No. 02-1676 and consolidated cases

IN THE SUPREME COURT OF THE UNITED STATES

FEDERAL ELECTION COMMISSION, *et al.*, Appellants

v.

SENATOR MITCH MCCONNELL, *et al.*, Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION OF EMILY ECHOLS, et al., AND OF BARRET AUSTIN O'BROCK, *APPELLEES*, REGARDING ARGUMENT AND DIVIDING OF TIME FOR ARGUMENT

**MAY IT PLEASE THE COURT**: Pursuant to S. Ct. Rule 28 and the instructions of the Clerk related to motions on oral argument in these cases, Emily Echols, *et al.*,[1] and Barret Austin O'Brock – minor appellees who successfully challenged the constitutionality of Section 318 of BCRA – respectfully move this Court, in making its division of argument time in the consolidated cases, for an Order:

1. setting ten (10) minutes time on each side for argument related to the fourth question presented in the Jurisdictional Statement of the FEC, *et al.*, No. 02-1676, by which question the FEC seeks to overturn the judgment below that Section 318 is unconstitutional; and,

2. allocating such time for argument on the Plaintiffs'-Appellees' side to counsel for the minors appellees and to no other.[2]

Echols and O'Brock respectfully submit the following points and authorities:

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[1] In addition to Miss Echols, Hannah McDow, Isaac McDow, Jessica Mitchell, Daniel Solid, and Zachary White challenged Section 318 below and are appellees here.

[2] In the District Court, all arguments against the constitutionality of Section 318 were presented to the Court by counsel for the minor Plaintiffs.

## I. THE IMPORTANCE OF ARGUMENT BEFORE THIS COURT IS UNQUESTIONED

### A. This Court and Justices Past and Present Have Acknowledged the Important Role of Oral Argument

The FEC and its co-Appellants have presented five questions to this Court in their Jurisdictional Statement and this Court has noted probable jurisdiction thereon. The fourth question attacks the judgment below that Section 318 of BCRA is unconstitutional. In the view of the minor Appellees, that question should not be submitted for decision without argument.

First, this Court's Rules and consistent practice do not provide for submitting a case without oral argument.[3] Previously, that practice that was tolerated under former Rule 38.1. No explicit provision for submission without argument has been made in the Rules since the 1990 amendments to the Rules of this Court. *See* Stern, Gressman, Shapiro & Geller, Supreme Court Practice ¶ 14.2, at 673 (BNA Books Eighth ed. 2002). Second, submission *only upon* argument is is consistent with the Government's own prior insistence that summary affirmance of the judgment below would be inappropriate. *See* FEC's Response to Joint Motion to Affirm Summarily at 9-10.

Chief Justice Rehnquist has stated, "in a significant minority of cases in which I have heard oral argument, I have left the bench feeling different about the case than I did when I came on the

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[3] Shortly after retirement, Justice Brennan described the value to him of oral presentations in cases before the Court:

> STEWART: Does oral argument make a difference to you?
>
> JUSTICE BRENNAN: It does to me, very definitely -- *you know, we won't permit a case to be decided unless it is argued orally*. If the necessity arises -- and I can remember a couple -- we have relieved counsel and substituted another lawyer to argue the case. That's how, so far, at least, the Court has regarded the necessity for oral argument.
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> David O. Stewart, *A Life on the Court*, 77 ABA Journal 62 (Feb. 1991).

bench."[4] Other Justices, present and past, have expressed similar views about the value of oral argument. Justice Ginsburg described oral argument as providing "notice and a last clear chance to convince the Court concerning points on which the decision may turn."[5] Justice Brennan viewed oral argument as a *necessity*.[6]

Plainly, oral argument of cases to be decided by this Court is typical. This Court's Rules treat oral argument as mandatory in cases to be submitted for decision by the Court. And Justices of this Court have described argument as helpful in reaching decisions on the merits of such cases. Given these conclusions, the minor Appellees respectfully submit that decision of the FEC's fourth question presented should not be made without oral argument thereon.

## II. OF THE PARTIES PLAINTIFF BELOW, ONLY THE MINOR APPELLEES HERE HAVE STANDING TO COMPLAIN TO DEFEND THE JUDGMENT BELOW THAT SECTION 318 IS UNCONSTITUTIONAL

Emily Echols, *et al*., and Barret Austin O'Brock are the only Appellees before this Court with constitutional standing to defend the judgment below. These minors challenged the constitutionality of Section 318 in the District Court. Their challenges reflected Section 318's imposition of an immediate, continuing and substantial burden on their fundamental constitutional rights. In addition

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[4] Wm. Rehnquist, The Supreme Court 276 (1987). *See also* Wm. Rehnquist, *Oral Advocacy: A Disappearing Art*, 32-33, Brainerd Currie Lecture, Mercer Univ. School of Law ("Oral advocacy is probably more important in the Supreme Court of the United States than in most other appellate courts . . . . [T]he time set for oral argument is the only opportunity that you will have to confront face to face the nine members of the Court who will ponder and decide your case. The opportunity to convince them of the merits of your position is at its high point") (quoted in Shapiro, Oral Argument in the Supreme Court of the United States, 33 Cath. U. L. Rev. 529, 550 n.22 (Spring 1984, Symposium).

[5] *See* Stern, Gressman, Shapiro & Geller, Supreme Court Practice ¶ 14.1, at 672 (BNA Books Eighth Ed. 2002).

[6] *See supra* n.3.

to their challenge, three members of the United States Congress challenged the constitutionality of Section 318. In the view of these minor Appellees, those challengers lacked standing to challenge Section 318 except to extent they were currently declared candidates for election to federal office whose ability to receive donations by minors burdened their exercise of cognate constitutional rights of association. With respect to the standing problems confronting former and future, *but not present*, candidates, the minor Appellees incorporate by reference herein, as though fully set forth, the argument of the National Right to Life Committee, Inc., *et al*., *see* Brief of NRLC, *et al*., at 46-49.

Absent a present candidacy for office, during which candidacy those members of Congress were denied the right to join in association with minors (whether the Appellees here or others) through the symbolic act of donation and its patent message of support, members of Congress simply lack the concreteness of injury or particularity of interest that affords standing under Article III.

## III. THIS COURT SHOULD HEAR FROM THOSE DIRECTLY AFFECTED BY THE STATUTE AND DIRECTLY AT RISK IF THE JUDGMENT BELOW IS NOT SUSTAINED

Section 318 is not a hypothetical statute. Its impact – direct, real, and substantial – falls entirely upon persons aged less than eighteen years. The minor Appellees suffer under the burdens it imposes on the right to freedom of political association and freedom of speech. This Court should hear argument from those minors, upon whom the disproportionately heavy weight of Section 318 falls, rather than others whose claims to standing are speculative at best.

Moreover, every oral argument bears risks and offers rewards. Among the risks are concessions, acknowledgments, and admissions against interest.[7] These minor Appellees should

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[7] Literally dozens of this Court's cases indicate the role that a concession made during oral argument had on the disposition of the case. *See*, *e.g.*., *Republican Party v. White*, 536 U.S. 765, 772 and n.4 (2002); *Alabama v. Shelton*, 535 U.S. 654, 672 (2002).

have their defense of the judgment below presented to this Court by counsel of their choosing, counsel equipped to know what ground may or may not properly be conceded, counsel familiar with the relevant facts and law. As examination of the briefs here reveals, other parties have given only a passing examination of Section 318. This Court can only benefit in its consideration of the Government's fourth question presented by having argument from counsel for the minor Appellees. While others have made those passing arguments about the constitutionality of Section 318, that provision is the sole and exclusive focus of these minor Appellees, it is the only provision of BCRA they challenged and the judgment striking it below is the only one they seek to defend here.

## CONCLUSION

The motion of the minor Appellees should be granted.

RESPECTFULLY SUBMITTED,

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