I. TITLE I IS CONSTITUTIONAL.

Despite the many differences between the parties, there can be no dispute that Congress enacted Title I of BCRA because it concluded that the soft money that had been raised and spent by the national parties and by state and local parties in recent years was being used to influence the outcome of federal elections. There can also be no dispute that soft money contributions were being made to national, state, and local parties by corporations and labor unions, both of which had long been forbidden by FECA and its predecessors from making contributions to influence federal elections. And there can be no dispute that wealthy individuals made soft money contributions to national parties in amounts that far exceeded the amounts allowed by FECA for hard money. The goal of Title I was to close these massive soft money loopholes that were created, first slowly, and in recent years at an exponential pace, and that had made FECA's source and amount restrictions virtually irrelevant.

Title I of BCRA accomplishes that goal in two ways: First, it requires that all money raised by the national political parties be raised from sources and in amounts governed by federal law.

Second, Congress was well aware that soft money was being raised by state and local parties and concluded that such money was also being used to affect federal elections. Therefore, to prevent the soft money ban applicable to national parties from becoming wholly ineffective, it extended the soft money ban to certain activities of state and local parties that it concluded also affected federal elections, while leaving untouched the ability of state and local parties to raise and spend money of any amount and from any source they could on all other state election functions, limited only by the confines of state law.

Boiled down to its essence, plaintiffs' argument as to the national party soft money ban is that, for a variety of reasons, Congress can tell corporations and unions that they may not make hard

money donations to the parties, and limit the size of contributions from wealthy individuals, but so long as the donors change the label to soft money, the Constitution becomes an insurmountable barrier to this massive evasion of the purposes of source restrictions under federal law. As our previous submissions and this reply demonstrate, nothing in the Constitution guarantees the national political parties the right to create and maintain loopholes, whatever labels are applied to them.

Plaintiffs' attack the state and local party soft money provisions by arguing that – while Congress is not prevented from insisting that joint federal and state party election activities be funded on a shared basis — Title I goes too far, both because it mandates that certain functions be paid with 100 percent federally raised money, and because it extends the federal reach beyond what plaintiffs consider proper. However, as we have demonstrated, Title I's state and local party rules are carefully crafted to reach only those activities that Congress reasonably concluded are most likely to affect federal elections. Neither the law nor the facts of this case provide any reason to second guess Congress's expert judgment.

A. Defendants Have Amassed Overwhelming Evidence To Support the Constitutionality of BCRA.

Plaintiffs concede that defendants have presented a "tidal wave,"[3] "mountain"[4] and "onslaught"[5] of evidence. Yet, all they can muster by way of response is (1) to denigrate the evidence as "anecdotal" and (2) to seek — with a striking lack of success — to discredit tidbits from the immense factual record. In the end, plaintiffs fail to undermine the overwhelming legislative and adjudicative record before this Court of the actual and apparent corrupting influence of soft money and the pattern of evasion of longstanding legal requirements that prompted the enactment of BCRA.

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3 McConnell Opp. Br. at 1.

4 *Id.* at 20.

5 *Id.* at 3.

1. *The Court Should Reject Plaintiffs' Suggestion That It Turn a Blind Eye to The Overwhelming Evidence that Demonstrates the Insidious Effects of Soft Money.*

Plaintiffs criticize the "tidal wave" of evidence as "anecdotal,"[6] thus insinuating that it should be given little weight. The evidence is not merely anecdotal. But even if much of it is, the evidence here is of the same kind and quality as the evidence the Supreme Court relied on in *Buckley* and *Shrink Missouri* in sustaining contribution limits.[7] In *Buckley,* the Supreme Court relied on evidence of "extensive contributions by dairy organizations to Nixon fund raisers, in order to gain a meeting with White House officials"; coordination by the milk producers to contribute a total of $2 million through individual contributions of no more than $2,500 and the coincidence in time between the contributions and a government decision favorable to the dairy organizations; "lavish contributions by groups or individuals with special interests to legislators from both parties"; "revelations of huge contributions from . . . potential ambassadors";[8] testimony that contributions were motivated "by the perception that this was necessary as a 'calling card, something that would get us in the door and make our point of view heard'" and polls demonstrating a public perception that "government is pretty much run by a few big interests looking out for themselves."[9]

The legislative and adjudicative record before this Court, while comparable in type, is far more compelling. The "notorious 'White House Coffees' and 'Lincoln Bedroom visits'" to which plaintiffs refer, McConnell Opp. Br. at 1, might well, on their own, justify closing the soft money

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6 *See, inter alia,* RNC Opp. Br. at 2, 3, 6; McConnell Opp. Br. at 1, 3, 20.

7 *See Buckley v. Valeo*, 424 U.S. 1, 27 n.28 (1976) (citing *Buckley v. Valeo*, 519 F.2d 821, 839-40 nn. 36-38 (D.C. Cir. 1975)); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 388-95 (2000).

8 As defendants have shown, large soft money donors still often receive ambassadorships. For relevant documents, *see* [REDACTED].

9 *Buckley*, 519 F.2d at 839-40 nn.36-38 (D.C. Cir. 1975) (citation omitted). In *Buckley*, although the Court did not itself "marshal the evidence in support of the congressional concern, [it] referred to 'a number of the abuses' detailed in the Court of Appeals' decision." *Shrink Mo.*, 528 U.S. at 391. The evidence relied upon in *Shrink Mo.* was less extensive than this. *Id.* at 384-385, 390-91.

loophole. As set forth in Intervenors' Opening Brief, however, the evidence goes far beyond the incidents detailed in the Thompson Committee Report.[10] It includes:

- Polls showing "that the American public believes" that the "views of large contributors to parties improperly influence policy and are given undue weight in determining policy outcomes."[11] Over 70 percent of the public believe that Members of Congress sometimes vote based on what large contributors to their parties want, even when it is not what their constituents want and is not in the best interest of the country.[12]

- A bipartisan array of former and current Members of Congress recounting their personal experience regarding the corrupting influence of soft money on our political system. As Senator Alan Simpson, the former Assistant Majority Leader, testified, "I have seen firsthand how the current campaign financing system prostitutes ideas and ideals, demeans democracy, and debases debate."[13] Based on this experience, he concluded: "Too often, Members' first thought is not what is right or what they believe, but how it will affect fundraising. Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about — and quite possibly votes on — an issue? Donations from the tobacco industry to Republicans scuttled tobacco legislation, just as contributions from the trial lawyers to Democrats stopped tort reform."[14]

- Documents and testimony from soft money donors demonstrating that they give, in large part, [REDACTED] "[15] and to "shape and affect governmental decisions."[16] [REDACTED] .[17]

  [REDACTED] [18]

- Testimony from former Chairmen of both the Democratic and Republican parties demonstrating that, despite longstanding laws banning the use of corporate, union, and large individual contributions to influence federal elections, soft money was widely used to influence federal elections. Former RNC Chairman Brock testified that "[t]he money by and

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10 Much of this evidence is summarized in Intervenors' and the Government's Opening Briefs. *See* Intervenors' Br. at 20-50; Gov't Br. at 68-87.

11 *See* Mark Mellman & Richard Wirthlin, Research Findings of a Telephone Study Among 1300 Adult Americans at 5 (Sept. 23, 2002) [DEV 2-Tab 5, hereinafter Mellman & Wirthlin Expert Report].

12 *Id.* at 7.

13 Simpson Decl. ¶ 3 [DEV 9-Tab 38].

14 *Id.* ¶ 10.

15 [REDACTED]

16 Greenwald Decl. ¶ 12 [DEV 6-Tab 16] (former Chairman of United Airlines).

17 [REDACTED]

18 [REDACTED]. Donors also appear to favor the party and politicians that are currently in power. *See* Donald P. Green, *Report on the Bipartisan Campaign Reform Act* (Sept. 23, 2002) at 25 ("contributors target their donations to officeholders who are best position to reciprocate with valuable favors or to retaliate against them in the event that they do not contribute.") [DEV 1-Tab 3, hereinafter D. Green Expert Report].

large is not used for 'party building.' To the contrary, the parties by and large use the money to help elect federal candidates."[19] Former DNC Chairman Fowler testified that in 1996 the DNC transferred soft money to states with key federal elections for use in ways that inevitably affected those elections.[20] DNC Chief Financial Officer Brad Marshall testified that "[d]uring the 2000 presidential election year, the largest single portion of the DNC budget was used for issue advertising" and that the DNC "typically" sent money to the state parties to run these ads in order to take advantage of the fact that state parties may spend a larger proportion of soft money than the national party.[21]

- Documents and testimony showing, in the words of the RNC's own expert, that "[n]ational parties allocate soft money to state organizations primarily with the intent to help federal candidates in close races."[22] For example, "in the 2000 election, the national Democratic Party funneled approximately $145 million and the Republican Party transferred $129 million to their affiliated state parties to take advantage of the state parties' ability to spend a larger percentage of soft money on advertisements featuring Federal candidates."[23]

- Testimony demonstrating that federal officials are aware of large donations when considering legislation and that these donations affect the contents of the legislation. For example, Senator Feingold testified that after a bill had been approved by both the House and the Senate, a special rider, which was never discussed on the floor or in the committee report, was inserted to the significant benefit of Federal Express. When Senator Feingold filibustered the bill in an attempt to block the rider, a fellow Senator asked him to end his filibuster because Federal Express had given a $100,000 donation to the Democratic Party.[24]

2. *The Court Should Not Rely on the RNC's Distortions of the Record.*

The RNC plaintiffs unsuccessfully attempt to portray defendants' description of the record as "grossly exaggerated" and "downright distorted."[25] They do so in order to discredit the

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19 Brock Decl. ¶ 6 [DEV 6-Tab 9].

20 Fowler Decl. ¶ 15 [DEV 6-Tab 13].

21 *See* Marshall Decl. ¶ 3 [DEV 8-Tab 28].

22 Ray La Raja, *American Political Parties in the Era of Soft Money* (2001) 74 (unpublished Ph.D. dissertation, University of California at Berkeley) (attached to La Raja Cross Tr. (Oct. 15, 2002) [hereinafter La Raja Cross. Tr., Ex. 3].

23 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). *See* Fowler Decl. ¶ 15; *see also* Marshall Decl. ¶ 5; Stoltz Decl. ¶ 14 [DEV 9-Tab 39]. [REDACTED]; Wolfson Decl. ¶¶ 6, 63 & Ex. N; [REDACTED]; Vogel Decl. ¶ 63. [REDACTED]

24 *See* Feingold Dep. Tr. (Sept. 9, 2002) at 62-63. Federal Express gave large amounts to both the Democratic and Republican Parties in its efforts to win favorable treatment of its special provision. Russell D. Feingold, *Special Interests and Soft Money*, 10 Stan. L. & Pol'y Rev. 59, 59 (1998).

25 RNC Opp. Br. at 1. Most of the RNC's fellow Title I challengers join this claim. *See* McConnell Opp. Br. at 1, CDP/CRP Opp. Br. at 2 n.2. Rather than re-argue every piece of evidence, defendants respond only to the most glaring errors and invite the Court to look at the documents that plaintiffs seek to "undermine."

conclusions to which both the record evidence *and their own expert's writings* inevitably lead: that soft money abuses give rise to both actual and apparent corruption and that BCRA is a constitutionally permissible response to those abuses.

Using the same flawed definition of corruption as plaintiffs — a definition rejected by the Supreme Court[26] — *even the RNC's own expert* on state parties and soft money has recommended "that Congress place a cap on soft money contributions or, if soft money is banned, raise the limits on hard money contributions."[27] As Professor La Raja has concluded elsewhere, parties "exploit federal campaign finance laws by using . . . soft money for candidate support even though federal laws require them to use it for generic party building."[28] He also notes, "[r]ather than use soft money to shore up weak state and local organizations, or enforce party discipline in government, parties invest primarily in issue ads that help candidates."[29] Asking the question, "how is soft money harmful," La Raja writes:

> The obvious answer is it permits candidates, contributors, and parties to circumvent federal laws limiting campaign contributions. If party soft money can help a specific candidate, then corporations, unions, or wealthy individuals can simply funnel contributions to candidates through the parties. And the potential for a *quid pro quo* exchange

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26 Raymond La Raja, *Sources and Uses of Soft Money: What Do We Know?* in A User's Guide to Campaign Reform 83-108, 105 (Gerald C. Lubenow ed., 2001) [hereinafter "Sources And Uses of Soft Money"].

27 *Id.* at 106.

28 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, Ex. 3].

29 *Id.* at 15; *see also id.* at 25 (agreeing with the proposition that "soft money is being spent excessively on expensive media technology for political advertising, rather than on grassroots efforts that could generate genuine enthusiasm for party politics"); *id.* at 69 ("[t]he remarkable change in transfers to state parties [during the 1990s] suggests that soft money is used increasingly to support federal candidates rather than for state party building"); *id.* at 75 ("[r]ather than use soft money to shore up weaker organizations . . . the national organizations use soft money like hard money — to pursue the short-term goal of winning elections"). In fact, based on his research, La Raja concluded, "I find *no direct evidence* that parties use soft money to increase ideological cohesion or to support the weakest parties through party building." *Id.* at 70 (emphasis added).

> between contributor and policymaker escalates with the size of the contribution.[30]

And, in considering the impact of soft money reforms on the parties, Professor La Raja states "that there is little doubt that parties will adapt," reasoning that parties "have done extraordinarily well raising hard money in recent years, and they will focus more intensively on this supply of money"; and that in the end "*the parties will survive and possibly thrive.*"[31]

In an attempt to avoid the clear import of their own expert's statements, plaintiffs argue, *inter alia*, that his dissertation predates his expert report. RNC Opp. Br. at 12. But in his cross examination, Professor La Raja stood behind his dissertation, completed a mere nine months before the submission of his expert report in this case. La Raja Cross Tr. at 18. He also testified that he was not aware of any information that might change any of the conclusions in his dissertation. La Raja Cross Tr. at 17-18. Moreover, defendants have not attributed anything to Professor La Raja that he does not say in that dissertation. For example, as plaintiffs point out, Professor La Raja indicates (in the introduction to a chapter titled "The Nationalization of Party Operations") that no one had yet applied Heard's theory to see whether, instead of strengthening state and local parties, the soft money system has "nationalized" them and made them less independent. RNC Opp. Br. at 13. Had plaintiffs read a little further, however, they would have seen that in this same chapter *Professor La Raja himself* tests this proposition. His conclusion: "I find support for the party

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30 *Sources and Uses of Soft Money* at 105; *see also* La Raja Cross Tr., Ex. 3 at 144-45 ("[o]bserving the amounts of money raised and spent in campaigns makes the average American skeptical that the political process is fair.").

31 La Raja Cross Tr., Ex. 3, at 148 (emphasis added). Plaintiffs assert that the Intervenors misuse La Raja's discussion on this point by not acknowledging his assertion that parties will suffer relative to other groups. Leaving the merits and relevance of that claim aside, nothing in that statement by Professor La Raja, or in the accompanying discussion casts *any* doubt on his conclusion about the parties' ability to adapt and to thrive. In fact, as Professor La Raja concludes after his observation about the relative positions of parties and interest groups: "[o]ne thing we can be sure of is that parties will figure out the ground rules *and they will find an important role for themselves in the new campaign finance regime.*" *Id.* at 150 (emphasis added).

nationalization thesis since intra-party transfers to state committees increase the scale of state party operations and *serve the campaign priorities of the national party.*"[32]

In an effort to deflect attention from Professor La Raja's very damaging conclusions, the RNC repeatedly offers the retort that "***defendants' own expert,***"[33] Professor Paul Herrnson, has taken a different view. But Professor Herrnson did ***not*** prepare an expert report for any defendant in this case, and was never deposed or cross-examined.[34] The RNC is referring to Professor Herrnson's testimony for the FEC ***in another case*** three years before BCRA was enacted,[35] which the RNC, in fact, mischaracterizes.[36]

The RNC also challenges testimony regarding the influence of soft money contributions on the "Telecommunications Act of 1996" and the "Federal Aviation Administration authorization legislation." In both cases, the RNC suggests that soft money could not have influenced the legislation because both bills eventually passed the Senate with more than 90 votes.[37] Such sophistry ignores the fact, proven in this record, that a final roll-call vote is *not* the only way, or even the most accurate way, of evaluating whether the legislative process has been influenced.[38] As

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32 La Raja Cross Tr., Ex. 3, at 101 (emphasis added).

33 *See, e.g.*, RNC Opp. Br. at 7, 11, 13, 15; *see also id.* at 5 n.5, 9 n.9, 10 n.11, 13.

34 Defendants designated Professor Herrnson as a potential rebuttal expert, *see* The United States' Defendants September 16, 2002 Supplemental Designation of Witnesses and Documents Upon Which They Intend to Rely at 7, but never asked Professor Herrnson to draft a rebuttal report. Defendant FEC included the record in *RNC v. FEC*, (No. 98-cv-1207) (D.D.C. April 1999) — which included an expert report that Professor Herrnson prepared for the FEC in that case —as part of the extensive documentary record in this case.

35 *See* Herrnson Deposition, *RNC v. FEC*, No. 98-CV-1207 (D.D.C. Apr. 9, 14, 1999) ("Herrnson Dep. Tr."). Plaintiffs also rely on one of defendants' fact witnesses for statements made about the use of soft money prior to 1992. This was before the meteoric rise of soft money over the last decade. McConnell Opp. Br. at 11 n.5 (citing to a 1994 publication by Robert Biersack).

36 The RNC cites Professor Herrnson, for example, to support the proposition that existing studies do not examine the connection between contributions to candidates and legislative access, but instead merely conclude that more powerful lawmakers are able to raise more money. RNC Opp. Br. at 10. In fact, Professor Herrnson testified that money can sometimes facilitate access. Herrnson Dep. Tr. at 285-86, 432.

37 RNC Opp. Br. at 4 (citing Intervenors' Br. at 40 n.157; McCain Decl. ¶ 9; and Feingold Dep. Tr. at 62).

38 Common ways that donations influence the process are by dictating what legislation does/does not reach the floor; the content of that legislation; which amendments are made in order or not made in order; and the timing of that legislation. *See* Shays Dep. Tr. at 63-65. There is, moreover, strong evidence that the political party committees, and

several current and former Members of Congress testified, soft money shapes and skews the legislative process in more insidious ways. For example, quoting former Representative Eric Fingerhut, Senator McCain has noted:

> The public will often look for the grand-slam example of the influence of these interests. But rarely will you find it. But you can find a million singles . . . regulatory change, banking committee legislation (to cite a committee that I served on) . . . . Think of the committee and you can think of the interest group or the company that will have an interest . . . .[39]

In the case of the FAA authorization legislation, Senator Feingold opposed a provision — designed specifically to benefit large soft money donor Federal Express — that was slipped into the law during a conference committee and had not been voted on or discussed by either the House or the Senate. The RNC notes that the bill ultimately passed the Senate by a 92-2 vote, and that Sen. Feingold voted with the majority. From this, the RNC suggests that soft money could not have influenced the bill. What the RNC fails to note, however, is that Senator Feingold filibustered the bill to try to defeat the Federal Express amendment. Ultimately, his filibuster was defeated by just seven votes. 142 Cong. Rec. S12228-29 (Oct. 3, 1996). The RNC also fails to note that the founder of Federal Express explained to Senator Feingold that the company concluded that it "had no choice . . . other than to pay to play." *See* Feingold Dep. Tr. at 226. And finally, the RNC does not even attempt to explain away Sen. Feingold's testimony that a senior Democratic Senator urged him to go along with the provision because Federal Express had just given the Democratic party a $100,000 soft money contribution. *See* Feingold Dep. Tr. at 62.[40]

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the leadership of the House and Senate, control the legislative agenda and the congressional committee process in ways that would enable them to influence final legislation in many ways other than the final roll-call vote. *See* McCain Decl. ¶ 10 [DEV 8-Tab 29]; Simon Decl. ¶¶ 13-14 [DEV 9-Tab 37].

[39] McCain Decl. ¶ 5 (citing Martin Schram, *Speaking Freely* 93).

[40] Senator Simon similarly attested to the influence of FedEx's more than $1 million in soft money contributions during the 1995-96 election cycle when he described his own opposition to this provision in the Democratic Caucus.

Similarly, the fact that the Telecommunications Act, in the end, passed overwhelmingly does not prove, as plaintiffs assert,[41] that soft money contributions did not influence the shape of the legislation that was ultimately voted up or down. As Senator McCain testified, during his committees' consideration of the bill:

> [w]hile the halls and offices of Congress were overrun with representatives of telecommunications interests that had contributed soft money, the public interest had few lobbyists and no campaign contributions to protect it. . . . The legislation, which dealt with issues of interest to big money donors, was poorly conceived and filled with internal inconsistencies designed to appease these competing donors rather than to serve the public interest. Regardless of whether the interested donors received a "quid pro quo" for their donation, the entire process was skewed by these large contributions and there was clearly an appearance of improper influence.

McCain Decl. ¶ 9.

Plaintiffs ask this Court not only to ignore the evidence, but also to abandon common sense. They assert that "the much-touted 'access' ostensibly provided to both federal and nonfederal donors at fundraising events is to all appearances worthless." RNC Opp. Br. at 3, RNC Br. at 18 (citing the fact that four of the six sponsors of BCRA could not specifically remember the names of soft money donors at particular events). The fact that the most visible advocates of the soft money ban are not regularly lobbied by soft money donors at fundraisers is hardly surprising or probative.[42] In order to believe that access to federal officeholders is "worthless," one must assume that major U.S. corporations spend hundreds of thousands of dollars on soft money contributions, with total

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One of Sen. Simon's senior colleagues urged approving the provision without a hearing because "we've got to pay attention to who is buttering our bread." Simon Decl. ¶ 14.

[41] RNC Opp. Br. at 4 (noting that the Telecommunications Bill passed by 91 to 5).

[42] Notably, plaintiffs cite none of their own witnesses as support for this proposition. Moreover, the sponsors of BCRA have strongly stated their views that access is not "worthless." *See* McCain Decl. ¶ 6; Shays Decl. ¶ 9 [DEV 8-Tab 35]; 145 Cong. Rec. S133883, S13898 (daily ed. Nov. 4, 1995) (statement of Sen. Feingold); Meehan Dep. Tr. (Sept. 25, 2002) at 139-41, 182; Rudman Decl. ¶¶ 5, 7 [DEV 8-Tab 34].

disregard to their shareholders.[43] The Court would also have to conclude that experienced Members of Congress are incapable of assessing the role of money in modern politics and ignore the extensive legislative record in this case.[44]

To supplement the ample legislative record, [REDACTED]:

- [REDACTED][45]
- [REDACTED][46]
- [REDACTED].[47]

Moreover, documents show that the parties consider access valuable. A DNC call sheet suggested that Chairman Fowler "[a]sk [Denise Rich] to give 80K more this year for lunch with Potus on Oct. 27th."[48] One of the benefits advertised for a chairman ($45,000-250,000) of the RNC Gala is "Luncheon with . . . the Republican House and Senate Committee Chairmen of your choice."[49] Make no mistake that access has a price, and it is one that many donors believe they must pay.

Plaintiffs similarly seek to discredit evidence that Senator McConnell told fellow Republicans in 1998 that, if they voted to kill a pending tobacco bill, "the major tobacco

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43 As Sen. Boren testified: "I'm now a corporate director. . . . My fiduciary responsibility there is to the shareholders. And . . . you can't very well, if you're the . . . executive officer of these associations or corporations, give your money to people that are not supporting what you want, supporting your financial interest . . . ." Boren Cross Tr. (Oct. 21, 2002) at 34; *see also id.* at 32 (explaining that a Senator welcomed large corporate donors at one fundraiser by saying "I know you came tonight expecting good government and a whole lot more.").

44 *See, e.g.,* Thompson Comm. Rep. at 44-45 (detailing conversations between DNC Chair Donald Fowler and DNC Treasurer Patrick O'Connor and the White House regarding a casino application of grave interest to a large DNC donor); 147 Cong. Rec. S2448 (daily ed. March 19, 2001) (statement of Sen. Levin) ("[I]n order to get these large contributions, access to us is openly and blatantly sold . . . We sell access to insiders' meetings, strategy sessions, participation in congressional advisory groups, or trade missions."). Compare these sources with the plaintiffs' citation to the House Committee on Administration's "Adverse Report" on BCRA. RNC Opp. Br. at 2. Plaintiffs neglect to mention that the authors of this report were all opposed to BCRA. A bipartisan majority of Congress, and the President when he signed the bill, signaled that they did not share these views. Moreover, these members of Congress did not state that they disagreed on the *facts*, merely with the *conclusions* to be drawn from those facts — a viewpoint not shared by the majority of their colleagues.

45 [REDACTED].

46 [REDACTED].

47 [REDACTED].

48 [REDACTED].

49 RNC 0286400-02 [IER Tab 4].

manufacturers were promising to mount a television ad campaign to support those who voted against the bill."[50] Even under their own (incorrect) view that only the actuality or appearance of *quid pro quo* corruption gives rise to a compelling government interest, McConnell Opp. Br. at 21-22; RNC Opp. Br. at 26, the fact that many newspapers and witnesses at the time reported this comment gives rise to an appearance of *quid pro quo* corruption. The fact that the Department of Justice and the FEC ultimately decided not to prosecute Senator McConnell for conveying the offer about the tobacco bill, moreover, does little to dispel the sense that public policy should not be based — or appear to be based — on the willingness of corporations and unions to spend large sums of general treasury funds to secure votes.

Statistical evidence. Plaintiffs also distort the testimony of Professor Green. Contrary to the RNC's assertion,[51] Professor Green did not testify that existing data do not support a link between large contributions and legislative effort or access. While Professor Green acknowledged that studies done to date "on the whole" seem to show "that the typical *roll call vote* is weakly predicted by members' financial backing," D. Green Expert Report at 24 (emphasis added), he explained that "legislative effort may ultimately be more consequential than roll call votes," *id.* at 21, even though it is harder to quantify in a political science study. He explained:

> One may readily imagine two legislators with identical voting records. One does nothing to assist a bill's passage. The other takes an active role shepherding the bill through the drafting and markup processes, buttonholing fellow legislators in an effort to drum up support . . . obtaining a favorable rule concerning amendments, and so forth.[52]

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50 *See* McCain Decl. ¶ 8 (quoting Tobacco-Free Kids Complaint *available at* http://www.commondreams.org/pressreleases/June98/062998c.htm).

51 RNC Opp. Br. at 9.

52 D. Green Expert Report at 21.

Professor Green's cross-examination says nothing to the contrary.[53] Moreover, Professor Bok has testified that "[c]ountless studies have shown how political contributions are often followed by favorable actions in Congress — exemptions, delays, or even the defeat of unwanted legislation."[54]

Polling. Plaintiffs unsuccessfully attempt to discount the findings of preeminent polling experts Professor Richard Wirthlin, Mark Mellman, and Professor Robert Shapiro because the American public does not, in plaintiffs' opinion, know what soft money is.[55] The evidence, however, does not support these charges. While the American public may not be familiar with terms like "soft money" or "hard money," the public has well-formed opinions about the influence of money in politics.[56] And when the Mellman and Wirthlin poll asked the American public about the perceived impact large contributions of money to the political parties have on the American political system, this was done without the use of the term "soft money." The poll found that a "significant majority of Americans believe that those who make large contributions to political parties have a major impact on the decisions made by federally elected officials."[57]

Similarly, Professor Shapiro, in an exhaustive review of pre-existing public polling data, concluded that the American public has "perceived substantial corruption in politics connected to large soft money political contributions, either raised by federal office holders or given to political

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53 *See* D. Green Cross Tr. (Oct. 22, 2002) at 88 (when talking about the studies he has analyzed, he explains that "the money is following a bag of goods that include access and effort and oversight and votes . . . the idea is these are quite hardheaded business people and they allocate their money because they think that it matters.").

54 Derek Bok, *The Effects of Campaign Financing on the Quality of Government* (Sept. 23, 2002) at 3-4 [DEV 2-Tab 4, hereinafter Bok Expert Report]; *see also id.* at 2-3 (explaining that large, unregulated contributions "exacerbate the most serious weaknesses in the way our government performs," specifically contributing to the fact that "our legislation is often . . . plagued by inconsistencies, special exceptions, imprecise rules and arbitrary gaps in coverage," that "our regulatory system is unusually contentious, expensive [and] time-consuming," and that "our laws are consistently less favorable to [] poor and working people than legislation in other leading democracies.").

55 *See* RNC Opp. Br. at 7-9.

56 *See* Robert Y. Shapiro, *Public Opinion & Campaign Finance* at 13-14 (Sept. 18, 2002) [DEV 2-Tab 6, hereinafter Shapiro Expert Report]; Robert Y. Shapiro, *Rebuttal to the Expert Reports of Q. Whitfield Ayres and John C. Green* (Oct. 7, 2002) at 8-10 [DEV 5-Tab 2, hereinafter Shapiro Rebuttal Report].

57 Mellman & Wirthlin Expert Report at 6 (indicating that 77% of Americans "believe that big contributions to political parties have a great deal . . . or some impact . . . on decisions made by the federal government," while only 6% of Americans "think that big contributions don't have much or any impact").

parties."[58] Furthermore, other polling data shows that 70 percent of Americans believe that the views of big contributors to political parties are sometimes more important to the decisions made by Congress than are the views of constituents or the best interests of the country.[59] Finally, "[o]ver two-thirds of Americans (68%) also think that big contributors to political parties sometimes block decisions by the federal government that could improve people's everyday lives."[60]

Plaintiffs' expert Whitfield Ayres attempts to rebut the findings of Mellman and Wirthlin by substituting actual dollar amounts for the word "large." If the public views a $50,000 hard money contribution as somewhat corrupting, it takes only common sense to infer that the perception of corruption would increase drastically when soft money contributions of $250,000, $500,000, or $1,000,000 are at stake. As Professors Wirthlin and Shapiro testified, the perception of corruption is not a light-switch, but instead a sliding scale, with the size of a contribution driving the perception of corruption. *See* Wirthlin Cross Tr. at 57, 80, 147; Mellman Cross Tr. at 69.

B. Plaintiffs Fail To Demonstrate that the Court Should Put Title I Under a Strict Scrutiny Microscope.

Plaintiffs are wrong in arguing that Title I of BCRA is subject to strict scrutiny.[61] *See* McConnell Opp. Br. at 17-19; RNC Opp. Br. at 22-24, 34-40. The complete lack of merit in this argument is best illustrated by plaintiffs' repeated, erroneous reliance on *Citizens Against Rent*

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58 *See* Shapiro Expert Report at 18.

59 Mellman & Wirthlin Expert Report at 6-8 (finding that 71% of Americans believe "that members of Congress sometimes decide how to vote on issues based on what big contributors to their political party want, even if it's not what most people in their [congressional] district want, or even if it's not what [the member of Congress] think[s] is best for the country . . . .").

60 Mellman & Wirthlin Expert Report at 8-9.

61 Of course, as previously noted, the government has a compelling interest in preventing actual and apparent corruption. *See* Intervenors' Br. at 16-17; Intervenors' Opp. Br. at 18, n.14. Intervenors do not respond further here to plaintiffs' reiteration of their arguments that BCRA's solicitation provisions are subject to strict scrutiny, *see* Intervenors' Opp. Br. at 21-23, and that Title I is subject to strict scrutiny because, they claim, it "severely" burdens rights of association, *see id.* at 43-45.

Control v. City of Berkeley, 454 U.S. 290 (1981).[62] Nowhere does the Supreme Court's opinion in *Citizens Against Rent Control* mention "strict scrutiny," a "compelling interest," or "narrow tailoring." *See* 454 U.S. at 291-300. Instead, the Court held that the challenged limit on contributions to ballot measure committees — not political parties — is unconstitutional because "[i]t . . . does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights." *Id.* at 299.

Even more telling are the concurring opinions. Justice Marshall wrote: "Because *the Court's opinion is silent on the standard of review* it is applying to this contributions limitation, I must assume that the Court is following our consistent position that *this type of governmental action is subject to less rigorous scrutiny than a direct restriction on expenditures*." *Id.* at 301 (Marshall, J., concurring) (emphasis added). Justice Blackmun, joined by Justice O'Connor, indicated that the ordinance was subject to the same scrutiny that the Court applied to contribution limits in *Buckley*: "Berkeley must demonstrate that its ordinance advances a sufficiently important governmental interest and employs means 'closely drawn to avoid unnecessary abridgment' of First Amendment freedoms." *Id.* at 302 (Blackmun, J., concurring) (citation omitted).

Plaintiffs attempt to "cabin" the *Buckley* standard as applying exclusively to contributions to candidates. RNC Opp. Br. at 34-35. But the Supreme Court has repeatedly (including in *Buckley*) applied "less than strict" scrutiny to limits on contributions to various entities other than candidates. *See, e.g.*, *California Med. Ass'n v. FEC*, 453 U.S. 182, 193-99 (1981) (plurality opinion) (limits on contributions to multicandidate political committees);[63] *Buckley*, 424 U.S. at 38 (limit on aggregate

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62 *See, e.g.*, McConnell Br. at 33; McConnell Opp. Br. at 17; RNC Br. at 52-53; RNC Opp. Br. at 36, 39 ("the strict scrutiny applied in *Citizens Against Rent Control* . . . is appropriate").

63 Plaintiffs suggest that the Supreme Court's decision in *California Med. Ass'n* is inapposite, because Justice Blackmun, who concurred to provide the fifth vote (four Justices dissenting on jurisdictional grounds), indicated that, in his view, "a different result" might follow if a contribution limit were applied to "a committee that makes *only* independent expenditures." 453 U.S. at 203 (Blackmun, J., concurring) (emphasis added). But political parties, like the

amount that may be contributed to all candidates, political committees, and political parties). The Court has done so because, as explained in Intervenors' Opposition Brief, the *Buckley* Court's principal rationale for eschewing strict scrutiny applies with equal force to limits on contributions to other political associations: a limit on the amount one may contribute to any political association, like a limit on the amount one may contribute to a candidate, entails only a "marginal restriction upon the contributor's ability to engage in free communication" and "leave[s] the contributor free to become a member of any political association and to assist personally in the association's efforts." *Id.* at 20-22.

Intervenors have already addressed plaintiffs' argument that Title I's contribution limits are really spending limits and therefore subject to strict scrutiny. *See* Intervenors' Opp. Br. at 19-21. As previously demonstrated, the fact that Section 323(a) of FECA now prohibits a national party committee from "spend[ing]" contributions that it may not lawfully receive (while leaving the party free to spend *unlimited* amounts of permissible contributions on any activity) does not transform the contribution limit into a spending limit. The RNC plaintiffs implicitly concede as much, arguing only that Section 323(b) imposes "spending restrictions" because it prohibits state and local parties from using specified contributions to pay for certain Federal election activities. RNC Opp. Br. at 39.[64] That argument is meritless as well. In order for Congress to limit contributions to state and local political parties for use in connection with federal elections, but to leave unregulated (as plaintiffs contend it must) those contributions that are used in connection with exclusively state and

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multicandidate political committees involved in *California Med. Ass'n* make *both* independent expenditures *and* contributions, including coordinated expenditures, so that Justice Blackmun's comment has no application here. Moreover, Justice Blackmun indicated that a different result might follow only because, in his view, contributions to pure independent expenditure committees pose "no such threat" of actual or potential corruption. *Id.* As demonstrated elsewhere, that is not true of contributions to political parties.

[64] The RNC also bizzarely argues that sections 323(a) and 323(b) of BCRA are non-severable. RNC Opp. Br. at 48. Both sections easily pass constitutional muster, but even if one did not, severability is a question of congressional intent, and Congress spoke directly to the question in section 401 of BCRA. That provision makes clear that, if any provision or any application of the Act is unconstitutional, the remainder survives.

local elections, Congress necessarily needed to restrict contributions raised for *uses* affecting federal elections, as Section 323(b) does, rather than imposing a blanket contribution limit on state parties. The resulting well-tailored regulation leaves state and local parties free to spend unlimited amounts of money for purely state and local activities and to spend unlimited amounts of hard money on Federal election activities. Unless the Court truly elevates "form" over "function," contrary to the Supreme Court's opinion in *Colorado II*, 533 U.S. at 474, there can be no doubt that Section 323(b) is a contribution limit, not a spending limit.

Finally, plaintiffs contend that, even if Title I is subject to less than strict scrutiny under the First Amendment, it is nevertheless subject to strict scrutiny under the equal protection component of the Fifth Amendment. RNC Br. at 57-60; RNC Opp. Br. at 43-44. The argument is fundamentally inconsistent with decades of Supreme Court precedent. Title I's restrictions on political parties are, as demonstrated, contribution limits; as such, they are no more "speaker-based regulation[s] of expression" or "statutory classification[s] impinging on a fundamental right," *see id.*, than the contribution (or coordinated expenditure) limits upheld in *Buckley*, *California Med. Ass'n*, *Shrink Missouri,* and *Colorado II*. Were plaintiffs' argument correct, all of those contribution limits should have been subject to strict scrutiny. They were not, and neither is Title I of BCRA. *See, e.g.*, *California Med. Ass'n*, 453 U.S. at 200-01 (opinion of the Court) (rejecting equal protection challenge to limits on contributions to multi-candidate political committees without applying strict scrutiny).

C. The Legislative and Adjudicative Record Amply Demonstrates a Sufficient Governmental Interest.

Plaintiffs also misstate the legal standard, and ignore 25 years of consistent Supreme Court precedent, in arguing that defendants must prove an actual or apparent *quid pro quo* arrangement and in arguing that the Court's "anti-circumvention" rationale cannot justify various provisions of

Title I. *See, e.g.*, McConnell Opp. Br. at 20-25; RNC Opp. Br. at 26-28. The Supreme Court has articulated two constitutionally sufficient rationales for campaign contribution limits. First, the Court has repeatedly held that avoiding both the actuality and the appearance of corruption in government provides an ample basis for restricting campaign contributions. *See Buckley*, 424 U.S. at 26-28; *Shrink Mo.*, 528 U.S. at 388-89. Second, the Court has recognized that Congress may take steps — including limiting conduct that is "functionally" equivalent to contributions — to prevent "circumvention of valid contribution limits."[65]

1. The Supreme Court's Oft-Expressed Anti-Circumvention Rationale Has Vitality and Supports the Constitutionality of Title I.

As the McConnell plaintiffs would have it, "[i]n *Colorado II*, the Court did not *really* apply an 'anti-circumvention' rationale at all (despite some language in the Court's opinion to the contrary)."[66] But the Court's opinion, which issued less than 18 months ago, could not have stated its *ratio decidendi* more clearly. After deciding that it must "apply to a party's coordinated spending limitation the same scrutiny . . . appropriate for a contribution limit," namely whether the restriction is "'closely drawn' to match what we have recognized as the 'sufficiently important' government interest in combating political corruption," the Court framed the issue before it as follows:

> With the standard thus settled, the issue remains whether adequate evidentiary grounds exist to sustain the limit under that standard, on the theory that unlimited coordinated spending by a party *raises the risk of corruption (and its appearance) through circumvention of valid contribution limits.*[67]

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65 *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 456, 465 (2001); *see also Shrink Missouri*, 528 U.S. at 392-94; *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."); *California Med. Ass'n*, 453 U.S. at 198-99; *Buckley*, 424 U.S. at 38.

66 McConnell Opp. Br. at 23-24 (emphasis added). The RNC plaintiffs dismiss *Colorado II* as "inapplicable." RNC Opp. Br. at 27.

67 533 U.S. at 456 (internal citations omitted) (emphasis added).

In addressing that issue, the Court emphasized that "there is no recent experience with unlimited coordinated spending."[68] As a result, Congress's judgment was necessarily predictive, based not on actual experience with such spending, but on how the parties had behaved under the rules that did exist, and, as the Court accordingly framed the inquiry, "the question is whether experience under the present law confirms a serious threat of abuse from . . . unlimited coordinated party spending." *Id.* at 457. Based upon evidence of "how candidates, donors, and parties test the limits of the current law" and predictions by participants in the political process and experts, *see id.* at 457-61, the Court upheld Congress's predictive judgment that contribution limits would be eroded by allowing parties to engage in unlimited coordinated spending. *Id.* [69] In so doing, the opinion for the majority emphasized that "*all* members of this Court agree that circumvention is a valid theory of corruption."[70]

The *Colorado II* Court's characterization of the anti-circumvention rationale as "long-recognized"[71] was well-founded. *Buckley* itself called measures enacted "to prevent evasion" of contribution limitations "no more than a corollary" to the limits themselves.[72] In *California Med. Ass'n*, the Court rejected a contention that limits on contributions to PACs did not serve a sufficiently important government interest, holding that these limits are "an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*."[73] And in *Austin*, the Court upheld a state ban on corporate campaign expenditures as applied to the nonprofit Michigan Chamber of Commerce because otherwise

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68 *Id.* at 457; *see also* Intervenors' Br. at 53.

69 *Id.* at 464.

70 *Id.* at 456 (emphasis added).

71 *Id.* at 456 n.18.

72 424 U.S. at 38

73 453 U.S. at 198-99 (plurality opinion); *id.* at 203 (Blackmun, J., concurring in part).

"[b]usiness corporations . . . could circumvent the Act's restriction by funneling money through the Chamber's general treasury."[74]

Plaintiffs respond to the government's asserted interest in "anti-circumvention" of the campaign finance laws as if it were wholly unrelated to the government's interest in preventing political corruption in the first place.[75] But circumvention of campaign finance laws raises the same risk of actual and apparent corruption that underlies those laws. The McConnell plaintiffs say that the *Colorado II* Court only upheld the FEC's limitations on coordinated expenditures because "expenditures coordinated with federal candidates are the *functional equivalent* of direct contributions to the candidates themselves."[76] But, *Colorado II* rested on the more general premise that "unlimited coordinated spending by a party raises the risk of corruption (and its appearance) through circumvention of valid contribution limits." As defendants have already demonstrated in considerable detail, the raising and spending of soft money to circumvent FECA's source and amount limits has contributed greatly to the public's perception that moneyed special interests unduly (and corruptly) influence the electoral process.[77]

2. *The Supreme Court's Oft-Expressed Concern About Actual and Apparent Corruption Has Never Been Confined to Quid Pro Quo Episodes.*

The McConnell plaintiffs argue that the Court has "defined 'corruption' as arising only in situations in which contributions or expenditures are made, or appear to be made, as a *quid pro quo* to secure or influence a particular action by federal officeholders and candidates." McConnell Opp. Br. at 21. This argument brazenly ignores settled Supreme Court precedent. As the Supreme Court

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74 *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 664 (1990).

75 *See, e.g.*, McConnell Opp. Br. at 23 ("*In the alternative*, defendants argue that the government has an interest in imposing additional limits that, while themselves not justified by the anti-corruption rationale, are necessary to prevent circumvention of existing limits that are justified by the anti-corruption rationale.").

76 *Id.* at 24 (emphasis added).

77 *See* Intervenors' Br. at 44-50; *see also Colorado II*, 533 U.S. at 456.

recently explained in *Shrink Missouri*, when the *Buckley* Court spoke of "'improper influence' and 'opportunities for abuse' in addition to '*quid pro quo* arrangements,' [the Court] recognized a concern not confined to bribery of public officials but *extending to the broader threat from politicians too compliant with the wishes of large contributors.*" *Shrink Missouri*, 528 U.S. at 389 (emphasis added).[78] As the Court further explained, "[t]hese were the obvious points behind our recognition that the Congress could constitutionally address the power of money 'to influence governmental action' in ways 'less blatant and specific' than bribery." *Id.*

The Court adopted this standard in recognition of the profound importance that campaign finance laws play in maintaining and securing public confidence in the democratic process. As the *Buckley* Court observed, it adopted the standard described above because "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley,* 424 U.S. at 27. In *Shrink Missouri*, the Supreme Court echoed this rationale:

> Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works "only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."[79]

BCRA represents a bipartisan effort to restore the people's "faith in those who govern." *Id.* The government interests in preventing corruption and the appearance of corruption "directly implicate 'the integrity of our electoral process.'"[80]

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78 Plaintiffs rely repeatedly on the FEC's admission that it has no evidence that any Member of Congress changed a vote due to soft money but neglect to mention that neither the DOJ nor Intervenors has made the same admission. RNC Opp. Br. at 3, 26. In fact, Intervenors have proffered evidence of corruption of this sort. *See, e.g.,* McCain Decl. ¶¶ 5-11; Feingold Dep. Tr. at 60-61, 64.

79 528 U.S. at 390 (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1961)).

80 *Nat'l Right to Work Comm.*, 459 U.S. at 208 (quoting *United States v. UAW*, 352 U.S. 567, 570 (1957)).

Drawing on the Court's recognition of the profound importance that campaign finance laws play in maintaining and securing public confidence in the democratic process, Justice Breyer has explained that, when a campaign finance rule is challenged, "First Amendment-related interests lie on both sides of the constitutional equation."[81] Although plaintiffs seek to discredit this rationale as new, *see, e.g.,* McConnell Opp. Br. at 18, this approach was in fact applied in *Buckley* when the court balanced the importance of maintaining the integrity of the electoral process against other constitutional freedoms.

D. Title I Is Closely Drawn.

Proceeding on the false premises that BCRA is subject to strict scrutiny and that the only form of actual or apparent "corruption" that Congress may be address is "*quid pro quo* corruption," plaintiffs further contend that Title I is not sufficiently tailored. McConnell Opp. Br. at 25-29; RNC Opp. Br. at 29-33; CDP/CRP Opp. Br. at 14-18, 20-24. Plaintiffs' arguments lack merit for several reasons.

First, plaintiffs misconstrue the relevant case law. As demonstrated above and in defendants' prior submissions,[82] the soft money provisions are subject to a "less stringent test than strict scrutiny" and need not be the "least restrictive means" to serve the government's interest.[83] Moreover, in considering whether a particular statute is closely drawn, courts have consistently declined to second-guess Congress's "failure to engage in . . . fine tuning," *Buckley*, 424 U.S. at 30, or "a legislative determination as to the need for prophylactic measures where corruption is the evil feared."[84]

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81 Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 253 (2002).

82 *See* Intervenors' Br. at 14-19; Gov't Br. at 59-60; Intervenors' Opp. Br. at 17-23; Gov't Opp. Br. at 3-4.

83 *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1322 (9th Cir. 1992).

84 *Nat'l Right to Work Comm.*, 459 U.S. at 210; *cf. Turner Broad. Sys. v. FCC*, 512 U.S. 622, 665 (1994) ("[c]ourts must accord substantial deference to . . . predictive judgments of Congress"), *aff'd*, 520 U.S. 180 (1997).

Second, plaintiffs' arguments depend on a series of mistaken assertions about the scope and effect of BCRA. The Act they describe is a statutory strawman, made up to create constitutional problems where none exist. Thus, for example, the RNC plaintiffs suggest that BCRA's prohibition on national parties' spending or directing soft money precludes *any* national party participation in designing and implementing "Victory Plans" that use non-federal money raised by state parties (including Levin funds). RNC Opp. Br. at 24. In fact, national parties and their agents may participate in campaign strategy discussions and coordination with state parties concerning expenditures for federal election activities by the state parties either with hard money and Levin funds or with exclusively hard money, provided that national parties do not control the spending of Levin funds.[85]

Similarly, in challenging the state party soft money provisions, the CDP plaintiffs wrongly claim that BCRA swallows up the very state and local election activity. *See, e.g.,* CDP/CRP Opp. Br. at 7-8; *see also id.* at 21 (asserting that "Federal election activity encompasses virtually all party activity"). Plaintiffs argue that BCRA has "imposed a federally dictated clamp on the use of *all* state-regulated money" — including the use of soft money for what they assert is purely state election activity. CDP/CRP Opp. Br. at 16. In support of this argument they characterize almost all state or local party advocacy for state or local candidates as "get-out-the-vote" activity and thus "Federal election activity." CDP/CRP Opp. Br. at 7-8, 16-18.

The RNC plaintiffs try to undercut the deference due Congress in this area by arguing that no such deference is due in cases involving the regulation of entities, such as parties, that are formed expressly to participate in political debate. *FEC v. Nat'l Conserv. Political Action Comm.*, 470 U.S. 480, 500 (1985). But this reading of *NCPAC* is untenable. In *NCPAC,* the Supreme Court in no way cut back on what it termed "proper deference to a congressional determination of the need for a prophylactic rule"; rather, the Court applied that deference in full measure, though it ultimately concluded that the statute was unconstitutional. *Id.*

[85] This is not to say they may coordinate with respect to expenditures by outside groups that do not comply with the source prohibitions, amount limitations, and reporting requirements for "contributions" under the Act. *See* 2 U.S.C. § 441a(a)(7)(B)(ii). Likewise, 2 U.S.C. § 441a(d) limits party spending in coordination with a federal candidate. As opposed to the "spend" or "direct" language of 2 U.S.C. § 441i(a)(1), 2 U.S.C. § 441a(a)(7)(B)(ii) broadly defines coordination to include expenditures "made by any person in cooperation, consultation, or concert with, or at the request or suggestion of" a party committee.

But BCRA does *not* define all state or local party mailings, other communications, or activities that advocate exclusively the election or defeat of state or local candidates as "get-out-the-vote activity." Such activities are "Federal election activities" only if they otherwise meet the standards for GOTV activity and are conducted in connection with an election in which a federal candidate appears on the ballot. GOTV activities involve particular efforts to secure voter turn-out for purposes of an election, such as by providing voters with information regarding the times and locations of voting, helping to transport voters to the polls, and otherwise encouraging or assisting voters to turn out.[86] This hardly constitutes the entirety of state party election activity. Most significantly, state parties make contributions to state and local candidates of as much money, from whatever sources, as state law allows. In addition, state parties can make expenditures of as much money as state law allows to communicate with voters in support of, or in opposition to, state and local candidates, as long as such communications do not constitute GOTV activity.

Despite plaintiffs' suggestion to the contrary, *see* McConnell Opp. Br. at 7 & n.2, the express exclusions set forth in 2 U.S.C. §431(20)(B) do not exhaustively list all state or local party activities that BCRA leaves untouched. In addition, BCRA does not regulate state or local party expenditures for voter registration activity more than 120 days before a regularly scheduled federal election; get-out-the-vote, voter identification, or generic campaign activity that is not in connection with an election where a federal candidate appears on the ballot;[87] party administrative costs;[88] the

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[86] Indeed, while California plaintiffs' opening brief lists certain state or local party communications that Intervenors agreed would constitute "federal election activity," *see* CDP/CRP Br. at 19, it fails to note other occasions where Intervenors *denied* that mass mailings advocating only the election of state candidates would amount to any form of "Federal election activity." Intervenors' Responses to CDP/CRP Requests for Admission, 2 (RFA #1), 11 (RFA #25). Furthermore, plaintiffs claim that if a national party transfers even one dollar into a state for GOTV, the entire program must be paid for with 100 percent hard money. RNC Opp. Br. at 24. That is not true. For example, if a national party transfers hard money to a state party for GOTV activities in support of a federal candidate, this would not preclude that state party from spending hard money and Levin funds on generic GOTV. *See* 2 U.S.C. 441i(b)(2).

[87] These activities are outside the scope of "Federal election activity" as defined in 2 U.S.C. § 431(20)(A).

[88] *See* 11 C.F.R. 106.7(c)(2).

costs of raising funds not used in any part to finance "Federal election activity;"[89] or the costs of purchasing state or local party office buildings.[90]

Third, plaintiffs ignore much of the record before Congress and this Court in arguing both that Title I sweeps beyond the problems it was designed to address and that, at the same time, it fails to cure those problems entirely. Thus, plaintiffs claim that Congress was primarily, if not exclusively, concerned with "large" soft money donations by corporations and unions and with the parties' use of soft money for electioneering ads; they claim that, as a result, BCRA impermissibly overreaches because it bars national party committees from receiving and using any soft money donation, from any source, and regulates state party use of soft money for communications and activities other than issue ads. *See* RNC Opp. Br. at 31; *cf.* CDP/CRP Opp. Br. at 16.

The record, however, belies such a narrow view of the problem or Congress's purpose. As the legislative history and evidence demonstrate, soft money contributions of all sizes and from all sources have been used, in direct and wholesale circumvention of FECA's contribution limits, for activities that affect federal elections. Those activities include not just sham issue ads, but voter mobilization activities and generic party campaign communications.[91] Title I reflects a concern not

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89 *See* 11 C.F.R. 106.7(c)(4).

90 Indeed, BCRA expressly provides that state and local parties may use 100 percent soft money to finance the purchase or construction of a state or local party office building. *See* 2 U.S.C. § 453(b).

Plaintiffs assert that, as to state and local committees, Title I "ban[s] disbursements" of soft money for 'issue advocacy," McConnell Opp. Br. at 28; that Title I "effectively prohibits the parties from engaging in *any* broadcast communications unless all federal money is used," CDP/CRP Opp. Br. at 16 n.13; and that BCRA's provisions "treat voter registration or GOTV efforts conducted by *state candidates themselves* as 'federal election activity.'" CDP/CRP Opp. Br. at 17 n.15. These assertions, however, misrepresent the soft money restrictions applicable to state and local parties, as well as those applicable to state and local candidates. As noted in defendants' prior submissions, Title I does not impose *any* spending limit, let alone one that precludes "issue advocacy" by state parties. Instead, the state party provisions simply require that public communications that promote, support, attack, or oppose a clearly nothing about true issue ads. And, despite plaintiffs' claim that "BCRA's provisions . . . treat voter registration or GOTV efforts conducted by *state candidates themselves* as 'federal election activity,'" CDP/CRP Opp. Br. at 17 n.15, BCRA does not prohibit individual state or local candidates from spending from unregulated soft money on voter registration or GOVT efforts. It simply requires them to pay for public communications that promote or attack clearly identified federal candidates with hard money. *See* 2 U.S.C. § 441i(f).

91 *See generally* Intervenors' Opening Br. at 20-38.

just with one size, source or use of soft money to influence federal elections, but with a problem created by the parties' use of soft money to evade federal regulation of contributions used to affect federal elections. As a result, Congress was properly concerned with all uses of soft money by national parties, with those uses of soft money by state and local parties that influence federal elections, and with the ways in which soft money is solicited by both federal officeholders and national party officials.

Plaintiffs also misstate the purpose of BCRA in arguing that the law is fatally underinclusive. For example, plaintiffs correctly assert that Mr. Tamraz, Mr. Lindner, or Mr. Riady could continue to make large individual contributions to state parties under BCRA. RNC Opp. Br. at 6, 32. But this is not "the problem" a bipartisan majority enacted BCRA to solve; rather, BCRA seeks to sever the ties between such donations and the actual or apparent corruption of *federal* officials, leaving to states the "problem" of solving their own issues related to appearance of corruption.[92] While the statute does not prohibit Messrs. Tamraz, Linder, and Riady from donating soft money to state parties, it does preclude federal officeholders and national parties from soliciting such contributions,[93] and limits the ability of the state parties to use this money in ways that influence federal elections.[94] Thus, BCRA is closely drawn to prevent large soft money contributions from corrupting federal elections.

E. Plaintiffs' Federalism Argument Lacks Merit.

Plaintiffs' federalism arguments are fundamentally flawed. Indeed, after filing lengthy opening and opposition briefs, their claims are still difficult to discern. At times, plaintiffs seem to

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92 For the same reason, while plaintiffs correctly assert that a union could contribute $10,000 to a state Levin fund for GOTV activity, BCRA ensures that this money could not be used for such activities that name federal candidates. 2 U.S.C. 441i(b)(2)(i),(iii).

93 *See* 2 U.S.C. § 441i(a), (e)(1).

94 *See* 2 U.S.C. § 441i(b); 2 U.S.C. § 431(20)(A).

argue that the federal government may not adopt laws that, although otherwise within Congress's power, have "a direct and substantial impact on the ability of States to regulate their own elections." McConnell Opp. Br. at 4. At other times, they seem to acknowledge that Congress may enact measures to protect the integrity of federal elections and federal officials, but argue that certain applications of BCRA regulate *purely* state elections. *Id.* at 5-6, 8. And, yet at other times, they seem to argue that the Constitution permits the federal government to regulate overlapping federal and state election activity, but only under "allocation" rules like those that the parties have exploited in recent years. *Id.* at 8.

Plaintiffs slide back and forth among these three theories in an attempt to obscure fatal flaws in each. Thus, when confronted with the fact that they cannot cite a single case to support their "direct and substantial impact" test, plaintiffs shift to arguing that Congress lacks the authority to regulate *purely* state elections. McConnell Opp. Br. at 5-6 (citing *Ex parte Siebold*, 100 U.S. 371 (1879) and *United States v. Bowman*, 636 F.2d 1003 (5th Cir. 1981)). And, when confronted with the fact that they cannot reasonably argue that BCRA — or any provision of BCRA — regulates *purely* state elections, they respond that BCRA has "a direct and substantial impact" on state regulation. McConnell Opp. Br. at 4. Putting aside such sleights of hand, each of plaintiffs' three federalism theories is easily refuted.

First, plaintiffs' "direct and substantial impact" argument mischaracterizes what BCRA does and is without any legal support. Plaintiffs' contention rings particularly hollow, moreover, in this case where 19 states and 2 territories — who "as a rule jealously guard [the sovereign powers of the states] against encroachment by the federal government" — that agree BCRA does not "intrude on the sovereignty of the States." State Amicus Br. in Support of Defendants at 4,5.

BCRA imposes no significant limit on the ability of the states to control their own election processes. The law does not establish qualifications for seeking or holding state office;[95] it does not set qualifications for voting; [96] it does not specify when, where or how state elections should occur; it does not require that the states adopt any rules or regulations;[97] it does not require that state officials enforce federal rules;[98] and, indeed, it does not regulate the states or state officials in any manner. Rather, the Act merely regulates the collection and transfer of funds among private parties in order to protect the integrity of federal elections and offices.[99] The contention that BCRA has a "direct and substantial impact on the ability of states to regulate their own elections" is thus, as an initial matter, incorrect.

Plaintiffs, moreover, cannot cite a single case holding — or even suggesting — that the federal government's power to protect the integrity of federal elections ends where the federal regulation also affects state elections. To the contrary, both the Supreme Court and lower courts have repeatedly made clear that such effects on state elections raise no serious issue under the Tenth Amendment or the Time, Place or Manner Clause. In *Ex parte Yarbrough*, 110 U.S. 651 (1884), *Ex parte Siebold*, 100 U.S. 371 (1879), and *Ex parte Clarke*, 100 U.S. 399 (1879), the Supreme Court affirmed Congress's authority to regulate federal elections, even when those elections are held concurrently with state elections and the federal regulation will inevitably "regulate" those state elections along with the federal elections. Indeed, in *Ex Parte Clarke*, the Court upheld a statute that made it a federal crime for a city official, who served *ex officio* as an election judge in an

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95 *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991).

96 *Cf. Oregon v. Mitchell*, 400 U.S. 112 (1970).

97 *Cf. New York v. United States*, 505 U.S. 144, 161-66 (1992).

98 *Cf. Printz v. United States*, 521 U.S. 898, 929 (1997).

99 Intervenors' Opp. Br. at 10-11 & n.28.

election for state, county, municipal and federal offices, to fail to discharge his duties *in accordance with state law*. 100 U.S. at 403-04 (emphasis added).

The holdings in *Yarbrough*, *Siebold*, and other cases are summarized in *United States v. Bowman*, 636 F.2d 1003 (5th Cir. 1981), which upheld a federal statute making it a crime to purchase votes in any election in which a federal candidate appears on the ballot. In response to a challenge much like that raised here, the Court of Appeals wrote:

> The cases just discussed can be distilled into one basic proposition: under the Constitution, Congress may regulate "pure" federal elections, but not "pure" state or local elections; when federal and state candidates are together 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 intent to expose the federal election to such corruption or possibility of corruption.[100]

Plaintiffs attempt to avoid the force of this decision — and, even more significantly, the underlying precedents — by arguing that *Bowman* (1) did *not* decide whether "the federal government may regulate vote buying and voter-registration fraud even when that conduct affects only state elections," and (2) did not raise a federalism question because there can be "no conceivable conflict between federal and state policy interests" when it comes to vote buying and voter-registration fraud. McConnell Opp. Br. at 6. In attempting these distinctions, however, plaintiffs fail to note that other courts have rejected precisely the same constitutional challenge, even where the sole federal candidate on the ballot "lacked opposition,"[101] and where "it was neither proved nor alleged . . . that the defendants engaged in any conduct to influence an election for federal office."[102] Rather, the courts have uniformly held that it is enough that a federal candidate

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100 *Bowman*, 636 F.2d at 1011.

101 *United States v. McCranie*, 169 F.3d 723, 726 (11th Cir. 1999).

102 *United States v. Garcia*, 719 F.2d 99, 102 (5th Cir. 1983).

appear on the ballot.[103] Similarly, there is no basis for inferring that *Bowman* — or any of the cases on which it relies — turned in any way on the fact that the federal statutes were non-controversial. To the contrary, one can easily imagine that prosecution of the offense at issue in *Yarbrough* — conspiracy to intimidate an African American man in the exercise of his right to vote — was anything but non-controversial in many parts of this Country in 1884.

Plaintiffs also attempt to distinguish *Bowman* on the ground that the case involved an "as-applied" challenge to the federal law, while they have brought a facial challenge to BCRA. *See* McConnell Opp. Br. at 6. This argument, of course, gets the law exactly backwards, since the proponent of a facial challenge to a statute carries a far greater burden than a party bringing an as-applied challenge. In this Circuit, the law is settled that a facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the Act would be valid."[104] Thus, in seeking to distinguish *Bowman*, plaintiffs merely point out the extraordinarily high burden that they face in this case — a burden that they cannot come close to satisfying.

Finally, controlling law in this Circuit provides further support for the proposition that otherwise permissible federal rules will not be set aside merely because they also affect state elections. In *Blount v. SEC*, 61 F.3d 938, 939 (D.C. Cir. 1995), the Court of Appeals considered the constitutionality of a rule, approved by the SEC, that "restrict[ed] the ability of municipal securities professionals to contribute and to solicit contributions to the political campaigns of *state officials*

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103 *See, e.g., McCranie,* 169 F.3d at 727; *United State v. Cole*, 41 F.3d at 303, 306 (7th Cir. 1994); *United States v. Saenz*, 747 F.2d 930, 943-45 (5th Cir. 1984).

104 *AMFAC Resort, LLC v. Dep't of Interior*, 282 F.3d 818, 826 (D.C. Cir. 2002) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). *See also James Madison Ltd v. Ludwig*, 82 F.3d 1085, 1101 (D.C. Cir. 1996); *Chemical Waste Mgt, Inc. v. EPA*, 56 F.3d 1434, 1437 (D.C. Cir. 1995). Courts, moreover, have applied the "no set of circumstances" test to facial challenges brought under the Tenth Amendment. *See West Virginia v. HHS*, 289 F.3d 281, 292-93 (4th Cir. 2002) (holding that West Virginia could not carry the "very heavy burden" of showing that statute could not "operate constitutionally under any circumstances"). In addition, as noted previously, plaintiffs' standing to assert the sovereign interests of the states cannot be squared with long-standing Supreme Court precedent. *See* Intervenors' Opp. Br. at 10 n.28.

from whom they obtain[ed] business." (Emphasis added). As plaintiffs do here, the petitioner in that case claimed that the rule constituted "an effort to regulate state election campaigns and, as such usurp[ed] the states' power to control their own elections." *Id.* at 949. Rejecting this contention, the Court of Appeals noted that the rule did not "compel[ ] the states to regulate private parties"; did not "regulate[ ] the states directly"; and did not "have anything resembling the kind of preemptive effect on states' ability to control their own election processes that might be perceived as 'destructive of state sovereignty,'" and, accordingly, held that the contention was "meritless." *Id.* at 949.

Second, plaintiffs' argument that certain applications of BCRA regulate *purely* state election activity fails on both the facts and the law. BCRA, of course, defines "Federal election activity" in a manner that applies only where "voter registration activity" takes place during the final 120 days before "a regularly scheduled *Federal election*;" where "voter identification, get-out-the-vote activity, or generic campaign activity" are "conducted in connection with an election in which *a candidate for Federal office appears on the ballot*; and where "public communications" support or oppose "to a clearly identified *candidate for Federal office*." It is exceedingly unlikely that any such conduct could ever take place without influencing a federal election. Plaintiffs suggest that "state ballot initiatives and get-out-the-vote activity that features state candidates" will have "*no* practical effect on federal elections." Yet, as previously shown, Congress, using its experience and particularized expertise, reasonably found that activities of this sort inevitably affect federal elections, and, indeed, are often designed with the principal purpose of affecting federal elections.[105]

In addition, as noted above, the Courts of Appeals have recognized that Congress may legitimately protect the integrity of federal elections, and may not be put to the test of proving that

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105 *See* Intervenors' Opp. Br. at 25-27; Intervenors' Br. at 61-63.

each and every application of the federal law involved conduct that actually influences a federal election. Rather, even absent such evidence, Congress has "ample power to regulate conduct in the pendent state election to exclude the possibility of tainting, distorting, or otherwise unfairly affecting the results of a federal election."[106] Plaintiffs' contentions to the contrary, moreover, border on the absurd. They assert, for example, that only "40 to 50 of the 435 House races" in 2002 "were considered to be closely contested," and suggest that, as a result, application of federal law in the remaining races would cross the line of permissible federal regulation. McConnell Opp. Br. at 9. They fail to indicate, however, any standard for determining which races are sufficiently close to justify the assertion of federal power and assume that neither apparent nor actual corruption can arise in a race that is not close.[107]

Plaintiffs argue that the rules prohibiting political parties from soliciting funds on behalf of "certain" tax-exempt organizations also crosses the line between permissible regulation of federal elections and impermissible regulation of state elections. McConnell Opp. Br. at 9. They fail to note, however, that the "certain" 501(c) organizations that are covered by BCRA are those that "make expenditures or disbursements in connection with an election for Federal office." 2 U.S.C. § 441i(d)(1). Moreover, plaintiffs fail to address the history of abuse that required adoption of this provision.[108] And, although plaintiffs suggest that the solicitation rule should apply only to money that can be traced to efforts to influence federal elections, this approach ignores the fungibility of money,[109] and creates the substantial risk that parties will continue to game the system by covering

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106 *Garcia*, 719 F.2d at 102.

107 The 1972 election, in which President Nixon decidedly beat George McGovern, is but one example of why this assumption is mistaken.

108 In 1996, for example, the RNC funneled $4.6 million in soft money to a 501(c)(4) group called Americans for Tax Reform, an amount more than four times the group's budget for the previous year. 144 Cong. Rec. S869, S880 (daily ed. Feb. 24, 1998) (Statement of Sen. Dorgan); *see also* [REDACTED] *see also* Thompson Comm. Rep. at 5974-79; 5979-81.

109 *See Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000) (Kozinski, J.).

all other costs of these tax-exempt organizations in order to permit them to use their remaining funds to influence federal elections. Surely, it is within Congress's authority to foreclose the opportunity for evasions of this sort.

Similarly, plaintiffs' misplaced focus on instances in which BCRA requires that the national political parties raise and use only hard money — including for activity relating to off-year elections and to make contributions to state and local candidates for use in their campaigns – both overstates the significance of this activity, and understates the risk of actual and apparent corruption that they pose. Thus, avoiding the forest, and indeed, the trees, in favor of the underbrush, the RNC leads off its discussion of the federalism issues by arguing that BCRA unduly burdens purely state election activity by barring the leadership of the RNC from soliciting soft money for a state candidate in an off-year election. RNC Opp. Br. at 17. The RNC fails to note, however, that such activity constitutes a miniscule portion of the RNC's activities,[110] and that it remains free to raise hard money, which it may then contribute to such state candidates. Similarly, the RNC asserts that it spent about $15.6 million non-federal dollars in 2001 in states where no federal candidate was on the ballot, (RNC Opp. Br. at 18), but ignores the fact that it may continue to do so as long as it uses hard dollars.

Moreover, plaintiffs' argument that these peripheral applications of BCRA do not constitute the regulation of the "manner" of holding federal elections, and thus fall beyond Congress' power under the Time, Place and Manner Clause, misses the thrust of defendants' position. As we have previously shown, there are ways in which activities of this sort can – and do – affect federal elections,[111] and thus fall within the broad ambit Congress's "general supervisory power over the

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110 Bev Shea, the RNC's Finance Director, conceded that the RNC only rarely engages in such solicitations. *See* B. Shea Cross Tr. (Oct. 18, 2002) at 78-80 (estimating that the RNC only sent letters of this sort approximately five or six times in 2000; fewer than ten times).

111 *See* Intervenors' Opp. Br. at 31-35.

whole subject" of federal elections.[112] But, more fundamentally, this argument ignores Congress's equally significant power to adopt laws that protect the integrity of federal offices from actual and apparent corruption, even apart from the conduct of elections.[113] Plainly, the solicitation of donations and contributions by that national parties, including, most notably, the four congressional campaign committees – which are composed exclusively of Members of Congress – can give rise to precisely the type of actual or apparent "undue influence" that threatens the integrity of the federal political system.

Finally, plaintiffs suggest that allocation rules that permit state and national parties to use a mix of hard and soft money on activities that may affect both federal and state elections are constitutionally ordained. *See* McConnell Opp. Br. at 8. BCRA, of course, permits state parties to use a mix of hard and soft money on certain federal election activities, just not all of them. But, even putting this fact to the side, it is difficult to fathom the argument that the federal government must permit an unlimited amount of contributions from corporations, unions and wealthy individuals to influence federal elections, so long as the parties can collect enough hard money to "mix" with these contributions. That is exactly the system that has been abused in recent years, and exactly what Congress sought to end.

Although assertedly brought to protect the sovereign interests of the states, plaintiffs' "allocation" theory is easily disposed of by the amicus brief filed by 19 states (and two territories) in support of BCRA:

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112 *Ex Parte Siebold*, 100 U.S. 371, 387 (1880).

113 *See* Intervenors' Opp. Br. at 24-27. The Court, moreover, has extended the logic of these decisions to cases that do not involve federal employees. Thus, in *Oklahoma v. U.S. Civil Service Commission*, 330 U.S. 127 (1947), the Supreme Court expressly rejected a Tenth Amendment challenge to a statute barring *state* employees, "whose principal employment is in connection with any activity which is financed . . . by loans or grants made by the United States," from taking "any active part in political management or in political campaigns." Act to Prevent Pernicious Political Activities of 1939, § 12, 53 Stat. 1147, *amended*, 54 Stat. 767.

> These campaign activities that influence federal elections may also influence state elections, but they are nonetheless subject to federal regulation. Although state parties were previously permitted to use a mix of federal and non-federal money to fund these activities, see 11 CFR 106.5, that approach is not constitutionally mandated. When federal candidates are on the ballot, every dollar spent by a party to register a voter, get a voter to the polls, or convince a voter to vote the party line, is a dollar spent to influence the outcome of the federal election. The previous "apportionment" approach proved to be a loophole through which substantial amounts of soft money were used to influence the outcome of federal elections. BCRA merely closes the loophole.

State Amicus Br. in Support of Defendants at 7.

F. Plaintiffs' Equal Protection Argument Lacks Merit.

As defendants' prior submissions have made clear, plaintiffs' equal protection challenges lack merit. We have already responded to most of the Equal Protection arguments raised by plaintiffs in their Opposition Brief, including arguments about BCRA's alleged impact on parties *vis-à-vis* interest groups. The evidence does not suggest that BCRA will create a windfall for interest groups; assuming, *arguendo*, such a windfall occurred, it would have no constitutional significance, since political parties are different in relevant ways from interest groups and PACs. *See* Intervenors' Opp. Br. at 53-54.

Although plaintiffs now assert that their "equal protection argument flows directly" from *Colorado I*, RNC Opp. Br. at 41, 44, in fact, *Colorado I* does not address an equal protection challenge at all. *See Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 608 (1996) [hereinafter Colorado I]. Moreover, the reasoning of the *Colorado I* plurality (on which plaintiffs rely) rested, in part, on the then-untested assumption that FECA prevented soft money contributions from being used to influence federal campaigns except in the context of "limited, party-building activities." *Colorado I*, 518 U.S. at 616. And, significantly, the evidentiary record before the *Colorado I* Court was developed prior to the spectacular rise in the use of soft money that

has occurred in the past decade.[114] The plurality simply did not have before it the overwhelming evidence that is before this Court demonstrating that soft money is funnelled through state parties and used principally to influence federal campaigns, thereby enabling circumvention of FECA's hard money contribution limits and increasing the prospect of actual and apparent corruption. Finally, *Colorado I* only addressed limits on expenditures, and the plurality implied that it would be entirely permissible for Congress to "change the statute's limitations on contribution" in order to prevent circumvention. *Id.* at 617; *see also* Intervenors' Opp. Br. at 50 n.146. Notwithstanding plaintiffs' attempt to characterize it otherwise, *see, e.g.*, McConnell Opp. Br. at 18, BCRA's Title I imposes contribution, not expenditure, restrictions. *See* Intervenors' Opp. Br. at 19-21.

Plaintiffs essentially acknowledge that many of FECA's provisions impose lesser burdens on parties than on other entities. *See* McConnell Opp. Br. at 30-31; RNC Opp. Br. at 42-43. Plaintiffs nevertheless assert that the fact that parties are treated more favorably with respect to *certain* FECA provisions does not permit the "government . . . [to] single out [a party] and saddle it with burdens not imposed on others." RNC Opp. Br. at 43. That assertion, however, is flatly contradicted by well-established Supreme Court precedent. In *California Med. Ass'n*, the Court held that it was permissible to place greater burdens on certain contributions of individuals and unincorporated associations than on certain contributions of unions and corporations, because FECA otherwise "imposes far *fewer* restrictions on individuals and unincorporated associations than

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[114] The initial administrative complaint which led to the civil action was filed on June 12, 1986, and the parties' cross-motions for summary judgment in the civil action were filed in 1990, thereby shutting off further discovery. *See FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1451 (1993), *rev'd, FEC v. Colorado Republican Fed. Campaign Comm.*, 59 F.3d 1015 (10th Cir. 1995), *vacated, Colorado I*, 518 U.S. 604 (1996). The *Colorado I* plurality was careful to acknowledge that its conclusions about the link between independent expenditures and corruption were premised on the Court's precedents in the absence of contrary factual evidence in the record. *See Colorado I*, 518 U.S. at 617-18 (Court lacked "convincing evidence"; "Government does not point to record evidence"). The language in the controlling opinion suggests that the Court could revisit its conclusions if faced with evidence calling those conclusions into doubt; for example, the Court did not say that there *could not be* any "special dangers of corruption associated with political parties," only that it was "not *aware* of any" such dangers. *Id.* at 616 (emphasis added).

it does on corporations and unions." *California Med. Ass'n*, 453 U.S. at 200. In other words, the Court determined that Congress was entitled to impose greater restrictions on one entity with respect to a particular facet of campaign finance regulation and impose lesser restrictions on that entity with respect to other facets of campaign finance regulation. Any other result would prevent Congress from tailoring its regulations. Indeed, the *California Med. Ass'n* Court – in one of the only Supreme Court campaign finance decisions actually to address substantively an Equal Protection challenge – stated that "[t]he differing restrictions placed on [different entities] reflect a judgment by Congress that *these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process*." *Id.* at 201 (emphasis added); *accord NRWC*, 459 U.S. at 210-11 (1982). Plaintiffs' entire Equal Protection argument, including their claims of underinclusiveness and differential impact, fails to grasp this essential point.