INTRODUCTION

At stake in this litigation is nothing less than the future of political speech in our Nation. The Bipartisan Campaign Reform Act of 2002 (BCRA),[1] which takes effect today, constitutes the most comprehensive campaign finance legislation in over three decades, and the most threatening frontal assault on core First Amendment values in a generation. The law suppresses speech about political issues — speech indisputably at the heart of the First Amendment — and fundamentally undermines the role of national and state political parties in our electoral system. In doing so, it also squarely attacks the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976).

This consolidated brief is joined by Senator Mitch McConnell and plaintiffs in nine of the eleven currently pending lawsuits challenging the constitutionality of BCRA.[2] Understandably

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[1] Pub. L. No. 107-155, 116 Stat. 81 (2002).

[2] Those nine lawsuits are No. 02-582, *McConnell v. FEC*; No. 02-581, *National Rifle Ass'n v. FEC*; No. 02-633, *Echols v. FEC*; No. 02-751, *Chamber of Commerce v. FEC*; No. 02-753, *National Ass'n of Broadcasters v. FEC*; No. 02-754, *AFL-CIO v. FEC*; No. 02-874, *Republican Nat'l Committee v. FEC*; No. 02-875, *California Democratic Party v. FEC*; and No. 02-881, *Thompson v. FEC*. Separate briefs are being filed today by the plaintiffs in No. 02-781, *Paul v. FEC*, and No. 02-877, *Adams v. FEC*. As their complaints reflect, the plaintiffs on this consolidated brief do not all challenge each of the provisions at issue in the case or adopt the same legal theories. The ACLU, for example, does not join Senator McConnell, the Republican National Committee, and the California political parties in challenging Title I on federalism grounds. *See* Second Amended Complaint of McConnell Pltfs., May 7, 2002, ¶ 42, at 33-34. Pursuant to this Court's briefing orders of October 15, 2002, and October 29, 2002, this brief also includes separate submissions by the Republican National Committee plaintiffs, the California party plaintiffs, and the Thompson plaintiffs on Title I of the BCRA; the National Rifle Association plaintiffs, the ACLU, the Chamber of Commerce plaintiffs, the AFL-CIO plaintiffs, the Republican National Committee plaintiffs, and the California party plaintiffs on Title II; and the Republican National Committee plaintiffs, the California party plaintiffs, and the Thompson plaintiffs on Title III; and the AFL-CIO plaintiffs on Title V.

enough, the extraordinary collection of plaintiffs in these actions differ with each other on many issues. The California Democratic and Republican parties, for example, are used to disagreeing with each other on the widest range of issues, yet they agree that Title I of BCRA is unconstitutional. The American Civil Liberties Union (ACLU) frequently takes different positions on a range of civil-liberties issues from those of the National Rifle Association (NRA), yet they agree that the key provisions of Title II of BCRA are unconstitutional. The eclectic collection of plaintiffs in these actions — unions and corporations, competing political parties, starkly divergent public interest groups, individual officeholders and citizens — share little except a concern that their voices will not be heard in the democratic process if BCRA is upheld.

Despite differences among the challengers, there are common aspects in each of their challenges. Each section of BCRA at issue exhibits a total absence of proportionality — such little narrow tailoring engaged in, such slight attention paid to First Amendment interests, such utter contempt shown for governing Supreme Court precedent. To take but three examples:

Title I goes so far afield from core notions of federalism and the First Amendment as to bar the California Democratic Party from using funds lawfully raised under California law to pay for a radio advertisement urging California voters to reject a California initiative relating to affirmative action.

Title II deviates so far from First Amendment principles as to criminalize advertisements by the ACLU criticizing the Speaker of the House for not permitting a vote on the Employment Non-Discrimination Act, by the National Right to Life Committee denouncing partial-birth abortion and encouraging viewers to call their Senators to urge them to vote to ban that procedure, and by a term-limits group that urges a candidate to sign a pledge not to seek more

than two terms in office.

Title III sweeps so far beyond what is permitted under the First Amendment that it would ban a child from contributing twenty dollars of his own money to a congressional campaign being waged by his Sunday school teacher (while, irrationally, allowing that same minor to give $5,000 to a political action committee), and punish candidates who dare to criticize (or even refer to) other candidates for federal office in an advertisement by forcing them either to pay a higher rate or to include additional speech in the ad.

We could go on, but the basic point is straightforward. Some of these areas are ones in which Congress has power to act, some not. But in none of these areas is Congress free simply to ignore competing constitutional interests, to disparage governing Supreme Court case law, and to disregard well-established and deeply rooted constitutional limitations. Nor is Congress free, in an effort to avoid criticism of itself and its members, to enact a statute plainly designed to protect incumbents who had concluded — in Senator McCain's words — that they had "lost control of [their] campaigns." McCain dep. 100.

Senator McCain and the other sponsors of BCRA seem unwilling to accept that, in our system of free expression, it is not for them to decide what is said about political issues and the views of candidates for political office. Yet the single driving principle behind BCRA seems to be that, in the name of closing perceived or anticipated "loopholes," all normal constitutional considerations must give way or be ignored altogether. Never before has the First Amendment been treated as some sort of impediment to progress, with speech about issues and candidates viewed as some sort of threat to public health requiring quarantine lest too much of it be permitted. Never before has Congress wielded such a legislative sledgehammer when essential

speech and federalism issues are at stake. No such law, dating from the Alien and Sedition Acts, has ever been deemed constitutional.

SUMMARY OF ARGUMENT

If upheld by this Court, BCRA will work a fundamental reordering of the American political process. The unique and longstanding role of political parties in our democracy will be compromised. BCRA will sever the ties between national and state and local party committees and starve the latter financially through a series of provisions that usurp state campaign finance laws and effectively nationalize rules applicable to state and local elections. Non-party interest groups might be thought to be the winners in BCRA's brave new world, but they, in turn, face gag rules and blackout periods during which their speech will be criminalized. The only true winners will be incumbent officeholders, who will have regained "control" of their campaigns and supposedly "leveled" the playing field, so that winning future elections and retaining their positions will have been made that much easier.

Title I of BCRA effectively outlaws the use of what its sponsors pejoratively call "soft money": that is, money which has not previously been subject to federal regulation, but which has been raised by political parties in full compliance with applicable state law. Title I bans national party committees outright from either *receiving* or *spending* such state-regulated funds. *See* BCRA § 101(a). The practical effect of this provision is to ban national party committees from using state-regulated funds for *any* purpose, including contributions to state or local candidates, constitutionally protected issue advocacy, voter registration, voter identification, get-out-the-vote activity, party-promoting (or "generic") campaign activity, administrative expenses, and overhead — all purposes for which national party committees could previously use either

state-regulated funds, or a combination of federally regulated funds (known colloquially as "hard money") and state-regulated funds. Title I also bans national party committees from soliciting state-regulated funds for, or transferring state-regulated funds to, any other person or organization, including, most importantly, state and local party committees. *See id.*

In addition, Title I prohibits state and local party committees from spending state-regulated funds for what BCRA euphemistically calls "federal election activity" — a broadly defined phrase that encompasses voter registration, voter identification, get-out-the-vote activity, and generic campaign activity whenever there is a federal election, and issue advocacy containing certain types of references to federal candidates. *See* BCRA § 101(a)-(b). Because most States hold their elections for statewide and local office simultaneously with federal elections, the practical effect of this provision is to ban state and local party committees from using state-regulated funds to engage in these activities even if they are directed primarily or only toward state and local elections. Although Title I creates a narrow subcategory of these activities that can be paid for with a new category of federally regulated funds (so-called "Levin" funds), it prohibits state and local party committees from raising funds for these activities jointly or receiving transfers of these funds from other party committees. *See* BCRA § 101(a).

Title I also restricts federal officeholders and candidates in raising state-regulated funds for state and local party committees and candidates, and bans state and local candidates from spending state-regulated funds on issue advocacy that contains certain types of references to federal candidates. *See id.*

By regulating money that is raised in full compliance with applicable state law, Title I impermissibly intrudes into a core area of state sovereignty, the ability of States to regulate their

own elections. The Supreme Court has repeatedly made clear that Congress has the affirmative power only to regulate federal elections. Title I drastically curtails the ability of national, state, and local party committees to support state and local candidates, thereby overriding the laws of numerous States. Title I also dramatically limits the ability of federal officeholders and candidates to encourage financial support for state and local candidates, and directly regulates speech by state and local candidates themselves. Title I accordingly exceeds Congress' power to regulate federal elections under Article I, Section 4, of the Constitution, and the Tenth Amendment.

Title I also violates the First Amendment rights of free speech and free association enjoyed by political parties and their members. Title I severely burdens the speech and associational rights of parties by imposing direct restrictions on speech by parties, officeholders, and candidates and by interfering with the ability of party committees to associate with each other, their candidates, and other entities. As such, Title I is subject to strict scrutiny. Title I cannot possibly survive such scrutiny, or indeed any heightened scrutiny, because it is nowhere near sufficiently tailored to prevent actual corruption or the appearance of corruption. Even if it were true that the donation of state-regulated funds to a *political party* for activities that do not exclusively serve to get a candidate elected has a similar potential for the appearance of corruption as a direct contribution to a *candidate*, the sweeping provisions of Title I are vastly overbroad. Title I bans donations of state-regulated funds to national party committees of any *amount* and from any *source* to be used for any *purpose*, and imposes a similarly sweeping ban on expenditures of such funds. Title I imposes similar restrictions on state and local party committees, and contains a number of other provisions with no conceivable connection to an

asserted interest in preventing corruption at all. Finally, Title I violates fundamental principles of free speech and equal protection by regulating speech by political parties but not identical speech by other entities.

Title II of BCRA bans all corporations and unions from engaging in "electioneering communications," BCRA § 203, a newly defined term that sweeps in any issue advocacy carried by a broadcast, satellite, or cable medium within 30 days of a primary or 60 days of a general election which "refers to a clearly identified candidate for Federal office," BCRA § 201(a). In an apparent acknowledgment of the constitutional infirmity of this provision, Title II provides a "fallback" definition of "electioneering communications," which covers any issue advocacy that "promotes," "supports," "attacks," or "opposes" a federal candidate and "is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." *Id.* Title II also requires persons who disburse a certain amount for "electioneering communications," or who even enter into a contract to make such disbursements, to make disclosures to the FEC regarding those disbursements, *see* BCRA § 201(a), and imposes similar disclosure requirements for independent expenditures more generally, *see* BCRA § 212(a). Title II treats coordinated disbursements for "electioneering communications" as contributions to the "supported" candidates, *see* BCRA § 202, and directs the FEC to promulgate new regulations defining the concept of "coordination" more expansively, *see* BCRA § 214(c). Finally, Title II requires political parties to decide whether to make independent or coordinated expenditures on behalf of any given candidate at the time the candidate is nominated. *See* BCRA § 213.

Title II is unconstitutional because it impermissibly restricts core political speech: speech about issues central to our democracy. In direct contravention of *Buckley v. Valeo* and a vast

array of later rulings of courts of appeals, Title II purports to prohibit political advertisements by independent groups and others that "refer" to a candidate for federal office at the most critical of times: within 30 days of any primary and within 60 days of any general election. The statute explicitly rejects the Supreme Court's holding in *Buckley* that only "express advocacy" can be regulated consistent with the First Amendment, and offers a new and unconstitutional scheme designed to silence those who would otherwise choose to criticize, persuade, or even applaud federal officeholders and candidates. Moreover, by regulating, and indeed criminalizing, speech by *all* corporations, Title II not only sweeps in corporations that solely wish to comment on public issues, but flatly contradicts the Court's directive that such corporations must be allowed to engage in even express advocacy without restriction. Title II's disclosure requirements, like its regulations on direct speech, fail because they impose burdens on speech that constitutes more than "express advocacy" under the Court's decision in *Buckley*. Title II's coordination provisions are also unconstitutional, both because they *require* the FEC to treat as "contributions" independent expenditures made without any agreement between the entity making the expenditure and the supported candidate, and because they too extend to expenditures that cannot be regulated under *Buckley*. Finally, Title II imposes unconstitutional conditions on political parties by forcing them to choose to engage in one type of constitutionally protected political speech at the expense of another — and, in some circumstances, stripping them even of that choice altogether.

Title III of BCRA prohibits any minor from making a contribution, in any amount, to a candidate or political party committee. *See* BCRA § 318. Title III also burdens the ability of federal candidates to avail themselves of the lowest available rate for broadcast advertisements

when they wish to refer to another candidate in their advertising. *See* BCRA § 305. And Title III raises the generally applicable limitations on contributions and coordinated expenditures when candidates face opponents who are using personal funds in their campaigns. *See* BCRA §§ 304, 316, 319. The ban on contributions by minors cannot be said to be sufficiently tailored to serve any conceivable governmental interest, and the effective restriction on advertising critical of other candidates constitutes an impermissible viewpoint-based regulation of speech.

Finally, **Title V** of BCRA requires broadcasters to collect and disclose records of requests to purchase broadcast time for communications "relating to any political matter of national importance," even before the communications have been made. *See* BCRA § 504. This provision is unconstitutionally vague and lacks even a legitimate governmental justification.

I. TITLE I OF BCRA IS UNCONSTITUTIONAL.

We turn first to Title I, the portion of BCRA which imposes sweeping and unprecedented restrictions on the raising and spending of so-called "soft money": that is, money which is not subject to the federal source-and-amount limitations of FECA, and which has been raised in full compliance with applicable state law. This intrusive regulation violates basic principles of federalism, unconstitutionally infringes upon political parties' First Amendment rights of free speech and free association, and unconstitutionally discriminates against speech by political parties.

A. Title I Violates Article I, Section 4, And The Tenth Amendment Of The Constitution By Usurping The Right Of States To Regulate Their Own Elections.

For the first time in the relatively short history of campaign finance regulation, Congress has enacted legislation that systematically restricts political activity not only in federal elections, but also in state and local elections. This massive intrusion into a core area of state sovereignty

— the ability of States to regulate their own elections — violates basic principles of federalism. Congress lacks the affirmative power to regulate state and local elections. That power is reserved to the States under the Tenth Amendment, and accordingly the provisions of Title I which reach state and local elections must be invalidated.

The question whether Congress has the *affirmative* power to regulate in a certain area is the "mirror image[]" of the question whether States have the *reserved* power to regulate in that area under the Tenth Amendment. *See, e.g., New York v. United States*, 505 U.S. 144, 156 (1992) (emphasis omitted). Put another way, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *Id.* (emphasis omitted).

In order to justify Congress' unprecedented regulation of state and local elections, therefore, defendants must identify an enumerated source of congressional authority. The traditionally cited source of authority to regulate campaign financing is the Elections Clause, which states as follows:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. art. I, § 4, cl. 1. In *Buckley*, the Supreme Court suggested that this provision gives Congress the power to regulate *federal* campaign financing, though it also noted that none of the parties before it was challenging whether Congress had such a power. *See* 424 U.S. at 13.

Notwithstanding the Court's observation in *Buckley* that Congress can regulate campaign financing as it relates to federal elections, it is well established that the Elections Clause does *not*

give Congress any power to regulate state elections, much less the power to regulate *campaign financing* in state elections. *See, e.g., Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (noting that "the Constitution grants to the States a broad power to prescribe the 'Times, Places, and Manner of holding Elections for Senators and Representatives,' *which power is matched by state control over the election process for state offices*") (emphasis added; citation omitted); *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (noting that a State's power to regulate elections "inheres in the State by virtue of its obligation . . . to preserve the basic conception of a political community") (internal quotation omitted); *Pope v. Williams*, 193 U.S. 621, 632 (1904) (stating that "the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution").[3] Notably, even Justices who have dissented from many of the Supreme Court's recent federalism rulings have asserted that "[a] State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty." *California Democratic Party v. Jones*, 530 U.S. 567, 590 (2000) (Stevens, J., joined by Ginsburg, J., dissenting).

In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Supreme Court provided its most detailed exegesis of the Elections Clause. There, the Court considered, *inter alia*, amendments to the Voting Rights Act that would have given 18-year-olds the right to vote. *See Mitchell*, 400 U.S. at

[3] Indeed, the Court has emphasized that, when a State holds its elections simultaneously with the federal government, Congress is not thereby deprived of its power to regulate *federal* elections. *See Ex parte Siebold*, 100 U.S. 371, 393 (1879). The Court has never held that, when a State holds simultaneous elections, Congress somehow *acquires* the power to regulate *state* elections.

117 (opinion of Black, J.). The Court upheld these amendments as applied to federal elections, but struck them down as applied to state and local elections. *See id.* at 118. In announcing the judgment of the Court, Justice Black wrote that "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Id.* at 124-25 (footnote omitted); *see also Sugarman*, 413 U.S. at 647 (majority opinion quoting same language). Indeed, he added that "[n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and *the nature of their own machinery for filling local public offices*." *Mitchell*, 400 U.S. at 125 (emphasis added). The States' otherwise plenary power to regulate state elections, Justice Black noted, is limited only by those constitutional amendments that limit the powers of the States more generally, including the Civil War Amendments, "each of which has assumed that the States had general supervisory power over state elections." *See id.* at 125-26. After reviewing those amendments, Justice Black concluded that none of them required States to allow 18-year-olds to vote and therefore Congress lacked the power to extend the Voting Rights Act amendments to state elections. *See id.* at 126-30.

The Supreme Court's frequently reiterated interpretation of the Elections Clause, in *Mitchell* and elsewhere, is consistent with the provision's framing. The Elections Clause arose from a compromise between delegates to the Constitutional Convention who wanted only the States to have power over the election of both federal and state officials, and delegates who wanted Congress to have plenary power over the election of federal officials. *See* 2 J. Story, Commentaries on the Constitution of the United States 280-92 (1st ed. 1833). Under that

compromise, the Elections Clause gives States the initial power to regulate the "Times, Places and Manner of holding Elections" for *federal* office, but also gives Congress the power to override any state regulations with regulations of its own. As Justice Stevens noted in his careful account of the history of the Elections Clause, "[t]he Convention debates make clear that the Framers' overriding concern was the potential for States' abuse of the power to set the 'Times, Places, and Manner' of elections." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808-09 (1995). Indeed, Alexander Hamilton, in his spirited Federalist Paper defending the Elections Clause, stated that "[n]othing can be more evident than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy." The Federalist No. 59, at 363 (C. Rossiter ed. 1961); *see also id.* (noting that, absent federal regulation, state governments "could at any moment annihilate [the federal government] by neglecting to provide for the choice of persons to administer its affairs").

What is clear, however, is that regardless of the relative merits of assigning responsibility for regulating *federal* elections to the Congress or to the States, the Framers intended to leave the power of the States to regulate *state* elections untouched. As Hamilton wrote:

> Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments? The violation of principle, in this case, would have required no comment; and to an unbiassed observer, it will not be less apparent in the project of subjecting the existence of the National Government, in a similar respect to the pleasure of the State governments. An impartial view of the matter cannot fail to result in the conclusion that each, as far as possible, ought to depend on itself for its own

preservation.

Id.[4]

The resulting prohibition on federal regulation of state and local elections as outside the scope of Congress' enumerated power under the Elections Clause is reinforced by the fact that any such regulation would invade a core state function. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Supreme Court considered, *inter alia*, whether a state constitutional provision setting a mandatory retirement age for state judges conflicted with the federal Age Discrimination in Employment Act, which bars age discrimination except with respect to "policymaking" appointees, *see id.* at 457-70. The Court concluded that it did not, relying on the rule that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *See id.* at 460 (internal quotation omitted).

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[4] In support of a contrary view of the Elections Clause, defendants will likely cite a string of lower-court cases upholding a provision of the Voting Rights Act which prohibits vote buying and voter-registration fraud and is "applicable . . . to general, special, or primary elections held solely *or in part* for the purpose of selecting or electing any candidate [for federal office]." 42 U.S.C. § 1973*i* (emphasis added). The cases upholding this provision have relied, for the most part without extensive discussion, on a cobbled-together combination of the Elections Clause and the Necessary and Proper Clause. *See, e.g., United States v. Bowman*, 636 F.2d 1003, 1011-12 (5th Cir. 1981). Of course, the Supreme Court has derisively described the Necessary and Proper Clause as "the last, best hope of those who defend ultra vires congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1997). The Supreme Court has never spoken on the constitutionality of section 1973*i* in its present form, but, assuming *arguendo* that these cases were correctly decided, they nonetheless are readily distinguishable. First, they involve vote buying and voter-registration fraud, activities that much more directly affect the "Manner of holding Elections for Senators and Representatives." Second, they involve activities as to which there can be no conceivable conflict between federal and state policy interests. Unlike section 1973*i*, the BCRA effectively overrides a host of more expansive state laws, as we will presently demonstrate.

The Court has since noted that the *Gregory* rule applies whenever a federal law affects a "traditional and essential state function." *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 209 (1998). The law must implicate a "decision of the most fundamental sort for a sovereign entity," *Gregory*, 501 U.S. at 460; *accord City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 n.5 (1995), or affect a state power "at the heart of representative government," *Gregory*, 501 U.S. at 463 (internal quotation omitted); *accord BFP v. Resolution Trust Corp.*, 511 U.S. 531, 566 n.17 (1994) (Souter, J., dissenting). A State's regulation of the financing of its own campaigns falls squarely within this category: indeed, it is not far removed from a State's regulation of the qualifications of its officeholders — the type of regulation that was at issue in *Gregory* itself. *See Alden v. Maine*, 527 U.S. 706, 752 (1999) (noting, citing *Gregory*, that "[a] State is entitled to order the processes of its own governance"). As the Court noted in *Buckley*, "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government." 424 U.S. at 14; *see also id.* at 39 (noting that independent expenditures constitute "political expression at the core of our electoral process") (internal quotation omitted).

With these considerations in mind, it becomes obvious that numerous provisions of Title I exceed the scope of Congress' regulatory power under the Elections Clause.

First, and most importantly, Title I drastically curtails the ability of state and local party committees to support state and local candidates. Under BCRA, state and local committees are banned from spending any state-regulated funds for "federal election activity," which is broadly defined as (1) voter registration within 120 days of a regularly scheduled federal election; (2) voter identification, get-out-the-vote activity, or generic campaign activity conducted "in

connection with" any election in which a federal candidate appears on the ballot; (3) issue advocacy which "refers to" a clearly identified candidate for federal office and which "promotes," "supports," "attacks," or "opposes" a candidate for that office, regardless of whether the advocacy is transmitted by broadcast or any other means (including mass mailings and telephone banks), and regardless of whether the advocacy occurs close to an election; and (4) services provided by employees who spend more than 25 percent of their time on activities in connection with a federal election. *See* BCRA § 101(a) (adding new FECA § 323(b)(1)); BCRA § 101(b) (adding new FECA § 301(20)-(24)). State and local committees must pay for these activities solely out of ordinary federally regulated funds (that is, funds raised subject to the source-and-amount restrictions of the FECA) — or, to the extent the "Levin amendment" applies, out of a combination of ordinary federally regulated funds and "Levin" funds, a new category of federally regulated funds created by BCRA. *See* BCRA § 101(a) (adding new FECA § 323(b)(2)).[5]

[5] The "Levin amendment" carves out a narrow exception to the requirement that only ordinary federally regulated funds be used for "federal election activity." Under the Levin amendment, state and local committees may fund certain activities with a combination of ordinary federally regulated funds and "Levin" federally regulated funds. *See* BCRA § 101(a) (adding new FECA § 323(b)(2)(A)). The exception comprises any activity which would otherwise qualify as "federal election activity," but which (1) does not contain a reference to a clearly identified candidate for federal office and (2) does not involve any spending on a broadcast communication, unless that communication refers only to a clearly identified candidate for state or local office. *See* BCRA § 101(a) (adding new FECA § 323(b)(2)(B)). Any person may donate up to $10,000 in Levin federally regulated funds, *see* BCRA § 101(a) (adding new FECA § 323(b)(2)(B)(iii)), but with two significant restrictions. *First*, to the extent that States impose their own more stringent limitations on donations in state and local elections (such as prohibitions on donations by corporations and unions, or limits below $10,000 on donations to state and local party committees), those limitations trump the BCRA's limitations on Levin donations. *See id. Second*, state and local committees must raise money used for Levin activities

By imposing federal limits on these activities, BCRA effectively overrides the laws of numerous States that allow donations for such activities from corporations and unions; allow donations in greater or unlimited amounts; or allow donations *both* from corporations and unions *and* in greater or unlimited amounts. *See generally* Intervenors ES, Mann decl., table 1 (listings laws of States during 2000 election cycle). As a result, state and local committees will no longer be able to avail themselves of millions of dollars raised in full compliance with applicable state law. *See, e.g.*, 3 PCS/CDP 12-13 (Bowler) (noting that California Democratic Party would have lost over $13.4 million in state-regulated funds from large donors if BCRA limits had been in effect during 2000 election cycle); 3 PCS/CDP 406 (Erwin) (California Republican Party would have lost over $3.7 million). Those funds make up a substantial percentage of state and local committees' overall revenue. *See, e.g.*, 3 PCS/CDP 12-13 (Bowler) (noting that now-barred donations constituted 86% of California Democratic Party's state-regulated income during 2000 election cycle).

To be sure, BCRA purports to regulate state and local committees only when they engage in what BCRA misleadingly calls "federal election activity" — so named, no doubt, in an attempt to curl just inside the goalposts of the Elections Clause. In the vast majority of States, however, federal and state elections occur at the same time.[6] In those States, state and local committees are

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(whether ordinary federally regulated funds or Levin federally regulated funds) on their own. They are therefore banned either from receiving transfers of such funds from any other national, state, or local committee, or from engaging in joint efforts to raise Levin federally regulated funds with other state and local committees. *See* BCRA § 101(a) (adding new FECA §§ 323(b)(2)(B)(iv), 323(b)(2)(C)(ii)).

[6] Only five states — Kentucky, Louisiana, Mississippi, New Jersey, and Virginia — hold

barred from using state-regulated funds for "federal election activity," even if that activity has effects on *both* federal and state elections — or, as will likely be more common, has effects *primarily* on state elections. Indeed, the FEC has long conceded that such activities ordinarily *do* have effects on both federal and state elections, and has therefore allowed state and local parties to use state-regulated funds, or a combination of federally regulated and state-regulated funds, to pay for them.

Even worse, state and local committees are barred from using state-regulated funds for "federal election activity" even if that activity has *no* practical effect on federal elections. In 1996, the California Democratic Party used state-regulated funds to pay for the following radio advertisement encouraging voters to get out to vote against a fiercely contested ballot initiative that would have eliminated affirmative action:

> Tuesday is the day we decide whether we let them turn the clock back on us. Because Tuesday is election day, the day we can vote down Governor Wilson's scheme to take away our civil rights and end our chance for fairness. The Republican scheme is Prop. 209 and it would eliminate affirmative action which helps to make our society fair and gives every one of us a fair chance at the American dream. But to say yes to fairness and no to mean-spirited Prop. 209, we have to say yes to voting. On Tuesday, we must go to the polls and cast a most important vote for fairness, for affirmative action — a vote against Prop. 209. Vote No on 209. Vote no on the Republican scheme to turn the clock back and shut down equal opportunity for all. On Tuesday, vote yes for our future and no on Prop. 209. Don't let the Republicans get away with it. Don't stay home. That's what they're counting on. Paid for by the California Democratic Party.

Feingold dep., exh. 15. As Senator Feingold confirmed, that advertisement could now be treated as "federal election activity," either as get-out-the-vote activity or generic campaign activity. *See*

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their state and local elections during so-called "off-years," in which there are no regularly scheduled federal elections. *See* RNC ES, Banning decl. ¶ 28(a).

Feingold dep. 199-206. Therefore, under BCRA, a political party's financing of speech regarding this state initiative would effectively be federalized.

State and local committees are also barred from using state-regulated funds for activities that are driven exclusively by a desire to affect state and local elections (if, for example, the relevant federal election is either actually or practically uncontested). The mere fact that a federal election is simultaneously *taking place* does not necessarily mean that any genuine federal election *activity* is actually occurring. In the just-concluded 2002 election in California, for example, there were no elections for the Presidency or Senate; although there were elections statewide for the House of Representatives, only one of the 53 House races was hotly contested. *See* 3 PCS/CDP 13 (Bowler). In almost every corner of the State, therefore, the California parties' activities were intended *only* to affect state and local elections, notwithstanding the fact that there was also a federal election on the ballot. Under BCRA, the California parties' voter registration, voter identification, get-out-the-vote activity, and generic campaign activity would nevertheless have been uniformly treated as entirely "federal" and therefore potentially subject to criminal sanction.

Beyond the restriction to federally regulated funds for "federal election activity," state and local committees are limited from participating in state and local elections in at least two other ways. State and local committees are banned from soliciting *any* type of funds for, or donating any funds to, certain tax-exempt organizations or political committees. *See* BCRA § 101(a) (adding new FECA § 323(d)). In a State such as California, in which ballot initiatives are important mechanisms for enacting legislation, state and local committees will no longer be able to support many of the tax-exempt organizations that are formed to support or oppose such

measures. *See* 3 PCS/CDP 24-25 (Bowler); 3 PCS/CDP 416 (Erwin). State and local committees also will no longer be able to support many political committees, such as leadership committees, volunteer organizations, and clubs, which play a vital role in voter registration, get-out-the-vote efforts, and other grassroots activities. *See* 3 PCS/CDP 28-29 (Bowler); 3 PCS/CDP 395, 417 (Erwin).

Moreover, certain officials from state and local committees may be banned from virtually any involvement in raising funds for their committees. State committee chairs typically serve as members of their respective national committees, and other state committee members often serve on the national committees as well. *See, e.g.*, 3 PCS/CDP 4 (Bowler); 3 PCS/CDP 413 (Erwin). To the extent that such officials are construed to be "officers or agents acting on behalf of" the national party committees, they will be subject to the provision of Title I banning national committees from soliciting state-regulated funds or Levin federally regulated funds. *See* BCRA § 101(a) (adding new FECA §§ 323(a), 323(b)(2)(C)(i)). These restrictions threaten to deprive state and local committees of the services of some of their most important fundraisers. *See, e.g.*, 3 PCS/CDP 413 (Erwin).

Second, Title I effectively ends the involvement of national party committees in state and local elections. These committees are known as "national" committees, and not "federal" committees, for good reason: they are responsible for their parties' performance not only in federal elections, but in state and local elections as well. As the Republican National Committee's own witnesses have attested, the national committees have heretofore played a significant role in recent state and local elections by spending state-regulated funds on grassroots activities. *See, e.g.*, RNC ES, Josefiak decl. ¶¶ 47-56 (detailing RNC activities in 2001 Virginia

and New Jersey elections, including its involvement in absentee ballot initiatives, voter identification, get-out-the-vote mailings and phone banks, and field programs). But under BCRA, national party committees are prohibited outright from soliciting, receiving, or spending any state-regulated funds for use in state and local, as well as federal, elections — *even if no federal elections are on the ballot*. *See* BCRA § 101(a) (adding new FECA § 323(a)(1)).

National party committees are also banned from transferring state-regulated funds to state and local party committees for their use in state and local elections. *See id.* Transfers from the national committees, which have comparative expertise in fundraising, *see, e.g.*, RNC ES, B. Shea decl. ¶ 35; RNC ES, Knopp decl. ¶ 29, have constituted a sizable portion of the budgets of state and local committees in recent years, *see, e.g.*, 3 PCS/CDP 407 (Erwin); RNC ES, Josefiak rebuttal decl. ¶ 11. Although much of that money is devoted to issue advocacy, a significant amount of that money is used solely for the purpose of influencing state and local elections: for example, in 2001, the RNC, acting through its state-elections arm, transferred some $6.3 million to state committees for use in off-year state and local elections, including some $1.8 million to the Virginia Republican Party. *See* RNC ES, Banning decl. ¶ 28(a); RNC ES, Josefiak decl. ¶ 45.

The support that national party committees can provide to state and local committees is diminished in a number of additional ways. They are banned from soliciting Levin federally regulated funds for state and local committees, *see* BCRA § 101(a) (adding new FECA § 323(b)(2)(C)(i)), and from providing *either* ordinary federally regulated funds *or* Levin federally regulated funds for state and local committees to use for Levin activities, *see* BCRA § 101(a) (adding new FECA § 323(b)(2)(B)(iv)). In other words, the only way that national

committees will be able to help state and local committees is by assisting them in raising ordinary federally regulated funds, or by transferring ordinary federally regulated funds to them for non-Levin activities. Like their state and local counterparts, national committees are also banned from soliciting funds for certain tax-exempt organizations or political committees, even if those funds are to be used in state and local elections and can be so used under applicable state law. *See* BCRA § 101(a) (adding new FECA § 323(d)).

Further, national committees are prohibited from assisting state or local candidates by giving non-federally regulated funds to, or spending non-federally regulated funds on behalf of, such candidates, even if those receipts or disbursements fully comply with applicable state law. *See* BCRA § 101(a) (adding new FECA § 323(a)(1)). In off-year state and local elections in 2001, for example, the RNC, acting through its state-elections arm, gave almost $8.2 million directly to state and local candidates (including $4 million to candidates in Virginia and $3 million to candidates in New Jersey) and spent another $1.1 million directly on candidates' behalf. *See* RNC ES, Banning decl. ¶ 28(a); RNC ES, Josefiak decl. ¶ 45. Nor would national committees be permitted to give state-regulated funds to any other person or organization involved in state and local elections. *See* BCRA § 101(a) (adding new FECA § 323(a)(1)).

Taken together, these provisions will leave the national party committees in the unique position of being able to use *only* ordinary federally regulated funds for *any* purpose in state and local elections. They will also effectively require the national party committees to orphan their state and local counterparts, since they will no longer be able either to help them to raise funds other than ordinary federally regulated funds, or to transfer funds other than ordinary federally regulated funds to them. BCRA will therefore significantly diminish the involvement of national

party committees in the state and local political process.

Third, Title I dramatically limits the ability of federal officeholders and candidates to raise money for state and local candidates. Federal officeholders and candidates, and their agents and dependent entities, are banned from soliciting or directing Levin federally regulated funds for any "federal election activity," *see* BCRA § 101(a) (adding new FECA § 323(e)(1)(A)), and from soliciting or directing state-regulated funds "in connection with" any state or local election for any other purpose, *see* BCRA § 101(a) (adding new FECA § 323(e)(1)(B)). Although federal officeholders and candidates may speak at or attend certain fundraising events, *see* BCRA § 101(a) (adding new FECA § 323(e)(3)), these provisions otherwise bar them from participating in fundraising programs by state and local parties, except to the extent that those programs raise ordinary federally regulated funds. For example, federal officeholders and candidates will no longer be able to participate in the California Republican Party's "major donor" fundraising programs, which have relied heavily on the "top-of-the-ticket" star power of the President and members of Congress to raise individual donations permitted by state law. *See, e.g.*, 3 PCS/CDP 401-02, 414 (Erwin).

Federal officeholders and candidates also will be unable to write directly to donors to ask them to give donations permitted by state law to state and local parties, as Senator McConnell has frequently done in the past for state-party get-out-the-vote campaigns. *See* 2 PCS/McC 3-4 (McConnell); MMc 0014-0161.[7] Moreover, aside from speaking at and attending fundraising

[7] This is so even though Senator McConnell's home state, Kentucky, prohibits corporate donations altogether, *see* Ky. Rev. Stat. Ann. § 121.035(1), and imposes *stricter* limits on donations by individuals than those applicable under *federal* law, *see* Ky. Rev. Stat. Ann.

events, federal officeholders and candidates will otherwise be prohibited altogether from raising money directly for state and local candidates. For example, if an outgoing federal officeholder placed a phone call to a would-be donor asking him to give money to a candidate for governor, he would thereby violate BCRA. Like national political parties, therefore, federal officeholders and candidates will be effectively excluded from the state and local political process.

Fourth, Title I imposes unprecedented restrictions on the speech of state and local candidates themselves. Specifically, state and local candidates are banned from spending state-regulated funds on any form of issue advocacy that falls within the statutory definition of "federal election activity": that is, issue advocacy which "refers to" a clearly identified candidate for federal office and which "promotes," "supports," "attacks," or "opposes" a candidate for that office, regardless of whether the advocacy is transmitted by broadcast or any other means (including mass mailings and telephone banks), and regardless of whether the advocacy occurs close to an election. *See* BCRA § 101(a) (adding new FECA § 323(f)(1)). This ban on the use of state-regulated funds for such issue advocacy is all but tantamount to an outright ban on such advocacy, since there is simply no such thing as "federally regulated" money for state and local candidates under FECA. If, for example, a Democratic candidate for the California Legislature in 2004 spends funds lawfully raised under state law on a print ad touting his strong support for a proposed tax increase in California, and incidentally criticizing President Bush for his tax-cutting policy in the process, he would thereby violate BCRA.

In sum, Title I has a direct and substantial effect on the financing of state and local

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§ 121.150(11).

elections. Because the Elections Clause and the Tenth Amendment prohibit such intrusive regulation of state election activity, section 101 of BCRA should be invalidated in full.[8]

B. Title I Violates The First Amendment Rights Of Free Speech And Free Association And The Fifth Amendment Right Of Equal Protection.

The Supreme Court has stressed that "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (internal quotation omitted). In this section, we demonstrate that Title I burdens significant speech and associational rights, particularly with regard to political parties; that Title I should be subject to strict scrutiny; that Title I is not narrowly tailored to prevent actual corruption or the appearance of corruption; and that BCRA further violates core First and Fifth Amendment principles by discriminating against speech by political parties.

1. Title I Burdens Significant Speech And Associational Rights.

The Supreme Court has repeatedly recognized that restrictions on the financing of political campaigns infringe upon the closely connected First Amendment rights of free speech and free association. In *Buckley*, the Court expressly rejected the argument that contributions and expenditures on behalf of political candidates constitute conduct, rather than speech. *See* 424 U.S. at 15-16. Instead, the Court recognized, as to expenditures, that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign

[8] The above-cited provisions comprise virtually all of the subsections of section 101 of the BCRA. Because the unchallenged subsections of section 101 are incidental, section 101 should be invalidated in its entirety.

necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. The Court also acknowledged that contributions had a speech component, though it noted that "the expression rests solely on the undifferentiated, symbolic act of contributing." *Id.* at 21. As for the right of free association, the Court, citing its seminal decision on associational rights in *NAACP v. Alabama*, 357 U.S. 449 (1958), reasoned that "contribution and expenditure limitations also impinge on protected associational freedoms." *Buckley*, 424 U.S. at 22. Limitations on expenditures, the Court continued, "preclude[] most associations from effectively amplifying the voice of their adherents," and limitations on contributions "limit one important means of associating with a candidate or committee." *Id.*

Title I of BCRA implicates all of the same speech and associational rights implicated by the provisions of FECA at issue in *Buckley*, but it does not stop there.[9] Title I implicates speech interests not at issue in *Buckley*, to the extent that it imposes restrictions on *solicitations*, as well as "contributions" and "expenditures," of state-regulated funds. A restriction on solicitations constitutes the most direct form of restriction on speech. *See, e.g., United States v. Kokinda*, 497 U.S. 720, 725 (1990); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). Title I imposes a variety of restrictions on solicitations by national committees, state and local committees, and federal officeholders and candidates. National committees are banned outright from soliciting state-regulated funds, *see* BCRA § 101(a) (adding new FECA § 323(a)(1)), and

[9] Of course, those interests include the speech and associational rights of would-be donors, as well as those of the political parties as would-be spenders. *See, e.g.*, 9 PCS, McInerney decl. 2-10 (detailing donation activity of one representative donor).

from soliciting Levin federally regulated funds for state and local committees, *see* BCRA § 101(a) (adding new FECA § 323(b)(2)(C)(i)). State and local committees are banned from soliciting Levin federally regulated funds on behalf of, or jointly with, other state and local committees, *see* BCRA § 101(a) (adding new FECA §§ 323(b)(2)(B)(iv)), and, like their national counterparts, from soliciting *any* type of funds for certain tax-exempt organizations or political committees. *See* BCRA § 101(a) (adding new FECA § 323(d)). Finally, federal officeholders and candidates are banned from soliciting Levin federally regulated funds for any "federal election activity," *see* BCRA § 101(a) (adding new FECA § 323(e)(1)(A)), and from soliciting state-regulated funds "in connection with" any state or local election for any other purpose, *see* BCRA § 101(a) (adding new FECA § 323(e)(1)(B)). These systematic restrictions on solicitations infringe on core speech interests.

Title I also implicates associational interests not at issue in *Buckley*, to the extent that it particularly affects the associational rights of political parties through numerous provisions that directly regulate parties on the national, state, and local levels. The activities of political parties lie at the heart of protected association. As the Supreme Court has noted, "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). The right of association inheres not only in the members of a political party, but also in the parties themselves. *See, e.g., Eu*, 489 U.S. at 224; *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). As recently as two years ago, the Court reaffirmed that when a State attempts to regulate the "internal processes" of political parties, it infringes on the parties' associational rights and its actions are subject to close constitutional scrutiny. *See California Democratic Party*, 530 U.S. at

573.

In particular, the Court has made clear that a political party's determination of how to structure itself is entitled to the fullest constitutional protection. In *Eu*, the Court considered a California law that regulated the organization and composition of state party committees, limited the term of office for state committee chairs, and required chairmanship of the state committees to rotate between residents of northern and southern California. *See* 489 U.S. at 218. The Court unanimously invalidated these restrictions. *See id.* at 233. Writing for the Court, Justice Marshall reasoned that a political party's "determination . . . of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Id.* at 229 (internal quotation omitted). The California law burdened the freedom of association by "prevent[ing] the political parties from governing themselves with the structure they think best." *Id.* at 230. The Court noted that the associational rights at stake were particularly strong because the state law interfered not with the desire of party members merely not to associate with non-members, but rather with the desire of members to associate with one another in freely choosing their own leaders. *See id.* at 230-31. The Court concluded that California had failed to show that the regulation was necessary to serve a compelling state interest, and struck down the law. *See id.* at 231-33.

Like the law at issue in *Eu*, Title I severely burdens the associational rights of political parties. It does so in three primary ways.

First, Title I significantly interferes with the ability of national party committees to associate with their state and local counterparts. Under BCRA, national committees are banned not only from soliciting, receiving, or spending state-regulated funds, but also from *transferring*

state-regulated funds to state and local committees. *See* BCRA § 101(a) (adding new FECA § 323(a)(1)). Moreover, Title I bans national committees from soliciting Levin federally regulated funds for state and local committees, *see* BCRA § 101(a) (adding new FECA § 323(b)(2)(C)(i)), and from providing *either* ordinary federally regulated funds *or* Levin federally regulated funds for state and local committees to use for Levin activities, *see* BCRA § 101(a) (adding new FECA § 323(b)(2)(B)(iv)). The net effect of these provisions is to strip from political parties much of the power both to engage in coordinated fundraising and to decide how to allocate funds on the national, state, and local levels. *See generally* Intervenors ES, Stoltz decl. ¶¶ 3-11; RNC ES, B. Shea decl. ¶¶ 32-40.[10] At a minimum, the political parties will be forced to terminate their coordinated fundraising efforts and shift their fundraising activities from the national party committees, which are essentially prohibited from requesting from party supporters any funds except ordinary federally regulated funds, to state and local party committees, which, subject to state law, can continue to raise (if not necessarily spend) state-regulated funds, and can raise and spend Levin federally regulated funds.

Second, Title I similarly restricts the ability of state and local party committees to associate with their national, state, and local counterparts. State and local committees are prohibited from soliciting Levin federally regulated funds on behalf of other state and local committees (or jointly with those committees), and from transferring Levin federally regulated

[10] Ironically, while Title I bars party committees from working together to raise funds, a provision of Title II *compels* party committees to work together to decide whether funds should be used for independent or coordinated expenditures. *See infra* Part II.C (discussing BCRA § 213).

funds to those committees. *See* BCRA § 101(a) (adding new FECA §§ 323(b)(2)(B)(iv), 323(b)(2)(C)(ii)). These limitations only exacerbate the associational injuries from the limitations on intra-party fundraising imposed on national committees; not only are national committees barred from engaging in coordinated fundraising with state and local committees, but state and local committees are barred from engaging in coordinated fundraising even among themselves. Under BCRA, therefore, it is unlawful, even criminal, for these committees merely to solicit donations for other committees which would be otherwise permissible under state law. Moreover, to the extent that certain officials from state and local committees also serve on their respective national committees, and are at risk of being treated as "officers or agents acting on behalf of" those national committees and thus banned from soliciting state-regulated funds or Levin federally regulated funds, *see* BCRA § 101(a) (adding new FECA §§ 323(a), 323(b)(2)(C)(i)), state and local committees will likely withdraw their officers from national committee membership, giving state and local committees less say in the national committees' activities and forcing national committees to reconstitute themselves.

Third, Title I restricts the ability of party committees to associate with other individuals and entities. By severely restricting federal officeholders and candidates from participating in fundraising programs by state and local parties, *see* BCRA § 101(a) (adding new FECA § 323(e)(1)), Title I seriously impinges upon the right of free association between state and local committees and those officeholders and candidates, many of whom have until now played a significant role in state and local politics, *see, e.g.*, 2 PCS/McC 1-2 (McConnell) (detailing Senator McConnell's involvement in Kentucky state politics). And by banning national, state, and local party committees from soliciting funds for, or donating funds to, certain tax-exempt

organizations and political committees, *see* BCRA § 101(a) (adding new FECA § 323(d)), Title I interferes with the party committees' ability to associate with those organizations and committees.

In sum, Title I adversely affects the political parties' traditional ability to coordinate fundraising appeals, spending priorities, and campaign strategy on the national, state, and local levels, and also interferes with the ability of party committees to associate with other individuals and entities. There can be no question that Title I heavily burdens political parties' associational rights.

2. Title I Should Be Subject To Strict Scrutiny.

Title I should be subject to strict scrutiny because it imposes severe restrictions on the freedoms of speech and association, and especially severe restrictions on the freedom of association of political parties and their members. As the Supreme Court has consistently noted in cases outside the campaign-finance context, regulations that substantially burden the associational rights of political parties and their members are reviewable under the strict-scrutiny standard. *See, e.g., California Democratic Party*, 530 U.S. at 582 (applying strict scrutiny to state-mandated "blanket" primary); *Eu*, 489 U.S. at 231 (same for state law regulating the internal structure of state party committees); *cf. Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (stating that strict scrutiny applies where associational burdens are "severe"). There is no plausible justification for treating BCRA differently simply because it intrudes into the associational rights of political parties *with respect to campaign financing*, especially given the Supreme Court's admonition that the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor*

Patriot Co. v. Roy, 401 U.S. 265, 272 (1971). Because Title I works an unprecedented intrusion into the ability of political party committees to coordinate strategy on a nationwide basis, and to associate among each other and with their principal officeholders and candidates, strict scrutiny is demanded here.

Defendants may argue that Title I should be subject to something less than strict scrutiny under the Supreme Court's decision in *Buckley*. There, of course, the Court considered congressional limitations on contributions and expenditures, and ultimately concluded that both contributions and expenditures were entitled to First Amendment protection. *See Buckley*, 424 U.S. at 14-23. As the Court has since noted, "[p]recision about the relative rigor of the standard [of] review . . . was not a pretense of the *Buckley per curiam* opinion." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 386 (2000). The *Buckley* Court did observe, however, that "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions." 424 U.S. at 23. Notwithstanding some language in *Buckley* suggesting that even contribution limits should be subject to the "closest scrutiny," *id.* at 25 (internal quotation omitted), the Court has since stated that "restrictions on contributions require less compelling justification than restrictions on independent spending," *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986). Therefore, although applying strict scrutiny to limitations on *expenditures*, the Court has stated, without elaboration, that contribution limits pass constitutional muster as long as they are "closely drawn to match a sufficiently important interest." *Shrink Missouri*, 528 U.S. at 387-88 (internal quotation omitted).

It is true that in some sense, Title I of BCRA imposes limits on *both* contributions *and*

expenditures, at least with respect to the national party committees. Title I prohibits the national committees from *spending* state-regulated funds, but also prohibits them from *receiving* state-regulated funds (and therefore necessarily prohibits would-be donors from *giving* state-regulated funds to national committees). Even it Title I is so interpreted, however, strict scrutiny is warranted under *Buckley* where no direct contribution to a *candidate* is involved. As the Court has previously noted, a limitation on the amount of contributions by an individual to a third party effectively functions as a limitation on the amount of expenditures by the third party itself. *See Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 299 (1981); *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 638 (1996) (*Colorado I*) (Thomas, J., concurring in the judgment and dissenting in part).

Strictly speaking, Title I does not impose any new limits on the *amounts* of contributions or expenditures: instead, it simply subjects funds used by national, state, and local committees for a variety of previously unregulated purposes to the *preexisting* source-and-amount limitations of FECA, and creates a new category of federally regulated funds — so-called "Levin" funds — for money used by state and local committees for another range of previously unregulated purposes. Because Title I effectively regulates the *uses* for which money is raised and spent, rather than imposing new *limits* on the *amounts* of contributions or expenditures themselves, the contributions-versus-expenditures dichotomy of *Buckley* does not directly apply. In addition, beyond its primary provisions directly regulating the *use* of state-regulated funds by national, state, and local committees, Title I contains a variety of other provisions that are even harder to classify under *Buckley*'s taxonomy, such as its provisions banning the mere *solicitation* of funds (which unquestionably merit strict scrutiny under traditional First Amendment analysis) and its

provisions banning the *transfer* of funds from one party committee to another. Because *Buckley*'s lower standard applicable to restrictions on the amounts of contributions cannot readily be applied to Title I, strict scrutiny is warranted.

3. Title I Is Not Sufficiently Tailored To Prevent Actual Corruption Or The Appearance Of Corruption.

To survive strict scrutiny, Title I must be narrowly tailored to meet a compelling governmental interest. *See, e.g., California Democratic Party*, 530 U.S. at 582. Under any form of heightened First Amendment scrutiny, much less strict scrutiny, Title I is insufficiently tailored to meet a cognizable governmental interest.

Defendants' efforts to suggest otherwise notwithstanding, *see, e.g.*, 5 PCS/CDP 1301-03 (Supplemental Resp. of FEC to RNC's Second Interrogs., Sept. 19, 2002) (five interests); 5 PCS/CDP 1314-15 (Resp. of United States to RNC's Second Interrogs., Sept. 19, 2002) (eight interests); 5 PCS/CDP 1265-67 (Resp. of Intervenors to RNC's Second Interrogs., Sept. 19, 2002) (twelve interests), the only sufficiently important governmental interest recognized by the Supreme Court in the campaign-finance context is the government's interest in reducing actual or apparent corruption, *see FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) (noting that the Court "held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances"). Moreover, the Court has defined "corruption" to apply only to *quid pro quo* arrangements: that is, situations in which contributions or expenditures are made in order to secure a particular action, or, at most, to "influence" a particular action. *See Buckley*, 424 U.S. at 26 (referring, in the Court's discussion of actual corruption, to the risk that "large contributions are given to

secure a political *quid pro quo* from current and potential office holders"); *id.* at 27 (stating that "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions" is "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements"); *id.* at 45 (referring to the "dangers of actual or apparent *quid pro quo* arrangements").

The FEC has conceded that it cannot identify any instances of actual corruption arising from the donation of state-regulated funds. *See* Shays dep., exh. 15, at 2-3 (Resp. of FEC to RNC's First & Second Reqs. for Adm., Sept. 16, 2002). Senator McCain has testified similarly. *See* McCain dep. 170-71. Perhaps as a result of their inability to show actual corruption, and their utter inability to demonstrate that the provisions of Title I are sufficiently tailored to serve any interest in preventing even the appearance of corruption, defendants have ambitiously suggested not only that there are other cognizable governmental interests beyond the prevention of actual or apparent corruption, but that the governmental interest in preventing actual or apparent corruption should itself be broadened to encompass the prevention of what Senator Feingold referred to as the "possibility of the appearance of corruption." Feingold dep. 195-99. Alternatively, defendants have articulated that broader interest as the prevention of "circumvention" of existing limits tailored to prevent corruption, *see, e.g.*, 5 PCS/CDP 1314 (Resp. of United States to RNC's Second Interrogs., Sept. 19, 2002); or the prevention of the generic buying of "access," *see, e.g.*, 5 PCS/CDP 1267 (Resp. of Intervenors to RNC's Second Interrogs., Sept. 19, 2002).

These broader definitions of the corruption rationale prove too much. Assuming *arguendo* that officeholders and candidates are more solicitous of individuals who provide

financial support for their election (whether directly or indirectly), *but see* 2 PCS/ER 956-57 (Primo) (noting that "there is scant evidence . . . that money secures access"), the only solution would be to take money out of politics altogether in order to force officeholders and candidates to pay equal attention to all of their constituents, *see generally* Elizabeth Garrett, *The Future of Campaign Finance Reform Laws in the Courts and in Congress*, Chi. Pub. L. & Legal Theory Working Paper No. 19 (2002), *available at* http://www.law.uchicago.edu/academics/publiclaw/index.html. The Supreme Court has flatly rejected this equality rationale as a basis for campaign finance regulation. *See, e.g., Buckley*, 424 U.S. at 48-49 (stating that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voices of others is wholly foreign to the First Amendment").

Once the government's interest in preventing actual or apparent corruption is properly cabined, the only remaining question is whether Title I is sufficiently tailored to serve that interest. To conclude that Title I serves that interest at all, this Court would first have to indulge two critical assumptions: *first*, that the donation of *any* state-regulated funds to, or the spending of *any* state-regulated funds by, a *political party* is just as corrupting as a contribution directly to a *candidate*, and *second*, that a donation of state-regulated funds to be used for activities that do not exclusively serve to get a candidate elected (such as generic party activity), or the spending of state-regulated funds for such activities, is just as corrupting as a contribution to be used for activities that exclusively do so (such as express advocacy).

The Supreme Court, however, has already rejected both assumptions. In *Colorado I*, the Court considered whether Congress could constitutionally limit independent expenditures by political parties. In concluding that it could not, the plurality opinion expressly rejected the

argument that there are "any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction." 518 U.S. at 616. The plurality recognized that political party expenditures were designed not only to get the party's candidates elected, but also to promote the views of the party's members. *Id.*; *see also id.* at 629 (Kennedy, J., concurring in part and dissenting in part) (noting that political parties "exist to advance their members' shared political beliefs"); *id.* at 646 (Thomas, J., concurring in part and dissenting in part) (contending that "[t]he very aim of a political party is to influence its candidate's stance on issues").[11] Moreover, the plurality expressly recognized that "FECA permits unregulated 'soft money' contributions to a party for certain activities," such as voter registration and get-out-the-vote activity, but stated outright that "the opportunity for corruption posed by these greater opportunities for contributions is, *at best, attenuated.*" *Id.* at 616 (emphasis added).[12]

Even assuming that defendants could prove that a donation of state-regulated funds to, or

[11] This is particularly true for so-called "minor" parties, such as the Libertarian Party, whose spending of state-regulated funds, even for issue advocacy, is as a practical matter *exclusively* designed to promote the views of their members. *See* 9 PCS/MC 894-95, 904-05 (Dasbach *et al.*).

[12] In *FEC v. Colorado Republican Fed. Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*), the Court did uphold limits on *coordinated* expenditures by political parties, reasoning that, when making such expenditures, parties "act as agents for spending on behalf of those who seek to produce obligated officeholders," *id.* at 452. The Court's opinion, however, dealt only with *coordinated* expenditures, which the Court has consistently treated as functionally equivalent to contributions by the coordinating entity to the candidate. *See id.* at 444. Critically, the Court emphasized that political parties should be treated no differently from individuals or political action committees in being subjected to this rule. *See id.* at 455. Because the BCRA makes no distinction between the *coordinated* and *independent* spending of state-regulated funds, the reasoning of *Colorado II* is inapposite. Even if Congress can regulate the *coordinated* spending of state-regulated funds, BCRA would fail the narrow-tailoring requirement because it also reaches *independent* spending.

spending of state-regulated funds by, a political party for activities that do not exclusively serve to get a candidate elected gives rise to actual or apparent corruption of candidates in some circumstances, defendants cannot show that the sweeping prohibitions of Title I are sufficiently tailored to prevent such corruption for at least three reasons.

First, the core provisions of Title I affecting national party committees are not sufficiently tailored. To the extent that it is the *amount* or *source* of *donations* of state-regulated funds which gives rise to actual or apparent corruption,[13] Title I contains no relevant tailoring at all, instead banning donations of state-regulated funds of *any* amount (even if the amount is less than the maximum permissible contribution of *federally regulated* funds) and from *any* source (whether an individual, corporation, or other entity), and further banning any *spending* of state-regulated funds, *see* BCRA § 101(a) (adding new FECA § 323(a)(1)).[14] Such overbreadth is particularly of concern to so-called "minor parties" such as the Libertarian Party, which receive virtually no donations of large amounts or from corporations. *See* 9 PCS/MC 893 (Dasbach *et al.*). Moreover, to the extent that it is the *use* for which state-regulated funds is put that creates actual or apparent corruption (say, because the use of state-regulated funds for issue advocacy, notwithstanding the plain language of *Buckley, see infra* Part II.A, is more corrupting than the

[13] *See, e.g.*, Feingold dep. 123 (stating that "I have been very clear that I consider the soft money contributions to be extremely corrupting because of their size").

[14] The Hagel amendment, by contrast, would have imposed a $60,000 limit on aggregate donations of federally regulated funds and state-regulated funds from any one donor to a national party committee. *See* 147 Cong. Rec. S2908 (daily ed. Mar. 26, 2001) (proposed amendment to S. 27, 107th Cong. (2001)); *cf.* RNC ES, LaRaja decl. ¶ 29 (suggesting that cap of $100,000 on donations of state-regulated funds to national party committees would sufficiently address any perceived corruption from "mega-donors").

use of state-regulated funds for activities that more indirectly serve to get a candidate elected, such as generic party activity), *see, e.g.*, Feingold dep. 126-27; RNC ES, LaRaja decl. ¶ 30, Title I again contains no relevant limitations, banning the receipt and disbursement of state-regulated funds no matter the purpose for which the funds are being given or spent, *see* BCRA § 101(a) (adding new FECA § 323(a)(1)). Finally, Title I fails the tailoring requirement to the extent that it sweeps in activity relating only to state and local elections and therefore does not serve to get federal candidates elected at all. *See supra* Part I.A. All of these arguments apply equally to the ban on merely soliciting state-regulated funds for, or transferring such funds to, any other person or organization. *See* BCRA § 101(a) (adding new FECA § 323(a)(1)).

Second, the core provisions of Title I affecting state and local party committees are also not sufficiently tailored. As a threshold matter, to the extent that it is the *amount* or *source* of donations of state-regulated funds which gives rise to actual or apparent corruption, Title I again contains virtually no relevant tailoring, instead barring the use of *all* state-regulated funds for "federal election activity" (regardless of amount or source), *see* BCRA § 101(a) (adding new FECA § 323(b)(1)), and imposing *amount* but not *source* restrictions for Levin federally regulated funds used for activities that fall under the exception set out in the Levin amendment, *see* BCRA § 101(a) (adding new FECA § 323(b)(2)). Like the provisions affecting national committees, moreover, the provisions affecting state and local committees fail to draw adequate distinctions between *uses* for which state-regulated funds are put which allegedly are more likely to create actual or apparent corruption (for example, "issue advocacy," notwithstanding the plain language of *Buckley*, *see infra* Part II.A), and those which are less likely to do so (for example, generic party activity), *see* BCRA § 101(b) (adding new FECA § 301(20)-(24)); BCRA § 101(a)

(adding new FECA § 323(b)(2)(B)). Finally, and perhaps most egregiously, the provisions of Title I affecting state and local committees, like those affecting national committees, fail the tailoring requirement insofar as they regulate activity that relates only to state and local elections and does not benefit federal candidates.

Third, a number of other provisions of Title I are also not sufficiently tailored. To take but three examples, the provision banning state and local committees from engaging in joint efforts to raise Levin federally regulated funds, *see* BCRA § 101(a) (adding new FECA § 323(b)(2)(C)(ii)); the provision banning state and local committees from receiving transfers of Levin federally regulated funds from other committees, *see* BCRA § 101(a) (adding new FECA § 323(b)(2)(B)(iv)); and the provision banning national, state, and local committees from soliciting funds for or donating funds to certain tax-exempt organizations or political committees, *see* BCRA § 101(a) (adding new FECA § 323(d)), cannot seriously be said to have any connection whatsoever with an asserted interest in preventing actual or apparent corruption of federal candidates, much less to be sufficiently tailored to such an interest.

4. Title I Violates Core First And Fifth Amendment Rights By Discriminating Against Political Parties.

Finally, Title I is unconstitutional because it regulates speech by political parties but not identical speech by other entities. As the Supreme Court has repeatedly observed, both within and without the campaign-finance context, "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and *the speakers who may address a public issue*." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) (emphasis added; citation omitted). This requirement of neutrality among speakers is embedded not only in the equal protection component of the Fifth Amendment, but

also in the First Amendment itself. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Discrimination against particular speakers is a species of impermissible underbreadth, insofar as the government prohibits speech by particular speakers under a valid rationale for regulation but does not prohibit speech by other speakers under a similarly valid rationale. *See, e.g., Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2537 (2002); *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980).

On two recent occasions, the Court has made clear that nothing in the asserted governmental rationale of preventing actual or apparent corruption justifies treating political parties differently from other entities. As noted above, in *Colorado I*, in concluding that political parties (like other entities) could not be restricted in making independent expenditures, the Court expressly rejected the argument that there are "any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction." 518 U.S. at 616 (plurality opinion). And in *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II*), in concluding that political parties (again like other entities) *could* be restricted in making coordinated expenditures, the Court reiterated the *Colorado I* plurality's conclusion that there is "no reason to see [political party] expenditures as more likely to serve or be seen as instruments of corruption than . . . expenditures by anyone else," *id.* at 444.

Title I will unquestionably place political party committees at a severe disadvantage compared to interest groups. Whereas national party committees are banned outright from raising or spending state-regulated funds for contributions to state or local candidates, voter registration, voter identification, get-out-the-vote activity, or generic campaign activity, advocacy relating to ballot measures, or even administrative expenses or overhead, interest groups (such as

"501(c)(4)" tax-exempt organizations, "527" political committees, and FECA-regulated political action committees) will be able to continue to raise and spend non-federally regulated funds for all of these purposes. Moreover, whereas national party committees are banned outright from raising or spending state-regulated funds for any issue advocacy (regardless of whether it refers to a federal candidate, is transmitted by a broadcast medium, or occurs anytime near an election), interest groups will be able to continue to raise and spend non-federally regulated funds for issue advocacy subject only to the "electioneering communications" restrictions of Title II — and unincorporated organizations (or *MCFL* corporations, to the extent this Court recognizes the *MCFL* exception) will be able to raise and spend such funds for "electioneering communications" as well.[15] To the extent that state and local committees are banned from using state-regulated funds to engage in certain types of issue advocacy, voter registration, voter identification, get-out-the-vote activity, and generic campaign activity (or required to use Levin hard money for such activities), they too will be comparatively disadvantaged.[16] Unsurprisingly, interest groups have already been gearing up to supplant political party committees with regard to

[15] The comparative disadvantage suffered by party committees will only be exacerbated if this Court holds unconstitutional the "electioneering communications" provisions of Title II, thereby allowing interest groups to engage in unfettered issue advocacy. Indeed, if this Court holds Title II unconstitutional, it should strike down Title I as well, since Congress would not have enacted Title I's draconian provisions in Title II's absence. *See, e.g., Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987).

[16] The inability of party committees to engage in issue advocacy will be particularly disadvantageous to so-called "minor" parties, such as the Libertarian Party, which know that their candidates are unlikely to be elected and therefore use state-regulated funds (as well as federally regulated funds) in their "campaigns" effectively for the sole purpose of advancing their favored issues. *See* 9 PCS/MC 894-95, 904-05 (Dasbach *et al.*).

all of these activities, as numerous press reports have chronicled. *See, e.g.*, Peter H. Stone, *New Channels for Soft Money*, Nat'l Journal, Sept. 7, 2002, at 2542; Thomas B. Edsall, *New Ways to Harness Soft Money in Works*, Wash. Post, Aug. 25, 2002, at A1; Thomas B. Edsall & Juliet Eilperin, *PAC Attack II*, Wash. Post, Aug. 18, 2002, at B2. Interest groups have stated in this litigation that they expect donations to increase because of the limitations imposed by BCRA on political party committees. *See, e.g.*, RNC ES, Gallagher decl. ¶ 61.

The overall effect of Title I will therefore be to divert funds from political party committees, and thereby greatly diminish the central role that political parties have played in our political process from the earliest days of the Republic. "The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change." *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring). Because Title I impermissibly disadvantages political parties, it violates fundamental principles of free speech and equal protection, and should be declared unconstitutional.