; and two plaintiffs, the AFL-CIO and a group led by the James Madison Center for Free Speech, moved the district court for an order enjoining enforcement of Title II as enacted and as construed by the district court.

Standards For Granting Stay

In considering a stay application, a Circuit Justice is "to determine whether the four Justices would vote to grant certio-

rari, to balance the so-called 'stay equities,' and to give some consideration as to predicting the final outcome of the case in this Court." *Gregory-Portland Indep. School Dist. v. United States*, 448 U.S. 1342 (1980) (Rehnquist, J., in chambers); *see also Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980). In this case, Congress has provided the parties with a right of direct appeal to the Supreme Court, *see* Section 403 of BCRA, and this Court's review of the district court's judgment is a virtual certainty.[3] Thus, the only standards that must be considered in determining whether a stay is appropriate are (1) whether there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous, (2) whether the applicant has demonstrated that irreparable harm will result from the denial of the stay, and (3) whether the balance of equities counsels in favor of a stay. *Rostker v. Goldberg*, 448 U.S. at 1308.

1. Likelihood of Prevailing on the Merits

The district court's decision effectively expanded BCRA's ban on so-called "electioneering communications" to embrace speech that indisputably has absolutely nothing to do with elections and that Congress clearly did not intend to ban. The

[3] "Although no statutory equivalent of § 2101(f) authorizing stays and prescribing the procedures in cases coming to the Supreme Court by appeal, as distinct from certiorari, the procedure is the same." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 675 (7th ed. 1993); *see also, e.g., Appalachian Power Co. v. Public Serv. Comm'n*, 46 U.S.L.W. 3356 (1977) (Burger, C.J.).

court correctly held that BCRA's primary definition of "electioneering communications" was unconstitutionally overbroad, but even that definition did not restrict speech broadcast more than 60 days before an election in a market thousands of miles away from the relevant electorate. Nor does the fallback definition reach communications aired many months before an election in a state far removed from the state in which that election will take place, since such a communication necessarily would plainly be "suggestive of [a] plausible meaning other than an exhortation to vote for or against a specific candidate." But even though Congress did not ban this nonelectoral speech, the court below has.

As noted above, NRA has immediate plans to air radio broadcasts that oppose positions articulated by Senator Charles Schumer on certain types of lawsuits against gun manufacturers, and that attack him for trying to "drive out of business the very companies that equip America's military and law enforcement." *See* Tab 9. Senator Schumer is currently a "federal candidate" in New York, but the election is not for another 18 months, and the NRA plans to air its message throughout states other than New York, where the radio listeners will have absolutely nothing to do with an election in New York. Thus, the only "plausible meaning" that 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 decision below.

Ironically, the district court's creation of a ban that is broader than that enacted by Congress arose 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 district 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 district 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 banned 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 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 in it 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 district 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.

This is a gross misapplication of vagueness doctrine. Courts avoid vagueness problems by narrowly construing statutes so as to limit the burdens on speech, not by construing a statute broadly so as to expand a speech prohibition. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976). As the district court stated, "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)). We are not aware of any authority suggesting that a vagueness problem can be cured by exacerbating an overbreadth problem -- that is, by creating a "bright-line" rule that bans substantially more speech than did the original vague provision.

Even if there were such authority, the district 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," *see* Leon, J. Mem. Op. 93, 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 NRA's proposed radio spot communication appended hereto at Tab 9, which is designed to urge various Senators to support a bill currently pending before Congress that would protect gun manufacturers from suit. The script asks "where does [Senator X] stand on this important bill? He isn't saying." It concludes by exhorting the listeners to "Tell [Senator X] to stand with freedom-loving people of his state and not with Chuck Schumer. Tell [Senator X] to support S. 659." A "person of ordinary intelligence" might conclude that this communication "attacks" the relevant Senator, or might not. It would depend upon a number of different variables, as Judge Leon noted. All that can be known now is that the district court's revised version of BCRA's fallback prohibition might make airing this reference to the relevant Senator a criminal offense. That possibility, borne of the vague standard that survives the district 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 them-

[4] Of course, to the extent that the district court's revised version of the fallback definition clearly prohibits the ad's reference to the relevant Senator, the proposed radio spot provides yet another vivid demonstration of the fatal overbreadth of the district court's rendition of "electioneering communications." Once again, the district court would be prohibiting speech that even BCRA's most ardent sponsors recognized to be nonelectioneering.

selves, 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 district court's decision; they are the chilling effect of the lower court's decision.

Finally, the district 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. Judicial authority 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. Rather, it is well-settled that the question whether to sever a portion of a statute depends upon "the [District] 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 the "Legislature would not have enacted those provisions which are within its power, independently of that which is not").[5]

This legal test focuses exclusively upon legislative intent because of "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 [situa-

[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 v. Schor*, 478 U.S. 833, 841 (1986)) (" '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").

tions] which the legislature passing the statute had, by its very terms, expressly excluded.' " *Legal Servs. 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 district 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 district 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 district 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 princi-

pal 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 district 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 from 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 in the primary definition to further brace it against constitutional challenge. 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 emphasized whenever they explained it, is precisely the one deleted by the district court's opinion. *See* 147 CONG. REC. S3120 (statement of Sen. Specter).

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. The district court therefore plainly erred in fashioning a sweeping new prohibition in this delicate area of precious First Amendment freedoms, as it did by severing the invalidated clause.[7]

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[6] Indeed, the only reason why the *Furgatch* test was ultimately included as an alternative definition (rather than as 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.

[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).

2. Irreparable Harm

There is no doubt that the harm to NRA described in Mr. LaPierre'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 NRA plans to inveigh. *See* La Pierre Decl. at 3-4, ¶¶ 7-9 (appended at Tab 6). 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." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality).

Nevertheless, in the course of supporting NRA's request for a temporary, administrative stay, so long as it applies to the entire judgment, the intervener-defendants have argued that "even if the NRA cannot finance certain advertisements with its general treasury funds, there is no reason that the NRA Victory Fund cannot fund them." Response of Intervening Defendants to the NRA's Motion for Administrative Stay, at 3 (filed with the district court May 9, 2003). Under this cavalier approach to First Amendment values, NRA does not suffer a First Amendment violation so long as PVF is permitted to say what NRA may not. But the PVF's rights are cold comfort to the NRA. Because of

the restrictions on how it raises money, the PVF has only a tiny fraction of the money that is contributed to the NRA by its four million members. And what money PVF does have is especially reserved for influencing elections, which NRA is forbidden from doing, and which is the very reason for PVF's existence. To force PVF now to spend its limited resources on communications designed solely to influence legislation will necessarily diminish the resources it has available to engage in express advocacy, thereby causing, under penalty of criminal sanction, a judicially forced reduction in the total amount of political speech that NRA and PVF may collectively utter.[8] Whether it is constitutional to muzzle NRA in this way will be debated during the briefing on the merits, but it is frivolous to suggest that NRA suffers no "injury" because PVF may theoretically act as its surrogate voice.

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

[8] The Intervener-Defendants also suggested that the NRA might consider whether it qualifies as an *MCFL* entity before it complains of having suffered irreparable harm. That is ridiculous. As the Intervener-Defendants well know, the NRA obviously believes that it should always qualify under the *MCFL* exception, and has also specifically argued in this case that BCRA should not apply to any 501(c)(4) entities. But the FEC takes a different view, and has demonstrated quite clearly that it will oppose and litigate any claim that NRA qualifies for the *MCFL* exception. *See generally FEC v. NRA*, 254 F.3d 173 (D.C. Cir. 2001).

case overwhelmingly favor a stay of the district court's mandate with respect to Title II.

Assuming, *arguendo*, that Congress correctly found Title II's restrictions on speech to be justified by the compelling governmental purpose of ridding federal elections of "electioneering communications," the relief sought by the NRA would actually restore Congress's handiwork by temporarily putting Title II's provisions back in effect pending this Court's review of their constitutionality. Congress specifically 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 the district court's decision jettisoned those limits, effectively enacting a new definition of "electioneering communications," never contemplated by Congress, which criminalizes all broadcasts – anytime, anywhere -- containing references to federal candidates that are "not neutral." In short, Congress's considered judgment to define "electioneering communication" as it did militates heavily in favor of staying, preliminarily, the district court's decision to rewrite those definitions.[9]

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[9] Indeed, the fact that the three-judge panel declared unconstitutional portions of an act of Congress, and that the NRA for present purposes seeks a stay that would serve merely to reinstate the temporary operation of that statute as enacted,

Congress itself has determined that the public interest is best served by its primary definition of "electioneering communications," and that definition would be reinstated, pending review by this Court, should this Court grant an emergency stay of the district court's 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 at large, will be best served by the entry of an administrative stay with respect to Title II until the district court can rule on the pending stay applications. Indeed, the defendants in this case have also asked the district court to stay its entire judgment pending review by this Court.

Moreover, the First Amendment interests at stake are sufficiently pressing to warrant a stay. 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,

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strongly favors the granting of a stay. *See, e.g.*, *Turner Broadcasting v. FCC*, 507 U.S. 1301 (1993) (because 1992 Cable "like all Acts of Congress, is presumptively constitutional," Court held that "it should remain in effect pending a final decision on the merits by this Court") (Rehnquist, C.J., as Circuit Justice); *Bowen v. Kendrick*, 483 U.S. 1304 (1987) (Rehnquist, C.J., as Circuit Justice); *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers); *Schweiker v. McClure*, 452 U.S. 1301 (1981) (Rehnquist, J., in chambers); *Marshall v. Barlow's, Inc.*, 429 U.S. 1347, 1348 (1977) (Rehnquist, J., in chambers).

the equities always favor speech over regulation, because even the temporary deprivation of this fundamental freedom constitutes irreparable harm, as explained above. And the speech being suppressed here is not billboard advertising or nude dancing, but political speech about public officials and proposed legislation -- the very core of the First Amendment. There can be no greater public interest than preserving the free exchange of ideas that makes democracy possible. And 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 specific, well-articulated, well-known political mission. The district 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.

There is a final consideration. Congress was well aware that Title II raised serious constitutional questions and took great care to ensure thorough and deliberate judicial review of those questions before Title II's restrictions on speech took 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 now been slammed shut by

the district court's decision effectively making 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 the three-judge court's mandate pending a hearing on the merits. This factor alone compels a stay.

CONCLUSION

For the foregoing reasons, NRA respectfully requests that a temporary stay be granted, pending the district court's resolution of NRA's motion for a stay under FED. R. CIV. P. 62(c).

Respectfully submitted,

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