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04-5352

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHRISTOPHER SHAYS and MARTIN MEEHAN,

***Plaintiffs-Appellees*,**

v.

FEDERAL ELECTION COMMISSION,

***Defendant-Appellant*.**

Appeal From The United States District Court For The District Of Columbia
Civil Action No. 02-1984 (CKK)

BRIEF AMICI CURIAE FOR SENATORS JOHN McCAIN AND RUSSELL FEINGOLD SUPPORTING APPELLEES SHAYS AND MEEHAN AND URGING AFFIRMANCE

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CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Court's Rule 28(a)(1), John McCain and Russell Feingold, *amici curiae* in the above-captioned case, submit this Certificate of Counsel. Pursuant to Rule 29 of this Court, *amici* McCain and Feingold timely filed in this Court a written representation that all parties to this appeal had consented to their participation.

(A) Parties and *Amici*. All parties, intervenors, and *amici* appearing before the District Court and in this Court are listed in the brief for the Federal Election Commission.

(B) Rulings Under Review. References to the ruling at issue appear in the brief for the Federal Election Commission.

(C) Related Cases. This case has not previously been before this Court or a court other than the District Court below. *Amici* are not aware of any "related cases," as that term is defined in D.C. Cir. R. 28(a)(1)(C), currently pending in this Court or any other Court.

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STATEMENT OF INTEREST

Amicus John McCain is currently a U.S. Senator, representing the state of Arizona. Senator McCain was first elected to the U.S. Senate in November of 1986 and was re-elected in 1992, 1998, and 2004. *Amicus* Russell D. Feingold also is presently a U.S. Senator, representing the state of Wisconsin. Senator Feingold was first elected to the U.S. Senate in November of 1992, and was re-elected in 1998 and 2004.

Senators McCain and Feingold were the principal United States Senate sponsors of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). They worked together over seven years to secure passage of BCRA to rid politics of the corrupting influence of soft money and enhance the public's confidence in the workings of its governing institutions. They seek leave to file this brief to present their views to the Court on the importance of this case to the achievement of the purposes of BCRA.

Senators McCain and Feingold submitted a brief below as *amici curiae* strongly supporting the challenge to the Federal Election Commission ("FEC" or "Commission") regulations in this case. Those regulations deny the American people the full measure of protection from actual and apparent political corruption to which they are entitled under law and negatively affect those who seek election to federal office. *Amici* Senators McCain and Feingold respectfully submit that the FEC's regulations at issue in this case unlawfully preserve parts of the soft money system that were in fact banished by Congress in BCRA. Senators McCain and Feingold, therefore, submit that the lower court's ruling invalidating the six (6) regulations that are the subject of this appeal was correct, and that the district court's judgment should be affirmed.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

> Now and then the Supreme Court issues a decision that cries out to the public, "We don't know what we're doing!" *McConnell* is such a decision.[1]

This statement, in a speech delivered by then-Federal Election Commission Chairman Bradley A. Smith a month after the U.S. Supreme Court's decision in *McConnell v. FEC*,[2] illustrates the disdain with which the FEC has regarded the Bipartisan Campaign Reform Act of 2002 ("BCRA").[3] *Amici* submit that the FEC's disdain for BCRA was also reflected in the regulations adopted by the agency to implement that statute—which the Supreme Court correctly observed was the most recent effort by the federal government "designed to 'purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions.'" *McConnell v. FEC*, 540 U.S. at 115 (quoting *United States v. Automobile Workers*, 352 U.S. 567, 572 (1957)).

Congress enacted Titles I and II of BCRA to fulfill two major purposes: 1) to address concerns that political parties, candidates, and officeholders were increasingly reliant on and subject to the use of soft money and so-called "issue advertisements" to

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[1] *See* Bradley A. Smith, Chairman, Federal Election Commission, Remarks to American Conference Institute, Washington, D.C. (Jan. 29, 2004), *available at* http://www.fec.gov/members/smith/smithspeech03.pdf.

[2] *McConnell v. FEC*, 540 U.S. 93, 124 S.Ct. 619 (2003).

[3] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 161 Stat. 81 (codified as amended in 2 U.S.C. § 431 *et. seq*. and in scattered sections of 47 U.S.C.). FEC Commissioners also spoke out against BCRA in speeches and articles at the time of congressional consideration of this legislation, declaring it ill-advised and unconstitutional. *See* Bradley A. Smith, *Enron Didn't Corrupt Washington*, Wall St. J., Feb. 12, 2002, *available at* 2002 WL-WSJ 3385685; Bradley A. Smith, *McCain-Feingold Will Hurt The Little Guy*, Wall St. J., Mar. 20, 2001, *available at* 2001 WL-WSJ 2857719; Bradley A. Smith, *Block Those Limits*, Newsday, Mar. 18, 2001, *available at* 2001 WL 92221; David M. Mason, *Campaign Finance Reform: Broad, Vague and Unenforceable*, Lecture to the Heritage Foundation (Feb. 13, 2002), *available at* http://www.heritage.org/Research/GovernmentReform/HL732.cfm.

influence federal elections; and 2) to prohibit corporations and labor unions from using their general treasury funds that are aimed at, or will have an effect on, federal election outcomes. Instead of issuing regulations designed to advance these congressional mandates, however, the FEC continued its long and sad history of creating loopholes and otherwise subverting the purposes of federal campaign finance laws. Just as the unraveling of federal campaign finance restraints preceding the enactment of BCRA was largely caused by the FEC's failure to enforce congressional restraints on the use of soft money, so too the FEC's post-BCRA rulemakings produced regulations at odds with the text and intent of the campaign finance laws that Congress enacted. Simply put, the FEC has once again proven itself incapable of breaking with its tradition of, in the words of the *McConnell* decision, "subvert[ing]" federal campaign finance law.[4]

The purpose of this *amici curiae* brief is to underscore the importance of the case pending before this Court, to explain how the FEC's unlawful regulations undermine the fundamentally important purposes served by BCRA, and to explain how those regulations go far beyond anything that Congress ever intended or envisioned. The loopholes created by the regulations may seem small and hyper-technical to some. But they are neither. In fact, the time-proven understanding that "'candidates, donors, and parties test the limits of the current law'"[5] suggests that any loophole, no matter the size, will be exploited and lead to consequences directly at odds with the purposes of BCRA. Past experience suggests a further threat: that the unlawful loopholes adopted by the FEC and their faulty

[4] *McConnell, supra,* 540 U.S. at 142 ("§323(a) . . . simply effects a return to the scheme that was approved in *Buckley* and that was *subverted* by the creation of the FEC's allocation regime") (emphasis added).
[5] *Id.* at 144 (citations omitted).

analytical underpinnings will be expanded to broader contexts, undermining federal campaign finance restraints even further.[6]

ARGUMENT

I. The FEC's BCRA Regulations Unlawfully Preserve Parts of the Soft Money System and Undermine the Purposes of the Act.

"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." *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 390 (2000). With these words, the U.S. Supreme Court posed an implicit challenge to Congress and the President. Though appearing in a decision upholding limits on contributions to candidates for state office, they spoke sternly to the prevailing state of federal campaign finance regulation.

Indeed, by 2000, federal campaign finance restraints enacted over the course of a century,[7] in the wake of scandals demonstrating the corrupting influence of big money in politics, had been thoroughly unraveled by a major loophole: soft money. On account of this loophole, the use of statutorily forbidden corporate and labor treasury funds and

[6] *Amici* agree with appellees that the facial challenges to the regulations at issue in this case are justiciable, and add only that the Commission is clearly wrong in arguing that the proper method for challenging those regulations is through an enforcement action under FECA rather than a facial challenge under the APA. This Court has held squarely that "FECA has no provisions governing judicial review of regulations, so an action challenging its implementing regulations should be brought under the judicial review provisions of the" APA. *Perot v. FEC*, 97 F.3d 553, 560-61 (D.C. Cir. 1996) (per curiam).

[7] *See* 2 U.S.C.A. § 441b(a) (West Supp. 2001) (banning contributions and expenditures of corporate and union treasury funds in connection with federal elections); 2 U.S.C.A. § 441a(a)(1) (West Supp. 2001) (limiting "contributions" by individuals to federal candidates, national party committees and other political committees); 2 U.S.C.A. § 431(8)(A)(i) (West Supp. 2001) (defining a "contribution" as a deposit of anything of value made "for the purpose of influencing any election for Federal office").

unlimited political donations from individuals had become commonplace in federal campaigns.[8]

As political parties and elected officials aggressively pursued larger and larger soft money donations to finance federal campaigns – with law, as a practical matter, supplying no barrier to their quest – the American people increasingly perceived soft money as influencing their governing institutions, and rightly grew disgusted. Indeed, any voter with an understanding of human nature and an awareness of the vast amounts of soft money given and spent to influence federal elections could hardly be blamed for believing that federal officeholders were unduly influenced by their benefactors' generosity.

Then-Senator Fred Thompson (R-TN) explained the problem this way:

> When the very people who have legislation before you are coming to you with greater and greater amounts of money for your political campaign, that creates a potential conflict of interest that we simply do not need. It does not look good. The American people think, the average Joe on the street thinks, that with that much money being paid to that few people, they are expecting something for it.[9]

In a moment of conscience and courage, Congress decided in 2002 that the American people deserved better than campaign finance limits that existed only on paper. It enacted BCRA to restore the regulatory fabric that had been repeatedly torn by the soft money loophole, with a goal no less important than enhancing the public's confidence in its mechanisms of governance.

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[8] *See* 540 U.S. at 122-132; Report of Thomas E. Mann, *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (No. 02-582), *aff'd in part and rev'd in part*, 540 U.S. 93, 124 S.Ct. 619 (2003).

[9] *See* 148 Cong. Rec. S2110 (daily ed. Mar. 20, 2002) (statement of Sen. Thompson).

BCRA was designed to restore force and meaning to longstanding federal campaign finance restraints and prevent their circumvention. Accordingly, the statute:

- bans national party committees, officers, or agents acting on behalf of national committees, and entities "directly or indirectly established, financed, maintained, or controlled" by national committees from all forms of soliciting, receiving, directing, transferring, or spending soft money. *See* 2 U.S.C. § 441i(a);

- prohibits state and local parties from spending soft money on any form of the statutorily defined "Federal election activit[ies]," with a narrow exception available only upon strict compliance with all the safeguards of the "Levin Amendment." *See* 2 U.S.C. §§ 441i(b) & 431(20)(A);

- proscribes all solicitation, receipt, direction, transfer, and disbursement of soft money in connection with elections by federal candidates and officeholders. *See* 2 U.S.C. § 441i(e);

- requires the FEC to issue regulations which fully implement the statutory standard for coordination. See Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, §§ 214(b) & (c), 116 Stat. 81. 94-95; and

- prohibits expenditures of corporate and union treasury funds on "electioneering communication[s]." *See* 2 U.S.C. §§ 441b(a), (b)(2) & (c).

These and other provisions of BCRA clearly required a significant break from past practices and fundamentally changed the ways federal campaigns were to be financed. Indeed, they were well-understood as doing so. As then-House Democratic Whip Nancy Pelosi (D-CA) stated during legislative debate on BCRA:

> Today, we have an opportunity to achieve a great victory for the American people, to bring democracy back to them . . . *We have an opportunity to create a new architecture of political fund-raising in our country which devolves to the grassroots, to the people from which power comes and where it belongs*.[10]

[10] *See* 148 Cong. Rec. H347 (daily ed. Feb. 13, 2003) (statement of Rep. Pelosi) (emphasis added). Republican Congressman Zack Wamp (R-TN) likewise remarked during House debate, "Do not be afraid of giving up soft money . . . *we should not be afraid to go into a new era and to leave the old behind*. *See id* at H405 (daily ed. Feb. 13, 2003) (statement of Rep. Wamp) (emphasis added). *See also id.* at H404 (daily ed. Feb. 13, 2002) (statement of Rep. Menendez) ("Vote for Shays-Meehan . . . and let us have a new day dawn in our democracy, one that is a democracy in which the individual citizens' right to vote and the power of their vote will ultimately determine fate of policy in this country, not hundreds of millions of dollars of special interest moneys"); *id.* at H402 (daily ed. Feb. 13, 2002) (statement of Rep. DeLauro) ("This is a historic moment. We have the opportunity to end the era of unregulated soft money"); *id.* at

Indeed, the seven years time and extraordinary legislative efforts[11] it took to secure enactment of BCRA demonstrate that this legislation represents fundamental change. Had defenders of the *status quo* considered BCRA conducive to the continuance of soft money in federal campaigns, they would hardly have fought its passage as vigorously as they did.

In *McConnell v. FEC*, the U.S. Supreme Court firmly validated Congress' work – upholding virtually all of BCRA, confirming the concerns that motivated its enactment, recognizing its careful tailoring, and establishing a wide berth for the permissible operation of federal campaign finance restraints under our Constitution.

Notably, the Court came to the same conclusions as Congress about the serious threat posed by soft money to the integrity of our political institutions. Answering the core question of "whether large *soft-money* contributions to national party committees have a corrupting influence or give rise to the appearance of corruption," the Court replied: "[b]oth common sense and the ample record in these cases confirm Congress' belief that they do." 540 U.S. at 145 (emphasis in original). It indicated that "[t]he

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H351 (daily ed. Feb. 13, 2002) (statement of Rep. Kind) ("Right now we stand on the brink of historic reform . . . that will put the power of democracy back in the hands of ordinary Americans . . . that will force politicians and political parties to get back to the grassroots level").

[11] Although the House passed versions of BCRA in 1998 and 1999, filibusters foiled similar success in the Senate until April of 2001. *See* Alison Mitchell, *Campaign Finance Bill Passes in Senate, 59-41*, N.Y. Times, Apr. 3, 2001, at A1. Following the Senate's passage of the legislation in April of 2001, its proponents encountered procedural obstacles in the House. The bill was slated for debate on the House floor in July of 2001. However, opponents of the legislation proposed bizarre and unfair procedures for its floor consideration. A majority of the House then voted down those proposed procedures. *See* 147 Cong. Rec. H3980-90 (daily ed. Jul. 12, 2001). In turn, the House Leadership refused to reschedule the legislation for consideration. Proponents of BCRA were accordingly forced to take the extraordinary step of filing a "discharge petition" and seeking the required 218 signatures of House Members. They secured the 218th signature in January of 2002. *See* Glen Johnson, *Pivotal Moments United Coalition Despite Pressure*, Boston Globe, Feb. 15, 2002, at A34. In February of 2002, the House finally considered and approved BCRA, and just over one month later, the Senate enacted the legislation which had passed the House (thus avoiding any need for a "conference committee"). *See* 148 Cong. Rec. H465-66 (daily ed. Feb. 13, 2002); 148 Cong. Rec. S2160-61 (daily ed. Mar. 20, 2002).

evidence connects soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation." *Id.* at 150. The Court also saw the same corruption concerns underlying solicitations of soft money by national party committees: "[a] national committee is likely to respond favorably to a donation made at its request regardless of whether the recipient is the committee itself or another entity." *Id.* at 157-58.

Moreover, the Court agreed with Congress that "the corrupting influence of soft money does not insinuate itself into the political process solely through national party committees" – and, in particular, that "state committees function as an alternate avenue for precisely the same corrupting forces." *Id.* at 164. It added that "[l]arge soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder." *Id.* at 182.[12]

And importantly, the Court reaffirmed that "combating the appearance or perception of corruption engendered by large campaign contributions" is "of 'almost equal' importance" to preventing cash-for-votes exchanges. *Id*. at 143-44. When Congress completed its work on BCRA in March of 2002, the FEC was urged to "carry out the will of Congress, to implement and enforce the law, not to undermine it."[13] Unfortunately, the agency did not heed this call for it to fulfill its statutory charge.

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[12] Furthermore, after noting the absence of arguments in the case contesting that the government had a "compelling" interest in prohibiting independent expenditures of corporate and union treasury funds for express advocacy, the Court upheld the extension of such restrictions to "electioneering communications" – dismissing allegations of overbreadth and underinclusiveness. *McConnell, supra*, 540 U.S. at 203-207.

[13] *See* 148 Cong. Rec. S2105 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold).

The district court struck down 15 of 19 FEC regulations implementing BCRA, and the FEC has chosen to appeal that decision with respect to only six (6) regulations. The record below shows that the FEC contravened the text and intent of BCRA and undermined its fundamentally important purposes, by adopting regulations that unlawfully preserve parts of the banished "old era" and maintain a role for soft money in federal elections. For example, one of the regulations that was struck down below (and which the FEC has appealed to this Court) carved out wide swaths for outside groups to air soft money campaign ads which were blatantly coordinated with federal candidates.[14] Similarly, another regulation (struck down below but not appealed by the Commission) would have allowed state parties to pay part of the costs of phone banks encouraging core party voters to "get out and vote" with unlimited soft money donations (on the pretense that this is not "get-out-the-vote activity").[15] The FEC's departure from the command of BCRA was so pronounced that a Commissioner who had voted to implement the Act in accordance with its text and intent said to his colleagues responsible for the unlawful regulations which were adopted, "*You have so tortured this law, it's beyond silly.*"[16]

The FEC's unlawful regulations should not be allowed to stand as the final word on BCRA's implementation. Neither this regulatory agency nor any other has the authority to rewrite Congress' work; yet that is precisely what the FEC attempted to do here.

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[14] *See* 11 C.F.R. § 109.21(c) (excluding non-express advocacy public communications from treatment as a "coordinated communication" if publicly distributed or disseminated more than 120 days before a federal election).

[15] *See* 11 C.F.R. § 100.24(a)(3) (failing to include *encouraging* people to vote in the regulatory definition of "[g]et-out-the-vote activity").

[16] *See* Thomas B. Edsall, *New Routes to Channel 'Soft Money' On Horizon*, Wash. Post, Jun. 23, 2002, at A07 (emphasis added) (quoting Commissioner Thomas).

II. This Case Is of Critical Importance to Protecting the Integrity of Federal Campaign Finance Law and Ensuring Its Fundamentally Important Purposes Are Served.

It is especially important that the FEC's unlawful BCRA regulations be overturned. At stake is whether the American people will receive the full measure of protection from actual and apparent political corruption provided by the laws enacted by their elected representatives. The public is surely entitled to that measure of protection: the law is Congress's covenant with the American people – here concerning a matter fundamental to the integrity of their governing institutions – and it must be honored in its entirety.

If the FEC's unlawful regulations are allowed to stand, the public will not receive what it is due. The fundamentally important purposes of BCRA will be undermined – inevitably and significantly, and the seeds of future enforcement problems will be sowed.

A. If Permitted to Stand, the Unlawful Loopholes Opened by the FEC's BCRA Regulations Will Be Severely Exploited, Undermining the Purposes of the Act.

The Supreme Court observed in *McConnell* that the "entire history of campaign finance regulation" teaches "the hard lesson of circumvention." 540 U.S. at 165. The Court also noted that "'candidates, donors, and parties test the limits of the current law.'" *Id.* at 144 (citations omitted). The perceived rewards for testing the law's limits are magnified under current political conditions, in which control of the presidency, Senate, or House of Representatives (or some combination thereof) is seemingly up for grabs every other November. Given the history and high stakes of political campaigns, the unlawful loopholes opened by the FEC's BCRA regulations will inevitably be exploited.

For example, as previously mentioned, the FEC's regulations permit federal candidates to sit down with outside spenders and openly craft soft money advertisements that sing their praises or trash their opponents – and those ads can then be aired to their electorates in wide swaths of their election years.[17] Such conduct, condoned by the FEC's regulations, will surely fuel public cynicism about elected officials and the workings of our governing institutions.

In *Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976), the Supreme Court considered "prearranged or coordinated expenditures" to be subject to campaign contribution limits, noting that this application of the law served to "prevent attempts to circumvent the Act." In unlawfully licensing circumvention of a vital anti-circumvention measure, the FEC has resurrected precisely the danger perceived by the *Buckley* Court in "prearranged or coordinated expenditures": "that [such] expenditures will be given as a quid pro quo for improper commitments from the candidate." *Buckley, supra*, at 47.

B. If Permitted To Stand, the Unlawful Loopholes Opened by the FEC's BCRA Regulations Will Be a Foundation for Broader Unraveling of Federal Campaign Finance Law.

Years of experience with campaign finance regulation suggest a further threat to the proper enforcement of federal election law if the FEC's unlawful BCRA regulations are upheld. These regulations could very well serve as a foundation for a repeat of the downward regulatory spiral which characterized the rise of the soft money system in the first place. Indeed, the wide breadth of the FEC's wrongdoing in its BCRA rulemakings provides multiple departure points for future mischief. Moreover, some of the faulty

[17] *See* 11 C.F.R. § 109.21(c) (excluding non-express advocacy public communications from treatment as a "coordinated communication" if publicly distributed or disseminated more than 120 days before a federal election).

legal analyses employed by the Commission are so sweeping that they will inevitably be imported to new contexts, undermining other aspects of federal campaign finance law.

Above all, the past cannot be ignored. The rise of the soft money system illustrates the dangerous phenomenon of "loophole-creep." That history stands as a serious cautionary tale as to the potential consequences of allowing the FEC's unlawful BCRA regulations to remain in force.

In a 1978 Advisory Opinion, the FEC opened the door to soft money in federal elections, by permitting state and local parties to spend an "allocated" mixture of hard and soft money on voter drive activities affecting both federal and state elections.[18] This initial opening for soft money in federal campaigns was to grow into a gaping loophole which thoroughly unraveled federal campaign finance law. Soon after its adoption, the 1978 ruling became a basis for allowing the receipt of unlimited donations by *national* parties.[19] Then, in the late 1980's and early 1990's, "allocation" migrated to party payments for generic television advertising aimed at reinforcing the campaign themes of their presidential nominees.[20]

Finally, in the 1996 presidential elections, the "allocation" theory – developed to account for a perceived dual focus of certain campaign activities on federal and state elections – was employed by the political parties in financing television advertising

[18] *See* FEC Advisory Op. 1978-10 (Aug. 29, 1978).

[19] *See* FEC Advisory Op. 1979-17 (Jul. 16, 1979).

[20] *See* 147 Cong. Rec. S3254 (daily ed. Apr. 2, 2001) (statement of Sen. Thompson) (citing Anthony Corrado, *The Origins and Growth of Party Soft Money Finance* (Mar. 30, 2001)).

promoting or attacking *only* presidential candidates (so long as the parties made the easy adjustment of avoiding express advocacy in this advertising).[21]

With the political parties able to finance roughly two-thirds of the costs of their presidential campaign advertisements with soft money, national party soft money fundraising exploded.[22] Moreover, the ability of the parties to use soft money for federal candidate-specific campaign advertisements paved the way for soft money "joint fundraising committees," which were little more than a device for Senate candidates to raise soft money and launder it through the party structure to benefit their own campaigns.[23]

Neither statutory nor constitutional law compelled these developments. As the Supreme Court made clear in *McConnell*, the soft money system for parties and candidates was the product of unwarranted legal interpretations by the FEC. In the Court's view, the FEC's "allocation" theory was an unlawful loophole run amok, which undermined the integrity of our political system. Notably, the Court described BCRA's national party soft money ban as "simply effect[ing] a return to the scheme that was approved in *Buckley* and that was *subverted by the creation of the FEC's allocation regime*, which permitted the political parties to fund federal electioneering efforts with a combination of hard and soft money." *McConnell, supra*, 540 U.S. at 142 (emphasis added). The Court also broadly tied the FEC's "allocation regime" to harmful consequences for our political system:

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[21] *See id.* at S3254-55 (daily ed. Apr. 2, 2001).

[22] *See id*. (daily ed. Apr. 2, 2001). *See also McConnell*, *supra* at 124 ("As the permissible uses of soft money expanded, the amount of soft money raised and spent by the national political parties increased exponentially").

[23] *See* Peter H. Stone, *Scrambling for Dollars*, Nat'l J., Feb. 23, 2002, *available at* 2002 WL 7094739.

> The question for present purposes is whether large *soft-money* contributions to national party committees have a corrupting influence or give rise to the appearance of corruption. Both common sense and the ample record in these cases confirm Congress' belief that they do . . . [T]he FEC's allocation regime has invited widespread circumvention of FECA's limits on contributions to parties for the purpose of influencing federal elections. Under this system, corporate, union, and wealthy individual donors have been free to contribute substantial sums of soft money to the national parties, which the parties can spend for the specific purpose of influencing a particular candidate's federal election. It is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude.

McConnell, supra, at 145.

Even Chief Justice Rehnquist, dissenting in *McConnell*, evidently saw shortcomings in the FEC's implementation of federal campaign finance law preceding BCRA. The Chief Justice observed that "[m]any of the abuses described by the Court involve donations that were made for the 'purpose of influencing a federal election,' *and thus are already regulated*." 540 U.S. at 357 (emphasis added) (citations omitted). Accordingly, he indicated that "Congress could have sought to have the existing restrictions enforced" instead of enacting BCRA – a proposal that certainly does not reflect well on the agency *charged with enforcing* "the existing restrictions." *Id*.

The story of the soft money system casts the FEC's unlawful BCRA regulations and their faulty analytical underpinnings not merely as today's pressing problems, but also harbingers of greater harm to come. Hard experience teaches how unlawful loopholes can metastasize, at grave cost to the integrity of our political system.

Fortunately, that experience need not be repeated. The FEC's unlawful BCRA regulations have been challenged relatively early in their lifespan. Just as BCRA sought a "new era" for campaign fundraising practices, this case presents the opportunity for a

"new era" in enforcement of the laws on the books. Unlawful loopholes must be nipped in the bud, before they take root.

CONCLUSION

Amici respectfully urge the Court to affirm the decision below striking down six (6) regulations promulgated by the FEC, for those regulations are contrary to the text and intent of BCRA. The district court correctly observed that "[t]he public is owed a campaign finance system whose contours reflect the democratic will as outlined in the expressed intent and explicit legislation enacted by their elected representatives—the Congress." JA 216. The American people are entitled to the full measure of protection from actual and apparent political corruption provided by their laws and a decision from this Court upholding the decision below will give voters the protection they deserve.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH Fed. R. App. P. 32(a)(7)

As required by Fed. R. App. P .32(a)(7)(C)(i), I hereby certify that the foregoing brief complies with the length requirements of Fed. R. App. P. 32(a)(7)(B). I have relied upon the word count feature of the Microsoft Word software application; the brief contains 4712 words.

I further certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A), as modified by D.C. Cir. R.32(a)(1), and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionately space typeface using Microsoft Word 2000 in Times New Roman font size 12.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2005, a copy of the foregoing Brief *Amici Curiae* for Senators John McCain and Russell Feingold was served by regular mail, first-class, postage prepaid, and addressed as follows:

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