No. 02-1747

IN THE

Supreme Court of The United States

CONGRESSMAN RON PAUL, GUN OWNERS OF AMERICA, INC., GUN OWNERS OF AMERICA POLITICAL VICTORY FUND, REALCAMPAIGNREFORM.ORG, CITIZENS UNITED, CITIZENS UNITED POLITICAL VICTORY FUND, MICHAEL CLOUD, AND CARLA HOWELL,

Appellants,

v.

FEDERAL ELECTION COMMISSION, *ET AL.*,

Appellees.

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

BRIEF FOR APPELLANTS CONGRESSMAN RON PAUL, *ET AL.*

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court erred by dismissing appellants' freedom of the press challenge to various provisions of BCRA, and to provisions of FECA amended by BCRA, on the ground that, in the area of campaign finance regulation, the freedom of the press guarantee in the First Amendment to the United States Constitution contains no greater rights than those protected by the guarantees of free speech and association?

2. Whether the district court erred by upholding the statutory exemptions in BCRA enjoyed by the "institutional press" and other FEC-licensed press activities from the prohibitions against, and regulations of, electioneering communications and contribution limits governing appellants, on the ground that Congress may, regardless of the freedom of the press guarantee, grant greater rights to the "institutional press" than to the "general press," only the latter of which appellants are a part?

3. Whether the district court erred by holding that, regardless of the constitutional guarantee of the freedom of the press, the fall-back definition of electioneering communication in Title II of BCRA (as modified by the court) and the accompanying prohibitions and regulations are constitutional as applied to appellants as members of the "general press," even though the institutional press and other FEC-licensed press activities are exempted?

4. Whether the district court erred by holding that, regardless of the constitutional guarantee of the freedom of the press, those appellants who are federal officeholders and/or candidates for federal office must, as members of the "general press," submit to the Federal Election Commission's licensing power and editorial control as provided for in BCRA § 101(a)

(new FECA § 323(e)), including limiting their ability to assist candidates and causes they support, whereas members of the "institutional press" are exempt?

5. Whether the district court erred by holding that, regardless of the freedom of the press, those appellants who are candidates for election to state office, must, as members of the "general press," submit to the licensing power and editorial control of the Federal Election Commission as provided for in BCRA § 101(a) (new FECA § 323(f)), if they refer to a candidate for federal office and the Federal Election Commission determines this to constitute promotion or support, whereas members of the "institutional press" are exempt?

6. Whether the district court erred by holding that, regardless of the freedom of the press, appellant Congressman and candidates for federal office, being members only of the "general press," had no standing to challenge the constitutionality of BCRA § 307(a) limiting individual contributions to federal election campaigns, and mandating disclosure of contributor identities and donations, despite the impact of such limits upon the editorial function of their campaigns for federal office, and by dismissing appellant candidates' press challenge to such statutory limits and requirements?

PARTIES TO THE PROCEEDING

The appellants in this case, who were plaintiffs in Civil Action No. 02-CV-781 below before the district court, are: Congressman Ron Paul; Gun Owners of America, Inc.; Gun Owners of America Political Victory Fund; RealCampaignReform.org; Citizens United; Citizens United Political Victory Fund; Michael Cloud; and Carla Howell.

The appellees in this case, who were defendants or intervenor-defendants below, are: Federal Election Commission; the United States of America; Senator John McCain; Senator Russell Feingold; Representative Christopher Shays; Representative Martin Meehan; Senator Olympia Snowe; and Senator James Jeffords.

This case was consolidated below with ten other civil actions challenging the constitutionality of certain BCRA provisions.

The names of plaintiffs in each of the consolidated cases are as follows:
National Rifle Ass'n v. FEC: National Rifle Association of America (NRA) and NRA Political Victory Fund;
McConnell v. FEC: U.S. Senator Mitch McConnell, former U.S. Representative Bob Barr, U.S. Representative Mike Pence, Alabama Attorney General William H. Pryor, Libertarian National Committee, Inc., American Civil Liberties Union, Associated Builders and Contractors, Inc., Associated Builders and Contractors Political Action Committee, Center for Individual Freedom, Club for Growth, Inc., Indiana Family Institute, Inc., National Right to Life Committee, Inc., National Right to Life Educational Trust Fund, National Right to Life Political Action Committee, National Right to Work Committee, 60-Plus Association, Inc., Southeastern Legal Foundation, Inc., U.S. English d/b/a/ ProENGLISH, Thomas

McInerney, Barret Austin O'Brock, and Trevor M. Southerland;

Echols v. FEC: Emily Echols, Daniel Solid, Hannah McDow, Isaac McDow, Jessica Mitchell, Daniel Solid, and Zachary C. White;

Chamber of Commerce v. FEC: Chamber of Commerce of the United States, U.S. Chamber Political Action Committee, and National Association of Manufacturers (Plaintiff National Association of Wholesaler-Distributors withdrew);

National Ass'n of Broadcasters v. FEC: National Association of Broadcasters;

AFL-CIO v. FEC: AFL-CIO and AFL-CIO Committee on Political Education and Political Contributions;

Republican National Committee v. FEC: Republican National Committee (RNC), Mike Duncan, former Treasurer, current General Counsel, and Member of the RNC, Republican Party of Colorado, Republican Party of New Mexico, Republican Party of Ohio, and Dallas County (Iowa) Republican County Central Committee;

California Democratic Party v. FEC: California Democratic Party, Art Torres, Yolo County Democratic Central Committee, California Republican Party, Shawn Steel, Timothy J. Morgan, Barbara Alby, Santa Cruz County Republican Central Committee, and Douglas R. Boyd, Jr.;

Adams v. FEC: Victoria Jackson Gray Adams, Carrie Bolton, Cynthia Brown, Derek Cressman, Victoria Fitzgerald, Anurada Joshi, Nancy Russell, Kate Seely-Kirk, Peter Kostmayer, Rose Taylor, Stephanie L. Wilson, California Public Interest Research Group (PIRG), Massachusetts Public Interest Research Group, New Jersey Public Interest Research Group, United States Public Interest Research Group, the Fannie Lou Hamer Project, and Association of Community Organizers for Reform Now; and

Thompson v. FEC: U.S. Representatives Bennie G. Thompson and Earl F. Hilliard.

The names of other defendants in the consolidated cases are as follows: Federal Communications Commission; John D. Ashcroft; in his capacity as Attorney General of the United States; United States Department of Justice; and David M. Mason, Ellen L. Weintraub, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas, and Michael E. Toner, in their official capacities as Commissioners of the Federal Election Commission.

STATEMENT PURSUANT TO RULE 29.6

Appellant Gun Owners of America Political Victory Fund, a political committee, is a separate segregated fund of appellant Gun Owners of America, Inc., a nonprofit, nonstock corporation, and appellant Citizens United Political Victory Fund, a political committee, is a separate segregated fund of appellant Citizens United, a nonprofit, nonstock corporation. Otherwise, none of the appellants has a parent corporation. None of the appellants is a stock company, and no publicly held company owns 10 percent or more of the stock of any of the appellants.

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* The first record number is that of the docket entries in 02-CV-781 (Paul v. FEC), followed by the record number in 02-CV-582 (McConnell v. FEC), if available, or by the filing date.

TABLE OF AUTHORITIES

OTHER

OPINIONS BELOW

The three-judge district court issued its judgment, along with four opinions which were filed on May 2, 2003: a *per curiam* opinion joined by two of the judges, and individual opinions by each of the three judges. The opinions are reported at 203 U.S. Dist. LEXIS 7816. Pursuant to this Court's Order of May 15, 2003, the appellants submitted jointly the district court's opinions, in the form of a Supplemental Appendix to the Jurisdictional Statement (hereinafter "Supp. App.").

JURISDICTION

The district court issued its opinions and judgment on May 2, 2003. Appellants timely filed their Notice of Appeal on May 7, 2003. This Court has appellate jurisdiction pursuant to § 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, 114. Appellants filed their Jurisdictional Statement on May 30, 2003, and this Court noted probable jurisdiction on June 5, 2003. Appellants' Notice of Appeal is reprinted at Paul Plaintiffs' Jurisdictional Statement, Jur. St. App. 1a.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution is reprinted at Paul Plaintiffs' Jurisdictional Statement, Jur. St. App. 5a.

Sections 434 and 441a of Title 2 of the United States Code (FECA prior to BCRA's amendments), are set forth at Paul Plaintiffs' Jurisdictional Statement, Jur. St. App. 6a.

The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002), is reprinted at Paul Plaintiffs' Jurisdictional Statement, Jur. St. App. 27a.

STATEMENT OF THE CASE

BCRA was signed into law on March 27, 2002. Eleven separate complaints were filed in the United States District Court for the District of Columbia challenging its constitutionality. The cases were consolidated by the three-judge panel assigned to hear them, and the parties were ordered to conduct discovery and submit their cases-in-chief, supporting briefs and opposition and reply briefs on an expedited basis over the course of approximately six months. The fully-submitted cases were argued before the court below on December 4-5, 2002. On May 2, 2003, the district court issued four separate opinions — a *per curiam* opinion and an opinion of each of the three judges on the panel — upholding certain BCRA provisions, striking down certain other BCRA provisions, and dismissing challenges to certain other BCRA provisions for nonjusticiability and lack of standing. *See* Supp. App.

The Paul Plaintiff appellants relied exclusively upon the freedom of the press in their arguments, rather than invoking the free speech and association guarantees relied on in Buckley v. Valeo, 424 U.S. 1 (1976), and by the other plaintiffs below.

To establish that FECA/BCRA violates their freedom of the press, the Paul Plaintiffs introduced substantial fact and expert testimony. These witnesses provided testimony and expert reports to establish that political campaigns and public interest advocacy involve traditional press activities and that FECA/BCRA interfere with these press activities in a number of significant ways. *See, e.g.*, Declarations of Congressman Ron Paul, Michael Cloud, and Carla Howell, and Reports of Paul Plaintiffs' Expert Witnesses James C. Miller III, Perry

Willis, and Walter J. Olson, in the Appendix hereto ("App.").[1] In particular, for example, the Paul Plaintiffs demonstrated that the FECA/BCRA licensing, reporting, and expenditure limitations, together with their contribution limits, have adversely affected Congressman Paul's federal election campaigns, as well as those of federal and state candidates Michael Cloud and Carla Howell, and will continue to do so. *See, e.g.*, Paul Decl. ¶¶ 16-18, App. 75a-76a, Cloud Decl. ¶¶ 6-30, App. 83a-95a, Howell Decl. ¶¶ 4-21, App. 96a-103a, Miller Rep. at 13-27, App. 21a-39a, Willis Rep. ¶¶ 7-11, App. 49a-56a, Olson Rep. ¶ 116, App. 68a-69a. The Paul Plaintiffs also established, *inter alia*, that FECA/BCRA inhibits both challengers to incumbent members of Congress and the growth of minor parties. *See, e.g.*, Cloud Decl. ¶¶ 7-13, App. 83a-88a, Howell Decl. ¶¶ 9-13, 20-21, App. 98a-100a, 103a, Miller Rep. at 8-13, App. 16a-23a, Willis Rep. ¶¶ 9-14, App. 52a-62a. Moreover, the Paul Plaintiffs demonstrated, *inter alia*, that, at least with regard to the passage of FECA, and that by the time BCRA was passed, the incumbent-protecting effect of this kind of regulation was discussed in Congress. *See, e.g.*, Statement of Sen. McConnell, 148 Cong. Rec. S3131-3132 (daily ed.

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[1] The Paul Plaintiffs demonstrated their functions as independent and effective "presses" — developing and implementing editorial policy, as well as researching, drafting, editing, publishing, and even withholding news stories, editorials, and commentaries on both public policy issues and federal election campaigns and candidates. The Paul Plaintiffs extensively publish through press releases, unpaid appearances on radio and television news, talk, and other shows, through paid political advertisements in newspapers and on radio and television, and through their own outlets — faxes, e-mail, web sites, direct mail, newsletters, bumper stickers, video and audio tapes, telephone calls, door-to-door campaigning, speeches, debates, and even a syndicated radio show. *E.g.*, Paul Decl. ¶¶ 13-15, App. 72a-74a; Willis Rep. ¶¶ 7, 8, App. 49a-52a; Lizardo Decl. ¶ 5, App. 78a; Bossie Decl. ¶¶ 3, 5; Pratt Decl. ¶¶ 3, 5, 9; Babka Decl. ¶¶ 4, 7, 9, Rec. No. 60.

Mar. 29, 2001); Statement of Rep. Ney, 148 Cong. Rec. H348 (daily ed. Feb. 13, 2002).[2]

The evidence introduced by the Paul Plaintiffs was not challenged by the defendants, and apparently was accepted by the court below. There is no apparent factual dispute, and the Paul Plaintiffs' claims were rejected as a matter of law. Supp. App. at 99sa-105sa, 158sa-59sa, 460sa, 472sa-75sa and 1144sa-46sa. This case fundamentally concerns whether the constitutional guarantee of freedom of the press applies to the Paul Plaintiffs, and, if so, whether that guarantee precludes the challenged governmental restrictions, embodied in BCRA/FECA, of the Paul Plaintiffs' press activities.

SUMMARY OF ARGUMENT

The Paul Plaintiffs challenge the constitutionality of various provisions of the BCRA-amended FECA under the freedom of the press. Although it recognized the distinctiveness of the Paul Plaintiffs' challenge, the district court dismissed it, erroneously ruling that the freedom of the press imposes no limits upon campaign finance regulations different from those imposed by free speech and association. Deferring to congressional representations that the BCRA-amended FECA prevents "corruption and appearance of corruption," the court applied the strict scrutiny and intermediate scrutiny tests set forth in Buckley v. Valeo on the erroneous assumption that Buckley and its progeny precluded consideration of the Paul Plaintiffs' freedom of the press claims.

The record below unmistakably demonstrates that the BCRA-amended FECA increases the advantages that FECA granted to

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[2] The Paul Plaintiffs' evidence below is set out in more detail in their Jurisdictional Statement to the Court, Jur. St. at 3-14.

incumbents over challengers. Because campaign finance regulations implicate congressional self-interest, the normal rule of judicial deference to the constitutional judgment of Congress does not apply. Claims that such statutes have been enacted to prevent "corruption and appearance of corruption" remain undefined and constitutionally suspect. Insofar as Buckley has spawned the loose use of such terms, it ought to be overruled, or set aside, having failed to provide bright-line rules governing the marketplace of ideas related to federal elections.

The freedom of the press provides such bright-line rules. According to this Court's precedents, the freedom of the press: (1) bans congressional licensing of the publication and dissemination of ideas; (2) constrains Congress from imposing prior restraints upon such publication and dissemination except under the most extraordinary circumstances; (3) prohibits Congress from authorizing government officials to exercise the editorial function in such publication and dissemination; (4) forbids Congress from forcing the disclosure of the identities of publishers and disseminators; and (5) proscribes Congress from placing discriminatory economic burdens upon some such publishers and disseminators, and not others. Enforcing these freedom of the press constraints upon Congress is the only way to protect the people from government corruption, and it is not subject to any override by an asserted compelling government interest.

Subjecting the BCRA-amended FECA to analysis under the freedom of the press reveals that the Title II prohibitions and regulations of "electioneering communications" violate all five press standards. New FECA § 323(e) and § 323(f), created by Title I of BCRA, impose like unconstitutional restrictions. Section 323(e) imposes unconstitutional editorial control over federal officeholders and candidates; Section 323(f) imposes unconstitutional editorial control over state and local

officeholders and candidates. Finally, the Paul Plaintiffs have standing to challenge the contribution limits imposed by BCRA-amended FECA § 307, which together with the individual and PAC contribution limitations of FECA § 441a and their companion disclosure requirements contained in FECA § 434, impose unconstitutional editorial control upon candidates and their campaigns. All should be struck down.

ARGUMENT

I. THE CUSTOMARY DEFERENCE ACCORDED TO THE CONSTITUTIONAL JUDGMENT OF CONGRESS DOES NOT APPLY IN THIS CASE.

Ordinarily, this Court, when called upon to judge the constitutionality of an act of Congress, "accords great weight to the decisions of Congress," even in cases presenting First Amendment challenges. CBS v. Democratic National Committee, 412 U.S. 94, 102 (1973). *Accord* Rostker v. Goldberg, 453 U.S. 57, 64 (1981). Such deference to the constitutional judgment of Congress does not, however, apply in every case. For example, as explained by Justice Scalia in Morrison v. Olson, 487 U.S. 654 (1988), this Court did not invoke the "caution that we owe great deference to Congress' view that what it has done is constitutional" in assessing the constitutionality of the independent counsel law, because "where the issue pertains to separation of powers, and the political branches are ... in disagreement, neither can be presumed correct." Indeed "[a]s one of the **interested** and coordinate parties to the underlying constitutional dispute, Congress, no more than the President, is entitled to the benefit of the doubt." *Id.* at 704-05 (Scalia, J., dissenting) (emphasis added).

This Court did not extend deference to the constitutional judgment of Congress in Powell v. McCormack, 395 U.S. 486 (1969), in a dispute over the extent of congressional power to exclude a person from Congress by the exercise of its power to "judge ... the qualifications of its own members," recognizing that Congress had an institutional **self-interest** in an expansive interpretation of such power, an interpretation that was, also, in direct conflict with "a fundamental principle of our representative democracy ... 'that the people should choose whom they please to govern them,'... [a] principle [that] is undermined as much by limiting whom the people can select as by limiting the franchise itself." *Id*. at 541-47.

Similarly, Congress is an interested party with respect to the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 116 Stat. 81 (2002), and the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431, *et seq*. ("FECA"), that it amends. In both acts, Congress has crafted rules governing the process by which monies may be raised and spent to challenge Congressmen for **re-election**, a preeminent concern — if not **the preeminent concern** — of each member of Congress. As Chief Justice Burger observed in Buckley v. Valeo. 424 U.S. 1 (1976):

> I see grave risks in legislation, enacted by incumbents of major political parties, which distinctively disadvantages minor parties or independent candidates. This Court has, until today, been particularly cautious when dealing with **enactments that tend to perpetuate those who control legislative power**. *See* Reynolds v. Sims, 377 U.S. 533, 570 (1964).... [Buckley, 424 U.S. at 251 (Burger, C.J., concurring and dissenting) (emphasis added).]

Further, this Court ruled that a legislature's failure to consider the interests of minor parties creates a need for courts to do so. "[B]ecause the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decision making may warrant **more careful judicial scrutiny**." Anderson v. Celebrezze, 460 U.S. 780, 793 (1983) (emphasis added). This rule should also be applied to acts of the United States Congress when the rights of minor party candidates are in question.[3]

A. BCRA/FECA Advantages Incumbents.

A campaign against an incumbent is not a fair fight. Incumbents enjoy a great advantage over challengers simply because their names are already well known and they have immediate access to the media due to their position. Other tangible benefits of incumbents had a total value between $1,823,086 and $3,144,999 in 1999 for each U.S. senator. Cloud Decl. ¶¶ 12-13, App. 85a-88a. *See also* Miller Rep. at 8-24, App. 16a-36a; Willis Rep. ¶¶ 10-13, App. 53a-61a;

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[3] The political harm suffered by minor parties under FECA/BCRA are cogently demonstrated by the Willis Rep. ¶¶ 4-10, App. 44aa-55a; Miller Rep. at 8-27, App. 16a-39a; Cloud Decl. ¶¶ 6-30, App. 83a-95a; and Howell Decl. ¶¶ 4-21, App. 96a-103a. The need for this additional protection of minor parties is apparent when one considers their importance to our political system. "There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." Williams v. Rhodes, 393 U.S. 23, 32 (1968). *See also* Sweezy v. New Hampshire, 354 U.S. 234 (1957). "All political ideas cannot and should not be channeled into the programs of our two major parties.... Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society." *Id.* at 250-51.

Buckley at 31. FECA/BCRA builds on these natural advantages of incumbency in numerous ways to the virtual destruction of a fair and open system of elections.

Economist, former Chairman of the Federal Trade Commission and Director of the Office of Management and Budget, James C. Miller III, Ph.D., who testified as an expert witness for the Paul Plaintiffs, has analyzed the manner in which political campaigns resemble commercial markets and incumbent politicians resemble monopolists. He found that any regulation which limits fundraising or spending harms challengers more than incumbents because challengers benefit more than incumbents from each dollar spent on their campaign. In economic terms, challengers receive a higher marginal utility for each dollar spent. Miller Rep. at 17, App. 27a. Because of the anti-competitive nature of fundraising/spending limits, the major effect of FECA has been to protect incumbents from challengers. *Id.* at 16, App. 25a. In commercial markets, monopoly leads to higher profits, higher prices, lower quality, and less innovation. When incumbents are able to enjoy monopolistic powers, the effects on citizens and voters are like the effects of monopoly on consumers. The range of options is limited, the overall quality of service is diminished, accountability suffers, officials more frequently respond to vested interests rather than the electorate at large, deliberations are less transparent, and citizens have less information about the candidates, their qualifications, and their positions. *Id.* at 7-8, App. 15a-16a. Even a candidate who faces no serious threat of electoral defeat may wish to avoid challenge simply to avoid the criticism that challengers generally use in their campaigns against incumbents. Finally, when one party is unable to achieve a true **monopoly**, the **second choice** of the would-be monopolist is to form a **duopoly** with one other party, thus enjoying nearly all of the benefits of monopoly, and simply sharing them with one other

group. However, like commercial trusts, political candidates and parties have an incentive to break the agreement with their fellow conspirators. Thus, they **seek to enforce their anti-competitive agreements by law**. J. Miller, *Monopoly Politics* 40-42 (Hoover Inst. Stanford Univ.: 1999).

Perry Willis, the former national director of the Libertarian National Committee and an experienced political consultant and fundraiser, also served as an expert witness for the Paul Plaintiffs. He testified that polls show a significant number of Americans hold political beliefs that are best described as "libertarian." Willis Rep. ¶ 4, App. 44a-46a. However, in spite of public support, the discriminatory effects of federal campaign laws on minor parties make it virtually impossible for libertarians to be viable candidates for federal office.[4] *Id.* ¶¶ 4-5, App. 44a-48a. Challengers, especially minor party challengers, must rely on fewer sources of contributions than incumbents because many potential donors refuse to donate to challengers given the ever present threat of retribution from the incumbent. To overcome this disadvantage, challengers must rely on larger contributions from strong supporters who share their philosophical convictions, which FECA/BCRA's contribution limitation makes impossible. Moreover, because of the limited amount of money which can be accepted from each contributor, challengers must pay the costs to locate and communicate with a greater number of potential donors, thus spending less communicating their message to the general public. Incumbents, however, can easily and inexpensively convince large numbers of donors to contribute to the

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[4] Additionally, the institutional media, which is exempted from FECA/BCRA, is uniformly biased against libertarian ideas. In an effort to counteract this bias, the primary aim of Libertarian campaigns is to serve as a press, educating the public about the policy options which are ignored by the mainstream press' focus on "conservative" versus "liberal" approaches. Willis Rep. ¶¶ 7-8, App. 49a-52a.

campaigns; thus, they are not harmed by contribution limits. *Id.* ¶¶ 9-12, App. 52a-58a. FECA/BCRA's reporting requirements also severely limit the ability of challengers, especially minor party challengers, to raise money because their greatest support comes from people who have philosophical or economic reasons to oppose the status quo. However, these are also people who tend to fear having the government learn of their efforts to change the status quo. Thus, many supporters of Libertarian campaigns donate $199 to avoid having their personal information reported. *Id.*, ¶ 13, App. 58a-61a.[5]

The anti-competitive provisions of FECA have been exponentially worsened by BCRA. For example, under BCRA, an American citizen can be sent to federal prison for five years for criticizing a member of Congress in the way that Congress has determined to be impermissible, and for a wide variety of other "offenses." FECA § 309(d)(1), Jur. St. App. at 69a. BCRA prohibits a member of Congress from signing a fundraising letter for a group that he or she supports to conduct issue advocacy or voter registration, and BCRA makes it virtually impossible for minor party candidates for federal and

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[5] Judge Buckley of the U.S. Court of Appeals for the District of Columbia observed in 2000: "the argument is essentially between political insiders and political outsiders, as exemplified by the ideologically disparate group that joined Sen. Eugene McCarthy and me in challenging the constitutionality of the Campaign Reform Act of 1974. What we had in common was a concern that its **restrictions on spending and giving would effectively squeeze independent voices and political reform movements out of the political process** by making it even more difficult than it already was to raise effective challenges to the political status quo. The legislation was, in fact, so notoriously one-sided in this respect that it became known as the **Incumbent Protection Act**." Cato Policy Report, March/April 2000, p. 1, Corruption, Campaign Finance, and Term Limits, http://www.cato.org/pubs/policy_report/v22n2/buckley.html (emphasis added).

state office to run as a team to maximize their chance of gaining public attention and public support. FECA § 323(e) and (f), Jur. St. App. at 30a-33a. BCRA continues the FECA practice of severely limiting contributions by Americans to campaign committees, with an anemic, less-than-inflation increase in limitations, ensuring that effective challenges to incumbents will be virtually impossible. FECA § 315(a)(1), Jur. St. App. at 62a. BCRA continues and expands the FECA practice of compelling the disclosure of the identity of financial supporters so that incumbents may know the identity of those who would have the temerity to oppose them. 2 U.S.C. § 434(b)(3)(A), Jur. St. App. at 12a, and new FECA § 304(f), Jur. St. App. at 37a-41a. Few Americans can be expected to understand these restrictions or how they are to be applied to decisions made in the heat of an election campaign.[6]

In the face of the anti-competitive track record of FECA and the record below concerning BCRA, the time is right for this Court to entertain a broad challenge to the entire regulatory scheme for federal campaign finance.[7] Such a challenge is

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[6] BCRA makes FECA much more complex and difficult to work with. Even FEC employees often do not understand these restrictions. Paul Plaintiffs' expert witness Walter J. Olson, CPA, stated that, even though he is an experienced consultant in the area of campaign finance regulation, he frequently must call the FEC advice line. A number of times, the FEC information specialist he has spoken to has not been able to answer his questions. On occasion, FEC employees actually admit that they have no advice to give and Mr. Olson, as treasurer facing personal liability for FECA violations, must act at his own peril. Olson Rep. ¶ 8, App. 67a-68a.

[7] It is particularly important that the campaign finance reformers be checked now, because they have made it clear that even the restrictions in BCRA do not satisfy them. For example, before the House of Representatives had even voted on BCRA, Senator McCain declared "This new law does not resolve all of the problems of our campaign finance system — but it was a historic and **significant step** forward.... Those of us who believe deeply in

presented by the Paul Plaintiffs. Their challenge differs from the challenges of all others in this litigation in three ways: (1) the Paul Plaintiffs base their challenge on the press clause of the First Amendment rather than the speech and association clauses, or equal protection or due process; (2) the Paul Plaintiffs seek the re-examination and overturning of Buckley v. Valeo based on a real record, not just congressional self-serving promotionals upon which Buckley relied, although these plaintiffs believe that Buckley could simply be set aside; and (3) the Paul Plaintiffs challenge contribution limits and disclosure requirements not challenged by other parties and never before challenged on freedom of press grounds.

B. Claims of Corruption and the Appearance of Corruption Are Undefined and Mask a Constitutionally Illegitimate Purpose.

In this case, as in Buckley, the federal government and intervening members of Congress maintain that so-called reform is justified to combat "corruption and the appearance of corruption" in government, lest the people lose faith in their government officials and in their current system of government. *See* Defendants' Brief at 71-84 (Rec. No. 66). Rather than provide this Court with a precise definition of "corruption" and "appearance of corruption," they prefer to invoke those terms as "judicial mantras," hoping that by repetition this Court will simply accept the claims on the strength of this Court's normal practice of according deference to Congress. As pointed out

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these reforms will not falter in our efforts to ... **implement further reforms** in the future." McCain Declares Reform Crusade Continues, Press Release of John McCain, Nov. 14, 2001. His attitude is shared by his co-author of the Senate version of BCRA, Senator Feingold, who said, "[BCRA] is only a **first step** to cleaning up the system. There are **many provisions** we can consider **down the road**...." Statement of Sen. Feingold, 147 Cong. Rec. S2887 (daily ed. Mar. 26, 2001).

above, such deference should not be accorded Congress in this case because any presumption of constitutionality does not apply when Congress acts to protect itself and the current two-party system.

In Buckley, the Court was clear about what **it** meant by "corruption" — "large contributions ... given to secure political quid pro quo's from current and potential office holders." *Id.*, 424 U.S. 26. But this is not what BCRA's supporters meant by corruption. As FEC Commissioner Bradley Smith has written:

> What is meant by "corruption" in [the current "reform" debate] is not the common definition of the term, that is to say, personal enrichment of a legislator in exchange for a vote.... What reformers mean by "corruption" is that legislators react to the wishes of constituents; or what, in other circumstances, might be called "responsiveness." What makes this particular incidence of responsiveness "corrupt" is that the constituents involved have taken an active role in supporting the candidate's campaign for election.... In short, for at least some campaign regulation advocates, it appears that democracy itself is the problem. If individuals and groups are allowed to spend money campaigning, they might succeed in convincing voters to vote in certain ways; if they are allowed to lobby their representatives, they might persuade those representatives to support or oppose legislation. This "has really got to be changed." Democracy itself is corrupt. [B. Smith, *Unfree Speech* 52, 214 (Princeton Univ. Press: 2002).]

Although BCRA sponsors seek to define preventing the "appearance of corruption" as a compelling **governmental interest** justifying restrictions on the First Amendment rights of Americans, they are actually addressing a compelling **political interest** shared by all incumbents. When government is perceived as corrupt, it is the **incumbents**, not the challengers, who are at risk. Combating the "appearance of corruption," then, is a ruse designed by incumbents to justify limits on the freedoms of others to further their own interests.

Just two terms ago, this Court ruled that a state may not regulate the content of a campaign for elective judicial office without first defining specifically its goals. In Republican Party of Minn. v. White, 536 U.S. 765 (2002), this Court found that the claimed government interests of "preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary" did not survive careful scrutiny. *Id.* at 773. Likewise here, the Government should not be allowed to claim an interest in preventing "corruption and the appearance of corruption" without defining those terms with the same precision as required in the White case. This is especially important here, where the government candidly admits that its overarching goal is to preserve the people's "confidence" in the present system of representative government. *See* Buckley, 424 U.S. at 27. In the past, governments have attempted to achieve that same goal through laws prohibiting seditious libel, contending that the current government must have the power to preserve its reputation with the people, lest the people lose confidence in their government. *See* Rex v. Tutchin, Howell's State Trials 1095 (1704) (sustaining seditious libel prosecution on the theory that "it is very necessary for all governments that the people should have a good opinion of it." *Id.* at 1128). However, if it is constitutionally illegitimate for the government to pursue a seditious libel prosecution in order to protect the government's

reputation, as this Court ruled in New York Times v. Sullivan, 376 U.S. 254 (1964), then the government cannot protect the government's reputation by "preventive" measures such as those contained in BCRA/FECA, notwithstanding this Court's opinion in Buckley.

II. THE COURT BELOW ERRONEOUSLY DISMISSED THE PAUL PLAINTIFFS' CLAIMS UNDER THE FREEDOM OF THE PRESS.

Beginning with Buckley v. Valeo, and continuing through Federal Election Commission v. Beaumont, ___ U.S. ___, 123 S. Ct. 2200 (2003), this Court has never addressed a freedom of the press challenge to the Federal Election Campaign Act. For that reason alone, the *per curiam* opinion declined to determine the Paul Plaintiffs' challenges to BCRA under the freedom of the press. Supp. App. at 104sa. Additionally, the court below dismissed the Paul Plaintiffs' freedom of the press claims on the ground that the freedom of the press clause provides "no rights ... that are superior to or different than those under the other clauses of the First Amendment." *Id.* at 103sa-04sa. Thirdly, faulting the Paul Plaintiffs for failure "to provide the Court with a standard to apply" to their Press Clause claims,[8] the court below "appl[ied] the same scrutiny to

[8] The *per curiam* opinion criticized the Paul Plaintiffs also for failing "to ... delineate the additional, substantive rights provided under the First Amendment Freedom of the Press Clause." Supp. App. at 101sa, n.61. This simply is not correct. In the briefing below by the Paul Plaintiffs, the "substantive rights" guaranteed by the freedom of the press were addressed thoroughly, given the 30-, 20-, and 10-page limitations on briefs imposed by the district court (Order of Oct. 15, 2002, Rec. No. 51) (reduced from the Paul Plaintiff's request of 45, 30, and 25 pages.) *See* Initial Brief at 8-12, Rec. No. 65, Opposition Brief at 10-11, Rec. No. 73, and Reply Brief at 1-6. The distinct judicial standard applied to violations of the press freedom are set forth in the several subparts of Section II.B, *infra*.

all First Amendment claims, whether presented under the Speech or Press Clauses." Supp. App. at 102sa-03sa, 105sa. Finally, the court rejected the Paul Plaintiffs' freedom of the press claims on the ground that "[i]f the Press Clause affords greater or different rights, it might force the courts to make a distinction between the 'institutional' and 'general' press," which could prove difficult, if not impossible, under the freedom of the press guarantee." *Id.* at 104sa, n.65. The court erred on all four points.

A. The Paul Plaintiffs' Freedom of the Press Claims Are Not Barred by Buckley and Its Progeny.

The court below worried that, if the Paul Plaintiffs' press claims were addressed on the merits, then "litigants could besiege the courts with a host of challenges to laws previously upheld by [this] Court ... merely by characterizing themselves in their complaints as members of the 'press' because their purpose is to disseminate information to the public." *Id.* at 104sa. To be sure, no plaintiff should be permitted to camouflage a free speech or association claim by wrapping it in freedom of the press clothing in order to escape the strictures of *stare decisis*. But that is not what the Paul Plaintiffs have done. Rather, on the basis of the unchallenged facts concerning their press activities — ranging from publication of public information to campaigning for public office — they have asserted that they are entitled to the discrete protections of the freedom of the press — including the prohibitions against government licensing, prior restraints, editorial control, forced identity disclosure and discriminatory economic burdens — all of which are different from either the "strict scrutiny" or "intermediate scrutiny" protections enjoyed by the free speech and association claimants who previously litigated Buckley and its progeny. *See e.g.*, Amended Complaint §§ 41-45, App. at 1a-4a; Paul Plaintiffs' Proposed Findings of Fact §§ 12-20, 23-

49, App. 109a-120a. *See also* itemization of record evidence on press claims in Statement of the Case, *supra*, at 3-4.

Lack of a prior challenge to campaign finance laws based upon the freedom of the press guarantee is no bar to raising such a challenge now. If "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence" (Walz v. Tax Comm. of New York, 397 U.S. 664, 678 (1970)), then surely the government does not acquire immunity from constitutional violations just because they have not been brought to the attention of the courts in previous litigation that stretches back only 27 years. Indeed, the fact that no one had previously raised a claim that campaign finance regulation "interferes with First Amendment freedoms" did not preclude this Court from addressing such a challenge in Buckley. *See* Buckley, 424 U.S. at 13-14. *See also* New York Times v. Sullivan, 376 U.S. 254, 268 (1964) (previous statements by the Court that the Constitution does not protect libelous publications is no bar to constitutional challenge to libel of government).

B. The Freedom of the Press Is Subject to a Different and Higher Standard of Review.

The court below concluded that the Paul Plaintiffs' press claims were no different from those previously litigated in Buckley and its progeny, because, as a matter of law, there are "no rights under the Press Clause that are superior to or different than those under the other clauses of the First Amendment." Supp. App. at 103sa-04sa. Thus, it reasoned, because "the Press Clause has largely been subsumed into the Speech Clause," the Paul Plaintiffs' claims are subject to "the same scrutiny" as other "First Amendment claims," whether they be free speech or association. *Id.* at 102sa, 104sa. To

reach this conclusion, the court below disregarded a long line of this Court's precedents applying a higher and different standard of review to the freedom of the press.

The court below inferred from First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), that "in the context of an election law statute, as applied to a non-media corporation, the Supreme Court treated the Press and Speech Clauses as indistinct." Supp. App. at 103sa. This is a misreading of Bellotti. First, the bank plaintiff in Bellotti did not raise a freedom of the press claim, but limited its claims to violations of the freedoms of speech and association. Bellotti, 438 U.S. at 767, 771, 776-77, 780. Second, this Court **explicitly** characterized the bank's claim as one based upon the freedom of speech, without any reference whatsoever to any possible freedom of the press claim, and thus it applied the Buckley strict scrutiny test. *Id.* at 786-91. Third, although the Bellotti plurality referred to "press cases," this Court did not — contrary to the claim of the *per curiam* opinion below (Supp. App. at 103sa) — engage in a careful discussion of the freedom of the press, much less consider the bank's rights under the Press Clause to be indistinct from its claims under the Speech Clause. Rather, as Chief Justice Burger wrote in his concurring opinion, "[t]he meaning of the Press Clause, as a provision separate and apart from the Speech Clause, is implicated only indirectly by this case." Bellotti, 438 U.S. at 802.

No Licensing Standard. In his Bellotti concurrence, the Chief Justice proposed that the Press Clause, as distinguished from the Speech Clause, was designed to prohibit "official [government] restraints," such as "licensing, censors, indices of prohibited books, and prosecutions for seditious libel...." *Id.* at 795, 800. In particular, he noted that any effort to limit the reach of the Press Clause to "media corporations," as had been suggested by some, would run afoul of "the abhorred licensing

system of Tudor and Stuart England — a system that the First Amendment was intended to ban in this country." *Id.* at 801. To support this proposition, the Chief Justice cited Lovell v. Griffin, 303 U.S. 444 (1938), which found unconstitutional a city ordinance requiring a person to obtain a permit **before** disseminating literature because it "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." *Id.* at 451. And the Court so ruled in Lovell without subjecting the ordinance to strict or other scrutiny to determine if the city had a compelling interest to impose its licensing system.

In Watchtower Bible and Tract Society v. Village of Stratton, 536 U.S. 150 (2002), this Court assessed the constitutionality of a licensing system requiring a mayoral permit **before** engaging in "door-to-door ... religious proselytizing [and] anonymous political speech and the distribution of handbills." *Id.* at 153. Relying primarily upon its "World War II-era cases" (*id.* at 164), including Lovell (*id.* at 161), it placed special emphasis upon Schneider v. State, 308 U.S. 147, 164 (1939), quoting therefrom as follows:

> [P]amphlets have proved the most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people. On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press.... To require a **censorship through license** which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart

> of the constitutional guarantees. [Watchtower, 536 U.S. at 162 (emphasis added).]

The Watchtower Court then concluded that it was unnecessary to resolve the "standard of review ... assessing the constitutionality of this ordinance" — whether strict or intermediate or some lesser scrutiny — because "the breadth of speech affected by the ordinance and the **nature of the regulation**" offends "the very notion of a free society — that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so," notwithstanding the government's claimed countervailing interests of preventing fraud and other crime, or protecting privacy. *Id.* at 164-166 (emphasis added). In essence, this Court in Watchtower concluded that the ordinary free speech or association standards of strict or intermediate scrutiny do not apply to a law "requiring a permit" to engage in "everyday public discourse," even if "the issuance of permits ... is a ministerial task that is performed promptly." *Id.* at 166. In so ruling, this Court recognized that, even if a government official has absolutely no discretion not to issue a permit, any "statute purporting to license the dissemination of ideas" is inherently "evil," and therefore, unconstitutional on its face. Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

Prior Restraint Standard. In addition to outlawing the licensing and censorship of publications and dissemination of ideas, the freedom of the press applies a more stringent standard than free speech to **previous** restraints upon publications. During their long tenures on this Court, Justices Black and Douglas concluded that **all** such restraints violated the freedom of the press. *See* New York Times Co. v. United States, 403 U.S. 713, 717, 720 (1971). Although their view never prevailed, the press doctrine of "no prior restraints" has

laid down a much higher standard than the strict scrutiny standard applied to free speech and association. In Near v. Minnesota, 283 U.S. 697 (1931), Chief Justice Charles Evans Hughes observed that "the chief purpose of the guaranty [of the liberty of the press is] to prevent previous restraints upon publication." *Id.* at 713. While the Chief Justice acknowledged that "the protection even as to previous restraints is not absolutely unlimited," he maintained that "only in exceptional cases" could the government impose such a restraint. *Id.* at 716. In the 1971 Pentagon Papers case, this Court ruled that "'any system of prior restraints ... bear[s] a heavy presumption against its constitutionality.'" New York Times, 403 U.S. at 714 (internal cites omitted). To overcome this presumption, it was not enough for the government to show a "compelling state interest." Rather, as Justice Brennan noted in a separate opinion, "only government allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order." *Id.* at 726-27. *See also id.* at 730-31.

No Government Editorial Control. Additionally, the freedom of the press posits editorial control in the people, not in the government. As Blackstone put it: "Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press." IV Blackstone's *Commentaries* at 151-52. Indeed, the very purpose of prohibiting the licensing of publications is to prevent government officials, executive, administrative, or judicial, from assuming the function of editors. *See* Near v. Minnesota, 283 U.S. at 711-17. As Justice Black put it in the Pentagon Papers case:

> In the First Amendment the Founding Fathers gave the free press the protection that it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose the deception in government. [New York Times, 403 U.S. at 717.]

Thus, in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), a Florida right-to-reply statute was struck down as an unconstitutional intrusion upon the editorial function of newspaper, even though the statute, by requiring that a candidate for election to office have access to a monopoly news outlet to reply to charges against him, was designed to ensure a more fully informed electorate. *Id.* at 245, 258. This Court reasoned that, no matter how strong the interest of the state to counter the entrenched economic concentration of power in newspapers in order to "ensure that a wide variety of views reach the public," the freedom of the press guaranteed the private exercise of editorial discretion. *Id.* at 247-56. Thus, it is clear that the press guarantee of private editorial control is not subject to any overriding government interest, compelling or otherwise. *See id.* at 259-61 (White, J., concurring).

No Forced Identity Disclosure. Concomitant with the press guarantee of private editorial control is the right to publish and disseminate anonymously. As Justice Black opined in Talley v. California, 362 U.S. 60 (1960), the constitutional right to communicate anonymously is rooted, firstly, in the no licensing/no censorship principle of the

freedom of the press, and only secondarily in the privacy protection afforded by the guarantee of free association. *See id.* at 62-65. While the anonymity protection of free association may be subject to overriding state interests, where applicable, the anonymity protection of the freedom of the press is not. *Compare id.* at 62-65 *with id.* at 66 (Harlan, J., concurring) and *id.* at 69 (Clark, J., dissenting).

In Buckley v. Valeo, plaintiffs challenged the forced disclosure of the identities of contributors (publishers) of campaign literature **solely** on the ground that such disclosure violated the privacy protection afforded by free association. 424 U.S. at 11. Therefore, this Court analyzed FECA's forced disclosure provisions under the strict scrutiny standard applicable to free association anonymity claims. *See id.* at 64-68. After Buckley, this Court has had the opportunity to review forced disclosure laws on four occasions. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982); McIntyre v. Ohio Elections Comm., 514 U.S. 334 (1995); Buckley v. Amer. Const. Law Found., 525 U.S. 599 (1999); and Watchtower v. Stratton, *supra.* In the Socialist Workers and American Constitutional Law Foundation cases, this Court applied the strict scrutiny test because the challenging parties had rested their anonymity claim upon freedom of association. Brown, 459 U.S. at 91-102; Amer. Const. Found., 525 U.S. at 200-05.

In McIntyre, however, an Ohio statute prohibiting the distribution of "anonymous campaign literature" was challenged as a violation of the freedom of speech. McIntyre, 514 U.S. at 336. In his majority opinion striking down the Ohio statute, Justice Stevens eschewed reliance on the privacy protection of free association, in favor of the free press principle of private editorial control, relying heavily upon Talley and Miami Herald. *Id.* at 341-45, 347-49. Although the

majority claimed that it was applying "strict scrutiny" to the Ohio statute as in Buckley v. Valeo (*id.* at 347, 352-57), Justice Scalia, in dissent, found the majority opinion's attempt "to distinguish Buckley unconvincing." *Id.* at 382-84 (Scalia, J., dissenting). Concurring with the majority, Justice Thomas discarded any attempt at strict scrutiny, finding the anonymity principle protected, without exception, in the freedom of the press. *Id.* at 359-71. *See also* Watchtower, 536 U.S. at 164.

No Discriminatory Economic Burdens. To confine the freedom of the press to freedom from licensing and censorship alone would be "too narrow a view of the liberty of the press." Grosjean v. American Press Co., Inc., 267 U.S. 233, 245-47 (1936). As the Grosjean Court observed, after the English monarchy gave up its licensing power to control the flow of information about the government, it turned to its taxing power to impose economic burdens upon "the publication of comments and criticisms objectionable to the Crown." *Id.* at 246. While the Parliament imposed stamp duties upon advertising revenue and printed publications "'avowedly for the purpose of repressing libels,'" in reality, "the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people with respect of their government affairs." *Id.* at 247 (internal cites omitted). Writing in opposition to the infamous Stamp Act of 1765, John Adams noted that the Act imposed "restraints and duties" upon the press to "strip us in a great measure of the means of knowledge." J. Adams, "A Dissertation of the Canon and Feudal Law," reprinted in J. Adams, *The Revolutionary Writings of John Adams* 21, 34 (Liberty Fund, Indianapolis: 2000). According to Adams, such taxes transferred the wealth of the people to the government in violation of the freedom of the press which was rooted in the "divine right" of the people "to know ... the characters and conduct of their rulers." *Id.* at 28.

Anytime the government imposes an economic burden upon publications, whether by tax or regulation, the costs of publication increase, and where such an economic burden is discriminatorily placed upon some, and not others, it is a violation of the freedom of the press. Grosjean, 297 U.S. at 240-41, 250-51; Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987) ("[O]fficial scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press."); Miami Herald, 418 U.S. at 256. ("The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply exacted in terms of the cost in printing and composing time and materials...."). According to Grosjean and Miami Herald, the imposition of such a discriminatory economic burden is a *per se* violation of the freedom of the press.[9]

As Justice Frankfurter so forcefully put it:

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[9] Despite these press precedents, the court below concluded that Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990), "settled" the question that, under the First Amendment, the government may impose discriminatory economic burdens on the "general press," as contrasted with the "'institutional' media," because "the [institutional] press' unique societal role ... provide[s] a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations." Supp. App. at 103sa, n.64. Such a reading of Austin is wholly unwarranted. In Austin, this Court did not even address the discriminatory strictures of the freedom of the press, much less, contrary to the court below's claim, "settle" the question that the "media exemptions" contained in BCRA and FECA are justified by a "compelling" state interest. *Id.* The Austin plaintiff raised no freedom of the press claim, relying instead upon free speech and equal protection. Austin, 494 U.S. at 657-58. Thus, this Court applied the strict scrutiny test of Buckley and the Equal Protection Clause's compelling state interest test to the plaintiff's claims (*id.* at 658-66, 666-68), not this Court's distinctive rules governing freedom of the press.

> [T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect **all persons** in their right to print what they will as well as to utter it. "[T]he liberty of the press is no greater and no less than the liberty of **every** subject of the Queen." *Regina v. Gray,* [1900] 2 *Q.B.* 36, 40, and in the United States, it is no greater than the liberty of **every** citizen of the Republic. [Pennekamp v. Florida, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring, emphasis added).[10]]

C. The Freedom of the Press Is Not a Subset of the Freedom of Speech.

In disregard of the rich legacy of the distinct and higher standard of review applied to the freedom of the press, the *per curiam* opinion decided that the freedom of the press had been "'subsumed into the Speech Clause.'" Supp. App. at 102sa. In doing so, the court below violated the first principle of constitutional interpretation, which commands that:

> In expounding the Constitution of the United States [citation omitted], **every word** must have its due force, and appropriate meaning; for it is evident from the whole instrument, that **no word** was unnecessarily used, or needlessly added. [Wright v. United States, 302 U.S. 583, 588 (1938) (emphasis added).]

To rule that there is no real difference between the Speech and Press Clauses would not only undermine the integrity of

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[10] *Accord*, Lovell, 303 U.S. at 451-52; Bellotti, 435 U.S. at 781, n.17, 782, n.18, 790-91, n.30 (majority op.), and at 798-802 (Burger, C.J., concurring).

the constitutional text, but would also rest upon a profound misreading of history of the two freedoms. Not only was the freedom of the press extended to the people a century before the freedom of speech,[11] but it was the freedom of the press, not the freedom of speech, that served as the American "palladium"[12] of liberty through the war for independence and into the late 18th century constitution-making. Thus, in the early state declarations of right, the freedom of the press was secured to the people,[13] but not the freedom of speech, the latter being secured only to the elected members of the state legislature assembled.[14] Whatever security the people enjoyed to speak freely came solely from the protection afforded by the freedom of the press.[15] Thus, according to this early history of the constitutional treatment of the freedoms of speech and of the press, free speech was subsumed under the freedom of the press, not the other way around.

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[11] By the end of the 17th century, the liberty of the press was a right of all Englishmen (IV Blackstone's *Commentaries* at 152, n.a.), whereas the freedom of speech was enjoyed only by members of Parliament assembled. *English Bill of Rights, Declaration 9* (Dec. 16, 1689), reprinted in *Sources of Our Liberties* 247 (Perry, ed., Rev. ed., American Bar Foundation, Chicago: 1978) (hereinafter "*Sources*").

[12] *See* P. Payson, *A Sermon* (Boston, 1778), reprinted in I *American Political Writing during the Founding Era ("American Founding Era") 1760-1805* 523, 530 (C. Hyneman and D. Lutz, eds., Liberty Press, Indianapolis: 1983).

[13] *See, e.g.,* Section 12, Constitution of Virginia (1776), reprinted in *Sources* at 312.

[14] *See, e.g.,* Articles XVI and XXI, Constitution of Massachusetts (1780), reprinted in *Sources* at 376,77.

[15] *See, e.g.,* Section XII of the 1776 Constitution of Pennsylvania, reprinted in *Sources* at 330.

Indeed, James Madison and other opponents of the Sedition Act of 1798 enlisted the freedom of the press to ban seditious libel prosecutions. *See, e.g.*, J. Madison, *Report on the Virginia Resolutions*, reprinted in 5 *The Founders' Constitution* 141, 142 (P. Kurland and R. Lerner, eds., Univ. Chicago: 1987). It was not until the 20th century that the ban on seditious libel was linked to the freedom of speech. *See* Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting). Not until 45 years later did this Court rule that seditious libel laws violated "freedom of expression," and even then it expressly approved of Madison's claim that such laws violated the freedom of the press. *Compare* New York Times v. Sullivan, 376 U.S. at 269-72 *with id.* at 273-77. To rule, as the court below ruled, that the Press Clause has somehow been absorbed by the Speech Clause is, therefore, neither historically nor textually sound.

Nor is the view of the court below sound as a matter of constitutional policy. Although the licensing system banned by the freedom of the press extended to all publications, no matter what the subject, the central design was to prevent the publication and dissemination of information "raising a disaffection to His most Excellent Majesty and His Government,"[16] to the end of protecting the reputation of the current regime. T. Cooley, A Treatise on Constitutional Limitations 516 (5th ed. Little, Brown, Boston: 1883); *Sources* at 242-43. Not surprisingly, the leaders of the American independence movement realized the importance of the freedom of the press in ridding the colonies of the hated English licensing system. Thus, in the Continental Congress' 1774 appeal to the inhabitants of Quebec for support of the war

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[16] "An Act for Preventing the Frequent Abuses in Printing Seditious Treasonable and Unlicensed Books and Pamphlets and for Regulating Printing and Printing Presses," reprinted in 5 *Founders' Const.* 112.

for independence, they stressed the "importance" of the freedom of the press for "its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs." I *Journals of the Continental Congress,* reprinted in I *American Founding Era* 233-34. Indeed, nine years earlier, John Adams, writing against the Stamp Act, likewise praised the freedom of the press as essential to save the people from "tyrants," warning especially against those in government who attempt to "wheedle[] [you] out of your liberty by ... pretences of politeness, delicacy or decency." J. Adams, "A Dissertation on the Canon and Feudal Law," reprinted in J. Adams' *Revolutionary Writings* 28, 29.

Even after a more representative form of government was established in America, James Madison invoked the freedom of the press against the Sedition Act of 1798, which he maintained was designed to "repress[] information and communication among the people" in relation to congressional and presidential elections:

> Let it be recollected ... that the right of electing members of the Government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust and on the **equal freedom,** consequently, of examining and discussing these merits and demerits of the candidates... [J. Madison, Report on Va. Resolutions, reprinted in 5 *Founders' Const.* 145, emphasis added.]

St. George Tucker echoed Madison's view, advising elected officials that, if they cannot stand the criticism that comes with elective office, they ought to retire, not impair "the absolute freedom of inquiry." Otherwise, the American government will be "instantly changed from a federal union of representative democracies, in which the people of the several states are sovereign ... to a consolidated oligarchy..., according to the prevailing caprice of the constituted authorities or of those who may usurp them." St. G. Tucker, "Of the Right of Conscience; and of the Freedom of Speech and of the Press," reprinted in St. G. Tucker, *Views of the Constitution of the United States with Selected Writings*, 371, 381 (Liberty Fund, Indianapolis: 1999). To prevent such a transformation, Tucker maintained, "the absolute freedom of the press" had been especially designed, being far more effectual to this task than the freedom of speech. *Id.* at 382.

This historic link between the freedom of the press and free elections has not been lost on this Court. In Mills v. Alabama, 384 U.S. 214 (1966), this Court struck down an Alabama corrupt practices law prohibiting the solicitation of a vote for or against a proposition on election day on the sole ground that it violated the freedom of the press, and without subjecting the law to strict or any other kind of scrutiny. *Id.* at 218-20. The Court affirmed that the absolute freedom of the press was essential to "the free discussion of governmental affairs [which] of course includes discussion of candidates" (*id.* at 218):

> Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. [*Id.* at 219.]

It is the freedom of the press, then, not free speech and association, that America's founders declared to be "one of the great bulwarks [against] despotic governments." *See* Section 12, Virginia Constitution (1776), reprinted in *Sources* 312. Indeed, it was the "absolute" freedom of the press — unconstrained by government licensing, previous restraints, editorial control, forced disclosures, and discriminatory economic burdens, not contained by licensing, limitations, controls, disclosures, and burdens such as are imposed by BCRA/FECA — that was deliberately designed by America's founders to protect the people from government corruption.

III. BCRA TITLE II VIOLATES THE PAUL PLAINTIFFS' FREEDOM OF THE PRESS.

Coining a new term, "electioneering communications," Congress has, by BCRA Title II, extended the reach of FECA beyond communications that meet the formulaic test of "express advocacy" as defined in Buckley v. Valeo, 424 U.S. at 44, n.52. Claiming that federal candidates and their supporters were "evading" the law by "sham issue" advertising on radio and television, Congress enacted Title II, to place under FEC control "any broadcast, cable, or satellite communication which ... **refers** to a clearly identified candidate for Federal office," and which is broadcast within a specified period leading up to an election, or in the alternative — should this Court find the regulation unconstitutional — any such communication "which **promotes** or **supports** a candidate for [Federal] office, or **attacks or opposes** [such] a candidate." New FECA § 304(f)(3)(A)(i) and (ii), Jur. St. App. at 38a-39a (emphasis added). In a split decision, the court below found the primary definition of electioneering communication unconstitutional, but the "backup" definition constitutional. Supp. App. at 12sa (*Per curiam* op.). Had the court below applied the freedom of the press standard of review, it should

have found the entire BCRA Title II regulatory scheme unconstitutional.

A. Title II Is an Unconstitutional Licensing System.

BCRA § 203(a) (Jur. St. App. at 42a-44a) purports to impose a broad and absolute ban on all corporate and labor union disbursements for "electioneering communications." In fact, it does not. Rather, by its definitions of "electioneering communications" including its statutory and regulatory exemptions thereto, Title II functions as a comprehensive licensing system permitting some corporate and labor union expenditures of funds that influence federal elections, while denying that same privilege to others, including plaintiffs Citizens United, Gun Owners of America, Inc., and RealCampaignReform.org.

As Judge Henderson pointed out in dissent below, BCRA Title II does not ban all communications that refer to a federal candidate within the statutory specified periods, nor all communications that either promote or support the election or defeat of a federal candidate. Supp. App. at 364sa. Indeed, as the FEC has expressly provided, Title II does not apply to "a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail; or telephone communications." 11 C.F.R. § 100.29(c)(1). Second, as Judge Henderson also observed, Title II does not even apply to all such communications that are broadcast by radio and television. Supp. App. at 365sa-66sa.

Third, Title II does not apply to "a candidate debate or forum" approved by the FEC or "to any other communication exempted under such regulations as the [FEC] may

promulgate" so long as such exemption is consistent with Title II. New FECA § 304(f)(3)(B)(iii) and (iv), Jur. St. App. at 40a. Fourth, according to the court below, some nonprofit and political advocacy corporations are exempted from Title II's ban on electioneering communications under FEC v. Massachusetts Citizens for Life (MCFL), 479 U.S. 238 (1986). *See* Supp. App. at 13sa, 368sa-70sa, and 1166sa-69sa (Leon Op.). Accordingly, the FEC has extended its regulations governing the MCFL exception to electioneering communications, by which the FEC exercises enormous discretionary power over whether a nonprofit corporation qualifies. 11 C.F.R. § 114.10.

By absolutely exempting some publications (11 C.F.R. § 100.29(c)(1) and (2)), qualifiedly excepting others (11 C.F.R. §§ 100.29(c), 114.10), and permitting still others so long as they meet the registration and reporting requirements of FECA/BCRA (11 C.F.R. § 104.20), Title II "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." Lovell, 303 U.S. at 451. By conferring special privileges upon some to publish and disseminate their ideas in ways not permitted to others,[17] Title II engages in the kind of discrimination that is "reminiscent of the abhorred licensing system of Tudor and Stuart England — a system the [freedom of the press] was intended to ban from this country." Bellotti, 435 U.S. at 801 (Burger, C.J., concurring).

B. Title II Is an Unconstitutional Prior Restraint.

[17] For example, any incorporated television or radio broadcasting outlet may publish without restriction a news story, editorial or commentary containing an electioneering communication, but plaintiffs Citizens United, Gun Owners of America, Inc., and RealCampaignReform.org may not broadcast any electioneering communication unless they fit within the MCFL exception set forth in 11 C.F.R.§ 114.10.

Title II imposes a prior restraint not only upon those corporations and labor unions banned by § 203(a) (Jur. St. App. at 42a) from expending money for "electioneering communications," but upon those like the plaintiffs Gun Owners of America Political Victory Fund ("GOAPVF") and Citizens United Political Victory Fund ("CUPVF") who are permitted by Title II to engage in electioneering communications, but are not exempted from the onerous reporting, disclosure, and financial burdens imposed upon them as political committees. *See* new FECA § 304(f)(1) and (2), Jur. St. App. at 37a-38a.

There is no question that the ban on plaintiffs Gun Owners of America, Inc., Citizens United, and RealCampaignReform.org operates as a prior restraint. Not only does the statute, on its face, prohibit such organizations from making any expenditures towards certain press activities, which are now defined as electioneering communications, but, by 11 C.F.R. § 114.10(a) and (e), the FEC requires such organizations to "demonstrat[e] qualified nonprofit corporation status" under MCFL by certification to the FEC. And the FEC is empowered to seek a court injunction against them should they fail to meet the certification requirement, or otherwise to evade the ban on electioneering communications. *See* 2 U.S.C. § 437g(a)(6)(A).[18] Such an injunctive action would also be available to the FEC to enforce the reporting requirements of Title II, as applied to GOAPVF and CUPVF should either

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[18] Such restraints cannot be characterized as "time, place and manner" restrictions, as the *per curiam* opinion below maintained. Supp. App. at 107sa, n.69. The ban on electioneering communications by corporate entities, coupled with the administrative regulations requiring certification meeting the MCFL exception, are designed "to prevent the dissemination of ideas or opinions thought dangerous or offensive" and, therefore, are well within the definition of "prior restraint." *See* Blue Canary Corp. v. City of Milwaukee, 251 F.3d 1121, 1123 (7th Cir. 2001).

disburse funds "for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year." New FECA § 304(f)(1), Jur. St. App. at 37a. Indeed, such reports are due within 24 hours after the first and each subsequent aggregation of any excess over $10,000 during each calendar year. *See* Supp. App. at 66sa. While such reports need not be made "until after the advertisements have been publicly distributed" (*id.* at 108sa), there is no question that they are a significant factor in the making of any decision to "produce," much less "air," an electioneering communication as defined by Title II. As Judge Henderson observed in her dissent on this point, the reporting and disclosure requirements laid down in Title II are "intrusive," "inhibiting," and "cumbersome." *Id.* at 372sa-73sa, 375sa.

As prior restraints, BCRA § 201's reporting and disclosure requirements (Jur. St. App. at 37a-38a) must be justified, if at all, by the kind of imminent and serious danger to the survival of the nation as was required in the publication of the Pentagon Papers. *See* New York Times v. United States, 403 U.S. at 714, 718, 725-27, 730. The government has made no such showing here, nor has it even attempted such a showing. *See* Supp. App. at 112sa-13sa, 823sa-30sa, 835sa-40sa.

C. Title II Unconstitutionally Establishes Government Editorial Control.

In the political marketplace, the First Amendment, particularly the freedom of the press, demands a wide berth for speakers and their audience, writers and their readers. Not only must governments refrain from paternalistic suppression of truthful information, but they also cannot suppress ideas on the ground that they may be misleading, or even "false." *See* New York Times v. Sullivan, 376 U.S. at 271-73. Otherwise, the

government would intrude upon the constitutional right of private editorial control of both the publisher and his reader, the speaker and his listener. *See* Martin v. City of Struthers, 319 U.S. 141, 141-44, 147-49 (1943). Thus, governments may not generally force a speaker or writer to disclose his or her identity as a deterrent against the dissemination of misleading, false, or even fraudulent ideas. *See, e.g.*, McIntyre v. Ohio Elections Comm., 514 U.S. 334, 349-53 (1995).

The court below, however, assumed the opposite. The *per curiam* opinion chided some plaintiffs for having run television and radio issue ads "while hiding under dubious and misleading names," claiming that the First Amendment's commitment to "uninhibited, robust, and wide-open" debate justified — indeed, compelled — government-enforced disclosure of speaker and publisher identities, lest such "organizations hide themselves from the scrutiny of the voting public." Supp. App. at 106sa. Such a paternalistic view of the role of government in the marketplace of political ideas, as Judge Henderson amply demonstrated, is totally foreign to the First Amendment. *Id.* at 346sa-47sa, 378sa-80sa. Indeed, forcing the disclosure of the names of the major publishers (the $1,000 contributors) and publishers is a direct abridgment of the editorial discretion guaranteed to the people by the freedom of the press. *See* McIntyre, 514 U.S. at 348.

But the forced disclosure of publisher identities is not the only unconstitutional intrusion that BCRA Title II makes upon the people's editorial prerogatives. By imposing its view on whether a political ad that "refers" to a clearly identified candidate for Federal office, or one that "supports" or "promotes" the election of a candidate or "attacks" or "opposes" such a candidate, is a "sham issue" ad, the government has robbed both the producer of the ad, and the viewer thereof, of their editorial powers secured by the freedom

of the press. *See* Martin, 319 U.S. at 143-44. The freedom of the press secures to the people the right to make such editorial judgments for themselves. *See* Miami Herald, 418 U.S. at 247-54, 256, 258.

Additionally, Congress has conferred upon the FEC significant editorial judgment, through the issuance of advisory opinions, to determine whether an "issue ad" is a regulated "electioneering communication." According to Judge Leon, such editorial discretion "saves" the back-up definition from a constitutional challenge of vagueness. *See* Supp. App. at 1166sa. Judge Leon has overlooked, however, that the grant of such power is the very essence of censorship, wresting from the people the right to draw the line between "candidacy advocacy" and genuine issue advocacy. *See id.* at 1138sa-39sa.[19] The exercise of such editorial control is *per se* an unconstitutional abridgment of the freedom of the press. *See* Miami Herald, 418 U.S. at 258.

D. Title II Imposes Discriminatory Economic Burdens.

There is no question that Title II discriminates. The statute expressly exempts altogether "a news story, commentary, or

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[19] The exercise of such editorial discretion by means of advisory opinions, under the threat of civil penalties and injunctive relief, would be even more pronounced under Title II's primary definition of "electioneering communications." As Judge Henderson observed, the statutory definition which turns on whether a communication "refers to a clearly identified candidate for Federal office" is open-ended. Supp. App. at 358sa-59sa. She is right. The FEC has already exercised its editorial powers, promulgating a regulation containing examples of what meets the statutory definition, which, unsurprisingly, is open-ended. *See* 11 C.F.R. § 100.29(b)(2). Under the Buckley regime, this Court put a tight rein on the FEC, requiring the "magic words" of express candidate advocacy. Under the new BCRA regime, the FEC is loosed as editor-at-large of political advertising related to federal election campaigns.

editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate." New FECA § 304(f)(3)(B)(i), Jur. St. App. at 39a. Thus, media corporations that own television and radio stations "need not make separably identifiable expenditures to communicate their views" on the issues; rather, "[t]hey accomplish the same objective each day within the framework of their usual protected communications." *See* Bellotti, 435 U.S. at 783, n.17. As Judge Henderson observed, BCRA exempts a "class of privileged speakers" from having to comply with the reporting and disclosure requirements of Title II. Supp. App. at 365sa-366sa.

Such discriminatory treatment is an unconstitutional violation of the Paul Plaintiffs' freedom of the press. The increased costs of compliance with the reporting and disclosure requirements of Title II are obvious. *See* MCFL, 479 U.S. at 254-55. Such costs operate like a "tax on knowledge," imposing economic burdens that adversely impact the quality and quantity of communications on the issues related to campaigns for election to federal office. *See* Cloud Decl. ¶¶ 7, 10, 14, App. 83a-85a, 89a. *See also* Willis Rep. ¶¶ 13c, 14, App. 60a-62a; Miller Rep. at 22-24, App. 33a-36a; Olson Rep. ¶ 116, App. 68a. By imposing these costs on some, and not on others, BCRA Title II crosses a fixed line of unconstitutionality. *See* Grosjean, 297 U.S. at 251.

IV. BCRA TITLE I, CREATING NEW FECA § 323(e) AND § 323(f) RESTRICTIONS, VIOLATES THE FREEDOM OF THE PRESS.

A. New FECA § 323(e) Imposes Unconstitutional Editorial Controls.

New FECA § 323(e) (Jur. St. App. 30a-32a.) singles out for special limitations the political activities of somewhat more than 1,100 Americans each biennium — federal office holders and their challengers — whether they act directly or through agents and organizations. Under BCRA, Congressman Paul, a federal office holder, could be sentenced for up to five years in federal prison if he were to knowingly and wilfully sign a letter for Gun Owners of America, Inc. soliciting funds to pay for radio ads criticizing identified Congressmen who voted against a bill sponsored by Congressman Paul.[20] Congressman Paul testified that such limits adversely impact his "ability as a federal office holder and candidate for election to federal office to help raise money for organizations that promote [his] positions on policy issues." Paul Decl. ¶ 16, App. 75a. If Congressman Paul is so restricted, then he is obviously handicapped in his ability to legislate. Also harmed is Gun Owners of America, Inc., which has used congressional signers for solicitation letters in the past, intends to do so in the future, and uses the funds for "issue advocacy" which BCRA classifies as "federal election activity." Pratt Decl. ¶ 10, Rec. No. 60. *See also* Bossie Decl. ¶ 9, Rec. No. 60, as to the activities of Citizens United, and Babka Decl. ¶¶ 7-9, Rec. No. 60, as to the activities of RealCampaignReform.org.

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[20] How these rules actually operate could not be more confusing. The statute clearly permits some solicitations to be made for I.R.C. § 501(c) organizations, subject only to the requirement that the "solicitation does not specify how the funds will or should be spent." Section 323(e)(4), Jur. St. App. 32a. However, the FEC implemented rules that allow solicitations that are "not to obtain funds for activities in connection with an election," which could be read to require that the solicited funds not be used for activities in connection with an election rather than the statutory requirement that the solicitation not make reference to such an intended use. 11 C.F.R. § 300.65(a)(2).

These restrictions are not limited to uses of funds which affect only federal elections, but rather extend to "any election." Section 323(e)(1)(B), Jur. St. App. at 31a. If BCRA had been in effect in 2002, Michael Cloud, the Libertarian candidate for U.S. Senate from Massachusetts, could have been fined up to $50,000 for a knowing and wilful solicitation of contributions to the campaign committees of his Libertarian colleagues who were candidates for statewide office in Virginia, where unlimited individual contributions are lawful for state races. Virginia State Board of Elections, *Campaign Finance in Virginia* (rev. July 2003), 18.

In an opinion by Judge Henderson, the court below dismissed the claims of the Paul Plaintiffs on the ground that such restrictions on federal officeholders "do ... not exert 'editorial control' on anyone's press activities." Supp. App. at 460sa, n.175. This is not correct. Although Judge Henderson has conceded that "solicitation" of funds to support the dissemination of ideas is constitutionally protected (Supp. App. at 459sa), she has failed to recognize that a "cap" on such solicitation, however "moderate," impairs the editorial function that the freedom of the press confers upon federal office holders and candidates. *See* Miami Herald, 418 U.S. at 254-58. Furthermore, she ignored § 323(e)(1)'s limit on "spend[ing] funds," notwithstanding this Court's affirmation in New York Times v. Sullivan that such expenditures are crucial to the free press guarantee of "'the widest possible dissemination of information from diverse and antagonistic sources.'" New York Times, 376 U.S. at 266.

It is difficult even to understand the Congressional purpose of such a limitation. According to Judge Henderson, "a federal candidate's solicitation of large donations from wealthy individuals, corporations, and labor organizations — whether or not the funds are used 'for the purpose of influencing' a

federal election — can raise an appearance of corruption of the candidate." Judge Henderson relied on the defense testimony of two corporate CEO's who resent being asked for contributions, two senators who resent asking, and a witness who testified that the public perceived candidate fundraising to be corrupt. Supp. App. at 456sa-57sa. If testimony such as this is the basis for § 323(e), it undermines the very purpose of the freedom of the press. The free press guarantee posits editorial control and accountability in the people, not in the government. *See* Miami Herald, 418 U.S. at 254-58. Just because the senators and businessmen would rather that the government make their editorial decisions for them does not mean that they can enlist Congress to deny that press right to others.[21] To the contrary, the freedom of the press was designed to ban such paternalistic legislation to ensure that the people remained the censors of the government, not the other way around. *See* Arg. II, *supra*, at 30-32.

Actually, § 323(e) operates to protect incumbents by placing a discriminatory economic burden upon their challengers. By denying to challengers the freedom to solicit, it will make it more difficult for interest groups, such as Gun Owners of America, Inc. and Citizens United, to raise funds necessary to attack incumbents for how they have voted, and will encumber greatly minor party federal candidates like Michael Cloud to

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[21] Indeed, the exclusive focus of § 323(e) appears to have been incumbents, not their challengers, yet the prohibitions apply equally to both. Never discussed in the legislative history, the record below, or any of the court opinions was how the BCRA ban on fundraising by challengers — who have neither power to pressure potential donors nor valuable access to buy — could be justified. Senator McCain's justification that this provision prevents "Federal officeholders from using their offices or positions of power to solicit money" as being analogous to "federal laws and ethical rules" simply does not apply to challengers. Statement of Sen. McCain, 148 Cong. Rec. S2138 (Mar. 20, 2002).

pool their resources with candidates of that same party seeking election to state office.

B. New FECA § 323(f) Imposes Unconstitutional Editorial Controls.

New FECA § 323(f) (Jur. St. App. at 32a) precludes state and local officeholders, or candidates therefor, from spending any funds except FECA/BCRA-regulated "funds" for a "public communication that refers to a clearly identified candidate for Federal office ... and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." Jur. St. App. at 32a-33a. According to 11 C.F.R. § 100.26, a "public communication," means "a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising [but not] communications over the Internet."[22]

According to Judges Kollar-Kotelly and Leon, § 323(f)'s restrictions on state and local officeholders and candidates are permissible as limits on "the use of soft money ... for the purpose of directly influencing a federal election." Supp. App. 1146sa, 993sa. If § 323(f) had been in effect for the last election cycle, plaintiff Carla Howell, the 2002 Libertarian candidate for Governor of Massachusetts, would likely have been financially precluded from promoting plaintiff Michael Cloud, the 2002 Libertarian candidate for U.S. Senate from

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[22] The legislative record is devoid of any debate on this provision, except for a brief reference in the section-by-section analysis of BCRA entered into the Congressional Record by Sen. Feingold, 148 Cong. Rec. S1992 (Mar. 18, 2002).

Massachusetts, in her campaign literature or her media advertisements, or cooperative mailings supporting their joint candidacies. Cloud Decl. ¶ 20, App. 90a-91a; Howell Decl. ¶ 7, App. 97a-98a; Paul Decl. ¶ 16, App. 75a. Further, Ms. Howell could not reasonably have afforded to air an endorsement of her candidacy by a member of Congress (who was a candidate for federal office) with a supportive reference to any such congressman, even one from another state, even though his constituents would never see the communication. Amazingly, in a Presidential election year, Ms. Howell, for example, could not, for lack of funding necessary to comply with § 323(f) attack a President running for reelection as a big spender of the type that she would not be if elected.

A more comprehensive effort by Congress to ensconce the FEC as editor-in-chief of American election campaigns is difficult to imagine. By placing upon state and local officeholders and state and local candidates the onerous FECA contribution limits and reporting burdens, Congress has imposed an unconstitutional penalty upon such officeholders and candidates in their exercise of editorial discretion. *See* Miami Herald, 418 U.S. at 254-58. This burden falls especially hard upon minor party candidates, such as Mr. Cloud and Ms. Howell, because the pooling of scarce resources is essential if minor party state, local, and federal candidates are to get their message to the electorate. *See* Cloud Decl. ¶ 20, App. 90a.

V. THE FECA/BCRA CONTRIBUTION LIMITS AND DISCLOSURE REQUIREMENTS ARE UNCONSTITUTIONAL.

A. The Paul Plaintiffs Have Standing to Challenge the Constitutionality of BCRA § 307.

The district court held that the Paul Plaintiffs lacked standing to challenge the constitutionality of BCRA § 307. Supp. App.

at 8sa. Judge Henderson opined that "no person who challenges either set of provisions" in BCRA increasing the FECA contribution limits "has standing to do so" (*id.* at 472sa), and specifically, that the "Paul plaintiffs lack standing to challenge BCRA's failure to index certain contribution limits for inflation," because the Paul Plaintiffs' evidence constituted "mere allegations." *Id*. at 475sa. This ruling is erroneous.

First, it mistakenly assumes that the Paul Plaintiffs' complaint was limited to the failure of BCRA to raise and index the contribution limits for PACs. 2 U.S.C. § 441a(a)(1)(C), Jur. St. App. at 19a. The Paul Plaintiffs' constitutional attack upon BCRA § 307 also contained the claim that the administration of the BCRA-amended FECA individual contribution limits violates the freedom of the press rights of candidates Ron Paul, Michael Cloud, and Carla Howell. *See* Paul Plaintiffs' Amended Complaint ¶¶ 11(b), 13(a)-(b), 16(a)-(b), 41, 43, 44, 53, and 57, App. 1a-4a, 6a. *See also* Paul Plaintiffs' Initial Brief at 27-30, Rec. No. 65; Opposition Brief at 15, Rec. No. 74; and Reply Brief at 7-10.

Second, the court below disregarded the more than ample evidence proffered by the Paul Plaintiffs in support of their claims. Addressing first their challenge to the contribution limits with respect to political committees, there is concrete evidence of injury in fact in the record. Both CUPVF's Michael Boos and GOAPVF's Lawrence Pratt represented that their respective political committees were injured by virtue of the FECA/BCRA $5,000 per-election maximum contribution the committees were permitted to make to federal candidates and committees. 2 U.S.C. § 441a(a)(2)(A), Jur. St. App. at 19a. Pratt Decl. ¶¶ 18-19, App. 105a-06a, Boos Decl. ¶¶ 13-14, App. 107a-08a. Those unrebutted declarations were supported by testimony that their respective committees likely would receive more contributions if the contribution limit had been

raised/indexed for inflation, or simply did not exist at all. *See* Pratt Decl. ¶¶ 12, 18, App. 105a; Pratt Dep. at 22-25; Boos Decl. ¶ 14; Boos Dep. at 32-33, Rec. No. 60. The plaintiff committees' FEC reports, demonstrating a history of maximum contributions under FECA in certain years, supported the testimony that higher contributions would have been made if allowed. Pratt Decl. ¶¶ 18-19, App. 105a-06a, and Exhibit A (Rec. No. 60); Boos Decl. ¶¶ 13-14, App. 107a-08a, and Exhibit B (Rec. No. 60). These ongoing, active multicandidate political committees clearly were impacted adversely by FECA, which limited contributions to such PACs per calendar year, as well as by such PACs per candidate, per election, to $5,000, and by BCRA, which failed to raise such contribution limits or to index such contributions for inflation. Such fact-based testimony is clearly sufficient to meet the "injury in fact" requirement for standing. *See* Lujan v. National Wildlife Federation, 504 U.S. 555, 561-62 (1992).

As for the impact of BCRA § 307 upon the Paul Plaintiff candidates and their committees, Congressman Paul and Mr. Cloud both testified that their press activities were impaired by the BCRA/FECA individual and PAC contribution limits. *See* Paul Plaintiffs' Proposed Findings of Fact ¶¶ 12-13, 19-20, 37-39, 41-42 and 48-49, App. 109a-110a, and 113a-120a; Paul Decl. ¶¶ 12-16, App. 72a-75a; Lizardo Decl. ¶¶ 3-5, App. 77a-78a; Anonymous Witness No. 1 Decl. ¶¶ 3-5, App. 79a-80a; Cloud Decl. ¶¶ 13-15, App. 87a-89a. Without question, such evidence that the individual contribution limits adversely impact on the quantity and quality of their campaign communication meets the Lujan standing test.

In sum, the Paul Plaintiffs submitted unrebutted testimony that establishes, concretely and with particularity, the invasion of a legally protected interest, which is actual (under FECA) and imminent (under BCRA), there being no doubt about either

a causal connection between those injuries and the limitations imposed by the statutes complained of or the fact that future injury will be redressed by a favorable decision.

B. The BCRA/FECA Contribution Limits and Disclosure Requirements Unconstitutionally Abridge the Paul Plaintiffs' Rights under the Freedom of the Press.

Heretofore, limits upon individual contributions have been sustained upon the factual assumption that "contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." Buckley, 424 U.S. at 29. Thus, constitutional orthodoxy holds that limits on contributions, constituting only a "marginal restriction ... upon free communication," are constitutional and to be measured solely by the First Amendment guarantees of free speech and free association. Buckley, 424 at 20-22. The evidence adduced by the Paul Plaintiffs, however, shatters both the factual and legal assumptions in Buckley, particularly when contribution limits are measured by the freedom of the press.

Unrebutted testimony has established that Congressman Paul has labored through several campaigns hampered by limits on individuals who desire to contribute beyond the maximum, cutting into the quantity and quality of his efforts to reach the public to support his candidacy and his position on the issues. Paul Decl. ¶¶ 14-15, App. 73a-74a; Elam Decl. ¶ 5, Rec. No. 60. In like manner, plaintiffs Cloud and Howell have been hampered in their recent campaigns for federal office. Cloud Decl. ¶ 15, App. 89a; Howell Decl. ¶ 15, App. 101a. In each of his races, plaintiff Paul has faced opposition from the

"institutional press" in the major markets of his congressional district (Paul Decl. ¶ 13, App. 72a-73a) and plaintiffs Cloud and Howell have been virtually ignored by the press. Cloud Decl. ¶¶ 25-28, App. 92a-94a; Howell Decl. ¶ 8, App. 98a. *See also* Willis Rep. ¶ 5, App. 46a-48a. Under FECA the Paul Plaintiffs have been, and continue to be, subject to the contribution limits imposed by 2 U.S.C. § 441a(a). Yet, the institutional press is exempted from the BCRA/FECA contribution limits for expenditures for news stories, commentaries, and editorials attacking candidates, or supporting the opposition. 2 U.S.C. § 431(9)(B)(i). *See* Bellotti, 435 U.S. at 781, n.17.

Such disparate treatment of the "institutional press" and the Paul, Cloud, and Howell candidacies has resulted directly from the press exemption enjoyed by the former, first established by FECA (2 U.S.C. § 431(9)(B)(i)), and extended by BCRA Title II (new FECA § 304(f)(3)(B)(i), Jur. St. App. at 39a). By imposing economic burdens upon the Paul Plaintiffs, but not upon the institutional media, BCRA/FECA violates the freedom of the press which commands equal treatment of all forms of communicative activity:

> Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals.... The press in its historic connotation comprehends **every sort of publication which affords a vehicle of information and opinion."** [Branzburg v. Hayes, 408 U.S. 665, 704 (1972), quoting Lovell v. Griffin (emphasis added).]

Additionally, the enforcement mechanism employed by FECA/BCRA to assure compliance with individual contribution limits intrude upon the editorial function of candidates and their campaign committees, requiring disclosure

of the identities of their major "publishers," *i.e.*, their individual contributors of more than $200. *See* 2 U.S.C. §§ 434(b)(3), 431(13). Over 50 percent of Americans believe that politicians want disclosure requirements so they can see who is giving money to their challengers. By a two-to-one margin, Americans believe that incumbents use agencies to harass the supporters of challengers. J. Miller, *Monopoly Politics* 104-05.[23] As noted in Part II above, the protective shield of anonymity provided by the First Amendment is not limited to freedom of association. Indeed, since Buckley, this Court has applied the anonymity principle where the claim of "privacy" was clearly attenuated, demonstrating that forced disclosure of the identities of publishers, editors, and disseminators is based upon the freedom of the press, not just free association. *See, e.g.*, McIntyre, 514 U.S. at 341-44; Watchtower, 536 U.S. at 166-68.

In Watchtower, this Court noted that Talley and McIntyre stand for the proposition that the principle of anonymity applies to "persons who **support** causes," as well as to persons who engage in the actual communicative activity promoting such causes. Watchtower, 536 U.S. at 166 (emphasis added). Indeed, those who contribute money to enable the writers and editors, the circulators and the speakers are their "publishers." All alike are equally protected by the freedom of the press from forced disclosure of their identities. *See* McIntyre, 514 U.S. at 360-67 (Thomas, J., concurring). To allow the government, in

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[23] Moreover, incumbents have an advantage in fundraising because they are in a position to intimidate prospective donors once their identities are disclosed. They "often remind major contributors that even if they lose, they will be around long enough to help them or hurt them." J. Miller, *Monopoly Politics* 79-80. As a result, some groups have a blanket policy of never contributing to non-incumbents in primaries and some PACs feel compelled to give money to candidates who hold views in direct opposition to their founding principles. *Id.*

the name of "corruption and the appearance of corruption," to sacrifice this time-honored principle of anonymity is to disregard the central purpose of the freedom of the press, as articulated by Sir William Blackstone: "Every freeman has an undoubted right to lay **what sentiments he [not the government] pleases before the public**: to forbid this, is to **destroy** the freedom of the press." IV W. Blackstone's *Commentaries* 151-52 (emphasis added).

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed, Buckley v. Valeo should be either overturned or set aside, freedom of the press be established as the governing constitutional principle for evaluation of campaign finance legislation, and the challenged sections of BCRA/FECA should be stricken.

Respectfully submitted,

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