IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al., Plaintiffs, v. FEDERAL ELECTION COMMISSION, et al., Defendants.	Civ. No. 02-0582 (CKK, KLH, RJL) **All Consolidated Cases**

GOVERNMENT DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTIONS FOR A STAY PENDING APPEAL, FOR AN INJUNCTION PENDING APPEAL, AND TO ALTER OR AMEND THE JUDGMENT

Defendants Federal Election Commission, the United States of America, the U.S. Department of Justice, John Ashcroft, Attorney General of the United States, and the Federal Communications Commission, respectfully file this response to motions filed by several of the plaintiffs to stay portions of this Court's Final Judgment; to enjoin operation of parts of BCRA that this Court found constitutional; and to amend the Final Judgment to extend it to third parties who have never participated in this litigation. The multiple stay requests filed by parties on both sides of this case (including by the government defendants) underscore the propriety of granting a stay of this Court's ruling – in its entirety – pending resolution of the expedited appeals to the Supreme Court already underway. But the government defendants oppose plaintiffs' unusual requests for injunctive relief and to amend the judgment to extend it to parties not even before this Court.

1. As explained in the government's stay motion, BCRA enjoys a strong presumption of constitutionality and should remain in effect pending a final decision on the merits by the Supreme Court in the expedited appeals that have been filed in this case. See Turner Broadcasting Sys., Inc.

v. FCC, 507 U.S. 1301, 1302 (1993) (Rehnquist, C. J., in chambers). The stay motions filed by the intervening defendants and National Rifle Association, AFL-CIO, ACLU, and Madison Center plaintiffs only highlight the propriety of a stay of the Court's Final Judgment pending expedited Supreme Court review. The "balance of equities" clearly favors a stay when both plaintiffs and defendants seek one. Although plaintiffs seek a stay only of the portion of this Court's judgment addressing the definition of "electioneering communications," the judgment of this Court should be stayed in its entirety pending Supreme Court review in order to minimize the disruption caused by this Court's decision as the Nation prepares for the 2004 federal election cycle.

The differing views and extensive analyses reflected in the opinions authored by the members of this Court in its ruling invalidating some, but not other, provisions of BCRA demonstrates that at a minimum there is substantial room for disagreement with respect to the constitutionality of BCRA's various provisions. Rather than attempting to revisit every aspect of this Court's divided ruling to determine on a piecemeal basis what portions of the judgment should be stayed, the Court should stay the ruling in its entirety and leave the legal regime enacted by Congress in place during the interim period that it takes for the Supreme Court to resolve the parties' appeals on an expedited basis. Staying the Court's decision in its entirety will minimize the potential disruption and regulatory chaos that would ensue if the Federal Election Commission (FEC) and regulated parties were forced to go from learning and seeking to adapt to the new rules enacted by Congress in BCRA; to learning and seeking to adapt to the new rules established by this Court through the combined effect of its various opinions; to learning and seeking to adapt to the new rules established by the Supreme Court in the ultimate decision in this case – all in the critical months leading up to the federal election cycle in 2004. Staying the Court's judgment on a piecemeal basis is likely only to engender further confusion about what rules are in effect at any given time.

Immediately staying this Court's final judgment in its entirety also would simplify the expedited proceedings that are already under way in the Supreme Court. In accordance with the expedited appellate review called for by BCRA, numerous parties (including the government defendants) have noticed appeals to the Supreme Court. The Supreme Court will soon consider and act on the jurisdictional statements filed by the parties and likely set an expedited schedule for the final resolution of this case. Denying a stay in whole or in part would only complicate the proceedings now underway in the Supreme Court in that parties would likely be forced to seek a stay in the Supreme Court of any aspects of this Court's ruling that are not stayed by this Court.

2. Certain Madison Center plaintiffs (joined by the AFL-CIO) have requested this Court to take certain extraordinary steps in the wake of its decision that are unnecessary if this Court grants the parties' requests for a stay and, in any event, are without merit.

a. The Madison Center plaintiffs ask this Court to enjoin enforcement of the "electioneering communications" provisions of BCRA that this Court upheld. But the presumption of validity to which all Acts of Congress are entitled, reinforced by this Court's judgment that the relevant provisions are indeed constitutional, weighs heavily against such extraordinary relief. "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.'" Turner Broadcasting, 507 U.S. at 1302 (citations omitted; emphasis added). "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." Id. at 1302-03; Brown v. Gilmore, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers) ("It is established, and our own rules require, that injunctive relief under the All Writs Act is to be used

"'sparingly and only in the most critical and exigent circumstances.'" (citations omitted)).[1] There is no basis whatever for granting such extraordinary injunctive relief in this case.

In requesting an injunction pending appeal, the Madison Center plaintiffs seek to avoid immediate application to their communications of BCRA's ban on the use of union and corporate general treasury funds for "electioneering communications," insofar as this Court upheld BCRA's fallback definition of such communications. The same practical effect would more appropriately be achieved, however, simply by granting a stay of this Court's Final Judgment. Such a stay would leave in place BCRA's primary definition of "electioneering communications," which is limited to communications made 60 days before a federal general election or 30 days before a federal primary election. See BCRA § 201 (amending 2 U.S.C. 434(f)).

b. The Madison Center plaintiffs also ask this Court to alter or amend its Final Judgment to extend it beyond the parties to this action. That request should be rejected. First, there is of course no basis to expand the judgment if this Court stays the judgment. Second, the Madison Center lacks standing to raise the rights of third parties who have not participated in this case. See Madsen v. Women's Health Center, Inc., 512 U.S. 753, 775 (1994) (finding that named parties "lack[ed] standing to challenge a portion of the order applying to persons who are not parties"). Third, even if the Madison Center could demonstrate standing, granting its motion would violate the well-established rule that "'[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" Virginia Soc. for Human Life v. FEC, 263 F.3d 379, 392 (4th Cir. 2001) (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979)) (emphasis

[1] Plaintiffs' reliance on Homans v. City of Albuquerque, 264 F.3d 1240 (10th Cir. 2001), is misplaced. The court in that case enjoined the effect of a city charter provision, not an Act of Congress, and the court indicated that the charter provision was at odds with binding Supreme Court precedent. See id. at 1243-1244. For the reasons explained in the government's merits briefs, that is plainly not true of the congressionally enacted BCRA.

added). Preventing enforcement of a statute against a non-plaintiff does not provide any proper relief to a plaintiff and, thus, the general rule is that a prevailing party may not obtain an injunction against the enforcement of a statute against another entity, much less on a nationwide basis. See ibid.

CONCLUSION

For the foregoing reasons, and those stated in our stay motion, the Court should stay its May 2, 2003 Final Judgment pending resolution of the expedited appeals in this case by the Supreme Court of the United States. The Court should deny the Madison Center Plaintiffs' Motion for Injunction Pending Appeal and their Motion to Alter or Amend the Judgment.

Respectfully submitted,

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Dated: May 12, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al., Plaintiffs, v. FEDERAL ELECTION COMMISSION, et al., Defendants.	Civ. No. 02-0582 (CKK, KLH, RJL) **All consolidated cases.**

(PROPOSED) ORDER

These consolidated cases are before the Court upon (1) Plaintiffs National Rifle Association's and National Rifle Association Political Victory Fund's Motion for Stay Pursuant to Rule 62(c); (2) Plaintiffs National Rifle Association's and National Rifle Association Political Victory Fund's Motion for Administrative Stay Pending Adjudication of Their Motion for Stay Under Rule 62(c); (3) Plaintiff American Civil Liberties Union's Motion for Stay Pursuant to Rule 62 (c); (4) Certain Madison Plaintiffs' Motion for Injunction Pending Appeal; (5) the Motion of Plaintiff AFL-CIO for an Injunction Pending Appeal; and (6) the Madison Center Plaintiffs' Motion To Alter or Amend the Judgment. The Court having considered these motions, and the parties' respective submissions in support of and in opposition thereto,

IT IS HEREBY ORDERED THAT:

1. Plaintiffs National Rifle Association's and National Rifle Association Political Victory Fund's Motion for Stay Pursuant to Rule 62(c) is hereby DENIED;

2. Plaintiffs National Rifle Association's and National Rifle Association Political Victory Fund's Motion for Administrative Stay Pending Adjudication of Their Motion for Stay Under Rule 62(c) is hereby DENIED;

3. Plaintiff American Civil Liberties Union's Motion for Stay Pursuant to Rule 62 (c) is hereby DENIED;

4. Certain Madison Plaintiffs' Motion for Injunction Pending Appeal is hereby DENIED;

5. The Motion of Plaintiff AFL-CIO for an Injunction Pending Appeal is hereby DENIED; and

6. The Madison Center Plaintiffs' Motion To Alter or Amend the Judgment is hereby DENIED.

So ORDERED this _____ day of May, 2003.

HON. KAREN LECRAFT HENDERSON
UNITED STATES CIRCUIT JUDGE

HON. COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

HON. RICHARD J. LEON
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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2003, copies of the foregoing document was served (1) upon all counsel known to be designated by the parties for service by electronic mail, by electronic mail, (2) upon the following by facsimile:

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