IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al.,	)	
Plaintiffs,	)	Civ. No. 02-0582 (CKK, KLH, RJL)
v.	)	**ALL CONSOLIDATED CASES**
FEDERAL ELECTION COMMISSION, et al.,	)	**REDACTED**
Defendants.	)	

BRIEF OF DEFENDANTS

INTRODUCTION AND SUMMARY

Nearly a century ago, Congress reaffirmed our nation's commitment to one of its founding principles: that elected leaders ought to shape public policy based on the wishes of their constituents, or their honest judgment of what best serves the national interest, but not on the inducements of money. This democratic ideal lay at the heart of Congress's decision in 1907 to ban corporations from making federal campaign contributions. It has remained at the foundation of federal campaign finance laws ever since, as Congress has reacted to repeated cycles of scandal and disillusionment with "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,'" to which the Supreme Court has accorded "considerable deference." FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 209 (1982) ("NRWC"). The same democratic ideal that money should neither buy legislative favors, nor appear to buy them, underlies the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA").

I. Some thirty years following its enactment, regulation under the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 et seq. ("FECA"), no longer lives up to its intended purpose. FECA is meant to reduce the "opportunities for abuse inherent in a regime of large individual financial contributions," Buckley v. Valeo, 424 U.S. 1, 27 (1976) (per curiam), by limiting the amount of contributions that may be made to candidates. In light of the central role played by political parties as intermediaries between donors and candidates, see FEC v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431, 452 (2001) ("Colorado II"), FECA has long imposed limits on contributions made to political party committees. FECA also incorporates previously enacted prohibitions against corporate and labor union spending on federal elections, to prevent unions and corporations from converting their aggregated wealth into political "war chests" that can distort and corrupt democratic processes. 2 U.S.C. 441b; see Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990). In recent years, however, these mainstays of regulation under FECA have given way as political parties, corporations, unions, and other wealthy donors and organizations have systematically exploited two widening breaches in FECA's statutory scheme: "soft money," and "issue advocacy."

A. "Soft money" is the term used for contributions raised outside the framework of FECA's source and contribution limits and disclosure requirements. As Congress recognized, the increasing use of soft money permits evasion of FECA in two fundamental respects: (1) it allows corporations and labor unions to use their general treasury funds to influence federal elections; and (2) it allows all donors to make contributions to candidates and parties outside of FECA's limitations and disclosure provisions. Both avenues of circumvention pose the very risk of actual and apparent corruption that FECA was enacted to prevent. Unregulated contributions to political parties, like unregulated

contributions to individual candidates, can cause federal officeholders to feel obligated to advance the interests of large donors rather than the interests of constituents and the nation as a whole.

The concept of soft money derives from the fact that party committees engage in certain activity in connection with state and local elections that is not necessarily related to federal elections, and therefore is not necessarily within the scope of the language of FECA. Soft money was meant to be used by political parties solely for influencing the nomination or election of candidates for state or local office, and to conduct generic "party-building" activities.

In practice, however, the parties have raised and spent hundreds of millions of soft dollars for activities that, while nominally falling within the "party-building" category, in reality are intended to support the parties' candidates for federal office, and are indistinguishable from the types of activities that parties and candidates are required to use their hard money to fund. Indeed, in the 2000 election cycle, soft money constituted 42% of the national parties' total budget. The soft money loophole has grown from a narrow exception to FECA's limitations into a huge and ever-growing means of circumventing those limitations, reintroducing the very "opportunities for abuse inherent in a regime of large . . . financial contributions" that FECA was meant to foreclose. Buckley, 424 U.S. at 27.

The fundraising practices of the major political parties demonstrate the continued dangers of corruption that first led Congress to regulate the financing of federal elections nearly a century ago. Parties are today the central and largest force in raising, spending, and directing campaign dollars. In the 2000 election cycle, the Democratic and Republican parties raised a combined total of $1.236 billion dollars, a staggering increase over the past twenty years. Although parties play a valuable role in our system of representative democracy by, inter alia, unifying unwieldy factions,

the power accrued through that organizing role is enormous, and subject to abuse. The national parties solicit soft money from sources – corporations and labor unions – that have long been prohibited from making federal campaign contributions. The parties solicit soft money in amounts that far exceed the contribution limits that the Supreme Court upheld in Buckley, and they rely primarily upon federal officeholders and candidates to make those solicitations.

When parties attempt to gain financial support using these methods, they play a mediating role among large donors, candidates, and officeholders, essentially functioning as "bargaining agents for groups of lawmakers in their dealings with interest groups" who are themselves, in effect, "buying votes on proposals where those votes are cheapest." Cotton M. Lindsay & Michael T. Maloney, Party Politics and the Price of Payola, 26 Econ. Inquiry 203, 203 (1988). As the Supreme Court recently observed, "[p]arties thus perform functions more complex than simply electing candidates; whether they like it or not, they act as agents for spending on behalf of those who seek to produce obligated officeholders." Colorado II, 533 U.S. at 452. The parties actively promote the influence of their officeholders when soliciting large donations by organizing direct fundraising contact between contributors and legislators, and providing privileged access for contributors, thus heightening officeholders' awareness of the identities and interests of the large contributors to the party's electoral efforts. At some point, donors' contributions to a political party can become large enough to engender an overall sense of indebtedness from most or all of a party's members. See id. at 455 ("[P]arties continue to organize to elect candidates, and also function for the benefit of donors whose object is to place candidates under obligation, a fact that parties cannot escape."). Even if no actual corruption ensues, the public is left with the perception that democratic ideals don't matter – and that federal officeholders favor the interests of large donors over the interests of their constituents.

Donors likewise believe that large soft money contributions to political parties benefit particular candidates that they wish to support and that making such donations is necessary to receive access to, and favorable consideration from, federal candidates and officeholders. The parties, by promising special access to federal officials in exchange for large soft money donations, exploit and foster this perception. Thus, many large donors, especially those in heavily regulated industries, believe that they must accede to requests for large soft money donations out of fear that adverse legislative consequences could otherwise result.

B. FECA's safeguards against corruption have also recently been breached by the rise of so-called "issue advocacy," television and radio advertisements that extol a candidate's virtues, or criticize his or her opponent, without specifically urging voters to elect one candidate or defeat the other. FECA § 441b requires that corporations and labor unions refrain from spending general treasury funds to support activities related to federal elections, but allows them to participate in electoral politics using "separate segregated funds" – accounts maintained specifically for political purposes, containing contributions from individual shareholders, members, and executive or administrative personnel. Under a clarifying construction of FECA first adopted in Buckley, and, ten years later, in FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ("MCFL"), application of § 441b, as well as FECA's requirements for disclosure of independent political expenditures, is limited to communications that expressly advocate the election or defeat of a candidate for federal office – those using so-called "magic words" such as "vote for," "elect," "defeat" or "reject." Buckley, 424 U.S. at 44 n.52; MCFL, 479 U.S. at 249.

Since 1996, corporations, labor unions, and other interest groups have taken routine advantage of this construction of FECA to spend tens, if not hundreds, of millions of dollars on TV and

radio advertisements about candidates – broadcast in the days and weeks immediately preceding Election Day, and geographically targeted to the constituents who will decide the candidates' political futures - which by these and all other appearances, and the frequent admissions of the organizations that pay for them, are meant to affect voters' choices at the polls. Yet these expenditures escape regulation under FECA because the ads' sponsors simply omit words of express advocacy, which are largely historical artifacts of American political campaigns that are rarely used as means of political persuasion even by candidates themselves.

Untrammeled spending by corporations and labor unions for these thinly veiled campaign commercials has re-opened the political process to the "distorting effects of immense aggregations of wealth," Austin, 494 U.S. at 660, and the potentially corrupting influence of large-scale corporate and union spending on the elected officials who are aided thereby. NRWC, 459 U.S. at 209-10. Elected officials are well aware and keep track of who runs "issue" ads on their behalf, and they are naturally grateful to the unions and corporations that provide such assistance to their campaigns. Indeed, corporations and labor unions run "issue" ads for or against federal candidates with an expectation that investing hundreds of thousands if not millions of dollars in this fashion will pay off when it comes to legislation that concerns them. They do not hesitate to remind legislators of the assistance their advertising provided in helping these officials get elected.

The routine and effortless manner in which unions, corporations, and other groups and individuals now bypass regulation under FECA has also thwarted the purposes of FECA's disclosure requirements. As the Supreme Court recognized in Buckley, disclosure requirements serve important governmental interests: they assist voters in evaluating candidates for elected office by informing the electorate about the sources of candidates' political support; they deter corruption by expos-

ing large contributions and expenditures made on candidates' behalf; and they assist those charged with enforcing the law by facilitating the detection of violations of FECA's contribution and expenditure limitations. 424 U.S. at 66-68. By avoiding disclosure, many interest groups and organizations now run issue ads supporting or opposing a federal candidate while concealing their sources of financial support, and sometimes their identities – information that the electorate needs to know, before casting their votes, so they may evaluate the interests to which candidates may be most responsive.

II. Thus, notwithstanding FECA, corporations, supposedly banned from making campaign contributions, now give millions of dollars to political parties to further the electoral prospects of their candidates. In the process, their executives and lobbyists gain a quality of access to elected officials that is not available to average citizens. Labor unions, supposedly prohibited from making expenditures for the purpose of influencing federal elections, spend millions of dollars on TV and radio advertisements that are indistinguishable from the candidates' own. Wealthy individuals, theoretically "capped" on the amounts they may contribute to federal campaigns, make unlimited donations to the parties, and form pseudonymous front groups to conceal their support for yet more political advertising on behalf of favored candidates. These practices – albeit technically legal under the current system – have fueled an unrelenting arms race for cash that gives at least the appearance that legislative votes are for sale. Congress enacted BCRA, after years of deliberation and debate, to put an end to these circumventions of FECA's restrictions, and to restore meaning to the regulatory scheme that had evolved over the course of nearly one-hundred years.

A. Title I of BCRA includes several interrelated provisions that address the threats that soft money presents to the integrity of federal elections. The cornerstone of Title I is the national party

soft money ban, which prohibits national party committees from soliciting, receiving, spending, or transferring any soft money. The ban closes the soft money loophole and thus prevents circumvention of FECA's limitations by the national parties. The statute imposes no limits on how the national party committees may spend their money; it simply requires that all money spent by the national parties must be raised in accordance with FECA's longstanding requirements. At the same time, Congress substantially raised the limits on contributions of hard money to national party committees and indexed those limits for inflation, making it easier for those committees to raise hard money.

Other provisions in Title I are carefully drawn to complement the national party soft money ban, eliminating additional existing and potential loopholes involving, among others, state, district, and local party committees ("state-level" party committees). As Congress recognized, state-level party committees have been a primary and willing vehicle through which the national parties have circumvented FECA. The national parties have transferred millions of dollars in soft money to their state-level counterparts, which have used those funds largely to support federal election activity, and under fewer restrictions than are applicable to the national parties. Title I prevents those committees from continuing the same abuse of soft money that the national parties have accomplished.

B. To close the "issue advocacy" loophole at the point where it has been subject to the greatest abuse, Title II of BCRA regulates "electioneering communications," defined as TV or radio communications that refer to clearly identified candidates for federal office within 60 days of a general election, or 30 days of a primary, and, in the case of House, Senate, and presidential primary elections, are broadcast to the state or district where the election will be held. Corporations and labor unions that sponsor electioneering communications must pay for them with funds contributed to their separate segregated funds by individual shareholders, members, or executive or admin-

istrative personnel, rather than with funds from their general treasuries. All persons spending $10,000 or more in a year for electioneering communications must file reports disclosing their identities, the cost of their communications, the elections to which the communications pertain, and (broadly speaking) the identities of persons making large donations to finance the communications.

These regulations of electioneering communications ban no speech whatsoever, but merely restore vigor to the statutory scheme as it has existed for the better part of a century, and do so in a narrowly tailored manner that focuses directly on the type of election-related spending by unions and corporations that has recently presented the greatest threat of distortion and corruption of political processes. At the same time, unions and corporations may still speak their minds using segregated funds that reflect the true power of political association rather than the might of the commercial marketplace. With equal precision, the disclosure provisions vindicate the interests of voters in knowing exactly who is behind electioneering messages of the type they have been receiving about candidates in the heat of recent campaigns.

Two other provisions in Title II of BCRA address the problem of coordinated spending among donors, candidates, and parties. Section 213 of BCRA gives political parties the opportunity, available to no one else, to choose between (1) making expenditures coordinated with a candidate in amounts much greater than FECA ordinarily permits, and (2) making expenditures, including independent expenditures, under the rules generally applicable to multicandidate committees. Section 214(b) of BCRA merely requires the FEC to promulgate new regulations defining what constitutes a communication that is "coordinated" with a federal candidate or party, based on congressional concern that the FEC's current regulations are too narrow to be effective in regulating coordinated activity in the real world of campaigns and elections.

The remaining provisions at issue were likewise enacted to prevent evasion of FECA's source and amount limitations, to strengthen disclosure for the benefit of an informed electorate, and to promote robust debate and competition in federal election campaigns. Section 318 of BCRA prohibits individuals age 17 or younger from making contributions to candidates or political parties, to prevent adults from circumventing FECA's contribution limits by making surrogate contributions through minors under their control. The so-called "millionaire provisions" of BCRA increase the standard contribution limits for a candidate whose opponent expends substantial personal funds on his or her own campaign, so that non-wealthy candidates are not discouraged from running against a self-funded opponent. Sections 305 and 504 of BCRA amend the Communications Act of 1934 to require disclosures about the source and sponsorship of political messages broadcast on television or radio.

Plaintiffs raise a series of facial challenges to these provisions of the new statute, but for any one or more these challenges to succeed, plaintiffs must demonstrate that the enactments in question could never be applied in a valid manner, or, to the extent their claims rest on the First Amendment, that the statute's provisions are substantially overbroad. New York State Club Ass'n v. City of New York, 487 U.S. 1, 11 (1988). Plaintiffs cannot discharge this heavy burden. This litigation makes abundantly clear that academics and consultants hold varying opinions about how best to reform the campaign finance system, but BCRA is a bipartisan attempt by the true experts in this area to devise the best solution to a complex problem. Every Member of Congress has been a successful participant in the federal campaign finance system. They must raise the funds necessary to run their election campaigns, and they must face the demands of their political parties and the pressures of large donors while performing their legislative duties. Having directly operated under this system,

Members of Congress are uniquely qualified based on personal experience to determine the need for and proper scope of additional regulation in this area. As with the other steps taken by Congress over the years to correct defects in the campaign finance system, the legislative judgments embodied in BCRA "warrant[] considerable deference." NRWC, 459 U.S. at 209. The statute that Congress has enacted is closely drawn to combat the widespread circumvention of statutory limits on the sources and amounts of spending on federal election campaigns. It renews a national commitment to the proposition that public policy should not wear a price tag. Accordingly, as explained in detail below, each of plaintiffs' facial challenges should be rejected.

FACTUAL AND LEGAL BACKGROUND

To protect the integrity of federal elections and to guard against corruption of federal office-holders, the nation's campaign finance statutes set monetary rules of engagement in political campaigns. As the Supreme Court has recognized, "[t]he overriding concern behind the enactment of [such] statutes . . . was the problem of corruption of elected representatives through the creation of political debts." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788 n.26 (1978). During the past century, Congress has found it necessary to make incremental changes to existing campaign finance statutes, aspiring both to encourage robust debate and to limit the potential for corruption inherent in a system of privately financed campaigns. Contrary to plaintiffs' attempt to portray BCRA as a radical new form of governmental regulation, BCRA simply revitalizes a long established legal tradition in this country limiting the potentially corrupting influence of labor unions, corporations, and unlimited campaign contributions upon electoral politics.

Building upon FECA's central pillars, BCRA does not ban speech, but instead limits large unregulated contributions to political parties, ensures that corporate and union campaign spending

reflects the power of true political association rather than of the commercial marketplace, and increases disclosure requirements. As we explain, these reforms are fully in step with longstanding campaign finance laws that have been upheld by the Supreme Court, and they were adopted by Congress after careful and extensive deliberation to address the substantial problems created by demonstrated and pervasive circumvention of the existing campaign finance rules.[1]

Parties, Corporations and Unions: The Heritage of Campaign Finance Laws

Recently, a United States Senator commented on "corporations and individuals [who] gave over $100,000 each to both [the Democratic and Republican] parties":

> They didn't contribute because of shared values, obviously. They contributed to cover their bets – to make sure they had access to the winner. They had enough money to do that. That's how far this system has fallen. The parties advertise access. It's blatant. Both parties do it. Openly.

147 Cong. Rec. S3248 (Apr. 2, 2001) (Sen. Levin). A short time later, the Supreme Court likewise concluded:

> Parties are . . . necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to the contributors.

Colorado II, 533 U.S. at 451-52.

These contemporary observations may just as accurately have been made of the situation as it existed in the late 19th and early 20th centuries, when wealthy corporate interests flooded the parties with money, and the parties, in turn, used their officeholders to satisfy the parties' contribu-

[1] In the following discussion and throughout the defendants' brief, initial citations to the defendants' trial exhibits will include a reference to the volume and tab number where each exhibit is located in Defendants' Exhibit Volumes ("DEV") (e.g., "DEV 1-Tab 1," designating Tab 1 of Defendant's Exhibit Volume 1). Documents not designated by a Tab number will be cited by volume and bates-stamp number (e.g., DEV 21-INT00005). Citations to a previously cited exhibit (or in the case of documents, a previously cited bates-stamp series) will not include a DEV reference. Citation to transcripts of depositions and cross-examinations taken in these consolidated cases will be by name of witness and date, (e.g., "McCain Dep. Tr. (Sep. 9, 2002) at 12"). All deposition and cross-examination transcripts cited by the parties have been filed with the Court as a joint exhibit of the parties. Finally, citations to Plaintiffs' exhibits will be identified by plaintiff and document (e.g., " Decl. [AFL-CIO] ¶ 2").

tors.[2] These circumstances prompted charges that corporations "were corrupting government and gaining special favors in return for their campaign gifts." Thomas E. Mann, Report of Thomas E. Mann (Sep. 20, 2002) at 3 [DEV 1-Tab 1, hereinafter Mann Expert Rep.]; see United States v. UAW, 352 U.S. 567, 570-71 (1957).

Congress responded in 1907 by enacting the Tillman Act. Ch. 420, 34 Stat. 864. The Tillman Act for the first time prohibited corporations from making monetary contributions in connection with federal election campaigns. UAW, 352 U.S. at 575. The public debate preceding enactment of this and subsequent legislation reflected concern over the use of money for political purposes by organizations in a position to exercise disproportionate influence on federal elections, and, thereby, over the legislators whose political fates turn on the outcome of those contests. There was particular concern that political parties would become indebted to large corporate contributors and use their own leverage over candidates and elected officials to control government policy. See id. at 571-73, 76-77. The necessity of regulation was summarized in hearings on the Tillman Act:

> The idea is to prevent . . . the great aggregations of wealth from using their corporate funds . . . to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public. It strikes at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government. And I believe that the time has come when something ought to be done to put a check to the giving of $50,000 or $100,000 by a great corporation toward political purposes upon the understanding that a debt is created from a political party to it.

Id. at 571 (citation omitted). Nearly 20 years later, after the Teapot Dome scandal, Congress enacted the Federal Corrupt Practices Act of 1925, ch. 368, Title III, 43 Stat. 1070 ("FCPA"), a significant

[2] See, e.g., William A. White, The Old Order Changeth (1910), at 11-15. History includes such notorious examples of political corruption as the Boss Tweed and Tammany Hall machine, the 1876 Tilden/Hayes presidential election, the Custom House scandals of the 1880s, Teapot Dome, and the Prendergast Machine. See, e.g., Rebuttal Expert Report of Donald P. Green ("D. Green Rebuttal Expert Rep.") at 20-21 [DEV 5-Tab 1]; Decl. of Morton Keller at 17-21; Nathan Miller, The Founding Finagler (1976); Shelley Ross, Fall From Grace: Sex, Scandal, and Corruption in American Politics from 1702 to the Present (1988).

revision of existing legislation adopted in the midst of enduring concern over the disproportionate influence of aggregated corporate wealth on political parties and the political process:

> We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates . . . in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest.

UAW, 352 U.S. at 576-77 (quoting 65 Cong. Rec. S9507-9508 (Sen. Robinson)).

In 1943, temporary wartime legislation extended the proscription against campaign contributions by corporations to contributions by labor organizations. Smith-Connally Act, § 9, 57 Stat. 163, 167-68; see UAW, 352 U.S. at 578; Mann Expert Rep. at 4. Congress acted on this occasion out of a conviction that "just as the great corporations had made huge political contributions to influence government action or inaction . . . the powerful unions were pursuing a similar course, and with the same untoward consequences for the democratic process." UAW, 352 U.S. at 578.[3] Despite the Smith-Connally Act, however, organized labor spent millions of dollars in connection with the national elections of 1944, to support a program of political "education" that included, among other things, the distribution of 200,000 pamphlets to the public-at-large opposing the re-election of Senator Taft. UAW, 352 U.S. at 580. Two years later, labor unions and numerous other political

[3] Testimony given before Congress by Lewis Hines, national legislative representative for the American Federation of Labor, did nothing to dispel this impression:

> [F]or many years the financial interests of this country have held sway; they have held pretty much their own way, and it has been done with money. That is the only thing that made any impression.
>
> Labor unions have grown strong. Labor unions recently have started to take an active interest in politics. Labor unions have money. . . . If it has been good over the years for the employers to elect Representatives to Congress – and there are many Representatives in Congress elected by the employers – why is it not good for organized labor and the trade-union movement to put forth a little effort and financial support, if necessary, to help elect their friends who have passed humanitarian legislation?

Hearings Before a Subcomm. of the House Committee on Labor, 78 Cong., 1st Sess., 1, 2 (1943).

committees and organizations spent additional millions of dollars on political advertising in the 1946 elections. These activities precipitated investigations by committees in both Houses of Congress, which concluded that the limitation on contributions by corporations and labor unions had been rendered ineffective due to widespread "expenditures" made by these organizations on behalf of favored candidates, and that Congress ought to "plug the existing loophole":

> "The intent and purpose of the provision of the act prohibiting any corporation or labor organization making any contribution in connection with any election would be wholly defeated if it were assumed that the term 'making any contribution' related only to the donating of money directly to a candidate, and excluded the vast expenditures of money in the activities herein shown to be engaged in extensively. Of what avail would a law be to prohibit the contributing direct to a candidate and yet permit the expenditure of large sums in his behalf?"

UAW, 352 U.S. at 581 (quoting H.R. Rep. No. 2739, 79th Cong., 2d Sess. 40 (1946)); see id. at 581-83. Congress acted quickly on this recommendation. The Taft-Hartley Act of 1947, ch. 120, 61 Stat. 136, ___, amended the FCPA again "to proscribe any 'expenditure' as well as 'any contribution' [and] to make permanent [its] application to labor organizations" in addition to corporations. UAW, 352 U.S. at 582-83.[4]

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[4] The prohibition was eventually codified at 18 U.S.C. 610, and later transferred to the Federal Election Campaign Act, 2 U.S.C. 441b, as part of a more general re-codification designed to enhance the civil enforcement powers of the FEC. Federal Election Campaign Act Amendments of 1976, P.L. 94-283, 90 Stat. 475. See S. Rep. No. 677, 94th Cong., 2d Sess. 2-3 (1976), reprinted in 1976 U.S.C.C.A.N. 929, 930-31.

Contribution Limits and Disclosure Requirements for Individuals, Parties, and PACs: The Federal Election Campaign Act of 1971 ("FECA") and its 1974 Amendments

FECA, enacted by Congress in 1971, strengthened campaign finance disclosure requirements; imposed certain contribution limits; and codified the understanding under pre-existing law that corporations and unions could establish and administer separate, segregated funds for the purpose of making political contributions and expenditures from contributions to the fund collected from stockholders, members, executive and administrative personnel, and their families. See Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 387, 409-10 (1972). The 1972 election, followed by the Watergate scandal, became a "watershed for public confidence in the electoral system" and led to more changes. See Buckley v. Valeo, 519 F.2d 821, 840 (D.C. Cir. 1975) (en banc) (per curiam), aff'd in part, rev'd in part, 424 U.S. 1 (1976). The congressional investigation of Watergate provided a legislative record that was "replete with specific examples of improper attempts to obtain governmental favor in return for large campaign contributions." Id. at 840 n.37. The investigation revealed: extensive contributions by dairy organizations to Nixon fundraisers, structured so as to avoid FECA disclosure requirements and timed with President Nixon's decision to overrule the Secretary of Agriculture and increase price supports, see id. at 839 n.36; "lavish contributions" by special interest groups to legislators from both parties, including illegal corporate contributions, that were deemed "necessary as a 'calling card,'" id. at 839 n.37; and significant donations made by persons seeking ambassadorships on the understanding that "such contributions were a means of obtaining the recognition needed to be actively considered," id. at 840 n.38. The FECA Amendments of 1974 followed in the wake of this investigation, and, as the Supreme Court has explained, these amendments were designed "to limit the actuality and appear-

ance of corruption resulting from large individual financial contributions." Buckley v. Valeo, 424 U.S. 1, 26 (1976).

The FECA Amendments of 1974 imposed dollar limitations on contributions by individuals and political committees to candidates for federal office, to political party committees, and to independent political committees.[5] 2 U.S.C. 441a(a). The Act defines "contribution" to include "any gift . . . of . . . anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8). The 1974 Amendments also imposed limits on the amounts that individuals, candidates, political committees, and political parties could spend to help federal candidates win elections. The Amendments also included a variety of recordkeeping and disclosure requirements aimed at informing the electorate, deterring corruption, and detecting violations of the contribution limits. See 2 U.S.C. 432-434. The Amendments further created the Federal Election Commission, which was empowered to monitor and enforce the campaign finance laws. See generally 2 U.S.C. 437c(b)(1), 437d(a), 437g.

Buckley v. Valeo

The constitutionality of the 1974 Amendments to FECA was challenged in short order. In its landmark decision Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court recognized that limitations on campaign contributions and expenditures operate "in an area of the most fundamental First Amendment activities," but concluded that "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." Id. at 14, 20. The Court reasoned

[5] Under 2 U.S.C. 441a(a), an individual could contribute $20,000 to a national political party and $5,000 to any multicandidate political committee in any calendar year, and $1,000 to any single candidate per election, with an overall annual limitation of $25,000 on any contributor. (A multicandidate political committee generally is a political committee, other than a political party, that has made contributions to five or more candidates and has received contributions from more than fifty persons. 2 U.S.C. 441(a)(4).) Prior to BCRA, these limits remained constant.

that although "a contribution serves as a general expression of support for the candidate and his views," it "does not communicate the underlying basis for the support." Id. at 21. The "expression rests solely on the undifferentiated, symbolic act of contributing" and the quantity of the expression does not increase with the size of the contribution. Id. The Court rejected the notion that the contribution limitations would prevent candidates and political committees from "amassing the resources necessary for effective advocacy," noting that the "overall effect" of such limitations is "merely to require candidates and political committees to raise funds from a greater number of persons." Id. at 21-22.

In upholding the challenged contribution limits, the Buckley Court found that the statute's primary purpose to limit "the actuality" and, of "almost equal concern," the "appearance of corruption resulting from large individual financial contributions" provided a "constitutionally sufficient justification for the $1,000 contribution limitation." Id. at 26-27. The Court also determined that the $25,000 aggregate annual limit on contributions by an individual legitimately served to prevent circumvention of the $1,000 contribution limit that might be accomplished through, for example, "huge contributions to . . . [a] candidate's political party." See id. at 38. The Court found that the contribution limitations "focus[] precisely on the problem of large contributions[,] the narrow aspect of political association where the actuality and potential for corruption have been identified[,] while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." Id. at 28.

Buckley also considered 18 U.S.C. 608(e)(1), which provided that no person (other than a political party or candidate) could make any expenditure "relative to a clearly identified candidate . . . which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000." See 424 U.S. at 39-40, 193-94. The Court concluded that the statute's defining phrase, "relative to a clearly identified candidate," did not adequately mark the boundary between permissible and impermissible speech, and it dealt with this problem of vagueness "by reading § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate." Id. at 41-44. In a footnote, the Court explained that the express advocacy standard would restrict the application of the provision to communications containing such words and phrases as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject,'" id. at 44 n.52, a description that became known as the "magic words" test. Mann Expert Rep. at 19.[6]

Buckley also addressed a somewhat related provision, 2 U.S.C. 434(e) (now codified as amended at 2 U.S.C. 434(c)), which required persons, other than political committees or candidates, to file statements with the FEC disclosing their "expenditures" made "for the purpose of influencing" a federal election. 424 U.S. at 74-82; see 2 U.S.C. 431(9). The Court found that the ambiguity of this phrase, when used for a provision regulating independent spending, posed the same constitutional problems of vagueness encountered in 18 U.S.C. 608(e)(1). Id. at 78-79. Thus, the Court also construed "expenditure" for purposes of the independent spending at issue in § 434(e) "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Id. at 80 (footnote omitted). The Court sustained § 434(e) as a means

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[6] The Court then held that 18 U.S.C. 608(e) could not be justified as an anti-corruption measure, because "[t]he exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness undermine[d] its effectiveness." Id. at 45-48.

of "shed[ding] the light of publicity on spending that is unambiguously campaign related," and "help[ing] voters to define more of the candidates' constituencies." Id. at 80-81; see id. at 66-68. The Court likewise upheld the recordkeeping, reporting, and disclosure requirements applicable to candidates and political committees, set forth in 2 U.S.C. 431-434. Id. at 64-68, 83 & n.113. While noting that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," id. at 64, the Court found that the identified interests advanced by the disclosure requirements outweighed the alleged harm, see id. at 72.

Since Buckley, the Supreme Court has repeatedly sustained the constitutionality of limitations on campaign contributions and measures adopted to ensure compliance with the contribution limitations upheld in Buckley. Thus, in California Medical Ass'n v. FEC, 453 U.S. 182, 198 (1981) (plurality) ("Cal Med"), the Court upheld FECA's $5,000 limitation on contributions to multicandidate political committees, noting that without this limitation, the contribution limitations upheld in Buckley "could be easily evaded." See also id. at 203 (Blackmun, J., concurring). In Colorado II, supra, the Court upheld the limits upon party coordinated expenditures on the ground that the evidence supported the "long-recognized rationale of combating circumvention of contribution limits designed to combat the corrupting influence of large contributions to candidates from individuals and nonparty groups." 533 U.S. at 456 n.18. In Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 382, 396-98 (2000) ("Shrink Missouri"), the Court upheld state contribution limits ranging from $250 to $1,000. The Court declined to establish any monetary amount as "a constitutional minimum" below which legislatures may not regulate. Shrink Missouri, 528 U.S. at 397. Rather, the Court explained, a contribution limitation will be upheld

unless it is "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." Id.

The Supreme Court since Buckley has likewise sustained prohibitions on both independent expenditures and contributions made with corporate treasury funds, to prevent the "corrosive and distorting effects [on the electoral process] of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas," Austin, 494 U.S. at 660, and to ensure that "substantial aggregations of wealth" amassed by labor unions and corporations "are not converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions." NRWC, 459 U.S. at 207.

Ten years after Buckley, however, in FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ("MCFL"), the Court, following the same rationale adopted in Buckley to avoid problems of vagueness, concluded that an expenditure must involve express advocacy in order to come within § 441b's prohibition on independent expenditures. Id. at 248-49. At the same time, the Court also reaffirmed at length the government's substantial interests in curbing the undue political influence of corporations and labor unions that exercise control over large aggregations of wealth. Id. at 256-60. But it nevertheless carved out an as-applied exception to § 441b, finding that these interests were not at work in that case, as it involved an ideological organization that could not engage in business activities, had no shareholders or other affiliated persons having an economic disincentive to dissociate from the organization if they disagreed with its political activities, and accepted no funding from labor unions or business corporations that could be converted into the type of political spending that gives rise to a threat of corruption. Id. at 264.

The Origin of "Soft Money"

When the Supreme Court upheld FECA's contribution limitations in Buckley, it assumed that the definition of "contribution" categorically included any "[f]unds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary" (in addition to "dollars given to another person or organization that are earmarked for political purposes"). 424 U.S. at 24 n.24 (emphasis added); see also id. at 78 (similar definition of "contribution" as including, inter alia, "contributions made directly or indirectly to a candidate, political party, or campaign committee"). FECA's definitions of "contribution" and "expenditure" were, and remain, both limited to the donation or use of money or anything of value "for the purpose of influencing an election for Federal office." 2 U.S.C. 431(8)(A)(i), (9)(A)(i). Because the statute did not specify the particulars of how such lines were to be drawn, the issue was left to the FEC.

The FEC first addressed this question in advisory opinions, and then issued formal regulations in 1977. In Advisory Opinion 1975-21 the FEC considered a local party committee that had established separate accounts for funds raised in compliance with FECA's source and amount limitations (known today as "federal funds" or "hard money") and for corporate contributions permitted under state law but prohibited by FECA § 441b for use in connection with federal elections. The FEC concluded that the local party had to pay "an allocable portion of [its] administrative expenses" from its hard money account, and, because a "voter registration drive has a relation to Federal elections as well as State and local," expenditures for that purpose also had to be allocated on the same basis as administrative expenses. Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5135, at 10,068. In Advisory Opinion 1976-72, however, the FEC concluded that FECA § 441b and proposed regulations under that provision would preclude a state party committee from using funds received

from corporations or unions to finance "any portion of" a voter registration drive. Id. ¶ 6934, at 17,047. But this Advisory Opinion did not address the allocation of a portion of expenses for voter registration activities to an account containing funds not raised in accordance with FECA (known today as "nonfederal funds" or "soft money") that did not include corporate or union money.

In 1977, the FEC promulgated its first general set of regulations to implement FECA. Those regulations provided that "[a]ny political committee" that received contributions or made expenditures to, or on behalf of, any federal candidate, could either establish a separate federal account for its federal election activities, or use a single account containing only funds subject to the federal contribution limits to finance all of its activities with respect to both state and federal elections. 11 C.F.R. 102.6 (1977). To the extent party committees or other political committees established a separate federal account under the regulations, however, the committees were required to "allocate administrative expenses on a reasonable basis between their Federal and non-Federal accounts." 11 C.F.R. 106.1 (1977).

The next year, in Advisory Opinion 1978-10, the FEC modified the advice it had given in Advisory Opinion 1976-72, and concluded that "the costs of [voter] registration and get-out-the-vote drives" by a state party committee "should be allocated between" federal and non-federal accounts "in the same manner as other general party expenditures" under the regulations. Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5340. The FEC, thus, essentially returned to the view it had taken in Advisory Opinion 1975-21. Accordingly, under FECA as implemented by the FEC, state parties could maintain both federal accounts (composed of "hard money") and nonfederal accounts (composed of "soft money"), with administrative expenses and overhead, as well as expenses for voter

registration and get-out-the-vote activities, allocated between the accounts on a reasonable basis, even if the nonfederal accounts contained funds received from corporations and unions.

Up to this point, FEC advisory opinions on these topics had been made in response to requests for guidance from state and local political parties. In Advisory Opinion 1979-17, the FEC was asked for the first time about a proposal involving the acceptance of corporate funds by a national party committee for use in connection with state and local elections. The FEC, noting that its 1977 regulations permitted the establishment of separate accounts by "[a]ny political committee," see 11 C.F.R. 102.6(a)(2) (1977), essentially extended its rulings to national parties, permitting national party committees to create separate, segregated accounts, one of which could be "designated specifically and exclusively to finance national party activity limited to influencing the nomination or election of candidates for public office other than elective 'Federal office.'" Fed. Elec. Campaign Fin. Guide (CCH) ¶ 5416.

In sum, by 1979 it was clear that under the FEC's regulations, both national and state party committees were permitted to solicit and accept donations unconstrained by FECA's source and amount limitations, so long as those donations were maintained in separate accounts and were used only for influencing the nomination or election of candidates for nonfederal office. It was also clear that political committees maintaining such accounts were required to allocate between the accounts their overall administrative and operating expenses. Such expenses would include items such as fundraising, candidate recruitment, and research. See 11 C.F.R. 106.5(a)(1), (2). In addition, political committees were required to allocate expenses for general voter registration and get-out-the-vote drives not conducted on behalf of specific federal candidates.

Also in 1979, Congress enacted amendments to FECA that related to the financing of election-related activities by state and local parties. See Mann Expert Rep. at 7-8. Congress acted in response to concerns that traditional state and local party grassroots and volunteer activities arguably were subject to FECA's limitations on coordinated expenditures on behalf of candidates.[7] Congress defined two new sets of activities that were exempt from the statutory definitions of "contribution" and "expenditure" and, thus, from limits on party contributions to and coordinated expenditures on behalf of federal candidates. The first set of exempted activities included state party disbursements for campaign materials such as pins, bumper stickers, and yard signs used in connection with volunteer activities on behalf of the party's nominees. 2 U.S.C. 431(8)(B)(x), (9)(B)(viii). The exemption was conditioned, inter alia, on the use of hard money for the activity. Id. The second exemption applied to a state party's payment for "the costs of voter registration and get-out-the-vote activities" conducted on behalf of the party's presidential ticket. 2 U.S.C. 431(8)(B)(xii), (9)(B)(ix). Again, the exemption was conditioned, inter alia, on the use of hard money for the activity.[8] Despite the condition placed on the exemption, the 1979 Amendments did not displace the FEC's allocation regulations; a state party could allocate its expenses for the exempt activities between federal and nonfederal accounts, but it had to use hard money, in some

[7] FECA treats expenditures made in coordination with, or at the request or suggestion of, a federal candidate or his authorized political committees as a contribution to the candidate. See 2 U.S.C. 441a(7); Colorado II, 533 U.S. at 438; Buckley, 424 U.S. at 46 ("[C]oordinated expenditures are treated as contributions rather than expenditures under the Act."). FECA permits political party committees to spend well beyond the ordinary contribution limit applicable to political committees generally on coordinated expenditures. See 2 U.S.C. 441a(d).

[8] Another exemption from the definitions of "contribution" and "expenditure" for the activities of state and local parties in preparing and distributing printed slate cards and sample ballots had been included in FECA prior to 1979. 2 U.S.C. 431(8)(B)(v), (9)(B)(iv). That exemption was not conditioned on the use of hard money.

appropriate proportion, to reflect the federal election aspects of the activity.[9] See Common Cause v. FEC, 692 F. Supp. 1391, 1394-95 (D.D.C. 1987).

As a result of these developments, soft money became an important part of national party campaign finance beginning around 1980. Mann Expert Rep. at 12. In the 1980 election, the national Republican Party committees spent approximately $15 million in soft money and the national Democratic Party committees spent approximately $4 million, together constituting 9% of the national parties' total spending. Id.[10] In 1984, the national parties collectively spent roughly $21.6 million in soft money, which represented 5% of their total spending. Id. Most of this money was spent on voter registration and get-out-the-vote programs conducted by state party committees, "targeted to focus on key battlegrounds in the presidential race." 147 Cong. Rec. S3253 (April 2, 2001) (Anthony Corrado, The Origins and Growth of Party Soft Money Finance (2001), Ex. 1 to statement of Sen. Levin). By 1988, national party soft money spending increased to $45 million or 11% of national party spending. Mann Expert Rep. at 12. The parties' soft money receipts in 1988 included nearly 400 gifts of $100,000 or more. See id. at 13.

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[9] See H.R. Rep. 96-422, 96th Cong., 1st Sess. 8-9 (1979) ("If a State or local party organization prepares a slate card which includes both Federal and State candidates, the party organization may allocate or apportion the costs attributable to all the Federal candidates and the costs attributable to all the State candidates. . . . Money used to pay the costs attributable to State candidates is subject to the prohibitions and limitations of State Law. Accordingly, if State law allows the use of treasury funds of a corporation, that money could be used for the State portion, but not for any portion allocable to Federal candidates."); id. at 9 ("'[I]f the campaign materials' used for volunteer activities "contain reference to both State and Federal candidates, the party organization may allocate the costs between the State and Federal candidates. The money used to pay the cost attributable to State candidates would be subject to State, not Federal law.").

[10] The two major national political parties comprise, inter alia, six main national party committees: the Republican National Committee ("RNC"); the National Republican Senatorial Committee ("NRSC"), organized to aid the election of Republican candidates for the Senate; the National Republican Congressional Committee ("NRCC"), organized to aid the election of Republican candidates for the House of Representatives; the Democratic National Committee ("DNC"); the Democratic Senatorial Campaign Committee ("DSCC"), organized to aid the election of Democratic candidates for the Senate; and the Democratic Congressional Campaign Committee ("DCCC"), organized to aid the election of Democratic candidates for the House of Representatives.

The parties' growing use of soft money prompted a rulemaking petition by Common Cause, asking FEC to issue new allocation rules pertaining to the use of soft money. Common Cause alleged that party committees were improperly spending soft money to influence federal elections by taking advantage of FEC's regulations, which, as discussed supra, granted party committees considerable leeway to allocate their expenses between federal and nonfederal accounts using any "reasonable basis," 11 C.F.R. 106.1(e)(1978). See Mann Expert Rep. at 13. In Common Cause v. FEC, 692 F. Supp. 1391 (D.D.C. 1987), the district court found that FECA permitted allocation, but directed the Commission to revise its regulations to give party committees more specific guidance on how such activities should be allocated. Id. at 1395.

In 1990, the FEC promulgated such regulations permitting committees that chose to establish nonfederal accounts to allocate to those accounts a portion of their "[a]dministrative expenses," 11 C.F.R. 106.5(a)(2)(i), and expenses for "[g]eneric voter drives," which included "voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate." 11 C.F.R. 106.5(a)(2)(iv). National party committees were required to allocate at least 65% of their administrative and generic voter drive expenses to federal accounts during presidential election years, and at least 60% in non-presidential election years. 11 C.F.R. 106.5(b), (c). For state and local parties, the allocation of these expenses was determined by the proportion of federal offices to all offices on the state's general election ballot. 11 C.F.R 106.5(d). While this provision produced a wide range among the states in the percentage of hard money required to be allocated to these "mixed" expenses, the required hard money percentage for state parties was, on average, substantially lower than the 60-65% required

for the national parties. Mann Expert Rep. at 14; __

. The regulations also required national party committees, but not state party committees, to file public reports disclosing the donations to, and expenditures from, their soft money accounts. 11 C.F.R.104.8(e),(f); 104.9(c), (d). In addition, the regulations required all political committees with nonfederal accounts to file public reports disclosing the expenses allocated between the committee's federal and nonfederal accounts. 11 C.F.R. 104.10.

The Prodigious Growth of Soft Money and Its Use to Support Federal Campaigns

In 1992, the first election cycle for which national party soft money donations and expenditures were reported to FEC, soft money spending by the national parties reached $80 million, 16% of the national parties' total spending. Mann Expert Rep. at 15; see also 147 Cong. Rec. S3253 (April 2, 2001) (Ex. 1 to Statement of Sen. Levin). Both parties received donations of $200,000 or more from their top donors and actively solicited corporate gifts. Mann Expert Rep. at 15; id. at Tbl. 4 (listing top 50 soft money contributors in the 1992 election cycle, with donations as high as $1 million). The national parties exerted "firm control" over how this soft money was spent, with their primary focus the election of federal rather than nonfederal candidates. Mann Expert Rep. at 16. The bulk of the money was transferred to ten presidential election battleground states, where the funds, along with the appropriate proportion of hard money, were used to finance voter registration and get-out-the vote activities, typically under a plan preapproved by the national party, and to fund "generic" party television ads, run in key states to reinforce the message of the presidential candidates without mentioning the names of the candidates. Id.

The use of soft money increased dramatically in the 1996 election cycle, with the national parties' total soft money spending reaching $272 million. Mann Expert Rep. at 21 & Tbl. 2; see Declaration of Raymond J. La Raja at 18 & Fig. 7 (Sep. 23, 2002) [RNC] [hereinafter La Raja Expert Rep.]. The exorbitant increase was due largely to an innovative move by President Bill Clinton and his political consultant, Dick Morris, to use soft money to fund media advertisements that either promoted President Clinton by name, or criticized his opponent by name, while carefully avoiding particular words expressly advocating either candidate's election or defeat. Mann Expert Rep. at 18; see David B. Magleby, Report Concerning Interest Group Electioneering Advocacy and Party Soft Money Activity (Sep. 23, 2002) at 11 [DEV 4-Tab 8, hereinafter Magleby Expert Rep.];[11] Jonathan S. Krasno & Frank J. Sorauf, Evaluating the Bipartisan Campaign Reform Act (BCRA) (Sep. 23, 2002) at 50-51 [DEV 1-Tab 2, hereinafter Krasno & Sorauf Expert Rep.]. While these advertisements prominently featured the President, none of the costs were charged as coordinated expenditures by the Democratic party committees on behalf of President Clinton's campaign, even though the President was intimately involved in the ad campaign and the ads were designed to promote the President's electoral prospects. Mann Expert Rep. at 18.[12] Rather, the party argued that the advertisements could be treated like generic party advertising encouraging people to "vote Republican" or "vote Democrat" and could be financed as administrative expenses with a mix of soft and hard money, per the FEC allocation rules. Id. The party argued that this "issue advocacy" implicated neither limitations on party contributions and coordinated expenditures, nor the spending

[11] During the past two election cycles, Professor Magleby supervised teams of academics who systematically monitored campaigns in many of the most competitive federal races. Data was collected from party and interest group leaders, broadcast stations, and political communications disseminated during the campaigns. Magleby Expert Rep. at 5, 11-12 & Apps. B-F.

[12] See also Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. 105-167 at 107, 114, 8286 [hereinafter Thompson Comm. Rep.].

limits applicable to presidential candidates,[13] because the advertisements did not "in express terms advocate the election or defeat of a clearly identified candidate for federal office," Buckley, 424 U.S. at 44.[14] The Buckley Court, however, had neither required nor suggested that the financing of candidate and political party advertisements could be subject to federal campaign finance laws only if they used words of "express advocacy." Indeed, the Court stated that spending by candidates and political committees is "by definition, campaign related." Id.

Between July 1995 and June 1996, the Democratic National Committee ("DNC") spent an estimated $34 million on television advertisements in support of President Clinton's reelection under the guise of "issue advocacy," including $12 million in hard money and $22 million in soft money. Mann Expert Rep. at 18; 147 Cong. Rec. S3254 (April 2, 2001) (Ex. 1 to statement of Sen. Levin). The DNC was able to spend such a large proportion of soft money by transferring funds to state party committees, which were subject to more favorable FEC allocation ratios, and having the state committees purchase the ad time. 147 Cong. Rec. S3254 (April 2, 2001) (Ex. 1 to statement of Sen. Levin). The Republican National Committee ("RNC") quickly followed suit, announcing in May 1996 a $20 million "issue advocacy" advertising campaign with the explicit purpose of showing

[13] The Presidential Election Campaign Fund Act provides certain public funding for a presidential candidate's general election campaign where the candidate, inter alia, agrees to limit campaign spending and the acceptance of certain contributions. See generally 26 U.S.C. 9001 et seq.

[14] The advantage to such an approach was described in a statement to donors by President Clinton himself:

> [W]e even gave up one or two of our fundraisers at the end of the year to try to get more money to the Democratic Party rather than my campaign. My original strategy had been to raise all the money for my campaign this year, so I could spend all my money next year being president, running for president, and raising money for the Senate and House Committee and for the Democratic Party.
>
> And then we realized that we could run these ads through the Democratic Party, which meant that we could raise money in twenty and fifty and hundred thousand dollar lots, and we didn't have to do it all in thousand dollars. And run down–you know what I can spend which is limited by law. So that's what we've done. But I have to tell you I'm very grateful to you. The contributions you have made in this have made a huge difference.

Thompson Comm. Rep. at 62.

"'the differences between Dole and Clinton and between Republicans and Democrats on the issues facing our country, so we can engage full-time in one of the most consequential elections in our history.'" Mann Expert Rep. at 20; 147 Cong. Rec. S3254 (April 2, 2001) (Ex. 1 to statement of Sen. Levin). The RNC's presidential candidate-specific ads, like the DNC's, were targeted to key battleground states for the presidential election and financed with a mix of hard and soft money.[15] Mann Expert Rep. at 19-20; Thompson Comm. Rep. (Minority Views) at 8299, 8366. The parties also began using the same strategy to support congressional candidates, spending a mix of hard and soft money on "issue advocacy" to support their campaigns. Mann Expert Rep. at 20; Lamson Decl. ¶ 9 [DEV 7-Tab 26] (describing "issue ad" campaign in Montana).

By the end of the 1996 election, the national parties' total soft money spending reached $272 million, more than triple their soft money spending in the 1992 election. Soft money spending now constituted 30% of the national party committees' total spending. Mann Expert Rep. at 21 & Tbl. 2. The national party committees used the state party committees as vehicles for implementing their newly developed issue advocacy strategy and transferred $115 million in soft money to state party committees, where more favorable FEC allocation ratios permitted a larger percentage of soft money to be used. Mann Expert Rep. at 22; Krasno & Sorauf Expert Rep. at 10-11, 34.

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[15] One of the "issue ads" run by the RNC was called "The Story":

> (Audio of Bob Dole:) We have a moral obligation to give our children an America with the opportunity and values of the nation we grew up in. (Voice Over:) Bob Dole grew up in Russell, Kansas. From his parents he learned the value of hard work, honesty and responsibility. So when his country called . . . he answered. He was seriously wounded in combat. Paralyzed, he underwent nine operations. (Audio of Bob Dole:) I went around looking for a miracle that would make me whole again. (Voice Over:) The doctors said he'd never walk again. But after 39 months, he proved them wrong. (Audio of Elizabeth Dole:) He persevered, he never gave up. He fought his way back from total paralysis. (Voice Over:) Like many Americans, his life experience and values serve as a strong moral compass. The principle of work to replace welfare. The principle of accountability to strengthen our criminal justice system. The principle of discipline to end wasteful Washington spending. (Voice of Bob Dole:) It all comes down to values. What you believe in. What you sacrifice for. And what you stand for.

Thompson Comm. Rep. at 4014; see Selected Party Soft Money Ads, App. A to Defs.' Mem., Tab 3, No. 1 (video).

The abuses of the campaign finance system by the political parties in the 1996 elections are well documented in the Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167 (6 vols.), Mar. 10, 1998, commonly referred to as the "Thompson Committee Report." The Thompson Committee investigated and reported its findings concerning the widespread fundraising abuses that occurred during the 1996 Presidential campaign, developing a factual record on which, it anticipated, other legislative committees could rely "in formulating legislative proposals." Thompson Comm. Rep. at 8. The Thompson Committee concluded that "soft money spending by political party committees eviscerates the ability of FECA to limit the funds contributed by individuals, corporations, or unions for the defeat or benefit of specific candidates." Id. at 4468. More specifically, it found that "the DNC deftly utilized state party committees in 1996 as a conduit to further increase their illegal expenditure of soft money on electioneering messages favoring the re-election of President Clinton, all the time claiming such advertisements consisted of pure issue advocacy outside the scope of the FECA." Id. at 4466-67; see also Thompson Comm. Rep. at 4564 (Minority Views) ("Both the Democratic and Republican Parties raised vast amounts of soft money from corporate, union and individual donors, and then used loopholes in the law to spend that money helping specific candidates. The biggest of these loopholes involves so-called issue advocacy, in which communications, paid for in whole or part with soft money, attack a candidate by name while claiming to be an issue discussion outside the reach of federal election laws.").

The Thompson Committee also documented the national parties' prevalent practice of providing access to important officeholders in exchange for large soft money contributions to the political parties. For instance, it found that the DNC provided large party donors with favors

including access to senior decision makers, and noted that this policy resulted in "a number of alarmingly unsavory characters" gaining access to the President. Thompson Comm. Rep. at 41. Examples of access given in exchange for large contributions to the DNC included the infamous White House "coffees," held for donors who made contributions to the Democratic Party averaging over $54,000 per person, id., prompting one contributor, who ultimately pled guilty to criminal violations related to his giving, to acknowledge, "'The White House is like a subway: You have to put in coins to open the gates.'" Id. at 783; see Krasno & Sorauf Expert Rep. at 8; see infra at Title I, pt. I.B.2.b.

The Thompson Committee Minority likewise observed that the practice of providing major contributors with "added access to decisionmakers in the legislative and executive branches of government" is "[o]ne of the most troubling aspects of the campaign finance system." Thompson Comm. Rep. at 4573. The Minority Report found that Republicans also "have openly offered contributors access to congressional and political figures in their party," citing, inter alia, a Republican invitation offering "a smorgasbord of benefits" available in exchange for a $250,000 contribution, including "sharing a table with the Senate or House committee chairman 'of [the donor's] choice.'" Id.; see id. at 7968-78 (describing numerous examples of special access given to large donors to the RNC).[16]

The exploitation of soft money continued unabated after the 1996 election. During the 1998 midterm election cycle, the national parties spent $221 million in soft money, representing 34% of

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[16] For instance, the Minority reported that the RNC's two principal donor programs, Team 100, which required an initial contribution of $100,000 plus $25,000 over the next three years, and the Republican Eagles, which required members to contribute $15,000 annually, used promotional materials that "promised that participants in the Team 100 and Eagles programs would receive special access to high-ranking Republican elected officials, including governors, senators, and representatives." Id. at 7968. The Minority quoted a memorandum from an RNC aide to the chairman of Team 100, stating that the RNC was working on getting a "'hot'" contributor "'an appointment with [Representative] Dick Armey, so we can get his other $50,000.'" Id. at 7973. The minority also quoted a fundraising letter to a prospective Team 100 member that reported that after Ed Lupberger, the CEO of Entergy, joined Team 100, Haley Barbour escorted him to four legislative meetings "'that turned out to be very significant in the legislation affecting public utility holding companies. In fact, it made Ed a hero in his industry.'" Id.

their total spending. Mann Expert Rep. at 23 & Tbl. 2. By the 2000 election, the national parties' soft money spending nearly doubled once more, reaching $498 million, constituting 42% of the national party committees' total spending. Id. at 24. The national party committees, through their state parties, once again made "issue ads" a central component of the presidential campaigns,[17] as well as congressional races,[18] in competitive states. Id. at 25-26 (citing studies); see Krasno & Sorauf Expert Rep. at 30.

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Thus, as concluded in the academic work of one of *plaintiffs'* experts, the huge increase in raising and spending of soft money, from about 9% of total spending in 1980 to 42% in 2000, was neither the result of a sudden interest by party committees in increasing their administrative expenses for purposes of, for example, party building activities, nor was it the result of merely an expanded interest in state and local elections; rather, the spending was undertaken to influence federal elections. See LaRaja Cross Tr. (Oct. 15, 2002) at 68, 72-73, 178 & Ex. 3; Mann Expert Rep. at 26.

The practices employed by the parties in raising soft money demonstrate that donors are well aware that the parties raise the funds in order to influence federal elections. The House and Senate

[17] Mann Expert Rep. at 24; see Biersack Decl. Tbl. 8 [DEV 6-Tab 6];

[18] "Issue ads" in congressional races typically praised or criticized a candidate for his or her actions or character, then asked the audience to "tell" or "ask" the candidate to do something. See, e.g., Selected Party Soft Money Ads, App. A to Defs.' Mem., Tab 3 (video); Chapin Decl. ¶¶ 8-11 [DEV 6-Tab 12] (describing Florida 8th Cong. Dist. "issue ad" campaigns).

[19] Soft money was also transferred to state parties for get-out-the-vote and voter mobilization, but those activities likewise have a significant effect on federal elections. See, e.g., Mann Expert Rep. at 25;

national party committees regularly use Members of Congress, through direct solicitations and fund-raising events,[20] to raise soft and hard money simultaneously from individuals, corporations, and unions, and donors recognize little distinction between the two.[21] Indeed, an innovation that gained prominence in 2000 and only emphasized the intended use of soft money in federal elections, was the creation of "joint fundraising" or "victory" committees, established jointly by particular federal candidates and their party committees. Through such entities a donor can write a single check to the joint fundraising committee and have the funds allocated according to applicable legal limits between the candidate and the party committee's hard and soft money accounts. Mann Expert Rep. at 30; Magleby Expert Rep. at 37; Krasno & Sorauf Expert Rep. at 13; __

Not surprisingly, in their various, continuing efforts to raise increasing amounts of soft money for use in federal elections, the parties have also continued their practices of enticing donors with opportunities for access to political leaders and decisionmakers in exchange for donations.[22]

The risks of corruption that Congress has found to be inherent in an unregulated, privately-funded campaign finance system are apparent from the abuses related to soft money. The soft money regime has permitted corporations and labor unions to inject millions upon millions of dollars from their general treasuries into the federal election process in direct contravention of

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[20] __

[21] Randlett Decl. ¶ 7 [DEV 8-Tab 32] (Members of Congress raise soft money to help with federal campaigns, not party-building); Rozen Decl. ¶ 12 [DEV 8-Tab 33] ("Donors . . . understand that if a federal officeholder is raising soft money . . . they are raising it for federal uses, namely to help . . . federal candidates."); Buttenweiser Decl. ¶ 15 [DEV 6-Tab 11] (little difference between hard and soft money); Simon Decl. ¶ 9 [DEV 9-Tab 37] (donors told by candidates that soft money donation is "fairly close" to direct campaign contribution).

[22] __

congressional intent, and it has permitted both individual and organizational donors effectively to make donations to influence federal elections that vastly exceed the contribution limits the Supreme Court upheld in Buckley. As the record developed herein makes clear, and as we discuss further below, exploitation and abuse of soft money has created a system in which large soft money donors to the political parties are rewarded with access to candidates and officeholders, candidates and officeholders feel obligated to large party donors, and potential donors accede to requests for large donations because they believe it is necessary in order to avoid adverse legislative consequences.[23]

In short, since 1980, the party committees have increasingly exploited soft money as a means of circumventing the contribution limits and funding source prohibitions set forth in FECA. Although soft money originated as a limited exception to permit the parties to support activities that were not linked directly to electing or defeating a particular federal candidate, the national parties, working primarily through the state parties, have evaded FECA by spending enormous quantities of soft money to influence federal elections – money raised in amounts exceeding FECA's contribution limits and obtained from sources prohibited under FECA. Mann Expert Rep. at 26.

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[23] See infra; see also, e.g., Bumpers Decl. ¶¶ 18-23 [DEV 6-Tab 10] (explaining that soft money donations can buy access to officeholders and get phone calls to officeholders returned, and that there is often "an expectation of reciprocation where donations to the party are made"); Simpson Decl. ¶¶ 8-12 [DEV 9-Tab 38] ("[b]ig labor and big business use large soft money donations to corrupt the system to the detriment of the little guy"; "[l]arge donors of both hard and soft money receive special treatment"; recounting instances in which Senators' votes and legislative priorities were affected by the fear of losing future donations); Rudman Decl. ¶ 9 [DEV 8-Tab 34] ("[l]arge soft money contributions in fact distort the legislative process. They affect what gets done and how it gets done"); Kolb Decl. ¶ 9 & Ex. 6 [DEV 7-Tab 24] (poll of senior executives shows that pressure is placed on business leaders to make large contributions, and that the main reasons such contributions are made is fear of adverse legislative consequences and to obtain access to lawmakers); Hassenfeld Decl. ¶¶15-16 [DEV 6-Tab 17] (many corporate donors "view large soft money donations as a cost of doing business, and frankly, a good investment relative to the potential economic benefit to their business");

Hickmott Decl. ¶ 9 [DEV 6-Tab 19]("[C]orporations, labor unions and individuals make soft money contributions to national political parties and federal candidate PACs, including joint fundraising committees, to influence the legislative process for their business purposes.").

Electioneering by Corporations and Labor Unions Through "Issue Ads."

Just as 1996 saw the political parties pioneer the use of "issue advocacy" as a means of evading FECA's source and amount restrictions on campaign contributions, see supra at 28-36, it also saw a full-fledged effort by outside groups to use "issue advocacy" as a means of evading both FECA's limitations on corporate and union campaign spending as well as its disclosure requirements, beginning a trend that continued and accelerated through the 2000 election cycle.

Under the Supreme Court's construction of FECA in Buckley and, in 1986, MCFL, see supra at 21, so long as political communications did not include express advocacy, expenditures for those communications could go undisclosed under Buckley, and they could be financed directly from union or corporate treasuries. This significant limitation on FECA's application was not fully exploited for some time, however. In the years following MCFL, groups occasionally used "issue advocacy" as a means of electioneering,[24] but such practices did not become widespread until the 1996 election cycle. See Mann Expert Rep. at 19-20; see also Krasno & Sorauf Expert Rep. at 50. As chronicled by the Annenberg Public Policy Center, expenditures on "issue advocacy" in 1996 were wholly unprecedented, with corporations, unions, and interest groups spending approximately $75 million on ads that avoided express advocacy but "that looked and sounded like campaign ads." Annenberg Pub. Policy Ctr., Issue Advocacy Advertising During the 1996 Campaign ("Annenberg 1996 Study") at 3, 7-8 [DEV 38-Tab 21]; Thompson Comm. Rep. (Minority Views) at 5927 & n.4.

Most prominently in 1996, the AFL-CIO and a coalition of business groups ran competing multi-million dollar "issue advocacy" campaigns targeted at influencing the November

[24] For example, in the weeks preceding the 1992 presidential election, the Christian Action Network paid for television advertisements out of its general corporate treasury that, while not expressly advocating candidate Bill Clinton's defeat, negatively depicted Clinton in an altered photograph while representing that he supported a "radical" homosexual agenda. See FEC v. Christian Action Network, 894 F.Supp. 946, 948-49 (W.D. Va. 1995), aff'd, 92 F.3d 1178 (4th Cir. 1996); Craig B. Holman & Luke P. McLoughlin, Buying Time 2000 at 25 [DEV 46].

congressional elections. The AFL-CIO initiated the advertising battle in early 1996, with the announcement that it planned to spend $35 million in the coming year on a campaign to win back Democratic control of the House of Representatives. See Frank Swoboda, AFL-CIO to Target 75 House Districts, Wash. Post, Jan. 25, 1996 [DEV 10-Tab 40];

The campaign, funded from union dues, spent over $20 million on a series of television advertisements run from the end of June 1996 through Election Day. See Thompson Comm. Rep. at 3999; Annenberg 1996 Study at 11; FEC General Counsel's Rep. in In re AFL-CIO, MUR 4291 ("AFL-CIO MUR Rep.") at 5 [DEV 52-Tab 3].[25] These advertisements uniformly criticized House Republican incumbents on their legislative records, often contrasting their voting behavior unfavorably with the positions of their Democratic challengers, while conspicuously avoiding express exhortations for their defeat. See AFL-CIO MUR Rep. at 6. An example is an ad run from September 26 to October 9 in the district of House Republican incumbent Steve Stockman:

The AFL-CIO's advertisements soon prompted a major counter-attack by a coalition of business organizations, operating under the nondescript pseudonym "The Coalition: Americans Working for Real Change" ("Coalition"). The founding members of the Coalition, including the U.S. Chamber of Commerce and National Association of Manufacturers, were members of the "Thursday Group," a variety of business organizations that regularly met on Thursdays to discuss legislative

[25] "MUR" is an acronym for "Matter Under Review," which is how administrative enforcement proceedings under 2 U.S.C. 437g(a) are designated on the FEC's docket.

strategy with Representative John Boehner of Ohio, Chairman of the House Republican Conference, along with other Republican Members and party officials. FEC Gen. Counsel's Rep. in In re The Coalition, MUR 4624 ("Coalition MUR Rep.") at 12, 15 [DEV 53-Tab 6];

Following the AFL-CIO's announcement of its advertising campaign, Representative Boehner urged pro-business allies to respond, and the Coalition formed soon afterwards. Coalition MUR Rep. at 13-14, 16;

the Coalition eventually raised approximately $5 million in corporate funds

Coalition MUR Rep. at 18;

[26]

The Coalition used these funds to run advertisements from September through November 4, 1996, uniformly praising Republican incumbents targeted by the AFL-CIO, while stopping short of expressly calling for their re-election. See Coalition MUR Rep. at 26-27.[27]

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Notwithstanding their lack of express advocacy, the timing, location, and candidate-specific focus of the dueling advertisements run by the AFL-CIO and the Coalition left unmistakable fingerprints of electioneering intent.

— ; Coalition MUR Rep. at 26-27. The targeted incumbents were all competing in tight races, indicating that they were selected for attack (and defense) on the basis of their electoral vulnerability. See Thompson Comm. Rep. at 4001 (AFL-CIO ads focused on "swing districts"); Coalition MUR Rep. at 27;

Moreover, while the ads discussed the incumbents' positions with respect to certain legislative issues, virtually none of these issues were pending before the House of Representatives at the time the ads were run, indicating that the ads were intended not to affect upcoming legislative votes, but rather to affect votes in the upcoming November elections. AFL-CIO MUR Rep. at 5-6. On the basis of such considerations, eventual investigation by the Thompson Committee found that the ads were made for the purpose of influencing federal elections. See Thompson Comm. Rep. at 4000 (AFL-CIO ads); Thompson Comm. Rep. (Minority Views) at 8944-45 (Coalition ads).[28]

[28] See also AFL-CIO MUR Rep. at 5-6; Coalition MUR Rep. at 35.

Not only were the ads run by the AFL-CIO and the Coalition intended to influence the 1996 elections, but they were also used to curry favor with policymakers. The Coalition in particular made a point of seeking credit for its ads from the legislators aided by them. After each wave of ads the Coalition aired, the Coalition forwarded tapes of the ads through Representative Boehner to the individual Members in whose districts the ads ran, to "show the Republican Members of the House that [their business allies] were, indeed, doing something" in response to the AFL-CIO's ads. Coalition MUR Rep. at 30-32;

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Hence, by the 1996 election, the longstanding prohibition on union and corporate campaign spending had become largely ineffective. Through the guise of "issue advocacy," the nation's largest union and an assemblage of some of its largest corporate interests had been able to spend tens of millions dollars on advertisements broadcast for the purpose of influencing federal elections. These ads, it was believed, served to create debts of gratitude among congressional allies – providing the very sort of leverage over the legislative process, purchased with corporate or union "war chests," that the restriction upon corporate and union campaign spending was designed to eliminate.

The discovery of "issue advocacy" as an electioneering tool also enabled groups to evade FECA's disclosure requirements in 1996. Simply by avoiding express advocacy, groups were able to conceal the financing of their electioneering activities from public view. Magleby Expert Rep. at 18-19; Annenberg 1996 Study at 3; Thompson Comm. Rep. (Minority Views) at 5968. Many groups even took the further step of electioneering pseudonymously, like the business groups operating behind "The Coalition: Americans Working for a Real Change." Ads run under such opaque disclaimers left the public with no meaningful information regarding their funding source, compounding the secrecy gained from avoiding disclosure to the FEC. For example, "Citizens for

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[32] There is some evidence also that the AFL-CIO sought credit in this way for its ads, though from White House officials rather than members of Congress. The AFL-CIO informed the White House well in advance that it planned to run a $35 million campaign focused on the 1996 elections. Thompson Comm. Rep. at 4001. According to White House Chief of Staff Harold Ickes, the AFL-CIO wanted "to let the White House know the key points [of the AFL-CIO's efforts] and the amount of resources that labor was devoting to trying to take back the House." Id.

Reform" and "Citizens for the Republic Education Fund" together spent several million dollars in 1996 on attack ads against various Democratic candidates, such as the following "issue ad" run against Montana House candidate Bill Yellowtail:

> Who is Bill Yellowtail? He preaches family values, but took a swing at his wife. And Yellowtail's response? He only slapped her, but "her nose was not broken." He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments – then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.

Thompson Comm. Rep. at 4007; Lamson Decl. ¶ 11 [DEV 7-Tab 26]. Investigation by Congress eventually found that these two groups apparently were largely underwritten through a conduit by Koch Industries, the second largest privately held company in the nation, and were operated by Triad Management, a political consulting firm. Thompson Comm. Rep. (Minority Views) at 5982-83; see also Magleby Expert Rep. at 18. Due to lack of disclosure, much remains unknown to the public about the financing of the two groups. Id.;

Circumvention of FECA's requirements through the use of "issue advocacy" continued unabated following the 1996 election. Both the aggregate amounts expended on issue ads and the number of groups making such expenditures rose considerably from 1996 to 2000.[33] Studies of the 1998 and 2000 elections by the Brennan Center for Justice at New York University Law School, and by a group of political scientists across the nation organized by Professor David Magleby, as supplemented by expert reports submitted in this case by the authors of those studies along with other political scientists, show that the vast majority of these ads that referred to candidates for federal office ran within 60 days of Election Day, that such ads were concentrated in competitive

[33] Krasno & Sorauf Expert Rep. at 50; Annenberg Pub. Policy Ctr., Issue Advocacy Advertising During the 1997-1998 Election Cycle ("Annenberg 1998 Study") at 1-2 [DEV 66-Tab 6]; Annenberg Pub. Policy Ctr., Issue Advocacy Advertising During the 1999-2000 Election Cycle ("Annenberg 2000 Study") at 1, 4 [DEV 38-Tab 22]; see also Annenberg 2000 Study at 9 (explaining basis for Annenberg figures).

electoral races, and that they were overwhelmingly likely to be perceived as having an electioneering purpose.[34]

The 2000 election featured much the same patterns of conduct as those seen in 1996. Labor and business again dominated the airwaves: the AFL-CIO, the pharmaceutical industry, and the Chamber of Commerce constituted three of the top four group sponsors of television ads referring to federal candidates within 60 days of the election. Kenneth H. Goldstein, Amended Expert Report at 14 & Tbl. 3 [DEV 3-Tab 7, hereinafter Goldstein Expert Rep.]; Annenberg 2000 Study at 7.

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The AFL-CIO campaign met with return fire from the pharmaceutical industry, in the guise of a nonprofit organization dubbed "Citizens for Better Medicare."

[34] See Jonathan S. Krasno & Daniel E. Soltz, Buying Time ("Buying Time 1998") Fig. 1.5 at 17, Fig. 2.8 at 38, Fig. 4.15 at 103, Fig. 4.22 at 110 [DEV 47]; Craig B. Holman & Luke P. McLoughlin, Buying Time 2000 Fig. 4-6 at 31, Fig. 6-8 at 56 [DEV 46]; Krasno & Sorauf Expert Rep. at 50-60 & App. Tbls. 2, 4-6; Kenneth H. Goldstein, Amended Expert Report at 17-19, 24-28 & Tbls. 2, 4, 8 [DEV 3-Tab 7, hereinafter Goldstein Expert Rep.]; Magleby Expert Rep. at 5-6, 13-15, 22, 26-33 & Tbls. 1, 2, 2A; see also Storyboards of Ads Referring to Candidates Within 60 Days of the 1998 and 2000 Elections [DEV 48-Tabs 3&4]. Findings from the Buying Time studies, the Krasno & Sorauf and Goldstein reports, and the work of Professor Magleby are discussed in greater detail below. See infra at 139-42, 161.

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[37] On the other side of the equation, Elaine Bloom, who in 2000 ran unsuccessfully against Rep. Clay Shaw of Florida, credited ads aired by Citizens for Better Medicare with assisting Mr. Shaw's come-from-behind victory in that race. Bloom Decl. ¶¶ 4-6 [DEV 6-Tab 7].

While the air wars between business and labor constituted the largest and most direct influx of corporate and union money into the 2000 elections, corporate money also helped fund ads run by various interest groups, who, by virtue of avoiding express advocacy, could solicit corporate contributions to pay for their electioneering activities.

Evasion of FECA's disclosure provisions also proliferated in 2000. As Congress observed in June of 2000, numerous groups (including, e.g., Citizens for Better Medicare) were being

organized as tax-exempt "political organizations" under § 527 of the Internal Revenue Code – which by statutory definition exist for the very purpose of influencing elections, see 26 U.S.C. 527(e)(1)-(2) -- yet they were not making any disclosures to the FEC, simply by virtue of avoiding express advocacy in their electioneering activities. See Disclosure of Political Activities of Tax-Exempt Organizations: Hearing Before the Subcomm. on Oversight of the Comm. on Ways and Means, 106th Cong. (2000).[38] Although Congress attempted to fix the problem by amending the tax code to require § 527 political organizations to publicly disclose the identities of their contributors,[39] these groups persisted in using "issue advocacy" to avoid disclosure.

Perhaps the most telling example of how groups had, by 2000, come cavalierly to rely on "issue advocacy" to evade FECA's strictures, is supplied by the National Rifle Association.

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[38] Many of these organizations even had specific provisions in their charter prohibiting them from engaging in express advocacy. Id. at 47.

[39] See Pub. L. 106-230, 114 Stat. 477 (codified at 26 U.S.C. 527(i)-(j)(2002)), (held unconstitutional by Nat'l Fed'n of Republican Assemblies v. United States, 218 F. Supp. 2d 1300 (S.D. Ala. 2002)).

In sum, by 2000, corporations, unions, and interest groups fully recognized that, through the trivial effort of avoiding express advocacy, they could make unrestricted and undisclosed expenditures to influence the outcome of federal elections while avoiding the reach of federal election law. As a result, a long-established regime intended to prohibit the use of corporate and union treasuries

[40] See also Selected Interest Group Electioneering Radio Ads, App. A to Defs.' Mem., Tab 6, Nos. 1&2 (audio);

for federal campaign spending, and to require disclosure of who finances federal campaign spending, had been eviscerated through the routine exploitation of the "issue advocacy" loophole.

Repairing the System: Legislative Debate and
Enactment of the Bipartisan Campaign Reform Act

BCRA represents the culmination of an extraordinary amount of effort by Congress over several years to develop legislation to repair a federal campaign finance system that had been proven, over the course of the 1990s, to be increasingly dysfunctional. Scores of bills proposing an enormous variety of potential reforms were introduced in both the House and the Senate,[41] and the problems with the campaign finance system and various reform proposals have been considered by a panoply of congressional committees.[42] The provisions adopted in BCRA are those that Congress

[41] The bills introduced in the last three Congresses alone include, but are not limited to: "Bipartisan Campaign Reform Act of 1997," H.R. 493 (105th Cong.); "Campaign Reform and Election Integrity Act of 1998," H.R. 3485 (105th Cong.); "Campaign Finance Improvement Act of 1998," H.R. 3476 (105th Cong.); "Bipartisan Campaign Integrity Act of 1997," H.R. 2183 (105th Cong.); "Campaign Reporting and Disclosure Act of 1998," H.R. 3582 (105th Cong.); "Bipartisan Campaign Reform Act of 1997," S. 25 (105th Cong.); "Senate Campaign Financing and Spending Reform Act," S. 57 (105th Cong.); "Campaign Finance Reform and Disclosure Act of 1997," S. 179 (105th Cong.); "Clean Money, Clean Elections Act," S. 918 (105th Cong.); "Grassroots Campaign and Common Sense Federal Election Reform Act of 1998," S. 1689 (105th Cong.); "Voter Empowerment Act of 1999," H.R. 32 (106th Cong.); "Bipartisan Campaign Reform Act of 1999," H.R. 417 (106th Cong); "Clean Money, Clean Elections Act," H.R. 1739 (106th Cong.); "FEC Reform and Authorization Act of 1999," H.R. 1818 (106th Cong.); "Campaign Integrity Act of 1999," H.R. 1867 (106th Cong.); "Citizen Legislature and Political Freedom Act," H.R. 1922 (106th Cong.); "Campaign Reform and Election Integrity Act of 1999," H.R. 2668 (106th Cong); "PAC Limitation Act of 1999," H.R. 2866 (106th Cong..);"Open and Accountable Campaign Financing Act of 2000," H.R. 3243 (106th Cong.); "FEC Reform and Authorization Act of 2000," H.R. 4037 (106th Cong.); "Campaign Finance Improvement Act of 2000," H.R. 4685 (106th Cong); "Campaign Finance Disclosure on Sales of Personal Assets Act of 2000," H.R. 4989 (106th Cong.); "Informed Voter Act of 2000," H.R. 5507 (106th Cong.); "Campaign Finance Improvement Act of 2000," H.R. 5596 (106th Cong.); "Bipartisan Campaign Reform Act of 1999," S. 26 (106th Cong.); "Federal Election Enforcement and Disclosure Reform Act," S. 504 (106th Cong.); "Clean Money, Clean Elections Act," S. 982 (106th Cong.); "Bipartisan Campaign Reform Act of 1999," S. 1593 (106th Cong.); "Campaign Finance Integrity Act of 1999," S. 1671 (106th Cong.); "Open and Accountable Campaign Financing Act of 2000," S. 1816 (106th Cong.); "Campaign Finance Reform and Disclosure Act of 2000," S. 2565 (106th Cong.); "Bipartisan Campaign Reform Act of 2001," H.R. 2356 (107th Cong.); "Campaign Reform and Citizen Participation Act of 2001," H.R. 2360 (107th Cong.); and "Bipartisan Campaign Finance Reform Act of 2001," S. 27 (107th Cong.).

[42] These congressional hearings and and associated reports include, but are not limited to: Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rpt. 105-167 (6 vols.) (Comm. on Governmental Affairs), March 10, 1998 [Thompson Comm. Rep.]; Investigation of Political Fundraising Improprieties and Possible Violations of Law: Interim Report ("Burton Comm. Rep."), H.R. Rept. 105-829 (4 vols.) (Comm. on Gov't Reform and Oversight), November 5, 1998; Campaign Contribution Limits, S. Hrg. 106-19 (Comm. on Rules and Admin.), March 24, 1999; The Justice Department's Handling of the Yah Lin "Charlie" Trie Case, S. Hrg. 106-318 (Comm. on Gov'tal Affairs), Sep. 22, 1999; 1996 Campaign Finance Investigations, S. Hrg. 106-1059 (Subcomm. on Admin. Oversight and the Courts, Comm. on the Judiciary), May 24, June 6, and June 21, 2000; 1996 Campaign Finance Investigations, S. Hrg. 106-1072 (Comm. on Judiciary), June 27, 2000; Johnny Chung: Foreign Connections, Foreign Contributions, H.R. Hrg. No. 106-23 (Comm. on Gov't Reform), May 11, 1999; White House Insider Mark Middleton: His Ties to John Huang, Charlie Trie, and Other Campaign Finance Figures, H.R. Hrg. No. 106-93 (Comm. on Gov't Reform), August 5, 1999; Disclosure of Political Activities of Tax-Exempt Organizations, H.R.
(continued...)

deemed most essential to combat the "biggest loopholes in the system: the soft money and the phony issue ads." 148 Cong. Rec. S2104 (Mar. 20, 2002) (Sen. Feingold).

Following the 1996 elections, Senators McCain and Feingold introduced legislation to address the eruption of soft money donations and unregulated electioneering disguised as "issue ads." See 143 Cong. Rec. S159 (Jan. 21, 1999); 143 Cong. Rec. S10106-12 (Sep. 29, 1997). Section 101 of this version of the McCain-Feingold bill would have prohibited national, state, district and local committees of political parties from soliciting or receiving any soft money donations. It also proposed to address electioneering issue advocacy by redefining "expenditures" subject to FECA's strictures to include public communications at any time of year, and in any medium, whether broadcast, print, direct mail, or otherwise, that a reasonable person would understand as advocating the election or defeat of a candidate for federal office. See 143 Cong. Rec. S10107, 10108.

In part to respond to concerns raised by the bill's opponents about its constitutionality,[43] Senators Snowe and Jeffords proposed an amendment to McCain-Feingold to draw a bright line between genuine issue advocacy and a narrowly defined category of television and radio advertisements, broadcast in proximity to federal elections, "that constitute the most blatant form of [unregulated] electioneering." 144 Cong. Rec. S906, S912 (Feb. 24, 1998). Senator Snowe explained that this approach had been developed in consultation with constitutional experts, to come up with "clear and narrow wording" which, in contrast to the earlier provisions of the McCain-Fein-

[42](...continued)
Hrg. No. 106-103 (Subcomm. on Oversight, Comm. on Ways and Means), June 20, 2000; The Role of John Huang and the Riady Family in Political Fundraising, H.R. Hrg. No. 106-142 (Comm. on Gov't Reform), December 15, 16 and 17, 1999; The Role of Yah Lin "Charlie" Trie in Illegal Political Fundraising, H. R. Hrg. No. 106-172 (Comm. on Gov't Reform), March 1, 2000; The Justice Department's Implementation of the Independent Counsel Act, H.R. Hrg. No. 106-231 (Comm. on Gov't Reform), June 6, 2000; Has the Justice Department Given Preferential Treatment to the President and Vice -President?, H.R. Hrg. No. 106-256 (Comm. on Gov't Reform), July 20, 2000; Campaign Finance Reform: Proposals Impacting Broadcasters, Cable Operators and Satellite Providers, H.R. Hrg. No. 107-42 (Subcomm. on Telecommunications and the Internet, Comm. on Energy and Commerce), June 20, 2001.

[43] See, e.g., 143 Cong. Rec. S9994, S10009-11, 10018-19 (Sep. 26, 1997); 143 Cong. Rec. S10719, 10726-27 (Oct. 9, 1997).

gold bill, supra, strictly limited the reach of the legislation to TV and radio advertisements that mention a candidate within 60 days of a general election, or 30 days of a primary, so as specifically to avoid the pitfalls of vagueness identified in Buckley.[44] Snowe-Jeffords was adopted as an amendment both to the McCain-Feingold bill, 144 Cong. Rec. S1000, and later to the companion legislation known in the House as Shays-Meehan. See 147 Cong. Rec. H3801, H3802 (June 28, 2001).

Congress continued to debate the wisdom, necessity and constitutionality of campaign finance reform legislation, and the scope of its various provisions, in some detail for the next four years. The Snowe-Jeffords provisions were the subject of extensive debate. Citing studies by the Annenberg Public Policy Center at the University of Pennsylvania showing the growing use of so-called "issue ads" by corporations, unions and other interest groups to promote or oppose the election of federal candidates while simultaneously evading regulation under FECA,[45] the legislation's sponsors maintained that the Snowe-Jeffords provisions represented necessary corrective legislation to "give the public the facts they need to better evaluate the candidates [and] the information they are receiving," 144 Cong. Rec. S918, and to "reinforce the traditional rules limiting the role of unions and corporations in elections." Id. at 914.[46]

In answer to assertions by McCain-Feingold's opponents that Buckley had flatly prohibited all regulation of independent political communications containing express advocacy,[47] the legislation's supporters explained that Snowe-Jeffords had been carefully constructed to pass constitu-

[44] 144 Cong. Rec. S912-13; see also 144 Cong. Rec. S972, S974 (Feb. 25, 1998) ("We are replacing the issue advocacy provisions of the McCain-Feingold legislation . . . that could raise constitutional questions.").

[45] See 144 Cong. Rec. S875, S885, S913-14; 144 Cong. Rec. S972; 145 Cong. Rec. H8178, H8197 (Sep. 14, 1999); 147 Cong. Rec. S2433, S2455 (March 19, 2001).

[46] See also 144 Cong. Rec. S871, S895; 144 Cong. Rec. S993; 145 Cong. Rec. H8181, H8197; 147 Cong. Rec. S2421, S2456-57 (Mar. 19, 2001); 147 Cong. Rec. S3072 (Mar. 29, 2001).

[47] 144 Cong. Rec. S869-70, 873-75, 915-16; 144 Cong. Rec. S980-82; 144 Cong. Rec. H3722, 3732 (May 21, 1998); 145 Cong. Rec. 8188; 145 Cong. Rec. S12799, S12830-31 (Oct. 19, 1999).

tional muster by defining "electioneering communications" both narrowly and objectively, so as to avoid the vagueness that troubled the Supreme Court in Buckley,[48] a conclusion supported by two empirical studies conducted on political advertising by the Brennan Center for Justice at New York University Law School and additional research by Professor David Magleby of Brigham Young University.[49] Congress continued to debate the constitutionality of the Snowe-Jeffords provisions until final passage of the bill in 2002.[50]

Summary of Key Statutory Provisions

BCRA was thus enacted in response to the widespread abuse and circumvention of the existing statutory regime that regulates and limits permissible campaign contributions to federal candidates, federal officeholders, and political parties. As described above, the two largest loopholes of the statutory regime under FECA are the solicitation and use of soft money by political parties and the rise of corporate and union electioneering through issue advertisements. Congress has addressed these problems in Title I and Title II, Subtitle A, of BCRA, which are summarized below. In addition, Congress adopted several provisions designed to ensure the effectiveness of these reforms; these provisions are discussed further in the Argument section, infra.

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[48] 144 Cong. Rec. S869, S875-76, S898, S914; 144 Cong. Rec. 972-75, S993, S998-99; 147 Cong. Rec. S2845, S2848 (Mar. 26, 2001) (citing correspondence from 20 constitutional scholars endorsing the Snowe-Jeffords provisions, 147 Cong. Rec. S3036-37 (Mar. 28, 2001)).

[49] 147 Cong. Rec. S2456-58, S3040-43, S3072, S3251-52. See Buying Time: Television Advertising in the 1998 Congressional Elections ("Buying Time 1998") [DEV 47]; Buying Time 2000: Television Advertising in the 2000 Federal Elections ("Buying Time 2000") [DEV 46]. For example, Buying Time 1998 concluded that extending federal campaign finance and disclosure laws to advertisements mentioning a federal candidate within 60 days of a general election would have affected just 7 percent of the advertisements in 1998 that researchers determined to be genuine issue advocacy rather than advocacy intended to influence federal elections. Buying Time 1998 at 10, 109.

[50] See 147 Cong. Rec. S2421, 2422-24, 2455-58 (Mar. 19, 2001); 147 Cong. Rec. S2708-09 (Mar. 22, 2001); 147 Cong. Rec. S2846-50 (Mar. 26, 2001); 147 Cong. Rec. S3036-3037 (Mar. 28, 2001) (debates preceding initial Senate passage on April 2, 2001, 147 Cong. Rec. S3258); see also 148 Cong. Rec. H258-63 (Feb. 12, 2002); 148 Cong. Rec. H339-43, H348-49, H373, H412-15 (Feb. 13, 2002); 148 Cong. Rec. S2096, S2101, S2115, S2118, S2132, S2138 (Mar. 20, 2002).

In Title I of BCRA, Congress addressed the soft money system by adding, in § 101, a new § 323 to FECA, entitled "Soft Money of Political Parties" (to be codified at 2 U.S.C. 441i, see 116 Stat. 82). Section 323 contains several interrelated provisions designed to eliminate all solicitation, contribution, and use of unregulated soft money by federal candidates, federal officeholders, and national political parties, and to eliminate the use of soft money for federal election activity by any other political parties, officeholders, and candidates:

- Section 323(a) prohibits the national committee of a political party from soliciting, receiving, directing to another person, spending, or transferring soft money, i.e., any funds "that are not subject to the limitations, prohibitions, and reporting requirements of this Act."

- Section 323(b) addresses state and local parties' practice of using soft money to support federal campaigns, providing that, subject to certain exceptions, a State, district, or local committee of a political party may not use soft money to make expenditures or disbursements for "Federal election activity."

- Section 323(c) provides that the costs associated with fundraising for federal election activity must be made with hard money, i.e., "funds subject to the limitations, prohibitions, and reporting requirements of this Act."

- Section 323(d) addresses another avenue for circumvention by providing that parties may not solicit any funds for, or make or direct any donations to, certain tax-exempt organizations described in section 501(c) of the Internal Revenue Code and to organizations engaged in political activities described in section 527 of the Internal Revenue Code.

- Section 323(e) generally prohibits federal candidates and officeholders from soliciting, receiving, directing, transferring, or spending any soft money in connection with an election for federal office, making exceptions for attendance at fundraising events for state, district, or local committees of a political party and certain solicitations on behalf of nonprofit organizations.

- Section 323(f) prohibits a candidate for state or local office or a state or local officeholder from spending soft money for a "public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office."

Title II of BCRA prohibits labor unions and corporations from using general treasury funds to produce and air "electioneering communications," and places disclosure requirements on all persons that make large financial outlays for such communications. Section 201(a) of the statute amends FECA by adding a new subsection (f)(3) to 2 U.S.C. 434, defining an electioneering communication as a TV or radio communication that "refers to a clearly identified candidate for Federal office," and is made within the 60 days before a general election or the 30 days before a primary. Additionally, in the case of a communication that refers to a House, Senate or (under rules adopted by the FEC)[51] presidential primary candidate, the communications must be "targeted to the relevant electorate," meaning that it can be received by at least 50,000 persons in the state or district where the election is being held.[52] Under BCRA § 201(a), all persons making financial outlays in excess of $10,000 for the costs of electioneering communications must file statements with the FEC identifying the persons making the disbursements, those to whom these disbursements were made, and persons who contributed $1,000 or more to the person making the disbursement. BCRA, § 201(a) (adding 2 U.S.C. 434(f)(1), (2)(A)-(F)).

Section 203 of BCRA amends FECA 441b to prohibit corporations and labor unions from expending general treasury funds for electioneering communications. Prior to BCRA's enactment, § 441b(a) made it unlawful for any corporation or labor organization "to make a contribution or expenditure in connection with any [federal] election," the phrase "contribution or expenditure" being defined under subsection (b)(2). BCRA § 203(a) adds the term "applicable electioneering

[51] See Final Rule, Electioneering Communications, 67 Fed. Reg. 65,211 (Oct. 23, 2002) (to be codified at 11 C.F.R. 100.29(b)(3)).

[52] Under a last-minute amendment to the Snowe-Jeffords provisions offered by Senator Specter and adopted by the full Senate on March 29, 2001, see 147 Cong. Rec. S3070, S3118-3123, paragraph (3)(A)(ii) states that if the above definition of electioneering communications "is held to be constitutionally insufficient," then the term "electioneering communication means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office . . . and which is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate."

communication" to the list of expenditures under § 441b(b)(2) that are prohibited to corporations and labor unions under the terms of subsection (a).[53] By the same token, however, the prohibition as applied to electioneering communications is subject to the same longtime exception, under § 441b(2)(C) and (b)(4), that allows corporations and labor unions to make expenditures for such political purposes from separated segregated accounts containing funds donated by individual shareholders, members, and executive or administrative personnel.[54]

Title II of BCRA also deals with the subject of coordination. Section 213 of BCRA amends FECA § 441a(d), regarding coordinated expenditures between candidates and their parties. Under § 441a(d)(1)-(3), political party committees are permitted to make coordinated expenditures on behalf of each of their candidates far exceeding the level of coordinated expenditures, $5,000, that other political committees are permitted to make with respect to a given candidate. 2 U.S.C. 441a(a)(2)(A), (7)(B)(i). Section 213 of BCRA amends § 441a by adding a new subsection (d)(4), which provides that, once a political party nominates a candidate, the party may choose during that election cycle either: (1) to forgo independent expenditures and make coordinated expenditures with respect to that candidate under the more generous terms of subsection (d)(1)-(3); or (2) to make unlimited independent expenditures with respect to that candidate, as defined by FECA § 431(17), see Colorado I, 518 U.S. at 618, but accept the $5,000 limit on contributions and coordinated

[53] An "applicable" electioneering communication is defined by a further amendment to § 441b as one "made by any entity described in subsection (a) of this section [i.e., a corporation or labor union] or by any other person using funds donated by an entity described in subsection (a) of this section" [same]. BCRA, § 203(b), adding 2 U.S.C. 441b(c)(1).

[54] Specifically, FECA § 441b(b)(2)(C) permits unions and corporations to use treasury funds to establish and administer "separate segregated fund[s] to be utilized for political purposes" (id.). Such a fund, which is a political committee under the Act (and commonly called a "PAC"), 2 U.S.C. 431(4)(B), can solicit and receive voluntary contributions from corporate employees and stockholders, from union members, from members of a membership corporation, and from their families. 2 U.S.C. 441b(b)(4)(A)-(C). These funds can be contributed to federal candidates or used to pay for independent expenditures or electioneering communications. Corporations and unions may also use treasury funds to finance communications with their stockholders, executive and administrative personnel, and their "members," on any subject. 2 U.S.C. 431(9)(B)(iii), 441b(b)(2).

expenditures applicable to all other multicandidate political committees. Section 214 of BCRA simply repeals the FEC's regulations on coordinated communications paid for by persons other than candidates or parties, and directs the Commission to promulgate new regulations on the subject that "shall not require agreement or formal collaboration to establish coordination." The statute further specifies that "the regulations shall address "(A) payments for the republication of campaign materials; (B) payments for the use of a common vendor; (C) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and (D) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party."

Title III of BCRA contains the so-called "millionaire provisions," which incrementally raise the limits on individual contributions to candidates applicable under 2 U.S.C. 441a, allowing greater individual contributions to be made to a House or Senate candidate when an opposing candidate's campaign expenditures made from his or her own personal funds (adjusted for the excess of the gross receipts of the candidate's campaign committee over the gross receipts of the opponent's committee), exceed a threshold amount. BCRA §§ 304, 316 (adding 2 U.S.C. 441a(i)); BCRA § 319 (adding 2 U.S.C. 441a-1). Title III also eliminates another means by which FECA's contribution limits can be and in the past have been evaded, by prohibiting individuals less than 18 years of age from making contributions to candidates or political parties. BCRA § 318 (adding 2 U.S.C. 441k).

Sections 305 and 504 of BCRA both amend § 315 of the Communications Act of 1934, 47 U.S.C. 315. Section 305 restricts eligibility for the "lowest unit charge" for air time to candidates who certify that they will not directly refer to another candidate for the same office in their

broadcasts without identifying themselves in the broadcast and stating that they personally approved the broadcast. BCRA § 504 requires broadcasters to maintain and make publicly available complete records of requests to purchase broadcast time for a variety of political communications.

As we discuss in detail below, each of these provisions is fully consistent with the Constitution and was enacted in full accordance with Congress's well-established authority to regulate federal elections.

ARGUMENT

The Court's consideration of plaintiffs' constitutional challenges to BCRA must start with the recognition that plaintiffs have asserted their claims before any enforcement of the statute against them. The plaintiffs have abjured the usual and preferred judicial practice, particularly in cases "hav[ing] fundamental and far-reaching import," of adjudicating the constitutionality of statutes as applied to particular sets of facts before entertaining challenges to them on their face. See, e.g., Renne v. Geary, 501 U.S. 312, 323-24 (1991). By choosing instead to bring a pre-enforcement facial challenge, plaintiffs have taken on a most difficult burden. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223 (1990) (noting that "facial challenges to legislation are generally disfavored"). To prevail in this litigation plaintiffs "must demonstrate that [BCRA] either 'could never be applied in a valid manner,' or that even though it may be validly applied to the plaintiff[s] and others," it is nevertheless "'substantially' overbroad." New York State Club Ass'n, 487 U.S. at 11 (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 796-798 (1984)). As explained below, plaintiffs cannot discharge that heavy burden.

TITLE I

PRESENTATION BY THE GOVERNMENTAL DEFENDANTS

I. THE NATIONAL PARTY SOFT MONEY BAN IS CONSTITUTIONAL.

Congress enacted BCRA in response to widespread circumvention of longstanding statutory limits on federal campaign contributions. Title I of BCRA "shuts down the soft money system." 147 Cong. Rec. S2446 (Mar. 19, 2001) (Sen. Feingold). The primary mechanism by which BCRA accomplishes that goal is the national party soft money ban, which puts a stop to further evasion of FECA's limitations by the national parties, but without restricting how the national parties spend their money. At the same time, BCRA raises the limits on hard money contributions to the national parties to enhance their capacity to raise funds within the new regulatory framework.

To prevent state-level party committees from circumventing FECA's requirements in place of the national parties, BCRA generally requires state-level party committees to use funds contributed in conformity with the federal limits to finance "Federal election activity." But BCRA leaves those committees entirely free to continue to raise funds beyond the federal limits in accordance with state law, and to use unlimited quantities of such soft money, if permitted under state law, for activity unrelated to federal elections. BCRA also includes a provision (the "Levin Amendment") that authorizes state-level party committees to use limited amounts of soft money under specified conditions to fund certain types of federal election activity. And BCRA doubles the amount of hard money that persons can contribute to state party committees, from $5,000 to $10,000 per year.

Title I of BCRA also closes other soft money loopholes by prohibiting party committees from soliciting any funds for, or making or directing donations to, certain tax-exempt organizations

that may use such funds to influence federal elections, and by prohibiting federal candidates and officeholders from soliciting, receiving, directing, transferring, or spending any soft money in connection with a federal election. As explained below, each of these several interrelated provisions readily passes constitutional muster.

A. Congress Has Broad Latitude to Ensure That Federal Restrictions on the Sources and Amounts of Campaign Contributions Are Not Evaded.

"The constitutional power of Congress to regulate federal elections is well established . . . ." Buckley, 424 U.S. at 13. Article I, § 4 of the Constitution grants Congress the power to regulate congressional elections, and the Supreme Court has recognized "broad congressional power to legislate in connection with the elections of the President and Vice President." Buckley, 424 U.S. at 14 n.16. BCRA's soft money provisions ensure compliance with longstanding federal restrictions on the sources and amounts of campaign contributions that the Supreme Court has already upheld against constitutional challenge. As explained above, Congress has long prohibited corporations and labor organizations from making contributions to candidates and political committees. See NRWC, 459 U.S. at 208-09; Mariani v. United States, 212 F.3d 761, 770 (3d Cir. 2000) (en banc). The Supreme Court has also repeatedly upheld federal limits on the amounts of money that individuals and other organizations may contribute to candidates, political parties, and other political committees, finding that the limitation of "the actuality and appearance of corruption resulting from large individual financial contributions" provided a "constitutionally sufficient justification" not only for FECA's $1,000 limit on individual contributions to a particular candidate, 424 U.S. at 26, but also other, much lower limits, see Shrink Missouri, 528 U.S. at 390. See supra 18-21.

In upholding the constitutionality of these limitations on campaign contributions, the Supreme Court has considered whether the government demonstrated "a sufficiently important

interest" and employed "means closely drawn to avoid unnecessary abridgment of associational freedoms." Buckley, 424 U.S. at 25. While that test was established to evaluate First Amendment challenges based on the freedom of association, the Supreme Court has concluded that "a contribution limitation surviving a claim of associational abridgment would survive a speech challenge as well," inasmuch as contribution limits bear "more heavily on the associational right than on freedom to speak." Shrink Missouri, 528 U.S. at 388. Accord Colorado II, 533 U.S. at 456. The Court has established no "constitutional minimum" below which legislatures may not regulate. Shrink Missouri, 528 U.S. at 397. Rather, a contribution limitation will be upheld unless it is "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." Id.

The Supreme Court has also deferred to Congress "as to the need for prophylactic measures where corruption is the evil feared," NRWC, 459 U.S. at 210, and has repeatedly sustained provisions enacted to prevent evasion of the limits on campaign contributions upheld in Buckley. Thus, in Buckley itself, the Court upheld a $25,000 limitation on total contributions by an individual in any calendar year because the restriction "serve[d] to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." 424 U.S. at 38. Similarly, in California Medical Association v. FEC, supra, FECA's $5,000 limit on contributions to multicandidate political committees was sustained as a means of preventing the circumvention of the contribution limitations upheld in Buckley, which otherwise "could be easily evaded." Id. at 198 (plurality); see also id. at 203 (Blackmun, J., concurring).

In Colorado II, all members of the Court agreed that "circumvention is a valid theory of corruption," 533 U.S. at 456, and a majority upheld the limits on party coordinated expenditures because the evidence supported the "long-recognized rationale of combating circumvention of contribution limits designed to combat the corrupting influence of large contributions to candidates from individuals and nonparty groups," id. at 456 n.18. The Court concluded that "substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open." Id. at 457. The Court therefore held that "a party's coordinated expenditures . . . may be restricted to minimize circumvention of contribution limits."[55] Id. at 465.

In this same vein, BCRA's ban on soft money donations to national political parties attempts to preclude evasion of, indeed, make absolute, FECA's limits on what persons can contribute to political parties. Under BCRA's revised contribution limits, individuals can give $25,000 per year to a national political party; corporations and unions can contribute $15,000 per year from their qualifying, separate segregated funds, although they can contribute nothing from their general treasury funds. BCRA § 307 (amending 2 U.S.C. 441a(a)(1)). As we demonstrate below, Title I of BCRA prevents the evasion of those contribution limits, which the Supreme Court has already recognized are necessary to prevent corruption and the appearance of corruption. Individuals, corporations, and unions will no longer be able to make additional donations to political parties under the pretense that such dollars are not used for purposes of influencing federal elections.

[55] Likewise, in Colorado I, the Court, in overturning FECA limits on independent expenditures by parties, noted that donors could contribute up to $20,000 to a political party, which the party could then turn around and use for independent expenditures for the benefit of a particular candidate. In light of that fact, the Court stated, 518 U.S. at 617:

> We could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits were a serious matter, might decide to change the statute's limitations on contributions to political parties.

All that remains after this analysis, then, is to determine whether, from the parties' perspective, the contribution limits are "so radical in effect as to render political association ineffective . . . ." Shrink Missouri, 528 U.S. at 397. The political parties thrived before they began accepting hundreds of millions of dollars in soft money contributions, and there is no basis for finding that they will not continue to do so after BCRA takes effect. See infra at 106-07. In sum, BCRA's restrictions on the solicitation, use, and expenditure of nonfederal funds are "'closely drawn' to match a 'sufficiently important interest,'" Shrink Missouri, 528 U.S. at 387-88 (citation omitted), and therefore readily withstand scrutiny under the First Amendment.

B. The Ban on the Solicitation, Receipt and Use of Soft Money by National Political Parties Is Closely Drawn to Prevent the Appearance and Reality of Corruption in Federal Elections.

Section 101(a) of BCRA provides that the national committee of a political party "may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. 441i(a)(1).[56] The provision "[p]rohibits national party committees and entities controlled by the parties from raising, spending, or transferring money that is not subject to the limitations, prohibitions, and reporting requirements of the FECA (i.e., soft money)." 148 Cong. Rec. S1992 (Mar. 18, 2002) (Ex. 1 to statement of Sen. Feingold).

Congress enacted the provision to "put the national parties entirely out of the soft money business." 148 Cong. Rec. H408-09 (Feb. 13, 2002) (Rep. Shays). The ban "covers all activities of the national parties, even those that might appear to affect only non-federal elections," because "the national parties operate at the national level, and are inextricably intertwined with federal

[56] For simplicity, we cite the soft money provisions as they are slated to be codified in the United States Code. See Pub. L. No. 107-155, 116 Stat. 82 (Mar. 27, 2002).

officeholders and candidates, who raise the money for the national party committees." Id. at H409. As a result, "there is a close connection between the funding of the national parties and the corrupting dangers of soft money on the federal political process." Id. Accordingly, Congress concluded that "[t]he only effective way to address this problem of corruption is to ban entirely all raising and spending of soft money by the national parties." Id.

The soft money prohibitions in § 101(a) – which do not impose any limitation on the amount of a national political party's expenditures, but, instead, merely require that such expenditures be financed by funds that are subject to the "contribution" limitations of FECA – impose, in effect, a ban on the *contribution* of "soft money" to national political parties by individuals, corporations, unions, and other entities. As a result, individuals and entities are limited to the "hard money" contribution limitations of FECA with respect to the provision of funds to national political parties. Individuals, for instance, can give up to $25,000 annually to a national political party. See 2 U.S.C 441a(a)(1). Notably, this is much more than the contributions that an individual can give to other political committees (i.e., PACs). Id. In other words, the federal election laws give national political parties a much greater opportunity to obtain contributions than that enjoyed by comparable nonparty committees.

As explained below, both the legislative history and the record developed in this litigation make clear that the national party soft money ban is closely drawn to advance governmental interests that the Supreme Court has already held to be "sufficiently important" to justify regulation of campaign contributions and funding sources. Buckley, 424 U.S. at 25; see also NRWC, 459 U.S. at 207. Because the provision fully comports with constitutional requirements, plaintiffs' challenges fail.

1. The Supreme Court's decision in *Buckley v. Valeo* forecloses plaintiffs' First Amendment challenge to the national party soft money ban.

Plaintiffs' First Amendment challenge to the ban on national party soft money is fatally undermined by the Supreme Court's decision in Buckley. Under BCRA, "soft money" contributions to national parties are eliminated, leaving an individual with the ability to contribute up to $25,000 annually to such a party. As noted above, the Court in Buckley has already upheld FECA's $25,000 ceiling on the aggregate amount of contributions an individual could make during any calendar year. See 424 U.S. at 38. That aspect of Buckley was apparently premised on the Court's understanding that virtually all donations of value to a national political party were "contributions" within the meaning of FECA, and therefore subject to the $25,000 limit.[57] The Court reasoned that this "quite modest restraint" on political activity served to prevent circumvention of the statute's $1,000 limitation on individual contributions to a particular candidate "by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." 424 U.S. at 38 (emphasis added). Thus, the limitation on aggregate contribution amounts was "no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid." Id.

[57] A footnote in Buckley suggests that the Court assumed that FECA would apply to all money raised by political parties. See Buckley, 424 U.S. at 23 n.24. In concluding that it was unnecessary to narrow the meaning of the phrase "for the purpose of influencing an election for Federal office" in the context of FECA's definition of "contribution," the Court stated that "[t]he use of the phrase presents fewer problems in connection with the definition of a contribution [than in other contexts] because of the limiting connotation created by the general understanding of what constitutes a political contribution. Funds provided to a candidate or political party or campaign committee either directly or indirectly . . . constitute a contribution. In addition, dollars given to another person or organization that are earmarked for political purposes are contributions under the Act." 424 U.S. at 23 n.24 (emphasis added); see also id. at 78 (similar definition of "contribution" as including, inter alia, "contributions made directly or indirectly to a candidate, political party, or campaign committee") (emphasis added).

If Congress can constitutionally impose a ceiling on the aggregate amount of contributions of hard money (as it surely can, see Shrink Missouri, 528 U.S. at 387-88, 391-97; Buckley, 424 U.S. at 20-38), and if, as in Buckley, that limitation is constitutional even on the assumption that all funds provided to a party are "contributions," it follows that Congress has the power to restrict or ban contributions of soft money to national political parties. The rationale is similar in both cases: the restriction or prohibition would serve to prevent FECA's limits on individual contributions to candidates from being circumvented, without at the same time unduly impairing the ability of donors to speak or associate freely, or the ability of parties to accumulate funds through permissible contributions. See Shrink Missouri, 528 U.S. at 404 (Breyer, J., concurring) ("Buckley's holding seems to leave the political branches broad authority to enact laws regulating contributions that take the form of 'soft money.'").

The Court's decision in Cal Med provides further, analogous support for the constitutionality of the soft money ban. Cal Med involved a challenge to FECA's limits on contributions to nonparty multicandidate political committees. The plaintiff, California Medical Association, a nonprofit association of California doctors, had formed a multicandidate political committee that was subject to FECA's $5,000 limit on the amount that individuals and unincorporated associations could contribute to it annually. See 2 U.S.C. 441a(a)(1)(C). The Court rejected the plaintiff's First Amendment claim that the danger of corruption (or its appearance) did not apply when the contributions flow to a multicandidate political committee instead of directly to a federal candidate. Noting that Congress had enacted the $5,000 limit on contributions to such committees "in part to prevent circumvention of the very limitations on contributions that this Court upheld in Buckley," 453 U.S. at 197-98, the plurality and the concurrence concluded that the limitation was valid because

"an individual or association seeking to evade the $1,000 limit on contributions to candidates could do so by channeling funds through a multicandidate political committee. Similarly, individuals could evade the $25,000 limit on aggregate annual contributions to candidates if they were allowed to give unlimited sums to multicandidate political committees." Id. at 198; see also id. at 203 (Blackmun, J., concurring in the judgment). The contribution limitation upheld in Cal Med obviously affects the ability of multicandidate political committees to engage in constitutionally protected speech and other activities. Indeed, the limitation on protected activities that results from the $5,000 limitation at issue in Cal Med is more severe than that caused by the $25,000 limitation on contributions to national political parties that is the result of BCRA's soft money ban. But the Court, nevertheless, upheld that contribution limitation in Cal Med based on an anticircumvention rationale. If, as Cal Med holds, the limitation on contributions to multicandidate political commitees is valid as a means of preventing the circumvention of FECA's limitations on contributions to candidates, then it follows that the ban on soft money contributions to parties – which has a much less pronounced incidental impact on political expression – should also be constitutional as an anticircumvention device.

2. The National Party Soft Money Ban Prevents the Appearance and Reality of Corruption.

Even if the validity of the national party soft money ban did not follow as a matter of law from Buckley and Cal Med, it is plainly constitutional. The national party soft money ban furthers several interrelated governmental interests of paramount importance. Most fundamentally, the ban prevents circumvention of the contribution limits and funding-source restrictions set forth in FECA and reduces the actual corruption and the appearance of corruption that the unlimited donation of soft money to the national political parties has created. The provision also reduces the pressure

placed on donors by federal officeholders and party officials to contribute large sums of money, pressure that contributes to the pervasive view that large financial contributions are a prerequisite to meaningful participation in the political process.

As the Supreme Court has explained, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." Shrink Missouri, 528 U.S. at 391. And "Buckley demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible." Id. As the Court explained:

> The opinion [in Buckley] noted that "the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem [of corruption] is not an illusory one." . . . Although we did not ourselves marshal the evidence in support of the congressional concern, we referred to "a number of the abuses" detailed in the Court of Appeals's decision, . . . which described how corporations, well-financed interest groups, and rich individuals had made large contributions, some of which were illegal under existing law, others of which reached at least the verge of bribery. . . . The evidence before the Court of Appeals described public revelations by the parties in question more than sufficient to know why voters would tend to identify a big donation with a corrupt purpose.

Id. (citations omitted). While the record in Shrink Missouri did not indicate that the Missouri Legislature relied upon the evidence and findings accepted in Buckley, the Supreme Court held that the evidence introduced by the parties or relied upon by the lower courts, including affidavits and newspaper articles, was sufficient to justify the challenged statute. 528 U.S. at 393. As with the statute in Shrink Missouri, the interests served by BCRA are neither "novel nor implausible," and there is accordingly no need for an elaborate record to establish the problems of actual and apparent corruption that the statute prevents. Here, however, there is a vast legislative and evidentiary record, and it confirms the strength and validity of the government's interests.

a. The national party soft money ban prevents evasion of federal source and contribution limits.

Soft money contributions to political parties have increased enormously over the past two decades. See supra at 29-36. As Congress recognized, the amount of soft money donated to and utilized by political parties increased from approximately $20 million during the 1980 and 1984 federal elections, to roughly double that amount in the 1988 federal elections, then skyrocketed to approximately $86 million during the 1992 election, to more than $260 million during the 1996 federal elections, and then close to $500 million during the 2000 elections. 147 Cong. Rec. S2445 (Mar. 19, 2001) (Sen. Feingold); see also Donald P. Green, Report on the Bipartisan Campaign Reform Act (Sep. 23, 2002) at 30 & Tbl. 1 [DEV 1-Tab 3, hereinafter D. Green Expert Rep.]. In the 1996 election cycle, the national party committees received approximately 27,000 donations from federally prohibited sources (corporations and labor unions), and the top 50 soft money donors gave donations to ranging from $530,000 to over $3.2 million. Thomas E. Mann, Expert Report of Thomas E. Mann (Sep. 20, 2002) at 22 & Tbl. 5 [DEV 1-Tab1, hereinafter Mann Expert Rep.]. By the 2000 election, donations in amounts of $100,000 or more constituted a "large and significant share" of the total soft money contributions received by the parties. David M. Primo, Rebuttal Expert Affidavit of David M. Primo (Oct. 7, 2002) ¶ 29 [SLF] [hereinafter Primo Rebuttal Expert Rep.]. Approximately 60 percent of the parties' total soft money receipts were donated by approximately 800 entities, with more than 400 of those corporations and unions. Mann Expert Rep. at 24-25.[58] Each of those entities gave at least $120,000, with the largest donor giving almost $6

[58] See, e.g., Luis Navarro Decl. [RNC] ¶ 14 (Service Employees International Union makes soft money donations to federal political parties); Robert Lenhard Decl. [RNC] ¶ 13 & Tab D (documents 000152, 000154-55) (tax filings showing that in 2001 the American Federation of State, County, and Municipal Employees made multiple donations to Democratic national party committees in amounts ranging from $100,000 to $300,000 each).

million. Id. Soft money spending by the national parties in the 1999-2000 election cycle comprised 42 percent of their total spending. Id.

Moreover, the parties have collected and used soft money to directly influence federal elections, primarily through "issue ads." The parties and candidates, in the period leading up to the 1996 election, transformed the soft money regime, Mann Expert Rep. at 17, to focus on this use of soft money. See supra at 30-35. In the 1998 midterm election, the national party congressional campaign committees were fully committed to raising and spending soft money to advance the election prospects of their candidates, and the practice continued in the 2000 election, with the parties making "issue ads, " paid for by state parties using a mix of hard and soft money transferred by the national party, a weapon of choice in promoting their federal candidates, both in the presidential campaign and in House and Senate races in competitive states.[59] These "issue ads" in congressional races typically praised or criticized a candidate for his or her actions or character, then asked the audience to "tell" or "ask" the candidate to do something.[60] Candidates and campaign consultants from both parties agree that these ads, typically run close to and preceding an election, are intended, and in fact do, influence federal elections. See Lamson Decl. ¶¶ 6, 17 [DEV 7- Tab 26] (consultant to Democratic candidates); Chapin Decl. ¶¶ 8, 11 [DEV 6-Tab 12] (Democratic congressional candidate); Bloom Decl. ¶¶ 10-11 [DEV 6-Tab 7] (Democratic congressional

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[59] See Mann Expert Rep. at 24-26; Krasno & Sorauf Expert Rep. at 30-31; see also Bumpers Decl. ¶ 4 [DEV 6-Tab 10]; La Raja Cross Tr. (Oct. 15, 2002) at 73-75, 169, 177-78 & Ex. 3 ( ) (plaintiffs' expert witness);

[60] & Ex. 2-1, 2-2, 2-3, 2-4, 3-1 [DEV 7-Tab 26] (Montana Cong. Dist.); Pennington Decl. ¶¶ 13-14 [DEV 8-Tab 31] (Florida 8th Cong. Dist.); Chapin Decl. ¶¶ 8-11 [DEV 6-Tab 12] (Florida 8th Cong. Dist.); Bloom ¶¶ 10-11 [DEV 6-Tab 7] (Florida 22nd Dist.); ; see also Selected Storyboards for Advertisements Sponsored by Political Parties in the 1998 & 2000 Elections that Did Not Use the "Magic Words"[DEV 48-Tabs 9 & 10]; Selected Party Soft Money Ads, App. A to Defs.' Mem., Tab 3 (video).

candidate); Pennington Decl. ¶¶ 13-14 [DEV 8-Tab 31] (Republican political consultant).[61] Indeed, the evidence demonstrates that donors make little distinction between donations of hard money and soft money; they understand that both types of donations can provide assistance to the campaigns of federal candidates whom they wish to support. See, e.g., supra at 35 & n.21; Mariani v. United States, 80 F. Supp. 2d 352, 386 (M.D. Pa. 1999) (citing affidavit of lobbyist Daniel Murray ¶ 3 [DEV 68-Tab 33]), certified question answered, 212 F.3d 761 (3d Cir. 2000). Further, as discussed supra at 34-35, the fundraising practices employed by the parties (i.e., using Members of Congress to raise soft and hard money simultaneously and participating with candidates in joint fundraising committees that raise both hard and soft money) only serve to confirm that the parties raise soft money for use in influencing federal elections.

Congress recognized that the enormous "soft money loophole has effectively destroyed" the contribution limits established in FECA and upheld by the Supreme Court in Buckley. 147 Cong. Rec. S2448 (Mar. 19, 2001) (Sen. Levin). Contributors can evade the limitations on contributions to a candidate by giving unlimited amounts to the party, which then "turns around and spends that money helping the candidate win election." Id.; see also

Thus, "[s]oft money has become the conduit through which wealthy individuals, labor unions and corporations have in many ways seized control of our political process." 147 Cong. Rec. S2449 (Mar. 19, 2001) (Sen. Collins).

[61] See also Bailey Decl. ¶¶ 9, 11 [DEV 6-Tab 2] (Republican campaign consultant: when creating true issue or party building ads, there is no need to reference a candidate; ads that do and are run near the election are designed to influence the election);

The rise of the soft money system and campaign-related "issue advocacy" funded with soft money has, in short, undermined three longstanding "pillars of federal election law": the banning of "corporate contributions out of concerns that concentrated wealth and the advantages of incorporation could distort and corrupt democratic government"; the banning of labor union contributions "to neutralize the political benefits that might result from their publicly-facilitated organizational strengths"; and the banning of "[l]arge and unlimited individual contributions . . . to prevent the buying of access to or special treatment by government officials." Mann Expert Rep. at 31-32.

b. The national soft money ban reduces the potential for corruption in the political process.

There can be no question that circumvention of federal contribution limits and source prohibitions through unlimited soft money contributions to the political parties has resulted in the appearance of, and potential for, corruption in the political process. Soft money contributions to the political parties are potentially as corrupting as contributions made directly to candidates. As the Supreme Court has recognized, large contributions to the political parties can produce "obligated officeholders," Colorado II, 533 U.S. at 452, just as large contributions made directly to candidates can, see Buckley, 424 U.S. at 26. The political parties "act as agents for spending on behalf of those who seek to produce obligated officeholders," and donors "can use parties as conduits for contributions meant to place candidates under obligation." Colorado II, 533 U.S. at 452. Indeed, contributing money to political parties "is a more effective way of seeking influence than merely giving to individual members of Congress," because one large check to a party committee can provide more access to a larger number of officeholders than writing a greater number of small checks to individual candidates' campaigns. Krasno & Sorauf Expert Rep. at 12. Accord

Randlett Decl. ¶ 13 [DEV 8-Tab 32]. The party committees "are headed by or enjoy close relationships with [the party's] leading officials, individuals who by virtue of their positions, reputations, and control of the legislative party machinery have special influence on their colleagues." Krasno & Sorauf Expert Rep. at 12-13. The "party's involvement does not sterilize the system," because "[e]lected officials know exactly who the big party contributors are." Rudman Decl. ¶ 12 [DEV 8-Tab 34]. Accord Bumpers Decl. ¶ 20; Simpson Decl. ¶ 5 [DEV 9-Tab 38]; McCain Decl. ¶ 6 [DEV 8-Tab 29]; Greenwald Decl.¶ 11 [DEV 6-Tab 16]; Randlett Decl.¶ 10.

Large soft money donors to the party may benefit an officeholder or candidate in numerous direct and indirect ways. Such contributions raised by an officeholder or candidate, for instance, may translate into direct financial support from the party to that candidate or officeholder's campaign. Members of Congress have testified that success in soft money fundraising helped ensure that the party contributed as much in permissible direct contributions, coordinated expenditures, and other support as might be needed in the Members' campaigns. See Bumpers Decl. ¶¶ 10-11; Simon Decl. ¶¶ 9-10 [DEV 9-Tab 37]; see also Billings Decl. Ex. A ¶¶ 7, 10 [DEV 6-Tab 5]. Moreover, the Supreme Court has recognized that donors understand that their contributions to the party will directly benefit in such a fashion the candidates that they support. Colorado II, 533 U.S. at 458; see Wirth Decl. Ex. A ¶¶ 7-10 [DEV 9-Tab 43].

National political party committees also can and do provide significant assistance to the campaigns of federal candidates through the use of soft money. See Mann Expert Rep. at 20, 23, 26; see also Simpson Decl. ¶ 7 ("I always knew that both the national and state parties would find ways to assist my candidacy with soft money."); Randlett Decl. ¶ 7 (soft money "used to help federal candidates win elections."). One direct and significant benefit to a candidate raising soft

money would be through the candidate's adding to the universe of soft money that the party can use, in conjunction with state parties, to run so-called "issue ads" to assist the candidate's campaign.[62] Still another potential direct benefit to a candidate from soft money donations comes through the use of soft money to support voter registration, voter identification, and get-out-the-vote activities, which can have significant effects on the candidate's election prospects. See, e.g., Mann Expert Rep. at 25;

Even if a particular soft money contribution does not directly benefit a given candidate, he or she nonetheless has a substantial interest in promoting a strong ongoing relationship with the donor in light of the overlapping interests of the party and the candidate. __________

Parties exert considerable influence over federal candidates and officeholders, who, in turn, have a significant stake in the success of their parties. As Professor Green explains, parties frequently recruit, endorse, and finance candidates for public office, and "[f]ederal candidates in particular must pass through a sieve of party caucuses or primaries in order to appear on the general election ballot with the mantle of a political party beside their names." D. Green Expert Rep. at 7. Candidates "must typically build a cordial relationship with party leaders" to locate donors and activists who might help them with their campaigns, particularly "if candidates hope to secure direct campaign support from the parties or from prominent figures within the party," who are "apt fundraisers" and "important assets to any campaign organization." Id. at 9. The political parties also "control the resources crucial to subsequent electoral success and legislative

[62] See supra at 71-73; David B. Magleby, Report Concerning Interest Group Electioneering Advocacy and Party Soft Money Activity (Sep. 23, 2002) at 37-38 [DEV 4-Tab 8, hereinafter Magleby Expert Rep.]; Rudman Decl. ¶ 12 . "Issue ads" not only assist a candidate's campaign by virtue of the electioneering message contained in the ads, they also force the candidate's opponent to spend time and resources to counter the ads. See Pennington Decl. ¶ 11; Beckett Decl. ¶¶ 10-11 [DEV 6-Tab 3]; Lamson Decl. ¶ 17.

power" once a candidate is elected to public office. Id. at 7. For example, the parties "organize the legislative caucuses that make committee assignments," choose committee chairs, and elect legislative leadership. Id. at 7-8. Moreover, the success of the party in many respects accrues to the benefit of the officeholders who belong to that party. For example, the majority party enjoys "special procedural prerogatives and staffing resources" in the House and Senate committees and subcommittees. Id. Remaining in the party's good graces is thus critical for a candidate or officeholder.

As the Supreme Court has recognized, a candidate has an incentive to raise funds for his party "to increase personal power and a claim to party leadership." See Colorado II, 533 U.S. at 460 n.23. By engaging in fundraising activities, federal officeholders lengthen "the list of public and party officials who owe them favors." D. Green Expert Rep. at 9. "The ubiquitous role that parties play in the lives of federal officials means that no official can ignore the fundraising ambitions of his or her party." Id. at 15. This is reflected in the fundraising pressure that the national party committees impose on federal officeholders.

The DSCC

maintains a "tally" program that keeps track of hard money that a Democratic Senate candidate helps raise. Colorado II, 533 U.S. at 458;

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The frequent identity of interests between the parties and candidates and officeholders is reflected in the most prominent fundraising tactic employed by both parties, which is in itself potentially corrupting: the reliance on federal officials to raise soft money and the selling of access to federal officials as a reward for making large soft money donations to the party. As the Supreme Court has noted, under current law "substantial donations turn the parties into matchmakers whose special meetings and receptions give the donors the chance to get their points across to the candidates." Colorado II, 533 U.S. at 461. The legislative record establishes that "[t]he Republican and Democratic national political parties that solicit and spend [soft] money use explicit offers of access to the most powerful, elected officials." 147 Cong. Rec. S3138 (Mar. 29, 2001) (Sen. Levin); see also id. at S3248-49 (Apr. 2, 2001) (Sen. Levin); 145 Cong. Rec. S12744-45 (Oct. 18, 1999) (Sen. Levin).

The Thompson Committee Report, which was frequently cited in the legislative debate leading to BCRA's enactment,[64] amply documents the practice of providing access to important officeholders in exchange for large contributions of soft money to political parties.[65] The Committee majority found that the DNC provided large party donors with "access to senior decision

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[64] See, e.g., 147 Cong. Rec. S3138 (Mar. 29, 2001) (Sen. Thompson); 147 Cong. Rec. S2530 (Mar. 19, 2001) (Sen. Lieberman); 147 Cong. Rec. S3138 (Mar. 29, 2001) (Sen. Levin).

[65] The Thompson Committee issued 427 subpoenas for documents or testimony, reviewed 1.5 million pages of documents, took 200 depositions, conducted over 200 witness interviews, held 32 days of hearings, and heard testimony from 72 witnesses. Thompson Comm. Rep. at 15.

makers" and various perks, including "'overnights' at the White House," and "Presidential coffees at the White House (even in the Oval Office)." Thompson Comm. Rep. at 41. The Committee minority agreed, observing that the practice of providing major contributors with "added access to decisionmakers in the legislative and executive branches of government" is "[o]ne of the most troubling aspects of the campaign finance system." Id. at 4573; see also id. at 7968-78 (Minority Views).

The widely publicized "White House coffees" provided a prime example of how large soft money contributions to the Democratic Party translated into meetings with the President in the White House. Id. at 41. The Thompson Committee found that between January 1995 and August 1996, the White House hosted 103 coffees, of which the "vast majority" were attended by the President. Id. About 60 of the coffees were sponsored by the DNC, and 92 percent of the attendees of these coffees were "major Democratic Party contributors." Id.[66]

The Thompson Committee also concluded that "a number of alarmingly unsavory characters gained access to the President in return for campaign contributions." Id. at 41. These included, most famously, Roger Tamraz and Johnny Chung. Mr. Tamraz, an international businessman who was wanted by French police and subject to an Interpol arrest warrant for embezzlement in Lebanon, who seeking U.S. backing for an oil pipeline project in the Caucasus. Id. at 43. When officials at the National Security Council declined to support the project as harmful to U.S. interests, Tamraz contributed $300,000 to various Democratic Party committees in order to get senior party officials to provide him with access to senior U.S. officials that he had previously been denied. Id. at 43,

[66] The Committee found that these guests made contributions totaling $26.4 million during the 1996 election cycle, which represents "an average contribution of over $54,000 per person, with one-third of their total donations, some $7.7 million, given within a month of the donor's attendance at a White House coffee. For example, the five persons attending a coffee on May 1, 1996, in the Oval Office itself each contributed $100,000 to the DNC one week later." Id.

2913-14. Mr. Tamraz candidly admitted that the "only reason" he made those donations was to secure access to the White House and promote his pipeline plan to the President. Id. at 2913. Tamraz's contributions did in fact result in his obtaining access to senior officials, including six private meetings with President Clinton. Id. at 44. The Thompson Committee majority concluded that in addition to obtaining access, "Tamraz had actually persuaded President Clinton, [Presidential advisor Thomas F. "Mack"] McLarty, and [Associate Deputy Secretary for Energy Kyle] Simpson to begin looking for reasons to support Oil Capital's [i.e., Tamraz's] pipeline proposal." Id. at 2925. Tamraz was disappointed that he ultimately did not achieve his objective, and suggested that he should have given more money to obtain the outcome he desired, stating "'I think next time, I'll give 600,000 [dollars].'" Id. at 2930.

Mr. Chung made contributions to the DNC totaling $366,000 during the 1995-96 election cycle and received access to the President and the First Lady event though he was regarded by the National Security Council as a "'hustler'" and told DNC officials that he would use access to the White House to entertain his foreign clients.[67] Id. at 783. The Committee noted that Mr. Chung bluntly acknowledged to the press that he received this access in exchange for his contributions to the DNC: "[t]he White House is like a subway: You have to put in coins to open the gates." Id.

The record developed in this litigation likewise confirms that the parties continue to routinely and openly reward large soft money donors with access to federal officeholders and party leaders, not only through meetings, but also through informal opportunities to discuss issues with officeholders at fundraising events, such as dinners, retreats, golf tournaments, and other events.

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[67] Throughout the legislative history, members of Congress expressed their concern that soft money had become a frequent conduit for access to elected officials not only for Americans, but also for foreign interests. See, e.g., 147 Cong. Rec. S2449 (Mar. 19, 2001) (Sen. Collins); 147 Cong. Rec. S3138 (Mar. 29, 2001) (Sen. Levin); ______

See, e.g.,

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Congress recognized that the acceptance of large donations by national parties and the practice of providing large party donors special access to high-ranking federal officials have a tremendous potential to corrupt the political system, either in the form of donors receiving special treatment by the Legislative or Executive Branches as a quid pro quo for past or future donations, see Buckley, 424 U.S. at 26, or "politicians too compliant with the wishes of large contributors," see Shrink Missouri, 528 U.S. at 389. Senator Levin observed that in Buckley, the Supreme Court found an appearance of corruption "from the size of the contribution alone without even looking at the sale of access. . . . Selling access in exchange for contributions would only take the Court's concerns and justification for limits a step further." 148 Cong. Rec. S2115 (Mar. 20, 2002) (Sen. Levin); see also 147 Cong. Rec. S2530 (Mar. 19, 2001) (Sen. Lieberman); 148 Cong. Rec. H351 (Feb. 13, 2002) (Rep. George Miller); 147 Cong. Rec. S3107-10 (Mar. 29, 2001) (Sen. Feingold).

Respected political scientists endorse Congress's conclusion that soft money donations to the national political parties have the potential to lead to the trading of legislative or policy favors or otherwise corrupt the political process. See Mann Expert Rep. at 28-29, 32-35; Krasno & Sorauf

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We will arrange to have dinner and play golf with key members [of the over 25 Senators planning to attend].").

Expert Rep. at 15; D. Green Expert Rep. at 25-26, 28. The risk of corruption extends beyond the risk that contributions will influence final roll-call votes on legislation; contributions can influence other, less public, aspects of the legislative and policymaking process that "may ultimately be more consequential than roll-call votes." D. Green Expert Rep. at 21. In addition to their roll call votes, members of Congress can express support or opposition on issues by "offe[ring] amendments, mobiliz[ing] support, help[ing] place items on or off the agenda, speed[ing] or delay[ing] action, and provid[ing] special access to lobbyists." Mann Expert Rep. at 33. Such activity need not occur on the chamber floor; it can take place at party leadership meetings and caucuses and in standing committees and subcommittees and conference committees. Id. Similarly, in the Executive Branch influence can be sought regarding appointments and access to decisionmakers. Id. at 34; see also La Raja Cross Tr. at 139-41 (legislative leaders and presidential nominees are able to raise the most money because of their ability to control policy).

Current and former Members of Congress likewise agree that large soft money donations, and the special access to legislators and policymakers that they provide, can corrupt, and have corrupted, the lawmaking process. Former Senator Paul Simon, for example, testified that "[i]t is not unusual for large contributors to seek legislative favors in exchange for their contributions." Simon Decl. ¶ 13. He recounted an incident during the 1995-96 legislative session involving an amendment proposed by Federal Express, which had reportedly contributed almost $1 million in soft money to the political parties in the preceding election cycle. Id. Senator Simon opposed the proposal in the Democratic Caucus, prompting one of his colleagues to respond that "'we've got to pay attention to who is buttering our bread.'" Colorado II, 533 U.S. at 451 n.12; Simon Decl. ¶ 14.

Senator Simon describes this incident as a "clear example of donors getting their way, not on the merits of the legislation, but just because they had been big contributors." Id.

Former Senator Rudman similarly attests that large soft money donors receive special access to lawmakers, and that with this access these donors press elected officials "to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way." Rudman Decl. ¶ 7. Senator Rudman explained that while "[e]lected officials may not intend to be affected by such access," they "receive a disproportionate amount of input and advice from larger, more wealthy contributors," which can "skew their judgment." Id. ¶ 8. Senator Simpson recalled "specific instances when Senators' votes were affected by the fear of losing future donations," and opined that "[d]onations from the tobacco industry to Republicans scuttled tobacco legislation, just as contributions from the trial lawyers to Democrats stopped tort reform." Simpson Decl. ¶¶ 10-11. Senator McCain concurred: "I believe, based on my experience, that elected officials do act in particular ways in order to assist large soft money donors and that this skews and shapes the legislative process." McCain Decl. ¶ 5. He cited several instances in which large soft money donors at least strongly appear to have influenced various stages of the legislative process. Id. ¶¶ 8-12; see also Wirth Decl. Ex. A ¶¶ 16-18.

Testimony from lobbyists, corporate representatives, major donors, and party insiders confirms that corporate donors frequently give soft money to parties to "influence the legislative process for their business purposes." Hickmott Decl. ¶ 9 [DEV 6-Tab 19]; see also

— Kirsch Decl. ¶¶ 11, 14 [DEV 7-Tab 23]; Geshke Decl. ¶¶ 9-10 [DEV 6-Tab 14]; Hassenfeld Decl. ¶¶ 13, 15 [DEV 6-Tab 17]; Hiatt Decl. ¶¶ 11-12 [DEV 6-Tab 18]; Mariani, 80 F. Supp. 2d at 386, 395 (citing affidavit of lobbyist Daniel Murray ¶¶ 7, 12 [DEV 68-

Tab 33]).[69] In short, as Senator Rudman explained, "[l]arge soft money contributions in fact distort the legislative process," and the current system is "inherently, endemically, and hopelessly corrupting." Rudman Decl. ¶¶ 9-10.

c. The national soft money ban reduces the appearance of political corruption.

Whether or not soft money contributions have in fact resulted in political corruption, the legislative record and the record developed in this case demonstrate that the unregulated soft money system has created the appearance of corruption. See Buckley, 424 U.S. at 26-27. As the Supreme Court has made clear, avoiding the appearance of corruption is an important governmental interest; if the government leaves "the perception of impropriety unanswered," the "cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works 'only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.'" Shrink Missouri, 528 U.S. at 906 (citation omitted). Combating the public perception that the national political system has been corrupted by the influence of soft money donors was one of the principal reasons that Congress enacted BCRA. As Senator Feingold observed, "[t]he appearance of corruption is rampant in our system, and it touches virtually every issue that comes before us." 147 Cong. Rec. S2446 (Mar. 19, 2001) (Sen. Feingold); see also id. at S3107 (Sen. Feingold). Other Members of Congress agreed. See, e.g. 148 Cong. Rec.

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S2107-09 (Mar. 20, 2002) (Sen. McCain); 147 Cong. Rec. S3248-49 (Apr. 2, 2001) (Sen. Levin) (referencing articles suggesting links between political contributions and such issues as bankruptcy legislation, ambassadorships, and pardons given by President Clinton); 148 Cong. Rec. S2107 (Mar. 20, 2002) (Sen. McCain);147 Cong. Rec. S2952-53 (Mar. 27, 2001) (Sen. Kerry); 148 Cong. Rec. S2107-09 (Mar. 20, 2002) (Sen. McCain) (referencing Enron scandal); id. at H270 (Feb. 12, 2002) (Rep. Lucas) (same); id. at H272 (Feb. 12, 2002) (Rep. Moore) (same).

Moreover, Congress viewed the soft money ban as a means of reducing public cynicism about politics and increasing public participation in democratic governance. See, e.g., 148 Cong. Rec. H352-53 (Feb. 13, 2002) (Rep. Shays); 148 Cong. Rec. H272 (Feb. 12, 2002) (Rep. Moore); 148 Cong. Rec. H270 (Feb. 12, 2002) (Rep. Boyd); 147 Cong. Rec. H3986 (July 12, 2001) (Rep. Pelosi). Many members of Congress were quick to point to the steady downward trend in voter turnout in the United States over the last four decades, including the closely contested 2000 election, in which only 51 percent of eligible voters cast ballots. Id.; see also Krasno & Sorauf Expert Rep. at 41 (citing Walter Dean Burnham, The Current Crisis in American Politics (Oxford University Press 1983)).

The view that large soft money donations to the political parties carry the potential for corruption is shared widely beyond Capitol Hill. The political parties frequently accuse each other of giving political favors to the largest party donors. D. Green Expert Rep. at 26 n.34 (citing RNC and DNC press releases). The media regularly reports on new legislation by linking the effects that a new policy will have on soft money donors. See Krasno & Sorauf Expert Rep. at 18-21; see also Primo Rebuttal Expert Rep. ¶ 7; Robert Y. Shapiro, Rebuttal to the Expert Reports of Q. Whitfield Ayres and John C. Green (Oct. 7, 2002) at 8-9 [DEV 5-Tab 2, hereinafter Shapiro Rebuttal Expert

Rep.]. The editorial pages and television talk shows are similarly filled with commentary suggesting a connection between large soft money donations and the outcomes of government policy.[70] And most importantly, the public observes the conduct of candidates and federal officeholders and perceives that "policy decisions are bought and sold in Washington." Mann Expert Rep. at 35.

This appearance of corruption has been confirmed through the use of carefully designed public opinion surveys. The evidence is overwhelming that people view large soft money contributions to political parties as contrary to the democratic ideal of honest policy-making. As Mark Mellman and Richard Wirthlin – among the most respected Democratic and Republican pollsters in the country – found in their recent telephone survey of 1,300 adult Americans, the American public believes that "[t]he views of large contributors to parties improperly influence policy and are given undue weight in determining policy outcomes." Mark Mellman & Richard Wirthlin, Research Findings of a Telephone Study Among 1300 Adult Americans (Sep. 23, 2002) at 5 [DEV 2-Tab 5, hereinafter Mellman & Wirthlin Expert Rep.]. The vast majority of Americans (71%) think that Members of Congress sometimes decide how to vote on an issue based the preferences of large party contributors, even when that vote is at odds with the desires of the Member's constituents, and even when the Member thinks that the vote is not in the best interests of the country. Id. at 7-8.[71] This poll conducted by Mellman & Wirthlin provides compelling evidence that the current soft money system creates the appearance of corruption.

[70] A sampling of those articles appears in the record at DEV 44 & 45. See also Meet the Press (1997), App. A to Defs.' Mem., Tab 5, No. 2 (video).

[71] Perhaps more disturbingly, over two-thirds of the American public think that soft money donors to political parties sometimes block decisions by the federal government that could improve people's everyday lives. Mellman & Wirthlin Expert Rep. at 9. Similarly, more than 8 in 10 Americans believe that party soft money donors get "special consideration," compared to the nearly 7 in 10 Americans who believe that people like them are unlikely to receive similar "special consideration." Id. at 9-10.

Moreover, the Mellman & Wirthlin poll is consistent with the findings of Columbia University Professor Robert Y. Shapiro – a leading academic survey methodologist – who reviewed all existing public opinion data touching upon campaign finance practices since 1990 (except for trend data which goes back to the 1940s). Based on his systematic analysis of the available data, Professor Shapiro concluded "unequivocally" that the current campaign finance system's allowance of large soft money contributions by wealthy individuals, interest groups, corporations, and labor unions creates an appearance of corruption. Robert Y. Shapiro, Public Opinion & Campaign Finance (Sep. 18, 2002) at 2, 13-14 [DEV 2-Tab 6, hereinafter Shapiro Expert Rep.]. By banning soft money, BCRA addresses a significant contributing factor to the appearance of corruption.

d. The national party soft money ban reduces the appearance and reality of corruption that result from pressuring donors to make large campaign contributions.

In addition to the potential for officeholders to feel obligated to soft money donors, Congress was concerned about the unseemly pressure placed on donors by powerful federal officeholders and party officials soliciting large contributions. Not only are solicitations made personally by Members of Congress, see supra at 34-35, 71-74, the solicitations are numerous.[72] As Senator Feingold observed, "the fact that we in the Congress are doing the asking is what gives this system an air of extortion, as well as bribery." 147 Cong. Rec. S2446 (Mar. 19, 2001) (Sen. Feingold). Senator Feingold cited an op-ed piece by Senator Zell Miller describing his telephone calls to potential donors: "'[m]ost large contributors understand only two things: what you can do for them and what

[72] Rozen Decl. ¶¶ 6-7 [DEV 8-Tab 33] (once donor begins giving soft money, expectations are raised for "increasingly larger" donations).

you can do to them. I always left that room feeling like a cheap prostitute who'd had a busy day.'" Id. at S2445.[73]

Congress cited evidence that the business leaders who are asked to contribute soft money to the parties accede to requests for large donations because they believe that if they do not, they will lose access to federal officials and may face adverse legislative consequences. See 147 Cong. Rec. S2954-55 (Mar. 27, 2001) (Sen. Feingold) (discussing Committee for Economic Development ("CED") survey of senior executives at large corporations); see also INT 001927-29 [DEV 32-Tab 69] (results of CED survey); INT 012983-85 [DEV 34-Tab 6] (same); 148 Cong. Rec. H273 (Feb. 12, 2002) (Rep. Turner).[74] Moreover, the record in this case confirms that business leaders and other insiders believe "they must participate in the soft money system in order to succeed." Hassenfeld Decl. ¶ 23.[75]

[73] Congress recognized that eliminating national party soft money could reduce the "debilitating and demeaning and distasteful" aspects of a fundraising system, 147 Cong. Rec. S2717 (Mar. 22, 2001) (Sen. Leahy), which demoralize federal officeholders, distract them from their official duties, and discourage people from public service. See also 148 Cong. Rec. H351 (Feb. 13, 2002) (Rep. Shays); id. at H352-53; Thompson Comm. Rep. at 43.

[74] Just how party leaders can pressure corporate executives is illustrated by the fallout from a CED proposal recommending campaign finance reform. After the CED issued its proposal, Senator McConnell, as Chair of the National Republican Senatorial Committee, sent a letter to several CED members expressing his "concern" that CED made a "serious error" in identifying them as backers of the proposal, "which may cause some embarrassment to you if it is not immediately corrected." Kolb Decl. ¶ 6 [DEV 7-Tab 24]. After CED sent a letter in response explaining its position on campaign finance, Senator McConnell sent a follow-up letter expressing his "great concern" that the business leaders would endorse the proposal and, in a handwritten personalized note, urged the executives to withdraw from CED. Several of the executives, "who work for companies that had significant issues pending before Congress at the time, considered the letters a thinly-veiled attempt to intimidate them with the implied message: Resign and keep quiet, or don't count on doing business with Congress." Kolb Decl. ¶ 8 [DEV 7-Tab 24]. See also Herrnson Decl. at 38-39 (Jan. 28, 1999) [DEV 67-Tab 21, from RNC v. FEC, 98-CV-1207 (D.D.C.)] ("Following the Republican takeover of Congress, Majority Whip Tom Delay ... greeted lobbyists with a list that categorized the four hundred largest PACs as 'Friendly' or 'Unfriendly,' depending on the proportion of their contributions that went to Republicans in the 1994 elections, to hammer home the message that groups that wanted access to Republican leaders would be expected to give most of their PAC money to GOP candidates and party committees in the future (Maraniss and Weisskopf 1995)."); "The Top 400: An NRCC PAC Briefer" [DEV 77-Tab 146, from FEC v. Colo. Republican Federal Campaign Comm., No. 89-N-1189 (D. Colo.)].

[75] See Rozen Decl. ¶¶ 8, 10-11 (lobbyist: soft money is given in order to build relationships with Members of Congress and to obtain access to those Members through interaction at fundraising events or more formal, personal meetings; such access increases donor's chances of succeeding with its legislative or policy agenda; donations given to both parties to help ensure access to Members in both parties); Bumpers Decl. ¶¶ 18, 20, 31-34 (former long-time Senator: soft money donors obtain access to Members of Congress; Members know who large donors are; "you cannot be a player in Washington unless you immerse yourself in the current [campaign finance] system"); Greenwald Decl. ¶¶ 8-12 (former Chairman and CEO of United Airlines: corporate donors solicited by Members of Congress feel pressure to accede to requests in order to avoid adverse consequences with respect to donor's access to Members or donor's legislative business and to avoid giving an advantage on these matters to competitors); Randlett Decl. ¶¶ 11-12 (business
(continued...)

Randlett Decl. ¶ 6.

As Senator Feingold remarked, "[w]hen the business leaders and the CEOs of this country believe they are being shaken down and that they are being intimidated into giving these contributions, at a bare minimum, this is the appearance of corruption that the U.S. Supreme Court has identified as the basis for legislative action in this area." 147 Cong. Rec. S2954-55 (Mar. 27, 2001) (Sen. Feingold).

3. The national party soft money ban is closely drawn to achieve its objectives.

The legislative record makes clear that the national party soft money ban is closely drawn to advance the exceedingly important governmental interests described above. Congress was plainly justified in concluding that the national party soft money ban is necessary because experience had shown that allowing the national political parties to solicit and accept soft money seriously compromised the integrity of federal elections and the political process. Over the years during

[75] (...continued)
leader: to enhance chances for business that its issues will be considered and favorably reviewed by Members of Congress, business should give "to both sides"; merely giving to one side is likely to be noticed by the other side);

[76] Even when solicitations are made by party officials rather than by federal officeholders, the solicitations can place tremendous pressure on prospective donors. Solicitations from party leaders are potentially coercive because party leaders are so closely connected to federal officeholders. See McCain Decl. ¶ 21. The Thompson Committee, for example, found that Clinton Administration Deputy White House Chief of Staff Harold Ickes "ran the DNC on a day-to-day basis," that he reported its fundraising and expenditures to the President and the Vice President, and that the DNC's national chairman, Don Fowler, was effectively subordinate to Ickes. Thompson Comm. Rep. at 34. The "party's involvement does not sterilize the system," because "[e]lected officials know exactly who the big party contributors are." Rudman Decl. ¶ 12. Accord Bumpers Decl. ¶ 20; McCain Decl. ¶ 6; Simpson Decl. ¶ 5; Greenwald Decl. ¶ 11; Randlett Decl. ¶ 10.

which it considered campaign finance reform, Congress expressly considered, and rejected, alternatives to the wholesale ban on receipt or use of soft money by the national parties.

Most significantly, Congress considered and rejected the notion that it could achieve its objectives by limiting soft money donations to the national parties rather than banning them entirely. Congress concluded that capping soft money contributions rather than eliminating them would "send[] the campaign finance laws back in time to the very beginning of the 20th century before the Tillman Act banned direct corporate donations to the parties and before Taft-Hartley banned direct labor contributions to the parties." 147 Cong. Rec. S2887-88 (Mar. 26, 2001) (Sen. Hollings) (opposing the "Hagel Amendment," which would have permitted soft money in limited amounts). The House, like the Senate, rejected proposals that would have capped, rather than banned, soft money contributions.[77] At the same time, however, Congress softened any potential adverse consequences to the parties of the soft money ban by increasing the statutory limits on hard money contributions. See 147 Cong. Rec. S3247 (Apr. 2, 2001) (Sen. Levin); see also Magleby Expert Rep. at 56.

C. Plaintiffs' Challenges to the National Party Soft Money Ban Lack Merit.

1. The national party soft money ban does not violate the First Amendment.

Plaintiffs' contention that BCRA's national party soft money ban violates the parties' rights of free speech and association lacks merit. See RNC Compl. ¶¶ 43-51; McConnell Second Amend. Compl. ¶ 99. The ban simply requires national political parties to fund their activities with hard money. To prevail on their claim, plaintiffs must show that restricting the national parties to hard money will prevent them "from amassing the resources necessary for effective advocacy," Buckley,

[77] See, e.g., 148 Cong. Rec. H273 (Feb. 12, 2002) (Rep. Turner); 148 Cong. Rec. H260 (Feb. 12, 2002) (Rep. Meehan); see also H.R. Rep. No. 107-131, at 48-49 (2001) (Minority Views of Steny H. Hoyer, Chaka Fattah, and Jim Davis to accompany H.R. 2356, Bipartisan Campaign Reform Act of 2001).

424 U.S. at 21, or otherwise "render [them] useless." Colorado II, 533 U.S. at 455; see also Shrink Missouri, 528 U.S. at 396. They have made no such showing.

As Senator Feingold explained, "[s]oft money isn't some magic bullet that the parties need to increase voter turnout or voter participation in the democratic process. Throughout much of the 1970s and 1980s, soft money was mostly absent from party fundraising. The parties raised hard money, and ran their parties on hard money. . . . We didn't need soft money then, and we don't need it now." 147 Cong. Rec. S3106-07 (Mar. 29, 2001) (Sen. Feingold); see also Hickmott Decl. ¶¶ 6-7 (former DSCC official: in 1980s and early 1990s, DSCC functioned effectively without soft money). Moreover, "while the bill eliminates soft money, it also increases the hard money limits to the parties and makes those limits subject to indexing," and permits state and local parties, with restrictions, to use soft money to conduct get-out-the-vote and voter mobilization activities. 147 Cong. Rec. S3247 (Apr. 2, 2001) (Sen. Levin).

The evidence in this case confirms Congress's conclusion that the national party soft money ban will not render the parties at the national and state levels "useless." Colorado II, 533 U.S. at 455; see also Shrink Missouri, 528 U.S. at 396. BCRA substantially increases the caps on contributions of hard money to candidates and parties,[78] providing ample assurance that the national soft money ban will not render the parties unable to function. Even under the existing hard money contribution limits, parties have proven able to raise very large amounts of hard money, even with extremely large sources of soft money at their disposal. D. Green Expert Rep. at 30. As Professor

[78] See 2 U.S.C. 441a(a)(1)(A)-(B) (increasing limit on contributions to candidates and candidates' committees from $1,000 to $2,000 for individuals, and increasing limit on individual contributions to national political party committees from $20,000 to $25,000); 2 U.S.C. 441a(a)(1)(D) (increasing limit on contributions to state political party committees from $5,000 to $10,000); 2 U.S.C. 441a(a)(3) (increasing aggregate limit on individual contributions from $25,000 per year to $95,000 per two-year election cycle, of which $37,500 may be contributed to candidates); 2 U.S.C. 441a(h) (increasing limit on contributions by the Republican or Democratic Senatorial Campaign Committees from $17,500 to $35,000). In addition, many of these contribution limits are to be increased annually to account for inflation as reflected in changes in the consumer price index. 2 U.S.C. 441a(c).

Green explains, the "parties have always managed to find a way to raise larger and larger sums of money under hard money constraints." Id. (noting that while soft money donations rose from $86.1 million to $495.1 million between the 1991-92 election cycle and the 1999-2000 election cycle, hard money contributions also rose markedly, from $445 million in 1991-92 to $741 million in 1999-2000). Under BCRA, "state and national parties will be encouraged to broaden their financial base of hard money contributors," and the "dramatic increase in hard money fundraising over the past decade leaves little doubt that this can be achieved." Donald P. Green, The Impact of the BCRA on Political Parties: A Reply to La Raja, Lott, Keller, and Milkis (Oct. 7, 2002) at 5 [DEV 5-Tab 1, hereinafter D. Green Rebuttal Expert Rep.]; see also McCain Decl. ¶ 20; Buckley, 424 U.S. at 21-22 ("The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons.").

Plaintiffs also contend that the national party soft money ban violates their freedom of association because it prevents them from pooling their resources and conferring about the ways in which state and local parties should spend soft money. See McConnell Second Amend. Compl. ¶ 100. Those contentions lack merit. It is unclear whether organizations even have a First Amendment right to associate with other organizations. See DKT Mem. Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 294 (D.C. Cir. 1989) ("Neither this Court nor the Supreme Court has held that the Constitution protects rights of association between two organizations."). Even assuming that such a right exists, BCRA does not infringe it. The national parties remain free to solicit money for, and transfer money to, state and local party committees. BCRA simply requires that the money be raised in accordance with FECA. Thus, the national soft money ban does not prevent the national parties from pooling their resources with their state and local counterparts "in furtherance of

common political goals," Buckley, 424 U.S. at 22; it merely restricts the national parties to contributions that are raised pursuant to the "hard money," i.e., the contribution, limitations of FECA.

Moreover, BCRA does not prevent the national, state, and local parties from conferring about spending priorities or any other issues. There is nothing in BCRA that purports to restrict the ability of party committees to confer about campaign strategy.

2. The national party soft money ban is fully consistent with the Equal Protection component of the Fifth Amendment.

Plaintiffs contend that BCRA violates the Fifth Amendment's equal protection guarantee by placing restrictions on national parties that do not apply to certain other types of organizations and individuals. See RNC Compl. ¶¶ 72-77; McConnell Second Amend. Compl. ¶ 102. It is important to note at the outset that, in many significant respects, Congress has treated political parties more favorably than other entities. For example, political parties are permitted to receive far more extensive contributions from individuals than are non-party political committees. See 2 U.S.C. 441a(a)(1). In addition, political parties can make much greater contributions to federal candidates – in the form of coordinated expenditures – than can other entities or individuals. See 2 U.S.C. 441a(d). And, unlike any other entity, a political party may transfer hard money to other political committees within its party without limitation. See 2 U.S.C. 441a(a)(4). Congress also has given party committees a multi-million-dollar federal subsidy for their quadrennial conventions, see 26 U.S.C. 9008, a windfall that is not available to other entities.

The national soft money ban was enacted explicitly to address the special risk of corruption that unregulated donations to political parties present. Professor Green explains that political parties

"play a distinctive and in many ways privileged role" in the political process, and "[e]ven the largest political action committees cannot begin to approach the political scope, influence, or depth of electoral support characteristic of the Republican or Democratic Parties." D. Green Expert Rep. at 8. Plaintiffs' expert likewise acknowledged that generally no other organizations in American politics are as closely related to federal candidates as the political parties. See La Raja Cross Tr. (Oct. 15, 2002) at 51-53. Indeed, the fundamental goal of political parties is to gain control of the government. Thus, the national parties are principally interested in electing candidates from their members and winning electoral majorities. See D. Green Expert Rep. at 8-9 & n.10. Among other things, the parties recruit and endorse candidates, organize the slate of candidates presented to voters, organize legislative caucuses that assign legislators to committees, and elect legislative leadership. Id. at 7-8. The national party committees, moreover, "are headed by or enjoy close relationships with their leading officials, individuals who by virtue of their positions, reputations, and control of the legislative party machinery have special influence on their colleagues," and donations to the parties – "especially six and seven figure soft money contributions – are usually made by the arrangement with or knowledge of these most influential members of the party." Krasno & Sorauf Expert Rep. at 12-13.

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This unique relationship between the parties and federal candidates and officeholders creates a special danger of corruption stemming from the unregulated solicitation and acceptance of contributions by the political parties, which, Professor Green explains, "attack the very foundation

of electoral accountability." D. Green Rebuttal Expert Rep. at 19. As discussed supra, pt. I.B.2.b., Congress recognized the acute dangers of corruption associated with the parties' extremely close relationship to federal officeholders and influential party leaders, which permits parties to offer access to federal officials in exchange for large contributions, and can put significant pressure on federal officeholders and candidates to court large donors and accommodate their interests. See, e.g., 148 Cong. Rec. S2115 (Mar. 20, 2002) (Sen. Levin). As the Supreme Court has recognized, donors give to the political parties "with the tacit understanding that the favored candidate will benefit," contributions to a party have been "used as a funnel from donors to candidates," and substantial soft money donations "turn the parties into matchmakers whose special meetings and receptions give the donors the chance to get their points across to the candidates." Colorado II, 533 U.S. at 458, 461 & n.25. A vast "'web of relations link[s] major donors, party committees, and elected officials.'" Id. at 463 (quoting Briffault, Political Parties and Campaign Finance Reform, 100 Colum. L. Rev. 620, 652 (2000)). "Free flowing soft money donated to parties and party leaders creates cascades of obligation-driven and favor-currying motives in politicians that are separate from and in tension with electoral outcomes." D. Green Rebuttal Expert Rep. at 19.

In short, the unique problems of perceived and actual corruption posed by soft money donations to the political parties provides a compelling basis for BCRA's focus on the parties. No other entities are as closely identified, or share as many interests, with federal candidates and officeholders. No other entities can offer the same access to a large and diverse group of powerful lawmakers, and no other entities have the same level of influence over federal candidates and

officeholders. Accordingly, the national party soft money ban is fully consistent with equal protection principles.[79]

3. The national party soft money ban is not unconstitutionally vague or overbroad.

Plaintiffs allege that the terms "solicit" and "direct" in 2 U.S.C. 441i(a)(1) are unconstitutionally vague, as is the reference in 2 U.S.C. 441i(a)(2) to "any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee." See RNC Compl. ¶ 89; McConnell Second Amend. Compl. ¶ 103. The FEC's regulations, however, resolve any possible vagueness problems with respect to those provisions. See 11 C.F.R. 300.2 (67 Fed. Reg. 49,064, 49,121 (July 29, 2002)); see also 67 Fed. Reg. 49,081 (July 29, 2002).

A statute is void for vagueness only if it "'forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" United States v. Lanier, 520 U.S. 259, 266 (1997). As the D.C. Circuit has repeatedly explained, "the Constitution does not require unattainable feats of statutory clarity." United States v. Barnes, 295 F.3d 1354, 1366 (D.C. Cir. 2002) (citation omitted). "Since words, by their nature, are imprecise instruments, even laws that easily survive vagueness challenges may have gray areas at the margins." Id. (citation omitted). "Condemned to the use of words, we can never expect mathematical certainty from our language." Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).

[79] Moreover, to the extent plaintiffs contend that the national soft money ban puts the parties at a disadvantage with respect to corporations and unions, their claim plainly lacks merit. As the Supreme Court recognized in Cal Med, an equal protection challenge to the federal campaign laws cannot be sustained when the entity claiming unequal treatment is accorded more favorable overall treatment under those laws. 453 U.S. at 200-01. Thus, the Court rejected an equal protection challenge to FECA's contribution limits applicable to multicandidate committees brought by an unincorporated association because FECA as a whole "imposes far fewer restrictions on individuals and unincorporated associations than it does on corporations and unions." Id. Here, political parties are similarly subject to much less restriction than are corporations and unions, which are prohibited from making any contributions to political candidates or campaigns from their general treasury funds. See 2 U.S.C. 441b(a). A political party committee, by contrast, not only may make contributions to political candidates and campaigns, see 2 U.S.C. 441a(a)(2), but (unlike any other entity) also may transfer hard money to other political committees within its party without limitation, see 2 U.S.C. 441a(a)(4), and can make much higher coordinated expenditures on behalf of a federal candidate or campaign committee than any other entity, see 2 U.S.C. 441a(d).

The Supreme Court has rejected vagueness challenges to the term "solicit" in other political contexts, see Broadrick v. Oklahoma, 413 U.S. 601, 605-08 (1973), and no different result is warranted here. Indeed, the FEC's regulations adopt a narrow definition of that term: "solicit" means "to ask that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value, whether the contribution, donation, transfer of funds, or thing of value, is to be made or provided directly, or through a conduit or intermediary. A solicitation does not include merely providing information or guidance as to the requirement of particular law." 11 C.F.R. 300.2(m) (67 Fed. Reg. 49,122 (July 29, 2002)).

The FEC's regulations furnish similar clarity with respect to the phrase "to direct," which is defined as follows: "to ask a person who has expressed an intent to make a contribution, donation, or transfer of funds, or to provide anything of value, to make that contribution, donation, or transfer of funds, or to provide that thing of value, including through a conduit or intermediary. Direction does not include merely providing information or guidance as to the requirement of particular law." 11 C.F.R. 300.2(n) (67 Fed. Reg. 49,122 (July 29, 2002)).

Moreover, the FEC has established a detailed test to determine whether a committee of a political party "directly or indirectly established, finances, maintains, or controls an entity." See 11 C.F.R. 300.2(c) (67 Fed. Reg. 49,121 (July 29, 2002)). The test sets forth ten factors that must be "examined in the context of the overall relationship between [the] sponsor and the entity," 11 C.F.R. 300.2(c)(2), including whether the sponsoring committee owns controlling interest in voting stock in the entity; has the authority or the ability to participate in the governance of the entity; has authority over decision-making employees or members of the entity; has common or overlapping membership, officers, or employees with the entity, or provides a significant quantity of funds or

goods to the entity; or, in addition, whether there are other circumstances indicating "a formal or ongoing relationship between the sponsor and the entity." 11 C.F.R. 300.2(c)(2)(i)-(x). Similar factors have been in the FEC's regulations for more than a decade. 11 C.F.R. 100.5(g), 110.3 (1990). The regulations also provide a "safe harbor" for the activities of an entity occurring before November 6, 2002, and they state that an entity may request an advisory opinion from FEC to "determine whether the sponsor is no longer directly or indirectly financing, maintaining, or controlling the entity for purposes of this part." 11 C.F.R. 300.2(c)(3), (4).

There is no basis for finding any of the challenged terms vague on their face. As the Supreme Court has made clear, the fact that "[a] statute may leave room for uncertainty at the periphery" does not render it unconstitutionally vague. NRWC, 459 U.S. at 211; see also United States v. Petrillo, 332 U.S. 1, 7 (1947); Barnes, 295 F.3d at 1366. The existence of a theoretical possibility of confusion in some future application is particularly insignificant where, as here, the regulatory agency has provided a mechanism for regulated entities to obtain prompt advisory opinions if necessary. See 2 U.S.C. 437f(a) (requiring FEC to issue advisory opinions no later than 60 days after submission of a complete written request and no later than 20 days after a request submitted within 60 days of a federal election involving the requesting party). Indeed, "to the extent that it offers a prompt means of resolving doubts with respect to the statute's reach, the advisory opinion . . . mechanism written into the FECA . . . under which the Commission is authorized to give advice concerning the Act's application to specific factual situations, . . . mitigates whatever chill may be induced by the statute and argues against constitutional adjudication on a barren record." Martin Tractor v. FEC, 627 F.2d 375, 384-85 (D.C. Cir.) (footnotes omitted), cert. denied, 449 U.S. 954 (1980); see also United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S.

548, 580 (1973); Blount v. SEC, 61 F.3d 938, 948 (D.C. Cir. 1995). Reliance on an FEC advisory opinion "is a defense to criminal prosecution or civil suit." Martin Tractor, 627 F.2d at 385; see 2 U.S.C. 437f(c)(2); FEC v. National Rifle Association, 254 F.3d 173, 185 (D.C. Cir. 2001). Because plaintiffs "may seek and obtain advice from the [FEC] and thereby remove any doubt there may be as to the meaning of the law," National Ass'n of Letter Carriers, 413 U.S. at 580, their facial vagueness challenge lacks merit.

4. The national party soft money ban is fully consistent with the Tenth Amendment and principles of federalism.

Plaintiffs allege that the national soft money ban violates the Tenth Amendment and principles of federalism by prohibiting the national parties from raising or spending soft money in support of state or local elections. See McConnell Second Amend. Compl. ¶ 101; RNC Compl. ¶¶ 32-41. But Congress properly recognized that fundraising by national party committees presents a serious threat to the integrity of the federal political system, even where the fundraising is not ostensibly aimed at providing direct support for the election of a federal candidate. As Representative Shays explained, "[b]ecause the national parties operate at the national level, and are inextricably intertwined with federal officeholders and candidates, who raise the money for the national party committees, there is a close connection between the funding of the national parties and the corrupting dangers of soft money on the federal political process. The only effective way to address this problem of corruption is to ban entirely all raising and spending of soft money by the national parties." 148 Cong. Rec. H408-09 (Feb. 13, 2002) (Rep. Shays). As discussed in detail above, unregulated donations to the parties, like contributions to candidates, have the potential to create obligated federal officeholders. See supra at pt. I.B.2.b. Similarly, solicitations on behalf of

a party, like solicitations on behalf of a candidate, can coerce potential donors to make contributions in order to avoid possible adverse legislative consequences. See supra at pt. I.B.2.d; see also McCain Decl. ¶ 21. Moreover, money is fungible. Even if a national party agreed to use such funds only for activity that affects only state or local elections, the party and federal candidates nonetheless could benefit from such donations: the availability of those funds for state and local election activity would free a corresponding amount of funds for the party to use in election activity to benefit federal candidates. __________ Thus, the ultimate use made of any given contribution or donation to a national party committee can have little relationship to its potential to corrupt the federal political process.

Because the national parties' fundraising practices present a clear danger of corruption at the federal level, Congress had ample authority to regulate those practices, even where the funds raised are to be used to support non-federal election activity. The Elections Clause grants Congress the power to regulate elections of members of the House of Representatives and the Senate, Buckley, 424 U.S. at 14 n.16. The Supreme Court has also recognized "broad congressional power to legislate in connection with the elections of the President and Vice President," Buckley, 424 U.S. at 14 n.16, and congressional authority to regulate party primaries, United States v. Classic, 313 U.S. 299 (1941). For the reasons explained above, the solicitation, receipt, and transfer of soft money by national parties has a direct effect on federal elections and presents a particularly potent opportunity for corruption of federal candidates and officeholders. The national party soft money ban, accordingly, falls squarely within Congress's authority to regulate federal elections and protect the integrity of the federal government.[80/] The Tenth Amendment poses no bar to the valid exercise

[80/] "If the government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption . . . , without legal restraint, then, indeed, is the country in danger." Bourroughs, 290 U.S. at 547 (quoting Ex parte Yarbrough, 110 U.S. 651, 667 (1884)).

of Congress's delegated authority under Article I. See New York v. United States, 505 U.S. 144, 156 (1992); see also Burroughs v. United States, 290 U.S. 534, 544-45 (1934) (regulation of national party committees "in no sense invades any exclusive state power").[81]

5. The prohibition against the solicitation of soft money by officers or agents acting on behalf of a national party committee is constitutional.

The chairs of the California Democratic and Republican parties, who also sit on the executive committees of their respective national party committees, CDP Compl. ¶¶ 12, 16, challenge BCRA's prohibition against "any officer or agent" of a national committee "solicit[ing], receiv[ing], or direct[ing] to another person a contribution, donation, or transfer of funds or any other thing of value, or spend[ing] any funds, that are not subject to the limitations, prohibitions, and reporting requirements" of the Act. 2 U.S.C. 441i(a). Those plaintiffs challenge that provision on the ground that it would prevent them, as officers of national party committees, from raising soft money for their state committees. CDP Compl. ¶ 81, 84-86. That challenge rests on a fundamental misreading of the statute.

The prohibition against officers and agents of the national party committees raising or spending soft money applies only to the extent that the officer or agent is "acting on behalf of such a national committee." 2 U.S.C. 441i(a)(2) (emphasis added). The FEC's implementing regulations confirm what the statutory text already makes plain. See 11 C.F.R. 300.2(b) (67 Fed. Reg. 49,121 (July 29, 2002)) (defining "agent" to refer to any person with actual authority to engage in activities "on behalf of" the relevant organization). And the FEC's explanation of its regulations leaves no doubt that "individuals, such as State party chairmen and chairwomen, who also serve as members

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[81] In any event, the record in this case makes clear that many national party activities and the majority of funds expended by the national parties are spent to influence federal elections, even when those activities and funds are directed to party organizations at the state and local level. See supra at 28-36; infra at 100-02.

of their national party committees can, consistent with BCRA, wear multiple hats, and can raise non-Federal funds for their State party organizations without violating the prohibition against non-Federal fundraising by national parties." 67 Fed. Reg. 49,083 (July 29, 2002). Accord McCain Decl. ¶ 21. Thus, to the extent that the plaintiffs merely seek to solicit money as officers of, and on behalf of, the state party, BCRA poses no obstacle.

II. BCRA'S LIMITATIONS ON THE USE OF SOFT MONEY BY STATE-LEVEL PARTY COMMITTEES ARE CONSTITUTIONAL.

A. The Restrictions on State-Level Committees' Use of Soft Money for Federal Election Activity Are Closely Drawn to Prevent the Appearance and Reality of Corruption in Federal Elections.

In addition to imposing a soft money ban on national party committees, BCRA also restricts the use of soft money by party committees at the state, district, and local levels. Unlike national party committees, however, state-level party committees are not subject to a complete ban on the solicitation and disbursement of soft money. BCRA only requires that they generally use hard money to fund "Federal election activity." 2 U.S.C. 441i(b)(1). BCRA leaves state-level party committees entirely free under federal law to use soft money to fund various activities that affect only state or local elections. See 2 U.S.C. 431(20)(B). Moreover, BCRA includes a provision – the "Levin Amendment" – which authorizes state-level party committees to use soft money in limited quantities to fund certain "Federal election activity" that affects both federal and state elections held on the same day. See 2 U.S.C. 441i(b)(2)(A).[82]

[82] See also 148 Cong. Rec. H409-10 (Feb. 13, 2002) (Rep. Shays). The Levin Amendment permits state-level party committees to use soft money to fund voter registration activity within 120 days of a federal election and get-out-the-vote, voter identification, and generic campaign activity in connection with a federal election. See 2 U.S.C. 441i(b)(2)(A), 431(20)(A)(i), (ii). In most instances, this soft money must be allocated with hard money, 2 U.S.C. 441i(b)(2)(A), and must be raised in increments not exceeding $10,000, 2 U.S.C. 441i(b)(2)(B)(iii). Hard and soft money used pursuant to the Levin Amendment must be raised by the party committee that is spending it, not transferred from another committee. 2 U.S.C. 441i(b)(2)(B)(iv).

BCRA's state-level party provisions are supported by the same interests as the ban on soft money by national party committees. Just as national party committees have been used as conduits for corporations, unions, and large individual donors to evade federal contribution and source limitations, so, too, have state-level party committees. Congress recognized that allowing state-level party committees to continue to expend unlimited amounts of unregulated funds on activity that influences federal elections would leave open a gaping loophole in federal law, allowing donors to evade federal contribution and source limitations, and thereby promote the appearance and reality of political corruption. As Senator McCain explained:

> In order to close the existing soft money loophole and prevent massive evasion of Federal campaign finance laws, the soft money ban must operate not just at the national party level but at the State and local level as well. We have authority to extend the soft money reforms to the State and local level where it is necessary, as it is here, to protect the integrity of Federal elections. Closing the loophole is crucial to prevent evasion of the new Federal rules.

148 Cong. Rec. S2138-39 (Mar. 20, 2002); see also D. Green Expert Rep. at 16-17.

The state-level parties have played a central role in the soft money system from its inception and have materially assisted the national parties' efforts to circumvent FECA by using money raised outside FECA's limitations to support federal election campaigns. The national parties have transferred millions of dollars in soft money to the state parties, over $265 million (roughly one-half of their receipts) in the 2000 election cycle alone. Compare Biersack Decl. Tbl. 8 with id. Tbl. 2. The state parties have used those funds in large measure to support federal election activity, and under fewer restrictions than the national parties. As Dr. Mann explains, "since the advent of soft money, national parties have used state parties primarily as vehicles for advancing federal election campaign objectives. The state parties have been willing partners with their national counterparts

in seizing the opportunities presented by the soft money system to boost their federal candidates." Mann Expert Rep. at 30.

Soft money that the national parties solicit for or transfer to state parties is used to promote the campaigns of federal candidates, frequently through media advertising directed or orchestrated by the national parties. _______

See also supra at 30-35. As Senator Thompson explained, in the 2000 election, "Republican and Democratic Senate candidates set up joint fundraising committees, joining with party committees, to raise unlimited soft money donations. The joint committees then transferred the soft money funds to their Senate party committees, which transferred the money to their state parties, which spent the soft money on 'issue ads,' targeted get-out-the-vote and other activities promoting the federal candidates who had raised the money." 147 Cong. Rec. S3251 (Apr. 2, 2001) (Sen. Thompson); see also id. at S3252-55;

The national parties frequently transfer soft money to state parties because they can achieve a "better ratio of hard to soft dollars than if they spent the money themselves." Magleby Expert Rep. at 37; see also supra at 30-35. Under the FEC's regulations, see 11 C.F.R. 106.5, state parties are able to spend a larger proportion of soft money on activities that may benefit both federal and state candidates than the national parties are permitted to use. Thus, the more favorable ratio applicable to state parties encourages national parties to "launder" a portion of their soft money by

transferring it to state parties, where a larger proportion of it can be used on federal campaign activity. See supra at 30-35; The national parties likewise solicit soft money donations to state party committees to provide assistance to federal campaigns in those states. See, e.g., Hassenfeld Decl. ¶ 9; Kirsch Decl. ¶ 9; Wirth Decl. Ex. A ¶¶ 5-6 (congressman raised money for state party);

Tellingly, the national parties transfer most soft money to states where there are highly competitive federal races. See Magleby Expert Rep. at 37-38, 39; supra at 30-35;

Fowler Decl. ¶ 15; Professor Magleby has found that state party officials "readily acknowledge they are simply 'pass throughs'" for national soft money funds paid to "the vendors providing the broadcast ads or direct mail." Magleby Expert Rep. at 38-39. The national party committees thus "exercise a great deal of control over how soft money is spent," after it is transferred to state parties. Id. at 38; ___ Indeed, in "a few instances where party committees lack confidence in how state parties will utilize the soft money transferred to them, the national parties have spent the money from Washington and foregone the more favorable soft/hard ratio generally available to the state parties." Magelby Expert Rep. at 38.[83]

[83] Even when national parties provide money to assist state candidates, the funds are often used to influence activities affecting federal elections, such as redistricting. State legislatures determine the boundaries of the districts from which members of the House of Representatives are elected, and "[t]he chances that a House incumbent will be ousted by unfavorable district boundaries are often greater than the chances of defeat at the hands of the typical challenger." D. Green Expert Rep. at 11. House members, and the national parties to which they belong, thus "have a tremendous incentive to be attuned to the state legislature and the state party leadership." Id. National party organizations therefore "have been flooding the states with campaign donations, both soft money and hard, to influence the redistricting process." Id. at 12 (citation omitted); ______

The fact that state parties have facilitated the use of soft money by national parties in federal elections demonstrates the crucial need for § 441i(b). If BCRA only regulated soft money contributed to national party committees, donors would simply funnel soft money in unlimited amounts to state and local party committees to influence federal elections, allowing the same circumvention of FECA's contribution and source limits that the national party soft money ban was enacted to eliminate. See D. Green Expert Rep. at 5, 7, 12-13. As a result, "any successful attempt to limit national party soft money activity must perforce prevent easy evasion through surrogates such as state and local parties." Mann Expert Rep. at 31. Thus, BCRA's state-level soft money provisions prevent circumvention of longstanding limitations on contributions to candidates and political parties and the recently enacted national party soft money ban. Indeed, when the Supreme Court in Colorado II explained the role of political parties in circumventing federal contribution limits, it was a state party whose activities were at issue. See 533 U.S. at 439.

At the same time, BCRA leaves open ample opportunity for state-level party committees to raise funds for federal or state election activity. The statute doubles the amount of hard money that persons can contribute to state party committees, from $5,000 to $10,000 per year. See 2 U.S.C. 441a(a)(1)(D). That is highly significant. Even under the $5,000 annual limit under prior law, state party committees proved their ability to raise ever-increasing amounts of hard money: hard money receipts by seven state parties initially involved in this litigation rose from $111.2 million in 1991-92, to $180.5 million in 1995-96, to $309.6 million in 2000. See Biersack Decl. Tbl. 11.

BCRA not only doubles the limit on contributions of hard money to state parties, it allows state-level party committees to use non-federal funds subject to the Levin Amendment for voter registration activity within 120 days of a federal election and voter identification, get-out-the-vote,

and generic campaign activity in connection with a federal election. See 2 U.S.C. 431(20)(A)(i), (ii), 441i(b)(2)(A). And BCRA leaves state and local party committees entirely free to raise and spend soft money in unlimited amounts for activity that has no impact on federal elections. See 2 U.S.C. 431(20)(B).

In short, BCRA "represents a balanced approach which addresses the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties, which then use those funds for Federal election activity. At the same time, the [statute] does not attempt to regulate State and local party spending where this danger is not present, and where State and local parties engage in purely non-Federal activities." 148 Cong. Rec. S2138-39 (Mar. 20, 2002) (Sen. McCain).

BCRA thus ensures that "when a State party is spending money on Federal elections, it has to be hard money." 147 Cong. Rec. S2941 (Mar. 27, 2001) (Sen. Feingold). It accomplishes that goal by generally requiring state parties to use only hard money to fund "Federal election activity." 2 U.S.C. 441i(b)(1). Congress carefully defined "Federal election activity" to reach only activity that affects federal elections and that Congress therefore has a strong interest in regulating. As Senator Feingold explained:

> We all know that voter registration in States helps Federal candidates. Likewise, get out the vote activity and generic campaign activity – like general party advertising – when Federal candidates are on the ballot. Those kind of activities, regardless of how laudable they are and how much we want to encourage them, assist Federal candidates in their election campaigns. So we believe they must be paid for with Federal money. Obviously, so should public communications that refer to a clearly identified federal candidate and support or oppose a candidate for that office.

147 Cong. Rec. S2941 (Mar. 27, 2001); ______

To be sure, some of that activity can affect state as well as federal elections. But that does not divest Congress of authority to regulate it. To the contrary, Congress has long recognized that voter registration and get-out-the-vote activities influence federal elections and accordingly has regulated the funds that can be used for such activities. Since 1979, "FECA unambiguously [has] require[d] that state party committee money spent for . . . volunteer materials, voter registration, and 'get-out-the-vote' activities . . . must be paid for solely from funds subject to the limitations and prohibitions of the FECA" to the extent that the expenditures are to influence a federal election. Common Cause v. FEC, 692 F. Supp. 1391, 1396 (D.D.C. 1987) (emphasis in original); see supra at 24-26. The power of Congress or the FEC to impose contribution limits on the raising of funds used for such activities cannot be seriously questioned. See 692 F. Supp. at 1396 ("It is possible that the . . . [FEC] may conclude that no method of allocation will effectuate the Congressional goal that all monies spent by state political committees on those activities . . . be 'hard money' under the FECA.") (emphasis in original).

The impact of such activities on federal elections is manifest. As Professor Green explains, "[b]ecause the partisan proclivities of the electorate express themselves toward both state and federal candidates, state parties influence federal elections directly even when they mobilize their supporters on behalf of a candidate for state office." D. Green Expert Rep. at 13 (emphasis in original); see also id. at 13-14 (discussing study of 1992 California election revealing that those who voted for a state candidate of a particular party were more than 5 times more likely to vote for a federal Senate candidate of the same party than for the candidate from the opposing party, and that of the more than 2.1 million voters casting a ballot for a Democratic or Republican state assembly candidate, "86.4% cast ballots for the same party when voting for U.S. House candidates"); id. at 14 ("[A] campaign

that mobilizes residents of a highly Republican precinct will produce a harvest of votes for Republican candidates for both state and federal offices."); see also D. Green Rebuttal Expert Rep. at 13-14 (so-called voter mobilization activities such as direct mail and commercial phone banks have a persuasive impact on voters);

Requiring state party committees to use hard money and Levin funds for federal election activity does not impermissibly threaten to render state and local political parties "useless." Shrink Missouri, 528 U.S. at 396. Plaintiffs' own expert concedes that they "will certainly adapt and make themselves players in the campaign process" after BCRA takes effect. La Raja Cross Tr. at 148.

In the years leading up to BCRA, soft money proved easy to obtain, and party committees at all levels accordingly became strongly dependent on such funds. See Green Rebuttal Expert Rep. at 20-22; Biersack Decl. Tbl. 2. In the absence of BCRA, party committees could be expected to follow the path of least resistance and continue to raise large amounts of soft money for use in federal election activity. BCRA, however, was enacted to combat the appearance and reality of corruption that results when parties and their large donors can exploit the soft money loophole and thereby evade federal contribution and source

[84] In any event, only a small proportion of national soft money has been used to fund these activities; the vast majority of soft money raised by the national parties has funded "issue ads" and other activities meant to bolster federal candidates' campaigns. See supra at 34-36. As members of Congress noted, "only a small percentage of party soft money is spent for get-out-the-vote and voter mobilization activities. Only 8.5 cents of every dollar goes to GOTV and voter registration activities while 40 cents of every dollar goes to purchase ads to support or defeat candidates for Federal office." 148 Cong. Rec. S1996 (Mar. 18, 2002) (Sen. Dodd); see also 148 Cong. Rec. H372 (Feb. 13, 2002) (Rep. Moran) (same).

limitations. In light of that problem, state and local party committees have no constitutional entitlement to, or dire need for, soft money to spend on federal election activity:

> Soft money doesn't provide some kind of magic bullet that States need to conduct get out the vote activities, or other activities surrounding Federal elections. The States just need adequate funds to conduct those activities, and McCain-Feingold makes sure that they have the money – we double the amount of hard money an individual can give to a state party and increase the aggregate annual limit a commensurate amount.
>
> We want to help state parties stay a vibrant part of our politics. And there are plenty of activities where States can spend whatever soft money they might raise through their State party. We don't attempt to exert any control over what a State party spends on election activities that are purely directed at State elections. But we do say – a million dollar contribution to the party from Philip Morris, or the AFL-CIO, or Roger Tamraz, or Denise Rich has the appearance of corruption, whether the money is used for phony issue ads attacking candidates, or voter registration.

147 Cong. Rec. S2941 (Mar. 27, 2001) (Sen. Feingold); see also 147 Cong. Rec. S3251 (Apr. 2, 2001) (Sen. Thompson).

B. Plaintiffs' Challenges to the State-Level Party Provisions Lack Merit.

1. The provision barring transfer of nonfederal funds among party committees is constitutional.

Plaintiffs urge that BCRA unconstitutionally prohibits party committees from pooling their resources through the transfer of funds. But BCRA generally does not prohibit transfers of hard money among party committees. Thus, national party committees are free to transfer hard money to state-level committees; state-level committees are free to transfer hard money to national party committees; and state-level committees are free to transfer hard money to each other. BCRA only regulates the transfer of soft or hard money when such funds are raised pursuant to the Levin Amendment for use in federal election activity.

As explained above, notwithstanding the general prohibition on the use of soft money to influence federal elections, the Levin Amendment permits state-level party committees to raise additional funds subject to certain restrictions for use in certain federal election activity. See 2 U.S.C. 441i(b)(2)(A). Thus, the Levin Amendment provides a state-level party committee with an additional means of funding federal election activity: the committee can fund such activity entirely with hard money, which the committee can raise itself or obtain from another party committee; or the committee can invoke the Levin Amendment, and fund such activity in part with soft money.

The Levin Amendment prohibits party committees from aggregating and transferring funds raised pursuant to that provision. See 2 U.S.C. 441i(b)(2)(B)(iv). In the absence of that prohibition, an unlimited number of state-level party committees would be free to work in concert to aggregate substantial sums of soft money from the same contributors. If such aggregation were permitted, the $10,000 limit on donations of funds under the Levin Amendment would be rendered nugatory.

Moreover, the Levin Amendment is "an effort to enhance [plaintiffs'] speech rights," and its restrictions, accordingly, "must be assessed in that light." See Schenck v. Pro-Choice Network, 519 U.S. 357, 383-84 (1997); see also NRWC, 459 U.S. at 210. Congress was not constitutionally required to provide state-level committees with the option of using Levin funds; it could have required those committees to fund federal election activity entirely with hard money. The conditions that Congress placed on the additional funding option that the Levin Amendment provides are entirely reasonable.

Moreover, the limitation on the use of funds that are "directed" or "spent" by or in the name of a national party or a federal candidate or "directed" through fundraising activities conducted jointly by two or more state, local, or district committees, see 2 U.S.C. 441i(b)(2)(C), is not

unconstitutionally vague or overbroad, CDP Compl. ¶ 70. The word "spent" is reasonably understood to refer to the expenditure of funds. And, as explained above, the term "directed" is defined narrowly to exclude "merely providing information or guidance as to the requirement of particular law." 11 C.F.R. 300.2(n); see also 11 C.F.R. 300.2(m) (similarly limiting the term "solicit"). In light of those narrowing definitions, it is clear that discussions that merely "touch on fundraising, campaign strategies, and spending priorities," CDP Compl. ¶ 70, do not trigger FECA's restrictions. For the reasons explained supra, at 99-106, the statute is reasonably designed to "prevent the Levin [A]mendment from becoming a new loophole" in federal campaign finance laws, 148 Cong. Rec. H369-01, H409-10 (Feb. 13, 2002) (Rep. Shays), by ensuring that large sums of money cannot be freely diverted to party committees in circumvention of contribution limits.[85]

2. The restrictions on state-level party committees are fully consistent with the Tenth Amendment and principles of federalism.

Plaintiffs' contention that BCRA's state-level party provisions violate the Tenth Amendment and principles of federalism lacks merit. As the Supreme Court has made clear, Congress has broad authority to regulate federal elections, see Buckley, 424 U.S. at 13-14 & n.16, and BCRA's state-level party provisions regulate conduct that directly affects those elections. As explained above, the limitations on the use of soft money by state-level party committees apply only to "Federal election activity," and that term is defined to encompass only activity with a substantial impact on federal elections. See 2 U.S.C. 431(20)(A), 441i(b)(1). Congress expressly excluded the following state and local election activity from the definition of "Federal election activity": (a) public communications that refer "solely to a clearly identified candidate for State or local office," if the

[85] Plaintiffs also challenge BCRA's prohibition on the transfer of national party hard money to state and local party committees for activity that can be funded with Levin funds. CDP Compl. ¶ 77-79. National party committees, however, are free to transfer hard money in unlimited amounts to their state and local counterparts. All BCRA does is prohibit the use of transferred hard money in federal election activity that is funded pursuant to the Levin Amendment.

communication is not voter registration activity within 120 days of a federal election or get-out-the-vote, voter identification, or generic campaign activity in connection with a federal election; (b) contributions to a candidate for state or local office if the contribution "is not designated to pay for a Federal election activity"; (c) the costs of state, district, and local political conventions; and (d) the costs of "grassroots campaign materials . . . that name or depict only a candidate for State or local office." 2 U.S.C. 431(20)(B). Moreover, FEC's regulations define the activities that constitute federal election activity equally narrowly. 11 C.F.R. 100.24 (67 Fed. Reg. 49,110-11 (July 29, 2002)); see also 67 Fed. Reg. 49,066 (July 29, 2002). Thus, state-level party committees remain free under federal law to raise and spend unlimited sums for use in such nonfederal activity.

As explained above, the conduct that BCRA does regulate is directly linked to Congress's interest in preventing the appearance and reality of corruption in federal elections. Accordingly, the statute falls squarely within Congress's power under Article I to regulate federal elections. Congress's power to regulate elections in which federal candidates are on the ballot, even when state candidates are on the ballot as well, has long been upheld. See, e.g., Ex parte Siebold, 100 U.S. 371, 393 (1879) ("If for its own convenience a State sees fit to elect State and county officers at the same time and in conjunction with the election of representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter."); United States v. Bowman, 636 F.2d 1003, 1011 (5th Cir. 1981) ("When federal and state candidates are together on the same ballot, Congress may regulate any activity which exposes the federal aspects of the election to the possibility of corruption."). Thus, the Tenth Amendment poses no bar to the valid exercise of Congress's delegated authority under Article I. See supra 96-99. And BCRA's state-level party

provisions do not commandeer the state legislative process or conscript state and local officers. Those provisions simply regulate private conduct that affects federal elections.

3. BCRA's restrictions on state-level party committees do not violate equal protection principles.

Plaintiffs contend that BCRA's state-level party provisions violate the equal protection component of the Fifth Amendment because those provisions treat state-level party committees differently from other organizations. McConnell Second Amend. Compl. ¶¶ 104-11; RNC Compl. ¶¶ 68-82; CDP Compl. ¶¶ 72, 73. As explained supra, at pt. I.C.2, however, Congress has in many important respects treated political parties more favorably than similarly situated entities, allowing the parties to make much greater coordinated expenditures with candidates, and to receive far larger contributions from individuals than nonparty political action committees.

More important, parties perform unique functions: they organize the slate of candidates presented to voters; organize legislative caucuses that assign legislators to committees; and elect legislative leadership. D. Green Expert Rep. at 7-8; see supra at pt. I.C.2. And "whether they like it or not . . . [political parties] act as agents for spending on behalf of those who seek to produce obligated officeholders." Colorado II, 533 U.S. at 452. See D. Green Expert Rep. at 8. In light of those threats, it is entirely proper for Congress to treat party committees differently from other organizations. See Cal Med, 453 U.S. at 183 (Congress can conclude that entities having "differing structures and purposes . . . may require different forms of regulation in order to protect the integrity of the political process").

Congress's decision not to index limits on contributions to state-level party committees for inflation does not violate equal protection principles. Contrary to the contention of the California Democratic Party, CDP Compl. ¶¶ 98-106 (Count VIII), Congress was not required to index limits

on contributions to state and local party committees simply because it indexed limits with respect to other individuals and entities that have a greater impact on federal elections.[86] Congress need not "choose between attacking every aspect of a problem or not attacking the problem at all." Dandridge v. Williams, 397 U.S. 471, 486-487 (1970). The legislative line drawn in this case "has some reasonable basis," Schweiker v. Wilson, 450 U.S. 221, 234 (1981) (citations and internal quotations omitted); Congress could reasonably conclude that contributions to state-level committees would generally have less direct impact on federal elections and, therefore, should be treated differently. Such a distinction does not offend the Constitution even if it is "not made with mathematical nicety or because in practice it results in some inequity." Id. (citations and internal quotations omitted).

As the Supreme Court has repeatedly explained, the determination of a particular contribution limit is a matter of legislative judgment that "need not be 'fine tun[ed].'" Shrink Missouri, 528 U.S. at 388 (quoting Buckley, 424 U.S. at 30). Thus, the Court in Buckley showed substantial deference not only to Congress's determination that unlimited campaign contributions threaten democratic values, but also to Congress's judgment regarding the choice of an appropriate dollar limit. As the Court explained, "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." 424 U.S. at 30 (citation omitted). Thus, the Constitution specifies no precise mathematical formula

[86] The following provisions provide for indexing: 2 U.S.C. 441a(a)(1)(A) (contributions to federal candidate or his authorized committee); 2 U.S.C. 441a(a)(1)(B) (contributions to political committees maintained by a national political party and that are not candidate committees); 2 U.S.C. 441a(a)(3) (aggregate limit on contributions by individuals); 2 U.S.C. 441a(b) (limits on expenditures by presidential candidates that accept federal matching funds); 2 U.S.C. 441a(d) (expenditures by national committees, state committees, or subordinate committees of a state committee in connection with federal election campaigns); 2 U.S.C. 441a(h) (contributions to senatorial candidates by the NRSC, DSCC, or the national committee of a political party).

for calculating permissible contribution limits; "the dictates of the First Amendment are not mere functions of the Consumer Price Index."[87] Shrink Missouri, 528 U.S. at 397.

Nor have the plaintiffs made any showing that the limit is "so low as to impede the ability of [parties] to 'amas[s] the resources necessary for effective advocacy.'" Shrink Missouri, 528 U.S. at 397 (quoting Buckley, 424 U.S. at 21). BCRA doubles the hard money contribution limits applicable to state party committees, and plaintiffs provide no reliable evidence that, under those subtantially higher contribution limits, state party committees will be unable to participate meaningfully in federal elections. See supra at 103-04. If Congress concludes at some time in the future that the impact of inflation warrants an adjustment in the contribution limits, it can make such an adjustment at that time, as it did in BCRA by doubling the previous limit on contributions to state parties.

4. The restrictions on state-level party committees are not unconstitutionally vague or overbroad.

Plaintiffs allege that 2 U.S.C. 431(20)(A)(iii) is unconstitutionally vague. That provision bars state-level party committees from using soft money for "a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." The provision uses commonly understood terms to further a clear and legitimate congressional purpose: preventing the use of soft money to promote or attack candidates for federal office and thereby influence federal elections.

As Senator Feingold explained, the provision is not intended to prohibit "spending non-Federal money to run advertisements that mention that [state candidates] have been endorsed

[87] These same precedents foreclose the Paul plaintiffs' complaint that the limit on contributions to political committees that are not political parties is not indexed for inflation by BCRA. See Paul Compl. ¶¶ 5, 56.

by a Federal candidate or say that they identify with a position of a named Federal candidate, so long as those advertisements do not support, attack, promote or oppose the Federal candidate, regardless of whether the communication expressly advocates a vote for or against a candidate." 148 Cong. Rec. S2143 (Mar. 20, 2002) (Sen. Feingold). Simply promoting the candidacy of a state candidate does not trigger the prohibition; the communications must "support[] or oppose[]" the federal candidate. See id. All the statute prevents is "the laundering of soft money through State candidate campaigns for advertisements promoting, attacking, supporting or opposing Federal candidates." Id.; see supra at 104-05. And, by limiting the statute to references to "clearly identified" candidates for federal office, Congress employed a term that both it and the FEC have already defined, see 2 U.S.C. 431(18); 11 C.F.R. 100.17, and that the Supreme Court in Buckley endorsed, see 424 U.S. at 43-44. As Senator Feingold explained, the term "refers to" also is not unconstitutionally vague. 148 Cong. Rec. S2144 (Mar. 20, 2002) ("A communication that 'refers to a clearly identified candidate' is one that mentions, identifies, cites, or directs the public to the candidate's name, photograph, drawing, or otherwise makes an 'unambiguous reference' to the candidate's identity."); see also 11 C.F.R. 100.29(b)(2) (67 Fed. Reg. 65,210 (Oct. 23, 2002)).

Moreover, any uncertainty in the particular application of the statute can be clarified by seeking an advisory opinion from the FEC. See 2 U.S.C. 437f(a); Martin Tractor, 627 F.2d at 384-86; see also National Ass'n of Letter Carriers, 413 U.S. at 580. As explained above, the statute requires the FEC to provide prompt responses to requests for advisory opinions, 2 U.S.C. 437f(a), and reliance on those opinions can provide a defense to criminal or civil enforcement proceedings, 2 U.S.C. 437f(c)(2). The availability of prompt clarification from the agency further undermines plaintiffs' facial vagueness challenge.

The California Democratic Party plaintiffs contend that the phrase "generic campaign activity" as used in the definition of "Federal election activity" is vague and overbroad. CDP Compl. ¶ 57. The FEC's regulations define the term "generic campaign activity" as "a public communication that promotes or opposes a political party and does not promote or oppose a clearly identified Federal candidate or a non-Federal candidate." 11 C.F.R. 100.25 (67 Fed. Reg. 49,111 (July 29, 2002)). That definition is not overbroad. The legislative record and the record in this case make clear that generic activity promoting a political party benefits federal candidates that are nominated by that party, and that such activity has in fact been employed by the major parties for that purpose. See 147 Cong. Rec. S2940-41 (Mar. 27, 2001) (Sen. Feingold) ("[G]et out the vote activity and generic campaign activity – like general party advertising – when Federal candidates are on the ballot . . . assist Federal candidates in their election campaigns. So we believe they must be paid for with Federal money."); supra at 104-06.

Nor is the relevant provision unconstitutionally vague. A reasonable person would understand what constitutes a communication that "promotes or opposes" a political party and not a clearly identified candidate. As clarified in the regulation, the definition is plainly aimed at public communications focusing on the interests of a political party apart from any clearly identified candidate, such as the distribution of literature exhorting voters to "Support Democrats" or "Vote Republican." And any uncertainty regarding the applicability of the statute to particular cases can be clarified by seeking an advisory opinion from the FEC. See supra at 95.

5. The reporting requirements of Title I are constitutional.

BCRA requires that state and local party committees register and file reports with the FEC to the extent they engage in any federal election activity. See 2 U.S.C. 434(e). Those requirements

are "narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." Buckley, 424 U.S. at 81. The provisions are closely drawn to ensure that state and local party committees are in compliance with the reasonable restrictions that BCRA imposes on those committees and that the public is informed of the extent of federal election activity in which those committees engage. The disclosure "provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office." Id. at 66-67 (footnote omitted). Such disclosure also "deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures to the light of publicity." Id. at 67; see also Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 202 (1999).

The Court in Buckley v. Valeo recognized that those governmental interests are substantial and concluded that the federal disclosure requirements at issue in that case were "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." 424 U.S. at 82. For similar reasons, BCRA's disclosure requirements readily withstand scrutiny. Even assuming that compliance with those provisions will require expenditure of funds that could exceed the total revenues of such local party committees, that would not provide a basis for invalidation of the statute, let alone invalidation on its face. Indeed, the Court in Buckley rejected a challenge to political committee recordkeeping requirements that applied to contributions as small as $10 and disclosure requirements for aggregated contributions that totaled as little as $100. 424 U.S. at 82-84; see also id. at 71 (sustaining disclosure requirements notwithstanding its recognition that "the damage done by disclosure to the associational interests of . . . minor parties and their members and to supporters of

independents could be significant"). If independent political committees with limited resources can be required to report their federal financial activity, there is no reason to treat state party committees any differently.

III. BCRA'S SOFT MONEY PROVISIONS CONCERNING TAX-EXEMPT ORGANIZATIONS ARE CONSTITUTIONAL.

BCRA also prohibits all political party committees and entities "directly or indirectly established, financed, maintained, or controlled by" those committees from "solicit[ing] any funds for, or mak[ing] or direct[ing] any donations to" certain tax-exempt organizations described in §§ 501(c) and 527 of the Internal Revenal Code. 2 U.S.C. 441i(d). The provision is intended to "prevent the parties from collecting soft money and laundering it through other organizations engaged in federal electioneering." 148 Cong. Rec. S1992 (Mar. 18, 2002) (Ex. 1 to statement of Sen. Feingold).

The restrictions in § 441i(d) are appropriate "prophylactic measures," see NRWC, 459 U.S. at 210, ensuring that party committees do not funnel funds to tax-exempt organizations as a means of evading BCRA's soft money restrictions and FECA's contribution limitations and disclosure requirements. Congress recognized that tax-exempt organizations have served as virtual arms of party committees, conducting federal electioneering activities to benefit candidates of a particular party without being subject to any of the funding source or contribution limitations or disclosure requirements that are applicable to party committees.[88] For example, the RNC infused Americans for Tax Reform ("ATR"), a 501(c)(4) tax-exempt organization, "with over $4.5 million in the weeks leading up to the 1996 election," and ATR then paid "its bills for a direct mail and phone bank campaign involving four million calls and 19 million pieces of mail explicitly disputing the

[88] See, e.g., 144 Cong. Rec. S1048 (Feb. 26, 1998) (Sen. Glenn); 144 Cong. Rec. S977 (Feb. 25, 1998) (Sen. Levin); 144 Cong. Rec. S898 (Feb. 24, 1998) (Sen. Ford); Thompson Comm. Rep. at 4013; id. at 4568 (Minority Views).

Democrats' position on Medicare as it related to the November 5th election." 144 Cong. Rec. S840 (Feb. 23, 1998) (Sen. Lieberman).[89] The DNC engaged in similar conduct. Id.; see also Kirsch Decl. ¶ 10 (describing solicitations by Democratic party for non-profit groups, e.g., NARAL (see Gallagher Decl. ¶ 1 [RNC]), assisting with 2000 presidential campaign).

In such instances, party committees soliciting funds for and directing funds to tax-exempt organizations circumvent not only FECA's disclosure requirements and funding source and contribution limitations, but also the FEC's allocation regulations, which require all party committees to use a specified proportion of hard money to fund certain types of election-related activity that may affect both state and federal elections. Those allocation rules will continue to govern certain disbursements by state and local party committees. See generally 11 C.F.R. 106.1, 106.7, 300.33; see also 67 Fed. Reg. 49,076-80, 49,098-99 (July 29, 2002). In the absence of BCRA's prohibition against the solicitation or transfer of funds to tax-exempt organizations, state and local party committees would be free to direct soft money to those organizations, which, unlike the party committees, could then use all of those funds for activities that influence federal campaigns.

Moreover, donations solicited or directed by national party committees to benefit tax-exempt organizations that conduct political activities create the same potential problems of corruption that other unregulated fund-raising by the national parties engenders, i.e., the creation of obligated officeholders, and of donors who feel compelled to contribute in order to obtain access to, and consideration from, federal officials.[90] Permitting party committees to provide such assistance to tax-exempt organizations also creates the danger that the party committees may use their ability to

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[89] See also Thompson Comm. Rep. at 4566 (Minority Views).

[90] See supra; see also Bumpers Decl. ¶ 27; Pennington Decl. ¶ 8.

provide such assistance to gain control of such organizations. As Professor Green explains, if this loophole were not closed, party committees could "easily circumvent the new regulatory regime by creating satellite party organizations in the guise of tax-exempt organizations, which would be free to collect donations of unlimited size." D. Green Expert Rep. at 18.

The restrictions on party committee solicitations for and donations to tax-exempt organizations are closely drawn to prevent corruption of the political process and circumvention of FECA. Thus, BCRA permits party committees to solicit funds for, and to make and direct donations to, other political committees, including PACs, which, unlike other tax-exempt organizations, are themselves subject to regulation under FECA. See 2 U.S.C. 441i(d)(2); 2 U.S.C. 431(4). This limitation reflects Congress's recognition that the risk of circumvention and corruption is reduced where the organizations to which party committees direct funds are themselves subject to FECA's contribution limitations, source restrictions, and disclosure requirements.

Plaintiffs suggest that the Tenth Amendment and principles of federalism preclude Congress from prohibiting solicitations and donations by party committees for tax-exempt organizations where the funds are to be used in state elections. See McConnell Second Amend. Compl. ¶¶ 101, 110. But BCRA's scope is limited. With respect to § 501(c) organizations, the statute applies only if the organization make expenditures or disbursements in connection with a federal election. Congress plainly has a valid interest in regulating party solicitations and donations to such organizations. Although BCRA apparently has a broader reach with respect to § 527 political organizations, the statute nonetheless raises no Tenth Amendment concerns. Congress can properly regulate solicitations and donations by political parties to tax-exempt political organizations even if the funds are earmarked for activity that affects only state or local elections. In light of the

fungibility of money, such solicitations and donations can aid federal candidates: the receipt of funds for state and local election activity frees a corresponding amount of funds for the tax-exempt organization to use in election activity to benefit federal candidates. ___

The potential for corruption and circumvention of FECA's requirements exists regardless of the ostensible purpose for which the funds in question are to be used.

Plaintiffs contend that Section 441i(d) violates the equal protection guarantee of the Fifth Amendment because party committees are subjected to restrictions on their solicitation and disbursement of funds that are not imposed upon other entities. See McConnell Second Amend. Compl. ¶¶ 102, 111. As explained in detail, supra at 90-93, however, party committees are not similarly situated to other organizations; the close relationship and identity of interests between party committees and federal candidates and officeholders present unique threats of corruption. Congress properly concluded that party committees should not be allowed to serve as conduits for contributions to tax-exempt entities that could then serve as de facto arms of the parties not subject to the same degree of federal regulation and control.

Plaintiffs contend that § 441i(d) is unconstitutionally vague and overbroad because the terms "solicit" and "direct" are not defined and it is unclear which activities are prohibited. CDP Compl. ¶ 89; see also McConnell Second Amend. Compl. ¶ 103. They also contend that the extension of the prohibition to "any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee" is excessively vague and overbroad. McConnell Second Amend. Compl. ¶ 103. Those arguments lack merit for the reasons previously discussed, supra at 93-96. See 11 C.F.R. 300.2(c), (m), (n).

As explained above, see supra at 95, the ability to conceive of hypothetical circumstances under which a particular term may prove ambiguous does not render the statute unconstitutionally vague, especially where, as here, plaintiffs can "resolv[e] [any] doubts with respect to the [regulation's] reach" by requesting an advisory opinion under 2 U.S.C. 437f. Martin Tractor Co., 627 F.2d at 384-85. Moreover, the FEC's regulations contain safe-harbor provisions allowing party committees to "obtain and rely upon a certification from the [tax-exempt] organization" as to whether it makes expenditures or disbursements "in connection with an election for Federal office" if the certification satisfies certain formal requirements. See 11 C.F.R. 300.37(c)-(d), 300.50(c)-(d), 300.51(c)-(d). Those provisions, and the availability of advisory opinions, eliminate any possible vagueness concerns.

IV. BCRA'S SOFT MONEY RESTRICTION ON FEDERAL CANDIDATES AND OFFICEHOLDERS IS CLOSELY DRAWN TO PREVENT THE APPEARANCE AND REALITY OF CORRUPTION.

BCRA provides that federal candidates and officeholders and entities that they establish, finance, maintain, or control shall not "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. 441i(e)(1)(A). The statute permits federal candidates to raise nonfederal funds for state and local elections, but only in amounts that do not exceed federal contribution limits and only from sources that are permitted to donate to federal campaigns. 2 U.S.C. 441i(e)(1)(B).

Those restrictions, however, do not apply to "the solicitation, receipt, or spending of funds" by a person "who is or was also a candidate for a State or local office solely in connection with such election for State or local office," provided that certain conditions are met. 2 U.S.C. 441i(e)(2).

Moreover, federal candidates and officeholders are permitted to "attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party," 2 U.S.C. 441i(e)(3), and are generally permitted to make a "general solicitation of funds on behalf of" tax-exempt "501(c)" organizations if the solicitation "does not specify how the funds will or should be spent," 2 U.S.C. 441i(e)(4)(A).[91] BCRA also permits federal candidates and officeholders to raise money for voter identification and certain other types of federal election activity if the solicitations are directed to individuals and do not exceed $20,000 in any calendar year. Id. § 441i(e)(4)(B).

As Representative Shays explained, BCRA's restrictions on federal candidates are meant to advance the statute's "key purpose" of stopping "the use of soft money as a means of buying influence and access with federal officials." 148 Cong. Rec. H408 (Feb. 13, 2002) (Rep. Shays). Thus, BCRA "take[s] federal officials, including Members of Congress, out of the business of raising soft money for political parties, political committees and candidates. Federal candidates and officeholders, furthermore, cannot establish or control political committees that raise or spend soft money." Id.

The provision permits federal candidates and officeholders to continue to engage in civic fundraising activities for nonprofit organizations, but restricts the solicitations that can be made to support certain types of federal election activity. See 148 Cong. Rec. H408 (Feb. 13, 2002) (Rep. Shays). Thus, "the bill's solicitation restrictions would not apply to a Federal candidate soliciting funds for the Red Cross explicitly to be used for a blood drive – as this is not an organization whose principal purpose is to engage in get-out-the-vote or voter registration activities and the solicitation

[91] The organization for which funds are solicited cannot be an entity whose principal purpose is to conduct voter registration within 120 days of a federal election or voter identification, get-out-the-vote, and generic campaign activity in connection with a federal election. See 2 U.S.C. 431(20)(A)(i), (ii), 441i(e)(4)(A).

is not expressly to obtain funds for such activities." 148 Cong. Rec. S2139-40 (Mar. 20, 2002) (Sen. McCain).

Congress recognized that prohibiting federal candidates and officeholders from raising or spending soft money was essential to reduce the appearance and reality of corruption resulting from the growth of soft money. BCRA assures that "[t]he official with power, and the candidate seeking to be in a position of power" will not "be able to solicit huge sums of money and sell access to themselves for their campaign or for outside groups." 148 Cong. Rec. S2116 (Mar. 20, 2001) (Sen. Levin).

As described at length above, the solicitation of soft money by federal officeholders and candidates fosters the appearance and reality of corruption because, as with contributions made directly to federal candidates, contributions of soft money to the political parties can benefit federal candidates and officeholders who feel indebted to large donors. See supra at 71-81; Colorado II, 533 U.S. at 452; Buckley, 424 U.S. at 26. The problem is particularly acute when the solicitations are made directly by federal candidates and officeholders themselves, where the link between the federal candidate and the soft money donor is most direct. See supra at 73-76; Greenwald Decl. ¶ 8. The recent prominence of "joint fundraising committees," in which party fundraising committees are sponsored by particular Senators in association with their parties, provides a particularly blatant example of how the candidates and parties understand, and exploit, the fact that party donors often give to the party as a means of benefitting particular campaigns or enhancing relationships with officeholders and candidates. See Magleby Expert Rep. at 37; Buttenwieser Decl. ¶ 8; ______

The potential for corruption is not limited to solicitations made on behalf of national party committees. Federal candidates and officeholders also solicit soft money contributions for state and local party committees and tax-exempt organizations, which can then use those funds for activity that influences federal elections. See Buttenwieser Decl. ¶ 16; Kirsch Decl. ¶¶ 9-10;

Even where federal officeholders and candidates do not solicit soft money for purposes that could directly assist their own campaigns, the appearance and reality of corruption looms large. Federal officeholders and candidates may feel beholden to large donors who make soft money donations at their behest even where the donations are made for purposes that only affect state elections, since such donations can enhance the stature of federal officeholders and candidates with party leadership. See supra at 73 (discussing influence of national parties upon federal candidates and officeholders). Moreover, direct requests for large soft money donations by federal officeholders or candidates for federal office can make potential donors feel they must contribute. Congress recognized, and the record confirms, that donors accede to such funding requests in order to curry favor with the federal candidate who is asking for the solicitation, whether or not the federal candidate will in fact directly benefit from the donation. See supra at 84-86.[92]

—— —— As discussed above, large soft money donations are routinely and openly rewarded with access to legislative leaders, party officials, and federal officeholders. See supra at 75-81. In addition, BCRA's restrictions on federal officeholders and candidates directly advance Congress's interest

[92] See also Randlett Decl. ¶ 9 ("Most soft money donors don't ask and don't care why the money is going to a particular state party . . . [w]hat matters is that the donor has done what the Member asked.");

in reducing the fundraising pressure that has demoralized federal candidates and officeholders, driving many away from public service and diverting incumbent legislators from their public duties. See supra at 85 n.73.

BCRA is closely drawn to promote these important government interests. The statute prohibits federal candidates and officeholders from soliciting soft money in connection with any federal election, while leaving them free to solicit and raise money in compliance with FECA's contribution limits. BCRA permits federal candidates to solicit money in connection with state or local elections, but minimizes the dangers of corruption by restricting these solicitations to the amounts and sources that FECA permits. BCRA also permits federal candidates to attend or speak at fundraising events for state, district, and local committees of a political party. See 11 C.F.R. 300.64 (67 Fed. Reg. 49,131 (July 29, 2002)). In addition, BCRA allows unlimited solicitations on behalf of § 501(c) organizations if the solicitations are general in nature and made on behalf of organizations whose primary purpose is not to engage in federal election activity. 2 U.S.C. 441i(e)(4)(A). Thus, BCRA permits federal candidates and officeholders to make solicitations even for tax-exempt organizations that engage in federal election activity, but imposes reasonable restrictions that reduce the potential for, and appearance of, corruption.[93]

Plaintiffs contend that equal protection principles foreclose Congress from allowing federal candidates and officeholders to make general solicitations for § 501(c) nonprofit organizations without also allowing similar solicitations for political parties and other organizations. McConnell

[93] Plaintiffs suggest that the restrictions on federal candidates and officeholders will prevent them from associating with their state and local party committees. That concern is apparently based on the view that the FEC will construe the terms "solicit" and "direct" so broadly that any discussions between federal candidates and officeholders concerning state and local parties' spending priorities would fall within the prohibition. See CDP Compl. ¶¶ 82-84. As explained above, however, the FEC's regulations narrowly define those terms and eliminate any vagueness concerns. See supra at 93-96; 11 C.F.R. 300.2(m), (n). Plaintiffs also complain that the failure to define "fundraising event" in subsection (e)(3) will chill association between federal candidates and officeholders and the state and local parties. But a reasonable person would understand that the term applies to gatherings where monies are being raised. In fact, BCRA places no restriction on attendance at party events that do not involve the raising of funds. The provision, accordingly, is not void for vagueness.

Second Amend. Compl. ¶ 116. But § 501(c) organizations whose principal purpose is not to conduct federal election activity are quite differently situated from political parties, which regularly engage in such activity. As explained above, voter registration and get-out-the-vote activities influence federal elections and, therefore, are proper subjects of federal regulation. Numerous other activities in which tax-exempt organizations may be involved have no such impact, however. The danger of apparent and actual electoral corruption is obviously greater with respect to solicitations of soft money by organizations that are principally engaged in election activity as opposed to activity that has no impact on elections. Cf. Buckley, 424 U.S. at 79 (political committee definition may be limited to organizations where "major purpose" is electoral). In any event, BCRA allows federal candidates to solicit funds for certain federal election activity, provided the solicitation is made only to individuals and the amount solicited from an individual during the calendar year does not exceed $20,000. 2 U.S.C. 441i(e)(4)(B).

Plaintiffs' contention that the restrictions on federal candidates and officeholders violate the Tenth Amendment and principles of federalism is groundless. As discussed above, the fundraising activities of federal officeholders and candidates affect federal elections and the integrity of the federal government even when the funds solicited are to be used for purposes other than federal election activity. See supra at 124. Moreover, the Tenth Amendment is not implicated because the challenged provision falls squarely within Congress's constitutional authority to regulate federal elections and there has been no commandeering of any state legislative process or state or local officials. See supra at 110.

Plaintiffs Thompson and Hilliard contend that the prohibition against federal candidates and officeholders raising soft money violates equal protection principles and the First Amendment

because it effectively prevents them from competing in the political process. Thompson & Hilliard Compl. ¶¶ 40-41. They allege that they cannot raise sufficient campaign funds by relying on individual contributions in the districts that they represent and that the prohibition against raising soft money therefore violates their equal protection rights and their rights of free speech and free association "because of the disproportionate effect on minority communities of the restrictions on funding available, by reason of BCRA, for voter registration and get out the vote activities." Id.[94]

That argument is mistaken. BCRA's restrictions on federal officeholders make no distinctions on the basis of race or any other suspect classification. The statute accords exactly the same treatment to all federal candidates, regardless of their race or ethnicity. Indeed, plaintiffs allege no intent by Congress to discriminate on the basis of race; they allege only a "disproportionate effect" on "minority communities." Thompson & Hilliard Compl. ¶ 41. In the absence of intentional discrimination, however, plaintiffs can state no equal protection claim. See, e.g., Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). And plaintiffs' claim of discrimination on the basis of wealth ignores the fact that equal protection principles do "'not require absolute equality or precisely equal advantages,'" and do not "'require the State to 'equalize economic conditions.'" Ross v. Moffitt, 417 U.S. 600, 612 (1974) (citations omitted). Further, plaintiffs have not shown that the challenged restrictions will prevent them "from amassing the resources necessary for effective advocacy." Buckley, 424 U.S. at 21.

[94] Plaintiffs Thompson and Hilliard also seek to invoke the First Amendment and equal protection rights of their constituents. Thompson & Hilliard Compl. ¶ 41. But they plainly lack standing to do so. See, e.g., Powers v. Ohio, 499 U.S. 400, 410 (1991) ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties."); NAACP, Boston Chapter v. Harris, 607 F.2d 514, 523 (1st Cir. 1979).

V. BCRA'S LIMIT ON STATE-LEVEL CANDIDATES' USE OF SOFT MONEY FOR CERTAIN PUBLIC COMMUNICATIONS IS CONSTITUTIONAL.

BCRA requires that candidates for state or local office use only hard money to fund "a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." 2 U.S.C. 431(20)(A)(iii), 441i(f)(1). That provision is entirely consistent with the First Amendment. The statute allows state and local candidates to use unlimited amounts of hard money to fund such communications; it simply prohibits candidates from raising soft money to be used for such purposes. Because those communications obviously have a direct effect on federal elections (by supporting or attacking a clearly identified candidate for federal office), it is plainly permissible for Congress to require that such communications be funded with hard money, which can be provided to them by a party committee, if state law permits. Just as Congress can limit state and local party committees to the use of hard money for such communications, Congress can impose similar limitations on state and local candidates, who (like their party counterparts) remain free under BCRA to spend soft money on communications that are confined to state and local candidates. See supra at 109-10. Precisely because that provision is a valid exercise of Congress's power under Article I to regulate federal elections, it fully comports with the Tenth Amendment and principles of federalism.

TITLE II

PRESENTATION BY THE GOVERNMENTAL DEFENDANTS

I. BCRA'S REGULATION OF ELECTIONEERING COMMUNICATIONS IS CONSTITUTIONAL.

The essence of BCRA's regulation of electioneering communications is two-fold. First, it ensures that labor unions and corporations pay for campaign-related ads that are broadcast shortly before an election with funds voluntarily contributed by individuals for that purpose. Second, it achieves full disclosure of whose dollars are spent when unions, corporations, and other individuals and organizations pay for such ads. But it is not a ban on speech. BCRA allows corporations and unions to spend unlimited amounts of funds voluntarily contributed by their constituents to run electioneering ads, and fits comfortably within the long, constitutional tradition, discussed above, of regulating corporate and union spending in the electoral process. Indeed, its fundamental purpose is to restore integrity to the statutory scheme by which Congress has traditionally furthered the compelling governmental interests in preventing the "corrosive and distorting effects of immense aggregations of wealth" on the electoral process, Austin, 494 U.S. at 660 (upholding constitutionality of restriction on corporate independent expenditures), and the potentially corrupting influence of large-scale expenditures by labor unions and corporations on the elected officials who are aided by them. NRWC, 459 U.S. at 209-10 (sustaining proscription of corporate campaign contributions). It also vindicates the interests of voters in knowing who is responsible for the messages they receive about candidates at the height of an election campaign. Buckley, 424 U.S. at 66-68.

Congress designed BCRA's definition of "electioneering communication[s]" to meet the Supreme Court's concerns about the vagueness of certain language in FECA's regulation of independent expenditures. It draws a clear line in the right place, matching the contours of real

campaign speech as it has developed since Buckley. It is narrowly tailored to serve compelling interests, and is constitutional.

In advancing a contrary view of the matter, the Title II plaintiffs, like their co-plaintiffs, assume the burdens associated with bringing a pre-enforcement facial challenge to an act of Congress. The trial declarations submitted by the Title II plaintiffs describe no specific advertisements, referring to particular candidates in specific races, that these plaintiffs intend to produce or air at any specified time or place in the future, that would qualify as electioneering communications under BCRA.[95] For that matter, according to their discovery responses, many of the Title II plaintiffs have never sponsored television or radio broadcasts that would qualify as electioneering communications.[96] Still others, as non-profit organizations operating under § 501(c)(3) of the Internal Revenue Code,[97] are exempted from BCRA's regulation of electioneering communications altogether. See Final Rule, Electioneering Communications, 67 Fed. Reg. 65,190, 65,199-200 (Oct. 23, 2002) (to be codified at 11 C.F.R. 100.29(c)(6)).

Only the AFL-CIO, Chamber of Commerce plaintiffs, NRA, NRWC, and Club for Growth have histories of spending significant sums of money on "issue" ads that would meet BCRA's

[95] —

[96] See Interrogatory Responses of 60-Plus (Interrog. No. 11) [DEV 10-Tab 13]; RealCampaignReform.org (Interrog. No. 11) [DEV 11-Tab 27]; Center for Individual Freedom (Interrog. No. 10) [DEV 10-Tab 12]; National Association of Broadcasters (Interrog. No. 4) [DEV 10-Tab 21]. The only political ad in the ACLU's history that would meet BCRA's criteria for an electioneering communication is a 30-second radio advertisement aired in March 2002, just prior to the commencement of this litigation.

[Tab 3]. — see also USA-ACLU 00001-2 (press releases)

[97] See McConnell Second Amend. Compl. ¶¶ 30, 32, 36, 37 (identifying the Indiana Family Institute, the National Right To Life Committee Education Trust Fund, the Southeastern Legal Foundation, and U.S. d/b/a Pro-English as 501(c)(3) organizations).

criteria for electioneering communications. See supra at 37-49. But none of these plaintiffs, either, has described particular advertisements, referring to clearly identified candidates for federal office, that they plan to run in proximity to one or more federal elections, to which they contend BCRA's application would be unconstitutional. Accordingly, to prevail, the Title II plaintiffs must establish that BCRA's regulation of electioneering communications "could never be applied in a valid manner," or is substantially overbroad. New York State Club Ass'n, 487 U.S. at 11; Taxpayers for Vincent, 466 U.S. at 796-798. As discussed herein, their efforts to shoulder that burden all fail.

In support of their position, plaintiffs assert that Buckley announced a rule of substantive constitutional law that prohibits any regulation of independent political spending on communications that do not involve express advocacy, even though experience has proven that regulation of express advocacy alone is no longer an effective means of preventing free-wheeling electioneering by labor unions and corporations. Plaintiffs argue, in other words, that Buckley leaves Congress no choice but to abandon its century-long commitment to safeguarding the Nation's democratic institutions from the corrupting "influence of political war chests funneled through the corporate [and labor union] form," Austin, 494 U.S. at 659, and to accept the resulting distortion and corruption of the political process as a permanent feature of our democracy.

Nothing in Buckley requires that outcome. As is plain on the face of the decision, Buckley adopted the express advocacy standard as a saving construction of several ambiguous FECA provisions that raised serious questions of unconstitutional vagueness. That standard was never meant to be etched in constitutional stone as an unyielding limitation on the power of Congress to combat emergent threats of corruption of the political process. As discussed herein, the four criteria

by which BCRA defines electioneering communications are perfectly clear, and suffer from none of the vagueness that concerned the Court in Buckley.

Nor can plaintiffs carry their burden of demonstrating that the criteria defining electioneering communications are substantially overbroad. The four criteria that Congress adopted work together to ensure that the statute does not sweep substantially beyond its intended scope of advertising designed to influence the outcome of federal elections, a conclusion that is supported by empirical studies considered by Congress – and which have been validated for purposes of this action – showing that BCRA's definition of electioneering communications applies to only two to six percent of the genuine issue advocacy in which labor unions, corporations and other interest groups engage. As a result of BCRA, labor unions and corporations such as the AFL-CIO, or the Chamber of Commerce, may end up financing some tiny percentage of genuine issue advocacy, involving federal candidates, with funds from their separate segregated accounts, and on equally rare occasions other groups engaged in genuine issue advocacy may have to comply with modest disclosure requirements, but this is an insufficient basis for invalidating the statute as overbroad.

Plaintiffs' quarrels with BCRA's disclosure provisions are equally meritless. BCRA's requirements for disclosure of electioneering communications serve the same voter information, anti-corruption, and enforcement interests that the Supreme Court found sufficiently important in Buckley to sustain FECA's requirements for disclosure of expenditures made by independent groups and organizations. Moreover, the disclosures required under BCRA are less intrusive than the disclosures required under FECA § 434(c), regarding independent expenditures by individuals and groups.

A. BCRA's Requirement That Corporations and Labor Unions Finance Electioneering Communications Using Separate Segregated Funds Serves Compelling Governmental Interests.

1. Independent campaign spending by corporations and labor unions can unfairly distort and influence the electoral process.

BCRA § 203 prohibits corporations and labor unions from making financial outlays of general treasury funds for the purpose of sponsoring electioneering communications, but allows them to support such communications through payments made from their separate segregated funds. While these requirements "do not stifle corporate [and labor union] speech," as regulations touching on political expression they must nevertheless be "narrowly tailored to serve a compelling state interest." Austin, 494 U.S. at 657-58. Section 203 of BCRA is not vulnerable to a facial challenge because it serves a variety of governmental interests that the Supreme Court has often acknowledged to be compelling.

The Supreme Court has repeatedly recognized that the "compelling governmental interest[s] in preventing corruption support[ ] the restriction of the influence of political war chests funneled through the corporate form." Austin, 494 U.S. at 659 (internal quotation marks and citation omitted). "Th[e] concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas." MCFL, 479 U.S. at 257. "Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." Id.

Austin upheld the constitutionality of restricting independent corporate expenditures when it reviewed a Michigan statute modeled on § 441b, see 494 U.S. at 655 n. 1, explaining that

> State law grants corporations special advantages – such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets – that enhance their ability to attract capital and to . . . maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace."

494 U.S. at 658-59 (citation omitted). The Court found this potential for unfair influence sufficient to uphold a ban on financing independent electoral expenditures from corporate treasuries, in the interest of preventing "the corrosive and distorting effects [on the political process] of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." Id. at 659-60. The Austin Court also found that the limit on corporate independent expenditures was narrowly tailored, indeed, "precisely targeted," because it "eliminate[d] the distortion caused by corporate spending" and "ensure[d] that [corporate] expenditures reflect actual public support for the political ideas espoused by corporations," while at the same time allowing corporations to express their political views through a separate segregated fund. 494 U.S. at 660-61; see also MCFL, 479 U.S. at 258-59 (by "requiring that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending, § 441b seeks to ... ensure that competition among actors in the political arena is truly competition among ideas.").

2. Corporations and labor unions have recently engaged in systematic evasion of FECA's restrictions on campaign expenditures to influence the outcome of federal elections.

Campaign expenditures by corporations and labor unions have been regulated for more than 50 years, and for most of this time these entities have abided by the intent of the law that they refrain from using their general treasury funds to influence federal elections. See supra at 37. In recent

years, however, the effectiveness of these statutory limits has been seriously eroded as a flood of unregulated corporate and union campaign expenditures has surged through the "issue advocacy" loophole onto the field of electoral politics. As discussed above, in Buckley, the Supreme Court adopted the "express advocacy" standard as a narrowing construction of two FECA provisions in order to avoid problems of vagueness. 424 U.S. at 39-44, 80-84; see also infra at 148-53. In its discussion, the Court gave examples of "express words of advocacy," including phrases "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject' " id. at 44 n. 52 – what have come to be known popularly as the "magic words." MCFL adopted this same "express advocacy" test in its construction of § 441b. 479 U.S. at 249. By taking advantage of this statutory construction of FECA, and simply omitting words of express advocacy, corporations and unions have begun routinely to pay for campaign-related ads about federal candidates with tens of millions of dollars in general treasury funds that these organizations are supposedly barred from using for the purpose of influencing federal elections.

From June through November, 1996, the AFL-CIO spent $20 million in union dues on broadcast television advertisements attacking incumbent Members of the House. The Coalition, an ad-hoc association representing corporate enterprise, spent another $5 million in corporate treasury funds for advertisements defending these same House Members. See supra at 37-42.

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See supra at 43-46. Together, Citizens for Better Medicare, the Chamber of Commerce, and the AFL-CIO, spent more than $17 million on candidate-centered "issue" ads in the 60 days preceding the November 2000 election, according to conservative estimates. Kenneth H. Goldstein, Amended Expert Report at 14 & Tbl. 3 [DEV 3-Tab 7, hereinafter Goldstein Expert Rep.]. Total spending by corporations, unions, and interest groups on candidate-centered "issue" ads, according to the same estimates, approached $50 million in 2000; nearly 80 percent of these ads were broadcast within 60 days of the November elections. Id. at 17 & Tbl. 1B.[98]

The record overflows with evidence that the purpose of these corporate and labor union expenditures was to influence federal elections. In 1996, the AFL-CIO admitted as much, declaring its intent to launch a broadcast advertising campaign to win back Democratic control of the House of Representatives. See supra at 37-38. Internal documents and testimony establish that the Coalition intended just as firmly to maintain the House Republican majority, as investigations by Congress found. See supra at 40.

Indeed, in 1997, Tanya Metaska, the Executive Director of the NRA Institute for Legislative Action, admitted with remarkable candor that:

> Today, there is erected a legal, regulatory wall between issue advocacy and political advocacy. And the wall is built of the same sturdy material as the emperor's clothing. Everyone sees it. No one believes it. It is foolish to believe there is any practical difference between issue advocacy and advocacy of a political candidate.

[98] These estimates are based on data from the nation's top 75 media markets serving 80 percent of the population, but do not include spending for issue advertisements in media markets serving the remaining 20 percent of the populace. Furthermore, the figures do not attempt to account for the increased cost of advertising time during the peak season of political campaigns. Hence, they understate the actual totals spent on televised issue advocacy. See Goldstein Expert Rep. at 8; see also Annenberg Pub. Policy Ctr., Issue Advocacy Advertising During the 1999-2000 Election Cycle ("Annenberg 2000 Study") at 9 [DEV 38-Tab 22]

> What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day. We engaged in issue advocacy in many locations around the country. Take Bloomington, Indiana, for example. Billboards in that city read,
>
> > "Congressman Hostettler is right. Gun laws don't take criminals off Bloomington's streets. Call 334-1111 and thank him for fighting crime by getting tough on criminals."
>
> Guess what? We really hoped people would vote for the Congressman, not just thank him. And people did. When we're three months away from an election, there's not a dime's worth of difference between "thanking" elected officials and "electing" them.

FEC101–0249-52 [DEV 45-Tab 108].[99]

With an equal lack of inhibition, in 2000 the web page of the Business-Industry Political Action Committee ("BIPAC") publicly advised BIPAC's members on the use of issue ads to help elect their preferred candidates:

> The following pages illustrate the ways the business community can become more involved during the last few weeks of the campaign. There are three areas where business can be most effective in mobilizing its assets for November: Volunteer Involvement, Corporate Communications, and Issue Ads . . . .
>
> **Issue Advocacy.** Corporate dollars, unlimited and unreported. Not limited to TV and radio, this technique urges action on an issue but does not advocate the election or defeat of a candidate, although it mentions the name of a candidate or incumbent and may urge the viewer/reader to call.

FEC101–0245-48 (emphasis added) [DEV 45-Tab 107].

Even when the sponsors of these advertisements are not so forthcoming, their electoral message is unmistakable. No description can substitute for seeing and hearing the ads themselves, and the Court has been provided with a videotape of several dozen illustrative ads. See Selected

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Interest Group Electioneering Ads, App. A to Defs.' Mem., Tab 1.[100] By way of example, in October 1996 a tax-exempt organization called Citizens for Reform broadcast the following ad in Arkansas, where Winston Bryant was running for the Senate:

> Senate candidate Winston Bryant's budget as Attorney General increased 71 percent. Bryant has taken taxpayer-funded junkets to the Virgin Islands, Alaska, and Arizona. And spent about $100,000 on new furniture. Unfortunately, as the State's top law enforcement official, he has never opposed the parole of any convicted criminal, even rapists and murderers. And almost 4,000 Arkansas prisoners have been sent back to prison for crimes committed while they were out on parole. Winston Bryant: Government waste, political junkets, soft on crime. Call Winston Bryant and tell him to give the money back.

Thompson Comm. Rep. at 4007.

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In the context of an election, interest groups may run ads wholly ungermane to the issues they exist to promote – clear indication that their purpose in so doing is to promote candidates, not issues. For example, EMILY's List, a pro-choice group, ran ads during the 2000 election supporting

[100] The record also contains copies of "story boards" of most of the political ads aired in the 1998 and 2000 election cycles; they include a transcription of the words spoken in each ad with snapshots of every fourth second of the accompanying video. See DEV 48.

[101] The two advertisements reproduced above illustrate a common feature of electioneering ads – they each refer to multiple themes (e.g., government waste, political junkets, and crime), suggesting their true purpose is to provide voters with a variety of reasons either to support or to oppose a candidate. Genuine issue ads typically focus on a single issue that their sponsors wish to bring to the public's attention. See Krasno & Sorauf Expert Rep. at 56-57 & n.138.

a candidate's stance on gun control. Beckett Decl. ¶ 13 [DEV 6-Tab 3]; Chapin Decl. ¶ 13 [Tab 12].

see also App. A to Defs.' Mem., Tab 6, Nos. 3-6 (audio).

see also App. A to Defs.' Mem., Tab 1, No. 4 ("Yankee Baby" video). The lack of any nexus between these ads and the legislative agendas of their sponsors shows that they were designed instead to advance an election agenda.

Additional facts about the timing, placement, and content of electioneering ads eliminate any possible doubt that their purpose is to influence federal elections. The Buying Time studies that Congress considered prior to BCRA's enactment,[102] examined all political ads televised by network affiliates and national cable networks in the top 75 media markets, encompassing 80 percent of American households.[103] Under the supervision of Professor Kenneth Goldstein of the University of Wisconsin, teams of students reviewed each ad in the 1998 and 2000 databases, capturing a variety of data such as whether a candidate was identified in the ad, whether "magic words" were

[102] See 148 Cong. Rec. S2116-18, S2136, S2141 (Mar. 20, 2002); 148 Cong. Rec. S1996 (Mar. 18, 2002); 147 Cong. Rec. S3249-55 (Apr. 2, 2001); 147 Cong. Rec. S3112-13 (Mar. 29, 2001); 147 Cong. Rec. S3036, 3042 (Mar. 28, 2001); 147 Cong. Rec. S2847 (Mar. 26, 2001); 147 Cong. Rec. S2457 (Mar. 19, 2001); 146 Cong. Rec. S6046 (Jun. 29, 2000).

[103] See Craig B. Holman & Luke P. McLoughlin, Buying Time 2000 [DEV 46]; Jonathan S. Krasno & Daniel E. Soltz, Buying Time ("Buying Time 1998") [DEV 47]. Both studies were based on data supplied by the Campaign Media Analysis Group ("CMAG"), which monitors local television advertising in the country's top 75 media markets. The CMAG system differentiates between programming and advertising, and when it detects a commercial advertisement it downloads the ad, creating a "storyboard" including the complete text of the audio track and snapshots of every fourth second of the video. Thereafter, the CMAG system automatically recognizes each particular commercial when it is re-broadcast, and maintains a log of when and where it airs. In 1998, the CMAG database included 2,100 political advertisements aired over 300,000 times by candidates, parties, and interest groups. The year 2000 database included almost 3,000 unique ads aired on approximately 840,000 occasions. Buying Time 1998 at 7; Buying Time 2000 at 18-19; see also Goldstein Expert Rep. at 5-6, 8 & n. 4; Krasno & Sorauf Expert Rep. at 53.

used, and whether the purpose of the ad was to provide information about or urge action on a bill or issue, or to generate support for or opposition to a particular candidate. Buying Time 2000 at 18-21; Buying Time 1998 at 6-8; Goldstein Expert Rep. at 6-7 & n. 4; Jonathan S. Krasno & Frank J. Sorauf, Evaluating the Bipartisan Campaign Reform Act (BCRA) (Sep. 23, 2002) at 53 & n.124 [DEV 1-Tab 2, hereinafter Krasno & Sorauf Expert Rep.]. Defendants' experts, Drs. Goldstein and Krasno (the latter the principal author of Buying Time 1998) have reviewed the databases used to generate Buying Time 1998 and 2000, and, after reconciling minor discrepancies they discovered, Goldstein Expert Rep. at 7; Krasno & Sorauf Expert Rep. at 60 n.142 & App. § B, have reproduced the analyses conducted in both Buying Time studies. As a result of these minor reconciliations, their figures differ slightly from the results reported in the two Buying Time studies, but they similarly reveal the unvarnished truth about electioneering ads.

In 1998 and 2000, 78-85 percent of interest group ads referring to candidates ran during the 60 days before the election (as did most of the candidates' own ads). Goldstein Expert Rep. at 17 & Tbl. 4; Krasno & Sorauf Expert Rep. at 57 & App. Tbls. 3, 6. In stark contrast, 82 percent of interest group ads in 2000 that did *not* refer to a candidate ran *outside* the 60-day period before the election. Goldstein Expert Rep. at Tbl. 4. In 1998, 62 percent of such ads ran outside the 60-day period. Krasno & Sorauf Expert Rep., App. Tbl. 3. The prevalence of ads that focus on candidates in the 60 days before an election, and their comparative rarity outside that period, reveal that their sponsors' motives are based on electoral concerns. Further supporting that conclusion, more than 70 percent of the interest group ads in 2000 that the Buying Time coders perceived as electioneering in nature were broadcast within 60 days of the election. Goldstein Expert Rep. at 27-28 & Tbl. 8. Ads actually focusing on issues in the 60 days before the election were uncommon: nearly 80

percent of the group ads that coders viewed as genuine issue ads ran outside that period. Id. In other words, as stated in Buying Time 2000, while groups do pay to air genuine issue ads, they "are rather evenly distributed throughout the year," while their "electioneering ads make a sudden and overwhelming appearance immediately before elections . . .." Id. at 56; see also Krasno & Sorauf Expert Rep. at 57 & App. Tbl. 6; David B. Magleby, Report Concerning Interest Group Electioneering Advocacy and Party Soft Money Activity (Sep. 23, 2002) at 33 [DEV 4-Tab 8, hereinafter Magleby Expert Rep.] ("In 2000, 58% of the interest group electioneering advocacy came in the last two weeks of the election."); cf. Annenberg 2000 Study at 14 (finding that 94% of "issue ads" aired on or after September 1, 2000 "made a case for against a candidate").[104]

Electioneering advertisements are not only heavily concentrated in the few weeks before federal elections, but, like the AFL-CIO's and the Coalition's advertisements in 1996, they are also heavily concentrated in the few jurisdictions with the most competitive election contests, where a small change in public opinion could tip an election one way or the other. This repeated convergence of "issue ads" on a handful of closely contested races sheds further light on the electoral motives of the organizations that pay for them. In the last 60 days before the 2000 election, 85-90 percent of group ads referring to candidates for the House or the Senate aired in competitive districts or states. Goldstein Expert Rep. at 20-21. In the last 60 days before the 1998 election, all group ads referring to Senate candidates ran in five races, four of which were rated "toss ups"; all group ads referring to House candidates ran in 12 races, eight of which were rated "toss ups."

[104] There are significant practical disadvantages to running genuine issue ads during the height of an election campaign, not only because the cost of advertising time rises as the election nears, but also "because an individual interest group's message on a public policy issue is likely to become lost" in the "flood of advertising . . . during the last two months before an election." Goldstein Expert Rep. at 32; ______ Bailey Decl. ¶ 12 [DEV 6-Tab 2]; Therefore, in the absence of an electoral purpose, interest groups can be expected to avoid large-scale issue advertising at the height of an election campaign.

Krasno & Sorauf Expert Rep. at 57 & App. Tbls. 4 and 5. As various interest group personnel explained in interviews conducted in a study by defendants' expert, Professor David Magleby, groups run ads in competitive contests where their "investment" is most likely to make a difference. Magleby Expert Rep. at 31.[105]

Not only do candidate-focused ads in the last two months before an election exhibit a (frequently conceded) electioneering intent, but that is their effect as well. Magleby Expert Rep. at 52-54; Beckett Decl. ¶¶ 11-12, 15; Bloom Decl. ¶¶ 6, 12-17 [DEV 6-Tab 7]; Chapin Decl. ¶¶ 8, 12, 15; Lamson Decl. ¶¶ 10-11, 17 [DEV 7-Tab 26]; Pennington Decl. ¶¶ 17 [DEV 8-Tab 31];

Thus, over the course of the last several federal elections, unions and corporations have brought millions of dollars of their aggregated wealth to bear on the course of the electoral process, threatening the same distortion of the political marketplace by economic might, unrelated to the power of ideas, that supplied a compelling justification for regulation in Austin, 494 U.S. at 659-60.

3. Independent campaign spending by corporations and labor unions can be used to create political debts and to evade limits on soft money donations to political parties.

In NRWC, the plaintiff, a non-profit corporation, asserted that § 441b burdened rights of free association by prohibiting contributions to its separate segregated fund from persons other than its "members." The Court rejected this argument, focusing on the historical purpose of the statute: the prevention of corruption by ensuring that "substantial aggregations of wealth" amassed by labor unions and corporations "are not converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions." 459 U.S. at 207 (citing Bellotti, 435 U.S. at 788 n. 26). Applying the "closest scrutiny," the Court concluded that these interests

[105] See also

CFG000223 [DEV 130-Tab 5] (Club for Growth explaining that its "issue advocacy campaigns can make all the difference in tight races.").

outweighed the rights asserted by the plaintiff, and that the limitation on corporate contributions was "sufficiently tailored to these purposes to avoid undue restriction" upon First Amendment freedoms. Id. at 207. It refused, moreover, to "second-guess a legislative determination as to the need for prophylactic measures where corruption," in the form of improper corporate and labor union influence, "is the evil feared." Id. at 210.

Based on the record available in Buckley, the Supreme Court remarked at that time that independent advocacy by groups and individuals "d[id] not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." 424 U.S. at 46 (emphasis added). The record before this Court concerning corporate and labor union spending now shows otherwise. See Bellotti, 435 U.S. at 788 n.26 ("Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." (citing Buckley, 424 U.S. at 46)).

see Simpson Decl. ¶ 13 [DEV 9-Tab 38].

— Organizations that sponsor issue ads on behalf of elected officials "will later remind Members of how the ads helped get them elected." Simpson Decl. ¶ 13; see Bumpers Decl. ¶¶ 26-27 [DEV 6-Tab 10].

The potentially corrupting uses and influence of corporate or union "issue" advocacy are visible throughout the record. In 1996, the AFL-CIO made certain that officials at the Clinton White House knew of its plans "to ensure that the Democrats could take back the House," and the extent of the resources that organized labor would devote to the task. Thompson Comm. Rep. at 4001.

Similarly, in 1998, prior to a vote on the proposed National Tobacco Policy and Youth Smoking Reduction Act, legislators were advised that major tobacco companies had promised to mount a television ad campaign to support those who voted against the bill. McCain Decl. ¶ 8 [DEV 8-Tab 24]. In a Club for Growth fundraising letter, a freshman congressman expressed his appreciation for the support he received from the Club in his successful 2000 campaign, support which included TV advertising during the final days before the election: "I was a non-establishment candidate who, thanks to . . . the Club for Growth, was able to afford to overcome the attacks from the left by using TV ads to spread our message." CFG000208-09; see also CFG000239 [DEV 130-Tab 5]. According to recent accounts, the rising influence of the National Federation of Independent

Business ("NFIB") is due in part to the gratitude of officeholders it has aided. Juliet Eilperin, Small Business Group Sticks to One Side of Political Fence, Wash. Post, May 16, 2002 [DEV 45-Tab 103]. One newly elected Congressman reportedly told the president of NFIB, which had just spent $100,000 in support of his candidacy, "If it hadn't been for your people, I wouldn't have won." Id.

Moreover, as explained above, see supra at 68-69, the political parties have raised tens, if not hundreds, of millions of dollars from business corporations and unions, and much of that money has then been spent on electioneering ads to influence federal elections. Although Title I of BCRA will eliminate the national parties' ability to raise and spend such soft money in the future, without effective regulation of candidate-centered "issue" advocacy, such as that contained in Title II of the statute, much of this money could simply flow through a different channel but with much the same destination. See Krasno & Sorauf Expert Rep. at 82 ("The history of campaign financing is a story of evolution as participants have sought out and exploited weaknesses in the system."); Randlett Decl. ¶ 17 [DEV 8-Tab 32] ("[O]ne potential method of evading the national party soft money ban . . . would involve a political consultant, working with some level of pre-arrangement with an office holder, say a Senator, and persuading a corporate donor that the Senator wants the donor to run a lot of 'issue ads' that will help him. . . . That kind of proxy, "wink and nod" scenario takes the core soft money transaction as it works today and adds one layer of complexity. But it's not a big layer.").

In other words, without a restriction on corporate and union electioneering ads, large soft money donors could simply donate the money they would have given to political parties to nonprofit corporations and other organizations, instead, which in turn could run the same kind of ads that the parties would have run. As Congress recognized:

> Banning soft money without addressing issue advocacy will simply redirect the flow of undisclosed money in campaigns. Instead of giving soft money to political parties, the same dollars will be turned into "independent" ads. The issues of soft money and independent advertisements go hand in hand and one can not be addressed without the other.

145 Cong. Rec. S12661-62 (Oct. 15, 1999) (remarks of Sen. Feinstein); see also 145 Cong. Rec. S12617 (Oct. 14, 1999). Given the evidence canvassed above, it would be naïve to think that party officials and officeholders would be ignorant of, or not feel a sense of obligation to, those individuals and organizations that funnel large donations through sympathetic interest groups to pay for election ads.

[106] In sum, BCRA's regulation of electioneering communications furthers the compelling governmental interest in preventing corruption of elected officials, not only on its own terms, but also by helping to ensure that the new limits on soft money will not be easily evaded.

4. BCRA serves compelling governmental interests by preventing corporations and labor unions from using their treasuries as "war chests" to finance electioneering ads.

In the final analysis, the scope of political corruption and distortion arising from large-scale expenditures by labor unions and corporations on electioneering *qua* issue advocacy "can never be

[106] The evidence shows that candidates and parties have recommended to their supporters that they make donations to friendly interest groups to help finance issue ads on their behalf. Kirsch Decl. ¶¶ 9-10 [DEV 7-Tab 23] (the "national Democratic party . . . recommended that I donate to certain groups that were running effective ads in the effort to elect Vice-President Gore, such as NARAL"); Bumpers Decl. ¶ 27 ("Members or parties sometimes suggest that corporations or individuals make donations to interest groups that run 'issue ads.'"); CFG000208-09 (solicitation letter); The inducement of candidates, parties and their supporters to direct large donations to issue advocacy groups, as a means of circumventing BCRA's new strictures against soft money, "would almost certainly intensify" in the absence of effective regulation of electioneering communications. See Colorado II, 533 U.S. at 460.

reliably ascertained," but the record of this litigation "demonstrate[s] that the problem is not an illusory one." Buckley, 424 U.S. at 27. These problems arise because corporations and labor unions can spend unlimited general treasury funds on electoral advocacy outside FECA's regulatory framework, and now do so routinely, through the simple expedient of avoiding express advocacy.

Whatever may have been the case in 1976, or even 1986, by 1996 reliance upon "explicit words of advocacy of election or defeat of a candidate" was no longer the touchstone of electoral advocacy during the heat of a campaign, when the public is particularly conscious of its upcoming electoral decisions. See Bailey Decl. ¶ 5; Krasno & Sorauf Expert Rep. at 54.[107] In contemporary political campaigns, even candidates, whose advertising by definition is freighted with electoral purpose, no longer bother with express advocacy. In 1998 and 2000, candidate ads used words of express advocacy only 11 percent of the time. Goldstein Expert Rep. at 16; Krasno & Sorauf Expert Rep. at 53-54; Rudman Decl. ¶ 18 [DEV 8-Tab 34] ("Many, if not most, campaign ads run by parties and by candidates themselves never use such 'magic words.' It is unnecessary."); see also Selected Candidate Ads, App. A to Defs.' Mem., Tab 4 (video); DEV 48-Tabs 5, 6, 9, 10 (selected 1998 and 2000 storyboards of candidate and party ads without "magic words"). Media consultants do not consider it most effective or even advisable to use such "clumsy words as 'vote for' or 'vote against'" when creating political advertisements, Bailey Decl. ¶ 2, instead preferring advertising that makes a case for or against a candidate, but allows viewers to come to their own conclusions about how to cast their votes.[108]

[107] In 2000, 96 percent of the electioneering ads sponsored by interest groups did not use "magic words" of express advocacy. Buying Time 2000 at 29 & Fig. 4-3; Goldstein Expert Rep. at 10, 31 (tables showing that, in 2000, less than 4% of group ads mentioning candidates contained express advocacy (2,876 / (3,663 + 74,204)) see also Krasno & Sorauf Expert Rep., App. Tbls. 1 and 7 (showing that, in 1998, only 7% of group ads mentioning candidates used express advocacy (517/7,377)); Magleby Expert Rep. at 26.

[108] Bailey Decl. ¶ 3 ("All advertising professionals understand that the most (continued...)

Because express advocacy is no longer the rule of campaign advocacy, and has become the rare exception, unions and corporations may now draw freely upon their treasuries to engage in electioneering activities to virtually the same extent as candidates, in disregard of § 441b, and in derogation of the government's compelling interests against distortion and corruption of the political process. Just as Congress passed the Taft-Hartley Act to close the "expenditure" loophole that labor unions, corporations and others had exploited to evade the long-established prohibition on contributions, see supra at 13-15; UAW, 352 U.S. at 580-83, BCRA closes the "issue advocacy" loophole in current law at its most widely exploited point, restoring vitality to the statutory scheme under FECA § 441b. It does so by putting an end to unlimited spending of general treasury funds on the most blatant form of electoral activity in which unions and corporations have recently engaged – TV and radio advertisements that support or attack candidates for office in the weeks immediately preceding a federal election. And in so doing, it serves compelling governmental interests that overcome plaintiffs' facial attack.

B. Buckley Does Not Prohibit Congress from Enacting Narrowly Tailored Anti-Corruption Measures Simply Because They Are Not Limited to Communications Containing Express Advocacy.

Notwithstanding the compelling governmental interests that are promoted by BCRA's regulation of electioneering communications, plaintiffs maintain that these portions of the statute are unconstitutional, per se, because they encompass communications that do not include express advocacy. E.g., McConnell Second Amend. Compl., ¶ 48; NRA Compl., ¶ 70; AFL-CIO Compl., ¶ 14. This claim necessarily rests on a particular view of Buckley, as holding that the First Amend-

[108](...continued)
effective advertising leads the viewer to his or her own conclusion without forcing it down their throat."); Pennington Decl. ¶ 10 ("These final words [in ads], like 'tell,' have become the real 'magic words' in modern campaigning. . . . [T]he real audience for them is not the voters, but the courts who may be examining the ad after the election."); Becker Decl. ¶ 8 ("[N]o particular words of advocacy are needed in order for an advertisement to influence an election."); Lamson Decl. ¶ 6; Bloom Decl. ¶ 5; Bumpers Decl. ¶ 26.

ment categorically bars Congress from adopting any regulation of independent political spending that does not involve express advocacy, no matter what conceivable form that regulation might take, or how important it might be to the integrity of democratic institutions. But Buckley does not sustain that sweeping proposition.

What plaintiffs critically misperceive about Buckley's express advocacy holding is that it arose from statutory interpretation made necessary by the vague language of the 1974 amendments to FECA. The statutory criterion with which the Supreme Court grappled in Buckley rested on the undefined phrase "relative to." The Court found that "so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech." 424 U.S. at 41. The Court's primary concern was that the resulting vagueness about which communications would be considered "relative to" a candidate " 'blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.' " Id. at 43 (quoting Thomas v. Collins, 323 U.S. 516, 535 (1945)). The Court was similarly concerned that the vague phrase "relative to" " 'puts the speaker . . . wholly at the mercy of the varied understanding of his hearers . . . .'" Id. In the face of this vast uncertainty, the Buckley Court adopted the express advocacy standard as a clarifying construction: to "preserve the provision against invalidation on vagueness grounds, § 608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." Id. at 44 (footnote omitted). In similar fashion, the Court construed FECA's requirement for disclosure of individual expenditures made "for the purpose of influencing" a federal election to include only those financial outlays made for communications containing express advocacy, to "avoid the shoals of vagueness" and to "insure that the reach of [the statute was] not impermissibly broad." Id. at 78-80.

Likewise, in MCFL, when the Court construed § 441b's prohibition on the use of a corporation's general treasury funds to finance independent expenditures "in connection with any election" for federal office, the Court found similar constitutional problems with this vague statutory language. Relying on its reasoning in Buckley, the Court held that this provision "requires a similar construction," 479 U.S. 248-49 (emphasis added), thus again making clear that it was construing particular, unclear statutory language, not ruling in the abstract on requirements of the First Amendment. Thus Buckley and MCFL themselves explained that the express advocacy requirement was an "exacting interpretation of . . . statutory language necessary to avoid unconstitutional vagueness," 424 U.S. at 45, not a substantive constitutional requirement applicable to any regulation of campaign-related expenditures.

In other words, a straightforward reading of Buckley (and MCFL) reveals that the Court was engaged in the familiar exercise of construing a statute in order to avoid deciding questions about its constitutionality, see Zadvydas v. Davis, 533 U.S. 678, 689 (2001); United States v. Harriss, 347 U.S. 612, 618 (1954), as the Supreme Court and lower courts, including this one, have recognized. Osborne v. Ohio, 495 U.S. 103, 120 n.14 (1990); FEC v. Survival Education Fund, Inc., 65 F.3d 285, 291 n. 2 (2d Cir. 1995); Faucher v. FEC, 928 F.2d 468, 470 (1st Cir. 1991); FEC v. Christian Coalition, 52 F. Supp. 2d 45, 87 n.50 (D.D.C. 1999). Nothing in the judicial act of placing a saving construction on particular statutory language prevents Congress from later determining, on the basis of experience, and careful deliberation, that a different approach to a problem with which the legislature may legitimately be concerned is necessary, and constitutional. To the contrary, the Supreme Court has repeatedly made a point of stating otherwise. In U.S. v. Thirty-Seven Photographs, 402 U.S. 363, 373 (1971) (plurality opinion), the Court examined a customs statute

that prescribed no time limits following the seizure of imported property for the initiation and completion of forfeiture proceedings. The Court found it constitutionally necessary to construe the law to require that "forfeiture proceedings be commenced within 14 days and completed within 60 days . . . ." But the plurality also acknowledged Congress's power to revisit the limits it had inferred:

> Of course, we do not now decide that these are the only constitutionally permissible time limits . . . . We do nothing in the case but construe § 1305(a) in its present form, fully cognizant that Congress may re-enact it in a new form specifying new time limits, upon whose constitutionality we may then be required to pass.

Id. at 374. Similarly, in U.S. v. 12 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123, 130 n.7 (1973), the Court expressed serious constitutional misgivings about the definition of obscene material contained in the same customs statute, and explained its readiness to construe vague statutory terms "as limiting regulated material to patently offensive representations" of specific "hard core" conduct. "Of course," the Court added, "Congress could always define other specific 'hard core' conduct." Id.

Buckley's treatment of expenditures by independent political committees also refutes the plaintiffs' absolutist interpretation that political spending not involving express advocacy necessarily lies beyond the power of Congress to regulate. When the Court described the "line-drawing problems" posed by § 434(e), which required individuals and organizations to disclose their expenditures made "for the purpose of influencing" an election, it observed that placing that same disclosure requirement on political committees did not create similar difficulties. 424 U.S. at 78-79. Expenditures by political committees – organizations whose major purpose is the election of candidates – could safely be assumed to be "campaign related" without engrafting an "express advocacy" limitation onto the definition of expenditure in that context. Id. at 79. Other courts have held accordingly that an express advocacy limitation is unnecessary under circumstances where the

category of expenditures in question may confidently be viewed as "campaign related." See North Carolina Right To Life, Inc. v. Leake, 108 F. Supp. 2d 498, 505-07 (E.D.N.C. 2000) (registration and disclosure requirements may be placed on groups whose major purpose is electioneering without regard to Buckley's express advocacy standard); Christian Coalition, 52 F. Supp. 2d at 87-88 & n.50 (Buckley does not require that regulation of coordinated expenditures for political expression be limited to express advocacy). As discussed herein, "electioneering communications" defined under BCRA are also sufficiently "campaign related" to avoid any danger that substantial amounts of genuine issue discussion, unrelated to an electoral purpose, will be burdened.

Buckley did not purport, then, to announce a new rule of substantive constitutional law, namely, that the First Amendment prohibits any regulation of independent political spending for communications that do not involve words of express advocacy. Such a proposition would have been easy enough to state in so many words, but they are nowhere to be found in the Court's opinion. Indeed, for the Court to have issued such a sweeping pronouncement would have required that it break faith with a "cardinal rule[ ]" of adjudication to which it has "rigidly adhered: . . . never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Brockett v. Spokane Arcades, 472 U.S. 491, 501-02 (1985); Raines, 362 U.S. 17, 21 (1960); see also Clinton v. Jones, 520 U.S. 681, 690 n. 11 (1997).

To dispose of the controversy in Buckley, it was sufficient for the Court to rectify the problem of vagueness in the statute before it at the time. See Rescue Army v. Mun. Court of Los Angeles, 331 U.S. 549, 568-69 (1947) ("[C]onstitutional issues affecting legislation will not be determined . . . in broader terms than are required by the precise facts to which the ruling is to be applied."). There is no reason to believe that the Court meant to foreclose all future action by Con-

gress to readjust the federal election laws as needed to address continuing threats of corruption as they might later evolve, so long as Congress, in making the very sort of "cautious advance, step by step," to which the Court would later pledge deference in NRWC, 459 U.S. at 209 (citation omitted), avoided the vagueness problems of concern in Buckley. As the Fourth Circuit observed when reviewing an FEC regulation that defines express advocacy more broadly than the "magic words":

> The FEC ends its argument that 11 C.F.R. § 100.22(b) is constitutional with the following comment: "if the express advocacy requirement is read too narrowly, the prohibitions of 2 U.S.C. 441b will require little more than careful diction and will do almost nothing to prevent millions of dollars from the general treasuries of unions and corporations from directly influencing federal elections, and from doing so without disclosing to the public the source of the influence." That is a powerful statement, but we are bound by Buckley and MCFL, which strictly limit the meaning of "express advocacy." If change is to come, it must come from an imaginative Congress or from further review by the Supreme Court.

Virginia Soc'y for Human Life, Inc. v. FEC, 263 F.3d 379, 392 (4th Cir. 2001) (emphasis added). With BCRA, Congress has taken up that creative task.[109]

Thus, the question before this Court is one not presented to any other tribunal since Buckley issued its express advocacy ruling: whether Congress may apply the teachings of experience to establish a new paradigm, one that meets with the political realities of our times, or whether the nation must forsake its longstanding commitment to the proposition that the aggregated wealth of unions and corporations ought not to be used to unduly influence the outcome of federal elections, or to garner improper influence over democratically elected leaders. The plaintiffs maintain that Buckley prohibits Congress from making that decision, a proposition that ultimately depends on the analysis in Buckley itself, but, as seen, it is a proposition that Buckley will not sustain.

[109] Since Buckley, there have been a number of lower court decisions analyzing the scope of permissible regulation under the Court's express advocacy construction of FECA. Other cases have involved the constitutionality of various state campaign finance laws that hinged on definitions of regulated activity that did not rely on an express advocacy test. To the extent these lower court cases have described the express advocacy standard as an absolute constitutional rule, they did so unnecessarily, and, for the reasons explained above, are simply contrary to the decision in Buckley.

C. BCRA's Definition of Electioneering Communications Satisfies *Buckley*'s Concerns, and Is Not Unconstitutionally Vague.

Given that Buckley's express advocacy construction of FECA rested on concerns about vagueness, BCRA is entirely consistent with the holding of Buckley, because BCRA's definition of electioneering communications is manifestly not vague. Plaintiffs' assertions to the contrary, McConnell Second Amend. Compl., ¶ 50; NRA Compl., ¶¶ 76-79; NAB Compl., ¶ 19, are misguided.

A statute is subject to a charge of facial vagueness if it requires compliance with "an unascertainable standard" of conduct, Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971), or "it operates to inhibit the exercise of [First Amendment] freedoms" through "[u]ncertain meanings" that "lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (internal quotation marks and citations omitted). By contrast, a statute cannot be condemned as unconstitutionally vague where on its face "it is clear what the [statute] as a whole prohibits." Hill v. Colorado, 530 U.S. 703, 733 (2000) (citing Grayned, 408 U.S. at 110).

The four criteria in the definition of an electioneering communication tautly define a narrow class of campaign ads, based largely on the time, place and manner in which they are disseminated. Under BCRA, communications are considered "electioneering" only if they: (1) are broadcast over television or radio, via broadcast, cable or satellite communications facilities (BCRA § 201(a), adding 2 U.S.C. 434(f)(3)(A)); (2) "refer[ ] to a clearly identified candidate for Federal office" (id., adding 2 U.S.C. 434(f)(3)(A)(I));[110] (3) are made within 60 days before a general election or 30 days before a primary election in which the clearly identified candidate seeks office (adding 2

[110] The Court found that this language was unambiguous when construing a nearly identical clause in Buckley, 424 U.S. at 43-44 n.51 (construing then § 608(e)(2), id. at 193-94, since recodified as 2 U.S.C. 431(18)).

U.S.C. 434(f)(3)(A)(II)); and (4) for House, Senate and presidential primary elections, can be received by at least 50,000 persons in the state or district where the election is being held (2 U.S.C. 434(f)(3)(A)(III) & (C)); see Final Rule, Electioneering Communications, 67 Fed. Reg. at 65,210-211 (promulgating new regulation to be codified at 11C.F.R. 100.29).[111]

These criteria are absolutely clear, individually and collectively, and no one wishing to avoid violations of BCRA need guess at where these four defining characteristics have drawn the line. Any individuals or organizations intending to broadcast electioneering communications, or wishing, on the other hand, to engage in genuine issue advocacy, can easily determine in advance whether their advertisements meet BCRA's definition of electioneering communications, and thus encounter no realm of legal uncertainty from which they must steer clear. "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989). Yet "perfect clarity" and "precise guidance" are exactly what BCRA provides.

Congress enacted BCRA's electioneering communications provisions in response to both the Court's holding in Buckley regarding express advocacy, and the extraordinary exploitation of that construction by large moneyed interests. When it approached this task, Congress was acutely aware of its duty to "avoid the shoals of vagueness," Buckley, 424 U.S. at 78:

> What has been done with Snowe-Jeffords is a very careful effort to make sure the constitutional requirements of Buckley v. Valeo have been met. In fact, they have been met. It is not vague; it establishes a very clear bright-line test so we don't have a vagueness constitutional problem.

[111] Under rules promulgated by the FEC on October 23, 2002, persons may consult the website of the Federal Communications Commission ("FCC") to learn whether a broadcast can be received by 50,000 persons or more, and may rely on that information for purposes of determining whether their communications meet BCRA's definition of electioneering. Final Rule, Electioneering Communications, 67 Fed. Reg. at 65,217 (amending 11 C.F.R. § 100.29(b)).

147 Cong. Rec. S2883 (March 26, 2001) (Sen. Edwards). As a result of the care with which Congress carried out its legislative duties, BCRA's definition of electioneering communication is simple, objective, and unambiguous – a classic bright-line test that entirely avoids placing speakers "wholly at the mercy of the varied understanding" of their listeners, Buckley, 424 U.S. at 43 (quoting Thomas, 323 U.S. at 535), and therefore suffers from none of the vagueness that prompted the Court in Buckley to adopt the express advocacy construction.

D. BCRA's Definition of Electioneering Communications Is Narrowly Tailored.

The expenditure provisions construed in Buckley and MCFL were broadly applicable to communications made at any time, in any location, and through any medium. Section 608(e), examined in Buckley, prohibited all persons other than candidates themselves, or political party committees, from spending more than $1,000 a year on communications of any kind, whether broadcast, print, direct mail, or otherwise, deemed "relative to" a candidate for federal office. 424 U.S. at 39-40, 193-94. FECA § 441b, which the Court scrutinized in MCFL, is limited in its application to labor unions and corporations, and is narrowly tailored to allow unions and corporations to express themselves through their separate segregated funds, but still applies without geographic or temporal limitation, and regardless of the medium, to all communications by labor unions and corporations made for the purpose of influencing federal elections.

In sharp contrast to these provisions, BCRA's regulation of electioneering communications is surgically tailored to end the now rampant practice of broadcasting election ads artfully crafted to evade FECA's expenditure and disclosure requirements. Using the four criteria described supra, at 154-55, Congress has carefully targeted only those ads that identify a candidate for federal office and are broadcast on television or radio, in the final weeks before the election, to the very state or

district where the election is being held. Thus, the definition strictly limits the statute's reach to those circumstances that are most clearly election-related, presenting the greatest potential for distortion or corruption of political processes.

In the first instance, BCRA focuses exclusively on advertisements that refer to candidates for federal office, for both common sense and common practice teach that they are the best suited and therefore most likely vehicles for wielding influence over the course of an election, and, by extension, elected officials. See Goldstein Expert Rep. at 19 & Tbl. 4 (showing that 99.6% of candidate ads and 99.8% of party ads refer to federal candidates). Adding an even greater degree of precision to its scope, however, in Senate, House or presidential primary races, BCRA regulates only those advertisements referring to a candidate that are targeted to the relevant electorate – those broadcast to at least 50,000 persons within the state or district where the candidate in question is running. Communications reaching substantial numbers of the electorate who will decide a candidate's political future are those best calculated to influence an election beforehand, and to earn the candidate's gratitude afterward. By regulating only those ads broadcast within a candidate's electoral jurisdiction, BCRA further ensures that advertising that is not designed as an appeal to relevant voters remains unaffected.

The statute also reflects careful tailoring on the part of Congress insofar as it addresses only those communications occurring within 30 days of a primary or 60 days of a general election that refer to clearly identified candidates running in that election. These periods not only correspond to traditional conventions of American politics that, for example, demarcate the Labor Day weekend as the "kickoff" of the general election season, they also coincide with the period when the vast majority of interest group advertisements referring to federal candidates – as much as 80 percent –

are broadcast. Goldstein Expert Rep. at 17; see also Krasno & Sorauf Expert Rep. at 57 & App. Tbl. 3. Thus, Congress focused on the time period of greatest concern, during the heat of a campaign for federal office, and refrained from regulating during other periods, farther removed Election Day, when the public's attention is not focused on the choices to be made in an imminent election, and advertisements referring to federal candidates are therefore less likely to have the purpose or effect of influencing the outcome.

Moreover, the electioneering communications definition only applies to TV and radio broadcasts, leaving similar communications in alternative media unregulated. Newspaper and magazine advertising, mass mailings, internet mail, public speeches, billboards, yard signs, phone banks, and door-to-door campaigning all fall outside its narrow scope, as do internal communications between a corporation or union and its stockholders or members.[112] Although Congress could have defined electioneering communications to include other forms of communication, it chose instead to focus narrowly on what experience has shown to be the most widely exploited medium for the evasion of existing law. See Buckley, 424 U.S. at 105 ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." (internal quotation marks and citation omitted)).

Lastly, but no less importantly, § 203(a) of BCRA, as an amendment to FECA § 441b, permits corporations and labor unions to finance electioneering communications using their separate segregated accounts, allowing them to express their political views with funds, reflecting true political support for those ideas, that do not threaten corruption or distortion of the political process.

[112] For example, in the 1998 Senate race in Nevada, ninety full-time shop stewards from the AFL-CIO went door to door visiting the homes of 40,000 labor union members. Magleby Expert Rep. at 18 n.26; see generally id. at 24-26, 42-44.

Austin, 494 U.S. at 660-61. Thus BCRA is "precisely targeted" to the compelling governmental interests that justify its regulation of electioneering communications. Id. at 660.

E. BCRA's Definition of Electioneering Communications Is Not Overbroad.

Because BCRA is narrowly tailored to the prevention of distortion and corruption in the political process, and relies on a permissible standard of regulation that operates with impeccable precision and clarity, plaintiffs cannot carry their burden of establishing that BCRA "could never be applied in a valid manner." New York State Club Ass'n, 487 U.S. at 11. Accordingly, they cannot prevail in this action unless they can show, in the alternative, that BCRA's electioneering communications provisions are substantially overbroad. Id.; Taxpayers for Vincent, 466 U.S. at 796-798.

The "traditional rule" is that a person "may not challenge [a] statute on the ground that it may conceivably be applied unconstitutionally . . . in situations not before the Court." Los Angeles Police Dept. v. United Reporting Pub. Corp., 528 U.S. 32, 39 (1999). This rule reflects the "incontrovertible proposition that it would indeed be undesirable for [a] [c]ourt to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation," rather than "focusing on the factual situation before [it]." New York v. Ferber, 458 U.S. 747, 767-68 (1982). Facial overbreadth challenges represent a narrow exception to this principle, Taxpayers for Vincent, 466 U.S. at 798, and "[b]ecause of the wide-ranging effects of striking down a statute on its face," invalidation on grounds of overbreadth is considered "strong medicine" that courts must apply "with hesitation, and then 'only as a last resort.'" LAPD, 528 U.S. at 39 (quoting Ferber, 458 U.S. at 767 (citing Broadrick, 413 U.S. at 613)).

Accordingly, only a statute that "reaches a substantial amount of constitutionally protected conduct" may be invalidated as facially overbroad. City of Houston v. Hill, 482 U.S. 451, 458

(1987); New York State Club Ass'n, 487 U.S. at 14; Broadrick, 413 U.S. at 615. "It is not enough for a plaintiff to show 'some' overbreadth," Ashcroft v. ACLU, 122 S. Ct. 1700, 1713 (2002) (plurality opinion), and "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." Taxpayers for Vincent, 466 U.S. at 800. Rather, the burden is on the plaintiff to "demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally." New York State Club Ass'n, 487 U.S. at 14 (emphasis added); see Colorado II, 533 U.S. at 456 n. 17 (refusing to consider overbreadth challenge to the party expenditure provision where the party did not "lay the groundwork for its overbreadth claim"); Regan v. Time, Inc., 468 U.S. 641, 651-52 & n. 18 (1984) (assuming statute's reach was not overbroad given "paucity of evidence to the contrary").

Plaintiffs challenge BCRA's definition of electioneering communications as overbroad, McConnell Second Amend Compl., ¶ 50; NAB Compl., ¶ 19, but the definition comports with reality and ends the masquerade of election advertisements professing to be the mere discussion of political issues. The definition successfully covers the vast majority of election ads, while simultaneously reaching as few actual issue ads as possible. See supra at 139-42. And by targeting with transparent clarity an extremely well-defined set of advertisements, BCRA has no ambiguous scope that would cause it to sweep substantially beyond its intended and legitimate scope of advertising intended to influence the outcome of federal elections. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 n. 6 (1982) (in determining the extent of a statute's overbreadth, a "court should evaluate the ambiguous as well as the unambiguous scope of the enactment . . . [as] the vagueness of a law affects overbreadth analysis").

The record of this action fully supports that conclusion. The databases prepared for the two Buying Time studies, and analyzed for present purposes by Drs. Goldstein and Krasno, demonstrate BCRA's insignificant overbreadth. Dr. Krasno found that only three genuine issue advertisements, accounting for just six percent of all broadcasts of genuine issue ads in 1998, would have met BCRA's definition of electioneering communications. Krasno & Sorauf Expert Rep. at 60 & App. § C. Professor Goldstein found that, in 2000, only six genuine issue ads would have been regulated as electioneering communications under BCRA, accounting for an even smaller fraction than in 1998, just 2.3 percent, of all broadcasts of genuine issue ads during the year. Goldstein Expert Rep. at 24-26 & Tbl. 7.[113] Thus, these analyses not only prove that a "magic words" approach fails to identify a large number of campaign ads, see supra at 147 n.107, but also that BCRA's electioneering communications criteria would have safeguarded from any regulation whatsoever between 94 and almost 98 percent of all genuine issue advertisements broadcast in 1998 and 2000. In essence, the definition's overbreadth is no more than two to six percent – a far cry from the substantial overbreadth necessary to invalidate a statute on its face. Even if a few genuine issue ads will be subject to BCRA's regulation of electioneering communications, the Court "cannot conclude that [BCRA] is substantially overbroad and must assume that 'whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.'" New York State Club Ass'n, 487 U.S. at 14 (quoting Broadrick, 413 U.S. at 615-16).

[113] These figures do not take into account issue advertising in non-election years such as 1997 and 1999, and to that extent they *overstate* BCRA's impact on genuine issue advocacy. See Goldstein Expert Rep. at 27 n. 22; Krasno & Sorauf Expert Rep. at 61-62; Krasno Rebuttal Expert Rep. at 14-15 (due to absence of ads from 1997 in database, figures reported in Buying Time 1998 should be understood as upper bounds); ______

There is, in addition, little basis here for permitting an overbreadth challenge out of concern that "those who desire to engage in [genuine issue advocacy] . . . may refrain from doing so . . .." Spokane Arcades, 472 U.S. at 503-04. Real issue ads are not concerned about why certain candidates should or should not be elected to office, which explains why, in 2000, they did not depict or mention a candidate 97 percent of the time. Buying Time 2000 at 31-32 & Fig. 4-6; see also DEV 48 at Tabs 4, 8 (storyboards for selected genuine issued ads).

see also Bailey Decl. ¶¶ 9-11 ("When we were creating true issue ads . . . it was never necessary for us to reference specific candidates for federal office . . . ."). The ease with which genuine issue ads can speak their message and remain outside BCRA's definition of electioneering communication thus means there is little reason to fear that BCRA will "chill" genuine issue advocacy. Corporations and unions can easily design effective ads to promote their views on issues that would not be regulated under BCRA, with minimal impact on their First Amendment rights.

On those rare occasions where it might be necessary to the effective promotion of an issue to run advertisements that refer to a candidate, are broadcast within 60 days of an election, and are targeted to that candidate's constituents, the alternative for corporations and labor unions is not silence, but merely to finance their advertisements with money from their separate segregated funds. See Austin, 494 U.S. at 660. Non-profit corporations entitled to the MCFL exception, for which the establishment of a separate segregated fund might represent an impermissible burden, may rely on their general treasury funds to pay for electioneering communications merely by certifying to the

FEC that they meet the criteria of "qualified non-profit corporations" under the FEC's rules. See Final Rule, Electioneering Communications, 67 Fed. Reg. at 65,211-12 (amending 11 C.F.R. § 114.10). As noted above, non-profit corporations operating under § 501(c)(3) of the Internal Revenue Code are exempted from BCRA's regulation of electioneering communications altogether. See Final Rule, Electioneering Communications, 67 Fed. Reg. 65,211 (to be codified at 11 C.F.R. 100.29(c)(6)); see also 67 Fed. Reg. 65,199-200.

In the final analysis, BCRA cannot be characterized as overbroad merely because it may place incidental regulatory burdens on a tiny percentage of genuine issue advocacy that might be broadcast in proximity to federal elections. In Austin, the Supreme Court deferred to the legislative judgment that it is the potential for distortion of the political process inherent in the corporate form that justifies the regulation of spending by corporations "without great financial resources, as well as those more fortunately situated," and concluded therefore that a restriction on electoral spending by both business and nonprofit corporations was not overbroad. 494 U.S. at 661 (citing NRWC, 459 U.S. at 209-10). BCRA reflects a like judgment on the part of Congress that the demonstrated potential for exploitation of electioneering ads by corporations and unions, as a means of exerting unfair and improper influence over the electoral process, and, potentially, elected officials, also demands regulation of such advertising when broadcast in close proximity to federal elections. This is, significantly, a judgment that Congress came to only after many years of deliberation over the constitutionality of the statutory provisions that it eventually adopted. See supra at 50-52 (discussing legislative history of the Snowe-Jeffords provisions). The "considerable deference" that courts must show to Congress's "adjustment of the federal electoral laws . . . to account for the particular legal and economic attributes of corporations and labor organizations," NRWC, 459 U.S.

at 209-10, is that much greater where, as here, the Congress, "a coequal branch of government whose Members take the same oath [judges] do to uphold the Constitution . . . specifically considered the question of [BCRA's] constitutionality." Rostker v. Goldberg, 453 U.S. 57, 64 (1981); Littlewolf v. Lujan, 877 F.2d 1058, 1063 (D.C. Cir. 1989) ("[F]ederal statutes enjoy a presumption of constitutionality, especially where . . . Congress explicitly considered constitutional questions.").[114] Because BCRA is targeted exclusively at corporate and labor union advertising that presents the clearest potential for corrosive distortion of electoral politics, it is not overbroad. Austin, 494 U.S. at 660.

F. BCRA's Application to Nonprofit Corporations Does Not Impair Its Constitutionality.

BCRA § 203 extends FECA § 441b's well-established hard money requirement for independent expenditures — i.e., that corporations and unions use separate segregated funds to pay for such expenditures — to electioneering communications as well. BCRA § 204 applies this requirement to nonprofit corporations operating under § 501(c)(4) or § 527 of the Internal Revenue Code, as FECA § 441b has always provided.[115] In the alternative to their arguments that BCRA's

[114] To the extent that Congress relied upon scientific analyses of data such as those contained in Buying Time, see, e.g., 148 Cong. Rec. S2117 (Mar. 20, 2002) (Sen. Jeffords), plaintiffs bear the burden of demonstrating why such reliance on such legislative facts was unreasonable. In other constitutional challenges that involved complex factual analyses, the Supreme Court has deferred to legislative factfinding of that kind. See Turner II, 520 U.S. at 196 ("We owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power. Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to . . . the remedial measures adopted . . . ."); Vance v. Bradley, 440 U.S. 93, 110 (1979) ("In an equal protection case ... those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 330 n.12 (1985). Even if the ultimate standard of scrutiny applicable in these cases may vary, deference to Congress's underlying factfinding is proper.

[115] As originally introduced, the Snowe-Jeffords provisions made exceptions for non-profit corporations having tax-exempt status under § 501(c)(4) of the Internal Revenue Code, 26 U.S.C. 501(a), (c)(4), and for incorporated "political organizations" as defined under § 527(e)(1) of the Internal Revenue Code, so long as the communications in question are "paid for exclusively by funds provided directly by individuals." See BCRA, § 203(b), adding 2 U.S.C. 441b(c)(2); see id., adding 2 U.S.C. 441b(c)(3), (4). However, pursuant to an amendment sponsored by Senator Wellstone, who worried that this exception would create a loophole in the statute, see 147 Cong. Rec. S2845-2849, S2882-2884 (March 26, 2001), § 204 of BCRA adds a further paragraph (6) to new subsection 441b(c), which in effect eliminates the exception made for 501(c)(4) and 527 organizations under paragraph (2) of subsection 441b(c).

electioneering communications provisions must be struck down on their face, plaintiffs maintain that they may not constitutionally be applied to non-profit corporations. See McConnell Second Amend. Compl., ¶¶ 49, 62; NRA Compl., ¶ 73. Contrary to plaintiffs' assertions, applying to nonprofit corporations the same hard money requirements that are made applicable to business corporations does not violate the First Amendment, or principles of Equal Protection.

The Supreme Court's decision in Austin is dispositive. In that case, the Michigan Chamber of Commerce, a nonprofit corporation, challenged a state statute which, like FECA § 441b, required for-profit and nonprofit corporations alike to make independent expenditures through a separate segregated fund. Austin, 494 U.S. at 655-56. In upholding the statute, the Court rejected the argument that the statute was "overinclusive, because it includes within its scope closely held corporations that do not possess vast reservoirs of capital." Id. at 661. The Court found that, due to the "special benefits conferred by the corporate structure," all corporations present the potential to distort the electoral process, and it "'accept[ed] Congress' judgment that it is the potential for such influence that demands regulation.'" Id. (quoting NRWC, 459 U.S. at 209-10) (emphasis in Austin).

At the same time, the Court in Austin reaffirmed its holding in MCFL that a small class of ideological nonprofit corporations could not constitutionally be required to set up a separate segregated fund in order to make independent expenditures. 494 U.S. at 661-65. However, the Court held – despite the plaintiff corporation's nonprofit status – that "[b]ecause the Chamber does not share [the three] crucial features" that had been "essential" to the Court's holding in MCFL, "the Constitution does not require that it be exempted from the generally applicable" restrictions on corporate independent expenditures. Id. at 661-62.[116] Thus, Austin clearly establishes that "the

[116] MCFL (1) had been formed to promote political ideas and could not engage in business activities, (2) lacked any members who had an economic disincentive for disassociating with the corporation if they disagreed with its political activity, and (3) was not established by, and had a policy of not accepting contributions from, business (continued...)

Constitution does not require" exemption of a nonprofit corporation from an otherwise valid restriction on corporate election expenditures unless it possesses the three characteristics set out in MCFL.

Hence, there is no basis for plaintiffs' various contentions that BCRA is unconstitutional in virtue of imposing hard money requirements on "organizations whose major purpose is not the nomination or the election of candidates," McConnell Second Amend. Compl. ¶ 49, or "expressive associations," id., or organizations that are tax-exempt under §§ 501(c)(4) and 527 of the tax code, id. ¶ 62. BCRA's hard money requirements simply apply to corporations across the board, just like FECA's restrictions, and just like the restrictions upheld in Austin. If a corporation shares the three "crucial features" set out in MCFL, then it is entitled to an as-applied exemption from these restrictions, Austin, 494 U.S. at 661; beyond its bearing on those factors, however, a corporation's "major purpose" or "expressive" nature or tax-exempt status is of no constitutional significance.[117]

It is also insignificant that BCRA does not codify the MCFL exemption. Neither does FECA § 441b, the very provision scrutinized in MCFL; nor did the statute in Austin – where the Supreme Court specifically found it permissible for the statute to treat all corporations equally on its face. See Beaumont v. FEC, 278 F.3d 261, 277-78 (4th Cir. 2002) ("[P]laintiffs' argument that § 441b(a) is facially invalid because its text does not contain an MCFL exception fails in view of the Court's own refusal in Austin to declare an almost identical state statute facially invalid for the same

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[116](...continued)
corporations. Id. at 662-64. The Austin Court found that the Chamber lacked all of these characteristics, but in particular the Court focused on the fact that, "[b]ecause the Chamber accepts money from for-profit corporations, it could . . . serve as a conduit for corporate political spending." This concern is borne out by the election activity of 1996-2000, in which non-profits such as Citizens for Reform and Citizens for Better Medicare served as conduits for millions of dollars of corporate campaign spending. See supra at 42-43, 46-47.

[117] Indeed, if an organization's preferred tax status has any constitutional significance in this context, it implies that Congress has more, not less, leeway to regulate the organization's political spending, to ensure that public money is not used to finance activity that Congress does not wish to subsidize. See Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983) (upholding speech restrictions on tax-exempt organization as valid condition attached to federal subsidy).

reason.") (citations omitted), petition for cert. filed, 71 U.S.L.W. 3190 (Sep. 12, 2002) (No. 02-0403). MCFL merely carves out an as-applied exemption to restrictions on corporate election activity; it does not supply the basis for a facial attack.

The MCFL exemption applies to electioneering communications under BCRA to the same extent as it applies to independent expenditures under FECA.[118] Indeed, while the MCFL exemption is not codified in statute, it is codified in regulations promulgated under BCRA, paralleling similar regulations promulgated under FECA. See Final Rule, Electioneering Communications, 67 Fed. Reg. at 65,211-12 (to be codified at 11 C.F.R. 114.10); see also 67 Fed. Reg. 65,205-06. These regulations make it easy for qualified nonprofit corporations running electioneering communications to invoke the MCFL exemption by simply certifying to the FEC that they meet the relevant criteria. See id. § 114.10(e)(1)(ii). Hence, there is no basis for concluding that BCRA is facially unconstitutional merely because it does not explicitly recite the MCFL exemption in its text.

G. The Media Exception in BCRA's Definition of Electioneering Communications Does Not Violate Principles of Equal Protection.

Plaintiffs next take issue with BCRA's so-called "media exception." See, e.g., McConnell Second Amend. Compl., ¶ 51; NRA Compl., ¶ 83; AFL-CIO Compl., ¶ 11. Under BCRA, new FECA § 434(f)(3)(B)(i) excludes from the definition of an electioneering communication a "communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political

[118] As Senator McCain made clear during congressional debate: "BCRA does not purport in any way, shape, or form to overrule or change the Supreme Court's construction of [FECA] in MCFL. Just as an MCFL-type corporation, under the Supreme Court's ruling, is exempt from the current prohibition on the use of corporate funds for expenditures containing 'express advocacy,' so too is an MCFL-type corporation exempt from the prohibition in the Snowe-Jeffords amendment on the use of its treasury funds to pay for 'electioneering communications.' Nothing in this bill purports to change MCFL." 148 Cong. Rec. S2141 (Mar. 20, 2002).

party, political committee, or candidate." This new provision is nearly identical to a pre-existing provision of FECA, 2 U.S.C. 431(9)(B)(i), that excludes from the definition of "expenditure" news stories and editorials broadcast or published by the media. This so-called "media exception" protects the traditional role of the press and does not violate the equal protection clause.

Again, Austin is dispositive on this issue. The Court there rejected the claim that Michigan's segregated fund requirement for corporations unfairly favored media corporations by excluding them from its scope. The Court held, 494 U.S. at 666-69 (citations and footnote omitted; emphasis added):

> Although all corporations enjoy the same state-conferred benefits inherent in the corporate form, media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public. We have consistently recognized the unique role that the press plays in "informing and educating the public, offering criticism, and providing a forum for discussion and debate." Bellotti, 435 U.S., at 781 . . .. The Act's definition of "expenditure"... conceivably could be interpreted to encompass election-related news stories and editorials. The Act's restriction on independent expenditures therefore might discourage incorporated news broadcasters or publishers from serving their crucial societal role. The media exception ensures that the Act does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events. . . . A valid distinction thus exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public. Although the press' unique societal role may not entitle the press to greater protection under the Constitution, Bellotti, supra, 435 U.S., at 782, and n.18, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations. We therefore hold that the Act does not violate the Equal Protection Clause.

BCRA's media exception serves the same purpose and is constitutional for the same reasons.

H. BCRA's Definition of Electioneering Communications Does Not Violate Either the First Amendment or Principles of Equal Protection by Excluding Non-Broadcast Communications from the Scope of Its Regulation.

As mentioned above, BCRA's definition of electioneering communications encompasses only television and radio communications and not communications made through other media, such as print. See FECA 434(f)(i); 11 C.F.R. 100.29(b)(1). Plaintiffs allege that by excluding other media BCRA violates the First Amendment and the equal protection component of the due process clause. McConnell Second Amend. Compl. ¶ 51; NAB Compl. ¶ 24. These allegations have no merit.

Plaintiffs have no ground on which to complain that BCRA regulates less speech rather than more. See Blount v. SEC, 61 F.3d 938, 946 (D.C.Cir.1995) ("The First Amendment does not require the government to curtail as much speech as may conceivably serve its goals."); DLS, Inc. v. City of Chattanooga, 107 F.3d 403, 412 n.7 (6th Cir. 1997) (same for Equal Protection Clause).[119] As Buckley makes clear, reform in this area "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." 424 U.S. at 105(citation omitted); see also MCFL, 479 U.S. at 258 n.11 ("While business corporations may not represent the only organizations that pose th[e] danger [of distorting the political marketplace], they are by far the most prominent example.").

Although Congress could have included non-broadcast communications within BCRA's scope, it chose instead to focus narrowly on redressing the recent abuses connected with broadcast communications. Broadcast communications are not only more far-reaching and influential than

[119] See also Mariani v. U.S., 212 F.3d 761, 774 (3d Cir. 2000) (en banc) ("Congress may regulate speech so long as it demonstrates that the recited harms are real, and it may, consistent with that principle, choose to regulate just some part of that speech.").

non-broadcast communications, see, e.g.,

but, most important, they are far more expensive. See, e.g., S2614 (March 21, 2001) (Sen. Durbin) ("The cost [of air time] . . . is going through the roof."). The high price of broadcast advertising time is the primary engine driving the escalating costs of contemporary elections, which, in turn, threaten to pressure candidates and parties to curry favor with groups able to pay for the ads. Broadcast is thus the primary medium by which large aggregations of wealth may be used to distort or corrupt the political process. It was therefore entirely reasonable for Congress to single out television and radio for regulatory attention.

I. The "Backup" Definition of Electioneering Communications Is Also Constitutional.

BCRA § 201 includes an alternate provision applicable only if its main definition of electioneering communications is judged to be unconstitutional. If the primary definition is stricken, then the statute provides that:

> the term 'electioneering communication' means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

BCRA § 201(a), adding 2 U.S.C. 434(f)(3)(A)(ii). Contrary to the plaintiffs' assertions, e.g., McConnell Second Amend. Compl., ¶ 48; AFL-CIO Compl., ¶¶ 15-16 , this definition is neither vague nor overbroad.

The backup definition is narrowly tailored and highly protective of First Amendment interests. It precludes regulation of a communication unless it has "no plausible meaning other than an exhortation to vote for or against a specific candidate." This requirement by itself rules out the

possibility that the provision covers pure issue advocacy: if a communication has only one plausible meaning and that meaning is an exhortation to support or oppose a candidate, its message cannot by definition be a mere discussion of issues. The provision also satisfies the Buckley Court's concerns because it is "directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 80.

The backup definition also avoids placing the speaker at the mercy of the subjective "varied understanding of his hearers," Buckley, 424 U.S. at 43 (quoting Thomas v. Collins, 323 U.S. 516, 535 (1945)). To the contrary, the definition makes clear that if more than one plausible interpretation is possible, a communication will not be considered an electioneering communication, even if many listeners would likely interpret it as calling for an election result. In essence, the backup definition is no different from other First Amendment tests that use an objective, "reasonable person" standard that does not vary depending upon the sensitivity or special knowledge or ignorance of particular listeners. In areas as diverse as obscenity (see Miller v. California, 413 U.S. 15 (1973)), fighting words (see Brandenburg v. Ohio, 395 U.S. 444 (1969); Hess v. Indiana, 414 U.S. 105 (1973)), and religious expression (see County of Allegheny v. ACLU, 492 U.S. 573 (1989)), the Supreme Court has eschewed mechanical tests and has instead evaluated the interests at stake with sensitivity for the context and the nature of the expression at issue. Moreover, here Congress has not only defined electioneering communications with an objective test, but with an extremely narrow one.

In sum, if both of Congress's definitions of electioneering communication were invalidated, the prohibitions of 2 U.S.C. 441b would require little more than careful diction and would do almost nothing to prevent millions of dollars from the general treasuries of unions and corporations from

being used directly to influence federal elections, and from doing so without disclosing to the public the source of the influence. Construing the requirements of the First Amendment in such a rigid and unrealistic manner would provide a powerful incentive for the spread of "covert speech" that carefully avoids stating clearly its central electoral message and thereby, as Justice Kennedy has stated, "mocks the First Amendment." Shrink Missouri, 528 U.S. at 406 (Kennedy, J., dissenting).

J. BCRA'S Disclosure Requirements for Electioneering Communications Are Constitutional.

Plaintiffs also direct a number of claims of unconstitutionality at BCRA's requirements for disclosure of electioneering communications. McConnell Second Amend. Compl., ¶¶ 54-58; NRA Compl., ¶¶ 86-88; Chamber Compl., ¶¶ 23-26; AFL-CIO Compl., ¶ 21. As in the case of BCRA's segregated fund requirement, plaintiffs cannot prevail in a pre-enforcement facial challenge to the statute's disclosure requirements unless they can show that these provisions "could never be applied in a valid manner," or are substantially overbroad. New York State Club Ass'n , 487 U.S. at 11.

The First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed. Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 651 n.14 (1985). In Buckley, while the Court stated that "exacting scrutiny" applied to the disclosure provisions at issue there, the Court framed the inquiry as whether there existed "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." 424 U.S. at 64; see also id. at 80 (upholding disclosure requirements upon finding that they "bear[] a sufficient relationship to a substantial governmental interest").

Applying that standard, the Supreme Court has already upheld FECA's existing disclosure requirements, Buckley, 424 U.S. at 60-84, finding them justified by three governmental interests:

> First, disclosure provides the electorate with information "as to where political campaign money comes from . . ." in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return. . . .
>
> Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

Buckley, 424 U.S. at 66-68 (footnotes omitted).

BCRA's new disclosure requirements governing electioneering communications are justified by the same interests underlying FECA's existing disclosure requirements. Indeed, BCRA simply remedies the evasion of FECA's existing disclosure requirements through the use of "issue ads." As discussed in greater detail above, see supra at 42-43, 46-47, in the three election cycles preceding BCRA's enactment, Congress witnessed tens of millions of dollars being spent on such ads, exerting a substantial influence on election campaigns, while the sources of this campaign spending went entirely undisclosed to the public under FECA. Compounding the problem, many ad sponsors further concealed their identity from the public by electioneering pseudonymously, through front organizations such as "The Coalition: Americans Working for Real Change," "Citizens for Reform."

See id.; see also Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 298 (1981) ("[W]hen individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source."); see also Selected Interest Group "Issue Ads," App. A to Defs.' Mem., Tab 1. Thus, due to exploitation of the "issue advocacy" loophole, a large and growing portion of recent federal election activity has been enshrouded in secrecy, leaving the public under-informed and corruptive practices unexposed. Krasno & Sorauf Expert Rep. at 73-74 ("Secrecy is one of the outstanding characteristics of issue ads . . . . [W]e – and regulators – are hampered by a remarkable paucity of information about them. . . . This secrecy, by itself, creates enormous opportunities for wrongdoing, for favors to be exchanged between issue advocates and public officials.").

BCRA aims to dissipate this shroud of secrecy by extending the requirement of disclosure to electioneering communications. As the sponsor of BCRA's disclosure provisions explained:

> We deter the appearance of corruption by shining sunlight on the undisclosed expenditures for sham issue advertisements. Corruption will be deterred when the public and the media are able to see clearly who is trying to influence the election. In addition our provisions will inform the voting public of who is sponsoring and paying for an electioneering communication.

147 Cong. Rec. S3034 (Mar. 28, 2001) (Sen. Jeffords).

BCRA's disclosure provisions are modest and appropriately tailored to these goals. BCRA's provisions merely impose the same type of disclosure obligations already imposed on individuals and groups under FECA § 434(c)'s well-established disclosure requirements for independent expenditures. See MCFL, 479 U.S. at 262 (noting that § 434(c)'s disclosure requirements for individuals and groups serve governmental disclosure interests in an appropriately tailored manner);

Buckley, 424 U.S. at 82 (upholding predecessor to § 434(c)); Richey v. Tyson, 120 F. Supp. 2d 1298, 1321-22 (S.D. Ala. 2000) (upholding state disclosure provisions comparable to § 434(c)).[120]

There is thus no basis for plaintiffs' contentions that BCRA's disclosure requirements unduly burden their rights of association by forcing them to disclose the identities of their contributors. See AFL-CIO Compl. ¶ 12; Chamber Compl. ¶ 24; McConnell Second Amend. Compl. ¶¶ 4, 58; NRA Compl. ¶¶ 64-65, 87-89. Such disclosure has long been required for independent expenditures under FECA § 434(c) and is necessary to reveal the true sponsors of electioneering communications – especially where such communications are broadcast in the name of a front organization. Indeed, BCRA's new disclosure provisions are considerably less intrusive in this regard than those of § 434(c). Whereas § 434(c) requires groups making independent expenditures to identify each of their donors contributing over $200, id. § 434(c)(1)(C), BCRA's requirements reach only donors contributing over $1000, id. § 434(f)(2)(E). Moreover, if a group makes disbursements for electioneering communications from a separate bank account containing money donated only by individuals, then under BCRA the group need only identify persons contributing more than $1,000 to that account. Id. § 434(f)(2)(E). Hence, the statute provides such a group with ample means to protect the anonymity even of large donors to its general treasury, if it so chooses, simply by setting up a separate bank account for donations to finance electioneering communications.[121]

[120] Specifically, BCRA requires sponsors of electioneering communications to disclose their identity, to a certain extent the identities of their donors (explained further infra), the elections and candidates to which their electioneering communications pertain, and the amount of each of their disbursements for the electioneering communications over $200 – much the same information FECA § 434(c) already requires regarding independent expenditures. Compare 2 U.S.C. 434(f)(2) with id. § 434(c)(1). BCRA does not require disclosure of electioneering communications at all until an individual or group spends more than $10,000 to produce and air such communications in a single calendar year. 2 U.S.C. 434(f)(1). By comparison, FECA 434(c)'s existing disclosure requirements for independent expenditures are triggered by a far lower threshold of $250. 2 U.S.C. 434(c)(1).

[121] In any event, plaintiffs cannot launch a facial challenge to BCRA's contributor-disclosure requirement based on the claim that it infringes on their associational rights; rather, such a claim can be pursued only on an as-applied basis, with each plaintiff having to make an individualized showing that disclosure of its contributors will cause them to suffer significant harassment. See Buckley, 424 U.S. at 74. Even were such individual as-applied challenges to be entertained in this litigation, no plaintiffs have made the requisite showing of a "reasonable probability that the

Nor can plaintiffs successfully argue that BCRA's disclosure requirements fail simply because they encompass more than express advocacy. While in Buckley the Court limited the independent expenditure disclosure provisions at issue there to encompass only express advocacy, the Court did so out of a concern for the vagueness of the language of those provisions. See supra 148-53. By contrast, BCRA's disclosure provisions are not vague, nor, for that matter, are they overbroad; like the corporate and union financing restrictions discussed above, they rest on a bright-line definition of "electioneering communication" that does not capture a substantial amount of pure issue advocacy.

Indeed, even if this Court were to find the governmental interest in avoiding the appearance of corruption inadequate to justify BCRA's financing restrictions on electioneering communications, BCRA's disclosure requirements for such communications would still be constitutional because of the separate informational interests they serve. Buckley, 424 U.S. at 81. The government has a substantial interest in "aid[ing] the voters in evaluating those who seek federal office." Id. at 66-67. Any ad falling within BCRA's definition of electioneering communication, by virtue of discussing a candidate in the midst of a federal election, is virtually certain to contain argument bearing on the voters' evaluation of the candidate. By requiring disclosure for such ads, BCRA "helps voters to define more of a candidate's constituencies," information the Supreme Court has recognized as important to casting an informed vote. Id. at 81.[122] Accordingly, apart from whether BCRA's disclosure requirements are justified on the same grounds as its restrictions on corporate and union

compelled disclosure . . . will subject them to threats, harassment, or reprisals." Id.

[122] As shown by defendants' expert Professor David Magleby, voters are frequently confused over the sources of advertisements referring to candidates around the time of an election, and, in polls, they have consistently indicated that they consider this information important for them to know. Magleby Expert Rep. at 29-30; Mark Mellman & Richard Wirthlin, Research Findings of a Telephone Study Among 1300 Adult Americans (Sep. 23, 2002) at 20 [DEV 2-Tab 5]; see also Krasno & Sorauf Expert Rep. at 78-79 (discussing Magleby study).

funding, the informational interests served by BCRA's disclosure requirements provide an independent basis on which to uphold their constitutionality. See Bellotti, 435 U.S. at 792 n.32 (noting that state may require disclosure of ballot initiative advertising sources in order to serve informational interests, even while it may not restrict corporate financing of such advertising).

II. BCRA'S COORDINATION PROVISIONS ARE CONSTITUTIONAL.

A. The Choice Afforded to Political Parties Under Section 213 of BCRA Is Constitutional.

Section 441a(a) of FECA sets out dollar limits on contributions and coordinated expenditures that may be made to a candidate or a political committee by an individual (generally $1,000, raised to $2,000 in BCRA), or by a multicandidate political committee (generally $5,000, unamended by BCRA). In addition to the $5,000 in § 441a(a) applying to all multicandidate political committees, national and state party committees receive "special treatment," Colorado I, 518 U.S. at 610-11, and under § 441a(d) may make substantial additional coordinated expenditures.[123] In 2000, the limits on these additional coordinated expenditures ranged from $33,780 to $67,560 for House of Representative races and, for Senate races, from $67,560 to $1.6 million. See Colorado II, 533 U.S. 431, 439 n.3 (2001).

Section 213 of BCRA amends § 441a(d) and provides that, once a candidate has been nominated, a party can choose to take advantage of the more generous limits on coordinated expenditures if it is willing to forgo independent expenditures. Alternatively, a party can elect to make unlimited independent expenditures, but then its coordinated expenditures will be subject to

[123] Section 441a(d) authorizes national and state party committees to make coordinated expenditures equal to 2 cents multiplied by the voting age population of the United States for a Presidential candidate; the greater of $20,000 or 2 cents multiplied by the voting age population of a State for the State's candidate for Senator; and $10,000 for a candidate for Representative. See 2 U.S.C. 441a(d)(2), (3). These limits are adjusted each year for inflation. 2 U.S.C. 441a(c). The FEC interprets Section 441a to permit national and state political parties to take advantage of both the $5,000 limit on contributions set out in Section 441a(a) and the higher limits on coordinated expenditures in Section 441a(d). See, e.g., 11 C.F.R. 110.7(b)(3).

the same $5,000 contribution limit that applies to coordinated expenditures of all other multicandidate political committees.

Plaintiffs maintain that § 213 violates the First Amendment and the due process and equal protection components of the Fifth Amendment. These claims lack merit. Section 213 gives political parties the opportunity, available to no one else, to choose between (1) making coordinated expenditures in amounts much greater than FECA ordinarily permits, and (2) making expenditures, including independent expenditures, under the rules generally applicable to multicandidate committees. Accordingly, § 213 is fully consistent with the First and Fifth Amendments.

When Congress enacted the predecessor of § 441a(d) in 1974, it did not intend to allow political parties to support their candidates by making both significantly higher coordinated expenditures and unlimited independent expenditures, since at that time it was generally believed that national political parties could not make independent expenditures. See S. Rep. No. 689, 93d Cong., 2d Sess. 7, 15, 18-19 (1974); H.R. Rep. No.1438, 93d Cong., 2d Sess., 54, 56 (1974). Congress reaffirmed that view when it reenacted § 441a(d) after the Buckley decision generally invalidated limits on independent expenditures. H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976); see also FEC v. DSCC, 454 U.S. 27, 28 n.1 (1981) (noting FEC's position that "[p]arty committees are considered incapable of making 'independent' expenditures in connection with the campaigns of their party's candidates").

Twenty years later, however, the Supreme Court, in Colorado I, held that political parties could make independent expenditures and that, as for other entities, those expenditures could not be limited. The Court's plurality opinion stated that, for purposes of coordinated and independent

expenditures, there was no reason to treat political parties any differently from any other multicandidate organization. See Colorado I, 518 U.S. at 619, 621.

Nonetheless, FECA still treated political parties differently from other organizations: parties were permitted to make coordinated expenditures subject to the much higher limits in Section 441a(d). Parties challenged those limits in Colorado II, arguing that they should not be subject to any limits on coordinated expenditures whatsoever. The Supreme Court disagreed, concluding that coordinated expenditures by parties are particularly likely to lead to circumvention of the Act's contribution limits, while a party's interest in making coordinated expenditures is entitled to no greater constitutional protection than the interest of anyone else. 533 U.S. at 455. The Court accordingly applied the same scrutiny to the limits on political party coordinated expenditures that it had applied to limits on other political actors. In accordance with the basic approach applied in prior cases not involving corporations and unions – "routinely str[iking] down limitations on independent expenditures . . . while repeatedly upholding contribution limits," id. at 441 – the Court upheld the limitations set out in § 441a(d) and held that "a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits," id. at 465. The Supreme Court already had upheld the $1,000 contribution limits for individuals and the $5,000 limit for multicandidate party committees in Buckley, recognizing that "[t]hese limitations, along with the disclosure provisions, constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions." 424 U.S. at 58.

The holdings in Buckley, Colorado I, and Colorado II make clear that Congress may constitutionally regulate contributions and coordinated expenditures by political parties, and that the

pre-BCRA contribution limits in §§ 441a(a) and 441a(d) are constitutional. It also is clear that political parties need not be treated differently from other multicandidate committees for purposes of imposing contribution limits. Congress was therefore entitled to apply to political parties the same $5000 limit on contributions and coordinated expenditures it had imposed on other multicandidate political committees. That is one of the options a party committee has under BCRA: to make unlimited independent expenditures in support of a candidate, but only the $5000 in contributions and coordinated expenditures permitted by 2 U.S.C. 441a(a)(2)(A), just like other multicandidate committees.

In BCRA, however, Congress gave party committees another option, not available to anyone else: if the committee voluntarily chooses to forgo making independent expenditures, it can make coordinated expenditures up to the much higher limits set out in § 441a(d). A party committee choosing this option would be in the same position Congress intended when it first enacted those higher limits in 1974, making coordinated expenditures at the higher limit but not independent expenditures. Providing such an option, which a party committee is free to accept or decline, does not constitute a restriction of First Amendment rights. Cf. Maher v. Roe, 432 U.S. 464, 476 (1977) ("Constitutional concerns are greatest when the [government] attempts to impose its will by force of law; the [government]'s power to encourage actions deemed to be in the public interest is necessarily far broader.").

The Court's ruling in Buckley, in sustaining FECA's public financing provisions, is instructive. The Court upheld a restriction on candidate expenditures imposed on publicly financed candidates, even though it had invalidated the same restriction on expenditures by other candidates, because participation in public financing was a voluntary option. "Congress ... may condition

acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forego private fundraising and accept public funding." 424 U.S. at 57 n.65. Similarly, Congress is entitled to offer party committees a higher limit on coordinated expenditures, if they voluntarily agree to forgo independent spending.

Plaintiffs contend that § 213 requires the national party and the political parties established by the State that want to take advantage of the higher limits in § 441a(d) to make a single, unified choice between coordinated and independent expenditures. This may not be the case, however. Both FEC's pre-BCRA regulations and its proposed post-BCRA regulations make clear that the statute is intended to distinguish between two groups within a particular party: (1) national party committees and (2) all State and local committees of that party. See, e.g., 11 C.F.R. 110.7(b)(1) ("The national committee of a political party, and a State committee of a political party, including any subordinate committee of a State committee, may each make expenditures in connection with the general election campaign of a candidate . . . ." (emphasis added)); 67 Fed. Reg. 60,042, 60,067 (proposed 11 C.F.R. 109.32(b)(1)) (Sep. 18, 2002). Under the proposed regulation, each group would be able to make its own selection.[124]

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[124] To prevent circumvention, § 213 prohibits a party committee choosing the higher coordination limit from transferring funds to, or receiving funds from, a committee choosing the option of making unlimited independent expenditures. The California Democratic Party contends that Section 213 is unconstitutional because it bars all such transfers, even where the money is not earmarked for independent expenditures. This argument, however, ignores the fungibility of money. Allowing such transfers would free a committee's other funds for independent expenditures. The California Democratic Party also contends that § 213 violates the equal protection component of the Fifth Amendment. However party committees are actually treated better than any other multicandidate committee because they are given the option of choosing a higher coordinated expenditure limit if they consider that more beneficial than making independent expenditures. Cf. Republican National Committee v. FEC, 487 F.Supp. 280, 285 (S.D.N.Y.) (three-judge court) ("Since the candidate remains free to choose between funding alternatives, he or she will opt for public funding only if, in the candidate's view, it will enhance the candidate's power of communication and association."), aff'd mem., 445 U.S. 955 (1980).

Even under a construction of the provision that would require a unified choice on spending by the national and state-level committees of a political party, the statute would be fully consistent with the Constitution. Only committees that are "established and maintained" by the official state or national party committee are among those "considered to be a single political committee" under this provision. 2 U.S.C. 441a(d)(4)(B). In light of that close structural relationship established by the parties themselves, Congress can properly require such committees to make a single unified choice. And the statute leaves the parties free to establish any internal structure or procedure they believe necessary to govern the manner in which the spending decision with respect to each candidate is to be made. Even if the statute "prompts parties to structure their spending in a way that they would not otherwise choose to do," Colorado II, 533 U.S. at 450 n.11, it is not unconstitutional.

B. Section 214 of BCRA Is Consistent with the First Amendment.

Since 1976, 2 U.S.C. 441a(a)(7)(B)(i) has provided that an expenditure coordinated with a candidate is a contribution, and since Buckley, the Supreme Court has recognized that such expenditures may constitutionally be limited. See 424 U.S. at 46-47; see also Colorado II, 533 U.S. at 446.[125] Sections 214(b) and (c) of BCRA repeal the FEC's current regulations defining coordinated communications and require the FEC to promulgate new regulations. Although the statute sets out four criteria that the FEC must address in the new regulations, it does not require that the new regulations define coordinated communications by reference to any of them.

[125] In § 214(a) of BCRA, Congress incorporated into the statute the principle previously set out in the Commission's regulations, 11 C.F.R. 100.23(b),(c), that expenditures coordinated with a political party, like expenditures coordinated with a candidate, are treated as contributions.

Under the former regulations, an expenditure for a communication was to be considered coordinated if the communication was created, produced, or distributed (1) at the "request or suggestion" of the candidate or party; (2) after the candidate or party had "exercised control or decision-making authority" over the content or distribution of the communication; or (3) after "substantial discussion or negotiation" between the creator, producer, distributor, or payer of the communication and the candidate or party about the content or distribution of the communication, the result of which is "collaboration or agreement." 11 C.F.R. 100.23(c). Congress concluded "that the current FEC regulation is far too narrow to be effective in defining coordination in the real world of campaigns and elections and threatens to seriously undermine the soft money restrictions contained in the bill." 148 Cong. Rec. S2096, S2145 (Mar. 20, 2002) (Sen. McCain). Rather than legislate a new definition of coordination itself, however, Congress repealed the existing coordination regulations and directed the FEC to promulgate new ones. See, e.g., 147 Cong. Rec. S3183-01, S3193 (Mar. 30, 2001) (Sen. McCain) ("[W]e are asking the FEC to promulgate regulations to crack down on the abuses of coordination.").

It is doubtful that plaintiffs' challenge to § 214(c) raises an issue ripe for judicial resolution, and plaintiffs will suffer no hardship by this Court's withholding consideration of their challenge until after the new regulations are promulgated. See Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). Section 214(c) of BCRA neither requires nor prohibits any actions by plaintiffs. It makes no substantive revision to 2 U.S.C. 441a(a)(7)(B), the statutory provision that governs plaintiffs' coordinated spending. Indeed, the provision is addressed solely to the Commission, directing it to revise its regulatory construction of the statute. Cf. Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998) (no "significant"

hardship where the provisions "do not command anyone to do anything or to refrain from doing anything"); cf. also American Trucking Ass'n v. ICC, 747 F.2d 787, 790 (D.C. Cir. 1984) (sua sponte finding agency policy statement not ripe for judicial consideration where the statement was ambiguous and "neither imposes any obligation upon these petitioners, nor in any other respect has any impact upon them 'felt immediately . . . in conducting their day-to-day affairs'" (quoting Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164 (1967))). Until those regulatory revisions are completed, neither the Court nor plaintiffs can know how the revised regulations will affect plaintiffs or have any basis for evaluating whether those regulations will contravene constitutional principles.[126]

Similarly, plaintiffs lack Article III standing to challenge § 214(c). Plaintiffs have not alleged any concrete and particularized injury from § 214(c)'s instructions to the Commission to promulgate a new regulation. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). They have also failed to show a causal connection between any alleged injury and § 214(c). Id. The provision by itself causes plaintiffs no legally cognizable harm. Cf. Metcalf v. National Petroleum Council, 553 F.2d 176, 186-87 (D.C. Cir. 1977) (consumers asserting that statutorily required composition of federal advisory committee would lead to higher costs for petroleum products lacked standing because the occurrence of the harm was "speculative and conjectural"). If, after the Commission promulgates the new regulations, plaintiffs have concerns about the regulations' applicability to specific activities they wish to undertake, they may use the Commission's "chill-reducing advisory opinion mechanism[,] . . . a relatively riskless controversy-ripening tool," set forth in 2 U.S.C. 437f. Martin Tractor, 627 F.2d at 388. If

[126] Indeed, even the terms in the statute on which plaintiffs purport to base their claim, "agreement or formal collaboration," were not defined by Congress and are subject to interpretation in the Commission's rulemaking.

plaintiffs believe that the regulations on their face or as applied infringe their First or Fifth Amendment rights, they may challenge those regulations in a single-judge district court, not the special three-judge court convened in this case.

A favorable decision by this Court also would not redress any alleged injury, see Lujan, 504 U.S. at 561, because eliminating Congress's directive to the Commission would not make the existence of an "agreement or formal collaboration" the defining characteristic of a coordinated expenditure. Section 441a(a)(7)(B)(i) of FECA explicitly provides that expenditures made "at the request or suggestion of a candidate" will be treated as contributions to the candidate.[127] A "request" or a "suggestion" is not synonymous with either an "agreement" or "formal collaboration." The person to whom a request or suggestion is made can act on it without entering into an agreement or engaging in a formal collaboration with the person who made the request or suggestion, as evidenced by the following hypothetical: A candidate suggests to a wealthy individual, "If you want to help, you might finance some political advertisements advocating my election"; the individual does not reply, but a week later, buys $100,000 worth of air time to advocate the candidate's election. Invalidating § 214(c) would not preclude a finding that those advertisements could be treated as contributions under the plain language of FECA § 441a(a)(7)(B)(i).

Even if the Court concludes that plaintiffs present a justiciable challenge to § 214 (b) or (c), such a challenge clearly fails on the merits. Section 214(b) and (c) do nothing more than (1) repeal existing regulations, (2) require the FEC to promulgate new regulations, and (3)

[127] See 148 Cong. Rec. S2145 (Mar. 20, 2002) (Sen. Feingold) ("The bill does not change the basic statutory standard for coordination, which defines and sets parameters for the FEC's authority to develop rules describing the circumstances in which coordination is deemed to exist.").

mandate that the agency in the new regulations address four explicit factors and not require "agreement or formal collaboration" to establish coordination. Plaintiffs have not alleged that either the first or second of these actions has violated their constitutional rights. Nor could they. Congress clearly has the authority to repeal existing regulations and require an agency to promulgate new ones. Plaintiffs could only articulate a challenge to the facial validity of the statute on the ground that any regulations the FEC might promulgate will necessarily be unconstitutionally vague and overbroad. In order to succeed on such a facial challenge, however, plaintiffs would have to demonstrate that there is no possible way for the FEC to constitutionally promulgate regulations that comply with the statute. See, e.g., Salerno, 481 U.S. at 745. In this case, no such showing can be made.

The Supreme Court has taken a "functional" rather than a "formal" approach in identifying contributions and coordinated expenditures. Colorado II, 533 U.S. at 438, 443. The Court adopted that approach in Buckley, and 2 U.S.C. 441a(a)(7)(B)(i), added to FECA in 1976, see Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, Title I, § 112(2), 90 Stat. 475, 486 (1976), incorporates that decision's conclusions on how to differentiate expenditures that may constitutionally be treated as contributions from those that may not. The Supreme Court discussed the matter in responding to the government's concern that, in the absence of expenditure ceilings, FECA's contribution limits could easily be avoided through expenditures coordinated with candidates and their campaigns. Buckley, 424 U.S. at 46. The Court found that FECA's contribution limits "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." Id. at 47.

In reaching these conclusions, the Court relied on FECA's legislative history for "guidance" on how to differentiate expenditures that are contributions from expenditures that are not. See id. at 46 n.53. The Court noted that the House report on the 1974 amendments to FECA "speaks of independent expenditures as costs 'incurred without the request or consent of a candidate or his agent.'" Id. (citing H.R. Rep. No. 93-1239, at 6 (1974) (emphasis added)). It quoted approvingly from the Senate report that discussed the example of an individual's purchasing billboard advertisements to endorse a candidate: "'If he does so completely on his own, and not at the request or suggestion of the candidate or his agent[ ] that would constitute an "independent expenditure" . . . . However, if the advertisement was placed in cooperation with the candidate's campaign organization, then the amount would constitute a gift by the supporter . . . .'" Buckley, 424 U.S. at 46 n.53 (quoting S. Rep. No. 93-689, at 18 (1974)) (emphases added); see also id. at 36-37 & n.43.

Thus, unlike plaintiffs here, the Court in Buckley adopted a practical rather than a restrictive, formalistic approach. Instead of treating an agreement or formal collaboration as the sine qua non of an expenditure that the government could regulate consistent with the Constitution, the Court in Buckley focused on the circumstances leading to an expenditure. In particular, the Court agreed with Congress that an expenditure made at the request or suggestion of a candidate is, in practical effect, the equivalent of a contribution; like a contribution, it can create an opportunity for corruption or the appearance of corruption.

The Court exhibited the same sensitivity to factual circumstances in Colorado I, where, for the first time in an enforcement action, the Court considered whether particular expenditures by a spender were "independent" or "coordinated." Before the Colorado Republican Party had

selected its senatorial nominee from among several individuals vying for the nomination, it had bought radio advertisements attacking the Democratic Party's likely senatorial nominee. 518 U.S. at 613-14. The Court found that the Colorado Republican Party had in fact made those expenditures "independently, without coordination with any candidate." Id. at 608.

The sparse record on the preparation of the advertisements included no evidence that the Party had communicated at all with any of its senatorial candidates about the advertising campaign. The Court found the following points decisive: the expenditure occurred prior to nomination; the Party chairman arranged for the development of the advertisement script on his own initiative and alone approved the script; only the Party's staff read the script; and all relevant discussions took place at meetings attended only by the Party's staff. Colorado I, 518 U.S. at 613-14. The Court discounted a statement by the Party's Chairman that "it was the practice of the Party to 'coordinat[e] with the candidate' 'campaign strategy.'" Id. at 614. That statement was just a "general description of Party practice" and did "not refer to the advertising campaign at issue here or to its presentation." Id. Hence, "the uncontroverted direct evidence [showed] that this advertising campaign was developed by the Colorado Party independently and not pursuant to any general or particular understanding with a candidate." Id.

In sum, the Supreme Court has eschewed a rigid, formalistic approach and instead has emphasized the factual circumstances of an expenditure, for "[c]oordinated spending . . . covers a spectrum of activity." Colorado II, 533 U.S. at 445. "[F]acts speak less clearly once the independence of the spending cannot be taken for granted, and money spent by an individual or PAC according to an arrangement with a candidate is therefore harder to classify." Id. at 442-443. To resolve the facial challenge in this case, however, this Court need not identify all the

activities that are part of the coordinated spending spectrum. It is enough that, under the Supreme Court's functional approach, the existence of an agreement or formal collaboration is not constitutionally required for an expenditure to be deemed coordinated and hence subject to the statutory contribution limits. Indeed, even a new regulation that included only the first two prongs of the old regulation – communications created, produced, or distributed at the request or suggestion of the candidate or after the candidate has exercised control or decision-making authority over the content or distribution – would, without requiring agreement or formal collaboration, satisfy both the statute and the First Amendment.[128] See Buckley, 424 U.S. at 46 n.53. Accordingly, plaintiffs' facial attack on the statute plainly lacks merit.[129]

The statute also requires the FEC to address the following four factors in promulgating its new regulations: (1) payments for the republication of campaign materials; (2) payments for the use of a common vendor; (3) payments for communications directed by former employees of a candidate or political party; and (4) payments made after substantial discussion with a candidate or political party. See BCRA § 214(c). As Congress emphasized, however, none of the factors need be included in the definition of coordination: "[T]he bill does not provide a new definition of 'coordination.' The bill repeals recently adopted FEC regulations on coordination and directs the FEC to issue new regulations. It requires the FEC to address certain topics in the

[128] This is not to suggest that the FEC should or will promulgate such a regulation; it simply demonstrates that § 214 can easily be satisfied without raising any First Amendment concerns. The FEC's proposed regulations set out a three-part test for determining whether a communication is coordinated, focusing on: (1) who paid for the communication; (2) the content of the communication; and (3) the conduct and interactions between the payer and the candidate or the political party committee. See 67 Fed. Reg. 60,065-66 (proposed 11 C.F.R. 109.21) (Sep. 18, 2002).

[129] Although the D.C. Circuit generally has invoked the broader "no-set-of-circumstances" test in evaluating facial challenges, see Amfac Resorts v. Department of the Interior, 282 F.3d 818, 826 (D.C. Cir. 2002), some cases have suggested an alternative, more lenient standard under which a plaintiff might succeed on a facial challenge without demonstrating that the statute is invalid in every conceivable application, see id. Even under that more lenient standard, however, plaintiffs' facial challenge in this case lacks merit, since there are numerous possible ways for the FEC to satisfy both the statutory mandate and the Constitution.

rulemaking, but does not dictate what the FEC should decide." 148 Cong. Rec. S1530 (Mar. 5, 2002) (Analysis of Changes Proposed By Senator McConnell to Pending Campaign Finance Reform Legislation); see also 147 Cong. Rec. S3185 (Mar. 30, 2001) (Sen. Feingold) (the amendment "doesn't require the FEC to come out any certain way or come to any definite conclusion one way or another").

In order to succeed in their challenge, plaintiffs must demonstrate that there is no constitutionally permissible way in which the FEC can even consider the listed factors. Plaintiffs can make no such showing. Congress is entitled to provide guidance to agencies when it directs them to promulgate regulations, and although Congress certainly could have identified additional or different criteria, the legislative record fully supports Congress's choice. See, e.g., 147 Cong. Rec. S2423 (Mar. 19, 2001) (Sen. Specter) (discussing the shared use of campaign consultants); Thompson Comm. Rep. at 128 (same); id. at. 120 (discussing shared advertisements); id. at 4005 (discussing activities of former campaign employees); id. at 4010-11 (discussing common vendors); id. (Minority Views) at 6295 (discussing common vendors). Accordingly, § 214 is entirely consistent with the First Amendment.[130]

[130] Included among the plaintiffs challenging § 214 are the Paul plaintiffs. See Paul Compl. ¶ 33. The claims presented in the Paul complaint more generally, however, can be described as omnibus in nature: the Paul plaintiffs take issue with virtually every aspect of FECA from coordination, id., to contribution limits in general, see id. ¶¶ 11(b)(iii), 13(a), 17(b)(iii), 56; to all disclosure and reporting requirements, see id. ¶¶ 11(b), 12(b), 13(b), 47; to BCRA's provisions concerning soft money, see id. ¶¶ 18, 40, and electioneering communications, see id. ¶¶ 13(c), 14, 35-36. To the extent the Paul claims concern amendments made by BCRA, the claims are addressed by defendants' arguments with respect to those amendments. To the extent the Paul claims address FECA requirements apart from those occasioned by BCRA, however, such as the imposition of contribution limits in general, those claims are either outside the jurisdiction of this Court, see BCRA § 403 (three-judge court available only for actions challenging constitutionality of BCRA "or any amendment made by" BCRA), or are foreclosed by Buckley and its progeny.

TITLE III

PRESENTATION BY THE GOVERNMENTAL DEFENDANTS

I. THE MILLIONAIRE PROVISIONS OF TITLE III ARE CONSTITUTIONAL.

In the so-called "millionaire provisions" set forth in §§ 304, 316, and 319 of BCRA, Congress modified the standard campaign contribution limits applicable when a candidate faces an opponent who expends substantial personal funds, beyond a statutory threshold amount, on his or her own campaign.[131] The limits rise incrementally, in proportion to the amount of personal funds expended by the self-financing candidate. The statutory formula also takes into account the relative campaign funds available to both candidates, so that an incumbent candidate with a sizeable campaign fund will not receive any benefits under the millionaire provisions unless his or her self-financed opponent devotes a much larger amount of personal funds to the campaign. See BCRA § 316; see also Robert F. Bauer, Soft Money Hard Law: A Guide to the New Campaign Finance Law 72-74 (Perkins Coie 2002) (providing illustrative examples). Moreover, BCRA lifts the limits on coordinated expenditures of the opposing candidate's political party when a Senate candidate spends more than 10 times the threshold amount or a House candidate spends more than $350,000 in personal funds. See BCRA §§ 304, 319.[132]

As a threshold matter, as discussed below by the intervenor-defendants, plaintiffs lack standing to challenge the millionaire provisions. If the Court finds the claims justiciable, however, they should be rejected on the merits. The millionaire provisions increase the pool of

[131] The threshold of personal spending for Senate races is $150,000 plus $0.04 multiplied by the voting age population of the candidate's state. BCRA § 304. For the House, the threshold is a standard $350,000. BCRA § 319.

[132] BCRA also caps the amounts that candidates can accept under the provisions: 110% of the self-funded opponent's expenditures for the Senate and 100% for the House. BCRA further requires a candidate to return to contributors any amounts raised under the provisions not spent on that election, thereby restricting the use of the provisions to the specific election where adverse financial conditions exist, and preventing amassing of funds for future elections. BCRA §§ 304, 319. See 147 Cong. Rec. S2451, S2462 (Mar. 19, 2001) (Sen. Domenici).

potential candidates and promote robust competition in federal elections without limiting the spending of the self-funded candidate and without entirely abandoning limits on contributions that serve to minimize the potential for corruption.

A. **The Millionaire Provisions Are Closely Drawn to Advance Important Governmental Interests.**

Congress enacted the millionaire provisions in order to address a problem arising from the invalidation in Buckley of a provision of FECA limiting the amount a candidate could spend on his or her own campaign. See Buckley, 424 U.S. at 51-54. As Senator McConnell explained in reference to draft legislation considered in 1987:

> [W]e ought to ensure a level playing field in elections involving wealthy candidates, by eliminating the "millionaire's loophole" to the post-Watergate contribution limits. If a candidate intends to spend or loan massive funds on his campaign, our bill would allow his opponents to accept larger contributions. It's time to stop Congress from becoming nothing more than an exclusive club for millionaires.

133 Cong. Rec. S7466 (1987); see also 142 Cong. Rec. S6795 (June 25, 1996) (Sen. Domenici); 143 Cong. Rec. S10148 (Sep. 29, 1997) (Sen. Feingold); 135 Cong. Rec. S209 (Jan. 25, 1989) (Sen. Dole); And as Senator DeWine noted during debate of BCRA, the millionaire's loophole has fueled a perception of corruption that "someone today who is wealthy enough can buy a seat" in the Congress. 147 Cong. Rec. S2547 (2001); see also 136 Cong. Rec. S11052 (July 30, 1990) (Sen. Dole); 148 Cong. Rec. H431 (Feb. 13, 2002) (Rep. Moore Capito); 148 Cong. Rec. S2153 (Mar. 20, 2002) (Sen. Domenici); 144 Cong. Rec. S6762 (June 25, 1998) (Sen. Tim Hutchinson). See Gable v. Patton, 142 F.3d 940, 947 (6th Cir. 1998) (government has a compelling interest in "keep[ing] one candidate from essentially buying a campaign").

By allowing larger contributions to a candidate whose voice may otherwise not be heard when running against a self-funded opponent, BCRA facilitates the speech of one candidate without in any way restricting the speech of the self-financing candidate, thereby furthering First Amendment interests by increasing voters' opportunities to hear and evaluate many views in the marketplace of political ideas. See Buckley, 424 U.S. at 14-15 ("[T]he ability of the citizenry to make informed choices among candidates for office is essential, for those who are elected will inevitably shape the course that we follow as a nation."); see also New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open."). More generally, the millionaire provisions encourage less wealthy candidates to run for office and thus help to offset pressure on political parties to recruit not the best candidates, but those who can finance their own campaigns. See Declaration of Paul S. Herrnson in RNC v. FEC (Jan. 28, 1999) at 29-30 [DEV 67-Tab 21, hereinafter Herrnson Expert Rep. in RNC v. FEC]; Kolb Decl. Ex. 1 at 18-20 [DEV 7-Tab 24]; Krasno & Sorauf Expert Rep. at 70;

147 Cong. Rec. S2537, S2546 (Mar. 20, 2001) (Sen. DeWine); 147 Cong. Rec. S2464 (Mar. 19, 2001) (Sen. Sessions).

The millionaire provisions resolve a complex problem by accommodating two vital interests: increasing the pool of potential candidates and encouraging competition between candidates, and preventing corruption and the appearance of corruption fostered by unlimited campaign contributions. This does not mean that Congress concluded that the normal contribution limits do not better serve the interest in avoiding corruption. See 148 Cong. Rec. S2142 (Mar. 20, 2002) (Sen. McCain). Rather, Congress devised a solution closely drawn to

promote all of these goals by preserving the contribution limits but raising them incrementally in highly specialized circumstances. The "court[s] ha[ve] no scalpel to probe" whether this compromise could have been struck with somewhat different limits. Buckley, 424 U.S. at 30.

B. The Millionaire Provisions Do Not Violate the First Amendment.

The millionaire provisions in no way restrict or limit the amount of money that candidates may expend on their own campaigns. Like the public financing provisions upheld in Buckley, these content-neutral provisions neither impose uneven burdens among candidates nor "abridge, restrict, or censor speech, but rather facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." Buckley, 424 U.S. at 92-93 (footnote omitted). As Senator DeWine explained:

> [T]his amendment will enhance free speech. . . . [T]he end result will not be that the candidate who is the millionaire will have a smaller megaphone. . . . [T]hat millionaire who is putting in his or her own money will have the same megaphone they had before this amendment – but what it means is that the candidate who is facing that multimillionaire will also have the opportunity to have a bigger megaphone, to grow that megaphone. [I]t will put more money into the political system, [but] the effect of that money will be to enhance the first amendment. It will be to enhance people's ability to communicate and get a message across without in any way hurting someone else's ability – namely the millionaire – to get their message across.

147 Cong. Rec. S2546 (Mar. 20, 2001); see also 147 Cong. Rec. S2537-2538 (Mar. 20, 2001) (Sen. DeWine); 147 Cong. Rec. S3236 (Apr. 2, 2001) (Sen. Murray); 147 Cong. Rec. S2549 (Mar. 20, 2001) (Sen. Feingold); 142 Cong. Rec. S6810 (June 25, 1996) (Sen. Feingold).

Just as the Supreme Court in Buckley recognized that presidential candidates are free to choose whether to spend unlimited privately raised funds or to accept public financing along with expenditure limits, see id. at 57 & nn.65, 95, so too are wealthy candidates under BCRA

free to decide whether to spend large amounts of personal funds or to limit their use of personal funds to prevent their opponents from benefiting from the millionaire provisions' higher contribution limits.[133] The millionaire provisions thus do not coerce or punish wealthy candidates. The provisions place no limit on a self-financing candidate's ability to raise sufficient funds. Nor do they place any limit on the amount that such a candidate can spend. And increasing contribution limits for candidates who cannot spend enormous amounts of personal funds promotes First Amendment interests by increasing both the pool of potential candidates and encouraging robust competition in federal elections. See 147 Cong. Rec. S2538-39, 2546 (Mar. 20, 2001) (Sen. DeWine); 147 Cong. Rec. S2453 (Mar. 19, 2001) (Sen. Bennett); 147 Cong. Rec. S2536, 2540 (Mar. 20, 2001) (Sen. Durbin); 135 Cong. Rec. S209 (Jan. 25, 1989) (Sen. Dole).

The lower courts have held in an analogous context that increased contributions for publicly-financed candidates running in opposition to self-funded candidates are constitutional. See Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 38-39 (1st Cir. 1993) (upholding statute allowing publicly-financed candidates to receive increased contributions twice the standard amount); Daggett v. Webster, 205 F.3d 445, 464 (1st Cir. 2000) (plaintiffs "have no right to speak free from response"); Wilkinson v. Jones, 876 F. Supp. 916, 926-28 (W.D. Ky. 1995). As held by the lower court in Daggett:

> [P]laintiffs want to preserve the ability to "out spend" their publicly-financed opponents. The general premise of the First Amendment, on the other hand, is that it

[133] The lower courts have recognized that providing candidates with financial resources to counteract wealthy self-funded opponents is not unconstitutionally coercive. For example, in Wilkinson v. Jones, 876 F. Supp. 916 (W.D. Ky. 1995), the court rejected a challenge to Kentucky's public financing scheme as coercive and found that the self-funded candidate controls the other candidate's access to increased contributions and expenditures. Id. at 926-28; see also Daggett v. Webster, 205 F.3d 445, 468 (1st Cir. 2000) ("[T]he non-participating candidate holds the key as to how much and at what time the participant receives matching funds."). The millionaire provisions provide self-funded candidates comparable control and should likewise be upheld.

> preserves and fosters a marketplace of ideas. See, e.g., Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981). In that view of the world, more speech is better. This "marketplace of ideas" metaphor does not recognize a disincentive to speak in the first place merely because some other person may speak as well.

Daggett, 74 F. Supp. 2d 53, 58 (D. Me. 1999) (footnote omitted).

Nor do the millionaire provisions infringe the First Amendment rights of political party committees and other contributors. From the point of view of contributors, the millionaire provisions provide a benefit, not a burden, in that they provide contributors with an option to give more money to certain candidates who face self-funded opponents. A political party or other contributor who wishes to contribute to a self-funded candidate may still do so under BCRA, and individual contributors can now give $2,000 per election under the generally applicable, increased contribution limits. BCRA § 307. If any contributors, including political parties, wish to treat all their favored candidates equally, nothing in BCRA prevents them from doing so or forces them to give an additional amount to opponents of self-funded candidates. Of course, the millionaire provisions do not in any way limit contributors' ability to support candidates of their choice through other lawful means, e.g., by making independent expenditures, volunteering in a candidate's campaign, or associating with other supporters of the self-funded candidate. See Buckley, 424 U.S. at 28 (upholding contribution limits in part because individuals were still "free to engage in independent political expression" and to express support by volunteering).[134]

[134] To the extent that some plaintiffs may argue that the millionaire provisions violate the constitutional rights of the opponents of self-financing candidates, see Adams Compl. ¶ 54, such arguments are patently meritless. The opponents of self-financing candidates receive an unquestionable benefit by gaining the option of accepting contributions in amounts above the standard limits. If they decline to exercise that option for any reason, they are free to make that choice and would suffer no harm. If contributors choose not to give them larger contributions, that is an individual choice neither covered by nor attributable to the statute.

C. The Millionaire Provisions' Declaration-of-Intent Requirement Does Not Violate a Self-Funded Candidate's Right of Free Speech.

Sections 304(b) and 319(b)(1)(B) of BCRA modify the reporting provisions of FECA by requiring candidates to file a declaration stating the amount of personal funds they intend to spend on their campaigns, if the amount exceeds the applicable threshold for their race. The declaration requires only a statement of current intent to self-fund and the anticipated amounts, information that will eventually be reported to the Commission under existing law. See 2 U.S.C. 434; 11 C.F.R. 104. Thus, the essence of the new requirement is timing, not substance. The Supreme Court has already upheld the constitutionality of provisions that require far more disclosure than that contained in the initial declaration. See Buckley, 424 U.S. at 64-68. Disclosing the intended amount of self-financing earlier in the election process creates no significant burden. In fact, since the declaration of intent discloses only the amount of money a declared candidate intends to expend, and nothing about the candidate's views or the identity of his or her supporters, this requirement does not even implicate the "privacy of association and belief" that is the basis for scrutiny under the First Amendment. Buckley, 424 U.S. at 64.

Even if the initial declaration requirement imposed some minimal constitutional burden on self-funded candidates, it serves compelling governmental interests. See Buckley, 424 U.S. at 64-68. Indeed, without this information, the millionaire provisions would be ineffective because neither the candidate opposing a self-financing candidate nor the FEC would have any way of knowing whether he or she qualifies to raise funds under the increased contribution limits. If a self-funded candidate waited until late in the campaign before spending large amounts of personal funds, the purpose of the millionaire provisions would be evaded. "To avoid this type of gamesmanship,"

requiring a declaration of intent "is a legitimate approach for the legislation to take." Daggett, 74 F. Supp. 2d at 59.

D. The Millionaire Provisions Do Not Violate the Fifth Amendment's Equal Protection Guarantee.

The millionaire provisions include no suspect classification, and the provisions therefore need only be rationally related to a legitimate purpose in order to withstand equal protection scrutiny. See, e.g., Heller v. Doe, 509 U.S. 312, 320 (1993).

The millionaire provisions easily withstand rational basis scrutiny. Indeed, as noted above, the provisions satisfy much more rigorous scrutiny; they are closely drawn to advance vital governmental interests. They carefully aim to eliminate the distortion in the campaign finance system created by massive infusions of a candidate's own wealth (which does not reflect that candidates' popularity in the political marketplace)[135] by allowing a candidate without such personal wealth or a large campaign war chest an opportunity to compete on a more equal footing by soliciting contributions in amounts greater than the normal contribution limits.

The millionaire provisions do not violate principles of equal protection because a contributor, under special circumstances, can give additional money to a candidate running against a self-funded candidate. In Buckley, the Court explicitly rejected the claim that contribution limits discriminated between incumbents and challengers, explaining that FECA's limits applied to all candidates without regard to "present occupations, ideological views, or party affiliations." Id.

[135] In Buckley, the Court noted that because of the contribution limit the financial resources available to a candidate's campaign "will normally vary with the size and intensity of the candidate's support," 424 U.S. at 56, but that this "normal relationship" may not apply where the candidate devotes a large amount of his or her personal resources to his or her campaign. Id. at 56 n.63.

at 31; see also Shrink Missouri, 528 U.S. at 389 n.4. The millionaire provisions are equally evenhanded.[136]

II. SECTION 318 OF BCRA, PROHIBITING CERTAIN POLITICAL CONTRIBUTIONS AND DONATIONS BY CHILDREN AGE SEVENTEEN AND YOUNGER, IS CONSTITUTIONAL.

Section 318 of BCRA prohibits individuals age seventeen or younger from "mak[ing] a contribution to a candidate or a contribution or donation to a committee of a political party." BCRA § 318 (adding a new provision, to be codified as 2 U.S.C. 324). A limit on contributions will be sustained against a First Amendment challenge if the government "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of [First Amendment] freedoms." Buckley, 424 U.S. at 25 (internal quotation marks and citations omitted); see also Shrink Missouri, 528 U.S. at 388.

Contribution limits are central to FECA's system for protecting the integrity of the federal election campaign process. Congress recognized that some parents use their influence over their children and their control over their children's assets to circumvent the limits on contributions to candidates and parties. As a prophylactic measure, BCRA § 318 eliminates this opportunity for evasion, while leaving youngsters with many opportunities to participate in political campaigns.

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[136] As discussed above, the choices the millionaire provisions provide to certain contributors and candidates are additional benefits, not burdens. BCRA does not require any candidate, individual contributor, or political party to treat anyone differently based on any impermissible classification. Indeed, political parties have a long history of spending different amounts of money in support of their various candidates, and nothing in BCRA will require them to change their spending patterns. See, e.g., FEC Press Reports on Party Spending 1994-2000 Elections, www.fec.gov; Krasno & Sorauf Expert Rep. at 36; In fact, political parties have tried to recruit millionaire candidates precisely so that the party would not need to spend as much of its own money to assist them. See, e.g., Herrnson Expert Rep. in RNC v. FEC at 29-30; Kolb Decl. Ex. 1 at 18-20 [DEV 7-Tab 24]; Krasno & Sorauf Expert Rep. at 70; 147 Cong. Rec. S2537, S2546 (Mar. 20, 2001) (Sen. DeWine); 147 Cong. Rec. S2464 (Mar. 19, 2001) (Sen. Sessions).

A. The Restriction Serves the Important Governmental Interest in Preventing the Use of Children to Evade FECA's Contribution Limits.

Contribution limits serve the important governmental interest in foreclosing opportunities for corruption and the appearance of corruption, and the Supreme Court has long upheld such limits for that reason, despite the resulting restrictions on First Amendment rights. BCRA § 318 serves the equally important interest in preventing circumvention of contribution limits, and likewise comports with the First Amendment. See 148 Cong. Rec. S2145 (Mar. 20, 2002) (Sen. McCain) (provision added "to prevent evasion of the contribution limits."). "[A]ll members of the Court agree that circumvention is a valid theory of corruption." Colorado II, 533 U.S. at 456. One need not find that most parents seek to evade the limits to conclude that prophylactic measures are warranted. See Buckley, 424 U.S. at 30 (upholding $1,000 limit on individual contributions even though the Court assumed that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action"). Cf. NRWC, 459 U.S. at 210 ("Nor will we second-guess a legislative determination as to the need for prophylactic measures when corruption is the evil feared.").

The need for the prophylactic measure adopted by Congress here is clear. The Commission has long been concerned that "contributions are sometimes given by parents in their children's names," thereby circumventing FECA's contribution limits. See FEC Annual Report 1992, at 64 (1993) [DEV 14-Tab 1];[137] see also 148 Cong. Rec. S2145 (Mar. 20, 2002) (Sen. McCain) ("[T]here is substantial evidence that individuals are evading contribution limits by directing their children to make contributions."); Thompson Comm. Rep. at 4504 ("There is ... substantial evidence that minors are being used by their parents, or others, to circumvent the limits imposed on

[137] For years, the Commission in its annual report notified Congress that some parents have been undermining FECA's contribution limits through contributions purportedly made by their children, and each year, the Commission recommended that Congress enact legislation to prevent the abuse. See FEC's annual reports for 1992-2000 [DEV 14 & 15].

contributions.").[138] Some parents use their own resources, directly or through gifts to their child, to make the contribution under the child's name. For example, in MUR 4484, a father made $1,000 contributions to four candidate committees in the name of his infant son. See INT 015778-859 [DEV 52-Tab 5] (Documents Relating to MUR 4484 (Stewart Banium, Jr., et al.)); FEC 101–0001-0055, 0323-28, 137–0001-13 [DEV 133-Tab 3]; see also INT 015610-13 [DEV 43-Tab 3] (MUR 3268, Jan. 31, 1992 Letter to Michael Lolicata, re: Closing of Investigation; Factual and Legal Analyses); FEC 138-0026-0034 [DEV 43-Tab 5] (MUR 4048). Other parents use their control over their children and their children's assets to cause contributions of funds belonging to the children. In MUR 4255, for example, a father who had given a candidate nearly the statutory maximum and whose wife had contributed the maximum to the same candidate used money from the bank accounts of his one-year-old and three-year-old children to make three $1,000 contributions to the candidate in the children's names. See USA-CIV00890-759 & FEC119-0016-0023 [DEV 43-Tab 4] (Documents relating to MURs 4252, 4253, 4254, & 4255); see also INT 015867-72 [DEV 43-Tab 1] (MUR 488: First General Counsel's Report); see generally Alan C. Miller, Minor Loophole, L.A. Times, Feb. 28, 1999 (report on study commissioned by the newspaper), reprinted in 148 Cong. Rec. S2146-S2148 (Mar. 20, 2002).[139]

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[138] Political fundraisers may unwittingly be encouraging parents in this conduct. As an experienced fundraiser has explained, "Normally when we go out and solicit campaign contributions we do not limit it to the individual. We also want to know whether or not their spouse or their minor or adult children would like to make some campaign contributions." 147 Cong. Rec. S2933 (Mar. 27, 2001) (Sen. Dodd). Dodd was chairman of the DNC in 1995-96 and has served in Congress since 1974. Michael Barone, Richard E. Cohen, with Charles E. Cook Jr., The Almanac of American Politics 2002, at 324, 328 (2001).

[139] See also USA-CIV 00700-05 [DEV 44] (David Mastio, The Kiddie-Cash Caper: Gifts from Minors Are the Next Big Campaign Loophole, Slate.com, posted May 21, 1997); USA-CIV 00783 [DEV 44] (Rise in Student Gifts Begs Question: Was Law Broken?, USA Today, May 20, 1997, at 12A); FEC 137–0009-0012 [DEV 134-Tab 3] (Chris Harvey, The Young and the Generous: Md. Children Give to Campaigns, Wash. Post, Nov. 20, 1995, at B01); (Alex Knott, Members Cash In on Kid Contributions, Roll Call, June 5, 1995, at A-1, reprinted in 148 Cong. Rec. S2146 (Mar. 20, 2002); FEC 137–0008 (Jerry Landauer, Kiddies Go Krazy Over Carter, Break Open Piggy Banks, Wall St. J., July 8, 1976, at 1, 27).

The problem has persisted despite the statutory prohibition against contributions made "in the name of another person" (2 U.S.C. 441f) and a Commission regulation that specifies the conditions under which a contribution may be attributed to a child under the age of eighteen. The regulation requires that the child "knowingly and voluntarily" make the decision to contribute. 11 C.F.R. 110.1(i)(2)(i) (2002 rev. ed.). In addition, the child must have exclusive ownership or control of the funds or goods contributed, and those items cannot have been given to the child for use in making political contributions. 11 C.F.R. 110.1(i)(2)(ii), (iii).

Because FECA does not require political committees to seek or report the age of contributors, the reports filed with the Commission do not reveal the number of contributions by children. However, for each contribution over $200, FECA does require recipient committees to attempt to learn the occupation of the contributor, see 2 U.S.C. 431(13), 432(c)(3), 434(b)(3)(A), and "student" is the most likely occupational category for young contributors.[140] In the 1999-2000 election cycle, "students" made 3,133 contributions of $200 or more, with an aggregate value of $3,049,945. See Biersack Decl. Tbl. 20 [DEV 6-Tab 6]. Of these, 2,995, or 96%, with an aggregate value of $2,857,961, were to candidate and party committees. Id. [141]

[140] The occupational category of "student" is both under- and over-inclusive with respect to minors who make political contributions. On the one hand, some parents attribute to their child who allegedly made a contribution an occupation other than "student." Moreover, where no occupation is listed on a contribution form, the treasurer of a political committee need only use his or her "best efforts" to obtain contributor information, so the occupation of many contributors is never reported. 2 U.S.C. 432(i); RNC v. FEC, 76 F.3d 400, 403 (D.C. Cir. 1996). On the other hand, the category of "student" obviously encompasses individuals older than seventeen years of age.

[141] Except for a dip during the 1997-98 election cycle, the number of "student" contributions during the 1990s rose with each successive cycle. See Biersack Decl. Tbl. 20.

B. The Prohibition of Certain Contributions by Children Is Carefully Drawn to Prevent Circumvention of the Statutory Dollar Limits by Other Individuals.

By law as well as tradition, parents are entitled to control, influence, and direct their children. "[T]he parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." Ginsberg v. New York, 390 U.S. 629, 639 (1968). The Constitution and state law recognize and protect this traditional parental authority. "[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion); see also id. at 78 ("Whether for good or ill, adults not only influence but may indoctrinate children.") (Souter, J., concurring); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish parents may terminate the formal education of their adolescent children sooner than the compulsory school attendance laws would allow); Tex. Code Ann. Fam. § 151.003 ("A state agency may not adopt rules or policies or take any other action that violates the fundamental right and duty of a parent to direct the upbringing of the parent's child.").

Parental rights compound the practical problems the Commission faces in attempting to investigate and prove whether a child knowingly and voluntarily made a particular contribution, and thus whether the parent has violated the contribution limits. As in MUR 4254, some parents will invoke their parental rights and refuse to have their child make an affidavit or submit to questioning. See USA-CIV00932 [DEV 43-Tab 4]. Even when the Commission has unimpeded access to a child, the Commission may not be able to obtain reliable evidence whether the child, rather than the parent, "made" the contribution because of parental influence and the child's immaturity. As the Commission's Office of General Counsel has noted, determining whether a child had the requisite

knowledge and capacity and acted voluntarily "becomes a very subjective decision." See USA-CIV00930 [DEV 43-Tab 4] (General Counsel's Report, MURs 4252-55, at 10); see also FEC 138-0055, 0056; FEC 138-0059, 0060 [DEV 43-Tab 5] (Selected Documents from MURs 199, 4048, 4208, and Pre-MUR 318). Enforcement of the limits is particularly difficult where the contributing children come from "politically active families; yet these are the very individuals who are most likely to make such contributions." See USA-CIV00925 [DEV 43-Tab 4] (General Counsel's Report, MURs 4252-55, at 5). Although the children's exposure to a candidate or his or her campaign can be consistent with an independent choice to contribute, it does not foreclose the possibility of parental manipulation or direction.

Nonetheless, in enacting section 318, Congress "recognize[d] that many individuals under the age of 18 support candidates with great fervor and feel passionately about public issues." 148 Cong. Rec. S2146 (Mar. 20, 2002) (Sen. McCain). As Senator McCain explained, "We do not mean to suggest that children should not be able to participate in the political system.... We simply believe that allowing them to contribute to candidates presents too great a risk of abuse." Id.[142] Congress's solution therefore targets the most troubling opportunity for circumvention, and leaves children with a variety of other ways to participate in political campaigns. They may volunteer their services to a candidate for federal office or to a political committee, including a party committee. See 2 U.S.C. 431(8)(B)(i); 11 C.F.R. 110.19(d) (approved Oct. 31, 2002).[143] They may make

[142] In its report on illegalities in the 1996 federal elections, the Thompson Committee recommended that children be precluded from contributing to candidates for federal office. Thompson Comm. Rep. at 4504. This recommendation was part of a broader proposal that "those [individuals] ineligible to vote be precluded from making contributions to candidates for federal office. . . . [E]ach contributor [should be] an American citizen of voting age." Id.

[143] See, e.g., FEC 137-0013 [DEV 134-Tab 3] (Editorial, Youths can play politics without donating money, Pantagraph.com, dated Apr. 13, 2002).

unlimited independent expenditures to express their views, and they may contribute to independent political committees. See 2 U.S.C. 441a(a)(1)(C).

No one could reasonably argue that babies, toddlers, and other young children are capable of knowingly and voluntarily making contributions (or that those children, as a usual practice, have exclusive control over the assets used for the contribution). Thus, the matter comes down to the decision where to draw the line. Congress chose the age of eighteen. The Supreme Court has recognized that "'when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.'" Buckley, 424 U.S. at 83 n.111 (internal citation omitted); see also id. at 30 ("Congress' failure to engage in ... fine tuning does not invalidate the legislation."); Stiles v. Blunt, 912 F.2d 260, 267 (8th Cir. 1990) ("[W]hether the minimum age [to run for state representative] should be 18, 21, 24, or some other age is a classic example of legislative line-drawing that we must leave undisturbed."); Gaunt v. Brown, 341 F. Supp. 1187, 1189 (S.D. Ohio) ("Age limit on voting necessarily must be arbitrary"), aff'd, 409 U.S. 809 (1972); Craig v. Boren, 429 U.S. 190, 210 n.24 (1976) ("[T]he Legislature is free to redefine any cutoff age for the purchase and sale of 3.2% beer that it may choose.").

The Constitution distinguishes between individuals under age eighteen and those over that age. Most notably, the Constitution does not guarantee children seventeen years and younger the right to vote, see U.S. Const. amend. XXVI, although "the right of suffrage is a fundamental matter in a free and democratic society." Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). In general, "the constitutional rights of children cannot be equated with those of adults." Bellotti v. Baird, 443 U.S. 622, 634 (1979). "Even where there is an invasion of protected freedoms 'the power of the state to

control the conduct of children reaches beyond the scope of its authority over adults.'" Ginsberg, 390 U.S. at 638 (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)). In cases where the Supreme Court has upheld children's claims to constitutional protection, "[t]hese rulings have not been made on the uncritical assumption that the constitutional rights of children are indistinguishable from those of adults." Bellotti, 443 U.S. at 635.

The treatment of children seventeen and younger in section 318 is consistent with state law that limits the rights and privileges of minors. See, e.g., Richard A. Leiter, National Survey of State Laws 444-55 (3d ed. 1999). In most states, only someone eighteen years of age or older is capable of controlling and disposing of his or her property, is qualified to serve on a jury, see 33 Council of State Governments, The Book of the States 386-87 (2000-01 ed.) (Tbl. 7.32 ("Minimum Age for Specified Activities")); see also 28 U.S.C. 1865(b)(1), and is eligible to vote for candidates for public office.[144] With respect to children younger than eighteen, under state law, parents generally "have the right to make all decisions regarding the child's care and control, education, health, residence, associates, and religion," and children "must, in general, follow the direction of their parents." 1 Donald T. Kramer, Legal Rights of Children ("Legal Rights") § 14.03, at 591 (footnotes omitted) (2d ed. 1994). See, e.g., Tex Code Ann. Fam. § 151.001 ("Rights and Duties of Parent") (Vernon 2002). Moreover, unless parents relinquish the right, they are entitled to the services and earnings of their minor children.[145] Although minors have the right to acquire and own some

[144] FEC, State Voter Registration Requirements, www.fec.gov/votregis/state_voter_ reg_ requirements02.htm (9/25/02).

[145] See, e.g., Ga. Code § 19-7-1(a) ("Until he reaches the age of majority, the child shall remain under the control of his parents, who are entitled to his services and the proceeds of his labor."); Cruz v. Broward Cty School Bd., 800 So. 2d 213, 215 (Fla. 2001); Dixon v. State, 579 So. 2d 29, 32 (Ala. Crim. App. 1990).

property, "they are considered incapable of property management." 1 Legal Rights § 801, at 394-95 (footnote omitted).

Other restrictions also apply. For example, state law provides that contracts by minors are generally voidable.[146] In most states, minors must sue or be sued through adult parties representing their interests, and the federal courts apply that law.[147] Indeed, the present litigation illustrates this point.[148] With the consent of a parent or guardian, a youth under eighteen may engage in some activities ordinarily reserved for individuals eighteen or older. See, e.g., 10 U.S.C. 505(a) (enlistment in the armed forces). However, the youth is not thereby entitled to engage in the full range of adult activities. For example, he or she still may not vote or purchase alcohol. See The Book of the States 386 (table).

Finally, contributions by minors of all ages, even adolescents, present additional practical difficulties. The Commission either can accept at face value self-serving, conclusory, and sometimes lawyer-crafted statements of family members,[149] or it can probe for the truth by querying youngsters about their knowledge of politics and their relationship with their parents in ways that may threaten the privacy of the family.[150] See Merriken v. Cressman, 364 F. Supp. 913, 915 (E.D.

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[146] See, e.g., Ga. Code §§ 1-2-8, 13-3-20, 44-5-41 (2002); Byrd v. Commercial Credit Corp., 675 So. 2d 392, 393 (Ala. 1996); Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 357 (Fla. Dist. Ct. App. 1997).

[147] See 1 Legal Rights §§ 11.01-11.02, at 517-18; §§ 12.01-12.05, at 530-45; Fed. R. Civ. P. 17(b) (law of domicile establishes capacity to sue or be sued) and 17(c) (appointment of representative for "infants or incompetent persons").

[148] See Caption of Echols Amend. Compl. Since the McConnell Second Amended Complaint does not indicate that the two minor plaintiffs in that case, O'Brock (see ¶ 40) and Southerland (see ¶ 41), sued through adult representatives, they apparently are improper parties to this litigation. See La. Civ. Code Ann. art. 29, 216 (West 2002); La. Code Civ. Proc. Ann. art. 683 (West 2002); Ga. Code §§ 9-2-28, 29-4-7, 39-1-1(a); Miracle v. Spooner, 978 F. Supp. 1161 (N.D. Ga. 1997).

[149] See FEC 138-0008 to 0014 [DEV 43-Tab 5] (MUR 199); FEC 137-0018 [DEV 43-Tab 1] (MUR 488); FEC 138-0044, 0045, 0050 [DEV 43-Tab 5] (MUR 4208); FEC 101–0050-55 [DEV 134-Tab 3] (MUR 4252).

[150] See FEC 119-0017, 0021 [DEV 43-Tab 4] (Letter from Loren W. Hershey (father) to the Federal Election Commission re: MUR 4254, Oct. 13, 1995, at 2, 6).

Pa. 1973) (holding unconstitutional a questionnaire for high school students that was intended to help identify potential drug abusers and that asked "personal questions about [the students'] relationship with parents and siblings"); Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998) (absent significant harm to child, state constitution protects privacy of family from intrusion by government).

In sum, section 318 of BCRA "restores the integrity of the individual contribution limits," 148 Cong. Rec. S2145-S2146 (Mar. 20, 2002) (Sen. McCain), and provides a constitutional solution to vexing problems the Commission faces in enforcing those limits. The limited prohibition it imposes is clearly consistent with long-established restrictions on the liberties and activities of minors.

III. THE INCREASE IN THE INDIVIDUAL CONTRIBUTION LIMIT TO $2,000 IS CONSTITUTIONAL.

BCRA § 307(a)(1) increases the amount that an individual may contribute to a candidate per election from $1,000 to $2,000. The plaintiffs in Adams assert that this new limit will violate their right to equal protection under the Fifth Amendment because the voter plaintiffs, and the supporters of the candidate plaintiffs, do not have sufficient funds to contribute $2,000.

A. The *Adams* Plaintiffs Lack Article III Standing.

BCRA's increase in the individual contribution limit does not restrict the activities of the Adams plaintiffs in any way. The candidate plaintiffs can still run for office, the voter plaintiffs can still make the same contributions they did under the $1000 limit, and the organizational plaintiffs can still educate and lobby as they did before. Thus, BCRA § 307(a)(1) causes them no injury in fact, an essential requirement of standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61

(1992). Any decision by the candidate plaintiffs to limit the size of contributions they will accept would be a self-imposed injury not caused by BCRA, any lack of personal wealth that prevents the voter plaintiffs from making larger contributions is also not caused by BCRA, and the organizational plaintiffs have no protected constitutional right to have legislators accept their lobbying positions. Cf. Georgia State Conference of NAACP Branches v. Cox, 183 F.3d 1259, 1263-64 (11th Cir. 1999) (no "right to equal influence in the overall electoral process").

Plaintiffs' real claim is that the Constitution requires the government to prevent other citizens from raising and contributing more than they do, but "Buckley ... made clear that contributors cannot be protected from the possibility that others will make larger contributions." Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981) (citations omitted). For all these reasons, plaintiffs raising similar claims have repeatedly been found to lack constitutional standing. See, e.g., Cox, 183 F.3d at 1262-64; Albanese v. FEC, 78 F.3d 66, 68 (2d Cir. 1996); Whitmore v. FEC, 68 F.3d 1212, 1215 (9th Cir. 1995); see also NAACP v. Jones, 131 F.3d 1317, 1324 (9th Cir. 1997); Winpisinger v. Watson, 628 F.2d 133, 137-39 (D.C. Cir. 1980).

B. BCRA's Increase in the Individual Contribution Limit Does Not Violate the Equal Protection Component of the Fifth Amendment.

Because wealth is not a suspect category, BCRA's increase in the individual contribution limit is subject to review only for a rational basis.[151] The new $2,000 limit serves the same purpose as the original $1,000 contribution limit—minimizing the opportunity for corruption and the appearance of corruption. See Buckley, 424 U.S. at 23-35; Shrink Missouri, 528 U.S. at 397-98. The

[151] "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Buckley, 424 U.S. at 93. Race is a suspect category, but the $2000 contribution limit applies the same to candidates and contributors of all races. The Adams plaintiffs allege only disparate impact, not discriminatory intent, and that is not a basis for finding unconstitutional discrimination.

change to a $2,000 limit simply reflects some of the impact of inflation in the quarter century since the original $1,000 limit was upheld in Buckley.[152]

There is no arguable basis for the judiciary to require Congress to tighten the contribution limit. "[T]he Act applies the same limitation on contributions to all candidates regardless of their present occupations, ideological views, or party affiliations." Buckley, 424 U.S. at 31; see also id. at 56 ("[N]othing invidious, improper, or unhealthy in permitting [campaign contributions] to be spent to carry the candidate's message to the electorate.") (footnote omitted). "[I]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." Buckley, 424 U.S. at 30 (internal citation omitted). Accord, Shrink Missouri, 528 U.S. at 387-88.

[152] See, e.g., 148 Cong. Rec. H443 (Feb. 13, 2002) (Rep. Shays); 147 Cong. Rec. S3006 (Mar. 28, 2001) (Sen. Thompson) (The $1,000 limit "has not been indexed for inflation since 1974"); id. at S3011 (Sen. Feinstein) ("Ordinary inflation has reduced the value of a $1,000 contribution to about one-third of what it was in 1974.").

TITLES III AND V: CLAIMS AGAINST THE FCC

PRESENTATION BY THE UNITED STATES DEFENDANTS

I. SECTIONS 305 AND 504 OF BCRA ARE CONSTITUTIONAL.

A. Background

Sections 305 and 504 of BCRA impose disclosure requirements with respect to certain political broadcasts on radio or television. Those requirements were enacted against the backdrop of a long history of federal regulation of political broadcasts, beginning with the Radio Act of 1927, 44 Stat. 1162, and the Communications Act of 1934, 47 U.S.C. 151 et seq. The Communications Act requires broadcast stations to provide equal opportunities for air time to legally qualified candidates for the same office, 47 U.S.C. 315(a), and to grant reasonable access to legally qualified candidates for federal office, 47 U.S.C. 312(a)(7); see CBS, Inc. v. FCC, 453 U.S. 367 (1981) (upholding "reasonable access" requirement). The Act also prohibits broadcast stations from charging candidates more for air time than "the charges made for comparable use of such station by other users," 47 U.S.C. 315(b)(2), and requires a station to sell broadcast time to a qualified candidate at the "lowest unit charge of the station for the same class and amount of time for the same period" during the period immediately prior to an election (45 days preceding a primary or 60 days preceding a general election). 47 U.S.C. 315(b)(1).[153] During other times, the station can charge no more than the rate applicable to other advertisers for "comparable use." 47 U.S.C. 315(b)(2).

These provisions, mandating reasonable access and equal opportunities for air time for legally qualified candidates and providing legally qualified candidates with access to the "lowest

[153] The "lowest unit charge" provision was added in 1972 by FECA, "which had the dual purpose of reducing the costs of campaigns and increasing candidates' access to the broadcast media." Miller v. FCC, 66 F.3d 1140, 1142 (11th Cir. 1995) (citing S. Rep. No. 92-96, at 20, reprinted in 1972 U.S.C.C.A.N. at 1774).

unit charge," further Congress's goal of promoting "full and unrestricted discussion of political issues by legally qualified candidates." Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525, 529 (1959). In conjunction with those provisions, Congress and the FCC have imposed comprehensive disclosure obligations on candidates and advocacy groups using the broadcast media for political programming. The Communications Act requires identification of the sponsors of all advertisements, including political advertisements, at the time of broadcast. See 47 U.S.C. 317; 47 C.F.R. 73.1212(e) (broadcast stations); 47 C.F.R.76.1615(a), (c) (cable television systems). The broadcast station must exercise "reasonable diligence" in making the sponsorship announcement. See 47 U.S.C. 317(c); Loveday v. FCC, 707 F.2d 1443, 1449 (D.C. Cir. 1983).

Since at least 1939, the FCC also has required broadcast stations to maintain a complete record of all requests for broadcast time made for a political candidate, including the disposition of the request and the charges made. See 47 C.F.R. 3.104 (1939); see also 47 C.F.R. 3.90(a)(3) (1939). Current regulations require stations to maintain a "political file" for public inspection, which must include "all requests for broadcast time made by or on behalf of a candidate for public office" along with the disposition of such requests and charges made or if free time is provided for use. See 47 C.F.R. 73.1943 (broadcast stations); 47 C.F.R.76.1701 (cable television systems).

In addition, since 1944, the FCC has imposed detailed requirements for disclosure of sponsorship of paid broadcasts on broadcast stations. See Loveday, 707 F.2d at 1453-54. Any paid broadcast must include an announcement disclosing "fully and fairly . . . the true identity of" the sponsor. 47 C.F.R. 73.1212(e); see also 47 C.F.R.1615(d) (disclosure of "true identity" of sponsor on cable television). Where the paid broadcast is "political matter or matter involving the discussion of a controversial issue of public importance," and a corporation or other entity is paying for the

matter, a list of the entity's chief executive officers or members of the executive committee or board of directors must be made available for public inspection. 47 C.F.R. 73.1212(e); 47 C.F.R. 76.1701(d) (cable television). Such lists must be available for public inspection for two years. Id.

The FCC has issued legal guidance on political broadcasting issues, The Law of Political Broadcasting and Cablecasting: A Political Primer, 100 F.C.C.2d 1476 (1984) ("Political Primer"), and has codified its political programming policies, In re Codification of the Commission's Political Programming Policies, Report and Order, 7 F.C.C.R. 678 (1991), on reconsideration, 7 F.C.C.R. 4611 (1992). The FCC is available to answer inquiries from broadcast stations, candidates, and political parties about their rights and obligations, and it is not uncommon for the agency to mediate disputes that arise among stations, candidates, and political parties.

Sections 305 and 504 of BCRA amend Section 315 of the Communications Act to require disclosures about the source and sponsorship of political messages broadcast on television or radio. Section 305 places restrictions on a candidate's eligibility to obtain the "lowest unit charge" under 47 U.S.C. 315(b). The provision requires a candidate to provide written certification to a broadcast station that neither the candidate nor any authorized committee of the candidate will make any "direct reference to another candidate for the same office, in any broadcast" unless the broadcast satisfies certain requirements. For a television broadcast, the statute requires, for at least four seconds at the end, a "clearly identifiable photographic or similar image" of the candidate, and "a clearly readable printed statement, identifying the candidate and stating that the candidate has approved the broadcast and that the candidate's authorized committee paid for the broadcast." For a radio broadcast, the statute requires "a personal audio statement by the candidate that identifies the

candidate, the office the candidate is seeking, and indicates that the candidate has approved the broadcast."

Section 305 leaves candidates "totally free . . . to say anything they want about their opponent." 147 Cong Rec. S2693 (Mar. 22, 2001) (Sen. Wyden). It only modifies the conditions under which federal law entitles a candidate to obtain air time at the "lowest unit charge." If a candidate mentions his or her opponent in a broadcast, the candidate cannot qualify for the "lowest unit charge" unless he or she states approval of the broadcast in accordance with the requirements of Section 305. See 147 Cong. Rec. S2694 (Mar. 22, 2001) (Sen. Levin) ("[I]f [federal candidates] want [the] lowest unit rate . . . if they want to take advantage of that benefit which is conferred . . . they [must] at least put their name and their face at the end of the ad they are funding."); see also 148 Cong. Rec. S2174-02 (Mar. 20, 2002) (Sen. Wyden).

Section 504 of BCRA requires a broadcast station to maintain and make publicly available a "political file" containing a complete record of requests to purchase broadcast time "made by or on behalf of a legally qualified candidate for public office" or to broadcast a "message relating to any political matter of national importance," including "a national legislative issue of public importance." The record created by the licensee must include "the name of the person purchasing the time, the name, address, and phone number of a contact person for such person, and a list of the chief executive officers or members of the executive committee or of the board of directors of such person." The information must be placed in the political file and retained for at least two years.

B. Plaintiffs Lack Standing to Challenge the Constitutionality of Section 305, and Present No Ripe Controversy with Respect to That Provision.

Plaintiffs' challenge to Section 305 of BCRA is not justiciable. Only the Second Amended McConnell Complaint, ¶¶ 94-96, includes a challenge to that provision and, because Section 305 applies exclusively to candidates for federal elected office, Senator McConnell and Representative Pence are the only plaintiffs conceivably affected by the provision. But neither Senator McConnell nor Representative Pence has alleged any "actual or imminent" injury from Section 305. In the absence of a concrete and particularized injury, plaintiffs lack Article III standing. See Lujan, 504 U.S. at 560-61.

Plaintiffs bear the burden to demonstrate standing and, at this stage of the case, to set forth "specific facts," id., to support their claim of "specific present objective harm or a threat of specific future harm," Laird v. Tatum, 408 U.S. 1, 14 (1972). In their challenge to Section 305, plaintiffs have wholly failed to discharge their burden.

Neither Senator McConnell

nor Representative Pence has stated whether they intend to run ads referring to their possible opponents in future elections.

Even if plaintiffs had made a credible showing of future injury, any injury from Section 305 would not be sufficiently imminent to satisfy standing or ripeness requirements. Senator McConnell is a candidate for reelection in November 2002, before BCRA takes effect. Assuming that he is reelected, Senator McConnell will not face another senatorial campaign for six years. Thus, the earliest that Senator McConnell could experience any effect from Section 305 is before the Republican primary in 2008, when the "lowest unit charge" would be available under 47 U.S.C. 315(b). And Section 305 could cause a legally cognizable injury to Senator McConnell only if he intends to broadcast an advertisement that refers to his opponent without the requisite acknowledgment. Similarly, the earliest that Section 305 could apply to Representative Pence is during his primary race in 2004 under the same caveats. In these circumstances, plaintiffs' challenge to Section 305 is premature. See United Public Workers v. Mitchell, 330 U.S. 75, 90-91 (1947).

C. Sections 305 and 504 of BCRA Satisfy the First Amendment.

In raising a facial challenge to Sections 305 and 504, plaintiffs bear "a heavy burden," Rust v. Sullivan, 500 U.S. 173, 183 (1991); facial invalidation "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort." Broadrick, 413 U.S. at 613. As explained below, the disclosure requirements under Sections 305 and 504 are fully consistent with the First Amendment.

The Supreme Court has long recognized the important role of public disclosure in preventing fraud and corruption. The Court in Buckley upheld FECA's reporting and disclosure

requirements on political committees and federal candidates and on persons acting independently of a federal candidate or his committee. The Court explained that the Government has a substantial interest in providing the electorate with information regarding the sources of political campaign funds and how candidates spend those funds. Such information allows voters "to place[] each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches." 424 U.S. at 67. In addition, "[t]he sources of a candidate's financial support . . . alert the voters to the interest to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." Id. Disclosure also deters "actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures to the light of publicity." Id.

Similarly, the Court in Buckley determined that the disclosure of independent expenditures furthers a "substantial governmental interest" in increasing "the fund of information concerning those who support the candidates," and "help[ing] voters to define more of the candidates' constituencies." Id. at 81. Such disclosure "shed[s] the light of publicity on spending that is unambiguously campaign related but [that] would not otherwise be reported." Id.

Two years later, in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), the Supreme Court recognized that mandatory disclosure of the source of corporate advertising on political issues served the Government's interest in allowing "the people . . . to evaluate the arguments to which they are being subjected." Id. at 792 n.32 (citing Buckley, 424 U.S. at 66-67). The Court reasoned that "[c]orporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible" and that the public is assisted in evaluating the relative merits of conflicting arguments by considering "the source and credibility of the advocate." Id. The

Court also reiterated its pronouncement in Buckley that disclosing sources of communication has the "prophylactic effect" of preventing corruption or the appearance of corruption. Id.; see also Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 202-03 (1999) (approving state-law provisions requiring disclosure of names of initiative sponsors and amounts spent); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 298-99 (1981) (recognizing municipality's legitimate goal of "identifying the sources of support for and opposition to ballot measures").

Sections 305 and 504 readily withstand scrutiny under Buckley v. Valeo and its progeny. By requiring disclosure of whether a candidate approved a broadcast that refers to his opponent, Section 305 provides voters with important additional information to consider in evaluating that candidate. And requiring the disclosure to be made with the candidate's face and voice ensures that this vital information is transmitted to viewers and listeners in a way that sufficiently distinguishes it from the remaining parts of the broadcast so that the information is communicated effectively.[154] Section 504 also provides public access to important information about political broadcasts. Evidence suggests that voters currently have difficulty identifying the true sponsors of issue ads on television or radio, and determining whether those sponsors are related to a candidate's campaign. Organizations that sponsor issue ads frequently are front groups for trade associations, labor unions, and wealthy individuals. This lack of disclosure creates greater opportunities for political corruption. See Magleby Expert Rep. at 18-19, 28-30; Krasno & Sorauf Expert Rep. at 71-72, 73-74 ("Secrecy is one of the outstanding characteristics of issue ads, especially those financed by interest groups. ... This secrecy, by itself, creates enormous opportunities for wrongdoing, for favors

[154] This is not the first time that standards of clarity have been imposed on sponsors of political broadcasts. See 47 C.F.R. 73.1212(a)(2)(ii) ("In the case of any television political advertisement concerning candidates for public office, the sponsor shall be identified with letters equal to or greater than four percent of the vertical picture height that air for not less than four seconds.")

to be exchanged between issue advocates and public officials."). Thus, Sections 305 and 504 prevent the appearance and reality of corruption.

Not only do Sections 305 and 504 further an important government interest, but their scope is narrow. Both provisions apply only to television and radio broadcast stations and cable television systems. Courts have upheld more intrusive regulation of those media than any other form of communication. See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969); NBC v. United States, 319 U.S. 190 (1943); compare Talley v. California, 362 U.S. 60 (1960) (ban on anonymous leaflets invalid) and Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating state law providing right of reply to political candidate attacked by newspaper) with Red Lion, 395 U.S. at 393-94 (upholding FCC's Fairness Doctrine and implementing rules); CBS v. FCC, 453 U.S. 367 (1981) (upholding statute providing federal political candidates right of reasonable access to broadcast stations and FCC's implementation of statute); Turner Broad., 512 U.S. at 653-57 (rejecting First Amendment challenge to cable television "must-carry" regulations required by statute and noting that attempted analogy to Tornillo ignored "important technological differences between newspapers and cable television [systems]").

Indeed, the federal courts have upheld significant regulation of political discourse on broadcast media that result in far greater intrusions on broadcasters than the requirements of Sections 305 and 504. The Supreme Court, for example, has rejected a First Amendment challenge to 47 U.S.C. 312(a)(7), which requires broadcasters to provide reasonable access for federal candidates. See CBS, 453 U.S. at 396-97. The Court also sustained the FCC's Fairness Doctrine, which required that broadcast stations air discussion of controversial public issues and provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues. See Red Lion, 395 U.S. at

369, 389-90.[155] And the D.C. Circuit has upheld 47 U.S.C. 315(a), which requires equal opportunities for broadcast time for all legally qualified candidates where time is made available to any candidates for the office. Branch v. FCC, 824 F.2d 37, 48-50 (D.C. Cir. 1987).

Moreover, unlike political discourse in other fora, political broadcasts have traditionally been subject to significant disclosure requirements. As explained above, Congress has long required the disclosure of those who sponsor paid broadcasts, including political advertisements. See 47 U.S.C. 317. And the FCC has ruled that issue ads that do not disclose true sponsors violate its sponsorship identification rules, and the agency has cautioned stations to exercise reasonable diligence in determining the true sponsor of the ad and displaying the sponsor on the ad. See Trumper Comm., 11 F.C.C.R. 20,415, 1996 WL 635821 (Oct. 29, 1996). Moreover, the Fifth Circuit has rejected a First Amendment challenge to a state statute requiring sponsors of political broadcast advertisements to identify themselves. See KVUE, Inc. v. Moore, 709 F.2d 922, 937 (5th Cir. 1983), aff'd, 465 U.S. 1092 (1984).

Sections 305 and 504 are no different for First Amendment purposes than these restrictions that the courts have upheld. Section 305 applies only to advertisements by federal candidates; it is limited to the period immediately before an election, when the Communications Act requires broadcasters to offer the "lowest unit charge" benefit to federal candidates, see 47 U.S.C. 315(b); 47 C.F.R. 73.1942 (broadcast stations), 76.206 (cable television systems); and it applies only when the candidate seeks the "lowest unit charge" benefit. Much like the required statement of sponsorship under prior law, section 305 merely requires that, as a condition of receiving the benefit of "lowest

[155] The FCC eliminated the Fairness Doctrine in 1987. See Syracuse Peace Council, 2 FCC Rcd 5043 (1987), recon. denied, 3 F.C.C. 2d 2035 (1988). The D.C. Circuit affirmed the Commission's determination that the Fairness Doctrine no longer served the public interest. See Syracuse Peace Council v. FCC, 867 F.2d 654, 669 (D.C. Cir. 1989).

unit charge," candidates state their approval of broadcasts referring to their opponent. This ensures that the federal benefit itself is not used to subsidize speech that might mislead the public. Cf. Regan v. TWR, 461 U.S. 540, 545-46, 547-51 (1983). Indeed, even outside the broadcasting context, the Supreme Court has upheld a disclosure provision analogous to Section 305. In Lewis Pub. Co. v. Morgan, 229 U.S. 288, 316 (1913), the Court rejected a First Amendment challenge to a federal statute that requires newspapers to publish and provide to the Postmaster General a statement of the names and address of their editors, publishers, business managers, and owners in order to qualify for preferential postage rates. See 39 U.S.C. 3685.

Section 504 is also narrowly targeted to ensure an informed public. As the legislative record demonstrates, the sponsors of a wide range of political advertisements broadcast on radio and television have kept their identities secret from the public. See supra at 42-43, 46-47. Section 504 requires public disclosure of those sponsors, a requirement that is not meaningfully different for First Amendment purposes from preexisting FCC regulations that compel disclosure of the sponsors of broadcasts concerning "controversial issue[s] of public importance." See 47 C.F.R. 73.1212(e); see also 47 C.F.R. 76.1701(d) (cable television). Broadcasters have complied with this longstanding provision without difficulty. See National Association of Broadcasters, Political Broadcast Catechism (2000). Just as reasonable access, equal opportunity for air time, and sponsorship identification have withstood First Amendment scrutiny, Sections 305 and 504, which reach no more broadly, also pass constitutional muster.

Plaintiffs' contention that Section 504 is unconstitutionally vague and overbroad lacks merit. The statutory text describes in explicit detail the information that must be included in the political file, and broadcasters should have no difficulty complying with it. Indeed, the provision is similar to

existing requirements. As explained above, stations are already required to maintain a "political file" for public inspection that includes "all requests for broadcast time made by or on behalf of a candidate for public office." 47 C.F.R. 73.1943, 76.1701. And paid broadcasts must already "fully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or other entity by whom or on whose behalf such payment is made." 47 C.F.R. 73.1212(e), 76.1615(d).

Moreover, contrary to plaintiff's argument, section 504's reference to broadcasts concerning "political matter[s] of national importance" is not unduly vague. The Communications Act and the FCC's implementing regulations are replete with language that is at least as broad as the text of Section 504. The Act directs the FCC to consider the "public interest" in granting licenses. See 47 U.S.C. 307(a), 309(a). The Act also directs broadcasters to operate "in the public interest" and to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." See 47 U.S.C. 315(a). The Act authorizes the FCC to require additional sponsorship announcements for "any political program or any program involving the discussion of any controversial issue." 47 U.S.C. 317(a)(2). Disclosure obligations are triggered by the transmission of "any political broadcast matter or any broadcast matter involving the discussion of a controversial issue of public importance." See 47 C.F.R. 73.1212(d),(e) ("station shall . . . require that a list of the chief executive officers or members of the executive committee or of the board of directors . . . shall be made available for public inspection"); see also 47 C.F.R. 76.1701(d) (disclosure where cablecasting material is "a political matter or matter involving the discussion of a controversial issue of public importance"). Moreover, as described above, the FCC routinely assists

broadcasters, candidates, and others with questions about political broadcasts on radio or television and about record-keeping by broadcast stations and cable systems.

CONCLUSION

For the foregoing reasons, the motion of the Governmental Defendants and the Defendant-Intervenors for judgment should be granted, and plaintiffs' claims dismissed, with prejudice.