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

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[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

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[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

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[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

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[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

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[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

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[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

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[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*

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[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

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[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

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[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:

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[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:

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[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

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[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

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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).

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[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