IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, *et al.*, **Plaintiffs,** **v.** **FEDERAL ELECTION COMMISSION, *et al.*,** **Defendants.**	**Civ. No. 02-582 (CKK, KLH, RJL)**
REPUBLICAN NATIONAL COMMITTEE, *et al.*, **Plaintiffs,** **v.** **FEDERAL ELECTION COMMISSION, *et al.*,** **Defendants.**	**Civ. No. 02-874 (CKK, KLH, RJL)** **All consolidated cases.**

BRIEF OF AMICI CURIAE DELAWARE, IDAHO, INDIANA, NEBRASKA, NORTH DAKOTA, SOUTH DAKOTA, UTAH, AND VIRGINIA IN SUPPORT OF PLAINTIFFS REPUBLICAN NATIONAL COMMITTEE, REPUBLICAN PARTY OF COLORADO, REPUBLICAN PARTY OF NEW MEXICO, AND DALLAS COUNTY (IOWA) REPUBLICAN COUNTY CENTRAL COMMITTEE

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INTRODUCTION

Since the Founding, the sovereign states have overseen elections for state and local office. Because election of the public officials who constitute the state and local governments is a fundamental attribute -- arguably the fundamental attribute -- of state sovereignty, any attempt by the federal government to seize from the states the authority to oversee their own elections directly threatens their role as genuine "dual sovereigns" in our federal system.

The Bipartisan Campaign Reform Act of 2002 ("BCRA") effects a sweeping federalization of state campaign finance law, supplanting the sovereign judgments of the states and forcing upon them uniform rules for the financing of federal, state, and local election activity. These new rules regulate participation in every state and local election regardless of whether a federal candidate appears on the ballot. It applies even to those states that hold state elections only in odd-numbered, non-federal election years. It does not merely affect the state and local election activity of state and local political party committees. Rather, it fundamentally alters the way that national political party committees may participate in state and local elections. Indeed, it regulates national party activities that have no perceptible connection to any federal election. On these points, we respectfully but firmly disagree with the interpretation of the BCRA set forth by our sister states that have submitted an amicus brief in support of defendants.

Because we believe Congress has exceeded the bounds of its constitutional authority and intruded upon the sovereign powers reserved to the states, in violation of the Tenth Amendment to the United States Constitution and general principles of federalism, the States of Delaware, Indiana, Idaho, Nebraska, North Dakota, South Dakota, Utah, and Virginia ("amici

States")[1] respectfully submit this brief as amici curaie in support of plaintiffs Republican National Committee, Republican Party of Colorado, Republican Party of New Mexico, Republican Party of Ohio, and Dallas County (Iowa) Republican County Central Committee.

STATEMENT OF INTEREST

The amici States have widely disparate campaign finance laws and regulations governing state and local election activity. Just as the Federal Government's power to regulate the financing of federal election activities derives from its authority over federal elections through the Federal Elections Clause, Art. I, § 4, state power to regulate the financing of state election activities derives from the powers explicitly reserved to the states, in that Clause, to regulate their own elections. As of November 6, 2002, when the BCRA took effect, however, the states' campaign finance laws were largely overridden by federal law. That is so even in states like amicus Commonwealth of Virginia that conduct their state elections in odd-numbered, non-federal election years, when there are no federal candidates on the ballot. The amici States submit this brief to the Court in order to highlight the importance of preserving the states' freedom to supervise their own elections and to undertake their own reform efforts, in light of their unique circumstances and experience.

The conduct of state and local elections is, and always has been, the responsibility of the states. Amici and other states have evolved a distinctive panoply of laws to regulate campaign finance, reflecting differing priorities and concerns among the citizens of the several states. The concerns of South Dakota, which bans corporate contributions, are not necessarily

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[1] The Attorney General of Alabama, Bill Pryor, is a plaintiff in McConnell v. FEC, Civ. No. 02-582 (CKK, KLH, RJL). In light of his role as a named plaintiff, the State of Alabama is not joining this brief as an amicus curiae. General Pryor has authorized the amici States, however, to indicate that he is in agreement with the positions articulated herein.

shared by Utah, which allows unlimited corporate contributions. Federalizing state and local campaign finance law directly intrudes upon the sovereign powers of the states and changes the balance of power between the federal and state sovereigns. The states have a particular interest in ensuring that the Federal Government does not exceed its limited Constitutional authority at their expense, and amici submit this brief to defend that interest.

BACKGROUND

The principle of "dual sovereignty," under which the states and the Federal Government remain sovereign in their own respective spheres, is among the great innovations of our Constitution. The Supreme Court has referred to this bedrock principle of the constitutional order as "Our Federalism." As Madison explained in The Federalist, "the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." The Federalist No. 39, at 245 (C. Rossiter ed. 1961).

The Constitution's protection of the sovereign powers of the states "is not just an end in itself." New York v. United States, 505 U.S. 144, 181 (1992). It is an essential mechanism for safeguarding individual civil liberties. See id. ("The Constitution does not protect the sovereignty of the States for the benefit of the States. . . . To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals."); Printz v. United States, 521 U.S. 898, 921 (1997) ("This separation of the two spheres is one of the Constitution's structural protections of liberty.").

Under "Our Federalism," the states retain "a large residuum of sovereignty." Alden v. Maine, 527 U.S. 706, 748 (1999). That "[r]esidual state sovereignty was . . . implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, . . . which implication was rendered express by the Tenth

Amendment[]." Printz, 521 U.S. at 919. That same "implication" is embodied in general principles of federalism reflected "throughout the Constitution's text." See id.; id. at 923 n. 13 (noting that Tenth Amendment is not "exclusive textual source of protection for principles of federalism" and that "[o]ur system of dual sovereignty is reflected in numerous constitutional provisions.").

Recently, the Supreme Court has reiterated that in legislating on matters affecting the states, Congress "must accord the States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central government and the separate states." Alden, 527 U.S. at 758. Most significantly for the issues raised by the BCRA, the Court in Alden cautioned that "[w]hen the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government. . . . A State is entitled to order the processes of its own governance." Id. at 751-52 (emphasis added).

Through the BCRA, the Federal Government has in fact "assert[ed] authority over a State's most fundamental political processes." No political process is more fundamental to state sovereignty than the election of a state's public officials and representatives. See Oregon v. Mitchell, 400 U.S. 112, 125 (1970) (Black, J., controlling opinion) ("[n]o function is more essential to the separate and independent existence of the States and their governments" than the power to determine the qualifications of voters for state and local offices and "the nature of their own machinery for filling local public offices."); California Democratic Party v. Jones, 530 U.S. 567, 589 (2001) (Stevens, Ginsberg, JJ., dissenting) ("A State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty.").

For this reason, the Supreme Court has always understood the Constitution to reserve to the states the authority to oversee their own elections. See Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986) ("[T]he Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices.") (emphasis added); Oregon v. Mitchell, 400 U.S. at 135 (Black, J., controlling opinion) ("Our judgments . . . save for the States the power to control state and local elections which the Constitution originally reserved to them and which no subsequent amendment has taken from them."). By supplanting the sovereign judgments of the states in the field of campaign finance, the BCRA unconstitutionally deprives our states of their ability to "order the processes of [their] own governance," Alden, 527 U.S. at 751, in violation of the Tenth Amendment and principles of federalism.

ARGUMENT

I. BCRA IMPLEMENTS UNIFORM CAMPAIGN FINANCE RULES THAT LARGELY SUPPLANT THE DIVERSE ARRAY OF CAMPAIGN FINANCE STATUTES ADOPTED BY THE STATES.

A. The States Have Adopted A Wide Variety of Approaches to the Regulation of Campaign Finance.

Each of the 50 states, the four United States territories, and the District of Columbia has adopted its own unique campaign finance laws. See "Campaign Finance Law 2000," Chart 2-A, Federal Election Commission web site, at http://www.fec.gov/pages/cfl00chart2A.htm (visited on Oct. 30, 2002) ("FEC Chart"). In many instances, these laws date to the late 19th century and have undergone a long and deliberative process of continual development and revision. California enacted state regulation of municipal campaign finance as early as 1878. See David Schultz, Money, Politics, and Campaign Finance Reform Law in the

States (2002), at 350-51 (noting enactment of California's Pierce Clubs Act regulating municipal elections in San Francisco). Laws regulating the financing of elections for state office followed nationwide. See, e.g., Massachusetts "Act to Prevent Corrupt Practices in Elections and to Provide for Publicity of Election Expenses," Mass. Acts (1892); California "Act to Promote the Purity of Elections," Cal. Stat. (1893).

While there are principles and provisions common to many or all of the states' current campaign finance laws -- such as disclosure of campaign contributions and expenditures -- there is also great diversity among them. For example, according to the Federal Election Commission's most recent summary of state campaign finance laws, 29 states permit corporate treasury funds to be contributed to state and local candidates' campaigns. See FEC Chart. Some of those states allow unlimited corporate contributions. Among them are amici State of Utah and Commonwealth of Virginia. Most of those states also allow unlimited contributions of labor union treasury funds. In the case of Utah, corporate contributions are allowed, but labor union contributions are prohibited. See Utah Code § 20A-11-1403.

Others have adopted limits on the amounts of corporate contributions. Among them are amici States Delaware, Idaho, and Indiana. One of the amici States, Nebraska, has a slightly different approach that limits the amount of corporate funds any one candidate may accept overall. In contrast, 21 states prohibit corporate contributions to state and local candidates. See FEC Chart. Among them are amici States North Dakota and South Dakota. Many states, including all of the amici States, allow state and local political parties to receive unlimited amounts from national political party committees. Some other states limit the amount of support that may be provided to a state or local party committee by the national party committees. See id. (e.g., Hawaii, Maryland, New Jersey, Vermont, and Washington State).

There are numerous other peculiarities of state campaign finance laws, such as restrictions on contributions by certain regulated industries, prohibitions on contributions by lobbyists while the legislature is in session, regulations governing the operation of political action committees ("PACs"), and provisions for public financing of state and local elections. States such as Utah and Virginia have opted for generally non-restrictive campaign finance regimes that require complete disclosure of campaign finance activities but largely do not restrict the raising or spending of campaign funds, so long as they are disclosed.

These are just a handful of examples of the variety of rules and regulations adopted by the states, in light of each state's unique experience and history. The variety is made even richer by the fact that many municipalities have adopted their own campaign finance rules that are consistent with, but often significantly different from, the rules governing elections for state offices. New York City, for example, adopted a public financing system that includes more restrictive contribution limits than the relatively high contribution limits under state law. States and localities are continually adjusting their campaign finance laws to reflect new priorities, enforcement concerns, and changed conditions. In many cases such changes are enacted by state legislatures and city councils. In some cases they are enacted directly by citizens through ballot initiatives and referenda. See, e.g., California Proposition 34. There is constant ferment within the states, as various reforms are tested and the campaign finance laws are gradually refined. In the campaign finance context, the states truly have been, in Justice Brandeis's famous words, "laboratories of democracy." New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932).

Although the BCRA does not entirely replace the states' campaign finance laws, it substantially restricts their freedom to control their own elections. The new federal rules for state and local campaign finance are imposed on national parties even in the five states --

including amicus Commonwealth of Virginia -- that hold their elections for state office during odd-numbered years, when there are no federal offices on the ballot and there is no conceivable federal interest in regulating state campaign finance activity.[2] Outside those five states, many other states (including amicus Indiana) hold municipal elections during odd-numbered years. Again, BCRA purports to supplant state law and to regulate national party participation in these elections -- even though there is no federal candidate on the ballot.

B. The BCRA Imposes Uniform Rules that Fundamentally Alter the Way State and Local Elections are Regulated.

Ignoring the many different approaches to state and local campaign finance adopted by the states over more than a century of state-level reform, Title I of the BCRA imposes uniform rules that change the way state and local elections are financed in every state in the union, regardless of whether the state schedules its elections to coincide with federal elections.

Although our sister states who have filed as amici supporting the BCRA tend to minimize the effect of the BCRA on state campaign finance laws, their description of that effect is, regrettably, inaccurate. The following are some examples of the fundamental changes imposed by the BCRA upon national party participation in state elections:

Prohibition on national party contributions. National political party committees are prohibited from raising or spending funds, other than those raised pursuant to federal law, to make contributions to, or expenditures in support of, state and local candidates. For example, in states that permit corporate funds to be contributed to candidates, the RNC would not be permitted to raise or spend corporate funds -- in any amount -- for a contribution to the

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[2] Those states are Kentucky, Louisiana, Mississippi, New Jersey, and Virginia.

Republican candidate for Governor. All national party contributions to state and local candidates must be made with federally regulated funds. See BCRA, § 101(a) (creating new FECA § 323(a)(1)).

National party solicitation of contributions to state candidates. National political party officials are prohibited from soliciting contributions of non-federal funds to state and local candidates and political parties. See id. § 101(a) (creating new FECA § 323(a)(1)). Funds raised by state and local candidates are regulated by state and local law, not federal law. Because state and local candidates raise state-regulated money, it is a crime for an agent of a national party to assist them in fundraising. Thus, a national party chairman cannot solicit a contribution for a gubernatorial candidate even in a state that holds its elections in an odd-numbered, non-federal election year, even if the solicitation is to be sent by the contributor directly to the gubernatorial candidate's campaign.

Prohibition on national party transfers to state parties. National political party committees are prohibited from transferring funds to a state or local party committee in any amount, unless those funds are raised pursuant to federal law, regardless of how the funds are to be used by the state or local party. See id. § 101(a) (creating new FECA § 323(a)(1)). The BCRA goes further and even restricts transfers of federally regulated funds, if those funds are to be used in connection with what the BCRA vaguely and expansively calls "federal election activity." Id. § 101(a) (creating new FECA § 323(b)(2)(B)(iv)(II)). Transfers of funds among state party committees, among state and local party committees, and among national, state, and local party committees are also restricted. See id. § 101(a) (creating new FECA § 323(b)(2)(B)(iv)). Thus, the BCRA countermands the laws of all of the amici States, insofar as

those laws permit unlimited transfers of funds among national, state, and local political party committees.

National party participation in state parties' GOTV efforts. National political party officials are effectively prohibited from associating with state party officials for the purpose of organizing get-out-the-vote ("GOTV") efforts unless those efforts are paid for entirely with federally regulated funds. See id. § 101(a) (creating new FECA § 323(a)(1)). The national parties therefore cannot send their field operatives to work with state parties on their GOTV efforts, even when there are no federal candidates on the ballot, without forcing the state parties to pay for their GOTV with 100% federal funds.

The following are some examples of fundamental changes imposed on the state political parties, whenever even a single federal candidate appears on the ballot:

State parties required to use federal funds for voter registration. All voter registration activity within 120 days of a federal primary or general election will be subject to full federal regulation.[3] See id. § 101(a) (creating new FECA § 323(b)); § 101(b) (creating new FECA § 301(20)(A)(i)).

State parties required to use federal funds for GOTV. State and local political party committees must pay for certain GOTV and voter registration activities entirely with funds raised subject to federal restrictions. See id. § 101(a) (creating new FECA § 323(b)). For example, if there is a single federal candidate on the ballot, a broadcast message asking voters to

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[3] State parties must pay for such voter registration activity using either 100% federal funds or a mix of federal funds and so-called "Levin funds." Levin funds must be raised by the state parties in amounts not to exceed $10,000, regardless of whether state law would permit the party to raise funds in larger amounts.

support the Party's entire ticket must be paid for with 100% federal funds, even if, as is often the case, state and local candidates on the ballot vastly outnumber federal candidates.

State and local party joint-fundraising restricted. State and local political party committees are subjected to restrictions on their ability to engage in joint fundraising. See id. § 101(a) (creating new FECA § 323(b)(2)(B)).

Federal officeholders are restricted in raising state-regulated funds for state parties. Federal officeholders may not raise non-federal funds for a state party, other than to "attend, speak, or be a featured guest" at a state party fundraiser. See id. § 101(a) (creating new FECA §§ 323(e)(1), 323(e)(3)).

In virtually every state, these new rules conflict in varying degrees with existing state campaign finance laws, as enacted by the citizens of those states through their elected representatives. All of the amici States, for example, currently allow the national parties to make contributions to state candidates, using non-federal funds, and to solicit non-federal contributions to state candidates. All of them allow the national parties to use non-federal funds to pay for GOTV and allow national party officials to cooperate with state parties in planning GOTV efforts.

The BCRA's usurpation of state authority is most starkly apparent in those states, such as amici Virginia and Utah, that have adopted campaign finance regimes largely based on disclosure rather than limitations on the flow of campaign money. Virginia and Utah emphasize transparency rather than restrictions on the ability of parties and candidates to raise and spend campaign funds. The centerpiece of Virginia's campaign finance statute, the Virginia Campaign Finance Disclosure Act, Va. Code Ann. T. 24.1, Ch. 9, is a comprehensive disclosure regime intended to insure the transparency of all campaign-related fundraising in connection with state

and local elections. There are no limits on the source and amount of campaign contributions. Parties and candidates are free to raise as much money as they are able to attract from individuals, corporations, and labor unions. Because there are no limits, state political parties have received large transfers of funds from national party committees, which the state parties in turn have used to support state and local candidates and to mobilize voters. In 2001, for example, when there were no federal candidates on the Virginia ballot, the RNC transferred $1,817,682 to the Republican Party of Virginia and, in addition, spent $4,040,715 in support of Virginia state and local candidates. See Banning Decl. ¶ 28(a).

Utah's campaign finance law also principally focuses on disclosure. In the case of Virginia and Utah, the decision to forego more restrictive campaign finance rules reflects a thoughtful, sovereign judgment based on many years of experience in supervising elections within their borders. Nevertheless, the BCRA will now compel state and local candidates and political parties in Virginia and Utah, as in every other state, to operate under tight federal restrictions. Ironically, the amici States have had few recent controversies concerning their campaign finance systems; whereas controversies -- real or imagined -- about campaign finance at the federal level seem commonplace.

II. BCRA UNCONSTITUTIONALLY INTRUDES UPON THE SOVEREIGN POWER OF THE STATES TO REGULATE THEIR OWN ELECTIONS.

The BCRA directly regulates pure state and local election activity that the states alone are entitled to control under the powers reserved to them by the Constitution, in violation of the Tenth Amendment and principles of federalism.

A. The BCRA Regulates Pure State and Local Election Activity.

The states that have submitted a brief as amici curaie in support of defendants ("State Amici Supporting Defendants") repeatedly and incorrectly claim that the BCRA is

"tailored" to regulate "only those campaign activities that influence the outcome of federal elections." See Brief of State Amici Supporting Defendants at 5; id. at 7 ("[T]he Act is targeted to reach only activity that influences the outcome of federal elections."; id. ("[T]he Act leaves untouched those campaign activities that relate solely to state elections."); id. at 13-14 ("Congress carefully drafted the statute to avoid regulating stand-alone state elections. In fact, the Act has no relevance to a state election where there is no federal candidate on the ballot."); id. at 17-18 ("[BCRA] does not regulate state election activity that has no connection to federal elections."). These claims are simply false, and repeating them does not make them true. There is no question but that the BCRA "regulat[es] stand-alone state elections" and is directly "relevan[t] to a state election where there is no federal candidate on the ballot." It is, for example, a crime under the BCRA for a national party chairman to send a fundraising letter for a state gubernatorial candidate. As shown above, Title I of the BCRA has a pervasive effect on state and local campaign activity. It supplants what have always been state and local judgments with new, restrictive federal rules. This federal usurpation of state and local authority applies even in states and during years when there are no federal candidates on the ballot.

B. Congress Has No Power to Regulate the Financing of State and Local Elections.

As shown in the RNC's main brief, the Federal Elections Clause does not authorize the Federal Government to regulate state and local election activities. Indeed, the original understanding of the Clause, and subsequent case law, establish that the Founders reserved to the states the authority to oversee their own elections. The BCRA not only exceeds Congress's enumerated powers, it trenches deeply upon the inherent sovereign powers of the states.

The Supreme Court has repeatedly made clear the importance of protecting the sovereignty of the states against federal encroachment. In Alden, the Court emphasized that:

> Congress has vast power but not all power. When Congress legislates in matters affecting the states, it may not treat these sovereign entities as mere prefectures or corporations. . . . Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States. Alden, 527 U.S. at 758.

This is the essence of what the Court has called "Our Federalism." The Court has emphasized that "our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." Id. at 748. States are entitled to be accorded "the dignity that is consistent with their status as sovereign entities." Federal Maritime Comm'n v. South Carolina State Ports Auth., 122 S. Ct. 1864, 1874 (2002). Concern for protecting the sovereignty of the states should be especially great where Congress presumes to interfere with states' governance of their own political processes.

C. The Suggestion By State Amici Supporting Defendants That States May Simply Change the Dates of their State and Local Elections Demonstrates a Profound Misunderstanding.

Congress affirmatively did not "tailor" or "target" the BCRA to "reach only activity that influences the outcome of federal elections." See Brief of State Amici Supporting Defendants, at 7. Certainly a letter from the RNC chairman asking a loyal Republican to make a state-regulated contribution to the Republican candidate for Mayor of Indianapolis or Governor of Virginia, in a non-federal election year, does not "influence the outcome of a federal election."

As for the state political parties, Amici States Supporting Defendants' try to justify the BCRA's heavy-handed regulation -- which, for example, treats a GOTV broadcast advertisement naming a gubernatorial candidate when there are no competitive federal races on

the ballot as 100% federal activity -- by suggesting that the states remain free to reschedule their elections during non-federal election years. It is a telling suggestion.

First, the concession that for states to preserve their ability to regulate their own elections they must schedule them in non-federal election years is an extraordinary reflection of the extent to which the BCRA utterly fails to "accord the states the esteem due to them as joint participants in the federal system." Alden, 527 U.S. at 758. States are primary regulators of elections. Why should they be forced to move their elections in deference to an overbroad, untailored federal statute?

Second, it is in fact not the case that by rescheduling their elections states could save themselves from losing control over their own elections. To the contrary, as shown above, even if every state followed the five that now hold their state elections in non-federal election years, they would all still be compelled to operate under the strict BCRA regime regulating national party involvement in state and local elections, which applies regardless of when the election takes place.

CONCLUSION.

For the foregoing reasons, the amici States respectfully request that the Court strike down Title I of the BCRA on the ground that Congress acted outside the bounds of its constitutional authority, in violation of the Tenth Amendment and principles of federalism.

Respectfully submitted,

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