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

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

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

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

Attorneys for Appellants
**Counsel of Record*

August 21, 2003

(Counsel continued on inside front cover)

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

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

PERRY B. THOMPSON
6127 Carroll Lake Road
Commerce, MI 48382
(248) 390-2058

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INTRODUCTION

According to the Government and the six intervening members of Congress ("intervening incumbents"), the First Amendment challenge to the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"), can only be resolved by plowing through a mammoth record of thousands of pages of testimony and expert reports to determine whether Congress had a compelling or substantial government interest to override the constitutional rights of free speech and association. In so doing, the Government and the intervening incumbents would lead this Court into a legislative thicket of self-serving statements and studies that will not yield a rule of law, but only an underbrush of cases either tangled together by factual similarities or pulled apart by legal niceties. *Compare* results obtained in FEC v. Mass. Citizens for Life, 479 U.S. 238 (1986) *with* those in FEC v. Beaumont, ___ U.S. ___, 123 S.Ct. 2200 (2003).

This Gordian knot of precedent from Buckley v. Valeo, 424 U.S. 1 (1976) through FEC v. Beaumont, will not be cut unless this Court is willing to reexamine Buckley, which occupies its core. And only the Paul Plaintiffs, among the all the plaintiffs in this case, have offered a solution to unravel the strings with which Congress has entangled campaigns for election to federal office. The solution proposed is not a new one, and is rooted in a long line of this Court's precedents interpreting and applying the First Amendment's freedom of the press.

Overlooked by Buckley and its progeny, the freedom of the press offers bright-line rules, free from the balancing tests urged by the Government and the intervening incumbents, that, if followed, would open up the political process to all people on equal terms, not close the door to "ordinary folk" because they cannot afford to own a newspaper or broadcast facility, and therefore, cannot take advantage of the corporate media exemption, or because they cannot afford the cadre of lawyers,

accountants, and political consultants that are necessary to keep a candidate out of harm's way should a government form or report fail to meet the requisite legal standard.

In an unbroken line of authority, beginning with Sir William Blackstone's description of the liberty of press as belonging to "every man" in 1769, adopted by this Court in Near v. Minnesota, 283 U.S. 697 (1931), and recently reaffirmed in Watchtower v. Village of Stratton, 536 U.S. 150 (2002), freedom of the press has been expressly recognized as **a right equally available to all**, not merely the corporate media.

The impermissibility of **licensing** systems for the dissemination of ideas has been firmly established in a line of cases stretching unbroken from Lovell v. Griffin, 303 U.S. 444 (1938), Schneider v. State, 308 U.S. 147 (1939), and Thornhill v. Alabama, 310 U.S. 88 (1940), to the recently decided Watchtower. The decisions in Near v. Minnesota, 283 U.S. 697 (1931), and New York Times v. U.S., 403 U.S. 713 (1971), establish and confirm that **prior restraint** of press activity is permitted under only the most extreme of circumstances. Those decisions, together with others such as Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), establish that imposing **editorial control** over press activities is not permitted. The right to engage in **anonymous** press activities is established in cases such as Talley v. California, 362 U.S. 60 (1960), and McIntyre v. Ohio Elections Comm., 514 U.S. 334 (1995). Finally, the impermissibility of **discriminatory economic burdens** on press activities has been established in a line of cases which includes Grosjean v. American Press Co., Inc., 267 U.S. 233 (1936), Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. 221 (1987), and Miami Herald, *supra*. BCRA and the Federal Election Campaign Act of 1971, 2 U.S.C. § 431, *et seq.* ("FECA"), violate all of these press principles and entitle the Paul Plaintiffs to judgment. *See* Paul Plaintiffs' Br. at 32-50.

I. THIS COURT MUST RE-EXAMINE BUCKLEY.

The Paul Plaintiffs present squarely to this Court the claim that freedom of the press protects the right of citizens to publish what they choose in criticizing incumbents, without fear of serving a five-year sentence in federal prison, even if those publications both affect the outcome of federal elections and bring incumbents into disrepute. For if *The New York Times* has the right to criticize incumbents without being licensed by the Government, and without having its sources of income limited and publically disclosed, then so do the Paul Plaintiffs.

In their briefs, neither the Government nor the intervening incumbents have deigned address the merits of the Paul Plaintiffs' press claims. The sole response in either brief to the 50-page brief of the Paul Plaintiffs is a footnote in the Government's brief (p. 126, n. 58) stating a general jurisdictional objection to the Paul Plaintiffs' challenge to certain contribution limits (discussed in Section IV herein). The Government and the intervening incumbents have ignored the challenge of the Paul Plaintiffs in the same way they want this Court to ignore the substance of this challenge.[1]

The Government and the intervening incumbents have pretended that they have "joined issue" by addressing the claims of the other plaintiffs. But the challenge of the Paul Plaintiffs is **not** indistinguishable from that brought by the other plaintiffs. Although the Paul Plaintiffs have attacked many of the same provisions of BCRA as the other plaintiffs in this consolidated litigation, the constitutional attack of the Paul Plaintiffs is, and has been throughout, clearly separate and

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[1] If this Court actually places special reliance on the "gray briefs"to present fairly to the Court all of the issues in a case, it will be sorely disappointed by the selective approach undertaken in this case, omitting all discussion of important claims by the Paul Plaintiffs.

unique:

- Only the Paul Plaintiffs have asked this court to overturn Buckley v. Valeo. It would appear that the Paul Plaintiffs in the instant case are the only litigants to ask this Court to overturn Buckley in the 27 years since that case was decided.
- Only the Paul Plaintiffs have relied on freedom of the press, the application of which to campaign finance regulation has gone unlitigated before this Court.
- Only the Paul Plaintiffs have attacked Congress' regulation of campaign finance as an impermissible licensing scheme designed by and for incumbents.

The challenge of the Paul Plaintiffs is not illegitimate, "beyond the pale," or undeserving of a response, but well-grounded in the Constitution and the factual record of this case. The "rope-a-dope" strategy, adopted by the Government and intervening incumbents, whereby they would absorb the energy of each factual and legal punch rather than join issue with the Paul Plaintiffs, may deprive this Court of the benefits of vigorous advocacy,[2] but it should not stand in the way of this

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[2] Neither has the challenge brought by the Paul Plaintiffs found favor with other plaintiffs making limited challenges to BCRA not grounded in freedom of the press. None have challenged Buckley; indeed, all give it homage. None find fault with the federal licensing of election campaigns. None have expressed serious concern about the adverse effect of these laws on challengers and minor parties. All agree that Congress indeed may regulate elections despite the First Amendment, and make only the limited claim that BCRA goes just a bit too far in restricting speech, or perhaps that it is not the least restrictive means to accomplish such regulatory goals. It is no wonder that certain plaintiffs are uncomfortable with the challenge of the Paul Plaintiffs that attacks the foundation of the current system under which they have gained the political power that they seek to preserve. In its order of August 4, 2003, this Court accepted the proposal of certain plaintiffs to exclude the Paul Plaintiffs from oral argument. Accordingly, this Reply Brief will be the last word from the Paul Plaintiffs, who would

Court's re-examining Buckley. If it does, it will find a ruling based upon forecasts, unrelated to a factual record of the actual effect of FECA, on the electoral playing field. *See, e.g.,* Buckley at 424 U.S. 21-22, 31 n.33, 32-34, 69-74, 82-83. But the real-world, factual case presented by the Paul Plaintiffs demonstrates that the current system of federal campaign finance regulation makes it extremely difficult for challengers to defeat incumbents, and virtually impossible for minor party candidates to defeat Republican and Democratic candidates. In light of the five substantive press claims of the Paul Plaintiffs, well-grounded in established precedents and the record (*see* Paul Plaintiffs' Br. at 19-27), together with the consequences wrought by the statutory provisions challenged herein, wholly unrebutted by the Government and the intervening incumbents, the challenge of the Paul Plaintiffs should be upheld.

II. THIS COURT MUST NOT DEFER TO CONGRESS.

The Government and intervening incumbents insist that this Court abjectly defer to the expertise of Congress on the corrupting power of money in the political process, invoking repeatedly the shibboleth of "appearance of corruption." *See*, *e.g*., Brief for the Federal Election Commission, *et al*. ("Govt. Br.") at 28, 39 n.14, 89, 93; Brief for Intervenor-Defendants ("Int. Br.") at 11, 34, 36 n.27. Indeed, the Government has contended that a long line of decisions by this Court proves that there is no credible basis to question the constitutionality of the exercise of "Congress's authority to protect the integrity of federal elections and prevent corruption of federal office-holders." Govt. Br. at 2-3. This simply is not true, even in the cases cited by the Government. *Id*. at 3.

Prior to Buckley, members of this Court did not defer to

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respectfully request that these unique arguments receive careful review.

congressional efforts at campaign finance regulation. In 1948, with a bare majority of the Court refraining from passing constitutional judgment upon § 313 of the Corrupt Practices Act (which prohibited union expenditures in connection with any federal election), the entire "liberal wing" — Justices Rutledge, Douglas, Black, and Murphy — found the law an unconstitutional abridgment of the freedoms of speech and of the press, and the right of assembly. United States v. Congress of Industrial Organizations, 335 U.S. 106, 139-55 (1948) (Rutledge, J., concurring). In these four justices' opinion, the Court was "duty bound to ... decide in its own independent judgment" whether § 313 "abridged" the rights secured by the First Amendment:

> That office cannot be surrendered to legislative judgment [which] does not bear the same weight and is not entitled to the same presumption of validity, when the legislation ... restricts the rights ... protected by the [First] Amendment, as are given to other regulations having no such tendency. [*Id.* at 140.]

Not only did the four justices deny the usual presumption of validity to a law "trenching on [the] basic rights" secured by the First Amendment, they found an actual "**presumption** ... **against** the legislative intrusion into these domains," because they threatened the "very foundation of democratic institutions, grounded as those institutions are in the freedoms of religion, conscience, expression and assembly." *Id.* at 139, 140 (emphasis added).

Nine years later, two members of this concurring opinion, Justices Douglas and Black, (Justices Rutledge and Murphy having passed away), joined by Chief Justice Warren, had occasion to articulate more fully the "constitutional foundation" of the American democratic republic. Dissenting from a majority opinion that had declined to address the constitutionality of § 313 of the Corrupt Practices Act, Justice

Douglas observed that "whether a union can express its views on issues of an election and on the merits of candidates, unrestrained and unfettered by Congress ... is **as important an issue as has come before the Court** for it reaches the very vitals of our system of government":

> Under our Constitution it is We the People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important — vitally important — that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community. [United States v. UAW-CIO, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting) (emphasis added).]

Upon this principle, Justice Douglas rested his case that the "exercise of First Amendment rights," if they are to remain "'full, fair and untrammeled,'" cannot permit "an indictment charging no more than the use of union funds for broadcasting television programs that urge and endorse the selection of certain candidates for Congress of the United States." *Id.* at 593, 594. In so doing, Justice Douglas recognized that "the preferred rights of the First Amendment," especially the freedom of the press, is abridged by limiting "the expenditure of money," whether that limit applies to a union or a newspaper in that it "usually costs money to communicate an idea to a large audience." *Id.* at 594.

Despite this rich legacy of judicial counsel, this Court in Buckley dropped its First Amendment guard. With Chief Justice Warren and Justices Douglas and Black gone from the Court, and in the aftermath of Watergate, a new majority of compromise was formed, a compromise made possible only by deference to Congress, fueled by the litigants' neglect of the

freedom of the press. By ignoring the freedom of the press in Buckley, the Court was able to find constitutional a brand new licensing system governing campaigns for federal election.

III. BCRA RESTS UPON AN UNCONSTITUTIONAL FOUNDATION.

In their opening brief, the intervening incumbents have rested their constitutional case for BCRA on the claim that the ultimate purpose of campaign finance regulation is "[t]o protect democracy" by laying down new rules of popular political engagement designed to combat "a dramatic loss of public confidence" in the current system of government by restoring the ordinary citizen's faith in his or her elected representatives. Int. Br. at 1-2. Thus, these intervenors maintain that the mere "perception of corruption"[3] would be sufficient to sustain every BCRA provision because campaign finance regulation is, after all, designed to save America's democracy, including

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[3] When President Nixon named Judge Clement Haynsworth for the U.S. Supreme Court in 1969, he learned firsthand about Congress' reliance on "appearances" to appoint to itself greater powers. Congressional opponents of the Haynsworth nomination could point to no actual impropriety committed by the judge, but rather justified their opposition based on an alleged appearance of impropriety. In his memoirs, President Nixon observed, "It was a vicious circle: the nominee would not be condemned for what he had done but for what he had been accused of having done by his detractors." Richard M. Nixon, *The Memoirs of Richard Nixon* at 421 (Grosset & Dunlap: 1978). That type of machination is also applicable to BCRA which was passed largely to combat the "appearance of corruption," not the objective reality of corruption which supporters of McCain-Feingold generally denied existed (*see, e.g.*, McCain Depo. at 20, Rec. 199; Statement of Sen. Dodd, 148 Cong. Rec. S2099 (daily ed. Mar. 20, 2002); Statement of Rep. Boehlert, 148 Cong. Rec. H405 (daily ed. Feb. 13, 2002); Statement of Rep. Udall, 148 Cong. Rec. H355 (daily ed. Feb. 13, 2002)), but a matter of perception which can be created by the very congressmen who seek the reelection assistance which flows from it, working hand-in-glove with the corporate media — the only component of American society exempted from its application.

themselves as incumbent officeholders, from the power of money. *See, e.g.,* Int. Br. at 15-17.

Less dramatically, but no less significantly, the Government has insisted that campaign finance regulation is necessary because the very "integrity of the federal work force" is at risk. Govt. Br. at 30. Thus, the Government has argued that campaign finance regulation is not just about the integrity of the elections, but about insulating the "federal work force," including elected federal officials such as the intervening incumbents, no matter the degree of temptation of money in the formulation and implementation of the nation's public policy. *See, e.g.,* Govt. Br. at 30-34, 41-43.

Both the intervening incumbents' and the Government's claims rest BCRA upon an errant constitutional foundation, having presumed that the common good depends upon the people thinking well of Government. Instead, the United States Constitution is based upon the principle that the common good depends upon a free people protected from governmental abridgment of their First Amendment rights. *See* United States v. CIO, 335 U.S. at 140 (Rutledge, J., concurring).

A. The American Government is Established upon the Sovereignty of the People.

The sovereignty of the people is enshrined in both the Declaration of Independence and the Constitution of the United States. As James Madison wrote:

> As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived. [*Federalist No. 49,* as reprinted in A. Hamilton, *et al.*, The Federalist 262 (Liberty Fund, Indianapolis: 2001).]

In 1798, however, this commitment to popular sovereignty

was severely challenged. Fearful that the system of government established in the U.S. Constitution would be transformed by the French Revolution and the emerging Republican Party led by Thomas Jefferson, the Federalist Party-dominated Congress enacted the Sedition Act of 1798, which prohibited the publication of "false, scandalous, and malicious ... writings against the government of the United States, or either House of Congress, or the President of the United States, with intent to defame [them]." Act of July 14, 1798, 1 *Stat.* 596.[4] This law was immediately challenged by Madison as a violation of the freedom of the press. J. Madison, *Report on the Virginia Resolutions* (*Va. Res.*) (Jan. 1800), reprinted in 5 *The Founders' Constitution* (*Founders' Const.*) 141 (P. Kurland and R. Lerner, eds., Univ. Chi.: 1987). Reminding his fellow Virginians that "[i]n the United States ... [t]he People, not the Government, possess the absolute sovereignty," he contended that "[t]he security of the press requires that it should be exempt ... not only from the previous inspection of licensers, but from the subsequent penalty of law." J. Madison, *Report on the Virginia Resolutions*, reprinted in 5 *The Founders' Const.* at 142.

While Madison's view of the freedom of the press did not prevail in the courts during his lifetime, it found favor with this Court in New York Times v. Sullivan, 376 U.S. 254 (1964), which relied heavily upon Madison's comments in support of the Bill of Rights and in opposition to the Sedition Act:

> If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not the Government over the People.... In every state ... in the Union, the press

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[4] In seeking to limit the press activities of Americans to preserve the reputation of Government, the Sedition Act can be viewed as a forerunner of FECA and BCRA.

> has exerted a freedom canvassing the merits and measures of public men.... On this footing the freedom of the press has stood; and on this foundation it yet stands. [*Id.* at 275].

The Court in New York Times v. Sullivan, therefore, concluded that "[t]he right of free public discussion of the stewardship of public officials was thus ... a fundamental principle of the American form of Government." *Id.*

B. Elected Officials Are Servants of the People.

In recognition of the people's continuing sovereignty, the people of the several states insisted upon frequent and free elections so as to ensure that elected officials would "be restrained from oppression, by feeling and participating in the burdens of the people ... [by] be[ing] reduced to a private station, return[ing] to that body from which they were originally taken." *See, e.g.,* 1776 *Va. Const,.* §5, reprinted in *Sources of Our Liberties* (*Sources*) at 311-12 (Perry, ed., Rev. Ed., ABA Found., Chicago: 1978). The people of the United States followed suit, providing for two-year terms for persons elected to the House of Representatives, six-year terms for persons elected to the Senate, and four-year terms for the President of the United States. *See Sources* at 405-06.

Additionally, the people of the states secured constitutional protection for the freedom of the press, as "one of the great bulwarks of liberty." 1776 *Va. Const.*, reprinted in *Sources* at 312. As a rampart of liberty, the freedom of the press had long been recognized as essential to ensure that elected representatives served the people faithfully as their "agents and trustees." J. Adams, "A Dissertation on the Canon and Feudal Law," reprinted in J. Adams, *The Revolutionary Writings of John Adams* 28 (Liberty Fund, Indianapolis: 2000). Adams' view that elected government officials were the "agents and trustees" of the people was reflected in the early state

constitutions. The 1784 New Hampshire Constitution is illustrative:

> All power residing originally in, and being derived from the people, all the magistrates and officers of the government, are their substitutes and agents, and at all times accountable to them. [1784 *N.H. Const.*, Art. VIII, reprinted in *Sources* at 383.]

The United States Constitution rests upon the same premise:

> The government of the Union ... is, emphatically, and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit. [McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404-05 (1819).]

As a "government of the people, by the people, and for the people," elected federal officials are the servants and trustees of the people, and as such, are accountable to the people. Thus, in sponsoring a Bill of Rights for the United States Constitution, James Madison introduced a series of proposals "based largely on the declarations of rights in the state constitutions, particularly of Virginia." *Sources* at 422. Foremost among them: "the freedom of the press."

The Government and the intervening incumbents reject the sovereignty of the people and ask this Court to turn upside-down the relationship between the Government and the people, transferring sovereignty to incumbent officeholders and making the people the servants of the Government. BCRA thus converts elected officials (and candidates for election to federal office) into ordinary Government employees (and potential Government employees), accountable **not** to the American people, but to incumbent-appointed bureaucrats that populate the Federal Election Commission ("FEC"). This point can be best illustrated by a careful assessment of the

Government's and intervenor-incumbents' defense of BCRA § 101 creating new FECA § 323(e).

C. New FECA § 323(e) Created by Title I of BCRA Treats Elected Officials as Government Employees.

The Government's defense of § 323(e) **explicitly** rests upon the argument that elected federal officials (and candidates for election to federal office) are "employees" (or potential employees) of the Government and, therefore, are subject to greater restrictions upon their First Amendment activities than ordinary citizens. *See* Govt. Br. at 57-58. In support of this novel claim, the Government relies upon two cases upholding the constitutionality of the Hatch Act, a law designed to protect the merit civil service system from "partisan politics." *See* Govt. Br. at 57 and n. 27. By extending the reach of the Hatch Act precedents to **elected** officials, the Government has taken the incredible position that elected officials should be as insulated from the vicissitudes of the popular will as career Government employees, presumably so that the "integrity of the federal work force" can be preserved. *See* Govt. Br. at 30. Not only is the Government's position on § 323(e) based upon a misreading of this Court's Hatch Act cases, but, if embraced, would put an end to the American constitutional democratic republic, not preserve it.

This Court has justified limitations upon the partisan activities of merit-based civil servants on the primary ground that such a limitation was necessary to ensure that the law would be "administer[ed] in accordance with the **will** of Congress, rather than in accordance with their own will or the will of a political party." U.S. Civil Service Comm. v. Nat'l. Ass'n. of Letter Carriers, 413 U.S. 548, 565 (1973) (emphasis added). Secondarily, the Court reasoned that "public ... confidence in the system of **representative** Government [would otherwise] be eroded," if it appeared that the will of Congress was being thwarted by career Government employees

attempting to implement their own political agendas. *Id.* (emphasis added). Thus, the Hatch Act was designed to ensure that everyday government operations would reflect the will of elected officials, and that those elected officials would serve as representatives of the electorate accountable to the people.

Section 323(e) does just the opposite, preventing candidates for office, whether they be incumbents or challengers, from freely soliciting funds to help their fellow citizens to have a more effective voice in federal elections, by interposing between candidates and their fellow citizens a set of restrictive rules enforceable by an unelected Federal Election Commission. Thus, federal candidates and officeholders become accountable to unelected government officials, rather than to the people. Such a violation of the sovereignty of the people necessarily transgresses freedom of the press (*see* Paul Plaintiffs' Br. at 40-43).

The intervening incumbents have also ignored the freedom of the press, because they, too, have abandoned the popular sovereignty principle upon which it is based. They have justified § 323(e) as a welcome prophylactic to "the risk that the donor will acquire (or appear to acquire) **undue** influence" (Int. Br. at 36 (emphasis added)), without regard for any differences between incumbents and challengers, insider incumbents and outsider officeholders, and major party candidates and minor party candidates. It is enough for the intervening incumbents that § 323(e) is "**aimed** at the core problems of corruption and appearance of corruption," without regard for the likelihood or degree of "influence." *See id.* (emphasis added). As Justice Rutledge pointed out 55 years ago, "'undue influence' ... may represent no more than the convincing weight of argument fully presented, which is the very thing that the [First] Amendment and the electoral process it protects were intended to bring out." United States v. CIO, 335 U.S. at 145 (Rutledge, J., concurring). Additionally, as

Justice Douglas observed 46 years ago, money is necessary if one's ideas are to be communicated effectively "to a large audience," and any restriction on the amount of money spent on such activity threatens the freedom of the press. *See* United States v. UAW, 352 U.S. at 594 (Douglas, J., dissenting).

The intervening incumbents' view of the First Amendment, however, is directly the opposite. In their eyes, § 323(e) is constitutional because it forces more of the American citizenry's money through the FEC sieve (Int. Br. at 36) and, in so doing, makes the ordinary citizen more accountable to the unelected members of the FEC, than to one another. Hence, § 323(e) is diametrically opposed to the principle that elected officials are the trustees or servants of the people. It squeezes power out of the people's money and transfers that power to the FEC, reconstituting the people's money as "federal funds" to impress upon elected officeholders, as well as candidates, who their boss really is.

D. BCRA/FECA Treats the American People as Indentured Servants.

In its zeal to eliminate "soft money" and other "nonfederal funds" from all communicative activities that influence the outcome of federal elections, BCRA continues the congressional attack begun with FECA in the 1970's to upend the sovereignty of the American people, by a steady process of indenturing the American people. Instead of standing in the way of this attack, this Court failed in Buckley v. Valeo even to detect it. Indeed, Buckley has accelerated the attack by placing the Court's imprimatur upon the Government's claim that FECA could be justified by the "appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." Buckley, 424 U.S. at 27. In support of this claim, the Buckley Court cited only one case, CSC v. Letter Carriers, 413 U.S. 548 (1973), likening an individual citizen's

contribution to a political campaign to the individual "partisan political conduct" of a career employee of the Federal Government:

> Here, as there, Congress could legitimately conclude that the avoidance of improper influence "is also critical ... if confidence in the system of representative Government is not to be eroded to a disastrous extent." [Buckley, 424 U.S. at 27].

In Buckley, the Court made absolutely no effort to assess the validity of this comparison, assuming it to be self-evident from the Letter Carriers opinion, when just the opposite was true.

Letter Carriers was based upon a categorical First Amendment distinction between the Government's "interest in regulating the conduct and 'the speech of its employees ... from those it possesses in connection with regulation of speech of the citizenry in general.'" *See id.*, 413 U.S. at 564. Indeed, it was assumed in Letter Carriers, that the Government's interest in "the appearance of improper influence" of the private political activity of a career Government employee in the carrying out of "the will of Congress" is quite distinct from any "appearance of improper influence" of the private political activity of a citizen in shaping "the will of Congress," itself. *See id.* The "will of Congress," by definition, cannot be insulated from "partisan politics," as the entire BCRA Title I attempts to do, without a foundational change in the American democratic republic. *See Federalist 10,* reprinted in *The Federalist, supra,* at 42. Nor can the will of Congress be walled off from "uninhibited, robust and wide-open debate" (New York Times v. Sullivan, 376 U.S. at 270), as BCRA Title II does, without trampling upon the freedom of the press, the primary means by which the people exercise their continuing sovereignty over their government. By misapplying the Court's "Hatch Act" precedents, the Buckley Court stifled the political activities of the American citizenry as if the people

themselves, unless constrained like an unelected federal career bureaucrat, posed a threat to the American form of representative government!

One of the most egregious examples of the American people's new status as chattel servants of the government is BCRA Title II's revocation of the long-held American right to anonymous political discourse. Section 201 of BCRA (new FECA § 304(f)) requires disclosure of the name and address of any person or group spending $10,000 or more per year for "electioneering communications" that mention elected officials one to two months prior to federal elections. This section also requires disclosure of the names and addresses of all contributors of $1,000 or more for such communications. BCRA § 212 (new FECA § 304(g)) imposes a similar reporting requirement for independent expenditures in excess of $1,000 expressly supporting or opposing a candidate within 20 days of a federal election. BCRA's violation of the right to anonymous publication is an extension of disclosure requirements instituted by FECA, which have rarely been challenged and apparently never on press grounds. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982). However, this Court has repeatedly held that the freedom of the press does not allow the Government to force the disclosure of the identity of a person disseminating ideas. *See, e.g.,* Talley v. California, 362 U.S. 60 (1960), McIntyre v. Ohio Election Commission, 514 U.S. 334 (1995).[5]

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[5] Arguing against legally mandated financial disclosure does not mean that the Paul Plaintiffs believe that if they prevail there would be no disclosure to voters. If voters demand it, political "market forces" would be brought to bear that would cause candidates to disclose donor information, paying the political price of withholding such information only when deemed necessary to protect donors from harassment. *See* Miller Report at 27, Paul Plaintiffs' Brief Appendix at 39a. Voluntary disclosure could result in even more disclosure than currently required. For example, in his reelection campaign, President Bush is once again disclosing every donor who gives

BCRA, and the FECA which it amends, masquerading as reform measures to "preserve American democracy," work as wholesale transfers of sovereignty from the people to the current incumbent elected officeholders, and their appointed FEC bureaucrats, who are, when it comes to federal elections, the people's masters, **not** as they should be, the people's servants.

IV. THE PAUL PLAINTIFFS HAVE STANDING TO CHALLENGE BCRA § 307, AS WELL AS THE RELATED FECA REPORTING REQUIREMENTS.

In the only specific reference to the Paul Plaintiffs in the briefs of the Government and the intervening incumbents, the Government has argued that this Court lacks jurisdiction over the Paul Plaintiffs' claim regarding Congress' failure to increase the contribution limit set forth in FECA § 315(a)(1), 2 U.S.C. § 441a(a)(2)(a), applicable to multicandidate political committees. It is clearly mistaken.

The essence of the Government's argument is that, because the contribution limit applicable to political committees in FECA was not expressly modified by BCRA, BCRA Title III's § 307 is immune from attack in this lawsuit. *See* Govt. Br. at 126, n.53.[6] This argument is mistaken, first, because it is based

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one dollar or more to the Bush campaign at http://www.GeorgeWBush.com.

[6] This argument of the Government is quite different from the determination of the district court that the Paul Plaintiffs lack standing to maintain that claim. The district court held that the Paul Plaintiffs lacked standing to challenge the constitutionality of BCRA § 307. Supp. App. at 8sa. But that determination lacks any reasonable support. As pointed out in their Brief (at 45-47), 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

upon a misreading of the Paul Plaintiffs' complaint. That complaint was not limited to BCRA's failure to increase the contribution limit applicable to multicandidate political committees, but extended to other FECA contribution limits, including those individual contribution limits modified by BCRA, and related FECA enforcement provisions. *See* Paul Plaintiffs' Br. at 32-50, and App. 1a-8a, 109a-120a.

The Government also misreads BCRA's § 403(a), which extends jurisdiction to "any action ... brought for declaratory or injunctive relief to challenge the constitutionality of any provision of [BCRA] or any amendment made by [BCRA]." The Government would limit the reach of this section to claims challenging the constitutionality of "any provision" of BCRA or "any amendment" of BCRA. Such a construction, however, is not permissible, flying in the face of the well-established rule of interpretation that a "statutory provision" should not be read "so as to render superfluous other provisions in the same enactment." Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990). Because "provision" and "amendment" are separated by the disjunctive "or," § 403(a) has extended to this Court jurisdiction over claims based either on a "provision of" BCRA or on an "amendment made by" BCRA to FECA. Thus, § 403(a) encompasses claims like the Paul Plaintiffs' challenge to the individual contribution limits under 2 U.S.C. § 441a and the entire FECA individual contribution scheme, including the reporting requirements, because the FECA provision governing **contribution limits** was the object of an "amendment made

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the fact that future injury will be redressed by a favorable decision. This is sufficient for constitutional standing under the standard articulated by this Court in Lujan v. National Wildlife Federation, 504 U.S. 555, 561-62 (1992). Indeed, any argument, or even any comment whatsoever, by the Government or the intervening incumbents regarding this issue has been conspicuously absent in this case.

by" BCRA § 307(a). *Cf.* United States v. Generix Drug Corp., 460 U.S. 453, 458-59 (1983).[7]

CONCLUSION

For the reasons stated herein, and in Paul Plaintiffs' opening brief, this Court should find that the BCRA/FECA provisions challenged by the Paul Plaintiffs violate their freedom of the press and should be struck down.

Respectfully submitted,

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

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

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[7] Alternatively, as a matter of ancillary jurisdiction, this Court should address the merits of the Paul Plaintiffs' challenge to the contribution limits and the reporting/disclosure requirements of 2 U.S.C. §§ 432 through 434. *See* 17 Charles A. Wright, *et al.*, *Federal Practice and Procedure*, § 4234 at 600, § 4235 at 603-04, 624-25, 626 (2d ed. 1988 & Supp. 2002). *See also* Page v. Bartels, 248 F.3d 175 (3d Cir. 2001). If contribution limits, as amended by BCRA, are unconstitutional as violative of the press freedom, then the constitutionality of the companion forced disclosure provisions of FECA must be reexamined. *See* Buckley v. Valeo, 424 U.S. at 66-86.

While there is no requirement that claims within the ancillary jurisdiction of this Court be heard, determining such claims in this action would be consistent with longstanding U.S. Supreme Court decisions. *See, e.g.*, Allee v. Medrano, 416 U.S. 802 (1974); United States v. Georgia Public Service Comm., 371 U.S. 285 (1963). In this case, the Paul Plaintiffs' claims are closely interrelated, resting upon similar factual, and identical legal, foundations. A decision on the merits of all of the claims is in the interests of fairness as well as judicial economy.

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

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

PERRY B. THOMPSON
6127 Carroll Lake Road
Commerce, MI 48382
(248) 390-2058

Attorneys for Appellants
**Counsel of Record*
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