TITLE III

PRESENTATION OF GOVERNMENTAL DEFENDANTS

I. THE MILLIONAIRE PROVISIONS OF TITLE III ARE CONSTITUTIONAL.

Sections 304, 316, and 319 of BCRA, the so-called "millionaire provisions," modify the general contribution limits to account for the special problem involving a candidate facing an opponent who chooses to finance his or her campaign largely with personal funds instead of contributions from political supporters. Even if they have standing, plaintiffs have not met the burden of their facial challenge to the provisions' constitutionality. Indeed, the McConnell plaintiffs now agree that the millionaire "provisions are manifestly a step in the right direction." See McConnell Br. at 95. Congress enacted the millionaire provisions to enhance opportunities for speech, and like other statutes designed to "further[], not abridge[], pertinent First Amendment values," Buckley, 424 U.S. at 93 & n.127, the millionaire provisions are constitutional. See Gov't Br. at 191-99.

A. The Millionaire Provisions Do Not Violate Equal Protection.

Contrary to the RNC's argument, see RNC Br. at 74, the millionaire provisions do not violate the equal protection rights of political parties merely because the provisions allow a political party to make additional coordinated expenditures for those candidates whose wealthy opponents choose to finance their own campaigns. As noted in our opening brief, Gov't Br. at 198-99, the provisions do not force the RNC to "discriminate" among its candidates. Historically, national political parties have not spent equal amounts to support each of their candidates. See Gov't Br. at 199 n.136. If the RNC decides to adopt such a policy, however, it is free under BCRA to pass up the opportunity to make larger coordinated expenditures in support of candidates facing a self-funded opponent.

Congress is not required by the Constitution to adopt the same limit on coordinated party expenditures for all candidates, regardless of circumstances. To the contrary, the Supreme Court recently

upheld a provision, limiting coordinated party expenditures, which imposed a different limit for Senate candidates in each state based on voting age population. Colorado II, 533 U.S. at 465. Thus, Congress is clearly not precluded from tailoring the limits on contributions and coordinated spending to the different circumstances in which election campaigns occur. See Buckley, 424 U.S. at 30 & n.32 (contribution limits could have been "scaled to take account of the differences in the amounts of money required for House, Senate, and Presidential campaigns").[127]

The RNC argues that the wealth of a candidate's opponent should not be a factor in political party spending, but the millionaire provisions do not require political parties to do anything differently; they simply give the option of making larger coordinated expenditures in support of a candidate running against a self-financing opponent. Because the millionaire provisions apply equally to all campaigns run in such circumstances and are narrowly tailored to address the specific problem presented by self-financed candidates, they do not infringe the RNC's equal protection rights.

B. The Millionaire Provisions Do Not Make the Contribution Limits Unconstitutional.

Contrary to plaintiffs' arguments , RNC Br. at 74, the compelling governmental interests the Supreme Court has repeatedly recognized as justifying the general contribution limits are not invalidated by Congress's decision to relax those limits in particular circumstances, circumstances in which Congress concluded this was necessary to avoid discouraging participation in election campaigns by candidates facing opponents capable of using their own vast wealth to finance their campaigns at a level that might eliminate any meaningful opposition. Such accommodation of competing interests is commonplace in legislative action and "[c]ourts . . . must respect and give effect to these sorts of compromises." Ragsdale v.

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[127] The Constitution also does not require opposing candidates to be subject to identical regulations, regardless of their sources of funding. Thus, Buckley upheld public financing for major party candidates that was unavailable to minor party candidates, 424 U.S. at 93-97; upheld public financing in presidential primaries that "limit[ed] subsidies to those with a substantial chance of being nominated," id. at 106; and upheld an expenditure limit on publicly financed candidates that did not apply to their privately financed opponents, id. at 108-09.

Wolverine World Wide, Inc., 535 U.S. 81, __, 122 S. Ct. 1155, 1164 (2002) (citation omitted); see also Buckley, 424 U.S. at 84 n.112 (special exception from reporting requirements for photographic, matting, or recording services furnished to incumbents "represents a reasonable accommodation between the legitimate and necessary efforts of legislators to communicate with their constituents and activities designed to win elections by legislators in their other role as politicians").[128]

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (emphasis in original). There is no factual or legal basis for plaintiffs' assertions that the millionaire provisions undo Congress's decision that general contribution limits are needed to reduce opportunities for corruption and the appearance of corruption, a decision repeatedly upheld by the Supreme Court.[129]

Finally, there is no basis for the completely unsupported assertion that Congress adopted the millionaire provisions to protect incumbents. McConnell Br. at 95-97. To the contrary, Congress included a restriction on eligibility based upon the amount by which a candidate's campaign funds exceed the self-financing candidate's campaign funds. See BCRA § 316. Because it is usually incumbents who have

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[128] The RNC cites Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), and City of Ladue v. Gilleo, 512 U.S. 43 (1994), for the proposition that when a statute leaves a "governmental interest partially unprotected," it undercuts the asserted interest. RNC Br. at 74. Both of those cases are inapposite, however. Lukumi involved an ordinance banning animal sacrifice that was targeted at a religious sect, but was ostensibly based on public health concerns. The Court found the statute to be substantially underinclusive because it forbade "few killings but those occasioned by religious sacrifice." 508 U.S. at 543-44. City of Ladue invalidated an ordinance prohibiting many residential signs, even messages posted in a residence window, because the provision almost completely foreclosed an "important and distinct" medium of expression while showing little respect for individual liberty in the home. 512 U.S. at 55-58. In contrast to these cases, the millionaire provisions are carefully tailored to serve specific congressional purposes that arise in narrowly defined circumstances, and they have no impact on minimizing the opportunity for corruption accomplished by the general contribution limits in the vast majority of election contests to which the millionaire provisions have no application.

[129] Indeed, there are no bounds to the proposition that enactment of an exception to a statutory requirement demonstrates that the requirement is itself unnecessary, and acceptance of such a proposition would lead to the invalidation of countless statutes.

accumulated large amounts of campaign funds prior to an election campaign, this provision makes it more difficult for an incumbent even to qualify for increased contribution limits. In any event, on their face, the millionaire provisions do not discriminate between incumbents and challengers, and plaintiffs have offered no evidence that they will operate "invariably and invidiously" in favor of incumbents as a class. See Buckley, 424 U.S. at 33; see id. at 30-31 (contribution limits applicable "regardless of [a candidate's] occupation, ideological views, or party affiliation" do not violate equal protection "[a]bsent record evidence of invidious discrimination against challengers as a class").

II. SECTION 318 OF BCRA, PROHIBITING CERTAIN POLITICAL CONTRIBUTIONS AND DONATIONS BY CHILDREN UNDER THE AGE OF EIGHTEEN DOES NOT VIOLATE THE FIRST AMENDMENT.

The Supreme Court has "'consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending,'" Shrink Missouri, 528 U.S. at 387 (quoting MCFL, 479 U.S. at 259-60), because restrictions on contributions, unlike restrictions on expenditures, do not significantly interfere with associational and speech rights. Id. at 386-88. A restriction on contributions survives a First Amendment challenge if it is "'closely drawn' to match a 'sufficiently important interest.'" Id. at 387-88 (quoting Buckley, 424 U.S. at 25, 30). As we explained in our opening brief, BCRA § 318 serves the important governmental interest in foreclosing evasion of the individual contribution limits, see Gov't Br. at 60-61, 199-202, and it is "closely drawn" to match that interest.[130] BCRA § 318 narrowly applies to contributions to candidates and party committees, and leaves children free to contribute to other types of political committees.[131] Children may also "associate actively [with candidates and parties] through

[130] BCRA § 318's prohibition of contributions by children to candidates and party committees will be codified as 2 U.S.C. 441k, not 2 U.S.C 324, as we mistakenly stated in our opening brief (p.199).

[131] The plaintiffs repeatedly mischaracterize § 318 as banning all contributions by minors. See, e.g., McConnell Br. at 93, 94.

volunteering their services," Buckley, 424 U.S. at 28, and may make unlimited independent expenditures to express their support for candidates.

The Thompson plaintiffs concede that Congress may constitutionally prohibit contributions by young children, Thompson & Hilliard Br. at 16, and the other plaintiffs have not disputed that proposition. Thus, the only dispute here is about the age at which to draw the line. Congress chose the age of eighteen, which is the traditional age of majority, the age at which the Constitution recognizes the right to vote, and the age at which legally sanctioned control by parents of their children's property and associational activities ceases.[132] Cf. Am. Constitutional Law Found., Inc. v. Meyer, 120 F.3d 1092, 1101 (10th Cir. 1997) ("Plaintiffs have not demonstrated that persons under eighteen have a stronger interest in circulating [initiative and referendum petitions] than they do in voting. The age requirement [for circulating petitions] is a neutral restriction that imposes only a temporary disability–it does not establish an absolute prohibition but merely postpones the opportunity to circulate."). This was a reasonable policy choice by Congress and easily survives judicial review. See Gov't Br. at 205-07.

Contrary to the plaintiffs' assertion, see McConnell Br. at 91, FECA's prohibition in 2 U.S.C. 441f on the making of contributions in the name of another is insufficient to foreclose circumvention of the individual contribution limits. The Supreme Court rejected a similar assertion in Colorado II. The Colorado Republican Party had claimed that preventing circumvention of individual contribution limits by limiting coordinated spending by political parties was unconstitutional because an existing "earmarking" provision already addressed any risk of circumvention. 533 U.S. at 462. In rejecting this argument, the Court noted that the party's "position . . . ignores the practical difficulty of identifying and directly combating circumvention under actual political conditions." Id. The Court further explained that "circumvention is

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[132] The McConnell plaintiffs assert that Congress should have excluded minors who are "emancipated," McConnell Br. at 94, but none of the minor plaintiffs has standing to make that argument because none are alleged to be emancipated. Accordingly, the constitutionality of applying § 318 to emancipated minors is not presented in this case and can be addressed in an as-applied challenge, if an emancipated minor ever seeks to make such contributions.

obviously very hard to trace. The earmarking provision.... would reach only the most clumsy attempts to pass contributions through to candidates." Id. The Court refused, therefore, "[t]o treat the earmarking provision as the outer limit of acceptable tailoring." Id. The shortcomings of reliance only upon § 441f are similar. See Gov't Br. at 203-04, 207-08.

For similar reasons, the other options suggested by the plaintiffs, see McConnell Br. at 94, are inadequate to eliminate the opportunity for parents to circumvent the contribution limits by attributing contributions to their children. Contributors are not required to disclose their ages or their family relationship with other contributors, so there is no way to identify all suspect contributions from information that is publicly available. Requiring such disclosures and undertaking investigations to determine the extent to which children's contribution decisions were controlled or influenced by the children's parents, as plaintiffs, in effect, suggest, would be more intrusive on constitutional interests than the contribution restriction enacted by Congress.

"'Neither the right to associate nor the right to participate in political activities is absolute.'" Buckley, 424 U.S. at 25 (quoting Letter Carriers, 413 U.S. at 567).[133] The prophylactic contribution restriction Congress adopted eliminates an opportunity for circumvention of the contribution limits, while leaving minors with multiple ways to participate in political campaigns and express their views regarding candidates. It is, therefore, constitutional.

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

Despite some lengthy rhetoric, the Adams plaintiffs ultimately concede that BCRA § 307, in raising the individual contribution limit to $2,000, does not interfere with the right of the "non-wealthy" to vote in

[133] It makes no difference that § 318 is a limited prohibition of contributions rather than a limit on their dollar amount. In NRWC, 459 U.S. at 207-11, the Supreme Court upheld a prohibition of corporate contributions to candidates, and also a complete prohibition of solicitations of contributions to a separate segregated fund from individuals who were not members of the corporation. The Court found that the compelling governmental interest in avoiding corruption justified this infringement of associational freedom. The same interest justifies § 318.

federal elections. Adams Br. at 12. And the Supreme Court has explicitly rejected the plaintiffs' argument that Bullock v. Carter, 405 U.S. 134 (1972), and other decisions involving the right to vote "permit[ ] Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society." Buckley, 424 U.S. at 49 n.55.

> These voting cases and the reapportionment decisions serve to assure that citizens are accorded an equal right to vote for their representatives regardless of factors of wealth or geography. But the principles that underlie invalidation of governmentally imposed restrictions on the franchise do not justify governmentally imposed restrictions on political expression.

Id.; see also Georgia State Conference of NAACP Branches v. Cox, 183 F.3d 1259, 1263, 1264 (11th Cir. 1999) ("The ballot access cases . . . do not recognize the right to equal influence in the overall electoral process. . . . [They] only recognize that each voter is entitled to a single, equal vote."); Kruse v. City of Cincinnati, 142 F.3d 907, 918 (6th Cir. 1998) (quoting Buckley, 424 U.S. at 49 n.55, in rejecting similar argument); NAACP, Los Angeles Branch v. Jones, 131 F.3d 1317, 1323 (9th Cir. 1997) ("There is simply no claim here that voter plaintiffs are denied their right to cast votes in any part of the election process. We do not equate the ability to contribute financially to a campaign prior to voting with the right to cast a vote."); Albanese v. FEC, 78 F.3d 66, 69 (2d Cir. 1996) ("Unlike the plaintiffs in Terry [v. Adams, 345 US 461(1953)], plaintiffs here are not prevented from voting in any election.").

BCRA §307 places no restrictions on access to the ballot, and "[c]andidates do not have a fundamental right to run for public office." NAACP v. Jones, 131 F.3d at 1324 (citing Clements, 457 U.S. at 963). Moreover, voters – whether wealthy or not – have no constitutional right to elect particular individuals to public office. The Constitution itself establishes age, citizenship, and residency requirements for Representatives and Senators, U.S. CONST. art. I §§ 2, 3, and the Supreme Court has upheld actual restrictions on ballot access that limit the persons from among whom voters can choose in a way that BCRA does not. E.g., Burdick v. Takushi, 504 U.S. 428 (1992) (ban on write-in voting); Clements v.

Fashing, 457 U.S. 957 (1982) (requirement that certain officeholders complete their current term before being eligible to serve in the legislature); see Buckley, 424 U.S. at 96 ("The States have ... been held to have important interests in limiting places on the ballot to those candidates who demonstrate substantial popular support.").

Accordingly, even if the Adams plaintiffs had standing to litigate their challenge to BCRA § 307 – and they have not even attempted to establish their standing even though they have the affirmative obligation to do so, Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) – there is no legal basis for their claim that the Judiciary should require Congress to regulate the political activities of others more strictly through a reduced contribution limit in order to enhance the relative voice of certain segments of society.

Plaintiffs Thompson and Hilliard now appear to assert essentially the same wealth-based, disparate impact claim as the Adams plaintiffs, see Thompson & Hilliard Br. at 6, 8-9; accordingly, their claim also must fail, for the reasons stated.[134] See also Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977) (intentional discrimination required for equal protection claim; disparate impact insufficient).[135]

IV. THAT CERTAIN CONTRIBUTION LIMITS ARE NOT INDEXED FOR INFLATION DOES NOT VIOLATE EQUAL PROTECTION PRINCIPLES.

The California Democratic Party and California Republican Party challenge Congress's decision not to index for inflation limits on contributions to state-level party committees. CDP/CRP Br. at 50. As

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[134] Interestingly, Representatives Thompson and Hilliard seek relief inconsistent with the Adams plaintiffs and with their wealth-based, disparate impact claim: they ask not that the Court invalidate the increase in the individual contribution limit to $2,000, but that the Court rewrite the statute completely to provide for an apparent increase in the $2,000 limit for individuals giving to "economically challenged" candidates. Thompson & Hilliard Br. at 11-12. Of course, the Court lacks jurisdiction to rewrite BCRA in such a fashion. See Eubanks v. Wilkinson, 937 F.2d 1118, 1122-23 (6th Cir. 1991).

[135] Even the Thompson & Hilliard plaintiffs' claims of impact are merely speculative, however. See, e.g., Thompson & Hilliard Br. at 11.

explained in our opening brief, however, the fact that such contributions were not indexed does not offend the Constitution. See Gov't Br. at 111-13.

V. THE PAUL PLAINTIFFS' CHALLENGE TO FECA AND BCRA LACKS MERIT.

The Paul plaintiffs have challenged all disclosure provisions of FECA[136] and BCRA, as well as other provisions of BCRA, as violating the freedom of the press. These plaintiffs assert that freedom of the press is a significantly greater guarantee than the guarantees of free speech and association or of equal protection. See Paul Br. at 9 n.3.[137] The guarantee of freedom of the press, however, offers no greater protection than other related constitutional guarantees. See New York Times v. Sullivan, 376 U.S. 254, 269-71 (1964) (construing freedoms of speech and press as one and the same); see also Austin, 494 U.S. at 668 ("[T]he press' unique societal role may not entitle the press to greater protection under the Constitution."). Thus, though phrased differently, the Paul plaintiffs' arguments present no distinct or better constitutional challenge to FECA or BCRA than those already rejected in Buckley and subsequent cases, or those challenges made by other plaintiffs in this litigation. Accordingly, the arguments already presented by defendants in defense of Title I and Title II apply fully to the Paul plaintiffs' arguments as well. And as to their Title III claims, the Paul plaintiffs have not shown in this facial challenge that contribution limits unconstitutionally discriminate against third-party candidates as a class.[138] See Buckley, 424 U.S. at 31.[139]

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[136] To the extent that the Paul plaintiffs challenge provisions of FECA not amended by BCRA, this Court should not exercise jurisdiction over their claim. See Gov't Br. at 190 n.130.

[137] Plaintiffs also challenge all disclosure provisions as imposing prior restraints, editorial controls, and discriminatory economic burdens, see Paul Br. at 13-18, but BCRA does not authorize the government to edit or enjoin anyone's speech. Although the Paul plaintiffs state that they perform some of the same functions as the press – by, for example, extensively "publishing" through press releases, unpaid appearances on television and radio, and through their own websites and bumper stickers – these plaintiffs do not exist, as the press does, to "inform[] and educate[] the public" or to provide a "forum for discussion and debate," Austin, 494 U.S. at 667 (citations and internal quotation marks omitted). Instead, their purpose is to promote their own candidacies and legislative agendas. See, e.g., Paul Decl. ¶ 4 [Paul]; Bossie Decl. ¶ 3 [Paul].

[138] To the extent the Paul plaintiffs challenge the fact that certain contribution limits are not indexed for inflation, Paul Br. at 27 n.11, this challenge is answered by our opening brief, Gov't Br. at 111-13.

[139] See also Buckley, 424 U.S. at 34-35 ("Moreover, any attempt to exclude minor party and independents en masse from . . . [FECA's] contribution limitations overlooks the fact that minor-party candidates may win elective office

The Paul plaintiffs also challenge restrictions on personal use of campaign funds under BCRA § 301, but § 301 merely codifies past FEC regulations interpreting the prior 2 U.S.C. 439a. See 148 Cong. Rec. S2143 (March 20, 2002) (Sen. Feingold). BCRA § 301 is rationally related to furthering a legitimate governmental interest, see Heller v. Doe, 509 U.S. 312, 320 (1993), in ensuring the ethical use of campaign contributions.

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or have a substantial impact on the outcome of an election."). Although plaintiff Libertarian candidates Carla Howell and Michael Cloud allege that, without contribution limits, they would have obtained more contributions needed for their candidacies, see Howell Decl. ¶ 15 [Paul]; Cloud Decl. ¶ 15 [Paul], Howell's run for a Massachusetts Senate seat in 2000 was ranked by Campaign and Elections magazine as the number one third-party senatorial campaign in that cycle. See Howell Decl. ¶ 5. In addition, Cloud, as principal fundraiser, raised over $800,000 for Howell's 2000 candidacy. See Cloud Decl. ¶ 10. And this happened even before BCRA's doubling of the individual contribution limit, see BCRA § 307, which presumably will benefit any future candidacies of plaintiffs.

IV. THE MILLIONAIRE'S PROVISIONS ARE CONSTITUTIONAL.

For the most part, the challenges to the Millionaire's Provisions leveled in plaintiffs' opening briefs are sufficiently addressed in defendants' opening briefs.[385] However, plaintiffs do raise two points worth refuting here: first, they claim that the Millionaire's Provisions demonstrate the insufficiency of corruption or the appearance thereof as a justification for BCRA's basic contribution limits; and, second, they claim that the Millionaire's Provisions are simply an incumbent-protection measure.[386] Both arguments are flawed.

Plaintiffs' first argument fails because, as set out in Intervenors' opening brief, multiple interests were at stake when BCRA was crafted, and Congress was not required to eliminate all potential for corruption or the appearance thereof at the expense of all other interests — in this instance, the interest in encouraging non-wealthy candidates to compete and political parties to recruit and aggressively promote such candidates. As Senator McCain put it, Congress could "reasonably determine" that "contribution limits — despite their fundamental importance in fighting actual and apparent corruption — should be relaxed to mitigate the countervailing risk that they will unfairly favor those who are willing, and able, to spend a small fortune of their own money to win election."[387] Nothing in the Constitution prohibits Congress from determining that it is willing to tolerate a greater risk of corruption or its appearance in circumstances where competing interests

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[385] The Adams plaintiffs argue that the Millionaire's Provisions are unconstitutional for a different reason: that they impose an unconstitutional burden on voting rights "by forcing the non-wealthy to compete in a game they cannot win." Adams Br. at 20. But "[p]olitical 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources." *FEC v. Mass. Citizens For Life, Inc.*, 479 U.S. 238, 257 (1986) (citations omitted). Moreover, invalidating BCRA's increase in the individual contribution limits would not bring about the absolute equality the Adams plaintiffs seek. Wealthy candidates would still be able to finance their own campaigns, and wealthy individuals would still be able to make unlimited independent expenditures to advocate the election of candidates other than the candidate plaintiffs.

[386] *See* RNC Br. at 73; McConnell Br. at 95-97.

[387] *See* 148 Cong. Rec. S2142 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

exist, and such a determination in no way undermines the fundamental sufficiency of the governmental interest in preventing corruption or the appearance thereof.[388]

Second, plaintiffs assert that the Millionaire's Provisions are simply an incumbent protection measure — as, indeed, they assert that all of BCRA is. Plaintiffs' argument ignores the structure of the provisions, which explicitly take into account any "war chest" a particular candidate (usually an incumbent) may have amassed in determining whether or not the increased limits are triggered; thus, incumbents will typically benefit less from the Millionaire's Provisions than non-incumbents who face a wealthy opponent (including a wealthy incumbent opponent). Plaintiffs' broader argument that BCRA as a whole is designed to protect incumbents is also undermined by more general facts about the impact of campaign finance reform on incumbents' electoral prospects. As Professor Green concludes, state-of-the-art research demonstrates that there is no tenable basis for the claim that "the passage of [campaign finance reform] worsens the lot of challengers"[389] and that there is, quite simply, "no functional relationship between the aggregate flows of money to the parties and the electoral prospects of challengers."[390] BCRA is precisely what it appears to be: a legitimate and wholly justified "response to the threat of corruption arising from unregulated soft money,"[391] and nothing about the Millionaire's Provisions casts any doubt on either the sufficiency of the interests justifying BCRA as a whole or the purposes behind it.

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[388] *See, e.g., Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (upholding variable contribution limits as serving a "multifaceted network of interests," including prevention of corruption); *see also Buckley*, 424 U.S. at 28 (Congress was "surely entitled" to enact provisions of FECA as "a partial measure" to achieve its goals).

[389] Donald D. Green, *The Impact of the BCRA on Political Parties: A Reply to La Raja, Lott, Keller, and Milkis* (Oct. 7, 2002) at 17 [DEV 5 – Tab 1, hereinafter D. Green Rebuttal Report].

[390] *Id.*; *see also id.* at 14-17.

[391] D. Green Rebuttal Report at 23.

TITLES III AND V: CLAIMS AGAINST THE FCC

PRESENTATION BY THE UNITED STATES DEFENDANTS

I. SECTION 305 OF BCRA IS CONSTITUTIONAL.

As discussed in our opening brief, Gov't Br. at 215-16, plaintiffs' challenge to § 305 is not justiciable. Plaintiffs do not even address the issue of standing or ripeness in their opening brief, let alone discharge their burden of showing that a concrete case or controversy exists with respect to § 305. Even assuming that plaintiffs could satisfy standing and ripeness requirements, their challenge to § 305 fails on the merits. The disclosure required under § 305 provides voters with important additional information to consider in evaluating candidates,[140] and requiring the disclosure to be made with the candidate's face and voice ensures that this vital information is transmitted to viewers and listeners in a way that sufficiently distinguishes it from the remaining parts of the broadcast so that the information is communicated effectively.

As explained in our opening brief, see Gov't Br. at 211-13, 219-20, § 305 is consistent with the long history of federal regulation of political broadcasts, and imposes less intrusive requirements than many existing provisions. See 47 U.S.C. 312(a)(7), 315; 47 C.F.R. 73.1212(d)(e), 73.1940-1944, 76.205-76.206, 76.1611, 76.1701. Indeed, the courts have recognized that Congress may validly regulate access to broadcast time by candidates for public office. See CBS v. FCC, 453 U.S. 367 (1981) (upholding "reasonable access" requirement); Branch v. FCC, 824 F.2d 37, 48-50 (D.C. Cir. 1987) (rejecting challenge to provision requiring broadcasters to provide "equal time" to legally qualified candidates). Section 305 is also consistent with the long history of federal disclosure requirements imposed on broadcasters and cable television systems. See 47 C.F.R. 73.1943; 47 C.F.R. 76.1701(a)-(c). The

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[140] Section 305 requires candidates that wish to receive the "lowest unit charge" for their political broadcasts either to certify they will not make any direct reference to their opponent or to include a short and plain statement at the end of the broadcast referring to their opponent acknowledging their approval thereof. The statute thus ensures that "the candidate's sponsorship [is] absolutely clear" in the broadcast. 147 Cong Rec. S2693 (Mar. 22, 2001) (Sen. Collins).

statute simply imposes an additional disclosure requirement on candidates who seek the "lowest unit charge" benefit, see 47 U.S.C. 315(b)(1), made available to them during the period immediately prior to a federal election.

Contrary to plaintiffs' contention (McConnell Br. at 89-90), § 305 does not discriminate on the basis of viewpoint. The statute does not "treat[] 'negative' advertising differently from 'positive' advertising," McConnell Br. at 89-90. Section 305 applies to all broadcasts that "refer" to a candidate's opponent, regardless of the party affiliation of the candidate, the candidate's purpose in sponsoring the broadcast, or the point of view expressed in the broadcast.[141]

In light of the strong interest in favor of public disclosure of information about federal candidates, Congress presumably could have required all candidates to provide the disclosure that § 305 encourages. Congress surely can take the lesser step of making disclosure a condition on the availability of the "lowest unit charge," a step that leaves candidates free to purchase broadcast time at the "comparable use rate," 47 U.S.C. 315(b)(2), if they do not wish to respond to the permissible incentive for disclosure that § 305 provides.[142]

Plaintiffs' contention (McConnell Br. at 90) that § 305 imposes an unconstitutional condition lacks merit. The unconstitutional conditions cases have typically involved efforts to suppress speech. See, e.g., Speiser v. Randall, 357 U.S. 513, 519 (1958) (denial of tax exemption "'aimed at the suppression of dangerous ideas'" (citation omitted)); Hannegan v. Esquire, Inc., 327 U.S. 146, 156 (1946) (denial of

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[141] Plaintiffs' reliance on the title of § 305 (see McConnell Br. at 90) is misplaced. "'[T]he title of a statute . . . cannot limit the plain meaning of the text.'" Pa. Dep't of Corrections v. Yeskey, 524 U.S. 206, 212 (1998) (quoting Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528-29 (1947)). The plain language of § 305 makes clear that it applies to all broadcasts that refer to a candidate's opponent whether or not the reference is negative.

[142] Plaintiffs (McConnell Br. at 89) invoke Perry v. Sindermann, 408 U.S. 593 (1972), but that case is entirely inapposite. The Court in Perry noted that public employment may not be denied because of the plaintiff's exercise of his constitutionally protected freedoms of speech and association. Perry was an attempt to suppress speech. Nothing in that case casts doubt on Congress's power to impose a disclosure requirement on federal candidates as a condition on the receipt of a government-created benefit like lowest unit charge.

second class mailing privileges for periodical amounted to censorship). Section 305, by contrast, promotes First Amendment values by creating an incentive for candidates to provide more information to the public, information that makes clear their approval of political broadcasts that refer to their opponents. Such public disclosure furthers First Amendment values by increasing the amount of information available to the public. Federal candidates who seek public office have no legitimate interest in refusing to disclose their sponsorship of political advertisements broadcast on radio or television in support of their campaigns.

Plaintiffs' suggestion (McConnell Br. at 89) that § 305 is an impermissible effort to "compel" speech similarly lacks merit.[143] Compelled speech cases generally involve efforts to require individuals to associate themselves with the messages of other parties that they do not necessarily endorse. See, e.g., Wooley v. Maynard, 430 U.S. 705, 717 (1977). Section 305, by contrast, simply requires a candidate to acknowledge responsibility for his own political broadcast and for views conveyed on his own behalf.

II. SECTION 504 OF BCRA IS CONSTITUTIONAL.

Section 504 of BCRA requires a broadcast station to maintain and make publicly available a "political file" containing a complete record of requests to purchase broadcast time "made by or on behalf of a legally qualified candidate for public office" or to broadcast a "message relating to any political matter of national importance," including "a national legislative issue of public importance." The record must include "the name of the person purchasing the time, the name, address, and phone number of a contact person for such person, and a list of the chief executive officers or members of the executive committee or of the board of directors of such person."

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[143] Plaintiffs' reliance (McConnell Br. at 89) on Cohen v. California, 403 U.S. 15 (1971), and Brown v. Hartlage, 456 U.S. 45 (1982), is entirely misplaced. Cohen involved the appeal of a criminal conviction for the wearing of a jacket that displayed an offensive slogan protesting the draft. 403 U.S. at 16. Brown involved a constitutional challenge to the application of the Kentucky Corrupt Practices Act to a campaign pledge by a county commissioner to reduce his salary if elected. 456 U.S. at 47. Neither case involved a candidate's disclosure of sponsorship in a political broadcast on television or radio, and neither case suggests that Congress may not require such disclosure.

Plaintiffs contend that the reference to "political matters of national importance" is unconstitutionally vague. McConnell Br. at 98-99; AFL-CIO Br. at 18-19. They also argue that § 504 serves no legitimate government objective. McConnell Br. at 99-100; AFL-CIO Br. at 19-20. They further contend that § 504 is invalid because (1) it requires disclosure of information about "requests" for broadcasts, whether or not an actual broadcast occurs, and (2) it is not limited to broadcasts that "expressly advocate[]" the election or defeat of a candidate. Id. Those arguments lack merit.

As explained in our opening brief, Gov't Br. at 222-23, the statutory reference to "political matters of national importance" is not void for vagueness. Plaintiffs' contrary argument, McConnell Br. at 98, relies on the Declaration of Jack N. Goodman, senior vice president and general counsel of the National Association of Broadcasters ("NAB"), stating that NAB broadcasters will have difficulty in determining whether broadcast requests refer to "political matters of national importance." The NAB itself, however, counsels broadcasters to collect sponsorship information for broadcasts that contain "political matter or matter involving the discussion of a controversial issue of public importance." See NAB Political Broadcast Catechism (5th ed.) at 62, 65 [PCS/NAB at 0373]; see also 47 C.F.R. 73.1212(e); 47 C.F.R. 76.1701(d) (cable television systems). That standard has been part of the FCC sponsorship regulations since 1944, see Loveday v. FCC, 707 F.2d 1443, 1453-54 (D.C. Cir. 1983), and NAB does not cite any previous objection to these similar requirements.[144] Moreover, as explained in our opening brief, Gov't Br. at 213, any uncertainty regarding the scope of the statute is diminished by the FCC's availability to answer inquiries about enforcement of its political broadcast regulations.[145]

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[144] In fact, the NAB has posted on its website a document that provides guidance to its members on compliance with § 504 pending resolution of this litigation. The document, which advises that the phrase "political matters of national importance" includes such issues as "Medicare reform or gun control," does not suggest that determining the meaning of the phrase will be especially difficult. See NAB, The Bipartisan Campaign Finance Reform Act of 2002: New Public File Requirements For Issue Advertisements (www.nab.org/MembersOnly/nabsays/legal /BCRA.pdf).

[145] Plaintiffs' reliance on Trinity Broadcasting v. FCC, 211 F.3d 618 (D.C. Cir. 2000), see McConnell Br. at 99, is misplaced. The Court in Trinity sustained the FCC's interpretation of its regulations concerning minority ownership, id. at 627, but refused to enforce the denial of a broadcast license because the agency did not provide adequate notice

Section 504 plainly serves an important governmental interest. As explained in our opening brief, Gov't Br. at 218, 221, the statute is narrowly targeted to ensure an informed electorate. The Supreme Court has long recognized the importance of public disclosure in the political arena. See Buckley, 424 U.S. at 67, 81; Gov't Br. at 217-18. And, even outside the political arena, the courts have recognized Congress's broader latitude to regulate television and radio broadcast stations and cable television systems. See Gov't Br. at 219. Section 504 is a permissible regulation of those media, ensuring that the public can determine the identity of the actual sponsor of political broadcasts and the amount of money spent (and offered to be spent) on such broadcasts.

Contrary to plaintiffs' contention, § 504 properly requires disclosure of information about "requests" to purchase air time. See McConnell Br. at 100; AFL-CIO Br. at 18-20. The FCC's political file regulations have always required candidates to disclose their "requests" to purchase broadcast time. See 47 C.F.R. 73.1943 (broadcast stations); 47 C.F.R. 76.1701 (cable television systems). The similar disclosure mandated under § 504 provides the public with access to information concerning the amounts that individuals and groups are prepared to spend to broadcast messages on political matters of national importance, as well as how much they actually spend on such broadcasts. Further, requiring disclosure of the identities of those who make requests, and the broadcasters' disposition of those requests, enables the public to evaluate whether broadcasters are processing requests in an even-handed fashion.[146]

Finally, the AFL-CIO erroneously suggests that Congress can only require sponsorship disclosures in a political file for broadcasts that expressly advocate the election or defeat of a candidate. See AFL-

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of the interpretation, id. at 632. That an administrative agency may be required to provide notice of its interpretation of an ambiguous regulation before undertaking enforcement action casts no doubt on Congress's authority to enact § 504 and to delegate to the FCC the responsibility of interpreting and implementing that provision.

[146] Moreover, in its preexisting regulations governing candidate broadcasts, see 47 C.F.R. 73.1943, 76.1701, the FCC has not interpreted the term "request" to reach beyond specific proposals to purchase broadcast time at a particular rate and for a particular class of time. The agency has not understood the term to encompass a mere telephonic inquiry about whether the station sells advertising time.

CIO Br. at 19-20. As discussed above, FCC regulations already require disclosure of the sponsor's chief executive officers or members of the executive committee or board of directors for paid broadcasts of a "political matter or matter involving the discussion of a controversial issue of public importance." See 47 C.F.R. 73.1212(e); 47 C.F.R. 76.1701(d) (cable television systems). In the highly regulated area of political broadcasts on radio or television, there is no right to make an anonymous broadcast. To the contrary, stations are under a longstanding obligation to determine the "true sponsor" of broadcasts, including broadcasts that are in no way campaign-related. See 47 U.S.C. 317(c); Loveday, 707 F.2d at 1449; see also Trumper Communications, 11 F.C.C.R. 20,415, 1996 WL 635821 (Oct. 29, 1996). The collection and disclosure of sponsorship information concerning political broadcasts does not violate the Constitution. See KVUE, Inc. v. Moore, 709 F.2d 922, 937 (5th Cir. 1983) (rejecting First Amendment challenge to state statute requiring sponsors of political broadcast advertisements to identify themselves), aff'd, 465 U.S. 1092 (1984).

CONCLUSION

For the foregoing reasons, and for the reasons stated in defendants' opening brief, the motion of the Governmental Defendants and the Defendant-Intervenors for judgment should be granted, and plaintiffs' claims dismissed, with prejudice.

Dated: November 20, 2002

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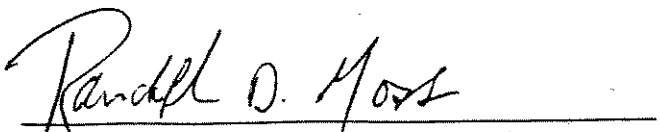

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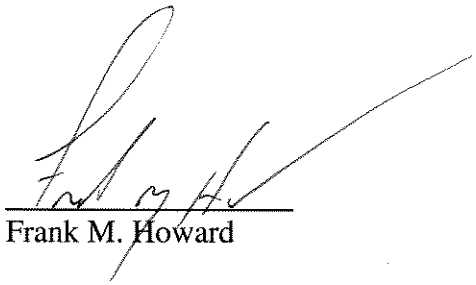

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