

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SENATOR MITCH McCONNELL, <i>et al.</i> ,)	
)	
Plaintiffs,)	<u>CONSOLIDATED ACTIONS</u>
)	
v.)	Civ. No. 02-0582
)	(CKK, KLH, RLL)
FEDERAL ELECTION COMMISSION, <i>et al.</i> ,)	
)	
Defendants.)	
)	
<hr/>		
NATIONAL RIFLE ASSOCIATION, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civ. No. 02-0581
)	(CKK, KLH, RLL)
FEDERAL ELECTION COMMISSION, <i>et al.</i> ,)	
)	
Defendants.)	
)	

**REPLY OF THE NATIONAL RIFLE ASSOCIATION AND THE NATIONAL RIFLE
ASSOCIATION POLITICAL VICTORY FUND TO RESPONSES TO MOTION FOR
STAY PURSUANT TO RULE 62(c)**

NRA respectfully files this reply to various response briefs that bear upon NRA’s motion for a stay of this Court’s judgment regarding Title II’s operative definition of electioneering communications, or upon NRA’s motion for an emergency stay of that judgment pending the final resolution of all stay and injunction motions before the Court.¹

¹ The Government defendants and the plaintiffs represented by the James Madison Center for Free Speech (hereinafter, “JMC”) have each filed responses to NRA’s May 7 motion to stay this Court’s judgment as to the operative definition of electioneering communications. In addition, the Intervenor-Defendants have filed a Response to NRA’s Motion for Administrative Stay, filed with the Court May 8, and the AFL-CIO has filed a brief in which it opposes the motions for an

At the outset, NRA wishes to emphasize that every party in the Title II case has agreed that this Court's judgment with respect to Title II's definition of electioneering communications should have no present force or effect, though defendants urge this result as part of an across-the-board stay of the Court's entire judgment. Given that, and given that NRA has demonstrated through a sworn affidavit and the text of a radio script that it has an immediate desire to broadcast political speech on a pressing legislative issue having nothing to do with any election, this Court should immediately grant NRA's request for an administrative stay pending resolution of all other motions. This Court's judgment has silenced NRA from running those radio broadcasts for close to one week, even though the broadcasts are clearly ones that BCRA's authors never intended to prohibit. Indeed, even the Government and the Intervenor-Defendants think NRA should be entitled to air this speech.² There is therefore no reason not to grant NRA's motion for an administrative stay.

The JMC plaintiffs and the AFL-CIO seek to enjoin the government from enforcing not only this Court's "construction" of the fallback definition of "electioneering communications,"

across-the-board stay filed by the Government defendants and the Intervenor-Defendants, and in which it states that it "disagrees with the decision of [NRA] to seek a stay of the injunction as to the primary definition of 'electioneering communications' as a means of avoiding application of the equally offensive fall-back definition." AFL-CIO Opposition Brief (filed May 12, 2003) at 14 n.12.

² As of tomorrow, one full week will have passed since NRA submitted its brief requesting relief from this Court's Title II judgment, in which it demonstrated a pressing need to air broadcasts supporting important legislation pending in Congress that would help protect the firearms industry from frivolous lawsuits, and that would "attack" certain legislators who oppose (or who may oppose) that legislation. Because of NRA's desire to speak out on this legislative issue, it submitted an emergency application with the Chief Justice of the United States requesting an administrative stay pending this Court's resolution of all pending motions. Earlier today, the Chief Justice denied NRA's emergency application "without prejudice to its renewal if the District Court has not acted by Tuesday, May 20, 2003." (See Attached). NRA strongly urges the Court to issue at least a temporary stay before May 20, a date that is almost two weeks after the date on which NRA first explained that its purely "non-electoral" political speech is being silenced in ways that Congress never intended and that are anathema to the First Amendment.

but also the primary definition of “electioneering communications” as set forth in BCRA. NRA obviously welcomes any injunction against enforcement of any of BCRA’s Title II provisions, but has requested more limited relief only because the district court’s rendition of Title II visits an immediate and irreparable injury on NRA, by prohibiting it from speaking now about a pressing legislative issue that is at the forefront of the organization’s agenda.

JMC presents a lengthy argument showing that, as argued by NRA, plaintiffs have a substantial likelihood of succeeding in reversing this Court’s Title II judgment. *See generally* Memorandum In Support of Certain Madison Center Plaintiffs’ Motion for Injunction Pending Appeal (“JMC Brief”) at 4-18.³ In addition, JMC explains that, like NRA, two parties it represents, the National Right to Life Committee, Inc. (“NRLC”) and the Club for Growth (“CBG”), seek to run advertisements referring to federal candidates while addressing pending legislative issues. JMC makes these arguments in support of its motion for an injunction, rather than in support of the more limited stay sought by NRA. But in arguing that these parties will be injured “absent [JMC’s] requested protection,” JMC ignores the fact that the threatened injuries immediately facing the parties it represents will be completely avoided if this Court grants the relief requested by NRA.

JMC and the AFL-CIO do not deny that the interests of the parties it represents and NRA are perfectly aligned. To the contrary, in a pleading submitted to the Chief Justice, JMC stated that one acceptable disposition of NRA’s emergency stay application would be for the Chief Justice to “grant the NRA’s motion for the limited time until the district court responds to the pending stay and injunction pending appeal motions, which would give the NRA protection now and

³ Likewise, the AFL-CIO states that “[w]e generally concur with the legal arguments regarding the constitutional deficiency of [the Court’s] formulation [of electioneering communications] by plaintiffs National Rifle Association, at pages 5-13 of its memorandum in support of its motion for a stay pending appeal.” Motion of Plaintiff AFL-CIO For an Injunction Pending Appeal at 2.

not ultimately harm the JMC Plaintiffs' interests." Madison Center Plaintiffs' Response to the NRA's Emergency Application at 7. Of course, granting a stay "for the limited time until the district court responds to the" pending motions is precisely the relief the NRA has sought in its motion for an administrative stay filed with this Court on May 8.

Likewise, the Government and the Intervenor-Defendants do not disagree with NRA that this Court's Title II judgment should be stayed. Instead, their responses simply emphasize their view that "[a] stay should issue, but the stay should not attempt to differentiate between different portions of this Court's judgment." Response of Intervening Defendants to the NRA's Motion for Administrative Stay ("Intervenors' Brief") at 1; *see also* Government Defendants' Response To Plaintiffs' Motions For A Stay Pending Appeal, For An Injunction Pending Appeal, And To Alter Or Amend The Judgment ("Government Brief") at 2 ("the Court should stay the ruling in its entirety"). The only reason given by defendants for opposing a "partial stay" is the risk of "increased confusion" that might result from staying only one part of this Court's judgment. They argue that this confusion would outweigh the benefit of having a stay to "serve the substantial public interest in minimizing disruption of the 2004 federal election cycle." Intervenor Brief at 2; *see also* Government Brief at 2 ("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").

The defendants' argument overlooks the true grounds for NRA's stay application: it has nothing to do with minimizing disruption to the 2004 election cycle, and everything to do with NRA's immediate exercise of the fundamental right to free speech enshrined in the First Amendment. NRA has not come to this Court seeking relief from potential "confusion"; it has rushed to this Court seeking emergency relief from a criminal prohibition against its ability to speak out about pending legislation. That constitutional injury surely trumps any concerns over

possible “confusion” that might accompany a partial stay.⁴

Moreover, it is fundamentally illogical for defendants to argue against a partial stay. Everyone agrees that this Court’s Title II ruling should be stayed; plaintiffs and defendants alike agree that it should not be enforced pending the Supreme Court’s review. By contrast, while defendants seek a stay of the Court’s Title I judgment, plaintiffs who successfully challenged the constitutionality of Title I understandably oppose such a stay. There is no legal or policy reason why an unopposed stay motion should be made contingent upon a contested stay motion, and the defendants should not be permitted to, in effect, use the obviously compelling reasons for staying the Title II judgment as leverage for also staying the Title I judgment. The two judgments present distinct legal questions on the merits, and visit distinct types of injury upon different parties. In short, NRA’s application for an emergency stay should depend solely upon the strength of its own legal claims, and on the gravity of its own irreparable injury, not upon the legal arguments and purported harm suffered by its opponent on a different part of the case.

Respectfully submitted,



Charles J. Cooper
(D.C. Bar No. 248070)
David H. Thompson
(D.C. Bar No. 450503)
Hamish P.M. Hume
(D.C. Bar No. 449914)
Derek L. Shaffer
(D.C. Bar No. 478775)

Cleta Mitchell
(D.C. Bar No. 433386)
FOLEY & LARDNER
3000 K Street, N.W.
Suite 500
Washington, D.C. 20007
(202) 295-4081

⁴ To be sure, NRA, which did not challenge Title I, takes no position on whether the Court should issue an across-the-board stay; it merely insists that its right to relief from this Court’s Title II ruling should in no way depend upon the separate inquiry into whether a stay of the Court’s Title I decision is also warranted.

COOPER & KIRK, PLLC
1500 K Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 220-9600

Brian S. Koukoutchos
COOPER & KIRK, PLLC
28 Eagle Trace
Mandeville, LA 70471
(985) 626-5052

Dated: May 13, 2003

ATTACHMENT

MAY. 13. 2003

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

May 13, 2003

AREA CODE 202
478-3611

Charles J. Cooper
Cooper & Kirk, PLLC
1500 K Street, N. W.
Suite 200
Washington, D. C. 20005

RE: National Rifle Ass'n, et al. v. Federal Election Comm'n, et al.
(02A951)

Dear Mr. Cooper:

The application to stay the judgment of the United States District Court for the District of Columbia pending review has been presented to the Chief Justice, who on May 13, 2003, denied the application without prejudice to its renewal if the District Court has not acted by Tuesday, May 20, 2003.

Very truly yours,

William K. Suter, Clerk

By 

Troy D. Cahill
Staff Attorney

cc: All Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this 13th of May, 2003, copies of the foregoing were served upon the following by hand delivery, electronic mail and facsimile:

James J. Gilligan
Trial Attorney
U. S. Department of Justice
20 Massachusetts Ave, N.W.
Room 7136
Washington, DC 20001
(202) 514-3358 (Telephone)
(202) 616-8460 (Fax)
james.gilligan@usdoj.gov

Randolph D. Moss
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6640 (Telephone)
(202) 663-6363 (Fax)
rmoss@wilmer.com

Stephen E. Hershkowitz
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20436
(202) 694-1650 (Telephone)
(202) 219-0260 (Fax)
shershkowitz@fec.gov
litigation@fec.gov

upon the following by Overnight Mail and electronic mail:

Prof. Burt Neuborne
Frederick A.O. Schwarz, Jr.
E. Joshua Rosenkranz
Brennan Center for Justice
161 Avenue of the Americas, 12th Flr.
New York, NY 10013
(212) 998-6730
neuborne@turing.law.nyu.edu
fritz.schwarz@nyu.edu
joshua.rosenkranz@nyu.edu

upon the following by U.S. Mail, electronic mail and facsimile:

Kenneth W. Starr
Kirkland & Ellis
655 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5130 (Telephone)
(202) 879-5200 (Fax)
kenneth_starr@dc.kirkland.com

James Bopp, Jr.
Bopp, Coleson & Bostrom
1 South Sixth Street
Terre Haute, Indiana 47807
(812) 232-2434 (Telephone)
(812) 235-3685 (Fax)
jboppjr@bopplaw.com
jboppjr@aol.com

Floyd Abrams
Cahill, Gordon & Reindel
80 Pine Street, Room 1914
New York, New York 10005-1702
(212) 701-3621 (Telephone)
(212) 269-5420 (Fax)
fabrams@cahill.com

Valle Simms Dutcher
Southeastern Legal Foundation
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, Georgia 30326
(404) 365-8500 (Telephone)
(404) 365-0017 (Fax)
vsdutcher@southeasternlegal.org

James M. Henderson Sr.
The American Center for Law and
Justice
205 Third Street, S.E.
Washington, D.C. 20003
(202) 546-8890 (Telephone)
(202) 337-3167 (Fax)
jmhenderson@ACLJ-DC.org

upon the following by U.S. Mail and electronic mail:

G. Hunter Bates
1215 Cliffwood Drive
Goshen, Kentucky 40026
(502) 216-9265 (Telephone)
ghunterb@hotmail.com
hunter.bates@mcconnell02.com

Jan Witold Baran
Wiley, Rein & Fielding LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7330 (Telephone)
jbaran@wrf.com

Laurence E. Gold
AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5130 (Telephone)
lgold@aflcio.org

Sherri L. Wyatt
Sherri L. Wyatt, PLLC
1017 12th Street, N.W.
Suite 300
Washington, D.C. 20005
(202) 216-9850 (Telephone)
sherrissima@juno.com

William J. Olson
William J. Olson, P.C.
8180 Greensboro Drive
Suite 1070
McLean, VA 22102-3860
(703) 356-5070 (Telephone)
wjopc@lawandfreedom.com

Bobby R. Burchfield
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-5350 (Telephone)
bburchfield@cov.com

Joseph E. Sandler
Sandler, Reiff & Young, P.C.
50 E Street, S.E.
Suite 300
Washington, D.C. 20003
(202) 479-1111
sandler@sandlerreiff.com

Thomas W. Kirby
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7062 (Telephone)
tkirby@wrf.com

John C. Bonifaz
National Voting Rights Institute
One Bromfield Street
Third Floor
Boston, MA 02108
(617) 368-9100, x10 (Telephone)
jbonifaz@nvri.org

Mark J. Lopez
American Civil Liberties Union
125 Broad Street
New York, New York 10004
(212) 549-2608 (Telephone)
mlopez@aclu.org

upon the following by electronic mail only:

Abegg, Heidi K.: habegg@wc-b.com
Abrams, Floyd: fabrams@cahill.com
Amundson, Jan: jamundson@nam.org
Bader, R.: rbader@fec.gov
Bailey, Kevin: KBailey@wilmer.com
Barnett, T.: tbarnett@cov.com
Beck, Stacy: sbeck@wilmer.com
Bell, C.: cbell@BMHLAW.com
Bhattacharyya, Rupa:
rupa.bhattacharyya@usdoj.gov
Bokat, Stephen A.: sbokat@uschamber.com
Buckley, S.: sbuckley@cahill.com
Burns, Caleb: cburns@wrf.com
Caplan, Deborah: Deborah@olsonhagel.com
Carvin, Michael: macarvin@jonesday.com

Coffin, Shannen: shannen.coffin@usdoj.gov
Coleson, R.: rcoleson@bopplaw.com
Conrad, R.: rconrad@uschamber.com
Curtis, Charles: ccurtis@hewm.com
Danetz, Lisa: ldanetz@nvri.org
Daniel, Elizabeth: elizabeth.daniel@nyu.edu
Dixton, Grant: grant_dixton@dc.kirkland.com
Dye, Alan P.: adye@wc-b.com
Evans, Randy: randy.evans@agg.com
Gacki, Andrea: andrea.gacki@usdoj.gov
Gilchrist, Barbara: barbara.gilchrist@usdoj.gov
Ginsberg, Benjamin: bginsberg@pattonboggs.com
Goodman, Lee: lgoodman@wrf.com
Gora, Joel: JGORA@pcm.brooklaw.edu
Gordon, Jennifer: jgordon@hewm.com

Harth, David: dharth@hewm.com
Henry, Terry: terry.henry@usdoj.gov
Hirt, Theodore: theodore.hirt@usdoj.gov
Hogue, Lynn: LAWLLH@langate.gsu.edu,
lhogue@gsu.edu
Jordan, Bill: bill.Jordan@usdoj.gov
Josefiak, Thomas: tjosefiak@rmchq.org
Kelner, R.: rkelner@cov.com
Kesselman, Marc: marc.kesselman@usdoj.gov
Kirby, Thomas W.: tkirby@wrf.com
Kolker, D.: dkolker@fec.gov
Kuwana, Eric: ekuwana@pattonboggs.com
Leffel, Michael: MLeffel@wilmer.com
Lenhard, Robert: rlenhard@afscme.org
Letter, Douglas: douglas.letter@usdoj.gov
Macdougall, H.: hmacdougall@earthlink.net,
hmacdougall@mindspring.com
Manuel, Anja: amanuel@wilmer.com
Markley, B.: bmarkley@cahill.com
Martines, Kim: kim_martines@dc.kirkland.com
Marzen, T.: tmarzen@bopplaw.com
May, Colby: cmmay@ACLJ-DC.org
McGahn, Donald F., II: dmcgahn@nrcc.org
Medina, Monica: mpmedina@hewm.com
Miles, John: johnsmiles@lawandfreedom.com
Miller, Shont E.: millerse@mto.com
Mogilnicki, Eric: emogilnicki@wilmer.com
Mulvihill, Donald: mulvid@cgrdc.com
Murphy, L.: lwmurphy@dcacclu.org,
lwmurphy@aol.com
Olson, Lance H.: Lance@olsonhagel.com
Patterson, A. Krisan: kpatterson@wilmer.com
Phillips, Bradley: phillipsbs@mto.com
Raab, Michael: michael.raab@usdoj.gov
Reiff, Neil: reiff@sandlerreiff.com
Renaud, D. Mark: mrenaud@wrf.com
Sandler, Joseph: sandler@sandlerreiff.com

Shanmugam, Kannon:
kannon_shanmugam@dc.kirkland.com
Shapiro, Steven: sshapiro@aclu.org
Spies, Charles R.: cspies@rmchq.org
Sturek, Kenneth: Kenneth_sturek@dc.kirkland.com
Sullivan, Kathleen: sullivan@law.stanford.edu
Tenneriello, Bonnie: bonnie@nvri.org
Timmermann, J.: jtimmerman@nab.org
Titus, Herbert: forecast22@pinn.net,
tituslawfirm@aol.com
Trister, Michael: mtrister@ltsrlaw.com
Turner, Serrin: serrin.turner@usdoj.gov
Warren, Edward: edward_warren@dc.kirkland.com
Waxman, Seth: swaxman@wilmer.com
Weinberg, L.: lweinberg@afscme.org
Wilson, David: david.wilson@haledorr.com
Witten, Roger: rwitten@wilmer.com
Wolf, Richard: r.wolf@mooreandlee.com
Wright, Brenda: bw@nvri.org
Wyler, Arline: awyler@law.stanford.edu
Young, John Hardin: young@sandlerreiff.com



A handwritten signature in black ink, appearing to read "John Hardin Young", is written above a horizontal line.