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.

conjunction with any national party committee, federal officeholder or candidate, or other state or local party. *See* §§323(b)(2)(B), 323(b)(2)(C).

New **§323(c)** requires national, state, and local parties to use federally-regulated money to raise any money that will be used on Federal election activities, as defined in the statute.

New **§323(d)** prohibits any political party committee — national, state, or local — or its agents from "solicit[ing]" funds for or "mak[ing] or direct[ing]" any donations to either: (i) any tax-exempt §501 organization that spends any money "in connection with an election for Federal office"; or (ii) any §527 organization.

New **§323(e)** generally prohibits federal officeholders and candidates from soliciting, receiving, directing, or spending any nonfederal money (i) in connection with a federal election or (ii) even in connection with a state or local election. There are, however, several exceptions to §323(e)'s general prohibition. First, a federal officeholder or candidate (but *not* an agent of a national party committee) may solicit money for state and local candidates from sources and in amounts that would be allowed by Federal law. §323(e)(1)(B). Second, a federal officeholder or candidate (but *not* an agent of a national party committee) may attend or speak at a fundraising event for a state or local political party. *See* §323(e)(3). Third, a federal officeholder or candidate (but, again, *not* an agent of a national party committee) may solicit such funds on behalf of any tax-exempt §501 organization that spends money in connection with federal elections in either of two instances: (i) he or she may solicit unlimited funds for a §501 organization (such as the NAACP or the NRA) whose "principal purpose" is *not* voter registration, voter identification, or GOTV activity, so long as the solicitation does not specify how the funds will be spent; and (ii) he or she may solicit up to $20,000 per person per year

specifically for voter registration, voter identification, or GOTV activity, or for an organization whose "principal purpose" *is* to conduct any or all of those activities. *See* §323(e)(4).

Finally, new **§323(f)** generally prohibits state officeholders or candidates from spending non-federally regulated money on any public communication, even in the course of a state campaign, that "refers" to a clearly identified candidate for federal office and "promotes," "supports," "attacks," or "opposes" a candidate for that office.

* * *

The changes wrought by BCRA are not just sweeping but also anomalous, irrational, and, indeed, perverse. For instance —

- Although touted as an effort to get the "special interests" out of federal elections, BCRA instead singles out political parties for unfavorable treatment; thus, BCRA marginalizes parties in the political marketplace and, paradoxically, serves to magnify the power and influence of narrow, extreme special interest groups, who can – and will – use in unlimited amounts the very "soft money" that parties are denied.

- BCRA is written so broadly that it makes it a *federal* crime — punishable by up to five years in prison — for an officer of the RNC to send a fundraising letter on behalf of a candidate for *state* office.

- In several respects, BCRA places more onerous limitations on the fundraising and spending activities of political party officials than federal officeholders and candidates, despite the fact that it is the feared corruption of officeholders and candidates — not of political parties — to which campaign finance laws are properly addressed.

- BCRA imposes on national party committees a flat ban on *any* involvement with nonfederal funds for *any* purpose whatsoever — even where those funds are used exclusively for state electoral activity in which no federal interest arises.

The drafters' good intentions cannot save a statute that, as these examples show, is so profoundly misguided and confused.

ARGUMENT

I. TITLE I EXCEEDS CONGRESS' DELEGATED LAWMAKING POWER AND VIOLATES FUNDAMENTAL PRINCIPLES OF FEDERALISM.

As of today, November 6, 2002, it is a federal crime for the Chairman of the RNC to send a fundraising letter on behalf of a *state* gubernatorial candidate or even a *local* mayoral candidate. RNC Exs. 232, 292, 1162 (sample letters). As of today, it is also a federal crime for the RNC to make donations to a *state* or *local* political candidate in full compliance with state election law unless those donations also comply with BCRA's extensive federal regime. And as of today, it is a federal crime for a *state* political party to use *state*-regulated money to encourage voters generically to support *state* candidates if it so happens that there is a federal candidate on the ballot.

A. The Factual Record Confirms the Sweep of §323.

Restrictions on National Party Participation in State Elections. As noted above, five states and numerous major cities conduct their elections in odd-numbered years. Josefiak Decl. ¶41. Absent a special election called to fill a vacant federal office, no federal candidates appear on the ballots in these states and cities during these odd-numbered years. *Id.* The RNC consistently devotes significant nonfederal financial resources to these elections. *Id.* For instance, the RNC spent approximately $5.8 million in the 2001 Virginia state elections[8] and approximately $4.2 million in the 2001 New Jersey state elections. *Id.* ¶¶45-46. The RNC was also involved in 2001 state elections in Louisiana and Mississippi. *Id.* ¶56; *see also* Banning Decl. ¶28(a) (RNC spent more than $21 million in the last two odd-year state elections cycles,

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[8] There was a special election in Virginia in June 2001 to fill a vacancy in the Virginia congressional delegation. Josefiak Decl. ¶54. Pursuant to FEC rules, the RNC conducted its activities concerning the special federal election with 100% federal money. Josefiak CX 30-31.

1999 and 2001); Duncan Decl. ¶15 (describing RNC involvement in Kentucky's odd-year elections); Brister Decl. ¶9 (Louisiana). The RNC also participates in these odd-year elections in other tangible ways (*e.g.*, by detailing staff). *See supra* at 6-7.

These odd-year elections are "critically important to the mission of the Republican Party." *Id.* ¶59. But because no federal candidates appear on the ballot, these elections have no effect whatsoever on federal candidates, federal officeholders, or federal elections; accordingly, the Federal Government simply has no compelling interest — indeed, no interest whatsoever — in regulating these odd-year state and local elections. Nonetheless, despite the fact that the RNC's participation in such elections is governed by and fully consistent with applicable state law as determined in the sovereign judgment of the relevant state governments, BCRA displaces those state judgments and categorically prohibits the RNC from raising or spending funds that are not also federally regulated. Thus, although Jack Oliver, the Deputy Chairman of the RNC, legally sent a fundraising letter on behalf of Brett Schundler's New Jersey gubernatorial campaign in October 2001, *see* Josefiak Decl. ¶44, a similar letter in October 2003 would — under BCRA — get Mr. Oliver jail time. That is preposterous; even the Government's own retained expert, Dr. Mann, admitted that BCRA's prohibition on national party officials raising money for state and local candidates is "unfortunate." Mann CX 108; *see also* Sorauf CX 158 (no need for rule prohibiting RNC from sending fundraising letter on behalf of state party).

The RNC's activities relating exclusively to state and local elections are perhaps most apparent in odd-year elections, but "the RNC engages in *the very same activities* during even-numbered years when federal candidates do appear on the same ballot." Josefiak Decl. ¶60 (emphasis added). Much of the RNC's activity during these even-year elections continues to affect state and local candidates exclusively — for instance, direct donations to state and local

candidates, direct donations to state parties for purely state and local activities, and fundraising assistance to state and local parties. Josefiak Decl. ¶61. Still, BCRA categorically prohibits the RNC from raising or spending nonfederal money on those activities — even if consistent with applicable state law.

Restrictions on State Party Participation in State Elections. In new §323(b), BCRA also operates directly on state and local party committees by prohibiting them from using nonfederal money for any activity defined by the statute as "Federal election activity." But by encompassing within its sweep virtually all state and local electoral activity occurring whenever a federal candidate appears on the ballot, the term "*Federal* election activity" is misleading. Even in those States that conduct even-year elections, there are almost always more state and local candidates — often, many more — than federal candidates on the ballot. Bennett Decl. ¶17(k). Indeed, absent a special election, the maximum number of federal offices that could *ever* appear on a single ballot is three (President, Senate, and Congress), and often that number is one (Congress). In contrast, this year more than a dozen state and local offices were on the ballot in Montgomery County, Maryland, and twice that many in San Francisco, California. Pre-BCRA FEC regulations made an effort to strike a meaningful federal-state balance by governing state-party spending, in part, according to ballot composition. In stark contrast, BCRA takes no account whatsoever of the states' interests.

In fact, many of the activities included within the term "Federal election activity" do not principally concern truly *federal* election activity at all. If the Republican Party of Ohio — which conducts even-year elections — sends a flyer reading "Vote Republican; John Smith for Dogcatcher on November 6;" BCRA requires the state party to pay for printing and mailing with 100% federal money. Green CX 150-51; *see also* Bowler Decl. Exs. D (GOTV mailing on

behalf of a candidate for state assembly); E (GOTV ad referring solely to state and local candidates). Even though the Federal Government's interest in such a situation is simply nonexistent, BCRA regulates this as "Federal election activity." BCRA §101(b) (defining Federal election activity to include *all* GOTV activity conducted in connection with any election in which a federal candidate appears on the ballot). Compounding the irrationality of §323(b) – and tacitly recognizing the absence of any real federal interest – BCRA, while forcing the Ohio party to pay for the Smith-for-Dogcatcher flyer with federally regulated money, would permit *Smith himself* to use wholly state-regulated money.

The Levin Amendment does little, if anything, to ameliorate the federal intrusion into the States' rightful sphere. Although purportedly intended to encourage state parties to engage in grassroots activities, *see* McCain Dep. 193-94 ("[T]he reason why we have the so called Levin Amendment for soft money is so that they can do the Get Out the Vote and the phone banks and the voter registration."), the Levin Amendment in fact imposes substantial federal restrictions on those very activities. For starters, Levin money may be used only for a generic message – any mention whatsoever of a clearly identified federal candidate, no matter to what extent state and local candidates dominate the substance of that message, requires 100% federal money. In addition, the Levin Amendment imposes a federal cap of $10,000 on individual donations to state parties for grassroots activities — even for grassroots activities pertaining exclusively to a state or local candidate. §323(b)(2)(B)(iii). Further, the Levin Amendment requires that all money — federal and Levin money alike — that is used for grassroots activities be "home grown." §323(b)(2)(B)(iv). Thus, if the RNC transfers *even one* federal dollar into a state for GOTV, the *entire* program must be paid for with 100% federal money. The Levin Amendment

thus prescribes federal regulation in instances where the federal interest in preventing the corruption of *federal* candidates and officeholders is attenuated, if not altogether imperceptible.

B. Title I Is Not Valid Federal Elections Clause Legislation.

Congress did not expressly claim a particular constitutional basis for enacting BCRA. In *Buckley v. Valeo*, 424 U.S. 1 (1976), however, the Supreme Court treated FECA — to which BCRA is an amendment — as a product of Congress' power under the Federal Elections Clause, U.S. Const. Art. I, §4. *Buckley*, 424 U.S. at 13 & n.16. That provision provides:

> The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

U.S. Const. Art. I § 4. *See also* S. Rep. No. 92-229, at 257 (June 21, 1971).

The Federal Elections Clause "was a compromise between those delegates to the Constitutional Convention who wanted the States to have final authority over the election of all state and federal officers and those who wanted Congress to make laws governing national elections." *Oregon v. Mitchell*, 400 U.S. 112, 119 n.2 (1970) (controlling opinion of Black, J.). The debate thus revolved around the question whether the Federal Government should have *any* role at all in regulating elections — even *federal* elections. As defense expert Dr. Green acknowledged, the allocation of control over elections was "maybe one of the most vigorously-debated aspects of the constitutional structure." Green CX 142.

Even the most ardent nationalists among the founders were particularly forceful in warning against federal encroachments into state elections. As Alexander Hamilton – whom Dr. Green described as "the Great Centralizer," Green CX 145 – wrote in *Federalist* No. 59:

> Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments? The

> violation of principle, in this case, would have required no comment; and, to an unbiased observer, it will not be less apparent in the project of subjecting the existence of the national government, in a similar respect, to the pleasure of the State governments.

Echoing Hamilton, Justice Joseph Story observed in dismissing a hypothetical federal power to regulate state elections that "[i]t would be deemed a most unwarrantable transfer of power, indicating a premeditated design to destroy the state governments. It would be deemed so flagrant a violation of principle, as to require no comment." Joseph Story, 2 *Commentaries on the Constitution of the United States* 284-85 (1st ed. 1833). Notably, Dr. Green has candidly conceded both (i) that the Hamilton view represents the original understanding of the Federal Elections Clause and (ii) that BCRA "*goes a lot farther than Hamilton indicated in Federalist Number 59.*" Green CX 148-49 (emphasis added).

Given the text and original understanding of the Federal Elections Clause, it is unsurprising that the Supreme Court has consistently recognized that the Clause has no application to state elections. For example, in *United States v. Reese*, 92 U.S. 214 (1875), which evaluated the constitutionality of the Enforcement Act of 1870, the Court dismissed the application of the Federal Elections Clause to a municipal election, noting that in view of the local character of the election at issue, "[t]he effect of art. 1, sect. 4, of the Constitution, in respect to elections for senators and representatives, is not now under consideration." *Id.* at 218. *Ex parte Siebold*, an Enforcement Act case involving ballot-box stuffing and other election irregularities in connection with a federal election, similarly emphasized the limitation of the Federal Elections Clause to federal elections: "We do not mean to say ... that for any *acts* of the officers of election, *having exclusive reference to the election of State or county officers*, they will be amenable to Federal jurisdiction." 100 U.S. 371, 393 (1871) (emphasis added).

To be sure, the Court has recognized that the Federal Elections Clause may permit some incidental regulation of state elections, but only as necessary to effectively regulate simultaneously-occurring federal elections. For example, *Siebold* noted that "[i]f for its own convenience a State sees fit to elect State and county officers at the same time and in conjunction with the election of representatives, Congress will not be thereby deprived of the right to make regulations *in reference to the latter*." *Id.* (emphasis added). Thus, Congress may not regulate state elections under the Clause simply because they happen to occur at the same time as a federal election; rather, the Clause is broad enough only to allow federal regulation carefully tailored to apply *solely* to "the latter."

The Court has repeatedly reiterated this principle. In *Blitz v. United States*, 153 U.S. 308 (1894), for instance, the Court dismissed an indictment for impersonating a voter because the indictment did not allege that the defendant had actually voted for Congress, as opposed to a state or local office. The Court there held that "[v]oting in the name of another for a state officer cannot possibly affect the integrity of an election for representative in congress," and that "[w]ith frauds of that character [*i.e.*, concerning elections for state office] *the national government has no concern*." *Id.* at 314-15 (emphasis added). More recently, in *Oregon v. Mitchell*, the Court struck down a provision of a federal law lowering to eighteen the voting age in *state and local elections*, even while upholding a provision similarly lowering to eighteen the voting age in *federal elections*. In his controlling opinion, Justice Black emphasized that "[o]ur 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." 400 U.S. at 135; *see also 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)).[9] Accordingly, the Federal Elections Clause cannot support BCRA's extraordinary assumption of federal power.

C. No Other Grant Of Congressional Authority Supports Title I.

The United States has admitted in the course of this litigation that Congress relied on no other enumerated constitutional power to support Title I. *See* United States' Responses to RNC's 2d Set of Interrogs. to Defts. (Sept. 19, 2002) at 4 (claiming Commerce Clause basis only for BCRA §§305 and 504, which amend Federal Communications Act, not at issue here). That should be the end of the matter. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (justification for government action "must be genuine, not hypothesized or invented *post hoc* in response to litigation"); *cf. United States v. Lopez*, 514 U.S. 549, 563 n.4 (1995) (rejecting Congress' *post hoc* rationalization for its exercise of commerce power). In any event, were defendants now to concoct a new justification for BCRA under some other constitutional provision – most likely, either the Commerce Clause or one of the Reconstruction Amendments – that effort would fail.

As an initial matter, it is significant that in originally enacting FECA, the Senate Rules Committee analyzed the "Constitutional Power of Congress To Legislate in Matters of

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[9] Courts have upheld the National Voter Registration Act against constitutional challenge, emphasizing that it does not expressly alter *state* election procedures. *See ACORN v. Miller*, 129 F.3d 833, 837 (6th Cir. 1997) ("Nothing in the Act prohibits a state from adopting separate registration requirements for the election of state officials."); *ACORN v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995) ("The 'motor voter' law does not purport to alter the qualifications fixed by the State of Illinois for voters in elections for the Illinois Assembly."); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1415-16 (9th Cir. 1995) (instructing district court to "impose no burdens on the state not authorized by the Act which would impair the State of California's retained power to conduct its state elections as it sees fit. ... Absent the invocation by Congress of its authority under the Fourteenth Amendment, *the State of California possesses the power to fix the time, place, and manner of the election of its officials.*") (emphasis added).

Elections." S. Rep. No. 92-229, at 257. That report listed several "provisions of the Constitution" — the Federal Elections Clause among them — that "determine and circumscribe the power of Congress to legislate on the subject of Federal elections." *Id.* (Notably, there is no reference to *state* elections.) Conspicuously absent from the list were both the Commerce Clause and the Enforcement Clauses of the Fourteenth and Fifteenth Amendments. This court should respect Congress' own recognition of the limits of its power.

1. The Commerce Clause Cannot Justify Title I's Restrictions.

The Commerce Clause authorizes Congress "[t]o regulate Commerce ... among the several States." U.S. Const. Art. I, §8. While the modern Commerce Clause power is unquestionably broad, it is not unlimited. *See United States v. Morrison*, 529 U.S. 598, 608 (2000). An unbridled commerce power would have the effect of subverting the principle of limited, enumerated congressional powers that has been central to our constitutional order since ratification. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

The conduct of election campaigns is core *political* conduct, not *commercial* activity. *See Buckley*, 424 U.S. at 19. Further, as in *Lopez*, "to the extent congressional findings would enable [the Court] to evaluate the legislative judgment that the activity substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here." 514 U.S. at 563. Indeed, the Government has *affirmatively disclaimed* any reliance on any commerce nexus for the challenged portion of BCRA. *See supra* at 32.

More fundamentally, the founders were acutely aware of the issues surrounding the proper role of the Federal Government in controlling federal and state elections, disagreed among themselves about the scope of that role, and set out a "vigorously debated" express compromise in the Federal Elections Clause. Green CX 142. Pursuant to that express "compromise," *Mitchell*, 400 U.S. at 119 n.2, the States and the Federal Government share

power over federal elections, but, importantly here, the States retain *full autonomy* over their own elections. An expansive view of the Commerce Clause cannot be allowed to swallow up and override this balance.

Where the Constitution embodies a specific compromise concerning the scope of congressional power in a specific area, the Commerce Clause may not be used as a tool to upset that compromise. Thus, the Supreme Court has held that the Commerce Clause may not be used to circumvent limitations on Congress' Bankruptcy Clause power:

> Unlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States. Such uniformity in the applicability of legislation is not required by the Commerce Clause. Thus, if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws.

Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 468-69 (1982) (citations omitted). If the Commerce Clause could not be construed to upset the limitations at issue in *Gibbons*, where "the debate in the Constitutional Convention regarding the Bankruptcy Clause was meager," 455 U.S. at 471, it certainly may not be applied to upset the balance of power established in the vigorously-debated Federal Elections Clause.

For all of these reasons, it is unsurprising that even before the Supreme Court's recent reiterations of the Commerce Clause's limitations, the Court had rejected the Commerce Clause as a basis for the regulation of elections. In *Mitchell*, Justice Harlan noted that "surely the Commerce Clause cannot be seriously relied on to sustain the Act here challenged," 400 U.S. at 215 (separate opinion), a point with which no other Justice expressed disagreement.

2. The Reconstruction Amendments Cannot Justify Title I's Restrictions.

Congress's enforcement powers under §5 of the Fourteenth Amendment or §2 of the Fifteenth Amendment likewise provide no basis for BCRA. To be a valid exercise of either the Fourteenth or Fifteenth Amendment's enforcement power, Enforcement Clause legislation must be directed to (i) a constitutional violation (ii) that is committed by a government entity. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 519-21, 524-25 (1997). Here, BCRA fails on both counts. First, and most obviously, BCRA does not respond to "state action." BCRA's impositions apply directly to non-governmental actors — here, political parties. *See Morrison*, 529 U.S. at 621 (Fourteenth Amendment enforceable only against state action); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 276 n.17 (1996) (Fifteenth Amendment enforceable only against state action). Second, the private plaintiffs challenging BCRA are not alleged to have *violated* anyone's constitutional rights; they are merely attempting to *exercise* their own. *See, e.g., Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 640 (1999) (finding no valid exercise of the enforcement clause authority where "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations").

D. Title I Contravenes the Principles of Federalism Embodied in the Constitution.

Even if defendants could find a constitutional provision giving Congress authority for BCRA, the statute's extensive intrusion into an area central to state sovereignty would contravene the Tenth Amendment and the principles of federalism embodied in the Constitution. *See, e.g., New York v. United States*, 505 U.S. 144, 156-57 (1992).

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 v. United States*, 521 U.S. 898, 919 (1997). In *Alden*, which principally addressed the scope of states' sovereign immunity under the Eleventh Amendment, the Court warned 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 must accord 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. 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. Importantly here, *Alden* emphasized that federal encroachment is of particular concern where a State's sovereign powers of *self-governance* are at stake: "When 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).

Similarly, in *Oregon v. Mitchell*, Justice Black's controlling opinion emphasized that "[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 — significantly here — "the nature of their own machinery for filling local public offices." 400 U.S. at 125. Indeed, in enacting FECA in 1971, a more prudent Congress referred to "the powers reserved in this field to the States" — seemingly an acknowledgment of the Tenth Amendment's "reserv[ation] to the States," U.S. Const. amend. X, of the power to regulate their own elections. *See* S. Rep. No. 92-229, at 258.

Each of the 50 States has considered and enacted legislation governing the financing of campaigns for state and local office. By superimposing federal restrictions on local, state, and

national party participation in state elections, BCRA overrides those state laws and thus offends "Our Federalism."

II. TITLE I SPLINTERS THE VARIOUS ELEMENTS OF THE POLITICAL PARTY APPARATUS AND THEREBY INFRINGES THE FIRST AMENDMENT RIGHT OF ASSOCIATION.

In view of the "important and legitimate role" they play "in American elections," *Colorado I*, 518 U.S. at 618, it is "well settled" that political parties "enjoy freedom of association protected by the First and Fourteenth Amendments," *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989); *accord, e.g.*, *Tashjian*, 479 U.S. at 215. Specifically, the Supreme Court has emphasized that "the First Amendment protects 'the freedom to join together [in parties] in furtherance of common political beliefs ....'" *Jones*, 530 U.S. at 574 (quoting *Tashjian*, 479 U.S. at 214-15). But BCRA creates — in Senator McCain's own words — a "firewall" between national and state party committees, McCain Dep. 223, and thus strikes at the very heart of the RNC, which, by definition, is a federation of state parties.

A. Title I Is Subject to Strict Scrutiny Because It Severely Burdens Political Parties' Associational Rights.

BCRA, of course, is not so clumsy as to prohibit outright the act of joining or affiliating with a political party. But the right of association entails much more than just the initial act of joining. As the Supreme Court stated in *Tashjian*, "[c]onsidered from the standpoint of [a political] Party itself, the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in any sense the most important." 479 U.S. at 215. Thus, the First Amendment protects not only (or even principally) the initial act of joining, but also the right of individuals, once joined, to combine their efforts to "advance[]," "further[]," and "promot[e]" common political goals and ideals. *Jones*, 530 U.S. at 574; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997).

The right of association, therefore, is a right to "*effective* association." *See* L. Tribe, *American Constitutional Law* §13.20, at 1103-04 (2d ed. 1988) (emphasis added). The Government violates the right of association not only where it prohibits or penalizes the act of joining, but also where it interferes "with an activity integral to the association in the sense that the association's protected purposes would be significantly frustrated were the activity disallowed." *Id.*; *see also Eu*, 489 U.S. at 224 (right of association means more than just "that an individual voter has the right to associate with the political party of her choice"). "Such governmental interference" with a party's right of association — even if it falls short of an outright ban on affiliation — is subject to strict constitutional scrutiny, and may not be upheld unless the Government shows (i) that it is pursuing a compelling regulatory interest and (ii) that "no less intrusive regulation" will suffice. Tribe, *supra*, at 1016-17 (collecting cases); *see also Eu*, 489 U.S. at 225 (strict scrutiny applied where law "burden[ed]" party's associational rights).

Healy v. James, 408 U.S. 169 (1972), is illustrative. There, the Court held that a state university had violated a student group's associational rights by denying it official campus recognition. The Court "concede[d] ... that the administration 'ha[d] taken no direct action ... to restrict the rights of (petitioners) to associate freely'" inasmuch as the group could still meet together off campus. 408 U.S. at 183. But, the Court emphasized, "the Constitution's protection is not limited to direct interference with fundamental rights" but reaches "indirect ... infringement" as well. *Id.* In other words, a group's freedom of association is "'protected not only against heavy-handed frontal attack'", but also from "'more subtle government interference.'" *Id.* (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960)).

In *Healy*, the Court noted that with official campus recognition came the privileges of using campus facilities for meetings and of publicizing group activities and views in the student

newspaper and on campus bulletin boards. *Id.* at 176, 181-82. Thus, the denial of official campus recognition "posed serious problems for the organization's existence and growth." *Id.* at 176. In short, the Court concluded that without official campus recognition and the incidental benefits such recognition conveyed, the organization's purpose would be unduly frustrated. Accordingly, "[s]uch impediments" to the group's right of association, even if indirect, could not "be viewed as insubstantial." *Id.* at 182.

Nor can the "impediments" imposed by BCRA on political parties' rights of association be deemed "insubstantial." The Republican Party, for instance, "comprises several interacting, independent entities that work closely together on a daily basis to promote Republican ideals at the local, state, and federal levels, help elect candidates who espouse these ideals at all levels, and govern after elections according to these ideals." Josefiak Decl. ¶11. The accomplishment of these purposes requires that the various elements and members of the Party be able to associate with one another and coordinate their activities.[10]

Indeed, the Republican Party's "association" is not merely *conceptual* — it is *actual.* Just one example, explained in detail above, is the close working relationship that exists among representatives from the national, state, and local Republican Party committees, as well as representatives of key national, state, and local Republican candidates, in the creation and implementation of "Victory Plans." *See supra* at 9. In addition to the Victory Plan meetings, the RNC conducts three annual meetings at which "Party officials from across the nation" engage in the "exchange of views, debate of issues, and formulation of Party rules and policy." Banning

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[10] *See* Duncan Decl. ¶7 ("[I]t is very important for the local, state, and national arms of the RNC to work closely together in all aspects of the political process."); La Raja Decl. ¶12 (various components of political parties "work together toward common goals," "rely on each other for information and resources," and are "bound to each other by the success of party candidates at different levels of government office").

Decl. ¶28(g). Further, during the 2000 election cycle alone, the RNC conducted 117 "nuts and bolts" seminars at which national representatives provided training concerning grassroots and GOTV activities to state and local campaign staff. *Id.* ¶28(c).

BCRA certainly burdens (or even proscribes) effective RNC participation in Victory Plan and other campaign-strategy meetings. RNC "agents" have historically been integrally involved in deciding how nonfederal funds will be raised and spent for Victory Plans, in transferring both federal and nonfederal funds to state parties for these programs, and in helping to raise federal and nonfederal funds for them. But new §323(a) prohibits national parties from "spend[ing]" or "direct[ing]" nonfederal funds (including Levin funds). Moreover, BCRA's "homegrown" requirement prohibits national party committees from providing *even federal money* for any such programs that also use Levin funds. In short, *any* RNC involvement in a Victory Plan meeting — the act of merely sitting down at a table and participating in collective decisionmaking about how money will be raised, directed, and spent — risks "federalizing" the entire enterprise. As a result, state and local parties and candidates are punished simply for associating with the RNC. Josefiak Decl. ¶¶40, 77. Notably, when asked whether RNC participation in Victory Plan or other grassroots planning activity would violate BCRA, Senator McCain repeatedly answered, "I'll have to get back to you." McCain Dep. 247-53.

Real-life examples abound. RNC Co-Chair Ann Wagner, who is also the Chair of the Missouri Republican Party, will be forced to choose between her responsibilities on the national and state party committees, because under new §323(a) it will be a federal crime for her to raise state-regulated money for the Missouri party while an officer of the RNC. Josefiak Decl. ¶80. New Jersey State Senator Joseph M. Kyrillos, Jr., who chairs the New Jersey Republican Party and is also one of the 165 members of the RNC, faces a related problem, Kyrillos Decl. ¶7, as

does Pat Brister, chair of the Republican Party of Louisiana and RNC national committeewoman, Brister Decl. ¶12. *See also* Duncan Decl. ¶9.

But these examples only scratch the surface. In fact, BCRA drives wedge after wedge between the various key elements that constitute the party "association." For instance —

1. **Between national party committees and state and local party committees:**

   - National party committees and their "agents" may not solicit nonfederal money for or engage in any coordinated fundraising activity with state or local party committees. §323(a).

   - National party committees may not participate with state and local parties in any decision concerning the "solicit[ation]," "spend[ing]," on "direct[ion]" of nonfederal money used for voter identification and GOTV activity. §§323(a), 323(b)(2).

   - National party committees may not transfer to or coordinate with state party committees in raising so-called Levin money. §§323(b)(2)(B), 323(b)(2)(C).

2. **Between national party committees and state and local candidates:**

   - National party committees may not solicit state-regulated money for state and local candidates. §323(a). Thus, for instance, BCRA makes it a federal crime for an officer of the RNC to make a fundraising appearance alongside a Republican candidate for the Kentucky state house, or even send a fundraising letter for him. Duncan Decl. ¶¶6, 9.

   - National party committees may not contribute state-regulated money to state and local candidates for use in state and local elections. §323(a).

3. **Between the various state and local party committees:**

   - One state or local party committee may not transfer either federal or Levin money to another state or local party committee – even within the same state – for "Federal election activity." §§323(b)(2)(B)(iv), 323(b)(2)(C).

4. **Between federal officeholders/candidates and state and local candidates:**

   - A federal officeholder or candidate may not solicit money for or assist in fundraising for state or local candidates except within federally-imposed limits. §323(e)(1).

   - A federal officeholder or candidate may not coordinate GOTV efforts with a state or local candidate without requiring the use of 100% federal money. §323(e)(1).

5. **Between federal officeholders/candidates and state party committees:**

   - Except within the narrow confines of attending a "fundraising event," federal officeholders and candidates may not solicit nonfederal money for state and local party committees. §§323(e)(1), 323(e)(3).

   - A federal officeholder or candidate may not coordinate GOTV efforts with a state or local party committee without requiring the use of 100% federal money. §§323(b)(2)(C), 323(e)(1).

6. **Between party committees and allied tax-exempt organizations:**

   - No party committee may solicit for or donate any money to any tax-exempt organization that, in turn, spends money on "Federal election activity." §323(d).

7. **Between national party committees and other allied groups:**

   - The RNC may not continue its current practice of funding partly with nonfederal money outreach efforts aimed at recruiting youth and minority voters. Banning Decl. ¶28.

   - The RNC has been forced to sever relations — by literally kicking them out of the building — with organizations that facilitate interaction among state and local officeholders (the Republican Governors Association, the Republican Attorneys General Association, and the National Republican Legislators Association).

* * *

This recitation paints a clear picture. While the Supreme Court is busy protecting the First Amendment rights of citizens to "join together" and "band together" in political parties to advance common political goals, *Jones*, 530 U.S. at 574, BCRA is busy pulling those very same citizens apart. The result of BCRA is a party apparatus hopelessly splintered and incapable of exercising any right of "effective" association to accomplish its core purposes. Josefiak Decl. ¶75 ("The unfortunate result [of BCRA] will be less interaction between the RNC and state parties, less sharing of expertise and resources, and significantly less resources devoted to core grassroots and get-out-the-vote activities that are crucial to increasing voter turnout."). Thus, here, as in *Healy*, the "practical realit[y]" is that BCRA "pose[s] serious problems for the [party's] existence and growth." 408 U.S. at 176, 183.

Indeed, BCRA runs headlong into on-point Supreme Court precedent concerning the associational rights of political parties. For instance, it is a fact that "[t]he RNC ... communicates directly with its own members and adherents, a function that is vitally important to building the Party." Banning Decl. ¶28(f); *see also* Milkis Decl. ¶48 ("The ability of an organization to communicate with its membership goes directly to its associational role."). In that vein, the Supreme Court struck down a state law prohibiting parties from endorsing candidates in primaries, stating that "it is particularly egregious where the State censors the political speech that a political party shares with its members." *Eu*, 489 U.S. at 224 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring)).[11] Notably, Congress has freely allowed other groups (namely, corporations, unions, and trade associations) to communicate with their members and/or restricted classes of employees at *any* time, on *any* subject, using *totally unregulated* money — *even* for the purpose of expressly advocating the election or defeat of a clearly identified federal candidate and *even* when the communication is fully coordinated with the federal candidate. 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. §114.3. By contrast, under BCRA, national party communications with their members and adherents for any purpose whatsoever, whether for express advocacy, housekeeping, or anything in between, are strictly regulated and must be paid for with precious federal money.

It is likewise a fact that "[t]o maintain strong organizations the parties need to engage in general party building during election and non-election years." La Raja Decl. ¶11(d). In *that* vein, the Supreme Court has declared that a "Party's attempt to broaden the base of public

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[11] *See also United States v. CIO*, 335 U.S. 106, 120-21 (1948) (Court had "gravest doubt ... as to [the] constitutionality" of statute restricting corporations and unions from communicating with members on matters of public importance); *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995) ("The Supreme Court long ago ... recognized an organization's ... First Amendment right to communicate with its 'members.'").

participation in and support for its activities is conduct undeniably central to the exercise of the right of association." 479 U.S. at 214; *see also id.* at 215 (protecting "potential association with nonmembers"). More recently, the Court in *Jones* quoted Justice Stevens' *Timmons* dissent for the proposition that a party has a right (by selecting a nominee) to "communicate to the voters what the party represents and, thereby, attract voter interest and support." 530 U.S. at 575 (quoting *Timmons*, 520 U.S. at 372). But while corporations, unions, and interest groups remain able after BCRA to use unregulated and undisclosed money to identify like-minded voters and urge them to vote (so long as they don't expressly advocate the election or defeat of an identified federal candidate) parties must use limited federal funds for identical purposes.

The BCRA thus strikes at the very heart of political parties' right of association – both the "internal" association that occurs among various party leaders, members, and committees, and the "external" association that occurs when parties seek to identify and recruit new adherents.

B. Title I's Infringement of Political Parties' Associational Rights Cannot Satisfy Any Form of Heightened Scrutiny.

Because the burdens that it imposes on the parties' associational freedoms are "heav[y]" and "severe," BCRA is "unconstitutional unless it is narrowly tailored to serve a compelling state interest." *Jones*, 530 U.S. at 582 (citing *Timmons*, 520 U.S. at 358). Here, as in all federal campaign-finance cases, the governmental interest at stake is the interest in preventing the corruption of federal officeholders and candidates or the appearance thereof. As shown, *see supra* at 16-21, this asserted justification is unproven at worst and highly exaggerated at best.

More fundamentally, Title I's provisions are not narrowly tailored to address any interest in preventing or reducing corruption or the appearance of corruption. Most notably, §323(a)'s flat ban on the solicitation, receipt, transfer, and disbursement of nonfederal money by national

political parties is clearly not "narrowly tailored," because *it is not "tailored" at all.* Section 323(a) reveals no effort whatsoever to account for the national parties' associational interests or to tailor its prohibitions to avoid unnecessarily burdening those interests. Section 323(a) simply states a categorical ban; no exceptions. In contrast, Congress at least nodded in the direction of tailoring §323(b), which covers state party activities; that provision states a rule, allows exceptions, and then imposes conditions on those exceptions.

It simply cannot be contended in good faith that *every* conceivable solicitation, use, transfer, or direction of nonfederal money by a national political party committee — even when no federal official is involved and when nonfederal money is used to pay overhead expenses — risks corrupting federal officeholders and candidates. Indeed, the Supreme Court itself has already concluded that the "opportunity for corruption" posed by "unregulated 'soft money' contributions to a party for certain activities such as electing candidates for state office or for voter registration and 'get out the vote' drives" is "*at best, attenuated.*" *Colorado I*, 518 U.S. at 616 (emphasis added). Even if it were true that some nonfederal money carried a potential for corrupting federal officeholders, a statute that "indiscriminately lumps" all proposed uses of that money constitutes a "fatally overbroad response to [the perceived] evil." *FEC v. NCPAC*, 470 U.S. 480, 498, 500 (1995). It is fundamental that Congress may not outlaw protected First Amendment activity in an effort to suppress unprotected activity. *See, e.g., Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1399, 1404 (2002).

BCRA's treatment of political parties (both national and state) also stands in contrast to its more lenient treatment of federal candidates and officeholders. Under §323(a), for instance, a national party committee is absolutely prohibited from raising, transferring, or spending nonfederal money, period — even in connection with a state or local election. Section

323(e)(1)(A), by contrast, states only that federal officeholders and candidates may not solicit, direct, transfer, or spend nonfederal money "in connection with an election for federal office." Then, §323(e)(1)(A) creates an explicit exemption that allows federal candidates and officeholders to raise, transfer, or spend nonfederal money in connection with a state or local election so long as the amount raised is less than a prescribed limit. Similarly, whereas §323(d) flatly prohibits political parties from soliciting funds for tax-exempt organizations that engage in Federal election activity, §323(e) creates an exemption permitting federal candidates and officeholders to make such solicitations under specified conditions. These provisions subjecting political parties to flat bans while permitting federal candidates and officeholders to engage in the same activities reveal an utter lack of tailoring in the Act's treatment of parties. Worse, these provisions flip the campaign-finance world on its head. It is, after all, the actual and perceived corruption of *candidates and officeholders* — not *political parties* — to which the Supreme Court has said campaign-finance laws may be properly addressed. So, why an outright ban on party activity and a Swiss-cheese approach to regulating the same activities when engaged in by candidates and officeholders? Asked, in effect, that very question in their depositions, BCRA co-sponsors Senators McCain and Feingold had no answer. McCain Dep. 205-15 ("I'll have to get back to you on that."); Feingold Dep. 189 (unable to explain distinction "off the top of [his] head"). BCRA simply does not reflect even a minimally tailored response to Congress's purported concern about election-related corruption of public servants.

III. TITLE I BROADLY PROHIBITS POLITICAL PARTIES, THEIR AGENTS, AND FEDERAL CANDIDATES AND OFFICEHOLDERS FROM "SOLICIT[ING]" FUNDS FOR POLITICAL CAUSES AND THEREBY INFRINGES THE FIRST AMENDMENT RIGHT OF FREE SPEECH.

Quite apart from its attack on political party association, Title I prohibits *pure speech*: party officials are prohibited from uttering words of solicitation for otherwise legal contributions.

As but one example, it is perfectly legal for anyone else to say "contribute to the Jones for Governor campaign," but it is a *crime* for a national party official merely to utter *those exact words*. Further, under BCRA —

1. **National party committees and their agents may not**

   - solicit any nonfederal funds for state parties or state candidates, even where the solicited donations are permissible under applicable state law, §323(a);
   - raise any lawful Levin money on behalf of state parties, §323(b)(2)(B);
   - participate with state parties in any joint nonfederal fundraising activities, §323(a); or
   - solicit any funds for tax-exempt organizations that lawfully engage in Federal election activity, §323(d).

2. **State party committees and their officers may not**

   - solicit any Levin money in conjunction with national parties or other state or local parties, §323(b)(2)(B);
   - engage in certain joint fundraising activity with federal officeholders or candidates; or
   - solicit any funds for tax-exempt organizations that engage in Federal election activity, §323(d).

3. **Federal candidates and officeholders may not**

   - solicit any funds for state or local candidates except within federally-imposed limits, §323(e)(1);
   - solicit any nonfederal funds, including Levin money, for state or local party committees, except within the confines of a "fundraising event," §§323(e)(1), 323(e)(3).

* * *

"Solicitation is a recognized form of speech protected by the First Amendment." *United States v. Kokinda*, 497 U.S. 720, 725 (1990). Indeed, the Supreme Court's "cases have long protected speech even though it is in the form of ... a solicitation to pay or contribute money." *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977). Most analogous to this case are the

Supreme Court's decisions concerning charitable solicitations — all of which lead inexorably to the conclusion that BCRA's solicitation restrictions are unconstitutional.

A. Title I's Solicitation Restrictions Are Subject to Strict Scrutiny Because They Constitute Direct and Substantial Limitations on Pure Speech.

In *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 622 (1980), the Court struck down an ordinance banning door-to-door or on-street solicitations by charitable organizations not using at least 75% of their receipts for "charitable purposes." At the very outset of its analysis, the Court rejected the argument that the ordinance should be upheld because it "deals only with solicitation and because any charity is free to propagate its views from door to door ... without a permit as long as it refrains from soliciting money." *Id.* at 628. The Court likewise rejected any suggestion that a charitable solicitation could be considered "commercial speech." *Id.* at 632. Rather, the Court accorded the solicitation full constitutional protection: "[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment." *Id.*

The *Schaumburg* Court held that such a "direct and substantial limitation" on free speech rights cannot be sustained unless (i) "it serves a sufficiently strong, subordinating interest that the [government] is entitled to protect" and, perhaps more importantly here, (ii) the government has done so "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Id.* at 636-37. Thus, the Court emphasized that "[b]road prophylactic rules in the area of free expression are suspect" and that "'[p]recision of regulation must be the touchstone.'" *Id.* at 637 (quoting *NAACP v. Button*, 371 U.S. 415, 438

(1963)). Because there were less restrictive means of preventing fraud and protecting personal privacy, the Court invalidated the anti-solicitation ordinance at issue. *See id.* at 637-39.

Significantly here, the *Schaumburg* Court emphasized that solicitation, "is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, *political*, or social issues." *Id.* at 632 (emphasis added). "[W]ithout solicitation," the Court said, "the flow of such information and advocacy would likely cease." *Id. See also Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 967-68 (1984) (striking down Maryland ordinance similar to the one in *Schaumburg*, but containing an exception if the organization would be effectively prevented from raising contributions, as not "precisely tailored"); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 787, 789, 794 (1988) (striking down North Carolina statute prohibiting professional fundraisers from charging "unreasonable" fees).

The Court's rulings in *Schaumburg*, *Munson*, and *Riley* apply with equal, if not greater, force to BCRA's restrictions on solicitations by political parties and candidates. The Supreme Court has repeatedly stressed that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs," *Mills v. Alabama*, 384 U.S. 214, 218 (1966), and, even more to the point, that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office," *Eu*, 489 U.S. at 223 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Accordingly, everything the Court said in the *Schaumburg* cases concerning charitable solicitations — that a solicitation is protected speech, that "[b]road prophylactic rules ... are suspect," and that "[p]recision of regulation" is required — applies *a fortiori* here.

B. Title I's Solicitation Restrictions Cannot Satisfy Any Form of Heightened Scrutiny.

BCRA's prohibitions on solicitation could hardly be clearer: the statute repeatedly uses the word "solicit." And under no meaningful analysis could BCRA's restrictions be said to be "narrowly tailored" to any interest that the Government is entitled to pursue. Of course, BCRA's lead provision, §323(a), is most notable for its overbreadth. That provision categorically prohibits national party committees or their officers from "solicit[ing]" nonfederal money from *any* person for *any* purpose, even where the solicited donations are permissible under applicable state law. There are no exceptions to §323(a)'s flat ban. BCRA therefore makes it a federal offense (as just one example) for an officer of the RNC to send a fundraising letter soliciting any amount of nonfederal money from any source on behalf of a gubernatorial or mayoral candidate. BCRA likewise categorically prohibits national party committees from assisting state parties in raising lawful Levin money, §323(b), and from soliciting donations on behalf of any tax-exempt organization that engages in Federal election activity, §323(d). BCRA therefore criminalizes, in the clearest and most sweeping terms, acts of *pure political speech*.

BCRA's restrictions on the solicitation rights of other political actors (state parties, political candidates, etc.) are perhaps slightly less sweeping than §323(a), but they, too, reflect a lack of careful tailoring. Indeed, in several respects BCRA's solicitation restrictions border on the irrational. For instance, under §323(e) a federal officeholder or candidate may not as a general matter "solicit" nonfederal money for state parties or candidates. Curiously, however, §323(e)(3) carves out an exception that permits federal officeholders and candidates (but *not* national party officials) to "speak" at fundraising events put on by a state or local party. Congress made no effort to explain why it chose to respect an officeholder's right to engage in

core political speech while standing indoors at a fundraising event but to deny to that individual the right to engage in the very same speech while standing outdoors in the parking lot.

Further, whereas §323(d) categorically prohibits both national and state party committees and their agents from soliciting any money on behalf of tax-exempt organizations that engage in Federal election activity, §323(e) creates an exception that permits federal officeholders and candidates to make the same solicitations under more lenient conditions. But, again, as explained above, this gets matters just backwards. It is the corruption of federal officeholders and candidates — not the corruption of political parties — that the Supreme Court has recognized as a legitimate state interest in its campaign finance cases. Neither of BCRA's chief proponents, Senators McCain and Feingold, could muster an explanation for why the Act treats parties more harshly than officeholders and candidates. *See supra* at 46. Because it expressly allows federal officeholders themselves to engage in the very solicitations that would land RNC agents in jail, BCRA simply does not achieve the "[p]recision of regulation" demanded by the Supreme Court.

IV. TITLE I LIMITS PARTY SPENDING AND UNDERMINES EFFECTIVE POLITICAL ADVOCACY AND THEREBY INFRINGES THE FIRST AMENDMENT RIGHT OF FREE SPEECH.

Defendants will likely argue that Title I is merely a contribution limit, sustainable under *Buckley*. BCRA does not fit neatly into *Buckley*'s contribution-expenditure paradigm, however.

A. Title I Is Subject to Strict Scrutiny Both Because It Purports To Limit Pure Issue Speech and Because It Operates, in Part, as an Expenditure Cap.

Section 323(a)'s restrictions apply prophylactically to prohibit national parties from "receiv[ing]" or "spend[ing]" nonfederal money for any purpose whatsoever. Section 323(a) certainly does not limit "contribut[ions] to a *candidate*," where the potential for apparent corruption is at its zenith and which the Supreme Court has "identified" as the "single narrow

exception to the rule that limits on political activity [are] contrary to the First Amendment." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296-97 (1981) (emphasis in original). Instead, §323(a) runs headlong into on-point Supreme Court precedent invalidating (i) limits on contributions to political associations (like the party plaintiffs here) that go to fund pure issue speech unrelated to campaigns and (ii) restrictions on noncoordinated spending by political parties. Section 323(a) thus sweeps with its ambit a whole host of speech activity that the Government may not constitutionally regulate.

In *Citizens Against Rent Control*, the Court struck down under the First Amendment a local ordinance that limited *contributions* to a political association that, in turn, engaged in pure issue speech. 454 U.S. at 296-99. Although much of the RNC's speech is campaign-related, and some is closely coordinated with its candidates' campaigns, it is also true that the RNC engages in pure issue speech that is unrelated to any campaign for office and, in that respect, is indistinguishable from the political association whose issue speech the Court accorded full First Amendment protection in *Citizens Against Rent Control*. *See supra* at 5 (RNC issue speech concerning, *e.g.*, balanced budget, welfare reform, and education policy).[12] "Placing limits on contributions which in turn limit expenditures" for pure issue speech is impermissible under *Citizens Against Rent Control*'s express holding.

Section 323(a) is also facially overbroad because it purports to limit national party "spend[ing]" that is not coordinated with any candidate's campaign. But the Supreme Court has already preserved as inviolate the parties' right to engage in unlimited independent campaign spending. Most notably, in *Colorado I*, the Court stressed that the "constitutionally significant

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[12] We endorse our co-plaintiffs' arguments concerning the constitutional impermissibility of any attempt to regulate issue advocacy.

fact" in assessing limits on party spending is "the lack of coordination between the candidate and the source of the expenditure," and held that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." 518 U.S. at 616-17; *see also NCPAC*, 470 U.S. at 493; *California Medical Ass'n v. FEC*, 453 U.S. 182, 203 (1981) (Blackmun, J., concurring). And the Court in *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431 (2001), reaffirmed the right of a political party to "spend money in support of a candidate *without legal limit* so long as it spends independently" and emphasized that "[a] party may spend independently *every cent it can raise* wherever it thinks its candidate will shine, on every subject and any viewpoint." *Id.* at 455 (emphasis added). To the extent that Title I purports to limit the RNC's uncoordinated spending, it is void.

Unlike §323(a), §323(b) does *not* restrict in any manner the amount of state-regulated money that state parties may *raise*; a state party may raise as much state-regulated money as it is able consistent with state law. Rather, §323(b) limits only the *spending* of such lawfully-raised money and, thus, must be reviewed as a pure expenditure limit. Under *Buckley* and its progeny, such a limit on independent spending of funds that were raised legally is subject to strict scrutiny and is impermissible because it bears no relationship to any effort to prevent corruption or the appearance thereof.

B. Even If Title I Were Treated as a Typical Contribution Limit Subject To Less Than Strict Scrutiny, It Would Be Invalid Because It Cannot Satisfy Any Form of Heightened Scrutiny.

In any event, any accommodation that courts might have shown with respect to limits on contributions to *non*-candidate entities, *but see Citizens Against Rent Control*, 454 U.S. at 296-97, has by no means been carte blanche. The First Amendment prohibits imposition of contribution limits that interfere with effective political speech.

Using 2000 numbers as benchmarks, Title I will deprive the RNC of $125 million in presidential election years and $48.5 million non-presidential election years. (Of course, these numbers represent a static view; Title I will likely deprive the RNC of more in future years.) It imposes similar, though even more severe, burdens on state political parties, which can no longer receive substantial nonfederal (or in many cases, federal) transfers from the national parties, and which will be deprived of critical fundraising assistance from national parties and federal officeholders and candidates. *See supra* at 15-16 (impact on state parties). Although BCRA dramatically increases the array of activities that must be funded with federal money — from national party involvement in state and local election activity, to the previously nonfederal portion of administrative overhead for national parties, to the overbroad array of state party activities swept within the definition of "Federal election activity" — the record is clear that neither the national nor state parties will be able to bridge the financial shortfall. The net effects of BCRA will be massive layoffs and severe reduction of important core political speech at the RNC, and reduction of many state parties to a "nominal" existence. *See supra* at 16.

Simultaneously, the demands on political parties have never been greater. Although interest group broadcasting advertising is not subject to any reporting requirements, estimates relied on by defendants indicate spending of $347 million in the 2000 election cycle, almost doubling since the 1998 cycle. Even now, broadcast issue advocacy by interest groups is increasing at a faster pace than total national political party fundraising. *See supra* at 10-11. Further, broadcast issue advertising by interest groups is only the tip of the iceberg, since their extensive voter mobilization efforts, *see supra* at 11-12, are neither publicly reported nor even carefully studied.

Congress passed BCRA with no apparent regard for its financial impact on the political parties. The FEC has admitted that it is aware of no methodical analysis of BCRA's impact on national, state, or local political parties. Vosdingh Dep. 24-33, 58-59, 107-09; *see also* Sorauf CX 151-52. Thus, the parties' evidence on the financial impact of BCRA "at all three levels of the political process" stands unrebutted. Order Denying in Part and Granting in Part FEC's Motion for a Stay of the Rule 30(b)(6) Deposition, etc., at 10 (Sept. 20, 2002).

Beginning with *Buckley*, the Supreme Court recognized that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21; *accord Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 395-96 (2000). In no prior Supreme Court case has a challenger to contribution limits been able to demonstrate that the limits "have a severe impact on political dialogue" or otherwise prevent "effective advocacy." Lower courts, however, including this one, have so found.[13] Here, the undisputed record likewise proves a severe burden on political dialogue and effective advocacy.

Even taken in isolation, the extensive restrictions on receiving non-federally-regulated money imposed on national parties will have an immediate, debilitating, and long-lasting effect. While defendants may emphasize the growing revenues of national political parties over time, fallaciously suggest that the parties will have no trouble replacing 40% of their revenue in short order, claim that the parties are spending too much money, or even (paternalistically) assert that

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[13] *California Prolife Council PAC v. Scully*, 989 F. Supp. 1282, 1297 (E.D. Cal. 1998) (striking down California campaign finance law on basis of "myriad facts which, taken together, require the court to conclude that [the statute] make[s] it impossible for the ordinary candidate to mount an effective campaign for office"), *aff'd*, 164 F.3d 1189 (9th Cir. 1999); *National Black Police Assn v. D.C. Board of Elections and Ethics*, 924 F. Supp. 270, 274 (D.D.C. 1996) (striking D.C. contribution limits as "prevent[ing] candidates from amassing the resources for effective advocacy"); *vacated as moot*, 108 F.3d 346 (D.C. Cir. 1997).

the parties are misspending the money they have, none of these propositions is demonstrated by the legislative record or the record compiled in this case.

To the contrary, the record in this case refutes each of these suggestions. As explained above, professional fundraisers have testified by declaration and on cross-examination that neither the national parties nor the state parties will be able to bridge the revenue gap. *See supra* at 14-16. Party executives have likewise testified to the severe financial impact. Banning Decl. ¶¶ 32-35 (40% layoffs, deep reduction in important programs); Bennett Decl. ¶¶15, 17(g), (j); Benson Decl. ¶¶8-11; Brister Decl. ¶15.

This testimony does not even fully capture the situation, however, because it addresses a world standing still. It does not take into account, for example, the geometric growth of interest group activity even *before* the enactment of BCRA. Moreover, this record compellingly demonstrates that BCRA affirmatively *encourages* interest groups to *expand* their activities, and provides them ample resources — funds from nonfederal donors who can no longer give to political parties — to do so, *see supra* at 13, while stopping political parties dead in their tracks.

In short, decisions upholding pure contribution limits have always contained a careful qualification that such limits (even when supported by a compelling interest) may not unduly undermine "political dialogue" or hamper "effective advocacy." Like the impermissible expenditure restrictions invalidated in *Buckley*, BCRA's restrictions "represent[] substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Buckley*, 424 U.S. at 23. The financial straightjacket that Title I imposes on parties alone offends that First Amendment principle; when coupled with Title I's other restrictions on party activity, *see supra* Parts II, III, the violation is all the more palpable.

V. TITLE I SUBJECTS POLITICAL PARTIES TO UNIQUE DISABILITIES NOT IMPOSED ON SPECIAL INTEREST GROUPS AND THEREBY VIOLATES THE EQUAL PROTECTION COMPONENTS OF THE FIRST AND FIFTH AMENDMENTS.

Not only will BCRA weaken political parties in absolute terms, *see supra* Parts II, III, IV, but also — and "more ominously" — it will weaken parties relative to special interest groups like the NRA, the Sierra Club, and NARAL. Milkis Reb. Decl. ¶16. Although interest groups engage in many of the same activities as parties, *see supra* at 12 (chart); Green CX 157 (NAACP GOTV plan "is not very different" from Missouri Republican Party Victory Plan), BCRA saddles parties alone with unique burdens. Specifically, BCRA severely restricts the ability of political parties to raise and use nonfederal money, but then — inexplicably — leaves narrow special interest groups almost wholly free to raise and spend such money however and whenever they choose and without disclosing or reporting the bulk of their activity.

A. Title I Is Subject to Strict Scrutiny Because It Discriminates Against Political Parties With Respect to the Fundamental Right of Political Expression.

BCRA's disparate treatment of political parties is subject to strict constitutional scrutiny. The Supreme Court has held as a matter of First Amendment law that "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). When the Government selectively imposes speech burdens — even if it does so on the basis of technically content-neutral criteria such as the size or income of the speaker — it poses the real danger of "distort[ing] the market for ideas" and thus runs a risk "similar to that from content-based regulation." *Leathers v. Medlock*, 499 U.S. 439, 448 (1991). As Justice O'Connor has emphasized, "[l]aws that single out particular speakers are substantially more dangerous, even when they do not draw explicit content distinctions." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 676 (1994) (concurring and dissenting opinion). Accordingly, although in other areas

"Congress ordinarily need not address a perceived problem all at once," the Supreme Court has rejected the "facile one-bite-at-a-time explanation for rules affecting important First Amendment values." *News Am. Publ'g v. FCC*, 844 F.2d 800, 815 (D.C. Cir. 1988); *accord, e.g., Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (in the speech context, a "selective ban" "cannot be defended on the ground that partial prohibitions may effect partial relief"). Consequently, even if a *uniformly* imposed speech burden would be justified by sufficiently weighty government interests, selective or "underinclusive" speech regulations are invalid unless the government can *independently* justify the differential treatment embodied in statutory exemptions.

There can be little doubt that BCRA singles political parties out, to use Justice O'Connor's words. As shown in greater detail below, BCRA categorically prohibits national parties from receiving or using nonfederal money — even where that money goes to fund core political speech and associational activities — while leaving special interest groups free to raise and spend such money with little if any regulation.

Equal protection analysis (here, under the Fifth Amendment) leads to the same result. "Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990); *see also, e.g., Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("Classifications ... affecting fundamental rights are given the most exacting scrutiny."); *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) ("The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives."). Title I plainly "classifies"; it does so on its face ("Soft Money *of Political Parties*"). Nor is it debatable that Title I "impinges" on or "affects" parties' "right to engage in political expression."

Put simply, while BCRA prohibits national party committees like the RNC from soliciting, receiving, spending, or directing non-federally regulated money, it imposes no similar (or even remotely similar) disabilities on corporations, unions, or special interest groups. For instance, these other groups may continue to use unregulated, undisclosed money —

- to pay overhead expenses;
- to engage in voter identification, voter registration, get-out-the-vote, and other grassroots mobilization activities;
- to communicate with their members or adherents (indeed, corporations, unions, and interest groups may use nonfederal money even to engage in express advocacy with their members or shareholders, *see* 2 U.S.C. § 441b(b)(2)(A));
- to run broadcast issue advertisements outside the designated 30- and 60-day windows, and print advertisements at any time;
- to contribute directly to state and local candidates where permissible under state law.

Peschong Decl. ¶¶13-14; FEC Responses to RFAs Nos. 101-108.

By contrast, political parties may not use nonfederal funds for *any* of these activities. *See also* McCain Dep. 268-74 (discussing campaign materials that, under BCRA, would have to be funded with federal money if distributed by a party, but could be paid with nonfederal money if distributed by a special interest group); Feingold Dep. 215-16 (same); Fowler CX 31 (allowing interest groups to run "electioneering communications" with nonfederal money would "greatly enhance" role of groups and "significantly diminish" the role of parties). Accordingly, rather than using a scalpel to regulate specific uses (by whomever) of nonfederal money that it found particularly objectionable, Congress in BCRA used a meat cleaver to cut political parties completely out of the game while leaving special interest groups largely untouched.

Even assuming (and we do not) that Title II's restrictions on "electioneering communications" were to be sustained, BCRA would still leave political parties at a severe disadvantage relative to interest groups. Special interest groups will simply use nonfederal

money to run issue ads "right up until the 31st day before a primary and the 61st day before a general election." Milkis Reb. Decl. ¶9. "Such advertising can serve to frame the terms of debate, all the more so because parties" — prohibited from similarly using nonfederal money — "will be constrained in their ability effectively to respond." *Id.* Indeed, the record here plainly shows that special interest groups are already shifting their focus in the weeks immediately preceding an election to the so-called "ground war," using their unregulated and undisclosed funds for telephone banks, targeted direct mail, door-to-door canvassing, leafleting, and other voter mobilization activity. *See supra* at 11-12. Under BCRA, the special interests will have even more resources to devote to such activities than they currently do, since they are already planning to solicit, and will certainly obtain, a large portion of nonfederal money previously donated to the parties. *See supra* at 12-13. The national parties will be left to try — almost certainly unsuccessfully — to counter the special interests by using their limited hard-money resources. Peschong Decl. ¶¶12-18; La Raja Decl. ¶24(d); La Raja Reb. Decl. ¶26. Of course, if Title II's 30/60 day restriction on interest-group-sponsored issue ads is struck down, the resource gap between the parties and the special interests will only widen. La Raja Decl. ¶15(d), Fowler CX at 37-38.[14]

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[14] It is no answer that FECA, as amended by BCRA, grants political parties certain advantages over other political actors. The increased contribution limits for parties in BCRA provide only a minimal advantage to the parties. Shea Decl. ¶¶11, 19. Moreover, these purported advantages for political parties pale in comparison to the bottomless well of nonfederal money from which special interest groups may now draw but parties may not.

Likewise, the simple fact that political parties have preferred access to the ballot cannot alone justify unique speech disabilities. The parties in *Jones*, 530 U.S. 567, *Eu*, 489 U.S. 214, and *Tashjian*, 479 U.S. 208, had preferred ballot access, and yet the Supreme Court in each of those cases invalidated the proposed restrictions on the parties' First Amendment rights. In any event, Congress accorded parties certain advantages because it found that parties serve an important purpose in the American political system, not so it later could saddle them with other

B. Title I's Differential Treatment of Political Parties and Special Interest Groups Cannot Satisfy Any Form of Heightened Scrutiny.

The Supreme Court has repeatedly recognized the "important and legitimate role" that political parties play in American elections. *Colorado I,* 518 U.S. at 618; *see also Davis v. Bandemer*, 478 U.S. 109, 144-45 (1986) (O'Connor, J., concurring).[15] More to the point, the Court has indicated in numerous contexts that parties may *not* be singled out for unfavorable treatment. Most recently, in *Colorado I*, the Supreme Court observed that "[w]e do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny *the same right* to political parties." 518 U.S. at 618 (emphasis added); *see also id.* at 616 ("The independent expression of a political party's views is 'core' First Amendment activity *no less than is* the independent expression of individuals, candidates, or other political committees." (emphasis added)). The Court's earlier decisions are to the same effect.[16]

The Court did not retreat from this principle in *Colorado II.* The only question at issue in *Colorado II* was whether "a party is ... in a different position from other political speakers, giving it a claim to demand a generally *higher* standard of scrutiny" when it comes to coordinated hard-money expenditures. 533 U.S. at 445 (emphasis added). In answering that

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hardships. *Cf.* S. Rep. No. 93-689, 1974 U.S.C.C.A.N. 5587, 5593 ("[A] vigorous party system is vital to American politics ....").

15 *See also Jones*, 530 U.S. at 574; *Timmons*, 520 U.S. at 357, 363; *Eu*, 489 U.S. at 223-24.

16 *See Eu*, 489 U.S. at 217 (noting oddity of rule under which, "[a]lthough the official governing bodies of political parties are barred from issuing endorsements, other groups are not"); *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 296 (1981) ("To place a ... limit on individuals wishing to band together to advance their views ... while placing none on individuals acting alone, is clearly a restraint on the right of association."); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

question in the negative, the Court certainly did not signal an intent to walk away from its prior cases precluding the Government from subjecting political parties to unique speech disabilities.

Even aside from the Supreme Court's very explicit statements forbidding discrimination against political parties, Title I cannot survive any form of heightened scrutiny. The question comes down to whether nonfederal spending by parties — as opposed to nonfederal spending by special interest groups — is *uniquely* likely to corrupt or appear to corrupt public servants. Significantly, the Supreme Court has already indicated that the answer to that question is "no." The Court in *Colorado I* said that it was "not aware of any special dangers of corruption associated with political parties that tip the constitutional balance" away from them and toward other political groups, and that, in fact, the logic seemed to cut the other way. 518 U.S. at 616-17. The Court further observed, in language particularly relevant here, that the potential of "unregulated 'soft money' contributions to a party for certain activities such as electing candidates for state office or for voter registration and 'get out the vote' drives" to corrupt is "*at best, attenuated.*" *Id.* (emphasis added); *see also Colorado II*, 533 U.S. at 444 (*Colorado I* held that there was "no justification for subjecting party election spending across the board to the kinds of limits previously invalidated when applied to individuals and nonparty groups"). Those conclusions are amply supported by the record evidence introduced here and, indeed, by simple common sense.

1. The Government Cannot Justify Subjecting Political Parties to Unique Speech Disabilities.

As shown, *see supra* at 16-17, this record refutes any suggestion that nonfederal money leads to *actual* corruption. The FEC has admitted that it has no evidence that a federal officeholder has ever actually changed his vote in exchange for a donation of nonfederal money to his political party (or, indeed, that the RNC has ever even attempted to influence an

officeholder's vote through the use of nonfederal money). In marked contrast, the record here *does* contain evidence that special interest groups have attempted to strike *quid pro quo* arrangements. *See supra* at 16-17. Thus, BCRA gets matters just backwards — it regulates the entities that don't engage in corrupting behavior, and leaves essentially alone those that do.

The reformers nonetheless assert that avoidance of the "appearance" of corruption justifies the unique restrictions on party committees. Whether phrased in terms of an appearance of corruption or as so-called enhanced "access" to federal officeholders (both of which boil down to the same thing), the record cannot be twisted to support the Government's claim.

First, to the extent the specter of special access is a problem at all as it relates to political parties, it is no more a problem among *nonfederal*-money donors (the subject of BCRA regulation) than among *federal*-money donors. In fact, in the experience of the RNC, the limited number of individuals who have either (i) sought (unsuccessfully) to condition a donation on the arrangement of a meeting with an officeholder or candidate or (ii) simply requested a meeting with an officeholder (without conditioning their donation) have more often been *federal-money* donors rather than *nonfederal-money* donors. Shea Decl. ¶¶44, 46. At the very least, the opportunity for face-to-face meetings between donors and officeholders is no greater where nonfederal money is involved than where federal money is involved. Indeed, the FEC has admitted that it has no evidence that officeholders are more likely to meet with nonfederal-money donors than with federal-money contributors. FEC Responses to RFAs Nos. 7-9; *see also* Fowler CX 42-46. And, of course, BCRA "does not purport to end" interactions between officeholders and federal-money donors, which "will likely continue after BCRA takes effect." Milkis Reb. Decl. ¶¶18-19.

Moreover, BCRA's restrictions on political parties cannot be justified as a means of indirectly limiting special interest group "access" because interest groups have available even more direct ways to obtain access to officeholders. To begin with, it is indisputable from the record in this case that special interest groups "use federal officeholders to raise funds, just as political parties do," and, more specifically, that special interest groups "host[] fundraisers much like those that parties conduct, featuring opportunities for wealthy donors and corporate executives to meet with federal officeholders." Milkis Reb. Decl. ¶19. Indeed, representatives of EMILY's List, NARAL, the League of Conservation Voters, **[MATERIAL REDACTED]**, and the Sierra Club, among others, have all candidly acknowledged that federal officeholders appear at group-sponsored fundraising events. *Id.* (citing interest-group declarations); *see also supra* at 12 (chart). Further, Senator McCain has testified to participating in a fundraiser for the Brennan Center and said that he was "sure" that some of the donors that attended the event did so "for the opportunity to meet John McCain." McCain Dep. 163. More generally, Senator McCain agreed that "federal officeholders are asked to raise money for as many causes as they could shake a stick at." *Id.* at 166-67; *see also* Snowe Dep. 249-50 (admitting that she has participated in fundraising for interest groups that have assisted her in campaigns).

Similarly, defense expert Dr. Mann has acknowledged that special interest groups engage in such activities as "electioneering communications" to "curry favor" with officeholders and to gain "access." Mann Decl. 33-34; Mann CX 148-49. Even if the 30/60 day windows were upheld, Dr. Mann concedes, special interest groups would continue to "curry favor" by engaging in a wide array of election-related activities, such as voter mobilization, paid for with completely unregulated and undisclosed nonfederal money. Mann CX 148-49. Notably, the FEC has admitted that "there is a potential for corruption or the appearance of corruption when non-

political party organizations" (*e.g.*, interest groups) that pay for issue advocacy, voter registration, voter identification, and GOTV activity "with nonfederal money also lobby federal officeholders." FEC Responses to RFAs Nos. 109-113.

Accordingly, insofar as BCRA purports to deny donors special "access" to officeholders, it is woefully underinclusive because it does not begin to address the supposed access enjoyed by hard-money donors to parties or by special interest groups. This substantial underinclusiveness indicates that "the interest given in justification of the restriction is not compelling." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (exemptions to an otherwise legitimate regulation of speech "diminish the credibility of the government's rationale for restricting speech in the first place"); *Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2537 (2002) (Scalia, J., concurring).

Defendants might also seek to justify BCRA's restrictions on political parties by asserting that the restrictions will prevent donors from using nonfederal donations to parties as "conduits" for circumventing direct contribution limits to candidates. This rationale is fatally undermined, however, by BCRA's exclusion of special interest groups *themselves* from the ban on spending nonfederal money. Applying a speech restriction to a potential indirect conduit, while carving an exemption for the principal actor to take the same action directly, is even more "facial[ly] underinclusive" than the speech restrictions at issue in *Florida Star* that "raise[d] serious doubts about whether" the measure served the asserted purposes in that case. 491 U.S. at 540; *see also Lukumi*, 508 U.S. at 546-47; *City of Ladue*, 512 U.S. at 52. Such an exemption, in fact, renders the statutory scheme wholly irrational as an effort to achieve its purported purpose.

Indeed, *Colorado II* itself demonstrates the facial invalidity of the speaker-based distinction drawn in BCRA. That case did not suggest that political party spending *per se* somehow creates an "undue influence on an officeholder's judgment" (let alone a likelihood of an outright *quid pro quo*). *Colorado II*, 533 U.S. at 440-41; *accord Buckley*, 424 U.S. at 28 n.31. Rather, it held that a party's expenditures, when coordinated with a candidate's campaign, could be limited *only because the party was potentially acting as a "conduit" for donations by other political actors* — namely, special interests and PACs — who "'do not pursue the same objectives in electoral politics' that parties do" but, instead, "are most concerned with advancing their narrow interest[s]" and "seek to produce obligated office holders" through their contributions. 533 U.S. at 451-52 (internal quotation marks omitted).[17] Thus, the Court held, because coordinated expenditures are the functional equivalents of "direct party contribution[s]" *and* because special interests could attempt to use those party contributions "to place candidates under obligation," Congress could limit parties' coordinated expenditures as a means of preventing the potentially corrupting effects of special interest contributions. *Id.* at 452, 464-65.

Under *Colorado II*, then, party spending can be regulated only because it may be co-opted by special interests as a vehicle for making their own corrupting contributions. BCRA, however, turns this reasoning on its head: it prohibits the unwitting party conduit from making noncorrupting disbursements of nonfederal money while simultaneously permitting — indeed encouraging — the special interests themselves to make the same disbursements directly. But, as *Colorado I* makes clear, it is irrational to impose more severe restrictions on parties' spending of special interest money than on *direct* spending by special interests because, "[i]f anything, an

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17 As shown below, the BCRA's "Millionaire's Provisions" cast considerable doubt on the Government's asserted justification for coordinated party expenditure limits. *See infra* RNC 73.

independent [party] expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seem *less* likely to corrupt than the same (or much larger) independent expenditure made *directly* by that donor." *Colorado I*, 518 U.S. at 617 (emphasis added); *cf.* Text of Proposed Cal. Prop. 34, Cal. Ballot Pamphlet, CDP App. 1193 ("Political parties play an important role in the American political process and help insulate candidates from the potential corrupting influence of large contributions.").

2. Title I's Differential Treatment of Parties and Special Interest Groups Will Make Matters Worse, Not Better.

No one doubts that special interest groups are positioning themselves to fill the void left by BCRA's banishment of political parties from the nonfederal money realm. Indeed, the record here proves that they are. *See supra* at 13. Put simply, in the wake of BCRA, "[w]e're going to see explosive growth in the role of interest groups when it comes to campaigns."[18]

For numerous reasons, this interest-group "explosi[on]" will not be a happy development for American democracy. *First*, special interest groups — the modern-day equivalent of James Madison's "factions," Keller Decl. ¶8 — "rarely share the parties' need to build consensus among a broad constituency." Milkis Reb. Decl. ¶16. Rather, interest groups "are most often focused on a narrow set of issues, or even a single issue, and are far more likely to represent one or the other extreme end of the political spectrum than they are to represent the broad center." *Id.* Special interest groups thus "push government to enact policies that benefit small constituencies at the expense of the general public." Milkis Decl. ¶27.[19] Accordingly — and

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[18] Thomas B. Edsall & Juliet Eilperin, *PAC Attack II; Why Some Groups Are Learning To Love Campaign Finance Reform*, WASH. POST, A1 (Aug. 18, 2002).

[19] *See also* Keller Decl. ¶16 (parties "temper ideological extremes"); Milkis Decl. ¶8 (parties "mediat[e] among diverse constituencies, and moderat[e] the influence of extremist forces and groups").

paradoxically — while "[p]assed with the objective of making the political process less corrupt, the BCRA actually risks greater corruption by strengthening *pressure group[] politics* at the expense of *party politics*." Milkis Decl. ¶10 (emphasis in original); *see also* Fowler CX 37.

Second, BCRA will result not only in a more fractious electoral process but also a less accountable one. Given the numerous disclosures that they are required to make to federal and state regulatory bodies concerning the source, amount, and destination of their campaign funds, political parties are almost perfectly transparent raisers and spenders of campaign-related money. Indeed, as Senator McCain acknowledged in his deposition in this case, national party committees like the RNC "report every penny that they raise to the [FEC], hard and soft," "identify the donors of all monies, hard and soft, over $200," "report every penny they spend ... to the [FEC]," and, for everything they spend over $200, "report the recipient" to the FEC, as well. McCain Dep. 179-80. State political parties likewise "report much of their activity" to the FEC. *Id.* at 180; *see also* Banning Decl. ¶21.

Not so with special interest groups. Although "when nonfederal funds [are] channeled through parties, laws require[] full disclosure of both contributors and expenditures[,] ... the new vehicles for this money" — special interest groups — "are likely to be more secretive, with little or no obligation to reveal their activities." Milkis Reb. Decl. ¶15 (citing Krasno & Sorauf Rep.).[20] Thus, BCRA will not push nonfederal money out of elections; *it will simply push it under the table*. Notably, the defendants' own witnesses have acknowledged that this will lead

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[20] Numerous witnesses here have testified to the problems caused by the lack of disclosure concerning campaign fundraising and spending by special interest groups. *See, e.g.*, Chapin Decl. ¶17 ("I think the most egregious thing of all is the lack of disclosure with regard to interest groups that spend a great deal of soft money on ads designed to affect election results ...."); Strother Decl. ¶15; Brister Decl. ¶11; LaRocco Decl. ¶5.

to a greater — not lesser — appearance of corruption. *See, e.g.*, Hassenfeld Dep. 78 (public disclosure "absolutely" important to avoid the appearance of corruption).

Third, interest groups often use names that range from the "indistinct," La Raja Decl. ¶24(i), to the affirmatively opaque. "Citizens for Better Medicare," which spent $65 million on television ads during the 1999-2000 cycle, was in fact funded not by patients'-bill-of-rights advocates but by the pharmaceutical industry. Milkis Decl. ¶49; Bloom Decl. ¶4; *see also* Lamson Decl. ¶7 ("mysterious group"); Strother Decl. ¶15 ("unidentifiable group"). Even those special interest groups whose names don't hide the ball (*e.g.*, the NRA) lack accountability because unlike political parties, special interest groups "are not linked at the ballot box with the candidate." La Raja Decl. ¶24(i). As a result, special interest groups — again, unlike parties — "can air ads without facing reprisals from voters, an arrangement that undermines accountability in the campaign process." *Id.*

Fourth, BCRA's restrictions on parties will stifle electoral competition. "There is wide consensus in political science that parties support challengers more than interest groups, who tend to contribute to incumbents." La Raja Decl. ¶14. Indeed, in the 2000 cycle, 75% of PACs' contributions went to incumbents, compared with only 11% to challengers, and 14% to open-seat contests. Parties, by contrast, directed only 39% of their contributions and coordinated expenditures to incumbents, while devoting 22% to challengers and 39% to open-seat contests. *See id.* The reason for the disparity lies in the different incentives of parties and interest groups: whereas parties desire to win electoral majorities, and thus target their resources toward candidates (whether incumbents or challengers) in "races that are competitive," McCain Dep. 161, special interest groups seek to build relationships with those currently in office so that they may lobby their positions. La Raja Decl. ¶14; Fowler CX 34-35.

Finally, interest groups are more and more the purveyors of increasingly shrill issue advertising. The growing volume of broadcast issue advertising paid for (with unregulated and undisclosed money) by special interest groups is much more likely than those paid for by parties to present negative "attacks": 70% compared to 45%. La Raja Decl. ¶20(d). Parties run more "promote" ads, extolling the virtues of particular candidates, and "contrast" ads, highlighting substantive differences between candidates. *Id.*

In sum, by channeling nonfederal money away from broad-based political parties and toward special interest groups, BCRA will accomplish precisely the opposite of what its proponents claim.[21]

CONCLUSION AND PRAYER FOR RELIEF

As shown, Title I of BCRA is constitutionally defective in fundamental respects. Not only does it subject state electoral processes to a pervasive federal regulatory regime in the absence of any valid constitutional authority, but it also denies political parties, their agents, and their members their most basic First Amendment rights to engage in political speech and association. Worst of all, far from reducing the undue influence of narrow special interests on American politics, Title I will likely enhance it.

Given these basic constitutional flaws, this Court should invalidate Title I in its entirety. Severance is not a practicable option. Defense experts have acknowledged the close inter-relationship of §§323(a) and 323(b) and have testified that if either fails, the congressional interest cannot be served. Mann CX 109-10 ("the whole effort would be lost" if §323(a) stuck

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[21] Defendants' experts were remarkably unenthusiastic about BCRA's prospects for actually reducing corruption or the appearance of corruption. Dr. Mann deemed BCRA at most an "incremental" statute that would have little effect on reducing corruption. Mann CX 32; *see also* Sorauf CX 190 ("it's speculative" whether BCRA will improve public confidence).

down; "the objective Congress had in mind would be undermined" if §323(b) struck down); Green CX 118-19.

The Supreme Court has long recognized that Congress's inclusion of a severability clause in an Act does not in and of itself require severance. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (refusing severance despite clause materially identical to BCRA §401); *Hill v. Wallace*, 259 U.S. 44, 69-71 (1922) (same). Rather, severance depends in part on whether Congress would have intended to enact the remaining provisions without those invalidated and, relatedly, whether what remains "is fully operative as a law." *Buckley*, 424 U.S. at 108 (quoting *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932)). Here, the provisions of new §323 are so "mutually dependent," *Carter*, 298 U.S. at 313, that no single subsection would retain viability in the absence of another. Indeed, were §323(a) struck down and national parties freed to use nonfederal money, §323(b) would cease to have any real effect; the converse, of course, is also true. The court may not simply re-write the statute in an effort to save it; that "is legislative work beyond the power and function of the court." *Hill*, 259 U.S. at 70.