RNC TITLE I REPLY

The RNC Plaintiffs view federal campaign finance regulation as a narrow exception to constitutional guarantees. Congress may legislate to prevent corruption or its appearance in federal elections, but not so far as to trample the federal system of dual sovereignty. It may regulate the financing of campaign activity, but not so far as to severely burden the rights of political parties to associate within themselves in ways fundamental to their core missions. It may even regulate certain activities of political parties, but not in such a way as to place parties at a distinct disadvantage in relation to other actors in the political marketplace.

Defendants have a fundamentally different view of federal campaign finance regulation: it is the paramount good, the overriding interest, the goal to which all constitutional values must yield. This view is apparent from Defendants' briefs, which so far have attempted to justify BCRA's restrictions predominately on the ground that they are necessary to close "loopholes" (a term used 70 times in their briefs thus far) in or avoid "circumvention " (109 times) or "evasion" (128 times) of existing campaign finance laws. Contrary to Defendants' assumption, the Constitution does not allow the ***exception*** of federal campaign finance regulation to swallow the ***rule*** of constitutional governance. But that is exactly what BCRA does:

- Title I federalizes everything national parties do – even the tens of millions of dollars the RNC spends in odd-year elections when no federal candidates are on the ballot – because, we are told, failure to do so would allow "evasion." Def. Opp. 4.

- Title I severely restricts the ability of the RNC and its agents to associate with state and local Republican Party organizations on Victory Plans because, Defendants say, failure to regulate RNC participation in this regard would fail to "close a beckoning state party loophole." Def. Opp. I-43.

- Title I criminalizes an RNC agent's mere utterance of the words "Contribute to the Jones for Governor campaign," even though the contribution sought is unquestionably legal under state law and will go to Jones' campaign (not the RNC), and even though BCRA would permit anyone else to mouth the very same words. Failure to impose this speech ban, it is insisted, would "open[] a loophole that would allow evasion of other limits." Def. Opp. I-35.

- And Title I treats political parties far more harshly than special interest groups, we are illogically told, because failure to impose such unique burdens on *parties* would (again) allow those very interest groups to "circumvent[]" the statute. Def. Opp. I-50.

Defendants attempt to justify Title I's various restrictions one-by-one as minor restraints, each of which is necessary to make the statute work. But as we have shown, even the individual restraints are emphatically *not* minor, their cumulative effect is severe, and the statute will not accomplish its purported aims, in any event. In short, the constitutional price Title I exacts is far too high for any minimal benefit it might possibly confer.

Title I is a meat cleaver. With all Defendants' talk about the "particularly acute" risk of corruption associated with fundraising by federal lawmakers (Def. Br. 123, *see also, e.g.*, *id.* at 4, 6-7, 71-72), the dangers of political party issue advocacy (*e.g.*, Def. Br. 5-6, 30-31, 69-71), and the supposed abuse by national parties of nonfederal money to influence federal elections (*e.g.*, Def. Br. 7, 34, 72, I-30), one is left to wonder why Congress could not have pursued its objectives more narrowly by, for instance –

- ***Prohibiting federal candidates and officeholders from raising nonfederal money.*** Paradoxically, as we have shown, Congress did just the opposite, giving lawmakers more freedom to engage in fundraising activity than it gave party officials.

- ***Regulating political parties' "electioneering communications" on the same terms that Title II regulates interest groups' ads.*** Such a restriction would have addressed concerns about issue ads without simultaneously starving the party-building and grassroots activities that are, in Senator McCain's words, the "fundamentals of a democratic process." McCain Dep. 192-93.

- ***Prohibiting national parties from using nonfederal money for "federal election activity," as §323(b) purports to do with state and local parties.*** Thus, Congress could have satisfied any perceived need to curb influence in federal elections without stifling national parties' historical involvement in state and local politics.

Even these alternatives would have raised substantial constitutional questions, but they at least would have nodded in the direction of narrow tailoring. As it is, instead of narrowly tailoring –

or even closely drawing – its approach, Congress opted for a statute that is at once both so grossly overbroad and so woefully underinclusive as to be fundamentally irrational.

FACTUAL BACKGROUND

The factual record here demonstrates the irrationality of Title I. As shown, the Supreme Court has recognized that healthy political parties play an "important and legitimate role" in American democracy and, indeed, that "representative democracy" is "unimaginable" without them. RNC Br. 3 (quoting *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000), and *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) ("*Colorado I*")). Parties empower the federal system by bridging local, state, and national constituencies, encourage and facilitate public participation in the political process, and build consensus by mediating and moderating among factions. RNC Proposed Findings of Fact ("FoF") ¶¶11-16.

The record also shows that the extensive existing regulation of officeholders, public employees, lobbyists, campaigns, and political parties has made corruption or its appearance less of a problem today than ever before in this country. FoF ¶¶88-89, 93. It is simply not the case that American democracy is in some sort of crisis requiring drastic action. And, make no mistake, despite Defendants' modest claims, Title I is indeed drastic – for the first time federalizing all national party activity, subjecting most state party activity during federal election years to extensive federal regulation, erecting "firewall[s]" within the party structure, and so forth.

We have also shown that the RNC and state parties work closely together in designing, funding, and implementing Victory Plans, and that the RNC provides considerable federal and nonfederal financial assistance to state parties in the form of direct transfers, fundraising assistance, and matching programs. FoF ¶¶38-44, 54-57, 66. Defendants offer no denial.

As for any alleged "compelling need," the FEC has admitted it has no evidence that money has ever changed a lawmaker's vote or, indeed, that the RNC has ever even attempted to use money to change a vote. RNC Br. 16-17; FoF ¶¶94-99. Many years of effort to develop a statistical link between political contributions and roll call votes, "access," or even so-called legislative "effort" have failed. RNC Opp. 9-10; FoF ¶¶95-96, 103. Lacking empirical support, Defendants have resorted to anecdotal evidence in an effort to show that money buys "access," but even their very favorite examples could not withstand inspection. RNC Opp. 1-15; FoF ¶¶101, 104, 105, 107-12.[1] And the much-ballyhooed "access" ultimately proved worthless, in any event, because the "accessed" officeholders could not even remember the donors' names. RNC Br. 18-19; FoF ¶108. Absent any governmental crisis, statistical support, or even trustworthy anecdotes, the asserted justification for BCRA simply does not exist. And, of course

---

[1] Of the numerous instances of Defendants' continued pattern of bending the record, we here address four. **(1)** In an effort to refute testimony that it is "exceedingly rare" for federal officeholders to solicit money for the RNC, Defendants cite but one flawed example. Def. Opp. I-18 n.44 (citing RNC 0266088-91). The RNC's Rule 30(b)(6) witness testified that, after due investigation, he had determined that the document was not created by any of the "individuals that are currently in the RNC Finance division," that "I cannot put any time frame on when this document was prepared, and believe me I have attempted to try to figure that out," that "D'Amato" and "Newt" may no longer have been legislators when the document was created, and that the list contained names of many long-time RNC donors. Josefiak Dep. 111-14. **(2)** Defendants claim that a "reception at Vice President's Residence [was] open only to Regents and Team 100" (Def. Opp. I-5-6 n.16), but neglect to mention that both the RNC's Deputy Chairman and its Finance Director testified that the event was *not* itself a fundraising event and was open to anyone who had served on the RNC Annual Gala's fundraising committee – regardless of how much the individual had personally donated. Oliver Dep. 256; Shea Dep. 49-50. **(3)** Citing a memorandum concerning seating arrangements at the RNC Annual Gala, Defendants claim (Def. Opp. I-5-6 n.16) that "soft money" donors sat with Members of Congress while "hard money" donors sat by themselves; in fact, the cited memorandum makes clear that nonfederal donors and federal contributors alike sat with Members. RNC 0294677-80 (Team 100 and Eagles, nonfederal and federal donors, respectively, seated together). **(4)** Defendants describe a hearsay letter from a non-RNC employee stating that "RNC Chairman Barbour 'escorted' the CEO of Entergy, a Team 100 member, on appointments with legislators," Def. Opp. 19. But the letter does not say "*appointments with legislators*"; rather, it says "appointments." FoF ¶110. *See also* FoF ¶105(b) (Entergy lobbying spending was over 10 times its nonfederal donations).

to whatever degree there is a problem of corruption or its appearance associated with interest group influence (RNC Br. 16-17; FoF ¶¶85-87), political parties are far more likely to ameliorate that problem than to exacerbate it (RNC Br. 4-5; FoF ¶¶151-156).

Significantly, special interest groups are increasingly engaged in the very same political activities as parties, FoF ¶¶ 76-83, and there is no legal or other impediment to their becoming even more active, using for the most part *truly* "soft money" that is neither regulated nor disclosed on the public record. Indeed, perversely, BCRA will encourage rather than restrain these interest group activities, thereby further marginalizing parties and further undermining the democratic process. RNC Br. 67-70; FoF ¶140.

ARGUMENT

Defendants have finally emerged (in part) from the "*Buckley* box," implicitly conceding that *Buckley* simply has nothing to say about our federalism or equal protection arguments. They persist, however, in their effort to force our First Amendment association and solicitation arguments into the *Buckley* contribution-to-candidate line of cases. Their purpose, of course, is to obtain the most lax standard of judicial review of BCRA, since they make (and presumably have) no argument that Title I could pass the rigors of strict scrutiny – it is self-evidently not narrowly tailored to serve any truly compelling government need. RNC Opp. 25.

Given the apparent centrality of the "anti-circumvention" rationale to Defendants' justification for Title I, *see supra* at 1-2, we pause to emphasize just how narrowly the Supreme Court has defined that rationale and how far beyond existing precedent Defendants' argument would take this Court. The limits of the anti-circumvention rationale were marked early on by Justice Blackmun, who in providing the necessary fifth vote to uphold limits on contributions to a non-party political committee in *California Medical* said that a "different result would follow"

were contributions not simply passed through in the form of contributions to individual candidates but were instead spent independently. *California Medical Ass'n v. FEC,* 453 U.S. 182, 203 (1981) (concurring in the judgment). Those limits were reiterated in *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. at 431, 464 (2001) ("*Colorado II*"), in which the Court strictly limited its "corruption-by-conduit" rationale to instances of coordinated party spending, which the Court found (citing *Buckley*) to be the functional equivalent of a direct candidate contribution. 533 U.S. at 442-43. As explained above, *see supra* at 1-2, Defendants' anti-circumvention plea here goes well beyond conduits and pass-throughs and, at bottom, is nothing more than an assault on the well-settled principle that statutes restricting constitutional rights must be narrowly tailored, or at least closely drawn, to address a perceived government need.[2]

I. TITLE I EXCEEDS THE ENUMERATED POWERS OF CONGRESS.

Defendants would have the Court believe that "national parties spend funds for purposes wholly unrelated to federal elections" on only "rare occasion." Def. Opp. I-16. But the undisputed record facts – which we have repeatedly cited and which Defendants have repeatedly ignored – prove otherwise. For example, we have shown that during the 2001 "odd-year" elections, in which no federal candidates were even on the ballot, the RNC spent *$15.6 million* on state and local elections, not including its commitment of very substantial in-house resources. RNC Br. 6-7; FoF ¶23. Likewise, during the 2000 elections, the RNC made $5.6 million in direct contributions to state and local candidates. RNC Br. 7; FoF ¶¶24, 57.

---

[2] *See also* RNC Opp. 27-28; Order Denying in Part and Granting in Part FEC's Motion for a Stay, etc., at 10 (D.D.C. Sept. 20, 2002) ("For the Court to properly evaluate BCRA's relation to the promotion of the alleged government interests, it must additionally assess the statute's countervailing impact on the federal, state, and local political processes.").

The RNC has supplemented this direct financial support with fundraising assistance. In 2002, RNC Chairman Racicot alone has made 82 fundraising trips to 67 cities, and the RNC's Co-Chairwoman and Deputy Chairman made 31 and 33 such trips, respectively, largely for state and local parties and candidates. FoF ¶42. RNC officials have also sent fundraising letters specifically on behalf of state and local candidates, including during non-federal election years. FoF ¶40.

As for state parties, the record shows that they "are often more focused on state and local elections than federal elections," FoF ¶46, and thus "generally raise more non-federal money" than federal money, FoF ¶67. Even in federal election years, state and local candidates and ballot issues almost always predominate in numbers, and often in practical importance, over the federal line(s) on the ballot. RNC Br. 27. These undisputed facts demonstrate the failings of Title I, which substantially bars state parties – and more notably, completely bars national parties – from using *state* regulated money for wholly or predominantly *state* election activity.

A. Defendants Cannot Account for the Original Understanding of the Federal Elections Clause.

The Government has admitted that, as a matter of historical fact, Congress relied on no enumerated constitutional power other than the Federal Elections Clause in enacting Title I of the BCRA. RNC Br. 32. And, in their opening brief, both the Government and legislator Defendants relied solely on the Federal Elections Clause to defend Title I.

Tellingly, although Plaintiffs have repeatedly cited *Federalist* No. 59 to show that Title I exceeds the intended scope of the Federal Elections Clause, Defendants studiously persist in ignoring it. Similarly, although their opposition brief cites their expert Dr. Green a total of ***58 times*** for various propositions, Defendants conveniently ignore Dr. Green's crucial admissions that (i) *Federalist* No. 59 fairly represents the original understanding of the Federal Elections

Clause, but (ii) BCRA "*goes much farther than Hamilton indicated in Federalist No. 59.*" Green CX 148-49 (emphasis added). Further, Dr. Green also admitted that, if the Federal Elections Clause allows the Federal Government to regulate any activity that "affects" a federal election – as Defendants have repeatedly argued here (Def. Br. 59-62, 96-107; Def. Opp. 4-13) – it would necessarily permit full federal regulation of gubernatorial and state legislative elections on the ground that those state officials participate in federal redistricting. Green CX 138. Rather than repudiate Dr. Green's extreme view, Defendants actually *embrace it*. Def. Br. 102 n.83. There is thus no limit to the theory of federal power that Defendants have advanced here. Rather than rely on the Federal Elections Clause, Defendants would nullify it.[3]

B. Both Sections 323(a) and 323(b) Exceed Congress' Federal Elections Clause Power.

Section 323(a)'s flat ban is utterly indefensible as an exercise of federal power. It federalizes everything national parties do, even when (as the record shows is often the case) the money (i) is raised without federal officeholder involvement and (ii) is used for direct contributions to state candidates (iii) in odd-year elections. It criminalizes RNC officials'

---

[3] None of the cases cited by Defendants helps them. As shown (RNC Opp. 21), *Ex parte Siebold*, 100 U.S. 371 (1879), and *United States* v. *Bowman*, 636 F.2d 1003 (5th Cir. 1981), establish only that Congress may regulate the *federal aspects* of simultaneously-occurring federal and state elections. Likewise, in *Ex parte Yarborough*, 110 U.S. 651 (1884), the Court held that the Federal Government is not deprived of authority to prevent voter fraud merely because state elections occur at the same time and place; nothing in *Yarborough* suggests that the Federal Government has plenary power over state election activity when federal and state elections coincide. To be sure, *Smiley v. Holm*, 285 U.S. 355 (1932), says that Congress "has a general supervisory power over the whole subject," but the relevant "subject" is the regulation of "congressional elections," not state and local elections. *Id.* at 367. Likewise, *Burroughs v. United States*, 290 U.S. 534 (1934), established only that Congress may require disclosure by presidential candidates. Finally, *Blount v. SEC*, 61 F. 3d 938 (D.C. Cir. 1995), upheld a regulation on political donations by municipal securities dealers against a federalism challenge as a proper exercise of authority delegated to the SEC under the Commerce Clause, not the Federal Elections Clause. *See also infra* at 18 n.10 (*Blount*); RNC Br. 32 n.9 ("motor voter" cases).

fundraising solicitations for gubernatorial and mayoral candidates – again, even when those solicitations are made in odd-year elections when not a single federal office is on the ballot. Section 323(a) makes no effort whatsoever to accommodate state interests.

Defendants' sole response: national parties are "inextricably intertwined" with federal officeholders. Def. Opp. 44. As we have shown (RNC Opp. 20), Defendants' assertion is both wrong and telling. It is *wrong* because the RNC relies on officeholders to solicit funds only "exceedingly rare[ly]," its state and local electoral activities are extensive, and even its governance is by state parties (not federal officeholders). FoF ¶¶1, 21-37, 64. Defendants' response is *telling* because at every turn Title I gives federal candidates and officeholders *more* leeway – not less – to engage in fundraising than it gives party officials.[4]

Because Defendants concede that §323(a) and (b) are inextricably bound up together (RNC Opp. 48), analysis of §323(b) is hardly necessary. But §323(b) is defective in its own right. To justify it, Defendants must argue, as they do, that Congress can regulate any state or local party activity that has "the potential to affect" a federal election (Def. Opp. I-13), even if that particular activity in fact has *no* "practical effect" on federal elections (Def. Opp. I-11 n. 30).

We agree that §323(b) *does* regulate state party activities that have no "practical effect" on federal elections, but strongly dispute whether it may permissibly do so. The "Smith for Dogcatcher" example we have repeatedly used is but one example of §323(b)'s overreaching[5];

---

[4] Defendants' undeveloped suggestion that Congress can regulate the actions of its own Members (*e.g.*, Def. Opp. I-8-10), might conceivably state a basis for Title I's restrictions on *officeholders* in §323(e), but it cannot possibly justify the broad-ranging restrictions on national parties in §323(a) or state parties in §323(b).

[5] The Government claims that the Dogcatcher flyer example would be exempted from §323(b) by an FEC regulation, "particularly if it is a 'mass mailing' of over 500 pieces." Def. Opp. 31. Because the Intervenors are presently challenging the very regulation on which the Government relies, they make no such argument. *See Shays v. FEC*, No. 02-CV-01984 (D.D.C. (continued...)

another is the common occurrence of GOTV activities in elections involving competitive state races but unopposed (actually or effectively) federal candidates, or in elections with dozens of state and local candidates and ballot referenda but only one federal candidate. FoF ¶24. Those GOTV activities may, in some theoretical sense, have a *potential* to affect a federal election, but they have no *practical* effect on the federal election; the paramount effect is on the state and local election, and any effect on the federal election is, as the Supreme Court has said, "at best, attenuated." *Colorado I*, 518 U.S. at 616. Because the Federal Elections Clause vests States with absolute authority to regulate their own elections, *Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970) (controlling opinion of Black, J.), Title I's intrusion is a direct affront to States' sovereignty.

Nor is the Levin Amendment an answer. Though expressly adopted as an effort to accommodate the State interests – not, as Defendants' lawyers now claim, as a matter of "legislative grace" (*see infra* at 14) – it imposes a *federal* cap (of $10,000) and a *federal* "home-grown" requirement on any use of non-federal funds. Thus, contrary to Defendants' plea, the Levin Amendment is not an accommodation but, instead, is itself a federal intrusion into the States' exclusive domain.

C. Defendants' Other Arguments Cannot Salvage Title I.

Defendants' effort to downplay the significance of Title I as a mere effort to "return the law to the *status quo ante*" when Congress first banned corporations and unions from making

---

filed Oct. 8, 2002). In any event, the Government implicitly concedes that if the flyer is mailed to 499 homes, or is "individualized" by hand-delivery to 10,000, or if the message is by phone, it *is* covered by §323(b). Our point therefore remains.

contributions in connection with federal elections (Def. Opp. I-2) revises history.[6] Indeed, as the undisputed evidence shows, the RNC began establishing non-federal accounts shortly after, and in complete compliance with, FECA and *Buckley*. RNC Br. 7; FoF ¶25.

Nor does Defendants' suggestion that Title I merely "alter[s] prior allocation rules, and close[s] loopholes" (Def. Opp. I-14) advance the ball. Section 323(a) does not simply "alter" the allocation rules for national parties; it federalizes 100% of their activities, and renders any state/federal allocation meaningless. Similarly, §323(b) both (i) expands the scope of state party activities regulated by the Federal Government by virtue of the overbroad definition of "Federal election activity" and (ii) federalizes 100% of the money spent on all such activities through the Levin Amendment's $10,000 cap and "home grown" requirements.[7]

Defendants' half-hearted and *post hoc* Commerce Clause argument never leaves the starting gate. They ignore every argument made in our opening brief: that such *post hoc* justifications are impermissible; that Title I regulates political speech, not commerce; and, most fundamentally, that the specific compromise hammered out by the Framers in the Federal Elections Clause cannot be overridden by an over-expansive view of the Commerce Clause. RNC Br. 32-34.

---

[6] The Tillman Act affected state elections only insofar as it prohibited so-called federally chartered corporations and national banks from donating to state and local candidates. *See* Tillman Act of 1907, 34 Stat. 864. Congress singled out corporations that were creatures of the Federal Government precisely because it recognized that it *lacked* constitutional power under the Federal Elections Clause to impose a general ban on corporate contributions to state candidates. 59 Cong. Rec. 1, 1453 (1907) (Rep. Hardwick). The federal ban on contributions by foreign nationals, also applicable to state and local elections, was passed as part of the Foreign Agents Registration Act Amendments of 1966, not as part of any campaign finance statute. Pub. L. No. 89-486, 80 Stat. 244 (1966).

[7] The RNC challenged the application of the allocation regulations to its issue advocacy in *RNC v. FEC*, Civ. No. 98-1207-WBB (D.D.C.). That case became moot in view of BCRA, and was voluntarily dismissed without prejudice.

Finally, Defendants' effort to muddy the waters by restating our argument as a Tenth Amendment claim is also off the mark. Title I's fatal defects are, primarily, that it lacks any basis in any enumerated congressional power, and secondarily, that it offends "Our Federalism." *Cf. United States v. Morrison*, 529 U.S. 598, 617-19, 627 (2000) (in challenge by private party, holding that Congress had exceeded its Commerce Clause and Enforcement Clause powers in the Violence Against Women Act, without addressing the Tenth Amendment).[8]

II. TITLE I VIOLATES POLITICAL PARTIES' RIGHTS OF ASSOCIATION.

In response to the RNC's associational arguments, Defendants once more construct a man of straw, then destroy him. Defendants caricature the RNC as having argued that the right to associate is fundamentally about a "freedom to make or receive unlimited contributions of money." Def. Opp. 26. Not even close.

As the quintessential example of political-party associational activity, we have offered the Republican Party "Victory Plan" (or, on the Democratic side, "Coordinated Campaign"). At the start of each election year, representatives from each state Republican Party convene meetings with their local and national party counterparts to discuss and jointly make decisions about the design, budgeting, funding (including *raising* the funds), and implementation (including *spending* the funds) of Victory Plans, which aim to mobilize voters and get them to the polls and otherwise promote the Party's messages. Peschong Decl. ¶4. The resulting Victory Plans typically comprise numerous components, including, for instance, direct mailings, telephone banks, slate cards, yard signs, bumper stickers, rallies, and door-to-door leafleting – all geared toward achieving maximum effectiveness for the entire Republican ticket. *Id.* ¶¶5, 7.

---

[8] Contrary to Defendants' suggestion (Def. Opp. I-10-11 n.28), the RNC would have standing to raise a Tenth Amendment challenge here given the severe burdens BCRA places directly on it and its affiliated state parties. *See generally* Brief of Amici States of Utah, *et al.*

These grassroots activities are, as Senator McCain has described them, "the fundamentals of a democratic process." McCain Dep. 192-93.

Title I stifles these associational activities in at least two pivotal ways:

- ***First***, because §323(a) makes it a crime for national party personnel to "raise" or "spend" non-federal money, and because the essence of Victory Plans is joint local, state, and national consultation and decision-making about the *raising* and *spending* of funds for Victory Programs, national party personnel will henceforth be allowed to participate if, but only if, each component of the program is funded with 100% federal money. In other words, as punishment for national party involvement, the Victory Plan will be completely federalized – no Levin money or other non-federal money allowed.
    - Critically, this restriction on "rais[ing]" and "spend[ing]" non-federal money severely limits or prohibits RNC participation in Victory Plans even in the five states that hold odd-year elections.
- ***Second***, because §323(b)(2)(B)(iv) imposes a "home-grown" requirement for all Victory Plans that use Levin money, any RNC participation in *funding* a Victory Plan will, once again, come at the price of funding the program with 100% federal money. A single dollar of even federal money transferred by the RNC to a State party will preclude use of any Levin money.

Thus, whether or not Title I allows national parties to "confer[] with other party committees about campaign strategy" in some anemic sense, (Def. Opp. 23), Title I punishes state and local parties and candidates if the RNC participates meaningfully in the Victory Plan process.

Our witness statements and briefs have repeatedly emphasized the significance of the RNC's participation in the Victory Plan process. Yet, in more than 200 pages of Title I briefing, all Defendants have to say about Victory Plans is that Title I "in no way restricts the participation of members of ***state and local*** Republican Party committees in the RNC's Victory Plan meetings or any other planning and strategy sessions." Def. Opp. 25 (emphasis added). Although the "home-grown" requirement renders even this claim questionable, Defendants cannot – and do not even attempt to – deny that the RNC and other national party personnel will be left standing in the hallway.

Further, as we have shown, Title I doesn't stop at isolating national parties; it also separates state and local party committees from one another. Indeed, Defendants admit, as they must, that the Levin Amendment prohibits state and local parties from transferring among themselves *even hard money* for use in Victory Plans; again, all money used for any of those purposes – federal money and Levin money alike – must be "home grown" by the committee using it, and may not be transferred from or even raised in conjunction with any other party committee. Def. Opp. 24; RNC Opp. 24. In other words, local and state parties are prevented from pooling their resources among themselves in an integrated (rather than fragmented) state-wide Victory Plan.

Defendants' sole answer to this clear (and sweeping) restriction on parties' associational rights is their "legislative grace" theory of the Levin Amendment – *i.e.*, that Congress "was not constitutionally required to provide state-level committees with the option of using Levin funds," but "could have required those committees to fund activity affecting federal elections *entirely* with money raised in conformity with federal contribution limits." Def. Opp 24 (emphasis added). This argument fails on multiple levels. First, as shown, it is most doubtful that Congress could have required state parties to use 100% federally-regulated money to fund all activities that in any way "affect federal elections." *See supra* at 7-10; RNC Br. 29-32; RNC Opp. 17-21. *See also Siebold*, 100 U.S. at 393 (where state and federal elections are held simultaneously, Congress has the power "to make regulations *in reference to the latter*").

Second, contrary to defense counsel's *post hoc* revisionism, the legislative record here makes clear that, in fact, Congress believed that the Levin Amendment was critically necessary to keep § 323(b) from, as Senator Levin himself repeatedly said, going "too far" in regulating "some of the most core activities in which State parties are involved." 147 Cong. Rec. S3124

(Mar. 29, 2001); *see also, e.g.,* 147 Cong. Rec. S3247 (Apr. 2, 2001) (Sen. Levin) ("too far"); 147 Cong. Rec. S3240 (Apr. 2, 2001) (Sen. Nelson) (same).

Finally, even if Defendants were correct that Congress could have imposed §323(b) on state parties without the Levin Amendment, it is most doubtful that Congress could have conditioned the "privilege" of using Levin funds on a political party's waiver of its First Amendment associational rights. Indeed, the Supreme Court's "unconstitutional conditions" cases – particularly those involving the First Amendment – point in precisely the opposite direction. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Perry v. Sindermann*, 408 U.S. 593 (1972).

Ultimately, Defendants do no more than quibble around the edges of the RNC's associational argument. Def. Opp. 24-26, I-43-44. They never confront – much less come to grips with – its core. In addition to Title I's effective exclusion of RNC officers from the Victory Plan process and its balkanization of the various state parties, Title I's plain language –

- prohibits RNC Chairman Marc Racicot from sending a fundraising letter for a state party or gubernatorial candidate;
- prohibits RNC General Counsel Michael Duncan from appearing at a rally alongside a Republican candidate for the Kentucky state house to raise state-regulated money on the candidate's behalf; and
- prohibits the Dallas County (Iowa) Republican County Central Committee from coordinating with another local Iowa party committee in raising Levin funds.

Sitting down around a table to debate and coordinate campaign funding strategy, standing shoulder-to-shoulder with a state candidate at a fundraising rally, and assisting a sister state party in developing its grassroots voter-mobilization program are the guts of political party association. And yet these are the very activities that Title I so severely burdens and disrupts.

III. TITLE I'S SOLICITATION RESTRICTIONS VIOLATE THE FIRST AMENDMENT.

As shown (RNC Br. 46-47; RNC Opp. 34), §323(a) makes it a crime for the RNC's Chairman to state, either orally or in writing, "Contribute to the Jones for Governor Campaign." The crime occurs even though (i) the requested contribution is legal under state law, (ii) the money would go to Jones' campaign and not to the RNC, (iii) no federal officeholder is involved or even aware of the solicitation, and (iv) if uttered by a non-party official, BCRA would permit the solicitation. The record shows that RNC officers have, as a matter of fact, been substantially engaged in these activities. FoF ¶¶40, 42-43. Paradoxically, §323(e)(1)(B) permits federal officeholders – the object of Congress' purported concern – to engage in such solicitations, but categorically prohibits national party officials to do so. This ban on pure speech is subject to the strictest of scrutiny, and Defendants have given no reason to believe that it is narrowly tailored to serve any compelling Government interest. RNC Br. 46-51.

Defendants attempt to respond in three ways. First, they misleadingly suggest that national party officials may solicit donations for state and local candidates and parties "that comply with those [FECA] limits." Def. Opp. 38. But *state* candidates raise only *state*-regulated money (that is, "soft money"); they emphatically do *not* raise federally-regulated "hard money."[9] Thus, any money solicited for or contributed to a state candidate is by definition "soft money" – it is "not subject to the limitations, prohibitions, or reporting requirements" of FECA (*see* §323(a)(1)) – and the solicitation of such money by a national party official is a crime. It is true, of course, that §323(e) creates an exception allowing federal officeholders and candidates to

---

[9] *State* candidates must comply with *state*, not federal, campaign finance laws; their campaigns report to *state* election authorities, and comply with *state* contribution limits and other restrictions. Money received by *state* and local candidates is thus "*state*-regulated" money "not subject to" FECA, *see* §323(a).

solicit such "soft money" for state and local candidates and parties up to the analogous federal limit. But nowhere does BCRA contain a parallel exception for national party officials. On the face of it, Defendants' suggestion that national party officials should simply raise *federally*-regulated money for *state and local* candidates is nonsensical but, if taken seriously, would go a long way toward federalizing even state-candidate activity.

The Government Defendants' second argument is that the FEC's regulations permit party officials to wear "two hats" and that national party officials may solicit non-federal money in their "individual capacities." Def. Opp. 25-26, 38 n.47. Intervenors, who are at this very moment challenging the precise regulation upon which the Government Defendants rely, *see Shays v. FEC*, No. 02-CV-01984 (D.D.C. filed Oct. 8, 2002), understandably do not join this argument. The argument is meritless in any event. The FEC regulations address a situation in which a state party chair, who by party rules is also a member of the national committee, may solicit and thus raise non-federal money for her state party in her separate role as state chair. But for national committee officers, such as Chairman Racicot, Co-Chairwoman Wagner, or Deputy Chairman Oliver, who made 82, 31, and 33 fundraising trips, respectively, for state parties and candidates, it is simply not an option for them to engage in such extensive travel at personal expense. Moreover, a critical element of their speech is the ability to communicate on behalf of the Republican Party; depriving them of their associational ties as the price of allowing them to speak raises its own array of constitutional problems.

Finally, Defendants claim that the Supreme Court's decisions addressing solicitation are distinguishable because "none of those cases implicated the Government's interest in preventing the reality and appearance of corruption." Def. Opp. 35. But that is a canard. Those cases *did* consider a "compelling" government interest – namely, in preventing "fraud" – and nevertheless

struck down restrictions on charitable solicitation because, under strict scrutiny, they were simply not narrowly tailored to serve the asserted interest. *See, e.g., Schaumberg v. Citizens For A Better Environment*, 444 U.S. 620, 637-39 (1980).[10]

IV. TITLE I FAILS EVEN UNDER *BUCKLEY* AND ITS PROGENY.

As shown elsewhere (parts I, II, III and V), and as even Defendants ultimately recognize, *Buckley* simply has nothing to say about the federalism problems created by Title I, or about its discrimination against political parties. Nor does *Buckley*'s "contribution to candidate" analysis of association, or the solicitation by candidates of contributions to themselves, apply here. In any event, even under the traditional *Buckley* framework Title I must be reviewed under strict scrutiny. So reviewed, Defendants implicitly concede that it cannot pass.

---

[10] The cases cited by Defendants are well wide of the mark. *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), sustained the "pay to play" regulation of municipal securities dealers, but it is well-settled that restrictions on the activities of individuals in industries subject to pervasive economic regulation are subject to less probing scrutiny than when individuals are engaged in core political association. *See, e.g., Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995); *SEC v. Wall Street Publishing Institute, Inc.*, 851 F.2d 365, 372-73 (D.C. Cir. 1988). Further, *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), merely upheld a limited prohibition on a corporation's use of *corporate* money to solicit federally-regulated ("hard money") contributions from *nonmembers* to *its own PAC*. In stark contrast, §323(a) broadly prohibits national parties from using *any money* (federal or nonfederal) to solicit nonfederal funds from *anyone* (member or nonmember) for *any purpose* (federal or nonfederal). Moreover, as shown (RNC Opp. at 25-26), the Supreme Court has emphasized the fundamental difference between a corporation like NRWC and a political association like the RNC.

Finally, Defendants are left to rely on *Stretton v. Disciplinary Board*, 944 F.2d 137 (3rd Cir. 1991), which sustained restrictions on the solicitation of funds by judicial candidates for their own campaigns. To begin with, the potential for corruption when a judge solicits a contribution for himself is far greater than when the RNC Chairman (a non-officeholder) solicits a contribution for a state candidate. Courts have repeatedly distinguished fundraising activities by judges – who are "different from legislators and executive officials ... in ways that bear on the strength of the state's interest in restricting their freedom of speech" – as unique. *See Buckley v. Illinois Judicial Inquiry Board*, 997 F. 2d 224, 227 (7th Cir. 1993). Also, it is questionable whether restrictions on judicial candidate solicitations would survive the Supreme Court's recent decision in *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002). And, further, as we have shown, Title I inexplicably permits officeholders to make solicitations where party officials may not.

A. The *Buckley* Line of Cases Requires Strict Scrutiny of Title I.

1. Section 323(a) Is Subject to Strict Scrutiny.

As shown (RNC Opp. 35-39), Defendants' blithe assumption that relaxed scrutiny applies whenever a campaign finance restriction can be called a "contribution limit" is simplistic and misguided. To begin with, as we have shown, §323(a) is much more than a contribution limit; it is also a spending limit, a solicitation limit, and an associational limit all rolled into one.

Moreover, although for purposes of Title I the Government continues to ignore *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), the Supreme Court there clearly applied strict scrutiny to, and struck down, a *contribution limit* because the receiving organization was engaged in issue speech. Defendants' conclusion that Title I deserves intermediate rather than strict scrutiny derives from two equally mistaken premises: (i) that the RNC engages in no activities other than federal candidate support, and (ii) that *any* involvement in federal election activity by a "political committee" requires *total* adherence to federal contribution limits. The first premise is factually erroneous because the RNC engages in substantial pure issue speech, *see* RNC Br. 3-4; FoF ¶¶17-44, 55-57, and the second is legally erroneous, *see Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 664 (1990) (noting that receipt of funds for activities other than express advocacy was not affected by Michigan statute).[11]

---

[11] The RNC was a "political committee" for purposes of *Buckley*-era law only to the extent it received "contributions" or made "expenditures," defined as being "for the purpose of influencing" a federal election. 424 U.S. at 145, 147. Under FECA, the RNC's *federal* accounts were "political committees," but its *non-federal* accounts were not. Thus, Defendants fundamentally misread *Buckley*'s statement that "political committees" are "by definition, campaign related," *id.* at 79, to suggest that *all* of the RNC's activities, including its non-federal activities, could be subject to federal regulation. *See also* RNC Opp. 38 n.23.

Finally, the restrictions imposed on national party committees – associations at the very core of First Amendment-protected activity – are far more sweeping than the restrictions placed on corporations and unions by Title II. Yet, while conceding the applicability of strict scrutiny in Title II (Def. Br. 133), Defendants continue to insist, somewhat paradoxically, that the more restrictive provisions of Title I should receive less searching review.

2. Section 323(b) Is Subject to Strict Scrutiny.

As Defendants concede (Def. Br. 58), §323(b) does not prohibit state parties from receiving non-federal money. Indeed, Defendants insist that state parties will receive *more* non-federal money as a result of BCRA. Def. Opp. 43. Thus, even though BCRA allows state and local parties to raise more non-federal money, and even though it separately (in §323(e)) limits the allegedly-nefarious involvement of federal officeholders in raising that money, §323(b) nonetheless restricts the ability of those parties to *spend* the money so raised. Accordingly, §323(b) cannot be hammered into the "contribution" category, and, like all restrictions on spending, must be evaluated under strict scrutiny. *See Buckley,* 424 U.S. at 44-45.

3. Title I Cannot Survive Strict Scrutiny.

Defendants do not even argue that Title I survives strict scrutiny, because they know it can't. As shown (RNC Br. 29-31, 44-45), neither §323(a) nor §323(b) is narrowly tailored; indeed, §323(a) – a flat ban – is the utter antithesis of narrow tailoring. Moreover, even taken together the provisions fail meaningfully to address the "interest" asserted by Defendants. RNC Opp. 31-33. Indeed, our showing refutes Defendants' claim that Title I's blunderbuss approach is even "closely drawn" to serve any important, rather than exaggerated, need. RNC Opp. 24-33.

B. Title I Undermines Effective Political Party Advocacy.

To document the financial impact of BCRA on parties, the RNC Plaintiffs have relied primarily on the testimony of (i) Jay Banning, who has been at the RNC since 1976 and its Chief

Financial Officer since 1983; (ii) Beverly Shea, the RNC's Finance Director, who has been involved for more than 20 years with political fundraising for the RNC, the Republican Parties of New Mexico, Wisconsin, and Texas, and presidential and congressional campaigns; (iii) Janice Knopp, the RNC's Deputy Finance Director, who has also had 19 years of political fundraising experience at the state and national levels, and who has personally supervised "approximately 630 million" pieces of direct mail and the raising of more than $520 million of federal money; and (iv) Thomas Josefiak, who is the RNC's Chief Counsel, a former Chairman of the FEC, and also has more than 20 years involvement with political parties.[12] Together, their testimony chronicles the severe and irremediable impact of Title I on the RNC and its constituent state parties, requiring the RNC to lay off 40% of its staff and radically curtail its operations, and reducing many state parties to a "nominal" existence. RNC Br. 14-16.[13]

---

[12] *See* FoF ¶¶123-140; *see also* Banning Decl. ¶¶32-35; Shea Decl. ¶¶19-22, 41-42 & RNC Exs. 65, 2259; Knopp Decl. ¶¶10-24, 27-30 & RNC Exs. 65, 2259, 2432, 2433; Josefiak Decl. ¶75-86. Defendants once again resort to contextual laxity, suggesting that Ms. Shea spuriously reduced her estimate of "hard money" fundraising by 30%, and then whimsically "threw $10 million in for good measure." Def. Opp. I-41. In fact, Ms. Shea thoroughly justified her calculations, explaining that the 30% reduction in "hard money" from major donors was warranted because based on her analysis of contributions by major donors to other party committees, "30% of those contributors will go to another committee instead of ours" as a result of the aggregate contribution limit (Shea CX 30), and that the $10 million reduction was based on a conservative assumption that, in the 2004 presidential election year, with an incumbent President, "we could have raised an extra $10 million [of nonfederal money] over what we did in 2000" (Shea CX 31).

[13] Defendants claim that the California Democratic and Republican Parties "each admitted that they have made no attempt to evaluate how they would adapt" to BCRA, but neglect the testimony by the California Parties quantifying the statute's severe impact on them. Erwin Decl. ¶15(a) (CRP will lose 40% of budget in Presidential election years and 20% in other years); Bowler Decl. ¶19 (CDP will lose over 75% of its income), ¶24 (CDP's "mail program will be reduced below the level of effective communication of its message"). Defendants also quote the Republican Party of Virginia's comments in a 1998 FEC rulemaking (Def. Opp. 6 n.3) but fail to note its conclusion that the FEC "cannot further regulate 'soft money' without effectively trampling the states' interests in protecting state and local campaign finance." REG006-0007.

In the face of this testimony, Defendants concede they have no methodological analysis of the impact of BCRA on political parties at the local, state, or national level. FoF ¶124. Thus handicapped, Defendants are left to rely on their expert Dr. Green, a lifetime academic, who has in his life raised "zero" dollars (his word) of campaign money. Green CX 176. Dr. Green can only speculate – nonsensically – that parties "might be better served by making campaign funds more difficult to raise" (Def. Br. I-71), but he cannot credibly offer any real evidence here.

Thus, the only reliable evidence shows that Title I's financial impact on parties will be devastating and the restriction on their activities dramatic. Especially given expanded interest group activity, Title I will push parties toward the margins of American political debate.[14]

V. TITLE I VIOLATES THE EQUAL PROTECTION COMPONENTS OF THE FIRST AND FIFTH AMENDMENTS.

The record in this case shows that special interest group political activity of all sorts is pervasive and increasing. It is undisputed here that special interest groups can and do engage in virtually all of the same activities in which parties typically engage, including (i) grassroots voter-mobilization activities, (ii) issue advertisements, (iii) communications with their members on election-related matters, (iv) reliance on federal officeholders to help them raise funds, (v) direct campaign assistance to candidates, and (vi) lobbying lawmakers on policy issues. RNC Br. 12; FoF ¶76 (chart). Moreover, although largely unreported, interest group spending on federal campaign activity is astronomical, and increasing exponentially.[15] The record also shows

---

[14] Defendants emphasize that RNC federal-money fundraising doubled from the mid-term 1998 cycle to the 2000 presidential cycle. Def. Opp. 41-42. But comparison of mid-term elections to presidential elections is spurious, as shown by the fact that RNC federal-money fundraising *declined* by nearly 50% from the 1996 presidential cycle to the 1998 mid-term cycle, and will likely again decline from the 2000 cycle to the 2002 cycle. Shea CX 12-13.

[15] In the 2000 election cycle alone, interest groups combined to spend $347 million on issue ads, more than twice as much as political parties (RNC Br. 10-11); the NAACP spent roughly (continued...)

– and even Defendants' experts concede – that interest groups will corral much of the non-federal money currently going to political parties. RNC Br. 13, 67; FoF ¶149.

Accordingly, contrary to Defendants' suggestion (Def. Opp. 52), the undisputed record here reveals that both parties and interest groups view themselves as being in direct "competition" with each other. Mary Jane Gallagher of NARAL, for instance, has testified in this case that NARAL engages in "political advocacy in competition with the Republican Party." Gallagher Decl. ¶12. The RNC's John Peschong, in turn, has testified that NARAL and other special interest groups are "reliable and vigorous opponents of the Republican message and candidates." Peschong Decl. ¶12.

Nevertheless, Defendants contend that political parties are "unique" and that the "significant differences" between them and interest groups provide "strong support" for a rule treating parties *less favorably* than special interest groups. Def. Opp. 46. But, as shown (*see supra* at 3), to the extent that parties are "unique," their uniqueness should lead, if anything, to *better* treatment, not *worse*. Thus, by subjecting parties to pervasive speech and associational restrictions while leaving special interest groups largely unchecked, Title I gets matters precisely backwards.[16]

$10 million on grassroots voter-mobilization activities (RNC Br. 11-12); NARAL spent $7.5 million to mobilize 2.1 million voters and made more than $6 million in independent expenditures on behalf of federal candidates (Gallagher Decl. ¶24); the League of Conservation Voters made more than $4.5 million in independent expenditures (Callahan Decl. ¶15); and the National Education Association spent nearly $3 million on membership communications, including those devoted to express advocacy (Shust Decl. ¶25).

[16] Defendants' suggestion that the Court need not even address Plaintiffs' equal protection challenges, Def. Opp. I-49, is baseless. In order to sustain Title I, the Government must justify not only the burdens Title I imposes on parties' fundamental rights but also – and wholly separately – the *differential* burdens that Title I imposes on parties' and interest groups' (continued...)

For Defendants to succeed here, they must show not just that parties are *unique* but that parties are *uniquely bad* – that they are more likely than interest groups to corrupt federal officeholders and candidates. But Defendants have themselves said that "candidates can be *as beholden* to corporations or unions that spend money to help them through issue ad campaigns as they would be if the same entities ... funneled the money through the political party." Def. Br. I-108-09 (emphasis added).

In any event, Defendants' argument is that political parties pose "***special dangers of corruption***." Def. Opp. 50 n.51 (emphasis added); *see also* 47, 54 ("unique threats of corruption"). But in *Colorado I* – a decision Defendants inexplicably ignore – the Court *in haec verba* rejected this very argument, saying in no uncertain terms that "[w]e are not aware of any ***special dangers of corruption*** associated with political parties that tip the constitutional balance" so as to justify the imposition of unique burdens on parties not visited on other political actors. 518 U.S. at 616 (emphasis added); *see also id.* at 616, 618 (according parties "the same right[s]" as other actors; protecting parties' rights "no less than" other groups').[17] Defendants' repeated citation to *Colorado II* as support for a rule treating parties worse than interest groups (*e.g.*, Def. Opp. 47, 49) is misplaced. As shown (RNC Br. 61-62), *Colorado II* at most suggests that parties are perhaps entitled to no *better* treatment than other political actors. *Colorado I* and *Colorado II*, therefore, serve as bookends: while *Colorado II* may say that parties have *no greater* rights than other entities, *Colorado I* makes clear that they have *no less*.

---

fundamental rights. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990); *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 99-101 (1972).

[17] *See also* RNC Br. 61 (summarizing other Supreme Court decisions – likewise ignored by Defendants – counseling at least equal treatment of parties).

Defendants' implicit suggestion that the equal protection violation here is purged by benefits given to parties in other contexts – involvement in nominating candidates, service as "signposts" for voters, involvement in governance – is just wrong. The Supreme Court has never viewed those benefits as a warrant for imposing special burdens on political parties. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 217 (1989) (disapproving rule barring political parties, but not others, from endorsing candidates); *see also Jones*, 530 U.S. at 574; *Colorado* I, 518 U.S. at 616. On the contrary, the Court's view, as Justice O'Connor has said, has consistently been that political parties "contribute[] enormously to sound and effective government." *Davis v. Bandemer*, 478 U.S. 109, 144-45 (1986) (concurring).

Defendants' "uniqueness" argument also founders on the facts. Defendants contend that parties pose a "special danger[] of corruption," in essence, because they are closely related to candidates and engage in substantial campaign-related activity. Def. Opp. 47-49, I-50-52. But the record here overwhelmingly rebuts any suggestion that parties "corrupt" their candidates. Further, as shown above (*see supra* at 22-23) party involvement with candidates and their campaigns hardly distinguishes parties from modern interest groups. Indeed, Defendants' expert Dr. Mann has confirmed that interest groups engage in many of the activities in which parties engage specifically to "curry favor" with lawmakers. Mann Decl. 33-34; Mann CX 148-49. And their expert Dr. Herrnson has further confirmed what is apparent: that party soft money "does not create such strong policy-oriented IOU's between contributors and legislators as those created by narrowly-focused interest groups that spend soft money to help only a few candidates." Herrnson Dep. 208-09.

To the extent parties are "unique," they are uniquely *good* – and thus entitled to at least equal treatment – not uniquely bad.[18] As we have shown without serious rejoinder –

- whereas parties are "big-tent" organizations, interest groups serve narrow, often extreme constituencies;
- whereas parties disclose their campaign fundraising and spending, interest groups by and large do not;
- whereas parties are accountable to voters at the ballot box, interest groups are not;
- whereas parties enhance electoral choice by supporting viable challengers, interest groups tend to ossify the political landscape by reflexively supporting incumbents;
- whereas parties tend to run constructive issue ads that "promote" or "contrast" candidates, interest groups overwhelmingly run negative "attack" ads.

RNC Br. 67-70. There simply is no justification for subjecting political parties to onerous speech and associational restrictions while leaving interest groups largely unchecked.

Defendants respond that the RNC's "gloomy predictions" that Title I will empower interest groups while marginalizing parties[19] represent nothing more than a "policy disagreement" between the RNC and Congress over what's best for American democracy. Def. Opp. 52. Defendants are wrong. Even assuming (contrary to fact) that Congress had methodically investigated this issue, the problem with Title I is not one of policy, but of settled constitutional law. In constraining parties but exempting special interest groups, Title I is so

---

[18] Straining to score a rhetorical point, Defendants quote Dr. La Raja as "frankly acknowledg[ing] that parties are unique among 'the varied set of political actors in American life.'" Def. Opp. I-51 (quoting La Raja Decl. ¶11(b)). La Raja's point, of course, was that parties are uniquely *valuable* institutions (RNC Op. 12-14). Defendants misuse the quote for precisely the opposite point, that parties are uniquely *corrupting*. The same is true of Defendants' misleading, pieced-together quotation of RNC Finance Director Beverly Shea's testimony concerning parties' "unique" attributes. Def. Opp. I-51 n.147.

[19] Defendants do not seriously dispute that this will be the effect, other than to offer the Pollyanna-ish suggestion that perhaps big donors and interest groups will just take their money and go home. Def. Opp. 52, I-53. The record here belies any such claim. RNC Br. 13.

woefully underinclusive – so utterly ineffectual at achieving its supposed purpose of "reduc[ing] ... ***special interest*** influence"[20] – as to be fundamentally irrational. Defendants' suggestion that Title I's underinclusiveness shouldn't matter is founded on cases applying mere "rational basis" review (Def. Opp. 50, I-52) – which even Defendants have never suggested could apply here. While "a little play in the joints" might be justified when constitutional rights are not at stake, *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931), the Supreme Court has repeatedly made clear, both inside the campaign-finance context and out, that substantial underinclusiveness is indeed fatal to a law, like BCRA, that burdens fundamental rights and is therefore subject to heightened constitutional scrutiny. *See, e.g.*, *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 793-94 (1978); *Zablocki v. Redhail*, 434 U.S. 374, 390 (1978); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

Title I will, at best, provide "ineffective or remote" support, or "limited incremental" support, for Congress' asserted purpose of reducing special interest influence – and thus presents *precisely* the sort of fatal underinclusiveness that Defendants' own cases condemn. *Blount* 61 F.3d at 946 (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980), and *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983)). *See also* Mann CX 83 (BCRA is an "incremental" statute).

---

[20] Title I's title, ironically, is "Reduction of *Special Interest* Influence."

CONCLUSION

In view of the mass of briefing and factual material before the Court, we conclude by reiterating some of the more bizarre – and, we submit, patently unconstitutional – things Title I does:

1. Title I prohibits RNC Chairman Marc Racicot from sending a fundraising letter on behalf of a candidate for state office – even in an odd-year election in which there is not a single federal candidate on the ballot, and even though the candidate, not the RNC, will receive the money.

2. Despite the reformers' stated view that "[i]t's the broadcast television and radio ads that we believe are what is the problem," Title I is written so broadly as to prohibit national parties from receiving or using nonfederal money not just for issue advertising but *for any purpose whatsoever*, including for the very grassroots activities that Senator McCain has called "the fundamentals of a democratic process" (McCain Dep. 192-93).

3. Although billed as an effort to "reduc[e] ... *special interest* influence," Title I singles out political parties for unfavorable treatment, thus marginalizing parties and tightening the grip that narrow and often extreme special interests have on American politics.

4. Although all agree that it is the corruption of candidates and officeholders to which campaign finance laws may permissibly be addressed – and, indeed, although Defendants repeatedly emphasize the "particularly acute" risks that accompany candidate and officeholder solicitations – Title I at every turn gives candidates and officeholders more leeway to engage in fundraising activity than it gives political party officials.

Title I is at once so grossly overbroad (see Nos. 1, 2) and so woefully underinclusive (see Nos. 3, 4) as to be fundamentally irrational. Title I manifests an utter lack of proportionality, an utter absence of tailoring, and an utter inattention to constitutional principles. Whether viewed separately or together, §323(a) and §323(b) are seriously flawed. The Court should invalidate Title I in its entirety.

I. INTRODUCTION

The opposition brief filed by Defendants represents a first reluctant attempt to retreat from superficial characterizations of the scope of BCRA. Far from demonstrating that Plaintiffs have exaggerated the statute's breadth, Defendants' discussion only serves to illustrate even more clearly how extensively the statute intrudes into ordinary state and local election activity that has, up until now, been understood to be the province of state law. In addition, the fact that Defendants and Intervenors – the principle sponsors of the statute – openly disagree about the scope of conduct subject to federal regulation highlights the inherent ambiguities that underlie much of the statute.

Significantly, Defendants no longer argue that the provisions of BCRA, including "federal election activity," are "clearly defined." Instead, they now argue that the FEC's recently adopted regulations "narrowly interpret many of BCRA's provisions...in a manner that eliminates many of Plaintiffs' arguments." Opp. Br. 7. Defendants even acknowledge that the narrower construction was deemed necessary to avoid "federaliz[ing] a vast percentage of ordinary campaign activity." In relying on the regulations, Defendants at least implicitly concede that the language of BCRA itself allows for the "vast percentage" of "ordinary campaign activity" to be "federalized." Opp. Br. 7.

Of course, Intervenors have sued to set aside the very regulations relied upon by Defendants to salvage the statute.[1] As shown below, the regulations do not appreciably narrow or

---

[1] *Shays v. FEC*, No. 02-1984 (CKK)(D.D.C., filed Oct. 8, 2002). According to Intervenors, the broad language of the statute is simply inconsistent with Defendants' attempts to "narrow" it. While Plaintiffs agree that an agency's authoritative interpretation might in some circumstances save an otherwise unconstitutional statute, the pending legal challenge by Intervenors requires the Court to determine whether those regulations are consistent with the statutory language and whether they do, in fact, sufficiently narrow the terms of the statute to avoid the constitutional defects alleged, including vagueness and overbreadth. Intervenors' lawsuit indicates that they believe the answer to the first question is "no;" the fact that Plaintiffs, Intervenors, and Defendants have applied the regulations to

resolve that statute's most problematic areas. In fact, after two rounds of briefing, Defendants only identify one specific activity that is not "federal election activity" -- and Intervenors disagree with them on that activity.

Plaintiffs are struck by Defendants' attempt to have it both ways when it comes to construing the scope of BCRA. On the one hand, they argue that it is narrowly drawn to regulate only serious abuses of the federal election system. On the other hand, Defendants insist that Congress is entitled to fully regulate both state election activity (because "state parties influence federal elections directly even when they mobilize supporters on behalf of a candidate for state office"- Opp. Br. 27) and even state ballot measure activity (because it can involve "general partisan appeals"- Opp. Br. 31).

Ultimately, it is the weight of Defendants' own arguments that prove that BCRA imposes a level of federal supervision over political activity which is not only inconsistent with federalism principles, but incompatible with our basic constitutional protections afforded under the First Amendment's freedom of speech and association.

II. DEFENDANTS' ARGUMENTS CONFIRM THAT BCRA COMPLETELY FAILS TO ACCOMMODATE STATE SOVEREIGNTY

Defendants and Intervenors apparently view the only issue in this case as whether the Elections Clause confers authority on Congress to engage in federal campaign finance regulation. If Defendants have attempted to demonstrate that the Elections Clause itself provides authority for regulation of *any* activity, however remotely connected to a federal election, they have failed as the Elections Clause provides no such authority. Defendants' arguments also fail because they completely refuse to acknowledge that state sovereignty plays any role in the analysis.

---

certain activities and come to different conclusions as to whether they are "federal election activity" speaks directly to the second question.

The Defendants' position is apparently that the federal government may regulate virtually any activity, as long as it is related, however tangentially or remotely, to federal elections. Defendants rather candidly admit that the logic of their position would allow them to directly regulate campaign activities in support of state and local candidates, either because those activities might "affect" a federal election or because state elections might affect the redistricting process which might, in turn, affect the chances of re-election of particular federal candidates. Opp. Br. 27. They apparently also believe that it allows them to regulate ballot measure communications that contain "general partisan appeals" because of the "obvious impact" that such appeals can have on the selection of federal candidates. Opp. Br. 31 (concluding that radio advertisement opposing affirmative action initiative as "Republican scheme" would be "federal election activity"). Indeed, although Defendants claim that Plaintiffs have "mischaracterized" the scope of the statute, their own arguments and admissions lead to the inexorable conclusion that Defendants themselves see no limit on Congress' authority to reach all manner of "partisan" or "political" activity under the theory that it might affect a federal election.

In determining the reach of the Elections Clause, Defendants have completely neglected the other side of the equation – the state's interest in regulating its own elections. *See, e.g., New York. V. United States*, 505 U.S. 144, 155 (1992)(in many cases, the determinations of whether authority to regulate has been granted to federal government or reserved to states "are mirror images of each other"). Plaintiffs have not denied Congress' authority to regulate federal elections, they have merely asserted that both federal authority and state sovereignty are legitimate interests that must be accommodated, and that Congress' authority under the Elections Clause must be exercised in a way that does not overstep[] the boundary between federal and state authority." *Id.* Defendants simply ignore any such boundary.

Defendants argue that BCRA does not affect the "time, place or manner of voting in state elections." Opp. Br. 4. If federal authority to regulate campaign finance in federal elections derives from the "time, place, or manner" language of Article I, it is difficult to see how the state's exercise of its own authority to regulate its own elections is not a similar "time, place or manner" provision. *See, e.g., Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986) ("broad power to prescribe the 'Times, Places and Manner of holding elections for [federal office]...is matched by state control over the election for state offices"). Of course, BCRA *does* affect the states' exercise of their own "time, place or manner" authority to enact state campaign finance laws – it overrides and invalidates that authority to the extent that the state law is inconsistent with the federal law. This effect is not incidental or isolated; virtually all the states vary from the federal model of campaign finance regulation. With respect to limitations on contributions to political parties, the vast majority of the states have made legislative judgments permitting contributions in amounts higher than those allowed under federal law. These judgments are simply rendered null and void by the simple expedient of declaring that since they are held at the same time as federal elections, they "affect" those elections.[2]

BCRA prohibits the use of non-federal money that is raised directly by the state and local parties -- contributions that are both completely legal in that state and regulated directly by that state. This money – raised by state parties -- has nothing to do with the transfers that are the

---

[2] The Voter registration cases under the National Voter Registration Act, 42 U.S.C. §§1973qq et seq. ("Motor Voter") provide no support for the statute. Under that Act, as Defendants concede, the states "remain free to establish separate registration requirements for state elections." Opp. Br. 12. Under BCRA, the states have no ability to establish a separate campaign financing system for their own elections because such financing is made exclusively subject to federal regulation. Nor can the state "opt out" by scheduling its elections separately. Defendants acknowledge that even if the states hold their elections separately, BCRA will still impose some restrictions on those elections, although "far fewer" than the restrictions in states in which the elections are held together. Opp. Br. 12.

focus of Defendants' complaints. Defendants stubbornly persist in refusing to acknowledge this because they know that Sen. McCain was correct when he stated that "if it's State money generated within the State, ... then the Federal government does not have a role [in regulating it]." McCain Dep. 226.

The Declaration of Dr. LaRaja demonstrates that the state parties spent approximately $232 million in 2000 in non-federal, state-regulated money. This was money raised by the states and used for state activities. Dr. La Raja's figures show that the largest percentage of the state money in non-allocated accounts is used for voter mobilization and grassroots activities. LaRaja Decl. 40, Fig.16. This is *not* money reported to the FEC, and it has therefore not been analyzed by Defendants' "experts." Unlike money in the state parties' allocated accounts that are reported to the FEC, this is state-raised and state-regulated money that has been spent outside the federal system; *indeed, none of this money is involved in any of Defendants' extensive record purporting to document abuses of "non-federal" money.* Although Defendants' experts have opined on the use of "allocated" money for *generic* activities, they have made no effort to analyze the state parties' use of their non-allocated state money, money that under BCRA can no longer be used for its intended purpose of influencing state and local elections.

Defendants claim that since the parties complied with the previous allocation rules, they have "effectively conceded" that the activities in question can be regulated by Congress. This is, of course, untrue. Before BCRA, FECA purported to regulate only contributions and expenditures made "for the purpose of influencing a federal election" and the allocation rules reflected an attempt to allocate certain expenditures that could be said to have more than one purpose. In that sense, the allocation rules explicitly recognized, and accommodated, the state election purpose of these activities. Moreover, the allocation rules never purported to include

activities directly in connection with state or local candidates or ballot measures. In contrast, BCRA simply assumes that any activity that may have any "effect" on a federal election, no matter how remote, is "federal election activity" and can be 100% federally regulated. Congress has not engaged in "policy line-drawing" – it has obliterated any line by requiring that party campaign activities, even those in support of state candidates or measures, be completely regulated by federal law.

Although Defendants have been less than candid about the application the term "federal election activity" to particular conduct,[3] Plaintiffs and Defendants appear to agree that the following state and local activities are subject to *complete federal regulation* under BCRA:

- Phone banks by the state or local party in support of only state or local candidates or ballot measures urging voters to vote
- Paid distribution of doorhangers or other literature that reference only state or local candidates and ballot measures and contain a GOTV message
- Any generic communication "promoting" the state or local party
- Paid distribution of party "slate mail" even if it lists only state or local candidates
- Any actual voter registration activities by local party organizations conducted after the filing deadline for federal candidates (generally, even-numbered years)
- All vote-by-mail or absentee ballot programs conducted by the state or local party even if only state or local candidates are included
- All party mail in support of state or local candidates or ballot measures with a

---

[3] When served with approximately 20 examples of actual previous election activities or communications and asking them to admit whether each example constituted "federal election activity." Defendants refused to answer, arguing that the "attempt to obtain admissions as to BCRA's application to various *conceivable but hypothesized* circumstances did not comport with Rule 36" and stating that the Plaintiffs were "free to review the regulations and draw their own legal conclusions." Opp. Of Def's. FEC and DOJ to Pl's Motion to Compel Responses, at 3-5.

Intervenors, on the other hand, agreed that a substantial number of the identified activities were "federal election activity," including several generic mail pieces, phone bank activity for a statewide ballot measure, phone bank activity for local candidates, mail featuring only state or local candidates, doorhangers featuring only state or local candidates, and a party newsletter. CDP Br. 19.

GOTV message if it is "individualized"

This federalizing of state and local party election activity is not an "incidental" effect. As the FEC acknowledged in excluding certain activities conducted *by state and local candidates themselves* from the definition of "federal election identification,"

> BCRA makes voter identification a subset of Federal election activity, and *the regulatory implications of engaging in Federal election activity are significant.* For the Commission to exercise its discretion so as to sweep within Federal regulation candidates for city council, or the local school board, who join together to identify potential voters for their own candidacies, the Commission would require more explicit instruction from Congress. 67 Fed. Reg. 49070 (July 29, 2002) (emphasis added).

Of course, the exact same activities, if conducted by the state or local political parties on behalf of the state or local candidates, are "federal election activity" under BCRA. If a State Legislative candidate pays to call voters and urge them to vote for him or prints doorhangers to be distributed with his name on them, the activity is excluded because this is a "question of state law, not federal law," but if a political party does either of these things, it is federally regulated and must be paid with federally permissible funds. Ironically, even though Intervenors contend that BCRA will return the parties to grassroots mobilization, the parties are likely to reduce or eliminate these activities because of the federal funding requirements. *See* Bowler Decl. 3 PCS/CDP/CRP App. 9; Erwin Decl. 3 PCS/CDP/CRP App. 417. In fact, it can easily be seen that if "individualized" efforts are federally regulated and broadcast activities are not, that the local grassroots activity will suffer. In their opening brief, Plaintiffs illustrated the extent to which BCRA would adversely affect even the most local party activities by describing the Yolo County DCC Annual Bean Feed. Plaintiffs explained why the Bean Feed, which is the "kick-off" for the local party's voter registration and GOTV efforts, could as a practical matter no longer be held. Intervenors' response is telling: Yolo County may still have its Bean Feed, as long as the proceeds

are not used for "federal election activity." Opp. Br. I-27. Translated from BCRA-speak, this means that Yolo County may still have its Bean Feed as long as it is not using the money for voter registration or GOTV efforts. Of course, that is precisely why it is held; people do not simply come to eat the beans.

III. DEFENDANTS FAIL TO SHOW THAT BCRA MEETS CONSTITUTIONAL REQUIREMENTS IMPOSED BY THE FIRST AMENDMENT

A. Levin Limits and Federal Election Activity Are Subject to Strict Scrutiny

Defendants continue to insist that BCRA's funding restrictions on state and local party activities are mere "contribution" limits not subject to strict scrutiny on the theory that such limits have only a "marginal" impact on expressive speech. Opp. Br. I-17. But it is clear that BCRA imposes direct restrictions on "an amount that is expended or disbursed" by state and local parties when engaging in purely state and local activity now cleverly defined as "federal election activity." 2 U.S.C. §323(b)(1). As Plaintiffs have fully demonstrated, and Defendants freely admit, federal election activity encompasses activities far removed from influencing the election of federal candidates, or for that matter, influencing the election of any candidate (e.g., support of ballot measures). Opp. Br. 31. State and local parties are now prevented from spending lawfully raised money under state law for state and local purposes. In this respect, BCRA's restrictions are quite different from a contribution limit. Instead they operate very much as expenditure limits.

The Supreme Court has long held that expenditure limits are subject to the most exacting scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 44 (1976). Defendants' reliance upon *Buckley* is misplaced. While it is true the Court has applied a lower standard of review to contribution limits, the focus of these cases has been on contributions to *candidates*. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 388 (2000). Defendants' reference to *California Med. Ass'n v. FEC*, 453 U.S. 182 (1981) ("*CMA*") and *FEC v. Colorado Republican Fed. Camp. Comm.*, 533 U.S.

431 (2001) ("*Colorado II*") provide no more support. Both cases dealt with circumvention of contribution limits to *candidates* as a rationale for limiting contributions to either political committees (*CMA*) or direct expenditures by party committees (*Colorado II*).

If BCRA limited only party activities directly related to federal candidates, Defendants might have the better argument. But that is not what BCRA does. By defining "federal election activity" well outside the bounds of any reasonable application to federal elections, Congress has effectively imposed limits on what state and local parties may spend on lawful *state* activities. In that respect, *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290 (1981) is very much on point.

As the Court noted in *Citizens Against Rent Control*, limits on contributions to committees engaged in activities outside the candidate corruption/circumvention framework "impose a significant restraint on the freedom of expression of groups and those individuals who wish to express their views through committees." *Id.* at 299. In the context of support for ballot measures, the Court clearly explained "the contribution limit thus automatically affects expenditures, and limits on expenditures operate as a direct restraint on freedom of expression..." *Id.* at 299.

Intervenors argue that *Citizens Against Rent Control* is inapposite because the restrictions on contributions were for the purpose of influencing a ballot measure campaign. Opp. Br. I-20. Yet, Defendants' don't deny that BCRA regulates precisely this type of activity by state and local parties as well as many other purely state level activities.

Moreover, Plaintiffs have submitted virtually unrebutted evidence that BCRA will severely burden the political parties' ability to exercise the most basic speech and association rights and to participate fully in political debate. To begin with, the state parties will clearly have

to pay for a much wider range of campaign activity with contributions subject to the federal limits. As the FEC itself acknowledged in its rulemaking, "many disbursements by state, district, and local party committees mentioning Federal candidates that in the past were allocable between Federal and non-Federal accounts must now be paid solely with Federal funds." 67 Fed. Reg. 49075 (July 29, 2002). In addition, many disbursements that do not mention federal candidates will similarly require federally permissible funds.[4]

It is also important to keep in mind a point made by Defendants: even the cost of activity that is *not* federal election activity *must be still be allocated*; the only difference is that "federal election activity" must be allocated between federal and Levin accounts, and other activity must be allocated between federal and non-Levin non-federal money. This means that other expenses such as administrative, overhead (rent, utilities, etc.) and fundraising costs *will require the same percentage of federal funds as "federal election activity."*[5]

While arguing that the *national* parties have raised increasing amounts of federal money over the years, Defendants have presented no credible evidence that the *state* parties will be able to do so, and the unrebutted testimony of the state parties is to the contrary. *See* Bowler Decl. 3 PCS/CDP/CRP App. 6.

The California parties have also submitted unrebutted testimony that the effect of the

---

[4] Although the parties cannot say precisely how much more activity will require federal funds, it is clear that, at a minimum, all generic activities, virtually all voter registration activity, all state and local phone bank activity, and all local "door-to-door" GOTV activity, and all fundraising expenses will require federally limited funds. Mail that is determined to be "individualized" featuring only state candidates and ballot measures will also require federally permissible funds.

[5] Although one reading of BCRA is that when Congress defined "federal election activity" it meant to leave other activities to state law, the FEC decided otherwise and continued to superimpose the old allocation scheme on top of the "federal election activity" allocation scheme for activities not falling within that term. This means that states with odd-year elections are *not* completely free to use state money as suggested by Defendants; they must still allocate many of their activities under the old allocation system.

Levin spending limit will be to deprive them of somewhere between half and two-thirds of their non-federal income. Bowler Decl. 3 PCS/CDP/CRP App. 11; Erwin Decl. 3 PCS/CDP/CRP App. 405-06. Defendants completely miss this point when they cite the parties' declarations to the effect that the parties "raise significant amounts of soft money, consistent with state law, for use in state and local elections." Opp. Br. 42. The parties have, indeed, raised significant amounts of money under California law; it is the fact that BCRA will *prohibit* the use of one-half to two-thirds of that money precisely for state and local elections which is the issue here.[6]

The restrictions on the parties' associational activities will exacerbate the restrictions imposed by the Levin limit and the definition of "federal election activity." Defendants claim that the parties "can undertake precisely the same activities as before, so long as they are financed from contributions complying with the applicable federal restrictions." Opp. Br. 5. The claim that state parties can engage in the same activities as long as those activities are financed with federally limited contributions is simply misleading, but the statement is also inaccurate in several respects: parties can no longer transfer funds amongst themselves or engage in joint fundraising activities *even with respect to funds that meet federal restrictions*; they cannot engage in the most basic discussions about raising and spending money for campaign activity; and they cannot contribute to ballot measure committees or other non-profit organizations, even with funds that meet federal restrictions. Each of these restrictions, discussed more below, have been minimized or ignored by Defendants in an effort to show that BCRA is nothing more than a return the law to

---

[6] Defendants are also just plain wrong when they claim that the loss is "exaggerated" because it reflects national party transfers which was not "real" state money; the California parties have specifically factored out national party transfers in order to demonstrate the impact of the Levin spending limits on non-federal money raised directly by the states. *See* Bowler Decl. 3 PCS/CDP/CRP App. 7, 11. It is undoubtedly true that some states will suffer serious adverse effects from the loss of national party transfers, but this is not the case in California. In this regard, Defendants' statements that the national parties can still transfer federal money to state parties is simply not true; the parties cannot transfer even federal money if it is to be used for any "federal election activities."

the "status quo ante." Opp. Br. I-1,2.

Defendants do not seriously attempt to argue that BCRA meets strict scrutiny. No doubt they implicitly know that the statute cannot meet this rigorous test given Congress' complete lack of effort to narrowly tailor the reach of BCRA. The extensive anecdotal and opinion testimony clearly suggests that the "evil" Congress was attempting to eliminate by BCRA was the misuse of "unregulated soft money" that was transferred from the national parties to the state parties for use in running issue ads intended to influence federal elections. Opp. Br. 1-2. If that was Congress' objective, BCRA goes well beyond that goal, regulating purely state and local election activities and placing restrictions on spending of state regulated funds. It is readily apparent that Congress could have chosen narrower alternatives, including a limit on transfers, a narrower definition of "federal election activity," and treating parties like other entities with respect to "electioneering messages."

Congress made no such effort. Instead, under the guise of "closing loopholes" and preventing "circumvention" of contribution limits, it swept in a broad range of lawful activities to impose serious burdens upon state and local parties expressive and associational First Amendment rights.

B. The Definition of "Federal Election Activity" Remains Impermissibly Vague

Defendants rely heavily on the recently adopted FEC regulations for their claim that the Title I provisions "have a much more limited impact than Plaintiffs contend." Opp. Br. 9. This is wishful thinking. Fundamentally, the regulations are themselves vague. In addition, the regulations fail to define several key components of "federal election activity" in any meaningful way.

The most significant category of "federal election activity" includes voter identification,

get-out-the vote, and generic activity. Indeed, virtually all of the parties' campaign activities could be said to fall within one of these three categories. Defendants implicitly acknowledge this when they state that the FEC acted to avoid "federaliz[ing] a vast percentage of ordinary campaign activity." Opp. Br. 7 (quoting Explanation and Justification).

Although acknowledging the problem, the regulations do little to fix it. To begin with, the regulations defining "federal election activity" nowhere attempt to distinguish between state and local election activity, on the one hand, and federal election activity on the other, except in the limited context of communications by state and local candidates. The GOTV section, for example, simply states that GOTV means "contacting registered voters by telephone, in person, or by other individualized means, to assist them in engaging in the act of voting...[it] includes, but is not limited to providing to individual voters...information such as the date of the election, the times when polling places are open, and the location of particular polling places..." 11 CFR §100.24. By inference, then, all GOTV activities within the relevant time-frame are considered "federal election activity" regardless of whether they are in support of state, local or federal candidates.[7]

Moreover, the regulations (and Defendants' position) are at best internally inconsistent and equivocal. For example, with respect to party GOTV mail featuring only state candidates, a key issue in determining the extent to which "GOTV" will extend to election activity directed at purely state and local candidates, Defendants state only that since the GOTV regulation requires contacting voters by "individualized means," this "*apparently*" excludes "mass mailings"such as a

---

[7] The FEC has defined "in connection with an election in which a candidate for Federal office is on the ballot" to include the entire period from the earliest filing deadline for federal candidates (in California, this is late November of an odd-numbered year) through the general election. This has been challenged by Intervenors in the *Shays* litigation. *See,* fn. 1. The plaintiffs in that action assert that there should be *no* time limitation on the term.

"flyer" and Internet appeals. Opp. Br. 28 (citing 11 CFR §100.24).

Since "individualized means" is not defined (and Internet appeals are separately excluded), it is difficult to see why targeted mail addressed to an individual voter, at his or her individual address and containing his or her individual polling place is excluded. In support of their "conclusion," Defendants cite the mass mailing regulation which says nothing about GOTV or what "individualized" means in this context. *See* 11 C.F.R. § 100.27. The GOTV regulation itself does not exclude, or even reference, "mass mailings." Moreover, the definition of "telephone bank" at 11 C.F.R. § 100.28 is virtually identical to the definition of "mass mailing" (except it references 500 substantially similar phone calls rather than 500 substantially similar pieces of mail), and the Commission discussion makes clear that phone banks *are* "federal election activity." Finally, Defendants indicate that assisting voters "to vote by absentee ballot" is GOTV. 67 Fed. Reg. 49,067 (July 29, 2002). Absentee ballots are normally mailed to registered voters and are no more individualized than candidate mail (in fact, less, because they don't include the voter's polling place). In sum, it is unclear why an absentee ballot program or a phone bank is individualized GOTV, but candidate mail is not.

Further, Defendants imply that the regulation's requirement that the activity "assist" voters to engage in voting (Opp. Br. 28) is a narrowing limitation. However, the regulation itself goes on to state that GOTV includes "*providing* to individual voters...*information* such as the date of the election, the times when polling places are open, and the location of particular polling places..." 11 CFR §100.24.

It is clear that the Commission specifically declined to decide whether mail for state or local candidates or ballot measures is GOTV activity, despite the fact that mail is the most common form of political communication, and that it represents perhaps the most significant

portion of state and local party expenditures. *See* Bowler Decl. 3 PCS/CDP/CRP App. 8 (stating that the majority of CDP's nonfederal contributions go towards its mail program in support of nonfederal candidates).[8] It speaks volumes that Defendants do not actually state that such mail *is* excluded, saying only that "apparently" mass mailings such as a flyer are excluded, "apparently" leaving open the possibility that a different conclusion could be reached. Significantly, in "apparently" excluding state candidate mail, Defendants do not rely on the "state election focus" of the activity, but rather on the means of distribution which is not based on the language of the statute and can presumably be changed at any time.

With respect to the "clarity" of the regulations, it should also be emphasized that Defendants and Intervenors have, in fact, reached the opposite conclusion with respect to the same activity. Although Defendants state that state mail is "apparently" excluded," Intervenors have stated that both state candidate mail and vote-by-mail applications are "federal election activity." 3 PCS/CDP/CRP 239. Intervenors are, of course, the principle sponsors of BCRA, and the FEC regulations were in effect at the time they made these admissions. Although Defendants quote each of the Intervenors *extensively* throughout their briefs as to the purposes underlying BCRA, the harms sought to be addressed, and all other manner of opinion about "federal election activity," when it comes to the scope of BCRA, Defendants simply state that the positions of Intervenors "are not binding." Opp. Br. 9.

The regulation similarly provides little illumination on another component of "federal election activity" – "generic campaign activity." The regulation does not define this term in any

---

[8] In its extensive discussion in the Explanation and Justification, the FEC made absolutely no mention of it. 67 Fed. Reg. 49,067-68 (July 29, 2002). The rule expressly excludes communications mentioning only state or local candidates sent by the state candidates themselves, but there is no comparable exclusion for party mail. 11 C.F.R. §100.24 (a)(3). The section entitled "Activities Excluded From the Definition of Federal Election Activity" does not mention state candidate mail (or, for that matter, any mass mailing).

way; it merely tracks the statutory language, stating only that it includes "a public communication that promotes or opposes a political party" and not a candidate. 11 C.F.R. § 100.25. Defendants argued in their opening brief that the term "promote" was sufficient to "provide explicit standards for those who apply them." Op. Br. I-65. However, the opposition briefs demonstrate that "promoting" or "opposing" can be extremely elastic concepts. In fact, both Defendants and Intervenors specifically characterize an advertisement opposing California's Proposition 209 as "generic campaign activity." Opp. Br. 31; I-7. That ad, which urges voters to "vote no on the Republican scheme to turn the clock back and shut down equal opportunities for all," is characterized by Defendants as a "general partisan appeal" that would have an "obvious impact" on federal elections. This, in turn, allows it to be characterized as "federal election activity." The result is that activity clearly directed at a state ballot measure is subject to federal regulation and must be paid with 100% federal funds. (Levin funds cannot be used because it is a broadcast advertisement.)

When a communication becomes a "general partisan appeal" is not clear. Although Defendants apparently believe that they know it when they see it, years of litigation over the limits of "express advocacy" belie the assertion that such lines are either clear or easy to draw. Sen. Feingold himself, asked whether the Prop. 209 ad was "federal election activity," said ""I'm not absolutely certain. I'd have to sit down and think it through a while..." Feingold Dep. 200.

A communication that "promotes or supports, or attacks or opposes" a federal candidate is also "federal election activity." Again, the regulation merely repeats the statute; it does not elaborate. 11 C.F.R. § 100.24. In Plaintiffs' opening brief, they asked whether an invitation that "features" an candidate is "promotes" that candidate, or whether a letter from a candidate endorsing a ballot measure "promotes" the candidate? Op. Br. 33. Defendants have volunteered

no response. Plaintiffs can now add another question: If a candidate sends a letter asking the reader to join her and other Democrats in supporting a particular ballot measure, is it a "general partisan appeal" and thereby a "federal election activity?"

It is difficult to escape the conclusion that Defendants have consciously attempted to avoided addressing the most troublesome, and most intrusive, provisions of BCRA. The inability of the Defendants and Intervenors to agree on the meaning of "federal election activity," and the Defendants' inability (or refusal) to clarify the law in the rulemaking process, underscore the inherent vagueness of the term. The failure to use federally regulated funds for "federal election activity" is a federal crime, yet there is no way for state and party committees to know how to comply with the law. The suggestion that parties should simply rely on the advisory opinion process to determine the meaning of these provisions is absurd. Defendants cite no case that would require persons engaging in political communication to obtain advance clearance from the government on what they can and cannot say -- and there is, of course, no such case.

"A vague rule denies due process by imposing standards of conduct so indeterminate that it is impossible to ascertain just what will result in sanctions." *Timpinaro v. SEC*, 2 F.3d 453, 460 (1993). If there were ever an "indeterminate rule," it is the definition of "federal election activity" which is central not only to the spending provisions of the Levin Amendment, but also to the provisions restricting transfers, joint fundraising, solicitation and spending authority, and contributions to certain nonprofit organizations. As FEC Commissioner Toner stated in the rulemaking proceeding,

> ...there are some among us who argue that there is no need to issue bright line rules, that we should maintain broad prosecutorial discretion, that legal standards are best developed after the fact through years of enforcement cases and litigation. Such an approach would deprive people now of a clear sense of what they can and cannot do under BCRA. Such an approach would leave affected parties in the future at the mercy of the Commission's prosecutorial discretion and for the

> unfortunate ones who became test cases could force them to endure years of invasive discovery and spend hundreds of thousands of dollars in legal fees...[9]

This is precisely where the political parties find themselves today.

C. The Transfer and Joint Fundraising Ban Is Constitutionally Impermissible

Defendants inaccurately summarize the transfer restrictions. For example, they claim that "BCRA continues to allow party committees to...transfer money to other party committees. The statute simply requires that such money be raised in accordance with FECA." They also assert that the restrictions on inter-party transfers of soft money are simply "limits on monetary contributions from one committee to another." Finally, they state that party committees are free to "affiliate" with each other through contributions of hard money. Opp. Br. 23-24. Defendants similarly assert that the regulations "expressly permit joint fundraising...in specified circumstances" and that the parties have "broad latitude to associate with their candidates in connection with their fundraising activities."

In making these statements, Defendants apparently hope that the Court will not read the statutory or regulatory provisions they cite in support of these assertions because those provisions make precisely the opposite point. 11 C.F.R. § 102.17 states:

> Nothing in this section shall supercede 11 C.F.R. part 300, which prohibits any person from soliciting, receiving, directing, transferring, or spending any non-federal funds, or from transferring any federal funds for federal election activities.

Part 300, in turn, confirms the following:

- Levin funds must be raised *solely* by the committee that spends them. 11 C.F.R. § 300.31(a);
- A state or local party using Levin funds may not accept or use funds solicited, received, directed, transferred or spent by an officer or agent of a national committee, nor can they engage in joint fundraising of Levin funds with these

---

[9] Transcript of FEC Public Hearing (June 4, 2002), *available at* http://www.fec.gov/pdf/nprm/soft_money_nprm/transcript_of_hearing20020604.html.

persons. 11 C.F.R. § 300.31(e);

- A state or local party may jointly raise federal funds with a national party *if such funds are not to be used for Federal election activity.* 11 C.F.R. § 300.31(e)(1);

- A state or local party using Levin funds may not accept or use funds solicited, received, directed, transferred or spent by a federal candidate or officeholder, nor can they engage in joint fundraising of Levin funds with these persons. 11 C.F.R. § 300.31(e).

- A state or local party may not engage in joint fundraising of Levin funds with any other state or local party. It may engage in joint fundraising of federal funds *if such funds are not to be used for Federal election activity.* 11 C.F.R. § 300.31(f);

In other words, the statute and the regulations are quite clear that Levin funds can *never* be jointly raised by or transferred by any other party committee or candidate or officeholder, and that even *federal* funds – funds completely subject to the federal restrictions – may not be jointly raised or transferred if they are to used for "Federal election activity," i.e., voter registration, voter identification, GOTV, or generic campaign activity.

No matter how Defendants attempt to distort these prohibitions, the bottom line is that the prohibitions on transfers and joint fundraising of *Levin funds* is absolute, and the restrictions on the transfer and joint fundraising of *federal* funds is almost absolute, since the use of such funds is prohibited for virtually all campaign activity.[10] By restricting the transfer or joint fundraising of *federal* money, BCRA precludes the parties from acting collectively to support their candidates in important federal campaign contests by transferring or jointly raising *federal* funds. It similarly restricts state and local parties from making the same sort of collective decisions with respect to the use of lawfully raised *and federally limited* state funds for important state or local races.

In support of these prohibitions, Defendants state only that "reasonable limits on campaign

---

[10] Even if some state election activity falls outside "federal election activity" as Defendants half-heartedly suggest, it is nothing less than ironic that the only use for which *federal* money can be jointly raised or transferred would be activity in support of state candidates.

contributions violate no associational rights. See Buckley." Opp. Br. 27. They make no effort to explain how these restrictions and prohibitions serve a compelling governmental interest nor how they are narrowly tailored. Nor could they do so because a prohibition is not a "reasonable limit" and the restrictions on federal money cannot, by definition, be justified by any circumvention rationale – even the attenuated version offered by Defendants in this case.

The restrictions on transfers and joint fundraising are not limited to the extremely large contributions that are the focus of Defendants' briefs. Nor are they limited to activities between the national parties and other party committees. The restrictions prohibit the Yolo County DCC and its affiliated Democratic clubs from engaging in a joint fundraiser to support the local Democratic candidate for State Assembly. They restrict CRP from transferring federal or Levin money to Santa Cruz County RCC to increase door-to-door grassroots activities for the party's gubernatorial candidate.

Nothing in the record suggest that any of these activities lead to corruption or the appearance of corruption. Nothing in the record suggests that they lead to circumvention of either the federal candidate contribution limits or the federal party contribution limits. Even Defendants' "worst case" scenario – the possibility that a large non-federal contribution can be transferred among party committees to disguise that its real purpose is to assist a federal candidate – is completely inapplicable to restrictions on *federal* funds, and could effectively be addressed by a cap or limit on transfers of non-federal money rather than an outright ban. Defendants have not shown otherwise.

D. Restrictions on Solicitation, Spending and Directing Are Constitutionally Impermissible

Defendants' claims about the solicitation restrictions suffer from the same unwillingness to accept, and accurately state, the law. They claim that BCRA "prohibits only those forms of

solicitation that Congress believed to present a serious risk of corruption...State-level committees are free to solicit both hard and soft money for themselves and (with the exception of the Levin Amendment) for other committees as well." Opp. Br. 35, fn. 35. Of course, as discussed above, this effectively means that they are free to solicit as long as the money is not to be used for voter registration, voter identification, GOTV, and generic campaign activity. Solicitations to pay the rent or telephone bill are apparently lawful.

Defendants rely upon the need to prevent the reality or appearance of corruption as their rationale for these limitations. Whatever potential for corruption exists when candidates solicit for themselves, it is simply not present when one state or local party committee (or an agent of that committee) solicits for another party committee. This provision appears to preclude the chair of the state party from soliciting for a local party, or assisting in fundraising for that local party, to the extent that he is an agent for the state party. To the extent that the solicitation restriction is a variation on the joint fundraising restrictions, it is addressed above. The record contains no demonstration that solicitation by state or local parties (or their agents) on behalf of each other has the potential to cause corruption or the appearance of corruption of federal candidates. Nor has circumvention of the federal limits by state or local parties been shown.

Indeed, the potential for corruption is also not present when the candidate solicits for purposes *other than his or her candidacy.* Defendants have argued that Congress can limit this activity based on the theory that both the donor and donee may believe that the contribution will help the candidate in some way, or that the candidate will be beholden to the donor even if the donation is not used to support the candidate. However, Congress implicitly rejected both of these arguments when it made it lawful for candidates or officeholders to solicit for a 501(c) organization, even one that engages in "federal election activity." .

Additionally, the prohibitions on solicitation are impermissibly vague, despite the FEC's regulations. Although Defendants argue that a vagueness challenge to "solicitation" was rejected in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), in this case context makes a great deal of difference. While it may be reasonably clear when a federal employee is "soliciting" for a political candidate or party, as solicitation is presumably not part of that employee's job, it is significantly different to attempt to determine when a party official, candidate or officeholder is "soliciting" for a political party. Those individuals have regular occasion to meet with persons in large and small groups extolling the virtues of the parties and its candidates, discussing important races, discussing party needs and resources, etc.[11] The FEC has defined "solicit" and "direct" to mean "to ask" and to exclude "merely providing information or guidance as to the requirement of particular law." 11 C.F.R. § 300.2(m)(n). Can it seriously be contended that "asking" or "merely providing information" exhaust the possible range of communications that could be interpreted by an onlooker or, more significantly, by an opponent as a "solicitation?" Defendants have complained that when donors asked national party officials how they could help further, those donors were told that contributions could be made to certain states in which close elections were expected. It is completely unclear whether the current regulations specifically allow, specifically prohibit, or are silent on this question, pointing up once again how the parameters of potentially criminal conduct are extremely unclear.

This is also why Defendants are wrong when they assert that BCRA does not prevent party

---

[11] Defendants' argument that a state party chair who is also a member of the national party can raise money for the state party is also not reassuring. First, although that statement appears in the Commission discussion accompanying the rule, it is not in the rule. Second, although Defendants state that the state chair will not be an "agent" in those circumstances, "officer" is not defined and it is unclear what positions with the national party will be considered "officers." Finally, like many of the examples above, the rule simply doesn't address the many possible situations in which it would be unclear whether a person was acting "on behalf of" a state or local party, a national party, or both.

representatives from conferring about spending priorities or engaging in campaign planning. Opp. Br. 24. The coordinated campaigns or victory plans that the parties use to coordinate their efforts on behalf of candidates at all levels involve both federal and non-federal candidates, federal and non-federal fundraising, and federal and non-federal spending. Decisions are made about what specific voter identification, GOTV and generic campaign activities (i.e., "federal election activities") will take place, and how much will be spent on them. Fundraising is planned and decisions are made about where funds raised will be "directed." Additional staff are hired. Various organizations are asked to take responsibility for various programs. It is truly disingenuous to declare that such activities – involving national party and state party officials, state and federal candidates, and other organizations (such as, in California, significant ballot measure campaigns) – do not involve "directing" or "spending" non-federal funds. "Spend" is not defined. Using any common sense understanding of these terms, individuals participating in the coordinated campaign or victory plan meetings and discussions could easily be accused of "directing" or "spending" both federal and non-federal funds.[12]

E. Contributions To, and Solicitations For Non-Profit Organizations Are Constitutionally Impermissible

Defendants' opposition brief simply repeats that the restrictions on party contributions to 501(c) organizations are necessary to prevent circumvention of the restrictions on contributions to party committees (which are, of course, necessary to prevent circumvention of the restrictions on contributions to candidates). Defendants simply do not acknowledge the complete denial of the parties' constitutional right to make contributions to ballot measure committees, or the significant burden on speech and association imposed by such a ban. *See, Citizens Against Rent Control v.*

---

[12] It should also be noted that the definitions of "solicit" and "direct" are among those being challenged by some of the Intervenors in the *Shays* litigation. *See*, fn. 1. This lawsuit also challenges the provision that allows candidates and officeholders to solicit at fundraisers.

Berkeley, supra. Nor do they explain why problems of "sham" organizations are not adequately addressed by the provisions which apply the limitations on political parties to any entity "established, financed, maintained or controlled" by a party committee. *See, e.g.,* 2 U.S.C. sections 323(a) and (b). They also do not explain why contributions of *federal* money have the potential for circumvention, or why limits on contributions or solicitation would not be as effective as an outright ban.

Defendants' only response is that CDP gave money in 1996 to a ballot measure committee (No on 165) "for a voter registration drive...that was 'targeted' at potential Democratic registrants." Opp. Br. 38; I-41. This purportedly demonstrates that ballot measure committees are "susceptible to the parties' campaign finance machinations." Opp. Br. I-41. As a matter of fact, Proposition 165 was a welfare reduction measure, and the No on 165 committee conducted a voter registration drive in low-income areas with large concentrations of welfare recipients. CDP contributed to the committee "knowing" that it was going to do voter registration in those areas. The No on 165 was *never* alleged to be a "sham" organization or an extension of the Democratic Party. The only issue was whether the contribution should be treated as a direct party voter registration expenditure and allocated between CDP's federal and non-federal accounts. This example does not in any way support a complete ban on ballot measure activity, nor does it provide support for a ban on indirect contributions to such committees such as inclusion in party mail.

THOMPSON PLAINTIFFS' REPLY BRIEF

TITLE I ARGUMENT: THE BCRA PROHIBITION ON SOFT MONEY IS VIOLATIVE OF THE 1ST AND 5TH AMENDMENTS OF THE CONSTITUTION

The one point on which all parties to this action agree is that the resolution of many of the constitutional issues in this litigation starts with *Buckley v. Valeo,* 424 U.S. 1 (1976). In that case issues of First Amendment rights of free speech and association, as well as equal protection rights of the Fifth Amendment, are recognized as rights of individuals, parties, and candidates that are infringed upon by the 1974 amendment to the Federal Election Campaign Act of 1971.[1] In considering this challenge, the Court of Appeals rejected the constitutional attacks on the FECA Act concluding that the '*minor infringement*' on constitutional rights was deemed *justified* because the government had a clear and compelling interest in preserving the integrity of the electoral process. (citations omitted) (emphasis added).

On appeal to the U.S. Supreme Court, the appellants argued that the Court of Appeals failed to give the FECA Act the *strict scrutiny* demanded under accepted First Amendment and equal protection principles of the U.S. Constitution. In upholding the decision of the Court of Appeals as to all issues except as to total campaign expenditures, the Supreme Court departed from precedent by *using a less than "strict scrutiny" test in analyzing First Amendment issues in reaching its conclusions*. This deviation from precedent is dealt with at length in the Cato Institute's *Amici Curiae* Brief at pages 3 through 9 and the discussion therein is adopted and incorporated by reference by plaintiffs Thompson and Hilliard.[2]

---

[1] *Buckley v. Valeo,* 424 U.S. 1 (1976) at 14, 15.
[2] Brief of *Amici Curiae*: The Cato Institute and the Institute for Justice. November 12, 2002.

The *Buckley* Court, as part of its' discussion, indicated that *it had no experience, and there was no evidence in the record*, regarding the effect the 1974 Amendment to the FECA would have on *fundraising* (emphasis added). In upholding the decision of the Appellate Court, however, the Supreme Court *recognized the need for funding as a means to run an effective and meaningful campaign*, stating:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necissitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments o effective political speech.[3]

The Court nevertheless advised that "[t]he overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce to total amount of money potentially available to promote political expression."[4]

The Court also noted that it was necessary to balance the government's need to prevent "undue influence on candidates and officeholders or the appearance thereof" against the need for candidates to "amass the resources necessary to have a meaningful campaign".[5] Additionally, *Buckley,* 424 U.S. at 22 implies that candidates should be

---

[3] Id. at 19
[4] Id. at 22.

able to replace 'soft money' by including more givers. This assertion, however, ignores the fact that statistics reveal that *less than 2/10 of 1% of the population contributes to political campaigns.*[6] (emphasis added). Plaintiffs Thompson and Hilliard, who have been officeholders since 1992, can attest to the difficulty of raising funds from constituents.[7] While recognizing that money is necessary for an effective and meaningful campaign, *Buckley* does not *suggest an amount that is the minimum needed by a candidate to run an effective and meaningful campaign* (emphasis added). Congress, too, recognized that campaign expenses can be sizeable. Perhaps its wisdom under the BCRA, section 304 (the Millionaire's Provision), provides a first approximation of the amount it takes to conduct a meaningful campaign, when it established $ 350,000 as the amount needed to invoke its use by candidates for the U.S. House of Representatives.

Due to the Buckley Court's *failure to visit the issue of infringement upon the First Amendment freedom of speech and association rights of candidates for office*, plaintiff Thompson and Hilliard's issues provide the basis for a *case of first impression* (emphasis added). For in *Buckley,* the Court dealt only with the First Amendment and restrictions upon *individual contributions* and limits upon those expenditures for political expression, stating:

> [A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution,

---

[5] See Id. at 21.
[6] Campaign Finance As A Civil Rights Issue, 43 How. L. J. 1 at 16 (1999).
[7] See Thompson Deposition at 59, 60 and Hilliard Deposition at 64 - 70.

> since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.[8]

Buckley did not address issues of fundraising as it affects candidates from "economically challenged" districts. Neither the Congress, the BCRA, nor defendants, in their briefs, acknowledge the plight or argue the merits of the trials and tribulations involved in the fundraising activities of "economically challenged" candidates in "economically challenged" districts as a class. Thus, without addressing this situation, looking at the likelihood of success in applying its suggestions to the stark reality of poverty that exists, and truly understanding plaintiffs' woes, the advice of the *Buckley* Court to "raise more money by getting more people involved" is totally unrealistic. In issuing that advice, the Court in *Buckley* admitted that it did not have any experience with fundraising where limits were placed on individual giving. Furthermore, there was no such evidence in the record presented by the parties therein upon which the Court could rely.[9]

Unlike the situation in *Buckley,* where the Court did not have the benefit of experience to know what effect limitations on contributions would have, we now have some experience as to the effect limitations on contributions by individuals would have on candidates under the 1974 amendment to the FECA. These effects can be juxtaposed to fundraising efforts of candidates in "economically challenged" Districts under the BCRA.[10]

---

[8] *Buckley*, at 21.
[9] Buckley, at 34.
[10] See Thompson Opening and Opposition Brief Appendices.

As with many other candidates from poor districts who cannot finance their own campaigns from personal funds, plaintiffs Thompson and Hilliard must rely heavily on contributions from their constituents in order to mount meaningful campaigns. In theirs and other poor districts, where the average family earns less than $ 20,000.00 a year, and the per capita income may be as low as $7,000.00[11], most people can't afford to contribute and, where they can, their contribution rarely reached the previously allowable limit of $ 1,000.00 under FECA and its 1974 amendment. Plaintiffs Thompson and Hilliard represent "economically challenged" districts which rank 430 and 426, respectively, among the 435 nationwide congressional districts in per capita income, being less than ten thousand dollars per annum. It is *highly unlikely* that they, and other candidates whose districts fall within the more than 75 other counties with per capita income below $11,000.00, will be able to *add more contributors* or *have more constituents who can contribute the allowable $2000.00 under BCRA* to make up for money lost campaign funds due to 'soft money' prohibitions under the BCRA (emphasis added).[12] Statistics presented as Appendices to Plaintiff Thompson and Hilliard's opening and opposition briefs also support this conclusion.[13]

Surely, monies raised from individual constituents by Representatives Thompson and Hilliard is representative of other "economically challenged" districts, contributions which do not approach the sum of $350,000 required to invoke the millionaire's provision. Under the BCRA Plaintiffs will not be able to raise the funds necessary to allow them, as candidates, to "amass the capital necessary to run an effective and

---

[11] See Huckabee, David C. CRS Report for Congress – Districts of the 103d Congress: Income Data and Rankings. March 1, 1993.
[12] See Thompson Deposition at 59,60 and Hilliard Deposition at 64 to 70.
[13] *ibid.*

meaningful campaign or "...drive the voice of candidates from poor districts above the level of notice". *Nixon v. Shrink Missouri,* 528 U.S. 377, 397 (2000).

Thus, the rights that plaintiffs Thompson and Hilliard, as well as their constituent contributors are afforded under the First Amendment to the U.S. Constitution, the right of freedom of speech and association, will *surely be cut off* merely because of their economic status. They will not have the same access to the media. They will no longer have the ability to hire campaign consultants and managers. They will have significantly less time to spend in developing their platform and advocating the causes of these poorer counties which make up their respective districts, because they have to spend significantly more time under the new restrictions provided in The BCRA to raise the funds needed to finance a meaningful campaign. Their efforts to educate their constituents concerning voter registration, how to use the voting machines, their ability to pay people to man the polls on election day, to provide transportation to constituents who would otherwise be unable to travel the distance to the polls on election day will all be lost if they can no longer benefit from the soft money contributions that provided the mechanism for these seemingly routine aspects of a meaningful campaign in the past.

Thus, to impose the BCRA's ban on soft money as it now stands, makes it almost inevitable that the voices of plaintiffs and candidates similarly situated will become faint to the point of a mere whisper and no longer will their voices be able to 'rise to the level of notice'[14]. Congress could easily have prevented this situation with a better *balancing of compelling governmental interests*—avoidance of undue influence while still allowing "economically challenged" candidates an opportunity to raise the money necessary to

[14] See *Nixon v Shrink Missiouri* at 397.

conduct a meaningful campaign. This ability to have their voices heard is a fundamental guarantee under the First Amendment. As suggested in plaintiffs' opening brief, a system whereby candidates without the necessary personal funds to conduct their campaign could, under limited conditions (as with the millionaire's provision), obtain funds in excess of the individual allowable contribution to a candidate in an election, but less than the contribution limits allowed for a two year cycle.[15]

The First Amendment to the U. S. Constitution provides for American citizens certain rights and entrusts that their intelligence is able to discern between good and evil in their participation in the electoral process. The First Amendment places 'The People' in the position to combat any evil that lurks in the Electoral and Legislative processes through the doctrine of "One Person, One Vote". Candidates and officeholders should be revealed through open and thorough debates on the issues and, for violations of appropriately drawn legislation prohibiting undesired conduct, prosecuted to the fullest extent of that legislation. And in cases where members of Congress violate the public trust, they should be harshly disciplined by the Congress and the FEC, pursuant to the rules promulgated by Congress and the 1974 amendments to the FECA.

Thus, plaintiffs contend that the only way to allow them, and other candidates similarly situated, the ability to effectively compete in the political process and prevent the total disenfranchisement and disintegration of their voices and those of the constituents they represent, is to strike down the provisions of the BCRA which prevent the solicitation and raising of soft money, or in the alternative, pursue a hybrid approach that would allow a mix of soft and hard funds to be used by the "economically

[15] See Thompson Opening Br., at 11, 12.

challenged". If no such consideration is given to such unfortunates their voices which represent their ideas for a better America will be mere echoes in the wind.