TITLE II THE RESTRICTIONS OF SECTION 213 ON PARTY EXPENDITURES IS UNCONSTITUTIONAL

Section 213 of the BCRA (2 U.S.C. § 315(d)(4)) prohibits any political party committee from making an independent expenditure with respect to a candidate after it has made a coordinated expenditure or, conversely, from making a coordinated expenditure after it has made an independent expenditure. This prohibition is unaffected by the presence or absence of actual coordination in connection with a particular expenditure.

Section 213 of the BCRA also provides that all political party committees of a particular party, from the national committee to a state committee to a local committee are considered to be a "single committee" for purposes of this prohibition, despite the fact that none of these entities may have any control over the contribution or expenditure decisions of the others. 2 U.S.C. § 441a(d)(4)(B). The result is that if one committee, at any level, makes a coordinated expenditure, all other party committees of that party are prohibited, under threat of severe criminal penalties, from making independent expenditures *without regard to their actual involvement* in the coordinated expenditure. In addition, if any state or local party makes an independent expenditure in support of a candidate, any other committee of that party – national, state or local – that makes coordinated expenditures in support of the same candidate cannot transfer any federal money to the party committee making the independent expenditure, even if those funds may be spent on activities unrelated to the making of an independent expenditure.

Under current law, the parties are entitled to make independent expenditures so long as those expenditures are truly independent and are not coordinated with the candidate. *See Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 619 (1996). Although each party committee can ensure that its independent activities have not been coordinated with a candidate, it has no control over (and usually no knowledge of) the activities

of other party committees.[32] Even within California, the state parties have no control over (and usually no knowledge of) the activities of the County Central Committees. These Committees function independently of the state parties. Bowler Decl., 3 PCS/CDP/CRP 26; Morgan Decl. 3PCS/CDP/CRP 488.

The effect of these provisions is to prohibit a coordinated expenditure if *any* party committee *anywhere* has made an independent expenditure for the same candidate, or to prohibit an independent expenditure if any party committee has made a coordinated expenditure. The clear intent of these provisions is to ban party committees from making any independent expenditures.

This attempt to prohibit the parties from making independent expenditures is plainly in conflict with the Court's decision in *Colorado*. In that decision, the Court held that, "We do not see how a Constitution that grants to individuals, candidates and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties." *Id.* at 618. An independent expenditure by a political party is, by definition, not coordinated with a candidate and therefore is not interchangeable with a contribution in terms of its value to the candidate. *Id.* at 617-18. In other words, it does not have the potential for corruption or the appearance of corruption that a contribution or a coordinated expenditure have, and therefore is not justified by a sufficiently compelling governmental interest. *Id.*

Section 213 effectively creates a presumption of coordination by a party committee with

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[32] As a practical matter, one party committee would not necessarily have any way of knowing whether other party committees (including local party committees) have made such expenditures without examining the reports of each and every party committee in the country and, not even then because of the lag time between the close of a reporting period and the actual filing date for that period. Erwin Decl. 3PCS/CDP/CRP 417-418. The BCRA does not include any mechanism by which this information would simultaneously be available to all party committees.

its candidate -- regardless of the presence of *actual* coordination -- whenever that party committee makes a coordinated expenditure that precedes or follows an independent one, and whenever any committee of the same party makes a coordinated expenditure even though the committee in question has never done so. Such a presumption is precisely like the presumption of coordination explicitly rejected in *Colorado. Id.* at 619 (" The question..is whether the court of Appeals erred as a legal matter in accepting the Government's conclusive presumption that all party expenditures are 'coordinated.' We believe it did.")

Even if one could draw some assumptions about the level of a party's coordination with a candidate from the existence of previously (or subsequently) coordinated expenditures, no such assumption could reasonably be based on the activities of a *different* party unit. There is no legal basis for broadly imputing the acts of one entity to another and even if there were, *Colorado* clearly demands that there be a factual basis for doing so. Id. at 622. Section 213's blatant disregard for the presence or absence of actual coordination, as a factual matter, flies in the face of the Court's holding in *Colorado*. Section 213, therefore, is manifestly unconstitutional.