NO. 02-1674, *et al.*

IN THE SUPREME COURT OF THE UNITED STATES

SENATOR MITCH McCONNELL, *ET AL.*,
APPELLANTS,

v.

FEDERAL ELECTION COMMISSION, *ET AL.*,
APPELLEES.

On Appeal from the United States District Court
For the District of Columbia

RESPONSE OF APPELLANTS, CONGRESSMAN RON PAUL, *ET AL.*, IN OPPOSITION TO ALLOCATION OF ORAL ARGUMENT TIME PROPOSED IN MOTION FOR DIVIDED ARGUMENT OF CERTAIN ALIGNED APPELLANTS

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 INDIAN RIVER ROAD
VIRGINIA BEACH, VA 23464
(757) 467-0616

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
SUITE 1070
8180 GREENSBORO DRIVE
MCLEAN, VA 22102
(703) 356-5070

RICHARD WOLF
MOORE & LEE, LLP
1750 TYSONS BOULEVARD
SUITE 1450
MCLEAN, VA 22102
(703) 506-2050

GARY G. KREEP
U.S. JUSTICE FOUNDATION
SUITE 1-C
2091 E. VALLEY PARKWAY
ESCONDIDO, CA 92027
(760) 741-8086

PERRY B. THOMPSON
629 HIGH KNOB ROAD
FRONT ROYAL, VA 22630
(540) 305-0012

ATTORNEYS FOR APPELLANTS
*COUNSEL OF RECORD

July 18, 2003

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. 02-1674, *et al.*

IN THE SUPREME COURT OF THE UNITED STATES

SENATOR MITCH McCONNELL, *ET AL.*,
APPELLANTS,

v.

FEDERAL ELECTION COMMISSION, *ET AL.*,
APPELLEES.

On Appeal from the United States District Court
For the District of Columbia

RESPONSE OF APPELLANTS, CONGRESSMAN RON PAUL, *ET AL.*,
IN OPPOSITION TO ALLOCATION OF ORAL ARGUMENT TIME PROPOSED
IN MOTION FOR DIVIDED ARGUMENT OF CERTAIN ALIGNED APPELLANTS

Appellants, Congressman Ron Paul, *et al*. (appellants in Docket No. 02-1747, one of the consolidated cases herein) ("Paul Plaintiffs"), hereby submit their response to the Motion for Divided Argument[1] which was represented to have been filed herein by seven[2] groups of "plaintiffs" in Docket Nos. 02-1674, *et al*. (hereinafter "the aligned appellants"), and oppose the allocation of oral argument time sought therein. Specifically, the Paul Plaintiffs oppose the efforts of the aligned appellants to have the

---

[1] *See* Motion for Divided Argument filed jointly by appellants in Docket Nos. 02-1674, 02-1727, 02-1733, 02-1734, 02-1753, 02-1755, and 02-1756.

[2] *See* discussion in paragraph 2, *infra,* as to the accuracy of that representation.

Paul Plaintiffs excluded from the oral argument of their case on appeal. The grounds for this opposition are as follows:

1. On June 5, 2003, this Court ordered that four hours be allotted for oral argument in this case, and the parties subsequently were directed to file by July 14, 2003, any motions concerning oral argument. On July 14, 2003, the Paul Plaintiffs filed their Motion for Separate Oral Argument Time herein, requesting separate oral argument time of 20 minutes (less than the one-half hour generally allowed according to Rule 28.3) for the group of eight Paul Plaintiffs at the argument of this matter scheduled for September 8, 2003. On the same date, July 14, 2003, the aligned appellants filed their Motion for Divided Argument, seeking for themselves all of the oral argument time to be allotted in the aggregate to all appellants without having even seen the Paul Plaintiffs' Motion for Separate Oral Argument Time. The aligned appellants expressly opposed any request for oral argument time by the Paul Plaintiffs, as well as certain other plaintiffs, on the ground that "[t]o the extent that those plaintiffs have distinctive theories or claims, they have been sufficiently aired in the briefs on the merits." (*Id.*, at 3.)[3]

2. The McConnell Motion for Divided Argument states that it represents seven of the eleven groups of **plaintiffs** in this

[3] The Paul Plaintiffs were not consulted by the aligned appellants as to the filing of their motion.

litigation: the McConnell, Republican National Committee ("RNC"), National Right to Life Committee ("NRLC"), ACLU, California Democratic Party, AFL-CIO, and Chamber of Commerce groups. This does not appear to be accurate. The motion appears to have been filed on behalf of seven of the ten groups of **appellants**, but **plaintiff** groups do not correlate to **appellant** groups. For example, two of the seven aligned appellants, NRLC and ACLU, were not separate plaintiff groups below but were listed on the McConnell First Amended Complaint below.[4] By transforming one McConnell complaint into three separate appeals, these appellants were able to file additional pages of appellants' briefs and will be able to file additional pages of reply briefs. Counsel for the Paul Plaintiffs know of no rule that this multiplication of appellants violates, and did not object to the additional briefing by the McConnell plaintiffs, but would object to the proposed allocation of oral argument time based on the sheer number of those making such a request. (To illustrate this point, had the McConnell plaintiffs filed only one appeal, the McConnell proposal would have been made by only five of the appellant groups, not seven.)

3. The aligned appellants claim that the arguments of the Paul Plaintiffs, as well as the other two groups of appellants whose

[4] Further, National Association of Broadcasters, a separate plaintiff below, did not file its own appeal, but joined the McConnell group of appellants.

arguments they would exclude from oral argument on September 8, 2003, "have been sufficiently aired in the briefs on the merits." Motion for Divided Argument of aligned appellants, p. 3, ¶4. Aside from the sheer presumptiveness embodied in such a statement, its implications are inconsistent and incorrect, and decidedly inappropriate.

a. The McConnell plaintiffs did not explain why the claims of the Paul Plaintiffs have been sufficiently aired in the briefs, while the claims of the aligned appellants — whose briefs, in the aggregate, are several times the length of the Paul Plaintiffs' brief — were **not** sufficiently aired. Even if one could say that the Paul Plaintiffs' brief "sufficiently airs" their arguments, and even if one could say that the briefs of the aligned appellants do not sufficiently air those plaintiffs' arguments, what element of logic or justice would lead to the conclusion that the Paul Plaintiffs should be excluded from oral argument?

b. The effort of the aligned appellants cavalierly to exclude the Paul Plaintiffs from a most important aspect of their appeal before this Court fails to recognize the importance — to the Justices of this Court, as well as to the plaintiffs themselves — of oral argument, including the opportunity of posing questions to counsel, and counsel have the opportunity of response, as well as of presenting their appellants' case in a non-briefing format that the Justices otherwise would not have.

c. Indeed, it is fair to say that the deliberative process truly begins at the conclusion of oral argument. As this Court's Guide for Counsel states, the oral argument "*present[s] the opportunity to stress the main issues of the case that might persuade the Court in your favor.*" Guide for Counsel in Cases Argued Before the Supreme Court of the United States 8 (Clerk of the Court, Washington, D.C.: October Term 2002) (emphasis original).[5] The oral argument, not the reading of the briefs, then, is the last event before the Court meets in "Conference, and the case ... assigned to a Justice to write the majority opinion." *Id.* at 13. The effort of the aligned appellants to exclude the Paul Plaintiffs from oral argument would deprive them of the right to present their case at a critical point in this Court's deliberative process.

4. There are numerous reasons justifying the Paul Plaintiffs' request for separate oral argument time of 20 minutes (one-twelfth of the total allotment of oral argument time, and one-sixth of the two hours presumably allotted to the plaintiffs-appellants in these related cases). The principal reasons are as follows:

a. First, the Paul Plaintiffs' claims and arguments in this litigation are unique in the context of these related cases,

---

[5] Indeed, this Court's Rules assume that there will be oral argument, and that it will build on the briefs: "Oral argument should emphasize and clarify the written arguments in the briefs on the merits. Counsel should assume that all Justices have read the briefs before oral argument." Supreme Court Rule 28.1.

because only the Paul Plaintiffs rely upon the First Amendment's freedom of the press as the constitutional foundation for their claims.[6] The court below recognized the singularity of the Paul Plaintiffs' theory of the case, both by its decision to permit the Paul Plaintiffs to argue orally their challenges to each of the three titles of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (U.S. District Court for the District of Columbia, Civ. No. 02-582, *et al*., Order dated November 15, 2002, Record No. 218), and by its *per curiam* opinion addressing the Paul Plaintiffs' claims separately and independently from the claims of all of the other plaintiffs in this consolidated case. *See* McConnell, et al., v. Federal Election Commission, et al., *Per Curiam* Opinion (May 2, 2003), Supplemental Appendix to Jurisdictional Statements ("Supp. App.") at 99sa-105sa.

b. Second, the district court rightfully set aside time for the Paul Plaintiffs to argue orally their claims under each of the BCRA titles because: (i) each of the legal claims of the Paul Plaintiffs is based on the freedom of the press, not freedom of

---

[6] BCRA's grant of jurisdiction to this court states in part: "Any Member of Congress may bring an action ... for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act." BCRA Section 403(c). Appellant Congressman Ron Paul is the only member of the U.S. House of Representatives who has personally waged a broad and vigorous challenge to BCRA (the claims of former Congressman Bob Barr were not even discussed in the brief of the McConnell appellants, and the only claim of Congressman Mike Pence that the NRLC appellants put forth was limited to BCRA Section 323(e)).

speech and association, equal protection, and/or due process, as was the case with every other plaintiff; (ii) the Paul Plaintiffs' press claims, if applied to this case, invoke standards of review distinct from, and higher than, those applicable to the claims of the other plaintiff-appellants and, if sustained, dispense with any judicial inquiry concerning any overriding government interest as to the provisions challenged; (iii) the Paul Plaintiffs' challenge to Section 307 of Title III of BCRA, as it amends the relevant sections of the Federal Election Campaign Act of 1971, as amended ("FECA"), necessitates a reexamination of the constitutionality of the FECA's contribution limitations and contribution disclosure requirements, issues raised by no other plaintiff; and (iv) only the Paul Plaintiffs challenge the continued vitality of Buckley v. Valeo, 424 U.S. 1 (1976), seeking that it either be set aside or, if necessary, be overruled, a result that three justices of this Court have gone on record as favoring (*see* FEC v. Colorado Republican Federal Campaign Committee, 533 U.S. 431, 465 (2001) (Thomas, J., dissenting)), but which as yet has not been addressed by other members of this Court because parties in recent cases have not briefed or argued the matter. *See* Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 397 (2000).

c. Third, not only are the Paul Plaintiffs' freedom of the press claims legally distinct from those of the aligned appellants, but their interests in this litigation substantially diverge from

those of the other plaintiffs. At the core of the Paul Plaintiffs' press claims is the contention that the exemptions conferred on the institutional media in Section 201(a) of BCRA Title II, and in FECA (2 U.S.C. Section 431(9)(B)(i)), invalidate not only the "electioneering communications" regulations of BCRA Title II (also argued by appellant NRA on different, non-freedom of press grounds), but also new Sections 323(e) and (f) of BCRA Title I and Section 307 of BCRA Title III. Not only does no other plaintiff take this position in this litigation, but the aligned appellants include the National Association of Broadcasters, an association of corporate members directly benefitting from these exemptions which enhance broadcasters' relative power to affect the outcome of campaigns for election to federal office, allowing them to engaged in activities that are considered criminal if engaged in by the Paul Plaintiffs. (*See* former FEC Commissioner Darryl R. Wold's remarks in Speak Up Newport, February 15, 2001, "The Next Election: Counting the Money; Counting the Votes; and What Really Counts.") Additionally, the aligned appellants include members of Congress whose challenge to Section 323(e) of BCRA Title I was characterized by Judge Henderson in her opinion below as "lukewarm" and "without full analysis." Supp. App. 452sa. Congressman Ron Paul and two Libertarian party candidates for federal office (one in 2002 and the other in the year 2000) have waged a vigorous attack upon BCRA

Section 323(e) because, in part, that new law discriminates against "outsider" incumbents and challengers.

d. Fourth, as the only appellants in Docket No. 02-1747, the Paul Plaintiffs should be entitled to argue their cause. Anything less would be an unfair deprivation of their rights, which are equal to the rights of any other group of plaintiffs in these related cases. The aligned appellants' effort to deprive the Paul Plaintiffs of such a right is patently unjust and, indeed, selfish.

5. For the foregoing reasons, and in order to present these distinct and important constitutional challenges, the Paul Plaintiffs believe that they need and should be entitled to 20 minutes of oral argument time before this Court, and that, in light of the current allotment of oral argument time, such an allotment of time to them would be fair and in the interests of justice. As noted in their pending Motion for Separate Oral Argument Time, because their legal claims are so different, the testimony of their three expert witnesses (of the total of 11 expert witnesses testifying below to support the nine complaints below attacking BCRA as too restrictive) and their 11 fact witnesses tell a substantially different story about the design and effect of BCRA/FECA. Additionally, as recognized by the district court's *per curiam* opinion (Supp. App. at 99sa-102sa), the Paul Plaintiffs' press claims raise threshold issues, and, if sustained on the merits, would resolve the constitutional questions with respect to

the BCRA/FECA sections that they challenge without having to apply either the strict scrutiny or intermediate scrutiny tests of Buckley. *See* Paul Plaintiffs' Jurisdictional Statement at 16-25, and Paul Plaintiffs' Brief for Appellants at 16-32 (Docket No. 02-1747).

6. The allocation of time suggested by the aligned appellants (Motion for Divided Argument at 3) proposes that counsel for the McConnell appellants (20 minutes) and counsel for the political parties (40 minutes) would spend an entire hour — one-half of the total argument time allotted to the appellants — arguing the very same subjects ("to address the 'non-federal funds' and 'forced choice' provisions," *id*. at 3). They then suggest that other counsel for the McConnell appellants (40 minutes) and counsel for the AFL-CIO appellants (20 minutes) spend an entire hour — the other half of the total argument time allotted to the appellants — at least in part on the same subjects ("to address the 'electioneering communications,' 'attack ad,' and 'broadcaster records' provisions" for the McConnell appellants and "to address the 'electioneering communications,' 'coordination,' and 'advance disclosure' provisions" for the AFL-CIO appellants, *id*. at 3).[7] In

[7] Although counsel for the McConnell appellants represented 28 diverse plaintiffs below in their First Amended Complaint, on appeal they only represent nine, with an apparently limited scope: a Senator, a former Congressman, five nonprofit organizations, a trade association of broadcasters, and a donor. Yet they seek 60 minutes of argument on issues which would appear to be as broad as the case itself, despite the fact that their clients may not be

addition to their proposal that two of their counsel be allotted oral argument time of 40 minutes each — substantially more than counsel normally would receive in a non-divided oral argument — moreover, the aligned appellants have offered no explanation or justification for attempting to exclude from this Court at oral argument challenges to other statutory provisions contested in these consolidated cases, including the BCRA media exemption, the required disclosure provisions and individual contribution limits mandated by FECA (2 U.S.C. Sections 434, 441a), as amended by BCRA, which have been challenged by the Paul Plaintiffs.

7. With respect to allocating time to the various issues presented on appeal, the Government has suggested following the court's organizational approach, dividing argument according to the BCRA titles being challenged. (*See* Motion of the Federal Election Commission, *et al*. for Divided Argument, 2.) If such an approach were followed, the Paul Plaintiffs would suggest a modification of the Government's suggested approach whereby — instead of allocating three-quarters of the allotted time to Titles I and II — time would be allotted as follows: 80 minutes each to Title I, II, and III/other issues. The Paul Plaintiffs submit that such an allotment of time would best provide for argument on the issues before this Court. In that event, the Paul Plaintiffs would request that their 20 minutes not be divided because their press

---

well situated to present these diverse issues to this Court.

claims present a factually and legally cohesive argument to the challenged provisions in each of BCRA's three titles.

For the foregoing reasons, Appellants, the Paul Plaintiffs, oppose the Motion for Divided Argument of the aligned appellants, and respectfully request, consistent with the Paul Plaintiffs' Motion for Separate Oral Argument Time herein, that the Paul Plaintiffs be allowed 20 minutes to make their own oral argument to the Court at the argument of this matter on September 8, 2003.

Respectfully submitted,

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070

RICHARD O. WOLF
MOORE & LEE, LLP
1750 Tysons Boulevard
Suite 1450
McLean, VA 22102
(703) 506-2050

GARY G. KREEP
U.S. JUSTICE FOUNDATION
Suite 1-C
2091 E. Valley Parkway
Escondido, CA 92027
(760) 741-8086

PERRY B. THOMPSON
629 High Knob Road
Front Royal, VA 22630
(540) 305-0012

Attorneys for Appellants
**Counsel of Record*
July 18, 2003