No. 02-___

In The Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, et al.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Do the restrictions imposed upon state and local political parties and party officers by Title I of the Bipartisan Campaign Reform Act of 2002 ("BCRA") violate Article I, section 4 of the U.S. Constitution, the First, Fifth, and Tenth Amendments, and principles of federalism?

PARTIES TO THE PROCEEDING

The following state and local political party committees, and officers of those committees, were plaintiffs in the District Court and are appellants in this Court: California Democratic Party; California Republican Party; Yolo County Democratic Central Committee; Santa Cruz County Republican Central Committee; Art Torres; Shawn Steel; Timothy J. Morgan; Barbara Alby; Douglas R. Boyd, Sr.

The following were defendants or defendant-intervenors in the District Court and are appellees in this Court: Federal Election Commission; United States Department of Justice; Federal Communications Commission; Senator John McCain; Senator Russell Feingold; Representative Christopher Shays; Representative Marty Meehan; Senator Olympia Snowe; Senator James Jeffords.

STATEMENT PURSUANT TO RULE 29.6

None of the appellants has a parent corporation, and no publicly held company owns 10% or more of the stock of any of the appellants.

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The opinions of the District Court are reported at 2003 WL 2010983, 21003118, 21003103, and 21003124 (D.D.C. May 1, 2003). Pursuant to this Court's May 15, 2003 Order, the California Appellants anticipate filing a jointly prepared appendix with other Appellants containing the opinions of the District Court.

JURISDICTION

The decision of the District Court was entered on May 2, 2003, by a three-judge court convened pursuant to 28 U.S.C. § 2284 and BCRA Section 403(a)(1). California Appellants timely filed their Notice of Appeal on May 12, 2003. App. 1a. This Court has jurisdiction under 29 U.S.C. § 1253 and BCRA § 403(a)(3).

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

The Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 is reproduced at App. 8a. Also reproduced in the Appendix are the following provisions from the U.S. Constitution: Article I, section 4 (App. 4a), the First Amendment (App. 5a), the Fifth Amendment (App. 6a), and the Tenth Amendment (App. 7a).

STATEMENT OF THE CASE

Appellants in *California Democratic Party, et al. v. Federal Election Commission, et al.* (No. 02-875) are state and local party committees, and officers of those committees, who have challenged the Bipartisan Campaign Reform Act of 2002 ("BCRA") on the grounds that BCRA violates the constitutional rights of the state and local parties under the First, Fifth and Tenth Amendments, and that it exceeds Congress' authority under the Elections Clause (Article I, Section 4) and violates principles of federalism.

According to its sponsors, BCRA is designed to close "loopholes" that have allowed non-federal (or "soft" money) to intrude into federal elections and permitted political parties and organizations to disseminate "sham" issue ads. In the name of closing these "loopholes," and in order to prevent the possibility of future harms (many of which are simply conjectural), BCRA prohibits a broad range of speech, conduct and associational activity. With respect to the political parties, it is designed to isolate the various units of the parties and ensure that their collective activities are limited. In fact, many of these "loopholes" exist precisely because certain speech and association activities are entitled to constitutional protection. *See, e.g.,* Op. Henderson, J. at 293: "[D]efendants' assertions and BCRA's restrictions reflect little more than the frustration with First Amendment principles firmly rooted in *Buckley, Citizens Against Rent Control, and Colorado Republican I*."

The key provisions of BCRA are contained in Titles I and II. Title I, which is the focus of the California Appellants, contains a host of new restrictions on the political

parties at the national, and state and local level.[1] The heart of Title I is Section 101, which creates new sections 323(a)-(f) and the definition of "federal election activity" at FECA § 301(20).

New FECA § 323(a) prohibits the national political parties from soliciting, directing or spending non-federal money for either federal elections or for state or local elections. New FECA § 323(b) similarly prohibits state and local political parties from soliciting, directing or spending non-federal money on any "federal election activity." New FECA §§ 323(c)-(f) contain related restrictions on fundraising for "federal election activities;" restrictions on donations to tax exempt organizations that engage in "federal election activities;" restrictions on federal candidates and officeholders raising, spending or directing money for "federal election activities;" and restrictions on state candidates engaging in certain "public communications" that refer to federal candidates.

Despite the name, the only connection between many of the activities that are included in the statutory definition of "federal election activity" and a federal candidate is the actual date of the election. "Federal election activity" includes any voter registration activity within 120 days of an election that includes a federal candidate; any voter

[1] Appellants also challenged BCRA section 213, which prohibits any political party committee from making independent expenditures on behalf of a candidate if any unit of the party has made a coordinated expenditure and, conversely, prohibits a party committee from making a coordinated expenditure if any unit of the party has made an independent expenditure. The court below unanimously found this provision unconstitutional and enjoined its enforcement. Appellants do not seek review of this finding.

identification, get-out-the-vote or generic party promotional activity conducted "in connection with" such election (regardless of whether it is actually directed at a state or local candidate); the services of any employee who spends more than 25% "in connection with" such election; and any public communication that refers to a federal candidate, and that "promotes," "supports," "attacks" or "opposes" that candidate "regardless of whether the communication expressly advocates a vote for or against a candidate." New FECA § 301(20)(A).

BCRA requires that all "federal election activity" be funded with federal money, even if that activity is, in fact, directed at state or local candidates. This means that money lawfully raised under state law (i.e., non-federal money) cannot be used for most state and local election activity. As a practical matter, FECA § 323(b) results in the vast majority of state and local election activity being subjected to federal regulation and federal financial restrictions. Some activities may be funded, in part, with "Levin funds," a new category of federally regulated money. Contributions of Levin funds may be made from sources prohibited by federal law (e.g., unions or corporations), but the limit on the amount that may be contributed is exactly the same as the limit on federal contributions.

Both the legislative history and the actual language used demonstrate clearly that Congress intended the definition of "federal election activity" to encompass most of the campaign activities traditionally performed by the state and local political parties – activities such as voter registration, walking precincts, and calling prospective voters to remind them to turn out on election day – even

when a federal candidate is not promoted, or even mentioned. In fact, even activities expressly advocating the support or defeat of state or local candidates are transformed by the BCRA into "federal election activity" on the theory that encouraging voters to vote for a state or local candidate may "affect" a federal race on the same ballot.

The price that state and local parties have to pay under BCRA in order to use their own state-regulated funds to engage in ordinary campaign activities such as voter registration or get-out-the-vote activity in their own elections is substantial. First, they must raise all the funds themselves; they cannot make or receive transfers of federal or non-federal money – even between state or local party committees within the same state – for these activities. FECA § 323(b)(2)(B)(iv). Second, the cost of fundraising to raise money for these activities may be paid only with federally regulated money. FECA § 323(c). Third, they may not engage in joint fundraising activities with other state or local parties. FECA § 323(b)(2)(B)(ii). Fourth, they may not spend any non-federal money that has been "solicited" or "directed" to them by any federal candidate or officeholder, or any national party committee officer or agent. FECA §§ 323(b)(2)(C)(i); 323(a); 323(e).

Even if a state or local party does not choose to engage in any "federal election activity," BCRA imposes additional restrictions on that party. A state or local political party may not donate to, or solicit money for, any 501(c) organization that engages in "federal election activity," including nonpartisan voter registration, get-out-the-vote activity, or ballot measure activity, or any "527" committee, including "political committees" under state law. FECA § 323(d).

The Proceedings Below

The California Appellants challenged the provisions of FECA §§ 323(b)-(f), and the new definition of "federal election activity" at FECA § 301(20). It is their position that these provisions impermissibly subject an enormous amount of state and local election activity – indeed, the lion's share – to federal regulation and federal financial restrictions despite the fact that these activities are neither directed at federal candidates nor have any significant effect on federal races. The effect of subjecting these activities to federal regulation and at the same time limiting the amount of *state-regulated* money that can be used for those activities is to dramatically reduce the amount of money available and the ability of the state and local parties to participate meaningfully in their own state and local elections. This substantial interference with the rights of the state and local parties is not narrowly tailored to reach only activities that have the purpose of influencing federal elections and is not justified by any other important governmental interest.

In addition, the California Appellants submit that the various limitations on the parties' speech and activities interfere with their ability to act collectively in support of candidates or an ideological message. Specifically, the restrictions on joint fundraising and transfers unconstitutionally limit their ability to set organizational priorities. The prohibitions on the national parties and federal candidates being able to "spend" or "direct" non-federal money mean that those persons cannot join with the state parties in planning a unified campaign. Since many state party officers also hold offices in their national parties, these restrictions essentially remove key members of the party from direct decision-making within their party. The

restrictions on contributions to tax exempt 501(c) and 527 organizations, particularly in California, mean that the parties cannot become involved in ballot measure campaigns, and cannot provide financial support to the local Democratic and Republican clubs that do much of the grass-roots campaign work. None of these provisions are narrowly tailored to meet the asserted goals of preventing corruption of federal officeholders or circumvention of existing federal contribution limits. Moreover, they place the parties at a distinct disadvantage relative to other non-party participants in the political process who are not subject to the same associational and financial constraints.

The District Court issued its decision May 2, 2003. Each member of the Court issued his or her own opinion and separate findings of fact. Judges Kollar-Kotelly and Leon also joined a *per curiam* opinion (which focused largely on disclosure provisions not challenged by the California Appellants). Because Judge Henderson would have stricken most of BCRA's provisions as unconstitutional, and Judge Kollar-Kotelly would have upheld most of the provisions, the opinion of Judge Leon determines, in most instances, whether a particular provision was upheld or invalidated.

Judges Henderson and Leon both concluded that the most significant sections of Title I were unconstitutional. Judge Leon analyzed FECA §§ 323(a) and (b) under intermediate scrutiny. Although he erred in failing to apply strict scrutiny, he nonetheless found that these provisions were not "closely drawn" to meet an important federal objective. Op. Leon, J. at 26-37, 45-50. He also concluded that the definition of "federal election activity" at FECA § 301(20) was unconstitutionally overbroad, with the exception of the portion of that definition pertaining to

a "public communication" that "promoted," "supported," "opposed" or "attacked" a federal candidate. Op. Leon, J. at 44-45. Judge Leon concluded that the "public communication" portion of the provision is constitutional because it "directly affects federal elections and gives rise to the appearance of corruption." Op. Leon, J. at 45. He also concluded that the evidence failed to demonstrate the effect of activities such as voter registration and get-out-the-vote efforts on federal elections, or created any sense of indebtedness on the part of federal officeholders that would create an appearance of corruption. Op. Leon, J. at 48. He joined with Judge Henderson in striking down the restrictions on contributions to tax exempt organizations, but voted with Judge Kollar-Kotelly to uphold the restrictions on state candidates in 323(f). Judge Leon would have stricken 323(e), the restriction on non-federal fundraising by federal candidates or officeholders, a provision upheld by Judges Henderson and Kollar-Kotelly.

Judge Henderson would have stricken most of BCRA, finding it "unconstitutional in virtually all of its particulars" and describing it as "break[ing] faith" with fundamental First Amendment principles. Op. Henderson, J. at 5. Because Judge Henderson concluded that the restrictions on speech and association could not properly be characterized as "contribution limits," she applied strict scrutiny. Finding that the provisions of FECA §§ 323(a) and (b) were not narrowly tailored to serve a compelling government interest, she would have invalidated both. Op. Henderson, J. at 172-175, 285-306. In so doing, Judge Henderson specifically rejected as insufficient the government's argument that state activities could be regulated because they might have some effect on a federal race taking place at the same time. She also found unconstitutional

FECA § 323(c), the restrictions on fundraising, FECA § 323(d), the restrictions on contributions to tax exempt organizations, and FECA § 323(f), the restrictions on state candidates' use of non-federal funds for "public communications" that mentioned federal candidates.

Judge Kollar-Kotelly would have upheld Title I in its entirety. Reasoning that all of Title I was a "contribution limit," she applied intermediate scrutiny. She then concluded that the provisions were "closely drawn" to achieve the governmental interests in preventing the corruption of federal officeholders or circumventing the federal contribution limits. As Judge Leon correctly observed, Judge Kollar-Kotelly's interpretation and application of this Court's circumvention cases "dictates a novel application of that precedent."

SUBSTANTIAL QUESTIONS ARE PRESENTED

As acknowledged by the majority of the court below, BCRA significantly limits the fundamental ability of the state and political parties to participate in the political process, including their own state and local elections. Section 101 defines "federal election activity" as virtually any activity that takes place in proximity to an election which includes a federal office, without regard to the purpose of the expenditure. In doing so, it brings within its regulatory sphere the vast majority of state and local election activity, including activities that are intended to influence only state and local elections. In the name of "regulating" the parties' "federal" election activity, BCRA imposes significant and constitutionally unprecedented

barriers to normal communication and traditional associational activities. In imposing such restrictions, it also impermissibly singles out the political parties while allowing and even encouraging similar conduct by other groups in the political arena.

Although the court below invalidated FECA §§ 323(a), (b), (c) and (d), it upheld 323(e) and (f). In addition, while the court found that the definition of "federal election activity" at FECA § 301(20) was unconstitutional, it severed out and saved the "public communication" portion of that definition which is itself unconstitutionally overbroad. Because of the constitutional questions raised by virtually every provision in new FECA §§ 323(a)-(f), and the related definition of "federal election activity" at FECA § 301(20), this Court should note probable jurisdiction to review those provisions and the District Court's failure to declare them unconstitutional in their entirety.

I. The Extensive Regulation of State and Local Election Activity Exceeds Congress' Authority to Regulate Federal Elections

Although Congress did not expressly identify the authority under which it enacted BCRA, it has been assumed that authority is asserted under the Elections Clause of the Constitution (Article I, § 4). *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 13 & n.16 (1976) (noting that Congress' authority to regulate federal elections is well established). The Elections Clause on its face gives Congress authority to regulate the "time, places and manner" of federal elections.

BCRA, however, goes well beyond the regulation of federal elections and comprehensively regulates election

activity at the state and local level if those elections are held at the same time as any federal election. The Federal Elections Clause has never been construed to provide such authority to Congress, and principles of federalism preclude any such construction. In striking down a Congressional enactment lowering the voting age for state elections, but upholding it with respect to federal elections, Justice Black cautioned that although Congress had broad supervisory authority over federal elections, the Constitution made clear that equivalent power to regulate state elections was left to the states as sovereign entities. *Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970) (opinion of Black, J.); *see also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (power given to Congress by Article I, § 4 over federal elections matched by state control over election process for state offices); and *California Democratic Party v. Jones*, 530 U.S. 567, 590 (2000) (Stevens, J., dissenting) ("[a] State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty").

The states, in exercising this sovereignty, have come up with a range of campaign finance regimes – some less restrictive than the federal system, some more restrictive. California, for example, allows unrestricted contributions for non-candidate expenditures and allows contributions of up to $25,000 for candidate-related expenditures because the voters believed that the parties "play an important role . . . and help insulate candidates from the potential corrupting influence of large contributions." Op. Henderson, J. at 164, Finding ¶ 72. BCRA defines typical state and local party activities such as voter registration, get-out-the-vote communications (even for state or local candidates), and generic party promotion as "federal election activity"

and then subjects these activities to federal regulation, including spending limits. Such action on the part of Congress effectively (and impermissibly) nullifies the considered decisions of the states on these matters, and it does so without requiring any nexus between the activity or communication regulated and a federal candidate other than proximity to a particular election.

Because Judges Henderson and Leon invalidated most of the restrictions of FECA § 323(b) on First Amendment grounds, they did not reach the question of whether Article I, § 4 confers authority on Congress to regulate state and local elections, although Leon termed the issue "considerable." Op. Leon, J. at 45. Judge Kollar-Kotelly concluded that none of the plaintiffs below had standing to raise the issue. Op. Kollar-Kotelly, J. at 600-608.

II. BCRA Violates The Political Parties' First Amendment Rights of Speech and Association

This Court has held that the government may lawfully impose limitations on political contributions without violating the First Amendment if those limits are "closely drawn" to match a "sufficiently important governmental interest." *Buckley*, *supra*, 424 U.S. at 25; *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-388 (2000). However, BCRA imposes several restrictions on solicitation and spending that are neither closely drawn nor justified by a sufficiently important governmental interest. Moreover, BCRA goes well beyond mere contribution limitations and imposes direct restrictions on speech and associational activities of the political parties and their officers. In fact, the court below found that these provisions were almost

entirely unconstitutional, although it erred in applying less than strict scrutiny in analyzing them.

Fundamentally, BCRA prohibits the state and local parties from spending money lawfully raised under state law on state election activities such as voter registration or get-out-the-vote activities, even if directed at state or local candidates. Although it allows *limited* state-regulated funds to be used in *some* circumstances, the conditions imposed on the use of such money are extremely onerous and pose separate and independent restrictions on association: the state-regulated money cannot have been transferred to the party from another unit of the party and cannot have been jointly raised with another unit of the party. It must have been raised using only federally regulated money. The restrictions on transfers *of any size* and on joint fundraising directly interfere with the parties' autonomy. *See California Democratic Party v. Jones, supra*, 530 U.S. at 582. All of these restrictions now exist for state-regulated money raised by state and local political parties for use in state and local elections. As the state parties demonstrated below, these restrictions have a direct and devastating effect on the ability of the parties to function effectively in support of their state and local candidates. The Court properly found that the restrictions imposed upon the parties were not sufficiently related to any interest in preventing corruption to be constitutionally permissible, although the court's decision to leave the "public communications" provision intact forces the parties to continue to live with many of the associational restrictions still in place, at least as to those activities. This portion of the court's decision was error and should be reversed.

Also prohibited outright are "donations" to, or solicitations for, tax exempt organizations under IRS Code section 501(c) if they engage in "federal election activity," including nonpartisan voter registration or get-out-the-vote activities. As the California Appellants demonstrated, ballot measure committees are normally 501(c) organizations. They engage in get-out-the-vote activities. The effect of BCRA is therefore to prohibit the political parties from making any direct contributions to, or soliciting on behalf of, ballot measures. This absolute restriction on the parties' ability to become involved in important electoral issues in the state flies in the face of this Court's holding in cases such as *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) and *Citizens Against Rent Control/Coalition For Fair Housing v. Berkeley*, 454 U.S. 290, 299 (1981).

Additionally, the parties are prohibited from contributing to, or soliciting for, state political committees registered under IRS Code § 527. Any organization that is supporting state or local candidates that is not a party committee is required to file under section 527. The local "Young Democrats Club" or "Lincoln Club" is typically a 527 committee. Their main activities are usually voter registration or get-out-the-vote activities – often for state or local candidates. The effect of this restriction is to prohibit political parties from providing direct financial support to these clubs which are often the "grass-roots" component of the party structure. The court correctly invalidated these restrictions and California appellants do not seek review on this issue.

In addition to the above restrictions, BCRA significantly limits the associational activities of the parties in additional ways. By making it a federal crime for federal candidates and officeholders (or their agents), or the

national parties (or their officers or agents) to "spend," "solicit," or "direct" non-federal money, BCRA essentially makes it illegal for these persons to engage in traditional campaign activity with their state or local counterparts. The Democrats' "Coordinated Campaign" and the Republicans' "Victory Plan" are efforts to bring all the various levels of the party together to plan and strategize, assess and allocate resources and set priorities for their campaign activities up and down the ticket. Critical state or local races can be an important focus of these campaign activities. If discussions take place about the raising, spending or directing of state-regulated resources, any federal candidate (or her representative) and any national party representative who is in the room is putting himself or herself at risk of prosecution. Since many state or local party officers are also national party officers, this prohibits these important party members from direct participation in decision-making. The chilling effect of such a possibility on the officers themselves is obvious and the existence of such restrictions forces the parties to significantly restructure or forego their traditional associational activities. These restrictions cannot withstand the "closest scrutiny" that must be given to such limitations on associational activity. *See NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958); *see also Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989).

Finally, the very vagueness and/or overbreadth of many of BCRA's terms render certain provisions unconstitutional. The "public communications" restriction upheld by the court illustrates the point. The court concluded that Congress could properly regulate one category of "federal election activity" – any "public communication that refers to a clearly identified candidate for Federal office . . . and

that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) . . . " As a "federal election activity," all such public communications must be paid with 100% federal money.

A "public communication" includes "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public . . . " Because the definition includes mail and other written communications media, it is substantially broader in scope than the "back-up" definition of "electioneering communications" in Title II which is structured similarly to include communications that "support," "promote," "attack" or "oppose" a clearly identified federal candidate. Although the court apparently believed that the terms "promote" or "attack" were sufficiently precise, it is evident that these terms are, in fact, extremely subjective. In fact, an argument could be made that *any* mention of a candidate either serves to promote or attack that candidate, depending on the light in which he or she is cast. And the fact that it extends to many communications not included in the Title II definition makes it even more problematic for the parties who routinely send out party mail that refers to federal candidates in contexts that may be prohibited by this language, e.g., fundraising solicitations for the party itself, endorsements of state candidates or ballot measures, and even voter registration materials.

This is precisely the kind of vague language rejected in *Buckley*, *supra*, 424 U.S. at 44 & n.52, 80. The Court erred in concluding that Congress could constitutionally

restrict any "public communication" by a political party that falls within the broad definition provided by BCRA.

III. The Provisions of BCRA Violate Equal Protection

BCRA imposes restrictions on the speech and associational activities of the political parties that are not similarly imposed on other participants in the political process. Distinctions drawn in these areas must be given the most exacting scrutiny. *See Police Dep't of Chicago v. Mosely*, 408 U.S. 92 (1972). As the record well documents, the inevitable result of many of BCRA's restrictions is that non-party organizations will begin performing many of the functions traditionally performed by parties without being subject to the substantial restrictions imposed on the parties themselves. To the extent that these organizations typically have a narrower focus than the parties and considerably less transparency than the parties, BCRA's goals are likely to be frustrated rather than achieved by the restrictions imposed.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction.

Respectfully submitted,

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