Nos. 02-1674 & Consolidated Cases
IN THE
SUPREME COURT OF THE UNITED STATES

MITCH MCCONNELL, *et al.*,
Appellants,
v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

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

BRIEF OF *AMICI CURIAE* REPRESENTATIVES CASTLE AND PRICE, AND REPRESENTATIVES ALLEN, ANDREWS, BAIRD, BASS, BOEHLERT, CARDIN, ESHOO, FRANK, GILCHREST, GREENWOOD, HOLT, HOUGHTON, NANCY L. JOHNSON, LEACH, JOHN LEWIS, KENNETH LUCAS, MALONEY, PETRI, PLATTS, RAMSTAD, SCHIFF, SIMMONS, AND TOM UDALL IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Representative David Price and Representative Michael Castle supported consistently the reform proposal enacted ultimately as the Bipartisan Campaign Reform Act of 2002. They have worked together, across party lines, as especially thoughtful architects of BCRA. Each brought special insight to this issue, based upon an individual background of deeper study of this subject: Representative Price, as a professor of political science and author of respected technical works on the subject; Representative Castle, as a state governor involved in the interrelated state and federal systems of democracy and governance.

Their particular interest is to inform the Court from the specially enriched understanding that thoughtful Members of Congress, as expert participants themselves in the electoral process, brought to the problem of constructing reforms of the campaign finance system. Their particular depth of interest caused them to select representation by the principal counsel filing this brief, Professor Richard Briffault of Columbia Law School, author of numerous scholarly articles and presentations on the recent legislative and judicial legal developments in this subject. They have been joined in this brief by other Representatives who associate themselves with the goal of a bipartisan presentation reflecting the special insights on this subject of Members of Congress who brought deep expertise, as well as bipartisan devotion to democracy-strengthening reform, to the enactment of the BCRA. They are:

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation of submission of this brief.

Representatives Allen (D-ME), Andrews (D-NJ), Baird (D-WA), Bass (R-NH), Boehlert (R-NY), Cardin (D-MD), Eshoo (D-CA), Frank (D-MA), Gilchrest (R-MD), Greenwood (R-PA), Holt (D-NJ), Houghton (R-NY), Nancy L. Johnson (R-CT), Leach (R-IA), John Lewis (D-GA), Kenneth R. Lucas (D-KY), Maloney (D-NY), Petri (R-WI), Platts (R-PA), Ramstad (R-MN), Schiff (D-CA), Simmons (R-CT), and Tom Udall (D-NM).

SUMMARY OF ARGUMENT

The Bipartisan Campaign Reform Act of 2002 (BCRA) is the product of a careful bipartisan Congressional effort to repair the cracks that emerged in the federal campaign finance system since this Court upheld the principal provisions of the Federal Election Campaign Act (FECA) in *Buckley v Valeo*, 424 U.S. 1 (1976), more than a quarter-century ago.

In *Buckley* and other cases this Court has specifically upheld Congress's authority in the critical areas that BCRA targets. Congress has responded to new campaign finance schemes – particularly soft money and so-called issue advocacy – unanticipated when FECA was enacted. As elected officials, members of Congress have a powerful, first-hand awareness of the subtle details and changing nature of electoral campaigns; of the impact of campaign practices on government integrity and on public confidence; and of how the fundamental provisions of campaign finance law have the potential to be evaded.

BCRA's provisions regulating political party soft money and electioneering communications are clear, closely-drawn, narrowly-tailored rules that draw on Congress's special familiarity with political campaigns and the impact of campaign finance practices on governance.

ARGUMENT

I. AS THE SUPREME COURT HAS RECOGNIZED, CONGRESS HAS SPECIAL EXPERTISE IN THE CAMPAIGN FINANCE REGULATION NEEDED TO PROMOTE DEMOCRACY

Elections are the heart and soul of American democracy. For almost one hundred years Congress has repeatedly responded to public concerns that particular campaign finance practices jeopardize the integrity of the electoral process and public confidence in government. Three principles have become central components of federal campaign finance law upheld by this Court, in recognition that, rather than infringe on the First Amendment, they promote the First Amendment values of fair political discourse, voluntary participation in political life, and voter education.

The first principle is the complete exclusion of corporate and union treasury funds from federal elections, *see Federal Election Commission v. Beaumont*, 123 S.Ct. 2200, 2205 & n. 3(2003)(*citing* numerous authorities).[2] A second major principle, with a pedigree going to 1910, is disclosure, both of contributions and of independent expenditures to support or oppose federal candidates. The Court has repeatedly upheld disclosure as vital to the prevention of

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[2] This is, among other things, "to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by contributions." *Federal Election Commission v. National Right to Work Committee (NRWC)*, 459 U.S. 197, 207 (1982); *see United States v. Automobile Workers*, 352 U.S. 567, 570 (1957)(union treasuries). *See also Austin v. Michigan Chamber of Commerce*, 494 U.S. 652,658-59 (1990); *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 495 (1985); *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL*), 479 U.S. 238, 258 (1986).

corruption and the promotion of the informed electorate so crucial to an effective democracy. *Buckley v. Valeo*, 424 U.S. 1, 61-62 & n.71 (1976).

The third major principle of federal campaign finance regulation – restrictions on the dollar amounts of contributions – became law with the enactment of the Federal Election Campaign Act (FECA) Amendments of 1974, responding to the Watergate scandals that marked the financing of the 1972 presidential election. *Buckley v. Valeo, supra*, 424 U.S. at 28.[3] As this Court has recognized,[4] very large contributions undermine public confidence in democracy itself.

As candidates for office, members of Congress have first-hand experience with campaign finance - the need for money to pay for staff, transportation, research, and advertising; the nitty-gritty of fundraising dinners, personal solicitations, and other practices for obtaining money; and the funding interactions with individual donors, interest groups, and political parties. *See, e.g., Colorado Republican II, supra*, 533 U.S. at 452 ("We have long recognized Congress's concern with this reality of political life").

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[3] As *Buckley* emphasized, a ban on raw vote-buying would "deal with only the most blatant and specific attempts of those with money to influence government action." *Id.* at 28. Rather, very large contributions raise "the broader threat from politicians too compliant with the wishes of large contributors." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 389 (2000).

[4] As the Court recently explained, 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." *Shrink Missouri, supra*, 528 U.S. at 390, *citing and quoting United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961). *See Buckley, supra*, 424 U.S. at 27 ("the appearance of corruption"); *id.*, *citing and quoting Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 565 (1973)("the appearance of improper influence").

Members of Congress also have close familiarity with the impact of campaign laws on campaign practices. Members know the administrative costs of compliance and the burdens that contribution limitations can place on fundraising, the shortcomings of election law administration, and the development of campaign finance techniques that can avoid legal restrictions. They learn first-hand whether and how campaign finance regulations actually work in practice. Justice Breyer recently observed, Congress has "significantly greater institutional expertise," *Nixon v. Shrink Missouri PAC, supra*, 528 U.S. at 402 (Breyer, J., concurring) than the Court in assessing campaign practices and their impact on public integrity and the electoral process.

So, too, as law-makers responsible for our Nation's governance, members of Congress have direct experience with the potential impact of campaign finance practices on governance – on the role that contributions can potentially play in affecting which interests secure how much access to public officials, which interests either wield or appear to wield extra influence on legislative and agency decision-making, and the impacts of these on the day-to-day operations of government.

From regular and close contact with constituents, members of Congress become keenly aware of public concerns about the campaign finance system and the extent to which certain campaign finance practices undermine public confidence in government. Reform leaders and supporters within Congress must, and do, focus overwhelmingly upon the need to restore that public confidence.

This Court has recognized Congress's institutional expertise over campaign finance in three ways. First, the Court has looked to Congress's determination that certain campaign finance practices so threaten electoral or government integrity or public confidence in government that regulation is

warranted. *See, e.g., Beaumont, supra*, 123 S. Ct. at 2205-07. *See also Nixon v Shrink Missouri, supra*, 528 U.S. at 403 (Breyer, J., concurring)("the legislature understands the problem – the threat to electoral integrity, the need for democratization – better than do we"). Second, when the Court determines that a particular regulatory technique is a constitutionally appropriate means of addressing a threat that a campaign finance practice poses to democracy, the Court has deferred to Congress with respect to the scope of such regulation. *Beaumont, supra*, 123 S.Ct. at 2208.[5] Finally, the Court has sustained laws that Congress has determined are necessary to prevent circumvention or evasion of the core requirements of campaign finance regulation, from *Automobile Workers*, *supra*, 352 U.S. at 582, to, most recently, *Beaumont.*[6]

To be sure, Congress does not and should not enjoy *carte blanche* with respect to campaign finance laws that implicate the First Amendment, *Buckley, supra*, 424 U.S. at 14-23, 64-68. Rather, campaign finance law ought to reflect an evolving partnership between Congress and the Court.

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[5] *See Buckley,* 424 U.S. at 30 (quoting the Court of Appeals that "a court has no scalpel to probe, whether, say, a $2,000 [contribution] ceiling might not serve as well as $1,000."). Similarly, the disclosure threshold "is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion." *Id.* at 83. The Court also upheld limits on smaller corporations by declining to " second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *NRWC, supra*, 459 U.S. at 210.

[6] The anti-circumvention purpose was crucial in *Buckley*, 424 U.S. at 35-36, 38; in *California Medical Association v. Federal Election Commission (CalMed)*, 453 U.S. 182, 197-98 (1981); in *Federal Election Commission v. Colorado Republican Federal Campaign Committee (Colorado Republican II),* 533 U.S. 431, 456 (2001)("all Members of the Court agree that circumvention is a valid theory of corruption"), and *id.* at 457 n.19; and in *Beaumont*, *supra*, 123 S.Ct. at 2207 (warning against "circumvention of [valid] contribution limits.")(*citing and quoting Colorado Republican II).*

Congress has the primary responsibility for surveying the political landscape, determining which campaign finance practices threaten democratic values and developing a legislative response. Judicial review assures that any resulting restrictions on electoral activity are politically neutral, adequately justified, narrowly-drawn, and consistent with the needs of a free and fair democratic electoral system.

II. BCRA'S RESTRICTIONS ON SOFT MONEY CONTRIBUTIONS TO THE POLITICAL PARTIES ARE A CONSTITUTIONAL MEANS OF RESTORING FECA'S LIMITATIONS AND PROHIBITIONS

BCRA's restrictions on soft money affect only contributions, so the more deferential standard of review that this Court has applied to contribution restrictions ought to apply. *MCFL, supra*, 479 U.S. at 259-60. A contribution restriction will be upheld if it is "'closely drawn' to match a 'sufficiently important interest.'" *Nixon, supra*, 528 U.S. at 387-88, *quoting Buckley, supra*, 424 U.S. at 25.

A. CONGRESS FOUND THAT UNRESTRICTED SOFT MONEY DONATIONS HAVE THE DELETERIOUS EFFECTS ON THE POLITICAL PROCESS AND PUBLIC TRUST IN GOVERNMENT THAT PREVIOUSLY NECESSITATED REGULATING HARD MONEY DONATIONS

Soft money contributions to the political parties emerged as a factor in federal elections only after the enactment of FECA's restrictions on direct contributions to federal candidates and to the parties. Some soft money activity can be found in the late 1970s and 1980s, *see Richard Briffault, The Political Parties and Campaign Finance Reform*, 100 Colum. L. Rev. 620, 628-29 (2000). But, soft money exploded in federal elections in the 1990s. Over the course of that decade, soft money grew from roughly 17% of national party money in the 1991-92 election cycle to nearly 40% of national party

money – or nearly $500 million – in the 1999-2000 election cycle. *See McConnell v. Federal Election Commission*, 251 F. Supp.2d 176 (D.D.C. 2003) at 331 (opinion of Henderson, J.); *id.* at 439-41 (opinion of Kollar-Kotelly, J.).

Soft money has enjoyed such exponential growth precisely because it enables big donors, parties, and candidates to avoid FECA's contribution source prohibitions and dollar limitations. Although FECA capped individual contributions to the national committees of the political parties at $20,000, in 1999-2000 there were 800 donors who each gave $120,000 or more to the national party committees, including hundreds of corporations and unions – even though FECA completely bars corporate and union treasury funds from federal elections. *See id.* at 331 (opinion of Henderson, J.). The top 50 soft money donors each gave between $955,695 and $5,949,000. *See id.*[7]

Members of Congress have found that huge soft money donations have potentially serious effects on our government's

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[7] Senator Thompson, who chaired the Senate's investigation into illegal and improper activities in the 1996 federal election campaigns, concluded that, compared to "a short time ago," now, "those raising the money would consider themselves foolish if they spent too much time on raising those hard dollars when they can pick up the phone to these big outfits and raise many times that. You are not a player anymore unless you have $20,000, $30,000, $40,000, $50,000, or $100,000. . . ." 148 Cong. Rec. S2110 (Mar. 20, 2002). As Rep. Shays explained, soft money includes "the very kinds of contributions that the federal laws intended to exclude – namely donations from corporations, unions, as well as large individual contributions. Soft money is not just a loophole, it is the loophole that ate the law."148 Cong. Rec. H353 (Feb. 13, 2002); *accord*, 148 Cong. Rec. S2114-2115 (Mar. 20, 2002)(Sen. Levin)("the soft money loophole . . .allows parties to raise unlimited amounts of money from individuals as well as corporations and unions. . . . The loophole has destroyed the law. There are no effective limits"); 148 Cong. Rec. S2111 (Mar. 20, 2002)(Senator Schumer)(soft money "makes a mockery" of FECA's bans and dollar limits).

integrity.[8] As Senator Thompson explained in condemning the rise of very large soft money donations, "[i]t is not good to have legislators or Presidents too dependent on people for whom they are supposed to be making laws that affect their lives. When the very people who have legislation before you are coming to you with greater and greater amounts of money for your political campaign, that creates a conflict of interest." 148 Cong. Rec. S2110 (Mar. 20, 2002).[9] Even beyond any direct impact on government decision-making, members of Congress[10] found that the explosion of soft money has had a

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[8] According to Representative Miller, "[b]ecause of large, unregulated contributions, known as 'soft money,' special interests and corporations often get special representation by elected officials, special representation that is often in conflict with the larger public interest." 148 Cong. Rec. H351 (Feb. 13, 2002). According to Rep. DeGette, "[m]any took advantage of the soft money loophole to gain inordinate access to our country's leaders and lowered our nation's political parties to little more than middlemen for moving soft money for corporations and wealthy individuals." 148 Cong. Rec. H354 (Feb. 13, 2002). As Rep. Wu found, soft money "is nothing more than a backdoor way to avoid the contribution limits that are now placed on candidates. Soft money is influencing our process almost as much as direct contributions to candidates do. . . . And let's face it, special interest groups that contribute large sums of this soft money have an influence on the political process." 148 Cong. Rec. H354 (Feb. 13, 2002).

[9] As Senator Feingold stated on the floor of the Senate, "these days, major legislation almost never comes to this floor without interests, often on both sides, that have made major soft money contributions to the political parties." 148 Cong. Rec. S2104 (Mar. 20, 2002). According to Rep. Morella, "soft money has been at the heart of every political or corporate scandal over the past decade." 148 Cong. Rec. H344 (Feb. 13, 2002).

[10] According to Rep. Kind, "though the opponents of reform say the public does not care about this issue, the residents of Wisconsin's Third District tell me otherwise. They see where our system is headed and demand reform from Congress." 148 H. 351 (Feb. 13, 2002). According to Rep. Shays, "there is much evidence – and our own experience with our constituents confirms – that one of the major reasons citizens increasingly

devastating impact on public confidence in government.[11]

Indeed, precisely because these donations are "soft" -- that is, outside the scope of federal regulation -- they particularly damage public opinion. Many soft money donations are dramatically larger than permitted hard money contributions. Many very large donations come from corporations and unions in defiance of the ban on their participation in federal elections. From soft money, voters receive the troubling message that big money is simply too

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fail to vote is their perception that their vote makes no difference because of the role of money in politics and the influence of special interest groups." 148 Cong. Rec. H353 (Feb. 13, 2002). Rep. Maloney agreed, based on a survey of her Long Island constituents, that "their disenchantment with the current system results in fewer Americans exercising their right to vote." 148 Cong. Rec. H348 (Feb. 13, 2002). Representative Dingell found that "unregulated soft money . . . taints us all individually and collectively works to increase the public's cynicism and destroy faith in Congress." 148 Cong. Rec. H349 (Feb. 13, 2002). See also 148 Cong. Rec. H354 (Feb. 13, 2002) (statement of Rep. Wu that soft money contributes to a "culture of cynicism"); id. at H355 (statement of Rep. Udall that soft money creates "the perception that the national government is for sale to the highest bidder").

[11] Senator Lieberman explained the consequences of "a system that often leaves the average person disempowered, disinterested, and disengaged from a political process where the average person's annual income, in many cases, mostly doesn't even approach the cost of a ticket to our political parties' most elite fundraising events. This causes the average people, the majority, to continually question why their leaders are taking the actions they take. It causes those of us in public life to work, too often, under a cloud of suspicion, with our citizenry wondering whose interests are served." 148 Cong. Rec. S2137 (Mar. 20, 2002). As Senator McCain put it, "any voter with a healthy understanding of the flaws of human nature and who notices the vast amounts of money solicited and received by politicians cannot help but believe that we are unduly influenced by our benefactors' generosity. . . . [C]ampaign contributions from a single source that run into the hundreds of thousands or millions of dollars are not healthy to a democracy." 147 Cong. Rec. S2434 (Mar. 19, 2001).

powerful to be ignored. Effective controls on soft money would perform the extremely valuable function of directly redressing public distrust of our political system.

B. CONGRESS FOUND THAT UNRESTRICTED SOFT MONEY DONATIONS THREATEN GOVERNMENT INTEGRITY AND PUBLIC CONFIDENCE BECAUSE SOFT MONEY AFFECTS FEDERAL ELECTIONS AND FEDERAL OFFICEHOLDERS

The theory for the exemption of soft money from regulation is that the activities funded by soft money either do not affect federal elections or support a mix of federal elections and nonfederal activities. But, as Congress found, soft money does in fact have a direct impact on federal elections and the federal government. As the Court found in *Colorado Republican II*, parties, "whether they like it or not, . . . act as agents for spending on behalf of those who seek to produce obligated officeholders." 533 U.S. at 452.[12]

Donors can use "parties as conduits," *id.*, for soft money gifts as easily as for hard money contributions. Indeed, soft money is typically used in ways that directly benefit candidates' campaigns. The single greatest use of soft money is on communications that support or oppose a clearly identified candidate for federal office but which avoid the technical words of express advocacy. *See* Craig B. Holman & Luke P. McLoughlin, *Buying Time 2000: Television Advertising in the 2000 Federal Election* 31, 74 (2001). Party ads that support a candidate or oppose her opponent clearly benefit that candidate. Candidates are likely to know about such ads, and to be grateful

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[12] Parties can be and are used as "the instruments of some contributors whose object is not to support the party's message . . . 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 Republican II*, 533 U.S. at 452.

to the sources who provided the funding for them. As the Court observed in *Colorado Republican II*, this is how "the power of money actually works in the political structure." 533 U.S. at 450.

Similarly, the use of soft money for drives to mobilize voter support, and payment of party workers, in connection with elections where federal candidates appear on the ballot operates to benefit federal candidates and render these individuals grateful for the specific donors' funding. Given Congress's first-hand experience "with this reality of political life," *id*. at 452 n. 14, it reasonably concluded that soft-money-funded party activities that aid federal candidates are as great a potential source of undue influence as other items that FECA requires to be funded with hard money: party contributions to candidates, coordinated expenditures with candidates, and independent express advocacy expenditures in support of candidates.

Moreover, Members of Congress know, only too well, the mechanics of officeholder soft money fund-raising. Party fund-raising practices establish close links between officeholders and potential donors to the parties and, indirectly, to those officeholders. As Representative Shays explained, "even though the money often goes to the parties, it's the candidates themselves and their surrogates who . . . not only solicit the funds themselves, they meet with big donors who have important issues pending before the government; and sometimes, the soft money candidates raise for their political parties is often directed back to their own campaigns." 148 Cong. Rec. H352 (Feb. 13, 2002). Federal officials become directly involved in soliciting contributions for the party committees' soft money accounts. Major donors are rewarded with special access to leaders of the executive branch, members of the Congressional leadership, and committee chairs and ranking members. Many members of Congress, in turn, are

active in soliciting and obtaining large soft money contributions, in order to enhance their status in Congress and stake their claim to leadership of their parties. *See Colorado Republican II, supra*, 533 U.S. at 460 n.23.

Moreover, the national party committees soliciting and receiving soft money are closely connected to Congress.[13] Given the web of relations linking major donors, party committees, and elected officials, only the prohibition on national parties soliciting or accepting soft money can keep oversized individual, corporate, and union contributions out of federal campaigns, and away from federal officeholders and from party committees composed of or tightly linked to federal officeholders.

Further, the ban on state and local parties soliciting, receiving or using soft money for defined federal election activities is essential to prevent circumvention of the ban on national party soft money.[14] Drawing on Members' first-hand

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[13] The four congressional campaign committees – that is, the Democratic and Republican House and Senate campaign committees – are composed of members of Congress. Almost invariably, the president dominates his party's national committee, and the opposing party's presidential nominee comes to dominate his party's national committee. As a result, large donations to the national party committees effectively function as donations to the leadership of Congress and the president.

[14] As Senator McCain explained, the limit on state and local party federal election activities "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." 148 Cong. Rec. S2138 (Mar. 20, 2002). As Sen. McCain noted from the 1996 campaign finance investigation reports, "the coffers of Federal and State political parties are intertwined. In 1996, the State parties spent money they received from the national parties on advertisements considered key to the Presidential candidate's election . . . . The bottom line is, whatever the technical niceties, soft money is being spent by State parties to support Federal campaigns. In fact, much of the soft money spent in the 2000

awareness of how the national parties use the state parties to support federal candidates, they reasonably concluded that some regulation of the state and local parties was necessary to prevent circumvention of the soft money ban.[15] From their own in-depth experience, they drew this definition narrowly to capture the federal election activities of state and local parties, without reaching state and local party programs that do not affect federal elections. They established BCRA's soft money restrictions as essential loophole-closing devices to restore the campaign finance structure created by FECA and sustained in *Buckley*.

C. CONGRESS DETERMINED THAT BCRA IS LIKELY TO STRENGTHEN, NOT WEAKEN, THE POLITICAL PARTIES

Critics of BCRA have asserted that the soft money restrictions will hurt the political parties. But, that is entirely mistaken. BCRA places no new limits on the amount of money that parties can give to candidates or to spend on expenditures coordinated with candidates. It places no limits on party independent expenditures. Nor does it place any limitations on party voter registration or voter mobilization, or party spending on generic party activities. All BCRA requires is that these activities be funded by hard money, that is, by contributions that comply with federal dollar limitations and source prohibitions.

Virtually all Members of Congress affiliate with one of

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elections to support Federal campaigns was spent by State parties." 148 Cong. Rec. S2138 (Mar. 20, 2002).

[15] They tied the statutory definition of federal election activities to communications that expressly mention federal candidates, expenditures for voter registration and mobilization in connection with an election in which a federal candidate is on the ballot, and the salaries of state and local party officials who spend 25% or more of their time on federal campaigns.

the two major parties, run for election on party lines, participate in party caucuses in Congress, and serve as leading members of their state and national parties. As political leaders dedicated to making the party system of our democratic republic viable, they are the last group in the nation who would enact legislation to harm their own parties. In fact, Congress in 1979 exempted hard-money-funded party-building activity from FECA's party spending limitations, *see* David E. Price, *Bringing Back the Parties* 252 (1984)(by a principal *amicus* for this brief). Indeed, both Republicans and Democrats in Congress expressed confidently and vigorously the expectation that BCRA's soft-money reform will strengthen, not weaken, the parties by directing the parties to rely more on grass-roots donors rather than wealthy special interests.[16]

When the pre-BCRA law allowed the parties to be reduced to mere conduits for the flow of big soft-money contributions for the benefit of candidates, that law demeaned, not strengthened, the role of the parties. When parties merely serve as instruments for candidates raising soft money which the same candidates or their operatives, in turn, direct to be used for specific ads, this hollows out the functioning of

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[16] As Senator McCain has explained, "the massive influx of soft money" "has turned State and local parties into mere pass-through accounts for the national parties and for large, direct contributions from corporations, unions and wealthy individuals. If anything, the bill will return the State and local parties to the grassroots and encourage them to broaden their bases and reach out to average voters." 148 Cong. Rec. S2139 (Mar. 20, 2002). *Accord*, 148 Cong. Rec. S2112 (Mar. 20, 2002) (Sen. Schumer)("Campaign finance will strengthen our grassroots political system by breaking the parties' reliance on a handful of very wealthy contributors and forcing them to build a wider base of small donors and grassroots supporters").

parties, marginalizing the parties' vital traditional functions.[17]

BCRA does little to impair the ability of parties to fund their activities. Despite the growing role of soft money, parties still rely primarily on hard money, and hard money contributions climbed sharply in the 1990s, from $445 million in 1991-92 to $741 million in 1999-2000. 251 F. Supp.2d at 441 (opinion of Kollar-Kotelly, J.). BCRA will make it easier for parties to raise hard money contributions.[18]

And, BCRA even contains section 323(b)(2), known as the Levin Amendment, allowing specific state and local party activities to be paid with a mix of hard and soft funds. Section 323 allows restricted soft money use for some voter registration, get-out-the-vote, voter identification, and generic party activities in elections with federal candidates on the

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[17] On the floor of the House, Rep. Wamp, drawing on his experience chairing the local Republican Party in Chattanooga, Tennessee, urged enactment of BCRA because "Both of our political parties will be better served by weaning ourselves from soft money and returning to the people, returning to the foot power, returning to the grassroots. Writing big checks is actually the easy way out for people that want to participate in this process, [while] [t]he harder way is to involve the people." 148 Cong. Rec. H463 (Feb. 13, 2002). By contrast, as for the advertising purchased with big soft-money contributions, "We rarely see ads saying, this is what our party stands for. Join our party. Be a part of our platform. Get involved. We mostly see ads that are degrading and divisive." *Id.*

[18] BCRA § 307 raises the maximum individual contribution to the political party national committees from $20,000 to $25,000, and BCRA § 102 raises the hard money cap as to the state party committees from $5,000 to $10,000. Even more dramatically, BCRA raises, and rearranges, the aggregate cap on individual contributions, encouraging donors to give the full authorized amount to the parties without that cutting into their ability to contribute to candidates. That is, section 307(b) establishes sub-aggregate caps so that an individual's donations to parties do not reduce the actual limit on what he can donate to candidates, i.e., the caps do not cause candidate donations to compete with, or "crowd out," party donations.

ballot, subject to careful controls that avoid the abuses of unrestricted soft money. Taken together with the increase in the limits on individual hard money donations and the Levin Amendment, Congressional restricting of soft money merely passing through the parties does not weaken the parties; it restores their traditional role.

III. BCRA'S DEFINITION OF ELECTIONEERING COMMUNICATIONS IS A CLEAR, OBJECTIVE AND NARROWLY-DRAWN TEST THAT IS ESSENTIAL TO PREVENT THE WIDESPREAD AND BLATANT EVASION OF THE LONGSTANDING BAN ON THE USE OF CORPORATE AND UNION TREASURY FUNDS AND OF DISCLOSURE REQUIREMENTS

A. CONGRESS ADOPTED THE NEW DEFINITION OF ELECTIONEERING COMMUNICATIONS IN RESPONSE TO OVERWHELMING EVIDENCE OF WIDESPREAD AND BLATANT EVASION OF FECA

Section 201 of BCRA amends the FECA by adding, inter alia, a new subsection 304(f)(3) which creates a new statutory term – "electioneering communication" - with two key applications. First, it promotes disclosure.[19] Second, it bolsters the longstanding prohibition on the use of corporate and union treasury funds in federal elections by applying that ban to electioneering communications. See BCRA § 203, amending 2 U.S.C. § 441b(b)(2). As a result, a corporation or union may use its separate, segregated fund to pay for electioneering communications, but may not use treasury funds to pay for such communications.

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[19] BCRA requires that any person spending more than $10,000 in electioneering communications comply with FECA's reporting and disclosure requirements for independent expenditures. See BCRA, § 201, 2 U.S.C. § 434(f)(1).

This amendment is a direct response to one of the greatest loopholes to emerge in the structure of federal campaign finance law – the rise of so-called issue advocacy advertising. Issue advocacy consists of electoral communications that effectively advocate or oppose the cause of a candidate but stop short of literally calling for the election or defeat of a candidate. The most common tactic for political advertisers is to include some language calling on the viewer to respond to the ad by doing something other than voting, such as calling the sponsor for more information or calling the candidate criticized to complain about her views. *See* Richard Briffault*, Issue Advocacy; Redrawing the Elections/Politics Line*, 77 Tex. L. Rev. 1751, 1759-60 (1999).[20]

The genesis of such technically evasive fund-intensive activity – what Justice Kennedy has accurately labeled as "covert speech," *see Nixon v. Shrink Missouri PAC, supra*, 528 U.S. at 406 – is this Court's decision in *Buckley* construing FECA's provision requiring the disclosure of the sources of funds for independent expenditures.[21] In footnote, the Court referred to "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' "Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *See id.* at 80 n. 108, *cross-referencing id.* at 44 n. 52. These have come to be referred to as the "magic words" of express advocacy.

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[20] "By combining sharp criticism of a candidate with an exhortation to call the sponsor or the candidate criticized," *id*. at 1760, the sponsors of these ads can effectively participate financially in federal elections while avoiding federal campaign finance disclosure. *See also McConnell v. FEC*, *supra,* 251 F. Supp.2d at 304 (opinion of Henderson, J.); *id.* at 800 (opinion of Leon, J.).

[21] The Court construed the disclosure requirement "to reach only funds for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80.

After *Buckley* and *MCFL*,[22] only expenditures that contain words of express advocacy would be subject to federal disclosure requirements or the prohibition on the use of corporate or union treasury funds. Other campaign advertising has been labeled issue advocacy – even though many so-called issue ads contain no discussion of issues at all, but instead focus on the characters or personalities of the candidates for imminent election. At the time *Buckley* was decided, Congress and the Court had little experience in evaluating campaign advertising, or with campaign ads masquerading as issue discussions. Even when *MCFL* was decided a decade later, issue ads were relatively rare.

All that changed in the 1990s. "Beginning in 1996 corporations, unions, and interest groups . . . began large-scale use of their treasury funds to sponsor issue advertisements." *McConnell v. FEC, supra*, 251 F. Supp.2d at 305 (opinion of Henderson, J.). In the 1996 election cycle a total of approximately $135 million to $150 million was spent on issue advocacy advertising. By the 1999-2000 election cycle that figure had risen to more than $500 million. *Id.* at 304. *See also id.* at 527 (opinion of Kollar-Kotelly, J.); *id.* at 879 (opinion of Leon, J.). Corporate and union treasury funds, otherwise barred from federal elections, financed much of this. *See id.* at 304-05 (opinion of Henderson, J.); *id*. at 526-29 (opinion of Kollar-Kotelly, J.); *id*. at 879-80 (opinion of Leon, J.).

In addition to enabling corporations and unions to flout the ban on their use of treasury funds in federal elections, the rise of issue advocacy has frustrated Congress's efforts, approved by this Court, *Bellotti, supra*, 435 U.S. at 792 n. 32, to inform voters concerning the sources of campaign ads. The

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[22] In *MCFL*, the Court held that the ban on corporate and union independent expenditures in federal elections must also be interpreted to apply only to express advocacy. *See* 479 U.S. at 249.

court below found that "politicians and general strategists" as well as the voters "have difficulty determining the source of these commercials." *Id.* at 229 (per curiam).[23] Indeed, two of *plaintiffs'* experts agreed that issue advocacy frustrates the goal of an informed electorate.[24] The rise of unregulated issue advocacy denies the voters vital information and renders them less capable of casting effective and intelligent ballots.

B. CONGRESS FOUND THAT BUCKLEY'S EXPRESS ADVOCACY TEST FAILS TO DISTINGUISH BETWEEN CAMPAIGN-RELATED COMMUNICATIONS AND TRUE ISSUE SPEECH AND MUST BE REPLACED IF DISCLOSURE REQUIREMENTS AND THE BAN ON THE USE OF CORPORATE AND UNION TREASURY FUNDS ARE TO BE MEANINGFUL

As Senator Jeffords, a principal author of the electioneering communication provision, told to the Senate, "the 'magic words' standard created by the Supreme Court in

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[23] Without a disclosure requirement, how are voters to know that Citizens for Better Medicare – which spent $65 million in the 2000 election, a full 13% of all issue advocacy that year, *id.* at 304 (opinion of Henderson, J.) – is "an arm of the Pharmaceutical Research and Manufacturers Association"? *Id.* at 232 (per curiam, *quoting* Annenberg Public Policy Center Report). Similarly, how were voters to know that the "Republicans for Clean Air" who spent $2 million on ads praising one candidate and attacking his opponent during the 2000 Republican primaries were actually "two brothers, both of whom were strong financial supporters of then Governor Bush and one of whom was an authorized fundraiser for the Bush presidential campaign"? *Id*. at 232 (per curiam)(quotation omitted).

[24] *Id.* at 231 (finding that according to plaintiffs' expert Professor Sidney Milkis the names of issue advocacy advertising sponsors "did little to tell viewers who the sponsors of these messages were; indeed, in some cases they were misleading"); *id.* at 233 (finding that plaintiffs' expert Professor Raymond LaRaja "agrees that the candidate-centered issue advocacy of the Republicans for Clean Air highlights the fact that this technique can be used to influence federal elections without complying with FECA's disclosure provisions.").

1976 has been made useless by the political realities of modern political advertising. Even in candidate advertisements," he noted, "only 10 percent of the advertisements use the 'magic words.' Parties' and groups' use of the magic words is even smaller, with as few as 2 percent of their ads using the magic words." 148 Cong. Rec. S2117 (Mar. 20, 2002).[25] In the 2000 election, a half-billion dollars was spent on federal election campaign advertising that, because of the express advocacy/magic words test, was exempt from disclosure requirements or the ban on the use of corporate and union treasury funds. As each member [26] of the three-judge court below agreed, the express advocacy/magic words test fails utterly to distinguish between campaign-related

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[25] His principal co-sponsor, Senator Olympia Snowe explained that issue 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." 147 Cong. Rec. S2455 (Mar. 19, 2001).

[26] *See* 251 F. Supp.2d at 303 (opinion of Henderson, J.) ("Few candidate or party advertisements use words of express advocacy. In the 1998 election cycle only four percent of ads sponsored by candidates used words of express advocacy. In 2000 only 11.4 per cent of ads sponsored by candidates and only 2.2 percent of ads sponsored by political parties used words of express advocacy."); *id.* at 529 (opinion of Kollar-Kotelly, J.) ("it is neither common nor effective to use the 'magic words' of express advocacy in campaign advertisements"); *id*. at 532 ("Present and former officeholders and candidates likewise provide uncontroverted testimony that 'magic words' do not distinguish pure issue advertisements from candidate-centered issue advertisements'); *id.* at 874 (opinion of Leon, J.) ("The record convincingly demonstrates that the overwhelming majority of modern political advertisements do not use words of express advocacy, whether they are financed by candidates, political parties, or other organizations. As a result of this development, Congress found that FECA, . . . as defined by *Buckley*, was no longer relevant to modern political advertisement.")

communications and non-campaign-related communications.[27]

Most candidly, the former chair of plaintiff NRA Political Victory Fund stated in a speech that the distinction between express advocacy and issue advocacy: "is built of the same sturdy material as the emperor's new clothes": "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 a windy day." She added that when the NRA praised Congressman Hostettler for his position on gun laws and asked people to call a telephone number to thank him for his position, " Guess what? We really hoped people would vote for the Congressman, not just thank him. And people did." 251 F. Supp.2d at 536-37 (opinion of Kollar-Kotelly, J.) (*quoting* Tanya K. Metaksa); *id*. at 878-79 (opinion of Leon, J.) (*quoting* same statement). Absent a new definition of campaign-related communications, FECA's well-justified disclosure requirements and the ban on the use of corporate and union treasury funds will be completely nullified.

C. CONGRESS'S DEFINITION OF ELECTIONEERING COMMUNICATIONS IS CLEAR, OBJECTIVE AND NARROWLY-DRAWN TO ACHIEVE THE GOALS OF ASSURING THE DISCLOSURE OF THOSE COMMUNICATIONS MOST LIKELY TO HAVE AN IMPACT ON A FEDERAL ELECTION AND OF EXCLUDING CORPORATE AND UNION WAR CHESTS FROM FEDERAL ELECTIONS

BCRA's definition of electioneering communication

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[27] Indeed, as both Republican and Democratic media consultants testified, "it is rarely advisable to use such clumsy words as 'vote for' or 'vote against." *Id.* at 874-75 (*quoting* Republican political consultant Douglas L. Bailey). *Accord, id.* at 875 (*quoting* Democratic political media consultant Raymond Strother).

consists of a four-part test that looks to the medium, content, timing, and geographical placement of the advertisement. Congress used its expertise to develop a test both clear and objective, and narrowly-tailored to the Act's goals of voter information and enforcement of the ban on corporate and union treasury participation in federal elections.

First, the test is clear, unlike the vague definition of "expenditure" in FECA that gave rise to *Buckley*'s express advocacy construction. It is quite straightforward to determine that an ad is broadcast, refers to a clearly identified candidate for federal office, is aired in the district or state in which a candidate for the House or Senate is running, and is aired during the immediate pre-election period. Second, the test is objective, requiring no open-ended probing of the subjective intentions of the sponsor or the subjective perceptions of viewers. Third, the test is narrowly drawn to focus only on those advertisements, like expensive broadcast ads,[28] most likely to have an impact on an election, and thus to justify the disclosure requirement and the application of the ban on corporate and union treasury funds.[29]

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[28] The media prong of the definition – regulating only broadcast, cable, and satellite communications – targets only those messages that Congress determined were most likely to have an impact on voters' electoral decision-making, and fits with BCRA's provision setting the dollar threshold for disclosure concerning electioneering communications at $10,000, *see* BCRA § 201(a), adding new subsection (f)(1) to FECA § 304, 2 U.S.C. § 434(e). This portion of the definition spares from disclosure the low-cost, grass-roots types of individual participation focused upon by the Court's decision in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

[29] The targeting requirement limits regulation to only those ads that are aired to a candidate's electoral constituency, thus, eliminating all ads that can have no effect on voting decisions. And, the requirement that an ad refer to a clearly identified candidate for federal office eliminates all ads that make no references to candidates. Although issue discussions in such

Finally, the bright-line temporal test narrows the scope of regulation to targeted broadcast messages that clearly refer to candidates and that are funded to air only in the period immediately preceding the candidate's election. Experienced Members of Congress knew from their own in-depth electoral activity the particular likelihood that such broadcast messages will impact on the voters' upcoming electoral decision.[30] Thus, the temporal test not only narrows the scope of regulation but is also crucial to the determination that the affected costly broadcast advertising is, in fact, electioneering.

To be sure, the exact temporal line for the imminent pre-election period is debatable. But, this is precisely the sort of question, like the dollar threshold for disclosure or the dollar ceiling on contributions, for which this Court deems deference to Congress appropriate. See *Buckley, supra,* 424 U.S. at 30, 83. Moreover, Congress adopted the 60 day/30 day test from a fine model: its self-imposed rules governing its own franked mass communications with the public.[31] Congress's judgment

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ads could have an indirect effect on voting decisions, in many cases the impact is likely to be attenuated, so Congress appropriately excluded such ads from regulation. Conversely, ads that do refer to candidates, even if they also discuss issues, very likely affect a voter's consideration of whether or not to vote for that candidate in the imminent election.

[30] The temporal test draws on the widely-shared view in both the political science, and practical political, communities that during the days and weeks immediately preceding election day, highly funded advertising focuses increasingly on the election.

[31] Long before BCRA, Congress concluded that, in the immediate pre-election period, it should preclude its own members from using their franking privilege on mass mailings. Moreover, BCRA's definition of the pre-election period is actually narrower and less burdensome than the restrictions Congress has imposed on its own franking. Because Members imposed this ban solely on themselves one-sidedly and not on non-officeholding candidates who have no frank, the 60 day/30 day line from

concerning the temporal scope of the immediate pre-election period is also amply supported by the extensive evidence in the record [32] indicating a dramatic shift in the nature of high-cost political advertising in the defined pre-election period.

With the temporal test, the statutory definition of electioneering communication is clearly and narrowly tailored to the compelling governmental interests of providing for effective disclosure of the sources of funding of communications likely to have an impact on federal elections, and of assuring that corporate and union treasury funds are not used to pay for communications likely to have an effect on federal elections. Corporations and unions that wish to broadcast communications concerning political issues, even during the pre-election period, are free to do so, provided they either skip clear references to the federal candidates imminently on the ballot, or use funds voluntarily contributed by individuals to separate segregated funds expressly for that purpose. Avoiding the use of candidates' names poses no difficulty for effective advocacy that is truly about issues.[33]

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that context carries a uniquely potent imprimatur of objective Congressional in-depth expertise about elections and expensive mass communications. And, under 39 U.S.C. § 3210(a)(6), the ban on the use of the Congressional frank for mass mailings begins to run 90 days before both a primary and a general election for House members, and 60 days before both a primary or a general election for Senators when they are standing for election.

[32] Most interest group advertising outside the pre-election period does not refer to federal candidates or officeholders, whereas nearly all political advertising that actually mentions federal candidates or officeholders is aired in the defined pre-election period. *See* 251 F. Supp.2d at 305 (opinion of Henderson, J.); *id*. at 563 (opinion of Kollar-Kotelly, J.); *id*. at 889 (opinion of Leon, J.).

[33] Republican political consultant Douglas Bailey, who has extensive experience in developing both electioneering issue ads and true issue ads, testified that with respect to true issue ads "it was never necessary for us to reference specific candidates for federal office in order

IV. BCRA'S "STAND BY YOUR AD" PROVISION, SECTION 311, IS NARROWLY TAILORED TO SERVE VITAL PUBLIC INTERESTS IN EFFECTIVE DISCLOSURE OF BROADCAST CAMPAIGN ADVERTISING

Section 311 of the BCRA, the "Stand By Your Ad" provision, makes a specific set of improvements on the FECA's existing disclosure provision for candidate-funded advertisement expenditures, 2 U.S.C. § 441d. Its key subpart simply improves the traditionally-required candidate self-identification of sponsorship by having him broadcast this in a format that is effective – namely, with brief use of his own image and voice. This should not be considered constitutionally controversial. In the district court, the challengers only questioned section 311 as to one particular aspect, namely, its inserting a cross-reference to BCRA's new term "electioneering communications" as to the scope of its application, the issue previously discussed in this brief.[34] The challengers contested another provision about disclosures, section 305, having to do with negative advertising; however, that section is not connected in any way to section 311, and the challenges made to that section simply cannot be made to the completely content-neutral section 311. This brief provides a

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to create effective ads." 251 F. Supp.2d at 561 (quoted in opinion of Kollar-Kotelly, J.); *id.* at 884 (quoted in opinion of Leon, J.). Similarly, Democratic consultant Raymond Strother testified that the many true issue ads he had made in 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." *See id.* at 882 (quoted in opinion of Leon, J.) *id*. at 561 (partially quoted in opinion of Kollar-Kotelly, J.).

[34] Section 311 extended the disclosure obligations to "an electioneering communication (as defined in section 434(f)(3) of this title." 2 U.S.C. sec. 441d(a). This does not require addressing by this section of the brief (rather, the previous section of the brief about, overall, the issues of electioneering communications, should be considered as addressing that issue as applied to this section as well).

fuller treatment of section 311 primarily because Rep. David Price, one of the two principal amici Members of the House of Representatives filing this brief, was the chief sponsor seeing section 311 through from introduction to passage, making this brief a superior vehicle for explicating this valuable provision.[35]

A. SECTION 311 MAKES TRADITIONAL DISCLOSURES FOR CANDIDATE-FINANCED BROADCAST ADS MORE EFFECTIVELY

The consistent legal tradition of disclosure of candidate broadcast advertising's sponsorship goes back in general to the Communications Act's origins in 1927 and 1934, as refined in 1944 regulations and a 1960 statutory amendment. *Loveday v. Federal Communications Commission*, 707 F.2d 1443, 1449-57 (D.C. Cir. 1983)(reciting history of FCC political advertising disclosure requirement). Separately, disclosure requirements for candidate (and independent) advertising expenditures in various media also developed as part of the campaign finance disclosure requirements, *Buckley v. Valeo*, 424 U.S. at 61-64.[36]

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[35] Rep. Price originally introduced his "Stand by Your Ad" bill in 1997, and it was included in the contemporary version of the campaign finance reform bill when this came to the House floor in 1998. See 144 Cong. Rec. H3777-78 (May 22, 1998)(Rep. Price). It was reintroduced and/or included in reform bills in subsequent Congresses. 145 Cong. Rec. E26 (Jan. 7, 1999)(Rep. Price) and H8255-56 (daily ed. Sept. 14, 1999)(Rep. Price); 147 Cong. Rec. E5 (Jan. 31, 2001)(Rep. Horn); 148 Cong. Rec. H426 (Feb. 11, 2002)(Rep. Price). By contrast, Section 305 was developed by Senate sponsors. This is noted simply to clarify that the two provisions are separate and that this brief, filed by bipartisan Representatives, is a vehicle for discussing the House-originated, not Senate-originated, provision. Parenthetically, the district court did not rule on the challenge to section 305, finding it was not yet ripe.

[36] Ultimately, the FEC and the FCC coordinated the broadcast campaign advertising disclosure requirements in 1978. *KVUE v. Moore*, 709 F.2d 922, 933-34 (5th Cir. 1983), *aff'd*, 464 U.S. 1092 (1984). So, unlike the context of *McIntyre v. Ohio Elections Commission*, *supra*, the case of an anonymous leafletter opposing a local-ballot school tax levy, no

So, as amended by section 311, section 441d(a) requires that "Whenever a political committee makes a disbursement for the purpose of financing" any ad through specified media, "if paid for and authorized by a candidate . . . [it] shall clearly state that the communication has been paid for by such . . ." Section 441d's constitutionality[37] has never been seriously questioned. However, section 441d[38] operated with a notable flaw: the format for identification was the "matchbook-sized" or "postage stamp-sized" picture, which simply failed at communicating to the electorate. So, the "Stand By Your Ad" provision first and foremost makes the candidate broadcast an effectively visible and audible self-identification.[39]

B. SECTION 311'S KEY SUBPART LETS CANDIDATES CHOOSE THEIR OWN PLACEMENT AND FORMAT FOR DISCLOSURES

Several aspects of this "Stand By Your Ad" provision warrant notice as obviating various kinds of constitutional questions. Like the pre-BCRA version of section 441d, the

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tradition of anonymity has ever applied to broadcast candidate-sponsored campaign advertising.

[37] *See, e.g.*, *McIntyre,* at 354 n.18 ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected")(citing *Buckley*); *KVUE v. Moore, supra*, 709 F.2d at 937 (a "sponsorship identification requirement . . . . does not violate the first amendment").

[38] 47 C.F.R. § 73.1212 (disclosure need only be "four percent" as high as screen); Kathleen Hall Jamieson, Dirty Politics: Deception, Distraction, and Democracy 227 (1992)(ad had "a matchbook-sized picture of [the candidate] . . . . to meet the FCC-stipulated condition for a lower purchase rate for ad time."); 148 Cong. Rec. H426 (Feb. 11, 2002)(Rep. Price)("postage stamp-sized picture").

[39] Section 311 requires a television ad statement "the candidate has approved" the ad "shall be conveyed by—(I) [a] . . . view of the candidate . . ., or (II) the candidate in voice-over, accompanied by a clea[r] . . . image . . .; and (ii) . . . in writing . . . [for] 4 seconds." 2 U.S.C. § 441d(d)(1)(B).

"Stand by Your Ad" provision is triggered entirely by the candidate's financing, absolutely without anything to do with advertising content. And, the "Stand by Your Ad" provision was written to be separate from, and not embroiled in, the issues regarding the main provisions of the BCRA.[40]

Furthermore, section 311 raises no concern about infringing candidates' stylistic freedom with respect to their advertising content. It does not oblige candidate advertising[41] to speak about issues, to use a "talking heads" format, or to take any particular tone. Like a self-identifying photograph on a passport or a driver's license, the candidate's image identifies him with something neither disparaging nor opprobrious, just his decision to sponsor advertising.

Compared to the key subpart of "Stand By Your Ad" concerning self-identification in candidate-sponsored broadcast advertising, the rest of the provision is complementary in nature. The pre-BCRA § 441d applied to independently sponsored broadcast advertising, requiring an independently sponsored advertisement to disclose that it was not authorized by a candidate. As interpreted by the FEC, Section 311 merely makes this disclosure more effective by using "a representative of the political committee or other person [paying for the ad]," 2 U.S.C. § 441d(d)(2), for their choice of either a brief visual

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[40] As originally introduced (see the legislative history previously cited), "Stand by Your Ad" was a free-standing bill. Its origins and purpose thus kept it apart from the debates over the main provisions.

[41] When the candidate self-identifies as having authorized his advertisement, he has a free and unfettered choice whether this is completely integrated into the rest of the advertisement, such as by a candidate who speaks or acts various parts of his advertising message and includes this disclosure in what he says, or is completely separated at the end, where the written statement about authorization is placed.

image or a voice-over.[42] This means that those receiving the ad see or hear, by contrast[43] with the candidates pictured or heard in candidate-sponsored advertisements, that this is not candidate-sponsored. Overall, section 311 is a valuable provision that, like the rest of BCRA, solves problems in the effectiveness of the prior campaign finance laws.

V. CONCLUSION

For these reasons, amici ask the Court to uphold BCRA as constitutional.

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[42] The FEC has promulgated regulations about the image and the voice-over in independent advertisements. "Unlike the requirements for television communications authorized by candidates, the audio statement required for television communications that are not authorized by candidates can be accomplished through voice-over *without any requirement of a photograph* or similar representation of the speaker." 67 Fed. Reg. 76967 (Dec. 13, 2002)(emphasis added). So the independent advertiser need not even supply any visual image at all, just voice-over disclosure.

[43] Those paying for an independent advertisement have freedom in choosing their "representative" for the brief disclosure image or voice-over. And, they have absolutely no obligation whatsoever to identify, visually or otherwise, a candidate they support. The district court's per curiam opinion (slip op. at 169 & n.101) insightfully questioned the challengers' inaccurate suggestion that "political ads [must] contain information identifying the candidate supported by the communication." The independent advertiser simply notes the absence of authorization by "any candidate" (pursuant to section 441d(a)(3)), doing so either by having their representative viewed as this is said, or having that representative say this in voice-over.

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