No. 02-1740

In The Supreme Court of the United States

VICTORIA JACKSON GRAY ADAMS, et al.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,

Appellees.

On Appeal From The United States District Court, District Of Columbia

BRIEF OF APPELLANTS

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QUESTION PRESENTED

Whether the District Court erred in ruling that a challenge to the increased "hard money" contribution limits found in sections 304, 307 and 319 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, 97-100, 102-03, and 109-12 (codified as amended at 2 U.S.C. §§ 441a and 441a-1) is nonjusticiable due to lack of cognizable injury, even though the increases will confer preponderant electoral power on wealthy donors and will effectively exclude candidates and voters without access to networks of large donors from electoral participation, in violation of the equal protection guarantee incorporated by the due process clause of the Fifth Amendment to the United States Constitution.

LIST OF PARTIES

Actual parties to the proceedings in the United States District Court were:

(1) Victoria Jackson Gray Adams, Carrie Bolton, Cynthia Brown, Derek Cressman, Victoria Fitzgerald, Anurada Joshi, Nancy Russell, Kate Seely-Kirk, Rose Taylor, Stephanie L. Wilson, California Public Interest Research Group, Massachusetts Public Interest Research Group, New Jersey Public Interest Research Group, United States Public Interest Research Group, Fannie Lou Hamer Project, and Association of Community Organizers for Reform Now, plaintiffs, appellants herein,

(2) The United States of America, defendant,

(3) The Federal Communications Commission, defendant,

(4) The Federal Election Commission, defendant,

(5) John Ashcroft, in his capacity as Attorney General of the United States, defendant,

(6) Sen. John McCain, Sen. Russell Feingold, Rep. Christopher Shays, Rep. Martin Meehan, Sen. Olympia Snowe, and Sen. James Jeffords, defendant-intervenors.

CORPORATE DISCLOSURE STATEMENT

None of the appellants has a parent corporation, and no publicly held company owns 10% or more of the stock of any of the appellants.

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The opinions of the three-judge United States District Court for the District of Columbia are reprinted in the Supplemental Appendix to Jurisdictional Statements, Vols. I-V, filed by the appellants in McConnell et al. v. FEC et al., No. 02-1674, on behalf of all of the parties to the consolidated challenges to the Bipartisan Campaign Finance Reform Act of 2002, including the *Adams* appellants.

JURISDICTION

The final judgment of the court below was entered on May 2, 2003. The *Adams* appellants, Victoria Jackson Gray Adams, Carrie Bolton, Cynthia Brown, Derek Cressman, Victoria Fitzgerald, Anurada Joshi, Nancy Russell, Kate Seely-Kirk, Rose Taylor, Stephanie L. Wilson, California Public Interest Research Group, Massachusetts Public Interest Research Group, New Jersey Public Interest Research Group, United States Public Interest Research Group, Fannie Lou Hamer Project, and Association Of Community Organizers For Reform Now, filed their notice of appeal on May 5, 2003. *See* Appendix to Jurisdictional Statement ("J.S. App.") at 1a. The jurisdiction of this court is invoked under the Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 81, 113-114 (2002). This Court noted probable jurisdiction on June 5, 2003.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This constitutional challenge is brought pursuant to the due process clause of the Fifth Amendment to the U.S. Constitution, set forth at J.S. App. 3a. The challenged sections of the Bipartisan Campaign Finance Reform Act of 2002 are codified at 2 U.S.C. §§ 441a and 441a-1 and set forth beginning at J.S. App. 4a.

STATEMENT OF THE CASE

This case arises out of an injury to the appellants' fundamental right to vote caused by the radical increases in the limits on individual campaign contributions in the Bipartisan Campaign Finance Reform Act of 2002 (BCRA), §§ 304, 307 and 319, 116 Stat. 81, 97-100, 102-03, and 109-12 (codified as amended at 2 U.S.C. §§ 441a and 441a-1). These provisions raise the amount that an individual may contribute to a federal campaign from $1,000 per election to $2,000 per election. BCRA § 307. The individual contribution limit is further raised in races where a candidate faces an opponent who has spent over a threshold amount in personal funds. Under such circumstances, a candidate for Representative may receive individual contributions of up to $3,000 per election, and a Senate candidate may receive individual contributions of up to $12,000 per election. BCRA §§ 304 and 319.

The appellants are non-wealthy voters; organizations representing the interests of non-wealthy voters; and candidates lacking personal wealth and access to large networks of wealthy donors. They assert that the BCRA increases will enable the largest donors and candidates

with vast networks of wealthy contributors to dominate the electoral process. Candidates who are not favored by the highest donors will no longer have any meaningful chance of success. Voters supporting those candidates will be denied the effective exercise of the franchise.

Thus, the BCRA hard money increases will deprive the appellants of the equal opportunity to participate in all integral aspects of the electoral process, in violation of the equal protection guarantee incorporated by the due process clause of the Fifth Amendment to the United States Constitution. Voluminous evidence supports the appellants' claim of electoral exclusion. The ruling of the three-judge district court, that the appellants lack standing because there is no cognizable injury fairly traceable to the BCRA, Per Curiam Opinion, Supplemental Appendix to Jurisdictional Statements ("J.S. Supp. App.") at 85sa; Opinion of Judge Henderson, J.S. Supp App. at 472sa-476sa, fails to take adequate account of this evidence and therefore fails to weigh adequately the constitutional values at stake in this case.

A. The predominance of the largest donors in the electoral process.

The appellants presented substantial, uncontroverted evidence that the challenged provisions would give grossly disproportionate weight in the electoral process to a small portion of the population able to contribute the maximum amount permitted. Combined with the real-world practice of bundling contributions, the hard money increases will heavily favor elite donors and candidates with access to such donors. Only a tiny minority of the voting-age population, 0.11 percent, gave maximum hard money contributions to

federal candidates in the 2000 election cycle, yet these contributions constituted nearly half of all individual funds raised. *Adams* Exh. 1, Declaration and Expert Report of Derek Cressman ("Cressman Decl."), ¶¶ 4-5, J.S. App. 22a-23a. Major hard money donors are overwhelmingly white and male, and 81 percent have family incomes over $100,000. *See Adams* Exh. 2, Declaration and Expert Report of Prof. John Green, ¶ 3 ("Green Decl."), J.S. App. 31a. Among this group, those who say they will give more under increased limits are particularly wealthy, with 22 percent having family incomes over $500,000. *See Adams* Exh. 2B, Clyde Wilcox & John Green, et al., *Raising the Limits*, Public Perspective, May/June 2002, at 11, 13, J.S. App. 39a.

The challenged increases in BCRA will "result in increased giving by the elite pool of individual donors to federal campaigns," Green Decl. ¶ 4, and would allow this elite group to dominate the electoral process. Indeed, analysis of FEC data for the first quarter of 2003 shows that 57 percent of all funds already raised by 2004 presidential candidates have come from donations higher than $1,000. *See* Press Release, U.S. PIRG, "Presidential Candidates Getting More Money from Big Donors" (Apr. 16, 2003), *available at* http://www.pirg.org/democracy/democracy.asp?id2=9950. Expert witness Derek Cressman estimates that under the increased limits, the proportion of individual funds raised by federal candidates from donors giving under $200 will fall from 30 percent to 21-25 percent, while the percentage raised from donors giving the maximum amount allowed will increase from 46 percent to 55-63 percent. Cressman Decl., ¶ 14, J.S. App. 27a.

Candidates with networks of maximum donors are able to augment their fundraising advantage by encouraging

these donors to bundle (*i.e.*, solicit or facilitate) maximum contributions from business associates, friends and family members. *Adams* Exh. 3, Declaration and Expert Report of Craig McDonald ("McDonald Decl."), ¶ 5, J.S. App. 47a. The BCRA hard money increases will multiply the amounts bundled by well-connected donors, giving these donors grossly disproportionate electoral power. *Id.*, ¶ 15. Candidates lacking networks of large donors will be effectively excluded from any meaningful participation in the process.

The Bush Pioneer program – the hard money bundling operation employed in the 2000 election cycle by the George W. Bush Presidential Exploratory Committee, Inc., and its successor organization, the George W. Bush For President Committee – exemplifies the disproportionate electoral influence that bundlers enjoy. Each Pioneer was responsible for gathering at least $100,000 in hard money contributions, and the 212 Pioneers channeled more than $22 million to the 2000 Bush presidential campaign. *Id.*, ¶ 13, J.S. App. 53a.

Under the BCRA increases, this small group could have potentially collected twice as much from the same number of donors. In fact, press accounts indicate that the Bush campaign for 2004 is asking a new group, called the "Rangers," to bundle at least $200,000 each.[1]

[1] *See* Sharon Theimer, "Bush Volunteer Fund-Raising Group Formed," Associated Press, May 23, 2003, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A30660-2003May23.html; Richard A. Oppel Jr., "Bush's Heaviest Hitters to Be Called Rangers," N.Y. TIMES, May 24, 2003, at A12.

The Pioneer program also demonstrates that those who bundle contributions often do so with the aim of gaining enhanced access and influence with elected officials. The Pioneers – who were comprised largely of corporate executives and lobbyists, McDonald Declaration, ¶ 10, J.S. App. 50a-51a – were each assigned a tracking number so that the Bush Campaign could record the total amount of money raised by each individual. *Id*. ¶ 15; Deposition of John L. Oliver III, 30(b)(6) witness on behalf of Bush for President, Inc., 46, line 10 to 57, line 11, 106, lines 10-16. *See also* May 27, 1999 letter from Bush Pioneer Thomas R. Kuhn, *Adams* Exh. 6, Joint Appendix[2] ("Jt. App.") at __.[3] Each Pioneer, therefore, was "credited" with delivering at least $100,000 to the campaign, despite the nominal hard money limit of $1,000. As wealthy

[2] Pursuant to communication from the Office of the Clerk of the Supreme Court on June 25, 2003, the Joint Appendix will be filed after the briefs in the consolidated litigation. Bound copies of the *Adams* appellants' briefs with corrected citations to the Joint Appendix will be filed subsequently.

[3] The relevant text of this letter reads as follows: "As you know, a very important part of the campaign's outreach to the business community is the use of tracking numbers for contributions. Both Don Evans [the chair of the campaign] and Jack Oliver [the campaign's national finance director] have stressed the importance of having our industry incorporate the #1178 tracking number in your fundraising efforts. ***LISTING YOUR INDUSTRY'S CODE DOES NOT PREVENT YOU, ANY OF YOUR INDIVIDUAL SOLICITORS OR YOUR STATE FROM RECEIVING CREDIT FOR SOLICITING A CONTRIBUTION. IT DOES ENSURE THAT OUR INDUSTRY IS CREDITED, AND THAT YOUR PROGRESS IS LISTED AMONG THE OTHER BUSINESS/INDUSTRY SECTORS.***" *Adams* Exh. 6, Jt. App. at ___ (emphasis in original). Kuhn sent a letter with similar language on May 26, 1999, to "Association Executives for Bush." *Adams* Exh. 6, Jt. App. at ___.

individuals such as the Pioneers are increasingly able to determine electoral outcomes under BCRA, they will also expand their ability to influence legislative outcomes. A wealth of evidence documents the disproportionate access and influence that maximum donors and bundlers enjoy in Congress.[4] "The increased individual contribution limits will exacerbate the disproportionate access and influence that the largest donors enjoy." Simon Decl., ¶ 10, J.S. App. 74a-75a.

B. The electoral exclusion of voters and candidates lacking personal wealth or access to large networks of wealthy donors.

Under the BCRA hard money limit increases, candidates without access to networks of wealthy donors will be effectively excluded from seeking political office, as the

[4] *See Adams* Exh. 18, Declaration of Pat Williams, former Member of Congress from Montana ("Williams Decl."), ¶ 4, J.S. App. 77a ("There is no doubt in my mind that those giving the largest contributions expect preferential access and disproportionate influence"); *Adams* Exh. 17, Declaration of Paul Simon, former U.S. Senator from Illinois ("Simon Decl."), ¶ 4, J.S. App. 73a ("No member of Congress, not even the most scrupulous, is unaware of his or her largest contributors, and not even the most scrupulous members will ignore them."); Deposition of Representative Earl F. Hilliard, Sept. 5, 2002, 68, lines 18-20, 86, lines 9-15, 95, lines 9-11; Deposition of Representative Bennie G. Thompson, Sept. 19, 2002, 68, lines 16-22. Fact witnesses for the defendants make the same point. *See Adams* Exh. 33, Declaration of Senator Dale Bumpers, former U.S. Senator from Arkansas, ¶ 14, J.S. App. 137a (discussing hard and soft money donors); Deposition of Arnold Hiatt, major hard money donor, Sept. 26, 2002, 102, lines 20-25, 104, lines 5-19. *See also* Stratmann Decl., ¶ 13-30, J.S. App. 60a-67a (documenting evidence that campaign contributions affect legislators' voting behavior).

war chests of well-connected candidates grow and the financial bar rises far beyond the reach of those lacking such connections. The voices of candidates lacking access to large numbers of wealthy donors will be driven "beneath the level of notice," *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 397 (2000), and low- and moderate-income voters will lose their ability to have a meaningful impact on the electoral process.

Candidates with a financial advantage nearly always win elections; such candidates won congressional office 94 percent of the time in the 2000 general election, Cressman Decl. ¶ 2, J.S. App. 22a, and the same statistic held true in the 2002 Congressional election. *See* Press Release, Center for Responsive Politics, "Gender Gap, GOP Edge in Small Donations Could Loom Big in 2004 Elections" (June 27, 2003), *available at* http://www.opensecrets.org/pressreleases/donor demog.asp. These realities are confirmed by the candidate appellants and others who have previously run for federal office and are considering doing so again, but who testified that the BCRA increases would deter them from future candidacies because they lack access to large networks of maximum donors.[5] Senator Russell Feingold, a defendant-intervenor and a co-sponsor of BCRA, admitted that the hard money increases will likely further enable certain candidates to build up campaign war chests, "potentially discourag[ing] some people from running" for

[5] *See Adams* Exh. 19, Declaration of Dr. Thomas A. Caiazzo ("Caiazzo Decl."), J.S. App. 79a; *Adams* Exh. 20, Declaration of Gail Crook, ("Crook Decl."), J.S. App. 83a; *Adams* Exh. 21, Declaration of Victor Morales ("Morales Decl."), J.S. App. 88a; *Adams* Exh. 22, Declaration of Cynthia Brown ("Brown Decl."), J.S. App. 93a; *Adams* Exh. 23, Declaration of Ted Glick ("Glick Decl."), J.S. App. 96a.

federal office. Deposition of Russell Feingold ("Feingold Deposition"), Sept. 9, 2002, 264, line 14 to 265, line 3.

Voters express themselves in the electoral process primarily through supporting the candidates of their choice. Thus when candidates lacking access to large donors are eliminated from competition, those who would support them are effectively deprived of the right to vote. As voter-appellant Carrie Bolton testified, under the BCRA increases supporting a candidate lacking large donors "would be like fighting a fire with a cup of water." *Adams* Exh. 25, Declaration of Carrie Bolton ("Bolton Decl."), ¶ 11, J.S. App. 105a-6a.

The voter-appellants have testified that they cannot afford to make large campaign contributions. Indeed, most Americans are unable to make contributions anywhere near the BCRA limit. A $2,000 contribution would represent nearly five percent of the median U.S. family income, which U.S. Census Bureau data puts at $42,228. *See* U.S. Census Bureau, INCOME 2001, *at* http://www.census.gov/hhes/income/income01/inctab1.html (last visited July 1, 2003). The $12,000 limit applicable in some races under the millionaire provisions would represent over 28 percent of median income.

Because the hard money increases will deprive the voter-appellants of the equal opportunity to elect the candidates of their choice, these appellants have testified that the increases will make their vote less meaningful.[6]

[6] *See Adams* Exh. 24, Declaration of Victoria Jackson Gray Adams ("Adams Decl.") ¶ 5, J.S. App. 101a ("The largest donors get more attention, and when the ceiling is raised the voices of small contributors

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As Bolton testified, "The increases in the hard money contribution limits make it no longer conceivable that I can access the political process. They undermine the meaning and value of my vote." Bolton Decl., ¶ 12, J.S. App. 106a. Representatives Earl F. Hilliard and Bennie Thompson testified that the increases will harm the ability of low- and moderate-income communities, and communities of color, to elect the representatives of their choice.[7]

C. The entrenchment of incumbents.

By aiding candidates favored by the wealthy, incumbent members of Congress dealt themselves a powerful advantage, for incumbents most often are the favorites of the wealthy. The uncontroverted evidence shows that BCRA's hard money increases will benefit incumbents, who enjoy greater access to large donors than do challenger candidates. *See Adams* Exh. 4, Declaration and Expert Report of Professor Thomas Stratmann ("Stratmann Decl."), ¶¶ 5-12, J.S. App. 57a-60a; Cressman Decl.,

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and voters like myself will be lost."); *Adams* Exh. 30, Declaration of Chris Saffert, ¶ 18, J.S. App. 125a-126a ("The effect of the contribution limit increases will be to drown out the voices of people from low and moderate-income communities . . . "); *Adams* Exh. 26, Declaration of Daryl Irland ("Irland Decl."), J.S. App. 107a; *Adams* Exh. 27, Declaration of Anuradha Joshi ("Joshi Decl."), J.S. App. 110a; *Adams* Exh. 28, Declaration of Howard Lipoff ("Lipoff Decl."), J.S. App. 113a; *Adams* Exh. 29, Declaration of Nancy Russell ("Russell Decl."), J.S. App. 116a; *Adams* Exh. 31, Declaration of Kate Seely-Kirk ("Seely-Kirk Decl."), J.S. App. 127a; *Adams* Exh. 32, Declaration of Stephanie L. Wilson ("Wilson Decl."), J.S. App. 130a.

[7] *See* Thompson Deposition, 87, lines 9-12 ("[B]y doubling the hard money contribution, you price low and moderate communities out of the market for electoral participation"); Hilliard Deposition, 103, lines 4-7.

¶ 19. J.S. App. 29a. A leading co-sponsor of the BCRA, Defendant-Intervenor Senator Feingold, has admitted that the hard money increases will benefit incumbent candidates facing challengers without access to wealth. Feingold Deposition 260, lines 7-8.

Incumbents' advantages in raising maximum contributions are particularly pronounced. An analysis of Federal Election Commission data from the 2000 election cycle finds, "Senate incumbents in 2000 raised, on average, nearly three times as much as their challengers did from donors of $1,000 or more: $1.8 million v. $650,000. House incumbents in 2000 raised more than twice as much from donors of $1,000 or more as their challengers, on average: $178,000 v. $85,000." *Adams* Exh. 35, "Why the Battle over Hard Money Matters: Hard Facts on Hard Money," Public Campaign, J.S. App. 152a-153a. By raising the hard money limit, Congress has exacerbated the advantage incumbents already have over challengers to an intolerable degree.

D. The further exclusionary effects of the "millionaire" provisions.

The burdens on non-wealthy candidates described above will increase exponentially in races where a self-funded candidate triggers provisions allowing opponents to raise funds in increments of $3,000 per election in House races, and up to $12,000 per election in Senate races. *See* BCRA §§ 304, 319. The record demonstrates that when one candidate takes advantage of these "millionaire" provisions to multiply maximum contributions, a competing candidate whose supporters cannot make large donations will be buried in her opponents' cash. Candidates

who have in the past faced wealthy, self-funded opponents testified that the burden of simultaneously confronting a second campaign with vast infusions of cash from wealthy donors would make it impossible for them to compete.

For example, appellant Cynthia Brown, a candidate for the United States Senate from North Carolina in the 2002 Democratic Primary, testified that one of her opponents was a millionaire who "contributed enormous sums of money to his own campaign" while another opponent "raised large sums of money from wealthy contributors," Brown Decl., ¶ 5, J.S. App. 94a; that her own contributions averaged approximately $25, *id.* ¶ 4; and that she would consider running again for the U.S. Senate, but the BCRA millionaire provisions would "seriously discourage" her from participating. *Id*. ¶ 7, J.S. App. 94a-95a.[8] She stated:

[8] Neither Ms. Brown nor any of the other candidates challenging various provisions of the BCRA in the consolidated litigation could have demonstrated complete certainty that they would compete in the 2004 elections, given that the lawsuits were filed during the 2002 elections. However, there is a clear likelihood that if Ms. Brown were to run for the Senate in North Carolina in 2004 she would be in a race where the millionaire amendment provisions apply. Incumbent Senator John Edwards spent $6.15 million of his own money to win election in 1998, *see* Center for Responsive Politics, JOHN R. EDWARDS: POLITICIAN PROFILE, *available at* http://www.opensecrets.org/1998os/index/N00002283.htm, and he will face re-election in 2004. North Carolina press accounts have already noted that the millionaire provision will likely be triggered even if Edwards does not run, since in that event Charlotte investment banker Erskine Bowles – who spent $6.8 million in his 2002 Senate bid – reportedly plans to enter the race. *See* Associated Press, "*Millionaire's Amendment" Could Help Burr in Senate Race*, June 24, 2003, *available at* http://newsobserver.com/nc24hour/ncnews/story/2643531p-2432009c.html; Jim Morrill, *Law May Level Political Funding Field*, Charlotte Observer, June 24, 2003, *available at* http:/www.charlotte.com/mld/observer/news/6156128.htm. Another entrant in the primary, U.S. Rep.

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> If I were to run for the U.S. Senate again from North Carolina, I would likely face again a millionaire opponent. Under the increases in the hard money contribution limits, my other opponents would be free to raise up to $12,000 per individual per election. The people I know can hardly afford to contribute twenty-five dollars, let alone $12,000. There is no way that any candidate like me can compete under these new conditions. These increases in the hard money contribution limits would effectively eliminate any future campaign I might hope to wage for the U.S. Senate.

Id., ¶¶ 8-9, J.S. App. 95a.[9] *See also* Glick Decl., ¶ 6, J.S. App. 98a ("It is impossible to participate facing that tremendous disparity in resources. I just do not run in the circles of people who can contribute $12,000.").

E. Proceedings in district court.

The *Adams* plaintiffs filed a lawsuit in the U.S. District Court for the District of Columbia on May 7, 2002. Count I alleged that the increases in the individual hard money contribution limits contained in BCRA Sec. 307 violate the equal protection guarantee incorporated by the due process clause of the Fifth Amendment to the U.S. Constitution. Count II alleged that the BCRA provisions

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Richard Burr, has reportedly begun fundraising and would take advantage of the higher contribution limits if the millionaire amendment were triggered. *See id*.

[9] Appellant Carrie Bolton, a North Carolina voter supporting Ms. Brown, also testified regarding her desire to support Ms. Brown in future elections. Bolton Decl., J.S. App. 103a-106a.

providing for further contribution increases in response to expenditures from personal funds (the "millionaire" provisions), BCRA §§ 304 and 319, similarly violate the Fifth Amendment.

The case was consolidated with ten other challenges to various provisions of the BCRA and assigned to a three-judge panel. A two-day trial based on recorded testimony was held on December 4 and 5, 2002. The defendants and defendant-intervenors presented no evidence counter to that presented by the *Adams* plaintiffs. Rather, they argued that the plaintiffs' injuries were insufficient to confer standing. *See* Defendants' Opening Brief ("Def. Br.") at 208-209. The three-judge District Court issued a final judgment on May 2, 2003 dismissing the claims as nonjusticiable. *See* Per Curiam Opinion, J.S. Supp. App. at 85sa; Opinion of Judge Henderson, J.S. Supp App. at 472sa-476sa.

SUMMARY OF ARGUMENT

This Court has long held that "[t]he basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license." *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 & n.14 (1996) (*citing Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (invalidating, as a denial of equal protection, an annual $1.50 poll tax imposed by Virginia on all residents over 21); *Bullock v. Carter*, 405 U.S. 134 (1972) (invalidating Texas scheme under which candidates for local office had to pay fees as high as $8,900 to get on the ballot); *Lubin v. Panish*, 415 U.S. 709 (1974) (invalidating California

statute requiring payment of a ballot-access fee fixed at a percentage of the salary for the office sought)).

The hard money increases in BCRA bar non-wealthy voters and candidates from exercising effectively this "basic right to participate in [the] political process[ ]." *M.L.B.*, 519 U.S. at 124. These increases exclude low- and moderate-income voters from effective exercise of the franchise as tangibly as did the mandatory candidate filing fees at issue in *Bullock* and *Lubin*. By raising contribution limits to levels at which only upper-income voters can afford to give, Congress has functionally guaranteed to that narrow segment of the electorate the power to determine which candidates are able to mount viable campaigns long before any ballots are cast. While non-wealthy voters may now be able to pull the lever on Election Day, BCRA's hard money increases prevent them from having "an equally effective voice." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (disparities in voting strength based on population of electoral district violate equal protection clause of Fourteenth Amendment). Similarly, the hard money increases prevent candidates lacking access to elite donor networks from competing meaningfully for federal office, "thereby tending to limit the field of candidates from which voters might choose." *Bullock*, 405 U.S. at 143. These increases "fall[ ] with unequal weight on voters, as well as candidates, according to their economic status." *Id*. at 144.

Congress may not raise contribution limits to a level which debases and dilutes the fundamental right to vote. By enabling elite donors to dominate the electoral process, Congress has created two distinct classes of voters: those who, as a result of the hard money increases, can employ

vast networks of wealth in support of the candidates of their choice and those who cannot. The Constitution prohibits the State from unlawfully weighting a citizen's vote in this way. *See Reynolds*, 377 U.S. at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."). *See also Moore v. Ogilvie*, 394 U.S. 814, 819 (1969) ("The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.").

In *Harper*, this Court stated that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper*, 383 U.S. at 665. By doubling the hard money contribution limit for all federal races and by multiplying it even further for races involving self-funded candidates, Congress has redrawn the lines in a manner which undermines the franchise. While Congress does not have the authority to enact a contribution limit which is "so radical in effect as to render political association ineffective," *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 397 (2000), neither does it have the authority to enact a contribution limit which allows elite donors to achieve a stranglehold over the electoral process, locking out the voices of ordinary voters.

There is no legitimate state interest that justifies the increased limits. The increases cannot be justified by inflation, as fundraising under the previous $1,000 limit far outpaced inflation, and defenders of the BCRA increases admitted that they had no difficulties fundraising under the previous limits. The record also demonstrates

that the increased limits will decrease, rather than increase, electoral competition, because incumbents possess far more extensive networks of maximum donors.

Because the appellants have stated a legally cognizable injury that is fairly traceable to the challenged provisions, and will be redressed by invalidation of those provisions, their claims are fully justiciable. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The record discloses the imminent, particularized harm that the appellants will suffer from the increases. The electoral exclusion of which they complain is a direct result of the BCRA increases, and therefore fairly traceable to the enactment of those provisions. Because the appellants seek to preserve their ability to exercise effectively their basic right in the political process, rather than absolute equality in electoral influence, a return to the previous hard money limits will redress their injury.

ARGUMENT

I. THE BCRA HARD MONEY CONTRIBUTION LIMIT INCREASES VIOLATE THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION OF THE LAW.

A. The marginalization of low- and moderate-income voters violates equal protection principles established in the Court's voting rights precedents.

Victoria Jackson Gray Adams has been an active advocate for voting rights for over forty years, and was a founder of the Mississippi Freedom Democratic Party, which challenged the seating of the state's all-white delegation to the 1964 Democratic Party national convention.

Adams Decl., ¶ 1, JS App. 100a. Yet despite her lifelong commitment to electoral democracy, she testified that the BCRA increases will "deprive me of full participation and discourage me from involvement with electoral politics." *Id*. ¶ 3, JS App. 101a. This is a sad irony, given that the asserted rationale behind the BCRA's overall reform of campaign finance includes "restoring Americans' faith in the electoral process and decreasing public cynicism about our system of government," along with preventing corruption and the appearance of corruption. *See Adams* Exh. 15, Intervenors' Responses to Contention Interrogatories, Responses to *McConnell* Interrogatory No. 1 and *Adams* Interrogatory No. 1., 2-5, Jt. App. at ___. Far from serving these admirable goals, the BCRA hard money increases will accomplish the inverse, convincing low- and moderate-income citizens that their voices are meaningless compared with the few who are able to channel tens or hundreds of thousands of dollars to their favored candidates. The disparities between electoral "haves" and "have-nots" will deepen to a chasm, and those without wealth will be relegated to second-class citizenry, denied a "fundamental political right . . . preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

The Constitution must and does provide a remedy. This Court has long held that exclusion from the electoral process based on economic status violates equal protection principles,[10] *see Harper v. Virginia Board of Elections*, 383

[10] The Fourteenth Amendment case law cited herein applies with equal force to a violation of equal protection committed through federal law. "The Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment." *Schwieker v. Wilson*, 450 U.S.

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U.S. 663 (1966) (poll tax violates equal protection clause of Fourteenth Amendment); *Bullock v. Carter*, 405 U.S. 134 (1972) (candidate filing fees violate equal protection clause); *Lubin v. Panish*, 415 U.S. 709 (1974) (same), and that all citizens are entitled to an equally meaningful vote. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964) (disparities in voting strength based on population of electoral district violate equal protection clause of Fourteenth Amendment); *Davis v. Bandemer*, 478 U.S. 109 (1986) (dilution of voting strength is justiciable under the equal protection clause). The appellants seek to enforce the very rights guaranteed by these cases: an equal ability to participate in the electoral process regardless of economic status, and an equally meaningful vote.

Like the mandatory candidate filing fee, the hard money contribution increases preserve the right to vote but deprive the vote of meaning. The challenged statutes in *Bullock* and *Lubin* did not directly abridge the right to vote, but rather denied non-wealthy voters a meaningful vote, by preventing them from voting for the candidates of their choice. In striking such fees as a violation of the equal protection clause of the Fourteenth Amendment, the Court observed that candidates "lacking both personal wealth and affluent backers are in every practical sense" excluded from the electoral process by mandatory filing fees, and that "[t]he effect of this exclusionary mechanism on voters is neither incidental nor remote." *Bullock*, 405 U.S. at 143-144. *See also Lubin*, 415 U.S. at 716 (rights of excluded candidates are "intertwined with the rights of

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221, 22 n.6 (1981); *see also National Black Police Association, Inc. v. Velde*, 712 F.2d 569, 580 (D.C. Cir. 1983).

voters"); *Anderson v. Celebrezze*, 460 U.S. 780, 786-787 (1983) (striking early candidate filing deadline which unconstitutionally burdened rights of voters supporting independent candidate). The exclusion of voters and their preferred candidates was *de facto* rather than *de jure*; those lacking wealth were not literally but "in every *practical* sense" excluded from elections. *Bullock*, 405 U.S. at 143-144 (emphasis added).

Similarly, the apportionment cases recognize that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555. *See also Baker v. Carr*, 369 U.S. 186 (1962) (vote dilution claim is justiciable); *Gray v. Sanders*, 372 U.S. 368 (1963) (violation of equal protection and due process clauses of Fourteenth Amendment, and of Seventeenth Amendment, to weight rural votes more heavily than urban votes); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (vote dilution violates Art. I, § 2); *Davis*, 478 U.S. 109 (dilution of voting strength of political group is justiciable under equal protection clause).

Reynolds held that state legislative apportionment must be based on population; the Alabama legislative apportionment that was held unconstitutional gave voters in some Senate districts up to 16 times more weight than others, and in some House districts the imbalance was about 41-to-1. 377 U.S. at 545. Approximately 25 percent of the population had the power to elect a majority of the state's Senate and House. *Id*. In holding these disparities a violation of the equal protection clause, the Court declared that each citizen is entitled to "an equally effective voice" in elections, as "[m]odern and viable state government needs, and the Constitution demands, no less." *Reynolds*,

377 U.S. at 565. The disparities in electoral power in this case are no less glaring. The appellants' expert witness Derek Cressman testified that with the hard money increases, maximum donors – who in recent elections have constituted just 0.11 percent of the voting age population – will provide between 55-65 percent of all individual funds to federal candidates. Cressman Decl., ¶¶ 4, 15, J.S. App. 22a-23a, 27a. Clearly, then, low- and moderate-income voters will not have an equally effective voice in elections.

The appellants do not contend that the Constitution requires absolute equality in electoral influence, and indeed disparities of electoral power have existed under the $1,000 pre-BCRA contribution limit. However, with the BCRA increases those disparities will rise to a level that denies the appellants "an equally effective voice," *Reynolds*, 377 U.S. at 565, in elections, and indeed will drive their voices "beneath the level of notice." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 397 (2000). The fact that the appellants' injury is a matter of degree does not make it less of a constitutional violation, as is clear from the apportionment cases.[11] For example, *Reynolds* allowed that "some deviations from the equal-population principle

[11] *See also* Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 680-81 (1998) ("As in so many areas of the law, it is far easier to identify dramatically anticompetitive practices than it is to specify precisely what optimal competition would look like. This is particularly characteristic of much of the constitutional law of politics.") (citing *Gormillion v. Lightfoot*, 364 U.S. 339 (1960) (striking down the 28-sided gerrymander of Tuskeegee); *White v. Regester*, 412 U.S. 755 (1973) (identifying impermissible vote dilution); *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (same); *Davis v. Bandemer*, 478 U.S. 109 (1986) (setting the standard for claims of unconstitutional partisan gerrymandering)).

are constitutionally permissible" if "based on legitimate considerations incident to the effectuation of a rational state policy." 377 U.S. at 579. But even when justified on that basis, deviation from one-person, one-vote cannot be "[c]arried too far," and "careful judicial scrutiny must be given . . . to the character as well as the degree of deviations from a strict population basis." *Reynolds*, 377 U.S. at 581. *See also Davis*, 478 U.S. at 133-34 (holding that a prima facie showing of discrimination in apportionment requires evidence that the challenged plan "has had or will have effects that are *sufficiently serious to require intervention by the federal courts*") (emphasis added).

There are many other contexts in which constitutional violations are a matter of degree. For example, in *Burson v. Freeman*, 504 U.S. 191 (1992), the Court upheld a 100-foot "campaign-free zone" around polling places while recognizing that larger zones might be unconstitutional. The Court viewed the relevant question to be "*how large* a restricted zone is permissible" while recognizing that "[a]t some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden. . . . " *See id.* at 208, 210 (plurality). Similarly, the Supreme Court has found that the difference between 15 feet and 8 feet is constitutionally significant in determining whether buffer zones between protesters and persons entering medical clinics violate the First Amendment. *Compare Schenck v. Pro-Choice Network of Western New York,* 519 U.S. 357 (1997) (holding 15-foot buffer zone unconstitutional), *with Hill v. Colorado*, 530 U.S. 703 (2000) (holding 8-foot buffer zone constitutional). By the same token, the difference between a contribution limit of $1000, on the one hand,

and $2000 or as much as $12,000, on the other hand, *is* constitutionally significant.

B. The Court should act to preserve equal access to the electoral system through reasonable contribution limits.

Equal protection principles require that the Court act to preserve the franchise for all citizens, just as it did in the wealth discrimination cases, *see Harper*, 383 U.S. 663; *Bullock*, 405 U.S. 134; *Lubin*, 415 U.S. 709, and the one-person, one-vote cases. *See Baker*, 369 U.S. 186; *Gray*, 372 U.S. 368; *Wesberry*, 376 U.S. 1; *Reynolds*, 377 U.S. 533; *Davis*, 478 U.S. 109. When this Court enforced the one person, one vote standard in *Wesberry*, it recalled Madison's words:

> Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.

376 U.S. at 18 (citing THE FEDERALIST, No. 57 (Cooke ed. 1961)). With the BCRA hard money increases, the rich will in every practical sense become the electors of federal officeholders, for no one lacking their favor will have a significant chance of success. In *Wesberry*, this Court famously observed, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classifications of people in a way that unnecessarily

abridges this right." 376 U.S. at 17-18. It is this vision of the Constitution that the Court must now act to protect, by striking down BCRA's doubling of hard-money contributions.

The Court's well-known admonishment in *Buckley v. Valeo*, 424 U.S. 1 (1976) that the voting rights cases do not support "abridging the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society," 424 U.S. at 49 n.55, does not bar relief in this case. The quoted statement was written in regard to the FECA's expenditure limitations which, on the record in *Buckley*, the Court held to be an unconstitutional restriction of speech. *Id*. at 51. The appellants in this case seek to maintain the very contribution limits that *Buckley* held entail "only a marginal restriction upon the contributor's ability to engage in free communication," 424 U.S. at 20, and do *not* substantially infringe the speech or associational rights of donors. *Id.* at 22; *see also Federal Election Commission v. Beaumont*, No. 02-403, 539 U.S. ___, slip op. at 14 (U.S. June 16, 2003) ("Going back to *Buckley v. Valeo*, 424 U.S. 1 (1976), restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression."); *Shrink Missouri*, 528 U.S. at 386-88 (distinguishing between spending and contribution limits and upholding Missouri's contribution limits ranging from $250 to $1,000); *FEC v. Mass Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.").

The appellants here seek to "assure that citizens are accorded an equal right to vote for their representatives regardless of . . . wealth," *Buckley*, 424 U.S. 49 n. 55, a constitutional value that *Buckley* reaffirmed. *Id.* They do not seek to validate "governmentally imposed restrictions on political expression," as *Buckley* prohibited. *Id*. Far from stifling speech, contribution limits "aim to democratize the influence that money itself may bring to bear upon the electoral process. In doing so, they seek to build public confidence in that process and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes." *Shrink Missouri*, 528 U.S. at 401 (Breyer, J., joined by Ginsburg, J., concurring), citing *Reynolds*, 377 U.S. at 565.[12] While *Buckley* did not find, on the record before it, that the promotion of equality justified the imposition of spending limits, 424 U.S. at 48-49,

[12] Further, in his *Shrink* concurrence Justice Breyer cautioned against reading *Buckley*'s disapproval of spending limits as a prohibition of any effort to promote electoral equality, particularly through contribution limits.

> [*Buckley*] said . . . that it rejected 'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others.' But those words cannot be taken literally. The Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many. . . . Regardless, as the result in *Buckley* made clear, the statement does not automatically invalidate a statute that seeks a fairer electoral debate through contribution limits, nor should it forbid the Court to take account of the competing constitutional interests just mentioned.

528 U.S. at 402 (Breyer, J., concurring) (internal citations omitted).

neither does that decision give constitutional license to a law that creates gaping inequalities.[13]

Justice Breyer has observed that contribution limits "protect the integrity of the electoral process – the means through which a free society democratically translates political speech into concrete action." *Shrink Missouri*, 528 U.S. at 401 (Breyer, J., joined by Ginsburg, J., concurring). The evisceration of contribution limits accomplishes the inverse, striking at the integrity of the electoral process. The dangers to democracy posed by the increased influence of wealth in elections are undeniable. *See, e.g.,* Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW U. L. REV. 1055, 1072-73 (1999) ("[W]ealth disparity introduces massive political inequality skewed to a predictable set of self-interested positions" and permits "wholly unjustifiable differences in political power to emerge. . . . The obvious inequalities introduced by massive wealth disparities cause many persons to lose faith in the system."); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1412 (1986) (in an election campaign, the resources at the disposal of the rich "enable them to fill all available space for public discourse with their message"); Ronald Dworkin, *Free Speech and the Dimensions of Democracy*, *in* IF BUCKLEY FELL 63, 78

[13] Unlike *DeShaney v. Winnebago County Department of Services*, 489 U.S. 189 (1989) (state's failure to protect an individual against private violence does not constitute a violation of the Due Process Clause), this case does not involve the failure of the government to act. Rather, it involves the government's direct action in enabling wealthy donors to dominate the electoral process, debasing the vote of ordinary citizens.

(E. Joshua Rosenkranz ed., 1999) ("People cannot plausibly regard themselves as partners in an enterprise of self-government when they are effectively shut out from the political debate because they cannot afford a grotesquely high admission price."). The BCRA's hard money increases turn these dangers into accomplished fact.

C. No legitimate state interest justifies the BCRA hard money increases.

The harms wrought by the increased tide of hard money are not justified by any legitimate state interest. There is no factual basis for the purported rationale that because of inflation the increase is necessary to permit federal candidates to amass sufficient funds to campaign. Senator Mitch McConnell, a proponent of BCRA's hard money limit increases, admitted at his deposition that he raised millions of hard money dollars in each of his campaigns for the U.S. Senate under the pre-BCRA limits, and in each race – including the most recent re-election campaign in 1996 – he has "successfully competed." Deposition of Senator Mitch McConnell, Sept. 23, 2002, 12, lines 8 to 19, line 16. Defendant-Intervenor Senator Feingold admitted, "I have never considered the prior thousand dollars limitation to be a barrier to my ability to run for office." Feingold Deposition, 243, lines 21-23. Candidates for federal office have been raising and spending more money than ever under the prior $1,000 limit.[14] Fundraising by candidates for Congress increased by 425 percent from the

[14] It is also worth noting that the Court, in *Shrink Missouri*, 528 U.S. 377, rejected the argument that a $1,000 contribution limit was so low as to inhibit campaigning in Missouri's statewide elections.

1977-78 cycle to the 1999-2000 cycle, and inflation accounted for less than half of that increase. Cressman Decl., ¶ 17, J.S. App. 28a. If increased spending under the prior $1,000 limit requires outreach to an expanded donor base, surely this is a benefit, and preferable to increased reliance on an ever-smaller group of elite donors. Senator Christopher Dodd rightly called BCRA's hard money increase a "cost-of-living adjustment for the less than 1 percent of the American public that can afford to write a $1,000 check." *Adams* Exh. 34, Jim Abrams, "Senate takes up rival to McCain-Feingold spending limits," Associated Press, 2, Jt. App. at ___.

Neither is it credible that the hard-money increases will reduce the time that candidates spend fundraising. While candidates will be able to raise money in greater increments, this will only spur *more* fundraising, rather than less, and will push the campaign finance arms race to new heights. As Rep. Bennie Thompson testified, "I don't know any Member of Congress that says 'I've raised enough money for the campaign cycle. I'm going to stop'. . . . I think a Member will raise as much money as he or she can until that election is over."[15] Finally, the increased contribution limits will decrease, rather than

[15] *See also* Simon Decl. ¶ 11, J.S. App. 75a ("The increased contribution limits will only increase the amount of time Senators and Representatives spend fundraising."); *Adams* Exh. 16, Declaration of Sam Gejdenson, former Member of Congress from Connecticut, ¶ 4, J.S. App. 70a; Hilliard Deposition, 88, lines 7-8, 90, lines 12-16; Cressman Decl., ¶ 18, J.S. App. 28a ("Increasing contribution limits will not reduce the time candidates spend raising money. Many states have no contribution limits at all, yet there is no evidence from those states that candidates spend any less time raising funds.").

increase, electoral competition, given that incumbents possess far more extensive networks of maximum donors. *See supra*, Statement of the Case, Section C.[16] Challengers generally do not enjoy the fundraising advantages that come with the power of incumbency. While there may, on occasion, be a challenger able to garner large amounts of maximum donations, the increases will overwhelmingly favor those already entrenched in office. *See* Stratmann Decl., ¶¶ 5-12, J.S. App. 57a-60a.

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

[16] *See also* Williams Decl. ¶ 4, J.S. App. 77a ("[M]embers of committees with jurisdiction over matters of concern to wealthy interests attract large numbers of maximum contributions"); Bumpers Decl. ¶ 14, J.S. App. 137a (donors give because they want access to Members).

¶ 14, J.S. App. 137a, and that "[t]he increased individual contribution limits will exacerbate the disproportionate access and influence that the largest donors enjoy." Simon Decl., ¶ 10, J.S. App. 74a-75a. It is well established that large contributions can create the reality or perception of corruption. *See, e.g.*, *Buckley*, 424 U.S. at 26-28; *Shrink Missouri*, 528 U.S. 377; *Frank v. City of Akron*, 290 F.3d 813 (6th Cir. 2002), *reh'g en banc denied*, 303 F.3d 752 (6th Cir. 2002), *cert. denied, City of Akron*, *Ohio v. Kilby*, 123 S.Ct. 968 (2003); *Daggett v. Commission on Governmental Ethics and Practices*, 205 F.3d 445 (1st Cir. 2000). The BCRA hard money increases will only increase this threat.[17]

II. THE APPELLANTS' CLAIMS ARE FULLY JUSTICIABLE.

Standing to litigate in federal court requires an "injury in fact" which is concrete and particularized, and

[17] In addition to increasing the reality and perception of corruption defined as a donor's improper influence on policy outcomes, the BCRA will even more greatly increase corruption as it has been more broadly defined, as "money that causes officeholders to be more likely to respond to large donors than the needs of ordinary citizens." Burt Neuborne, THE VALUES OF CAMPAIGN FINANCE REFORM 12 (Brennan Center for Justice 1998), *available at* http://www.brennancenter.org/resources/downloads/cfr2.pdf. As Prof. Neuborne points out, such corruption causes "the erosion of the capacity of a public official to make independent judgments free from financial pressures. A political system that subordinates the independence and free will of its officials to the need to raise money may be said to be corrupt in a structural sense. An even broader idea of corruption would include financial arrangements that put pressure on an officeholder to compromise her independence by taking political positions, not because she believes in them, but because they have financial consequences for her." *Id*.

actual or imminent, not conjectural or hypothetical; the injury must be fairly traceable to the challenged conduct; and it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The appellants have demonstrated that their claims meet these tests.

The appellants' injuries are legally cognizable, as established by case law outlawing electoral discrimination based on economic status, *see Bullock*, 405 U.S. at 143-44; *Lubin*, 415 U.S. at 716, and upholding the right to an equally meaningful vote, *see Reynolds*, 377 U.S. at 565; *Davis*, 478 U.S. 109, as discussed *supra* in Section I. The imminent effects of the BCRA hard money increases – the radically increased electoral power of the highest donors, and the corresponding diminishment in the electoral voice of low- and moderate-income citizens – is documented by the evidence described in the Statement of the Case, *supra*. This evidence includes expert testimony on the likely effects of increased limits on contribution patterns, *see* Cressman Decl., J.S. App. 21a; Green Decl., J.S. App. 30a; McDonald Decl., J.S. App. 45a; Stratmann Decl., J.S. App. 55a, and testimony from voters and candidates who have experience in federal elections, wish to participate in future federal elections, and will see their electoral voices greatly diminished under the increased limits. *See* Caiazzo Decl., J.S. App. 79a; Crook Decl., J.S. App. 83a; Morales Decl., J.S. App. 88a; Brown Decl., J.S. App. 93a; Glick Decl., J.S. App. 96a; Adams Decl., J.S. App. 100a; Bolton Decl., J.S. App. 103a; Irland Decl., J.S. App. 107a; Joshi Decl., J.S. App. 110a; Lipoff Decl., J.S. App. 113a; Russell Decl., J.S. App. 116a; Seely-Kirk Decl., J.S. App. 127a; Wilson Decl., J.S. App. 130a. The appellees did not challenge the validity of any of this evidence in proceedings below.

In addition, the appellant candidates and their voter-supporters articulate an injury to their ability to compete in elections consistent with the competitive harm recognized in numerous cases. *See, e.g.*, *Int'l Assn. of Machinists v. FEC*, 678 F.2d 1092 (D.C. Cir. 1982) (voters have standing to challenge FECA provisions allowing corporations greater latitude in solicitation than unions, giving corporations an economic advantage in elections); *Vote Choice, Inc. v. DiStefano,* 4 F.3d 26 (1st Cir. 1993) (hereinafter *Vote Choice*) (candidate not accepting public financing has standing to challenge statute raising contribution limit from $1,000 to $2,000 for candidates accepting public financing); *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621 (2d Cir 1989) (candidate has standing to challenge tax-exempt status of debate-staging organization where she was deprived of opportunity to participate in debates and "palpably impaired" in her ability to compete "on an equal footing with other significant presidential candidates."); *Buchanan v. FEC*, 112 F.Supp.2d 58 (D.D.C. 2000) (candidate has standing to challenge exclusion from national debate under Federal Election Campaign Act). To deny cognizable injury from a candidate's loss of competitive advantage "would tend to diminish the import of depriving a serious candidate for public office of the opportunity to compete equally for votes in an election." *Fulani*, 882 F.2d at 626. The competitor standing doctrine has clear application in a case such as this one, where the appellants suffer an economic disadvantage in elections from the challenged provisions. *See Vote Choice*, 4 F.3d at 37; *Int'l Assn. of Machinists*, 678 F.2d at 51.

The appellants' injuries are fairly traceable to the BCRA hard money increases. As discussed in Section II, *supra*, by enacting the increases, Congress enabled elite

donors to dominate the electoral process and effectively drown out the voices of low- and moderate-income citizens, directly causing the appellants' injuries. Rather than seek to remedy generalized inequalities, the appellants ask that specific legislation directly causing electoral exclusion based on economic status be declared unconstitutional.[18]

Finally, the injuries would clearly be redressed by a decision favorable to the appellants. An invalidation of the BCRA increases would return the hard money limits to the levels established by FECA before BCRA's enactment. "The elementary rule of statutory construction is without exception that a void act cannot operate to repeal a valid existing statute, and the law remains in full force and operation as if the repeal had never been attempted." *Conlon v. Adamski*, 77 F.2d 397, 399 (D.C. Cir. 1935). *See also Frost v. Corporation Comm'n*, 278 U.S. 515, 527 (1929) (amendment to an Oklahoma statute regulating the licensing of cotton gins held unconstitutional, leaving pre-existing statutory provisions in place); *Arkansas Lousiana Gas Company v. City of Texarkana*, 97 F.2d 179, 183 (8th Cir. 1938) (holding that pre-existing gas rates remained in effect upon a ruling that an amended rate schedule violated the Fourteenth Amendment; "A void legislative

[18] This case is distinguishable from the cases upon which Judge Henderson relied in her concurring opinion below. *See* Opinion of Judge Henderson, J.S. Supp. App. at 473sa-474sa. Unlike *Ga. State Conference of NAACP Branches v. Cox*, 183 F.3d 1259 (11th Cir. 1999), *NAACP, Los Angeles Branch v. Jones*, 131 F.3d 1317 (9th Cir. 1997), and *Albanese v. FEC*, 78 F.3d 66 (2d Cir. 1996), the appellants here do not seek a court order mandating the State's creation of a voluntary public financing system for candidates. Rather, the appellants merely seek an order invalidating legislative provisions which debase and dilute the fundamental right to vote.

enactment does not operate to repeal a preexisting valid one."). The appellants' constitutional injuries will clearly be redressed by a return to the previous FECA limits, even though disparities of influence existed under the lower contribution limits as well. As discussed *supra* in Section I:A, a constitutional violation may arise when existing disparities rise to a level that causes injury of constitutional magnitude. *Reynolds*, 377 U.S. at 581; *Davis*, 478 U.S. at 133-34; *Burson*, 504 U.S. at 208; *and compare Schenck*, 519 U.S. 357, *with Hill*, 530 U.S. 703. The BCRA increases multiply the electoral power of the highest donors at the expense of the appellant voters and candidates, who now face insurmountable obstacles to the effective exercise of their basic rights in the political process.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the district court; declare that sections 304, 307, and 319 of BCRA, codified in 2 U.S.C. § 431 *et seq.*, violate the equal protection guarantee incorporated by the Due Process Clause of the Fifth Amendment to the United States Constitution; and remand the case to the district court with instructions to enter a permanent injunction restraining the appellees from enforcing or otherwise applying sections 304, 307, and 319 of BCRA and ordering the appellees to enforce the provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, that were amended by sections 304, 307, and 319 of BCRA as such provisions existed prior to the enactment of BCRA. In the alternative, the Court should reverse the district

court's ruling of nonjusticiability and remand the case for consideration on the merits.

Respectfully submitted,

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