No.

IN THE

Supreme Court of the United States

SENATOR JOHN MCCAIN, SENATOR RUSSELL FEINGOLD, REPRESENTATIVE CHRISTOPHER SHAYS, REPRESENTATIVE MARTIN MEEHAN, SENATOR OLYMPIA SNOWE, AND SENATOR JAMES JEFFORDS,

Appellants,

v.

SENATOR MITCH MCCONNELL *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

ROGER M. WITTEN
WILMER, CUTLER & PICKERING
399 Park Avenue
New York, NY 10022

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
ERIC J. MOGILNICKI
EDWARD C. DUMONT
PAUL R.Q. WOLFSON
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Additional counsel on inside cover

BURT NEUBORNE
FREDERICK A.O. SCHWARZ, JR.
BRENNAN CENTER FOR JUSTICE
161 Avenue of the Americas, 12th Floor
New York, NY 10013

DAVID J. HARTH
CHARLES G. CURTIS, JR.
MICHELLE M. UMBERGER
HELLER EHRMAN WHITE & MCAULIFFE LLP
One East Main Street, Suite 201
Madison, WI 53703

BRADLEY S. PHILLIPS
MUNGER, TOLLES & OLSON LLP
355 South Grand Ave.
35th Floor
Los Angeles, CA 90071

E. JOSHUA ROSENKRANZ
HELLER EHRMAN WHITE & MCAULIFFE LLP
120 West 45th Street
New York, NY 10036

ALAN B. MORRISON
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009

MICHAEL D. LEFFEL
ANJA L. MANUEL
A. KRISAN PATTERSON
JENNIFER L. MUELLER
STACY E. BECK
JERROD C. PATTERSON
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037

FRED WERTHEIMER
ALEXANDRA EDSALL
DEMOCRACY 21
1825 Eye Street, N.W.
Suite 400
Washington, D.C. 20006

TREVOR POTTER
GLEN M. SHOR
CAMPAIGN LEGAL CENTER
1101 Connecticut Ave., NW
Suite 330
Washington, D.C. 20036

QUESTIONS PRESENTED

Whether the three-judge district court erred in invalidating on First Amendment grounds portions of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, including provisions addressing:

1. the raising, directing, transferring, and use of funds by political parties, federal candidates, and federal officeholders (BCRA § 101);

2. the use of funds from corporate and labor union general treasuries to finance broadcast advertisements that are intended or likely to influence federal elections, and disclosure requirements for all such broadcast advertisements (BCRA §§ 201, 203, 204); and

3. the ability of political parties to make both "independent" and "coordinated" expenditures to support the campaigns of candidates they have nominated to seek federal office (BCRA § 213).

PARTIES TO THE PROCEEDINGS

The appellants who are parties to this Jurisdictional Statement are six Members of Congress who intervened as defendants in the district court in support of BCRA's constitutionality pursuant to BCRA § 403(b): Senator John McCain; Senator Russell D. Feingold; Representative Christopher Shays; Representative Martin Meehan; Senator Olympia J. Snowe; and Senator James Jeffords. For ease of reference, these appellants will hereafter be referred to as the "intervenor appellants." The following persons and entities were also defendants in the district court: the Federal Election Commission (FEC) and David W. Mason, Ellen L. Weintraub, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas, and Michael E. Toner, in their capacities as Commissioners of the FEC; John D. Ashcroft, in his capacity as Attorney General of the United States; the United States Department of Justice; the Federal Communications Commission; and the United States of America. Current FEC Commissioners Weintraub and Toner replaced former Commissioners Karl J. Sandstrom and Darryl R. Wold, who were originally named as defendants.

The appellees here, who were plaintiffs in the district court, are Senator Mitch McConnell; Representative Bob Barr; Representative Mike Pence; Alabama Attorney General Bill Pryor; Libertarian National Committee, Inc.; American Civil Liberties Union; Associated Builders and Contractors, Inc.; Associated Builders and Contractors Political Action Committee; Center for Individual Freedom; Club for Growth, Inc.; Indiana Family Institute, Inc.; National Right to Life Committee, Inc.; National Right to Life Educational Trust Fund; National Right to Life Political Action Committee; National Right to Work Committee; 60 Plus Association, Inc.; Southeastern Legal Foundation, Inc.; U.S. d/b/a ProENGLISH; Thomas E. McInerney; Barret Austin O'Brock; Trevor M. Southerland; National Rifle Association of America; National Rifle Association Political Victory Fund; Emily Echols, a minor child, by and through her next friends Tim and Wendy

Echols; Hannah McDow, a minor child, by and through her next friends Tim and Donna McDow; Isaac McDow, a minor child, by and through his next friends Tim and Donna McDow; Jessica Mitchell, a minor child, by and through her next friends Chuck and Pam Mitchell; Daniel Solid, a minor child, by and through his next friends Kevin and Bonnie Solid; Zachary C. White, a minor child, by and through his next friends John and Cynthia White; Republican National Committee (RNC); Mike Duncan as member and Treasurer of the RNC; Republican Party of Colorado; Republican Party of Ohio; Republican Party of New Mexico; Dallas County (Iowa) Republican County Central Committee; California Democratic Party; Art Torres; Yolo County Democratic Central Committee; California Republican Party; Shawn Steel; Timothy J. Morgan; Barbara Alby; Santa Cruz County Republican Central Committee; Douglas R. Boyd, Sr.; Victoria Jackson Gray Adams; Carrie Bolton; Cynthia Brown; Derek Cressman; Victoria Fitzgerald; Anurada Joshi; Peter Kostmayer; Nancy Russell; Kate Seely-Kirk; Rose Taylor; Stephanie L. Wilson; California Public Interest Research Group; Massachusetts Public Interest Research Group; New Jersey Public Interest Research Group; United States Public Interest Research Group; The Fannie Lou Hamer Project; Association of Community Organizers for Reform Now; Chamber of Commerce of the United States; National Association of Manufacturers; U.S. Chamber Political Action Committee; American Federation of Labor and Congress of Industrial Organizations (AFL-CIO); AFL-CIO Committee on Political Education Political Contributions Committee; Representative Ron Paul; Gun Owners of America, Inc.; Gun Owners of America Political Victory Fund; Real Campaign Reform.Org; Citizens United; Citizens United Political Victory Fund; Michael Cloud; Carla Howell; Representative Bennie G. Thompson; Representative Earl F. Hilliard; and National Association of Broadcasters.

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MISCELLANEOUS

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Appellants,

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Appellees.

OPINIONS BELOW

The opinions of the district court are not yet reported. In accordance with this Court's order of May 15, 2003 (Nos. 02-M-98 and 02-M-99), they are omitted from the appendix bound together with this jurisdictional statement, but will be reprinted in a single appendix to be filed on behalf of all appellants.

JURISDICTION

The judgment of the district court was entered on May 2, 2003. Intervenor appellants filed a notice of appeal (App., *infra*, 1a-3a) on May 5, 2003. The jurisdiction of this Court rests on Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002 (BCRA or Act), Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 113-114, and 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced at pages 14a-86a of the appendix to the jurisdictional statement filed by the Solicitor General in

FEC v. McConnell, also seeking review of the judgment below (Gov't J.S.).

STATEMENT

In enacting the Bipartisan Campaign Reform Act, Congress heeded an admonition delivered by this Court that could not have been more relevant or timely. "Leave the perception of impropriety unanswered," this Court warned, "and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377, 390 (2000). By 2002, when BCRA was enacted, massive circumvention of the federal campaign finance laws had produced a profound public cynicism about the very integrity of our political system. As a bipartisan study credited by the court below found, an overwhelming majority of Americans had come to believe that Members of Congress disproportionately heed the views of large donors and sometimes vote based on what these large contributors want — even if it is not what most constituents want, or what the Members think is best for the country.[1]

The source of this public cynicism was plain for all to see. As the massive record before Congress and the district court overwhelmingly demonstrates, political parties, corporations, unions, and wealthy individuals have used

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[1] *See* Kollar-Kotelly op. 180-82 (citing Mark Mellman & Richard Wirthlin, Research Findings of a Telephone Study Among 1300 Adult Americans (Sept. 23, 2002) at 2-3, 6-9); Leon op. 243-47 (same). The study revealed that 71 percent of the public believes that Members of Congress sometimes vote the way large donors to their parties want, even when it is not what most people in their districts want and even when it is not what Members think is best for the country. *See* Kollar-Kotelly op. 181-82; Leon op. 246. Eighty-four percent believes that "Members of Congress will be more likely to listen to those who give money to their political party in response to their solicitations for large donations," Kollar-Kotelly op. 182; Leon op. 246; and 68 percent believes big donors block decisions that could improve their everyday lives, *see* Kollar-Kotelly op. 182; Leon op. 247.

unregulated "soft money" contributions, supposed "issue ads," and coordinated expenditures to circumvent protections against corruption and the appearance of corruption that Congress enacted over the course of almost a century.

- In the 2000 election cycle alone, for example, corporations, unions, and wealthy individuals contributed almost a *half billion dollars* in soft money to the national parties. *See* Leon op. 122; Kollar-Kotelly op. 20. Although these unregulated contributions were based on the fiction that they had nothing to do with federal elections, "it was clear that parties were using corporate and labor union soft money donations to influence federal elections . . . and not primarily for state and local elections." Leon op. 138-39; *see also* Kollar-Kotelly op. 80-82.
- Similarly, although federal law has long barred corporations and unions 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 which "have not only been crafted for the specific purpose of directly affecting federal elections, but have been very successful in doing just that." Leon op. 89; *see also* Kollar-Kotelly op. 218-19, 398.

The Bipartisan Campaign Reform Act was Congress's response to this evisceration of its regulatory regime. The opponents of BCRA assail it as an epochal change in the law. In reality, the core provisions of the Act simply restore the law to what it was before wholesale exploitation of loopholes and regulatory rulings rendered impotent longstanding safeguards against corruption and the appearance of corruption in campaign finance. At issue in this case is whether Congress may enact meaningful campaign finance laws or must, instead, accept the rampant circumvention that has made a mockery of the law in recent years.

1. a. *FECA and* Buckley *v.* Valeo. "The history of federal campaign finance regulation . . . is a long-standing and recurring problem that has challenged our government for nearly half of the life of our Republic." Per Curiam op. 16. Since the Administration of Theodore Roosevelt, Congress has legislated to address the problems of corruption and the appearance of corruption in our federal political process presented by the amassing of large war chests to influence elections and federal officeholders.

The Tillman Act of 1907 prohibited corporations from making contributions in connection with federal election campaigns. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864. By 1947, Congress had expanded that prohibition to include expenditures designed to influence federal elections, and had extended the ban on both contributions and expenditures to labor unions as well as corporations. War Labor Disputes Act of 1943, Pub. L. No. 89; § 9, 57 Stat. 167 (amending Sec. 313 of Federal Corrupt Practices Act); Labor Management Relations Act of 1947, Pub. L. No. 80-101, § 304, 61 Stat. 159 (same). These restrictions on the use of general corporate or union funds to influence federal elections were eventually transferred to the Federal Election Campaign Act (FECA). *See* Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. § 431 *et seq.*).

The Watergate investigations disclosed campaign finance abuses that mobilized public and legislative opinion in favor of further reform.[2] In response, Congress acted to limit campaign contributions and expenditures; to require expanded disclosure of campaign contributions and expenditures; and to establish a Federal Election Commission (FEC) to administer and to enforce the law. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

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[2] *See, e.g., Buckley* v. *Valeo*, 519 F.2d 821, 839-40 (D.C. Cir. 1975), *aff'd in part, rev'd in part on other grounds by Buckley* v. *Valeo*, 424 U.S. 1 (1976); Report of the Watergate Special Prosecution Force at 71-85 (Oct. 1975).

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), this Court generally upheld the new law's limits on contributions to candidates and parties (*id.* at 23-38); struck down its limits on campaign expenditures, whether by candidates themselves or by others acting independently of candidates (*id.* at 39-50); and upheld its requirements for disclosure of contributions and expenditures by candidates, political parties, and other political committees (*id.* at 60-74). In addition, the Court upheld the Presidential Election Campaign Fund Act, Pub. L. No. 89-909, §§ 301-305, 80 Stat. 1587 (codified as amended at 26 U.S.C. §§ 9001-9042 (2002), which provided a public financing system for presidential elections. *Buckley*, 424 U.S. at 85-109.

b. *The rise of soft money.* The fundamental tenet of federal campaign finance laws, as sustained in this Court's decision in *Buckley*, has long been that the threat of actual or apparent corruption of federal elections and officeholders can be minimized by regulating the source and amount of political contributions made to influence federal elections. Over time, however, this tenet was undermined — not by any rule of constitutional law, but by the development of the soft money loophole. The political parties and federal candidates took advantage of that loophole to raise and spend massive amounts of federally unregulated contributions to influence federal elections. Typically, corporations, unions, and wealthy individuals would make unregulated contributions to the national parties, often at the behest of federal officeholders, on the pretense that these funds would not be used to influence federal elections. The funds would then be transferred to state party committees, which would use the funds — along with a mix of "hard money" (*i.e.*, money raised according to FECA's regulations) — to run so-called "issue ads" about federal candidates or to engage in other election activity that indisputably influenced federal elections.

Shortly after this Court issued its decision in *Buckley*, a state party asked the FEC whether it could spend corporate funds on party activities that influence federal elections and also influence state elections. In response, the FEC advised that federal law barred the use of any "corporate/union treasury funds . . . to fund *any portion* of a registration or get-out-the-vote drive conducted by a political party." Adv. Op. 1976-72 (emphasis added). Two years later, however, and without any explanation, the FEC reversed its position. In place of its prior determination that no corporate or union funds could be used to finance *any* activities that influence federal elections, the FEC adopted the fiction of "allocation." Under this fiction, funds used for a single political activity that influenced both federal and state elections were divided into separate state and federal components. Corporate and union funds were placed in the state (or soft money) component, and their expenditure on the mixed-purpose activity was deemed, contrary to fact, not to influence the federal election. *See* Adv. Op. 1978-10.

Undermining the purpose of FECA, this administrative interpretation of the law opened the door to allow the political parties to raise huge contributions, used for the purpose of influencing federal elections, without complying with federal rules limiting the size of individual contributions and prohibiting corporate and union contributions. As committees in both the Senate and House of Representatives concluded after conducting "extensive investigations" into the 1996 federal elections, "permitting nonfederal donations to political parties eviscerated FECA's longstanding ability to prevent corporate and labor union treasury funds from influencing federal elections." Per Curiam op. 39.

National party soft-money fundraising and spending grew substantially in the 1980s and early 1990s, from an estimated total of $19 million in 1980 to $45 million in 1988 to $80 million in 1992. *See* Per Curiam op. 34, 36-37. By the end of the 1992 election, a major share of "non-federal" funds was in fact being spent for the purpose of influencing federal elections. *See* Per Curiam op. 36-37.

The trend accelerated dramatically in the 1996 presidential election. Prior to that time, it had been assumed that, while parties could use soft money in voter mobilization efforts, they could not substitute it for hard money in the area of funding candidate-specific mass communications. Starting in August of 1995, however, the Democratic party committees raised and spent substantial amounts of soft money on television advertisements prominently featuring President Clinton or his expected opponent Senator Dole, *see* Per Curiam op. 37, and that discussed issues that were expected to be of significance in the upcoming election. On the theory that these "issue ads" were not campaign expenditures under FECA because (i) they were run by the party (not the campaign) and (ii) they did not use specific words "expressly advocating" the President's re-election, *see* 2 U.S.C. § 431(17), the party funded them as it would have funded generic party advertising — with a mixture of hard and soft money. *See* Per Curiam op. 37-38 & nn.14-15. The Republican National Committee followed suit and announced it was devoting $20 million to an "issue advocacy" campaign featuring its presidential candidate. *See id.* at. 37-38; Leon op. 125; Kollar-Kotelly op. 24.

In the 1996 election cycle, national parties spent $272 million in soft money — more than three times as much as in 1992. *See* Leon op. 121-22; Kollar-Kotelly op. 19-20. In the 2000 presidential election, soft money fundraising and spending by the national parties reached $498 million — 42 percent of their total spending. *See* Per Curiam op. 40. To raise a half-billion dollars, the national parties turned to large donors: 60 percent of the soft money they raised in the 2000 cycle came from just 800 donors, including 435 corporations, unions, and other organizations and 365 individuals, each contributing at least $120,000. *See* Henderson op. 139-40; Leon op. 122-23.

Finally, the soft money loophole operated to turn state and local parties into outposts of the national parties in the race to use federally unregulated funds in ever-growing amounts to influence federal elections. Because the FEC adopted allocation rules that permitted state and local parties to spend a greater percentage of soft money on mixed-purpose activities than their national party counterparts,[3] the parties quickly learned to raise both hard and soft money at the national level, and then transfer it to state parties to fund activities that influenced federal elections. *See* Per Curiam op. 38-39; Leon op. 174-76; Kollar-Kotelly op. 49-52. This maneuver permitted them to better leverage their soft money expenditures by requiring a smaller hard money share of the mix. *See* Per Curiam op. 36, 38-39. As a result, in 1992, almost $15 million was transferred to state parties — principally in states that were battlegrounds in the federal presidential election. *Id.* at 37. In 1996, the national parties transferred $115 million in soft money to their state committees, which accounted for two-thirds of state party soft money expenditures. *See* Leon op. 121-22; Kollar-Kotelly op. 19-20. By the 2000 election, this amount more than doubled, with the national parties transferring $280 million in soft money — over half of the soft money raised by the national parties — to take advantage of the more favorable allocation rules at the state level. *See* Leon op. 122-23; Kollar-Kotelly op. 20-22.

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[3] Before BCRA went into effect, allocation rules required that national parties (other than the House or Senate campaign committees) use 60 percent hard money (65 percent hard money during a presidential election year) for "issue ads." *See* 11 C.F.R. § 106.5(b) (2002) (*superseded by* BCRA § 101(a), effective Nov. 6, 2002 (*see* 67 Fed. Reg. 49064, 49112-16)). The House and Senate campaign committees were required to use a minimum of 65 percent hard money for generic voter drives and administrative expenses (including "issue ads"). *See* 11 C.F.R. § 106.5(c)(2) (2002), *superseded by* BCRA § 101(a) (*see* 11 C.F.R. 300.10) (2002)). By contrast, the hard money percentage required for state party committees for expenditures on generic voter drives and administrative expenses (including "issue ads") was based on the ratio of federal candidates to state candidates on the ballot and was therefore typically much lower than 60 percent under the allocation rules. Many state parties could, in some elections, spend almost two-thirds soft money. *See* 11 C.F.R. § 106.5(d)(1) (2002) (*superseded by* BCRA § 101(b)); *see also* Federal Election Commission, *Campaign Guide for Political Party Committees* 48 (Aug. 1996).

c. *The Rise of Sham "Issue Advocacy."* Beginning in the 1996 election cycle, corporations, labor unions, and other non-party interest groups also discovered how to circumvent FECA's source limitations and disclosure requirements by running millions of dollars' worth of candidate-specific "issue ads." These advertisements were targeted at key federal elections and were clearly intended to support or oppose specific federal candidates, in open derogation of the law's intent. Nevertheless, so long as the advertisements omitted specific words of "express advocacy" such as "vote for" or "vote against," amounts spent to produce and air them were deemed to fall outside FECA's statutory definition of "independent expenditures." *See* Leon op. 263-64, 322-23; Kollar-Kotelly op. 296-300, 339, 386-408; Per Curiam op. 41-42.

The result was the wholesale collapse of two key aspects of campaign finance law. First, corporations and unions used the advertisements to deploy their general treasury funds (as opposed to "PAC" funds raised from voluntary, individual contributions made to separate segregated funds specifically for political use) to participate directly in federal candidate elections — something otherwise prohibited since the 1940s. Second, groups and individuals collected and spent unlimited amounts for federal campaign activity, without public disclosure of the source, nature, or amount of those expenditures. *See* Per Curiam op. 41-42; Kollar-Kotelly op. 217-19, 389-92; Leon op. 263-64.

As the court below found, "the factual record unequivocally establishes that" advertisements of this sort "have not only been crafted for the specific purpose of directly affecting federal elections, but have been very successful in doing just that." Leon op. 89; *see also* Kollar-Kotelly op. 395-98. Groups that wanted to influence federal elections, without complying with FECA's source restrictions and disclosure requirements, discovered that the statutory "express advocacy" test was, in the memorable phrase of one NRA official, a "wall . . . built of the same sturdy material as the emperor's clothing. Everyone sees it.

No one believes it." Kollar-Kotelly 234 (citation omitted); Leon op. 261 (citation omitted).

d. *Coordinated Expenditures.* The soft money and sham "issue ad" evasions were further exacerbated by a breakdown in the regulation of "coordinated expenditures." Although this Court, Congress, and the FEC had long recognized the importance of vigorously policing "attempts to circumvent [FECA] through prearranged or coordinated expenditures amounting to disguised contributions," *Buckley,* 424 U.S. at 47, a divided FEC in late 2000 promulgated new regulations that redefined "coordination" much more narrowly in the context of "general public political communications."[4] These rules were extensively criticized as "render[ing] the coordination standard — and thus, the contribution limits — meaningless."[5] In addition, the political parties were able to take advantage of a special privilege under FECA to make large coordinated expenditures with their nominees, while making purportedly "independent" expenditures on behalf of those same nominees during the same campaign.[6]

2. *BCRA.* Congress responded to these wholesale evasions of the Nation's campaign finance laws by enacting BCRA. We will not duplicate here the Solicitor General's full description of the relevant provisions of the Act. *See* Gov't J.S. 7-16. We set out only a brief summary of the

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[4] *See* 65 Fed. Reg. 76138 (Dec. 6, 2000); *see also* 66 Fed. Reg. 23537 (May 9, 2001) (final rule and effective date); 11 C.F.R. § 100.23 (repealed by BCRA § 214(b)).

[5] Statement of Reasons of Commissioner Thomas and Chairman McDonald in *In re The Coalition, et al.,* MUR 4624, at 8 (FEC Sept. 7, 2001); *see also id.* at 12; Statement of Reasons of Commissioners Thomas and McDonald in *In re Republicans for Clean Air,* MUR 4982, at 9-10 (FEC Apr. 23, 2002) (detailing various ways in which "[t]he Commission's new test for coordination weakens important provisions of [FECA]").

[6] 148 Cong. Rec. S2144 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (discussing problem of "one arm of the party . . . *coordinating* with a candidate while another arm of the same party purports to operate *independently* of such candidate" (emphasis added)).

principal provisions of Titles I and II, which respond directly to the developments in campaign finance practices described above.

a. Title I of BCRA addresses the circumvention of FECA through the raising and use of soft money. Recognizing the central role of the national parties in exploiting what had become a massive loophole and the need for a comprehensive solution to avoid further evasion of the law, BCRA bars the national party committees from soliciting, receiving, or spending soft money; transferring it to a state party or other entity; or directing a soft money contribution to some other recipient.[7] BCRA also imposes comparable restrictions on federal candidates and officeholders.[8] At the same time, BCRA raises the *hard* money limits on contributions by individuals to candidates (from $1,000 to $2,000 per election) and to national party committees (from $20,000 to $25,000 per year), and raises the aggregate cap on contributions by individuals to candidates and party committees (from $50,000 to $95,000 over a two-year cycle).[9]

In light of the substantial use of soft money contributions by state parties to influence federal elections, Congress also restricted the use of soft money for specified state or local party activities that affect federal elections. Although federal law has long applied to the use of contributions by state parties for activities affecting federal elections, BCRA recognized that revised rules were needed to prevent continued circumvention of federal law. The Act thus requires that state and local committees use hard money to pay for four categories of "Federal election activity": (1) voter registration activity during the 120 days

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[7] *See* 2 U.S.C. § 441i(a).

[8] *See* 2 U.S.C. § 441i(e)(1).

[9] *Compare* 2 U.S.C. § 441a(a)(1)(A)-(B), *and* 2 U.S.C. § 441a(a)(3) *with* 2 U.S.C. § 441a(a)(1) (2002), *and* 2 U.S.C. § 441a(a)(3) (2002) (*amended by* BCRA § 307(a), (b)).

immediately before a regularly scheduled federal election; (2) voter identification, get-out-the-vote (GOTV) drives, and generic campaign activity conducted in connection with an election in which a candidate for federal office is on the ballot; (3) public communications that promote, support, attack, or oppose a clearly identified candidate for federal office; and (4) the services of state party employees who spend more than 25 percent of their time on activities in connection with a federal election.[10]

At the same time, BCRA leaves state and local parties free to raise all the funds state law permits and to pay for purely state election activities with whatever funds state law allows. The Act specifically excludes from the definition of "Federal election activity": (1) public communications that refer solely to a clearly identified candidate for state or local office and that do not constitute a federal election activity; (2) contributions to candidates for state and local office, so long as the contribution is not designated for a federal election activity; (3) the costs of state, district, or local political conventions; and (4) the costs of grassroots campaign materials that name or depict only candidates for state or local office.[11]

Finally, to prevent further evasion of the federal campaign finance laws, Title I of BCRA bars political parties from soliciting funds for, or making donations to, certain tax-

[10] *See* 2 U.S.C. § 441i(b); 2 U.S.C. § 431(20)(A). Under the so-called Levin Amendment, state and local committees may use, in addition to hard money, soft money contributions of up to $10,000 per year to pay for a portion of certain *federal* election activities, so long as the money is raised by the state or local party committee making the expenditure. *See* 2 U.S.C. § 441i(b)(2)(A), (B)(iv), (C). Levin Amendment funds may be used only for those federal election activities (described in 2 U.S.C. § 431(20)(A)(i) and (ii)) that neither mention federal candidates nor involve broadcast media (except in the case of a communication which refers solely to a clearly identified candidate for state or local office). *See* 2 U.S.C. § 441i(b)(2)(B)(i) and (ii).

[11] *See* 2 U.S.C. § 431(20)(B).

exempt organizations that make expenditures in connection with federal elections.[12]

b. Subtitle II(A) of BCRA addresses the problem of sham "issue ads" designed to influence federal elections, funded by corporations and unions from their general treasury funds, and often run under assumed names without compliance with FECA's disclosure requirements.

In place of the FECA's openly-mocked "express advocacy" standard, *see* 2 U.S.C. § 431(17), BCRA adopts a precisely-defined category of "electioneering communications"[13] that must comply with Congress's longstanding disclosure rules and restrictions on the use of general corporate and union funds. An advertisement is an "electioneering communication" if, but only if, it:

- is broadcast by television, radio, cable or satellite;
- refers to a "clearly identified candidate" for federal office;
- runs in the 60 days before a general election, or the 30 days before a primary; and
- is targeted to the identified candidate's electorate.[14]

BCRA does not *prohibit* the airing of *any* advertisement. It requires any person or group spending more than $10,000 on "electioneering communications" in a calendar year to file reports with the FEC providing information relating to its financing and sponsorship of the

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[12] *See* 2 U.S.C. § 441i(d).

[13] *See* 2 U.S.C. § 434(f)(3)(A)(i).

[14] Specifically, except for advertisements that refer to a candidate for President or Vice President, an advertisement must reach at least 50,000 persons in a relevant state or district to be covered. 2 U.S.C. § 434(f)(3)(c). The statutory definition also excludes news stories and editorials; communications that are required to be paid for with hard money under another provision of the Act; and communications relating to certain candidate debates. It gives the FEC authority to exempt other communications under certain circumstances. *See* 2 U.S.C. § 434(f)(3)(B).

advertisement.[15] And, it requires unions and corporations that wish to sponsor "electioneering communications" to do so with money that is voluntarily and deliberately contributed for political purposes by individual employees, members, shareholders, or other organizational constituents.[16]

BCRA also establishes a back-up definition of "electioneering communications," applicable only if the principal definition is held to be unconstitutional. Under the back-up definition, "the term 'electioneering communication' means any broadcast, cable, or satellite communication which promotes or supports a candidate for [federal] office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." 2 U.S.C. § 434(f)(3)(A)(ii).

c. Subtitle II(B) of BCRA addresses "independent and coordinated expenditures." Among other things, Section 214 repeals the revised and narrowed definition of "coordination" adopted by the FEC in 2000 and instructs the FEC to engage in a new rulemaking. Section 213 further

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[15] *See* 2 U.S.C. § 434(f).

[16] *See* BCRA § 203, amending 2 U.S.C. § 441b(b)(2) and adding § 441b(c). Although BCRA Section 203 enacts a provision, 2 U.S.C. § 441b(c)(2), that would grant a limited exemption for certain political and other nonprofit organizations that are organized as corporations, that exemption is effectively withdrawn by BCRA § 204 (sometimes known as the Wellstone Amendment), enacting 2 U.S.C. § 441b(c)(6). However, under the FEC's regulations, an *MCFL* incorporated tax-exempt organization, *see FEC* v. *Massachusetts Citizens for Life, Inc.* 479 U.S. 238, 264 (1986), may use its treasury funds to finance either express advocacy or electioneering communications. *See* 11 C.F.R. § 114.10 (2003).

The intervenor appellants agree with the Solicitor General that Congress did not intend for BCRA to override the so-called *MCFL* exception to 2 U.S.C. § 441b, and, thus, for the same reasons given by the federal appellants, do not challenge the district court's holding that BCRA's "electioneering communication" provisions cannot be applied to *MCFL* corporations. *See* Gov't J.S. at 24 n.8.

provides that, after a political party has chosen its nominee, a party committee may not make coordinated expenditures on behalf of that nominee under 2 U.S.C. § 441a(d) while also purporting to make independent expenditures on behalf of that same nominee during the same election cycle.

3. *The present litigation.* Immediately after President Bush signed BCRA into law, a number of parties filed challenges, raising a host of constitutional claims. The three-judge district court consolidated the cases for all purposes and granted the motion of the intervenor appellants to intervene as of right to defend the constitutionality of the Act. *See* Orders of May 3 and May 10, 2002 (granting intervention); BCRA § 403(b) (providing for intervention as of right by Members of Congress); Fed. R. Civ. P. 24(a)(1).[17] The consolidated cases were submitted to the district court on a massive documentary record consisting of written declarations, expert reports, documents designated by the various parties, and designated portions of the transcripts of depositions conducted by the parties outside the presence of the district court. The district court issued its judgment on May 2, 2003, sustaining many of the most important provisions of BCRA but declaring other significant portions of the law unconstitutional.

a. With respect to Title I, the district court upheld BCRA's ban on the raising or use of soft money by federal candidates and officeholders (and entities subject to their

[17] The district court unanimously held that, even assuming that an intervening party must establish Article III standing, the intervenor appellants had done so. "[A]s opposed to members of the general public, the movants have a concrete, direct, and personal stake — as candidates and potential candidates — in the outcome of a constitutional challenge to a law regulating the processes by which they may attain office. . . . '[I]t is relatively self-evident that the people who have the most to gain and lose from the criteria governing [the electoral process] are the candidates themselves.'" Order of May 3, 2002, at 7 (citation omitted); *see also id.* at 8 (finding that intervenor appellants also met Article III's redressability requirement); *Buckley*, 424 U.S. at 7-8, 12 & n.11 (recognizing participation of candidates and elected officials in campaign finance litigation).

control)[18] and the use of soft money contributions by state candidates for public communications that promote, support, attack, or oppose clearly identified candidates for federal office. *See* Per Curiam op. 7. It also upheld BCRA's core restriction on the use of soft money contributions by national parties for "public communication[s] that refer[] to a clearly identified candidate for Federal office" and that promote, support, attack, or oppose that candidate. *See* Per Curiam op. 5-6.[19] Yet, attempting to draw an elusive and unsound line between activities that are "directly" targeted at federal elections (such as advertisements about federal candidates) and other activities that necessarily affect federal elections and also affect state elections (such as "generic" GOTV drives and advertisements), the district court struck down the remainder of BCRA's restriction on raising and spending soft money by national parties. *See id.* at 5-7. Similarly, the district court upheld BCRA's related restriction on the use by state and local parties of soft money contributions for "public communications" that promote, support, attack, or oppose clearly identified candidates for federal office, and struck down the remainder of the state-party soft money provision. *See id.* at 6-7. The court also struck down BCRA's ban on the solicitation or donation of funds by political parties to certain tax-exempt organizations that engage in activities in connection with federal elections. *See id.*

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[18] In sustaining this ban, Judge Henderson erroneously concluded that "the non-essential phrase 'including funds for any Federal election activity'" should be severed from the provision. Henderson op. 316 n.173. This clause should be restored to the provision.

[19] Judge Henderson would have held that all of the national party soft money ban is unconstitutional. Judge Kollar-Kotelly, in contrast, would have upheld the national soft money ban in its entirety. Judge Leon, in his decisive opinion, upheld the national soft money ban, but only with respect to funds used for "public communications" (as described in 2 U.S.C. § 431(20)(A)(iii)). In other respects, he joined Judge Henderson in concluding that the national soft money ban is unconstitutional. *See* Per Curiam op. 5-6.

b. As for Title II(A), which brings statutorily defined "electioneering communications" under the scope of FECA, the district court rejected the plaintiffs' contention that the so-called "express advocacy," 2 U.S.C. § 431(17), or "magic words" standard, *see Buckley*, 424 U.S. at 44 n.52, imposes a constitutional straitjacket that would preclude Congress from legislating in a manner that effectively prevents corporations and unions from spending their general treasury funds to influence federal elections. *See* Kollar-Kotelly op. 363-70 (joined by Judge Leon). And, as the court recognized, an overwhelming record before Congress and the court had established that the express advocacy test had been rendered utterly meaningless — to the point that thousands of advertisements that patently had the purpose and effect of influencing federal elections were not covered by FECA and that even candidates who are indisputably running election advertisements typically do not use these words. *See* Leon op. 89, 251-61; Kollar-Kotelly op. 220-21.

Two judges on the panel nonetheless struck down the primary definition of "electioneering communication" (as defined by 2 U.S.C. § 434(f)(3)(A)(i)), although "for different reasons." Leon op. 73. A different combination of judges upheld the "back-up" definition (2 U.S.C. § 434(f)(3)(A)(ii)), except for striking the last phrase of the definition — "and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate."[20] The court upheld BCRA's disclosure requirements (2 U.S.C. § 434(f)(1)-(4), (6)-(7)) for electioneering communications[21]

[20] Judge Henderson would have struck both definitions of "electioneering communications" in their entirety. *See* Per Curiam op. 8. Judge Kollar-Kotelly would have upheld both definitions in their entirety, although she concurred with respect to Judge Leon's opinion on the alternative definition solely because of Judge Leon's decision striking the primary definition. *See id; see also* Leon op. 93-95 (adopting "saving construction" of "electioneering communications").

[21] "Electioneering communications" again assumes the meaning of the alternative definition, as further defined by Judge Leon. *See supra* note 20.

except as to disclosure of "contracts to disburse" funds for an electioneering communication. *See* Per Curiam op. 120-24. The court upheld BCRA Section 204 (the "Wellstone Amendment"), which applies Title II's "electioneering communication" provisions to certain nonprofit organizations, except insofar as it covered so-called "MCFL organizations." Per Curiam op. 9; *see also FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986) (*MCFL*).

c. Concerning Title II(B), the district court sustained the constitutionality of several coordination provisions and held that the challenges to others are nonjusticiable. *See* Per Curiam op. 9-10, 140-69. The court struck down BCRA Section 213, however, concluding that it is unconstitutional to require parties to "choose between making coordinated expenditures under the Party Expenditures Provision or unlimited independent expenditures on behalf of their [nominated] federal candidates." *Id.* at 10.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This Court has repeatedly held that Congress has sufficient constitutional authority, consistent with the First Amendment, to protect the political process from the corrosive influence of campaign finance practices that threaten our democracy,[22] and to take steps to prevent the circumvention of the Nation's campaign finance laws.[23] In enacting BCRA, Congress adhered to this settled doctrine. It did not attempt to re-invent campaign finance regulation,

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[22] *See Buckley* v. *Valeo*, 424 U.S. 1, 20, 26-28 (1976); *FEC* v. *National Conservative PAC*, 470 U.S. 480, 496-97 (1985); *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440-444 (2001) (*Colorado II*); *see also Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 666-69 (1990); *Nixon* v. *Shrink Missouri Gov't PAC*, 528 U.S. 377, 392-94 (2000) (*Shrink Missouri*).

[23] *Colorado II*, 533 U.S. at 456, 465; *see also FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 210 (1982); *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 198-199 (1981); *Buckley*, 424 U.S. at 35-38.

but rather acted to repair laws that have been in place and have controlled the conduct of federal election activity for decades.

In many respects, a majority of the three-judge district court recognized both the desperate need for congressional action and Congress's broad authority to protect the integrity of the federal political system. Even to the extent the district court struck down provisions of BCRA, it did not take fundamental issue with the record of circumvention or with Congress's authority to enact legislation to prevent future circumvention of the law.

In striking down portions of the soft money rules, the primary definition of "electioneering communication," and the requirement that political parties elect either to make "coordinated" or "independent" expenditures, however, the district court went seriously astray. A majority of the court failed to accord appropriate weight to Congress's substantial experience in matters relating to campaign finance and the years of analysis, hearings, and debate that informed Congress's judgment. The majority also failed to heed this Court's admonition that judges should not "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 210 (1982). Most troublesome, by second guessing the Congress, the court's judgment, if uncorrected, leaves the door open for continued circumvention of the federal campaign finance laws and for continued public cynicism regarding federal elections and officeholders. If a legislative and judicial record has ever justified the adoption of comprehensive, prophylactic measures to prevent actual and apparent corruption in elections and government, it is set forth in this case.

Accordingly, the intervenor appellants respectfully request that the Court note probable jurisdiction with respect to those portions of the district court's decision holding certain provisions of BCRA unconstitutional and set this and related appeals for briefing and argument in accordance with Congress's direction "to expedite to the greatest possible extent the disposition of th[is] action and appeal." BCRA § 403(a)(4).

a. *Title I — Soft Money.* In *Buckley* v. *Valeo*, 424 U.S. at 12-59, this Court held that the First Amendment permits more extensive limitation of political contributions than of political expenditures, and the Court has repeatedly sustained limitations on contributions to candidates, parties, and political committees. *See, e.g., FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 457 (2001) (*Colorado II*); *Nixon* v. *Shrink Missouri Gov't PAC*, 528 U.S. 377, 382 (2000). *Buckley* itself, of course, upheld limits on the amount an individual may contribute to a political party in support of its federal electoral activities. *See* 424 U.S. at 26-36, 38. In addition, federal law has long contained an outright prohibition on contributions by corporations and labor unions to political parties in connection with federal elections, and this Court has never called the constitutionality of those restrictions into doubt. *See Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 661 (1990); *MCFL*, 479 U.S. 256-59; *NRWC*, 459 U.S. at 209-10 (1982); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 788 n.26 (1987); *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 415-16 (1972); *United States* v. *UAW-CIO*, 352 U.S. 567, 578-79 (1957). The Court has emphasized, moreover, that contributions to the political parties implicate precisely the concerns about corruption and the appearance of corruption that are at the heart of *Buckley*'s rationale. *See Colorado II*, 533 U.S. at 450-52.

The Title I soft money rules thus fall squarely within the scope of regulation of contributions permitted under this Court's decisions. Nothing in this Court's precedents supports or even suggests the proposition, embraced by Judge Leon below, that federal limits on contributions may not constitutionally be applied to party expenditures that affect federal elections and also affect state elections.

Any such limitation on Congress's ability to regulate contributions to parties would render the limits upheld in

Buckley meaningless. Indeed, Congress's enactment of Title I of BCRA reflects its judgment that, following *Buckley*, these limits had lost their force. Slowly at first, and then with increased intensity, the national parties, working with their state and local affiliates, found ways to raise and spend massive amounts of soft money from corporations and labor unions to influence federal elections, despite the longstanding federal laws prohibiting corporations and labor unions from contributing to national political parties in connection with a federal election. Similarly, the parties learned how to raise large amounts of money from individuals that far exceeded the amounts of money that individuals were permitted to give to a national political party to influence a federal election. Title I of BCRA is Congress's measured response to that circumvention.

Judge Leon's controlling opinion on the constitutionality of Title I recognizes the potential for circumvention through the use of soft money, but he mistakenly concludes that Congress has the power to regulate only certain uses of money spent by political parties, and lacks the power to regulate from whom and in what amounts all national party money is raised. Leon op. 26-27. Accordingly, he sustained the national party soft money ban only as to "public communications that refer[] to a clearly identified candidate for Federal office . . . and that promote[] or support[] a candidate for that office, or attack[] or oppose[] a candidate for that office." *See* Leon op. 88-95.

Judge Leon's opinion thus ignores the overwhelming evidence of actual or apparent corruption resulting from the *solicitation* and *receipt* of soft money by national parties, regardless of how that money is eventually spent. Given the inseverable link between the national political parties and the federal candidates they support, Judge Leon erred in second-guessing Congress's considered judgment that large contributions to the national parties pose a similar risk of actual or apparent corruption as contributions to the candidates themselves. And, given the overwhelming evidence that soft money contributions to the national parties bring with them special access to federal officeholders and thus the appearance of corruption, Judge Leon's distinction cannot be sustained.

If allowed to stand, moreover, this result is sure to invite continued exploitation of the soft money loophole. A principal national party committee (*i.e.*, the Democratic National Committee or the Republican National Committee) may be precluded from spending these funds on communications that refer to a clearly identified candidate, but left free to raise and use unregulated contributions to continue to influence federal elections by, for example, running "generic" GOTV drives or paying the salaries of party employees who work for federal candidates. Judge Leon also ignores the fact that the vast majority of the activity of the national parties is indisputably directed at federal elections, and that they remain free under BCRA to use funds raised in accordance with federal law on whatever state election activity they do pursue.

The district court further erred in overturning many of the soft money rules that apply to state and local parties. In recent years, state and local parties have spent hundreds of millions of dollars in soft money to influence federal elections. Congress, accordingly, correctly recognized that the soft money loophole could only be closed through comprehensive legislation that included state and local parties. In doing so, Congress took care to limit the law's scope to only those activities that influence federal elections.

Thus, BCRA's state and local party soft money rules apply only to four carefully defined categories of "Federal election activity" — (1) voter registration drives conducted in the last four months before a regularly scheduled federal election; (2) voter identification, GOTV and other generic campaign activity "conducted in connection with an election in which a candidate for Federal office appears on the ballot . . ."; (3) public communications that promote, support, attack or oppose a candidate for federal office; and (4) services of employees who spend more than 25 percent of their time on activities in connection with a Federal election. 2 U.S.C.

§ 431(20)(A). In striking down all but the "public communication" section of this provision, Judge Leon's controlling opinion improperly second-guesses the expert judgment of Congress in its determination to treat these activities as sufficiently federal to require that they be funded with federally regulated contributions. *Cf. NRWC*, 459 U.S. at 209 (holding that "careful legislative adjustment of the federal electoral laws" were entitled to considerable deference by the judiciary). Long before enactment of BCRA, federal regulations recognized that activities of the sort covered in the state and local party soft money rules influence federal elections, and thus required that an allocated share of the cost of such activities be funded with hard money contributions. *See* 11 C.F.R. § 106.5(a)(2) (2002). Congress enacted BCRA, in part, because this allocation system invited and resulted in massive circumvention of federal limits and restrictions. There exists no basis in First Amendment jurisprudence to distinguish between those activities that directly and exclusively influence federal elections, and those that influence federal elections and also influence state elections. In both cases, Congress has the well-settled authority to preclude the use of corporate and union contributions, and large individual contributions, to influence federal elections. *See, e.g., Buckley*, 424 U.S. at 26; *Austin*, 494 U.S. at 661.

As stated in *Shrink Missouri*, "[w]here a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments — at least where that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge." 528 U.S. at 402 (Breyer and Ginsburg, J.J., concurring); *see also NRWC*, 459 U.S. at 210. Members of Congress possess particular expertise about the operation of election laws and the need to close loopholes, because they have secured election under FECA. Whatever limits there may be to the deference to Congress's special expertise, the lines drawn here are eminently sensible, and they should not have been overturned by the court below.

Finally, the district court erred in holding unconstitutional BCRA's prohibition against party committees soliciting funds on behalf of, or donating funds to, tax exempt organizations that engage in activities in connection with federal elections. In enacting this provision, Congress again reacted to a history of abuse of the federal campaign finance laws, and adopted a tailored response to that history.

b. *Title II(A) — Electioneering Communications.* Under settled First Amendment doctrine, corporations and unions may be precluded from using their general treasury funds for the purpose of influencing candidate elections. As this Court held in *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. at 652, 660 (1990), "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas," provide a constitutionally sufficient basis for barring the use of these funds on election activity.

A majority of the district court correctly recognized this established law. It also correctly found that, since 1996, corporations and unions have circumvented FECA's restrictions in this regard with impunity, by running extensive (and expensive) broadcast advertising campaigns with the purpose and effect of influencing federal candidate elections, while simply avoiding the so-called "magic words" of express advocacy, such as "vote for" or "vote against." The district court soundly rejected the plaintiffs' often-repeated refrain that such a "magic words" test is a constitutionally ordained limitation on Congress's power to frame effective federal campaign finance laws. *See* Kollar-Kotelly op. 370-75 (joined by Judge Leon); *see also* Leon op. 74 n.97.

Despite recognizing both the need for action and Congress's authority to act, the district court struck down the primary definition of "electioneering communication" adopted by Congress in Title II(A) of BCRA. Under that definition, corporations and unions are prohibited from using their general treasury funds — as opposed to their segregated or "PAC" funds — to finance broadcast advertisements that refer to a candidate in a federal election; that are targeted to reach that candidate's electorate; and that air in the final weeks before the election. The court erred in invalidating this narrowly-crafted provision.

It bears emphasis that the electioneering communications provision of BCRA does not "ban" any speech. It merely reaffirms and reinvigorates long-settled law by restricting the sources of funding that may be used to influence federal elections. A corporation or union is free to finance advertisements about federal candidates that are aired in the closing weeks of elections, but it must do so with funds voluntarily raised from individuals through a segregated fund.

Moreover, in adopting the primary definition of "electioneering communications," Congress demonstrated close attention to constitutional limitations. In response to concerns over vagueness, it adopted a clear, objective test. In response to concerns over overbreadth, it relied on the experience of its Members and on empirical data to conclude that the primary definition reached no further than necessary to close the sham "issue ad" loophole. The evidence developed in this case bears out Congress's judgment, and shows that the primary definition is not "substantially overbroad," but rather accurately identifies advertisements that are designed to, and do in fact, influence federal elections. *See* Kollar-Kotelly op. 305-36; 427-64.

This evidence, moreover, comports with the common sense principle that advertisements that refer to a federal candidate, that are aired in the immediate run-up to that candidate's election, and that are targeted at the relevant electorate are very likely intended — and almost sure to be viewed — as containing an electioneering message. Given the compelling need for a legislative solution to the sham "issue ad" loophole and the inevitable challenge in crafting legislation in this area, Congress's studied response deserves both respect and deference.

Finally, while a decision sustaining the primary definition would obviate this point, the district court correctly sustained the back-up definition of "electioneering communications," but erred in severing the final clause of that definition. That clause — which requires that the advertisements at issue be "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate" for federal office — does not make the definition impermissibly vague. On the contrary, it provides an assurance that any conceivable doubt regarding application of the back-up definition will be resolved *against* coverage.

c. *Title II(B) — Coordination.* Although the district court was generally correct in its resolution of the various coordination issues, *see* Per Curiam op. 138-69, it erred in one important respect. Section 213 of BCRA amends FECA to provide that, after a political party has chosen its nominee, a party committee may not make coordinated expenditures on behalf of that nominee under 2 U.S.C. § 441a(d) while also purporting to make "independent expenditures" as defined in 2 U.S.C. § 431(17) on behalf of that same nominee during the same election cycle. Section 213 is triggered only by a political party's exercise of what this Court has called the "special privilege" of making large "party coordinated expenditures" under Section 441a(d) — a "special privilege [that] others do not enjoy." *Colorado II,* 533 U.S. at 455. Section 213 does not apply to the coordinated expenditures that may be made by any multicandidate political committee under Section 441a(a)(2). Judge Leon's controlling decision on this point (joined by Judge Kollar-Kotelly, *see* Kollar-Kotelly op. 477) nevertheless concluded that Congress may not condition the Section 441a(d) privilege on a political party's agreement to forgo independent expenditures on behalf of the same nominee during the same election cycle. *See* Leon op. 99-106; *see also* Henderson op. 256-57.

The district court's analysis of this issue is seriously flawed. Among other things, the choice imposed by Section 213 is, analytically and in practical effect, no different from FECA's offer of public financing to those candidates who voluntarily relinquish their First Amendment right to engage in unlimited campaign expenditures, a choice that repeatedly has been sustained. *See, e.g., Buckley*, 424 U.S. at 57 n.65, 95, 99; *Republican National Comm.* v. *FEC*, 487 F. Supp. 280, 283-87 (S.D.N.Y.) (three-judge district court), *aff'd*, 445 U.S. 955 (1980). Just as a candidate who accepts public financing may be required to abide by expenditure limits that would otherwise run afoul of the First Amendment, so too may a political party that takes advantage of the special coordination provisions in Section 441a(d) — which in 2000 allowed each party to spend up to $1.6 million in coordination with each of its senatorial nominees[24] — be required to abide by expenditure restrictions that might otherwise raise First Amendment concerns. If a political party does not believe that limiting independent expenditures for one of its nominees is in its best interests, it is free to decline the special coordination privilege, play by the same coordination rules as all other multicandidate political committees, and seek to engage in unlimited independent expenditures.

This choice bears none of the earmarks of an unconstitutional condition — there is no attempt at viewpoint-based discrimination, no effort to restrict a generally available benefit, and a reasonable nexus between the special benefit being sought and the right being given up. In this case, Congress reasonably concluded that a

[24] Under the provisions of Section 441a(c)-(d), the 2000 Senate coordinated expenditure limits ranged from $67,560 up to $1,636,438 per candidate, and the 2000 House limits ranged from $33,780 to $67,560. *See Colorado II*, 533 U.S. at 439 n.3. These limits, moreover, applied separately to the state and national parties, thus, in effect, permitting twice these amounts to be spent by a political party on behalf of a candidate.

political party should not be allowed to engage in large amounts of coordinated spending with its nominee — something no other person or entity may do — while simultaneously claiming to be entirely independent from that same nominee. Claims of simultaneous independence and coordination in these circumstances are tenuous at best, create a strong appearance of impropriety, and are very difficult, if not impossible, to police and resolve. *See Colorado II*, 533 U.S. at 462 (Congress may account for "the practical difficulty of identifying and directly combating circumvention under actual political conditions.").

* * *

Although the district court properly upheld many of the most important portions of BCRA, the errors described above led the district court to reject the considered judgment of the political Branches, and to strike down significant provisions of the most important federal campaign finance legislation in a generation. BCRA's reforms were designed principally to stop evasion and to restore the FECA regime so that it could operate more or less as was envisioned at the time of *Buckley*. To the extent the district court's decision strikes portions of BCRA, it undermines the government's legitimate and justified attempts through BCRA to stop evasion and to preserve the integrity of the federal political process. The correctness of the district court's constitutional analysis is a federal question of unquestionable significance.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

ROGER M. WITTEN
WILMER, CUTLER &
PICKERING
399 Park Avenue
New York, NY 10022

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
ERIC J. MOGILNICKI
EDWARD C. DUMONT
PAUL R.Q. WOLFSON
WILMER, CUTLER &
PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

MAY 2003

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 02-582
(CKK, KLH, RJL)

SENATOR MITCH MCCONNELL, *ET AL.*, PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, *ET AL.*,
DEFENDANTS

AND

SENATOR JOHN MCCAIN, SENATOR RUSSELL FEINGOLD, REPRESENTATIVE CHRISTOPHER SHAYS, REPRESENTATIVE MARTIN MEEHAN, SENATOR OLYMPIA SNOWE, AND SENATOR JAMES JEFFORDS, DEFENDANT INTERVENORS

**On Appeal from the
United States District Court
for the District of Columbia**

[Filed: May 5, 2003]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

In accordance with Section 403(a)(3) of the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA") and Rule 18.1 of the Rules of the Supreme Court of the United States, intervening defendants Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords hereby appeal to the Supreme Court of the United States from so much of the judgment entered by this Court on May 2, 2003, as declares unconstitutional or enjoins the enforcement of any provision of BCRA.

Dated this 5th day of May, 2003.

Respectfully submitted,

ROGER M. WITTEN
(D.C. Bar No. 163261)
SETH P. WAXMAN
(D.C. Bar No. 257337)
RANDOLPH D. MOSS
(D.C. Bar No. 417749)
WILMER, CUTLER &
PICKERING
2445 M Street, N.W.
Washington, D.C.
20037-1420
(202) 663-6000

DAVID J. HARTH
CHARLES G. CURTIS, JR.
HELLER EHRMAN WHITE & MCAULIFFE LLP
One East Main Street, Suite 201
Madison, WI 53703

BRADLEY S. PHILLIPS
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071

PROF. BURT NEUBORNE
FREDERICK A.O.SCHWARZ, JR.
BRENNAN CENTER FOR JUSTICE
161 Avenue of the Americas, 12th Floor
New York, NY 10013

FRED WERTHEIMER
DEMOCRACY 21
1825 Eye Street, N.W., Suite 400
Washington, DC 20006

TREVOR POTTER
THE CAMPAIGN AND MEDIA LEGAL CENTER
1101 Connecticut Ave., N.W., Suite 330
Washington, DC 20036

Counsel for the Defendant-Intervenors