IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Reply in Support of
Certain Madison Center Plaintiffs' Motion for Injunction Pending Appeal
&
Madison Center Plaintiffs' Motion to Alter or Amend the Judgment

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Argument

Certain James Madison Center for Free Speech (JMC) Plaintiffs (Club for Growth, Inc., Indiana Family Institute, Inc., National Right to Life Committee, Inc., National Right to Life Educational Trust Fund) have moved for an injunction pending appeal of this Court's truncated backup definition of "electioneering communication." They now reply to responses by the Government Defendants and the Intervening Defendants.

Furthermore, all JMC Plaintiffs also moved the court to alter or amend its judgment and now reply to responses by the same Defendants.

I. The Motion for Injunction Pending Appeal Should Be Granted.

The Intervenors argue that the requested injunction should be denied because (1) a presumption that all acts of Congress are constitutional precludes the injunction; (2) there is no irreparable harm "*from the general stay*" (not from the reigning truncated backup "electioneering communication" *definition*) and JMC Plaintiffs might fit BCRA's *MCFL* exemption anyway; and (3) the proposed injunction will harm others. Government Defendants make some of the same arguments, as noted below.

A. No Presumption Precludes Likelihood of Success on the Merits.

The Intervenors seek to employ a presumption that Acts of Congress are constitutional in such a forceful way that it would eliminate all injunctions pending appeal, Intervenor Resp. at 2 & n.2, making superfluous any rules or judicially established tests for such injunctions. In support, they cite the Chief Justice's in-chamber opinion in *Turner Broadcasting Sys., Inc. v. FCC*, 507 U.S. 1301, 1302 (1993). Of course that case was about the Supreme Court's All Writs Act, which Supreme Court rules mandate "to be used sparingly," *id.* at 1303, because it "grants judicial intervention that has been withheld by the lower courts." *Id.* at 1302 (internal quotation marks and citation omitted).

That is not the situation here. The question here is whether this "lower court" will "grant judicial intervention." The Supreme Court's All Writs Act test is much higher than the test in this court, which is the standard test of whether the four criteria for stays and injunctions have been met, without the two

added "thumbs on the scale" of (1) an allegedly near-insurmountable presumption protecting all federal laws[1] and (2) the existence of a negative decision by the lower court on the injunction request.[2] The four-part test for this court, upon which all agree, nowhere includes a presumption in favor of constitutionality for all federal laws. Rather, it asks merely whether there is a likelihood of success on the merits, a much lower test. And that correct test is met by the JMC Plaintiffs.[3]

As do Defendants, the JMC Plaintiffs incorporate by reference their prior arguments as to the constitutionality of the definitions of "electioneering communication." But unique to this motion is the fact that neither of the definitions that were an "Act of Congress" are now in effect after Judge Leon agreed to sustain only the first part of the backup definition, amputating the final clause.

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[1]Defendants' description of the presumption is overblown, as is evident from the opinion the Chief Justice cites as authority. In *Turner Broadcasting*, *id.* 1302, Chief Justice Rehnquist cited *Marshall v. Barlow's, Inc.*, 429 U.S. 1347, 1348 (1977) (Rehnquist, J., in chambers), for the proposition that federal laws are presumed constitutional and "should remain in effect pending a final decision on the merits by this Court." In *Marshall*, now-Chief Justice Rehnquist was dealing with a request for a stay pending appeal, and he did not say that there was some near-insurmountable presumption that ban injunctions. Rather he issued a stay pending appeal, and he did so to protect parties not even before the court. The full quote from which Defendants selectively quote, indicates that it is the facts of the unique situation that govern, not the presumption:

> "*In such a situation*, where the decision of the District Court has invalidated a part of an Act of Congress, I think that the Act of Congress, presumptively constitutional as are all such Acts, should remain in effect pending a final decision on the merits by this Court.

Marshall, 429 U.S. at 1348 (emphasis added). Plainly, his comment was descriptive of the presumption, not prescriptive that the presumption should trump the "situation." *Turner Broadcasting* reveals the same attention to the situation, noting that "even the dissenting judge rejected the argument now urged by applicants," a situation clearly not present in the case at bar.

[2]The All Writs Act is also limited because it may only be used "if (1) it is necessary or appropriate in aid of our jurisdiction . . . and (2) the legal rights at issue are indisputably clear." *Turner Broadcasting*, 507 U.S. at 1303 (quotation indicators omitted). This is clearly distinct from the case at bar where the test is "substantial likelihood of success on the merits," not "indisputably clear," so that opinions on stays pending injunction in the Supreme Court are inapplicable to stays pending injunction in the district court.

[3]Both Intervening and Government Defendants cite *Turner Broadcasting* for the need to maintain the "status quo." Intervernor Resp. at 2 n.3; Gov. Resp. at 3. Of course, if the status quo must always be maintained, then all rules and standards for an injunction pending appeal are superfluous because whatever *is* must remain. But this misuses *Turner Broadcasting*, which noted that unlike a stay "an injunction grants judicial intervention that has been withheld by the lower courts." 507 U.S. at 1302 (quotation indicators omitted). This motion is about judicial intervention *by the lower courts*, so Supreme Court concerns about the status quo are simply inapplicable, as is Defendants' citation.

No one has previously briefed the truncated backup definition. Consequently, in its opening memorandum on the present motion, the JMC Plaintiffs noted the grave vagueness issues posed by this new creation, explained the unlimited temporal and geographical reach of the vague terms "promote or support . . . or attack or oppose," and measured the newly-minted definition against the benchmark language of the Supreme Court's express advocacy test in *Buckley* and *MCFL*, even setting out the following table to make starkly clear how far short the new backup definition falls from the United States Supreme Court's mandate for clarity in legislation bordering on (or impinging on, in this case) protected issue advocacy:

Too vague, per Supreme Court (*see supra)*	**"Electioneering Communication"**
"advocating the election or defeat of a clearly identified candidate for federal office"	"promot[ing] or support[ing] . . . or attack[ing] or oppos[ing] a candidate for that office"

Defendants have failed to even make an effort to come to grips with the constitutional force of this comparison between what the Supreme Court declared unconstitutionally vague and the truncated backup definition, demonstrating the strong likelihood of success that the truncated backup definition of "electioneering communication" is unconstitutional.

Despite the obvious fact that the JMC Plaintiffs enjoy a strong likelihood of success on the merits, Intervenors retreat to (a) their overblown presumption, (b) the unlikely assertion of their continued "belie[f] that both the primary and [untruncated] backup definitions . . . are constitutional" and will be upheld (which, even if it were true, is irrelevant to the substantial likelihood of success of the merits on the *truncated* backup definition), (c) the assertion that this Court rejected "the 'magic words' test" (which is an inaccurate portrayal of the Supreme Court's test and irrelevant to the present motion), and (d) alleged facts about evasion of existing campaign finance law.[4]

[4]The AFL-CIO has dismissed the "record" claim in a convincing manner, which the JMC Plaintiffs join (along with the rest of the AFL-CIO's arguments on the stay/injunction pending appeal issues). AFL-CIO Opp. Mem. at 6 n.5 (record primarily about 60-day backup period, not 30-day primary period [or backup definition]).

The *Government* Defendants at least are able to acknowledge the only relevant issue, namely, that the truncated backup definition of "electioneering communication" has little likelihood of success on the merits. Gov. Stay Mem. at 12 ("no temporal or geographical limitations"; "standard that Congress did not enact"; "reflect[s] the reasoning of a single member of this Court and is open to serious challenge on appeal").

Intervenors conclude their short effort to disprove the JMC Plaintiffs' likelihood of success on the merits by arguing that Plaintiffs "make much of the fact that the Court was not unanimous in upholding the constitutionality of the back-up definition," and that "[t]his argument does not support their Motion . . . because they do not seek a stay of all the non-unanimous portions of the Court's opinion." Intervenor Resp. at 4. Besides being a logical non sequitur, Intervenor's argument fails because this motion seeks only relief as to the truncated backup definition, which is causing irreparable harm to the JMC Plaintiffs' *immediate* plans and rights. It is no argument to say, "you should have sought to 'stay' other things that don't affect you."

Thus, the Intervenors attempt to dodge the real issue. The problem with the truncated backup definition is not that it was non-unanimous. The problem is that, as the Government concedes, the newly-minted definition has "no temporal or geographical limitations" and is a "standard that Congress did not enact." The likelihood of success on the merits of this motion is enhanced by the fact that the truncated backup definition "reflect[s] the reasoning of a single member of this Court and is open to serious challenge on appeal." Gov. Stay Mem. at 12.

B. There Is Irreparable Harm.

Defendants attempt to shift to the JMC Plaintiffs what is not Plaintiffs' to prove. Intervenors frame the issue this way: Plaintiffs "have utterly failed to show any irreparable harm *from the general stay* proposed by Defendants [and] the Intervening Defendants . . . ." Intervenor Resp. at 2 (emphasis added). But the injunction pending appeal standard requires the JMC Plaintiffs to prove only that they will be irreparably harmed by operation of the truncated backup definition.

In opposing the Defendants' motion for a general stay, the JMC Plaintiffs had the burden of demonstrating that they would be harmed by the wholesale stay as part of the analysis of harm to other parties. But the test there was whether there was *harm*, not *irreparable harm*, as both Plaintiffs and Defendants have to prove in making the case for their own motion.

The JMC Plaintiffs have demonstrated that they would be harmed by the proposed wholesale stays, so that those should be denied, and that they are suffering immediate irreparable harm if the truncated backup definition of "electioneering communication" is left in place. In its Memorandum in support of its motion for an injunction pending appeal, NRLC sets out the fact that it is constantly in legislative battles and routinely broadcasts grassroots lobbying advertisements, and that it has an intention to do so but for the chill of the truncated backup definition. JMC Mem. at 17-18. Similarly, Club for Growth's irreparable harm for current advertising in support of President Bush's proposed tax cut was also set out. *Id.* at 18-19

The *Declaration of David N. O'Steen, Ph.D.*, appended hereto, includes exhibits of three radio advertisement texts that NRLC wants to broadcast right now but is chilled from airing because it believes these ads may be viewed as "promot[ing] or support[ing] . . . or attack[ing] or oppos[ing] a candidate for that office" under this Court's truncated backup definition. The advertisements will be about the positions of Senators Fritz Hollings, Tom Daschle, Tim Johnson, Blanche Lincoln, and Mark Pryor, who are candidates for federal office, on the Unborn Victims of Violence Act. These advertisements note that these Senators do not support the bill, or have failed to take a position, and asks constituents to call and lobby them to support the bill.

Furthermore, Dr. O'Steen also affirms, as represented before, that because NRLC has a practice of doing such advertising and will continue to do so, that, if the primary definition of "electioneering communication" is resuscitated, NRLC will be harmed by that definition when the certainty of its advertising quickly coincides with unconstitutional 30/60-day gag periods beginning in December 2003 and continuing through the months of rolling caucuses and primaries that begin in January 2004. *Id.*

Club for Growth's advertisements described in the opening memorandum have drawn much attention.[5] As stated there:

> While CFG believes that their advertisement is "neutral" and lawful, it depicts a federal candidate and could be considered, by someone, as not "neutral" under Judge Leon's criterion for "electioneering communication," for the reasons just discussed *supra*, and so could be considered as "attacking or promoting" a candidate under the vague definition. CFG plans to continue running these advertisements but fears that it will have to defend against unwarranted complaints and FEC investigations against it under the truncated backup definition of "electioneering communication." Absent the relief presently requested, CFG is presently at risk but chooses to continue so as not to forever lose this opportunity to affect the public policy debate on these matters.
> stable laws

JMC Plaintiffs' Mem. at 19. This fear is heightened by the reported statement of BCRA sponsor and intervening Defendant Sen. John McCain that CFG's advertisements are unlawful under this Court's "electioneering communication" definition.[6]

As mentioned in the opening Memorandum, CFG has targeted Sen. Voinovich of Ohio, who is a candidate, with these advertisements. CFG is also targeting Sen. Olympia Snowe of Maine, who is a candidate,[7] with the same broadcast ads and has budgeted $50,000 for a television advertising campaign on the same theme to encourage Sen. Tom Daschle of South Dakota to support the tax cut proposal.[8] When news became public of a potential issue advertising broadcast plan by the Rushmore Policy Council, called the "Daschle Accountability Project" and designed to highlight the Senator Daschle's record, "Democrats . . . complained that the council's ads would have violated the campaign

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[5] *See*, *e.g.*, *Meet the Press*, Transcript for April 27, 2002, available at <http://www.msnbc.com/news/905942.asp> (visited May 7, 2003) (Tim Russert discussing Club for Growth advertisement about Bush tax cut mentioning Ohio Sen. Voinovich with the Senator).

[6] *See* Sharon Theimer, *Groups Say Ruling OKs Lawmaker Mentions*, Washingtonpost.com <http://www.washingtonpost.com/ac2/wp-dyn/A21646-2003May6?language=printer> (visited May 12, 2003) ("But one of the [BCRA]'s sponsors, Republican Sen. John McCain of Arizona, had a tougher interpretation of the court's decision: He said it means ads such as the Club's shouldn't be running.").

[7] Sen. Snowe is a candidate. <http://herndon1.sdrdc.com/cgi-bin/fecimg/?C00291955> (FEC website) (visited May 13, 2003).

[8] *See Group Budgets $50,000 to Attack Daschle* <http://abcnews.go.com/wire/Politics/ap20030512_1955.html> (ABC News web site) (visited May 13, 2003).

finance law's prohibition on outside interest groups using largely unregulated 'soft money' to *attack or promote* candidates."[9]

The JMC Plaintiffs plainly have demonstrated irreparable harm, but Intervenors attempt to avoid this fact by arguing that "Plaintiffs have failed to demonstrate that they would not fall under the *MCFL* exemption for Internal Revenue Code § 527 organizations." Intervenor Resp. at 6. The BCRA does include an exception to the ban on corporate "electioneering communications" for both § 501(c)(4) and § 527 corporations. BCRA, § 203(c)(2). But this argument fails. First, Indiana Family Institute and NRL Educational Trust Fund are both § 501(c)(3) organizations, so could not be within the exception. Second, the BCRA exception only extends to organizations that accept no corporate contributions and have zero business activities, which Plaintiffs believe to be an unconstitutional burden on their rights.[10] In any event, the JMC Plaintiffs suffer irreparable harm because the vagueness of the truncated backup "electioneering communication" definition never lets them know when they might need the protection of an *MCFL* exception, even if they might qualify for the limited one available.

C. Other Parties and the Public Will Not Be Harmed.

Intervenors assert that other parties and the public will be harmed by the uncertainty of changing rules, the costs of adjusting to changing rules, and the fact that a federal law will be set aside. Intervenor Resp. at 7. But changing rules are common in cases challenging laws as unconstitutional, and corporations commonly absorb the modest costs of legal advice on compliance with such changing rules. And the notion that any time a federal law is set aside there is harm to the public good posits that

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[9] *See Lieberman Flies His Mother to Iowa* <http://www.newsday.com/news/politics/wire/sns-ap-liebermans-mom,0,4825959.story?coll=sns-ap-politics-headlines> (Newsday.com web site) (visited May 13, 2003).

[10] All federal circuit courts to consider the issue have rejected the position that if a group receives any business income or business corporation contributions it doesn't qualify for the *MCFL* exemption, and these courts have permitted such income and contributions, as long as they were "de minimis" and not "substantial." *See NRA,* 254 F.3d at 192; *MCCL,* 113 F.3d at 130; *Day,* 34 F.3d at 1363-65; *NCRL,* 168 F.3d at 714; *Survival Educ. Fund,* 65 F.3d at 292. The Second and Eighth Circuits agree that one looks at the percentage of revenue: if it is "modest," a group qualifies. *P.A.* at 21a. The D.C. Circuit looks to the absolute amount received: if $1,000, the group qualifies, but $7,000 is too much. *NRA*, 254 F.3d at192.

every time an unconstitutional law is struck down by federal courts to defend the Constitution and the People's liberties the public good has suffered.

Therefore, under Defendants' argument, the public was harmed when this Court struck down BCRA's prohibition on political contributions by minors and when it struck down the 60/30-day primary definition of electioneering communication. And under Defendants' argument, there could never be an injunction pending appeal because enjoining a federal law would harm the public – and consequently the rules and standards for injunctions pending appeal are all superfluous.

But this argument turns this factor on its head. *Plaintiffs* have challenged provisions of the BCRA, resulting in some of them being declared unconstitutional. *Thus, Plaintiffs and the public are benefited by unconstitutional laws being declared unconstitutional.* But Defendants then claim that this change in law *harms Plaintiffs* and thus should be prevented. They thus have it both ways: a law found constitutional remains in effect and a law found unconstitutional remains in effect because enjoining it would *change the rules*. In truth, Plaintiffs and the public are benefitted when an unconstitutional law does not go into effect.

II. The Motion to Alter or Amend Judgment Should Be Granted.

JMC Plaintiffs have moved this Court, pursuant to Fed. R. Civ. P. 59(e), to alter or amend its judgment, so that it will provide "that the Defendants and their agents are permanently enjoined from enforcing, executing or otherwise applying those sections of BCRA found unconstitutional by this three-judge District Court against the Plaintiffs" *or any similarly situated person or entity with respect to activities conducted anywhere in the United States*.

The Government argues that Plaintiffs "lack standing to raise the rights of third parties who have not participated in this case." Gov. Brief at 4 (citing *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 775 (1994)). It also argues that extending the Court's injunction to non-Plaintiffs would violate the rule that injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Gov. Brief at 4 (quoting *Virginia Society for Human Life v. FEC*, 263 F.3d 379, 392 (4th Cir 2001) and *Califano v. Yarnasaki*, 442 U.S. 682, 702 (1979)).

First, the Government Defendants do not specifically argue against Plaintiffs' claim that this Courts judgment should be amended to embrace the entire United States whether or not it is applied to similarly situated third parties. They only object to nationwide application of the Judgment insofar as it is applied to non-parties. *See* Gov. Brief at 5. The BCRA is a statute that applies nationwide, and it can be challenged only in the District of Columbia. Plainly, if a nationwide injunction against the offending provisions of the BCRA is not granted, then offending provisions of BCRA might continue to apply everywhere else *except* the District of Columbia.

Second, the Government's argument against extension of its injunction against application of the BCRA to those similarly situated to the Plaintiffs misconceives the nature of Plaintiffs' claim. In the interests of justice and judicial economy, the Plaintiffs have argued that the Court's injunction ought to be extended to embrace similarly situated persons and entities to avoid requiring hundreds to trek to the District Columbia to file multiply boilerplate suits to enjoin the FEC from threatening them with unconstitutional provisions of the BCRA. If a statutory provision of the BCRA is unconstitutional, then the Court should enjoin its application to anyone to whom it might be applied, not simply to those who bring suit. Unlike the litigants in Madsen, "who lacked standing to challenge a portion of the order applying to persons who are not parties," 512 U.S. at 775, the JMC Plaintiffs do not challenge this Court's judgment as it applies to non-parties. They request that its judgment be *extended* to embrace similarly situated non-parties with the protections that attend the judgment in the interests of justice and judicial administration.

Moreover, Plaintiffs do not suggest the Court violate the established rule that injunctive relief be no more burdensome to the defendants than necessary to provide relief to the plaintiffs. Being ordered to desist from enforcing numerous enjoined provisions of the BCRA would create no new burden on the Government Defendants – indeed, it would relieve them of any obligation to enforce the offending

provisions of the BCRA in the United States beyond the District of Columbia and against non-Plaintiffs in this case.[11]

The Intervenors claim that the Motion to Alter or Amend the Judgment inappropriately requests relief because they assert that the Motion "raises arguments or presents evidence that could have been raised prior to the entry of judgment." Intervenor Resp. at 3 n. 5 (quoting Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 2810.0 (3d. ed 2003). But this is not so. Plaintiffs make no substantive argument, much less purport to present evidence, in support of their Motion to Alter or Amend. They ask in the interests of justice, clarity, and efficient administration that the reach of the judgment be extended. A Rule 56(e) motion "will be granted if necessary to prevent manifest injustice." *Id.* (footnote omitted). In this case, it would be a "manifest injustice" if unconstitutional provisions of the BCRA continued to be enforced outside the District of Columbia and against persons and entities in the same situations as the Plaintiffs here. This Court is thus authorized to extend its injunction against enforcement of certain provisions of the BCRA to anywhere in the United States and on behalf of those similarly situated.

[11] An erroneous order of a lower court can properly be stayed as it affects non-parties. *Marshall v. Barlow's, Inc.*, 429 U.S. 1347 (1977) (per Chief Justice Rehnquist as Circuit Judge). Likewise, a statute (such as the BCRA) can be enjoined as it affects non-parties.

CONCLUSION

Plaintiffs have meet their burden of proof on all elements of the standard for an injunction pending appeal. Therefore, this Court should enjoin the truncated backup definition of "electioneering communication" pending the final determination of the merits of this case by the United States Supreme Court.

Additionally, the motion to alter or amend this Court's judgment should be granted.

Respectfully submitted,

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