**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **SENATOR MITCH McCONNELL, et al.,**<br>Plaintiffs,<br><br>**v.**<br><br>**FEDERAL ELECTION COMMISSION, et al.,**<br>Defendants. | Civ. No. 02-0582<br>(CKK, KLH, RKL) |

**NOTICE OF FILING**

Plaintiffs in No. 02-582, *McConnell v. FEC*; No. 02-581, *National Rifle Ass'n v. FEC*; No. 02-633, *Echols v. FEC*; No. 02-751, *Chamber of Commerce v. FEC*; No. 02-753, *National Ass'n of Broadcasters v. FEC*; No. 02-754, *AFL-CIO v. FEC*; No. 02-874, *Republican National Committee v. FEC*; No. 02-875, *California Democratic Party v. FEC*; and No. 02-881, *Thompson v. FEC*, hereby file with the Court the Consolidated Reply Brief for Plaintiffs in Support of Motion for Judgment.

November 27, 2002

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# CONSOLIDATED REPLY BRIEF FOR PLAINTIFFS IN SUPPORT OF MOTION FOR JUDGMENT

**CONSOLIDATED REPLY BRIEF FOR PLAINTIFFS**

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## INTRODUCTION

The metes and bounds that govern this Court's consideration of BCRA could hardly be clearer. Under *New York Times*, *Buckley*, and *Republican Party of Minnesota*, Congress cannot limit robust and uninhibited debate about public figures and public issues — most particularly during election campaigns — under the guise of enacting campaign finance "reform." Nor does Congress possess constitutional authority to federalize state campaign activity simply by declaring *ipse dixit* that virtually all such activity affects federal elections in some way or the other. These precepts cannot be wished away simply by pretending that BCRA amounts to no more than minor tinkering necessary to "[p]reclud[e] evasions" and "return[] the law to the *status quo ante*." Opp. Br. I-1-2.

If mere tinkering with existing law were all that were required, then surely the changes that BCRA brings about could long since have been accomplished by FEC regulation or enforcement. If, for example, *Buckley*'s express-advocacy ruling really amounted to nothing more than a clarifying interpretation to cure statutory vagueness, then the FEC's determined effort to enact a version of BCRA's "electioneering communications" ban by regulation would have been well-received by the courts. But just the opposite occurred. Federal courts have been virtually unanimous that the FEC acted unconstitutionally by attempting to regulate beyond express advocacy. *See* McConnell Opp. Br. 39-41. Indeed, the FEC was sanctioned and ordered to pay attorney's fees by the Fourth Circuit exactly because it persisted, in the face of *Buckley*, in its efforts to erase that decision's constitutional protection of issue advocacy. *See id.* at 39.

Although our opponents now pretend otherwise, BCRA was deemed by its sponsors a "landmark" law needed precisely because "real and meaningful campaign finance reform" could *not* be achieved by FEC regulation or enforcement. 148 Cong. Rec. S2134 (daily ed. Mar. 20, 2002) (statement of Sen. Snowe). It cannot be, therefore, that Title I simply amounts to a "refine[ment]" of the FEC's allocation rules. *See* Opp. Br. I-2. To the contrary, Title I invents entirely novel concepts and limitations — "federal election activity," "Levin" funds, and restrictions on national, state and local parties — which never before appeared in FEC

regulations. In defending these expansive new concepts, our opponents are forced to argue that Congress possesses plenary power to regulate state and local elections as long as Congress purports to be regulating federal elections as well. That cannot be. Nothing in the Constitution, much less the Elections Clause, empowers any such encroachment on state sovereignty or the associational and speech rights of political parties. *See infra* Part I.

Likewise, our opponents cannot defend BCRA's electioneering communications provisions by arguing that those provisions merely "restore" the ban on corporate and union contributions to candidates and parties and that both corporations and unions remain free to broadcast issue ads as they choose using "PAC funds." *See* Opp. Br. I-1, I-3. *Bellotti* and a host of other decisions confirm the right of corporations and unions to participate fully in the untrammeled public debate guaranteed by First Amendment. "Allowing" corporate and union speech solely through PACs but banning it otherwise is unconstitutional save for the limited situation of "express advocacy" under *Buckley*. *See* NRA Opp. Br. 2-6; AFL-CIO Opp. Br. 7-10. Incumbent politicians may wish that they, and they alone, could serve as gatekeepers handing out tickets of admission to the public debate during the election season. But the First Amendment does not assign incumbent politicians, or anyone else, that role. By providing otherwise, BCRA (despite our opponents' derisive tone) *is* entirely "revolutionary." *See infra* Part II.

## I. TITLE I OF BCRA IS UNCONSTITUTIONAL.

In their opposition brief, defendants rely again virtually exclusively on anecdotal evidence about the role of state-regulated money in the political process, and only slightly more on the relevant law. But defendants still offer no convincing response to plaintiffs' federalism, First Amendment, and equal protection challenges.

### A. Title I Violates Article I, Section 4, And The Tenth Amendment Of The Constitution.

Defendants' response to plaintiffs' federalism arguments is characterized above all by a willingness to ignore the longstanding role of States in regulating the financing of their own campaigns. For more than a generation, state regulatory schemes had rested comfortably alongside FECA's carefully tailored scheme applicable to the financing of *federal* campaigns. BCRA changes all that. By way of obvious example, the government repeatedly refuses to define "soft money" as funds that are subject to *state* instead of federal regulation. Instead, the government defines "soft money" as funds that "exceed[] FECA's contribution limits or come[] from a source that the statute prohibits." Opp. Br. 1; *see also id.* at 16, 51 (same).[1] For their part, intervenors suggest that BCRA passes constitutional muster simply because it does not "purport[] to regulate in an area of *exclusive* state control." *Id.* at I-17. The idea of dual sovereignty in a federal republic seems alien to their thinking. Not even Hamilton went so far. Beyond their failure even to acknowledge the role that States have historically played in regulating the financing of state campaigns, defendants betray a thinly veiled contempt for the idea that States *could* properly enact their own campaign finance regulations. They describe the very concept of

[1] In so defining "soft money," the government appears to leave unclassified a substantial subset of state-regulated funds. For instance, if an individual gave $50 to a state party committee in order to support a candidate for governor, such a donation would not constitute a "hard money" contribution regulated by FECA, since it would not have been given "for the purpose of influencing [an] election for Federal office," 2 U.S.C. § 431(8)(A)(i), but it would not constitute a "soft money" donation under the government's definition either, since it would not "exceed[] FECA's contribution limits or come[] from a source that the statute prohibits."

"state-regulated money" as "emblematic of the precise distortion that required enactment of BCRA." *Id.* at I-5 n.14. Defendants' disregard for, and even animus toward, state regulation comes as no surprise. It merely reflects Congress' own disregard for state regulation in enacting Title I. Because Title I has a direct and substantial effect on state elections, it exceeds Congress' power under the Elections Clause.[2]

As a threshold matter, both the government and intervenors contend that Title I does not affect an area of core state sovereignty at all. As they see it, Title I "neither regulates state elections nor modifies the states' regulation of their own elections," but instead "merely regulates the money that some private parties may give to other private parties." *Id.* at. 4; *see also id.* at I-11 (asserting that Title I "merely regulates financial transactions between private parties"). Defendants cannot have it both ways. If Title I solely regulates private financial transactions, it cannot constitute a valid enactment under the Elections Clause. If, on the other hand, Title I really does regulate elections, defendants cannot seriously contend that it regulates *only* federal elections and not state elections as well — especially as defendants concede that Title I regulates at least some activities that affect *both* federal *and* state elections. *See, e.g.*, Opp. Br. I-6; *id.* at 5. Defendants do not, because they cannot, deny that a State's regulation of its own elections constitutes a core state function. *See, e.g., Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (opinion of Black, J.).

Defendants' primary contention is that, under the Elections Clause, Congress has plenary power to regulate state and local elections as long as it purports to be regulating federal elections

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[2] Intervenors claim, albeit only in a footnote, that plaintiffs lack standing, as private parties, to challenge BCRA under the Tenth Amendment. *See* Opp. Br. I-10-11 n.28. It is clear, however, that private parties are routinely allowed to bring suit where they are claiming that Congress acted *outside* its delegated powers, rather than merely asserting that Congress violated state sovereignty in acting *under* its delegated powers. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995). Indeed, the government recently made precisely this point in defending before the Supreme Court the right of private parties to assert alleged limitations on Congress' delegated powers. *See* Br. for the United States at 25-26, *Pierce County v. Guillen*, No. 01-1229 (U.S. filed July 5, 2002).

as well. Defendants advance two arguments, which we address in turn.

*First*, defendants contend that the Elections Clause gives Congress the power not only to regulate federal elections, but also to "protect federal offices from the actuality or appearance of corruption," Opp. Br. I-8; "protect the integrity of federal offices," *id.*; and "minimize the possibility of corruption of federal officials," *id.* at 5. In essence, defendants argue that Congress has the enumerated power under the *Elections Clause* to prevent any corruption that it could constitutionally regulate under the *First Amendment*, regardless of whether that corruption has any nexus to a federal election. This strays far beyond the text of the Elections Clause and the case law interpreting it. The Elections Clause does not give Congress plenary power to police the *political system* for alleged corruption — especially where that supposed corruption involves activity relating only to state, and not federal, *elections*. In support of their broader view of congressional power, defendants rely heavily on the Supreme Court's decision in *Burroughs v. United States*, 290 U.S. 534 (1934), *see* Opp. Br. 5, I-9, I-11 n.30. In *Burroughs*, the Court considered the constitutionality of reporting requirements on political committees that accepted contributions in connection with *presidential or vice presidential elections*. *See* 290 U.S. at 541. The Court reasoned that these provisions constituted a valid exercise of Congress' power to regulate presidential elections under Article II, Section 1, of the Constitution. *See id.* at 544. Nowhere did the Court suggest that Congress' power to regulate presidential elections somehow comprised a power to regulate *state* election activity under the guise of preventing corruption on the *federal* level — indeed, nothing in the statute suggested that it even *applied* to state election activity. To the extent that the Court spoke of Congress' power to protect the federal government from "corruption," therefore, it was speaking only of corruption *in connection with federal elections*. *See id.* at 545.[3]

[3] Curiously, intervenors intimate that Congress' power to police the political system resides somewhere outside the Elections Clause. *See* Opp. Br. I-8. They studiously avoid, however, finding a home for that penumbral power. Although intervenors quote a reference by Justice Black to the Necessary and Proper Clause, *see id.* at I-9 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 124 n.7 (1970)

*Second*, defendants contend that, under the Elections Clause, Congress has "substantial discretion" to regulate state elections and need not "[t]ailor" its regulations so as not to affect state elections. Opp. Br. I-9; *see also id.* at I-11 n.30 (same). That is profoundly misguided, however. None of the cases defendants cite stands for that structurally destabilizing proposition. In *Burroughs*, the Supreme Court did acknowledge that Congress had discretion to choose the appropriate means of protecting federal elections from corruption. *See* 290 U.S. at 547-48. But that language at most suggests that Congress has the discretion to choose any means of protecting federal elections which does not intrude on state elections — not that Congress has license to federalize state election activity whenever the means chosen would have an effect (however tangential) on a federal election. Similarly, in *Ex parte Yarbrough*, 110 U.S. 651 (1884), and *Ex parte Siebold*, 100 U.S. 371 (1880), the Court held only that Congress *retained* the power to regulate federal elections even when state and federal elections were held simultaneously, *see Yarbrough*, 110 U.S. at 662; *Siebold*, 100 U.S. at 393. The Court in no way suggested that Congress could regulate *state* elections as well. Indeed, in *Siebold*, the Court flatly stated that Congress *lacked* the authority to regulate actions that had "exclusive reference" to state elections. *See id.*[4] These cases stand only for the proposition that both the federal and state systems must be allowed their appropriate sphere, lest federal power sweep all of state authority within its ambit.

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(opinion of Black, J.)); *cf. id.* at 9 n.10, 11 n.14 (same by the government), they do not expressly rely on that clause — perhaps mindful of the Supreme Court's recent admonition that the Necessary and Proper Clause is "the last, best hope of those who defend ultra vires congressional action," *Printz v. United States*, 521 U.S. 898, 923 (1997).

[4] The government contends that *Siebold* and a companion case, *Ex parte Clarke*, 100 U.S. 399 (1879), "upheld federal statutes punishing state election officials for violating their duties under state election statutes at elections where candidates for Congress are simultaneously voted upon," Opp. Br. 10. In *Clarke*, however, the Court suggested only that Congress had the power to federalize a violation of a duty under a state statute if that violation occurred "in reference to an election of a representative to Congress." 100 U.S. at 404.

In view of the utter absence of Supreme Court supporting authority, the government (but not intervenors) relies heavily on two lines of lower-court cases. *See* Opp. Br. 11-12. Both lines are readily distinguishable. The government again cites *United States v. Bowman*, 636 F.2d 1003 (5th Cir. 1981), and other cases upholding the constitutionality of 42 U.S.C. § 1973*i*, the provision of the Voting Rights Act barring vote buying and voter-registration fraud in elections held "solely or in part" for the purpose of electing federal candidates, *see* Opp. Br. 11. As a threshold matter, it is worth reiterating that the Supreme Court has not spoken on the constitutionality of section 1973*i*. *See* McConnell Br. 14 n.4. Even assuming that those cases both are correctly decided *and* could be read as allowing Congress to prohibit vote buying and voter-registration fraud even when that conduct only affects state elections, those cases are inapposite.[5] As we noted in our opening brief, *see id.*, vote buying and voter-registration fraud are activities as to which there can be no conceivable conflict between federal and state policy interests. In contrast, the States have reached divergent conclusions from Congress as to the propriety (and indeed desirability) of certain activity in the financing of campaigns. The government has no answer to this fundamental distinction.

In addition, the government relies on a line of cases rejecting Tenth Amendment challenges to the National Voter Registration Act (NVRA), 42 U.S.C. §§ 1973gg to 1973gg-10, the so-called "motor voter law" that requires States to allow voters to register for federal elections while applying for a driver's license and in other specified situations, *see* Opp. Br. 12. To the extent that NVRA presents genuine Tenth Amendment problems at all, however, it is because it "conscript[s] state agencies to carry out voter registration for the election of Representatives and Senators," *see Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995), arguably in violation of the federalism principles articulated in *New York v. United*

[5] As we have noted, *see* McConnell Opp. Br. 6, *Bowman* itself involved a defendant who had bought votes as to *both* federal and state elections, *see* 636 F.2d at 1009, and the court expressly reserved the question whether Congress could constitutionally regulate conduct solely affecting state elections, *see id.*

*States*, 505 U.S. 144 (1992) — not because it constitutes an improper exercise of Congress' *enumerated power* under the Elections Clause. Nothing in NVRA requires States to alter registration procedures or qualifications for *state* elections. *See Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 837 (6th Cir. 1997). Any effects on state qualifications (say, because NVRA makes it harder for States to identify non-resident voters) are "indirect" at best. *See Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995).[6] Like the Voting Rights Act cases, the NVRA cases are inapposite.[7]

In sum, defendants cannot show that the Elections Clause allows Congress to enact regulations that have a direct and substantial effect on state elections. The only remaining question, then, is whether BCRA indeed has such an effect on state elections. It plainly does.

*First*, BCRA prevents state and local party committees from using state-regulated funds for some activities that inevitably affect *both* state and federal elections (such as voter registration or voter identification), and for others that affect *only* state elections (such as get-out-the-vote activity directed toward state ballot initiatives or featuring state candidates). As defendants acknowledge, the FEC itself has long recognized that most activities now classified as "federal election activity" have effects on *both* state and federal elections. In view of that recognition, the FEC has until now allowed state parties to use a combination of state-regulated and federally regulated funds to pay for those activities. Although the FEC allocation scheme

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[6] The government argues that NVRA has a substantial effect on state *registration procedures* because it compels States to decide whether to maintain their own registration procedures or to maintain a unified federal and state registration system (and thus change their procedures to conform with the new federal procedures). *See* Opp. Br. 12. BCRA, however, is not analogous to NVRA in this regard, because many of the restrictions of BCRA applicable to state elections would remain in force even in States that chose not to conduct their state elections simultaneously with federal elections. *See, e.g.*, McConnell Br. 21-22 (discussing restrictions on national committee activity in off-year state elections).

[7] The government cites another case, *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), for the proposition that Congress can regulate activity relating to state elections (in that case, contributions by securities professionals to state candidates), *see* Opp. Br. 13. *Blount*, however, upheld those regulations not under the Elections Clause, but rather under the Commerce Clause, on the ground that Congress could regulate private persons in their conduct of interstate trade in municipal securities. *See* 61 F.3d at 949.

may not have precisely reflected the relative size of the effects on state and federal elections in every instance, it sufficiently accommodated the competing state interest in regulating activities that also affect state elections. BCRA, by contrast, goes far beyond permissible "policy line-drawing," Opp. Br. 6, and does not merely "expand," "refine," "alter," or "change" the allocation rules, *see id.* at I-2, I-14, I-20; instead, it does away with the allocation rules altogether for the broad swath of activities classified as "federal election activity" — including those activities classified as "Levin" activities, for which only federally regulated funds (that is, a combination of ordinary federally regulated funds and "Levin" federally regulated funds) can be used. As to "federal election activity," BCRA overrides the considered policy judgments of numerous States, which, unlike federal law, have previously allowed donations for the state "share" of such activities from corporations and unions; allowed donations in greater amounts than federal law or in unlimited amounts; or both. *See generally* 1 DEV, tab 1, table 1 (Mann) (listing overridden laws of States).

As for those activities of state and local parties which affect *only* state elections, the government (though not, understandably, intervenors, who are suing to challenge the regulations at issue) claims that the FEC's regulations on "federal election activity" eliminate "many," if not all, of plaintiffs' examples. *See* Opp. Br. 2, 6-9. Defendants' intramural dispute aside, the government's argument lacks merit. Although the relevant regulations narrow the scope of "federal election activity" in certain respects, they do not do so in a way that attempts to differentiate between federal and state election activity. For example, the government contends that the California Democratic Party's 1996 radio ad encouraging voters to vote against a ballot initiative on affirmative action, *see* McConnell Br. 18, would no longer constitute get-out-the-vote activity under the FEC's regulations because it was not disseminated by an "individualized means," Opp. Br. 31 (emphasis omitted) (quoting 11 C.F.R. § 100.24(a)(3)). But if the medium of communication changes, the rule changes as well. If the California Democratic Party simply "broadcast" the same advertisement via a phone bank, rather than the radio, and did so within 72 hours of the election, it would still constitute get-out-the-vote activity even under the FEC's

regulations — *notwithstanding the fact that it would have no practical effect on federal elections*. The pertinent regulations do nothing to reduce the relative *portion* of regulated activity that affects state elections, and therefore do nothing to cure BCRA's unconstitutionality.[8]

Finally, defendants have no valid justification for two additional limitations applicable to state and local committees, which have unquestionable effects on state and local elections. As to the provision of Title I banning state and local committees from soliciting *any* type of funds for, or donating any funds to, certain tax-exempt organizations or political committees, defendants offer only the lame justification that those organizations and committees *sometimes* engage in activities that affect federal elections, *see* Opp. Br. I-47-48 — notwithstanding the evidence in the record that those organizations and committees are vital in promoting state ballot initiatives and supporting state grassroots activities, *see* McConnell Br. 19-20. And as to the provision of Title I barring state and local committee officials from raising state-regulated funds on behalf of their committees to the extent they are construed to be "officers or agents acting on behalf of" the national party committees, defendants merely renew their claim that the FEC's regulations foreclose such treatment, *see* Opp. Br. 2, 25, I-14 — ignoring entirely the fact that those regulations define only the term "agent" and not the term "officer," and relying heavily on a *comment* to the rule suggesting only that state and local committee members can continue to raise non-federal funds as long as they are merely members of the national committees, *see* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,083 (July 29, 2002). These provisions impose additional burdens on the ability of state and local

[8] For their part, intervenors claim that this ad would not have affected only state elections because the ad contained three references to the Republican Party and therefore would presumably have had the effect of encouraging Democrats to get out to vote in federal, as well as state, elections. *See* Opp. Br. I-11 n.30, I-31. To the extent this effect actually occurred when the ad was run, however, it was surely attenuated. Intervenors have it exactly backwards by suggesting that, whenever an activity has an incidental effect on federal elections, Congress can exclusively regulate it even if it also has substantial effects on state elections. Rather, where an activity has more than incidental effects on state elections, Congress must accommodate the competing state interest in regulating that activity.

committees and their leaders to engage in activities that affect state elections. Under the Elections Clause, that will not do.

*Second*, BCRA prevents national committees from using state-regulated funds for *any* purpose, including for activities that indisputably affect *only* state elections (such as transfers to state committees for use in off-year state elections, and donations to, and disbursements on behalf of, state candidates in off-year state elections). Defendants again all but concede that national committees engage in some activities that do affect only state elections. *See, e.g.*, Opp. Br. I-15.[9] Remarkably, defendants maintain that the federal government can regulate even these activities. None of the defendants' three arguments in support of this improbable proposition has merit. Reiterating an argument from their opening brief, *see* Br. 96, defendants first contend that national committees are so "closely tied to . . . federal officials" that fundraising by national committees poses a threat of "corruption of federal officeholders" even if the money is ultimately used for activities that affect only state elections, *see* Opp. Br. I-16. As we demonstrated in our opposition brief, *see* McConnell Opp. Br. 12, this argument rests on the erroneous premise that the Elections Clause gives Congress the power to police the entire political system, rather than just the power to regulate the manner of holding federal *elections*.

Defendants next contend, again as in their opening brief, *see* Br. 97, that a ban on the receipt and disbursement of state-regulated funds by national committees is justified because state-regulated funds and federally regulated funds are fungible, *see* Opp. Br. I-16; *id.* at 1, and because national committees can continue to use "as much hard money as they deem fit," *see id.*

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[9] At one point, defendants contend that, "[e]ven when a national party uses soft money directly for state elections, it often does so for the purpose of influencing the ultimate electoral prospects of the federal officeholders and candidates who control the party." Opp. Br. I-27 n.69. Defendants reason that "the results of a state election can have a significant impact upon subsequent federal elections": for example, because elected state officials play an important role in federal redistricting. *Id.* This boundless approach is entirely imcompatible with the Founders' vision of a federal republic. Such an effect on federal elections is surely too attenuated to give the federal government power entirely to displace the competing state interest in regulating state election activity.

at I-15. As we have again already shown, *see* McConnell Opp. Br. 9-10, this argument is entirely question-begging: even assuming that national committees could use federally regulated funds for activities that affect only state elections, *but see* 2 U.S.C. § 431(8)(A)(i) (defining federally regulated contributions as those made "for the purpose of influencing [an] election for Federal office"), the mere fact that national committees will be able to spend more of their existing, already federally regulated funds on activities affecting *federal* elections does not somehow give Congress the power to regulate the donation of *state-regulated* funds for activities that affect only *state* elections.

Finally, defendants contend that "a rule permitting the national parties to raise and spend soft money for *purely* state election activity would raise severe enforcement difficulties, requiring adoption of either rules for case-by-case adjudication . . . or a bright-line test." Opp. Br. I-16; *see also id.* at I-11 n.30 (same). But the Elections Clause does not require *exact* tailoring as to activity affecting federal elections and activity affecting state elections; instead, it at a minimum requires *some* degree of accommodation of state interests in the operation of their own election systems. By banning national parties altogether from using state-regulated funds for state election activity, Title I flunks the Elections Clause test.

*Third*, BCRA severely restricts the ability of federal officeholders and candidates to raise state-regulated funds for use by state parties or candidates in state and local elections. Other than stating, in a typical *ipse dixit*, that Congress "[u]ndoubtedly" has the constitutional authority to regulate the activities of federal officeholders and candidates, *see id.* at I-16, defendants have no real justification for these restrictions, other than to recycle their worn argument that Congress has the power to "prevent the threat of actual or apparent corruption of federal officials and those seeking federal office," *id.* This argument, however, is no more availing with regard to restrictions on federal officeholders and candidates than it is with regard to national party committees. Again, the argument rests on the erroneous premise that Congress has the power not just to regulate the manner of holding federal elections, but also to regulate even the activities of federal officeholders who are not seeking reelection, or activities of federal officeholders and

candidates which have no connection to their own election, all in the name of policing the political system. These restrictions implicate quintessentially *state* election activity, and defendants' efforts to convert them into federal election regulations simply because a federal officeholder happens to be involved flout the established limits of the Elections Clause.

*Fourth*, BCRA bans state and local candidates from spending state-regulated funds on advertising that refers to candidates for federal office. Defendants' sole justification for this provision is that "nothing in BCRA precludes state or local candidates from raising and spending hard money" to spend on such advertising. *Id.* at I-15; *see also id.* at 25 (same). But as defendants have already acknowledged, *see* Br. 128, nothing in FECA affirmatively *allows* state and local candidates to raise "hard," or federally regulated, money in the first place. In order to engage in such advertising, therefore, state and local candidates will be wholly reliant on transfers of federally regulated money from party committees or PACs. This provision effectively bans ads whose primary, if not exclusive, effect is on state elections.

In sum, Title I has a direct and substantial effect on the financing of state and local elections. Because nothing in the history or subsequent case law interpreting the Elections Clause sanctions such an unprecedented intrusion into States' regulation of their own election activity, Title I is unconstitutional.[10]

[10] Defendants additionally seek to justify Title I on the basis of the Commerce Clause. *See* Opp. Br. 13, I-9 n.26. Whether made in an implicit concession of the weakness of their Elections Clause argument or merely out of a desire to keep their options open in the Supreme Court, defendants' Commerce Clause argument lacks merit. Title I regulates *political*, not *commercial*, activity; contains no jurisdictional hook; and lacks any congressional findings. *See* RNC Br. 33-34. We are unaware of any case that has upheld a campaign finance regulation as a valid Commerce Clause enactment — and indeed we are unaware of any instance in which the government has previously attempted to justify a campaign finance regulation under the Commerce Clause.

### B. Title I Violates The First Amendment Rights Of Free Speech And Free Association And The Fifth Amendment Right Of Equal Protection.

Having seemingly exhausted their supply of anecdotes regarding the supposed selling of "access" by political parties, defendants have very little new to say in their opposition brief about plaintiffs' First Amendment challenges to Title I. Their strategy, however, remains the same: convince this Court to apply the most deferential level of scrutiny, define the governmental interests supporting Title I as broadly as possible, and hope for the best. The governing case law rebukes their efforts.

#### 1. Title I Burdens Significant Speech And Associational Rights.

As in their opening brief, defendants begin by attempting to minimize the First Amendment rights burdened by Title I. Indeed, defendants even suggest that the associational rights burdened by Title I are no greater than those implicated by the contribution and expenditure limits at issue in *Buckley v. Valeo*, 424 U.S. 1 (1976). *See* Opp. Br. 26-27. Not so. Title I imposes severe burdens on the associational rights of political parties — burdens far greater than those imposed by FECA.

Defendants at least acknowledge the "close relationship between national and state parties." *Id.* at I-43. But they downplay the burden Title I imposes on this relationship by emphasizing the associational rights that remain under the new law — predominantly the ability of national and state committees to coordinate efforts to raise and allocate federally regulated funds. *See id.* at 2, I-43-44. Defendants' emphasis on the remaining associational rights, however, entirely misses the point. The mere fact that BCRA "is not so clumsy as to prohibit outright" associations between party committees, RNC Br. 37, does not render the associational burdens on party committees merely incidental. On the contrary, Title I imposes a host of crippling restrictions on the ability of national committees to engage in coordinated fundraising with their state and local counterparts, and also on the ability of state and local party committees to do likewise with other state and local committees. Although defendants suggest that Title I

merely imposes "limits on monetary contributions from one committee to another," *id.* at 23; *see also id.* at I-45 (same), those limits will have direct effects on the *structure* of the political parties by forcing political parties to shift their fundraising activities from national party committees, which can no longer raise any funds except federally regulated funds, to state and local committees, which can continue to raise (if not necessarily spend) state-regulated funds, *see* McConnell Br. 29. When taken as a whole, these restrictions will greatly curtail the ability of party committees to coordinate fundraising efforts — even if they do not terminate that ability altogether. Title I therefore severely burdens the parties' associational rights.

**2. Title I Should Be Subject To Strict Scrutiny.**

Since their asserted interests in support of BCRA have never been held to be compelling ones, defendants devote substantial energy to arguing that Title I should be subject to the lower form of heightened scrutiny seemingly applied in *Buckley* to limits on the amounts of contributions. *See, e.g.*, Opp. Br. 3-4, I-17-23. Although defendants protest that this Court would be "break[ing] new legal ground" by applying strict scrutiny to Title I, *id.* at I-18, it is defendants who seek to break new legal ground by urging lower scrutiny *as to provisions that impose no new limits on the amounts of contributions* — the only kind of limits to which the Supreme Court has seemingly applied lower scrutiny.

As a threshold matter, defendants again fail to confront the Supreme Court's conclusion (outside the context of contributions to *candidates*) that a limitation on the amount of contributions to a *third party* effectively functions as a limitation on the amount of expenditures by the third party itself — at least where the contributions do not raise the specter of circumvention of limits on direct contributions to candidates.[11] *See Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 299 (1981). In a footnote,

[11] The Court's decisions in *Buckley* and *California Med. Ass'n v. FEC*, 453 U.S. 182 (1981), on which defendants heavily rely, *see* Opp. Br. I-18-20, are distinguishable on this ground, *see* McConnell Opp. Br. 23-24.

defendants purport to distinguish *Citizens Against Rent Control* because it involved a third party that had been formed not to "advocate the election or defeat of candidates for public office," but rather to "support a local ballot measure." Opp. Br. I-20 n.49. This is unfaithful to the Supreme Court's broader teaching in that case. In any event, the asserted distinction is really no distinction at all: like the ordinance at issue in *Citizens Against Rent Control*, Title I imposes no limitations relating to *express advocacy* by third parties, but instead limits donations to, and spending by, third parties for a variety of other purposes — including the support of state and local ballot initiatives. *See, e.g.*, McConnell Br. 18-19. *Citizens Against Rent Control* mandates that, to the extent that Title I is viewed as imposing limits on contributions to political parties beyond the already applicable "hard money" limits, it effectively limits expenditures by political parties and therefore should be subject to strict scrutiny.

Defendants next contend that Title I only imposes limitations on *contributions*, and not *expenditures*, and therefore should be accorded something short of strict scrutiny. *See* Opp. Br. I-19-21. This blinks reality and is utterly at odds with the logic of *Buckley*. As to state and local committees, Title I *only* imposes limitations on the "expend[iture]" or "disburse[ment]" of state-regulated funds for "federal election activity." *See* BCRA § 101(a) (adding new FECA § 323(b)(1)). Although donors remain free to give state-regulated funds to state and local committees in *unlimited amounts*, defendants nevertheless call this provision a contribution limit because the law restricts the *uses* to which those funds may be put. *See* Opp. Br. I-20. But *any* restriction on expenditures imposes some burden on the *uses* to which contributions may be put. Indeed, *Buckley* itself concerned a limitation, not on all expenditures, but only on those "expenditures" that met the statutory definition and were made "relative to a clearly identified candidate." 424 U.S. at 41. Even though the statutory provision at issue therefore effectively imposed limits on the ability to use contributions to fund qualifying "expenditures," *Buckley* had no difficulty distinguishing between a restriction on expenditures and a restriction on contributions. Defendants' attempt to confuse this clear distinction has no merit.

As to national committees, Title I prohibits them not only from "receiv[ing]" a donation

of state-regulated funds, but also from "spend[ing]" such funds. *See* BCRA § 101(a) (adding new FECA § 323(a)(1)). By its express terms, therefore, Title I imposes *both* contribution and expenditure limits on national committees. That alone triggers strict scrutiny. Moreover, as we have noted, *see* McConnell Br. 33, Title I does not impose any new limits on the *amounts* of contributions to, or expenditures by, national committees, like the limits at issue in *Buckley*: instead, Title I subjects funds used by national committees for a variety of previously unregulated purposes to the *preexisting* source-and-amount limitations of FECA. Therefore, in response to defendants' glass-half-full argument that "BCRA imposes *no* limit on *how much* a national party can spend on any activity," Opp. Br. I-19, it can equally be said that BCRA imposes *no* limit on *how much* a national party can *raise* for any activity: instead, BCRA simply requires national committees to raise and spend federally regulated, rather than state-regulated, funds. Because Title I regulates the *uses* for which money is raised and spent rather than imposing any new limits on the *amounts* of contributions or expenditures, the contributions-versus-expenditures dichotomy of *Buckley* is inapposite here. Strict scrutiny is thus warranted.

Finally, defendants offer no plausible justification for applying less than strict scrutiny to a variety of provisions in Title I — most notably the provisions banning the mere solicitation of funds. These cannot be classified as restrictions on either "contributions" or "expenditures" under *Buckley*'s taxonomy. Defendants contend that Title I's solicitation provisions should be subject to less than strict scrutiny — notwithstanding "[w]hat[] a formalistic dichotomy between 'contributions' and 'solicitations' might otherwise suggest," *id.* at I-22 — simply because the solicitation provisions are necessary to prevent circumvention of FECA's contribution limits, *see id.* But defendants have it exactly backwards. In determining the appropriate level of scrutiny, a reviewing court does not, as defendants would have it, look at the *governmental interest being asserted.* Rather, as the Supreme Court did in *Buckley*, the reviewing court is first to measure the burden that the law places on speech and associational interests, and, in light of that examination, then to determine the appropriate level of scrutiny. *See* 424 U.S. at 14-23. And defendants cannot gainsay that the Court has squarely held that solicitation, unlike contribution, constitutes

pure speech activity enjoying the fullest First Amendment protection. *See, e.g., Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). Even the cases cited by defendants support the longstanding proposition that restrictions on solicitations are subject to strict scrutiny. *See, e.g., Stretton v. Disciplinary Bd. of the Supreme Court of Penn.*, 944 F.2d 137, 146 (3d Cir. 1991).

In sum, because Title I severely impacts the First Amendment rights of political parties by imposing restrictions on the uses for which money is raised and spent, and because Title I imposes a host of additional restrictions of the kind to which strict scrutiny has traditionally been applied, settled law demands that Title II receive strict scrutiny.

### 3. Title I Is Not Sufficiently Tailored To Prevent Actual Corruption Or The Appearance Of Corruption.

Having devoted the vast majority of their opening brief on Title I to various arguments regarding the federal government's interest in regulating state-regulated funds, defendants have little to add to those arguments in their opposition brief. Defendants' renewed arguments that the anti-corruption rationale first articulated in *Buckley* should be broadened, and that this Court should recognize a wide-ranging governmental interest in imposing additional limits that prevent circumvention of current limits, remain just as unpersuasive the second time around.

As in their opening brief, defendants seek to broaden the government's compelling interest in preventing actual or apparent *quid pro quo* corruption of particular federal officeholders or candidates (as recognized in *Buckley*) so as now to include prevention of the "potential for . . . corruption," Opp. Br. I-26, or "corruption [of] the political process" more generally, *id.* at 35. This is a vague, amorphous concept without roots in the law. Defendants define that interest as the prevention of the selling of "access." But this elusive concept sweeps well beyond the idea that a donation influences a particular legislative action to the idea that a donation will leave an officeholder "feeling beholden" to the donor. *Id.* at 16; *see also id.* at I-37 (same).

At the outset, defendants cannot show as a factual matter that non-federal funds purchase,

or appear to purchase, "access" to federal officeholders and candidates. *See* McConnell Opp. Br. 22-23. Even if they could, defendants' efforts to frame this broader, "access"-based governmental interest find no support in settled law. As in their opening brief, defendants rely almost exclusively on a single sentence from the Supreme Court's decision in *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000), in which the Court suggested that the government has an interest in addressing the "broader threat from politicians too compliant with the wishes of large contributors." *See, e.g.*, Opp. Br. 15-16, 22, I-6 (quoting *Shrink Missouri*, 528 U.S. at 389).[12] But *Shrink Missouri* did not purport to broaden the government's interest in preventing corruption to the prevention of "access" more generally; instead, in the very passage on which defendants rely, the Court expressly quoted from *Buckley*'s discussion of the governmental interest in preventing *quid pro quo* arrangements. *See* 528 U.S. at 388-89 (quoting *Buckley*, 424 U.S. at 26-27). Although *Buckley*, in turn, referred to the "opportunities for abuse inherent in a regime of large individual financial contributions," 424 U.S. at 27, it did so in the context of discussing *quid pro quo* arrangements, and suggested only that the "opportunities for abuse inherent in a regime of large individual financial contributions" to candidates *could* give rise to the *appearance* of such arrangements, *see id.* Moreover, defendants have no response to the overarching conceptual point that, to the extent that officeholders or candidates provide greater "access" to individuals who provide financial support not to the officeholders or candidates themselves, but instead via their political parties (or other indirect means), the only solution would be to ban private money from politics altogether, in order to afford equal "access" to all. In a section of *Buckley* entirely ignored by defendants, the Court expressly rejected precisely this

[12] Defendants also rely on a sentence from *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II*), in which the Court, citing *Shrink Missouri*, suggested that corruption comprises "undue influence on an officeholder's judgment[] and the appearance of such influence." Opp. Br. I-6 (quoting *Colorado II*, 533 U.S. at 441). This language, however, stands only for the unobjectionable proposition, stated in *Buckley* itself, that the government's interest in preventing corruption is implicated where a contribution or expenditure is made, not to *secure* a particular action, but instead merely to *influence* it. *See* McConnell Br. 34-35.

equality rationale. *See* 424 U.S. at 48-49.

In view of the lack of support for their broader, "access"-based governmental interest, defendants now primarily contend that the government has an interest in imposing additional limits to prevent circumvention of existing ones. Defendants liberally sprinkle their brief with references to the need to prevent "evasion" of current limits and close "loopholes" in existing law. *See, e.g.*, Opp. Br. I-1-4 (making 12 references to "evasion" or "loopholes" in four-page introduction alone). But something fundamental is missing in all this. Defendants point to no instance in which the Supreme Court has applied an anti-circumvention rationale to justify limitations on activities besides *contributions*, or limitations on donations that could not be put to all of the same uses as direct contributions to candidates. What is more, defendants offer no limiting principle for their anti-circumvention rationale. This sweeping concept could justify imposing limits on *any* currently lawful use of money to influence the political process under the guise of preventing "evasion" or closing "loopholes" — and could (as here) justify imposing limits on independent expenditures, which at least one of the cases on which defendants rely expressly disclaimed. *See California Med. Ass'n v. FEC*, 453 U.S. 182, 203 (1981) (Blackmun, J., concurring). Like their "access"-based anti-corruption rationale, defendants' cumulative anti-circumvention rationale is both unsupported in law and unlimited in logic.[13]

Once defendants' broader rationales are discounted, the sole remaining question is whether Title I is sufficiently tailored to serve the government's interest in preventing actual or apparent *quid pro quo* corruption. In order to show that Title I serves the government's compelling interest in preventing actual or apparent *quid pro quo* corruption *at all*, defendants must prove that the donation of any state-regulated funds to, or the spending of any state-

[13] Intervenors, at least, now appear to be relying exclusively on the anti-circumvention rationale to defend several provisions of Title I. *See, e.g.*, Opp. Br. I-32-35 (provisions banning joint fundraising by, and transfers between, party committees); *id.* at I-35-38 (provisions banning solicitations); *id.* at I-45-48 (provision banning transfers by state and local committees to certain tax-exempt organizations or political committees).

regulated funds by, a *political party* is just as corrupting as a contribution directly to a *candidate.* And defendants must also show that the donation or spending of state-regulated funds for activities that do not exclusively serve to get a federal candidate elected is just as corrupting as a contribution for activities that exclusively do so. *See* McConnell Br. 36-37; McConnell Opp. Br. 25-26. These are formidable hurdles, and defendants fail to surmount either one.

As to the first requirement, although defendants again labor to demonstrate the close ties between political parties and federal officeholders, *see* Opp. Br. 21, I-25-27, defendants fail to come to grips with the Supreme Court's outright rejection of the proposition that there are "any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction," *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) (*Colorado I*) (plurality opinion); *see also id.* at 629 (Kennedy, J., concurring in part and dissenting in part) (same); *id.* at 646 (Thomas, J., concurring in part and dissenting in part) (same).

As to the second requirement, the best defendants can do is to attempt to distinguish away the *Colorado I* plurality's statement that "the opportunity for corruption posed by [unregulated 'soft money'] contributions is, at best, attenuated," *id.* at 616, on the ground that the statement was dicta and based on an inadequate evidentiary record, *see* Opp. Br. I-28 n.73. This is off-base, however. The *Colorado I* plurality in no wise relied on the evidentiary record (or lack thereof), but instead made the common-sense observation that a contribution of state-regulated funds used for activities that do not exclusively serve to get a federal candidate elected (such as voter registration, which benefits candidates up and down a party ticket) is less likely to corrupt the candidate than activities exclusively targeted to support a particular candidate's election (such as express advocacy on the candidate's behalf).

Finally, even if they could surmount these hurdles, defendants cannot demonstrate that Title I is sufficiently tailored to serve the government's interest in preventing actual or apparent *quid pro quo* corruption. In their opposition brief, defendants are again coy about what aspect of the donation or spending of state-regulated funds gives rise to actual or apparent corruption. To

the extent that "the problem of corruption and perceived corruption grows with the size of the contributions at issue," Opp. Br. 16, defendants offer no justification for the virtual absence of any relevant tailoring in Title I, which bars donations of state-regulated funds of *any* amount to national committees and effectively bars donations of state-regulated funds of *any* amount for "federal election activity" to state and local committees. Defendants' only "explanation" as to why a cap on donations of state-regulated funds is not a more narrowly tailored alternative is the fact that Congress considered, and rejected, such an alternative. *See id.* at 45. And to the extent that the use of state-regulated funds for *issue advocacy* is said to give rise to actual or apparent corruption, *see id.* at I-28-29, defendants again fail to justify the virtual absence of any relevant tailoring in Title I, which bans the use of state-regulated funds for *any* purpose by national committees and for a variety of additional, concededly less corrupting purposes by state and local committees.

In the end, absent a deferential degree of scrutiny, and unable to wield their limitless rationales for government regulation, defendants cannot plausibly argue that Title I is narrowly tailored to prevent actual or apparent corruption. Even if Congress was empowered under the Elections Clause to enact Title I, it violates the First Amendment.

#### 4. Title I Violates Core First And Fifth Amendment Rights By Discriminating Against Political Parties.

Title I also violates principles of equal protection because it regulates speech by political parties but not identical speech by other entities. Defendants do not disagree that Title I will place party committees at a severe disadvantage compared to interest groups, though they continue to stress the ways in which current law treats party committees more favorably, *see id.* at 47, I-53 n.157; *but see* McConnell Opp. Br. 30 (demonstrating the ways in which it treats them *less* favorably). Defendants contend only that political parties are differently situated from interest groups and (in a telling leap of logic) therefore deserve to be subjected to more draconian treatment. *See, e.g.*, Opp. Br. 47, I-50-52. This flouts governing law. As the Supreme Court has made clear, nothing in the asserted governmental rationale of preventing actual or apparent

corruption justifies treating political parties more harshly than other entities. *See Colorado II,* 533 U.S. at 444; *Colorado I,* 518 U.S. at 616 (plurality opinion).[14]

Confronted with this authority, defendants nevertheless resolutely continue to argue that political parties can be subjected to worse treatment because no other entities have as close a relationship with federal candidates and officeholders. *See* Opp. Br. 49. As a factual matter, this assertion is dubious at best. As defendants concede, political parties are "big tents," whose members often disagree with the party on given issues. *See id.* at 48. In contrast, interest groups are likely to be more closely knit and concomitantly associated with a smaller number of candidates. *See id.* at 51. To take an example, an unsolicited donation of $50,000 in state-regulated funds to a small campaign finance reform group with which Senator McCain is affiliated would arguably be more likely to give rise to an appearance of corruption with respect to Senator McCain than an identical donation to the Republican National Committee, with whom Senator McCain frequently disagrees. Moreover, even if it is *currently* true that political parties are more closely identified with federal candidates and officeholders than interest groups are, that identification will surely change as a result of Title I's differential treatment of political parties.

Finally, defendants suggest that there is no reason to believe that Title I will result in a

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[14] Defendants unconvincingly attempt to deal with *Colorado I* and *Colorado II*. As to *Colorado I*, defendants purport to distinguish it because it involved expenditures, rather than contributions, and further note that the *Colorado I* plurality stated that Congress could adjust limits on contributions to political parties in order to prevent circumvention of limits on contributions to candidates. *See* Opp. Br. 17 n.20, I-50 n.146. Leaving aside defendants' dubious characterization of Title I as involving only contributions, *see supra* Part I.B.2, nothing in *Colorado I* suggests that the plurality thought that political parties could be treated differently from other entities. Although it is true that Congress can limit contributions of federally regulated funds to political parties as a way of preventing circumvention of limits on direct contributions to candidates, Congress can similarly impose limits on contributions to *PACs*. *See California Med. Ass'n v. FEC*, 453 U.S. 182, 198 (1981) (plurality opinion); *id.* at 203 (Blackmun, J., concurring).

As to *Colorado II*, defendants contend that the Court accepted the proposition that political parties and candidates have a particularly close relationship. *See* Opp. Br. 47, I-50 n.146. The Court did recognize the close relationship between political parties and candidates, but simply refused to use that fact as a basis for treating political parties *more* favorably than other groups; it did not use that fact as a basis for treating them *worse*. *See Colorado II*, 533 U.S. at 455.

massive shift in funding from parties to interest groups. *See* Opp. Br. I-53. There is substantial evidence, however, that such a shift is already underway. *See* McConnell Br. 42-43. The reality is this: the differential treatment of political parties under Title I will simply "force[] a substantial amount of political speech underground, as contributors and candidates devise ever more elaborate methods of avoiding [existing] limits." *Shrink Missouri*, 528 U.S. at 406 (Kennedy, J., dissenting).

By impermissibly disadvantaging political parties at the expense of interest groups and other players in the political process, Title I violates fundamental principles of free speech and equal protection. It should be invalidated.