United States District Court
District of Columbia

Shaun McCutcheon et al., *Plaintiffs*	
v.	**Civil Case No. 1:12-cv-01034-JEB**
Federal Election Commission, *Defendant*	THREE-JUDGE COURT REQUESTED

Application for Three-Judge Court Or, Alternatively, Certification Under 2 U.S.C. § 437h, and Memorandum in Support

Plaintiffs move for the convening of a three-judge court to adjudicate this challenge, pursuant to § 403(a)(1) and (d)(2) of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Pub. L. No. 107-155 (2002), 116 Stat. 81, 113-14. *See* LCvR 9.1; 28 U.S.C. § 2284. BCRA § 403 is set out below. *See infra* note 1.

Alternatively, if this Court finds it lacks jurisdiction under BCRA § 403, Plaintiffs invoke the judicial-review provision at 2 U.S.C. § 437h and request the Court to "immediately . . . certify all questions of constitutionality of [the Federal Election Campaign Act ("FECA")] to the United States court of appeals . . . , which shall hear the matter sitting en banc."

Points and Authorities

I. The BCRA Judicial-Review Provisions Apply.

A. Plaintiffs Meet the Criteria for Judicial Review under BCRA § 403.

Pursuant to BCRA § 403(d)(2), Plaintiffs elect to have the provisions of § 403(a) apply to this case. 116 Stat. at 113-14. BCRA § 403(a) provides that a constitutional challenge to any

BCRA provision shall be filed in this Court, and "shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code." 116 Stat. at 113-14.[1] The referenced statute, section 2284(a), says that "[a] district court of three judges shall be convened when otherwise required by Act of Congress." Section 2284(b)(1) states:

> [T]he judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

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[1] In relevant part, BCRA § 403, 116 Stat. at 113-14, provides as follows:

SEC. 403. JUDICIAL REVIEW.

(a) SPECIAL RULES FOR ACTIONS BROUGHT ON CONSTITUTIONAL GROUNDS.—If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by the filing of a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

(b) . . . .

(c) . . . .

(d) APPLICABILITY.—

(1) INITIAL CLAIMS.— . . . .

(2) SUBSEQUENT ACTIONS.—With respect to any action initially filed after December 31, 2006, the provisions of subsection (a) shall not apply to any action described in such section unless the person filing such action elects such provisions to apply to the action.

BCRA § 403(a) permits plaintiffs to elect its special judicial-review provision in any "*challenge [to] the constitutionality* of any *provision* of [BCRA] or any *amendment* made by [BCRA]." 116 Stat. 113-14 (emphasis added). The criteria here are (1) a constitutional challenge to (2) a BCRA provision or an amendment made by BCRA.

First, regarding the *constitutional-challenge criterion*, Plaintiffs' challenge to the individual biennial contribution limits, codified at 2 U.S.C. § 441a(a)(3), is based on a violation of the First Amendment. So this criterion is met.

Second, regarding the *BCRA provision/amendment criterion*, the challenged current biennial contribution limits statute (2 U.S.C. § 441a(a)(3)) is entirely a BCRA "provision," though it is part of BCRA § 307 which also made "amendments." BCRA § 307 contained some "amendments" that merely raised contribution limits, such as the increase in the amount that a person could contribute to a candidate committee[2] from $1,000 to $2,000, *see infra* (setting out relevant portion of § 307), but the change to the prior individual biennial contribution limit went beyond merely altering the numbers (or indexing some for inflation, as BCRA § 307 also did). The nature of the significant change may be seen by comparing the before and after provisions codified at 2 U.S.C. § 441a(a)(3).

[2] Regarding terminology, Plaintiffs follow the FEC's use of "candidate committee," "national party committee," and "political action committee" ("PAC"). *See* FEC, *The Biennial Contribution Limit* (revised 2011). "Candidate committee" includes "candidate" because candidates (except for Vice President) must designate a principal campaign committee (and may designate additional authorized political committees), 11 C.F.R. 101.1(a)-(b), and receive any contributions as agents of their authorized committee(s), 11 C.F.R. 101.2. The cited brochure uses "state, local & district party committee," but "state party committee" will be used here to include local and district party committees, unless context contraindicates, because all share a $10,000 per calendar year combined limit. Plaintiffs do not follow the FEC's use of "biennial contribution *limit*" to refer to all limits at 2 U.S.C. 441a(a)(3) because the statute contains multiple limits.

Before BCRA, the FECA individual-contribution-limit provision at 2 U.S.C. § 441a(a)(3) read as follows:

> No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made to a candidate in a year other than the calendar year in which the election is held with respect to which such contribution is made, is considered to be made during the calendar year in which such election is held.

See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 189 (1976) (per curiam) (Appendix setting out statute). This biennial limit was not in the original Federal Election Campaign Act of 1971 ("FECA"), but was first added as part of § 101 of the FECA Amendments of 1974, Pub. L. 93-433 (1974), 88 Stat. 1263.

In BCRA, Congress adjusted some contribution limits, *see, e.g.*, BCRA § 307(a), *infra*, but it broke the old biennial aggregate *limit* on individual's contributions into *three limits*, with (1) one limit for contributions to candidate committees, (2) another limit on contributions to non-candidate committees (i.e., national party committees, state party committees, and PACs), and (3) another, a sub-limit, on non-candidate, non-national party committees (i.e., state party committees and PACs)—with the first limit independent of the other two and the latter two interdependent. BCRA § 307 is as follows:

> **SEC. 307. MODIFICATION OF CONTRIBUTION LIMITS.**
>
> (a) INCREASE IN INDIVIDUAL LIMITS FOR CERTAIN CONTRIBUTIONS.—Section 315(a)(1) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(1)) is amended—
>
> (1) in subparagraph (A), by striking "$1,000" and inserting "$2,000"; and
>
> (2) in subparagraph (B), by striking "$20,000" and inserting "$25,000".
>
> (b) INCREASE IN ANNUAL AGGREGATE LIMIT ON INDIVIDUAL CONTRIBUTIONS.—Section 315(a)(3) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441a(a)(3)) is amended to read as follows:
>
> "(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than—
>
> "(A) $37,500, in the case of contributions to candidates and the authorized committees of candidates;
>
> "(B) $57,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties.".

BCRA § 307(a)-(b), 116 Stat. 102-03. The change here in BCRA § 307(a) is an example of a mere amendment in the amount of a limit. But the change in BCRA § 307(b) is an amendment that repeals and replaces an old provision with a new provision, with multiple limits and altered operation with constitutional significance for the present challenge.[3]

Therefore, while BCRA speaks of § 307(b) as "amend[ing]" the prior provision, it is properly considered a new provision, not a mere change in the amount of a contribution limit. As such it is a "*provision* of [BCRA]," subject to the election by Plaintiffs of the special judicial-review provisions at BCRA § 403. 116 Stat. 113-14 (emphasis added). But even if considered "an amendment made by [BCRA]," BCRA § 403 provides for its judicial-review provisions to apply to a constitutional challenge to "an amendment." *Id.*

BCRA § 307(b) was not challenged in *McConnell v. FEC*, 540 U.S. 93 (2003), and has yet to be considered by any court. Thus, the reasons that Congress had for providing special judicial-review provisions for BCRA provisions and amendments apply fully to this challenge to BCRA § 307(b). Moreover, while *Buckley* rejected a facial constitutional challenge[4] to the now-repealed

[3] BCRA § 307 (in relevant part) is codified at 2 U.S.C. 441a(a)(3) as follows (2011-12, inflation-adjusted amounts in brackets):

> (3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than—
>
> (A) $37,500 [$46,200], in the case of contributions to candidates and the authorized committees of candidates;
>
> (B) $57,500 [$70,800], in the case of any other contributions, of which not more than $37,500 [$46,200] may be attributable to contributions to political committees which are not political committees of national political parties.

[4] *Buckley*'s holding does not control here because: (a) that ceiling's statutory context has been materially altered, (b) that ceiling was repealed and replaced by BCRA's multiple biennial contribution limits, *see* 2 U.S.C. § 441a(a)(3); (c) *Buckley* was a facial holding (so inapplicable to as-applied challenges); and (d) *Buckley* did not even suggest that contributions to candidate committees could pose a circumvention concern (so a biennial limit based on contributions to candidates, as in 2 U.S.C. 441a(a)(3)(A), has never been considered by any court). These argu-

"overall $25,000 ceiling" on total contributions under the FECA judicial-review provision at 2 U.S.C. § 437h, *see id.* at 38, that was because the old overall ceiling was a FECA provision, while BCRA § 307(b) is a BCRA provision.

B. Judicial Review of BCRA Differs From Judicial Review of FECA.

As noted above, BCRA § 403 authorizes a three-judge court to adjudicate constitutional challenges to "any provision of [BCRA] or any amendment made by [BCRA]." Such three-judge courts do not have authority to review provisions of FECA. *McConnell*, 540 U.S. at 229. Rather, actions challenging the constitutionality of FECA are subject to direct review before the appropriate court of appeals sitting en banc. *Id.*; 2 U.S.C. § 437h. Because three-judge BCRA courts have no authority over FECA, a plaintiff challenging a BCRA provision must have an injury redressable by a ruling with respect to BCRA, not one requiring a ruling with respect to a FECA provision. *McConnell*, 540 U.S. at 229. BCRA § 307(b), codified at 2 U.S.C. § 441a(a)(3), is just such a provision.

B. Plaintiffs Have Standing Because a Three-Judge Court Can Fully Redress Their Injuries with a Favorable Ruling with Respect to BCRA Alone.

FECA does not cause or contribute to Plaintiffs' injuries because the original aggregate limit contained in FECA no longer exists, having been wholly repealed and replaced by BCRA § 307(b). A three-judge court may redress Plaintiffs' injuries by invalidating 2 U.S.C. § 441a(a)(3), a BCRA provision, as applied and facially, without reviewing any FECA provision. Consequently, Plaintiffs have standing to assert their claim before a three-judge court convened pursuant to BCRA § 403.

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ments are developed in the *Memorandum in Support of Preliminary Injunction*.

C. Plaintiffs Have Standing Under *Bluman v. FEC*.

The recent decision by this Court in *Bluman v. FEC*, 766 F. Supp. 2d 1, 4 (D.D.C. Jan. 7, 2011) (mem. op.), granting a request for a three-judge court in a case presenting a challenge to a different BCRA provision, directly supports Plaintiffs' standing to assert their claim before a three-judge court.

The plaintiffs in *Bluman* were foreign nationals, lawfully present in the U.S., who challenged BCRA § 303, which prohibits contributions and expenditures by foreign nationals. 766 F. Supp. 2d at 1. While the prohibition on contributions from foreign nationals had been extant in FECA since 1976, "[i]n 2002 Congress enacted § 303 of the BCRA, which repealed the previous foreign national prohibition provision codified at 2 U.S.C. § 441e(a) and replaced it with 2 U.S.C. § 441e(a)(1)." *Id.* at 2. Based on this statutory history, the FEC opposed the plaintiffs' application for a three-judge court, arguing that a three-judge court would "lack[] 'authority' to address the constitutionality of a provision of the BCRA where the activities it prohibits were 'already unlawful before BCRA's enactment.'" *Id.* at 3 (citation omitted). The FEC contended that even if the court ruled in favor of plaintiffs on BCRA § 303, "the prohibitions on foreign nationals' activity in pre-BCRA § 441e would remain in place, the plaintiffs' alleged injuries would not be redressed, and the plaintiffs therefore would lack standing." *Id.* at 3 (quoting FEC opposition memorandum). The FEC lost, the district court reasoning that

> if a three-judge court were to strike down § 303 as unconstitutional, then no other law . . . would prohibit the plaintiffs from engaging in their desired conduct. . . . [T]he pre-BCRA provision barring foreign nationals from making political contributions is no longer in effect, having been entirely replaced by 303 of the BCRA. Nor does the fact that the plaintiffs' proposed activities were banned before the BCRA's enactment impact the plaintiffs' entitlement to a three-judge court. *See* BCRA 403 (stating that "any action . . . brought for declaratory or injunctive relief to challenge the constitutionality of *any provision* of [the BCRA] . . . shall be heard by a [three] judge court"). Because the plaintiffs' requested relief would remedy their alleged injury in fact, they have the requisite standing and are entitled

to a three-judge court to review their constitutional challenge to BCRA 303.

Id. at 4 (emphasis in original).

The district court's holding in *Bluman* applies directly to the case at bar. As in *Bluman*, Plaintiffs challenge a BCRA provision that repealed and replaced a FECA provision governing the subject matter at issue. The BCRA provision challenged in *Bluman* contained a ban on contributions from foreign nationals that had been included in FECA since 1976. *Id.* at 2. While FECA did not include (prior to BCRA's enactment) the stand-alone limits on contributions to candidate committees and non-candidates, the latter with a sub-limit, candidate contributions were counted for purposes of FECA's undifferentiated aggregate limit, and one could have challenged the inclusion of candidate contributions in this calculation on the same grounds urged by Plaintiff McCutcheon, just as one could have challenged the foreign national contribution ban in FECA before it was replaced with a similar provision by BCRA. However, the "fact that the plaintiff's proposed activities"—here, contributing to candidate committees and national party committees without restriction by the biennial contribution limits—"were banned before the BCRA's enactment" does not "impact the plaintiff's entitlement to a three-judge court." *Id.* at 4. Rather, because Plaintiffs' requested relief (invalidation of the biennial contribution limits as applied and facially) would remedy their alleged injury in fact, they have the requisite standing and are entitled to a three-judge court, just as were the plaintiffs in *Bluman*. *See id.*

D. The cases rejecting applications for three-judge courts are distinguishable.

a. *McConnell* Is Distinguishable.

In *Bluman*, the FEC opposed the request for a three-judge court, seeking refuge in *McConnell*, 540 U.S. 93. The *Bluman* district court found *McConnell* readily distinguishable for reasons that apply equally in the case at bar.

In *McConnell*, a three-judge court had been convened under BCRA § 403(a) to address a challenge to BCRA § 307 for increasing certain contribution limits and indexing them for inflation. 540 U.S. at 226. The claims of two groups of plaintiffs—the "Adams plaintiffs" and the "[Ron] Paul plaintiffs"—to BCRA § 307 had been dismissed by the three-judge court below because they lacked standing. *See id.* at 229. The Paul plaintiffs' challenge is relevant here.

The Paul plaintiffs asserted a First Amendment "Freedom of Press Clause" violation because they were subject to contribution limits but the institutional media were not, and, they claimed, "their political campaigns and public interest advocacy involve[d] traditional press activities and that, therefore, they [we]re protected by [the free-press right]." *Id.* at 228. The reason the Court found that the Paul plaintiffs lacked standing was that Congress had merely increased the limits they challenged in BCRA § 307 and left the media-exemption provisions in place, so that if they succeeded in striking the BCRA limits "both the limitations imposed by FECA and the exemption for news media would remain unchanged." *Id.* at 229.[5] Thus, a victory would not redress

[5] BCRA § 401 provides that "[i]f any provision . . . or amendment made by [BCRA], or the application of a provision or amendment to any person or circumstances, is held to be unconstitutional, the remainder . . . shall not be affected . . . ." 116 Stat. 112. So one reading of *McConnell* here is that, if there is an existing FECA statute for which the amount of a contribution limit has been altered by BCRA, if the raised (and inflation-indexed) limit is held unconstitutional, the existing FECA statute would remain unaltered. It is not necessary to decide this question because in *McConnell* the press-exemption was extant (and in multiple provisions) so that the relief sought would not redress the plaintiffs' alleged injury. At this time, Plaintiffs express no opinion on whether, or in what circumstances, judicial invalidation of a BCRA provision would resurrect the preexisting FECA provision or, instead, would render the code provision "a legal nullity in all its iterations, as assumed by the *Bluman* court. *See Bluman*, 766 F. Supp. 2d at 4. Nevertheless, *McConnell* does not support the view that, where a BCRA provision has entirely replaced the preexisting FECA provision on the subject, invalidation of the provision would resurrect the FECA language. The amendments at issue in *McConnell* (BCRA § 307(a)) merely substituted the numbers extant in FECA with higher numbers. 540 U.S. at 226. Such question is irrelevant to Plaintiffs' challenge here because, as stated, their injuries can be remedied by striking a subsection of the amendment and leaving the rest of BCRA § 307 in force.

their complaint. *Id.* So "although the Court *ha[d] jurisdiction to hear a challenge to § 307*," *id.* (emphasis added), the Paul plaintiffs lacked standing to challenge the increase in, and inflation-indexing of, contribution limits in BCRA, as they had done. Without Article III standing, there was no more the Court could do, and it dismissed the challenge. *Id.*

As part of its analysis, the *McConnell* Court indicated that any challenge to the FECA provisions (which it said would apply if the BCRA changed limits were held unconstitutional) would have to be brought under the judicial-review provisions of FECA, not BCRA:

> The Paul plaintiffs cannot show the "'substantial likelihood' that the requested relief will remedy [their] alleged injury in fact," [*Vermont Agency of Natural Resources v. United States ex rel.*] *Stevens*, 529 U.S. [765,] 771 [(2000)]. The relief the Paul plaintiffs seek is for this Court to strike down the contribution limits, removing the alleged disparate editorial controls and economic burdens imposed on them. But § 307 merely increased and indexed for inflation certain FECA contribution limits. This Court has no power to adjudicate a challenge to the FECA limits in this case because challenges to the constitutionality of FECA provisions are subject to direct review before an appropriate en banc court of appeals, as provided in 2 USC § 437h, not in the three-judge District Court convened pursuant to BCRA § 403(a). Although the Court has jurisdiction to hear a challenge to § 307, *if the Court were to strike down the increases and indexes established by BCRA § 307, it would not remedy the Paul plaintiffs' alleged injury because both the limitations imposed by FECA and the exemption for news media would remain unchanged*. A ruling in the Paul plaintiffs' favor, therefore, would not redress their alleged injury, and they accordingly lack standing. See *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 105-110 (1998).

Id. (emphasis added).

The *McConnell* Court did *not* say that if BCRA "merely increased . . . FECA contribution limits," *id.*, then a BCRA amendment was not *really* a BCRA amendment that could be reviewed by a three-judge court. This is clear because the Court clearly said that "the Court *has jurisdiction* [on appeal under the BCRA judicial-review provision] *to hear a challenge to § 307*," *id.* (emphasis added), which section was about raising and inflation-adjusting contribution limits. And it is also clear from BCRA § 403 itself, which provides the BCRA judicial-review provision

for a "challenge [to] the constitutionality of . . . *any amendment* made by [BCRA]." 116 Stat. 113-14 (emphasis added). Thus, saying that BCRA "amendments" to FECA are not "amendments" reviewable under BCRA § 403 would be contrary to the plain statutory words.

So what the Court meant (and what it said, 540 U.S. at 229) was that, since striking the BCRA contribution limits would leave FECA provisions in place, a challenge to the underlying FECA limits would *also* be required to redress plaintiffs' harm, and that could not be done under BCRA's judicial-review provisions. Rather, as the Court said, such a FECA challenge would be brought under FECA's judicial-review provision at 2 U.S.C. § 437h.

Thus, for plaintiffs who *have* standing (as here) to challenge a provision of BCRA § 307, BCRA's judicial-review provision, § 403, is properly employed. Plaintiffs here do not challenge *mere increases* in the contribution limits in BCRA § 307 (nor FECA press-exemption provisions). They challenge the limits *per se, as applied and facially*, i.e., they challenge the very notion that an individual biennial limit is constitutionally justified. If they succeed, their requested relief *will* redress their harm. So *McConnell*'s analysis does not deprive them of standing or make BCRA's judicial-review provision inapplicable.

Plaintiffs' claim here is similar to the *McConnell* claim in one respect only: the three-judge district court "has jurisdiction to hear a challenge to § 307." *McConnell*, 540 U.S. at 229. Otherwise, it is distinguishable because, "[u]nlike *McConnell*, if a three-judge court were to strike down [2 U.S.C. § 441a(a)(3) as applied and facially] . . . then no other [statutory] law . . . would prohibit the plaintiffs from . . . their desired conduct." *See Bluman*, 766 F. Supp. 2d at 4. In other words, Plaintiffs have standing to assert their claims because "if the court were to strike down" the biennial contribution limits, as applied and facially, that would redress Plaintiffs' injury without requiring consideration of the preexisting FECA language. *Cf. McConnell*, 540 U.S. at 229;

Schonberg v. FEC, 792 F. Supp. 2d 14, 19 (D.D.C. 2011).

b. *Schonberg* Is Distinguishable.

Schonberg involved a challenge to BCRA § 301, which "set forth the permissible and impermissible uses of campaign contributions accepted by successful candidates for federal office." *Schonberg*, 792 F. Supp. 2d at 18. BCRA § 301 amended FECA § 313 by striking the FECA language in its entirety and replacing it. However, the new section was "essentially the same" as the prior FECA language. *Id.* The court stressed this point in its opinion, noting that the amendment had merely codified the extant FEC regulations on the use of campaign funds for personal expenses. *Id*.

The plaintiff, who litigated pro se, was a non-incumbent congressional candidate who brought constitutional challenges against provisions of FECA and BCRA, alleging facial violations of the Due Process, Equal Protection, Emoluments, Appointments, and Congressional Compensation Clauses of the U.S. Constitution. *Id.* at 15-16. The plaintiff's alleged injury stemmed from "the purported competitive advantages BCRA and FECA afforded" the incumbent Congressman who had defeated plaintiff previously and who plaintiff planned to challenge again in 2012. *Id.* at 15. While he originally challenged multiple BCRA sections, the plaintiff abandoned all BCRA challenges except to § 301, which he alleged provided incumbents with an unconstitutional advantage in federal elections because they could use certain official perks to the practical benefit of their reelection campaigns. *Id*. at 19.

The three-judge panel granted the FEC's motion to dissolve the three-judge court, holding that it "lack[ed] jurisdiction to consider Schonberg's BCRA claim." *Schonberg*, 792 F. Supp. 2d at 14. The panel provided two bases for its decision: that Schonberg failed to state a claim under BCRA, and that he had "not shown the injuries he alleges . . . would be redressed by a favorable

decision of this court holding BCRA 301 unconstitutional." *Id.* at 19.

The panel's conclusion that Schonberg's challenge to BCRA § 301 was not a BCRA claim "over which this court has jurisdiction under BCRA § 403(a)," misreads the Supreme Court's holding in *McConnell*. The *Schonberg* panel, as noted above, stated expressly that BCRA § 301 had merely codified the FEC's extant regulations and was "essentially the same" as the FECA section it replaced. *Id.* at 18. Likening this to the amendments considered in *McConnell*, the panel concluded that "the change effected by BCRA 301 is not materially greater than that effected by BCRA 307's raising and indexing the contribution limits at issue in *McConnell.*" *Id.* at 19. "Accordingly," the panel continued, "Schonberg's claim that BCRA 301 is unconstitutional is actually a challenge to FECA, which falls outside the jurisdiction of a three-judge district court. . . ." *Id.* This conclusion is flawed because the *McConnell* Court based its referenced holding *exclusively* on a lack of standing—specifically, lack of redressability. *McConnell*, 540 U.S. at 229. Contrary to the panel's reading, *McConnell* stated expressly that it otherwise had jurisdiction to consider the Paul plaintiffs' BCRA challenge. *Id.* ("*Although the Court has jurisdiction to hear a challenge to § 307*, if the Court were to strike down the increases and indexes established by BCRA § 307, it would not remedy the . . . alleged injury because both the limitations imposed by FECA and the exemption for news media would remain unchanged." (emphasis added)). The *Schonberg* court's conclusion that it lacked jurisdiction over the BCRA provision at issue is therefore in direct tension with *McConnell*. It is also contrary to the language of BCRA itself, section 403(a) of which provides jurisdiction to adjudicate constitutional challenges to "any provision" of BCRA or "any amendment made by" BCRA, and to this district court's earlier holding in *Bluman*. Even if it were not so, this portion of *Schonberg* is easily distinguishable from McCutcheon's claim because BCRA § 307(b) materially changed the previous aggregate limit.

That is, unlike in *Schonberg*, the two provisions are not "essentially the same." *Schonberg*, 792 F. Supp. 2d at 18.

Schonberg's holding with respect to standing is also easily distinguishable. The scope of the plaintiff's alleged injury in fact determines what is necessary to redress the injury. *See McConnell*, 540 U.S. at 227 (noting that standing "often turns on the nature and source of the claim asserted"). Schonberg filed an incredibly broad complaint. Alleging that he suffered a competitive disadvantage *vis a vis* incumbents, he leveled claims against numerous FECA provisions and even the statute governing the "Representational Allowance for Members of House of Representatives" (2 U.S.C. § 57(b)), in addition to requesting invalidation of BCRA § 301. *Schonberg*, 792 F. Supp. 2d at 15-18. The district court contemplated two alternative consequences of invalidation, and correctly concluded that Schonberg lacked standing because neither alternative would remedy Schonberg's injury.

Under one alternative, holding BCRA § 301 unconstitutional would mean that the preexisting FECA provision would be resurrected. *Id.* at 19 ("As in *McConnell*, were this court to hold that BCRA § 301 is unconstitutional, the limitations imposed by FECA would remain in force.").[6] The district court was here assuming that invalidating the challenged BCRA section would render it "as inoperative as though it had never been passed," resurrecting the FECA language that had been replaced. *Id.* (citation omitted). *Cf. Bluman*, 766 F. Supp. 2d at 4 (indicating that invalidation of BCRA § 303, which had entirely replaced the preexisting FECA language, would not resurrect the FECA language). Nevertheless, assuming the preexisting FECA language

[6] This conclusion does not necessarily follow from *McConnell*, because BCRA § 301 repealed and completely replaced the preexisting FECA language. *See* BCRA § 301 (striking and replacing all of FECA § 313). The amendments at issue in *McConnell*, on the other hand, had not disturbed the preexisting FECA language, other than by substituting higher numbers.

was to be given renewed effect, Schonberg's injury would still be suffered under FECA.

Under the second alternative, invalidation of the BCRA provision would not give renewed effect to the language it had replaced, but would simply nullify the corresponding code provision. *Schonberg*, 792 F. Supp. 2d at 19. This option would not remedy Schonberg's injury either. The Court explained:

> Alternatively, assuming that holding BCRA § 301 unconstitutional would render 2 U.S.C. § 439a a legal nullity in all its iterations, this result would not further Schonberg's goal of more stringent regulation of the federal campaign finance system and elimination of the alleged competitive advantages for incumbent federal candidates… . Schonberg has made no showing that federal candidates, free from the constraints imposed by 2 U.S.C. § 439a, would be *more* restricted in their use of campaign funds or that the Constitution itself forbids the pecuniary evils of the federal campaign finance system that he alleges persist. To the contrary, removing these limits would exacerbate, rather than remedy, the perceived ills.

Id. at 19 (emphasis supplied by the Court). The ineluctable conclusion was that Schonberg lacked standing because, regardless of the consequence of invalidating the BCRA provision at issue, neither alternative would redress his alleged injury in fact by setting him on par with incumbents.

By contrast, Plaintiffs' injuries here are readily redressed by striking the biennial limits on contributions BCRA § 307(b), as applied and facially. Therefore, Plaintiffs have standing to assert their challenges before a three-judge court.

II. Alternatively, the Constitutional Questions Should Be Certified.

In the alternative, if this Court finds it lacks jurisdiction under BCRA § 403, Plaintiffs invoke the judicial-review provision at 2 U.S.C. § 437h and request the Court to "immediately . . . certify all questions of constitutionality of [FECA] to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." 2 U.S.C. § 437(h).[7] Plaintiffs move

[7] The provision authorizes review where a case is brought by "the national party of any political committee" (Republican National Committee ("RNC")) "or any individual eligible to vote in

certification as to the questions set out below.

1. Has each of the Plaintiffs alleged sufficient injury to constitutional rights enumerated in the following questions to create a constitutional "case or controversy" within the judicial power under Article III?

As was done in *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975), a preliminary question deals with standing. *Id.* at 898-01. Plaintiffs have standing because the challenged provisions apply to their intended activities and Plaintiffs thus are chilled in the exercise of their First Amendment rights. The case is ripe because primaries are ongoing and the November 2012 general election is near. If this case is not fully decided before any particular primary or the November 2012 election, Plaintiffs have verified their intent to do materially similar activities in the future, and elections are regularly recurring events, so this case is well within the exception to mootness for cases capable of repetition yet evading review. *See, e.g.*, *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 461-63 (2007) ("*WRTL-II*") (Roberts, C.J., joined by Alito, J.) (controlling opinion); *Davis v. FEC*, 554 U.S. 724, 734-36 (2008). *See also Verified Complaint for Declaratory and Injunctive Relief* ("VC") ¶¶ 11-12, 22-54, 75-83.

2. (Count 1) Is the biennial limit (currently $70,800) on contributions to non-candidate committees at 2 U.S.C. § 441a(a)(3)(B) unconstitutional as applied to contributions to national party committees for lacking a cognizable interest?

Count 1of the *Verified Complaint* raises this issue, VC ¶¶ 84-105, and it is addressed in the *Memorandum in Support of Preliminary Injunction Motion* at 12-30. The arguments in those documents suffice at present to show that this is an important question requiring prompt resolution.

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any election for the office of President of the United States" (Shaun McCutcheon). *Id.*

3. (Count 2) Are the biennial limits (currently $70,800 and $46,200) on contributions to non-candidate committees at 2 U.S.C. § 441a(a)(3)(B) facially unconstitutional for lacking a cognizable interest and being substantially overbroad?

Count 2of the *Verified Complaint* raises this issue, VC ¶¶ 106-11, and it is addressed in the *Memorandum in Support of Preliminary Injunction Motion* at 30-31. The arguments in those documents suffice at present to show that this is an important question requiring prompt resolution.

4. (Count 3) Are the biennial limits (currently $70,800 and $46,200) on contributions to non-candidate committees at 2 U.S.C. § 441a(a)(3)(B) unconstitutional, as applied and facially, for being too low?

Count 3of the *Verified Complaint* raises this issue, VC ¶¶ 112-20, and it is addressed in the *Memorandum in Support of Preliminary Injunction Motion* at 31-33. The arguments in those documents suffice at present to show that this is an important question requiring prompt resolution.

5. (Count 4) Is the biennial limit (currently $46,200) on contributions to candidate committees at 2 U.S.C. § 441a(a)(3)(A) unconstitutional for lacking a cognizable interest?

Count 4of the *Verified Complaint* raises this issue, VC ¶¶ 121-37, and it is addressed in the *Memorandum in Support of Preliminary Injunction Motion* at 33-40. The arguments in those documents suffice at present to show that this is an important question requiring prompt resolution.

6. (Count 5) Is the biennial limit (currently $46,200) on contributions to candidate committees at 2 U.S.C. § 441a(a)(3)(A) unconstitutional for being too low?

Count 5of the *Verified Complaint* raises this issue, VC ¶¶ 138-42, and it is addressed in the *Memorandum in Support of Preliminary Injunction Motion* at 40-41. The arguments in those documents suffice at present to show that this is an important question requiring prompt resolution.

Should this Court decide that this case does not qualify for the judicial-review provision at BCRA § 403, Plaintiffs will request further briefing on certification, which seems unnecessary at this point.

Plaintiffs have conferred with opposing counsel regarding this motion, and they do not oppose this motion. LCvR 7(m).

Respectfully submitted,

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Certificate of Service

I hereby certify that the foregoing document was served on June 22, 2012 on the following persons by this Court's electronic case filing service ("ECF") (as applicable), by First Class U.S. Mail, and by a courtesy copy to Anthony Herman at aherman@fec.gov and Adav Noti at anoti@fec.gov:

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