No. 02-

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

JURISDICTIONAL STATEMENT

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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 Section

101(a) (FECA Section 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 Section 101(a) (FECA Section 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 FECA amended by BCRA Section 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 statute 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, the 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, 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, the Republican Party of Colorado, the Republican Party of New Mexico, the Republican Party of
Ohio, and the 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 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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JURISDICTIONAL STATEMENT

INTRODUCTION

This case presents a freedom of the press challenge to several of the most intrusive provisions of the growing body of federal campaign finance law. The appellants, known in the court below as the "Paul Plaintiffs" — 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 — allege that the Bipartisan Campaign Reform Act of 2002 ("BCRA"), and many of the amendments to the Federal Election Campaign Act of 1971 ("FECA") wrought by BCRA, violate their rights guaranteed by the freedom of the press of the First Amendment of the United States Constitution.

The district court rejected the Paul Plaintiffs' discrete press challenge, ruling, as a matter of law, that the Paul Plaintiffs' rights under the freedom of the press are governed by a standard no higher than, and no different from, the compelling interest test developed in First Amendment litigation involving free speech and association. *Per Curiam Op.* at 106-13. Although certain BCRA provisions were determined to be unconstitutional as violative of other First Amendment guarantees, many BCRA/FECA provisions were sustained, including virtually all of those provisions challenged by the Paul Plaintiffs.

The effect of the district court's ruling is to retain and enlarge unconstitutionally invasive federal campaign finance laws, abridging freedom of the press as well as curtailing core political speech throughout the country, and leaving the area of campaign finance regulation in disarray. This is a vital First Amendment case that demands this Court's attention and review.

Appellants request and urge this Court to note probable jurisdiction on the questions presented herein, and to reverse the district court on each of those questions.

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. None of the opinions is reported. Pursuant to this Court's Order of May 15, 2003, the appellants are submitting jointly the district court's opinions, in the form of a Joint Appendix. *See* Appendix hereto ("App.") 4a.

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 Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, 114. Appellants' Notice of Appeal is reprinted at App. 1a.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution is reprinted at App. 5a.

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

The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, is reprinted at App. 27a.

STATEMENT OF THE CASE

1. Federal campaign finance regulation, including laws licensing entry into the marketplace of ideas generated by campaigns for election to federal office, appears to have been attempted by Congress, for the first time, only in the second half of the twentieth century, with passage of the Federal Election Campaign Act of 1971 (and its extensive 1974 Amendments). *See* 2 U.S.C. Section 431, *et seq*. Previously, certain federal statutes had been enacted affecting certain rights of certain "persons." *See, e.g.*, Burroughs v. United States, 290 U.S. 534 (1934). FECA was Congress's first comprehensive

effort to take control of federal "electioneering," including the establishment of an administrative agency with power to enforce a complete panorama of licensing restrictions, contribution and expenditure limitations, reporting and disclosure requirements, backed up by penalties both civil and criminal, for infractions of the new rules.

In Buckley v. Valeo, 424 U.S. 1 (1976), this Court found some of the original provisions of FECA unconstitutional abridgments of free speech and association. For nearly a generation, the Buckley decision has guided this Court, and the lower federal courts, in the application of free speech and association to the enforcement of FECA by the Federal Election Commission ("FEC"), and the enforcement of similar rules enacted by state legislatures to control the financing of election campaigns. *See, e.g.,* FEC v. Colo. Rep. Fed. Election Campaign Comm. (Colo. II), 533 U.S. 431 (2001); Nixon v. Shrink Missouri Gov't. PAC (Shrink PAC), 528 U.S. 377 (2000). Despite continued adherence to Buckley, three justices on this Court have urged that Buckley be overruled, observing most recently that the Court's application of Buckley has "offered only tepid protection to core speech and associational rights that our Founders sought to defend." Colo. II, 533 U.S. at 466 (Thomas, J., dissenting).

Indeed, the "strict scrutiny" standard of Buckley has proved to be a malleable tool, the application of which has turned on how strictly the courts are predisposed to scrutinize the application of a particular regulation to the facts of a case. *Compare* Shrink PAC, *supra*, with FEC v. Mass. Citizens for Life, 479 U.S. 238 (1986). Essentially, the application of Buckley has proved *ad hoc*, rather than principled, opening the door for Congress to extend the FEC's power by the enactment of the Bipartisan Campaign Reform Act which contains a

number of novel encroachments upon the marketplace of ideas generated by campaigns for election to public office.

a. In an effort to sweep more and more contributions and expenditures in the marketplace of ideas generated by federal election campaigns within the licensing and regulatory power of the FEC, Title I of BCRA has extended the reach of federal campaign regulation in such a way as to place discriminatory controls upon political parties, federal and state officeholders, and candidates for federal and state office. For example, BCRA Title I, Section 101(a) (FECA Section 323(e)) prohibits a federal officeholder, or candidate for federal office, from "solicit[ing], receiv[ing], direct[ing], transfer[ing], or spend[ing] funds in connection with an election for Federal office ... unless the funds" are raised under the licensing and regulatory control of the FEC. In a similar manner, BCRA Title I prohibits any state or local officeholder or candidate for state or local office from "spend[ing] any funds..." (Section 101(a) (FECA Section 323(f))) 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)" (BCRA Section 101(b) (FECA Section 301(20)(A)(iii))).

By these provisions, Congress has breached the wall that Buckley had raised limiting the reach of the FEC only to those communications that expressly advocate a vote for or against a particular candidate. Buckley, 424 U.S. at 42-44, n.52. In so doing, Congress has invited the FEC to exercise editorial control over the "public communications" of federal, state, and local officeholders, and candidates for election to federal, state, and local office in ways that would be impermissible if applied to a newspaper or magazine of general circulation for a news

story, editorial, or commentary "that promotes or supports a candidate .... or attacks or opposes a candidate." *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

b. In another effort to breach the Buckley wall between "express advocacy" and "issue advocacy," Title II of BCRA creates a whole new set of prohibitions and regulations extending the FEC's licensing power and editorial control over "electioneering communications," on the grounds that although such broadcast, cable, or satellite communications do not expressly advocate the election or defeat of a particular candidate, they profoundly affect the outcome of federal elections. In recognition that BCRA's effort to exercise editorial control over the discussion of issues in relation to a campaign for federal election was on shaky constitutional grounds, Congress not only offered a "fall-back" definition of "electioneering communications," but provided a number of exceptions, keeping the FEC's editorial hands off news stories, commentaries, and editorials "distributed through the facilities of any broadcasting station [not] owned or controlled by any political party, political committee, or candidate" (BCRA Section 201(a) (FECA Section 304(f)(3)(B)(i))) and affirming the FEC's editorial powers in relation to candidate debates (BCRA Section 201(a) (FECA Section 304(f)(3)(B)(iii))). In short, BCRA Title II, by means of the licensing power of the FEC, treats differentially persons and entities, allowing some to participate in the debate over the issues related to election campaigns without having to comply with BCRA contribution limits and prohibitions, disclosure requirements, and economic burdens, but not others, a differentiation that would never be constitutionally tolerated if applied to a newspaper or magazine of general circulation. *See* Grosjean v. American Press Co., Inc., 297 U.S. 233 (1936).

c. In order to obtain the necessary support for BCRA Titles I and II, Congress raised the FECA individual contribution limit to individual candidate campaigns per election from $1,000 to $2,000, indexing the limit to inflation. BCRA Title III, Section 307(a). Even with this increase, Congress continued to impose significant editorial control upon individual candidate campaigns, limiting both the quality and quantity of campaign communications, as well as forcing disclosure of the identities of contributors, consequences that would be constitutionally intolerable under such rulings as Miami Herald, *supra*, and Talley v. California, 362 U.S. 60 (1960).

2. BCRA was enacted 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.

3. Appellants, the Paul Plaintiffs, present unique challenges to the constitutionality of BCRA/FECA, having relied exclusively upon the freedom of the press, rather than invoking the free speech and association standards relied on in Buckley. Although they participated collectively with most of the other plaintiffs regarding procedural undertakings, their

substantive presentation was distinct, and the district court permitted them to brief the issues separate and apart from the other plaintiffs in the consolidated cases below. *See Per Curiam Op.* at 56. Although the district court addressed the freedom of the press legal claims of the Paul Plaintiffs by ruling them irrelevant as a matter law, the opinions below carry sparse mention of the evidentiary foundation for those claims.[1] Such evidence was admitted below through substantial fact and expert testimony, as follows: (i) the reports and declarations of three expert witnesses: **James C. Miller III, Ph.D.**, former

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[1] The Paul Plaintiffs' case was mentioned or discussed in the district courts' opinions at the following pages. *Per Curiam* Opinion: 5 (description of contents of opinion), 56 (description of briefing schedule), 81 (description of parties), 87 (findings re identities of plaintiffs Ron Paul and GOA), 88 (findings re identities of plaintiffs GOAPVF, RealCampaignReform.org (erroneously identified as "RealCampaignFinance.org"), CU, and CUPVF), 89 (findings re identities of plaintiffs Cloud and Howell), 106-113 (findings of law with regard to Paul Plaintiffs' free press claims), 115 (description of parties challenging BCRA section 201), 170 (conclusion); Judge Henderson's Opinion: 11 (description of parties), 40 (identification of press claims re corporate disbursements for "electioneering communications"), 54 (identification of free press challenges to BCRA Section 101), 58 (identification of free press challenges to $2,000 contribution limit), 111 (citing declarations of Paul Plaintiffs witnesses Boos and Pratt with respect to the limited ability of PACs to finance electioneering communications), 227 (not deciding free press challenges to BCRA Sections 201, 203-204), 242 (not deciding free press challenges to BCRA Section 212), 325 (rejecting free press challenge to BCRA Section 101(a) (FECA Section 323(e)), 339-42 (determining no Article III standing with regard to indexing of contribution limit increase); Judge Kollar-Kotelly's Opinion: 229, 397 (plaintiff Ron Paul deposition to support opinion that outside issue ads in 2000 were intended to influence elections), 334-36 (witness Pratt declaration regarding determination that primary definition of "electioneering communications" not overbroad), 471 (equal protection and free press challenge to BCRA/FECA media exemption); and Judge Leon's Opinion: 257-258 (plaintiff Ron Paul deposition to support opinion that outside issue advertisements in 2000 were intended to influence elections), 333 (citing Pratt declaration regarding radio advertisement in 2002 within 30 days of primary in New Hampshire).

Chairman of the Federal Trade Commission and Director of the Office of Management and Budget; **Perry Willis**, former Director, Libertarian Party and Campaign Manager, Harry Browne, Libertarian for President 2000; and **Walter J. Olson, CPA**, campaign finance practitioner; and (ii) 11 fact witnesses: **Congressman Ron Paul**; **Mark Elam**, Campaign Manager of Paul for Congress; **Tom Lizardo**, Chief of Staff, Congressman Ron Paul; **Lawrence D. Pratt**, Executive Director, Gun Owners of America, Inc.; **James H. Babka, Jr.**, President, RealCampaignReform.org; **Michael Boos, Esquire**, General Counsel, Citizens United; **David N. Bossie**, President, Citizens United; **Michael Cloud**, Libertarian Party candidate for U.S. Senate from Massachusetts in 2002; **Carla Howell**, Libertarian Party candidate Governor of Massachusetts in 2002; **Anonymous Witness No. 1**, a donor who contributes less to federal candidates than the reporting threshold to avoid disclosure of his identity; and **Anonymous Witness No. 2,** a donor who would contribute to federal candidates more than $1,000 per election under current law, or $2,000 per election under BCRA, if it were legal to do so.

Combined, these witnesses presented the facts, as follows:

a. Appellant Ron Paul is a Member of the United States House of Representatives from the 14th Congressional District of Texas. He is a member of the Republican Party, and was the Republican nominee in 2002 for the congressional seat he now holds. Congressman Paul, in addition to his own activities as a voter and contributor to other organizations and candidates, conducts a number of "general press" activities as a candidate for federal office. Congressman Paul testified, *inter alia*, how FECA/BCRA operated as a prior restraint upon him and his campaign committee, requiring them, prior to entering into the marketplace of ideas related to his campaigns for election to federal office, to secure a license from, and submit to the

editorial supervision and control of, the FEC. Congressman Paul also testified that the continuing and increased discriminatory burdens of such laws — including contribution limitations, soft money limits, campaign coordination rules, and "electioneering communications" — would substantially and adversely impact his ability to engage in a variety of communicative activities related to his campaigns for federal office. But for BCRA/FECA, Congressman Paul would be able to raise more money from individuals and organizations for communicative activities, as well as expand the range of fundraising events, receive more assistance from volunteers, and redirect resources now required to comply with FEC licensing, recordkeeping, and reporting requirements. Paul Decl. Paras. 14-18. *See also* Elam Decl. Paras. 5-12; Lizardo Decl. Paras. 3-5; Anonymous Witness No. 1 Decl. Paras. 2-9; Anonymous Witness No. 2 Decl. Paras. 3-8; Olson Expert Witness Decl. Paras. 7-11, 13; and Miller Expert Witness Decl. at 16-19.

b. Appellants Cloud and Howell also engage in "general press" activities similar to those engaged in by Congressman Paul, both as citizens and voters, and as candidates for federal and state office. Mr. Cloud and Ms. Howell , both members of the Libertarian Party, as well as respective federal and state candidates of the Libertarian Party in 2002, engage in press activities that have been, are, and will continue to be profoundly limited by the federal campaign laws embodied in BCRA/FECA. For example, Mr. Cloud and Ms. Howell, and their campaigns, promote (and seek to educate the public regarding) various policy issues and ideas, including the reduction of the size of government, abolition of the Massachusetts income tax, and the restoration of personal liberties, and both work with other Libertarian candidates for state and federal office. In fact, as 2002 federal and state Libertarian Party candidates, respectively, Mr. Cloud and Ms.

Howell coordinated certain campaign activities with one another in the 2002 federal election cycle, which would be prohibited by BCRA's Title I "soft money" rules. The press campaign activities of both Mr. Cloud and Ms. Howell in the past have been restrained, economically burdened, and adversely impacted by the laws limiting campaign contributions and requiring registration, reporting, and disclosure, which will be exacerbated under BCRA/FECA. Mr. Cloud's and Ms. Howell's press activities are adversely impacted especially by the discriminatory effects of the FECA with respect to the institutional media, because they are involved with a "third party." Cloud Decl. Paras. 1-2, 7-17, 19-20, 23-28; Howell Decl. Paras. 7-20; Willis Expert Witness Decl. Paras. 6-10.

c. Appellants Gun Owners of America, Inc. ("GOA"), RealCampaignReform.org ("RCR"), and Citizens United ("CU"), are separate nonpartisan, nonprofit, nonstock educational/advocacy organizations which, by their respective undertakings, engage in "general press" activities. GOA and CU spend significant funds for communications on issues related to federal election campaigns during periods, *inter alia*, just prior to federal primary and federal general elections, utilizing broadcast, cable, and satellite facilities. GOA and CU also communicate with the public by means of mailed and telefaxed letters, messages and articles on their Internet web sites, audio tapes, videotapes, and radio and television broadcasts to the public. The press activities of both GOA and CU include engaging in issue advocacy, by means of communications which will constitute prohibited and/or highly regulated "electioneering communications" as that term is defined by both the primary and back-up definitions in BCRA (BCRA Section 201(a) (FECA Section 304(f)(3)(A))). Bossie Decl. Para. 5; Boos Decl. Paras. 8, 11-14; Pratt Decl. Paras. 10, 13, 16-19. RCR, which was formed in 2000, does not have the

many years of press activities that GOA and CU have, but it regularly distributes educational communications by e-mail to a contributor list of 15,000; it also has engaged in developing communications to the public by radio broadcast which would constitute "electioneering communications" as defined by BCRA. Babka Decl. Para. 9. The communications to the public of GOA, RCR, and CU that are in evidence do not constitute "express advocacy" within the meaning of federal election law, but rather "issue advocacy." Likewise, the types of communications that GOA, RCR, and CU are prohibited by BCRA/FECA from broadcasting do not constitute "express advocacy." Additionally, GOA, RCR, and CU are negatively impacted by BCRA/FECA with respect to their working relationships with federal officeholders. For example, both GOA and CU solicit funds through direct mail endorsed by Members of Congress who support the goals of those organizations. RCR has not yet reached that stage of its development, but would like to engage in such communications in the future. BCRA/FECA would effectively prohibit such communications, and thus would substantially interfere with such press activities. Paul Plaintiffs Proposed Findings of Fact, Paras. 3, 5, 6, 14, 15.

d. Appellants Gun Owners of America Political Victory Fund ("GOAPVF") and Citizens United Political Victory Fund ("CUPVF") are multicandidate "political committees," independent of any political party and are the federally-registered, connected political committees of appellants GOA and CU, respectively. Paul Plaintiffs Proposed Findings of Fact, Paras. 4, 7.

e. BCRA/FECA subjects appellants' "general press" activities to a system of federal licensure. Appellants Paul, Cloud, and Howell, who have been federal candidates, have been required to file a "statement of organization" with the

government before the individual, or any committee established by the individual, can expend more than $5,000 on "campaign activities," including publishing communications that expressly advocate the individual's election to federal office. Furthermore, BCRA/FECA imposes economically burdensome regulations upon federal candidates and their "campaign" committees. BCRA/FECA requires candidate committees to file periodic reports with the government containing the name, address, occupation, and employer of any contributor of more than $200 in the aggregate during a calendar year. This regulatory burden limits the funds available to federal candidates. For example, plaintiff Cloud estimated that his 2002 campaign for Senate would have received between $100,000 and $300,000 in additional contributions from at least 261 contributors who would have donated more, but did not do so because any contributions over $200 in the aggregate in a calendar year from an individual would have required that his or her identity be disclosed in filed reports. There is other substantial evidence that this reporting/disclosure requirement interferes with plaintiffs' press activities by restricting the funds that would otherwise be available for their federal candidacies. Paul Plaintiffs Proposed Findings of Fact, Paras. 17, 18. Additionally, BCRA/FECA limits individual contributions to a candidate's committee to $2,000 per election. This regulatory burden limits the funds available to federal candidates. Plaintiff Cloud estimates that the limitation of $1,000 prior to BCRA cost his campaign committee between $350,000 and $700,000 in net contributions from at least 46 donors. Such limits enhance the role and influence of institutional media corporations in the electoral process. Paul Plaintiffs Proposed Findings of Fact, Para. 19.

f. BCRA/FECA also imposes economically burdensome regulations upon I.R.C. Section 501(c)(4) organizations, including appellants GOA, CU, and RCR, as well as separate

segregated funds ("SSFs") GOAPVF and CUPVF, which had to be formed solely because of discriminatory prohibitions on corporate involvement in federal elections in order to conduct "express advocacy." GOAPVF and CUPVF have been required to file "statements of organization" with the FEC in order to register before they were permitted to provide any financial support to federal candidates, including publishing communications that expressly advocate the election or defeat of any federal candidate. No multicandidate SSF, including plaintiffs GOAPVF and CUPVF, may receive contributions in excess of $5,000 per year from an individual. GOAPVF, CUPVF, and other political committees supporting or opposing federal candidates also are required to file periodic reports with the FEC regarding their financial activities. GOAPVF, CUPVF, and other political committees registered with the FEC are further required to report the name, address, employer, and occupation of each contributor donating more than $200 in the aggregate in a calendar year. This burden on plaintiffs' press activities is not imposed on other elements of the press, such as the institutional media, and is discriminatory. The reporting burden can be 20 percent or more of an SSF's annual receipts. Paul Plaintiffs Proposed Findings of Fact, Para. 20.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Paul Plaintiffs' rights under the freedom of the press are unconstitutionally abridged by government censorship and patrimony under BCRA/FECA. Well aware of the First Amendment encroachments with the passage of BCRA, Congress predicted immediate constitutional challenges, expressly providing for a direct appeal to this Court from the decision of the three-judge district court opinion below. The questions presented by appellants are both substantial and discrete from the questions presented by all other plaintiffs in the court below, and, if addressed on the merits, are dispositive

of the constitutionality of the provisions challenged by the Paul Plaintiffs in this case.

A. Paul Plaintiffs' Freedom of Press Claims Are Discrete.

In its *per curiam* opinion, the court below recognized that the Paul Plaintiffs' claims that BCRA violates the freedom of the press were "discrete" from those of all of the other plaintiffs in this case. *Per Curiam Op.* at 106. Indeed, no other plaintiff challenged BCRA, or any of its provisions, on the ground that it violated the plaintiffs' rights guaranteed by the freedom of the press. *See Per Curiam Op.* at 106-113. Not only did the court below find the Paul Plaintiffs' press claims discrete from the other plaintiffs' free speech and association, and equal protection and due process claims, but it understood that, if the Paul Plaintiffs prevailed on their press claims, it would be dispositive of most of the constitutional challenges to BCRA. Thus, the *per curiam* opinion opened its discussion of the constitutionality of BCRA by addressing the "Paul Plaintiffs' Press Clause Challenge." Although the court rejected that challenge, it did not summarily dismiss it. Rather, it disposed of the Press Clause challenge by ruling, as a matter of law, that "the Press Clause provides no greater rights" than the freedoms of speech and association, and therefore, governed by no standard other than "the general First Amendment compelling interest test." *See Per Curiam Op.* at 106. In so ruling, the court below erred.

B. The Freedom of the Press Is Distinct from the Freedoms of Speech and Association.

In support of its claim that this Court "has not explicitly stated whether the freedom of press affords greater protections than that of speech or association," the court below failed to examine a single case in which this Court explicitly relied upon

the freedom of the press guarantee, as distinguished from the other freedoms listed in the First Amendment. *See Per Curiam Op.* at 106-113. Instead, the court relied upon two contemporary academic treatises for the remarkable proposition that "the Press Clause has largely been subsumed into the Speech Clause." *Per Curiam Op.* at 109-110. By relying on the contemporary opinions of "two leading First Amendment scholars" — rather than examining the text and history of the freedom of the press in relation to the freedoms of speech and association — the court below departed from the first principle of constitutional interpretation:

> In expounding the Constitution of the United States ... **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. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. **Every word** appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. [Wright v. United States, 302 U.S. 583, 588 (1938) (quoting from Holmes v. Jennison, 14 Pet. 540, 570, 571 (1840)) (emphasis added).]

Indeed, by failing to adhere to this long-standing rule of interpretation, the court below "disregard[ed] ... a deliberate choice of words and their natural meaning" (*id.*, 302 U.S. at 588), as evidenced by the first-hand witness of St. George Tucker, author of "the first extended, systematic commentary on the Constitution after it had been ratified by the people of the several state and amended by the Bill of Rights" (St. G.

Tucker, *View of the Constitution of the United States with Selected Writings* vii (Liberty Fund: 1999)):

> [N]othing could more clearly evince the inestimable value that the American people have set upon the liberty of the press, than their uniting it in the same sentence, and even in the same member of a sentence, with ... the freedom of speech. And since congress are equally prohibited from making any law abridging the freedom of speech, or of the press, they boldly challenged their adversaries to point out the constitutional distinction... If the unrestrained freedom of the press, said they, be not guaranteed, by the constitution, neither is that of speech. If, on the contrary the unrestrained freedom of speech is guaranteed, so also, is that of the press. If then the genius of our federal constitution has vested the people of the United States, not only with a censorial power, but even with the sovereignty itself ... why, said they, is the exercise of this censorial power, this sovereign right ... to be confined to the freedom of speech? ... Surely not.... The best speech... must be altogether inadequate to the due exercise of the censorial power, by the people. The only adequate supplementary aid for these defects ... is **the absolute freedom of the press**. [St. G. Tucker, "Of the Right of Conscience; and of the Freedom of Speech and of the Press," in *View of the Constitution of the United States and Selected Writings, supra,* at 382 (emphasis added).]

Not only did the court below ignore the constitutional text and history, it failed to acknowledge a number of this Court's venerable precedents, cited by the Paul Plaintiffs in their briefs below, establishing that the freedom of the press imposes

constitutional limits upon the exercise of government power, distinct and independent of "the general First Amendment compelling state interest test." *See Per Curiam Op.* at 113.

First, this Court has held that the freedom of the press prohibits all "prior restraints" imposed by government officials upon the communication of ideas, except for "a single, extremely narrow class of cases ... [which] may arise only when the Nation 'is at war.'" New York Times v. United States, 403 U.S. 713, 725-26 (1971) (Brennan, J., concurring), (citing Schenck v. United States, 249 U.S. 47, 52 (1919)). Thus, whenever a government imposes an unconstitutional prior restraint upon the communication of ideas, it is "unnecessary" for a court to apply the general First Amendment standard of strict scrutiny. *See* Watchtower v. Village of Stratton, 536 U.S. 150, 161-64 (2002).

Second, this Court has found, as an unconstitutional abridgment of the freedom of the press, any statute requiring a "license" from the government for the privilege of communicating ideas. Lovell v. City of Griffin, 303 U.S. 444, 451 (1938). This "no licensing" principle applies regardless of the claimed government interest, because, as this Court has recently observed, "[i]t is offensive — ... to the very notion of a free society — that ... a citizen must first inform the government of her desire to speak ... and then obtain a permit to do so, [e]ven if the issuance of permits ... is a ministerial task that is performed promptly...." Watchtower v. Village of Stratton, 536 U.S. at 165-66.

Third, this Court has ruled that the freedom of the press prohibits the forced disclosure of the identities of authors, publishers, disseminators, and other communicators, not as a measure to protect the privacy of such persons, but to maintain inviolate the absolute right of the author or publisher to decide

whether to disclose his or her name. *See* Talley v. California, 362 U.S. 60, 64-65 (1960); *accord,* McIntyre v. Ohio Elections Commission, 514 U.S. 334, 342-43 (1995). This principle of anonymity is designed to protect the people from the power of government censorship, reflecting the Press Clause's foundational principle that the people have power to censor their government, not vice versa. *See* J. Madison, "Report on the Virginia Resolutions," reprinted in IV J. Eliot, ed., *The Debates in the Several State Constitutions* 569-70 (Phila: 1866).

Fourth, this Court has held that the government may not exercise any editorial control over the content of a communication, the freedom of the press having absolutely reserved the "editorial function" to the author, publisher, disseminator or other private communicator. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247-54, 256, 258 (1974). As Sir William Blackstone put it in his *Commentaries on the Laws of England*, "[e]very 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 W. Blackstone, *Commentaries on the Laws of England* 151-52 (Univ. Chi., facs. ed. 1769).

Fifth, this Court has determined that the freedom of the press forbids government from placing discriminatory economic burdens upon communicative activity, thereby imposing, in effect, a tax on "the acquisition of knowledge by the people in respect to their governmental affairs." Grosjean v. American Press Co., Inc., 297 U.S. 233, 247 (1936). Such an economic burden is considered by the freedom of the press to be an unconstitutional "penalty" (*see* Miami Herald, 418 U.S. at 256), and unconstitutional *per se* when imposed upon particular "subject matter, or ... content." Arkansas Writers'

Project, Inc. v. Ragland, 481 U.S. 221, 229-30 (1987) (internal citation omitted).

C. The Freedom of the Press Applies to Campaign Finance.

Despite the Paul Plaintiffs having called the district court's attention to these specific press principles and precedents, and demonstrated their applicability to their challenge to BCRA, the court below declined to apply them. First, they declined because they found the Paul Plaintiffs' challenge "novel ... — a tack that has not been used in the campaign finance realm." *Per Curiam Op.* at 107. Second, the court observed that, if the Paul Plaintiffs' press claims applied to BCRA, then "litigants could besiege the courts with a host of challenges to laws previously upheld by the Supreme Court on First Amendment grounds, merely by characterizing themselves in their complaints as members of the 'press' because their purpose is to disseminate information to the public." *Id.* at 112. The court below is wrong on both counts.

As an initial matter, the court's claim that the Paul Plaintiffs can cite no case applying freedom of press to campaign finance reform laws is inaccurate, depending upon the definition one applies to "campaign finance reform." The Paul Plaintiffs did cite Miami Herald, a case in which this Court applied freedom of press and struck a state law regulating campaigns by forcing newspapers to expend resources in ways contrary to the editorial policy of the paper.

Additionally, two district courts, relying in part upon the freedom of the press, limited the investigative powers of the FEC in its effort to enforce the "news activity" exemption provided in 2 U.S.C. Section 431(9)(B)(i). FEC v. Phillips Publishing, Inc., 517 F. Supp. 1308, 1312-14 (D.D.C. 1981);

Reader's Digest Association v. FEC, 509 F. Supp. 1210 (S.D.N.Y. 1981). Indeed, in the Phillips case, the district court noted that Congress based the FECA exemption enjoyed by a "press entity," in part, upon the freedom of the press. Phillips, 517 F. Supp. at 1312. However, the court below was correct that, until the Paul Plaintiffs filed their complaint in this case, no one had waged a direct challenge to the constitutional legitimacy of comprehensive federal campaign finance regulations (FECA/BCRA) on freedom of the press grounds.[2] *Per Curiam Op.* at 110-11.

As the Paul Plaintiffs pointed out, and as the court below acknowledged, the freedom of the press is not, however, a special privilege of the institutional media, but extends to "every freeman," citing this Court's opinion in Near v. Minnesota, 283 U.S. 697, 713-14 (1931). *Per Curiam Op.* at 108. By providing the special exemptions to the institutional media under FECA[3] and BCRA,[4] Congress has breached this

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[2] It is true that one of the plaintiffs, *Human Events*, in Buckley v. Valeo, included a freedom of the press claim in its complaint. But neither the United States Court of Appeals for the District of Columbia nor this Court addressed that claim in their opinions. Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975); Buckley v. Valeo, 424 U.S. 1 (1976).

[3] FECA provides the institutional media (with respect to the definition of "expenditure") an exemption for: "any news story, commentary, or editorial distributed through the facilities of **any broadcasting station, newspaper, magazine, or other periodical publication**, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. Section 431(9)(B)(i) (emphasis added).

[4] Additionally, BCRA provides the institutional media (with respect to an "electioneering communication") an exemption for: "a communication appearing in a news story, commentary, or editorial distributed through the facilities of **any broadcasting station**, unless such facilities are owned or controlled by any political party, political committee, or candidate." BCRA Section 201(a) (FECA Section 304(f)(3)(B)(i)) (emphasis added). *See also*

first principle of the freedom of the press, conferring upon a "definable category of persons or entities," special First Amendment privileges, and thereby, instituting a system of inclusion and exclusion "reminiscent of the abhorred licensing system" that the liberty of the press was designed to prohibit. *See* First National Bank of Boston v. Bellotti, 435 U.S. 765, 801, 802 (1978) (Burger, C.J., concurring); *accord* IV W. Blackstone's *Commentaries* at 152, n.*a*.[5]

As the Paul Plaintiffs demonstrated below, through the testimony of several witnesses, the federal campaign finance system functions as licensing system, requiring candidates and their supporters to obtain permission from the government before taking their message to the people.[6] As White House

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subsections (iii) and (iv) exempting candidate debates and other FEC-licensed press activities.

[5] To escape this application of free press principles, the court below read this Court's decisions in Bellotti and Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990) to have established that the government may discriminate between the "general press" and the "institutional press" on the ground that the government has a "compelling interest ... to exempt media corporations from the scope of political expenditure limitations." *Per Curiam Op.* at 111, n.64. To read Bellotti and Austin as having, *de facto,* conferred upon the "institutional media" greater rights than the "general press" (*Per Curiam Op.* at 111, n.65) smacks of the very kind of special privilege that Chief Justice Burger claimed, in Bellotti, the First Amendment condemned.

[6] The operation of FECA/BCRA as a licensing scheme was explained by Paul Expert Witness Walter J. Olson, CPA. Mr. Olson, a certified public accountant and expert in FEC compliance matters, submitted a report containing detailed testimony about the burdensome, intricate, labor-intensive, time-consuming, and costly recordkeeping and reporting requirements imposed by FECA, and further increased by BCRA. His report demonstrates that FECA/BCRA exposes individuals and organizations engaged in federal election activities to serious penalties for violation of an extensive and intricate set of operating, reporting, filing, and recordkeeping

Press Secretary Ari Fleischer put it, upon the occasion of President Bush's formal announcement that his re-election campaign had begun:

> Today ... the legal structure for a re-election campaign was put in place as a result of the filing of what's called FEC Form 1 and FEC Form 2... This is the legal structure that is required, so that grass-roots activities can begin, the fundraising can begin. This is the required legal step that must be taken for other events to follow on. ["Bush Formally Starts 2004 Campaign," May 16, 2003, http://www.newsmax.com/archives/articles/2003/5/16/151352.shtml.]

And, as the Paul Plaintiffs' testimony demonstrated below, once the FEC Forms 1 and 2 are filed, the candidates and their supporters enter into a marketplace of ideas in which they lose substantial editorial control over their campaigns and in which challengers and third party candidates are placed at significant disadvantage in relation to incumbent office holders and the institutional media.[7]

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requirements so complex that the FEC's own information and software specialists are sometimes unable to provide answers.

[7] Paul Expert Witness James C. Miller III, Ph.D., former Chairman of the Federal Trade Commission and Director of the Office of Management and Budget and author of the book, *Monopoly Politics,* submitted a report testifying to the actual operation and effect of the federal election laws, as well as the rules promulgated and enforced by the FEC. Dr. Miller's report documents how FECA/BCRA operates to the disadvantage of challengers, and to the advantage of incumbents, and how campaign finance regulations generally impair the quantity and quality of public debate by candidates on the issues.

Paul Expert Witness Perry Willis, an experienced federal campaign manager and Libertarian Party organizer, submitted a report in which he

According to the court below, however, 27 years after Buckley, it is too late for the Paul Plaintiffs to challenge BCRA on freedom of the press grounds. *See Per Curiam Op.* at 112. But the *per curiam* opinion has cited no case supporting the proposition that a party is precluded, other than by collateral estoppel, from raising a new constitutional claim just because it might undercut judicial precedents applying other constitutional guarantees. *See, e.g.,* Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965).

Had Buckley been litigated and decided based on freedom of press principles, it is submitted that a very different result would have obtained. A classic press analysis openly reveals the impropriety of Congress establishing a burdensome licensing scheme, regulating both issue advocacy and campaigns for office, threatening to fine or send to jail those who criticize Congressmen in a manner those Congressmen find impermissible, chilling the activities of those Americans who seek to participate politically and electorally in our constitutional republic. Unlike Buckley, which was based solely on congressional findings to which this court deferred, the challenge by the Paul Plaintiffs to BCRA/FECA has demonstrated the actual anti-competitive, anti-minor party, anti-challenger scheme which Members of Congress have devised to protect their own selfish political interests under the ruse of preventing an undefined and vague threat — "corruption and the appearance of corruption." The Paul Plaintiffs fully agree with the three justices on this Court who have stated in previous opinions that Buckley should be

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testified at great length as to how FECA/BCRA serves to protect the Democratic and Republican parties' domination of American politics by artificial enhancement of media influence on elections through a special privilege exemption, and imposition of draconian contribution limits and reporting requirements on minor parties and their candidates, who are oftentimes ignored by the exempt institutional media.

overruled,[8] and would ask the Court to overrule Buckley. Nonetheless, since the Paul Plaintiffs are contending that the freedom of the press, overlooked by the parties in Buckley, dictates a different approach to the constitutionality of campaign finance regulation than the one based upon free speech and association, it may be possible that Buckley can merely be set aside rather than overruled.

1. Title II BCRA Violations of Freedom of the Press.

Claiming that the Buckley distinction between "express candidate advocacy" and "issue advocacy" is too easily evaded, Congress enacted Title II of BCRA to subject certain "sham issue ads" broadcast over the air waves to the same prohibitions and regulations as ads expressly advocating the election or defeat of a clearly identified candidate for federal office. Such "issue ads," Congress maintained, are, in reality, camouflaged express candidate advocacy, and therefore, ought to be prohibited and regulated in like manner as express advocacy ads in order to protect the federal government from corruption and the appearance of corruption. *See, e.g.*, 148 Cong. Rec. S2,114-16 (daily ed. March 20, 2002) (statement of Sen. Carl Levin).

Conspicuously exempted from the new Title II BCRA prohibitions and regulations, however, is any "news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate." (BCRA Section 201(a) (FECA Section 304(f)(3)(B)(i)).) Thus, any television or radio station fitting the statutory exemption is completely free to spend money to

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[8] *See* FEC v. Colo. Rep. Fed. Election Campaign Comm., 533 U.S. 431, 465 (2001) (Thomas, J., dissenting).

communicate its position on the issues, without having to comply with the Title II prohibitions, or licensing, disclosure, and editorial control requirements, and economic burdens.

The BCRA exemption for television and radio is not based upon a congressional finding that such entities do not engage in "sham issue" communications, expressing camoflauged support for the election or defeat of candidates for federal office. Rather, the BCRA exemption is based upon a previously-enacted FECA provision exempting the express advocacy of the election or defeat of a federal candidate contained in any "news story, commentary, or editorial distributed through the facilities of any broadcasting station ... unless such facilities are owned or controlled by any political party, political committee, or candidate." (2 U.S.C. Section 431(9)(B)(i).)

Neither exemption for such television and radio news, editorial or commentary broadcasts is based upon a finding by Congress that generally such media do not corrupt, or create the appearance of corruption, of the electoral process. Rather, the original FECA exemption is, in part, based explicitly upon the freedom of the press. *See* Phillips, 517 F. Supp. at 1312. The BCRA exemption, in turn, is calculated to preserve editorial control over the discussion of public issues, even when related to an election campaign, as dictated by the freedom of the press in favor of the print media. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. at 247-54, 256, 258, *supra.*

Indeed, if Congress subjected the institutional press to the prior restraint, registration (licensing), contribution and disclosure requirements (editorial controls), and economic burdens that the non-exempt press is subjected to under Title II of BCRA, they would be the first to invoke their rights under

the freedom of the press as the Miami Herald Publishing Co. did in response to a Florida state campaign finance regulation imposing upon any newspaper that attacked a candidate for office to provide space in its publication for a "right to reply." And they would expect to prevail on that press claim, notwithstanding any countervailing government interest, compelling or otherwise, on the ground that, under the freedom of the press, the "editorial function," including the right to decide how to spend limited financial resources, is an inviolate right. *See* CBS v.Democratic National Comm., 412 U.S. 94, 145 (1973) (Stewart, J., concurring) ("For that guarantee (the freedom of the press) gives **every** newspaper the liberty to print what it chooses and reject what it chooses, free from the intrusive editorial thumb of Government." (emphasis added)).

The adverse impact of BCRA Title II on the Paul Plaintiffs' press right is aggravated by additional exemptions conferred upon FEC-licensed candidate debates and other press activities as determined by the FEC. The grant of such discretionary editorial control to a government agency strikes at the very heart of the freedom of the press which guarantees that the editorial function belongs to the people not to the government. *See* Miami Herald Publishing Co. v. Tornillo.

2. Title I BCRA Violations of Freedom of the Press.

BCRA Section 101(a) (FECA Section 323(e)(1)) subjects a federal officeholder or candidate for election to federal office to the "limitations, prohibitions, and reporting requirements of this Act," if he or she engages in activity to "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity...." While the court below struck down three statutory definitions of "federal election activity," it left intact the one specifying any "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)." BCRA Section 101(b) (FECA Section 301(20)(A)(iii)).

Likewise, the court upheld BCRA Section 101(a) (FECA Section 323(f)), subjecting a state or local officeholder or candidate for election to state or local office to the "limitations, prohibitions, and reporting requirements of this Act," if he or she "spend[s] any funds" for any "public communication that refers to a clearly identified candidate for Federal office ... and that promotes or supports that 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)."

Had the district court applied the freedom of press protections to BCRA Section 101(a) (FECA Sections 323(e) and 323(f)), it should have found them unconstitutional in their entirety as an impermissible prior restraint, a forbidden licensing and disclosure requirement, overreaching editorial control, and a discriminatory economic burden. To single out individuals who hold government office, or who are candidates for such office, and impose upon them special licensing, disclosure requirements, editorial control, and economic burdens strikes at the very heart of the freedom of the press which guarantees to every man liberty to communicate on matters of state without first having to obtain government permission. *See* Watchtower v. Village of Stratton, 536 U.S. at 165-66.

3. Title III BCRA Violation of Freedom of the Press.

The Paul Plaintiffs challenged the constitutionality of BCRA Section 307(a) modifying the individual contribution limits to federal election campaigns by FECA as a violation of the freedom of the press. At the heart of this challenge was the claim that contribution limits, in whatever amount, unconstitutionally abridge a candidate's editorial authority by abridging his or her right to determine the quality and quantity of his or her communications and his or her right to determine whether or not to disclose to the public the identities of his or her co-publishers.

In his sworn declaration, Congressman Paul attested that the individual contribution limitation adversely impacted his campaign by reducing the quality and quantity of his communications during his election campaign. His campaign manager and a campaign consultant confirmed this testimony, adding that they were aware of several individuals who would have given more to the Paul campaigns had there been no limit. Additionally, two anonymous witnesses furnished declarations that they would have given more but for the contribution limitations and/or the disclosure requirements.

This evidence of the impact on the Paul campaign's editorial function was ignored by the court below, having ruled as a matter of law that Paul Plaintiffs' press claim was indistinguishable from the free speech and association claims of the other plaintiffs. This erroneous ruling led the court to conclude that none of the Paul Plaintiffs had standing to contest the constitutionality of the individual contribution limits.

Had the court below addressed the Paul Plaintiffs' freedom of the press claims on the merits, not only should the court below have found standing, but also a violation of the freedom

of the press guarantees of editorial autonomy as embraced by this Court in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569-70, 573-74 (1995) and anonymity as embraced by this Court in McIntyre v. Ohio Elections Commission, *supra.*

CONCLUSION

For the reasons stated, this Court should note probable jurisdiction of the Paul Plaintiffs' appeal

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