IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, *et al*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.* Defendants.	Civil Action No.: 02-CV-0582 (CKK, KLH, RJL)
CALIFORNIA DEMOCRATIC PARTY, *et al*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.* Defendants.	Civil Action No. 02-CV-0875 (CKK, KLH, RJL) **CONSOLIDATED ACTIONS**

OPPOSITION OF PLAINTIFFS CALIFORNIA DEMOCRATIC PARTY AND CALIFORNIA REPUBLICAN PARTY TO DEFENDANTS' AND INTERVENORS' REQUEST FOR STAY

Plaintiffs California Democratic Party (CDP) and California Republican Party (CRP)[1]

[1]Other plaintiffs in the CDP/CRP case joining in this opposition are Yolo County Democratic Central Committee, Art Torres, Santa Cruz Republican Central Committee, Shawn Steel, Timothy Morgan, Barbara Alby, and Douglas R. Boyd, Sr.

respectfully request that this Court deny the request of defendants United States and Federal Election Commission ("Government") and the Intervening Defendants ("Intervenors") to stay this Court's May 2, 2003 judgment insofar as those requests seek to stay the judgment of the Court with respect to Title I of the Bipartisan Campaign Reform Act (BCRA). In its decision, the majority of the Court held that virtually all provisions of Title I governing the raising and spending of non-federal funds violate the First Amendment rights of the political parties. As a result, the Court enjoined enforcement of those provisions, with the exception of Section 301(20)(A)(iii)(use of non-federal money for public communications that refer to federal candidates and support, promote, attack or oppose those candidates) and Section 323(e)(solicitation of non-federal funds by federal candidates and office-holders).

Having little legal justification for a stay, the Government and Intervenors have attempted to leverage the concern of several plaintiffs over the Court's interpretation of "electioneering communications" in Title II into a more generalized argument for staying the entire decision, including those portions of the Court's decision that invalidate many of the provisions of Title I. For the reasons set forth more fully below, plaintiffs CDP and CRP submit that the decisions regarding Title I and Title II are sufficiently different that evaluation of the merits of a stay can and should proceed separately. With respect to the Court's decision on Title I, plaintiffs urge the Court to deny defendants' request.

ARGUMENT

The Federal Rules of Civil Procedure provide that when an appeal is taken from an order granting or denying an injunction, the court may in its discretion suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as it considers proper. Fed. R. Civ. P. 62(c). In requesting a stay under Rule 62(c), "it is the movant's obligation to

justify the court's exercise of such an extraordinary remedy." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985). The moving party must satisfy "stringent standards" to justify a stay pending appeal. *United States v. Judicial Watch, Inc.*, 241 F.Supp.2d 15, 16 (D.D.C. 2003), quoting *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 230 F.Supp.2d 12, 14 (D.D.C. 2002).

As the Government and Intervenors acknowledge, in order to obtain a stay of this Court's ruling, they must show: (1) a strong likelihood of prevailing on the merits; (2) unless the stay is granted, they will suffer irreparable harm; (3) a stay will not result in substantial harm to plaintiffs; and (4) a stay will not harm the public interest. *Cuomo*, *supra* at 974. None of these factors favors a stay of the Court's decision with respect to Title I.

1. Defendants and Intervenors Cannot Demonstrate Likelihood of Success on the Merits

Plaintiffs CDP and CRP incorporate the arguments on the merits from their previous briefs and do not seek to reargue those points here. Suffice it to say that the majority of this Court found that the restrictions of Title I violated the First Amendment rights of political parties at all levels. Specifically, Judge Leon found that BCRA's broad prohibition on the use of non-federal money for purposes "other than purposes such as those defined in Section 201(20)(A)(iii)" is "simply not regulable by Congress." Slip. Op. (Leon, J.) at 36-37. Judge Henderson went even further, concluding that:

> New FECA section 323(a)'s ban on national party use of non-federal funds fails to serve the government's interest in preventing actual or apparent corruption of federal candidates and worse, it indiscriminately restricts independent expenditures disbursed for protected issue advocacy and non-corrupting party-building activities. In my opinion, the ban is substantially overbroad,...and represents an impermissible burden on the expressive associational rights of the national political party committees...(Slip. Op. (Henderson, J.) at 285.)

> New FECA sections 301(20) and 323(b)'s restrictions on state and local party use of non-federal funds fails to serve the compelling governmental interest in preventing the actual or apparent corruption of federal candidates. Moreover they invalidly inhibit core political speech directed at the main toward state and local candidates and issues...Therefore, I would hold that they are unconstitutional on their face. (*Id.* at 305.)

The Government and Intervenors appear to believe that the fact that each Judge on the panel issued his or her own decision makes it more likely that the defendants will prevail on appeal. Plaintiffs disagree. A majority of this Court was strongly and unambiguously troubled by the broad restrictions imposed upon the parties by BCRA – restrictions that were neither narrowly tailored to accomplish Congress' purported goals nor likely even to further those goals. Essentially, the fact that the majority came to a single, clear conclusion as to many of the Title I provisions albeit through somewhat varying analyses suggests that although the case can be analyzed in different ways, such analyses lead to but one conclusion: that Congress overreached substantially and thereby violated the fundamental First Amendment rights of the political parties and their members.

2. The Balance of Harms Strongly Favors Denial of the Stay

Neither the Government nor Intervenors will suffer any harm at all, let alone irreparable harm, if the stay is denied. Their arguments about irreparable harm come down essentially to the argument that the Court's decision will create "confusion" which will make it difficult for the FEC to enforce the law and for Intervenors (as candidates) to comply with the law. To bolster this argument, the Government and Intervenors urge that this Court's decision "imposes a new regulatory regime" (Gov. Memo. at 8) and "introduce[s] substantial uncertainty" for those subject to regulation (Gov. Memo. at 9).

With respect to Title I, just the opposite is true. The political parties have been

operating under more or less the same regulatory regime for approximately 30 years. It was BCRA itself that imposed a sweeping, impossibly complex and intimidating new regulatory regime and introduced substantial uncertainty. With the exception of certain limits on fundraising by federal candidates and office-holders, and the use of non-federal funds for certain public communications that refer to candidates, this Court's decision simply returns the law to its familiar posture prior to BCRA.

While the Government and Intervenors make much of the fact that BCRA has been in effect for several months, many of the most onerous of the Title I provisions from the perspective of the state and local parties have not yet taken full effect. For example, the restrictions on the state and local parties' ability to conduct get-out-the-vote activity and voter registration have not yet gone into effect as a practical matter in California. Under the FEC's new regulations, the requirement to pay for get-out-the-vote activities entirely with federal funds (or a combination of such funds and funds raised and regulated under the complicated Levin Amendment) begins with the earliest filing deadline for the primary election for federal candidates. 11 C.F.R. § 100.24(1)(i). In California, this filing period does not begin until approximately October 27, 2003 and the restriction on voter registration commences 120 days from the March 2, 2004 primary, or approximately November 3, 2003.

This is not to say that BCRA has not already inhibited the parties from engaging in certain kinds of fund-raising or associational activities. It most certainly has. Although the actual payment for such activities has not yet begun, BCRA has significantly inhibited fundraising and coordination of such activities among the various party entities. It would be more accurate to state that the California state and local parties have largely adopted a "wait and see" approach and have deferred as much planning and decision-making as possible while

awaiting the outcome of this case. But as summer proceeds into fall, this approach becomes less tenable.

If a stay is granted, the parties will be increasingly prevented, at the risk of criminal prosecution, from engaging in otherwise lawful collective activity, including normal election planning activity in conjunction with national party officers and staff and state and local candidates that may be found to constitute impermissible "soliciting," "directing" or "spending" of non-federal funds for activities that benefit the entire party ticket. In addition, uncertainty about the scope of restrictions on party officials with respect to fundraising events sponsored by either the parties themselves or by like-minded non-profit groups will chill an increasing amount of communication and associational activity. *See, e.g.*, FEC Advisory Opinion 2003-3 (Commission unable to agree on whether federal candidate's name may appear on invitation to fundraising event for state or local candidate). Further, although the new FEC regulations promulgated in response to BCRA help to clarify some of the troublesome provisions, those very clarifications are being challenged in a pending suit by Intervenors to set those regulations aside.

"'[T]he loss of First Amendment freedoms, for even minimal period of time, unquestionably constitutes irreparable injury' where the injury is 'both threatened and occurring' at the time of" the motion. *People for Ethical Treatment of Animals, Inc. v. Gittens*, 215 F.Supp.2d 120, 128 (D.D.C. 2002), quoting *Elrod v. Burns*, 427 U.S. 347, 374 (1976). *Accord, National Treasury Employees Union v. King*, 961 F.2d 240, 244 (D.C. Cir. 1992); *Pearson v. Shalala*, 130 F.Supp.2d 105, 119 (D.D.C. 2001). Here, the loss would be for substantially more than a "minimal period."

It now appears likely that a decision of the Supreme Court may not be forthcoming until approximately the end of this year. It therefore appears likely that the decision of this Court will

be in effect not only for a longer time than BCRA itself has been in effect, but during a more critical period. Plaintiffs fully expect the Supreme Court to affirm the decision of this Court and declare the restrictions of Title I unconstitutional. If the Court allows its decision to stand, plaintiffs' exercise of their First Amendment freedoms will be protected in this important period pending Supreme Court review. On the other hand, if the Court stays its decision with respect to Title I, the First Amendment rights of the parties will be clearly and irreparably violated over the next six to nine months (and possibly longer) in the very ways identified by the majority of this Court.

The California political parties are aware that certain Title II plaintiffs are seeking temporary relief from one aspect of the Court's decision concerning its interpretation of "electioneering communications." Whatever the merits of these requests[2], the issues involved are different and separable from those presented in Title I. No Title I plaintiff has sought a stay of the Court's decision. Significantly, the decision of the Court with respect to Title I merely returns the parties to the regulatory scheme in place for many years, with a few significant limitations carved out by the Court. Such a result – despite the Government's and the Intervenors' claims to the contrary – causes no demonstrable harm to the defendants.

The Government and Intervenors argue that the "harm" is the confusion that will be inflicted upon the regulated community. In fact, a return to modified pre-BCRA rules will be

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[2]The California party plaintiffs did not challenge Title II and take no position on the requests for a stay of the Court's holding with respect to "electioneering communication" except to note that the definition of this term announced by the Court is very close to the statutory definition of "public communications" in Title I. While the political parties understand that the Court has concluded that such communications can only be funded with federal money, the parties have presented similar arguments as to both the vagueness and overbreadth of the Title I definition.

significantly *less* confusing than the recent efforts to implement the BCRA. The Government has it easily within its control to conform to the Court's ruling and minimize any disruption by simply reinstating the regulatory regime under which the political parties have operated for many years (taking into account the restrictions upheld by the Court).[3] For example, virtually all of the new allocation regulations applicable to state and local parties could simply be left in effect and the recently repealed or superceded allocation regulations, applicable to the national parties and contained in a single section of the regulations (11 C.F.R. § 106.5), can easily be reinstated. Similarly, the previous reporting and disclosure provisions for national party committees can likewise be reissued, thereby ensuring reporting of all receipts and disbursements. With respect to state and local parties, the FEC would simply have to suspend its new regulations to the extent that they are inconsistent with the Court's ruling; for the most part, the parties' handling of their receipts and disbursements would simply continue as it has in the past, with BCRA's restrictions on non-federal fundraising and Levin funds confined to public communications specifically referring to federal candidates in accordance with the Court's decision. The Government's suggestion that the Court's decision will effectively result in significant "unregulated" activity is simply an attempt to scare the Court since the FEC clearly has the authority to ensure that the previous regulatory regime, familiar to everyone in the

[3]Similarly, the Government's concern that participants who "seek to take advantage of the regime created by the decision" (i.e., act in accord with the Court's ruling) may be "in jeopardy of violating provisions of the statute that...are upheld by the Supreme Court) can easily be resolved by the Government's simple acknowledgment that it will accept the ruling of this Court. What the Government is really attempting to do by this kind of comment is accomplish by intimidation what it has been unable to achieve in a court of law.

regulated community and in effect until very recently, continues in effect pending appeal.[4]

The Government also suggests that the decision allows the political parties to engage in conduct which it finds objectionable, such as using "soft money" for activities including voter registration and get-out-the-vote activity that "plainly has an impact on federal elections" (Gov. Memo. at 9). Not only does the Government fail to demonstrate any harm from this conduct, but the conclusion that such use of state-regulated funds constitutes a "harm" depends completely upon an argument that has been rejected by the Court and should be rejected as a basis for a stay. *See, e.g., United States v. Judicial Watch, Inc., supra* at 17 (stay denied by this court where movant "bases its claim of irreparable harm on an argument that the court has already rejected").

In sum, the harm of imposing upon the nation's political parties an incredibly broad and vague set of restrictions found unconstitutional by a majority of this Court must be weighed against (at worst) a delay in the effective date of the statute; in these circumstances, the balance of hardships tilts heavily against issuance of a stay of the Title I ruling.

3. The Public Interest Will Not Be Served By A Stay

The public interest argument of both Intervenors and the Government is fundamentally an effort to reargue the merits. The Government asserts that, without a stay, the parties will raise and spend "soft money" which is thus "likely to create the appearance or fact of corruption..." (Gov. Memo. at 9). Although a majority of this Court upheld the restrictions on federal candidates and office-holders soliciting non-federal funds, and restrictions on the political

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[4]The Government's argument that the FEC will not be able to provide Advisory Opinions makes little sense. If the Court's decisions stands, the FEC will not called upon to "apply" those sections that are invalidated and enjoined by the Court, but will only be interpreting those provisions *upheld* by the Court.

parties' use of non-federal funds for certain candidate-related communications, it found virtually all other restrictions imposed by Title I on the parties' rights of speech and association unconstitutional on their face. Slip. Op. (Henderson, J.) at 285, 305; Slip. Op. (Leon, J.) at 36-37. Intervenors' argument that these activities should continue to be prohibited because the Court has merely "temporarily suspended" their reforms (Int. Memo. at 11) clearly misses the import of the Court's decision. Once the defendants' efforts to reargue the merits are rejected, as they should be, it is manifest that the public interest in preserving the political party committees' First Amendment rights and avoiding the massive confusion and uncertainty visited by BCRA itself strongly favors rejecting a stay, not granting one.

In an apparent acknowledgment that reiteration of its losing arguments on the merits carries little force, the Government's fall-back position is that the public interest is uniquely harmed whenever an Act of Congress is invalidated. However, the Government's reliance on stay decisions by single Justices in cases such as *Walters v. National Ass'n of Radiation Survivors*, 468 U.S. 1323 (1984) and *New Motor Vehicle Board v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) is misplaced. First, the Chief Justice has made it clear that the principle cited by the Government applies where a single district judge holds an Act of Congress unconstitutional: "It has been the varying practice of this Court...to note probable jurisdiction and decide on the merits all cases in which a single district judge declares an Act of Congress unconstitutional. In virtually all of these cases the Court has also granted a stay..." *Bowen v. Kendrick*, 483 U.S. 1304 (1987)(Rehnquist, Circuit Justice, in Chambers).[5] In the instant case, of course, a three-

[5]Indeed, in *Walters*, the statute found unconstitutional by the single District Court judge had been on the books for ore than 120 years and had been found constitutional by a three-judge court, whose judgment was then affirmed by the Supreme Court. It is difficult to seriously compare this situation to the decision of this three-judge court holding unconstitutional a statute

judge court has held BCRA unconstitutional, in part, after extensive consideration of a massive record. *Cf. Graves v. Barnes*, 405 U.S. 1201, 1204 (1972)(Powell, Circuit Justice, in Chambers)(stay denied where "case received careful attention by the three-judge court...").

Second, the Government ignores the equally compelling principle that the balance of equities in any stay decision favors allowing the exercise of First Amendment and other constitutional rights, not preventing such exercise. "[A]ny First Amendment infringement that occurs with each passing day is irreparable." *Nebraska Press Ass'n v. Stuart,* 423 U.S. 1327, 1329 (1975)(stay decision by Blackmun, Circuit Justice, in Chambers). Thus, in *Williams v. Zbaraz*, 442 U.S. 1309 (1979), Justice Stevens, as Circuit Justice, denied the stay of a district court decision holding a state statute unconstitutional. Justice Stevens noted that the state's claims of injury to its interests "must be weighed against the plaintiffs' claims of irreparable injury to their interests if the stay is granted" including the "conceded constitutional right to choose to have an abortion...if the judgment is stayed, the constitutional right to choose will for many be meaningless." *Id.* at 1314. He concluded that the stay should therefore be denied.

In this case, a majority of this Court has found that Title I of BCRA violates the constitutional rights of the political parties in many particulars, and has accordingly enjoined the offending provisions of the Act. The judicial acknowledgment of such rights would be, in Justice Stevens' words, "meaningless" if those rights could not be exercised during the coming months.

CONCLUSION

For the reasons set forth above, the motions of the Government and the Intervenors to

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(BCRA) that has been in effect for approximately six months and the constitutionality of which has never been addressed by any court.

stay the Final Judgment of this Court insofar as the Final Judgment holds Title I of BCRA unconstitutional in part, pending disposition of appeals to the Supreme Court, should be denied.

Dated: May 12, 2003

Respectfully submitted,

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[PROPOSED] ORDER DENYING
MOTIONS TO STAY AS TO TITLE I

Upon consideration of the Government Defendants' Motion for Stay of Final Judgment Pending Appeal ("Government's Stay Motion") and the Motion of Intervening Defendants to Stay Injunctions Pending Appeal ("Intervenors' Stay Motion"), the memoranda of points and authorities filed in support of such motions and the oppositions and replies thereto, it is hereby

ORDERED, that insofar as the Government's Stay Motion and Intervenors' Stay Motion seek a stay of those paragraphs of this Court's Final Judgment in regard to section 101 of the Bipartisan Campaign Reform Act of 2002, each of those motions be, and they are hereby, DENIED.

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

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CERTIFICATE OF SERVICE

This is to certify that I caused a copy of the foregoing **OPPOSITION OF PLAINTIFFS CALIFORNIA DEMOCRATIC PARTY AND CALIFORNIA REPUBLICAN PARTY TO DEFENDANTS' AND INTERVENORS' REQUEST FOR STAY** and **[PROPOSED] ORDER DENYING MOTIONS TO STAY AS TO TITLE I** to be served on all counsel designated to receive service, on May 12, 2003, by the means indicated below:

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Dated: May 12, 2003

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