IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Senator Mitch McConnell, et al., Plaintiffs, v. Federal Election Commission, et al., Defendants.	Civ. No. 02-0582 (CKK, KLH, RJL) **ALL CONSOLIDATED CASES**

REDACTED
OPPOSITION BRIEF OF DEFENDANTS

ROBERT D. McCALLUM, JR.
Assistant Attorney General
SHANNEN COFFIN
Deputy Assistant Attorney General
JOSEPH H. HUNT
THEODORE C. HIRT
JAMES J. GILLIGAN
TERRY M. HENRY
RUPA BHATTACHARYYA
ANDREA GACKI
MARC KESSELMAN
SERRIN TURNER
Attorneys
U.S. DEPARTMENT OF JUSTICE
P.O. Box 883
Washington, D.C. 20044
(202) 514-3358

Counsel for the United States Defendants

ROGER M. WITTEN (D.C. Bar #163261)
SETH P. WAXMAN (D.C. Bar #257337)
RANDOLPH D. MOSS (D.C. Bar #417749)
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Defendant-Intervenors

LAWRENCE H. NORTON
General Counsel
RICHARD B. BADER (D.C. Bar #911073)
Associate General Counsel
STEPHEN HERSHKOWITZ (D.C. Bar #282947)
Assistant General Counsel
DAVID KOLKER (D.C. Bar #394558)
Acting Assistant General Counsel

ROBERT W. BONHAM III
VIVIEN CLAIR
HOLLY J. BAKER
COLLEEN T. SEALANDER
HARRY SUMMERS
BENJAMIN A. STREETER III
GREG MUELLER
WILLIAM SHACKELFORD
KEVIN DEELEY
LEIGH G. HILDEBRAND
BRANT LEVINE
MICHELLE ABELLERA
MARK GOODIN
Attorneys
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

Counsel for Defendant Federal Election Commission

ADDITIONAL COUNSEL LISTED ON FOLLOWING PAGES

For Defendants United States of America, John Ashcroft, Attorney General of the United States, the U.S. Department of Justice, and the Federal Communications Commission

Douglas N. Letter
Irene M. Solet
Colette G. Matzzie
Ara B. Gershengorn
Terry M. Henry
Andrea Gacki
John Knepper
Attorneys
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

For Defendant-Intervenors: Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords

Lynn Bregman
Eric J. Mogilnicki
Edward DuMont
Michael D. Leffel
Anja L. Manuel
Stacy E. Beck
A. Krisan Patterson
Jennifer L. Mueller
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420

Bradley S. Phillips
Michael R. Doyen
Stuart N. Senator
Deborah N. Pearlstein
Randall G. Sommer
Shont E. Miller
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071

David J. Harth
Charles G. Curtis, Jr.
Monica P. Medina
Michelle M. Umberger
Sarah E. Reindl
HELLER EHRMAN WHITE & MCAULIFFE LLP
One East Main Street, Suite 201
Madison, WI 53703

Frederick A.O. Schwarz, Jr.
E. Joshua Rosenkranz
Prof. Burt Neuborne
Elizabeth Daniel
Laleh Ispahani
Adam H. Morse
BRENNAN CENTER FOR JUSTICE
at NYU School of Law
161 Avenue of the Americas, 12th Floor
New York, NY 10013

Paul M. Dodyk
Christopher J. Paolella
Peter Ligh
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019

Fred Wertheimer
Lexa Edsall
DEMOCRACY 21
1825 Eye Street, N.W., Suite 400
Washington, DC 20006

Trevor Potter
Glen Shor
THE CAMPAIGN AND MEDIA LEGAL CENTER
1101 Connecticut Ave., N.W.,
Suite 330
Washington, DC 20036

Alan B. Morrison
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, DC 20009

Joint Government and Intervenors' Introduction

The consistent, but flawed, theme of plaintiffs' attack on BCRA is that it represents an epochal change in the law — that it is "the most threatening frontal assault on core First Amendment values in a generation,"[1] that it is the modern-day Alien and Sedition Acts,[2] and that it will fundamentally undermine the political parties.[3] In truth, BCRA is anything but epochal. The core provisions of the Act work to *restore* the law to what it was when Congress banned corporations and unions from making contributions or expenditures from general treasury funds in connection with federal elections in 1907 and in the 1940s;[4] when it imposed limits on contributions by individuals to candidates and parties in 1974;[5] and when it treated coordinated expenditures as contributions in 1976.[6]

In recent years, corporations, unions, political parties, and wealthy individuals have used soft money contributions, so-called "issue" ads, and coordinated expenditures to evade these long-standing restrictions on a massive scale. In the 2000 election cycle, unions, corporations, and wealthy individuals contributed almost *a half billion dollars* in soft money to the national parties.[7] Although these funds were principally used for the purpose of influencing federal elections, they evaded coverage under FECA based on the fiction — embodied in plaintiffs' use of the phrase "state-regulated funds" — that soft money has nothing to do with federal elections. Yet, even the RNC's soft money expert witness acknowledges that the parties have used soft money to "exploit

---

1 McConnell Br. at 1.

2 McConnell 2nd Am. Compl. at ¶ 5; *see also* McConnell Br. at 4.

3 McConnell Br. at 1; RNC Br. *passim.*

4 *See* Gov't Br. at 12-15; Intervenors' Br. at 2 (citing Tillman Act, Ch. 420, 34 Stat. 864 (1907); Labor Management Relations Act of 1947, Pub. L. No. 80-101, § 304, 61 Stat. 159 ("Taft-Hartley Act")).

5 *See* Gov't Br. at 16-17; Intervenors' Br. at 2-3 (citing Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. § 431 *et seq.*) ("FECA")).

6 *See* Intervenors' Br. at 3 (citing 2 U.S.C. § 441a(a)(7)(B)(i)).

7 Thomas E. Mann, *Report of Thomas E. Mann* (Sept. 23, 2003) at 24 & Table 3 [DEV 1-Tab 1, hereinafter Mann Expert Report].

federal campaign laws" and to influence federal elections.[8] Similarly, although federal law has long barred unions and corporations from using their general treasury funds to influence federal elections, corporations and unions have spent millions of dollars of such funds over the past several years on so-called "issue" ads, which avoid words like "vote for" or "vote against," but are undeniably intended to, and do, influence federal elections. Precluding evasions such as these, and returning the law to the *status quo ante*, can hardly be seen as revolutionary.

Similarly, plaintiffs' suggestion that BCRA breaks new ground by extending its soft money provisions to state and local parties is baseless. Federal campaign laws, and Federal Election Commission rules, have long applied to state and local parties when they engaged in activities, such as get-out-the-vote ("GOTV") and voter registration efforts, that influence federal elections.[9] Under prior law, state and local parties were allowed to spend a mix of soft and hard money on certain activities that, in fact, influenced federal elections.[10] Experience has demonstrated, however, that these allocation rules invited massive evasion of federal law.[11] All that BCRA does is expand and refine the allocation rules — in some cases requiring the use of exclusively federal funds — to ensure that the state and local parties are no longer used to "launder" soft money in aid of federal election campaigns.

Plaintiffs also repeatedly and inaccurately assert that BCRA "bans" speech. BCRA, does no such thing. In Title I, the Act imposes restrictions on the collection and use of soft money, but leaves the parties free to raise hundreds of millions of dollars (or more) of hard money to engage in whatever speech they deem fit. Similarly, in Title II, the electioneering communications rules only

---

[8] Ray La Raja, *American Political Parties in the Era of Soft Money* (2001) at 74-75 (unpublished Ph.D. dissertation, University of California at Berkeley) (attached to La Raja Cross Tr. (Oct. 15, 2002) at Ex. 3) [hereinafter La Raja Cross. Tr., Ex. 3]. Professor La Raja testified that he stands by the conclusions in his dissertation. La Raja Cross Tr. at 17-18.

[9] *See* Adv. Op. 1976-72 (requiring that 100% hard money be used for such activities); Adv. Op. 1978-10 (ruling that state or local party voter-registration and GOTV activities could be allocated between federal and non-federal accounts in the same manner as party administrative costs, partially superseding Adv. Op. 1976-72).

[10] *See* 11 C.F.R. § 106.5 (establishing allocation formulas for national, state and local political party committees).

[11] *See, e.g.*, Gov't Br. at 30-31, 69-70, 100-02; Intervenors' Br. at 7-12.

preclude unions and corporations from using their general treasury funds to run certain broadcast ads that refer to a clearly identified candidate for federal office right before an election in the candidate's district and merely require that others make disclosures regarding certain electioneering ads. Unions and corporations remain free to use their PAC funds (raised voluntarily from individuals) to run whatever ads they deem fit and entirely to avoid coverage under Title II, by (a) running the ads at any time in any place in the newspaper or some other non-broadcast medium; (b) running the ads at any time in any place in any medium without the name or likeness of the candidate; (c) running the ads in any place in any medium outside the period that is 60 days before a general election or 30 days before a primary election; or (d) targeting an audience other than the constituency of the candidate mentioned in the ads.

Plaintiffs also falsely suggest that only a narrow band of zealots support the law, while a diverse array of groups — that share nothing more in common than a desire to protect First Amendment values — oppose it. BCRA, of course, was enacted on a bipartisan basis and signed by the President. Moreover, although the law is described as an affront to the First Amendment, it is supported in this litigation by virtually every former leader of the ACLU, who collectively disagree with the position the ACLU espouses here.[12] Although it is described as an assault on states' rights, it is supported in this litigation by 19 states.[13] Although it is described as an incumbent protection measure, it is supported by a bipartisan array of *former* members of Congress — including Senators Brock, Rudman, Boren, Simpson, Bumpers, Glenn, Simon, and Wirth, and Representatives

---

[12] *See* Brief of Amici Curiae, Former Leadership of the American Civil Liberties Union in Support of Defs. FEC, et al. Only the current leadership of the ACLU, and Ira Glasser, who retired as ACLU Executive Director in 2001, do not support the defendants' position in this case. The ACLU's National Legislative Director from 1972-1976, who signed a letter to Congress with the other amici publicly supporting the constitutionality of the BCRA, was unable, due to illness, to consent to appear on the amicus brief. *Id.* at 2 n.1.

[13] *See* Brief of Amici Curiae, States of Iowa, Vermont, Alaska, Colorado, Connecticut, Hawaii, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, Oklahoma, Rhode Island, Washington, the Territory of the United States Virgin Islands, and the Commonwealth of Puerto Rico in Support of Defs.

LaRocco and Williams — who have nothing to gain from protecting incumbents, but who bring to bear substantial personal experience regarding the corrosive influence of money on our political system. And, perhaps most significantly, although BCRA is described as unnecessary, it is widely supported by a public that, unlike the plaintiffs, perceives that money has grossly skewed the political process.

In attacking BCRA, plaintiffs further complain that the law goes too far and that Congress could have accomplished its goals with less comprehensive rules. In truth, BCRA goes as far as necessary to protect the integrity of the federal political process—and no farther. Many of the same parties that today rail against the scope of BCRA's restrictions spent the previous decade relentlessly creating and exploiting holes in the campaign finance laws. In enacting BCRA, Congress used its expert judgment to respond to these "catch-us-if-you-can" efforts, to close the most gaping loopholes in the federal campaign finance laws, and to anticipate how parties, unions, corporations, and wealthy individuals will attempt to evade the new restrictions. In the end, plaintiffs object because they recognize that BRCA effectively prevents future evasions.

In essence, this case is about whether Congress possesses the authority to enforce long-established law or whether the Nation must accept rampant evasion that threatens to make a mockery of that law and the democratic ideals it embodies. Supreme Court precedent makes clear that the underlying laws are constitutional, and establishes that Congress may enact legislation to prevent the evasion of campaign finance laws. The legislative history of BCRA, and the evidentiary record assembled in this case, moreover, demonstrate the extraordinary pattern of evasion that has taken place in recent years, and the substantial threat of future evasions if nothing were done. Taken together, this precedent and evidence requires that the Court reject plaintiffs' challenges.

ARGUMENT

TITLE I

PRESENTATION BY THE GOVERNMENTAL DEFENDANTS

Plaintiffs' challenge to BCRA's soft money provisions rests on several fundamental errors. In an attempt to overcome the unique and heavy burden attending their effort to have BCRA declared invalid on its face, see New York State Club Ass'n v. City of New York, 487 U.S. 1, 11 (1988), plaintiffs have resorted to mischaracterizing the essential nature of the statute. BCRA imposes no limits whatsoever on the amounts that political party committees can expend on election activity. The statute, accordingly, is subject to the more lenient standard of review that governs contribution limits, not the stricter scrutiny that governs limits on expenditures.

The Supreme Court has made clear that FECA's longstanding limits on contributions are constitutional, and it is those same contribution limits that plaintiffs seek to prevent Congress from enforcing. As explained in our opening brief, the proliferation of soft money has allowed political parties, candidates, and donors to circumvent FECA's prohibition on contributions from the general treasuries of corporations and labor unions and its limitations on the amounts that individuals can contribute. Plaintiffs attempt to create the illusion that "soft money" is qualitatively different from hard money, and that they have a constitutional right to raise soft money free of congressional regulation. But money is fungible, and in fact, soft money, by definition, is nothing more than a donation that exceeds FECA's contribution limits or comes from a source that the statute prohibits. Congress, therefore, was amply justified in requiring that funds spent by party committees on activities that influence federal elections be raised subject to the federal contribution restrictions.

Plaintiffs exaggerate the breadth of the statute in a variety of important respects. Plaintiffs provide several examples of supposed overreaching by BCRA with respect to state and local election activity, but plaintiffs' parade of horribles is belied by the text of BCRA and the regulations of the

Federal Election Commission ("FEC") implementing the statute. In fact, the statute and the FEC's regulations are carefully drawn to avoid federalizing ordinary state and local party campaign activity. For example:

- Plaintiffs contend that defining "Federal election activity" to include get-out-the-vote ("GOTV") and voter registration activity precludes the state-level parties from using soft money to advertise support for state ballot initiatives and state candidates whenever a federal candidate is also on the ballot, even if the federal candidate is not mentioned in the advertisement. The FEC, however, has limited the definition of governed GOTV and voter-registration activities to contacting voters via individualized means. Thus, such mass advertising is excluded.

- Contrary to plaintiffs' suggestion, not all activity that affects both state and federal elections must be funded entirely with hard money. Mixed federal/state activity that is not "Federal election activity" can, as before, be allocated by state parties between soft money and hard money. Similarly, certain Federal election activity expenses can be allocated between hard money and Levin Amendment funds.

- Contrary to plaintiffs' suggestions, state parties will not be completely deprived of national party transfers of funds. National parties remain free under BCRA to transfer hard money to state parties, except in limited circumstances.

- Contrary to plaintiffs' suggestions, nothing in BCRA prevents state and national parties, and their members, from meeting or conferring regarding campaign strategy or spending priorities.

- Contrary to plaintiffs' suggestions, the FEC's regulations make clear that state and local party officers who also serve on their party's national committee are free to raise money, including soft money, when acting on behalf of their state and local committees.

- Contrary to plaintiffs' suggestions, federal candidates may speak at state party fundraising events "without regulation or restriction," 67 Fed. Reg. 49,108 (July 29, 2002) (11 C.F.R. 300.64).

In sum, BCRA, as implemented, is far more narrowly tailored than plaintiffs suggest. When plaintiffs' mischaracterizations and exaggerations are set aside, when the realities of the system of modern campaign finance are contemplated, and when the proper standard of review is applied, plaintiffs' facial attacks on BCRA must be rejected. Title I readily passes constitutional muster.

I. TITLE I IS NOT SUBJECT TO STRICT SCRUTINY

Contrary to plaintiffs' contentions, the effect of BCRA's soft money provisions is to limit contributions to political parties; they place no limits on the amount of party expenditures. The national party soft money ban, for example, imposes no limitation on the amount of a national political party's expenditures. Rather, the ban simply requires that the party not accept any funds that do not comply with FECA's contribution limitations. Because national party committees will only have hard money, the provision's references to spending funds not raised under FECA's limits impose no independent restrictions. Similarly, BCRA does not place a cap on the amount of expenditures by state-level party committees. Rather, the statute simply requires that the money used to fund "Federal election activity" be raised in compliance with the longstanding federal contribution restrictions or, if the committee prefers, in compliance with the more lenient Levin Amendment provisions.

As restrictions on the solicitation and acceptance of contributions, rather than on the amount of expenditures, the provisions of Title I are not subject to strict scrutiny. The Supreme Court has "consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 387 (2000) ("Shrink Missouri") (citation omitted). Thus, a contribution limit is constitutional even if it involves "'significant interference' with association rights," as long as it is "'closely drawn' to match a 'sufficiently important interest'... though the dollar amount of the limit need not be 'fine tun[ed].'" Id. at 387-388 (quoting from Buckley v. Valeo, 424

U.S. 1, 25, 30 (1976) (per curiam) (footnote omitted);[1] see id. at 421 (Thomas, J. dissenting) ("[T]he Court appl[ies] something less – much less – than strict scrutiny.").[2]

II. TITLE I IS A VALID EXERCISE OF CONGRESS'S AUTHORITY UNDER THE ELECTION AND COMMERCE CLAUSES.

Plaintiffs' claims that BCRA's soft money provisions impermissibly intrude on the Tenth Amendment's principles of federalism and state sovereignty are without merit. BCRA actually represents a tailored attempt to restore the integrity of existing federal campaign finance regulation by reducing avenues for evasion of current law and is fully consistent with the Tenth Amendment.

At the outset, it bears emphasizing that BCRA neither regulates state elections nor modifies the states' regulation of their own elections. It does not invade a core state function, by, for example, establishing the tenure for the state's own elected officials or officeholders. See Gregory v. Ashcroft, 501 U.S. 452 (1991). Unlike the provisions at issue in the cases cited by plaintiffs, it does not impose or affect qualifications for candidates or officeholders; regulate the time, place or manner of voting in state elections or the machinery for filling state offices; regulate voter qualifications for state elections, cf. Oregon v. Mitchell, 400 U.S. 112 (1970); regulate the affairs of the state itself, or its employees or officials; or regulate the processes of state government. Indeed, Title I is not directed at the states at all. Title I merely regulates the money that some private parties may give to other private parties. Although the federal regulation of these private financial transactions is in some respects more restrictive than state law is, that is true of numerous federal laws.

---

[1] Because contribution limits bear "more heavily on the associational right than on freedom to speak" the Court has "proceeded on the understanding that a contribution limitation surviving a claim of associational abridgment would survive a speech challenge as well." Shrink Missouri, 528 U.S. at 388.

[2] Even if strict scrutiny were applicable, the government interests supporting BCRA are plainly compelling, see Colo. Republican Campaign Comm. v. FEC, 518 U.S. 604, 609 (1996) (plurality) ("Colorado I"); FEC v. NCPAC, 470 U.S. 480, 496-97 (1985), and Congress narrowly tailored its remedy to address the most serious risks of corruption.

Moreover, the objective of BCRA Title I is not to regulate state elections. The object of the law is federal elections and, more particularly, the opportunities for corruption of federal candidates and officeholders. The power of Congress to take necessary and proper steps to minimize the possibility of corruption of federal officials has long been recognized. See, e.g., Burroughs v. United States, 290 U.S. 534, 545 (1934).

As discussed in detail below, plaintiffs' broad assertions about activities that would be prohibited under BCRA are based largely upon mischaracterizations of the statute. Title I simply reinforces the existing contribution limits and restrictions by prohibiting national political parties from receiving funds beyond FECA's regulation, and by requiring that state and local parties finance their "Federal election activity" either with funds raised pursuant to FECA's requirements or with Levin funds. National and state parties still can undertake precisely the same activities as before, so long as they are financed from contributions complying with the applicable federal contribution restrictions. Those activities might (in some cases) also be intended to influence state and local elections held in conjunction with federal elections, but that is not why Congress has regulated them, and the effect on such state elections therefore is purely incidental.

Moreover, since 1990, FEC regulations have required committees that chose to establish federal accounts to allocate a portion of their "[a]dministrative expenses" (11 C.F.R. 106.5(a)(2)(i)) and expenses for "[g]eneric voter drives," which included "voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate." 11 C.F.R. 106.5(a)(2)(iv). National party committees were required to allocate at least 65% of these expenses to federal accounts during presidential election years, and at least 60% in non-presidential election years. 11 C.F.R. 106.5(b), (c). For state and local parties, the allocation was determined by the proportion of

federal offices to all offices on the state's general election ballot (11 C.F.R. 106.5(d)), often resulting in a lower allocation ratio. See Gov't Br. at 27-28.

Thus, even prior to BCRA, state and local political parties were required to finance certain activities – principally contributions or expenditures in connection with federal elections – entirely with federal funds, and to finance others with a significant allocated percentage of federal funds. Although the RNC once challenged the validity of the FEC's allocation regulations, RNC v. FEC, 98-CV-1207 (D.D.C. voluntarily dismissed Aug. 27, 2002), the RNC plaintiffs now acknowledge that pre-BCRA allocation rules "made an effort to strike a meaningful federal-state balance by governing state-party spending, in part, according to ballot composition." RNC Br. at 27.[3] To the extent that plaintiffs thus appear to accept the constitutionality of the pre-existing allocation requirements, plaintiffs have effectively conceded that the activities in question can be regulated by Congress. Whether the financing of these activities is regulated through the financing requirements of the allocation rules, or the requirements of BCRA, is a question of policy line-drawing, not of the constitutional authority of Congress to legislate on such matters.[4]

In addition, plaintiffs also almost completely ignore that the FEC – the independent federal agency with exclusive jurisdiction to administer, interpret, and civilly enforce FECA[5] – has already promulgated regulations implementing Title I pursuant to an expedited schedule established by Congress to ensure that

---

[3] At least some state parties were using federal funds for these activities even before BCRA. Thus, the Republican Party of Virginia candidly admitted in a 1998 FEC rulemaking that banning soft money would have little impact since it already was financing most of its activities with hard money. REG006–0007 [DEV 21].

[4] Contrary to plaintiffs' implication, see, e.g., RNC Br. at 15, state-level parties may continue to allocate most other mixed federal-state activity – anything that benefits both federal and state candidates but is not within the parameters of "Federal election activity" – under the existing allocation formula. Off-year activities in support of state candidates, for the most part, can be paid by state-level parties entirely with soft money.

[5] The FEC is empowered to "formulate policy" with respect to FECA, 2 U.S.C. 437c(b)(1), "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," 2 U.S.C. 437d(a)(8), 438(a)(8), (d), and to render advisory opinions concerning FECA's application, 2 U.S.C. 437f. Congress also gave the FEC exclusive jurisdiction over civil enforcement of these statutes. 2 U.S.C. 437c(b)(1); 437d(a)(6); 437d(e); 437g(a). The FEC also has authority to defend civil actions in its own name. 2 U.S.C. 437c(f)(4).

the regulations were in place before the statute took effect on November 6, 2002. BCRA § 402(c). Those regulations narrowly interpret many of BCRA's provisions, including the definitions underlying the statutory phrase "Federal election activity," in a manner that eliminates many of plaintiffs' arguments. See Pinnock v. Int'l House of Pancakes Franchisee, 844 F. Supp. 574, 581 (S.D. Cal. 1993) (interpretation of statute by enforcing agency must be considered in vagueness challenge); Ward v. Rock Against Racism, 491 U.S. 781, 795-96 (1989); cases cited infra at 8.

During that rulemaking, the FEC received several comments objecting to the proposed regulations on similar Tenth Amendment grounds.[6] The FEC's final regulations address these concerns. The FEC, for example, concluded "that it must define GOTV [get-out-the-vote activity] in a manner that distinguishes the activity from ordinary or usual campaigning that a party committee may conduct on behalf of its candidates. Stated another way, if GOTV is defined too broadly, the effect of the regulations would be to federalize a vast percentage of ordinary campaign activity." 67 Fed. Reg. 49,067. The FEC, therefore, defined "GOTV activity" as "contacting registered voters . . . to assist them in engaging in the act of voting." Id.; 11 C.F.R. 100.24(a)(3). This is "narrower and more specific than . . . generally increasing public support for a candidate or decreasing public support for an opposing candidate." 67 Fed. Reg. 49,067.[7]

---

[6] REG008-0175–0193 (RNC) [DEV 22]; REG007-0166-0188 (Association of State Democratic Chair) [DEV 23]; REG007-0272-0289 (Michigan Democratic Party) [DEV 23]. See also REG008-0016-0019 (Peter Bearse) [DEV 22]. See generally Transcript of Public Hearings (June 4-5, 2002) [DEV 24 & DEV 25].

[7] The FEC's regulation also explicitly excludes "any communication by an association or similar group of candidates for State and local office or of individuals holding State or local office if such communication refers only to one or more state or local candidates." 11 C.F.R. 100.24(a)(3). As the FEC stated in its Explanation and Justification, "this exclusion keeps State and local candidates' grassroots and local political activity a question of State, not Federal law. Interpreting the statute to extend to purely State and local activity by State and local candidates would potentially bring into the Federal regulatory scheme thousands of State and local candidates that are currently outside the Federal system. The FEC declines to undertake such a vast federalization of State and local activity without greater direction from Congress." 67 Fed. Reg. 49,067.

The FEC adopted a similar narrowing interpretation of the term "voter identification," limiting it to costs of "creating or enhancing voter lists by verifying or adding information about the voters' likelihood of voting or likelihood of voting for specific candidates." 11 C.F.R. 100.24(a)(4). Voter identification, as a subset of "Federal election activity," is limited to "those times when a candidate for Federal office appears on the ballot." 11 C.F.R. 100.24(b)(2).[8]

Plaintiffs, however, ask the Court to disregard the construction and interpretation of BCRA reflected in the FEC's regulations because those regulations have been challenged, in part, in a separate legal proceeding by two of the intervening defendants. See CDP/CRP Br. at 17 n.16 (citing Shays v. FEC, No. 02-CV-1984 (CKK) (D.D.C. filed Oct. 8, 2002)). But the regulations, unless or until overturned, are the law and foreclose plaintiffs' attempt to have the Court review the facial validity of BCRA as if the statute were construed or applied more broadly than reflected in the FEC's regulations. See Broadrick v. Oklahoma, 413 U.S. 601, 617-18 (1973) ("a court cannot be expected to ignore" construction of statute by implementing authority); Pinnock, 844 F. Supp. at 581. Indeed, "it is a cardinal principle of statutory interpretation" that acts of Congress should be construed to avoid constitutional questions if it is "fairly possible" to do so. Zadvydas v. Davis, 533 U.S. 678, 689 (2001) (citations and internal quotation marks omitted); see also Broadrick, 413 U.S. at 613 ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute."); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional, and by the other valid, our plain duty is to adopt that which will save

[8] Similarly, the FEC recognized an exception for voter identification undertaken by groups of state or local candidates or officeholders solely in reference to state or local candidates. The FEC included this exception because it found it "implausible that Congress intended to federalize State and local elections activity to such an extent without any mention of the issue during the floor debate for BCRA." 67 Fed. Reg. 49,069-49,070.

the act."). Here, the FEC's regulations supply such a narrowing construction of BCRA, and plaintiffs' request that the Court reach out to address their broader construction of BCRA contravenes that "cardinal principle."[9]

Thus, when viewed in the proper context, it is clear that BCRA's soft money provisions have a much more limited impact than plaintiffs contend. To the extent the provisions incidentally impact state and local elections, Congress clearly was acting within its broad constitutional authority over federal elections when it enacted Title I's soft money provisions, not under any power reserved to the states. As the Supreme Court recognized in Buckley, "[t]he constitutional power of Congress to regulate federal elections is well established." 424 U.S. at 13. The Federal Elections Clause, "Article I, § 4 of the Constitution[,] grants Congress the power to regulate elections of members of the Senate and House of Representatives." Id. at 13 n.16. That provision provides that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except as to Places of choosing Senators." U.S. CONST. art. I § 4 (emphasis added).[10] Although Article I only refers to elections for the House and Senate, the Supreme Court has also found broad congressional power to legislate in connection with the elections of the President and Vice President. Buckley, 424 U.S. at 13 n.16, 132.[11] Indeed, in Burroughs v. United States, 290 U.S. 534 (1934), the Supreme Court rejected a Tenth Amendment challenge to an

---

[9] Furthermore, plaintiffs' reliance on broader interpretations of BCRA in the discovery responses or depositions of Defendant-Intervenors, or opinions of non-lawyer expert witnesses in this case, see, e.g., CDP/CRP Br. at 19; McConnell Br. at 18-19; is misplaced to the extent they are inconsistent with the FEC's legally determinative regulations. The positions of Defendant-Intervenors in this litigation are not binding on the agencies charged with implementing and enforcing FECA.

[10] In addition, the Necessary and Proper Clause, U.S. CONST. art. I § 8 cl.18, authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." See Buckley, 424 U.S. at 60, 132; Oregon v. Mitchell, 400 U.S. 112, 120 (1970).

[11] See also Oregon v. Mitchell, 400 U.S. at 124 (opinion of Black, J.); United States v. Classic, 313 U.S. 299 (1941).

indictment for disclosure violations under the Federal Corrupt Practices Act of 1925 ("FCPA"), a predecessor to FECA. The Court rejected an argument that Congress could not regulate the financing of presidential election campaigns, holding that "[s]o narrow a view of the powers of Congress . . . is without warrant." Id. at 544. And the Court has long held that this broad congressional authority extends to "prevention of fraud and corrupt practices" in connection with federal elections, and that "[i]t has a general supervisory power over the whole subject." Smiley v. Holm, 285 U.S. 355, 366-67 (1932).

In Ex parte Siebold, 100 U.S. 371, 393 (1879), the Court emphasized that, "[i]f, for its own convenience, a State sees fit to elect State and county officers at the same time and in conjunction with the election of representatives, Congress will not thereby be deprived of the right to make regulations in reference to the latter." 100 U.S. at 393.[12] Indeed, in that case and a companion decision, the Supreme Court upheld federal statutes punishing state election officials for violating their duties under state election statutes at elections where candidates for Congress are simultaneously voted upon, although there was no evidence of specific intent to affect the federal election. Ex parte Siebold, 100 U.S. at 393; Ex parte Clarke, 100 U.S. 399, 403-04 (1879).[13]

In sum, "when federal and state candidates are on the same ballot, Congress may regulate any activity which exposes the federal aspects of the election to the possibility of corruption, whether or not the actual corruption takes place and whether or not the persons participating in such activity had a specific

---

[12] See also Ex parte Yarbrough, 110 U.S. 651, 661-662 (1884) ("Can it be doubted that Congress can by law protect the act of voting, the place where it is done, and the man who votes from personal violence or intimidation, and the election itself from corruption or fraud? If this be so, and it is not doubted, are such powers annulled because an election for State officers is held at the same time and place? Is it any less important that the election of members of Congress should be the free choice of all electors, because State officers are to be elected at the same time? These questions answer themselves . . . .") (citation omitted).

[13] Plaintiffs suggest that Congress's power "to regulate federal campaign financing" under Article I § 4 might be in doubt because none of the parties in Buckley challenged "whether Congress had such a power." McConnell Br. at 10 (emphasis in original). As the Court noted, however, those parties did not challenge Congress's authority because it was so "well established." Buckley, 424 U.S. at 13.

intent to expose the federal election to such corruption or possibility of corruption." United States v. Bowman, 636 F.2d 1003, 1011 (5th Cir. 1981) (citing cases). "With federal and state elections held on the same day and with all candidates listed on one ballot, it is impossible to isolate the threat to the integrity of the state electoral process from a threat to the integrity of the federal contest." Id. at 1012.[14]

Plaintiffs' attempt to distinguish Bowman and other similar decisions involving the Voting Rights Act on the ground that they "involve vote buying and voter-registration fraud, activities that much more directly affect the 'Manner of holding Elections for Senators and Representatives,'" McConnell Br. at 14 n.4; see also CDP Br. at 23-24, is unavailing. Both the Voting Rights Act and BCRA serve the interests of preventing corruption. As the Court in Bowman explained, "[t]he only way to prevent corruption in federal elections with any reasonable probability of success, indeed the means that Congress has chosen, is to foreclose all chances of exposure by prohibiting corrupt practices anytime a federal candidate is on the ballot. Congress has made this decision, and, since the end is legitimate and the means appropriate, the courts cannot, and will not, condemn it." 636 F.2d at 1012.

Recognizing Congress's broad power to regulate federal elections, several courts have rejected Tenth Amendment challenges to the National Voter Registration Act ("NVRA"), 42 U.S.C. 1973qq, et seq., which requires states to provide voter registration at, inter alia, state offices providing public assistance and driver's license registration. Ass'n of Cmty Orgs. For Reform Now v. Miller, 129 F.3d 833 (6th Cir. 1997); Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995); Ass'n of Cmty Orgs. For Reform

---

[14] "When candidates for federal office appear on the same election-day ballot with the local candidates who have been the target of illegal vote-buying activities, the Necessary and Proper Clause affords Congress ample power to regulate conduct in the pendant state election to exclude the possibility of tainting, distorting or otherwise unfairly affecting the results of a federal election." United States v. Garcia, 719 F.2d 99, 102 (5th Cir. 1983). "[W]hether the federal candidate on the ballot is opposed or unopposed is of little consequence because the integrity of a mixed federal-state election is marred by fraudulent voting activities, even if these activities are only directed toward the state election." United States v. McCranie, 169 F.3d 723, 727 (11th Cir. 1999) (citing United States v. Cole, 41 F.3d. 303, 306 (7th Cir. 1994)); see also United States v. Cole, 41 F.3d 303 (7th Cir. 1994); United States v. Saenz, 747 F.2d 930, 943-945 (5th Cir. 1984); United States v. Carmichael, 685 F.2d 903, 908-909 (4th Cir. 1982).

Now v. Edgar, 56 F.3d 791 (7th Cir. 1995); Wilson v. United States, 878 F. Supp. 1224 (N.D. Cal. 1995). Although those courts concluded that the NVRA "intrudes deeply into the operation of state government," Edgar, 56 F.3d at 792-793, and "its impact on such elections probably will be significant," Voting Rights Coalition, 60 F.3d at 1415, they nevertheless recognized that Article I, § 4 "specifically grants Congress the authority to force states to alter their regulations regarding federal elections." Miller, 129 F.3d at 836. "Because the Constitution specifically delegates to Congress the power to regulate federal elections and the NVRA is limited to federal elections, by its own terms, the Tenth Amendment is inapplicable." Condon v. Reno, 913 F. Supp. 946, 963 (D.S.C. 1995). Thus, "Congress through the NVRA may directly regulate the state's manner and means of voter registration without invading an area reserved to the states." Wilson, 878 F. Supp. at 1328 (citation omitted). The states remain free under the NVRA to establish separate registration requirements for state elections, but if the states continue to maintain a single, unified registration system for their mixed elections, they are required to follow the federal requirements. See Miller, 129 F.3d at 836. Similarly in this case, involving a less directly intrusive statute, if the states choose to continue holding their elections on the same day as federal elections, state-level political parties must comply with BCRA.[15]

In Blount v. SEC, 61 F.3d 938, 946 (D.C. Cir. 1995), the D.C. Circuit rejected First Amendment challenges to an SEC rule restricting the ability of municipal securities professionals to contribute or solicit contributions to the political campaigns of certain state officials. The Court also rejected as "meritless" a Tenth Amendment challenge that the provision "usurps the states' power to control their own elections." Blount, 61 F.3d at 949

> Rule G-37 neither compels the states to regulate private parties, as the Tenth Amendment prohibits . . . , nor regulates the states directly, a question on which the Supreme Court's

[15] State-level party committees in states that conduct their elections in odd-numbered years are still subject to BCRA, but the statute will result in far fewer restrictions in those circumstances.

> Tenth Amendment jurisprudence "has traveled an unsteady path . . . ." Further, the rule does not have anything resembling the kind of preemptive effect on states' ability to control their own elections processes that might be perceived as "destructive of state sovereignty."

Id. (citing inter alia, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985), and Gregory, 501 U.S. at 460-462). For all these reasons, Title I of BCRA is plainly a valid exercise of Congress's power under the Elections Clause.

In addition, contrary to plaintiffs' contentions, BCRA's soft money provisions also fall within Congress's authority under the Commerce Clause. Not only are transactions in soft money that BCRA regulates themselves economic activity, but also the soft money that a political party receives as a result of those transactions is, in turn, available for additional commerce: the purchase of goods and services for use in connection with elections. See United States v. Morrison, 529 U.S. 598, 610 (2000) (economic nature of the regulated activity plays central role in Commerce Clause analysis); see also Perez v. United States, 402 U.S. 146, 154-57 (1971).[16]

[16] Plaintiffs' suggestion that defendants have waived reliance on the Commerce Clause by virtue of an interrogatory response, RNC Br. at 32, is baseless. The interrogatory response was expressly made "without prejudice to any argument that, as a matter of law . . . [,] any other Constitutional power supports the BCRA." U.S. Resp. to RNC's 2d Set of Interrogs. ¶ 20 (Sept. 19, 2002). And Congress need not expressly invoke the Commerce Clause in order for legislation to be sustained under that provision. "The constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." Woods v. Miller, 333 U.S. 138, 144 (1948).

III. TITLE I IS FULLY CONSISTENT WITH THE FIRST AMENDMENT.

Plaintiffs advance numerous arguments in support of their contention that BCRA's soft money restrictions violate their First Amendment rights of free speech and association. But their arguments are based on the erroneous assumption that the soft money restrictions are subject to strict scrutiny. For the reasons discussed above, and in our opening brief, the soft money restrictions function only as limits on campaign contributions, which are constitutional if closely drawn to advance sufficiently important government interests. See Buckley, 424 U.S. at 25; Shrink Missouri, 528 U.S. at 388. As explained at length our opening brief, Gov't Br. at 58-87, and as discussed further below, Title I readily satisfies this standard.[17]

A. BCRA's Soft Money Provisions Prevent the Appearance and Reality of Corruption.

In our opening brief, we explained in detail how Title I advances the government's vital interests in preventing the appearance and reality of corruption in federal elections and in preventing circumvention of the contribution limits and funding source restrictions set forth in FECA Gov't Br. at 66-86 (interests advanced by national party soft money ban), 99-103 (interests advanced by state party restrictions), 117-19 (interests advanced by restrictions pertaining to tax-exempt organizations), 123-25 (interests advanced by restrictions pertaining to federal candidates and officeholders).

The overwhelming evidence demonstrates that the exploitation and abuse of soft money has fostered corruption and the appearance of corruption in the federal political system, establishing a regime in which political parties openly provide access to federal officeholders and candidates in exchange for large soft money donations to political party committees; federal officeholders and candidates have strong

[17] As discussed infra at 128-29, the arguments presented by the governmental defendants on Title I apply to the Paul plaintiffs' freedom of the press claims as well.

incentives to take actions on official matters in a manner that will benefit large donors to their parties; and the public believes that federal candidates and officeholders put the interests of large donors to the political parties ahead of the interests of their constituents or the nation as a whole. Plaintiffs' efforts to explain away this evidence fall flat.

First, plaintiffs attempt to limit Congress, and this Court, to an unduly narrow definition of "corruption." See McConnell Br. at 35-36. In Buckley, the Supreme Court emphasized the government interest in preventing corruption that occurs when "large contributions are given to secure a political quid pro quo from current and potential office holders." 424 U.S. at 27. But the Court has never stated or suggested that only demonstrated incidents of actual quid pro quo corruption justify governmental regulation of campaign finance. Indeed, the Court rejected that contention in Buckley itself, concluding that Congress also is legitimately concerned with "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." Id. at 27. The Court also expressly rejected the contention that bribery laws and disclosure requirements provide a less restrictive means of dealing with corruption, observing that "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action," and that "Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." Buckley, 424 U.S. at 27-28. More recently, in Shrink Missouri, the Court again emphasized that its concern with corruption extends beyond bribery "to the broader threat from politicians too compliant with the wishes of

large contributors." 528 U.S. at 389. Whether or not defendants can point to direct evidence of soft money contributions made in return for a political quid pro quo is not determinative.[18]

Plaintiffs contend that hard money presents the same risks of actual and apparent corruption as soft money. See RNC Br. at 17, 63. They similarly contend that the "only solution" to a problem of corruption associated with officeholders and candidates who "are more solicitous of individuals who provide financial support for their election" directly or indirectly "would be to take money out of politics altogether in order to force officeholders and candidates to pay equal attention to all of their constituents." McConnell Br. at 35-36. But the record confirms the common sense proposition that the problem of corruption and perceived corruption grows with the size of the contributions at issue, and soft money simply represents donations that exceed FECA's contribution limits or come from the general treasuries of unions or corporations, which are prohibited from making contributions at all. Because the likelihood of a recipient feeling beholden plainly increases with the size of the contribution, BCRA's requirement that contributors not donate any money beyond the federal contribution restrictions addresses this problem in a direct and targeted way.[19]

---

[18] In any event, defendants have presented considerable evidence of soft money donations that at the very least appear to have been made to secure political quid pro quos. See Gov't Br. at 79-81; see also, e.g., Simon Decl. ¶ 13 [DEV 9-Tab 37] ("[I]t is not unusual for large contributors to seek legislative favors in exchange for their contributions."); Simpson Decl. ¶ 10 [DEV 9-Tab 38] ("[D]onations from the tobacco industry to Republicans scuttled tobacco legislation, just as contributions from the trial lawyers to Democrats stopped tort reform."); Hickmott Decl. ¶ 9 [DEV 6- Tab 19] (corporate donors frequently give soft money to parties to "influence the legislative process for their business purposes");

. Congress noted similar concerns. See, e.g., 147 Cong. Rec. S3107-10 (Mar. 29, 2001) (Sen. Feingold) ("[I]t is important for us to acknowledge that millions of dollars are given in an attempt to influence what we do.").

[19] Plaintiffs' own expert, David Primo, testified that, assuming that money does buy access to or influence of federal officeholders, soft money is more likely to buy access or influence "simply by virtue of the numbers." Primo Cross Tr. (Oct. 23, 2002) at 162; accord Krasno & Sorauf Expert Rep. at 15 [DEV 1-Tab 2] ("[T]he much greater size of the [soft money] individual donations at issue here pose a proportionately larger risk of influencing their beneficiaries than do contributions of hard money."); ; Wirthlin Cross Tr. (Oct. 21, 2002) at 57..

Plaintiffs contend that some of defendants' experts and witnesses support the view that the public perception of corruption or undue influence is inaccurate. See RNC Br. at 17. Yet when Dr. Mann, for example, stated that widespread public concern over congressional ethics (specifically, Congress's policing of its own Members) was unfortunate and inaccurate, he also added: "But accurate or not, the public view is important, and it is clearly influenced by the way in which Congress fulfills its constitutional mandate to judge its own members and employees." Mann Cross Tr. (Oct. 11, 2002) Ex. 5 at 7. More important, Congress is entitled to address the public perception of corruption, whether or not that perception reflects reality. "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." Shrink Missouri, 528 U.S. at 390; see also id. at 394-395 (finding academic doubts about actual corruption irrelevant to legislative authority to address the public perception).[20] And the fact is that the public does perceive corruption. See Mellman & Wirthlin Expert Rep. [DEV 2-Tab 5]; Shapiro Expert Rep. (DEV2-Tab 6].

Plaintiffs attempt to discount the corrupting potential of the special access to candidates and officeholders that party committees provide to soft money donors. See RNC Br. at 18. They cite assertions of some individual officeholders that they do not recall meeting with or being unduly influenced by donors at various functions. Of course, testimony that some individual officials may not have been unduly influenced by particular meetings with donors does not contradict the substantial evidence that others have been. It also does nothing to address the public perception of corruption that the Supreme Court has found

---

[20] Plaintiffs contend that the Supreme Court in Colorado I concluded that political parties present no greater risk of actual or apparent corruption than any other entity. See McConnell Br. at 37; RNC Br. at 16-19. In FEC v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431 (2001) ("Colorado II"), however, the Court explained that this observation only applied to limits on "independent expenditures," and that there was no dispute that, in other contexts, Congress was "concerned with circumvention of contribution limits using parties as conduits." 533 U.S. at 457 n.19. Title I of BCRA addresses the latter problem.

such special access creates, and the belief among donors that acceding to contribution requests from the parties is a prerequisite to obtaining access to powerful officials. Indeed, in Buckley the Court assumed that most contributors do not seek special influence, 424 U.S. at 22-30, but it nonetheless upheld prophylactic contribution restrictions because "the reality or appearance of corruption" is "inherent in a system permitting large financial contributions." Id. at 28. Because the contribution limits "focu[s] precisely on the problem of large campaign contributions," id., BCRA's soft money restrictions, which do nothing more than prevent circumvention of those limits by foreclosing contributors from making an additional donation beyond the statutory limit, are narrowly tailored to this long-recognized interest.

In any event, the ways in which soft money donations can purchase access and influence go beyond the amount or significance of face-to-face interaction with particular officeholders. Congress has recognized, and defendants have already recounted, in considerable detail, that donors give soft money with the expectation that they will meet and speak with officeholders in order to press their legislative agendas – an expectation that is frequently realized. See Gov't Br. at 32-36, 71-84. Because soft money is simply an additional donation in excess of statutory limits, RNC's attempt to portray hard money donors and soft money donors as separate groups, see RNC Br. at 63, is untenable. The likelihood that a donation exceeding the federal limits will earn more attention than a smaller donation within those limits is simply a matter of common sense that follows directly from the Supreme Court's reasoning in upholding the contribution limits themselves.

Indeed, the record is filled with examples of instances in which the RNC has facilitated the ability of its soft money donors to obtain access to federal officials. For example, in 1995, RNC Chairman Haley Barbour sent Senate Majority Leader Dole a handwritten note asking him to meet with the Chief Executive

Officer ("CEO") of Pfizer, a member of the exclusive "Team 100" soft money donor group,[21] to discuss an extension of a lucrative tax credit. Mr. Barbour's note requesting the meeting noted that the CEO who had requested the meeting "is extremely loyal and generous." See ODP0025-02456-02457 [DEV 70-Tab 48] (from RNC v. FEC, No. 98-CV-1207 (D.D.C.)); see also Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167 at 7971 (1998) [hereinafter Thompson Comm. Rep.] (Minority Views) (letter noting how RNC Chairman Barbour "escorted" the CEO of Entergy, a Team 100 member, on appointments with legislators that were "very significant" in legislation affecting Entergy and made the CEO "a hero in his industry");

. Democratic Party committees have likewise facilitated access for its soft money donors. See Gov't Br. at 32-36, 75-78; see also Richard Briffault, The Political Parties And Campaign Finance Reform, 100 COLUM. L. REV. 620, 650 (2000) ("Briffault II") (citing Wall Street Journal report that "cash-for-access confabs on pending bills are business as usual in Washington") (footnote omitted). As the Supreme Court has already concluded, "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.[22]

---

[21] Membership in Team 100 requires a $100,000 threshold donation to the RNC, followed by subsequent $25,000 annual donations for the next three years. See "Team 100" (RNC Finance Committee website: www.rncfc.org/public/team100.htm);

[22] There also is no merit to plaintiffs' contention that the government has no interest in preventing actual or apparent corruption with respect to soft money donations to "minor" parties, such as the Libertarian Party, because such candidates are rarely elected to federal office. See McConnell Br. at 37 n.11. There is no doubt that "minor-party candidates may win elective office or have a substantial impact on the outcome of an election." Buckley, 424 U.S. at 34-35; see also id. at 70; Goland v. United States, 903 F.2d 1247, 1251 (9th Cir. 1990) (supporter of major party candidate financed minor party candidate's television appearance to criticize first candidate's major party opponent). The Buckley Court, therefore, refused to exempt minor parties, one of which was the Libertarian Party, 424 U.S. at 34 n.40, from the contribution limits.

The RNC further suggests that its fundraising practices present no risk of corruption because it "rarely if ever uses federal officeholders for fundraising." RNC Br. at 20-21.

Moreover, the RNC, like all national political committees, advertises access to federal officeholders and candidates in exchange for large donations to party committees.[23] See Gov't Br. at 75-81.[24] In any event, Buckley established that Congress is entitled to enact general contribution limits to reduce "the opportunities for abuse inherent in a regime of large individual financial contributions," 424 U.S. at 27 (emphases added), whether or not a particular regulated party has engaged in such practices.

---

[23] The legislative record includes numerous examples of party committees advertising donations to the party as the price of access to important policy makers. An invitation to a 1997 senatorial campaign committee event, for instance, promised that "large contributors would be offered 'plenty of opportunities to share [their] personal ideas and vision with' some of the top leaders and senators." 147 Cong . Rec. S3248 (Apr. 2, 2001) (Sen. Levin). The invitation further stated that failure to attend means that "'you could lose a unique chance to be included in current legislative policy debates – debates that will affect your family and your business for many years to come.'" Id.; see also 145 Cong. Rec. S12745 (Oct. 18, 1999). As Senator Levin remarked, "[n]o American should think that because he or she cannot contribute a huge sum of money they are then going to be unable to participate in a debate which affects family and business for many years to come." 147 Cong. Rec. S2979 (Mar. 27, 2001). Other examples of solicitations offering access to federal officials in exchange for large soft money contributions to national party committees appear at, e.g., 147 Cong. Rec. S3249 (Apr. 2, 2001) (Sen. Levin); 147 Cong. Rec. S2530 (Mar. 19, 2001) (Sen. Lieberman).

[24]

Moreover, even if a particular federal officeholder did not personally raise funds from a particular donor, the officeholder, nevertheless, is likely to know that the donor is a large contributor to the party. The "party's involvement does not sterilize the system," because "[e]lected officials know exactly who the big party contributors are." Rudman Decl. ¶ 12 [DEV 8-Tab 34]; accord Bumpers Decl. ¶ 20 [DEV 6-Tab 10] ("[Y]ou cannot be a good Democratic or a good Republican Member and not be aware of who gave money to the party."); McCain Decl. ¶ 6 [DEV 8-Tab 29] ("Legislators of both parties often know who the large soft money contributors to their parties are.").[25] Thus, "[p]arty committees do not so much dilute and 'cleanse' private interest money as centralize it and focus it on the President and the congressional leadership." Briffault II, 100 COLUM. L. REV. at 651. Federal officeholders have a strong interest in cultivating future contributions from large party donors, maintaining their good will, and returning their telephone calls because of the close intersection between the interests of the party and the interests of the candidate and officeholders. See Gov't Br. at 72-75; see also Bumpers Decl. ¶ 18 ("those who have consistently been good party members and good donors can get access" and "get their phone calls returned").[26]

In any event, Buckley and Shrink Missouri upheld limits on all contributions without regard to the particular method of solicitation or the particular dealings between donor and recipient. As the Supreme

---

[25] These fundraising events also furnish soft money donors with the opportunity to interact with the staffers who work for federal officeholders. See

Such interactions with staffers can be as beneficial as direct interactions with federal officeholders, cf. Rudman Dep. Tr. (Sept. 17, 2002) at 17 (noting that having Hill staffers as contacts "is better frankly than having them with the senators"), and these staffers also know the identities of the big soft money donors, see Simpson Decl. ¶ 9 ("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.").

[26] Moreover, solicitations from party leaders, like solicitations from officeholders and candidates, are potentially coercive because party leaders are so closely connected to federal officeholders. See Gov't Br. at 90 n.76; see also Kolb Decl. Ex. 6 at 4 [DEV 7-Tab 24] (51% of corporate executives surveyed agreed that "many business executives fear adverse legislative consequences to themselves or their industry if they turn down requests for campaign contributions from high-ranking political leaders and/or political operatives").

Court has recognized, Congress's authority is not limited to blatant quid pro quo exchanges, but extends to "the broader threat from politicians too compliant with the wishes of large contributors." Shrink Missouri, 528 U.S. at 389; see also Colorado II, 533 U.S. at 462-63 (noting the "web of relations linking major donors, party committees, and elected officials" described in Briffault II, 100 COLUM. L. REV. at 652). Thus, the validity of the statutory contribution limits at the heart of BCRA does not depend upon the good or bad faith of any particular party committee; "whether they like it or not, [parties] act as agents for spending on behalf of those who seek to produce obligated officeholders." Colorado II, 533 U.S. at 452.[27]

B. Title I is Closely Drawn to Address the Appearance and Reality of Corruption.

As explained in detail in our opening brief, the provisions of Title I satisfy the First Amendment because they are closely drawn to prevent the appearance and reality of electoral corruption. See Gov't Br. at 58-90. Plaintiffs advance a series of arguments in support of their contention that the statute is not properly tailored to address the corruption problems that Congress sought to address. Those arguments are premised on an erroneous understanding of the statute's scope and on unfounded speculation as to its impact on the political parties. Properly understood, the statute clearly does not infringe any associational rights or rights of free speech.

---

[27] Plaintiffs' argument that, when viewed in historical context, corruption and the appearance of corruption are not significant national problems, see RNC Br. at 20-21, therefore, fails to account for the Supreme Court's view, including the modern realities of "obligation-driven" and "favor-currying" corruption that provides large donors to political party committees with undue influence over officeholders and the political process. D. Green Rebuttal Expert Rep. at 20 & n.15 [DEV 5-Tab 1]. For example, "obligation-driven" corruption occurs when federal officeholders feel a sense of obligation that "may grow out of the personal relationship that officeholders may have forged with donors." See D. Green Expert Rep. at 20 [DEV 1-Tab 3]; see also

; Simpson Decl. ¶ 9 ("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.").

1. Title I infringes no First Amendment rights of association.

Plaintiffs contend that BCRA's soft money restrictions violate the associational rights of political party committees by restricting their ability to engage in soft money transactions. See McConnell Br. at 28-31; RNC Br. at 37-44; CDP Br. at 27-43. But BCRA leaves party committees free to engage in virtually any political activities using money contributed under the statutory contribution limits. And the statute in no way restricts party officials from conferring with other party committees to discuss campaign strategy or any other matter. As explained in our opening brief, BCRA's provisions against circumvention of the statutory contribution limits are closely drawn to prevent the appearance and reality of corruption. Accordingly, plaintiffs' associational claims lack merit. Gov't Br. at 64-87.

Plaintiffs stress that BCRA restricts the ability of party committees to transfer soft money to other party committees. As explained in our opening brief, however, it is unclear whether organizations even have a First Amendment right to associate with other organizations. See Gov't Br. at 89; DKT Mem. Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 294 (D.C. Cir. 1989) ("Neither this Court nor the Supreme Court has held that the Constitution protects rights of association between two organizations."). Even assuming that such a right exists, BCRA does not infringe it. The statute leaves party committees with ample means of associating with other party committees. Indeed, BCRA continues to allow party committees to solicit money for, and transfer money to, other party committees. The statute simply requires that such money be raised in accordance with FECA. The restrictions on inter-party transfers of soft money, moreover, are simply limits on monetary contributions from one committee to another. Thus, they are not meaningfully different from the limits on contributions to multicandidate political committees upheld in Cal. Med. Ass'n v. FEC, 453 U.S. 182, 198 (1981) (plurality) ("Cal Med"); see id. at 203 (Blackmun, J., concurring). The impact of BCRA's contribution limits on associational activity is modest: party commit-

tees are free to "affiliate" with other party committees through contributions of hard money. Buckley, 424 U.S. at 22.

BCRA prohibits state-level party committees from using hard money received from another committee to fund Federal election activity pursuant to the Levin Amendment. See 2 U.S.C. 441i(b)(2)(B)(iv). But as an exception to the requirement that Federal election activity be financed only with hard money, the entire Levin Amendment "is an effort to enhance [plaintiffs'] speech rights," and its restrictions accordingly "must be assessed in that light." See Schenck v. Pro-Choice Network, 519 U.S. 357, 383-84 (1997); see also FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 210 (1982) ("NRWC") (upholding restriction on solicitation of contributions to corporation's PAC on the basis of compelling governmental interests supporting the overall ban on corporate contributions to candidates, to which the limited opportunity to establish a PAC was an exception); Sinclair Broadcast Group v. FCC, 284 F.3d 148, 169 (D.C. Cir. 2002) ("As an exception to the local ownership restrictions . . . the eight-voices exception presents no separate constitutional implications . . . if anything . . . it decreases the minimal burden on speech imposed by the Local Ownership Order."). Congress was not constitutionally required to provide state-level committees with the option of using Levin funds for federal election activities; it could have required those committees to fund activity affecting federal elections entirely with money raised in conformity with federal contribution limits. And state-level committees that do not wish to comply with the Levin Amendment's restrictions are free to fund federal election activity entirely with hard money.[28]

Moreover, BCRA does not prevent representatives of national, state, and local party committees from conferring about spending priorities or any other issues. Nothing in BCRA purports to restrict the

---

[28] Plaintiffs contend that Levin Amendment funds cannot include donations from corporations or unions, even if such donations are allowed under state law. McConnell Br. at 17. But FEC's regulations make clear that such donations are permitted where state law allows. See 11 C.F.R. 300.31(c).