In The United States District Court

FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH MCCONNELL, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Civ. No. 02-582 (CKK, KLH, RJL)
v.	)	
	)	**Consolidated Actions**
FEDERAL ELECTION COMMISSION, *et al.*,	)	
	)	
Defendants.	)	
	)	

BRIEF OF *AMICI CURIAE*
THE CATO INSTITUTE AND THE INSTITUTE FOR JUSTICE

Erik S. Jaffe, # 440112
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165
(202) 237-8166 (fax)
jaffe@esjpc.com
Counsel for Amici Curiae

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CONTENTS

AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant cases are of central interest to Cato and the Center because they present issues going to the very heart of the First Amendment and will likely result in a once-in-a-generation re-examination of the Constitution's treatment of political speech.

The Institute for Justice ("IJ") was founded in 1991 and is our nation's only libertarian public interest law firm, defending basic individual rights such as economic liberty, private property rights, and the right to free speech. IJ seeks a rule of law under which individuals can control their destinies as free and responsible members of society. IJ works to advance its ideals through both the courts and the mainstream media, forging greater public appreciation for economic liberty, private property, school choice, free speech, and individual initiative and responsibility versus government mandate. This case involves just such a fundamental clash between public freedom of speech and government mandates, and thus touches the very core of IJ's purposes and ideals.

ARGUMENT

Current jurisprudence regarding freedom of speech and association related to elections is a mass of contradictions and confusion. Those problems stem largely from several fundamental inconsistencies in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). Both time and analysis have demonstrated that various aspects of *Buckley* are untenable and indefensible. The current cases, challenging the sweeping regulations of political speech and association adopted in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), present both this Court and the Supreme Court with a vital opportunity to return to core First Amendment principles and either eliminate or at least minimize the contradictions in *Buckley* and its progeny.

While this Court obviously cannot overrule Supreme Court precedent, it certainly has no obligation to extend the contradictory elements of *Buckley* further in the wrong direction. At a minimum, when faced with conflicting principles in Supreme Court precedent, this Court should apply the principle that is truest to the Constitution and refuse to extrapolate from principles that conflict with First Amendment fundamentals. *Cf*. *Bendix Autolite Corp*. v. *Midwesco Enterprises*, 468 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) (it would do "no damage to the interests protected by the doctrine of *stare decisis*" to abandon a particular approach to negative Commerce Clause cases, leaving "[i]ssues already decided … untouched" and adopting a "more appropriate" analysis for the future).

Furthermore, the unusual procedural posture of this case – direct, inevitable, and expedited appeal to the Supreme Court, BCRA § 403(a) – gives this Court greater leeway in dealing with tenuous precedent. Given the BCRA's blunt challenge to prior First Amendment jurisprudence and its short-circuiting of the usual process of court of appeals percolation and discretionary Supreme Court review, a candid and thorough treatment by this Court

of the Constitution's requirements will provide a greater service to the Supreme Court than would rote application of questionable precedent.

I. GENUINE STRICT SCRUTINY SHOULD APPLY TO ALL RESTRICTIONS ON ELECTION-RELATED SPEECH AND ASSOCIATION.

It is a cornerstone of the First Amendment that restrictions on political speech and association are subject to strict judicial scrutiny. Yet *Buckley* applied a lower level of scrutiny to restrictions on campaign contributions than it did to restrictions on other types of expenditures for election-related speech. Such differential scrutiny was based on non-existent or irrelevant distinctions between contributions and expenditures and departs from fundamental First Amendment principles. Strict scrutiny should apply uniformly to all restrictions on political speech and association, including restrictions on campaign contributions.

As *Buckley* at least initially recognized, both contributions and expenditures "operate in an area of the most fundamental First Amendment activities," in which the "First Amendment affords the broadest protection" for both individual expression and the "fundamental" right to associate. 424 U.S. at 14, 25. *Buckley* also correctly recognized that the ability to expend money to generate speech and to associate and pool money for group speech were fully protected by the First Amendment. *Id*. at 15-19. As with many rights, exercising the right to speak almost always costs money, especially if the speaker intends to reach a large audience. The right to speak thus necessarily encompasses the right to pay for speech or the distribution of speech, just as the right to counsel encompasses the right to hire a lawyer and the right to free exercise of religion includes the right to contribute to a church. In each of those cases the expenditure or contribution is protected not because "money is speech" or "money is a lawyer," or "money is religion," but rather because the expenditure of money is part of the *exercise* of the right to speak, to counsel, or to free exercise of religion.

Yet despite its recognition of such bedrock principles, *Buckley* offered only inconsistent fidelity to those principles, applying strict scrutiny to expenditure restrictions while applying a much diluted level of scrutiny to restrictions on contributions. 424 U.S. at 25; *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377, 386 (2000) ("Precision about the relative rigor of the standard to review contribution limits was not a pretense of the *Buckley per curiam* opinion. … While we did not then say in so many words that different standards might govern expenditure and contribution limits affecting associational rights, we have since then said … 'that restrictions on contributions require less compelling justification than restrictions on independent spending.'") (citation omitted).

Buckley's diluted scrutiny for contribution restrictions was based on the assertions that contributions involve only symbolic speech, that any speech resulting from contributions is merely contingent speech by someone other than the contributor, and that any burdens imposed by contribution restrictions are only marginal. 424 U.S. at 21-22. Those assertions, however, are both wrong and irrelevant to the level of scrutiny to be applied.

The claim that the only First Amendment interest at issue with contributions is the "undifferentiated symbolic act of contributing," unrelated to the amount of the contribution, 424 U.S. at 21, is simply incorrect, and even *Buckley* itself later acknowledges that "[m]aking a contribution … enables like-minded persons to pool their resources in furtherance of common political goals." *Id*. at 22. Just as with contributions to other advocacy groups, campaign contributors form part of an expressive association organized around a favored candidate who is both an object of the collective speech as well as a unifying spokesperson or coordinator for such speech. Contributors thus "speak" not merely symbolically through the act of contributing, but also through the very speech funded by the contribution, which will in-

deed vary in both scope and reach according to the amount, rather than the mere fact, of contributions. And even if *Buckley*'s characterization of contributions were accurate, contributions to candidates would be no different from contributions to other speakers or groups as far as the First Amendment interests involved. The supposedly undifferentiated and symbolic nature of contributions in general thus cannot explain the lower scrutiny applied to contributions to candidates rather than to other associations.

Buckley's claim that the connection between contributions and speech is contingent upon whether contributions are "spent by a candidate or an association to present views to the voters," and its disparagement of the resulting expression as involving only "speech by someone other than the contributor," 424 U.S. at 21, is once again wrong and irrelevant to the standard of scrutiny to be applied. Unlike gifts or bribes, campaign contributions can be spent *only* to support campaign-related expression. Furthermore, those contributions implicate purported government interests only when they *are* spent to generate expression. Any contingent connection between candidates and the ensuing speech thus is irrelevant to the First Amendment inquiry. And while it is true that it may be the candidate doing the literal speaking that results from contributions, it is emphatically *not* true that such speech is *only* that of the candidate, rather than the speech of both the candidate and the contributors combined. *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958) (association "and its members are in every practical sense identical," it "is but the medium through which its individual members seek to make more effective the expression of their own views"); *see also*, *Buckley*, 424 U.S. at 22 (role of associations is to "effectively amplify[] the voice of their adherents"); *Nixon*, 528 U.S. at 415 (Thomas, J., dissenting) ("a contribution, by amplifying the voice of the candidate, helps to ensure the dissemination of the messages that the contributor wishes to con-

vey"). The fact that someone other than the multiple contributors utters the final words does not diminish the expressive interest of the contributors. In any event, neither the added step required to convert contributions into speech nor the use of third parties to perform the final act of speaking distinguishes contributions from other forms of expenditures for speech. Such factors are thus incapable of justifying the differential scrutiny applied to restrictions on contributions and expenditures.

Buckley's third asserted distinction that contribution restrictions have only a marginal impact on political expression, 424 U.S. at 21-22, is no more tenable than the previous two. The size of the First Amendment burden imposed by contribution restrictions is not so slight as *Buckley* suggests, and in any event the magnitude, as opposed to the character, of a speech restriction has nothing to do with the *standard* of scrutiny applied.

Contrary to *Buckley*'s suggestion, a contribution limit is not merely an "indirect[]" burden on campaign speech, "making it relatively more difficult for candidates to raise large amounts of money." 424 U.S. at 26 n. 27. There is nothing *indirect* in conditioning the amount of a candidate's expression on his ability "to raise funds from a greater number of persons," and there is nothing *indirect* in "compel[ling] people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." *Id*. at 21-22. Rather, allowing speakers to raise and pool money only by bits and pieces, and doing so precisely *because* such money will be used for political speech, quite directly offends the First Amendment and burdens speech and association.

Whether direct or indirect, however, the burden is substantial just the same, particularly where the aggregation of large amounts of money is essential for access to "expensive modes of communication" such as television, radio, and other mass media, which are "indis-

pensable instruments of effective political speech." *Buckley*, 424 U.S. at 19. Requiring a gardener to water a garden with a thimble rather than a pitcher plainly would burden the production of flowers, and so too with contribution limits and the production of speech. Contribution limits necessarily increase the time and expense a candidate must devote to raising money for substantive campaign speech and divert such time and expense from what the candidate would otherwise discuss in support of his or her election. And they increase the burden on contributors as well, who must now search for a less effective means of combining in support of a shared message and are likely to find numerous alternative avenues of association and collective speech foreclosed as well.

Even if "indirect," the "burden here is hardly incidental to speech" as would be some otherwise valid regulation of conduct. *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 790 n. 5 (1988).[1] Campaign contributions are especially intended to generate political speech and the only value they carry for a candidate is to enable speech that will persuade the voters to elect that candidate. All restrictions imposed because of the communicative impact of the affected expression should be strictly scrutinized.

Finally, the size of the First Amendment burden goes to the balancing element of whether a restriction is more burdensome than necessary to achieve a compelling interest, not to the standard of scrutiny. Even a trifling speech tax discriminatorily imposed on messages

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[1] The burden here is imposed directly on money targeted for communication, and not on the raising of money in general. That is what distinguishes contribution restrictions from generally applicable income taxes, which are not targeted to speech related income. The general tax example – *i.e.*, a regulation on general conduct that has an incidental effect on speech – falls within the analysis of *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968). But a restriction specifically on raising money for speech and imposed precisely because such money will be spent on speech – *i.e.*, because of its communicative impact – completely fails the *O'Brien* test. *Id*. at 382.

critical of the government would be subject to strict scrutiny regardless of the size of the burden on such speech.

The inconsistency of *Buckley*'s expenditure/contribution dichotomy also can be seen in the treatment of certain expenditures as if they were merely contributions despite the total inapplicability of *Buckley*'s own supposedly defining criteria. For example, expenditures for so-called "express advocacy" of the election or defeat of a candidate are restricted to a greater extent than other expenditures for speech and are given the type of diminished protection provided to "contributions" rather than expenditures. *Buckley*, 424 U.S. at 43, 44 n. 52. Yet express advocacy is not contingent on any subsequent act by the candidate, is neither symbolic nor by proxy, and directly varies in quantity and reach with the amount of money expended. Treating expenditures for express advocacy as contributions thus is an internally inconsistent fiction that weakens protection for such direct speech. But there is no excuse for placing such a thumb on the scales given that "[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." *Buckley*, 424 U.S. at 48.[2] If there is a difference in the government interest threatened by such speech, that difference should be evaluated under normal strict scrutiny by asking whether the interest is compelling and the remedy narrowly tailored.[3]

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[2] But for *Buckley's* recognition of that basic principle, it could be made a crime for an individual – not merely a corporation or labor union – to take out a small newspaper advertisement that read "Vote for Harry Browne." *See* 424 U.S. at 40.

[3] Coordinated expenditures are another example of direct speech and direct association being scrutinized under the lesser standards applied to contributions despite the complete absence of the distinguishing factors of contributions. That such expenditures might have a greater influence on a candidate, or are restricted in order to prevent "circumvention" of the contribution limits, does not lower the First Amendment bar, but at most increases the governmental interest to be weighed within the

In the end, the speech and association interests are fundamentally identical for expenditures and contributions that can only be used to support speech. The line separating expenditures and contributions is incoherent. Both should be afforded the "fullest and most urgent application" of the First Amendment, *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971), and restrictions on either should be subject to no less than the full force of strict scrutiny. Indeed, content-based restrictions on such core political speech and association should be *per se* invalid under the First Amendment, with no further inquiry or balancing required. *Republican Party of Minnesota* v. *White*, 122 S. Ct. 2528, 2544 (2002) (Kennedy, J., concurring). Diluting the standard of scrutiny for contribution restrictions in order to bolster otherwise deficient justifications for restricting speech and association is impermissible under the First Amendment and contrary to basic notions of principled adjudication. Moreover, changing the standard of balancing based on factors already accounted for *within* the balance is simply *ad hoc* decision-making at its worst.

II. EXPRESSIVE ASSOCIATION AND COLLECTIVE SPEECH SHOULD BE EVALUATED CONSISTENTLY AND PROTECTIVELY.

Another of *Buckley*'s unfortunate legacies is the inconsistent treatment of multiple forms of collective speech. While *Buckley* and later cases applied strict scrutiny to restrictions on speech by private associations in general, the Court has given less First Amendment protection to such private associations as political parties and committees, business corporations, and labor unions. *See FEC* v. *Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 252-53, 256-60 (1986) ("*MCFL*").

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existing parameters of strict scrutiny. Although contribution limits themselves may have survived a lower level of scrutiny, coordinated expenditure restrictions serving the same interests once-removed might not survive true strict scrutiny. *See Buckley*, 424 U.S. at 44-45.

Funds raised by political parties for expression are, of course, no different than funds for expression raised by any other association. Cases since *Buckley* have confirmed that strict scrutiny applies to restrictions on fundraising by other private associations. *See, e.g.*, *MCFL*, 479 U.S. at 254-55, 256. Yet such cases offer no cogent basis for applying lesser scrutiny to fundraising restrictions burdening political party speech. The influence of political parties over a candidate who is a member of that party is hardly a negative consideration under the First Amendment, but rather is no more than a description of free association. A candidate who chooses party association is "a standard bearer who best represents the party's ideologies and preferences," *Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214, 223 (1989) (citations and internal quotation marks omitted), and thus ought to reflect and be influenced by those preferences. Furthermore, any concern over the influence of large donors on the views of a political party is hardly *improper* influence, but rather is the inevitable consequence of economic and social disparities. Such disparate influence would exist in the case of large donors to any expressive association, and does not offer any basis for distinguishing political parties from all other associations.

As with restrictions on political party speech, there is likewise no justification for reduced scrutiny of restrictions on political speech by business corporations and labor unions. Those entities are vital associations based on the shared interests of their members – assuming voluntary purchase of stock by shareholders or payment of membership dues by workers. That those interests are largely economic does nothing to diminish their constitutional status. Political advocacy and speech driven by economic perspectives are likely universal and, in any event, are no different than speech motivated by less worldly concerns. *Cf. NAACP* v.

Alabama, 357 U.S. at 460 ("it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters").

The notion that corporate and union speech is somehow not a valid reflection of the interests of the shareholders or members, *MCFL*, 479 U.S. at 258, 260, simply ignores that such agency issues are inherent to all associations and do not diminish the speech interests involved so long as association is voluntary. All shareholders and members are free to remain affiliated or not, and do so knowing that the entities are authorized to speak in furtherance of the collective economic interests that they represent. That individuals may have other interests that conflict with their economic interests in a corporation or union – and hence conflict with a corporation's or union's speech – simply puts them to the choice of which interests are more important to them and thus whether to continue or terminate their association. That same choice is presented by all forms of association.

The further suggestion by some that corporations and unions must be foreclosed from engaging in certain political speech in order to limit the influence of such wealthy entities is not only inadequate as a justification for lesser scrutiny, it is a reason itself to invalidate restrictions on such speech. Though failing in its application, *Buckley* at least correctly recognized that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." 424 U.S. at 48. That, said *Buckley*, is "wholly foreign to the First Amendment," the protections of which "cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id*. at 48-49.

Disparagement of certain private associations as being "special," rather than ordinary, interests – with the implication that those interests are somehow narrower and less valid – flies in the face of free-association principles and case law. Whatever the unifying ideas or

interests that motivate a particular association's expression, the government simply has no power to regulate speech on the basis of its satisfaction or dissatisfaction with those ideas or motives. Nor can government apply differential standards to the expression of certain associations in order to correct a perception that those associations command resources disproportionate to the strength or support behind their ideas. The notion of equalizing the speech of groups based on the number of persons supporting such groups was advanced without success in *Buckley*, 424 U.S. at 17, and manipulating different groups' relative ability to speak "is a decidedly fatal objective." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 579 (1995). The law "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id*. [4]

Furthermore, the supposedly narrow motives and interests of different groups not only fails to diminish the constitutional protection for their expressive activities, it is actually a central and important assumption of the Framers and a key aspect of the checks and balances of our Constitution. Those checks and balances are designed to promote a multiplicity of competing factions in order to block domination by any single faction. Indeed, Madison's greatest concern regarding the "violence of faction" was not the proliferation of many small

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[4] Different considerations would apply to associations engaging in a mixture of expressive and non-expressive activity. Laws and regulations targeted at non-expressive conduct of certain associations – say terrorist groups – that impose an incidental burden on expression would be evaluated under the familiar *O'Brien* test for such mixed-effect laws. Of course, in this case, the *O'Brien* test is inapplicable for the same reason it was rejected in *Buckley* – the challenged laws are specifically and intentionally aimed at expression, and at the expressive consequences of contributions and expenditures *for* speech, rather than at conduct itself. *See Buckley*, 424 U.S. at 17 ("Even if the categorization of the expenditure of money as conduct were accepted, the limitations challenged here would not meet the *O'Brien* test because the governmental interests advanced in support of the Act involve 'suppressing communication.'").

factions, but the "superior force of an interested majority." Federalist No. 10, The Federalist Papers 45 (Rossiter & Kesler eds. 1999). Madison correctly recognized that "the *causes* of faction cannot be removed and that relief is only to be sought in the means of controlling its *effects*." *Id.* at 48 (emphasis in original). The solution is not to replace conflicting factions with a single majority faction of the public, but rather to render any potential majority faction "unable to concert and carry into effect schemes of oppression." *Id*. at 49. Any supposed concern with "special" interests thus misunderstands the entire problem of faction as it concerned the Founders. Far from being compelling, a desire to decrease special interests is anathema to the "republican remedy for the disease[]" of factionalism. *Id.* at 52.

In the end, all voluntary associations, whatever their primary motivating concerns and actual or potential wealth, collectivize and amplify the speech of their associates. Their expressive activity should be equally protected by the First Amendment.

III. DISCLOSURE RULES UNNECESSARILY TRAMPLE PROTECTED ANONYMITY AND ASSOCIATIONAL PRIVACY.

Buckley's casual approval of numerous disclosure requirements for speakers and contributors is inconsistent with the recognition of the right to engage in anonymous speech and associational privacy as essential aspects of the freedom of speech and association. Forcing speakers to reveal their identities both compels and restricts speech – they are compelled to say more than they would choose on their own, and they may be deterred from speaking at all if, by revealing their identities, they may expose themselves to various forms of harassment or retaliation for their views. Because of such concerns, the First Amendment protects the rights of individuals to engage in anonymous speech. *See Watchtower Bible and Tract Society of New York* v. *Village of Stratton*, 122 S. Ct. 2080, 2089-90 (2002); *McIntyre* v. *Ohio*

Elections Comm'n, 514 U.S. 334 (1995). Similar concerns underlay First Amendment protection of the right to associational privacy. As the Supreme Court has observed,

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association …. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. … Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

NAACP v. *Alabama*, 357 U.S. at 462.

Notwithstanding the protection afforded anonymous speech and associational privacy, *Buckley* upheld various disclosure requirements on the grounds that contribution disclosures (1) provide a means of gathering data essential to detecting violations of the contribution limits themselves; (2) deter actual corruption and avoid the appearance of corruption by publicizing large contributions and expenditures and thus discouraging their use for seeking political favor; and (3) provide information to the electorate regarding who supports a candidate and thus supposedly reveal something about the candidate's views and about the interests to which he might be responsive. 424 U.S. at 66-68.

Those justifications fail to offer an adequate basis for depriving speakers and contributors of their rights to anonymity and associational privacy. First, the interest in enforcing contribution limits might well be a valid concern if, but only if, such limits are themselves valid restrictions on speech. *Cf. Buckley*, 424 U.S. at 75-76 (discussing disclosure related to invalid expenditure limits). That condition is doubtful given proper First Amendment scrutiny, *supra* Part I, and a correct understanding of the quite narrow government interest in preventing corruption. And even if contribution limits continue to be upheld, enforcement concerns are more than adequately addressed by record-keeping and limited dis-

closure to enforcement authorities themselves. Further disclosure to the public substantially adds to the speech burden without appreciably aiding enforcement of contribution limits.

Second, the alleged interest in deterring corruption and the appearance of corruption is particularly inapt if contribution limits themselves are upheld. The restrictions are so low as to eliminate even the speculative suggestion that the underlying contributions would influence a candidate. In any event, even in the absence of limits, large contributions and expenditures for speech are simply *not corrupt*, regardless of whether they are given in exchange for political favor. *See infra* Part IV.

Third, the information value provided by disclosure simply is not an adequate basis for government restriction or compulsion of speech and association. Insofar as disclosure is meant to provide information about the contributors or expenders themselves, control over such information is squarely part of First Amendment freedoms. *McIntyre*, 514 U.S. at 342 ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment."). And insofar as it is meant to provide information about a candidate, that benefit is far too attenuated to impose First Amendment burdens on third parties making contributions or expenditures. To obtain information about candidates, it is the candidates themselves who should be required to disclose contributions, and if a contribution is made anonymously, that fact itself can be disclosed without further requiring identification of the donor.[5] A candidate accepting large amounts of anonymous donations may well be suspect, but the public can judge that for themselves and vote accordingly.

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[5] If the contributor revealed his or her identity to the candidate, but asked for that information to be withheld, then disclosure of that circumstance too could be required without disclosing the contribu-

IV. THE GOVERNMENT'S INTEREST IN PREVENTING CORRUPTION IS TOO-BROADLY DEFINED AND MAY NOT INCLUDE INTERFERING WITH THE INHERENT DEMOCRATIC BARGAIN BETWEEN ELECTED OFFICIALS AND THEIR SUPPORTERS.

In addition to applying inconsistent scrutiny to restrictions on speech and association, much of the difficulty in recent campaign finance jurisprudence stems from a flawed conception of the governmental interests at stake. While speaking broadly of an interest in preventing corruption or the appearance of corruption, *see, e.g.*, *Buckley*, 424 U.S. at 25-27, the cases offer no cogent definition of corruption and no significant analysis as to why preventing the mere *appearance* of corruption is a compelling interest under the First Amendment.

Any compelling government interest in preventing corruption of elected officials is limited to instances of *quid pro quo* bribery of actual or potential office-holders. Bribery, in turn, occurs only when value is given to candidates or office holders for *personal* use. Bribes do not include contributions and expenditures that are dedicated solely to generating political speech. Nor do they include the value of speech in persuading the citizenry to elect a candidate. While speech, like votes themselves, may well be exchanged for official action, such exchanges are the essence of democracy and may not be redefined, *ipse dixit*, as "corrupt."

A. Democracy Is a *Quid Pro Quo* between Elected Officials and Members of the Public.

Democracy in general, and elections in particular, are, by definition, an exchange between candidates and the citizens that elect them. Every candidate for office necessarily says to voters: "Give me your vote, give me a job as your representative, and I will give you something in return." Different candidates offer different things in exchange for being given

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tor's identity. Of course, a candidate who disclosed having agreed to conceal from the public the identity of a known donor quite likely would lose the trust of numerous voters if the donation truly appears corrupt. Concerns regarding such contributions are thus self-correcting at the ballot box.

their jobs. Some promise to lower taxes, some to provide more social services; some promise to fight for abortion rights, others to fight against abortion; some promise to bring more public works to their jurisdiction, others to reduce "pork" in politics. As a practical matter, the exchange is structured much like a solicitation of a bribe: "I will take official actions that you desire if you give me your votes (and hence a job)." And from the voters' side the exchange likewise looks like a bribe: "We will give you our votes (and hence a job) if you agree to give us something we want." Yet we never consider that exchange to be an actual bribe even in the face of a blatant *quid pro quo* – vote for me and I promise to do X; we will vote for you if you promise to do X – because there is nothing *improper* about the exchange. In fact, the exchange is precisely what we want and expect it to be. Voters are entitled to vote for candidates responsive to their desires, and candidates are entitled to respond to those desires through lawful official action. That is the entire point of representative democracy.

Our constitutional democracy also relies on the core premise, endorsed through the First Amendment, that politicians and the public will be influenced not just by the periodic votes of the citizenry, but also by the public political speech of competing interest groups and individuals. Sometimes such speech is designed to persuade politicians to take a particular stance on various matters within their authority, and sometimes it is designed to persuade the public to vote for or against politicians based on their stances on such matters. In both cases the speech may influence the conduct of elected officials or the conduct of the voting public (thereby changing the identity and views of elected officials). Such influence is an inherent and desirable element of a democracy whereby changes in government are brought about through speech and elections rather than through force. Just as with votes, speech is routinely exchanged for the promise and performance of official conduct. A newspaper that

says it will only endorse a candidate who pledges to vote (for/against) abortion rights, a citizens' group that says it will endorse a candidate that pledges not to raise taxes, and a candidate that promises to increase law enforcement in exchange for the endorsement of a respected anti-crime advocate, all are engaged in the same – and entirely proper – exchange that forms the election process itself.

Such fundamental *quid pro quo* exchanges – political support and votes in return for desired official action – embody representative government. They are neither improper nor corrupt, and may not be redefined as such without abandoning both elections and the First Amendment. Any government interest based on contrary assumptions is not compelling, not substantial, and not even valid.

B. Exchanges Mediated through Speech Are Not Corrupt.

The primary government interests asserted in support of campaign finance restrictions are the prevention of the corruption or the appearance of corruption. But those asserted interests are so poorly conceived and defined that they fail to differentiate cogently between proper and improper influence on government officials. It is *Amici*'s position that any influence over candidates that is mediated through political speech or lawfully cast votes, and which provides to the candidate only the benefit or detriment of victory or defeat in an election for public office, is not corrupt, even when exercised in the form of a *quid pro quo*.

In addressing the asserted problem of corruption, *Buckley* focused on "the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 424 U.S. at 25. But saying that something has an influence on candidates' positions and eventual actions is a far cry from demonstrating that such an influence is improper, much less corrupt. As with the asserted interest in judicial impartiality

discussed in *Republican Party of Minnesota*, advocates of campaign speech restrictions are "rather vague" about what they mean by corruption and yet "[c]larity on this point is essential before we can decide whether" corruption is "indeed a compelling state interest, and, if so, whether the [restriction at issue] is narrowly tailored to achieve it." 122 S. Ct. at 2535.

Many things have an influence – indeed, even a coercive influence – on candidates' positions and actions, yet few would be considered improper. Public opinion is the most obvious example of something that might "coercively" influence a candidate – at least any candidate that takes seriously his or her role as a representative of constituents and who has any interest in being elected or re-elected. Such influence is inherent where free elections are used to choose representatives. We are ordinarily quite pleased by the fact that government is responsive to the will of the people rather to the autocratic views of a particular official.

Given the inherent exchanges between citizens and their elected representatives, "corruption" cannot be defined as merely a *quid pro quo* involving valid action by elected officials as the back end of the exchange. Such a definition would define virtually *all* behavior by elected officials as corrupt and would indict the Constitution itself. In order to have a useful and coherent definition of corruption, the concept must be limited to official action exchanged for some *private* advantage, not simply the very public advantage of getting elected.

Assistance in attaining electoral success cannot be considered an improper means of influence over a candidate. Neither then can campaign contributions that fund speech intended to provide such success by persuading voters to support a particular candidate. While it is true that it costs considerable money to use mass-communications media to reach out to the public, the only value of that money is in providing speech and persuading voters. If a candidate were to receive contributions for some *personal* use such as buying jewels or fancy

cars, that would indeed be a bribe. But contributions that assist the candidate in getting elected are no different than endorsements or votes.[6] Because the assistance is channeled through the uniquely protected medium of political speech, it cannot be deemed corrupt.

An alternative basis for imagining contributions to be corrupt stems not from their form – money for speech as opposed to the giving of endorsements or votes – but rather from the perception that persons or groups providing especially large contributions for political speech will somehow have disproportionate leverage over candidates than would persons or groups offering less electoral assistance. But speech having unequal influence on the public, and hence unequal value to candidates, comes in many shapes – speech by the media, speech by celebrities, speech by religious leaders, and speech by the economically successful. Whether through differences in access, quantity, or credibility, the impact of speech will necessarily vary. But the First Amendment places its trust in the public, not government, to sort it all out in the end. And if an elected official is more responsive to those constituents that have a greater impact in persuading the public to vote for him or her, that is not corruption – that is simply politics. Disparities in influence are the inevitable consequence of differences in wealth, intelligence, popularity, motivation, and a hundred other factors. Such disparities might be addressed through means such as education, economic opportunity, and the like, but they can never be eliminated in a free society.

Even if disparities in actual or apparent influence are troubling, the government may not attempt to equalize the political strength of different elements in society by restricting the

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[6] BCRA § 313 contains a provision that states a "contribution or donation described in subsection (a) shall not be converted by any person to personal use." That provision reflects the essential demarcation between corrupt and non-corrupt payments to candidates.

voice of some to enhance the voice of others. *Buckley*, 424 U.S. at 48-49. The First Amendment uniquely and especially condones political influence mediated through speech and forbids government manipulation of that aspect of the political process. However imperfect or worrisome a system built on such influence may be, it is the system the Constitution established, it is better than the alternatives, and it may not simply be redefined as "corrupt" in order to avoid the First Amendment.

C. Eliminating the Mere Appearance of Corruption, as Opposed to Actual Corruption, Is Not a Compelling Government Interest.

Absent a demonstrable interest in preventing actual corruption, campaign-related restrictions are alleged to serve the interest of avoiding a public perception of unproven corruption – the mere "appearance of corruption," *Buckley*, 424 U.S. at 27 – that might shake confidence in our democratic institutions. But mere public suspicions or misperceptions of corruption surrounding contributions and expenditures for political speech is no basis for ignoring the constitutional scheme. Rather, the proper answer to such misperception is either more speech, the election of candidates voluntarily practicing the public's notion of virtue, or, ultimately, a constitutional amendment if the existing system cannot hold the public's confidence. In no event are public misperceptions a justification for distorting constitutional provisions set out precisely to resist even the strongly held desires of a temporal majority.

Perhaps the most obvious illustration of that principle is to ask whether the government could prevent citizens, the press, or anyone else from criticizing elected officials for being corrupt because they kow-tow to political polls, they favor special (or ordinary) interests within their own state, or they favor persons who voted for them. The factual aspect of such criticism would plainly be true, although many would presumably argue with the characterization of such behavior as "corrupt." But regardless of whether such criticism caused

the public to believe – rightly or wrongly – that elected officials were corrupt, there is simply no conceivable basis for restricting such speech without violating the First Amendment.[7]

If the danger from exposing or imagining a corrupt government is so great, then there should be ample incentive for more speech to counter such danger. And if more speech is insufficient to mitigate the public's contempt and distrust for the government, and to restore its confidence in our constitutional system, then presumably there will be sufficient support and motivation for a constitutional amendment.[8]

V. APPLICATION OF GENERAL PRINCIPLES TO SPECIFIC SECTIONS OF THE BCRA.

Under the proper First Amendment framework for evaluating restrictions on speech and association, numerous provisions of the BCRA are unconstitutional. The results of a First Amendment evaluation of several of the BCRA's more troubling provisions are set out below, organized according to the BCRA's separate Titles. Applying the proper scrutiny and a narrowed understanding of what constitutes actual corruption, few provisions survive.

BCRA Title I: ***Soft-Money Prohibitions.*** Because political parties are private expressive associations entitled to full First Amendment protection, the restrictions in BCRA

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[7] The weight given to the appearance of corruption in *United States Civil Service Commission* v. *National Association of Letter Carriers* involved partisan conduct by non-elected civil service employees charged with *administering* the law, 413 U.S. 548, 564-65 (1973), (emphasis added), and cannot credibly be translated to the behavior of *elected* officials who *make* the law, who are necessarily political, and who can and should favor the positions of their political supporters. Law-making is frequently more of an exercise in political power than administrative fairness. Concerns over such things as undue favoritism or imposing unequal burdens on property ought to be handled by the constitutional checks of the Equal Protection and Takings Clauses, as well as by the next election cycle.

[8] *Buckley*'s concern with eliminating "the *opportunity* for abuse inherent in the process of raising large monetary contributions," 424 U.S. at 30 (emphasis added), is distinct from concern with mere appearances and, properly understood, carries more weight. The only true opportunity for "abuse" of campaign contributions is their potential conversion by the candidate to private and personal use, which can be handled by a direct prohibition of such conversion and audit procedures sufficient to enforce that prohibition. Any lingering risk of conversion is not even addressed by contribution lim-

§ 101 on their collection and expenditure of funds earmarked for political speech must be subject to strict scrutiny. Those restrictions would also fail such scrutiny because the government's interest is virtually non-existent given that, as explained in Part II, political party speech and private influence over such speech are not even remotely corrupt.

Disclosure Requirements. The requirement that political committees disclose the identities of contributors, BCRA § 103(a), impairs fundamental First Amendment rights of anonymity and associational privacy without adequate government interest or justification. With contribution limits in place, disclosure serves virtually no purpose. And even without contribution limits, any legitimate interest in revealing a candidate's sources of support is adequately served by requiring disclosure of the acceptance and amounts of anonymous contributions without requiring disclosure of the identities of the contributors.

BCRA Title II: ***Restrictions on Electioneering Communications.*** Disclosure and segregated funding requirements triggered by electioneering communications, BCRA §§ 201(a), 211, 212, also impair the rights to anonymity, associational privacy, and expressive association in general. The fact that the restrictions are triggered by the content and presumed communicative impact of the speech involved renders them subject to strict scrutiny. Because electioneering communications are simply not corrupt, restrictions triggered by such communications serve no legitimate, much less compelling, purpose.

Coordinated Expenditures. Restrictions on broadly defined coordinated expenditures, BCRA §§ 202, 213 & 214, involve direct restrictions on speech and association subject

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its and is not a compelling interest. *Cf*. *Buckley*, 424 U.S. at 56 ("no indication that substantial criminal penalties" and publicity would be "insufficient to police" contribution limits).

to full strict scrutiny. Such coordinated speech is not at all corrupt and thus restrictions cannot survive proper First Amendment scrutiny.

Restrictions on Corporate and Union Funding of Speech. Prohibiting business corporations and labor unions from engaging in express advocacy and other electioneering communications, BCRA § 203, and forbidding other associations from using corporate or labor donations for electioneering communications, BCRA § 201(a), squarely suppress the expression of voluntary associations and are subject to strict scrutiny. The interests alleged for suppressing corporate and labor speech are not compelling and in some instances are patently offensive under the First Amendment.

BCRA Title III: ***Contribution Limits.*** The contribution limits contained in BCRA § 307, though higher than previous limits, nonetheless must be evaluated under, and would fail, full strict scrutiny. In light of the BCRA's requirement that contributions to candidates be used only for campaign-related activities and may not be converted to personal use, BCRA § 313, such contributions would have no connection to any genuine corruption. Thus the individual and aggregate limits on such contributions would further neither significant nor compelling government interests.

Wealthy or Popular Opponent Exceptions. The heightened contribution and political party spending limits for *opponents* of wealthy or popular candidates, BCRA §§ 304, 316 & 319, must be judged under strict scrutiny, indisputably fail such scrutiny, and effectively discredit the government's claimed interests in support of the BCRA's standard contribution and party spending limits. The higher limits will most often apply to poorer or less popular candidates, who are actually *more* vulnerable to the supposedly corrupting influence of larger contributions. Wealthy or popular opponents – still constrained by the lower limits – are *less*

vulnerable to such influences. *Compare Buckley*, 424 U.S. at 26 ("a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign"), *with id*. at 52 ("the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limits are directed"). The self-evident purpose of such differential limits – equalizing the speech of differently funded candidates – is not even valid, much less compelling. 424 U.S. at 48-49. Such discrimination against wealthy or popular candidates, who pose less of a risk of corruption, cannot survive First Amendment scrutiny.

The differential contribution limits also demonstrate either that the standard $2,000 contribution limit is unrelated to any interest in fighting corruption or that such interest is insufficiently important to be pursued consistently. *See Greater New Orleans Broadcasting Ass'n* v. *United States*, 527 U.S. 173, 186-87 (1999) (questioning substantiality of government interest when it is "offset, and sometimes outweighed, by countervailing policy considerations," where policy was "decidedly equivocal" towards interest, and where Congress was unwilling "to adopt a single national policy that consistently endorses" the interest); *Carey* v. *Brown,* 447 U.S. 455, 465 (1980) (legislature demonstrates interest "is not a transcendent objective" when it makes "no attempt to distinguish among various [restricted activities] on the basis of the harms they would inflict" on the asserted interest). Sections 304, 316, and 319 thus undermine numerous other provisions of the BCRA.

CONCLUSION

For the foregoing reasons, this Court should declare the challenged portions of the BCRA unconstitutional and enjoin their further enforcement.

Respectfully Submitted,

Erik S. Jaffe, # 440112
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165
(202) 237-8166 (fax)
jaffe@esjpc.com
Counsel for Amici Curiae

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2002, copies of the foregoing *amici curiae* brief were served upon the following by U.S. Mail, electronic mail, and facsimile:

James J. Gilligan
Trial Attorney
U. S. Department of Justice
901 E Street, NW, Room 816
Washington, DC 20004
(202) 514-3358 (Telephone)
(202) 616-8460 (Fax)
james.gilligan@usdoj.gov

Randolph D. Moss
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6640 (Telephone)
(202) 663-6363 (Fax)
rmoss@wilmer.com

Stephen E. Hershkowitz
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20436
(202) 694-1650 (Telephone)
(202) 219-0260 (Fax)
shershkowitz@fec.gov
litigation@fec.gov

Kenneth W. Starr
Kirkland & Ellis
655 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5130 (Telephone)
(202) 879-5200 (Fax)
kenneth_starr@dc.kirkland.com

Valle Simms Dutcher
Southeastern Legal Foundation
3340 Peachtree Road, N.E.
Suite 3515
Atlanta, Georgia 30326
(404) 365-8500 (Telephone)
(404) 365-0017 (Fax)
vsdutcher@southeasternlegal.org

James Bopp, Jr.
Bopp, Coleson & Bostrom
1 South Sixth Street
Terre Haute, Indiana 47807
(812) 232-2434 (Telephone)
(812) 235-3685 (Fax)
jboppjr@bopplaw.com
jboppjr@aol.com

James M. Henderson Sr.
The American Center for Law and Justice
205 Third Street, S.E.
Washington, D.C. 20003
(202) 546-8890 (Telephone)
(202) 337-3167 (Fax)
jmhenderson@ACLJ-DC.org

Floyd Abrams
Cahill, Gordon & Reindel
80 Pine Street, Room 1914
New York, New York 10005-1702
(212) 701-3621 (Telephone)
(212) 269-5420 (Fax)
fabrams@cahill.com

Charles J. Cooper
Cooper & Kirk PLLC
1500 K Street, N.W., Suite 200
Washington, D.C. 20005
(202) 220-9600
(202) 220-9601
ccooper@cooperkirk.com

upon the following by U.S. Mail and electronic mail:

G. Hunter Bates
1215 Cliffwood Drive
Goshen, Kentucky 40026
(502) 216-9265 (Telephone)
ghunterb@hotmail.com
hunter.bates@mcconnell02.com

Jan Witold Baran
Wiley, Rein & Fielding LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7330 (Telephone)
jbaran@wrf.com

Laurence E. Gold
AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5130 (Telephone)
lgold@aflcio.org

Sherri L. Wyatt
Sherri L. Wyatt, PLLC
1825 I Street, N.W.
Suite 400
Washington, D.C. 20006
(202) 429-2009 (Telephone)
sherrissima@juno.com

William J. Olson
William J. Olson, P.C.
8180 Greensboro Dr,, Ste. 1070
McLean, VA 22102-3860
(703) 356-5070 (Telephone)
wjopc@lawandfreedom.com

Bobby R. Burchfield
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-5350 (Telephone)
bburchfield@cov.com

Joseph E. Sandler
Sandler, Reiff & Young, P.C.
50 E Strret, S.E., Suite 300
Washington, D.C. 20003
(202) 479-1111
sandler@sandlerreiff.com

Thomas W. Kirby
Wiley, Rein & Fielding LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7062 (Telephone)
tkirby@wrf.com

John C. Bonifaz
National Voting Rights Institute
One Bromfield Street
Third Floor
Boston, MA 02108
(617) 368-9100, x10 (Telephone)
jbonifaz@nvri.org

Mark J. Lopez
American Civil Liberties Union
125 Broad Street
New York, New York 10004
(212) 549-2608 (Telephone)
mlopez@aclu.org

Prof. Burt Neuborne
Frederick A.O. Schwarz, Jr.
E. Joshua Rosenkranz
Brennan Center for Justice
161 Avenue of the Americas, 12th Flr.
New York, NY 10013
(212) 998-6730
neuborne@turing.law.nyu.edu
fritz.schwarz@nyu.edu
joshua.rosenkranz@nyu.edu

and upon the following by electronic mail only:

Abegg, Heidi K.: habegg@wc-b.com
Amundson, Jan: jamundson@nam.org
Bader, R.: rbader@fec.gov
Bailey, Kevin: KBailey@wilmer.com
Barnett, T.: tbarnett@cov.com
Beck, Stacy: sbeck@wilmer.com
Bell, C.: cbell@BMHLAW.com
Bhattacharyya, Rupa: rupa.bhattacharyya@usdoj.gov
Bokat, Stephen A.: sbokat@uschamber.com
Buckley, S.: sbuckley@cahill.com
Burns, Caleb: cburns@wrf.com
Caplan, Deborah: Deborah@olsonhagel.com
Carvin, Michael: macarvin@jonesday.com
Coffin, Shannen: shannen.coffin@usdoj.gov
Coleson, R.: rcoleson@bopplaw.com
Conrad, R.: rconrad@uschamber.com
Curtis, Charles: ccurtis@hewm.com
Danetz, Lisa: ldanetz@nvri.org
Daniel, Elizabeth: elizabeth.daniel@nyu.edu
Dixton, Grant: grant_dixton@dc.kirkland.com
Dye, Alan P.: adye@wc-b.com
Evans, Randy: randy.evans@agg.com
Gacki, Andrea: andrea.gacki@usdoj.gov
Gilchrist, Barbara: barbara.gilchrist@usdoj.gov
Ginsberg, Benjamin: bginsberg@pattonboggs.com
Goodman, Lee: lgoodman@wrf.com
Gora, Joel: JGORA@pcm.brooklaw.edu
Gordon, Jennifer: jgordon@hewm.com
Harth, David: dharth@hewm.com
Henry, Terry: terry.henry@usdoj.gov
Hirt, Theodore: theodore.hirt@usdoj.gov
Hogue, Lynn: LAWLLH@langate.gsu.edu, lhogue@gsu.edu
Jordan, Bill: bill.Jordan@usdoj.gov
Josefiak, Thomas: tjosefiak@rnchq.org
Kelner, R.: rkelner@cov.com
Kesselman, Marc: marc.kesselman@usdoj.gov
Kolker, D.: dkolker@fec.gov
Kuwana, Eric: ekuwana@pattonboggs.com
Leffel, Michael: MLeffel@wilmer.com
Lenhard, Robert: rlenhard@afscme.org
Letter, Douglas: douglas.letter@usdoj.gov
Macdougal, H.: hmacdougal@earthlink.net, hmacdougal@mindspring.com
Manuel, Anja: amanuel@wilmer.com
Markley, B.: bmarkley@cahill.com
Martines, Kim: kim_martines@dc.kirkland.com
Marzen, T.: tmarzen@bopplaw.com
May, Colby: cmmay@ACLJ-DC.org
Mcgahn, Donald F., II: dmcgahn@nrcc.org
Medina, Monica: mpmedina@hewm.com
Miles, John: johnsmiles@lawandfreedom.com

Miller, Shont E.: millerse@mto.com

Mogilnicki, Eric: emogilnicki@wilmer.com

Mulvihill, Donald: mulvid@cgrdc.com

Murphy, L.: lwmurphy@dcaclu.org, lwmurphy@aol.com

Olson, Lance H.: Lance@olsonhagel.com

Patterson, A. Krisan: kpatterson@wilmer.com

Phillips, Bradley: phillipsbs@mto.com

Raab, Michael: michael.raab@usdoj.gov

Reiff, Neil: reiff@sandlerreiff.com

Renaud, D. Mark: mrenaud@wrf.com

Shanmugam, Kannon: kannon_shanmugam@dc.kirkland.com

Shapiro, Steven: sshapiro@aclu.org

Spies, Charles R.: cspies@rnchq.org

Sturek, Kenneth: Kenneth_sturek@dc.kirkland.com

Sullivan, Kathleen: sullivan@law.stanford.edu

Tenneriello, Bonnie: bonnie@nvri.org

Timmermann, J.: jtimmerman@nab.org

Titus, Herbert: forecast22@pinn.net, tituslawfirm@aol.com

Trister, Michael: mtrister@ltsrlaw.com

Turner, Serrin: serrin.turner@usdoj.gov

Voigts, Anne E.: voigtsam@mto.com

Warren, Edward: edward_warren@dc.kirkland.com

Waxman, Seth: swaxman@wilmer.com

Weinberg, L.: lweinberg@afscme.org

Wilson, David: david.wilson@haledorr.com

Witten, Roger: rwitten@wilmer.com

Wolf, Richard: r.wolf@mooreandlee.com

Wright, Brenda: bw@nvri.org

Wyler, Arline: awyler@law.stanford.edu

Young, John Hardin: young@sandlerreiff.com