UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH MCCONNELL, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	CIVIL ACTION NO. 02-CV-582 (CKK, KLH, RJL) Consolidated with: CIVIL ACTION NOS. 02-CV-581 (CKK, KLH, RJL) 02-CV-633 (CKK, KLH, RJL) 02-CV-751 (CKK, KLH, RJL) 02-CV-753 (CKK, KLH, RJL) 02-CV-754 (CKK, KLH, RJL) 02-CV-874 (CKK, KLH, RJL) 02-CV-875 (CKK, KLH, RJL) 02-CV-877 (CKK, KLH, RJL) 02-CV-881 (CKK, KLH, RJL)
CONGRESSMAN RON PAUL, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	and CIVIL ACTION NO. 02-CV-781 (CKK, KLH, RJL)

REPLY BRIEF OF PLAINTIFFS IN CIVIL ACTION NO. 02-CV-781, 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, IN SUPPORT OF THEIR CASE-IN-CHIEF

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ARGUMENT

In their Brief and Opposition Brief, Defendants have not attempted to rebut the specifics of the Paul Plaintiffs' claims. Instead, they have argued: (1) that the Paul Plaintiffs' claims with respect to Titles I, II, and III of BCRA are indistinguishable from the claims of other plaintiffs in these consolidated cases; and (2) that any claims attacking FECA provisions not expressly amended by BCRA are beyond the jurisdiction of this Court. *See* Def. Opp. Br. at 128-129. In fact, however, the Paul Plaintiffs' free press challenges to all Titles are distinct from all claims advanced by other plaintiffs, and the Paul Plaintiffs' claims are within this Court's jurisdiction.

I. THE CONSTITUTIONALITY OF THE BIPARTISAN CAMPAIGN REFORM ACT IS PROPERLY TESTED AGAINST THE FIRST AMENDMENT'S FREEDOM OF THE PRESS.

Defendants have claimed that, because "[t]he guarantee of the freedom of the press … offers no greater protection than" the guarantees of "free speech and association or equal protection[,] the Paul Plaintiffs' arguments present no distinct or better constitutional challenge to FECA or BCRA than those already rejected in Buckley and subsequent cases, or those made by other plaintiffs in this litigation." Def. Opp. Br. at 128-29. This claim is at odds with the constitutional text and history, as well as with 70 years of Supreme Court precedent.

A. Defendants Have Ignored First Amendment Text and History.

Although freedom of the press is listed behind freedom of speech in the First Amendment, the freedom of the press is the primary people's freedom, both chronologically and philosophically. The right of the people to the freedom of the press was recognized in England before the end of the 17th century (IV W. Blackstone, *Commentaries on the Laws of England* 152, fn. a (Univ. of Chi. Facsimile Edition: 1769)), while the freedom of speech was

guaranteed only to the representatives of the people in Parliament assembled. *See* Article 9 of the 1689 English Bill of Rights, reprinted in *Sources of Our Liberties* 247 (Perry, ed., NYU Press: 1972) ("*Sources*"). Thus, Blackstone stated that the right of the people to the freedom of the press — not speech — was "essential to the nature of a free state." IV Blackstone's *Commentaries, supra,* at 151.

One month before the signing of the Declaration of Independence, the people of Virginia followed suit in declaring that the right of the people to "the freedom of the press [not speech] is one of the great bulwarks of liberty."[1] As evidenced by the October 25, 1780 Massachusetts Constitution, the freedom of speech was guaranteed not to the people directly, but to the people's representatives in the state assembly.[2] When the freedom of speech was recognized in the early state constitutions as a right of the people, it was not a right independent from freedom of the press, but rather was considered to be covered by a freedom of the press guarantee.[3]

At the heart of the freedom of **speech** enjoyed by the people's representatives was a right not to be punished **after** having spoken words in debate or other legislative deliberations. Thus, under the English Bill of Rights and the early state constitutions, the elected

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[1] Section 12 of the June 12, 1776 Constitution of Virginia, reprinted in *Sources of Our Liberties, supra,* at 312. *Accord,* Sect. 23, Sept. 11, 1776 Dela. Decl. of Rights, and Sec. XV, Dec. 14, 1776 N.C. Const., reprinted in *Sources* at 340 and 356, respectively.

[2] *See* Articles XVI and XXI, Oct. 25, 1780 Mass. Const., reprinted in *Sources* at 376-77. *Accord,* Secs. VIII and XXXVIII, Nov. 3, 1776 Md. Const., and Arts. XXII and XXX of June 2, 1784 N.H. Const., reprinted in *Sources* at 347 and 350, and at 385, respectively.

[3] *See, e.g.,* Sec. XII of the Aug. 16, 1776 Pa. Const., and Sec. XIV of the July 8, 1777 Vt. Const., reprinted in *Sources* at 330 and 366 respectively.

representatives of the people were protected from laws imposing criminal or other penalties for seditious libel or stirring up sedition. *Sources* at 233-35. At the same time, under the English common law and early state constitutions, the people were protected by the freedom of the **press** from laws designed to **prevent** the publication of seditious **speech**, but not from prosecutions for subsequently engaging in such speech. *Sources, supra,* at 242-44. Later, when the freedom of speech was extended to the people by the First and Fourteenth Amendments of the U.S. Constitution, the people enjoyed the **additional** protection from seditious libel prosecutions.[4] In sum, freedom of the **press** protects the people's right to be free from laws that are designed to **prevent** supposed harm to the government **before** it happens. This is in contrast to the right of freedom of **speech**, which is designed to protect the people from government actions intended to **punish** alleged harm done to the government **after** it occurs. BCRA/FECA was supposedly designed primarily to **prevent** "corruption and the appearance of corruption," not punish corruption after it happens. Therefore, the right of the people that is primarily at stake is the freedom of the press.

B. Defendants Have Ignored Relevant Supreme Court Precedents.

Relying solely upon New York Times v. Sullivan, 376 U.S. 254, 269-271 (1964), and Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 668 (1990), Defendants have contended that the freedoms of speech and the press are the same. But in neither case did the Supreme Court even address whether the freedom of the press offered greater or less

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[4] *See* Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting). Justice Holmes' position was later approved by the Supreme Court in New York Times v. Sullivan, 376 U.S. 254, 276 (1964).

protection than the freedoms of speech or association.[5]

For over 70 years, the Supreme Court has ruled that the freedom of the press is the fountainhead of protections that have proved greater than those found in the freedom of speech or association or equal protection. Yet Defendants are asking this Court to ignore those decisions and the four freedom of press principles set forth therein:

(1) "'The liberty of the press … consists in laying **no previous restraints** upon publications.'" Near v. Minnesota, 283 U.S. 697, 713 (1931) (emphasis added). *See id.*, at 719. *Accord*, New York Times v. United States, 403 U.S. 713, 715-18, 722-24, 726-27, 730-31 (1971). The Supreme Court has recognized that special First Amendment problems are presented, and, consequently, has applied the strictest scrutiny to any such restraint: "a free society **prefers** to **punish** the few who **abuse** rights of speech **after** they break the law than to **throttle** them and all others **beforehand**." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975) (emphasis added).

(2) A city ordinance requiring **a license** from the government to distribute literature of any kind within the city limits was "invalid on its face … [in that] it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." Lovell v. Griffin, 303 U.S. 444, 451 (1938). Just this last term, the Supreme Court struck down a licensing statute without even articulating any applicable "standard of review" because "[i]t is

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[5] The Sullivan passage cited by Defendants contains only a discussion of general standards reflected in the First Amendment, not a review of the discrete "protection[s]" offered by the freedom of the press, as contrasted with the freedom of speech. *See* New York Times v. Sullivan, *supra*, 376 U.S. 269-71. The Austin reference does not even purport to be a discussion of First Amendment standards, much less a review of the distinct protections offered by the press and speech guarantees, but rather addresses solely whether an institutional press exemption comported with equal protection of the laws. Austin, *supra*, 494 U.S. at 667-68.

offensive … to **the very notion of a free society** — that … a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so." Watchtower v. Stratton, 536 U.S. ___, 153 L.Ed.2d 205, 218-219 (2002) (emphasis added).[6]

(3) The freedom of the press is also the source of the distinctive First Amendment doctrine that the government cannot, no matter how strong and compelling its interest, "exercise [] **editorial control** and judgment" over a private publication. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (emphasis added). In Miami Herald, the Supreme Court applied this press principle to a law that required a newspaper to publish a candidate's reply to a newspaper attack. The Supreme Court rejected the State's economic arguments on the sole ground that it interfered with the financial decisions that are integral to the exercise of editorial control and judgment. *Id.,* 418 U.S. at 254-57.

(4) By **exempting the institutional media** (2 U.S.C. Sections 431(9)(B)(i) and 434(f)(3)(B)(i)), however, the federal campaign finance laws collides with another free press principle: no imposition of a discriminatory economic burden. This principle originated to turn back discriminatory taxes levied upon publishers. *See* Grosjean v. American Press Co., 267 U.S. 233, 245-51 (1936). Such a tax, when based upon content, "is entirely incompatible with the First Amendment's guarantee of freedom of the press." Arkansas Writers' Project v. Ragland, 481 U.S. 221, 230 (1987); *cf.* Miami Herald v. Tornillo, *supra,* 418 U.S. at 256.

In their initial brief, the Paul Plaintiffs have shown that FECA/BCRA, and certain BCRA provisions, violate one or more of these four press principles. *See* Paul Pl. Init. Br. at

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[6] *Accord,* IV W. Blackstone's *Commentaries, supra,* at 151 ("The liberty of the press is indeed essential to the nature of a free state….").

8-30. Defendants have made no effort to counter these claims, choosing to deny that such independent press principles exist. Not only have Defendants ignored Supreme Court precedent, but they have "disregard[ed] … the first principle of constitutional interpretation" (Wright v. United States, 302 U.S. 583, 588 (1938)):

> In expounding the Constitution … 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…. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning. [Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840).]

Accord, Williams v. United States, 289 U.S. 553, 572-73 (1933); Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69, 77-78 (1946).

C. Defendants Have Ignored the Applicability of the Freedom of the Press.

In their zeal to avoid addressing the Paul Plaintiffs' freedom of the press claims on the merits, Defendants have suggested that the press principles of no "prior restraints, editorial controls, and discriminatory economic burdens" do not apply to the Paul Plaintiffs because, unlike the institutional press which exists "to 'inform[] and educate[] the public' or to provide a 'forum for discussion and debate,'" the "purpose" of the Paul Plaintiffs' press activities is "to promote their own candidacies and legislative agendas." Def. Opp. Br. at 128, n. 137.[7]

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[7] Insofar as Defendants' suggestion rests upon Austin, *supra,* it gains no support from any opinion in that case. The majority expressly disclaimed that it was resting its opinion on the proposition that the institutional media had any special place in the First Amendment. Austin, *supra,* 494 U.S. at 668. And the two dissenting justices expressly rejected the proposition. *Id.*, 494 U.S. at 691, 712. Nor can Defendants maintain that the institutional media may lay claim to any other First Amendment special privileges because they are the "press." *See, e.g.,* First National Bank of Boston v. Bellotti, 435 U.S. 765, 782 (1978) ("[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten."); *id.,* at 802 (Burger, C.J., concurring) ("[T]he First Amendment does not 'belong' to any definable category of persons or entities. It belongs to all who

Ironically, in making this defense, Defendants have admitted that the media exemption contained in 2 U.S.C. Section 431(9)(B)(i) and 434(f)(3)(B)(i) are based upon content. As such, they are *per se* violations of the freedom of the press. Arkansas Writers, *supra*, 481 U.S. at 230. They are also *per se* violations of the freedom of speech, as stated in Regan v. Time, Inc., 468 U.S. 641 (1984):

> Under the statute, one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted in the other is not.... Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." [*Id.,* 468 U.S. at 648-49.]

Not only does the Defendants' suggestion collide with these *per se* rules of unconstitutionality, but it crashes into a wall of Supreme Court precedent that the media do not have any constitutional privileges under the freedom of the press that are not equally available to all. *See* Lovell v. Griffin, *supra,* 303 U.S. at 452, and cases cited in Paul Pl. Init. Br. at 12.

II. THIS COURT HAS JURISDICTION OVER ALL CLAIMS ASSERTED BY THE PAUL PLAINTIFFS.

Defendants have contended that this Court "should not exercise jurisdiction" over those claims of the Paul Plaintiffs to the extent that they "challenge provisions of FECA not amended by BCRA." Def. Opp. Br. at 128, n. 136. Indeed, according to defendants' reading of BCRA Section 403(a), this Court does not have jurisdiction over any "FECA requirements apart from those occasioned by BCRA." Def. Br. at 190, n. 130. Thus, Defendants have maintained that this Court may not address the Paul Plaintiffs' claims that the FECA contribution limits, and

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exercise its freedoms.").

the directly dependent disclosure and reporting requirements, are unconstitutional, but only the increase in those contribution limits "occasioned by BCRA." Defendants are mistaken.

BCRA Section 403(a) provides that this Court shall hear "any action brought for declaratory or injunctive relief to challenge the constitutionality of any provision of [BCRA] or any amendment made by [BCRA]." In essence, Defendants have read this jurisdictional grant to extend only to the Paul Plaintiffs' claims that challenge the constitutionality of "any provision" or "any amendment" of BCRA. According to Defendants' construction of Section 403(a), "provision" and "amendment" mean exactly the same thing. Such a construction, however, flies 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). "[P]rovision" and "amendment" are separated by the disjunctive "or," indicating that Section 403(a) has extended to this Court jurisdiction over claims based either on a "provision of" BCRA or on an "amendment made by" BCRA. *Cf.* United States v. Generix Drug Corp., 460 U.S. 453, 458-59 (1983). Thus, "provision" and "amendment" cannot be identical terms, lest one or the other be rendered superfluous.

Additionally, Section 403(a) states that jurisdiction lay to challenge "any provision **of** this Act" or "any amendment **made by** this Act." (Emphasis added.) A common sense reading of the two alternative jurisdictional bases would be that the "provision of this Act" basis would extend to any BCRA section that adds something new to the United States Code, whereas the "amendment made by this Act" basis would extend to any preexisting code section as amended by BCRA. Otherwise, the provision basis would swallow up the amendment

basis, rendering the latter superfluous. The Paul Plaintiffs' claims contesting the unconstitutionality of the individual contribution limits under 2 U.S.C. Section 441a, as amended by BCRA, therefore, come within the scope of Section 403(a), because the **contribution limits** provision of the FECA was specifically modified by BCRA Section 307(a).[8]

As for the Paul Plaintiffs' challenges to other contribution limits and the filing/reporting/disclosure requirements of 2 U.S.C. Sections 432 through 434, this Court has ancillary jurisdiction, because the constitutionality of the contribution limits, as amended by BCRA, necessarily impacts on the constitutionality of those sections. This is especially true with respect to the forced disclosure provision because its constitutionality turned significantly upon its being found necessary to enforce the contribution limits. *See* Buckley v. Valeo, 424 U.S. 1, 66-86 (1976). If contribution limits, as amended by BCRA, are unconstitutional as violative of the press freedom, then the constitutionality of the unamended FECA's forced disclosure provision must be reexamined. Thus, this Court has power to decide other claims in the case that, standing alone, would require only a single judge. *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) (remanded for three-judge court determination on all claims, both three-judge claims and related non-three-judge claims, where single judge had disposed of entire case on plaintiffs' non-three-judge claims). There is no requirement that claims within the ancillary jurisdiction of this Court be

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[8] Defendants have taken the further untenable position that, irrespective of BCRA Section 403(a)'s guarantee of judicial review, the contribution limitations of BCRA are neither challengeable by the Adams Plaintiffs for being too high (Def. Br. at 208), nor by the Paul Plaintiffs for being too low (Def. Br. at 190, fn. 130).

heard, but determining such claims in this action would be consistent with longstanding United States Supreme Court decisions. *See, e.g.*, Allee v. Medrano, 416 U.S. 802 (1974); United States v. Georgia Public Service Commission, 371 U.S. 285 (1963). Those cases unequivocally recognize the ancillary jurisdiction of a three-judge district court to adjudicate claims that, by themselves, would not mandate consideration by a three-judge court, but which, when related to and presented with claims requiring adjudication by a three-judge court may, and probably should, be adjudicated in one single action before the three-judge court.

The Paul Plaintiffs' claims are closely interrelated, and they all rest on the same factual and legal foundations. This Court clearly has jurisdiction to determine the constitutionality of all of the statutory provisions challenged by these plaintiffs, and since all of the relevant evidence is before this Court, and a decision on the merits of all of the claims is in the interests of fairness as well as judicial economy, this Court should exercise its jurisdiction.

CONCLUSION

For the reasons stated herein and in previous briefs, the challenged provisions of BCRA/FECA should be viewed as every bit as much a violation of the freedom of the press as the Sedition Act of 1798 was a violation of the freedom of speech, and just as deserving of disapprobation as the Sedition Act, which President Jefferson considered an unconstitutional "'nullity, as absolute and as palpable as if Congress had ordered [the American people] to fall down and worship a golden image.'" New York Times v. Sullivan, *supra*, 367 U.S. at 276.

Respectfully submitted,

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