No. 02A-

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL RIFLE ASSOCIATION, ET AL., APPLICANTS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPLICATION TO STAY INJUNCTIVE ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
PENDING APPEAL TO THE UNITED STATES SUPREME COURT

INTERVENOR-DEFENDANTS' RESPONSE TO APPLICATION OF THE NATIONAL RIFLE ASSOCIATION FOR A STAY OF THE JUDGMENT OF THE DISTRICT COURT

On May 2, 2003, the three-judge district court in this case issued a series of lengthy opinions, in which that court upheld several provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA or Act), Pub. L. No. 107-155, invalidated other provisions as unconstitutional, and permanently enjoined the enforcement of those provisions that it held unconstitutional. In the district court, both the government and the intervenor-defendants (Senator McCain, *et al.*) have moved for a stay of all aspects of the district court's judgment, insofar as it held the BCRA unconstitutional and enjoined its enforcement. Plaintiff-appellants National Rifle Association (NRA), *et al.*, have moved in the district court for a *partial* stay of the district court's judgment, *only* insofar as the district court invalidated parts of BCRA, in § 201 and § 203, that prohibit the financing of certain statutorily defined "electioneering communications" from general corporate and union funds. In addition, both the NRA and the government have applied to the district

court for an immediate temporary stay, pending the district court's decision whether to issue a stay of its injunctive order during the parties' appeal to this Court. The district court has directed that all responses to all stay applications be filed by Monday, May 12, and that all replies in support of the stay applications be filed by Wednesday, May 14. *See* Briefing Order of May 8, 2003, at 4-5. The parties are currently in the process of filing those pleadings in the district court.

Not content to wait for the district court's decision on the stay applications,[1] the NRA has now filed a stay application in this Court that essentially replicates its stay application in the district court, in that it requests a stay of only *part* of the district court's judgment. While the intervenor-defendants do not oppose the stay sought by the NRA, either in the district court or in this Court, we submit that the *entirety* of the district court's injunction should be stayed — especially including the district court's partial invalidation of BCRA's prohibition against use of "soft money" by party committees in a manner that could influence federal elections — pending this Court's final disposition of all the appeals from the judgment of the three-judge district court. Above all else, the public interest overwhelmingly supports the issuance of a stay of the entirety of the district court's judgment in this case.

BACKGROUND

1. On March 27, 2002, the President signed BCRA into law. Congress recognized that actors in the political system would have to adjust their campaign finance practices to meet

[1] Despite the NRA's claim that the district court's decision "operates to silence the NRA's political speech now," NRA Emergency Stay App. at 1 (emphasis in original), the NRA never demonstrates that the funds of its PAC, the NRA Political Victory Fund (a co-plaintiff in this litigation) would be insufficient to fund any ad it seeks to run. *See, e.g.*, Kollar-Kotelly op. 471-72 n.143 (writing for the Court). Indeed, the NRA had sufficient PAC funds during the 2000 election cycle to use that money for expenditures that the law permits to be paid with general *treasury* funds. *See* Atkins Cross. Tr. (Oct. 10, 2002) at 41.

the new requirements of BCRA, and acted to ensure that the new law would be implemented without undue disruption of the federal election process. To that end, Congress (a) delayed the effective date of BCRA (which was enacted during an election year) until after the 2002 federal election cycle, so that the parties could have to time to prepare for the new requirements, (b) required the Federal Election Commission (FEC) to issue final rules on the new soft money provisions within 90 days, and final rules on all other provisions of the law within 270 days, of the date of BCRA's enactment, (c) required expedited review of all constitutional challenges to the Act, and (d) provided a right of direct appeal to this Court from any final district court decision on the constitutionality of the Act. *See* BCRA § 402(a)(1) (effective date), § 403(a)(3) (right of appeal), § 403(a)(4) (expedited review). Congress's intent and expectation was that the entirety of the BCRA, as enacted, would apply to all elections in the 2004 election cycle.

With exceptions not relevant here, BCRA took effect on November 6, 2002. At no prior time during the litigation of this case did any party argue that BCRA should not be allowed to take effect. Thus, for more than six months, BCRA has defined the principal rules of federal campaign finance regulation, and the parties have been subject to those rules.

2. On May 2, 2003, the district court issued a decision upholding portions of BCRA and declaring other provisions of the law unconstitutional. The district court also entered an injunction permanently enjoining the defendants from enforcing those portions of BCRA that it held unconstitutional.

Numerous parties have already filed notices of appeal to this Court from the district court's judgment, in compliance with the BCRA's requirement that all such notices of appeal be filed within 10 days of that judgment. *See* BCRA § 403(a)(3). In addition, several parties have already filed jurisdictional statements in this Court. *See id.* (jurisdictional statements must be

filed within 30 days of district court's decision). For example, on May 2, plaintiffs Senator McConnell, *et al.*, who have challenged the constitutionality of BCRA across the board, filed a jurisdictional statement invoking this Court's review of those aspects of the district court's judgment upholding the BCRA. On May 12, the government defendants filed a jurisdictional statement invoking the Court's review of those aspects of the district court's decision that invalidated the BCRA. The intervenor-defendants have filed a notice of appeal and expect to file their jurisdictional statement shortly. It appears likely, therefore, that this Court will soon note probable jurisdiction of these appeals.

The number of complex issues addressed, the variety of positions and voting combinations taken by the three judges on the district court (Per Curiam op. at 5), and the sheer volume of the lower court's opinions will inevitably invite disagreement among the parties and other participants in the political process regarding the implications of the lower court's decision. In light of this uncertainty, the FEC has indicated that it might be required to provide interim guidance regarding the effect of the lower court's decision on the campaign finance laws, should it remain unstayed.[2] But as the government has observed in its papers filed in the district court, it is far from clear that, as a practical matter, the FEC would be able to provide final, considered guidance significantly earlier than this Court might be expected to render its final judgment in

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[2] *See, e.g.*, BNA Today, May 6, 2003 (FEC is "considering issuing guidelines to the political community about how the nation's new campaign finance law will be enforced in light of a federal court decision that drastically changes some of the law's key provisions"); *id.* (statement by FEC Chair Ellen Weintraub that the FEC is "'sensitive to the need of the regulated community for some clarity. . . . We're reviewing it as quickly as possible and we will try to get guidance out as quickly as possible.'").

this case, or indeed to be useful for the 2004 election cycle.[3] Any such guidance will certainly take weeks or months to prepare in compliance with the Administrative Procedure Act.

As a result, if the district court's judgment remains in effect, there will be widespread confusion about the state of federal election law until this Court issues its decision on the merits. Some may seek to take advantage of this uncertainty by testing the limits of the law. It is very likely that, if the district court's decision is not stayed, some party committees will raise and spend substantial sums of soft money with the purpose and, quite possibly, the effect, of influencing the 2004 federal elections. Indeed, the district court's decision creates an incentive for political parties to raise and spend soft money *now*: if this Court eventually sustains the BCRA's ban on use of soft money by national party committees in its entirety, the principal national party organizations will not be permitted to spend soft money contributions that they might have raised in the interim.

Moreover, if the district court's judgment is not stayed pending appeal, the Nation will face the prospect of adjusting to several separate sets of campaign finance laws in roughly a year's time. Before November 6, 2002, the pre-BCRA version of the Federal Election Campaign Act of 1971 ("FECA") governed financing of federal election campaigns. After November 6, 2002, FECA, as amended by BCRA, applied. If the district court's decision is not stayed, then that decision will dictate yet another set of rules. But, if this Court sustains BCRA in its entirety

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[3] For example, a central feature of the district court's judgment is that it invalidated much of BCRA's restrictions on the raising and spending of soft money (i.e., money not subject to the requirements of the Federal Election Campaign Act). Before BCRA was enacted, the FEC had in place regulations that required party committees to allocate the funding of certain election activity that affected both state and federal elections with a combination of hard and soft money. But BCRA rendered such allocation rules unnecessary by eliminating the soft-money accounts of national party committees, and so the FEC repealed those allocation rules. The district court has revived the ability of national party committees to raise and spend soft money, even though the FEC has no allocation rules currently in place. *See* Mem. of Points and Authorities in Support of Gov't Defs. Motion for Stay 10-11 (D.D.C. filed May 9, 2003).

or in principal part, then the interested parties will then have to shift back to the set of rules enacted by Congress in BCRA.

ARGUMENT

The central consideration governing the issuance of a stay in this case is that the district court has "invalidated part of an Act of Congress." *Marshall v. Barlow's Inc.*, 429 U.S. 1347, 1348 (1977) (Rehnquist, J., in chambers). As such, "[t]he presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships." *Walters v. National Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers). This case presents a particularly compelling case for a stay of the district court's injunction: the statute at issue was intended to address concerns that Congress deemed to be fundamental to the integrity of our political system, and Congress has provided for direct appellate review in this Court of any district court decision invalidating BCRA. In the absence of a stay, moreover, there will be grave uncertainty about the rules that govern the financing of election campaigns in the impending 2004 cycle.

Even if this case did not involve the constitutionality of an Act of Congress and did not present issues of such great moment, it would be clear that the district court's judgment should be stayed. Typically, in considering whether to stay a judgment pending appeal to the Court, this Court (or an individual Justice) considers four factors: First, is there a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction? Second, is there a "fair prospect" that a majority of the Court will conclude that the decision below was erroneous? Third, is irreparable harm likely to result from the denial of a stay? Finally, what are the relative harms to the parties and to the public at large?

See Rostker v. Goldberg, 448 U.S. 1306, 1308-1309 (1980) (Brennan, J., in chambers); *see also Rubin v. United States*, 524 U.S. 1301, 1301-1302 (1998) (Rehnquist, C.J., in chambers); *Edwards v. Hope Med. Group for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers); *California v. American Stores Co.*, 492 U.S. 1301 (1989) (O'Connor, J., in chambers); *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). In this case, all four factors point decisively to a stay of the entirety of the district court's injunctive order — and *against* only a partial stay, such as the NRA has requested.

1. There appears to be little doubt that the Court will note probable jurisdiction over the various appeals from the district court's judgment. BCRA provides for direct appellate review in this Court of the district court's order. See BCRA §§ 403(a)(3)-(4). This case, therefore, falls within the Court's "obligatory jurisdiction." *See, e.g., New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 (1977) (Rehnquist, J., in chambers) ("Because the case presumably will be coming to us by appeal and will therefore be within our obligatory jurisdiction, I feel reasonably certain that four Members of the Court will vote to note probable jurisdiction and hear the case on the merits . . .").

2. Although it cannot be determined with "mathematical certainty" how each Justice might rule in a case,[4] there is at minimum a "fair prospect" that this Court will reverse substantial parts of the district court's judgment invalidating provisions of BCRA, including its invalidation of portions of the soft money rules contained in Title I. Far from breaking new constitutional ground, BCRA is an exercise of the well-established power of Congress to protect the public

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[4] *California v. American Stores Co.*, 492 U.S. 1301, 1306 (1989) (O'Connor, J., in chambers) ("Although I cannot, of course, predict with mathematical certainty my colleagues' views on this subject, . . . plausible arguments exist for reversing the decision below and . . . there is at least a fair prospect that a majority of the Court may vote to do so.").

against corruption and the appearance of corruption by (a) limiting individual contributions to federal candidates and (b) proscribing expenditures of general corporate and union treasury funds in connection with federal elections. Since 1974, Congress has capped contributions by individuals to candidates and parties in connection with federal elections.[5] This Court has consistently upheld such contribution limits.[6] Further, since 1907, Congress has banned the use of corporate treasury funds for contributions to federal candidates and their parties;[7] since 1947, Congress has similarly banned expenditures of union treasury funds in connection with federal elections.[8] This Court has consistently upheld laws that bar the use of such funds in connection with candidate elections, including independent expenditures.[9]

BCRA responds to a widespread pattern of circumvention of Congress's rules governing contribution limits and corporate and union contributions and expenditures in connection with federal elections that Congress amply documented after years of investigation. Title I of BCRA closes the "soft money" loophole that permitted the injection of hundreds of millions of dollars of corporate contributions into the coffers of political parties for use in federal elections; Title II closes the sham "issue ad" loophole that reintroduced immense corporate expenditures directly into federal elections. In closing these gaping loopholes, Congress acted well within constitutional bounds. The constitutionality of the 1907, 1947, and 1974 laws is unchallenged in this litigation, and Congress has the settled authority to prevent their circumvention, as well as

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5 Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. § 431 *et seq.*) ("FECA").

6 *See Buckley v. Valeo*, 424 U.S. 1, 26-36 (1976); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000),

7 Federal Corrupt Practices Act, Pub. L. No. 59-36, 34 Stat. 864 (1907) ("Tillman Act").

8 Labor Management Relations Act of 1947, Pub. L. No. 80-101, § 304, 61 Stat. 159 ("Taft-Hartley Act").

9 *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 661 (1990); *FEC v. National Right to Work Comm.*, 459 U.S. 197, 209-210 (1982).

the erosion of public confidence in the law that comes with the wholesale disregard for the limits Congress has set and the courts have sustained.[10] At the same time, BCRA leaves individuals and groups of individuals free to make independent expenditures in any amount, and also permits corporations and unions to operate segregated but related political committees to finance both contributions and independent expenditures, subject to FECA's long-standing rules limiting contributions to candidate campaign committees and requiring disclosures to preserve public confidence in the integrity of federal elections.[11]

3. Absent a stay, both the parties to this litigation and the public as a whole will suffer irreparable harm in at least three ways:

First, the district court's decision, if unstayed, will lead to great uncertainty as to how political parties and candidates can and may finance advertisements with an eye to the 2004 elections. The decision may well influence the outcome of those elections, depending on how candidates react to and take advantage of that uncertainty. Before the district court's decision, the parties and candidates were obligated to adhere to the rules of BCRA, including the ban on soft money, and none of the plaintiffs sought in this litigation to prevent those rules from coming into effect before issuance of the district court's final decision. Now, the district court's decision, which invalidated part of the soft-money ban, allows the parties to raise and spend unlimited soft money in a manner that could influence federal elections, except with respect to a certain statutorily defined class of advertisements (2 U.S.C. § 431(20)(A)(iii)), as to which the

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[10] *See California Med. Ass'n v. FEC*, 453 U.S. 182, 198-199 (1981); *FEC v. Colorado Rep. Fed. Campaign Comm.*, 533 U.S. 431, 447, 457, 464 (2001).

[11] BCRA also guards against a repetition of the documented massive circumvention of statutory expenditure limits in FECA by candidates for President who accepted public money on condition that they would observe statutory expenditure limits, and then raised soft money for their parties to spend on advertisements to promote their campaigns. *See, e.g., Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*, S. Rep. No. 105-167, at 105-129 (1998).

district court sustained the soft-money restriction. As we have explained, there is at least a fair prospect that this Court will reverse the district court and reinstate the soft-money ban that Congress found necessary to protect the integrity of federal elections. But if and when this Court does so, the parties will then have to revert back to a soft-money ban, even though they will have *already raised* soft money. That prospect creates a massive incentive for parties to raise and spent soft money *immediately*, until this Court restores the regime that Congress enacted. At the same time, candidates and party committees that might take a more conservative approach, adhering more strictly to the law as written by Congress, may well find themselves at a significant disadvantage vis-à-vis their rivals who decide to take advantage of the district court's decision by raising and spending massive amounts of soft money from corporations, unions, and wealthy individuals.

Second, the confusion engendered by the district court's decision threatens to undermine public confidence in the democratic process, as will any renewed injection of soft money into elections for federal office. Congress enacted BCRA to put a stop to serious abuses that have engendered widespread cynicism about the integrity of federal elections and officeholders. As this Court has noted, "[c]onflict of interest legislation is 'directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.'" *Crandon v. United States*, 494 U.S. 152, 165 n.20 (1990) (citation omitted); *see also Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000) ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.").

Finally, the act of setting aside a duly enacted Act of Congress — even for a short period of time — irreparably injures both the government and the public, the beneficiaries of that law. Thus, "any time a State is enjoined by a court from effectuating statutes . . . of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd.*, 434 U.S. at 1351 (Rehnquist, J., in chambers). Similarly, where a lower court enjoins enforcement of an Act of Congress, the harm to the public is immediate; and if that judgment is later reversed on appeal, the harm incurred is irreparable. *Cf. National Ass'n of Radiation Survivors*, 468 U.S. at 1324 (Rehnquist, J., in chambers); *Barlow's, Inc.*, 429 U.S. at 1348 (Rehnquist, J., in chambers).[12]

4. The public interest speaks forcefully in favor of a stay of the entirety of the district court's injunctive order — and not just a part of it. First, the public interest in avoiding confusion and disruption of the impending election cycle favors a stay. Notably, Congress expressly considered the public interest in avoiding disruption of federal elections and took steps designed to avoid that problem. Congress delayed the effective date of BCRA, which was enacted into law while the 2002 election season was already in full swing, until after the November 2002 election, so that the political parties and candidates would not have adjust mid-course. Congress also directed that any constitutional challenge to BCRA be litigated with dispatch, including a direct appeal to this Court from the district court without the customary review in the intermediate court of appeals, so that any constitutional cloud over BCRA could be

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[12] Parties opposing a stay may contend that a stay would be inappropriate in light of the fact that the district court invalidated BCRA on First Amendment grounds. This Court has granted stays in First Amendment cases, however, where the standards for issuance of a stay were otherwise met. *See Ashcroft v. North Jersey Media Group, Inc.*, 536 U.S. 954 (2002) (staying district court preliminary injunction awarded on First Amendment grounds); *see also Secretary of Interior v. Community for Creative Non-Violence*, 464 U.S. 989 (1983) (declining to vacate stay of court of appeals' mandate in First Amendment case).

dispelled as quickly as possible.[13] Until now, the parties have operated under the rules of BCRA, and no unfairness would be worked by maintaining those rules in effect until this Court issues its decision in this case. By contrast, the NRA's submission that only *part* of the district court's injunction should be stayed would only magnify the confusion and disruption resulting from the district court's order by creating three classes of rules in BCRA — those upheld by the district court and still in effect; those invalidated but at least temporarily still in effect pending this Court's final decision; and those invalidated and (perhaps temporarily) not in effect until this Court's final decision. Such a piecemeal approach to Congress's handwork does not promote the public interest and should be rejected.

CONCLUSION

For the foregoing reasons, the injunctive order entered by the district court in this case should be stayed in its entirety pending this Court's final disposition of all of the appeals from that order.

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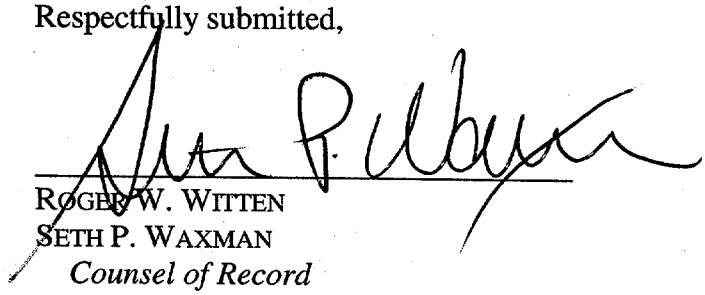
[13] *See, e.g.*, 148 Cong. Rec. S2096, S2142 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold) ("This expedited judicial review process will assist an orderly transition from the old system to the new system under this bill. Furthermore, the FEC is charged with promulgating soft money regulations well before the date that the soft money ban will take effect. In short, with enactment of the bill, promulgations of key regulations, and a prompt and efficient resolution of the litigation, we will be in a position in which a new campaign finance system can be implemented in a certain and sure fashion for the 2004 elections."); 148 Cong. Rec. S2096, S2142 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (responding to a question about the "effective date" provision, and stating "[b]ecause of the delay in getting the bill through the House, it became clear that there would be a number of very complicated transition rule issues and implementation problems if we were to try to put the bill into effect for the 2002 elections. We reluctantly determined that it would simply not be practical to apply new rules in the middle of the election cycle. To change the rules in the middle of the campaign would have created uncertainty and potential unfairness, particularly since primaries are imminent in some States.").

Respectfully submitted,



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