UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-582 (CKK, KLH, RJL)

NATIONAL RIFLE ASSOCIATION OF AMERICA, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-581 (CKK, KLH, RJL)

EMILY ECHOLS, a minor child, by and through her next friends, TIM AND WINDY ECHOLS, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-633 (CKK, KLH, RJL)

CHAMBER OF COMMERCE OF THE UNITED STATES, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-751 (CKK, KLH, RJL)

NATIONAL ASSOCIATION OF BROADCASTERS, Plaintiff, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-753 (CKK, KLH, RJL)

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-754 (CKK, KLH, RJL)

CONGRESSMAN RON PAUL, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-781 (CKK, KLH, RJL)
REPUBLICAN NATIONAL COMMITTEE, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.* Defendants.	Civ. No. 02-874 (CKK, KLH, RJL)
CALIFORNIA DEMOCRATIC PARTY, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-875 (CKK, KLH, RJL)

VICTORIA JACKSON GRAY ADAMS, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-877 (CKK, KLH, RJL)

REPRESENTATIVE BENNIE G. THOMPSON, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-881 (CKK, KLH, RJL)

MEMORANDUM OPINION
(May 1, 2003)

COLLEEN KOLLAR-KOTELLY, *District Judge*:

I. INTRODUCTION

The recent issues confronting Congress related to campaign finance are neither novel nor unfamiliar:

> The idea is to prevent . . . the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their

> interests as against those of the public. It strikes at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government. And I believe that the time has come when something ought to be done to put a check to the giving of $50,000 or $100,000 by a great corporation toward political purposes upon the understanding that a debt is created from a political party to it.

Elihu Root, *Addresses on Government and Citizenship* 143 (Bacon and Scott ed. 1916) (original statement made before the Constitutional Convention of the State of New York in **1894**).

> Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest.

65 Cong. Rec. 9507-9508 (**1924**) (Statement of Sen. Joseph Robinson).

> We all know that money is the chief source of corruption. We all know that large contributions to political campaigns not only put the political party under obligation to the large contributors, who demand pay in the way of legislation, but we also know that large sums of money are used for the purpose of conducting expensive campaigns through the newspapers and over the radio; in the publication of all sorts of literature, true and untrue; and for the purpose of paying the expenses of campaigners sent out into the country to spread propaganda, both true and untrue.

86 Cong. Rec. 2720 (**1940**) (Statement of Sen. John Bankhead).

> The unchecked rise in campaign expenditures coupled with the absence of limitations on contributions and expenditures, has increased the dependence of candidates on special interest groups and large contributors.

H.R. Rep. No. 93-1239, at 3 (**1974**).

> We have gone from basically a small donor system in this country where the average person believed they had a stake, believed they had a voice, to one of extremely large amounts of money, where you are not a player unless you are

> in the $100,000 or $200,000 range, many contributions in the $500,000 range, occasionally you get a $1 million contribution. . . . Many Members are tired of picking up the paper every day and reading about an important issue we are going to be considering, one in which many interests have large sums at stake and then the second part of the story reading about the large amounts of money that are being poured into Washington on one side or the other of the issue--the implication, of course being clear, that money talks and large amounts of money talk the loudest.

147 Cong. Rec. S2958 (daily ed. March 27, **2001**) (statement of Senator Fred Thompson). Although these statements each reflect discrete points in the history of campaign finance regulation in this country, they reflect the same sentiment: over the course of the last century, the political branches have endeavored to protect the integrity of federal elections with carefully tailored legislation addressing corruption or the appearance of corruption inherent in a system of donor-financed campaigns.

In the area of campaign finance regulation, congressional action has been largely incremental and responsive to the most prevalent abuses or evasions of existing law at particular points in time. For example, consistent with the Constitution, Congress has been permitted to prohibit the use of corporate treasury funds for contributions and expenditures to federal candidates and their parties, forbid the use of union dues in connection with federal elections, cap contributions by individuals to candidates and parties, offer presidential candidates the option of financing their general election campaigns with money from the public fisc, and subject coordinated expenditures to contribution limitations. This process has been evolutionary, and the deliberative nature of the legislative effort is not unexpected given the fact that campaign finance is an extraordinarily challenging area to legislate,

particularly given the strong First Amendment interests at stake. On the one hand, congressional action in this area plainly implicates an individual's right to be free from government regulation, a right that is unquestionably at its apogee in the context of political speech. On the other hand, legislation in this area is designed to embolden public confidence in the political system, which thereby ultimately encourages individuals to participate and engage in the electoral process. *See Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n* ("*Colorado I*"), 518 U.S. 604, 609 (1996) (per curiam) (observing that in assessing the constitutionality of FECA's various provisions the Supreme Court "essentially weigh[s] the First Amendment interest in permitting candidates (and their supporters) to spend money to advance their political views against a 'compelling' governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption"); *see also Burson v. Freeman*, 504 U.S. 191, 198 (1992) ("Perhaps foremost among these serious issues are cases that force us to reconcile our commitment to free speech with our commitment to other constitutional rights embodied in government proceedings.").

Mindful of these competing constitutional interests, Congress has moved deliberately and often slowly to address evasion or abuse of the law. Building a consensus in an area so penetratingly close to the heart of the First Amendment requires serious consideration. In fact, in the case of the legislation presently before the Court, the legislative process took over

six years of study and reflection by Congress.[1] This thoughtful and careful effort by our political branches, over such a lengthy course of time, deserves respect. *See, e.g.*, *Rust v.*

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[1] Although campaign finance reform was considered during the 104th Congress, *see, e.g.*, Campaign Reform Act of 1996, H.R. 3820, 104th Cong. (1996) (considered on the House floor, but failed by a vote of 162-259, 142 Cong. Rec. H8,516 (daily ed. July 25, 1996)), deliberations on BCRA's precursors did not begin until the One Hundred and Fifth Congress. The bills introduced in the One Hundred and Fifth Congress, One Hundred and Sixth Congress, and One Hundred and Seventh Congress, relating to campaign finance, include, but are not limited to: "Bipartisan Campaign Reform Act of 1997," H.R. 493 (105th Cong.); "Campaign Reform and Election Integrity Act of 1998," H.R. 3485 (105th Cong.); "Campaign Finance Improvement Act of 1998," H.R. 3476 (105th Cong.); "Bipartisan Campaign Integrity Act of 1997," H.R. 2183 (105th Cong.); "Campaign Reporting and Disclosure Act of 1998," H.R. 3582 (105th Cong.); "Bipartisan Campaign Reform Act of 1997," S. 25 (105th Cong.); "Senate Campaign Financing and Spending Reform Act," S. 57 (105th Cong.); "Campaign Finance Reform and Disclosure Act of 1997," S. 179 (105th Cong.); "Clean Money, Clean Elections Act," S. 918 (105th Cong.); "Grassroots Campaign and Common Sense Federal Election Reform Act of 1998," S. 1689 (105th Cong.); "Voter Empowerment Act of 1999," H.R. 32 (106th Cong.); "Bipartisan Campaign Reform Act of 1999," H.R. 417 (106th Cong); "Clean Money, Clean Elections Act," H.R. 1739 (106th Cong.); "FEC Reform and Authorization Act of 1999," H.R. 1818 (106th Cong.); "Campaign Integrity Act of 1999," H.R. 1867 (106th Cong.); "Citizen Legislature and Political Freedom Act," H.R. 19 22 (106th Cong.); "Campaign Reform and Election Integrity Act of 1999," H.R. 2668 (106th Cong.); "PAC Limitation Act of 1999," H.R. 2866 (106th Cong.);"Open and Accountable Campaign Financing Act of 2000," H.R. 3243 (106th Cong.); "FEC Reform and Authorization Act of 2000," H.R. 4037 (106th Cong.); "Campaign Finance Improvement Act of 2000," H.R. 4685 (106th Cong.); "Campaign Finance Disclosure on Sales of Personal Assets Act of 2000," H.R. 4989 (106th Cong.); "Informed Voter Act of 2000," H.R. 5507 (106th Cong.); "Campaign Finance Improvement Act of 2000," H.R. 5596 (106th Cong.); "Bipartisan Campaign Reform Act of 1999," S. 26 (106th Cong.); "Federal Election Enforcement and Disclosure Reform Act," S. 504 (106th Cong.); "Clean Money, Clean Elections Act," S. 982 (106th Cong.); "Bipartisan Campaign Reform Act of 1999," S. 1593 (106th Cong.); "Campaign Finance Integrity Act of 1999," S. 1671 (106th Cong.); "Open and Accountable Campaign Financing Act of 2000," S. 1816 (106th Cong.); "Campaign Finance Reform and Disclosure Act of 2000," S. 2565 (106th Cong.); "Bipartisan Campaign Reform Act of 2001," H.R. 2356 (107th Cong.); "Campaign Reform and Citizen Participation Act of 2001," H.R. 2360 (107th Cong.); and "Bipartisan Campaign Finance Reform Act of 2001," S. 27 (107th Cong.).

Sullivan, 500 U.S. 173, 223-224 (1991) (O'Connor, J., dissenting) ("This Court acts at the limits of its power when it invalidates a law on constitutional grounds. In recognition of our place in the constitutional scheme, we must act with great gravity and delicacy when telling a coordinate branch that its actions are absolutely prohibited absent constitutional amendment.") (internal quotation marks and citations omitted); *see also FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982) ("This careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference.") (citation and quotation marks omitted). Nevertheless, it is the province of the judiciary to intervene when Congress has struck the wrong balance and disproportionately transgressed First Amendment rights in the name of reform. While navigating this balance is undoubtedly complex, such a task is demanded by the dictates of the Constitution and the well worn path of interpretation of congressional action relating to campaign finance legislation by the Supreme Court of the United States.

It is within this historical framework that the incremental changes Congress strives to accomplish in enacting the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA") are properly understood. BCRA is yet another step in the careful evolution of the campaign finance laws targeted at addressing exceptions to the constitutionally permissible laws that are already in force. Indeed, BCRA was enacted in large measure to amend the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431 *et seq.*

("FECA"), and any constitutional interpretation of BCRA must, as its starting point, recognize the role BCRA plays within the current state of federal law. In other words, it must be remembered that the statutory provisions at issue were designed by Congress as a comprehensive approach to the abuses of FECA that legislators and candidates were acutely aware of in their capacity as political actors.[2] BCRA was designed to ameliorate FECA's most glaring abuses, while staying true to the constitutional boundaries set forth by the judiciary.

Presently before this three-judge District Court are eleven consolidated actions challenging much of BCRA as unconstitutional and seeking declaratory and injunctive relief to prohibit its enforcement. Plaintiffs and Defendants have filed cross motions for judgment pursuant to Rule 54 of the Federal Rules of Civil Procedure. Suffice it to say, the legal challenges raised by this litigation are complex and raise issues of fundamental importance to the conduct and financing of federal election campaigns.

In resolving these challenges, I have endeavored to adopt a cohesive constitutional framework in adjudicating Plaintiffs' claims, premised on the extensive record in this case

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[2] As Senator Fritz Hollings wryly observed during the Senate debate on BCRA:

> It amused me the other day when they said we finally had some debate going on in the Senate. The reason we have a debate is because this is the first subject we know anything about. All the rest of it is canned speeches that the staff gives you, and you come out and you talk about Kosovo, you talk about the defense budget, or you talk about the environment, and you read scientific statements and everything – but we know about money. Oh boy, do we know.

147 Cong Rec. S2852-53 (daily ed. March 26, 2001) (statement of Senator Fritz Hollings).

and Supreme Court precedent. It is an approach that I believe is consistent with our common law traditions: a decision is rooted in the record of this case and guided by the constitutional boundaries established by the Supreme Court's campaign finance jurisprudence. Under this approach, I have only found three of the challenged sections unconstitutional: Sections 213, 318, and 504. The provisions I have found unconstitutional are all provisions of BCRA that are not central to its core mission and are entirely severable without doing injustice to the remainder of the law. The rest of the challenged provisions I find either constitutional or nonjusticiable, with the small exception, as observed in the *per curiam* opinion, of one disclosure provision contained in Section 201. In the case of Section 201, Judge Leon and I have severed subsection (5) of Section 201; a relatively minor change that does not impair the remaining disclosure provisions of the Act.[3]

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[3] I cannot agree with Judge Henderson, who appears to characterize my opinion, along with the *per curiam* opinion, and Judge Leon's opinion, as "upholding a portion [of BCRA] here and striking down a fragment [of BCRA] there until *they* [Judge Leon and Judge Kotelly] have drafted legislation the Congress would never have enacted – all in the name of *deference* to that body." Henderson Op. at 5 (first emphasis added, second emphasis in original). I would observe that my opinion does not sift through various sections of BCRA that have been challenged, adopting some and rejecting others. Rather, my decision is predicated on lengthy discussions of both the record and the governing caselaw. In undertaking this analysis, I have only found three sections unconstitutional in their entirety; the same three sections that Judge Henderson and Judge Leon have each found unconstitutional. I have also, with Judge Leon, severed one section from a disclosure provision in Section 201; but this is no different from Judge Henderson severing a phrase from Section 323(e). Henderson Op. at Part IV.D.4. It is also important to note that I have not "drafted legislation." *Id*. Nothing in my opinion rewrites BCRA in any manner whatsoever. I have accepted the statute on its face, finding its core provisions constitutional, with exceptions noted above as to some ancillary provisions.

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II. FINDINGS OF FACT

Reviewing a record in a case involving protected First Amendment rights requires serious examination and analysis of the underlying testimony and documentary evidence. Therefore, with few exceptions, I have not relied on or cited to the Findings of Fact proposed by the litigants. To ensure accuracy and to eliminate any gloss or characterizations added by the parties, I have reviewed and cited the underlying documents, depositions, or declarations and have, in many instances, chosen to quote directly from the original sources.[4]

I have endeavored to develop a factual record that is commensurate with my legal approach. Accordingly, even though in regard to my Conclusions of Law I am in dissent on most of Title I, as well as in dissent with regard to the primary definition of electioneering communication in Title II, I have found it appropriate to adequately set forth the bases of my Factual Findings to assist the appellate review of the three-judge District Court's decisions, and because the nature of my legal positions demand it.

Having set forth the following preliminaries, I now turn to my Findings of Fact. While the record is exhaustive–replete with multiple sources for each point–I have focused

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[4] Almost exclusive reliance on the litigants' proposed findings of fact, which I have already indicated is a method of fact finding that I do not employ, should lead to a careful examination by the reviewing Court of the adopted findings. *See Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1404 (D.C. Cir. 1988) (per curiam) ("While 'the fact that the trial judge has adopted proposed findings does not, by itself, warrant reversal,' 'it does raise the possibility that there was insufficient independent evaluation of the evidence and may cause the losing party to believe that his position has not been given the consideration it deserves.'") (quoting *Photo Elecs. Corp. v. England*, 581 F.2d 772, 777 (9th Cir.1978)); *id* at 1408.

on selecting from the complete record, facts that are probative in supporting my legal conclusions, distinguishing, where appropriate, between disputed and uncontroverted evidence. In short, I have exercised my discretion to be selective without sacrificing, to the best of my ability, my due diligence.[5]

TITLE I: BCRA NONFEDERAL MONEY ("SOFT MONEY") PROVISIONS

National Party Nonfederal Money Fundraising and Spending

1.1 As discussed both in the *per curiam* opinion and my own conclusions of law, FECA was silent on how to draw lines around money raised outside of FECA's source and

[5] I am compelled to respond to Judge Henderson, who, without *any elaboration*, has criticized three of my Findings in particular as leaving her "'with the definite and firm conviction that a mistake has been committed." Henderson Op. at 67 n.55 (quoting *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (citing my Findings ¶¶ 2.13; 1.82-1.83). In the examples Judge Henderson cites, she points to two summaries and an introduction; ignoring the surrounding Findings in support of the evidentiary record. I have in my Findings discussed in great detail the foundation and basis for the particular Findings she cites. *See infra* Findings ¶¶ 2.8, 2.8.1-2.8.3.5; 1.73-1.81; 1.83.1-1.83.7. Judge Henderson does not assail that analysis nor does she in any way indicate a reasoned basis for her disagreement. As such, I must respectfully disagree with her view that a "mistake has been committed" in regard to these three Findings of Fact.

In addition, although Judge Henderson determines that the record is largely superfluous to her legal conclusions, *see* Henderson Op. at 7 n.1 ("[a]lthough the actions before us have produced a large (*but probably unnecessary*) *record*") (emphasis added), she seemingly urges the Supreme Court to adopt her "Alternative Findings of Fact" "as an alternative to those of the majority," *id*. at 67, and in conclusory fashion alleges mistakes in the Findings of Fact of the "majority," without any specificity. *Id*. Given that Judge Henderson's findings are "an alternative to those in the majority," I have not found it prudent to catalogue each instance where I disagree with her factual conclusions. I would simply observe that I respectfully disagree that Judge Henderson's "Alternative Findings of Fact" are a more appropriate and accurate "alternative to those [Findings of Fact] of the majority." *Id*.

amount limitations for political parties to spend on activities that were expected not to be used for the purpose of influencing a federal election. The FEC's opinions and rulemakings drew that line by permitting state and national party committees to pay for the nonfederal portion of their administrative costs and voter registration and turnout programs with monies raised under relevant state laws (not FECA), even if they permitted contributions from sources such as corporations and labor unions that were prohibited under FECA. As a result, national and state parties began to raise so-called "soft money," which described these nonfederal funds–not subject to FECA limits and restrictions–to pay for a share of election-related activities.

1.2 It is undisputed that over the past two decades the parties have raised and spent an increasing amount of nonfederal funds.

1.3

> In 1980 the national Republican party spent roughly $15 million in soft money, the Democrats $4 million. This constituted 9% of total spending by the two national parties. In 1984 the amount of soft money spent by the national parties increased marginally to $21.6 million but it constituted a smaller share (5%) of total national party activity. In 1988 . . . . [p]arty soft money spending more than doubled to $45 million, which was 11% of national party totals . . . . By 1988, both parties had developed effective means of courting large soft money donors. After the election, Republicans revealed that they had received gifts of $100,000 each from 267 donors; Democrats counted 130 donors contributing $100,000 or more. . . .

Mann[6] Report at 12-13 [DEV 1-Tab 1] (citations omitted).

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[6] Thomas Mann is one of Defendants' experts. I note that neither Plaintiffs nor (continued...)

1.4 The FEC began tracking nonfederal donations in the 1992 election cycle. During that cycle the Democratic and Republican parties together raised $86.1 million in nonfederal funds. During the 1994 election cycle the two major parties raised $101.6 million in nonfederal funds; during the 1996 election cycle they raised $263.5 million in nonfederal funds; during the 1998 election cycle they raised $222.5 million in nonfederal funds; during the 2000 election cycle they raised $487.5 million in nonfederal funds; and during the 2002 election cycle they raised $495.8 million in nonfederal funds. *See* FEC, News Release: Party Fundraising Reaches $1.1 Billion in 2002 Election Cycle (Dec. 18, 2002), *available* at http://www.fec.gov/press/20021218party/20021218party. html.

1.4.1 There was

> a threefold increase in national party soft money activity between 1992 and 1996—from $80 million to $272 million. Soft money as a share of total national party spending jumped from 16% to 30%. Both parties and their elected officials worked hard to solicit soft money donations from corporations, wealthy individuals, and labor unions. During the 1996 election the national party committees received … approximately 27,000 contributions from federally prohibited sources . . . Less than $10 million of the $272 million was contributed directly to state and local candidates in the 1996 cycle. . . . The two parties transferred a total of $115 million in soft money to state party committees, which financed two-thirds of state party soft money expenditures. . . . State party soft money expenditures for political communication/advertising jumped from less than $2

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[6](...continued)
Defendants have challenged the qualifications of any of the designated experts in this case.

million in 1992 to $65 million in 1996.

Mann Report at 21-22 [DEV 1-Tab 1] (citation omitted). During the 1996 election cycle, the top 50 nonfederal money donors made contributions ranging from $530,000 to $3,287,175. *Id*. at 22. Three of the top 50 nonfederal money donors to the national political parties in 1996 were state political parties. Mann Expert Report Tbl. 5 [DEV 1-Tab 1].

1.4.2 The total amount of soft money spent [in the 1998 midterm election cycle]—$221 million—was less than in 1996 but more than double the previous midterm election. And soft money as a share of total spending by the national parties jumped to 34%. The congressional party campaign committees put a premium on raising and spending soft money to advance the election prospects of their candidates. . . . Both national party committees had discovered they could finance campaign activity on behalf of their senatorial candidates with soft money in the form of 'issue advocacy.' The same pattern, more pronounced with the Democrats than the Republicans, was evident in the House campaign committees.

Mann Report at 23 [DEV 1-Tab 1] (citation omitted).

1.4.3 [S]oft money financing of party campaigning exploded in the 2000 election cycle. Soft money spending by the national parties reached $498 million, now 42% of their total spending. Raising a half billion dollars in soft money [in 2000] took a major effort by the national parties and elected officials, but they had the advantage of focusing their efforts on large donors. . . .The top 50 soft money donors . . . each contributed between $955,695 and $5,949,000. Among the many soft money donors who gave generously to both parties were Global Crossing, Enron and WorldCom.

Mann Report at 24-25 [DEV 1-Tab 1] (citation omitted). "A total of $280

million in soft money—well over half the amount raised by the six national party committees—was transferred to state parties [in 2000], along with $135 million in hard money." *Id.* at 26. "By contrast, the national parties contributed . . . only $19 million directly to state and local candidates, less than 4% of their soft money spending and 1.6% of their total financial activity in 2000." Mann Report at 26 [DEV 1-Tab 1] (citation omitted). The table below "shows the trend in hard and soft money donations to the political parties since the 1991-1992 election cycle, when the FEC first began tracking these figures. Soft money donations rose from $86.1 million to $495.1 million between 1991-2 and 1999-2000, but hard money contributions rose markedly as well, from $445 million to $741 million." Green[7] Expert Report at 30 [DEV 1-Tab 3].

	1991-92	**1993-94**	**1995-96**	**1997-98**	**1999-2000**
Hard Money	$445.0	$384.7	$638.1	$445.0	$741.0
Soft Money	$86.1	$101.6	$262.1	$224.4	$495.1
Total	$531.1	$486.3	$900.2	$669.4	$1,236.1

Id. (Tbl. 1: National Party Receipts 1992-2000) (figures in millions) (based on "FEC Reports Increase in Party Fundraising for 2000" release of May 15, 2001). Defendants' expert Donald Green points out that while the amount of

[7] Donald Green is one of Defendants' experts.

money flowing into the campaign finance system has continued to grow, "the lawmakers subject to its influence remain constant in number." Green Rebuttal Report at 22 [DEV 5-Tab 1].

1.4.4 During the first 18 months of the 2001-2002 election cycle the parties reported nonfederal receipts of $308.2 million, which is a 21 percent increase over the same period during the 1999-2000 cycle. The FEC notes that this increase is "all the more significant given that typically parties raise more in Presidential campaign cycles than in non-presidential campaigns." Press Release, Federal Election Commission, Party Fundraising Growth Continues (Sept. 19, 2002) FEC141-0001 [DEV 28]. By October 16, 2002, the parties had raised over $421 million in nonfederal funds. News Release, Federal Election Commission, National Party Fundraising Strong in Pre-Election Filings, *available at* http://www.fec.gov/press/20021030partypre.html/20021030partypre.html.

The Rise of Nonfederal Money Spending

1.5 The figures above demonstrate that although nonfederal receipts and spending began to grow in the 1980s, this trend accelerated beginning in 1996.

1.6 Experts from both parties attribute the accelerated rise in nonfederal money spending to President Bill Clinton and his political consultant Dick Morris' use of such funds during the 1996 campaign to fund

> television ads designed to promote Clinton's reelection. While the ads prominently featured the President, none of these costs were charged as coordinated expenditures on behalf of Clinton's campaign. Instead the party paid the entire cost, based on a legal argument never before made: that party communications which did not use explicit words advocating the election or defeat of a federal candidate could be treated like generic party advertising and financed, according to the FEC allocation rules, with a mix of soft and hard money.

Mann Report at 18 [DEV 1-Tab 1]. In the words of Plaintiffs' expert Raymond La Raja, this "maneuver . . . catapulted soft money." La Raja Cross Exam. Ex. 3 at 45 [JDT 15] (Raymond Joseph La Raja, American Political Parties in the Era of Soft Money (2001) (unpublished Ph.D. dissertation, University of California at Berkeley).

> The strategy to deploy soft money for [political advertising] is described in a series of memos from Dick Morris. . . . Morris says, "I met with . . . attorney[s] . . . and explained the kinds of ads I had in mind. Fortunately, they said the law permitted unlimited expenditures by a political party for such 'issue-advocacy' ads. By the end of the race, we had spent almost thirty-five million dollars on issue-advocacy ads (in addition to about fifty million dollars on conventional candidate-oriented media), burying the Republican proposals and building a national consensus in support of the president on key issues."

Magleby[8] Expert Report at 11 (quoting Dick Morris, Behind the Oval Office: Getting Reelected Against All Odds 141, 624 (1999)) [DEV 4-Tab 8]. "The national Democratic party managed to finance two-thirds of its pro-Clinton 'issue ad' television blitz by taking advantage of the more favorable allocation methods available to state parties. They simply transferred the requisite mix of hard and soft

[8] David Magleby is an expert for Defendants.

dollars to party committees in the states they targeted and had the state committees place the ads." Mann Expert Report at 22 [DEV 1-Tab 1]; *see also* La Raja Cross Exam. Ex. 3 at 14, 37-48 [JDT 15] (discussing the emergence of "party soft money"); Finding ¶ 1.26.1 (discussing allocation regime).

1.7 Experts for both sides agree that "[i]t did not take the Republican party long to respond in kind by promoting Bob Dole and Jack Kemp." Magleby Expert Report at 11 [DEV 4-Tab 8]; *see also* La Raja Cross Exam. Ex. 3 at 46 [JDT Vol. 15] ("The Dole-Kemp campaign responded to the Morris plan with its own party-based media strategy.").

> In May of 1996, the Republican National Committee announced a $20 million "issue advocacy" advertising campaign. Its purpose, in the words of the chairman, would be "to show the differences between Dole and Clinton and between Republicans and Democrats on the issues facing our country, so we can engage full-time in one of the most consequential elections in our history." These presidential candidate-specific ads, like the Democratic ones, were targeted on key battleground states and financed with a mix of hard and (mostly) soft money. Both parties were now financing a significant part of the campaigns of their presidential candidates outside of the strictures of the FECA and well beyond the bounds of the 1979 FEC ruling that national parties may raise corporate and union funds and solicit unlimited donations from individuals "for the exclusive and limited purpose of influencing the nomination or election of candidates for nonfederal office."

Mann Expert Report at 20 (citation omitted) [DEV 1-Tab 1]; *see also infra* Findings ¶ 1.20.1 (Republican consultants' discussion about whether such advertisements met the "issue advocacy test").

1.8 This approach for the use of nonfederal funds spilled over into congressional races. Mann Expert Report at 20 [DEV 1-Tab 1]; *see also* Lamson[9] Decl. ¶ 9 (describing both parties' national committees' use of nonfederal money to run advertisements in a race for Congress in Montana).

1.9 By the end of the 2000 election cycle, it was clear that although "[s]cholars might differ about how best to change the campaign finance system, . . . they could not avoid the conclusion that party soft money and electioneering in the guise of issue advocacy had rendered the FECA regime largely ineffectual." Mann Expert Report at 26.

The Rise of Nonfederal Money Is Not Related to "Party Building"

1.10 "The parties' expanding use of soft money for the promotion or attack of particular candidates . . . . [runs] counter to the stated purposes of soft money which were to permit parties to raise unlimited amounts of money for 'party building' purposes, unlike hard money which is subject to the contribution limits given to the parties to help elect or defeat candidates." Magleby Expert Report at 11 [DEV 4-Tab 8].

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[9] Since January 2001, Joe Lamson has served as the Communications Director for the Office of Public Instruction of the State of Montana, a post he also held from early 1997 until January 2000. During 2000, Lamson managed Nancy Keenan's campaign to represent Montana's Congressional district. During 1996, Lamson managed Bill Yellowtail's campaign to represent Montana's Congressional district. From 1983 through 1996, Lamson served as the state director for United States Representative Pat Williams' Congressional office in Montana. During this same period, Lamson also managed Congressman Williams' election campaigns in Montana. From 1981 to 1983, Lamson was Executive Director of the Montana Democratic Party. Lamson provided a sworn declaration in *Colorado Republican Fed. Campaign Comm. v. FEC*, 41 F. Supp. 2d 1197 (D. Colo. 1999), *aff'd*, 213 F.3d 1221 (10th Cir. 2000), *rev'd*, 533 U.S. 431 (2001). Lamson Decl. ¶¶ 2-3 [DEV 7-Tab 26].

Magleby notes that "[t]he content of such ads does nothing to foster party infrastructure. Those who make the ads and manage the campaigns are consultants, who often do not even reside in the state where the election is taking place." Magleby Expert Report at 49 [DEV 4-Tab 8]. Plaintiffs' expert La Raja concurs, finding that the political parties "exploit federal campaign finance laws by using soft money for candidate support even though federal laws require them to use it for generic party building." La Raja Cross Exam. Ex. 3 at 74-75; *see also* La Raja Cross Exam. at 67 [JDT Vol. 15] (finding that "more non-federal funds in the allocation accounts are used for media rather than what I call party building").

1.11 As former Senator Brock[10] attests, nonfederal money

> by and large is not used for 'party building.' To the contrary, the parties by and large use the money to help elect federal candidates -- in the Presidential campaigns and in close Senate and House elections. Far from reinvigorating the parties, soft money has simply strengthened certain candidates and a few large donors, while distracting parties from traditional and important grassroots work.

Brock Decl. ¶ 6 [DEV 6-Tab 9]; *see also* Boren[11] Decl. ¶ 4 [DEV 6-Tab 8] ("[S]oft

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[10] Senator William Brock he served as United States Representative from Tennessee from 1963 until 1971. From 1971 until 1977, he served as a United States Senator from the State of Tennessee. From 1977 until 1981, he served as Chairman of the Republican National Committee. Brock Decl. ¶ 2 [DEV 6-Tab13].

[11] Senator David Boren served as a United States Senator from Oklahoma from 1979-1994. Boren Decl. ¶ 2 [DEV 6-Tab 8]

money is not used purely for 'party building' activities"); Buttenwieser[12] Decl. ¶ 15 [DEV 6-Tab 11] (explaining that there is little difference between federal and nonfederal money beyond the source and amount limitations on federal money, because national and state political parties use nonfederal money to influence federal elections).

National Party "Issue Advocacy" Campaigns Funded With Nonfederal Money

1.12 As the experts for both parties note, the rise in nonfederal money fundraising was spurred by the new-found ability to run "issue advertisements" designed to affect federal elections.

1.13 Witnesses involved in the political process all agree that political party "issue advocacy" includes communications, paid for in whole or part with nonfederal money, that attack or support a candidate by name while claiming to be an issue discussion outside the reach of federal election laws and do not use the *Buckley* express advocacy language referred to as "magic words."[13]

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[12] Peter Buttenwieser is a large contributor to the Democratic Party. He estimates that from the 1996 election cycle through the 2002 cycle, he has donated over $2.8 million in non-federal funds to national committees of the Democratic Party, including over $1.2 million in the 2000 election cycle. Also from the 1996 election cycle through the current cycle, he estimates that he and his wife have contributed approximately $100,000 per cycle in federal funds to federal candidate committees and other federal political committees not affiliated with political parties. During this same period, he has also hosted many hard money fundraising events for federal candidates in Philadelphia. Buttenwieser Decl. ¶ 6 [DEV 6-Tab 11].

[13] *See Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976).

Members of Congress and candidates for federal office agree that political party advertisements paid for with nonfederal funds often influence elections. *See* 146 Cong. Rec. H428 (Feb. 15, 2000) (Rep. Ganske) (noting that parties in the 1996 election cycle "took . . . [nonfederal] money and they did not use it to just go out and get a voter registration guide, they used that money for issue ads on TV that were nothing less than full campaign attack ads. Independent surveys have shown that 80 percent of those, quote, issue ads were actually attack ads."); Shays Decl. in *RNC* ¶¶ 7, 8 [DEV 68-Tab 40] ("The political parties . . . use these [nonfederal] funds not for general party-building activities, but instead on television advertisements that are designed to influence the outcome of federal elections (and are often indistinguishable from candidate-sponsored campaign ads."); Meehan Decl. in *RNC* ¶ 13 [DEV 68-Tab 30] ("I believe that 'issue ads' by party committees are designed to and do affect the outcomes of elections, that they defeat candidates, and that they drive up the costs of elections."); Rudman[14] Decl. ¶ 12 [DEV 8-Tab 34] ("The parties use soft money to help federal candidates get elected by running so-called 'issue ads' funded with soft money in closely contested federal races."); McCain Decl. ¶¶ 15, 17 (describing political party advertising demonstrating that political "parties circumvent federal contribution and spending limits by running candidate ads under the guise of 'issue

[14] Senator Warren Rudman was elected to the United States Senate from New Hampshire in 1980 where he served two terms. Rudman Decl. ¶¶ 1, 3 [DEV 8-Tab 34].

advocacy.'"); Chapin[15] Decl. ¶ 11 [DEV 6-Tab 12] (stating that the National Republican Campaign Committee ("NRCC") ran television advertisements during her 2000 Congressional campaign designed to influence the result of the election); Bloom Decl. ¶ 10 [DEV 6-Tab 7].

Political consultants agree as well. *See* Beckett[16] Decl. ¶ 11 ("The NRCC itself ran television ads in the 2000 Congressional campaign. . . . which as I recall were run

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[15] Since early 2001, Linda Chapin has been the Director of the Metropolitan Center for Regional Studies at the University of Central Florida. Chapin Decl. ¶ 2 [DEV 6-Tab 12] received about 49% of the votes cast. *Id*. ¶ 4. From 1998 to 2000, Chapin directed the Orange County (Florida) Clerk's Office. *Id*. ¶ 2. Prior to that, Chapin was elected to two successive four-year terms, in 1990 and 1994, as County Chairman of Orange County. *Id*. The County Chairman is a strong executive position roughly equivalent to a mayoral office. *Id*. In recognition of Chapin's work as County Chairman, she received a Public Service Excellence Award from then-President Bill Clinton in 1997, and an Alumni Achievement Award from the Kennedy School of Government at Harvard University in 1999. *Id*. Prior to her tenure as County Chairman, she was elected to a four-year term on the Orange County Commission in 1986.

[16] Terry S. Beckett is a Democratic political consultant who has spent about 25 years working on political campaigns. Beckett Decl. ¶ 2 [DEV 6-Tab 3]. Beckett worked on the 1976 and 1980 Presidential campaigns of Jimmy Carter, the 1978 Bill Nelson Congressional campaign, and she ran Dick Batchelor's 1982 Congressional campaign. *Id*. Beckett also endeavored to establish a House Democratic Caucus within the Alabama legislature in the mid 1980's. *Id*. Beckett ran Gary Hart's 1988 Presidential campaign in Florida and Louisiana, and Dick Gephardt's 1988 Presidential campaign in Florida. *Id*. In 1986, Beckett did the polling on Linda Chapin's campaign for Orange County (Florida) Commissioner, and ran Chapin's 1990 and 1994 campaigns for Orange County Chairman. *Id*. Beckett also served as general consultant on Ms. Chapin's 2000 campaign to represent Florida's Eighth Congressional district, overseeing the work of the campaign manager and the media and polling consultants. *Id*. Beckett has also been involved in government having worked on the Executive Staff for Bob Graham from 1981-82 when he was the Governor of Florida and also serving as Ms. Chapin's Chief of Staff from 1991 to 1994 when she was County Chairman. *Id*. In addition, Beckett worked for a polling firm during the 1980s. *Id*.

in the two months prior to the general election . . . . [which] were clearly intended to influence the election result.") & Ex. 3 (storyboards of two of these advertisements) [DEV 6-Tab 3]; *id*. ¶ 9 (describing Democratic Congressional Campaign Committee ("DCCC") efforts during the same election); Lamson Decl. ¶¶ 9, 17, Ex. 2-4 [DEV 7-Tab 26] (noting that political parties ran "issue ads" designed to influence the outcome of the Montana Congressional election in both 1996 and 2000); Pennington[17] Decl. ¶ 10-11, 13-15 [DEV 8-Tab 31] (discussing how parties can and have used issue advocacy to affect federal elections). The DNC's political director also concurs. Stoltz[18] Decl. ¶ 16 [DEV 9-Tab 39] ("In my experience, issue ads affect elections.

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[17] Rocky Pennington is a Republican political consultant. Pennington Decl. ¶ 2 [DEV 8-Tab 31]. He is the owner and President of three Florida companies engaged in political activities: Southern Campaign Resources, Direct Mail Systems, Inc., and Summit Communications. *Id*. Southern Campaign Resources, which Pennington founded in 1982, does general consulting primarily for Florida state campaigns, but has also done Congressional races in Florida, including Congressman Cliff Steams' first race in 1988 in Ocala, Bill Sublette's 2000 campaign in the Eighth Congressional district, and Congressman Jeff Miller's 2001 special election in the Panhandle. *Id*. Direct Mail Systems, founded in 1981, is a direct mail company with roughly 100 employees that has done fundraising and has sent voter contact mail for candidates, parties and interest groups in Florida and elsewhere. *Id*. Direct Mail Systems has also sent voter contact mail for some of Florida's Republican Congressional delegation, as well as for state Republican parties in many other states. Finally, Summit Communications, which Pennington founded in 2000, creates political advertising for television and radio and buys airtime for various campaigns, such as Congressman Miller's 2001 general election campaign. *Id*.

[18] Gail Stoltz has been employed as the Political Director of the DNC since May 2001. From 1998 through 2001, she worked for the Service Employees International Union as Government Affairs Director. Prior to this she worked as Political Director for the Democratic Senatorial Campaign Committee ("DSCC") and in various capacities for the Democratic National Committee ("DNC"). Stoltz Decl. ¶ 1.

The ads can either demoralize or confuse voters so that they do not vote, or they can energize a voter base for or against a party or its candidates. During a presidential election year, the ads definitely make a difference when a presidential candidate is featured.").

In addition, experts for both sides agree that these "issue ads" are intended to and do support the campaigns of federal candidates. *See* La Raja Cross Exam. Ex. 3 at 15 [JDT Vol. 15], 101-04; Magleby Expert Report at 40-42 [DEV 4-Tab 8].

Characteristics of National Party Nonfederal Campaign Advertisements

1.14 Many national political party committee "issue ads" have focused on the positions, past actions, or general character traits of federal candidates, as part of efforts to influence federal elections.

Scripts of these advertisements confirm this. *See, e.g.,* ODP0021-01393 [DEV 70-Tab 48] (Republican National Committee's ("RNC") advertisement titled "Pledge," discussed *infra* Findings ¶ 1.20.2; ODP0023-02288 to 95 [DEV 70-Tab 48] (sample scripts of "Keep More" with different sponsors identified (*i.e.* RNC, CRP, "[state party name]"). Some versions of the advertisement end with "[Member Name] kept his promise and voted for the middle-class tax cut. Clinton vetoed it," while others end with "Congressman [___] voted for the largest tax increase in American history . . . and against Republican efforts to roll it back."); ODP0023-02308 [DEV 70-Tab 48] (national political party advertisement titled "Fool Me Once," beginning

with the line "Compare the Clinton rhetoric with the Clinton record," discussing statements President Clinton made and actions on the same issues, and concluding with the line "Tell President Clinton you won't be fooled again."); ODP0023-02313 [DEV 70-Tab 48] (RNC advertisement titled "Stripes," which states in part: "Bill Clinton . . . He's really something. He's now trying to avoid a sexual harassment lawsuit claiming he is on active military duty. . . . Active Duty? Bill Clinton. . . He's really something."); ODP0023-02314 [DEV 70-Tab 48] (script of the RNC's "The Story," discussed *supra* Finding ¶ 1.20.1); ODP0023-02326 (national political party advertisement titled "More," stating that "Under President Clinton, spending on illegal[] [immigrants] has gone up. While wages for the typical worker have gone down. . . . Tell President Clinton to stop giving benefits to illegals, and end wasteful Washington spending."); ODP0023-02389-92 [DEV 70-Tab 48] (three versions of a national political party advertisement titled "Control" stating that "Washington labor bosses and liberal special interest groups want to buy control of Congress," and explaining why these groups think a named candidate "will vote their way. . . to return to higher taxes and more wasteful spending"); ODP0029-00010-25 [DEV 70-Tab 48] (national political party advertisement titled "High Taxes" and related documents. "High Taxes" states that a Congressional candidate while "in the state legislature. . . voted to raise corporate and personal income tax rates almost 18 percent. He even supports raising social security tax limits."); ODP0029-00031 [DEV 70-Tab 48]

(national political party advertisement titled "Family Budget," stating that a Congressional candidate raised taxes while in state and local government, and concluding: "If you think your family pays enough in taxes . . . Call [____]. Tell her to stop raising your taxes.") (emphasis in original); ODP0029-00041 [DEV 70-Tab 48] (national congressional committee advertisement supporting a candidate who "knows you have better things to do with your money than pay higher taxes"); *see also* ODP0029-00114 [DEV 70-Tab 48]; ODP0029-00169 [DEV 71-Tab 48]; ODP0029-00177 to 79 [DEV 71-Tab 48]; ODP0029-00235 to 37 [DEV 71-Tab 48]; ODP0029-00329 [DEV 71-Tab 48]; ODP0029-00339 [DEV 71-Tab 48]; ODP0041-00177 to 78 [DEV 71-Tab 48]; ODP0041-00202 to 06 [DEV 71-Tab 48]; ODP0041-00220 to 23 [DEV 71-Tab 48]; ODP0041-00280 to 82 [DEV 71-Tab 48]; ODP0041-00352 to 54 [DEV 71-Tab 48]; ODP0041-01261 [DEV 71-Tab 48]; ODP0041-01275 [DEV 71-Tab 48]; ODP0029-00138 to 47 [DEV 71-Tab 48]; ODP0036-01403 to 06 [DEV 71-Tab 48]; ODP0036-02931-32 [DEV 71-Tab 48]; ODP0041-00269-71 [DEV 71-Tab 48]; ODP0041-01024 to 27 [DEV 71-Tab 48]; ODP0041-01219 [DEV 71-Tab 48] (other political party advertisements that focus on the positions, past actions, or general character traits of federal candidates, and related documents).

1.15 Many political party committee "issue ads" have compared the positions or past actions of competing federal candidates, portraying one position negatively and the

other positively, as part of efforts to influence federal elections. Scripts provided to the Court confirm this fact. *See, e.g.,* ODP0023-02387 [DEV 70-Tab 48] (national political party advertisement comparing candidate positions on issues, stating that "Congressman [____] voted for our plan to give families a $500 per child tax credit. . . . [Opponent] voted for Jim Florio's $2.8 billion tax increase which increased your income, sales and gas taxes."); ODP0029-00149 [DEV 71-Tab 48] (national political party advertisement stating that one candidate "support[s] the $500 per child tax credit and ending the tax penalty on married couples," while the other "voted against" those ideas); ODP0029-00159 [DEV 71-Tab 48] (national political party advertisement stating that one candidate "wants Washington <u>bureaucrats</u> to decide what's right for our kids," while the other "supports local school control") (emphasis in original); ODP0041-00585-86 [DEV 71-Tab 48] (national congressional campaign committee advertisement stating that one candidate "supports a program" that "spends millions to hire more bureaucrats," while the other "supports proposals that spend less on bureaucrats and more on local schools"); ODP0041-00729-32 [DEV 71-Tab 48] (national political party advertisement stating that one candidate supports a welfare program that "is restoring responsibility, pride and self-worth," while the other "voted <u>against</u> moving able-bodied welfare recipients from welfare to work") (emphasis in original); ODP0041-01152 [DEV 71-Tab 48] (national political party advertisement stating that one candidate "doesn't support tax cuts for Idaho working families," while

the other "has a different view") ; ODP0041-01177 [DEV 71-Tab 48] (national political party advertisement stating that one candidate was "the only member of Congress who did not want to tell parents when a child molester moved into their neighborhood," while the other "supports laws that protect our children and keep violent criminals in jail for their full terms"); ODP0041-01189 [DEV 71-Tab 48] (national political party advertisement stating that one candidate voted against a measure to "abolish the tax code to force meaningful reform," while the other "wants to abolish the tax code, so we can create a tax code that is fairer and simpler for working families"); ODP0041-01198 [DEV 71-Tab 48] (national political party advertisement noting that one candidate "supports tax cuts for working families," while the other "voted against billions worth of tax cuts for working families"); ODP0041-01266 [DEV 71-Tab 48] (national political party advertisement noting that one candidate "pushed for tax increases" while the other "knows lower taxes and responsible government spending are better policies"); ODP0041-01337 [DEV 71-Tab 48] (national political party advertisement noting that one candidate "supports Senator Kennedy's ultra liberal plan to mandate spending increases of 25 billion dollars over the next five years," while the other "supports lower taxes").

1.16 Political parties aim their nonfederal money largely at competitive races. The political party committees spend millions of nonfederal dollars in competitive U.S. Senate races and hundreds of thousands of dollars or more in competitive U.S. House races.

Magleby Report at 39 [DEV 4-Tab 8]. *See also* McConnell Dep. at 237 [JDT Vol. 19] ("I think every Senator realizes that the resources of the National Republican Senatorial Committee ["NRSC"] are going to be deployed to the . . . maximum extent in places where there are competitive races"); Bumpers[19] Decl. ¶ 4 [DEV 6-Tab 10] ("Party committees focus their resources on competitive races."); McCain Decl. ¶ 22 [DEV 8-Tab 29] ("[P]arties generally focus their soft money spending first on taking care of the parties' current officeholders and on the candidates running for open seats and after that on the challengers running against incumbents").

1.16.1 For example, television and radio electioneering advertising by political parties played an important role in the 2000 Congressional elections in Florida's Eighth District, "a very close open-seat race." Beckett Decl. ¶¶ 4, 9 [DEV 6-Tab 3] (noting that the winning candidate garnered 51% of the vote). Political parties on both sides of these campaigns ran so-called "issue ads" that were financed partly with nonfederal money but clearly directed at influencing the outcome of the election. The DCCC ran television advertising praising Linda Chapin, the Democratic candidate, or criticizing the Republican candidates,

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[19] Senator Dale Bumpers served two terms as Governor of Arkansas, from 1971 to 1975. Bumpers Decl. ¶ 2 [DEV 6-Tab 10]. After his time as Governor, Bumpers served as a Member of the United States Senate, representing the State of Arkansas, from 1975 to 1999. *Id*. After he retired from the Senate, Senator Bumpers spent one year directing the Center for Defense Information, a nonprofit think-tank based in Washington, D.C. *Id*. He currently practices law in Washington D.C. at the law firm Arent Fox Kintner Plotkin & Kahn, PLLC. *Id*. ¶ 3.

through the Democratic State Party in order to take advantage of the more favorable hard money-soft money allocation ratios enjoyed by state parties.[20] Beckett Decl. ¶ 9, Ex. 1 [DEV 6-Tab 3]; Chapin Decl. ¶ 9 [DEV 6-Tab 12]; *see also* Bloom Decl. ¶ 10, Ex. 1-1, 1-4, (describing a similar situation for the 2000 election campaign in Florida's 22nd Congressional District) [DEV 6-Tab 7]. The NRCC and the Florida Republican Party also ran television advertisements in the two months prior to the general election, most of which criticized Chapin's record or positions, and which witnesses testify were clearly intended to influence the election results.[21] Chapin Decl. ¶ 10, Ex. 2

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[20] One advertisement run during the final 60 days of the election campaign, paid for by the DCCC through the Florida Democratic Party, attacked Chapin's challenger, stating the following:

> Announcer: "I'm pro-gun." That's how he described himself to the Orlando Sentinel. Pro-gun. He wants to get rid of the Brady Bill, the common-sense law that says we should just wait 5 days before purchasing a handgun. Pro-gun. He even opposes mandatory trigger locks to keep children safe from harm. "I'm pro-gun." He's Ric Keller, and you should tell him to support sensible gun safety for a change.

Chapin Decl. ¶ 9 & Ex. 1-2 [DEV 6-Tab 12]; Beckett Decl. ¶ 9 -DEV 6-Tab 3].

[21] One advertisement paid for by the NRCC ran within 60 days of the election and stated the following:

> Announcer: It was Tyson vs. McNeeley, the fight shown on Pay-Per-View, bought and paid for by the county jail system. Linda Chapin's county commission ran the jail system that paid for Cable TV for convicts at [its] work-release center. Under Chapin, Convicts also got new TVs and VCRs. The Sentinel wrote cells are carpeted. The day room has padded furniture, such is life for hundreds of Orange County Jail prisoners. Ask Chapin why convicts got Cable TV.

Chapin Decl. ¶ 11 & Ex. 3-2 [DEV 6-Tab 12]; Beckett Decl. ¶ 11; Pennington Decl. ¶ 14.

[DEV 6-Tab 12]; Beckett Decl. ¶ 10, Ex. 2 [DEV 6-Tab 3]; Pennington Decl. ¶ 14, Ex. 3 [DEV 8-Tab 31]; *see also* Bloom[22] Decl. ¶ 11, Ex. 2 (Republican party ads in 2000 Florida 22nd District Congressional race) [DEV 6-Tab 7].

1.16.2 > Most interest groups, in contrast [to political parties], seek to build relationships with officeholders as a way of improving access to the legislative process and lobbying their position. In political science, there is strong empirical support for the theory that interest groups allocate resources primarily to pursue the "access" strategy, meaning they give to candidates who are most likely to win office, which is usually the incumbents (see, for example, Herrnson 2000). Political parties, however, allocate resources for electoral strategies, meaning they contribute money to a party candidate who is in a potentially close election.

La Raja Expert Report ¶ 14 [RNC Vol. VII].

1.17 "Almost 92% of party ads in the 2000 election never even identified the name of a political party, let alone encouraged voters to register with the party, to volunteer with the local party organization, or to support the party." *Buying Time 2000* at 64 [DEV 46]. Defense Expert Magleby concurs, finding "only 15 percent of the ads in 1998

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[22] Elaine Bloom is currently engaged in consulting, public speaking, and community activities. Bloom Decl. ¶ 2 [DEV 6-Tab 7]. In 2001, Bloom was a candidate for Mayor of Miami Beach, Florida. *Id*. In 2000, Bloom was the Democratic candidate in the general election to represent Florida's 22nd Congressional district, running against the incumbent Republican Clay Shaw, who had served in Congress for nearly 20 years. *Id.* (Shaw won the race by approximately 500 votes out of over 200,000 cast). Prior to the 2000 race, Bloom served as a member of the Florida House of Representatives for over 18 years, from 1974 to 1978 (representing Northeast Dade County) and from 1986-2000 (representing Miami Beach and Miami). *Id*. Bloom was Speaker Pro-Tempore of the Florida House from 1992 to 1994, and also served as chair of several legislative committees, including the Health Care Committee, the Joint Legislative Management Committee, the Joint Legislative Auditing Committee, and the Tourism and Cultural Affairs Committee. *Id*.

and 7 percent of the ads in 2000 mentioned the party by name in the ad, except in the tag line indicating which party committee paid for the ad." Magleby Expert Report at 49 [DEV 4-Tab 8].

1.18 Out of the estimated $25.6 million spent by political parties on advertisements in the 1998 election cycle, $24.6 million went to fund advertisements that referred to a federal candidate. *See* Krasno & Sorauf[23] Expert Report at Table 1. Out of 44,485 commercials, 42,599 referred to a federal candidate. *Id.* Viewers perceived 94 percent of these advertisements as electioneering in nature. *Id.* at Table 7.

1.19 Plaintiffs' own experts and witnesses testify that "[i]ssue advertising outside the context of electioneering by political parties is rare." RNC expert Nelson Polsby Dep. in *RNC v. FEC*, 98-CV-1207 (D.D.C) (hereinafter "*RNC*") Ex. 3, at 5 [DEV 66-Tab 5]. In this case, the Plaintiffs' expert, Professor Raymond La Raja, acknowledges that "issue advertisements" are intended to and do support the campaigns of federal candidates. La Raja Cross Exam. Ex. 3 at 14-15 [JDT Vol. 15] ("[I]ssue ads, however, have been designed with the intent of boosting the campaigns of targeted candidates. . . . Rather than use soft money to shore up weak state and local organizations, or enforce party discipline in government, parties invest primarily in issue ads that help candidates.") [JDT Vol. 15]; La Raja Decl. ¶ 16(b) [RNC Vol. VII] ("Political parties use nonfederal money to develop and disseminate political messages."). RNC

[23] Jonathan Krasno and Frank Sorauf are experts for Defendants.

political operations director Terry Nelson[24] testifies that the RNC engages in "issue advocacy in order to achieve one of our primary objectives, which is to get more Republicans elected." Nelson Dep. at 191 [JDT Vol. 24]. This conclusion is echoed by Defense Expert Magleby. Magleby Expert Report at 45 [DEV 4-Tab 8] ("The content, tactics and strategy [of political party advertisements] are generally indistinguishable from the candidate campaigns, except that party campaign communications are generally more negative in tone.")

1.19.1 An RNC official provides examples of advertisement campaigns he claims the RNC ran for "the exclusive purpose of influencing the legislative and policy debate." Josefiak[25] Decl. ¶ 91 [RNC Vol. I]. These campaigns dealt with the issues of the balanced budget amendment, welfare reform, and education. *Id*. One of these advertisements' purpose

> was to communicate the Republican Party's position that the federal government must control its reckless appetite for deficit spending. This particular advertisement featured President Clinton, and included numerous clips of him stating a different number of years in which he would balance the budget. The advertisement explained, "Talk is cheap. Double talk is expensive. Tell Mr. Clinton to support the Balanced Budget Amendment.

Id ¶ 91(c). Josefiak calls this advertisement "one of the most memorable and

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[24] Terry Nelson is the RNC's Deputy Chief of Staff and Executive Director of Political Operations. Nelson Dep. at 8-9 [JDT Vol. 24]

[25] Thomas Josefiak is Chief Counsel of the RNC. Josefiak Decl. ¶ 1 [RNC Vol. I].

effective broadcast advertisements in [RNC] history." *Id*. This commercial was run in May 1996, *id*., the same time the RNC was running very similar so-called "issue advertisements" attacking President Clinton as part of an effort to assist the Dole presidential campaign which was low on funds, *see infra* Findings ¶ 1.20. RNC advertisements addressing welfare reform were also run in the summer of 1996, "comparing Clinton's rhetoric on welfare reform with his record on welfare reform." Josefiak Decl. ¶ 91(d)[RNC Vol. I]. Comparing President Clinton's statements with his record was a major theme of RNC advertisements run during this period in aid of the Dole campaign. *See infra* Findings ¶¶ 1.20, 1.20.2.

Another RNC advertisement ran in October 2002, the month before a federal election,"nationwide in support of the Republican Party's education agenda," and had the following script:

> Male: Every child can learn . . .
> Female: . . . and deserves a quality education in a safe school.
> Male: But some people say some children can't learn . . .
> Female: . . . so just shuffle them through.
> Male: That's not fair.
> Female: That's not right.
> Male: Things are changing. A new federal law says every child deserves to learn.
> Female: It says test every child to make sure they're learning and give them extra help if they're not.
> Male: Hold schools accountable. Because no child should be in a school that will not teach and will not change.
> Female: The law says every child must be taught to read by the 3rd grade. Because reading is a new civil right.

Male: President Bush's No Child Left Behind Law.
Female: The biggest education reform and biggest increase in education funding in 25 years.
Male: Republicans are working for better, safer schools . . .
Female: . . . so no child is left behind.
Male: That's right . . . Republicans.
Announcer: Learn how Republican education reforms can help your children. Call 1-800-843-7620. Help President Bush and leave No Child Behind.
Paid for by the Republican National Committee.

Josefiak Decl. ¶ 91(e) & RNC Ex. 2428 [RNC Vol. I]. The decision by the RNC to run this advertisement, about legislation that had already passed, within one month of a federal election raises questions about whether promoting education policy was the only goal of this advertisement.

These presumably are the best examples the RNC had of its "genuine issue advocacy." I find that two of these commercials, when viewed in context, clearly had an electioneering purpose in addition to any policy goal. The third, concerning education, may also have sought to promote Republican candidates. These examples reinforce the determination of the RNC's own experts: genuine issue advocacy on the part of political parties is a rare occurrence. *See supra* Findings ¶ 1.19.

1.20 Political parties also engage in "issue advocacy" to help their candidates whose campaigns are low on funds. For example, the RNC spent $20 million on issue advertisements from March 18, 1996, through the Republican National Convention in August, designed to boost Senator Dole's image at a time when he had virtually run

out of federal matching primary funds. The RNC paid for a portion of these issue advertisements with nonfederal funds, including the costs of creating and/or disseminating advertisements that attacked President Clinton's record on welfare reform, taxes, and budgetary policy. Thompson Comm. Report at 4014-16, 7520, 8294; Annenberg Report 1997 at 66; Huyck[26] Decl. in *Mariani v. United States*, 3: CV-1701 (M.D. Pa) (hereinafter *Mariani*) ¶¶ 3, 5 [DEV 79-Tab 60]; *see also* Huyck Decl. in *Mariani* Attach. A [DEV Supp.-Tab 9] (text of advertisements paid for by the RNC and other Republican party committees in part with nonfederal money).

The RNC conducted a detailed analysis of several advertisements it was planning to run in various markets. The advertisements consisted of two themes: build up then-Senator and Republican presidential candidate Bob Dole, and attack President Bill Clinton. These advertisements were tested in focus groups to see the effect they had on undecided voters. The advertisement used to build up Senator Dole told his life story and never mentioned the words "vote for," "elect," or any of the "magic words" of express advocacy. The second set of advertisements showed President Clinton speaking on a certain issue, then publicly stating the opposite. All of the commercials were tested to see which would give help Senator Dole and hurt President Clinton in the polls. Memorandum to Haley Barbour from Charlie Nave and

[26] Pat Huyck was the RNC's Director of Accounting as of 1999. Huyck Decl. in *Mariani v. United States*, 3: CV-1701 (M.D. Pa) ¶¶ 3, 5 [DEV 79-Tab 60].

Joel Mincey, dated May 28, 1996, FEC MUR 4553, Fabrizio Dep. Ex. 5 [DEV 55-Tab 113] (INT011830); FEC MUR 4553, Fabrizio Dep. at 83-94 [DEV 55-Tab 113] (despite working as a consultant for Senator Dole, Fabrizio McLaughlin and Associates were sharing their data with the RNC, NRSC, and NRCC).

1.20.1 One example from this effort is "The Story":

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

Fabrizio Dep. Ex. 2; McCain Decl. ¶15. The RNC paid for "The Story," in part with nonfederal money, and it was intended to help Senator Dole in the Presidential election. Huyck Decl. in *Mariani* ¶ 3 [DEV 79-Tab 60]; FEC

MUR 4553, Fabrizio Dep. at 50 [DEV 55-113]; McCain Decl. ¶ 15 [DEV 8-Tab 29].

The RNC's Curt Anderson and Wes Anderson wrote to the RNC Chairman regarding the Dole "Story" advertisement, stating: "We could run into a real snag with the Dole Story spot. Certainly, all the quantitative and qualitative research strongly suggests that this spot needs to be run. Making this spot pass the issue advocacy test may take some doing." ODP0025-02018-20 [DEV 70-Tab 48]. Senator Levin commented: "[a]ny reasonable person looking at that ad at that particular time in the Presidential season would say: It's not an ad about welfare or wasteful spending; it is an ad about why should we elect that particular nominee." 145 Cong. Rec. S12747 (1999) (Sen. Levin). Senator Dole himself stated that "The Story" "never says I'm running for President. I hope that it's fairly obvious since I'm the only one in the picture." Center for Responsive Politics, A Bag of Tricks: Loopholes in the Campaign Finance System (1996) at 13, ODP0018-00172 [DEV 69-Tab 48].

1.20.2 Another example from the RNC's 1996 issue advocacy campaign is "Pledge"

> Clinton: I will not raise taxes on the middle class.
> Announcer: We heard this a lot.
> Clinton: We gotta give middle class tax relief, no matter what else we do.
> Announcer: Six months later, he gave us the largest tax increase in history. Higher income taxes, income taxes

> on social security benefits, more payroll taxes. Under Clinton, the typical American family now pays over $1,500 more in federal taxes. A big price to pay for his broken promises. Tell President Clinton: You can't afford higher taxes for more wasteful spending.

Annenberg Report 1997 at 66; *see also* Huyck Decl. in *Mariani* ¶¶ 3 & Attach. A [DEV 79-Tab 60].

1.21 The political parties understand that their issue advocacy campaigns affect federal elections, and they sponsor them with that purpose. This fact is evident from the 1998 "Operation Breakout" issue advocacy campaign mounted by the NRCC in cooperation with the RNC. "Operation Breakout" was touted as an effort to "ensure that the [Republican] party not only maintains, but expands our majorities in Congress." ODP0031-00299 [DEV 71-Tab 48] (September 25, 1998, letter from RNC Chair Nicholson to donor thanking him for his donation to "Operation Breakout"); *see also* ODP0033-00534 [DEV 71-Tab 48] (RNC Solicitation letter for "Operation Breakout," describing it as an effort to "hold onto our majority in the House").

1.22 The nature of the political parties' issue advertisements, detailed *supra*, demonstrates what any observer of politics has come to know: political party "issue advocacy" campaigns are targeted at federal elections, particularly competitive races, and are intended to, and do affect the outcome of those contests.

National Parties Expend A Large Proportion of their Nonfederal Funds for "Issue Advocacy"

1.23 The national political parties spend a large proportion of their budgets on "issue

advertisements" that are designed to help elect federal officeholders and candidates. In 2000, for example, the RNC spent an estimated $70-75 million dollars on the production and broadcasting of television and radio advertisements, including both issue advocacy and coordinated expenditures. Oliver[27] Dep. at 148-49 [DEV Supp.-Tab 1]. *Id.* "During the 2000 presidential election year, the largest single portion of the DNC budget was used for issue advertising." Marshall Decl. ¶ 3 [DEV 8-Tab 28].

1.24 Defense expert David Magleby's study estimates that "over half, and sometimes as much as three-quarters, of soft money expenditures go to broadcast advertising." Magleby Expert Report at 49 [DEV 4-Tab 8].

1.25 As Defendants' expert Donald Green, relying on an article by Plaintiffs' expert La Raja, observes:

> [T]he original exemptions for soft-money were justified partly on the grounds that get-out-the-vote activity would help strengthen parties. As it happened, only a small fraction of the soft money (or hard money, for that matter) that flowed to state and national parties was spent on voter mobilization activity, even broadly conceived to include direct mail and commercial phone banking. According to the classification system presented by La Raja and Jarvis-Shean (2001, p.3), 8.5% of national party soft money expenditures went to 'mobilization' and 'grassroots.' The figures for state and local parties are each 15%.

D. Green Report at 14 n.17 [DEV 1-Tab 3] (citing Raymond La Raja and Elizabeth Jarvis-Shean, Assessing the Impact of a Ban on Soft Money: Party Soft Money

[27] John Oliver is Deputy Chairman of the RNC.

Spending in the 2000 Elections. (Unpublished manuscript: Institute of Governmental Studies and Citizens' Research Foundation 2001).

National Parties Funnel Nonfederal Funds Through State Parties for the Purchase of Advertisements Designed to Affect Federal Elections

1.26 The evidence clearly demonstrates that a large proportion of nonfederal funds transferred from the national to the state parties is targeted for the purchase of specific issue advertisements designed by the national parties. These advertisements are overwhelmingly intended to affect federal elections. This is done in large part because the state parties have better federal/nonfederal allocation ratios which allows such state-bought advertisements to be purchased with a greater proportion of nonfederal funds.

1.26.1 Defense expert Magleby explains how the FEC's allocation regime makes nonfederal fund transfers to the state parties attractive to the national parties.

> Parties can stretch their soft money even further by transferring soft and hard money to state parties where they can achieve a better ratio of soft to hard dollars than if they spent the money themselves. This is because the ratio of soft to hard dollars for party spending if done by the national patty committees is 35 percent soft and 65 percent hard for presidential years, and 40 percent soft and 60 percent hard for off years, but if done by state parties the ratio of soft to hard dollars is greater. The reason for this difference is state parties are allowed to calculate their soft/hard ratio based on the ratio of federal offices to all offices on the ballot in any given year. Both political parties have found spending soft money with its accompanying hard money match through their state parties to work smoothly, for the most part, and state officials readily acknowledge they are simply "pass throughs" to the vendors providing the broadcast

ads or direct mail.

Magleby Expert Report at 37 [DEV 4-Tab 8]. Other witnesses and evidence support this contention, which no one disputes. *See, e.g.,* Marshall Decl. ¶ 3 [DEV 8-Tab 28] (testifying that in 2000 the DNC transferred funds to the state parties to take advantage of their allocation rates); *see also* 11 C.F.R. § 106.5(b)(2)(i) (2001) (during presidential election years national party committees required to pay for their mixed activities with at least 65 percent in federal funds); *id*. at § 106.5(b)(2)(ii) (during nonpresidential election years national party committees required to pay for their mixed activities with at least 60 percent in federal funds).

1.26.2 The national political parties take advantage of this allocation regime when planning and executing their advertising budgets. One RNC memorandum contains a chart which

> clearly demonstrates what we already clearly know, that any media we place in the target presidential states should be placed through state parties. The average ballot allocation in the top 17 target states is 37% federal - 63% non-federal, this obviously contrasts very well with our 65% federal - 35% non-federal allocation.

RNC Memorandum dated March 18, 1996, titled "Ballot Allocation of Target States" ODP0025-02720 to 21 [DEV 70-Tab 48]. The memorandum concludes that by using the state political parties, rather than directly making the purchase, the RNC would save $2.8 million in federal funds on a $10

million media buy. *Id. see also* ODP0021-1365 to 1367 [DEV 70-Tab 48] (memorandum from Haley Barbour to the California House Republicans, discussing the need to make a media buy in California and stating that "[t]o accomplish this buy, the [RNC] would transfer funds to the California Republican Party, which would actually buy the advertising. Under FEC regulations, the California Republican Party must pay for the advertising with one-third FEC contributions and two thirds nonfederal dollars"); McConnell Dep. at 267-77 [JDT Vol. 19] (stating that the NRSC prefers to transfer funds to state parties who then purchase NRSC advertisements with a more favorable federal/nonfederal fund allocation ratio); Nelson Dep at 76-77 [JDT Vol. 24] (stating that purchasing political advertisements through state parties has two advantages: (1) better federal/nonfederal fund allocation ratios and (2) "having [a] state disclaimer [on the advertisement] is generally better than having a national disclaimer on it"); Marshall Decl. ¶ 3 [DEV 8-Tab 28] (noting that in 2000, the largest single portion of the DNC budget was used for issue advertising, but that "[t]he DNC typically did not expend money for these issue ads itself, but instead transferred both federal and non-federal money to the state parties to make these expenditures"); ODP0023-02358 to 65 [DEV 70-Tab 48] (RNC tally of "1996 Media Buys," listing advertisements purchased, price, and the amount of federal and RNSEC funds used);

ODP0023-03560 to 660 [DEV 70-Tab 48] (RNC report of 1996 fund transfers to state parties used for "party building/media buy"); ODP0025-01560 [DEV 70-Tab 48] (memorandum from the Republican National Finance Committee dated May 24, 1996, titled "California T.V. Money," discussing the need to raise $4 million in nonfederal funds in two weeks which would then be transferred to the CRP in order to "*get on the air and stay on the air* for the next three months in CA") (emphasis in original); *supra* Findings ¶¶ 1.6 (in 1996 the DNC financed two-thirds of its Clinton presidential campaign issue advocacy through state party transfers), 1.4.3 (Mann) (over half of the nonfederal money raised by the national party committees was transferred to the state parties during the 2000 election cycle).

1.26.3 The national political party committees transferred $9,710,166 in federal funds to state political party committees during the 1992 election cycle, $9,577,985 during the 1994 election cycle, $49,967,893 during the 1996 election cycle, $30,475,897 during the 1998 election cycle, and $131,016,957 during the 2000 election cycle. The national political party committees transferred $18,646,162 in nonfederal funds to state political party committees during the 1992 election cycle, $18,442,749 during the 1994 election cycle, $113,738,373 during the 1996 election cycle, $69,031,644 during the 1998 election cycle,

and $265,927,677 during the 2000 election cycle. Biersack[28] Decl. Tbls. 4, 8 [DEV 6-Tab 6].

1.26.4 State political parties use a large portion of the transferred nonfederal money to finance public communications that support or oppose a federal candidate. *See* Bowler[29] Decl. ¶ 15 (explaining that "[t]he majority of [national transfers to the CDP] were for issue advocacy"). According to Plaintiffs' expert La Raja, "[i]t appears that both parties . . . use soft money transfers primarily to execute national campaign strategy through state parties." La Raja Cross Exam. Ex. 3 at 103 [JDT Vol. 15]. La Raja finds that "more non-federal funds in the allocation accounts are used for media rather than what I call party building," La Raja Cross Exam. at 67 [JDT Vol. 15] (La Raja's definition of "party building" does not include administrative spending); La Raja Expert Report ¶ 22 [RNC Vol. VII] (finding that in 2000, 44 percent of transferred nonfederal funds were used for media expenditures and 30 percent for administrative overhead). La Raja concludes that "state parties invest most soft money from the national parties in federal races," but notes that "these

[28] Robert W Biersack served as the Supervisory Statistician for the FEC from 1983 to February 2002. As the Supervisory Statistician, he was responsible for evaluating the quality, reliability, and validity of information contained in the FEC disclosure databases. Currently, he is Deputy Press Officer for the FEC, a position he has held since February 2002. Biersack Decl. ¶ 1 [DEV 6-Tab 6].

[29] Kathleen Bowler is the Executive Director of the CDP. Bowler Decl. ¶ 1.

investments have considerable effects on races further down the ticket." La Raja Cross Exam. Ex. 3 at 139 [JDT Vol. 15] (La Raja dissertation) [JDT Vol. 15]; *see also* La Raja Cross Exam. 17-18 (stating that he stands by the conclusions reached in his dissertation).

1.26.4.1 A good example of this system comes from the Republican Party of New Mexico ("RPNM"). A 1998 financial statement from the state party shows that it received revenues of $1,524,634 in nonfederal transfers from other Republican organizations, $1,110,987 in individual contributions, and just $389,552 in federal transfers from Republican organizations. The RPNM spent over one-third of its 1998 revenues, $1,062,095, on "issue advocacy—television, radio and mail." INT810-1605 to 12 (RNC NM0406326 - 33) [DEV 114].

1.26.5 These issue advertisements funded by nonfederal transferred funds are mainly intended to support federal candidates. Plaintiffs' expert La Raja notes that "one of the goals" of national party allocation of nonfederal funds to state parties is to help federal candidates in close elections, and that his "impression" is that it is their primary goal. La Raja Cross Exam. at 73-74 [JDT Vol. 15]; *see also* Magleby Expert Report at 39 ("[National party s]oft money is largely aimed at competitive [federal] races."). La Raja finds that the parties "are highly functional rather than responsible. Rather than use soft

money to shore up weaker organizations, or reward state party members for moving closer to national party ideology, the national organizations use soft money like hard money – to pursue the short-term goal of winning elections." La Raja Cross Exam. Ex. 3 at 75 [JDT Vol. 15]; *see also id*. at 15 (stating that parties invest soft money primarily "in issue ads that help candidates"). According to La Raja, the national parties' spending of nonfederal funds is proof that "they are functional parties dedicated to winning elections." *Id*. at 25; *see also* La Raja Cross Exam. Ex. 1 (La Raja Decl.) ¶ 11(a) ("American political parties have focused primarily on winning elections . . . .") [JDT Vol. 15].

1.26.6 Representatives of the Congressional committees acknowledge that fund transfers from their committees to state parties are used primarily for federal election advertising. *See* Jordan[30] Decl. ¶ 68 [DEV 7-Tab 21] ("In my experience, the large majority of the DSCC's nonfederal transfers to state and local party committees have been to support the nonfederal share of issue advocacy communications. Frequently, these communications refer to Democratic Senate candidates or their Republican opponents, while not

[30] James Jordan is the Executive Director of the DSCC. Jordan Decl. ¶ 1 [DEV 7-Tab 21].

expressly advocating any candidate's election or defeat."); Vogel[31] Decl. ¶ 63 [DEV 9-Tab 41] ("In my experience, the large majority of the NRSC's nonfederal transfers to state and local party committees have been to support the nonfederal share of issue advocacy communications. Frequently, these communications refer to Republican Senate candidates or their Democratic opponents, while not expressly advocating any candidate's election or defeat."); McGahn[32] Decl. ¶ 55 [DEV 8-Tab 30] ("In my experience, the large majority of the NRCC's nonfederal transfers to state and local party committees have been to support the nonfederal share of issue advocacy communications. . . . Frequently, these communications refer to Republican House candidates or their Democratic opponents, while not expressly advocating any candidate's election or defeat."); Wolfson[33] Decl. ¶ 63 [DEV 9-Tab 44] ("In my experience, the large majority of the DCCC's nonfederal transfers to state and local party committees have been to support the nonfederal share of issue advocacy communications. Frequently, these communications refer to Democratic House candidates or their Republican

[31] Alexander Vogel is General Counsel for the NRSC. Vogel Decl. ¶ 1 [DEV 9-Tab 41].

[32] Donald McGahn is General Counsel for the NRCC. McGahn Decl. ¶ 1 [DEV 8-Tab 30].

[33] Howard Wolfson is Executive Director of the DCCC. Wolfson Decl. ¶ 1 [DEV 9-Tab 44].

opponents, while not expressly advocating any candidate's election or defeat.") *see also* La Raja Cross Exam. Ex. 3 at 69 (La Raja dissertation) [JDT Vol. 15] ("It would be particularly surprising for congressional campaign committees to venture outside their traditional scope of helping candidates and invest in state party organizations.").

1.26.7 Representatives of the congressional campaign committees also admit that they retain control over the advertisements their nonfederal money transfers are used to purchase. Jordan Decl. ¶¶ 72-73 [DEV 7-Tab 21] ("When the DSCC transfers funds to state party committees, including nonfederal funds, for the purpose of disseminating issue advocacy communications, it first develops the communications in consultation with media consultants, who are generally retained by the state party at the request or suggestion of the DSCC, and then provides the communications to the state party, together with the necessary funds to distribute them locally. State parties may, but generally do not, reject the communications. . . . The DSCC does not permit issue advocacy communications it supports to be recorded or produced until they have been approved by DSCC counsel and DSCC senior employees."); Vogel Decl. ¶ 67-68 [DEV 9-Tab 41] ("When the NRSC transfers funds to state party committees, including nonfederal funds, for the purpose of disseminating issue advocacy communications, it first develops the communications in

consultation with the state party and media consultants, who are generally retained by the state party at the request or suggestion of the NRSC, and then provides the communications to the state party, together with the necessary funds to distribute them locally. State parties may, but generally do not, reject the communications. . . . The NRSC does not permit issue advocacy communications it supports to be recorded or produced until they have been approved by NRSC counsel and NRSC senior employees."); McGahn Decl. ¶¶ 58-59 ("When the NRCC transfers funds to state party committees, including nonfederal funds, for the purpose of disseminating issue advocacy communications, it first develops the communications in consultation with the state party and media consultants, and then provides the communications to the state party, together with the necessary funds to distribute them locally. State parties may, but generally do not, reject the communications. . . . The NRCC does not permit issue advocacy communications it supports to be recorded or produced until they have been approved by me, as NRCC counsel, and NRCC senior employees."); Wolfson Decl. ¶¶ 66-67 ("When the DCCC transfers funds to state party committees, including nonfederal funds, for the purpose of disseminating issue advocacy communications, it first develops the communications in consultation with media consultants, who are generally retained by the state party at the request or suggestion of the DCCC, and then

provides the communications to the state party together with the necessary funds to distribute them locally. State parties may, but generally do not, reject the communications. . . . The DCCC does not permit issue advocacy communications it supports to be recorded or produced until they have been approved by DCCC counsel and DCCC senior employees.").

1.26.7.1 On September 28, 1998, NRSC Executive Director Steven Law wrote then-NRSC Chairman Senator Mitch McConnell recommending that the NRSC fund an issue ad playing off an article that appeared in Nevada's largest newspaper. Democratic Senatorial candidate Harry Reid "got bad reviews for an over-the-top, hostile performance, suggesting a line of attack that builds on our six-month-long message that Harry Reid says one thing in Nevada and does the opposite in Washington. . . . If we went in this direction, I would suggest running this spot for one week at 1000 [gross ratings point], to be followed with our last ad in the Nevada issue advocacy campaign, on lawyers' fees." ODP0036-02931-32 [DEV 71-Tab 48]. Law's idea was later implemented in an advertisement paid for by the Republican State Central Committee of Nevada. ODP0036-01403 to 06 [DEV 71-Tab 48].

1.26.7.2 Documents in the record also demonstrate that the state political parties are merely conduits between the national political parties and their media consultants. *See, e.g.,* CRP 00367 [IER Tab 28] (fax from the NRCC to the

CRP's Victory 2000 project proving CRP "wiring info" and informing the state party that the "[m]oney will be in your account today . . . . Please wire back to Strategic Media"); CDP 02095-101, 2103-04, 2106 [IER Tab 12] (wire transfer instructions from the DNC to the CDP for media buys); CDP 02984-89 [IER Tab 12] (detailing transfer of funds from DCCC to CDP for media buy).

1.26.7.3 The RNC and DNC also transfer nonfederal funds to state parties to pay for advertisements over which the national party committees retain control. *See* Castellanos Dep. (Sept. 27, 2002) at 111-12 (stating that when working on advertisements for state parties, National Media dealt with an RNC representative, not a state party member); Marshall Decl. ¶ 4 (noting that the DNC normally approved the content of the advertisement and the amount of money to be spent before calling the state party in question "to let it know that an ad was coming"); Josefiak Dep. at 97-98 [JDT Vol. 11] (acknowledging that the RNC transfers funds to state parties to pay for RNC advertisements); Huyck Decl. in *Mariani* ¶4 (stating that in 1995-1996 the RNC transferred funds to state party committees to pay for issue advertisements related to the 1996 Presidential election campaign) [DEV 79-Tab 60]; Hazelwood[34] Dep. at 118-19 (RNC transfers funds to state parties to pay for issue advertisements).

[34] Elizabeth Blaise Hazelwood is the RNC's political director. Hazelwood Dep. at 10.

In 2000, the RNC raised over $254 million, a majority of which was transferred to the state parties for various activities. Josefiak Dep. at 76 [JDT Vol. 11]; *see also* FEC, National Party Transfers to State/Local Committees: January 1, 1999 to December 31, 2000, *available at* http://www.fec.gov/press/051501partyfund/tables/nat2state.html (during the 2000 election cycle the RNC made transfers of approximately $129 million—$93.2 million in nonfederal funds and $35.8 million in federal funds—to state and local parties). The greatest expenditures from these transfers were for political advertising and administrative expenses. Josefiak Dep. at 76-77 [JDT Vol. 11].

1.27 The evidence above clearly demonstrates that the national political parties transfer nonfederal money through their state party affiliates for the purpose of buying so-called "issue advertisements" at a better allocation ratio. These advertisements are created and controlled by the national political parties, with the state political parties merely accepting the nonfederal money transfers and passing the funds on to media consultants as directed by the national political parties. These advertisements are intended to affect federal elections without using express advocacy terminology.

Get-Out-The-Vote (GOTV)

1.28 It is undisputed that GOTV efforts, paid for with nonfederal funds by national party committees and targeted at federal elections, *directly* assist federal candidates, as well

as state and local candidates of the same party whose elections are held on the same day. Declarations from representatives of the four major congressional campaign committees attest to the fact that these committees "transfer[] federal and nonfederal funds to state and/or local party committees for . . . *get-out-the-vote efforts*. These efforts have a significant effect on the election of federal candidates." Jordan Decl. ¶ 69 [DEV 7-Tab 21]; Wolfson Decl. ¶ 64 [DEV 9-Tab 44]; Vogel Decl. ¶ 64 [DEV 9-Tab 41]; McGahn Decl. ¶ 56 [DEV 8-Tab 30] (emphasis added); *see also* Josefiak Decl. ¶ 26 [RNC Vol. I] (Republican Party "Victory Programs" which include GOTV components are designed to benefit candidates at the *federal*, state and local levels)(emphasis added); Philp[35] Dep. at 47, 49 (when asked "[are there a]ny other services that the party provides to federal candidates," answering that the Colorado Republican Party's GOTV "program is designed to benefit all candidates.").

1.28.1 Documentary evidence corroborates the testimony that GOTV efforts assist federal candidates. *See, e.g.,* CDP 00859 [IER Tab 1.I] (letter thanking a CDP donor and noting that CDP's "*get-out-the-vote efforts*" would help "increase the number of Californian Democrats in the United States Congress, continue Democratic leadership in the State Senate, take back the State Assembly -- and deliver California's 54 electoral votes for President Bill Clinton's and Vice

[35] Alan Philp testified on behalf of the Colorado Republican Party. Philp Dep. at 9 [JDT Vol. 26].

President Al Gore's re-election.") (emphasis added); CRP 07164 [IER Tab 1.F] (letter from the Executive Director of the Dole-Kemp campaign, stating in part: "Unfortunately, federal law prohibits the Dole/Kemp campaign from accepting any contributions after the last day of the national convention. However, you can still support the Dole/Kemp ticket by sending your contribution to the Victory '96 fund, which will support the party's '*get out the vote*' operation and help us ensure a successful campaign in California . . .") (emphasis added); *infra* Findings ¶ 1.60 (McConnell letter noting that the Kentucky Victory 2000 campaign, which included a GOTV component, "was an important part of President George W. Bush's impressive victory in Kentucky last year, and it will be critical to my race and others next year").

1.28.2 Defendants' expert Donald Green concludes that

> [t]he evidence from California, as well as from numerous opinion surveys and exit polls that demonstrate the powerful correlation between voting at the state and federal levels, shows quite clearly that a campaign that mobilizes residents of a highly Republican precinct will produce a harvest of votes for Republican candidates for both state and federal offices. A campaign need not mention federal candidates to have a direct effect on voting for such a candidate. That parties recognize this fact is apparent, for example, from the emphasis that the Democrats place on mobilizing and preventing ballot roll-off among African-Americans, whose solidly Democratic voting proclivities make them reliable supporters for office-holders at all levels. As a practical matter, generic campaign activity has a direct effect on federal elections.

Green Expert Report at 14 [DEV 1-Tab 3].

1.28.3 The RNC transfers nonfederal funds to state political parties to subsidize voter mobilization activities of the state parties. Banning[36] Decl. ¶ 31 [RNC Vol. III]; *see also* Duncan[37] Decl. ¶¶ 11-12 [RNC Vol. VI]. According to Josefiak, the RNC also helps state and local parties fundraise for these voter mobilization efforts. *See* Josefiak Decl. ¶¶ 63, 65-72 [RNC Vol. I]; *see also* Benson[38] Decl. ¶ 10 [RNC Vol. VIII] ("[T]he Republican national party committees also assist [the Colorado Republican Party] in raising money for these party building programs.").

1.29 The CDP and the CRP conduct GOTV door-to-door canvassing campaigns, phone banks and mailings. Since federal, state and local candidates are on the same ballot in California, these efforts affect all the candidates on the ballot. This fact explains why these efforts usually required the state parties to use a mix of federal and nonfederal money to pay for such activities. *See, e.g., Bowler* Decl. ¶ 20.b. (noting that CDP slate cards and door hangers often mention both federal and nonfederal candidates and thus were funded with the mix of funds); *id*. (50 to 60 percent of

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[36] Jay Banning has served as the RNC's Director of Administration and Chief Financial Officer since 1983, and has been employed by the RNC in these and other capacities for twenty-six years. Banning Decl. ¶ 1 [RNC Vol. III].

[37] Robert Duncan is a Member of the RNC from the State of Kentucky. At the time the RNC's Complaint in this case was filed, he served as Treasurer of the RNC, but as of July 2002 he became its General Counsel. Duncan Decl. ¶ 1 [RNC Vol. VI].

[38] Bruce Benson is Chairman of the Colorado Republican Party. Benson Decl. ¶ 1 [RNC Vol. VIII].

CDP's paid phone banks make reference to a federal candidate and must therefore be paid for with a mix of funds); *see also* Erwin Aff. ¶ 10. It is important to note, however, that under BCRA's Levin Amendment state political parties may still use a mix of nonfederal and federal funds to pay for GOTV efforts for elections that include federal candidates, as long as they use nonfederal funds raised in accordance with the provision. Of course, for elections without a federal candidate on the ballot, BCRA does not impose any restrictions.

1.30 It is clear that nonfederal funds used to finance GOTV efforts for elections with federal candidates on the ballot affect federal elections. It is clear that GOTV activities target a certain political party's likely voters and attempts to get them to the polls. Even if the intent behind such efforts were to only affect state and local contests, increasing the number of Democrats, for example, who vote in a state and local election will undoubtedly increase the number of votes for the federal Democratic candidates who share the same ballot. This fact is well-known and appreciated by the national political parties and federal candidates.

Voter Registration

1.31 It is undisputed that voter registration efforts, paid for with nonfederal funds by the national party committees in the period before federal elections, *directly* assist federal candidates, as well as state and local candidates from the same party whose elections are held on the same day. As Dr. Mann notes:

> In a series of advisory opinions, the Commission sought to ensure that a portion of state party activities benefiting [sic] both federal and nonfederal candidates be paid for with hard money. In Advisory Opinion 1975-21, *the Commission ruled that a local party committee had to use hard dollars to pay for a part of its administrative expenses and voter registration drives, on the grounds that these functions have an indirect effect on federal elections*. It used this opinion in regulations it issued in 1977 governing allocation of administrative expenses between federal and nonfederal accounts. The allocation was to be made "in proportion to the amount of funds expended on federal and non-federal elections, or on another reasonable basis." (11 C.F.R. 106.1(e) 1978).

Mann Expert Report at 9 [DEV 1-Tab 1] (emphasis added).

1.32 Representatives of the four major congressional campaign committees, confirm that the four committees"transfer[] federal and nonfederal funds to state and/or local party committees for . . . *voter registration* . . . efforts. These efforts have a significant effect on the election of federal candidates." Jordan Decl. ¶ 69 [DEV 7-Tab 21]; Wolfson Decl. ¶ 64 [DEV 9-Tab 44]; Vogel Decl. ¶ 64 [DEV 9-Tab 41]; McGahn Decl. ¶ 56 [DEV 8-Tab 30] (emphasis added); *see also* CDP 00859 [IER Tab 1.I] (letter thanking a CDP donor and noting that CDP's "*voter registration* . . . efforts" would help "increase the number of Californian Democrats in the United States Congress, continue Democratic leadership in the State Senate, take back the State Assembly--and deliver California's 54 electoral votes for President Bill Clinton's and Vice President Al Gore's re-election.") (emphasis added); *see also* Findings ¶ 1.60 (McConnell letter noting that the Victory 2000 campaign, which included a voter registration component "was an important part of President George W. Bush's

impressive victory in Kentucky last year, and it will be critical to my race and others next year"); Philp Dep. at 49 (when asked "[are there a]ny other services that the party provides to federal candidates," answering that the Colorado Republican Party's GOTV "program is designed to benefit all candidates. That could include voter registration and so on and so forth.").

1.33 CRP official Erwin[39] testifies that "[t]he overwhelming amount of [voter registration] activity is 'generic' voter registration activity urging potential registrants to 'Register Republican.'" Erwin Aff. ¶ 9. Erwin testifies that the CRP has paid for voter registration—with a mix of federal and nonfederal funds—through its Operation Bounty program, in which Republican county central committees, Republican volunteer organizations and Republican candidates for federal and state office participate. Through its Operation Bounty drives, the CRP has typically registered over 350,000 Republican voters in each election cycle since the 1984 election cycle (except 1997-98). *See* Erwin Aff. ¶ 9; *see also* CDP App. at 1185 [PCS 4] (charting CRP's voter registration activity by election cycle since 1984 cycle).

Ms. Bowler states that the CDP's expenditures on voter registration—consisting of a mix of federal and nonfederal funds—were approximately $145,000 in the 1996 election cycle; $300,000 in the 1998 cycle; $100,000 in the 2000 election cycle; and $185,000 during the period from January 1,

[39] Ryan Erwin is the Chief Operating Officer of the CRP. Erwin Aff. ¶ 1.

2001 to June 30, 2002. *See* Bowler Decl. ¶ 20.a. Ms. Bowler notes that the CDP's expenditures for voter registration were higher in 1998 (a year with eight statewide elections) than in 2000 (a presidential election year). *Id*. CRP and CDP officials testify that "it is often the case that these voter registration activities are primarily driven by the desire to affect State and local races." Erwin Aff. ¶ 14a; Bowler Decl. ¶ 20.a.

Whatever their intention, the evidence *supra*, makes clear that these efforts affect federal elections; particularly as demonstrated by the CDP's fundraising materials. *See* Findings ¶ 1.32). Moreover, under the Levin Amendment state political parties may still use a mix of nonfederal and federal funds to conduct voter registration efforts for elections that include federal candidates, as long as they use nonfederal funds raised in accordance with the provision. Of course, for those elections without a federal candidate on the ballot, BCRA does not impose any restrictions.

Redistricting

1.34 The national parties use nonfederal funds, as well as federal funds, toward their redistricting efforts, and these efforts are of value to Members of Congress because the changes in the composition of a Member's district can mean the difference between reelection and defeat.

1.34.1 As Defendants' expert Donald Green notes:

> The most important legislative activity in the electoral lives of U.S. House members takes place during redistricting, a process that is placed in the hands of state legislatures. The chances that a House incumbent will be ousted by unfavorable district boundaries are often greater than the chances of defeat at the hands of the typical challenger. Thus, federal legislators who belong to the state majority party have a tremendous incentive to be attuned to the state legislature and the state party leadership.
>
> For example, in early 1999 the Republican National Committee, recognizing that state legislatures in Tennessee and Georgia would soon control redistricting, transferred substantial sums of money to those states' Republican parties in an effort to win the few seats necessary to gain the majority. As Edwin Bender, in a report for the National Institute on Money in State Politics explains: "In a number of states with legislatures that are controlled by narrow margins, a win or two in the state House or Senate in 2000 could mean the difference between a redistricting committee controlled by Democrats or Republicans, and districts that favor one party over the other . . . . As a result, national party organizations have been flooding the states with campaign donations, both soft money and hard, to influence the redistricting process.

Green Expert Report at 11-12 [DEV 1-Tab 3].

1.34.2 The RNC uses a mix of federal and nonfederal funds to support redistricting efforts, including redistricting litigation. Josefiak Decl. ¶ 74 [RNC Vol. I]. In 2002, for example, the RNC budgeted approximately $4.1 million on redistricting. Seventy percent of the redistricting budget was to be funded with nonfederal money. Banning Decl. ¶ 28.i [RNC Vol. III]. The RNC spends more overall on state legislative redistricting than on congressional redistricting. Josefiak Decl. ¶ 74 [RNC Vol. I]; *see also infra* Findings ¶

1.78.1 (Fortune 100 Company nonfederal money budget request noting that "because both [national] parties will be working to influence redistricting efforts during the next two years, we anticipate that we will be asked to make soft money contributions to these efforts. Redistricting is a key once-a-decade effort that both parties have very high on their priority list.").

1.34.3 Mr. Alan Philp, of the Colorado Republican Party, testifies that his party and the Colorado Democratic Party played a significant role in the state's legislative redistricting process. Philp Dep. at 65 [JDT Vol. 26]. Philp states that the results of the redistricting process "[c]an have a significant impact" on candidates for federal office. *Id*. at 66. He notes that the Colorado Congressional delegation discussed redistricting with the Colorado Republican Party. *Id*.

Other Activities Paid for with Nonfederal Funds

1.35 *Administrative Expenses*: The FEC allowed the RNC to pay for its administrative overhead—including salaries, benefits, equipment, and supplies for party operations at RNC headquarters in Washington, D.C.—with a mix of federal and nonfederal funds. *See* Banning Decl. ¶ 27 [RNC Vol. III]; Bowler Decl. ¶ 15. "During the 2000 election cycle, the RNC spent $35.6 million of nonfederal funds and $52.9 million of federal funds on administrative overhead." Banning Decl. ¶ 27 [RNC Vol. III]. "Administrative overhead includes the operating costs of RNC facilities, such as

utility bills and maintenance, fundraising costs, and routine expenses for travel and supplies. Administrative overhead also includes the salaries of RNC employees." *Id.* According to Plaintiffs' expert La Raja, the RNC spent about one-quarter of their nonfederal disbursements on administration and overhead during the 2000 election cycle and transferred 67 percent to the state parties. La Raja Expert Report ¶ 14(c) [RNC Vol. VII]. State parties spent about 30 percent of their nonfederal money disbursements during the 2000 election cycle on administrative expenses and overhead. La Raja Expert Report ¶ 22 [RNC Vol. VII]; *see also* Bowler Decl. ¶ 15 (stating that allocation is required for administrative expenses like rent, utilities, and salaries). The fact these expenditures required a mix of federal and nonfederal funds demonstrates that these activities affect federal elections. *See also supra* Findings ¶ 1.26.4 (Plaintiffs expert La Raja stating administrative expenses are not "party building" activity).

1.36 *Training Seminars*: Banning testifies that the RNC used a mix of federal and nonfederal funds to conduct training seminars for Republican candidates, party officials, activists and campaign staff, many of whom are involved in state and local campaigns and elections. Topics included grassroots organizing, fundraising and compliance with campaign finance regulations. During the 2000 election cycle at least 10,000 people attended RNC-sponsored training sessions, including 117 "nuts and bolts" seminars on grassroots organizing and get-out-the-vote activities. During

the same cycle the RNC spent $391,000 in nonfederal funds and $671,000 in federal funds on such training and support. *See* Banning Decl. ¶ 28(c) [RNC Vol. III]; *see also* La Raja Expert Report at 11 [RNC Vol. VII] (parties "help candidates by training them and their campaign staff," support which "can make an important difference in whether a candidate chooses to run for office, particularly in an era of cash-intensive campaigning that requires skillful application of advanced campaign technologies"). According to La Raja, the RNC spent $8.5 million in nonfederal funds directly on all of its grassroots and voter mobilization activities for the 2000 election cycle. La Raja Expert Report ¶ 14(c) [RNC Vol. VII]. This constitutes about one-half of one percent of all RNC nonfederal spending during the 2000 election cycle. *See* Biersack Decl. Table 2 [DEV 6-Tab 6] (showing the RNC spent $163,521,510 in nonfederal funds during the 2000 election cycle). Furthermore, by virtue of the fact these activities were paid for with a mix of federal and nonfederal funds demonstrates that they affect federal elections.

1.37 *State and Local Governmental Affairs*: The RNC provided $100,000 of seed money for the formation of a Republican state attorneys general association that focuses on state issues. RNC Ex. 978; *see also* Josefiak Decl. ¶¶ 82-84 [RNC Vol. I]. According to Banning, during the 2000 election cycle the RNC spent $199,000 in nonfederal funds and $333,500 in federal funds on state and local governmental affairs. *See* Banning Decl. ¶ 28.b [RNC Vol. III]. The nonfederal funds the RNC spent on state

and local governmental affairs constituted a minuscule percentage of the RNC's $163,521,510 nonfederal budget for the 2000 election cycle. *See* Biersack Decl. Table 2 [DEV 6-Tab 6]. Furthermore, by virtue of the fact these activities were paid with a mix of federal and nonfederal funds demonstrates that they affect federal elections.

1.38 *Minority Outreach:* Banning states that the RNC used a mix of federal and nonfederal funds to support efforts to increase minority involvement and membership in the Republican Party. During the 2000 election cycle the RNC spent $1,211,000 in nonfederal funds and $2,163,000 in federal funds on support of allied groups and minority outreach. *See id*. ¶ 28.e. This nonfederal expenditure also constituted a minuscule percentage of the RNC's total nonfederal spending for the 2000 election cycle. *See* Biersack Decl. Table 2 [DEV 6-Tab 6]. Furthermore, by virtue of the fact these activities were paid for with a mix of federal and nonfederal funds demonstrates that they affect federal elections.

1.39 *State and Local Elections:* The RNC's Josefiak testifies that "the RNC actually focuses many of its resources on purely state and local election activity," Josefiak Decl. ¶ 19 [RNC Vol. I]; however, the figures provided to the Court do not support this contention. For example, in 1999 and 2000 the RNC donated approximately $7.3 million in nonfederal funds to state and local candidates. Josefiak Decl. ¶ 61 [RNC Vol. I]; Banning Decl. ¶ 28(a) [RNC Vol. III]. However, this amount is a small

fraction of the $163,521,510 in nonfederal funds it spent during the 2000 election cycle. Biersack Decl. Table 2 [DEV 6-Tab 6]. Plaintiffs' expert La Raja finds that the Republican Party allocated just seven percent ($9.5 million) of their nonfederal funds during the 2000 election cycle for contributions to state and local candidates. La Raja Expert Report ¶ 14(b) [RNC Vol. VII]. Furthermore, according to Defense expert Mann, the two national parties donated "only $19 million directly to state and local candidates, less than 4% of their soft money spending and 1.6% of their total financial activity in 2000." Mann Report at 26 [DEV 1-Tab 1] (citation omitted).

1.39.1.1 The RNC also provides testimony that it "sometimes devotes significant resources toward states with competitive gubernatorial races even though the races for federal offices are less competitive." Josefiak Decl. ¶ 62 [RNC Vol. I]. According to Josefiak, in 2000, most observers believed that Indiana was a "safe" state for George W. Bush and that it did not have a competitive Senate race. "Nevertheless, the RNC committed significant resources to the state in hopes of influencing the gubernatorial race." Josefiak Decl. ¶ 62 [RNC Vol. I].

Josefiak's declaration provides no figures to allow the Court to determine what constitutes "significant resources." Furthermore, although Indiana may have been a "safe" state for the Republican presidential candidate and the Republican candidate for U.S. Senate, the Indiana ballot provided

voters with three federal races in which to vote, meaning that many expenditures, even if intended to only influence a single state race, affected federal election races. Most importantly, nothing in BCRA prevents the RNC from using unlimited amounts of federal funds to affect any state election.

1.39.1.2 Five States—Kentucky, Louisiana, Mississippi, New Jersey and Virginia—hold elections for state and local office in odd-numbered years when there are typically no federal candidates on the ballot. *See* Josefiak Decl. ¶ 41 [RNC Vol. I]. Likewise, numerous cities—including Houston, Indianapolis, Los Angeles, Minneapolis and New York City—hold mayoral elections in odd-numbered years. *See id*. RNC officials state that for elections in which there is no federal candidate on the ballot, the RNC frequently trains state and local candidates, contributes to state and local candidate campaign committees, funds communications calling for election or defeat of state and local candidates, and supports get-out-the-vote activities. *See* Banning Decl. ¶ 28(a) [RNC Vol. III]; Josefiak Decl. ¶¶ 19, 41-59 [RNC Vol. I]. The RNC's CFO Jay Banning testifies that in 1999 and 2001, including transfers to state parties, direct contributions to local and state campaigns, and direct RNC expenditures, the RNC spent approximately $21 million in nonfederal funds in 1999 and 2001 (approximately $5.7 million in 1999, $15.7 million in 2001). Banning Decl. ¶ 28(a) [RNC Vol. III]; *see also* Duncan Decl. ¶¶ 14-15 [RNC Vol. VI]

(discussing RNC contributions to Kentucky state and local races). Defendants' expert Mann states that donations to gubernatorial candidates in an odd numbered year is not something intended to affect a Federal election. Mann Cross Exam. at 71. Again, BCRA does not preclude the national political parties from spending unlimited federal funds on such activities. Furthermore, state political parties can spend nonfederal funds on such campaigns without limit as long as no federal election is held at the same time. *See, e.g.*, Torres[40] Decl. ¶ 8 [3 PCS] (stating that the CDP has spent millions of dollars in nonfederal funds supporting candidates in Los Angeles).

1.40 With the exception of administrative expenses, the activities paid for with nonfederal funds listed *supra* constituted a very small portion of the political parties' nonfederal expenditures during the 2000 election cycle. Furthermore, administrative expenses, training seminars, expenditures on state and local governmental affairs, and minority outreach, were all paid for with a mixture of federal and nonfederal funds meaning that these activities have some impact on federal elections.

The State Parties Have Become "Branches" of the National Parties

1.41 The evidence *supra* clearly demonstrates that nonfederal money has not been used primarily for "party building" activities as the authorizing rationale envisioned; rather, the funds are being used by the national parties for electioneering activities and the

[40] Art Torres is the elected chair of the CDP. Torres Decl. ¶ 1 [3 PCS].

state parties have been coopted as part of this effort.

1.42 The emergence of nonfederal money as a potent force in national politics has made the state political parties, according to Plaintiffs' expert La Raja, "more reliant on the national parties. They have worked more with the national parties. They have become what I term branch organizations, which to me is not a pejorative. It means they work more closely with the national organization," "they still retain autonomy. However, they're integrated more with the national party structure." La Raja Cross Exam. at 43-44, 60 [JDT Vol. 15]. This has lead to a "nationalized party system, [where] state parties use national party resources to advance national party goals." *Id*. at Ex. 3 at 88, 101. "The national parties employ the state parties as instruments to pursue federal electoral goals, particularly through issue ads sponsored by state organizations [paid for with nonfederal money transferred from the national political parties]." *Id*. at 104.

1.43 The close affiliation between the state, local and national parties is clear from their cooperation during election campaigns that include state and federal elections.

1.43.1 Ms. Bowler testifies that the CDP works closely with the DNC in planning and implementing "Coordinated Campaigns," the purpose of which is to allocate resources and coordinate plans for the benefit of Democratic candidates up and down the entire ticket. Party officials, candidates at all levels of the ticket and their agents participate in Coordinated Campaigns and collectively make

decisions regarding the solicitation, receipt, directing, and spending of the CDP's funds, both federal and nonfederal. Bowler Decl. ¶¶ 5, 29 [3 PCS]. According to Bowler, the CDP is "integrally related to the [DNC]." *Id.* ¶ 5.

1.43.2 The RNC's "Victory Plans" are voter contact programs designed to support the entire Republican ticket at the federal, state, and local levels. The RNC works with every state party to design, fund and implement the Plans. *See* Benson Decl. ¶8 [RNC Vol. VIII]; Josefiak Decl. ¶26 [RNC Vol. I]; Peschong Decl. ¶¶4-5 [RNC Vol. VI].

1.43.2.1 According to RNC Chief Counsel Josefiak, Victory Plans are formulated and implemented after extensive and continuous collaboration between the RNC and the state parties; each Plan is tailored to the unique needs of each State and designed to stimulate grassroots activism and increase voter turnout in the hopes of benefitting candidates at all levels of the ticket. Josefiak Decl. ¶¶25-40 [RNC Vol. I]. According to Mr. Erwin, the CRP works closely with the RNC in planning and implementing a Victory Plan. The Victory Plan is implemented in the general election cycle with the full involvement of RNC staff, CRP staff, state legislative leadership and representatives from the top of the ticket campaigns. *See* Erwin Aff. ¶ 4 [3 PCS]. "By their nature, the Victory Plans and the programs specified in them span the calendar year, not just the 60 or 120 days prior to the election." Peschong Decl. ¶ 4 [RNC Vol.

VI]. The Victory Plans generally incorporate rallies, direct mail, telephone banks, brochures, state cards, yard signs, bumper stickers, door hangers, and door-to-door volunteer activities. *Id*.

1.43.2.2 According to Josefiak, in 2000 the RNC transferred approximately $42 million to state parties to use in Victory Plan programs, 60 percent (about $25 million) of which was nonfederal money, not including money spent on broadcast "issue advertising." Josefiak Decl. ¶ 31 [RNC Vol. I]; *see also* Peschong[41] Decl. ¶¶ 4, 8-9 [RNC Vol. VI] (stating that "[t]he RNC typically provides a very substantial share of the funding of state victory programs.").

1.43.2.3 State Republican party officials observe that because there are often numerically more state and local races than federal races during a given election, Victory Plans "often place greater emphasis" on the non-federal races. *See* Benson Decl. ¶ 8 [RNC Vol. VIII]; Bennett Decl. ¶ 17.k [RNC Vol. VIII] (stating that the average ratio of state and local candidates to federal candidates in Ohio in 2002 is 18 to 1). This observation does not change the fact that Victory Plans are designed to "support the entire ticket." Benson Decl. ¶ 8 [RNC Vol. VIII] (emphasis added).

[41] John Peschong is the RNC's Regional Political Director for the Western Region. Peschong Decl. ¶ 1.

Efforts to Address the Role of Nonfederal Funds in Campaign Finance Must Limit State Party Use of Nonfederal Funds that Affect Federal Elections

1.44 It is clear that state political party electoral activities affect federal elections, especially when state and federal elections are held on the same date. The record establishes that federal officeholders value these services and that they solicit nonfederal donations for the state political parties in order to assist their own campaigns. National political parties also solicit nonfederal donations for their state counterparts and transfer nonfederal funds as part of their efforts to affect federal elections. *See infra* Findings ¶ 1.59. The workings of this campaign finance system demand that if one wants to address the impact of nonfederal money, one cannot ignore the state role in the system. Former Members of Congress concur. Former Senator Rudman states clearly:

> To curtail soft-money fundraising and giving, it is necessary to have a comprehensive approach that addresses the use of soft money at the state and local party levels as well as at the national party level. The fact is that much of what state and local parties do helps to elect federal candidates. The national parties know it; the candidates know it; the state and local parties know it. If state and local parties can use soft money for activities that affect federal elections, then the problem will not be solved at all. The same enormous incentives to raise the money will exist; the same large contributions by corporations, unions, and wealthy individuals will be made; the federal candidates who benefit from state party use of these funds will know exactly whom their benefactors are; the same degree of beholdenness and obligation will arise; the same distortions on the legislative process will occur; and the same public cynicism will erode the foundations of our democracy -- except it will all be worse in the public's mind because a perceived reform was undercut once again by a loophole that allows big money into the system.

Rudman Decl. ¶ 19 [DEV 8-Tab 34]. Former Senator Brock comments:

> It does no good to close the soft money loophole at the national level, but then allow state and local parties to use money from corporations, unions, and wealthy individuals in ways that affect federal elections. State and local parties use soft money to help elect federal candidates both by organizing voter registration and get-out-the-vote drives that help candidates at all levels of the ticket, and by using soft and hard money to run 'issue ads' that affect federal elections. Therefore, for soft money reforms to be truly effective, it is vitally important to require the use of hard money at the state level to pay for activities that affect federal elections.

Brock Decl. ¶ 8 [DEV 6-Tab 9].

Summary

1.45 The evidence *supra* clearly demonstrates that nonfederal money has become an increasingly important part of the national political parties' campaign efforts. The increase in nonfederal fundraising and spending, especially since 1994, has been dramatic, and is due to the advent of the so-called "issue advertisement." Political party issue advertisements do not include words of express advocacy, but are engineered to still have an impact on federal elections. Despite their effect, the fact that these advertisements do not constitute express advocacy has allowed the political parties to use nonfederal money, raised in part from the treasuries of corporations and labor unions, to fund these commercials and thereby skirt campaign finance laws. Furthermore, these advertisements make a mockery of the original justification for allowing the political parties to raise these funds, as they have nothing to do with "party building." Plaintiffs' own expert finds that these funds have been spent

primarily on electioneering and not on strengthening the political parties.

The fact that the national political parties found a huge loophole through which to circumvent the federal campaign finance regime was only the first step. In order to maximize the power of this new-found political tool, the national political parties coopted their state party affiliates, or branches as Plaintiffs' expert calls them, and funneled nonfederal funds through them in order to take advantage of the state political parties' more attractive allocation ratios. By doing so, the national parties minimized the amount of federal funds needed to purchase advertisements designed to affect federal elections– advertisements that in the spirit of FECA should have been paid for completely with federal funds. As a result, the state political parties became an integral part of the national political parties' nonfederal money strategy, and therefore any effort to deal with the use of nonfederal funds in the campaign finance regime requires addressing the state political parties.

Not all nonfederal funds are spent on political advertisements, but these advertisements constitute the largest category of nonfederal spending of the national and state political parties. Furthermore, other activities, such as voter registration and GOTV, that are paid for in part with nonfederal funds clearly affect federal elections when state and local elections are held on the same day as the federal election. Redistricting efforts affect federal elections no matter when they are held. In sum, the political parties used nonfederal funds to circumvent FECA and affect federal

elections.

The Role of Federal Lawmakers in Political Party Nonfederal Fundraising

1.46 Unlike other entities, political parties have uniquely close relationships with candidates they nominate and support, and who, in turn, lead the party. *See* D. Green Expert Report at 7-9 [DEV 1-Tab 3]; McCain Decl. ¶¶ 22-23 [DEV 8-Tab 29]. The Colorado Republican Party has stated in past litigation: "A party and its candidate are uniquely and strongly bound to one another because: [a] party recruits and nominates its candidate and is his or her first and natural source of support and guidance[;] [a] candidate is identified by party affiliation throughout the election, on the ballot, while in office, and in the history books[;] [a] successful candidate becomes a party leader, and the party continues to rely on the candidate during subsequent campaigns[;] [a] party's public image largely is defined by what its candidates say and do[;] [a] party's candidate is held accountable by voters for what his or her party says and does[;] [a] party succeeds or fails depending on whether its candidates succeed or fail. No other political actor shares comparable ties with a candidate." Brief of Colorado Republican Party in *FEC v. Colorado Republican Fed. Campaign Comm.* ("*Colorado II*"), 533 U.S. 431, 457 (2001), at 19-20; *see also id.* at 7-8, 26-31; Philp Dep. at 47-54 [JDT Vol. 26].

Federal Lawmakers Run the Party Committees

1.47 The national committees of the two major political parties are: the Republican

National Committee ("RNC"); the National Republican Senatorial Committee ("NRSC"); the National Republican Congressional Committee ("NRCC"); the Democratic National Committee ("DNC"); the Democratic Senatorial Campaign Committee ("DSCC"); and the Democratic Congressional Campaign Committee ("DCCC"). Vogel Decl. ¶ 6 [DEV 9-Tab 41]; McGahn Decl. ¶ 6 [DEV 8-Tab 30] ; Jordan Decl. ¶ 6 [DEV 7-Tab 21]; Wolfson Decl. ¶ 6 [DEV 9-Tab 44]. The primary purpose of the congressional committees is to ensure the election of candidates from their respective parties to their respective legislative body and otherwise support the goals of their party. *Id*.

> The national party committees are dominated by elected public officials -- the president or presidential candidate in the case of the Republican and Democratic National Committees, the top House and Senate party leaders for the congressional campaign committees. . . . There is no meaningful separation between the national party committees and the public officials who control them.

Mann Expert Report at 29 (citations omitted) [DEV 1-Tab 1]; *see also* Krasno & Sorauf Expert Report at 9-10 ("Simply put, no wall between the national parties and the national government exists."), 12-13 ("Party committees are headed by or enjoy close relationships with their leading officials, individuals who by virtue of their positions, reputations, and control of the legislative machinery have special influence on their colleagues.") [DEV 1-Tab 2]; Green Expert Report at 9-10 [DEV 1-Tab 3] ("Political parties, it should be noted, are structured along very different principles from the American government. One such principle is the separation and dispersal of

power, of which one finds many examples in the Constitution. . . . Leaders of legislative party caucuses may also serve as members or leaders of party campaign committees. Furthermore, party leaders are drawn disproportionately from the ranks of those who hold important legislative leadership posts. . . . [T]he internal structure of parties permits, for example, former U.S. Senator D'Amato, who chaired the [RSCC] from 1995-97, to at the same time serve as chair of the Senate Banking, Housing, and Urban Affairs Committee. Parties, in contrast to the lawmaking institutions they inhabit, are organized in ways that concentrate authority, entrusting multiple roles to particular individuals."); Rudman Decl. ¶ 6 [DEV 8-Tab 34]; Vogel Decl. ¶ 4 [DEV 9-Tab 41] (NRSC is comprised of sitting "Republican Members of the United States Senate . . . . The chair of the NRSC is elected by the Republican Caucus of the United States Senate."); Jordan Decl. ¶ 4 [DEV 7-Tab 21] (the DSCC "is comprised of sitting Democratic Members of the United States Senate . . . . The chair of the DSCC is appointed by the Democratic Leader of the United States Senate."); McGahn Decl. ¶ 4 [DEV 8-Tab 30] (the NRCC includes the "entire elected Republican leadership" and its executive committee includes "the Speaker of the House, the Majority Leader, the Republican Whip, Conference Chairman, the Conference Vice-Chairman, the Conference Secretary, the Policy Chairman and the NRCC Chairman"); Wolfson Decl. ¶¶ 4 [DEV 9-Tab 44] (the DCCC is comprised of sitting Democratic Members of (or Delegates to) the United States House of

Representatives, and the Chair of the DCCC is elected by the Democratic Caucus of the United States House of Representatives).

1.48 "For at least a century [the national party committees] have been melded into their party's presidential campaign every four years, often assuming a subsidiary role to the presidential candidate's personal campaign committee. The presidential candidate has traditionally been conceded the power to shape and use the committee, at least for the campaign." Sorauf/Krasno Report in *Colorado Republican* at 27 [DEV 73-Tab C].

Political parties are primarily concerned with electing their candidates and the money they raise is spent assisting their candidates' campaigns. As Congressman Meehan explained:

> The ultimate goal of a political party such as the Democratic Party is to get as many Party members as possible into elective office, and in doing so to increase voting and Party activity by average Party members. The Party does this by developing principles on public policy matters the Party stands for, and then by finding candidates to run for the various political offices who represent those principles for the Party. When the Party finds its candidates, it tries to raise money to help get like-minded people to participate in the elections, and to try to get the Party's candidates the resources they need to get their message out to voters. In my experience, political parties do not have economic interests apart from their ultimate goal of electing their candidates to office.

Meehan Decl. in *RNC* ¶¶ 3-4 [DEV 68-Tab 30]. Senator Bumpers testifies that he is "not aware that the [Democratic] party has any interest in the outcome of public policy debates that is separate from its interest in supporting and electing its candidates." Bumpers Decl. ¶ 6 [DEV 6-Tab 10]. Senator McCain testifies that

"[t]he entire function and history of political parties in our system is to get their candidates elected, and that is particularly true after the primary campaign has ended and the party's candidate has been selected." McCain Decl. ¶ 23 [DEV 8-Tab 29].

1.49 In general, the RNC espouses three core principles as guiding the mission of the national Republican Party, which includes electing candidates to national, state and local offices who represent the RNC's political views. In practice, electing these candidates is the RNC's primary focus.

1.49.1 The RNC's Chief Counsel, Thomas Josefiak, attests that

> [t]he Republican Party has a long and rich history advocating some core principles: a smaller federal government, lower taxes, individual freedom, and a strong national defense. The RNC achieves these principles through three primary means: (1) promoting an issue agenda advocating Republican positions on issues of local, state, regional, national and international importance; (2) electing candidates who espouse these views to local, state and national offices; and (3) governing in accord with these views. Although these efforts sometimes overlap, they also frequently occur independently of one another.

Josefiak Decl. ¶ 22 [RNC Vol. I]. Other documents in the record, however, show that the RNC and Republican state parties' primary purpose is to elect Republican candidates to office. *See, e.g.,* RNC's Resp. to FEC RFA's in *RNC*, No. 40 [DEV 68-Tab 35]; ODP0021-02003 [DEV 70-Tab 48] (RNC Memorandum in which Chairman Haley Barbour states: "The purpose of a political party is to elect its candidates to public office, and our first goal is to elect Bob Dole president. . . . Electing Dole is our highest priority, but it is not

our only priority. Our goal is to increase our majorities in both houses of Congress and among governors and state legislatures."); Knopp[42] Cross Exam. at 10 [JDT Vol. 13] (stating that the primary purpose of the RNC is "to elect Republicans to state, local, and national office"); Brister[43] Decl. ¶ 4 [RNC Vol. VIII] ("The Republican Party of Louisiana's primary purpose is to help elect Republicans to office 'from the courthouse to the White House'"). Whether the Republican Party's "core principles" drive its pursuit of electoral majorities, or vice versa, is a chicken-or-the-egg type quandary that I need not resolve at this juncture. What is clear from the evidence, however, is that regardless of whether or not it is done to advocate the party's principles, the Republican Party's primary goal is the election of its candidates who will be advocates for their core principles. As Dr. Green observes: "In order to obtain power a party must win elections; and in order to win elections, elected officials scramble to claim credit for good legislative deeds while publicizing the misdeeds of the opposition party." Green Expert Report at [DEV 1-Tab 3].

1.50 The evidence makes clear that the national party committees are creatures of their elected federal politician members, who run them and set their priorities. It is clear

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[42] Janice Knopp is the RNC's Deputy Director of Finance/Marketing Director. Knopp Decl. ¶ 1 [RNC Vol. V].

[43] Pat Brister is the Chairman of the Republican Party of Louisiana. Brister Decl. ¶ 1 [RNC Vol. VIII].

that the national party committees are focused on electing their candidates to federal office, and in the case of the DNC and RNC are actually subsumed by their respective Presidential candidates' campaigns. Given these facts, it is not surprising that the national party committees use their elected officials to solicit donations.

Federal Lawmakers Solicit Nonfederal Funds for the National Party Committees

1.51 It is a common practice for Members of Congress to be involved in raising both federal and nonfederal dollars for the national party committees, sometimes at the parties' request. The personal involvement of high-ranking Members of Congress is a major component of raising federal and nonfederal funds.

Current and former Members of Congress acknowledge this fact. *See, e.g.,* Rudman Decl. ¶ 12 [DEV 8-Tab 34]; Bumpers Decl. ¶¶ 7-9 [DEV 6-Tab 10]; Simon[44] Decl. ¶ 7 [DEV 9-Tab 37] ("While I was in Congress, the DCCC and the DSCC would ask Members to make phone calls seeking contributions to the party. They would assign me a list of names, people I had not known previously, and I would just go down the list. I am certain they did this because they found it more effective to have Members make calls."); Simpson[45] Decl. ¶ 4 [DEV 9-Tab 38]; McCain Decl. ¶¶

[44] Senator Paul Simon served as a United States Senator for Illinois from 1985 to 1997, and was a Member of the House of Representatives from 1975 to 1985. Prior to being elected to Congress, Senator Simon served as Lieutenant Governor of Illinois from 1968 to 1972, and served in the Illinois House of Representatives from 1954 to 1962 and in the Illinois State Senate from 1962 to 1966. Simon Decl. ¶ 1 [DEV 9-Tab 37].

[45] Senator Alan Simpson served as United States Senator from Wyoming from 1979 (continued...)

2, 21 [DEV 8-Tab 29] ("Soft money is often raised directly by federal candidates and officeholders, and the largest amounts are often raised by the President, Vice President and Congressional party leaders."); Feingold Dep. at 91–93 [JDT Vol. 6]; Shays Decl. ¶ 18 [DEV 8-Tab 35] ("Soft money is raised directly by federal candidates, officeholders, and national political party leaders. National party officials often raise these funds by promising donors access to elected officials. The national parties and national congressional campaign committees also request that Members of Congress make the calls to soft money donors to solicit more funds."); Meehan Decl. in *RNC* ¶ 6 [DEV 68-Tab 30] ("Members of Congress raise money for the national party committees, and I have been involved in such fund-raising for the Democratic Party. At the request of the Party Members of Congress go to the [DCCC] and call prospective donors from lists provided by the Party to ask them to participate in Party events, such as DCCC dinners or [DNC] dinners. These lists typically consist of persons who have contributed to the Democratic Party in the past.").

Representatives of the House and Senate congressional campaign committees testify that their committees and their leadership ask Members of Congress to raise funds in specified amounts or to devote specified periods of time to fundraising.

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[45](...continued)
to 1997. Simpson Decl. ¶ 2 [DEV 9-Tab 38].

Jordan Decl. ¶ 33 [DEV 7-Tab 21]; Vogel Decl. ¶¶ 32-33 [DEV 9-Tab 41]; McGahn Decl. ¶¶ 34-35 [DEV 8-Tab 30]; Wolfson Decl. ¶ 35 [DEV 9-44] (stating that the DSCC, NRSC, NRCC, and DCCC ask members of Congress to raise money for the committees).

Political donors also testify that Members of Congress solicit nonfederal money. *See, e.g.,* Randlett[46] Decl. ¶¶ 6-9 [DEV 8-Tab 32] ("I've been involved in political fundraising long enough to remember when soft money had little value to federal candidates. Ten years ago, a Senator might call a potential donor and the donor would say something like, 'I would love to write you a check; I'm a big fan of yours; but I'm federally maxed, so I can't do it. If you like, I could write a soft money check to your state party.' And the Senator might say, 'Don't bother. The soft money just doesn't do me any good.' However, in recent election cycles, Members and national committees have asked soft money donors to write soft money checks to state and national parties solely in order to assist federal campaigns. Most soft money donors don't ask and don't care why the money is going to a particular state party, a

[46] Wade Randlett is Chief Executive Officer of Dashboard Technology, a World WideWeb technology consulting firm based in San Francisco, California. Prior to founding Dashboard Technology, Mr. Randlett served on the management teams of two other software companies. He was the Democratic political director at the Technology Network, also known as TechNet, a Palo Alto-based non-profit corporation and political service organization which he co-founded in 1996. Prior to starting TechNet, he spent many years as a political fundraiser and general political consultant, working primarily in the Silicon Valley area of Northern California, but also throughout California and to some extent in major metropolitan areas in other parts of the nation. Randlett Decl. ¶ 2 [DEV 8- Tab 32].

party with which they may have no connection. What matters is that the donor has done what the Member asked.").

Lobbyists also find that Members of Congress are involved in fundraising for their political parties. *See* Rozen[47] Decl. ¶ 15 [DEV 8-Tab 33] ("Even though soft money contributions often go to political parties, the money is given so that the contributors can be close to, and recognized by, Members, Presidents, and Administration officials who have power. Members, not party staffers or party chairs, raise much of the large soft money contributions. Party chairs do not have that much power because the DNC and the RNC by themselves don't have power to do anything. So people are not giving to be close to the party chairs. The Members of Congress and the President are the heart of the national parties. The elected officials are the ones who are really raising the money, either directly or through their agents."); *see also* Murray[48] Dep. in *Mariani* at 41-42 [DEV 79-Tab 58]; Rozen Decl., Ex. A ¶ 7

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[47] Robert Rozen worked as a lobbyist for various interests at the law firm Wunder, Diefenderfer, Cannon & Thelen from 1995 until 1997. For the last six years, he has been a partner in a lobbying firm called Washington Counsel; now Washington Council Ernst & Young. Mr. Rozen represents a variety of corporate, trade association, non-profit, and individual clients before both Congress and the Executive Branch. His work includes preparing strategic plans, writing lobbying papers, explaining difficult and complex issues to legislative staff, and drafting proposed legislation. He also organizes fundraisers for federal candidates and from time-to-time advises clients on their political contributions. Rozen Decl. ¶ 4 [DEV 8-Tab 33]

[48] Daniel Murray served as a government relations specialist for Sprint, GTE and BellSouth Corporations from 1982 until 1995. As Executive Director of those companies, he assisted them and their PACs in selecting candidates and political groups for financial (continued...)

[DEV 8-Tab 33].

Finally, documentary evidence corroborates this testimony. ODP0037-00062 [DEV 71-Tab 48] (Letter to NRSC Chairman's Foundation member seeking a renewal contribution signed by Senator McConnell); ODP0037-00884 [DEV 71-Tab 48] (letter from Senator McConnell thanking donor for $5,000 federal and $25,000 nonfederal donation to NRSC's issue advocacy campaign); ODP0031-00821 (letter from contributor to RNC with contribution, stating "Congressman Scott McInnis deserve [sic] most of the recruitment credit"); ODP0037-00882 (a solicitation letter from Senator McConnell to potential donor at the Microsoft Corporation, expressing the hope that this person would "take a leadership role with [McConnell] at the NRSC in support of the Committee's issue advocacy campaign. The resources we raise now will allow us to communicate our strategy through Labor Day. . . . Your immediate commitment to this project would mean a great deal to the entire Republican Senate and to me personally."); ODP0037-01171 to 72 [DEV 71-Tab 48] (correspondence referencing solicitations by federal officeholders and candidates); *infra* Finding ¶

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[48](...continued)
support in both federal and nonfederal funds. During this period he also served on the Democratic Business Council of the DNC, the Advisory Council of the Democratic Leadership Council, the 1998 and 1992 DNC Convention Site Selection Committees, the DSCC Leadership Circle, the DCCC Annual Dinner Committee, the RSCC Annual Dinner Committee, and steering committees for many House and Senate campaigns. Since 1995, he has acted as a government relations consultant for business and other clients. Murray Aff. in *Mariani* ¶¶ 3-5 [DEV 79-Tab 59].

1.74.3 (Fortune 100 company's documents stating that Members of Congress had requested nonfederal donations).

1.52 "The parties often ask Members to solicit soft money from individuals who have maxed out to the Member's campaign." Simpson Decl. ¶ 6 [DEV 9-Tab 38]; *see also* Meehan Decl. in *RNC* ¶ 6 ("Party leaders also ask a Member to call his or her own 'maxed out' donors--those who have contributed to that Member the maximum amount of 'hard money' allowed under the [FECA]--in order to request further donations to the Party including those which are not restricted by the Act ('soft money').") [DEV 68-Tab 30]; Billings Decl., Ex. A ¶ 12 [DEV 6-Tab 5]; Jordan Decl. ¶ 20 [DEV 7-Tab 21] ("When donors have reached their federal contribution limit, the DSCC frequently encourages them to make additional donations to the DSCC's nonfederal account."); Wolfson Decl. ¶ 21 (same for DCCC); Vogel Decl. ¶ 20 (same for NRSC); McGahn Decl. ¶ 21 (same for NRCC); Sorauf/Krasno Report in *Colorado Republican*, at 13-14 [DEV 68-Tab 44]; ODP0018-00620 to 21 [DEV 69-Tab 48] (federal candidate noting that he "recently sent a letter to [his] maxed out donors suggesting contributions to the NRCC"); Kirsch[49] Decl. ¶ 8 ("[O]nce a federal candidate understands that a donor has maxed out, there will often be a request that the donor make soft money donations to a national party committee, as has been

[49] Steven T. Kirsch is founder and Chief Executive Officer of Propel Software Corporation. He has donated millions of dollars to the Democratic Party and to "progressive candidates and groups." Kirsch Decl. ¶¶ 2, 4 [DEV 7-Tab 23].

suggested when I have been in that situation.") [DEV 7-Tab 23]; La Raja Cross Exam. Ex. 3 at 54 [JDT Vol. 15] ("[I]t is common practice for a candidate to encourage donors to give to the party when they have 'maxed' their federal contributions to his or her committee").

1.53 Mr. Vogel, General Counsel of the NRSC, testifies that "[s]ometimes, the NRSC urges Republican Senators to contact particular donors because of shared public policy views, such as outreach efforts to the high-tech community by Senators with an interest in those issues." Vogel Decl. ¶ 28 [DEV 9-Tab 41]; *see also id*. Tab D at NRSC 066-000009 (draft letter from chairmen of the NRSC and NRCC Technology Committees inviting High Technology CEOs to the 1998 Republican House-Senate Dinner in response "to your industry's plea for a voice on the cutting edge issues so important to the future of high technology" and noting that the dinner is the "most prestigious annual event, and all Republican members of the U.S. House and Senate will be in attendance.") [DEV 9-Tab 41]. The DCCC engages in similar practices. Wolfson Decl. ¶ 31 [DEV 9-Tab 44] ("Sometimes, the DCCC urges Democratic House Members to contact particular donors because of shared public policy views. For example, the DCCC has sought and received assistance from particular Democratic House Members in fundraising from the labor community, because those Members had a strong public record of support for labor."); *see also* Randlett Decl. ¶ 6 [DEV 8-Tab 32] ("National party committees often feel they need to raise a

certain amount of soft money for a given election cycle. To reach that overall goal, they may divide up potential donors by geography, affiliated organization, or issue interests. The party committees decide which Members of Congress should contact these potential donors, and these Members then put in a certain amount of call time at the national committee soliciting the money. A Member and a potential donor may be matched because the Member is on a legislative committee in which the donor has a particular interest, whether economic or ideological.").

1.54 Despite the foregoing evidence, the Finance Director of the RNC states that it is "exceedingly rare" for the RNC to rely on federal officeholders for personal or telephonic solicitations of major donors. *See* B. Shea[50] Decl. ¶ 17 [RNC Vol. V]. She states that by RNC policy and practice, the RNC Chairman, Co-Chairwoman, Deputy Chairman, fundraising staff or members of major donor groups—not federal officeholders—undertake initial contact and solicitation of major donors of both federal and nonfederal funds. *Id*. Whether or not initial solicitations by federal officials on behalf of the RNC are rare, the record shows that they are made. RNC0178497 (May 10, 1996, letter from RNC Chairman Haley Barbour to Senators, asking to use their name for a "membership recruitment package," which while "not directly solcit[ing] funds," "will serve as a set-up letter for the membership invitation package that will be mailed several days after this letter."). Furthermore, Members

[50] Beverly Shea is the RNC's Finance Director. Shea Decl. ¶ 1 [RNC Vol. V].

of Congress solicit funds for the RNC from those who have donated in the past. *See, e.g.,* RNC0266088-91 (handwritten notes determining which Member of Congress would call particular potential donors); RNC0250514-15 (April 1997 solicitation letter from Speaker Gingrich asking donors "to continue [their] support [for] the President's Club"); Moreover, it is clear that Ms. Shea does not speak for the NRSC or the NRCC which clearly use Members to solicit funds. *See, e.g.,* Findings ¶ 1.51.

1.55 Raising nonfederal funds for the political parties can be in a Member's interest. For example, the amount of money a Member of Congress raises for the national political party committees often affects the amount the committees give to assist the Member's campaign. *See, e.g.,* Boren[51] Decl. ¶ 4 [DEV 6-Tab 8] ("[T]he DSCC and other national party organizations kept records, or 'tallies' of how much soft money a Senator had raised for the party. The DSCC then gave little [nonfederal] money to the campaigns of those Senators who had not raised adequate [nonfederal] party funds. In my view, this practice demonstrates very clearly that soft money is not used purely for 'party building' activities, but that there is at least a working understanding among the party officials and Senate candidates that the money will benefit the individual Senators' campaigns."); *id*. (explaining that because he "minimized" the amount of time he spent raising soft money for the DNC, he "received almost no

[51] Senator David Boren served as a United States Senator from Oklahoma from 1979-1994. Boren Decl. ¶ 2 [DEV 6-Tab 8]

money from the Democratic Party for my campaigns."); Bumpers Decl. ¶ 11 [DEV 6-Tab 10] ("Members who raise money for the DSCC expect some of that money to come directly back to them. Part of this unwritten but not unspoken rule is that if you do not raise a certain amount of money for the DSCC, you are not going to get any back. The DSCC does not give a candidate the maximum allowed unless he or she has raised at least a certain amount for the DSCC."); *infra* Findings ¶ 1.56.1 (statement of Senator Simpson).

Members also have an interest in a strong party that can assist its federal officeholders. *See, e.g.,* Bumpers Decl. ¶ 10 [DEV 6-Tab10] ("When a Member raises money for the party, there is a sense on the part of the Member that he or she is helping his or her own campaign by virtue of raising that money. When Members raise funds for the DNC, it helps the DNC perform its function of keeping tabs on statements, policies, and votes of opposition party members and groups.").

Former DNC and DSCC official and current lobbyist Robert Hickmott[52]

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[52] In 1980, during President Carter's re-election campaign, Robert Hickmott worked at the Democratic National Committee ("DNC") as an Associate Finance Director. Hickmott Decl. ¶ 2 [DEV 6-Tab 19]. Following the general election, Hickmott became the Executive Director of a new DNC entity, the Democratic Business Council ("DBC"), where he served until 1983. *Id*. During 1985-86, Hickmott served as National Finance Director for then-Congressman Timothy Wirth's Senate campaign, and from 1987 until early 1989, on Senator Wirth's Senate staff. *Id*. After that, Hickmott was in private practice as an attorney until January 1991, when he joined the Democratic Senatorial Campaign Committee ("DSCC") as Deputy Executive Director. *Id*. In 1993, Hickmott worked for four years as the Associate Administrator for Congressional Affairs at the Unites States Environmental (continued...)

testifies that even incumbents with safe seats have incentives to raise money for the parties. He explains:

> Incumbents who were not raising money for themselves because they were not up for reelection would sometimes raise money for other Senators, or for challengers. They would send $20,000 to the DSCC and ask that this be entered on another candidate's tally. They might do this, for example, if they were planning to run for a leadership position and wanted to obtain support from the Senators they assisted. This would personally benefit them, in addition to doing their part to retain Democratic control of the Senate, which would preserve the legislative power of all Democratic Senators.

Hickmott Decl., Ex. A ¶ 18 [DEV 6-Tab 19]; *see also id*. ¶ 13 (attesting that Senators were very concerned about whether or not donors' checks were tallied to them); *infra* Findings ¶ 1.56.3 (describing the DSCC tallying/credit system). Senator McCain attests that

> [t]he parties encourage Members of Congress to raise large amounts of soft money to benefit their own and others' re-election. At one recent caucus meeting, a Member of Congress was praised for raising $1.3

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[52](...continued)
Protection Agency, then for two years as a counselor to then-Secretary Andrew Cuomo at the United States Department of Housing and Urban Development ("HUD"). *Id*. In 1999, Hickmott left HUD and joined The Smith-Free Group ("Smith-Free"), a small governmental affairs firm located in Washington, D.C. *Id*. ¶ 3. Hickmott is currently a Senior Vice President at Smith-Free and one of the six principals in the firm. *Id*. Hickmott is a regular contributor to candidates for Congress, for President, and the national party committees, primarily to Democratic candidates, but also to several Republicans, as well. *Id*. In the 1999-2000 cycle, he contributed just over $7,000 and in the 2001-2002 cycle, he has contributed a little more than $10,000. *Id*. Hickmott provided a declaration in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 41 F. Supp. 2d 1197 (D. Colo. 1999), *aff'd*, 213 F.3d 1221 (10th Cir. 2000), *rev'd*, 533 U.S. 431 (2001) ("Colorado II"); *See Colorado II*, 533 U.S. at 458.

> million dollars for the party. James Greenwood, a Republican Congressman from Pennsylvania, recently told the New York Times that House leaders consider soft money fundraising prowess in assigning chairmanships and other sought-after jobs. . . . I share Mr. Greenwood's concerns.

McCain Decl. ¶ 7 [DEV 8-Tab 29]. Finally, the political parties' power over Members of Congress provides additional incentive to fundraise for the national party committees. As Dr. Green notes: "The ubiquitous role that parties play in the lives of federal officials means that no official can ignore the fundraising ambitions of his or her party." Green Expert Report at 15 [DEV 1-Tab 3].

Nonfederal Funds are Given with Intent to Assist Specific Members of Congress; Political Parties Keep Track of Contributions Members of Congress Raise

1.56 Nonfederal money is often given to national parties with the intent that it will be used to assist the campaigns of particular federal candidates, and it is often used for that purpose.

1.56.1 Senator Simpson testifies that "[d]onors do not really differentiate between hard and soft money; they often contribute to assist or gain favor with an individual politician. When donors give soft money to the parties, there is sometimes at least an implicit understanding that the money will be used to benefit a certain candidate. Likewise, Members know that if they assist the party with fundraising, be it hard or soft money, the party will later assist their campaign." Simpson Decl. ¶ 6 [DEV 9-Tab 38]. "Although soft money cannot be given directly to federal candidates, everyone knows that it is fairly easy to

push the money through our tortured system to benefit specific candidates." *Id.* ¶ 7. Senator Wirth[53] understood that when he raised funds for the DSCC, donors expected that he would receive the amount of their donations multiplied by a certain number that the DSCC had predetermined, assuming that the DSCC had raised other funds. Wirth Decl. Ex. A ¶¶ 5, 8 [DEV 9-Tab 43]; *see also FEC v. Colorado Republican Fed. Campaign Comm.* ("*Colorado II*"), 533 U.S. 431 (2001); Bumpers Decl. ¶¶ 10-12 [DEV 6-Tab 10]; Simon Decl. ¶ 10 [DEV 9-Tab 37].

1.56.2 Individual nonfederal money donors have made specific requests that the national political party apply their nonfederal money gifts to particular federal campaigns. *See, e.g.,* RNC0035464 [DEV99], RNC0032733-34 [DEV 92] (fundraising letters requesting that nonfederal money donations be used for particular federal elections). As one experienced donor observes: "The committee receiving . . . a soft money donation [solicited by a Member of Congress from a 'maxed out' contributor] understands that it has been raised by or for a particular federal candidate, and this affects how much the committee spends on behalf of that candidate. I have discussed with national

[53] Senator Timothy Wirth served in the U.S. House of Representatives from 1974 to 1986, representing the Second Congressional District of the State of Colorado. From 1987 through 1992 he served as Senator for the State of Colorado in the United States Senate. Wirth Decl. Ex. A ¶ 2 [DEV 9-Tab 43].

party committees the spending of such soft money to benefit federal candidates." Kirsch Decl. ¶ 8 [DEV 7-Tab 23]; *see also* Hiatt[54] Dep. at 114-18 (explaining that anyone donating nonfederal money is indirectly giving it to the campaigns of federal candidates and officeholders, and stating that his soft money donations were earmarked for particular candidates but that he does not know if the money was actually spent on those candidates).

1.56.2.1 Plaintiff Thomas McInerney, a large individual contributor to the Republican Party, states that he donated amounts in excess of $57,500 per election cycle to Republican organizations at the national, state and local levels. For example, in 2002, he donated $250,000 to the RNC, in addition to other donations to national, state and local political committees. He states that his donations were intended to support state and local candidates and political parties. McInerney Aff. ¶¶ 4, 10, 12 [9 PCS]. Mr. McInerney's affidavit does not state whether or not these funds were used in the manner he desired, only that "it is his understanding" that they were used for such activities. *Id*. ¶¶ 11, 13, 15. Regardless of whether his donations were used for state and local

[54] Arnold Hiatt engaged in substantial political spending for a number of years. He estimates that from the 1992 election cycle through 1997, he donated approximately $60,000 in federal funds, mostly to federal candidates, with a few contributions to federal political action committees ("PACs"). In October of 1996, he gave a $500,000 nonfederal donation to the DNC. In February of 2001, he made a $5000 hard money donation to the League of Conservation Voters' PAC, and believes that is the only hard money donation he has given since 1997. Hiatt Decl. ¶ 5 [DEV 6-Tab 18].

political activities, the record is clear that Mr. McInerney represents an exception to the general rule that donors give money to the national parties with the intent that they will be used to assist federal candidates. Furthermore, if Mr. McInerney wants to donate funds to state parties for activities that affect state and local elections, nothing in BCRA prevents him from doing so. *See also infra* Findings ¶ 1.61.

1.56.3 The DSCC maintains a "credit" program that credits nonfederal money raised by a Senator or candidate to that Senator or candidate's state party. Jordan Decl. ¶¶ 36-39 [DEV 7-Tab 21]. Amounts credited to a state party can reflect that the Senator or candidate solicited the donation, or can serve as a donor's sign of tacit support for the state party or the Senate candidate. Jordan Decl. ¶¶ 37-40, Tabs F, G [DEV 7-Tab 21]. According to former DSCC official Hickmott, Senators were very concerned about whether or not donors' checks were tallied to them. Hickmott Decl., Ex. A ¶ 13 [DEV 6-Tab 19]; *see also supra* Findings ¶ 1.55 (Senator Boren commenting on the tallying system and effect of a candidate's fundraising for the national political committee on the support the candidate's campaign received from the national party).

1.56.4 Both the NRCC and NRSC are aware of which Members have raised funds for their committees, and may advise Members of amounts they have raised, in order to encourage Members to aid the collective interest of preserving or

obtaining a majority in the House or Senate. McGahn Decl. ¶¶ 34-35 [DEV 8-Tab 30]; Vogel Decl. ¶¶ 33, 36 [DEV 9-Tab 41]. Similarly, although the DCCC uses "no formal credit or tally program," it "advises Democratic House Members of the amounts they have raised for the DCCC, ascribing particular contributions to the fundraising efforts of the Member in question." Wolfson Dec. ¶ 36 [DEV 9-Tab 44]; Thompson Dep. at 28-29 [JDT Vol. 32] (testifying that the DCCC "provide[s] the entire Democratic Caucus with the amounts of money raised by name of every Democratic member of Congress. . . . [a]t the Democratic Caucus meeting. . . . I think it's a method used to let people know that if the DCCC is going to be successful all members should participate.").

1.57 Federal candidates also raise nonfederal money through joint fundraising committees formed with national committees. *See* Buttenwieser Decl. ¶¶ 8-14 [DEV 6-Tab 11]. One common method of joint fundraising is for a national congressional committee to form a separate joint fundraising committee with a federal candidate committee. A joint fundraising committee collects and deposits contributions, pays related expenses, allocates proceeds and expenses to the participants, keeps required records, and discloses overall joint fundraising activity to the FEC. Wolfson Decl. ¶ 40 [DEV 9-Tab 44]; Vogel Decl. ¶¶ 39-45 [DEV 9-Tab 41]; Jordan Decl. ¶¶ 41, 50 [DEV 7-Tab 21]; Oliver Dep. at 258 [DEV Supp.-Tab 1].

> A typical allocation formula for joint fundraising between the [congressional campaign committees] and a federal candidate will

> allocate the first $2,000 of every contribution from an individual to the participating candidate, with $1,000 designated to the primary election and $1,000 to the general election; and the next $20,000 to the [congressional campaign committee's] federal account. Because the [congressional campaign committee] is normally the only participant eligible to receive nonfederal funds, any remaining amounts of an individual contribution will be allocated to the [congressional campaign committee's] nonfederal account, as will the entirety of any contribution from a federally prohibited source.

Wolfson Decl. ¶ 42 [DEV 9-Tab 44]; Vogel Decl. ¶ 41 [DEV 9-Tab 41]; Jordan Decl. ¶ 45 [DEV 7-Tab 21]. Two experts characterize the joint fundraising system as one "in which Senate candidates in effect raise[] soft money for use in their own races." Krasno and Sorauf Expert Report at 13 [DEV 1-Tab 2].

1.58 It is clear from the record that in practice Members of Congress actively solicit large nonfederal donations to their political parties, often at the behest and direction of the political parties. The political parties encourage Members to solicit such donations and reward those who are successful by assisting their campaigns. Furthermore, although the raising of nonfederal funds is rationalized as an effort to pay for "party building" activities, it is clear that this money is solicited by Members and given by donors with the understanding that it will be used to assist the campaigns of particular federal candidates.

Federal Lawmakers and National Party Committees Solicit Nonfederal Funds for State Parties

1.59 National party committees direct donors to give nonfederal money to state parties in order to assist the campaigns of federal candidates. *See, e.g.,* Kirsch Decl. ¶ 9 [DEV

7-Tab 23] ("The national Democratic party played an important role in my decisions to donate soft money to state parties in [the 2000 election] cycle, recommending that I donate funds to specific state parties just before the election. They said, essentially, if you want to help us out with the Presidential election, these particular state parties are hurting, they need money for get-out-the-vote and other last minute campaign activities."). Robert Hickmott, a former DNC and DSCC official testifies:

> Once you've helped a federal candidate by contributing hard money to his or her campaign, you are sometimes asked to do more for the candidate by making donations of hard and/or soft money to the national party committees, the relevant state party (assuming it can accept corporate contributions), or an outside group that is planning on doing an independent expenditure or issue advertisement to help the candidate's campaign. These types of requests typically come from staff at the national party committees, the campaign staff of the candidate, the candidate's fundraising staff, or former staff members of the candidate's congressional office, but they also sometimes come from a Member of Congress or his or her chief of staff . . . . Regardless of the precise person who makes the request, these solicitations almost always involve an incumbent Member of Congress rather than a challenger. As a result, there are multiple avenues for a person or group that has the financial resources to assist a federal candidate financially in her or her election effort, both with hard and soft money.

Hickmott Decl. ¶ 8 [DEV 6-Tab 19]; *see also* Buttenwieser Decl. ¶ 16 [DEV 6-Tab 11] ("The DSCC has also requested that I provide assistance to state parties."); Hassenfeld[55] Decl. ¶ 9 [DEV 6-Tab 17] ("In 1992, when I told the Democratic Party

[55] Alan G. Hassenfeld has served as Chairman of the Board and Chief Executive Officer of Hasbro, Inc. since 1989, a global company based in Rhode Island with annual revenues in excess of $3 billion. Hasbro designs, manufactures, and markets toys, games, (continued...)

that I wanted to support then-Governor Bill Clinton's presidential campaign, they suggested that I make a $20,000 hard money contribution to the DNC, which I did. The Democratic Party then made clear to me that although there was a limit to how much hard money I could contribute, I could still help with Clinton's presidential campaign by contributing to state Democratic committees. There appeared to be little difference between contributing directly to a candidate and making a donation to the party. Accordingly, at the request of the DNC, I also made donations on my own behalf to state Democratic committees outside of my home state of Rhode Island. . . . Through my contributions to the political parties, I was able to give more money to further Clinton's candidacy than I was able to give directly to his campaign."); Randlett Decl. ¶ 9 [DEV 8-Tab 32] ("[N]ational committees have asked soft money donors to write soft money checks to state and national parties solely in order to assist federal campaigns."); Josefiak Decl. ¶ 68 [RNC Vol. I] ("It is . . . not uncommon for the RNC to put interested donors in touch with various state parties. This often occurs when a donor has reached his or her federal dollar limits to the RNC, but wishes to make additional contributions to the state party. When this happens, the RNC will

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[55](...continued)
interactive software, puzzles and infant products. He also sits on a number of civic and philanthropic boards. He is a member of the Board of Trustees of the University of Pennsylvania and Deerfield Academy, he serves on the Dean's Council of the Kennedy School of Government at Harvard, and sits on the board of Refugees International. He also run three charitable foundations: the Hasbro Charitable Trust, the Hasbro Children's Foundation. and a family foundation. Hassenfeld Decl. ¶¶ 2-3 [DEV 6-Tab 17].

often suggest that the donor make contributions to certain state parties that are most in need of funds at that time.").

1.60 Federal officeholders have directed contributors to the state parties when the contributors have "maxed out" to the candidate or when it appears that the state party can most effectively use additional money to help that officeholder or other federal candidates. As one candidate's solicitation letter stated, "you are at the limit of what you can directly contribute to my campaign," but "you can further help my campaign by assisting the Colorado Republican Party." *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 458 (2001) (quoting an August 27, 1996 fundraising letter from then-Congressman Allard); *see also* Philp Dep. Ex. 14 [JDT Vol. 26] (same letter); MMc0014 [DEV 117-Tab 2] (letter to a contributor stating: "Since you have contributed the legal maximum to the McConnell Senate Committee, I wanted you to know that you can still contribute to the Victory 2000 program . . . . This program was an important part of President George W. Bush's impressive victory in Kentucky last year, and it will be critical to my race and others next year" signed by Senator McConnell with the handwritten note: "This is important to me. Hope you can help"); Buttenwieser Decl. ¶¶ 15-16 [DEV 6-Tab 11] ("Federal candidates have often asked me to donate to state parties, rather than the joint committees, when they feel that's where they need some extra help in their campaigns. I've given significant amounts to the state parties in South Dakota and North Dakota because all the

Senators representing those states are good friends, and I know that it's difficult to raise large sums in those states."); Hickmott Decl. ¶ 8 [DEV 6-Tab 19] (quoted *supra* Findings ¶ 1.59); Randlett Decl. ¶ 9 [DEV 8-Tab 32] ("Members [of Congress]. . . have asked soft money donors to write soft money checks to state and national parties solely in order to assist federal campaigns.").

1.61 Plaintiff Thomas McInerney states that he donates over $10,000 per year to state and local political party organizations to be spent on state and local organizations and elections. McInerney Aff. ¶¶ 4, 10, 12 [9 PCS]. Mr. McInerney's affidavit does not state whether or not these funds were used in the manner he desired, only that "it is his understanding" that they were used for such activities. *Id*. ¶¶ 11, 13, 15. Regardless, nothing in BCRA prevents Mr. McInerney from donating funds to state and local party organizations – the law only restricts the types of activities on which these nonfederal funds may be spent. However, if Mr. McInerney's purpose in donating these funds is to assist state and local parties and candidates, BCRA ensures that his funds will be spent only on activities that exclusively affect state and local parties and elections, and not on practices that constitute federal election activity.

Summary

1.62 The evidence clearly demonstrates that federal officeholders not only solicit nonfederal donations for the national political committees, but also for state political parties. The testimony and documentary evidence makes clear that candidates value

such donations almost as much as donations made directly to their campaigns and that these donations assist federal candidates' campaigns. Furthermore, the evidence makes clear that the national parties also direct nonfederal donations to their state party affiliates for the purpose of affecting federal elections. This evidence also corroborates the findings that GOTV and voter registration efforts by state parties affect federal elections. *See, e.g., supra* Findings ¶¶ 1.28, 1.31. Most importantly, the close nexus between the national political parties and federal officeholders led BCRA's framers to conclude that:

> Because the national parties operate at the national level, and are inextricably intertwined with federal officeholders and candidates, who raise the money for the national party committees, there is a close connection between the funding of the national parties and the corrupting dangers of soft money on the federal political process. The only effective way to address this [soft money] problem of corruption is to ban entirely all raising and spending of soft money by the national parties.

148 Cong. Rec. H409 (daily ed. Feb. 13, 2002) (statement of Rep. Shays).

Corruption

1.63 The fact that Members of Congress are intimately involved in the raising of money for the political parties, particularly unlimited nonfederal money donations, creates opportunities for corruption. The record does not contain any evidence of bribery or vote buying in exchange for donations of nonfederal money; however, the evidence presented in this case convincingly demonstrates that large contributions, particularly those nonfederal contributions surpassing the federal limits, provide donors access to

federal lawmakers which is a critical ingredient for influencing legislation, and which the Supreme Court has determined constitutes corruption. *See Buckley v. Valeo*, 424 U.S. 1, 27 n.28 (1976) (citing *Buckley*, 519 F.2d at 839 nn.37-38).

Vote Buying/Bribery

1.64 No Member of Congress testifying in this case states that he or she has ever changed his or her vote on any legislation in exchange for a donation of nonfederal funds to his or her political party. *See, e.g.,* Resp. of FEC to RNC's First and Second Reqs. for Admis. at 2-3 (admitting lack of evidence); McCain Dep. at 171-74 (unable to identify any federal officeholder who changed his or her vote on any legislation in exchange for a donation of non-federal money to a political party); Snowe Dep. at 15-16 (same); Jeffords Dep. at 106-07 (same); Meehan Dep. at 181-83 (same); Shays Dep. at 171 (same); *see also* 148 Cong. Rec. S2099 (daily ed. March 20, 2002) (statement of Sen. Dodd) ("I have never known of a particular Member whom [sic] I thought cast a ballot because of a contribution."); 147 Cong. Rec. S2936 (daily ed. March 27, 2001) (statement of Sen. Wellstone) ("I don't know of any individual wrongdoing by any Senator of either party.").

1.65 Senator Rudman notes:

> I understand that those who opposed passage of the Bipartisan Campaign Reform Act, and those who now challenge its constitutionality in Court, dare elected officials to point to specific [instances of vote buying]. I think this misses the point altogether. [The access and influence accorded large donors] is inherently, endemically, and hopelessly corrupting. You can't swim in the ocean

> without getting wet; you can't be part of this system without getting dirty.

Rudman Decl. ¶ 10 [DEV 8-Tab 34].

1.66 Consistent with Senator Rudman's testimony, the record, while not containing evidence that nonfederal funds have purchased votes, includes testimony from former and current Members of Congress describing the influence of nonfederal funds on the political system. Former Senator Simpson states:

> Too often, Members' first thought is not what is right or what they believe, but how it will affect fundraising. Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about--and quite possibly votes on--an issue? . . . When you don't pay the piper that finances your campaigns, you will never get any more money from that piper. Since money is the mother's milk of politics, you never want to be in that situation.

Simpson Decl. ¶ 10. Senator Simpson also relates that

> Large donors of both hard and soft money receive special treatment. No matter how busy a politician may be during the day, he or she will always make time to see donors who gave large amounts of money. Staffers who work for Members know who the big donors are, and those people always get their phone calls returned first and are allowed to see the Member when others are not.

Id. ¶ 9. Former Senator Simon testifies:

> It is not unusual for large contributors to seek legislative favors in exchange for their contributions. A good example of that which stands out in my mind because it was so stark and recent occurred on the next to last day of the 1995-96 legislative session. Federal Express wanted to amend a bill being considered by a Conference Committee, to shift coverage of their truck drivers from the National Labor Relations Act to the Railway Act, which includes airlines, pilots and railroads. This was clearly of benefit to Federal Express, which according to published

> reports had contributed $1.4 million in the last 2-year cycle to incumbent Members of Congress and almost $1 million in soft money to the political parties. I opposed this in the Democratic Caucus, arguing that even if it was good legislation, it should not be approved without holding a hearing, we should not cave in to special interests. One of my senior colleagues got up and said, 'I'm tired of Paul always talking about special interests; we've got to pay attention to who is buttering our bread.' I will never forget that. This was a clear example of donors getting their way, not on the merits of the legislation, but just because they had been big contributors. I do not think there is any question that this is the reason it passed.

Simon Decl. ¶¶ 13-14 [DEV 9-Tab 37]; *see also Colorado II*, 533 U.S. 431, 451 n.12 (2001) (quoting Senator Simon); Feingold Dep. at 62 [JDT Vol. 6] (testifying that in the fall of 1996 a senior Senator suggested to Senator Feingold that he support the Federal Express amendment because "they just gave us $100,000"). Former Senator Boren testifies:

> Donations, including soft money donations to political parties, do affect how Congress operates. It's only natural, and happens all too often, that a busy Senator with 10 minutes to spare will spend those minutes returning the call of a large soft money donor rather than the call of any other constituent. . . .
>
> As a Member of the Senate Finance Committee, I experienced the pressure first hand. On several occasions when we were debating important tax bills, I needed a police escort to get into the Finance Committee hearing room because so many lobbyists were crowding the halls, trying to get one last chance to make their pitch to each Senator. Senators generally knew which lobbyist represented the interests of which large donor. I was often glad that I limited the amount of soft money fundraising I did and did not take PAC contributions, because it would be extremely difficult not to feel beholden to these donors otherwise. I know from my first-hand experience and from my interactions with other Senators that they did feel beholden to large donors.

Senator Boren Decl. ¶¶ 7-8 [DEV 6-Tab 8]; *see also id*. ¶ 9 ("Many Congressmen vie for positions on particular committees such as Finance and Ways and Means in large part because it makes it much easier for them to raise money. They then spend large amounts of their scarce time raising money for their party from businesses that have specific matters pending before their committees.").

1.67 It is clear that political parties are involved in efforts to influence federal officeholders with regard to the passage or defeat of specific legislation. The motivation behind these efforts may not be imparted to the officeholder. However, an internal document shows that on at least one occasion the motivation for doing so was associated with donors' interest in the legislation.

1.67.1 Senator Rudman testifies that while the RNC would lobby him to take a position on legislation, it never asked him to take a particular position because a donor had contributed soft money to the party. Rudman Dep. at 77-82 [JDT Vol. 27]. Senator McCain testifies that "there are many times where the Republican National Committee tried to change my votes and other votes of other Republicans . . . [T]he Republican National Committee constantly weighs in on legislation before the Congress of the United States," McCain Dep. at 171-72 [JDT Vol. 18], but he also states that he does not "know [if it was] in exchange for donations or not." *Id*. The record, however, also contains a call sheet titled "Team 100 One-On-One with [a national

association]," for a call that took place on February 28, 2000, in Chairman Jim Nicholson's office. RNC0159740 [DEV 95]. Included on the sheet were instructions to thank the group for upgrading to Team 100. *Id*. The call sheet includes handwritten comments, including: "Gary Miller sponsoring Brownfield Legislation. Boehlert + Bliley against. Working w/ Speaker. Asked JN help. JN agreed to talk to Boehlert @ the possible time. When appropriate. . . . Call Sen. Abraham about support homebuilders - Property Rights Bill . . . . Lott good friend of homebuilders." *Id*.

1.68 Although one Defense expert believes it does not occur, two present Members of Congress testify that threats have been made by the political parties to withhold financial support due to Members' positions on issues. *See* Shays Dep. at 172-84 [JDT Vol. 29] (stating Republican Party never attempted to change his vote, but that "[i]t was made clear to a number of my colleagues if they voted for the campaign finance reform, they would get no campaign contributions"); McCain Decl. ¶ 7 [DEV 8-Tab 29] ("At times, when Members seek to support legislation their congressional leaders oppose, they are threatened with the prospect that their leaders will withhold soft money being spent on their behalf."); Defense Expert Mann Cross Exam. at 113-15 [JDT Vol. 17] ("I would be shocked if [the RNC] ever did such a thing. . . . [T]he point is to win the margin seat, to control the majority for the party, not to weaken a potentially vulnerable candidate. . . . It would be self-defeating. That isn't how it

works."). The FEC does not investigate or make determinations of national parties using federal money to induce federal legislators to support or oppose specific legislation, and therefore has no knowledge of whether such practices occur. Vosdingh Dep. at 89 [RNC Vol. VIII].

1.69 Plaintiffs' own expert Raymond La Raja recognizes the corruption potential inherent in nonfederal donations to the political parties. In a recently published book, La Raja argues that limiting nonfederal money donations reduces "the potential for corruption by eliminating the super donors." Green Rebuttal Report at 4 [DEV 5-Tab 1] (quoting Raymond La Raja, Sources and Uses of Soft Money: What Do We Know?, *in* A User's Guide to Campaign Reform at 106 (Gerald C. Lubenow ed., 2001). He continues:

> If only a modest portion of party soft money goes to fund issue ads, it is worth re-examining the question: how is soft money harmful? The obvious answer is that it permits candidates, contributors, and parties, to circumvent federal laws limiting campaign contributions. If party soft money can help a specific candidate, then corporations, unions, or wealthy individuals can simply funnel contributions to candidates through the parties. And the potential for quid pro quo exchange between contributor and policymaker escalates with the size of the contribution.

Id. (citing same at 105). In fact, La Raja asserts that "[t]o reduce the potential for corruption, I recommend that Congress place a cap on soft money contributions or, if soft money is banned, raise the limits on hard money contributions." *Id*. (citing same at 106). In his dissertation, La Raja makes a similar recommendation. La Raja

Cross Exam. Ex. 3 at 147 [JDT Vol. 15]; *see also id.* at 105 ("In a society in which political participation is unequal among socioeconomic groups it is discomforting to think that wealthy people and organizations might have disproportionate influence on government policies simply because they can write large checks to politicians. For this reason alone, policymakers might pause before granting dispensations to political parties though these institutions may perform valuable functions in democratic politics."). La Raja concludes that

> [t]here are two distinct benefits of using soft money. First, the parties can raise these funds in large increments. Although most soft money contributions are relatively small – the average per source is less than $10,000 – the parties solicit large amounts from corporations, unions and wealthy individuals. . . .
> Another important advantage of soft money is that the parties can concentrate these funds in key races. *By exploiting soft money rules, the parties effectively sidestep the federal ceilings that prevent them from allocating resources efficiently in the closest contests.* To navigate around the federal restrictions on soft money the parties have developed close ties with their state parties because these affiliates receive special exemptions for party building activity.

Id. at 51 (emphasis added); *see also id.* at 74-75 (concluding that parties "exploit federal campaign finance laws by using soft money for candidate support even though federal laws require them to use it for generic party building"); La Raja Cross Exam. 17-18 [JDT Vol. 15] (stating that he stands by the conclusions reached in his dissertation).

Donors are Pressured to Make Contributions to Political Parties

1.70 Corporate donors, trade associations, and individual donors are pressured to make

large contributions to the parties.

1.70.1 The Committee for Economic Development (CED)[56] released a "survey, which was conducted by the Tarrance Group, . . . drawn from telephone interviews of a random sample of 300 corporate executives employed by major U.S. corporations." Kolb[57] Decl. ¶ 9 [DEV 7-Tab 24]. The survey showed that "[n]early three-quarters of [senior executives of the nation's largest businesses] (74 percent) say pressure is placed on business leaders to make large political donations. The main reasons corporate America makes political contributions, the executives said is fear of retribution and to buy access to lawmakers. Seventy five percent say political donations give them an advantage in shaping legislation; and nearly four-in-five executives (78 percent) called the system 'an arms race for cash that continues to get more and more out of control.'" *Id*. ¶ 9 & Ex. 6.

1.70.1.1 Plaintiffs challenge these poll results, noting that Kolb, CED's President, could not provide details regarding how the Tarrance Group conducted the survey. *See* Proposed Findings of Fact of the RNC, Republican Party of Colorado, the Republican Party of Ohio, the Republican Party of New Mexico, the Dallas

[56] CED is "an independent non-partisan research and policy organization of some 200 Trustees who are prominent business leaders and educators." Kolb Decl. I ¶ 1 [DEV-Tab 24].

[57] Charles Kolb is CED's president. Kolb Decl. I ¶ 1 [DEV 7-Tab 24].

County (Iowa) Republican County Central Committee, and Mike Duncan ("RNC Proposed Findings") ¶ 115(b) (citing Kolb Dep. at 128, 145 [JDT Vol. 13]). They also state that many of the survey questions did not distinguish between federal and nonfederal funds. *Id*. (citing Kolb Dep. Ex. 5). With regard to the first criticism, the fact that a person who commissioned a study could not explain how the polling firm actually conducted the survey, without more, does not render the poll flawed. Plaintiffs have provided no information which indicates that the Court should view the Tarrance Group's work with caution. In fact, in his deposition, Kolb explained that the Tarrance Group is "a professional polling firm. They know how to do their business pretty well and they're fairly well respected from everything we could tell," Kolb Dep. at 145 [JDT Vol. 13], and the RNC did not challenge this assessment in the deposition or in their filings. In fact, the record shows that The Coalition– an organization supported by a number of Plaintiffs– used the Tarrance Group for its own polling. *See infra* Findings ¶ 2.6.2.2. As for the second criticism, it is true that the pollsters did not ask those surveyed to distinguish between federal and nonfederal funds; however, the fact that nearly 80 percent called the campaign finance system "an arms race for cash that continues to get more and more out of control" strongly suggests that political party contribution coercion does not stop once a donor reaches the federal contribution limits.

1.70.2 Lobbyist Robert Rozen testifies that

> [i]n some cases corporations and trade associations do not want to give in amounts over the hard money limits, but they feel pressured to give in greater amounts and end up making soft money donations as well. They are under pressure, sometimes subtle and sometimes direct, from Members to give at levels higher than the hard money limits. For example, some Members in a position to influence legislation important to an industry naturally wonder why a company in that industry is not participating in fundraising events.

Rozen Decl. ¶ 8 [DEV 8-Tab 33]; *see also* Brian McGrory, Businesses Drawn to Campaign Reform, Boston Globe, February 13, 1997, ODP0018-00457-60 [DEV 69-Tab 48] (quoting Howard Marlowe, a Washington lobbyist, as saying: "We are spending tens of millions of dollars to satisfy the constant craving of congressmen or the parties for money and our own craving for access. . . . You don't know if you say 'no'--and you may have given five times already--whether they will shut off the access you have been buying with all these other contributions. We need the access.").

1.70.3 A national survey of major congressional donors conducted in 1997 found that a majority were critical of the campaign finance system and supportive of reform. John Green, Paul Herrnson, Lynda Powell, and Clyde Wilcox, *Individual Congressional Campaign Contributors: Wealthy, Conservative and Reform-Minded* (1998), FEC 101-0282, 0283 [DEV 45-Tab 110]. Eighty percent of respondents agreed that "office-holders regularly pressure donors

for contributions," while one-half agreed "that contributors regularly pressure office-holders for favors and seek access to government." *Id*. at 0290.

1.70.4 Former Senator Boren testifies that "Donors . . . feel victimized. Now that I've left office, I sometimes hear from large donors that they feel 'shaken down.'" Boren Decl. ¶ 10.

Federal Officeholders' Awareness of Who Donates to Parties

1.71 Some present and past officeholders, corroborated by separate documentary evidence, testify that many in Congress are aware of the identities of contributors of large donations to the political parties. Some officeholders testify that they personally are unaware of who donates to the political parties, but they are mostly BCRA co-sponsors, aligned against these types of large, unregulated contributions and not active participants in nonfederal fundraising, or Members who have distanced themselves from receiving this information.

1.71.1 Some Members of Congress testifying in this case state that they *personally* are unaware of who donates money to their parties. *See* Feingold Dep. at 115-16 [JDT Vol. 6] ("Q: How generally are . . . Senators made aware of, if at all, the amounts and identities of soft money donors to the national committees? A: I don't know exactly how that's done or how much it's done."): Snowe Dep. at 223-24 [JDT Vol. 31] (unaware of nonfederal donors to the RNC); Jeffords Dep. at 96 [JDT Vol. 11] ("somewhat" aware of nonfederal donors to

the national political parties); Meehan Dep. at 179 [JDT Vol. 22] (aware of few nonfederal donors to national party committees, only because "from time to time I read who they are in the newspaper"). The record shows that when Members do not know the identity of contributors, it is sometimes because those officeholders made a conscious effort to remain unaware or that their staff handled such information. *See, e.g.,* Senator Feingold Dep. at 115 [JDT Vol. 6] (explaining that while he does not know how Senators are made aware of the identity of donors of nonfederal money to national parties, it is because he "made a real effort to be far away from that part of the process so [he is] not privy to or aware of exactly how that's done and to what extent it's done."); Congressman Meehan Dep. at 178-79 [JDT Vol. 22] (explaining that he was unaware of the Democratic National Committee's "tallying" process, by which the amount of money the DNC spends on a particular candidate is related to the amount of nonfederal money that candidate raised for the DNC, but that he was "probably one of the last people that they would let know about the tallying process"); Rudman Dep. at 75-78 [JDT Vol. 27] (explaining that while he did not know the identity of contributors who donated "either hard or soft money" to the RNC, that the RNC "probably" provided him with that information but he "didn't have any interest in it. I was the most disinterested candidate in money of anyone you've probably ever run into. . . . And [if such

reports] came to the office, the [administrative assistant] took them and probably read them.").

Senator McConnell has stated that during his 18 years in the United States Senate he has met thousands of Americans with whom he has shaken hands, posed for photographs, answered questions and discussed legislative issues. The overwhelming majority of these meetings were with people who do not donate funds to the Republican Party at the national, state, or local level. Senator McConnell also states that he is typically unaware of the donation history of individuals with whom he meets. McConnell Aff. ¶ 13 [2 PCS]. While Senator McConnell may generally not be aware of the donation history of each of the individuals he meets, he is aware of the donation history of some specific large donors. For example, Senator McConnell sent the following letter to a contributor which stated in part:

> It was a pleasure seeing you at the Senate-House Dinner last week. The dinner was not a good time to talk, but I wanted to let you know about the August 12 fundraiser I am having at your neighbor['s] . . . home. . . .
> In addition to your $2,000 contribution in the last election cycle, I was proud to also receive $1,000 each from [five other donors]. Their support again would be greatly appreciated.

McConnell Dep. Ex. 11 [JDT Vol. 19] (MMc0987). The letter is signed "Mitch" and includes the following handwritten note: "As you may recall, any contributions to my '02 campaign will count against your $25,000 annual hard

money limit in '02 + not '99. Hope you can help." *Id*.

Another handwritten letter states: "Thanks so much for your continuing friendship and support. Your commitment for $2000 each from you + your lady will be very helpful in my reelection next year. Thanks again + I look forward to hearing from you soon. Mitch." *Id*. Ex. 5 (MMc0753); *see also* Findings ¶ 1.60 (letter to contributor noting that he had given the maximum amount of federal funds to Senator McConnell's campaign); McConnell Dep. at 38-41 [JDT Vol. 19] (explaining that a particular company collected $47,000 for his campaign because its chairman, who is a friend of Senator McConnell's, hosted a fundraiser for the McConnell campaign)

1.71.2 Many others testify that federal officeholders and candidates are typically aware of who donates to their parties.

Former and current Members of Congress state that they and their colleagues are aware of who makes large contributions to their parties. *See, e.g.,* Bumpers Decl. ¶¶ 18, 20 [DEV 6-Tab 10] (explaining that officeholders of both parties are aware of contributors' identities, that he had "heard that some Members even keep lists of big donors in their offices," and that "you cannot be a good Democratic or a good Republican Member and not be aware of who gave money to the party. If someone in Arkansas gave $50,000 to the DNC, for example, I would certainly know that."); 148 Cong Rec. H352 (daily

ed. Feb. 13, 2002) (statement of Rep. Shays) (recognizing that "it's the candidates themselves and their surrogates who solicit soft money. The candidates know who makes these huge contributions and what these donors expect. Candidates not only solicit these funds themselves, they meet with big donors who have important issues pending before the government; and sometimes, the candidates' or the party's position appear to change after such meetings."); Senator Simpson Decl. ¶ 5 [DEV 9-Tab 38] (explaining that "[p]arty leaders would inform Members at caucus meetings who the big donors were. If the leaders tell you that a certain person or group has donated a large sum to the party and will be at an event Saturday night, you'll be sure to attend and get to know the person behind the donation. . . . Even if some members did not attend these events, they all still knew which donors gave the large donations, as the party publicizes who gives what."); Senator Boren Decl. ¶ 6 [DEV 6-Tab 8] (testifying that "[e]ach Senator knows who the biggest donors to the party are" because "[d]onors often prefer to hand their [nonfederal money contribution] checks to the Senator personally, or their lobbyist informs the Senator that a large donation was just made."); Congressman Bennie G. Thompson Dep. at 28-29 [JDT Vol. 32] (testifying that the DCCC "provide[s] the entire Democratic Caucus with the amounts of money raised by name of every Democratic member of Congress."); McCain Decl. ¶ 6 [DEV 8-Tab 29]

("Legislators of both parties often know who the large soft money contributors to their party are, particularly those legislators who have solicited soft money," and "[d]onors or their lobbyists often inform a particular Senator that they have made a large donation."); Senator Simon Decl. ¶ 16 [DEV 9-Tab 37] (stating that he was more likely to first return the telephone call of a donor to his campaign than someone who had not donated, and that increased access for those who give large contributions to the party is not fair to those who cannot afford to give contributions at all); Wirth Decl. Ex. A ¶ 17 [DEV 9-Tab 43] ("[C]andidates were generally aware of the sources of the funds that enabled the party committee to support their campaigns.").

Party officials and a political donor state that Members of Congress are made aware of who makes large donations to their party. Vogel Decl. ¶¶ 25-28 [DEV 9-Tab 41] (explaining that the NRSC distributes lists of potential donors to incumbents so that they can solicit donations); McGahn Decl. ¶¶ 21, 34-37 [DEV 8-Tab 30] (same for NRCC); Jordan Decl. ¶¶ 20, 25-28 [DEV 7-Tab 21] (same for DSCC); Wolfson Decl. ¶¶ 21, 28-31 [DEV 9-Tab 44] (same for DCCC); Randlett Decl. ¶ 10 [DEV 8-Tab 32] ("Information about what soft money donors have given travels among the Members in different ways. Obviously the Member who solicited the money knows. Members also know who is involved with the various major donor events which they attend, such

as retreats, meetings and conference calls. And there is communication among Members about who has made soft money donations and at what level they have given, and this is widely known and understood by the Members and their staff.").

1.71.3 The record also contains evidence showing that sometimes large donors make their identities known to Members of Congress. This memorandum from a large, influential interest group consisting of major corporations from a particular industry, discusses an upcoming meeting between the group's representatives and Senator McConnell, then head of the NRSC. [citation sealed]. The "objectives" of the meeting included "apprising him of [sic] industry's concern with attention on" an issue directly related to their industry and "expressing [the group's] willingness to be a resource, substantively and politically, to assist in maintaining a Republican majority in 2000." *Id*; *see also* Findings ¶¶ 1.75.1 (testimony about donors choosing to personally deliver donations to Senator Chuck Robb when he was Chairman of the DSCC), 1.75.2 (Senator McCain statement: "Donors or their lobbyists often inform a particular Senator that they have made a large donation."), 1.75.2 (statement by Sen. McCain).

1.72 It is clear from the evidence *supra* that many Members of Congress know who donates to their political parties, and that those who do not can easily find such

information. In fact the record suggests that for a Member not to know the identities of these donors, he or she must actively avoid such knowledge as it is provided by the national political parties and the donors themselves. This finding is not particularly unexpected given that many Members of Congress actively solicit federal and nonfederal contributions for their parties. *See supra* Findings ¶ 1.51.

The fact that some Members know who donates large amounts of money to their political parties is a necessary corollary to the next set of findings which demonstrates that many who give large donations to the political parties, particularly unrestricted nonfederal donations, are provided with access to federal lawmakers. This access provides these donors with the opportunity to influence legislation.

Evidence Regarding Contributions and Access to Federal Lawmakers

1.73 The record contains a substantial amount of evidence showing that large donations to the political parties, particularly nonfederal contributions, provide donors with special access to federal lawmakers. This access is valued by contributors because access to lawmakers is a necessary ingredient for influencing the legislative process. Contributors find that nonfederal funds are most effective at obtaining special access, and to ensure that they maintain this access donors contribute to both political parties. The political parties take advantage of contributors' desire for access by structuring their donor programs so that as donations increase, so do the number and intimacy of special opportunities to meet with Members of Congress. The facts below make clear

that this effect of nonfederal donations corrupts the political system.

Donors Give Nonfederal Donations in Order to Obtain Special Access to Federal Lawmakers

1.74 Testimony in the record from lobbyists, Members of Congress, and individual and corporate donors, demonstrates that major contributors to the political parties give nonfederal donations for the purpose of obtaining increased access to, and strengthening their relationships with federal officeholders.

1.74.1 Lobbyists state that their clients make donations to political parties to achieve access. According to lobbyist, and former DNC and DSCC official, Robert Hickmott "[t]here is a very rare strata of contributors who contribute large amounts to the DSCC because they actually believe in Democratic politics. . . . The majority of those who contribute to political parties do so for business reasons, to gain access to influential Members of Congress and to get to know new Members." Hickmott Decl., Ex. A. ¶ 46 [DEV 6-Tab 19]; *see also* Rozen Decl. ¶ 10 ("[L]arge political contributions are worthwhile because of the potential benefit to the company's bottom line.") [DEV 8-Tab 33]; Andrews[58]

[58] Mr. Andrews is an attorney and lobbyist at the Washington, D.C. firm of Butera & Andrews, specializing in government relations and federal legislative representations. He has been an active lobbyist before Congress since 1975. Prior to that time, he served as Chief Legislative Assistant to then United States Senator Sam Nunn. Prior to forming Butera & Andrews, he worked in the government relations practice at the Washington office of the law firm of Sutherland, Asbill & Brennan. During his career, he has represented clients from throughout the nation and abroad, and they have included major corporations, trade associations, coalitions, and state governmental entities. He has worked with clients on a (continued...)

Decl. ¶ 8 (stating that sophisticated political donors "typically are trying to wisely invest their resources to maximize political return.") [DEV 6-Tab 1].

Wright Andrews explains:

> Sophisticated political donors - particularly lobbyists, PAC directors, and other political insiders acting on behalf of specific interest groups - are not in the business of dispensing their money purely on ideological or charitable grounds. Rather, these political donors typically are trying to wisely invest their resources to maximize political return. Sophisticated donors do not show up one day with a contribution, hoping for a favorable vote the next day. Instead, they build longer term relationships. The donor seeks to convey to the member that he or she is a friend and a supporter who can be trusted to help the federal elected official when he or she is needed. Presumably, most federal elected officials recognize that continued financial support from the donor often may be contingent upon the donor feeling that he or she has received a fair hearing and some degree of consideration or support.

Andrews Decl. ¶ 8 [DEV 6-Tab 1]. Lobbyist Robert Rozen testifies that

> [t]ypically, a contributor gives money to establish relationships, to be able to lobby on an issue, to get close to Members, to be able to have influence. While an elected official of course does not have to do something because somebody gave, a contribution helps establish a relationship, and the more you give the better the relationship. It is not that legislation is being written in direct response to somebody giving a lot of money. Rather, it is one step removed: relationships are established because people give a lot of money, relationships are built and

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[58](...continued)
broad array of issues including environmental matters, federal taxation, banking, financial services, housing, and many others. He has served two terms as President of the American League of Lobbyists, and Washingtonian magazine named him as [sic] of "Washington's Top 50 Lobbyists." Andrews Decl. ¶ 1 [DEV 6-Tab 1]

> are deepened because of more and more money, and that gets you across the threshold to getting the access you want, because you have established a relationship.

Rozen Decl., Ex. A ¶ 12 [DEV 8-Tab 33].

1.74.2 Some former and current Members of Congress testify that donors expect to establish relationships with officeholders in return for their nonfederal donations to the national political parties. Former Senator Rudman explains:

> By and large, the business world, including corporations and unions, gives money to political parties. . . [because] they believe that if they decline solicitations for such contributions, elected and appointed officials will ignore their views or, worse, that competing business interests who do make large contributions to the party in question will have an advantage in influencing legislation or other government decisions. The same is true in the preponderance of cases where wealthy individuals give $50,000, $100,000, $250,000, or even more to political parties in soft money donations.").

Rudman Decl. ¶ 5 [DEV 8-Tab 34]; *see also* Bumpers Decl. ¶ 14 [DEV 6-Tab 10] ("Although some donors give to Members and parties simply because they support a particular party or Member, the lion's share of money is given because people want access. If someone gives money to a party, out of friendship with a Member, that donor may never ask for anything in return. However, although many people give money with no present intention of asking for anything in return, they know that if they ever need access they can probably get it. Donations can thus serve as a type of insurance."); *id.* ¶ 13 (testifying that people give money to party committees feel that they are

"ingratiating themselves" with the federal officeholder who solicits the donation); Wirth Decl., Ex. A. ¶ 5 [DEV 9-Tab 43] (stating that those donors who made contributions to the state party "almost always did so because they expected that the contributions would support my campaign," and that, generally, "they expected that [the Senator] would remember their contributions."); Brock Decl. ¶ 5(a) [DEV 6-Tab 9] (testifying that large givers "for their part, feel they have a 'call' on these officials. Corporations, unions, and wealthy individuals give these large amounts of money to political parties so they can improve their access to and influence over elected party members. Elected officials who raise soft money know this."); Boren Decl. ¶ 9 [DEV 6-Tab 8] ("[Members of Congress] know exactly why most soft money donors give - to get access and special influence based on their contributions.").

1.74.3 Business contributors also testify that nonfederal donations to parties are made to obtain access to federal officeholders. Roger Tamraz, an American businessman involved in investment banking and international energy projects, made donations to the DNC during the 1996 election cycle. When asked during Congressional hearings whether one of the reasons he made the contributions was because he "believed it might get [him] access?," Mr. Tamraz responded: "Senator, I'm going even farther. It's the only reason–to get access. . . ." Thompson Comm. Report at 2913 n.46 (quoting page 63 of

Mr. Tamraz's testimony before the committee). Some corporate donors view nonfederal donations as the cost of doing business. *See* Hassenfeld Decl. ¶ 16 ("Many in the corporate world view large soft money donations as a cost of doing business, and frankly, a good investment relative to the potential economic benefit to their business. . . . I remain convinced that in some of the more publicized cases, federal officeholders actually appear to have sold themselves and the party cheaply. They could have gotten even more money, because of the potential importance of their decisions to the affected businesses.") [DEV 6-Tab 17]; Randlett Decl. ¶ 5 [DEV 8-Tab 32] (stating that "many soft money donations are not given for personal or philosophical reasons. They are given by donors with a lot of money who believe they need to invest in federal officeholders who can protect or advance specific interests through policy action or inaction. Some soft money donors give $250,000, $500,000, or more, year after year, in order to achieve these goals. For most institutional donors, if you're going to put that much money in, you need to see a return, just as though you were investing in a corporation or some other economic venture."); *see also* Kirsch Decl. ¶ 14 (stating that "[major] donors perceive that they are getting a business benefit through their special access, and that it is a good investment for them.") [DEV 7-Tab 23].

Documents submitted show that a Fortune 100 company makes large

contributions to national party committees with the expectation that its contributions will cultivate or strengthen its "relationships" with particular Members of Congress. *See, e.g.,* Internal Fortune 100 company memorandum entitled "Justification for donation to [DSCC]" (October 25, 2000) [citation sealed] ("I am requesting a check for $50,000.00 to the Democratic Senatorial Campaign Committee (DSCC). Senator Robert Torricelli is the chairman for the DSCC and in a recent conversation with the Senator, he requested the above amount from [our company]. Senator Torricelli has been a friend to [our company] for many years and he has shown himself to be a thoughtful voice regarding issues in our industry. He currently serves on the Judiciary, Foreign Relations & Governmental Affairs and Rules and Administration Committees. I feel this would be a great opportunity to strengthen our relationship with Senator Torricelli and the DSCC."); Internal Fortune 100 company memorandum entitled "Justification for donation to [DSCC]" (December 12, 2000) [citation sealed] ("I am requesting a check in the amount of $50,000 to the Democratic Senatorial Campaign Committee (DSCC). Senator Patty Murray (D-WA) is the new chairman of the DSCC . . . . Senator Murray sits on the Senate Committees on Appropriations, Budget, Health, Education, Labor and Pensions, and Veterans Affairs. This donation would further enhance our ties with the DSCC and get our relationship with Senator

Murray off to a good start."); Internal Fortune 100 company memorandum entitled "[DCCC]/Congressman Bill Luther" (May 7, 2001) [citation sealed] ("I am requesting a check for $25,000.00 to the [DCCC] to support party building activities in response to a request from Congressman Bill Luther. Congressman Luther has been a friend to [our company] for many years . . . . He currently serves on the Commerce Committee, the Subcommittees for Telecommunications, Trade & Consumer Protection as well as the Finance and Hazardous Materials. I feel this would be a great opportunity to strengthen our relationship with Congressman Luther."); Internal Fortune 100 company memorandum entitled "Georgia Senate 2002" (July 19, 2001) [citation sealed] ("I am requesting a check for $10,000.00 on behalf of Georgia Senate 2002. Senator Cleland has been reaching out to his key supporters and he has contacted [our company] for financial assistance with Georgia Senate 2002. This is very important to Senator Max Cleland and over the years, Senator Cleland has been a good friend to [our company]. I feel this would be a great opportunity to strengthen our relationship with Senator Cleland."). One legislative advocate from this company described the benefits reaped from contributing $100,000 to the NRCC: "I think we established some goodwill with [Congressman] Tauzin, both by [our company] contributing at the $100,000 level to the NRCC dinner he chaired last month and by my

participation in the NRCC Finance Committee for the dinner. Tauzin understood that [our company] participated at the same level as the major . . . companies [in our industry] did, and he expressed genuine interest in trying to begin to reach out to the competitive industry. In sum, I think the event was a real positive for [our company]." Internal Fortune 100 company memorandum entitled"NRCC Leadership Dinner 2000," dated April 4, 2000, [citation sealed].

An internal RNC document also shows that donors often give to the national parties to achieve access to lawmakers. RNC0177216 [DEV 95] (note written on stationery of RNC's Team 100 Director, Haley Barbour, stating "they have pretty much decided to join T-100 . . . . They want access to political players . . . . Their top issue is tort reform").

1.74.4 One experienced individual donor testifies that "[l]arge soft money donors give in order to obtain access and influence." Hiatt Decl. ¶ 11 [DEV 6-Tab 18].

1.74.5 Plaintiffs' expert La Raja testifies that interest groups probably pursue an access strategy when they give money to political parties. La Raja Cross Exam. at 89 [JDT Vol. 15].

Large Nonfederal Donations Provide Donors Access to Federal Lawmakers

1.75 The record demonstrates that large donations, especially nonfederal contributions, to

the political parties provide donors with access to Members of Congress. The record is a treasure trove of testimony from Members of Congress, individual and corporate donors, and lobbyists, as well as documentary evidence, establishing that contributions, especially large nonfederal donations, are given with the expectation they will provide the donor with access to influence federal officials, that this expectation is fostered by the national parties, and that this expectation is often realized. As one former Member of Congress puts it: "[A]ccess is it. Access is power. Access is clout." Boren Decl. ¶ 7 [DEV 6-Tab 8] (quoting Rep. Mazzoli).

1.75.1 Testimony from lobbyists demonstrates that large donations, particularly in nonfederal form, are a necessary ingredient for a successful lobbying campaign because they provide their clients with access to federal lawmakers, which allows them to influence legislation.

Lobbyist Robert Rozen testifies that large nonfederal donations are essential for developing relationships with Members of Congress, which in turn lead to access, which in turn lead to influence over policy.

> I know of organizations who believe that to be treated seriously in Washington, and by that I mean to be a player and to have access, you need to give soft money. As a result, many organizations do give soft money. . . . They give soft money because they believe that's what helps establish better contacts with Members of Congress and gets doors opened when they want to meet with Members. There is no question that money creates the relationships. Companies with interests before particular committees need to have access to the chairman of that committee, make donations, and go to events where the

> chairman will be. Even if that chairman is not the type of Member who will tie the contribution and the legislative goals together, donors can't be sure so they want to play it safe and make soft money contributions. The large contributions enable them to establish relationships, and that increases the chances they'll be successful with their public policy agenda. Compared to the amounts that companies spend as a whole, large political contributions are worthwhile because of the potential benefit to the company's bottom line.

Rozen Decl. ¶ 10 [DEV 8-Tab 33]; *see also id*. ¶ 14 ("You are doing a favor for somebody by making a large [soft money] donation and they appreciate it. Ordinarily, people feel inclined to reciprocate favors. Do a bigger favor for someone--that is, write a larger check--and they feel even more compelled to reciprocate. In my experience, overt words are rarely exchanged about contributions, but people do have understandings: the Member has received a favor and feels a natural obligation to be helpful in return. This is how human relationships work. The legislative arena is the same as other areas of commerce and life. It is similar to a situation that has been in the news recently: an investment banking firm made shares of hot initial public offerings available to the officers of Worldcom Inc., while Worldcom Inc. executives were giving the firm tens of millions of dollars in investment-banking business. There doesn't have to be a specific tie-in to achieve the result.").

Lobbyist Robert Hickmott, who is a former DNC and DSCC official, testifies that he advises his clients to make contributions in order to "establish

relationships. Having those relationships in many ways then helps us get meetings and continue that relationship." Hickmott Dep. at 50 [JDT Vol. 10]. Hickmott testifies that when Senator Robb was chairman of the DSCC he would go to the DSCC offices where he would "accept checks from individuals or organizations who wanted to give money to the DSCC and they wanted face time with Chairman Chuck Robb." *Id*. at 94-95. Donors would "use this as an opportunity not only to make a contribution to the DSCC, but also to convey to Senator Robb what their group or individual position was on an issue." *Id*. at 95.

Lobbyist Daniel Murray's testimony in a prior case, which has been incorporated into the record of this case, states that

> contribut[ing] soft money . . . has proven to provide excellent access to federal officials and to candidates for federal elective office. Since the amount of soft money that an individual, corporation or other entity may contribute has no limit, soft money has become the favored method of supplying political support. . . . [S]oft money begets both access to law-makers and membership in groups which provide ever greater access and opportunity to influence.

Murray Aff. in *Mariani* ¶ 14 [DEV 79-Tab 59].

1.75.1.1 Although there are varying views as to whether lobbying efforts are a more effective means of achieving access to federal officeholders than large nonfederal contributions, there is no dispute that large nonfederal contributions provide an additional means of obtaining access to officeholders and are

generally part of modern lobbying plans. While one lobbyist concedes that his clients hire him because he is able to provide them access to lawmakers regardless of the client's donation history, one of the ways he is able to provide this service is through nonfederal donations he and his firm arrange for Members of Congress and their political parties. Moreover, Plaintiffs have not presented the testimony of a single lobbyist who believes that nonfederal money donations do not assist clients in their efforts to gain access to influence federal lawmakers.

1.75.1.2 Some testimony presents lobbying as a more effective method of obtaining access to federal lawmakers than nonfederal donations. *See* RNC Finance Director B. Shea Decl. ¶ 45 [RNC Vol. V] ("It is obvious why major donors to the RNC do not regularly use their donations as a means to obtain 'access.' All or virtually all who have personal or organizational business with the federal government retain or employ professional lobbyists."); Former Senator Bumpers Dep. in *RNC* at 39 [DEV 63-Tab 1] ("[M]oney really does buy access . . . . [a]t some level that's true of campaign contributions, and it's almost always true in the cases of lobbying") *but see infra* Findings ¶ 1.75.2 (Former Senators Rudman, Boren and Simpson's views on access). Evidence was also presented that many entities that donate nonfederal funds to political parties also spend vast sums of money lobbying federal officeholders, sometimes

exceeding their donations by many multiples. *See* Resp. of Intervenors to RNC's First and Second Reqs. for Admis. at 23-24 (admitting that top five corporate nonfederal donors during the 1996 election campaign donated $9,009,155 to national party committees and same five corporations spent $27,107,688 on lobbying during 1996 alone[59]); *id*. at 24-25 (admitting that top five corporate donors of nonfederal funds during 1997 and 1998 donated $7,774,020 to national party committees and same five corporations spent $42,000,000 on lobbying during that same period[60]); *see also* Primo Cross Exam. at 164 [JDT Vol. 27] (noting that nonfederal donations "is a piddling amount of money . . . relative to what corporations spend on lobbying and . . . philanthropy"); Mann Cross Exam. at 49 [JDT Vol. 17] ("It's not either or.

[59] The donors were Philip Morris ($3,017,036 in nonfederal contributions to national political parties, $19,580,000 in lobbying expenditures), Joseph E. Seagram & Sons ($1,938,845 in nonfederal contributions to national political parties, $550,000 in lobbying expenditures), RJR Nabisco ($1,442,931 in nonfederal contributions to national political parties, $1,637,688 in lobbying expenditures), Walt Disney Co. ($1,359,500 in nonfederal contributions to national political parties, $980,000 in lobbying expenditures), and Atlantic Richfield ($1,250,843 in nonfederal contributions to national political parties, $4,360,000 in federal and state lobbying expenditures). Resp. of Intervenors to RNC's First and Second Reqs. for Admis. at 23-24.

[60] The donors were Philip Morris ($2,446,316 in nonfederal contributions to national political parties, $38,800,000 in lobbying expenditures), Communications Workers of America ($1,464,250 in nonfederal contributions to national political parties, $460,000 in lobbying expenditures), AFSCME ($1,340,954 in nonfederal contributions to national political parties, $2,460,000 in lobbying expenditures), Amway Corp. ($1,312,500 in nonfederal contributions to national political parties, $$240,000 in lobbying expenditures), American Financial Group ($1,210,000 in nonfederal contributions to national political parties, $20,000 to $40,000 in lobbying expenditures)

Is more money spent on lobbying than soft money donations? Yes. It varies tremendously. In some sectors it's 2-1, in others 4-1, 10-1. You have given an example in a particular case of 15-1, but the fact is most of the organizations and economic interests doing that lobbying, inside and outside lobbying, are also intimately involved in the political financing game and making large contributions to political parties."). One lobbyist states that his clients hire him in large part because of his contacts on Capitol Hill and because he has access to federal officeholders whether or not their clients have donated money to candidates, officeholders or parties. *See* Hickmott Dep. at 46-47, 50-51 [JDT Vol. 10]; *but see id.* at 50 (noting that his firm gives "contributions to establish relationships. Having those relationships in many ways then helps us get meetings and continue that relationship."); Andrews Cross Exam. at 19-20 [JDT Vol. 1] (acknowledging that some organizations gain access by means other than money, such as by using celebrity individuals).

1.75.1.3 Lobbyists maintain that "basic" or traditional lobbying activities are "alone insufficient to be effective in many instances in lobbying endeavors. To have true political clout, the giving and raising of campaign money for candidates and political parties is often critically important." Andrews Decl. ¶ 5 [DEV 6-Tab 1]; Murray Aff. in *Mariani* ¶¶ 6-7 [DEV 79-Tab 4] (testifying that

"[a]long with each . . . legislative plan [a plan to "advance the client's legislative agenda"], and essential to achieving the client's goals, I develop a parallel political financial support plan. In other words, I advise my clients as to which federal office-holders (or candidates) they should contribute and in what amounts, in order to best use the resources they are able to allocate to such efforts to advance their legislative agenda. Such plans also would include soft money contributions to political parties and interest groups associated with political issues."); *see also* Meehan Dep. in *RNC* at 40-41 [DEV 66-Tab 4] ("[P]ower and influence in Washington is not just the amount of soft money an industry contributes to the political parties. I would say that also it's the amount of PAC money that they contribute to the political candidates, it's the amount of hard money they contribute, it's the amount of lobbying money that they expend in order to influence members of Congress."). Furthermore, testimony from lobbyists shows contributions help lobbyists gain access to lawmakers. Lobbyist Wright Andrews comments:

> The amount of influence that a lobbyist has is often directly correlated to the amount of money that he or she and his or her clients infuse into the political system. Some lobbyists help raise large "soft money" donations and/or host many fundraising events for key legislators. Some simply represent a single client with very deep pockets and can easily reach into large corporate or union funds for "soft money" donations or other allowable expenditures that may influence legislative actions. Those who are most heavily involved in giving and raising campaign finance money are frequently, and not surprisingly, the lobbyists

with the most political clout.

Andrews Decl. ¶ 12 [DEV 6-Tab 1]; *see also* Hickmott Dep. at 50 [JDT Vol. 10]. Andrews testifies that it has become a common practice for lobbyists to "host a number of fundraisers." Andrews Decl. ¶ 16 [DEV 6-Tab 1] He explains that "[w]hereas the political parties periodically organize 'gala' events in large ballrooms filled with hundreds of donors, lobbyists now often prefer attending smaller events hosted by other lobbyists, with only ten or fifteen people participating, all sitting at a dinner or breakfast table with the invited guest elected official. This type event allows lobbyists a better opportunity to build more personal relationships and to exchange views." *Id.*

1.75.2 Former and current Members of Congress testify that contributions provide donors with access to influence federal lawmakers. Former Senator Rudman describes the system bluntly:

> Special interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get special access. Sitting Senators and House Members have limited amounts of time, but they make time available in their schedules to meet with representatives of business and unions and wealthy individuals who gave large sums to their parties. These are not idle chit-chats about the philosophy of democracy. In these meetings, these special interests, often accompanied by lobbyists, press elected officials -- Senators who either raised money from the special interest in question or who benefit directly or indirectly from their contributions to the Senator's party -- to adopt their position on a matter of interest to them. Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote

> on legislation in a certain way. No one says: 'We gave money so you should do this to help us.' No one needs to say it -- it is perfectly understood by all participants in every such meeting. . . .
> Large soft money contributions in fact distort the legislative process. They affect what gets done and how it gets done. They affect whom Senators and House members see, whom they spend their time with, what input they get, and -- make no mistake about it -- this money affects outcomes as well

Rudman Decl. ¶¶ 7, 9 [DEV 8-Tab 34]. Senator Simpson testifies that groups used "to give to someone who was for your philosophy," but now "[i]t's giving so you can get access." Simpson Dep. at 11-12 [JDT Vol. 30]. Senator Boren finds the "comments some of [his] colleagues have made about the system are completely consistent with [his] own experience. For example, former Rep. Romano Mazzoli (D-Kentucky) said: 'People who contribute get the ear of the member and the ear of the staff. They have the access--and access is it. Access is power. Access is clout. That's how this thing works. . .' Similarly, Rep. Jim Bacchus (D-Fla.) has explained: "I have on many occasions sat down and listened to people solely because I know they had contributed to my campaign." Boren Decl. ¶ 7 [DEV 6-Tab 8] (citation omitted). Former Senator Simon attests:

> Giving to party committees also helps you gain access to Members. While I realize some argue donors don't buy favors, they buy access. That access is the abuse and it affects all of us. If I got to a Chicago hotel at midnight, when I was in the Senate, and there were 20 phone calls waiting for me, 19 of them names I didn't recognize and the 20th someone I recognized as a $1,000

> donor to my campaign, that is the one person I would call. You feel a sense of gratitude for their support. This is even more true with the prevalence of much larger donations, even if those donations go to a party committee. Because few people can afford to give over $20,000 or $25,000 to a party committee, those people who can will receive substantially better access to elected federal leaders than people who can only afford smaller contributions or can not afford to make any contributions. When you increase the amount that people are allowed to give, or let people give without limit to the parties, you increase the danger of unfair access.

Simon Decl. ¶ 16 [DEV 9-Tab 37]. Senator McCain notes:

> At a minimum, large soft money donations purchase an opportunity for the donors to make their case to elected officials, including the President and Congressional leaders, in a way average citizens cannot. Many legislators have been in situations where they would rather fit in an appointment with a soft money contributor than risk losing his or her donation to the party. Legislators of both parties often know who the large soft money contributors to their party are, particularly those legislators who have solicited soft money. Members of Congress interact with donors at frequent fundraising dinners, weekend retreats, cocktail parties, and briefing sessions that are held exclusively for large donors to the party. Donors or their lobbyists often inform a particular Senator that they have made a large donation. When, as a result of a Member's solicitation, someone makes a significant soft money donation, and then the donor calls the Member a month later and wants to meet, it's very difficult to say no, and few of us do say no.

McCain Decl. ¶ 6 [DEV 8-Tab 29]; *see also* Shays Decl. ¶ 9 [DEV 8-Tab 35] ("Soft money donations, particularly corporate and union donations, buy access and thereby make it easier for large donors to get their points across to influential Members of Congress. The donors of large amounts of soft money

to the national parties are well-known to the leadership and to many other Members of Congress. The access to elected officials that large donors receive goes far beyond an average citizen's opportunity to be heard.").

1.75.2.1 Defendant-Intervenors who testified in this case state that they personally do not provide special access to individuals or corporations that provide large contributions to parties, regardless of whether the donation is in federal or nonfederal funds. *See* Feingold Dep. at 116 [JDT Vol. 6] ("I cannot imagine a situation where . . . I would meet with somebody because they gave soft money."); Snowe Dep. at 210-11 [JDT Vol. 31] (stating she has never given preferential access to any donor, federal or nonfederal, and that "[e]verybody has access to my office to the extent that I have time available"); Jeffords Dep. at 96-97 [JDT Vol. 11] (stating person's status as a donor to national party committee does not "affect [his] decisions as to who [he] meet[s] with or give[s] access to"); Meehan Dep. at 180 [JDT Vol. 22] (stating he provides no preferential access to nonfederal donors); Cross Exam. of Shays at 20-21 [JDT Vol. 29] (agreeing he "pretty much [has] an open door policy to meet people who want to talk to [him] about important legislative issues"). Given the efforts these Members of Congress have made over the past years to reform the political system, it is not surprising that they would have such policies. These Members, however, do not claim to speak for the rest of their

colleagues.

1.75.3 Corporate donors testify that contributions provide access to influence lawmakers. Wade Randlett testifies that "many members of the business community recognize that if they want to influence what happens in Washington, they have to play the soft money game. They are caught in an arms race that is accelerating, but that many feel they cannot afford to leave or speak out against." Randlett Decl. ¶ 14 [DEV 8-Tab 32].

Chairman Gerald Greenwald[61] testifies that

> labor and business leaders are regularly advised that—and their experience directly confirms that—organizations that make large soft money donations to political parties in fact do get preferred access to government officials. That access runs the gamut from attendance at events where they have opportunities to present points of view informally to lawmakers to direct, private meetings in an official's office to discuss pending legislation or a government regulation that affects the company or union. . . . [Some unions and corporations] give large soft money contributions to political parties – sometimes to both political parties – because they are afraid to unilaterally disarm. They do not want their competitors alone to enjoy the benefits that come with large soft money donations: namely, access and influence in Washington. Though a soft money check might be made out to a political party, labor and business leaders know that those checks open the doors to the offices of individual and important Members of Congress and the Administration, giving donors the

[61] Mr. Greenwald is currently Chairman Emeritus of United Airlines, the largest employee majority-owned company in the United States. From 1994 through his retirement in 2000, he served as the Chairman and CEO of United. Prior to that, he was vice chairman at Chrysler Corporation and worked at Ford Motor Company. Greenwald Decl. ¶ 2 [DEV 6-Tab 16]

> opportunity to argue for their corporation's or union's position on a particular statute, regulation, or other governmental action. Labor and business leaders believe--based on experience and with good reason--that such access gives them an opportunity to shape and affect governmental decisions and that their ability to do so derives from the fact that they have given large sums of money to the parties.

Greenwald Decl. ¶¶ 10, 12 [DEV 6-Tab 16]; *see also* Hassenfeld Decl. ¶¶ 23-24 ("I think companies in some industries have reason to believe that because their activities are so closely linked with federal government actions, they must participate in the soft money system in order to succeed.") [DEV 6-Tab 17].

An Eli Lilly and Company memorandum states that its 1995-96 political "contributions and the related activities we have participated in have been key to our increased role and ability to get our views heard by the right policy makers on a timely basis; in other words, a smart investment." Eli Lilly and Company Memorandum (Jan. 15 1997), ODP0018-00481 to 86 [DEV 69-Tab 48].

1.75.4 The former Chairman of the DNC testifies that "[m]any contributors of large sums of money- both Republicans and Democrats - gain access to party and governmental officials that they otherwise would not have. With this access, contributors are able to make their cases to people who make public policy and

take official governmental action." Fowler[62] Decl. ¶ 6 [DEV 6-Tab 13]

1.75.5 Individual donors testify that contributions provide access to influence federal officeholders on issues of concern to them. Steven Kirsch testifies that

> [p]olicy discussion with federal officials occurs at major donor events sponsored by political parties. I have attended many such events. They typically involve speeches, question and answer sessions, and group policy discussions, but there is also time to talk to Members individually about substantive issues. For example, at a recent event. I was able to speak with a Senator representing a state other than California and we had a short conversation about how our respective staffers were working together on a particular issue.

Kirsch Decl. ¶ 12 [DEV 7-23]. Similarly, Peter Buttenwieser testifies:

> Events, meetings and briefings held for soft money donors provide opportunities for the donors to hear speeches and engage in policy discussions with federal office holders. There is also a certain amount of politicking and lobbying at these events. This is true particularly in the side discussions, in which donors can approach office holders and discuss their issues.

Buttenwieser Decl. ¶ 25 [DEV 6-Tab 11]. He also observes that

> [t]here is no question that those who, like me, make large soft money donations receive special access to powerful federal office holders on the basis of the donations. I am close to a number of Senators, I see them on a very consistent basis, and I now regard the Majority Leader as a close friend. I understand that the unusual access I have correlates to the millions of dollars I have given to political party committees, and I do not delude myself into thinking otherwise. Not many people can

[62] Mr. Donald Fowler from 1971 until 1980, he served as Chairman of the South Carolina Democratic Party and from January 1995 until January 1997 he served as Chairman of the Democratic National Committee. Fowler Decl. ¶ 2 [DEV 6-Tab 13].

> give soft money on that scale, and it naturally limits the number of those with that level of access.

Id. ¶ 22. Arnold Hiatt testifies that

> [a]s a result of my $500,000 soft money donation to the DNC, I was offered the chance to attend events with the President, including events at the White House, a number of times. I was offered special access as a result of the contributions I had made, though I generally never took advantage of that access. One event that I did attend was a dinner at the Mayflower Hotel in Washington, D.C. in approximately March 1997 with President Clinton and Vice-President Gore. The dinner was for the largest donors to the DNC, about thirty people. I did not plan on attending but I went because several people urged me to use the occasion to speak in favor of campaign finance reform. I used the opportunity to talk to the President about how the campaign finance system in this country had become a crisis, and argued that the crisis provided an opportunity for the President to provide some leadership. I don't think that we got the leadership I was seeking on the campaign finance issue, but I did get the chance to make a personal pitch to the President as a result of my donation.

Hiatt Decl. ¶ 9 [DEV 6-Tab 18]. Hiatt testifies that others in attendance also shared their views on policy matters of importance to them as the event was advertised as an opportunity to "give advice to the president." Hiatt Dep. at 119-21 [JDT Vol. 10]; *see also* Hassenfeld Decl. ¶ 12-13 [DEV 6-Tab 17] ("[W]hen given the opportunity, some donors try to pigeonhole or corner Members, in a less than diplomatic way, to discuss their issues at these

events."); Geschke[63] Decl. ¶ 5 [DEV 6-Tab 14] (testifying that in connection with $50,000 in federal and nonfederal donations made to the DNC he and his wife attended a dinner of 10 to 12 people with President Clinton "last[ing] two or three hours, and consist[ing] primarily of a conversation about issues of importance to the nation and the President's program"); RNC 0026901 [IER Tab 7] (note from the director of the RNC's Team 100 program thanking a donor for "facilitating Dow [Chemical]'s generous contribution to the Republican Party. It's a timely donation as we head into the final hours of the campaign. Give me a call . . . and we can figure out when is a good time to bring your Dow [Chemical] leadership into town to see [RNC Chairman] Haley [Barbour], [Senate Majority Leader Robert] Dole & [Speaker of the House] Newt [Gingrich]."); RNC 00031843 [IER Tab 7] (letter from donor to RNC Chairman Jim Nicholson telling him "I do feel I have benefited [sic] from Team 100 in the audience it has afforded me with party leaders"); RNC 0194817 [IER Tab 1.E] (letter from RNC to a pharmaceutical company asking the company for its opinion and suggestions on the enclosed RNC "health care package" and a $250,000 donation to join the RNC's Season Pass program).

[63] Mr. Charles Geschke is Chairman of the Board of Adobe Systems, Inc., which he co-founded in 1982. Geschke Decl. ¶ 1 [DEV 6-Tab 14]. Since 1994, Mr. Geschke estimates that he has donated over $150,000 in federal funds to federal political committees, and over $18,000 in nonfederal funds to national party committees. *Id*. ¶ 3 [DEV 6-Tab 14].

Thomas McInerney, a large contributor to the Republican party, states that his support for the Republican Party at the national, state, and local levels is not dependent upon gaining access to federal officeholders. McInerney states that he would support the Republican Party whether or not he was solicited by a federal officeholder and whether or not his contribution resulted in attendance at an event that included federal officeholders. McInerney Aff. ¶ 17 [9 PCS]. Even so, McInerney attests that he has been *offered* access to federal officeholders in exchange for his donations of nonfederal funds. *Id*.[64]

The Political Parties Facilitate Access to Members of Congress for Their Large Contributors

1.76 Party leaders facilitate direct communications on matters of policy between nonfederal money donors and officeholders. Several documents in the record demonstrate this fact.

For example, a handwritten note dated February 21, 1995 from RNC Chairman Haley Barbour to [a major donor] stated, in part: "Dear [____]: Thank you for your very thoughtful memo on the estate and gift tax law. I've read it and will pass it along to appropriate Senators, Representatives and staff folks when I'm on the Hill tomorrow." ODP0031-01403 to 04 [DEV 71-Tab 48]. A March 28, 1995, letter from

[64] Mr. McInerney's affidavit includes statements about his understanding of the legal effect of New York campaign laws which is irrelevant to the cases at bar. *See* McInerney Aff. ¶ 8 [9 PCS]. His affidavit also contains statements which suggest an incomplete understanding of the impact BCRA will have on his campaign donations.

House Ways and Means Committee Chairman Bill Archer (R-TX) to the donor thanked the donor for his "intriguing" proposal, noting Archer's personal preference that the estate and gift taxes be repealed completely. ODP0031-01412 [DEV 71-Tab 48]. A March 31, 1995 letter from the donor to Team 100 Director Timothy Barnes enclosed the donor's 1995 Team 100 membership check and requested that Barnes provide Barbour with a copy of Archer's March 28, 1995 letter. ODP0031-01406 to 11 [DEV 71-Tab 48]. Team 100 membership requires a $100,000 donation every four years, with $25,000 donations in each intervening year. Findings ¶ 1.77.1.

A handwritten note dated Oct. 27, 1995, from RNC Chairman Haley Barbour asks Senate Majority Leader Bob Dole to meet with the CEO of Pfizer, a member of the RNC's "Team 100" nonfederal money donor group, to discuss an extension of the Section 936 tax credit:

> Dear Bob
> [___], CEO of Pfizer, has asked to see you on Wed. 11/1. He is extremely loyal and generous. He also is not longwinded. He'll tend to his business and not eat up extra time. They have proposed a [Internal Revenue Code §] 936 solution that [Republican Senator William] Roth and [Republican Congressman Bill] Archer are considering. I'm sure that is the issue. I'd appreciate it if you'd see Bill. [signed] Haley.

ODP0025-02456 to 57 [DEV 70-Tab 48].

A letter from the chairmen of the Congressional Forum of the NRCC addressed to the Association of Trial Lawyers of America discusses an upcoming Congressional Forum Chairman's Dinner, and notes: "[o]ur event will give you an excellent

opportunity to meet with the Members of the [Judiciary Committee] to discuss issues relevant to your organization." ODP0042-00025 [DEV 71-Tab 48]; *see also* July 10, 1996 letter from John Palmer to [redacted addressee] (reminding addressee that Palmer had asked him to join the RNC's Team 100, and noting that RNC Chair Barbour escorted new Team 100 member and Energy CEO [_____] on four appointments that were "very significant" in legislation affecting companies like his and made him "a hero in his industry"), ODP0023-02043 [DEV 70-Tab 48]; RNC0044465 [DEV 93] (Memorandum from Tim Barnes of the RNC to Royal Roth noting that someone from [a company] had been "trying to establish a contact in Senator Dole's office for [a company executive]. As you know, [this executive] has been very generous to the RNC. If there is any way you can assist, it would be greatly appreciated."); ODP0030-03512 to 13 [DEV 71-Tab 48] (notes of telephone call between Jim Nicholson of the RNC and a Team 100 member, which states that Nicholson will take up an issue discussed with Senator Trent Lott); [DEV 71] Letter from RNC Chairman Jim Nicholson to [a donor], August 18, 1998, copies to House Speaker Newt Gingrich, House Majority Leader Dick Armey and Congressman John Linder ODP0033-00534(stating "I appreciate your interest in helping us hold onto our majority in the House. . . . I can tell you every single dollar of your contribution will go directly into *Operation Breakout*. . . . If you will make your check out (which can be personal or corporate) to the Republican National Committee and annotate it for

Operation Breakout I will personally show a copy of it to Newt, Dick Armey and John Linder. Please feel free to accompany it with a transmittal letter containing any other message that you choose."); ODP0042-000654 (memorandum to all Congressional Forum members from the chairmen, informing them of an upcoming dinner featuring members of the Banking Committee, noting that "[o]ur event will give you an excellent opportunity to meet with members of the committee to discuss issues relevant to your organization") ; ODP0042-01111 [DEV 71-Tab 48] (letter from NRCC to the Federal Managers' Association, noting an upcoming dinner where the addressee could express "interests and concerns regarding upcoming legislation"); RNC0156717 (letter from RNC to Senator Hagel staffer, asking Senator Hagel to meet with a donor for four "key" reasons including: "[h]e runs [sic] $80,000,000 high tech business," and "[h]e just contributed $100,000 to the RNC.").

In addition to these documents, the record includes corroborating testimony like that of former Senator Wirth who states:

> The Democratic national campaign committees sometimes asked me to meet with large donors to the party whom I had not met before. At the party's request, I met with the donors. I understood that the donors' goal in making the large contributions was often to occasion meeting(s) with me or other prominent Democratic congressional leaders to press their positions on legislative issues. On these occasions, sometimes all I knew about the donor would be the issue in which he was interested.

Wirth Decl. Ex. A ¶ 15 [DEV 9-Tab 43]. Former DNC Chairman Donald Fowler testifies:

> Party and government officials participate in raising large contributions from interests that have matters pending before Executive agencies, the Congress, and other government agencies. Party officials, who are not themselves elected officials, offer to large money donors opportunities to meet with senior government officials. Donors use these opportunities - White House and congressional meetings - to press their views on matters pending before the government.

Fowler Decl. ¶ 8 [DEV 6-Tab 13].

1.76.1 The RNC's Finance Director attests that the RNC does not arrange meetings with government officials for any of its donors—federal or nonfederal. B. Shea Decl. ¶ 44 [RNC Vol. V]. She states that the RNC Finance Division, "[a]s a matter of policy," passes along requests from donors for meetings with a federal officeholder to that officeholder's scheduling staff "without inquiring into the purpose of the proposed meeting," "neither . . . advocate[s] a meeting nor ascertain[s] whether a meeting has been arranged," does not provide to the officeholder's scheduler the amount of the money that donor has contributed to the party. *Id.* at 44, 46. When asked about this policy during her cross-examination, Ms. Shea testified that the policy is an informal, unwritten policy. B. Shea Dep. at 80 [JDT Vol. 29]. She does not say whether this policy applies only to the RNC Finance Division or to the entire committee. Furthermore, the policy is more nuanced than Ms. Shea's declaration implies. According to Ms. Shea, the RNC Finance Division's "policy" is to not "force" federal officeholders to meet with donors, but that it may pass along requests

to a Member's scheduler and say "this is a Team 100 member, could you see if you could fit them in." *Id*. at 82. Indicating that a person is a Team 100 member, which means they give the RNC $100,000 every four years, with $25,000 donations each intervening year, while not informing the scheduler of the precise amount of money the donor gave the RNC, does give the Member's office the message that the individual interested in a meeting is a major donor. *See also supra*, Findings ¶ 1.76 (other instances of RNC officials setting up meetings for major donors with Members of Congress). Furthermore, as Senator Simon has stated, "Staffers who work for Members know who the big donors are, and those people always get their phone calls returned first and are allowed to see the Member when others are not." *See supra* Findings ¶ 1.66.

1.77 The political parties have structured their donation programs so that donors are encouraged to contribute larger amounts in order to get access to more exclusive and intimate events at which Members of Congress are present. The evidence also shows that the parties use the enticement of access to secure larger donations. For example, a letter from then-RNSC Chairman Senator McConnell explained that a $25,000 nonfederal fund donation would provide the donor membership in the NRSC's Chairman's Foundation whose benefits "include four to five small dinner meetings annually, each focused on a specific Senate Committee. The meetings consist of a briefing with the top committee staff members, followed by a reception and dinner

with the staffers and Republican members of the committee to discuss the issues. Foundation members are also invited to all Senatorial Trust events which provide an additional four opportunities year to meet with our Republican Senate Majority." ODP0037-02271 [DEV 71-Tab 48].

1.77.1 RNC documents show that the RNC's donor programs offer greater access to federal office holders as the donations grow larger, with the highest level and most personal access offered to the largest soft money donors. ODP0018-00113 to 36 [DEV 69-Tab 48] (RNC Brochure "Donor Programs"); *see also* Resps. RNC to FEC's First RFA's, No. 62 [DEV 12-Tab 10]. The RNC offers its donors a range of different donor programs, for a range of different donor financial levels and interests. ODP0025-00375 to 79 [DEV 70-Tab 48] ("Summary of RNC's Donor Programs"). The RNC President's Club required a $1,000 annual contribution, or $2,000 per couple per year, and held a meeting in Washington, D.C. at least once a year which included policy briefings and discussions led by Republican political leaders. *Id.* at ODP0025-00375; B. Shea Decl. ¶ 14.b [RNC Vol. V]. The Chairman's Advisory Board required a $5,000 annual hard money contribution and offered a "vigorous and informal exchange of views among Board members and party leaders. . . . Board meetings include three or four panel discussions, each chaired by a Congressional leader or senior policy adviser with particular

expertise in the area under consideration." ODP0025-00375 to 77 [DEV 70-Tab 48]. According to the document, the Chairman's Advisory Board was established "to enlist the personal energy and professional expertise of Republican leaders in business and community affairs in developing policy and campaign strategies at the highest levels for the party." ODP0025-00375 to 77 [DEV 70-Tab 48]. The Republican Eagles required an annual contribution of $15,000 (individual) or $20,000 (with spouse or nonfederal/corporate). *Id*. ODP0025-00377 to 0378, ODP0025-00429 [DEV 70-Tab 48]. The Eagles program offered a series of national and regional meetings with elected Republican Congressional leaders, special access to Republican events, and other benefits. ODP0025-00428 [DEV 70-Tab 48]; ODP0030-02838 to 39 [DEV 71-Tab 48]. The Team 100 program required a donation of $100,000 upon joining and every fourth year thereafter, with $25,000 donations required in each of the three intervening years. ODP0014-00983, ODP0014-01457 to 58 [DEV 69-Tab 48]. The Team 100 program offered members national and regional meetings with the Republican Party leadership throughout the year, special events, membership in the Eagles program, the opportunity to participate in international trade missions, and other benefits. ODP0025-00377, ODP0025-00424, ODP0025-01705 to 13 [DEV 70-Tab 48]. The Season Ticket program required a donation of $250,000 upon joining and

renewals thereafter. ODP0022-03045 to ODP0022-3046, ODP0023-02480, ODP0025-01569 [DEV 70-Tab 48]; ODP0030-03408 [DEV 71-Tab 48]. The "Season Ticket" or "Season Pass" program offered the greatest and most exclusive range of RNC donor program benefits, including one Team 100 membership, two Eagle memberships, special access to a range of Republican Party events, and the assistance of RNC support staff. ODP0025-01569 [DEV 70-Tab 48]. The RNC also offers the Regents program designed for members who give an aggregate amount of $250,000 in nonfederal funds per two-year election cycle. B. Shea Decl. ¶ 14.g [RNC Vol. V].

1.77.2 The NRSC also offered several major donor programs. In 1995 and 1996, the NRSC offered a corporate donor program called "Group 21" or "G21," which required an annual donation of $100,000. ODP0037-02246, ODP0037-02275, ODP0037-02281 [DEV 71-Tab 48]. The "Group 21" program offered donors "small dinners with [then-NRSC Chairman] Senator D'Amato and other senators" and other "VIP benefits." ODP0037-02275 [DEV 71-Tab 48]. The Chairman's Foundation required an annual corporate (meaning nonfederal money) donation of $25,000. ODP0036-03603 [DEV 71-Tab 48]. The Senatorial Trust required an annual donation of $10,000 (personal) or $15,000 (corporate). ODP0036-03873 to 74 [DEV 71-Tab 48]. The Presidential Roundtable required an annual donation of $5,000 in personal or corporate

funds. ODP0037-00315 [DEV 71-Tab 48]. *See also* ODP0036-03525 (letter signed by Senator McConnell to NRSC member asking him to renew his membership, noting that "[y]our non-federal contribution to the Chairman's Foundation will allow us to put our federal dollars directly towards the Senate campaigns, where they are desperately needed."); ODP0036-3562 (letter signed by Senator McConnell thanking addressee for joining the Chairman's Foundation); ODP0036-03595 (letter signed by Senator McConnell soliciting someone to join the Chairman's Foundation); ODP0037-01861 to 69 (NRSC brochure) [DEV 71-Tab 48]; Vogel Decl. ¶ 51 ("The NRSC uses a variety of donor programs to motivate persons to donate funds. These programs tend to be associations of donors and fundraisers, who are grouped by the nature and extent of the funds given or raised."), Tabs A, J [DEV 9-Tab 41] (2002 Senatorial Trust materials).

1.77.3 "The DSCC hosts several different types of events to motivate persons to donate funds. These events are often attended by Democratic Senators, Democratic Senate candidates, other Democratic holders of federal office, Democratic Cabinet officials and other celebrities who neither seek nor hold federal office." Jordan Decl. ¶ 52 [DEV 7-Tab 21]. For example, during the 1996 election cycle, the DSCC offered memberships in its "Leadership Circle." COL0002-00698 [DEV 78-Tab 152]. Membership required a

$10,000 annual contribution for individual donors, and $15,000 for PACs. *Id*. Benefits included "special Leadership Circle weekend retreats and issue seminars with Senators and Washington officials. . . . Leadership Circle members also receive tickets to the annual Senate Fall Dinner, followed by a day of issue oriented meetings with Senators and political experts." *Id*. The DSCC also offered memberships to its "Majority Trust," "the premiere donor program of the DSCC for individuals who contribute $20,000 per calendar year." *Id*. "The Majority Trust offers important programs, weekends and retreats throughout the year attended by Democratic Senators." *Id*. The DSCC also solicits donations for special events. For example, for the DSCC's 1999 Annual Fall Dinner, a $50,000 nonfederal donation bought the donor benefits including a priority table at the dinner and one ticket to the VIP Reception. Jordan Decl. Attach. L (DSCC-L-0025).

1.77.4 The NRCC offers individuals or PACs that contribute $15,000 annually, or corporations that give $20,000 annually, membership in its Congressional Forum which "has been designed to give its members an intimate setting to develop stronger working relationships with the new Republican Congressional majority," ODP0042-01226 [DEV 71-Tab 48], and the "benefit that attracts most Forum members are the dinners with Committee Chairmen and the Republican members from each Committee," ODO0042-00028 [DEV

71-Tab 48]. These dinners "average about 75 people including Members—that means at least two Committee Members at every table." ODP0042-00171 to 72 [DEV 71-Tab 48]. "In addition to the monthly dinners, we offer two annual meeting weekends, a golf tournament and a dinner with the Elected Leadership and all the Committee Chairs is included as a benefit of . . . . Forum membership." *Id*. Forum benefits also include all the Benefits of the NRCC's House Council program. ODP0042-01226 [DEV 71-Tab 48]; *see also* ATT 000018 [DEV 7-Tab 20] (invitation to 1999 Republican Senate-House Dinner, with escalating benefits including meetings, receptions and a breakfast with Congressional leaders).

1.77.5 "The DCCC uses a variety of donor programs to motivate persons to donate funds. These programs tend to be associations of donors and fundraisers, who are grouped by the nature and extent of the funds given or raised." Wolfson Decl. ¶ 53 [DEV 9-Tab 44]. For the 2002 election cycle, the DCCC's "Major Donor Programs" included the Business Forum, which required an annual contribution of $10,000. *Id*. at Tab J (DCCC-J-0007). Business Forum Members' benefits included "[b]i-monthly political briefings and receptions with the House Democratic Leadership and other Democratic pro-business Members in the House of Representatives[, an a]nnual retreat with Chairwoman Lowey and the House Democratic Leadership[, an] annual

Democratic Congressional Dinner event package[, and a] bi-monthly conference call/briefing with Leader Gephardt and Chairwoman Lowey. *Id.* (capitalization altered). The Majority Council required a $50,000 annual contribution, and included the bi-monthly conference call, "complementary invitations to all DCCC fundraising events, including the Annual Democratic Congressional Dinner with private reception and political briefing[, and] complementary invitations to Premiere Retreats with Leader Gephardt, Chairwoman Lowey, House Democratic Leadership and Ranking Members. *Id*. (capitalization altered). Membership to the National Finance Board required a $100,000 annual contribution, and included as benefits all of the "Majority Council" benefits as well as "two private dinners with Leader Gephardt, Chairwoman Lowey, House Democratic Leadership and Ranking Members[and] two retreats with Leader Gephardt and Chairwoman Lowey in Telluride, CO and Hyannisport, MA." *Id*. (capitalization altered).

1.77.6 The state parties also use the promise of access to federal lawmakers to encourage larger donations. *See, e.g.,* CDP 0098 [DEV 106] (CDP brochure showing that those who contribute $100,000 to the CDP are classified by the party as "Trustees," and that the CDP "recognizes its extraordinary supporters with extraordinary opportunities," providing "Trustees" with "[e]xclusive briefings, receptions and meetings with officials such as U.S. Senator Dianne

Feinstein, U.S. Senator Barbara Boxer, Lt. Governor Gray Davis, Controller Kathleen Connell and other national figures."); CRP-00269 (flyer titled "The California Golden Circle," noting that "[t]hrough Golden Circle contributions, California Republicans have been able to elect leaders from the White House to the State House," that Golden Circle members will assist the CRP "goal . . . to deliver fifty-five electoral votes for our Republican Presidential nominee in 2004, maintain a Republican majority in Congress, and elect a Republican Legislature," and including among Golden Circle "Membership Benefits" "private receptions/meetings held throughout California with local, state and national Republican leaders to discuss current political issues").

1.77.7 Contributors request to be seated with certain lawmakers at these donor events. For example, an RNC "Table Buyer's Guest List" sheet for "The Official 1995 Republican Inaugural Gala" filled out by "Am. Banker's Ass'n/Nation's Bank" contained a request to sit with certain Members of Congress and "anyone on House Banking Comm." ODP0023-3288 [DEV 70-Tab 48]; *see also* 2000 RNC Gala Leadership Levels, undated, RNC0022509 [DEV 92]; 2000 RNC Attendance Forms, April 20, 2000, RNC0236323 [DEV 97] (filled out by Microsoft attendee requesting to be seated with a particular Senator or "Leadership Commerce Comm. or Judiciary"); RNC0145258 [DEV 93] (filled out by Chevron corporation attendee, requesting to be seated with a Member

from California, Louisiana or Texas); RNC0202199 [DEV 96] (filled out for the MBNA table, requesting to be seated with five particular Senators); RNC0202200 [DEV 96](filled out for the Reliant Resources, Inc. table, asking to be seated with one specific Representative and five named Senators); RNC 0032805 - 06, RNC 0032799 [DEV 92] (request for Burger King Chairman and Team 100 member who donated $100,000 to be seated with Senator Fred Thompson and three other Senators, and document showing Senator Thompson was placed at the Burger King table). PhRMA's Judith Bello testifies that the five Members of Congress PhRMA listed as requested "VIP" to be seated at its table at the 2000 Republican House-Senate dinner were all Members who had responsibility or oversight over issues of importance to the pharmaceutical industry. Bello Dep. at 82 [JDT Vol. 1].

1.77.8 The political parties have used such opportunities to promote their various donor clubs. For example, Senator McConnell, as head of the NRSC, wrote a solicitation letter which noted that the Republican Senate Council ($5,000 annual PAC contribution) and the Chairman's Foundation ($25,000 annual corporate gift) provide "excellent opportunities for both corporate executives and Washington representatives to meet and discuss current issues with leading Republican Senators." ODP0036-03603 [DEV 71-Tab 48]; *see also* RNC 0286400 [IER Tab 4] (offering $250,000 donors to the RNC Gala Co-

Chairman status which included a "Breakfast and Photo Opportunity with [Senate Majority Leader] Trent Lott and [Speaker of the House] Newt Gingrich," as well as a "Luncheon with Republican House and Senate Leadership and the Republican House and Senate Committee Chairmen of your choice").

1.77.9 According to lobbyist Robert Rozen:

> [S]oft money contributions built around sporting events such as the Super Bowl or the Kentucky Derby, where you might spend a week with the Member, are even more useful. At the events that contributors are entitled to attend as a result of their contributions, some contributors will subtly or not-so-subtly discuss a legislative issue that they have an interest in. Contributors also use the events to establish relationships and then take advantage of the access by later calling the Member about a legislative issue or coming back and seeing the Member in his or her office. Obviously from the Member's perspective, it is hard to turn down a request for a meeting after you just spent a weekend with a contributor whose company just gave a large contribution to your political party.

Rozen Decl. ¶ 11 [DEV 8-Tab 33]; *see also* COL0002-00698 (flyer listing DSCC Donor Programs, and including as part of its Majority Trust 1996 program, "a weekend in Aspen, CO in January, Superbowl weekend, Mardi Gras with Senator Breaux, a Jefferson Weekend in Charlottesville, VA in June, and the annual summer retreat on Nantucket Island in July.").

1.77.10 Sometimes the link between large donations and special access to elected federal officials is even more direct. A call sheet prepared for then-DNC

Chair Fowler instructs him to call a number of large contributors ask for donations, and invite them for lunch with the President of the United States ("POTUS"). DNC 113-00137 to 38 [DEV 134-Tab 7] ("Ask her to give 80k more this year for lunch with Potus on October 27th.") ("Ask him to write another 100K to become a Managing Trustee for the campaign and come to lunch with POTUS on Oct. 27."). A CDP call sheet entitled "Child Call List, 5/16/96," includes the notation that a potential donor should be asked "if they might be able to do $25,000 for a small mtg with the President, you know it's steep, but want to include them in these types of meetings." CDP 00124 [IER Tab 11].

Nonfederal Donations are More Effective than Federal Contributions at Procuring Access for Donors

1.78 Donors give nonfederal money, rather than federal money, to political parties because large nonfederal donations are more effective for obtaining access to federal officials than several small federal contributions. *See, e.g.,* Hickmott Decl., Ex. A. ¶ 47 [DEV 6-Tab 19] (explaining that "[i]f you want to get to know Members of Congress, or new Members of Congress, it is more efficient to write a $15,000 check to the DSCC and to get the opportunity to meet them at the various events than it would be to write fifteen $1,000 checks to fifteen different Senators, or Senators and candidates."); Andrews Decl. ¶ 14 [DEV 6-Tab 1] (stating that "a properly channeled $100,000 corporate soft money donation to the national Republican or Democratic

congressional campaign committees can get the corporate donor more benefit than several smaller hard dollar contributions by that corporation's PAC. Although the donations are technically being made to political party committees, savvy donors are likely to carefully choose which elected officials can take credit for their contributions. If a Committee Chairman or senior member of the House or Senate Leadership calls and asks for a large contribution to his or her party's national House or Senate campaign committee, and the lobbyist's client is able to do so, the key elected official who is credited with bringing in the contribution, and possibly the senior officials, are likely to remember the donation and to recognize that such big donors' interests merit careful consideration."); Randlett Decl. ¶ 13 [DEV 8-Tab 32] ("[Soft money donors] get a level of attention that a $1,000 hard money donor never will. Even someone who wrote 25 $1,000 hard money checks but no soft money is going to get much less attention and appreciation than someone who wrote one large soft money check."); Rozen Decl. ¶ 12-13 [DEV 8-Tab 33] ("Donors to the national parties understand that if a federal officeholder is raising soft money--supposedly 'non-federal' money--they are raising it for federal uses, namely to help that Member or other federal candidates in their elections. Many donors giving $100,000, $200,000, even $1 million, are doing that because it is a bigger favor than a smaller hard money contribution would be. That donation helps you get close to the person who is making decisions that affect your company or your industry. That is the reason

most economic interests give soft money, certainly not because they want to help state candidates and rarely because they want the party to succeed. . . . The bigger soft money contributions are more likely to get your call returned or get you into the Member's office than smaller hard money contributions."); Geschke Decl. ¶ 9 [DEV 6-Tab 14] ("Corporations and individuals can use soft money donations to get special access to federal office holders and at least the appearance of influence on issues that are important to them financially or politically. Hard money contributions do not provide the same opportunities for influence on federal policy as soft money donations do."); Simon Decl. ¶ 16 [DEV 9-Tab 37] ("Because few people can afford to give over $20,000 or $25,000 to a party committee, those people who can will receive substantially better access to elected federal leaders than people who can only afford smaller contributions or can not afford to make any contributions."); Kirsch Decl. ¶ 9 [DEV 6-Tab 14] ("Corporations and individuals can use soft money donations to get special access to federal office holders and at least the appearance of influence on issues that are important to them financially or politically. Hard money contributions do not provide the same opportunities for influence on federal policy as soft money donations do.").

1.78.1 In a memorandum to a high-level Fortune 100 company executive outlining a proposed $1.4 million nonfederal fund budget for FY1999, members of the Company's governmental affairs staff noted that

> [w]ith both houses of Congress and the White House hotly contested this cycle, the importance of soft money, and consequently the efforts by the parties to raise even more soft money, is greater than ever. On the Democratic side, [our company's] advocates have already fielded soft money calls from House Democratic Leader Gephardt, House Democratic Caucus Chairman Frost, Democratic Congressional Campaign Chairman Kennedy, and Democratic Senatorial Campaign Chairman Torricelli. Similar contacts to raise soft money have been made by Republican congressional leaders.
>
> In addition to the increased pressure from party and congressional leaders, it is clear that our direct competitors and potential competitors are weighing in with big soft money donations.

Memorandum from a Fortune 100 company's legislative advocate to a high-level executive, dated March 4, 1999, [citation sealed]. The nonfederal budget request was justified by a number of rationales:

> First, due to a significant [sic] in the number of events scheduled by the parties for their donors, the number of opportunities . . . to develop relationships with elected and administration officials has never been greater. As the parties compete more vigorously for soft money dollars, the number and quality of events for interacting with both the leadership and rank and file Members has been greatly increased. Between the six main committees (DNC, DSCC, DCCC. RNC, NRCC, NRSC) there are events both in and out of [Washington, D.C.] almost every day of the week.
>
> Two, . . . the parties have become increasingly reliant on soft money and both feel it is critical to their success in coming elections. Not surprisingly, this has made the parties especially sensitive to which companies contribute soft money, and which don't. As noted, our traditional competitors continue to contribute large amounts of soft money and as [our company] expands its business into new areas (e.g. cable, internet, networking) it faces new types of competitors, primarily in the computer and high tech industry, that also contribute heavily.

> Failure to maintain our soft money participation during this election cycle – given the heightened scrutiny those contributions will receive in the current competitive climate – may give our new and traditional competitors an advantage in Washington.
> Three, the next Administration will also be determined in this election cycle. Consequently, we will be asked to use soft money contributions to support both national parties at an even greater level than during a non-Presidential year. Funding for the national conventions and next year's national party committee requests should be anticipated in this year's budget and contributed when appropriate to foster the development of relationships with the key officials of the next Administration.
> Finally, because both parties will be working to influence redistricting efforts during the next two years, we anticipate that we will be asked to make soft money contributions to these efforts. Redistricting is a key once-a-decade effort that both parties have very high on their priority list. Given the priority of the redistricting efforts, relatively small soft money contributions in this area could result in disproportionate benefit.

Id.

Donors Often Contribute Nonfederal Funds to Both Major Political Parties in Order to Ensure Access and Prevent Retaliation

1.79 The record shows that many large contributors give to both political parties. Forty of the top 50 nonfederal money donors in 1996 donated to both political parties, as did 35 of the top nonfederal money donors in 2000. Mann Expert Report at Tbls. 5-6 [DEV 1-Tab 1]. Most of the top nonfederal contributors who gave to only one political party were either state political party committees (four in 1996) or labor unions (three in 1996, seven in 2000). *Id.* Those involved in political fundraising explain that this practice is a result of donors' desire to have special access to

lawmakers from both parties, and also out of concern that if the contributor gives to only one political party the other will perceive an imbalance and punish the donor.

Evidence from the corporate world demonstrates that major nonfederal donors give to both political parties in order to ensure access to lawmakers from both political parties. CEO Randlett comments that "[a]s a donor with business goals, if you want to enhance your chances of getting your issues paid attention to and favorably reviewed by Members of Congress, bipartisanship is the right way to go. Giving lots of soft money to both sides is the right way to go from the most pragmatic perspective."

Internal corporate documents corroborate Mr. Randlett's testimony. An Eli Lilly and Company memorandum shows that the company was concerned about a *Washington Post* article listing it as a significant donor to the Republican party. The memorandum discusses contributions being made at Democratic party events occurring in the near future. The memorandum concludes with: "[___] has talked to the White House and we can get back into this by giving $50[,000] - 100,000 to the DNC– says they would be pleased with this." ODP0018-00463 [DEV 69-Tab 48]; *see also id*. at ODP0018-00461 (the *Washington Post* article), ODP0018-00462 (photocopy of part of the article with handwritten note stating "Dems are upset. Calls from employees about imbalance. White House stays Dem we are in trouble"). Similarly, an internal Fortune 100 company memorandum states the following:

> Attached please find an invoice from the NRSC for [our company's] commitment of $25,000 in soft money. As you know, this request was approved during the PAC meeting this week. We recently approved a soft money donation to the New Dominion Fund, requested by Senator Chuck Robb. At the time this request was approved, the team determined that our support in this race would be equal. The request attached balances [our company's] support in this race, as a contribution to the RNSC has been requested by George Allen.

Internal memorandum (Oct. 26, 2000), [citation sealed].

One lobbyist explains that many "companies and associations that do give soft money typically contribute to both parties . . . because they want access to Members on both sides of the aisle." Rozen Decl. ¶ 7 [DEV 8-Tab 33]. Members of Congress are also cognizant that donors give nonfederal funds to both parties. As former Senator Bumpers observes: "Giving soft money to both parties, the Republicans and the Democrats, makes no sense at all unless the donor feels that he or she is buying access." Bumpers Decl. ¶ 15; *see also id.* (noting that the "business community makes such donations quite often").

Individual donors also acknowledge that nonfederal money donors give to both parties in order to ensure special access to federal lawmakers on both sides of the aisle. Hiatt Decl. ¶ 12 [DEV 6-Tab 18] (testifying "[p]eople give soft money donations to both parties because they want to make sure they have access regardless of who's in the White House, filling the Senate seat, or representing the Congressional district."); Buttenwieser Decl. ¶ 23 [DEV 6-Tab 11] ("I am aware that some soft money donors, such as some corporations, give substantial amounts to both

major political parties. Based on my observations, they typically do this because they have a business agenda and they want to hedge their bets, to ensure they get access to office holders on the issues that are important to them. This occurs at the national and state levels."); Geschke Decl. ¶ 10 [DEV 6-Tab 14] ("In my view, donors who give large amounts of soft money to both major parties are probably hedging their bets in trying to get influence. They may feel that influence with one party is not sufficient to achieve their financial or policy goals, especially now that power in Congress is pretty evenly balanced.").

1.80 The political parties are aware of this practice, as evidenced by an Ohio Republican Party document titled "Why People Give," which lists "so that they will have access to whoever is the winner" as one reason behind contributions. RNC OH 0418778 [IER Tab 1.H]. The record demonstrates that they have parlayed this knowledge into leverage which they use to pressure donors who have given to the other party to give to theirs as well. CEO Randlett explains how the political parties take advantage of this situation:

> [I]f you're giving a lot of soft money to one side, the other side knows. For many economically-oriented donors, there is a risk in giving to only one side, because the other side may read through FEC reports and have staff or a friendly lobbyist call and indicate that someone with interests before a certain committee has had their contributions to the other side noticed. They'll get a message that basically asks: "Are you sure you want to be giving only to one side? Don't you want to have friends on both sides of the aisle?" If your interests are subject to anger from the other side of the aisle, you need to fear that you may suffer a penalty if you don't give. First of all, it's hard to get attention for your issue if

> you're not giving. Then, once you've decided to play the money game, you have to worry about being imbalanced, especially if there's bipartisan control or influence in Washington, which there usually is. In fact, during the 1990's, it became more and more acceptable to call someone, saying you saw he gave to this person, so he should also give to you or the person's opponent. Referring to someone's financial activity in the political arena used to be clearly off limits, and now it's increasingly common.

Randlett Decl. ¶ 12 [DEV 8-Tab 32].

1.80.1 Plaintiffs maintain that the record "establishes that organizations and individuals may give to both parties because they desire to be actively involved in the political process." RNC Proposed Findings of Fact ¶ 119 (citing Bello Dep. at 39 [stating that it is "traditional" for PhRMA to "support the convention activities for both Republicans and the Democrats" because "we are good civic participants"] and Herrnson[65] Dep. at 495 [DEV 65] [acknowledging "it is possible" that "donors of soft money provide money to political parties because they support some members of . . . one party, and some members of another party"]). This self-serving statement of a PhRMA representative and Dr. Herrnson's acknowledgment that a hypothetical scenario was possible, support the RNC's contention that "organizations and individuals *may* give to both parties because they desire to be actively involved in the political process." The extensive testimony and documentary evidence

[65] Professor Paul Herrnson is one of Defendant's experts.

discussed *supra*, however, shows that the primary reason why entities and individuals *do* give to both parties is to ensure access to federal lawmakers. Moreover, interests in participating in the political process and an interest in obtaining access to legislators to influence them are neither incompatible nor mutually exclusive.

Empirical Evidence Linking Donations to Corruption

1.81 Experts testifying in this case agree that no study attempting to statistically or empirically link donations to corruption by federal officials is without flaws. However, even if these studies were universally accepted, it is clear that they would be of limited utility for the purposes of this case. As Defendants' expert Thomas Mann notes, "[m]ost of this research has examined the connections between PAC contributions (a surrogate for interested money) and votes in the House and Senate." Mann Expert Report at 32 [DEV 1-Tab 1]. However, as Mann observes, there are

> a myriad of ways in which groups receive or are denied favors beyond roll-call votes. Members can express public support or opposition in various legislative venues, offer amendments, mobilize support, help place items on or off the agenda, speed or delay action, and provide special access to lobbyists. They can also decline each of these requests.

Id. at 33 (citations omitted). In addition, Mann notes that the

> currency of campaign contributions extends well beyond PAC contributions to members' campaign committees. These include brokered if not bundled individual contributions, contributions to leadership PACs controlled by members, contributions to parties and candidates in targeted races and informally credited to members, soft-

> money contributions to parties and section 527 committees connected to members, and direct expenditures on 'issue ad' campaigns.

Id. at 34. Mann concludes that the "ways and means of potential influence (and corruption) are much more diverse than those investigated in the early scholarly research." *Id*. at 34.[66] Many of these studies also suffer from the fact that the interactions between donations and legislative action are difficult to observe. *See, e.g.,* Sorauf Cross Exam. at 132 [JDT Vol. 31]; *see also* Appendix ¶ III (for more analysis of these studies).

Summary

1.82 The immense quantity of testimonial and documentary evidence in the record demonstrates that large nonfederal contributions provide donors special access to influence federal lawmakers. This access is shown to be coveted by these donors because it provides them the opportunity to have their voices heard and to influence legislation on policy matters of concern to them. Testimony from lobbyists, major donors, federal lawmakers and political party officials, as well as internal political

[66] Mann notes that where the variables of "[p]arty, ideology, constituency, mass public opinion and the president . . . . are less significant, there is evidence that interest group contributions, particularly to junior members of Congress, have influenced roll call votes – for example, on financial services regulation." Mann Expert Report at 32-33 DEV 1-Tab 1] (citing Thomas Stratmann, Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation. Paper (prepared for delivery at the 2002 Annual Meeting of the American Political Science Association, Boston, 29 August - 1 September), available from the APSA Proceedings Web site: http://apsaproceedings.cup. org /Site/papers/022/022023 StratmannT.pdf. 2002.

party and corporate documents, shows that donors expect to receive this access, that this expectation is fostered by the political parties and federal lawmakers, and that special access is in fact provided to major donors. Corroborating this evidence is the fact that nonfederal money donors often give to both political parties, which demonstrates that in many cases, large nonfederal donations have less to do with political philosophy than with obtaining access to power. The record also makes clear that the best method of obtaining special access to federal lawmakers is through large nonfederal donations, rather than smaller donations under the federal campaign finance regime.

The political parties have taken advantage of the desire of donors for special access by structuring their entire fundraising programs to entice larger donations with the promise of increased and more intimate access to federal officials. The political parties have also pressured donors to give donations, playing off donors' fears of denial of access or political retribution. From this record it is clear that large donations, particularly unlimited nonfederal contributions, have corrupted the political system. This fact has not been lost on the general public, as is explored *infra*.

Public Perception of Corruption

1.83 The record demonstrates that the public believes there is a direct correlation between the size of a donor's contribution to a political party and the amount of access to, and influence on, the officeholders of that political party that the donor enjoys thereafter.

1.83.1 A research poll of 1,300 adult Americans conducted by two prominent political pollsters, Mark Mellman[67] and Richard Wirthlin,[68] finds that the public perceives that large donations as having a corrupting influence on federal officeholders.[69] *See* Mellman and Wirthlin Report [DEV 2-Tab 5].

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[67] Mark Mellman is "CEO of The Mellman Group, a polling and consulting firm. . . . Mellman has helped guide the campaigns of some fifteen U.S. Senators, over two dozen Members of Congress, and three Governors, as well as numerous state and local officials. In addition, Mellman works with a variety of public interest organizations . . . and corporate clients . . . He has served as a consultant on politics to CBS News, a presidential debate analyst for PBS, a contributing analyst for The Hotline, National Journal's daily briefing on politics, and is currently on the faculty of The George Washington University's Graduate School of Political Management." Mellman and Wirthlin Report at 2 [DEV 2-Tab 5].

[68] Richard Wirthlin is "Chairman of the Board of Wirthlin Worldwide, a strategic opinion research firm he founded in 1969, which now is one of the top companies in its field. Wirthin is perhaps best known as President Reagan's strategist and pollster. . . . Mellman and Wirthlin Report at 2-3 [DEV 2-Tab 5]. He is widely respected in the "field of social science research and one of this country's most respected political and business strategists." *Id*. Wirthlin "was chief strategist for two of the most sweeping presidential victories in the history of the United States. In 1981 he was acclaimed Adman of the Year by Advertising Age for his role in the 1980 campaign and in 2001 was one of four Republicans awarded American University's 'outstanding contribution to campaign consulting.' In the same year, he was designated 'Pollster of the Year' by the American Association of Political Consultants." *Id*. at 3. The *Washington Post* named Wirthlin "the prince of pollsters" and George Gallup, Jr. said Wirthlin is "one of the very best at our craft." *Id*.

[69] The survey was conducted over a period of five days (August 28, 2002 through September 1, 2002), and the pollsters made an average of 4.58 dialings per telephone number in the sample set in order to ensure that the sample was representative. *See* Mellman and Wirthlin Report at 22-23 [DEV 2-Tab 5]. The study's contact rate was 38 percent, more than double the industry average of 15 percent. *Id.* at 23. The rate of refusal of the respondents who refused to be polled was within the normal range for a random telephone survey conducted in the United States. *Id.* The pollsters took several steps to avoid bias. *Id*. at 24; *see also* Wirthlin Cross Exam. at 40 (explaining that the pollsters took steps to avoid bias by randomly ordering the questions, "so that there is no sequence developed where one question

(continued...)

Mellman and Wirthlin conclude that "[a] significant majority of Americans believe that those who make large contributions to political parties have a major impact on the decisions made by federally elected officials." In addition, Mellman and Wirthlin find that many Americans believe that the "views of these big contributors sometimes carry more weight than do the views of constituents or the best interests of the country." *Id*. at 6 [DEV 2-Tab 5]. The major findings of their poll include:

- Seventy-seven percent of Americans believe that big contributions to political parties have at least some impact on decisions made by the federal government. Fifty-five percent thought big contributions had a great deal of impact; 23 percent thought such donations had some impact. *Id.*
- Seventy-one percent of Americans "think that members of Congress sometimes decide how to vote on an issue based on what big contributors to their political party want, even if it's not what most people in their district want, or even if it's not what they think is best

[69](...continued)
may, if always asked in the same order, affect[] the second question."). The statistical margin of sampling error, that is, the error due to sampling versus if the pollsters talked to every American in the United States, is 2.7 percentage points: the actual opinions of Americans will be within 2.7 percentage points of those reported in the study 95 percent of the time. *Id.* at 22.

for the country." *Id.* at 7.

- A "large majority (84%) think that members of Congress will be more likely to listen to those who give money to their political party in response to their solicitation for large donations." *Id.* at 8.
- "Over two-thirds of Americans (68%) . . . think that big contributors to political parties sometimes block decisions by the federal government that could improve people's everyday lives." *Id.* at 8.
- "[A]bout four in five Americans think a Member of Congress would be likely to give special consideration to the opinion of an individual, issue group, corporation, or labor union who donated $50,000 or more to their political party (81%) or who paid for $50,000 or more worth of political ads on the radio or TV (80%). By contrast, only one in four Americans (24%) think that a member of Congress is likely to give the opinion of someone like them special consideration." *Id.* at 9.

1.83.1.1 The Mellman and Wirthlin Report did not measure the public's understanding of the campaign finance system, and did not ask if the respondents understood the difference between nonfederal and federal donations. *See* Cross Exam. of Mellman at 31-35 [JDT Vol. 22]. Mellman testifies that the purpose of the poll was to measure the public's perceptions. *Id.* at 31. According to Plaintiffs' expert, Q. Whitfield Ayres, the public does not understand the

distinction between federal and nonfederal donations and is not aware of campaign finance regulations. *See* Ayres Expert Report ¶ 8(a). Dr. Shapiro, an expert for Defendants, responds that

> [t]he public does not need detailed knowledge about . . . the nuances of existing campaign finance regulations, and the extent to which these regulations are enforced in order to form strong opinions toward campaign finance. The public can easily understand how political donations can lead to political access and influence--how political parties and politicians will pay attention to those who give money to the parties. The public has long questioned the motivations of, and responded with distrust toward labor unions, corporations, special interests more generally, and the government itself. The public is especially troubled and animated by these problems when they become blatantly visible in widely publicized incidents and scandals such as those involving Enron and the large soft money donations to the Democratic Party and the roles played by the Clinton Administration, President Bill Clinton, and Vice President Al Gore.

Shapiro Rebuttal Report at 9 [DEV 5-Tab 2] (citations omitted). Mr. Ayers also comments that his research finds that "every conclusion that the Wirthlin-Mellman report reached about 'large' or 'big' contributions and contributors applies with equal force to the new, hard money limits in the BCRA." Ayers Rebuttal Report at 4 [RNC Vol. VIII]. Mr. Wirthlin notes that what Mr. Ayers' research demonstrates is that "in the eyes of most Americans . . . $50,000 is considered [a] large" contribution, but comments that if that is the case then the nonfederal donations given in the past which far exceed $50,000 would be viewed as even larger. Wirthlin Cross Exam. at 148, 155

[JDT Vol. 32]. And, "as you move up the scale, there's going to be pretty close to unanimity on what constitutes big in the form of campaign contributions." Mellman Cross Exam. at 69 [JDT Vol. 22].

1.83.2 The results of the Mellman-Wirthlin study are confirmed by the research of Robert Shapiro, a professor at Columbia University, who analyzed public perception of nonfederal money contributions to political parties by reviewing all publicly available opinion survey data sources. Shapiro Expert Report at 7-8. [DEV 2-Tab 6]. The survey data Shapiro examined was comprised mostly of telephonic opinion polls. *Id.* at 8. Specifically, Shapiro focused on "public opinion data based on responses to surveys that were fielded since 1990" to determine the public's answers to several questions, including two questions which read: "To what degree has the public perceived corruption in politics connected to the influence of money and large campaign donations?" and "What have been the public's perceptions and opinions toward the substantial political donations in the form of soft money contributions to political parties?" *Id.* at 3, 8. According to Shapiro, poll results show that the "public has opposed large unregulated soft money contributions to political parties [and] that the public has been troubled by large soft money donations." *Id.* at 13. In addition, Shapiro concluded that the poll data showed "that a substantial proportion of the public has perceived corruption in the political

system, and that we have been losing ground." *Id.* at 11.

1.83.3 Former and current Members of Congress testify that their constituents believe that these large contributions to parties present an appearance of corruption. *See* Simpson Decl. ¶ 14 DEV 9-Tab 38] (testifying that "[b]oth during and after my service in the Senate, I have seen that citizens of both parties are as cynical about government as they have ever been because of the corrupting effects of unlimited soft money donations."); 144 S. Cong. Rec. S1041 (Feb. 26, 1998) (statement of Sen. Baucus) (stating that "[p]eople tell me they think that Congress cares more about 'fat cat special interests in Washington' than the concerns of middle class families like theirs. Or they tell me they think the political system is corrupt."); 146 Cong Rec. S4262 (May 23, 2000) (statement of Sen. Feingold) (stating that "[t]he appearance of corruption. . . . We all know it's there. We hear it from our constituents regularly. We see it in the press, we hear about it on the news."); Letter from Representative Asa Hutchinson to RNC Chairman Nicholson dated July 9, 1997, ODP0014-00003-4 (declining to support Nicholson's proposed campaign finance legislation because Hutchinson had to balance Nicholson's concerns "with a concern of my constituents which is that their influence in politics is being diminished by the abuses of soft money . . . . If our party is unable to enact meaningful campaign finance reform while we're in control of Congress, then I believe

this failure to act will result in more cynicism and create a growing lack of confidence in our efforts."); Congressman Meehan Decl. in *RNC* ¶¶ 15-17 [DEV 66-Tab 4] (stating that "there is a strong feeling in my [Congressional] district that soft money is corrupting the political process and influencing elections. My constituents feel that very large donations to the party committees, on the order of twenty-five, fifty or one hundred thousand dollars from one company or individual, have a corrupting influence."); Rudman Decl. ¶ 13 [DEV 8-Tab 34] ("The soft money system not only distorts the legislative process, it breeds deep cynicism in the minds of the public. I know this from my own experience in talking to citizens and voters over the years.").

1.83.4 Large donations made by groups or persons with an interest in pending legislative activity, even if not corrupting, create an appearance of corruption, especially when the donations are given in close proximity to legislative action on bills of interest to the donors. Senator McCain states:

> While the [generic drug] bill was pending [in 2002], the NRSC and NRCC held a large gala fundraiser to raise almost $30 million in largely soft money contributions, a substantial portion from pharmaceutical companies. According to newspaper reports, among the largest contributors to the gala were GlaxoSmithKline PLC ($250,000), PhRMA ($250,000), Pfizer ($100,000), Eli Lilly & Co. ($50,000), Bayer AG ($50,000) and Merck & Co. ($50,000).

McCain Decl. ¶ 11 [DEV 8-Tab 29].

> [T]here's an appearance [of corruption] when there's a million

> dollar contribution from Merck and millions of dollars to your last fundraiser that you held, and then there is no progress on a prescription drug program. There's a terrible appearance there. There's a terrible appearance when the Generic Drug Bill, which passes by 78 votes through the Senate, is not allowed to be brought up in the House shortly after a huge fundraiser with multimillion dollar contributions from the pharmaceutical drug companies who are opposed to the legislation.

McCain Dep. [JDT Vol. 18] at 174-175.

> Senator Feingold commented that
>
> > members of the National Consumer Bankruptcy Coalition, an industry lobbying group made up of the major credit card companies such as Visa and Mastercard and associations representing the Nation's big banks and retailers, gave nearly $4.5 million in contributions to parties and candidates. . . . Some of the campaign contributions from these companies seem to be carefully timed to have a maximum effect. It is very hard to argue that the financial largess of this industry has nothing to do with its interest in our consideration of bankruptcy legislation. For example, on the very day [in 1998] that the House passed the conference report last year and sent it to the Senate, MBNA Corporation gave a $200,000 soft money contribution to the National Republican Senatorial Committee.

145 Cong. Rec. S14067-68 (Nov. 5, 1999); *see also* Feingold Dep. at 67 [JDT Vol. 6]. "[A] $200,000 contribution [was] given 2 days after the House marked up a bankruptcy bill by MBNA. OK, it is not illegal. Conceded. Maybe it is not even corrupt, but it certainly has the appearance of corruption to me and I think to many people." 145 Cong. Rec. S12593 (Oct. 14, 1999) (statement of Sen. Feingold). Senator Feingold has also stated that "[t]he appearance of corruption is rampant in our system, and it touches every issue that comes

before us." 147 Cong. Rec. S2446 (Mar. 19, 2001) (statement of Sen. Feingold); *see also* 147 Cong. Rec. S3248-49 (April 2, 2001) (statement of Sen. Levin) ("[P]ermitting the appearance of corruption undermines the very foundation of our democracy — the trust of people in the system.").

1.83.5 The Defendants have also submitted a substantial number of press reports which suggest that large soft money donations present the appearance of corruption. *See, e.g.,* Jackie Koszczuk, *Soft Money Speaks Loudly on Capitol Hill This Season*, Cong. Q., June 27, 1998, at 1736; Jill Abramson, *Money Buys A Lot More Than Access*, N.Y. Times, Nov. 9, 1997, at 4; Jane Mayer, *Inside the Money Machine*, The New Yorker, Feb. 3, 1997, at 32; Don Van Atta, Jr. and Jane Fritsch, *$25,000 Buys Donors 'Best Access to Congress'*, N.Y. Times, Jan. 27, 1997, at A1; *see also* Krasno and Sorauf Report at 19-20 DEV 1-Tab 2]; Primo Rebuttal ¶ 7 [2 PCS] (stating that "[t]he news media reinforces this view [that money distorts the political process] by portraying the political process as being driven by campaign contributions ...."). Senator Rudman states

> Almost every day, the press reports on important public issues that are being considered in Congress. Inevitably, the press draws a connection between an outcome and the amount that interested companies have given in soft money. . . . Even if a Senator is supporting a position that helps an industry for reasons other than that the industry gave millions to his party, it does not appear that way in the public eye.

Rudman Decl. ¶ 11 [DEV 8-Tab 34].

1.83.6 High-level political contributors testify that large nonfederal donations corrupt the political system or present an appearance of corruption. *See, e.g.,* Hassenfeld Decl. ¶ 19 [DEV 6-Tab 17] ("It is obvious to me that large soft money donations do buy access, that they can influence federal policy, and that they are corrupting to federal officeholders and to donors. Additionally, these unlimited donations to political parties pose a far greater risk than do hard money contributions to candidates of at least the appearance, if not the reality, of special interest influence on federal policy."); Kirsch Decl. ¶ 15 [DEV 7-Tab 23] ("[T]he current system of financing federal elections permits corruption to flourish."); Buttenwieser Decl. ¶ 30 [DEV 6-Tab 11] ("Large soft money donations can create at least the appearance of influence on federal policy making. . . ").

A national survey of major congressional donors conducted in 1997 found that a majority were critical of the campaign finance system and supportive of reform. John Green, Paul Herrnson, Lynda Powell, and Clyde Wilcox, *Individual Congressional Campaign Contributors: Wealthy, Conservative and Reform-Minded* (1998), FEC 101-0282, 0283[DEV 45-Tab 110]. Seventy-six percent of those surveyed believed the campaign finance system is either "broken and needs to be replaced," or "has problems and needs

to be changed." *Id*. Three-quarters of those surveyed supported a "ban on large 'soft money' donations." *Id*. at 0291.

1.83.7 Plaintiff's expert La Raja notes that

> [O]ne cannot ignore the central claim of reformers that the cash-based electoral environment fosters mistrust of the political system. Observing the amounts of money raised and spent in campaigns makes the average American skeptical that the political process is fair. Such doubts raise questions about political legitimacy. Even if politicians are not corrupt – and there has been minimal evidence to prove this claim – there is certainly the appearance of corruption. . . .
> It does not help matters that parties contribute to the arms race in campaigns. By using soft money parties raise the ante in elections. Candidates feel vulnerable to parties and interest groups that sponsor issue ads so they raise more money than ever. Campaign costs increase as each side fights to a draw . . . . Thus, the foraging for campaign money contributes to the perspective that money corrupts the system.

La Raja Cross Exam. Ex. 3 at 144-45 [JDT Vol. 25].

Summary

1.84 It is clear that the effect of large contributions on the political process has not been lost on the public. The polling surveys entered into the record provide powerful proof that the presence of large donations create the appearance of corruption in the eyes of the majority of Americans. Although Plaintiffs point out that BCRA's new federal limits are considered by Americans to constitute large contributions, the fact remains that nonfederal donations made under FECA were often much larger and therefore would be seen by Americans as more corrupting. Major donors who participate and

witness nonfederal fundraising believe that these donations present at the very least an appearance of corruption. Members of Congress have seen first-hand the cynicism these large, unregulated donations have bred in the minds of their constituents, and acknowledge the appearance of corruption inherent in large contributions made by those interested in legislation as the legislation is being considered by federal lawmakers. While it is not clear whether or not the public understands the exact contours of the campaign finance system and the nonfederal/federal money distinction, it is clear they view large contributions as corrupting.

Nonprofit Groups' Involvement in Federal Elections

1.85 Political parties and federal candidates work with nonprofit groups on campaign activities, and they have raised nonfederal money for, and directed and transferred nonfederal money to nonprofit groups for use in activities that affect federal elections.

1.85.1 The national party committees direct donors to donate nonfederal money to certain interest groups that then use such funds for broadcast issue advertisements and other activities that influence federal elections. For example, Steve Kirsch testifies that the national Democratic Party played an important role in his decision to donate soft money to "certain interest groups that were running effective ads in the effort to elect Vice-President Gore, such as NARAL. The assumption was that the funds would be used for television ads or some other activity that would make a difference in the Presidential

election." Kirsch Decl. ¶ 10 [DEV 7-Tab 23]; *see also* Buttenwieser Decl. ¶ 18 [DEV 6-Tab 11] ("I estimate that, over the last decade, I have given roughly $2 million to interest groups engaged in political activity, including non-profit corporations. . . . [because I believe the field work they do] can have important effects on political campaigns. I decide which of these groups to give to primarily on my own, though I have also discussed with DSCC personnel which groups are effective at these grassroots activities.").

1.85.2 The RNC, NRSC, and NRCC have all made nonfederal donations to the National Right to Life Committee, an independent group that assists Republican candidates through "issue advocacy" activities. Resps. Nat'l Right to Life Pls. To Defs.' First Interrogs., No. 3 [DEV 10-Tab 5]; *see also* RNC0065691A, RNC0065691 [DEV Supp.-Tab 3] (October 18, 1996, letter from the Republican National State Elections Committee to National Right to Life with enclosed $500,000 donation, stating in part "[y]our continued efforts to educate and inform the American public deserves recognition"). After the NRSC's 1994 donation, then-NRSC Chairman Senator Phil Gramm told the *Washington Post* that the party made this donation because it knew the funds would be used on behalf of several specific Republican candidates for the Senate, saying he had "made a decision…to provide some money to help activate pro-life voters in some key states where they would be pivotal to the

election." *Id.* at 5975; *see also* RNC 0373365 [IER Tab 31] (letter from the Republican National State Elections Committee to the American Defense Institute notifying the group of a $300,000 donation from the RNSEC's "non-federal component" to assist the group's "efforts to educate and inform Americans living overseas of their civic responsibilities."); RNC 0373370, 0373376, 0373381 (three letters to Americans for Tax Reform all dated in October 1996, providing the group $1,000,000, $2,000,000, and $600,000 donations in recognition of the group's "efforts to educate and inform the American public); Thompson Comm. Report at 4013 (majority report) ("In addition to direct contributions from the RNC to nonprofit groups, the senior leadership of the RNC helped to raise funds for many of the coalition's nonprofit organizations."); *id.* at 5934 (minority report) ("[T]he Committee received evidence indicating that both political parties suggested to supporters that they make contributions to sympathetic groups), 5983 ("Tax-exempt 'issue advocacy' groups and other conduits were systematically used to circumvent federal campaign finance laws".)

1.85.3 The DNC has also made contributions to nonprofit groups to be used on activities that affect federal elections. Marshall Decl. ¶ 9 [DEV 8-Tab 28] (DNC official attesting that "[i]nfrequently, the DNC also makes small contributions to outside groups such as non-profit voter registration and get out

the vote organizations focusing their efforts on minority and low-income communities, to assist with these groups' important work in empowering minority and low-income citizens.").

1.85.4 The National Right to Work Committee "pays for its advertising from its treasury, [and] admits that certain Members of Congress or Executive Branch Officials have generally encouraged financial support for the Right to Work cause and, specifically, for the support of NRTWC in advocating for these issues, through lobbying as well as issue advertising." Resp. Nat'l Rt. Work Comm. to Defs. First RFAs, No. 17 [DEV 12-Tab 2].

1.85.5 Members of Congress assist nonprofit groups raise funds for the purpose of affecting national elections. Congressman Ric Keller signed a Club for Growth fundraising letter dated July 20, 2001 which credited the Club for his own 2000 electoral success and assured potential donors that their money would be used to "help Republicans keep control of Congress." CFG00208-10 [DEV 130-Tab 5]; *see also* NRW-2812 [DEV 129-Tab 2] (letter from Congressman Pete Sessions asking the recipient to meet with National Right to Work Committee personnel regarding the Committee's effort to "stop Big Labor from seizing control of Congress in November"). Nonprofit groups have influenced the outcome of federal elections. *See* Pennington Decl. ¶¶ 15, 19 [DEV 8-Tab 31] (discussing the Club for Growth's impact on the 2000

Congressional election in Florida's Eighth District); *see also infra* Findings ¶ ? (Bumpers) ("Members or parties sometimes suggest that corporations or individuals make donations to interest groups that run "issue ads." Candidates whose campaigns benefit from these ads greatly appreciate the help of these groups.").

1.85.6 Ms. Bowler testifies that most committees that are organized to support or oppose ballot measures in California are organized as 501(c)(4) committees. She states that virtually all of the ballot measure committees in California engage in activity that can be characterized as get-out-the-vote activity under BCRA. Bowler Decl. ¶ 30 [3 PCS]. This fact is undoubtedly known to the CDP as summary judgment was entered against the state political party for its nonfederal contribution to a ballot measure committee which was not reported to the FEC and spent almost entirely on voter registration activities. *See FEC v. CDP*, No. S-97-0891 (E.D. Cal. Oct. 14, 1999) (order granting summary judgment). Judge Garland E. Burrell, Jr. of the Eastern District of California found that on the basis of this conduct the CDP had "violated the FECA and the allocation rules by funding a generic voter drive that targeted Democrats." *Id*. at 15. This example shows that ballot measure committees engage in voter mobilization efforts that affect federal elections, *see also* Findings ¶¶ 1.28, 1.32, and that permitting nonfederal donations and solicitations to such groups

would allow political parties to circumvent BCRA.

1.85.7 "Virtually every member of Congress in a formal leadership position has his or her own 527 group. . . . In all, Public Citizen found 63 current members of Congress who have their own 527s. Another 38 members of Congress have a stake in the Congressional Black Caucus [] 527. 527 groups are also popular with influential congressional committee chairmen. . . . And 527s are increasingly popular with other members of Congress, who want to be more influential. . . ." Public Citizen Congress Watch, Congressional Leaders' Soft Money Accounts Show Need for Campaign Finance Reform Bills, Feb. 26, 2002, at 6 [DEV 29-Tab 3]. "For congressional leaders, 527 groups appear to collect about as much money as their campaign committees and often as much as their leadership PACs." *Id.* at 9.

1.85.7.1 "There are basically two kinds of 527s active in federal politics: those that exist to promote certain politicians (which Public Citizen calls 'politician 527s') and those that exist to promote certain ideas, interests and partisan orientations in election campaigns. . . . Politician 527s generally serve as soft money arms of 'leadership PACs,' which incumbents use to aid other candidates and otherwise further their own careers. Like the campaign committees of members of Congress, leadership PACs can receive only 'hard money' contributions, which are limited in amounts and may not come directly from

corporations or unions. Politician 527s use their soft money mainly to sponsor events that promote their own careers, help create a 'farm team' of successful state and local candidates, and spur partisan 'get-out-the-vote (GOTV)' efforts." *Id.* at 6.

1.85.7.2 Many donors to Member 527 organizations donate with the intent of influencing federal elections. For example, Peter Buttenwieser testified that in early 2002 he donated $50,000 to a 527 organization, Daschle Democrats, which ran broadcast ads in South Dakota supporting Senator Tom Daschle in response to the attacks that had been made against him. Mr. Buttenwieser stated: "I was willing to do this because I felt that the attacks were hurting Senator Daschle and Senator Tim Johnson's re-election campaign as well." Buttenwieser Decl. ¶ 20 [DEV 6-Tab 11].

1.85.7.3 Twenty-seven industries (including individuals, such as executives, associated with the industries) contributed $100,000 or more in just a single year to the top 25 politician 527 groups. These industries accounted for 52 percent of all contributions to the top 25 politician 527s. The top 10 industries contributing were: computers/Internet, securities & investments, lawyers/law firms, telephone utilities, real estate, TV/movies/music, air transport, tobacco, oil & gas, and building materials and equipment. Top corporate contributors included AT&T, SBC Communications, Philip Morris, Mortgage Insurance

Companies of America, Clifford Law Offices, U.S. Tobacco and American Airlines. Overall, only 15 percent of total contributions to the top 25 politician 527's came in amounts of less than $5,000. Democratic party committees and unions also contributed over $100,000 to the top politician 527s. In fact, Democratic party committees (mainly the DNC) were the single largest contributor to politician 527s. Almost all of this money (81 percent) went to the Congressional Black Caucus 527. Public Citizen Congress Watch, Congressional Leaders' Soft Money Accounts Show Need for Campaign Finance Reform Bills, Feb. 26, 2002, at 10–11 [DEV 29-Tab 3].

1.85.8 According to Kathleen Bowler of the CDP, Section 527 organizations include political clubs. The CDP has contributed to these groups "to assist [them] with very basic administrative and organizational costs, as well as for voter registration activities." Bowler Decl. ¶ 31. Bowler attests that these groups "traditionally engaged in grass-roots GOTV activity, they are not engaged in direct activities in connection with federal elections." *Id*. Similarly,

> CRP for many election cycles has provided and paid for partisan voter registration, through its Operation Bounty program in which Republican County Central Committees, Republican volunteer organizations and Republican candidates for state and federal office may participate, and through supplementary paid voter registration drives. Most of these participating groups and organizations are Internal Revenue Code section 527 organizations.

Erwin Aff. ¶ 9.

Since California's state elections are held at the same time as federal elections, GOTV efforts in California will affect federal elections, even if these effects are unintentional. *See supra* Findings ¶ 1.28.

1.86 It is clear that prior to BCRA, the political parties donated nonfederal funds to nonprofit entities which then used those funds to affect federal elections in ways that assisted the political party that donated the money. Furthermore, federal candidates have solicited funds for nonprofit corporations that have assisted them in their campaigns, and donors note that the political parties and federal candidates have directed them to donate to specific nonprofit groups in order to affect federal elections. What the record shows is that BCRA's framers were aware of this budding practice which would become a gaping loophole if not addressed by the campaign finance reform legislation in light of BCRA's other provisions affecting the collection and use of nonfederal funds by the national and state political parties.

The Effect of BCRA on Interest Group Activity

1.87 Experts expect that little of the nonfederal money donations to political parties barred by BCRA will now be made to interest groups. *See* Mann Cross Exam. at 164-65 [JDT Vol 17] ("I think [BCRA] is going to produce a tremendous shift in resources from television to ground activities -- registration, mobilization, get out the vote. Yes, some of this will be by interest groups."); Green Rebuttal Report at 19 [DEV 5-Tab 1] ("I doubt that much of the money that currently goes to parties in the form of soft

money will go instead to PACs and other tax-exempt organizations. The money donated to political parties is given with an eye toward the special favors that only a political party can deliver by dint of its ubiquitous role in all levels of government. No interest group can approximate the scope or influence of a political party; no interest group has the same presence in the lives or careers of politicians. It therefore seems unlikely that money seeking access will flow in appreciable quantities to much less propitious interest group destinations.").

1.88 One interest group and one political consultant predict that some nonfederal money donors will donate their money to interest groups. Kate Michelman, President of NARAL, has stated that nonfederal donors seeking to "elect people who embody their values will be looking to [donate to] groups like NARAL, which do serious political work and are seasoned operatives." Gallagher Decl. ¶ 61 [RNC Vol. XIII] ("If [nonfederal donors] can't give to the parties . . . they are going to find other means." (quoting Michelman)). Michael Lux, President and Co-founder of Progressive Strategies, L.L.C., a political consulting firm, testifies that he expects that "[t]here will be organizations who will be able to raise more money because folks who used to give to the party will now give to outside groups. And hopefully I will be involved in many of those projects," although "obviously you never know the unintended consequences of specific pieces of legislation"). Lux Dep. at 50-52 and Ex. 2 [RNC Vol. 16].

1.89 One RNC official testifies that she does not believe interest groups can replace political parties. B. Shea Dep. at 90 [JDT Vol. 29] (agreeing that interest groups could never replace political parties).

1.90 Plaintiffs supply the Court with testimony showing that prior to BCRA, interest groups, unlike political parties, were rarely required to make public disclosure of their receipts, donors, disbursements, and activities. *See* Beinecke[70] Decl. ¶¶ 3, 9 [RNC Vol. IX] (prior to BCRA, National Resources Defense Council (NRDC) did not have to file disclosure forms with FEC or disclose to the public amounts donated by foundations); Gallagher Decl. ¶ 15 [RNC Vol. XIII] (prior to BCRA National Abortion and Reproductive Rights Action League (NARAL) was not required to track whether it received donations from persons outside United States); Sease[71] Decl. ¶ 11 [RNC Vol. XIX] (prior to BCRA, Sierra Club was not generally required to report identity of individual donors to any government entity); *see also* Keller[72] Expert Report ¶ 42 [RNC Vol. VIII] (stating that his understanding is that the political activities of interest groups "are far less transparent than those of parties").

While this may have been the case prior to BCRA, BCRA contains provisions

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[70] Frances Beinecke is the Executive Director of the NRDC. Beinecke Decl. ¶ 1 [RNC Vol. IX].

[71] Deborah Sease is the Legislative Director of the Sierra Club. Sease Decl. ¶ 1 [RNC Vol. XIX].

[72] Morton Keller is an experts for the Plaintiffs.

addressing the lack of transparency in interest group political activity. *See* BCRA §§ 201, 212. Therefore, this testimony describes conditions under a different campaign finance regime and does little to assist the Court in determining the impact on campaign finance disclosure of any hypothetical future increase in interest group activity.

1.91 State Republican party officials comment that interest groups engage in voter registration, voter identification, get-out-the-vote activities, and lobbying of officeholders, Dendahl[73] Decl. ¶ 11 [RNC Vol. VIII]; Bennett[74] Decl. ¶ 11 [RNC Vol. VIII] (declaring he has read about such interest group activities in the media). Bruce Benson, the Chairman of the Colorado Republican Party predicts that "Special Interest Groups will fill the void caused by the reduction in Political Party activity since they will not have to report the unlimited contributions from any source they will be able raise and spend." Benson Decl. ¶ 12 [RNC Vol. VIII].

It appears that Mr. Benson's assessment does not take into account BCRA's new disclosure requirements for certain expenditures made by interest groups. *See* BCRA §§ 201, 212.

1.92 John Peschong, the RNC's Regional Political Director for the Western Region states

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[73] John Dendahl is the State Chairman of the Republican Party of New Mexico. Dendahl Decl. ¶ 1 [RNC Vol. VIII].

[74] Robert Bennett has served as Chair of the Ohio Republican Party since 1988. Bennett Decl. ¶ 1-2 [RNC Vol. VIII].

that "In recent election cycles, I have observed that some of the major interest groups, such as the AFL-CIO, NEA, CTA, and NAACP, have reduced their reliance on broadcast issue advocacy, and shifted reliance to grassroots voter mobilization activities." Peschong Decl. ¶¶ 13-14 [RNC Vol. VI].

1.93 During the closing weeks of the 2000 campaign, the NAACP National Voter Fund registered over 200,000 people, put 80 staff in the field, contacted 40,000 people in each target city, promoted a get-out-the-vote hotline, ran three newspaper print ads on issues, made several separate direct mailings, operated telephone banks, and provided grants to affiliated organizations. *See* Green Cross Exam. at 15-20, Ex. 3 [JDT Vol. 9]; McCain Cross Exam. at 70-72 [JDT Vol. 18]. The NAACP reports that the program turned out a million additional black voters and increased turnout (over 1996 numbers) among targeted groups by 22 percent in New York, 50 percent in Florida and 140 percent in Missouri. Green Cross Exam. Ex. 3 [JDT Vol. 9]. The NAACP's effort, which cost approximately $10 million, was funded in large part by a single $7 million donation by an anonymous individual. *Id*. at 20, Ex. 3; McCain Cross Exam. at 73-74 [JDT Vol. 18].

1.94 According to Mary Jane Gallagher, NARAL's Executive Vice President, in 2000, NARAL spent $7.5 million and mobilized 2.1 million pro-choice voters. The group also made 3.4 million phone calls and mailed 4.6 million pieces of election mail. *See* Gallagher Decl. ¶ 24 [RNC Vol. XIII].

1.95 I find the effect BCRA will have on interest group activity unclear. While testimony in the record reveals that some nonfederal donations that went to the national political parties under FECA, and are now barred under BCRA, will go to interest groups, no witness has provided an assessment as to how much nonfederal money will be redirected to interest groups. Furthermore, the evidence regarding the lack of transparency with regard to interest group political activity does not take into account BCRA's new disclosure requirements that apply to such activities, and therefore is not helpful to the Court.

State Party Fundraising

Fundraising By National Party Officials & Federal Officeholders for State Parties

1.96 According to RNC officials, the RNC provides financial and fundraising assistance to state and local candidates and parties through a variety of means. *See* Dendahl Decl. ¶ 10 [RNC Vol. VIII]; Duncan Decl. ¶ 13 [RNC Vol. VI]; Josefiak Decl. ¶ 44, 65-72 [RNC Vol. I]; B. Shea Decl. ¶¶ 32-40 [RNC Vol. V]; *see also* La Raja Expert Report ¶ 12(b) [RNC Vol. VII] (discussing national party support for state parties generally). For example, RNC officers have sent fundraising letters on behalf of state and local candidates during off-year election cycles. *See, e.g.,* RNC Ex. 292 (RNC 0332976) (fundraising letter signed by Deputy RNC Chairman Jack Oliver on behalf of Bret Schundler's New Jersey gubernatorial campaign); Josefiak Decl. RNC Ex. 1162 [RNC Vol. I] (fundraising letter signed by Haley Barbour on behalf of George

Allen's Virginia gubernatorial campaign); Josefiak Decl. RNC Ex. 1766 [RNC Vol. I] (fundraising letter signed by Haley Barbour on behalf of New Jersey Republican Party); Feingold Dep. Ex. 12 [JDT Vol. 6] (fundraising letter from Jim Nicholson on behalf of Norm Coleman's Minneapolis mayoral campaign). Robert Duncan, current General Counsel and former Treasurer of the RNC, was actively involved in fundraising activities for the Republican Party of Kentucky and for Kentucky state candidates. He sponsored receptions and hosted and attended fundraising dinners in support of the Kentucky Republican Party. Duncan Decl. ¶¶ 5-6 [RNC Vol. VI].

The RNC states that prior to BCRA,

> RNC officers were intimately and substantially involved in helping state and local candidates raise money in accordance with state and federal law. Since becoming Chairman of the RNC in February 2002, Marc Racicot has made 82 trips in his capacity as Chairman to 67 cites in 36 states. Virtually all of these trips have involved assisting state and local parties and candidates with fundraising. *See* Josefiak Decl. ¶ 70. RNC Co-Chairwoman Ann Wagner and Deputy Chairman Jack Oliver have made 31 and 33 trips respectively since becoming RNC officers, the majority of which involved providing fundraising assistance to state and local parties and candidates. *Id*. For example, Ann Wagner was the keynote speaker at a fundraising dinner for the Shelby County Tennessee Republican Women's Club on September 8, 2001. *See* RNC Exh. 301.

RNC Proposed Findings of Fact ¶ 42. However, the Josefiak Declaration upon which the RNC relies does not support its contention. Josefiak only states that the "majority of these trips have had significant fundraising components to them," Josefiak Decl. ¶ 70 [RNC Vol. I]; he says nothing about the type of fundraising accomplished during

these trips. Only one of these 146 trips is documented to have been for the purposes of state or local party fundraising. *See* RNC Ex. 301.

Nothing prevents RNC officials from raising federal funds for state candidates. *See* BCRA § 101(a); FECA § 323(a); 2 U.S.C. § 441i(a) (barring officers of agents of national political party committees from soliciting or directing contributions "that are not subject to the limitations, prohibitions, and reporting requirements of this Act.").

1.97 Senator McConnell attests that he engages in fundraising activities for state and local candidates, such as speaking at a state party fundraiser or attending a candidate rally. McConnell Aff. ¶ 5 [2 PCS]. Under BCRA, Senator McConnell may continue "to attend, speak, or be a featured guest at a fundraising event for a State, district or local committee of a political party." BCRA § 101; FECA § 323(e)(3); 2 U.S.C. § 441i(e)(3).

CDP and CRP Fundraising

1.98 The CDP and the CRP present evidence regarding their general fundraising activities and claim that BCRA will adversely affect their revenues. *See* Bowler Decl. ¶¶ 10, 12, 19, 23, 35 & Ex. A [3 PCS] (discussing CDP's federal and nonfederal fundraising achievements, methods, and difficulties, and the impact BCRA will have on CDP fundraising); Torres Decl. ¶ 9 [3 PCS] (discussing the effect of BCRA on CDP fundraising and therefore CDP activities); Erwin Aff. ¶¶ 12, 13, 15(a) & CDP App.

at 1189 [3 PCS] (discussing CRP's fundraising programs and activities and the effect BCRA will have on these activities). These claims, however, are speculative and not based on any analysis. Bowler Dep. at 9-14 [JDT Vol. 3] (acknowledging that the CDP had not discussed any strategies for changing either its fundraising or operational activities to adjust to the requirements of the BCRA, that no one at the CDP had talked with any strategists or consultants with respect to ways in which the party might change either its fundraising or operational activities in response to the BCRA, and acknowledging that CDP's assessment of BCRA's effect was based on an analysis on how the law would have affected their past fundraising without looking at different ways money could have been raised); Erwin Dep. at 131-40 [JDT Vol. 5] (admitting the CRP did not conduct an analysis of how it would change its fundraising or operations to adapt to BCRA, that the party does not "know what the ramifications" of BCRA will be on its fundraising receipts, and that he does not know how much of the nonfederal money that was collected by the national parties will now be directed at the CRP); *see also* Philp Dep. at 18-22 [JDT Vol. 26] (testifying that the Colorado Republican Party has done no formal analysis to determine BCRA's effect on the political party's revenue flow, and has not consulted with fundraising experts to determine different ways to fundraise under BCRA).

Furthermore, since the state political parties collect many donations in small increments, they could be classified as either federal or nonfederal contributions. No

party has provided the three-judge panel with analysis taking this fact into account. The CDP and CRP also present testimony and documentary evidence concerning the effect the Levin Amendment will have had on their nonfederal fundraising. *See* Bowler Decl. ¶ 19 & Ex. A [3 PCS]; Torres Decl. ¶ 7 [3 PCS]; Erwin Aff. ¶ 13 [3 PCS]. In addition to not being the product of a serious, forward-looking analysis, the testimony is not sufficiently precise and leaves as many questions as it answers. For example, the CDP's evidence regarding the impact of the Levin amendment on its nonfederal money fundraising does not make clear if the amount of funds it claims will be "reduced" includes the initial $10,000 of these donations which are permitted to be used for federal election activity under BCRA, or deducts those sums to present a more accurate calculation. *See* Bowler Decl. ¶ 19 & Ex. A [3 PCS].

Finally, Plaintiffs' own expert Raymond La Raja finds that "new rules that limit soft money fundraising will not present a problem for parties already constrained by similar limits under state law." La Raja Cross Exam. Ex. 3 at 148 [JDT Vol. 15] (La Raja dissertation). He notes that "in states where campaigns are expensive and where parties rely on major donors" such measures "will hamper party activity and create some confusion. . . . Although state parties will adapt, the middling and weaker state parties might suffer the most. . . ." *Id*. However, he concludes that the "[o]ne thing we can be sure of is that parties will figure out the ground rules and they will find an important role for themselves within the new campaign finance regime." *Id*.

at 150.

As such, I find the CDP and CRP's analysis of BCRA's impact on their fundraising activities speculative and lacking probative value.

1.99 The amount of nonfederal money the CRP and CDP raise themselves is much more than the nonfederal funds they receive from transfers from the national parties. CDP/CRP 1171 [3 PCS] (in the 2000 election cycle, 19.1 percent of all CRP nonfederal money came from national party transfers); CDP/CRP 35, 37, 39 [3 PCS] (in 2000, 36 percent of all CDP nonfederal money was from national party transfers). Ms. Bowler states, however, that "the percentage of 'soft money' falling into this category would vary from state to state, as well as by election cycle . . ." Bowler Rebuttal Decl. ¶ 3 [3 PCS].

1.99.1 According to Ms. Bowler "[t]he majority of [national transfers] were for issue advocacy, although money has been transferred for voter registration, get-out-the-vote activities, and even administrative expenses. We are able to raise a substantial amount of money for our non-Federal activities and do not rely on national party transfers for those purposes." Bowler Decl. ¶ 16 [3 PCS]; *see also id*. ¶ 12 (explaining that in the 1999-2000 cycle, the CDP raised $15,617,002 in nonfederal funds, which it used to fund state and local activities); Bowler Rebuttal Decl. ¶ 4 [3 PCS] (explaining that the CDP pays for much of its voter registration and get-out-the-vote activities with money

raised by the state party). To the extent the CDP uses its nonfederal funds for purely state campaign activity, BCRA has no effect on such expenditures. As noted *supra*, Findings ¶ 1.28, 1.32, GOTV and voter registration activities affect federal elections in states like California that hold their state and local elections in conjunction with federal elections. As such, these activities could be paid for with federal funds or with an FEC-specified allocated mix of federal and nonfederal funds (raised pursuant to the Levin Amendment). *See* BCRA § 101; FECA § 323(b)(2)(a)-(c); 2 U.S.C. 441i(b)(2)(a)-(c).

TITLE II: ELECTIONEERING COMMUNICATIONS THAT AFFECT FEDERAL ELECTIONS

2.1 The Origins of the Problem Congress Sought to Solve With Title II

Federal law has long prohibited corporations and labor unions from spending general treasury funds in connection with a federal election. The Supreme Court's interpretation of FECA in a series of cases beginning in 1976 has limited FECA's control over corporate and labor union involvement with federal elections. Prior to BCRA, corporations and labor unions exploited these limitations and spent general treasury funds in massive amounts to influence federal elections with "issue advertising" campaigns.

2.1.1 In *FEC v. Massachusetts Citizens for Life, Inc.*, the Supreme Court held that the prohibition on corporations and labor unions using general treasury funds on expenditures in connection with a federal election was overbroad, narrowing the restriction to corporate and union spending on "express advocacy." *FEC v. Massachusetts Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238, 249 (1986) ("We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b."). In *Buckley*, the Supreme Court provided examples of express advocacy: "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley*, 424 U.S. at 44 n.52. These examples have been referred to as the "magic words" because if they are invoked by an

organization, they trigger FECA's limitations.

2.1.2 As a result of *MCFL*, corporations and labor unions were permitted to use their general treasury funds on independent expenditures in connection with a federal election, provided that those independent expenditures[75] did not contain words of "express advocacy." In other words, corporations and labor unions could use their general treasury funds to pay for an advertisement which influenced a federal election, provided that the corporation or labor union did not use any of *Buckley*'s "magic words" in the advertisement. Magleby Expert Report at 5-6, 9, 10 [DEV 4-Tab 8]; *see also* Krasno and Sorauf Expert Report at 50 [DEV 1-Tab 2].

2.2 **The Rise of Issue Advocacy Campaigns Funded by Corporate & Labor Union General Treasuries**

Approximately ten years after *MCFL*, during the 1996 election cycle, corporations and labor unions began aggressively to use general treasury funds to pay for "issue advocacy" campaigns that avoided express advocacy but were designed to influence federal elections.

2.2.1 The Annenberg Center for Public Policy has been studying issue advocacy since the early 1990s. *See* Annenberg Public Policy Center, Issue Advocacy Advertising During the 1999-2000 Election Cycle ("Annenberg Report 2001")

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[75] As discussed, *supra*, independent expenditures differ from coordinated expenditures in that coordinated expenditures are treated as contributions under FECA.

at 1 [DEV 38 Tab-22]. In addition to Defendants, Plaintiffs and their experts have cited to and included the Annenberg Study in their materials, and have not specifically challenged any of the Center's findings. *See, e.g.*, NRA 196 [11 PCS]; La Raja Decl. ¶¶ 24(h) [RNC Vol. VII] (quoting Annenberg Study), ¶ 20(b) & Figure 10 (quoting Annenberg data); Milkis[76] Decl. ¶ 49 [RNC Vol. VII] (citing Annenberg Study). *See also infra* App. ¶¶ I.B.1-I.B.6. Congress also relied on the Annenberg studies. 147 Cong. Rec. S2455 (daily ed. March 19, 2001) (statement of Sen. Olympia Snowe) ("Let there be no mistake. The record I intend to outline will show these advertisements constitute campaigning every bit as much as any advertisements run by candidates themselves or any ad currently considered to be express advocacy and therefore subject to Federal election laws."); *id*. at 2456 (statement of Sen. Olympia Snowe) (citing Annenberg Report 2001). Accordingly, I rely on the Annenberg Center's results as uncontroverted evidence.

2.2.2 According to the Annenberg Center's research, issue advertisements generally fall into three categories: candidate-centered, legislation-centered, and general image-centered. Annenberg Report 2001 at 13. "Candidate-centered advertisements make a case for or against a candidate but do so without the use of the ten words delineated in *Buckley*." *Id*. (noting that these advertisements

[76] Sidney Milkis is an expert for the Plaintiffs.

"usually present a candidate in a favorable or unfavorable light and then urge the audience to contact the candidate and tell him or her to support the sponsoring organization's policy position."). Legislation-centered advertisements "seek to mobilize constituents or policy makers in support of or in opposition to pending legislation or regulatory policy." *Id*. (noting that these advertisements usually mention specific, pending legislation). Finally, general image-centered advertisements are "broadly written to enhance the visibility of an organization or its issue positions, but are not tied directly to a pending legislative or regulatory issue." *Id*.[77] Throughout the Findings and my opinion. I will generally use the nomenclature candidate-centered issue advertisements (or electioneering issue advertisements) and genuine or pure issue advertisements. Genuine issue advertisements include both legislation-centered and general image-centered issue advertisements.

2.2.3 In discussing the 1999-2000 election cycle, the Annenberg Center found that

[77] Other commentators have referred to two types of advertisements: candidate-centered (also called electioneering) issue advertisements and genuine issue advertisements. Advertisements designed to genuinely influence debate over a particular issue are known as "true" or "genuine" issue advertisements, while those issue advertisements designed to influence a federal elections are known as "electioneering" or "candidate-centered" issue advertisements. Krasno and Sorauf Expert Report at 65 [DEV 1-Tab 2] ("Advertising data show that there are two distinct types of issue ads, those that are basically candidate-oriented and electioneering in nature, and those that only present or urge action on an issue. The former are nearly identical in format, structure, and timing to ads produced by candidates, while the latter bear little or no resemblance to electioneering.").

"[t]he type of issue ad that dominated depended greatly on how close we were to the general election. . . . Though candidate-centered issue ads always made up a majority of issue ads, as the election approached the percent [of] candidate-centered spots increased and the percent of legislative and image ads decreased, such that *by the last two months before the election almost all televised issue spots made a case for or against a candidate*." *Id*. at 14 (emphasis added).

2.2.4 Overall, the Annenberg Center concludes that "[o]ver the last three election cycles the numbers of ads, groups, and dollars spent on issue advocacy has climbed." *Id*. at 1. During the 1996 election cycle, the Annenberg Center estimated that $135 million to $150 million was spent on multiple broadcasts of about 100 advertisements. Annenberg Report 2001 at 1 [DEV 38-Tab 22]. In the next election cycle (1997-1998), the Annenberg Center found that 77 organizations aired 423 advertisements at a cost of between $250 million and $340 million. *Id*.[78] In the 1999-2000 election cycle, the Annenberg Center found that 130 groups spent over an estimated $500 million on 1,100 distinct advertisements. *Id*. For the 1999-2000 election cycle, the Republican and

[78] The report the Annenberg Study produced following the 1997-1998 election cycle placed this estimate at between $275 million to $340 million. Annenberg Public Policy Center, Issue Advocacy Advertising During the 1997-1998 Election Cycle ("Annenberg Report 1998") at 1 [DEV 66-Tab 6].

Democratic parties accounted for almost $162 million (31%) of this spending; Citizens for Better Medicare, $65 million (13%); Coalition to Protect America's Health Care, $30 million (6%); U.S. Chamber of Commerce, $25.5 million (5%); AFL-CIO, $21.1 million (4%); National Rifle Association, $20 million (4%); U.S. Term Limits, $20 million (4%). *Id*. These groups and the two parties accounted for two out of every three (67%) dollars spent on issue ads in the 2000 cycle. *Id*. (noting that other groups spent a combined $166.2 million (33%) on issue advocacy during the 1999-2000 election cycle); *see also* La Raja Decl. ¶ 20(b) & Figure 10 [RNC Vol. VII] (quoting Annenberg data and noting that "[t]hese figures . . . closely match my own data on party-based issue ads collected by examining financial reports filed with the FEC").

2.2.5 In addition to the spectacular rise in candidate-centered issue advertising, political scientists and experts testify that by the 2000 election cycle, PAC interest groups ran dramatically fewer advertisements that referred to a federal candidate than non-PAC interest groups.

2.2.5.1 Political Scientist Anthony Corrado found that one of the "most notable direct consequences of the FECA" was the "proliferation of PACs." Anthony Corrado, *A History of Federal Campaign Finance Law* at 18 [DEV 29-Tab 17]. Corrado's historical research concludes that "from 1974 to 1986, the

number of committees registered with the FEC increased from 1,146 to 4,157, while the amounts they contributed to candidates rose from about $12.5 million to $105 million." *Id*. Corrado determined that campaign finance regulation was a major factor in the growth of PACs. *Id*. "The FECA sanctioned PACs, and groups and organizations had an incentive to form PACs since the law established a higher contribution limit for PACs than for individual donors." *Id*. at 18-19; *see also* Keller Decl. ¶¶ 57 [RNC Vol. VIII] ("[T]he unintended consequences of previous campaign finance legislation [has been] the growth of PACs and more powerful advocacy and interest groups."), 42 ("Political action committees (PACs) have rapidly grown in numbers."); Milkis Decl. ¶ 34 [RNC Vol. VII] ("Consequently, during the 1970s, the number of Political Action Committees (PACs) exploded.").

2.2.5.2 Defendants' expert Magleby finds that by the 2000 election cycle, the number of PACs had increased to only 4,499. Magleby Expert Report at 16 [DEV 4-Tab 8]. Plaintiffs' expert Keller notes that by March 31, 2002, the number of federal PACs had dropped to 4,328. Keller Decl. ¶ 42 [RNC Vol. VIII]; *see also* Milkis Decl. ¶ 35 [RNC Vol. VII] (same). By the 2000 election cycle, *non*-PAC interest groups ran 74,024 political advertisements referring to a federal candidate, compared to *only* 3,663 by interest group PACs. Goldstein Expert Report at 10 [DEV 3-Tab 7] (Table 1B); *see also* Rosenthal Decl. ¶ 25

(discussing that since 1995 the AFL-CIO's PAC has not made any independent expenditures); *cf.* Magleby Report at 14-15 [DEV 4-Tab 8] ("If parties and interest groups can effectively communicate a 'vote for' or 'vote against' message with party soft money and electioneering advocacy money, as the studies show they can, then it is not surprising that we have seen so much growth in this form of campaigning in recent election cycles.").

2.2.6 After studying the dramatic rise of candidate-centered issue advertisements over a seven year period, the Annenberg Center concluded *inter alia* that:

> 1) The amount of money spent on "issue advocacy" is rising rapidly.
> 2) Instead of creating the number of voices *Buckley v. Valeo* had hoped, issue advocacy allowed groups such as the parties, business and labor to gain a louder voice.
> 3) The distinction between issue advocacy and express advocacy is a fiction.
> 4) Issue advocacy masks the identity of some key players and by so doing, it deprives citizens of information about source of messages which research tells us is a vital part of assessing message credibility.

Annenberg Report 2001 at 1 [DEV 38-Tab 22]. As Plaintiffs' expert Raymond J. La Raja states, "'Over the last three election cycles, the number of groups sponsoring ads has exploded, and consumers often don't know who these groups are, who funds them, and whom they represent.'" La Raja Decl. ¶ 24(h) [RNC Vol. VII] (quoting Annenberg Report 2001 at 1).

2.2.7 It is therefore uncontroverted that "[b]y the early 1990s and especially by

1996, interest groups had developed a strategy to effectively communicate an electioneering message for or against a particular candidate without using the magic words and thus avoid disclosure requirements, contribution limits and source limits." Magleby Expert Report at 10 [DEV 4-Tab 8]. Political consultant Douglas L. Bailey explained why it was not until the 1996 election cycle that corporations and labor unions began to make heavy use of issue advocacy as a tool of electioneering. Political consultant Bailey testifies:

> When I consulted on dozens of campaigns in the 1970s and 1980s, we operated under essentially the same set of rules that governed in 1996, but many of today's practices would have been considered dangerous and wrong then, both politically and legally. In the post-Watergate era, we were worried about not only obeying the rules, but also assuring that our clients were seen as trying to clean up the image of the political process. But due to a lack of enforcement and a willingness on the part of some to win at all costs, these concerns appear to have dissipated.

Bailey Decl. ¶ 14 [DEV 6-Tab 2].

2.2.8 As this section illustrates, the uncontroverted record demonstrates that since the 1996 election cycle, candidate-centered issue advertisements have been used by corporations and labor unions to influence federal elections with general treasury funds.

2.3 **Express Advocacy Not Widely Used Nor An Effective Means of Campaign Advertising**

Exacerbating this development, is the undisputed fact that the overwhelming majority

of modern campaign advertisements do not use words of express advocacy, whether they are financed by candidates, political parties, or other organizations. It is also uncontroverted that political consultants do not employ express advocacy when making campaign advertisements because they do not view it as an effective means of campaign advertising. As a result, corporations and labor unions are able to pay for the most effective form of political advertisements when seeking to influence federal elections.

2.3.1 Empirical study demonstrates that modern campaign advertisements do not use words of express advocacy. Dr. Goldstein finds, that 11.4 percent of the 433,811 advertisements aired by candidates met the express advocacy test during the 2000 federal election. Goldstein Amended Expert Report at 16 [DEV 3-Tab 7]. Conversely, 88.6 percent of candidate advertisements in 2000 "were technically undetected by the *Buckley* magic words test." *Id*. This result demonstrates "that magic words are not an effective way of distinguishing between political ads that have the main purpose of persuading citizens to vote for or against a particular candidate and ads that have the purpose of seeking support for or urging some action on a particular policy or legislative issue." *Id*. Former Senator Rudman confirmed these empirical results observing that "[m]any, if not most, campaign ads run by parties and by candidates themselves never use . . . 'magic words.' It is unnecessary." Rudman Decl. ¶

18 [DEV 8-Tab 34].

2.3.2 The uncontroverted testimony of political consultants demonstrates that it is neither common nor effective to use the "magic words" of express advocacy in campaign advertisements. The political consultants' testimony, which I adopt as part of my Findings, is worth repeating *in toto*; particularly given the fact that the testimony of these political consultants is uncontroverted on these points and is not rebutted by the production of *any* contrary political consultant testimony by Plaintiffs discussing this subject.

Republican Political Consultant Douglas L. Bailey[79]

> In the modern world of 30 second political advertisements, it is rarely advisable to use such clumsy words as "vote for" or "vote against." If I am designing an ad and want the conclusion to be the number "20," I would use the ad to count from 1 to 19. I would lead the viewer to think "20," but I would never say it. All advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their throat. This is especially true of political advertising, because people are generally

[79] In 1968, Bailey founded Bailey, Deardourff & Associates, which was among the first national political consulting firms, working for Republican candidates for Governor, Congress, Senate, and President. The firm's clients included Gerald Ford's Presidential Campaign, and over fifty successful campaigns for Governor or the United States Senate in 17 states. Bailey Decl. ¶ 1 [DEV 6-Tab 2]. As campaign consultant, Bailey's job was "to plan the campaign and then create broadcast advertisements that would shape its outcome." *Id*. ¶ 2. In 2000, Bailey was among the first eight recipients of the American University-Campaign Management Institute's "Outstanding Contribution to Campaign Consulting Award given to the consultants "who have best represented the ideals of the profession and shown concern for the consequences of campaigns on public attitudes about our democratic process." *Id*. Bailey also has done work for political parties and issue advocacy groups. *Id*. ¶¶ 9-12.

very skeptical of claims made by or about politicians.

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

In the era of the 30 second ad, it is a mistake to view any particular electioneering advertisement as a campaign in and of itself. Over time, a campaign defines a candidate through a combination of style, image, and issues. Even shortly after watching an ad, the target audience usually doesn't remember the ad's substantive details. Rather, the viewers just get a feel for the candidate. It takes a lot of these "feels" to make up a campaign. Thirty second campaign ads, therefore, must be viewed collectively. It is impossible for the political ad consultant to truly close a positive sale until after he has had time to build the candidate's image through a series of 30 second spots.

Even if an electioneering ad aired in August, September, or October used words such as "vote for," "support," or "cast your ballot," it would do little good. People's minds may change from day to day about how they intend to vote, or more likely, they aren't significantly focused on whom to vote for until the days immediately prior to the election. Thus, the only real sale date is on election day in November. In the months leading up to that 'sale date,' the most important positive thing an ad can do is to create a general impression of a candidate that the voters will internalize over time, and that will hopefully sink in by election day.

Even if the goal of an early-September electioneering ad were to make a direct pitch for a vote, it would be nearly impossible to do it effectively. It is amazing how short thirty seconds really is when you

are trying to craft a political ad. There is barely enough time to effectively convey a single theme. If you change course in the final five seconds of an ad, you may undo everything that you have attempted to accomplish in the previous 25 seconds. Therefore, it is uncommon that you would see a political advertisement on television that says "Candidate X is tough on crime" and then breaks that flow and switches to the entirely separate point of "Please vote for Candidate X."

Bailey Decl. ¶¶ 3-4, 6-8 [DEV 6-Tab 2].

Democrat Political Consultant Raymond Strother[80]

[M]edia consultants prefer putting across electioneering messages without using words such as "vote for." Good media consultants never tell people to vote for Senator X; rather, you make your case and let the voters come to their own conclusions. In my experience, it actually proves less effective to instruct viewers what you want them to do. They have to come to their own conclusion. Americans like to think they make up their own minds and determine their own fate. Without even mentioning an upcoming election, the media consultant can count on the electoral context and voters' awareness that the election is coming. Voters will themselves link your ad to the upcoming election. When viewed months or years after the election a particular ad might look like pure issue advocacy unrelated to a federal election. However, during the election, political ads–whether candidate ads, sham issue ads, true issue ads, positive ads, negative ads or whatever–are each seen by voters as just one more ingredient thrown into a big cajun stew. Thus, there is precious little difference in how you go about crafting

[80] Strother is a political consultant, and President and founder of Strother/Duffy/Strother. Strother Decl. ¶ 1 [DEV 9-Tab 40]. He is also Chairman of the Board of the American Association of Political Consultants, and last year served as its President. *Id*. Since 1967, he has worked for more than 300 campaigns. *Id*. Representative clients at the presidential, congressional, and gubernatorial levels have included Lloyd Bentsen, Paul Simon, Gary Hart, Bill Clinton, Al Gore, Mary Landrieu, and Zell Miller. *Id*. In the last two decades alone, his firm has "helped elect candidates in 44 states and five countries, including 13 Senators, 8 Governors, and scores of Congress members. [His firm has] won more Democratic Primaries than any other firm." *Id*.

"issue ads" and candidate ads.

Strother Decl. ¶ 4 [DEV 9-Tab 40]. During the cross-examination period, Strother made another observation:

> What you're trying to do is give people enough information [sic] they can make up their own minds. Of course, you're leading them to make up their minds in one direction, but I don't call that hard sale. People tend not to vote for issues anyway, most of the time. They tend to vote for the individual, and they measure the individual by issues.

Strother Cross Exam. at 43 [JDT Vol. 32]; *see also id*. at 44 (observing that 90% of candidate advertisements Strother has put together in his career have *not* used express advocacy).

2.3.3 Unrebutted expert testimony confirms the view of political consultants. Krasno and Sorauf state that:

> the practices of political advertisers are not dissimilar from those of commercial advertisers. Car ads rarely exhort viewers to "buy" a Chevrolet, nor do soft drink ads urge people to "drink" their product. The most aggressive ads usually urge viewers to do no more than call or visit a website for information. . . . This atmospheric approach to commercial advertising–where the product is presented in various desirable tableaus–has become increasingly popular. It serves the general strategy of advertisers to present viewers with a variety of reasons to choose their product, hoping that they will latch onto one. Too heavy-handed an approach might interfere with this process by raising viewers' defenses. Political ads seem to follow the same strategy, hoping that citizens will grow to prefer a candidate without being told to troop to the polls. That may or may not be an effective approach, but it is the one that advertisers use and that regulators and courts must reckon with.

Krasno and Sorauf Expert Report at 54 [DEV 1-Tab 2] (footnote omitted); *see*

also Magleby Report at 15 [DEV 4-Tab 8] ("The absence of magic words in electoral communications does not impede the ability of media consultants to craft an electioneering message. In fact, candidates rarely use the magic words in their own ads.").

2.4 **Current Federal Law Does Not Distinguish Between Pure Issue Advertisements and Candidate-Centered Issue Advertisements**

Not only are words of express advocacy uncommon and ineffective in campaign advertising, it is also undisputed that they are ineffective criteria for distinguishing between genuine issue advertisements and advertisements that do not use express advocacy but are designed to influence a federal election.

2.4.1 Experts provided uncontroverted testimony to support this point. "The 'magic words' defined in *Buckley v. Valeo* do not provide an effective way to determine whether advertisements have the purpose and/or effect of supporting or opposing particular candidates." Magleby Report at 5 [DEV 4-Tab 8]; *see also* Krasno and Sorauf Expert Report at 58 [DEV 1-Tab 2] ("The magic words test, however, does not distinguish between [pure issue advertisements and candidate-oriented issue advertisements]; indeed it does not distinguish between ads sponsored by candidates and any type of issue ad, or even between political and commercial advertising. Whatever its utility might once have been, this standard is now irrelevant to how political ads are designed.").

2.4.2 Present and former officeholders and candidates likewise provide

uncontroverted testimony that "magic words" do not distinguish pure issue advertisements from candidate-centered issue advertisements. 147 Cong. Rec. S3072 (2001) (Senator Russ Feingold) ("People didn't need to hear the so-called magic words to know what these ads were really all about."); 147 Cong. Rec. S3036 (Senator John McCain) ("[W]e can demonstrate that the Court's definition of "express advocacy"–magic words–has no real bearing in today's world of campaign ads."). Senator Carl Levin made the following statement on the floor of the Senate in 1998:

> To show the absurd state of the law, at least in some circuits, we can just look at one of the 1996 televised ads that was paid for by the League of Conservation Voters and which referred to House Member Greg Ganske, a Republican Congressman from Iowa, who was then up for reelection. This is the way the ad read:
>
> *It's our land; our water. America's environment must be protected. But in just 18 months, Congressman Ganske has voted 12 out of 12 times to weaken environmental protections. Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air. Congressman Ganske voted for the big corporations who lobbied these bills and gave him thousands of dollars in contributions. Call Congressman Ganske. Tell him to protect America's environment. For our families. For our future.*
>
> The ad sponsor claimed that was an issue ad, an ad that discussed issues rather than a candidate, and so could be paid for by unlimited and undisclosed funds. If one word were changed, if instead of 'Call Congressman Ganske,' the ad said, 'Defeat Congressman Ganske,' it would clearly qualify as a candidate ad subject to contribution limits and disclosure requirements. In the real world, that one word difference doesn't change the

> character or substance of that ad at all. Both versions unmistakably advocate the defeat of Congressman Ganske.

144 Cong. Rec. S10073 (1998) (Senator Carl Levin) (advertisement text in italics); *see also* Decl. of Elaine Bloom ¶ 5 [DEV 6-Tab 7] ("In my experience in campaigns for federal, state and local office, including my involvement in the television advertising we ran in my race for Congress, no particular words of advocacy are needed for an ad to influence the outcome of an election. Many so-called 'issue ads' are run in order to affect election results.").[81] As former Senator Dale Bumpers testifies:

> Soft money also finds its way into our system through so-called "issue advertisements" sponsored by outside organizations that mostly air right before an election. Organizations can run effective issue ads that benefit a candidate without coordinating with that candidate. They have experienced professionals analyze a race and reinforce what a candidate is saying. These ads influence the outcome of elections by simply stating "tell him [the opponent] to quit doing this." The "magic words" test is

[81] Elain Bloom is currently engaged in consulting, public speaking, and community activities. Bloom Decl. ¶ 2 [DEV 6-Tab 7]. In 2001, Bloom was a candidate for Mayor of Miami Beach, Florida. *Id*. In 2000, Bloom was the Democratic candidate in the general election to represent Florida's 22nd Congressional District, running against the incumbent Republican Clay Shaw, who had served in Congress for nearly 20 years. *Id* (Shaw won the race by approximately 500 votes out of over 200,000 cast). Prior to the 2000 race, Bloom served as a member of the Florida House of Representatives for over 18 years, from 1974 to 1978 (representing Northeast Dade County) and from 1986-2000 (representing Miami Beach and Miami). *Id*. Bloom was Speaker Pro-Tempore of the Florida House from 1992 to 1994, and also served as chair of several legislative committees, including the Health Care Committee, the Joint Legislative Management Committee, the Joint Legislative Auditing Committee, and the Tourism and Cultural Affairs Committee. *Id*.

> completely inadequate; viewers get the message to vote against someone, even though the ad may never explicitly say "vote-against-him."

Bumpers Decl. ¶ 26 [DEV 6-Tab 10]; *see also* Chapin Decl. ¶ 7 [DEV 6-Tab 12] ("Based on my experience in campaigns for federal and local office, including the television advertising we ran in my races for County Chairman and Congress, I am familiar with political campaign ads. No particular words of advocacy are needed in order for an ad to influence the outcome of an election.").[82] Congressman Christopher Shays, a Defendant-Intervenor, testifies:

> Although the Supreme Court has identified a limited category of "magic words" that make an advertisement a campaign advertisement, my experience as a candidate and a Member of the House is that this limited test is inadequate to identify campaign ads. Campaign ads need not include phrases such as "vote for," "re-elect" or "vote against" to be effective campaign tools, and the practice of large numbers of so-called "issue ads" before an election proves it.

---

[82] Since early 2001, Linda Chapin has been the Director of the Metropolitan Center for Regional Studies at the University of Central Florida. Chapin Decl. ¶ 2 [DEV 6-Tab 12]. Chapin was the Democratic candidate in the 2000 general election to represent Florida's Eighth Congressional District, which was an open-seat race. *Id*. ¶ 4. In the November 2000 general election, her Republican opponent received about 51% of the votes cast, and Chapin received about 49% of the votes cast. *Id*. ¶ 4. From 1998 to 2000, Chapin directed the Orange County (Florida) Clerk's Office. *Id*. ¶ 2. Prior to that, Chapin was elected to two successive four-year terms, in 1990 and 1994, as County Chairman of Orange County. *Id*. The County Chairman is a strong executive position roughly equivalent to a mayoral office. *Id*. Prior to her tenure as County Chairman, she was elected to a four-year term on the Orange County Commission in 1986.

Shays Decl. ¶ 12 [DEV 8-Tab 35].

2.4.2.1 Federal officeholders and candidates also testify that, based on their experience, the intent behind issue advertisements that mention the name of a federal candidate, are aired right before the election, and broadcast to the candidate's electorate, is to influence the election. Chapin Dep. at 27 [JDT Vol. 5] ("It's possible that you could debate the [fact that issue advertisements run within 60 days of an election can be both intended to influence the outcome of an election and intended to promote a particular perspective on a particular public policy issue], but in my experience those ads are almost entirely intended to influence the outcome of an election."); *see also* Paul Dep. at 27-28 [JDT Vol. 25] (Plaintiff Congressman Ron Paul testifying that the outside group issue ads run in his 2000 Congressional campaign were intended to influence the election.).

2.4.3 The uncontroverted testimony of political consultants confirms that there is no difference between campaign advertisements that contain words of express advocacy and candidate-centered issue advertisements that are designed to influence federal elections but that do not use the "magic words" of *Buckley*. Consequently, it is uncontroverted that political consultants are able to easily create advertisements designed to influence federal elections that do not use words of express advocacy, and therefore, can be paid for with funds from

prohibited sources (corporation and labor union general treasury funds).

Republican Political Consultant Douglas L. Bailey

> The notion that ads intended to influence an election can easily be separated from those that are not based upon the mere presence or absence of particular words or phrases such as "vote for" is at best a historical anachronism. When I first entered this business, and up through the mid-1980s, we were regularly able to purchase five minute slots of air time. In a five minute spot, I could introduce a candidate, bring the viewer to a comfort level with the candidate, cover a few different substantive issues, and at the end, have the candidate make a direct appeal for a vote. In this by-gone era, it made sense for a candidate to appeal directly for votes using words such as "vote for," "support," or"cast your ballot" on the basis of a more full or substantive story told in a five minute time period. By contrast, in a 30 second ad, there is not enough time to make a positive direct sale.

Bailey Decl. ¶ 5 [DEV 6-Tab 2].

Democrat Political Consultant Raymond Strother

> Because it is so easy for consultants in my business to make ads that will influence federal elections without triggering the need to use hard dollars to pay for them, the difference between hard money and soft money is a joke. If I want to use soft money to influence an election, there is no real difference in what I do to create the ad. The only thing that is different is the tag line at the end. From the point of view of a media consultant, there is no real difference between ending an advertisement with "Vote for Senator X" versus ending an advertisement with "Tell Senator X to continue working hard for America's families." The public simply does not differentiate between ads that are otherwise identical, but contain these slightly different tag lines at the very end.
>
> When we design, produce, and run "issue ads" that mention specific candidates for federal office and that are aired in

> proximity to an election, these ads are for only one purpose: to effect [sic] the outcome of an election. To call these ads "issue ads" is a sham. We know that these ads have been paid for with soft money; we know why we have been hired; and we know how easy it is to make sham issue ads that comply with the law, but nevertheless affect federal elections. We know this even without explicit instructions from our clients. Any media consultant who says otherwise isn't telling the truth. This is what everyone in the business does and you know what you are supposed to produce. It is playing within the current set of rules, but these rules need to be changed.
>
> One common trick that makes the job of creating sham issue ads even easier is the two-camera candidate shoot. Sometimes, the media consultant for the candidate's campaign committee will shoot the film and sell it to the media consultant for a third party for a reasonable rate. They simply take 2 cameras on a shoot when they are filming the candidate's ad. Camera A shoots the footage for the candidate's ad, and Camera B takes nearly identical footage that is then sold to other media consultants for a nominal fee. The media consultant for the third party just has to buy the film from Camera B and put on a clever tag line at the end. In this way, the candidate's media consultant gets direct control over the images of the candidate used in the issue groups' ads.

Strother Decl. ¶¶ 3, 8, 11 [DEV 9-Tab 40].

Republican Political Consultant Rocky Pennington

> Many soft money ads that avoid the magic words are clearly intended to affect federal elections. Parties and interest groups would not spend hundreds of thousands of dollars to runs [sic] these ads 15 days before an election if they were not trying to affect the result. These candidate-specific ads are not usually run the year before the election or the week after. The usual final tag line for soft money electioneering is to "call" or "ask" or "tell" a candidate to stop or continue doing something, often something vague like fighting for the right priorities. This is pretty silly, because it's hard to imagine thousands of people

> calling the candidate in response to the ad and saying, keep doing this, this is wonderful. These standard final words, like "tell," have become the real "magic words" in modern campaigning. I imagine some smart lawyer came up with them, because the real audience for them is not the voters, but the courts who may be examining the ad after the election.

Pennington Decl. ¶ 10 [DEV 8-Tab 31]. Both the Chamber of Commerce and AFL-CIO admit that "[t]he ultimate way to tell an elective official to do something is through the voting process." G. Shea Dep. at 46 [JDT Vol. 30]; Josten Dep. at 230 [JDT Vol. 12] ("I would say that [voting against a candidate] is probably one of the best ways to tell a politician you don't like what they are doing."). Plaintiffs attempt to challenge this premise by citing text from Senator Feingold's deposition that his constituents do call him about issues they may have seen in issue advertisements; however, a careful reading of the colloquy makes clear that the type of advertisements his constituents may have seen is never clarified. I cannot conclude from this exchange that the advertisements that led to those telephone calls would be covered by Title II of BCRA. During his deposition, Senator Feingold only indicates that he receives calls from constituents in response to television advertisements. Senator Feingold was not specifically asked if these advertisements were the type covered under Title II of BCRA. Feingold Dep at 238-39 [JDT Vol. 6] ("Q. . . . You mentioned ads, and I have shown you ads which say call Senator so and so, contact Senator so and so. Your constituent sometimes do call you

and contact you, do they not? A. Yes, they do. Q. And they sometimes talk about issues including abortion, right to life issues and other issues, do they not? A. Yes, they do. Q. In your opinion, are they sometimes affected by advertisements that they have seen on television? A. I'm sure they are.").

Democrat Political Consultant Terry S. Beckett

> I am aware of the idea that particular "magic words" might be required in order for an advertisement to influence an election. However, in fact no particular words of advocacy are needed in order for an ad to influence the outcome of an election. No list of such words could be complete: if you list 50, savvy political actors will find 100 more. For example, many so-called "issue ads" run by parties and interest groups just before an election attack a candidate, then end by supposedly urging the viewer to "tell" or "ask" the candidate to stop being that way. These ads are almost never really about issues. They are almost always election ads, designed to affect the election result, and many do affect the election result. You can see this most clearly in the ones that amount to personal attacks, or that criticize a candidate on several unrelated "issues." In fact, in my experience, candidates tend to shy away from such negative attack ads because there would be political repercussions for them. But entities like the DCCC [Democratic Congressional Campaign Committee] and the Club for Growth do not have such constraints. Based on my observations, the candidate ads in the 2000 Congressional race, which were financed with federal funds ("hard money"), were actually more about "issues" than the supposed "issue ads" run by political parties and interest groups, which I understand were financed at least in part with non-federal funds("soft money").

Beckett Decl. ¶ 8 [DEV 6-Tab 3].

Democrat Political Operative Joe Lamson

> Based on my experience in managing many federal election

> campaigns, I am familiar with campaign advertising. No particular words of advocacy are needed in order for an advertisement to influence the outcome of an election. When political parties and interest groups run "issue ads" just before an election that say "call" a candidate and tell her to do something, their real purpose is typically not to enlighten the voters about some issue, but to influence the result of the election, and these ads often do have that effect. Parties and groups generally run these pre-election "issue ads" only in places where the races are competitive. These "issue ads" generally stop on the day of the election. For example, these groups could run ads explaining Nancy Keenan's position on the issues after the November general election so that people could discuss them over the Thanksgiving dinner table, but it doesn't seem to work that way.

Lamson Decl. ¶ 6 [DEV 7-Tab 26].

Former Chair of Plaintiff NRA Political Victory Fund Tanya K. Metaksa[83]

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

[83] Metaksa served as Chairman of the National Rifle Association Political Victory Fund and as Executive Director of the NRA Institute for Legislative Action. She made the statement above in her opening remarks to the American Association of Political Consultants' Fifth General Session on "Issue Advocacy." INT 015987, Opening Remarks at the American Ass'n of Political Consultants Fifth General Session on "Issue Advocacy," Jan. 17, 1997, at 2 [DEV 38-Tab 25]. During this litigation, NRA Executive Vice President Wayne LaPierre testified that Ms. Metaksa is "someone who was knowledgeable about NRA's political strategies" and was someone who was "a reliable and trustworthy employee of NRA." LaPierre Dep. at 11 [JDT Vol. 14]. Plaintiffs have not objected to Ms. Metaksa's statement on hearsay grounds and given Mr. LaPierre's comments, I find Ms. Metaksa's statement trustworthy and rely on it for purposes of my Findings.

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

INT 015987, Opening Remarks at the American Ass'n of Political Consultants Fifth General Session on "Issue Advocacy," Jan. 17, 1997, at 2 [DEV 38-Tab 25].

2.4.4 As a result of these developments, Congress found that FECA, as construed by the Courts to limit only independent expenditures containing *Buckley*-defined express advocacy, was no longer relevant to modern political advertising. *See, e.g.*, 148 Cong. Rec. S2117 (2002) (Statement of Sen. James Jeffords) ("The 'magic words' standard created by the Supreme Court in 1976 has been made useless by the political realities of modern political advertising. Even in candidate advertisements, what many would say are clearly advertisements made to convince a voter to support a particular candidate, only 10 percent of the advertisements used the 'magic words.'"); *see also* 148 Cong. Rec. S2116 (2002) (Statement of Sen. Carl Levin) ("[T]he Brennan

Center study found that of the ads actually run by candidates and paid for with hard money specifically on behalf of their election or defeat, only 9 percent used the seven magic words and phrases identified by the Supreme Court. That is compelling evidence that the magic words identified by the Supreme Court are not a complete test of what constitutes electioneering ads. More is at work here than just the seven magic words identified by the Supreme Court.").

2.5 **Candidate-Centered Issue Advocacy Has Risen Because it Permits Corporations & Labor Unions to Influence Federal Elections with General Treasury Funds While Avoiding FECA's Restrictions**

It is uncontroverted that the shift toward using issue advocacy can be explained by three phenomena. "First, it permits groups and individuals to avoid disclosure. Second, it allows them to avoid contribution limits. Third, it permits some groups (such as corporations and labor unions) to spend from generally prohibited sources." Magleby Report at 18 [DEV 4-Tab 8]; *see also* Krasno and Sorauf Expert Report at 50 [DEV 1-Tab 2] (Avoiding FECA allows advertisers to collect any sum of money from any source they can. Avoiding FECA allows advertisers to conduct their operations without disclosing their activities to the public.").

2.5.1 *Avoid Disclosure*

It is not disputed that one advantage to using candidate-centered issue advertising to influence federal elections is that the advertisements are outside

FECA's purview. Accordingly, disclosure is not required for the organization paying for these advertisements. Magleby Expert Report at 18 [DEV 4-Tab 8] ("The 1996, 1998 and 2000 election cycles all saw examples of groups who sought to avoid accountability for their communications by pursuing an electioneering advertising/election advocacy strategy rather than limiting their activities to independent expenditures or other activities expressly permitted by the FECA."). Indeed, Plaintiffs' expert Sidney M. Milkis notes:

> It is important to point out, however, that interest groups have also increased their political advertisements that connect, indeed subordinate the discussion of issues to electioneering, much of it negative in tone. As an Annenberg Public Policy Center study indicates, the ads of special interest groups represented 68% of all spending on issue ads in the 1999-2000 cycle; interest groups spent more than $347 million on these issue advertisements. The names of these groups did little to tell viewers who the sponsors of these messages were; indeed, in some cases they were misleading. For example, The Citizens for Better Medicare, which spent $65 million on television ads, is funded primarily by the pharmaceutical industry. Not only were the funding sources of interest groups ads more misleading than party-sponsored ads, they also tended to be more negative, especially in the early stages of the 2000 campaign.

Milkis Decl. ¶ 49 [RNC Vol. VII] (citing Annenberg Report 2001). Aside from the observation of Plaintiffs' expert Milkis about the lack of disclosure relating to political advertisements, two further examples illustrate this point:

- In 1998, the AFL-CIO helped pay for ads in the Connecticut Fifth Congressional District race through a group named the "Coalition to Make Our Voices Heard." Steven Rosenthal defended campaigning under an obscure name in this case

> saying, "Frankly we've taken a page out of their book [other interest groups] because in some places it's much more effective to run an ad by the 'Coalition to Make Our Voices Heard' than it is to say paid for by 'the men and women of the AFL-CIO.'"

Magleby Expert Report at 18-19 [DEV 4-Tab 8] (citing Rosenthal's comments at a lunchtime discussion panel at the Pew Press Conference).

- One or more sources of the funds used by Plaintiff NRA to finance at least one political advertisement that identified a candidate and that was broadcast on television or radio within the 60 days preceding a general election in a state or Congressional district in which that candidate was running for federal office has not been publicly disclosed.

Resps. of the NRA and the NRA Political Victory Fund to Def. FEC's First Req. for Admis., No. 12, 5 [DEV 12-Tab 9] ("The NRA is not required under applicable law to disclose the specific individuals who provide it with funding, and it respects the strong desire of many of its members and contributors to remain anonymous.").

2.5.2 *Avoid Source Limitations*

Federal law has long prohibited corporations and labor unions from using their general treasury funds for federal election purposes. Therefore, another advantage to candidate-centered issue advertising is that the advertisements can be paid for with general treasury funds and thereby avoid FECA's source restrictions. Magleby Expert Report at 19 [DEV 4-Tab 8] ("The ability of corporations and trade unions to effectively campaign through electioneering

advertisements and election advocacy" under the rubric of issue advocacy by avoiding the magic words, "makes a sham of these longstanding federal laws.").

2.5.3 *Avoid Contribution Limitations*

As donations of nonfederal funds are not limited by federal law, "groups can raise larger amounts of money in less time." Magleby Expert Report at 19 [DEV 4-Tab 8] (For example, "groups like Citizens for Better Medicare, Pharmaceutical Research and Manufacturers of America, NAACP National Voter Fund, and NARAL, were able to far exceed what individuals, PACs or parties could do through hard money contributions."); *id*. at 10 ("[T]his method of advocacy allows groups to accept unlimited contributions to pay for the communications."). This fact provides another advantage of using candidate-centered issue advocacy.

2.6 **Organizations' Use of Candidate-Centered Issue Advocacy**

Examples from the record demonstrate that organizations use candidate-centered issue advertising as a means of avoiding FECA's restrictions.

2.6.1 *AFL-CIO's Issue Advocacy Media Campaign Surrounding the 1996 Federal Election*

The evidence demonstrates that the AFL-CIO's issue advertising campaign in and around the 1996 federal general election was designed to influence the election and was paid for with general treasury funds.

2.6.1.1 Denise Mitchell,[84] Special Assistant for Public Affairs to AFL-CIO President John J. Sweeney, states that she "realize[s] that AFL-CIO advertising could affect how citizens vote. . . . [T]hey may in some cases have an indirect effect on election outcomes. . . . This, however, has never been the point of our broadcast advertising program. . . ." Mitchell's statement is controverted by evidence from the record that the AFL-CIO did not attempt to rebut or discount:

- A September 18, 1996, memorandum from a polling firm analyzed the potential impact of five issue advertisements in terms of their likely effect on voters. Memorandum from Guy Molyneux and Molly O'Rourke of the polling firm Peter D. Hart Research Associates, Inc., to the AFL-CIO's Special Assistant for Public Affairs, Denise Mitchell, "Ad Targeting" (Sept. 18, 1996), AFL-CIO 001614–16 [DEV 124] ("[The advertisement]

[84] Denise Mitchell is the Special Assistant for Public Affairs to AFL-CIO President John J. Sweeney. Mitchell Decl. ¶ 1 [6 PCS]. She was appointed to this position on November 1, 1995, shortly after Sweeney was elected President of the AFL-CIO. *Id*. Prior to assuming this position, Mitchell had worked with Sweeney in a similar role for a number of years when he was President of the Service Employees International Union and she had assisted in his campaign for election to the position of AFL-CIO President. *Id*. Mitchell has worked in marketing and media relations for unions and other non-profit organizations on working family issues for more than 20 years. *Id*. In her current position, Mitchell has the primary responsibility for overseeing all public relations activities of the AFL-CIO including all AFL-ClO use of broadcast and print media. *Id*. ¶ 2. Mitchell is responsible for making the operational decisions as to both the substance and the method of communication of the AFL-CIO's message to union members and to the general public. *Id*. Mitchell makes the strategic and logistical decisions regarding the AFL-CIO's media buys, and, within policy guidelines, makes the editorial decisions regarding the content of the AFL-CIO's communications.

Taxes appears to be the single strongest spot, in terms of *reaching the widest range of voters and affecting people's impression of the incumbent's Issue position.* It should especially be directed to younger voters. [The advertisement] Kids is also very strong, and again should be directed to young people. [The advertisements] Medicare, Homes, and Retire are most effective with older audiences. If you can only run 4 spots, [the advertisement] Retire is probably the one to drop.") (emphasis added); *see also* Memorandum from Geoff Garin and Guy Molyneux of Peter D. Hart Research Associates, Inc. to Denise Mitchell, "AFL-CIO Mall Intercepts Survey" (Sept. 13, 1996), AFL-CIO 001582-84 [DEV 124] (Mall Intercept Survey of individuals' reactions to these advertisements including *how the advertisements made the respondents feel about fictitious congressman's position on each issue*); *see also* Mitchell Cross Exam. at 66-75 [JDT Vol. 23].

- On March 29, 1996, Mitchell received a memorandum from a campaign consultant analyzing political media consultants for the AFL-CIO. The memorandum stated:

> Political campaigns are superheated environments where the objective is not, always, to make the best looking spot. The objective is to communicate with the persuadables at the time they are making their decision. Being able to pivot the entire campaign at exactly the right time is the real talent of a media consulting firm. Consequently, there is little reward for great spots.
> No one knows better than you how consuming this can be. . . .
> [These advertisements can be done], but you must understand that you will be asking these political consultants to do it under rules they have never had to follow before. . . .
> What [all of these firms can do] is manage the political message in a volatile environment.

Memorandum from Joe Cowart of Joseph Cowart Campaign Consulting to Denise Mitchell, "Political Media Consultants" (Mar. 29, 1996), AFL-CIO 001702–04 [DEV 124].

- An October 9, 1996, internal memorandum from the AFL-CIO's Brian Weeks to AFL-CIO's Mike Klein discussed where media buys might be placed to help Dick Durbin in his Illinois Senate race, based on Mr. Durbin's lack of resources to air advertisements in certain markets. Memorandum from Brian Weeks to Mike Klein, "Electronic Buy for Illinois Senator" (Oct. 9, 1996), AFL-CIO 005244 [DEV 125].

Accordingly, with regard to the AFL-CIO's issue advertising campaign that aired before the 1996 general election, I find that Mitchell's statement that the indirect effect on election outcomes has never been the point of the AFL-CIO's broadcast advertising program, Mitchell Decl. ¶ 70 [6 PCS], carries no weight in light of these internal documents.

2.6.1.2 It is clear that the AFL-CIO's issue advocacy campaign was designed to influence the 1996 general election and was accomplished through candidate-centered issue advocacy so as to avoid FECA's source limitations. Independent expert testimony, which has not be countered by the AFL-CIO with any contrary expert testimony, demonstrates that the AFL-CIO's 1996 issue advocacy campaign was designed to influence federal elections:

> The 1996 initiative by labor into unregulated and unlimited electioneering communications was substantial. The AFL-CIO spent a reported $35 million dollars (see Deborah Beck, Paul Taylor, Jeffrey Stanger, and Douglas Rivlin, "Issue Advocacy Advertising During the 1996 Campaign: A Catalog," report series by the Annenberg Public Policy Center, no. 16, 16 September 1997, 10), much of it on television, aimed at defeating 105 members of Congress, including 32 heavily targeted Republican freshmen. See Paul Herrnson, *Congressional Elections: Campaigning at Home and in*

> *Washington*, (Washington, D.C.: Congressional Quarterly, 1998), 123. Labor broadcast television commercials in forty districts, distributed over 11.5 million voter guides in twenty-four districts and ran radio ads in many others. See "Labor Targets," *Congressional Quarterly Weekly Report*, 26 October 1996, 3084; Jeanne I. Dugan, "Washington Ain't Seen Nothin' Yet," *Business Week Report*, 13 May 1996, 3.

Magleby Expert Report at 10 n.7 [DEV 4-Tab 8] (citation omitted); Mann Expert Report at 28 [DEV 1-Tab 1] ("The AFL-CIO was one of the first nonparty groups in 1996 to seize the opportunity to broadcast electioneering ads under the guise of issue advocacy (Dwyre 1999); they continue to avail themselves of that opportunity today (Magleby 2002)."); Krasno and Sorauf Expert Report at 52 [DEV 1-Tab 2] ("For example, the AFL-CIO in the first issue ad campaign in House elections in 1996 acknowledged its intent to help Democratic candidates, and its results were measured accordingly.") (footnote omitted); *see also* Mitchell Dep. at 96-97 [JDT Vol. 23] (stating that in 1996, in the 60 days before the election, in terms of dollars spent by the AFL-CIO on broadcast advertising, the substantial majority of that money was spent on advertisements that mentioned members of the House of Representatives).

2.6.1.3 In fact, Mitchell admits that some of the AFL-CIO's advertisements were intended to directly or indirectly influence the 1996 general election. Mitchell testifies that after Congress adjourned on October 3, 1996, the AFL-CIO discontinued its broadcast advertisements "aimed at immediately pending

legislative issues." Mitchell Decl. ¶ 42 [6 PCS]. The AFL-CIO then began to run "electronic voter guides" which compared the positions of congressional candidates on various issues. *Id*.; Mitchell Cross Exam. at 183-84 [JDT Vol. 23] ("Is there any ad which the AFL-CIO ran in the 60-day period prior to the federal elections of 2000, 1998 and 1996 where you concede that a purpose was to affect the vote in the forthcoming election? . . . A Well, would you include indirectly affect? Do you want to ask it that way? Q I will start with that way. A Okay. You know, certainly the voter guides in particular had that as a purpose."); *see also id*. at 184 ("Q You do concede that the ads that you ran in the 60 days prior to 2000, 1998 and '96 might have had the effect of influencing votes in the forthcoming election, don't you? A I don't -- right, I don't deny that among other things they might have had an effect on how citizens perceived office holders and had an effect on their vote.").

2.6.1.4 In an FEC investigation into organized labor's role in the 1996 election, the General Counsel found:

> In the nine flights broadcast between late June and mid-September, 1996, the advertisements would criticize the incumbent member of Congress named therein, frequently in harsh terms, about his or her record on the issue that was the subject of the advertisement. However, with the exception of a flight of advertisements on the topic of the minimum wage that aired in late June and early July, 1996, there was no clear connection between the content of the advertisements and any legislation that was then the subject of intensive legislative action at the time of the advertisements. The targets of these

> advertisements were uniformly both Republicans and incumbents. In the eight flights that began in late September and continued through election day, the advertisements took the form of so-called "electronic voter guides," comparing the Republican incumbent and the Democratic challenger (or the Republican and Democratic nominees, in the cases of open seats) on a particular issue; the Democratic candidate's record was uniformly presented more favorably than the Republican candidate's. The scripts of both kinds of advertisements appeared to have been carefully designed to avoid "express advocacy" of the election or defeat of any candidate. . . .

FEC MUR 4291, General Counsel's Report, June 9, 2000, at 5-6, INT003837-38 (footnote omitted) [DEV 52-Tab 3]. The investigation into the AFL-CIO's tactics sought to ascertain whether AFL-CIO had coordinated election-related communications with candidates for Federal office, their campaigns, or with political parties. *Id*. at 1. The investigation "developed no evidence of any instance in which the AFL-CIO made any communication to the general public after coordination with a recipient candidate or party committee that meets the standard for coordination set forth in *FEC v. The Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999)." *Id*. at 3. As a result of this conclusion, the General Counsel recommended to the Commission that the investigation into organized labor's role in the 1996 elections be closed. *Id*. at 1. Although the FEC concluded that there was no coordination under governing caselaw, the agency did find that with one exception the issue advertisements were directed at particular officeholders and candidates during the election cycle.

2.6.1.5 Other political organizations viewed the AFL-CIO's issue advertising campaign as designed to influence federal elections. One of the complaints filed with the FEC against the AFL-CIO was brought by the National Republican Congressional Committee ("NRCC"). McCain Decl., Attach. F [DEV 8-Tab 29] (Complaint in MUR 4307). The NRCC stated in their complaint:

> The [AFL-CIO] TV ads are careful not to specifically violate phrases contained in Sec. 100.22(a) such as "vote against Old Hickory" or "defeat accompanied by a picture of one or more candidate/s/" or "reject the incumbent". However there is clearly a violation of Sec. 100.22(b). *If one reads the language of that section and looks at the entire picture including external events it is obvious that any informed American clearly knows that the purpose of these ads is "expressly advocating" defeat of the Republican who is the subject of the ad.*

Id. at 1 (emphasis added).

2.6.1.6 The AFL-CIO has presented no uncontroverted evidence to substantiate their claim that the intended purpose of their issue advocacy with regard to the 1996 general election was unrelated to electing or defeating candidates for federal office. The AFL-CIO does concede, in fact, that its issue advocacy does have an affect on voters during the election cycle. Moreover, there is no dispute that the AFL-CIO's advertising campaign did affect the 1996 general election. Of the 32 House Republican freshmen the AFL-CIO targeted in 1996, 12 were defeated. Annenberg Report 1997 at 13 [DEV 38-Tab 21].

2.6.2 *The Coalition–Americans Working for Real Change's Issue Advocacy Media Campaign Surrounding the 1996 Federal Election*

The evidence demonstrates that similar to the AFL-CIO's issue advertising campaign during the 1996 election cycle, business interests (known as The Coalition–Americans Working for Real Change) responded with their own issue advocacy campaign designed to influence the election and paid for with corporate general treasury funds thereby permitting these corporations to evade FECA's source limitations. The record also demonstrates that by running candidate-centered issue advertisements The Coalition was able to avoid FECA's disclosure requirements and hide its corporate sponsors behind an ambiguous and unobjectionable pseudonym.

2.6.2.1 In their proposed findings, the Chamber of Commerce, NAM, and the Associated Builders and Contractors claim that "Defendants' assertion that The Coalition's 1996 activities show that preelection issue ads are merely candidate ads in disguise is mistaken. Participants in The Coalition were unanimous that its ads were intended to respond to issue ads being run by the AFL-CIO." Proposed Findings of Fact of Chamber, NAM, Associated Builders and Contractors, *et. al.* ¶ 24. Bruce Josten, Executive Vice President for Government Affairs for the U.S. Chamber of Commerce, testifies that the purpose of the advertisements aired during the 1996 federal election was to respond to attack advertisements paid for by the AFL-CIO and organized by

its president, Mr. John Sweeney, and not to influence the election of any federal candidate. Josten Dep. at 165 [JDT Vol. 12] ("The purpose of this coalition, specifically, only, uniquely was to respond to [John Sweeney's] ads and the false statements in them, in some cases, up to 75 Congressional districts. That was the mission of this coalition."). Mr. Josten explained that there "were TV markets where John Sweeney ran an ad accusing a member of Congress about their votes on the issues that I mentioned earlier, and in the spring he started running ads that were not true, and we would follow him" with television ads paid for by the Coalition. *Id*. at 44. According to Mr. Josten, the AFL-CIO commercials attacked Members of Congress who had supported pro-business initiatives and legislation favored by the Coalition. "My objective was to knock down impressions that Mr. Sweeney and his advertisers and campaigns were trying to undertake and express our viewpoints exactly the opposite of that and let the viewers make their own decision about that dialogue that was being imposed on them." *Id*. at 88.

2.6.2.2 Josten's testimony is controverted by specific evidence in the record that indicates that one purpose of the advertising campaign was to influence the 1996 general election:

- In 1996, the Coalition sought proposals from advertising firms for a "campaign to re-elect a pro-business Congress." TC00698 [DEV 121]. Media consultant Alex Castellanos of National Media, Inc. opened his proposal to the Coalition by stating: "Thank you for the opportunity to

present two 30 second television and one 60 second radio scripts, as requested, to your campaign to re-elect a pro-business Congress." *Id*.

- The Coalition commissioned firms to conduct polls and focus groups to measure voter responses to their advertisements. AV0024-40, 0046-47, 0060-64, 0106-118, 0139-41 [DEV 121]. The Coalition retained two polling organizations in 1996, the Tarrance Group and American Viewpoint, to test whether specific Coalition and AFL-CIO advertisements would make participants more or less likely to vote for particular federal candidates. FEC MUR No. 4624, General Counsel's Report, April 20, 2001, at 22-23 [DEV 53-Tab 6]; Josten Dep. at 68-114 [JDT Vol. 12]. One firm surveyed "voter attitudes nationwide," TC 00513-37 [DEV 121], and another survey tested possible Coalition ads on focus groups, including one of "Swing Voters." AV0139-41, AV0037-40 [DEV 121].

- A June 28, 1996, Tarrance Group memorandum to the Coalition stated: "The net result among swing voters in Cleveland was that 25% of participants were moved closer to voting for a Republican candidate for Congress and about half of the participants were moved against national labor leaders. In other words, the response ads not only leveled the playing field, but put some points on the board for Republican candidates as well." AV139 [DEV 121] (stating that Republican Members of Congress are "currently under attack by AFL-CIO advertising" and are "outgunned and outclassed" and if "targeted Republicans ever hope to be operating on an even playing field during the 1996 election, it will require that an outside voice come to their defense.").

- A July 12, 1996, memorandum to the Coalition from American Viewpoint on "Key Findings of the Pre-Test in Des Moines Media Market of Iowa 4" concludes that Congressman "Greg Ganske is in deep trouble in the Des Moines Market," and states that "this is one of the most challenging districts that could have been chosen to assess the impact of your advertising. . . . If advertising can move numbers in this district, it should be effective in most other districts. Voters have not yet focused on the union's campaign as only 25% has seen the commercials. As a result, there is still time to reach them with a substantial buy." Memorandum from Gary Ferguson to the Coalition Steering Committee, "Key Findings of the Pre-Test in the Des Moines

Market of Iowa 4" (July 12, 1996), NAW0002, 05 [DEV 121].

- One Coalition document included five headings referring to 1996 Congressional races: "Lean/Tilt DEM," "Toss-Up/Tilt GOP," "Lean GOP," "GOP Favored," and "Watch List." TC-00662-63 [DEV 121]. Under each heading is a list of candidates, and next to the names an indication of whether there has been a single or double media buy, or whether the buy has been pulled. *Id*.

- In late 1996, the Coalition commissioned the Tarrance Group to conduct a detailed post-election analysis. The Tarrance Group, *Coalition Post-Election Survey Analysis*, NAM0206-27, at NAM0213 [DEV 121]. The Tarrance Group reported:

> The Coalition commissioned this research to assess the impact of their two-month advertising campaign and its relative effect on voters in the face of the very aggressive, year-long campaign sponsored by the AFL-CIO. Given that four of the six Republican candidates tested in this research won their respective races, one could conclude that the Coalition's efforts were a success–as they were in the vast majority of the targeted districts in which the Coalition was involved.
>
> To be sure, the most compelling empirical evidence that Coalition dollars were spent effectively is the fact that although the AFL-CIO outspent the Coalition by nearly 7 to 1 and began their onslaught almost a year earlier, voters in the tested districts were only twice as likely (36% average) to recall having seen, read, or heard the labor union's advertising as they were the business coalition's advertising (16% average).
>
> Memorandum from Brian Tringali and Gary Ferguson of American Viewpoint and the Tarrance Group to Chuck Greener of the Coalition, "Key Findings from Post-Election Surveys in OH-6, IA-4, WA-1, WA-5, WA-9, and KY-1," (November 22, 1996), NAM0208 [DEV 121]; *see also* "Report on Accomplishments" TC00610-13 [DEV 121] (document Coalition sent to its

> members noting the successes of the Coalition's campaign among swing voters).

Accordingly, as to The Coalition's issue advertising campaign that aired before the 1996 general election, I find that Josten's statement that the purpose of the coalition was "only" to respond to the advertising campaign of the AFL-CIO, Josten Dep. at 165 [JDT Vol. 12], carries no weight in light of these internal documents.

2.6.2.3 It is clear that The Coalition's issue advocacy campaign was designed to influence the 1996 general election and was accomplished through candidate-centered issue advocacy so as to avoid FECA's source and disclosure limitations. Independent evidence confirms that The Coalition's issue advertising campaign surrounding the 1996 general election was designed to influence the election. This expert testimony, which has not been controverted by any contrary expert testimony by Plaintiffs, concludes that:

> The business community responded to [the 1996 initiative by labor into unregulated and unlimited electioneering communications] with their own unlimited and undisclosed communications, again avoiding any of the magic words. Partners in the business response were the National Federation of Independent Business (NFIB), U.S. Chamber of Commerce, the National Association of Wholesaler-Distributors, the National Restaurant Association and the National Association of Manufacturers. Their group, called the "Coalition–Americans Working for Real Change," was active in thirty-seven House races, spent an estimated $5 million on over thirteen thousand television and radio commercials, and mailed over two million letters mainly in support of Republicans, to

> owners of small business. *See* Paul Herrnson, "Parties and Interest Groups in Postreform Congressional Elections," in *Interest Group Politics*, 5th ed., ed. Allan Cigler and Burdett A. Loomis (Washington, D.C.: Congressional Quarterly, 1998), 160-61.

Magleby Report at 10 n.7 [DEV 4-Tab 8]; *see also* Josten Dep. at 29 [JDT Vol. 12]; Huard Dep. at 58 [JDT Vol. 11] (both noting that Coalition spent roughly $5 million on the campaign).

2.6.2.4 The FEC likewise concluded that the purpose of the Coalition's 1996 issue advocacy campaign was to influence the federal election. FEC MUR No. 4624, General Counsel's Report, April 20, 2001, at FEC MUR 4624, General Counsel's Rep., April 20, 2001, at 35 [DEV 53-Tab 6] ("The facts set out above establish that the Coalition's communications were undertaken for the purpose of influencing federal elections . . . ."); *id*. at 44-45 (recommending that the case against the Coalition be closed). Like the AFL-CIO, although the FEC recommended that the case be closed, that decision does not change the fact that it found that the Coalition sought to influence the 1996 general election with its issue advertising campaign.

2.6.3 *Citizens for Better Medicare*

Citizens for Better Medicare ("CBM") is an organization funded by the pharmaceutical industry that spent heavily on candidate-centered issue advertisements designed to influence the 2000 general election and paid for

with the general treasury funds of their corporate members, thereby avoiding the source limitations of FECA. Like The Coalition, CBM also used issue advocacy to avoid FECA's disclosure requirements.

2.6.3.1 Timothy Ryan, former executive director of CBM, testifies that CBM is an organization sponsored by PhRMA, an industry trade association, and its activities were primarily financed by major drug companies. Ryan Dep. at 13 [JDT Vol. 27] ("We solicited funding from the pharmaceutical companies to underwrite our efforts."); *id*. at 10-11 ("PHRMA was really the leading organization to organize and fund CBM."); PH 0379 [DEV 128-Tab 2] (Letter from PhRMA President and CEO to Amgen, "enclosing a contribution form for the grassroots and local media activities of CBM . . . . All information in your reply will be kept in strict confidence except as required by law or a court of competent jurisdiction."); CBM 0029 [DEV 128-Tab 1] (tally of donations from major drug companies to CBM in FY 2001, totaling $39,586,892.32). Despite the source of its funding, CBM describes itself as "a grassroots organization representing the interests of patients, seniors, disabled Americans, small businesses, pharmaceutical research companies and many others concerned with Medicare reform." *CBM: Who We Are* . . . [DEV 128-Tab 1]. Given that it is undisputed that the pharmaceutical industry financed CBM, CBM stands as an example of how FECA's disclosure requirements can be

avoided by running candidate-centered issue advertisements behind a misleading name like "Citizens for Better Medicare."

2.6.3.2 At the point in time the House of Representatives was considering a prescription drug benefit bill, Ryan testifies that CBM ran a series of advertisements that did not refer specifically to individual Members of Congress. Ryan Dep. at 42 [JDT Vol. 27]; *see also* Castellanos Dep. at 103-04 [JDT Vol. 4]. This practice changed during the 60 days before the election where CBM's advertising focused on specific federal candidates. *See supra* Findings ¶ 2.6.3.3.

2.6.3.3 Judith Bello, senior adviser to PhRMA, states that PhRMA supported a market-oriented approach to prescription drug coverage, and Republicans typically endorsed that type of plan. Bello Dep. at 149-50 [JDT Vol. 1]. Alex Castellanos, a political consultant with National Media, testifies that CBM understood that the Democrats planned to use the prescription drug issue as a major theme in the 2000 election. Castellanos Dep. at 94–95. In response, in the *60 days* prior to the 2000 general election, CBM and the U.S. Chamber of Commerce spent heavily on "issue ads" supporting those Members and attacking Democratic candidates. Annenberg Report 2001 at 4, 20-22 [DEV 38-Tab 22]. Castellanos states that these advertisements mentioned Members' names. Castellanos Dep. at 63–66 [JDT Vol. 4]; *see also* Ryan Dep. at 68–72,

79–85 [JDT Vol. 27]; Josten Dep. at 191–97 [JDT Vol. 12]; Bloom Decl. ¶¶ 6, 14, 16 [DEV 6-Tab 7]; Mitchell Dep. at 198–204 [JDT Vol. 23]; USA-CBM 00004 [DEV 128-Tab 1] (October 20, 2000, Memorandum to CBM file outlining "CBM Campaign Summary") (noting that for Fall 2000 the advertising theme was "Keep it Local" and discussing advertising strategy "[a]s the November 2000 elections grew closer").

2.6.3.4 According to Timothy Ryan, much of CBM's advertising strategy leading up to the 2000 election was aimed at supporting candidates attacked in AFL-CIO advertising. Ryan Dep. at 68-72 [JDT Vol. 27]; Castellanos Dep. at 63-66 [JDT Vol. 4]. CBM spent about $65 million on television advertising in the 2000 election cycle. Ryan Dep at 15 [JDT Vol. 27]. "Citizens for Better Medicare . . . spent almost as much money on issue ads as either political party," accounting for 13 percent of issue ad spending for the 1999-2000 cycle. La Raja Decl. ¶ 20(b) & Tbl. 10 [RNC Vol. VII] (reproduced from the Annenberg Public Policy Center).

2.6.3.5 The issue advocacy campaign of CBM run in the 60 days prior to the 2000 federal election demonstrates that these advertisements were designed to influence the federal election and evade FECA's source restrictions. This example also illustrates how organizations are able to use campaign-centered issue advocacy to avoid FECA's disclosure limitations and hide their identities behind euphemistic organizational

names.

2.6.4 *The National Rifle Association*

In addition to the AFL-CIO, The Coalition, and CBM, the National Rifle Association's ("NRA") use of issue advocacy around the 2000 federal election also clearly establishes that corporations use issue advocacy to directly influence federal elections and evade FECA's source limitations.

2.6.4.1 The NRA used issue advocacy to influence the 2000 federal election. Documentary evidence demonstrates this point:

- The NRA's media consultant, Angus McQueen, wrote an August 2000 memo entitled "NRA National Election Media Recommendations." The memo notes that the NRA's first objective is to "influence [the] outcome of [the] presidential election and other key congressional seats in 10 'battle ground' states." McQueen Cross Exam., Ex. 2, NRA-ACK 17913-15 [JDT Vol. 22]. McQueen is an advertising professional whom the NRA produced to testify specifically about the NRA's paid media program. *See generally* McQueen Decl. [11 PCS].

- Executive Vice President of the NRA, Wayne LaPierre, sent out a fundraising letter from the NRA to its members that stated that he "spent what it took [in 2000] to defeat Al Gore, which amounted to millions more than we had on hand." LaPierre Dep. Ex. 3 at 3 (NRA02575 [DEV 120]) [JDT Vol. 14]. LaPierre testified: "We took some money out of the reserves to cover the deficit that NRA had at the end of the 2000 year. . . . [The Gore advertising] was probably . . . the main contributing factor." LaPierre Dep. at 105 [JDT Vol. 14].

- The fundraising letter from LaPierre also stated that "I could choose to spend as much as the NRA possibly could, to get our message to gun-owning voters in critical swing states -- or I could hold funds in reserve for battles during 2001 and beyond." LaPierre Dep. Ex. 3 at 3 (NRA02575 [DEV 120]) [JDT Vol. 14]; *see also* LaPierre Dep. at 95-106 [JDT Vol. 14] (observing that the NRA spent $5 million to defeat

Al Gore). During his deposition, Mr. LaPierre was asked repeatedly if he had "spent what it took to defeat Al Gore." *Id.* at 95-102. Mr. LaPierre admitted that the statement was truthful, *id*. at 102, but sought to characterize it as about more than the Presidential election, *id*. at 101-02 ("Q. Is it true that regular NRA "spent what it took to defeat Al Gore"? A. If you include the culture of the country, yes. Al Gore was trying to change the culture of the country. We prevented him from doing it. That was the battle. It wasn't only an election battle. All these politicians think of this stuff only in election terms. And it's like–it's like they're 30 years out of date. The fact is this is about the air. It's about the airwaves. It's about the hearts and minds of America. And that's where the battle is being fought. And they're not willing to concede that. Yet we live it every day. So I'm not willing to concede the point that this was only about the elections, because the elections were about the air. And the air is what we were fighting for, that people breathe. We didn't want it to be only anti-firearm second amendment air, which is what they were trying to put out there.").

- LaPierre also testifies that he chose to do as much as he could for critical swing voters in swing states, meaning battleground states with respect to the Presidency, and in what were perceived to be close Congressional races. LaPierre Dep. at 157-58 [JDT Vol. 14]; *see also id*. at 159-165, 220-21.

2.6.4.2 The NRA created an advertising campaign in which "infomercials" would be run from September 1, 2000 to November 6, 2000. Two of the NRA's objectives were to "influence political elections where Republican seats are jeopardized" and "increase awareness of key gun issues as the Presidential election approaches." Memorandum from Jay Finks of the NRA's media firm Ackerman-McQueen to Melanie Hill of the NRA, "NRA Infomercial Fall Focus Campaign," June 5, 2000, NRA-PVF 00429-00432, at NRA-PVF 00429 [DEV 120].

2.6.4.3 Wayne LaPierre also testifies that the NRA "hoped [an NRA infomercial critical of Presidential candidate Al Gore] would impact the election." LaPierre Dep. at 177 [JDT Vol. 14]. When asked if the advertisement was designed in part to persuade viewers that they ought to vote against Gore, LaPierre testified: "We're happy if it did that. And, yeah, we're thrilled if it did that." *Id*. at 174-75. LaPierre thought that the Gore infomercials would have a "positive" political impact on the election: "Positive impact would mean a vote . . . against Al Gore." *Id.* at 277.

2.6.4.4 Not only does internal documentation and testimony from NRA officials demonstrate that the purpose of the group's 2000 issue advocacy campaign was to influence the federal election, the text of two radio advertisements illustrates the point as well. Moreover, these radio advertisements demonstrate that there is no meaningful difference between candidate-centered issue advertisements and campaign advertisements that use *Buckley*'s magic words. As the following demonstrates, at least one of the "issue ads" paid for with funds from the NRA's general treasury was virtually identical to express advocacy paid for by the NRA's PAC, with the terms of express advocacy in the PAC advertisement simply being omitted:

PAC Advertisement	Non-PAC Advertisement
MR HESTON:	HESTON: **Other issues may come and go, but no issue is as important as our freedom. And the day of reckoning is at hand.**
Did you know that right now in federal court, Al Gore's Justice Department is arguing that the Second Amendment gives you no right to own any firearm? No handgun, no rifle, no shotgun.	Did you know that right now in federal court, Al Gore's Justice Department is arguing that the Second Amendment gives you no right to own any firearm? No handgun, no rifle, no shotgun.
And when Al Gore's top government lawyers make it to the U.S. Supreme Court to argue their point, they can have three new judges handpicked by Al Gore if he wins this election.	And when Al Gore's top government lawyers make it to the U.S. Supreme Court to argue their point, they can have three new judges hand-picked by Al Gore if he wins this election.
Imagine . . . what would Supreme Court Justices Hillary Clinton, Charlie Schumer, and Dianne Feinstein do to your gun rights?	Imagine . . . what would Supreme Court Justices Hillary Clinton, Charlie Schumer and Dianne Feinstein do to your gun rights?
And what you think wouldn't matter any more. Because the Supreme Court has the final say on what the Constitution means.	And what you think wouldn't matter any more. Because the Supreme Court has the final say on what the Constitution means.
When Al Gore's Supreme Court agrees with Al Gore's Justice Department and bans private ownership of firearms, that's the end of your Second Amendment rights.	When Al Gore's Supreme Court agrees with Al Gore's Justice Department and bans private ownership of firearms, that's the end of your Second Amendment rights.
Please, vote freedom first. Vote George W. Bush for President.	
ANNCR: Paid for by the NRA Political Victory Fund and not authorized by any candidate or candidate's committee.	ANNCR: Paid for by the National Rifle Association.
NRA-ACK 14190 [DEV 120] (emphasis in original).	NRA-ACK 14192 [DEV 120] (emphasis in original).

NRA-ACK 14190, 14192 [DEV 120]. When confronted with these two scripts during his cross-examination, Angus McQueen, who created these two advertisements, admitted that one of his purposes in designing the commercials was to influence the results of the federal election. McQueen Cross Exam. at 41 [JDT Vol. 22] ("Insofar as providing information to an informed citizenry, the answer is a qualified yes."). Indeed, Mr. Wayne LaPierre testifies that these two scripts were "exactly the same." LaPierre Dep. at 269 [JDT Vol. 14]; *id*. at 270-71 (observing that in the Non-PAC advertisement, Mr. Heston's reference to the "day of reckoning" is a reference to the 2000 federal election). These two advertisements are emblematic of the meaningless distinction between candidate-centered issue advocacy run in close proximity to a federal election and advertisements that use express words of advocacy and are paid for with federal funds from a corporate or union PAC. Accordingly, I find that the NRA's issue advocacy campaign paid for with general treasury funds and run during the 2000 election was designed to influence that election and evade FECA's restrictions.

2.6.5 *The Club for Growth*

2.6.5.1 The Club for Growth provides another example of a corporation using general treasury funds on issue advocacy designed to influence a federal election. *See* CFG 000421 [DEV 130-Tab 5] (Board of Directors' minutes)

[document sealed].

2.6.5.2 David Keating, The Club for Growth's Executive Director admits that CFG's issue advocacy, "although educational, may also affect elections." Keating Decl. ¶ 8 [8 PCS]. Keating comments that "CFG has an overarching desire to change public policy which far exceeds any desire to affect elections." *Id*. It is clear from documentary evidence and independent evidence that The Club for Growth aims to change public policy by influencing federal elections.

2.6.5.3 The Club for Growth's mission statement states that the Club "is primarily dedicated to promoting the election of pro-growth, pro-freedom candidates through political contributions and issue advocacy campaigns." CFG 000217 [DEV 130-Tab 5].

2.6.5.4 In a brochure soliciting donations, The Club for Growth noted: "Before the elections, the Club plans to invest $1 million in television advertising in key congressional districts to advance our pro-growth issues. This is a tactic the unions have used so effectively against pro-growth candidates. These issue advocacy campaigns can make all the difference in tight races." CFG 000223 [DEV 130-Tab 5]; *cf*. NRW-02814 [DEV 129-Tab 2] (January 2, 2001, fundraising letter from the National Right to Work Committee noting that it had run "more than 1,000 television ads in Virginia, Nevada, Florida and Nebraska shining a spotlight on the differences between the candidates in

those states on Right to Work").

2.6.5.5 The testimony of political consultant Rocky Pennington, who worked for Republican candidate Bill Sublette is that:

> [i]nterest group broadcast ads had a very significant effect on the outcome of the 2000 Congressional race [in Florida's Eighth district], especially the ads run by the Club for Growth. . . . [T]he Club for Growth and [competing Republican candidate Ric] Keller had made their relationship well known, and the Club for Growth ads clearly reflect an intent to help elect Mr. Keller. . . . In my view, the ad entitled "Keller Sublette Higher Taxes" . . . was a very, very effective one, and had it not run just before the primary, I believe Mr. Sublette would have reached 50% and there would have been no run-off. Our polling at that time indicated that we were in good shape, until the Club for Growth ads began.

Pennington Decl. ¶ 15 and Ex. 3-1 [DEV 8-Tab 31]; *see also* Keating Decl. ¶ 17 ("Within thirty days of the 2000 primary election in Florida, [The Club for Growth] ran approximately $90,000 in television and radio voter education advertising discussing the tax voting record of Bill Sublette.").

2.6.5.6 Independent expert testimony confirms that The Club for Growth uses issue advocacy to influence federal elections. Krasno and Sorauf Report at 52 [DEV 1-Tab 2] ("The Club for Growth, a conservative Republican group, bluntly discusses its electioneering activities on its website; they include direct contributions, bundled contributions, and issue ads.").

2.6.5.7 Without question, The Club for Growth aggressively used issue advocacy to influence the 2000 federal elections. The Club for Growth paid for these

advertisements with corporate general treasury funds and thereby evaded FECA's restrictions.

2.6.6 *Candidate-Centered Issue Advertisements May Be Run About Issues In Which the Group Running Them Has No Particular Interest*

Aside from the foregoing examples, another indicia that an issue advertisement has an electioneering purpose is that, in certain instances, candidate-centered issue advertisements are run by organizations who have no organizational interest in the advertisement's "issue."

2.6.6.1 Federal candidate Linda Chapin testifies that

> [t]he Florida Women's Vote project of EMILY's List also ran a television ad in the [2000 Florida Eighth District Congressional] campaign[,] . . . which as I recall was run in the two months prior to the general election[.] The ad praises my record on gun safety and ends with the line: "Tell Linda Chapin to continue fighting." This ad is clearly intended to influence the election result. Based on my observations, EMILY's List is not particularly interested in gun control issues. However, they are interested in supporting pro-choice female candidates like me, and this ad serves that purpose.

Chapin Decl. ¶ 13 [DEV 6-Tab 12]; *id*., Ex. 4 (advertisement storyboard); *see also* Chapin Dep. at 35-36 [JDT Vol. 5] ("Q. Did the ads [run by EMILY's List] mention your commitment to being pro-choice? A. No, and I think that's one thing that was interesting about these ads was that they were not about choice; they were about other subjects."); Beckett Decl. ¶ 13 [DEV 6-Tab 3] (The advertisement run by EMILY's List "praises Ms. Chapin's record on gun

safety . . . . EMILY's List is all about being pro-choice; gun safety is not their issue. Clearly, this ad is trying to elect Ms. Chapin. And I was not the only one who thought so. This ad was up during a period in the first half of October 2000 when the Chapin campaign was not on the air, in order to save resources. The [Republican candidate Ric] Keller['s] campaign noticed this and complained to a reporter, saying that this was a clear sign of coordination. I explained . . . that I had been advised by our consultants in Washington that under the current rules I was allowed to tell anyone what my plans were, as long as no one told me what their plans were. EMILY's List clearly knew what my plans were, they knew I was going dark at that time. I can only surmise that they decided to run this ad at that time based on that information. Obviously, the Keller campaign viewed this ad as one designed to assist Ms. Chapin's candidacy."); *id*. Ex. 4 (advertisement storyboard).

2.6.6.2 The Associated Builders and Contractors' Edward Monroe, in testifying about an ABC issue advertisement that discussed federal candidate Melissa Hart's past actions of pushing for the "strongest possible penalties for child molesters who attempt to lure children over the internet," admitted that pushing for such penalties was not a particular concern of ABC members as compared to the general public. Monroe Dep. at 65-67, 90-91 [JDT Vol. 23]. Indeed, Monroe testifies, "[a]s previously answered, no, [the pushing for strongest possible

penalties for child molesters who attempt to lure children over the Internet] is not a particular concern to the general public of contractors or general group of contractors." *Id*. at 91. ABC attempts to explain this away in their proposed findings of fact by citing Monroe's redirect examination where Plaintiffs attempted to rehabilitate his testimony. Proposed Findings of Fact of Chamber, NAM, Associated Builders and Contractors, *et. al*. ¶ 26 ("ABC's membership has a distinctive ethos: 'very strong patriotic red, white and blue God and country association,' so that issues like children and pornography are important and pushed by state affiliates.") (citing Monroe Cross at 100-01). On re-cross examination, Defense counsel confirmed the following:

> Q Would you turn to page 66 of your deposition. I will read to you starting with line 20. Do you see that? A Yes. Q Question, "Do your contractor and builders members have any different or special interest in child molestation as compared to the general public?" Answer, "No." Did you give that testimony and was it truthful? A Yes.

Monroe Cross Exam. at 102 [JDT Vol. 23]. Accordingly, I find that Plaintiff ABC has not cast any doubt on the conclusion that ABC ran candidate-centered issue advertisements about issues that were not of greater concern to its membership than to the general public. This conclusion leads me to find that the ABC advertisements relating to Melissa Hart's views on punishment for child molesters were designed to influence the election.

2.6.6.3 David Keating, executive director of The Club for Growth, testifies that during

the 2000 election cycle, The Club for Growth gave $20,000 to the American Conservative Union to support an issue advertisement which discussed Senate candidate Hillary Clinton's residency in New York. Keating Dep. at 58-59 [JDT Vol. 12] ("Q. Whether or not Hillary Clinton is a resident of New York State really doesn't have anything to do with the Club for Growth's interest in pro-growth conservative Republican elected officials, does it? A. It doesn't seem to directly, no.").

2.6.6.4 The testimony of Defense expert Magleby notes the following example of an advocacy organization running an issue advertisement not connected to its mission:

> An example of an interest group which not only masked its identity through an innocuous name, but ran ads on a topic unrelated to the function or purpose of the group was The Foundation for Responsible Government (FRG). In 1998 FRG spent nearly $300,000. Who was "The Foundation for Responsible Government?" The trucking industry. Upon investigation, Professor Eric Hrzik of the University of Nevada-Reno found that the trucking industry was upset with Senator Reid for supporting legislation that would have banned triple trailer trucks. Rather than discuss their policy difference with Reid on triple-trailer trucks, FRG ran mostly positive ads late in the campaign, discussing Reid's opponent, John Ensign's positions on health care and taxes.

Magleby Report at 28-29 [DEV 4 – Tab 8] (footnotes omitted).

2.6.6.5 A Citizens for Life press release, issued on January 9, 2000, about three weeks before the New Hampshire Republican Presidential primary, announced that

the organization had begun airing an advertisement entitled "Funny Diseases" on several New Hampshire radio stations with the following script:

> Four million Americans suffer from Alzheimer's disease—a brain disorder that causes progressive mental impairment. According to a September 1, 1999 Associated Press report, here is what Senator John McCain once had to say about the devastating memory loss produced by this disease: "The nice thing about Alzheimer's is you get to hide your own Easter eggs." . . . McCain also once jokingly referred to the Leisure World home for senior citizens as "Seizure World." This information is brought to you by Citizens For Life, a New Hampshire pro-life organization.

NRLC-00017 [DEV 130-Tab 1]; *see also* NRLC-00016 (Press Release) (claiming that the advertisement is timely because the New Hampshire State Senate will be voting in January on a bill to legalize assisted suicide). I find that this advertisement was designed to influence the primary election.

2.6.6.6 These examples indicate that corporations spend general treasury funds on candidate-centered issue advertisements to influence federal elections and thereby avoid FECA's requirements.

2.6.7 *Candidate-Centered Issue Advertisements May Be Run About Past Votes Without Discussing Upcoming Legislation or May Be Run About Issues Not Pending Before the Legislature*

The record indicates that organizations often run candidate-centered issue advertisements about Members' past votes on bills without discussing any future legislation or run advertisements about a Member's position on an issue that is not pending before Congress at the time the advertisement is aired.

These kinds of advertisements are another indication of organizations running candidate-centered issue advertisements, paid for with general treasury funds, that are designed to influence a federal election.

2.6.7.1 A series of advertisements run by the AFL-CIO illustrates the point that issue advertisements designed to influence federal elections can focus on a past vote of a particular member and not on encouraging a Member to vote in a particular way on pending or future issues or legislation. Issue advertisements that fall into this category provide strong indicia that these purpose of these commercials is to influence the outcome of a federal election because they only provide analysis of the Member's past vote. *See, e.g.*, Mitchell Decl. ¶ 61 [6 PCS] (AFL-CIO advertisement "Job," which ran between September 13 and 25, 2000, criticized candidates for already having voted "to prevent an important OSHA regulation intended to prevent repetitive motion injuries from being implemented") Ex. 1 at 101-02, 141-42 ("Yet Congressman _____ voted to block federal safety standards that would help protect workers from this risk.") [6 PCS]; *id*. ¶ 58 (AFL-CIO advertisement "Help" targeted "Republican Representatives who had voted against the Patient's Bill of Rights when it passed the House in October, 1999"), Ex. 138 ("Yet Melissa Hart has sided with the insurance companies, opposing the real Patients' Bill of Rights."); *id*. ¶ 59 (AFL-CIO advertisements "Sky" and "Protect," run in July

and August of 2000, criticized "twelve different Representatives who had voted at the end of June to pass prescription drug legislation that failed to guarantee drug benefits under Medicare"), Ex. 139 ("Sky") ("Yet Congressman Kuykendall voted against guaranteeing seniors prescription benefits under Medicare. . . .) (emphasis in original), Ex. 140 ("Protect")[85] ("Yet Congressman Jay Dickey sided with the drug industry. He voted no to guaranteed Medicare prescription benefits that would protect seniors from runway [sic] prices.").

2.6.7.2 Another example of candidate-centered issue advertisements designed to influence federal elections is Plaintiff U.S. Chamber of Commerce's advertisements run during the 2000 federal election attacking various Members on the prescription drug issue that was not pending before Congress at the time the advertisement was aired. *See* Josten Dep. 191-230 & Exs. 23-23I [JDT

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[85] The full text of "Protect" is:

> PHARMACIST: The Senior Citizens today can't afford their medication. They come in and I know they're skipping medication so they can pay for their food. With the rising cost of medication today, it could wipe out anybody at any time.
> VOICE: Yet Congressman Jay Dickey sided with the drug industry. He voted no to guaranteed Medicare prescription benefits that would protect seniors from runway [sic] prices. Tell Dickey quit putting special interests ahead of working families.
> PHARMACIST: Watching people walk away without the medication takes a little bit out of me every day.

Mitchell Decl. Ex. 140 [6 PCS].

Vol. 12]. Most of these advertisements concluded by instructing viewers to tell the targeted Members to "stop supporting a big government prescription drug plan." *Id*. Exs. 23-23I. However, these same advertisements included no telephone number to call, *see id*. at 194, and by the time the advertisements aired, there was no prescription drug issue then pending before Congress, *id*. at 208-11. Indeed, a few of these advertisements were run against candidates who were not even incumbents. Josten Dep. at 197, 212, 227 & Exs. 23A, 23D, 23E, 23I [JDT Vol. 12]. Hence, the point of these advertisements was likely *not* to influence any pending issue before the Congress, because the candidate mentioned was not even a Member of Congress.

2.6.7.3 These examples demonstrate that organizations run advertisements about past votes or about issues no longer before Congress. The purpose of these types of candidate-centered issue advertisements is to influence a federal election with general treasury funds and to avoid FECA's restrictions.

2.6.8 *Candidate-Centered Issue Advertisements Often Permit the Candidate to Avoid Running "Negative" Advertising or Otherwise Assist the Candidate by Running Advertising While the Candidate is Low on Funds*

Two other indicia that candidate-centered issue advocacy is designed to influence a federal election and thereby avoid FECA's restrictions over

organizations (a) helping a candidate by running negative advertisements[86] so as to permit the candidate to run positive advertisements and (b) helping a candidate by running advertisements where and when the candidate cannot due to budget constraints.

2.6.8.1 Political consultants testify that electioneering issue advertisements often focus on candidates as opposed to issues. Raymond Strother testifies:

> Character ads were once the province of the candidate committees. Now, however, candidates often avoid "going negative" themselves, and rely on third parties to do this dirty work for them. If a trade association or a labor union runs an ad about the honesty and integrity–or lack thereof–of a candidate for federal office, their intent to influence the election is obvious and unmistakable.

Strother Decl. ¶ 9 [DEV 9-Tab 40]; *see also* Beckett Decl. ¶ 8 [DEV 6 – Tab 3] ("[I]n my experience, candidates tend to shy away from . . . negative attack

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[86] Two examples of "negative" candidate-centered issue advertisements are:

Americans For Job Security Advertisement "Are you Taxed Enough Already?"
In this advertisement, an announcer states that "Gore plans to squeeze more money out of middle class families at the gas pump. . . . Gore's ideas are so extreme. If they ever came to pass, Americans would truly be Gored at the pump." CMAG Storyboards [DEV 48-Tab 3].

Cheney Myanmar
This advertisement, run by an unknown group, stated that a "brutal military regime in Myanmar . . . forced men, women and children into slave labor to assist the building of an oil pipeline by . . . Haliburton . . . we just can't trust Dick Cheney a heartbeat away from the presidency." CMAG Storyboards [DEV 48, Tab 3; IER Tab 15.].

ads because there would be political repercussions for them. But entities like the DCCC [Democratic Congressional Campaign Committee] and the Club for Growth do not have such constraints. Based on my observations, the candidate ads in [one] 2000 Congressional race, which were financed with federal funds ('hard money'), were actually more about 'issues' than the supposed 'issue ads' run by political parties and interest groups, which I understand were financed at least in part with non-federal funds ('soft money').").

2.6.8.2 Former Representative Larry LaRocco[87] testifies:

> In my 1994 Congressional reelection campaign, many outside interest groups targeted me for defeat, and they used soft money to advance their goal. These organizations ran television advertisements in markets my opponent did not. For example, to my knowledge, my opponent did not buy any media in the Spokane market–which covered 40% of my district–but other groups, such as pro-term limit organizations, ran ads in that market which criticized my policies. Unlike my opponent, these outside organizations were not required to disclose the sources of their funding. This tactic suggested there may have been some communication between the advertisers and my opponent's campaign.

LaRocco Decl. ¶ 5 [DEV 7-Tab 27].

2.6.8.3 Evidence in the record also demonstrates that organizations run issue advertisements to assist candidates when their campaigns are low on funds,

[87] LaRocco served as a Member of Congress from 1990 to 1995, representing the First Congressional District of Idaho. LaRocco Decl. ¶ 2 [DEV 7-Tab 27]. He served two terms and lost his 1994 reelection campaign. *Id*.

which is an indication that these advertisements serve an electioneering purpose. For example, an advertisement run during Linda Chapin's campaign for the House of Representatives by EMILY's List, praising Chapin's record on gun safety, was aired "during a period in the first half of October 2000 when the Chapin campaign was not on the air, in order to save resources. . . . EMILY's List . . . knew I was going dark at that time. I can only surmise that they decided to run this ad at that time based on that information." Beckett Decl. ¶ 13 [DEV 6-Tab 3]; *see also supra* Findings ¶ 2.6.1.1 (AFL-CIO memorandum discussing where media buys could be placed to help the Durbin Senate campaign which could not air advertisements due to a lack of resources).

2.6.8.4 Both negative candidate-centered issue advertisements aired to enable federal candidates to run positive advertisements and candidate-centered issue advertisements run in areas where candidates lack funding to purchase air time, provide additional indicia that corporate and labor union issue advertising is focused on influencing federal elections while avoiding FECA's restrictions.

2.6.9 In sum, I find that these examples and characteristics of electioneering issue advertisements illustrate that corporations and labor unions routinely use candidate-centered issue advocacy as a means of influencing federal elections.

2.7 **Federal Candidates and Political Parties Know and Appreciate Who Runs Candidate-Centered Issue Advertisements in Their Races**

Candidate-centered issue advertisements paid for with corporate and labor union general treasury funds and designed to influence the federal election permit corporations and labor unions to inject immense aggregations of wealth into the process. Candidate-centered issue advertisements paid for from the general treasuries of these organizations radically distorts the electoral landscape.

2.7.1 Campaign consultants and a lobbyist testify that candidates are acutely aware of third-party interest groups who run candidate-centered issue advertisements on behalf of their candidates and that candidates appreciate the support of those organizations. Political consultant Strother testifies:

> Campaign consultants, and candidates themselves, pay very close attention to the political advertisements broadcast in their districts. Every campaign that I have been associated with in the past several years has kept very close watch on who is advertising, and when and where. Candidates, who are often already elected officials, all keep track of who is helping them, who is sitting on the sidelines, and who is attacking them. Candidates in tight races are especially grateful to the issue groups who run ads on the candidate's behalf.

Strother Decl. ¶ 13 [DEV 9-Tab 40]; *see also* Lamson Decl. ¶ 19 [DEV 7-Tab 26]; Beckett Decl. ¶ 16. The uncontroverted testimony of lobbyist Wright Andrews provides:

> Sophisticated political donors–particularly lobbyists, PAC directors, and other political insiders acting on behalf of specific interest groups–are not in the business of dispensing their money

purely on ideological or charitable grounds. Rather, these political donors typically are trying to wisely invest their resources to maximize political return. Sophisticated donors do not show up one day with a contribution, hoping for a favorable vote the next day. Instead, they build longer term relationships. The donor seeks to convey to the member that he or she is a friend and a supporter who can be trusted to help the federal elected official when he or she is needed. Presumably, most federal elected officials recognize that continued financial support from the donor often may be contingent upon the donor feeling that he or she has received a fair hearing and some degree of consideration or support.

Often, corporate clients seek their lobbyists' advice concerning how their money is best spent, whether it be by contributing their PAC's hard money directly to candidates, donating soft money to the political parties, or funding independent expenditures such as broadcast 'issue ads.' Although the answer for each client will depend upon various circumstances, including the goals that client is working to achieve, unregulated expenditures–whether soft money donations to the parties or issue ad campaigns–can sometimes generate far more influence than direct campaign contributions.

Another practice used to secure influence in Washington is for an interest group to run so called "issue ads." "Issue ads" run in close proximity to elections may influence the outcome of the election. Moreover, such ads may influence the elected official who is seeking reelection to come out in support of or opposition to particular legislation due to the response local voters have to the ads. These ads are noticed by the elected officials on whose behalf, or against whom, these ads are run. An effective advertising campaign may have far more effect on a member than a direct campaign contribution or even a large soft money donation to his or her political party that is used for political purposes in his or her district or state. These ads often have the effect of showing an elected official that a lobbyist's particular issue can have consequences at the ballot box. Given how useful "issue ads" can be in creating political clout with candidates, it is laughable to have a system that prohibits

> corporations and labor unions from giving even a penny to a candidate, but allows them to funnel millions into positive or negative advertising campaigns that may influence election outcomes and that many candidates are likely to be influenced by.

Andrews Decl. ¶ 8, 13, 17 [DEV 6-Tab 1]. Plaintiffs have put forth no contrary evidence to rebut the testimony of these consultants and lobbyist.

2.7.2 Former officeholders and candidates confirm the view of the consultants that Members of Congress and federal candidates are very aware of who ran advertisements on their behalf and feel indebted to those who spend money to help get them elected. Former Senator Bumpers testifies:

> Members or parties sometimes suggest that corporations or individuals make donations to interest groups that run "issue ads." Candidates whose campaigns benefit from these ads greatly appreciate the help of these groups. In fact, Members will also be favorably disposed to those who finance these groups when they later seek access to discuss pending legislation.
>
> Politicians especially love when a negative "issue ad" airs against their opponents. If these politicians did not feel that the issue ads were helping them, they would call the people sponsoring them and tell them to stop, or they would hold a press conference and angrily denounce the ads. But that rarely, if ever, happens.

Bumpers Decl. ¶¶ 27-28 [DEV 6-Tab10]; *see also* Chapin Decl. ¶ 16 [DEV 6-Tab 12] ("Federal candidates appreciate interest group electioneering ads like those described above that benefit their campaigns, just as they appreciate large donations that help their campaigns. I appreciated the ads run by

EMILY's List on my behalf. In general, candidates in the midst of a hard-fought election like mine appreciate any help that comes their way.").

2.7.3 Indeed, interest groups can be the ones who apprise politicians of the advertisements that they run on their behalf. For example, The Coalition sent tapes of the advertisements it aired in 1996 to Joyce Gates, assistant to House Republican Conference Chairman John Boehner. FEC MUR No. 4624, General Counsel's Rep., April 20, 2001, at 30 [DEV 53-Tab 6]. As the General Counsel's Report publicly indicates, the Coalition's Alan Kranowitz testified in an FEC investigation that the Coalition sent the tapes to "show the Republican Members of the House that we were, indeed, doing something, after the fact." *Id*. The Coalition also provided tapes of the ads to RNC Political Director Curt Anderson. *Id*. at 32; *see also* Josten Dep. at 266-67 [JDT Vol. 12] ("Those ads after they were aired were shown to Congressman Bayner [sic].").

2.7.4 Politicians who benefit from the help provided by corporate and labor union general treasury fund spending on their races raise money for these organizations to demonstrate their appreciation. Congressman Ric Keller, for whose 2000 open-seat campaign the Club for Growth had run issue advertising, signed a Club for Growth fundraising letter dated July 20, 2001. The letter stated:

> The Club for Growth selected my race as one of its top priorities. . . .
> Since the Club targets the most competitive races in the country, your membership in the Club will help Republicans keep control of Congress.

CFG000208-210, at CFG000208, 09 (emphasis in original) [DEV 130-Tab 5]; *see supra* Findings ¶ 2.6.5.5 (Pennington) (describing how The Club for Growth's candidate-centered issue advertisements helped Keller win the primary election).

2.7.5 Groups aggressively push to be recognized for the role they played in helping a candidate get elected to office. After Election Day, the Coalition listed ideas "on maximizing the credit the Coalition should get for its 1996 activities," including whether to "[m]ake a report to each Member that [it] helped and actively solicit formal thanks." Memorandum to Alan Kranowitz, Bruce Josten and Elaine Graham from Larry McCarthy of Cannon McCarthy Mason Limited, Next Steps for the Coalition, dated Nov. 17, 1996, TC00802-04, at TC00803 [DEV 121].

2.7.6 The AFL-CIO admits that it made the financing of at least one political advertisement that identified a Candidate and was broadcast on television or radio within the 60 days preceding a general election in a state or congressional district in which that Candidate was running for federal office known to a Member or Candidate, and known to a Political Party. Resps.

AFL-CIO and COPE to FEC's First RFA's, Nos. 20-21 [DEV 12-Tab 5].

2.7.7 The AFL-CIO admits that at least one candidate or Member of Congress has expressed appreciation or gratitude for its financing of at least one political advertisement that identified a Candidate and was broadcast on television or radio within the 60 days preceding a general election in a state or congressional district in which that Candidate was running for federal office. Resps. AFL-CIO and COPE to FEC's First RFA's No. 22 [DEV 12-Tab 5].

2.7.8 Some candidates or their political committees requested or suggested that the AFL-CIO broadcast advertisements in their districts in 1996. FEC MUR 4291, General Counsel's Rep., June 9, 2000, at 21 [DEV 52-Tab 3].

2.7.9 Mellman and Wirthlin, based on their August-September 2002 poll, state:

> Americans see very little difference between the influence of a soft money donation to a political party and the funding of political ads on television and radio. . . .
>
> *If an individual, issue group, corporation, or labor union paid for 50,000 dollars or more worth of political ads on the radio or TV that benefitted a Member of Congress, how likely would the Member of Congress be to give their opinion special consideration because of the ads–would they be very likely, somewhat likely, somewhat unlikely, or very unlikely to give them special consideration because of the ads, or don't you have an opinion on this?*
>
> *80% TOTAL LIKELY*
> *37% Very likely*
> *43% Somewhat likely*
> *10% TOTAL UNLIKELY*
> *5% Somewhat unlikely*

5% Very unlikely
9% Don't have opinion
0% Don' t know Refused

Mellman and Wirthlin Report at 9-10 [DEV 2-Tab 5]; *see also* Resp. NAB to FEC's First RFA's, No. 3. [DEV 12-Tab 7] (admitting "that access to members of Congress and Executive branch officials is one factor out of many that might conceivably affect federal legislation and executive decisions and policies assuming all other circumstances are equal").

2.7.10 Political parties are equally grateful for the support that issue advocacy organizations perform for their candidates.

2.7.10.1 An internal RNC document entitled "Coalitions Plan" states:

> The RNC Coalitions effort should be judged by the simple question–will it get us more votes on election day?
>
> Their [sic] will no doubt need to be countless meetings, committees, and tribunals to provide *all the customary access that the myriad of entities have come to expect*, but ultimately every activity that we engage in should be done to win votes. . . .
>
> There are many organizations that can routinely deliver measurable influence of behalf of Republicans, but there are five groups that have distinguished themselves. The RNC should give these five organizations a great deal of attention. These groups are the:
> National Rifle Association
> National Right to Life Committee
> National Right to Work Committee
> National Federation of Independent Business
> Christian Coalition

> These organizations deliver a disproportionate percentage of the Republican Base on election day. They should receive special and constant attention. We must prioritize our limited resources toward these organizations. . . .
>
> An important aspect of any RNC Coalitions work will be done to engage the many other organizations that work within the political arena. . . .
>
> The RNC will establish a regular meeting of key organizations. This meeting should be held at least three times a year. The emphasis should by on the free exchange of important information about the upcoming elections. Each meeting should be an event featuring the Chairman, Co-Chair, RNC Regional Field Representatives and at least one high pro-file [sic] Member of Congress. Examples would be Newt Gingrich, Trent Lott, Dick Armey, etc.

RNC0275390-RNC0275396, at RNC0275390-91 [DEV 97] (emphasis added).

2.7.10.2 An RNC slide show presented how interest group broadcast issue advocacy was used to help candidates in the 2000 election cycle:

> **Outside Help for Democrats in 2000**
> Liberal groups spent record amounts assisting Democrats in 2000. Highest Issue Advertising Spenders: Planned Parenthood–$14 million, NAACP–$10.5 million, Sierra Club–$9.5 million. NARAL–$7.5 million.
> (Annenberg Public Policy Center of the University of Pennsylvania, "Issue Advertising in the 1999-2000 Election Cycle").
>
> **Outside Help for Republicans**
> Business Roundtable–$6 million (2/3rds supporting Republicans), NRA–$15/20 Million
> (Annenberg Public Policy Center of the University of Pennsylvania, "Issue Advertising in the 1999-2000 Election Cycle").
>
> **Impact of Third Party Spending for the 2000 Cycle**
> In 2000 it was estimated that more than $509 million was spent on issue

advocacy television and radio advertising. Third parties accounted for almost $347 million (68%) of this spending.
Republican Party–$83.5 million (16%), Democratic Party–$78.4 million (15%).
(Annenberg Public Policy Center of the University of Pennsylvania, "Issue Advertising in the 1999-2000 Election Cycle").

RNC Counsel's Office, "'Soft' Dollars: What They Mean for the Republican Party," RNC0248802-RNC0248809, at RNC0248808-09 [DEV 97] (emphasis in original).

2.7.10.3 An RNC document states that "third party special interests [sic] groups . . . are permitted to raise and spend soft money for issue advocacy purposes. Liberal special interest groups spent record amounts assisting Democrats in 2000 . . . . In fact, of the $500 million spent on issue advertisements during the 2000 cycle, 68% ($347 million) was spent by third part[y] special interest groups – more than twice the amount spent by both political parties combined." "Issue Updates Campaign Finance Reform Concerns and Effects," RNC0318573-RNC0318576, at RNC0318575 [DEV 98].

2.7.10.4 On October 18, 1996, the RNC, through its non-federal component, the Republican National State Elections Committee, gave $500,000 to the National Right to Life Committee with a cover letter from RNC Chairman Haley Barbour to NRLC Executive Director David O'Steen stating: "Your continued efforts to educate and inform the American public deserves [sic] recognition." RNC0065691A [DEV 134-Tab 8]; *see also* RNC0065691 [DEV 134-Tab 8]

(copy of the check). In October 1999, the National Right to Life Committee received a $250,000 donation from the NRCC which was "put in NRLC's general fund." Resps. Nat'l Rt. Life Pls. to Defs' First Interrogs., No. 3 [DEV 10-Tab 15]. NRLC representatives "were present at a meeting with Rep. Tom Davis when he presented the check to National Right to Life." *Id*.

2.7.10.5 DNC Political Director Gail Stoltz spoke generally about the recent developments of using issue advertising for electioneering purposes. Stoltz stated: "In my experience, issue ads affect elections. The ads can either demoralize or confuse voters so that they do not vote, or they can energize a voter base for or against a party or its candidates. During a presidential election year, the ads definitely make a difference when a presidential candidate is featured." Stoltz Decl. ¶ 16 [DEV 9-Tab 39].

2.7.10.6 Political parties and candidates have directed donors who have maxed out their federal contributions to give money to nonprofit corporations who can then spend money on issue advocacy. Robert W. Hickmott provides the following uncontroverted testimony:

> As both a contributor to candidates and parties, and as a lobbyist who advises clients about political spending, I am personally aware of the fundraising practices of federal candidates. Once you've helped a federal candidate by contributing hard money to his or her campaign, you are sometimes asked to do more for the candidate by making donations of hard and/or soft money to the national party committees, the relevant state party (assuming it can accept corporate contributions), or an outside group that

> is planning on doing an independent expenditure or issue advertisement to help the candidate's campaign. These types of requests typically come from staff at the national party committees, the campaign staff of the candidate, the candidate's fundraising staff, or former staff members of the candidate's congressional office, but they also sometimes comes [sic] from a Member of Congress or his or her chief of staff (calling from somewhere other than a government office). Regardless of the precise person who makes the request, these solicitations almost always involve an incumbent Member of Congress rather than a challenger. As a result, there are multiple avenues for a person or group that has the financial resources to assist a federal candidate financially in his or her election effort, both with hard and soft money.

Hickmott Decl. ¶ 8 [DEV 6-Tab 19].

2.7.11 While the record does not have any direct examples of votes being exchanged for candidate-centered issue advocacy expenditures, I find that the record demonstrates that candidates and parties appreciate and encourage corporations and labor unions to deploy their large aggregations of wealth into the political process. If nothing else, I find that the record presents an appearance of corruption stemming from the dependence of officeholders and parties on advertisements run by these outside groups.

2.7.12 Accordingly, I find that Congress was correct in concluding that a problem existed with the state of FECA. Corporations and labor unions were routinely spending general treasury funds on advertisements designed to influence federal elections and they were able to use general treasury funds to pay for the most potent form of political advocacy–advertisements that do not use words

of express advocacy. This conclusion leads to the following question: are candidate-centered issue advertisements objectively distinguishable from pure issue advertisements so that one may distinguish genuine issue advocacy from electioneering without considering subjective factors? The record unequivocally answers that question in the affirmative.

2.8 **Candidate-Centered Issue Advertisements Are Empirically Distinguishable from "Pure" Issue Advertisements**

Pure issue advertisements are empirically distinguishable from candidate-centered issue advertisements designed to influence an election on a number of bases: (a) issue advertisements designed to influence federal elections almost always identify a candidate for federal office; (b) issue advertisements designed to influence federal elections are generally run in close proximity to a federal election; and (c) issue advertisements designed to influence a federal election are run in states and congressional districts with close races.

2.8.1 *Candidate-Centered Issue Advertisements Almost Always Identify a Candidate for Federal Office*

I find that issue advertisements designed to influence a federal election almost always refer to specific candidates by name. Generally speaking, pure issue advertisements are less likely to refer to a federal candidate by name.

2.8.1.1 The uncontroverted testimony of political consultants who have designed genuine issue advertisements confirms this finding. Plaintiffs failed to

produce any political consultants who have designed issue advertisements to rebut directly this testimony.

- Political consultant Doug Bailey testifies:

> In addition to the work we did for candidates at Bailey, Deardourff, we also did political ads for political parties and issue groups. When we were creating true issue ads (e.g, for ballot initiatives . . .), and when we were creating true party building ads, *it was never necessary for us to reference specific candidates for federal office in order to create effective ads*. For instance, we created a serious [sic] of ads opposing a . . . referendum in Florida which made no reference to any candidates. We were successful in conveying our message, and the referendum failed two to one. . . .
>
> Similarly, issue organizations can design true issue ads without ever mentioning specific candidates for federal office. *In my decades of experience in national politics, nearly all of the ads that I have seen that both mention specific candidates and are run in the days immediately preceding the election were clearly designed to influence elections.* From a media consultant's perspective , there would be no reason to run such ads if your desire was not to impact an election. This is true not only in the 60 days immediately prior to an election, but probably also in the 90 or 120 days beforehand.

Bailey Decl. ¶¶ 9, 11 [DEV 6-Tab 2] (emphasis added); *see also* Strother Decl. ¶ 7 [DEV 9-Tab 40] (emphasis added) (observing that the pure issue advertisements he had made during his career "did not mention any candidates by name. Indeed, there is usually no reason to mention a candidate's name unless the point is to influence an election.").

2.8.1.2 Uncontroverted expert testimony likewise confirms the view that issue

advertisements designed to influence a federal election almost always mention the name of a federal candidate. Krasno and Sorauf Expert Report at 55-56 [DEV 1-Tab 2] ("The most obvious characteristic shared by candidate ads and candidate-oriented issue ads is their emphasis on candidates. Candidate names appear in virtually all of these spots, with candidates most likely to identify themselves in their ads and candidate-oriented issue ads most likely to identify the opposing candidate (in some pejorative way). Pure issue ads, on the other hand, were much less likely to mention a candidate for federal office . . . .").

2.8.1.3 A sampling of issue advertising campaigns demonstrates that candidates are often mentioned in the advertisements only as election day approaches.[88]

- Citizens for Better Medicare ("CBM")

  During the final three weeks before the 2000 federal election, CBM aired 6,010 spots that mentioned a candidate and only eight spots that did not mention a candidate. Goldstein Expert Report, App. A, Tbl. 17A [DEV 3-Tab 7]. In the final 63 days before the election, CBM ran a total of 14,975 advertisements. *Id*. Of these advertisements 10,876 mentioned a federal candidate, while 4,099 did not mention a federal

[88] Evidence for this finding is based on the Expert Report of Kenneth M. Goldstein. Goldstein compiled this information from data supplied by Campaign Media Analysis Group (CMAG). Goldstein Expert Report at 2 [DEV 3-Tab 7]. Although Plaintiffs question the completeness and accuracy of the CMAG data, I accept the CMAG data as a valid database. *See infra* Findings 2.12.1. Moreover, nowhere do Plaintiffs challenge the data of when candidates' names were mentioned in the advertisements.

candidate. *Id*. From January 1 through September 4, 2000, CBM ran 23,867 television spots, *none* of which mentioned a candidate. *Id*.

- Chamber of Commerce

  Between January 1, 2000, and Election Day 2000 (November 6, 2000), the Chamber of Commerce ran a total of 7,574 advertisements. *Id*. Tbl. 17B. *All* of these advertisements were run in the seven weeks before the election and *all* of these advertisements mentioned a federal candidate. *Id*.

- Planned Parenthood[89]

  Between January 1, 2000, and Election Day 2000 (November 6, 2000), Planned Parenthood ran a total of 6,523 advertisements. *Id*. Tbl. 17C. In the 63 days before the election, 185 advertisements were run that did not mention a federal candidate, while 5,916 advertisements were run that mentioned a federal candidate. *Id*. (noting that the only time Planned Parenthood ran advertisements that mentioned a federal candidate's name was in the five weeks prior to the election).

- AFL-CIO

  Between January 1, 2000, and Election Day 2000 (November 6, 2000), the AFL-CIO ran a total of 18,324 advertisements. *Id*. Tbl. 17D. In the

[89] The Annenberg Report describes Planned Parenthood as "a pro-family planning political advocacy group." Annenberg Report 2001 at 24 [DEV 38 - Tab 22].

63 days before the election 10,099 advertisements were run and each mentioned a federal candidate. *Id*. During this same time period, the AFL-CIO ran no advertisements that did not mention a federal candidate. *Id*.

- Women Voters: A Project of Emily's List[90]

  Between January 1, 2000, and Election Day 2000 (November 6, 2000), Emily's List ran a total of 2,680 advertisements. *Id*. Tbl. 17E. In the 63 days before the election, 7 advertisements were run that did not mention a federal candidate, while 2,665 advertisements were run and each mentioned a federal candidate. *Id*. (noting that the only time Emily's List ran advertisements that mentioned a federal candidate's name was in the seven weeks prior to the election).

- Americans for Job Security[91]

  Between January 1, 2000, and Election Day 2000 (November 6, 2000), Americans for Job Security ran a total of 6,062 advertisements. *Id*. Tbl. 17F. In the 63 days before the election, 5,073 advertisements were run and each mentioned a federal candidate. *Id*. During this same time

[90] The Annenberg Report describes Emily's List as "an organization dedicated to helping Democratic women who support abortion rights get into office." Annenberg Report 2001 at 22 [DEV 38 - Tab 22].

[91] The Annenberg Report describes Americans for Job Security as a "pro-business lobbying group." Annenberg Report 2001 at 23 [DEV 38-Tab 22].

period, Americans for Job Security ran only advertisements that mentioned federal candidates. *Id*.

- Business Round Table[92]

  Between January 1, 2000, and Election Day 2000 (November 6, 2000), the Business Round Table ran a total of 8,158 advertisements. *Id*. Tbl. 17G. In the 63 days before the election, 4,571 advertisements were run and each mentioned a federal candidate. *Id*. During this same time period, the Business Round Table ran only advertisements that mentioned federal candidates. *Id*.

- Handgun Control[93]

  Between January 1, 2000, and Election Day 2000 (November 6, 2000), Handgun Control ran a total of 3,383 advertisements. *Id*. Tbl. 17H. In the 63 days before the election, 3,146 advertisements were run and each mentioned a federal candidate. *Id*. During this same time period, Handgun Control ran only advertisements that mentioned federal candidates. *Id*.

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[92] The Annenberg Report describes the Business Round Table as "an organization that represents the CEO's of America's largest corporations." Annenberg Report 2001 at 20 [DEV 38-Tab 22].

[93] The Annenberg Report describes Handgun Control as an "advocacy group supporting legislation to promote gun safety." Annenberg Report 2001 at 25 [DEV 38-Tab 22].

- Sierra Club[94]

  Between January 1, 2000, and Election Day 2000 (November 6, 2000), the Sierra Club ran a total of 2,270 advertisements. *Id*. Tbl. 17I. In the 63 days before the election, 22 advertisements were run that did not mention a federal candidate, while 1,707 advertisements were run that did mention a federal candidate. *Id*.

- League of Conservation Voters[95]

  Between January 1, 2000, and Election Day 2000 (November 6, 2000), the League of Conservation Voters ran a total of 5,027 advertisements. *Id*. Tbl. 17J. In the 63 days before the election, 371 advertisements were run and each advertisement did not mention a federal candidate, while 1,705 advertisements were run that mentioned a federal candidate. *Id*. (noting that the only time the League of Conservation Voters ran advertisements mentioning a federal candidate's name was in the eight weeks prior to the election).

2.8.1.4 Candidate-centered issue advertisements almost always name a federal candidate. This finding is neither surprising nor controverted. As the

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[94] The Annenberg Report describes the Sierra Club as "a pro-environment advocacy group." Annenberg Report 2001 at 23 [DEV 38-Tab 22].

[95] The Annenberg Report describes the League of Conservation Voters as a "pro-conservation advocacy and education group." Annenberg Report 2001 at 23 [DEV 38-Tab 22].

examples of the interest group advertisements indicate, however, issue advertisements generally start naming a federal candidate only as the election draws near.

2.8.2 *A Majority of Candidate-Centered Issue Advertisements are Run in Close Proximity to a Federal Election*

As the sampling of interest group advertisements above illustrates, as the election draws near, advertisements that name a federal candidate are much more common than issue advertisements that do not name a federal candidate. I find that most candidate-centered issue advertisements appear in close proximity to a federal election. In the case of the general election, which has been most heavily studied, it is clear that candidate-centered issue advertisements are most prevalent within sixty days of a federal election.

2.8.2.1 The Annenberg Public Policy Center found that by the last two months before the election, almost all televised issue spots made a case for or against a candidate. Annenberg Report 2001 at 14 [DEV 38-Tab 22]. The Annenberg Report, a study relied on by Plaintiffs, concluded:

> The type of issue ad that dominated depended greatly on how close we were to the general election. During the two-year election cycle 71% of distinct issue ads were candidate-centered, 16% were legislation-centered, and 13% were general-image centered. However, distinct ads from before the final two months of the election were 43% candidate-centered, 35% legislation centered, and 22% general-image oriented. That picture flipped when looking at unique ads from the last two months of the election. In that case fully 89% of unique ads

> were candidate-centered, while just 3.6% were legislative centered, and 7.4% were general-image issue ads. *In other words candidate-centered issue ads became much more prominent as the election approached. . . .*
>
> When we took into account how many times these ads aired and not just the number of different ads, we found an even greater percent were candidate-centered. Television spots airing after Super Tuesday were 87% candidate centered, 9.5% legislative-centered, and 3.6% image oriented. By breaking that time period down further and looking only at spots that aired September to November, we found that there was a greater percentage of candidate-centered ads in the last two month of the campaign than in the last eight. *Fully 94% of issue ads aired after August made a case for or against a candidate*. Just 3.1% were legislative ads, and 2.3% were general image ads. Though candidate-centered issue ads always made up a majority of issue ads, as the election approached the percent candidate-centered spots increased and the percent of legislative and image ads decreased, such that *by the last two months before the election almost all televised issue spots made a case for or against a candidate*.

Id. (emphasis added).

2.8.2.2 In the sixty days prior to a federal election, interest group advertisements that mention a federal candidate rise dramatically, whereas issue advertisements that do not mention a federal candidate remain fairly constant during the course of the year.[96] A graph using data from the 2000 election cycle compiled

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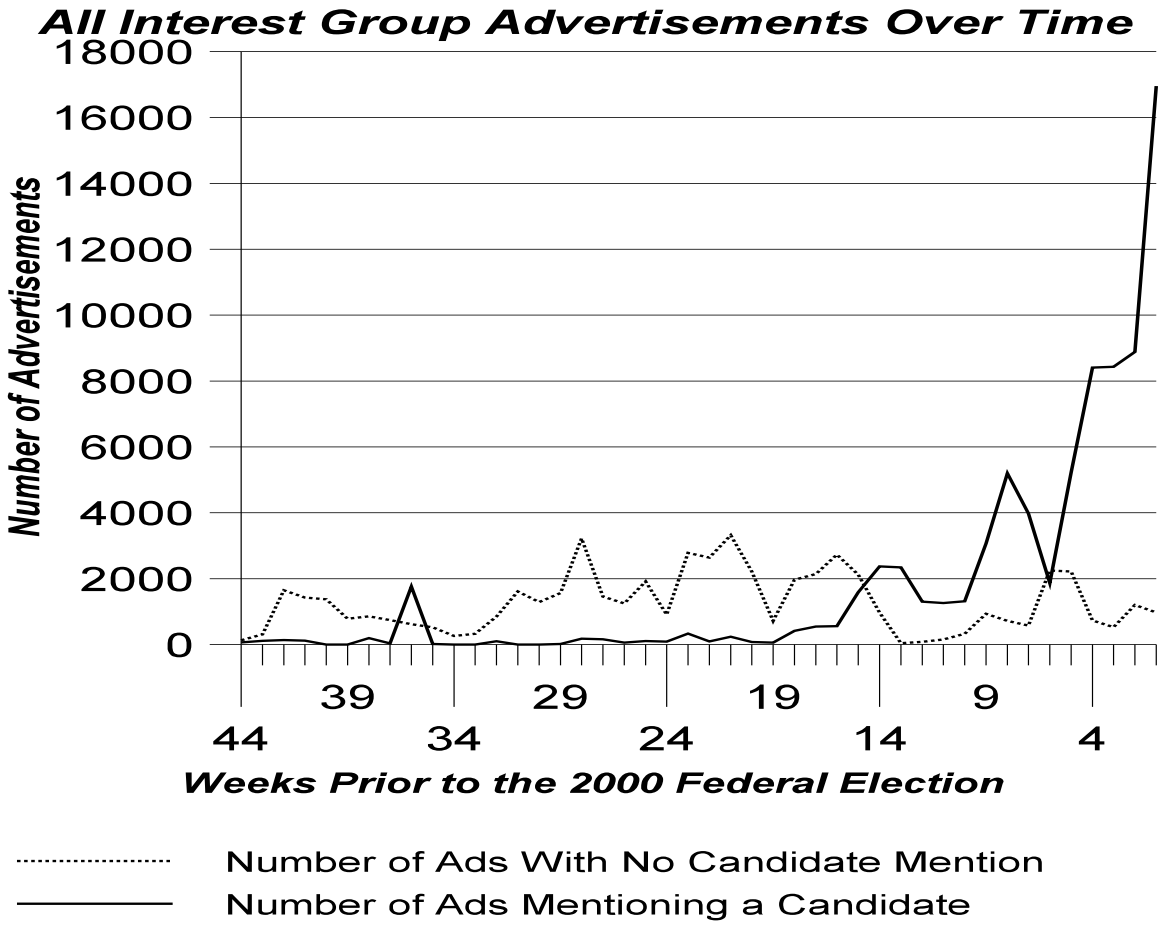
[96] The Chart is based on data compiled by Kenneth Goldstein. Goldstein Expert Report, App. A, Table 16 [DEV 3-Tab 7]. Goldstein observed all interest group advertisements run during the forty-four weeks prior to the election using CMAG data. Although Plaintiffs dispute the completeness of his data set, *see* Appendix, none of the experts have criticized that the data demonstrates that in the sixty days prior to a federal election, the clear majority of issue advertisements mention the name of a federal candidate.

by Kenneth Goldstein illustrates this point:



2.8.2.3 The uncontroverted testimony of experts confirms that the airing of issue advertisements designed to influence a federal election is at its zenith in the final weeks prior to an election. Magleby Expert Report at 18 [DEV 4-Tab 8] ("Genuine issue ads are more generic or 'educational' on their face than ads that are electioneering in nature. They are also rare in the period before an election."); *id*. at 33 ("In the contests we monitored in 1998, most interest group electioneering advocacy came in the final weeks of the campaign. In 2000, 58% of the interest group electioneering advocacy came in the last two weeks of the election."); Goldstein Expert Report at 17 [DEV 3-Tab 7] ("The CMAG database provides empirical evidence of a strong positive correlation between [an advertisement's reference to a federal candidate and the proximity in time of the broadcast of the advertisement to the federal election] and consequently of its validity as a test for identifying political television advertisements with the purpose or effect of supporting or opposing a candidate for public office."). The conclusions of these experts has not been contradicted by any contrary expert testimony introduced by Plaintiffs in this litigation.

2.8.2.4 As the Annenberg Center, experts in this case, and the empirical data establish, candidate-centered issue advocacy is run in close proximity to federal elections.

2.8.3 *A Majority of Candidate-Centered Issue Advertisements Are Run in States and Congressional Districts with Close Races*

2.8.3.1 The empirical data and the uncontroverted testimony of experts and political consultants in this case demonstrate that candidate-centered issue advertisements are run in congressional districts or states where there are close races.

2.8.3.2 Defense expert Magleby states that:

> Interest groups . . . take aim at particular states with competitive U.S. Senate races or congressional districts where the outcome is in doubt. In 1998, 2000, and 2002, I conducted numerous interviews with key staff in scores of interest groups to assess where they engage in electioneering advertisements. . . . The widely shared view of interest groups is that they campaign where their investment can make a difference and that is almost always in competitive contests. This tendency has been reinforced by the exceedingly close margin of party control in Congress in recent years. Interest groups routinely do their own polls to inform them on where to spend their electioneering advocacy money. For example, before they sent mailings, the NEA [National Education Association] conducted surveys to determine "if they could make a difference" with their spending.

Magleby Report at 31 (footnotes omitted) [DEV 4-Tab 8]; *see also* Krasno and Sorauf Report at 57 (footnote omitted) [DEV 1-Tab 2] (Candidate and candidate-oriented issue ads "are narrowly targeted to air in only the most closely contested elections.").

2.8.3.3 Political consultants also provide uncontroverted testimony that candidate-centered issue advertisements are concentrated on competitive races in the

weeks before a federal election. Political consultant Strother testifies:

> In addition to mentioning a candidate and proximity in time to election day, another informative factor is to look at where the ad was run. When media consultants want to influence elections, they air their ads in competitive districts and battleground states. Thus, in addition to looking at the ad itself, to discern electioneering intent you might also look at the Cook Report of competitive or 'toss-up' races. Those are the most likely places where the advertisements could have an impact on the outcome of an election. Thus, when a political party or an issue group focuses an advertising campaign on competitive districts, the intent to influence the election is clear. By contrast, when the goal is to persuade members of Congress to vote one way or another on a piece of pending legislation, an issue ad campaign will be targeted at the undecided members.

Strother Decl. ¶ 9 [DEV 9-Tab 40]; *see also* Lamson Decl. ¶ 6 [DEV 7-Tab 26] ("Parties and groups generally run these pre-election 'issue ads' only in places where the races are competitive.").

2.8.3.4 Empirical data likewise demonstrates that candidate-centered issue advertisements are concentrated in congressional districts and states with contested elections. "The CMAG database[97] shows that interest group financed television ads that mentioned a candidate and were broadcast within 60 days of an election were highly concentrated in states and congressional districts with competitive races." Goldstein Expert Report at 20 [DEV 3-Tab 7] ("As shown in Table 5, during the 2000 senatorial elections, 89.2 percent of such

[97] The CMAG data is discussed in detail in the Appendix to my opinion and Finding ¶ 2.12.1.

interest group ads ran in states where the race was competitive. Four states accounted for 77 percent of the ads broadcast by interest groups; political parties broadcast 65 percent of their ads in these four states. Interest group ads were particularly important in Michigan, where interest groups broadcast 22 percent of the total ads broadcast in the race.");[98] *id*. at 21 ("The geographical distribution of interest group ads in Senate elections closely paralleled that of the political parties, which ran 90.6 percent of their ads in those competitive states. The same was true in House elections. As demonstrated in Table 6, during 2000, 85.3 percent of interest group financed ads broadcast within 60 days of the election were aired in congressional districts with competitive elections. Similarly, the political parties ran 98.2 percent of their ads in those districts.") (footnotes omitted); *see generally id*. at 3, 20-24, Tbls. 5-6; Krasno and Sorauf Report, App. Tbls. 4-5 [DEV 1-Tab 2]; *see also Buying Time* 2000 at 53 [DEV 46] ("The competitiveness of candidate races also affects the

[98] In determining which races were competitive, Goldstein relied on his professional judgment as informed by various media sources including the Cook Report which he attached to his expert report. Goldstein Expert Report at 20 n.17 [DEV 3-Tab 7]. The Cook Report is also used by Plaintiffs to handicap races. LaPierre Dep. at 196 [JDT Vol. 14] ("Q. What were your sources of information from which you determined which races were close or which races were in battleground states or whatever? A. Newsletters, the media, just the general turning on the television. I mean, everybody–there are no secrets in–when you get into a campaign, I mean, everybody knows. I mean, it's–the columnists, the TV, the radio, the–I mean, every newsletter you pick up, whether it's the Cook Report. . . ."); Ryan Dep. at 76-77 [JDT Vol. 27] (recalling that he would check the Cook Report to find out which races of Congress were competitive).

magnitude and timing of political advertising."). This expert testimony has not been challenged by Plaintiffs with any contrary expert evidence.

2.8.3.5 Indeed, even Plaintiff NRA admits that it targets its issue advocacy campaigns toward competitive races. NRA Executive Vice President Wayne LaPierre testified that " the other thing that makes an impact on what the NRA does is NRA–NRA, in terms of its election efforts–and when I say NRA, I'm including the whole organization–tends to focus on competitive races." LaPierre Dep. at 118 [JDT Vol. 14]; *see also id*. at 105 ("Q. Is it correct that the NRA spent as much as it could to get its message to gun owning voters in critical swing states? A. That's true.") 196 ("Okay. Now, we've talked a little bit about the location of your ads and that they were at least concentrated on close races or battleground states. You and I may differ on whether that–A. Right. Q.–where the proportion is, but they're concentrated on those races. A. Right."); *supra* Findings ¶ 2.6.4.1 (national election media recommendations by NRA media consultant who proposes focusing issue advocacy on ten congressional seats in 'battle ground' states).

2.8.4 In sum, the uncontroverted record establishes that pure issue advocacy is empirically distinguishable from candidate-centered issue advocacy on the basis of (a) whether the federal candidate is named; (b) whether the advertisement is run in close proximity to a federal election; and (c) if the

advertisement is run in a competitive race. As the uncontroverted testimony of Defense expert David Magleby states:

> A number of indicia make clear that the ads run by individuals and interest groups are in reality electioneering ads that are meant to influence, and do influence, elections: These electioneering ads *generally* name a candidate, run close in time to the election, target the named candidate's district, are run primarily in competitive races, and generally track the themes in the featured candidate's campaign.

Magleby Report at 6 [DEV 4-Tab 8] (emphasis added). Magleby outlines a general rule that candidate-centered issue advertising is distinguishable from pure issue advertising.

2.8.5 Despite being able to empirically distinguish candidate-centered issue advocacy from pure issue advocacy, the record demonstrates that it is very difficult, if not impossible, to determine the objective behind an advertisement by simply listening or viewing the advertisement; particularly when that advertisement is viewed outside the context of the election.

2.8.5.1 Political Consultant Raymond Strother testifies:

> None of us, without understanding the context and the time, can tell you what a sham ad is and a nonsham ad. You can't do that by looking at pictures or even looking at the ads. When I was teaching at Harvard, I brought Doug Bailey up to lecture my class. He showed [a] series of commercials, and he said, "Okay, which is the best commercial," and everybody voted. "The worse commercial," and everybody voted. He said, "You're all wrong. There is no best or worse commercial because none of you are qualified to judge these commercials because you don't know the context in which they were run or the problems they

> were to solve." When I look at storyboards, I have no way of knowing if they're fake, real, et cetera, because I don't know the time -- I don't know anything about them.

Strother Cross Exam. at 90-91. Strother's testimony demonstrates that it is difficult to discern the true purpose of an advertisement without viewing it in its context. Rather, as discussed above, the best way to distinguish pure issue advocacy from candidate-centered issue advocacy is through empirical variables dealing with when and where the advertisement is run, and whether it mentions a federal candidate.

2.8.5.2 An example of the difficulty of discerning the objective behind an advertisement is presented by Defendants and comes from the 1998 Senate campaign between incumbent Senator Lauch Faircloth and now-Senator John Edwards. An advertisement run during the campaign by the American Association of Health Plans ("AAHP") told viewers to call Senator Faircloth "today and tell him to keep up his fight" against trial lawyers' efforts to pass new liability laws. Gov't Opp'n at 82-83; Def. App. C, Tab 1 at 1 ("Look Out for the Lawyers").[99] Defendants point out that this advertisement might appear

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[99] The text of the advertisement is as follows:

> Worried about rising healthcare costs? Then look out for the trial lawyers. They want Congress to pass new liability laws that could overwhelm the system with expensive new healthcare lawsuits. Lawsuits that could make the trial lawyers richer. That could make healthcare unaffordable for millions. Senator Lauch Faircloth is fighting to stop the trial lawyers [sic] new laws. Call him today and tell

(continued...)

to be an example of "genuine issue advocacy" if not for the fact that "[a]t the time this ad was run, the airwaves in North Carolina were saturated with millions of dollars of ads run by Senator Faircloth's campaign, by the Republican party, and by interest groups portraying Edwards as a 'deceptive,' truth stretching trial lawyer. Edwards' own campaign ads trumpeted Edwards as a trial lawyer 'fighting for the people.'" Gov't Opp'n at 83; *see also* Def. App. C, Tab 1 at 2 (Faircloth-sponsored advertisement titled "Stretch the Truth," asking: "Who teaches other lawyers how to stretch the truth? Meet personal injury lawyer John Edwards."); *id*. at 3 (Faircloth-sponsored advertisement titled "You are," telling voters they were paying for Edwards' campaign because "[h]e makes millions suing people. Our hospitals and family doctors, so we all pay more for medical care"); *id*. at 4 (Faircloth-sponsored advertisement titled "The Truth," stating "Newspapers say ". . . [Edwards] has the lawyer's habit of stretching the truth."); *id* at 7 (Edwards-sponsored advertisement titled "Who I Am," which states: "As a young lawyer, I decided to represent people, not big insurance companies."); *id* at 5-6, 8-12.

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[99](...continued)

> him to keep up his fight. Because if trial lawyers win, working families lose.

Def. App. C, Tab 1 at 1. This advertisement was submitted by Plaintiffs on a CD as a "powerful illustration of the . . . type of issue advocacy that would be prohibited by BCRA's primary definition of 'electioneering communications.'" McConnell Br. at 61.

2.9 BCRA's Restriction on "Electioneering Communication"

As discussed earlier, Congress clearly recognized that labor unions and corporations were easily evading FECA's prohibition on their use of general treasury funds to influence federal elections by running broadcast advertisements that did not use words of express advocacy but were clearly designed to influence federal elections. Moreover, as discussed above, these general treasury funds purchased the most effective form of political communication. In *Buckley*, the Supreme Court observed that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Buckley*, 424 U.S. at 42. For this reason, the Supreme Court made clear that a test distinguishing between a discussion of issues and a discussion of candidates that relied on the subjective intent of the listener was problematic. *Id*. at 44 ("In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion.") (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). In enacting Title II's restriction on "electioneering communication," Congress recognized the Supreme Court's admonition in *Buckley* that legislation distinguishing between issue advocacy and candidate discussion must, if at all possible, avoid reliance on the

subjective impressions of the listener. BCRA accomplishes this feat with the primary definition of electioneering communication.

2.9.1 Section 203 of BCRA extends the prohibition on corporate and labor union general treasury funds being used in connection with a federal election to cover "electioneering communication". BCRA § 203; FECA § 316(b)(2); 2 U.S.C. § 441b(b)(2). Section 201 of BCRA amends section 304 of FECA by adding the following definition of an "electioneering communication":

> (i) The term "electioneering communication" means any broadcast, cable, or satellite communication which–
> (I) refers to a clearly identified candidate for Federal office;
> (II) is made within–
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A). Under this definition, in order to constitute an electioneering communication, therefore, the communication (a) must be disseminated by cable, broadcast, or satellite, (b) must refer to a clearly identified Federal candidate, (c) must be distributed within certain time periods before an election, and (d) must be targeted to the relevant electorate. *Id*. The fact that the communication must be "targeted to

the relevant electorate," means that, in the case of House and Senate races, the communication will not constitute an "electioneering communication" unless 50,000 or more individuals in the relevant Congressional district or state that the candidate for the House or Senate are seeking to represent can receive the communication. BCRA § 201; FECA § 304(f)(3)(C); 2 U.S.C. § 434(f)(3)(C).

2.9.2 By adopting a definition of electioneering communication that by and large is premised on the empirical determinants that Congress found distinguish pure issue advocacy from candidate-centered issue advocacy, Congress adopted a definition of electioneering communication that rejected reliance on the subjective impressions of the listener and focuses on objective variables that do an impressive job, in most circumstances, of distinguishing between candidate-centered issue advertising and pure issue advertising. The lone question remaining is whether the primary definition of electioneering communication is narrowly tailored to capture candidate-centered issue advocacy from pure issue advocacy. After carefully reviewing the evidence in the record, I conclude that it is narrowly tailored.

2.10 **The Primary Definition of Electioneering Communication is Narrowly Tailored to Radio & Television Advertisements**

Electioneering communication is narrowly defined to only include communications disseminated by cable, broadcast, or satellite. By including only the media that were found by Congress to be problematic, the primary definition of electioneering

communication is narrowly tailored.

2.10.1 Defense expert Magleby observes that broadcast advertising is the most prevalent form of communicating candidate-centered issue advocacy. Magleby states that

> [b]roadcast advertising is the most visible mode of communicating an electioneering message and is believed to be the most effective for reaching a mass audience. In all of the contests we monitored in 1998 and 2000, interest groups used broadcast, including television and radio, to communicate with voters. . . .
> Broadcast advertising was an especially important element in all of the competitive races we monitored in 2000. . . . In Senate races, television and radio were also major components of the candidate and outside money campaigns. . . .
> Radio is also an effective communications tool for electioneering by interest groups. As with television, if the communications do not use the particular language of express advocacy, the groups do not report the expenditures to the FEC, and stations do not provide the same disclosure that they provide for campaign communications by candidates. Academics monitoring our sample of competitive contests in 2000 found the interest groups making use of radio for electioneering efforts included the NRA, Americans for Limited Terms, U.S. Chamber of Commerce, NFIB, NEA, League of Conservation Voters, Million Mom March PAC, Planned Parenthood and the National Right to Life PAC. Of the 105 radio ads we recorded, only 20 ads contained the magic words.

Magleby Expert Report at 22 [DEV 4-Tab 8].

2.10.2 Those intimately involved in making candidate-centered issue advertisements confirm this expert testimony.

- Denise Mitchell, Special Assistant for Public Affairs to AFL-CIO

President John J. Sweeney, confirms this conclusion. Mitchell states:

> The AFL-CIO also sometimes purchases newspaper advertising for its issue advocacy. We have usually done so in newspapers with high readership among Members of Congress and their staffs . . . . When we are seeking to influence and mobilize public opinion, however, we almost always have used broadcast advertising because it is far more cost-effective; most people get their news and information from broadcast sources; newspaper readership is tilted toward higher-income readers, and we try to reach working and middle-class families; and broadcasts simply have a more potent effect, including the ability to generate additional 'free media' . . . . Also, newspapers are a more passive medium, with less immediacy than broadcast, and are less likely to generate action, and it is far harder to convey in print the human, personal impact of legislative issues -- a key part of our strategy and effectiveness.

Declaration of Denise Mitchell ¶ 28 [6 PCS]; *see also id*. ¶ 29 (explaining why the AFL-CIO does not use direct mail or telephone banks to reach the general public).

- Political consultant Rocky Pennington testifies that

> [e]ffective electioneering is crucial in political campaigns. Television, an emotion-based medium, is the most effective. Radio can also be effective, depending on the specific market you're trying to reach. For example, if you're in a Republican primary and want to reach Republican males between the ages of 18 and 45, Rush Limbaugh radio is probably a good buy. Direct mail can also be very effective, in a different way, since it is more of an information-based medium. You're reaching voters at different levels, and it's good to have a good mix. The above media are good for both candidate and third party communications in a campaign.

Pennington Decl. ¶ 9 [DEV 8-Tab 31]. Pennington provides an example of a particularly effective candidate-centered issue advertisement run on the radio:

> Other interest groups also ran ads trying to elect Mr. Keller in the Republican primary and the run-off. One ad run against Mr. Sublette that I thought probably cost us a couple points in the primary was a radio spot run, as I recall, primarily on conservative talk radio and maybe some Christian stations by Americans for Limited Terms. This ad attacked Mr. Sublette on tax and other issues, basically calling him a big government liberal, while praising Mr. Keller as a real conservative.

Id. ¶ 16.

- Communications consultant Angus McQueen, who has "provided strategic communications advice and services to the" NRA and the NRA PVF for approximately 22 years, states that among the various media outlets "for conveying [NRA's] message, the most powerful is the use of 'paid broadcast media,' which simply refers to paid media that is broadcast over network, cable, or satellite television, or over the radio." McQueen Decl. ¶¶ 3, 10 [11 PCS].

2.10.3 As a result of the following testimony and discussion, I disagree with the NRA's contention that "[a]ds broadcast over the internet are comparable to those broadcast over TV and radio in terms of their public reach and impact." Proposed Findings of Fact of the NRA and NRA PVF ¶ 22. In support of this

finding, the NRA cites only to three items of evidence. This evidence does not support the NRA's conclusion.

2.10.3.1 The first piece of evidence is the declaration of Angus McQueen, the NRA's long-time communications consultant, which notes that the Internet has become an "*increasingly important* part of how information becomes disseminated in our society," resulting in "information [being] disseminated more rapidly, by a greater variety and multitude of diverse sources, than in was in the past." McQueen Decl. ¶ 17 [11 PCS] (emphasis added). "Thus, as illustrated by the popularity of the NRA's website and its "NRA Live!" service [a daily NRA webcast news program], groups like the NRA have in a sense taken over part of the role previously played by the media." *Id*. This testimony only observes that the Internet is becoming an "increasingly important" means of communication. It makes no effort to compare traditional television and radio advertising to Internet communications. With the NRA's webcast, "NRA Live!", viewers make a choice to go to the website and download or watch the program, while advertisements on television and radio are aired throughout programming without any viewer choice. The NRA fails to explain this critical distinction. The Internet and television and radio advertising are completely different forms of media and without testimony comparing the two, I find this evidence does not support the NRA's

conclusion.

2.10.3.2 The second piece of evidence is a submission of "NRA Live!" viewership statistics for the periods of March 1999 through March 2000 and March 2001 through August 2002. NRA App. at 322-23. The NRA makes no effort to compare these numbers to traditional television and radio ratings and therefore it is impossible from this submission to determine if the NRA Internet program has a comparable impact to that of traditional television and radio advertising. Moreover, the viewership statistics are missing data during the period of April 2000 through to March of 2001; precisely the period around the 2000 federal election. As a result, the data does not even demonstrate if the NRA program was being viewed more or less during the election cycle.

2.10.3.3 Third, the NRA provides two videotapes containing multiple editions of "NRA Live!" Broadcasts. NRA App. I. This evidence does absolutely nothing to prove that the Internet has the same impact as television and radio broadcasting.

2.10.3.4 In sum, I do not find that the Internet is now, or was, a comparable medium to television and radio broadcast advertising. Indeed, the NRA's own media consultant testifies that "paid media that is broadcast over network, cable, or satellite television, or over the radio," is the "most powerful" medium for conveying its message. McQueen Decl. ¶ 10 [11 PCS]. If the Internet medium

was as effective as the NRA claims, then it is unclear why the NRA spent as much money on candidate-centered broadcast issue advertising as it did during the 2000 elections. Why not just spend the funds on Internet advertising if that were as effective? The NRA does not answer this question.

2.10.4 Although there seems to be agreement that direct mail is an important tool of campaigning, there is no evidence in the record that it is nearly as effective as broadcast advertising. Defendants' expert Magleby states that campaign mail "can be very effective." Magleby Expert Report at 25 [DEV 4-Tab 8]. Rocky Pennington, a political consultant, comments that direct mail is usually a component of political campaign plans. Pennington Decl. ¶ 3 [DEV 8-Tab 31]. Much like newspaper advertising, direct mail is "a more passive medium, with less immediacy than broadcast, and [is] less likely to generate action." Mitchell Decl. ¶ 28 [6 PCS]. Accordingly, I do not find direct mail to be as effective or as problematic as broadcast candidate-centered issue advertising.

2.10.5 For the same reason I do not find newspaper advertising to be as effective as candidate-centered issue advertisements broadcast on radio and television. The NRA proposes the following finding:

> Newspaper ads often dwarf broadcast ads, especially radio ads, in terms of their expense. For instance, a full-page ad in the *New York Times* would cost $65,000 whereas a 60 second radio broadcast that recites precisely the same text in a small market such as Peoria would cost only $75.

Proposed Findings of Fact of the NRA and NRA PVF ¶ 20. In support of this statement, the NRA cites to two pieces of evidence: a statement by their communications consultant, Angus McQueen, that a 60 second radio commercial in a major media market costs $850, while one in a smaller market sells for $75, McQueen Decl. ¶ 24 [NRA App. 34], and a declaration that is unidentified stating that a group called "Campaign for America" purchased a full-page advertisement in July 1998 in the *New York Times* which cost $64,581.30, NRA App. 256-57 ¶ 12. Simply because a print advertisement is more expensive in the *New York Times* than a local radio spot in Peoria does not mean that the latter is relatively more effective. The far more useful comparison would be between an advertisement in *The New York Times*, a newspaper with nationwide circulation, and a broadcast advertisement aired on a national broadcast network. The NRA has not produced any evidence to demonstrate that when the comparison is properly restated it is more effective to communicate in print advertising. Indeed, Plaintiffs concede that it is not as effective. Mitchell Decl. ¶ 28 [6 PCS] ("When we are seeking to influence and mobilize public opinion, however, we almost always have used broadcast advertising [as opposed to newspaper advertising] because it is far more cost-effective; most people get their news and information from broadcast sources; newspaper readership is tilted toward higher-income readers, and we

try to reach working and middle-class families; and broadcasts simply have a more potent effect, including the ability to generate additional 'free media' . . . . Also, newspapers are a more passive medium, with less immediacy than broadcast, and are less likely to generate action, and it is far harder to convey in print the human, personal impact of legislative issues -- a key part of our strategy and effectiveness."). Accordingly, I do not find that newspaper advertising poses a comparable problem to that of broadcast advertisements detailed *supra*.

2.10.6 The primary definition of electioneering communication is narrowly tailored to only the communication media that was problematic. The evidence demonstrates that more than any other medium, broadcast advertisements were the vehicle through which corporations and labor unions spent their general treasury funds to influence federal elections. This focus is neither overbroad nor underinclusive in scope as my Findings demonstrate.

2.11 **The Primary Definition of Electioneering Communication is Narrowly Tailored by Broadcast Advertisements Appearing Sixty Days Before a General Election and Thirty Days Before a Primary Election, That Name a Candidate, and Are Targeted to that Candidate's Electorate**

BCRA only applies to broadcast advertisements that refer to a federal candidate, that are targeted at the candidate's electorate, and that are broadcast within sixty days of a general election and thirty days of a primary election. By focusing on these characteristics, the primary definition of electioneering communication demonstrates

narrow tailoring.

2.11.1 As an initial matter, it is important to observe that Dr. Milkis, Plaintiffs' expert, testifies that advertising aired *more* than 30 days before a primary or *more* than 60 days before an election "can serve to frame the terms of debate." Milkis Rebuttal Decl. ¶ 9 [RNC Vol. VII]. For example, there are examples of arrangements between political parties and candidates, whereby political parties have run advertisements for the candidates during the summer months when the candidate was low on funds, which permitted the candidate to save money to be spent on advertisements later in the election cycle. Magleby Expert Report at 47 [DEV 4-Tab 8] (noting such arrangements between Senators Debbie Stabenow and Chuck Robb and their political parties during the 2000 election cycle). Nevertheless, even though advertisements aired outside the thirty and sixty day period can influence voters, Congress recognized that most candidate-centered issue advertisements were targeted in close proximity to a federal election. *See supra* Findings ¶¶ 2.8.1.3, 2.8.2 (discussing the fact that candidate-centered issue advocacy is concentrated in the weeks surrounding federal elections).

2.11.2 It is also important to note that it is unrebutted that advertisements naming federal candidates, targeted to their electorate, and aired in the period before the election, influence voters. Political consultant Raymond Strother, testifies

that in his experience consulting for candidates' campaigns, all political advertisements that mention a candidate's name in the weeks leading up to an election, regardless of intent and regardless of whether express advocacy is used, influence voters. Strother Cross Exam. at 70 [JDT Vol. 32] ("I do not believe there are issue ads run immediately before an election that mentioned the candidate that aren't important in the decision-making process of the voter."). Strother's belief is based on his view that voters assimilate and process information from a variety of different sources; creating, in his parlance, a "big cajun stew." *Id*. at Ex. 1 (Strother Declaration) ¶ 4. These various sources ultimately combine to help a voter make a decision. Strother elaborated on this point during cross examination:

> [P]eople, although they're interested, they're casually interested voters. Often you'll run an ad with a certain line in it, and when you poll or go into a focus group, they credit the line to your opponent. That's how casually they watch television, but it's in this climate where they don't know where they get their information. Samuel Popkin wrote a book called, *The Reasoning Voter*, and Popkin says that Americans assimilate information through thousands of different sources to make their opinions, and they're not sure where they came from, but it's a big stew. It's a bit of information here from a brother-in-law, a bit of information here from the barber, a bit of information here from a television ad or a radio ad, and they forget where the information came from.

Strother Cross Exam. at 34-35 [JDT Vol. 32]. This explanation is the reason that Strother concludes that advertisements run immediately prior to a

candidate's election that mention the candidate ultimately have some influence on the decision-making process of the voter. *See id*. at 70; *see also* Resp. of NAB to FEC's First RFA's, No. 4 [DEV 12-Tab 7] ("NAB admits that a Political Advertisement might conceivably influence a federal election without the use of any particular words as might many other factors depending upon the circumstances of each individual race."); *supra* Findings ¶ 2.3.2 (Bailey) ("Over time, a campaign defines a candidate through a combination of style, image, and issues. Even shortly after watching an ad, the target audience usually doesn't remember the ad's substantive details. Rather, the viewers just get a feel for the candidate. It takes a lot of these "feels" to make up a campaign.").

Plaintiffs do not challenge Strother's conclusion with contrary testimony from other political consultants. Instead they rely on their own self-serving testimony and self-selected advertisements they claim are pure issue advertisements that would be unfairly captured by BCRA's primary definition of electioneering communication. BCRA's primary definition of electioneering communication presents an empirical test that ignores this type of self-serving *ex post facto* rationalization by focusing on purely objective criteria: broadcast advertisements, referring to a federal candidate, targeted to that candidate's electorate, and aired in close proximity to a federal election

influence voters.

2.11.3 For example, the McConnell Plaintiffs provide this three-judge District Court with 21 advertisements aired during the 1998 and 2000 election cycles, claiming they serve as "powerful illustrations of the amount and type of issue advocacy that would be prohibited by BCRA's primary definition of 'electioneering communications.'" McConnell Br. at 61; PCS CD 8.

2.11.3.1 With regard to these allegedly "powerful illustrations" of BCRA's overbreadth, Defendants point out that nine of the twenty-one advertisements proffered by the McConnell Plaintiffs would not have been affected by BCRA; eight were not run within 60 days of a general election or 30 days of a primary contest, and one was run in the Washington, D.C. media market where the two Senators mentioned, Senator Jesse Helms of North Carolina, and Senator Joseph Biden of Delaware, were not running for office. Gov't Opp'n at 78 & n.78 (identifying PCS CD 8 at Tracks 5, 7, 10, 12-17). Plaintiffs do not rebut these statements.

2.11.3.2 Of the advertisements that remain, four highlight past votes of the candidate, PCS CD 8 at Tracks 9 ("Stabenow Death Tax," Def. App. C, Tab 2 at 2), 18 ("Job," Mitchell Decl. Ex. 141 [6 PCS]), 19, 20, four urge action on upcoming votes, *id*. at Tracks 2, 3 ("Save,"[100] Mitchell Decl. Ex. 113 [6 PCS]), 6

[100] According to the AFL-CIO, "Save" was run "[a]fter the [Taxpayer Relief Act] (continued...)

("Label," Mitchell Decl. Ex. 132 [6 PCS]), 11, three criticize candidate positions on term limits, Medicare funding and a prescription drug plan, *id*. at 1, 8, 21, and one commends the candidate's fight against trial lawyers,[101] *id*. at 4 ("Look Out For the Lawyers," Def. App C, Tab 1 at 1).

2.11.3.3 Of this meager showing, I do not consider the four advertisements on a candidate's past votes as probative. Criticizing a candidate on past votes in the period of time immediately before a federal election with no indication of future legislation on the issue likely serves no purpose other than to affect the outcome of the election. As a result I find those four advertisements to be examples of electioneering. *See supra* Findings ¶ 2.6.7.

2.11.3.4 What the McConnell Plaintiffs are left with is *at most* eight advertisements that they claim are pure issue advertisements that would be affected by BCRA. As I have already concluded that it is very difficult, if not impossible, to discern retroactively the true intent of an issue advertisement, *see supra* Finding ¶ 2.8.5, I do not engage in a similar parsing of these advertisements. I would note that it is very likely that these eight advertisements did influence federal

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[100](...continued)
passed the House and was being considered in the Senate." Mitchell Decl. ¶ 52 [PCS 6]. This advertisement was "intended to influence House Members in the event that the bill returned for another vote in the Senate [sic]." *Id*. It was run between October 2 to October 9, 1998. *Id*.

[101] *See supra* Finding ¶ 2.8.5.2 (discussing this advertisement).

elections because they refer to a federal candidate in a broadcast advertisement aired in close proximity to a federal election, and targeted to the candidate's electorate. *See supra* Finding ¶ 2.11.2. Moreover, Defendants, Defendant-Intervenors, and my own Findings cast doubt on Plaintiffs' assertion that these advertisements did not serve an electioneering purpose, *see, e.g.*, *supra* Finding ¶ 2.8.5.2 (discussing trial lawyer advertisements around the Edwards/Faircloth election). Nevertheless, the primary definition of electioneering communication focuses on objective criteria precisely to avoid trying to guess the true intent of an advertisement. For the foregoing reasons even assuming these eight advertisements were pure issue advertisements, I do not find that they demonstrate overbreadth. Simply put, eight advertisements covering a pool of at least two election cycles–including both primaries and general elections–do not serve as "powerful illustrations" of the overbreadth of BCRA's primary definition of "electioneering communications." McConnell Br. at 61.

2.11.4 Defendants identify an additional 39 advertisements Plaintiffs use in their briefings as examples of genuine issue advertisements which would be unfairly affected by BCRA's provisions. Gov't Opp'n at 77-94. Plaintiffs do not rebut this figure. In addition to these advertisements, I have found four additional advertisements alleged in declarations to be examples of legislative-centered

advertisements that would be affected by BCRA.

2.11.4.1 For twelve of these advertisements, Plaintiffs provide the Court with no specific information regarding the dates they were run except that they were aired in 1994. These twelve advertisements were sponsored by the NRA and concerned the Brady gun law and a crime bill. NRA App. 885-88 [12 PCS]; *see also* LaPierre Decl. ¶ 21 [11 PCS] (stating only that the crime bill commercials were run in 1994). Without any information as to their airing dates, I am unable to reach any conclusion about them and therefore do not consider them. Thirteen other commercials, also sponsored by the NRA, would escape BCRA's effects because they were run in 2000 and referred only to President Clinton who was not a candidate for office at that time. NRA App. 914-16 [12 PCS]. Accordingly, I exclude from consideration these thirteen advertisements as well.

2.11.4.2 Another advertisement, sponsored by the ACLU, I exclude from consideration because it was clearly designed simply to provide the corporation standing to challenge BCRA. The ACLU cites, as an example, an advertising campaign directed at Speaker Dennis Hastert, who represents the fourteenth district of Illinois, run in March of 2002, urging him to bring the Employment Non-Discrimination Act (ENDA) to a full vote in the House. Murphy[102] Decl. ¶ 10

[102] Laura W. Murphy has served as the ACLU's legislative director since 1993. (continued...)

[3 PCS]; *see also* Text of advertisements, 3 PCS/ACLU 14-17. The advertisement was broadcast on multiple Chicago and Aurora, Illinois radio stations throughout the weekend of March 15-March 17, 2002. *Id*. Since the advertisement was run within thirty days of a primary election, the commercial would have constituted an electioneering communication under BCRA and would have violated BCRA because it was paid for with the general treasury funds of a corporation. *Id*. (observing that the "ACLU also hoped to highlight the constitutional flaws of BCRA"). An internal ACLU document demonstrates that the ACLU's purpose in running the advertisement was to create a commercial that would violate BCRA. A March 10, 2002, e-mail from Laura Murphy, legislative director of the ACLU, to her colleagues, explained why the ACLU's March 2002 Hastert ad was run:

> Anthony wants the ACLU to be in a position to challenge Shays-Meehan when it becomes law as early as during the Easter recess. As you know the issue advocacy restrictions would select groups like the ACLU if we want to take out and [sic] ad 30 days before a primary or 60 days before a general election in broadcast, satellite or cable outlets. These ads would have to reach 50,000 people or more and would have to mention the name of a candidate. *Steve thinks that the ads that we ran during the 2000 election cycle would not qualify to give us clear standing to challenge the law*.
>
> Anthony wants us to run these ads and he has said that he has 501(c) 4 money to do them! I have a chart in my office, but I

[102](...continued)
Murphy Decl. ¶ 1 [3 PCS].

> can also fax one to you from New York tomorrow 3-1-02, that show all of the primary dates around the country. When You [sic] get that, I need you to look at the states where there are primaries and see if *you can find a candidate whom we could target for an issue ad*. For example it is too soon to do an ad by Tuesday, but Tuesday, March 12 is the Texas primary and we could decide that Chet Edwards is on the fence about something and run an ad that says, "Call Chet Edwards and ask him to support xyz." Anthony said that he has money to pay for such an ad. Or we could target a Senator on election reform. Remember it does not have to be TV, as the broadcast restriction in Shays-Meehan covers radio as well. We would like to run these ads before the bill becomes law. WHICH ONLY GIVES US ABOUT TWO WEEKS TO PULL THIS TOGETHER!!
>
> Phil, I know you have been busy with the web crisis (which you did not tell me about), so you are probably crazed. But I was hoping that Greg could take the lead on finding the issue that will still be important in tow [sic] weeks where we can target a member and it will make sense. I think that the issue we pick should be a priority so that we do not waste 501(c)(4) money on something we are not really concerned about.

Email Message Attached as Ex. to Resps. of American Civil Liberties Union to Defendant's Second Set of Requests for Production of Documents, Ex. B; USA-ACLU-00003 [DEV 130-Tab 4] (italics added). Defense experts Krasno and Sorauf comment on the ACLU's Hastert advertisement:

> In short, BCRA is remarkably successful in differentiating between the vast majority of pure issue ads and candidate-oriented issue ads.
>
> Nevertheless, the ACLU has demonstrated with a commercial about gay rights, aired in House Speaker Dennis Hastert's district last spring before the GOP primary, that it is possible to deliberately create a pure issue ad that runs afoul of BCRA. This episode deserves special scrutiny, and we would emphasize

> several points. It is telling, from our perspective as students of elections and campaigns, that the ACLU was forced to fabricate its own example of a pure issue ad that would be improperly categorized by BCRA. Given the huge numbers of issue ads broadcast in 1998 and 2000, if plaintiffs are correct in their dire predications about how BCRA would damage free speech rights, it should have been easy to find numerous real-life examples to illustrate the same point. In fact, very few pure issue ads would have been affected by BCRA. Even more telling, however, the ad that the ACLU ran was designed in a specific way to trigger BCRA. It need not have done so.

Krasno and Sorauf Report at 62-63 [DEV 1-Tab 2]; *see also* Text of ads, 3 PCS/ACLU 16-17 (noting script of advertisement that the ACLU ran in the print media over this issue). Given this information surrounding the background of the ACLU advertisement, I exclude it from consideration.

2.11.4.3 Another advertisement run by the AFL-CIO, titled "Sky," criticized Members of Congress for a past vote. Mitchell Decl. Ex. 139 ("Sky"); *see also id*. ¶ 59 (failing to note whether there was any upcoming legislation related to the past votes that the advertisement might have been targeting). Similar to my conclusion above, I do not consider this advertisement because I find it to be electioneering.

2.11.4.4 Of the remaining twelve advertisements, four commercials are discussed in detail in other paragraphs of my Findings or the appendix to my opinion. *See* Findings ¶¶ 2.6.6.2 (ABC advertisement concerning penalties for child molesters), App. ¶ I.D.7.i, I.D.8.c (Anti-abortion commercial identifying

Senators Kohl and Feingold); Findings ¶ 2.11.8.2 ("Deny" and "Barker"). Another advertisement run by CBM was aired in response to commercials aired by the AFL-CIO to "correct the issue debate and counter the distortions in the ads that we just saw." Ryan Dep. at 74-75. Of the remaining seven advertisements, four are NRA-sponsored 30-minute "news magazines" (titled "California," "It Can't Happen Here,"[103] "Million Mom March," and "Tribute"[104]), NRA Reply at 22-24, one was run by the Southeastern Legal Foundation,[105] 60-Plus Association, the Center for Individual Freedom, and the National Right to Work Committee, praising Senator McConnell's stance on campaign finance reform, McConnell Br. at 63, one was sponsored by the

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[103] "California" and "It Can't Happen Here" are discussed in greater detail *supra*, App. ¶ I.D.8.h.

[104] "Tribute" includes the following statement delivered by Charlton Heston:

> The NRA is baaaaaaack. [Much applause] All of this spells very serious trouble for a man named **Gore**. [Applause]. That leads me to that one mission that is left undone -- winning in November. . . . So, as we set out this year to defeat the divisive forces that would take freedom away, I want to say these fighting words for everyone within the sound of my voice to hear and to heed and especially for you, Mr. **Gore**. "From my cold dead hands." [Much Applause].

NRA App. at 947 (emphasis in the original). The NRA states that this passage "simply reflect[s] the NRA's practice of soliciting members by mentioning anti-gun politicians." NRA Reply at 24.

[105] The Southeastern Legal Foundation is a 501(c)(3) organization, McConnell Second Amend. Compl. ¶ 36, which is exempt from BCRA's restrictions on electioneering communication. Final Rule, Electioneering Communications, 67 Fed. Reg. 65,190, 65,199-200 (Oct. 23, 2002) (to be codified at 11 C.F.R. 100.29(c)(6)).

National Right to Life Committee and criticized Senator McCain's position on campaign finance reform, O'Steen Cross Exam. at 52, and one was a Chamber of Commerce-sponsored commercial aired in Utah which pointed out that a candidate had not taken a position on two competing drug prescription plans, Chamber/NAM Br. at 5.[106]

2.11.4.5 I have been able to find an additional four advertisements that were cited by Plaintiffs in declarations as being motivated by pending legislation and happened to run within the 30 or 60-day BCRA windows. (AFL-CIO's "No Two Way," "Spearmint," "Spear," and the Gun Owners of America's armed pilots advertisement). For purposes of this analysis I accept Plaintiffs' characterization of these commercials.

2.11.4.6 Given my finding that it is very difficult to determine the objective behind the advertisement without a thoroughgoing contextual analysis of the advertisement, *see supra* Finding ¶ 2.8.5, I do not attempt to parse these remaining sixteen advertisements to determine if their true purpose was to affect an election. I make this statement even though I recognize that these

[106] Defendants dispute the argument that this advertisement did not have an electioneering purpose based on the context in which the advertisement was run. Gov't Opp'n at 85-86. Defendants note the commercial was run only between November 1 and 6, 2000, when Congress was not in session. *Id*. at 85. The race was labeled a "toss-up" by the Cook Report, and the advertisement's "tag line – 'Tell Matheson to make a decision. This issue is too important to ignore.' – played to the overall campaign theme that voters should elect someone who is decisive and who shares their values." *Id*. The Chamber does not respond to these observations.

advertisements likely did influence the election by virtue of referring to a federal candidate, in close proximity to a federal election, and targeted to the candidate's electorate, *see supra* Finding ¶ 2.11.2, and even though Defendants, Defendant-Intervenors, and my own Findings demonstrate that some of these advertisements were likely electioneering, *See, e.g.*, *supra* Finding ¶ 2.6.6.2 (discussing ABC's advertisement on a candidate's record on child molestation legislation). Rather, I simply conclude that the evidence of these advertisements cited in Plaintiffs briefing is not sufficient to render BCRA overbroad. If Plaintiffs were correct, that BCRA would have such an indelible effect on their ability to advertise about issues of importance to their organization, I would have expected a more robust showing; particularly when the examples they submitted are from as far back as 1996 and include advertisements aired in close proximity to both primary *and* general elections. As a result of all these considerations, I conclude that these remaining sixteen advertisements do not demonstrate BCRA's overbreadth; even if taken in conjunction with the eight advertisements raised by the McConnell Plaintiffs and discussed *supra*.

2.11.5 The AFL-CIO Plaintiffs have adopted a similar tactic as the McConnell Plaintiffs in regard to primary elections and attempt through a series of examples to show that BCRA's thirty day window is overbroad. The AFL-

CIO Plaintiffs have put forth a number of advertisements which they claim are "genuine issue advertisements" relating to pending legislation that BCRA would capture because they ran on television and radio within 30 days of a primary election. AFL-CIO Br. at 10-11 (citing Mitchell Decl. ¶¶ 32, 34-36, 37-39, 40, 50, 58-59). Instead of discussing these at length in my Findings, I have analyzed them in my Appendix. *See* App. ¶¶ II.A.[107]

2.11.5.1 These AFL-CIO examples constitute 336 cookie-cutter advertisements selected from a pool of at least three different election cycles. Of this number, I determine that only 50 of these advertisements would have been arguably affected by BCRA. *Id.* ¶ II.A.10. While I have some doubt that all of these fifty remaining advertisements were designed purely to influence the pending legislative debate and not a primary election outcome, given my finding that discerning the true intent behind an advertisement is nearly impossible without a fulsome understanding of the context in which the advertisement ran, *see supra* Finding ¶ 2.8.5, I do not attempt to make that judgment with these advertisements even though they likely had that effect given their content and timing. *See supra* Finding ¶ 2.11.2. Given these factors and the fact that at

[107] The AFL-CIO Plaintiffs also cite to a handful of advertisements that they claim are pure issue advertisements that would appear within the sixty-day period. I have already discussed these in my findings on the McConnell Plaintiffs' twenty-one advertisements, in the context of the thirty-nine advertisements spotted by Defendants and Defendant-Intervenors in their briefing, and with regard to the four additional advertisements that I found reviewing Plaintiffs' submissions.

best the AFL-CIO Plaintiffs were only able to find fifty advertisements that would be affected by BCRA out of federal primary elections covering at least three election cycles, I conclude that the AFL-CIO Plaintiffs have not shown that BCRA's thirty day period is overbroad. Moreover, the record contains other evidence that demonstrates that the thirty day primary window is narrowly tailored.

2.11.5.2 Defendants' experts comment that the

> hodgepodge of different primary dates makes it difficult to factor [the 30 day primary window] into the analysis, but we are confident that it would have little effect on the proportion of pure issue ads incorrectly captured by BCRA for the simple reason that so few of these advertisements mention candidates at all. Indeed, our examination of 1998 shows this to be true: no pure issue ads would have been captured by the 30-day primary period.

Krasno and Sorauf Expert Report at 61 [DEV 1-Tab 2].

2.11.5.3 The experts' thesis is substantiated by empirical evidence regarding the thirty day period. Defendant Intervenors are the only party that conducted a study of the data to determine the impact of BCRA on advertisements run during the 2000 primary election period. Def. Int. Reply at 59. They found 76 distinct advertisements, which aired more than 60 days before the election from the CMAG database, comprising 16,916 airings. *Id*. at 59 & n.201. Of these advertisements, three percent of the airings (522 out of 16,916) named a candidate and were aired within 30 days of the candidate's primary. *Id*. at 59

& n.202. Examining the student codings, the Defendant Intervenors found the majority of the advertisements had been deemed "electioneering," resulting in a finding that of the advertisements identifying a candidate and airing within 30 days of a 2000 primary election, 1.2 percent were "genuine issue advertisements." *Id*. at 59. As none of the other parties submitted any study dismissing these results or objecting to Defendant-Intervenors' study, I accept the conclusions reached therein. As I have already found that candidate-centered issue advertisements are used to influence primary elections, *see* Findings ¶¶ 2.6.5.5, 2.10.2 (Pennington), 2.6.6.5 (New Hampshire Presidential primary advertisement referencing Senator McCain), I conclude that on the basis of my Findings relating to the AFL-CIO advertisements, Defense experts Krasno & Sorauf's results, and Defendant-Intervenors' analysis, BCRA's thirty day window is narrowly tailored.

2.11.6 As discussed in this section, Plaintiffs have focused on examining the intent behind their advertisements to demonstrate BCRA's purported overbreadth. However, Plaintiffs have not been able to provide any evidence to support this position that is not either self-serving testimony or evidence rebutted by contrary evidence.

2.11.7 There is a disputed issue of fact about whether advertisements that name a federal candidate, are aired in that candidate's electorate, and broadcast in

close proximity to the candidate's election are ever pure issue advertisements. Given this disputed issue, I cannot agree with Plaintiffs that the primary definition of electioneering communication is overbroad.

2.11.7.1 Political consultants testify that there is minimal utility in running a genuine issue advertisement in the 60 days before a federal election. As a result, issue advertisements run in that time frame are most likely designed to influence the outcome of a federal election. Pennington Decl. ¶ 10 [DEV 8-Tab 31] ("Parties and interest groups would not spend hundreds of thousands of dollars to run these [soft money] ads 15 days before an election if they were not trying to affect the result. These candidate-specific ads are not usually run the year before the election or the week after."); Lamson Decl. ¶ 6 [DEV 7-Tab 26] ("These 'issue ads' generally stop on the day of the election."); Strother Decl. ¶ 7 [DEV 9-Tab 40] ("[T]hese issue advertisements were run when there were no pending elections. For these true issue ads, we specifically avoided the months right before the election because (a) air time would be more expensive; and (b) each ad would just become part of the election season gumbo and viewers would assume that it was just another election-related ad."); Strother Cross Exam. at 70-71 [JDT Vol. 32]; Bailey Decl. ¶12 [DEV 6-Tab 2]. Plaintiffs have provided no contrary political consultant testimony to rebut these conclusions.

2.11.7.2 Defense expert testimony confirms the political consultants' view that it is impractical to run genuine issue advertisements in the weeks leading up to an election, unless you are aiming to influence a federal election. Dr. Goldstein states:

> One concern sometimes raised by those opposed to the BCRA regulations is that the restriction may harm interest groups by preventing them from advertising on their issues at a time when citizens are supposedly paying the most attention to politics. There is no reason to believe that BCRA would significantly hinder interest groups from effectively getting out their messages on public policy issues. Running genuine issue ads near an election does not increase the effectiveness of those ads; in fact, it is likely that the ads' effectiveness actually decreases. . . .
>
> In addition to being less effective at conveying their messages, issue ads run close to an election are also less cost-effective, since the price of scarce television and radio air time is higher near an election than during the rest of the year.

Goldstein Expert Report at 32-33 [DEV 3-Tab 7]; *see also infra* App. ¶ I.C.8; Magleby Expert Report at 20 [DEV 4-Tab 8] ("In contrast, genuine issue ads are more likely to run earlier since rates are cheaper and proximity to an election is less important."); Krasno and Sorauf Expert Report at 57 [DEV 1-Tab 2] ("Pure issue ads are more likely to respond to the congressional calendar or an advertising strategy unrelated to an election.").

2.11.7.3 Plaintiffs' experts dispute the Defense experts' position and contend that it is effective and necessary for corporations and labor unions to spend general

treasury funds on broadcast advertisements in the weeks before an election that mention the name of a federal candidate and are targeted to the candidate's electorate. Monroe Decl. ¶¶ 18-19 [10 PCS] ("The defendants in this proceeding have argued that ads run near the time of an election are evidence that the association's actual intent is to advocate the election of one candidate or another. However, there are other, more valid, explanations for the timing of our advertising. One is that serious legislative initiatives or regulatory proposals often are considered near the time of elections. Also, it is clear that members of the public are generally more receptive to and engaged in considering government policy ideas and issues as elections near. If that is the time when people will listen, that is the time to speak. And once an election occurs, there seems to be a period of fatigue during which political matters are of less interest, making issue ads then less effective."); Huard Decl. ¶ 10 [10 PCS] ("NAM has run issue ads at times when no election was impending. In broad terms, however, Americans tend to have greater interest in political matters as an election approaches. At the same time, elected officials are most attuned to the views of their constituents in the pre-election period. Thus, for many purposes, the pre-election season is a critical time for issue ads. Conversely, after an election public interest in public policy matters fades, perhaps due to fatigue. Then, few issue ads are run soon after an election.");

Murphy Decl. ¶ 12 [3 PCS] ("Finally, it is important to emphasize that the blackout periods imposed by the BCRA–60 days before a general election and 30 days before a primary–are often periods of intense legislative activity. During election years, the candidates stake out positions on virtually all of the controversial issues of the day. Much of this debate occurs against the backdrop of pending legislative action or executive branch initiatives. Some of the President's or Attorney General's boldest initiatives are advanced during election years–often within 60 days of a general election. This year, for instance, legislation creating a new federal department of Homeland Security is under consideration during this pre-election period."); *but see supra* Finding ¶ 2.11.4.2 (only example of a pure issue advertisement created by ACLU that would be effected by BCRA was intentionally created to violate BCRA in order to provide ACLU with standing to challenge law).

2.11.7.4 Plaintiffs' expert Dr. Gibson agrees that running issue advertisements in proximity to federal elections is effective; however, he does not respond to Defendants' expert's view that commercials aired close to an election are more expensive, or the fact that genuine issue advertisements tend to air in conjunction with the legislative calendar as opposed to the federal election cycle. *See infra* App. ¶ I.C.8.

2.11.8 On the basis of this dispute and my earlier Findings, I disagree with Plaintiffs'

claim that the legislative calendar can necessitate the running of issue advertisements during the final days of an election campaign that refer to a federal candidate and are targeted to the candidate's electorate.

2.11.8.1 Many deponents merely state that "serious legislative initiatives or regulatory proposals often are considered near the time of elections," without providing actual examples of advertisements run in response to the legislative activity. Monroe Decl. ¶ 18 [10 PCS]; *see also* Huard Decl. ¶ 11 [10 PCS] ("[I]ssue ads supporting a particular tax bill may well be needed as the bill approaches a vote. If it happens that primaries or elections are imminent, that does not diminish the need to be able to speak out right then."); Murphy Decl. ¶ 12 [3 PCS] (commenting that "the blackout periods imposed by the BCRA . . . are often periods of intense legislative activity," noting consideration of the Homeland Security Department bill occurred within 60 days of the 2002 election, but listing political activities conducted that would not have been affected by BCRA). This evidence is so general that, even if I were to consider Plaintiffs' point valid, I would find that it was not probative.

2.11.8.2 While two other organizations provide examples of advertisements run about legislative issues that were actually pending before the legislature, this testimony does not demonstrate that the primary definition of electioneering communication is overbroad. Other than the AFL-CIO and the Gun Owners

of America ("GOA"), no other groups examples were provided of advertisements run in the 60 days prior to an election or 30 days prior to a primary directly addressing pending legislative activity. The examples from the AFL-CIO included advertisements regarding an "upcoming budget fight over education programs" in September 1996. Mitchell Decl. ¶ 41 & Ex. 59 [6 PCS] ("No Two Way").[108] The labor group also ran commercials between September 21 and 25, 1998, in eight congressional districts, opposing "fast track" trade legislation, which was scheduled for a vote in the House of Representatives on September 25, 1998. Mitchell Decl. ¶ 52 & Ex. 116 [6 PCS] ("Barker"). During the same month, the AFL-CIO also ran a "flight of broadcasts" aimed at a scheduled Senate vote on HMO legislation that the AFL-CIO considered to be inadequate, *id*. ¶ 51 & Exs. 105-07 ("Deny"), and opposing the Taxpayer Relief Act which had been recently marked up by the

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[108] The FEC's investigation of the AFL-CIO's 1996 political advertisement concluded that

> [i]n the nine flights broadcast between late June and mid-September, 1996, the advertisements would criticize the incumbent member of Congress named therein, frequently in harsh terms, about his or her record on the issue that was the subject of the advertisement. However, with the exception of a flight of advertisements on the topic of the minimum wage that aired in late June and early July, 1996, there was no clear connection between the content of the advertisements and any legislation that was then the subject of intensive legislative action at the time of the advertisements.

General Counsel's Report, MUR 4291 (Jun. 9, 2000) at 5-6 [DEV 52-Tab 3]. The AFL-CIO responds, stating that "No Two Way" was "broadcast in order to influence the 'upcoming budget fight on education programs' and referred to related past votes to make its point." AFL-CIO Reply at 4 n.3 (quoting Mitchell Decl. ¶ 41 [6 PCS]).

House Ways and Means Committee, *id.* ¶ 52 & Exs. 108-09 ("Spearmint" and "Spear"); G. Shea Decl. ¶ 43 [7 PCS]. In 2002, the GOA ran a radio advertisement in New Hampshire within 30 days of the primary election for the New Hampshire Republican U.S. Senatorial nominee, which supported legislation allowing airline pilots to be armed. Declaration of Lawrence D. Pratt ¶ 5.

2.11.8.3 As I have stated throughout, it is nearly impossible to determine retroactively the objective behind an issue advertisement, s*ee supra* Finding ¶ 2.8.5, and consequently, I do not attempt to engage in an analysis of the true intent behind these advertisements, even though it is highly likely that these advertisements influenced the election on the basis of their content and timing, *see supra* Finding ¶ 2.11.2. Rather, I conclude that this minimal showing from the AFL-CIO and GOA does not provide a basis for concluding that the primary definition of electioneering communication is overbroad.

2.12 **Expert Reports on BCRA's Effect on Political Advertising**

Plaintiffs have not produced any studies of their own analyzing BCRA's purported effect on pure issue advertising. Instead, as discussed above, Plaintiffs prefer to rely on picking out advertisements they claim are pure issue advertisements affected by BCRA and criticizing studies relied on by Congress during their deliberations that Defendants have produced for the litigation. In my Appendix, I describe the various

expert reports purporting to demonstrate the problems created by issue advocacy advertisements affecting federal elections, as well as the narrow tailoring BCRA has achieved to avoid affecting federal non-electioneering advertisements. *See infra* Appendix. My Appendix examines the criticism of these studies. *id.* Overall, I find that much, though not all, of the relevant evidence presented by the Defendants has merit and has not been discredited by Plaintiff's expert, Dr. Gibson, whose criticism focused on the *Buying Time* studies.

2.12.1 At the outset, it is clear that the data underling a majority of the studies, provided by CMAG, is not without its limitations. App. ¶ I.A. I am aware that CMAG's coverage is not universal, that advertisements can be, and apparently are missed, and that some information may not be present on the four-second snapshot storyboards. *Id*. ¶ I.A.3. The most notable deficiency in the data appears to be its inability to identify different "cookie cutter" advertisements (advertisements identical except for mentioning different candidates). *Id*. Despite pointing out these gaps, Dr. Gibson has not demonstrated how these shortcomings affect a majority of the conclusions that can be drawn from the CMAG data. *Id*. ¶ I.A.4. Furthermore, Plaintiffs have failed to demonstrate that the efforts taken by experts to remedy the "cookie cutter" effect for their studies were deficient. *Id*. In addition, no evidence has been presented that the data is biased in one way or the other based on the fact that CMAG does

not cover 20 percent of American households or local cable channels. *Id*. Dr. Gibson's hypothesis that the CMAG is more likely to miss "genuine issue advertisements" is pure conjecture, and contradicted by Dr. Goldstein's testimony regarding the overinclusive nature of the advertisements provided to CMAG by CMR. *Id*. ¶ I.A.3. Finally, the evidence shows that CMAG is used as the basis for many political science studies which are peer-reviewed and published by the top political science journals in the country, and is a regular resource for politicians and political parties. *Id*. ¶ I.A.5. Given the widespread acceptance of CMAG in academic and political circles, and the fact that Plaintiffs were unable to demonstrate that its flaws result in bias, I accept the CMAG data as a legitimate source of data for use in studies seeking to understand the contours of political advertising, recognizing it has certain limitations.

2.12.2 The Annenberg studies, discussed in Findings ¶¶ 2.2.1, 2.2.2, 2.2.3, 2.2.4, 2.2.6 (conclusions), 2.8.2.1, *supra*, as far as I can discern, have not been challenged by anyone. In fact, as mentioned above, the record shows that Members of Congress, Defendants' experts, and even Plaintiffs' experts rely on the Annenberg Reports, and as such I find no reason not to accept their conclusions as well. *See* Findings ¶ 2.2.6 (Annenberg Center concluding *inter alia* that "[i]nstead of creating the number of voices *Buckley v. Valeo* had

hoped, issue advocacy allowed groups such as the parties, business and labor to gain a louder voice" and that the "distinction between issue advocacy and express advocacy is a fiction").

2.12.3 Dr. Goldstein provides an expert report based on his own findings derived from his own version of the CMAG data from the 2000 election, which he had updated since providing it to the *Buying Time 2000* authors. App. ¶ I.C. Unrebutted are his findings that: interest group advertising in 2000 was concentrated in so-called "battleground" states; roughly 11 percent of candidate-sponsored advertisements in 2000 used express advocacy terminology; interest group advertisements, which identified a candidate in 2000, tended to be broadcast within the final 60 days of the election campaign, whereas those that did not identify a candidate were spread more evenly throughout the year; and interest group advertisements that mentioned candidates in 2000 were highly concentrated in "battleground states." *Id*. Dr. Goldstein's uncontroverted conclusions further demonstrate that BCRA's primary definition of "electioneering communication" narrowly focuses on the key empirical determinants that separate genuine issue discussion from electioneering. I accept these uncontroverted findings.

2.12.4 Plaintiffs have attempted to discredit the *Buying Time* reports specifically through the expert reports of Dr. Gibson. Dr. Gibson presents various

criticisms of the reports in an effort to have the Court dismiss them or find Dr. Gibson's alternative conclusions more acceptable. The effort is not unlike that of a piñata party: if one hits the piñata enough, it will eventually crack apart. Although some of these "hits" have merit, I point out that neither Plaintiffs nor Dr. Gibson have attempted to conduct their own similar study, or even replicate a discrete portion of the *Buying Time* studies, despite the fact that the underlying materials were provided to them by Defendants. Presenting the Court with contradictory results from such a study would have been far more persuasive than the recalculations of incorrect versions of the *Buying Time* data sets and the often conjectural and speculative criticism proffered by Plaintiffs and Dr. Gibson.

2.12.5 In terms of the *Buying Time* reports in general, I would not discount the studies because they were approached with a particular result in mind. The testimony shows that policy perspectives and effective scientific research are not mutually exclusive. App. ¶ I.D.7.b. The "cleaning" of the data that Dr. Gibson finds suspicious appears, from the testimony, to be a necessary function for databases of the size produced for the *Buying Time* reports and not the function of bias. *Id*. ¶ I.D.7.n. Fixing miscodings and resolving the "cookie cutter" issues required such actions. *Id*. The confusion among the experts as to the correct database to use to analyze the studies' findings, *see id*.

¶ I.D.7.d, decreases the utility of Dr. Gibson's Expert Report, but also undermines the notion that the *Buying Time* authors manipulated the data in order to achieve their desired results. The fact that the Brennan Center maintained previous versions of the *Buying Time* data sets suggests that their changes were not part of an effort to introduce bias into the data set.

2.12.6 I also do not take issue with the studies' designers seeking to determine the mental perceptions of ordinary viewers. Studies based on subjective opinions are an accepted practice in the social sciences. *Id.* ¶ I.D.7.i. The evidence also demonstrates that although university students are not necessarily representative of society as a whole, relying on student impressions as the basis for academic conclusions is an accepted scholarly practice. *Id.* ¶ I.D.7.h.

2.12.7 Much, if not all, of the objective findings in the *Buying Time* reports have not been undermined by Plaintiffs' expert. For example, Plaintiffs have not challenged the findings in *Buying Time* that very few advertisements utilize express advocacy terminology, and that interest group advertisements, which identify candidates, are concentrated toward the end of the election campaign. *Id.* ¶ I.D.7.a. I find that this objective data is insulated from the great majority of criticism leveled at the *Buying Time* reports. *Id.* (Dr. Gibson commenting that "[e]ntirely objective characteristics of the ads (e.g., whether a telephone number is mentioned in the text of the ad) present few threats to reliability.").

Furthermore, some of these results are supported by those of the unrebutted Annenberg Report 2001. *See id*. ¶ I.B.1.

2.12.8 However, I am troubled by the fact that coders in both studies were asked questions regarding their own perceptions of the advertisements' purposes, and that these perceptions were later recoded. *See, e..g., id*. ¶ I.D.8.c. When such changes are made, it is difficult to determine their effect on the findings in the reports. The principal casualty in this regard are the conclusions the *Buying Time* studies make regarding the percentage of "genuine" issue advertisements "captured" by BCRA. *Buying Time 1998* finds that seven percent of genuine issue advertisements aired over the course of 1998 were aired in the final 60 days of the election campaign and mentioned a candidate, and Dr. Krasno determined that out of all of the advertisements identifying a candidate sixty days before the election, 14.7 percent were "genuine" issue advertisements. *Id*. ¶ I.D.6.a, I.D.7.r.(2). Dr. Gibson found figures from the *Buying Time 1998* data ranging from 16 percent to 60 percent. *Id*. ¶ I.D.7.r.(3). *Buying Time 2000* finds that 0.6 percent of the advertisements aired in the final sixty days of the 2000 campaign which identified a candidate were "genuine" issue advertisements. *Id*. ¶ I.D.6.b. The results from both *Buying Time* studies are based on coders' answers to the questions asking for their opinions on the commercials' purpose. *Id*. ¶ I.D.4.

2.12.9 For *Buying Time 1998*, it is clear that a small number of advertisements disputed in this litigation, which aired a considerable number of times, were coded as "genuine" issue advertisements, but that the coders continued to fill out the survey sheets as if they had found the advertisements to be "electioneering" commercials. *Id.* ¶ I.D.7.r.(3). This fact undermines Dr. Gibson's, Dr. Krasno's, and *Buying Time 1998*'s conclusions about the impact BCRA would have had on genuine issue advertisements over the course of 1998 or within the final 60 days of the election. I cannot determine based on the record which view of the student coding is correct, and as such I find this matter in dispute and do not accept either side's conclusion on this particular point.

2.12.10 *Buying Time 2000* suffers from a similar infirmity, although the reasons for the changes appear to be more the result of the authors' perceptions than on coding irregularities, *id.* ¶ I.D.8.c, and for that reason, I cannot accept its finding that, of all of the issue advertisements run within 60 days of the 2000 election that mentioned a candidate, 0.6 percent were genuine advertisements, *id.* ¶ I.D.6.b. However, Dr. Goldstein finds that if one includes all of the advertisements that Plaintiffs allege were recoded from genuine to electioneering commercials, the most "conservative" calculation of advertisements aired in the final 60 days of the 2000 election also identifying

a candidate, which were "genuine," is 17 percent. *Id*. ¶ I.D.8.c. This figure is not rebutted by Plaintiffs or their expert.

2.12.11 Dr. Gibson also argues that since the majority of advertisements coded as electioneering were also coded as having policy matters as their primary focus, the studies in fact demonstrate that the vast majority of advertisements captured by BCRA are genuine issue advertisements. App. ¶¶ I.D.7.p, I.D.8.e. I reject this argument. As Defendants' experts have clearly demonstrated, the fact that an advertisement may focus on issues does not preclude the possibility that the advertisement is designed to promote a candidate. *Id*. ¶ I.D.7.p . Dr. Lupia's beer commercial analogy illustrates this point effectively. *Id*. (Lupia observes that many beer commercials do not focus on the product, but rather people "engaged in a range of activities that we can call 'wild nights out.'" Accordingly, it is not unreasonable to "perceive that the purpose of the ad is to get" the viewer to buy the beer, "but to judge its primary focus as wild times.") Furthermore, the results for candidate-sponsored advertisements demonstrate that even when a person running for office airs an advertisement in an effort to win election, he or she more often than not focuses those commercials on policy matters as a means of conveying a candidate's values and not directly on the personal characteristics of the candidates. *Id.* ¶ I.D.7.p; *see also supra* ¶ 2.3.2 (Bailey) (Over time, a campaign defines a candidate

through a combination of style, image, and issues. Even shortly after watching an ad, the target audience usually doesn't remember the ad's substantive details. Rather, the viewers just get a feel for the candidate. It takes a lot of these "feels" to make up a campaign.").

2.12.12 In any event, I view these calculations as largely an academic exercise. The expert testimony in this case demonstrates the subjective nature of the effort of trying to capture mental impressions of viewers, and illustrates how one person's genuine issue advertisement can be another's electioneering commercial. *Id*. ¶ I.D.7.i, I.D.8.c. Determining the purpose of an advertisement is a subjective enterprise, and that appears to be why BCRA's framers have used objective criteria to define "electioneering communication." Furthermore, as Dr. Lupia explains, these exercises can help us determine what BCRA's impact would have been on past behavior, but they do not necessarily tell us how BCRA will affect non-electioneering issue advertisements in the future. *Id*. ¶ I.D.7.r.(4).

2.12.13 I also address Dr. Gibson's assertion that 30,108,857 group-citizen genuine issue communications would have been affected by BCRA. App. ¶ I.D.7.q. Dr. Gibson applied gross rating point data to 707 of the 713 genuine issue advertisement airings Krasno and Sorauf found would be captured by BCRA to reach this figure. *Id*. Defendants have not responded to Dr. Gibson's

calculation, in part because Dr. Gibson raises it for the first time in his rebuttal expert report. *Id*. Although 30 million group-citizen communications is certainly an impressive figure on its face, a closer inspection reveals that the figure is not as oppressive as it sounds.

2.12.13.1 First, these thirty million communications are airings of three distinct advertisements aired 707 times. Therefore, these 30 million communications actually represent only three messages transmitted during programs whose aggregate viewership constitutes 30 million households. As Dr. Gibson has not provided a citation to the source of the gross rating point data he used, I cannot verify his figures. However, it is clear that one advertisement, "HMO said no" represents the majority of the 707 airings, having been broadcast 118 times in Greensboro, 126 times in Raleigh-Durham, and 211 in St. Louis (I cannot determine where the other two advertisements, "CENT/Breaux" and "CCS/No Matter What" were aired). *Id*. ¶ I.D.7.r.(2) n.201. The data shows that even if "HMO said no" had reached every household in Greensboro, Raleigh-Durham, and St. Louis with a television, the number of households receiving the message would be 2,529,450. *Id*. Given this calculation, and the lack of direction provided by the experts in this case, it appears that while 30 million genuine issue *communications* would have been affected by BCRA, the actual number of *households* affected is much lower, although not

necessarily insignificant, because many of the 30 million households obviously received the group-citizen communications numerous times.

2.12.13.2 Second, Dr. Gibson provides no context for his 30 million communications figure. He does not discuss whether or not these 707 airings were received by a greater or lesser percentage of households than the other 4140 airings which were run within 60 days of the 1998 election and identified a candidate. If one takes the average number of households that received a single airing of one of the three genuine advertisements in 1998, 42,586 ($^{30,108,857}/_{707}$), and multiplies it by the total airings of commercials mentioning a candidate and run within 60 days of the election, the result is 206,414,342 group-citizen issue communications (42,586 * 4847). This figure, admittedly not precise, demonstrates that the amount of group-citizen genuine issue communications (Dr. Gibson's 30 million figure) is likely a small proportion of the total amount of group-citizen issue communications captured by BCRA's "electioneering communication" definition (represented by the 206 million communications figure above). In fact, this exercise is merely an amplification of the Krasno and Sorauf analysis and results in the same 14 percent figure that Drs. Krasno and Sorauf determined represents the amount of genuine issue advocacy that would be captured by BCRA. App. ¶ I.D.7.r.(2). Again, Dr. Gibson's 30 million communications figure could constitute a greater or lesser percentage

of the universe of communications mentioning a candidate and airing within 60 days of the 1998 election, but I am given no basis for making such a determination.

2.12.13.3 Therefore, although I do not reject Dr. Gibson's calculation, I find that the record does not provide me with a sufficient basis for assessing its significance and therefore its utility for determining whether BCRA is overbroad is minimal at best.

2.13 ***Conclusion***

Based on the extensive evidence presented in the record, it is entirely possible to distinguish pure issue advocacy from candidate-centered issue advocacy without relying on the listener/viewer attempting to discern the "true" intent of the advertisement. These empirical determinants form the basis of the primary definition's objective test: issue advertisements that mention a federal candidate, are broadcast on radio or television, are aired in the candidate's electorate, and are aired in close proximity to a federal election. While there may be advertisements sharing these characteristics that are not intended to influence an election, the record demonstrates that as an objective matter advertisements sharing these characteristics influence the outcome of federal elections. When corporations and labor unions pay for these advertisements with general treasury funds, they are in violation of longstanding federal policy.

TITLE III: MISCELLANEOUS

3.1 The Federal Election Commission has recommended that Congress take measures to prevent contributors from using their minor children as a method of circumventing campaign finance laws. FEC Annual Report 1992 at 69 (recommending that Congress "establish a minimum age for contributors" due to the FEC's finding that "contributions are sometimes given by parents in their children's names") [DEV 14-Tab 1]; FEC Annual Report 1993 at 50 (recommending that Congress adopt a "presumption that contributors below age 16 are not making contributions on their own behalf" due to the FEC's finding that "contributions are sometimes given by parents in their children's names" and noting that "Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another") [DEV 14-Tab 2]; FEC Annual Report 1994 at 56 (same) [DEV 14-Tab 3]; FEC Annual Report 1995 at 56 (same) [DEV 14-Tab 4]; FEC Annual Report 1996 at 55-56 (same) [DEV 14-Tab 5]; FEC Annual Report 1997 at 54 (same) [DEV 15-Tab 6]; FEC Annual Report 1998 at 44 (same) [DEV 15-Tab 7]; FEC Annual Report 1999 at 50 (same) [DEV 15-Tab 8]; FEC Annual Report 2000 at 43 (same) [DEV 15-Tab 9].

3.2 The Thompson Committee Majority Report recommended precluding "those ineligible to vote . . . from making contributions to candidates for federal office." Thompson Comm. Report at 4506. The majority found "substantial evidence that

minors are being used by their parents, or others, to circumvent the limits imposed on contributors." *Id*.

3.3 Senator Christopher Dodd stated on the Senate floor: "Normally when we go out and solicit campaign contributions we do not limit it to the individual. We also want to know whether or not their spouse or their minor or adult children would like to make some campaign contributions. As long as such contributions are voluntary, then those individuals may contribute their own limit . . . ." 147 Cong. Rec. S2933 (daily ed. Mar. 27 2001) (Sen. Christopher Dodd).

3.4 Senator McConnell testifies that he "occasionally" asks donors who have given the maximum level of federal money to his campaign if they have family members who would be willing to contribute to the campaign as well. McConnell Dep. at 99-100 [JDT 19]. He also states that "occasionally" donors send checks on behalf of their children. *Id*. at 132.

3.5 The evidence shows that at least four investigations into contributions made by minors were initiated in response to press articles. *See* Pre-MUR 318, 00890-933 [DEV 43-Tab 4]; *see also* FEC MUR 4254, FEC119-0016 [DEV 43-Tab 4] (letter from a father under investigation to the FEC stating that the FEC's investigation relied on a newspaper article).

3.6 Defendants cite to 14 newspaper articles which discuss contributions by minors. *See* Alan C. Miller, Minor Loophole, L.A. Times, Feb. 28, 1999, reprinted in 148 Cong.

Rec. S2146-S2148 (2002); David Mastio, The Kiddie-Cash Caper: Gifts from minors are the next big campaign loophole, Slate, May 21, 1997, INT013275–INT013280 [DEV 134-Tab 3]; Rise in student gifts begs question: Was law broken?, USA Today, May 20, 1997, at 12A, FEC101-0001 [DEV 134-Tab 3]; Chris Harvey, The Young and the Generous: Md. Children Give to Campaigns, Wash. Post, Nov. 20, 1995, at B01, FEC137-0009-0011 [DEV 134-Tab 3]; Alex Knott, Members Cash In on Kid Contributions, Roll Call, June 5, 1995, at A-1, reprinted in 148 Cong. Rec. S2146 (2002); Jerry Landauer, Kiddies Go Krazy Over Carter, Break Open Piggy Banks, Wall St. J., July 8, 1976, at 1, 27, FEC137-0008 [DEV 134-Tab 3]; John Kruger, Youths 2-17 follow parents' lead in political contributions, The Hill, Nov. 27, 1999, INT013287 [DEV 42-Tab 2], at 1, 53; Michelle Malkin, Kiddie-case collections open fund-raising loophole, Seattle Times, May 27, 1997, INT013272–INT013274 [DEV 42-Tab 2]; Kid Stuff, Roll Call, June 15, 1995, INT013262 [DEV 42-Tab 2]; Youthful Donors, Political Finance and Lobby Reporter, June 14, 1995 [DEV 42-Tab 2], at 10; Kids count, especially in campaign gifts, The Knoxville News-Sentinel, June 11, 1995, INT013265–INT013266 [DEV 42-Tab 2], at F3; Karin Wahl-Jorgensen, Some Folks Channel Political Gifts Through Children, Plain Dealer, May 28, 1995, INT013282–INT01328 [DEV 42-Tab 2], at 9A; David Mastio, Students Donate to Candidates, Tulsa World, March 11, 1995, INT013258–INT013260 [DEV 42-Tab 2].

3.7 It is clear that not all campaign contributions by minors are in fact donations by their parents. *See, e.g.,* Decl. of Jessica Mitchell ¶ 9 (". . . I made a contribution to [Tim Feeney's] campaign just recently, in the amount of Five Dollars.") [1 Echols ES Tab 5]; Decl. of Pamela Mitchell ¶ 20 ("I have never used my daughter's name, or any other person's, in making a political donation, in order to avoid limits that the law places on my ability to support candidates of whom I approve.") [1 Echols ES Tab 10].

3.8 There have been a number of instances where the FEC has found that individuals have made contributions in their children's names in violation of campaign finance laws prohibiting the making of contributions in the name of another person.

3.8.1 The FEC found that an individual violated campaign finance laws by "making four (4) contributions -- $1,000 each -- to four (4) Federal campaign committees in the name of his infant son during the calendar years 1992 and 1993." FEC MUR 4484, INT 15778 [DEV 52-Tab 5]. The four campaign committees either returned the funds or disclosed the contribution as a debt owed to the contributor in an amended quarterly report in response to inquiries by the FEC. *Id*. at INT 15826-29. The contributor and the FEC entered into a conciliation agreement that included a civil penalty of $4,000. *Id*. at INT 15789-94.

3.8.2 The FEC found that a contributor contributed $1,000 in the names of his two

daughters, ages 4 and 8, on November 7, 1988, the same day he made a $1,000 contributions in his own name. FEC MUR 3268, INT 15612 [DEV 43-Tab 3]. The Commission elected not to pursue its case against the contributor, in part because he had pled guilty to criminal charges of defrauding investors and had filed for bankruptcy. *Id*. at INT 15613.

3.8.3 The FEC found that a contributor donated $4,000 in postage stamps in 1993 to a federal campaign committee in the names of his seven and eleven year old children. FEC MUR 4048, FEC119-0008-09 [DEV 43-Tab 5]. The FEC and the contributor entered into a conciliation agreement, pursuant to which the contributor agreed to pay a $7,500 civil fine. *Id*. at FEC119-0012.

3.8.4 The FEC found that a contributor took money from the bank accounts of his one year old and three year old children to make three $1,000 contributions in their names to federal candidates. FEC MUR 4255, FEC 101-0046-47 [DEV 134-Tab3].

3.9 FECA does not require political committees to seek or report the age of contributors. Gov't Br. at 202.

3.10 The FEC states that it "faces unique and significant practical problems in attempting to investigate and prove whether a child knowingly and voluntarily made a particular contribution and thus whether the child's parent violated the contribution limits. Gov't Amended Proposed Findings of Fact ¶ 794. In some cases, parents have

refused to submit their children to FEC questioning. FEC MUR 4254, USA CIV00932 [DEV 43-Tab 4] (report explaining that parents refused to allow their children to be questioned). The Commission maintains that determining whether or not children of a certain age are capable of making "knowing and voluntary" contributions is a subjective undertaking, made more difficult by parental influence and what the FEC deems to be "self-serving affidavits." Gov't Amended Proposed Findings of Fact ¶ 794; FEC MURs 4252-4255, General Counsel's Report at 5, 10, USA-CIV00925, 930-31 [DEV 43-Tab4] ("[I]t is difficult to accept the notion that children as young as eight years old are capable of 'knowingly and voluntarily' making the decisions to contribute to political campaigns. However, in the absence of anything in the Commission's regulations such as a presumption that a young child may not make contributions this becomes a very subjective decision. In this matter there does not appear to be any choice but to accept the assurance affirmed by affidavits that these were knowing and voluntary decisions."). The FEC also claims that "[q]uerying youngsters about their knowledge of politics and their relationship with their parents may threaten the privacy of the family." FEC Findings of Fact ¶ 794. In support of this contention, the Commission proffers a letter from an attorney representing a family investigated by the FEC which states

> [my clients] believe that the general process of inquiry of the instant FEC Docket is unduly intrusive into the privacy of their family affairs
> . . . .
> By the very act of responding truthfully to the instant Interrogatories

> and Document requests, [my clients] must open up their efforts to conduct their family affairs, to inculcate civic and political virtues and to teach values to their children to scrutiny by public officials . . . . The untoward effects are to . . . invade privacy and private communications of husband and wife and of parents and children and possibly to create disruption in normal family functioning merely by responding to an apparently legitimate FEC inquiry.

FEC MUR 4254, FEC119-0017, 0021 [DEV 43-Tab 4].

III. CONCLUSIONS OF LAW

I find it most appropriate to discuss BCRA's Title II first, before turning to my discussion of Title I, and the other remaining provisions of BCRA that are addressed in this opinion.

I. Title II: NONCANDIDATE CAMPAIGN EXPENDITURES

Sections 201, 203 and 204: The Prohibition on Electioneering Communications

The McConnell, NRA, Chamber of Commerce, NAB, and AFL-CIO Plaintiffs all challenge the prohibition on corporate and labor disbursements for electioneering communications. These Plaintiffs also challenge both definitions of "electioneering communication" (the primary definition and the fallback definition).

As discussed in the *per curiam* opinion, FECA Section 441b prohibits corporations and labor unions from using their general treasury funds on contributions or expenditures in connection with a federal election. 2 U.S.C. § 441b. Sections 203 and 204 of BCRA extend this prohibition to "electioneering communication." BCRA provides for two definitions of electioneering communication—a primary definition and a backup definition to be substituted in the event the main definition is held to be constitutionally infirm. Given the uncontroverted record of abuse and circumvention of the longstanding prohibition of Section 441b, I find the primary definition of electioneering communication, and the corresponding restrictions in sections 203 and 204, constitutional. As a result, I find BCRA's restriction on the ability of corporations and labor unions to spend general treasury funds on electioneering

communications to be facially constitutional as a matter of law, including its application to section 501(c)(4) and section 527(e)(1) corporations that do not receive an *MCFL* exemption.

As my opinion on the constitutionality of the primary definition does not command a majority, I am cognizant that the majority who have found the primary definition unconstitutional must tackle the constitutionality of the backup definition of electioneering communication. To that end, I concur in the judgment reached by Judge Leon's opinion on this question. Accordingly, the final judgment of the three-judge District Court panel reflects my support of his opinion as an alternative to my own finding that the primary definition of electioneering communication is constitutional. Given my view of the constitutionality of the primary definition, I have no further occasion to consider the constitutionality of the backup definition.

A. ***Introduction***

For close to one hundred years the political branches have made the choice, consistent with the Constitution, that individual voters have a right to select their federal officials in elections that are free from the direct influence of aggregated corporate treasury wealth and–for over fifty years–free from the direct influence of aggregated labor union treasury wealth. The rationale for the prohibition is simple, persuasive, and longstanding. First, such a restriction "ensure[s] that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are

aided by the contributions." *FEC v. Nat'l Right to Work Comm. ("NRWC")*, 459 U.S. 197, 207 (1982). Second, such a prohibition "protect[s] the individuals[,] who have paid money into a corporation or union for purposes other than the support of candidates[,] from having that money used to support political candidates to whom they may be opposed." *Id*. at 208. In other words, when corporations and labor unions spend their general treasury funds to influence federal elections, our coordinate branches have stated that they must use segregated funds voluntarily and deliberately committed by individual citizens for that purpose.

Since 1996, this longstanding prohibition has become a fiction, with abuse so overt as to openly mock the intent of the law. The record persuasively demonstrates that corporations and unions routinely seek to influence the outcome of federal elections with general treasury funds by running broadcast advertisements that skirt the prohibition contained in section 441b by simply avoiding *Buckley*'s "magic words" of express advocacy. In enacting Title II, Congress responded to this problem by tightly focusing on the main abuse: broadcast advertisements aired in close proximity to a federal election that clearly identify a federal candidate and are targeted to that candidate's electorate. In devising Title II, Congress has returned to a regime where corporations and labor unions must use federal money from a separate segregated fund explicitly designated for federal election purposes when seeking to influence federal elections.[109]

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[109] In this manner, Title II neatly dovetails with the nonfederal funds prohibitions contained in Title I. Whereas the political parties have expressed their frustration that Title I will diminish their importance relative to special interest groups, *see, e.g.*, RNC Br. at 13, (continued...)

Indeed, the record conclusively establishes that the "magic words" of express advocacy identified in *Buckley* are rarely used in any form of electioneering advertisements in the modern political campaign. Findings ¶ 2.3. The perverse consequence of this situation is that advertisements that avoid express advocacy are not only the type of advertisements that political consultants generally employ for their candidate clients, they are also precisely the advertisements that corporations and labor unions, prior to BCRA, were permitted to run. Accordingly, as the record demonstrates, corporations and labor unions, with minimal effort, were able to influence federal elections with their general treasury funds; a practice long prohibited by Congress and contrary to that enforced by the judiciary.

It is for these reasons, particularly given the overwhelming record in this case, that I find facially constitutional the prohibition in Title II on corporations and labor unions using general treasury funds for electioneering communications.

B. ***Standard of Review***

Plaintiffs first contend that both *Buckley* and *MCFL* foreclose any Congressional regulation of speech that does not constitute express advocacy, and as a result, Title II fails as a matter of law because BCRA's restrictions on electioneering communication apply to broadcast advertisements that do not contain express advocacy. McConnell Br. at 51

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[109](...continued)
Title II ensures that these special interest organizations, except those explicitly qualifying for *MCFL*-status, will have to run broadcast advertisements that influence a federal election with the same federal dollars that the political parties will have to use to pay for their advertisements (except that BCRA increases the amount of federal money that the parties can raise relative to their special interest counterparts).

("*Buckley* and *MCFL* condemn Congress' regulation of speech that does not constitute express advocacy."). In other words, Plaintiffs posit that the Court does not even need to reach the question of whether BCRA is narrowly tailored to serve a compelling governmental interest, because both *Buckley* and *MCFL* announce a substantive rule of constitutional law; namely, that Congress may not regulate any speech that does not qualify as express advocacy as that term has become known.

As a matter of law, and as discussed *infra*, I find Plaintiffs' argument on this point unpersuasive. Neither *Buckley* nor *MCFL* create a rule of substantive constitutional law whereby Congress can only regulate political speech containing words of express advocacy. Rather, *Buckley* and *MCFL* used the express advocacy standard as a means of construing otherwise unconstitutionally vague portions of FECA. As I do not view *Buckley* and *MCFL* as prohibiting future Congressional regulation of political speech, I reach the question of whether BCRA is narrowly tailored to serve a compelling governmental interest.

In turning to that question, it bears pointing out that the parties argue in their briefing about who bears the "burden" in this litigation, with each side pointing the finger at the other. *Compare* Gov't Br. at 131 ("[Plaintiffs] efforts to shoulder [their] burden all fail.") *with* McConnell Reply at 32 ("Defendants incorrectly argue throughout their briefs that *plaintiffs* bear the burden of demonstrating that BCRA's ban on electioneering communications is overly broad.") (emphasis in original). Throughout this litigation, Defendants argue that Plaintiffs bear a burden of demonstrating that the law is substantially overbroad. Defendants

contend that as Plaintiffs bring a facial challenge to these sections of BCRA, they must establish that the prohibition on corporate and labor union spending of general treasury funds on electioneering communications is substantially overbroad. *See Ashcroft v. ACLU*, 122 S.Ct. 1700, 1713 (2002); *Ashcroft v. The Free Speech Coalition*, 122 S.Ct. 1389, 1398-99 (2002). As the Supreme Court instructed in *Broadrick v. Oklahoma*, "the Court has altered its traditional rules of standing to permit–in the First Amendment area–attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (internal quotation marks and citation omitted).

Plaintiffs wait until their reply briefs to address Defendants' salient argument on this point. McConnell Reply at 32, Chamber/NAM Reply at 4-5. Plaintiffs essentially argue that there are two kinds of facial challenges under the First Amendment. The first, involves statutes that injure "third parties," and involves the *Broadrick* line of cases. Chamber Reply at 4. The second facial attack is where "a plaintiff invokes its own First Amendment rights in a way that subjects a statute to strict scrutiny." Chamber/NAM Reply at 5 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 & n.3 (1992); *Sec'y of State of Md. v. Joseph H. Munson, Co.*, 467 U.S. 947, 965-66 & n.13 (1984)). Plaintiffs argue that they belong in this latter category.

The difficulty with Plaintiffs' position, however, is that none of their submissions

describe in specific detail any advertisements, referring to particular candidates in any races, that Plaintiffs intend to produce or air at any time in the future, and that would fall within BCRA's electioneering communication provisions. As such, it is difficult to argue that Plaintiffs have demonstrated affirmatively and concretely, in any kind of detail, the scope of their claimed First Amendment injuries.

Nevertheless, none of the parties dispute the fact that the framework for reviewing the constitutionality of these sections is strict scrutiny. Tr. at 252 (Waxman) ("The standard is strict scrutiny, there's no doubt about it. This is political speech. This is core political speech."). Moreover, a number of Plaintiffs do have a history of using corporate and labor union general treasury funds to pay for electioneering communications.

In practical terms, given the way Defendants have argued this case, the debate over the "burden" is largely academic. Defendants present their Title II arguments by primarily demonstrating that the law meets a strict scrutiny test. Indeed, to some degree, Defendants have essentially conflated the strict scrutiny and substantial overbreadth inquiries. *See* Tr. at 251-52 (Waxman) ("And that brings us to the real constitutional issue, whether the burdens that Congress' new law imposes on speech are narrowly tailored to serve compelling public interests; or, more precisely, again because this is a facial challenge, whether plaintiffs have demonstrated that the new provisions are substantially overbroad in relation to their legitimate goals."). Furthermore, as I find that the provisions in Title II are constitutional under this strict scrutiny review, the question of which party bears the burden is also largely

irrelevant. Consequently, although I am convinced that Plaintiffs have not demonstrated that the "electioneering communication" provisions in Title II are substantially overbroad, I analyze the law under the strict scrutiny framework consistent with Defendants' presentation in their briefing.

In undertaking this latter analysis, I will examine whether BCRA's restrictions on electioneering communications are narrowly tailored to serve a compelling public interest. Under this strict scrutiny review, I find that the restrictions on corporate and labor union spending on electioneering communications are constitutional at this facial challenge stage, meaning that BCRA's restrictions on political speech are narrowly tailored to serve a corresponding compelling governmental interest.

The remainder of my opinion on this question is divided into four parts. The first section contains my reasons for finding that express advocacy is not a constitutional requirement. On this point, I am joined by Judge Leon and therefore speak for the Court. The second portion provides my dissenting view that the primary definition of electioneering communication is narrowly tailored to serve a compelling governmental interest. In the third and fourth sections, I write for the Court and discuss my reasons for concluding that Plaintiffs' underbreadth argument and Plaintiffs' challenge to the "media exemption" both lack merit.

C. *Express Electoral Advocacy is Not a Constitutional Requirement*

1. The Origins of the Express Advocacy Test

I conclude that in the context of regulating federal elections, Congress may restrict corporate and union spending on political speech which does not contain words of express electoral advocacy, provided that such restrictions are narrowly tailored to serve a compelling governmental interest. In condemning Title II, Plaintiffs insist that *Buckley* announced a substantive rule of constitutional law, such that Congress is forever prohibited from regulating any political speech that does not contain explicit words of express advocacy–even if the political speech being regulated is paid for with corporate or labor union general treasury funds. McConnell Opp'n at 38 ("*Buckley* thus leaves no doubt that its express-advocacy test is a constitutional requirement."). Plaintiffs provide very little textual analysis of the *Buckley* and *MCFL* decisions and instead overstate the extent of the *Buckley* holding to satisfy their purpose.

In reviewing Title II, it should be noted that none of the parties dispute the fact that the electioneering communication restrictions in Title II regulate more political speech than just express advocacy. Therefore, if I conclude that the express advocacy standard is forever enshrined in the Constitution, then the restrictions on electioneering communications in Title II would be condemned as a matter of law before any analysis of substantial overbreadth is even performed. In taking a step back and analyzing *Buckley* and *MCFL*, it becomes apparent, however, that the express advocacy standard devised by the Supreme Court in

Buckley is not a substantive rule of constitutional law that operates as a *per se* restriction on future Congressional action.

In *Buckley*, the Supreme Court considered a provision of FECA that limited the amount of money individuals and certain groups could independently expend "relative to" a clearly identified federal candidate.[110] *See Buckley*, 424 U.S. at 39-51 (discussing section 608(e)(1) of FECA). Section 608(e)(1) of FECA provided that "[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year *advocating the election or defeat of such candidate*, exceeds $1,000." *Id*. at 39 (omission in original) (emphasis added). Prior to directly considering the constitutionality of section 608(e)(1), the Supreme Court stated that "[*b*]*efore* examining the interests advanced in support of [the provision's] expenditure ceiling, consideration must be given to appellants' contention that the provision *is unconstitutionally vague*." *Id*. at 40 (emphasis added).

In undertaking the vagueness inquiry, the Supreme Court was particularly troubled by the phrase "relative to" as it appeared in the provision under consideration. *Id*. at 40-44. Observing that the law did not define the phrase, the Supreme Court found that "[t]he use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between

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[110] More specifically, this provision in FECA "prohibit[ed] all individuals, who are neither candidates nor owners of institutional press facilities and all groups, except political parties and campaign organizations, from voicing their views 'relative to a clearly identified candidate' through means that entail aggregate expenditures of more than $1,000 during a calendar year." *Buckley*, 424 U.S. at 39-40.

permissible and impermissible speech unless other portions of [the provision] make sufficiently explicit the range of expenditures covered by the limitation." *Id*. at 41-42. Interpreting the phrase in its context, the Supreme Court stated that the "context clearly permits, if indeed it does not require, the phrase 'relative to' a candidate to be read to mean 'advocating the election or defeat of' a candidate." *Id*. at 42. Accordingly, the Supreme Court, used the context of the provision to make a "first-cut" at construing the vague phrase "relative to."

Even with this clarification, however, the Supreme Court found that the vagueness inquiry was merely "refocuse[d]" and, thus, not completely resolved. *Id*. at 42. Confronted with the challenge of interpreting "advocating the election or defeat of a candidate" the Supreme Court was once again concerned about an interpretation of the wording of the statute that covered more speech than was actually necessary. The Supreme Court remarked that:

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.

Id. In other words, the Supreme Court found that even if it was permissible to construe the phrase "relative to" as the equivalent of "advocating the election or defeat of a candidate," the vagueness inquiry was not complete because such a construction did not provide a bright line between permissible speech and impermissible speech and had the potential to cause

speakers to self censor genuine issue discussion in order to avoid violating the statute.[111]

In fact, to underscore its apprehension that its first narrowing construction was not satisfactory, the Supreme Court quoted a passage at length from *Thomas v. Collins*, 323 U.S. 516, 535 (1945):

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43 (quoting *Thomas*, 323 U.S. at 535). To satisfy its concerns, therefore, the Supreme Court further construed section 608(e)(1) to apply "only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id*. at 44. In a footnote, the Supreme Court observed that "[t]his construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,'

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[111] The McConnell Plaintiffs seize on this quotation as immutable proof that express advocacy is somehow chiseled in stone as a constitutional requirement. McConnell Opp'n at 34 (Buckley's adoption of this bright line test "was not merely an exercise in statutory construction."). However, as is clear from the context in which this quotation was made, the Supreme Court in making this statement was observing that the phrase "relative to" could not be remedied by a simple reference to the context of the provision, but rather, needed further narrowing before the vagueness concerns would be ameliorated.

'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id*. at 44 n. 52. These phrases have come to be known as the "magic words," *see* Findings ¶ 2.1.1, because a communication that invokes one of these words unquestionably qualifies as express advocacy and falls within the ambit of FECA. Notably, even with this narrowing construction, the Supreme Court struck down section 608(e)(1) as unconstitutional under the First Amendment. *See id*. at 44-51.

The Supreme Court also imported the "express advocacy" requirement into another provision of FECA that it found unconstitutionally vague. Section 434(e) of FECA required individuals and certain groups to disclose contributions and expenditures. Contributions and expenditures were each defined in terms of the use of money or other valuable assets "for the purpose of influencing" the nomination or election of candidates for federal office. *Id*. at 77. The Supreme Court found that the phrase "for the purpose of influencing" was unconstitutionally vague. *Id*. ("It is the ambiguity of this phrase that poses constitutional problems."). Finding no legislative history to help guide the statutory analysis, the Court turned to construing the disclosure provision in such a manner so as "*to avoid the shoals of vagueness*." *Id*. at 78 (emphasis added).

When attempting to construe the phrase in relation to expenditures, the Court encountered "line-drawing problems." *Id*. To resolve this difficulty, the Supreme Court, again, interpreted the phrase in the same manner in which it had interpreted the vague portion of section 608(e)(1). *Id*. at 79 ("Although the phrase, 'for the purpose of . . . influencing' an election or nomination, differs from the language used in § 608(e)(1), it shares the same

potential for encompassing both issue discussion and advocacy of a political result."). As a result, the Supreme Court found that "[t]o insure that the reach of § 434(e) is not impermissibly broad, we construe 'expenditure' for purposes of that section in the same way we construed the terms of s 608(e) to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id*. at 80. So construed, the Supreme Court held that section 434(e) was narrowly tailored to serve a sufficiently important governmental interest. *Id*. at 80-82.

Ten years later in *MCFL*, the Supreme Court again invoked the express advocacy test. *MCFL*, 479 U.S. at 248-49. In doing so, the Supreme Court gave insight into the reasoning behind the origins and purpose of the express advocacy test. The *MCFL* Court wrote that in *Buckley*, "in order to avoid problems of overbreadth, the Supreme Court held that the term 'expenditure' encompassed 'only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.'" *Id*. (quoting *Buckley*, 424 U.S. at 80). With this in mind, the Supreme Court turned to the question before it, which was whether the term "expenditure," as used in section 441b, was again vague. Having found that *Buckley* had adopted the express advocacy construction for the term "expenditure" in the provision requiring disclosure of independent expenditures, it is not surprising that the Court found the term "expenditure" for purposes of section 441b to also require the express advocacy construction. *Id*. at 249 ("We agree with appellee that this rationale *requires a similar construction* of the more intrusive provision that directly regulates independent spending.

We, therefore, hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b.") (emphasis added).

2. The Express Advocacy Test is Not a Substantive Rule of Constitutional Law

As is clear from the discussion above, both *Buckley* and *MCFL* explicitly invoked the express advocacy test *only* as a means of statutory construction. In *Buckley*, the Supreme Court was confronted with two different provisions of FECA that both presented vagueness challenges for the Court. As a result, the Supreme Court turned to the "'cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); *see also Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (observing the "'well-established principle that statutes will be interpreted to avoid constitutional difficulties"). I do not believe that in devising the express advocacy standard, the Supreme Court in *Buckley* was announcing an unalterable principle of constitutional law that would prohibit future congressional action directed toward express and issue advocacy. *See Wisconsin Realtors Ass'n v. Ponto*, 233 F. Supp. 2d 1078, 1085 (W.D. Wis. 2002) ("I am not convinced that *Buckley* was intended to work such a significant inhibition on future legislative efforts to address problems raised by the competing state interests and constitutional imperatives inevitably associated with express and issue advocacy."); *Nat'l Fed'n of Republican Assemblies v. United States*, 218 F. Supp. 2d 1300,

1325 (S.D. Ala. 2002) ("The plaintiffs' second error is their insistence that *Buckley* held that all political speech other than express electoral advocacy lies beyond the reach of constitutional regulation, including disclosure requirements."); *see also Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001) ("[W]e are bound by *Buckley* and *MCFL*, which strictly limit the meaning of 'express advocacy.' If change is to come, it must come from an imaginative Congress or from further review by the Supreme Court."). Rather, the *Buckley* Court was particularly concerned with construing vague provisions of a statute in order to avoid reaching difficult questions of constitutional law. In the case of section 608(e)(1), the Supreme Court was unsuccessful–even after construing the statute in an effort to avoid vagueness problems, the provision still failed to satisfy exacting First Amendment scrutiny. *Buckley*, 424 U.S. at 44-45. Whereas, in the case of section 434(e), the statutory construction successfully salvaged the statute which, as narrowed, bore "a sufficient relationship to a substantial governmental interest." *Id*. at 80.

The McConnell Plaintiffs argue that it is "unfathomable" that Defendants would suggest the express advocacy test was not constitutionally ordained. McConnell Opp'n at 35-36 (quoting *Buckley*, 424 U.S. at 80) ("To insure the reach of § 434(e) is not impermissibly broad, we construe 'expenditure' for purposes of that section in the same way we construed the terms of § 608(e) to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.") (emphasis removed). However, as the quoted language explicitly indicates, the Supreme Court

construed the statutory language in an effort to save the provision from unconstitutional overbreadth. By adopting a narrowing construction to this vague provision, the Supreme Court easily found section 434(e) constitutional. *Buckley*, 424 U.S. at 80-82. Further diminishing the credibility of the McConnell Plaintiffs' argument is the fact that the *Buckley* phrase quoted by the McConnell Plaintiffs appears in the midst of a section the Supreme Court entitled "Vagueness Problems." *Id*. at 76.[112]

Accordingly, Plaintiffs' reasoning is faulty when they argue that the "express advocacy doctrine reflects more than a concern about vagueness." ACLU Opp'n at 4; *accord* McConnell Opp'n at 37 ("[I]t is nonsensical to read the opinion as merely addressing statutory vagueness."). In adopting the express advocacy doctrine, the Supreme Court was engaging in statutory construction in order to avoid unnecessarily declaring specific portions of FECA unconstitutional. In fact, nowhere in *Buckley* or *MCFL* does the Supreme Court explicitly state that the express advocacy test is a constitutional requirement. Each time the

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[112] The McConnell Plaintiffs also offer the argument that because *Buckley* invoked First Amendment caselaw during its initial discussion of "General Principles," it was clear that *Buckley* was creating a rule of substantive constitutional law when it articulated the express advocacy standard. McConnell Opp'n at 37, McConnell Reply at 27 (citing *Buckley*, 424 U.S. at 14) (noting that *Buckley* cited *Mills v. Alabama*, 384 U.S. 214 (1966) and *New York Times v. Sullivan*, 376 U.S. 254 (1964)). However, Plaintiffs fail to point out that these citations appear in the section "*General Principles*" and were cited for the uncontroversial proposition that the "First Amendment affords the broadest protection to . . . political expression." *Buckley*, 424 U.S. at 14 (emphasis added). It defies logic to argue that because the Supreme Court invoked First Amendment caselaw for the proposition that FECA's restrictions on contributions and expenditures operate in the area of the most fundamental First Amendment rights, that the Court was implicitly–thirty pages later–hewing express advocacy into constitutional stone.

Supreme Court has invoked the express advocacy standard it has done so in the context of construing a vague portion of FECA. I would expect that if the Supreme Court were announcing a substantive rule of constitutional law it would have stated it explicitly in either of these two cases.

Plaintiff ACLU takes a snippet of the *Buckley* opinion, and without offering any textual analysis of the case, argues that *Buckley*'s clear ruling is that "the government's regulation of expenditures can only reach 'communications that in express terms advocate the election or defeat of a clearly identified candidate. . . .'" ACLU Br. at 13 (quoting *Buckley*, 424 U.S. at 44). However, the Supreme Court stated in full: "We agree that in order to preserve the provision against invalidation on *vagueness grounds*, § 608(e)(1) must be *construed* to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44 (emphasis added). When the quoted portion appears in its full context, it appears obvious the extent to which Plaintiff ACLU has misconstrued *Buckley*'s words. The express advocacy test in *Buckley* was merely an appropriate exercise in statutory construction.[113]

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[113] Plaintiff ACLU also states that Title II of BCRA applies to advertisements "that merely 'refer' to a candidate" and that, as a result, Title II "should be struck down." ACLU Br. at 13. The ACLU's argument lacks merit because the primary definition of BCRA does not place a "ban on communications that merely 'refer' to a candidate." ACLU Br. at 13. Rather, BCRA prohibits corporations and labor unions from funding *broadcast advertisements* with *general treasury funds*, which *refer to a federal candidate*, *run in close proximity to an election* and are *targeted to the candidate's relevant electorate*. Corporations (continued...)

Plaintiffs are correct that the *Buckley* Court "did not posit a bipolar world of issue advocacy and express advocacy." However, they err in concluding that the Supreme Court, therefore, "permitted regulation only where it is unmistakably clear that the speech at issue can only be characterized as express advocacy." McConnell Br. at 49; *see also* ACLU Br. at 15 ("Only 'express advocacy' can be subject to regulation; issue advocacy is free from permissible regulation."). As Judge Richard W. Vollmer recently observed:

> The Supreme Court in *Buckley* employed no such terminology and recognized no such dichotomy. Rather, the *Buckley* Curt [sic] saw political speech as comprised of "issue discussion" and "advocacy of a political result." 424 U.S. at 79. This would represent only a semantic difference if "advocacy of a political result" were confined to express electoral advocacy, for then "issue discussion" would occupy the same territory that the plaintiffs claim for "issue advocacy"--that is, all political speech that is not express electoral advocacy.
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> The *Buckley* Court, however, recognized that advocacy of a political result extends beyond express electoral advocacy . . . . The *Buckley* Court introduced express electoral advocacy as a benchmark to provide speakers the clear boundary that the statutory cap on independent expenditures otherwise lacked. *Id*. at 43- 44. *If express electoral advocacy were the only form of electoral advocacy that exists, the Court would not have been concerned that speakers could not tell the difference between issue discussion and electoral advocacy*; the Court established the express electoral advocacy standard precisely because other forms of electoral advocacy exist but may prove difficult to distinguish from issue discussion. . . .

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[113](...continued)
and labor unions are, of course, free to fund as many of these prohibited advertisements as they desire from their separate segregated fund. I doubt anyone disputes the proposition that had Congress enacted a law that had banned communications that "merely 'refer' to a candidate" that such a law would be declared overbroad and unconstitutional. *Id*. However, the restriction related to electioneering communications in BCRA is much narrower than Plaintiff ACLU describes in its briefing and is targeted to communications that influence federal elections.

Nat'l Fed'n of Republican Assemblies, 218 F. Supp. 2d at 1324 (emphasis added). Plaintiffs are mistaken in their conclusion that in not establishing a "bipolar world," the Supreme Court has necessarily decreed a rule of substantive constitutional law. As Judge Vollmer points out:

> Electoral advocacy is not automatically immune from regulation *but, to the extent it cannot easily be distinguished from issue discussion*, it may be necessary to exclude electoral advocacy from regulation so as to avoid self-censorship by uncertain speakers and the resulting abridgement of issue discussion. The bright line of express electoral advocacy was required under Section 434(e), not because all speech falling short of express electoral advocacy is immune from regulation, *but because no other means of readily distinguishing electoral advocacy from issue discussion presented itself.*

Id. at 1328-29 (emphasis added). The point of *Buckley* and *MCFL* was not that Congress can only regulate express advocacy. Rather, the Supreme Court in these cases took a vague statute and construed it in such a manner so as to create a bright line because the statute itself did not provide any "other means of readily distinguishing electoral advocacy from issue discussion." *Id*. at 1329.

a. *Other Cases Cited by Plaintiffs Are Not Relevant or Are Distinguishable*

Plaintiffs' briefing, while heavy on hyperbole attacking Defendants' submissions, is incredibly light on textual analysis of the *Buckley* and *MCFL* opinions. Perhaps attempting to shift attention away from their lack of a robust discussion of *Buckley*, Plaintiffs attempt to bolster their position by citing to a series of lower court cases that Plaintiffs claim uphold the express advocacy standard as a rule of constitutional law. McConnell Br. 51-53. I

acknowledge that there is some dicta in these cases which suggests that the express advocacy test is a constitutional requirement. Nevertheless, the language in these cases is dicta, is not binding precedent, and for the reasons discussed in this section, is unpersuasive.

The cases cited by Plaintiffs fall mainly into two categories. First, many of their cited cases involve courts striking down FEC regulations attempting to broaden the Supreme Court's express advocacy standard. Not surprisingly, courts rejected the FEC's efforts because neither they nor the Commission has the authority to redefine the statutory test. These courts correctly observed that Congress or the Supreme Court were the appropriate branches to undertake such steps. BCRA is therefore consistent with this strand of caselaw. The second grouping of cases involve federal courts striking down state statutes and state regulations that had a variety of constitutional defects. In these cases, the state statutes at issue all captured too much pure issue advocacy without fashioning an appropriate test that predominantly regulated electoral advocacy. BCRA differs from these state provisions in that with BCRA, Congress, supported by a plethora of evidence and experience, created a narrowly tailored definition of electioneering communication that is specifically focused on communications that influence federal elections.

With regard to the cases where courts struck down FEC regulations, the Commission, and not Congress, had sought to define express advocacy broader than the Supreme Court had permitted in *Buckley*. *See, e.g.*, *Va. Soc'y for Human Life*, 263 F.3d at 385, 392 (striking down FEC regulation 11 C.F.R. § 100.22(b) that defined express advocacy in such a manner

so as to include communications that "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates"); *Maine Right to Life Comm., Inc. v. FEC*, 98 F.3d 1, 1 (1st Cir. 1996) (summarily affirming district court decision to strike down same regulation); *Right to Life of Dutchess Cty., Inc. v. FEC*, 6 F. Supp. 2d 248, 253 (S.D.N.Y. 1998) (striking down same regulation). In relation to this broadly defined FEC regulation, these courts held that neither they nor the FEC had the authority to change the express advocacy test, concluding that to do so required further congressional or Supreme Court action. In fact only one decision concluded that the FEC could make such a regulation, *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), a case that has been largely discredited. *See, e.g.*, *Chamber of Commerce of the United States of America v. Moore*, 288 F.2d 187, 194 (5th Cir. 2002) (citing cases disagreeing with *Furgatch*). In attempting to create these regulations, the FEC's efforts produced provisions plagued with vague terms that raised the same concerns that troubled the *Buckley* Court, placing the speaker at the mercy of the subjective intent of the listener to determine if a communication was covered by FECA. *See Buckley*, 424 U.S. at 43 ("'In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.'") (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). Indeed, the consensus among the judiciary has been that courts "are bound by *Buckley* and *MCFL*, which

strictly limit the meaning of 'express advocacy.' If change is to come, *it must come from an imaginative Congress or from further review by the Supreme Court*." *Va. Soc'y for Human Life*, 263 F.3d at 392 (emphasis added).[114] Unlike the present case, the absence of further congressional action led these courts to strike down the FEC's regulation.

With regard to the second category of cases involving state law provisions, Plaintiffs refer to these decisions solely in a footnote. McConnell Br. at 53 n.20. These cited cases are each distinguishable because the state laws and regulations considered by the various courts each disregarded the principles of vagueness and overbreadth articulated in *Buckley* or reached too far in regulating issue advocacy. In *Chamber of Commerce*, the Fifth Circuit pointed out that the state statute at issue "essentially adopted the language of the Supreme Court's decisions in *Buckley* and *MCFL* [which meant that the only decision that the court needed to reach was] to determine whether the Chamber's advertisements constitute 'express advocacy' under the standard articulated [in the state statute]." *Chamber of Commerce*, 288 F.3d at 196. Accordingly, for the court in *Chamber of Commerce*, the only decision to reach was whether the communications at issue in the case constituted express advocacy. There is some unexplained dicta in the case which states that the "Supreme Court has held that the First Amendment permits regulation of political advertisements, but only if they *expressly* advocate the election or defeat of a specific candidate." *Id*. at 190 (no citation provided).

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[114] Other cases relied on by Plaintiffs concern other FEC regulations relating to voter guides. *Clifton v. FEC*, 114 F.3d 1309, 1317 (1st Cir. 1997); *Faucher v. FEC*, 928 F.2d 468, 472 (1st Cir. 1991).

For the reasons articulated in this section, I expressly disagree with such dicta, presented without a thoroughgoing analysis of *Buckley* or any other support. *See Nat'l Fed'n of Republican Assemblies*, 218 F. Supp. 2d at 1329-30 (citing *Chamber of Commerce*) ("While some of these cases contain unexplained dicta arguably suggesting that express electoral advocacy is a universal, constitutional limitation on disclosure requirements, none so holds and none offers any textual analysis of *Buckley* that could support such a proposition.").

In another case cited by Plaintiffs, *North Carolina Right to Life, Inc. v. Bartlett*, the Fourth Circuit invalidated a North Carolina statute requiring political committees to make certain disclosures. *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-713 (4th Cir. 1999). The *Bartlett* court found "unconstitutionally vague and overbroad" a state statute that reached further than FECA in extending disclosure requirements to (1) groups that only incidentally engage in express advocacy and (2) groups engaging in issue advocacy. *Id.* In the same breath as it struck down the provision, the Fourth Circuit made clear that it would have first endeavored to save the provision like the Supreme Court did in *Buckley*. *Id*. at 712 ("The question then is whether we may similarly construe North Carolina's definition of political committee to save it from being void for vagueness."). The court in *Bartlett*, therefore, only found that the North Carolina statute was not subject to a narrowing interpretation, not that the express advocacy test was a permanent fixture of constitutional law. However, to the extent some language in *Bartlett* could arguably lead in that direction,

I find it to be dicta unaccompanied by a serious textual analysis of *Buckley*.[115]

Plaintiffs also cite *Citizens for Responsible Government State Political Action Committee v. Davidson*, a case where the Tenth Circuit severed unconstitutional portions of a Colorado campaign finance law. The state law defined independent expenditure to include not only express advocacy, but also "expenditures for political messages which unambiguously refer to any specific public office or candidate for such office." *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1187-88 (10th Cir. 2000). The term "political message" was in turn defined as including messages delivered by telephone, by print or electronic media, or by any other written material that applied not only to express advocacy, but also to unambiguous references to candidates. *Id.* at 1188. The *Davidson* court found that as applied to the plaintiffs, the law encroached on legitimate issue advocacy, which "is a violation of the rule enunciated in *Buckley* and its progeny." *Id.* at 1194 (quoting *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000)). From the plain text of the Colorado statutes, the laws were aimed not

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[115] Indeed in distinguishing *Bartlett*, the court in *National Federation of Republican Assemblies* found:

> Only a single case cited by the plaintiffs clearly stands for the proposition asserted. In *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir.1999), *cert. denied*, 528 U.S. 1153 (2000), the Court stated that Buckley "defined political committee as including only those entities that have as a *major purpose* engaging in *express advocacy* in support of a candidate." *Id.* at 712 (emphasis in original). The Court offered no authority for this proposition, which is plainly contrary to *Buckley* and which is dicta in any event.

Nat'l Fed'n of Republican Assemblies, 218 F. Supp. 2d at 1330 (footnotes omitted).

just at electioneering, but also at pure issue discussion. No effort was made to draw a different line than had been drawn in *Buckley*, and as a result, the Tenth Circuit severed those constitutionally offensive portions. *Davidson* also contains unexplained dicta that "the [Supreme Court in *MCFL*] clarified that express words of advocacy were not simply a helpful way to identify 'express advocacy,' but that the inclusion of such words was constitutionally required." *Id*. at 1187. For the reasons set forth above, I disagree with this statement, and consider it to constitute unpersuasive dicta.

The other cases Plaintiffs cite are equally unpersuasive. *See Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 968-970 (8th Cir. 1999) (striking down a state regulation defining express advocacy in a similar manner as 11 C.F.R. § 100.22(b) as unconstitutional because the focus of the regulation is on "what reasonable people or reasonable minds would understand by the communication"); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 1999 U.S. App. LEXIS 23325 at *5-*6 (7th Cir. 1999) (upholding Indiana disclosure statute after Indiana Supreme Court certified that statute applied only to organizations engaging in express advocacy). Indeed, the court in *Iowa Right to Life* grounded its decision on the fact that the "State's definition of express advocacy creates uncertainty and potentially chills discussion of public issues." *Iowa Right to Life*, 187 F.3d at 970.

After reviewing these cases, I am convinced that none of the cases cited above offer a convincing argument that express advocacy is a constitutional requirement. The vague and

subjective terms associated with the provisions of FECA impelled the *Buckley* court to offer the express advocacy construction. In turning to BCRA, it is clear that the primary definition of electioneering communication does not present this problem.

3. The Primary Definition of Electioneering Communication is Not Vague

Unlike the vagueness concerns which motivated the Supreme Court in *Buckley* and *MCFL*, the primary definition of electioneering communication is not vague. Indeed, *none* of the Plaintiffs argued in their briefing or at oral argument that the primary definition presented any vagueness concerns. *See* McConnell Br. at 57-69; Tr. at 264-65 (Waxman) ("No one is arguing--I don't believe that any of the 82 plaintiffs in this case argue that the principal definition that is the four-part test, is vague in any respect. It's hard to imagine how it could be less vague.") (none of the Plaintiffs ever objected to this characterization). In other words, there is no vagueness challenge to the primary definition presently before the Court.

Plaintiffs make a number of general arguments in opposition to the primary definition: first, they contend that the primary definition fails because it regulates more speech than express advocacy, McConnell Br. at 44-57; second, they argue that even if express advocacy is not a constitutional requirement, the primary definition is unconstitutionally overbroad, McConnell Br. at 57-69; third, they argue that the primary definition of electioneering communications is "woefully" underinclusive, McConnell Br. at 75-77; and fourth, they argue that the primary definition violates the Fifth Amendment, McConnell Br. at 77-81.

Nowhere, however, do any of the Plaintiffs argue that the primary definition is vague. Given that among all of the seasoned political actors and organizations that comprise the remaining 77 Plaintiffs in this case, not one has argued that vagueness is a problem plaguing the primary definition, I could decline to engage in a vagueness inquiry. *See, e.g.*, *Tri-State Hosp. Supply Corp. v. United States*, 142 F. Supp. 2d 93, 101 n.6 (D.D.C. 2001) ("The court makes no ruling on such acts, however, because the United States has not briefed the issue."); *Carter v. Cleland*, 472 F. Supp. 985, 989 n.4 (D.D.C. 1979) ("This issue was not briefed by the parties. No decision will be rendered on it."); *cf. Kattan v. District of Columbia*, 995 F.2d 274, 276 (D.C. Cir. 1993) ("[T]his Court has recognized that a losing party may not use a Rule 59 motion to raise new issues that could have been raised previously."); *United States v. Wade*, 255 F.3d 833, 839 (D.C. Cir. 2001) (issues that are not briefed are considered "abandoned") (*citing Terry v. Reno*, 101 F.3d 1412, 1415 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997)).

However, since Judge Henderson discusses the vagueness question in her opinion, *see* Henderson Op. at Part IV.A, I note that even were I to entertain the vagueness question, I would conclude that the primary definition of electioneering communication is free from any vagueness infirmities. The primary definition of electioneering communication, as set forth in section 201 of the Act, comprises four distinct elements, each designed to be clear, objective, limited in scope, and directly responsive to the evidence concerning recent electioneering by corporations and labor unions with their general treasury funds. An

advertisement falls within the definition, and therefore would have to be funded with money from a labor union or corporation's segregated fund, if, *and only if*, it satisfies *each* of the following four elements:

A. It is broadcast by television, radio, cable, or satellite. Newspaper advertisements, direct mail, billboards, phone banks, Internet advertisements, door-to-door canvassing, or leaflets are not covered by the primary definition.

B. It refers to a "clearly identified candidate" for federal office. Broadcast advertisements dealing with issues are not electioneering communications, unless the advertiser chooses to mention or show a particular federal candidate.[116]

C. It runs in the 60 days before a general election, or the 30 days before a primary.

D. The advertisement is *targeted* to the identified candidate's electorate. Specifically, the advertisement must reach at least 50,000 voters in a relevant state or district.

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[116] The language in the statute, "refers to a clearly identified candidate for Federal office," BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A), does not suffer the same problems that the *Buckley* court had with FECA's "relative to" language. Although, the definition of "refer" shares "relate" as a synonym, "refer" is a much more precise word. Merriam-Webster's Collegiate Dictionary, Tenth Edition 1997 (defining refer as "1 a: to have relation or connection: RELATE b: to direct attention usu. *by clear and specific mention*.") (emphasis added). Given that "refers to" is a much more exacting word than "relative to," and given that none of the Plaintiffs have complained that there is any ambiguity with this wording, I find that this phrase does not suffer from the same vagueness problems that plagued FECA when the *Buckley* court construed the phrase "relative to."

BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A); *see also* Def.-Int. Br. at 110. In a case construing a new Wisconsin statutory provision very similar to the primary definition of "electioneering communication," Chief Judge Barbara B. Crabb makes the compelling point that the Wisconsin statute at issue in that case actually posed less of a vagueness problem than the express advocacy standard identified in *Buckley*:

> Whatever the potential constitutional flaws of Wisconsin's new reporting and disclosure scheme, vagueness does not appear to be one of them. In fact, the state legislature's approach appears to draw a line even brighter than the one established in *Buckley*. The law makes clear that once a certain dollar threshold is surpassed, the law's disclosure requirements apply to any communication referring to a clearly identified candidate that appears within 60 days of an election. *A copy of a proposed advertisement and a calendar are all that is necessary to make a conclusive advance determination that the ad is subject to regulation*. By contrast, the *Buckley* approach to express advocacy still leaves room for a degree of uncertainty because, as plaintiffs concede, the list of words and phrases identified in that opinion as constituting express advocacy is illustrative, rather [than] exhaustive. Therefore, in a later case involving the federal statute at issue in *Buckley*, the Court noted that the definition of express advocacy it adopted in *Buckley* would also cover a communication whose message "is marginally less direct than 'Vote for Smith.'" *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986). Just how "direct" an exhortation must be to qualify as express advocacy under *Buckley* is not free of all uncertainty for would-be political advertisers.

Wisconsin Realtors, 233 F. Supp. 2d at 1086 (emphasis added). The same could be said of the primary definition of electioneering communication in BCRA. Electioneering communication is more certain and more explicitly defined than *Buckley*'s and *MCFL*'s explanation of express advocacy in that it provides objective criteria for potential political communicators to follow. Although there is no exhaustive list of words falling under the

rubric of express advocacy, the electioneering communication definition is precise as to what communications are encompassed by its terms. Accordingly, I find none of the vagueness concerns identified by the *Buckley* Court present with regard to the primary definition of electioneering communication.

D. *The Evisceration of Section 441b*

1. **Introduction**

As discussed in the foregoing section, the Supreme Court in *Buckley* and *MCFL* construed FECA's restrictions on independent expenditures to apply only to expenditures containing words of "express advocacy." While the Supreme Court was prescient in observing that such a construction with regard to limits on an *individual's* independent expenditures was bound to create loopholes in the regulatory system, *Buckley*, 424 U.S. at 45 ("It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefitted the candidate's campaign."), the Supreme Court emphasized in *Buckley* that it was without a record to uphold restrictions that went beyond express advocacy, *id*. at 46 ("[T]he provision does not *presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.") (emphasis added). In keeping with our system of constitutional checks and balances, the Supreme Court effectively sent the issue back to the political branches for further

consideration. The Supreme Court, in my view, never conclusively foreclosed reconsideration of a limitation on independent expenditures, provided that such a restriction was not vague and was supported by an adequate record. Indeed, in the context of restricting corporate and labor union independent expenditures, the Supreme Court, after *Buckley*, explicitly left this door open. *See First Nat'l. Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978) ("Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.").

The instant case presents such a record to the three-judge District Court and also demonstrates the wisdom of then-Justice Rehnquist's observation that the "careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference." *NRWC*, 459 U.S. at 209 (internal citation and quotation marks omitted). Since 1996, corporations and labor unions have used their general treasury funds to influence federal elections in direct contravention of the original intent of Section 441b and its statutory predecessors. Congress responded to this problem by enacting Sections 201, 203, and 204 of BCRA. Therefore, before turning to a discussion of whether these sections of BCRA are narrowly tailored, I shall briefly discuss the erosion of the express advocacy test as a means of distinguishing between electoral advocacy and issue discussion. The Findings of Fact demonstrate that Congress correctly observed that Section 441b was no

longer effective at preventing corporations and labor unions from using their general treasury funds to influence federal elections. Indeed, to quote a former NRA official, the state of the Section 441b prohibition prior to BCRA was "built of the same sturdy material as the emperor's clothing." Findings ¶ 2.4.3 (Metaksa).

The Findings of Fact with regard to the evisceration of Section 441b resemble a mosaic with each piece of evidence building on the next, and when viewed as a whole, present a damaging portrait of corporations and labor unions using their general treasury funds to directly influence federal elections. It is to this picture that I now turn.

2. The Rise of Spending on Issue Advocacy in Close Proximity to Federal Elections

As discussed *supra*, in *MCFL*, the Supreme Court construed the prohibition on expenditures in section 441b as only applying to expenditures containing words of "express advocacy." *MCFL*, 479 U.S. at 249 ("We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b."). As a result of *MCFL*, corporations and labor unions were permitted to use their general treasury funds on independent expenditures in connection with a federal election, provided that those independent expenditures did not contain words of "express advocacy." In other words, so long as corporations and labor unions did not use any of *Buckley*'s "magic words" in their advertisement, they could use their general treasury funds to pay for advertisements that influenced a federal election. Of course, if the corporation or labor union chose to use the magic words in an advertisement, it could still do so, provided it paid for such a

communication from a segregated fund, thereby ensuring that there was political support for the advertisement.

As a consequence of the Supreme Court's decision in *MCFL*, candidate-centered issue advertisements,[117] funded with corporate and labor union general treasury funds, has dramatically increased in recent election cycles. Findings ¶ 2.2. "By the early 1990s and especially by 1996, interest groups had developed a strategy to effectively communicate an electioneering message for or against a particular candidate without using the magic words and thus avoid disclosure requirements, contribution limits and source limits." *Id*. ¶ 2.2.7 (Magleby).[118] The 2001 Annenberg Report, relied on by Defendants, Plaintiffs, and Congress, establishes that during the 1996 election cycle, an estimated $135 million to $150 million was spent on multiple broadcasts of about 100 distinct advertisements, in the 1997-1998 election cycle, 77 organizations aired 423 distinct advertisements at a cost of between $250 million and $340 million,[119] and in the 1999-2000 election cycle, 130 groups spent over

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[117] As the Findings demonstrate, issue advertisements generally fall into three categories: candidate-centered, legislation-centered, and general image-centered. Findings ¶ 2.2.2. Candidate-centered advertisements make a case for or against a candidate but do so without using "magic words." *Id*. These are the advertisements that BCRA seeks to distinguish from other forms of issue advocacy.

[118] The reason why it was not until 1996 that this explosion in candidate-centered issue advocacy occurred, as political consultant Bailey explains, was that in post-Watergate campaigns, it was important for candidates to be seen as attempting to clean up the political process. Findings ¶ 2.2.7 (observing that "due to a lack of enforcement and a willingness on the part of some to win at all costs, these concerns appear to have dissipated").

[119] The report the Annenberg Study produced following the 1997-1998 election cycle (continued...)

an estimated $500 million on 1,100 distinct advertisements. *Id.* ¶ 2.2.4.[120] Plaintiffs' own expert readily concedes that the number of organizations sponsoring issue advertisements has "exploded" over the last three election cycles. *Id.* ¶ 2.2.6 (La Raja).[121] From their studies, the Annenberg Public Policy Center concludes that the amount of money spent on "issue advocacy" is increasing rapidly, that this development permits the political parties, corporations, and labor unions to gain a "louder" voice, and that consequently, the "distinction between issue advocacy and express advocacy is a fiction." *Id.* Indeed, even the political parties recognize the value which these outside corporations and labor unions bring

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[119](...continued)
placed this estimate at between $275 million to $340 million. *See supra* note 78.

[120] As a representative sample, the Annenberg Report 2001 found that in the 2000 election cycle, the Republican and Democratic parties accounted for almost $162 million (31%) of this spending on issue advocacy; Citizens for Better Medicare, $65 million (13%); Coalition to Protect America's Health Care, $30 million (6%); U.S. Chamber of Commerce, $25.5 million (5%); AFL-CIO, $21.1 million (4%); National Rifle Association, $20 million (4%); U.S. Term Limits, $20 million (4%). Findings ¶ 2.2.4.

[121] Interestingly, the huge rise in issue advocacy spending during federal campaigns far outpaces spending on the amount of PAC-sponsored advertising. Under the original intent of FECA, corporations and labor unions that wished to sponsor electioneering advertisements would have had to do so with segregated funds (e.g. "PAC money"). 2 U.S.C. § 441b(b)(2)(C). During the 2000 election cycle, non-PAC interest groups ran 74,024 political advertisements referring to a federal candidate, while PAC interest groups ran only 3,663 advertisements. Findings ¶ 2.2.5.2. Although none of the parties discuss this discrepancy, and although there are likely a number of factors to explain it, it does not take much imagination to conclude that one of the primary reasons that PAC advertising is so low in comparison, is that if a corporation or labor union can fund the most effective form of electioneering with general treasury funds, there is no need to try and raise PAC money or comply with PACs' disclosure provisions simply to run electioneering advertisements that use words of "express advocacy."

to the election with their issue advocacy. *Id*. ¶ 2.7.10.

3. "Magic Words" Are Rarely Used in Political Advertisements

As issue advocacy by corporations and labor unions has grown as a means of influencing federal elections, the trend of all forms of political advertisements has been to move away from words of express advocacy–whether they are advertisements produced by candidates, political parties, or corporations and labor unions. Findings ¶ 2.3. The unrebutted expert testimony demonstrates that only 11.4 percent of advertisements purchased by federal candidates that aired during the 2000 election cycle would qualify as electioneering under the "magic words" test. *Id*. ¶ 2.3.1 (Goldstein); *see also id*. ¶ 2.3.2 (Strother) (observing that 90% of candidate advertisements he has put together in his career have *not* used express advocacy). Moreover, the uncontroverted testimony of political consultants establishes that express advocacy is no longer considered an effective tool of political advertising. *Id*. (Strother) ("Good media consultants never tell people to vote for Senator X; rather, you make your case and let the voters come to their own conclusions. In my experience, it actually proves less effective to instruct viewers what you want them to do."); (Bailey) ("In the modern world of 30 second political advertisements, it is rarely advisable to use such clumsy words as 'vote for' or 'vote against.'"). When *Buckley* was handed down, express advocacy in political advertising was more common. *Id*. (Bailey). Since the mid-1980s, political advertising has shifted and today the practices of political advertisers–with only a mere 30 seconds to convey their messages–parallel commercial

advertisers where a "product is presented in various desirable tableaus . . . present[ing] viewers with a variety of reasons to choose their product." *Id*. ¶ 2.3.3 (Krasno and Sorauf) ("Political ads seem to follow the same strategy, hoping that citizens will grow to prefer a candidate without being told to troop to the polls.").

4. Other Advantages of Using Issue Advocacy to Influence Federal Elections

Aside from the fact that candidate-centered issue advocacy is a much more powerful means to convey an electioneering message, it is uncontroverted there are other strong incentives for using "issue advocacy" to influence federal elections. *Id*. ¶ 2.5. First, by running "issue advertisements" in the immediate run-up to a federal election, corporations and unions are able to avoid any of the disclosure requirements that ordinarily attach when these groups use general treasury funds to influence federal elections. *Id*.; *id*. ¶ 2.5.1. Plaintiffs' Experts Milkis and La Raja equally concur that the rise of issue advocacy has permitted issue organizations to hide their true identities while running these advertisements. *Id*. ¶ 2.5.1 (Milkis); ¶ 2.2.6 (La Raja) ("Over the last three election cycles, the number of groups sponsoring ads has exploded, and consumers often don't know who these groups are, who funds them, and whom they represent."). As Plaintiffs' expert Milkis candidly observes, "For example, The Citizens for Better Medicare, which spent $65 million on television ads [during the 2000 election cycle], is funded primarily by the pharmaceutical industry." *Id*. ¶ 2.5.1; *see also id*. (citing example of AFL-CIO running advertisements in congressional race under the name "Coalition to Make Our Voices Heard"); *id*. ("Frankly

we've taken a page out of their book [other interest groups] because in some places it's much more effective to run an ad by the 'Coalition to Make Our Voices Heard' than it is to say paid for by 'the men and women of the AFL-CIO.'") (Magleby) (citing comments of AFL-CIO representative at a lunchtime discussion panel at the Pew Press Conference). As a result, not only are corporations and unions able to fund the most effective form of political advertising with their general treasury funds, but they are able to create corporations which have euphemistic names and which, in many instances, serve as fronts for injecting corporate general treasury funds into federal elections. *Id*. In addition to avoiding FECA's disclosure requirements, it is uncontroverted that another advantage of running election advertisements as "issue advocacy" is that corporations and labor unions can use their general treasury funds to influence federal elections which, as Defense Expert Magleby observes, "makes a sham of these longstanding federal laws." *Id*. ¶ 2.5.2. The uncontroverted testimony of Defense Expert Magleby also makes clear that by avoiding PACs, these organizations can raise larger amounts of funds more quickly than if they had to raise money to pay for their advertisements using PACs. *Id*. ¶ 2.5.3.

5. **The Impact of These Developments**

Accordingly, when the Supreme Court's construction of Section 441b in *MCFL* is combined with the fact that very few political advertisements use words of express advocacy, the result is obvious: corporations and labor unions, long prohibited from using their general treasury funds to influence federal elections, are able to run the most effective form of

political advertising and the most widely used form of political advertising from their general coffers. At the same time, the law constitutionally prohibits corporations and labor unions from using general treasury funds to influence federal elections with advertisements that use express words of advocacy–a style of advertising rarely used and described by political consultants as ineffective. The unintended result of this development is that the longstanding prohibition on the use of corporate and labor union general treasuries to influence federal elections is undermined. Indeed, the role of corporations and labor unions in federal elections is actually enhanced because these corporations and labor unions are able to fund the most potent form of political advertising using treasury funds.

The testimony from political consultants, experts, and officeholders and candidates convincingly bears this point out. The record demonstrates that the express advocacy test is not a useful benchmark for distinguishing between campaign advertising and issue advertising, that no particular words are necessary to create electioneering advertisements, and that corporations and labor unions produce advertisements that directly influence federal elections under the guise of "issue advocacy." *Id*. ¶ 2.4. Despite the fact that *MCFL* interpreted Section 441b as reaching more advocacy than the examples in *Buckley's* footnote 52, *MCFL*, 479 U.S. at 249, the test has proven ineffective at distinguishing between genuine issue advocacy and electioneering paid for with corporate and labor union general treasury funds. Indeed, as the testimony presented in this case convincingly demonstrates, no particular words of advocacy are necessary for effective campaign advertisements; it is easier

for corporations and labor unions to skirt the prohibition contained in Section 441b. In sum, Congress found that the express advocacy test, grafted onto Section 441b by the *MCFL* Court, was no longer preventing corporations and labor unions from spending general treasury funds on federal elections. Findings ¶ 2.4.4.

6. Corporations and Labor Unions Routinely Spend General Treasury Funds on Advertisements Designed to Influence Federal Elections

a. *Political Consultants Testify that Candidate-Centered Issue Advertisements are Electioneering*

Advertisements designed to influence a federal election under the guise of issue advocacy usually end by telling the viewer to call, ask, or tell a candidate to do something. Findings ¶ 2.4.3 (Pennington). From the perspective of political consultants, who provide testimony in this case, there is no practical difference between these "issue advertisements" and those advertisements where express advocacy is used. *Id*. (Strother) ("From the point of view of a media consultant, there is no real difference between ending an advertisement with 'Vote for Senator X' versus ending an advertisement with 'Tell Senator X to continue working hard for America's families.'"); (Beckett) ("However, in fact no particular words of advocacy are needed in order for an ad to influence the outcome of an election. No list of such words could be complete. . . ."); (Lamson) ("When political parties and interest groups run 'issue ads' just before an election that say 'call' a candidate and tell her to do something, their real purpose is typically not to enlighten the voters about some issue, but to influence the result of the election, and these ads often do have that effect."). Plaintiffs have

provided no contrary political consultant testimony to discredit the testimony of these political consultants. I find the uncontroverted testimony of the political consultants particularly compelling because it comes from well-known and respected professionals who are engaged in the business of making political advertisements. *See id*.

Ms. Tanya Metaksa, former Chair of the NRA PVF, stated in her opening remarks at the American Association of Political Consultants' Fifth General Session on "Issue Advocacy" that "[i]t is foolish to believe there is any practical difference between issue advocacy and advocacy of a political candidate. What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." *Id*. (Metaksa); *see also id*. (Strother) ("When we design, produce, and run 'issue ads' that mention specific candidates for federal office and that are aired in proximity to an election, these ads are for only one purpose: to effect [sic] the outcome of an election."). In concrete terms, perhaps the most striking example of this "line in the sand drawn on a windy day," is the two camera shoot, where consultants bring two cameras to shoot an advertisement. *Id*. (Strother). The film in Camera A is used by the candidate, while the nearly identical film in Camera B is sold for a nominal fee to a third party who then "gets direct control over the images of the candidate used in the issue groups ads." *Id*. In my judgment, the testimony of political consultants provides overwhelming evidence that corporations and labor unions spend general treasury funds on advertisements that, while not using words of express advocacy, are designed to influence federal elections.

b. *Current and Former Officeholders and Candidates Testify that Corporations and Labor Unions Use General Treasury Funds to Pay for Advertisements Designed to Influence Federal Elections*

In addition to political consultants, current and former officeholders and candidates testify that the express advocacy test has become meaningless, that no particular words of advocacy are necessary to convey an electioneering message, and that corporations and labor unions were using their general treasury funds to influence federal elections. *Id.* ¶ 2.4.2. This testimony is particularly compelling given that the political actors supporting BCRA, to borrow words from Justice Byron White, "included many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years." *Buckley*, 424 U.S. at 261 (White, J., concurring in part, dissenting in part); *see also Colorado I*, 518 U.S. at 650 (Stevens, J., dissenting) ("Congress surely has both wisdom and experience in these matters that is far superior to ours."). Even Plaintiff Congressman Ron Paul conceded during his deposition that outside group issue advertisements run during his 2000 congressional campaign were intended to influence the election. Findings ¶ 2.4.2.1 (Paul). Politicians from both political parties provide convincing testimony in this case, and also provide important guidance through floor statements made during the debate over campaign finance legislation, that in their considered judgment the express advocacy test was not preventing corporations and labor unions from influencing federal elections using general treasury funds, and that no particular words are necessary to convey an electioneering message. *Id.* ¶ 2.4.2 (including statements and testimony from Feingold, McCain, Levin,

Bloom, Bumpers, Chapin, and Shays).

c. *Examples of Corporations and Labor Unions Demonstrate That These Organizations Use Their General Treasury Funds to Pay for Advertisements Designed to Influence Federal Elections*

The record, however, goes beyond the testimony of experts, political consultants, and present and past officeholders and candidates. The documented behavior of corporations and labor unions also clearly demonstrates that issue advocacy is used as a tool of electioneering by corporations and labor unions. *Id*. ¶ 2.6. The Findings, which culled the most salient examples from the substantial record submitted by the parties, demonstrate that, for example, the AFL-CIO, the Coalition, Citizens for Better Medicare, the NRA, and The Club for Growth all used corporate general treasury funds to influence recent federal elections. *Id*. ¶¶ 2.6.1-2.6.5. Plaintiffs dismiss this evidence as merely "anecdotal," McConnell Opp'n at 32, which is a characterization of the weight of the evidence and not a comment on whether it is rebutted. To the contrary, the examples of corporations and labor unions using general treasury funds to influence federal elections are not "anecdotal," but powerful illustrations of a regulatory regime in paralysis. Indeed, like a mosaic, these "anecdotal" examples when combined with the other evidence in the record relating to the general ineffectiveness of Section 441b, and the failure of the express advocacy test, make a compelling case for the restrictions Congress arrived at in enacting Sections 201, 203, and 204 of BCRA.

1) The NRA

The Findings relating to the activities of Plaintiff NRA, however, really drive home

the point that the express advocacy test has become meaningless and that corporations spend general treasury funds on candidate-centered issue advertisements to influence federal elections. *Id*. ¶ 2.6.4. Aside from the NRA's media consultant who stated that the first objective of the NRA was to influence the outcome of the presidential election and other key congressional races, *id*. at 2.6.4.1, the NRA ran two nearly identical radio advertisements in the 2000 election: one paid for with PAC money which used express advocacy and one paid for with corporate general treasury funds which did not use express advocacy. *Id*. ¶ 2.6.4.4. The only real difference between the advertisements was that the one paid for with PAC money said "Vote George W. Bush for President" at the end of the advertisement. *Id*. In my view, this advertisement is a perfect example–the poster child–of how pointless the express advocacy test is at distinguishing between genuine issue advocacy and electioneering advertisements. In addition to this evidence, the Findings, particularly those resting on the internal documents of the NRA, *id*. ¶ 2.6.4.1, also demonstrate just how driven the NRA was to use general treasury funds, which fell outside the source and amount limitations of FECA, to directly influence the 2000 federal election. *Id*. ¶ 2.6.4.

2) Citizens for Better Medicare and The Club for Growth

Another glaring example from the Findings includes the pharmaceutical industry's uncontroverted efforts to influence the 2000 elections, *id*. ¶ 2.6.3, by admittedly spending over sixty-five million dollars on television advertising which, according to Plaintiffs' expert Dr. La Raja, was almost as much as either of the two political parties spent on issue

advocacy, *Id.* ¶ 2.6.3.4. The pharmaceutical industry's efforts were cloaked behind the name "Citizens for Better Medicare." I have concluded from the testimony and documents submitted in this case that this issue advocacy campaign mounted during the 2000 election cycle was designed to influence the federal election with corporate general treasury funds in direct contravention of the historic prohibition on such activity. *See id.* ¶ 2.6.3; *see also id.* ¶ 2.6.3.4 ("Much of CBM's ad strategy leading up to the 2000 election was aimed at supporting candidates attacked in AFL-CIO advertising.").

In addition to CBM's activities, I have also found that Plaintiff The Club for Growth influenced the 2000 federal elections with corporate general treasury funds. *Id.* ¶ 2.6.5. The Club for Growth openly acknowledges in their solicitation materials that "these issue advocacy campaigns can make all the difference in tight races." *Id.* ¶ 2.6.5.4. Moreover, the activity of The Club for Growth in Florida in a 2000 Congressional race demonstrates in an uncontroverted manner the power of a corporation when it uses general treasury funds to influence federal primary elections. *Id.* ¶ 2.6.5.5.

3) AFL-CIO

With regard to the AFL-CIO's issue advocacy campaign during the 1996 federal election, I have found that the AFL-CIO used issue advocacy to influence the 1996 general election. Findings ¶ 2.6.1. The internal documents surrounding the AFL-CIO's efforts are particularly revealing and directly contradict the AFL-CIO's self-serving declaration submitted in this case, which attempts to downplay the electoral considerations behind their

advertisements. *Id*. ¶ 2.6.1.1 (observing that the indirect effect on election outcomes has "never been the point of [the AFL-CIO's broadcast advertising program"). The documents demonstrate that media consultants were hired by the AFL-CIO to test how their advertising would resonate with the electorate, how to create advertisements that "manage the political message in a volatile environment," and even how to place a media buy in Illinois to help a Senate candidate when the candidate did not have the resources to fund advertising on his own. *Id*. Moreover, other independent evidence, including expert testimony, establishes that the AFL-CIO's 1996 issue advocacy campaign was designed to influence the federal election. *Id*. ¶¶ 2.6.1.2-2.6.1.5. The AFL-CIO does not refute or explain the discrepancy between its general denial about its issue advocacy and these contrary evidentiary documents. The Findings elaborate on these points and others in more detail, but I conclude from this evidence that during the 1996 election campaign the AFL-CIO used general treasury funds to influence a federal election, and therefore was able to circumvent FECA's requirement that their efforts be paid for with federal funds from a segregated account. *See id*. ¶ 2.6.1.6 (observing that twelve of the thirty-two House Republican freshman targeted by the AFL-CIO were defeated).

4) The Coalition–Americans Working For Real Change

In response to the AFL-CIO, Plaintiffs Chamber of Commerce, National Association of Manufacturers, and National Association of Wholesaler-Distributors, and other business entities, formed a corporation entitled the "Coalition–Americans Working for Real Change"

also to influence directly the 1996 federal election. *Id*. ¶ 2.6.2. I have found that The Coalition's issue advocacy campaign around the 1996 election was designed to influence the federal election. *Id*. Like the AFL-CIO, the internal documents of the Coalition demonstrate that electoral strategies, and not "issue advocacy," were at the heart of the Coalition's efforts in 1996. *Id*. ¶ 2.6.2.2. Indeed, the Coalition sought advice from consultants and polling firms on how to maximize their ability to influence federal elections. *Id*. These internal documents, combined with independent expert testimony and the FEC General Counsel's report, *see id*. ¶¶ 2.6.2.3-2.6.2.4, strongly contradict the Coalition's self-serving efforts in this litigation to portray their 1996 advertising campaign as something less than electioneering advertisements in disguise. The Coalition used corporate general treasury funds to directly influence the 1996 election and, therefore, was able to circumvent FECA's policy of compelling corporations to use federal money from a segregated account. *See generally id*. ¶ 2.6.2; *see also id*. ¶ 2.6.2.2 (post-election analysis done by Coalition's polling firm).

The AFL-CIO and The Coalition presented no uncontroverted evidence that they did not try to influence the 1996 federal election with issue advertisements. Moreover, these organizations do not contest that they paid for these advertisements with general treasury funds. The effort by the AFL-CIO and The Coalition to portray themselves as engaging in issue advocacy, as opposed to electioneering, is belied by their own internal documents.

d. *Other Examples of Advertisements Demonstrate That Corporations and Labor Unions Use Their General Treasury Funds to Pay for Advertisements Designed to Influence Federal Elections*

Aside from the examples above of corporations and labor unions directly using general treasury funds to influence federal elections, the attributes of so-called "issue advertisements" in the Findings demonstrate the electioneering purpose behind these commercials.

1) Organizations Run Issue Advertisements About Which They Have No Particular Organizational Interest

First, the Findings compellingly demonstrate that many candidate-centered issue advertisements are run about issues in which the organization sponsoring the advertisement has no interest. *Id*. ¶ 2.6.6. On this basis, it is clear that these advertisements were designed to influence a federal election. For example, EMILY's List, an organization dedicated to pro-choice female candidates, ran advertisements on gun-control for federal candidate Linda Chapin. *Id*. ¶ 2.6.6.1. Other examples from the Findings include the Associated Builders and Contractors running an advertisement about a federal candidate that dealt with penalties for child molesters. *Id*. ¶ 2.6.6.2 (admitting that such an advertisement is not of a particular concern of contractors). In another situation, the Club for Growth funneled $20,000 to the American Conservative Union to fund an issue advertisement relating to Hillary Clinton's candidacy which the Club candidly admitted at deposition had nothing to do with the Club's interest in pro-growth conservative Republicans. *Id*. ¶ 2.6.6.3. Another example is an

advertisement run by the trucking industry, under the pseudonym "The Foundation for Responsible Government," praising the record of an opponent of a Senator on health care and taxes. *Id*. ¶ 2.6.6.4 (observing that the Senator was a target of the group because he supported legislation banning triple trailer trucks). Finally, the group Citizens for Life, a New Hampshire Pro-Life Organization, ran advertisements in 2000 against John McCain criticizing jokes allegedly made by McCain about Alzheimer's and a home for senior citizens. *Id*. ¶ 2.6.6.5. The New Hampshire group claimed the advertisement was timely because the *New Hampshire State* Senate was close to voting on a bill to legalize assisted suicide. *Id*. I am not persuaded that any of these advertisements were anything other than electioneering advertisements. Rather, these examples demonstrate that corporations spend general treasury funds on candidate-centered issue advertisements to influence federal elections. *Id*. ¶ 2.6.6.6.

2) Organizations Run Issue Advertisements About Past Votes or About Issues No Longer Before Congress

Second, organizations run candidate-centered issue advertisements praising or criticizing candidates for past votes or discussing a Member's position on an issue not pending before Congress. These candidate-centered issue advertisements are clearly designed to influence federal elections. *Id*. ¶ 2.6.7. For example, the AFL-CIO has run a series of advertisements on past votes of particular Members of Congress. *Id*. ¶ 2.6.7.1. As discussed in my Findings, these advertisements are nothing more than campaign advertisements. *Id*. Another example of this practice is the Chamber's advertisements

attacking various Members of Congress over the prescription drug issue that was not pending before Congress when the advertisements were aired. *Id*. ¶ 2.6.7.2. Many of these advertisements did not include a phone number to contact the Member, and some of the advertisements were aired against candidates who were not even Members of Congress. *Id*. The Chamber's advertising in this regard was plainly designed to influence the federal election. *Id*. These examples from the AFL-CIO and the Chamber also demonstrate that corporations and labor unions used general treasury funds to pay for candidate-centered issue advertisements designed to influence a federal election. *Id*. ¶ 2.6.7.3.

3) Organizations Air Advertisements When A Candidate Lacks Funds to Run Advertisements and So a Candidate Can Avoid Running Advertisements Attacking an Opponent

Corporations and labor unions also use general treasury funds to pay for candidate-centered issue advertisements (a) when candidates lack funds to put their own advertisements on the air and (b) to attack a candidate's opponent so that the candidate can run only "positive" advertisements. *Id*. ¶ 2.6.8. These indicators provide yet another powerful indication that these "issue advertisements" are nothing short of campaign advertisements designed to affect elections, paid for with the general treasury funds of corporations and labor unions. *Id*. ¶ 2.6.8.4. The uncontroverted testimony of political consultants is that negative character advertisements are often run by a third party because they shield the candidate from the political repercussions that are likely to result if the candidate actually ran the negative advertisement him or herself. *Id*. ¶ 2.6.8.1. In addition to allowing the

candidate to refrain from running negative advertisements, organizations often run such advertisements praising a candidate or criticizing the candidate's opponent when the candidate's campaign does not have resources to run advertising on its own. *Id*. ¶ 2.6.8.2 (former Representative discussing how his opponent did not buy media in a media market that covered 40% of his district, but that other groups filled the void attacking the Representative); *id*. ¶ 2.6.8.3 (beneficial advertisements by EMILY's List ran when the Chapin campaign was not on the air to save resources); *id*. ¶ 2.6.1.1 (internal memorandum of the AFL-CIO discussing advertising buy by the union to help Illinois Senate candidate in markets where the candidate lacked resources to air advertising). I conclude that these advertisements were also clearly designed to influence a federal election and paid for with the general treasury funds of corporations and labor unions.

7. ***Conclusion***

In sum, it again bears emphasizing that FECA has always permitted corporations and labor unions to run electioneering advertisements, provided that those advertisements were paid for with money that came from a segregated fund dedicated specifically for federal electioneering. As the examples above illustrate, the utility of Section 441b as a tool to prevent corporate and labor union general treasury funds from influencing elections has been effectively blunted. *See id*. ¶ 2.6.9. While the primary purpose of these advertisements ultimately may be difficult to determine with precision, given the reticence of these organizations to admit they are campaign advertisements, the effect of these advertisements

on federal elections is legion. Consequently, as I state in my Findings, "Congress found that FECA, as construed by the Courts, to only limit independent expenditures containing express advocacy, was no longer relevant to modern political advertisements." *Id.* ¶ 2.4.4; *see also id.* ¶ 2.4.3 (unrebutted testimony of political consultant Bailey) ("The notion that ads intended to influence an election can easily be separated from those that are not based upon the mere presence or absence of particular words or phrases such as 'vote for' is at best a historical anachronism."). Congress appropriately concluded that corporations and labor unions were openly violating the intent of its longstanding (and long-upheld) prohibition on the use of corporate and labor union general treasury funds to influence elections.

In crafting the primary definition of electioneering communication, Congress recognized just how difficult the task of discerning a speaker's true intent can be for a court or regulatory agency. Taking heed from *Buckley*'s stringent admonition that a distinction between the discussion of issues and advocacy for the election or defeat of candidates "may often dissolve in practical application" and that a law must be construed in a manner that avoids "'put[ting] the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers,'" *Buckley*, 424 U.S. at 42, 43, Congress crafted an objective, impartial, and thoroughly simple test for distinguishing between electioneering and issue advocacy. Congress recognized, as the record in this case indicates, that candidate-centered issue advertisements influence federal elections. Congress thereafter drew an incredibly clear bright-line test that focuses on the key empirical determinants that distinguish pure

issue advertisements from candidate-centered issue advertisements. The result is that broadcast advertisements paid for by corporations or labor unions, aired in close proximity to an election that clearly identify a federal candidate, and are targeted to that candidate's electorate, need to be paid for with federal funds from a segregated account. Congress, therefore, is not prohibiting speech by any corporation or labor union; it is merely requiring these organizations to pay for speech that ostensibly influences federal elections with segregated funds that are regulated under FECA.

The question remaining is whether this bright line that Congress has drawn is narrowly tailored to serve compelling governmental interests. I shall first turn to the compelling governmental interests behind Title II and then shall move to a discussion of whether Title II of BCRA is narrowly tailored to serve those compelling governmental interests.

E. *Title II of BCRA is Narrowly Tailored to Serve a Compelling Governmental Interest*

1. **BCRA's Prohibition on Electioneering Communications; the Primary Definition Serves Compelling Governmental Interests**

As discussed *supra*, Section 203 extends the longstanding prohibition on corporations and labor unions making contributions or expenditures from general treasuries in connection with federal elections to electioneering communications as defined in the primary definition. BCRA § 203; FECA § 316(b)(2); 2 U.S.C. § 441b(b)(2). Corporations and labor unions are now prohibited from spending general treasury funds on electioneering communications, but

are permitted to spend unlimited federal money from separate segregated funds on electioneering communications. Even though a corporation or labor union "remains free to establish a separate segregated fund, composed of contributions earmarked for that purpose by the donors . . . the corporation [or labor union] is *not* free to use its general funds for campaign advocacy purposes [and w]hile that is not an absolute restriction on speech, it is a substantial one." *MCFL*, 479 U.S. at 253 (emphasis in original) (plurality opinion). As a result, even though the Act permits corporations and labor unions to make electioneering communications with their segregated funds, the prohibition in section 203 must be "justified by a compelling state interest." *Id*.

In discussing the compelling governmental interests in enacting sections 203 and 204, Defendants rely on longstanding precedent of the Supreme Court that has already extensively discussed the compelling interests related to government regulation of corporate and labor union general treasury funds in the context of federal elections. Gov't Br. at 133-134. The Supreme Court's prior discussions of the compelling interests needed to sustain restrictions on corporate and labor union general treasury funds are equally applicable in the context of Sections 203 and 204 of BCRA. Plaintiffs, with the exception of the NRA, do not seriously question this position, but rather focus their energies on the fact that these provisions are not narrowly tailored to serve these compelling governmental interests. As discussed *infra*, I find Plaintiffs' argumentation on that point to be rebutted by the extraordinary record in this case. Before turning to these arguments, however, I shall briefly discuss the compelling

governmental interests behind sections 203 and 204 in Title II.

In defending the constitutionality of Title II, Defendants rely on the compelling governmental interest described in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), and supported by a rich history of Supreme Court cases discussing Section 441b.[122] Defendants also contend that the compelling governmental interest supporting the prohibition on electioneering communications relates to the potential for the appearance of corruption that occurs when corporations and labor unions pay for electioneering communications with their general treasury funds. Tr. at 252 (Waxman) ("[T]he record in this case of the kind of *Austin* corruption, and even potential *quid pro quo* corruption, absolutely dwarfs the evidentiary record that the Supreme Court has considered in any of the cases it has decided, including *Buckley*."). As a corollary to this latter theory, Defendants also advance an anti-circumvention rationale to justify these provisions, observing that "BCRA's regulation of electioneering communications furthers the compelling governmental interest in preventing corruption of elected officials, not only on its own terms, but also by helping to ensure that the new limits on soft money will not be easily evaded." Gov't Br. at 146. I conclude that the first two theories of corruption are sufficient to uphold the challenged provisions and therefore do not reach the third.

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[122] The parties to the litigation have dubbed this compelling governmental interest theory "*Austin* corruption." Even though the statute in *Austin* only applied to corporations, *Austin*, 494 U.S. at 655, the Supreme Court has long upheld a similar corruption rationale in the case of labor unions. *See Pipefitters*, 407 U.S. at 415-16; *UAW*, 352 U.S. at 585; *NRWC*, 459 U.S. at 207-08.

a. *Corruption Related to Corporations and Labor Unions*

The Supreme Court has long indicated that the government has a compelling interest in placing restrictions on corporate and labor union involvement in federal elections so as to prevent "the corrosive and distorting effects of immense aggregations of wealth," facilitated by either the corporate or union forms, on federal elections. *Austin*, 494 U.S. at 660. As discussed *supra*, corporations and labor unions routinely seek to influence federal elections with broadcast advertising campaigns, paid for with general treasury funds. Sections 203 and 204 of BCRA, which are plainly designed to combat this development, fulfill the same purposes that the government identified as supporting Section 441b in *NRWC* and that the Supreme Court upheld:

> The first purpose of § 441b, the government states, is to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political "war chests" which could be used to incur political debts from legislators who are aided by the contributions. *See United States v. United Automobile Workers*, 352 U.S. 567, 579 (1957). The second purpose of the provisions, the government argues, is to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed. *See United States v. CIO*, 335 U.S. 106, 113 (1948).
>
> We agree with the government that these purposes are sufficient to justify the regulation at issue.

NRWC, 459 U.S. at 207-08. In a nutshell, *NRWC* encapsulates the compelling governmental interests behind Section 441b, which also plainly serve as a basis for upholding BRCA Sections 203 and 204.

The Supreme Court's most recent discussion of these justifications was in *Austin*, where the Supreme Court considered a Michigan state statute which was patterned after section 441b, prohibiting corporations from making independent expenditures in connection with state candidate elections. *Austin*, 494 U.S. at 655 n.1. The issue before the Court was the constitutionality of the state's ban on independent expenditures made by corporations, which the Court held to be "constitutional because the provision is narrowly tailored to serve a compelling state interest." *Id*. at 655. In finding the compelling interest justifying Michigan's statute, the Court recognized a "different type of corruption in the political arena" than the appearance of corruption that had been used to justify *Buckley*'s restrictions on individuals making independent expenditures. *Id*. at 660.

As a baseline, the *Austin* Court reiterated that "'[p]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.'" *Id*. at 658 (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*")) (alteration in original). The plaintiff in *Austin* had argued that because the restriction at issue focused on independent expenditures, as opposed to contributions, the danger of corruption or the appearance of corruption was not present. *See Buckley*, 424 U.S. at 47 ("Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only

undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.").

The *Austin* Court responded by distinguishing this language on the basis that it applied to independent expenditures made by *individuals* as opposed to those made by *corporations*. *Austin*, 494 U.S. at 659. Indeed, *Austin* pointed out that the Court had left open the possibility in *Bellotti*, that "a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by *corporations* to influence candidate elections." *Id*. (emphasis added) (citing *Bellotti*, 435 U.S. at 788 n.26) ("The importance of the governmental interest in preventing [corruption of elected representatives through the creation of political debts] has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. *Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections*.") (emphasis added).

Having set forth this analysis, the Supreme Court found that *regardless* of whether the danger of "financial *quid pro quo* corruption," *id*. at 659 (internal citations and quotation marks omitted), identified in *Buckley* as insufficient to uphold the limitation on independent expenditures made by individual donors, was present in the case of a corporation (a question

clearly left open in *Bellotti*), the Court found that a "different type" of corruption rationale was sufficient to serve as Michigan's compelling interest. *Id*. at 659, 659-60. The *Austin* Court stated this rationale as "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id*. at 660. The Supreme Court was keen to point out that "the mere fact that corporations may accumulate large amounts of wealth is not the justification for [Michigan's restriction on independent expenditures]; rather, the unique state-conferred corporate structure that *facilitates* the amassing of large treasuries warrants the limit on independent expenditures." *Id*.

This "different" theory of corruption was not new as the *Austin* Court observed. *Id*. at 659 ("We therefore have recognized that 'the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form.'") (quoting *FEC v. Nat'l. Conservative Political Action Committee*, 470 U.S. 480, 500-01 (1985) ("*NCPAC*")) (also citing *MCFL*, 479 U.S. at 257). In fact, in *MCFL* the Court pointed out:

> We have described that rationale in recent opinions as the need to restrict "the influence of political war chests funneled through the corporate form," *NCPAC*, 470 U.S. at 501; to "eliminate the effect of aggregated wealth on federal elections," *Pipefitters*, 407 U.S. at 416; to curb the political influence of "those who exercise control over large aggregations of capital," [*UAW*], 352 U.S. at 585; and to regulate the "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization," *National Right to Work Committee*, 459 U.S. at 207. This concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas.

MCFL, 479 U.S. at 257.

Outside the context of corporations, the Supreme Court has been generally solicitous of a similar rationale for upholding Section 441b as applied to labor unions. In *Pipefitters* and *UAW*, as the *MCFL* Court observed, the Supreme Court found that the compelling governmental interest behind the regulation of corporations was applicable to labor unions. *Pipefitters*, 407 U.S. at 415-16 ("When Congress prohibited labor organizations from making contributions or expenditures in connection with federal elections, it was, of course, concerned not only to protect minority interests within the union but to eliminate the effect of aggregated wealth on federal elections."); *UAW*, 352 U.S. at 585 ("To deny that [using union dues to sponsor commercial television broadcasts designed to influence the electorate to select certain candidates for Congress in connection with the 1954 elections] constituted an 'expenditure in connection with any [federal] election' is to deny the long series of congressional efforts calculated to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital."). As noted in *NRWC*, the government's interest in enacting such a provision relates to the fact that labor union members pay money into a union's general treasury and that money may be used to support candidates for office opposed by the individual union member, *NRWC*, 459 U.S. at 208, a justification that applies with equal force to corporate shareholders. *Id*. at 207.

Except for the NRA, none of the Plaintiffs who challenge Title II explicitly contest

the asserted compelling governmental interests relating to preventing corruption or the appearance of corruption that emanates from the particular legal and economic attributes of corporations and labor unions. Given the longstanding history behind section 441b, this is not unexpected. Despite this fact, the NRA Plaintiffs spend significant time in their pleadings asserting that the compelling interest cannot support sections 203 and 204. NRA Br. at 9-14; NRA Opp'n at 6-17, NRA Reply at 12-14. As clarified by their reply brief, the NRA basically argues that this type of corruption only applies to those corporations that "use resources amassed in the economic marketplace, to obtain an unfair advantage in the political marketplace." NRA Reply at 12 (quoting *Austin*, 494 U.S. at 659 (in turn quoting *MCFL*, 479 U.S. at 257)). In *Austin*, the Michigan Chamber of Commerce, relying on *MCFL*, contended that the Michigan statute could not be applied to it because it was a "nonprofit ideological corporation." *Austin*, 494 U.S. at 661. The Supreme Court flatly rejected this *as-applied* challenge. *Id*. at 662-65. In this case, the NRA asserts a similar argument: that it is unlike the Michigan Chamber of Commerce in *Austin*, and therefore, broadly speaking, Title II cannot be justified as preventing *Austin* corruption. NRA Reply at 12 (stating that the NRA does not do business in the economic marketplace, nor derive market profits, nor derive more than a negligible portion of its revenues from corporate contributions). Basically, however, the NRA is using *Austin* as a means of making an as-applied challenge to BCRA.

To begin with, in *MCFL*, the Supreme Court stressed that the rationale for regulating

corporations and labor unions was "longstanding" and used to restrict "the corrosive influence of concentrated corporate wealth" on federal elections. *MCFL*, 479 U.S. at 257. The Supreme Court went on to explain that "[b]y requiring that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending, § 441b seeks to prevent this threat to the political marketplace." *Id*. at 258. The resources available to the segregated fund, the Court reasoned, reflected "popular support for the political positions of the committee." *Id*. As a result, the Court observed that "[r]egulation of corporate political activity thus has reflected concern not about use of the corporate form per se, but about the potential for unfair deployment of wealth for political purposes." *Id*.

Nevertheless, the Supreme Court concluded that the government could not uphold Section 441b *as applied* to the plaintiff in *MCFL* based on this admittedly "longstanding" rationale. *Id*. ("Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace. While MCFL may derive some advantages from its corporate form, those are advantages that redound to its benefit as a political organization, not as a profit-making enterprise."). Therefore, the Supreme Court never questioned the government's asserted compelling interest in regulating corporations of all types--it merely held that *as applied* to MCFL, the rationale was insufficient to support Section 441b's

restrictions.

The NRA would have us believe that this form of corruption is only available to uphold Section 441b restrictions when the corporations being regulated are of the for-profit variety. NRA Reply at 12. In *Austin*, and for that matter in *MCFL*, the Supreme Court made *no* distinctions among different types of corporations when analyzing the compelling governmental interest. The *Austin* Court thus broadly recognized that all corporations benefit from the "state-conferred corporate structure that facilitates the amassing of large treasuries." *Austin*, 494 U.S. at 660; s*ee also MCFL*, 479 U.S. at 268 (Rehnquist, C.J., concurring in part, dissenting in part) ("I do not dispute that the threat from corporate political activity will vary depending on the particular characteristics of a given corporation; it is obvious that large and successful corporations with resources to fund a political war chest constitute a more potent threat to the political process than less successful business corporations *or nonprofit corporations*. . . . These distinctions among corporations, however are distinctions in degree that do not amount to differences in kind.") (emphasis added) (internal citation and quotation marks omitted). The Court in *MCFL* merely held that *as applied* to the plaintiff in *MCFL*, Section 441b could not be upheld by the longstanding compelling governmental interest present in avoiding the corrosive effects of large treasuries of corporations accumulated with the assistance of the corporate form. In *Austin*, the Court held that the state statute could be applied to the plaintiff because the Michigan Chamber of Commerce did not qualify for an *MCFL* exemption.

The NRA never directly disputes this proposition; rather, the organization essentially contends that like the plaintiff in *MCFL*, and unlike the plaintiff in *Austin*, sections 203 and 204 of BCRA cannot be upheld when *applied* to the NRA because as an organization it does not use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace. NRA Br. at 12; *see also* NRA Reply Br. at 12. The NRA implicitly presents the Court with an as-applied challenge couched in *Austin*-terms instead of those of *MCFL*. NRA Br. at 14 ("In any event, the NRA satisfies every criterion identified by the *Austin* Court for extending the First Amendment's protection to the independent political expenditures of a nonprofit political advocacy corporation. . . ."). Of course, in making its decision that the Michigan Chamber of Commerce did not qualify for an *MCFL* as-applied exemption, the *Austin* Court was explicitly relying on *MCFL*. *Austin*, 494 U.S. at 661-62.

On July 31, 2002, the NRA filed a joint motion to stay, *inter alia*, discovery in this case and agreed that they would also stay any as-applied challenge they had against BCRA under *MCFL* until the Supreme Court resolved the merits of Plaintiffs' challenge to BCRA. NRA Joint Mot. to Stay (Jul. 31, 2002) at 1-2. On August 13, 2002, the three-judge District Court entered an order granting this motion. *NRA v. FEC*, 02cv581 (D.D.C. Aug. 13, 2002) (order on joint motion to stay) ("ORDERED that there will be a stay of discovery and briefing of Plaintiffs' contention that BCRA's restrictions on 'electioneering communications' are unconstitutional as applied to them."). As is clear from their briefing on this point, with the *MCFL* avenue closed to them, Plaintiff NRA uses *Austin* to argue that

BCRA, as applied to them, fails to satisfy any compelling governmental interest. NRA Reply at 12 (observing that Title II cannot be justified as designed to present *Austin*-type corruption because it does not amass resources in the economic marketplace.).

The NRA should not be able to litigate an as-applied challenge to Title II in direct violation of the three-judge panel's order, requested by the NRA, by merely cloaking such a challenge under *Austin* as opposed to *MCFL*. Defendants point out that they did not conduct discovery into the NRA's business practices on the basis of this order and therefore are in no position to discuss whether the NRA deserves an *MCFL*-type exemption. Gov't Opp'n at 107 n.109 ("Defendants have, thus, had no opportunity to discover facts that might refute, *inter alia*, NRA's contention about its profits derived from business activities."); Def.-Int. Opp'n at 67 n.208 ("Indeed, the NRA specifically stipulated with defendants in this case that its as-applied challenge to coverage based on *MCFL* would be stayed pending the outcome of the general facial challenge. *See* Joint Motion to Stay (filed on July 26, 2002), at 2 (granted by the Court on Aug. 13, 2002).").

Any corporation that believes it deserves an *MCFL*-exemption may seek an exemption under the FEC's regulations–and any arguments relating to the strictness of those regulations–are open to a challenge *at that time*, by making that claim, or by resisting enforcement, just as the plaintiffs did in *Austin* and *MCFL*. Accordingly, the NRA's claim has no merit in this litigation, *NRA v. FEC*, 02cv581 (D.D.C. Aug. 13, 2002) (order on joint

motion to stay),[123] and I conclude that the longstanding compelling governmental interests behind Section 441b are equally applicable to Sections 203 and 204 of BCRA.

b. *Appearance of Corruption*

Moreover, I find that congressional action in this case could be justified under the

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[123] In addition to the NRA, the ACLU also hints in its briefing that it fits within the class of corporations deserving of *MCFL*-type protection. *See* ACLU Br. at 16. I am extraordinarily skeptical that the NRA or the ACLU fit within the *MCFL* paradigm, which Justice Brennan, the author of *MCFL* described as a "small" class of exempt organizations. *Austin*, 494 U.S. at 672 (Brennan, J., concurring). First, each organization accepts corporate funding, ACLU Br. at 2 n.2; NRA Br. at 2. In *MCFL*, the corporation had an explicit policy against accepting corporate contributions. *MCFL*, 479 U.S. at 264. The NRA claims its corporate contributions are "negligible," NRA Br. at 2, while the ACLU argues that their corporate donations are "extremely modest,"ACLU Br. at 17. These statements, themselves, indicate that both organizations would be minimally burdened if they were to forgo corporate funding so as to qualify for *MCFL* status. Nevertheless, the *absolute* amounts involved–$85,000 for the ACLU, ACLU Br. at 2 n.2, and $385,000 for the NRA, NRA Br. at 2–are not petty cash; particularly compared with what our Circuit has found to be *de minimis*.

The D.C. Circuit has held, in a case involving the NRA itself, that an organization may qualify for an *MCFL* exemption as long as it is not "a potential conduit for corporate funding of political activity." *FEC v. NRA*, 254 F.3d 173, 192 (D.C. Cir. 2001). In *NRA*, the court stated that the appropriate test for this inquiry is whether "[t]he harm contemplated by the statute stems from the absolute amount of corporate money an organization has to spend in the political process, not from the relationship between corporate contributions and the organization's total revenues." *Id*. (finding that $7,000 in corporate contributions in one year precluded the NRA from taking advantage of the *MCFL*-exemption).

Moreover, the NRA openly admits that it engages in business activities. *Compare* NRA Br. at 19 (discussing that it loses money on advertising in its magazines and sale of NRA memorabilia *but that it generates $1.7 million in rental income on leasing its building space*) *with MCFL*, 479 U.S. at 264 (observing that an *MCFL*-type corporations "cannot engage in business activities."). Furthermore, in *MCFL*, the plaintiff "was formed for the express purpose of promoting political ideas, and cannot engage in business activities." *MCFL*, 479 U.S. at 264. In addition to its primary purpose of Second Amendment advocacy, the NRA also "promotes public firearm safety, trains law enforcement agencies in the use of firearms, sponsors shooting competitions, and advances hunter safety." Findings ¶ 13.

Obviously, until a fuller factual record concerning these two organizations has been developed, an as-applied challenge to Title II of BCRA is inappropriate.

rationale that electioneering communications made with general treasury funds of corporations and labor unions create an appearance of corruption. The record powerfully demonstrates that electioneering communications paid for with the general treasury funds of labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting.

In my judgment, the record in this case with regard to interest group issue advocacy substantially demonstrates the potential for the appearance of corruption given the current practices of labor unions and corporations in connection with federal elections. As noted *supra*, the Supreme Court in *Bellotti* left open the possibility that in the context of candidate elections the record in a future case might be sufficient to justify restrictions on independent expenditures paid for with the general treasury funds of corporations and labor unions. *Bellotti*, 435 U.S. at 788 n.26 ("The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem . . . ."); *see also NCPAC*, 470 U.S. at 510 n.7 (White, J., dissenting) ("The possibility was thus left open, and remains open, that unforeseen developments in the financing of campaigns might make the need for restrictions on 'independent' expenditures more compelling. . . . The time may come when the governmental interests in restricting such expenditures will be sufficiently compelling to satisfy not only Congress but a majority of

this Court as well."). In my view, this case presents just such a record. *See* Findings ¶ 2.7.

The factual findings of the Court illustrate that corporations and labor unions routinely notify Members of Congress as soon as they air electioneering communications relevant to the Members' elections. Findings ¶¶ 2.7.3, 2.7.6. The record also indicates that Members express appreciation to organizations for the airing of these election-related advertisements. *Id*. ¶¶ 2.7.2, 2.7.8. Indeed, Members of Congress are particularly grateful when negative issue advertisements are run by these organizations, leaving the candidates free to run positive advertisements and be seen as "above the fray." *Id*. ¶ 2.7.2. Political consultants testify that campaigns are quite aware of who is running advertisements on the candidate's behalf, when they are being run, and where they are being run. *Id*. ¶ 2.7.1.[124] Likewise, a prominent lobbyist testifies that these organizations use issue advocacy as a means to influence various Members of Congress. *Id*.

The Findings also demonstrate that Members of Congress seek to have corporations and unions run these advertisements on their behalf. *Id*. ¶ 2.7.8. The Findings show that Members suggest that corporations or individuals make donations to interest groups with the understanding that the money contributed to these groups will assist the Member in a campaign. *Id*. ¶ 2.7.10.6; *see also id*. ¶ 2.7.4. After the election, these organizations often seek credit for their support. *Id*. ¶ 2.7.5; *see also id*. ¶ 2.7.4. In a similar manner, political

[124] On the other hand, it is sometimes the case that when a candidate is attacked, the candidate and his/her consultants are unaware of who is running the negative advertisement because the organization running the advertisement is cloaked behind a misleading name. *See generally* Per Curiam Opinion Findings Related to BCRA's Disclosure Provisions.

parties are often grateful for the support of these organizations, *id*. ¶ 2.7.10, and parties have sent contributions to these organizations, *id*. ¶ 2.7.10.4. Finally, a large majority of Americans (80%) are of the view that corporations and other organizations that engage in electioneering communications, which benefit specific elected officials, receive special consideration from those officials when matters arise that affect these corporations and organizations. *Id*. ¶ 2.7.9.

The evidence, therefore, paints a picture of corporations and labor unions targeting particular federal candidates or their opponents–that the organizations have a specific interest in getting these particular candidates elected to federal office. The candidates and political parties are well aware of these corporations and labor unions and are cognizant of which organization is running advertisements supporting their candidacy. It is also quite clear that these candidates are very appreciative of the additional electioneering support provided on their behalf from the general treasuries of corporations and labor unions. All of this creates the appearance of corruption, as is demonstrated by the polling data in the Findings..

The NRA also challenges this asserted interest, arguing that "gratitude" is not corruption. NRA Opp'n at 8-12. The NRA misses the point of Defendants' argument, which is that the electioneering broadcasts disguised as "issue advocacy," create a very significant *appearance* of corruption. Defendants never argue that "gratitude" is corruption as the NRA would have the Court believe. Rather, Defendant-Intervenors correctly observe that "[t]he result is plain: candidates can be as beholden to corporations or unions that spend money to

help them through ad campaigns as they would be if the same entities wrote a check directly to the campaign, or funneled the money through the political party." Def.-Int. Br. at 108-09. In my view, the potential for the appearance of corruption–identified as the compelling justification for sections 203 and 204 of BCRA–relates to the very simple fact that when a corporation or labor union spends millions of dollars from its general treasury on a campaign, elected officials are likely to feel beholden when matters relating to these organizations arise.

In *Buckley*, the Supreme Court stated with regard to the independent expenditure restrictions on *individuals* that

> quite apart from the shortcomings of § 608(e)(1) in preventing any abuses generated by large independent expenditures, the independent advocacy restricted by the provision *does not presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions. The parties defending § 608(e)(1) contend that it is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities. They argue that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act. Section 608(b)'s contribution ceilings rather than § 608(e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions.

Buckley, 424 U.S. at 46-47 (emphasis added). The Court in *Buckley* wrote that the threat of independent expenditures made by individuals did not "presently appear" to pose a danger of possible corruption. Therefore, *Buckley* explicitly left open the possibility that a time might come when a record would indicate that independent expenditures made by individuals

to support candidates would raise an appearance of corruption. The Court concluded, in 1976:

> [S]ection 608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign. Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, § 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.

Buckley, 424 U.S. at 47. This discussion in *Buckley* spoke only of the lack of evidence in that record with regard to restrictions on the independent expenditures of *individuals*; an issue that has clearly not been foreclosed for *corporations* or *labor unions*. *Bellotti*, 435 U.S. at 788 n.26 ("Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."). In my view the record assembled by the parties in this case demonstrates that a compelling governmental interest behind Congress's regulatory effort was to prevent the appearance of corruption. It is a legitimate interest and the NRA's arguments are unpersuasive.[125]

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[125] The NRA also argues that Title II cannot be justified as essential to prevent circumvention of Title I, NRA Opp'n at 13-15. Because I find that the first two rationales asserted by the government are sufficient, I do not need to reach whether this rationale constitutes a compelling governmental interest. Consequently, I decline to reach the NRA's argument on this point.

c. *Conclusion*

The compelling governmental interests identified by the Supreme Court in its campaign finance jurisprudence apply equally to Sections 203 and 204 of BCRA. Plaintiffs, aside from the NRA, do not challenge these bases as a justification for the restrictions on electioneering communications contained in Title II. Rather, Plaintiffs vigorously contend that the primary definition, as prohibited by Sections 203 and 204 of BCRA, is not narrowly tailored to serve that compelling government interest and is overbroad as a matter of constitutional law. It is this contention to which I now turn.

2. **Sections 201, 203, and 204 of BCRA are Narrowly Tailored to Serve Compelling Governmental Interests**

I find that BCRA's prohibition of corporate and labor union spending of general treasury funds on electioneering communications, as defined in the primary definition, is narrowly tailored to serve the aforementioned compelling governmental interests. In reading the floor debates leading up to BCRA's passage, I am impressed by the care with which Congress crafted BCRA's delicate balance between regulation of issue advocacy and electoral advocacy, carefully weighing the serious First Amendment interests at stake. With Title II, Congress created an objective, impartial approach based on empirical data that provides objective indicia for distinguishing between electioneering advertisements and genuine issue discussion.

a. *Introduction*

In briefing this issue, Plaintiffs take great pains to exaggerate the reach of BCRA's

electioneering communication provision–a technique no doubt designed to assist their efforts at demonstrating overbreadth. By so doing, Plaintiffs' distort the actual reach and purpose of Title II. *See, e.g.*, NRA Br. at 5 (presenting the law as a close relative of the universally condemned Sedition Acts of 1798). Given the extent to which Plaintiffs contort Title II to serve their own rhetorical purposes, it is necessary to state once again what BCRA does and does not accomplish in Title II.

The primary definition in section 201 is specifically focused on the pressing problem of corporations and labor unions using general treasury funds to directly influence federal elections under the guise of issue advocacy. Plaintiffs dismiss the primary definition in Title II as a "sweeping" "condemnation of core political speech," McConnell Opp'n at 43, and characterize the restrictions in Title II as "staggeringly overbroad." McConnell Br. at 59. Despite these statements, the primary definition of "electioneering communication" includes only communications that fulfill four, very discrete components: (a) they must be disseminated by cable, broadcast, or satellite, (b) they must refer to a clearly identified Federal candidate, (c) they must be distributed within 60 days before a general election or 30 days before a primary election, and (d) they must be targeted to the relevant electorate. BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A).

Furthermore, Section 201 also contains a provision which expressly exempts four additional classes of communication from both the primary and backup definitions of electioneering communication. The four categories excluded from the definition of

electioneering communication are:

> (i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;[126]
> (ii) a communication which constitutes an expenditure or an independent expenditure under . . . [FECA];[127]
> (iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or
> (iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii) [which is a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)].

BCRA § 201(a); FECA § 304(f)(3)(B); 2 U.S.C. § 434(f)(3)(B). The final exemption in

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[126] The first statutorily-created exemption is almost identical to a pre-existing provision of FECA, 2 U.S.C. 431(9)(B)(i), that excludes from the definition of "expenditure" news stories and editorials broadcast or published by the media. 2 U.S.C. § 431(9)(B)(i) ("[Expenditure does not include] any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."). The parties have referred to this carve-out as the "media exemption." *See infra*.

[127] This exemption prevents double reporting of an electioneering communication if it already constitutes an expenditure or independent expenditure under the Act. Electioneering Communications, 67 Fed. Reg. 65190, 65,197-98 (October 23, 2002) (to be codified at 11 C.F.R. §100.29(c)(3)).

Section 201 provides the Commission with authority to promulgate further regulatory exemptions to the definition of "electioneering communication." However, the Commission's ability to create further regulatory carve-outs is closely circumscribed. First, any future exemption must be consistent with the requirements of the electioneering communication provision. Second, a communication cannot be exempted if it is a "public communication" "that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office." BCRA § 101(b); FECA § 301(2)(A)(iii); 2 U.S.C. § 431(20)(A)(iii). As this latter limitation essentially tracks the language of the fallback definition, the statute appears to require the Commission not to stray from either definition of electioneering communication when promulgating future exemptions.[128]

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[128] Since the passage of BCRA, the Commission has promulgated two exemptions to the definition of electioneering communication. The first, exempts communications paid for by candidates for state or local office where the mention of a Federal candidate is "merely incidental" and thus not in violation of Section 301(20)(A)(iii) of FECA. Electioneering Communications, 67 Fed. Reg. at 65,198-99 (to be codified at 11 C.F.R. 100.29(c)(5)). The second, exempts communications paid for by any charitable organization operating under Section 501(c)(3) of the Internal Revenue Code, which by law are not permitted to engage in partisan political activity. *Id*. at 65,199-200 (to be codified at 11 C.F.R. 100.29(c)(6)).

Four of the McConnell Plaintiffs are Section 501(c)(3) organizations. McConnell Second Am. Compl. ¶¶ 30, 32, 36, 37 (identifying the Indiana Family Institute, Inc., the National Right To Life Educational Trust Fund, the Southeastern Legal Foundation, Inc., and U .S. d/b/a Pro-English as 501(c)(3) organizations). Given the FEC's regulations, I find that Court does not have jurisdiction over these four Plaintiffs on both standing and ripeness grounds. These four Plaintiffs do not demonstrate any injury-in-fact, a necessary prerequisite of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (Plaintiffs have the burden of establishing standing to bring their suit by demonstrating that they have: (1) suffered an "injury in fact;" (2) which is "fairly traceable to the conduct complained of;" and (continued...)

Plaintiffs present two overbreadth challenges to Title II. First, Plaintiffs argue that the primary definition of electioneering communication applies to too many genuine issue advertisements to be considered narrowly tailored. McConnell Br. at 57-69; McConnell Opp'n at 42-48; McConnell Reply 33-40; NRA Br. at 17, 24-33; NRA Opp'n at 17-25; NRA Reply at 22-25; ACLU Reply 7-10; AFL-CIO Reply at 8-9. Second, Plaintiffs contend that Title II is unconstitutional because it applies to all corporations and does not contain a special statutory carve-out for non-profit, *MCFL*-type corporations. McConnell Opp'n at 41-42; NRA Br. at 17-24; ACLU Br. at 16-17; *see also* NRA Reply at 14-20; ACLU Reply at 2-7.

b. *BCRA's Restrictions on Electioneering Communication is Narrowly Tailored*

The restrictions in Title II on electioneering communications, as defined in the primary definition, are narrowly tailored. As discussed *supra*, Congress can permissibly regulate beyond express electoral advocacy only by ensuring that the law does not unconstitutionally burden issue discussion. In creating Title II of BCRA, Congress created a bright-line test that focuses on objective criteria common to broadcast advertisements that directly influence federal elections. By constructing this bright-line test, and avoiding a test that rests on subjectivity, Congress not only avoided the vagueness problems that plagued

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[128](...continued)
(3) is capable of judicial redress.). Moreover, as Plaintiffs have presented "a controversy that has not yet arisen and may never arise," *Wisconsin Right to Life v. Paradise*, 138 F.3d 1183, 1187-88 (7th Cir. 1998), their claim is not ripe and the Court lacks jurisdiction to resolve their specific challenge to the electioneering communications provision. Accordingly, I do not believe that the Court has any jurisdiction over the claims of these four Plaintiffs in relation to the electioneering communication provisions in Title II.

FECA, but also specifically linked their findings of abuse of Section 441b to the provisions in the primary definition. By using the main indicators of abuse – broadcast advertisements, aired in close proximity to a federal election, containing a reference to a candidate, and targeted to the candidate's electorate – Congress created a clear rule that constitutionally distinguishes between electioneering advertisements and genuine issue advertisements in the overwhelming majority of cases.

The Findings conclusively demonstrate that genuine issue advocacy is empirically distinguishable from issue advertisements seeking to influence a federal election. Findings ¶ 2.8. The vast majority of issue advertisements designed to influence a federal election identify a federal candidate, are run sixty days prior to a general election, or thirty days before a primary election, and are run in states or congressional districts with close races. I shall briefly examine each of these in turn.

1) Issue Advertisements Designed to Influence a Federal Election Almost Always Identify a Federal Candidate

The record in this case conclusively establish that issue advertisements designed to influence a federal election almost always refer to a specific federal candidate. *Id.* ¶ 2.8. Political consultants who create genuine issue advertisements present uncontroverted testimony that when designing pure issue advertisements, "it was never necessary . . . to reference specific candidates for federal office in order to create effective ads." *Id.* ¶ 2.8.1.1 (Bailey) (discussing examples); *see also id.* (Strother) (pure issue ads did not mention any candidates by name). The flip side of this coin, as the consultants allude to in their

testimony, is that when advertisements do mention a candidate's name, particularly in the period preceding an election, the advertisement's primary purpose is usually to influence the election. *Id*. (Bailey) ("In my decades of experience in national politics, nearly all of the ads that I have seen that both mention specific candidates and are run in the days immediately preceding the election were clearly designed to influence elections."); *id*. (Strother) ("Indeed, there is usually no reason to mention a candidate's name unless the point is to influence an election."). Expert testimony concurs in the views of the political consultants. *Id*. ¶ 2.8.1.2 (Krasno & Sorauf) ("The most obvious characteristic shared by candidate ads and candidate-oriented issue ads is their emphasis on candidates. . . . Pure issue ads, on the other hand, were much less likely to mention a candidate for federal office. . . . ") (Krasno & Sorauf); ¶ 2.8.4 (Magleby) ("A number of indicia make clear that the ads run by individuals and interest groups are in reality electioneering ads that are meant to influence, and do influence, elections: These electioneering ads generally name a candidate. . . .").

This point is driven home by additional evidence, which demonstrates that advertisements run in the sixty days preceding a general election overwhelmingly mention a federal candidate and those run outside that period overwhelmingly do not mention a federal candidate. *Id*. ¶ 2.8.1.3 (discussing advertisements by Citizens for Better Medicare, Chamber of Commerce, Planned Parenthood, AFL-CIO, EMILY's List, Americans for Job Security, Business Round Table, Handgun Control, Sierra Club, and League of Conservation Voters). These facts strongly suggest that true issue advocacy need not mention a

candidate's name to be effective, and that when advertisements mention a federal candidate, they are likely to be aired in close, temporal proximity to an election as part of an effort to influence that election. This pattern is manifested repeatedly in other issue advocacy organizations' campaigns, demonstrating in an objective and unbiased manner the fact that most advertisements designed to influence federal elections refer to a federal candidate.[129] *Id*. By focusing on those advertisements that specifically refer to a federal candidate, Title II of BCRA appropriately targets issue advertisements that are designed to influence an election.[130] *Id*. ¶ 2.8.1.4.

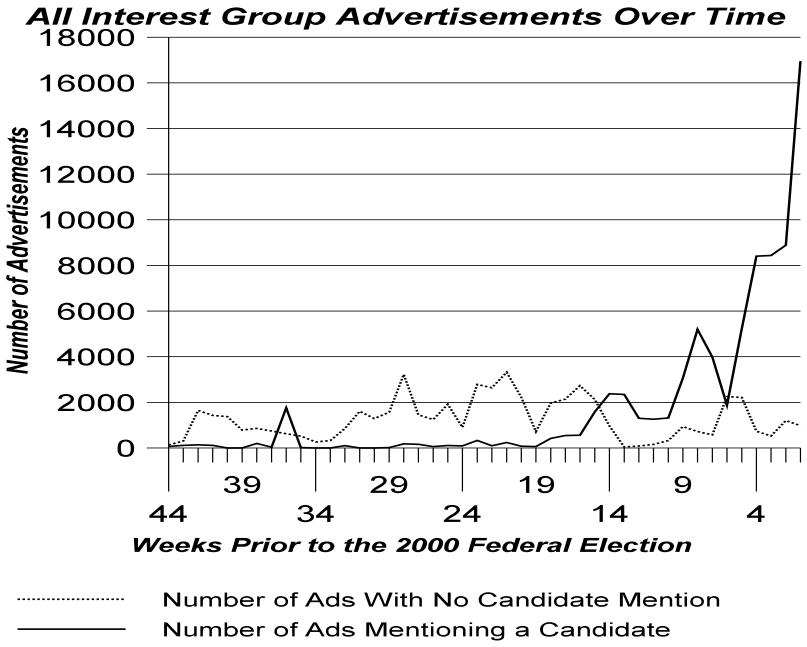
2) A Majority of Candidate-Centered Issue Advertisements are Run in the Sixty Days Prior to a General Election and Thirty Days Prior to a Primary Election

The Findings also overwhelmingly demonstrate the appropriateness of BCRA's sixty and thirty day benchmarks. While advertisements appearing outside these time frames can influence elections, Congress appropriately focused on the periods of time that most directly influence federal elections. *Id*. ¶ 2.11.1. The Annenberg Study, which was not challenged

[129] No similar evidence was presented by Plaintiffs to show an opposite trend or pattern.

[130] Moreover, BCRA appropriately leaves untouched advertisements paid for with corporate and labor union general treasury funds that do not refer to a federal candidate. For example in the 63 days before the 2000 election, Citizens For Better Medicare ran 14,975 advertisements, of which 4,099 did not mention a federal candidate. Findings ¶ 2.8.1.3. *None* of these advertisements that did not mention a federal candidate would be covered under BCRA. However, the 6,000 advertisements that mentioned a federal candidate and that were aired in the final three weeks of the 2000 election potentially would need to be paid for with segregated funds if the advertisements met the other criteria of the primary definition to be considered "electioneering communication."

by Plaintiffs, and was relied on by Plaintiffs' experts, as well as by Congress, concluded that during the 2000 federal election "[f]ully 94% of issue ads aired after August made a case for or against a candidate." *Id.* ¶ 2.8.2.1. As the following chart from the findings illustrates, issue advertisements that mention a federal candidate dramatically increase in the period before a federal election. In this case, the picture tells the entire story:



Id. ¶ 2.8.2.2. In addition, uncontroverted expert testimony in this case confirms that issue advertisements aimed at influencing federal elections are aired in the period right before an election. *Id.* ¶ 2.8.2.3; *id.* (Goldstein) ("The CMAG database provides empirical evidence

of a strong positive correlation between [an advertisement's reference to a federal candidate and the proximity in time of the broadcast of the advertisement to the federal election] and consequently of its validity as a test for identifying political television advertisements with the purpose or effect of supporting or opposing a candidate for public office."). The evidence establishes that Congress was correct to conclude that sixty days before a federal election is the time corporations and labor unions have sought to use their general treasuries to influence federal elections. *See* Findings ¶ 2.8.2.4.

The thirty-day benchmark is similarly narrowly tailored. Plaintiffs complain that no analysis of narrow tailoring "exists as to ads broadcast within 30 days of primaries or conventions, and defendants appear to have abandoned any contention that there is any basis in experience to prohibit such advertisements." AFL-CIO Reply at 3 n.2. This argument is incorrect; Defendants have put forth evidence concerning BCRA's thirty-day window and Plaintiffs have done nothing to contradict or challenge the evidence. As the Findings establish, Defendant-Intervenors were the only party to actually study the impact of BCRA on advertisements run during the 2000 primary election period. Findings ¶ 2.11.5.3. The Defendant-Intervenors found only 76 distinct advertisements which aired more than 60 days before the general election from the CMAG database, comprising 16,916 airings. *Id*. Of these advertisements, only three percent of the *airings* (522 out of 16,916) named a candidate and were aired within 30 days of the candidate's primary. *Id*. Defendant-Intervenors observed that of the advertisements identifying a candidate and airing within 30 days of a

2000 primary election, only 1.2 percent were coded as "genuine issue advertisements." *Id*. Defendants' experts Krasno and Sorauf make a similar finding. *Id*. ¶ 2.11.5.2. These experts observe that the "hodgepodge of different primary dates makes it difficult to factor [the 30 day primary window] into the analysis, but we are confident that it would have little effect on the proportion of pure issue ads incorrectly captured by BCRA for the simple reason that so few of these advertisements mention candidates at all. Indeed, our examination of 1998 shows this to be true: no pure issue ads would have been captured by the 30-day primary period." *Id*. Plaintiffs make absolutely *no* effort to challenge this data, and I find the evidence sufficient to demonstrate that the thirty-day time frame is supported by the record in this case.

Indeed, the closest Plaintiffs come to challenging Defendants' on this point is the AFL-CIO's citation to 336 cookie-cutter advertisements aired over three election cycles, only 50 of which would have been even covered by BCRA's provisions. Findings ¶ 2.11.5.1. I discuss these advertisements in more detail, *infra*, however it is clear that this evidence represents the political advertising activity of only one interest group, albeit a particularly active one. As such, this submission does not directly address Defendants' analysis which examines BCRA's effect on issue advocacy during the primary cycle in general. I, therefore, find that this AFL-CIO evidence does not change my finding that BCRA's thirty-day period is supported by the record as being narrowly tailored to achieve the governmental interest at stake.

Moreover, Defendants provide uncontroverted evidence that the effect of advertisements run during a primary can be just as damaging as advertisements run during the general election. The record demonstrates that interest group broadcast advertisements had a substantial effect on the outcome of the 2000 Congressional race in Florida's Eighth district, particularly with the advertisements run by The Club for Growth during the primary. *Id*. ¶ 2.6.5.5 (Pennington); *see also id*. ¶ 2.10.2 (Pennington) (noting that radio advertisements by Americans for Limited Terms attacking Mr. Keller's opponent on taxes and other issues was quite effective). The Club for Growth and Republican candidate Ric Keller had made their relationship well known, and the Club for Growth ran advertisements particularly helpful to Mr. Keller including one entitled "Keller Sublette Higher Taxes." *Id*. ¶ 2.6.5.5 (Pennington). Keller's Republican primary opponent, Bill Sublette, had been the front-runner until this advertising campaign by The Club for Growth began. *Id*. Rocky Pennington, Mr. Sublette's campaign consultant, observed that Sublette would have garnered 50 percent of the vote in the Republican primary and not have had to face a run-off primary contest had it not been for The Club for Growth advertisements. *Id*.

After the election, in June of 2001, Congressman Ric Keller signed a Club for Growth fundraising letter stating:

> The Club for Growth selected my race as one of its *top priorities*. . . .
> Since the Club targets the most competitive races in the country, your membership in the Club will help Republicans keep control of Congress.

Id. ¶¶ 2.7.4 (underline in original, italics added for emphasis). In my judgment, the Keller-

Sublette primary election advertising example epitomizes the reason Congress extended the prohibition on electioneering communications to 30 days within primary elections. It also demonstrates that simply because a primary election does not ultimately produce an officeholder, since the winner only receives a chance to run for elected office, the risk of corruption is still clearly present. *See* Findings ¶ 2.6.6.5 (New Hampshire Presidential primary election advertisements referencing Senator McCain). The thirty-day prohibition around primaries is therefore supported by the record.

The sixty and thirty-day figures are not arbitrary numbers selected by Congress, but appropriate time periods tied to empirically verifiable data. The Findings persuasively demonstrate that advertisements designed to influence a federal election mention the name of a candidate and appear in the sixty and thirty days before a federal election or primary contest. The primary definition of electioneering communication is narrowly tailored because it focuses only on these periods of time, where it has been shown that candidate-centered issue advocacy is at its zenith and the influence of these advertisements on federal elections is at its strongest. Indeed, expert testimony likewise concludes that the majority of issue advertisements that mention a federal candidate appear in the period before an election. *Id*. ¶ 2.8.2.3.

Unlike Judge Leon, I am equally unpersuaded by Plaintiffs' claim that the legislative calendar requires the running of issue advertisements during the periods covered by BCRA. *See, e.g.*, AFL-CIO Br. at 10-11; Findings ¶ 2.11.8. I do not find that Plaintiffs have

presented sufficient evidence to demonstrate this proposition. Findings ¶ 2.11.8.3. In many instances, Plaintiffs conclusively allege that legislative activity occurs during this time frame without providing either specific examples from the legislative calendar or examples from their own issue advertising campaigns addressing these legislative issues. *Id*. ¶ 2.11.8.1. The actual examples of some advocacy tied to specific pending legislation Plaintiffs present are comparatively few and I conclude are not sufficient to demonstrate that BCRA is overbroad. *Id*. ¶ 2.11.8.2. Importantly, Plaintiffs never overcome the fact that all issue advertisements that refer to a federal candidate, that are run in close proximity to a federal election, and that are targeted to the candidate's electorate influence the outcome of the federal election. *Id*. ¶ 2.11.2. Nor do they overcome the evidence showing that most "pure" issue advertisements do not mention the name of federal candidates. *Id* ¶ 2.8.1.1. Congress properly concluded that advertisements mentioning a candidate run in this time frame have an electioneering affect, even if they are run for a different purpose, and if these advertisements were paid for by corporations and labor unions, Congress concluded, consistent with longstanding policy, to require that these advertisements be paid for with segregated funds specifically designated for election purposes.

Additionally, the record establishes that it is a disputed issue of fact as to whether it is even effective to run "genuine" issue advertisements in the immediate run-up to a federal election. Findings ¶ 2.11.7. Political consultants, current and former candidates and officeholders, and Defendants' expert witnesses contend that it is ineffective to run issue

advertisements in close proximity to a federal election, and as a result, advertisements about issues run during that time frame are likely designed to influence federal elections. *Id*. ¶¶2.11.7.1-2.11.7.2. Plaintiffs respond that it is necessary to run issue advertisements that mention the name of a federal candidate close to an election because of the public's greater interest in public affairs during that time frame. *Id*. ¶¶ 2.11.7.3-2.11.7.4. Because this issue is disputed, I reach no conclusion on this matter. What I do conclude is that with the primary definition of electioneering communication, the test does not focus on the objective behind the advertisement but rather objective determinants that have been empirically proven to distinguish issue advertisements that influence federal elections from other types of issue advertising.

Given the record presented to the Court, I conclude that BCRA captures the overwhelming majority of advertisements that are designed to affect federal elections. Even if the primary purpose of a broadcast advertisement is to pressure a Member of Congress on pending legislation, the record demonstrates that advertisements mentioning a federal candidate that run in close proximity to a federal election that are targeted at that candidate's electorate have a serious impact on elections. Still, BCRA only requires that these advertisements be paid for with segregated funds as opposed to general treasury funds.

3) Most Candidate-Centered Advertisements That Mention a Candidate for Federal Office Are Run in States and Congressional Districts With Close Elections

The Court's Findings conclusively demonstrate from the evidence that issue

advertisements designed to influence a federal election are focused predominantly on close races. Findings ¶ 2.8.3. Expert and political consultant testimony, as well as empirical data, all demonstrate this fact. *Id*. The obvious reason for focusing primarily on close races is that corporations and labor unions endeavor to receive the most value out of each dollar spent on advertising in order to maximize their influence on elections. Even Plaintiff NRA admitted to focusing its advertisements on competitive races. *Id*. ¶ 2.8.3.5.

In my judgment, tailoring BCRA to apply only to "competitive races" would create line-drawing difficulties that would make such a law unconstitutional. However, the primary definition of electioneering communication is narrowly tailored in that it only focuses on broadcast advertisements that are targeted to the relevant electorate of each candidate. This means that, in the case of House and Senate races, the communication will not constitute an "electioneering communication" unless 50,000 or more individuals in the relevant congressional district or state that the candidate for the House or Senate are seeking to represent can receive the communication. BCRA § 201; FECA § 304(f)(3)(C); 2 U.S.C. § 434(f)(3)(C). Broadcast advertisements that target substantial portions of the electorate who decide a candidate's political future are those most likely to influence an election, and earn the candidate's gratitude. I find that by applying only to a candidate's relevant electorate, the primary definition of electioneering communication is narrowly tailored.

4) Legal Conclusions Relating To Expert Reports and Plaintiffs' Sample Advertisements

In my Findings and in the Appendix to this Opinion, I have made an effort to describe

thoroughly the various expert reports purporting to demonstrate the problems created by issue advocacy advertisements affecting federal elections, as well as the narrow tailoring Congress achieved in BCRA to avoid affecting federal non-electioneering advertisements. I have also devoted a great deal of effort and care to lay out the criticisms of these studies proffered by Plaintiffs' expert, and the responses to that criticism by Defendants' experts. I have done so because the record demonstrates that a number of the reports, such as the *Buying Time* and the Annenberg Center studies, were relied upon by Congress in its consideration of BCRA and the parties have presented the Court with a wealth of material aimed at bolstering or discrediting them. In addition, Plaintiffs have attempted to demonstrate BCRA's overbreadth by discussing a series of advertisements that they claim would be unfairly captured under the primary definition of electioneering communication. The problem with this approach is that it asks the Court to sit as the viewer and find that these advertisements were pure issue advertisements. The *Buckley* Court warned against a statutory test that relied on the viewer and listener's interpretation of a political message. I have declined, therefore, to engage in this exercise. As my Findings discuss, I have reviewed Plaintiffs' submission, including all of their cited advertisements, and conclude that they do not demonstrate BCRA's overbreadth. *See* Findings ¶¶ 2.11.3-2.11.5.

Turning to the experts, as indicated in my Findings, I find that much, though not all, of the relevant evidence presented by the Defendants has merit and has not been discredited by Plaintiffs' expert, Dr. Gibson, whose criticism focused on the *Buying Time* studies. *Id.*

¶ 2.12. At the outset, it is worth pointing out that the conclusions reached in Dr. Goldstein's Expert Report are unrebutted on the following points: interest group advertising in 2000 was concentrated in so-called "battleground" states; roughly 11 percent of candidate-sponsored advertisements in 2000 used express advocacy terminology; interest group advertisements, which identified a candidate in 2000, tended to be broadcast within the final 60 days of the election campaign, whereas those that did not identify a candidate were spread more evenly throughout the year; and interest group advertisements that mentioned candidates in 2000 were highly concentrated in "battleground states." *Id.* ¶ 2.12.3. Dr. Goldstein's uncontroverted conclusions further demonstrate that BCRA's primary definition of electioneering communications narrowly focuses on the key empirical determinants that separate genuine issue discussion from electioneering.

Plaintiffs have attempted to discredit the *Buying Time* reports primarily through the expert reports of Dr. Gibson. Dr. Gibson presents various criticisms of the reports in an effort to have the Court dismiss them or find Dr. Gibson's alternative conclusions more acceptable. As I mentioned in my Findings, the effort is not unlike that of a piñata party: if one hits the piñata enough, it will eventually crack apart. *Id.* ¶ 2.12.4. Although some of these "hits" have merit, I point out that neither Plaintiffs nor Dr. Gibson have attempted to conduct their own similar study, or even replicate a discrete portion of the *Buying Time* studies, despite the fact that the underlying materials were provided to them by Defendants. Presenting the Court with contrary results from such a study would have been far more

persuasive than the recalculations of *Buying Time* data and the often conjectural and speculative criticism proffered by Plaintiffs and Dr. Gibson.

Importantly, much, if not all, of the objective findings in the *Buying Time* reports have not been undermined by Plaintiffs' expert. For example, Plaintiffs have not challenged the conclusions in *Buying Time* that very few advertisements utilize express advocacy terminology, and that interest group advertisements which identify candidates are concentrated toward the end of the election campaign. *Id.* ¶ 2.12.7. I find that this objective data is insulated from the great majority of criticism leveled at the *Buying Time* reports. *Id.* (Dr. Gibson commenting that "[e]ntirely objective characteristics of the ads (e.g., whether a telephone number is mentioned in the text of the ad) present few threats to reliability."). Furthermore, some of these results are supported by those of the unrebutted Annenberg Reports. *Id.*

As my Findings discuss, I have not accepted either side's discussion of the conclusion in *Buying Time 1998* related to the percentage of genuine issue advertisements that would be affected by BCRA. *Id.* ¶¶ 2.12.5-2.12.9. *Buying Time 1998* finds that seven percent of genuine issue advertisements aired over the course of 1998 were aired in the final 60 days of the election campaign and mentioned a candidate, and Dr. Krasno determined that out of all of the advertisements identifying a candidate sixty days before the 1998 election, 14.7 percent were "genuine" issue advertisements. *Id.* ¶ 2.12.8. Dr. Gibson presented figures from the *Buying Time 1998* data ranging from 16 percent to 60 percent. *Id.* I have found that

given the record it is impossible to determine which expert's view of the student coding is correct, and as such I find this matter in dispute and do not accept either side's conclusion on the likely effect BCRA would have based on the *Buying Time 1998* data.

In regard to *Buying Time 2000*, I do not accept its finding that, of all of the issue advertisements run within 60 days of the 2000 election that mentioned a candidate, 0.6 percent were genuine advertisements. *Id.* ¶ 2.12.10. I reached this conclusion primarily because Dr. Goldstein finds that if one includes all of the advertisements that Plaintiffs allege were recoded from genuine to electioneering commercials, the most "conservative" calculation of advertisements aired in the final 60 days of the 2000 election also identifying a candidate, which were "genuine," is 17 percent. *Id.*[131] This figure is not rebutted by Plaintiffs or their expert.

As I also explain in my Findings, I view these calculations as largely an academic exercise. *Id.* ¶ 2.12.12. The expert testimony in this case demonstrates the subjective nature of the effort of trying to capture mental impressions of viewers, and illustrates how one

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[131] Dr. Gibson also argues that since the majority of advertisements coded as electioneering were also coded as having policy matters as their primary focus, the studies in fact demonstrate that the vast majority of advertisements captured by BCRA are genuine issue advertisements. As the Findings demonstrate, I reject this argument. Findings ¶ 2.12.11. Defendants' experts have clearly demonstrated that the fact an advertisement may focus on issues does not preclude the possibility that the advertisement is designed to promote a candidate. *Id.* Dr. Lupia's beer commercial analogy illustrates this point effectively. *Id.* Furthermore, the results for candidate-sponsored advertisements demonstrate that even when a candidate running for office airs an advertisement in an effort to win election, he or she more often than not focuses those commercials on policy matters and not on personal characteristics of the candidates. *Id.*; *see also supra* ¶ 2.3.2 (Bailey).

person's genuine issue advertisement can be another's electioneering commercial. *Id*. ¶ 2.8.5. This is why BCRA's framers have used objective criteria to define "electioneering communication." Furthermore, as Dr. Lupia explains, these exercises can help us determine what BCRA's impact would have been on past behavior, but they do not necessarily tell us how BCRA will affect non-electioneering issue advertisements in the future. *Id*. For example, the NRA claims that its 30-minute "news magazine" titled "California," is genuine issue advocacy but it would be unfairly affected by BCRA because it showed an image of the group's periodical, which featured a picture of Vice President Al Gore on the cover for a few seconds. App. ¶ I.D.8.h. The advertisement was aired within 60 days of the 2000 election, and therefore would fall into BCRA's "electioneering communication" definition. I would note that it is clear that the NRA views Vice President Gore's presence in the advertisement as a coincidence and not a vital part of the commercial. *Id*. ¶ I.D.8.h. As such, one would expect that with the enactment of BCRA, the NRA would change its behavior. The NRA could leave the advertisement unchanged and only air it more than 60 days before an election, or more than 30 days before a primary, and escape BCRA's coverage. The NRA could also show a periodical with a different cover and air the advertisement whenever it liked. Or, the group could leave the advertisement unchanged, run it within the 60 day window and pay for the commercial from its PAC funds. This is one example, but it illustrates the point that trying to determine the number of advertisements that will be unfairly subjected to BCRA based on past behavior does not account for adaptation of that

behavior based on the new reality.

The fact that some genuine issue advertisements identified a candidate and were aired within 60 days of an election in the past does not mean that the candidate's presence was an essential, as opposed to an incidental, aspect of the commercial, or that such a percentage will remain constant. However, even if such conclusions could be drawn, it appears that the least contested figure presented to the Court is that 17 percent of advertisements in 2000 that would have been affected by BCRA were "genuine" issue advertisements. This figure is one of the reasons that Judge Leon finds the primary definition of electioneering communication to be substantially overbroad. I cannot agree with Judge Leon. First, I find these debates over "actual" percentages of genuine issue advocacy illustrative of why the Supreme Court in *Buckley* found that regulations relating to the subjective intent of the listener to be flawed. Trying to discern whether an advertisement is electioneering or issue advocacy is very difficult and open to debate. *See* Finding ¶ 2.8.5. Second, this number is the outermost number of "genuine" issue advertisements that would be covered under BCRA; strong arguments can be made that the number should be reduced. Given the evidence in this case that broadcast advertisements aired in close proximity to a federal election, that mention the name of a candidate, and that are targeted to the candidate's electorate directly influence federal elections, I find that Congress was correct to establish an objective test for determining what constitutes electioneering. In other words, even if I were to accept the 17 percent figure as a valid metric for determining overbreadth, I find that the any such impact

of BCRA is substantially counterbalanced by the record in this case and the objective empirical determinants related to these advertisements. For these reasons, I do not find Dr. Goldstein's conservative estimate of 17 percent to deem BCRA's primary definition of electioneering communication substantially overbroad.

Plaintiffs, as noted above, did not conduct their own empirical study like the *Buying Time* study, but instead provided the Court with examples of advertisements that they claim BCRA would have captured had it been in effect when they were aired. The McConnell Plaintiffs provided a CD-ROM containing 21 advertisements they claim provide "powerful illustrations of the amount and type of issue advocacy that would be prohibited by BCRA's primary definition of 'electioneering communications.'"[132] *Id.* ¶ 2.11.3. However, nine of these advertisements would not fall under BCRA's definition of electioneering communication because they either were not targeted at a relevant electorate or were not aired within 30 or 60 days of a primary or general election. *Id.* ¶ 2.11.3.1. Four of the remaining advertisements focus on a candidate's past votes with no reference to any pending or future legislation. *Id.* ¶ 2.11.3.2. I reject the notion that these advertisements are examples of genuine issue advocacy. *Id.* ¶ 2.11.3.3. It is difficult to imagine what purpose an advertisement would have other than to promote the election or defeat of a candidate

[132] As noted numerous times in this opinion, BCRA would not "prohibit" these advertisements. These advertisements can be run, unaltered, if paid for from segregated funds. In addition, if the advertisements are not run in the candidate's electorate, BCRA places no restrictions on these advertisements. If the advertisements are run more than 30 days before a primary or 60 days before a general election, BCRA imposes no restrictions on these commercials.

when it is aired within 60 days of an election or 30 days of a primary, clearly identifies a candidate, runs in that candidate's electoral district, and focuses on the candidate's past voting record without referring to pending future legislation. Take, for example, the AFL-CIO's "Protect" advertisement:

> PHARMACIST: The Senior Citizens today can't afford their medication. They come in and I know they're skipping medication so they can pay for their food. With the rising cost of medication today, it could wipe out anybody at any time.
> VOICE: Yet Congressman Jay Dickey sided with the drug industry. He voted no to guaranteed Medicare prescription benefits that would protect seniors from runaway prices. Tell Dickey quit putting special interests ahead of working families.
> PHARMACIST: Watching people walk away without the medication takes a little bit out of me every day.

Id. ¶ 2.6.7.1. The argument that this advertisement, and those like it, was aired to promote an issue, and not to attack a candidate, strains credulity. Therefore, out of these 21 self-selected, and presumably most self-serving advertisements McConnell Plaintiffs provided the three-judge panel, eight at most are genuine issue advertisements that would be affected by BCRA.[133] *Id*. ¶ 2.11.3.4.

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[133] I state "at most" due to the fact that Defendants have provided background for almost all of the advertisements presented by Plaintiffs to the Court as genuine issue commercials. Examining the advertisements with knowledge of the context in which they were aired raises serious doubt in my mind that the true purpose of some of these communications was to promote issues as opposed to candidates. Indeed, the uncontroverted expert testimony states that in assessing the true purpose of an advertisement it is very important to view the advertisement in the context of the election in which it was run, rather than as part of a cold, factual record. Findings ¶ 2.8.5 (Strother). For example, one advertisement submitted by the McConnell Plaintiffs exhorts viewers to "call" incumbent Senator Lauch Faircloth "today and tell him to keep up his fight [against trial lawyers]. (continued...)

In addition, Defendants identify 39 advertisements that appear in Plaintiffs' briefings, which Plaintiffs claim are genuine issue advertisements. *Id*. ¶ 2.11.4. In addition to these 39 advertisements, I have found four additional advertisements alleged in declarations to be examples of legislative-centered advertisements that would be affected by BCRA, *id*., as well as a large number of cookie-cutter advertisements alluded to in the AFL-CIO's Opening Brief, which the group claims would be unfairly affected by BCRA's 30-day primary window, *id*. ¶ 2.11.5. I address the groupings of advertisements in turn.

The 39 advertisements scattered throughout Plaintiffs' briefs include 12 NRA advertisements which the group only identifies as having been aired sometime in 1994, and 13 commercials sponsored by the same group that aired in March of 2000, but mentioned only President Clinton who was not then a candidate for office. *Id*. ¶ 2.11.4.1. On these

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[133](...continued)
Because if trial lawyers win, working families lose." *Id*. ¶ 2.8.5.2. From a detached perspective, this advertisement appears to be advocating an anti-trial lawyer policy; however, when one is informed that Senator Faircloth's opponent was now-Senator John Edwards, a prominent trial lawyer, and that advertisements both supporting and opposing Senator Edwards focused on his trial lawyer credentials to the point that the phrase "trial lawyer" was synonymous with John Edwards, it is difficult to view the advertisement as anything other than electioneering. *Id*. However, as noted *supra*, ascertaining a political advertisement's true purpose is often a subjective exercise, one that Congress elected not to include in BCRA's primary definition of "electioneering communication." As such, unless there is an objective factor indicating that a proposed "genuine" advertisement is in fact an electioneering commercial, I will accept Plaintiffs' characterizations in the interests of a conservative and objective analysis. The conservative figure above also includes "Save," which criticizes a candidate's past vote but urges viewers to call the Member of Congress and "tell him to vote no when the Gingrich plan comes up again," intending, according to the AFL-CIO, "to influence House Members in the event that the bill returned for another vote in the [House]." Findings ¶ 2.11.3.2.

bases, I exclude these NRA commercials from consideration. I also exclude the ACLU's advertisement as an example of a "genuine issue advertisement" since it is clear that it was engineered to provide the group standing to challenge BCRA and is the only example of a past "electioneering communication" made by the group. *Id.* ¶ 2.11.4.2. I reject another, the AFL-CIO's "Sky," since it, like the four in the McConnell Plaintiffs' 21 advertisement submission described *supra*, criticized a Member of Congress's past vote without reference to any pending or future legislation. *Id.* ¶ 2.11.4.3. Therefore, out of these 39 advertisements Plaintiffs used in their briefings to illustrate the unfairness of BCRA, 12 at most are genuine issue advertisements that would be affected by BCRA.[134] *Id.* ¶ 2.11.4.6.

Four other advertisements were cited by Plaintiffs in declarations as being motivated by pending legislation and happened to run within the 30 or 60-day BCRA windows. *Id.* ¶ 2.11.4.5 ("No Two Way," "Spearmint," "Spear," and the Gun Owners of America's armed pilots advertisement). For purposes of this analysis I accept Plaintiffs' characterization of these commercials. *But see supra* note 133.

Finally, the AFL-CIO mentions that a number of its legislation-focused

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[134] Again I use the qualifier "at most" due to the presence of advertisements whose context makes me question the notion that they are genuine issue advertisements and not electioneering commercials. *See supra* note 133. This conservative figure includes: the Associated Builders and Contractor's advertisement on penalties for child molesters, a subject that the group acknowledges "is not [an issue of] particular concern to the general public of contractors or general group of contractors;" Findings ¶ 2.6.6.2, and the NRA's "Tribute" where Charlton Heston discusses "winning in November" and states "as we set out this year to defeat the divisive forces that would take freedom away, I want to say these fighting words for everyone within the sound of my voice to hear and to heed and especially for you, Mr. **Gore**. "From my cold dead hands." Findings ¶ 2.11.4.4 (emphasis in original).

advertisements would be affected by BCRA's 30-day window. Looking at the "flights" of advertisements detailed in its submissions, it appears that the vast majority of the "cookie-cutter" advertisements that made up these flights would not have been affected by BCRA. Findings ¶ 2.11.5.1; *see also* App. ¶ II.A. Out of 336 cookie-cutter advertisements cited to by the AFL-CIO, 50 would have been regulated by BCRA. Finding ¶ 2.11.5.1; *see also* App. ¶ II.A. The rest were part of the same lobbying efforts, but were not aired within 30 days of a named-candidate's primary. Finding ¶ 2.11.5.1; *see also* App. ¶ II.A.

These Plaintiff-produced advertisements provide very little insight into what effect BCRA would have had on political advertising in the past, or the effect it is likely to have in the future. Of the 400 self-selected advertisements proffered by Plaintiffs as illustrations of the overbreadth of BCRA, presumably the best examples available, less than 20 percent (79/400) would have been affected by BCRA, even if the five advertisements focusing on past votes in the absence of pending legislation are considered genuine issue advocacy. Furthermore, Plaintiffs do not attempt to compare the volume of these advertisements with a comparative total number of advertisements or airings of advertisements. Consequently, I am left with no idea as to what these advertisements represent in terms of the overall quantity of distinct advertisements aired over the *four* election cycles (1994, 1996, 1998, and 2000) in which Plaintiffs' proffered advertisements were aired. These examples do little to convince me of BCRA's overbreadth, and if anything, suggest the opposite conclusion.

5) Conclusion Relating to Narrow Tailoring

In my judgment, BCRA's restriction on electioneering communication is narrowly tailored to achieve the related compelling governmental interests. In devising Title II, Congress followed the clear instruction from the Supreme Court in *Buckley*–that limitations upon political speech could not hinge on the subjective intent of the listeners. *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). Instead, Congress focused on objective facts and concluded that issue advertisements designed to influence a federal election shared a number of characteristics: first, the vast majority of issue advertisements run in the period before an election mention a federal candidate; second, these commercials are run in the sixty and thirty days before general or primary elections; and third, these advertisements are targeted at the most competitive races. In devising the primary definition of electioneering communication, Congress constructed a rule that only touched advertisements matching the criteria Congress found to be problematic: broadcast advertisements, referring to a federal candidate, targeting the candidate's electorate, run in close proximity to a federal election. Corporations and labor unions that desire to spend general treasury funds on advertisements fitting these characteristics can do so; they simply must pay for them with funding committed for that purpose by individuals who agree with the message of the union or corporation.

Congress properly determined that genuine issue advocacy can be discerned empirically from electioneering advocacy. In crafting Title II, it arrived at a definition of

electioneering communication that matched its findings. It is very difficult to argue with Congress's conclusion that broadcast advertisements mentioning a federal candidate, run in close proximity to the candidate's election, and targeting the candidate's electorate do not have a significant influence on federal elections. In my judgment, Congress was correct to compel corporations and labor unions to pay for these advertisements with segregated funds committed to the purpose of electioneering in federal elections.

c. *Section 204 of BCRA Does Not Render Title II Fatally Overbroad*

Plaintiffs also argue that the restrictions on electioneering communications in Title II are not narrowly tailored because they apply to all corporations and do not provide for a specific statutory carve-out for corporations fitting the characteristics of the plaintiff in *MCFL*. With the Snowe-Jeffords' provision, BCRA appeared to provide for an exception to the electioneering communication ban for certain types of corporations; however, this exception has been eliminated by the "Wellstone Amendment," now codified in Section 204. The Snowe-Jeffords Provision would have permitted section 501(c)(4) organizations and section 527(e)(1) organizations to make electioneering communications provided that the organizations paid for these communications with money contributed by individuals, disclosed the names and addresses of those individuals who had given more than $1,000 to the account that paid for the communication, and, in the case of 501(c)(4) organizations, ensured that corporate and individual contributions were segregated into two separate accounts. The Wellstone Amendment, however, takes this exception away and requires

corporations organized under section 501(c)(4) and section 527(e)(1) of the Internal Revenue Code to use segregated funding for electioneering communications. The Wellstone Amendment was codified in a separate section of BCRA in order to preserve severability; however, as I am persuaded that the Wellstone Amendment is constitutional, I do not find it necessary to sever it from BCRA.

Notably, the language in the Snowe-Jeffords Provision is silent as to whether or not corporations of the type identified in *MCFL* would be included within the parameters of its exception. In *MCFL*, the Supreme Court found that the prohibition in Section 441b on making independent expenditures containing words of express advocacy was unconstitutional *as applied* to a certain nonprofit, nonstock corporation. *MCFL*, 479 U.S. at 241. The Supreme Court's decision created an as-applied carve-out for certain nonprofit corporations that met three characteristics of the corporation at issue in the case which were "essential" to the Supreme Court's holding. *Id*. at 263. First, the corporation was "formed for the express purpose of promoting political ideas, and cannot engage in business activities [which] ensures that political resources reflect political support." *Id*. at 264. Second, the corporation did not have any "shareholders or other persons affiliated so as to have a claim on its assets or earnings [which e]nsures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity." *Id*. Third, the corporation "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities [which] prevents

such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *Id*.

The decision in *MCFL* stands for the proposition that the prohibition on independent expenditures containing words of express advocacy is unconstitutional as applied to a "small" group of qualified nonprofit corporations that fit the parameters set out by the majority in *MCFL*. *Austin*, 494 U.S. at 672 (1990) (Brennan, J., concurring). Although FECA was not amended by Congress in the wake of *MCFL*, the Commission eventually promulgated regulations exempting corporations fitting the criteria of *MCFL*, or Qualified Nonprofit Corporations ("QNCs"), from the prohibition on independent expenditures (expenditures containing words of express advocacy). 11 C.F.R. § 114.10(d)(1) ("A qualified nonprofit corporation may make independent expenditures, as defined in 11 C.F.R. § 100.16, without violating the prohibitions against corporate expenditures contained in 11 C.F.R. part 114."). In defining what kind of corporation can receive QNC status, the Commission has hewed closely to the characteristics of the corporation in *MCFL*. *See* 11 C.F.R. § 114.10(c).

Given that Congress has never expressly codified the *MCFL* characteristics, it is not unexpected that the Snowe-Jeffords Provision never indicates whether QNCs would be included within the ambit of its exception. Nevertheless, the Snowe-Jeffords Provision, by its terms, appears to include QNCs. The Snowe-Jeffords provision applies to all section 501(c)(4) organizations and all section 527(e)(1) organizations without exception. In

addition, the Snowe-Jeffords Provision permits certain section 501(c)(4) organizations and certain section 527(e)(1) organizations to make electioneering communications, provided that the funds used to pay for those communications comes from individuals who disclose their names and addresses. The regulations defining a QNC mandate that for a corporation to receive QNC-status, the corporation cannot receive corporate donations. 11 C.F.R. § 114.10(c) (4)(ii).[135] By its terms, the Snowe-Jeffords Provision would therefore appear to encompass QNCs.[136]

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[135] Some courts have found that the regulations establishing the test for which corporations qualify for QNC-status is too rigid and excludes corporations that legitimately deserve recognition under a more functional-based approach (for example, where the corporation has accepted a *de minimis* amount of corporate donations). *See North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000) ("We agree with those circuits that have addressed the question, each of which has held that the list of nonprofit corporate characteristics in *MCFL* was not 'a constitutional test for when a nonprofit corporation must be exempt,' but 'an application, in three parts, of First Amendment jurisprudence to the facts in MCFL.'") (quoting *Day v. Holahan*, 34 F.3d 1356, 1363 (8th Cir.1994)); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 292 (2d Cir.1995); *see also FEC v. Nat'l Rifle Ass'n*, 254 F.3d 173, 190-91 (D.C. Cir. 2001). Even if a QNC were permitted to accept a *de minimis* amount of corporate contributions, it would still be able to qualify for Snowe-Jeffords by paying for its communication with funds from a segregated account that contains funding from individuals only.

[136] The disclosure of names and addresses of individual contributors is not any more restrictive than the disclosure that the corporation in *MCFL* was forced to make. *MCFL*, 479 U.S. at 262 ("Even if § 441b is inapplicable, an independent expenditure of as little as $250 by MCFL will trigger the disclosure provisions of § 434(c). As a result, MCFL will be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to specify all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures. These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions. The state interest in disclosure (continued...)

The Wellstone Amendment was added by Congress to force all corporations to fund their electioneering communications through political action committees with federal funds. 147 Cong. Rec. S2847 (daily ed. Mar. 26, 2001) (statement of Sen. Paul Wellstone) ("Let me be clear, this amendment does not say any special interest group cannot run an ad. . . . It only says these groups and organizations need to comply with the same rules as unions and corporations. Groups covered by my amendment can set up PACs, they can solicit contributions, and they can run all the ads they want. All this amendment says is they cannot use their regular treasury money. They can't use the soft money contributions to run these ads."). Under the Snowe-Jeffords Provision, individuals could have given unlimited amounts of nonfederal money to section 501(c)(4) organizations and section 527(e)(1) organizations and these groups would have been permitted to engage in electioneering communications provided that the groups paid for the advertisements with the funding contributed by the individuals. The Wellstone Amendment compels these organizations to fund all of their electioneering communications through a political action committee using federal funds.

The Wellstone Amendment does not explicitly mention the status of corporations fitting the characteristics of an *MCFL* corporation. During the final passage of BCRA in the Senate, Senator McCain indicated that "[j]ust as an *MCFL*-type corporation, under the

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[136](...continued)
therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act."). Under the Snowe-Jeffords Provision, only individuals who have contributed $1,000 in the aggregate during a calendar year would have to disclose their names and addresses.

Supreme Court's ruling, is exempt from the current prohibition on the use of corporate funds for expenditures containing 'express advocacy,' so too is an *MCFL*-type corporation exempt from the prohibition in the Snowe-Jeffords amendment on the use of its treasury funds to pay for 'electioneering communications.'" 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. John McCain).[137]

Picking up on Senator McCain's statement, the FEC–in the recently promulgated regulations implementing BCRA–has created an exemption for QNCs to make electioneering communications. 11 C.F.R. § 114.10 (A qualified nonprofit corporation may make electioneering communications, as defined in 11 C.F.R. 100.29, without violating the prohibitions against corporate expenditures contained in 11 C.F.R. part 114."). Although not expressly provided for in the Wellstone Amendment, under Commission regulations, QNCs are permitted, therefore, to spend unlimited amounts of money on electioneering communications based on the implementing regulations by the FEC.

I am convinced that Section 204 is constitutional in its present state and would leave for another day, in the context of an as-applied challenge, a determination of whether the

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[137] The reference Senator McCain makes to the Snowe-Jeffords' Provision is to the entire prohibition on corporate and labor union general treasury funds being used for electioneering communications, which was also known as "Snowe-Jeffords" throughout the legislative history. Thus, Senator McCain is not referring to "Snowe-Jeffords" as it has been discussed in this opinion as an exemption for section 501(c)(4) and section 527(e)(1) organizations. Electioneering Communications, 67 Fed. Reg. at 65204 ("Senator McCain specifically referred to that part of the Snowe-Jeffords amendment that prohibits the use of [a corporation's] treasury funds to pay for electioneering communications, the main provision of this amendment that remains unaltered by the passage of the Wellstone amendment.") (internal citation and quotation marks omitted) (second brackets in original).

FEC's regulations apply too narrowly and exclude corporations that should qualify for QNC-status. In my judgment, it was permissible for Congress not to exempt nonprofit corporations as a specific class from BCRA's restrictions on the general-treasury funding of electioneering communications. It goes without saying, and even Defendants concede, that *MCFL* establishes that FECA's (and now BCRA's) restrictions on the use of corporate treasury funds cannot constitutionally be applied to certain nonprofit corporations. Def.-Int. Opp'n at 65. However, given the FEC's regulations, I feel any argument relating to an *MCFL* exemption is premature. Any corporation that believes it should fall within *MCFL* may seek exemption under the FEC's regulations.[138] Moreover, if any corporation thinks that the Commission's regulations are too narrow in defining an *MCFL*, they may challenge them on that basis at the appropriate time. As the Defendant-Intervenors nicely phrase the inquiry: "The question is whether the new provisions added to FECA by BCRA may constitutionally be applied to the same set of corporations (and, of course, unions, other groups, and individuals) to which FECA's existing provisions have long applied, and continue to apply." Def.-Int. Opp'n at 67. I answer that question in the affirmative and find that organizations like the NRA or ACLU that desire *MCFL* treatment in order to be exempted under BCRA need to present such a claim in the future as was done by the plaintiffs in *Austin* and *MCFL*. Accordingly, I find that the Wellstone Amendment does not render Title II substantially

[138] Future reviewing courts will not be writing on a blank slate. The Commission's regulations on the scope of the *QNC* exemption have been litigated multiple times. *See supra* note 135.

overbroad.[139]

d. *Conclusion Relating to Compelling Governmental Interests and Narrow Tailoring*

Based on the objective, empirical evidence, I conclude that BCRA is narrowly tailored to address the compelling governmental interests at stake in this case. As the Findings provide, Congress concluded that corporations and labor unions were using their general treasury funds to influence federal elections in violation of years of statutory prohibition. Title II of BCRA addresses the concern of Congress that corporations and labor unions were using their substantial aggregations of wealth to dominate the political environment. In that vein, Title II protects the individuals who have paid money into a corporation or union for purposes other than the support of candidate from having their money used to support political candidates to whom they may be opposed. Finally, Title II also addresses the potential for corruption that exists when corporations and labor unions make independent expenditures that have the potential to create political debts. *See Bellotti*, 435 U.S. at 788 n.26.

In addressing both forms of corruption, the primary definition of BCRA creates an

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[139] Judge Leon finds Title II of BCRA unconstitutional only insofar as it applies to *MCFL*-corporations. However, I cannot agree with his conclusion that Sections 203 and 204 are unconstitutional because they do not create a specific statutory carve-out for *MCFL* corporations. *MCFL* was an as-applied challenge, and the Supreme Court did not strike down all of FECA as a result of its decision. Rather, the *MCFL* exemption is litigated on a case-by-case basis. *See MCFL*, 479 U.S. at 271 (Rehnquist, C.J., concurring in part, dissenting in part) (foreshadowing that the result of the *MCFL* decision would be to spur "costly litigation"). Therefore, I do not find a constitutional defect in the fact that BCRA does not create a statutory carve-out for *MCFL* corporations.

objective test that identifies broadcast advertisements that influence a federal election. BCRA focuses only on those broadcast advertisements that mention a federal candidate, which, as demonstrated, is a key determinant of issue advertising that is essentially designed to influence a federal election. In addition, BCRA only applies to broadcast advertisements which, while mentioning a candidate, are targeted to that candidate's electorate. Moreover, BCRA only applies to these advertisements when they appear within the thirty days of a candidate's primary election or sixty days of the date of a general election. Nor is BCRA overbroad because it applies to certain non-profit corporations. It is obvious that the Supreme Court's decision in *MCFL* means that BCRA cannot constitutionally be applied to certain nonprofit corporations and the Commission's regulations provide for this fact. Finally, BCRA does not prohibit corporations and labor unions from making advertisements meeting the aforementioned criteria. Rather, BCRA only requires that corporations and labor unions pay for these advertisements with funding that comes from those committed to the political ideals of the corporation and labor union; namely through PACs where disclosure is present and where contributors are aligned with the political message of the corporation or labor union.

In my view, Title II is narrowly tailored to serve these compelling governmental interests. The primary definition of electioneering communication purposefully creates a new objective test that draws a bright line between issue advocacy and electoral advocacy. At this facial challenge stage, I find that it is narrowly tailored to serve compelling

governmental interests and therefore respectfully dissent from the conclusions reached by Judge Henderson and Judge Leon on this point.

F. ***Plaintiffs' Underbreadth Challenge***

A number of Plaintiffs also argue that Title II of BCRA is unconstitutional because it is fatally underinclusive. *See, e.g.*, McConnell Br. at 75-77, 81; NRA Br. at 34-39; Chamber/NAM Br. at 6. For example, Plaintiffs contend that Title II is underinclusive because it does not restrict broadcast advertisements outside the thirty and sixty-day windows. McConnell Br. at 75; NRA Br. at 37-38. The Plaintiffs also contend that BCRA is underinclusive because it does not apply to print advertisements, direct mail, and the Internet, McConnell Br. at 81; NRA Br. 33-37, and because it only applies to corporations and labor unions, NRA Br. at 38.[140]

Given our Circuit's decision in *Blount v. SEC*, I am not persuaded by Plaintiffs arguments on this score. The D.C. Circuit court in *Blount* stated:

> [A] regulation is not fatally underinclusive simply because an alternative regulation, which would restrict *more* speech or the speech of *more* people, could be more effective. The First Amendment does not require the government to curtail as much speech as may conceivably serve its goals. While the rule chosen must "fit" the asserted goals, *City of Cincinnati* [*v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993)], it must also, by virtue of the narrow tailoring requirement discussed below, strike an appropriate

[140] To the extent that the McConnell Plaintiffs argue in a brief footnote that Title II is underinclusive because it applies to advertisements that make only "passing" references to federal candidates, McConnell Br. at 77 n.37, Plaintiffs fail to state how it would be possible to create a restriction on electioneering communication that would be based on the length of time a reference to a federal candidate is mentioned. I simply do not find this argument persuasive.

> balance between achieving those goals and protecting constitutional rights. Because the primary purpose of underinclusiveness analysis is simply to "ensure that the proffered state interest actually underlies the law", *Austin*, 494 U.S. at 677 (Brennan, J., concurring), a rule is struck for underinclusiveness only if it cannot "fairly be said to advance any genuinely substantial governmental interest", *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984), because it provides only "ineffective or remote" support for the asserted goals, *id.* (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980)), or "limited incremental" support, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983). *See also Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (government "must demonstrate its commitment to advancing [its] interest by applying its prohibition evenhandedly. . . . Without more careful and inclusive precautions against alternative forms of [the harm], we cannot conclude that Florida's selective ban . . . satisfactorily accomplishes its stated purpose."). Thus, with regard to First Amendment underinclusiveness analysis, neither a perfect nor even the best available fit between means and ends is required.

Blount v. SEC, 61 F.3d 938, 946 (D.C. Cir. 1995) (emphasis and alterations in original). As concluded *supra*, there is a tight fit between the asserted compelling governmental interests and the statutory provisions in Title II.

Plaintiffs first complain that BCRA is underinclusive because it regulates only advertisements aired within 60 days of a general election or 30 days of a primary, as opposed to advertisements falling just outside those periods. McConnell Br. at 75-77; NRA Br. at 37-38. As extensively discussed *supra*, BCRA focuses on issue advertisements designed to influence a federal election. The law, therefore, regulates advertisements that only fall within periods before federal elections. On the basis of empirical data, Congress concluded that sixty days before a general election and thirty days before a primary election were the periods of time in which issue advertisements were being used most often to influence federal

elections. While Plaintiffs expert, Dr. Milkis, observes that advertisements outside the thirty and sixty day period have some effect on federal elections, Findings ¶ 2.11.1, the Findings demonstrate that issue advertisements mentioning a federal candidate are most often aired in the sixty days before a general election and the thirty days before a primary election. *See generally id.* ¶ 2.11. Congress recognized that most candidate-centered issue advertisements were run in close proximity to a federal election. *See supra* Findings ¶¶ 2.8.1.3, 2.8.2 (discussing the fact that candidate-centered issue advocacy is concentrated in the weeks surrounding federal elections). In my judgment, focusing on periods outside the sixty and thirty day windows would have rendered the primary definition fatally overbroad given the empirical evidence presented about the timing of candidate-centered issue advertisements. Accordingly, I find that Title II strikes an appropriate balance between achieving the compelling governmental interests and protecting constitutional rights.

Plaintiffs next challenge Title II as underinclusive on the ground that its definition of electioneering communication covers broadcast advertisements on television and radio, but not advertisements run in other media, such as print, direct mail, or the Internet. McConnell Br. at 81; NRA Br. at 33-36; *see also* Findings ¶ 2.10. As stated, however, by the AFL-CIO Plaintiffs, "broadcast is the most potent medium available in this electronic age, which is precisely why BCRA seeks to decisively impair groups' access to it. Print advertising, telephone banks, direct mail and other forms of non-broadcast communications pale in comparison as mass communications outlet." AFL-CIO Br. at 11. The Findings similarly

conclude that broadcast advertising on television and radio are the most potent form of advertising. Findings ¶¶ 2.10.1-2.10.2.[141]

I disagree with the NRA's conclusion that the other forms of media, like webcasts, telemarketing, direct mail, email, and print advertisements will logically become the next vehicle for corporations and labor unions looking to influence a federal election. In my view, the flaw with this argument lies in the assumption that these other media are just as effective as television and radio advertising for conveying an electioneering message. The evidence at this juncture does not support this conclusion. Therefore, I also respectfully disagree with Judge Henderson's conclusion on this matter.

The NRA, for example, contends that its webcasts of "NRA Live!" which often

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[141] Plaintiffs' citation to *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002), is misplaced. McConnell Br. at 76; NRA Br. at 33. In *Republican Party of Minnesota*, the Supreme Court struck down a state law that prohibited candidates for judicial office from announcing their views on disputed legal or political issues. The Court found the law to be underinclusive because it only prohibited a judge from announcing views on a disputed issue during the pendency of his or her candidacy. *Republican Party of Minnesota*, 122 S. Ct. at 2537 (observing that the day before an individual declares his or her candidacy and after he or she is elected are both periods where the statute did not apply). In the case of *Republican Party of Minnesota*, the Supreme Court concluded that if a judge's announcement of his or her legal views threatened his or her appearance of fairness, then that threat existed regardless of whether the announcement occurred during his or her campaign. *See id*. at 2537 (observing that "statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible"). Such is not the case with regard to the thirty and sixty day windows of BCRA. The evidence in this case demonstrates that broadcast issue advertisements airing outside the 30 and 60 day periods do not influence federal elections to anywhere near the same degree as those aired within the 30 and 60 day windows. Rather, it is in the immediate run-up to the federal election that issue advocacy is most often exploited for electioneering purposes. Congress was correct to focus on the problem and not attempt to prohibit more conduct than the record would support.

criticize politicians, are comparable to the NRA's issue advertising campaigns broadcast through radio or television. *See* NRA Br. at 36-37; Findings ¶ 2.10.3. The NRA's evidence in support of this assumption is not sufficient. First, the NRA offers a declaration of their communications consultant Angus McQueen who states that the Internet has become an "*increasingly* important part of how information becomes disseminated in our society." Findings ¶ 2.10.3.1 (emphasis added). However, congressional judgment regarding the "careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference." *NRWC*, 459 U.S. at 209 (internal citation and quotation marks omitted). Merely because the Internet is "increasingly" part of how society receives and disseminates information does not make it comparable to broadcast advertisements over television and radio, which everyone acknowledges was the problem Congress sought to address with BCRA. The other evidence presented by the NRA is a submission of "NRA Live!" viewership statistics and various videotapes containing broadcasts of "NRA Live!." Findings ¶ 2.10.3.2. However, the NRA does not include any expert or other testimony that "NRA Live!" is influencing federal elections to the same degree as the NRA's broadcast advertising campaigns. It is likely that there is no evidence of such a phenomenon because in order to view "NRA Live!," individuals must "opt-in" by going to the NRA website and viewing the program. Those individuals choosing to do so are likely more predisposed to the NRA's views about political candidates than the undecided

voter watching a sitcom on a Thursday evening and viewing a thirty-second issue advertisement critical of Al Gore. The risk of corrupting the political process is much more powerful in the latter example than in the former. I cannot agree that Title II is flawed because it did not extend BCRA's restrictions to the Internet.

I reach the same conclusion for direct mail and newspaper advertising. Although everyone agrees that direct mail can be "very effective," *Id*. ¶ 2.10.4 (Magleby), there is no evidence that direct mail has reached the degree of effectiveness as broadcast advertising. Until such a conclusion is reached by Congress, I find it appropriate that it did not extend the definition of electioneering communication to direct mail. In regard to newspaper advertising, the NRA presents no testimony that newspaper advertising is as effective as broadcast radio and television advertising. As Denise Mitchell, Special Assistant for Public Affairs for AFL-CIO President John J. Sweeney, observes: "newspapers are a more passive medium, with less immediacy than broadcast, and are less likely to generate action, and it is far harder to convey in print the human, personal impact of legislative issues -- a key part of our strategy and effectiveness." *Id*. ¶ 2.10.2 (a conclusion, I note, that is also applicable to direct mail). I agree and find the NRA's arguments regarding print media unpersuasive. To the extent that the NRA cites advertisements that are more expensive to run in newspapers than advertisements run on radio, NRA Br. at 35; Findings ¶ 2.10.5, the NRA misses the point; failing to provide a shred of evidence that the print medium has anywhere near the effect as the broadcast media for conveying electioneering messages. Even the NRA's own

communication consultant concedes that "paid broadcast media" is the most powerful means of conveying the NRA's messages. Findings ¶ 2.10.2 (McQueen).

In the final analysis, Congress appropriately tailored the primary definition of electioneering communication to radio and television advertisements. *Id*. 2.10.6. The uncontroverted testimony of experts and political consultants is that broadcast advertising is the most effective form of communicating an electioneering message. *Id*. ¶ 2.10.1-2.10.2 (Magleby, Pennington). Even Plaintiff AFL-CIO concedes this point. AFL-CIO Br. at 11. The fact that Congress did not extend the prohibition on electioneering communication to non-broadcast advertisements does not render Title II unconstitutional as underinclusive under the First Amendment.

Plaintiffs also contend that because the restrictions in Title II only apply to corporations and labor unions, the law is underinclusive as it does not cover unincorporated entities and wealthy individuals. NRA Br. at 38. Section 203 of BCRA amends 2 U.S.C. § 441b, a statute that has long regulated the activities of corporations and labor unions. The Supreme Court has already rejected a similar argument in a footnote to its *MCFL* decision:

> While business corporations may not represent the only organizations that pose this danger, they are by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth. That Congress does not at present seek to regulate every possible type of firm fitting this description does not undermine its justification for regulating corporations. Rather, Congress' decision represents the "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,'" to which we have said we owe considerable deference. *FEC v. National Right to Work Committee*, 459 U.S. 197, 209 (1982) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937)).

MCFL, 479 U.S. at 259 n.11. In *Austin*, the Supreme Court found that the state statute modeled after Section 441b, which did not apply to unincorporated associations or labor unions, was not underinclusive. *Austin*, 494 U.S. at 665. The Supreme Court in *Buckley* held that Congress had not assembled a record that would permit justifying restrictions on the independent expenditures of individuals, *see Buckley*, 424 U.S. at 46; Congress should not, therefore, be penalized for not limiting the amount that wealthy individuals can spend on electioneering communications by following the dictates of a Supreme Court decision. *See Austin*, 494 U.S. at 678 (Brennan, J., concurring) (statute not underinclusive because it adheres to Supreme Court precedent). Given the prior decisions of the Supreme Court, Plaintiffs' underbreadth challenge on this ground fails.

G. *Plaintiffs' Challenge Relating to Exemption for News Stories, Commentaries or Editorials from a Broadcast Station*

Finally, the NRA Plaintiffs[142] argue that the exemption in Title II of BCRA for news stories, commentaries, or editorials–the "media exemption"–violates the Equal Protection Clause and the First Amendment in that it is underinclusive. NRA Br. at 42.[143] As discussed,

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[142] The Paul Plaintiffs also raise this claim. The Paul Plaintiffs argument is discussed in the *per curiam* opinion.

[143] I disagree with the NRA's argument that the media exemption demonstrates that BCRA is, in essence, a regulation of television programming. *See* NRA Br. at 47. BCRA, in my judgment, is not akin to regulations that burden the editorial discretion of TV companies by requiring them to carry certain programming content. Again, BCRA does not prohibit speech. The NRA is free to run electioneering communications, provided they are paid for with segregated funds. As Defendants correctly observe, "The amount the NRA can (continued...)

supra, BCRA, like FECA, exempts certain communications distributed through the facilities of a broadcasting station from regulation. BCRA § 201(a); FECA § 304(f)(3)(B); 2 U.S.C. § 434(f)(3)(B) ("a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate" is not included in the definition of electioneering communication).

In my view, the Supreme Court foreclosed consideration of this issue with its decision in *Austin* and the evidence that the NRA has put forward is not sufficient to alter the conclusion reached in that case. In *Austin*, the Supreme Court found that the Michigan statute's exemption of media corporations from its expenditure restriction did not render the statute unconstitutional. *Austin*, 494 U.S. at 666-67 (noting that the "media exception" in the Michigan statute excluded from the definition of expenditure any "expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or opposition to a candidate for elective office . . . in the regular course of publication or broadcasting") (citation and footnote observing that the Michigan exemption was similar to the exemption in FECA both omitted). The Supreme Court concluded that the media exemption was bound to impose fewer restrictions

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[143](...continued)
spend on such ads is limited only by the willingness of its millions of individual members to contribute to the NRA's separate segregated fund, which in 2000 spent $17 million to influence federal elections." Gov't Opp'n at 104. I therefore find the NRA's argument on this score unpersuasive.

on the expression of corporations that are in the media business and therefore needed to be justified by a compelling state purpose. The Supreme Court held:

> Although all corporations enjoy the same state-conferred benefits inherent in the corporate form, media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public. We have consistently recognized the unique role that the press plays in "informing and educating the public, offering criticism, and providing a forum for discussion and debate." *Bellotti*, 435 U.S. at 781. *See also Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve"). The Act's definition of "expenditure," [citation omitted] conceivably could be interpreted to encompass election-related news stories and editorials. The Act's restriction on independent expenditures therefore might discourage incorporated news broadcasters or publishers from serving their crucial societal role. The media exception ensures that the Act does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events. . . . A valid distinction thus exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public. Although the press' unique societal role may not entitle the press to greater protection under the Constitution, *Bellotti*, *supra*, 435 U.S. at 782, and n.18, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations. We therefore hold that the Act does not violate the Equal Protection Clause.

Austin, 494 U.S. at 667-68.

The NRA argues that the decision in *Austin* on this point was somehow a "close call" and questions whether *Austin* "was correctly decided." NRA Br. at 48. The NRA argues that "the emergence of the internet and the absorption of the broadcast networks by non-media conglomerates" change the role of media corporations in society. *Id*. at 42. According to the NRA, since *Austin* was decided in 1990, there has been such a seismic shift in the structure

of the media industry that *Austin* is no longer relevant.

The NRA argues that the emergence of the Internet and the absorption of broadcast networks by nonmedia companies have altered the nature of traditional companies and therefore render Title II facially unconstitutional. NRA Br. at 42. I have discussed the problems with the NRA's Internet arguments, *supra*. With regard to the NRA's arguments about nonmedia companies purchasing media companies, the NRA's entire line of argument ignores the fact that the media exception only applies to the "facilities of any broadcasting *station*," BCRA § 201(a); FECA § 304(f)(3)(B); 2 U.S.C. § 434(f)(3)(B) (emphasis added), not the facilities of any broadcasting *company*. The NRA provides *no* evidence that the purchase of media corporations by other businesses has any impact on any "news story, commentary, or editorial distributed through the facilities of any broadcasting station." BCRA § 201(a); FECA § 304(f)(3)(B); 2 U.S.C. § 434(f)(3)(B).[144] Furthermore, it is not the role of a district court, in my judgment, to question a binding decision of the United States Supreme Court, particularly when the proffered evidence amounts to no more than a disagreement with the *Austin* result.

Given that the NRA's evidence relating to the media exemption is entirely lacking, there is no reason to engage in a further discussion of their argument. The equal protection argument was settled in *Austin*, and for the same reasons announced in that decision, I find that the NRA's underinclusiveness argument is also without merit. Simply put, *Austin* is

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[144] Moreover, as the NRA points out in its brief, NBC was acquired in 1985 by General Electric, a move which *predated* the *Austin* Court's decision. NRA Br. at 44 n.31.

controlling.

H. ***Conclusion Regarding Title II***

I have considered and rejected Plaintiffs' other arguments made to the three-judge District Court and conclude that the restrictions on electioneering communication, as defined in the primary definition, are facially constitutional. In making this decision, I am extremely cognizant of how rare it is for a decision to uphold a content-based restriction on speech. Nevertheless, in finding these provisions in Title II constitutional I am motivated primarily by the record assembled in this case and the history of government regulation of corporations and labor unions in the context of federal elections.

In this case, the facts tell the story. The record convincingly demonstrates that corporations and labor unions use general treasury funds to influence federal elections in direct violation of years of federal policy. I am not convinced that Congress is powerless to act to channel the corporate and labor union presence in federal elections through PACs where disclosure is present and where contributors are aligned with the political message of the corporation or labor union. The express advocacy test, in my view, is not a constitutional requirement; what is required is an objective, bright-line rule that constitutionally distinguishes between issue advocacy and advocacy intended to influence a federal election.

With the primary definition of electioneering communication, Congress fashioned a test that includes all of the major characteristics of issue advertising designed to influence a federal election: broadcast advertisements, aired in close proximity to a federal election,

referring to a federal candidate, and targeted to that candidate's electorate. In Congress's judgment, these advertisements influence federal elections in the overwhelming majority of cases, despite Plaintiffs' self-serving testimony in this case which, in many instances, is belied by prior written statements and documentary evidence. In this facial challenge, on the basis of the record assembled, and on the basis of the longstanding history of congressional regulation of corporate and labor union involvement with federal elections, I find that Congress's decision to prohibit corporate and labor union spending on electioneering communications with general treasury funds is one that meets the standard of strict scrutiny.

By enacting Title II, Congress recognized the paramount importance of having legislation that controls electioneering communication and of preventing corporations and labor unions from using general treasury funds to influence federal elections. After reviewing the law under strict scrutiny review, I have found the primary definition of electioneering communication constitutional. Given the importance of this issue to Congress–*as demonstrated by their enacting a backup definition to ensure that electioneering communications would be regulated even in the event the primary definition is found unconstitutional*–I join, in the alternative, Judge Leon's opinion regarding the constitutionality of the backup definition of electioneering communication. Nevertheless, as my opinion makes plain, I strongly believe that the primary definition is fully consistent with the Constitution, and but for the position of the other judge's on this three-judge District Court, would not reach the backup definition.

Section 213

The only remaining provision of Title II that has not been addressed in my opinion or the *per curiam* opinion, is Section 213 of BCRA. For the reasons stated in Judge Leon's opinion, I agree that Section 213 is unconstitutional. While the record is replete with evidence related to the close nexus between parties and candidates in the fundraising process, there is no evidence to demonstrate that a political party's expenditures after nominating its candidate are always coordinated. *See* 148 Cong. Rec. S2144 (daily ed. Mar. 20, 2002) (statement of Sen. John McCain) ("We believe that once a candidate has been nominated a party cannot coordinate with a candidate and be independent in the same election campaign."). *Colorado I* disproves this notion, and Defendants have put forward no additional evidence to demonstrate that there are any special corruption problems with having political parties make independent expenditures on behalf of their candidates. *Colorado I*, 518 U.S. at 618 ("The Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures."). Given the record in this case, I must concur with Judge Leon in finding Section 213 unconstitutional.

II. TITLE I: REDUCTION OF SPECIAL INTEREST INFLUENCE

Section 101: Soft Money of Political Parties

The McConnell, RNC, CDP, and Thompson[145] Plaintiffs all present a variety of constitutional challenges to Title I of BCRA, premised on the First, Fifth, and Tenth Amendments of the Constitution. After reviewing the record in this case, the governing caselaw, and the parties' lengthy briefing, I find that Plaintiffs' arguments lack merit and that Title I of BCRA is constitutional.[146]

For well over two decades, the Commission has sought to regulate the use of nonfederal funds by permitting the national, state, and local political party committees to

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[145] In regard to Title I, the Thompson Plaintiffs, in their briefing, initially presented only an equal protection argument. Thompson Br. at vii; Thompson Opp'n at 1. I concur entirely in Judge Henderson's discussion of the Thompson Plaintiffs' equal protection claim. Henderson Op. at Part IV.D.4. To the extent the Thompson Plaintiffs have attempted to argue a First Amendment claim, the tenor of their argument is that candidates from economically disadvantaged areas need to be able to raise soft money to be competitive. Thompson Reply at 7. First, candidates have never been able to directly raise or spend soft money, so to the extent the Thompson Plaintiffs claim they are deprived of an effective tool of financing, it only further convinces me of the extent to which federal candidates have become dependent on nonfederal funds. Second, the Thompson Plaintiffs' argument is essentially a policy-based argument, better suited for the legislature than this three-judge District Court panel. It has long been held that Congress has broad authority to set contribution limitation amounts. *See, e.g.*, *Nixon v. Shrink Missouri Government PAC* ("*Shrink Missouri*"), 528 U.S. 377, 395-97 (2000). Finally, to the extent it is possible, I subsume the Thompson Plaintiffs' general First Amendment claims into the rest of my discussion on the First Amendment.

[146] Plaintiffs take a scattershot approach in regard to their Title I arguments, and although I have considered all of their arguments, in the interest of both space and time, I address only the ones I have determined are the most salient. The arguments not addressed specifically lack merit.

allocate expenses on "nonfederal" activities between their federal and nonfederal accounts. The vast record in this case demonstrates that this system–a cobbled-together aggregation of FEC regulations and advisory opinions–is in utter disarray with all of the different political party units spending nonfederal money to influence *federal* elections. Congress was correct in finding that in many instances, the allocation regime was a failure. The only way to return the system to the original design of FECA was to prevent the national party committees from raising money outside of the restrictions in FECA and to restrict the use of nonfederal funds by the state and local party committees for "Federal election activity." Seen from this perspective, Title I is not a draconian realignment of the role of political parties. *See, e.g.*, RNC Br. at 42. Rather, Title I operates as a fundraising restriction aimed at restructuring the failed allocation regime that has produced a campaign finance system so riddled with loopholes as to be rendered ineffective. Concomitantly, BCRA restores in large measure, the federal campaign finance structure that had functioned effectively prior to the rise of seductive "soft money."

In other words, Congress created Title I of BCRA to fix the contribution limitations of FECA that have fallen into severe disrepair, largely as a result of these aforementioned regulations and advisory opinions. Title I accomplishes this goal by requiring the national committees of the political parties to fund their operations with federally regulated money. Equally important, the law also compels the state and local committees of the national political parties to fund their Federal election activities with money raised in compliance with

federal law. Other provisions in Title I are designed to ensure the integrity of Title I, by including restrictions on the ability of the committees of the national parties and their agents to raise money for certain tax-exempt organizations and by placing limitations on federal and state candidates in regard to certain campaign and fundraising activities. At the same time, BCRA raises the limitations on "hard money" contributions to the national, state, and local party committees to facilitate raising funds within this new statutory framework.

When stripped of Plaintiffs' gloss, it becomes evident that Title I basically operates as a contribution limitation on political party fundraising, amply supported by prior Supreme Court caselaw and the immense record in this case. Given the sufficiently important governmental interests long identified by the Supreme Court to support the contribution restrictions like those at issue in Title I, Congress rightfully concluded that the only way to combat the problems related to the abusive use of nonfederal funds was to: (a) limit the funding of national committees of the political parties to money regulated by the federal government, and (b) enact a series of limited, ancillary, prophylactic measures involving state and local committees and candidates to ensure the integrity of the national committee nonfederal funds prohibition. In my judgment, Title I is constitutional.

My opinion presents a concurrence in part and a dissent in part. I concur with Judge Leon's view that in undertaking a First Amendment analysis of Title I, the relevant standard of review is the scrutiny that the *Buckley* Court applied to contribution restrictions, that the limitation in Section 323(b) on state parties' activities described in Section 301(20)(A)(iii)

is constitutional, and that the restrictions on state candidates in Section 323(f) is constitutional. I also concur in the judgment of Judge Henderson that Section 323(e) is constitutional. My opinion begins with a brief discussion of the rise of nonfederal money as a tool of national party financing for federal election purposes. Given that the conclusions reached by Judge Henderson and Judge Leon turn primarily on Plaintiffs' First Amendment challenges, I next discuss those arguments, and provide the reasoning for my dissent on the remaining issues. Finally, I provide my reasons for rejecting Plaintiffs' Fifth Amendment arguments and for finding that Plaintiffs lack standing to assert a challenge under the Tenth Amendment to Title I.

A. *Background: The Rise of Nonfederal Money as a Means of Financing Federal Elections*

As discussed at length in the *per curiam* opinion, Title I was enacted by Congress to combat the growing problem of the national committees of the political parties raising funds outside of the source and amount restrictions in FECA and using that money to influence federal elections. In creating Title I, Congress attempted to shore-up the decades-old contribution restrictions in FECA, which had been eroded as a result of a series of FEC rulemaking and advisory opinions which established an allocation system. To accomplish this goal, Congress eschewed the failed system of allocation percentages and prohibited national political party committees from raising money that is not subject to federal source and amount limitations.

The 1974 Amendments to FECA placed limitations on the source and the amount of

contributions to federal candidates and political parties. The law prohibited corporations and labor unions from making contributions to political parties and federal candidates. 2 U.S.C. § 441b(a). FECA also limited an individual's contributions to $1,000 per election to a federal candidate, $20,000 per year to national political party committees, and $5,000 per year to any other political committee such as a political action committee ("PAC") or a state party committee. 2 U.S.C. § 441a(a)(1). Individuals were likewise subject to an overall annual limitation of $25,000 in total contributions. 2 U.S.C. § 441a(a)(3).[147] These limitations have been consistently upheld by the Supreme Court. *Buckley*, 424 U.S. at 23-38; *NRWC*, 459 U.S. at 207-10. The definitions of contribution and expenditure in FECA were then, and remain now, limited to the donation or use of money or anything of value "for the purpose of influencing an election for Federal office." 2 U.S.C. § 431(8)(A)(i), (9)(A)(i). The statute was therefore silent on how to draw lines around money raised outside of FECA's source and amount limitations for political parties to spend on activities that were expected

[147] Under BCRA, the contribution limits have been raised. BCRA § 307(a); FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(A)-(B) (increasing limit on contributions to candidates and candidates' committees from $1,000 to $2,000 for individuals, and increasing the limit on individual contributions to national political party committees from $20,000 to $25,000); BCRA § 102; FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(D) (increasing limit on contributions to state political party committees from $5,000 to $10,000); BCRA § 307(b); FECA § 315(a)(3); 2 U.S.C. § 441a(a)(3) (increasing aggregate limit on individual contributions from $25,000 per year to $95,000 per two-year election cycle, of which $37,500 may be contributed to candidates); BCRA § 307(c); FECA § 315(h); 2 U.S.C. § 441a(h) (increasing limit on contributions by the Republican or Democratic Senatorial Campaign Committees from $17,500 to $35,000). Moreover, many of these contribution limits are to be increased annually to account for inflation as reflected in changes to the consumer price index. BCRA § 307(d); FECA § 315(c); 2 U.S.C. § 441a(c).

not to be used for the purpose of influencing a federal election.

As has been set out in much greater detail in the *per curiam* opinion, the FEC's opinions and rulemakings drew that line by permitting state and national political party committees to pay for the nonfederal portion of their administrative costs and voter registration and turnout programs with monies raised under relevant state laws (not FECA), even if they permitted contributions from sources such as corporations and labor unions that were prohibited under FECA. As a result, national and state political parties began to raise so-called "soft money," which described these nonfederal funds–not subject to FECA limits and restrictions–to pay for a share of election-related activities that influenced federal elections. Generally, the state political parties' allocation rate was substantially lower than the national party allocation rate. The rules, therefore, furnished national political parties with an incentive to channel many of these expenditures through state political party committees, since this approach allowed a higher proportion of the parties' expenses to be paid for with nonfederal funds which were much easier to raise than those funds raised subject to FECA's restrictions.

During the 1980 election cycle, the RNC spent approximately $15 million in nonfederal funds and the DNC spent roughly $4 million, constituting nine percent of the national political parties' total spending. Findings ¶ 1.3. In 1984, the national political parties spent, collectively, approximately $21.6 million in nonfederal funds, which accounted for five percent of their total spending. *Id*. By 1988, national party nonfederal funds

increased to $45 million or eleven percent of national party spending. *Id*. In 1992, nonfederal fundraising by the national parties reached $86.1 million, and nonfederal funds were used for sixteen percent of the national parties' spending. *Id*. ¶ 1.4, 1.4.1. With the 1996 election cycle, the national parties raised *$263.5 million* in nonfederal funds and nonfederal money spending constituted approximately thirty percent of the national party committees' total spending. *Id*.

The uncontroverted record demonstrates that in 1996 the dramatic rise in spending of nonfederal funds by national political parties was tied to the development of issue advocacy media campaigns. Originated by President William Clinton's political consultant Dick Morris, the move was eventually copied by the Republican Party. *Id*. ¶¶ 1.6, 1.7. Morris used nonfederal funds to pay for advertisements that either promoted President Clinton by name or criticized his opponent by name, while avoiding words that expressly advocated either candidate's election or defeat. *Id*. 1.6. While these advertisements prominently featured the President, none of the costs associated with these advertisements were charged as coordinated expenditures on behalf of President Clinton's campaign, subject to the FECA's contribution limits. *Id*. Rather, the political party paid the entire cost, with a mix of federal and nonfederal funds, arguing that political party communications that did not use explicit words advocating the election or defeat of a federal candidate could be treated like generic party advertising (that is, "Vote Republican!") and financed, according to the FEC

allocation rules, with a mix of federal and nonfederal funds.[148] *Id*. In many cases, the national political party committees used the state political party committees as vehicles for implementing the issue advocacy campaign because the allocation rules were much more favorable for state parties, and consequently, the advertisements could be financed with nonfederal funds. *See, e.g., id*. ¶¶ 1.26.1, 1.26.2, 1.26.6. This approach later spread to Congressional campaigns. *Id*. ¶ 1.8.

Political parties were now able to pay for such "issue advertisements" with a mix of federal and nonfederal funds because the FEC treated these advertisements as "generic" party advertisements. In order to fund these "generic" party advertisements or "issue advertisements," the political parties needed to raise an increasing amount of nonfederal money. With this strategy firmly in place, the national political parties spent $221 million in nonfederal funds on the 1998 midterm elections, or 34 percent of their total spending, which was more than double the amount of nonfederal funds spent during the previous midterm elections. *Id*. ¶ 1.4.2. With the 2000 elections, spending of nonfederal funds by the national political parties reached $498 million, which was now 42 percent of their total spending. *Id*. 1.4.3. The top 50 non-federal fund donors during the 2000 election cycle each

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[148] As discussed in the *per curiam* opinion, the FEC had ruled that party committees could sponsor issue advocacy advertisements that did not feature a federal candidate and pay for these advertisements with a combination of hard and soft dollars as permitted under the allocation regulations. Federal Election Commission Advisory Opinion 1995-25 (discussing that allocation rules were permissible to allocate funding for "RNC plans to produce and air media advertisements on a series of legislative proposals being considered by the U.S. Congress, such as the balanced budget debate and welfare reform").

contributed between $955,695 and $5,949,000. *Id*. During the first 18 months of the 2001-2002 election cycle, the political parties reported non-federal receipts of $308.2 million, which is a 21 percent increase over the same period during the 1999-2000 cycle. *Id*. ¶ 1.4.4. The FEC notes that this increase is "all the more significant given that typically parties raise more in Presidential campaign cycles than in non-presidential campaigns." *Id*.

It was in response to its view that the use of "soft money" was a problem that Congress enacted Title I of BCRA. *See, e.g.*, *Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*, S. Rep. No. 105-167, at 4468 (1998) ("Thompson Committee Report") at 4468 (majority report) ("soft money spending by political party committees eviscerates the ability of FECA to limit the funds contributed by individuals, corporations, or unions for the defeat or benefit of specific candidates"); *id*. at 4565 (minority report) ("Together, the soft-money and issue advocacy loopholes have eviscerated the contribution limits and disclosure requirements in federal election laws and caused a loss of public confidence in the integrity of our campaign finance system."). The original design of the FEC's rules on allocation were to permit the political parties the opportunity to raise nonfederal funds for purposes unrelated to federal elections. The parties were permitted to pay for the nonfederal portion of their expenses with nonfederal funds. Over time, however, what started out as a fairly simplistic approach to cost allocation (nonfederal portions of administrative and get-out-the-vote ("GOTV") activities could be paid for with nonfederal funds), turned into a gaping loophole, which permitted the national

political parties to raise enormous sums of money to spend on federal elections–all outside FECA's source and amount limitations. In essence, the actions by the political parties at all levels disproved the assumption that voter registration activity, voter identification, generic campaign activity, and get-out-the-vote activity in relation to a federal election could be allocated between nonfederal and federal accounts without inviting the political parties to circumvent FECA's carefully constructed contribution system and without creating anew the same problems of corruption identified in *Buckley* involving unlimited individual contributions. The parties' actions confirmed the Supreme Court's observation in *Colorado II*, that "[d]espite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and *parties* test the limits of the current law . . . ." *Colorado II*, 533 U.S. at 457 (emphasis added).

Prior to BCRA, the contribution regime carefully constructed in FECA, and upheld in *Buckley*, had become nothing more than an elaborate fiction with the national political parties and their state counterparts circumventing the restrictions with ease. Prior to BCRA, federal candidates and officeholders, in conjunction with their political party committees, raised large amounts of nonfederal money for purposes directly related to federal elections. Beginning with issue advocacy strategy employed for the election campaign of President William Clinton in 1996, the system took a turn for the worse as the political parties scrambled to collect as much "soft money" as possible to fund "issue advertisements" that were nothing short of campaign commercials in disguise. While loudly complaining about

the other side's tactics, neither side was willing to unilaterally disarm, and the pressure to raise more and more money outside the system became increasingly intense, as the political party committee receipts clearly demonstrate. In the face of what can only be described as FEC lassitude to these problems, the political branches, after years of deliberation and consensus, passed Title I to tackle the threat posed by nonfederal funds. Having set forth these preliminary observations to provide context for my opinion, I now turn to Plaintiffs' various constitutional challenges to Title I and explain why I have concluded that these arguments lack merit. In engaging in the following analysis, I shall discuss the extensive record established in this case, which demonstrates that Title I is a prophylactic measure aimed both at the corruption or the appearance of corruption associated with nonfederal funds and at the evasion of FECA's source and amount limitations.

B. ***Plaintiffs' First Amendment Challenges***[149]

1. *Standard of Review*

Unlike the electioneering communication provisions in Title II, the litigants contest the level of scrutiny that should control the Court's review of Title I for First Amendment purposes. Plaintiffs contend that the restrictions in Title I merit review under the lens of strict scrutiny, *see, e.g.*, McConnell Br. at 31-34; RNC Br. at 37-44, while Defendants argue that the provisions in Title I should be analyzed under the "closely drawn" scrutiny that the *Buckley* Court applied to contribution restrictions, *see, e.g.*, Def. Opp'n at 3-4; Def.-Int.

[149] I consider Plaintiffs' First Amendment underbreadth challenge as part of my analysis of their Equal Protection challenge, discussed *infra*.

Opp'n at 17-23. In my judgment, Title I is a fundraising restriction that merits review entirely under *Buckley*'s "closely drawn" scrutiny applicable for contribution limitations.

Plaintiffs are mistaken when they argue that the restrictions in Title I partly impose an expenditure cap and, therefore, Title I requires strict scrutiny. McConnell Br. at 33; RNC Br. 51-53. Title I does not in any way limit political party committee spending on *any* activity. These restrictions only indirectly affect expenditures by placing limitations on the source and amount of funds available for the party committees to use in order to make independent expenditures. Accordingly, the scrutiny applicable to contribution restrictions is appropriate for Title I.

Plaintiffs also urge this three-judge panel to apply strict scrutiny because Title I includes restrictions on the solicitation of nonfederal funds. I disagree with this theory as well. From a functional perspective, Title I presents a comprehensive contribution restriction that merits the scrutiny that *Buckley* applied to contribution restrictions. The Supreme Court in *Colorado II*, found that FECA presents "a functional, not formal, definition of 'contribution,'" because it included within the definition of contribution "coordinated expenditures." *Colorado II*, 533 U.S. at 438. According to the Supreme Court in *Colorado II*, the *Buckley* Court acknowledged Congress's functional classification, and "observed that treating coordinated expenditures as contributions 'prevent[s] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions.'" *Colorado II*, 533 U.S. at 443 (quoting *Buckley*, 424 U.S. at 47) (also noting that *Buckley*

"enhanced the significance of this functional treatment by striking down independent expenditure limits on First Amendment grounds while upholding limitations on contributions (by individuals and nonparty groups), as defined to include coordinated expenditures").

A functional view of BCRA's solicitation restrictions demonstrates that they are designed to counter potential evasion of contribution restrictions. As is discussed *infra*, the record in this case is replete with incidents where the solicitation of nonfederal donations by party officials and candidates threatens the integrity of FECA's contribution restrictions. Hence, like the expenditure limitations discussed in *Colorado II*, which are aimed at preventing attempts to circumvent FECA's contribution regime, BCRA's solicitation provisions are also designed to ensure the integrity of FECA's contribution limitations and not limit speech. Title I in its entirety, therefore, is properly considered within *Buckley*'s contribution framework and is reviewed under the scrutiny set out in *Buckley* applicable to contribution restrictions. *See also NRWC*, 459 U.S. at 210-11 (upholding restriction limiting a corporation's solicitation of contributions to corporation's PAC to members of the corporation on the basis of compelling governmental interests supporting the overall ban on corporate contributions to candidates).

Accordingly, I agree entirely with Judge Leon's discussion in his opinion that the three-judge District Court's analysis of the provisions in Title I merits review under the "closely" drawn scrutiny that the *Buckley* Court applied to contribution limitations and not strict scrutiny, and I concur in that portion of his opinion. We both agree that the restrictions

will be upheld in Title I, if the Government demonstrates that the provisions in Title I are "closely drawn" to match a "sufficiently important interest." *Buckley*, 424 U.S. at 25; *see also Shrink Missouri*, 528 U.S. at 387-88.[150] With that standard in mind, I now turn to the sections of Title I and my analysis of whether these contribution restrictions are constitutional.[151]

2. *Title I is Constitutional Under the First Amendment*

In my judgment, this three-judge District Court need not go further than *Buckley* to uphold Title I from attack under the First Amendment. It is clear that *Buckley* provides sufficient flexibility for Congress to have enacted Title I in order to address the problems associated with political parties using nonfederal funds to influence federal elections. *See Shrink Missouri*, 528 U.S. at 404 (Breyer, J., concurring) ("*Buckley*'s holding seems to leave the political branches broad authority to enact laws regulating contributions that take the form of 'soft money.'"). The primary justifications for Title I are neither original nor

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[150] Like Judge Leon, I observe that if the contribution limitations in Title I survive a claim that it infringes associational rights, then it also survives a speech challenge under the First Amendment. *Shrink Missouri*, 528 U.S. at 388; *see also id*. at n.3 (observing that contribution standard of review likewise addresses the "correlative overbreadth challenge").

[151] I also do not conclude that *Buckley*'s contribution-expenditure dichotomy is irrelevant to our review. McConnell Br. at 33 (stating that the "contributions-versus-expenditures dichotomy of *Buckley* does not directly apply"). Plaintiffs assert that the reason for not applying *Buckley* is because Title I "effectively regulates the *uses* for which money is raised and spent." McConnell Br. at 33 (emphasis in original). The problem with this argument is that *all* contribution limitations "effectively regulate" the uses for which money is raised and spent. *See* Tr. at 92 ("All contribution limits have [an] indirect effect on expenditures.") (Bader). Accordingly, this argument fails to convince me that the contribution-expenditure distinction is inapplicable to the restrictions at issue in Title I.

unprecedented.

(a) Title I Serves The Same Sufficiently Important Interests Identified in Buckley and its Progeny

Title I was enacted to fulfill the same interests in "preventing corruption or the appearance of corruption" that the *Buckley* Court had found to support FECA's limitations on contributions.[152] The *Buckley* Court held that FECA's contribution limitations served the sufficiently important interests of "the prevention of corruption and the appearance of corruption spawned by the real or imagined *coercive influence* of large financial contributions on candidates' positions and on their actions if elected to office." *Buckley*, 424 U.S. at 25 (emphasis added). Moreover, under the rubric of "preventing corruption or the appearance of corruption," the Supreme Court has also permitted Congress to enact contribution limitations that serve to "prevent evasion" of the individual financial contribution limitations already found constitutional by the Supreme Court. *Id.* at 38; *see also Colorado II*, 533 U.S. at 456 (observing that "all members of the [Supreme] Court agree that circumvention is a valid theory of corruption.").

Since *Buckley*, the Supreme Court has consistently reaffirmed the notion of Congress's ability to create reasonable contribution restrictions to stem the tide of corruption and the appearance of corruption that exists in a regime of private candidate financing. *See Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley* ("*Citizens Against Rent*

[152] *See NCPAC*, 470 U.S. 480, 496-97 (1985) (observing that *Buckley* and *Citizens Against Rent Control* held that these rationales "are the only legitimate and compelling government interests thus far identified for restricting campaign finances").

Control"), 454 U.S. 290, 296-97 (1981) ("*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate* . . . . "); *California Med. Ass'n. v. FEC*, ("*California Med. Ass'n.")* 453 U.S. 182, 194-195 (1981) (noting that *Buckley* held that contribution limits "served the important governmental interests in preventing the corruption or appearance of corruption of the political process that might result if such contributions were not restrained"); *see also Bellotti*, 435 U.S. at 788 n.26 ("The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted.") (internal citation omitted). Hence, the interests behind the restrictions on political party nonfederal funds have long had support in the Supreme Court's campaign finance jurisprudence.

In this case, Congress concluded that donations of nonfederal money to the political party committees had the same "coercive influence" on "candidates' positions and on their actions if elected to office" as the large contributions to candidates permitted prior to the enactment of the individual contribution limitations in 1974. *Buckley*, 424 U.S. at 25. Congress also concluded that the individual contribution limitations were being circumvented by political party committees at all levels who raised nonfederal funds and then spent those funds for federal election purposes.

In advancing these long upheld rationales to support the provisions in Title I of BCRA, I find that the evidence presented by Defendants to support these justifications is more than sufficient. As the Supreme Court observed in *Shrink Missouri*: "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink Missouri*, 528 U.S. at 391. Given the Supreme Court's discussion of contribution restrictions beginning with *Buckley*, I find that Defendants do not break from well-established precedent in offering support for Title I because *Buckley* has already established that Congress may legislate: (a) to prevent corruption or the appearance of corruption inherent in the process of raising large monetary contributions; and (b) to prevent circumvention of the valid contribution limitations. As I demonstrate *infra*, the record before this three-judge District Court is *overwhelming* and amply supports both of the asserted rationales. With the foregoing in mind, I shall now briefly describe these interests and the evidence supporting them.

(i) The *Buckley* Court's Explanation of "Prevention of Corruption"

Given that there is such disagreement in the briefing as to what the Supreme Court meant by "prevention of corruption," it is important to take stock of how the *Buckley* Court used that phrase and the evidence it relied on to find that Congress was justified in enacting FECA's contribution restrictions. As the Supreme Court in *Buckley* held:

It is unnecessary to look beyond the Act's primary purpose to limit the

> actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the $1,000 contribution limitation. *Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign*. The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given *to secure a political quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. *Although the scope of such pernicious practices can never be reliably ascertained*, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.

Buckley, 424 U.S. at 26-27 (footnote omitted) (emphasis added). As this passage illustrates, the *Buckley* Court understood "corruption" as something intrinsic to the fundraising process of large contributions in a "system of private financing of elections." *Id*. at 26. The Supreme Court's rationale was grounded in the realistic and pragmatic understanding that "large contributions are given to secure a political *quid pro quo*;" *Id*. at 26; *see also id*. at 27 (referring to "political *quid pro quo*" as the "*danger* of actual *quid pro quo* arrangements") (emphasis added). Indeed, in introducing the primary interest behind the individual contribution limitations, the Supreme Court stated that the primary interest in FECA's contribution limitations "is the prevention of corruption and the appearance of corruption spawned by the real or imagined *coercive influence* of large financial contributions on candidates' positions and on their actions if elected to office." *Id*. at 25 (emphasis added). Simply put, *Buckley* equates corruption with the fundraising process where access to elected

officials and candidates is provided in exchange for large contributions.[153]

This point is underscored by the evidence relied on in the *Buckley* opinion to support the Supreme Court's discussion of the government's interest in preventing corruption. *See id*. at 27 n.28 (citing evidence from the Court of Appeals opinion in *Buckley* that relates to access provided to donors who contribute large sums of money). That the *Buckley* Court referred to the record from the Court of Appeals opinion deserves repeating here because it demonstrates that in upholding the individual contribution limitations in FECA, the "corruption" that concerned the *Buckley* Court was the *access* to federal candidates that large contributors receive. As the Court of Appeals found:

> Looming large in the perception of the public and Congressmen was the revelation concerning the extensive contributions by dairy organizations to Nixon fund raisers, *in order to gain a meeting* with White House officials on price supports. The industry pledged $2,000,000 to the 1972 campaign, a pledge known to various White House officials, with President Nixon informed directly by Charles Colson in September 1970, as acknowledged by the 1974 White House paper.
>
> Since the milk producers, on legal advice, worked on a $2500 limit per committee, they evolved a procedure, after consultation in November 1970 with Nixon fund raisers, to break down the $2 million into numerous smaller contributions to hundreds of committees in various states which could then hold the money for the President's reelection campaign, so as to permit the producers to meet independent reporting requirements without disclosure. On March 23, 1971, after a meeting with dairy organization representatives, President Nixon decided to overrule the decision of the Secretary of

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[153] Given *Buckley*'s teaching on constitutional analysis of contribution restrictions, I cannot agree with Judge Leon's theory that a reviewing court should focus its analysis on whether the *use* for which a contribution is put is corrupting. *See generally* Leon Op. *Buckley* and its progeny all instruct that the fundraising process is the focal point of the contribution restriction analysis, as my discussion in this section illustrates.

> Agriculture and to increase price supports. In the meetings and calls that immediately followed the internal White House discussion and preceded the public announcement two days later, culminating in a meeting held by Herbert Kalmbach at the direction of John Ehrlichman, the dairymen were informed of the likelihood of an imminent increase and of the desire that they reaffirm their $2 million pledge.
>
> *It is not material, for present purposes, to review the extended discussion in the Final Report on the controverted issue of whether the President's decision was in fact, or was represented to be, conditioned upon or "linked" to the reaffirmation of the pledge.*

Buckley, 519 F.2d at 839 n.36 (emphasis added) (internal citations omitted) (cited in *Buckley*, 424 U.S. at 27 n.28). The Circuit Court in *Buckley*, as affirmed by the Supreme Court, found that it was unnecessary to review the disputed issue of whether President Nixon's decision on price supports was actually changed by the $2,000,000 contribution. Instead, the Supreme Court found it sufficient that the dairy farmers were given access to the President and his officials in exchange for a sizable contribution. The corruption, thus, was associated with the fact that the donation was given "in order to gain a meeting with White House officials on price supports." *Id*.

This conclusion is further borne out by other evidence discussed in the Court of Appeals opinion and cited by the Supreme Court:

> The findings document lavish contributions by groups or individuals with special interests to legislators from both parties, e.g., by the American Dental Association to incumbent Congressmen in California; by H. Ross Perot, whose company supplies data processing for medicare and medicaid programs, to members of the House Ways and Means and Senate Finance Committees, and the House Appropriations Subcommittee for HEW.
> The disclosures of illegal corporate contributions in 1972 included the testimony of executives that they were motivated by the perception that this

> was necessary as a *"calling card, something that would get us in the door and make our point of view heard*," or "*in response to pressure for fear of a competitive disadvantage that might result*."
> The record before Congress was replete with specific examples of improper attempts to *obtain governmental favor* in return for large campaign contributions.

Buckley, 519 F.2d at 839 n.37 (emphasis added) (internal citations omitted) (cited in *Buckley*, 424 U.S. at 27); *see also id*. n.38 (discussing evidence relating to large contributions given in exchange for ambassadorships).[154] The *Buckley* Court, therefore, realized the problems that inhere in a "system of private financing of elections," where contributors who donate large sums of money are given access to officeholders. *Buckley*, 424 U.S. at 26. In making this point, the Supreme Court eschewed relying on evidence that the contribution was connected to the decision-making of the federal official, *Buckley*, 424 U.S. at 27 n.28 (citing *Buckley*, 519 F.2d at 839 n.36) (finding such a question "not material"); rather, the provision of a meeting in exchange for the contribution satisfied the *Buckley* Court. The *Buckley* Court therefore equated corruption with the fundraising process and, in particular, the special

[154] The evidence in the Court of Appeals opinion relating to giving ambassadorships in exchange for large donations discusses the conviction of one fundraiser under 18 U.S.C. § 600 for having promised a current Ambassador a more prestigious post in return for a $100,000 contribution to be split between Senate candidates designated by the White House and the 1972 campaign. *Buckley*, 519 F.2d at 840 n.38. Notably, the conviction did not involve a federal candidate or officeholder and therefore does not stand for the premise that, in citing this evidence, the Supreme Court requires evidence of bribery to support a contribution restriction. The point was only made to demonstrate that "while the appointment of large contributors [to ambassadorships] is not novel," *id*., the activity surrounding ambassadorships and the 1972 election "made the 1972 election a watershed for public confidence in the electoral system," *id*. at 840; *see also id*. at 839 n.36 (declining to rely on evidence that a large contribution was connected to the decision-making of the federal official).

access given to large contributors. *See Buckley*, 424 U.S. at 30 ("Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that *the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated*.") (emphasis added).

Given the *Buckley* Court's understanding of corruption, it is not surprising that it explicitly did not require evidence of bribery of federal officeholders and candidates to support the contribution limitations in FECA. *Id*. at 27 ("Although the scope of such pernicious practices *can never be reliably ascertained*, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.") (emphasis added). In linking "corruption" with the fundraising process of large contributions in a donor-financed system of elections and not on specific evidence of bribery, the Supreme Court merely recognized the obvious: large contributions provide a "calling card" and can help "obtain" government favors. *Buckley*, 519 F.2d at 839 n.37 (cited by *Buckley*, 424 U.S. at 27 n.28). Contribution limitations served to "prevent corruption" by removing the "*coercive influence*" that large contributions have when "given to secure a *political quid pro quo*" from elected officials or candidates. *Buckley*, 424 U.S. at 25, 26 (emphasis added). In fact, implicit in *Buckley*'s rejection of the argument that bribery laws constituted a less restrictive alternative than FECA's contribution limitations was a recognition that the threat addressed by bribery laws "deal[s] with only the most blatant and specific attempts of those with money to influence governmental action." *Id*. at 28; *see also id*. at 30 ("Not only is it

difficult to isolate suspect contributions, but, more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.").

Hence, it was very clear that in discussing corruption the *Buckley* Court concluded that bribery laws were not simply enough and that contribution restrictions were targeted at reducing the "coercive influence" of large monetary contributions on the political process. *Id*. at 25; *see also NCPAC*, 470 U.S. at 497 ("Corruption is a subversion of the *political process*. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political *favors*.") (emphasis added). In sum, as the *Shrink Missouri* Court effectively articulated:

> In speaking of "improper influence" and "opportunities for abuse" in addition to "*quid pro quo* arrangements," we recognized a concern not confined to bribery of public officials, *but extending to the broader threat from politicians too compliant with the wishes of large contributors*. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money "to influence governmental action" in ways less "blatant and specific" than bribery.

Shrink Missouri, 528 U.S. at 389 (quoting *Buckley*, 424 U.S. at 28) (emphasis added). This statement, in a nutshell, is what *Buckley* meant by "corruption."[155]

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[155] I therefore cannot agree with Judge Henderson, who states that the Supreme Court "has not settled on a precise definition of 'corruption.'" Henderson Op. at Part IV.A n.148. To reach this proposition, Judge Henderson contrasts this quotation from the *Shrink Missouri* (continued...)

(ii) The *Buckley* Court's Explanation of Prevention of the "Appearance of Corruption"

Additionally, the *Buckley* Court observed that it was not only preferential access given to large contributors through the fundraising process that was corrupting. The Supreme Court also recognized that the public perception associated with a regime of large individual contributions undermined faith in the government in the public at large. This concern was another aspect of the corruption thesis that the *Buckley* Court found supported upholding the individual limitations on contributions. As the *Buckley* Court states:

Of almost equal concern as the danger of actual *quid pro quo* arrangements is

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[155](...continued)
majority opinion with Justice Thomas' dissent in that case and the Supreme Court's statement in *NCPAC* that "[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *NCPAC*, 470 U.S. at 497. Judge Henderson's footnote does not cite *Buckley* or even discuss its text in reaching this conclusion. As I have endeavored to explain at length in this section of my opinion, *Buckley* has clearly provided guidance as to what the Supreme Court meant by "corruption." *See also Colorado II*, 533 U.S. at 441 (defining "corruption [as] being understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence").

Also on this point, I observe that although Judge Leon recognizes that corruption involves "something more than a quid pro quo arrangement . . . as well as improper influence or conduct by a donor that results in a legislator who is too compliant with the donor, Leon Op. at Part I.A.3 (internal quotation marks and citations omitted), Judge Leon–while stating the definition of corruption correctly–refers to corruption in his opinion as something resembling the characteristics of bribery, *id*. ("whether the corruption is actual or perceived, every traditional and accepted definition to date depends on the donor conferring, or being perceived as having conferred a benefit on the candidate in return for something") (citing and quoting to *Black's Law Dictionary*'s definition of "*quid pro quo*"). Thus, while Judge Leon and I apparently agree on the definition of corruption as defined by the Supreme Court, I cannot agree with the way Judge Leon employs his definition of corruption throughout his opinion as something akin to bribery. *See id*. at Part I.B.2 ("there is no evidence in the record of actual quid pro quo corruption") (citing evidence that there is no evidence of vote buying in the record).

> 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*. . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."

Buckley, 424 U.S. at 27 (quoting *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 565 (1973)) (emphasis added). Picking up on this discussion from *Buckley*, in *Shrink Missouri*, the Supreme Court observed:

> While neither law nor morals equate all political contributions, without more, with bribes, we spoke in *Buckley* of the perception of corruption "inherent in a regime of large individual financial contributions" to candidates for public office, [*Buckley*, 424 U.S. at 27], as a source of concern "almost equal" to *quid pro quo* improbity, *ibid*. The public interest in countering that perception was, indeed, the entire answer to the overbreadth claim raised in the *Buckley* case. *Id*. at 30. This made perfect sense. 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. Democracy works "only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961).

Shrink Missouri, 528 U.S. at 390. More recently, in *Colorado II*, the Supreme Court observed that "corruption [was] understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence." *Colorado II*, 533 U.S. at 441.

Within the *Buckley* framework, it does not take too much imagination to realize the appearance of corruption associated with nonfederal donations to political party committees, particularly given that "*Buckley* demonstrates that the dangers of large, corrupt contributions

and the suspicion that large contributions are corrupt are neither novel nor implausible." *Shrink Missouri*, 528 U.S. at 391. In *Buckley* the evidence demonstrated that "corporations, well-financed interest groups, and rich individuals had made large contributions . . . [which was] more than sufficient to show why voters would tend to identify a big donation with a corrupt purpose." *Id*. at 391; *see also Buckley*, 519 F.2d at 838-40 (discussing "the trend revealed by the polls" that demonstrated that in 1974, 69.9 percent of individuals found that "the government is pretty much run by a few big interests looking out for themselves"). The *Buckley* Court, therefore, understood the "appearance of corruption" as the public perception that "large donors call the tune" that *inherently* exists in a donor financed election system that permits large contributions.

(iii) Circumvention as a Valid Theory of Corruption

Aside from the corruption associated with the preferential access to officeholders that large contributors receive through the fundraising process, and the public perception of corruption inherent in a regime of large individual, financial contributions, the Supreme Court recognized in *Buckley* that a circumvention of individual contribution limitations also serves as a basis for justifying contribution restrictions. Prior to BCRA's enactment, a donor was limited to give $1,000 to a candidate and his or her authorized committee for any election for Federal office. 2 U.S.C. § 441a. The same donor was limited to an aggregate of $20,000 to the political committees established and maintained by a national political party in any calendar year. In *Buckley*, the Supreme Court upheld FECA's $25,000 limitation on

total contributions that an individual could make during any calendar year. In finding this provision constitutional, the Court held that "this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of . . . *huge contributions to the candidate's political party*." *Buckley*, 424 U.S. at 38 (emphasis added).

In upholding the $25,000 total contribution limitation, under this "anti-circumvention" theory, the Supreme Court did not engage in *any* separate constitutional balancing. In other words, the Supreme Court never discussed whether the $25,000 limitation was "closely drawn" to match a "sufficiently important interest." Instead, in one paragraph, the Supreme Court upheld the restriction on the premise that it was "no more than a corollary of the basic individual contribution limitation" that the Supreme Court had already determined to be constitutional. *Id*. at 38. Since *Buckley*, the "anti-circumvention" rationale has been upheld by the Supreme Court and is a well-accepted theory for justifying congressional action in the area of campaign finance. *Colorado II*, 533 U.S. at 456 (noting that "all members of the [Supreme] Court agree that circumvention is a valid theory of corruption"); *California Med. Ass'n.*, 453 U.S. at 197-199 (plurality opinion) (upholding limitations on contributions to nonparty multicandidate political committees under an anti-circumvention rationale). If the provision in FECA limiting the total amount of contributions a donor could make was found constitutional by the *Buckley* Court on the basis that it was designed to keep the individual

donor restrictions intact, it follows that the provisions in Title I–which are similarly designed to prevent evasion of the individual contribution limits in FECA–are constitutional.

In *Colorado II*, the Supreme Court powerfully reaffirmed its commitment to the anti-circumvention theory. *Colorado II*, 533 U.S. at 456-65. In *Colorado II*, the Supreme Court upheld FECA's limitations on coordinated expenditures by state political parties–a question that it had remanded during the *Colorado I* litigation. *Id*. The Court observed in *Colorado II* that "[s]ince there is no recent experience with unlimited coordinated spending, the question is whether experience under the present law confirms a serious *threat* of abuse from the unlimited coordinated party spending." *Id*. at 457 (emphasis added). Put differently, because unlimited coordinated expenditures had been prohibited since FECA, there was no evidence of whether or not such a system was actually corrupting. The Supreme Court concluded, however, that even though there was no evidence that unlimited coordinated expenditures were corrupting, Congress was empowered to exercise its predictive judgment. In the words of Defendant-Intervenors, Congress could preemptively act "to close loopholes and to prevent evasion of the contribution restrictions and limits established in FECA, and upheld in *Buckley* even in the absence of past abuses." Def.-Int. Br. at 53. With no evidence of present evasion, the Supreme Court in *Colorado II* found that "[d]espite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties *test* the limits of the current law, and it shows beyond serious doubt how contribution limits *would be* eroded if inducement to circumvent them were enhanced by

declaring parties' coordinated spending wide open." *Colorado II*, 533 U.S. at 457 (emphasis added).[156]

The anti-circumvention rationale articulated by the *Colorado II* Court clearly supports the idea that Congress is entitled to exercise latitude in forming predictive judgments about possible evasion and circumvention of the law and is able to act accordingly to prevent such abuse. Circumvention of a current statutory regime or congressional prediction that "evasion" will occur if a prophylactic rule is not adopted is consonant with the *Buckley* Court's understanding of corruption. The *Buckley* Court was concerned with the "real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Buckley*, 424 U.S. at 25. Certainly, if an individual or organization is able to evade the law and engage in the kind of large financial giving that FECA was designed to prevent, then the system would be nullified and the "real or imagined coercive influence of large financial contributions" on candidates and officeholders would still exist. *Id*. In other words, the corruption would still be present. However, in such a situation, the appearance of corruption would only be worse. Where evasion is present in a carefully regulated regime, faith in the law is undermined when it is widely known that others are skirting the rules–even when what those individuals and organizations may be doing is considered legal. In *Colorado II*, for example, the Supreme Court determined that if

[156] Plaintiffs contend that in *Colorado II*, "the Court did not *really apply* an 'anti-circumvention' rationale at all (despite some language in the Court's opinion to the contrary)." McConnell Opp'n at 23-24 (emphasis added). Plaintiffs' contention is erroneous given my reading of *Colorado II*.

unlimited coordinated expenditures were made legal, circumvention of the existing contribution limits *would* occur. *Colorado II*, 533 U.S. at 460 ("If suddenly every dollar of spending *could be* coordinated with the candidate, the inducement to circumvent would almost certainly intensify."). Circumvention as a theory of corruption, therefore, has a very strong lineage in Supreme Court campaign finance jurisprudence and is simply a logical outgrowth of *Buckley*'s teaching about corruption.

* * *

In sum, the *Buckley* decision represents an understanding that bribery laws are not enough to capture the more subtle and pervasive influences that large financial contributions can have on a donor-financed election system. The Supreme Court has long understood that the fundraising process, itself, is the source of corruption when large donations are given in exchange for access to influence federal officeholders and candidates. In enacting Title I of BCRA, Congress focused on this same problem that had developed with regard to fundraising of nonfederal funds.

(iv) Restrictions on Political Party Committee Fundraising are Necessary to Effectuate These Sufficiently Important Interests

As one scholar observes, "the rise of soft money, the enormous disparity between FECA's limits on individual and PAC donations to candidates and the much larger sums given in soft money, and the role of federal officeholders in soliciting soft money contributions to the parties suggest that donor-to-party-to-candidate conduit corruption is a

real possibility." Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 Colum.L.Rev. 620, 649 (2000) [hereinafter Briffault]. The record in this case demonstrates that the "donor-to-party-to-candidate conduit corruption" is no longer just a "real possibility," but a reality. *Id*.

In *Colorado II*, the Supreme Court recognized that the donor-to-party-to-candidate conduit raised a legitimate concern regarding corruption. The *Colorado II* Court found that "[w]hat a realist would expect to occur has occurred. Donors give to the party with the tacit understanding that the favored candidate will benefit." *Colorado II*, 533 U.S. at 458. For this proposition, the Supreme Court cited a number of declarations, which Defendants have again included in this litigation. The Supreme Court observed that without a restriction limiting the political parties' coordinated expenditures, the contribution limitations would be rendered ineffective. *Id*. at 460 ("If suddenly every dollar of spending could be coordinated with the candidate the inducement to circumvent would almost certainly intensify.").

The evidence to support this finding bears repeating briefly here, because as the Supreme Court in *Colorado II* found donations made to the political party, as opposed to directly given to the candidate, can pose the same coercive influence that the restrictions in FECA were targeted to address. In *Colorado II*, the Supreme Court observed that "the record shows that even under present law substantial donations turn the parties into matchmakers whose special meetings and receptions give the donors the chance to get their points across

to the candidates." *Colorado II*, 533 U.S. at 461. As proof of this proposition, the Supreme Court noted in a footnote that "the DSCC has established exclusive clubs for the most generous donors, who are invited to special meetings and social events with Senators and candidates." *Id*. at 461 n.25. This evidence recognizes that large donations to *political party committees* enables contributors to gain access to elected federal officeholders and candidates.[157]

This view of political parties by the Supreme Court is confirmed by their statement in *Colorado II* that "whether they like it or not, [political parties] act as agents for spending on behalf of those who seek to produce obligated officeholders." *Id*. at 452. One of the pieces of evidence that the Supreme Court relied on to support this view was the testimony of former Senator Paul Simon. *Id*. at 451 n.12. Senator Simon stated, "I believe people contribute to party committees on both sides of the aisle for the same reason that Federal Express does, because they want favors. There is an expectation that giving to party committees helps you legislatively." *Id*. (recounting a debate over a bill favored by Federal Express during which a colleague exclaimed, "'we've got to pay attention to who is buttering our bread").

In *Colorado II*, the Supreme Court also found persuasive the declaration of Robert

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[157] Of course, it bears pointing out that the Supreme Court's discussion of these donations was in the context of contributions that were within the $20,000 limit on donations to national party committees. The record *in this case* conclusively establishes that the nonfederal funds pouring into the national party coffers is from prohibited sources and significantly larger than the federal fund donations at issue in *Colorado II*.

Hickmott, former Democratic fundraiser and National Finance Director for Timothy Wirth's Senate campaign, who testified that "'[w]e . . . told contributors who had made the maximum allowable contribution to the Wirth campaign but who wanted to do more that they could raise money for the DSCC so that we could get our maximum [Party Expenditure Provision] allocation from the DSCC.'" *Id.* at 458 (quoting declaration of Robert Hickmott) (second set of brackets in original). The Supreme Court also recounted the testimony of Senator Timothy Wirth that he "'understood that when [he] raised funds for the DSCC, the donors expected that [he] would receive the amount of their donations multiplied by a certain number that the DSCC had determined in advance, assuming the DSCC has raised other funds.'" *Id.* (quoting declaration of Timothy Wirth). Likewise, Leon G. Billings, former Executive Director of the Democratic Senatorial Campaign Committee (DSCC), testified that "'[p]eople often contribute to party committees because they have given the maximum amount to a candidate, and want to help the candidate indirectly by contributing to the party.'" *Id.* (quoting declaration of Leon G. Billings). In addition, the Supreme Court found merit in a fundraising letter from Congressman Wayne Allard, dated August 27, 1996, explaining to a contributor that "'you are at the limit of what you can directly contribute to my campaign,'" but "'you can further help my campaign by assisting the Colorado Republican Party.'" *Id.* (quoting fundraising letter from Congressman Wayne Allard, dated Aug. 27, 1996). In *Colorado II*, the Supreme Court also observed that an "informal bookkeeping" system developed, which in the Democratic Party was known as the "tallying

system," that would link donations to the party committees with the candidates that had raised the money. *Id*. at 459. As explained by Mr. Hickmott and Senator Paul Simon, the accounting system essentially was an agreement between the DSCC and the candidates' campaign such that candidates were credited with generating donations for the DSCC. The DSCC, in turn, would support the candidate based on the amount of donations the candidate had collected for the DSCC. *Id*.; *see also id*. at 458 n.22 (noting that "tallying is a sign that contribution limits are being diluted and could be diluted further if the floodgates were open").

Accordingly, the Supreme Court has already accepted the proposition that "[p]arties are thus necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one narrow issue, or even to support any candidate who will be obliged to the contributors." *Colorado II*, 533 U.S. at 451-52. Senator Simon's testimony, along with the rest of the *Colorado II* evidence cited by the Supreme Court, has been included in this litigation. Plaintiffs have not made any effort to bring into question any of this evidence, and I accept it and the conclusions reached in *Colorado II* with regard to the evidence.

(v) Evidence from the Record Supporting the Asserted Government Interests

Before turning to the evidence from this record related to the asserted interests discussed above, it is important to make one, brief observation. In the instant case, Plaintiffs

contend that the record before this Court, as relied on by Defendants, is nothing short of "an onslaught of anecdotal material about the role of [nonfederal funds] in the political process." McConnell Opp'n at 3. I disagree with Plaintiffs' characterization and find that the evidence in this case is no different from evidence produced in virtually every other campaign finance case that the Supreme Court has heard. Plaintiffs' criticism of the evidence from this record as merely "anecdotal" would have applied with equal force to the evidence the Supreme Court found persuasive in *Buckley* and *Colorado II*. For example, as discussed above, in *Colorado II*, the Supreme Court credited evidence from the FEC's public records, and the testimony of politicians, political consultants, party officials, scholars, and experts. To some degree, Plaintiffs' criticism of the record evidence as "anecdotal" only underscores the difficulty that Plaintiffs have in rebutting the testimony in this record that the fundraising process related to large donations of nonfederal funds to the party committees, particularly at the national level, presents the same problems with corruption and the appearance of corruption that was identified by the Supreme Court in *Buckley*.

(1) Evidence From the Record in this Case Relating to "Corruption" and the "Appearance of Corruption" as Defined in *Buckley*

Federal Officials Control the National Party Committees and are Intimately Involved in Raising Nonfederal Funds for the National Party Committees

The record in this case makes it clear that federal officeholders and candidates control the national political party committees and are so deeply involved in raising non-federal funds for the national party committees that there is no meaningful separation between the

national committees and the federal candidates and officeholders that control them. Findings ¶¶ 1.50, 1.58. This finding supports the congressional decision to enact a complete ban on nonfederal funds at the national political party level.

All six national political party committees are controlled and dominated by federal officeholders or candidates. In the case of the DNC or RNC, both are headed by the President or presidential candidate of each party. Findings ¶ 1.47. In the case of the national congressional committees (DCCC, NRCC, DSCC, NRSC), the top leaders of each party in the House and the Senate head the committees and exercise control over them. *Id*. This very fact has led one of Defendants' experts to conclude that "[t]here is no meaningful separation between the national party committees and the public officials who control them." *Id*. Furthermore, "[f]or at least a century [the national party committees] have been melded into their party's presidential campaign every four years, often assuming a subsidiary role to the presidential candidate's personal campaign committee. The presidential candidate has traditionally been conceded the power to shape and use the committee, at least for the campaign." *Id*. ¶ 1.48.

The record also demonstrates that the primary purpose of the political parties is to get as many of its candidates elected to public office. *Id*. ¶ 1.48.[158] This purpose drives the

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[158] The RNC presented testimony suggesting that electing its candidates is only one means of achieving its core political principles. Findings ¶¶ 1.49, 1.49.1. It claims it also strives to achieve its core principles by promoting an issue agenda that reflects its principles and governing in accordance with its principles. *Id*. ¶ 1.49.1. Its own internal documents show that its primary purpose "is to elect its candidates to public office." *Id*. Therefore, the (continued...)

political parties' fundraising efforts. As Congressman Meehan notes, "political parties do not have economic interests apart from their ultimate goal of electing their candidates to office." *Id*.

The national political party committees request and encourage Members of Congress to solicit nonfederal money donations from contributors, and the personal involvement of high-ranking Members of Congress is a major component of the political parties' fundraising programs.[159] *Id*. ¶¶ 1.51, 1.53. The record is replete with testimony from current and former Members of Congress, political contributors, and lobbyists, all recounting examples or personal experiences where Members of Congress actively solicited nonfederal funds for their political parties. *Id*. 1.51. This testimony is corroborated by numerous internal documents from a Fortune 100 company requesting authorization for donations to national party committees in response to requests made by Members of Congress. *Id*. ¶ 1.74.3. An internal memorandum from this company notes that "[o]n the Democratic side, [our] advocates have already fielded soft money calls from House Democratic Leader Gephardt, House Democratic Caucus Chairman Frost, Democratic Congressional Campaign Chairman

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[158](...continued)
testimony that electing candidates is not the RNC's primary purpose is rebutted and cannot be relied upon.

[159] The RNC's Finance Director states that it is rare for federal officials to make initial personal or telephonic solicitations of major donors for the RNC because the RNC has a policy against such practices. Findings ¶ 1.54. Whether such practices are rare or not, and whether or not the Finance Department has such a policy, the record is clear that such solicitations, initial and subsequent, do occur. *Id*. It is also clear that the Finance Director's statement does not extend to the NRSC or the NRCC. *See id*. ¶ 1.51.

Kennedy, and Democratic Senatorial Campaign Chairman Torricelli. Similar contacts to raise soft money have been made by Republican congressional leaders." *Id.* ¶ 1.78.1. In addition, the record shows that national political party committees and candidates have formed joint fundraising committees, which share the burdens and the receipts of these joint ventures. *Id.* ¶ 1.57. These joint fundraising committees allow the national committees to collect whatever amount a particular donor gives in excess of the federal funds the candidate is permitted to accept. *Id.* All nonfederal funds raised by such joint committees go to the political party. *Id.*

Members have a number of reasons to oblige. First, as former Senator Dale Bumpers testifies, helping the party benefits the Member because it aids the party in "perform[ing] its function of keeping tabs on statements, politics and votes of opposition party members and groups." *Id.* ¶ 1.55. Former DNC and DSCC official Robert Hickmott observes that raising money for one's political party also helps the political party's efforts to maintain or obtain control of Congress, which serves the Member's own interests. *Id.* Second, the record demonstrates that while there may not be a formal commitment that the amount of money spent by the national party committees on their Members' behalf is connected to the amount of money they raise, there is, in former Senator David Boren's words, "at least a working understanding among the party officials and Senate candidates that the [nonfederal] money [raised by the candidate] will benefit the individual Senators' campaigns." *Id.*; *see also id.* ¶ 1.56.3, 1.56.4.

In regard to this latter point, as the Supreme Court already observed in *Colorado II*, an "informal bookkeeping" system was developed within the DSCC known as the "tallying system," which was designed to credit different members with collecting donations for the DSCC. *Colorado II*, 533 U.S. at 459 (observing that based on the members efforts, the DSCC would determine its support for the candidate). The record in this litigation reflects that the DSCC continues to maintain a "credit" program, which credits nonfederal funds raised by a Senator or candidate for that person's party. Findings ¶ 1.56.3. The NRCC, NRSC and DCCC do not have such a system; however, they advise Members of the amounts they have raised for the respective committees. *Id*. ¶ 1.56.4. Former Senator Simpson testifies that: "[w]hen donors give soft money to the parties, there is sometimes at least an implicit understanding that the money will be used to benefit a certain candidate. Likewise, Members know that if they assist the party with fundraising, be it hard or soft money, the party will later assist their campaign." *Id*. ¶ 1.56.1.

Former Senator Simpson's observation about the donors' understanding concerning the use of the party donations is supported by other evidence in the record. A letter from an RNC contributor with an enclosed contribution states that "Congressman Scott McInnis deserve [sic] most of the recruitment credit." *Id*. ¶ 1.51. Similarly, a lobbyist testifies that donors are interested in making sure that particular Members of Congress receive "credit" for their contributions:

> Although the [nonfederal] donations are technically being made to political party committees, savvy donors are likely to carefully choose which elected

> officials can take credit for their contributions. If a Committee Chairman or senior member of the House or Senate Leadership calls and asks for a large contribution to his or her party's national House or Senate campaign committee, and the lobbyist's client is able to do so, the key elected official who is credited with bringing in the contribution, and possibly the senior officials, are likely to remember the donation and to recognize that such big donors' interests merit careful consideration.

Id. ¶ 1.78. Additional testimony shows that individual donors request that their nonfederal money contributions to the national party committees be applied to particular federal campaigns. *Id.* ¶ 1.56.2.[160]

Third, at least with regard to the DSCC and its "credit" program, former DSCC official Robert Hickmott testifies that Members can raise money and credit it to other candidates to obtain support from those they assisted if they plan to run for a leadership post. *Id.* ¶ 1.55. Fourth, the relationship between the candidate/Member and the party makes it difficult for the candidate/Member to avoid raising funds for the party. As Defendants' expert Donald Green puts it: "The ubiquitous role that parties play in the lives of federal officials means that no official can ignore the fundraising ambitions of his or her party." *Id.*; *see also id.* ¶ 1.46 (describing the unique relationship between candidates/Members and their parties).

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[160] The record also contains the testimony of Plaintiff Thomas McInerney, a major contributor to the Republican Party. He states that his nonfederal donations to the RNC were intended to go to state and local election activities. Findings ¶ 1.56.2.1. This testimony does not rebut the testimony of others that such donations are often given for use in federal campaigns, *id.* ¶ 1.56.2, and his practice of giving to national political party committees to assist state and local election activity appears to be an exception to the general rule. Furthermore, nothing in BCRA prevents Mr. McInerney from donating nonfederal funds to state and local parties for use in state and local elections.

Federal Candidates and Officeholders in Most Instances Are Aware of the Largest Contributors of Nonfederal Funds to the National Party Committees

The fact that federal officeholders are so intimately involved in the solicitation of nonfederal funds suggests that they are cognizant of the identities of the major national party committee donors, which in turn allows them to open their doors to these donors. *Id.* ¶ 1.71-1.72. In fact, the evidence demonstrates that it is difficult for Members of Congress not to know the identities of the large donors to their political parties. *Id.* As former Senator Bumpers testifies: "you cannot be a good Democratic or a good Republican Member and not be aware of who gave money to the party." *Id.* ¶ 1.71.2. Indeed, Members of Congress testify that they and their colleagues are cognizant of donations made to their parties.[161] *Id.* 1.71.2. For example, Congressman Shays stated on the floor of the House that "it's the candidates themselves and their surrogates who solicit soft money. The candidates know who makes these huge contributions and what these donors expect." *Id.* ¶ 1.71.2. Former Senator Simpson testifies:

> Party leaders would inform Members at caucus meetings who the big donors were. If the leaders tell you that a certain person or group has donated a large

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[161] Other Members of Congress testify that they are *personally* unaware of who donates to the parties; however, these Members are almost all Defendant-Intervenors who were involved in the efforts to enact BCRA and, like Senator Feingold, have made efforts to distance themselves from nonfederal fundraising or had little interest in such information. *Id.* ¶ 1.71.1. Moreover, these Members do not claim to speak on behalf of all of their colleagues. *Id.*

Senator McConnell attests that he typically does not know the donation history of the individuals with whom he meets. The record demonstrates that he is aware of the donation history of some of the major donors to his campaign, and has sought nonfederal donations from at least one donor who had donated the maximum federal funds to his campaign. *Id.*

> sum to the party and will be at an event Saturday night, you'll be sure to attend and get to know the person behind the donation. . . . Even if some members did not attend these events, they all still knew which donors gave the large donations, as the party publicizes who gives what.

Id. Similarly, Senator McCain observes that "[l]egislators of both parties often know who the large soft money contributors to their party are, particularly those legislators who have solicited soft money," and that "[d]onors or their lobbyists often inform a particular Senator that they have made a large donation." *Id*. Former Senator Simon candidly testifies that he would likely return a telephone call to a large contributor before making other calls. *Id*. Accordingly, either as a consequence of a donor-based election system, or as a result of federal candidates and officeholders raising large amounts of nonfederal funds for the national parties, federal candidates and officeholders know who makes large donations to the national party committees, which inevitably leads to special access for these donors to influence federal lawmakers.

Large Nonfederal Funds Donations Provide Contributors Access to Federal Officeholders

In addition, the record clearly establishes that large nonfederal money contributors are provided with special access to federal officeholders in a manner on par with the large individual donors discussed in *Buckley*. *Id*. ¶¶ 1.75-1.80.1, 1.81. This access provides these donors with opportunities to influence legislative activity, and is a major reason large donations are made to the political parties. As one Member of Congress put it: "access is it. Access is power. Access is clout. That's how this thing works. . ." *Id*. ¶ 1.75.2.

Although no empirical study has been able to demonstrate this point conclusively,

App. ¶ III, testimony from those intimately involved in national political fundraising, as well as documents submitted as part of the record, provide powerful evidence that large nonfederal money donations provide such donors access to influence federal lawmakers.[162] Just like the Supreme Court panel that issued *Buckley*, I find this evidence–of specific examples of access given to large contributors–probative and compelling.

Numerous prominent lobbyists testify that in order to have access to Members of Congress, clients must combine their lobbying efforts with sizeable nonfederal money donations. *Id*. ¶ 1.75.1. Failure to do so, according to lobbyist Robert Rozen, will hinder a client's ability "to be treated seriously in Washington," by which he means, "to be a player and to have access" *Id*. He explains that "relationships [with Members of Congress] are established because people give a lot of money, relationships are built and are deepened because of more and more money, and that gets you across the threshold to getting the access you want, because you have established a relationship." *Id*. ¶ 1.74.1. The other lobbyists who testify in this case concur, including Daniel Murray, who notes that nonfederal funds, "ha[ve] become the favored method of supplying political support," which "begets . . . access

[162] As an aside, I do not find it particularly surprising that an empirical study has not been able to conclusively demonstrate this point. Access to federal officials may be subtle, less open to verification, and therefore less likely to be captured by empirical review. Furthermore, the fact that the FEC does not require nonfederal contributors to disclose these contributions makes the feasibility of such a study even more remote. The inability to empirically assess this matter would be troublesome if not for the record before this three-judge panel**,** which is rich with testimony from individuals intimately involved in nonfederal fundraising who describe the unprecedented access given to those who contribute large sums of nonfederal funds. In my judgment, the difficulty of being able to study this phenomenon empirically is of little consequence given this evidence. *See* Findings ¶ 1.81-1.82; App. ¶ III

to law-makers" because of the lack of any limit on how much may be donated. *Id*. ¶ 1.75.1. *Cf. Buckley*, 519 F.2d at 839 n.37 ("The disclosures of illegal corporate contributions in 1972 included the testimony of executives that they were motivated by the perception that this was necessary as a "calling card, something that would get us in the door and make our point of view heard," Hearings before the Senate Select Comm. on Presidential Campaign Activities, 93d Cong., 1st Sess. 5442 (1973) (Ashland Oil Co. Orin Atkins, Chairman).") (citation to Findings omitted).

Plaintiffs point out that one of these lobbyists claims that he is hired because of his ability to provide access to lawmakers regardless of whether or not the client has donated money to the parties. Findings ¶ 1.75.1.2. Similarly, an RNC official states that lobbying is a better way to achieve access to lawmakers than donating to their campaigns or parties, and Plaintiffs note that many individuals and entities who donate large sums of nonfederal funds also devote substantial sums to lobbying efforts, which can dwarf their nonfederal fund donations. *Id*.. While these observations have merit, it is clear from lobbyists, such as Wright Andrews, that the "amount of influence that a lobbyist has is often *directly correlated* to the amount of money that he or she and his or her clients infuse into the political system." *Id*. ¶ 1.75.1.3 (emphasis added). In fact, Andrews notes that many lobbyists have taken to hosting fundraisers themselves, which provide them with an opportunity to interact with lawmakers in a setting of their choosing and concludes that "[t]hose who are most heavily involved in giving and raising campaign finance money are frequently, and not surprisingly,

the lobbyists with the most clout." *Id*. The lobbyist whom Plaintiffs tout as claiming he can achieve special access for his clients regardless of *their* contribution history, can provide that access in part because of political contributions made or arranged by his firm. *Id*. ¶ 1.75.1.2. Furthermore, lobbyists testify that traditional lobbying alone is not in and of itself sufficient to achieve a client's goals and that contributions are usually part of a lobbyist's "legislative plan." *Id*. ¶ 1.75.1.3. This point is bolstered by the numerous internal documents authored by employees of a Fortune 100 company's internal lobbying department, requesting authorization to make nonfederal donations to national party committees as part of efforts to "strengthen [its] relationship" with various federal lawmakers. *Id*. ¶ 1.74.3. In the words of one expert, "[i]t's not either or . . . . the fact is most of the organizations and economic interests . . . lobbying, inside and outside lobbying, are also intimately involved in the political financing game and making large contributions to political parties. *Id*. ¶ 1.75.1.2.

Numerous former and current Members of Congress also testify that entities and individuals that make large contributions to the political parties do so because it provides them with special access to lawmakers which allows them to influence legislation.[163] *Id*. ¶ 1.75.2. Senator Rudman is blunt:

> Special interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get special access. Sitting Senators and House Members have limited amounts of time, but they make time

[163] Some Defendant-Intervenors in this case testify that they personally do not provide special access to large donors of nonfederal funds. Findings ¶ 1.75.2.1. These Members of Congress do not claim to speak for their colleagues or contradict their colleagues' testimony that such access is provided to major donors. *Id*.; *see also id*. ¶ 1.75.2.

> available in their schedules to meet with representatives of business and unions and wealthy individuals who gave large sums to their parties. These are not idle chit-chats about the philosophy of democracy. In these meetings, these special interests, often accompanied by lobbyists, press elected officials -- Senators who either raised money from the special interest in question or who benefit directly or indirectly from their contributions to the Senator's party - to adopt their position on a matter of interest to them. Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way. No one says: "We gave money so you should do this to help us." No one needs to say it -- it is perfectly understood by all participants in every such meeting.

Id.

Representatives of corporate nonfederal money donors echo the lobbyists' and former Members' testimony that nonfederal donations beget access. *Id*. 1.75.3. The Chairman Emeritus of United Airlines testifies that large nonfederal donations provide donors with benefits:

> namely, access and influence in Washington. Though a soft money check might be made out to a political party, labor and business leaders know that those checks open the doors to the offices of individual and important Members of Congress and the Administration, giving donors the opportunity to argue for their corporation's or union's position on a particular statute, regulation, or other governmental action.

Id. The record contains internal documents which support this view. *Id*. ¶¶ 1.75.3, 1.78.1. One internal corporate memorandum states that "contributions and the related activities we have participated in have been key to our increased ability to get our views heard by the right policy makers on a timely basis; in other words, a smart investment." *Id*. 1.75.3. In addition, a poll of a random sample of 300 corporate executives employed by major U.S. corporations conducted by the Tarrance Group on behalf of the Committee for Economic Development

("CED") found that 75 percent of those surveyed said that "political donations give them an advantage in shaping legislation." *Id*. ¶¶ 1.70.1-¶1.70.1.1.

Wealthy individuals who donate large sums of nonfederal funds also share that they were provided with unique access after they made large contributions to the political parties. *Id*. ¶ 1.75.5. One individual testifies that after he made a $500,000 contribution to the DNC he was invited to a number of events where President Clinton was in attendance, including a small dinner with President Clinton and Vice President Gore that was billed as an opportunity to "give advice to the President." *Id*. He used the opportunity to speak in favor of campaign finance reform and to urge the President to take a leadership role in the effort. *Id*. Another donor testifies that $50,000 in political donations provided him and his wife the opportunity to attend a dinner of 10 to 12 people, including President Clinton, which lasted two to three hours and involved "primarily a conversation about issues of importance to the nation and the President's program." *Id*. One wealthy contributor who states that he does not give to the political parties in order to secure special access admits that he has been offered such opportunities. *Id*.

The record establishes in compelling fashion that large nonfederal money donors are provided access to federal officeholders and candidates in exchange for their large contributions. Political parties play a role in facilitating this access to influence.

The National Party Committees Facilitate Access to Federal Officeholders for Their Large Nonfederal Donors

Both political parties and their congressional committees have dangled access to

Members of Congress as an inducement to collect larger contributions from donors; these donations often take the form of nonfederal funds. *Id.* ¶¶ 1.76-1.77.10. In fact, the political parties have institutionalized this process by creating clubs for different ranges of donations; as donations escalate, so do the opportunities to attend special events with Members of Congress as well as the intimacy of these events. *Id.* For example, the NRCC's Congressional Forum was "designed to give its members [$15,000 PAC or individual contributors or $20,000 corporate contributors] an intimate setting to develop stronger working relationships with the new Republican Congressional majority." *Id.* ¶ 1.77.2. The NRSC's Group 21 required an annual donation of $100,000 and provided members small dinners with Senators and "VIP benefits." *Id.* The DCCC also had a $100,000 donor club called the "National Finance Board," which provided donors "two private dinners with Leader Gephardt, Chairwoman Lowey, House Democratic Leadership and Ranking Members[and] two retreats with Leader Gephardt and Chairwoman Lowey . . . ." *Id.* ¶ 1.77.5. The state political parties have also used the enticement of special access to federal candidates to induce larger donations. *Id.* ¶ 1.77.6. The best example of this is a CDP brochure advertising the CDP's Trustees program, which required a $100,000 donation to the CDP. *Id.* The CDP "recognizes its extraordinary supporters with extraordinary opportunities," and provides "Trustees" with "[e]xclusive briefings, receptions and meetings with officials such as U.S. Senator Dianne Feinstein, U.S. Senator Barbara Boxer . . . and other national figures." *Id.*

Large contributions have therefore become the price of admission to attend events where relationships can be formed with Members of Congress and legislative issues can be discussed. Individual wealthy donors testify that "[p]olicy discussion with federal officials occurs at" these major donor events. *Id.* ¶ 1.75.5. The events "include speeches, question and answer sessions, and group policy discussions, but there is also time to talk to Members individually about substantive issues." *Id.* One witness testifies that, "when given the opportunity, some donors try to pigeonhole or corner Members . . . to discuss their issues at these events." *Id.* One donor to the RNC's Team 100, a club that requires a $100,000 donation every four years with $25,000 donations in each intervening year, wrote to the RNC Chairman telling him, "I do feel I have benefitted from Team 100 in the audience it has afforded me with party leaders." *Id.*; *see also id.* ¶ 1.77.1 (describing the Team 100 program). Lobbyist Robert Rozen describes the access provided by other political party events:

> [S]oft money contributions built around sporting events such as the Super Bowl or the Kentucky Derby, where you might spend a week with the Member, are even more useful. At the events that contributors are entitled to attend as a result of their contributions, some contributors will subtly or not-so-subtly discuss a legislative issue that they have an interest in. Contributors also use the events to establish relationships and then take advantage of the access by later calling the Member about a legislative issue or coming back and seeing the Member in his or her office. Obviously from the Member's perspective, it is hard to turn down a request for a meeting after you just spent a weekend with a contributor whose company just gave a large contribution to your political party.

Id. ¶ 1.77.9. A Fortune 100 company's internal lobbying department justified its request for a $1.4 million nonfederal funds budget for FY 1999 (from its general treasury) in part by

noting:

> due to a significant [sic] in the number of events scheduled by the parties for their donors, the number of opportunities . . . to develop relationships with elected and administration officials has never been greater. As the parties compete more vigorously for soft money dollars, the number and quality of events for interacting with both the leadership and rank and file Members has been greatly increased. Between the six main committees (DNC, DSCC, DCCC, RNC, NRCC, NRSC) there are events both in and out of [Washington, D.C.] almost every day of the week.

Id. ¶ 1.78.1.

These events are touted by the parties as opportunities to meet and discuss issues with Members of Congress. *Id*. ¶ 1.77.8. For example, Senator McConnell, as head of the NRSC, wrote a solicitation letter which noted that the Republican Senate Council ($5,000 annual PAC contribution) and the Chairman's Foundation ($25,000 annual corporate gift) provide "excellent opportunities for both corporate executives and Washington representatives to meet and discuss current issues with leading Republican Senators." The RNC sought $250,000 donations as part of its Annual Gala, and offered such donors breakfast with the Senate Majority Leader and Speaker of the House, as well as a "[l]uncheon with Republican House and Senate Leadership and the Republican House and Senate Committee Chairmen of your choice." *Id*. Furthermore, the political parties accept donor requests as to which Member they would like seated at their table at political party dinners. *Id*. ¶ 1.77.7. The record shows that donors request to be seated with specific Members or with Members who sit on particular committees, and that these requests have been met. *Id*.

The parties also facilitate access to Members of Congress outside of their donor

events. According to Ms. Beverly Shea, the RNC Finance Division's "policy" is to not "force" federal officeholders to meet with donors, but that it may pass along requests to a Member's scheduler and say "this is a Team 100 member,[164] could you see if you could fit them in." *Id.* ¶ 1.76.1. This statement appears to be accurate. Nothing in the record demonstrates that meetings have been literally forced on Members of Congress. However, there is ample evidence that RNC officials request meetings with Members of Congress on behalf of large donors, which intimate or state bluntly the donor's generosity to the political party. A few examples illustrate how the RNC Finance Division's policy operates. The Chairman of the RNC handwrote the following note to Senate Majority Leader Robert Dole:

> Dear Bob
> [____], CEO of Pfizer, has asked to see you on Wed. 11/1. He is extremely loyal and generous. He also is not longwinded. He'll tend to his business and not eat up extra time. They have proposed a [Internal Revenue Code §] 936 solution that [Republican Senator William] Roth and [Republican Congressman Bill] Archer are considering. I'm sure that is the issue. I'd appreciate it if you'd see [him]. [signed] Haley.

Id. ¶ 1.76. Another appeal for a meeting makes the connection between access and money even more apparent. An RNC letter sent to a staffer to Senator Hagel, asks Senator Hagel to meet with a donor for four "key" reasons including: "[h]e runs [sic] $80,000,000 high tech business," and "[h]e just contributed $100,000 to the RNC." *Id.* It also appears that RNC officials are so confident that their "requests" for meetings with large donors will be granted that they are offered to donors in advance of making such requests to the Member or the

[164] Team 100 is an RNC donor club requiring a $100,000 donation every four years, and $25,000 donations each intervening year. Findings ¶ 158.

Member's staff. A letter from the RNC's Team 100 director thanks a donor for "facilitating Dow [Chemical]'s generous contribution to the Republican Party" and tells the donor: "Give me a call . . . and we can figure out when is a good time to bring your Dow [Chemical] leadership into town to see [RNC Chairman] Haley [Barbour], [Senate Majority Leader Robert] Dole & [Speaker of the House] Newt [Gingrich]." *Id*.

This practice is not limited to the RNC. The former head of the DNC testifies:

> Party and government officials participate in raising large contributions from interests that have matters pending before Executive agencies, the Congress, and other government agencies. Party officials, who are not themselves elected officials, offer to large money donors opportunities to meet with senior government officials. Donors use these opportunities - White House and congressional meetings - to press their views on matters pending before the government.

Id.

On some occasions the connection between access and donations has been made even more obvious. Call sheets in the record from the DNC and the CDP include instructions such as "Ask her to give 80k more this year for lunch with" President Clinton, and ask "if they might be able to do $25,000 for a small mtg with the President." *Id*. ¶ 1.77.10.

In sum, the record reflects that political parties facilitate access to federal candidates and officeholders in exchange for large nonfederal funds donations. It also reflects that some major donors admit that they contribute nonfederal funds, not to help with party building, but to gain access to federal candidates and officeholders.

Donors Contribute Large Nonfederal Money Donations to the National Party Committees For the Purpose of Obtaining Access to Federal Officeholders

It is clear that donors understand the system. The record is replete with examples of donors who give donations for the purpose of obtaining access to federal lawmakers and thereby influence government policy. *Id.* ¶¶ 1.74-1.74.5. Perhaps Roger Tamraz – made famous by his testimony during the Thompson Committee Hearings – summed it up best when he was asked if he made contributions to the DNC because he believed it might get him access and responded: "Senator, I'm going even farther. It's the only reason . . . ." *Id.* ¶ 1.74.3. Mr. Tamraz is not alone. One wealthy political fundraiser observes that "many soft money donations are not given for personal or philosophical reasons. They are given by donors with a lot of money who believe they need to invest in federal officeholders who can protect or advance specific interests through policy action or inaction." *Id.* He notes that some nonfederal money donors give "$250,000, $500,000, or more, year after year," and that for this kind of investment "you need to see a return," just like any other investment. *Id.* Other witnesses experienced with political donations also describe these donations as an "investment" or "the cost of doing business." *Id.* One CEO comments that achieving access is important to corporate givers and that "[f]ederal officeholders actually appear to have sold themselves and the party cheaply. They could have gotten even more money, because of the potential importance of their decisions to the affected businesses." *Id.*

These donors have also discovered that nonfederal donations are more effective at obtaining access to federal lawmakers than federal contributions. *Id.* ¶ 1.78. As former DNC

and DSCC official and current lobbyist Robert Hickmott observes: "If you want to get to know Members of Congress, or new Members of Congress, it is more efficient to write a $15,000 check to the DSCC and to get the opportunity to meet them at the various events than it would be to write fifteen $1,000 checks to fifteen different Senators, or Senators and candidates." *Id*. This sentiment is echoed by various lobbyists and major party contributors, including one lobbyist who notes that "a properly channeled $100,000 corporate soft money donation to the national Republican or Democratic congressional campaign committees can get the corporate donor more benefit than several smaller hard dollar contributions by that corporation's PAC." *Id*. Lobbyist Robert Rozen describes the mentality starkly:

> Donors to the national parties understand that if a federal officeholder is raising soft money--supposedly "non-federal" money--they are raising it for federal uses, namely to help that Member or other federal candidates in their elections. Many donors giving $100,000, $200,000, even $1 million, are doing that because it is a bigger favor than a smaller hard money contribution would be. That donation helps you get close to the person who is making decisions that affect your company or your industry. That is the reason most economic interests give soft money, certainly not because they want to help state candidates and rarely because they want the party to succeed. . . . The bigger soft money contributions are more likely to get your call returned or get you into the Member's office than smaller hard money contributions.

Id. As such, it is abundantly clear that, in general, a large majority of major donors of nonfederal funds to the political party committees contribute this money to gain access to federal officeholders and candidates not to support a political philosophy or "party building" activities. The fact that major nonfederal funds donors give to both political parties only underscores this point.

Contributors of Nonfederal Funds Give to Both Political Parties to Ensure Special Access

The importance to large contributors of gaining access to federal lawmakers in order to press their individual agendas leads many, in the words of one witness, to "hedge their bets, to ensure they get access to office holders on the issues that are important to them." *Id.* ¶ 1.79; *see also id.* ¶ 1.80. One CEO put it this way: "As a donor with business goals, if you want to enhance your chances of getting your issues paid attention to and favorably reviewed by Members of Congress, bipartisanship is the right way to go. Giving lots of soft money to both sides is the right way to go from the most pragmatic perspective." *Id.* ¶ 1.79. The parties are aware of this view, as one document from the Ohio Republican party entitled "Why People Give" includes the observation: "many people give to both sides so that they will have access to whoever is the winner." *Id.* ¶ 1.80.[165]

The record also contains evidence that the political parties exploit contributors' fears of losing access if they back one political party and that party loses control of Congress. One CEO describes the situation this way:

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[165] The RNC claims that the record "establishes that organizations and individuals may give to both parties because they desire to be actively involved in the political process." *Id.* ¶ 1.80.1. In support of this statement, the RNC provides a statement by a PhRMA representative that the group gives to the convention activities of both parties because "we are good civic participants," and a deposition statement from one of Defendants' experts acknowledging the *possibility* that donors provide support to both parties because they support some members from each party. *Id.* Although these statements suggest that donors "may" give to both parties for reasons other than access, they do not contradict the numerous statements and documents in the record that demonstrate that special access is the *primary* motivation for many donors who give to both parties. *Id.* Moreover, interests in participating in the political process and in obtaining special access to legislators to influence them are neither incompatible nor mutually exclusive.

> [I]f you're giving a lot of soft money to one side, the other side knows. For many economically-oriented donors, there is a risk in giving to only one side, because the other side may read through FEC reports and have staff or a friendly lobbyist call and indicate that someone with interests before a certain committee has had their contributions to the other side noticed. They'll get a message that basically asks: "Are you sure you want to be giving only to one side? Don't you want to have friends on both sides of the aisle?" If your interests are subject to anger from the other side of the aisle, you need to fear that you may suffer a penalty if you don't give. First of all, it's hard to get attention for your issue if you're not giving. Then, once you've decided to play the money game, you have to worry about being imbalanced, especially if there's bipartisan control or influence in Washington, which there usually is. In fact, during the 1990's, it became more and more acceptable to call someone, saying you saw he gave to this person, so he should also give to you or the person's opponent. Referring to someone's financial activity in the political arena used to be clearly off limits, and now it's increasingly common.

Id. ¶ 1.80; *see also id*. ¶ 1.70-1.70.4 (facts regarding pressure placed on political donors). An internal Eli Lilly and Company document shows these concerns in action. *Id*. ¶ 1.79. The *Washington Post* had listed the company as a top donor to the Republican party. *Id*. A handwritten notation on a photocopy of the article says "Dems are upset . . . . White House stays Dem we are in trouble," and an internal memorandum refers to discussions with the White House indicating that Eli Lilly "can get back into this by giving $50[,000]- 100,000 to the DNC– says they would be pleased with this." *Id*.

Another good example of this practice of giving to both political parties is that in 2000, a Fortune 100 company agreed to contribute $25,000 to the NRSC at the request of George Allen, the then-Republican-candidate in the 2000 Senatorial race in Virginia against incumbent Senator Chuck Robb. An employee noted that the company had donated to Senator Robb's Leadership PAC and that a similar contribution to the NRSC was necessary

to balance out the company's support for the candidates. *Id*.

The Tarrance Group/CED poll of business leaders found that 74 percent of respondents "say pressure is placed on business leaders to make large political donations. The main reasons corporate America makes political contributions, the executives said is fear of retribution and to buy access to lawmakers." *Id*. ¶ 1.70.1. Another poll conducted in 1997 of major congressional donors found that 80 percent of those surveyed agreed that "office-holders regularly pressure donors for contributions." *Id*. ¶ 1.70.3.[166] Lobbyist Robert Rozen provides context for this fear:

> In some cases corporations and trade associations do not want to give in amounts over the hard money limits, but they feel pressured to give in greater amounts and end up making soft money donations as well. They are under pressure, sometimes subtle and sometimes direct, from Members to give at levels higher than the hard money limits. For example, some Members in a position to influence legislation important to an industry naturally wonder why a company in that industry is not participating in fundraising events.

Id. ¶ 1.70.2. Former Senator Boren notes that political donors feel that they are victims of "shake[] down[s]." *Id*. ¶ 1.70.4. One internal memorandum from a Fortune 100 company notes that "our traditional competitors continue to contribute large amounts of soft money," and predicted that failure to "maintain our soft money participation during this election cycle – given the heightened scrutiny those contributions will receive in the current competitive climate – <u>may</u> give our new and traditional competitors an advantage in Washington. *Id*. ¶

[166] The poll also showed that 76 percent of the major donors surveyed believed the campaign finance system was either "broken and needs to be replaced," or "has problems and needs to be changed." *Id*. ¶ 1.70.3. Three-quarters of respondents supported a "ban on large 'soft money' donations." *Id*.

1.78.1 (emphasis in original); *see also Buckley*, 519 F.2d at 839 n.37 ("The disclosures of illegal corporate contributions in 1972 included the testimony of executives that they were motivated by the perception that this was necessary . . . 'in response to pressure for fear of a competitive disadvantage that might result.'") (quoting statement of former chairman of American Airlines, George Spater) (internal citations omitted) (cited in *Buckley*, 424 U.S. at 27 n.28).

The evidence detailed above clearly indicates that large donations to political parties, especially nonfederal donations, open doors to federal lawmakers' offices. The record shows that the reverse is also true: failure to provide large nonfederal donations can effectively block access to federal lawmakers. As one CEO put it: "It is obvious to me that large soft money donations do buy access, that they can influence federal policy, and that they are corrupting to federal officeholders and to donors. Additionally, these unlimited donations to political parties pose a far greater risk than do hard money contributions to candidates of at least the appearance, if not the reality, of special interest influence on federal policy." Findings ¶ 1.83.6; *see generally id*. (testimony and poll results demonstrating wealthy individual donors find the campaign finance system as either corrupt or as creating the appearance of corruption). In sum, the evidence demonstrates that major donors of nonfederal money primarily give these contributions to the national committees to gain access to federal officeholders. Notably, the record also demonstrates that major nonfederal money donors give to the state and local committees for the benefit of federal officeholders

and candidates.

Federal Candidates Are Cognizant of the Benefits of Having Nonfederal Money Donors Contribute to State Parties

Federal candidates understand that they can benefit from donations made to the state political parties. The evidence discussed *infra* demonstrates that candidates solicit contributions to the state parties to assist their campaigns. *See infra* at 556. However, perhaps the most probative evidence of the importance federal candidates place on such contributions is a letter written by Senator Mitch McConnell to one of his contributors. He writes:

> Since you have contributed the legal maximum to the McConnell Senate Committee, I wanted you to know that you can still contribute to the Victory 2000[167] program . . . . This program was an important part of President George W. Bush's impressive victory in Kentucky last year, and it will be critical to my race and others next year.

Id. ¶ 1.60. Senator McConnell also handwrote: "This is important to me. Hope you can help." *Id*; *see also id*. (letter from Congressman Wayne Allard explaining to a contributor that although maxing out to his campaign, the contributor could further help his campaign by donating to the Colorado Republican Party).

These additional facts confirm that nonfederal donations to the state political parties affect federal elections and are valued by federal candidates. It is therefore clear that such donations to state political parties can result in access to federal officials while also providing

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[167] Victory programs are programs designed by the state Republican parties in conjunction with the RNC and implemented by the state party with assistance from the RNC. *See* Findings ¶¶ 1.43.2.

a route to circumvent FECA's limitations.

Political Donations Achieve Political Results

As discussed at length earlier, in the context of supporting contribution restrictions, *Buckley* and its progeny do not require evidence that large contributions to candidates were conditioned upon a certain decision by a federal officeholder or candidate. *Buckley*, 519 F.2d at 839 n.36 (cited in *Buckley*, 424 U.S. at 27 n.28) ("It is not material, for present purposes, to review the extended discussion in the Final Report on the controverted issue of whether the President's decision was in fact, or was represented to be, conditioned upon or "linked" to the reaffirmation of the pledge."). Nevertheless, a few examples from my Findings of Fact and prior caselaw illustrate that in many instances large nonfederal donations produce the desired result for the donor. Indeed, why else would corporate executives refer to general treasury contributions to the political parties as "investments" or the "cost of doing business" if results were not obtained? *See supra* at 530. Although there is no evidence in the record before this three-judge panel that federal bribery or gratuity laws have been violated in exchange for nonfederal funds, *see* Findings ¶ 1.64, that is not what *Buckley* requires as a basis for support of a contribution restriction. As *Buckley* observed, bribery laws "deal with only the most blatant and specific attempts of those with money to influence government action." *Buckley*, 424 U.S. at 28. Contribution limitations, like those in Title I and in *Buckley*, target the "opportunity for abuse inherent in the process of raising large monetary contributions." *Id*. at 30. Former Senator Rudman speaks to this point:

> I understand that those who opposed passage of the Bipartisan Campaign Reform Act, and those who now challenge its constitutionality in Court, dare elected officials to point to specific [instances of vote buying]. I think this misses the point altogether. [The access and influence accorded large donors] is inherently, endemically, and hopelessly corrupting. You can't swim in the ocean without getting wet; you can't be part of this system without getting dirty.

Id. ¶ 1.65. The record in this case confirms Senator Rudman's view that large nonfederal contributions to the national political party committees achieve access. *See id*. ¶¶ 1.75-1.80.1, 1.81. The record also contains an example demonstrating that large nonfederal donations achieve their intended result– that is, having an effect "on candidates' positions and on their actions if elected to office." *Id*. ¶ 1.66. Senator Simon testifies:

> It is not unusual for large contributors to seek legislative favors in exchange for their contributions. A good example of that which stands out in my mind because it was so stark and recent occurred on the next to last day of the 1995-96 legislative session. Federal Express wanted to amend a bill being considered by a Conference Committee, to shift coverage of their truck drivers from the National Labor Relations Act to the Railway Act, which includes airlines, pilots and railroads. This was clearly of benefit to Federal Express, which according to published reports had contributed $1.4 million in the last 2-year cycle to incumbent Members of Congress and almost $1 million in soft money to the political parties. I opposed this in the Democratic Caucus, arguing that even if it was good legislation, it should not be approved without holding a hearing, we should not cave in to special interests. One of my senior colleagues got up and said, 'I'm tired of Paul always talking about special interests; we've got to pay attention to who is buttering our bread.' I will never forget that. This was a clear example of donors getting their way, not on the merits of the legislation, but just because they had been big contributors. *I do not think there is any question that this is the reason it passed.*

Findings ¶ 1.66; *see also Colorado II*, 533 U.S. 431, 451 n.12 (2001) (quoting Senator Simon's declaration); *see also* Findings ¶ 1.66 (Senator Feingold testifying that in the fall of

1996 a senior Senator suggested to him that he support the Federal Express amendment because "they just gave us $100,000").

In addition, the record makes clear that the national political parties lobby their Members of Congress on various legislative issues. *Id.* ¶ 1.67. A document in the record suggests that at least on one occasion the political parties have asked Members to take a position on an issue because of a donor's interest in the issue. *Id.* ¶ 1.67.1.[168] Furthermore, Plaintiffs' expert La Raja acknowledges that the "potential for quid pro quo exchange between contributor and policymaker escalates with the size of the contribution," and recommends that "[t]o reduce the potential for corruption, I recommend that Congress place a cap on hard money contributions or, if soft money is banned, raise the limits on hard money contributions." *Id.* ¶ 1.69.

Therefore, while the record contains no evidence that federal bribery laws have been broken–something not required by *Buckley* to support the contribution restrictions at issue in the case–the record does contain certain examples showing that access achieves legislative results and creates the potential for such arrangements. Findings ¶¶ 1.63, 1.68. Even without this evidence, the access provided to federal officeholders and candidates by the political party committees is more than sufficient to justify Congress's decision to enact Title I.

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[168] There is also testimony in the record suggesting that the political parties threaten to withhold financial support for Members' campaigns if they do not take the political party's position on an issue. Findings ¶ 1.68.

Polling Data Demonstrates an Appearance of Corruption Relating to Large Donations to the Political Parties

Evidence in the record demonstrates that the public, in response to the existence of large nonfederal donations, perceives corruption in the nation's campaign finance system. Findings ¶ 1.84. A poll conducted by two prominent political pollsters, Mark Mellman and Richard Wirthlin, shows that Americans believe that large donations to political parties affect the decisions of Members of Congress. *Id.* ¶¶ 1.83.1, 1.83.1.1 The poll found that 77 percent of Americans believe that big contributions to political parties have at least some impact on decisions made by the federal government-- 55 percent believe the impact is great. *Id.* Results from the 2002 Mellman and Wirthlin poll are also strikingly similar to those of a survey conducted in 1974 and cited by the D.C. Circuit in *Buckley*, which reported that 69.9 percent of respondents believed that "the government is pretty much run by a few big interests." *Buckley*, 519 F.2d at 838-39. Mellman and Wirthlin's survey found that 71 percent of those polled believe that Members of Congress make decisions based on what the big contributors to their party want, even if it is not what their constituents want or what the Member thinks is in the best interests of the country. Findings ¶ 1.83.1. An even greater percentage, 84 percent, believe that Members are more likely to listen to large party contributors because of their contributions, and 68 percent think that big contributors to political parties have blocked decisions by the federal government that could improve people's everyday lives. *Id.* The poll also reflects that the public perceives that their views are given less attention than those of large contributors. Eighty-one percent of those polled

believe that the views of those corporations, unions, interest groups or individuals who donate $50,000 or more to a political party would likely receive special consideration from Members of Congress, while only 24 percent believe a Member is "likely to give the opinion from someone like them special consideration." *Id.*

Professor Robert Shapiro's review of public opinion polls conducted since 1990 confirms the Mellman and Wirthlin conclusion that large nonfederal contributions are viewed as corrupting by the public. *Id.* ¶ 1.83.2. He concludes that the public is troubled and opposes large unregulated nonfederal contributions to political parties, that "a substantial proportion of the public has perceived corruption in the political system, and that we are losing ground." *Id.*

Another poll shows that 76 percent of high-level political contributors, those who know the campaign finance system first-hand, are critical of the regime. *Id.* ¶ 1.83.6. The polling data is confirmed by the testimony of corporate and individual donors stating that nonfederal donations corrupt the campaign finance system or create the appearance of corruption. *Id.*

This polling data on the appearance of corruption reflects a dispiriting reality. The public's perception of the influence and effect of large nonfederal donations justified Congressional action in enacting Title I.

Members of Congress Report that Constituents Are Concerned About Large Contributions to Political Parties Which Demonstrates an Appearance of Corruption

In addition to the polling data, Members of Congress have expressed concern that

large contributions to their political parties create the appearance of corruption in the eyes of their constituents. *Id.* ¶ 1.83.3. Among them is former Senator Simpson, who testifies that "[b]oth during and after my service in the Senate, I have seen that citizens of both parties are as cynical about government as they have ever been because of the corrupting effects of unlimited soft money donations." *Id.* Representative Asa Hutchinson wrote to the RNC Chairman that he could not support the RNC's proposed campaign finance bill because he had to balance the RNC's concerns

> with a concern of my constituents which is that their influence in politics is being diminished by the abuses of soft money . . . . If our party is unable to enact meaningful campaign finance reform while we're in control of Congress, then I believe this failure to act will result in more cynicism and create a growing lack of confidence in our efforts.

Id.

Members of Congress have also expressed concern over the appearance of corruption inherent in the intersection of large contributions and legislative action on issues of concern to the contributors. For example, Senator McCain testifies:

> [T]here's an appearance [of corruption] when there's a million dollar contribution from Merck and millions of dollars to your last fundraiser that you held, and then there is no progress on a prescription drug program. There's a terrible appearance there. There's a terrible appearance when the Generic Drug Bill, which passes by 78 votes through the Senate, is not allowed to be brought up in the House shortly after a huge fundraiser with multimillion dollar contributions from the pharmaceutical drug companies who are opposed to the legislation.

Id. ¶ 1.83.4. In addition, Senator Feingold has remarked that "a $200,000 contribution [was] given 2 days after the House marked up a bankruptcy bill by MBNA. OK, it is not illegal.

Conceded. Maybe it is not even corrupt, but it certainly has the appearance of corruption to me and I think to many people." *Id*.

Examples like these are often picked up by the press, as evidenced by the sample press articles provided by Defendants. *Id*. ¶ 1.83.5; *see also id*. (Senator Simpson and Plaintiffs' expert Primo on the effect of press reports on the public's perception of corruption); *cf. Buckley*, 519 F.2d at 839 n.36 ("Looming large in the perception of the public and Congressmen was the revelation concerning the extensive contributions by dairy organizations to Nixon fund raisers, in order to gain a meeting with White House officials on price supports.").

Plaintiffs' expert La Raja comments:

> [O]ne cannot ignore the central claim of reformers that the cash-based electoral environment fosters mistrust of the political system. Observing the amounts of money raised and spent in campaigns makes the average American skeptical that the political process is fair. Such doubts raise questions about political legitimacy. Even if politicians are not corrupt – and there has been minimal evidence to prove this claim – there is certainly the appearance of corruption. . . .
> It does not help matters that parties contribute to the arms race in campaigns. By using soft money parties raise the ante in elections. Candidates feel vulnerable to parties and interest groups that sponsor issue ads so they raise more money than ever. Campaign costs increase as each side fights to a draw . . . . Thus, the foraging for campaign money contributes to the perspective that money corrupts the system.

Id. ¶ 1.83.7.

This testimony demonstrates that Members of Congress and political scientists were aware of the public's disaffection with the campaign finance system, and nonfederal money

in particular, prior to BCRA's enactment.

Conclusion

In enacting Title I, Congress clearly was aware of the parallels between the "coercive influence" of unlimited donations to federal candidates addressed by FECA's contribution limitations, and the "coercive influence" of nonfederal money donations to the national political party committees the government asserts supports Title I. *See, e.g.*, Thompson Committee Report at 4563 (minority report) ("No one can deny that individuals who contribute substantial sums of money to candidates are likely to have more access to elected officials. And most of us think greater access brings greater influence. It was this concern over linkages between money, access and influence -- amid allegations that Richard Nixon's 1968 and 1972 presidential campaigns accepted individual contributions of hundreds of thousands, even millions, of dollars -- that spurred Congress to enact the original campaign finance laws. While those laws have evolved over the 20 years since that time, the goals have remained the same: to prevent wealthy private interests from exercising disproportionate influence over the government, to deter corruption, and to inform voters."); *see also id*. at 42-43 (majority report) ("Simply put, 25 years after Congress passed election reform laws intended to insulate the President from an unseemly and potentially corrupting involvement with campaign money, President Clinton spent enormous amounts of time during the 1996 election cycle raising money. In the ten months prior to the 1996 election, President Clinton attended more than 230 fundraising events, which raised $119,000,000.

The President maintained such a pace for over a year before the election, often attending fundraisers five and six days each week. According to Presidential campaign advisor Dick Morris, President Clinton 'would say "I haven't slept in three days; every time I turn around they want me to be at a fundraiser . . . I cannot think, I cannot do anything. Every minute of my time is spent at these fundraisers." This frenzied pursuit of campaign contributions raises obvious and disturbing questions. Can any President who spends this much time raising money focus adequately upon affairs of state? Is it even possible for such a President to *distinguish* between fundraising and policymaking?"). Congress appropriately recognized that nonfederal money donations are primarily "given to secure a political *quid pro quo* from current and potential office holders," which undermines "the integrity of our system of representative democracy." *Buckley*, 424 U.S. at 26-27.

The record in this case is impressive and is much more substantial than what was found in *Buckley* to support the contribution limitations at issue in that case. Prior to BCRA, federal candidates and officials assisted their national political party committees in raising enormous funds not only well outside FECA's amount limitations, but also outside FECA's source limitations. The large nonfederal money donations were primarily given for one purpose: they provided access to federal officeholders in order to exert influence over federal legislative activity. *Buckley* and its progeny hold that Congress has broad authority to combat the corruption associated with this situation. The corruption associated with nonfederal donations to political party committees, and the appearance of corruption in the

mind of the public, therefore presents a compelling justification for Congress's enactment of Title I.

(2) Evidence From the Record in this Case Relating to Circumvention

Before turning to the evidence of circumvention in the record, it bears repeating that the record before the Supreme Court in *Colorado II* contained *no* actual evidence of political parties making unlimited coordinated expenditures, but just a hypothesis of what could occur if the "floodgates" to this practice were opened. *Colorado II*, 460 U.S. at 459 n.22. In *this case*, the record before the three-judge District Court establishes in compelling fashion that prior to the passage of BCRA, the contribution limitations in FECA were rendered edentulous and that Congress, therefore, had justification to act. With that observation in mind, I turn to the evidence in the record related to circumvention.

The National Party Committees Collect and Spend Nonfederal Funds Primarily to Avoid FECA's Contribution Limitations

The record in this case amply demonstrates that the national political parties have used nonfederal funds to circumvent FECA's contribution limits. The evidence leads me to the same conclusion reached by Plaintiffs' expert Raymond La Raja:

> By exploiting soft money rules, the parties effectively sidestep the federal ceilings that prevent them from allocating resources efficiently in the closest contests. To navigate around the federal restrictions on soft money the parties have developed close ties with their state parties because these affiliates receive special exemptions for party building activity.

Findings ¶ 1.69. As La Raja notes, the national political parties have used nonfederal funds

themselves, and through their state party counterparts, to affect federal elections, in contravention of the spirit, if not the letter, of FECA.

The national political parties use nonfederal funds for electioneering purposes, despite the fact that such funds are permitted under the rationale that they be used for "party building" activities. *Id.* ¶ 1.41. The evidence shows that political parties spend a great deal of the nonfederal funds that they raise on issue advocacy, *id.* ¶ 1.23-1.25, and testimony from political party officials and experts, as well as documents in the record, show that very few of these advertisements are aimed at party building, but rather are designed to affect federal elections.

The National Party Committees Spend Nonfederal Funds on "Issue Advocacy" Advertisements That Are Designed to Influence Federal Elections

The RNC's own experts testify that "issue advocacy outside the context of electioneering by political parties is rare," and that party-sponsored issue advertisements are intended to and do support the campaigns of federal candidates. *Id.* ¶ 1.19-1.19.1. These assertions are supported by the numerous examples of these advertisements submitted for the record, *see, e.g., id.* ¶¶ 1.14, 1.15 , as well as the testimony of Members of Congress, federal candidates, political consultants, and an RNC official who acknowledges that the RNC's issue advocacy efforts are aimed at achieving a primary objective of getting more candidates elected, *id.* ¶ 1.19, 1.13. Many of these advertisements focus on a candidate's characteristics or past actions (without reference to a future legislative event), such as one which noted that a Congressional candidate had voted to raise taxes while in state and local government, and

concluded with the line: "If you think your family pays enough taxes . . . Call [___]. Tell her to stop raising your taxes". *Id.* ¶ 1.14. Other advertisements run by political parties compare the past records of competing candidates in a stark and loaded fashion. *Id.* ¶ 1.15. One such advertisement stated that one candidate was "the only member of Congress who did not want to tell parents when a child molester moved into their neighborhood" but that the other "supports laws that protect our children and keep violent criminals in jail for their full terms." *Id.* Another such advertisement told viewers that one candidate supported a welfare program that "is restoring responsibility, pride and self-worth," but that the other "voted against moving able-bodied welfare recipients from welfare to work." *Id.* (emphasis in original). The notion that such advertisements are intended to promote issues and not political campaigns strains credulity.

The empirical evidence submitted shows that political party advertisements are overwhelmingly candidate-centered. Ninety-two percent of party-sponsored advertisements aired during the 2000 election did not identify the sponsoring political party by name, or encourage voters to register with or support the party. *Id.* ¶ 1.17. During the 1998 election cycle, of the $25.6 million spent by the political parties on advertisements, $24.6 million went to commercials that referred to a federal candidate; out of the 44,485 advertisements purchased by the parties, 42,599 identified a federal candidate. *Id.* ¶ 1.18.

Furthermore, it is clear that the political parties run their advertisements largely in competitive races, where the record shows they can have a significant impact on the outcome

of the election. *Id*. ¶¶ 1.16-1.16.1. The political parties also run advertisements to assist their candidates' campaigns when they are low on funds. *Id*. ¶ 1.20. For example, the RNC spent $20 million in so-called "issue advocacy" to assist the Dole campaign between March and August 1996 when the campaign had almost run out of money. *Id*. The advertisements run by the RNC at this time included "The Story," *id*. ¶ 1.20.1, and "Pledge," *id*. 1.20.2, which exemplify the two themes of the RNC's campaign: build up then-Senator Dole and attack then-President Clinton, *id*. ¶ 1.20. The record shows that the RNC had done "quantitative and qualitative research [which] strongly suggest[ed] that ["The Story"]needs to be run," but was concerned that "[m]aking this spot pass the issue advocacy test may take some doing." *Id*. 1.20.1. Nevertheless, the advertisement was run and paid for in part with nonfederal funds. *Id*.

This record convincingly demonstrates that political party advertisements, on which much of the nonfederal funds collected by the national political party committees is spent, influence federal elections and have little to do with "party building."[169] *Id*. 1.10, 1.22. The political parties are well aware of this as demonstrated by the fact one national political party committee openly solicited funds for an issue advocacy campaign by describing it as an effort "to ensure that the [Republican] party not only maintains, but expands our majorities in Congress." *Id*. ¶ 1.21. This reality, leads inevitably to the "conclusion that party soft money

[169] Indeed, many of the characteristics of political party advertisements mirror those of interest group-sponsored candidate-centered issue advocacy, detailed in my discussion of Title II, *supra*.

and electioneering in the guise of issue advocacy ha[s] rendered the FECA regime largely ineffectual." *Id*. ¶ 1.9.

National Party Committees Spend Comparatively Little Nonfederal Money on "Party Building Activities," Most of Which Have Some Impact on Federal Elections

Plaintiffs have provided examples of where national political parties have used nonfederal, or a mix of nonfederal and federal money, for what they call "party-building" activities. Activities such as state redistricting efforts, *id* ¶¶ 1.34-1.34.3, training seminars for candidates, party officials, activists and campaign staff, *id*. ¶ 1.36, state and local government affairs activities, *id*. ¶ 1.37, and minority outreach, *id*. ¶ 1.38, are all paid for with a mix of federal and nonfederal funds which demonstrates that they have an effect on federal elections, *id*. ¶ 1.40. Furthermore, the figures provided by the RNC show that these activities constituted a very small percentage of their nonfederal and combined spending for the 2000 cycle. *Id*. This finding computes with that of Plaintiffs' expert Raymond La Raja, who finds that only "8.5 percent of national party soft money expenditures went to 'mobilization' or 'grassroots'" activities during the 2000 election cycle. *Id*. ¶ 1.25.[170]

The national political parties also spend nonfederal money on contributions to state and local candidate campaigns. *Id*. ¶ 1.39. Defendants' expert Thomas Mann found that during the 2000 election cycle, "the national parties contributed only $19 million directly to

[170] The national political parties spend more nonfederal money on administrative expenses, which constitute operating expenses such as salaries, benefits, supplies, and travel expenses; however, Plaintiffs' expert La Raja notes that these efforts do not constitute "party building" activities. Findings ¶¶ 1.35, 1.26.4. Furthermore, these expenses are paid for with a mix of funds demonstrating that they too have an effect on federal elections. *Id*. ¶ 1.35.

state and local candidates, less than 4% of their soft money spending and 1.6% of their total financial activity in 2000." *Id*. The RNC testifies that during the 2000 election campaign, it donated approximately $7.3 million in nonfederal funds to state and local candidates. *Id*. FEC documents show that this represents a very small percentage of the $163,521,510 in nonfederal funds the RNC spent during the 2000 election cycle. *Id*. Again, it is evident that despite Plaintiffs' examples, the vast majority of nonfederal funds are not being used for "party building" activities.

Nonfederal Money Donations Are Often Made on Behalf of Federal Candidates In Order to Circumvent FECA's Individual Limitations

Nonfederal donations to the national party committees, despite the fact they are supposed to be used for "party building" purposes, are often solicited and made with the intent that they will be used to assist a federal candidate's campaign. *Id*. 1.56. Senator Simpson observes that

> [d]onors do not really differentiate between hard and soft money; they often contribute to assist or gain favor with an individual politician. When donors give soft money to the parties, there is sometimes at least an implicit understanding that the money will be used to benefit a certain candidate. Likewise, Members know that if they assist the party with fundraising, be it hard or soft money, the party will later assist their campaign.

Id. ¶ 1.56.1. The Findings demonstrate that donors who give nonfederal funds to political parties to support federal candidates are doing so to evade the individual contribution limitations. *See id*. ("Although soft money cannot be given directly to federal candidates, everyone knows that it is fairly easy to push the money through our tortured system to benefit

specific candidates.") (quoting Senator Simpson). One donor explains that "[t]here appeared to be little difference between contributing directly to a candidate and making a donation to the [state] party. . . . Through my contributions to the political parties, I was able to give more money to further Clinton's candidacy than I was able to give directly to his campaign." *Id.* ¶ 1.59.

These findings correlate to the record that was before the Supreme Court in *Colorado II*, which stands for the same principle, that for donors the national political parties act as conduits to federal candidates. *See supra* at 508. In the words of then-RNC Chairman Haley Barbour: "the purpose of a political party is to elect its candidates to public office . . . ." Findings ¶ 1.49.1. This sentiment is especially true with regard to the national congressional campaign committees. As Plaintiffs' expert La Raja observes, these committees traditionally limit their activities to assisting their candidates' campaigns. *Id.* ¶ 1.26.6. Therefore, the record reflects that major nonfederal money donors use political parties to produce "obligated officeholders." *Colorado II*, 533 U.S. at 452.

State and Local Party Committees Play an Integral Role in Helping the National Party Committees Spend Nonfederal Funds on Federal Elections

The record also demonstrates that the national political parties have used their state political party "branches," as Plaintiff's expert Raymond La Raja terms them, as part of their FECA circumvention scheme. Findings ¶ 1.42. Indeed, the RNC admitted as much in its briefing:

The Republican Party is *a single, unitary organization* that comprises various

> interrelated parts – the RNC, state and local parties, the RNC's 165 members, candidates identifying themselves as "Republicans," and so forth. Indeed, the state parties select the 165 voting members of the RNC, and the party through its convention and other mechanisms nominates candidates.

RNC Opp'n at 23 (emphasis added). As La Raja concludes, the closeness between the state and national political parties is a result of the attractiveness of using the state political parties' more favorable federal/nonfederal money allocation ratios to fund federal electioneering practices. Findings ¶ 1.42. Large sums of nonfederal funds have been transferred to the state political parties over the past decade. *Id*. ¶ 1.26.3. During the 2000 election cycle, over half of the nonfederal money raised by the national party committees was transferred to the state political parties, a sum reaching $266 million. *Id*. ¶¶ 1.26.3, 1.4.3. Rather than being used for "party-building" activities, as the rationale for nonfederal funds provides, a large proportion of these funds were used to finance issue advertisements intended to influence federal elections. *Id*. ¶¶ 1.26.4; *see also id*. ¶ 1.26. Plaintiffs' expert La Raja finds that when administrative expenses are excluded from the calculus, state political parties invest most nonfederal funds transferred from the national political parties on federal races, *and concludes that more nonfederal funds are used for media rather than party building*. *Id*. Similarly former Senator William Brock, who is also a former Chairman of the RNC, testifies that nonfederal funds are used almost exclusively to help elect federal candidates and not for "party building." *Id*. ¶ 1.11. A 1998 financial statement from the Republican Party of New Mexico shows that it received revenues of $1,524,634 in nonfederal transfers from other Republican organizations, $1,110,987 in individual

contributions, and $389,552 in federal transfers from Republican organizations. The state political party spent over one-third of its revenues on "issue advocacy." *Id.* ¶ 1.26.4.1.

Moreover, representatives of all the major national congressional committees testify that they transfer nonfederal funds to state political parties in order to purchase advertisements aimed at influencing federal elections. *Id.* ¶ 1.26.6. They also state that although the state political parties may reject the national party committee's requests that transferred money be wired to specific consultants to pay for specific advertisements, they generally comply with the request. In addition, advertisements supported with congressional committee funds are not produced or recorded until the national party committees provide final approval. *Id.* ¶ 1.26.7. Documentary evidence supports this testimony, and shows that the state political parties are merely conduits in this process. *Id.* ¶ 1.26.7.2 (communications from the NRCC to the CRP providing information about money that was wired to CRP's account with instructions to wire the money to a media consulting firm, and similar documents from the DCCC to the CDP), ¶ 1.26.7.1 (NRSC memorandum suggesting an idea for an attack advertisement, and a copy of an advertisement implementing the idea paid for by the Republican State Central Committee of Nevada). These statements and documents compute with Plaintiffs' expert La Raja's observation that "[i]t would be particularly surprising for congressional campaign committees to venture outside their traditional scope of helping candidates and invest in state party organizations." *Id.* ¶ 1.26.6. The record also demonstrates that the DNC and RNC operate in the same fashion. *Id.* ¶ 1.26.7.3, 1.26.7.2.

By purchasing these advertisements through the state political parties, the national political parties take advantage of the better federal-to-nonfederal spending ratios under which the state political parties operate. *Id.* ¶ 1.26.2, 1.27.

In addition, both national political parties prepare and execute detailed campaign strategies with their state affiliates for election campaigns that include state and federal elections. *Id.* ¶ 1.43. The Democratic national and state political parties implement "Coordinated Campaigns" which aim to allocate resources and coordinate plans for the benefit of Democratic candidates up and down the entire ticket. *Id.* ¶ 1.43.1. The Republican Party develops and implements similar plans with its state party affiliates called "Victory Plans." *Id.* ¶¶ 1.43.2-1.43.2.3. These plans demonstrate the close affiliation and cooperation between the national and state political parties that has led one state political party official to conclude that her state political party and national political party were "integrally related." *Id.* ¶ 1.43.1.

Therefore, it is very apparent that prior to BCRA's enactment national political party committees were using their state branches to assist in their circumvention of FECA, and in the process were integrating the state political parties into the national political party structure. Given this scenario, Congress made an appropriate predictive judgment that the enactment of BCRA's ban on nonfederal donations to the national political parties would escalate the use of nonfederal donations to state political parties to circumvent national campaign finance laws. *Id.* ¶¶ 1.44, 1.45.

It should be noted that Congress's concern – that restrictions on state and local political parties were necessary to prevent evasion of the nonfederal money ban at the national committee level – is justified not only by the record in this case, but by Congress's institutional experience in the area of campaign finance regulation. The evidence before the *Buckley* Court indicated that the $2 million contribution from the dairy industry to President Nixon's campaign was divided up into smaller amounts among hundreds of *state-level committees* in order to avoid disclosure requirements. *Buckley*, 519 F.2d at 839 n.36 (cited in *Buckley*, 424 U.S. at 27 n.28). Therefore, the technique of shifting money used to benefit a federal candidate from the national level to the state level in order to avoid a federal restriction is not new. Congress appropriately recognized the threat to the nonfederal funds prohibition at the national committee level, if the state and local political party committees were not prevented from using nonfederal funds on activities that directly influence federal elections.

Nonfederal Money Donations Are Provided to State Party Committees on Behalf of Federal Candidates In Order to Benefit the Federal Candidate

Furthermore, federal candidates and national party committees inform donors who have given the maximum amount of federal funds to their campaigns/committees that they can still help federal candidates by donating funds to state political parties. Findings ¶¶ 1.59, 1.60. An example of this is Congressman Wayne Allard's letter relied on in *Colorado II* and discussed *supra* at 510. One CEO describes the practice this way:

In 1992, when I told the Democratic Party that I wanted to support

> then-Governor Bill Clinton's presidential campaign, they suggested that I make a $20,000 hard money contribution to the DNC, which I did. The Democratic Party then made clear to me that although there was a limit to how much hard money I could contribute, I could still help with Clinton's presidential campaign by contributing to state Democratic committees. . . . Accordingly, at the request of the DNC, I also made donations on my own behalf to state Democratic committees outside of my home state. . . . Through my contributions to the political parties, I was able to give more money to further Clinton's candidacy than I was able to give directly to his campaign.

Findings ¶ 1.59. One wealthy contributor provides similar testimony:

> Federal candidates have often asked me to donate to state parties, rather than the joint committees, when they feel that's where they need some extra help in their campaigns. I've given significant amounts to the state parties in South Dakota and North Dakota because all the Senators representing those states are good friends, and I know that it's difficult to raise large sums in those states. The DSCC has also requested that I provide assistance to state parties.

Id. ¶ 1.60. As former DNC and DSCC official Robert Hickmott explains, "[o]nce you've helped a federal candidate by contributing hard money to his or her campaign, you are sometimes asked to do more for the candidate by making donations of hard and/or soft money to . . . the relevant state party . . . ." *Id*. ¶ 1.59.

In addition, one CEO comments that in the past, donors who had reached their federal limit would ask candidates if a nonfederal contribution would assist the campaign and were told: "Don't bother. The soft money just doesn't do me any good." However,

> in recent election cycles, Members and national committees have asked soft money donors to write soft money checks to state and national parties solely in order to assist federal campaigns. Most soft money donors don't ask and don't care why the money is going to a particular state party, a party with which they may have no connection. What matters is that the donor has done what the Member asked.

Id. ¶ 1.51; *see also id*. ¶ 1.61. It is clear that these donations are valued by the national political parties and federal candidates/officeholders who solicit them. *Id*. ¶ 1.62.

The record detailed above demonstrates that both major political parties collect nonfederal funds, and direct nonfederal contributions to their state party "branches," in order to use that money to influence federal elections. The national political parties also transfer nonfederal money through the state parties for the same purpose. The evidence shows the amounts spent on "party building" and in support of state and local candidates is a small fraction of the total amount of nonfederal funds raised by the national political parties. Not including administrative expenses, the majority of these funds are used for so-called "issue advocacy" designed to affect federal elections. After reviewing this record, I find myself in agreement with Plaintiff's expert La Raja: the parties

> are highly functional rather than responsible. Rather than use soft money to shore up weaker organizations, or reward state party members for moving closer to national party ideology, the national organizations use soft money like hard money – to pursue the short-term goal of winning elections.

Id. ¶ 1.26.5.

Political Party Committees Suggest Donors Contribute to Issue Advocacy Organizations

The record also demonstrates that prior to BCRA, political parties and candidates would solicit and donate funds to tax-exempt organizations, which would then fund activities in order to influence federal elections on behalf of the political party or candidate-donor. *Id*. ¶ 1.85. Former DNC and DSCC official Robert Hickmott testifies that

> [o]nce you've helped a federal candidate by contributing hard money to his or

> her campaign, you are sometimes asked to do more for the candidate by making donations . . . [to] an outside group that is planning on doing an independent expenditure or issue advertisement to help the candidate's campaign. . . . As a result, there are multiple avenues for a person or group that has the financial resources to assist a federal candidate financially in his or her election effort, both with hard and soft money.

Findings ¶ 1.59.

In addition, the record reflects that each Republican Party national committee has donated funds to the National Right to Life Committee, which Senator Phil Gramm, as NRSC Chairman, explained was done to "help activate pro-life voters in some key states, where they would be pivotal to the election." *Id*. ¶ 1.85.2. Other documents in the record show sizable political party donations have been made to nonprofit groups with common political views in close proximity to federal elections to be used to mobilize the party's voters. *Id* ¶¶ 1.85.2, 1.85.3.

That such donations are used to affect federal elections is also demonstrated by the fact that the national party committees and federal candidates or officeholders solicit donations for tax-exempt groups. The National Right to Work Committee ("NRTWC") admits that "certain Members [of Congress] or Executive Branch Officials have generally encouraged financial support for the Right to Work cause and, specifically, for the support of NRTWC in advocating for these issues, through lobbying as well as issue advertising." *Id*. ¶ 1.85.4. A letter in the record from Congressman Pete Sessions asks a recipient to meet with NRTWC personnel regarding the group's effort to "stop Big Labor from seizing control of Congress in November." *Id*. ¶ 1.85.5. Similarly, Congressman Ric Keller signed a

fundraising letter for The Club for Growth, which assured potential donors that their money would be used to "help Republicans keep control of Congress." *Id*. The record also demonstrates that the DSCC and DNC informs donors which tax-exempt organizations are most effective at grassroots activities that affect federal elections. *Id* ¶ 1.85.1. Some of these organizations are organized as ballot measure committees or political clubs that engage in voter mobilization efforts which, when aimed at elections with federal candidates on the ballot, affect federal elections. *See id*. ¶¶ 1.85.6, 1.85.8.

In addition, evidence in the record shows that federal officeholders and candidates themselves have created their own tax-exempt organizations to assist in their election activities. According to Public Citizen, 63 Members of Congress have organizations organized under Section 527 of the Internal Revenue Code, and another 38 "have a stake in the Congressional Black Caucus [] 527 organization." *Id*. 1.85.7. These 527 organizations are used to promote the Member's career, as well as encourage strong state and local candidates and spur partisan get-out-the vote efforts. *Id*. ¶ 1.85.7.1. One large DNC contributor testifies that in early 2002 he donated $50,000 to the Daschle Democrats, a 527 organization, which ran advertisements in support of Senator Tom Daschle in response to attacks made against him. The contributor made the donation "because [he] felt that the attacks were hurting Senator Daschle and Senator Tim Johnson's re-election campaign as well." *Id*. ¶ 1.85.7.2. The DNC has made large contributions to Section 527 groups organized by candidates. *Id*. ¶ 1.85.7.3. Corporations also make large donations to federal

officeholder and candidate 527 organizations. *Id*. ¶ 1.85.7.3.

Congress was obviously concerned about this practice when it enacted Title I. For example, legislative history reflects a discussion of Judith Vasquez's contribution to a tax-exempt organization. Ms. Vasquez wanted to contribute $100,000 to the DNC, however because Ms. Vasquez was not a United States citizen, the donation was "problematic." Thompson Committee Report at 3663 (majority report). Therefore, Ms. Vasquez was told to donate the money to "Vote Now '96," "a tax-exempt GOTV organization that focused on traditional Democratic constituencies." *Id*. "Vasquez ultimately donated $100,000 to Vote '96." *Id*. at 7105 (minority report). The legislative history also includes an NRSC document entitled "Coalition Building Manual," issued in 1994, the text of which was included in the congressional record. *Id*. at 5969 (minority report) (discussing the document); *see also id*. at 5987-6015 (Coalition Building Manual). The Manual states in particular that "[w]hat we say about ourselves is suspect, but what others say about us is credible." *Id*. at 5990 (emphasis in original).

It is clear that political parties and candidates have used tax-exempt organizations to assist them in their efforts to win federal elections. *Id*. ¶ 1.86. Given this fact, and the fact that BCRA prohibits state and national political parties from using nonfederal funds to affect federal elections, the attractiveness of using these tax-exempt proxies would become even more attractive to the political parties if nothing had been done by Congress to address this obvious circumvention route. *Id*.

Conclusion

The massive record in this case thus clearly demonstrates that the national political party committees raise funds outside of *Buckley*'s source and amount limitations for purposes directly related to federal elections. Moreover, state and local party committees, in addition to nonprofit advocacy organizations, are used by the national party committees as part of their circumvention scheme. Congress was correct to conclude, therefore, that a prohibition on nonfederal funds at the national committee level would be ineffective at ending circumvention of FECA's contribution limitations. Accordingly, given the comprehensive record developed in this case, which presents impressive evidence that nonfederal funds secure easy evasion of the individual contribution limitations, I find that Congress was justified in enacting Section Title I under an anti-circumvention theory of corruption.

(b) *Title I Is Closely Drawn*

(i) Section 323(a) is Closely Drawn

In my view, Section 323(a) is closely drawn to match the sufficiently important governmental interests discussed above. When a court reviews a contribution limitation enacted by a coordinate political branch, the court's review is more deferential than if the restriction at issue were an expenditure. In reviewing contribution restrictions, the Supreme Court has deferred to congressional expertise as to both the need for prophylactic measures or the particularities of those measures. *See NRWC*, 459 U.S. at 210 ("Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption

is the evil feared."); *see also NCPAC*, 470 U.S. at 500 (observing that deference is proper, but that it did "not suffice to establish the validity" of the *expenditure* restriction at issue in that case); Def.-Int. Opp'n at 24. As Justice Breyer wrote in his concurring opinion in *Shrink Missouri*:

> In such circumstances–where a law significantly implicates competing constitutionally protected interests in complex ways–the Court has closely scrutinized the statute's impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality. Rather, it has balanced interests. And in practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative). Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments--at least where that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge. *This approach is that taken in fact by Buckley for contributions* . . . .

Shrink Missouri, 528 U.S. at 402 (Breyer, J., concurring) (emphasis added). Given my view that this three-judge District Court should give deference to Congress's judgment in the area of contribution restrictions, and finding that no less restrictive alternative would ameliorate the problems Congress sought to address with Section 323(a), I find the provision closely drawn.

Plaintiffs argue that Section 323(a) is overbroad because it does not focus on the amount or source of the national party committees' funding and instead bans donations of all nonfederal funds regardless of the amount. McConnell Br. at 38 ("To the extent that it is the *amount* or *source* of *donations* of [nonfederal] funds which gives rise to actual or

apparent corruption, Title I contains no relevant tailoring at all.") (emphasis in original); McConnell Opp'n at 27; McConnell Reply at 21-22; *see also* RNC Br. at 45. Plaintiffs cite the Hagel amendment as an example of a more narrowly tailored approach that Congress should have adopted. McConnell Br. at 38 n.14. The Hagel amendment would have imposed a $60,000 limit on aggregate donations of federal and nonfederal funds from any one donor to a national party committee. I do not find Plaintiffs' argument persuasive.

In *Buckley*, the challengers to FECA's contribution limitations argued that the $1,000 limitation was "unrealistically low." *Buckley*, 424 U.S. at 30. In flatly rejecting this argument, the Supreme Court adopted the D.C. Circuit's statement that "'[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000.'" *Id*. (quoting *Buckley*, 519 F.2d at 842) (observing that "Congress' failure to engage in such fine tuning" by scaling the contribution limitations based on the differences between congressional and Presidential campaigns was not fatal to the contribution restrictions"). In much the same manner, Congress has made a judgment that contributions of nonfederal funds to national political party committees permits easy circumvention of FECA's contribution limitations and raises an appearance of corruption, and that the only means of addressing this problem is a complete ban at the national political party level. Much as *Buckley* instructed that courts should not use a scalpel to probe to see if a less restrictive means might be available, this three-judge District Court should defer to Congress's judgment that any cap on nonfederal funds would not ameliorate

the abuses it sought to be extinguished. Indeed, a cap on nonfederal funds would likely be constitutionally suspect because the potential for circumvention would still exist and the appearance of corruption surrounding $60,000 in donations to the national political party committees would still be present.

In short, Congress would not have accomplished its goal with such a cap because the national political party committees would still be able to use the allocation percentages to inject nonfederal funds into federal elections. Congress concluded that the FEC's approach for allocation was no longer acceptable at the national political party committee level. In my judgment, Congress is entitled to make that judgment.[171] Moreover, all nonfederal funds, regardless of the source, pose the same potential for corruption. While corporate and labor union donations of nonfederal funds may be more egregious in their use, given longstanding federal policy against their use in federal elections, it is not simply corporate and labor union donations that pose a problem. Contribution limitations are being directly circumvented by individuals as well as corporations and labor unions. Plaintiffs' argument that BCRA could have been tailored better had it focused on particular sources is therefore unavailing.

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[171] Plaintiffs also argue that Section 323(a) is particularly overbroad with respect to "minor parties" like the Libertarian Party which receives virtually no donations of large amounts or donations from corporations. McConnell Br. at 38; McConnell Opp'n at 28-29. *Buckley* forecloses this argument. In *Buckley*, the Supreme Court observed that "minor-party candidates may win elective office or have a substantial impact on the outcome of an election." *Buckley*, 424 U.S. at 35; *see also id*. at 70. The *Buckley* Court, therefore, refused to exempt minor parties, one of which was the Libertarian Party, *see id*. at 34 n.40, from the contribution limitations. Accordingly, I do not find that BCRA is overbroad because it applies to minor party candidates, and I also find that Plaintiffs have not presented sufficient evidence to re-evaluate *Buckley*'s conclusion regarding minor parties.

Plaintiffs also contend that Section 323(a) is overbroad because it bans the receipt and disbursement of nonfederal funds "no matter the purpose for which the funds are being given or spent." McConnell Br. at 39; McConnell Opp'n at 28; *see also* McConnell Reply at 22; RNC Opp'n at 30-31. The critical assumption that Plaintiffs make is that the "use" of nonfederal funds is what creates the actual or apparent corruption. McConnell Br. at 38. The assumption by Plaintiffs is fatal to their argument.

As demonstrated above, the corruption associated with nonfederal funds is much greater than the "uses" for which the money is put. Merely preventing the national political party committees from spending nonfederal funds on certain activities would do nothing to address the corruption associated with the national political party committees soliciting and collecting nonfederal funds. The law is targeted at the *collection and solicitation* of nonfederal funds, which are precisely the types of activities that Congress found posed the greatest threat of corruption. Moreover, simply preventing the national political party committees from using "soft money" to pay for the kinds of "issue" advertisements at which Title II is directed, would do little, if anything, to prevent, in *Buckley*'s words, "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." *Buckley*, 424 U.S. at 27. As amply demonstrated above, simply because the political party is the solicitor of the funds is of no import, given that the political party committees are "agents for spending on behalf of those who seek to produce obligated officeholders." *Colorado II*, 533 U.S. at 452.

Regardless of the ultimate use of nonfederal funds, Congress appropriately concluded that the solicitation and raising of nonfederal funds posed such a significant threat of corruption that the only means of addressing the problem was a complete ban at the national committee level.

In this vein, Plaintiffs argue that "the Supreme Court itself has already concluded that the opportunity for corruption posed by unregulated soft money contributions to a party for certain activities such as electing candidates for state office or for voter registration and get out the vote drives is at best, attenuated." RNC Br. at 45 (quoting *Colorado Republican Fed. Campaign Comm. v. FEC* ("*Colorado I*"), 518 U.S. 604, 616 (1996)) (emphasis removed) (internal quotation marks omitted). I disagree and find that the plurality opinion in *Colorado I* actually provides authority for Congress's enactment of Section 323(a). Justice Breyer's plurality opinion demonstrates this point:

> We recognize that FECA permits individuals to contribute more money ($20,000) to a party than to a candidate ($1,000) or to other political committees ($5,000). 2 U.S.C. § 441a(a). We also recognize that FECA permits unregulated "soft money" contributions to a party for certain activities, such as electing candidates for state office, see § 431(8)(A)(i), or for voter registration and "get out the vote" drives, see § 431(8)(B)(xii). But the opportunity for corruption posed by these greater opportunities for contributions is, at best, attenuated. Unregulated "soft money" contributions *may not be used to influence a federal campaign*, *except when used in the limited, party-building activities specifically designated in the statute*. See § 431(8)(B).

Colorado I, 518 U.S. at 616 (emphasis added). As is clear from the emphasized language, the critical assumption behind Justice Breyer's conclusion relating to nonfederal funds is that

"'soft money' contributions may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute." *Colorado I*, 518 U.S. at 616. However, as the record demonstrates in *this* case, Congress found that nonfederal funds were being used in massive amounts to influence federal campaigns. The pre-BCRA situation obviously changes the fundamental supposition underlying Justice Breyer's statement, which was premised on a factual record developed prior to the rise of soft money as a financing tool for federal election purposes.[172] Indeed, as Justice Breyer more recently observed in his concurrence in *Shrink Missouri*, "After all, *Buckley*'s holding seems to leave the political branches broad authority to enact laws regulating contributions that take the form of 'soft money.'" *Shrink Missouri*, 528 U.S. at 404 (Breyer, J., concurring). Accordingly, I do not find Plaintiffs' argument relating to *Colorado I* to have merit. With

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[172] The Defendant-Intervenors point out that in *Colorado I*

> [t]he initial administrative complaint which led to the civil action was filed on June 12, 1986, and the parties' cross-motions for summary judgment in the civil action were filed in 1990, thereby shutting off further discovery. *See FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1451 (1993), *rev'd*, *FEC v. Colorado Republican Fed. Campaign Comm.*, 59 F.3d 1015 (10th Cir. 1995), *vacated*, *Colorado I, 518* U.S. 604 (1996). The *Colorado I* plurality was careful to acknowledge that its conclusions about the link between independent expenditures and corruption were premised on the Court's precedents in the absence of contrary factual evidence in the record. See *Colorado I*, 518 *U*.S. at 617-18 (Court lacked "convincing evidence"; "Government does not point to record evidence"). The language in the controlling opinion suggests that the Court could revisit its conclusions if faced with evidence calling those conclusions into doubt; for example, the Court did not say that there could not be any "special dangers of corruption associated with political parties," only that it was "not *aware* of any" such dangers. *Id*. at 616 (emphasis added).

Def.-Int. Reply Br. at 38 n.114.

BCRA, Congress responded to the wholesale evasion of the contribution limitations and on the basis of empirical evidence and experience, enacted Section 323(a), concluding "that the potential for evasion of the individual contribution limits was a serious matter." *Colorado I*, 518 U.S. at 617.

Plaintiffs also argue that Section 323(a) is not closely drawn because it "sweeps in activity relating only to state and local elections and therefore does not serve to get federal candidates elected at all." McConnell Br. at 39; McConnell Opp'n at 29; McConnell Reply at 20-21. Plaintiffs' argument, however, ignores the compelling reason behind Section 323(a): namely, that the close relationship between national political parties and federal officials justified nothing else but a complete prohibition on raising nonfederal funds at the national party committee level.[173]

Supreme Court precedent, the legislative history, and the record before this Court powerfully demonstrate the need for the nonfederal funds prohibition at the national political party committee level. As the Supreme Court observed in *Colorado II*, "[w]hat a realist would expect to occur has occurred. Donors give to the party with the tacit understanding

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[173] This point applies equally to Plaintiffs' suggestion that a more narrowly tailored approach would have been to simply prohibit labor unions and corporations from contributing nonfederal funds to the national political party committees. *See* McConnell Opp'n at 27. Such a prohibition would not address the actual or apparent corruption Congress sought to address with Section 323(a). The record amply demonstrates that the corrupting potential of nonfederal funds donations was not simply confined to a particular source but with the actual or apparent corruption posed by the solicitation of nonfederal funds by federal officeholders and candidates and the problems created by the national committees' efforts to evade federal contribution limitations.

that the favored candidate will benefit." *Colorado II*, 533 U.S. at 458. The Findings of Fact establish that there is "no wall between the national parties and the national government." Findings ¶ 1.47; *see also* Briffault at 651-52 (observing the web of relations linking major donors, party committees and elected officials) (quoted with approval in *Colorado II*, 533 U.S. at 462-63). As Congress recognized, given the blurring of the lines between federal officials and the national political party committees, the only way to address the problem with nonfederal funds was to prohibit the national committees from raising it. Findings ¶ 1.62.

As discussed, *supra*, federal officeholders hold positions of power in both the national political parties and the federal government. Briffault at 651 ("Under the current campaign finance system, however, the 'party-as-organization' and the 'party-in-government' are increasingly merged. Members of Congress constitute and control the CCCs [Congressional Campaign Committees] that play the leading role in providing party money and campaign services to congressional candidates. The President typically controls his party's national committee, and once a favorite has emerged for the presidential nomination of the other party, that candidate and his party's national committee typically work closely together. As a result, large donations to the party organization are effectively donations not just to specific candidates but to the party-in-government's leadership, who use that money to protect or expand their power in government, by spending in congressional races and the presidential election."). Indeed, officeholders and candidates who are successful fundraisers gain

enhanced stature in Congress as a result of their fundraising prowess. Findings ¶ 1.66 (statement of Senator Boren). In other words, it is often the case that those who are the best "soft money" fundraisers are the most influential government officials.

Given that the national political party committees and federal officeholders and candidates are "inextricably intertwined," Findings ¶ 1.62; *see also* ¶ 1.46, the national party ban is closely drawn. The record overwhelmingly demonstrates that large "soft money" donors are given access to special meetings with the President and key congressional leaders. *See, e.g., id*. ¶¶ 1.75.5, 1.77.10. Accordingly, Congress was justified in placing a complete ban on the national party committees raising nonfederal funds regardless of the ultimate use of those funds and regardless of who ultimately solicits them.

Finally, Plaintiffs contend that Section 323(a) sweeps too broadly because it will have "an immediate, debilitating, and long-lasting effect" on the national political party committees. RNC Br. at 55. I find this argument implausible. It bears emphasizing that the national political party committees have only been raising large sums of nonfederal funds in recent years. I do not take Plaintiffs to be actually arguing that prior to the explosive growth of nonfederal funds as a means of political party financing, political parties were somehow handicapped and unable to effectively communicate their message. The idea, therefore, that because political parties are now limited solely to federal funds they will be effectively silenced, is nonsensical based on the record developed in this case. *See* RNC Br. at 54 ("The net effects of BCRA will be massive layoffs and severe reduction of important core political

speech at the RNC, and reduction of many state parties to a 'nominal' existence.").

As *Buckley* observed, "[t]he overall effect of [FECA's] contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression." *Buckley*, 424 U.S. at 21-22. The same applies to Section 323(a), which will require the national committees of the political parties to raise funds from a greater number of persons. Moreover, BCRA raises the individual contribution limitation to national political parties to $25,000. Now each national political party committee is permitted to receive up to $15,000 from political action committees, 2 U.S.C. § 441a(a)(2)(B), and up to $25,000 from individuals, BCRA § 307(a)(2); FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(B). In addition, in comparing the federal funds raised by the political parties during the 1996 election cycle with the 2000 election cycle, the Findings of Fact demonstrate that the amount of federal funds raised has increased. Findings ¶ 1.4.2. Given that BCRA has *increased* the federal funds limits for the national committees the suggestion that the absence of nonfederal funds from the coffers of the national committees is going to create a "severe reduction of important core political speech," RNC Br. at 54, is simply not credible.

In sum, I am convinced that a ban on nonfederal funds raised by the national political party committees is closely drawn to match the sufficiently important governmental interests.

Deference to Congress's judgment is warranted and appropriate for the contribution restriction in Section 323(a). Moreover, given the record established in this case and judicial precedent on the relationship of political parties and donors, I find that all of Plaintiffs' arguments for why Section 323(a) is not closely drawn are without merit.[174]

(ii) Section 323(b) is Closely Drawn

Recognizing that the nonfederal funds prohibition on the national party committees in Section 323(a) would be rendered entirely ineffective without some form of corresponding restrictions on state, local, and district party committees use of nonfederal funds–a sensible proposition given the evidence discussed above–Congress enacted Section 323(b). Consistent with Congress's recognition that some state party spending does exclusively affect state elections, Congress doubled the hard money limitations available for state party committees, BCRA § 102; FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(D), and permitted state party committees to raise "Levin" funds to pay for Section 301(20)(A)(i) and (ii) activities, provided that certain conditions are met. BCRA § 101 (a); FECA § 323(b)(2)(A)-(C); 2 U.S.C. § 441i(b)(2)(A)-(C).

With Section 323(b), Congress struck a compromise between requiring state and local political parties to use federal funds on "Federal election activity" and leaving to state law the state political party financing of activities related to state and local elections. Indeed, as one of the Senate sponsors stated:

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[174] Given my conclusion that Section 323(a), in its entirety, is constitutional, I need not reach Judge Leon's discussion narrowing Section 323(a).

> [BCRA] represents a balanced approach which addresses the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties, which then use those funds for Federal election activity. At the same time, the bill does not attempt to regulate State and local party spending where this danger is not present, and where State and local parties engage in purely non-Federal activities. We will not succeed in closing the soft-money loophole unless we address the problem at the State and local level. We do this, however, while preserving the rights and abilities of our State and local parties to engage in truly local activity.

148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. John McCain).

The detailed evidence discussed *supra*, convincingly demonstrates that nonfederal funds are funneled to the state political parties by the national political parties or donors at the direction of the national political parties or federal officeholders and candidates, to be used to influence federal elections. The evidence also shows that these contributions are given with the intent and effect of influencing federal elections. In addition to the evidence *supra*, representatives of all four of the national party congressional committees agree that they transfer "federal and nonfederal funds to state and/or local party committees for voter identification, voter registration and get-out-the-vote efforts. These efforts have a significant effect on the election of federal candidates." Findings ¶¶ 1.28, 1.32; *see also id.* ¶ 1.31. These statements are corroborated by documentary evidence, *id.* ¶ 1.28.1, 1.32, as well as by expert Donald Green who finds that

> [t]he evidence from California, as well as from numerous opinion surveys and exit polls that demonstrate the powerful correlation between voting at the state and federal levels, shows quite clearly that a campaign that mobilizes residents of a highly Republican precinct will produce a harvest of votes for Republican candidates for both state and federal offices. A campaign need not mention federal candidates to have a direct effect on voting for such a candidate. That

> parties recognize this fact is apparent, for example, from the emphasis that the Democrats place on mobilizing and preventing ballot roll-off among African-Americans, whose solidly Democratic voting proclivities make them reliable supporters for office-holders at all levels. As a practical matter, generic campaign activity has a direct effect on federal elections.

Id. ¶ 1.28.2; *see also id*. ¶ 1.30. Therefore these efforts by the state political parties in states that hold their elections on the same day as federal elections, which the record shows are funded in part by the national political parties, *id*. ¶ 1.28.3, 1.43.1, 1.43.2.1, affect federal elections even if they are only intended to affect the state contests, *id*. ¶¶ 1.29, 1.33.

Congress clearly understood that political party committees are essentially one, large interdependent organism and that without legislation targeted at state and local parties, the new campaign finance law would permit easy evasion of the national party committee "soft money" ban. Congress was appropriately concerned that if Title I of BCRA policed only nonfederal donations at the national committee level, donors would simply make those same donations to the state and local "branches" of the national committees, which would then use those funds to influence federal elections. Congress would have accomplished little with a direct prohibition at the national political party level if there was no corresponding restriction on nonfederal funds at the state and local level, given the unitary nature of political parties. Section 323(b) is a key provision of Title I designed to prevent the nonfederal funds prohibition on the national parties in Section 323(a) from being rendered completely ineffective.

In drafting Section 323(b), Congress was aware that under the FEC's previous

allocation regime, state and local party committees were permitted to spend a mix of federal and nonfederal funds on certain activities that directly influenced federal elections. Congress found, however, that these allocation rules permitted easy evasion of the federal contribution limitations because political parties at all levels were raising amounts, in many instances, far in excess of federal contribution limitations. Those monies, instead of going to fund a portion of nonfederal activity, were actually going to finance federal election activity. Therefore, for the national political parties, Congress required that they be exclusively financed with money raised according to federal law. With regard to the state and local political parties, Congress refined the allocation rules to require that state parties use exclusively federal funds when spending money on "Federal election activity." Section 323(b), therefore, ensures that the state and local parties are no longer used as conduits for national party spending of nonfederal funds to aid federal election campaigns.

Section 323(b) accomplishes this goal by only limiting or, in some instances, completely prohibiting state, district, and local political party committees' use of nonfederal funds when it is spent on: (1) voter registration activity that occurs within 120 days of a regularly scheduled federal election; (2) voter identification, GOTV activity, or generic campaign activity *conducted in connection* with an election where a federal candidate appears on the ballot; (3) public communications that refer to a clearly identified candidate for federal office and that promotes or supports or attacks or opposes a candidate for that office; or (4) an employee who spends more than 25 percent of his or her time during a given

month on activities in connection with a federal election. BCRA § 101(b); FECA § 301(20)(A)(i)-(iv); 2 U.S.C. § 431(20)(A)(i)–(iv). Plaintiffs argue that "BCRA has imposed a federally dictated clamp on the use of *all* state-regulated money." CDP/CRP Opp'n at 16 (emphasis in original); *see also* McConnell Br. at 40 (Section 323(b) regulates "activity that relates only to state and local elections and does not benefit federal candidates."); CDP/CRP Opp'n at 21 (Federal election activity "encompasses virtually all party activity"). Plaintiffs' statements are clearly inaccurate. The definition of "Federal election activity" and the corresponding restrictions on it in Section 323(b) are closely drawn to match the sufficiently important interests discussed above.[175]

It is true, no doubt, that Section 323(b) affects activity that has an impact on both federal and state elections. However, this, in and of itself, does not instantly pose First Amendment difficulties because the corruption related to nonfederal funds inheres in the fundraising process where major nonfederal donations are provided in exchange for access to federal officeholders and candidates–a process facilitated by the political party apparatus at all levels. The record demonstrates that the state political parties were equal partners and

[175] Throughout their briefing, Plaintiffs proffer various examples of what they claim are "Federal election activit[ies]," which they then use to demonstrate BCRA's unconstitutionality. Many of these examples, however, are not covered under BCRA. For example, the RNC suggests that the Republican Party of Ohio could not use nonfederal funds to pay for printing a mailing of a flyer that reads "Vote Republican; John Smith for Dogcatcher on November 6." RNC Br. at 27. First, the printing and mailing of the flyer would not be GOTV activity because it is not individualized. Also, it is not "generic campaign activity" because it mentions a specific state candidate. Additionally, because it only mentions a state candidate, it is not covered by Section 301(20)(A)(iii).

complicit in helping the national political parties raise and spend nonfederal funds for federal election purposes. Recognizing, however, that not every activity in which a state political party engages in affects federal elections, Congress sensibly limited the reach of BCRA to "Federal election activities," which are those activities at the state and local party level that strongly benefit federal candidates.

Since 1970, Congress has regulated the state and local political parties in this manner by requiring them to pay for many of these "Federal election activities" with federal and nonfederal funds. Plaintiffs' never challenge the constitutionality of having to use allocation percentages when paying for Section 301(20)(A) activities. If, as Plaintiffs' apparently concede, it is consistent with the Constitution to regulate how this activity is paid for in the first instance, then it is difficult for Plaintiffs to offer any compelling First Amendment argument that Congress is unable to require these activities to be paid for solely with federal funds, particularly given the interests articulated in the foregoing section. Plaintiffs' real complaint is that they are unable to continue to use the allocation ratios to pay for Section 301(20)(A) activities as they have done since the late 1970s. However, given the record in this case, I conclude that Congress is entitled to modify the allocation ratios as it has done statutorily in Section 323(b). To reiterate, the Supreme Court instructs that courts should not "second guess a legislative determination as to the need for prophylactic measures where the corruption is the evil feared." *NRWC*, 459 U.S. at 210; *cf. Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) ("courts must accord substantial deference to the predictive

judgments of Congress").

In 1987, Judge Thomas Flannery of the United States District Court for the District of Columbia required the FEC to implement regulations standardizing the allocation system. *Common Cause v. FEC*, 692 F. Supp. 1391, 1396 (D.D.C. 1987). Judge Flannery observed that "it is possible that the Commission may conclude that *no* method of allocation will effectuate the Congressional goal that *all* monies spent by state political committees on those [volunteer materials, voter registration, and GOTV activities,] be 'hard money' under the FECA." *Id*. In 1987, it was determined that the allocation regime was sufficient. At the time of BCRA's passage, however, Congress determined that the allocation system was ineffective at preventing nonfederal funds from influencing federal elections.

Congress concluded, on the basis of the evidence before it, that the problems related to nonfederal funds already existed at the state political party level and that, prospectively, a national political party "soft money" ban would be entirely ineffective at the national level without some corresponding regulations at the state and local political party level. I shall briefly turn to each of the determinants of "Federal election activity."

(1) Section 301(20)(A)(i) and (ii) Activities

With regard to Section 301(20)(A)(i) and (ii) activities, the Findings compellingly demonstrate that voter registration activities, voter identification, GOTV activities, or generic campaign activity conducted in connection with an election where a federal candidate is on the ballot will have an influence on federal elections. As discussed *supra*, the record

includes the testimony of the representatives of all four of the national party congressional committees that they transfer "federal and nonfederal funds to the state party committees for voter identification, voter registration and GOTV efforts." Findings ¶¶ 1.28, 1.32 (officials observing that "[t]hese efforts have a significant effect on the election of federal candidates"); *see also id.* ¶ 1.28.1, 1.32 (CDP touting impact it has on federal elections with voter registration, vote-by-mail, and get-out-the-vote efforts in a letter it sent to a contributor). Furthermore, it is clear that efforts to encourage a particular political party's partisans to the polls, will assist *all* of that party's candidates on the ballot, state, local and federal alike. Voter mobilization efforts are designed to get a particular political party's faithful to the polls for a particular election.

Moreover, the Levin Amendment provides further evidence that Congress sought to accommodate the interests of the state political party committees in drafting Section 323(b). Given that a majority of states hold their elections at the same time as federal elections, Congress recognized that Section 301(20)(A)(i) and (ii) activities would have a more dramatic effect on state and local elections than on other activities. As a result, Congress found it important to permit the state and local parties to supplement their federal funding with nonfederal funds raised pursuant to the Levin Amendment to pay for these activities. As long as the activity does not refer to a clearly identified candidate for federal office, the funds are not used for certain broadcast communications, and the funds are raised directly by the state or local political party according to the requirements of state law (in increments

of $10,000 or less) the state political party committees can use Levin funds to pay for Section 301(20)(A)(i) and (ii) activities. When paying for activities with Levin funds, the FEC's allocation percentages apply to the expenditure.

As a result, the Levin Amendment essentially acts as a modified allocation system. Congress determined that Section 301(20)(A)(i) and (ii) activity would often have a significant effect on state elections, given that most states hold elections at the same time as the federal government. By permitting the state and local parties to raise and spend "Levin funds," Congress allowed state and local political parties to continue to raise funds not subject to FECA *in a way that would not jeopardize the rest of the nonfederal money restrictions in Title I.* It can hardly be argued that a $10,000 donation to a state political party committee poses a threat of corruption when the federal limit on individual giving to state parties is also $10,000, BCRA § 102; FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(D), the limit to national parties is $25,000, BCRA § 307(a)(2); FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(B), and the total cap on individual contributions is $95,000 per two-year election cycle, of which $37,500 may be contributed to candidates. BCRA § 307(b); FECA § 315(a)(3); 2 U.S.C. § 441a(a)(3). In other words, even though the Levin Amendment permits some nonfederal money into the political party system, it does so in a way that will not create a new loophole and also serves to accommodate state interests regarding their elections.

Because it was Congress's desire to prevent a new loophole from emerging, when it enacted the Levin Amendment, Congress prohibited transfers among or joint fundraising by

state and local political parties with respect to "Levin funds." BCRA § 101, FECA § 323(b)(B)(iv), (C); 2 U.S.C. §§ 441i(b)(2)(B)(iv), (C). I am not persuaded by Plaintiffs' arguments that these provisions are not closely drawn. McConnell Br. at 40; CDP/CRP Br. at 36-39.[176] As stated by Defendant-Intervenors, "[w]ere state and local parties free to transfer $10,000 contributions among themselves, contributors could multiply the amount of their permissible contribution to a particular party simply by funneling additional soft money through other party committees." Def.-Int. Br. at 63 n.228. By way of example, a donor attempting to gain influence with a candidate in one congressional district could make ten $10,000 contributions to ten local parties, on the understanding that the entire $100,000 would be transferred to the one party that was engaged in "Federal election activities" in that candidate's district. Def.-Int. Opp'n at 34. Of course, state and local political parties remain free jointly to raise or transfer as much nonfederal funds as they desire to pay for activities that are not considered "Federal election activity," subject only to state restrictions.

With the Levin Amendment, Congress determined that state and local political party

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[176] I am also not persuaded by the doomsday scenario described by the CRP and CDP regarding the effect BCRA will have on their fundraising. Findings ¶¶ 1.98-1.99.1 (also describing their fundraising and spending generally). Their estimations of BCRA's impact on their fundraising efforts are not based on any formal analysis, but instead on an application of BCRA to past fundraising efforts which is explained in an imprecise manner that leaves as many questions as it answers. *Id.* ¶ 1.98. It is unrealistic to think that the state political parties will fundraise in exactly the same fashion under the BCRA regime as they did under FECA. Furthermore, Plaintiffs' own expert Raymond La Raja believes that BCRA will not affect some state parties' fundraising efforts at all, and while others may be affected, "[o]ne thing we can be sure of is that parties will figure out the ground rules and they will find an important role for themselves within the new campaign finance regime. *Id.*

committees should be permitted to spend limited amounts of nonfederal funds on certain "Federal election activities." Enacting this provision further demonstrates that Congress made a significant effort to tailor the nonfederal money restrictions at the state party level. Given that the provision must only be "closely drawn," I find that Congress's restrictions on Section 301(20)(A)(i) and (ii) activities are constitutional.[177]

(2) Section 301(20)(A)(iii) Activity

Turning to Section 301(20)(A)(iii)–a public communication that supports or opposes a clearly identified federal candidate–I likewise find this provision constitutional under the First Amendment. In Judge Leon's opinion, he explains why Congress' decision to restrict

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[177] In doing so, I am also not persuaded by Plaintiffs' arguments that some of the provisions in Section 301(20)(A)(i) and (ii) are vague; particularly "get-out-the-vote activity." *See, e.g.*, CDP/CRP Br. at 33. First, I am not persuaded that a reasonable person would have difficulty understanding what is meant by these terms, and the fact that these provisions apply to political actors only strengthens my conviction. Second, the FEC has promulgated implementing regulations related to "Federal election activity." Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,083 (July 29, 2002). In my judgment, these regulations may mollify any constitutional uncertainties related to these terms. *See Martin Tractor Co. v. FEC*, 627 F.2d 375, 384-387 (D.C. Cir. 1980), *cert. denied sub nom. Nat'l Chamber Alliance for Politics v. FEC*, 449 U.S. 954 (1980). In *Martin Tractor*, the Court of Appeals determined that the advisory opinion process and the uncertainty of plaintiffs' legal rights counseled against premature constitutional adjudication because the "adversarial posture assumed by the parties and contours of their dispute," *id.* at 387, lacked clarity, unlike other cases that had found ripeness in similar circumstances. Moreover, the fact the FEC "has said or done nothing . . . to indicate how it construes the term 'solicit,'" left the court "without substantial guidance to decide this case or even to frame the constitutional issues at stake." *Id.* at 387. Finally, Plaintiffs have not spent much time briefing this issue, and I am therefore chary to strike these provisions down without waiting to see if the FEC's regulations ameliorate Plaintiffs' vagueness concerns. In the interim, an Advisory Opinion process stands by to prevent any potential chill that might be incurred by Plaintiffs.

state and local party organizations to funding Section 301(20)(A)(iii) activities with federal funds is closely drawn to match a sufficiently important interest. I agree with his analysis and concur with him that Section 323(b) is constitutional in restricting the state and local party committees to spending federal funds on Section 301(20)(A)(iii) activities. I would additionally point out that I am particularly persuaded by Judge Leon's discussion of the fact that Section 301(20)(A)(iii) is a restriction on a contribution (as opposed to an expenditure). To the extent that Judge Leon's opinion on this point is inconsistent with anything that I have discussed in my own opinion–for example, my view of *Buckley*'s definition of corruption or my view of what constitutes pure issue advocacy–I do not join those portions of Judge Leon's discussion.[178]

(3) Section 301(20)(A)(iv) Activity

Finally, with regard to Section 301(20)(A)(iv) activity–requiring state and local parties to use federal funds to pay the salary of an employee who spends more than 25 percent of his or her compensated time in a month in connection with a Federal election–I find that none of the Plaintiffs have articulated a specific reason for striking the provision down. In other words, Plaintiffs do not provide any specific argument as to why that provision is unconstitutional. Given the paucity of specific briefing on this provision (Defendants have also not spent any time addressing this specific provision), I would not hold Section 301(20)(A)(iv) facially unconstitutional.

[178] This statement applies with equal force to any of the portions of my colleagues' opinions in which I am concurring.

(4) Conclusion

I find that Section 323(b) is closely drawn to match the sufficiently important governmental interests at stake in this case. Congress was appropriately concerned, as the record in this case tellingly indicates, that a prohibition on nonfederal funds at the national level would be entirely ineffective without corresponding restrictions on the state and local party committees. Section 323(b) is a closely drawn answer to that problem that continues to permit State and local parties to raise as much nonfederal funds as they are able to raise, consistent with state law, to be spent on activity that solely affects state elections.

(iii) Section 323(c)

This provision is not specifically challenged by any Plaintiff. As such, I do not pass on its constitutionality.

(iv) Section 323(d) is Closely Drawn

Section 323(d) is a measure intended to prevent political parties from using tax-exempt groups as a means of evading FECA's source, amount, allocation, and disclosure requirements. BCRA § 101; FECA § 323(d); 2 U.S.C. § 441i(d). Section 323(d) accomplishes this goal by prohibiting any political party committee or its agents from "solicit[ing]" funds for or "mak[ing] or direct[ing]" any donations to either: (i) any tax-exempt section 501 organization, *see* 26 U.S.C. § 501(c), that spends any money "in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)"; or (ii) any section 527 organization, *see* 26 U.S.C. § 527, (other

than a state or local party or the authorized campaign committee of a candidate for state or local office). BCRA § 101; FECA § 323(d)(1); 2 U.S.C. §§ 441i(d).

As discussed above, the record clearly indicates that prior to BCRA, the political parties used tax-exempt organizations as a means of evading FECA's requirements. Congress was appropriately concerned that without restrictions on party solicitation and party direction of federal and nonfederal money to tax-exempt interest groups, party committees would continue to use satellite party organizations disguised as tax-exempt groups to continue to circumvent FECA and also help the parties circumvent the new contribution requirements in BCRA. Seen from this perspective, Section 323(d) is a reasonable, prophylactic measure to which this three-judge District Court owes deference. *NRWC*, 459 U.S. at 210.

Section 323(d) is closely drawn because it only applies to Section 501(c) organizations that "make[] expenditures or disbursements in connection with an election for *Federal office* (including expenditures or disbursements for Federal election activity)," BCRA § 101; FECA § 323(d)(1); 2 U.S.C. § 441i(d)(1) (emphasis added), and Section 527 organizations, which by definition have been given tax-exempt status because they engage in political activity.[179] BCRA § 101; FECA § 323(d)(2); 2 U.S.C. § 441i(d)(2). Section 323(d),

[179] Section 527 of the tax code defines a "political organization" as "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1). An "exempt function" is defined as "the function of influencing or attempting to influence the selection, (continued...)

therefore, focuses only on those non-profit organizations that have posed a threat to the stability of the campaign finance regime. Parties continue to be permitted to contribute to any 501(c) organization that does not engage in "Federal election activity," BCRA § 101; FECA § 323(d)(1); 2 U.S.C. § 441i(d)(1), and are free to contribute federal funds to PACs formed by tax-exempt organizations that do engage in "Federal election activities," BCRA § 101; FECA § 323(d)(2); 2 U.S.C. § 441i(d)(2).

Despite this tailoring, Plaintiffs make a number of arguments that exaggerate the reach of Section 323(d). For example, the CDP Plaintiffs contend that Section 323(d) "prohibits the parties from participating in ballot measure campaigns." CDP/CRP Br. at 44. This statement is incorrect as state political parties are not in any way prohibited by BCRA from making direct expenditures to support or oppose ballot measures. BCRA does prohibit the state and local committees from soliciting donations on behalf of and directing any donations to an organization that engages in "Federal election activity." To the extent that ballot measure organizations, which the CDP Plaintiffs argue are "typically" Section 501(c)(4) organizations, engage in "Federal election activity," BCRA prohibits the political party committees at all levels from directing monetary contributions to those organizations.

There is no question that ballot measure organizations often engage in GOTV activity

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[179](...continued)
nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed." 26 U.S.C. § 527(e)(2).

in and around federal elections. Indeed, the CDP should understand this fact. On October 19, 1999, Judge Garland E. Burrell, Jr. of the Eastern District of California ordered summary judgment for the Commission against the CDP because the CDP had contributed $719,000 in nonfederal funds to "Taxpayers Against Deception–No On 165," a tax-exempt California political committee opposed to a state spending referendum. *FEC v. CDP*, No. S-97-0891 (E.D. Cal. Oct. 14, 1999) (order granting summary judgment) at 2. None of the CDP's donations were reported to the FEC, *id*. at 7-8, and all but $2,000 of the money contributed by the CDP was knowingly used for partisan voter registration. *Id*. at 2, 13. The ballot committee persuaded the CDP to donate $719,000 to its organization because it promised to target potential registrants that would be predisposed to vote for Democrats based on historic voting patterns. *Id*. at 4. The district court in that case found that on the basis of this conduct, the CDP had "violated the FECA and the allocation rules by funding a generic voter drive that targeted Democrats." *Id*. at 15. Accordingly, contrary to the CDP's contention, ballot measure committees can not only help a party committee avoid disclosure requirements, but they can also help party committees avoid the allocation system. In other words, in the *FEC v. CDP* case, the $719,000 in nonfederal funds transferred to the ballot committee for voter registration did not have to be allocated between federal and nonfederal accounts, as the CDP would have had to do if it had engaged in the same spending. *See also* Findings ¶ 1.85.6.

The CDP Plaintiffs also make the argument that a party official could violate the law

"simply for contributing to his or her church, if the church has engaged in non-partisan activities encouraging (or assisting) its members to vote." CDP/CRP Br. at 46. This statement is incorrect. Section 323(d) only prohibits actions by party officials "on behalf of" the party committee. BCRA § 101; FECA § 323(d); 2 U.S.C. 441i(d). A party official's personal donation of his or her own money to a church, like other donations or solicitations made by party officials individually on their own behalf, are simply not covered under Section 323(d).

Section 323(d) applies to the party committees soliciting and directing federal and nonfederal funds to these tax-exempt organizations. The evidence in this case and the record before Congress demonstrates congressional concern with the role of tax-exempt organizations in circumventing FECA's contribution restrictions. *See* Findings ¶¶ 1.85-1.86. As discussed earlier, the record in this case establishes that prior to BCRA, parties and candidates would solicit and donate funds to tax-exempt organizations which would then be used to influence federal elections on behalf of the party or candidate donor. The legal advantage to employing a tax-exempt organization is that it avoids the source, amount, disclosure, and allocation system of the FECA regime. Therefore, Congress recognized that continuing to permit parties to solicit and direct federal funds to these tax-exempt organizations logically posed a circumvention problem. Notably with BCRA, Congress does permit political party committees to solicit and direct federal funds to PACs, which are regulated under FECA and required to make disclosures and to accept only federal funds.

Tax-exempt organizations can establish political committees under the Act to which political parties can direct funds or solicit donations to the PAC.

As the foregoing discussion indicates, I find that Congress acted prophylactically and on the basis of a compelling record to ensure that tax-exempt organizations would not undermine the Title I's restrictions on nonfederal funds. As such, and on the basis of the record before me, I determine that Section 323(d) is closely drawn and facially constitutional.

(v) Section 323(e) is Closely Drawn

I concur with Judge Henderson's conclusion that Section 323(e) is constitutional under the First Amendment, albeit on slightly different grounds. Given my conclusion regarding the definition of Federal election activity, I do not find it necessary to narrowly construe the provision.

As discussed at length, political parties dangle access to federal candidates as bait to lure large nonfederal money donors. In response to this obvious problem, Congress enacted Section 323(e), which prohibits federal candidates and officeholders from soliciting, receiving, directing, transferring, or spending any nonfederal funds in connection with a federal election. BCRA § 101; FECA § 323(e)(1)(A); 2 U.S.C. § 441i(e)(1)(A). The statute permits federal candidates or officeholders to raise nonfederal funds in connection with a state and local election, provided that those funds do not exceed the federal contribution limitations and are from sources permitted under federal law. BCRA § 101; FECA § 323(e)(1)(B)(i) and (ii); 2 U.S.C. § 441i(e)(1)(B)(i) and (ii). Notably, a federal officeholder

or candidate "may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party." BCRA § 101; FECA § 323(e)(3); 2 U.S.C. § 441b(e)(3). Also, federal candidates and officeholders may solicit money on behalf of any tax-exempt Section 501(c) organization whose "principal purpose" is not 301(20)(A)(i) or (ii) activity, so long as the solicitation does not specify how the funds will be spent. BCRA § 101; FECA § 323(e)(4)(A); 2 U.S.C. § 441i(e)(4)(A). Concomitantly, a federal candidate is permitted to raise money for a tax-exempt Section 501(c) organization that does engage in Section 301(20)(A)(i) and(ii) activity, subject to the condition that he or she may solicit up to $20,000 per person per year from individuals only. BCRA § 101; FECA § 323(e)(4)(B)(i) and (ii); 2 U.S.C. § 441i(e)(4)(B)(i) and (ii).

BCRA is closely drawn because it permits federal candidates and officeholders to continue to engage and fully participate in the political process, but closely circumscribes their activities to prevent the kinds of problems that developed with their solicitation of nonfederal funds. For example, under BCRA, a federal officeholder may raise up to $2,000 from an individual for use in a state election, but may not raise money from a corporation for that purpose. However, to avoid undermining traditional political activity, BCRA permits federal candidates and officeholders to appear and speak at state and local party events. *Cf.* Findings ¶¶ 1.97, 1.96. Accordingly, Plaintiffs are simply wrong to claim that, under BCRA, "aside from speaking at and attending fundraising events, federal officeholders and candidates will otherwise be prohibited altogether from raising money directly for state and

local candidates." McConnell Br. at 23-24. Rather, BCRA permits federal officeholders and candidates to raise nonfederal funds for state candidates, provided that they are within the federal source and amount limitations.

In my judgment, Defendants have adequately explained why Section 323(e) permits federal officeholders and candidates to make certain solicitations for tax-exempt organizations and why political parties and party officials under Section 323(d) are prohibited from making the same solicitation. *See* RNC Br. at 46 (arguing the "[t]hese provisions subjecting political parties to flat bans while permitting federal candidates and officeholders to engage in the same activities reveal an utter lack of tailoring in the Act's treatment of parties."). The reason for the difference is that unlike political party officials, candidates are subject to limits on solicitation at all times, not whether or not they are acting on behalf of the party. As Defendants suggest, "it was reasonable for Congress to allow candidates to make solicitations under limited circumstances that accommodate the legitimate interests of candidates in providing personal support for certain organizations, while retaining the monetary limits that help minimize the risk of corruption." Gov't Opp'n at 39. Plaintiffs' offer no real response to this in their filings.

As Judge Henderson has observed in regard to Section 323(e) in her opinion, "[i]t bears emphasizing that the plaintiffs do not challenge this provision with the same vigor as they do BCRA's other non-federal fund restrictions." Henderson Op. at 323. Given that Plaintiffs have spent little time engaging in a discussion of these issues and the fact that the

record before this three-judge District Court amply supports the congressional decision to regulate federal candidates in this manner, I find that under *Buckley*'s scrutiny applicable to contribution restrictions, Section 323(e) is closely drawn and, therefore, consistent with the First Amendment.

(vi) Section 323(f) is Closely Drawn

For the reasons set forth in Judge Leon's opinion, I similarly find Section 323(f) closely drawn to match the sufficiently important governmental interests discussed above.

(c) *Conclusion*

In my judgment, Title I is a closely drawn contribution restriction targeted at reducing the corrosive influence of nonfederal funds on federal elections. As Justice Byron White remarked in *Citizens Against Rent Control*: "Every form of regulation–from taxes to compulsory bargaining–has some effect on the ability of individuals and corporations to engage in expressive activity. We must therefore focus on the extent to which expressive and associational activity is restricted by [the law at issue]." *Citizens Against Rent Control*, 454 U.S. at 310 (White, J., dissenting). Taking a comprehensive view of Title I, as I have done in my discussion above, I conclude that any infringement on First Amendment protections is more than outweighed by the significant state interests behind regulating nonfederal funds. Accordingly, I find Title I consistent with the First Amendment guarantees of speech and association and the ruling in *Buckley*.

C. ***Plaintiffs' Equal Protection and Underbreadth Claims***

Plaintiffs contend that Title I is also unconstitutional because it violates the Fifth Amendment by restricting the activities of political parties without imposing similar restrictions on special interest groups. *See, e.g.*, McConnell Br. at 40-43; RNC Br. at 57. As a corollary to this argument, Plaintiffs contend that in treating political parties differently from special interest organizations, Title I is fatally underinclusive because it "does not begin to address the supposed access enjoyed by hard-money donors to political parties or by special interest groups." RNC Br. at 65. Since I find Title I consistent with the First Amendment guarantees of speech and association, I am required to reach Plaintiffs' arguments on these points. After considering the parties' arguments and the relevant caselaw, I find Plaintiffs' contentions on these points to be without merit.

Assuming that Plaintiffs' equal protection arguments are even viable after my discussion of Plaintiffs' First Amendment issues, *see* 3 Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law–Substance & Procedure* § 18.40 (3d ed. 1999), I find their arguments unpersuasive.[180] It is a well-worn tenet of equal protection analysis "that all

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[180] As Professors Rotunda and Nowak discuss:

> It is generally unnecessary to analyze laws which burden the exercise of First Amendment rights by a class of persons under the equal protection guarantee, because the substantive guarantees of the Amendment serve as the strongest protection against the limitation of these rights. Laws which classify persons in their exercise of these rights will have to meet strict tests for constitutionality without need to resort to the equal protection clause. Should the laws survive substantive review under the specific guarantees they are also likely to be upheld under an equal protection analysis, for they have already

(continued...)

persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). It is well understood, therefore, that the "Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (internal citation and quotation marks omitted). In this case, the record and prior precedent demonstrate that political parties are not "similarly situated" to special interest organizations. The law does not treat political parties "better or worse" than special interest organizations. It only treats them differently because they have different interests that need to be accommodated, and they have a different role in the campaign system and in the government than do special interest organizations.

The record in this case establishes the unique situation of political parties in the political process. As Plaintiffs' expert La Raja concludes, "[m]ost interest groups, in contrast [to political parties], seek to build relationships with officeholders as a way of improving access to the legislative process and lobbying their position. . . . Political parties . . . allocate resources for electoral strategies, meaning they contribute money to a party candidate who is in a potentially close election." Findings ¶ 1.16.2; *see also id.* ¶ 1.46 (discussing the special relationship between political parties and their candidates/officeholders).

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[180](...continued)
been found to represent the promotion of government values which override the individual interest in exercising the specific right. . . .
If the Court examines the classification under the First Amendment and finds that the classification does not violate any First Amendment right, the Court is unlikely to invalidate that classification under equal protection principles.
3 Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law–Substance & Procedure* § 18.40 (3d ed. 1999).

Furthermore, an RNC official agrees that interest groups can never replace political parties. *Id.* ¶ 1.89. As Senator McCain testifies,"[t]he entire function and history of political parties in our system is to get their candidates elected, and that is particularly true after the primary campaign has ended and the party's candidate has been selected." *Id.* ¶ 1.48. In fact, FECA recognizes this difference when it defines a political party as "an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C 431(16). Interest groups are simply not connected to candidates in the same manner. *See Colorado II*, 533 U.S. at 449 ("[t]here is no question about the closeness of candidates to parties").

It is therefore the case that BCRA treats political parties differently than special interest organizations. For example, political parties are permitted to receive greater contributions from individuals than are interest groups. *Compare* BCRA § 307(a); FECA § 315(a)(1)(B); 2 U.S.C. § 441a(a)(1)(B) *with* 2 U.S.C. § 441a(1)(C). The political parties are permitted to make greater coordinated expenditures in support of federal candidates than special interest organizations. 2 U.S.C. § 441a(d). Moreover, the national political parties and the national Senate committees may make greater contributions to Senate candidates than special interest groups. BCRA § 307(c); FECA § 315(h); 2 U.S.C. § 441a(h). Finally, BCRA permits national political parties to transfer federal money (in any amount) to other party committees without being subject to the contribution limits that apply to such transfers

by nonparty committees. 2 U.S.C. § 441a(a)(4). At the same time, special interest organizations set up as nonprofit corporations, will have to comply with the electioneering communication provisions in Title II. *See supra*. BCRA presents a symmetrical approach to the problems plaguing the campaign finance system: national political party fundraising of nonfederal funds and interest organizations using general treasury funds to influence a federal election. The law simply recognizes the unique nature of these organizations in the political process and accommodates them in different ways. *Cf. California Med. Ass'n*, 453 U.S. at 201 ("The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process."). Accordingly, I find that Title I does not violate the Fifth Amendment guarantees of equal protection.

As a corollary of their Fifth Amendment arguments, Plaintiffs also contend that Title I is underinclusive because it does not subject interest groups to the same restrictions on nonfederal money applicable to political party committees. McConnell Br. at 41-43; RNC Br. at 57-58, 65. As the Court of Appeals has held, "a regulation is not fatally underinclusive simply because an alternative regulation, which would restrict *more* speech or the speech of *more* people, could be more effective. The First Amendment does not require the government to curtail as much speech as may conceivably serve its goals." *Blount v. SEC*,

61 F.3d 938, 946 (D.C. Cir. 1995) (emphasis in original). As "the primary purpose of underinclusiveness analysis is simply to 'ensure that the proffered state interest actually underlies the law,' *Austin*, 494 U.S. at 677 (Brennan, J., concurring), a rule is struck for underinclusiveness only if it cannot 'fairly be said to advance any genuinely substantial governmental interest,' *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984)." *Id*. As I have shown above, the record in this case significantly demonstrates that Title I is carefully tailored to address the problem that was before Congress–nonfederal funds raised by the national committees of the political parties. The rationale underlying Title I simply does not apply with equal force to entities not covered by Title I. Accordingly, an underinclusive challenge is without merit.

I also agree with Defendants when they state that Plaintiffs make a policy argument better suited for the legislature than the judiciary when Plaintiffs argue that "Title I's differential treatment of parties and special interest groups will make matters worse, not better." RNC Br. at 67 (capitalization altered).[181] Def. Opp'n at 52; *Cf. Colorado II*, 533 US. at 454 n.15 ("[Wle do not mean to take a position on the wisdom of policies that promote one

[181] As part of this argument, Plaintiffs present evidence attempting to show that under BCRA, interest group activity will escalate and supplant those activities traditionally done by political parties. Findings ¶¶ 1.87-1.88, 1.91-1.93. This change would be a negative development, Plaintiffs attempt to show, because interest groups do not operate as transparently as political parties. *Id*. ¶¶ 1.90, 1.91. A review of the facts leads to the conclusion that none of them sheds much light on what BCRA's impact will be on the activities of interest groups. *Id*. ¶ 1.95. Furthermore, the evidence regarding the lack of disclosure required of interest group political activity does not take into account BCRA's new disclosure requirements. *Id*.

source of campaign funding or another."). The problem that Congress sought to solve related to the fundraising abuses and access given to large nonfederal money contributors to political parties. Title I accomplishes this goal in a narrowly tailored fashion.

Moreover, the evidence in the record is at best inconclusive as to whether nonfederal funds will suddenly flow to special interest groups. While there is some evidence in the record that interest groups are expected to receive nonfederal funds donations, there is equal evidence in the record that nonfederal funds will not flow to special interest groups since these groups cannot deliver "the special favors that only a political party can deliver by dint of its ubiquitous role in all levels of government." Findings ¶ 1.87.[182] As the Findings demonstrate, the experts are divided on this question. Accordingly, it is the choice of Congress as to whether it should refrain from offering legislation at this time directed at special interest organizations. If special interest groups create problems of corruption worthy of congressional attention, that is always the prerogative of Congress; but such an amendment to campaign finance laws would require a compelling record– a record not present here. *Cf. NRWC*, 459 U.S. at 209 ("This careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and

[182] Plaintiffs also cite to a series of newspaper articles for the fact that interest groups are now "*gearing up*" to supplant political party committees with respect to nonfederal fundraising. McConnell Br. at 42 (emphasis added). This evidence is highly speculative and since it would not form a basis for congressional action in the first instance, I am not persuaded that Congress needed to grapple with this problem; particularly when expert evidence is largely divided over whether special interest groups will even supplant political party committees in nonfederal funds fundraising.

economic attributes of corporations and labor organizations warrants considerable deference.") (internal quotation marks and citations omitted). Accordingly, in my judgment, Plaintiffs' underbreadth challenge fails.

D. *Plaintiffs' Federalism Challenge*

My colleagues, with two exceptions, do not specifically address Plaintiffs' claims that 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." McConnell Br. at 9 (capitalization altered).[183] Given that I find Title I constitutional in keeping with *Buckley* and the First Amendment, I am also required to reach Plaintiffs' federalism arguments. However, after serious reflection, particularly in regard to the parties' answers to my questions at oral argument, I do not find that any of the Plaintiffs before this three-judge panel have standing to raise a Tenth Amendment challenge to Title I.[184]

It is true that standing for private parties challenging acts of Congress has been found

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[183] Judge Henderson rejects Plaintiffs' federalism challenge to Section 323(e). Henderson Op. Part IV.D.4, while Judge Leon rejects Plaintiffs' federalism challenge with regard to Section 301(20)(A)(iii) activities. Leon Op. Part I.B.2. Neither of my colleagues, however, address the question of whether Plaintiffs have standing to present his argument.

[184] When I refer to standing in this context, I am specifically referring to rules of prudential standing which act as self-imposed limitations on the jurisdiction of Article III courts. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982) ("Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that 'the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' *Warth v. Seldin*, 422 U.S. [490, 499 (1975)]."). It is my view, therefore, that Plaintiffs lack "third-party standing" to assert the constitutional rights of the States.

when a plaintiff asserts that Congress has acted in excess of its Article I powers. Most of these cases have focused on situations where Congress plainly exceeded its power under the Commerce Clause and the statutes were declared unconstitutional. *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act, making it a federal offense for any individual knowingly to possess a firearm at a place that an individual knows or has reasonable cause to believe is school zone, exceeded Congress's commerce clause authority); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that the Commerce Clause did not provide Congress with authority to enact civil remedy provision of Violence Against Women Act). On the other hand, courts have been reluctant to provide private parties with standing when they are asserting the rights of a State. *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 144 (1939) ("As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, *have no standing in this suit to raise any question under the amendment*.") (emphasis added); *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 761 (10th Cir. 1980) ("Only the State has standing to press claims aimed at protecting its sovereign powers under the Tenth Amendment.").

In *New York v. United States*, the Supreme Court articulated this distinction in the context of a *State* bringing suit:

> In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution *See, e.g.*, *Perez v. United States*, 402 U.S. 146 (1971); *McCulloch v. Maryland*, 4 Wheat. 316 (1819). In other cases the Court has sought to determine

> whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. *See, e.g.*, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *Lane County v. Oregon*, 7 Wall. 71 (1869). *In a case like these, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If 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. See United States v. Oregon*, 366 U.S. 643, 649 (1961); *Case v. Bowles*, 327 U.S. 92, 102 (1946); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941).

New York v. United States, 505 U.S. 144, 155-56 (1992) (emphasis in original). In the context of a State bringing suit, the Supreme Court concluded that the distinction was practically irrelevant. *Id*. at 159 ("In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment."). The Supreme Court has not, however, addressed whether this distinction is of no practical difference when a private party challenges a law of Congress and indirectly asserts the Tenth Amendment as a basis for finding the law unconstitutional. Indeed, given *Lopez* and *TVA*, it would appear that this distinction is relevant when someone other than the State or the State's officials are bringing the challenge.

This distinction is the reason Plaintiffs claim at places in their briefing that their federalism challenge involves the argument that Congress lacks the affirmative power to

have enacted BCRA under the Elections Clause. *See, e.g.*, McConnell Reply at 4 n.2 ("[P]rivate parties are routinely allowed to bring suit where they are claiming that Congress acted *outside* its delegated powers, rather than merely asserting that Congress violated state sovereignty in acting *under* its delegated powers.") (emphasis in original) (citing *Lopez*). Despite what Plaintiffs state, their briefing shifts between these two poles and is often not clear as to whether they are making a "Tenth Amendment" argument that Congress is transgressing "the province of state authority reserved by the Tenth Amendment," *New York*, 505 U.S. at 155, or are simply arguing that Congress had exceeded its delegated authority, *id*. *See, e.g.*, CDP/CRP Br. at 21 ("In this case, plaintiffs' [sic] believe that the two inquiries [identified in *New York*] do indeed converge, but that under either inquiry, BCRA oversteps the boundary between federal and state authority.") (internal citation and quotation marks omitted).

The ease with which Plaintiffs move between these two arguments is problematic. If it is the case that Plaintiffs are making a Tenth Amendment argument that Congress, in enacting BCRA, was transgressing the province of state authority reserved by the Tenth Amendment, then *TVA* holds that Plaintiffs do not have standing to bring such a challenge.[185]

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[185] I would observe, that the D.C. Circuit in the *Lomont* case recently discussed the issue of private party standing under the Tenth Amendment in a footnote. *Lomont v. O'Neill*, 285 F.3d 9, 13 n.3 (D.C. Cir. 2002). While the D.C. Circuit did not rule on this issue, it certainly hinted that the Supreme Court should be the tribunal to overrule *TVA* and not the lower courts. Accordingly, to the extent Plaintiffs are claiming that they fit into the latter category of cases, I find that *Lomont* cautions against this three-judge panel finding standing. *See City of Roseville v. Norton*, 219 F. Supp. 2d 130, 148 (D.D.C. 2002) ("This Court is (continued...)

However if, Plaintiffs are arguing that Congress lacks the affirmative authority to enact Title I, then presumably *Lopez* and that line of cases recognizes private parties do have standing to assert such a challenge at least in the context of the Commerce Clause.

In order to make an argument that Congress has acted *outside* its power under the Elections Clause in enacting Title I of BCRA, Plaintiffs are forced to contend that Congress is intruding on the ability of *States* to regulate their own elections. *See, e.g.*, McConnell Br. at 9 ("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.") (emphasis added). To the Plaintiffs in these consolidated cases, therefore, BCRA violates state sovereignty and the focus of their arguments are on the injury to the States.

This result is different from the Supreme Court striking down a law in the Commerce Clause context, like *Lopez*, where the argument is that the legislature focused on a problem unrelated to interstate commerce. *Lopez*, 514 U.S. at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."). However, given the nature of Title

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[185](...continued)
bound to apply Circuit precedent. *Lomont* implicitly recognizes that the Seventh Circuit's reasoning in *Gillespie* [a case finding private party standing under the Tenth Amendment] cannot be squared with *TVA*'s holding.").

I, and the Elections Clause, Plaintiffs are really contending that Congress was not simply regulating federal elections, *but was impermissibly legislating state elections*. *See, e.g.*, McConnell Br. at 17 ("By imposing federal limits on these activities, BCRA effectively overrides the laws of numerous States. . . ."). The injury in this context is not held by an individual plaintiff, but rather the injury is only held by the State, who organizes the elections pursuant to state law. Since Title I operates as a contribution restriction, the injury to the Plaintiffs in this case rests on an interference with funds specifically regulated or not regulated by their individual States. Premising a Tenth Amendment argument based on the Elections Clause, in the context of BCRA, therefore compels Plaintiffs to present an argument that specifically rests on the rights of their individual States, who have chosen to regulate or not regulate these funds.[186]

At oral argument, CDP Plaintiffs' counsel had difficulty explaining this nuanced difference in relation to their legal positions. *See* Tr. at 29-30. RNC Plaintiffs' counsel proffered that under *Oregon v. Mitchell,* Plaintiffs had standing because the Supreme Court decided that case based on "Congress's overreach." Tr. at 43. In *Oregon v. Mitchell*, the Court considered, *inter alia*, amendments to the Voting Rights Act that would have given 18 year-olds the right to vote. The Court upheld the amendments as applied to federal elections, but struck them down as applied to state and local elections. *Oregon v. Mitchell*, 400 U.S.

[186] In another context, therefore, Plaintiffs might have private party standing to assert that Congress exceeded its authority under the Elections Clause. However, in the context of BCRA, the parties are actually asserting the rights of their individual States in this litigation.

112, 118 (1970) (opinion of Black, J.). Justice Black, in striking down that portion of the Act that applied to state elections, stated 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." *Id*. at 125 (emphasis added); *see also id*. at 124-25 (observing that "the Framers of the Constitution intended the *States* to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections") (emphasis added).

It is correct that *Mitchell* found that Congress had acted in excess of its statutory authority, but *Mitchell* involved an *original* action in the Supreme Court brought by a number of *States* who resisted compliance with the Voting Rights Act. *Id*. at 117; *see also id*. at 117 n.1 ("No question has been raised concerning the standing of the parties or the jurisdiction of this Court."). Accordingly, in *Mitchell*, there was no question that the plaintiffs in that case were able to argue that Congress exceeded its power under the Elections Clause because the plaintiffs in that action were either the States themselves or the United States, who had each invoked the original jurisdiction of the Supreme Court of the United States. The question in this case is whether a private party can assert that right on behalf of the State. As no States are among the 77 plaintiffs to this case, and as none of the Plaintiffs bring suit as representatives of the States, I find that Plaintiffs' Tenth Amendment challenge to Title I is nonjusticiable.

The issue of third-party standing is particularly weighty in this case, where for example, the State of Kentucky has joined an *amicus* brief in support of BCRA, while Plaintiff Mitch McConnell, who represents Kentucky in the Senate, is a lead Plaintiff challenging BCRA. Moreover, this situation represents a question that the Supreme Court has not definitively addressed. *See Pierce County v. Guillen*, 123 S. Ct. 720, 732 n.10 (2003) ("[I]n light of our disposition . . ., we need not address the second question on which we granted certiorari: whether private plaintiffs have standing to assert 'states' rights' under the Tenth Amendment where their States' legislative and executive branches expressly approve and accept the benefits and terms of the federal statute in question.").[187]

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[187] Beside Kentucky, 18 States, the Commonwealth of Puerto Rico, and the Territory of the United States Virgin Islands support BCRA, although they take no position on the standing issue. *See* Am. and Substituted Br. of *Amici Curiae*–The States of Iowa and Vermont *et al.*; Utah and seven other states oppose BCRA and do not address the standing issue. Br. of *Amici Curiae* Utah, *et al.* The Utah *Amici* point out in a footnote that Alabama did not join the *amici* brief because Alabama's Attorney General William Pryor was a named Plaintiff in the *McConnell* action. *Id.* at 2 n.1. The footnote is silent on whether Pryor brought suit in his official capacity representing the State of Alabama. However, it is clear from the entire record in this case that Pryor did not bring this suit in his official capacity. *See* McConnell Second Am. Compl. ¶ 18. At oral argument, Judge Henderson raised the question with Defendant-Intervenors' counsel whether Attorney General Pryor brought suit in his official capacity on behalf of Alabama. The colloquy was:

> JUDGE HENDERSON: Isn't the Alabama Attorney General, Bill Pryor, a plaintiff in the McConnell?
> COUNSEL: Yes, he is.
> JUDGE HENDERSON: Why isn't he, to the extent that that standing is needed, why doesn't he fill that?
> COUNSEL: Because I don't believe he's bringing the action in his capacity as a representative of the state.
> JUDGE HENDERSON: All right. I don't remember in the complaint.
> COUNSEL: I don't think the State of Alabama is a party in this case.

(continued...)

Since I have found that Plaintiffs lack standing to raise claims under the Elections Clause and Tenth Amendment, I do not proceed further. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998) ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.").

E. ***Conclusion***

In my judgment Title I in its entirety is constitutional. The evidence put forward in the record provides ample justification for Congress enacting the contribution restrictions at issue in the case. The record demonstrates that FECA's entire contribution structure has been completely gutted by political actors willing to test the limits of the law in a manner that has returned the campaign finance system to a regime equaling the troubling aspects of the 1972 regime. In response, Plaintiffs argue that "BCRA simply goes too far." CDP/CRP Br. at 46. However, reading Plaintiffs' briefing in this case, I am not sure if Plaintiffs would accept any restrictions whatsoever on nonfederal funds. Indeed, Plaintiffs' view of corruption is so incompatible with the *Buckley* Court's understanding of the term, that under Plaintiffs'

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[187](...continued)

JUDGE HENDERSON: Well, the state isn't, but he's not representing the State of Alabama.

COUNSEL: I don't believe so, no.

JUDGE HENDERSON: All right.

Tr. at 124-25. Plaintiffs registered no objection to this discussion and, therefore, the only conclusion to be drawn is that Mr. Pryor is not bringing suit in his official capacity on behalf of the State of Alabama.

governing rationale, FECA's contribution limitations upheld in *Buckley* would be struck down.

The Supreme Court has long recognized Congress' broad authority to enact measures to protect the integrity of federal elections. Title I accomplishes its purpose without unduly transgressing the rights of individuals to engage in the political process. While there may be future challenges which test some of the regulations at issue in this case, at this facial challenge stage, Title I survives constitutional attack.

III. Title III: MISCELLANEOUS

Sections 304, 305, 307, 316, and 319

I concur with Judge Henderson's with regard to: BCRA Section 305, the condition on the lowest broadcast unit charged; BCRA Section 307, regarding increased contribution limitations; and BCRA Sections 304, 316 and 319, special provisions dealing with financing campaigns against wealthy opponents (also known as the "Millionaire Provisions").

Section 318: Prohibition of Contributions by Minors

Section 318 adds Section 324 to FECA, providing that:

> An individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution or donation to a committee of a political party.

BCRA § 318; FECA § 324; 2 U.S.C. § 441k. Section 318 is challenged by the McConnell Plaintiffs.

The Government maintains that this provision is subject to *Buckley*'s "closely drawn" scrutiny standard. Gov't Br. at 199. According to the Government, Section 318 serves the important governmental interest of preventing circumvention of contribution limits and is closely drawn to avoid unnecessary infringement of constitutional rights. *Id*. at 200-08. Plaintiffs disagree, arguing that since the provision works as a complete ban on contributions by minors to candidates and political party committees, it is subject to strict scrutiny. McConnell Pls.' Br. at 92. Plaintiffs maintain that even if exacting scrutiny is the appropriate standard, preventing circumvention is not a cognizable government interest in the campaign finance context, and that even if it were, Defendants have failed to show that Section 318 is

tailored to serve that interest. *Id*. at 93.

Given the evidence presented in this case, I need not decide the appropriate standard of review, for even if exacting scrutiny were applied to the present situation, Defendants have failed to present sufficient evidence to establish that parents' use of minors to circumvent campaign finance laws serves an important governmental interest.[188] Although it is clear that the FEC and Congress have been concerned for many years with the potential for campaign finance abuses through the use of minors' contributions,[189] Findings ¶¶ 3.1, 3.2, the evidence presented is insufficient to support government action that abridges constitutional freedoms.

Campaign finance laws prohibit anyone from making "a contribution in the name of another person or knowingly permit[ting] his name to be used to effect such a contribution," or "knowingly accept[ing] a contribution made by one person in the name of another person." 2 U.S.C. 441f. Donations made by minor children are specifically addressed in FEC regulations. *See* 11 C.F.R. 110.1(i)(2) (2002 revised ed.).[190] However, enforcing these

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[188] This reason necessarily precludes discussion of whether the provision is narrowly tailored to meet an important governmental interest.

[189] The record also demonstrates that not all contributions to political campaigns made by minors are done by their parents in circumvention of campaign finance laws. *See, e.g.,* Findings ¶ 3.7.

[190] The regulations provide that contributions by minors that do not violate FECA's other provisions are permitted so long as

> (i)The decision to contribute is made knowingly and voluntarily by the minor child;
>
> (ii) The funds, goods, or services contributed are owned or controlled exclusively by the minor child, such as in-come earned by the child, the

(continued...)

provisions with respect to contributions by minors has been difficult due to the fact that FECA does not require reporting of a donor's age. *Id.* ¶ 3.9. The evidence also shows that when the FEC has discovered donations given by young children which raised suspicions, their investigations were stymied by the refusal of parents to allow interviews, constitutional privacy concerns, and parental and legal counsel influence. *Id.* ¶ 3.10.

Perhaps due to these difficulties, the Government was able to provide the Court with only four instances where the FEC found contributions were made by parents in the name of their minor children in violation of existing campaign finance laws. *Id.* ¶ 3.8-3.8.4. Some of these investigations have been prompted by newspaper articles discussing contributions made by parents in their young children's names. *Id.* ¶ 3.5, 3.6. Therefore, although the record shows that the threat of circumvention in this manner exists, including statements from lawmakers that fundraising appeals include appeals for contributions from family members, *id.* ¶¶ 3.3, 3.4, the minimal evidence presented does not establish that circumvention of campaign finance laws by parents of minors supports the required governmental interest. If the Government had proffered a more robust record establishing that such corruption exists it likely would have succeeded in establishing this element of the

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[190](...continued)
proceeds of a trust for which the child is the beneficiary, or a savings account opened and maintained exclusively in the child's name; and
(iii) The contribution is not made from the proceeds of a gift, the purpose of which was to provide funds to be contributed, or is not in any other way controlled by another individual.
11 C.F.R. 110.1(i)(2) (2002 revised ed.).

analysis, given that all members of the Supreme Court agree "that circumvention is a valid theory of corruption." *Colorado II*, 533 U.S. at 456. The Government's failure to do so, however, dooms their arguments and Section 318 of BCRA.

IV. Title V: ADDITIONAL DISCLOSURE PROVISIONS

Section 504

For the reasons stated in Judge Leon's opinion, I concur that Section 504 is unconstitutional.

IV. CONCLUSION

For the reasons set forth in this Memorandum Opinion, I find Title I in its entirety consistent with the Constitution. Moreover, I conclude that BCRA's restrictions on electioneering communication as set out in Sections 201, 203, and 204 are constitutional. I also find Section 301 of BCRA constitutional. I further determine that Sections 213, 318, and 504 are unconstitutional. I concur with Judge Henderson's discussion of Plaintiffs' standing with regard to BCRA's condition on the lowest broadcast unit charged, BCRA's increased contribution limitations, and BCRA's "Millionaire's Provisions."

For anyone who has great faith in the purity of this country's democracy, the factual record amassed in this case is bound to depress. The pre-BCRA campaign finance regime saw wealthy individuals, corporations, and labor unions routinely providing donations, far surpassing legal limitations, to the national party committees to influence federal elections. In some instances, this system compelled corporate entities to give massive amounts of nonfederal funds to the national party committees merely to stay on par with their competitors. Of greater concern, corporations and labor unions poured massive amounts of general treasury funds into electioneering communications designed to influence federal elections, despite longstanding federal policy against corporate and labor union general treasury funds being used for these purposes.

Judge Henderson criticizes my reasoning and conclusions as "treat[ing] a First Amendment with which [she is] not familiar." Henderson Op. at 5. My response is that my

approach to adjudicating these cases and the constitutional challenges presented therein has been grounded in a textual analysis of *Buckley* and its progeny. My view of the First Amendment emanates from *Buckley*'s teachings and in resolving these cases I have continually returned to *Buckley* for insight and guidance.

Having spent much time reviewing the record submitted in this case, one thing is very clear: evidence of the wholesale evasion of FECA is not "anecdotal" or "beside the point." Rather, it is evidence of a regulatory regime in disarray. Without BCRA, the major provisions of the Federal Election Campaign Act designed to reduce the corrupting influence of large sums of money channeled into the political process are decimated. The clock will be turned back to close to 100 years of incremental and balanced campaign finance regulation.

Congress, which has concentrated on enacting a law that is true to *Buckley* to address these abuses, should not be left impotent to correct these glaring problems. In reading much of the legislative debate surrounding BCRA's passage, I am struck by the concern of Congress to abide by *Buckley*'s teachings. In my judgment, the fact that Congress was so cognizant of *Buckley* should give this three-judge panel great pause before reaching out to strike down wholesale provisions of BCRA. In declaring much of BCRA's core tenets facially unconstitutional, it is my belief that this panel's approach has strayed from the conservative, measured, and customary approach to adjudicating facial challenges that is demanded by the dictates of our constitutional tradition. Simply put, on the basis of the

record assembled, the Constitution does not act as an impermissible barrier to the changes sought by our coordinate branches to improve the democratic process.

With the record firmly before it, the Supreme Court will review this three-judge panel's legal conclusions *de novo*. *Cf. Colorado II*, 533 U.S. at 458 n.21. The constitutional rights of those who participate in the election of federal officeholders are unquestionably of the highest order, but so too is the sanctity of the process that produces those public officials who participate in the governance of our democratic society.

May 1, 2003

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX

I. Expert Reports on BCRA's Effect on Political Advertisements

Defendants have provided a number of expert reports to address the issue of whether BCRA is overbroad in terms of the types of advertisements it affects. *See, e.g.,* Jonathan S. Krasno & Daniel E. Seltz, Buying Time: Television Advertising in the 1998 Congressional Elections (2000) ("*BT 1998*") [DEV 47]; Craig B. Holman & Luke P. McLoughlin, Buying Time 2000: Television Advertising in the 2000 Federal Elections (2001) ("*BT 2000*") [DEV 46]; Goldstein Amended Expert Report (Oct. 2, 2002) ("Goldstein Expert Report") [DEV 3-Tab 7]; Jonathan S. Krasno & Frank J. Sorauf, Evaluating the Bipartisan Campaign Reform Act (BCRA) [DEV 1-Tab 2] ("Krasno & Sorauf Expert Report"). These studies have been subject to various criticisms, which have been responded to, and I set forth these arguments below.

A. *The CMAG Data Set*

1. All of these studies relied on data from the Campaign Media Analysis Group ("CMAG"), and for that reason, the Court considers it useful to discuss their underlying data source which becomes a point of criticism for Plaintiffs' expert, Dr. James L. Gibson, before discussing the studies' themselves. Dr. Gibson, Plaintiffs' expert witness, produced "An Analysis of the 1998 and 2000 Buying Time Reports," criticizing both Buying Time studies. James L. Gibson, Expert Report, An Analysis of the 1998 and 2000 Buying Time Reports (Sept. 30, 2002)

("Gibson Expert Report") [1 PCS].

2. CMAG tracks political television advertising in the top 75 media markets, containing more than 80 percent of U.S. residents. *BT 1998* at 6-7 [DEV 47]; *BT 2000* [DEV 46] at 18; Gibson Expert Report at 7 [1 PCS]; *see also* Goldstein Dep. (Vol. 1) at 47-49 [JDT Vol. 8] (describing how CMAG compiles its data). These 75 markets are geographically dispersed. Goldstein Rebuttal Report at 23 [DEV 5-Tab 4]; *see also* Goldstein Expert Report App. G at 1-2 [DEV 3-Tab 7] (listing the 75 markets monitored by CMAG). In 1998-1999 New York was the largest media market with 6,812,540 television households representing 6.854 percent of all television households. *See* Dr. James L. Gibson's Rebuttal to the Expert Reports of Kenneth M. Goldstein and Jonathan S. Krasno and Frank J. Sorauf (Oct. 7, 2002) ("Gibson Rebuttal Report") Ex. 2 at 1 [2 PCS] (listing 1998-1999 Nielson estimates of media markets in order of size). Shreveport was the seventy-fifth largest media market, with 370,990 television households, or 0.373 percent of all television households. *Id*. at 2. For each market, CMAG monitors the four major broadcast networks (ABC, CBS, NBC, and Fox), as well as 42 national cable networks. Goldstein Expert Report App. G at 2-3 [DEV 3-Tab 7]. The CMAG data sets include two types of data. First, for every political advertisement aired, CMAG provides a transcript of the audio portion of the advertisement and a storyboard consisting of a still capture of every fourth second of the video

portion of the advertisement. Goldstein Expert Report at 6 [DEV 3-Tab 7]. Second, CMAG provides data on each airing of an advertisement, including time, length, station, show and estimated cost. *Id*.

3. The CMAG data set has some "gaps." Goldstein Dep. (Vol. 1) at 52 & Ex. 9 at 16. The CMAG does not monitor local cable advertising in the 75 markets it covers. Gibson Expert Report at 8 [1 PCS]; Gibson Rebuttal Report at 24 [2 PCS]. The 1998 and 2000 CMAG data sets did not cover advertisements broadcast in the nation's 140 smallest media markets, which are more rural than the 75 captured by CMAG. Goldstein Dep. (Vol. 2) at 9-10 & Ex. 9 at 16 [JDT Vol. 8]. For those markets covered, the evidence shows not all advertisements are captured by CMAG. Dr. Goldstein participated in a validity study of the CMAG data by comparing the CMAG data with a sampling of invoices from eight television stations. *Id*. Ex. 9 at 16. The results show that for seven of the stations, 97 percent or more of the advertisements listed on their invoices correlated with the CMAG data. *Id*. at 16-17 and 28 (Tbl. 2). For one station, however, 20 percent of the advertisements accounted for in the station's invoices could not be found in the CMAG data. *Id*. Dr. Goldstein surmises that this could be the result of inadequate record keeping by the station as well as CMAG omissions. *Id*. at 17 n.3. Dr. Gibson, for the first time in his rebuttal report, finds this to be a major shortcoming of the CMAG data. Gibson Rebuttal Report at 5-6 [2 PCS]. He

deduces from these missed advertisements that CMAG "likely missed 1,764 ads," or 5.04 percent of these eight stations' airings, and using these figures estimates "that 48,864 airings that in fact were broadcast [nationwide] . . . were not captured by the CMAG methodology." *Id*. (applying the 5.04 percent figure to the total number of advertisements captured by CMAG). Dr. Gibson assumes, without any factual support, that CMAG has missed the same percentage of advertisements in all the covered media markets. Moreover, although Dr. Gibson acknowledges that "we do not know any of the characteristics of these . . . missing airings," he nonetheless hypothesizes, without any factual research or support, that the advertisements missed are most likely those that "did not have a clear 'political purpose' that could be discerned by the CMAG analysts." *Id*. at 6; *but see* Goldstein Dep. (Vol. 2) at 12 [JDT Vol. 8] (stating that commercials provided to CMAG by Competitive Media Reporting ("CMR")[191] is "overly inclusive," including "ads for the Red Cross, [and] ads for electric companies"). Another shortcoming of the CMAG data is that although it provides 100 percent of the advertisements' audio, it only provides snapshots at four second intervals of the advertisements' video. As such, twenty-five percent of the advertisement storyboards for the 1998 data set do not display the name of the group sponsoring

[191] CMAG gets [its] data from Competitive Media Reporting, a company that tracked advertising in the top 75 markets in 1998 and 2000, but now tracks advertising in the top 100 markets. Goldstein Dep. (Vol. 1) at 47

the advertisement. Goldstein Dep. (Vol. 2) at 21 [JDT Vol. 8]; Gibson Expert Report at 8 [1 PCS]. Another perceived shortcoming of CMAG is that it tracks markets not electoral districts, and is unable to distinguish between different versions of advertisements that are identical with the exception of the candidate or officeholder's name (also known as "cookie cutter" advertisements). Gibson Expert Report at 7 [1 PCS]; Gibson Rebuttal Report at 7 [2 PCS]; Goldstein Dep. (Vol. 2) at 113 [JDT Vol. 8].

4. In terms of CMAG's underinclusiveness, Plaintiffs' expert, Dr. Gibson, "presents no evidence or reason to believe that . . . including advertisements from the markets not covered would change [the] results [of studies based on the data]." Rebuttal Report of Dr. Arthur Lupia (Oct. 14, 2002) ("Lupia Expert Report") at 28 [DEV 5-Tab 5]; *see also* Goldstein Rebuttal Report at 24 [DEV 5-Tab 4] ("Moreover, Professor Gibson does not offer any reason to believe that the ads run on local cable advertising are significantly different than the broadcast ads captured by CMAG."). Dr. Gibson did not suggest that "CMAG's inability to capture local cable spots introduced any systematic bias into the data." Goldstein Rebuttal Report at 24 [DEV 5-Tab 4]. Most importantly, there is no evidence that Dr. Goldstein's efforts to identify the appropriate electoral district for advertisements in general or for "cookie cutter" advertisements in particular were flawed or failed to correct these CMAG deficiencies. Goldstein Rebuttal Report

at 25-27 [DEV 5-Tab 4]; *see also* Goldstein Expert Report App. E at 3 [DEV 3-Tab 7] (detailing the process of pairing "cookie cutter" advertisements with the appropriate electoral district); Seltz Dep. at 80-84 [JDT Vol. 28] (detailing how the *Buying Time 1998* authors dealt with the "cookie cutter" issue, including consulting political contacts, experts, newspaper articles, and geographic airing of the advertisements). One of Defendants' experts characterized the filling in of this missing data as "a straightforward– though admittedly tedious–exercise to systematically compare the added data in the *Buying Time*/Goldstein database–against available records." Lupia Expert Report at 30 [DEV 5-Tab 5]. According to Dr. Goldstein, the "snapshot" style of the CMAG storyboards does not compromise the "ability to accurately analyze the content of ads, especially because CMAG provides a complete transcription of the audio portion of the ad along with the video captures." Goldstein Rebuttal Report at 24-25 [DEV 5-Tab 4]. Furthermore, Dr. Goldstein states, "there is no reason to believe that there in [sic] any systematic bias associated with the CMAG terminology capturing only one video frame every four seconds." *Id*. at 25. As for the 25 percent of 1998 storyboards which did not indicate the advertisement's sponsor, the *Buying Time 1998* authors were able to remedy this problem by referring to the "CMAG's original coding (which accurately provides the sponsor of the ad in well over 95 percent of cases), examining the content of the ad, and, in a few cases, by phoning

television stations." *BT 1998* [DEV 47] at 8.

5. Defendants' expert Goldstein explains that CMAG data is relied on by "[c]andidates and political parties interested in monitoring elections across the nation (including both the Democratic and Republican Executive Committees, not to mention several of the plaintiffs in this litigation)." Goldstein Rebuttal Report at 23-24 [DEV 5-Tab 4]. Dr. Goldstein states that CMAG data has served as the basis for a number of his articles, "which have been published in the top-rank of peer-reviewed political science journals." *Id*. at 39. Dr. Goldstein also states that "[d]uring the peer-review process for these articles, none of the academic reviewers shared Professor Gibson's concerns about the validity or reliability of the CMAG databases," which include reviews conducted by two of "the three most prestigious journals in [the political science] discipline." *Id*. at 39 & n.21 (quoting Gibson Expert Report at 2 [1 PCS]). Furthermore, Dr. Goldstein notes that during the 2000 and 2002 election cycles, the Wisconsin Advertising Project, which he heads, has provided CMAG data to journalists covering political advertising in real time. *Id*. Although "[m]uch of the data we report can cast the election strategies of particular candidates, parties or interest groups in an unfavorable light . . . . at no time have we been challenged on the accuracy of the factual data we have reported on the content and targeting of political advertising." *Id*. at 39-40. Dr. Gibson does not contest these statements in his

rebuttal report, and does not suggest a better source of data for this type of study. *See* Gibson Expert Report at 6-9 [1 PCS]; Gibson Rebuttal Report at 3-7 [2 PCS].

B. *The Annenberg Public Policy Center Reports*

1. The Annenberg Public Policy Center ("Annenberg Center") "was established by publisher and philanthropist Walter Annenberg in 1994 to create a community of scholars within the University of Pennsylvania that would address public policy issues." Annenberg Report 1997 at 2 [DEV 38-Tab 21].

2. "For much of the last decade the Annenberg Center has been tracking the growth of broadcast issue advocacy advertising." Annenberg Report 2001 at 1 [DEV 38 Tab-22]. The Annenberg Center notes that to "the naked eye, these issue advocacy ads are often indistinguishable from ads run by candidates. But in a number of key respects, they *are* different. Unlike candidates, issue advocacy groups face no contribution limits or disclosure requirements. Nor can they be held accountable by the voters on election day." Annenberg Report 1997 at 3 [DEV 38 Tab-21].

3. The Annenberg Report 1997 reported that more than two-dozen organizations, including "political parties, labor unions, trade associations and business, ideological and single-issue groups" spent an estimated $135 million to $150 million worth of issue advertisements during the 1995-1996 campaign, compared to the $400 million spent on advertising by the federal candidates running for

office. Annenberg Report 1997 at 3 [DEV 38 Tab-21]. Almost 86.9 percent of these advertisements mentioned a candidate for office or public official by name. *Id*. at 8. "Most" of the groups running these advertisements "declined to make known the identities of their donors." *Id*. at 4.

4. The Annenberg Center's 1998 report estimates that at least 77 groups ran issue advertisements during the 1997-1998 election cycle costing between $275 and $340 million." Annenberg Report 1998 at 1 [DEV 66-Tab 6]. Overall, 53.4 percent of these advertisements mentioned candidates by name, although 80.1 percent of those advertisements run in the final two months of the campaign mentioned candidates. *Id*.

5. As also discussed *supra*, the Annenberg Report 2001 finds that during the 1999-2000 election cycle 130 groups aired 1,100 distinct advertisements, at an estimated cost of over $500 million. Annenberg Report 2001 at 1 [DEV 38-Tab 22]. The report found that 60 percent of distinct radio and television issue advertisements (689 out of 1,139) aired from January 1, 1999 to November 7, 2000, were broadcast for the first time during the final two months of the election cycle. *Id*. at 12. In addition, 73 percent of all the distinct advertisements mentioned a candidate. *Id*. at 14. In terms of television advertisements, the closer the advertisement was aired to election day, the more likely it contained a candidate mention. *Id*. at 15. Between March 8 and August 31, 2000, candidates were

mentioned in 72 percent of the television issue advertisements aired. *Id*. After August, 95 percent of the television commercials broadcast mentioned a candidate. *Id*. The report found that during the 2000 election cycle, 89 percent of unique advertisements were "candidate-centered," meaning they made "a case for or against a candidate" without using express advocacy. *Id*. at 13, 14.

6. The Annenberg Center reports were relied on by Members of Congress, cited to during the Senate debate, and are relied on by Plaintiffs in this litigation. *See, e.g.,* 147 Cong. Rec. S2456 (daily ed. March 19, 2001) (statement of Sen. Snowe) (citing Annenberg Report 2001); Findings ¶ 2.2.1 (Lupia)

C. *The Goldstein Expert Report*

Dr. Goldstein, who was involved in assembling the data sets used in both *Buying Time* studies, produced his own expert report for the purpose of this litigation. *See generally* Goldstein Expert Report. Since Dr. Goldstein did not participate in the writing of either *Buying Time* studies or play a role in "selecting the conclusions that the authors of these reports chose to draw from the database," Goldstein Rebuttal Report at 3-4 [DEV 5-Tab 4], his report constitutes a separate assessment of the data collected. Furthermore, the database he works from differs from that provided to the *Buying Time 2000* authors, as it has corrected omissions and errors discovered after *Buying Time 2000* was completed. *Id*. at 4-5. Dr. Goldstein's study produces nine principal conclusions. Other than his problems with the CMAG database which

underlies the study, *see supra* App. ¶ I.A, Dr. Gibson leaves most, but not all, of the conclusions in Dr. Goldstein's Expert Report unchallenged. *See* Gibson Rebuttal Report [2 PCS]. Dr. Goldstein's conclusions and Dr. Gibson's criticisms are discussed *infra*.

1. *Scope of Political Advertising.* The following conclusions are not rebutted, except to the extent that they rely on CMAG data. *See supra*, App. ¶ I.A. In the 2000 election cycle (from January 1, 2000 through election day), interest groups accounted for 16 percent of all political television advertisements at an estimated cost of $93 million.[192] Goldstein Expert Report at 8. Political parties accounted for 27 percent of the political commercials at an estimated cost of $162 million, while candidates accounted for the remaining 52 percent of advertisements at an estimated cost of $338 million. *Id.* Compared to the 1998 campaign, the increase in interest group spending was the most dramatic, "rising from approximately $11 million in 1998 to an estimated $93 million in 2000." *Id.* at 9; *see also id.* at 10 (Tbls. 1A-B) (showing the increase in candidate spending (from approximately $136.6 million to approximately $338.4 million) and in political party spending (from approximately $25.6 million to $162.3 million)). The majority of interest

[192] Dr. Goldstein notes "[t]hese figures . . . underestimate television expenditures because CMAG estimates only cover markets serving 80 percent of the nation's population and make no attempt to measure the increased cost of advertising during the peak seasons of political campaigns when the demand for television advertising time pushes up spot prices." Goldstein Expert Report at 8 [DEV 3-Tab 7].

group advertising in 2000 was "not sponsored by PACs, and fell outside FECA regulation." *Id*. at 8. According to Dr. Goldstein's figures, interest group PACs spent roughly $2 million on 3,688 political advertisements in federal races in 2000, while interest group non-PAC expenditures constituted $90 million spent on 129,647 commercials. *Id*. at 10 (Tbl. 1B).

2. *The Role of Interest Groups and Political Parties in Political Television Advertising for the 2000 Presidential Campaign*: The following conclusions are not rebutted, except to the extent that they rely on CMAG data. *See supra*, App. ¶ I.A. In terms of the presidential campaign, political parties purchased 41 percent of television advertisements aimed at the 2000 presidential race, while candidates accounted for 38 percent of the commercials, and interest groups eight percent. Goldstein Expert Report at 11 & n.11 [DEV 3-Tab 7] (the remaining advertisements were coordinated expenditures). Interest group advertising in certain "battleground" states,[193] however, "rivaled that of the candidates or parties." *Id.*; *see also id.* at 12 (Tbl. 2). For example, in Missouri, during the last 60 days of the election, "interest groups ran almost three-quarters as many ads" identifying a candidate as did the actual candidates. *Id*. at 11. In House elections, interest group advertisements identifying a candidate and running in the last 60

[193] Dr. Goldstein determined what states constituted "battleground states" "based on a professional review of various media sources," such as CNN.com. Goldstein Expert Report at 12 n.12 [DEV 3-Tab 7].

days of the campaign accounted "for 17 percent of total House ad broadcasts during the 2000 election cycle," while political parties provided 22 percent of advertisements in these races, and candidates 60.6 percent. *Id*. at 13. Dr. Goldstein finds that 99.8 percent of political party-financed television advertising mentioned or depicted a candidate, while only 1.8 percent of the ads "even mentioned the name of the party and many fewer promoted the candidate by virtue of his or her party affiliation." *Id*.[194]

3. *The BCRA Universe of Interest Group Electioneering*: The following conclusions are unrebutted, except to the extent that they rely on CMAG data. *See supra*, App. ¶ I.A. Dr. Goldstein finds that 35 interest groups broadcast commercials on television during the last 60 days of the 2000 election that mentioned a candidate. Goldstein Expert Report at 13 [DEV 3-Tab 7]. These electioneering advertisements were aired 59,632 times at an estimated cost of approximately $40.5 million. *Id*. at 14; *see also id*. at 14-15 (Tbl. 3).[195] The top ten of these groups accounted for 87 percent of these expenditures. *Id*. at 13.

4. *The "Magic Words" Test*: The following findings are not rebutted, except to the

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[194] This assessment does not include the "tag lines" included in most advertisements identifying the commercial's sponsor that can include the political party's name. Goldstein Expert Report at 13 n.14 [DEV 3-Tab 7].

[195] This result only reflects the 80 percent of households covered by CMAG, and according to Dr. Goldstein "[n]o comprehensive information is available for the balance of the markets or for ads airing on local cable stations." Goldstein Expert Report at 14 n.15 [DEV 3-Tab 7].

extent that they rely on CMAG data. *See supra*, App. ¶ I.A. The so-called "magic words" test derives from *Buckley*'s legal standard for determining whether an advertisement is designed to persuade citizens to vote for or against a particular candidate. Such advertisements were termed "express advocacy" by the Supreme Court, and defined as containing words such as "elect," "defeat" or "support." *See supra* at 211. Dr. Goldstein notes that all candidate-sponsored advertisements must be paid for with federal funds and are considered to be electioneering, regardless of whether they meet the express advocacy test. Therefore, if the use of express advocacy terminology is "an accurate way to classify an ad, then advertisements clearly and obviously created and aired to influence elections would be expected to employ such magic words." Goldstein Expert Report at 16 [DEV 3-Tab 7]. Dr. Goldstein finds, however, that 11.4 percent of the 433,811 advertisements aired by candidates met the express advocacy test. *Id*. Conversely, 88.6 percent of candidate advertisements in 2000 "were technically undetected by the *Buckley* magic words test." *Id*. This result demonstrates to Dr. Goldstein "that magic words are not an effective way of distinguishing between political ads that have the main purpose of persuading citizens to vote for or against a particular candidate and ads that have the purpose of seeking support for or urging some action on a particular policy or legislative issue." *Id*.

5. *Temporal Distribution of Interest Group-Financed Television Advertisements*

Which Mention a Candidate: The following conclusions are unrebutted, except to the extent that they rely on CMAG data. *See supra*, App. ¶ I.A. Dr. Goldstein determines that the "CMAG database provides empirical evidence of a strong positive correlation between [advertisements' reference to a candidate and the proximity in time of their broadcast to the election] and consequently of their validity as a test for identifying political television advertisements with the purpose or effect of supporting or opposing a candidate for public office." Goldstein Expert Report at 17 [DEV 3-Tab 7]. He finds that interest group advertisements that "mention or depict a candidate tend to be broadcast within 60 days of the election," while those which do not "tend to be spread more evenly over the year." *Id*. Specifically, his calculations show 78 percent of interest group advertisements mentioning a candidate for federal office aired within 60 days of the election, while 18 percent of those that did not mention a candidate were aired during that time. *Id*. (also finding 85 percent of advertisements mentioning a presidential candidate and 76 percent of commercials mentioning a House candidate aired within 60 days of the election). In addition, Dr. Goldstein finds the distribution of those advertisements mentioning candidates for federal office to be "closely correlated to the distribution of electioneering communications broadcast by candidates and political parties." *Id*. For example, 76 percent of interest group advertisements mentioning a House candidate were broadcast

within 60 days of the election, as compared to 79 percent of such advertisements run by candidates, and 94 percent of those purchased by political parties. *Id*. For Senate elections, 74 percent of interest group advertisements that mentioned a candidate were run within 60 days of the election, as were 67 percent of candidate and 81 percent of political party-sponsored commercials. *Id*. at 17-18; *see also id.* at 19 (Tbl 4).

6. *Geographic Distribution of Interest Group-Sponsored Advertisements Which Mention a Candidate and are Aired within 60 Days of an Election*: The following conclusions are unrebutted, except to the extent that they rely on CMAG data. *See supra*, App. ¶ I.A. Dr. Goldstein finds that interest group advertisements that mentioned a candidate and were broadcast within 60 days of the 2000 election "were highly concentrated in states and congressional districts with competitive races." Goldstein Expert Report at 20 [DEV 3-Tab 7]. For Senate races, 89.2 percent of these commercials ran in competitive races, including Michigan where interest groups accounted for "22 percent of the total ads broadcast in the race." *Id*. Political parties were similarly focused, running 90.6 percent of their ads in the competitive states. *Id*. at 21. Four states (Michigan, Virginia, Washington, and Florida) attracted "77 percent of the ads broadcast by interest groups [aimed at Senate races]; political parties broadcast 65 percent of their ads in these four states." *Id*. at 20; *see also id.* at 21 (Table 5). House races demonstrated the same

pattern, with 85.3 percent of interest group "electioneering" advertisements, and 98.2 percent of political party "electioneering" advertisements broadcast in competitive districts. *Id*. at 21; *see also id*. at 22-23 (Table 6). In some competitive congressional districts, interest groups ran more advertisements than the candidates or their parties. *Id*. at 22. Therefore, concludes Dr. Goldstein, the "CMAG database provides strong evidence that the interest group ads covered by BCRA are targeted at competitive electoral contests and closely parallel political party ads in their geographic distribution." *Id*. at 24.

7. *Coders' Perceptions of Interest Group Television Advertisements*: Dr. Goldstein had students code each interest group political television advertisement aired in the 2000 campaign. They could code the commercials' purpose as either to "'generate support or opposition for candidate,' or to 'provide information or urge action,'" and "were also given the option of 'unsure/unclear.'" Goldstein Expert Report at 24 & n.20 [DEV 3-Tab 7]. Dr. Goldstein finds that "[t]he coders' perceptions provide evidence that BCRA's definition of Electioneering Communication accurately captures those ads that have the purpose or effect of supporting candidates for election to public office." *Id*. at 26. The coders found 97.7 percent of the 60,623 interest group sponsored television advertisements that mentioned a candidate and were broadcast within 60 days of an election as "electioneering," or supporting or opposing a candidate. *Id*; *see also id*. at 25

(Tbl. 7). Dr. Goldstein finds this result particularly persuasive given the fact that the students coded one-third of all interest group television advertisements run over the course of the 2000 campaign to be genuine issue advertisements. *Id*. at 26. Of the 45,001 advertisements deemed to be "genuine issue advertisements" by the coders, 3.1 percent would have been covered by BCRA in that they were run within 60 days of the election and identified a candidate. *Id*. at 27.[196] Dr. Goldstein acknowledges that in *Buying Time 2000*, and an article he co-authored with Dr. Jonathan Krasno, fewer than six advertisements were said to be unfairly captured by BCRA. *Id*. at 26 n.21. In those other publications, "certain of these six ads–particularly those as to which there was disagreement among the student coders–were ultimately treated as electioneering. In fact, [Dr. Goldstein's] own judgment is that five of these six ads were clearly intended to support or oppose the election of a candidate . . . . However, in this report, [Dr. Goldstein] chose[] to take the most conservative approach and count all six as Genuine Issue Ads." *Id*. However, Dr. Goldstein now acknowledges that a "most conservative" estimate would include 6 more advertisements listed in footnote 8 of his Rebuttal Report. Goldstein Dep. (Vol. 2) at 160 [JDT Vol. 8]. Adding these six advertisements results in the finding that 17 percent of the advertisements run

[196] Dr. Goldstein contends that this "percentage overstates the proportion of all Genuine Issue Ads covered by BCRA, because it does not take into account the unregulated ads run in non-election years during a single Congressional Term, such as 1999." Goldstein Expert Report at 27 n.22 [DEV 3-Tab 7].

during the last 60 days of the 2000 campaign identifying candidates were genuine issue advertisements. *Id*. at 169; *see also infra* App. ¶ I.D.8.c (discussing these advertisements in more detail).[197] Dr. Gibson finds fault with the fact that this conclusion relies on a methodology he finds problematic. He insists the conclusion is flawed by focusing "on the highly subjective coding" of the student coders to determine the purpose of the issue advertisements (*i.e*. to promote a candidate or to urge action on an issue). Gibson Rebuttal Report at 20 [2 PCS]; *see also* Holman Dep. at 73 [JDT Vol. 10] (noting that the question asks for a subjective assessment). As discussed *infra* in connection with the *Buying Time* studies, Dr. Gibson also believes that the data shows that a large majority of the advertisements barred by BCRA "have policy matters as their primary focus," thereby destroying the distinction he draws between electioneering and genuine issue advocacy. Gibson Rebuttal Report at 20 [2 PCS]; *see also infra* App. ¶ I.D.8.e.

8. *The Effectiveness of Broadcasting Issue Ads Close to an Election*: Dr. Goldstein's final conclusion is that if an interest group is genuinely interested in promoting an issue, the least desirable time to air such an advertisement is in the final 60 days of an electoral campaign. Goldstein Expert Report at 32 [DEV 3-Tab 7]. This finding runs counter to Plaintiffs' argument that BCRA "may harm interest groups

[197] This revelation casts doubts on some of Dr. Goldstein's other conclusions which are therefore not recounted here.

by preventing them from advertising on their issues at a time when citizens are supposedly paying the most attention to politics." *Id*. Dr. Goldstein first comments that "while there is evidence that interest in politics and *elections* rises as Election Day approaches, there is absolutely no evidence to support the position that interest in *public policy* issues rises as well during that time." *Id*. (emphasis in original). Second, he notes that "communication theory has concluded that advertising is likely to be most effective (at informing or persuading) when viewers are exposed to one-sided flows of information in isolation from other advertising." *Id*. (citing William McGuire, The Myth of Massive Media Impact: Savagings and Salvagings, 1 Public Communication and Behavior 173 (1986); John Zaller, The Nature and Origins of Mass Opinion (1992)). Dr. Goldstein notes that since the last two months of an election campaign is when most political advertisements are aired (64.2 percent of all political advertisements run in 2000 were run in the campaign's final 60 days), "an individual interest group's message on a public policy issue is likely to become lost" if aired during that period. *Id*. Dr. Goldstein also posits that "partisan attachments . . . harden during the last two months of a campaign" which makes it "more difficult to persuade otherwise open-minded viewers of the merits of an interest group's policy stance." *Id*. at 32-33 (citing John Zaller, Nature and Origins of Mass Opinion (1992)). Finally, running issue advertisements close to an election, besides being less effective at

conveying their messages, is "also less cost-effective, since the price of scarce television and radio air time is higher near an election than during the rest of the year." *Id*. at 33. Dr. Goldstein argues his theory is bolstered by the data from his study. Interest group advertisements not mentioning a candidate are spread over the course of the calendar year and are not concentrated within the last two months of a campaign. In 2000, 17.7 percent of such advertisements were aired in the final 60 days of the election campaign, slightly more than the 16.4 percent "which would have run if the ads had been equally distributed throughout the year." *Id*. at 33; *see also id*. at 31 (Table 9). In contrast, during the months of April through June 2000, 45 percent of such issue advertisements were aired, "as against an expected 25 percent if the ads were spread evenly throughout the year." *Id*. Dr. Goldstein believes this concentration is "a likely result of groups turning on the heat to pass or defeat bills before Congress adjourned for the summer." *Id*. Therefore, Dr. Goldstein finds that the data confirms his theory that the final two months of an election campaign "is probably the worst time for an interest group to educate the public on its particular issue." *Id*. However, Dr. Gibson is critical of this conclusion. Gibson Rebuttal Report at 26 [2 PCS]. According to Dr. Gibson, political psychologists, like William McGuire (whose work Dr. Goldstein cites), have concluded "that to persuade someone involves two steps. First, one must get the attention of the person one is attempting to persuade. Second, one

must overcome the strength of existing attitudes if the attempt at persuasive communication is to result in attitude change." *Id*. Given that "those with strong attitudes tend to pay attention to political communications while those with weak political attitudes tend to ignore them. . . . [t]hose most easily reached are least easily changed; those most easily changed are those most difficult to reach." *Id*. Since those with "weak attitudes" tend to pay attention during "the most extreme circumstances," the period leading up to the election provides the window in which to communication with these difficult to reach, but easily persuaded individuals. *Id*. at 27. Dr. Gibson also rejects the argument that issue advertising close to an election is unproductive because partisan allegiances harden as elections approach. *Id*. He states that this line of reasoning leads to the strange conclusion that "candidates should abandon advertising as the election approaches since these hardened attitudes are difficult to convert." *Id*. Dr. Gibson points out that "that does not happen, since, as the election approaches, candidates try to reach an even greater percentage of marginal voters, who have little interest in politics, and relatively pliable issue views." *Id*.

D. Buying Time Studies

1. The Brennan Center for Justice at New York University Law School ("Brennan Center") produced two studies examining television advertising in election campaigns. *See BT 1998* [DEV 47]; *BT 2000* [DEV 46]. The Brennan Center is

"primarily a law firm that also does a great deal of research in a variety of social science issues that includes campaign finance along with criminal justice and other electoral issues and poverty issues." Holman Dep. at 10 [JDT Vol. 10]. The Brennan Center was involved in the crafting of BCRA and provided analysis of issues being debated in Congress to legislators, the media and the public. *Id*. at 11. The Center also put together a letter signed by 88 First Amendment scholars, concluding that the McCain-Feingold bill was constitutional. *Id*. at 19 & Ex. 3. Representatives of the Brennan Center testified in favor of the McCain-Feingold bill, *id*. at 22, and during Senate debate on the legislation, Senators cited to *Buying Time* data and Brennan Center analyses. Holman Dep. Ex. 3 at 2 [JDT Vol. 10].

2. The Pew Charitable Trust funded both *Buying Time* studies. *See BT 1998* [DEV 47]; *BT 2000* [DEV 46]. The Brennan Center's funding proposal for *Buying Time 1998* states that the study had an academic purpose, but would also be used "to fuel a continuous and multi-faceted campaign to propel reform forward." Holman Dep. Ex. 4 at 2 [JDT Vol. 10]. The proposal painted the study as part of a strategy to overcome the "obstacles to reform," and noted that the first step in achieving the goal was "to develop a reliable source of information on the nature of the problem." *Id*. at 7. The Brennan Center proposed a two-phased research plan for *Buying Time 1998*. Krasno Dep. Ex. 4 at 1 [JDT Vol. 14]. The first phase, proposed to cost $200,000, entailed acquiring data from CMAG, "adapt[ing] it so

that it might be easily used, and us[ing] it to develop a strategy for responding to the threat posed by issue advocacy." *Id*. at 1, 3. The second phase, estimated to require $800,000 to complete, would "focus on convening a formidable group of scholars and activists to create policy recommendations and reports, as well as . . . publiciz[ing] these activities on Capitol Hill and beyond." *Id*. at 3. Whether or not the study would proceed to the second phase, according to the proposal, would "depend on the judgment of whether the data provide[d] a sufficiently powerful boost to the reform movement." *Id*. at 6. In April or May of 2000, Dr. Kenneth Goldstein of the University of Wisconsin, who had worked on the data set for *Buying Time 1998* petitioned the Pew Center for another grant. Goldstein Dep. (Vol. 1) at 29 [JDT Vol. 8]. His request stated that he was "happy to work with others in the policy community to make sure that our study is designed and executed in ways that help move the reform ball forward." Goldstein Dep. (Vol. 1) at 37 & Ex. 6 at 5 [JDT Vol. 8].

3. Mr. Seltz, co-author of *Buying Time 1998*, states that there were a number of purposes behind the study, but that "the primary purpose was to contribute to the body of knowledge about campaign finance reform and specifically issue advocacy . . . and to fill what we viewed to be an empirical void in the literature about issue advocacy. Seltz Dep. at 22 [JDT Vol. 28]. "An independent but related purpose . . . was indeed to provide information to . . . proponents of

campaign finance reform to help them fashion new and better arguments for reform, but arguments that would be based on research that was verifiable, checkable, transparent, reproducible." *Id*. Mr. Holman, a principal co-author of *Buying Time 2000*, did not approach the project with the purpose of producing results that would support campaign reform and had never seen the grant proposal submitted to the Pew Charitable Trust. Holman Dep. at 25-26 [JDT Vol. 10]; *see also id.* at 29-30 ("I was mostly excited about the political science aspect of [the study] . . . . It was not clear at any point and never explained to me exactly what sort of policy direction that would go in.").

4. Dr. Kenneth Goldstein provided assistance in processing and coding data for the *Buying Time* studies. Goldstein Rebuttal Report at 6 [DEV 5-Tab 4]. As part of this effort, he merged CMAG's two data sets to produce "a single, comprehensive data set." *Id*. He also had university students (at the University of Arizona for *Buying Time 1998* and the University of Wisconsin for *Buying Time 2000*) "assess[] . . . the content, tone, issues addressed, whether the ads mentioned a political candidate or provided a toll-free number to call, etc. . . . In addition to collecting certain specific information concerning each storyboard reviewed, the study also asked coders: 'In your opinion, is the purpose of the ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?'" Goldstein Expert Report at 7 [DEV 3-Tab

7]. Advertisements that provided information or urged action on a bill or issue were labeled "genuine issue ads" in both studies, whereas those communications that generated support or opposition for a particular candidate were referred to as "sham issue ads" in *Buying Time 1998*, *see, e.g.*, *BT 1998* [DEV 47] at 87, and "electioneering issue ad" in *Buying Time 2000*, *see, e.g., BT 2000* [DEV 46] at 30. Each *Buying Time* database consists of 40 million data points. *Id*. at 37.

5. As noted *supra*, App. ¶ I.A, Dr. Gibson criticizes the CMAG data underlying both reports. Dr. Arthur Lupia was asked by the Brennan Center to evaluate Dr. Gibson's Expert Report and provided a report detailing his findings. *See generally* Lupia Expert Report.

6. <u>*Buying Time* Findings</u>

   a. *Buying Time 1998* drew a number of conclusions with regard to the nature and effect of political advertising in the United States. The study's main findings include:

      - Four percent of candidate advertisements used "express advocacy" terms. *BT 1998* [DEV 47] at 9.
      - The proportion of issue advertisements mentioning a candidate rises as the date of the election approaches. In July and August 1998, 61 percent of issue advertisements mentioned a candidate. By September, the percentage reached 82 percent and for the remainder of the campaign remained at 82

percent or higher, reaching a peak of 97 percent in the first half of October. *Id*. at 87, 103 (Figure 4.15).

- Forty-one percent of issue advertisements that provided information or urged action appeared within 60 days of the election, but only two of those advertisements, or seven percent, referred to a candidate. *Id*. at 109.

b. *Buying Time 2000*'s key findings from the 2000 election cycle included:

- Seven percent of all political advertisements contained express advocacy terms. *BT 2000* [DEV 46] at 73. Candidates used express advocacy terminology in 10 percent of their ads, *id*. at 15, 29, while political parties and interest groups used such terms approximately two percent of the time, *id*. at 73.
- "Genuine issue ads" (those urging action on a public policy or legislative bill) were "rather evenly dispersed throughout the year, while group-sponsored electioneering ads [which promote the election or defeat of a federal candidate] make a sudden and overwhelming appearance immediately before elections." *Id*. at 56.
- The study found that if BCRA had applied to the 2000 campaign, three genuine issue ads (which aired 331 times) would have fallen within the Act's definition of "electioneering communication." *Id*. at 73. Put another way, of the advertisements run within 60 days of the 2000 election which

also depicted a candidate, 99.4 percent constituted electioneering advertisements, while 0.6 percent were genuine issue advertisements. *Id*. at 72 (Figure 8-2).

7. Criticism of *Buying Time 1998*

   a. Plaintiffs' expert, Dr. James L. Gibson, while leveling various criticism at both *Buying Time* studies, does not dispute that express advocacy words "are rarely used in political advertising, or that group sponsored ads that mention candidates tended to be concentrated before an election." Goldstein Expert Report at 38-39 [DEV 3-Tab 7]; *see also* Lupia Expert Report at 9 [DEV 5-Tab 5]; Gibson Expert Report at 11 [1 PCS] ("Entirely objective characteristics of the ads . . . present few threats to reliability."). Neither does he challenge the conclusions that advertisements sponsored by political parties and interest groups comprise a significant and increasing portion of political advertising broadcast in federal races. Lupia Expert Report at 9 [DEV 5-Tab 5].

   b. Dr. Gibson states that "*Buying Time 1998* should not be accepted as the product of scientific inquiry, but is instead policy advocacy written by people with a strong ideological commitment to a particular position on campaign finance reform." Gibson Expert Report at 3 & n.3 [1 PCS] (citing the research proposal and co-author Daniel Seltz's deposition testimony); *see also supra* App. ¶ I.D.2. Dr. Gibson suggests that "[t]he strong policy and ideological

commitments of the investigators are not compatible with the conventional cannons of scientific objectivity and may have undermined the integrity of the data collection and analysis." Gibson Expert Report. at 3 n.3 [1 PCS]. He applies this criticism to *Buying Time 2000* as well. *Id*. at 45. Dr. Krasno confirms that *Buying Time 1998* is an advocacy document. Krasno Rebuttal Report at 2 [DEV 5-Tab3]. He admits that he believed that groups and political parties were sponsoring "thinly-veiled campaign ads masquerading as issue advocacy." *Id*. However, Dr. Krasno suggests that "[t]he fact that we expected certain results (and those expectations were largely realized) loads the issue emotionally, but misses the point. Scholars rarely embark upon research without some expectations as to its results. But more than most scholars, we had a compelling reason to insure that our results could withstand allegations of bias." *Id*. Dr. Krasno also notes that Daniel Seltz's responsibilities with regard to *Buying Time 1998* did not include data analysis. *Id*. at 3. Dr. Lupia comments that a "person's political or ideological beliefs need not prevent them from being an effective scientist," and that Dr. Gibson's allegation that "*Buying Time* cannot be the product of scientific inquiry because its authors have an ideological commitment" is erroneous. *Id*. Dr. Lupia also states that he knows of no "conventional canons of scientific objectivity," and that Dr. Gibson fails to produce one. *Id*. Lastly, Dr. Lupia

observes that Dr. Gibson's claim that the policy perspective of the *Buying Time 1998* authors "may have undermined the integrity" of the study, "is pure speculation," and Dr. Gibson's report "presents no direct evidence on this point." *Id*. at 11. Dr. Goldstein rejects the charge that he or anyone under his supervision "perverted" the results of the databases, or that his approach to the project was based on anything other than "the spirit of scientific inquiry and objectivity." Goldstein Rebuttal Report at 8 [DEV 5-Tab 4]. He also claims that his "interest in creating a scientifically valid and reliable database was based on more than just abstract notions of professionalism and objectivity, as important as they were. I always intended to use–and, in fact, have used–CMAG databases in a wide variety of other scholarly studies having nothing to do with campaign finance reform." *Id*. at 8-9.

c. Dr. Gibson states that *Buying Time 1998* was not part of a peer-review process prior to its publication, meaning it "was not vetted in any way whatsoever prior to its publication, and consequently the normal process of explication of the project methodology, error correction, and review of substantive conclusions prior to publication did not take place." Gibson Expert Report at 4 [1 PCS]. Dr. Gibson maintains that this "seriously limits the confidence one can place in the Report." *Id*. Dr. Gibson makes the same criticism of *Buying Time 2000*. *Id*. at 45. Dr. Krasno states that this fact was the result of time constraints

dictated by the political calendar, the funders of the study, and policymakers, and notes that "subsequent publications by myself and by Professor Goldstein have withstood the peer review process." Jonathan S. Krasno, Rebuttal to Professor James L. Gibson at 3-4 & n.3 (citing to Jonathan Krasno & Kenneth Goldstein, "The Facts About Television Advertising and the McCain-Feingold Bill," 35 Political Science 207 (2002)). Dr. Lupia finds the significance of the lack of peer-review "doubtful . . . at best." Lupia Expert Report at 13 [DEV 5-Tab 5]. He notes that Dr. Gibson "displays no apparent knowledge of whether scholars or experts had opportunities to comment on critical aspects of the *Buying Time* reports." *Id*. at 14.

d. Dr. Gibson maintains that "[n]o data base has been (nor can be, it appears) produced that will generate the specific numbers found in [*Buying Time 1998*]. . . . In the social sciences, we demand that statistical analysis be replicable . . . . This report is not replicable, and that undermines tremendously any confidence one should place in the findings produced." Gibson Expert Report at 5 [1 PCS]; *see also id*. at 23-26; Seltz Dep. at 52 [JDT Vol. 28] (stating that the *Buying Time 1998* authors did not "track the evolution of all the changes" or corrections they made to the data set). Dr. Gibson levels the same charges at *Buying Time 2000*. Gibson Expert Report at 47-48 [1 PCS]. Dr. Krasno agrees that "replication is a core precept of science," but states that Dr. Gibson

"overstates the case by insisting on 'exact' replication." Krasno Rebuttal Report at 6 [DEV 5-Tab 3]. According to Dr. Krasno, perfect replication "of the results of others, even with their help, is often impossible." *Id*. (quoting Gary King, Replication, Replication, 28 Political Science 444 (1995)). Dr. Gibson was not able to consult with Dr. Krasno in order to discover "the original command files used to produce the numbers in *Buying Time 1998*," which Dr. Krasno maintains replicate the *Buying Time 1998* results. *Id*. at 6-7 & n. 6; *see also id*. at 8 n.10 ("[I]t appears that Professor Gibson worked with a slightly different version of the data set than that used to create *Buying Time 1998*."); Lupia Expert Report at 18 n.3 [DEV 5-Tab 5]. Despite using the incorrect data set, Dr. Krasno notes that where Dr. Gibson provides examples of the discrepancies between his findings and those of *Buying Time 1998*, the differences are statistically insignificant. *Id*. at 7-8 (referring to Gibson Expert Report at 24 [1 PCS]); *see also* Goldstein Expert Report at 18 n.10 [DEV 3-Tab 7] (stating that the variances in Dr. Gibson's results "are so small as to suggest their own triviality"); Lupia Expert Report at 43 [DEV 5-Tab 5] (stating "the demonstrated discrepancies are small" and the Gibson Expert Report "provides no evidence that such changes affect any of *Buying Time*'s major claims"). Dr. Goldstein contends that the reason Dr. Gibson could not replicate the results of *Buying Time 2000* was because he was using the wrong

data set. Goldstein Rebuttal Report at 18, 19-20 [DEV 5-Tab 4].[198] Using the "federal.sav" data set produced by the Brennan Center, Dr. Goldstein was "able to replicate key findings of the *Buying Time* [*2000*] study," and correlate others "within a fraction of a percentage point." *Id*. at 20. Dr. Goldstein comments that Dr. Gibson had all the information to "replicate the *Buying Time* studies in the most direct fashion–that is, by re-coding all (or even a sample) of the captured advertisements and comparing the results of his coding exercise with the results of mine. Because Dr. Gibson never attempted to test the conclusions implicit in the database by replicating the coding exercise, most of his assertions about the reliability and validity of the conclusions drawn from the databases are necessarily speculative." *Id*. at 19; *see also* Lupia Expert Report at 17 [DEV 5-Tab 5] ("It is also worth noting that the Plaintiffs and their experts passed up the opportunity to resolve their concerns by replicating the data collection procedure itself."). Dr. Lupia comments that just because "a particular scientist fails in her attempt to *replicate* a study does

[198] The result of this confusion is that instead of the experts arguing from the same data set, each produces conclusions from a different set of numbers. The source of the divergence in data relied upon appears to be the result of the number of data sets provided to the Plaintiffs by Defendants' experts and the late production of additional data sets. *See* Gibson Supplement to Rebuttal Expert Report of October 7, 2002: 1998 Data ("Gibson Supplemental Report") [2 PCS]. Furthermore, since the analysis of the studies occurred in the context of litigation, the two sides' experts could not confer and resolve the resulting confusion regarding the data sets. This fact has made the duel between the parties' experts more confusing, and therefore less helpful to the Court.

not show that the study is not *replicable*. . . . The claim that 'the report is not replicable' is not proved in the [Gibson] report." Lupia Expert Report at 17 [DEV 5-Tab 5] (emphasis in original); *see also id*. at 44.

e. Dr. Gibson charges that the *Buying Time 1998* report "is filled with questionable statistical techniques and applications." Gibson Expert Report at 5 [1 PCS]. Dr. Lupia observes that nowhere in his report does Dr. Gibson identify mistakes in the application of statistical procedure. Lupia Expert Report at 18-19 [DEV 5-Tab 5]. Dr. Lupia characterizes Dr. Gibson's critique as a "difference in point-of-view on how to categorize certain events that has nothing to do with statistical techniques *per se*." *Id*. at 19.

f. Dr. Gibson suggests that CMAG's shortcomings, detailed *supra* App. ¶ I.A, affect the level of credence one may give the *Buying Time* reports; however, he advances no hypotheses demonstrating why any of CMAG's shortcomings affect the results of *Buying Time*. Gibson Expert Report at 7-9 [1 PCS] (noting that there are "many limitations to the CMAG data," but not suggesting the impact the limitations have on the results of *Buying Time* studies); Gibson Rebuttal Report at 5-7 [2 PCS] (stating he has no basis for verifying that the CMAG data base is accurate, that there is no way of knowing the characteristics of the missing airings, but concluding that the "apparent[]" errors caution against relying on the CMAG data for drawing conclusions on

the nature of political communications); *see also* Goldstein Rebuttal Report at 23 [DEV 5-Tab 4] (stating that Dr. Gibson "does not even attempt to explain how these alleged limitations undermine the validity of the conclusions set forth in *Buying Time*"); Krasno Rebuttal Report at 5 [DEV 5-Tab 3].

g. The division of tasks between the authors of *Buying Time 1998* and Dr. Goldstein also calls into question the results of the study according to Dr. Gibson. Dr. Gibson posits that since the study's authors engaged in secondary analysis of the data provided by Dr. Goldstein their "understanding of the nuances and peculiarities of the data base" was "most likely limit[ed]." Gibson Expert Report at 6 [1 PCS]. Given the size of the database and "various data infirmities," Dr. Gibson finds it "extremely worrisome that the results [of *Buying Time 1998*] are so heavily dependent upon the limited skills of an author [Mr. Seltz] who is a novice analyst." *Id*. Dr. Krasno, as noted *supra*, explains that Mr. Seltz did not engage in data analysis, making "Professor Gibson's fear that he contributed findings to *Buying Time 1998* . . . unfounded." Krasno Rebuttal Report at 3 [DEV 5-Tab 3]. Dr. Lupia points out that "secondary analysis of data collected by others" is common in the political science discipline, and has been undertaken by Dr. Gibson himself. Lupia Expert Report at 19-20 [DEV 5-Tab 5] (citing two articles authored by Dr. Gibson which use "country-level electoral data" from a "historical archive"

and a study conducted in 1954).

h. Criticism was raised that both studies relied on coding of advertisements conducted by university students. Gibson Expert Report at 9 [1 PCS]; *see also supra* App. ¶ I.D.4 (explaining the coders' role). Dr. Gibson finds troubling the following unanswered questions: "how the students were recruited, what expertise they had prior to being employed for the project, whether the students had been exposed to Dr. Goldstein's classes, whether the students had ideological and/or policy commitments to a particular outcome in the project, etc." *Id*. He also believes the fact the student coders were not trained "is a flaw of considerable proportion." *Id*. at 10. This is due to the fact that they were asked to make subjective judgments, and without training it is unknown whether or not they were competent to make such judgments. *Id*. at 18; *but see id*. ("[C]oding these advertisements is often simply difficult, irrespective of one's training and experience."); *see also* Holman Dep. at 73, 80 [JDT Vol. 10] (acknowledging the subjective nature of determining the purpose of a political advertisement). Dr. Gibson also notes that undergraduate students at Arizona State University or the University of Wisconsin are "not a representative sample of the 'average viewer,' and in the absence of training, the students were apparently free to exercise unstructured discretion in coding the ads. . . . [W]ithout training, practice coding, and discussion of coding rules

based on the results of the practice coding . . . I do not believe that undergraduate student coders can make accurate assessments on highly subjective characteristics of these ads." Gibson Expert Report at 10 [1 PCS]. Dr. Krasno responds, stating that

> it is likely a training program would have caused complaints that Dr. Goldstein and I were attempting to impose our standards on the coders. Given the alternatives, I felt [foregoing formal training] was preferable, especially since we were hoping for a (reasonably informed) ordinary viewer's impression of the ads. Limited pre-testing of the coding instrument showed that training was unnecessary because coders were apparently able to understand and answer the questions without further explanation.

Krasno Rebuttal Report at 5 n.4 [DEV 5-Tab 3]. Dr. Goldstein notes that Dr. Gibson's criticism in this regard is speculative, especially given the fact "he chose not to conduct his own survey, using his own coders and his own training techniques, and compare it to the results reached by the undergraduate coders." Goldstein Rebuttal Report at 31 [DEV 5-Tab 4]; *see also* Lupia Expert Report at 33 [DEV 5-Tab 5] ("In this case, such a replication would have been relatively simple to conduct . . . and would have allowed the [Gibson] report to rely less on speculation when alleging that measurable attributes of Goldstein's coders affected the data collection or analysis."). Dr. Goldstein states the lack of training was "a deliberate choice that is well-supported by social science principles . . . . aimed at getting the untutored common-sense impression of the coders, while minimizing the possibility of

biasing coders with any preconceived notions that might have been implicit in a set of instructions." Goldstein Rebuttal Report at 32 [DEV 5-Tab 4]. Formal training, Dr. Goldstein asserts, "would only undermine the independence of the coders' assessments and possibly introduce systematic bias into the survey." *Id*. The lack of training also made it easier to "simulate . . . the experience of a typical viewer watching the ads at home." *Id*. In terms of the representativeness of the coders, Dr. Goldstein comments that "the use of undergraduate subjects in studies measuring subjective perceptions of external stimuli is well-established and accepted social science procedure." *Id*. at 33. The students who coded the 1998 data were undergraduate honors students at Arizona State University, while six undergraduate students enrolled in Dr. Goldstein's upper-level Interest Group course at the University of Wisconsin coded the 2000 data. *Id*. According to Dr. Goldstein, the coders were not informed that the Brennan Center would be using their data to study the effects of campaign finance legislation, and he does not believe he "ever expressed to them any policy preference as to the desirability or undesirability of campaign finance legislation, either in the classroom or during the coding process." *Id*. at 34. Dr. Goldstein notes that if his involvement in the project suggested anything to the coders, it would have been that the project was about the tone of political advertising, one of his primary scholarly interests. *Id*. In terms of

the representativeness of the coders, Dr. Lupia states that "only if we had evidence that the way in which the undergraduates were unrepresentative caused *Buying Time*'s claims to differ from what a representative population would have produced" would there be a basis to believe the coders' unrepresentativeness threatened the quality of the data, but the Gibson "report presents no such evidence." Lupia Expert Report at 35 [DEV 5-Tab 5]. Lupia also notes that "in the field of psychology . . . important discoveries about mental states such as attitudes are often generated from studies that ask undergraduates to answer opinion questions after viewing paper-based stimuli. This practice has wide acceptance in social science and is the source of many important and socially valuable discoveries." *Id*. at 36; *see also* Holman Dep. at 241-42 [JDT Vol. 10] (noting "it's common practice to use students as survey respondents especially in political work").

i. Dr. Gibson challenges the reliability, or accuracy, of the coded data. Gibson Expert Report at 11 [1 PCS]. Dr. Gibson appears not to be concerned about the coding of objective characteristics of the advertisements. *Id*. ("Entirely objective characteristics of the ads (e.g., whether a telephone number is mentioned in the text of the ad) present few threats to reliability.") (footnote omitted). His main concern is over the coding of "subjective and judgmental" characteristics. *Id*. at 12. He provides Question 6 as an example:

6. In your opinion is the purpose of this ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a **particular candidate**?
   1. Provide information or urge action
      (If so, skip to Question #19)
   2. Generate support/opposition for candidate
   3. Unsure/unclear

Id. at 12 (citing *BT 1998* [DEV 47]) (emphasis in original). This question appears in *Buying Time 2000* as Question 11 except that the Buying Time 2000 version does not bold "particular candidate" and does not ask the coder to skip Questions. *See* Goldstein Expert Report App. F [DEV 3-Tab 7]. Dr. Gibson notes that it is not always readily apparent who the sponsor of the advertisement is, making it difficult for the coder to know whose purpose he or she is supposed to be evaluating. Gibson Expert Report at 12 [1 PCS]. This problem is exacerbated by the lack of "explicit guidelines for how to ascertain an 'ad's purpose.'" *Id*. To demonstrate the subjectivity of the question, Dr. Gibson points to an advertisement run in Wisconsin which highlights Senators Herb Kohl and Russell Feingold's positions on partial birth abortion and asks the viewer to call them. *Id*. at 12-13. To Dr. Gibson "it seems obvious that the central focus of the ad is on the policy issue of whether to ban partial birth abortions. . . . One might reasonably conclude that one purpose of the ad was to elicit support for the National Pro-Life Alliance. The most reasonable overall assessment of this ad is that it is an example of issue advocacy by an

interest group." *Id*. at 13-14. Holman, in an email, wrote that the ad "reads to me like a genuine issue ad," *id*. at 14 (citing Holman Dep. Ex. 14), but he concludes that it is an electioneering advertisement, Holman Dep. at 67 [JDT Vol. 10]. Both *Buying Time* studies treat the advertisement as an electioneering advertisement, but Dr. Goldstein in his expert report treats the broadcast of the advertisement in 2000 as a genuine issue advertisement.[199] Gibson Expert Report at 14 & n.13 [1 PCS]; *see also* Shays Dep. at 121 [JDT Vol. 29] (noting he finds the advertisement to be "powerful" and that "it should be run, but it was clearly designed to influence an election"); McLoughlin Dep. at 42 [JDT Vol. 20] (stating his personal view is that the advertisement is a "genuine issue ad"). Given the subjective nature of this task, Dr. Gibson states that "certain procedures are essential so that the reliability of the data collected can be assessed." Gibson Expert Report at 16 [1 PCS]. According to Dr. Gibson, there is "no assessment whatsoever of intercoder reliability [for *Buying Time 1998*]. Thus, unlike academic research based on subjective coding, no empirical evidence exists to indicate that the coders' subjective assessments of these ads were accurate." *Id.* at 18. Dr. Gibson finds this to be a "serious flaw." *Id*. Dr. Lupia responds arguing that the "practice of treating answers to opinion questions as objective phenomena

[199] Dr. Goldstein's explanation for this divergence in treatment is discussed, *supra* App. ¶ I.C.7; *see also infra* App. ¶ I.D.8.c.

is common in science." Lupia Expert Report at 38 [DEV 5-Tab 5] (describing an article co-authored by Dr. Gibson, the main conclusion of which is based on a survey where participants were asked about how they described their own identities). He notes that Question 6 begins with "In your opinion," and seeks to understand how the advertisements are perceived. *Id*. at 37. In addition, Lupia questions the basis for Dr. Gibson's claim that "the most reasonable overall assessment" of the Wisconsin partial birth abortion advertisement is that it is pure issue advocacy, because Dr. Gibson gives no clear explanation of this judgment. *Id*. at 40.

j. Dr. Gibson explains the importance of reliability in the *Buying Time* context. He maintains that the miscoding of a single advertisement could have "quite large consequences for the statistical results." Gibson Expert Report at 22-23 [1 PCS]. He proposes that if Advertisement #11 was coded as promoting issues rather than a candidate, the percentage of pure issue advertisements in the *Buying Time 1998* data set would rise six percentage points. *Id*. This, Dr. Gibson argues, demonstrates the volatility of the data set. *Id*. at 23. As Dr. Gibson notes, he is not claiming for purposes of this argument that Advertisement #11 was coded in error; he is merely showing how one *hypothetical* error could affect the data. *Id*. at 22 n.24.

k. Dr. Gibson also challenges the validity of the *Buying Time 1998* data. Gibson

Expert Report at 17 [1 PCS]. By this, Dr. Gibson means that coders may be consistent in their coding, but their coding may be incorrect. *Id*. Specifically, he suggests that:

> coders must seek easily discernable 'cues' in the advertisements as a means of making the required judgment. Since the presence of a political figure who seems to be a candidate is a readily accessible cue, the coders then develop an implicit decision rule that says: 'when a political figure is depicted in the ad, the ad involves electioneering.' Using this rule, the variable might be reliably coded. But this does not mean that the data are *valid*, since political figures appearing in ads could well be doing something other than electioneering.

Id. (emphasis in original). Dr. Lupia counters that Dr. Gibson's argument misrepresents what the coders were asked to do. Lupia Expert Report at 39 [DEV 5-Tab 5]. He argues that the question seeks the coders' perceptions of the purpose of the advertisements, not the advertisements' true purpose. *Id*. Just because coders' perceptions may not comport with reality does not threaten the validity of the data, because the survey seeks the coders' mental impressions. *Id*. However, when codings were changed on Question 6, the mental impressions of the coders, which were sought by the question, were overruled. Goldstein Dep. (Vol 2) at 208-209 [JDT Vol. 8].

l. Dr. Gibson puts forth the theory that "the confusion in the instructions regarding Questions 7 through 18 may have introduced a degree of bias into how the students coded Question 6 by suggesting that any advertisement that included the name of a candidate should be coded as having a purpose of

promoting or opposing a candidate." Gibson Expert Report at 30 [1 PCS]. Dr. Gibson states that

> analysis reveals that *fully 97.7% of* [group-sponsored airings having a 'purpose' of generating support or opposition to a candidate] *were also coded as mentioning candidates*. The most important conclusion I draw from this analysis is that mentioning a candidate and promoting a candidate are virtually the same thing, as these data were coded by the undergraduate students (and/or Professor Goldstein). It seems highly likely to me that the student coders coded these three questions (6, 7, and 8) virtually simultaneously: A candidate (or what the coder thought was a candidate) was observed in the ad, and then Question 6 was coded as electioneering (in part because the coders knew that the presence of a candidate was not coded if Question 6 was coded as providing information), and then the student made the determination of whether the candidate was 'the favored candidate' (Question 7) or the 'favored candidate's opponent' (Question 8). Thus, the entire relationship – empirical and logical – between Questions 6 and Questions 7, [sic] and 8 renders the data set of little utility for answering important questions about these ads and airings.

Gibson Expert Report at 30 [1 PCS]; *but see id*. at 55-56 (characterizing his own argument as "indirect evidence or conjecture"). Dr. Krasno responds to Dr. Gibson's finding that 97.7 percent of advertisements found to be electioneering commercials mentioned candidates by observing "[g]iven their goal of helping candidates, it would be surprising to discover that electioneering ads do not identify candidates." Krasno Rebuttal Report at 10 n.13 [DEV 5-Tab 3]; *see also* Goldstein Rebuttal Report at 27 [DEV 5-Tab 4] (stating that "it is difficult to imagine an ad intended to promote or oppose a candidate that did *not* mention that candidate") (emphasis in original). He also

states that Dr. Gibson's theory that the two items were "cognitively connected . . . . ignores the fact that candidate mentions are coded *after* the purpose of the ad, and that coders did score a number of ads that mentioned actual and apparent candidates in reasonably neutral ways as genuine issue advocacy." Krasno Rebuttal Report at 10 n.13 [DEV 5-Tab 3] (emphasis in original). Dr. Lupia finds Dr. Gibson's theory to be a "wild guess. It has no apparent scientific basis, which matters because the claim in question includes a very detailed statement about an exact sequence in coders' cognitive processes. . . . Moreover, I am quite familiar with the current scientific literature on the psychology of responses to opinion questions and this claim follows nowhere from it." Lupia Expert Report at 45 [DEV 5-Tab 5]; *see also* Goldstein Rebuttal Report at 28 [DEV 5-Tab 4]. He also comments that Dr. Gibson could have easily tested his theory by showing "one set of coders with the instructions regarding questions 7 through 18 visible while showing another set of coders Question 6 without the instructions or subsequent questions." Lupia Expert Report at 44 [DEV 5-Tab 5]. I observe that Question 6 on the *Buying Time 1998* coding sheets is the last question on the first page of the survey, with Questions 7 and 8 appearing on the following page. *See, e.g.*, Gibson Expert Report Ex. 7 [1 PCS]. The coding sheets provided by Dr. Gibson do not indicate coders changed (*i.e.* crossed out) their coding of

Question 6 for advertisements from issue advocacy to electioneering after seeing Questions 7 and 8 on the following page.

m. Plaintiffs challenge other aspects of Question 6 of *Buying Time 1998*. They note that the words "particular candidate" are printed in bold type, which Dr. Krasno states was done because he wanted the coders "to be thinking of candidates" when answering the question. Krasno Dep. at 123 [JDT Vol. 14]. Dr. Krasno explains that the bold type was meant to "make certain that the coders paid special attention to the appearance of candidates in these ads, so that they answered the question with respect to candidates, not with respect to something else." *Id*. at 122-23. The corresponding question used for *Buying Time 2000* did not include the bold type.

n. Dr. Gibson states that "it is apparent to me that no single *Buying Time 1998* Data Set exists. This is in part due to the fact that Dr. Goldstein was (and may still be) continuously making changes in the codes assigned to individual ads and airings." Gibson Expert Report at 11 [1 PCS]; *see also id.* at 5 ("[T]he data set is continuously being manipulated and changed. . ."). Dr. Gibson suggests that the only codes altered were those "undermining the preferred conclusions," introducing "asymmetrical bias . . . in the data set." *Id*. Dr. Gibson makes the same allegation with regard to the *Buying Time 2000* data set. *Id*. at 50 ("[T]his data set, like the 1998 data, is continuously being

changed."). Dr. Krasno explains that the short time frame of the study "inevitably meant that small changes to the data set would continue even after the release of *Buying Time 1998*." Krasno Rebuttal Report at 4 [DEV 5-Tab 3]. He claims that such changes are quite typical, and that "[v]irtually every provider of large data sets, from the National Election Studies to the Commerce Department, prepares versions of their data and continues to fix problems in subsequent releases." *Id*. The changes, Dr. Krasno maintains, reflect "the gradual filling in of missing data and the discovery of internal contradictions. There is no evidence at all in Dr. Gibson's report that any of the changes in the successive versions of the data that he examined had more than a trivial impact on his results or on those reported in *Buying Time 1998*." *Id*; *but see* Goldstein Dep. Ex. 17 (email authored by Holman stating that the "missing data category is uncomfortably large in the 1998 database"). Dr. Goldstein also notes that each *Buying Time* database consists of 40 million data points, and that "errors are inevitable in any database of this size." Goldstein Rebuttal Report at 37 [DEV 5-Tab 4]. He claims that Dr. Gibson's suggestion that these errors invalidate the database fails to make the distinction between random error and non-random error (or "systematic" bias). *Id*. Dr. Goldstein claims that it is "universally recognized that random error does not undermine the validity of a data set because random error, by definition, occurs

in all directions," and that such errors "are expected to cancel each other out." *Id*. Therefore while random errors "may make the coding of a particular data point inaccurate, their aggregate effect over the whole data set is not expected to undermine conclusions." *Id*. According to Dr. Goldstein, Dr. Gibson "typically does not specify whether . . . alleged errors were random or systematic," and concludes that "the great majority of the errors that Dr. Gibson alleges are, at most, the result of random 'noise' which would not have systematically biased the study's results or undermined its validity." *Id*. at 38. Dr. Goldstein states that the production of several versions of the *Buying Time* databases is explained by the fact that "social science researchers, like all prudent people, periodically back up their work when using computers." Goldstein Rebuttal Report at 9 [DEV 5-Tab 4]. Dr. Goldstein provides two explanations for the variances in data between the two data sets. First, some differences may be the result of "routine 'cleaning' of the data sets." *Id*. at 10. Dr. Goldstein says that it is "standard social science practice to clean a data set by correcting apparent errors after the codes have been entered into the database." *Id*. (citing Herbert F. Weisberg, Jon A. Krosnick & Bruce D. Bowen, An Introduction to Survey Research, Polling, and Data Analysis (3d ed. 1996)). Corrections were made to "wild codes– that is, entries for which no corresponding code existed in our codebook." *Id*. at 11. Dr. Goldstein and

his assistants also "corrected logically inconsistent answers . . . [and] also filled in missing data for some ads on a number of objective questions, such as candidate mention, in both the 1998 and 2000 databases." *Id*. More substantial differences can be attributed to the fact that Dr. Goldstein "continued updating and revising [his] own copy of the database as part of [his] continuing scholarly work." *Id*. at 11-12. Subsequent discoveries of miscodes of mostly contextual errors and 100 missing advertisements from the CMAG data set were added to Dr. Goldstein's version of the 2000 database. *Id*. at 12. Dr. Lupia reviewed the multiple databases and concludes that the changes are transparent and he finds no reason to conclude that Dr. Goldstein has attempted to hide anything. Lupia Expert Report at 22 [DEV 5-Tab 5]. Lupia agrees that Dr. Gibson's concern is a legitimate one; however, "[l]arge academic databases change for legitimate reasons, so the mere existence of the relative small changes cited in the [Gibson] report provide no basis to negate the project's credibility." *Id*. at 23. To Lupia, the important question is "why and how the changes were made," and Dr. Gibson's suggestions of illegitimacy are, in Lupia's opinion, "of varying and questionable credibility." *Id*.

o. Dr. Gibson examined "the actual student coding sheeting for 25 of the 1998 storyboards and . . . compared them to the 'final' version of the 1998 data set."

Gibson Expert Report at 15 [1 PCS]. Focusing on Question 6, he found that the original student codings of eight advertisements as "genuine issue advertisements" had been changed to electioneering advertisements. *Id*. These eight advertisements were aired over 2,400 times, significantly changing the results of the survey. *Id*. Dr. Gibson is troubled by the fact that the changes were "entirely asymmetrical: In not a single instance in these storyboards was a change made on an ad originally coded as having candidate support or opposition as its 'purpose.'" *Id*. He asks: "[s]ince no documentation of how individual ads were selected for reconsideration by Professor Goldstein has apparently been produced, one is left wondering why all of these changes could have the same effect." *Id*. Dr. Krasno's explanation of the changes to the advertisements is detailed *infra*, App. ¶ I.D.7.r.(3). Dr. Lupia states that Dr. Gibson's Report is subject to the same criticism with regard to his analysis of this matter. Lupia asks:

> why 25 storyboards and not more or less were examined. We are not told how these 25 cases were selected. Were they selected at random, were they given to Dr. Gibson by counsel (as is true in an analogous replication attempt . . .), or were they chosen by some other procedure? . . . Indeed, the [Gibson] report provides no basis for rejecting the hypothesis that the 'asymmetry' claim is an artifact of the cases being selected in a way that is biased toward this [sic] generating this particular result.

Lupia Expert Report at 41 [DEV 5-Tab 5].

p. In his report, Dr. Gibson discusses Question 22 on the coding sheet. The

Question reads:

> 22. In your judgement, is the primary focus of this ad on the personal characteristics of either candidate or on policy matters?
>
> 1. Personal characteristics
> 2. Policy matters
> 3. Both
> 4. Neither

Gibson Expert Report at 31-32 [1 PCS]. Dr. Gibson observes that 98.1 percent of the advertisements aired within 60 days of the election were found to focus on policy matters, which means that "many ads were coded in Question 6 as promoting candidates but also as being 'primarily' focused on policy matters in Question 22." *Id*. at 32-33. Dr. Gibson finds this result contrary to what one might expect. *Id*. at 32. He then analyzes both questions and finds Question 22 to be more valid and reliable. Question 6, reproduced *supra*, App. ¶ I.D.7.i, does not provide coders the option of finding that the advertisement promotes *both* issues and candidates, forcing coders "to make a dichotomous judgment about the ad's 'purpose.'" *Id*. at 33-34. Dr. Gibson also observes that "Question 6 does not ask the coder to discern the 'primary' purpose of the ad [it asks coders to provide their opinion on the advertisement's 'purpose']. Indeed, the question provides no guidance whatsoever as to how to code mixed-content ads." *Id*. at 34. For Dr. Gibson, the structure of Question 22 is superior to that of Question 6 because it provides the options of "both" and "neither," not "forcing a choice between different parts of the manifest content

of the ad . . . by allowing a coding of 'mixed' content." *Id*. Furthermore, he finds Question 22's request for the advertisements' "primary purpose," as opposed to Question 6's request for the commercials' "purpose," "provides at least some guidance for how to make the judgment required." *Id*. Dr. Gibson concludes that "Question 22 is structured in such a way as to provide more reliable information than Question 6." *Id*. Dr. Gibson also observes that the advertisements coded as supporting or opposing candidates have "quite a number of characteristics of what the authors of *Buying Time 1998* refer to as 'genuine issue ads.'" *Id*. at 35. He finds that:

> 95.6 percent of advertisements supporting or opposing candidates urged the viewer to take some action; 74.3 percent of these were coded as providing a toll-free telephone number and only 2.9 percent were coded as providing no telephone number
>
> 45.7 percent were coded as addressing health care issues; 30.1 percent addressed taxes; 27.8 percent addressed Social Security.

Id. at 34-35. Based on these findings, Dr. Gibson concludes that: "1) The coding in Question 6 is deeply flawed; 2) When Question 6 and Question 22 clash (i.e., the coding attributes differ), the coding of Question 22 should be considered more valid and reliable; 3) According to the coding, the vast and overwhelming majority of the ads said to be examples of illegitimate electioneering (by virtue of promoting candidates) in fact were judged by their own coders to have 'policy matters' as their 'primary focus.'" *Id*. at 35. Dr.

Krasno disputes Dr. Gibson's conclusion that Question 6 is deeply flawed, noting that "coders rated 99 percent of candidate ads (and 93 percent of party ads) as generating support or opposition for a candidate." Krasno Rebuttal Report at 10 [DEV 5-Tab 3] (citing *BT 1998* [DEV 47] at 41). This conclusion is bolstered in Dr. Krasno's opinion by the fact the coders were not asked to determine the sponsor of the advertisement and that the disclaimers on the storyboards provided to the coders were often difficult to read. *Id*. at 10 n.14. Dr. Krasno contends that an electioneering advertisement does not have to focus primarily on personal characteristics of a candidate. He notes that "political scientists routinely take the view that politicians frequently adopt and advertise policy positions in order to appeal to voters. *Id*. at 11 (citing as an example Anthony Downs, An Economic Theory of Democracy (1957)); *see also* Goldstein Rebuttal Report at 29 n.16 [DEV 5-Tab 4] (citing four articles for the proposition that "policy issues in electioneering ads is widely noted in the political science literature"); Seltz Dep. at 188 [JDT Vol. 28]. Dr. Krasno stated that the:

> best illustration of this point [is the fact that] coders rated 11 percent of candidate[-sponsored] ads as focused on the personal characteristics of the candidates, 64 percent as policy-related, and the remaining 25 percent as neither or both. If one assumes, as both common sense and FECA indicate, that candidates are wholly motivated by their desire to win election, then the problem with using q22 as Dr. Gibson would use it becomes obvious: it miscategorizes at least two thirds of candidate ads as not being electioneering. This is the same criticism that both

> editions of *Buying Time* level at the magic words test, that it does not work for the one group of ads whose purpose and category are already known, regardless of their language or style.

Id. at 11. Dr. Lupia comments that an advertisement's primary purpose (the question posed in Question 6) and its primary focus (the question posed in Question 22) do not have to be the same. To illustrate his point he notes that many beer commercials do not focus on the product, but rather people "engaged in a range of activities that we can call 'wild nights out.'" Lupia Expert Report. at 47 [DEV 5-Tab 5]. It would not be unreasonable to "perceive that the purpose of the ad is to get" the viewer to buy the beer, "but to judge its primary focus as wild times." *Id*. at 48. Dr. Lupia argues that, contrary to Dr. Gibson's assumption, individuals can make the same distinction for campaign advertisements, *i.e.* that their purpose is to get the person to vote for candidate X, but their focus is on issue Y. *Id*. Lupia also challenges the idea that the qualifier "primary" clarifies matters for the coders. He cites a study co-authored by Dr. Gibson based on a survey question on social identity that did not mention the word "primary," but concluded that the initial responses given revealed *primary* social identities. Lupia Expert Report at 51 [DEV 5-Tab 5] (quoting James L. Gibson & Amanda Gouws, Social Identities and Political Intolerance: Linkages within the South African Mass Public, American Journal of Political Science 278-92 (2000)). This, Lupia

states, is "standard practice" and the Dr. Gibson "report provides no tangible evidence or scholarly reference that Question 6 is inconsistent with standard scientific practice." *Id*. at 52. In terms of Dr. Gibson's determination that Question 22 is superior to Question 6, Lupia notes that Question 6 does provide the coder with a third option of "unsure/unclear" and the Gibson Expert Report "offers no direct evidence on how answers to the questions would have changed had we allowed the responses 'both' and 'neither' in Question 6 or the response 'unsure/unclear' in Question 22." *Id*. at 48, 50. Lupia posits in response to the criticism that Question 6 failed to provide guidance to the coders that providing instructions would open the study up to charges that the instructions themselves biased the coders' responses. *Id*. at 49.

q. Dr. Gibson observes, for the first time in his rebuttal report, that "[m]issing from the entire discussion of ads and airings in the expert reports submitted is any consideration of the people who consume these ads." Gibson Rebuttal Report at 24 [2 PCS]. He uses the "Gross Rating Points" variable in the *Buying Time* databases to assess the impact of BCRA on "the people who consume these ads." "Gross rating points are the sum of ratings for a particular time: if the local news is watched by ten percent of viewers with televisions, an ad run during the program represents ten gross rating points."

Id. at 25 (quoting *BT 1998* [DEV 47] at 6). Starting with Krasno and Sorauf's Expert Report's finding that there were 713 "genuine issue advertisement" airings during the last sixty days of the 1998 campaign which depicted a candidate, Dr. Gibson found gross rating points for 707 of the airings. He found:

> that these 707 airings represent communications with a staggering number of household – 30,108,857. Thus, were these ads (just the ads accepted by Dr. Krasno and Professor Goldstein as 'genuine issue ads') prohibited, over 30 million group-citizen political communications would be affected (and this figure is based on the quite conservative assumption that each household only has a single person viewing television).

Id. Dr. Gibson does not make a similar argument in relation to *Buying Time 2000*. For further discussion on this point *see* Findings ¶ 2.12.13.

r. *Buying Time 1998*'s Seven Percent Figure

Buying Time 1998's claim that only seven percent of "genuine issue ads" in the 1998 campaign would constitute electioneering communications under BCRA is disputed.

(1) According to Dr. Jonathan Krasno, author of *Buying Time 1998*, the question he sought to answer was "what is BCRA's impact on pure issue ads?" Krasno Rebuttal Report at 12 [DEV 5-Tab 3]. Dr. Krasno aimed to determine if BCRA's framers' attempts to minimize the impact of BCRA on pure issue ads through timing and identification of

candidates worked. *Id*. *Buying Time 1998* found that seven percent of all pure issue advertisements aired in 1998 identified a federal candidate and appeared within sixty days of the campaign. *Id*. at 13. This figure was determined by dividing the number of airings of genuine issue advertisements mentioning a federal candidate within 60 days of the election by the total number of genuine issue advertisements run in 1998. *Id*.; *see also* Seltz Dep. at 115-16 [JDT Vol. 28]. The Brennan Center stands by the seven percent figure, although for a period of time in 2001 it had questioned its accuracy. Holman Dep. at 142-43 [JDT Vol. 10]. During that period of time, the Brennan Center ran additional analyses and determined that seven percent of "unique issue ads– or in other words, . . . special interest groups placing issue ads" produced in 1998 would be captured unfairly by BCRA, *id*. at 123, 144, and that 13.8 percent of all issue advertisement airings mentioning a candidate and broadcast within 60 days of the 1998 election were genuine issue advertisements, *id*. at 154-55.

(2) Plaintiffs object to the use of this denominator. Dr. Gibson finds:

> using a denominator of all issue ads broadcast in 1998 for these calculations is arbitrary and makes little sense. Why use January 1, 1998, as the starting date for the total pool of issue ads (i.e., the denominator)? Why not include ads from December 1997, or even the entire election cycle beginning in November 1996? Why not limit the denominator to ads shown in the last half of

> 1998? The . . . selected . . . denominator . . . has no theoretical meaning.

Gibson Expert Report at 38 [1 PCS]; *see also id.* at 41 ("I can see no justification for making the denominator equal to all issue ads aired in 1998."). Furthermore, he argues that given his conclusion that more people are concentrating on political issues as elections draw near, discussed *supra* App. ¶ I.C.8, *Buying Time 1998*'s denominator, by using all issue advertisements run during the course of the year, makes "the assumption that ads aired anytime throughout the year are equally as valuable as ads aired in proximity to the election." Gibson Rebuttal Report at 27 [2 PCS]. He concludes that the "damage of prohibiting an ad within 60 days of an election cannot be ameliorated by allowing that ad to be broadcast at some other point throughout the year." *Id*. at 27-28. Dr. Krasno explains that the denominator reflects only advertisements run in 1998 because "we had no data from 1997 or the last weeks of 1996 to include in the denominator." Krasno Rebuttal Report at 14 [DEV 5-Tab 3]. He notes that the addition of such data into the denominator would simply "decrease the percentage of pure issue ads affected by BCRA" because all of those advertisements would have aired more than 60 days before the election and would therefore not increase the size of the numerator. *Id*. at 14-15 (emphasis in

original); *see also* Krasno & Sorauf Expert Report at 62 [DEV 1-Tab 2] ("The data from which these estimates are derived cover broadcasting only during the 1998 and 2000 calendar years, not the thirteen-plus months preceding them. Were we able to factor in the total number of pure issue ads that appeared between elections, the percentage of pure issue ads affected by BCRA would decline."). Dr. Gibson also suggests the better denominator, and one that is not arbitrary, is that used in *Buying Time 2000*; namely, all airings of issue advertisements during the last sixty days of the campaign which also depict a candidate. Gibson Expert Report at 39 [1 PCS]. The formula answers the question: If one were to assume all issue advertisements mentioning a candidate in the last 60 days of an election campaign had an electioneering purpose, what percentage of the time would this assumption be erroneous? *Id*. at 38-39. By contrast, the *Buying Time 1998* formula answers the question: "What percentage of total ads run throughout the year that mentioned a candidate by name and were coded as providing information or urging action appeared *within* 60 days of the election, rather than *earlier than* 60 days before the election?" *Id*. at 39 (emphasis in original). Dr. Krasno believes that Dr. Gibson's denominator would vary in size "with the amount of

candidate-oriented issue advertising before an election. This is particularly relevant because of the volume of candidate-oriented issue ads devoted to presidential campaigns. The result, of course, is highly unstable estimates of BCRA's impact from year to year." Krasno Rebuttal Report at 15 [DEV 5-Tab 3]. The effect of using the *Buying Time 1998* denominator is that the percentage is affected not only by the amount of genuine issue advertisements run within 60 days of the election, but also the number of electioneering advertisements run during that time. *Id*. at 16 n. 26. When Dr. Krasno applied Dr. Gibson's denominator to the *Buying Time 1998* data he found 14.7 percent of genuine issue advertisements would be unfairly captured.[200] *Id*.; *see also* Krasno & Sorauf Report at 60 n.143 [DEV 1-Tab 2]; *id*. App. at 3 (providing the calculation: 713 airings of three distinct

[200] Dr. Gibson, using a different data set than Dr. Krasno, found that by taking *Buying Time 1998*'s "flawed numerator and using the Brennan Center's own figures for calculating the proper denominator (airings within 60 days [of the election]), 16.5 % of the group ads were 'genuine issue ads' (as defined by the Brennan Center). . . ." Gibson Expert Report at 42 [1 PCS]. He goes on to reject this figure because he "does not accept the numerator." *Id*. He also finds that by using the data set he believed was the "final" version 25.7 percent of issue advertisements aired during 1998 mentioned a candidate and were broadcast within 60 days of the election were "genuine" issue advertisements. *Id*. at 37. Dr. Krasno states that this figure is incorrect because the data set used is incorrect, resulting in a numerator "four times too large," and that based on his study with Sorauf, he now calculates the correct figure to be 6.1 percent. Krasno Rebuttal Report at 19 & App. [DEV 5-Tab 3]; *see also* Krasno & Sorauf Expert Report at 60 [DEV 1-Tab 2]. Dr. Gibson's problems with the numerator are discussed *infra*, App. I.D.7.r.(3).

genuine issue advertisements[201] mentioning a candidate and aired within 60 days of an election constitutes the numerator; the denominator is the 4847 airings of issue advertisements mentioning a candidate within 60 days of the election). Dr. Krasno also notes that Dr. Gibson's calculations, finding 44.4 percent or more of genuine issue advertisements unfairly captured by BCRA to be, by Dr. Gibson's own report, a result of his changes to the numerator as well as to the denominator. *Id*. at 16; *see also* Gibson Expert Report at 40 [1 PCS]. Dr. Gibson notes that the discrepancy between his figures and that of *Buying Time 1998* "is due in part to the use of different denominators," but does not indicate the extent to which the change to the denominator, as opposed to his changes to the numerator, explains the discrepancy. Gibson Expert Report at 40 [1 PCS]. Dr. Lupia observes that both denominators answer questions that are different but finds both to be reasonable. "If I were asked to assess the proposed regulation's restrictiveness, the [Gibson] report's fraction could provide information

[201] One of these advertisements, "HMO said No" was aired a total of 455 times (118 times in Greensboro, 126 times in Raleigh-Durham, and 211 times in St. Louis). Krasno & Sorauf Expert Report App. at 3, 20 [DEV 1-Tab 2]. We were unable to find additional information about the other two advertisements, "CCS/No Matter Who" and "CENT/Breaux." *Id*. In 1998, St. Louis had 1,110,290 television households, Raleigh-Durham had 834,260, and Greensboro had 584,900. Gibson Rebuttal Report Ex. 2 [2 PCS].

about the impact during a particular time period, while *Buying Time* 1998's fraction could provide a better measure of the regulation's impact on issue advocacy more generally." Lupia Expert Report at 25 [DEV 5-Tab 5]. Lupia states that Dr. Gibson's denominator is no less arbitrary than that of *Buying Time 1998*. *Id*. at 26. Holman comments that the *Buying Time 1998* denominator is "a justifiable way" of determining the impact of BCRA on genuine issue advertisements, although he did not use the same one for *Buying Time 2000*. Holman Dep. at 140 [JDT Vol. 10]. For Holman, the *Buying Time 1998* calculation is "not incorrect. It's a different way of assigning a number to measure a phenomenon." *Id*; *but see id.* at 153-54 (stating that the text of *Buying Time 1998* relating to the seven percent figure is "[m]isleading" and "ambiguous" in that it did not identify clearly to what it referred).

(3) Plaintiffs' and Defendants' experts also disagree as to what the appropriate numerator should be. Dr. Gibson rejected the *Buying Time 1998* numerator because based on the data he was provided he concluded that eight advertisements aired 2,405 times in the last 60 days of the campaign were originally coded as promoting an issue or urging action (genuine issue advertisements) but were overruled by Dr.

Goldstein and recoded as electioneering advertisements. Gibson Expert Report at 42 [1 PCS]. When Dr. Gibson added in these advertisements he found that "nearly two-thirds of the group ads that aired within 60 days of the 1998 election were coded by the students as 'genuine issue ads.'" *Id*. at 43. Dr. Gibson in his Rebuttal Report revises this figure based on information provided during the course of the litigation, which indicated that over a quarter of the advertisements he added to the numerator did mention candidates, resulting in a figure of 50.5 percent. Gibson Rebuttal Report at 23 [2 PCS]; *see also* Krasno Rebuttal Report at 17-18 [DEV 5-Tab 3] (describing this error). Dr. Gibson concludes that "this 50.5 % figure represents the statistical floor . . . the 64 % figure cited in my report . . . provides the ceiling." Gibson Rebuttal Report at 24 [2 PCS]. Dr. Gibson, in his Supplement Report, states that Dr. Krasno had produced additional data files which included an earlier version of the data set upon which he had relied. Gibson Supplement to Rebuttal Expert Report of October 7, 2002: 1998 Data ("Gibson Supplemental Report") at 1 [2 PCS]. The data showed that one of the eight advertisements Dr. Gibson alleged had been recoded (from "genuine issue" to "electioneering") had originally been coded as promoting the election or defeat of a candidate, and that

another was missing data as to the nature of the commercial. *Id*. at 4. As a result of excluding the airings of these two commercials, Dr. Gibson calculates that his "ceiling" fell to 60 percent, and his "floor" remained unchanged. *Id*. at 5-6. Dr. Krasno rejects the inclusion of any of the airings of these eight advertisements in the numerator. *See* Krasno Response to Professor Gibson's Supplemental Rebuttal (Nov. 13, 2002) ("Krasno Response"). He objects to the notion that the recoding "reflects a deliberate effort to manipulate some of the results reported in *Buying Time 1998*," stating that the recoding aimed to "make the data set as sensible and accurate as possible." *Id*. at 1, 2. Dr. Krasno explains that the decision to recode five of the advertisements was based on their contradictory codings. *Id*. at 2. The survey was constructed so that when a coder found that an advertisement's purpose was to "provide information or urge action" (in other words, was a genuine issue advertisement) in Question 6, the coder was supposed to skip the next 12 questions. *Id*. at 2; Gibson Supplemental Report Ex. 7 [2 PCS]. For five of these advertisements, student coders found the advertisement provided information or urged action, but went on to answer the next 12 questions. Krasno Response at 2. In addition, Dr. Krasno states that "all of these ads were scored in a parallel process on

another variable, 'favcan,' as favoring a Democratic or Republican candidate. Again, the potential conflict between question 6 and favcan should have attracted attention as the data set was being prepared." *Id*. Dr. Krasno argues that a review of the storyboards for these five advertisements, as well as other contextual factors such as where and when they were aired, makes it clear that they should be coded as "electioneering." *Id*. at 2-4. As for the final advertisement concerning Senators Herb Kohl and Russell Feingold's positions on partial birth abortion, Dr. Krasno admits that whether or not it is a genuine issue or electioneering advertisement is a "close call," but the fact that it appeared only six times in 1998 means its coding has "no real effect on any calculations of BCRA's impact." *Id*. at 3; *see also supra* App. ¶¶ I.D.7.i, I.D.8.c (discussing the advertisement). Dr. Krasno believes that the "notion that a small handful of mistakes must be perpetuated because they were once made is both ludicrous and an extraordinary departure from the usual practice of compiling data sets. Dr. Gibson's argument would be more credible if he offered any explanation for why these commercials really are pure issue ads." Krasno Response at 5.

(4) Dr. Lupia weighs in on the fraction debate, contending that the Gibson and *Buying Time* reports "are reasonable conceptualizations of the

question about how the proposed regulations will affect groups in the present and future if groups act exactly as they did in the past. If, however, we want to evaluate the regulations' likely future impact we should consider the possibility that groups will adapt to the new regulations in different ways." Lupia Expert Report at 26 [DEV 5-Tab 5]. Both sides seek to predict the impact BCRA will have if no one alters their behavior. Lupia concludes that to "the extent that affected groups are able to choose [to alter their behavior], both estimates in the denomination debate may exaggerate the extent to which this aspect of the new regulation will restrict the groups' abilities to express themselves in the future. . . . To the extent that we agree that such groups will adapt in various ways, the credibility of the high-percentage estimates of the likely future impact of the proposed regulations on interest groups is severely undermined." *Id*. at 27.

8. Criticism of *Buying Time 2000*

   a. Many of Dr. Gibson's criticisms of *Buying Time 2000* are similar to those made of *Buying Time 1998* and are addressed *supra*, App. ¶ I.D.7.

   b. Dr. Gibson states that the *Buying Time 2000* data base "has numerous errors and inconsistencies in it," and comments that these changes preclude him from replicating the findings of *Buying Time 2000*. Gibson Expert Report at 46, 47-

48 [1 PCS].[202] He is troubled by the fact that Dr. Goldstein changed the coded "purpose" of 62 out of 338 advertisements, *id*. at 52, questions the motivation behind the changes, and asks what standards Dr. Goldstein employed in making the changes, *id*. at 53; *see also id*. at 47 n.43, 64 (concluding from a review of email correspondence between *Buying Time 2000* researchers that they "were committed to drawing a particular set of substantive conclusions from the data. When the conclusions were not forthcoming, the data was scrutinized further and alterations were made in the data base."). Dr. Goldstein states that "most of the 62 'changes' [Gibson] identifies in the 2000 database are not changes at all, but rather original student coding of additional CMAG storyboards that had not previously been coded at all, and were not part of the database used by the authors of *Buying Time 2000*." Goldstein Rebuttal Report at 4 [DEV 5-Tab 4]. The problem stems from Dr. Gibson's use of the wrong database; he does not analyze the *Buying Time 2000* database, but rather "a later iteration of [Dr. Goldstein's] own version of the database containing [his] own after-the-fact updates and re-codes, including additional ads later received from CMAG. . . . [N]one of this re-coding ever

[202] Dr. Goldstein testifies that he does not have the original student coding for this study, explaining that his "political science department . . . mistakenly deleted a big chunk of out files, including our access database." Goldstein Dep. (Vol. 2) at 129 [JDT Vol. 8].

made its way into the *Buying Time 2000* report."[203] *Id*. at 14-15. Dr. Goldstein also takes exception to the charge that he deliberately changed the data in order to decrease the number of pure issue advertisements, calling it "baseless." *Id*. at 4. In addition, Dr. Goldstein notes that he reevaluated the coding of 30 advertisements in the 2000 database in his post-*Buying Time 2000* academic research having nothing to do with campaign finance or the *Buying Time* studies and "[i]n 26 of these instances, [] changed the coding from electioneering to genuine issue." *Id*. at 5, 14-15, App. A (listing advertisements changed or added to the database and the changes made to each). Dr. Goldstein claims that for the *Buying Time 2000* database, he "did not change any of the student coders' responses to Question 11 in the data cleaning process." *Id*. at 16; *see also* Goldstein Dep. (Vol.2) at 57-59, 147-50

[203] For example, Dr. Gibson challenges the *Buying Time 2000* finding that "[o]f all the group-sponsored issue ads that depicted a candidate within 60 days of the election, 99.4 % were found to be electioneering issue ads. In absolute numbers, *only three genuine issue ads (which aired a total of 331 times in the 2000 elections) would have been defined as electioneering communications* . . . ." Gibson Expert Report at 61 [1 PCS] (quoting *BT 2000* [DEV 46] at 73 (emphasis in original)). Dr. Gibson finds that according to the database the three advertisements were only aired nine times, but the *Buying Time* authors reported 331 airings and a different data base that Dr. Gibson determines is the "original, student coded version" of Question 11 shows 1,082 airings.. *Id*. at 61-62. He declares that he "has confidence in none of these" figures. *Id*. at 62. Dr. Goldstein claims that if Dr. Gibson had used the correct database, "federal.sav," he would have been able to identify the three advertisements which comprise 331 airings. Goldstein Rebuttal Report at 21 [DEV 5-Tab 4] (finding advertisements #627 (172 airings), #1389 (81 airings), and #2862 (78 airings)). He also used the database to identify "all ads run by interest groups that mentioned a candidate and aired within 60 days of the election," and using that as the denominator arrived at the same percentage as *Buying Time 2000*. *Id*. (dividing 331 by 53,840).

[JDT Vol. 8] (detailing cell phone conference call from the West Palm Beach Airport asking for his assessment of three advertisements which were subsequently changed from genuine issue to electioneering advertisements based on Dr. Goldstein's assessments). Dr. Lupia comments that Dr. Gibson fails to connect his bias concerns with actual changes in the database or demonstrate the effects directly. Lupia Expert Report at 58 [DEV 5-Tab 5]. As such, Lupia finds the charge that the investigators were committed to reaching a particular outcome to be "at best, premature and, with certainty, not proven in the [Gibson] report. *Id*.

c. Dr. Goldstein does find that three advertisements in the *Buying Time 2000* database "were re-coded on Question 11 from 'promoting a candidate' to 'providing information or urging action on an issue.'" Goldstein Expert Report at 16 [DEV 3-Tab 7]. One was a version of a "cookie cutter" advertisement run by CBM (numbered 1269), which was "extremely similar" to a number of other CBM-sponsored advertisements that (Goldstein thought) had all been coded as "electioneering." *Id*. This fact was brought to Dr. Goldstein's attention by the *Buying Time* authors and, concluding that it was not "meaningfully distinguishable from the other CBM ads, . . . [he] recoded it as electioneering." *Id*. The second was the National Pro-Life Alliance advertisement (numbered 2107) which mentioned Wisconsin Senators Kohl

and Feingold. Again, the *Buying Time* authors told Dr. Goldstein that the advertisement was "virtually identical" to another advertisement run in Virginia mentioning then-Senator Charles Robb. *Id*. at 17. Dr. Goldstein reviewed the storyboards of the two advertisements and found them "not meaningfully distinguishable, and resolved the inconsistency by re-coding [the commercial] as electioneering." *Id*. The final advertisement changed was sponsored by the Rhode Island Women Voters (numbered 1367). The advertisement was originally coded as a "genuine issue advertisement" but changed by Dr. Goldstein after the *Buying Time* authors disagreed with the coding. *Id*. Dr. Goldstein believes that the advertisement "is clearly electioneering." *Id*. As noted *supra*, App. ¶ I.D.8.c, Dr. Goldstein recently discovered that the six corresponding versions of Advertisement #1269 were originally coded as "genuine issue advertisements" by the students and later changed by the *Buying Time 2000* authors to "electioneering" commercials. Goldstein Dep. (Vol. 2) at 158-59 [JDT Vol. 8]. When these six advertisements are added to the analysis, which Dr. Goldstein terms "the most conservative standard estimate," one finds that 17 percent of the advertisements aired within 60 days of the election which identified a candidate were "genuine issue advertisements." *Id*. at 169. Defendants' experts personally disagree that all of these commercials are "genuine issue

advertisements." *See* Holman Dep. at 82-83 [JDT Vol. 10] (stating he considers Advertisement #1367 to be his "poster child of sham issue advocacy"); Goldstein Expert Report at 26 n.21 [DEV 3-Tab 7] (noting that he considers all the commercials with the exception of Advertisement #2107 "were clearly intended to support or oppose the election of a candidate").

d. Dr. Gibson raises essentially the same concerns about Question 11 in *Buying Time 2000* as he does for the practically identical Question 6 in *Buying Time 1998*, discussed *supra* App. ¶ I.D.7.i. Gibson Expert Report at 54-55 [1 PCS]. Many of the rebuttal arguments posted in paragraph I.D.7.i, *supra*, are aimed at this charge as well. *See supra* App. ¶ I.D.7.i. In addition, Dr. Goldstein argues that data from the 2000 election shows that coders "were [not] systematically biased toward coding ads mentioning candidates as electioneering as opposed to issue ads." Goldstein Rebuttal Report at 29 [DEV 5-Tab 4]. Dr. Goldstein states that "79.8 percent of the group-sponsored ads classified as electioneering were coded as having run within 60 days of the election, compared to only 18.7 percent of non-electioneering ads." *Id*. at 28. As one "would expect . . . that ads designed to promote or oppose a candidate would air relatively close to Election Day," this objective data, in Dr. Goldstein's opinion, corroborates the coding in Question 11 and demonstrates that Dr. Gibson's theory is incorrect. *Id*. at 28-29.

e. Dr. Gibson also makes the argument that *Buying Time 2000*'s Question 27, identical to *Buying Time 1998*'s Question 22, is superior to Question 11, for much the same reasons he posits for the superiority of *Buying Time 1998*'s Question 22 over the same study's Question 6. Gibson Expert Report at 56-61 [1 PCS]; *see also* App. ¶ I.D.7.p. He also claims that Question 27 is more reliable "because it does not seem to have been subject to the post-coding manipulations inflicted on Question 11." Gibson Rebuttal Report at 16 [2 PCS]. The coders found 78.8 percent of the group-sponsored advertisements had policy matters as their primary focus, and 17.6 percent had both policy matters and personal characteristics as their primary focus. Gibson Expert Report at 57 [1 PCS]; *see also* Gibson Rebuttal Report at 16 [2 PCS] (applying the denominator used in Dr. Goldstein's Expert Report to conclude 84.4 percent of "electioneering" advertisements had policy matters as their primary focus.) Many of the arguments made in App. ¶ I.D.7.p, *supra*, are directed at this charge as well. In addition, Dr. Goldstein responds by stating that "most electioneering ads seek to influence votes by portraying the favored candidate as espousing reasonable policy positions on hot-button issues like taxes . . ., and the opponent as having unreasonable or even dangerous positions on the same issues." Goldstein Rebuttal Report at 30 [DEV 5-Tab 4]. The data from the 2000 election shows that "53.3 percent of candidate-sponsored ads focused

on policy issues rather than personal characteristics; an additional 35 percent focused on both policy and personal issues. Only 10.8 percent focused just on personal issues." *Id*. Furthermore, in 2000, 47.4 percent of advertisements using express advocacy terminology were coded as having a policy focus, 34.5 percent focused on both policy and personal issues, and 16.5 percent focused only on personal issues. *Id*. at 30-31. Dr. Goldstein concludes that Dr. Gibson's theory is "disproved by the fact that both candidate ads and express advocacy ads, which everyone agrees are electioneering, themselves focus primarily on policy issues." *Id*. at 31.

f. Dr. Gibson attempts to demonstrate "the extent to which changes in a relatively small number of highly subjective codings can affect the results reported and the conclusions reached." Gibson Expert Report at 62 [1 PCS]. He does so by looking at 30 advertisements produced by counsel and assumes that they each "could fairly be coded as 'providing information.'" *Id* at 62-63. By treating them as such and adding them to the Brennan Center's 331 figure (which he rejects) he concludes that the so-called "genuine" airings constitute 24.1 percent of all the airings within 60 days of the election, which did not use express advocacy and mentioned a candidate. *Id*. at 63. He then comments that "if one *assumed* that airings presented within 60 days of the 2000 election, which mentioned candidates, but which did not mention 'magic words,' were

intended to promote candidates . . ., one would be wrong, under this scenario, approximately 24% of the time." *Id*. (emphasis added); *see also* Gibson Dep. at 179-80 [JDT Vol. 7](confirming that he made no determination about how the advertisements should be coded); *id*. at 181 (stating he never looked at the storyboards for the 30 advertisements). This exercise leads Dr. Gibson to conclude that "changes in the coding of very small numbers of ads can change the results dramatically," "the current version of the 2000 data base supports many possible estimates of the number of ads with these characteristics," and "given all of the deficiencies of the data base and the coding on which it is based, the wisest course is to draw no conclusions whatsoever about these ads on the basis of the empirical evidence in the data base." Gibson Expert Report at 63 [1 PCS].[204] Dr. Goldstein finds Dr. Gibson's exercise with the 30 counsel-chosen advertisements to be "a remarkably bizarre manipulation of the data in order to artificially inflate *Buying Time 2000*'s 'false positive' count." *Id*. at 22. Dr. Goldstein notes that "if we 'assumed,'" as Dr. Gibson did for the 30 advertisements, "that 100 percent of the BCRA-related group ads were

[204] In his rebuttal report, Dr. Gibson adds to his 30 advertisement data set four additional commercials deemed by Goldstein's Expert Report to be genuine issue advertisements (Dr. Goldstein found six genuine issue advertisements run in 2000, and two were already in the 30 commercials chosen). Gibson Rebuttal Report at 15 [2 PCS]. By running a similar analysis, Dr. Gibson concludes that Dr. Goldstein's "estimates of the impact of the three criteria [60 days before the election, candidate mention, not supporting or opposing a candidate] are wholly dependent on subjective assessments of the 'purpose' of individual ads, assessments that are reasonably subject to debate." *Id*.

genuine issue ads, then we could arrive at a false positive percentage of 100 percent." *Id*. Dr. Lupia questions the credibility of this argument given that it is based on 30 advertisements chosen by Plaintiffs' counsel, and Dr. Gibson does not reveal the method behind their selection. Lupia Expert Report at 57 [DEV 5-Tab 5]; *see also* Gibson Dep. at 180 [JDT Vol. 7](confirming he has no understanding of how the advertisements were selected); Goldstein Expert Report at 22 [DEV 3-Tab 7] ("[W]here–as here–such assumptions are based on nothing more than the self-serving conjecture of plaintiffs' counsel, any such percentage is meaningless.").

g. Dr. Gibson notes that unlike the *Buying Time 1998* study, "it appears that the 2000 project made some serious attempt to assess the reliability of the data collected by the student coders." Gibson Expert Report at 49 [1 PCS]. He evaluates reliability testing as detailed in an article published by Drs. Krasno and Goldstein, where they found that the recoders differed from the original coders on the Question 11 "purpose" inquiry in only one instance. *Id*. (citing Jonathan Krasno & Kenneth Goldstein, The Facts about Television Advertising and the McCain-Feingold Bill," 35 PS: Political Science and Politics 207 (Jun. 2002).[205] The procedure involved the recoding of 250 advertisements, but Dr. Gibson questions "how these ads were sampled (e.g.,

[205] The procedures and results of the inter-coder reliability test are produced as Appendix I to the Goldstein Expert Report.

random versus non-random selection) and who the coders were (e.g., expert versus novice)," and notes that "variable-by-variable reliability results for the full ad coding data set are not presented." *Id*. Without this information, Dr. Gibson cannot assess whether the "inter-coder reliability methods can be accepted as producing any useful information." *Id*. Dr. Goldstein discusses his efforts to assess inter-coder reliability which appear to be different from that discussed by Dr. Gibson. *See* Gibson Rebuttal Report at 9 n.14 [2 PCS] ("It is unclear how [this test] relates to" the one described in the article published by Drs. Krasno and Goldstein). Dr. Goldstein describes a procedure whereby he randomly chose 150 unique advertisements, had them coded by five undergraduate students and "[i]n general, [] found inter-coder reliability to be extremely high." Goldstein Rebuttal Report at 34 [DEV 5-Tab 4]. Dr. Goldstein also conducted a more recent inquiry into the reliability of the coding of Question 11. He took all 350 advertisements in the data set that were sponsored by interest groups, "randomly selected 50[206] and asked 10 undergraduate students to code them on three attributes[:] . . . 1) whether the ads 'generate support or opposition for a particular candidate' or 'provide information or urge action'; 2) their tone (attack, contrast, or promote); and 3) their focus (a candidate's personal attributes or policy)." *Id*. at 34-35. The

[206] He later had to drop four because "their codes were missing from the original dataset." Goldstein Rebuttal Report at 35 [DEV 5-Tab 4].

original coders had found 64 percent of the sampled advertisements to generate candidate support, 26 percent to provide information or urge action, and for two percent of the advertisements they were unsure or unclear about the commercial's purpose. *Id*. at 35. The recoders agreed with the original codes 75 percent of the time, regardless of whether the original coding was "support or oppose a candidate" or "provide information or urge action." *Id*. at 35-36. The fact "that the coders agreed with the original code in 75 percent of the cases, *regardless of what that original code was*," Dr. Goldstein asserts, means that "there is no hint of systematic bias in the original coding." *Id*. at 36. Dr. Gibson, in his rebuttal report, challenges this test. Since Dr. Goldstein was unable to discover the original coding database used in *Buying Time 2000*, Dr. Gibson questions whether or not the reliability exercise tested correlation between the recoders and the original coders, or the recoders and a manipulated data set. Gibson Rebuttal Report at 9 [2 PCS]. Next, Dr. Gibson challenges the sample used by Dr. Goldstein. He notes that the pool from which Dr. Goldstein selected the advertisements was "highly skewed" in that very few were coded as genuine issue advertisements. *Id*. at 10. Dr. Gibson finds that "any conclusions about whether this sort of ad [group-sponsored] was in fact reliably coded cannot be accepted on the basis of an examination of such a small number of ads." *Id*. He also posits that since genuine issue

advertisements were "exceedingly rare" in the sample set that "it seems quite likely that even after coding only a few ads, the coders developed a strong expectation, implicit or explicit, that the next ad they coded would be an electioneering ad. It is very difficult to make subjective assessments of infrequently occurring events. Once a coder discerns a pattern in the responses to a subjective variable, it becomes difficult indeed for the coder to 'break the habit.'" *Id*.

h. The NRA criticizes the *Buying Time 2000* study for not including two 30-minute "news magazines" in the data which it claims are "genuine issue advertisements." Proposed Findings of Fact of the NRA and the NRA PVF ¶ 9. "If these airings had been considered, 34 % of the total volume of speech that BCRA in 2000 would have covered in the 60 days prior to the general election would have been genuine issue advertisements." *Id*. One of these "news magazines" was titled "California." LaPierre Decl. ¶12 [NRA App. at 5]. "California" was aired 800 times in California from August 29, 2002 to November 5, 2000. *Id*. ¶14. "During the entirety of the 30-minute program, there was only one fleeting reference to a federal candidate for office. Specifically, during a short segment urging viewers to join the NRA and describing the benefits of membership, a cover of an issue of the NRA's magazine 'First Freedom' depicting Vice President Gore's image, then a

presidential candidate, flashed on the screen for several seconds." *Id*. ¶13. One other NRA 30 minute "news magazine" would similarly would be "captured" by BCRA due to the inclusion of the "First Freedom" cover. NRA App. 917, 920, 924, 929 ("It Can't Happen Here) (also referring once to the "Clinton-Gore assault weapons ban"). The NRA does not allege that the study included other 30 minute advertisements, or that the CMAG monitors such commercial broadcasts. It does not indicate how other 30 minute "news magazines" it ran during 2000 would have affected the results of *Buying Time*. *See* Proposed Findings of Fact of the NRA and the NRA PVF ¶¶ 3-7.

II. **AFL-CIO Advertisements Run Within 30 Days of a Primary Election**

A. Plaintiff AFL-CIO has put forth a number of examples of what they claim are "genuine issue advertisements" relating to pending legislation that BCRA would capture because the commercials ran on television and radio within 30 days of a primary election. AFL-CIO Br. at 10-11 (citing Mitchell Decl. ¶¶ 32, 34-36, 37-39, 40, 50, 58-59). The advertisements cited to by the AFL-CIO ran in "flights," aimed at particular legislation pending at the time. Practically all of these flights consisted of a variety of "cookie-cutter" advertisements, meaning advertisements that are virtually identical except that they reference different candidates. *See generally* Mitchell Decl. Ex. 1 [6 PCS].[207] Ms. Mitchell describes advertising campaigns

[207] Ms. Mitchell provides with her declaration as Exhibit 1 a chart listing all of the (continued...)

comprising 29 different sets of cookie-cutter advertisements, some of which were run within 30 days of a named candidate's primary election. Mitchell Decl. ¶¶ 32, 34-36, 37-39, 40, 50, 58-59 [6 PCS].[208] In addition, Exhibit 1 shows that four more

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[207](...continued)
advertisements purchased by the AFL-CIO since 1995, which includes the advertisement's title, district where it aired, the candidate or officeholder mentioned, whether it was a radio or television advertisement, the issue(s) discussed, the commercial's audio and visual "call to action," the dates it was broadcast, the dates of the mentioned candidate/officeholder's primary and general election, and whether the advertisement was aired within 30 of the primary, or 60 days of the election date. *See* Mitchell Decl. Ex. 1 [6 PCS]; Mitchell Decl. ¶ 4 [6 PCS] (with some caveats, attesting that "Exhibit 1 is a substantially accurate list of the ads run by the AFL-CIO between 1995 and 2001."). Since the AFL-CIO brief cites to paragraphs from Ms. Mitchell's declaration, and Ms. Mitchell's declaration relies on the information contained in Exhibit 1, I look to both sources for information about these advertisements. In the event of inconsistency between Ms. Mitchell's testimony and the data in Exhibit 1, I rely on Exhibit 1 as its information is far more detailed and forms the basis for Ms. Mitchell's testimony. For example, in Paragraph 34 of her declaration, Ms. Mitchell states that "1991" ran in 28 media markets, identifying 3 candidates within 30 days of their primaries and cites to Exhibit 1 for support. *Id*. ¶ 34. However, Exhibit 1 shows advertisements aired in only 19 markets identifying one such candidate. *Id*. Ex. 1. I give credence to the information in Exhibit 1. In addition, in some cases two forms of the same advertisement were run in the same district against the same candidate. Unless the advertisements were identical, I have treated them as two separate cookie-cutter advertisements. *See e.g. id*. Ex. 1 at 33-34 (listing two "Couples" advertisements run in fourth Congressional district of North Carolina identifying Congressman Fred Heineman, but differing in that one pictured the Congressman and provided a 1-800 number while the other did not).

[208] The advertisements are: "Too Far," Mitchell Decl. ¶ 32 & Ex. 31 [6 PCS]; "1991," *id*. ¶ 34 & Ex. 33; "Raise," *id*. ¶ 35 & Ex. 35; "Votes," *id*. ¶ 35 & Ex. 36; "People," *id*. ¶ 35 & Ex. 38; "No," *id*. ¶ 35 & Ex. 39; "Minimum Wage," *id*. ¶ 36 & Ex. 42; "$5.15," *id*. ¶ 36 & Ex. 44; "Couple," *id*. ¶ 37 & Ex. 47; "Lady," *id*. ¶ 37 & Ex. 48; "Peace," *id*. ¶ 37 & Ex. 49; "Whither," *id*. ¶ 37 & Ex. 50; "Another," *id*. ¶ 38 & Ex. 53; "Edith," *id*. ¶ 40 & Ex. 58; "Pass," *id*. ¶ 50 & Ex. 94; "Support," *id*. ¶ 50 & Ex. 95; "Call," *id*. ¶ 50 & Ex. 98; "Failed," *id*. ¶ 50 & Ex. 99; "Liable," *id*. ¶ 50 & Ex. 100; "Soon," *id*. ¶ 50 & Ex. 100; "Basic," *id*. ¶ 50 & Ex. 102; "Label," *id*. ¶ 57 & Ex. 127; "Trust," *id*. ¶ 57 & Ex. 128; "Endure," *id*. ¶ 57
(continued...)

advertisements would have been captured by BCRA due to their airing within 30 days of the identified candidate's primary, but since all of the airings of three of these commercials would have been captured by BCRA's 60 day-window as well, I address only one of these advertisements in this Finding.[209]

1. "Too Far" was an advertisement which aired nationally on cable television and identified President William J. Clinton within 30 days of the Iowa primary in 1996. Mitchell Decl. ¶ 32, Ex. 1 at 17 [6 PCS].

2. During April 1996, the AFL-CIO ran a flight of advertisements entitled "1991" aimed at increasing the national minimum wage. *Id*. ¶ 34. Exhibit 1 shows that the AFL-CIO produced 19 versions of "1991," three of which ran within 30 days of an identified candidate's primary contest. *Id*. Ex. 1 at 17-20. In May 1996, the AFL-CIO ran four more flights of cookie-cutter advertisements related to legislation that would raise the minimum wage entitled "Raise," "Votes," "People," and "No." *Id*. ¶ 35. According to Exhibit 1, two versions

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[208](...continued)
& Ex. 129; "Stand," *id*. ¶ 57 & Ex. 130; "Block," *id*. ¶ 58 & Ex. 137; "Help," *id*. ¶ 58 & Ex. 138; "Sky," *id*. ¶ 59 & Ex. 139; and "Protect," *id*. ¶ 59 & Ex. 140.

[209] These four advertisements are: "Job," Mitchell Decl. ¶ 61 & Exs. 1 (at 102), 141 [6 PCS] (All airings of "Job" took place within 60 days of the 2000 general election); "Barker," *id*. ¶ 53 & Ex. 116 (All airings of "Barker" took place within 60 days of the 2000 general election); "No Two Way," *id*. ¶ 41 & Ex. 59 (All airings of "No Two Way" took place within 60 days of the 2000 general election); and "Raiders," *id*. Ex. 1 at 36, 38-39, Ex. 58 at 10. Since the "Job," "Barker," and "No Two Way" airings would have been captured by BCRA's 60-day window, they are not addressed here but in Findings ¶¶ 2.11.3.2, 2.11.8.2.

of "Raise" were aired, one of which was aired within 30 days of the named candidate's primary, and 19 versions of "People" were run, two of which mentioned a candidate within 30 days of the candidate's primary. *Id*. Ex. 1 at 21-25. The AFL-CIO's data shows that five versions of "No" were aired, none during the 30 days prior to the primary of an identified candidate, and Exhibit 1 shows no airings of "Votes." *Id*. Ex. 1 at 22. In late June and July of 1996, the AFL-CIO ran two more flights of advertisements entitled "Minimum Wage" and "$5.15" on the same issue. *Id*. ¶ 36. Nine versions of "Minimum Wage" were aired, none of which implicated candidates within 30 days of their primary, while 14 versions of "$5.15" were aired, one which named a candidate within 30 days of the candidate's primary. *Id*. Ex. 1 at 17, 19, 21-22, 32-35.

3. Between late June and early August 1996, the AFL-CIO ran four flights of advertisements entitled "Couple," "Lady," "Peace," and "Whither," "intended to defeat the continuing efforts of the Republican Congress to reduce Medicare/Medicaid benefits as part of the FY 1997 federal budget legislation." *Id*. ¶ 37. The group ran 34 versions of "Couple," two of which mentioned candidates within 30 days of their primaries, and 27 versions of "Whither" were run, four of which fell within 30 days of a named candidate's primary contest. *Id*. Ex. 1 at 25-36. Five versions of "Lady," and four versions of

"Peace" were run, but none of these advertisements ran within 30 days of an identified candidate's primary. *Id*. Ex. 1 at 29-34.

4. In late August and early September 1996, "the AFL-CIO sponsored another flight of advertisements entitled 'Another' in response to a series of advertisements run by business interest groups that called into question the AFL-CIO's Medicare ads by claiming that the Republican budget would increase, rather than decrease, Medicare budgets." *Id*. ¶ 38. The group ran 26 versions of "Another," six of which ran within 30 days of a named candidate's primary contest. *Id*. Ex. 1 at 39-42.

5. In August of 1996, the AFL-CIO "sponsored a television and radio advertisement entitled "Edith" which was intended to gain support for legislation to protect the retirement savings of working families by applying the same protections to 401(k) plans as already applied to traditional defined benefit plans." *Id*. ¶ 40. Forty versions of "Edith" were broadcast, 12 of which identified candidates within 30 days of their primaries. *Id*. Ex. 1 at 36-39. Four versions of a radio advertisement on the same topic entitled "Raiders" were aired by the AFL-CIO, one of which would have been captured by BCRA's 30-day rule. *Id*. Ex. 1 at 36, 38-39.

6. In July 1998, the AFL-CIO "sponsored several flights of television and radio advertisements designed to generate support for HMO reform legislation." *Id*.

¶ 50. These advertisements were entitled "Pass," "Support," "Call," "Failed," "Liable," "Soon," and "Basic." *Id*. The group ran two versions of "Pass," six versions of "Support," three versions of "Failed," three versions of "Liable," and seven versions of "Basic." *Id*. Ex. 1 at 78-82. None of these advertisements was run within 30 days of a named candidate's primary. *Id*. Seventeen versions of "Call" were broadcast, two of which named federal candidates within 30 days of their primary, as did one of the three versions of "Soon." *Id*. Ex. 1 at 80-82.

7. From February through June 2000, the "AFL-CIO ran several flights of ads entitled 'Label,' 'Trust,' 'Endure,' and 'Stand' in opposition to President Clinton's proposal to provide permanent normal trade relations to China." *Id*. ¶ 57. The group ran 14 versions of "Label," two within 30 days of a named candidate's primary. *Id*. Ex. 1 at 92-93. Sixteen versions of "Trust" were aired, three during the 30 days before a named candidate's primary. *Id*. Ex. 1 at 93-97. Eighteen versions of "Endure" were broadcast, three of which aired within 30 days of the named candidate's primary. *Id*. Ex. 1 at 94-97. Neither of the two versions of "Stand" aired by the AFL-CIO named candidates within 30 days of their primary elections. *Id*. Ex. 1 at 97.

8. In June and July of 2000, the AFL-CIO "paid for a flight of radio advertisements entitled 'Block' aimed at pressuring the Senate to approve the

Norwood-Dingell version of the Patient's Bill of Rights." *Id.* ¶ 58. Exhibit 1 shows one version of "Block" was aired, but not during the 30 days before a named candidate's primary. *Id.* Ex. 1 at 86. "In August and September, with the bill still stalled in Congress, [the AFL-CIO] ran several flights of television advertisements entitled 'Help' targeting Republican Representatives who had voted against the [bill] when it passed the House in October, 1999, urging viewers to contact each of these Members and 'tell him he's on the wrong side.' . . . One of the flights of 'Help' ran between August 18 and September 6, 2000." *Id.* ¶ 58. Nine versions of "Help" were aired during this flight, two of which aired within 30 days of a named candidate's primary. *Id.* Ex. 1 at 100.

9. Finally, during July and August of 2000, "the AFL-CIO ran television advertisements entitled "Sky" and "Protect" naming approximately twelve different Representatives who had voted at the end of June to pass prescription drug legislation that failed to guarantee drug benefits under Medicare." *Id.* ¶ 59. Twelve versions of "Sky" were aired, one of which was broadcast during the 30 days before a named candidate's primary. *Id.* Ex. 1 at 97-98. Fourteen versions of "Protect" aired, three of which aired within 30 days of a named candidate's primary. *Id.* Ex. 1 at 98-99.

10. These examples constitute 336 cookie-cutter advertisements, 50 of which

would have been affected by BCRA.

III. Empirical Studies on Corruption

In my Title I Findings, I briefly summarize the state of the empirical studies cited to by experts which attempt to demonstrate a link between political donations and political corruption. A more detailed analysis of these studies is presented below.

A. Some studies have attempted to show that PAC donations influence roll call votes. Defense expert Donald Green testifies that he knows of no statistically valid study conducted since 1990 correlating federally-regulated PAC contributions to candidates and roll call votes. Green Cross Exam. at 58 [JDT Vol. 9]; *see also id*. at 54-55 (noting that "the picture of evidence over a range of studies does not suggest a consistent relationship" between contributions and roll call votes); Bok Cross Exam. at 18-19 [JDT Vol. 3] (studies are "flawed"). Green also testifies that some studies have even found a negative correlation between contributions and roll call votes. *Id*. at 55. Defense expert Thomas Mann comments that these studies are

> often used to buttress the argument that political contributions do not corrupt the policy process. This is an odd inference, since it is based on studies of contributions that are limited as to source and size for the very purpose of preventing corruption or its appearance. PAC contributions are capped at $5,000 per election, an amount whose real value has shrunk by two-thirds since it was enacted in 1974. Are we to assume that studies of contributions of $50,000 or $500,000 or $5 million from corporations, unions and individuals would produce the same generally negative findings?

Mann Expert Report at 33. [DEV 1-Tab 1].

The experts testify that part of the reason the existing studies linking contributions

to roll call votes are flawed is that "political scientists lack the means by which to observe and determine [*quid pro quo* bribery]." Sorauf Cross Exam. at 132 [JDT Vol. 31]; *see also* Green Cross Exam. at 67-68 [JDT Vol. 9] ("[T]he literature on the relationship between roll call votes and money is murky because the problem is an extremely difficult one to solve, statistically."). Plaintiffs' expert David Primo summarizes the studies linking contributions to roll call votes:

> [I]t is well established that PAC contributions flow disproportionately to incumbent office holders, majority party members, members of powerful committees and to members on committees with jurisdictions relative to the PAC sponsor. . . . -- and you could say oh, it must be bribes. But in fact, once you get deeper in it, it just can't possibly be a fact that such little money is affecting the political process.

Primo Cross Exam. at 143-44 [JDT Vol. 27].

B. Other studies have attempted to link donations to other forms of legislative activity, such as committee voting, offering amendments, or filibustering. Defendants' expert Mann notes that there are "a myriad of ways in which groups receive or are denied favors beyond roll-call votes. Members can express public support or opposition in various legislative venues, offer amendments, mobilize support, help place items on or off the agenda, speed or delay action, and provide special access to lobbyists. They can also decline each of these requests." Mann Expert Report. at 33 [DEV 1-Tab 1]. One of these studies in particular,[210] which examines PAC contributions and

[210] Richard Hall & Frank Wayman, Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees, 84 American Political Science Review (continued...)

legislative activity, has been found to be statistically unsound. *See* Green Cross Exam at 55 [JDT Vol. 9]; *see also id.* at 68-72 (noting the study does not account for lobbying activities); Primo Cross Exam. at 136-37 [JDT Vol. 27] ("I am not convinced by their paper. . ."); Snyder Rebuttal Report at 7-9 [2 PCS] (noting that Hall and Wayman's study "has three notable flaws"). Plaintiffs' expert David Primo concludes that "there is no clear, consistent and systematic evidence that contributions play a major role in the legislative process." Primo Cross Exam. at 142 [JDT Vol. 27]. Defendants' expert Derek Bok explains that "[t]he difficulty is, of course, that the ability of researchers to get at the behavior prior to a vote is severely limited since a lot of that is not public, and therefore, it's . . . inherently difficult to prove one way or another what effect PAC contributions would have on prevoting behavior." Bok Cross Exam. at 21 [JDT Vol. 3].

C. Other studies have attempted to establish empirically a link between donations and access to legislators. Plaintiffs' expert Primo finds "scant evidence in the political science literature that money secures access." Primo Rebuttal Report ¶ 13 [2 PCS]; *see also* FEC expert Herrnson Dep. in *RNC v. FEC* at 300 (testifying that existing studies on "access" are "kind of weak and wishy washy") [DEV 64-Tab 3]; Bok Cross Exam. at 35-37 [JDT Vol. 3] (noting that researchers studying PAC donations have failed to show that access has a significant impact on policy decisions); Green Cross

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[210](...continued)
797 (1990).

Exam. at 93-95 [JDT Vol. 9] (unable to identify a study that shows PAC contributions lead to access to federal lawmakers). Defendants' experts Krasno and Sorauf note that "the absence of systematic data on access . . . prevents political scientists from searching for relationships between access and policy-makers' behavior." Krasno & Sorauf Expert Report at 5 [DEV 1-Tab 2].