

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**OPPOSITION 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

Defendants, including the Intervening Defendants, have grounded their defenses to this action on certain “founding principles” upon which they claim the Bipartisan Campaign Reform Act of 2002 (“BCRA”) rests. *See* Def. Br. at 1-57 and I-1-5. Such so-called “founding principles” may have superficial appeal, but they are deeply flawed, antithetical to the constitutional guarantee of the freedom of the press, and consequently, insufficient to defeat the Paul Plaintiffs’ free press claims, as shown in Sections I and II, *infra*. Defendants believe that the “corruption and appearance of corruption” rationale justifies whatever limitations on First Amendment rights Congress decides to impose. *See, e.g.*, Def. Br. at 66-86, I-15-40. This is rebutted in Section III, *infra*. Congress’ impermissible purpose of restoring public confidence in Congress by restricting liberty is treated in Section IV.

I. DEFENDANTS’ “DEMOCRATIC IDEAL” OF CAMPAIGN FINANCE REFORM CONFLICTS WITH, AND MUST YIELD TO, THE PAUL PLAINTIFFS’ FREE PRESS CLAIMS AGAINST BCRA TITLE I.

At the heart of Defendants’ case, claiming that the challenged BCRA provisions and the campaign finance system that it amends are constitutional, is the assertion that “the inducements of money” must be eliminated from the shaping of public policy so that the true “national interest” may be served. Def. Br. at 1. Indeed, this so-called “democratic ideal” (*id.*) motivates a number of Defendants’ expert witnesses, such as Derek Bok, who deplors the current state of American public policy, which he says is “plagued by inconsistencies, special exceptions, imprecise rules, and arbitrary gaps” and by a “regulatory system [that] is unusually contentious, expensive, time-consuming and often less effective than efforts to deal with similar problems in other countries.” Bok Exp. Rep. at 2.

Such a state of affairs is due, Defendants contend, to the “‘distorting effects of immense

aggregations of wealth’” (Def. Br. at 6), so that public policy is shaped not by “the power of true political association,” but by “the commercial marketplace.” Def. Br. at 9, 11-12.

Accordingly, Defendants have asserted that BCRA and the campaign finance system that it amends are designed to return America to its “founding principles.” Def. Br. at 1. In actuality, BCRA rests upon a distortion of those principles.

Defendants’ utopian view of economic equality in political campaigns reflects the same yearning for the pure equality of a town meeting form of government that was rejected by America’s founders in favor of the checks and balances inherent in an elected representative system. As James Madison wrote in *Federalist No. 10*, Defendants’ vision of pure political equality is totally unrealistic:

Theoretic politicians, who have patronized this species of [pure democratic] government, have erroneously supposed, that, by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions. [J. Madison, *Federalist No. 10* at 46 in *The Federalist* (G. Carey and J. McClellan eds. Liberty Fund, Indianapolis: 2001).]

Rather, it is in the very nature of man, Madison argued, that there have been, and will continue to be, “various and unequal distributions of property,” and consequently, politics will always entail conflict among different economic “factions”:

Those who are creditors, and those who are debtors.... A landed interest, a manufacturing interest, a mercantile interest, a monied interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. [*Id.* at 44.]

In recognition that not all property interests were then or would ever be alike, Madison and his founding colleagues addressed the problem of special interest money by constituting a Congress composed of a sufficient number of elected representatives of “a greater variety of

parties and interests [so that] it [is] less probable that a majority of the whole will have common motive to invade the rights of other citizens.” *Id.* at 48. Thus, through the checks and balances of competing economic interests, America’s founders designed the American system of representative government, because any attempt to exclude or reduce the influence of economic interests in the political marketplace would be hopelessly “impracticable.” *Id.* at 43.

Rejecting the founders’ view of the inherent self-serving nature of man in favor of what is akin to the Marxist notion of economic determinism,¹ Defendants have claimed that BCRA Title I’s bans on “soft money” are justified as an effort to remove the “causes of faction” by reducing, if not wholly eliminating, the “inducements of money” from politics. *See* Def. Br. at 1-5. Such efforts will surely fail. For example, even before BCRA became effective, the national Democratic and Republican parties had created “new entities” to receive the very “soft money” that BCRA Title I has prohibited. *See* Sen. John McCain Press Release, “McCain Declares Reform Crusade Continues” at 3-4. (Nov. 14, 2002) (“McCain Crusade”), <http://mccain.senate.gov/cfrnpcsph.htm>. Thus, just eight days after BCRA became law, Senator John McCain, one of its two principal sponsors in the Senate, called for yet more “reform,” to create a federal election campaign system not “tainted by the influence of huge big-dollar contributions from the special interests on the right and left.” *Id.* at 1.

Significantly, Senator McCain has expressed no concern about the “big-dollar contributions” from the “political center,” presumably because he perceives the political center to be where both he and a majority of the American people stand politically. Nor has he

¹ *See* David Noebel, Understanding the Times, pp. 747-750 (Summit Press, 1991).

expressed any worry about the big dollar investments of the institutional media that share his views on campaign finance despite their size, their enormous influence, their corporate natures, and their bias. To the contrary, he has complimented both, and especially “the journalists who have persevered in pulling back the curtain to reveal the truth behind our current campaign finance system.” *Id.* at 2-3.² Defendants’ Brief exhibits the same type of selectivity.

Compare Def. Br. at 134-48 *with* Def. Br. at 167-68.

James Madison gave a warning that applies to BCRA’s attempt to center and homogenize the political marketplace. He explained that even a “majority” can become a “faction,” and, when it does, it justifies its actions in the name of the democratic ideal, and then the majority is “enable[d] to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.” *Federalist No. 10, supra*, at 43, 45. In support of BCRA Title I, the Defendants point to opinion polls that, they claim, evidence overwhelming support for their efforts to limit the perceived political power of certain economic special interests. Def. Br. at I-4. In the 1970’s, there also appeared to be popular support to curb the power of the institutional media because of their concentrated economic power. *See* Miami Herald

² In contrast to the unlicensed freedom that journalists have under the Federal Election Campaign Act of 1971, as amended (“FECA”) “media exemption,” expanded by BCRA, Title I clamps down on: (1) federal candidates and officeholders, such as Congressman Ron Paul (who does not enjoy the support of the institutional press (Paul Pl. Init. Br. at 28)), by restricting his relationship with organizations, such as Plaintiffs Gun Owners of America, Inc. (“GOA”), Citizens United (“CU”), and RealCampaignReform.org (“RCR”) (which are not part of America’s political center (Paul Pl. Init. Br. at 1-2)); (2) national, state and local political parties, their candidates and officeholders by exercising significantly greater editorial control over “federal election activities,” thereby adversely impacting Plaintiffs Paul, Cloud, and Howell; and (3) candidates for federal and state office by depriving them of the editorial freedom of a collaborative campaign of a party’s candidates for state and federal office, which especially impacts adversely Plaintiffs Cloud and Howell and the Libertarian Party, with which they are affiliated. *See* Paul Pl. Init. Br. at 8-21.

Publishing Co. v. Tornillo, 418 U.S. 241, 247-54 (1974). But the Supreme Court determined that such popular support was an improper justification for any legislative imposition of editorial control over such media, because such an imposition limited the right of the newspaper to allocate its economic resources in the way that it saw fit, as guaranteed by the freedom of the press. *Id.*, 418 U.S. at 254-58. That same freedom belongs equally to the Paul Plaintiffs (*see* Paul Pl. Init. Br. at 8-12, 16-18).

II. BCRA’S TITLE II EFFORT TO EXTEND GOVERNMENT CONTROL OVER THE POLITICAL MARKETPLACE VIOLATES THE PAUL PLAINTIFFS’ FREE PRESS RIGHTS.

Defendants claim that BCRA Title II’s regulation of “electioneering communications” is necessary in order to “protect the integrity of the marketplace of political ideas” and to prevent certain entities from taking “unfair advantage in the political marketplace.” Def. Br. at 133-34. They also have claimed that First Amendment values are furthered by BCRA Title II’s forced disclosure of the identities of contributors to certain electioneering communications. Def. Br. at I-114.³ Both positions invent a policy for the First Amendment at odds with its text and purpose and are directly antithetical to the press interests asserted by the Paul Plaintiffs.

In 1973, Justice Potter Stewart issued a stern warning against the very kinds of rhetorical legerdemain advanced by the Defendants in this case:

The First Amendment prohibits the Government from imposing controls upon the press.... Yet here [it is contended] the First amendment *requires* the

³ Describing BCRA as “just a first step,” Senator McCain has promised to “re-introduce” legislation “that would require radio and television broadcasters to provide candidate-centered programs before elections, provide vouchers for free political advertising for political candidates, and ensure that air time is available to candidates at reasonable rates, ... [and thereby] increase[] the flow of political information through broadcast media.” McCain Crusade, *supra*, at 4.

Government to impose controls upon [the press] — in order to preserve First Amendment “values....” This is a step along a path that could eventually lead to the proposition that private *newspapers* “are” Government. Freedom of the press would then be gone. In its place we would have such government controls upon the press as a majority of this Court at any particular moment might consider First Amendment “values” to require. It is a frightening specter. [*CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 133 (1973) (Stewart, J., concurring) (emphasis original).]

Noting that there is “never a paucity of arguments in favor of limiting the freedom of the press,” but that there is great danger “when we lose sight of the First Amendment itself and march forth in blind pursuit of its ‘values’” (*id.*, 412 U.S. at 144-45), Justice Stewart called for a return to the nation’s founding principles:

Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that ‘fairness’ was far too fragile to be left for a Government bureaucracy to accomplish.... If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be made for freedom. [*Id.*, 412 U.S. at 145-46.]

Justice Stewart, of course, was entirely correct. In *Federalist No. 10*, James Madison, responding to the claim “that measures are too often decided, not according to the rules of justice..., but by the superior force of an interested and overbearing” faction, acknowledged that one means by which such an overbearing faction could be removed is “by destroying the liberty” that gave rise to the faction. Madison concluded, however, that the proposed remedy “was worse than the disease”:

Liberty is to faction, what air is to fire, an aliment, without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency. [*Federalist No. 10, supra*, at 43.]

At the heart of the First Amendment freedom of the press is the absolute sovereignty of

the people. As James Madison put it, the “security of the freedom of the press requires that it should be exempt, not only from previous restraint of the executive ... but from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws.” J. Madison, “Report on the Virginia Resolutions,” reprinted in *Sources of Our Liberties* 426 (R. Perry, ed., NYU Press: 1972).

Defendants’ view of sovereignty is just the opposite. They would elevate Congress over the people, claiming that “Members of Congress are uniquely qualified based on personal experience to determine the need for and proper scope of additional regulations” in the federal campaign finance system. Def. Br. at 11. Indeed, Defendants have argued in favor of increased Federal Election Commission (“FEC”) editorial control over Plaintiffs GOA’s, CU’s, and RCR’s communications⁴ “when broadcast in close proximity to federal elections” on the grounds that this Court should “defer” to the judgment of Congress (Def. Br. at 163-64). Just the opposite should be the case, for reasons demonstrated in the unrebutted expert report of Dr. James C. Miller III:

[I]n political markets, incumbents have the means as well as the incentive to limit competition. *They make the laws*. They not only have a legal forum in which to discuss ways of limiting competition, their actions to carry out policies to limit competition do not create for them legal liability of any sort. Although usually debated in high-sounding, public-interest rhetoric, these laws ... are understood to have great impact in limiting the ability of challengers to mount serious campaigns. [Miller Exp. Rep. at 14 (emphasis original).]

With the enactment of BCRA’s Title II restrictions on the use of broadcast facilities to

⁴ See Paul Pl. Init. Br. at 13-18, 21-22 and references to Pratt, Bossie, and Babka Declarations therein.

run “issue ads” during the crucial days at the end of a primary or general election campaign, Members of Congress have taken their incumbent protection goal a step higher, guarding against organizations that broadcast communications to the public opposing candidate positions on key issues.⁵ BCRA’s limitations on electioneering communications appear to be based on some proponents’ distaste for the “negative” tone of certain independent advertisements.⁶ *See, e.g., McCain Crusade, supra*, at 3; Statement of Rep. Blumenauer, 148 Cong. Rec. H 353 (daily ed. Feb. 13, 2002) (“The extreme, hard-edged and too-often hidden opponents of the public interest which are financed by soft money and anonymous contributions create a situation where the sheer volume of expenditure drowns out rational discourse.”). Other proponents supported the regulation of so-called “sham issue” ads because they are the product of “[i]ndependent campaigns conducted by groups that are accountable to no one [and that] threaten to drown out any attempt by candidates or the parties to communicate with voters.” Statement of Sen. Feinstein, 148 Cong. Rec. S 2154 (daily ed. Mar. 20, 2002).

⁵ The ban on electioneering communications also has the peculiar effect of rendering nonprofit issue organizations unable to defend themselves when the nonprofit is attacked during the course of campaigns. Such a scenario may occur with respect to a nonprofit’s newsletter issue containing various candidates’ scorecard, based on questionnaires and/or how Representatives and Senators have voted on various issues. If a federal candidate disavows the information, such as by accusing the nonprofit of false and inaccurate ratings, BCRA Title II ties the hands of the nonprofit so that it is unable to respond in what is usually the best way available — through broadcast media. Clearly, BCRA Title II works contrary to the public interest. *See generally* Pratt Decl. ¶¶ 3-6.

⁶ Incumbent legislators may say they are offended by the tone of certain electioneering communications aired by nonprofits, but they could never argue that the founders would be shocked by current electioneering. If anything, today’s civility might surprise them. For example, in the 1800 presidential campaign, “Yale president Timothy Dwight thought that Jeffersonians were ‘blockheads and knaves’ intent on severing ‘the ties of marriage with all its felicities.’ Jeffersonians countered with a question aimed at Alexander Hamilton, who had lost his chance for the presidency when caught in adultery but was still politically active: ‘What shall we say of a faction that has at its head a confessed and professed adulterer?’” Marvin Olasky, “Placating the Religious Right (1796-1800),” *World Magazine*, July 29, 2000.

The Supreme Court, however, has specifically recognized the impropriety of government efforts to insulate the Democrats and Republicans from competing ideas:

There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.” [Williams v. Rhodes, 393 U.S. 23, 32 (1968).]

See also Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

As revealed by the use of the first word in BCRA, congressional proponents urged “bipartisan” (as opposed to nonpartisan, or multipartisan, or even American) campaign finance reform to advance the interests of the two major parties. “[BCRA] is not just good for the political parties, for Democrats and Republicans, it is good for our country.” Statement of Rep. John Lewis, 148 Cong. Rec. H 342 (daily ed. Feb. 13, 2002). *See also* Statement of Sen. Paul Wellstone, 148 Cong. Rec. S 2097-98 (daily ed. Mar. 20, 2002). And further:

This legislation is not about candidates.... What it does is affect political parties. If you believe as I do that political parties have been a very, very important part of the American political system, have, in fact, strengthened American democracy, a two party system in my judgement is something that has stabilized American democracy and keeps us much different from other countries.... Political parties tend to center the American political debate, which I think is a good thing. [Statement of Rep. Tom Davis 148 Cong. Rec. H 343-344 (daily ed. Feb. 13, 2002).]

Accord, Brock Decl. at 9. Evidence of a legislative motive to help the two major parties makes BCRA inherently suspect:

[B]ecause the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendments rights of those groups will be ignored in legislative decision making may warrant **more careful judicial scrutiny**. [Anderson v. Celebrezze, 460 U.S. 780, 793 (1983) (emphasis added).]

Defendants’ claims clearly fly directly into the face of the freedom of the press, which

expressly denies to Congress any power over the people. As Chief Justice Warren Burger stated in his concurring and dissenting opinion in Buckley v. Valeo, 424 U.S. 1, 242 (1976), “[l]imiting contributions, as a practical matter, will limit expenditures and will put an effective ceiling on the amount of political activity and debate that the Government will permit to take place.” Echoing the position of the founders, Chief Justice Burger concluded:

Congress can no more ration political expression than it can ration religious expression; and limits on political or religious contributions and expenditures effectively curb expression in both areas. There are many prices we pay for the freedoms secured by the First Amendment; the risk of undue influence is one of them, confirming what we have long known: Freedom is hazardous, but some restraints are worse. [Buckley v. Valeo, *supra*, 424 U.S. at 256-57.]

In requiring financial disclosure and reports concerning electioneering communications, Congress has also repudiated another of America’s founding principles of freedom of the press, namely, that of anonymity. *See* Paul Pl. Init. Br. at 23-24. As Justice Thomas has pointed out: “Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the ‘freedom of the press.’” McIntyre v. Ohio Elections Commission, 514 U.S. 334, 361 (1995) (Thomas, J., concurring). Once again, the Defendants have rejected a core press freedom on the grounds that forced disclosure furthers other more important values, such as an informed electorate, exposure of corruption and enforcement of contribution limits. Def. Br. at 173-74.⁷ But, as Justice William O. Douglas has reminded us, the First Amendment “philosophy” of Madison and

⁷ Although Defendants rely upon Buckley v. Valeo, 424 U.S. 1, 66-68 (1976), as having affirmed the legitimacy of these three goals, it must be remembered that, even in Buckley, the Supreme Court explicitly rejected as out of tune with the First Amendment two proffered rationales for campaign finance reform: equalization of the ability of citizens to effect the outcome of elections and controlling the costs of campaigns. *Id.*, 424 U.S. at 48-49, 57.

Jefferson counseled against “government intrusion ... not only on the spectre of a lawless government but of government under the control of a faction that desired to foist its views of the common good on the people.” CBS v. Democratic Nat’l Comm., *supra*, 412 U.S. at 148. And for good reason. Congress has been known to enshroud its real purpose — and thus to camouflage its own self-interest — by devices such as the use of impressive rhetoric. *See Miller Exp. Rep.* at 14. As Chief Justice Burger observed in Buckley v. Valeo, *supra*, such forced disclosure provisions, touted by Defendants as designed to serve the public, actually have been used to help keep incumbents in power:

[P]otential contributors may well decline to take the obvious risks entailed in making a reportable contribution to the opponent of a well-entrenched incumbent. This fact did not go unnoticed by the Congress: “The disclosure provisions **really** have in fact made it difficult for challengers to challenge incumbents.” 120 *Cong. Rec.* 34392 (1974) (remarks of Sen. Long) [*Id.*, 424 U.S. at 237 (emphasis added).]

Clearly, Title II of BCRA, by its ban on electioneering communications and its forced disclosure provisions, deprive the Paul Plaintiffs of their First Amendment free press rights, and the Defendants cannot salvage the law with arguments that the public interest is served by discriminatorily silencing the non-institutional media. *See Paul Pl. Init. Br.* at 21-24.

III. PREVENTION OF CORRUPTION AND THE APPEARANCE OF CORRUPTION JUSTIFY NEITHER THE CHALLENGED BCRA TITLE I AND TITLE II PROVISIONS NOR THE UNCONSTITUTIONAL EXPENDITURE AND CONTRIBUTION LIMITS OF BCRA TITLE III.

Throughout their briefs, Defendants have repeatedly stated that the overall purpose of BCRA and the campaign finance system that it amends is to prevent “corruption and the appearance of corruption.” At no point, however, have Defendants provided this Court with a precise definition of “corruption”; rather, they have assumed that the meaning of the word is

self-evident. *See, e.g.*, Def. Br. at 71-84 and I-14-19.

Defendants have apparently assumed that there is no need to settle on a definition of “corruption,” although anti-corruption rhetoric permeates much of their case. *See, e.g.*, Def. Br. at 66-86 (Title I), 142-48 (Title II). As Justice Thomas pointed out in his dissenting opinion in Nixon v. Shrink Missouri Gov’t. PAC, 528 U.S. 377, 424 (2000) (“Shrink PAC”), defining “corruption” is the key issue in determining the constitutionality of campaign finance reform legislation. To be sure, Justice Thomas’s view was not shared by the majority in Shrink PAC, but that is because the majority read Buckley v. Valeo, 424 U.S. 1 (1976), to have adopted a more amorphous definition of “corruption,” noting specifically that no party in Shrink PAC had “challenged the legitimacy of the ... objectives” of campaign reform as articulated in Buckley, nor called “for any reconsideration of Buckley.” Shrink PAC, *supra*, 528 U.S. at 390. Such is not the case with respect to the Paul Plaintiffs.

The Paul Plaintiffs have argued that Buckley does not even govern their freedom of press claims, such claims having not been addressed in Buckley or in any of its progeny. Paul Pl. Init. Br. at 9, fn. 3. And there are other reasons to decline to apply automatically the loose use of “corruption” in Buckley: (1) Buckley was decided on a record in which the parties and *amici* did **not** contest the legitimacy of Congress’ purpose in FECA to achieve “the prevention of corruption and the appearance of corruption,” but disputed only whether such a purpose was sufficiently weighty to justify various features of the new law (Buckley v. Valeo, *supra* 424 U.S. at 24-29); (2) Buckley was decided solely upon a congressional record of the prospective impact of FECA (*id.*, 424 U.S. at 21-22, 28-37), not on the basis of its actual operation, which is now revealed (*see* Paul Pl. Init. Br. at 28-30); and (3) the Supreme Court now has given

notice that it will subject to “strict scrutiny” the claimed purpose of a law that directly infringes upon “a category of speech that is ‘at the core of our First Amendment freedoms’ — speech about the qualifications of candidates for public office.” Republican Party of Minn. v. White, 536 U.S. ___, 153 L.Ed.2d 694, 704 (2002).

In the Minnesota case, the State attempted to justify a rule limiting campaigns for judicial office as necessary to “preserv[e] the impartiality ... and ... appearance of impartiality of the state judiciary.” The High Court rejected the State’s position, (1) noting that the State was “rather vague ... about what they mean by ‘impartiality,’” (2) pointing out that, “although the term is used throughout ... the briefs, ... none of the[] sources [cited] bother[] to define it,” and (3) concluding that “[c]larity on this point is essential....” *Id.*, 536 U.S. ___, 153 L.Ed.2d at 704-05. Like the Minnesota statute, BCRA contains no explicit congressional findings that any of its diverse provisions are designed to prevent corruption or the appearance of corruption. Yet, its sponsors and supporters have maintained that BCRA’s provisions are justified by a compelling governmental interest to “prevent corruption and the appearance thereof.” *See, e.g.*, Statement of Rep. Shays, 148 Cong. Rec. H 353 (daily ed. Feb. 13, 2002); Shays Decl. at 2; Statement of Sen. Feingold, 148 Cong. Rec. S 2104 (daily ed. Mar. 20, 2002); McCain Decl. at 4.

Because neither BCRA nor the campaign finance system that it amends contains any statutory definition, or any findings, of corruption or the appearance of corruption, corruption should be given its ordinary meaning in the political context. *See, e.g.*, Republican Party of Minn. v. White, *supra*, 536 U.S. at ___, 153 L.Ed. 2d at 705. In its political sense, “corruption” means the “inducement (of a political official) by means of improper

considerations (as bribery) to commit a violation of duty.”⁸

The Paul Plaintiffs have challenged the constitutionality of two sections of BCRA Title III. Their first challenge is directed at Section 301 of BCRA Title III, which divides all campaign expenditures in two types: permitted uses and prohibited ones. Prohibited expenditures are those described as for “personal use.” This section authorizes the FEC to exercise editorial supervision over every candidate who runs for federal office, determining whether or not an expenditure “is authorized in connection with the campaign for Federal office of the candidate.” Paul Pl. Init. Br. at 25. In the exercise of this discretion, the FEC is not required to ascertain whether or not a candidate was “induced” to make an unauthorized expenditure by an improper consideration. Such a decision does not require a finding of corruption in the political sense; nor does it remotely relate to the prevent of the appearance of corruption in the political sense, there being no requirement to link an unauthorized expenditure to any external inducement of improper consideration. The same observation applies even if the FEC determination that an expenditure is unauthorized is based upon a finding that a particular expenditure falls into a category of “personal use” as defined in Section 301(b). Again, there is no requirement that the FEC find that an external party acted in such a way as to induce a candidate to convert campaign funds to personal use, rather than to apply them to a *bona fide* campaign expenditure.

It is clear, therefore, that Section 301 is only tailored, if at all, to prevent corruption

⁸ Webster’s Third International Dictionary 512 (3d ed. 1964). *See also* Nixon v. Shrink Missouri Gov’t. PAC, *supra*, 528 U.S. at 422 (Thomas, J., dissenting) (“[C]orruption ... mean[s] ‘perversion or destruction of integrity in the discharge of public duties by bribery or favor.’”).

not in the political sense, but in a more general sense, namely, “impairment of integrity, virtue or moral principle.”⁹ Webster’s Third International Dictionary, *supra*, at 512. In like fashion, it appears that BCRA/FECA’s contribution cap cannot be tailored to combat corruption in the political sense. BCRA’s \$2,000 per-election contribution cap on individual contributions to candidates, for example, is one that is “crudely tailored ... prohibiting all donors who wish to contribute in excess of the cap from doing so and restricting donations without regard to whether the donors pose any real corruption risk.” Shrink PAC, *supra*, 528 U.S. at 428 (Thomas, J., dissenting). Rather, individual and political action committee contribution caps appear to be set at some arbitrary **moral** ceiling, designed to implement BCRA’s vision of economic equality in the political marketplace. Even Buckley has condemned any effort by government to “restrict the speech of some elements of our society in order to enhance the relative voice of others [as] ... wholly foreign to the First Amendment.” Buckley v. Valeo, *supra*, 424 at 48-49. And such a goal is specifically forbidden by the freedom of the press. Miami Herald Publishing Co. v. Tornillo, *supra*. For the same reason that the corruption rationale fails to justify limitation on the Title III press activities of the Paul Plaintiffs, it likewise fails with respect to Titles I and II.

IV. BCRA AND THE CAMPAIGN FINANCE SYSTEM THAT IT AMENDS REST UPON A CONSTITUTIONALLY ILLEGITIMATE PURPOSE.

Defendants have contended that, from the Tillman Act of 1907 to BCRA of 2002, the overarching purpose of campaign finance legislation has been to restore the American people’s

⁹ See Shrink PAC, *supra*, 528 U.S. at 423 (Thomas, J., dissenting) (Corruption means “[t]he perversion of anything from an original state of purity.”).

confidence in the government (*see, e.g.*, Def. Br. at 13, 16, 82), and that the campaign finance laws are justified because they were passed to combat campaign finance practices that pose a serious threat to the nation's system of government by undermining the public's lack of confidence in Congress. Def. Br. at I-17. In short, Defendants claim that Congress may enact legislation designed to restore public confidence in Congress, and in the political parties with which they are affiliated, by imposing limits on the rights of the people to enter into the free marketplace of ideas related to campaigns for election to federal office.

Defendants never address why the American people should have confidence in Congressmen who misuse their position. Defendants have admitted that “powerful federal officeholders,” including Members of Congress, have become virtual “shake down” artists, pressuring “senior executives of large corporations” to give, or else “they will lose access to federal officials and may face adverse legislative consequences.” Def. Br. at 84-86. Yet Defendants support Congress' effort to be well thought of. Defendants' view that Congress has become a kind of political mafia engaged in a protectionist racket has been reinforced by the *amicus curiae* brief filed by the Council of Economic Development (“CED”), a self-identified “nonprofit, nonpartisan and nonpolitical research and policy organization of approximately 250 business leaders and educators”:

Corporate executives increasingly have felt coerced into giving ever-escalating soft money contributions with ever increasing frequency by subtle threats of retribution.... A well publicized article quotes a lobbyist for a Fortune 500 company as saying that the reason his company contributed soft money was “[b]asically **protection**.... If you decline to give, you're taking a risk of legislative retribution.... Companies are scared that on some critical issue, they'll get hosed.” [CED Brief at 7-8 (emphasis added).]

While the CED members apparently think that BCRA will finally remove the

congressional leeches from their backs, the problem of “soft money” is not going away. On November 2, 2002, the *New York Times* reported that “[a]ccording to party officials and fundraisers, both national political parties have set up state organizations and other groups that will continue to collect and spend the large unlimited campaign checks after they are barred to the national political parties by the McCain-Feingold campaign finance law on Nov. 6.” Van Natta and Oppel, “Parties Create Ways to Avoid Soft Money Ban,” <http://www.nytimes.com/2002/11/02/politics/campaigns/02MONE.html>. If this view is correct, incumbent legislators do not deserve to have the public’s confidence in them “restored.”

Even if BCRA and the campaign finance system that it amends are permissibly designed to restore public confidence, it is certainly not the least intrusive method of achieving that objective. For example, Congress could police itself through the development and enforcement of House and Senate ethics rules, or assist in the prosecution of Members of Congress who are morally corrupt, or use their influence to reform corrupt party practices. As Congressman Paul explained to his colleagues during the BCRA debates, “[T]he freedoms of the American people should not be restricted because some politicians cannot control themselves.” Statement of Rep. Ron Paul, 148 Cong. Rec. H 350 (daily ed. Feb. 13, 2002).

It appears, however, that the BCRA Congress would rather blame others, or the “system,” rather than police themselves. For example, the Ethics Committee of the Senate that voted for BCRA chose merely to “censure” Senator Robert Torricelli, even though there was reportedly overwhelming evidence that Torricelli had solicited gifts from a businessman in exchange for Torricelli’s intervention, “creat[ing] at least the appearance of impropriety.” U.S. Senate Select Committee on Ethics, Letter of Admonition (July 30, 2002),

<http://ethics.senate.gov/download/pdf/ethics/torricelli.pdf>. Senator Torricelli may not have been alone when he diverted attention from his own behavior by becoming a vocal proponent of BCRA:

Mr. President, it would appear that after more than a decade of discussions about campaign finance reform, the House of Representatives and the Senate may be nearer an accord on a historic change of how Federal elections are conducted in the United States. It is none too soon. Confidence in our political process has been undermined, the integrity of Congress itself has been questioned, and the system is badly in need of repair. [Statement of Sen. Torricelli, 148 Cong. Rec. S 479 (Feb. 7, 2002).]

The Senate's treatment of Senator Torricelli, and Senator Torricelli's actions supporting BCRA, give rise to the inference that the **real** objective of BCRA is not preventing corruption or the appearance of corruption, but rather making Congress **appear** to fight corruption, and using that rationale as cover for restricting the liberty of individuals to challenge their power. Indeed, once the claim of corruption and appearance of corruption is stripped away, BCRA and the campaign finance system that it amends are an exercise of legislative sleight of hand, designed to make the American people think better of the current government so that incumbent legislators may keep their jobs, and the two major political parties may remain in power.

As the Supreme Court stated in New York Times v. Sullivan, 376 U.S. 254, 269 (1964), however, government officials may not use the law to protect the government's reputation: "Injury to official reputation affords no ... warrant for repressing speech that would otherwise be free...." *Id.*, 376 U.S. at 272. Quoting from James Madison's "Report on the Virginia Resolutions" protesting the Sedition Act of 1798, and from earlier remarks on the floor of the House of Representatives, the Court endorsed Madison's view that any law

designed to protect the government's reputation turned the freedom of the press upside down:

Madison prepared the Report in support of the protest. His premise was that the Constitution created a form of government under which "The people, not the government, possess the absolute sovereignty...." Earlier, in a debate in the House ... Madison had said: "If we advert to the nature of Republican government, we shall find that the censorial power is in the people over the Government, not in the Government over the people." [*Id.*, at 274-75.]

One hundred years after Madison spoke these words, the great constitutional scholar, Thomas Cooley, recalled the days when the incumbent Federalist Party, fearful of its reputation, attempted to suppress free discussion in an effort to preserve its place in the country, only to reap "the very state of things it sought to repress — the final overthrow and destruction of the party" itself. Cooley, *A Treatise on Constitutional Limitations* 529 (5th ed., Boston: Little, Brown 1883). From this experience, Cooley concluded:

When it is among the fundamental principles of the government that the people frame their own constitution, and that in doing so they reserve to themselves the power to amend it from time to time ... it is difficult to conceive of any sound principle on which prosecutions for libels on the system of government can be based, except when they are made in furtherance of conspiracy with the evident intent and purpose to excite rebellion and civil war. [*Id.*]

Short of enacting a law prohibiting a conspiracy to overthrow the existing government by force or violence, Cooley warned against any law designed to govern "discussion of public measures ... circumscribed by the judgment of others upon their temperance or fairness":

They [the people] must be left at liberty to speak with the freedom which the magnitude of the supposed wrongs appears in their minds to demand; and if they exceed all the proper bounds of moderation, the consolation must be, that the evil likely to spring from the violent discussion will probably be less, and its correction by public sentiment more speedy, than if the terrors of the law were brought to bear to prevent the discussion. [*Id.* at 539.]

CONCLUSION

BCRA and the campaign finance system that it amends are designed to “temper” public debate by limiting the amount of money that an entity or person may invest in the way that he sees fit, to the end that campaigns for election to federal office might be perceived to be “fairer” than if such limits were not imposed and Americans might have faith in their government. As laudable as those goals might be in England where the Parliament embodies that nation’s sovereignty, they are not permissible in America where the people, not Congress, continue to possess our nation’s sovereignty. The Constitution of the United States was established, in part, “to secure the blessings of liberty,” including the liberty this Court is now called upon to defend, that “Congress shall make no law ... abridging the freedom of speech, or of the press.”

Respectfully submitted,

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