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The Defendants and Defendant-Intervenors (hereinafter “Defendants”) completely misconstrue the nature of the *Adams* Plaintiffs’ claims and wholly ignore Supreme Court precedent prohibiting wealth discrimination in the electoral process. The *Adams* Plaintiffs have standing to challenge their exclusion from the electoral process as caused by BCRA’s hard money limit increases. More than four decades of federal case law make clear that voters, as well as candidates, have standing to challenge exclusionary electoral barriers, including barriers based on economic status. The Defendants absurdly claim that BCRA’s hard money limit *increases* serve the purpose of preventing corruption and the appearance of corruption. These increases serve to entrench incumbents in power. The Defendants also absurdly claim that, under BCRA’s millionaire provisions, the *Adams* Plaintiffs are free to choose not to give or accept contributions up to \$12,000 per individual. That “freedom” argument, if successfully applied to earlier electoral barriers, would have preserved the poll tax and candidate filing fees. BCRA’s hard money limit increases do not give non-wealthy voters and candidates any freedoms. Rather, they make access to personal wealth and affluent backers a pre-requisite for electoral participation, in violation of the constitutional guarantee of equal protection for all.

I. THE *ADAMS* PLAINTIFFS HAVE STANDING TO CHALLENGE THE INCREASED HARD MONEY CONTRIBUTION LIMITS OF BCRA.

In order to have standing, a litigant must have suffered a concrete and particularized injury in fact, which is fairly traceable to the defendant’s conduct and will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The plaintiffs in this case clearly present such an injury. The challenged provisions will, in every practical sense, make competition impossible for non-wealthy candidates and voters. The hard money increases will multiply the advantages enjoyed by candidates with access to networks of large

donors, *see Adams* Plaintiffs Opening Br. at 4-8,¹ and will thereby diminish or eradicate the prospects of candidates lacking such access such as plaintiff Cynthia Brown,² and the hopes of their voter-supporters such as plaintiff Carrie Bolton.³ *See Adams* Plaintiffs' Opening Br. at 8-10.

In denying that plaintiffs have suffered cognizable harm, the defendants ignore case law explicitly recognizing competitive electoral injury as a justiciable claim. “[I]t is well-settled that an economic actor may challenge the government’s bestowal of an economic benefit on a competitor...Courts within this Circuit and elsewhere have expanded the competitor standing doctrine to the political arena, recognizing that political actors may bring suit when they are competitively disadvantaged by government action.” *Buchanan v. FEC*, 112 F.Supp.2d 58 (D.D.C. 2000)(internal citations omitted). 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 v. League of*

¹ *See Adams* Exh. 1, Declaration and Expert Report of Derek Cressman, (hereinafter “Cressman Decl.”); *Adams* Exh. 2, Declaration and Expert Report of Prof. John C. Green, ¶4 (hereinafter “Green Decl.”); *Adams* Exh. 3, Declaration and Expert Report of Craig McDonald, (hereinafter “McDonald Decl.”).

² *See Adams* Exh. 22, Declaration of Cynthia Brown (hereinafter “Brown Decl.”). As documented by expert witness Derek Cressman, fundraising nearly always determines success. Candidates with a substantial financial advantage won 94 percent of the time in the 2000 elections, Cressman Decl. ¶ 2, and maximum contributions made up 60 percent of individual donations to those winners. *Id.* ¶ 5. Candidates lacking access to large networks of maximum donors have testified that, under BCRA’s increased limits, they will be deterred from seeking federal office. *See also Adams* Exh. 19, Declaration of Dr. Thomas A. Caiazzo; *Adams* Exh. 20, Declaration of Gail Crook; *Adams* Exh. 21, Declaration of Victor Morales; *Adams* Exh. 23, Declaration of Ted Glick (hereinafter “Glick Decl.”).

³ *See Adams* Exh. 25, Declaration of Carrie Bolton; *Adams* Exh. 24, Declaration of Victoria Jackson Gray Adams; *Adams* Exh. 26, Declaration of Daryl Irland; *Adams* Exh. 27, Declaration of Anuradha Joshi; *Adams* Exh. 28, Declaration of Howard Lipoff; *Adams* Exh. 29, Declaration of Nancy Russell; *Adams* Exh. 31, Declaration of Kate Seely-Kirk; *Adams* Exh. 32, Declaration of Stephanie L. Wilson; *Adams* Exh. 30, Declaration of Chris Saffert.

Women Voters Educ. Fund, 882 F.2d 621, 626 (2d Cir 1989 (“*Fulani I*”); *c.f. Fulani v. Brady*, 953 F.2d 1324, 1327 (D.C. Cir. 1991)(“*Fulani II*”).⁴ See also *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 37 (1st Cir. 1993) (candidate had standing to challenge campaign finance law which placed her campaign at a competitive disadvantage); *Becker v. FEC*, 230 F.3d 381, 386 (2000)(candidate had standing to challenge FEC regulations disadvantaging his campaign). The Court in *Becker* warned against second-guessing “a candidate’s reasonable assessment of his own campaign” which “would require the clairvoyance of campaign consultants or political pundits—guises that members of the apolitical branch should be especially hesitant to assume.” *Id.* at 387.

Thus an injury to a candidate’s competitive advantage provides the concrete, direct, and personal stake necessary to confer standing, as this court itself acknowledged in its Order of May 3, 2002, granting the Motion to Intervene of the Defendant-Intervenors. See Order of May 3, 2002, at 7, citing *Buchanan*, 112 F.Supp.2d at 65, and *Vote Choice*, 4 F.3d at 37. A financial disadvantage to a candidate clearly constitutes this type of competitive injury, as recognized by *Int’l. Assn. of Machinists v. FEC*, 678 F.2d 1092, 1098 (D.C. Cir. 1982), which found standing for voters who alleged “a relative diminution in their political voices—their influence in federal elections” due to a financial disadvantage conferred on their preferred candidates by FECA. *Id.* at 1098.

The plaintiffs’ injury -- exclusion from the electoral process based on economic status -- is precisely the injury that voters and candidates claimed in the cases successfully challenging

⁴ The Court in *Fulani II* noted that “[u]nquestionably, there is such a concept as ‘competitor standing,’” 953 F.2d at 1327, but denied standing because plaintiff sued under the Internal Revenue Code and plaintiffs injuries’ were not fairly traceable to tax status of debate sponsor. The *Buchanan* decision notes that in *Fulani II* “the fact that the plaintiffs did not sue under FECA, but rather under the Internal Revenue Code, proved dispositive.... The FECA, unlike the Internal Revenue Code, confers a broad grant of standing.” See *Buchanan*, 112 F.Supp.2d at 63.

mandatory candidate filing fees. *See Bullock v. Carter*, 405 U.S. 134 (1972); *Lubin v. Panish*, 415 U.S. 709 (1974). The Supreme Court held that candidates “lacking both personal wealth and affluent backers” were “in every practical sense” excluded from the electoral process by filing fees. *Bullock*, 405 U.S. at 143-144. The Court also held that the rights of candidates are “intertwined with the rights of voters.” *Lubin*, 415 U.S. at 716; *see also Anderson et al. v. Celebrezze*, 460 U.S. 780, 786-787 (1983).

The standing of voters, as well as candidates, to challenge exclusionary electoral barriers is also affirmed by *Baker v. Carr*, 369 U.S. 186 (1962), and successor cases granting standing to voters who suffer a debasement of their vote due to legislative apportionment. *See Baker*; *Wesberry v. Sanders*, 376 U.S. 1 (1963); *Gray v. Sanders*, 372 U.S. 368 (1963); *Reynolds v. Sims*, 377 U.S. 533 (1964). Like the plaintiffs in these cases, plaintiffs here are free to vote and to seek office, but their “influence on the political process as a whole” is impaired. *Davis v. Bandemer*, 478 U.S. 109, 132 (1986). “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.

In arguing that the plaintiffs lack injury sufficient to confer standing, the Defendants misconstrue the nature of the plaintiffs’ claims. They set up a straw man in arguing that BCRA’s increased contribution limits will not “restrict the activities” of the plaintiffs, Def. Br. at 208, since there is no such claim; rather, the BCRA will render the plaintiffs’ activities futile. Defendants’ turn the plaintiffs’ claims on their head when they assert that BCRA will not force the plaintiffs to “limit the size of contributions they will accept,” *Id.* at 209; the plaintiffs are injured not by the limits on contributions they may accept but rather an *increase* in contributions that their *opponents* may accept. Finally, while defendants assert that the organizational plaintiffs “have no protected constitutional right to have legislators accept their lobbying

positions,” *id.*, these plaintiffs claim no such right, but rather the right of the voters they represent to a meaningful voice in the electoral process.

II. BCRA’S HARD MONEY LIMIT INCREASES VIOLATE THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION FOR ALL

A. The Defendants Ignore Supreme Court Precedent Prohibiting Wealth Discrimination In The Electoral Process

The Defendants’ arguments fundamentally miss the point. While wealth is not a suspect class, the Supreme Court has long held that the U.S. Constitution prohibits wealth discrimination in the electoral process. In its landmark ruling, *Harper v. Virginia Board of Elections*, 383 U.S. 663, 666 (1966), the Court struck down the poll tax on equal protection grounds, finding that “[v]oter qualifications have no relation to wealth.” In *Bullock v. Carter*, 405 U.S. 134, 144, the Court struck down mandatory candidate filing fees, holding: “We would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.” *See also Lubin v. Panish*, 415 U.S. 709 (1974) and *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 (1996) (“The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license.”)

In asserting that “BCRA’s increase in the individual contribution limit is subject to review only for a rational basis,” Defendants’ Opening Brief, 209, the Defendants ignore this longstanding Supreme Court precedent. Any substantial burden on the fundamental right to vote is subject to strict scrutiny, including a burden based on economic status. *See Bullock*, 405 U.S. at 142, 144 (applying the same “strict standard of review” to filing fees that the Court had applied to the poll tax), citing *Harper*, 383 U.S. 663. *See also Clements v. Fashing*, 457 U.S. 957, 965 (1982) (strict scrutiny applied to “classifications based on wealth” because “[e]conomic status is not a measure of a prospective candidate’s qualifications to hold elective office.”).

The Court has applied strict scrutiny not only to economic barriers to the right to vote imposed at the ballot box, *Harper*, but also to such barriers to equal participation in the electoral process, a core component of the right to vote. The Court in *Bullock* found that the Texas candidate filing fee system had “a real and appreciable impact” on voters and that “this impact [was] related to the resources of the voters supporting a particular candidate.” *Bullock*, 405 U.S. at 144. See also *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 401, (Breyer, J., concurring), quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (“in the context of apportionment, the Constitution ‘demands’ that every citizen have ‘an equally effective voice’”).

As demonstrated in the *Adams* Plaintiffs’ Opening Brief, BCRA’s increased contribution limits will deprive non-wealthy voters of the ability to support meaningfully the candidates of their choice and will violate the right to vote as concretely as previous wealth barriers. The hard money limit increases will make access to “personal wealth and affluent backers” a pre-requisite for electoral participation as surely as any filing fee and will allow such affluent backers to achieve a stranglehold on the electoral process. Even Defendant-Intervenor Senator Russ Feingold, the co-sponsor of BCRA, concedes that BCRA’s hard money limit increases will likely further enable certain candidates to build up campaign war chests, “potentially discourag[ing] some people from running” for federal office. Deposition of Senator Russ Feingold, September 9, 2002, 264, line 14 to 265, line 3 (hereinafter “Feingold Deposition”).

B. BCRA’s Hard Money Limit Increases Serve to Entrench Incumbents in Power, Not to Prevent Corruption.

The Defendants boldly assert that BCRA’s doubling of the individual contribution limit serves the purpose of “minimizing the opportunity for corruption and the appearance of corruption.” Defendants’ Opening Brief, 209. This is simply untrue. Far from preventing corruption and the appearance of corruption, BCRA’s hard money limit increases serve to

entrench incumbents in power. The factual record in this case demonstrates that the primary beneficiaries of the increases will be the very incumbents who enacted them. *See Adams* Plaintiffs' Opening Br. at 7-8; *Adams* Exh. 1, Declaration and Expert Report of Derek Cressman, ¶19 (hereinafter "Cressman Decl."); *Adams* Exh. 4, Declaration and Expert Report of Professor Thomas Stratmann, ¶¶5-12. Defendant-Intervenor Senator Feingold has admitted that the hard money limit increases will benefit incumbent candidates facing candidates without access to wealth. Feingold Deposition, 260, lines 7-8. By creating an "entrenched political regime[]," *Baker v. Carr*, 369 U.S. 186, 248 (1962) (Douglas, J., concurring), the BCRA hard money limit increases offend basic equal protection principles. *See Adams* Plaintiffs' Opening Br. at 13-14.

The Defendants' claim that the doubling of the individual contribution limit "reflects some of the impact of inflation," Defendants Opening Brief, 210, lacks any factual basis. Candidates for federal office have been raising and spending more money than ever under the prior \$1,000 limit. Fundraising by candidates for Congress increased by 425 percent from the 1977-78 cycle to the 1999-2000 cycle, and inflation accounted for less than half of that increase. Cressman Decl. ¶17. Defendant-Intervenor Senator Feingold concedes: "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. Senator Mitch McConnell, a proponent of BCRA's hard money limit increases, has admitted, in the course of this litigation, that he has raised millions of hard money dollars in each of his campaigns for the U.S. Senate, and, in each race, including his re-election campaign in 1996, he has "successfully competed." Deposition of Senator Mitch McConnell, September 23, 2002, 12, line 8 to 19, line 16. The inflation claim, raised during the congressional debate on BCRA, is merely a guise to mask the true purpose of the hard money limit increases: to preserve the power of those already in power.

The Defendants turn a statement in the Court’s ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976) on its head in an attempt to find justification for the hard money limit increases. Defendants’ Opening Br. at 210. The *Buckley* Court stated that “a court has no scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000,” *Id.* at 30, in the context of its holding that the individual \$1,000 contribution limit was justified to prevent corruption and the appearance of corruption. The reliance on that statement here – involving contribution limit *increases* designed not to address corruption but to entrench those in power – is entirely misplaced. In fact, BCRA’s hard money limit increases will have precisely the effect the Court in *Nixon v. Shrink* held would be constitutionally impermissible. *See Nixon v. Shrink*, 528 U.S. at 397: Contribution limits are permissible unless they are “so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice beneath the level of notice, and render contributions pointless.” Under BCRA’s hard money limit increases, vast infusions of cash will drown out the voices of non-wealthy candidates, making the association of their supporters ineffective and rendering small contributions pointless.

C. Candidates Lacking Affluent Backers Are Not ‘Free’ Under the Millionaire Provisions to Decline \$12,000 Contributions.

The Defendants make the incredible claim that the *Adams* plaintiffs are “free” under BCRA’s millionaire provisions to choose not to accept contributions up to \$12,000 per individual in races involving self-funded candidates. Defendants’ Opening Br. at 196, n.134. This is Orwellian language. Under that reasoning, the *Harper* plaintiffs were free to choose not to pay the \$1.50 poll tax in Virginia’s state elections, and the *Bullock* plaintiffs were free to choose not to pay the candidate filing fees in Texas’ primary elections. The Court in *Bullock*, in fact, rejected this precise argument, finding that the candidates were “unable, not simply unwilling, to pay the assessed fees...” *Bullock*, 405 U.S. at 146.

Candidate-Plaintiff Cynthia Brown has run for the U.S. Senate from North Carolina in a race involving a self-funded candidate and other opponents supported by affluent backers, and she is considering running again for the U.S. Senate in 2004, facing similar circumstances. Under BCRA's millionaire provisions, candidates like Plaintiff Brown will find it impossible to compete, because they are "unable, not simply unwilling" to gather contributions of up to \$12,000 from wealthy donors. *See Adams* Exh. 22, Declaration of Cynthia Brown, ¶¶ 8-9 (hereinafter "Brown Decl."): "The people that I know can hardly afford to contribute twenty-five dollars, let alone \$12,000. There is no way that any candidate like me can compete under these new conditions. These increases in the hard money contribution limits would effectively eliminate any future campaign I might hope to wage for the U.S. Senate." *See also Adams* Exh. 23, Declaration of Ted Glick, ¶6: "It is impossible to participate facing that tremendous disparity in resources. I just do not run in the circles of people who can contribute \$12,000."⁵ BCRA's millionaire provisions will multiply even further the burden on the rights of non-wealthy voters and will leave "the political marketplace," Defendants' Opening Br. at 198, open only to the wealthy and the well-connected, in violation of the constitutional guarantee of equal protection for all.

⁵ Similarly, it is ludicrous to argue that voter-supporters of candidates such as Plaintiff Brown are exercising "an individual choice" by not giving a \$12,000 contribution. Defendants' Opening Br. at 196, n.134. This is akin to Senator McConnell's claim at his deposition that a person holding a minimum wage job could make a \$12,000 contribution if he or she "were highly motivated." McConnell Deposition, 83, line 6. *See Adams* Exh. 25, Declaration of Carrie Bolton, ¶11 (hereinafter "Bolton Decl."): Under BCRA's millionaire provisions, "I would not even get on the scale with those making significant contributions."

Cynthia Brown is like most of us. She is not connected to people who have that kind of money. I could put up all the signs I wanted in that kind of future race, but I would never be able to get my voice heard. It would be like fighting a fire with a cup of water.

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.

Id., ¶¶11-12.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that the foregoing document, Adams Plaintiffs' Opposition Brief was served on this 20th day of November, 2002, in accordance with the parties' Stipulation and Order Concerning Initial Disclosure and Discovery Procedures herein, by transmitting copies thereof to all parties by e-mail, and by first-class mail to the following:

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