TITLE III

PRESENTATION BY THE GOVERNMENTAL DEFENDANTS

I. THE MILLIONAIRE PROVISIONS OF TITLE III ARE CONSTITUTIONAL.

In the so-called "millionaire provisions" set forth in §§ 304, 316, and 319 of BCRA, Congress modified the standard campaign contribution limits applicable when a candidate faces an opponent who expends substantial personal funds, beyond a statutory threshold amount, on his or her own campaign.[131/] The limits rise incrementally, in proportion to the amount of personal funds expended by the self-financing candidate. The statutory formula also takes into account the relative campaign funds available to both candidates, so that an incumbent candidate with a sizeable campaign fund will not receive any benefits under the millionaire provisions unless his or her self-financed opponent devotes a much larger amount of personal funds to the campaign. See BCRA § 316; see also Robert F. Bauer, Soft Money Hard Law: A Guide to the New Campaign Finance Law 72-74 (Perkins Coie 2002) (providing illustrative examples). Moreover, BCRA lifts the limits on coordinated expenditures of the opposing candidate's political party when a Senate candidate spends more than 10 times the threshold amount or a House candidate spends more than $350,000 in personal funds. See BCRA §§ 304, 319.[132/]

As a threshold matter, as discussed below by the intervenor-defendants, plaintiffs lack standing to challenge the millionaire provisions. If the Court finds the claims justiciable, however, they should be rejected on the merits. The millionaire provisions increase the pool of

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[131/] The threshold of personal spending for Senate races is $150,000 plus $0.04 multiplied by the voting age population of the candidate's state. BCRA § 304. For the House, the threshold is a standard $350,000. BCRA § 319.

[132/] BCRA also caps the amounts that candidates can accept under the provisions: 110% of the self-funded opponent's expenditures for the Senate and 100% for the House. BCRA further requires a candidate to return to contributors any amounts raised under the provisions not spent on that election, thereby restricting the use of the provisions to the specific election where adverse financial conditions exist, and preventing amassing of funds for future elections. BCRA §§ 304, 319. See 147 Cong. Rec. S2451, S2462 (Mar. 19, 2001) (Sen. Domenici).

potential candidates and promote robust competition in federal elections without limiting the spending of the self-funded candidate and without entirely abandoning limits on contributions that serve to minimize the potential for corruption.

A. The Millionaire Provisions Are Closely Drawn to Advance Important Governmental Interests.

Congress enacted the millionaire provisions in order to address a problem arising from the invalidation in Buckley of a provision of FECA limiting the amount a candidate could spend on his or her own campaign. See Buckley, 424 U.S. at 51-54. As Senator McConnell explained in reference to draft legislation considered in 1987:

> [W]e ought to ensure a level playing field in elections involving wealthy candidates, by eliminating the "millionaire's loophole" to the post-Watergate contribution limits. If a candidate intends to spend or loan massive funds on his campaign, our bill would allow his opponents to accept larger contributions. It's time to stop Congress from becoming nothing more than an exclusive club for millionaires.

133 Cong. Rec. S7466 (1987); see also 142 Cong. Rec. S6795 (June 25, 1996) (Sen. Domenici); 143 Cong. Rec. S10148 (Sep. 29, 1997) (Sen. Feingold); 135 Cong. Rec. S209 (Jan. 25, 1989) (Sen. Dole); And as Senator DeWine noted during debate of BCRA, the millionaire's loophole has fueled a perception of corruption that "someone today who is wealthy enough can buy a seat" in the Congress. 147 Cong. Rec. S2547 (2001); see also 136 Cong. Rec. S11052 (July 30, 1990) (Sen. Dole); 148 Cong. Rec. H431 (Feb. 13, 2002) (Rep. Moore Capito); 148 Cong. Rec. S2153 (Mar. 20, 2002) (Sen. Domenici); 144 Cong. Rec. S6762 (June 25, 1998) (Sen. Tim Hutchinson). See Gable v. Patton, 142 F.3d 940, 947 (6th Cir. 1998) (government has a compelling interest in "keep[ing] one candidate from essentially buying a campaign").

By allowing larger contributions to a candidate whose voice may otherwise not be heard when running against a self-funded opponent, BCRA facilitates the speech of one candidate without in any way restricting the speech of the self-financing candidate, thereby furthering First Amendment interests by increasing voters' opportunities to hear and evaluate many views in the marketplace of political ideas. See Buckley, 424 U.S. at 14-15 ("[T]he ability of the citizenry to make informed choices among candidates for office is essential, for those who are elected will inevitably shape the course that we follow as a nation."); see also New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open."). More generally, the millionaire provisions encourage less wealthy candidates to run for office and thus help to offset pressure on political parties to recruit not the best candidates, but those who can finance their own campaigns. See Declaration of Paul S. Hermson in RNC v. FEC (Jan. 28, 1999) at 29-30 [DEV 67-Tab 21, hereinafter Hermson Expert Rep. in RNC v. FEC]; Kolb Decl. Ex. 1 at 18-20 [DEV 7-Tab 24]; Krasno & Sorauf Expert Rep. at 70;

147 Cong. Rec. S2537, S2546 (Mar. 20, 2001) (Sen. DeWine); 147 Cong. Rec. S2464 (Mar. 19, 2001) (Sen. Sessions).

The millionaire provisions resolve a complex problem by accommodating two vital interests: increasing the pool of potential candidates and encouraging competition between candidates, and preventing corruption and the appearance of corruption fostered by unlimited campaign contributions. This does not mean that Congress concluded that the normal contribution limits do not better serve the interest in avoiding corruption. See 148 Cong. Rec. S2142 (Mar. 20, 2002) (Sen. McCain). Rather, Congress devised a solution closely drawn to

promote all of these goals by preserving the contribution limits but raising them incrementally in highly specialized circumstances. The "court[s] ha[ve] no scalpel to probe" whether this compromise could have been struck with somewhat different limits. Buckley, 424 U.S. at 30.

B. The Millionaire Provisions Do Not Violate the First Amendment.

The millionaire provisions in no way restrict or limit the amount of money that candidates may expend on their own campaigns. Like the public financing provisions upheld in Buckley, these content-neutral provisions neither impose uneven burdens among candidates nor "abridge, restrict, or censor speech, but rather facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." Buckley, 424 U.S. at 92-93 (footnote omitted). As Senator DeWine explained:

> [T]his amendment will enhance free speech. . . . [T]he end result will not be that the candidate who is the millionaire will have a smaller megaphone. . . . [T]hat millionaire who is putting in his or her own money will have the same megaphone they had before this amendment but what it means is that the candidate who is facing that multimillionaire will also have the opportunity to have a bigger megaphone, to grow that megaphone. [I]t will put more money into the political system, [but] the effect of that money will be to enhance the first amendment. It will be to enhance people's ability to communicate and get a message across without in any way hurting someone else's ability namely the millionaire to get their message across.

147 Cong. Rec. S2546 (Mar. 20, 2001); see also 147 Cong. Rec. S2537-2538 (Mar. 20, 2001) (Sen. DeWine); 147 Cong. Rec. S3236 (Apr. 2, 2001) (Sen. Murray); 147 Cong. Rec. S2549 (Mar. 20, 2001) (Sen. Feingold); 142 Cong. Rec. S6810 (June 25, 1996) (Sen. Feingold).

Just as the Supreme Court in Buckley recognized that presidential candidates are free to choose whether to spend unlimited privately raised funds or to accept public financing along with expenditure limits, see id. at 57 & nn.65, 95, so too are wealthy candidates under BCRA

free to decide whether to spend large amounts of personal funds or to limit their use of personal funds to prevent their opponents from benefiting from the millionaire provisions' higher contribution limits.[133] The millionaire provisions thus do not coerce or punish wealthy candidates. The provisions place no limit on a self-financing candidate's ability to raise sufficient funds. Nor do they place any limit on the amount that such a candidate can spend. And increasing contribution limits for candidates who cannot spend enormous amounts of personal funds promotes First Amendment interests by increasing both the pool of potential candidates and encouraging robust competition in federal elections. See 147 Cong. Rec. S2538-39, 2546 (Mar. 20, 2001) (Sen. DeWine); 147 Cong. Rec. S2453 (Mar. 19, 2001) (Sen. Bennett); 147 Cong. Rec. S2536, 2540 (Mar. 20, 2001) (Sen. Durbin); 135 Cong. Rec. S209 (Jan. 25, 1989) (Sen. Dole).

The lower courts have held in an analogous context that increased contributions for publicly-financed candidates running in opposition to self-funded candidates are constitutional. See Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 38-39 (1st Cir. 1993) (upholding statute allowing publicly-financed candidates to receive increased contributions twice the standard amount); Daggett v. Webster, 205 F.3d 445, 464 (1st Cir. 2000) (plaintiffs "have no right to speak free from response"); Wilkinson v. Jones, 876 F. Supp. 916, 926-28 (W.D. Ky. 1995). As held by the lower court in Daggett:

> [P]laintiffs want to preserve the ability to "out spend" their publicly-financed opponents. The general premise of the First Amendment, on the other hand, is that it

[133] The lower courts have recognized that providing candidates with financial resources to counteract wealthy self-funded opponents is not unconstitutionally coercive. For example, in Wilkinson v. Jones, 876 F. Supp. 916 (W.D. Ky. 1995), the court rejected a challenge to Kentucky's public financing scheme as coercive and found that the self-funded candidate controls the other candidate's access to increased contributions and expenditures. Id. at 926-28; see also Daggett v. Webster, 205 F.3d 445, 468 (1st Cir. 2000) ("[T]he non-participating candidate holds the key as to how much and at what time the participant receives matching funds."). The millionaire provisions provide self-funded candidates comparable control and should likewise be upheld.

> preserves and fosters a marketplace of ideas. See, e.g., Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981). In that view of the world, more speech is better. This "marketplace of ideas" metaphor does not recognize a disincentive to speak in the first place merely because some other person may speak as well.

Daggett, 74 F. Supp. 2d 53, 58 (D. Me. 1999) (footnote omitted).

Nor do the millionaire provisions infringe the First Amendment rights of political party committees and other contributors. From the point of view of contributors, the millionaire provisions provide a benefit, not a burden, in that they provide contributors with an option to give more money to certain candidates who face self-funded opponents. A political party or other contributor who wishes to contribute to a self-funded candidate may still do so under BCRA, and individual contributors can now give $2,000 per election under the generally applicable, increased contribution limits. BCRA § 307. If any contributors, including political parties, wish to treat all their favored candidates equally, nothing in BCRA prevents them from doing so or forces them to give an additional amount to opponents of self-funded candidates. Of course, the millionaire provisions do not in any way limit contributors' ability to support candidates of their choice through other lawful means, e.g., by making independent expenditures, volunteering in a candidate's campaign, or associating with other supporters of the self-funded candidate. See Buckley, 424 U.S. at 28 (upholding contribution limits in part because individuals were still "free to engage in independent political expression" and to express support by volunteering).[134/]

[134/] To the extent that some plaintiffs may argue that the millionaire provisions violate the constitutional rights of the opponents of self-financing candidates, see Adams Compl. ¶ 54, such arguments are patently meritless. The opponents of self-financing candidates receive an unquestionable benefit by gaining the option of accepting contributions in amounts above the standard limits. If they decline to exercise that option for any reason, they are free to make that choice and would suffer no harm. If contributors choose not to give them larger contributions, that is an individual choice neither covered by nor attributable to the statute.

C. The Millionaire Provisions' Declaration-of-Intent Requirement Does Not Violate a Self-Funded Candidate's Right of Free Speech.

Sections 304(b) and 319(b)(1)(B) of BCRA modify the reporting provisions of FECA by requiring candidates to file a declaration stating the amount of personal funds they intend to spend on their campaigns, if the amount exceeds the applicable threshold for their race. The declaration requires only a statement of current intent to self-fund and the anticipated amounts, information that will eventually be reported to the Commission under existing law. See 2 U.S.C. 434; 11 C.F.R. 104. Thus, the essence of the new requirement is timing, not substance. The Supreme Court has already upheld the constitutionality of provisions that require far more disclosure than that contained in the initial declaration. See Buckley, 424 U.S. at 64-68. Disclosing the intended amount of self-financing earlier in the election process creates no significant burden. In fact, since the declaration of intent discloses only the amount of money a declared candidate intends to expend, and nothing about the candidate's views or the identity of his or her supporters, this requirement does not even implicate the "privacy of association and belief" that is the basis for scrutiny under the First Amendment. Buckley, 424 U.S. at 64.

Even if the initial declaration requirement imposed some minimal constitutional burden on self-funded candidates, it serves compelling governmental interests. See Buckley, 424 U.S. at 64-68. Indeed, without this information, the millionaire provisions would be ineffective because neither the candidate opposing a self-financing candidate nor the FEC would have any way of knowing whether he or she qualifies to raise funds under the increased contribution limits. If a self-funded candidate waited until late in the campaign before spending large amounts of personal funds, the purpose of the millionaire provisions would be evaded. "To avoid this type of gamesmanship,"

requiring a declaration of intent "is a legitimate approach for the legislation to take." Daggett, 74 F. Supp. 2d at 59.

D. The Millionaire Provisions Do Not Violate the Fifth Amendment's Equal Protection Guarantee.

The millionaire provisions include no suspect classification, and the provisions therefore need only be rationally related to a legitimate purpose in order to withstand equal protection scrutiny. See, e.g., Heller v. Doe, 509 U.S. 312, 320 (1993).

The millionaire provisions easily withstand rational basis scrutiny. Indeed, as noted above, the provisions satisfy much more rigorous scrutiny; they are closely drawn to advance vital governmental interests. They carefully aim to eliminate the distortion in the campaign finance system created by massive infusions of a candidate's own wealth (which does not reflect that candidates' popularity in the political marketplace)[135] by allowing a candidate without such personal wealth or a large campaign war chest an opportunity to compete on a more equal footing by soliciting contributions in amounts greater than the normal contribution limits.

The millionaire provisions do not violate principles of equal protection because a contributor, under special circumstances, can give additional money to a candidate running against a self-funded candidate. In Buckley, the Court explicitly rejected the claim that contribution limits discriminated between incumbents and challengers, explaining that FECA's limits applied to all candidates without regard to "present occupations, ideological views, or party affiliations." Id.

[135] In Buckley, the Court noted that because of the contribution limit the financial resources available to a candidate's campaign "will normally vary with the size and intensity of the candidate's support," 424 U.S. at 56, but that this "normal relationship" may not apply where the candidate devotes a large amount of his or her personal resources to his or her campaign. Id. at 56 n.63.

at 31; see also Shrink Missouri, 528 U.S. at 389 n.4. The millionaire provisions are equally evenhanded.[136/]

II. SECTION 318 OF BCRA, PROHIBITING CERTAIN POLITICAL CONTRIBUTIONS AND DONATIONS BY CHILDREN AGE SEVENTEEN AND YOUNGER, IS CONSTITUTIONAL.

Section 318 of BCRA prohibits individuals age seventeen or younger from "mak[ing] a contribution to a candidate or a contribution or donation to a committee of a political party." BCRA § 318 (adding a new provision, to be codified as 2 U.S.C. 324). A limit on contributions will be sustained against a First Amendment challenge if the government "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of [First Amendment] freedoms." Buckley, 424 U.S. at 25 (internal quotation marks and citations omitted); see also Shrink Missouri, 528 U.S. at 388.

Contribution limits are central to FECA's system for protecting the integrity of the federal election campaign process. Congress recognized that some parents use their influence over their children and their control over their children's assets to circumvent the limits on contributions to candidates and parties. As a prophylactic measure, BCRA § 318 eliminates this opportunity for evasion, while leaving youngsters with many opportunities to participate in political campaigns.

[136/] As discussed above, the choices the millionaire provisions provide to certain contributors and candidates are additional benefits, not burdens. BCRA does not require any candidate, individual contributor, or political party to treat anyone differently based on any impermissible classification. Indeed, political parties have a long history of spending different amounts of money in support of their various candidates, and nothing in BCRA will require them to change their spending patterns. See, e.g., FEC Press Reports on Party Spending 1994-2000 Elections, www.fec.gov; Krasno & Sorauf Expert Rep. at 36; In fact, political parties have tried to recruit millionaire candidates precisely so that the party would not need to spend as much of its own money to assist them. See, e.g., Herrnson Expert Rep. in RNC v. FEC at 29-30; Kolb Decl. Ex. 1 at 18-20 [DEV 7-Tab 24]; Krasno & Sorauf Expert Rep. at 70; 147 Cong. Rec. S2537, S2546 (Mar. 20, 2001) (Sen. DeWine); 147 Cong. Rec. S2464 (Mar. 19, 2001) (Sen. Sessions).

A. The Restriction Serves the Important Governmental Interest in Preventing the Use of Children to Evade FECA's Contribution Limits.

Contribution limits serve the important governmental interest in foreclosing opportunities for corruption and the appearance of corruption, and the Supreme Court has long upheld such limits for that reason, despite the resulting restrictions on First Amendment rights. BCRA § 318 serves the equally important interest in preventing circumvention of contribution limits, and likewise comports with the First Amendment. See 148 Cong. Rec. S2145 (Mar. 20, 2002) (Sen. McCain) (provision added "to prevent evasion of the contribution limits."). "[A]ll members of the Court agree that circumvention is a valid theory of corruption." Colorado II, 533 U.S. at 456. One need not find that most parents seek to evade the limits to conclude that prophylactic measures are warranted. See Buckley, 424 U.S. at 30 (upholding $1,000 limit on individual contributions even though the Court assumed that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action"). Cf. NRWC, 459 U.S. at 210 ("Nor will we second-guess a legislative determination as to the need for prophylactic measures when corruption is the evil feared.").

The need for the prophylactic measure adopted by Congress here is clear. The Commission has long been concerned that "contributions are sometimes given by parents in their children's names," thereby circumventing FECA's contribution limits. See FEC Annual Report 1992, at 64 (1993) [DEV 14-Tab 1];[137] see also 148 Cong. Rec. S2145 (Mar. 20, 2002) (Sen. McCain) ("[T]here is substantial evidence that individuals are evading contribution limits by directing their children to make contributions."); Thompson Comm. Rep. at 4504 ("There is ... substantial evidence that minors are being used by their parents, or others, to circumvent the limits imposed on

[137] For years, the Commission in its annual report notified Congress that some parents have been undermining FECA's contribution limits through contributions purportedly made by their children, and each year, the Commission recommended that Congress enact legislation to prevent the abuse. See FEC's annual reports for 1992-2000 [DEV 14 & 15].

contributions.").[138] Some parents use their own resources, directly or through gifts to their child, to make the contribution under the child's name. For example, in MUR 4484, a father made $1,000 contributions to four candidate committees in the name of his infant son. See INT 015778-859 [DEV 52-Tab 5] (Documents Relating to MUR 4484 (Stewart Banium, Jr., et al.)); FEC 101 0001-0055, 0323-28, 137 0001-13 [DEV 133-Tab 3]; see also INT 015610-13 [DEV 43-Tab 3] (MUR 3268, Jan. 31, 1992 Letter to Michael Lolicata, re: Closing of Investigation; Factual and Legal Analyses); FEC 138-0026-0034 [DEV 43-Tab 5] (MUR 4048). Other parents use their control over their children and their children's assets to cause contributions of funds belonging to the children. In MUR 4255, for example, a father who had given a candidate nearly the statutory maximum and whose wife had contributed the maximum to the same candidate used money from the bank accounts of his one-year-old and three-year-old children to make three $1,000 contributions to the candidate in the children's names. See USA-CIV00890-759 & FEC119-0016- 0023 [DEV 43-Tab 4] (Documents relating to MURs 4252, 4253, 4254, & 4255); see also INT 015867-72 [DEV 43-Tab 1] (MUR 488: First General Counsel's Report); see generally Alan C. Miller, Minor Loophole, L.A. Times, Feb. 28, 1999 (report on study commissioned by the newspaper), reprinted in 148 Cong. Rec. S2146-S2148 (Mar. 20, 2002).[139]

[138] Political fundraisers may unwittingly be encouraging parents in this conduct. As an experienced fundraiser has explained, "Normally when we go out and solicit campaign contributions we do not limit it to the individual. We also want to know whether or not their spouse or their minor or adult children would like to make some campaign contributions." 147 Cong. Rec. S2933 (Mar. 27, 2001) (Sen. Dodd). Dodd was chairman of the DNC in 1995-96 and has served in Congress since 1974. Michael Barone, Richard E. Cohen, with Charles E. Cook Jr., The Almanac of American Politics 2002, at 324, 328 (2001).

[139] See also USA-CIV 00700-05 [DEV 44] (David Mastio, The Kiddie-Cash Caper: Gifts from Minors Are the Next Big Campaign Loophole, Slate.com, posted May 21, 1997); USA-CIV 00783 [DEV 44] (Rise in Student Gifts Begs Question: Was Law Broken?, USA Today, May 20, 1997, at 12A); FEC 137 0009-0012 [DEV 134-Tab 3] (Chris Harvey, The Young and the Generous: Md. Children Give to Campaigns, Wash. Post, Nov. 20, 1995, at B01); (Alex Knott, Members Cash In on Kid Contributions, Roll Call, June 5, 1995, at A-1, reprinted in 148 Cong. Rec. S2146 (Mar. 20, 2002); FEC 137 0008 (Jerry Landauer, Kiddies Go Krazy Over Carter, Break Open Piggy Banks, Wall St. J., July 8, 1976, at 1, 27).

The problem has persisted despite the statutory prohibition against contributions made "in the name of another person" (2 U.S.C. 441f) and a Commission regulation that specifies the conditions under which a contribution may be attributed to a child under the age of eighteen. The regulation requires that the child "knowingly and voluntarily" make the decision to contribute. 11 C.F.R. 110.1(i)(2)(i) (2002 rev. ed.). In addition, the child must have exclusive ownership or control of the funds or goods contributed, and those items cannot have been given to the child for use in making political contributions. 11 C.F.R. 110.1(i)(2)(ii), (iii).

Because FECA does not require political committees to seek or report the age of contributors, the reports filed with the Commission do not reveal the number of contributions by children. However, for each contribution over $200, FECA does require recipient committees to attempt to learn the occupation of the contributor, see 2 U.S.C. 431(13), 432(c)(3), 434(b)(3)(A), and "student" is the most likely occupational category for young contributors.[140/] In the 1999-2000 election cycle, "students" made 3,133 contributions of $200 or more, with an aggregate value of $3,049,945. See Biersack Decl. Tbl. 20 [DEV 6-Tab 6]. Of these, 2,995, or 96%, with an aggregate value of $2,857,961, were to candidate and party committees. Id. [141/]

[140/] The occupational category of "student" is both under- and over-inclusive with respect to minors who make political contributions. On the one hand, some parents attribute to their child who allegedly made a contribution an occupation other than "student." Moreover, where no occupation is listed on a contribution form, the treasurer of a political committee need only use his or her "best efforts" to obtain contributor information, so the occupation of many contributors is never reported. 2 U.S.C. 432(i); RNC v. FEC, 76 F.3d 400, 403 (D.C. Cir. 1996). On the other hand, the category of "student" obviously encompasses individuals older than seventeen years of age.

[141/] Except for a dip during the 1997-98 election cycle, the number of "student" contributions during the 1990s rose with each successive cycle. See Biersack Decl. Tbl. 20.

B. The Prohibition of Certain Contributions by Children Is Carefully Drawn to Prevent Circumvention of the Statutory Dollar Limits by Other Individuals.

By law as well as tradition, parents are entitled to control, influence, and direct their children. "[T]he parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." Ginsberg v. New York, 390 U.S. 629, 639 (1968). The Constitution and state law recognize and protect this traditional parental authority. "[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion); see also id. at 78 ("Whether for good or ill, adults not only influence but may indoctrinate children.") (Souter, J., concurring); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish parents may terminate the formal education of their adolescent children sooner than the compulsory school attendance laws would allow); Tex. Code Ann. Fam. § 151.003 ("A state agency may not adopt rules or policies or take any other action that violates the fundamental right and duty of a parent to direct the upbringing of the parent's child.").

Parental rights compound the practical problems the Commission faces in attempting to investigate and prove whether a child knowingly and voluntarily made a particular contribution, and thus whether the parent has violated the contribution limits. As in MUR 4254, some parents will invoke their parental rights and refuse to have their child make an affidavit or submit to questioning. See USA-CIV00932 [DEV 43-Tab 4]. Even when the Commission has unimpeded access to a child, the Commission may not be able to obtain reliable evidence whether the child, rather than the parent, "made" the contribution because of parental influence and the child's immaturity. As the Commission's Office of General Counsel has noted, determining whether a child had the requisite

knowledge and capacity and acted voluntarily "becomes a very subjective decision." See USA-CIV00930 [DEV 43-Tab 4] (General Counsel's Report, MURs 4252-55, at 10); see also FEC 138-0055, 0056; FEC 138-0059, 0060 [DEV 43-Tab 5] (Selected Documents from MURs 199, 4048, 4208, and Pre-MUR 318). Enforcement of the limits is particularly difficult where the contributing children come from "politically active families; yet these are the very individuals who are most likely to make such contributions." See USA-CIV00925 [DEV 43-Tab 4] (General Counsel's Report, MURs 4252-55, at 5). Although the children's exposure to a candidate or his or her campaign can be consistent with an independent choice to contribute, it does not foreclose the possibility of parental manipulation or direction.

Nonetheless, in enacting section 318, Congress "recognize[d] that many individuals under the age of 18 support candidates with great fervor and feel passionately about public issues." 148 Cong. Rec. S2146 (Mar. 20, 2002) (Sen. McCain). As Senator McCain explained, "We do not mean to suggest that children should not be able to participate in the political system.... We simply believe that allowing them to contribute to candidates presents too great a risk of abuse." Id.[142/] Congress's solution therefore targets the most troubling opportunity for circumvention, and leaves children with a variety of other ways to participate in political campaigns. They may volunteer their services to a candidate for federal office or to a political committee, including a party committee. See 2 U.S.C. 431(8)(B)(i); 11 C.F.R. 110.19(d) (approved Oct. 31, 2002).[143/] They may make

[142/] In its report on illegalities in the 1996 federal elections, the Thompson Committee recommended that children be precluded from contributing to candidates for federal office. Thompson Comm. Rep. at 4504. This recommendation was part of a broader proposal that "those [individuals] ineligible to vote be precluded from making contributions to candidates for federal office. . . . [E]ach contributor [should be] an American citizen of voting age." Id.

[143/] See, e.g., FEC 137 0013 [DEV 134-Tab 3] (Editorial, Youths can play politics without donating money, Pantagraph.com, dated Apr. 13, 2002).

unlimited independent expenditures to express their views, and they may contribute to independent political committees. See 2 U.S.C. 441a(a)(1)(C).

No one could reasonably argue that babies, toddlers, and other young children are capable of knowingly and voluntarily making contributions (or that those children, as a usual practice, have exclusive control over the assets used for the contribution). Thus, the matter comes down to the decision where to draw the line. Congress chose the age of eighteen. The Supreme Court has recognized that "'when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.'" Buckley, 424 U.S. at 83 n.111 (internal citation omitted); see also id. at 30 ("Congress' failure to engage in ... fine tuning does not invalidate the legislation."); Stiles v. Blunt, 912 F.2d 260, 267 (8th Cir. 1990) ("[W]hether the minimum age [to run for state representative] should be 18, 21, 24, or some other age is a classic example of legislative line-drawing that we must leave undisturbed."); Gaunt v. Brown, 341 F. Supp. 1187, 1189 (S.D. Ohio) ("Age limit on voting necessarily must be arbitrary"), aff'd, 409 U.S. 809 (1972); Craig v. Boren, 429 U.S. 190, 210 n.24 (1976) ("[T]he Legislature is free to redefine any cutoff age for the purchase and sale of 3.2% beer that it may choose.").

The Constitution distinguishes between individuals under age eighteen and those over that age. Most notably, the Constitution does not guarantee children seventeen years and younger the right to vote, see U.S. Const. amend. XXVI, although "the right of suffrage is a fundamental matter in a free and democratic society." Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). In general, "the constitutional rights of children cannot be equated with those of adults." Bellotti v. Baird, 443 U.S. 622, 634 (1979). "Even where there is an invasion of protected freedoms 'the power of the state to

control the conduct of children reaches beyond the scope of its authority over adults.'" Ginsberg, 390 U.S. at 638 (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)). In cases where the Supreme Court has upheld children's claims to constitutional protection, "[t]hese rulings have not been made on the uncritical assumption that the constitutional rights of children are indistinguishable from those of adults." Bellotti, 443 U.S. at 635.

The treatment of children seventeen and younger in section 318 is consistent with state law that limits the rights and privileges of minors. See, e.g., Richard A. Leiter, National Survey of State Laws 444-55 (3d ed. 1999). In most states, only someone eighteen years of age or older is capable of controlling and disposing of his or her property, is qualified to serve on a jury, see 33 Council of State Governments, The Book of the States 386-87 (2000-01 ed.) (Tbl. 7.32 ("Minimum Age for Specified Activities")); see also 28 U.S.C. 1865(b)(1), and is eligible to vote for candidates for public office.[144/] With respect to children younger than eighteen, under state law, parents generally "have the right to make all decisions regarding the child's care and control, education, health, residence, associates, and religion," and children "must, in general, follow the direction of their parents." 1 Donald T. Kramer, Legal Rights of Children ("Legal Rights") § 14.03, at 591 (footnotes omitted) (2d ed. 1994). See, e.g., Tex Code Ann. Fam. § 151.001 ("Rights and Duties of Parent") (Vernon 2002). Moreover, unless parents relinquish the right, they are entitled to the services and earnings of their minor children.[145/] Although minors have the right to acquire and own some

[144/] FEC, State Voter Registration Requirements, www.fec.gov/votregis/state_voter_ reg_ requirements02.htm (9/25/02).

[145/] See, e.g., Ga. Code § 19-7-1(a) ("Until he reaches the age of majority, the child shall remain under the control of his parents, who are entitled to his services and the proceeds of his labor."); Cruz v. Broward Cty School Bd., 800 So. 2d 213, 215 (Fla. 2001); Dixon v. State, 579 So. 2d 29, 32 (Ala. Crim. App. 1990).

property, "they are considered incapable of property management." 1 Legal Rights § 801, at 394-95 (footnote omitted).

Other restrictions also apply. For example, state law provides that contracts by minors are generally voidable.[146/] In most states, minors must sue or be sued through adult parties representing their interests, and the federal courts apply that law.[147/] Indeed, the present litigation illustrates this point.[148/] With the consent of a parent or guardian, a youth under eighteen may engage in some activities ordinarily reserved for individuals eighteen or older. See, e.g., 10 U.S.C. 505(a) (enlistment in the armed forces). However, the youth is not thereby entitled to engage in the full range of adult activities. For example, he or she still may not vote or purchase alcohol. See The Book of the States 386 (table).

Finally, contributions by minors of all ages, even adolescents, present additional practical difficulties. The Commission either can accept at face value self-serving, conclusory, and sometimes lawyer-crafted statements of family members,[149/] or it can probe for the truth by querying youngsters about their knowledge of politics and their relationship with their parents in ways that may threaten the privacy of the family.[150/] See Merriken v. Cressman, 364 F. Supp. 913, 915 (E.D.

[146/] See, e.g., Ga. Code §§ 1-2-8, 13-3-20, 44-5-41 (2002); Byrd v. Commercial Credit Corp., 675 So. 2d 392, 393 (Ala. 1996); Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 357 (Fla. Dist. Ct. App. 1997).

[147/] See 1 Legal Rights §§ 11.01-11.02, at 517-18; §§ 12.01-12.05, at 530-45; Fed. R. Civ. P. 17(b) (law of domicile establishes capacity to sue or be sued) and 17(c) (appointment of representative for "infants or incompetent persons").

[148/] See Caption of Echols Amend. Compl. Since the McConnell Second Amended Complaint does not indicate that the two minor plaintiffs in that case, O'Brock (see ¶ 40) and Southerland (see ¶ 41), sued through adult representatives, they apparently are improper parties to this litigation. See La. Civ. Code Ann. art. 29, 216 (West 2002); La. Code Civ. Proc. Ann. art. 683 (West 2002); Ga. Code §§ 9-2-28, 29-4-7, 39-1-1(a); Miracle v. Spooner, 978 F. Supp. 1161 (N.D. Ga. 1997).

[149/] See FEC 138-0008 to 0014 [DEV 43-Tab 5] (MUR 199); FEC 137-0018 [DEV 43-Tab 1] (MUR 488); FEC 138-0044, 0045, 0050 [DEV 43-Tab 5] (MUR 4208); FEC 101 0050-55 [DEV 134-Tab 3] (MUR 4252).

[150/] See FEC 119-0017, 0021 [DEV 43-Tab 4] (Letter from Loren W. Hershey (father) to the Federal Election Commission re: MUR 4254, Oct. 13, 1995, at 2, 6).

Pa. 1973) (holding unconstitutional a questionnaire for high school students that was intended to help identify potential drug abusers and that asked "personal questions about [the students'] relationship with parents and siblings"); Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998) (absent significant harm to child, state constitution protects privacy of family from intrusion by government).

In sum, section 318 of BCRA "restores the integrity of the individual contribution limits," 148 Cong. Rec. S2145-S2146 (Mar. 20, 2002) (Sen. McCain), and provides a constitutional solution to vexing problems the Commission faces in enforcing those limits. The limited prohibition it imposes is clearly consistent with long-established restrictions on the liberties and activities of minors.

III. THE INCREASE IN THE INDIVIDUAL CONTRIBUTION LIMIT TO $2,000 IS CONSTITUTIONAL.

BCRA § 307(a)(1) increases the amount that an individual may contribute to a candidate per election from $1,000 to $2,000. The plaintiffs in Adams assert that this new limit will violate their right to equal protection under the Fifth Amendment because the voter plaintiffs, and the supporters of the candidate plaintiffs, do not have sufficient funds to contribute $2,000.

A. The *Adams* Plaintiffs Lack Article III Standing.

BCRA's increase in the individual contribution limit does not restrict the activities of the Adams plaintiffs in any way. The candidate plaintiffs can still run for office, the voter plaintiffs can still make the same contributions they did under the $1000 limit, and the organizational plaintiffs can still educate and lobby as they did before. Thus, BCRA § 307(a)(1) causes them no injury in fact, an essential requirement of standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61

(1992). Any decision by the candidate plaintiffs to limit the size of contributions they will accept would be a self-imposed injury not caused by BCRA, any lack of personal wealth that prevents the voter plaintiffs from making larger contributions is also not caused by BCRA, and the organizational plaintiffs have no protected constitutional right to have legislators accept their lobbying positions. Cf. Georgia State Conference of NAACP Branches v. Cox, 183 F.3d 1259, 1263-64 (11th Cir. 1999) (no "right to equal influence in the overall electoral process").

Plaintiffs' real claim is that the Constitution requires the government to prevent other citizens from raising and contributing more than they do, but "Buckley made clear that contributors cannot be protected from the possibility that others will make larger contributions." Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981) (citations omitted). For all these reasons, plaintiffs raising similar claims have repeatedly been found to lack constitutional standing. See, e.g., Cox, 183 F.3d at 1262-64; Albanese v. FEC, 78 F.3d 66, 68 (2d Cir. 1996); Whitmore v. FEC, 68 F.3d 1212, 1215 (9th Cir. 1995); see also NAACP v. Jones, 131 F.3d 1317, 1324 (9th Cir. 1997); Winpisinger v. Watson, 628 F.2d 133, 137-39 (D.C. Cir. 1980).

B. BCRA's Increase in the Individual Contribution Limit Does Not Violate the Equal Protection Component of the Fifth Amendment.

Because wealth is not a suspect category, BCRA's increase in the individual contribution limit is subject to review only for a rational basis.[151] The new $2,000 limit serves the same purpose as the original $1,000 contribution limit minimizing the opportunity for corruption and the appearance of corruption. See Buckley, 424 U.S. at 23-35; Shrink Missouri, 528 U.S. at 397-98. The

[151] "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Buckley, 424 U.S. at 93. Race is a suspect category, but the $2000 contribution limit applies the same to candidates and contributors of all races. The Adams plaintiffs allege only disparate impact, not discriminatory intent, and that is not a basis for finding unconstitutional discrimination.

change to a $2,000 limit simply reflects some of the impact of inflation in the quarter century since the original $1,000 limit was upheld in Buckley.[152/]

There is no arguable basis for the judiciary to require Congress to tighten the contribution limit. "[T]he Act applies the same limitation on contributions to all candidates regardless of their present occupations, ideological views, or party affiliations." Buckley, 424 U.S. at 31; see also id. at 56 ("[N]othing invidious, improper, or unhealthy in permitting [campaign contributions] to be spent to carry the candidate's message to the electorate.") (footnote omitted). "[I]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." Buckley, 424 U.S. at 30 (internal citation omitted). Accord, Shrink Missouri, 528 U.S. at 387-88.

[152/] See, e.g., 148 Cong. Rec. H443 (Feb. 13, 2002) (Rep. Shays); 147 Cong. Rec. S3006 (Mar. 28, 2001) (Sen. Thompson) (The $1,000 limit "has not been indexed for inflation since 1974"); id. at S3011 (Sen. Feinstein) ("Ordinary inflation has reduced the value of a $1,000 contribution to about one-third of what it was in 1974.").