RNC TITLE I ARGUMENT

INTRODUCTION AND SUMMARY

Today, when BCRA becomes effective, the American political landscape will change dramatically — for the worse. The consensus of opinion among political scientists and professionals, as well as the United States Supreme Court, is that political parties serve a host of unique and valuable functions in American democracy. Nonetheless, at a time when the specter of government "corruption" is at an all-time low, *see* Keller Declaration ("Decl.") ¶55, BCRA directly targets political parties in numerous, often irrational, ways. It is against this background that the BCRA's constitutionality must be considered.[1]

The Republican National Committee ("RNC") and its state and local party co-plaintiffs begin with a recitation of the relevant facts and an explanation of the challenged provisions of Title I. We then demonstrate the many ways Title I offends the Constitution. *First*, we explain that Title I of BCRA is an assault on the federal structure of American government, exceeding Congress' delegated authority and infringing the principles of federalism embodied in the Constitution (Part I). *Second*, we show that Title I violates political parties' First Amendment right of association (Part II), restricts their "pure speech" through its restrictions on the solicitation of lawful contributions (Part III), and undermines their ability to engage in effective political advocacy (Part IV). *Third*, we emphasize that Title I singles out political parties for unfavorable treatment by subjecting them to unique disabilities in violation of the equal protection components of the First and Fifth Amendments (Part V).

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[1] For the Court's convenience, in lieu of citing to the various "volumes" of record material, the RNC will, as soon as practicable, lodge with the Court an "interactive" CD that will permit the Court to "jump" instantaneously from the text of the RNC's brief to the material that the brief cites for support.

FACTUAL BACKGROUND

"Soft Money" and the Pre-BCRA Regulatory Landscape. Title I of BCRA is designated "Soft Money of Political Parties." Although we describe BCRA's provisions in greater detail below, Title I essentially (i) prohibits national party committees (like the RNC) from receiving, directing, transferring, or spending any "soft money" for any purpose, and (ii) prohibits state party committees from spending "soft money" for what the statute calls "Federal election activity." "Soft money" is an imprecise term, but in general is used to refer to funds that are regulated by *state* campaign finance statutes; "hard money," by contrast, is regulated by the Federal Election Campaign Act ("FECA"), 2 U.S.C. §431 *et seq*. Because, as the FEC itself has recognized, the "soft money" label is pejorative and inherently misleading, this brief refers to "federal" and "nonfederal" (or, alternatively, "state-regulated") money.[2]

Political parties use federal money to make contributions to federal candidates and for campaign expenditures that expressly advocate a particular federal candidate's election or defeat. Parties have used state-regulated money, *inter alia*, to make contributions to and expenditures on behalf of state and local candidates. Accordingly, contrary to defendants' position here, the FEC recognized early on that nonfederal, or "soft," money is merely a byproduct of our federal system of government:

> "The origins of 'soft money' lie in the United States' federal system of government. The Constitution grants each state the right to regulate certain activities within that state. In the area of campaign finance, each state may establish its own rules for financing the nonfederal elections held within its borders. As a result, committees that support both federal and nonfederal candidates frequently must adhere to two different sets of campaign finance rules

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[2] *See* 67 Fed. Reg. 49064, 49064-65 ("Because the term 'soft money' is used by different people to refer to a wide variety of funds under different circumstances, the Commission is using the term 'non-Federal funds' in the final rules rather than the term 'soft money.' ... Moreover, non-Federal funds are regulated by State law.").

— federal and state. (Sometimes, cities and counties create yet a third set of rules governing the financing of local elections.)" FEC, Twenty Year Report, Ch. 3, p. 4-5 (April 1995).

The FEC thus understood that certain political party activities either are undertaken jointly on behalf of state and local, as well as federal, candidates, or are undertaken in close proximity to state and local, as well as federal, elections. For this reason, the FEC adopted "allocation regulations" to govern such "mixed" activities as overhead, full-ticket voter mobilization, communications with supporters, and certain advertising. 11 C.F.R. § 106.5. Accordingly, for instance, FEC rules required the Senate and House national campaign committees to use at least 65% federal money for all of their mixed activities; the RNC and the DNC were required to fund mixed activities with at least 65% federal money during presidential election years and 60% during other years. Staff salaries, utilities, and other overhead costs were paid pursuant to these allocation ratios. Josefiak Decl. ¶23. Title I of the BCRA now requires national political parties to fund *all* of their activities with 100% federally-regulated money.

State parties were also required (under pre-BCRA law) to allocate their spending on mixed activities, but did so based in part on the ratio of federal to state and local candidates on the ballot. *Id.* Because a typical ballot will have more state and local than federal candidates, state party allocation ratios frequently required a lower percentage of federal money than national party ratios. Title I of BCRA subjects all, or virtually all, of these state party "mixed" activities to full federal regulation.

The Importance of Political Parties in American Democracy. As the Supreme Court has recognized, "[t]he formation of national political parties was almost concurrent with the formation of the Republic itself." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). Now, as then, parties play an "important and legitimate role . . . in American elections." *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996). Indeed, the

Supreme Court has said that "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together [in parties] in promoting among the electorate candidates who espouse their political views." *Jones*, 530 U.S. at 374.

During periods when political parties have been strong, public participation in the political process has likewise been strong, and parties have been able to exercise both a moderating and mediating influence on the political process. Keller Decl. ¶¶13, 20, 23, 29, 47, 52-53; Milkis Decl. ¶¶8, 23(c), 25; La Raja Decl. ¶11. When parties have been weak, however, as during the peculiarly-named "Era of Good Feelings" from 1812 to 1828, in the pre-Civil War years from 1848 to 1860, and more recently in the 1970s, special interest groups with narrow and often extreme agendas have exerted significant influence, voter participation and turnout have declined, and government has been impotent to address pressing social and economic issues. Keller Decl. ¶¶10, 16-19, 29, 32, 47, 53, 57; Milkis Decl. ¶¶15-20, 23(d), 30; La Raja Decl. ¶13.

Functions performed by parties. Political parties have played four critical roles in maintaining a stable constitutional order. *First*, they have coordinated and reconciled various local, state, and national entities within our federal system of government. "'Among the most important [influences on federalism has been] the decentralized, non-disciplined party which, the historical record suggests, had a significant decentralizing influence on intergovernmental relations by providing an often powerful institutional link between local, state, and national offices.'" Milkis Decl. ¶23(a) (quoting Advisory Commission on Intergovernmental Relations, *The Transformation of American Politics: Implications for Federalism* 45 (1986)).

Second, political parties have encouraged a "democratic nationalism" not only by nominating and electing candidates but also by engaging in dialogues concerning public policy issues of national importance. *Id.* ¶23(b). Dr. Milkis cites numerous examples, including debate

over the national bank in the 1830s, abolition during the 1850s and 1860s, and the New Deal in the 1930s. *Id.* In the 1960s, the Democratic Party was instrumental in promoting President Johnson's Great Society. L. Sandy Maisel & Charles Bassett, *Political Parties and Elections in the United States: An Encyclopedia* 1054 (1991). Even more recently, the RNC has participated in important public policy debates concerning, for instance, a balanced budget amendment (in 1995, 20 months before the next federal election), welfare reform (1996), and education policy (2002). Josefiak Decl. ¶91; RNC Exs. 1711, 2428, 2440.

Third, "parties have been critical agents of consensus in the United States." Milkis Decl. ¶23(c). Unlike their less stable counterparts in Western Europe, Great Britain, and Japan, political parties in the United States have "conformed to the looser genius of American democratic life" by "building diverse and decentralized coalitions." *Id.* Rather than devolving into the "factions" feared by James Madison in *Federalist* No. 10, parties have forged consensus among a vast array of individuals, groups, and perspectives. Green Cross Examination ("CX") 84 (parties are "the main coalition building institutions ... by a good measure").

Finally, and relatedly, "parties have been the most important institutions to cultivate a sense of community, of collective responsibility in a political culture principally dedicated to individualism, privacy, and rights." Milkis Decl. ¶23(d). At those points in American history when parties' activities have been most constrained, parties have been less able to mediate among and moderate the often extreme views of self-interested single-issue advocacy groups, ranging from the Anti-Saloon and Immigration Restriction Leagues in the 1920s to the "self-styled public interest groups" of the 1970s. When special interest groups have been permitted to fill a vacuum left by weakened parties, the nation has paid a heavy price. Keller Decl. ¶¶10, 16-19, 29, 32, 47, 53, 57; Milkis Decl. ¶¶15-20, 23(d), 30.

The RNC and its activities. The RNC is the sole major national political party plaintiff in this litigation and, thus, is uniquely situated to address Title I's restrictions on political party activity. The RNC is governed by its constituent state parties (not vice versa); its 165 voting members are drawn three each from Republican parties in each of the 50 states, D.C., and the territories. RNC Ex. 1 ("The Rules of the Republican Party"); Josefiak Decl. ¶15. Historically, the RNC has had – and continues to have – three missions: to promote its core ideals; to help elect candidates at the local, state, and federal levels who espouse those ideals; and to assist Republican officeholders in governing according to those ideals. *Id.* ¶22.

Notably, Congressman Shays has reflected the reformers' fundamental misunderstanding of national political parties by repeatedly referring to them as "federal parties." Shays CX 25, 32, 34, 36, 38, 40, 44. But the RNC is not a *federal* party; it is a *national* party. It participates extensively in state and local, as well as federal, elections. Josefiak Decl. ¶¶19, 24, 60.

The Republican Party has been involved in state and local elections since its founding in 1856. The RNC's participation in state and local elections is perhaps most evident in odd-numbered years (*e.g.*, 2001, 2003), when no federal candidates appear on the ballot. Five states (Virginia, New Jersey, Kentucky, Louisiana, and Mississippi) and a number of major cities (such as New York, Los Angeles, Houston, Minneapolis, and Indianapolis) hold their elections for state and/or municipal office in odd-numbered years. In 2001, through contributions to state and local candidates, transfers to state parties, and direct spending, the RNC spent more than $15.6 million of state-regulated money on state and local election activity. Banning Decl. ¶28(a). Over and above this direct spending, the RNC also devoted considerable "in-house" efforts to the Virginia and New Jersey gubernatorial and state legislative races in 2001, detailing staff to those campaigns and making available other RNC resources. The costs of these in-house resources

were paid, under pre-BCRA law, as part of the RNC's administrative overhead with a "mix" of federal and nonfederal funds. Josefiak Decl. ¶¶45-55.

Significantly, the RNC engages in "the very same activities" on behalf of state and local candidates during years when federal candidates *do* appear on the ballot. *Id.* ¶60. In 2000, for instance, the RNC made approximately $5.6 million in direct contributions to state and local candidates. *Id.* ¶61. In federal election years, the bulk of the RNC's efforts are conducted in coordination with state parties and focus on full-ticket activities intended to aid Republican candidates at all levels, such as voter registration, voter identification, and Get Out the Vote ("GOTV") efforts. Notably, even when federal races are not competitive in a state — as in Indiana in 2000 or California in 2002 — the RNC often devotes substantial resources to these grassroots voter-mobilization programs. Josefiak Decl. ¶62; Peschong Decl. ¶8.

Defendants' Title I expert, Dr. Thomas Mann, asserted that the 1974 amendments to FECA were intended to federalize all national party activities and that national parties were freed to accept nonfederal money only as a result of a series of FEC advisory opinions culminating in 1979. Mann Decl. 6-11. Dr. Mann expressed his surprise to learn that, in fact, the RNC had set up numerous accounts to receive state-regulated money for use in state and local election activity shortly after the 1976 *Buckley* decision. Mann CX 78-82; Banning Decl. ¶¶4-5. Indeed, since *Buckley*, the RNC has operated twelve of these Republican National State Election Committee accounts, each tailored to the specifics of different state laws. Banning Decl. ¶¶5-17.

RNC fundraising activities. Contrary to popular misconception, the RNC has historically raised 60% of its total funding in the form of small donations through direct mail, telephone banks, and, more recently, Internet solicitations. Knopp Decl. ¶¶5, 8. In 2000, for example, the RNC raised over $107 million dollars through direct marketing. *Id.* ¶¶7-8. Of course, the RNC

also has "major donor" programs. The President's Club (requiring a contribution of $1,000 per year), the Chairman's Advisory Board ($5,000 per year), and the Republican Eagles ($15,000 per year) raise *federal* money. The RNC also has programs to raise donations of federal *and nonfederal* money, such as Team 100 ($100,000 every four years, $25,000 in other years). The RNC frequently invites major donors — federal and nonfederal donors alike — to dinners and meetings at which federal officeholders and party officials speak. Shea Decl. ¶14.

Also contrary to popular misconception, the RNC raises the bulk of its nonfederal money from individuals, not corporations. Knopp Decl. ¶9 (for 2000 cycle, $65 million nonfederal from individuals; $51 million from corporations). Indeed, in every year from 1997 through 2001, the average corporate donation of nonfederal money was significantly lower than the average individual donation. For example, in 2000, the average corporate donation of nonfederal money was $2226, whereas the average individual donation of nonfederal money was $10,410. As a percentage of the RNC's total federal *and* nonfederal fundraising, corporate donations have been declining, and currently stand at 13% for the 2002 cycle. *Id.*

Contrary to yet another popular misconception, it is "exceedingly rare" for a federal officeholder to make a personal or telephonic solicitation of money for the RNC. Shea Decl. ¶17. As a matter of RNC policy, solicitations for the RNC's major donor programs are carried out either by RNC officers or the professional fundraising staff — "*not* [by] Members of Congress." *Id.* Thus, officeholder involvement in raising large, nonfederal donations is neither inherent in the system nor part of the RNC's fundraising practice.

Activities of state Republican parties. Like their national counterparts, state political parties are also active in local, state, and federal elections. Because they are closer to the voters, it is often more efficient and strategic for state parties to shoulder the burden of grassroots voter

mobilization — voter registration, voter identification, and GOTV. Much, but not all, of this activity is intended to assist the entire Republican ticket. Bowler Decl. ¶¶4, 20(a); Cardenas Decl. ¶14; Bennett Decl. ¶17(e); Brister Decl. ¶5; Kyrillos Decl. ¶11. In most states, even in even-numbered years, elections for state and local office dominate the ballot, so slate cards, door hangers, and other full-ticket support items mention many more state and local than federal candidates. Bowler Decl. ¶20(b) and Exs. H, I.

Victory Plans. At the outset of each election year, each state Republican party prepares a written "Victory Plan" establishing its strategy for identifying, contacting, and mobilizing voters for that election cycle. The plan entails numerous components, including direct mailings, phone banks, brochures, slate cards, yard signs, and rallies. Peschong Decl. ¶4. The plan also sets forth the budget for the programs and a strategy for raising the money. From the outset, RNC field personnel assist the state party in drafting the plan, and RNC officials review and comment on each plan. *Id.* ¶¶5-7. In addition to the technical expertise the RNC brings to the Victory Plan process, the RNC provides funding for these programs — $42 million in 2000, 60% of which was nonfederal — and provides fundraising assistance to the state parties in raising their share. Josefiak Decl. ¶¶31, 63. "Nothing better exemplifies the close working relationship between the various components of the Republican Party than the Victory Plans and Programs that are crafted and implemented every year on a collaborative basis." *Id.* ¶25.

RNC financial assistance to state parties. The state parties are not generally as adept at fundraising as is the RNC. The RNC has a "brand name," professional staff, nation-wide presence, and economies of scale that state parties simply cannot replicate. Shea Decl. ¶41. Accordingly, as part of their cooperative relationship, the RNC bears a large part of the fundraising load for the state parties and, in turn, provides considerable direct funding to those

parties. The RNC made transfers of approximately $66.3 million ($18.1 million in federal money and $48.2 million nonfederal) to state and local parties during the 1996 cycle, $27.7 million ($7.0 million federal, $20.7 million nonfederal) during the 1998 cycle, and $129 million ($35.8 million federal, $93.2 million nonfederal) during the 2000 cycle. National Party Transfers to State/Local Committees Charts, *available at* www.fec.gov (visited Nov. 5, 2002).

The RNC also provides fundraising assistance to state and local parties. For example, since becoming RNC Chairman in January 2002, former Montana Governor Marc Racicot has made 82 trips to a total of 67 cities in 36 states; the majority of these trips involved fundraising efforts on behalf of state and local parties and candidates. Josefiak Decl. ¶70. RNC Co-chair Ann Wagner, who serves simultaneously as Chairwoman of the Missouri Republican Party, likewise travels the country raising money for state and local parties. *Id.* ¶¶70, 80. The RNC also conducts direct mail fundraising for state and local candidates. RNC Exs. 232, 292 (fundraising letters on behalf of gubernatorial and mayoral candidates). Such fundraising efforts for state and local candidates raise state-regulated funds, often in small denominations, that generally flow directly to the state candidate or party, not to the RNC. Josefiak Decl. ¶44.

The Rise of Special Interest Groups. Throughout American history, groups interested in single issues or limited sets of issues have populated American politics (*e.g.*, the Anti-Saloon League in the 1920s or the Sierra Club today). Parties seek to induce these groups into broader coalitions and thereby moderate their often extreme views. But in recent years, special interests have become increasingly active in their own right. Specifically, interest group broadcast issue advertising has exploded in recent election cycles, outpacing party issue advertising both in absolute and relative terms. In fact, interest group spending skyrocketed from $180-$223 million (65.5% of total issue ad spending) during the 1998 election cycle to $347 million (68% of the

total) during the 2000 election cycle. Interest groups, therefore, currently account for fully two-thirds of all such spending. *See* Annenberg Public Policy Center, *Issue Advertising in the 1999-2000 Election Cycle* 4 (2001); Jeffrey Stranger and Douglas Rivlin, *Issue Advocacy Advertising During the 1997-1998 Election Cycle* (1998).

This growth in interest group advertising has required the political parties to respond with their own issue advertising. Josefiak Decl. ¶92. As noted above, however, political party issue advocacy has been funded with a mix of federally-regulated and state-regulated money, all of which is fully regulated and disclosed on the public record. *Id.* ¶89. By contrast, so long as special interest groups avoid expressly advocating the election or defeat of a particular federal candidate, their activities may be paid for entirely with *truly* "soft" money – money that is *neither* regulated *nor* disclosed under federal or state law.

Moreover, interest groups are active in more than just broadcast issue advertising. Even before passage of BCRA, many interest groups were shifting their focus in the days and weeks preceding an election from broadcast advertising to "ground war" activities such as GOTV. For example, in the closing weeks of the 2000 election campaign, the NAACP and its affiliated organizations spent roughly $10 million on election-related activities. Green CX 20. The NAACP National Voter Fund, bankrolled in large part by a $7 million gift from a single anonymous donor, hired over 80 field staff, registered over 217,000 voters, sponsored a voter hotline, sent seven direct mailings, placed phone calls to over one million households (including recorded "non-partisan" calls from Tom Joyner and President Clinton), and provided grants to NAACP affiliates around the country. *Id.* at 15-20 & Green CX Ex. 3; *see also* McCain CX 70-73 & McCain CX Ex. L. The net effect of these efforts, the NAACP estimates, was to increase turnout by over a million voters in targeted areas, including increases among African-American

voters over 1996 figures of 22% in New York, 50% in Florida, and 140% in Missouri. McCain CX 72 & McCain CX Ex. L; Green CX Ex. 3. *See also* Peschong ¶¶13-14 (direct mail, phone bank, and door-to-door canvassing techniques used by AFL-CIO and NARAL to identify, mobilize, and transport to the polls sympathetic voters). Defendants' Title I experts agree that BCRA will encourage *more* interest group voter-mobilization activity, all funded with undisclosed, unregulated money. Green CX 24; Mann CX 164-65.

Thus, while interest groups may not *be* political parties, as the following chart shows, they engage in the whole range of activities conducted by parties:

Activities Conducted by the RNC and Non-Party Entities[3]

[CONFIDENTIAL AND HIGHLY CONFIDENTIAL INFORMATION REDACTED]

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[3] *See* Lenhard, American Federation of State, County, and Municipal Employees ("AFSCME") Decl.; Lipsen, Association of Trial Lawyers of America ("ATLA") Decl.; Solmonese, EMILY's List Decl.; Callahan, League of Conservation Voters ("LCV") Decl.; Gallagher, National Abortion and Reproductive Rights Action League ("NARAL") Decl.; Shust, National Education Association ("NEA") Decl.; Rosenberg, New Democrat Network ("NDN") Decl.; Beinecke, Natural Resources Defense Council ("NRDC") Decl.; Gilman, National Treasury Employees Union ("NTEU") Decl.; Navarro, Service Employees International Union, AFL-CIO ("SEIU") Decl.; Sease, Sierra Club Decl.

Rather than constraining these interest group activities, BCRA will actually *strengthen* special interest groups at the expense of political parties. Indeed, both CNN and the *Washington Post* have recently devoted full-length features to this very phenomenon.[4] Their message, in short: in the wake of BCRA, "[w]e're going to see explosive growth in the role of interest groups when it comes to campaigns."[5] More importantly, the record in this case amply demonstrates interest groups' plans to gobble up the resources that once went to parties. NARAL president Kate Michelman, for instance, has said that donors seeking to "elect people who embody their values will be looking to groups like NARAL, which do serious political work and are seasoned operatives, to invest in. If they can't give to the parties ... they are going to find other means." Gallagher Decl. ¶61. Similarly, **[CONFIDENTIAL MATERIAL OMITTED]**; *see also* La Raja Decl. ¶24, Milkis Decl. ¶47; Mann CX 164-65.

BCRA's Financial Impact on Political Parties. As explained above, before BCRA, the RNC was required to spend federal money for contributions to federal candidates, "express advocacy" expenditures on behalf of federal candidates, and a percentage (60% or 65%) of the cost of its mixed activities, like overhead, voter-mobilization efforts, and generic activities (*e.g.*, "Vote Republican"). But it was permitted to use non-federal money for activities that aided state

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4 *Lou Dobbs' Moneyline*, CNN (October, 31, 2002); Thomas B. Edsall & Juliet Eilperin, *PAC Attack II; Why Some Groups Are Learning To Love Campaign Finance Reform*, WASH. POST, B2 (Aug. 18, 2002); *see also* Thomas B. Edsall, *New Ways To Harness Soft Money in Works; Political Groups Poised To Take Huge Donations*, WASH. POST, A1 (Aug. 25, 2002).

5 Edsall & Eilperin, *supra*.

and local candidates exclusively, and a percentage (35% or 40%) for mixed activities. Under BCRA, the RNC will be required to pay *all* of its expenses with federally-regulated money. All told, BCRA will (using 2000 numbers as a benchmark) reduce RNC revenues by $125 million per presidential election year (*i.e.*, by 40%), and by $48.5 million per non-presidential election year, *even accounting for BCRA's increased contribution limits*. Shea Decl. ¶19. The RNC is already in the process of laying off 40% of its staff and dramatically scaling back its operations in response to BCRA. Banning Decl. ¶32.

For several reasons, it will not be possible for the RNC to replace the financial resources lost as a result of BCRA. *First*, the RNC already raises the maximum (or *very* close to the maximum) available amount of federal money. It mailed more than 80 million packages and placed 11 million calls to its house donor file during the 2000 cycle alone; more frequent solicitations of the RNC's donor base would be counter-productive. Knopp Decl. ¶¶17-19. Further, efforts to expand the donor base actually *lose* money in the short term; the RNC lost 7.5 cents on each of the nearly 20 million "cold" prospecting packages it sent during the 2000 cycle to people who had not donated before. *Id.* ¶¶15, 17-18. *Second*, raising federal money is very expensive. From 1997 through 2001, the RNC's average cost of raising a dollar of federal money was 47.8 cents; the cost of raising a nonfederal dollar was 18.4 cents. Knopp Decl. ¶21. Indeed, defense expert Dr. Green has admitted that BCRA will *increase* the parties' "marginal cost of fundraising." Green CX 270; *see also* Knopp CX 71-72; Shea CX 91-94. Thus, even if (contrary to fact) it were possible to replace the $116 million nonfederal dollars raised in 2000 but now prohibited by BCRA, the RNC would need to raise at least $181.34 million *more* in federal money — *more than twice as much federal money* — than it raised in 2000, its best year

ever. RNC Ex. 2259; Knopp Decl. ¶21.[6] *Third*, because BCRA creates greater demand for federal dollars, it will increase the competition among national and state parties for such funds. *Id.* ¶30.

At the state level, the effect is even more devastating. State parties generally raise more nonfederal than federal money. Bowler Decl. ¶12; Bennett Decl. ¶9; Cardenas Decl. ¶9. They often pay for 75% or more of their "mixed" activities with nonfederal money but, under BCRA, must now pay for 100% of those activities with federal money. Simultaneously, state parties will be deprived both of national party transfers and of the fundraising assistance of the national parties and federal officeholders. Banning Decl. ¶29; Brister Decl. ¶15; Duncan Decl.¶¶8-11. Moreover, BCRA places the state parties in direct competition with their national counterparts for federal dollars. Not only will they confront the same donor base as the national parties, and an aggregate election-cycle contribution limit of $37,500 shared with the three national Republican committees, but they will need to compete against the RNC's significant fundraising prowess as well. Knopp Decl. ¶29.

In the 2000 election cycle, the state Republican Parties of Kentucky, Wisconsin, and Oregon received 60%, 64%, and 77%, respectively, of their total funding by way of transfers from the RNC. Duncan Decl. ¶11; Josefiak Reb. Decl. ¶11. Recently, the RNC made a transfer of nonfederal funds to the Arkansas Republican Party simply to enable that party to pay its current outstanding bills. Josefiak Decl. ¶81. All told, nonfederal transfers by national committees accounted for *over half* of Republican state party nonfederal receipts in 2000, and

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[6] The "net" nonfederal dollars (exclusive of the 18.4% fundraising costs) for 2000 were $94.66 million ($116 million x 81.6%). To raise the same *net* amount of federal money at a cost of 47.8% would require the RNC to raise $181.34 million ($94.66 million ÷ 52.2%).

63% on the Democratic side. La Raja Decl. ¶22. State parties cannot make up this shortfall. Knopp CX 98-100 ("nearly impossible"). Significantly, RNC transfers to state parties are of *net* money (exclusive of fundraising costs). For state parties to replace these funds, they would have to raise a much higher amount to offset the fundraising costs, even as the marginal cost of fundraising increases. *Id.* at 99; Green CX 270.

Without RNC transfers and fundraising assistance, professional fundraisers and party professionals have concluded that many state parties will be unable to continue their activities at more than a nominal level. Josefiak Decl. ¶81; Shea Decl. ¶42; Knopp Decl. ¶27. Among the most severely impacted state parties are those of Arkansas, Maine, North Carolina, Oregon, and Wisconsin, Banning Decl. ¶30, but no state party will be unaffected, Bowler Decl. ¶23.

"Corruption" and the "Appearance of Corruption." As defense expert Dr. Frank J. Sorauf has observed, "the [campaign finance] reform agenda of the 1990s" – of which BCRA is a product – "is driven as much by populist demonologies as it is by the realities of contemporary political influence." Sorauf, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 Colum. L. Rev. 1348, 1356 (1994). Notably, the FEC and various intervening defendants here have admitted that they have *no evidence* that a member of the House or Senate has changed a vote on legislation because of a soft money donation to a party, *see* FEC Response to Requests for Admission ("RFA") Nos. 1, 2; Feingold Dep. 132-33; Jeffords Dep. 106-07, and, indeed, that they have *no evidence* that the RNC has ever even tried to change a vote on legislation through the use of federal or nonfederal funding, *see id.* Nos. 23, 24; Snowe Dep. 205-08, 231-32; Meehan Dep. 171-72 (DNC). Defense statistical expert Dr. Green likewise admitted that there are *no statistically valid studies* showing a correlation between political donations and legislative voting behavior. Green CX 58-61. In marked

contrast, the record here *does* contain evidence that special interest groups have attempted to strike *quid pro quo* arrangements — direct contributions or spending in exchange for candidates' commitments to vote a specified way. Beckett Decl. ¶7; Strother Decl. ¶14; Chapin Decl. ¶6.

Public perception. Defendants' assertion of an "appearance of corruption" fares no better. As an initial matter, the term "corruption" has been used so loosely for so long that it has ceased to have any real meaning. The record here shows that when people use the word "corruption," as often as not they are referring not to anything truly *corrupt* (and certainly not of the *quid pro quo* variety) but, rather, to things that are *unpleasant*: negative campaign ads, *e.g.*, Williams Dep. 21-22, 56-59; intense fundraising efforts, *e.g.*, Meehan Dep. 128; high campaign costs generally, *e.g.*, Strother CX 37-39; and the lack of disclosure and accountability on the part of special interest groups that run issue ads, *e.g.*, Shays CX 65. But none of these is a valid basis for government regulation of political parties and, in fact, none is addressed by BCRA.

As for public perception of true corruption, defense expert Dr. Mann has observed that widespread public concern over congressional ethics is an "unfortunate and inaccurate public judgment." Mann CX 40. Defense witness former Senator Warren Rudman has likewise conceded that any public perception of significant impropriety by Congress is inaccurate. Rudman Dep. 44-46. And, perhaps most strikingly, defendants' effort to use a public opinion poll to demonstrate a public perception of impropriety relating to *nonfederal* money (the subject of BCRA regulation) actually confirmed that the public believes even *federal* "hard money" contributions affect the legislative process. Ayres Reb. Decl. ¶3(f). Dr. Green goes further, agreeing that pro-reform groups will continue to bombard the public with often misleading suggestions that federally regulated money influences legislation. Green CX 95-109. BCRA, of course, makes no effort to reduce any supposed influence of federal money.

Access. This record also provides no support for the speculative claim that nonfederal donors obtain unique "access" as a result of their donations to political parties. While nonfederal donors, like federal donors, are invited to events at which officeholders appear, those events do not present opportunities to engage in lobbying activities. Shea Decl. ¶50. Indeed, Senator McCain acknowledged that he had spoken over the years at "numerous gatherings of contributors to political campaigns," including events for the RNC's Team 100, but acknowledged that he could not "recall any of the individuals who were present" at those events and, further, that none of the questions that were asked of him during those meeting "made enough of an impression on [him] to influence any legislative judgments." McCain Dep. 236-38. Similarly, Congressman Shays admitted attending events for large RNC donors, but even when presented with a list of the names of the eight people who sat with him at one recent dinner, could not recall a single one. Shays CX 20. Other BCRA proponents offered strikingly similar testimony. *See, e.g.*, Jeffords Dep. 101-05, 114-17; Snowe Dep. 226-27.

After a careful review of the RNC's meticulous records of contacts with its major donors, the RNC's Finance Director testified that the RNC receives fewer than 15 requests every two-year election cycle from donors — federal and nonfederal combined — for meetings with Members of Congress, and that the RNC simply passes those requests along to the scheduling staff in the Member's office, without commenting on whether the meeting should occur or determining whether the meeting actually took place. Shea Decl. ¶¶45-46. Defense statistical expert Dr. Green has admitted that he is aware of no valid study linking donations and "access" or "legislative effort." Green CX 69-72 (study not "statistically sound" and failed to control for effect of lobbying expenditures); *id.* at 95 (studies make no effort to track access). *Accord*

Feingold Dep. 116 ("I cannot imagine a situation where ... I would meet with somebody because they gave soft money."); Meehan Dep. 178-82; Jeffords Dep. 94-97; Snowe Dep. 210-11.

The exaggerated link between nonfederal donations and legislative access is dramatically demonstrated by the tobacco industry's actions while tobacco legislation was pending during 1998. Even though the industry considered that legislation a severe threat to its survival, the FEC has admitted in other litigation that the five major tobacco companies donated $5,304,588 to the six national political committees during the *1996* election cycle, but donated $1.2 million *less* during the *1998* election cycle, while the tobacco legislation was pending. FEC Responses to RFAs Nos. 49-50 in *Ohio Democratic Party v. FEC*, No. 98-CV-991 (D.D.C.). While reducing its nonfederal donations to the national parties, the industry, according to the Annenberg Public Policy Center, spent $40 million on its own issue advertising campaign from April through July 1998 against that tobacco legislation; also, from 1997 through the first six months of 1998, the industry made reportable lobbying disbursements of $60,224,940 — almost fifteen times its nonfederal donations to the six national parties. *Id.* Nos. 52-54.

The Thompson Committee hearings. In the summer of 1997, Senator Fred Thompson convened hearings into campaign finance improprieties during the 1996 election. The focus of the hearings was on the raising of nonfederal funds through such devices as "White House coffees," "Lincoln bedroom sleepovers," and donations from foreign sources, as well as the use of such money specifically for issue advertising. The investigation resulted in the indictments of 26 individuals and two corporations for violations of the existing campaign finance laws, almost all of whom pleaded guilty, were convicted, or fled the country. Green CX Ex. 12. Notably, in provisions not challenged in this case, BCRA tightens the restrictions on fundraising on federal property and on foreign donations. *See* BCRA §§302, 303.

"Corruption" as a justification for BCRA. Even if "corruption" were a problem, BCRA is both substantially overinclusive and woefully underinclusive in addressing it. As to the former, the primary concerns expressed by the defendants here have been officeholder involvement in raising nonfederal funds and the use of those funds for issue advocacy. *E.g.*, McCain Dep. 193 ("It's the broadcast television and radio ads that we believe are what is the problem."); Shays Dep. 42-43; Meehan Dep. 218-19; Snowe Dep. 159-60; Jeffords Dep. 83-85. But as noted, *see supra* at 8, the RNC rarely if ever uses federal officeholders for fundraising. Moreover, of the approximately $120 million in nonfederal money raised by the RNC in the 2000 cycle, *see* Knopp Decl. ¶7, only $43.6 million (36%) was used for issue advocacy, either directly or through state parties. Banning Decl. ¶25. In contrast to the bogeyman of issue advertising, the remaining 64% of the RNC's nonfederal funds were used for administrative overhead (30%), *id.* ¶27, and other vital party-building activities, including, among others, direct support for state and local candidates, voter identification and registration, and GOTV.

After sweeping broadly to prohibit *any* party involvement with nonfederal money for *any* purpose – whether or not there is any arguable tie to "corruption" – BCRA then altogether fails to address practices that would seem to pose an equal, if not greater, threat. For example, although special interest groups engage in extensive activities to "curry favor" with federal officeholders and candidates, Mann CX 148-49, BCRA makes virtually no effort to address these activities.

"Corruption" in historical context. Over the last century and a half, Congress has enacted a torrent of legislation aimed at eliminating actual or perceived corruption in American politics, from civil service reforms designed to eliminate political patronage, to the Lobbying Disclosure Act of 1995, to, of course, detailed campaign finance statutes adopted by the Federal

Government and every state. Keller Decl. ¶¶39-41. With extensive disclosure of every federal *and* nonfederal dollar they take in and spend, national political parties are more transparent than any other organization. Banning Decl. ¶21-22. Accordingly, Dr. Morton Keller, an eminent historian, concludes that "it is historically inaccurate to see corruption in its traditional sense as a major problem in contemporary American politics," and has testified that "'corruption or the appearance of corruption,' the primary justification for BCRA, is less of a problem in American politics today than at any time in the past." Keller Decl. ¶¶45, 55.

EXPLANATION OF RELEVANT TITLE I PROVISIONS

Although dubbed "Reduction of *Special Interest* Influence," Title I of BCRA does not actually target "special interest" groups; instead, it imposes onerous restrictions on political parties and, to a lesser extent, on state and federal officeholders and candidates.

Title I's flagship provision, new **§323(a)**, categorically prohibits national party committees (like the RNC) and their agents from "solicit[ing]," "receiv[ing]," "transfer[ring]," "direct[ing]," or "spend[ing]" any funds that are not subject to FECA's restrictions. This is the much-ballyhooed (and much-misunderstood) "soft-money ban." Notably, *there are no exceptions to §323(a)'s blanket prohibition*. Thus, as of today, national party committees may not be involved with so-called "soft money" in any way, shape, form, or fashion.

New **§323(b)** pertains to state and local political party committees. In contrast to §323(a)'s flat ban on national party involvement with nonfederal money, §323(b) creates a maze of regulatory complexity. It states a general rule, allows exceptions, and then imposes conditions on those exceptions. In general, §323(b)(1) prohibits state and local political parties from spending any state-regulated money for what the statute calls "Federal election activity." Federal election activity, in turn, is broadly defined by the Act to include (i) voter registration conducted within 120 days of a federal election, whether or not any registration activity refers to a federal

candidate; (ii) voter identification, GOTV, and generic party-promotion activity conducted "in connection with" any election in which a federal candidate appears on the ballot, again, whether or not any of these activities refers to a federal candidate; and (iii) any "public communication" that "refers" to a clearly identified candidate for federal office and "promotes," "supports," "attacks," or "opposes" a candidate for that office. Federal election activity does *not* include (i) a public communication that refers solely to a clearly identified state or local candidate (*unless* the communication otherwise qualifies as Federal election activity, for instance, as GOTV); (ii) a contribution to a state or local candidate (*unless* designated to pay for some other kind of Federal election activity); (iii) a state or local political convention; or (iv) grassroots campaign materials (stickers, buttons, etc.) that name only a state or local candidate.

Section 323(b)(2) — commonly referred to as the "Levin Amendment" — carves out an exception to §323(b)(1)'s general rule. Section 323(b)(2) permits state and local parties to use an FEC-specified percentage of now-federally-regulated "nonfederal" money ("Levin money" or "Levin funds") for voter registration, voter identification, and GOTV activities *provided that* certain specified conditions are met: (i) the permitted activities may not refer to a clearly identified federal candidate; (ii) those activities may not involve any broadcast communication except one that refers solely to a clearly identified state or local candidate[7]; (iii) no single donor may donate more than $10,000 to a state or local party annually for those activities; and (iv) all money (federal and Levin money alike) spent on such activities must be "homegrown" — *i.e.*, raised solely by the spending state or local party — and may not be transferred from or raised in

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[7] In contrast, pre-BCRA law permitted allocation of federal and nonfederal funds based the on time and space used in an ad. 11 C.F.R. §106.5.