No. 02-1733

In The

Supreme Court of the United States

NATIONAL RIGHT TO LIFE COMMITTEE, INC., ET AL.,
Appellants,
v.
FEDERAL ELECTION COMMISSION, ET AL., *Appellees.*

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

Jurisdictional Statement

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May 28, 2003

Questions Presented

1. Whether the prohibition of § 101 of the Bipartisan Campaign Reform Act of 2002 (BCRA) on the solicitation, receipt, redirection, or use of "soft money" by any national political party for any communication that "promotes or supports . . . or attacks or opposes" a federal candidate, violates the First and Fifth Amendment and principles of federalism.

2. Whether the prohibition on federal officeholders and candidates from soliciting, receiving, directing, transferring, or spending "soft money" contained in BCRA § 101 violates the First Amendment.

3. Whether the prohibition on state officeholders and candidates from soliciting, receiving, directing, transferring, or spending "soft money" in connection with an election for federal office in BCRA §101 violates the First Amendment.

4. Whether the backup "electioneering communication" definition at BCRA§ 201, or its construction by the district court, violates the First Amendment.

5. Whether the requirements that "disbursements" and "expenditures" be reported as occurring when contracted for, rather than when made, BCRA §§ 201 and 212, are justiciable and violate the First Amendment.

6. Whether District Court injunction should extend to activities outside the District of Columbia.

7. Whether BCRA § 403(b), permitting members of Congress to intervene, and the permitted intervention by Intervenor-Defendants without regard to whether they have Article III standing, violates the Constitution.

Parties to the Proceedings

This jurisdictional statement is filed on behalf of the following **Plaintiffs-Appellants** represented by the James Madison Center for Free Speech (JMC Appellants): U.S. Representative Mike Pence, Alabama Attorney General Bill Pryor, Libertarian National Committee, Inc. (LNC), Club for Growth, Inc. (CFG), Indiana Family Institute, Inc. (IFI), National Right to Life Committee, Inc. (NRLC), National Right to Life Educational Trust Fund (NRL Ed Fund), and National Right to Life Political Action Committee (NRL PAC).[1]

As to the **appeal of the denial of the *Madison Center Plaintiffs' Motion to Alter or Amend the Judgment*** herein, Trevor M. Southerland, and Barret Austin O'Brock were also plaintiffs below and are appellants along with the previously listed JMC Appellants.[2]

Plaintiffs below not represented by the Madison Center were U.S. Senator Mitch McConnell, former U.S. Representative Bob Bar, American Civil Liberties Union, Associated Builders and Contractors, Inc., Associated Builders and Contractors Political Action Committee, Center for Individual Freedom, National Right to Work Committee, 6-Plus Association, Inc., Southeastern Legal Foundation, Inc., U.S. English d/b/a/ ProENGLISH, Thomas McInerney.

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[1]**Withdrawn Plaintiffs** below are Alabama Republican Executive Committee, Libertarian Party of Illinois, Inc., DuPage Political Action Council, Jefferson County Republican Executive Committee, Christian Coalition of America, Inc., and Martin Connors.

[2]The Madison Center represented these two minors, who would be appellees as to their successful challenge to the ban on contributions by minors to candidates or political party committees. Mr. Southerland will become 18 years of age on May 28, 2003.

Defendants and **Intervenor-Defendants**, Appellees, herein, are the Federal Election Commission (FEC), Federal Communication Commission (FCC), John D. Ashcroft, in his capacity as Attorney General of the United States, the United States Department of Justice; and the United States of America, U.S. Senator John McCain, U.S. Senator Russell Feingold, U.S. Representative Christopher Shays, U.S. Representative Martin Meehan, U.S. Senator Olympia Snowe, and U.S. Senator James Jeffords.

Defendants in consolidated cases: (in addition to those named above) David W. Mason, Ellen L. Weintraub, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas, and Michael E. Toner, in their official capacities as FEC Commissioners.

Plaintiffs in consolidated cases:

- *National Rifle Ass'n v. FEC*, No. 02-581 — National Rifle Association of America (NRA) and NRA Political Victory Fund
- *Echols v. FEC*, No. 02-633 — Emily Echols, Daniel Solid, Hannah McDow, Isaac McDow, Jessica Mitchell, and Zachary White.
- *Chamber of Commerce v. FEC*, No. 02-751 — Chamber of Commerce of the United States, U.S. Chamber Political Action Committee, and National Association of Manufacturers (Plaintiff National Association of Wholesaler-Distributors withdrew.)
- *National Ass'n of Broadcasters v. FEC*, No. 02-753 — National Association of Broadcasters
- *AFL-CIO v. FEC*, No. 02-754 — AFL-CIO and AFL-CIO Committee on Political Education and Political Contributions

- *Paul v. FEC*, No. 02-781 — U.S. Representative 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 Clara Howell
- *Republican National Committee v. FEC*, No. 02-874 — Republican National Committee, (RNC), Robert Michael Duncan, former Treasurer, current General Counsel, and Member of the RNC, the Republican Party of Colorado, the Republican Party of New Mexico, the Republican Party of Ohio, and the Dallas County (Iowa) Republican County Central Committee
- *California Democratic Party v. FEC*, No. 02-875 — California Democratic Party, Art Torres, Yolo County Democratic Central Committee, California Republican Party, Shawn Steel, Timothy Morgan, Barbara Alby, Santa Cruz County Republican Central Committee, and Douglas Boyd, Jr.
- *Adams v. FEC*, No. 02-877 — Victoria Jackson Gray Adams, Carrie Bolton, Cynthia Brown, Derek Cressman, Victoria Fitzgerald, Anurada Joshi, Peter Kostmayer, Nancy Russell, Kate Seely-Kirk, Rose Taylor, Stephanie Wilson, California Public Interest Research Group (PIRG), The Fannie Lou Hamer Project, and Association of Community Organizers for Reform Now
- *Thompson v. FEC*, No. 02881 — U.S. Representatives Bennie Thompson and Earl Hilliard.

Corporate Disclosure Statement

None of the appellants has a parent corporation and no publicly held company owns ten percent or more of the stock of any of the appellants. Rule 29.6.

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Opinions Below

The district court's opinions have not yet been reported. *See* Appendix (App.) 3a. They are reprinted in a joint Supplemental Appendix filed in this appeal. JMC Appellants' Notice of Appeal is reprinted at App. 1a-2a. Their Second Notice of Appeal is reprinted at App. 69a.

Jurisdiction

The district court issued judgment on May 1, 2003. Appeal is direct. BCRA § 403(a)(1). JMC Appellants noticed appeal on May 7, 2003. On May 19, 2003, the district court denied *Madison Center Plaintiffs' Motion to Alter or Amend the Judgment* on May 19, 2003, and their Second Notice of Appeal as to this issue was filed on May 28, 2003. This Court has jurisdiction. 28 U.S.C. § 1253.

Constitutional & Statutory Provisions

BCRA is reprinted at App. 7a-68a.

Article I, § 4, of the U.S. Constitution is at App. 4a.

Article III, §2, clause 1, of the U.S. Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States, – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The First Amendment to the Constitution is at App. 5a.

The Fourteenth Amendment to the Constitution is at App. 6a.

The Tenth Amendment to the Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Statement of the Case

The Litigation

This case involves multiple challenges to BCRA, which itself amends the Federal Election Campaign Act (FECA), Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended by Pub. L. No. 93-443, 88 Stat. 1263 (1974) at 2 U.S.C. §§ 431-455).

FECA set limits on the amount of money that individuals, political parties, and political committees may contribute to candidates, i.e., limits on "hard money." BCRA raises the contribution limits on individuals to candidates and political parties and the amount individuals may contribute, in aggregate, to all candidates, political committees, and political party committees. JMC Appellants do not challenge these FECA or BCRA "hard money" limits.

Many of the restrictions contained in the 1974 amendments to the FECA were challenged in *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, this Court recognized that contributions and expenditures involved the First Amendment rights of free speech and association. *Id.* at 19-23. At the same time, the Court recognized a compelling governmental interest in "prevention of corruption and the appearance of corruption" that would justify limits on contributions to candidates. *Id.* at 25.

As a result, the *Buckley* Court upheld FECA's contribution limits to candidates, but stuck down its limits on campaign expenditures. *Id.* at 24-59. In the course of so deciding, this Court carefully distinguished between funds used for "express advocacy" (communications which expressly advocate the election or defeat of a clearly identified candidate by use of explicit words of advocacy) and "issue advocacy" (communications on issues of public concern that do not contain express advocacy). *Id.* at 44.

BCRA contains four titles that significantly expand the reach of FECA and that contain elements subject to challenge in this litigation.

Title I prohibits national political party committees for using money raised in compliance with state law, but not in compliance with federal law ("soft money"), for any purpose and from transferring it to any other entity, including state and local party committees. It forbids state and local party committees from spending non-federal money for any "federal election activity," which includes voter registration, voter identification, get-out-the-vote activity, and generic campaign activity when there is a federal candidate on the ballot, including advertising with certain references to federal candidates. It generally forbids federal officeholders and candidates from participating in raising or spending any non-federal funds, for themselves or others for "federal election activity." It bars state candidates from using non-federal funds for communications regarding candidates for federal office, even if those communications do not contain express advocacy.

Title II of BCRA, §§ 201 and 204, forbids corporations, unions, and entities using monies donated by unions and corporations from disbursing funds for "electioneering communications" – which § 203 defines as any broadcast advertisement within 30 days of a primary and 60 days of a general

election that "refers to a clearly identified candidate for Federal office." Section 203 includes a fallback definition of "electioneering communications" that includes any broadcast advertising at any time that "promotes," "supports," "attacks," or opposes a federal candidate and is "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." Disclosures to the FEC are also required of all persons who spend $10,000 on "electioneering communications." Sections 201 and 212 of Title II also impose disclosure requirements on those who enter into contracts to disburse funds for electioneering communication, regardless of whether communication occurs. Section 202 treats coordinated disbursements for electioneering communications as contributions to candidates. Section 213 requires political parties to choose whether to make independent or coordinated expenditures on behalf of a candidate.

Title III of BCRA, § 318, forbids minors from contributing "hard money" to any federal candidate and either "hard" or "soft" money to a political party committee. Section 305 conditions securing the lowest rates for broadcast advertising for federal candidates on certification that other candidates will not be referred to in the advertisement or that the advertisement will include a specified statement or identification. Section 311 requires detailed identification of sponsors of express advocacy or "electioneering communications." Sections 304, 316, and 319 increase the limitations on contributions and coordinated expenditures for candidates who have opponents with certain levels of personal funds in their campaigns.

Title V of BCRA, § 504, requires broadcasters to collect and disclose records of requests to buy broadcast time for communications "relating to any political matter of national importance," regardless whether the communications are made.

After BCRA was signed into law, eleven complaints were filed in the United States District Court for the District of Columbia challenging the constitutionality of multiple provisions of BCRA. The cases were consolidated under BCRA § 403 before a three-judge panel. Expedited discovery was ordered; witnesses filed written statements and were cross-examined without immediate judicial oversight. Expedited briefing ensued, oral argument was held on December 4 and 5, 2002; the district court issued its Final Judgment on May 1, 2003, upholding and striking down various provisions of BCRA. JMC Plaintiffs filed their Motion to Alter or Amend the Judgment on May 19, 2003. JMC Appellants filed their Notice of Appeal as to the judgment on May 7, 2003, and their Notice of Appeal as to the denial of *Madison Center Plaintiffs' Motion to Alter or Amend the Judgment* on May 28, 2003.

The Uniqueness of JMC Appellants

This Jurisdictional Statement is filed on behalf of JMC Appellants with special characteristics that render their standing unquestionable. They include a unique minority national political party, a federal officeholder and candidate, a state officeholder and candidate, a broad spectrum of nonprofit issue advocacy groups, and a political action committee. Their wide range assures that, on nearly all issues, a JMC Appellant has Article III standing to challenge the particular BCRA provisions in question. Particular details about four of these Appellants highlights their uniqueness and clear standing, describing the conduct in which they engage that would violate BCRA.

Libertarian National Committee (LNC) is the governing body of the Libertarian Party at the national level.[3] The LNC is

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[3]The Libertarian National Committee is the only national political party committee in *McConnell v. FEC,* thus the only party with standing to challenge BCRA's many restrictions on the conduct

a nonprofit corporation that seeks to advance the principle that all individuals have the right to exercise sole dominion over their lives and have the right to live in whatever manner they choose, so long as they do not forcibly interfere with the equal right of others to live in whatever manner they choose.

The impact of BCRA on the Libertarian National Committee is significantly greater than on the Democratic National Committee (DNC) or Republican National Committee (RNC). The Libertarian Party is much smaller than either of the major parties. In size and administrative sophistication, the LNC is similar to a typical state affiliate of the RNC or DNC. The LNC does not seek, accept, or use any federal funds to conduct its campaigns.

The general administrative burdens imposed by FECA are the same on all political parties, regardless of size, so that the LNC must expend a relatively higher percentage of its resources on compliance with FECA than the RNC or DNC – a situation exacerbated by BCRA. Moreover, the LNC has less relative expertise and sophistication, a greater likelihood that it will commit errors in administering the requirements of FCA, and will have greater administrative duties advising state affiliates as the result of BCRA – all to the further relative detriment of the LNC. Considerable administrative expenses will be incurred and changes in the infrastructure of the Libertarian national and state parties will also be required in order to comply with BCRA.

Only 10-15% of LNC funds are placed in its "soft money" account, a far lower percentage than for the RNC or DNC, which place more than half their funds in "soft money" accounts. At present, the LNC has three principle sources of non-federal money: 1) list rental fees, 2) dues paid through state

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of national political parties.

affiliates and forwarded from the state affiliates to the LNC, and 3) advertising in the LNC's newspaper, the *Libertarian Party® News,* and elsewhere. Only 7 of the 51 state affiliates of the national Libertarian Party have registered as political committees with the FEC, subject to FECA requirements. Very little money received by LNC is from any corporate source (if funds from renting lists or advertising in the *Libertarian Party®News* are discounted) or from large individual contributions. In 2002, for example, only one individual contribution exceeded $20,000. During the past six years, no more than 4 donors to the LNC have exceeded this limit in any one year.

No federal officeholder has been a candidate of the Libertarian Party, and no candidate of the Libertarian Party has ever won a race for federal office. Libertarian Party federal candidates know that they have only a remote chance to win federal office, and they use their candidacies for running educational/issue advocacy campaigns that concentrate on advancing libertarian principles. Libertarian Party federal candidate campaigns are also focused on fostering party growth and gaining and maintaining ballot access in order to assure that there will be an electoral forum in which federal candidates might advocate libertarian principles. The Libertarian Party also sometimes raises issues without any express reference to any Libertarian Party federal candidate when major party candidates are not addressing them.

The LNC has in the past and intends in the future to engage in conduct that would violate BCRA. It solicits, receives, and uses non-federal funds to advocate issues, and, as a means to this end, supports Libertarian Party candidates in campaigns for federal and state elective office – although no Libertarian Party candidate has ever been elected to federal or statewide office.

It solicits, receives, and uses non-federal funds to finance issue advocacy communications. It transfers non-federal funds

to state-affiliated parties that have in the past and intend in the future to receive such funds. It communicates with candidates for federal office and with federal officeholders and spends non-federal funds for issue advocacy communications regarding issues supported by federal candidates and federal officeholders. The LNC makes both independent and coordinated expenditures on behalf of it's candidates for state and federal office, after the party's candidates are nominated, and transfers funds between national, state, and local party committees. The LNC solicits funds for and makes donations to I.R.C. § 527 and I.R.C. § 501(c) organizations that make expenditures and disbursements in connection with federal elections.

The Libertarian National Committee is a membership organization that requires the regular payment of dues from members to the LNC. Dues are frequently paid to state-affiliated Libertarian Parties, with a portion to be distributed to the Libertarian National Committee, so that those who pay dues may be members of both the state and national parties. Dues are often paid by one person on behalf of another, as a wife might pay for a husband, and are often paid with delays in forwarding them to the LNC. In these circumstances, the funds are appropriately deposited in state affiliates' "soft money" accounts. Under BCRA, these funds may not be transferred to the LNC, so that members who pay dues in such a manner must be denied membership in the Libertarian National Committee. Further, the LNC is substantially sustained by non-federal funds dues transfers from state-affiliated parties to the LNC and by purchases of literature and other educational materials from the LNC by state-affiliated parties. By forbidding such non-federal funds transfers, BCRA thus effectively criminalizes the entire current structure of the Libertarian National Committee as a membership organization.

The LNC has in the past and intends in the future to use non-federal funds to finance its ballot access drives and to finance all of its national conventions, which are held every other year. Libertarian Party conventions, held in years when there are no federal presidential elections, are solely devoted to discussion and advocacy of issues; no candidates for public office are nominated for or selected to run as Libertarian Party candidates at these conventions.

Bill Pryor is presently the Attorney General of the State of Alabama and, until he is confirmed as a federal judge – a position for which he has been nominated, but for which he has not been confirmed – he will be a candidate in the next election for the office of Alabama Attorney General or for some other State office in Alabama.

As he has in the past, General Pryor intends in the future to make public communications that refer to clearly defined candidates for federal office and that promote or support candidates or attack or oppose a candidate for that office, including communications that do not expressly advocate the election or defeat of any federal candidate.

General Pryor has received and intends in the future to receive non-federal funds contributions from the Republican National State Elections Committee, a division of the Republican National Committee. As a candidate (and as a candidate in association with or in a group of candidates for state or local office or of individuals holding state or local office), he has in the past and intends in the future to spend funds lawfully raised under the laws of the State of Alabama, but raised and spent in compliance with the limitations imposed by BCRA, for the purpose of: (a) making public communications that refer to a clearly identified candidate for federal office and that promote or support a candidate or attack or oppose a candidate for that office, including communications that do not expressly advo-

cate the election or defeat of a federal candidate; (b) engaging in voter registration activities conducted within 120 days of a federal election, and (c) engaging in voter identification, get-out-the-vote, and generic campaign activities conducted in connection with an election in which a candidate for federal office is on the ballot.[4]

The Club for Growth, Inc. (CFG) is a nationwide ideological membership organization with approximately 5,000 members dedicated to advancing public policies that promote economic growth which is tax-exempt under § 527 of the Internal Revenue Code. The mission of CFG is to identify for its members the candidates for elective office who believe in these ideals, to monitor their performance in elected office, and to help finance their elections through CFG's connected PAC. CFG also helps finance strategic issue campaigns to advance its policy goals. In pursuit of these goals, CFG would violate BCRA in several ways.

CFG regularly makes disbursements for the direct costs of producing and airing "electioneering communications" in excess of $10,000 in a calendar year that: (a) refer to clearly identified candidates for federal office, (b) are made within 60 days before general, special, and runoff elections for the offices sought by the candidates and within 30 days before primary elections, and (c) are targeted to relevant electorates. CFG

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[4]General Pryor is the only plaintiff in *McConnell v. FEC* who complained against provisions of BCRA that forbid state candidates from receiving soft money from national political parties and that forbid raising or using non-federal money to refer (without express advocacy) to federal candidates or for registration, get-out-the-vote, and other generic election activities. Furthermore, General Pryor is the only state public official subject to provisions of BCRA that prohibit state officials from making public communications that refer to a clearly identified candidate for federal office.

regularly talks with candidates about their positions on the issues in interviews and forums. On a regular and recurring basis, CFG (1) consults with both incumbent and challenger candidates on their positions on issues, (2) does "electioneering communications," and (3) publishes communications with information about candidates' positions on issues. Some of these communications are done without any communication with any candidate and some are done after a communication with a candidate.

CFG is presently affected by BCRA. On May 13, 2003, the Democratic Senatorial Campaign Committee filed a complaint against CFG alleging that CFG had violated BCRA by broadcasting an "electioneering communication," under the lower court's truncated backup definition that prohibits any broadcast communication that "promotes or supports . . . or attacks or opposes" a candidate during the time that the backup definition was in effect. Letter from Robert F. Bauer & Marc E. Elias, Counsel for the Democratic Senatorial Campaign Committee (DSCC), to Lawrence Norton, FEC General Counsel (May 13, 2003).

The advertisement at issue was broadcast in South Dakota and told listeners to urge U.S. Senator Tom Daschle to support President Bush's pending tax cut plan. The complaint on behalf of the DSCC alleges that the advertisement "attacks [Daschle] for opposing the President's 'tax cut plan,'" in violation of the truncated backup definition. This advertisement is part of a broader effort by CFG to gain public and Congressional support for the President's tax cut plan.[5]

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[5]CFG has been running broadcast advertisements in support of President Bush's proposed tax cut, one of which has become the subject of the complaint by the DSCC to the FEC described. An advertisement was also run in Ohio depicting Ohio Senator George

National Right to Life Committee, Inc. (NRLC) is a 501(c)(4) corporation whose purpose is to promote respect for the worth and dignity of all human life from conception to natural death. NRLC's and its affiliated organizations' conduct would violate BCRA in several ways.

NRLC regularly makes disbursements for the direct costs of producing and airing "electioneering communications" in excess of $10,000 in a calendar year that: (a) refer to clearly identified candidates for federal office, (b) are made within 60 days before general, special, and runoff elections for the offices sought by the candidates and within 30 days before primary elections, preference elections, and conventions and caucuses of political parties with authority to nominate candidates for the offices sought by the candidates, and (c) are targeted to relevant electorates.

Voinovich, during the 18 days that the truncated backup definition was in effect, and has the following text:

> President Kennedy cut income taxes and the economy soared.
> President Reagan cut taxes more, and created fifteen million new jobs.
> President Bush knows tax cuts create jobs, and that helps balance the budget.
> But Senator George Voinovich opposes the president.
> Ohio has lost thousands of jobs, and president Bush has a plan to help.
> Tell George Voinovich to support the Kennedy, Reagan, Bush tax policy that will bring jobs back to Ohio.

Senator Voinovich is a candidate for federal office. While CFG believes that its advertisement is "neutral" and lawful, it depicts a federal candidate and could be considered by someone (as happened with the DSCC complaint to the FEC regarding the South Dakota ad), as not "neutral" under the truncated backup definition of BCRA.

On a regular and recurring basis, NRLC: (a) lobbies candidate legislators on legislation, (b) consults with both incumbent and challenger candidates on their positions on issues, (c) engages in "electioneering communications," and (d) publishes printed communications, including voter guides. These communications are done both with and without communications with candidates.

At present, NRLC is in the midst of Congressional legislative battles to ban human cloning, pass the Unborn Victims of Violence Act, and pursue other legislative interests. As part of these campaigns, NRLC plans to run broadcast advertisements in the Congressional districts of key members of Congress, naming the members of Congress, many or all of whom are candidates (i.e., have transacted $5,000 in "contributions" or "expenditures"), and could be viewed as attacking/opposing their positions on these legislative issues. The ads will be paid for with general corporate funds and will be similar to the AFL-CIO advertisement, "No Two Way," that Judge Leon found "not neutral" and thus contrary to BCRA because "it attacks [the candidate's] position on the federal budget." Supp. App., Vol. IV, 1163sa.

National Right to Life Educational Trust Fund (NRL Ed Fund) is an internal § 501(c)(3) fund of NRLC. It qualifies as an "MCFL-type" organization under *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). NRL Ed Fund has spent, and intends to do so again, more than $10,000 in a calendar year on broadcast communications that mention no candidate but advocate for or against issues that are hotly contested in contemporaneous political campaigns on which candidates running in the same geographic area have taken a position. Under the vague alternative definition of "electioneering communication," which examines whether a "communication . . . promotes or supports" or "attacks or opposes a candidate,"

§ 201(a), it is unclear whether such conduct would be considered an "electioneering communication."

National Right to Life Political Action Committee (NRL PAC) is a connected § 527 fund of NRLC that is registered with the FEC as a political action committee subject to the FECA. NRL PAC regularly makes contracts for independent expenditure communications in federal elections days, weeks, and months in advance of the time the actual independent expenditures are made. NRL PAC has suffered harassment and interference with contractual relationships as a result of federal candidates learning about arrangements with broadcasters to air independent expenditure in opposition to these candidates. NRL PAC intends to continue making independent expenditures, but its freedom of expression is burdened by the necessity of reporting them when contracts are made instead of when the independent expenditure is made.[6]

Mike Pence is the U. S. Representative from the Second Congressional District of the State of Indiana, first elected in 2000.He is an Assistant Majority Whip, Chairman of the Small Business Subcommittee on Regulatory Reform and Oversight, and serves on the Judiciary and Agriculture Committees. Representative Pence has raised, assisted to raise, and wishes to continue to raise and to assist in raising funds for Appellant Indiana Family Institute, Inc. (IFI), and he has communicated and wishes to continue to communicate with IFI with regard to raising and assisting in raising funds for IFI – conduct that would violate BCRA.[7]

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[6]NRL PAC is the only Plaintiff in *McConnell v. FEC* that makes independent expenditures subject to BCRA.

[7]U.S. Representative Mike Pence is the only plaintiff in *McConnell v. FEC* to challenge provisions of FEC that forbid federal

Indiana Family Institute, Inc. (IFI), is an Indiana non-profit corporation that qualifies as an "MCFL-type" organization under *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), and it qualifies as an "expressive association" as described in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). IFI is dedicated to encouraging and invigorating Indiana families by offering them time-proven solutions to problems which harm the family, the church, and society. Over 10,000 Indiana residents receive IFI publications and many hear IFI radio programs and commentaries throughout the State of Indiana.

IFI has made and intends to make disbursements for the direct costs of producing and airing "electioneering communications" in excess of $10,000 that: (a) refer to clearly identified candidates for federal office, (b) are made within 60 days before general, special, and runoff elections for the offices sought by the candidates and within 30 days before primary elections, preference elections, and conventions and caucuses of political parties with authority to nominate candidates for the offices sought by the candidates, and (c) are targeted to relevant electorates. IFI also: (a) lobbies candidate legislators on legislation, (b) consults with both incumbent and challenger candidates on their positions on issues, (c) engages in "electioneering communications," and (d) publishes printed materials, including voter guides. Some of these communications are done: (a) without any communication with any candidate, (b) after communication with a candidate, and (c) done with the agreement and/or formal collaboration of a candidate.

Appellant U.S. Representative Mike Pence has raised and intends to continue to raise and to assist in raising funds for IFI;

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candidates from raising funds for entities involved in federal election activities, as defined by BCRA.

IFI has communicated and will continue to communicate with Representative Pence with regard to raising and assisting in raising funds for IFI.[8]

Questions Presented Are Substantial

Raising or Using "Soft Money" By National Political Party Committees to Promote, Support, Attack, or Oppose Federal Candidates

While the district court held unconstitutional most of the soft money provisions of BCRA (§ 101), it upheld its prohibitions on "soft money" solicited, received, redirected, or used by national, state, or local political committees that "promotes or supports . . . or attacks or opposes" a federal candidate.

Section 101 violates the First Amendment. It restricts the freedom of speech and association in a manner that exceeds the contribution and expenditure limitations at issue in *Buckley*. It directly restricts speech, and it restricts the right of national political party committees to associate with officeholders, candidates, other party committees, and other organizations. As such, it should properly be subjected to strict judicial scrutiny. *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 299 (1981).

Under this standard of review, § 101 cannot survive scrutiny. The only interest that this Court has recognized to justify restrictions in the context of campaign finance is in reducing apparent or actual corruption. *FEC v. National Conservative Political Action Comm.,* 470 U.S. 480, 496-97 (1985). Special restrictions on political party committees cannot

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[8]IFI is the only Plaintiff in *McConnell v. FEC* to complain against provisions of BCRA that forbid federal candidates from raising non-federal money for entities engaged in federal election activities.

be justified since there are no "special dangers" of corruption associated with political parties." *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996). Moreover, use of campaign funds bear only an "attenuated" relationship to corruption unless there the funds are used "exclusively" to elect a candidate. *Id.* In any event, § 101 is not narrowly drawn. Even if there is a constitutionally cognizable compelling interest served by § 101, Congress might simply have restricted the amount of non-federal money raised rather than entirely banning its use.

Insofar as BCRA purports to regulate state election activities, the also violates the Tenth Amendment by subsuming powers reserved to the States. BCRA unconstitutionally interferes with state election activities if they even indirectly and remotely can be said to impact on federal elections in a manner that cannot be reconciled with our federal system.

Further, by unjustifiably discriminating against political parties, § 101 violates the equal protection component of the Fifth Amendment. Political party committees are entirely forbidden from using or raising non-federal money for any number of purposes – including specifically for communications to promote, attack, support, or oppose federal candidates. But all other citizens' groups are permitted to continue to raise and use nonfederal money for these purposes. This makes no constitutional sense when political parties have already been deemed to pose no "special dangers." *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 616 (1996).

Finally, the terms used by § 101 to restrict freedom of speech – forbidding a communication that "promotes or supports . . . or attacks or opposes" a federal candidate – are unconstitutionally vague.

Federal Officeholders and Candidates. The district court also upheld BCRA § 101 insofar as it forbids federal officeholders and candidates from soliciting, receiving, directing, transferring, or spending "soft money." Like the direct restrictions on free speech of § 101, this prohibition violates the First Amendment. It restricts the freedom speech and association in a manner that exceeds the contribution and expenditure limitations at issue in *Buckley v. Valeo*. It directly restricts speech by banning solicitation of funds. As an absolute ban, it is not narrowly drawn, as a restriction on amount might be.

State Officeholders and Candidates. Similarly, the district court upheld BCRA § 101 insofar as it forbids state officeholders and candidates from soliciting, receiving, directing, transferring, or spending "soft money" in connection with an election for federal office. This prohibition violates the First Amendment in the same manner as restrictions on federal candidates/officeholders. Moreover, it proceeds beyond the legitimates scope of the federal constitution reflected by the Tenth Amendment to the U.S. Constitution by purporting to regulate the conduct of state political candidates and officeholders.

The Truncated Backup Electioneering Communication" Definition

The district court also upheld the "backup" definition of "electioneering communications" of BCRA § 203, which, as construed by the lower court, reaches any broadcast reference to any candidate for federal office at any time "that is not neutral as to [the] candidate." Supp. App., Vol. IV, 1163sa. The court also largely upheld the "electioneering communications" provisions of BCRA involving disclosure of electioneering communications (§§ 201 and 311), coordinated electioneering communications as contributions (§ 202), and the ban on electioneering communications by corporations and unions (§§ 203 and 204).

The definition of "electioneering communications" violates the First Amendment under this Court's decisions in *Buckley* and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*). In light of serious constitutional overbreadth considerations, this Court in *Buckley* narrowly construed provisions in the FECA restricting expenditures "relative to a clearly identified candidate" and requiring disclosures for the purpose of "influencing" federal elections to embrace only "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 44 and n. 52. "Express terms" were defined to include "communications containing express words of advocacy of election of defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 80. *See also MCFL*, 479 U.S. at 248-49.

The plain language of neither of § 203's definitions of "electioneering communications" can be reconciled with *Buckley*. Both embrace communications that go beyond "express advocacy" to include "issue advocacy." Judge Leon's attempted saving construction of the backup definition of §203 to any communication "that is not neutral as to [the] candidate" generates the same conflict with *Buckley*: A communication that is "not neutral" about a candidate still does not necessarily in "express terms advocate the election or defeat of a clearly identified candidate."

Moreover, the truncated backup "electioneering communication" definition is unconstitutionally vague. The terms it employs – "promotes," "supports," "attacks," and "opposes" – are all open to interpretation with regard to any specific advertisement.

The Circuit Courts of Appeal that have considered cases involving the express advocacy test's protection for issue advocacy do not agree with the district court below as to the

constitutionality of tests abandoning this Court's own formulation of the express advocacy test. These courts have uniformly recognized that this Court's holdings in *Buckley* and *MCFL* are binding and require the bright-line test of explicit words expressly advocating the election or defeat of a clearly identified candidate for federal office. Thus, there is a conflict between these circuits and the three-judge panel below.

"These courts rely primarily on *Buckley*'s emphasis on (1) the need for a bright-line rule demarcating the government's authority to regulate speech and (2) the need to ensure that regulation does not impinge on protected issue advocacy." *Chamber of Commerce v. Moore*, 288 F.3d 187, 193 (5th Cir. 2002). *See*, e.g. *Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379, 391-92 (4th Cir. 2001) (*VSHL*) (a regulation that "shifts the focus of the express advocacy determination away from the words themselves to the overall impressions of the hypothetical, reasonable listener or viewer . . . is precisely what *Buckley* warned against and prohibited"); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1187, 1193-95 (10th Cir. 2000) (Statutes unconstitutional where they could not be narrowly construed to apply "only to expenditures for communications that contain explicit words advocating the election or defeat of a clearly identified candidate."); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386 (2d Cir. 2000) (finding all the parties "in essential agreement that the disclosure provisions . . . and reporting provisions . . . *are necessarily unconstitutional* unless they apply only to [communications] 'that expressly advocate the election or defeat of a clearly identified candidate.'" (emphasis added) (quoting *Buckley*, 424 U.S. at 80)); *Florida Right to Life v. Lamar*, 238 F.3d 1288 (11th Cir. 2001); *Iowa Right to Life Comm. v. Williams*, 187 F.3d 963, 969-70 (8th Cir. 1999) (To be regulable, "the communication must contain express language of advocacy with an exhortation to elect or defeat a candidate,"

and "[t]he Supreme Court has made clear that a 'finding of "express advocacy"depend[s] upon the use of language such as 'vote for,' 'elect,' 'support,' etc." (quoting *MCFL*, 479 U.S. at 249 (quoting *Buckley*, 424 U.S. at 44, n. 52)); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 506 (7th Cir. 1998) (The Court [in *Buckley*] recognized the important First Amendment interest in protecting political speech, including discussions surrounding elections and candidates. . . . Because of the vital importance of protecting such speech, the *Buckley* Court articulated what has come to be known as the 'express advocacy' test . . . ."); *Faucher v. Fed. Election Comm'n*, 928 F.2d 468, 470 (1st Cir.1991) ("The Supreme Court, recognizing that such broad language . . . creates the potential for first amendment violations, sought to avoid future conflict by explicitly limiting the statute's prohibition to "express advocacy.").

Even the Ninth Circuit in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), recognized the binding nature of the express advocacy test, although in dicta it discussed the test in ways that seemed broader than the Supreme Court's articulation of the test.[9] However, the 9th Circuit has now affirmed that it fully embraces the *Buckley* formulation, by declaring that "a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit *words* of advocacy." *California Pro-Life Council v. Getman*, 2003 WL 21027288 at *7 (9th Cir. 2003) (emphasis in original). This ruling eliminates

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[9] *Cf. FEC v. Christian Action Network*, 110 F.3d 1049, 1054 (4th Cir. 1997) (*CAN II*) (*Furgatch* contains broad dicta, but the Fourth Circuit summarized the narrower *holding* of *Furgatch* as: "where political communications . . . include an explicit directive to voters to take some [unclear] course of action, . . . 'context' . . . may be considered in determining whether the action urged is the election or defeat of a . . . candidate . . . .").

any arguable federal circuit court support for a contextual approach, which is contained in BCRA's alternate definitions of "electioneering communication."

Disclosure Requirements on "Electioneering Communications" and Independent Expenditures

The district court held BCRA § 212 (disclosure of independent expenditures) nonjusticiable and largely upheld § 201 (disclosure of "electioneering communications"). Both provisions require reporting to the FEC of "disbursements" and "expenditures" when contracted for rather than when they are made – and regardless whether the service contracted for is ever provided and, in fact, the independent expenditure or electioneering communication is actually communicated. They are thus significantly different than the reporting requirements this Court upheld in *Buckley*, 424 U.S. at 76-82, which required only disclosure of communications actually made.

Further, the disclosure provisions are not narrowly drawn to serve any compelling governmental interest. Though the government may have an interest in assuring that the electorate is informed of the source of expenditures made on behalf of candidates, there no such interest at stake unless these expenditures are, in fact, made. In the absence of an actual communication, there is no expenditure made on behalf of a candidate. Moreover, prior disclosure requirements would often result in prior notice to political opponents of political and media strategies, thereby chilling and effectively penalizing free speech. The prospect of chilled free speech or harassment of those with whom entities contract, for example, for media services, renders these provisions justiciable even in the absence of immediate harm.

Extent of the District Court's Injunction

JMC Appellants filed *Madison Center Plaintiffs' Motion to Alter or Amend the Judgment* in the district court, which was denied on May 19, 2003. *See* App. 87a. JMC Appellants appeal denial of that Order insofar as it denied JMC Appellants' request to explicitly extend the district court's injunction against the Defendants by ordering that the Defendants be enjoined from enforcing any unconstitutional BCRA provision against the Plaintiffs anywhere in the United States.

It is the policy of the FEC and the position that they have adopted in other similar cases that FEC rules and regulations that have been struck down in one jurisdiction will nevertheless be enforced by the FEC in other jurisdictions.[10] *See VSHL*, 263 F.3d 379, 382 (4th Cir. 2001); *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248, 252-53 (S.D. N.Y. 1998). Under this policy, the district court's judgment would bind the FEC only in the District of Columbia, leaving the FEC free to enforce enjoined BCRA provisions in other jurisdictions.

The FEC policy and the *VSHL* holding are in error. Under 5 U.S.C. § 706(2)(A), agency action can be entirely set aside if it is "not in accord with the law," including agency action found "contrary to constitutional right." 5 U.S.C. § 706 (2)(B). This justifies injunctive relief beyond the scope of any particular jurisdiction, especially when First Amendment rights are at issue and the "very existence [of a statute] may cause others not before the court to refrain from constitutionally protected

[10]Similarly, the "FEC has in the past prosecuted groups in the judicial districts where they distributed advertising materials, as opposed to the states where they are chartered or headquartered." *VSHL*, 263 F.3d at 389 (citing *FEC v. Pub. Citizen, Inc.*, 64 F. Supp. 2d 1327 (N.D. Ga. 1999); *FEC v. Nat'l Conservative Political Action Comm.*, 647 F. Supp. 987 (S.D. N.Y. 1986)).

speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

In view of FEC policy, the state of the law, and the silence of the district court on the geographical scope of its injunction, JMC Appellants have every reason to believe that the FEC would, consistent with its policy, enforce provisions of BCRA outside the District of Columbia absent a nationwide injunction.

As an Act of Congress, BCRA applies nationwide, so any of its provisions held unconstitutional should be also enjoined nationwide. In addition, BCRA § 403(1) provides that suit for declaratory and injunctive relief may only be brought in the United States District Court for the District of Columbia. Thus, there can be no protection from other courts from the FEC's enforcement actions in jurisdictions beyond the District of Columbia. JMC Appellants therefore request this Court to reverse the decision of the district court denying their Motion to Alter or Amend and to direct the district court on remand to enjoin the FEC from enforcing any BCRA provision held unconstitutional anywhere in the United States.

Article III Standing of Congressional Intervenors

Senator John McCain, Sen. Russell Feingold, Rep. Christopher Shays, Rep. Martin Meehan, Sen. Olympia Snowe, and Sen. James Jeffords (Intervenors) intervened under Fed. R. Civ. P. 24(a)(1), invoking BCRA § 403(b) ("any member of the House of Representatives . . . or Senate shall have the right to intervene either in support or opposition to the position of a party to the case regarding the constitutionality of the provision or amendment").

Applying BCRA § 403 does not, however, answer the separate question of whether all intervenors must have Article III standing, a matter this Court has not addressed. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1977)

(expressing "grave doubts whether the [initiative sponsors] have standing under Article III to pursue appellate review"); *Diamond v. Charles*, 476 U.S. 54, 68-69 and n.21 (1986) (an intervenor may not appeal, or continue a suit, without the party on whose side intervention was permitted, unless intervenor has Article III standing).

Intervenors must satisfy both constitutional and prudential requirements for standing. *See, e.g., National Credit Union Admin. v. First National Bank & Trust Co.*, 522 U.S. 1146 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Section 403(b), by permitting members of Congress to intervene, removes any prudential standing concerns. *Raines v. Byrd*, 521 U.S. 811, 820 n. 3 (1997) ("Congress's decision to grant a particular plaintiff the right to challenge an act's constitutionality . . . eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch when the plaintiff brings suit."). However, "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue a plaintiff who would not otherwise have standing." *Id.* at 820 n. 3. This Court has long held that Congressional power to create standing is, at least in theory, subject to the limitations of Article III. *See, e.g., Warth v. Seldin*, 422 U.S. 49 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 64 (1973). Thus, Article III's injury in fact requirement functions as a limit on Congress' power to confer standing. *See Lujan*, 504 U.S. at 580-81 (Kennedy, J., concurring); *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997).

Intervenors do not satisfy Article III standing requirements. First, they do not satisfy the requirement that suffer an "injury in fact" consisting of an "invasion of a legally protected interest which is (a) concrete and particularized . . .and (b) actual or imminent." *Lujan*, 504 U.S. 560 (internal quotations and citations omitted). A generalized, abstract interest as members

of a regulated class of legislators or as citizens participating in the political process is insufficiently concrete and particularized to grant them Article III standing.

Voters' "concern for the corruption of the political process is not only widely shared, but is also an abstract and indefinite nature, comparable to the common concern for obedience of the law." *Becker v. FEC*, 230 F.3d 381, 390 (1st Cir. 2000). *See also Chiglo v. City of Preston*, 104 F3d. 185, 187 (1997); *Hoffman v. Jeffords*, 175 F. Supp.2d 49, 55 (D.D.C. 2001). Likewise, this Court has held that individual members of Congress lacked standing to challenge the constitutionality of legislation, although the federal Line Item Veto Act provided that any member might bring suit, because the members had alleged no cognizable injuries to themselves, and their claimed institutional injury was widely dispersed and abstract. *Raines*, 521 U.S. at 829. *See also, e.g., Roe v. Casey*, 464 F. Supp. 486, 48 (E.D. Pa. 1978), *aff'd*, 623 F.2d 829 (3d Cir. 1980) (in constitutional challenge to statute, a legislator as member of Assembly and co-sponsor had no legally protectable interest).

Second, the Intervenors lack Article III standing because there is no causal connection between their "injury"and the conduct complained of. *Lujan*, 504 U.S. at 560-61. Any injury suffered by a holding that BCRA is unconstitutional would simply mean that the Intervener would have to continue to campaign in the absence of BCRA and within the established, relatively unregulated, system of election finance control. However, "[i]n those cases where a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (*or lack of regulation*) of someone else, it is substantially more difficult to establish injury in fact, for in such cases one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts

cannot presume either to control or to predict." *Common Cause v. FEC*, 108 F.3d 412, 417 (D.C. Cir. 1997) (quotations and citations omitted) (emphasis added).

Thus, whether the Intervenors lack Article III standing is in itself a plainly substantial question that warrants review by this Court.

Moreover, there is a conflict of circuits with regard to this matter that this Court ought properly to resolve. Several circuit courts require that interveners must have Article III standing. *Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Ehlmann*, 137 F.3d 573, 576-77 (8th Cir. 1998); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996); *Mausolf v. Babbit*, 85 F.3d 1295, 1300 (8th Cir. 1996); *Building and Constr. Trades Dept., AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir.1994). One circuit has stated that intervention under Rule 24 requires more of an interest than that required by Article III analysis. *United States v. 36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir.1985). But at least three other circuits do not require Article III standing for intervention. *United States Postal Serv. v.* B*rennan*, 579 F.2d 188, 190 (2d Cir.1978); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir.1994); *Yniguez v. State of Arizona*, 939 F.2d 727, 731 (9th Cir.1991).

Conclusion

For the foregoing reasons, the Court should note probable jurisdiction.

Respectfully submitted,

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