I. INTRODUCTION

This action is brought by the California Democratic Party (CDP), the California Republican Party (CRP), and several county party committees and state and local party officers (collectively, the California political parties) to challenge the constitutionality of several provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). In particular, the California political parties assert that the restrictions of the BCRA radically alter and expand the federal regulation of state and local political party activity and limit or prohibit the basic speech and associational activities of those organizations. The following provisions are specifically challenged:

- The definition of "federal election activity"
- The federal limitation on the use of state-regulated contributions for state and local election activities
- The prohibitions on joint fundraising and transfers of state-regulated funds and federally regulated funds by state and local party committees
- The prohibitions on fundraising of state-regulated funds by party leaders
- The prohibition against donations to, and solicitations of contributions on behalf of, certain non-profit organizations by state and local parties
- The restrictions on the ability of political parties to make independent and coordinated expenditures
- The failure to index the limitations on contributions to parties[1]

BCRA significantly amends the Federal Election Campaign Act of 1971 ("FECA") in ways that affect the fundamental ability of state and local parties and their members to participate in the political process, including their own state and local elections. The new law defines

---

[1] Each of these provisions except the last two is contained in Title I. The provisions regarding independent and coordinated expenditures are contained in Title II, and the failure to index is the result of language in Title III. These provisions are addressed in separate Title II and Title III Arguments.

"federal election activity" as virtually any political party activity that takes place in an election cycle in which a federal office is on the ballot, without regard to the purpose of the expenditure. In doing so, it brings within its sweep the vast majority of state and local political party activity, including activities that are intended only to influence non-federal elections, in an attempt to impose a federal regulatory regime upon all political parties down to the local units of each state political party. In making it a potentially criminal act for state and local parties to use state-regulated contributions on behalf of their own state and local candidates, BCRA is in direct conflict with California law, enacted by the State's voters, that made a specific finding that political parties have an "insulating" effect on large contributions and that their participation in the political process should not be limited.

It has been claimed that the restrictions on the parties' core political activities are justified because "unlimited contributions [] used in order to influence a federal election...raise[s] the possibility of the appearance of corruption." Feingold Depo. 196. Based on this "possibility," Congress needed to set up a "firewall" between the national and state parties. McCain Depo. 223. Senator Feingold has even argued that the restrictions will actually be "good" for the parties, stating that, with the BCRA, "maybe we could get back to knocking on doors and putting up yard signs and having barbeques and bean feeds . . ." Feingold Depo. 86-87.

Plaintiff Yolo County Democratic Central Committee *actually has* an annual Bean Feed,[2] or at least it did until this year. The impact of BCRA on that event is instructive. The proceeds of the Bean Feed support voter registration and get-out-the-vote activities of the committee and its affiliated local Democratic units. The committee accepts contributions from local unions and

---

[2] See Lay Decl. 3 PCS/CDP/CRP 147, and Bean Feed Invitation at 3 PCS/CDP/CRP 204-05. The expenditures of the Yolo County DCC for in the last three election years were $11,264 (2000); $13,914 (1998); and $11,264 (1996). Yolo County DCC Answers to Interrogatories, 4 PCS/CDP/CRP 1209.

businesses. Food for the event (including the beans) are donated, as are gifts for the raffle. Printing of the invitation is donated. All of this is legal under California law. But these contributions, from local (usually incorporated) businesses are "soft money" under BCRA. The invitation, which "promotes" the local Democratic officeholders, including the local Congressman, is "federal election activity." If 500 copies are made, printing can no longer be contributed by a union or corporation. The event itself may be considered "federal election activity," now subject to federal regulation, and may only be funded with federally regulated money. The local Congressman can no longer be one of the "sponsors;" that is prohibited. Indeed, he may choose not to even attend, out of concern that his remarks be interpreted as "soliciting" or "directing" "soft money." If any "soft money" proceeds are transferred to the other local party committees, that money cannot be used by those local groups for voter registration or GOTV activities, even for local candidates, and even though those contributions are legal under California law.

Surely, the framers of the Constitution never intended for Congress to reach so far into state and local politics. The restrictions imposed by BCRA go far beyond any reasonable attempt to address the issue of large corporate or union contributions, or even large transfers of non-federal money from the national parties to the states. Because the provisions of BCRA over-reach and restrict a wide range of protected activities having nothing to do with federal elections, they are unconstitutional.

II. FACTUAL BACKGROUND

A. The Role of the State Parties Generally

Although state parties play a role in federal elections, they do not exist primarily for that purpose. They exist primarily to support state and local candidates. California voters routinely

consider a large number of elections for state office, as well as elections for judicial office and local office, and ballot measures at both the State and local level.[3] Both CDP and CRP have traditionally focused the majority of their non-federal resources on these elections. Bowler Decl. 3 PCS/CDP/CRP 5; Erwin Decl. 3 PCS/CDP/CRP 387. The majority of the parties' activities have a clear state (or local) focus that is distinguishable from federal activity or even generic activity (which promotes the party, but not a particular candidate). This focus is not limited to the California parties; in the words of the Michigan Democratic Party Chair, "the core ongoing functions of the [Michigan Democratic] party [MDP] have nothing whatsoever to do with federal elections. If the MDP were simply banned from making any communication of any kind referencing a federal candidate, indeed, if there were no federal elections at all, the MDP would continue to raise its own funds, to exist and function, and little would change in terms of its basic structure and functions." Brewer Decl. 3 PCS/CDP/CRP 104. Even in states that do not have comprehensive campaign finance regulations, state laws often specify the nature of the parties' organizational structure and the role that the parties will play in the election process.

Most state parties are extensively regulated by state law. Under California law, CDP and CRP are the duly authorized and officially recognized Democratic Party and Republican Party of the State of California, respectively. CAL. ELEC. CODE §§ 7050 *et seq.* (Democratic Party) and 7250 *et seq.* (Republican Party). Although each organization has by-laws that provide specific governance provisions, their "organization, operations and functions" are dictated in large part by

---

[3] The California legislature consists of 40 elected State Senators and 80 elected State Assembly members. In addition, there are eight statewide elected officers: Governor, Lieutenant Governor, Attorney General, Secretary of State, Controller, Treasurer, Insurance Commissioner and Superintendent of Public Instruction. There are four members of the State Board of Equalization, elected by district, and State Supreme Court and Court of Appeal Justices also appear on the ballot in retention elections. There are, of course, also county, city, school district and other special district elections.

California law. *Id.* Each of the State parties is required to govern itself through a State Central Committee, which "shall conduct party campaigns for this party and in behalf of the candidates of the party. It shall appoint committees and employ campaign directors and perfect whatever campaign organization it deems suitable or desirable and for the best interest of the party." CAL. ELEC. CODE § 7196 (Democratic Party); § 7385 (Republican Party).

State law as well as party by-laws dictate the composition and functions of both the State Central Committees and County Central Committees.[4] CAL. ELEC. CODE §§ 7200 *et seq.*, §§ 7400 *et seq.* Members of the State Central Committees are, in part, elected from the 58 County Committees. The County Committees are, in part, elected by the voters of that county. In addition to the elected members of each body, all partisan elected officeholders and candidates, at both the State and national level, are automatically members of the State Central Committee as well as their own County Central Committee. In addition, the California members of each party's national committee (the Democratic National Committee, or DNC, and the Republican National Committee, or RNC,) also serve on the State Central Committee. Although each State party conducts annual conventions, they are governed in large part by their respective Executive Boards of one hundred to several hundred members. Many State and national elected officials, as well as all California members of the DNC or RNC, are members of their parties' respective Executive Boards.

At the most local level, the Elections Code provides for organizations at the Assembly District level ("AD Committees"). CAL. ELEC. CODE § 7162 and § 7460. These committees also elect delegates to the State Central Committee and are the district-level organizational blocks of the Party. Both the County Central Committees and AD Committees are primarily involved in

---

[4] Plaintiffs Yolo County Democratic Central Committee and Santa Cruz County Republican Central Committee are two such committees.

local voter registration, get-out-the-vote or similar grass-roots activities, and act as liaisons with the campaign organizations of Democratic and Republican candidates in that area.

CDP and CRP together represent over 12 million California voters who have joined CDP or CRP to advance common political beliefs. Each party provides financial and material support to federal, state and local candidates, recruits and trains those candidates and other activists, takes positions on public issues and publicizes those positions (including state and local ballot measures), engages in voter registration, get-out-the-vote (GOTV) and generic party-building activities, and maintains an administrative staff and administrative structure to support these goals and to comply with extensive state and federal regulation. Bowler Decl. 3 PCS/CDP/CRP 2; Erwin Decl. 3 PCS/CDP/CRP 384. Since California holds its elections on the same dates as the federal elections, the vast majority of its voter registration, voter identification, GOTV, and generic campaign activities which have the principle purpose and effect of influencing state and local elections will take place within the same cycle as federal elections. Bowler Decl. 3 PCS/CDP/CRP 14.

In "conducting their party campaigns," as statutorily directed, both CDP and CRP work with their national parties, the DNC and RNC. Bowler Decl. 3 PCS/CDP/CRP 4; Erwin Decl. 3 PCS/CDP/CRP 385. Both national committees are structured in such a way that the state party chairs and some other state party officers are automatically members of their national party committee.[5] Additional members are apportioned to, and selected by, the state parties. Particularly in election years, the national parties work with the state parties in strategic planning

---

[5] Plaintiffs Art Torres and Shawn Steel are the State Chairs of CDP and CRP, respectively, and are members of the DNC and RNC. Other plaintiffs, Timothy Morgan and Barbara Alby, are members of both the CRP executive board and the RNC. Some of these state party officials also serve on the Executive Committees of their national parties, i.e., Torres and Alby.

and at the operational level to elect their candidates to all levels of office and to disseminate the parties' message. The primary vehicles for this cooperative effort are the "coordinated campaign" (Democratic Party) and the "victory plan" (Republican Party). Both are efforts to bring all the elements of the party together to unify and build the party and work collectively on the parties' most important enterprise -- the election of their candidates. Each such plan involves representatives of the national, State and local parties, as well as representatives of the candidates and constituent groups that have historically provided strong grass-roots support. These persons come together to set priorities and goals, analyze resources and allocate those resources in an effort to elect as many of the parties' candidates as possible up and down the ticket. Bowler Decl. 3 3 PCS/CDP/CRP 4; Erwin Decl. 3 PCS/CDP/CRP 385.

B. State Campaign Finance Laws

Section 101 of BCRA purports to regulate "soft money" of the political parties. The term "soft money" is often used to refer to large contributions from a variety of sources (corporations, unions, individuals) made to the national parties. It is also used at times to suggest the complete absence of regulation. Although the same term, "soft money," has been used to refer to contributions to state party committees, that term is a misnomer -- and a significantly misleading one. Contributions to state and local party committees are indeed regulated, everywhere, by state law (and, in some cases, by local law). Each state's regulatory scheme reflects the particular choices of that state's legislature or electorate, and these choices vary widely among the states. Some laws are more restrictive than federal law; others are less restrictive.

California, like other states, has made a deliberate policy choice about the regulation of contributions to its political parties to be used for its state and local elections. Since 1974, California has extensively regulated campaign activities, including those of candidates and

political parties. California's law, the Political Reform Act, has long provided for detailed record-keeping of all campaign contributions and expenditures, and for full disclosure of those activities. *See* CAL. GOV. CODE §§ 81000 *et seq*. Periodic reports are required to be filed with the California Secretary of State at least semi-annually and on a more frequent basis in connection with the primary and general elections. Violations of the Act are enforced primarily by the State's Fair Political Practices Commission (FPPC).

In 2000, after a 1996 state campaign contribution limitation law was enjoined in *CPLCPAC v. Scully*, 164 F.3d 1189 (9th Cir. 1999)(affirming preliminary injunction), the State Legislature modified the previous law in several significant respects and placed the proposed modification before the voters on the November, 2000 ballot as "Proposition 34." Proposition 34 was adopted by the voters and went into effect January 1, 2001. That law imposes limits on contributions to candidates and offers certain benefits to candidates in exchange for voluntarily accepting certain spending limits, in an effort to limit campaign spending by candidates.[6] *See* CAL. GOV. CODE § 85300 *et seq.*

At the same time, however, Proposition 34 was specifically designed to allow the political parties to raise and spend more money, not less, in connection with State and local elections and thus to play a greater role in State and local elections, on the theory that empowering the parties to raise and spend more money relative to candidates reduced the appearance and threat of corruption by providing an "insulating" effect between large contributors and candidates. Johnson Decl. 3 PCS/CDP/CRP 151. Indeed, Proposition 34

---

[6] Contributions by persons other than political parties and "small contributor committees" are limited to $3,000 per election for state legislative candidates, $5,000 per election for statewide candidates and $20,000 per election for Governor. Small contributor committees may double their contributions to state legislators and statewide candidates other than Governor. CAL. GOV. CODE §§ 85301 - 85303. It is readily apparent that these limits are significantly higher than the federal limits, even those at the low end.

specifically provided that "[p]olitical parties play an important role in the American political process and help insulate candidates from the potential corrupting influence of large contributions." Text of Proposed Law, California Ballot Pamphlet, 4 PCS/CDP/CRP 1193. Limits for contributions to the parties for candidate-related expenditures are set at $25,000 per year. Contributions to the parties for non-candidate-specific expenditures, however (such as administrative expenses, generic party-building, voter registration, partisan GOTV activities and ballot measure expenditures) are deliberately unlimited. CAL. GOV. CODE § 85303(c). Expenditures *by* the Party on behalf of its candidates are also not limited. The voluntary spending limits for candidates were specifically set with the intent that political party expenditures would not count against the candidates' voluntary expenditure limits. CAL. GOV. CODE § 85400(c). In other words, the parties can support their candidates through communications to voters without the costs of those communications counting against the candidate's voluntary spending limits. The parties' active support of their candidates reduces the candidates' need to raise large campaign treasuries while at the same time allowing the parties and the candidates to cooperate in effectively communicating the candidates' (and the parties') message.

C. Federal Regulation of State Parties

Prior to its amendment by BCRA, the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431 *et seq.* (FECA) already comprehensively regulated contributions and expenditures made "for the purpose of influencing federal elections." *See* 2 U.S.C. § 431(8)(A)(i) (defining contribution) and 2 U.S.C. § 431 (9)(A)(i) (defining expenditure). Under FECA (pre-BCRA), contributions to state party committees for the purpose of influencing federal elections were limited to $5,000 per calendar year from individuals or political committees. 2

U.S.C. § 441a(a).[7] FECA also provides that state parties such as CDP and CRP can make direct contributions to federal candidates of not more than $5,000 per election and they can make limited "coordinated expenditures" on behalf of federal candidates, the amounts of which vary by office and are related to state population. As a result of a significant drop off in state and local election activity in the 1976 election, Congress amended FECA in 1979 to allow state and local parties to make certain grassroots expenditures on behalf of federal candidates that would be "exempt" from the limits on contributions and coordinated spending. 2 U.S.C. §§431(9)(B)(iv),(viii),(ix), as added by P.L. 96-187; see S. Rep. 96-319, 96th Cong., 1st Sess. 4-5 (1979). These expenditures included campaign materials distributed by volunteers that featured federal candidates (e.g., yard signs, brochures and bumper stickers), slate cards and sample ballots that included federal candidates, and voter registration and GOTV efforts on behalf of the party's presidential ticket. Although "exempt" party expenditures are not subject to FECA's contribution limits (which allows them to be made without reducing the parties' ability to provide more direct support), the costs of these activities attributable to federal candidates still have to be paid with federal funds.

Under pre-BCRA FEC regulations, state parties have been required to maintain at least two accounts: a federal account, which includes only contributions that meet the requirements of FECA, and a non-federal account, which includes contributions that meet the requirements of state law, but not those of federal law. 11 C.F.R. §102.5.[8] Only the federal account can be used for expenditures in connection with federal elections; the non-federal account can be used for

---

[7] This limit has been increased to $10,000 under BCRA.

[8] As the result of Prop. 34, the California state parties now maintain at least three accounts because their non-federal accounts are further divided into a candidate account, and an administrative account for non-candidate-specific expenditures, including expenditures for ballot measures.

expenditures in connection with state and local elections, including (in California) ballot measures.

Although FECA only regulates contributions or expenditures made "for the purpose of influencing federal elections," many state and local parties make expenditures that may conceivably have more than one purpose, particularly in states that conduct their own elections in conjunction with elections for Federal office.[9] The expenses for these activities have been required to be "allocated," or apportioned, between the state party's federal and non-federal accounts. Although the FEC originally allowed the state parties to allocate expenses between their federal and non-federal accounts on a "reasonable basis," a more detailed and comprehensive allocation system was adopted by the FEC in 1992 which remained in effect until the effective date of the BCRA and the recently adopted regulations. 11 C.F.R. Part 106.[10]

Since 1992, allocation has been required for most of the parties' basic administrative expenses (e.g., rent, supplies, utilities, salaries) and overhead, including most fundraising expenses. This has meant that any state party making expenditures in connection with a federal election has been required to pay a certain percentage of its overhead or operating costs with federal money, even in non-election years. In addition, the regulations have required allocation of the costs of exempt grassroots activities and "generic voter drives" including voter identification, voter registration, and get-out-the-vote drives, or "any other activities *that urge the general public to register, vote or support candidates of a particular party or associated with a*

---

[9] The vast majority of states do, in fact, conduct their elections at the same time as Federal elections, both because it allows for a more efficient use of scarce administrative resources and because it results in higher voter turnout. Only five states currently conduct their state elections in odd-numbered years.

[10] The previous allocation regulations were found at 11 CFR Parts 102, 104 and 106. These regulations have been substantially amended by the FEC as a result of the BCRA.

particular issue, without mentioning a specific candidate." (Former)11 CFR § 106.5(a)(2)(iv) (emphasis added).

Administrative expenses and generic party activities have been allocated based on the ratio of federal offices and non-federal offices expected to be on the state's general election ballot in that cycle (called the "ballot composition" formula), with a maximum number of non-federal "points" allowed. For example, in the 1999-2000 cycle in California, which included the Presidential race, administrative expenses (for both years) were required to be allocated 43% federal - 57% non-federal.[11]

Public communications that advocate the election or defeat of a federal candidate have been allocated using a "time and space" formula. For example, if a mailer endorsed only a federal candidate, the costs of the mailer would have to be paid with 100% federal funds, but if the mailer endorsed one federal candidate and two non-federal candidates equally, it would be paid one-third from the federal account and two-thirds from the non-federal account. If a communication featured only a state candidate, it has not been subject to allocation and could be funded with state ("non-federal") money.

As a practical matter, expenditures for these activities have never been "unlimited." Since each activity has required that a percentage of federal funds be used, the availability of more limited and harder-to-raise federal funds has acted as an upper limit on such expenditures. For example, in the 2000 election cycle, the California state parties were not able to use unlimited non-federal funds for voter registration or GOTV activities; 43% of the costs of these activities had to be paid with federal money. To the extent that the parties have always had

---

[11] Fundraising expenses have been allocated on a "funds raised" basis. For example, if a fundraising dinner raised $100,000, and $40,000 of the funds qualified as federal contributions and $60,000 did not qualify, the dinner expenses had to be paid with at least 40% federal dollars and at most 60% non-federal dollars.

limited federal money, voter registration or GOTV activities have had to compete for their share of that money with administrative and overhead costs, fundraising costs and, of course, candidate support expenditures attributable to federal candidates, all of which have also required federal money.

Several other developments affected the state political parties and the role they play in federal elections. First, although it was always clear that state parties would have state (or non-federal) income and expenditures, in 1979 FEC confirmed that national party committees could allocate the costs of certain party-building activities between their federal and non-federal accounts. FEC AO 1979-17. Over the years, the national parties have raised both federal and non-federal money and transferred a portion of that money (from both accounts) to states with important elections for additional voter registration, voter identification or GOTV activities. The original reference to "soft money" specifically referred to non-federal money raised by the national parties and transferred to the states for additional voter turnout activities; it was not understood to be a reference to state-regulated (i.e., non-federal) money raised by the state and local parties for their own activities.[12]

In response for an advisory opinion by the RNC, the FEC confirmed that public communications that did not contain express advocacy for or against a federal candidate could be treated as a "generic" administrative or voter drive expenses. FEC AO 1995-25. This allowed these communications to be treated the same way as other party-building expenses, i.e., allocated between federal and non-federal accounts. As a result, national party committees were able to

---

[12] When Common Cause filed a rulemaking petition in 1984, it defined "soft money" as "*funds that are raised by Presidential campaigns and national and congressional political party organizations* purportedly for use by state and local party organizations in nonfederal elections, from sources who would be barred from making such contributions in connection with a federal election..." *Common Cause v. Federal Election Com'n*, 692 F.Supp. 1391, 1392 (D.D.C.,1987) (emphasis added).

raise money and develop issue advertisements, praising or criticizing federal candidates or officeholders for their positions on various public policy issues. These ads focused on certain ideological issues (e.g., health care, lower taxes) perceived by the parties to appeal to the parties' own core constituencies as well as independent voters, and were designed to provide a "unified" or consistent party message that could be used by candidates up and down the ticket. The state parties, many of which could not have afforded the cost of such ads, were able to run the ads in their own names, thereby raising their own visibility in the state and generating interest around certain themes that could be further reflected in particular state races. In addition, allowing the states to run the ads allowed them to be funded using a more favorable allocation ratio than was available to the national parties, so that the total amount of federal money required was reduced. All of these transfers and activities have been lawful, and have been fully disclosed by the parties in their public campaign finance reports.

"Soft money" debates invariably focus on the transfers of non-federal money from the national parties to the state parties (particularly in the context of issue advertisements).[13] However, those debates usually fail to distinguish between those transfers and *other* non-federal money raised by the state parties, particularly state-regulated money raised and used for state and local campaign activities. In California, a state with a large donor base and active party organizations, the state parties have raised substantial amounts of non-federal money both before and after FECA for use in their own state and local elections. Under FECA, that money is considered "non-federal" money. Under BCRA, it is considered "soft money." Both CDP and CRP have acknowledged that they have each run issue advertisements created and funded by

[13] In fact, data indicates that state parties spend the majority of their non-federal money (including transfers from the national parties) on administrative overhead, grass-roots mobilization and other party-building activities, and not on issue advertisements. *See* La Raja Decl. 34-35.

transfers from the national parties, as permitted by law. However, the *vast majority* of their non-federal funds have come not from the national parties, but as the result of their own fundraising in conjunction with state and local candidates and activities. *See* Bowler Decl. 3 PCS/CDP/CRP 7; Erwin Decl. 3 PCS/CDP/CRP 404. State-regulated (non-federal) contributions to the state parties in the past several cycles have ranged from approximately $10 million per cycle to $17 million per cycle. Bowler Decl. 3 PCS/CDP/CRP 7; Erwin Decl. 3 PCS/CDP/CRP 403-4. *These amounts do not include transfers from the national parties; they reflect only the amounts raised by the state parties directly for state and local activities.* Under BCRA, most of this money cannot be used for election-related activities, even on behalf of state and local candidates or ballot measures.

Although money raised directly by the states is considered "soft" money under the BCRA, it is not "soft" money as that term is commonly used, and it is not "soft" money if that is meant to suggest that it is unregulated. The notion of "soft" money is largely the result of an almost exclusive focus on federal regulation. Some states have contribution limitations that are *more restrictive* than the federal laws. From the perspective of those states, the federal money is the "soft" money.

III. TITLE I ARGUMENT

The provisions of Title I of BCRA cannot be reconciled with several critical Constitutional principles and protections. First, Title I attempts to regulate what is clearly state election activity; in doing so, it exceeds Congress' authority to regulate federal elections and impermissibly intrudes on state sovereignty. Second, Title I unduly restricts and, in some cases, prohibits the political parties from engaging in the most basic speech and associational activities in violation of the protections afforded by the First Amendment. Finally, Title I isolates parties

and their speech and associational activities for unreasonable regulation not imposed on other participants in the political process in violation of the Equal Protection component of the Equal Protection component of the First and Fifth Amendments.[14]

For purposes of the Argument, we have divided the Title I provisions challenged by the California political parties into two sections: 1) those provisions defining "federal election activities" and imposing a limit on the use of state-regulated funds for those activities, and 2) those provisions that restrict the raising and spending of state-regulated money by state and local parties, including the prohibition on joint fundraising and transfers between party committees, the prohibitions on the involvement of certain party leaders in raising and spending state-regulated money, and the prohibition on party expenditures and contributions to, and solicitations on behalf of, certain non-profit organizations.

A. The Definition of "Federal Election Activity" and the Levin Limits on State-Regulated Money Are Unconstitutional

BCRA prohibits state and local parties from using non-federal, or state-regulated, money for "federal election activity."[15] Under BCRA, any amounts "expended or disbursed" by a state or local party for "federal election activity" must be made only from funds subject to the limitations, prohibitions, and reporting requirements of the BCRA – in other words, from federally regulated money. 2 USC § 323(b). "Federal election activity" includes *all* of the following:

---

[14] In an effort to avoid repetitious arguments, the California parties incorporate the Equal Protection arguments presented by the McConnell and RNC plaintiffs, and respectfully refer the Court to the appropriate sections of those briefs.

[15] Although Title I is primarily directed at political parties, the same provisions also apply to any "association or similar group of candidates for State or local office or of individuals holding State or local office." 2 USC § 323(b). In other words, groups of State candidates or officeholders are also prohibited from engaging in "federal election activities" unless they use only federal money.

- voter registration activity in the 120 days before any regularly scheduled federal election;

- voter identification, get-out-the-vote, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot;

- a public communication that refers to a federal candidate and promotes, supports, attacks or opposes that candidate;

- services during any month of any party employee who spends more than 25% of his/her time in connection with a federal election.

With the exception of voter registration, BCRA "federalizes" all of these activities by a state or political party without regard to when they are undertaken. Further, with the exception of the "public communications" provision, it does not require that the activity be directed at any federal candidate, or that it even mention a federal candidate. The new law contains no exemption for activities that are directly related to state or local candidates, or that mention only those candidates. Indeed, with respect to voter identification, GOTV and generic activities, "federal election activity" specifically includes "a public communication that refers solely to *a clearly identified candidate for State or local office*" if the activity is voter registration, voter identification or get-out-the-vote activity. 2 U.S.C. §§431(20)(A)(i),(ii); 431(20)(B)(i)[16]

Virtually all party activity in support of state and local candidates has a GOTV message. For example, see:

---

[16] The regulations recently enacted by the FEC reflect some attempt to narrow the scope of that statute's broad language in order to avoid "federaliz[ing] a vast percentage of ordinary campaign activity." 67 Fed. Reg. 49067 (July 29, 2002) (Explanation & Justification). However, plaintiffs note two things. First, the regulations themselves remain susceptible to extremely broad reading, in particular the definition of "GOTV" (discussed further below). Second, two of the Congressional sponsors of BCRA, Rep. Christopher Shays and Rep. Martin Meehan, have filed a complaint to set aside those regulations as inconsistent with the language of the Act. *See Christopher Shays et al. v. Federal Election Commission*, No. 1:2002cv01984. (D.D.C. filed Oct. 8, 2002). Because of the ambiguity in the regulations themselves, and because of the ambiguity caused by the pending legal challenge, the Court should consider only the language of the statute.

- 3 PCS/CDP/CRP 49 (mailgram for State Assembly candidate that provides election date and polling place);
- 3 PCS/CDP/CRP 51-52 (GOTV mail for state and local candidates that provides date of election);
- 3 PCS/CDP/CRP 54 (phone script for State Assembly candidate urging resident to "vote on Tuesday, November 3");
- 3 PCS/CDP/CRP 59 (doorhanger featuring only state and local candidates providing election date and polling place information).

None of these communications mention federal candidates. Under BCRA, all such activities must be paid completely with federal funds, or a combination of federal funds and federally limited "Levin Amendment" funds.

The so-called "Levin Amendment" is found in BCRA section 101(a) (2 U.S.C. § 323(b)(2)). Under the Levin Amendment, state and local parties may pay for a portion of the costs of certain "federal election activities" with a new type of federally limited contribution. *Id.* This new category of "Levin contributions" consists of contributions from any source allowed under applicable state law, but not to exceed $10,000 per donor per calendar year.[17] The $10,000 limit applies *even where the money is to be used for purely state or local candidate-support activity or ballot measure advocacy* if the activity falls into any of the "federal election activity" categories. The FEC is directed by statute to determine the appropriate ratio of federal funds to federally-limited Levin funds for these activities. *Id.*[18] A number of party activities

---

[17] The Levin amount may be lower, or may be limited as to source, if state law imposes lower limits or limits on the source of contributions for purposes of state elections.

[18] As a result of its recent rulemaking proceeding, the FEC has developed new allocation rules that govern the federal/Levin ratio as well as the federal/non-federal ratio for those activities that remain subject to allocation but do not fall within the definition of "federal election

must be paid with 100% federal funds, without any use of Levin funds. Such activities include any communication that refers to a clearly identified federal candidate or that involves the use of a "broadcast" medium. *Id.*

In response to Requests For Admission, Defendant-Intervenors indicated that the following activities constitute "federal election activity" and can only be funded with federally regulated funds:

- A generic GOTV mailer "Our voice is our Vote. Keep Asian Pacific Families Moving Forward. Vote Democrat." 3 PCS/CDP/CRP 177-178.
- A generic GOTV mailer "On Nov. 5th, We're Voting For Ourselves. Vote Democratic '96. It's Too Important Not To." 3 PCS/CDP/CRP 180-181.
- A GOTV phone script featuring Jesse Jackson urging defeat for Prop. 38, the school voucher initiative. 3 PCS/CDP/CRP 197.
- A nonpartisan GOTV flyer giving information about the Black Voter Intimidation Hotline '98. P3 CS/CDP/CRP 211.
- A Delaware Democrat newsletter with information about the coordinated campaign. 3 PCS/CDP/CRP 213-218.
- A GOTV mailer supporting a candicate for Mayor of Indianapolis; and four candidates for City Council. 3 PCS/CDP/CRP 220-223.
- A GOTV doorhanger featuring three state candidates. 3 PCS/CDP/CRP 225.
- A vote-by-mail/GOTV phone script urging support for three state candidates. 3 PCS/CDP/CRP 244.

None of these communications mentioned a federal candidate.[19] The definition of "federal election activity" simply does not take into account that the parties' activities may have a

---

activity" (e.g., administrative costs). Under the new rules, the percentage of federal funds required depends on which federal offices will be on the ballot in that cycle. 11 C.F.R. § 106.7.

[19] Defendant-Intervenors have agreed that each of these examples constitute "federal election activity." *See* Responses to Request for Admissions, 3 PCS/CDP/CRP 239.

state or local, rather than a federal, focus.[20] For example, voter registration is typically driven more by state election activity than federal. 3 Bowler Decl. PCS/CDP/CRP 12-13; Erwin Decl. 3 PCS/CDP/CRP 408. All vote-by-mail applications will be "federal" activity, even if no federal candidates are mentioned. *See, e.g.*, 3 PCS/CDP/CRP 79-84. In addition, 40-50% of phone bank activity is directed solely at local candidates. Bowler Decl. 3 PCS/CDP/CRP 15. These various GOTV activities have typically cost CDP $7-8 million and CRP $2-4 million. Bowler Decl. 3 PCS/CDP/CRP 8; 3 Erwin Decl. PCS/CDP/CRP 409. These activities are directly subject to federal regulation and spending limits as the result of BCRA.

1. The Extensive Regulation of State Election Activity Imposed by Title I Violates the Tenth Amendment and Principles of Federalism

The courts have repeatedly recognized the "fundamental principle" that "our Constitution establishes a system of dual sovereignty between the State and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452 (1991). The federal government was created as one of limited powers, in which the States retained "a residuary and inviolable sovereignty." *The Federalist No.* 39, at 245 (J. Madison). Residual state sovereignty was also implicit in the Constitution's conferral on Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, s. 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *See Printz v. United States*, 521 U.S. 898 (1997).

---

[20] The FEC's rules defining "GOTV" do not resolve this problem and, in some ways, exacerbate it. 11 C.F.R. § 100.24(a)(3). The existing rule states that GOTV "includes, but is not limited to" providing information to voters within 72 hours of an election about the date of the election, the hours or the location of polling places. *Id.* Much state candidate mail provides exactly this type of information. In addition, the rule expressly excludes communications by state candidates referring only to state candidates. By negative inference, the rule includes communications by party committees referring only to state candidates.

The Court has often been called upon to determine whether authority to regulate in a particular area has been granted by the Constitution to the Federal Government or retained by the States under the Tenth Amendment, although it has also acknowledged that, in many cases, "the two inquiries are mirror images of each other." *New York v. United States*, 505 U.S. 144, 155 (1992) (internal citations omitted). In this case, plaintiffs' believe that the two inquiries do indeed converge, but that under either inquiry, BCRA "oversteps the boundary between federal and state authority." *Id.* at 159.

In reviewing FECA in 1976, the Supreme Court began its substantive discussion by stating that "[t]he constitutional power of Congress to regulate federal elections is well established. . ." *Buckley*, 424 U.S. 1, 13 (1976). The Court noted that the power to regulate elections of members of the Senate and House of Representatives was granted by Article I, § 4, of the Constitution (although that authority was not expressly placed at issue in the case). *Id.* at 13 & fn. 16. The text of Art. I, § 4 reads as follows:

> 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.

Implicit in *Buckley's* comment was the understanding that Congress, in enacting FECA, was asserting its authority only with respect to *federal* elections. When the scope of FECA was subsequently addressed more directly, this court concluded that "[i]t is clear from the statute as a whole that the FECA regulates federal elections only. This limit on the FECA's reach underlies the entire act." *Common Cause v. FEC*, 692 F.Supp. 1391, 1395 (D.D.C. 1987).

In construing Art. I, § 4, the courts have been careful to distinguish between regulation of federal elections and purely state election matters. In *Ex Parte Siebold*, 100 U.S. 371 (1879), the Court concluded that state officials could be prosecuted for interfering with a federal election.

While acknowledging that the presence of state elections on the same date would not deprive Congress of authority to regulate the *federal* election, the Court went on to state: "We do not mean to say, however, that for any acts of the officers of the election, having exclusive reference to the election of State or county officers, they will be amenable to Federal jurisdiction." *Id.* at 393. Similarly, in *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 143 (1947), the Court held that "the United States is not concerned with, and has no power to regulate, local political activities as such . . ."

As the Court has observed, in some cases the question of whether the federal government is authorized to act is necessarily related to whether the act invades the powers reserved by the Tenth Amendment to the state as sovereign entities. *New York v. United States*, 505 U.S. at 156 (observing that the Tenth Amendment "states but a truism that all is retained which has not been surrendered"). And, as reiterated in *Gregory v. Ashcroft*, "the States possess sovereignty concurrent with that of the Federal Government, subject only to the limitations imposed by the Supremacy Clause." *Gregory*, 501 U.S. at 457 (citation omitted).

The limitations on Congressional authority and the concomitant concern for state sovereignty in the conduct of their own elections merged in *Oregon v. Mitchell*, 400 U.S. 112 (1970). In considering whether Congress had authority to lower the voting age for both state and federal elections, Justice Black's opinion concluded that this authority extended only to federal elections as "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Id.* at 124-25. While acknowledging Congress' broad supervisory authority over federal elections, Justice Black cautioned:

> On the other hand, the Constitution was also intended to preserve to the States the power that even the Colonies had to establish and maintain their own

> separate and independent governments, except insofar as the Constitution commands otherwise . . . No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.

Id; *See also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (noting that "the Constitution grants to the States a broad power to prescribe the 'Times, Places, and Manner of holding Elections for Senators and Representatives,' which power is matched by state control over the election for state offices"); *California Democratic Party v. Jones*, 530 U.S. 567, 590 (2000) (Stevens, J., dissenting) ("[a] State's power to determine how its officials are to be selected is a quintessential attribute of sovereignty").

Whether viewed from the perspective of the limits upon Congress' enumerated powers under Art. I, § 4 or in terms of its intrusion on state sovereignty, BCRA oversteps the federal/state balance in the sensitive area of elections and impermissibly interferes with the sovereignty of the states' management of their own electoral affairs. BCRA "federalizes" most election-related activities (not only of the state and local parties but, in some instances, of state candidates and officeholders as well) by simply defining them as "federal election activities" and thereby subjecting them to regulation. This restriction on state electoral activity is not merely an "indirect effect" of BCRA. *See, e.g., ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995). The specific language of BCRA engulfs virtually all election-related conduct, and the language used makes it clear that state activities were contemplated as well as federal.

While it may be true that Congress does not lose its authority to regulate federal elections when the states hold their elections on the same date, neither does that fact give Congress the authority to go beyond regulating as "necessary to insure the freedom and integrity of the [voters'] choice." *U.S. v. Classic*, 313 U.S. 299, 319-20 (1941). The courts have upheld

Congress' authority to prohibit criminal conduct in connection with federal elections (i.e., fraudulent registration or voting, vote buying, etc.). *See*, e.g., *U.S. v. Bowman*, 636 F.2d 1003 (1981). However, the authority exerted by BCRA goes beyond the power to regulate criminal conduct that may undermine the integrity of the process, and is exerted over completely lawful – indeed, most would say, beneficial – activities (voter registration, voter identification, GOTV activities) directed in large part, or even solely, at state and local elections and conducted in accordance with state law.

BCRA requires no nexus whatsoever between the activities sought to be regulated and the federal election other than the date of the election itself. As noted above, a state party communication that does nothing more than advocate the election of a candidate for state office, and refers to the date of the election, is "federal election activity" under BCRA. Even under the FEC rules, the exact same state and local election activities that may be funded completely with state-regulated funds in an odd-numbered year are rendered completely "federal" if conducted in connection with an election in which there may be only one federal candidate. 11 C.F.R. § 100.24(a)(1).

In its rulemaking proceeding, the FEC defined "in connection with an election in which a candidate for Federal office appears on the ballot" as "the period of time beginning on the date of the earliest filing deadline for access to the primary election ballot for Federal candidates as determined by State law" through the date of the general election. *Id.* Under California law, this deadline is 88 days before the primary, or early December of the odd-numbered year. CAL. ELEC. CODE § 8020. This means that the exact same mailer on behalf of a local state legislative candidate is "state" election activity if sent out in Virginia in November 2003,[21] but is "federal"

[21] Virginia holds its elections in odd-numbered years.

election activity if it is sent out in California in December, 2003 or at any time in 2004. The Virginia mailer may be funded completely with state-regulated money; the California mailer must be funded entirely with federal money, or a combination of federal funds and federally limited Levin funds.[22]

BCRA does not merely replace the previous administratively imposed allocation scheme with a new statutory allocation scheme. The previous allocation rules were specifically limited to "generic" voter activities that urged general the public to register, vote or support the party's candidates "without mentioning a specific candidate." (Former) 11 C.F.R. § 106.5(a)(2)(iv). The former allocation rules implicitly reflected FECA's requirement that the Act only covered expenditures that were for the purpose of influencing a federal election, and supplied a methodology for apportioning those expenditures that arguably had more than one purpose. Assuming (although it is by no means clear) Congress could make a similar legislative presumption that generic party activity is, at least in part, "for the purpose of influencing a federal election," it by no means follows that the same presumption can be made as to activities that are clearly directed to state and local elections contests. By using the phrase "amounts expended or disbursed" rather than "expenditures" (which would have required a federal-election-influencing purpose) and by defining the scope of the covered activities solely in temporal terms, Congress has completely divorced the definition of "federal election activity" from any federal election influencing purpose, and impermissibly extended its regulatory judgments over the state elections.

---

[22] It should also be noted that activity in connection with any state elections on dates other than the federal election dates (such as a special state election) is still federal election activity if it is after the date for federal candidates to file. Similarly, if a special election is held in an odd-numbered year for a federal office, the time between the filing of candidate papers and the final election will increase the time during which election activity is "federalized."

If Congress could regulate *any* activity that could possibly affect a federal election, state campaigns run by the candidates themselves could be regulated by Congress, as each necessarily involves activities designed to affect voter turnout; candidates themselves often conduct their own voter registration and GOTV activities that may, in turn, have an indirect impact upon federal candidates. Indeed, even ballot measure campaigns or legislative efforts could be said to have some indirect influence on federal elections as the very presence of a controversial issue may affect turnout among particular groups in the state.

In addition, by imposing its own significant limitations on the use of funds lawfully raised under state law by state and local political parties for use in their own elections, Congress has effectively invalidated the choices made by those state governments for the conduct of their own elections. There can be little dispute that the Levin limit, although imposed on state-regulated funds, is simply another federally imposed limitation.[23]

California law limits contributions to the parties for candidate-related expenditures to $25,000. Contributions for non-candidate-related expenditures are not limited. The $10,000 Levin contribution limit is *less than half* the limit that California has declared to be appropriate (and, presumably, noncorrupting) for contributions to the political parties for candidate-related uses. In fact, the voters made a specific finding that contributions to the parties have an "insulating" effect. 3 PCS/CDP/CRP 1193. The fact that California has decided to allow unlimited contributions for other purposes also reflects a specific policy decision that expenditures for those other purposes do not share the dangers associated with unlimited candidate contributions. Finally, the State of California has provided that its political parties may

---

[23] *See* Remarks of Former FEC General Counsel Lawrence Noble, Transcript of FEC Public Hearing (June 4, 2002)(Levin money "is a different form of federal money . . .") *available at* http://www.fec.gov/pdf/nprm/soft_money_nprm/transcript_of_hearing20020604.html.

make unlimited coordinated expenditures in support of their candidates and those expenditures are expressly exempted from their candidates' own voluntary expenditure limits.

In sum, the statutory scheme created by BCRA exceeds any reasonable authority to regulate "federal elections" and imposes a specific campaign finance regime upon each of the fifty states which in many cases will be in direct conflict with the laws of those states. California has expressly designed a campaign finance regime for its own elections that provides for the political parties to play a central role in state and local elections, and has chosen contribution and expenditure limits with that goal in mind. To the extent that BCRA simply invalidates California's legislative plan, Congress has impermissibly intruded upon California's rights as a sovereign entity.

2. The Limits on Use of State-Regulated Funds Violates The Parties' Rights of Free Speech and Association Protected By The First Amendment

As the *Buckley* decision made clear, controls on campaign contributions and expenditures "operate in an area of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14. The Court emphasized that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution" and "it can hardly be doubted that the constitutional guarantee [of freedom of expression] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Id.* The Court observed that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19.

Buckley also made clear that limits on contributions and expenditures impinged on

protected associational freedoms to the extent that contributions served to "affiliate" a person with a candidate, and allowed like-minded persons to pool their resources in furtherance of common political goals. *Id.* at 23. The Court concluded that although contribution and expenditure limits both implicated "fundamental First Amendment" interests, expenditure ceilings imposed significantly more severe restrictions on both freedom of speech and expression than did contribution limits. In upholding the contribution limits, however, the Court acknowledged 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." *Id.* at 21. The provisions of Title I of BCRA will have precisely this effect.

a. The limitations imposed by BCRA constitute a substantial burden.

Title I contains both contribution and expenditure limitations that directly limit the speech and associational rights of state and local political parties. The Levin Amendment, in particular, is an attempt to limit state and local party spending on certain election activities. Under the Levin Amendment, even if a state law allows a state party to accept a contribution of more than $10,000, the amount over $10,000 may not be used for certain election activities. Activities characterized as "federal election activities," even state or local activities, must be funded with federal money, or a combination of federal money and federally limited Levin money. The result of the broad definition of "federal election activity," combined with the Levin limits imposed upon the use of state-regulated money, is that many expenses currently paid with non-federal funds must now be paid either completely with federal funding or a combination of federal funds and federally limited Levin funds. Although on its face designed to limit state and local party spending on federal elections, it will necessarily and dramatically reduce spending by state and

local parties on their own candidates and issues.

To require that a particular expenditure be paid for exclusively, or even in part, with federal money has significant consequences. For example, CDP has raised approximately $4 million in federal money during each of the last several cycles. Bowler Decl. PCS/CDP/CRP 6. Administrative expenses, which must be allocated in part to the federal account, have been approximately $5-6 million per cycle. A percentage of all administrative expenses must be paid with federal money. This reduces the amount of federal money remaining for other allocated expenditures such as GOTV that are deemed to benefit federal candidates (and are therefore also allocated). This means that if additional activities (i.e., state campaign activities) must be funded wholly or in part with federal money, those activities come into direct competition with administrative costs and other programmatic costs already allocated between federal and non-federal accounts, as well as expenditures for the direct benefit of federal candidates.

Although both parties have made significant investments in federal fundraising, raising federal money is more difficult and expensive than raising non-federal money. *See* Bowler Decl. 3 PCS/CDP/CRP 6; Erwin Decl. 3 PCS/CDP/CRP 401. A review of federal money raised by the state parties demonstrates that the amounts raised have remained relatively constant, with the exception of CRP federal fundraising in 2000.[24] Both parties have raised approximately $4-8 million in federal money during the past several cycles (again, with 2000 being the aberration). Federal money is expensive to raise; the average contribution is quite low, and the more effective programs require a significant investment. *See* Bowler Decl. 3 PCS/CDP/CRP 22; Erwin Decl. 3

[24] This increase is attributable to "top of the ticket" fundraising efforts by the Republican national candidates that year. *See* Erwin Decl. 3 PCS/CDP/CRP 402.

PCS/CDP/CRP 401.[25]

The effect of the Levin Amendment will be to significantly reduce the state-regulated income available to the parties. Bowler estimates that CDP state-regulated income will be reduced by 76-86%. Bowler Decl. 3 PCS/CDP/CRP 11-12. Erwin estimates that 47-69% of CRP's non-federal income would be unavailable. Erwin Decl. 3 PCS/CDP/CRP 21-24.[26] Furthermore, because of additional BCRA limitations that severely restrict the ways in which Levin Amendment contributions can be raised (discussed more fully below), it is by no means clear that the California parties can even count on the level of non-federal contributions received in the past. Such contributions cannot be solicited, received, directed, transferred or spent by or in the name of any federal officeholder or federal candidate, or any national party committee officer or agent; they cannot be provided by any other state or local party committee; and they cannot be solicited, received or directed through any joint party fundraising activities, even if all the party committees are part of the California party structure. Each of these restrictions is likely to further limit the amount of Levin funds actually received by the parties.

The parties therefore face the prospect of being required to fund a significantly increased percentage of party election activity with either federal money or Levin funds that are, at best, likely to stay relatively stable or, more likely in the case of Levin funds, to decrease. The gap in projected revenues and the historical cost of the parties' activities are illustrated in Bowler Decl., 3 PCS/CDP/CRP 46. This graph illustrates, based on historical income and expense figures, the

---

[25] Although the BCRA raises the limit on federal contributions to party committees from $5,000 to $10,000, the number of donors actually contributing to CDP at the $5,000 level has been less than 5%, suggesting that the number of donors who can or will actually double their federal contributions to the parties is very small. *See* Bowler Decl. 3 PCS/CDP/CRP 28.

[26] These numbers do not include the loss of transfers, which would reduce the amounts further.

projected federal and Levin income and the expenses of the party. The gap between the two would have been approximately $12.5 million in the 1997-1998 cycle and approximately $16 million in the 1999-2000. *Id.*

All of the state parties' programmatic activities will essentially be competing against each other (and against administrative costs) for limited federal/Levin dollars.[27] The parties will not be able to do any television or radio advertisements, and their state GOTV program (mail and phones) will be reduced below the level of effective communication of the parties' message. Bowler Decl. 3 PCS/CDP/CRP 20; Erwin Decl. 3 PCS/CDP/CRP 412. As a practical matter, candidate support and GOTV activities will remain a party priority, but will be greatly reduced, both in terms of the number of candidates supported and the level of support available for a given candidate. Voter registration and generic party-building activity will be greatly reduced or largely eliminated. Bowler Decl. 3 PCS/CDP/CRP 19; Erwin Decl. 3 PCS/CDP/CRP 415.

The parties currently organize and conduct most of the grass-roots campaign activities. Bowler Decl. 3 PCS/CDP/CRP 20. Candidates cannot, for the most part, afford to conduct these activities; they use the media or mail because these methods are more effective for the money spent. Nor do candidates have the infrastructure set up to conduct large-scale grass-roots activities. Both parties organize and support local party headquarters during an election. The vast majority of these offices will have paid staff doing at least some training, recruiting, coordinating, etc. *Id.* If the parties cannot conduct or support these activities, either from lack of available funds or restrictions imposed on coordinating party activities at more than one level, these activities are likely to diminish. *See* La Raja Decl. 35-39; Snyder Decl. 13-15.

---

[27] Ironically, the BCRA will also increase the parties expenditures for two already expensive items: fundraising (which can only be done using federally permissible funds) and accounting (which will have to be increased because of the monthly reporting requirements imposed by the BCRA).

b. The provisions of BCRA are not narrowly tailored.

Even if the Levin Amendment is viewed as a "traditional" contribution limit, it must be "closely drawn" to match a "sufficiently important governmental interest." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000). Assuming that the Levin Amendment was designed to address the perceived problem of non-federal transfers by the national parties to the state parties (and assuming – without agreeing – that is a legitimate governmental concern), the Levin Amendment is not at all narrowly tailored to address that concern, and its restrictions on state party spending of state-regulated money will prohibit a wide range of lawful state party spending. Moreover, a cap on such spending (i.e., the $10,000 Levin limit) that is not adjusted in any way for the size of the state or the population to be reached presents particular problems for large states such as California. With all due respect to Senator McCain, when the cost of one statewide mail piece is approximately $260,000 (Bowler Decl. 3 PCS/CDP/CRP 20), $10,000 does *not* allow for a lot of communication. McCain Depo. 278 ("...You can print a lot of handouts for $10,000.")

Nor is the definition of "federal election activity" itself narrowly tailored to a legitimate government interest. The only nexus between the state and local election activities swept into this definition and federal elections is the fact that the state or local elections are held at the same time (or even, perhaps, within the same general time frame). Given the significant First Amendment burdens caused by these restrictions, more of a nexus must be required. The current statutory definition is substantially overbroad and includes much state and local election activity which the government cannot properly regulate, even apart from any federalism concerns.

A related constitutional concern with respect to the definition of "federal election activity" is the problem of vagueness. As can easily be seen from above, the statute's failure to

define "federal election activity" and, particularly "get-out-the-vote" activity, more clearly, makes interpretation exceptionally difficult. The failure to define "promote, support, attack or oppose" is similarly problematic. For example, does an invitation to an event at which a member of Congress will be featured "promote" that member? *See, e.g.*, 3 PCS/CDP/CRP 204-205. If the party sends out a mail piece publicizing a Senator's endorsement of a particular ballot measure, does that piece "promote" the Senator? *See, e.g.*, 3 PCS/CDP/CRP 368-369.

A review of the rulemaking proceeding before the FEC reveals significantly differing views about the proper interpretation of BCRA's provisions. A legal challenge to the Commission's interpretation is now pending. Ultimately, the Commission disagreed with its own General Counsel about key definitions. Determining which get-out-the-vote activity is "federal election activity" and which is not posed a challenge even for the bill's principal sponsors. *See* McCain Depo.. 275 (asked about nonpartisan flyer at App. 211: "I'd have to ask the experts and get back to you..."); Feingold Depo. 200 (asked about radio ad in opposition to affirmative action initiative: "I'm not absolutely certain. I'd have to sit down and think it through a while and read the statute and think about it a little bit.")[28] Where the law cannot clearly be discerned, they may "trap the innocent by not providing fair warning" or foster "arbitrary and discriminatory application." *Id.*[29]

---

[28] Plaintiffs served Requests For Admissions in this case, well after the FEC had adopted its Title I rules, asking whether particular communications constituted "federal election activity." The FEC responded that these requests raised "pure issues of law." *See, e.g.*, 3 PCS/CDP/CRP 262. Hundreds of party committees across the land are now left to decipher these "pure issues of law" for themselves.

[29] These rules often operate in the context of highly charged electoral competition. Complaints are often initiated by a political opponent, or supporters of an opponent. Investigations can be lengthy, expensive and intrude heavily upon privacy and associational interests. A law that is vague invites such complaints, and makes resolution difficult and unpredictable because judgment and interpretation are required.

Given the Act's increased civil and criminal penalties, the inability to clearly understand the scope of the Act is extremely troublesome for political parties, who are among the most active participants in the political process. There are only two ways of dealing with this uncertainty. One is to adopt a cautious approach; the vagueness of the terms make it inevitable that participants in the political process are likely to "steer far wider of the unlawful zone...than if the boundaries were clearly marked." *Buckley*, 424 U.S. at 41, fn. 48 (citations omitted). Second, the parties could request advice from the FEC. This course essentially subjects their communications to an unwarranted form of prior restraint, a restraint that is especially onerous in the context of political campaigns. Furthermore, as a practical matter, campaign decisions are typically made under the kinds of time pressures that do not allow several months for a response to a request for advice.

The parties cannot possibly raise the money under the federal limits necessary to reach a massive California audience in a meaningful way. Even where money is available, the absence of any clear rules as to which state and local activities are subject to federal regulation and which are not is likely to cause the parties to forego those activities. Congress has failed to properly narrow the focus of "federal" activities in any meaningful way, and has imposed a limit upon the parties' abilities to spend state funds that is completely unrelated to the likelihood of corruption or the appearance of corruption of federal candidates. The result is that, while the impact on federal elections may be negligible, the effect on state and local election activity will be enormous and will reduce that activity below the level of effective advocacy. Bowler Decl. PCS/CDP/CRP 81-91.

B. Restrictions on The Parties' Ability To Raise and Spend State-Regulated Funds Violate the First Amendment

The restrictions imposed by the broad definition of "federal election activity" and the

Levin limits on spending are exacerbated by related provisions of Title I that prohibit the state and local parties from engaging in various forms of traditional "organizational" behavior.

The First Amendment embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The courts have acknowledged on many occasions that political parties play a central role in public debate about issues and candidates. "Representative democracy in any populous unit of government is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) They have likewise repeatedly recognized that the First Amendment protects "the freedom to join together in furtherance of common political beliefs." *Id.* at 574 (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. at 214-15); *See also Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989).

In spite of the extremely high degree of protection afforded political speech and association, BCRA involves a comprehensive and multifaceted scheme to separate the various party units from each other and to impose government regulation on the parties' "internal processes." As the Court made clear in *Eu*, restrictions on the parties' internal organization substantially burden associational rights and must be justified by a compelling state interest. *Eu* 489 U.S. at 229 (stating that a political party's 'determination...of the structure which best allows it to pursue its political goals, is protected by the Constitution.') The Constitutional protection extends not only to direct interference, "but also from being stifled by more subtle government interference." *Healey v. James*, 408 U.S. 169, 183 (1972) (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960)). While there may be some disagreement as to whether the BCRA's restrictions on the party are "direct" or "subtle," they are clearly real.

These restrictions or prohibitions suffer from the same defects as the attempt to regulate "federal election activity" – they are both overbroad and vague. Fundamentally, BCRA reflects a judgment that the use of "soft money" (or "non-federal" money) should be limited or prohibited notwithstanding that such money is, by definition, lawful and regulated in many state contexts. To the extent that BCRA attempts to impede the *lawful* raising and spending of such money by state and local parties, it runs directly afoul of the First Amendment protections afforded to those lawful uses of non-federal money and those lawful activities that involve raising or spending such money. In an effort to define the prohibited conduct as broadly as possible, Congress has promulgated the kind of "[b]road prophylactic rules in the area of free expression [that] are suspect." *NAACP v. Button*, 371 U.S. 415, 438 (1963). To the extent that BCRA imposes a virtual "ban" on every activity having to do with non-federal money (which, by definition, includes all state-regulated money), the provisions are not at all narrowly tailored. They prohibit an extremely wide range of constitutionally protected conduct and completely lack that "[p]recision of regulation [that] must be the touchstone." *Id.*

It is also readily apparent that much of the burden on speech and associational rights is the result of broad terms that are, in many cases, undefined and involve some subjectivity. As the Court originally noted in *Buckley*, "[c]lose examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests." *Buckley*, 424 U.S. at 40-41. Here, the BCRA has increased the criminal penalties, making issues of statutory clarity all the more important.

1. Prohibitions on Transfers and Joint Fundraising of State-Regulated Funds Impose Substantial Burdens That Are Not Narrowly Tailored To Meet a Compelling Government Interest

BCRA Section 101(a) (2 U.S.C. §§ 323(b)) requires that each state or local party raise its

own Levin funds and prohibits the transfer of such contributions between state or local party committees, or between the national party committee and any state or local party committee. This section also provides that a state or local party may not pay for "federal election activities" with a Levin contribution if it is "solicited, received or directed" through joint fundraising activities at the state and local level, and that the state or local party may not pay for any "federal election activities" with *federally permissible contributions* transferred, contributed or provided by any national party committee or any other state or local party committee. 2 U.S.C. § 323(b)(2)(B). In other words, BCRA not only prohibits the transfer or joint fundraising of *Levin* funds, it also prohibits the transfer of *federal* money between political party units if that money is to be used for "federal election activity." Although this restriction is presumably intended to address the national party transfers, the prohibitions on transfers of Levin funds are not limited to transfers from, or joint fundraising with, the national party committees; they apply with equal force to transfers between the state and local party committees, as well as joint fundraising activities among the state and local parties. They are also not limited in terms of the size of the contributions; large and small transfers alike are completely prohibited.

The prohibition on transfers of state-regulated funds between the various party units and the prohibition on joint fundraising of state-regulated funds are direct impediments to the state and local parties working collectively to "conduct[] the party's campaigns," as required by State law. The transfer prohibitions apply even to federally permissible money if it is to be used for "federal election activity." Federal money is, by definition, money raised in compliance with all of the federal limitations as to both source and amount. It is money that has been determined by Congress to be noncorrupting if used directly to support a candidate. It is inexplicable how a limited contribution, twice removed from the source, through two party committees, can be

corrupting even though the initial contribution is not. The same is true as to the transfer of Levin funds among the state and local parties. Transferring money already raised within certain limits, not to a candidate, but to another party committee, cannot be said to be circumventing such limits. Similarly, a joint fundraising activity for Levin funds with another party committee, *where the funds to be raised are statutorily limited and are legally permissible as to both committees*, cannot lead to either corruption or the appearance of corruption. Fundraising is both a form of protected speech and a protected associational activity; it does not become any less protected because it is done jointly. The joint fundraising prohibition, like the other provisions, is an absolute ban. It is not tailored to address a legitimate problem, and is not limited to activities that have the potential for corruption or the appearance of corruption.

It is the nature of politics that some races will be closer than others and some races will be perceived by the parties to be more significant than others. In addition, a victory in a particular race may well have benefits for the party as a whole and its members beyond the actual race itself. In these cases, the parties should have the freedom that other organizations have to make basic organizational decisions about where money is best spent. These decisions reflect the group's collective decision-making and priorities. This interference with the right to self-governance is subject to strict scrutiny. *California Democratic Party*, 530 U.S. at 582. The argument that these restrictions will be "beneficial" for the parties because it will force them to return to their "grass-roots" should be rejected in this case just as the courts have rejected such paternalistic attempts to substitute the government's choices for those of the parties in the past. *Id.; Tashjian*, 479 U.S. at 552.

The prohibition on transfers (as well as contributions to other organizations) can also be viewed as an absolute ban on "spending" subject to strict scrutiny under *Buckley*. Under this test,

the prohibition would surely fail, as there is no compelling governmental interest justifying a complete ban without regard to the amount or purpose of the expenditure, or any other reasonable criterion related to a legitimate and articulated purpose.

Whether viewed as a restriction on the parties' internal operations or as a spending limit, these restrictions are not narrowly drawn to meet a compelling government interest.

2. The Prohibitions on Fundraising of State-Regulated Funds By Party Leaders Imposes a Substantial Burden That Is Not Narrowly Tailored To Achieve a Compelling Governmental Interest

A second critical area restricted by BCRA is the role of national party officers, candidates and officeholders and their agents in raising or spending "Levin contributions." BCRA Section 101(a) (2 U.S.C. § 323(b)) provides that a Levin contribution may not be used for "federal election activity," if it is "solicited, received, directed, transferred, or spent by" an officer or agent of any national party committee, or any federal candidate or officeholder. As stated above, the political parties are designed as representative bodies to have a great deal of "overlap" in their membership and leadership at the national, state and local levels. For example, certain state officers are automatically members of the national party. Indeed, several of the state officers who are plaintiffs in this action are also on their party's national committees and, in some cases, on the national party's executive committee. Torres Decl. 3 PCS/CDP/CRP 97; Morgan Decl. 3 PCS/CDP/CRP 490-91. To the extent that these individuals are considered "officers" or "agents" of the national party, they are prohibited from any involvement in raising or spending Levin funds – both of which they would be doing in their capacities as state party chairs and officers.

BCRA also prohibits federal candidates and officeholders from assisting a state or local party in raising non-federal funds even to be used exclusively for state or local elections, unless

those funds meet the federal limits and source restrictions. BCRA allows federal candidates and officeholders to "appear" at fundraising events but prohibits them from any involvement in fundraising. 2 U.S.C. §323(e)(3).

The prohibitions on federal candidates, officeholders, and national party leaders, including those who may also have leadership roles in the state or local parties, from "soliciting," "receiving," "directing," and "spending" pose special problems as they present direct restrictions on speech and association. The solicitation of contributions – as opposed to the making of contributions – is protected speech, and restrictions on the ability of an organization to solicit funds are subject to "exacting First Amendment scrutiny." *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 788 (1988). Such restrictions must be narrowly tailored to achieve a compelling governmental interest. *See also Schaumberg v. Citizens For A Better Environment*, 444 U.S. 620 (1980). The *Schaumberg* case struck down a restriction on door-to-door solicitation that did not meet certain local requirements; the court noted 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. The Court indicated that this kind of limitation on expression required both a sufficiently strong governmental interest and narrowly drawn regulations. Like the ban on transfers, the ban on soliciting is not tailored in any way.

In addition, the restrictions on various officials "soliciting" "spending" "or "directing" non-federal funds (and, in some cases, federal) will also seriously and adversely effect the process of "conducting the party's campaigns." The parties, and their officials at all levels, are bound together not only by ideology, but also in the common enterprise of electing candidates up and down the ticket. In various ways, the state parties attempt to coordinate their efforts, reach

out to their core constituencies and allocate their collective resources to achieve both electoral goals and ideological goals. Both of the California state parties have fairly well-established organizational structures for their campaigns: the Democrats have the "Coordinated Campaign," and the Republicans have the "Victory Plan." These "campaign operations" involve representatives of the national, state and local parties, as well as representatives from the federal candidates on the ballot in the coming election and constituent groups in the state that have historically provided strong party support, coming together to assist in the election of the parties' candidates at all levels. The focus of these discussions is to assess available resources, make decisions about how best to allocate available resources, and set collective goals and priorities. Because much of this activity involves discussions that touch on fundraising, campaign strategies, and spending priorities, the mere participation of national, state and local representatives of political parties in such meetings may subject participants to inquiries about their discussions and possible enforcement action. If these persons have to worry about whether their discussions amount to "soliciting," "receiving," "directing," or "spending" non-federal money, and whether their communications might subject them to extensive administrative investigation and even possible criminal prosecution, it will be virtually impossible to engage in the kind of collective planning and decision-making required in election campaigns. Since the "coordinated campaign" or "victory plan" are conducted on a statewide basis, and the focus is on state resources and state elections as well as any federal races, it is inevitable that such discussions will involve the spending or raising of non-federal funds -- prohibited speech. The ability of the parties to "conduct a party campaign" and to work to disseminate a coordinated message under these circumstances will be significantly impaired, if not completely destroyed.

In addition, the persons prohibited from these activities are the parties' *leaders*. The

candidates and officeholders are the most visible representatives of the parties. The parties' candidates at all levels are their standard-bearers. Although they may or may not be formally "officers," they are the face of the party to the party membership as well as the public at large. The federal candidates and officeholders are often better known than state or local candidates. This is particularly true in a state like California with term limits for state legislators and significant turnover. Members of the party and, especially, persons actively engaged in supporting the party, enjoy meeting the candidates – including federal candidates – and hearing them discuss issues in a particular campaign or in the news. Many organizations engaged in fundraising use "celebrities" or similarly well-known spokespersons to stimulate enthusiasm and excitement over the organization's program. Bowler Decl. 3 PCS/CDP/CRP 22. Parties are not significantly different in this regard, and the prohibitions of BCRA unreasonably deprives the parties of the assistance of some of their most successful and popular representatives. Moreover, it prohibits the parties' leaders from participation in one of the parties' important enterprises – raising funds needed to sustain the parties, support their electoral goals and disseminate their message. Although candidates and officeholders can appear at fundraisers, they cannot "solicit" non-federal funds on behalf of the state parties. The absence of a clear line between these activities will put candidates and officeholders at risk with respect to participating in such events and is likely to cause them to minimize these events or avoid them altogether. As noted above, this ban is not narrowly tailored to address a particular problem; it is a general prohibition that includes legitimate fundraising activities that are permissible under state law.

Finally, state or local party officers who also serve on their party's national committees run the risk that, in raising non-federal funds for their state parties, they may be accused of raising those funds as an officer or agent of the national committee. The burdens imposed on the

parties' speech and association rights by a rule that restricts its officers and representatives from fundraising, or from participating in spending decisions, are substantial.

The asserted interest here is to prevent donors from currying favor with federal candidates and officeholders, thereby creating the reality or appearance of corruption. Clearly, that interest is not served at all by preventing state party officials, who are not candidates and who serve as members of their party's national committee or as officers, from raising state-regulated funds for their own state parties. Nor is it served by restricting federal officeholders from raising state-regulated funds for state and local parties, for use in state and local elections. Given that under BCRA federal officeholders are free to raise unlimited amounts for nonprofit organizations, from any source, as long as the contribution is not "earmarked" for federal election activity, 2 U.S.C. §323(e)(4)(A), it cannot be said that restricting federal officeholders from raising state-regulated funds for party committees is "narrowly tailored" to serve the asserted interest. For that reason, the restrictions on solicitation of state-regulated funds to party committees, by state party officials who serve as officers, agents, etc. of national parties, and by federal office-holders and candidates, is unconstitutional.

3. The Prohibition on Contributions to, and Solicitations For, Certain Non-Profit Organizations by State and Local Parties Imposes a Substantial Burden That Is Not Narrowly Tailored To Achieve a Compelling Governmental Interest

BCRA Section 101(a) (2 U.S.C. § 323(d)) prohibits parties from making "donations" to organizations organized under 501(c) of the Internal Revenue Code that have made any expenditures for a "federal election activity." Because of the broad definition of that term, this provision prohibits contributions to, or solicitations on behalf of, many organizations that do not make expenditures in support of or opposition to any candidates -- federal, state or local. It includes organizations that are engaged only in nonpartisan activities, as well as ballot measure

committees (which are typically 501(c)(4) organizations). Bowler Decl. 3 PCS/CDP/CRP 24; Erwin Decl. 3 PCS/CDP/CRP 393-94. In California, there are usually a large number of ballot measures, both in the primary and general election, and at both the state and local level. The November, 2002 general election includes seven statewide measures. The San Francisco ballot includes an additional 20 local measures. Bowler Decl. 3 PCS/CDP/CRP 15. Since the committees formed to support or oppose these measures are by their very nature involved in GOTV activities, donations to these committees will be prohibited.

BCRA prohibits the parties from participating in ballot measure campaigns – campaigns in which some of the most significant state and local issues are debated and decided. The by-laws of both parties allow them to make endorsements on ballot measures, and the parties regularly do so, at both the state and local level. Some of the most significant political developments in California have involved the initiative process -- issues such as affirmative action, limitations on state and local taxation, immigration, insurance reform, welfare reform, restrictions on union membership, and term limits have all been the subject of ballot measures in recent years. The ban on contributions to these organizations means that the parties may not express their support or opposition to such measures by contributing to those campaigns.

The prohibition also appears to prohibit the parties from making "in-kind" contributions to such a committee. The parties commonly communicate their support or opposition by including it in mail pieces that contain a combination of candidate and ballot measure endorsements. *See* 3 PCS/CDP/CRP 59 (doorhanger featuring endorsement of Prop. 45 – local option on term limits). Under California law, each reference to the ballot measure constitutes an "in-kind" contribution to the benefitted committee unless done completely independently of the committee. The effect of this provision will be to prohibit all party expenditures on ballot

measures, unless those are done completely independently of the ballot measure committees.[30]

Political parties have a First Amendment right to make contributions in ballot measure campaigns. *See, e.g., First Nat'l Bank of Boston v. Belloti*, 435 U.S. 765 (1978) (holding a state cannot constitutionally prohibit corporations from making ballot measure contributions or expenditures, as risk of corruption is not present); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (holding contributions to ballot measure committee can not be constitutionally limited, as there is "no significant state or public interest in curtailing debate and discussion of a ballot measure"). BCRA indirectly imposes essentially the same restriction by prohibiting contributions to certain kinds of organizations – 501(c) organizations – organizations that (among other things) support or oppose ballot measures. This prohibition constitutes an unconstitutional interference with the parties' rights to make contributions to support or oppose ballot measures -- rights that have been clearly articulated by the court. No new or additional governmental interest justifies this restriction.

Even if Congress meant only to include other 501(c) non-profit groups, it is an impermissible limitation on the parties' rights to associate with those groups, and to contribute as a means of expressing that association. *Buckley*, 424 at 25. The state parties have both made contributions to a range of ideological organizations, many of which are involved in nonpartisan voter registration or GOTV activities. For example, CDP has made contributions to the A. Phillip Randolph Foundation, a 501(c)(3) organization that does nonpartisan voter registration.[31] In addition, many party officials are also actively involved with non-profit organizations and

---

[30] Defendant-Intervenors agreed that both direct or in-kind contributions would be barred to a BCRA 501(c)(4) ballot committee. *See* Responses to Request For Admissions, 3 PCS/CDP/CRP 248.

[31] Intervenors have agreed that such contributions would be barred under BCRA. See Responses to Request For Admissions, 3 PCS/CDP/CRP 248.

foundations; the vagueness of this provision leads to the conclusion that a party official could violate the law (and be subject to criminal penalties) simply for contributing to his or her church, if the church has engaged in non-partisan activities encouraging (or assisting) its members to vote.

Manifestly, section 323(d) is not tailored to any candidate corruption and, indeed, includes groups that are not even federal committees and do not make contributions to federal candidates or otherwise participate in federal elections. It cannot withstand the required level of constitutional scrutiny. There is no justification, let alone a compelling one, for extending the prohibition on contributions and solicitations to these organizations, or for allowing these inherently vague and unreasonable restrictions to chill contributions for these organizations, or solicitations on their behalf, by party officials or "agents."

IV. TITLE II ARGUMENT - see separate section

V. TITLE III ARGUMENT - see separate section

VI. CONCLUSION

Plaintiff California political parties submit that BCRA simply goes too far. It fundamentally changes the political process in ways that may not have been foreseen, even by its supporters. It dramatically alters that balance between the federal government and the states in the sensitive area of state elections, and thereby violates basic federalism principles. It intrudes upon political speech and association in ways that eviscerate cherished constitutional protections. It is unfortunately a case where the cure is more dangerous than the illness. It should be rejected.

Wherefore, based on the foregoing, plaintiffs respectfully request that the challenged provisions be declared unconstitutional and unenforceable.