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

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RESPONSE TO MOTION OF PLAINTIFFS IN *McCONNELL v. FEC*, NO. 02-1674, *ET AL.*, FOR DIVIDED ARGUMENT

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The motion for divided argument filed by seven groups of Plaintiffs in McConnell v. FEC, No. 02-1674 et al., ("McConnell Motion") does not offer any substantive justification for the divisions proposed therein, let alone for its conclusory assertion that the NRA's own motion "should be denied." McConnell Motion 3. In light of the sharp divergence of interests between the Plaintiffs joining in the McConnell Motion and the NRA, it is not surprising that they seek to exclude the NRA from argument.

1. a. The majority of the seven groups of Plaintiffs in the McConnell coalition -- those in McConnell v. FEC (No. 02-

1674), RNC v. FEC (No. 02-1727), National Right to Life Committee v. FEC (No. 02-1733),[1] and California Democratic Party v. FEC (No. 02-1753) -- are challenging Title I's ban on "soft-money" political contributions. Although the Defendants and the McConnell coalition are surely right that separate argument time should be allocated for Title I and Title II, it is equally apparent that the interests of Plaintiffs challenging Title I sharply diverge from those of the NRA, which has challenged only Title II, and that a lawyer representing the former cannot properly represent the latter. This Court should therefore disregard the views of those Plaintiffs in resolving the NRA's motion for divided argument on Title II.

The NRA's opening merits brief stresses both (i) the fundamental constitutional distinction drawn by this Court between political contributions (as regulated by Title I) and independent political expenditures (as regulated by Title II) in terms of their corruption potential, and (ii) a corresponding distinction reflected in the evidentiary record in this case. See NRA Br. (No. 02-1675) 15-19 & n.14. These constitutional and evi-

[1] Counsel for the National Right To Life Committee in No. 02-1733 also represents the Libertarian National Committee, which, along with the other political parties, is challenging Title I. In any event, the "electioneering communications" of the National Right To Life Committee (No. 02-1733), which is an MCFL-qualified entity, will presumably be protected regardless of how the First Amendment challenges to Title II are resolved. See S.A. 251 ¶45b (Henderson).

dentiary distinctions support the First Amendment challenge of Title II Plaintiffs at the expense of that of Title I Plaintiffs, who naturally prefer to, and do, elide them.

Conversely, Title I Plaintiffs extensively complain that BCRA unconstitutionally grants preferential treatment to "special interest groups" (citing the NRA by name) as compared to political parties. See Political Parties Br. 23-25, 91-98; McConnell Br. 35-38. For example, they argue that Title I's ban on soft-money contributions to political parties will serve to "divert[] funds from the political parties to interest groups," McConnell Br. 38; see Political Parties Br. 98; they thus give support to the Government's purported "loophole-closing" justification for Title II's ban on electioneering communications, upon which the District Court did not pass.[2] See S.A. 840 n.125 (Kollar-Kotelly).

In short, the interests of Plaintiffs challenging Title I (whether exclusively or as part of an "omnibus" challenge to BCRA as a whole) are opposed to the interests of the NRA and other nonprofit advocacy groups challenging only Title II, as the Title I Plaintiffs' attempt to exclude the NRA from oral ar-

[2] In the court below, the NRA was impelled to rebut this line of argument by citing evidence from both the legislative record and the litigation record demonstrating the unique ability of political parties and their candidates to preside over and exploit a soft-money regime. See NRA Opposition Brief 13-14 (filed Nov. 20, 2002).

gument tellingly confirms.

b. Similarly, the decision of the Chamber of Commerce and the other "Business Plaintiffs" (No. 02-1756) to join a motion seeking to exclude the NRA from oral argument follows predictably from the divergence of interests between business entities and nonprofit issue advocacy groups, as highlighted in the NRA's motion for divided argument. See NRA Motion 3-5. The same is true of the AFL-CIO (No. 02-1755), which does not stand to benefit from invalidation and severance of the Wellstone Amendment and therefore has interests divergent from those of the NRA.[3] See id. at 5 n.3.

c. Nor does any other Plaintiff group joining the McConnell Motion share the interests of the NRA in this litigation. The ACLU (No. 02-1753), in its merits brief to this Court, quotes the Intervenors' statement below that "the ACLU can credibly claim that 'all of its advocacy is focused on issues,'" see ACLU Br. 36 (quoting Defendant-Intervenors' Opposition Brief (filed Nov. 20, 2002)("Intervenors Opp.") I-75), but it omits the Intervenors' ultimate point: the one ad that the ACLU "has run in its 82-year life span that would have run afoul of BCRA . . . . was manufactured to give the organization at

[3] The AFL-CIO's only suggestion that its speech rights as a union may differ at all from those of business corporations comes in an oblique footnote, see AFL-CIO Br. 21 n.14, which surely does not situate it comparably to the NRA.

least rhetorical standing as a plaintiff in this case." Intervenors Opp. I-76. Thus, although both the NRA and the ACLU are 501(c)(4) corporations, the ACLU plainly does not share the NRA's vital interest in simply preserving its First Amendment right to broadcast "electioneering communications," even if that result is narrowly achieved through an argument seeking only the invalidation and severance of the Wellstone Amendment.[4]

2. This Court typically divides argument only to reflect "different interests or positions" among parties on the same side of a case. ROBERT L. STERN, EUGENE GRESSMAN, ET AL., SUPREME COURT PRACTICE 680-81 (8th ed. 2002). The McConnell Motion, however, seeks to carefully orchestrate the presentation of oral argument through different voices singing the same tune. Any notion that the McConnell Motion seeks to divide argument along the lines of Plaintiffs' differing positions is facially foreclosed by its proposal that, for Title I, Messrs. Starr and Burchfield each cover the same positions; and that, for Title II, Messrs. Abrams and Gold divide between them positions common to both, while the NRA's substantively divergent positions are excluded from argument altogether. The McConnell Motion offers no reason why a

[4] Indeed, far from highlighting Congress's careful design to facilitate a decision severing the Wellstone Amendment and restoring Section 203(b), see NRA Br. 6, 28-30, the ACLU maintains "[i]t is not clear why Congress did not simply repeal the Snowe-Jeffords Amendment when it adopted the Wellstone Amendment." ACLU Br. 4 n.3.

single lawyer could not represent the McConnell coalition's common interests and positions on Title I and II. Nor do the separate opening merits briefs filed by the Plaintiff groups joining the McConnell Motion reveal any substantive divergence whatsoever, let alone differences that would warrant dividing argument among their counsel.

With respect to Title II, the three issues that the McConnell Motion would reserve for counsel for the AFL-CIO -- "electioneering communications," "advanced disclosure," and "coordination" -- are ones to which the McConnell Plaintiffs speak in like, if not identical, fashion, as evident from their respective briefs. Compare McConnell Br. 38-64 with AFL-CIO Br. 12-49. It simply makes no sense for counsel for the AFL-CIO separately to address issues as to which the Court could readily put questions to counsel for the McConnell Plaintiffs, while the NRA is foreclosed from addressing wholly distinct and potentially dispositive issues that the Court lacks any other means of exploring at argument.

3. In sum, the NRA's First Amendment arguments go to the heart of the case against Title II, are not advanced by any other party, and -- at least with respect to the availability of Section 203(b) as a less restrictive alternative to the Wellstone Amendment and to the unconstitutionality of the media exception -- actually run counter to the interests of certain

Plaintiffs joining the McConnell Motion. Yet the McConnell Motion would exclude the NRA from Title II argument in favor of dividing argument between two parties whose interests, and arguments, are thoroughly aligned. Accordingly, the Court should deny the McConnell Motion for divided argument with respect to Title II, and grant the NRA's motion to divide the time allotted to Plaintiffs on Title II equally between counsel for the NRA (Charles J. Cooper) and counsel representing the Title II interests of business entities and unions.

Respectfully submitted,

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