RNC TITLE III ARGUMENT

BCRA'S SO-CALLED "MILLIONAIRE'S PROVISIONS" DISCRIMINATE AMONG SIMILARLY SITUATED FEDERAL CANDIDATES AND THEREBY VIOLATE THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT.

Sections 304 and 319 of BCRA are the so-called "Millionaire's Provisions." Section 304 eases and/or lifts certain financing restrictions on Senate candidates who face wealthy opponents (*e.g.*, Jon Corzine) willing to spend large amounts of personal money. The provision establishes three triggers, or "threshold amount[s]," tied to opponent spending. As the wealthy opponent's spending passes the first threshold, the limits on the size of the contributions the candidate may receive from individual donors triple. At the second threshold, those limits increase six-fold. Most significantly for purposes of this brief, at the third threshold, *all limits* on political-party coordinated expenditures imposed under 2 U.S.C. §441a(d) are lifted. BCRA §319 applies similarly, though not identically, to House candidates facing wealthy opposition.

At the outset, we note that the mere existence of these provisions undermines the claimed justification for *both* the contribution limits *and* the limits on coordinated expenditures. Indeed, in its brief to the Supreme Court in *Colorado II*, 533 U.S. 431, in which it persuaded a bare 5-4 majority to uphold coordinated party expenditure limits, the Government specifically contended that "unlimited party coordinated expenditures pose the same danger — *i.e.*, the risk of actual or perceived 'improper influence' based upon financial largess — as unrestricted campaign contributions by individuals or non-party committees." Pet. Br. 24 (citation omitted). If such limits are *necessary* to prevent corruption or the appearance of corruption, why are they any *less* necessary when a wealthy candidate enters the fray? And why is Jon Corzine, a multi-millionaire with over $60 million to spend on his own campaign, *more* likely to be corrupted by a $12,000 contribution or by unlimited party coordinated expenditures than his opponent, a

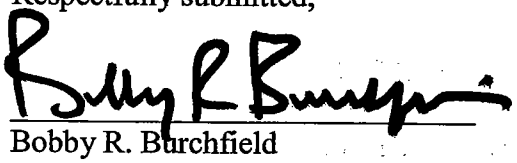
person with *no* personal wealth? Surely the opposite is true. The Millionaire's Provisions cast a pall over the Government's asserted justification for contribution limits and, specifically, coordinated expenditure limits.. *See, e.g., Lukumi*, 508 U.S. at 546-47 (where a statute leaves a purportedly compelling government interest partially unprotected, it casts doubt on the importance of the asserted interest); *City of Ladue*, 512 U.S. at 52 (same).

Moreover, as a result of the Millionaire's Provisions, BCRA treats similarly-situated candidates differently without any compelling justification. Under BCRA §304, the RNC could make unlimited coordinated expenditures on behalf of Senate Candidate A facing a Jon Corzine-like opponent, but would be limited to the amounts allowed in 2 U.S.C. §441a(d) in making such expenditures on behalf of Senate Candidate B, who is running in a neighboring state against a candidate of more modest means. Candidates A and B could be identical in every material respect except for the personal wealth of their respective opponents, and yet FECA, as amended by BCRA, prescribes different party coordinated expenditure limits for them.

There is no justification — much less a compelling justification — for the law's disparate treatment of the two candidates. Certainly, the wealth of a candidate's *opponent* is not a relevant basis for the distinction. And, again, if it were, the logic would run in the other direction — presumably, a candidate facing a rich opponent would be more in need of cash, and thus more indebted to the party for its support. In the end, defense expert Dr. Mann has conceded that the Millionaire's Provisions simply "demonstrate[] the fear, *irrational* as it may be, incumbents have of wealthy challengers." Mann CX 162 (emphasis added). Senator McCain likewise admitted that the provisions serve merely to "level the playing field" between candidates – a purpose that decisions since *Buckley* have roundly rejected as a basis for campaign finance legislation. We thus concur in Dr. Mann's view that "whether such measure

. . . would pass Constitutional muster is *doubtful*." *Id.* (emphasis added); Mann CX Ex. 16, p. 247. The remedy to the equal protection violation is to extend the favorable provisions — unlimited coordinated party expenditures and a $12,000 contribution limit — to all candidates. *See Califano v. Westcott*, 443 U.S. 76, 89 (1989) (typically, "proper course" for remedying underinclusive statute is "extension" of benefits to disadvantaged class, not "nullification" of benefits in advantaged class).

Respectfully submitted,



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