No. 02-1675

IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL RIFLE ASSOCIATION, *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Appellees.

_____

On Appeal From The United States
District Court For The District of Columbia

_____

MOTION FOR DIVIDED ARGUMENT

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In accordance with Rules 21 and 28.4, and this Court's order of June 19, 2003, Plaintiffs-Appellants the National Rifle Association ("NRA") and the NRA Political Victory Fund ("PVF") respectfully request divided argument as follows:[1]

1. The Title II Plaintiffs in these consolidated cases represent a variety of divergent interests, and, as the briefing in this Court makes clear, there are material differences in the issues and positions that they advance. Dividing oral argument

[1] On Friday, July 11, the NRA was advised by counsel for the Plaintiffs in McConnell v. FEC, No. 02-1674 ("McConnell Plaintiffs") that other Title II Plaintiffs had arrived at a joint proposal with respect to oral argument; the NRA was not consulted on the shaping of that proposal.

between lawyers representing these divergent interests is therefore warranted in this unusually important and complex case to ensure the complete and robust presentation of important issues and arguments. See ROBERT L. STERN, EUGENE GRESSMAN, ET AL., SUPREME COURT PRACTICE 680 (8th ed. 2002) ("In cases of special importance and complexity involving a number of parties with different interests who desire to present different arguments and issues, the Court has, on rare occasions, allowed several lawyers to argue on each side.").

2. The NRA's challenge to BCRA is limited to Title II's ban on "electioneering communications." It has advanced at least four First Amendment arguments that have not been advanced by any other Title II Plaintiff: the impermissible congressional purpose of Title II to suppress disfavored speech, see Brief for Appellants the NRA, et al. (filed July 8, 2003) ("NRA Br.") 7-14; the absence of a credible corruption rationale for Title II, see id. at 15-27; the presence in Title II of Section 203(b) as a less restrictive alternative to the sweeping ban on corporate "electioneering communications" effectuated by the Wellstone Amendment, see id. at 28-33; and the unconstitutionality of the media exception in Section 201(a). See id. at 44-50. None of these critical issues is likely to be addressed at oral argument by any Title II Plaintiff save for the NRA. Indeed,

the NRA's arguments concerning the Wellstone Amendment and the media exception certainly will not be advanced by counsel for the McConnell Plaintiffs, for they represent parties whose interests would not be served by this Court's acceptance of these points.

a. This Court's campaign finance cases have consistently drawn a sharp distinction between the political speech rights of nonprofit, grassroots advocacy organizations funded by donations from individual members, and the political speech rights of business corporations, trade associations, and interest groups funded largely with corporate contributions derived from the economic marketplace. Compare FEC v. MCFL, 479 U.S. 238, 258-59 (1986), with Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 659-60 (1990); see NRA Br. 4-5, 20-23, 34-35. As discussed in detail in our opening brief, see id. at 28-30 & nn.24-25, in drafting Title II, Congress initially sought to steer a safe course between this Court's decisions in MCFL, on the one hand, and Austin, on the other, by including an exception (the Snowe-Jeffords provision) in Section 203(b) that would permit the NRA and other 501(c)(4) advocacy groups to fund independent electioneering communications with money donated by individual supporters. Congress, however, effectively nullified that exception by enacting, over the opposition of BCRA's sponsors, Section 204, the Wellstone Amendment. BCRA's sponsors,

predicting the Wellstone Amendment's constitutional demise in this Court, insisted both that Section 203(b) remain in the statute (rather than simply being struck) and that the Wellstone Amendment be made "cleanly" severable. Id. at 29 n.24; see Legislative History Appendix to Brief for Appellants the NRA, et al. (filed July 8, 2003) ("LH App.") 58a-64a.

Title II on its face thus follows this Court's campaign finance jurisprudence in dividing the universe of corporate "electioneering" speakers into two groups: economic actors, including business corporations and trade associations, funded largely by corporate contributions; and grassroots advocacy groups, such as the NRA, funded by voluntary donations from individual members.

The divergence in the interests of these two groups is brought sharply into focus by the NRA's argument that the Wellstone Amendment should be struck and severed from Title II because the statute has a built-in, less restrictive alternative -- Section 203(b) -- for ensuring that corporate wealth generated in the economic marketplace is not used "to provide an unfair advantage in the political marketplace." MCFL, 479 U.S. at 257; see NRA Br. at 5-6, 28-33. Obviously, acceptance of this argument by this Court will offer no relief to non-501(c)(4) corporations, nor to those 501(c)(4) corporations that are funded largely by corporate contributions. It is thus entirely

understandable that counsel for the McConnell Plaintiffs, who represent both 501(c)(6) trade associations (e.g., Chamber of Commerce, National Association of Broadcasters) and 501(c)(4) corporations that rely largely on corporate funding (e.g., Center for Individual Freedom), have not advanced this argument despite the fact that BCRA's sponsors laid the foundation for it in Title II's structure and legislative history.[2] Given these divergent positions, borne of divergent interests, the proper course is for this Court to hear argument separately from a lawyer representing solely Title II Plaintiffs that specifically seek, and stand to benefit from, the invalidation and severance of the Wellstone Amendment, and from a lawyer representing Title II Plaintiffs whose interests depend upon a broader invalidation of Title II's restrictions on electioneering communications.[3]

b. Nor has any other Title II Plaintiff challenged the unconstitutionality of Title II's media exception in Section 201(a). See NRA Br. 44-50. Again, counsel for the McConnell

[2] To be sure, the McConnell Plaintiffs do note that the Wellstone Amendment is unconstitutional to the extent that it reaches corporations that are concededly protected by this Court's decision in MCFL, an entirely obvious and noncontroversial proposition that neither the Government nor the Intervenors contest. See Brief for Appellants/Cross-Appellees Senator Mitch McConnell et al. (filed July 8, 2003) ("McConnell Br.") 57.

[3] Plaintiff AFL-CIO is situated alongside business entities with respect to its arguments against Title II. Just as business entities are ineligible for Section 203(b) and unable to benefit if the Wellstone Amendment is struck down and severed from Title II, so too is the AFL-CIO, which therefore does not challenge the Wellstone Amendment.

Plaintiffs represent the National Association of Broadcasters in this case, whose interests obviously are not furthered by an argument that its corporate members are undeserving of the special privileges conferred upon them by Title II.

3. The NRA is uniquely positioned in this litigation to argue on behalf of 501(c)(4) grassroots advocacy groups whose independent electioneering communications are funded by individual contributions. The organization gives voice to the political speech of four million Americans of ordinary means, united in support of a singular political objective: the defense, promotion, and enjoyment of their right under the Second Amendment right to keep and bear arms. Measured not just in one- or two-minute advertising spots but also in half-hour news programs, the NRA's political speech in 2000 -- over 300,000 television minutes -- exceeded that of all other issue advocacy groups and unions combined. See NRA Br. 1-2, 35-43. Perhaps because the NRA is the archetypal group that enables "large numbers of individuals of modest means [to] join together in [an] organization[] which serve[s] to amplify the voice of [its] adherents,"[4] it was singled out by Congress as a prime target of Title II. See, e.g., LH App. 52a-57a. And the NRA has played a unique and vital role in this litigation from its inception, contributing

[4] FEC v. NCPAC, 470 U.S. 480, 494 (1985) (quoting Buckley v. Valeo, 424 U.S. 1, 22 (1976)).

voluminously to the record in this case, not only with respect to its own speech, but in deposing and cross-examining the Intervenors and other witnesses who purported to articulate a corruption rationale for Title II. It also adduced documentary evidence demonstrating that the factual predicates for Austin's approval of a special media exception are no longer valid.[5]

In short, the NRA respectfully submits that no Plaintiff is better situated than it to defend with focus and unreserved vigor the interests of grassroots advocacy corporations against Title II's assault on their First Amendment right to broadcast their political messages with reference to federal candidates.

4. For the foregoing reasons, the NRA respectfully submits that the time allotted for oral argument to Title II Plaintiffs be divided equally between the NRA arguing on behalf of nonprofit issue advocacy groups funded by individual contributions and separate counsel representing all other Title II Plaintiffs. Alternatively, the NRA does not oppose a further subdivision of time so as to afford unions a voice distinct from that of business entities.

[5] The NRA's prominent role was further reflected in the proceedings below, where it was allotted more pages and more time at oral argument than any other set of Title II Plaintiffs apart from the McConnell coalition.

Respectfully submitted,

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