

**IN UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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| VICTORIA JACKSON GRAY ADAMS,<br><i>et. al.</i> ,   | ) | Civil Action No.<br>02-cv-877-KLH-CKK-RJL |
|  | ) | <i>consolidated with</i>                  |
| <i>Plaintiffs,</i>                                 | ) | 02-cv-582-KLH-CKK-RJL                     |
|  | ) | (lead case)                               |
|  | ) |   |
| vs.  | ) | <i>and</i>                                |
|  | ) | 02-cv-581-KLH-CKK-RJL                     |
|  | ) | 02-cv-633-KLH-CKK-RJL                     |
| THE FEDERAL ELECTION COMMISSION<br><i>et al.</i> , | ) | 02-cv-751-KLH-CKK-RJL                     |
|  | ) | 02-cv-753-KLH-CKK-RJL                     |
|  | ) | 02-cv-754-KLH-CKK-RJL                     |
|  | ) | 02-cv-781-KLH-CKK-RJL                     |
| <i>Defendants.</i>                                 | ) | 02-cv-874-KLH-CKK-RJL                     |
|  | ) | 02-cv-875-KLH-CKK-RJL                     |
|  | ) | 02-cv-881-KLH-CKK-RJL                     |

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***ADAMS PLAINTIFFS' OPENING BRIEF***

**Introduction**

The *Adams* plaintiffs<sup>1</sup> allege that sections 304, 307, and 319 of the Bipartisan Campaign Finance Reform Act (BCRA), which provide for radical increases in the amount of hard money that individual donors may contribute to federal election campaigns,<sup>2</sup> violate the equal protection

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<sup>1</sup> The *Adams* plaintiffs include non-wealthy voters from across the country (Victoria Jackson Gray Adams, Carrie Bolton, Derek Cressman, Victoria Fitzgerald, Anurada Joshi, Nancy Russell, Kate Seely-Kirk, Rose Taylor, and Stephanie L. Wilson), a former candidate for the U.S. Senate from North Carolina who is considering running again for the U.S. Senate (Cynthia Brown), and several public interest organizations with non-wealthy members and constituencies (United States Public Interest Research Group, California Public Interest Research Group, Massachusetts Public Interest Research Group, New Jersey Public Interest Research Group, the Fannie Lou Hamer Project, and Association of Community Organizers for Reform Now). The *Adams* plaintiffs no longer include Peter Kostmayer, named in the underlying complaint, as Mr. Kostmayer has recently stated that he does not intend to run for federal office again. Plaintiffs' counsel will soon be filing a motion to withdraw Mr. Kostmayer from this case.

<sup>2</sup> Section 307 of BCRA doubles the amount of hard money individual donors may contribute to federal candidates per election from \$1,000 to \$2,000. BCRA, Pub. L. No. 107-155 § 307, 116 Stat. 102 (2002). Sections 304 and 319 of BCRA increase further the amount of hard money individual donors may

guarantee incorporated by the Due Process Clause of the Fifth Amendment to the United States Constitution by denying plaintiffs the equal opportunity to participate in all integral aspects of the electoral process. By multiplying the amount of hard money that maximum donors can channel to campaigns, these provisions of BCRA will open the floodgates of campaign cash, and make effective electoral participation impossible for candidates lacking either personal wealth or the ability to amass large numbers of maximum contributions. As such, the hard money limit increases will deny candidates and voters lacking access to wealth their right to participate in the electoral process on an equal and meaningful basis.

When the wealthy are able to so dominate electoral politics that those lacking wealth are virtually excluded from meaningful participation, the democratic process itself is compromised. “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Williams v. Rhodes*, 393 U.S. 23, 31 (1968)(footnote omitted) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). *See also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (the right to vote is “a fundamental political right...preservative of all rights”).

Because the right to vote is fundamental to American democracy, this country’s jurisprudence has long forbidden discrimination in the electoral process based on wealth, striking the poll tax, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), and mandatory candidate filing fees, *Bullock v. Carter*, 405 U.S. 134 (1972) and *Lubin v. Panish*, 415 U.S. 709 (1974), as violations of the constitutional guarantee of equal protection of the laws. *See also*

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contribute to federal candidates in races involving opponents making expenditures from personal funds. In such races, under Section 304, individual donors may contribute up to \$12,000 per Senate election, and under Section 319, individual donors may contribute up to \$6,000 per House election. BCRA, Pub. L. No. 107-155 §§ 304 and 319, 116 Stat. 97, 109 (2002).

*M.L.B. v. S.L.J.*, 519 U.S. 102, 124 (1996) (“The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license.”) If the increased hard money limits in BCRA are allowed to stand,<sup>3</sup> the tide of cash flowing to well-connected candidates will smother the electoral hopes of low-income voters and the candidates they favor. The BCRA will thus operate as a barrier to voting rights as surely as the poll tax and mandatory filing fee did in the past.<sup>4</sup>

The BCRA thus places a substantial burden on the voting rights of the non-wealthy, and therefore should be subjected to strict scrutiny. Because the defendants cannot demonstrate that the BCRA’s contribution limit increases are narrowly tailored to address a compelling government interest, the increases must be struck as an equal protection violation.

Indeed, the provisions in question fail even deferential review, as they are not reasonably necessary to serve any legitimate state interest. The spiral in campaign fundraising since the current \$1,000 limit was enacted belies any claim that an increase is necessary to counter inflation; to the contrary, raising the hard money limits will only spur fundraising to new heights. Indeed, the hard money increases defeat the very purpose that they, and the BCRA as a whole, claim to serve, as they will deepen incumbent war chests, stifle competition, and aggravate the perception and reality that large contributions create unequal access and influence for their donors.

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<sup>3</sup> The issuance of relief as the *Adams* plaintiffs have requested would return the individual hard money limits to the \$1,000 level. See *Conlon v. Adamski*, 77 F.2d, 397, 399 (D.C. Cir. 1935): “The elementary rule of statutory construction is without exception that a void act cannot operate to repeal a valid existing statute, and the law remains in full force and operation as if the repeal had never been attempted.”

<sup>4</sup> The Fourteenth Amendment case law cited herein applies with equal force to a violation of equal protection committed through federal law. “The Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment.” *Schwieker v. Wilson*, 450 U.S. 221, 22; 101 S.Ct. 1074, 1079 n.6 (1981); see also *National Black Police Association, Inc. v. Velde*, 712 F.2d 569, 580 (D.C. Cir. 1983).

## **Jurisdiction**

This Court has jurisdiction over this action under 28 U.S.C. § 2284, 28 U.S.C. § 1331, and § 403 of BCRA. Venue is established by § 403 of BCRA.

## **Background**

Wealthy donors exercise enormous influence in federal elections today, and under sections 304, 307, and 319 of BCRA, these donors will achieve a stranglehold on the electoral process. Only a small minority of the population makes maximum hard money contributions to federal candidates -- 0.11 percent of the voting age population made a contribution of \$1,000 or more in the 1999-2000 election cycle – yet these contributions constitute nearly half of all individual funds raised. *See Adams* Exh. 1, Declaration and Expert Report of Derek Cressman, ¶¶4-5 (hereinafter “Cressman Decl.”). These highest donors come disproportionately from the ranks of corporate management and wealthy communities, and are overwhelmingly white and male. *See Adams* Exh. 2, Declaration and Expert Report of Prof. John C. Green, ¶3 (hereinafter “Green Decl.”); Cressman Decl., 1E, 6 and 1G. As plaintiffs’ expert witness Professor John C. Green has testified, the hard money limit increases in BCRA will “result in increased giving by the elite pool of individual donors to federal campaigns.” Green Decl., ¶4.

Candidates with access to wealthy donors are able to multiply their fundraising advantage by encouraging these donors to bundle (i.e. solicit or facilitate) maximum contributions from business associates, friends and family members. *Adams* Exh. 3, Declaration and Expert Report of Craig McDonald, ¶5 (hereinafter “McDonald Decl.”). Under the BCRA hard money limit increases, bundling by the well-connected will grow to intolerable extremes. As plaintiffs’ expert witness Craig McDonald has testified: “The increased limits on individual contributions would undoubtedly increase the ability of elite fundraisers, such as those who comprise the Bush Pioneers, to deliver large amounts of money to political campaigns.” *Id.*, ¶15.

The Bush Pioneer program, the hard money bundling operation employed in the 2000 election cycle by the George W. Bush Presidential Exploratory Committee, Inc., and its successor organization, the George W. Bush For President Committee, provides a clear example of the disproportionate electoral influence that bundlers enjoy, and the electoral dominance that the BCRA increases would confer upon bundlers. The 212 Bush Pioneers channeled over \$22 million to the 2000 Bush presidential campaign. *Id.*, ¶13. Each Bush Pioneer was responsible for gathering at least \$100,000 in hard money contributions, accessing “a network of at least 100 donors who could contribute the \$1,000 maximum amount allowed under the law.” *Id.*, ¶3.

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“Members and/or potential members of the Pioneer network enjoyed special access” to candidate Bush, and “[m]any of the Pioneers were rewarded with government appointments,” including the appointment of 19 Pioneers as U.S. ambassadors to countries from Austria to Uruguay. McDonald Decl., ¶¶11-12.<sup>5</sup>

As the wealthy few are increasingly able to determine electoral outcomes under BCRA, they will also expand their ability to influence legislative outcomes. A wealth of evidence documents the disproportionate access and influence that maximum donors and bundlers enjoy in Congress. *See Adams* Exh. 7-13 (documenting the disproportionate influence of MBNA America Bank, a major credit card company and hard money bundler, in the passage of the bankruptcy legislation); *Adams* Exh. 18, Declaration of Pat Williams, former Member of Congress from Montana, ¶4 (hereinafter “Williams Decl.”): “There is no doubt in my mind that those giving the largest contributions expect preferential access and disproportionate influence;” *Adams* Exh. 17, Declaration of Paul Simon, former U.S. Senator from Illinois, ¶4 (hereinafter “Simon Decl.”): “No member of Congress, not even the most scrupulous, is unaware of his or her largest contributors, and not even the most scrupulous members will ignore them;” Deposition of Representative Earl F. Hilliard, September 5, 2002, 68, lines 18-20, 86, lines 9-15, 95, lines 9-11 (hereinafter “Hilliard Deposition”); Deposition of Representative Bennie G. Thompson, September 19, 2002, 68, lines 16-22 (hereinafter “Thompson Deposition”). Fact witnesses for the defendants make the same point. *See Adams* Exh. 33, Declaration of Senator

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<sup>5</sup> Individuals with access to corporate networks are especially positioned to increase their disproportionate power as bundlers under BCRA. Corporate executives who became Bush Pioneers were able to raise significant funds by soliciting from their company’s employees. For example, Charles Cawley, president of MBNA America Bank, a major credit card company, generated numerous contributions from MBNA executives to become a Bush Pioneer. MBNA employees contributed more than \$235,000 in hard money to the Bush presidential campaign, making them the campaign’s single biggest source of cash. *Adams* Exh. 7, Steve Campbell, “MBNA Big Player in Bush Campaign; One of Maine’s Largest Private Employers Funnels Millions of Dollars to Selected Politicians Nationwide,” *Portland Press Herald*, November 21, 1999, A1; *Adams* Exh. 8, Christopher H. Schmitt, “Tougher Bankruptcy Laws – Compliments of MBNA?,” *Business Week*, February 26, 2001, 43.

Dale Bumpers, former U.S. Senator from Arkansas, ¶14 (hereinafter “Bumpers Decl.”) (discussing hard and soft money donors); Deposition of Arnold Hiatt, major hard money donor, September 26, 2002, 102, lines 20-25, 104, lines 5-19. *See also Adams* Exh. 4, Declaration and Expert Report of Professor Thomas Stratmann, ¶13-30 (hereinafter “Stratmann Decl.”) (documenting evidence that campaign contributions affect legislators’ voting behavior). “The increased individual contribution limits will exacerbate the disproportionate access and influence that the largest donors enjoy.” Simon Decl., ¶10.<sup>6</sup>

The primary beneficiaries of the increased hard-money limits will be the very incumbents who enacted them. Defendant-Intervenor Senator Feingold has admitted that the hard money limit increases will benefit incumbent candidates facing candidates without access to wealth. Feingold Deposition, 260, lines 7-8. Plaintiffs’ expert witnesses Professor Thomas Stratmann, Derek Cressman, and Steve Cobble have all testified about the distinct advantages these increases provide to incumbents, who enjoy greater access to major donors than do challenger candidates. *See* Cressman, ¶19; Stratmann, ¶¶5-12; *Adams* Exh. 5, Declaration and Expert Report of Steven B. Cobble, ¶¶9-11. *See also Adams* Exh. 35, Public Campaign, “Why the Battle Over Hard Money Matters: Hard Facts on Hard Money,” (analyzing Federal Election Commission data from the 2000 election cycle), 1: “Senate incumbents in 2000 raised, on average, nearly three times as much as their challengers did from donors of \$1,000 or more: \$1.8 million v. \$650,000. House incumbents in 2000 raised more than twice as much from donors of

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<sup>6</sup> At his deposition, Senator Mitch McConnell was able to name individual corporate executives who had given and raised substantial sums of hard money for his political campaigns. Deposition of Senator Mitch McConnell, September 23, 2002, 38, line 8 to 53, line 17 (hereinafter “McConnell Deposition”). By contrast, he could not name any schoolteacher, nurse, coal miner, janitor, maid, or anyone holding a minimum wage job who had given a maximum contribution of \$1,000 to any of his political campaigns. McConnell Deposition, 31, line 17 to 34, line 8.

\$1,000 or more as their challengers, on average: \$178,000 v. \$85,000. Raising the hard money limit would exacerbate the advantage incumbents already have over challengers.”

Under the BCRA hard money limit increases, candidates without access to wealthy donors will be effectively excluded from seeking political office, as the war chests of well-connected candidates grow and the financial bar rises far beyond their reach. Candidates with a financial advantage nearly always win elections, and won congressional office 94 percent of the time in the 2000 general election. Cressman Decl., ¶2. A large proportion of winning campaigns are funded through maximum contributions, and maximum donations made up 60 percent of the individual funds raised by winning candidates in the 2000 election cycle. *Id.* ¶5. These global realities are confirmed by numerous individuals who are considering future bids for office, but testified that BCRA increases would deter them from future candidacies because they lack access to large networks of maximum donors. *See Adams* Exh. 19, Declaration of Dr. Thomas A. Caiazzo; *Adams* Exh. 20, Declaration of Gail Crook; *Adams* Exh. 21, Declaration of Victor Morales; *Adams* Exh. 22, Declaration of Cynthia Brown (hereinafter “Brown Decl.”); *Adams* Exh. 23, Declaration of Ted Glick (hereinafter “Glick Decl.”). Senator Russ Feingold, a defendant-intervenor and a co-sponsor of BCRA, has admitted that the hard money limit increases will likely further enable certain candidates to build up campaign war chests, “potentially discourag[ing] some people from running” for federal office. Deposition of Senator Russ Feingold, September 9, 2002, 264, line 14 to 265, line 3 (hereinafter “Feingold Deposition”).

The BCRA’s increased contribution limits will deprive non-wealthy voters of the ability to support meaningfully the candidates of their choice. Voter-plaintiffs and other non-wealthy voters have testified in this case that they cannot afford to make large campaign donations, that their preferred candidates would not be able to effectively compete under the BCRA increases,

that these increases would make their vote less meaningful, and that they would therefore be discouraged from forms of electoral participation such as volunteering, making small contributions, and even voting itself. As one voter-plaintiff testified: “The increases in the hard money contribution limits make it no longer conceivable that I can access the political process. They undermine the meaning and value of my vote.” *Adams* Exh. 25, Declaration of Carrie Bolton, ¶12. *See also Adams* Exh. 24, Declaration of Victoria Jackson Gray Adams (hereinafter “Adams Decl.”); *Adams* Exh. 26, Declaration of Daryl Irland; *Adams* Exh. 27, Declaration of Anuradha Joshi; *Adams* Exh. 28, Declaration of Howard Lipoff; *Adams* Exh. 29, Declaration of Nancy Russell; *Adams* Exh. 31, Declaration of Kate Seely-Kirk; *Adams* Exh. 32, Declaration of Stephanie L. Wilson. Representatives Hilliard and Thompson testified that the increases will harm the ability of low- and moderate-income communities, and communities of color, to elect the representatives of their choice. *See* Thompson Deposition, 87, lines 9-12: “[B]y doubling the hard money contribution, you price low and moderate communities out of the market for electoral participation;” Hilliard Deposition, 103, lines 4-7. *See also Adams* Exh. 30, Declaration of Chris Saffert, ¶18 (“The effect of the contribution limit increases will be to drown out the voices of people from low and moderate-income communities...”); Adams Decl., ¶5 (“The largest donors get more attention, and when the ceiling is raised the voices of small contributors and voters like myself will be lost.”)<sup>7</sup>

## **Argument**

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<sup>7</sup> In opposing the hard money limit increases, Senator Christopher Dodd stated on the Senate floor: “[W]hat are we doing here by raising these amounts? We are moving further and further and further away from the overwhelming majority of Americans. I would like to see the average American participate in the electoral process of the country...I do not see many campaigns that are going to bother any longer with smaller donor. It is the de facto exclusion of more than 99 percent of the American adult population who could support, financially, the political process in this country, that worries me the most.” Congressional Record – Senate, March 27, 2001, S2965.

**I. By Multiplying The Hard Money Contributions Of The Wealthy, Sections 304, 307, And 319 Of BCRA Deprive Non-Wealthy Voters And Candidates Of The Ability To Participate On An Equal Basis, In Violation Of The Equal Protection Guarantee Incorporated By The Due Process Clause Of The Fifth Amendment To The United States Constitution.**

Time and again, the Supreme Court has rejected laws that limit political participation to those with economic means. Faced with a poll tax of \$1.50, the Court decreed, “[A] State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. . . . [W]ealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.” *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666-670 (1966). Subsequently, the court held that financial barriers to candidates also violate the rights of voters. Ruling that mandatory candidate filing fees have a "real and appreciable impact on the exercise of the franchise," the Court struck down Texas filing fees ranging from \$150 to \$8,900 because they lacked a waiver or alternative means of qualifying for those unable to pay. *Bullock v. Carter*, 405 U.S. 134, 144 (1972); *see also Lubin v. Panish*, 415 U.S. 709 (1974) (striking California filing fees for the same reason).

The language used by the Court to describe the discriminatory impact of candidate filing fees applies perfectly to the harm that voters and candidates would suffer under BCRA’s hard money increases:

Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support. The effect of this exclusionary mechanism on voters is neither incidental nor remote. Not only are voters substantially limited in their choice of candidates, but also there is the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system. . . . [W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.

*Bullock*, 405 U.S. at 143-144. As demonstrated *supra*, BCRA’s increased contribution limits will make the possession of “personal wealth and affluent backers” a pre-requisite for electoral participation as surely as any filing fee and will allow such affluent backers to dominate the electoral process.

The core injury that results from the inequalities entrenched under *BCRA* is that suffered by the voters. As the Court noted in *Bullock*, candidates who are barred from running by financial requirements are likely to be the “favorites” of “the less affluent segment of the community.” 405 U.S. at 143-144; *see also Lubin*, 415 U.S. at 716 (“The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters.”) As demonstrated *supra*, the BCRA’s increased contribution limits will deprive non-wealthy voters of the ability to support meaningfully the candidates of their choice, and will eviscerate the right to vote, as concretely as previous wealth barriers. Under Sections 304, 307, and 319 of BCRA, the ability of bundlers such as the Bush Pioneers to channel vast amount of money to their favored candidates will increase to such an extent that it will prevent candidates and voters without access to wealth from having “an equally effective voice.” *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 401, (Breyer, J., concurring), quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

The BCRA works a constitutional injury even though it does not directly prohibit the political participation of the non-wealthy at the ballot box. Rather, the financing regime it creates “falls with unequal weight on voters, as well as candidates, according to their economic status,” *Bullock*, 405 U.S. at 144, just as did mandatory filing fees. The wealth discrimination cases embody a pragmatic recognition that non-wealthy candidates will have a greater difficulty raising funds from their voter supporters. *Bullock* observes:

*To the extent that the system requires candidates to rely on contributions from voters in order to pay the assessments...it tends to deny some voters the opportunity to vote for the candidate of their choosing; at the same time it gives the affluent the power to place on the ballot their own names or the names of persons they favor.*

405 U.S. at 144 (emphasis added). Even a “moderate” fee may prevent “impecunious but serious candidates” from running, and is therefore exclusionary. *Lubin*, 415 U.S. at 717-18. No less can be said of a finance regime which confers such an advantage on the wealthy and well-connected that others cannot compete.<sup>8</sup>

Though the direct victims of an exclusionary campaign finance regime are non-wealthy voters and candidates, the democratic process itself will suffer if the increased limits are allowed to go into effect. As former Representative Pat Williams testified, “The increased contribution limits will convince many voters that their votes, their small campaign contributions, and their political participation are meaningless.” Williams Decl., ¶7. Even a veteran voting rights activist like plaintiff Victoria Jackson Gray Adams testified that the BCRA increases will “discourage me from involvement with electoral politics.” Adams Decl., ¶3.

In *Nixon v. Shrink*, the Supreme Court announced that contribution limits are permissible unless they are “so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice beneath the level of notice, and render contributions pointless.” *Nixon v.*

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<sup>8</sup> The harms caused by the hard money limit increases in BCRA are clearly actionable under equal protection principles. See *Terry v. Adams*, 345 U.S. 461 (1953). In *Terry*, the Supreme Court held that the pre-primary endorsement process of a wholly private, all-white entity, the Jaybird Democratic Association, had become “an integral part . . . of the elective process that determines who shall rule and govern,” and therefore struck down as unconstitutional the exclusion of African-American voters from that process. *Id.* at 469. Justice Clark’s concurrence stated: “[A]ny ‘part of the machinery for choosing officials’ becomes subject to the Constitution’s restraints.” *Id.* at 481 (quoting *Smith v. Allright*, 321 U.S. 649 (1944); see also *Morse v. Republican Party of Virginia*, 517 U.S. 186, 207 (1996)(striking mandatory registration fee for delegates to party convention)). The system of campaign finance is as much an integral part of the political process as the pre-primary endorsement process in *Terry*. By permitting and regulating private campaign contributions in a manner which discriminates on the basis of economic status, the BCRA hard money limit increases violate the Constitution.

*Shrink*, 528 U.S. at 397. Here, the *increases* in the hard money contribution limits will have precisely this effect; vast infusions of cash will drown out the voices of non-wealthy candidates, making the association of their supporters ineffective and rendering small contributions pointless.

## **II. The BCRA Hard Money Limit Increases Serve To Entrench Incumbents In Power, In Violation Of The Constitutional Guarantee Of Equal Protection For All.**

As a measure that serves to entrench incumbents in power, *see supra*, the BCRA hard money limit increases offend basic equal protection principles. At the core of the concerns embodied in the equal protection clause is the protection against rule by an entrenched, unrepresentative and self-interested legislature. In the landmark ‘one person, one vote’ case of *Reynolds v. Sims*, the Supreme Court noted that, at the time the litigation had commenced, “there had been no reapportionment of seats in the Alabama Legislature for over 60 years...Consistent failure by the Alabama Legislature to comply with state constitutional requirements as to the frequency of reapportionment and the bases of legislative representation [had] resulted in a minority stranglehold on the State Legislature.” *Reynolds*, 377 U.S. at 569-570. The Court recognized in *Reynolds* that judicial intervention was necessary as it could not rely on the Alabama legislators, the beneficiaries of the existing apportionment scheme, to ensure the right of all citizens to an equal vote. “We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.” *Id.* at 566. *See also Baker v. Carr*, 369 U.S. 186, 248 (1962) (Douglas, J., concurring) (“entrenched political regimes” make relief other than judicial “illusory”); John Hart Ely, Democracy and Distrust 120 (Harvard Univ. Press, 1980): (discussing the entrenchment concern in the Supreme Court’s malapportionment cases: “[T]hose in power have a vested interest in keeping things the way they

are.”) The BCRA hard money limit increases will lead to an “entrenched political regime,” much in the way that malapportioned districts kept state legislators in power in *Reynolds* and *Baker*.<sup>9</sup>

### **III. Since BCRA’s Increased Limits Would Severely Burden The Voting Rights Of The Non-Wealthy, They Must Be Subjected To Strict Scrutiny.**

Any substantial burden on the fundamental right to vote is subject to strict scrutiny. Since BCRA’s increases in permitted hard-money contributions would severely burden the voting rights of the non-wealthy, they must be subjected to strict scrutiny, and could only stand if they were narrowly tailored to address a compelling state interest. The degree of scrutiny given to a challenged regulation depends upon the extent to which it burdens voting rights. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 792-93 (1983).<sup>10</sup> “As our cases have held, it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.” *Anderson v. Celebrezze*, 460 U.S. 780, 792-93 (1983), citing *Bullock*, 405 U.S. at 144, 149 (emphasis added).

The Supreme Court has closely scrutinized measures which have a discriminatory impact on the non-wealthy. The *Bullock* decision holds that mandatory filing fees are subject to close

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<sup>9</sup> Similarly, a central purpose of the First Amendment is to prevent incumbent legislators from entrenching themselves by enacting legislation that advantages their supporters while suppressing voices of dissent. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1147 (1991) (“the [First] Amendment’s historical and structural core was to safeguard the rights of popular majorities...against a possibly unrepresentative and self-interested Congress.”) See also Spencer Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 Vand. L.Rev. 1235, 1261-1262 (2000)(“The seemingly widespread distribution of the ability to communicate makes government protection of expressive liberties valuable to an expansive, diverse group of people, whereas government protection of liberties associated with political money is not roughly equally valuable to a large group of people.”)

<sup>10</sup> While the *Burdick* and *Anderson* cases involved First Amendment claims, the framework for scrutiny that they enunciate applies to equal protection claims. “We rely...on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment.” *Anderson*, 460 U.S. at 787 n.7, citing *Bullock*, *Lubin* and other cases.

scrutiny after it compares such fees to the \$1.50 poll tax struck in *Harper*. *Bullock*, 405 U.S. at 142-44. Holding that the filing fee, like the poll tax, “falls with unequal weight on voters, as well as candidates, according to their economic status,” the Court applies the same “strict standard of review” to filing fees that it had applied to the \$1.50 poll tax. *Id.* at 144, citing *Harper*, 383 U.S. 663. In *Clements v. Fashing*, 457 U.S. 957 (1982) the court notes that “classifications based on wealth” justify strict scrutiny, because “[e]conomic status is not a measure of a prospective candidate’s qualifications to hold elective office.” *Id.* at 965. The later *Anderson* and *Burdick* decisions reiterate the validity of this framework. *Anderson*, 460 U.S. at 793.

As discussed *supra*, the BCRA’s increased contribution limits will prevent non-wealthy candidates from seeking office and prevent non-wealthy voters from supporting and electing the candidates of their choice. Because these provisions burden candidates and voters based on wealth, they should be subjected to strict scrutiny just as were the mandatory filing fee and the poll tax. The Court must consider “whether the challenged restriction unfairly or *unnecessarily* burdens ‘the availability of political opportunity,’” *Anderson*, 460 U.S. at 793, quoting *Clements v. Fashing*, 457 U.S. 957 (1982) and *Lubin*, 414 U.S. at 716 (emphasis added), a test which shows the contribution limit increases to be unconstitutional.

#### **IV. BCRA’s Hard Money Increases Fail Even Deferential Review.**

Since the contribution limit increases are not reasonably necessary to serve any legitimate regulatory interests, the injury they work on the non-wealthy cannot be justified even under deferential review.

There is no factual basis for the purported rationale that increasing the hard-money limits is necessary to address the cost of inflation and to permit candidates to amass sufficient funds to campaign. Senator Mitch McConnell, a proponent of BCRA’s hard money limit increases,

admitted at his deposition that he has raised millions of hard money dollars in each of his campaigns for the U.S. Senate, and, in each race, including the most recent re-election campaign in 1996, he has “successfully competed.” Deposition of Senator Mitch McConnell, September 23, 2002, 12, line 8 to 19, line 16. Defendant-Intervenor Senator Feingold admitted: “I have never considered the prior thousand dollars limitation to be a barrier to my ability to run for office.” Feingold Deposition, 243, lines 21-23. Candidates for federal office have been raising and spending more money than ever under the prior \$1,000 limit.<sup>11</sup> Fundraising by candidates for Congress increased by 425 percent from the 1977-78 cycle to the 1999-2000 cycle, and inflation accounted for less than half of that increase. Cressman Decl., ¶17. If increased spending under the prior \$1,000 limit requires outreach to an expanded donor base, surely this is a benefit, and preferable to increased reliance on an ever-smaller group of elite donors. Senator Christopher Dodd rightly called BCRA’s hard-money increase a “cost-of-living adjustment for the less than 1 percent of the American public that can afford to write a \$1,000 check.” *Adams* Exh. 34, Jim Abrams, “Senate takes up rival to McCain-Feingold spending limits,” Associated Press, 2.

Neither is it credible that the hard-money increases will reduce the time that candidates spend fundraising. While candidates will be able to raise money in greater increments, this will only spur *more* fundraising, rather than less, and will push the campaign finance arms race to new heights. *See* Simon Decl., ¶: “The increased contribution limits will only increase the amount of time Senators and Representatives spend fundraising;” *Adams* Exhibit 16, Declaration of Sam Gejdenson, former Member of Congress from Connecticut, ¶4; Thompson Deposition,

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<sup>11</sup> It is also worth noting that the Supreme Court, in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), rejected the argument that a \$1,000 contribution limit was so low as to inhibit campaigning in Missouri’s statewide elections.

70, lines 16-22: “I don’t know any Member of Congress that says ‘I’ve raised enough money for the campaign cycle. I’m going to stop’ …I think a Member will raise as much money as he or she can until that election is over;” Hilliard Deposition, 88, lines 7-8, 90, lines 12-16; Cressman Decl., ¶18: “Increasing contribution limits will not reduce the time candidates spend raising money. Many states have no contribution limits at all, yet there is no evidence from those states that candidates spend any less time raising funds.”

Finally, the increased contribution limits decrease, rather than increase, electoral competition, given that incumbents possess far more extensive networks of maximum donors. *See supra* Section II. *See also* Williams Decl., ¶4: “[M]embers of committees with jurisdiction over matters of concern to wealthy interests attract large numbers of maximum contributions;” Bumpers Decl., ¶14 (donors give because they want access to Members). Challengers generally do not enjoy the advantages that come with the power of incumbency. While there may, on occasion, be a challenger able to garner large amounts of maximum donations, the increases will overwhelmingly favor those already entrenched in office.

Rather than advance any legitimate state interest, the hard-money increases will undermine the very interests put forward by the defendants and intervenors in their defense of BCRA as a whole, including “preventing corruption and the appearance of corruption that results from unlimited financial contributions,” “restoring Americans’ faith in the electoral process and decreasing public cynicism about our system of government,” and “preventing the adverse impact on candidates, parties, federal office holders and other participants in the political process from their participation in activities that create the appearance of corruption.” *See Adams* Exh. 15, Intervenors’ Responses to Contention Interrogatories, Responses to *McConnell* Interrogatory No. 1 and *Adams* Interrogatory No. 1., 2-5. The evidence presented *supra* makes abundantly clear that hard money donors contribute to candidates “because people want access,” Bumpers

Decl., ¶14, that “[t]he increased individual contribution limits will exacerbate the disproportionate access and influence that the largest donors enjoy,” Simon Decl., ¶10, and that “[l]ower-income citizens will be discouraged from active participation in political campaigns.” *Id. Buckley v. Valeo*, 424 U.S. 1 (1976), and other cases considering the constitutionality of contribution limits universally acknowledge that large contributions can create the reality or perception of corruption. *See, e.g., Buckley; Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000); *Frank v. City of Akron*, 290 F.3d 813 (6<sup>th</sup> Cir. 2002), rehearing en banc denied, 303 F.3d. 752 (2002); *Daggett v. Commission on Governmental Ethics and Practices*, 205 F.3d 445 (1<sup>st</sup> Cir. 2000). Thus, the BCRA hard money increases can only increase the dangers that this reality and/or perception will grow.

#### **V. The “Millionaire” Provisions, Further Increasing The Limits, Are An Even Greater Infringement On The Voting Rights Of The Non-Wealthy.**

The burdens on non-wealthy candidates described above will increase exponentially in races where a self-funded candidate triggers provisions allowing opponents to raise funds in increments of \$3,000 per election and \$6,000 per cycle in House races, and up to \$12,000 or \$24,000 per cycle in Senate races. *See* BCRA §§ 304 and 319. Where one candidate takes advantage of these provisions to multiply maximum contributions, a competing candidate whose supporters cannot make large donations will be buried in her opponents’ cash. Candidates who have in the past faced wealthy, self-funded opponents have testified that the burden of simultaneously confronting a second campaign with vast infusions of cash from wealthy donors would make it impossible for them to compete. *See* Brown Decl., ¶¶ 8-9: “The people that I know can hardly afford to contribute twenty-five dollars, let alone \$12,000. There is no way that any candidate like me can compete under these new conditions. These increases in the hard money contribution limits would effectively eliminate any future campaign I might hope to wage

for the U.S. Senate;” Glick Decl., ¶6: “It is impossible to participate facing that tremendous disparity in resources. I just do not run in the circles of people who can contribute \$12,000.”<sup>12</sup>

Since the burden on voting rights is multiplied by these “millionaire” provisions, there is even greater cause to subject them to strict scrutiny. And since they offend the very values they claim to serve, they cannot survive even deferential review. While ostensibly designed to permit non-wealthy candidates to counter the campaign messages of self-funded millionaires, they will have the opposite effect, by forcing the non-wealthy to compete in a game they cannot win. The candidates who would benefit from the millionaire provisions are those who have large networks of supporters willing and able to multiply their maximum contributions. Yet, a candidacy with supporters who can mainly give only \$25, \$50 or \$100 will be extinguished by the millionaire provisions.

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<sup>12</sup> When questioned regarding the increases in hard money contribution limits under BCRA in races involving self-funded candidates, Senator McConnell testified that a person holding a minimum wage job could make the maximum \$12,000 contribution if he or she “had a significant net worth” or “were highly motivated.” McConnell Deposition, 82, line 4 to 83, line 8. In other words, to paraphrase Anatole France, BCRA, in its “majestic impartiality,” permits the rich and poor alike to contribute \$12,000 under the millionaire amendment.

### **Conclusion**

For the above reasons, the Court should declare that Sections 304, 307, and 319 of the Bipartisan Campaign Finance Reform Act violate the equal protection guarantee incorporated by the Due Process Clause of the Fifth Amendment to the United States Constitution, and should enjoin the Defendants from enforcing these provisions.

Dated: November 6, 2002

Respectfully submitted,

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