IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Senator Mitch McConnell, et al., Plaintiffs, v. Federal Election Commission, et al., Defendants, and Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, Senator James Jeffords, Intervening Defendants.	Civil Action No.: 02-CV-582 (CKK, KLH, RJL) ALL CONSOLIDATED CASES

MEMORANDUM OF LAW IN OPPOSITION TO MADISON CENTER PLAINTIFFS' MOTIONS FOR INJUNCTION PENDING APPEAL AND TO ALTER OR AMEND THE JUDGMENT, AND IN OPPOSITION TO THE AFL-CIO PLAINTIFFS' MOTION FOR AN INJUNCTION PENDING APPEAL

Intervening Defendants Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords respectfully oppose the Madison Center Plaintiffs' Motions for Injunction Pending Appeal and to Alter or Amend the Judgment, and the AFL-CIO Plaintiffs' Motion for an Injunction Pending Appeal.

Ignoring this Court's admonition to incorporate previously briefed arguments by reference,[1/] the AFL-CIO and a minority of the Plaintiffs represented by the Madison Center ("Madison Center") devote almost the entirety of their recent motions to rearguing the merits of the

1/ *See* May 8, 2003 Order at 5.

electioneering communications provisions. They remake these arguments in order to urge the Court to issue an injunction that is inconsistent with BCRA as passed by Congress *and* as construed by this Court.[2/] The presumption of validity to which all Acts of Congress are entitled weighs heavily against such extraordinary relief.[3/] The AFL-CIO and Madison Center correctly understand that the injunction they seek makes no sense at all unless they are right about the underlying constitutional issues. However, they are wrong about those issues, for all of the reasons set forth in the prior briefing and in the Court's own opinion. Furthermore, the AFL-CIO and Madison Center have utterly failed to show any irreparable harm from the general stay proposed by Defendants, the Intervening Defendants, and several Plaintiffs groups (with regard to Title II), which would maintain the primary definition of Electioneering Communication found in BCRA (which all agree will not take effect until December). Indeed, the absence of such a stay would thwart the public's interest in stable campaign finance law.[4/] Instead, the AFL-CIO and Madison Center proposal would all but ensure that the entities regulated by the

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[2/] *See* Madison Center Plaintiffs' Mem. in Supp. of Inj. at 3-18; AFL-CIO Mem. in Supp. of Inj. Pending Appeal at 1-4.

[3/] *See Turner Broadcasting Sys., Inc. v. FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C. J., in chambers) ("Unlike a stay, which temporarily suspends 'judicial alteration of the status quo,' an injunction 'grants judicial intervention that has been withheld by the lower courts.' . . . Not surprisingly, [plaintiffs] do not cite any case in which such extraordinary relief has been granted, either by a single Justice or by the whole Court.").

[4/] In considering whether to issue a stay, the Court must consider whether (1) the petitioner is likely to prevail on the merits, (2) whether the petitioner will be irreparably injured if relief is not granted, (3) whether the issuance of a stay would harm other parties, and (4) where the public interest lies. *See Washington Metro. Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977). The Madison Center and AFL-CIO Plaintiffs have not met their burden under any of these factors.

BCRA would be faced with three different sets of rules, all within a year's time. Accordingly, Intervening Defendants oppose the injunction sought by the AFL and Madison Center.[5/]

I. The Madison Center and AFL-CIO Plaintiffs Have Not Demonstrated a Substantial Likelihood of Success on the Merits.

Pursuant to the Court's directive, the Intervening Defendants will not reargue the constitutionality of the electioneering provisions, but will instead incorporate by reference the arguments made in previous briefs before this Court.[6/] Intervening Defendants continue to believe that both the primary and back-up definitions of the electioneering communications provision are constitutional and that the Supreme Court will ultimately uphold them.

As this Court's decision demonstrates, it is unlikely that the position taken by the AFL-CIO and the Madison Center will ultimately prevail. Although this Court struck down the primary electioneering communications provision, it upheld the back-up definition in large part. In particular, the Court rejected the theory that the "magic words" test adopted in *Buckley v. Valeo* is constitutionally required,[7/] and found that groups funded by corporate and union treasury

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[5/] The Madison Center has also filed a Motion to Alter or Amend the Judgment. This Motion inappropriately requests relief Plaintiffs did not seek in their original motion. *See* Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 2810.1 (3d. ed 2003) ("The Rule 59(e) motion may not be used to . . . raise arguments or present evidence that could have been raised prior to the entry of judgment."). The Plaintiffs' original motion for judgment, signed by attorneys for the Madison Center, among others, seeks only a judgment "declar[ing] that sections 101, 201, 202, 203, 204, 211, 212, 213, 214, 304, 305, 311, 316, 318, 319, and 504 of [BCRA] are unconstitutional." Plaintiffs' Motion for Judgment at 1. The Madison Center's belated request for additional relief is particularly incongruous here, as it would require additional briefing and delay in the face of a Congressional command for expedited litigation. *See* BCRA § 403(a)(4).

[6/] *See* Brief of Defendants at I-72 – I-134; Opposition Brief of Defendants at I-55 – I-96; Reply Brief of Defendants at I-41 – I-70.

[7/] *See* Kollar-Kotelly, J., Op. at 363 (holding that "express advocacy [the "magic words test"] is not a constitutional requirement. On this point, I am joined by Judge Leon and therefore speak for the Court.").

funds have used this test to evade the law.[8/] The Madison Center's recapitulation of this theory in its brief ignores the Court's ruling and provides no basis for the Court to grant their Motion.

The AFL-CIO and Madison Center additionally make much of the fact that the Court was not unanimous in upholding the constitutionality of the back-up definition.[9/] This argument does not support their Motion, however, because they do not seek a stay of all of the non-unanimous portions of the Court's opinion. Instead, they wield the argument selectively in opposition to the portions of the opinion with which they disagree.[10/]

II. The Madison Center and AFL-CIO Plaintiffs Have Not Proven That They Will Suffer Irreparable Injury.

The Madison Center and AFL-CIO Plaintiffs cannot possibly meet their burden to prove that they will suffer "irreparable" harm if the primary electioneering communications definition remains in effect. As the Madison Center acknowledges, that provision "would have no effect until December of this year (30 days before the primary seasons begin)."[11/] Their fellow Plaintiffs, the National Rifle Association and ACLU,[12/] recently argued (in our view, correctly)

8/ *See, e.g.*, Kollar-Kotelly, J., Op. at 389, FoF ¶ 2.2.7 (writing for the Court and finding that "[b]y the early 1990s and especially by 1996, interest groups had developed a strategy to effectively communicate an electioneering message for or against a particular candidate without using the magic words and thus avoid disclosure requirements, contribution limits and source limits."); *see also id.* at 398, FoF ¶ 2.6 (writing for the Court and finding that "[t]he documented behavior of corporations and labor unions also clearly demonstrates that issue advocacy is used as a tool of electioneering by corporations and labor unions.").

9/ *See* Madison Center Plaintiffs' Mem. in Supp. of Inj. at 12-13 ("A truncated definition favored only by one judge, who wins his position by having the lowest common denominator position, is hardly a strongly supported holding."); AFL-CIO Mem. in Supp. of Inj. Pending Appeal at 1 (same).

10/ *See* Madison Center Plaintiffs' Mem. in Supp. of Inj. at 1, 12-13 (asking Court to declare both primary and back-up definitions unconstitutional); AFL-CIO Mem. in Supp. of Inj. Pending Appeal at 1-2 (same).

11/ Madison Center Plaintiffs' Mem. in Supp. of Inj. at 1.

12/ The ACLU Motion joins the reasoning of the NRA and seeks the same remedy: a stay of the Court's ruling on Title II of BCRA. *See* ACLU Mot. For Stay Pursuant to Rule 62(c) at 3.

that the primary electioneering communications provision *should* remain in effect because it "would have [] little practical impact on free speech until December of this year, when the 2004 election campaign season begins and by which time a resolution by the Supreme Court could reasonably be expected."[13/]

The AFL-CIO advances only one, and the Madison Center only two arguments in support of their implausible position. The Madison Center argues that Plaintiffs National Right to Life Committee ("NRLC") and Club for Growth will be irreparably harmed because they are "in the midst of congressional legislative battles" and seek to run issue advertisements to support their positions.[14/] The AFL-CIO similarly argues that it "often broadcast[s] advertisements that address policy and legislative issues."[15/] However, neither party even attempts to explain how the global stay defendants favor – a stay that preserves the primary electioneering communications provision – would harm them, since such a stay would enable the NRLC, Club for Growth and AFL-CIO to run the ads regarding current legislative battles they discuss in their brief and declaration.

The Madison Center additionally argues that they need "planning time,"[16/] and will be irreparably harmed if they cannot prepare now to run advertisements next year. However, they offer no evidence that the Court's ruling is preventing them from making any plans they wish – even assuming the implausible premise that they could identify today the legislative agenda for

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13/ Mem. in Supp. of NRA & NRA Victory Fund's Mot. for Stay Pursuant to Rule 62(c) at 1.

14/ Madison Center Plaintiffs' Mem. in Supp. of Inj. at 18-19.

15/ Second Mitchell Decl. at 2.

16/ Madison Center Plaintiffs' Mem. in Supp. of Inj. at 2.

December. More importantly, purely speculative injury such as being prevented from "planning" potential future advertisements, is not sufficient to warrant a stay.[17/]

Additionally, the groups comprising the Madison Center Plaintiffs have failed to demonstrate that they would not fall under the *MCFL* exemption or the exception for Internal Revenue Code § 527 organizations.[18/] This Court left both of these exemptions available.[19/] By failing to demonstrate that BCRA's limits on electioneering communications would apply to them, the Madison Center Plaintiffs have failed to demonstrate standing to seek this injunction – much less that they would suffer "irreparable harm" if the injunction they seek does not issue.

On the contrary, both the parties to this litigation and the public as a whole will suffer irreparable harm if this Court does not stay enforcement of its recent opinion in all respects.[20/]

III. The Madison Center and AFL-CIO Plaintiffs' Proposed Injunction Will Cause Substantial Harm to Other Parties.

The Madison Center Plaintiffs assert, without any supporting evidence, that no other parties will suffer harm if the Court contorts its ruling and the BCRA to suit the Madison Center.[21/] The

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[17/] *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985). (holding that for an injury to be irreparable, "the injury [to the movant] must be both certain and great; it must be actual and not theoretical."); *McGregor Printing Corp. v. Kemp*, 811 F. Supp. 10, 13 (D.D.C. 1993) *vacated on other grounds by McGregor Printing Corp. v. Kemp*, 20 F.3d 1188 (D.C. Cir. 1994) (denying stay pending appeal because injury was merely speculative); *Friends of the Earth v. Armstrong*, 360 F. Supp. 165, 197 (D. Utah), *vacated on other grounds by Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973) (holding that court cannot rest its decision whether to grant a stay on a showing of damages which is entirely speculative).

[18/] In fact, in a recent case where the Madison Center Plaintiffs' attorney, Mr. Bopp, represented Hawaii Right to Life, Inc., the Court held that the plaintiff was likely to qualify as a protected non-profit corporation under *MCFL*. *See* Final Order in *Hawaii Right to Life, Inc. v. FEC*, Civ No. 02-02313 (D.D.C. Dec. 16, 2002) at 2.

[19/] *See* Per Curiam Op. at 9 ("Judge Kollar-Kotelly and Judge Leon . . . uphold the . . . Snowe-Jeffords exemption provision for certain non-profit corporations organized under Sections 501(c)(4) and 527 of the Internal Revenue Code . . . ."); *see also* Kollar-Kotelly, J., Op. at 357; Leon, J. Op. at 96-98.

[20/] *See, e.g.*, Mem. in Supp. of Intervening Defs. Mot. for Stay Pending Appeal at 7-8; Mem. in Supp. of Government's Mot. for Stay Pending Appeal at 8-13.

AFL-CIO does not address the issue of harm to others at all.[22] In fact, the injunction sought by the AFL-CIO and the Madison Center will harm all persons and entities affected by BCRA because it will engender further uncertainty about the relevant law. The Madison Center and AFL-CIO urge this Court to create a set of rules that is grounded in neither BCRA nor this Court's opinion. Given that there are costs to adjusting to each change in the law, the proposed injunction would impose costs on every person or entity who seeks to comply with federal campaign finance law. Furthermore, The act of setting aside a duly enacted statute, even if for a short time, irreparably injures both the government and the beneficiaries of the law.[23]

IV. The Proposed Injunction Runs Counter to the Public Interest.

Congress and the President have expressed the public interest by enacting BCRA. In their Motions, the AFL-CIO and Madison Center merely repeat their conception of the public interest and the First Amendment, heedless of the fact that Congress and this Court have both now taken a different view. Defendants and Intervening Defendants believe that granting a comprehensive stay of the Court's opinion – instead of the AFL-CIO and Madison Center's partial one – would best serve the public interest. But at the very least, the Court should allow those portions of BCRA upheld as constitutional to stand until the Supreme Court decides otherwise.

21/ *See* Madison Center Plaintiffs' Mem. in Supp. of Inj. at 19-20.

22/ *See* AFL-CIO Mem. in Supp. of Inj. Pending Appeal.

23/ *See New Motor Vehicle Bd. of Calif. V. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).

IV. Conclusion

For the foregoing reasons, the Intervening Defendants respectfully request that the Court deny the Madison Center and AFL-CIO Plaintiffs' motion for a partial injunction of its ruling.

Dated: May 12, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2003, I caused a true and accurate copy of Intervening Defendants' Opposition to the Madison Center Plaintiffs' Motions for Injunction Pending Appeal and to Alter or Amend the Judgment, and in Opposition to the AFL-CIO Plaintiffs' Motion for an Injunction Pending Appeal to be served upon the following individuals by email and by first class mail:

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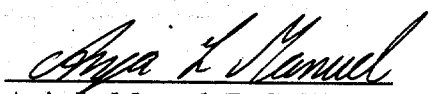

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