IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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Joint Government and Intervenors' Introduction

The consistent, but flawed, theme of plaintiffs' attack on BCRA is that it represents an epochal change in the law — that it is "the most threatening frontal assault on core First Amendment values in a generation,"[1] that it is the modern-day Alien and Sedition Acts,[2] and that it will fundamentally undermine the political parties.[3] In truth, BCRA is anything but epochal. The core provisions of the Act work to *restore* the law to what it was when Congress banned corporations and unions from making contributions or expenditures from general treasury funds in connection with federal elections in 1907 and in the 1940s;[4] when it imposed limits on contributions by individuals to candidates and parties in 1974;[5] and when it treated coordinated expenditures as contributions in 1976.[6]

In recent years, corporations, unions, political parties, and wealthy individuals have used soft money contributions, so-called "issue" ads, and coordinated expenditures to evade these long-standing restrictions on a massive scale. In the 2000 election cycle, unions, corporations, and wealthy individuals contributed almost *a half billion dollars* in soft money to the national parties.[7] Although these funds were principally used for the purpose of influencing federal elections, they evaded coverage under FECA based on the fiction — embodied in plaintiffs' use of the phrase "state-regulated funds" — that soft money has nothing to do with federal elections. Yet, even the RNC's soft money expert witness acknowledges that the parties have used soft money to "exploit

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1 McConnell Br. at 1.

2 McConnell 2nd Am. Compl. at ¶ 5; *see also* McConnell Br. at 4.

3 McConnell Br. at 1; RNC Br. *passim*.

4 *See* Gov't Br. at 12-15; Intervenors' Br. at 2 (citing Tillman Act, Ch. 420, 34 Stat. 864 (1907); Labor Management Relations Act of 1947, Pub. L. No. 80-101, § 304, 61 Stat. 159 ("Taft-Hartley Act")).

5 *See* Gov't Br. at 16-17; Intervenors' Br. at 2-3 (citing Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. § 431 *et seq.*) ("FECA")).

6 *See* Intervenors' Br. at 3 (citing 2 U.S.C. § 441a(a)(7)(B)(i)).

7 Thomas E. Mann, *Report of Thomas E. Mann* (Sept. 23, 2003) at 24 & Table 3 [DEV 1-Tab 1, hereinafter Mann Expert Report].

federal campaign laws" and to influence federal elections.[8] Similarly, although federal law has long barred unions and corporations from using their general treasury funds to influence federal elections, corporations and unions have spent millions of dollars of such funds over the past several years on so-called "issue" ads, which avoid words like "vote for" or "vote against," but are undeniably intended to, and do, influence federal elections. Precluding evasions such as these, and returning the law to the *status quo ante*, can hardly be seen as revolutionary.

Similarly, plaintiffs' suggestion that BCRA breaks new ground by extending its soft money provisions to state and local parties is baseless. Federal campaign laws, and Federal Election Commission rules, have long applied to state and local parties when they engaged in activities, such as get-out-the-vote ("GOTV") and voter registration efforts, that influence federal elections.[9] Under prior law, state and local parties were allowed to spend a mix of soft and hard money on certain activities that, in fact, influenced federal elections.[10] Experience has demonstrated, however, that these allocation rules invited massive evasion of federal law.[11] All that BCRA does is expand and refine the allocation rules — in some cases requiring the use of exclusively federal funds — to ensure that the state and local parties are no longer used to "launder" soft money in aid of federal election campaigns.

Plaintiffs also repeatedly and inaccurately assert that BCRA "bans" speech. BCRA, does no such thing. In Title I, the Act imposes restrictions on the collection and use of soft money, but leaves the parties free to raise hundreds of millions of dollars (or more) of hard money to engage in whatever speech they deem fit. Similarly, in Title II, the electioneering communications rules only

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[8] Ray La Raja, *American Political Parties in the Era of Soft Money* (2001) at 74-75 (unpublished Ph.D. dissertation, University of California at Berkeley) (attached to La Raja Cross Tr. (Oct. 15, 2002) at Ex. 3) [hereinafter La Raja Cross. Tr., Ex. 3]. Professor La Raja testified that he stands by the conclusions in his dissertation. La Raja Cross Tr. at 17-18.

[9] *See* Adv. Op. 1976-72 (requiring that 100% hard money be used for such activities); Adv. Op. 1978-10 (ruling that state or local party voter-registration and GOTV activities could be allocated between federal and non-federal accounts in the same manner as party administrative costs, partially superseding Adv. Op. 1976-72).

[10] *See* 11 C.F.R. § 106.5 (establishing allocation formulas for national, state and local political party committees).

[11] *See, e.g.*, Gov't Br. at 30-31, 69-70, 100-02; Intervenors' Br. at 7-12.

preclude unions and corporations from using their general treasury funds to run certain broadcast ads that refer to a clearly identified candidate for federal office right before an election in the candidate's district and merely require that others make disclosures regarding certain electioneering ads. Unions and corporations remain free to use their PAC funds (raised voluntarily from individuals) to run whatever ads they deem fit and entirely to avoid coverage under Title II, by (a) running the ads at any time in any place in the newspaper or some other non-broadcast medium; (b) running the ads at any time in any place in any medium without the name or likeness of the candidate; (c) running the ads in any place in any medium outside the period that is 60 days before a general election or 30 days before a primary election; or (d) targeting an audience other than the constituency of the candidate mentioned in the ads.

Plaintiffs also falsely suggest that only a narrow band of zealots support the law, while a diverse array of groups — that share nothing more in common than a desire to protect First Amendment values — oppose it. BCRA, of course, was enacted on a bipartisan basis and signed by the President. Moreover, although the law is described as an affront to the First Amendment, it is supported in this litigation by virtually every former leader of the ACLU, who collectively disagree with the position the ACLU espouses here.[12] Although it is described as an assault on states' rights, it is supported in this litigation by 19 states.[13] Although it is described as an incumbent protection measure, it is supported by a bipartisan array of *former* members of Congress — including Senators Brock, Rudman, Boren, Simpson, Bumpers, Glenn, Simon, and Wirth, and Representatives

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[12] *See* Brief of Amici Curiae, Former Leadership of the American Civil Liberties Union in Support of Defs. FEC, et al. Only the current leadership of the ACLU, and Ira Glasser, who retired as ACLU Executive Director in 2001, do not support the defendants' position in this case. The ACLU's National Legislative Director from 1972-1976, who signed a letter to Congress with the other amici publicly supporting the constitutionality of the BCRA, was unable, due to illness, to consent to appear on the amicus brief. *Id.* at 2 n.1.

[13] *See* Brief of Amici Curiae, States of Iowa, Vermont, Alaska, Colorado, Connecticut, Hawaii, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, Oklahoma, Rhode Island, Washington, the Territory of the United States Virgin Islands, and the Commonwealth of Puerto Rico in Support of Defs.

LaRocco and Williams — who have nothing to gain from protecting incumbents, but who bring to bear substantial personal experience regarding the corrosive influence of money on our political system. And, perhaps most significantly, although BCRA is described as unnecessary, it is widely supported by a public that, unlike the plaintiffs, perceives that money has grossly skewed the political process.

In attacking BCRA, plaintiffs further complain that the law goes too far and that Congress could have accomplished its goals with less comprehensive rules. In truth, BCRA goes as far as necessary to protect the integrity of the federal political process—and no farther. Many of the same parties that today rail against the scope of BCRA's restrictions spent the previous decade relentlessly creating and exploiting holes in the campaign finance laws. In enacting BCRA, Congress used its expert judgment to respond to these "catch-us-if-you-can" efforts, to close the most gaping loopholes in the federal campaign finance laws, and to anticipate how parties, unions, corporations, and wealthy individuals will attempt to evade the new restrictions. In the end, plaintiffs object because they recognize that BRCA effectively prevents future evasions.

In essence, this case is about whether Congress possesses the authority to enforce long-established law or whether the Nation must accept rampant evasion that threatens to make a mockery of that law and the democratic ideals it embodies. Supreme Court precedent makes clear that the underlying laws are constitutional, and establishes that Congress may enact legislation to prevent the evasion of campaign finance laws. The legislative history of BCRA, and the evidentiary record assembled in this case, moreover, demonstrate the extraordinary pattern of evasion that has taken place in recent years, and the substantial threat of future evasions if nothing were done. Taken together, this precedent and evidence requires that the Court reject plaintiffs' challenges.

ARGUMENT

TITLE I

PRESENTATION BY THE GOVERNMENTAL DEFENDANTS

Plaintiffs' challenge to BCRA's soft money provisions rests on several fundamental errors. In an attempt to overcome the unique and heavy burden attending their effort to have BCRA declared invalid on its face, see New York State Club Ass'n v. City of New York, 487 U.S. 1, 11 (1988), plaintiffs have resorted to mischaracterizing the essential nature of the statute. BCRA imposes no limits whatsoever on the amounts that political party committees can expend on election activity. The statute, accordingly, is subject to the more lenient standard of review that governs contribution limits, not the stricter scrutiny that governs limits on expenditures.

The Supreme Court has made clear that FECA's longstanding limits on contributions are constitutional, and it is those same contribution limits that plaintiffs seek to prevent Congress from enforcing. As explained in our opening brief, the proliferation of soft money has allowed political parties, candidates, and donors to circumvent FECA's prohibition on contributions from the general treasuries of corporations and labor unions and its limitations on the amounts that individuals can contribute. Plaintiffs attempt to create the illusion that "soft money" is qualitatively different from hard money, and that they have a constitutional right to raise soft money free of congressional regulation. But money is fungible, and in fact, soft money, by definition, is nothing more than a donation that exceeds FECA's contribution limits or comes from a source that the statute prohibits. Congress, therefore, was amply justified in requiring that funds spent by party committees on activities that influence federal elections be raised subject to the federal contribution restrictions.

Plaintiffs exaggerate the breadth of the statute in a variety of important respects. Plaintiffs provide several examples of supposed overreaching by BCRA with respect to state and local election activity, but plaintiffs' parade of horribles is belied by the text of BCRA and the regulations of the

Federal Election Commission ("FEC") implementing the statute. In fact, the statute and the FEC's regulations are carefully drawn to avoid federalizing ordinary state and local party campaign activity. For example:

- Plaintiffs contend that defining "Federal election activity" to include get-out-the-vote ("GOTV") and voter registration activity precludes the state-level parties from using soft money to advertise support for state ballot initiatives and state candidates whenever a federal candidate is also on the ballot, even if the federal candidate is not mentioned in the advertisement. The FEC, however, has limited the definition of governed GOTV and voter-registration activities to contacting voters via individualized means. Thus, such mass advertising is excluded.

- Contrary to plaintiffs' suggestion, not all activity that affects both state and federal elections must be funded entirely with hard money. Mixed federal/state activity that is not "Federal election activity" can, as before, be allocated by state parties between soft money and hard money. Similarly, certain Federal election activity expenses can be allocated between hard money and Levin Amendment funds.

- Contrary to plaintiffs' suggestions, state parties will not be completely deprived of national party transfers of funds. National parties remain free under BCRA to transfer hard money to state parties, except in limited circumstances.

- Contrary to plaintiffs' suggestions, nothing in BCRA prevents state and national parties, and their members, from meeting or conferring regarding campaign strategy or spending priorities.

- Contrary to plaintiffs' suggestions, the FEC's regulations make clear that state and local party officers who also serve on their party's national committee are free to raise money, including soft money, when acting on behalf of their state and local committees.

- Contrary to plaintiffs' suggestions, federal candidates may speak at state party fundraising events "without regulation or restriction," 67 Fed. Reg. 49,108 (July 29, 2002) (11 C.F.R. 300.64).

In sum, BCRA, as implemented, is far more narrowly tailored than plaintiffs suggest. When plaintiffs' mischaracterizations and exaggerations are set aside, when the realities of the system of modern campaign finance are contemplated, and when the proper standard of review is applied, plaintiffs' facial attacks on BCRA must be rejected. Title I readily passes constitutional muster.

I. TITLE I IS NOT SUBJECT TO STRICT SCRUTINY

Contrary to plaintiffs' contentions, the effect of BCRA's soft money provisions is to limit contributions to political parties; they place no limits on the amount of party expenditures. The national party soft money ban, for example, imposes no limitation on the amount of a national political party's expenditures. Rather, the ban simply requires that the party not accept any funds that do not comply with FECA's contribution limitations. Because national party committees will only have hard money, the provision's references to spending funds not raised under FECA's limits impose no independent restrictions. Similarly, BCRA does not place a cap on the amount of expenditures by state-level party committees. Rather, the statute simply requires that the money used to fund "Federal election activity" be raised in compliance with the longstanding federal contribution restrictions or, if the committee prefers, in compliance with the more lenient Levin Amendment provisions.

As restrictions on the solicitation and acceptance of contributions, rather than on the amount of expenditures, the provisions of Title I are not subject to strict scrutiny. The Supreme Court has "consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 387 (2000) ("Shrink Missouri") (citation omitted). Thus, a contribution limit is constitutional even if it involves "'significant interference' with association rights," as long as it is "'closely drawn' to match a 'sufficiently important interest'... though the dollar amount of the limit need not be 'fine tun[ed].'" Id. at 387-388 (quoting from Buckley v. Valeo, 424

U.S. 1, 25, 30 (1976) (per curiam) (footnote omitted);[1] see id. at 421 (Thomas, J. dissenting) ("[T]he Court appl[ies] something less – much less – than strict scrutiny.").[2]

II. TITLE I IS A VALID EXERCISE OF CONGRESS'S AUTHORITY UNDER THE ELECTION AND COMMERCE CLAUSES.

Plaintiffs' claims that BCRA's soft money provisions impermissibly intrude on the Tenth Amendment's principles of federalism and state sovereignty are without merit. BCRA actually represents a tailored attempt to restore the integrity of existing federal campaign finance regulation by reducing avenues for evasion of current law and is fully consistent with the Tenth Amendment.

At the outset, it bears emphasizing that BCRA neither regulates state elections nor modifies the states' regulation of their own elections. It does not invade a core state function, by, for example, establishing the tenure for the state's own elected officials or officeholders. See Gregory v. Ashcroft, 501 U.S. 452 (1991). Unlike the provisions at issue in the cases cited by plaintiffs, it does not impose or affect qualifications for candidates or officeholders; regulate the time, place or manner of voting in state elections or the machinery for filling state offices; regulate voter qualifications for state elections, cf. Oregon v. Mitchell, 400 U.S. 112 (1970); regulate the affairs of the state itself, or its employees or officials; or regulate the processes of state government. Indeed, Title I is not directed at the states at all. Title I merely regulates the money that some private parties may give to other private parties. Although the federal regulation of these private financial transactions is in some respects more restrictive than state law is, that is true of numerous federal laws.

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[1] Because contribution limits bear "more heavily on the associational right than on freedom to speak" the Court has "proceeded on the understanding that a contribution limitation surviving a claim of associational abridgment would survive a speech challenge as well." Shrink Missouri, 528 U.S. at 388.

[2] Even if strict scrutiny were applicable, the government interests supporting BCRA are plainly compelling, see Colo. Republican Campaign Comm. v. FEC, 518 U.S. 604, 609 (1996) (plurality) ("Colorado I"); FEC v. NCPAC, 470 U.S. 480, 496-97 (1985), and Congress narrowly tailored its remedy to address the most serious risks of corruption.

Moreover, the objective of BCRA Title I is not to regulate state elections. The object of the law is federal elections and, more particularly, the opportunities for corruption of federal candidates and officeholders. The power of Congress to take necessary and proper steps to minimize the possibility of corruption of federal officials has long been recognized. See, e.g., Burroughs v. United States, 290 U.S. 534, 545 (1934).

As discussed in detail below, plaintiffs' broad assertions about activities that would be prohibited under BCRA are based largely upon mischaracterizations of the statute. Title I simply reinforces the existing contribution limits and restrictions by prohibiting national political parties from receiving funds beyond FECA's regulation, and by requiring that state and local parties finance their "Federal election activity" either with funds raised pursuant to FECA's requirements or with Levin funds. National and state parties still can undertake precisely the same activities as before, so long as they are financed from contributions complying with the applicable federal contribution restrictions. Those activities might (in some cases) also be intended to influence state and local elections held in conjunction with federal elections, but that is not why Congress has regulated them, and the effect on such state elections therefore is purely incidental.

Moreover, since 1990, FEC regulations have required committees that chose to establish federal accounts to allocate 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 these 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 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)), often resulting in a lower allocation ratio. See Gov't Br. at 27-28.

Thus, even prior to BCRA, state and local political parties were required to finance certain activities – principally contributions or expenditures in connection with federal elections – entirely with federal funds, and to finance others with a significant allocated percentage of federal funds. Although the RNC once challenged the validity of the FEC's allocation regulations, RNC v. FEC, 98-CV-1207 (D.D.C. voluntarily dismissed Aug. 27, 2002), the RNC plaintiffs now acknowledge that pre-BCRA allocation rules "made an effort to strike a meaningful federal-state balance by governing state-party spending, in part, according to ballot composition." RNC Br. at 27.[3] To the extent that plaintiffs thus appear to accept the constitutionality of the pre-existing allocation requirements, plaintiffs have effectively conceded that the activities in question can be regulated by Congress. Whether the financing of these activities is regulated through the financing requirements of the allocation rules, or the requirements of BCRA, is a question of policy line-drawing, not of the constitutional authority of Congress to legislate on such matters.[4]

In addition, plaintiffs also almost completely ignore that the FEC – the independent federal agency with exclusive jurisdiction to administer, interpret, and civilly enforce FECA[5] – has already promulgated regulations implementing Title I pursuant to an expedited schedule established by Congress to ensure that

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[3] At least some state parties were using federal funds for these activities even before BCRA. Thus, the Republican Party of Virginia candidly admitted in a 1998 FEC rulemaking that banning soft money would have little impact since it already was financing most of its activities with hard money. REG006–0007 [DEV 21].

[4] Contrary to plaintiffs' implication, see, e.g., RNC Br. at 15, state-level parties may continue to allocate most other mixed federal-state activity – anything that benefits both federal and state candidates but is not within the parameters of "Federal election activity" – under the existing allocation formula. Off-year activities in support of state candidates, for the most part, can be paid by state-level parties entirely with soft money.

[5] The FEC is empowered to "formulate policy" with respect to FECA, 2 U.S.C. 437c(b)(1), "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," 2 U.S.C. 437d(a)(8), 438(a)(8), (d), and to render advisory opinions concerning FECA's application, 2 U.S.C. 437f. Congress also gave the FEC exclusive jurisdiction over civil enforcement of these statutes. 2 U.S.C. 437c(b)(1); 437d(a)(6); 437d(e); 437g(a). The FEC also has authority to defend civil actions in its own name. 2 U.S.C. 437c(f)(4).

the regulations were in place before the statute took effect on November 6, 2002. BCRA § 402(c). Those regulations narrowly interpret many of BCRA's provisions, including the definitions underlying the statutory phrase "Federal election activity," in a manner that eliminates many of plaintiffs' arguments. See Pinnock v. Int'l House of Pancakes Franchisee, 844 F. Supp. 574, 581 (S.D. Cal. 1993) (interpretation of statute by enforcing agency must be considered in vagueness challenge); Ward v. Rock Against Racism, 491 U.S. 781, 795-96 (1989); cases cited infra at 8.

During that rulemaking, the FEC received several comments objecting to the proposed regulations on similar Tenth Amendment grounds.[6] The FEC's final regulations address these concerns. The FEC, for example, concluded "that it must define GOTV [get-out-the-vote activity] in a manner that distinguishes the activity from ordinary or usual campaigning that a party committee may conduct on behalf of its candidates. Stated another way, if GOTV is defined too broadly, the effect of the regulations would be to federalize a vast percentage of ordinary campaign activity." 67 Fed. Reg. 49,067. The FEC, therefore, defined "GOTV activity" as "contacting registered voters . . . to assist them in engaging in the act of voting." Id.; 11 C.F.R. 100.24(a)(3). This is "narrower and more specific than . . . generally increasing public support for a candidate or decreasing public support for an opposing candidate." 67 Fed. Reg. 49,067.[7]

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[6] REG008-0175–0193 (RNC) [DEV 22]; REG007-0166-0188 (Association of State Democratic Chair) [DEV 23]; REG007-0272-0289 (Michigan Democratic Party) [DEV 23]. See also REG008-0016-0019 (Peter Bearse) [DEV 22]. See generally Transcript of Public Hearings (June 4-5, 2002) [DEV 24 & DEV 25].

[7] The FEC's regulation also explicitly excludes "any communication by an association or similar group of candidates for State and local office or of individuals holding State or local office if such communication refers only to one or more state or local candidates." 11 C.F.R. 100.24(a)(3). As the FEC stated in its Explanation and Justification, "this exclusion keeps State and local candidates' grassroots and local political activity a question of State, not Federal law. Interpreting the statute to extend to purely State and local activity by State and local candidates would potentially bring into the Federal regulatory scheme thousands of State and local candidates that are currently outside the Federal system. The FEC declines to undertake such a vast federalization of State and local activity without greater direction from Congress." 67 Fed. Reg. 49,067.

The FEC adopted a similar narrowing interpretation of the term "voter identification," limiting it to costs of "creating or enhancing voter lists by verifying or adding information about the voters' likelihood of voting or likelihood of voting for specific candidates." 11 C.F.R. 100.24(a)(4). Voter identification, as a subset of "Federal election activity," is limited to "those times when a candidate for Federal office appears on the ballot." 11 C.F.R. 100.24(b)(2).[8]

Plaintiffs, however, ask the Court to disregard the construction and interpretation of BCRA reflected in the FEC's regulations because those regulations have been challenged, in part, in a separate legal proceeding by two of the intervening defendants. See CDP/CRP Br. at 17 n.16 (citing Shays v. FEC, No. 02-CV-1984 (CKK) (D.D.C. filed Oct. 8, 2002)). But the regulations, unless or until overturned, are the law and foreclose plaintiffs' attempt to have the Court review the facial validity of BCRA as if the statute were construed or applied more broadly than reflected in the FEC's regulations. See Broadrick v. Oklahoma, 413 U.S. 601, 617-18 (1973) ("a court cannot be expected to ignore" construction of statute by implementing authority); Pinnock, 844 F. Supp. at 581. Indeed, "it is a cardinal principle of statutory interpretation" that acts of Congress should be construed to avoid constitutional questions if it is "fairly possible" to do so. Zadvydas v. Davis, 533 U.S. 678, 689 (2001) (citations and internal quotation marks omitted); see also Broadrick, 413 U.S. at 613 ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute."); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional, and by the other valid, our plain duty is to adopt that which will save

[8] Similarly, the FEC recognized an exception for voter identification undertaken by groups of state or local candidates or officeholders solely in reference to state or local candidates. The FEC included this exception because it found it "implausible that Congress intended to federalize State and local elections activity to such an extent without any mention of the issue during the floor debate for BCRA." 67 Fed. Reg. 49,069-49,070.

the act."). Here, the FEC's regulations supply such a narrowing construction of BCRA, and plaintiffs' request that the Court reach out to address their broader construction of BCRA contravenes that "cardinal principle."[9]

Thus, when viewed in the proper context, it is clear that BCRA's soft money provisions have a much more limited impact than plaintiffs contend. To the extent the provisions incidentally impact state and local elections, Congress clearly was acting within its broad constitutional authority over federal elections when it enacted Title I's soft money provisions, not under any power reserved to the states. As the Supreme Court recognized in Buckley, "[t]he constitutional power of Congress to regulate federal elections is well established." 424 U.S. at 13. The Federal Elections Clause, "Article I, § 4 of the Constitution[,] grants Congress the power to regulate elections of members of the Senate and House of Representatives." Id. at 13 n.16. That provision provides that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except as to Places of choosing Senators." U.S. CONST. art. I § 4 (emphasis added).[10] Although Article I only refers to elections for the House and Senate, the Supreme Court has also found broad congressional power to legislate in connection with the elections of the President and Vice President. Buckley, 424 U.S. at 13 n.16, 132.[11] Indeed, in Burroughs v. United States, 290 U.S. 534 (1934), the Supreme Court rejected a Tenth Amendment challenge to an

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[9] Furthermore, plaintiffs' reliance on broader interpretations of BCRA in the discovery responses or depositions of Defendant-Intervenors, or opinions of non-lawyer expert witnesses in this case, see, e.g., CDP/CRP Br. at 19; McConnell Br. at 18-19; is misplaced to the extent they are inconsistent with the FEC's legally determinative regulations. The positions of Defendant-Intervenors in this litigation are not binding on the agencies charged with implementing and enforcing FECA.

[10] In addition, the Necessary and Proper Clause, U.S. CONST. art. I § 8 cl.18, authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." See Buckley, 424 U.S. at 60, 132; Oregon v. Mitchell, 400 U.S. 112, 120 (1970).

[11] See also Oregon v. Mitchell, 400 U.S. at 124 (opinion of Black, J.); United States v. Classic, 313 U.S. 299 (1941).

indictment for disclosure violations under the Federal Corrupt Practices Act of 1925 ("FCPA"), a predecessor to FECA. The Court rejected an argument that Congress could not regulate the financing of presidential election campaigns, holding that "[s]o narrow a view of the powers of Congress . . . is without warrant." Id. at 544. And the Court has long held that this broad congressional authority extends to "prevention of fraud and corrupt practices" in connection with federal elections, and that "[i]t has a general supervisory power over the whole subject." Smiley v. Holm, 285 U.S. 355, 366-67 (1932).

In Ex parte Siebold, 100 U.S. 371, 393 (1879), the Court emphasized that, "[i]f, 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 thereby be deprived of the right to make regulations in reference to the latter." 100 U.S. at 393.[12] Indeed, in that case and a companion decision, the Supreme Court upheld federal statutes punishing state election officials for violating their duties under state election statutes at elections where candidates for Congress are simultaneously voted upon, although there was no evidence of specific intent to affect the federal election. Ex parte Siebold, 100 U.S. at 393; Ex parte Clarke, 100 U.S. 399, 403-04 (1879).[13]

In sum, "when federal and state candidates are on the same ballot, Congress may regulate any activity which exposes the federal aspects of the election to the possibility of corruption, whether or not the actual corruption takes place and whether or not the persons participating in such activity had a specific

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[12] See also Ex parte Yarbrough, 110 U.S. 651, 661-662 (1884) ("Can it be doubted that Congress can by law protect the act of voting, the place where it is done, and the man who votes from personal violence or intimidation, and the election itself from corruption or fraud? If this be so, and it is not doubted, are such powers annulled because an election for State officers is held at the same time and place? Is it any less important that the election of members of Congress should be the free choice of all electors, because State officers are to be elected at the same time? These questions answer themselves . . . .") (citation omitted).

[13] Plaintiffs suggest that Congress's power "to regulate federal campaign financing" under Article I § 4 might be in doubt because none of the parties in Buckley challenged "whether Congress had such a power." McConnell Br. at 10 (emphasis in original). As the Court noted, however, those parties did not challenge Congress's authority because it was so "well established." Buckley, 424 U.S. at 13.

intent to expose the federal election to such corruption or possibility of corruption." United States v. Bowman, 636 F.2d 1003, 1011 (5th Cir. 1981) (citing cases). "With federal and state elections held on the same day and with all candidates listed on one ballot, it is impossible to isolate the threat to the integrity of the state electoral process from a threat to the integrity of the federal contest." Id. at 1012.[14]

Plaintiffs' attempt to distinguish Bowman and other similar decisions involving the Voting Rights Act on the ground that they "involve vote buying and voter-registration fraud, activities that much more directly affect the 'Manner of holding Elections for Senators and Representatives,'" McConnell Br. at 14 n.4; see also CDP Br. at 23-24, is unavailing. Both the Voting Rights Act and BCRA serve the interests of preventing corruption. As the Court in Bowman explained, "[t]he only way to prevent corruption in federal elections with any reasonable probability of success, indeed the means that Congress has chosen, is to foreclose all chances of exposure by prohibiting corrupt practices anytime a federal candidate is on the ballot. Congress has made this decision, and, since the end is legitimate and the means appropriate, the courts cannot, and will not, condemn it." 636 F.2d at 1012.

Recognizing Congress's broad power to regulate federal elections, several courts have rejected Tenth Amendment challenges to the National Voter Registration Act ("NVRA"), 42 U.S.C. 1973qq, et seq., which requires states to provide voter registration at, inter alia, state offices providing public assistance and driver's license registration. Ass'n of Cmty Orgs. For Reform Now v. Miller, 129 F.3d 833 (6th Cir. 1997); Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995); Ass'n of Cmty Orgs. For Reform

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[14] "When candidates for federal office appear on the same election-day ballot with the local candidates who have been the target of illegal vote-buying activities, the Necessary and Proper Clause affords Congress ample power to regulate conduct in the pendant state election to exclude the possibility of tainting, distorting or otherwise unfairly affecting the results of a federal election." United States v. Garcia, 719 F.2d 99, 102 (5th Cir. 1983). "[W]hether the federal candidate on the ballot is opposed or unopposed is of little consequence because the integrity of a mixed federal-state election is marred by fraudulent voting activities, even if these activities are only directed toward the state election." United States v. McCranie, 169 F.3d 723, 727 (11th Cir. 1999) (citing United States v. Cole, 41 F.3d. 303, 306 (7th Cir. 1994)); see also United States v. Cole, 41 F.3d 303 (7th Cir. 1994); United States v. Saenz, 747 F.2d 930, 943-945 (5th Cir. 1984); United States v. Carmichael, 685 F.2d 903, 908-909 (4th Cir. 1982).

Now v. Edgar, 56 F.3d 791 (7th Cir. 1995); Wilson v. United States, 878 F. Supp. 1224 (N.D. Cal. 1995). Although those courts concluded that the NVRA "intrudes deeply into the operation of state government," Edgar, 56 F.3d at 792-793, and "its impact on such elections probably will be significant," Voting Rights Coalition, 60 F.3d at 1415, they nevertheless recognized that Article I, § 4 "specifically grants Congress the authority to force states to alter their regulations regarding federal elections." Miller, 129 F.3d at 836. "Because the Constitution specifically delegates to Congress the power to regulate federal elections and the NVRA is limited to federal elections, by its own terms, the Tenth Amendment is inapplicable." Condon v. Reno, 913 F. Supp. 946, 963 (D.S.C. 1995). Thus, "Congress through the NVRA may directly regulate the state's manner and means of voter registration without invading an area reserved to the states." Wilson, 878 F. Supp. at 1328 (citation omitted). The states remain free under the NVRA to establish separate registration requirements for state elections, but if the states continue to maintain a single, unified registration system for their mixed elections, they are required to follow the federal requirements. See Miller, 129 F.3d at 836. Similarly in this case, involving a less directly intrusive statute, if the states choose to continue holding their elections on the same day as federal elections, state-level political parties must comply with BCRA.[15]

In Blount v. SEC, 61 F.3d 938, 946 (D.C. Cir. 1995), the D.C. Circuit rejected First Amendment challenges to an SEC rule restricting the ability of municipal securities professionals to contribute or solicit contributions to the political campaigns of certain state officials. The Court also rejected as "meritless" a Tenth Amendment challenge that the provision "usurps the states' power to control their own elections." Blount, 61 F.3d at 949

> Rule G-37 neither compels the states to regulate private parties, as the Tenth Amendment prohibits . . . , nor regulates the states directly, a question on which the Supreme Court's

[15] State-level party committees in states that conduct their elections in odd-numbered years are still subject to BCRA, but the statute will result in far fewer restrictions in those circumstances.

> Tenth Amendment jurisprudence "has traveled an unsteady path . . . ." Further, the rule does not have anything resembling the kind of preemptive effect on states' ability to control their own elections processes that might be perceived as "destructive of state sovereignty."

Id. (citing inter alia, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985), and Gregory, 501 U.S. at 460-462). For all these reasons, Title I of BCRA is plainly a valid exercise of Congress's power under the Elections Clause.

In addition, contrary to plaintiffs' contentions, BCRA's soft money provisions also fall within Congress's authority under the Commerce Clause. Not only are transactions in soft money that BCRA regulates themselves economic activity, but also the soft money that a political party receives as a result of those transactions is, in turn, available for additional commerce: the purchase of goods and services for use in connection with elections. See United States v. Morrison, 529 U.S. 598, 610 (2000) (economic nature of the regulated activity plays central role in Commerce Clause analysis); see also Perez v. United States, 402 U.S. 146, 154-57 (1971).[16]

[16] Plaintiffs' suggestion that defendants have waived reliance on the Commerce Clause by virtue of an interrogatory response, RNC Br. at 32, is baseless. The interrogatory response was expressly made "without prejudice to any argument that, as a matter of law . . . [,] any other Constitutional power supports the BCRA." U.S. Resp. to RNC's 2d Set of Interrogs. ¶ 20 (Sept. 19, 2002). And Congress need not expressly invoke the Commerce Clause in order for legislation to be sustained under that provision. "The constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." Woods v. Miller, 333 U.S. 138, 144 (1948).

III. TITLE I IS FULLY CONSISTENT WITH THE FIRST AMENDMENT.

Plaintiffs advance numerous arguments in support of their contention that BCRA's soft money restrictions violate their First Amendment rights of free speech and association. But their arguments are based on the erroneous assumption that the soft money restrictions are subject to strict scrutiny. For the reasons discussed above, and in our opening brief, the soft money restrictions function only as limits on campaign contributions, which are constitutional if closely drawn to advance sufficiently important government interests. See Buckley, 424 U.S. at 25; Shrink Missouri, 528 U.S. at 388. As explained at length our opening brief, Gov't Br. at 58-87, and as discussed further below, Title I readily satisfies this standard.[17]

A. BCRA's Soft Money Provisions Prevent the Appearance and Reality of Corruption.

In our opening brief, we explained in detail how Title I advances the government's vital interests in preventing the appearance and reality of corruption in federal elections and in preventing circumvention of the contribution limits and funding source restrictions set forth in FECA Gov't Br. at 66-86 (interests advanced by national party soft money ban), 99-103 (interests advanced by state party restrictions), 117-19 (interests advanced by restrictions pertaining to tax-exempt organizations), 123-25 (interests advanced by restrictions pertaining to federal candidates and officeholders).

The overwhelming evidence demonstrates that the exploitation and abuse of soft money has fostered corruption and the appearance of corruption in the federal political system, establishing a regime in which political parties openly provide access to federal officeholders and candidates in exchange for large soft money donations to political party committees; federal officeholders and candidates have strong

[17] As discussed infra at 128-29, the arguments presented by the governmental defendants on Title I apply to the Paul plaintiffs' freedom of the press claims as well.

incentives to take actions on official matters in a manner that will benefit large donors to their parties; and the public believes that federal candidates and officeholders put the interests of large donors to the political parties ahead of the interests of their constituents or the nation as a whole. Plaintiffs' efforts to explain away this evidence fall flat.

First, plaintiffs attempt to limit Congress, and this Court, to an unduly narrow definition of "corruption." See McConnell Br. at 35-36. In Buckley, the Supreme Court emphasized the government interest in preventing corruption that occurs when "large contributions are given to secure a political quid pro quo from current and potential office holders." 424 U.S. at 27. But the Court has never stated or suggested that only demonstrated incidents of actual quid pro quo corruption justify governmental regulation of campaign finance. Indeed, the Court rejected that contention in Buckley itself, concluding that Congress also is legitimately concerned with "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." Id. at 27. The Court also expressly rejected the contention that bribery laws and disclosure requirements provide a less restrictive means of dealing with corruption, observing that "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action," and that "Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." Buckley, 424 U.S. at 27-28. More recently, in Shrink Missouri, the Court again emphasized that its concern with corruption extends beyond bribery "to the broader threat from politicians too compliant with the wishes of

large contributors." 528 U.S. at 389. Whether or not defendants can point to direct evidence of soft money contributions made in return for a political quid pro quo is not determinative.[18]

Plaintiffs contend that hard money presents the same risks of actual and apparent corruption as soft money. See RNC Br. at 17, 63. They similarly contend that the "only solution" to a problem of corruption associated with officeholders and candidates who "are more solicitous of individuals who provide financial support for their election" directly or indirectly "would be to take money out of politics altogether in order to force officeholders and candidates to pay equal attention to all of their constituents." McConnell Br. at 35-36. But the record confirms the common sense proposition that the problem of corruption and perceived corruption grows with the size of the contributions at issue, and soft money simply represents donations that exceed FECA's contribution limits or come from the general treasuries of unions or corporations, which are prohibited from making contributions at all. Because the likelihood of a recipient feeling beholden plainly increases with the size of the contribution, BCRA's requirement that contributors not donate any money beyond the federal contribution restrictions addresses this problem in a direct and targeted way.[19]

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[18] In any event, defendants have presented considerable evidence of soft money donations that at the very least appear to have been made to secure political quid pro quos. See Gov't Br. at 79-81; see also, e.g., Simon Decl. ¶ 13 [DEV 9-Tab 37] ("[I]t is not unusual for large contributors to seek legislative favors in exchange for their contributions."); Simpson Decl. ¶ 10 [DEV 9-Tab 38] ("[D]onations from the tobacco industry to Republicans scuttled tobacco legislation, just as contributions from the trial lawyers to Democrats stopped tort reform."); Hickmott Decl. ¶ 9 [DEV 6- Tab 19] (corporate donors frequently give soft money to parties to "influence the legislative process for their business purposes");

. Congress noted similar concerns. See, e.g., 147 Cong. Rec. S3107-10 (Mar. 29, 2001) (Sen. Feingold) ("[I]t is important for us to acknowledge that millions of dollars are given in an attempt to influence what we do.").

[19] Plaintiffs' own expert, David Primo, testified that, assuming that money does buy access to or influence of federal officeholders, soft money is more likely to buy access or influence "simply by virtue of the numbers." Primo Cross Tr. (Oct. 23, 2002) at 162; accord Krasno & Sorauf Expert Rep. at 15 [DEV 1-Tab 2] ("[T]he much greater size of the [soft money] individual donations at issue here pose a proportionately larger risk of influencing their beneficiaries than do contributions of hard money."); ; Wirthlin Cross Tr. (Oct. 21, 2002) at 57..

Plaintiffs contend that some of defendants' experts and witnesses support the view that the public perception of corruption or undue influence is inaccurate. See RNC Br. at 17. Yet when Dr. Mann, for example, stated that widespread public concern over congressional ethics (specifically, Congress's policing of its own Members) was unfortunate and inaccurate, he also added: "But accurate or not, the public view is important, and it is clearly influenced by the way in which Congress fulfills its constitutional mandate to judge its own members and employees." Mann Cross Tr. (Oct. 11, 2002) Ex. 5 at 7. More important, Congress is entitled to address the public perception of corruption, whether or not that perception reflects reality. "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." Shrink Missouri, 528 U.S. at 390; see also id. at 394-395 (finding academic doubts about actual corruption irrelevant to legislative authority to address the public perception).[20] And the fact is that the public does perceive corruption. See Mellman & Wirthlin Expert Rep. [DEV 2-Tab 5]; Shapiro Expert Rep. (DEV2-Tab 6].

Plaintiffs attempt to discount the corrupting potential of the special access to candidates and officeholders that party committees provide to soft money donors. See RNC Br. at 18. They cite assertions of some individual officeholders that they do not recall meeting with or being unduly influenced by donors at various functions. Of course, testimony that some individual officials may not have been unduly influenced by particular meetings with donors does not contradict the substantial evidence that others have been. It also does nothing to address the public perception of corruption that the Supreme Court has found

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[20] Plaintiffs contend that the Supreme Court in Colorado I concluded that political parties present no greater risk of actual or apparent corruption than any other entity. See McConnell Br. at 37; RNC Br. at 16-19. In FEC v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431 (2001) ("Colorado II"), however, the Court explained that this observation only applied to limits on "independent expenditures," and that there was no dispute that, in other contexts, Congress was "concerned with circumvention of contribution limits using parties as conduits." 533 U.S. at 457 n.19. Title I of BCRA addresses the latter problem.

such special access creates, and the belief among donors that acceding to contribution requests from the parties is a prerequisite to obtaining access to powerful officials. Indeed, in Buckley the Court assumed that most contributors do not seek special influence, 424 U.S. at 22-30, but it nonetheless upheld prophylactic contribution restrictions because "the reality or appearance of corruption" is "inherent in a system permitting large financial contributions." Id. at 28. Because the contribution limits "focu[s] precisely on the problem of large campaign contributions," id., BCRA's soft money restrictions, which do nothing more than prevent circumvention of those limits by foreclosing contributors from making an additional donation beyond the statutory limit, are narrowly tailored to this long-recognized interest.

In any event, the ways in which soft money donations can purchase access and influence go beyond the amount or significance of face-to-face interaction with particular officeholders. Congress has recognized, and defendants have already recounted, in considerable detail, that donors give soft money with the expectation that they will meet and speak with officeholders in order to press their legislative agendas – an expectation that is frequently realized. See Gov't Br. at 32-36, 71-84. Because soft money is simply an additional donation in excess of statutory limits, RNC's attempt to portray hard money donors and soft money donors as separate groups, see RNC Br. at 63, is untenable. The likelihood that a donation exceeding the federal limits will earn more attention than a smaller donation within those limits is simply a matter of common sense that follows directly from the Supreme Court's reasoning in upholding the contribution limits themselves.

Indeed, the record is filled with examples of instances in which the RNC has facilitated the ability of its soft money donors to obtain access to federal officials. For example, in 1995, RNC Chairman Haley Barbour sent Senate Majority Leader Dole a handwritten note asking him to meet with the Chief Executive

Officer ("CEO") of Pfizer, a member of the exclusive "Team 100" soft money donor group,[21] to discuss an extension of a lucrative tax credit. Mr. Barbour's note requesting the meeting noted that the CEO who had requested the meeting "is extremely loyal and generous." See ODP0025-02456-02457 [DEV 70-Tab 48] (from RNC v. FEC, No. 98-CV-1207 (D.D.C.)); see also Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167 at 7971 (1998) [hereinafter Thompson Comm. Rep.] (Minority Views) (letter noting how RNC Chairman Barbour "escorted" the CEO of Entergy, a Team 100 member, on appointments with legislators that were "very significant" in legislation affecting Entergy and made the CEO "a hero in his industry");

. Democratic Party committees have likewise facilitated access for its soft money donors. See Gov't Br. at 32-36, 75-78; see also Richard Briffault, The Political Parties And Campaign Finance Reform, 100 COLUM. L. REV. 620, 650 (2000) ("Briffault II") (citing Wall Street Journal report that "cash-for-access confabs on pending bills are business as usual in Washington") (footnote omitted). As the Supreme Court has already concluded, "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.[22]

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[21] Membership in Team 100 requires a $100,000 threshold donation to the RNC, followed by subsequent $25,000 annual donations for the next three years. See "Team 100" (RNC Finance Committee website: www.rncfc.org/public/team100.htm);

[22] There also is no merit to plaintiffs' contention that the government has no interest in preventing actual or apparent corruption with respect to soft money donations to "minor" parties, such as the Libertarian Party, because such candidates are rarely elected to federal office. See McConnell Br. at 37 n.11. There is no doubt that "minor-party candidates may win elective office or have a substantial impact on the outcome of an election." Buckley, 424 U.S. at 34-35; see also id. at 70; Goland v. United States, 903 F.2d 1247, 1251 (9th Cir. 1990) (supporter of major party candidate financed minor party candidate's television appearance to criticize first candidate's major party opponent). The Buckley Court, therefore, refused to exempt minor parties, one of which was the Libertarian Party, 424 U.S. at 34 n.40, from the contribution limits.

The RNC further suggests that its fundraising practices present no risk of corruption because it "rarely if ever uses federal officeholders for fundraising." RNC Br. at 20-21.

Moreover, the RNC, like all national political committees, advertises access to federal officeholders and candidates in exchange for large donations to party committees.[23] See Gov't Br. at 75-81.[24] In any event, Buckley established that Congress is entitled to enact general contribution limits to reduce "the opportunities for abuse inherent in a regime of large individual financial contributions," 424 U.S. at 27 (emphases added), whether or not a particular regulated party has engaged in such practices.

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[23] The legislative record includes numerous examples of party committees advertising donations to the party as the price of access to important policy makers. An invitation to a 1997 senatorial campaign committee event, for instance, promised that "large contributors would be offered 'plenty of opportunities to share [their] personal ideas and vision with' some of the top leaders and senators." 147 Cong . Rec. S3248 (Apr. 2, 2001) (Sen. Levin). The invitation further stated that failure to attend means that "'you could lose a unique chance to be included in current legislative policy debates – debates that will affect your family and your business for many years to come.'" Id.; see also 145 Cong. Rec. S12745 (Oct. 18, 1999). As Senator Levin remarked, "[n]o American should think that because he or she cannot contribute a huge sum of money they are then going to be unable to participate in a debate which affects family and business for many years to come." 147 Cong. Rec. S2979 (Mar. 27, 2001). Other examples of solicitations offering access to federal officials in exchange for large soft money contributions to national party committees appear at, e.g., 147 Cong. Rec. S3249 (Apr. 2, 2001) (Sen. Levin); 147 Cong. Rec. S2530 (Mar. 19, 2001) (Sen. Lieberman).

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Moreover, even if a particular federal officeholder did not personally raise funds from a particular donor, the officeholder, nevertheless, is likely to know that the donor is a large contributor to the party. 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 [DEV 6-Tab 10] ("[Y]ou cannot be a good Democratic or a good Republican Member and not be aware of who gave money to the party."); McCain Decl. ¶ 6 [DEV 8-Tab 29] ("Legislators of both parties often know who the large soft money contributors to their parties are.").[25] Thus, "[p]arty committees do not so much dilute and 'cleanse' private interest money as centralize it and focus it on the President and the congressional leadership." Briffault II, 100 COLUM. L. REV. at 651. Federal officeholders have a strong interest in cultivating future contributions from large party donors, maintaining their good will, and returning their telephone calls because of the close intersection between the interests of the party and the interests of the candidate and officeholders. See Gov't Br. at 72-75; see also Bumpers Decl. ¶ 18 ("those who have consistently been good party members and good donors can get access" and "get their phone calls returned").[26]

In any event, Buckley and Shrink Missouri upheld limits on all contributions without regard to the particular method of solicitation or the particular dealings between donor and recipient. As the Supreme

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[25] These fundraising events also furnish soft money donors with the opportunity to interact with the staffers who work for federal officeholders. See

Such interactions with staffers can be as beneficial as direct interactions with federal officeholders, cf. Rudman Dep. Tr. (Sept. 17, 2002) at 17 (noting that having Hill staffers as contacts "is better frankly than having them with the senators"), and these staffers also know the identities of the big soft money donors, see Simpson Decl. ¶ 9 ("Staffers who work for Members know who the big donors are, and those people always get their phone calls returned first and are allowed to see the Member when others are not.").

[26] Moreover, solicitations from party leaders, like solicitations from officeholders and candidates, are potentially coercive because party leaders are so closely connected to federal officeholders. See Gov't Br. at 90 n.76; see also Kolb Decl. Ex. 6 at 4 [DEV 7-Tab 24] (51% of corporate executives surveyed agreed that "many business executives fear adverse legislative consequences to themselves or their industry if they turn down requests for campaign contributions from high-ranking political leaders and/or political operatives").

Court has recognized, Congress's authority is not limited to blatant quid pro quo exchanges, but extends to "the broader threat from politicians too compliant with the wishes of large contributors." Shrink Missouri, 528 U.S. at 389; see also Colorado II, 533 U.S. at 462-63 (noting the "web of relations linking major donors, party committees, and elected officials" described in Briffault II, 100 COLUM. L. REV. at 652). Thus, the validity of the statutory contribution limits at the heart of BCRA does not depend upon the good or bad faith of any particular party committee; "whether they like it or not, [parties] act as agents for spending on behalf of those who seek to produce obligated officeholders." Colorado II, 533 U.S. at 452.[27]

B. Title I is Closely Drawn to Address the Appearance and Reality of Corruption.

As explained in detail in our opening brief, the provisions of Title I satisfy the First Amendment because they are closely drawn to prevent the appearance and reality of electoral corruption. See Gov't Br. at 58-90. Plaintiffs advance a series of arguments in support of their contention that the statute is not properly tailored to address the corruption problems that Congress sought to address. Those arguments are premised on an erroneous understanding of the statute's scope and on unfounded speculation as to its impact on the political parties. Properly understood, the statute clearly does not infringe any associational rights or rights of free speech.

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[27] Plaintiffs' argument that, when viewed in historical context, corruption and the appearance of corruption are not significant national problems, see RNC Br. at 20-21, therefore, fails to account for the Supreme Court's view, including the modern realities of "obligation-driven" and "favor-currying" corruption that provides large donors to political party committees with undue influence over officeholders and the political process. D. Green Rebuttal Expert Rep. at 20 & n.15 [DEV 5-Tab 1]. For example, "obligation-driven" corruption occurs when federal officeholders feel a sense of obligation that "may grow out of the personal relationship that officeholders may have forged with donors." See D. Green Expert Rep. at 20 [DEV 1-Tab 3]; see also

; Simpson Decl. ¶ 9 ("Large donors of both hard and soft money receive special treatment. No matter how busy a politician may be during the day, he or she will always make time to see donors who gave large amounts of money.").

1. Title I infringes no First Amendment rights of association.

Plaintiffs contend that BCRA's soft money restrictions violate the associational rights of political party committees by restricting their ability to engage in soft money transactions. See McConnell Br. at 28-31; RNC Br. at 37-44; CDP Br. at 27-43. But BCRA leaves party committees free to engage in virtually any political activities using money contributed under the statutory contribution limits. And the statute in no way restricts party officials from conferring with other party committees to discuss campaign strategy or any other matter. As explained in our opening brief, BCRA's provisions against circumvention of the statutory contribution limits are closely drawn to prevent the appearance and reality of corruption. Accordingly, plaintiffs' associational claims lack merit. Gov't Br. at 64-87.

Plaintiffs stress that BCRA restricts the ability of party committees to transfer soft money to other party committees. As explained in our opening brief, however, it is unclear whether organizations even have a First Amendment right to associate with other organizations. See Gov't Br. at 89; 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 statute leaves party committees with ample means of associating with other party committees. Indeed, BCRA continues to allow party committees to solicit money for, and transfer money to, other party committees. The statute simply requires that such money be raised in accordance with FECA. The restrictions on inter-party transfers of soft money, moreover, are simply limits on monetary contributions from one committee to another. Thus, they are not meaningfully different from the limits on contributions to multicandidate political committees upheld in Cal. Med. Ass'n v. FEC, 453 U.S. 182, 198 (1981) (plurality) ("Cal Med"); see id. at 203 (Blackmun, J., concurring). The impact of BCRA's contribution limits on associational activity is modest: party commit-

tees are free to "affiliate" with other party committees through contributions of hard money. Buckley, 424 U.S. at 22.

BCRA prohibits state-level party committees from using hard money received from another committee to fund Federal election activity pursuant to the Levin Amendment. See 2 U.S.C. 441i(b)(2)(B)(iv). But as an exception to the requirement that Federal election activity be financed only with hard money, the entire 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 FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 210 (1982) ("NRWC") (upholding restriction on solicitation of contributions to corporation's PAC on the basis of compelling governmental interests supporting the overall ban on corporate contributions to candidates, to which the limited opportunity to establish a PAC was an exception); Sinclair Broadcast Group v. FCC, 284 F.3d 148, 169 (D.C. Cir. 2002) ("As an exception to the local ownership restrictions . . . the eight-voices exception presents no separate constitutional implications . . . if anything . . . it decreases the minimal burden on speech imposed by the Local Ownership Order."). Congress was not constitutionally required to provide state-level committees with the option of using Levin funds for federal election activities; it could have required those committees to fund activity affecting federal elections entirely with money raised in conformity with federal contribution limits. And state-level committees that do not wish to comply with the Levin Amendment's restrictions are free to fund federal election activity entirely with hard money.[28]

Moreover, BCRA does not prevent representatives of national, state, and local party committees from conferring about spending priorities or any other issues. Nothing in BCRA purports to restrict the

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[28] Plaintiffs contend that Levin Amendment funds cannot include donations from corporations or unions, even if such donations are allowed under state law. McConnell Br. at 17. But FEC's regulations make clear that such donations are permitted where state law allows. See 11 C.F.R. 300.31(c).

ability of party committees (and their individual members) to meet and confer about campaign strategy. Thus, BCRA in no way restricts the participation of members of state and local Republican Party committees in the RNC's Victory Plan meetings or any other planning and strategy sessions. But see RNC Br. at 9, 39.

Contrary to plaintiffs' suggestion, see McConnell Br. at 30; CDP Br 30, the FEC's regulations make clear that state or local party officers who also serve on their party's national committees are free to raise money on behalf of their state or local committees. As explained in our opening brief, Gov't Br. at 98-99, BCRA's 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).[29]

Plaintiffs' description of BCRA's impact on associational rights is exaggerated in other respects as well. For example, contrary to plaintiffs' contention, see McConnell Br. at 24, nothing in BCRA prevents state and local candidates from establishing hard money accounts under FECA to make expenditures that promote or attack federal candidates. See 11 C.F.R. 102.5(a)(1) (authorizing political committee to set up single account consisting exclusively of hard money to be used for both state and federal election expenditures). Also, national party committees and their agents remain free to raise hard money for state and local candidates; a national party committee, like any federal political committee, is free to contribute its funds to state and local candidates, even though under BCRA all of its funds will have been raised subject to federal limits. Id. Indeed, when Congress has sought to restrict the uses made of funds in hard money accounts, it has done so expressly. See 2 U.S.C. 439a (prohibiting personal use of campaign funds

[29] Similarly, Speaker Hastert's suggestion that BCRA's national party soft money ban will preclude him from participating in state-level party activity by virtue of his status as an officer of the NRCC, Hastert Amicus Br. at 11-14, lacks merit. To the extent that the Speaker participates in such activity on his own behalf, he would not be acting as an agent of the NRCC, and the national party soft money ban, therefore, would not be implicated. See 2 U.S.C. 441i(a)(2).

by a federal candidate). There are no such restrictions on contributions of hard money by national parties to state and local candidates.

Moreover, contrary to plaintiffs' suggestion, see McConnell Br. at 30, the FEC's regulations expressly permit joint fundraising of hard money by state and national party committees in specified circumstances. See 11 C.F.R. 102.17, 300.31(e)(1), (f). State and local party committees are free to engage in joint fundraising with each other of hard money and soft money. See 11 C.F.R. 102.17. While a committee can only use money it raises itself for any federal election activities it chooses to conduct under the Levin Amendment option, there is no restriction in Title I on raising money jointly, or on transferring hard or soft money between state-level party committees.

State parties also have broad latitude to associate with federal candidates in connection with their fundraising activities. The statute explicitly permits federal candidates and officeholders to raise soft money that is not from corporate or union treasuries for state parties in amounts up to the equivalent federal limits. See 2 U.S.C. 441i(e)(1)(B). Thus, with that limitation, Senator McConnell is free to continue to send letters soliciting funds for state and local party committees. See McConnell Br. at 23. Moreover, federal candidates and officeholders are free to participate in fundraising events of state parties, and to speak "without regulation or restriction" during such events. 67 Fed. Reg. 49,108 (July 29, 2002); see 2 U.S.C. 441i(e)(3); 11 C.F.R. 300.64.[30]

The right to associate is not, however, a freedom to make or receive unlimited contributions of money. "[I]t is clear that 'neither the right to associate nor the right to participate in political activities is absolute.'" Buckley, 424 U.S. at 25 (citation omitted). Indeed, the Court in Buckley recognized that

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[30] Thus, if the Yolo County Bean Feed is a fundraising event, see CDP/CRP Br. at 3-4, the statute would permit the local congressman to attend, speak, and be a featured guest, 2 U.S.C. 441i(e)(4), and under the FEC's regulations he or she could speak at the event "without restriction," 11 C.F.R. 300.64(b). The party could also announce his or her attendance in its invitations. Id. 300.64(a).

reasonable limits on campaign contributions violate no associational rights. See Buckley, 424 U.S. at 22-23; NRWC, 459 U.S. at 207 ("[W]e conclude that the associational rights asserted by respondent may be and are overborne by the interests Congress has sought to protect in enacting §441b."). Contrary to plaintiffs' erroneous characterization, BCRA leaves party committees free to engage in a wide range of associational activities, including a significant amount of fundraising. Plaintiffs' associational claims, therefore, lack merit.

2. BCRA's definition of "Federal election activity" is not overbroad or void for vagueness.

Although some "Federal election activity" can affect state as well as federal elections, the impact on federal elections is manifest. As Professor Green explained, "[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 ("[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 14 (so-called voter mobilization activities such as direct mail and commercial phone banks have a persuasive impact on voters).

Plaintiffs exaggerate the breadth of the definition of "Federal election activity" in a number of important respects. For example, throughout their briefs, plaintiffs contend that the inclusion as Federal election activity of GOTV activity keeps them from advertising support for ballot initiatives and state

candidates if a federal candidate is on the ballot, even if the federal candidate is not mentioned in the advertisement. The FEC's regulations, however, define GOTV to mean "contacting registered voters by telephone, in person, or by other individualized means, to assist them in engaging in the act of voting," which includes "[p]roviding to individual voters, within 72 hours of an election, information such as the date of the election, the times when polling places are open, and the location of particular polling places" and "[o]ffering to transport or actually transporting voters to the polls." 11 C.F.R. 100.24(a)(3) (emphasis added). This excludes from regulation as GOTV all of a party committee's television or radio advertising for state candidates or ballot initiatives and, apparently, even mass mailings and Internet appeals. Only "individualized" assistance must be paid with federal funds (or Levin funds).

The FEC explained its intent to "define GOTV in a manner that distinguishes the activity from ordinary or usual campaigning that a party committee may conduct on behalf of its candidates. Stated another way, if GOTV is defined too broadly, the effect of the regulations would be to federalize a vast percentage of ordinary campaign activity." 67 Fed. Reg. 49,067 (July 29, 2002). The FEC also explained that "GOTV has a very particular purpose: assisting registered voters to take any and all necessary steps to get to the polls and cast their ballots, or to vote by absentee ballot or other means provided by law. The FEC understands this purpose to be narrower and more specific than the broader purposes of generally increasing public support for a candidate or decreasing public support for an opposing candidate." Id. The regulation also specifically excludes communications of any kind by a group of state or local candidates or of state or local officeholders, as long as it only refers to state candidates and not federal ones. Id.; 11 C.F.R. 100.24(a)(3). Thus, the regulation was designed to avoid precisely what plaintiffs contend the statute should not do.

Another regulation explicitly excludes from the definition of "Federal election activity" any "public communication" (which includes all broadcasts and mass mailings) that only refers to state or local candi-

dates and does not promote, oppose, support, or attack any clearly identified candidate for federal office, so long as the broadcast is not voter registration, GOTV, generic party advertising, or voter identification activity. 11 C.F.R. 100.24(c). Thus, state-level party committees are free to use soft money to promote their state and local candidates on television, since such advertising is excluded from Federal election activity.

Plaintiffs also suggest, without elaboration, that the term "get-out-the-vote activity" is unconstitutionally vague. CDP Br. at 32-33. As explained above, however, the FEC has made clear that the regulatory definition "is focused on activity that is ultimately directed to registered voters, even if the efforts also incidentally reach the general public." 67 Fed. Reg. 49,067. Thus, GOTV activity "has a very particular purpose: assisting registered voters to take any and all necessary steps to get to the polls and cast their ballots, or to vote by absentee ballot or other means provided by law." Id. As the FEC has explained, it "understands this purpose to be narrower and more specific than the broader purposes of generally increasing public support for a candidate or decreasing public support for an opposing candidate." Id. This controlling interpretation by the agency charged with enforcing BCRA eliminates any vagueness concerns.

Like its definition of GOTV, the FEC has defined "voter registration activity" to exclude all mass media communications urging registration and voting. The agency's definition is limited to "contacting individuals by telephone, in person, or by other individualized means, to assist them in registering to vote." 11 C.F.R. 100.24(a)(2). As the FEC explained: "The FEC has expressly rejected an approach whereby merely encouraging voter registration would constitute Federal election activity. The regulation requires concrete actions to assist voters, rather than mere exhortation." 67 Fed. Reg. 49,067. And it bears emphasizing that the definition of "Federal election activity" only encompasses voter registration that occurs within 120 days of a regularly scheduled federal election. See 2 U.S.C. 431(20)(A)(i). Thus, voter registration in connection with a special election is explicitly excluded. 11 C.F.R. 100.24(b)(1).

The FEC's regulations also define "generic campaign activity" to include only a "public communication" that "promotes or opposes a political party and does not promote or oppose" a clearly identified federal candidate or nonfederal candidate. 11 C.F.R. 100.25 Accordingly, advertising that promotes state and local candidates is not included, and the FEC stated that its intent in limiting generic campaign activity to public communications was "to ensure that the definition encompasses only the external activities of a political party committee, that is, activities targeted to the public." 67 Fed. Reg. 49,071. Along the same lines, the FEC explicitly excluded from "Federal election activity" the costs of any "State, district, or local political conventions, meetings, or conferences." Id. at 49,070. It also excluded the costs of grassroots campaign materials that name or depict only state or local candidates. Id.

Contrary to plaintiffs' suggestion, see RNC Br. at 15, not all activity that affects both state and federal elections must be funded entirely with hard money. Even after BCRA's enactment, there remains a great deal of mixed federal/state activity that is to be allocated between real soft money and hard money: anything that benefits both state and federal candidates but does not fall within the definition of "Federal election activity." And, for the most part, off-year activities in support of state candidates can be funded fully with soft money. Moreover, plaintiffs' assertion, RNC Br. at 15, that state parties will be deprived of national party transfers is not true. It is just that the national parties will only have hard money to transfer from now on.

Plaintiffs repeatedly err in analyzing whether particular conduct constitutes "Federal election activity." For example, plaintiffs' suggestion that a 1996 radio advertisement encouraging listeners to vote against a state ballot initiative would be GOTV activity, see McConnell Br. at 18-19, is belied by the FEC's regulations, which confirm that it would not. See 11 C.F.R. 100.24(a)(3) (GOTV limited to "contacting registered voters by telephone, in person, or by other individualized means, to assist them in engaging in the act of voting") (emphases added). It is a closer question whether the latter part of the

advertisement, which labeled the ballot initiative a "Republican scheme" and admonished listeners not to "let the Republicans get away with it," would make it "generic" campaign activity. In light of the obvious impact that such general partisan appeals can have on the selection of candidates running in an imminent federal election, however, there is nothing improper about Congress regulating the financing of expenditures for such matters.

Similarly, plaintiffs' contention that a state party committee could not use soft money to pay for the printing and mailing of a flyer that reads "Vote Republican; John Smith for Dogcatcher on November 6," RNC Br. at 27, is entirely incorrect. The printing and mailing of the flyer would not be GOTV activity because it is not "individualized," 11 C.F.R. 100.24(a)(3), particularly if it is a "mass mailing" of over 500 pieces, see 11 C.F.R. 100.27. It is also not "generic campaign activity" because it mentions a specific state candidate. See 11 C.F.R. 100.25. And because it only mentions a state candidate, it is not the type of communication that constitutes "Federal election activity" under 2 U.S.C. 431(20)(A)(iii).

Plaintiffs also contend that BCRA's definition of "Federal election activity" is unconstitutionally vague, see CDP Br. at 32-33, focusing on the inclusion in the definition of 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." 2 U.S.C. 431(20)(A)(iii) (emphasis added). As explained in our opening brief, however, the underlined language is not vague; the statute uses ordinary 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. Gov't Br. at 113-14; see 148 Cong. Rec. S2143 (Mar. 20, 2002) (Sen. Feingold).

Moreover, the fact that this provision applies exclusively to political parties – sophisticated participants in a highly regulated area[31] – diminishes any potential vagueness concerns. See NLRB v. Gissel Packing Co., 395 U.S. 575, 620 (1969) (rejecting vagueness challenge to National Labor Relations Act prohibition against employer offers of benefit and threats of reprisals for engaging in union activities, since "an employer, who has control over that relationship and therefore knows it best, cannot be heard to complain that he is without guidance for his behavior"); see also Grayned v. City of Rockford, 408 U.S. 104, 112 (1972) (context of statute can eliminate vagueness). Moreover, political parties can eliminate any uncertainty by requesting an advisory opinion from the FEC. As explained in our opening brief, see Gov't Br. at 95-96, the FEC is required by statute to provide a prompt response to a request for an advisory opinion, see 2 U.S.C. 437f(a), and reliance on such an opinion "is a defense to criminal prosecution or civil suit." Martin Tractor v. FEC, 627 F.2d 375, 385 (D.C. Cir. 1980). Political parties also can easily prevent any uncertainty simply by using hard money to fund any questionable communication that references a clearly identified candidate for federal office.[32]

A political party that forgoes those options, however, and instead elects to test the outer limits of the definition by "engaging in 'brinkmanship,'" cannot be heard to complain if it thereby "'overstep[s] and tumble[s] (over) the brink.'" See Gissel Packing, 395 U.S. at 575 (quoting Wausau Steel Corp. v. NLRB, 377 F.2d 369, 372 (7th Cir. 1967)); see also United States v. Wurzbach, 280 U.S. 396, 399 (1930) (Holmes, J.) ("Wherever the law draws a line there will be cases very near each other on opposite sides.

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[31] See Colorado II, 533 U.S. at 453 ("[T]he party marshals [the power to speak] with greater sophistication than individuals generally could."); Richard Briffault, Issue Advocacy: Redrawing the Elections/Politics Line, 77 TEX. L. REV. 1751, 1792 (1999) ("Briffault I") ("[A]s skilled campaign professionals, the major political parties are in the best position to conform their activities to legal requirements.").

[32] Section 431(20)(A)(iii) does not determine whether the party committees can make such communications, but only how the communications must be financed. Thus, the statutory language at issue is relevant only to determine whether public communications by state or local party committees that "refer to a clearly identified candidate for Federal office" constitute "Federal election activity" and, therefore, must be financed with hard money (or a combination of hard money and Levin funds).

The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk."); NRWC, 459 U.S. at 211 (rejecting vagueness challenge although "the statute may leave room for uncertainty at the periphery"); United States v. Barnes, 295 F.3d 1354, 1366 (D.C. Cir. 2002) ("Since words, by their nature, are imprecise instruments, even laws that easily survive vagueness challenges may have gray areas at the margins.") (citation and internal quotation marks omitted).

Plaintiffs' characterization of the advisory opinion process as a system of prior restraint, CDP Br. at 34, is at odds with Supreme Court and D.C. Circuit precedent squarely recognizing that such procedures provide a valuable means of ameliorating vagueness concerns in the context of political activities. See, e.g., United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 580 (1973); Martin Tractor, 627 F.2d at 384-85 (footnotes omitted).[33]

3. Title I's limitations on solicitations are constitutional.

Plaintiffs contend that Title I violates their free speech rights by impermissibly restricting the ability of party committees and candidates to solicit money. See McConnell Br. at 26-27; RNC Br. at 46-51. But the restrictions on solicitation are carefully limited to prevent the reality and appearance of corruption and are entirely consistent with Supreme Court precedent.

The restriction on solicitations of soft money by national party committees is a direct byproduct of BCRA's ban on the receipt, transfer, and use of soft money. Such solicitations, if permitted, would enable national parties to ask for soft money that BCRA prohibits them from receiving. Congress recognized that

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[33] The Buckley court noted that "a comprehensive series of advisory opinions or a rule . . . might alleviate the [statute's] vagueness problems." 424 U.S. at 40 n.47. It decided not to rely on future advisory opinions to reduce vagueness problems because at that time "the vast majority of individuals and groups subject to" the Act did "not have a right to obtain an advisory opinion from the Commission." Id. Congress, however, amended the advisory opinion provision to make it available to "any person," 2 U.S.C 437f(a)(1), and "[w]hen a means like this one is available to reduce uncertainty or narrow the statute's reach . . . the chill induced by facial vagueness or overbreadth is pro tanto reduced." Martin Tractor, 627 F.2d at 386.

national party soft money solicitations, which frequently offer access to officeholders in exchange for large donations, present a grave threat of actual or apparent corruption. See Gov't Br. at 71-81, 123-25. Even if the national parties make solicitations on behalf of state-level committees or other entities rather than on their own behalf, the solicitation process presents a significant danger of corruption, because both federal candidates and donors have reason to believe that such money can be used to benefit candidates.[34] There is, accordingly, a serious risk that the solicitation of soft money by the national parties – whether for themselves or for other party committees – will create "obligated officeholders." Colorado II, 533 U.S. at 452. BCRA's restriction on solicitation thus forms a crucial part of Congress's effort to "put the national parties entirely out of the soft money business." 148 Cong. Rec. H408-09 (Feb. 13, 2002) (Rep. Shays).

Plaintiffs suggest that BCRA's prohibition against federal candidates and officeholders "solicit[ing]" non-federal funds on behalf of state parties is unconstitutionally vague. CDP Br. at 42. As explained in our opening brief, however, Gov't Br. at 94, 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 the FEC's regulations adopt a narrow definition of that term here. 11 C.F.R. 300.2(m) (67 Fed. Reg. 49,122 (July 29, 2002)).

Plaintiffs invoke a series of Supreme Court decisions analyzing various restrictions upon solicitations for charitable organizations. See RNC Br. at 47-48 (citing Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 622 (1980); Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 967-68 (1984); Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781 (1988)). But none of those cases impli-

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[34] See, e.g., Gov't Br. at 100-03; id. at 102 n.83 (explaining that soft money can be used to influence state-law matters such as redistricting that can have impact on federal candidates and national parties); see also Hassenfeld Decl. ¶ 9 [DEV 6-Tab 17] (at DNC's request, donor made soft money donations to state Democratic committees outside of his home state to further Bill Clinton's 1992 presidential campaign); Kirsch Decl. ¶ 9 [DEV 7-Tab 23] (during 2000 election cycle, national Democratic party solicited donations to state parties to benefit Gore presidential campaign);

cated the government's interest in preventing the reality and appearance of corruption the political process. The provisions in each of those cases were purportedly aimed at preventing fraud by imposing certain solicitation restrictions where fundraisers failed to limit their fees or expenses in accordance with specified limits. In each case, however, "there [was] no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation [was] fraudulent." Riley, 487 U.S. at 793.

Here, by contrast, BCRA's solicitation restrictions directly advance the government's interest in preventing opportunities for actual and apparent corruption,[35] and courts have repeatedly sustained restrictions aimed at promoting that interest. Indeed, the Supreme Court has accorded great deference to legislative judgments when the integrity of candidate elections is at issue, notwithstanding the First Amendment interests at stake. See, e.g., NRWC, 459 U.S. at 210 n.7 (noting that First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978), "struck down a prohibition against corporate expenditures and contributions in connection with state referenda," but "pointed out that in elections of candidates to public office, unlike in referenda on issues of general public interest, there may well be a threat of real or apparent corruption"); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 352 n.15 (1995) ("'The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue.'") (citation omitted); id. at 356 ("The [FECA], at issue in Buckley, regulates only candidate elections, not referenda or other issue-based ballot measures" and in "candidate elections, the Government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures.").

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[35] BCRA prohibits only those forms of solicitation that Congress believed to present a serious risk of corruption. Thus, national party committees are free to solicit hard money for themselves and state-level party committees as they see fit. State-level committees are free to solicit both hard and soft money for themselves and (with the exception of the Levin Amendment) for other committees as well.

Thus, it is no surprise that courts have repeatedly sustained restrictions on the solicitation of contributions to be used to influence elections. In NRWC, the Supreme Court held that a nonprofit corporation had violated FECA § 441b by soliciting contributions to its federal PAC from individuals who were not its actual "members."[36] The Court rejected the view of the court of appeals, which had cited Schaumburg and had concluded that unless given "an elastic definition" the solicitation restriction might be unconstitutional because solicitations to contribute to the group's PAC "would neither corrupt officials nor coerce members of the corporation holding minority views." 459 U.S. at 206. The Court held that NRWC could constitutionally be prohibited from soliciting contributions from anyone other than actual members of the organization because § 441b was designed to avert corruption. See id. ("In this case, we conclude that the associational rights asserted by respondent may be and are overborne by the interests Congress has sought to protect in enacting [this provision]."). Moreover, in sharp contrast to the charitable organization solicitation cases, where the Court explicitly declined to uphold broad restrictions on solicitation as prophylactic measures, see, e.g., Schaumburg, 444 U.S. at 637; Riley, 487 U.S. at 800-01, the Court in NRWC declined to "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." 459 U.S. at 210; see also Broadrick, 413 U.S. at 605-06 (upholding prohibition on public employees "directly or indirectly, solicit[ing], receiv[ing], or in any manner be[ing] concerned in soliciting or receiving any . . . contribution for any political organization, candidacy or other political purpose").

Similarly, in Blount, the D.C. Circuit upheld federal restrictions on the solicitation of contributions to local candidates, explaining that "[a]lthough the record contains only allegations [of quid pro quos], no

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[36] See 2 U.S.C. 441b (prohibiting corporations and labor unions from making contributions or expenditures in connection with federal elections from their general treasuries, but permitting them to establish separate segregated funds (sometimes referred to as "PACs") to be used for such purposes, with contributions to those funds to be solicited only from stockholders and certain personnel and their families).

smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic." 61 F.3d at 945. The D.C. Circuit recognized that "without the prohibitions of sections (c) and (d) on soliciting contributions, directly or indirectly, underwriters could easily circumvent the prohibition against direct contributions." Id. at 61.

The record demonstrates that Congress correctly concluded that solicitation of soft money for state parties by national party committees and federal candidates presents an opportunity to circumvent the federal contribution limits, and thus implicates the danger of corruption. See Gov't Br. at 100-02, 124-25. Moreover, and, contrary to plaintiffs' characterizations, BCRA's restrictions on solicitation are narrowly targeted to prevent that danger. The statute only restricts the solicitation of soft money, which, by definition, does not comply with the federal limits. It leaves national party committees and candidates generally free to solicit contributions that comply with those limits.[37]

The only restriction on the general freedom to solicit hard money appears in 2 U.S.C. 441i(d), which prohibits national and state-level party committees from soliciting any funds for certain tax-exempt organizations that engage in federal election activity. As explained in our opening brief, 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.[38] The record makes abun-

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[37] Plaintiffs contend, McConnell Br. at 24, that the statute prevents national party committees and national party officials from soliciting any funds for state candidates because state candidates cannot receive hard money. That assertion is incorrect. See supra at 25-26. Moreover, individuals who serve as officers of national party committees are free to solicit soft money for state candidates and party committees in their individual capacities, so long as they are not acting "on behalf of" the national party committee. 2 U.S.C. 441i(a)(2); 67 Fed. Reg. 49,083 (July 29, 2002). Thus, contrary to plaintiffs' suggestion, see RNC Br. at 45-46, the limitation on solicitations by national party committees and officials on behalf of state-level candidates is not greater than the limitation on such solicitations by federal candidates.

[38] Plaintiffs contend that "a party official could violate the law (and be subject to criminal penalties) simply for contributing to his or her church, if the church has engaged in non-partisan activities encouraging (or assisting) its members to vote." CDP Br. at 46. But the statute only prohibits actions by party officials "on behalf of" a party committee. 2 U.S.C. 441i(d). A party official's personal donation of his or her own money to a church, like other

dantly clear that, as Congress recognized, allowing party committees to raise funds for tax-exempt political organizations opens up an easy way to circumvent the restrictions on contributions to party committees.[39]

In addition, the fact that § 441i(e)(4) permits federal candidates and officeholders to make certain solicitations for tax-exempt organizations does not undermine § 441i(d)'s restrictions on parties. Rather, § 441i(e)(4) permits general solicitations by candidates and officeholders for non-political tax-exempt organizations, such as the Red Cross, and only very limited solicitations (only to individuals in an amount up to $20,000 per year) for certain federal election activity. See 2 U.S.C. 441i(e)(4). Unlike party officials, candidates are subject to limits on solicitation whether or not they are acting on behalf of the party. Compare 2 U.S.C. 441i(a)(2) with id. 441i(e)(1). Thus, it was reasonable for Congress to allow candidates to make solicitations under limited circumstances that accommodate the legitimate interests of candidates in providing personal support for certain organizations, while retaining the monetary limits that help minimize the risk of corruption. See generally 148 Cong. Rec. H408 (Feb. 13, 2002) (Rep. Shays).

4. Plaintiffs have not shown that Title I will prevent political parties from amassing resources necessary for effective advocacy.

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donations or solicitations made by party officials individually on their own behalf, plainly would not be covered.

[39] See, e.g., 144 Cong. Rec. S1048 (Feb. 26, 1998) (Sen. Glenn) (explaining that in 1996 soft money "supplied the funds parties used to make contributions to tax-exempt groups, which in turn used the funds to pay for election-related activities"); 144 Cong. Rec. S977 (Feb. 25, 1998) (Sen. Levin) ("These soft money and issue ad loopholes are used to transfer millions of dollars to outside organizations to conduct allegedly independent election-related activities that are, in fact, benefiting parties and candidates."); 144 Cong. Rec. S898 (Feb. 24, 1998) (Sen. Ford) ("[W]e now know that many of these so-called independent organizations, many claiming tax-exempt status, are established, operated, and financed by parties and candidates themselves – and their finances are totally unregulated."); see also Thompson Comm. Rep. at 4013; id. at 4568, 5975-79 (Minority Views) (noting that "the RNC funneled money through several theoretically 'independent' groups and thereby effectively evaded the federal legal limits on the spending of soft money contributions"); cf. FEC v. Cal. Dem. Party, 13 F. Supp. 2d 1031, 1033 (E.D. Cal. 1998) (detailing the FEC allegation that, in 1992, the CDP improperly contributed $719,000 in solely nonfederal funds to ballot initiative group for essentially a partisan voter registration drive); "FEC v. California Democratic Party," Selected Court Case Abstracts at 86-87 (www.fec.gov/pdf/cca.pdf) (describing October 1999 summary judgment order against CDP finding that the ballot initiative group's voter registration drive was "targeted effort to register Democrats to vote in a general election.").

Plaintiffs also contend that the soft money provisions violate the First Amendment by threatening the ability of the political parties to operate effectively because they will have a difficult time raising sufficient hard money to replace all the soft money they will be unable to raise under BCRA. See RNC Br. at 13-16, 53-56; CDP/CRP Br. at 29-31. This is not the test for constitutionality of a contribution limit, however. Indeed, it is an inherent effect of any contribution limit to make it more difficult to raise as much money. "The overall effect of the Act's contribution ceiling is merely to require candidates and political committees to raise funds from a greater number of persons," but this does not "reduce the total amount of money potentially available to promote political expression." Buckley, 424 U.S. at 21-22. Rather, "the test," according to the Supreme Court, is "whether the contribution limit [is] so radical in effect as to render political association ineffective, drive the sound of [the recipient's] voice below the level of notice, and render contributions pointless." Shrink Missouri, 528 U.S. at 397.

Plainly, if the $1,000 individual contribution limit upheld in Buckley and the $1,075 limit upheld in Shrink Missouri satisfied this test, BCRA's $25,000 limit on contributions to national party committees and $10,000 limit on contributions to state party committees satisfies it a fortiori. As noted in Colorado II, even under the lower contribution limits before BCRA, "'political parties [were] dominant players, second only to candidates themselves, in federal elections.'" 533 U.S. at 450 (quoting amicus brief of political scientists). Indeed, it is idle to suggest that the $212 million in hard money that RNC raised in the 2000 election cycle, before BCRA raised the contribution limit, is so low as "to render political association ineffective" or "drive the sound of [its] voice below the level of notice." Shrink Missouri, 528 U.S. at 397.

We show below that the plaintiff parties' self-serving speculation about the likely results of their future fundraising efforts is dubious at best. But even if RNC is correct in its assertion that no additional individuals will be willing to contribute to it, or to contribute the additional amount permitted by the increase in the contribution limits, that would reflect no disability imposed by BCRA, but instead the inability of the

RNC to persuade people to donate money. As the Court in Buckley recognized, any indirect burden on speech caused by contribution limits is not unconstitutional merely because it requires political committees to raise funds from a greater number of sources. See 424 U.S. at 21-22; see also Buckley, 424 at 94 n.128 (the inability of a party "to get private financial support ... presumably reflects a general lack of public support for the party").[40] The same is true of the California state parties: if they are unable to raise as much as they would like under the doubled $10,000 contribution limit in BCRA, this would be because they lack sufficient political supporters willing to give them that much money. Buckley and Shrink Missouri clearly establish that Congress can impose reasonable contribution limits, even if the parties subject to that limit lack sufficient political support or fundraising prowess to accumulate as much money as they would like in contributions under the limit.[41]

The parties' asserted inability to raise more funds under BCRA's increased contribution limits than under FECA's lower contribution limits is difficult to understand, since individual donors who previously made soft money contributions to the parties after reaching FECA's contribution limits will now be able to make substantially larger hard money donations. Indeed, the RNC in a prior case made the very same claim that it had maximized its hard money fundraising with respect to the hard dollars it raised in the 1997-98 election cycle (citing at least one of the same witnesses it relies upon here). See Mem. in Support of Plaintiffs' Mot. for Summary Judgment at 14-16, 22, RNC v. FEC, No. 98-CV-1207 (D.D.C., filed June 15, 1999); Plaintiffs' Opp. to Def.'s Mot. for Summary Judgment at 19, RNC v. FEC, No. 98-CV-1207

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[40] Taxes similarly reduce the amounts available for spending by persons on advocacy, but that does not render them unconstitutional. Cf. Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 390 (1990) (tax provision "merely decreases the amount of money appellant has to spend on its religious activities [but] any such burden is not constitutionally significant").

[41] In any event, as discussed in our opening brief, Gov't Br. at 87-89, Congress concluded that the soft money ban would not deprive parties of the resources they need to operate and would ultimately strengthen the parties by increasing their base of support. 147 Cong. Rec. S3106-07 (Mar. 29, 2001) (Sen. Feingold) ("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.").

(D.D.C., filed July 15, 1999).[42] But despite its contention, the RNC more than doubled its hard money receipts in the very next election cycle. See Biersack Decl. Tbl. 1 [DEV 6-Tab 6] (RNC hard money receipts in 1997-98 were $104,048,689; in 1999-2000, they were $212,798,761).[43]

Plaintiffs contend that the state parties, in particular, will suffer from the loss of soft money transferred to them by the national parties. See RNC Br. at 15-16, 54; CDP/CRP Br. at 30-31.[44] But if the state parties lack supporters of their own willing to contribute soft money under California law, that is not the fault of BCRA. To the extent the state parties assert they can attract more contributions using the "star power" of federal officeholders, see CDP/CRP Br. at 42, BCRA permits federal officeholders to attend, and speak without restriction, at state party fundraisers, 2 U.S.C. 441i(e)(4); 11 C.F.R. 300.64, and also to solicit soft money donations to a state party up to the comparable federal contribution restriction, 2 U.S.C. 441i(e)(1). Moreover, the proven adaptability of party committees, see supra at n.43, belies plaintiffs' assumption that state-level parties cannot enhance their fundraising. Indeed, the California Democratic Party has already demonstrated its capacity to raise significant amounts of soft money, consistent with state law, for use in state and local elections, Bowler Decl. ¶¶ 13-14 [3 PCS/CDP/CRP at

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[42] ITT Rayonier, Inc. v. United States, 651 F.2d 343, 345 n.2 (5th Cir. 1981) (a court may take judicial notice of its own records).

[43] 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." D. Green Rebuttal Expert Rep. at 5; McCain Decl. ¶ 20 [DEV 8-Tab 29] (noting that in the "2000 election cycle, the two major parties nationally raised almost $750 million in hard money. To date, in the 2002 election cycle, the parties have already raised 12% more hard money than they had at the same point in 2000"); see also D. Green Expert Rep. at 29-30 (parties "constantly explore new . . . fundraising strategies" in their effort to gain competitive advantage over rivals); La Raja Cross Tr. at 154-55 (plaintiffs' own expert concedes that parties "will certainly adapt and make themselves players in the campaign process" under BCRA).

[44] Plaintiffs' speculation concerning the extent of any loss is, at best, exaggerated because, for example, it fails to take into account the fact that a portion of the national party transfers that the state parties expect to "lose" is attributable to transfers made to state parties specifically for the purpose of running issue ads orchestrated by the national parties. See Gov't Br. at 34, 69, 101;

. To the extent state parties were merely "vehicles" of the national parties for purposes of running ads orchestrated by the national parties, see Gov't Br. at 31, 100-02, those amounts, under a BCRA regime, would not be lost to the state parties; the ads would merely be paid for directly by the national party.

00001]; Bowler Rebuttal Decl. ¶¶ 3-4 [3 PCS/CDP/CRP at 00085], and the California Republican Party has demonstrated its ability to broaden significantly its hard money fundraising base when circumstances warrant, see D. Green Expert Rep. at 34.[45]

Moreover, the plaintiffs' dire predictions fail to account for the fact that "much of the soft money that formerly flowed through the national parties to the states in the form of nonfederal transfers will instead go to the states in the form of Levin contributions." D. Green Rebuttal Expert Rep. at 6. As Professor LaRaja reports, "[m]ost groups that made non-federal donations" to the political parties gave small amounts (median $375), La Raja Expert Rep. at 44, funds that under the new regime could be donated to state and local party committees as Levin funds, see D. Green Rebuttal Expert Rep. at 6. In addition, BCRA doubles the hard money contribution limits applicable to contributions to state party committees, and imposes no restrictions whatsoever upon the state parties' ability to raise and spend soft money for uses other than federal election activity. And the national party committees remain free to transfer funds to assist the state and local parties; the only restriction is that the national party committees' funds will have been raised in accordance with the reporting requirements, funding source restrictions, and increased contribution limitations of FECA, as modified by BCRA.[46]

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[45] Professor Green discusses the testimony of Ryan M. Erwin, chief operating officer of the California Republican Party, and notes that "the number of California Republican Party donors giving the maximum allowable hard money contribution of $5000 rose dramatically between the 1997-98 and 1999-2000 election cycles. Whereas the amount raised in $5000 amounts was $290,000 in 1995-1996 and $140,000 in 1997-1998, by 1999-2000 this figure had skyrocketed to $3,030,000. This surge in maximum federal contributions was due, according to Mr. Erwin, to the increased effort that the party expended in garnering this type of donation." See D. Green Expert Rep. at 34 (citations omitted) (quoting Erwin Dep. Tr. (Sept. 10, 2002) at 129-30); see Erwin Decl. Attachment A, Ex. 7, Chart 4 [3 PCS(CDP/CRP) at 00382] (chart showing growth in number of $5,000 donors to CRP).

[46] The lower court cases cited by the RNC in support of its contention that it will be unable to amass resources for effective advocacy are inapposite. Both cases were decided before the Supreme Court clarified in Shrink Missouri, 528 U.S. at 396-97, that there is no particular amount that is "a constitutional minimum" for contribution limits. Both cases also concerned limits on direct contributions to local candidates much lower than those in BCRA, and cited specific evidence concerning the costs of effective local campaigns. See Cal. Prolife Council PAC v. Scully, 989 F. Supp. 1282, 1297 (E.D. Cal. 1998), aff'd, 164 F.3d 1189 (9th Cir. 1999); Nat'l Black Police Ass'n v. D.C. Bd. of Elections & Ethics, 924 F. Supp. 270, 274 (D.D.C. 1996), vacated as moot, 108 F.3d 346 (D.C. Cir. 1997). Such issues and evidence are not presented here. BCRA doubles the federal individual contribution limits. While the statute also bans soft money

5. Congress properly determined that anything less than a ban on national party soft money would not adequately reduce the appearance and reality of corruption.

Plaintiffs contend that the national party soft money ban should have been more narrowly drawn to permit the national party committees to raise soft money in limited amounts, or from particular sources, or for specific purposes. See McConnell Br. at 38-39; RNC Br. at 45. Since soft money is simply money contributed in excess of the statutory contribution limits or in contravention of the requirement that unions and corporations make contributions from separate segregated funds, this argument amounts to nothing more than an assertion that the statutory contribution restrictions are themselves too strict. This argument is plainly foreclosed by Buckley, 424 U.S. at 30; Shrink Missouri, 528 U.S. at 397; and NRWC, 459 U.S. at 210.

Congress had good reason to conclude that narrower measures would not solve the appearance of corruption presented by soft money donations to national parties. The statute "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 officeholders and candidates, who raise the money for the national party committees." 148 Cong. Rec. H409 (Feb. 13, 2002) (Rep. Shays). Because of this "close connection between the funding of the national parties and the corrupting dangers of soft money on the federal political process," 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.; see Briffault II, 100 COLUM. L. REV. at 651 ("[C]ontributions to [national] party campaign committees place donors in direct contact with the legislators who dominate the legislative process.") (footnote omitted).

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donations to national parties, such monies were not, at least theoretically, supposed to be used in federal campaigns.

Plaintiffs suggest that a $60,000 or $100,000 cap on soft money donations to the political parties would be a more tailored solution to the problem of soft money. McConnell Br. at 38 n.14. But Congress expressly considered, and rejected, the notion that it could achieve its objectives by permitting a limited amount of soft money donations, above the statutory contribution restrictions, to the national parties, rather than banning them entirely. The Senate, for instance, debated the "Hagel Amendment," which would have permitted the national parties to raise soft money in amounts up to $60,000 per donor in excess of the hard money limits. See 147 Cong. Rec. S2908 (Mar. 26, 2001) (proposed amendment to S. 27). The House, like the Senate, rejected proposals that would have capped, rather than banned, soft money contributions to national parties, noting that they would not reduce the potential for and appearance of corruption.[47] Congress concluded that capping soft money donations rather than eliminating them would represent legislative approval of direct donations by corporations and unions to national political parties that 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. Feingold) (opposing the Hagel Amendment).[48]

Finally, plaintiffs suggest that Congress should have permitted the national party committees to continue to raise soft money, while imposing restrictions only on the uses of soft money that are most

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[47] See, e.g., 148 Cong. Rec. H273 (Feb. 12, 2002) (Rep. Turner) ("[T]he so-called Ney-Wynn substitute, does not clean up the current system. It does not ban soft money from the political process. In fact, Enron could have given 80 percent of the money they gave if the Ney-Wynn substitute becomes law tomorrow."); 148 Cong. Rec. H260 (Feb. 12, 2002) (Rep. Meehan) ("[T]he Ney bill allows $900,000 in soft money per donor to be given to national parties in just one election cycle."); see also H.R. Rep. 107-131, Bipartisan Campaign Reform Act of 2001, Minority Views of Steny H. Hoyer, Chaka Fattah, and Jim Davis to accompany H.R. 2356 (July 10, 2001), at 48-49 (a "$75,000 annual cap on soft money to the national parties . . . is [in effect] not a cap at all").

[48] Plaintiffs' assertion that Congress should only have banned soft money from corporations and unions, McConnell Br. at 30, ignores Congress's equally important interest in avoiding circumvention of the individual contribution limits. See Cong. Rec. S2931 (Mar. 27, 2001) (Sen. Kerry).

corrupting. See RNC Br. at 45. But that would not address the appearance of corruption arising from the raising of large contributions from soft money donors. Indeed, that would return, in essence, to the regime that existed prior to BCRA, with FEC regulations defining which activities could be funded with soft money. See Gov't Br. at 22-28 (explaining FEC soft money regulations). As explained in our opening brief, Gov't Br. at 29-36, 68-86, and as the record makes abundantly clear, that system proved to be ineffective in curbing the dangers of actual and apparent corruption that the national parties' soft money fundraising practices have engendered. The record demonstrates that permitting the national parties to raise funds in excess of FECA's contribution limits and funding source restrictions contributes to the reality and perception of corruption in the political process, regardless of the use that is ultimately made of those funds. See Gov't Br. at 74-86.

IV. BCRA'S SOFT MONEY PROVISIONS ARE FULLY CONSISTENT WITH THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT AND ARE NOT IMPERMISSIBLY UNDERINCLUSIVE.

Plaintiffs contend that the soft money ban in BCRA violates the Fifth Amendment by restricting their activities without imposing similar restrictions on corporations, unions, or special interest groups. See, e.g., McConnell Br. at 57; RNC Br. at 59. But the equal protection component of the Fifth Amendment is "'essentially a direction that all persons similarly situated should be treated alike.'" Nguyen v. INS, 533 U.S. 53, 63 (2001) (quoting Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)). The political parties are not similarly situated to corporations, unions, or special interest groups. The significant differences between political parties and other organizations provide strong support for Congress's decision to treat those entities differently.

At the outset, it bears emphasizing, see Gov't Br. at 90, that political parties receive substantially more favorable treatment under FECA than corporations, unions, or interest groups. Among other things, political parties are permitted to receive greater contributions from individuals, see 2 U.S.C. 441a(a)(1);

make greater coordinated expenditures in support of federal candidates, see 2 U.S.C. 441a(d); make greater contributions to Senate candidates (up to $35,000 in the election year), see 2 U.S.C. 441a(h); and transfer hard money to other party committees without being subject to the contribution limits that apply to such transfers by nonparty committees, see 2 U.S.C. 441a(a)(4).[49]

Moreover, the differential treatment of political parties under BCRA rests on the fact that unregulated donations to political parties pose unique threats of corruption. See Gov't Br. at 90-93. The defining feature of a political party under FECA is that it "nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of" the party. 2 U.S.C. 431(16). Thus, unlike other organizations, the ultimate goal of political parties is not just to persuade officeholders to favor their views, but "to obtain control of the levers of government by winning elections." Nader v. Schaffer, 417 F. Supp. 837, 844 (D. Conn.), aff'd mem., 429 U.S. 989 (1976); see also Colorado II, 533 U.S. at 449 ("There is no question about the closeness of candidates to parties."); id. at 450 ("[P]arties are organized for the purpose of electing candidates.").[50]

Thus, the parties alone "stand as deliberate associations of individuals drawn together to advance common aims by nominating and electing candidates who will pursue those aims once in office." Rosario v. Rockefeller, 458 F.2d 649, 652 (2d Cir. 1972), aff'd, 410 U.S. 752 (1973). While interest groups or corporations typically seek the support of candidates on a limited number of discrete issues, political parties

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[49] Plaintiffs summarily dismiss the favorable treatment they receive as insignificant. But a limit on contributions to a national committee that is five times as large as the limit for other political committees, and an advantage that exceeded $1.5 million in coordinated expenditures for a single Senatorial candidate, see Colorado II, 533 U.S. at 439 n.3, can hardly be characterized as "minimal," RNC Br. at 60 n.14.

[50] "When it comes to elections, parties know only one ideology, the capital 'D' or 'R' after the candidates' names. That practicality is reflected in funding decisions made by party committees that reflect virtually every political consideration save the candidates' views on the issues; mavericks are more than welcome if they can win." Krasno & Sorauf Expert Rep. at 24; see also D. Green Expert Rep. at 8-9 & n.10; Rudman Dep. Tr. at 49 (distinguishing national political parties from interest groups, stating that the "Republican National Committee, the Democratic National Committee, have one purpose in life, to elect people"); Briffault II, 100 COLUM. L. REV. at 656 ("Parties are quite different. Winning elections, and thereby political power, is their preeminent concern.").

seek to control the legislative and executive branches of government. As even the Chief Counsel to the RNC has testified, political parties and interest groups are "fundamentally different":

> [T]he difference between what I consider a party committee especially at the national level and other kinds of third-party interest groups [is] that, by their very nature, the political parties have to build coalitions to govern and to get elected .... And the way you govern is with the majority of the members of one House or the other. So it is a bigger tent process where a special interest group, if someone votes against your interest, you can do everything you can either to make sure that person doesn't get reelected or fund their opposition. Party committees in my mind do not do that.

Josefiak Cross Tr. (Oct. 15, 2002) at 53-55.

Party committees also have significantly greater influence over Members of Congress than do other entities. See D. Green Expert Rep. at 8 (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"). Indeed, the chairs of the Senate and House campaign committees – organizations that raised $212 million in soft money during the 1999-2000 election cycle alone – are themselves Members of Congress. See Krasno & Sorauf Expert Rep. at 9-10; Biersack Decl. Tbl. 2 [DEV 6-Tab 6]. As the Second Circuit has noted, "it is the rare candidate who can succeed in a general election without the support of the party." Rosario, 458 F.2d at 652. More generally, as we previously explained, Gov't Br. at 71-75, through both fundraising and their power to organize the legislative branch of government, parties have a unique and powerful influence in the careers of federal officeholders.

Congress's judgment that political parties warrant unique treatment finds strong support in both the evidentiary record and Supreme Court precedent. 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. See Gov't Br. at 71-81; Krasno & Sorauf Expert Rep. at 12-

14; D. Green Expert Rep. at 8-10. Donors make contributions to the political parties "with the tacit understanding that the favored candidate will benefit." Colorado II, 533 U.S. at 458. The parties are "matchmakers whose special meetings and receptions give the donors the chance to get their points across to the candidates." Id. at 461. And a party's special "efficiency in channeling benefits to candidates threatens to undermine the contribution limits to which . . . [other interests] are unquestionably subject." Id. at 454.

As the Supreme Court has recognized, Congress may accord different treatment to entities that "have differing structures and purposes, and that . . . therefore may require different forms of regulation in order to protect the integrity of the electoral process." Cal Med, 453 U.S. at 201; see also Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 665-66 (1990). In light of the substantial differences between political parties and other organizations, and the unique role parties play in the electoral system, Congress was justified in treating parties differently.

Plaintiffs contend that Title I is impermissibly underinclusive because it does not subject interest groups and PACs to the same soft money restrictions applicable to party committees. See McConnell Br. at 41-43; RNC Br. at 58. This argument appears to be largely the same as the claim of discrimination discussed above. In any event, as the D.C. Circuit has made clear, "a regulation is not fatally underinclusive simply because an alternative regulation, which would restrict more speech or the speech of more people, could be more effective." Blount, 61 F.3d at 946. Rather, a rule will be "struck for underinclusiveness only if it cannot 'fairly be said to advance any genuinely substantial governmental interest,' because it provides only 'ineffective or remote support for the asserted goals,' or 'limited incremental' support." Id. (citations omitted). Because a "primary purpose" of underinclusiveness analysis is to "'ensure that the proffered state interest actually underlies the law,'" it requires "neither a perfect nor even the best available fit between means and ends." Id. (quoting Austin, 494 U.S. at 677 (Brennan, J., concurring)); see also Fraternal Order

of Police v. United States, 173 F.3d 898, 904 (D.C. Cir. 1999). Here, there can be no question that Congress enacted Title I to prevent the appearance and reality of corruption presented by unregulated contributions to political party committees. See Gov't Br. at 71-86; see also supra at 14-22.[51]

Plaintiffs contend that special interest groups present the same dangers of corruption as political parties, citing evidence that interest groups have attempted to strike quid pro quo arrangements and curry favor with federal candidates and officeholders and that federal candidates and officeholders make appearances at fundraising events for interest groups. RNC Br. at 17, 20, 64.[52] But unlike an interest group, which may have some influence with a few particular candidates, a political party exerts tremendous power and influence over all candidates and officeholders who belong to that party. Unlike interest groups, political parties control the processes through which candidates are nominated and placed on the ballot. They also control "the resources crucial to subsequent electoral success and legislative power" once a candidate is elected. D. Green Expert Rep. at 7; see Gov't Br. at 71-75 (explaining the various incentives that federal candidates and officeholders have to provide special access and consideration to large party donors); see also Briffault II, 100 COLUM. L. REV. at 651-52 (describing "potential for large donors to

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[51] The underinclusiveness of a statute may trigger concern where the exemptions from the challenged statute "represent[s] a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people,'" or where the statute, "through the combined operation of a general speech restriction and its exemptions" constitutes an attempt "to select the 'permissible subjects for public debate' and thereby to 'control . . . the search for political truth.'" City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) (citations omitted). But no such concerns are present here. The statutory provisions at issue are entirely neutral as to content and viewpoint. Title I's regulation of political parties simply reflects the special dangers of corruption posed by the unique relationship political parties have with federal candidates and officeholders, and the special dangers of corruption that party fundraising presents.

[52] Plaintiffs reference the fact that federal candidates or officeholders have made occasional appearances at fundraising events for interest groups. RNC Br. at 64. But those occasional appearances simply do not compare to the opportunities that party committees have provided to large donors, as a regular component of their fundraising operations, to discuss substantive issues with officeholders in small settings. See Mann Expert Rep. at 29 [DEV 1-Tab 1]; Gov't Br. at 34-35, 75-78;

'corrupt' not just individual candidates but the parties and, thus, to 'corrupt' the government itself since the party leaders for election fundraising purposes are increasingly the same as the leaders of the party in government"). Congress, thus, had a strong basis for limiting contributions to political party committees and federal candidates without imposing similar restrictions on interest groups.

Plaintiffs further contend that the statute is fatally underinclusive because the hard money donations to political parties that are permitted under FECA also present a danger of corruption. RNC Br. at 63. Of course, all contribution limits are designed to restrict (not eliminate) the potential for corruption or undue influence from political contributions, based on the common sense view that, the more money contributed, the more likely it is that the recipient will feel beholden. Soft money is simply a contribution that exceeds the federal contribution restrictions. Thus, plaintiffs' argument boils down to the bizarre position that all contribution limits are underinclusive because they do not entirely ban contributions. This argument is foreclosed by the Supreme Court's decisions that such contribution limits are constitutional in Buckley and Shrink Missouri.

Plaintiffs' gloomy predictions that Title I's soft money restrictions will make the system worse instead of better, see RNC Br. at 67-70, represent nothing more than a policy disagreement with Congress, not a basis for a finding of facial unconstitutionality. See Colorado II, 533 U.S. at 454 n.5 ("[W]e do not mean to take a position on the wisdom of policies that promote one source of campaign funding or another."). Although plaintiffs predict that the political system will suffer because interest groups will gain prominence, see RNC Br. at 67-68, Congress reached a contrary conclusion, and that legislative policy choice warrants deference.

In any event, it is not a foregone conclusion that soft money that might have been contributed to the national political parties in the absence of BCRA will instead be contributed to anyone else, much less to interest groups rather than state and local parties. As Professor Green explained, "[t]he money donated

to political parties is given with an eye toward the special favors that only a political party can deliver by dint of its ubiquitous role in all levels of government. No interest group can approximate the scope or influence of a political party; no interest group has the same presence in the lives or careers of politicians." D. Green Rebuttal Expert Rep. at 19.

Even if some interest groups do rise in prominence as a result of changes in the regulatory environment, it does not follow that such prominence will come at the expense of the parties. Political parties as a class are not categorically in competition with interest groups. Parties compete with each other, and parties and interest groups are as likely to be allied with each other as to be in competition. See supra at n.39 (discussing alliances between party committees and particular interest groups); see also D. Green Rebuttal Expert Rep. at 18 (noting role of interest groups in pluralistic system). Moreover, as shown above, BCRA permits political parties to raise ample funds to engage in effective advocacy, and parties have no constitutional right to outspend their political adversaries.

In addition, BCRA regulates interest groups in several respects that minimize the concerns that plaintiffs express. Under Title I, interest groups, like all other entities, are precluded from making any soft money donations to the national parties or to federal candidates, minimizing the risk that interest groups will attempt to secure influence over federal officeholders through large, soft money donations to candidates or their parties. The statute also precludes party committees and federal candidates (with some limited exceptions) from soliciting funds for, or transferring funds to, certain tax-exempt organizations that engage in federal election activity. See 2 U.S.C. 441i(d), (e). Those restrictions minimize the danger that party committees and federal candidates will use such groups as satellite organizations that can conduct activities on their behalf without complying with FECA's disclosure requirements and contribution restrictions. See Gov't Br. at 117-19; supra at 38. Moreover, Title II of BCRA prohibits labor unions and corporations from using money from their general treasuries to pay for campaign-related advertisements broadcast

shortly before an election, and requires disclosure of the donors who fund such campaign-related advertisements. See infra at 55-58, 108-112; Gov't Br. at 129-48, 172-77 (discussing provisions).[53] Section 214 of the statute also requires FEC to enact new regulations to provide better guidance as to when an interest group's expenditures (including expenditures for electioneering communications, see BCRA § 202) will be deemed to have been "coordinated" with a candidate or party and thereby subject to the statutory contribution limits and source prohibitions.[54]

Finally, plaintiffs' prediction that the provisions of Title I "will stifle electoral competition," RNC Br. at 69, is without foundation. As Professor Green explains, the reliable evidence statistically demonstrates that "all forms of campaign finance regulation, including those that limit contributions to the parties, improve the electoral prospects of challengers." D. Green Rebuttal Expert Rep. at 15 (discussing Stratmann and Aparicio-Castillo (2002)).[55] Indeed, "[t]he massive influx of soft money into state and federal elections beginning in the early 1990s has had no effect on the electoral performance of challengers in U.S. House elections." Id. at 17.

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[53] The disclosure requirements in Section 201 of BCRA substantially redress the lack of accountability that plaintiffs cite, see RNC Br. at 68-69, as a problem with electoral activities conducted by interest groups. See 147 Cong. Rec. S3034 (Mar. 28, 2001) (Sen. Jeffords) ("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.").

[54] Plaintiffs' suggestion that Title I should be invalidated in the event that Title II is struck down, McConnell Br. at 42 n.15, is flatly at odds with the severability provision that Congress included in BCRA § 401, as is the suggestion that the remainder of Title I should be invalidated in the event that any one of its provisions is struck down, RNC Br. at 71. The severability provision "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987); see also Buckley, 424 U.S. at 108-09. Moreover, before adopting BCRA's severability provision, Congress rejected a proposal for a nonseverability provision that would have provided for the very result plaintiffs seek. See 147 Cong. Rec. S3087-S3105 (March 29, 2001) (Amendment No. 156 tabled).

[55] Professor Green further explained that the analysis relied upon by plaintiff's expert, Professor La Raja, is methodologically inferior to that conducted by Stratmann and Aparicio-Castillo, and that the data presented by plaintiffs' expert Lott do not in fact support the contention that campaign finance laws worsen the electoral prospects of challengers. See D. Green Rebuttal Expert Rep. at 15-17 & nn.10-11.

In short, political parties are not similarly situated to interest groups and other entities. In light of the unique threats of corruption that parties present, neither First Amendment, nor equal protection principles preclude Congress from treating political parties differently from other organizations.

TITLE II

PRESENTATION BY THE GOVERNMENTAL DEFENDANTS

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

The regulation of electioneering communications enacted under Title II of BCRA is aimed at accomplishing two fundamental objectives: preventing distortion and corruption of the political process when unions and corporations convert their aggregated wealth into "war chests" for political spending, and informing voters, before they cast their ballots, of the interests to which candidates would be most responsive if elected to office. See generally Gov't Br. at 129-48, 172-77. BCRA accomplishes these objectives by adopting a narrow and precise definition of "electioneering communication[s]," attaching segregated financing requirements to these communications when they are sponsored by unions or corporations, and, in general, requiring disclosure of large-scale expenditures for communications of this kind. As we discussed at length in our opening brief, BCRA's electioneering communications provisions serve compelling government interests, and withstand plaintiffs' facial constitutional challenge.

A. BCRA's Regulation of Electioneering Communications Is Not a Ban on Speech.

The Title II plaintiffs, like their Title I counterparts, mount their facial attack on these provisions by mischaracterizing the statute's objectives, overstating its impact, and disregarding what the evidence plainly shows: that federal election campaigns in the last decade have been awash in corporate, union, and other undisclosed spending intended to influence the outcome of those elections, contrary to the design and intent of the nation's long-standing campaign finance laws. Nowhere is plaintiffs' exaggeration of BCRA's impact more obvious than in their refrain that BCRA "bans political speech." See McConnell Br. at 44; see also id. at 46; NRA Br. at 47. As we have previously explained, neither FECA § 441b nor BCRA § 203 is a ban on speech. Neither statute prevents corporations or unions from framing political messages in any

way they choose, or limits the amount of money they can spend to make their messages heard. Instead, both statutes seek to ensure that such spending "reflect[s] actual public support for the political ideas espoused by corporations" and unions, rather than their success in the economic marketplace, Austin, 494 U.S. at 660, by regulating the source of funds such entities can use to pay for independent campaign-related communications. Under the two statutes, corporations and unions "are allowed . . . to make such expenditures from segregated funds used solely for political purposes." Id. at 654-55.

The same neglect of precedent undermines plaintiffs' contention that "Title II of BCRA criminalizes political speech." McConnell Br. at 44. Plaintiffs ignore the fact that the Supreme Court has upheld the very same kind of "criminalization," id., when that criminalization involves restrictions on how corporations and unions may finance express advocacy, Austin, 494 U.S. at 657-661; FEC v. Mass. Citizens for Life ("MCFL"), 479 U.S. 238, 248-49 (1986), which like issue advocacy, "constitute[s] political expression at the core of . . . First Amendment freedoms." Austin, 494 U.S. at 657.[56] Although the dissent in Austin – like the plaintiffs here – characterized the Michigan statute in question as a "content-based law which decrees it a crime for a nonprofit corporate speaker to endorse or oppose candidates for . . . public office," id. at 695 (Kennedy, J., dissenting), the majority upheld the statute's requirements for financing corporate independent expenditures as "precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views." Id. at 660. Because corporate and union wealth can just as unfairly influence elections and corrupt elected officials when it assumes the guise of "issue advocacy" as when it is deployed as express advocacy, see Gov't Br. at 134-46, a requirement that

[56] It is important to note that criminal prosecutions for independent expenditures under § 441b are unusual and require proof of a "knowing and willful" violation of the Act. 2 U.S.C. 437g(a)(5)(C). By empowering the FEC to bring civil enforcement actions to remedy unlawful campaign spending from the general treasuries of corporations and unions, Congress provided for a less severe enforcement mechanism than criminal prosecution. See 2 U.S.C. 437d(e), 437g. Plaintiffs have cited no cases involving criminal prosecutions arising from corporate or union expenditures since the FEC was given civil enforcement authority over such violations.

such expenditures be made from separate funds, contributed by individuals for electoral purposes, is likewise a narrowly tailored measure supported by compelling governmental interests.

Under Austin and MCFL, it is well established that the following ad must be financed through a separate segregated fund in order to be a lawful expenditure by a corporation or union:

> 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. And on Election Day, vote against Winston Bryant.

See Thompson Comm. Rep. at 4007. [Adding last sentence to the text of an actual ad]. Despite plaintiffs' rhetoric about BCRA's effect on political speech, they do not challenge Supreme Court precedent upholding financing restrictions for advertisements like that above under FECA § 441b. But, while plaintiffs appear to accept, as they must, what they call the "criminalization" of ads like this one (if knowingly and willfully paid for with corporate or union general treasury funds), they predict dire consequences for democracy if the same ad were subject to the same financing restriction if broadcast to the relevant electorate 60 days before the election, but without the last eight words. BCRA, however, does nothing more.

It is clear, therefore, that rather than bringing a new or grandiose type of regulation to political speech, BCRA simply builds upon the financing structure upheld by the Court in Austin, and incrementally amends FECA § 441b to apply the same financing restrictions – still applicable only to corporations and unions – to a narrow category of election advocacy defined as "electioneering communications." It does so in the recognition that there is no meaningful distinction between the ad quoted above, and the same ad without the final eight words, if the latter is broadcast to the relevant electorate in the heat of a federal campaign. See Gov't Br. at 146-48. Plaintiffs' extravagant comparisons between BCRA and "chilling

historical antecedents" such as the "infamous Sedition Act of 1798, " NRA Br. at 5, thus, make no sense. BCRA's definition of electioneering communications is fully consistent with relevant Supreme Court precedent, and is constitutional.

B. *Buckley* Announced No Rule of Constitutional Law That Prohibits Anti-Corruption Regulation of Independent Political Spending That Does Not Involve Express Advocacy.

1. Nothing in *Buckley*'s clarifying construction of FECA suggests that Congress may only regulate express advocacy.

As the centerpiece of their attack on BCRA's regulation of electioneering communications, plaintiffs assert that Buckley laid down a rule of substantive constitutional law that precludes any governmental regulation of independent political spending for communications that do not entail express advocacy. McConnell Br. at 47-49; ACLU Br. at 13-15. The Supreme Court did no such thing, however. See Gov't Br. at 19-21, 148-53. Buckley's express advocacy construction of FECA was just that, a matter of statutory interpretation, and had nothing to do with fixing new constitutional bounds on the power of Congress to do battle against corruption. The Court merely resolved difficulties of vagueness in former FECA § 608(e)(1), which restricted independent expenditures "relative to" federal candidates, "by reading § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate." 424 U.S. at 41-44 & n.52. Similarly, to "avoid the shoals of vagueness" the Court construed then-FECA § 434(e), requiring disclosure of independent expenditures "made for the purpose of influencing" federal elections, to encompass only those expenses incurred for communications containing express advocacy. Id. at 78-80.

As we have explained, Gov't Br. at 154-56, Congress designed BCRA's regulation of electioneering communications to avoid the vagueness problems that led the Buckley Court to adopt narrowing constructions of then §§ 608(e)(1) and 434(e). The four criteria in BCRA's definition of electioneering

communications are crystal clear, and no serious argument can be made suggesting otherwise. Indeed, in their roughly 400 pages of opening argument, not a single plaintiff has argued or suggested that BCRA's definition of electioneering communications is vague in any respect. This concession of BCRA's clarity not only forecloses any challenge to the statute on grounds of vagueness, but also establishes, as shown below, that Buckley's analysis is inapplicable in this instance.

The plaintiffs' repeated statements that Buckley "permit[s] regulation only of express advocacy," McConnell Br. at 49, have no foundation in the pages of that decision. Plaintiffs embellish their argument with partial quotations to Buckley to give the appearance of fidelity to the text, but in fact the Court's stated meaning was entirely different from that ascribed to it in plaintiffs' briefs. For example, the ACLU describes Buckley's "clear ruling" to be that "government[ ] regulation of expenditures can only reach 'communications that in express terms advocate the election or defeat of a clearly identified candidate . . . .'" ACLU Br. at 13 (quoting Buckley, 424 U.S. at 44). In point of fact, the Court stated, in full: "We agree that in order 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." Buckley, 424 U.S. at 44 (emphasis added). In short, such bald assertions as "only words of express advocacy can be regulated," McConnell Br. at 54, and "the Court concluded that Congress . . . could only regulate expenditures that were for [express advocacy]," ACLU Br. at 14, all fail for the simple reason that Buckley never said anything of the kind.

Again quoting selectively from the Court's decision, plaintiffs insist that, in striking down § 608(e)(1), Buckley held that "the First Amendment requires" that speakers be permitted "to 'skirt [] the restriction on express advocacy,'" and to "'spend as much as they want'" on federal campaigns, "as the price of preserving robust debate about candidates and issues." McConnell Br. at 49 (quoting Buckley, 424 U.S. at 45); ACLU Br. at 14-15 n.5. Once again, plaintiffs have disengaged the Court's remarks from

their context in order to distort their meaning. The relevant passage concerning § 608(e)(1) is as follows:

> We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify § 608(e)(1)'s ceiling on independent expenditures . . . . Unlike the contribution limitations' total ban on the giving of large amounts of money to candidates, § 608(e)(1) prevents only some large expenditures. So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views. The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or office-holder. It would naïvely underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefitted the candidate's campaign.

424 U.S. at 45 (emphases added). It is plain to see from the foregoing passage that the freedom claimed by plaintiffs "to spend as much as they want to promote candidate[s] and [their] view[s]" so long as they "eschew expenditures that in express terms advocate the election or defeat" of those candidates, arose from Buckley's "exacting interpretation of the statutory language" in FECA "necessary to avoid unconstitutional vagueness," and not as an absolute guarantee that emanates directly from the First Amendment itself. If anything, the Court's analysis supports Congress's authority to combat corruption of the political process by regulating electioneering communications, because it recognizes that unlimited spending on communications other than express advocacy could be exploited to benefit a candidate's campaign, and, thereby, to "obtain improper influence over candidates for elective office." Id. at 45.[57]

2. No later decision of the Supreme Court endorses plaintiffs' reading of *Buckley*.

[57] As we have noted, Buckley upheld provisions requiring disclosure of independent campaign spending by political committees, 424 U.S. at 79-80, which included no express advocacy limitation. Thus, Buckley itself demonstrated that it was never meant to foreclose all regulation of independent campaign spending that does not involve express advocacy. Similarly, as we have explained, Gov't Br. at 151-52, see infra at 118-19, coordinated spending need not contain express advocacy to be subject to regulation.

Plaintiffs find no backing for their interpretation of Buckley in any of the Supreme Court's subsequent decisions. They first cite MCFL, McConnell Br. at 51, but as the Court explained therein, MCFL merely applied the same rationale relied upon in Buckley – namely, curing vagueness in statutory language that defined "expenditures" in terms of a speaker's "purpose to influence an election" – and placed a "similar" express advocacy "construction" on FECA § 441b. 479 U.S. at 248-49. Thus, MCFL places no constitutional imprimatur on the express advocacy standard.

The ACLU cites First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978), Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981), and McIntyre v. Ohio Elec. Comm'n, 514 U.S. 334 (1995), as support for the proposition that "issue advocacy" enjoys absolute First Amendment protection, see ACLU Br. at 15 n.6, but these cases did not involve candidate elections or advocacy, and explicitly said so. In Bellotti, the Court distinguished statutes like FECA and stated:

> Appellants do not challenge the constitutionality of laws prohibiting or limiting corporate contributions to political candidates or committees, or other means of influencing candidate elections.... and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.

435 U.S. at 788 n.26 (emphasis added); see also Citizens Against Rent Control, 454 U.S. at 297-98 (distinguishing Buckley as involving candidate elections, not ballot measures); McIntyre, 514 U.S. at 352 n.15 ("risk of corruption perceived in cases involving candidate elections ... simply is not present in a popular vote on a public issue") (citations omitted). Moreover, in Bellotti, 435 U.S. at 789-92 & n.32, and Citizens Against Rent Control, 454 U.S. at 298-99, the Supreme Court endorsed some regulation of genuine issue advocacy – in particular, the imposition of disclosure requirements – even in campaigns involving voter referenda. Similarly, in McIntyre the Court observed that a restriction on political speech – in that case, a restriction on anonymous handbilling that was not limited to express advocacy – could be upheld "if it is narrowly tailored to serve an overriding state interest." Id. (citing Bellotti, 435 U.S. at 786).

3. No lower court precedent precludes anti-corruption legislation such as BCRA's regulation of electioneering communications.

Although the Supreme Court's jurisprudence provides no basis for plaintiffs' view that Congress may regulate only express advocacy consistent with the First Amendment, plaintiffs claim to have found a "mountain" of supporting precedent, McConnell Br. at 54, in decisions by the courts of appeals. Id. at 51-53. Plaintiffs have misconstrued these cases, and none of them, in any case, can change the fact that Buckley did not limit congressional regulation of independent campaign spending to express advocacy.

As an initial matter, the lower courts have repeatedly and accurately described Buckley's express advocacy test as a saving construction of a potentially unconstitutional statute, not itself a standard of constitutional law. See Gov't Br. at 150 (citing cases); see also FEC v. Colorado Republican Fed. Campaign Comm., 59 F.3d 1015, 1020 (10th Cir. 1995), rev'd on other grounds, 518 U.S. 604 (1996); Clifton v. FEC, 114 F.3d 1309, 1311 (1st Cir. 1997). For their part, plaintiffs string-cite cases from a number of courts (the D.C. Circuit is not among them) for the asserted proposition that "[t]he federal courts have been unanimous in rejecting the FEC's efforts to ignore Buckley and MCFL." McConnell Br. at 52. Plaintiffs' characterization of these decisions serves only to cloud the fact that these cases offer no support for plaintiffs' legal position.

In Right to Life of Duchess Cty., Inc. v. FEC, 6 F. Supp. 2d 248 (S.D.N.Y. 1998), and Maine Right to Life, Inc. v. FEC, 914 F. Supp. 8 (D. Me. 1996), aff'd 98 F.3d 1 (1st Cir. 1996) (per curiam) (adopting district court's opinion) ("MRTL"), the courts rejected the FEC's regulatory definition of express advocacy insofar as it includes communications that "[w]hen taken as a whole . . . could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)" See MRTL, 914 F. Supp. at 10. They based their decisions on the conclusion that this definition of express advocacy "is not authorized by FECA . . . as that statute has been interpreted" by the

Supreme Court. Duchess Cty., 6 F. Supp. 2d at 253 (emphases added); see MRTL, 914 F. Supp. at 13.[58] Virginia Soc'y for Human Life, Inc. v. FEC, 263 F.3d 379 (4th Cir. 2001) ("VSHL"), held the FEC's regulation unconstitutional, on the ground that, in the court's view, the regulation shifted the focus away from the speaker's words themselves to the inferences drawn by the listener, giving rise to the very uncertainty, unpredictability, and resulting chill that Buckley adopted the express advocacy construction of FECA to avoid. VSHL, 263 F.3d at 391-92; see also MRTL, 914 F. Supp. at 11-13.[59]

FEC v. Christian Action Network, Inc., 110 F.3d 1049, 1050 (4th Cir. 1997); FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45,52-53 (2d Cir. 1980); FEC v. Survival Educ. Fund, Inc., No. 89-0347, 1994 WL 9658, *3 (S.D.N.Y. Jan. 12, 1994); and FEC v. AFSCME, 471 F. Supp. 315, 16-17 (D.D.C. 1979), all concerned FEC enforcement actions where the courts simply held that the various advertisements, bulletins, letters, and posters in question did not contain express advocacy, and, therefore, did not fall within the scope of regulation under FECA as the Supreme Court had defined it. At bottom, then, the disputes in all these cases involving FEC regulations and enforcement actions turned on the meaning of the express advocacy standard itself, and had nothing to do with the authority of Congress to adopt a different standard for regulation that does not give rise to the vagueness and overbreadth concerns that Buckley identified.

Plaintiffs also cite a number of decisions where, as they see it, the courts of appeals "rejected attempts by the state legislatures to regulate speech that did not 'expressly advocate' the election or defeat

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[58] Similarly, in Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991), the First Circuit considered whether an FEC regulation of voter guides "f[ell] within the scope of [FECA] section 441b(a)," id. at 471, and held that the regulation "overstepped the regulatory boundaries imposed by the FECA as interpreted by the Supreme Court." Id. at 472; see also Clifton, 114 F.3d at 1311.

[59] The lower court decisions that have invalidated the FEC's regulation defining express advocacy, 11 C.F.R. 100.22(b), were mistaken. In any event, this regulation was explicitly left undisturbed by BCRA § 201 (creating new 2 U.S.C. 434(f)(3)(B)), which states "Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations."

of a candidate for public office." McConnell Br. at 53 & n.20. But these cases do not support the conclusion that, under Buckley, express advocacy is the only form of independent political communication that may be subject to campaign finance or disclosure laws. The cited precedents dealt with state election laws, unlike BCRA, that in the courts' eyes disregarded the principles of vagueness and overbreadth articulated in Buckley. See Citizens for Responsible Government State Political Action Comm. v. Davidson, 236 F.3d 1174, 1187-88 (10th Cir. 2000) (disclosure requirement for political messages referring to any "specific public office" except those made in the "regular course and scope of... business," delivered by telephone or "any print or electronic media"); Iowa Right to Life Comm., Inc. v. Williams, 187 F.3d 963, 969-70 (8th Cir. 1999) (disclosure statute encompassing communications that, "[w]hen taken as a whole... could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)"); North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705, 712-13 (4th Cir. 1999) (state election law's definition of a political committee held "void for vagueness" without benefit of a narrowing construction). The "rejection" in these cases of standards the courts viewed, rightly or wrongly, as vague and overbroad does not establish that regulation limited to express advocacy is the only constitutionally acceptable alternative. Indeed, in Iowa Right to Life, the Eighth Circuit explicitly acknowledged that the protection afforded to discussion of candidates and issues under Buckley "does not mean that government cannot regulate at all or subject such speech to some amount of scrutiny," so long as vagueness and overbreadth are avoided. 187 F.3d at 968.

We acknowledge that, in some of these decisions, the courts made remarks that plaintiffs might view as endorsing their reading of Buckley. But the fact remains that it was unnecessary to the decision of any of these cases to opine that Buckley ordained the express advocacy standard as the sole permissible standard for regulating independent campaign spending. If, in fact, these lower courts meant to say as much, then they disregarded the established rule of constitutional adjudication that courts should not

"ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground." Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 184 (1999).[60] At the same time, these courts improvidently, and, as shown, erroneously, imputed a similar design to the Supreme Court to break faith with this "cardinal rule[ ]" in Buckley, see Gov't Br. at 152 (quoting, inter alia, Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501-02 (1985)),[61] in order to make far-reaching and pre-emptive decisions in a legal realm where Congress enjoys special expertise to which the Supreme Court has repeatedly deferred. See Shrink Missouri, 528 U.S. at 393 n.5. As we observed in our opening brief, no case since Buckley has squarely presented the question arising in this case: whether Congress, consistent with the First Amendment, may enact narrowly tailored legislation of independent political spending for communications that do not involve express advocacy.

Congress enacted BCRA's regulation of electioneering communications because regulating express advocacy alone no longer prevents unions and corporations from converting their aggregated wealth into "war chests" for political spending that can distort the electoral process, and corrupt the politicians who benefit as a result. Thus, a nearly century-old legal tradition in this country, and the commitment to democratic ideals on which it is based, have been rendered largely irrelevant. According to plaintiffs, Buckley forever "condemns" our democratic institutions to this state of affairs, see McConnell Br. at 47, but they

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[60] For example, in U.S. Chamber of Commerce v. Moore, 288 F.3d 187 (5th Cir.), cert. denied, ___ U.S. ___, 71 U.S.L.W. 3163 (Nov. 12, 2002), see McConnell Br. at 53, the Fifth Circuit wrote that, under Buckley, "the government may regulate only those communications containing explicit words advocating the election or defeat of a particular candidate." Id. at 193. In Moore, however, the plaintiff sought a declaratory judgment that its political advertisements were not subject to Mississippi's disclosure law, id. at 190, which already incorporated the "express advocacy" standard articulated in Buckley. Id. at 196. Therefore, the court's discussion concerning the constitutional footing of the express advocacy standard was unnecessary to its decision that the plaintiff's advertisements, which avoided terms of explicit advocacy, see id. at 190-91 & n.1, were not covered by Mississippi's disclosure law. Id. at 196-97. Thus, the court's remarks must be taken as dicta.

[61] See also Garner v. Louisiana, 368 U.S. 157, 163 (1961) ("In the view we take of the cases we find it unnecessary to reach the broader constitutional questions presented."); United States v. Rumely, 345 U.S. 41, 47 (1953) ("Grave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication. Until then it is our duty to abstain from marking the boundaries of congressional power or delimiting the protection guaranteed by the First Amendment.") (emphasis added).

are mistaken in that point of view. While plaintiffs are largely correct that "the vagueness problem inherent in [FECA] could not be solved by anything but a bright-line test," id. at 48, Buckley never anointed express advocacy as the only bright-line test acceptable to the First Amendment.

C. BCRA'S Definition of "Electioneering Communications" Is Not Overbroad.

As we explained in our opening brief, BCRA's definition of "electioneering communications" is a bright-line test that is narrowly tailored to end the now rampant evasion of FECA's segregated fund and disclosure requirements through broadcast advertising crafted to omit the "magic words" of express advocacy. BCRA prohibits corporations and labor unions from using their general treasury funds to make "electioneering communications," which are specifically defined as TV or radio communications that "refer[] to a clearly identified candidate for federal office," made within the 60 days before a general election or the 30 days before a primary. Additionally, in the case of communications that refer to a House, Senate, or (under rules adopted by the FEC)[62] presidential primary candidate, the communications must be "targeted to the relevant electorate," meaning that they can be received by at least 50,000 persons in the state or district in which the election is being held.[63] This precise definition carefully limits BCRA's reach to those ads sponsored by corporations and unions that present the greatest potential for distortion or corruption of the political process. See Gov't Br. at 156-159, 163-164; see also infra at 98-103.

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[62] See Final Rule, Electioneering Communications, 67 Fed. Reg. 65,211 (Oct. 13, 2002) (to be codified at 11 C.F.R. 100.29(b)(3)).

[63] Plaintiffs overstate the nature of what they misleadingly characterize as the "blackout" period, see McConnell Br. at 59, by ignoring the targeting requirements contained in BCRA and clarified in the FEC regulations relating to electioneering communications. As those rules state, BCRA is not to be interpreted in a manner "that would lead to nationwide application of the electioneering communication provisions with respect to presidential primaries." 67 Fed. Reg. 65,194. Instead, the FEC has interpreted BCRA's regulation of ads broadcast within 30 prior to any State's presidential primary as limited to those ads which "can be received by 50,000 or more persons within the State holding the primary election." Advertisements can continue unregulated in States where no primary is scheduled within the next thirty days, or in media markets that reach smaller audiences.

As we also described, two empirical studies of political advertisements in the 1998 and 2000 election cycles determined that 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), and that the majority of interest group ads that did not mention candidates ran outside the 60-day period before the election. See Gov't Br. at 140. These studies concluded that application of an "electioneering communications" definition like that contained in BCRA would have had only an insubstantial effect on genuine issue advertising, and that 94 to almost 98 percent of such advertising would have remain unregulated had BCRA been in effect during those election years. See Gov't Br. at 161.

Despite the demonstrated narrowness of BCRA's electioneering communications definition, plaintiffs contend that Title II is unconstitutionally overbroad, and attempt to meet their burden of demonstrating substantial overbreadth, see Gov't Br. at 160 (citing, inter alia, New York State Club Ass'n, 487 U.S. at 14), without offering the Court any empirical studies of their own. Despite the years of legislative debate leading up to the enactment of BCRA and the considerable resources plaintiffs are devoting to this litigation, plaintiffs neither mention nor rely upon any studies of political advertising comparable to those presented in Buying Time or the work of Professor Magleby, a body of work that was before Congress when it debated BCRA. Instead, plaintiffs merely mount an attack on the only empirical evidence of the potential impact of BCRA provided to the Court, but succeed only in demonstrating their own fundamental misunderstanding of the analysis performed. Second, plaintiffs cite examples of advertisements that they believe will be improperly captured by BCRA without paying the slightest attention to whether the sponsors or advertisements in question are regulated by BCRA, or to the substantial contextual evidence that demonstrates that the vast majority of those advertisements were made for the purpose of influencing federal elections. As explained below, none of these arguments is sufficient to meet plaintiffs' burden of proving that BCRA is substantially overbroad.

1. The empirical evidence proves that BCRA is not substantially overbroad.

Plaintiffs fail to offer any empirical data of their own to meet their burden of demonstrating that BCRA suffers from substantial overbreadth. Even with respect to their "starting point" for discussion of their overbreadth claims – various proposed regulatory exceptions that the FEC declined to enact in recent rulemaking proceedings, see McConnell Br. at 58-59 – plaintiffs fail to offer any empirical evidence whatsoever regarding the extent to which genuine issue ads that might have qualified for these proposed exemptions[64] would nevertheless be captured by BCRA.[65] Nor do plaintiffs even attempt to take issue with the results of the Buying Time studies showing that 75-80% of interest group ads that mention candidates run during the 60 days before a federal elections and that 85-90% of these candidate-focused ads that aired in the last 60 days before an election were broadcast in the midst of the most closely contested races. Gov't Br. at 140-41. Instead, as explained below, plaintiffs mount a personal attack on the respected political scientists who authored the Buying Time studies, mischaracterize both the results of those studies and the evidentiary record in this litigation, and take varying meritless, and ultimately inconsistent, positions

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[64] As the Explanation and Justification accompanying the FEC's issuance of the electioneering communications makes clear, each of these proposed exemptions was rejected because the FEC could not conclude, on the basis of the rulemaking record before it, that they categorically described communications not intended to influence a federal election. See generally 67 Fed. Reg. 65,200-65,203.

[65] Plaintiffs most egregiously complain that public service announcements ("PSA's") will be subject to BCRA. McConnell Br. at 59. They fail to disclose, however, that billions of dollars worth of PSA's are aired at no expense to their sponsors. See NPR, Morning Edition, "Analysis: Small amount of time commercial broadcasters allot for public service announcements," 2002 WL 3167200 (quoting plaintiff National Association of Broadcasters regarding its survey finding that the broadcast industry donated $5.6 billion of airtime in one year alone). Since BCRA's definition of electioneering communications encompasses only paid political advertising, see 67 Fed. Reg. 65,193 (to be codified at 11 C.F.R. 100.29(b)(3)(i)), none of this billions of dollars worth of advertising would be regulated, even where it refers to clearly identified federal candidates and is timed and targeted in the manner specified by BCRA. In the same vein, plaintiffs fail to offer any empirical evidence that ads sponsored by corporations and labor unions (and paid for with their aggregated wealth) that refer to proposed legislation by popular name; have lobbying goals relating to prospective legislation; or promote ballot initiatives, referendums, or local tourism; and have no electoral purpose, see 67 Fed. Reg. 65,200-65,203, constitute any substantial portion of ads that would be subject to BCRA's financing restrictions and disclosure rules.

regarding the appropriate treatment of the political advertisements evaluated in the two Buying Time reports.

Without offering any evidence that alleged personal bias played any role in skewing the results of either Buying Time report, plaintiffs launch a personal attack on the political scientists responsible for the studies by casting them as proponents of "reform." See McConnell Br. at 67. That attack is meaningless. To point out that political scientists who study political campaigning and fundraising as a matter of professional interest acted with awareness that the campaign finance system that existed prior to BCRA was seriously broken and badly in need of repair, see Gov't Br. at 37-49, does no more to undermine the integrity of the Buying Time studies than the accusation that medical researchers studying diseases do so in an effort to cure diseases, not perpetuate them. See Lupia Rebuttal Expert Rep. at 11 [DEV 5]. What plaintiffs have failed to establish is that there was any effort on the part of those scholars to tilt the results of the studies in ways that would be used to support the precise language of BCRA's provisions. See Goldstein Rebuttal Expert Rep. at 9 [DEV 5] ("Like any conscientious observer, I was careful not to compromise my academic reputation by involving myself in any results-oriented research project."); Krasno Rebuttal Expert Rep. at 2 [DEV 5] ("Scholars rarely embark upon research without some expectation as to its results. But more than most scholars, we had a compelling reason to insure that our results could withstand allegations of bias."); Lupia Rebuttal Expert Rep. at 11, 40 (failing to find evidence of any such effort).

Plaintiffs also mischaracterize the results of the Buying Time studies.[66] To understand plaintiffs' mistake, it is necessary to explore briefly the mathematical computations that generated the results reported in the two studies. Both the studies and the parties discuss the number of genuine issue ads that might be regulated by BCRA as a percentage, but the real dispute is, as a percentage of what? Specifically, should the number of genuine issue ads that meet BCRA's definition of electioneering communication be compared with (1) the number of all genuine issue ads run in a given year, or with (2) all advertisements that meet BCRA's definition of electioneering communications? The first comparison, used in the 1998 Buying Time study, measures the percentage of all genuine issue ads that would be regulated by BCRA; the second comparison, used in the 2000 Buying Time study, measures the percentage of all BCRA-regulated ads that are genuine issue ads. A graphical representation of the differences between these two measurements is shown in Figure 1. The intersection of the two boxes represents the numerator, which is the same in each calculation: all genuine issue ads that also met BCRA's criteria; the denominators are, as is apparent from the illustration, quite different.

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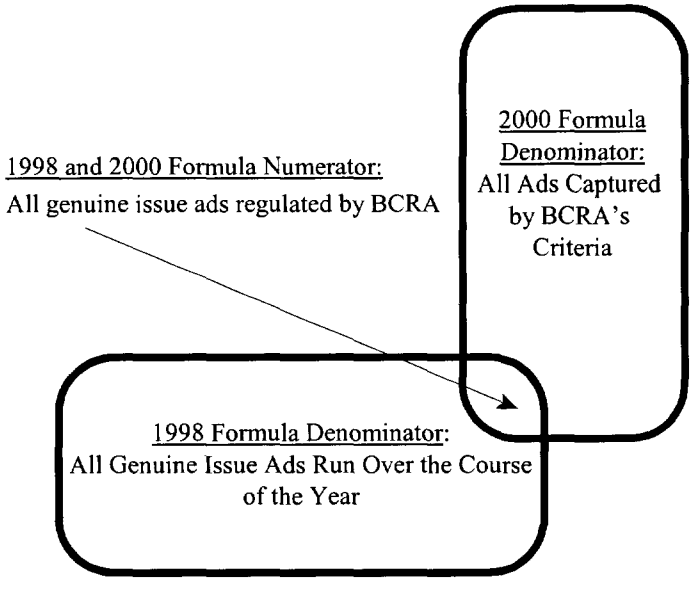
[66] Plaintiffs also object to the coverage of the two data sets that underlie the Buying Time studies. See McConnell Br. at 66 n.30. The two studies, however, are quite clear as to their scope – they evaluate broadcast television advertisements in the nation's top 75 media markets which serve approximately 80 percent of the nation's television viewing public. Neither plaintiffs nor plaintiffs' expert makes any attempt to meet their burden of explaining how, or whether, additional data from the nation's smaller media markets might have changed the results. See Goldstein Rebuttal Expert Rep. at 23-25; Krasno Rebuttal Expert Rep. at 5; Lupia Rebuttal Expert Rep. at 28. The NRA also argues that Buying Time is "palpably flawed" because it failed to include the NRA's half-hour newsmagazines in its calculations. The Buying Time studies, however, included no half-hour shows of any kind. Thus, the NRA cannot simply selectively add the airings of its own half-hour shows to the Buying Time data, see NRA Br. at 33, without wildly skewing the results. In any event, the NRA, which offers no expert testimony regarding the percentage figure it offers up in its brief, fails to describe how that percentage was derived, and absent any such explanation, it is entitled to no weight.

Figure 1.



As defendants' experts have explained, the best inquiry for purposes of evaluating BCRA's potential overbreadth is the first formula above, the one used in the 1998 edition of Buying Time, i.e., the percentage of all genuine issue ads aired in a given year falling within BCRA's scope.[67] See Krasno & Sorauf Expert Rep. at 60 n.43 & App. [DEV 1-Tab 2]; Krasno Rebuttal Expert Rep. at 14-16. This is so because the 1998 formula measures the impact of BCRA on the universe of genuine issues ads aired

[67] See City of Houston v. Hill, 482 U.S. 451, 459 (1987) (a statute may be invalidated for facial overbreadth if it "make[s] unlawful a substantial amount of constitutionally protected conduct").

in any particular calendar year and, thus, answers the critical question at the heart of any analysis of BCRA's potential overbreadth, i.e., the amount of genuine issue advocacy that BCRA would subject to regulation.[68] The small percentage of ads that would be affected by BCRA under this proper analysis – 6.1% in 1998 and 3.14% in 2000[69] – is insufficient to support a judgment that BCRA is substantially, and thus, facially, overbroad.[70] See Gov't Br. at 161.

The 2000 formula, on the other hand, as an empirical matter, combines both genuine issue and electioneering advertisements run within the 60 days prior to a federal election in its denominator, resulting in a calculation that will vary enormously depending upon the volume of candidate-focused ads in any given election year. Thus, if, hypothetically, in a non-competitive federal election, no electioneering ads were aired within 60 days of the election that mentioned a federal candidate, but a single genuine issue ad with those characteristics was aired, the measurement of BCRA's impact using the 2000 formula would yield

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[68] As we have explained, and as plaintiffs' expert appears to concede, the 1998 formula overestimates the impact of BCRA on genuine issue ads, because the denominator includes only the number of genuine issue ads run during a single calendar year — not an entire election cycle — in which federal elections were held. If the calculation were to include data regarding genuine issue ads aired in non-election years but during the same election cycle – whether it be two years, four years, or six years – the estimates would be significantly lower, since none of these non-election year ads would be subject to regulation under BCRA. See Gov't Br. at 161 n.113; Gibson Expert Rep. at 38 [1 PCS/ER 00001] ("Why use January 1, 1998, as the starting date for the total pool of issue ads (i.e., the denominator)? Why not include ads from December 1997, or even the entire election cycle beginning in November 1996?").

[69] As Dr. Krasno described in his expert report, he made some minor adjustments in his re-analysis of the 1998 data set, such that the estimate of BCRA's potential overbreadth that is correctly derived from that data set is 6.1%. See Krasno & Sorauf Expert Rep. at 60 n.142 & App.

[70] It is important to note that all calculations of the potential effect of BCRA generated by analyzing the 1998 data set are affected by a large number of airings of just one ad by the AFL-CIO, which named different senators and aired in multiple markets a total of 2,808 times. Thus, because some of the mentioned Senators were candidates for election in the districts in which the ad was aired, several airings of the ad were determined to be genuine issue ads that would have been subject to regulation had BCRA been in effect. See Krasno & Sorauf Expert Rep. App. This advertisement, referred to by the Buying Time authors as "HMO Said No"
that merely instructed viewers to call their (unnamed) Senators, a form of advertising that would not be subject to regulation under BCRA. See . Had all airings of this ad been of the generic kind, and, thus, been considered unregulated, only 2.2% of all genuine issue ads aired in 1998 would have been subject to BCRA. See Krasno & Sorauf Expert Rep. App. (Spreadsheets)

a result of 100%, even if hundreds or thousands of other genuine issue ads aired unregulated either prior to the 60-day period, or inside that period but identifying no federal candidates.

Plaintiffs confuse these two very different comparisons and, indeed, appear to invent a new formula altogether. They wrongly contend that "the authors of Buying Time 1998 now acknowledge that using the same approach that the Brennan Center employed to report its findings in 2000 . . . , over 14% of 'genuine' issue advertisements aired during the last 60 days of the 1998 election would have been prohibited by BCRA." McConnell Br. at 67 (emphasis added). As discussed above, however, the percentage formula used in the 2000 study measures the percentage of all the ads that would have met BCRA's primary definition of "electioneering communications" that were also genuine issue ads: 2.33% in 2000 and 14% in 1998. By no means does it measure what plaintiffs claim it measures – that "14% of 'genuine' issue advertisements aired during the last 60 days of the 1998 election would have been prohibited by BCRA"(emphasis added).

Plaintiffs offer no reason why this Court should adopt one formula over the other, and do not contest in any way the explanation offered by defendants' experts that the estimates of BCRA's potential overbreadth generated by applying the formula used in the 1998 edition of Buying Time – namely, 6.1% in 1998 and 3.14% in 2000 – are the most relevant available estimates.[71] Instead, plaintiffs choose to muddy the waters even further by quoting out of context a statement by Brennan Center President and CEO Joshua Rosenkranz, see McConnell Br. at 67, regarding what discovery proceedings have demonstrated to be his mistaken impression that the 7% figure reported in Buying Time 1998 was derived using the 2000 formula. See Holman Dep. Tr. (Sept. 6, 2002) at 143-145.

[71] Defendants have fully explained the various computations, and preferred methodology, used in the two reports and have provided the Court with the results of the application of both formulas to both the 1998 and the 2000 data sets. See Krasno & Sorauf Expert Rep. App. & Spreadsheets; Goldstein Expert Rep. at 25 (Tbl. 7).

What little remains of plaintiffs' attack on Buying Time does not constitute serious analysis. With respect to the 1998 study, plaintiffs object that eight advertisements were "recoded" from the "student coders' original assessments" that they were "genuine" (i.e., coded on Question 6 in the 1998 study as "providing information") to "electioneering" (i.e., coded on Question 6 in the 1998 study as "generating support or opposition for a particular candidate"). See McConnell Br. at 68-69. Plaintiffs argue that these eight ads should have been treated as genuine issue ads, and that if their number of airings are factored into the numerator of the 2000 formula, the estimate of BCRA's potential overbreadth rises to 64% percent.

This estimate is simply incorrect. First, plaintiffs use the 2000 formula for deriving their result, and, as we have explained, any calculation of BCRA's overbreadth is best made by determining the applicable percentage under the 1998 formula. More importantly, plaintiffs' estimates should be discounted because plaintiffs fail to explain any substantive basis for their objection to the manner in which these eight ads were ultimately treated for purposes of analyzing the 1998 data set. Plaintiffs fail to offer any analysis of the content of these advertisements, the races in which they were run, or the coding of other, similar advertisements in the database. An examination of these factors clearly demonstrates that the treatment of these advertisements as electioneering by the authors of Buying Time 1998 was correct. See generally Jonathan S. Krasno's Response to Professor Gibson's Supplemental Rebuttal; see also infra at 82-83 (discussing Look Out for the Lawyers); 83-84 (discussing AJS/Stabenow); 87-89, 93-94 (discussing AFL-CIO ads); 89 n.94 (discussing AFLT ads); and 92-93 (discussing NPLA ad).

Plaintiffs' analysis of the 2000 Buying Time study is equally flawed. With respect to the 2000 data set, six genuine issue ads were identified, see Goldstein Expert Rep. at 26 & n.21, which defendants' expert Professor Kenneth M. Goldstein used as the basis for his calculations of BCRA's potential overbreadth. See Gov't Br. at 161. As Dr. Goldstein explains, the published Buying Time 2000 study identified three genuine issue ads that would have met BCRA's electioneering communications definition.

Goldstein Expert Rep. at 26 n.21. Dr. Goldstein, in his effort to adopt a conservative approach when authoring his expert presentation to this Court, adjusted the published Buying Time results by treating as a genuine issue ad any ad that had ever been considered by any coder to be genuine, for a total of six, regardless of his agreement with that assessment or the treatment of other, similar ads. These six ads, which aired a total of 1,413 times in markets throughout the country, accounted for 3.14% of all genuine issue ad airings by interest groups during 2000 (using the 1998 formula), and for 2.33% of all ad airings by interest groups that mentioned a candidate and aired within 60 days of the general election (using the 2000 formula). Goldstein Expert Rep. at 25.

One of these six ads was an advertisement sponsored by Citizens for Better Medicare ("CBM"),

. See Gov't Br. at 33-34

(discussing AFL-CIO and CBM participation in the 2000 election cycle); see also infra at 87-89. The 2000 database contained six similar ads sponsored by CBM. See Goldstein Rebuttal Expert Rep. at 16-17 & n.8; Goldstein Cross Tr. (Oct. 24, 2002) Ex. 45. Each of these last six ads was coded as electioneering by the coders.[72] Nonetheless, because the one version of the ad listed in Dr. Goldstein's expert report had once been mistakenly coded as a genuine issue ad, Dr. Goldstein, out of an abundance of caution, treated that ad as such for purposes of his expert analysis. See Goldstein Expert Rep. at 26 n.21.

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[72] Plaintiffs make the wholly insupportable claim that Dr. Goldstein "inexplicably" treated these six ads as "sham ads." McConnell Br. at 69 n.34. As plaintiffs are fully aware, there is nothing whatsoever "inexplicable" about the treatment of these ads; Dr. Goldstein's rebuttal report, his deposition testimony, and documents introduced as exhibits by plaintiffs at their examination of Dr. Goldstein all clearly show that these six ads were treated as electioneering issue ads by both Dr. Goldstein and the authors of Buying Time 2000 because the coders coded them as such. See Goldstein Cross Tr. at 216-217; Id. Ex. 39, 42; Goldstein Rebuttal Expert Rep. at 16.

Without explanation, plaintiffs, who with respect to the 1998 data set castigated the Buying Time authors for deviating in the slightest from the judgment of the student coders, reverse their position when discussing this CBM ad from the 2000 data set.[73] In 2000, plaintiffs contend, Dr. Goldstein should have disregarded the student coders' judgment (as well as his own) that six advertisements aired by CBM were electioneering ads, and should have altered the coding on all six ads in light of his opinion that those ads were "not meaningfully distinguishable" from one advertisement by the same organization that one student coder determined to be a genuine issue ad. See McConnell Br. at 69 n.34. But if any recoding is to be done for the sake of uniformity, as plaintiffs suggest, it is certainly far more sensible and accurate to alter the coding on one ad that is mistakenly coded, as Dr. Goldstein did for purposes of assembling the data set that underlies Buying Time 2000, than to alter the coding on six similar ads in order to bring their coding into line with one. In other words, under their own reasoning, plaintiffs' suggestion is exactly, and indisputably, backwards.[74]

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[73] Plaintiffs' insistence that the student coders' assessments be rigidly adhered to (although plaintiffs apparently so insist only when it suits their purposes), is itself inconsistent with plaintiffs' expert's baseless contention that student coders cannot be trusted to offer their opinions on the purpose of political advertising. See Gibson Expert Rep. at 10. As defendants' experts have explained, the use of both student respondents and survey questions seeking opinions is routine in empirical political science research. Lupia Rebuttal Expert Rep. at 34-36; Lupia Cross Tr. (Oct. 25, 2002) at 36, 76-77; see also Krasno Response to Professor Gibson's Supplemental Rebuttal at 2 ("The point of having a combination of student coders and an expert like Dr. Goldstein working to prepare the data set is to take advantage of their disparate strengths, not to automatically confer authority on one over the others.").

[74] Plaintiffs' footnoted contention that "30 other ads" should be treated as "genuine" is similarly specious. McConnell Br. at 69 n.34. What plaintiffs fail to disclose in their description of these "30 other ads" is that these advertisements were selected by plaintiffs' counsel for their expert to factor into his calculations without any explanation whatsoever. See Gibson Cross Tr. (Oct. 21, 2002) at 179-80 ("Q: Now, you refer . . . to this mysterious group of 30 ads, and [your report] says, "This list was provided to me by counsel." What I wanted to know is how were these ads selected by counsel for you? A: I don't know. . . . Q: I take it you didn't make any determination that these 30 ads should have been coded as genuine issue ads, is that correct? A: That is correct. . . . Q: Did you have any understanding of the way in which the 30 ads were selected? A: No."). Indeed, Professor Gibson "never even looked at these storyboards," id. at 181, despite the fact that they were attached as an exhibit to his Expert Report and the airings attributed to these ads were used by him to perform various calculations of BCRA's impact. Professor Gibson thus has absolutely no basis for including these "30 other ads" in calculations of BCRA's potential overbreadth.

In sum, plaintiffs point to no valid reason for inflating the estimates of overbreadth that were obtained by careful analysis of the empirical data by the authors of Buying Time and then validated in a re-analysis of the relevant data sets by defendants' experts. Plaintiffs, therefore, fail to meet their burden of demonstrating, on the basis of the only empirical evidence that has been provided to the Court, that BCRA's electioneering communications definition is substantially overbroad. As Congress correctly determined, and as we demonstrated in our opening brief, it is not.

2. Plaintiffs' anecdotal evidence does not prove that BCRA is substantially overbroad.

In support of their argument that BCRA's definition of "electioneering communication" is overbroad, plaintiffs collectively discuss approximately sixty (60) specific television ads that they think would be unfairly captured by BCRA.[75] The product of months of culling through all of the available issue advertisements, these 60 ads (compared to the approximately 500 ads run by interest groups in 1998 and 2000,[76] purportedly represent plaintiffs' most "powerful illustrations" of BCRA's overbreadth. McConnell Br. at 61. As an initial matter, plaintiffs' anecdotal evidence cannot substitute for a comprehensive empirical analysis of BCRA's overall impact on genuine issue advocacy. Defendants recognize that a small amount of genuine issue advocacy will fall within BCRA's scope. What defendants deny, and what plaintiffs' anecdoctal evidence alone cannot prove, is that this amount will be so substantial as to warrant facial invalidation of the statute. In any event, plaintiffs' anecdotal evidence is overstated: plaintiffs overlook that many of the ads they cite as examples of BCRA's overbreadth would not have even fallen within BCRA's

[75] The McConnell plaintiffs have submitted with their opening brief a VHS tape containing 21 "issue ads." Several of these 21 ads are discussed in Plaintiffs' Opening Briefs, and an additional 38 ads are either referred to in the text of the plaintiffs' briefs, or the storyboards are appended to the back of the briefs. This section of our brief will address each of these ads.

[76] See Krasno & Souraf Expert Rep. App. (Spreadsheet: 2000 Formula); Buying Time 2000 at 59 [DEV 46].

scope; and they neglect substantial contextual evidence indicating that many of the remaining ads were in fact made for the purposes of influencing federal elections.

a. Plaintiffs' exaggerated claims of BCRA's impact should not be credited.

Before looking at a single storyboard or video clip, plaintiffs' list of 59 can be quickly cut by more than half to 25, because 34 ads would not have been covered by BCRA had it been in effect at the time the ads were run.[77] Plaintiffs' inability to limit their "most powerful" examples to advertisements that would have been covered by the statute belies their claim that BCRA will capture "an enormous amount of issue advocacy." McConnell Br. at 60. Of the 21 ads on the McConnell video tape, nine (9) fall outside of BCRA's limitations.[78] Similarly, twenty-five (25) of the particular advertisements cited by the NRA did not fall within the statute's 30/60-day window.[79] Given that the majority of the examples plaintiffs provide

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[77] For several of the remaining 25 ads, only a few of their many airings would have been captured by BCRA, infra at 93-94. Run dates referenced in this section can be found in App. D hereto (table containing selected CMAG data from Goldstein Expert Rep. [DEV-3-Tab 7 Ex.L (CD)]; Krasno & Sorauf Expert Rep. [DEV 1-Tab 1(CD App.)]

[78] The "Better World Campaign/Helms Biden Law" ad was run only in Washington, DC, and neither Jessie Helms nor Joseph Biden was a candidate for Senate in the DC television market. The other ads were run outside of the 30/60-day window: "Sierra Club/NC Faircloth Weaken" was run from 8/31 to 9/4/98, while the primary was held on 5/5/98 and the general election was held on 11/5/98; "Michigan Right to Life/Stabenow PBA" was run from 3/23 to 4/12/00, while the primary was held 8/8/00; "Sierra Club/Call McCain Grand Canyon" was run from 1/10-14/00, while the primary was held on 2/22/00; "AJS/Gorton A Magnificent River" was run from 6/14 to 7/18/00, while the primary was held on 9/19/00; "AJS/Gorton If We Lose the Dams" was run from 6/14 to 7/18/00, while the primary was held on 9/19/00; "Sierra Club/Protect Salmon Gorton," was run from 5/8-14/00, while the primary was held on 9/19/00; "PhARMA/Call Senator Gorton 60" was run on 7/19/00, while the primary was held on 9/19/00; and "Friends of the Earth/Asbestos Call Senator Grams" was run from 4/3/00 to 4/25/00, while the primary was held on 9/12/00.

[79] Thirteen (13) of the ads cited by the NRA are a series of television ads aired in March 2000, in response to President Clinton's Today Show "attacks on the NRA." NRA App. 914-16. The only individual named in these ads, Bill Clinton, was not a candidate for federal office in 2000. The NRA also cites to a series of eleven (11) television ads addressing a crime bill that aired sometime in 1994. NRA Br. at 26, LaPierre Decl. ¶ 21 (stating only that ads aired "in 1994," but providing no specific dates); NRA App. 886-88 (providing text of ads). The NRA has not provided any information that would allow the Court to find that these ads aired within the 30/60-day window and, thus, would have been covered by BCRA. The NRA has not provided the names of the Congressmen against whom this ad was run, or any details regarding which of the several crime bills that were debated up to mid-August 1994 to which the ad might have referred. The NRA has provided even less information regarding its Brady Bill ad, which is not ever mentioned in any of the NRA's testimony, and, therefore, the airing dates cannot be ascertained from the current record. NRA Br. at 26; NRA App. 885. In any event, the Brady Bill was passed on November 10, 1993, so it is odd that the NRA would be advertising about it in 1994.

would not have been covered by the statute, the Court should not indulge plaintiffs' implication that they are merely providing a few of the many available examples of ads that would be unfairly captured by BCRA.

The McConnell plaintiffs purport to catalogue the extent to which BCRA's electioneering communications provisions will "imperil" their speech, see McConnell Br. at 63-64; but, just as plaintiffs exaggerate the number of ads that would be regulated under BCRA, so, too, plaintiffs grossly overstate the statute's effect on the activities of non-profit corporations such as those that have joined this litigation.

Plaintiffs portray the Southeastern Legal Foundation, Inc. ("SLF") as a non-profit corporation that "regularly uses broadcast advertising to further its support" for limited government and individual economic freedom. Plaintiffs provide as a purported "example" a broadcast advertisement praising Senator McConnell for his stance on campaign finance reform, aired in September 2002. SLF co-sponsored this ad with plaintiffs 60-Plus Association, Inc. ("60-Plus"), the Center for Individual Freedom, Inc. ("CIF"), and the National Right To Work Committee, Inc. ("NRWC"). McConnell Br. at 63. In their discovery responses, plaintiffs SLF, 60-Plus, and CIF admit that they have never sponsored any other communications, beside the September 2002 advertisement, that would have been subject to regulation under BCRA. Their declarants identify not one electioneering communication that they will broadcast in the future. See Gov't Br. 130 n.95. Moreover, SLF is a 501(c)(3) organization that, as such, is exempt from BCRA's regulation of electioneering communications. 67 Fed. Reg. 65,199-200 (to be codified at 11 C.F.R. 100.29(c)(6)). BCRA "imperils" no speech in which these organizations engage.[80]

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[80] It nevertheless merits observation that, in the fiscal year ending June 30, 2001, non-profit 60-Plus received nearly $300,000 in donations from pharmaceutical corporations, associations, and organizations as such Pfizer, Inc., Merck, Inc., the Pharmaceutical Research and Manufacturers of America ("PhRMA"), and Citizens for Better Medicare. 60+ 0040 (tax return of 60-Plus) [DEV 131-Tab 3].

Another McConnell plaintiff, the National Right to Life Committee ("NRLC"), while claiming that it "regularly makes disbursements for the direct costs of producing and airing 'electioneering communications,'" O'Steen Decl. ¶ 6 [8 PCS/MC 262-63], in fact, has hardly ever done so. Indeed, in all of 1998 and 2000, the NRLC ran only one radio advertisement that would have qualified as an electioneering communication under BCRA. See O'Steen Dep. Tr. (Sept. 30, 2002) at 59-61.[81] Another group appearing in plaintiffs' list, Associated Builders & Contractors, is represented as using radio ads "to promote issues, . . . which ads coincide with legislative sessions and elections and will now be banned because they name candidates." McConnell Br. at 64.

see also Gov't Br., App. A, Tab 6, Nos. 3-6 (audio);

Such "off-issue" advertisements can only be interpreted as electioneering in design. See Gov't Br. at 138-39.

The ACLU's claims of injury are particularly egregious. The ACLU admits that the sole advertisement it has ever sponsored that would meet BCRA's definition of an electioneering communication was a March 2002 ad that urged House Speaker Dennis Hastert to bring the Employment Non-Discrimination Act to the floor of the House for a vote. ACLU Resp. to Defs' First Set of Interrogs. (Nos. 10-11) [DEV 10-Tab 7]; ACLU Resp. to Defs' Second Set of Interrogs. (No. 1) [DEV 10-Tab 9].

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[81] That advertisement, which criticized Senator John McCain for his stance on campaign finance reform, was run only in New Hampshire during the New Hampshire presidential primary, at the same time that the NRLC was running several similar ads out of its PAC that also expressly called for McCain's defeat. O'Steen Dep. Tr. (Sept. 30, 2002) at 57 & Ex. 6. As an NRLC press release makes clear, the ad, much like the ACLU Hastert ad, infra, was specifically contrived to serve as an example of the sort of "issue advocacy" that would be captured by BCRA. See id. at 58-59 & Ex. 8.

see also USA-ACLU 00001-02 (press releases)

[DEV 130-Tab 4]. Notwithstanding this record, the ACLU would have the Court believe that it has now "turned to the use of paid media to ensure that [its] views are heard," and that BCRA "would effectively mute much of this speech by the ACLU." ACLU Br. at 5, 6. In fact, the ACLU's declarants also fail to identify a single specific ad that the organization will run at any time in the near or distant future that would qualify as an electioneering communication under BCRA. See Romero Decl. [3 PCS/ACLU 6-19]; Murphy Decl. [3 PCS/ACLU 1-6]. BCRA's impact on the ACLU's speech is none.

Thus, although Plaintiffs insinuate that there is a cornucopia of activity that the statute would wrongly reach, when put to the test, their harvest is lean. Plaintiffs' exaggeration and speculation cannot be accepted as evidence sufficient to meet their burden of demonstrating that BCRA is substantially overbroad.

b. The record reflects that most of plaintiffs' "powerful illustrations" of issue advocacy were broadcast for purposes of influencing federal elections.

Of the 25 or so ads chosen by plaintiffs that, in fact, would have been subject to BCRA had it been in effect at the time the ads were run, many provide compelling demonstrations of electioneering, and in some cases were cited as such in defendants' opening brief. See Gov't Br., App. A, Tab 1 (Interest Group "Issue Ads"). Both the plain language of these ads and an understanding of the context in which they were run demonstrate that they were designed and intended to influence the outcome of federal elections. Just as the Buying Time coders' perceptions of the advertisements are useful to demonstrate that BCRA's definition captures very few ads that are not calculated to affect the outcome of federal elections, so, too, the contextual information revealing the political climate in which a particular advertisement was run bolsters the conclusion that BCRA's objective properly limits regulation to those ads that have an impact on federal elections. Even with respect to those few ads identified by plaintiffs that some might find to be closer calls, it remains true that the particulars of the ads and their context provide some evidence of electioneering. And as we have discussed, the fact that some of these communications combine both electioneering and genuine issue advocacy in one does not exempt such a communication from regulation where Congress's compelling interests are implicated.[82]

By way of example, plaintiffs single out more than once in their submissions to the Court an advertisement run by the American Association of Health Plans ("AAHP") called "Trial Lawyers."[83] The ad was

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[82] Just as when express advocacy is combined with issue advocacy, the presence of the latter does not insulate the former from regulation. In MCFL, the Court explained that the publication at issue constituted express advocacy because it could "not be regarded as a mere discussion of public issues" but instead "provide[d] in effect an explicit directive" and went "beyond issue discussion to express electoral advocacy." 479 U.S. at 249. The same applies when electioneering is combined with issue advocacy.

[83] See McC 030 (storyboard); McConnell Tape, No. 4 (video); see also Gov't App. A, Tab 1, No. 52. CMAG has labeled the advertisement "Look Out for the Lawyers."

broadcast in North Carolina in 1998, where incumbent Senator Lauch Faircloth was engaged in an extremely close race against trial lawyer John Edwards:

> Worried about rising healthcare costs? Then look out for the trial lawyers. They want Congress to pass new liability laws that could overwhelm the system with expensive new healthcare lawsuits. Lawsuits that could make trial lawyers richer. That could make healthcare unaffordable for millions. Senator Lauch Faircloth is fighting to stop the trial lawyers' new laws. Call him today and tell him to keep up his fight. Because if trial lawyers win, working families lose.

At the time this ad was run, the airwaves in North Carolina were saturated with millions of dollars of ads run by Senator Faircloth's campaign, by the Republican party, and by interest groups portraying Edwards as a "deceptive," truth-stretching trial lawyer.[84] Edwards' own campaign ads trumpeted Edwards as a trial lawyer "fighting for the people." App. C, Tab 1. Thus, for even the most casual observer of the 1998 North Carolina Senate campaign, the mere mention of the words "trial lawyer" would immediately summon the image of John Edwards. The tag line of the "Trial Lawyers" ad above may as well have read, "if John Edwards wins, working families lose." For plaintiffs to place the spotlight on this unabashed electioneering ad as one of their prime examples of a "true issue ad that would be unfairly captured by BCRA" again exposes their tendency to overstate the evidence.

Other ads cited by plaintiffs are similarly revealed to be electioneering when viewed in the context of the competitiveness of the particular elections in which they were run, or in light of the recurrent "air wars" between labor and business organizations trying to elect Members of Congress sympathetic to their interests.

Battleground Races. CMAG estimates that interest groups spent approximately $4 million airing television ads some 8,000 times relating to the 2000 Senate election in Michigan between Debbie

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[84] Several storyboards of ads run by the campaign committees and the political parties are attached hereto as App. C, Tab 1; see also Joshua Green, "John Edwards, Esq.," The Washington Monthly, October 2001, available at www.washingtonmonthly.com/features/ 2001/0110.green.html (describing campaign memos linking trial lawyer attack ads to election strategy).

Stabenow and Spencer Abraham, one of the most hotly contested Senate races that year, which ultimately resulted in challenger Stabenow upsetting the incumbent Abraham. The Cook Political Report (Oct. 25, 2000) at 85 ("Cook Report") [DEV 38-Tab 17 at INT 15523]. The sponsors of ads in this exceptionally tight race include a "who's who" of electioneering interest groups: the AFL-CIO, Americans for Job Security,[85] Americans for Quality Nursing Home Care, the Business Roundtable, the Chamber of Commerce, the League of Conservation Voters, the NRA, National Right to Life, and the Sierra Club.

One ad from the Stabenow-Abraham race included in plaintiffs' video submission is "Debbie Death Tax."[86] This ad, sponsored by the Michigan Chamber of Commerce, began airing on September 20, 2000, and continued running until less than a week before the election. The ad was not timed to any particular upcoming legislative action, and it refers explicitly to two past votes cast by then-Congresswoman Stabenow. Revealing that the Chamber's true focus was on the outcome of the Senate race in Michigan, the Chamber of Commerce not only spent an estimated $250,000 on these estate tax "issue ads," but also between September 20 and November 6, 2000, spent an additional $125,000 on "issue ads" concerning Stabenow's education agenda, and more than $750,000 on "issue ads" concerning Stabenow's position on prescription drug benefits.

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[85] Americans for Job Security ("AJS") is a business-backed organization that picked up the mantle of The Coalition after the 1996 election cycle. See Gov't Br. at 38-42 (discussing the electioneering activities of The Coalition). AJS is funded with millions from the American Insurance Association, the American Forest and Paper Association, Microsoft, and several large pharmaceutical firms. See John Nichols, "Money Flows Into Anti-Wellstone Campaign," The Nation, October 23, 2002. AJS's election year ads have covered an incredibly diverse range of topics including taxes, education, social security, welfare, crime, clean water, dams, and the personal characteristics of candidates. App. C, Tab 2. AJS also sponsored an ad targeting Debbie Stabenow in her 1998 race for the House. See "Stabenow Turned Her Back," McC 033. This particular ad accuses Stabenow of tolerating gang violence and turning her back on small businesses and working families.

[86] The message of this ad is that, because Stabenow voted against ending the estate tax, "working families are suffering." McC Video Tape, Ad No. 9. For additional "issue ads" run in connection with the Stabenow-Abraham election, see Gov't Br., App. A, Tab 1, Nos. 12- 15 ("Thanks," "Who," "Prescription Drugs," and "Call Debbie."). See also App. C, Tab 3.

In another hotly contested election, the U.S. Chamber of Commerce aired an advertisement, entitled "UT/Matheson Can't Decide" in the 2nd Congressional District of Utah during the 2000 election. See Chamber/NAM Br. at 5. The Chamber correctly points out that this ad was considered "genuine" by the Buying Time 2000 coders, and, indeed, when viewed out of context, the ad appears neutral in the sense that it says that Jim Matheson has not yet decided between two competing prescription drug plans, and that he should not pick "the big government plan." This ad, however, was run exclusively between November 1, 2000, and November 6, 2000. Knowledge of the issue environment of the campaign in which it appeared is also useful in divining its true purpose.[87] The Chamber claims that its ads were intended to influence upcoming legislative votes, see Chamber/NAM Br. at 1, but at the time this ad was run, Congress was not in session, having adjourned so Members could campaign, and Matheson was not a Member of Congress in any event; he was a challenger in an open seat race that the Cook Report labeled a toss-up.[88] The Chamber also fails to explain that Matheson was a Democrat in a very conservative district, and that his opponent's strategy, and the Republican party's strategy, was to portray him as a fence-sitting Democrat trying to masquerade as a Republican.[89] Thus, the ad's tag line – "Tell Matheson to make a decision. This issue is too important to ignore." – played to the overall campaign theme that voters should elect someone who is decisive and who shares their values.

Like most "issue ads," except for those that focus exclusively on the personal character traits of candidates, "Debbie Death Tax," "Thanks," "Who," "Prescription Drugs," "Call Debbie," and "Matheson Can't Decide" all contain at least some reference to a genuine issue. The issue, however, is merely the lens through which the advertisement attempts to portray the candidate:

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[87] ; Bailey Decl. ¶ 6-7, 10 [DEV 6-Tab 2].

[88] Cook Report (10/25/00), at 71 [DEV 38-Tab 17 at INT 15509].

[89] Almanac of American Politics 2002, p. 1536; see also App. C., Tab 4 (various storyboards of other advertisements aired in the 2000 Matheson-Smith race in Utah's 2nd Congressional District).

> Contrary to what many people would like to believe, it is well known among campaign consultants that the "swing voters" who regularly determine the outcome of elections usually vote on candidate personalities, rather than issues. Regardless of the substantive topic of any particular ad, one of the single most important messages that a political ad can convey is the underlying sentiment that a candidate has values similar to or different than the target viewers of the ad. A campaign commercial is most effective if the candidate is perceived as likeable to the citizens relaxing in their living rooms, and if the viewers feel comfortable that the candidate shares their values. Often, the substantive issue is merely the vehicle used to demonstrate personal qualities.

Bailey Decl. ¶ 4; see also id. ¶¶ 5-6. Thus, the point of an ad that is seemingly about a vote against a minimum wage bill may in actuality have been designed as a vehicle to portray the named candidate as beholden to large corporations.[90] When such advertisements air during the course of hotly contested elections, or in battleground states where the control of Congress or the White House may be determined, it is unimaginable that they do not seek to influence the outcome of the pending election. See Goldstein Expert Rep. at 20-24; Krasno & Sorauf Expert Rep. at 51, 57 n.140, 69;

Air Wars Between Opposing Groups. The electioneering battles between opposing interest groups are now familiar stories: big labor vs. big business, environmental lobbyists vs. industrial coalitions, etc. See Gov't Br. at 37-49. The various ads cited by plaintiffs in their opening brief and attached video tape should be viewed in the context of these multi-million dollar, high-stakes battles for control of Congress and of the White House.

The AFL-CIO argues that it sponsors issue ads solely for the purpose of influencing pending legislation. AFL-CIO Br. at 9-11. However, based upon both their timing and content, the advertisements

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[90]

sponsored by the AFL-CIO that met BCRA's criteria are more properly understood as being designed to influence federal elections. Despite the AFL-CIO's stated intent to influence pending legislation, few of the ads they cite in support of their argument actually make any mention of prospective actions by any of the targeted Members of Congress. For example, one of the ads cited by the AFL-CIO as a "lobbying ad" that would unfairly be captured by BCRA is entitled "Jobs." AFL-CIO Br. at 10; see

It is difficult to see how these advertisements could have had anything to do with influencing the outcome of pending legislative issues when Congress had already voted on the relevant issues months before these advertisements were broadcast.[91]

[91] As yet another example, "No Two Way," cited at AFL-CIO Br. at 9,

Of the cited ads that ran in the summer and fall of 1996, the FEC General Counsel Report systematically observed that "with the exception of a flight of advertisements on the topic of the minimum wage . . . there was no clear connection between the content of the [AFL-CIO's] advertisements and any legislation that was then the subject of intensive legislative action." AFL-CIO MUR Rep. at 5-6 [DEV 52-Tab 3]; see also Gov't Br. at 37-43.

The evidence is plentiful, however, that these ads had everything to do with influencing the 2000 congressional elections.

All but one of these races were considered at least competitive by the Cook Report, and nine were viewed as "toss-ups." Cook Report (10/25/00) at 42-43 [DEV 38-Tab 17 at INT 15479-80]. See Gov't Br. at 141-42 (citing evidence that electioneering ads are heavily concentrated in jurisdictions with competitive election races).

Similarly, an advertisement sponsored by the AFL-CIO that is included as part of the plaintiffs' consolidated evidentiary submission,

Eight of ten of these Members' re-election races were rated as competitive by the Cook Report, see Cook Report (10/20/98) at 33 [DEV 38-Tab 16 at INT 15399];

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Cf. McConnell Br. at 69 n.34.[93]

[93] The McConnell plaintiffs complain that Buying Time 2000, as well as defendants' experts, should have treated these ads as genuine issue ads rather than electioneering ads. McConnell Br. at 69 n.34.

[94] The ads sponsored by Americans for Limited Terms ("AFLT"), McConnell Br. at 62; McC-028, 032, 034; were similarly conceived, designed, and run to elect or defeat a candidate for federal office. Each of these three ads declares that a specific candidate has refused to sign a term limits pledge, and then ties this refusal to the candidate's submission to special interests and antipathy to the issues which local voters care about. They appeared within a few weeks of election day, months after the candidates had refused to sign the term limits pledge and, except for one ad that aired only once, ran until the day before the election, in many cases, in highly competitive elections. See Krasno Resp. to Professor Gibson's Supp. Rep. at 4. One of the incumbents targeted by AFLT, Merrill Cook, explains that the organization was blatant in its electioneering intent: "Huey Ridge [of AFLT] called me up two months ago and said if I didn't sign the pledge, he'd make sure there was an (advertising) campaign run against me in the district that would cost more than $100,000. I told him to go to h---." See Bob Bernick, Jr., Cook Does Not Get the Endorsement of U.S. Term Limits, Deseret News, Oct. 14, 1998, at B1. Indeed, AFLT made good on its promise to run anti-Cook ads, even though Cook was a second term Congressman, and there were hundreds of members who had been in office significantly longer.

Just as labor and business have fought over control of Congress in the elections since 1996, so, too, the NRA fought for control of the White House in 2000.[95] Any review of the NRA's ads must begin with NRA Executive Vice President Wayne LaPierre's repeated public statements that the NRA in 2000 had "no more important political objective" than "helping to assure Al Gore was defeated," LaPierre Dep. Tr. (Sept. 3, 2002) at 84; see also id. at 55, 85-86, 95, and that the NRA "spent what it took to defeat Al Gore, which amounted to millions more than we had on hand," id. at 98; see also id. at 93-94, 96, 101-113.

In an effort to support its claims of overbreadth, the NRA makes reference to a number of television broadcasts, but the only broadcasts the NRA cites that actually were run within BCRA's window, and that it does not admit were animated by electioneering intent, are four half-hour "infomercials" aired in 2000: "California," "It Can't Happen Here," "MMM," and "Tribute." These infomercials, the NRA contends, illustrate the burden BCRA would place on its speech, since they would have fallen within BCRA's scope despite containing only incidental references to federal candidates, mainly presidential candidate Al Gore. NRA Br. at 25-32. These denials of electioneering intent, however, do not square with the factual record.

The references to Mr. Gore in the four cited infomercials, while limited, make sense only in the context of the election. For example, the electioneering tenor of references to Mr. Gore in the "Tribute" infomercial is self-evident: Charlton Heston is shown forebodingly threatening that the rise of the NRA "spells very serious trouble for a man named Gore." Heston ends his remarks by defiantly clenching a musket over his head declaring:

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[95] Often the NRA's advertising efforts would be matched by groups supporting additional gun control laws such as Handgun Control, Inc. See, e.g., Gov't Br., App. A, Tab 1, Nos. 16-18.

> as we set out this year to defeat the divisive forces that would take freedom away, I want to say those fighting words for everyone within the sound of my voice to hear and to heed and especially for you, Mr. Gore: "From my cold dead hands."

NRA App. 946-47. Similarly, other infomercials describe a 1994 enactment as a "Clinton-Gore assault weapons ban"; yet, it is highly unlikely that the NRA would have employed this description had Mr. Gore not been a presidential candidate at the time: the enactment at issue was never popularly known this way, and NRA advertisements aired in 1994 regarding the same enactment do not invoke Mr. Gore's name. See NRA App. 885-88, 914-16. Hence, even if these infomercials were primarily designed for other purposes, they nonetheless, at points, advanced the NRA's electoral objectives. Indeed, Mr. LaPierre testified as to the NRA's infomercials generally that their "subtext . . . was the election," LaPierre Dep. Tr. at 88,

> Having chosen to insert electioneering material into their

infomercials, the NRA cannot complain if they would have been detected, and regulated, by BCRA, just as they would have been regulated by FECA had they contained, at points, words of express advocacy. See supra n. 82.

In any event, even if the references to candidates in the cited infomercials were entirely incidental, or "fleeting," as Mr. LaPierre put it, LaPierre Decl. ¶ 13, this merely goes to show that the burden imposed by BCRA in such circumstances is a trivial one, as the NRA could easily have avoided the references without any significant effect on the infomercials' non-electoral message, and without any more burden than is presently required to avoid magic words. For example, the NRA repeatedly points to a reference to Mr. Gore made in a section of the infomercials detailing the benefits of NRA membership: a sampling of NRA magazines is flashed on the screen at one point, with one magazine cover displaying the face of former President Clinton "morphing" into that of presidential candidate Gore. See NRA Br. at 27 & n.15, 30-31;

Given the incidental nature of the reference, the burden of avoiding it would have been negligible.

c. The "close calls" also reflect an electioneering intent, and Congress may require that funds collected from individuals for electoral purposes be used to pay for them.

Out of the plaintiffs' 60 "most powerful illustrations" of pure issue ads that allegedly would be unfairly captured by BCRA, only a handful of them present legitimately close calls. An ad that has caused disagreement among the experts, but which nonetheless had a demonstrable electoral purpose, is "Dumpster," sponsored by the National Pro-Life Alliance ("NPLA").[96] "Dumpster" not only criticizes Senators Kohl and Feingold of Wisconsin for supporting the "grisly procedure" of partial birth abortion, but also goes one step further and associates the named Senators with the "despicable act" of leaving newborn babies in garbage dumpsters. McCain Dep. Tr. (Sept. 25, 2002) at 119-25. While the text of the ad does not clearly indicate electioneering intent, there is significant contextual evidence indicating such intent. Holman Dep. Tr. at 68; Snowe Dep. Tr. (Sept. 30, 2002) at 132-35. This ad ran four times in Milwaukee between October 2-10, 1998, during the heat of Senator Feingold's re-election campaign; it then re-emerged and ran nine more times in Milwaukee between October 12 - 24, 2000, during the heat of Senator Kohl's re-election campaign.[97] Plaintiffs have pointed to no specific legislative events to rebut the inference that this ad was deployed during election season, put on the shelf, and then brought back out for the next election season.[98]

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[96] This ad is titled by CMAG and cited by plaintiffs as "WI/NPLA Feingold Kohl Abortion 60."

[97] An otherwise identical ad featuring then-Virginia Senator Charles Robb in place of Feingold and Kohl aired 15 times in Virginia during Robb's 2000 re-election. This ad is titled by CMAG and cited by plaintiffs as "VA/NPLA Robb Abortion."

[98] Indeed, sometimes interest groups will plan for months to run issue ads in the weeks leading up to the election, and coincidentally, legislation will arise that corresponds to their issue. Plaintiffs cite one such example in the

Another ad cited by plaintiffs is the Alliance for Quality Nursing Home Care's "Keep the Promise (Gore)." According to the CMAG data, of this ad's 986 airings, fewer than ten percent would have been regulated by BCRA.[99]

If the AFL-CIO's run data regarding the advertisement entitled "Deny," referencing HMO legislation, is correct, then the ad may indeed be a genuine issue ad that would nevertheless be captured by BCRA. However, contrary to the AFL-CIO's assertions that the ad ran only during the weeks preceding the vote on the HMO bill, see AFL-CIO Br. at 9, the CMAG satellite actually detected that the ad continued running until October 22, 1998, well after the legislative action the ad was supposedly timed to influence.[101] Moreover, the AFL-CIO's claim that it was necessary that this ad mention specific candidates by name is undercut by the fact

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This generic version would not have been regulated by BCRA.

Regardless of whether an ad captured by BCRA is unabashedly electioneering or something of a "close call," it is simply false to suggest that BCRA requires plaintiffs to "forego such advertising." See,

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Coalition for the Future American Worker's "KY/CFAW Call Northup," McC 026. CFAW's founder, Roy Beck, who controls a number of anti-immigration interest groups, has publicly stated that his ads were in the works leading up to the elections, and that the legislative debate in September was purely coincidental "lucky timing." Pamela Barnett, "Lott Wants Agreement With Dems On H-1B Visa Measure," National Journal's Congress Daily, September 14, 2000.

[99] The ad ran in Albuquerque, Austin, Boston, Cleveland, Columbus, Detroit, Harrisburg, Little Rock, Milwaukee, New Orleans, Philadelphia, Portland, Seattle-Tacoma, and St. Louis 986 times from 5/18/0 to 6/26/00. Out of all these airings, only a subset of the 39 airings in Albuquerque, and only a subset of the 93 airings in Little Rock (93x) were broadcast within 30 days of primary. Thus, BCRA would have captured less than 10% of the airings of this ad.

[100] On plaintiffs' video tape, this ad is called "AFL/Made in China Myrick."

Of the other China trade status ads, "Endorse" would have been captured in only three of 17 districts and "Trust" would have been captured in three of 12.

[101] Defendants have no similar information that would rebut the AFL-CIO's claim that its radio ad "Barker," AFL-CIO Br. at 10 ( ), continued running after the House's September 25, 2000 vote on Fast Track.

e.g., AFL-CIO Br. at 11. BCRA merely requires that they pay for such advertising using funds from their separate segregated accounts, and, at that, only to the extent the ads meet BCRA's definition of electioneering communications. For example, the AFL-CIO's "Deny," was aired in the states of 17 U.S. Senators, only four of whom were then candidates for re-election. See AFL-CIO Br. at 9. BCRA would only have required the use of PAC funds to pay for the ads targeting those four Senators. The statute would not have regulated the ads aired in the other 13 states at all. This does not amount to suppression of speech that warrants facial invalidation of a critical legislative enactment that Congress determined was necessary to forestall political corruption.

All told, plaintiffs have failed to show by example, anecdote, or illustration that BCRA is substantially overbroad. When put in context, nearly all of plaintiffs' purported "issue ads" reveal a genuine electioneering intent. Attaching financing restrictions and disclosure requirements to such advertisements is both constitutional and unremarkable. With respect to those few that ads that present closer calls, plaintiffs do not establish that they, or ads like them, comprise any significant portion of the communications regulated by BCRA, and therefore cannot demonstrate, on the basis of the handful of airings of those ads that would have fallen within BCRA's objective definition, that financing restrictions and disclosure requirements necessitate a finding that BCRA is substantially overbroad.

d. The evidence plaintiffs rely upon demonstrates the constitutionality of BCRA's "backup" definition.

A large part of plaintiffs' discussion, see McConnell Br. at 70-75, focuses on their challenges to the alternative, or "backup" definition of electioneering communications. See Gov't Br. at 170-172 (discussing BCRA § 201(a), adding 2 U.S.C. § 434(f)(3)(A)(ii)).[102] In support of their challenge to this

[102] Plaintiffs regard the fallback definition as an "[a]pparent acknowledgment of the manifest constitutional infirmity" of BCRA's primary definition, McConnell Br. at 45, but their perception is flawed. As introduced in February 1998, the Snowe-Jeffords amendments included just one definition of electioneering communications, that which is now known as the primary definition, see 144 Cong. Rec. S906 (Feb. 24, 1998); Gov't Br. at 50-51, and this remained the case

provision, plaintiffs' counsel, throughout the various depositions and cross-examinations in this case, engaged several of defendants' witnesses in a "pop quiz" by showing them advertisements they had never seen before and demanding that they prove on the spot that the ads were not genuine issue ads. See McConnell Br. at 70-75. Plaintiffs' counsel refused these witnesses' requests for information beyond what was on the face of the storyboards, such as the timing of the ads, the placement of the ads, the public statements made by the sponsors of the ads, or the matters at issue in the campaigns to which the ad related.[103]

The contradictory testimony elicited by plaintiffs by this "pop quiz" on this point, while rhetorically cute, actually serves as proof that the "backup" definition is extremely narrowly tailored and highly protective of First Amendment rights. As defendants explained in their opening brief, "the [backup] 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." Gov't Br. at 171. This standard, although it does not incorporate the specific, objective criteria included in BCRA's primary definition, is nonetheless akin to other First Amendment tests that include no such specifics, but instead use an objective "reasonable" person standard that does not vary based on the sensitivity or special knowledge or ignorance of particular listeners. Id. (citing cases).

To the extent, therefore, that plaintiffs have established with their "pop quiz" that reasonable people can disagree about some of the advertisements that they were shown, should the backup definition be made effective, plaintiffs have established no more than the narrowness of its scope. Such quizzes given to a

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essentially until April 2001, when the Senate first passed the McCain-Feingold legislation, 147 Cong. Rec. S3258 (Apr. 2, 2001). The backup definition was adopted as a last-minute amendment at the behest of Senator Specter. 147 Cong. Rec. 3070, 3122-23 (March 29, 2001).

[103] See, e.g., McCain Dep. Tr. at 91, 104, 111-18; Meehan Dep. Tr. (Sept. 25, 2002) at 66-68; Strother Cross Tr. (Oct. 24, 2002) at 26, 89-91; Holman Dep. Tr. at 46-47; McLoughlin Dep. Tr. (Sept. 10, 2002) at 27-30, 39-41; Sorauf Cross Tr. (Oct. 18, 2002) at 35, 51; Krasno Cross Tr. (Oct. 25, 2002) at 17; Lupia Cross Tr. (Oct. 25, 2002) at 48-49, 55-63; Feingold Dep. Tr. (Sept. 9, 2002) at 17-18, 45-46; Shays Dep. Tr. (Sept. 27. 2002) at 116-17.

handful of defendants' witnesses relating to a handful of advertisements do not meet plaintiffs' heavy burden of establishing that BCRA is substantially overbroad.

D. Plaintiffs' "Underinclusiveness" Challenges Are Meritless.

Plaintiffs challenge BCRA's electioneering communications provisions as "underinclusive." See McConnell Br. at 75-77, 81; NRA Br. at 34-39; Chamber/NAM Br. at 6. This challenge is meritless. Congress need not regulate the entire universe of activity intended to influence federal elections in order to regulate the category of "electioneering communications" covered by BCRA. To the contrary, the Supreme Court has emphasized that Congress's "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,' . . . warrants considerable deference." NRWC, 459 U.S. at 209 (citations omitted). As explained in Blount v. SEC, 61 F.3d 938 (D.C. Cir. 1995), which examined a securities regulation pertaining to campaign contributions:

> [A] regulation is not fatally underinclusive simply because an alternative regulation, which would restrict more speech or the speech of more people, could be more effective. The First Amendment does not require the government to curtail as much speech as may conceivably serve its goals.

Id. (upholding regulation, even though it "obviously [did] not eliminate all possible methods by which underwriters may curry favor"); accord Austin, 494 U.S. at 675-78 (Brennan, J., concurring); BellSouth Corp. v. FCC, 144 F.3d 58, 70 (D.C. Cir. 1998) ("[I]t would be odd to strike down a statute because Congress failed to restrict as much expression as it could have.").

Rather, "so long as [Congress] demonstrates that the recited harms [justifying a statute] are real," it may regulate the speech implicated by those harms, "and it may, consistent with that principle, choose to regulate just some part of that speech." Mariani v. United States, 212 F.3d 761, 774 (3d Cir. 2000) (en banc). Here, there can be no serious question that the harms recited in justification of BCRA's electioneering communications provisions are real. As previously detailed, BCRA's electioneering communica-

tions provisions were enacted in response to the widespread use of "issue advocacy" to evade FECA's restrictions on corporate and union campaign spending as well as its disclosure requirements. See Gov't Br. at 37-52. Such evasion was thoroughly documented in several studies relied upon by Congress and also in the Thompson Committee Report, and the compelling interests in remedying such evasion were cited throughout the congressional debate over BCRA. See id. at 50-51.[104] BCRA greatly reduces such evasion; it need not eliminate every vestige of it. See Mariani, 212 F.3d at 774 ("The requirement that the regulation alleviate the harm in a direct and material way is not a requirement that it redress the harm completely."). Accordingly, as explained in detail below, plaintiffs' underinclusiveness challenges fail.

1. BCRA permissibly targets ads run within 60 days of a general election or 30 days of a primary.

Plaintiffs first challenge BCRA as underinclusive on the ground that it regulates only ads aired within 60 days of a general election or 30 days of a primary, while leaving ads falling outside these windows

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[104] BCRA's legislative history demonstrates that Title II was enacted to restore vitality to the disclosure requirements and financing restrictions on corporate and union independent campaign spending. See Gov't Br. at 49-52; see generally 147 Cong. Rec. S3033-48, 3070-76 March 28 & 29, 2001) (debate on Title II during the Senate's consideration of an amendment offered by Senator DeWine, which would have struck Snowe-Jeffords in its entirety); cf. Buckley, 424 U.S. at 30-33 (rejecting the argument that FECA's contribution limits were incumbent protection legislation). The NRA presents thirty pages culled from the Congressional Record, dating as far back as 1996, as proof that BCRA's facially neutral text is an attempt to "insulate" incumbent politicians "from disagreement by the governed." NRA Br. at 5. See NRA App. at 54-82. Since the earliest days of the republic, however, courts have refused to infer an unconstitutional motive from the scattered statements of individual legislators. See, e.g., Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810) (Marshall, C.J.). "Inquiries into congressional motives or purposes are a hazardous matter." United States v. O'Brien, 391 U.S. 367, 383 (1968). The Court will not invalidate legislation "which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." Id. at 384. See also Bryan v. United States, 524 U.S. 184, 196 (1998) (statements of bill opponents "are no authoritative guide to the construction of legislation"). In Buckley, the Court upheld contribution limits even while acknowledging those limits were, in part, enacted for impermissible motives. The Buckley Court found three congressional purposes for limits on individual contributions to campaigns: (1) the prevention of corruption and the appearance of corruption; (2) "mut[ing] the voices of affluent persons and groups in the election process" and (3) reducing the cost of campaigns so as to "open the political system more widely to candidates without access to sources of large amounts of money." 424 U.S. at 25-26. The Court determined that the second purpose of the contribution limits, dampening the voice of wealthy individuals, is "wholly foreign to the First Amendment." Id. at 49. Had the Supreme Court followed the NRA's vision of legislative analysis, then the contribution limits enacted in FECA should have been ruled unconstitutional. The opposite happened. The government's legitimate and compelling interest in reducing corruption and the appearance of corruption was all the Court needed to uphold the statute. Id. at 26. The same interests require that BCRA be upheld.

unregulated. See McConnell Br. at 75-77; see also NRA Br. at 37-38. The limited temporal scope of the provisions, plaintiffs claim, "diminish[es] the credibility of the government's rationale for restricting speech." McConnell Br. at 76.

To the contrary, BCRA's 60- and 30-day windows effectuate BCRA's rationale. BCRA's Title II aims to extend existing campaign finance law to cover ads that avoid express advocacy but that are nonetheless designed to influence federal elections, as indicated by objective criteria. One of those criteria is the timing of an ad: for obvious reasons, advertisements run in the weeks and months just before the election occurs are most likely to affect the election. Indeed, 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; see also Gov't Br. at 140-41.[105] Hence, BCRA's temporal limitations are simply the stitches of narrow tailoring: they limit the statute's application to those times when electioneering ads are most likely to run. While some electioneering ads will certainly fall outside BCRA's 60- and 30-day windows, for Congress to leave such statutory breathing room is not only permissible, but necessary where it seeks to devise a bright-line test that avoids unnecessary overbreadth. See Mariani, 212 F.3d at 774 ("First Amendment underinclusiveness analysis requires neither a perfect nor even the best available fit between means and ends.").

Plaintiffs thus err in relying upon Republican Party of Minnesota v. White, ___ U.S. ___, 122 S. Ct. 2528 (2002). See McConnell Br. at 76-77. In that case, the Court struck down a restriction prohibiting candidates for judicial office from announcing their views on legal questions during the course of their campaign, reasoning that, if a judge's announcement of his or her legal views threatens his or her impartiality

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or appearance of impartiality, then that threat exists without regard to whether the announcement occurs during an election campaign. See 122 S. Ct. at 2537 ("[S]tatements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible."). Whereas the rationale for the restrictions at issue in Republican Party of Minnesota thus had no particular connection to elections, the rationale for BCRA's restrictions has everything to do with elections. Thus, in contrast to the "infinitesimal portion" of judicial announcements of legal positions captured by the restrictions in Republican Party of Minnesota, the vast bulk of electioneering ads occur within BCRA's time windows. Republican Party of Minnesota is inapposite.

2. BCRA permissibly targets television and radio advertisements.

Plaintiffs also challenge BCRA as underinclusive on the ground that its definition of electioneering communications covers television and radio advertisements, but not advertisements run in other media, such as print, direct mail, or the Internet. See McConnell Br. at 81; NRA Br. at 34-36. According to plaintiffs, no valid rationale explains "this naked preference." NRA Br. at 34.

As explained in our opening brief, however, BCRA's focus on television and radio advertisements reflects Congress's judgment that these advertisements pose the greatest danger of causing the "corrosive and distorting effects [that] immense aggregations of wealth" can have on elections and the political process. See Gov't Br. at 169-70; Austin, 494 U.S. at 660. Due to their particularly powerful impact, television and radio advertisements are capable of creating the greatest distortion, as plaintiffs effectively concede. See AFL-CIO Br. at 11 ("[B]roadcast is the most potent medium available in this electronic age .... Print advertising, telephone banks, direct mail and other forms of non-broadcast communications pale in comparison"). Further, television and radio advertisements typically have a broader reach and higher profile than non-broadcast advertisements, and thus they are more likely to be noticed not only by voters, but by

candidates who may feel indebted to the groups sponsoring the ads. Cf.

Finally, television and radio advertisements are typically much more expensive than non-broadcast advertisements and, thus, constitute a particularly valuable form of political currency. See NRA Br. at 15 ("All the parties to this action agree that money plays a pivotal role in the American political system given the necessity and enormous expense of communicating political speech through the broadcast media, especially television."); see also .[106]

For all these reasons, television and radio advertisements are currently the most prominent medium through which corporations, unions, and undisclosed groups have been evading FECA's restrictions and undermining the integrity of federal elections. They, therefore, "constitute the most blatant form of [unregulated] electioneering." 145 Cong. Rec. S511 (Jan. 19, 1999) (Sen. Snowe). Accordingly, Congress chose to make a priority of addressing these ads in particular, as is its prerogative, for the Supreme Court has never endorsed an "all or nothing" approach to judging the constitutionality of Acts of Congress, particularly in the First Amendment area. 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.") (citation omitted). To the contrary, the Court has noted that statutes protecting the government from corruption involve "an area where precisely targeted prohibitions are commonplace, and where more general prohibi-

[106] Inconsistently, the NRA later suggests in its brief that newspaper advertisements "often dwarf radio advertisements" in terms of their expense, citing an example of a full-page ad run in the New York Times at a cost of $65,000, and comparing it with a radio ad run in "a small market such as Peoria" at a cost of $75. This clearly unbalanced comparison is meaningless as it says nothing about the difference between the average costs of radio and newspaper advertisements. Indeed, the NRA overlooks that the advertising campaign of which the cited $65,000 New York Times ad was a part also included a television and radio component costing $1.1 million. See Berman Decl. ¶ 11 [NRA App. 256].

tions have been qualified by numerous exceptions." United States v. Sun-Diamond Growers of Calif., 526 U.S. 398, 412 (1999).

3. BCRA's segregated fund requirement permissibly applies only to corporations and labor unions.

Plaintiffs also challenge BCRA on the ground that, under § 203, corporations and unions are restricted in the ways that they may finance electioneering communications, while unincorporated entities and wealthy individuals are not similarly restricted. See NRA Br. at 38. What plaintiffs ignore, however, is that § 203 applies exclusively to corporations and unions simply because it is an extension of 2 U.S.C. 441b, whose longstanding financing restrictions for independent campaign spending have always applied exclusively to corporations and unions. See BCRA § 203 (amending § 441b to include electioneering communications within its coverage). The Supreme Court has squarely rejected the contention that § 441b is unconstitutionally underinclusive in this respect:

> While business corporations may not represent the only organizations that pose th[e] danger [of distorting the political process through aggregations of wealth amassed in the economic marketplace], they are by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth. That Congress does not at present seek to regulate every possible type of firm fitting this description does not undermine its justification for regulating corporations. Rather, Congress' decision represents the "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,'" to which we have said we owe considerable deference.

MCFL, 479 U.S. at 258 n.11 (citations omitted); see also Austin, 494 U.S. at 666 (rejecting contention that state statute modeled after 441b was unconstitutional by virtue of not applying to unincorporated associations with the ability to accumulate large treasuries); NRWC, 459 U.S. at 209.[107] Of course, to the

[107] As to the Chamber's argument that BCRA is underinclusive because the ads it regulates constitute "only 15% of all political advertising which includes ads sponsored by candidates and parties," the argument ignores that candidate and party ads are already effectively regulated by FECA insofar as those ads are paid for with contributions to candidates and parties, and those contributions are in turn regulated by FECA (as supplemented by Title I of BCRA). Moreover, to the extent that the Chamber attempts to play down the potential for corporate and union advertising to influence federal races by comparing it to political advertising generally, we have already documented the significant role corporate advertising has played in recent election cycles. Gov't Br. at 37-49. The comparison drawn by the

extent BCRA does not limit the amount that wealthy individuals can spend on electioneering communications, it merely reflects Buckley's holding that the government may not limit individual campaign expenditures. See 424 U.S. at 45-48; see also Austin, 494 U.S. at 675-78 (Brennan, J., concurring) (statute not underinclusive merely because it reflects the requirements of Supreme Court precedent).

4. BCRA permissibly excepts media activities from its coverage.

BCRA, like FECA before it, exempts certain communications distributed through the facilities of a broadcasting station from regulation. See BCRA § 201 (new FECA § 434(f)(3)(B)); 2 U.S.C. 431(9)(B)(i). The NRA argues that this "media exemption makes BCRA underinclusive to the point of incoherence." NRA Br. at 46. In the NRA's view, because media corporations can air news stories or commentaries that meet BCRA's definition of electioneering communication, without having to pay for such communications through a separate segregated fund, BCRA does nothing to stop the appearance of corruption "associated with the influence of large [media] corporations on elections." Id. This argument is also foreclosed by Austin, which concluded that a state segregated fund requirement for corporations was properly tailored to this governmental interest even though it included a media exception. See Gov't Br. at 167-68.

BCRA's media exception strikes a balance by continuing to protect the traditional role of the press without exempting media corporations entirely from the restrictions in FECA § 441b. See infra at 104-05. If Congress someday decides that further regulation of media corporations is necessary, it can take that next step. In the meantime, BCRA's media exception is not unconstitutional merely because media corporations may be able to deploy their financial resources in ways that other corporations may not. See Cal. Med.

Chamber understates that role since corporate advertising is typically concentrated in a small number of tight key races. In the races studied by Professor Magleby, for example, advertising by corporations and other groups rivaled that of candidates. Magleby Expert Rep. at 22.

Ass'n v. FEC, 453 U.S. 182, 201 (1981) (holding that "differing structures and purposes" of different entities "may require different forms of regulation in order to protect the integrity of the electoral process").

E. The Media Exception in BCRA's Definition of Electioneering Communications Is Constitutional.

Although the NRA admits that the Supreme Court in Austin identified a compelling governmental interest sufficient to survive strict scrutiny when it upheld the media exception in the context of FECA's § 441b, see NRA Br. at-41, the NRA treats Austin as if it had been silently overruled because, in the NRA's view, the "factual predicates" for Austin "are no longer true." NRA Br. at 42. Neither the NRA's factual mistakes, nor its disregard for dispositive precedent, however, can undermine the constitutionality of BCRA's media exception.

As we previously explained, Gov't Br. at 167-68, the Court in Austin found that although the "'press' unique societal role may not entitle the press to greater protection under the Constitution, . . . it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations." 494 U.S. at 668 (citation omitted). "The media exception ensures that the Act does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events. Cf. H.R. Rep No. 93-1239, p. 4 (1974) (explaining . . . federal media exception, 2 USC § 431(9)(B)(i) . . .)." Id.

In response to this precedent, the NRA does not even attempt to argue that the media exception has different constitutional ramifications when applied to electioneering communications as defined by BCRA rather than to the express advocacy expenditures at issue in Austin. Instead, the NRA launches a frontal attack on Austin itself. As part of that assault, moreover, the NRA, like other plaintiffs, mischaracterizes what BCRA and FECA proscribe: BCRA's regulation of electioneering communications, like FECA's regulation of independent expenditures, is only a financing restriction on corporations and unions, not a ban on speech. See supra at 55-58. Thus, for example, the NRA's accusation that BCRA

"forbid[s] outside groups from buying time from the media to broadcast different viewpoints," NRA Br. at 47, is simply untrue. The amount the NRA can spend on such ads is limited only by the willingness of its millions of individual members to contribute to the NRA's separate segregated fund, which in 2000 spent $17 million to influence federal elections. See http://www.fec.gov/press/053101pacfund/tables/pacdis00.htm.

Notably, the media exception speaks of the "facilities of any broadcasting station," not the facilities of any broadcasting company. Thus, the media exception is meant only to protect the media's traditional role in distributing electoral news and commentary to the public through its ordinary broadcasting, not to exempt media corporations entirely from section 441b; the exemption applies only to a corporation's regular media operations. See MCFL, 479 U.S. at 250-51 (finding that press exemption did not apply to a special election edition of a newsletter regularly published by a corporation because the Court could not "accept the notion that the distribution of [] flyers by entities that happen to publish newsletters automatically entitles such organizations to the press exemption"); see also Reader's Digest Ass'n, Inc. v. FEC, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981); FEC v. Phillips Publishing, Inc., 517 F. Supp. 1308, 1313 (D.D.C. 1981); 11 C.F.R. 100.8(b)(2). "A contrary position would open the door for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, thereby eviscerating § 441b's prohibition." MCFL, 479 U.S. at 251.

Rather than address the relevant precedent, the NRA asserts that this Court should disregard Austin as obsolete because media corporations no longer "occupy a 'unique societal role' in disseminating information" or "devote their resources to the news business." NRA Br. at 42. The NRA then offers its opinion that the rise of the Internet has changed the "fundamental factual premise for Austin's decision." Id. at 44. Yet, even if this Court were free to disregard binding Supreme Court precedent, the NRA does

not present a single fact or argument (see id. at 42-44) to establish that political advertising on television and radio has in any way diminished since Austin was decided, or that the pattern of broadcast editorials or coverage of political campaigns has changed in the past twelve years. See generally 107 Cong. Rec. S2613-16 (March 21, 2001) (Senate Debate on role of television in political advertising). In short, the NRA offers no proof that the rise of the Internet has eliminated the role of the institutional press in keeping citizens informed about current events, the promotion of which the Austin Court found to be a compelling governmental interest.

The NRA next contends that because some large media companies "have been merged into larger, multinational conglomerates," NRA Br. at 44, Austin can be ignored. As the NRA itself notes, however, "NBC was acquired in 1985 by General Electric," NRA Br. at 44 n.31, five years before Austin was decided. More importantly, this same argument was repudiated in Austin. Rejecting Justice Kennedy's dissenting view that the "web of corporate ownership that links media and nonmedia corporations is difficult to untangle for the purpose of any meaningful distinction," 494 U.S. at 712-13, the majority concluded that a "valid distinction . . . 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," id. at 668.[108] Nothing in the NRA's argument undermines that holding, and it is equally applicable to the media exception in BCRA.

F. BCRA Exempts Non-Profit Corporations That Qualify for the *MCFL* Exemption.

While eventually conceding that the Supreme Court in Austin "upheld an independent expenditure restriction on core political speech," NRA Br. at 17, the NRA attempts to avoid its import: misstating the

[108] In any event, it is worth noting that BCRA's definition of electioneering communication covers all television and radio stations, including cable and satellite systems, that can broadcast to more than 50,000 people in any state or congressional district where a federal election occurs. Many of these local companies undoubtedly have assets far less than those of the NRA.

holdings in both Austin and MCFL, the NRA asserts that these cases "draw a line between advocacy organizations that fund their speech with individual dues and contributions, and business or trade associations that fund their speech largely with contributions from business corporations," NRA Br. at 18. To the contrary, as we explained, Gov't Br. 164-67, Austin reaffirmed MCFL's holding that unless a nonprofit corporation shares the "three characteristics" of MCFL that were "essential" to the Court's holding in MCFL, the "Constitution does not require that it be exempted from the generally applicable provisions" of § 441b. 494 U.S. at 662 (emphasis added). As we also explained, Gov't Br. 167 & n.118, the MCFL exemption applies to electioneering communications under BCRA to the same extent as it applies to independent expenditures under FECA. Thus, a nonprofit corporation that qualifies for the MCFL exemption can make unlimited independent expenditures and electioneering communications from its general treasury funds.

To the extent that the NRA describes its own operations and the FEC's regulation in an effort to argue that BCRA's regulation of electioneering communications is overbroad, see NRA Br. at 17, the argument is foreclosed by MCFL, Austin, and the Court of Appeal's decision in FEC v. NRA, 254 F.3d 173 (D.C. Cir. 2001). The NRA's arguments on these points, NRA Br. at 17-24, rest entirely on the nature of its organization, not on the nature of the campaign spending regulated by BCRA's definition of electioneering communications. In other words, all of these arguments about NRA's corporate structure and mission would apply equally to FECA's regulation of independent expenditures, and have already been rejected in that context.[109]

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[109] Despite the fact that the NRA had entered into a stipulation, adopted by this Court by Order of August 13, 2002, that any as-applied challenge it might bring against BCRA would not be litigated at this time, its brief, see NRA Br. at 18-24, describes at length why it believes the NRA should qualify for the MCFL exemption, or more precisely, its own greatly expanded version of the MCFL exemption. Pursuant to the Order of August 13, the parties were not permitted to engage in discovery concerning any as-applied challenge the NRA might bring. Defendants have, thus, had no opportunity to discover facts that might refute, inter alia, NRA's contention about its profits derived from business activities. See, e.g., NRA Br. at 19 n.12. In accordance with the Court's Order, therefore, we will not digress

The FEC's definition of an MCFL corporation is derived directly from the Supreme Court's decisions in MCFL and Austin. Although there may be considerable disagreement about whether exempt nonprofit corporations should be permitted to accept de minimis contributions from business corporations, see FEC v. NRA, 254 F.3d at 191-92, the MCFL exemption is not available to all "advocacy organizations that fund their speech with individual dues and contributions," NRA Br. Br. at 18, as the NRA asserts. As this Circuit has explained, even if an organization like the NRA "appears to be a voluntary political association akin to the MCFL," and even if such an organization has a "core political mission," the Supreme court would "never . . . exempt[]" it from regulation if it accepts "substantial corporate contributions that it could . . . use[] for campaign purposes." 254 F.3d at 191. This critical inquiry focuses on "whether [corporate] contributions could . . .turn[] the NRA into a potential conduit for corporate funding of political activity." Id. at 192. Because this inquiry is the same whether the corporate contributions are eventually used to pay for independent expenditures or for electioneering communications, this criterion for the MCFL exemption applies with equal force to both kinds of campaign spending. Thus, in accordance with MCFL and Austin, Congress can require corporations like the NRA to finance their electioneering communications through a separate segregated fund, and that requirement does not make BCRA's regulation of electioneering communications unconstitutional.

G. BCRA'S Disclosure Requirements Are Constitutional.

Plaintiffs present three challenges to BCRA's disclosure requirements. First, plaintiffs challenge BCRA § 201's disclosure requirements for electioneering communications on the same grounds that they

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into an explanation of why NRA does not qualify for the MCFL exemption,

_____ FEC v. NRA, 254 F.3d 173, 192 (D.C. Cir. 2001). Thus, the NRA is barred by collateral estoppel from re-litigating this Circuit's decision in FEC v. NRA that it was not entitled to the MCFL exemption.

challenge BCRA § 203's financing restrictions: they argue that the provisions violate Buckley by virtue of encompassing more than express advocacy, see McConnell Br. at 55-56, or, alternatively, that they are overbroad, see NRA Br. at 49-50; ACLU Br. at 11-13. This challenge fails for the same reason as plaintiffs' challenge to § 203: as explained at length in our opening brief, the definition of electioneering communications underlying both § 201 and § 203 is not vague – and hence it complies with the holding of Buckley – nor is it overbroad, for it does not encompass a substantial amount of genuine issue advocacy. See Gov't Br. at 148-64; see also supra at 66-94.[110]

Second, plaintiffs challenge BCRA's disclosure requirements on the ground that "the chilling effect on [associational] rights caused by compelled disclosure is substantial." Chamber/NAM Br. at 19; see also NRA Br. at 50; ACLU Br. at 17-19. Buckley makes clear, however, that this line of argument cannot sustain a facial challenge. The Court in Buckley acknowledged the potential threat to associational rights posed by disclosure, 424 U.S. at 72-74, but it concluded that associational rights could be adequately vindicated through as-applied challenges in those specific situations where an individual association could show "a reasonable probability that compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisals." Id. at 74.

There is thus no basis for the ACLU's contention that BCRA is unconstitutional on its face for failing to exempt "controversial groups" from its disclosure requirements. See ACLU Br. at19. Indeed,

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[110] BCRA is thus distinguishable from the disclosure provision invalidated in the D.C. Circuit's decision in Buckley, cited by plaintiffs. See NRA Br. at 49-50; ACLU Br. at 12-13 (citing 519 F.2d 821, 871-75 (D.C. Cir. 1975)). That provision covered "any act directed to the public for the purpose of influencing the outcome of an election," or any material published or broadcast to the public referring to a candidate and setting forth "the candidate's position on any public issue, his voting record, or other official acts, . . . or otherwise designed to influence [the candidate's election]." The court found that the provision lacked a sufficient electoral nexus and suffered from incurable vagueness. See Buckley, 519 F.2d at 872-73, 875. In contrast, BCRA's Title II narrowly and unambiguously targets electioneering speech: it applies only to television or radio communications referring to a candidate that are aired in the 30 days before a primary or 60 days before a general election and that are targeted to the district or state where the election is sited. As shown by the empirical evidence, the communications that meet BCRA's carefully crafted test are highly likely to be keyed to federal elections. See Gov't Br. at 156-64. BCRA thus establishes the requisite electoral nexus found lacking in the provision in Buckley, while simultaneously avoiding any problems of vagueness.

Buckley specifically rejected the idea of such a "blanket" exemption. See 424 U.S. at 73-74. Nor was such an exemption recognized in Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982), as the ACLU represents. ACLU Br. at 18. Brown simply held certain disclosure requirements to be unconstitutional as applied to the Socialist Workers Party, finding that the district court "properly applied the Buckley test to the facts of this case." See 459 U.S. at 98 (emphasis added). The remedy in Brown was to prohibit application of the statute to that particular political party, not to invalidate the statute on its face. See id. at 102.

To the extent that the NRA and the Chamber plaintiffs bring such as-applied challenges, they have failed to make the requisite showing. These plaintiffs have presented no evidence of any "pattern of threats or specific manifestations of public hostility" sufficient to show that compliance with BCRA's disclosure requirements would likely result in harassment of their members.[111] Buckley, 424 U.S. at 74. Instead, the NRA and the Chamber plaintiffs primarily rely on the speculation of their spokesmen, plus limited evidence that some of their members have reduced or ceased their contributions in the past in order to avoid disclosure of their identities. See NRA Br. at 50; Chamber/NAM Br. at 19. Buckley specifically found testimony of this nature to be insufficient to warrant an exemption from disclosure. 424 U.S. at 71-72 & 72 n.88.[112] It is also worth noting that plaintiffs have presented no serious evidence that the election advocacy funded through their separate segregated funds has suffered because of the longstanding disclosure require-

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[112] Moreover, as previously explained, plaintiffs' fears of having to disclose the identities of their contributors are undercut by the fact that BCRA does not require a group sponsoring electioneering communications to disclose all of its contributors; rather, BCRA effectively requires a group to disclose only those persons whose contributions (of $1,000 or more) are used to fund its electioneering communications. Gov't Br. at 175.

ments of FECA, or that BCRA's additional requirements would somehow pose a greater risk to their activities.

Finally, plaintiffs challenge BCRA's disclosure provisions "insofar as they require disclosure to take place before – and irrespective of whether – an electioneering communication or an independent expenditure is aired." AFL-CIO Br. at 14; see also McConnell Br. at 56 n.22. This aspect of plaintiffs' challenge is directed at certain BCRA provisions requiring disclosure within 24 or 48 hours after disbursements for electioneering communications or independent expenditures, or contracts for such disbursements, are made. See AFL-CIO Br. at 14 n.14. As plaintiffs are aware, however, currently proposed FEC regulations interpret these provisions not to require disclosure until after "the date on which a communication is publicly distributed." See BCRA Reporting, 67 Fed. Reg. 64,555, 64,565-66 (Oct. 21, 2002) (proposing regulations to be codified at 11 C.F.R. 104.4(f), 104.20(a)); see also id. at 64,558-60 (Explanation and Justification). This approach is consistent with FEC regulations regarding similar FECA provisions preceding BCRA;[113] the approach has uniformly been supported in comments received by the FEC in its rulemaking;[114] and final action on the proposed regulations is expected soon. Given the probability that the proposed regulations will be adopted, which would moot the plaintiffs' concerns, plaintiffs' claims to injury are wholly speculative and their challenge to this aspect of BCRA's disclosure provisions is therefore unfit for judicial resolution. Harrison & Burrowes Bridge Constr. Inc. v. Cuomo, 981 F.2d 50, 61 (2d Cir. 1992) ("Constitutional challenges to statutes are routinely found . . . unripe when proposed regulatory

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[113] Former FECA § 434(c)(2), like its successor, § 434(g)(1), required disclosure of certain independent expenditures "within 24 hours after such independent expenditure is made." The FEC regulations interpreted an independent expenditure to be made "on the first date on which the communication [paid for by the expenditure] is published, broadcast or otherwise publicly disseminated." See 11 C.F.R. 109.1(f); 67 Fed. Reg. 12,838 (explanation and justification).

[114] See BCRA Reporting, 67 Fed. Reg. 64,559 (describing comments from initial NPRM); Comments on NPRM 2002-19 (second NPRM), available at http://www.fec.gov/pages/bcra/rulemakings/consolidated_reporting.htm.

amendments are pending."); see also T & S Products, Inc. v. U.S. Postal Service, 68 F.3d 510, 512 (D.C. Cir. 1995) (no standing where future agency action may moot the issue of plaintiff's alleged injury).[115]

Even if the FEC's regulations were to require some reporting of electioneering costs before an ad is broadcast, such requirements would not be unconstitutional. Clearly they would not constitute a "prior restraint," McConnell Br. at 55, since no reporting requirement, let alone the mere reporting of advertisement production costs, prevents anyone from speaking. The reports themselves would not have to reveal the specific content of the ads, yet they would perform an important function in informing the public about various candidates' supporters before election day.[116] Moreover, current FECA § 431(9)(A)(ii) includes within the definition of "expenditure" a "written contract, promise, or agreement to make an expenditure," so BCRA breaks no bold new ground in requiring the disclosure of financial obligations prior to their final execution. See also 11 C.F.R. 104.11(b).

II. BCRA'S COORDINATION PROVISIONS ARE CONSTITUTIONAL.

A. The Choice Afforded Political Parties Under BCRA § 213 Is Constitutional.

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[115] Noting that the FEC's currently proposed regulations would moot its challenge to BCRA's disclosure provisions, the AFL-CIO suggests that its challenge should be entertained nonetheless because "no party knows how this rulemaking will conclude." Precisely because the FEC has not concluded its rulemaking, however, plaintiffs' claims of injury are speculative. The case to which plaintiffs attempt to analogize, Citizens for Responsible Government v. Davidson, 236 F.3d 1174, 1192-93 (10th Cir. 2000), is not to the contrary. In that case, the court held that a state's mere representation in the course of litigation that it would not construe the challenged statute to proscribe plaintiffs' conduct did not eliminate the plaintiffs' standing. The court specifically predicated its holding on the fact that it was "aware of no . . . administrative regulations" reflecting the state's representation. Id. at 1193.

[116] The cases cited by plaintiffs are not to the contrary. See AFL-CIO Br. at 15-16. In Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 236 F.3d 1174, 1197 (10th Cir. 2000), the court invalidated a 24-hour notice requirement because it believed "such immediate notice" was unduly burdensome – claim not raised by plaintiffs here – and would not be "compromised by a more workable deadline." Here, however, given that electioneering communications by definition occur within a very tight timeframe – 30 or 60 days before primary or general elections – the public benefits in learning about candidates' supporters prior to voting outweigh any burden on those paying for such communications. Rosen v. Port of Portland, 641 F.2d 1243 (9th Cir. 1981), is also not on point because it concerned an advance notice requirement for pamphleteering and picketing; it presented an absolute bar to speech that did not involve candidate elections. Id. at 1247.

Plaintiffs' challenge to § 213 is grounded on the erroneous assumption that it "ban[s party committees] from making coordinated expenditures at all (if they choose to make independent expenditures first)." McConnell Br. at 86-87 (emphasis in original); id. at 88. In fact, 2 U.S.C. 441a(d)(4)(A) only precludes a party committee choosing to make independent expenditures from also making "any coordinated expenditure under this subsection." 2 U.S.C. 441a(d)(4)(A)(i), (ii) (emphasis added). "[T]his subsection" is 2 U.S.C. 441a(d), which contains the increased coordinated expenditure limit available only to party committees. A different subsection, 2 U.S.C. 441a(a)(2), establishes a generally applicable limit of $5,000 on contributions and coordinated expenditures by all multicandidate political committees, which includes party committees. See Colorado I, 518 U.S. at 625 ($5,000 limit would apply to party committee's coordinated expenditures in absence of special higher limit in section 441a(d)). Thus, no matter which choice parties make under BCRA § 213, they are able at a minimum to make contributions and coordinated expenditures up to the same $5,000 limit that applies to all other multicandidate committees. Accordingly, as explained in our opening brief, § 213 requires no choice between constitutionally protected activities, but instead leaves party committees in the same position as every other multicandiate political committee if they choose to forgo taking advantage of the option of increased coordinated expenditure limits.[117] Gov't Br. at 177-81; see also 67 Fed. Reg. 60,042; 60,056-57; 60,066-67 (Sept. 24, 2002) (proposed regulations 11 C.F.R. 109.20, 109.30, 109.31, and 109.32(b)(4)).[118]

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[117] Plaintiffs' reliance on Perry v. Sindermann, 408 U.S. 593 (1972), see McConnell Br. at 87, is misplaced. That case involved an allegation that the government had taken away a professor's job because of his speech. Rather than punishing anyone for engaging in speech, § 213 gives party committees a special option available to no one else, which they are free to accept or reject. We have shown, Gov't Br. at 180-81, that Buckley approved a similar option for presidential candidates to choose public funding coupled with an expenditure limit not applicable to candidates who declined the option. See Buckley, 424 U.S. at 57 n.65 & 95.

[118] Even if parties choose to make independent expenditures and, therefore, become subject to the same $5,000 contribution and coordinated expenditure limit applicable to every other multicandidate committee, national party committees still receive more advantageous treatment with respect to Senate races. See 2 U.S.C. 441a(h) (as amended by BCRA § 307(c)) ("[n]otwithstanding any other provision of the Act," national party committees may contribute up to $35,000 to a Senate candidate); see also 67 Fed. Reg. 60,056 (Sept. 24, 2002).

The plaintiffs also complain that the requirement in § 213 that state-level and national committees of the same party make a common choice between these options "forces party committees to associate with each other." McConnell Br. at 87-88 (emphasis in original). We have shown in our opening brief, that it is unclear whether state-level and national party committees must make a single choice together, but even if they must there is no violation of associational freedoms. Gov't Br. at 181-82. To the contrary, the statute merely recognizes an association already established by these committees by forming a common political party; only committees that are "established and maintained" by the official state or national party committee are considered a single political committee under this provision. FECA for decades has treated all other similarly affiliated groups of political committees as a single committee subject to a shared limit on contributions and coordinated expenditures. See 2 U.S.C. 441a(a)(5).

Indeed, plaintiffs themselves describe at length the extensive integration of their national and state party committees, both in their governance and in their coordinated approach to campaign expenditures. See RNC Br. at 25-27, 37-44; CDP/CRP Br. at 4-7, 13-14, 31, 35, 37-42. For instance, RNC describes itself as "a federation of state parties," RNC Br. at 37, explains that its component entities "work closely together on a daily basis," and states that the party's "various elements . . . associate with one another and coordinate their activities." RNC Br. at 39; see also CDP/CRP Br. at 39 ("[T]he political parties are designed as representative bodies to have a great deal of 'overlap' in their membership and leadership at the national, state, and local levels.").

Further, a "close working relationship . . . exists among representatives from the national, state, and local Republican Party committees, as well as representatives of key national, state, and local Republican candidates, in the creation and implementation of 'Victory Plans,'" RNC Br. at 39-40, and the Democrats have a similarly close working relationship in conducting their "Coordinated Campaigns." CDP/CRP Br.

at 6-7, 41.[119] Each party's unified campaign operation "brings all the elements of the party together to unify and build the party and work collectively on . . . the election of their candidates. . . . These persons come together to set priorities and goals, analyze resources and allocate those resources in an effort to elect as many of the parties' candidates as possible up and down the ticket." CDP/CRP Br. at 7. Accordingly, far from overriding private associational choice, § 213 merely responds to the affiliation of groups that have already made their own decision to join in a single political party, and which already routinely cooperate in devising campaign strategy and deploying their resources to promote their common candidates.

B. Sections 202 and 214 of BCRA Are Consistent with the First Amendment.

Plaintiffs appear to mount two separate arguments with respect to BCRA's treatment of coordinated expenditures. They have failed, however, to provide any reason to believe their challenge to § 214, which directs the FEC to promulgate a new regulation addressing coordination, presents any issue ripe for review. Furthermore, their challenge to § 202, which specifies that electioneering communications coordinated with a candidate or political party be treated as contributions in the same manner that coordinated expenditures have always been treated, is both contrary to judicial precedent and would undermine the statute's purpose of foreclosing opportunities for corruption.

We have already shown, Gov't Br. at 185-90, why plaintiffs' argument that "agreement or formal collaboration" is a constitutional "prerequisite to deeming an expenditure 'coordinated,'" McConnell Br. at 83, is incorrect,[120] and why plaintiffs' apparent belief that § 214 requires the FEC to define coordinated communications by the four criteria Congress listed in § 214(c), ACLU Br. at 9, 19-20, is erroneous. Even

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[119] See

[120] As discussed in the FEC's Notice of Proposed Rulemaking, even the terms "agreement" and "formal collaboration" must be construed in the rulemaking. 67 Fed. Reg. 60,052 (Sept. 24, 2002) (noting that proposed regulation "would require some degree of collaboration," though not "'formal,' in the sense of being planned or systematically approved or executed").

though the FEC is still in the midst of the rulemaking required by § 214, the plaintiffs insist (see, e.g., Chamber/NAM Br. at 6-18) that they are entitled to judicial review of BCRA § 214 before the regulation is promulgated. This assertion is based upon the fact that BCRA repeals the FEC's current coordination regulation as of December 22, 2002, and plaintiffs claim that if the FEC has not promulgated a new regulation by then, they will be chilled from immediately engaging in lobbying activities because of uncertainty about what communications with incumbent lawmakers the FEC will treat as "coordination." Chamber/NAM Br. at 6-7.

Plaintiffs' assertion that the FEC may not have a new regulation by December 22, 2002, is entirely speculative,[121] and plaintiffs have not demonstrated any injury that could warrant anticipatory judicial review of constitutional issues that the new regulation may obviate. See infra at 117-18. In any event, while amendments have been made to 2 U.S.C. 441a(a)(7), the statutory language defining conduct constituting coordination has not been altered at all. It is the same language that has been in place in the statute since 1976. Plaintiffs assert that lobbying activity will be chilled if the FEC's current regulation is repealed without replacement, but for almost a quarter century before that regulation was promulgated (near the end of 2000), the FEC's prior coordination regulation, 11 C.F.R. 109.1(b)(4)(i) (1999 ed.) (quoted in Intervenors' Br. at I-137 n.510), applied much more broadly. For example, it applied to expenditures based upon information about a candidate's plans provided by the candidate, and to expenditures made "by or through any person" who had been authorized to engage in certain kinds of campaign activities by the candidate. Id. Plaintiffs offer no reason why the repeal of the 2000 regulation would result in impermissible chilling of lobbying when a broader standard, under the same statutory language, was in effect

[121] As plaintiffs acknowledge, Chamber/NAM Br. at 13 n.7, the FEC has scheduled final adoption of a coordination regulation for December 12, 2002; it is subject to a statutory requirement to issue such a regulation by December 22, 2002; and there so far have been no regulations under BCRA that have been stymied by a 3-3 vote of the FEC Commissioners.

for almost 25 years before that regulation was first promulgated. Plaintiffs fail to offer evidence that lobbying was chilled under § 441a(a)(7)(B) during those decades,[122] and there is no reason to believe this provision will have that effect now.[123] Cf. Colorado II, 533 U.S. at 449 (party's claim that unlimited coordinated spending "is essential to its very function" amounts to saying that "for almost three decades political parties have not been functional or have been functioning in systematic violation of the law.").

Moreover, Congress did not intend "that lobbying meetings between a group and a candidate concerning legislative issues could alone lead to a conclusion that ads that the group runs subsequently concerning the legislation that was the subject of the meeting are coordinated with the candidate" and that the FEC's rule should not "lead to a finding of coordination solely because the organization that runs the ads has previously had lobbying contacts with the candidate." 148 Cong. Rec. S2145 (Mar. 20, 2002) (Sen. McCain). There is also nothing in the Notice of Proposed Rulemaking, 67 Fed. Reg. 60,042, suggesting that the FEC is contemplating a rule that would have such an effect; to the contrary, the proposed regulation focuses on communications with a candidate or party committee about a particular campaign expenditure, not on discussion of legislative issues. No incumbent federal lawmaker will be running for reelection before 2004, and there is nothing in the statute, the notice of proposed rulemaking, or the FEC's prior enforcement of § 441a(a)(7)(B) suggesting that lobbying during the next few weeks, or even months, could result in an otherwise independent public communication that is not distributed until 2004 being deemed "coordinated." Accordingly, plaintiffs have failed to present any grounds for disregarding the longstanding "policy of strict necessity in disposing of constitutional issues." Rescue Army

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[122] Far from being chilled, from 1997 to 1999 lobbying expenditures grew from $1.26 billion to $1.45 billion, a 7.3% annual rate. See www.opensecrets.org/bus/lobby00/index.asp (visited Nov.16, 2002). This rapid growth occurred during the period ending a year before promulgation of the 2000 regulation that plaintiffs now say is essential to avoid the "chilling" of their lobbying activity.

[123] In any event, any concern plaintiffs have about the legality of their activities under § 441a(a)(7)(B) can be addressed in an advisory opinion under 2 U.S.C. 437f. Plaintiffs' reading of Buckley as foreclosing reliance upon the advisory opinion process to address questions of vagueness and chill is contrary to law. See supra at 32-33 & n.33.

v. Mun. Court, 331 U.S. 549, 568 (1947); see also Aircraft & Diesel Corp. v. Hirsch, 331 U.S. 752, 772 (1947) ("[T]he very fact that constitutional issues are put forward constitutes a strong reason for not allowing this suit either to anticipate or to take the place of the [agency's] final performance of its function.").

Plaintiffs also challenge BCRA § 202, which amends 2 U.S.C. 441a(a)(7) to provide that an "electioneering communication" coordinated with a candidate or political party is a contribution. Plaintiffs suggest that "the First Amendment limits the coordination concept to express advocacy." Chamber/NAM Br. at 12. Coordinated expenditures, however, are contributions under the statute; there is no constitutional impediment to such treatment, see Colorado II, 533 U.S. at 442-45; and the D.C. Circuit has long recognized that the Supreme Court "limited [the express advocacy requirement] to those provisions curtailing or prohibiting independent expenditures. This definition is not constitutionally required for those statutory provisions limiting contributions." Orloski v. FEC, 795 F.2d 156, 167 (D.C. Cir. 1986); see also FEC v. Christian Coalition, 52 F. Supp. 2d 45, 87 n.50 (D.D.C. 1999) ("Buckley read an express advocacy standard into the statutory provisions regarding independent expenditures" but "with regard to 'coordinated expenditures' there is no constitutional need to narrow the definition of the term 'expenditure' given by Congress").[124]

Plaintiffs' express advocacy argument is unsupported by precedent,[125] and "give[s] short shrift to the government's compelling interest in preventing real and perceived corruption that can flow from large campaign contributions." Id. at 88. After all, the purpose of treating coordinated expenditures as

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[124] When Buckley upheld limits on contributions, 424 U.S. at 24-38, and when it found that "contribution" includes "all expenditures placed in cooperation with or with the consent of a candidate," id. at 78, it made no reference to the express advocacy concept.

[125] Plaintiffs rely primarily upon the separate views of a single Commissioner, never adopted by the agency. See Wertheimer v. FEC, 268 F.3d 1070, 1075 n.5 (D.C. Cir. 2002) (noting "one commissioner" has "stated that he believes a political party's ad is not coordinated with the candidate unless it expressly urges a vote for the candidate").

contributions is to avoid the opportunity for corruption when a benefit is provided a candidate through pre-arranged spending, and Buckley noted that it would not be difficult to "devis[e] expenditures that skirt[] . . . express advocacy of election or defeat but nevertheless benefit[] the candidate's campaign." 424 U.S. at 45. Thus, limiting the contribution limits to coordinated spending for express advocacy would "facilitat[e] circumvention by those seeking to exert improper influence upon a candidate or office-holder" and "permit[] unscrupulous persons and organizations to . . . [contribute] unlimited sums of money in order to obtain improper influence over candidates for elective office." Id. In Colorado II, 533 U.S. at 456, the Court confirmed Congress's compelling interest in avoiding such circumvention of the contribution limits through coordinated spending.[126]

[126] Plaintiffs argue that the statutory definition of coordination should be narrowed in order to eliminate law enforcement investigations of such activities. Chamber/NAM Br. at 14-18; AFL-CIO Br. at 12-13. "The law is clear," however, "that 'there is no constitutional right to be free of investigation.'" Sloan v. Dept. of Housing & Urban Dev., 231 F.3d 10, 18 (D.C. Cir. 2000) (citation omitted); see also Jones v. Unknown Agents of the FEC, 613 F.2d 864, 878 (D.C. Cir. 1979) ("Although field interviews such as those that allegedly occurred here undoubtedly may discourage some political association, we cannot say that this 'chill' states a constitutional claim."). Moreover, "money spent . . . according to an arrangement with a candidate is . . . harder to classify," Colorado II, 533 U.S. at 442-43, and involves "a necessarily fact-intensive inquiry allowing for extensive FEC inquiry into the nature and extent of communications between the alleged contributor and campaign." See also Christian Coalition, 52 F. Supp. 2d at 88. Indeed, in the Christian Coalition case, far from finding the FEC's investigation in the case improper, the district court sanctioned the Christian Coalition, not the Commission, for discovery abuses, id. at 51, and it ultimately found the Christian Coalition's expenditures not coordinated, "although not for lack of trying," id. at 93. The two investigations discussed in plaintiffs' briefs, Chamber/NAM Br. at 14-18; AFL-CIO Br. at 12-13, presented equally complex circumstances involving large numbers of people, and plaintiffs' self-serving description of those cases as presenting easily answered questions is belied by the factual discussion in the FEC General Counsel's reports [DEV 53-Tab 6 (MUR 4624); DEV 52-Tab 3 (MUR 4291)], which (contrary to the Chamber/NAM Br. at 15 n.8) are admissible as evidence of the results of those investigations. See FED. R. EVID. 803(8)(C); Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988).

TITLE III

PRESENTATION OF GOVERNMENTAL DEFENDANTS

I. THE MILLIONAIRE PROVISIONS OF TITLE III ARE CONSTITUTIONAL.

Sections 304, 316, and 319 of BCRA, the so-called "millionaire provisions," modify the general contribution limits to account for the special problem involving a candidate facing an opponent who chooses to finance his or her campaign largely with personal funds instead of contributions from political supporters. Even if they have standing, plaintiffs have not met the burden of their facial challenge to the provisions' constitutionality. Indeed, the McConnell plaintiffs now agree that the millionaire "provisions are manifestly a step in the right direction." See McConnell Br. at 95. Congress enacted the millionaire provisions to enhance opportunities for speech, and like other statutes designed to "further[], not abridge[], pertinent First Amendment values," Buckley, 424 U.S. at 93 & n.127, the millionaire provisions are constitutional. See Gov't Br. at 191-99.

A. The Millionaire Provisions Do Not Violate Equal Protection.

Contrary to the RNC's argument, see RNC Br. at 74, the millionaire provisions do not violate the equal protection rights of political parties merely because the provisions allow a political party to make additional coordinated expenditures for those candidates whose wealthy opponents choose to finance their own campaigns. As noted in our opening brief, Gov't Br. at 198-99, the provisions do not force the RNC to "discriminate" among its candidates. Historically, national political parties have not spent equal amounts to support each of their candidates. See Gov't Br. at 199 n.136. If the RNC decides to adopt such a policy, however, it is free under BCRA to pass up the opportunity to make larger coordinated expenditures in support of candidates facing a self-funded opponent.

Congress is not required by the Constitution to adopt the same limit on coordinated party expenditures for all candidates, regardless of circumstances. To the contrary, the Supreme Court recently

upheld a provision, limiting coordinated party expenditures, which imposed a different limit for Senate candidates in each state based on voting age population. Colorado II, 533 U.S. at 465. Thus, Congress is clearly not precluded from tailoring the limits on contributions and coordinated spending to the different circumstances in which election campaigns occur. See Buckley, 424 U.S. at 30 & n.32 (contribution limits could have been "scaled to take account of the differences in the amounts of money required for House, Senate, and Presidential campaigns").[127]

The RNC argues that the wealth of a candidate's opponent should not be a factor in political party spending, but the millionaire provisions do not require political parties to do anything differently; they simply give the option of making larger coordinated expenditures in support of a candidate running against a self-financing opponent. Because the millionaire provisions apply equally to all campaigns run in such circumstances and are narrowly tailored to address the specific problem presented by self-financed candidates, they do not infringe the RNC's equal protection rights.

B. The Millionaire Provisions Do Not Make the Contribution Limits Unconstitutional.

Contrary to plaintiffs' arguments, RNC Br. at 74, the compelling governmental interests the Supreme Court has repeatedly recognized as justifying the general contribution limits are not invalidated by Congress's decision to relax those limits in particular circumstances, circumstances in which Congress concluded this was necessary to avoid discouraging participation in election campaigns by candidates facing opponents capable of using their own vast wealth to finance their campaigns at a level that might eliminate any meaningful opposition. Such accommodation of competing interests is commonplace in legislative action and "[c]ourts . . . must respect and give effect to these sorts of compromises." Ragsdale v.

[127] The Constitution also does not require opposing candidates to be subject to identical regulations, regardless of their sources of funding. Thus, Buckley upheld public financing for major party candidates that was unavailable to minor party candidates, 424 U.S. at 93-97; upheld public financing in presidential primaries that "limit[ed] subsidies to those with a substantial chance of being nominated," id. at 106; and upheld an expenditure limit on publicly financed candidates that did not apply to their privately financed opponents, id. at 108-09.

Wolverine World Wide, Inc., 535 U.S. 81, __, 122 S. Ct. 1155, 1164 (2002) (citation omitted); see also Buckley, 424 U.S. at 84 n.112 (special exception from reporting requirements for photographic, matting, or recording services furnished to incumbents "represents a reasonable accommodation between the legitimate and necessary efforts of legislators to communicate with their constituents and activities designed to win elections by legislators in their other role as politicians").[128]

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (emphasis in original). There is no factual or legal basis for plaintiffs' assertions that the millionaire provisions undo Congress's decision that general contribution limits are needed to reduce opportunities for corruption and the appearance of corruption, a decision repeatedly upheld by the Supreme Court.[129]

Finally, there is no basis for the completely unsupported assertion that Congress adopted the millionaire provisions to protect incumbents. McConnell Br. at 95-97. To the contrary, Congress included a restriction on eligibility based upon the amount by which a candidate's campaign funds exceed the self-financing candidate's campaign funds. See BCRA § 316. Because it is usually incumbents who have

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[128] The RNC cites Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), and City of Ladue v. Gilleo, 512 U.S. 43 (1994), for the proposition that when a statute leaves a "governmental interest partially unprotected," it undercuts the asserted interest. RNC Br. at 74. Both of those cases are inapposite, however. Lukumi involved an ordinance banning animal sacrifice that was targeted at a religious sect, but was ostensibly based on public health concerns. The Court found the statute to be substantially underinclusive because it forbade "few killings but those occasioned by religious sacrifice." 508 U.S. at 543-44. City of Ladue invalidated an ordinance prohibiting many residential signs, even messages posted in a residence window, because the provision almost completely foreclosed an "important and distinct" medium of expression while showing little respect for individual liberty in the home. 512 U.S. at 55-58. In contrast to these cases, the millionaire provisions are carefully tailored to serve specific congressional purposes that arise in narrowly defined circumstances, and they have no impact on minimizing the opportunity for corruption accomplished by the general contribution limits in the vast majority of election contests to which the millionaire provisions have no application.

[129] Indeed, there are no bounds to the proposition that enactment of an exception to a statutory requirement demonstrates that the requirement is itself unnecessary, and acceptance of such a proposition would lead to the invalidation of countless statutes.

accumulated large amounts of campaign funds prior to an election campaign, this provision makes it more difficult for an incumbent even to qualify for increased contribution limits. In any event, on their face, the millionaire provisions do not discriminate between incumbents and challengers, and plaintiffs have offered no evidence that they will operate "invariably and invidiously" in favor of incumbents as a class. See Buckley, 424 U.S. at 33; see id. at 30-31 (contribution limits applicable "regardless of [a candidate's] occupation, ideological views, or party affiliation" do not violate equal protection "[a]bsent record evidence of invidious discrimination against challengers as a class").

II. SECTION 318 OF BCRA, PROHIBITING CERTAIN POLITICAL CONTRIBUTIONS AND DONATIONS BY CHILDREN UNDER THE AGE OF EIGHTEEN DOES NOT VIOLATE THE FIRST AMENDMENT.

The Supreme Court has "'consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending,'" Shrink Missouri, 528 U.S. at 387 (quoting MCFL, 479 U.S. at 259-60), because restrictions on contributions, unlike restrictions on expenditures, do not significantly interfere with associational and speech rights. Id. at 386-88. A restriction on contributions survives a First Amendment challenge if it is "'closely drawn' to match a 'sufficiently important interest.'" Id. at 387-88 (quoting Buckley, 424 U.S. at 25, 30). As we explained in our opening brief, BCRA § 318 serves the important governmental interest in foreclosing evasion of the individual contribution limits, see Gov't Br. at 60-61, 199-202, and it is "closely drawn" to match that interest.[130] BCRA § 318 narrowly applies to contributions to candidates and party committees, and leaves children free to contribute to other types of political committees.[131] Children may also "associate actively [with candidates and parties] through

[130] BCRA § 318's prohibition of contributions by children to candidates and party committees will be codified as 2 U.S.C. 441k, not 2 U.S.C 324, as we mistakenly stated in our opening brief (p.199).

[131] The plaintiffs repeatedly mischaracterize § 318 as banning all contributions by minors. See, e.g., McConnell Br. at 93, 94.

volunteering their services," Buckley, 424 U.S. at 28, and may make unlimited independent expenditures to express their support for candidates.

The Thompson plaintiffs concede that Congress may constitutionally prohibit contributions by young children, Thompson & Hilliard Br. at 16, and the other plaintiffs have not disputed that proposition. Thus, the only dispute here is about the age at which to draw the line. Congress chose the age of eighteen, which is the traditional age of majority, the age at which the Constitution recognizes the right to vote, and the age at which legally sanctioned control by parents of their children's property and associational activities ceases.[132] Cf. Am. Constitutional Law Found., Inc. v. Meyer, 120 F.3d 1092, 1101 (10th Cir. 1997) ("Plaintiffs have not demonstrated that persons under eighteen have a stronger interest in circulating [initiative and referendum petitions] than they do in voting. The age requirement [for circulating petitions] is a neutral restriction that imposes only a temporary disability–it does not establish an absolute prohibition but merely postpones the opportunity to circulate."). This was a reasonable policy choice by Congress and easily survives judicial review. See Gov't Br. at 205-07.

Contrary to the plaintiffs' assertion, see McConnell Br. at 91, FECA's prohibition in 2 U.S.C. 441f on the making of contributions in the name of another is insufficient to foreclose circumvention of the individual contribution limits. The Supreme Court rejected a similar assertion in Colorado II. The Colorado Republican Party had claimed that preventing circumvention of individual contribution limits by limiting coordinated spending by political parties was unconstitutional because an existing "earmarking" provision already addressed any risk of circumvention. 533 U.S. at 462. In rejecting this argument, the Court noted that the party's "position . . . ignores the practical difficulty of identifying and directly combating circumvention under actual political conditions." Id. The Court further explained that "circumvention is

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[132] The McConnell plaintiffs assert that Congress should have excluded minors who are "emancipated," McConnell Br. at 94, but none of the minor plaintiffs has standing to make that argument because none are alleged to be emancipated. Accordingly, the constitutionality of applying § 318 to emancipated minors is not presented in this case and can be addressed in an as-applied challenge, if an emancipated minor ever seeks to make such contributions.

obviously very hard to trace. The earmarking provision.... would reach only the most clumsy attempts to pass contributions through to candidates." Id. The Court refused, therefore, "[t]o treat the earmarking provision as the outer limit of acceptable tailoring." Id. The shortcomings of reliance only upon § 441f are similar. See Gov't Br. at 203-04, 207-08.

For similar reasons, the other options suggested by the plaintiffs, see McConnell Br. at 94, are inadequate to eliminate the opportunity for parents to circumvent the contribution limits by attributing contributions to their children. Contributors are not required to disclose their ages or their family relationship with other contributors, so there is no way to identify all suspect contributions from information that is publicly available. Requiring such disclosures and undertaking investigations to determine the extent to which children's contribution decisions were controlled or influenced by the children's parents, as plaintiffs, in effect, suggest, would be more intrusive on constitutional interests than the contribution restriction enacted by Congress.

"'Neither the right to associate nor the right to participate in political activities is absolute.'" Buckley, 424 U.S. at 25 (quoting Letter Carriers, 413 U.S. at 567).[133] The prophylactic contribution restriction Congress adopted eliminates an opportunity for circumvention of the contribution limits, while leaving minors with multiple ways to participate in political campaigns and express their views regarding candidates. It is, therefore, constitutional.

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

Despite some lengthy rhetoric, the Adams plaintiffs ultimately concede that BCRA § 307, in raising the individual contribution limit to $2,000, does not interfere with the right of the "non-wealthy" to vote in

[133] It makes no difference that § 318 is a limited prohibition of contributions rather than a limit on their dollar amount. In NRWC, 459 U.S. at 207-11, the Supreme Court upheld a prohibition of corporate contributions to candidates, and also a complete prohibition of solicitations of contributions to a separate segregated fund from individuals who were not members of the corporation. The Court found that the compelling governmental interest in avoiding corruption justified this infringement of associational freedom. The same interest justifies § 318.

federal elections. Adams Br. at 12. And the Supreme Court has explicitly rejected the plaintiffs' argument that Bullock v. Carter, 405 U.S. 134 (1972), and other decisions involving the right to vote "permit[ ] Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society." Buckley, 424 U.S. at 49 n.55.

> These voting cases and the reapportionment decisions serve to assure that citizens are accorded an equal right to vote for their representatives regardless of factors of wealth or geography. But the principles that underlie invalidation of governmentally imposed restrictions on the franchise do not justify governmentally imposed restrictions on political expression.

Id.; see also Georgia State Conference of NAACP Branches v. Cox, 183 F.3d 1259, 1263, 1264 (11th Cir. 1999) ("The ballot access cases . . . do not recognize the right to equal influence in the overall electoral process. . . . [They] only recognize that each voter is entitled to a single, equal vote."); Kruse v. City of Cincinnati, 142 F.3d 907, 918 (6th Cir. 1998) (quoting Buckley, 424 U.S. at 49 n.55, in rejecting similar argument); NAACP, Los Angeles Branch v. Jones, 131 F.3d 1317, 1323 (9th Cir. 1997) ("There is simply no claim here that voter plaintiffs are denied their right to cast votes in any part of the election process. We do not equate the ability to contribute financially to a campaign prior to voting with the right to cast a vote."); Albanese v. FEC, 78 F.3d 66, 69 (2d Cir. 1996) ("Unlike the plaintiffs in Terry [v. Adams, 345 US 461(1953)], plaintiffs here are not prevented from voting in any election.").

BCRA §307 places no restrictions on access to the ballot, and "[c]andidates do not have a fundamental right to run for public office." NAACP v. Jones, 131 F.3d at 1324 (citing Clements, 457 U.S. at 963). Moreover, voters – whether wealthy or not – have no constitutional right to elect particular individuals to public office. The Constitution itself establishes age, citizenship, and residency requirements for Representatives and Senators, U.S. CONST. art. I §§ 2, 3, and the Supreme Court has upheld actual restrictions on ballot access that limit the persons from among whom voters can choose in a way that BCRA does not. E.g., Burdick v. Takushi, 504 U.S. 428 (1992) (ban on write-in voting); Clements v.

Fashing, 457 U.S. 957 (1982) (requirement that certain officeholders complete their current term before being eligible to serve in the legislature); see Buckley, 424 U.S. at 96 ("The States have ... been held to have important interests in limiting places on the ballot to those candidates who demonstrate substantial popular support.").

Accordingly, even if the Adams plaintiffs had standing to litigate their challenge to BCRA § 307 – and they have not even attempted to establish their standing even though they have the affirmative obligation to do so, Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) – there is no legal basis for their claim that the Judiciary should require Congress to regulate the political activities of others more strictly through a reduced contribution limit in order to enhance the relative voice of certain segments of society.

Plaintiffs Thompson and Hilliard now appear to assert essentially the same wealth-based, disparate impact claim as the Adams plaintiffs, see Thompson & Hilliard Br. at 6, 8-9; accordingly, their claim also must fail, for the reasons stated.[134] See also Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977) (intentional discrimination required for equal protection claim; disparate impact insufficient).[135]

IV. THAT CERTAIN CONTRIBUTION LIMITS ARE NOT INDEXED FOR INFLATION DOES NOT VIOLATE EQUAL PROTECTION PRINCIPLES.

The California Democratic Party and California Republican Party challenge Congress's decision not to index for inflation limits on contributions to state-level party committees. CDP/CRP Br. at 50. As

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[134] Interestingly, Representatives Thompson and Hilliard seek relief inconsistent with the Adams plaintiffs and with their wealth-based, disparate impact claim: they ask not that the Court invalidate the increase in the individual contribution limit to $2,000, but that the Court rewrite the statute completely to provide for an apparent increase in the $2,000 limit for individuals giving to "economically challenged" candidates. Thompson & Hilliard Br. at 11-12. Of course, the Court lacks jurisdiction to rewrite BCRA in such a fashion. See Eubanks v. Wilkinson, 937 F.2d 1118, 1122-23 (6th Cir. 1991).

[135] Even the Thompson & Hilliard plaintiffs' claims of impact are merely speculative, however. See, e.g., Thompson & Hilliard Br. at 11.

explained in our opening brief, however, the fact that such contributions were not indexed does not offend the Constitution. See Gov't Br. at 111-13.

V. THE PAUL PLAINTIFFS' CHALLENGE TO FECA AND BCRA LACKS MERIT.

The Paul plaintiffs have challenged all disclosure provisions of FECA[136] and BCRA, as well as other provisions of BCRA, as violating the freedom of the press. These plaintiffs assert that freedom of the press is a significantly greater guarantee than the guarantees of free speech and association or of equal protection. See Paul Br. at 9 n.3.[137] The guarantee of freedom of the press, however, offers no greater protection than other related constitutional guarantees. See New York Times v. Sullivan, 376 U.S. 254, 269-71 (1964) (construing freedoms of speech and press as one and the same); see also Austin, 494 U.S. at 668 ("[T]he press' unique societal role may not entitle the press to greater protection under the Constitution."). Thus, though phrased differently, the Paul plaintiffs' arguments present no distinct or better constitutional challenge to FECA or BCRA than those already rejected in Buckley and subsequent cases, or those challenges made by other plaintiffs in this litigation. Accordingly, the arguments already presented by defendants in defense of Title I and Title II apply fully to the Paul plaintiffs' arguments as well. And as to their Title III claims, the Paul plaintiffs have not shown in this facial challenge that contribution limits unconstitutionally discriminate against third-party candidates as a class.[138] See Buckley, 424 U.S. at 31.[139]

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[136] To the extent that the Paul plaintiffs challenge provisions of FECA not amended by BCRA, this Court should not exercise jurisdiction over their claim. See Gov't Br. at 190 n.130.

[137] Plaintiffs also challenge all disclosure provisions as imposing prior restraints, editorial controls, and discriminatory economic burdens, see Paul Br. at 13-18, but BCRA does not authorize the government to edit or enjoin anyone's speech. Although the Paul plaintiffs state that they perform some of the same functions as the press – by, for example, extensively "publishing" through press releases, unpaid appearances on television and radio, and through their own websites and bumper stickers – these plaintiffs do not exist, as the press does, to "inform[] and educate[] the public" or to provide a "forum for discussion and debate," Austin, 494 U.S. at 667 (citations and internal quotation marks omitted). Instead, their purpose is to promote their own candidacies and legislative agendas. See, e.g., Paul Decl. ¶ 4 [Paul]; Bossie Decl. ¶ 3 [Paul].

[138] To the extent the Paul plaintiffs challenge the fact that certain contribution limits are not indexed for inflation, Paul Br. at 27 n.11, this challenge is answered by our opening brief, Gov't Br. at 111-13.

[139] See also Buckley, 424 U.S. at 34-35 ("Moreover, any attempt to exclude minor party and independents en masse from . . . [FECA's] contribution limitations overlooks the fact that minor-party candidates may win elective office

The Paul plaintiffs also challenge restrictions on personal use of campaign funds under BCRA § 301, but § 301 merely codifies past FEC regulations interpreting the prior 2 U.S.C. 439a. See 148 Cong. Rec. S2143 (March 20, 2002) (Sen. Feingold). BCRA § 301 is rationally related to furthering a legitimate governmental interest, see Heller v. Doe, 509 U.S. 312, 320 (1993), in ensuring the ethical use of campaign contributions.

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or have a substantial impact on the outcome of an election."). Although plaintiff Libertarian candidates Carla Howell and Michael Cloud allege that, without contribution limits, they would have obtained more contributions needed for their candidacies, see Howell Decl. ¶ 15 [Paul]; Cloud Decl. ¶ 15 [Paul], Howell's run for a Massachusetts Senate seat in 2000 was ranked by Campaign and Elections magazine as the number one third-party senatorial campaign in that cycle. See Howell Decl. ¶ 5. In addition, Cloud, as principal fundraiser, raised over $800,000 for Howell's 2000 candidacy. See Cloud Decl. ¶ 10. And this happened even before BCRA's doubling of the individual contribution limit, see BCRA § 307, which presumably will benefit any future candidacies of plaintiffs.

TITLES III AND V: CLAIMS AGAINST THE FCC

PRESENTATION BY THE UNITED STATES DEFENDANTS

I. SECTION 305 OF BCRA IS CONSTITUTIONAL.

As discussed in our opening brief, Gov't Br. at 215-16, plaintiffs' challenge to § 305 is not justiciable. Plaintiffs do not even address the issue of standing or ripeness in their opening brief, let alone discharge their burden of showing that a concrete case or controversy exists with respect to § 305. Even assuming that plaintiffs could satisfy standing and ripeness requirements, their challenge to § 305 fails on the merits. The disclosure required under § 305 provides voters with important additional information to consider in evaluating candidates,[140] 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.

As explained in our opening brief, see Gov't Br. at 211-13, 219-20, § 305 is consistent with the long history of federal regulation of political broadcasts, and imposes less intrusive requirements than many existing provisions. See 47 U.S.C. 312(a)(7), 315; 47 C.F.R. 73.1212(d)(e), 73.1940-1944, 76.205-76.206, 76.1611, 76.1701. Indeed, the courts have recognized that Congress may validly regulate access to broadcast time by candidates for public office. See CBS v. FCC, 453 U.S. 367 (1981) (upholding "reasonable access" requirement); Branch v. FCC, 824 F.2d 37, 48-50 (D.C. Cir. 1987) (rejecting challenge to provision requiring broadcasters to provide "equal time" to legally qualified candidates). Section 305 is also consistent with the long history of federal disclosure requirements imposed on broadcasters and cable television systems. See 47 C.F.R. 73.1943; 47 C.F.R. 76.1701(a)-(c). The

[140] Section 305 requires candidates that wish to receive the "lowest unit charge" for their political broadcasts either to certify they will not make any direct reference to their opponent or to include a short and plain statement at the end of the broadcast referring to their opponent acknowledging their approval thereof. The statute thus ensures that "the candidate's sponsorship [is] absolutely clear" in the broadcast. 147 Cong Rec. S2693 (Mar. 22, 2001) (Sen. Collins).

statute simply imposes an additional disclosure requirement on candidates who seek the "lowest unit charge" benefit, see 47 U.S.C. 315(b)(1), made available to them during the period immediately prior to a federal election.

Contrary to plaintiffs' contention (McConnell Br. at 89-90), § 305 does not discriminate on the basis of viewpoint. The statute does not "treat[] 'negative' advertising differently from 'positive' advertising," McConnell Br. at 89-90. Section 305 applies to all broadcasts that "refer" to a candidate's opponent, regardless of the party affiliation of the candidate, the candidate's purpose in sponsoring the broadcast, or the point of view expressed in the broadcast.[141]

In light of the strong interest in favor of public disclosure of information about federal candidates, Congress presumably could have required all candidates to provide the disclosure that § 305 encourages. Congress surely can take the lesser step of making disclosure a condition on the availability of the "lowest unit charge," a step that leaves candidates free to purchase broadcast time at the "comparable use rate," 47 U.S.C. 315(b)(2), if they do not wish to respond to the permissible incentive for disclosure that § 305 provides.[142]

Plaintiffs' contention (McConnell Br. at 90) that § 305 imposes an unconstitutional condition lacks merit. The unconstitutional conditions cases have typically involved efforts to suppress speech. See, e.g., Speiser v. Randall, 357 U.S. 513, 519 (1958) (denial of tax exemption "'aimed at the suppression of dangerous ideas'" (citation omitted)); Hannegan v. Esquire, Inc., 327 U.S. 146, 156 (1946) (denial of

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[141] Plaintiffs' reliance on the title of § 305 (see McConnell Br. at 90) is misplaced. "'[T]he title of a statute . . . cannot limit the plain meaning of the text.'" Pa. Dep't of Corrections v. Yeskey, 524 U.S. 206, 212 (1998) (quoting Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528-29 (1947)). The plain language of § 305 makes clear that it applies to all broadcasts that refer to a candidate's opponent whether or not the reference is negative.

[142] Plaintiffs (McConnell Br. at 89) invoke Perry v. Sindermann, 408 U.S. 593 (1972), but that case is entirely inapposite. The Court in Perry noted that public employment may not be denied because of the plaintiff's exercise of his constitutionally protected freedoms of speech and association. Perry was an attempt to suppress speech. Nothing in that case casts doubt on Congress's power to impose a disclosure requirement on federal candidates as a condition on the receipt of a government-created benefit like lowest unit charge.

second class mailing privileges for periodical amounted to censorship). Section 305, by contrast, promotes First Amendment values by creating an incentive for candidates to provide more information to the public, information that makes clear their approval of political broadcasts that refer to their opponents. Such public disclosure furthers First Amendment values by increasing the amount of information available to the public. Federal candidates who seek public office have no legitimate interest in refusing to disclose their sponsorship of political advertisements broadcast on radio or television in support of their campaigns.

Plaintiffs' suggestion (McConnell Br. at 89) that § 305 is an impermissible effort to "compel" speech similarly lacks merit.[143] Compelled speech cases generally involve efforts to require individuals to associate themselves with the messages of other parties that they do not necessarily endorse. See, e.g., Wooley v. Maynard, 430 U.S. 705, 717 (1977). Section 305, by contrast, simply requires a candidate to acknowledge responsibility for his own political broadcast and for views conveyed on his own behalf.

II. SECTION 504 OF BCRA IS CONSTITUTIONAL.

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 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."

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[143] Plaintiffs' reliance (McConnell Br. at 89) on Cohen v. California, 403 U.S. 15 (1971), and Brown v. Hartlage, 456 U.S. 45 (1982), is entirely misplaced. Cohen involved the appeal of a criminal conviction for the wearing of a jacket that displayed an offensive slogan protesting the draft. 403 U.S. at 16. Brown involved a constitutional challenge to the application of the Kentucky Corrupt Practices Act to a campaign pledge by a county commissioner to reduce his salary if elected. 456 U.S. at 47. Neither case involved a candidate's disclosure of sponsorship in a political broadcast on television or radio, and neither case suggests that Congress may not require such disclosure.

Plaintiffs contend that the reference to "political matters of national importance" is unconstitutionally vague. McConnell Br. at 98-99; AFL-CIO Br. at 18-19. They also argue that § 504 serves no legitimate government objective. McConnell Br. at 99-100; AFL-CIO Br. at 19-20. They further contend that § 504 is invalid because (1) it requires disclosure of information about "requests" for broadcasts, whether or not an actual broadcast occurs, and (2) it is not limited to broadcasts that "expressly advocate[]" the election or defeat of a candidate. Id. Those arguments lack merit.

As explained in our opening brief, Gov't Br. at 222-23, the statutory reference to "political matters of national importance" is not void for vagueness. Plaintiffs' contrary argument, McConnell Br. at 98, relies on the Declaration of Jack N. Goodman, senior vice president and general counsel of the National Association of Broadcasters ("NAB"), stating that NAB broadcasters will have difficulty in determining whether broadcast requests refer to "political matters of national importance." The NAB itself, however, counsels broadcasters to collect sponsorship information for broadcasts that contain "political matter or matter involving the discussion of a controversial issue of public importance." See NAB Political Broadcast Catechism (5th ed.) at 62, 65 [PCS/NAB at 0373]; see also 47 C.F.R. 73.1212(e); 47 C.F.R. 76.1701(d) (cable television systems). That standard has been part of the FCC sponsorship regulations since 1944, see Loveday v. FCC, 707 F.2d 1443, 1453-54 (D.C. Cir. 1983), and NAB does not cite any previous objection to these similar requirements.[144] Moreover, as explained in our opening brief, Gov't Br. at 213, any uncertainty regarding the scope of the statute is diminished by the FCC's availability to answer inquiries about enforcement of its political broadcast regulations.[145]

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[144] In fact, the NAB has posted on its website a document that provides guidance to its members on compliance with § 504 pending resolution of this litigation. The document, which advises that the phrase "political matters of national importance" includes such issues as "Medicare reform or gun control," does not suggest that determining the meaning of the phrase will be especially difficult. See NAB, The Bipartisan Campaign Finance Reform Act of 2002: New Public File Requirements For Issue Advertisements (www.nab.org/MembersOnly/nabsays/legal /BCRA.pdf).

[145] Plaintiffs' reliance on Trinity Broadcasting v. FCC, 211 F.3d 618 (D.C. Cir. 2000), see McConnell Br. at 99, is misplaced. The Court in Trinity sustained the FCC's interpretation of its regulations concerning minority ownership, id. at 627, but refused to enforce the denial of a broadcast license because the agency did not provide adequate notice

Section 504 plainly serves an important governmental interest. As explained in our opening brief, Gov't Br. at 218, 221, the statute is narrowly targeted to ensure an informed electorate. The Supreme Court has long recognized the importance of public disclosure in the political arena. See Buckley, 424 U.S. at 67, 81; Gov't Br. at 217-18. And, even outside the political arena, the courts have recognized Congress's broader latitude to regulate television and radio broadcast stations and cable television systems. See Gov't Br. at 219. Section 504 is a permissible regulation of those media, ensuring that the public can determine the identity of the actual sponsor of political broadcasts and the amount of money spent (and offered to be spent) on such broadcasts.

Contrary to plaintiffs' contention, § 504 properly requires disclosure of information about "requests" to purchase air time. See McConnell Br. at 100; AFL-CIO Br. at 18-20. The FCC's political file regulations have always required candidates to disclose their "requests" to purchase broadcast time. See 47 C.F.R. 73.1943 (broadcast stations); 47 C.F.R. 76.1701 (cable television systems). The similar disclosure mandated under § 504 provides the public with access to information concerning the amounts that individuals and groups are prepared to spend to broadcast messages on political matters of national importance, as well as how much they actually spend on such broadcasts. Further, requiring disclosure of the identities of those who make requests, and the broadcasters' disposition of those requests, enables the public to evaluate whether broadcasters are processing requests in an even-handed fashion.[146]

Finally, the AFL-CIO erroneously suggests that Congress can only require sponsorship disclosures in a political file for broadcasts that expressly advocate the election or defeat of a candidate. See AFL-

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of the interpretation, id. at 632. That an administrative agency may be required to provide notice of its interpretation of an ambiguous regulation before undertaking enforcement action casts no doubt on Congress's authority to enact § 504 and to delegate to the FCC the responsibility of interpreting and implementing that provision.

[146] Moreover, in its preexisting regulations governing candidate broadcasts, see 47 C.F.R. 73.1943, 76.1701, the FCC has not interpreted the term "request" to reach beyond specific proposals to purchase broadcast time at a particular rate and for a particular class of time. The agency has not understood the term to encompass a mere telephonic inquiry about whether the station sells advertising time.

CIO Br. at 19-20. As discussed above, FCC regulations already require disclosure of the sponsor's chief executive officers or members of the executive committee or board of directors for paid broadcasts of a "political matter or matter involving the discussion of a controversial issue of public importance." See 47 C.F.R. 73.1212(e); 47 C.F.R. 76.1701(d) (cable television systems). In the highly regulated area of political broadcasts on radio or television, there is no right to make an anonymous broadcast. To the contrary, stations are under a longstanding obligation to determine the "true sponsor" of broadcasts, including broadcasts that are in no way campaign-related. See 47 U.S.C. 317(c); Loveday, 707 F.2d at 1449; see also Trumper Communications, 11 F.C.C.R. 20,415, 1996 WL 635821 (Oct. 29, 1996). The collection and disclosure of sponsorship information concerning political broadcasts does not violate the Constitution. See KVUE, Inc. v. Moore, 709 F.2d 922, 937 (5th Cir. 1983) (rejecting First Amendment challenge to state statute requiring sponsors of political broadcast advertisements to identify themselves), aff'd, 465 U.S. 1092 (1984).

CONCLUSION

For the foregoing reasons, and for the reasons stated in defendants' opening brief, the motion of the Governmental Defendants and the Defendant-Intervenors for judgment should be granted, and plaintiffs' claims dismissed, with prejudice.

Dated: November 20, 2002

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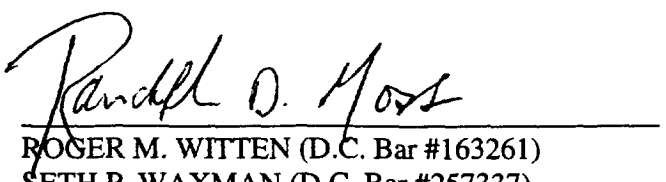

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