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NATIONAL VOTING RIGHTS INSTITUTE

Legal Challenge to the Increase in Hard Money Limits, Indexing, and the Millionaire Amendment in the Bipartisan Campaign Reform Act

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This memorandum will outline the legal basis for the constitutional challenge to the increase in hard money limits, the indexing of those limits, and the Millionaire Amendment in the Bipartisan Campaign Reform Act (BCRA).

The federal campaign finance system, which requires candidates to raise and spend huge sums of money from private donors, restricts civic and political participation based on economic status because low and middle income voters and candidates cannot participate at the same level as those with wealth or access to it. Quite simply, such voters are excluded from the process of choosing candidates for the ballot because such choices are made by that small class of citizens who can afford to contribute at high levels to political campaigns. Moreover, those voters who are able to make large contributions exercise a disproportionate influence with elected officials. Similarly, candidates without wealth or access to wealth are unable to amass the money necessary to mount viable campaigns, notwithstanding their level of grassroots support.

The debate regarding the Bipartisan Campaign Reform Act, which presumably is designed to help rectify this situation, thus far, has been limited to a discussion of the First Amendment on the one hand and the prevention of corruption or the appearance of corruption in government on the other. The promise of political equality, which grants all voters an equal opportunity to participate in the political process, has been notably absent from this debate.

Nor will the development and evolution of the existing challenges to the BCRA afford an opportunity for the value of political equality to be injected into the debate. In the existing challenges, various organizations and members of Congress are challenging

the soft money ban, the Millionaire Amendment, broadcast rate limitations, and the regulation of electioneering communications as violative of the First Amendment and the Equal Protection and Due Process Clauses of the United States Constitution. They seek to strip the law of all of its restrictions on campaigning, leaving only the "compromise provisions" that increase contribution limits.[1] The lawyers on behalf of the government, on the other hand, defend the law by focusing only on its value in combating governmental corruption and the appearance of corruption; they ignore all other constitutional values –including political equality- that are important to campaign finance reform.

The inclusion in BCRA of an increase in all hard money limits generally, an increase indexed to the rate of inflation, and the potential for tripling the higher contribution limits under the "Millionaire Amendment," has resulted in legislation that takes us backwards with respect to the democratic ideals of inclusion, participation, and representation. Prior to BCRA, the less than 1% of the population who contributed the maximum of $1000 to candidates enjoyed special access to politicians and to the leadership of political parties. With the increase in the hard money limits to $2000, and up to $6000 when one candidate is independently wealthy and self-funded-- "limits" that rise with the rate of inflation-- it seems certain that politicians will pay even less attention to less wealthy communities because they will have a much greater potential for financial support elsewhere. Just like poll taxes and filing fees, therefore, higher contribution limits further exclude those without wealth or access to it from equal participation in the political process.

The parties in this lawsuit challenge the BCRA's increase in hard money limits, generally and in the "Millionaire Amendment," because these provisions of the BCRA will only deepen political inequality in the United States.

Legal Theory

The Equal Protection Clause in the United States Constitution protects, as fundamental, the equal right to vote. The Supreme Court has recognized that the equal right to vote incorporates the equal right to participate in the electoral process. See, e.g., Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Terry v. Adams, 345 U.S. 461 (1953). In Terry v. Adams, for example, the Supreme Court addressed a constitutional challenge by

[1] Indeed, the remedy sought in their challenge to the Millionaire Amendment is the increase in contribution limits for *all* candidates' campaigns to $6000.

African-American voters to the pre-primary endorsement process of a wholly private entity, the Jaybird Association. Because the "Jaybird primary" had become "an integral part . . . of the elective process that determines who shall rule and govern," the state could not allow certain voters to be excluded from it, despite the fact that the state did not participate in its operation and that it did not prevent anyone from casting a vote. Id. at 469. Justice Clark's concurrence stated: "[A]ny 'part of the machinery for choosing officials' becomes subject to the Constitution's restraints." Id. at 481 (quoting Smith v. Allright, 321 U.S. 649 (1944)). The Supreme Court recently reiterated this principle that exclusion from an integral part of the election process "does not merely curtail [voters'] voting power, but abridges their right to vote itself. See Morse v. Republican Party of Virginia, 517 U.S. 186, 207 (1996).

Moreover, it is impermissible for wealth requirements to limit the "basic right to participate in political processes as voters and candidates." M.L.B. v. S.L.J., 519 U.S. 102, 124 (1996). In invalidating an annual $1.50 poll tax imposed by the state of Virginia, which disenfranchised otherwise qualified voters who did not or could not pay the poll tax, the Supreme Court explained that the Equal Protection Clause guards against *all* wealth qualifications that "invade or restrain" the fundamental right to an equal vote. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966). The Court stated:

> We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. . . . [W]ealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.

Id. at 666-670.

Likewise, the Supreme Court long ago recognized the "real and appreciable impact on the exercise of the franchise" that voters face under a system that excludes certain candidates on the basis of their lack of wealth. Bullock v. Carter, 405 U.S. 134, 144 (1972). In Bullock, the Court struck down filing fees ranging from $150 to $8,900 that Texas required primary candidates to pay to their political parties. By precluding prospective candidates without wealth from seeking office, the fees violated the equal protection rights of both candidates *and* voters, whose choices of candidates were limited and who were burdened more heavily. As the Court stated:

> Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen

> party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support. The effect of this exclusionary mechanism on voters is neither incidental nor remote. Not only are voters substantially limited in their choice of candidates, but also there is the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system. . . . [W]e 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.

Id. at 143-144**.**

The principles of Terry, Harper, and Bullock -- that wealth may not exclude voters and candidates from equal participation in the political process -- are still applicable today. Just last year, in a case brought by the National Voting Rights Institute, the United States District Court for the Middle District of Pennsylvania applied Bullock and Lubin, striking down Pennsylvania's filing fee requirement. See Belitskus v. Pizzingrilli, No. 3:cv-00-1300, at *6 (M.D.Pa. filed Aug. 20, 2001). The opinion explained that the "exclusionary effect" of Pennsylvania's filing fees was not "sufficiently mitigated by the fact that other persons can contribute the candidate's filing fee, since such a system would tend to 'deny some voters the opportunity to vote for a candidate of their choosing; while at the same time . . . giving the affluent the power to place on the ballot the names of persons they favor.'" Id. at *6-7 (quoting Bullock, 405 U.S. at 143-144). The court held that the filing fee therefore violated the Equal Protection Clause.

In terms of its exclusionary character, the increase in hard money limits – generally, as indexed for inflation, and under the Millionaire Amendment -- is no different than the poll tax or filing fee requirements that have been deemed equal protection violations. Given the spiraling costs of conducting viable campaigns, low and middle income voters and candidates cannot respond to, much less overcome, media blitzes launched by well-funded opposition. Like the voters in the filing fee cases, the voter-plaintiffs in this case are substantially limited in their choice of candidates, because the increase in contribution limits exacerbates their inability to provide sufficiently large contributions to either their favorite candidates, which would allow such candidates to compete with well-funded opponents, or to other already well-funded candidates, which would garner attention to the issues that concern these plaintiffs. Similarly, like the candidates who could not pay the filing fees, the candidate-plaintiffs here lack personal wealth and access to it and are therefore unable to afford the requisite sum to mount a

meaningful campaign. Because they lack wealth and access to wealth, they are unable to spread their electoral message and are, in every practical sense, precluded from seeking office, notwithstanding their qualifications and levels of grassroots support. By raising the contribution limits and thereby increasing the exclusionary influence of wealth in elections, the BCRA sanctions the exclusion of non-wealthy citizens from government and substantially injures their fundamental rights to equal participation in the nation's political processes.

The filing of this lawsuit will come at a critical time in the evolving jurisprudence in campaign finance law. Many regard the U.S. Supreme Court's ruling in Buckley v. Valeo, 424 U.S. 1 (1976), as occupying the field of what is permissible with respect to campaign finance reform. While this lawsuit would not directly challenge the Buckley ruling, it is important to note that there is growing support within the legal community and within the courts for a revisitation of that decision and for a recognition of equality principles. Indeed, four justices of the U.S. Supreme Court are now on record stating that the time may have come to revisit the Buckley ruling. See Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 405 (2000) (concurring opinion of Breyer, J., joined by Ginsburg, J.); id. at 409 (Kennedy, J., dissenting); Colorado Republican Federal Campaign Comm. v. FEC, 518 U.S. 604, 649-50 (1996) (Stevens, J., joined by Ginsburg, J., dissenting). Justice Breyer's concurring opinion in Nixon is of particular significance for its discussion of the equality concern in the campaign finance context. Justice Breyer wrote of "competing constitutionally protected interests" in the campaign finance arena, citing the Supreme Court's landmark ruling in Reynolds v. Sims, 377 U.S. 533, 565 (1964) ("[T]he Constitution 'demands' that each citizen have 'an equally effective voice.'").

The National Voting Rights Institute has been in the forefront of leading the legal movement to revisit Buckley. In August 2000, a federal district court in Burlington, Vermont, issued a ruling upholding most of Vermont's new campaign finance reform law, including contribution limits that are among the lowest in the country. Landell v. Sorrell, 118 F. Supp. 2d 459 (D. Vt. 2000). While the court struck down Vermont's mandatory campaign spending limits, citing Buckley, it nevertheless stated in powerful judicial language that the time had come to revisit that Supreme Court ruling. The court concluded its opinion with these words:

> The integrity of our democracy is inextricably bound to the voices of those with lesser means. Thus, the categorical preservation of free speech and association cannot lay waste to other core democratic values such as effective representation, equal access to the political system, and honest, responsive government.

Landell, 118 F.Supp.2d at 493. The National Voting Rights Institute serves as lead counsel for the defendant-intervenors in Landell, working closely with the Vermont Attorney General's Office in defense of Vermont's new law. Landell is now pending on appeal before the U.S. Court of Appeals for the Second Circuit and serves as one of two test cases in the country providing the opportunity for a potential Supreme Court reconsideration of the constitutionality of mandatory campaign spending limits.

The other test case is a lawsuit pending in Albuquerque, New Mexico. In September 2001, a federal district court in Albuquerque upheld campaign spending limits for the first time since the D.C. Court of Appeals *en banc* ruling in Buckley. See Homans v. City of Albuquerque, 160 F.Supp.2d 1266 (D.N.M. 2001). The court found that

> Albuquerque remains unique amongst municipalities in its high voter participation, and in the vibrancy of its highly competitive mayoral elections. The record clearly establishes twenty-five years of expenditure limits that have preserved the integrity of Albuquerque's electoral process and the public's faith in its elections.

Id. at 1273. Subsequent to that ruling, the plaintiff obtained an emergency order from a two-judge motions panel of the Tenth Circuit ordering the city to halt enforcement of its limits while the lawsuit is pending. The district court's findings nevertheless represent a significant development by demonstrating that limits on campaign spending promote the health of the democratic process. The case has returned to the district court for further litigation and additional findings prior to entry of a final judgment. The National Voting Rights Institute serves as special counsel to the city of Albuquerque in defense of its twenty-seven year old campaign spending limits.

The consolidated cases surrounding BCRA will mark the first time since Buckley that the Supreme Court will review a campaign finance reform law passed by the U.S. Congress. In that context, it is critical that the constitutional principles of political equality be raised for the Court's consideration. This lawsuit will serve as the vehicle for making these important arguments before the Court.

For more information, contact the National Voting Rights Institute at (617 368-9100, or visit the NVRI website, www.nvri.org.