NO. 02-1674, *et al.*

IN THE SUPREME COURT OF THE UNITED STATES

SENATOR MITCH McCONNELL, *ET AL.*,
APPELLANTS,

v.

FEDERAL ELECTION COMMISSION, *ET AL.*,
APPELLEES.

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

MOTION FOR RECONSIDERATION OF AUGUST 4, 2003 ORDER CONCERNING DIVIDED ARGUMENT

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

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
629 HIGH KNOB ROAD
FRONT ROYAL, VA 22630
(540) 305-0012

ATTORNEYS FOR APPELLANTS
*COUNSEL OF RECORD

August 11, 2003

MOTION FOR RECONSIDERATION OF AUGUST 4, 2003 ORDER CONCERNING DIVIDED ARGUMENT

Congressman Ron Paul and his fellow plaintiffs ("the Paul Plaintiffs") hereby respectfully move this Court to reconsider its August 4, 2003 Order denying the Paul Plaintiffs' motion for divided argument. The Paul Plaintiffs recognize the exceptional nature of their request for reconsideration, but believe strongly that denial of their ability to present oral argument before the Court would create the appearance of the Court's unwillingness to hear a frontal challenge to its own decision in Buckley v. Valeo, 424 U.S. 1 (1976), particularly since the Paul Plaintiffs have presented to the Court the only challenge to Buckley during the generation that has passed since it was decided in 1976, and the Paul Plaintiffs' arguments have been virtually ignored by the appellees in their briefs to this Court.

With the single exception of the brief filed by the Paul Plaintiffs, the briefs of all plaintiffs below, as well as the briefs of the Government and the Intervenor-Defendants filed on August 5, 2003, have assumed the continued legitimacy of the relevant campaign finance regulations sustained in Buckley. All other litigants have proceeded and argued as if the **only issue** in this case is whether the Bipartisan Campaign Reform Act of 2002, 116 Stat. 81 ("BCRA") **extends too far an otherwise constitutional licensing system** governing political speech that influences the outcomes of federal elections. And, for the most part, that is

essentially how the district court considered the case below. But this assumption is false. The Paul Plaintiffs have forthrightly, and explicitly, called for a reexamination of the unstated (and, indeed, unargued) Buckley premise that campaign finance regulation concerns only the First Amendment free speech and association guarantees, not the freedom of the press, which if applied to BCRA, would prove that the issue in this case is whether campaign finance regulation is unconstitutional from its roots up.

The basic strategy of the appellees in their briefs has been to ignore cavalierly the challenge of the Paul Plaintiffs. Although this can be dismissed as a high-risk litigation strategy, the Paul Plaintiffs cannot be denied oral argument without doing organic harm to the public's perception of the High Court.

The Paul Plaintiffs deny the constitutional legitimacy of the premise that an existing Congress and President have the power to enact laws designed to limit participation in campaigns for election to federal office for the purpose of "protect[ing] democracy," as the Intervenor-Defendants have claimed in their brief. (*See* Brief for Intervenor-Defendants, at 1.) All of the plaintiff groups, other than the Paul Plaintiffs, have accepted this constitutional premise, bypassing first principles to focus on whether the facts and circumstances contained in the "elephantine" record below justify an abridgment of an otherwise unfettered right of American citizens to criticize their elected officials and the

way that the governmental system currently is operating. According to the freedom of the press guarantee, however, Congress may make no law the purpose of which is to "restore ... public confidence ... [and] faith" in the six intervening members of Congress as part of the current government system. *See* Brief for Intervenor-Defendants, at 2. To the contrary, as the noted scholar St. George Tucker observed, the First Amendment, taken as a whole, was designed to dispossess Congress from any, and all, jurisdiction over the freedom to communicate one's opinion about politics (and religion), even if the purpose of the exercise of power was to protect the state (or church) from falling into disrepute with the people. S.G. Tucker, "Of the Right of Conscience; and of the Freedom of Speech and of the Press," reprinted in S.G. Tucker, *View of the Constitution of the United States with Selected Writings* 371-94 (Liberty Fund, Indianapolis: 1999).

To be sure, the Intervening Defendants' claim that Congress has the power to limit First Amendment freedoms to restore public confidence in the existing system of government finds support in Buckley v. Valeo. *See id.*, 424 U.S. at 27. But, on this crucial point, Buckley rested upon a statement made in a case involving the constitutionality of limits on the speech and association rights of **federal employees**, limits that the Court itself cautioned could not be imposed upon "the speech of the citizenry in general." *See* United States Civil Service Commission v. National Association of

Letter Carriers, 413 U.S. 548, 564-65 (1973). By relying upon this "Hatch Act" case, this Court's decision in Buckley has unleashed a set of rules governing the political activities of American citizens, turning them into agents and servants of the government, in direct contradiction of the founding principle that the government is the agent and servant of the people, the latter of whom have an "**absolute** freedom of inquiry [which if it] be in any manner abridged, or impaired by those who administer government [will] instantly change [our] union of representative democracies, in which the people are sovereign, [into] a consolidated oligarchy, aristocracy or monarchy." S.G. Tucker, "Of the Right of Conscience," *supra*, at 381 (emphasis added).

Only the Paul Plaintiffs are calling upon this Court to assess the constitutionality of BCRA by examining whether it is consistent with the founding principle of the sovereignty of the people over their government. All of the other parties are content to make the touchstone of this case not the original, textual meaning of the First Amendment freedom of the press, but this Court's 1976 Buckley opinion, and its unsupported (and unsupportable) extension of the "Hatch Act" to the American people.

In light of the fact that three justices sitting on this Court have called for Buckley to be overruled (*see* FEC v. Colorado Republican Federal Campaign Committee, 533 U.S. 431, 488 (2001) (Thomas, J., dissenting), and that this Court previously declined

to do so on the ground that no litigant has urged it to reexamine Buckley (*see* Nixon v. Shrink Missouri Government PAC, 328 U.S. 377, 397 (2000)), there appears to be every good reason to include in the oral argument of this case the only parties who have asked for such a reexamination. Until now, Buckley has remained unchallenged solely because no party has chosen to do so. That is no longer the case. Unless the Paul Plaintiffs are permitted to participate in oral argument, the question of the continued vitality of Buckley simply will **not** receive the attention that it deserves. In addition to considerations of justice, that lack of attention will create the impression that this Court is unwilling to hear a frontal challenge to its prior decision in Buckley.

Our constitutional republic is preserved not by restrictions, of the type contained in BCRA, on the ability of citizens to publish criticisms of government officials, even if that criticism creates the appearance in the electorate that those elected officials are corrupt. Rather, the republic is held together by common beliefs about the rule of law, and the basic integrity of government officials to listen to the views of the people, including the willingness of the judiciary to give fair hearing to those who challenge its prior decisions. Accordingly, the Paul Plaintiffs respectfully request that the Court reconsider its denial of the Paul Plaintiffs' motion for divided argument and grant the Paul Plaintiffs 20 minutes to present oral argument.

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

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 E. Valley Parkway
Escondido, CA 92027
(760) 741-8086

PERRY B. THOMPSON
629 High Knob Road
Front Royal, VA 22630
(540) 305-0012

Attorneys for Appellants
**Counsel of Record*
August 11, 2003