No. 02-1674

IN THE SUPREME COURT OF THE UNITED STATES

MITCH McCONNELL et al.,
Appellants,

v.

FEDERAL ELECTION COMMISSION et al.,
Appellees.

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

RESPONSE TO MOTION OF THE APPELLEES/CROSS-APPELLANTS FEDERAL ELECTION COMMISSION, ET AL., FOR EXPEDITED BRIEFING SCHEDULE

Appellants Senator Mitch McConnell; Southeastern Legal Foundation, Inc.; Bob Barr; Center for Individual Freedom; National Right to Work Committee; 60 Plus Association, Inc.; U.S. d/b/a Pro English; and Thomas E. McInerney come before the Court and state as follows:

1. Appellants agree with the Executive Branch defendants that this Court should note probable jurisdiction at its June 5 Conference in the four pending cases involving the constitutional challenge to the Bipartisan Campaign Reform Act of 2002 (BCRA) (No. 02-1674, McConnell v. Federal Election Commission; No. 02-1675, National Rifle Association v. FEC; No. 02-1676, FEC v. McConnell; and No. 02-1702, McCain v. McConnell). Appellants also suggest that this Court note probable jurisdiction at its June 5 Conference over all other properly taken appeals in this litigation in which

jurisdictional statements are filed between now and the statutory deadline for filing of June 2. Finally, notwithstanding the inexplicably belligerent position taken by the Intervenor defendants, see Response of Intervenor Defendants to McConnell J.S., appellants agree with the Executive Branch defendants that the Court should note probable jurisdiction over all of the questions presented in these cases "[i]n order to facilitate expeditious resolution of [these cases] in accordance with the statutory mandate," Response of Executive Branch Defendants to McConnell J.S. 7.

2. Although the Executive Branch defendants do not take a definitive position on the appropriate date for oral argument, appellants agree that expedited oral argument is warranted, and favor oral argument in early September. Holding oral argument on September 5 or 8 will enable this Court to have approximately one month to begin preparing its opinions in these cases before the official start of the October 2003 Term. And holding oral argument on one of these dates will give the Court a better chance to resolve these cases as early as possible in the 2004 election cycle, which is already underway.

3. Appellants, however, oppose the Executive Branch defendants' preferred briefing format and length.

a. As the Executive Branch defendants concede, this Court's "usual practice" is to order three simultaneous rounds of briefing in cases involving appeals and cross-appeals. Mot. of Executive Branch Defendants for Expedited Briefing Schedule 6. There are no special circumstances here that warrant departing from the "usual practice" and ordering only "two rounds" of briefing. The Court has typically reserved the "two-round" format -- in which each side files an opening and reply brief -- only for cases involving extraordinarily severe time constraints. See, e.g., Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 1004 (2000) (certiorari granted on November 24, 2000; oral argument set for December 1); Raines v. Byrd, 520 U.S. 1194 (1997) (probable jurisdiction noted on April 23, 1997; oral argument set for May 27); Felker v. Turpin, 517 U.S. 1182 (1996) (certiorari granted on May 3, 1996; oral argument set for June 3). Even if this Court decides to hold oral argument as early as September 5, no similarly severe time constraints exist here. Should the Court note probable jurisdiction at the June 5 Conference, the parties would have fully three months between the noting of probable jurisdiction and oral argument -- almost exactly as long as many parties had this Term for briefing on the merits in "non-expedited" cases. See, e.g., Beneficial Nat'l Bank v. Anderson, 123 S. Ct. 990 (2003) (certiorari granted on January 24, 2003; oral argument set for April 30). With both plaintiffs and

defendants dissatisfied with parts of the district court's decision, there simply is no basis for departing from the normal "three-round" briefing format that generally governs appeals and cross-appeals.

The Executive Branch defendants also offer no valid justification for staggered briefing, much less for requiring the "plaintiffs" to file their opening briefs first. The parties to this case come before the Court not as "plaintiffs" or "defendants," but as appellants or appellees (or both, given the disposition below as applied to most of the parties); the mere fact that there may be some overlap between the subject matter of the appeals and cross-appeals is neither unusual nor problematic. In the rare case in which this Court orders a "two-round" briefing format, it traditionally requires both sides to file their opening and reply briefs simultaneously. See, e.g., Bush, 531 U.S. at 1004; Raines, 520 U.S. at 1194; Felker, 517 U.S. at 1182; but see AT&T v. Iowa Utils. Bd., 522 U.S. 1101 (1998) (ordering staggered briefing in case involving cross-appeals). Requiring plaintiffs to go first would be particularly inequitable here. The numerous lawsuits below were filed by scores of plaintiffs, many with different and even conflicting interests. Under the Executive Branch defendants' proposed schedule, the plaintiffs would have only three weeks to coordinate their briefing efforts (and agree on

joint briefs to the extent possible) -- much less actually to prepare their 100-page opening briefs. The Executive Branch and Intervenor defendants, by contrast, would have fully six weeks to write their own 100-page opening briefs. Accordingly, fairness dictates that the Court order simultaneous briefing even if the Court were to take the unusual step of requiring two rather than three rounds of briefing.

Moreover, to the extent that this Court should decide that its "usual practice" of simultaneous briefing is somehow inappropriate here, it makes far more sense for the defendants, not the plaintiffs, to go first. Where the constitutionality of a statute that substantially burdens First Amendment rights is at issue, it is, of course, the responsibility of the defendants to present the justifications for burdening those rights in the first instance. Moreover, wishful press statements notwithstanding, even a cursory reading of the district court's judgment demonstrates that the plaintiffs, not the defendants, prevailed far more substantially below. To be sure, both sides have appealed (and some of the plaintiffs did appeal first), but on the two primary issues before this Court, the district court: (1) accepted plaintiffs' position and invalidated virtually the entirety of the restrictions on the raising and spending of "soft money" under section 101 of BCRA, and (2) accepted plaintiffs' position and invalidated both the primary

and secondary definitions of "electioneering communications," as written, under section 203 of BCRA. In addition, the district court struck down many of the remaining provisions of BCRA, including the advance-disclosure requirements of section 201; the forced choice between coordinated and independent expenditures in section 213; the ban on contributions by minors in section 318; and the reporting and recordkeeping requirements of section 504. Indeed, as reflected in appellants' jurisdictional statement, plaintiffs lost only on narrow issues with regard to the "soft money" and "electioneering communications" provisions, and on a limited number of other issues that the district court refused to reach on justiciability grounds.

Accordingly, compelling plaintiffs to masquerade solely as appellants and file their briefs first would deprive them unfairly of their hard-won victories below. Moreover, requiring plaintiffs to go first would be especially perverse with respect to certain plaintiff groups, who entirely or almost entirely prevailed below: for example, the plaintiffs in Echols v. FEC (who challenged solely the ban on contributions by minors), see Opp. of Emily Echols et al. 3, or the plaintiffs in Republican National Committee v. FEC (who challenged solely the restrictions on political parties). In the end, the only explanation for the proposal for staggered

briefing must lie not in its merits, but rather in a strategic desire to have the last word on all the issues before the Court.

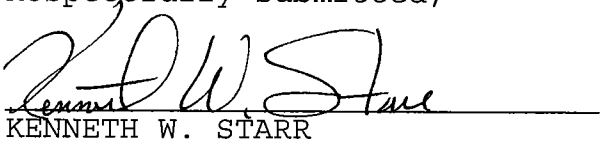
b. Moreover, if this Court adheres to its traditional "three-round" briefing schedule, there is no reason that opening briefs need be as long as the 100 pages which the Executive Branch defendants propose. Appellants were alone below in challenging all the provisions addressed by the district court. Yet even our comprehensive position can be briefed with at most a modest increase over the traditional page limits -- 60 pages for appellants' opening brief, 60 pages for our cross-appellees' opening brief, and 20 pages for our appellants' reply brief. While other plaintiffs below will necessarily be filing their own briefs because of their diverse interests, many (perhaps most) will not require, and probably will not file, three briefs, or briefs of the length required for appellants' comprehensive challenge. Should the Executive Branch or Intervenor defendants wish to seek a further increase over these limits, the appropriate procedure would be for them to move separately for such an increase, not to seek such an increase for themselves under the cover of seeking an increase for parties across the board. Moreover, to the extent that the various appeals by plaintiffs present distinct issues, the defendants can always file separate briefs as cross-appellees in those appeals, as the Executive Branch defendants themselves

concede. See Mot. of Executive Branch Defendants for Expedited Briefing Schedule 4.

c. In sum, there is no reason for this Court to vary its ordinarily applicable rules regarding briefing format or to grant page extensions beyond those proposed above. As for the schedule of briefing, appellants agree with the alternative schedule proposed by the Executive Branch defendants for a "three-round" briefing format, with briefs to be due on July 8, August 4, and August 22. See id. at 6 n.1.

4. Finally, there is no reason for this Court to wait to decide how much time to allocate for oral argument in these cases. As the Executive Branch defendants note, in Buckley v. Valeo, 424 U.S. 1 (1976), the Court allocated a total of four hours for oral argument. Appellants submit that a similar amount of time will be needed in this case -- especially given the novel and complex provisions of BCRA dealing with "soft money" and "electioneering communications." Once this Court allocates a total amount of time for oral argument, counsel for appellants will consult with other counsel to develop an efficient plan for oral argument, and will move for division of argument as necessary at the appropriate time.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Kenneth W. Starr, a member of the Supreme Court Bar, hereby certify that one copy of the foregoing Response to Motion of the Appellees/Cross-Appellants Federal Election Commission, et al., for Expedited Briefing Schedule were served on all parties required to be served. Service was made by hand delivery, where practicable, or by Federal Express on May 27, 2003, to:

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