IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Senator Mitch McConnell, et al., Plaintiffs, v. Federal Election Commission, et al., Defendants, and Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, Senator James Jeffords, Intervening Defendants.	Civil Action No.: 02-CV-582 (CKK, KLH, RJL) ALL CONSOLIDATED CASES

DEFENDANT-INTERVENORS' EXCERPTS OF BRIEF OF DEFENDANTS
(Redacted Version for Public Distribution)

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DEFENDANT-INTERVENORS' INTRODUCTION

"Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000). That warning underscores what the Supreme Court has long recognized: campaign finance practices can pose a serious threat to our democracy, and Congress has sufficient constitutional authority, consistent with the First Amendment, to protect the federal political process from the corrosive influence of those practices when they do.[1]

In enacting the Bipartisan Campaign Reform Act ("BCRA"), Congress broke no new legislative or constitutional ground. Laws barring corporations and unions from using general treasury funds for federal election activity and limiting individual contributions have commanded a national consensus for decades.[2] In recent years, however, corporations, unions, wealthy individuals, and the political parties have discovered and exploited ways to evade these longstanding laws on a scale that threatens to render them irrelevant. BCRA's core provisions close the loopholes that have permitted this wholesale evasion. They do nothing more and nothing less. Notably:

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[1] *See, e.g.*, *Burroughs v. United States*, 290 U.S. 534, 545 (1934); *United States v. CIO*, 335 U.S. 106 (1948); *United States v. UAW-CIO*, 352 U.S. 567, 585 (1957) (deference to legislative attempts to "avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital"); *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) ("Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'") (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)); *FEC v. Nat'l Conservative PAC*, 470 U.S. 480 (1985) ("*NCPAC*"); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 437 (2001) ("*Colorado II*").

[2] *See* Thomas E. Mann, *Report of Thomas E. Mann* at 2-11 [DEV 1-Tab 1, hereinafter Mann Expert Report] provides a brief history of campaign finance legislation.

- Since 1907, Congress has banned the use of corporate treasury funds for contributions to federal candidates and their parties;[3] since 1947, Congress has similarly banned expenditures of corporate treasury funds in connection with federal elections.[4] The Supreme Court has consistently upheld laws that bar the use of these funds in connection with candidate elections.[5] Title I of BCRA closes the "soft money" loophole that has permitted the injection of hundreds of millions of dollars of corporate contributions into the coffers of political parties for use in federal elections; Title II closes the sham "issue ad" loophole that reintroduced immense corporate expenditures directly into federal elections.
- Since the 1940s, Congress has prohibited the use of union dues in connection with federal elections.[6] As with corporate treasury funds, Titles I and II of BCRA close the soft money and sham issue ad loopholes that unions have used to reintroduce into federal elections massive contributions and expenditures from union dues.
- Since 1974, Congress has capped contributions by individuals to candidates and parties,[7] and the Supreme Court has upheld those contribution limits.[8] Title I of BCRA closes the soft money loophole that reintroduced unlimited individual contributions into federal

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3 Federal Corrupt Practices Act, Pub. L. No. 59-36, 34 Stat. 864 (1907) ("Tillman Act").

4 Labor Management Relations Act of 1947, Pub. L. No. 80-101, § 304, 61 Stat. 159 ("Taft-Hartley Act").

5 *See Austin*, 494 U.S. at 661; *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209-10 (1982).

6 Taft-Hartley Act; *Nat'l Right to Work Comm.*, 459 U.S. at 209; *United States v. UAW-CIO*, 352 U.S. at 578-79 (detailing congressional intent behind the proscription on electoral activity funded from the "huge war chests being maintained by labor unions"); *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 415-16 (1972) (noting that Congress barred labor unions from making campaign expenditures in order to "eliminate the effect of aggregated wealth on federal elections").

7 Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. § 431 *et seq.*) ("FECA").

8 *See Buckley*, 424 U.S. at 26-36. *See also Shrink Missouri*, 528 U.S. at 382.

elections. Consistent with *Buckley*, Title II leaves individuals and groups of individuals entirely free to make independent expenditures in any amount.

- Since 1976, Congress has offered presidential candidates the option of financing their general election campaigns with public money if they agree not to raise private funds or spend more than the public stipend.[9] The Supreme Court has upheld these provisions.[10] BCRA staunches massive evasion by candidates who accept public money and then raise soft money that their parties spend on ads to promote their campaigns.[11]
- Since 1976, Congress has treated expenditures made "in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate" as contributions to that candidate.[12] The Supreme Court has emphasized that "[t]here is no significant functional difference between" these so-called "coordinated" expenditures and direct contributions to a federal candidate.[13] BCRA closes loopholes that have severely hampered the regulation of coordinated expenditures in recent years.

In closing these gaping loopholes, Congress acted well within constitutional bounds. The constitutionality of the 1907, 1947, and 1974 laws are beyond serious dispute, and Congress has the settled authority to prevent their evasion and the derision that comes with the wholesale

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[9] 26 U.S.C. §§ 9003-9006 (2002). The Presidential Election Campaign Fund Act of 1966, Title IV of Pub. L. 89-909, §§ 301-305, 80 Stat. 1587 (codified as amended at 26 U.S.C. §§ 9001-9042 (2002)) ("Fund Act") was originally passed in 1966, but a 1967 provision barred Congress from appropriating any funds for its enforcement. Only after passage of subsequent legislation, including FECA Amendments of 1974, was the law effectively implemented. The first presidential campaign governed by the Act was in 1976. *See Buckley*, 424 U.S. at 86 n.114; Anthony Corrado, *A History of Federal Campaign Finance Law in* The Sourcebook 1, 9-15 (2d ed. forthcoming 2002) at http://www.brook.edu/dybdocroot/gs/cf/cf_hp.htm. In the case of presidential primary elections, candidates may elect to receive matching federal funds in return for agreeing to abide by spending limits. 26 U.S.C. §§ 9031-9042 (2002).

[10] *See Buckley*, 424 U.S. at 108-09; *Republican Nat'l Comm. v. FEC*, 445 U.S. 955 (1980).

[11] *See, e.g.*, *Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*, S. Rep. No. 105-167, at 105-29 (1998) [hereinafter Thompson Comm. Rep.].

[12] 2 U.S.C. § 441a(a)(7)(B)(i).

[13] *Colorado II*, 533 U.S. at 464.

disregard for the limits Congress has set and the courts have sustained.[14] BCRA stands firmly supported by precisely the same statutory and judicial precedent that it seeks to restore.

BCRA's legislative history, and the evidence now before this Court, document the overwhelming need to close the loopholes that corporations, unions, wealthy individuals and the political parties have exploited. Fully 79 percent of the public believes that Members of Congress sometimes or often vote based on what large contributors to their political party want;[15] 71 percent believe Members sometimes vote this way even when it is not what most people in their districts want and even when it is not what Members think is best for the country.[16] Eighty-four percent believe that "Members of Congress will be more likely to listen to those who give money to their political party in response to their solicitations for large donations,"[17] and 68 percent believe big soft money donors block decisions that could improve their everyday lives.[18]

Recognizing the threat to our system of government posed by inaction, a bipartisan majority of Congress acted to curtail what it identified, in its experience, as the worst evasions. Thus, the law puts an end to the spectacle of elected officials and their parties raising soft money contributions from corporations, labor unions, and wealthy individuals who have important policy matters pending before the federal government. And, BCRA terminates the ruse used by corporations and unions to spend treasury funds and union dues for broadcast campaign ads that

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[14] *See*, *e.g.*, *California Med. Ass'n v. FEC*, 453 U.S. 182, 198-199 (1981); *Colorado II*, 533 U.S. at 447, 457, 464.

[15] Mark Mellman & Richard Wirthlin, *Research Findings of a Telephone Study Among 1300 Adult Americans* (Sept. 23, 2002) at 6-7 [DEV 2-Tab 5, hereinafter Mellman & Wirthlin Expert Report].

[16] *Id.* at 7-8; *see also* Derek Bok, *The Effects of Campaign Financing on the Quality of Government* (Sept. 23, 2002), at 5-6 [DEV 2-Tab 4, hereinafter Bok Expert Report].

[17] Mellman & Wirthlin Expert Report at 8.

[18] *Id.* at 8-9. Elected officials think the same. *See, e.g.*, McCain Decl. at ¶¶ 1, 9-11 [DEV 8–Tab 29]. These deeply disturbing polling results are fully consistent with public opinion over the last 15 years. *See* Robert Y. Shapiro, *Public Opinion & Campaign Finance* at 9-18 (Sept. 18, 2002) [DEV 2-Tab 6, hereinafter Shapiro Expert Report].

masquerade as permissible "issue ads" by simply omitting specified words like "vote for" or "vote against."

In this brief, defendant-intervenors address the principal challenges to BCRA.[19] In the discussion of Title I, we show that the new national and state party soft money restrictions are a fully justified and necessary reform whose constitutionality is soundly grounded in applicable precedent. In the discussion of Title II, we show that BCRA's narrowly drawn rules on what money corporations and unions may use for certain kinds of ads at certain times are not precluded by *Buckley* and meet applicable constitutional requirements, as do the related disclosure requirements that apply to electioneering ads purchased by individuals. We also show that the coordination provisions in Sections 213 and 214 of BCRA are constitutional. Finally, in the discussion of Title III of the Act, we demonstrate that BCRA's Millionaire's Provisions are consistent with constitutional dictates.

I. BCRA's Soft Money Provisions Are Constitutional.

A. Background.

The Watergate investigations disclosed massive campaign finance abuses that repelled most Americans — illegal corporate and union contributions, large individual contributions, actual *quid pro quo* arrangements for ambassadorships, and an encompassing miasma of apparent corruption.[20] In response to these revelations, Congress substantially amended the Federal Election Campaign Act ("FECA") to limit individual contributions and to invigorate the

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[19] To minimize duplication, the Intervenors do not address every claim raised in the consolidated litigation in this brief, but concur in — and join — the government's showing that each of the challenged provisions is constitutional.

[20] *See* Report of the Watergate Special Prosecution Force 71-85 (Oct. 1975); *Buckley v. Valeo*, 519 F.2d 821, 839-40 (D.C. Cir. 1975) ("Congress and the public had become informed of the various aspects of the 1972 campaign. Revelations of huge contributions from the dairy industry, a number of corporations (illegally) and ambassadors and potential ambassadors, made the 1972 election a watershed for public confidence in the electoral system."), *aff'd in part, Buckley v. Valeo*, 424 U.S. 1 (1976).

long-standing but, until Watergate, ineffectually enforced prohibitions on corporate and union contributions.[21] Congress also offered presidential general election candidates the option of freeing themselves entirely from the burdens and entanglements of private fundraising by accepting public financing in return for a promise that they would not raise or spend private money for their campaigns.[22] *Buckley* and subsequent cases upheld disclosure provisions, contribution limits, and the Fund Act's public financing reform.[23]

The system worked well for a number of years,[24] until candidates and parties took advantage of FEC rulings premised on the fiction that campaign activity affecting both federal and state races — such as get-out-the-vote ("GOTV") efforts — could, at least in some theoretical sense, be divided into separate federal and state components.[25] Relying on this fiction, the FEC permitted the parties to allocate amounts spent on these activities, with a portion

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[21] *See* Mann Expert Report at 3-7.

[22] 26 U.S.C. §§ 9001-9013, 9031-9042 (1975) (establishing the Presidential Election Campaign Fund, providing public matching funds for qualified candidates, financed through revenue donated on individual tax returns in the amount of $1 per individual filing). Sections 9001 *et seq*. constitute the Presidential Election Campaign Fund Act, enacted by Pub. L. No. 92-178, § 801, 85 Stat. 563 (1971). Sections 9031 *et seq*. constitute the Presidential Primary Matching Payment Account Act, enacted by the 1974 Act amending FECA (Pub. L. No. 93-443, § 408(c), 88 Stat. 1297 (1974)).

[23] *Buckley*, 424 U.S. 1, 26-36, 60 (1976); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000) (upholding state contribution limits on political candidates and discussing both the disclosure and public financing provisions); *Colorado II*, 533 U.S. at 437 (upholding FECA's limits on a political party's coordinated expenditures).

[24] *See Electing the President: A Program For Reform, Final Report of the Commission on National Elections*, at 35 (The Center for Strategic and International Studies 1986) (Bipartisan commission concluded that 1974 amendment to FECA on public financing of presidential elections "has been a clear success, virtually eliminating the potential for corruption and greatly reducing opportunities for anyone or any group to exercise undue influence in presidential selection.").

[25] In two 1976 opinions, the Commission concluded that state or local party voter-registration and GOTV activities had to be paid for entirely with federal or "hard" money. *See* Adv. Op. 1976-83 and 1976-72. In 1978, however, the Commission reversed those opinions and concluded that such expenses could be allocated between federal and non-federal accounts in the same manner as party administrative costs. *See* Adv. Op. 1978-10. In addition, in 1979, the Commission expressly concluded that national party committees, too, could establish and maintain non-federal accounts for the deposit and disbursement of "office facility" funds exempt from FECA's limits or of funds raised and spent "for the exclusive and limited purpose of influencing the nomination or election of candidates for *nonfederal* office." Adv. Op. 1979-17 (emphasis added). For additional details see Mann Expert Report 7-11; *see also Common Cause v. FEC*, 692 F. Supp. 1391, 1394-96 (D.D.C. 1987); *Common Cause v. FEC*, 692 F. Supp. 1397, 1399 (D.D.C. 1988).

of the expenditure coming from regulated "federal" dollars and a portion coming from non-regulated, "non-federal," or "soft money" dollars. As described in greater detail in the Mann Expert Report,[26] based on these rulings and other legal developments, the national parties established "non-federal" accounts, for which elected officials, candidates, and party leaders solicited soft money funds from corporations and unions and from individuals who had already made the maximum hard-money contributions permitted by FECA. The parties then used those funds to pay a portion of their administrative and fundraising costs and to finance a share of GOTV or similar activities in states important to their presidential candidates or featuring close federal races. Over time, the fiction that an allocated share of soft money spent for these activities did not affect federal elections opened the door to a massive inflow of soft money into federal elections.

As Dr. Mann explains, national party soft-money fundraising and spending grew substantially in the 1980s, from an estimated total of $19 million in 1980 to $45 million (11 percent of party spending) in 1988.[27] In the 1992 election, soft-money fundraising and spending by the national parties grew to $80 million, representing 16 percent of overall party spending.[28] The parties sought gifts of $200,000 or more from top donors, primarily corporations and

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[26] *See* Mann Expert Report at 11-35.

[27] *See* Mann Expert Report at 11-15, Table 2 & Chart 1. In 1990, the FEC issued regulations that specified the ways in which certain expenses could be allocated between parties' "federal" and "non-federal" accounts, required national party committees to report all "non-federal" (soft money) receipts and disbursements, and required state committees to report disbursements of soft money for allocated expenses — i.e., those that related in part to federal elections. *See* 11 C.F.R. §§ 104.8(e)-(f), 104.9(c)-(e), 104.10(b), 106.5 (revised under BCRA, effective Nov. 6, 2002 (*see* 67 Fed. Reg. 49064, 49112-16)). These regulations "effectively routinized the raising and spending of soft money by the national parties," giving them "explicit guidelines on how to spend soft money on activities that benefit federal as well as state and local candidates without risking an [FEC] enforcement action." Mann Expert Report at 15 (citation omitted). See Intervenors' First Excerpts of Record (attached at Appendix B) [hereinafter IER] at Tab 2 for Charts containing party fundraising data.

[28] Constant-dollar figures are set out in Table 3 attached to the Mann Expert Report.

unions.[29] Almost $15 million was transferred to state parties — principally for voter identification and GOTV programs — and principally in ten states that were battlegrounds in the federal presidential election. *See id.* at 16. By the end of the election, students of parties and campaign finance recognized that, while the theory of soft money was that "non-federal" funds could be used for non-federal purposes, a major share of the soft money was in fact being spent for the purpose of influencing federal elections, thus allowing federal officials to raise soft money and steer it towards activities that would benefit their own elections. *See id*. at 17.

Under the direction of President Clinton and Dick Morris, the role of soft money dramatically expanded in the 1996 election. *See id.* at 17-21. Until 1995, it had been assumed that, while parties could use soft money in voter mobilization efforts, they could not substitute it for hard money in the core area of candidate-specific mass communications. Starting in August of 1995, however, Democratic committees raised and spent an estimated $34 million on television ads allegedly about issues, but prominently featuring President Clinton, without accounting for those expenses as contributions or coordinated expenditures subject to FECA and funding them, like generic party advertising, with a mix of hard and soft money. *See id.* at 18. Although informed observers considered this use of "issue ads" an "extraordinary leap," *id.* at 18-19, the Republican National Committee naturally followed suit. Senator Dole candidly revealed the purpose of the RNC "issue" ads run during the 1996 campaign: "It doesn't say 'Bob Dole for president.' . . . It talks about the Bob Dole story. It also talks about issues. . . . it never says that I'm running for President, though I hope that's fairly obvious, since I'm the only

[29] *See* Mann Expert Report at 15 & Table 4.

one in the picture! (Laughter)."[30] The FEC ultimately took no enforcement action to challenge these practices. *See* Mann Expert Report at 22-23.

Not surprisingly, national parties spent more than three times as much soft money in 1996 as in 1992 — $272 million — and soft money accounted for 30 percent of total party spending in that cycle. *See id.* at 21. The $115 million in soft money that the national parties transferred to their state committees financed two-thirds of the state parties' soft-money expenditures, including running the new party "issue" ads. Moreover, by transferring both hard and soft money in appropriate proportions, the national parties were able to take advantage of the more favorable allocation ratios available to various state parties, decreasing the overall ratio of hard to soft money required to fund their activities.[31] Thus, despite FECA, the national parties were funding a major share of their federal campaign efforts with money raised by elected officials, candidates, and party officials in unlimited amounts from corporations, labor unions, and wealthy individuals; they were using that money in part to fund broadcast advertising specifically referring to candidates for federal office; and they were using the state parties principally as vehicles to achieve maximum leverage and efficiency in these circumventions of the federal campaign finance laws.

In the 1998 off-year elections, the national parties together raised and spent $221 million in soft money — 34 percent of their total spending and more than double the amount of soft money spent in the previous mid-term election. *See id.* at 23. Again, the focus was on sham

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[30] Thompson Comm. Rep. at 4153-54.

[31] *See* Mann Expert Report at 22. Allocation rules require that national parties use 60 percent hard money (65 percent hard money during a presidential election year) for these "issue" ads. 11 C.F.R. § 106.5(b) (revised under BCRA, effective Nov. 6, 2002 (*see* 67 Fed. Reg. 49064, 49112-16)). By contrast, the hard money percentage required for state party committees is based on the ratio of federal candidates to state candidates on the ballot and is therefore typically much lower than 60 percent (many states can, in some elections, spend almost two-thirds soft money). *See* 11 C.F.R. § 106.5(d)(1); *see also* Federal Election Commission, *Campaign Guide for Political Party Committees* 48 (Aug. 1996).

"issue advocacy." *Id.* at 24. "Virtually all" of the ads run by political parties funded by soft money mentioned a federal candidate. *Id.*

Finally, in the 2000 presidential election, soft money fundraising and spending by the national parties reached $498 million — 42 percent of their total spending and, even in inflation adjusted dollars, five times as much as in the 1992 election. *See id.* at 24 & Table 3. Strikingly, for the first time, the two Democratic congressional campaign committees, which are composed of sitting Senators and Representatives and have the principal mission of electing federal candidates, actually raised and spent more soft money than hard money. *See id.* at 25. To raise a half-billion dollars, the national parties turned to large donors: 60 percent of the soft money they raised in the 2000 cycle came from just 800 donors, including 435 corporations, unions, and other organizations and 365 individuals, each contributing at least $120,000. *See id.* at 24-25. The top 50 soft money donors — including the now notorious Enron and WorldCom — each contributed between $955,695 and $5,949,000. *See id.* at 25. Many top contributors gave soft money to both parties, undermining any claim that the contributions were made for ideological — as opposed to pragmatic — reasons.[32] In the 2000 election cycle alone, AT&T, Microsoft, Enron, Freddie Mac, SBC Communications, and Citigroup, among others, each gave over $400,000 to each political party. Ninety-three entities gave $100,000 or more in soft money to both the Democrats and Republicans during this time period.[33]

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[32] *See* Donald P. Green, *Report on the Bipartisan Campaign Reform Act* (Sept. 23, 2002) at 25-26 & Ex. E [DEV 1-Tab 3, hereinafter D. Green Expert Report].

[33] *See* INT 004087-96 [DEV 31–Tab 52], Common Cause Report, *You Get What You Pay For* (2000) (describing soft money donations made between January 1, 1999 and June 30, 2000, and explaining that 93 donors gave $100,000 or more to each of the parties during this time period); *see also* INT 000139-143 [DEV 31–Tab 32], Common Cause, *Follow the Dollar Report: Life of the Party* (2001) (containing chart showing that 41 corporations and other entities each donated $100,000 or more in soft money to each political party in the year 2001 — a non-election year — alone); INT 000120-23 [DEV 31–Tab 30], Common Cause, *Follow the Dollar Report: Sale of the Century* (1999) (containing chart showing that in the first six months of 1999, 37 soft money donors gave $50,000 or more apiece to each political party); INT 000104-07 [DEV 30–Tab 22], Common Cause, *Follow the Dollar Report: Party Favors* (1998) (containing chart showing that during 1997, ten companies each gave $100,000 or more in soft

In spending this soft money, the national parties again focused on purported "issue advocacy," and again operated by transferring a mix of hard and soft money to strategically selected state parties.[34] To do this, the national parties transferred $280 million in soft money, along with $135 million in hard money, to state parties.[35]

The FEC has reported that the national parties have raised to date more soft money in the 2002 election cycle, an off-year election, than in any previous election cycle for a comparable period.[36] The national parties reported raising $421.3 million from January 2001 through October 16, 2002, twice what was raised during the same period in the 1998 cycle.[37] The largest increases were reported by the national congressional campaign committees,[38] which are composed of elected federal legislators.

As Dr. Mann concludes, "The evidence that national parties were raising soft money . . . and using it by working through state parties to influence federal elections was decisive."[39] Among other activity, it was clear that candidate-specific "issue ads" parties ran were overwhelmingly intended to influence the outcome of particular federal elections. Mann Expert Report at 26. While "[s]cholars might differ about how best to change the campaign finance

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money to each party and 48 donors each gave $50,000 or more in soft money to each party during the same period); INT 000096-100 [DEV 30–Tab 23], Common Cause, *The Sure Thing* (1996) (containing chart showing that 93 soft money donors each gave at least $50,000 to each party between Jan. 1, 1995 and Jun. 30, 1996); Cong. Rec. S12579 (Oct. 14, 1999) (statement of Sen. Feingold) (explaining that seven donors in 1992 gave 150,000 to both parties, while 43 donors did so in 1996, and noting that such donors are looking to ". . . get their hooks into whoever is controlling the legislative agenda.").

[34] Mann Expert Report at 25.

[35] Federal Election Commission press release, *FEC Reports Increase in Party Fundraising for 2000* (May 15, 2001) www.fec.gov/press/051501party fund/051501party fund.html.

[36] Federal Election Commission press release, *National Party Fundraising Strong In Pre-Election Filings* (Oct. 30, 2002) *available at* http://www.fec.gov/press/20021030partypre.html/20021030partypre.html.

[37] *Id.*

[38] *Id.*

[39] Mann Expert Report at 26.

system, . . . they could not avoid the conclusion that party soft money and electioneering in the guise of issue advocacy had rendered the FECA regime largely ineffectual." *Id.*

B. The Bipartisan Campaign Reform Act.

In response to this history of evasion and deterioration of the law, Congress enacted the Bipartisan Campaign Reform Act ("BCRA"), and, in Title I of the Act, sought to curtail the soft money abuses by imposing contribution limits of the kind the Supreme Court has consistently sustained since *Buckley*. To avoid unnecessary duplication, the Intervenors refer the court to the government's discussion of Title I of the Act for a detailed description of the relevant provisions. At the most general level, however, the provisions in Title I attack the soft money problem by barring the national committees of the political parties, their personnel, and entities they establish or control from soliciting soft money, receiving it, directing it to another person, transferring it, or spending it.[40] The law imposes comparable restrictions on federal candidates and officeholders.[41] At the same time, BCRA raises the *hard* money limits on contributions by individuals to candidates (from $1,000 to $2,000 per election cycle) and to parties (from $20,000 to $25,000 per year).[42]

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[40] *See* BCRA § 101(a) (2 U.S.C. § 441i(a)).

[41] *See* BCRA § 101(a) (2 U.S.C. § 441i(e)(1)(A)).

[42] 2 U.S.C. § 441a(a)(1)(A)-(B). In addition, to combat the risk and appearance of corruption that arises from the act of solicitation — a risk and appearance that remain regardless of the political use to which the money may ultimately be put — the law also prohibits federal officeholders and candidates from soliciting money for nonfederal elections in any amount in excess of the federal hard money limits. *See* 2 U.S.C. § 441i(e)(1)(B). In other words, under BCRA, a federal officeholder may, for example, raise up to $2,000 from an individual for use in a state senate election, but may not raise money from a corporation for that purpose. *See* 148 Cong. Rec. S2140 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). To avoid undue interference with traditional political activity, BCRA makes clear that federal officeholders and candidates can appear and speak at state and local party events, as long as they do not solicit money. *See id.* BCRA seeks to balance competing policy considerations by allowing federal candidates to raise money for 501(c) organizations in certain circumstances. *See id*.

Federal campaign finance laws have long applied to the use of contributions by state parties for activities affecting federal elections.[43] Recognizing that a soft money ban at the national level cannot be effective without soft money restrictions on parties at the state and local levels, Congress restricted the use of soft money at the state and local level for certain specified party activities that affect federal elections. BCRA thus requires that state, district, and local committees use hard money either in part or in whole to pay for four categories of "Federal election activity": (1) voter registration activity during the 120 days immediately before a regularly scheduled federal election; (2) voter identification, GOTV, and generic campaign activity[44] conducted in connection with an election in which a candidate for federal office is on the ballot; (3) public communications that promote, support, attack, or oppose a clearly identified candidate for federal office; and (4) the services of state party employees who spend more than 25 percent of their time on activities in connection with a federal election.[45]

At the same time, Congress left state and local parties free to raise all the funds state law permits and to pay for purely state election activities with whatever funds state law allows. BCRA provides that state, district, and local committees may use soft money contributions of up to $10,000 to pay for a portion of certain federal election activities,[46] moreover, so long as the

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[43] *See, e.g.*, 11 C.F.R. § § 106.5, 104.10(b) (revised under BCRA, effective Nov. 6, 2002 (*see* 67 Fed. Reg. 49064, 49113, 49116)).

[44] "Generic campaign activity" is defined as a campaign activity that promotes a political party rather than a candidate. *See* BCRA § 101(a), amending FECA § 301, 2 U.S.C. § 431(21).

[45] 2 U.S.C. § 441i(b); 2 U.S.C. 431(20)(A). Congress concluded that such activities substantially affect federal elections. *See, e.g.,* 148 Cong. Rec. H409 (Feb. 13, 2002) (statement of Rep. Shays); 147 Cong. Rec. S2887 (Mar. 26, 2001) (statement of Sen. Feingold); *see also* Fowler Decl. ¶ 17 [DEV 6-Tab13] (noting that "various activities such as GOTV campaigns, voter identification efforts, voter registration drives, and advertisements that mention federal as well as state candidates have the effect of promoting candidates for federal office as well as candidates for state office"); Lamson Decl. ¶ 15 [DEV 7-Tab 26] (noting that political parties carried out GOTV, voter registration, and identification activities in order to promote their congressional candidates); Kirsch Decl. ¶ 9 [DEV 7-Tab 23]. While plaintiffs argue that such activities also affect state elections held at the same time, they cannot argue that those activities do not affect federal elections. [REDACTED]

[46] Levin Amendment funds may be used only for those federal election activities (described in 2 U.S.C. 431(20)(A)(i) and (ii)) that neither mention federal candidates nor involve broadcast media (except in the case of a

money is raised by the state party making the expenditure.[47] BCRA also specifically excludes from the definition of "Federal election activity": (1) the costs of state, district, or local political conventions; (2) the costs of grassroots campaign materials that name or depict only candidates for state or local office, (3) contributions to candidates for state and local office, so long as the contribution is not designated for a federal election activity; and (4) public communications that refer solely to a clearly identified candidate for state or local office and that do not constitute voter registration, voter identification, or GOTV efforts.[48]

C. The Constitutional Framework.

The Supreme Court has addressed the constitutionality of campaign contribution limits on a number of occasions, and on each the Court has sustained the constitutionality of those limits. In doing so, the Court has articulated two constitutionally sufficient rationales for campaign contribution limits. First, the Court has repeatedly held that avoiding both the actuality and the appearance of corruption in government provides an ample basis for restricting campaign contributions. *See Buckley*, 424 U.S. at 26-28; *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 388-89 (2000). Second, the Court has recognized that Congress may take steps — including limiting conduct that is "functionally" equivalent to contributions — to prevent "circumvention of valid contribution limits."[49]

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communication which refers solely to a clearly identified candidate for state or local office). 2 U.S.C. § 441i(b)(2)(B)(i) and (ii).

[47] 2 U.S.C. § 441i(b)(2)(B)(iv), (C). The average non-federal donor gives a donation of under $10,000, well within the Levin Amendment's limits. *See* Rebuttal Report of Professor Donald P. Green at 3 [DEV 5-Tab 1, hereinafter D. Green Rebuttal Report].

[48] *See* 2 U.S.C. § 431(20)(B).

[49] *Colorado II*, 533 U.S. at 456, 465; *see also Shrink Missouri*, 528 U.S. at 392-94; *Nat'l Right to Work Comm.*, 459 U.S. at 210 ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."); *Cal. Med. Ass'n*, 453 U.S. at 198-99; *Buckley*, 424 U.S. at 38.

It is important to understand what the Court means by actual or apparent corruption. The Court has not limited either concept to the "taking of bribes" or similar *quid pro quo* actions. Rather, the Court has recognized that Congress may redress less "blatant and specific attempts of those with money to influence governmental action," *Buckley*, 424 U.S. at 28, including the risk that large contributions will exert an "undue influence on an officeholder's judgment [or] the appearance of such influence," *Colorado II*, 533 U.S. at 441. As the Court explained in *Shrink Missouri,* 528 U.S. at 389, "[i]n speaking of 'improper influence' and 'opportunities for abuse' in addition to 'quid pro quo arrangements,' we recognize[] a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors."[50]

The Supreme Court, in consistently upholding contribution limits, has recognized that restrictions on contributions have only an indirect and "marginal" impact on political speech.[51] Contribution limits "leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates," and they leave political associations free "to aggregate large sums of money to promote effective advocacy."[52] Thus, even a contribution limit that involves "significant interference" with associational rights

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[50] *See also Beaumont v. FEC*, 278 F.3d 261, 272 (4th Cir. 2002) ("Quid pro quo corruption is related to a second form of corruption, monetary influence. Corruption through monetary influence is a more subtle and hence more pervasive form of corruption than the quid pro quo, one in which officeholders consider monetary influences when performing their public duties.").

[51] *See Buckley*, 424 U.S. at 20-21.

[52] *Id.* at 22; s*ee also Shrink Missouri*, 528 U.S. at 387; *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615 (1996) (Breyer, J., plurality opinion) (treatment of contribution limits "has been grounded in the observation that restrictions on contributions impose 'only a marginal restriction upon the contributor's ability to engage in free communication,' . . . and because such limits leave 'persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources"); *id*. at 628 (Kennedy, J., concurring in part and dissenting in part) ("[i]n *Buckley*, we concluded that contribution limitations imposed only 'marginal restriction[s]' on the contributor's First Amendment rights, because certain attributes of contributions make them less like 'speech' for First Amendment purposes").

is constitutional if the government demonstrates that the regulation is "closely drawn" to further a "sufficiently important interest." *Shrink Missouri*, 528 U.S. at 387-88; *Buckley*, 424 U.S. at 25. Contribution limits are thus subject to a "somewhat less stringent test than strict scrutiny" and need not be the least restrictive means to serve the government's interest. *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1322 (9th Cir.) (citing *Buckley,* 424 U.S. at 20-21).

Furthermore, the Court has left no doubt that the prevention of actual and apparent corruption is a sufficiently important government purpose to justify contribution limits — indeed, although not constitutionally required, the courts have held that this interest is a "compelling" one.[53] As the Supreme Court has explained, "[c]onflict of interest legislation is 'directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.'" [54] Thus, the government interests in preventing corruption and the appearance of corruption "directly implicate 'the integrity of our electoral process.'"[55]

Drawing on the Court's recognition of the profound importance that campaign finance laws play in maintaining and securing public confidence in the democratic process, Justice

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[53] *See NCPAC*, 470 U.S. at 496-497 (describing "preventing corruption or the appearance of corruption" as "legitimate and compelling government interests"); *Nat'l Right to Work Comm.*, 459 U.S. at 208 ("The importance of the governmental interest in preventing [the corruption of elected representatives] has never been doubted.") (quotations and citations omitted); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-789 (1978) ("Preserving the integrity of the electoral process, preventing corruption . . . are interests of the highest importance."); *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 650-651 (6th Cir. 1997) ("The Supreme Court has consistently held that preventing perceived corruption is a compelling state interest"); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996) ("the state's interest in reducing corruption and its related concerns constitute[s] a compelling state interest") (internal quotations and citation omitted).

[54] *Crandon v. United States*, 494 U.S. 152, 165 n.20 (1990) (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961)).

[55] *Nat'l Right to Work Comm.*, 459 U.S. at 208 (quoting *U.S. v. UAW*, 352 U.S. at 570).

Breyer has explained that, when a campaign finance rule is challenged, "First Amendment-related interests lie on both sides of the constitutional equation, and that a First Amendment presumption hostile to government regulation, such as 'strict scrutiny,' is consequently out of place."[56] By "building public confidence in th[e] process," campaign finance laws "help to further the kind of open public political discussion that the First Amendment also seeks to encourage, not simply as an end, but also as a means to achieve a workable democracy."[57] Put most forcefully, "avoidance of [even] the appearance of improper influence" in our conduct of our government is "'critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'"[58]

Applying these standards, the Court has embraced the common-sense notions that large political contributions will inevitably tend to distort the judgment of even honorable elected officials,[59] and that the public will undoubtedly perceive a system that is inundated with large contributions as skewed in favor of those who give.[60] As a result, the Court has required only minimal evidence to support a legislative finding that large political contributions may give rise to actual or apparent corruption. In *Buckley*, although the Court did not itself "marshal the evidence in support of the congressional concern, [it] referred to 'a number of abuses' detailed in the Court of Appeals' decision." *Id.* at 391. Those abuses included "extensive contributions by dairy organizations to Nixon fund raisers, in order to gain a meeting with White House officials;"

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56 Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 253 (2002).

57 *Id*.

58 *Buckley*, 424 U.S. at 27 (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)).

59 *See United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1961) (recognizing "that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.").

60 *See, e.g.*, *Shrink Missouri*, 528 U.S. at 395 ("there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters.").

coordination by the milk producers to contribute a total of $2 million through individual contributions of no more than $2,500 and the coincidence in time between the contributions and a decision favorable to the dairy organizations; "lavish contributions by groups or individuals with special interests to legislators from both parties;" testimony that contributions were motivated "by the perception that this was necessary as a 'calling card, something that would get us in the door and make our point of view heard'" and the giving of contributions as "a means of obtaining the recognition needed to be actively considered."[61] In *Shrink Missouri*, the Court relied upon the affidavit of a state senator asserting that "large contributions have 'the real potential to buy votes;'" "newspaper accounts of large contributions supporting inferences of impropriety;" a number of scandals discussed in a judicial decision; and polling evidence showing that a large percentage of voters in the state believed that contribution limits were "necessary to combat corruption and the appearance thereof."[62]

As shown below, the evidence of the actual and apparent corrupting influence of soft money is overwhelming. As Senator Alan Simpson, the former Senate Republican Whip, testified, "I have seen firsthand how the current campaign financing system prostitutes ideas and ideals, demeans democracy, and debases debates."[63] Based on this experience, he concluded:

> Too often, Members' first thought is not what is right or what they believe, but how it will affect fundraising. Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about — and quite possibly votes on — an issue? Donations from the tobacco industry to Republicans scuttled tobacco legislation, just as contributions from trial lawyers to Democrats stopped tort reform.[64]

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61 *Buckley*, 519 F.2d at 839-40 nn.36-38 (D.C. Cir. 1975) (citation omitted).

62 *Shrink Missouri,* 528 U.S. at 393-94.

63 Simpson Decl. ¶ 2 [DEV 9-Tab 38].

64 *Id.* ¶ 10.

Likewise, the evidence leaves no doubt that Congress not only acted reasonably in closing soft money loopholes at both the federal and state levels, but that it would have been foolhardy to attempt to close certain loopholes and not others. Indeed, counsel for the RNC plaintiffs testified before Congress that ". . . a prohibition of soft money donations to national party committee alone would be wholly ineffective . . . ."[65] An effective soft money ban must ". . . seek to impose restrictions on State parties as well."[66] In short, the evidence shows that Congress acted against the backdrop of a history of persistent and expansive evasion of FECA, and acted to stem that abuse in a balanced and considered manner.

D. The Record Provides Overwhelming Support for Congress's Judgment that Soft Money Has Been Used To Evade the Law and, in Actuality and Appearance, Corrupts the Political Process.

1. How Soft Money Is Raised and Why It is Given.

Soft money does not arrive pristinely in the mail at party headquarters.[67] Elected officials raise much of it.[68] [REDACTED]

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[65] *The Constitution and Campaign Reform: Hearings on S. 522 Before the Comm. on Rules and Admin.*, 106 Cong. 301 (2000) (statement of Bobby R. Burchfield, Partner, Covington & Burling); s*ee also* 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain); *see also Oversight of the Federal Election Commission: Hearing Before the House Subcomm. on Gov't Mgmt., Info., & Tech.*, 105th Cong. 140 (Mar. 5, 1998) (testimony of Lawrence Noble) (noting that, as a general matter, "You have to look at the State level, also. You don't want to just force all that money down to the State level where you may have less disclosure and you may have much more lenient rules than at the Federal level. And that may, in the end, be counterproductive, if you just open at the State level what they can do."); *see also* Brock Cross. Tr. (Oct. 16, 2002) at 33 [hereinafter Brock Cross Tr.] (explaining why allowing state parties to use unregulated soft money "eviscerate[s]" the positive effects of BCRA, because of the fungibility of money.")

[66] *The Constitution and Campaign Reform: Hearings on S. 522 Before the Comm. on Rules and Admin.*, 106 Cong. 294 (2000) (statement of Bobby R. Burchfield, Partner, Covington & Burling).

[67] *See, e.g.*, Hickmott Decl. ¶ 9 [DEV 6-Tab 19] ("I tell my clients that they should personally give the money to a Member of Congress who can then give the money to the Chair of the party committee . . . . That way the donor, with one check, gets "chits" with multiple Members of Congress.") .

[68] Plaintiffs' expert acknowledges this. *See* Ray La Raja, *American Political Parties in the Era of Soft Money* (2001) 54 (unpublished Ph.D. dissertation, University of California at Berkeley) (attached to La Raja Cross Tr. (Oct. 15, 2002) at Ex. 3 and noting that he stands by the conclusions in his dissertation at La Raja Cross Tr. 17-18) [hereinafter La Raja Cross. Tr., Ex. 3] ("[M]ost party fundraising comes through face-to-face solicitations made by the party's candidates to prospective contributors."); *see also* McCain Decl. ¶ 7; Rudman Decl. ¶ 6 [DEV 8-Tab 34]; Shays Decl. ¶¶ 3,7 [DEV 8-Tab 35]; Simpson Decl. ¶¶ 4-6; Simon Decl. ¶ 4 [DEV 9-Tab 37]; Fowler Decl. ¶ 4; *see*

Federal officials participate in soliciting soft money for two reasons: first, they benefit from the soft money they raise; and second, their success as fundraisers reinforces their status in the party organization and the political hierarchy. [REDACTED][69] As the RNC plaintiffs' expert has observed, "[c]andidates control the flow of resources into parties, so they exert considerable leverage over how the party spends money."[70]

The elected officials who have their hands out also have their hands on legislation important to the donors, and those officials benefit when their parties spend soft money in ways that enhance their election prospects.[71] Former Senator Rudman testified:

> Nor should anyone have any illusions about the solicitation side of the process. Much of the soft money raised for political parties is raised by elected officials — sitting members of the Senate and the House of Representatives. . . . These and other elected officials solicit large sums of money from businesses, unions, and wealthy individuals who have legislative matters pending before the Senate and the House. *And make no mistake about it, elected officials who raise money for their party committees know exactly why most corporations, unions, and wealthy individuals contribute large sums to the party* . . . .[72]

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also Thompson Comm. Rep. at 9538 (Sen. Lieberman stated: "[W]ere it not for the lure of soft money and the relentless pressure to raise it, . . . [t]he President and the Vice-President, for example, never would have felt the need even to consider personally phoning supporters for donations, and we likely never would have seen the White House and Capitol Hill conscripted into serving the fundraising goals of the DNC, the RNC, and the two major presidential campaigns.").

[69] [REDACTED] [REDACTED]; *see also* Hickmott Decl., Ex. A, ¶¶ 8-26. *See also Colorado II*, 533 U.S. at 458-460; s*ee also* B. Thompson Dep. Tr. (Sept. 18, 2002) at 28 ("Q: Do you know does the DCCC to your knowledge keep any sort of record or credit or tally of amounts that members raise? A: They provide the entire Democratic Caucus with the amounts of money raised by name of every Democratic member of Congress. Q: They circulate that list? A: At the Democratic Caucus meeting.").

[70] La Raja Cross Tr., Ex. 3 at 15.

[71] *See* Shays Decl. ¶¶ 3, 7-10; Simpson Decl. ¶¶ 6-7. S*ee also* Simpson Dep. Tr. at 18 (providing an example of how the Republican Party would ask Archer Daniels Midland to buy tables at a fundraising event, cognizant of the agriculture bill coming up in Congress, and, in terms of ADM's willingness to buy a table, "you don't have to remind them. Part of the ag[riculture] bill is the corn subsidy, which is 5.2 billion bucks. And they eat off of it. In fact, they get most of it. It doesn't go to little old guys scrubbing around with dirt all over their hands. It goes to Archer Daniels Midland and Cargill and Shipper's.").

[72] Rudman Decl. ¶ 6 (emphasis added); s*ee also* Simpson Decl. ¶¶ 4-5 ("When I was in the Senate the Republican leadership would take us off Capitol Hill — usually to the Reagan Center — give us a list of heavy hitters, and tell us to make phone calls to get more money from these donors. . . . The more money one donates, the higher-level players he or she had access to. . . . Although I rarely made phone calls for the party, I agreed to attend and speak at their donor events. . . . Donors were often allowed to choose whom they wanted to sit with at events, provided they

When elected officials raise soft money, the tie between soft money contributions and pending legislation is not left to the imagination.[73] Here is an example of [REDACTED]

Or take the rationale for [REDACTED]

Senator Zell Miller of Georgia describes his experience in a fashion more vivid than most:

> I locked myself in a room with an aide, a telephone, and a list of potential contributors. The aide would get the "mark" on the phone, and then hand me a card with the spouse's name, the contributor's main interest, and a reminder to "appear chatty." I'd remind the agri-businessman that I was on the Agriculture Committee; I'd remind the banker I was on the Banking Committee. And then I'd make a plaintive plea for soft money — that armpit of today's fundraising. I'd always mention some local project I'd gotten — or hoped to get — for the person I was talking to. Most large contributors understand only two things: what you can do for them and what you can do to them. I always left that room feeling like a cheap prostitute who'd had a busy day.[74]

When federal elected officials do not raise the funds themselves, national party figures raise soft money in ways that often implicate federal elected officials. As Donald Fowler, former DNC Chairman, testified: "Party officials . . . offer to large money donors opportunities to meet with senior government officials. Donors use these opportunities — White House and congressional meetings — to press their views on matters pending before the government. This process undermines our democratic processes and creates a lack of confidence in its fairness on the part of average citizens."[75] Striking examples are reflected [REDACTED]

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have enough money. Party leaders would inform Members at caucus meetings who the big donors were. . . . At these events, it was not uncommon for the donors to mention certain legislation that affected them.").

[73] *See, e.g.*, [REDACTED]

[74] 147 Cong. Rec. S2445 (daily ed. Mar. 19, 2001) (statement of Sen. Feingold) (quoting Zell Miller, *A Sorry Way to Win*, Wash. Post, Feb. 25, 2001, at B7). Soft money donors realize that success at fundraising reinforces a politicians' status, and thus often "credit" their donations to helpful politicians. *See, e.g.*, [REDACTED]

[75] Fowler Decl. ¶ 8; *see also* Statement of Sen. Levin, 147 Cong. Rec. S2972 (daily ed. Mar. 27, 2001) (detailing access provided to major donors by both parties); FEC Soft Money Rulemaking: Analysis, Recommendations and Draft Final Rules, Memorandum, Agenda Document (FEC) No. 00-95 (Sep. 21, 2000) at 26; Thompson Comm. Rep. at 194 (describing a memorandum written by Terry McAuliffe to "organize breakfasts, luncheons, and coffees

The RNC also advertises access to legislators in exchange for big money. In a letter to prospective Mississippi Republican Team 100 members — who are asked to donate $100,000 to the RNC on joining and $25,000 for each of three years thereafter — John Palmer, the Chairman of Mobile Telecommunication Technologies, said:

> I had called you several weeks ago to ask you to join the Team 100 committee of the Republican Party. I feel that we have a rare opportunity with Haley [Barbour], Trent [Lott] and Thad [Cochran] in the positions they are today. Ed Lupberger, CEO of Entergy, joined Team 100 earlier this year and this past Spring, I saw Haley escort him on four appointments that turned out to be very significant in the legislation affecting public utility holding companies. In fact, it made Ed a hero in his industry.[76]

Even if federal officials do not make each solicitation themselves, they know who the biggest donors to the party are.[77]

Both parties' large soft money fundraising events regularly feature opportunities for major donors to meet with high-ranking Members of Congress and Administration officials.

[REDACTED][78]

Sometimes, senior party officials who raise soft money themselves intercede with legislative and executive branch decision makers. Mr. Fowler, as DNC Chairman, called the White House, and Patrick O'Connor, a former DNC Treasurer, spoke to the President, about the opposition of Minnesota Indian tribes to an application, submitted by other tribes to the

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with the President for about twenty 'major supporters' at a time—to 'offer these people an opportunity to discuss issues and exchange ideas with the President.' McAuliffe's second project was to offer the very top supporters 'overnights' at the White House. The third project in McAuliffe's memorandum was to include 'key supporters' in various other activities with the President, including 'golf games, morning jogs, etc.' The key to all three of these projects was to give major donors 'quality time with the President.'").

[76] Thompson Comm. Rep. at 8031; s*ee also* [REDACTED] See Tab 4 of Intervenors' Excerpts of Record for documents demonstrating the benefit of joining a national committee "donor club" such as Team 100.

[77] Boren Decl. ¶ 6 [DEV 6-Tab 8] ("Each Senator knows who the biggest donors to his party are. Donors prefer to hand their checks to the Senator personally . . . ."); McCain Decl. ¶ 6; Simpson Decl. ¶ 5 ("Party leaders would inform Members at caucus meetings who the biggest donors were.").

[78] *See* [REDACTED] In addition to preferential seating and private receptions at larger events, major donors are invited to join elected officials on golf outings, ski weekends, interactive conference calls, and at policy breakfasts. Boren Decl. ¶ 5-6; [REDACTED] See Tab 6 of Intervenors' Excerpts of Record for additional examples.

Department of Interior, to open a rival casino.[79] The Minnesota tribes thereafter became significant soft money donors to the DNC and other party committees.[80] Republican examples also abound. [REDACTED]

Congressman Shays vividly testified to the involvement and influence of party officials in the legislative process.[81]

Donors often view soft money donations as a business investment. Senator Rudman explained why: "By and large, the business world, including corporations and unions, gives money to political parties [because] . . . they believe that large contributions to a party (or, in some cases, to both major parties) will enable them to gain privileged access to and special influence over elected and appointed officials so they can affect government decisions in Washington that affect their interests . . . ."[82] The value of access to a particular official, moreover, turns on the influence that official can wield. Thus, as the RNC plaintiffs' expert, Professor La Raja, has observed, "party leaders raise the most [soft] money."[83] They are able to

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79 *See* Thompson Comm. Rep. at 44-45; *see also* Fowler Decl. ¶ 11.

80 *See* Thompson Comm. Rep. at 45.

81 Shays Dep. Tr. (Sept. 27, 2002) at 179 (explaining that during consideration of BCRA, "I had some Members say they could not support [BCRA] because they were told they would not get the support of [their party]; they would not get the support of [the congressional committee of their party]; and I had Members tell me, more than one who had voted for the bill in 1999, they could not vote for it this time and they hoped I understood, but if they voted for it, they would not be considered for chairmanship of a major committee.").

82 Rudman Decl. ¶ 5; *see also* 147 Cong. Rec. S2448 (daily ed. March 19, 2001) (Sen. Levin stated: "[I]n order to get these large contributions, access to us is openly and blatantly sold . . . We sell access to insiders' meetings, strategy sessions, participation in congressional advisory groups, or trade missions."). Congressman Paul agrees that this occurs: "Why do you think, say, someone like Speaker Hastert finds it easier to raise funds once he became Speaker of the House? A: Because he's important in the legislative process." Paul. Dep. Tr. (Sept. 25, 2002) at 35; *see also* D. Green Expert Report at 25.

83 La Raja Cross Tr., Ex. 3, at 34. Plaintiff Congressman Ron Paul also conceded this point. *See* Paul Dep. Tr. at 33. (Q: Based on your knowledge of what other members of your party do in the way of fund-raising for the Republican party, is it your sense that the Republican members of the House who hold leadership positions generally raise a significant amount of money for the party? . . . The Witness: They raise money — the leadership raise a lot of money for the party? Sure. . . . Q: And is it your sense that that includes soft money? A: Sure. Q: Do you think fund-raising plays a role in whether a member gets a leadership position? A: Yes.").

do so, in his view, because "[l]egislative leaders and the presidential nominee . . . control policy more than other office holders."[84]

[REDACTED][85]

[REDACTED] corroborate the testimony of Gerald Greenwald, former Chairman of United Airlines:

> most unions and corporations give large soft money contributions to political parties — sometimes to both political parties — because they are afraid to unilaterally disarm. They do not want their competitors alone to enjoy the benefits that come with large soft money donations: namely, access and influence in Washington. Labor and business leaders believe — based on experience and with good reason — that such access gives them an opportunity to shape and affect governmental decisions and that their ability to do so derives from the fact that they have given large sums of money to the parties.[86]

[REDACTED]

The legislative history documents how a notorious businessman, Roger Tamraz, made enormous soft money contributions to the DNC and to various state Democratic parties beginning in 1995 and, as a consequence, was granted no fewer than six meetings with President

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[84] La Raja Cross Tr., Ex. 3, at 34, n.4.

[85] [REDACTED] Simply put, access is largely a function of the size of one's contributions. As one lobbyist put it, "give greater amounts of money through soft money contributions . . . get better access." Rozen Decl. ¶ 11 [DEV 8-Tab 33]. Thus, for example, the largest donor at a fundraising event is the one who will sit next to the President. *See* Buttenwieser Decl. ¶ 25 [DEV 6-Tab 11]. [REDACTED] Accordingly, soft money donors have learned to leverage their donations by identifying the Members with whom they should maintain relationships based on their business interests, *see* Bumpers Decl. ¶ 32 [DEV 6-Tab 10], and giving the money directly to those Members who will then pass it on to the Chair of the committee rather than sending the check to a staffer at the committee — thus garnering favor with multiple Members of Congress with a single donation. *See* Hickmott Decl. ¶ 9.

[86] Greenwald Decl. ¶ 12 [DEV 6-Tab 16]. Charles Kolb, the President of the Committee for Economic Development ("CED"), a group of prominent business leaders and educators, testified that many business leaders agree with Mr. Greenwald's criticism of the system. In 1998, CED issued a report and policy statement on the campaign finance system "with virtually no dissent." Kolb I Decl. ¶ 4 [DEV 7-Tab 24]. The report found that "unlimited funding devices [*i.e.*, soft money] give a relatively small group of donors great influence in the electoral process. They facilitate relationships between monied interests and candidates that increase the possibility of corruption . . . ." Kolb I Decl., Ex. 1, at 3. The report recommended a complete ban on soft money, an increase in hard money contribution limits, and a provision very similar to the electioneering communications provision ultimately implemented by BCRA. Kolb I Decl., Ex. 1, at 7.

Clinton in his quest to obtain government backing for a Caucasus pipeline project.[87] Although he never received the backing he sought, when asked at a Senate hearing to comment on his $300,000 contribution in 1996, Tamraz responded: "I think next time, I'll give $600,000. . . . You set the rules, and we are following the rules . . . this is politics as usual. What is new?"[88] Tamraz was not alone: White House documents show that many large contributors were invited to meetings with President Clinton.[89] Large individual donors to the Republican Party are similarly able to meet with federal elected officials.[90]

The foregoing is merely illustrative of abundant legislative history and record evidence that show how soft money is raised and why it is given. In addition, we call the Court's attention to Tab 7 of Intervenors' Excerpts of Record.

2. The Parties Use Soft Money To Promote the Election of Federal Candidates.

Although the theory of "soft money" is that it is unrelated to federal elections, in practice, nothing could be farther from the truth.[91] As described in detail in the Mann Expert Report,

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87 Thompson Comm. Rep. at 43-44.

88 Thompson Comm. Rep. at 9514.

89 Major DNC soft money donor Johnny Chung was similarly granted repeated access to the White House. As the Thompson Committee found, Chung's "DNC contributions helped Chung obtain access to the White House at least 49 times between February 1994 and February 1996 — access that he used . . . to further his interests with foreign business clients. . . . So close was the nexus between Chung's donations and his visits, in fact, that White House officials actually collected money from him in the First Lady's office in exchange for allowing him to bring a delegation of his clients to White House events." Thompson Comm. Rep. at 783. The Democratic Senators on the Senate Governmental Affairs Committee found that "Chung's access to the White House was inappropriate and was probably influenced by his status as a major DNC donor." Thompson Comm. Rep. at 8260. Chung's own view on why he was granted access was even more explicit, "[t]he White House is like a subway: You have to put in coins to open the gates." *Id.* at 783; *see also* Common Cause FEC Testimony (Oct. 2, 1998) at 14.

90 *See, e.g.*, [REDACTED]

91 In fact, the primary purpose of at least four of the six major national party committees is to elect federal candidates to the House and Senate. As Profs. Sorauf and Krasno explain, "[these organizations] exist to win elections, to maximize the number of their partisans in a chamber and, above all, to win or maintain a legislative majority with all the perks that come with it." Jonathan S. Krasno and Frank J. Sorauf, *Evaluating the Bipartisan Campaign Reform Act (BCRA)*, (Sept. 23, 2002) [DEV 1-Tab 2, hereinafter Krasno & Sorauf Expert Report] at 16; *see also, e.g.,* INT 017551-52 (Senator McConnell's official Senate web site states that as Chairman of the NRSC

"[b]oth parties [have] financ[ed] a significant part of the campaigns of their presidential candidates outside the strictures of the FECA . . ." and "use the same funding strategy to campaign on behalf of their congressional candidates."[92] In the words of the RNC plaintiffs' own expert, "[n]ational parties allocate soft money to state organizations primarily with the intent to help federal candidates in close races."[93] The parties, in his view, "exploit federal campaign finance laws by using soft money for candidate support even though federal laws require them to use it for generic party building."[94] Indeed, "[r]ather than use soft money to shore up weaker organizations, or reward state party members for moving closer to national party ideology, the national organizations use soft money like hard money — to pursue the short-term goal of winning elections."[95]

Former party officials echo this indisputable conclusion. Former RNC Chairman Brock testified that "[t]he money by and large is not used for 'party building.' To the contrary, the parties by and large use the money to help elect federal candidates."[96] Former DNC Chairman Fowler testified that in 1996 the DNC transferred soft money to states with key federal elections, for use in ways that inevitably affected those elections.[97] "State parties which received these

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"[f]rom January 1997-January 2001 . . . McConnell was responsible for developing and supporting the campaigns of Republican Senate candidates.") [DEV 35-Tab 2]; INT 017553 (The NRSC's web site states that "[i]t is [the NRSC's] responsibility to wrest control of the Senate from the Democrats, and give President Bush a Republican Majority who will work to enact his agenda in the Senate.") [DEV 35-Tab3]; Rozen Decl. ¶ 12 (explaining that donors to the parties "understand that if a federal officeholder is raising soft money . . . they are raising it for federal uses, namely to help that Member or other federal candidates in their elections.").

92 Mann Expert Report at 20.

93 La Raja Cross Tr. Ex. 3 at 74.

94 La Raja Cross Tr. Ex. 3 at 74-75; *see also* B. Thompson Dep. Tr. at 14-15 ("Q: Have you ever been involved in raising soft money that was intended to be used at the federal level in some way or to get people out to vote in federal elections? A. Oh, yes, I have.").

95 La Raja Cross Tr. Ex. 3 at 75; *see id*. at 75-76 (national parties have engaged in "aggressive behavior . . . to exploit 'loopholes' in the campaign finance laws," and have "circumvented" laws that "seek to limit the ability of parties to help their candidates.")

96 Brock Decl. ¶ 6 [DEV 6-Tab 9].

97 Fowler Decl. ¶ 15.

funds paid for spots . . . using media firms . . . composed of media and campaign advisors who were under joint contract to the DNC and the Clinton Re-election Campaign. . . ."[98]

[REDACTED]

3. The Role of State Parties in the Soft Money System.

State and local parties play a critical role in fundraising and promoting the election of federal candidates in various ways.[99] As such, they are an integral part of the massive evasion system built on soft money.

First, the legislative record and adjudicative evidence show that national parties, their personnel, and federal candidates and officeholders have solicited soft money contributions for state parties with the understanding that the state parties would use the contributions to influence federal elections.[100] Both federal officeholders and the national parties direct contributors to the state parties when the contributors have "maxed out" to the candidate or when it appears that the state party can most effectively use additional money to help that officeholder or other federal candidates.[101] For example, in 1992, after making a $20,000 hard money contribution to the DNC, Alan Hassenfeld was told he could still help then-Governor Clinton's presidential

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[98] Fowler Decl. ¶ 15; *see also* [REDACTED] James Jordan, of the DSCC, likewise testified that "the large majority of the DSCC's [soft money] transfers to state and local party committees have been [spent] to support" so-called issue advertisements, Jordan Decl. ¶ 68 [REDACTED]

[99] *See* D. Green Expert Report at 11-13.

[100] *See, e.g.*, Buttenwieser Decl. at ¶ 16 (noting that he has contributed soft money to state parties when asked by either federal candidates or the DSCC); Hassenfeld Decl. at ¶ 9 ; Kirsch Decl. at ¶ 9; [REDACTED] ; Thompson Comm. Rep. at 2913-15 ("Tamraz directly contributed or helped solicit great sums of money to the DNC and to various state Democratic parties at Fowler's direction."); *see also* Tab 9 of Intervenors' Excerpts of Record for additional evidence that federal candidates and officeholders solicit soft money for state parties.

[101] *See* Kirsch Decl. ¶¶ 8-9; Philp Dep. Tr. (Sept. 19, 2002), Ex. 14 (August 27, 1996 Letter from Congressman Allard) (also indexed as CP 0066) [IER Tab 1.F]; [REDACTED] . Even plaintiffs' own experts and witnesses concede the existence of this practice. La Raja Cross Tr., Ex. 3 ("it is common practice for a candidate to encourage donors to give to the party when they have 'maxed' their federal contributions to his or her committee"); [REDACTED]

campaign by contributing soft money to state Democratic committees.[102] As he put it, "[t]here appeared to be little difference between contributing directly to a candidate and making a donation to the party."[103]

The notorious Tamraz episode also illustrates this point, because the contributions that earned Tamraz six meetings with the President were made in part to *state* Democratic parties.[104] Nor is Tamraz unique. Indonesian billionaire and co-Chairman of the Lippo Group, James Riady, funneled $410,000 to the Democratic parties of Ohio, Michigan, Louisiana, Arkansas, Georgia, and North Carolina during the 1992 presidential election year. Four of these states were very competitive in the race between candidate Bill Clinton and then-president George H.W. Bush. Not surprisingly, Riady had unparalleled access to the White House after President Clinton's election, visiting the White House 21 times between 1993 and 1996.[105] Carl Lindner, head of Chiquita brands, similarly contributed more than $500,000 to state Democratic parties in 1996. Lindner, who traditionally gave far more to Republicans than Democrats, began making these contributions the day after the Clinton administration agreed to take European countries to court for effectively excluding Chiquita bananas through various tariffs and trade barriers.[106]

Second, state parties themselves solicit soft money for the express purpose of using it for activities that affect federal elections, and they have spent soft money in ways that directly

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[102] *See* Hassenfeld Decl. ¶ 9 [DEV 6-Tab 17]; *see also* Bumpers Decl. ¶ 9 [DEV 6-Tab 10].

[103] Hassenfeld Decl. ¶ 9; *see* Buttenwieser Decl. ¶ 15.

[104] *See* Thompson Comm. Rep. at 2913-15; *id.* at 8095-249.

[105] McCain Decl., Ex. I, Lisa Meyers and Robert Windrem, *Riady Has History of Giving Money*, NBC News, Sept. 4, 1997 [INT 014861-68; DEV 36-Tab 12].

[106] *Id.*, *The Busy Back Door Men*, Time, Mar. 31, 1997, at 40 [INT 001289-90; DEV 33-Tab 20].

benefited federal candidates.[107] For example, in 1996, the Chairman of the California Democratic Party [REDACTED]

Moreover, that state parties use voter registration and mobilization to promote federal candidates is incontrovertible.[108] For example,

[REDACTED]

Third, large contributors to state parties receive special access to federal candidates and officeholders, just as when they contribute to the national parties.[109] Because state parties use soft money to assist in electing a federal candidate, that candidate is just as likely to be "too compliant" with the wishes of such contributors as he is to be unduly influenced by contributions made to the national party.[110] As Senator Rudman put it, "federal candidates who benefit from state party use of these funds will know exactly whom their benefactors are; [thus] the same degree of beholdenness and obligation will arise."[111]

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[107] "Much state party 'party building activity' is directed principally to influence federal elections, and all of the party voter activity inevitably does have a substantial impact on federal campaigns." 148 Cong. Rec. H409 (daily ed. Feb. 13, 2002) (statement of Rep. Shays); *see also* 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (". . . [W]hatever the technical niceties, soft money is being spent by State parties to support Federal campaigns. In fact, much of the soft money spent in the 2000 elections to support Federal campaigns was spent by State parties."); D. Green Expert Report at 13-14; [REDACTED] See also Tab 10 of Intervenors' Excerpts of Record for additional evidence that state parties solicit and spend soft money to affect federal elections.

[108] Lamson Decl. ¶ 15 (noting that political parties carried out GOTV, voter registration, and identification activities in order to promote their congressional candidates); Kirsch Decl. ¶ 9; [REDACTED].

[109] *See, e.g.*, Thompson Comm. Rep. at 3624; *see also* McCain Decl., Ex. I (newspaper accounts describing how two generous donors to state Democratic parties received extraordinary access to the White House); [REDACTED] See also Tab 11 of Intervenors' Excerpts of Record for additional evidence that state parties promise, and donors expect, special access to federal candidates and officeholders in exchange for soft money donations.")

[110] *See* Rudman Decl. ¶ 19; Brock Decl. ¶ 8; McCain Decl. ¶ 21; D. Green Expert Report at 12-13, 15, 21; *see also* Tabs 3, 5, and 7 of Intervenors' Excerpts of Record for additional evidence that donors generally give soft money to obtain and reward favorable decisions by federal officeholders.

[111] Rudman Decl. ¶ 19; *see also* Brock Decl. ¶ 8.

Fourth, as has been shown, state and local parties, among other things, have largely operated as "pass-through accounts for the national parties and for large, direct contributions from corporations, unions, and wealthy individuals."[112] The national parties spend soft money to help elect federal candidates by funneling hundreds of millions of dollars through their state and local party affiliates.[113] As a result, "[s]oft money turned state parties into the equivalent of offshore banks, whose principal activity was to shuttle money back and forth to satisfy allocation formulas and to pay for expensive mass media campaigns orchestrated by the national parties.[114] National parties, moreover, managed to avoid disclosing the ultimate uses to which soft money was put by funneling it through state parties,[115] and were able to take advantage of more favorable hard money/soft money allocation rules at the state level.[116]

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[112] 148 Cong. Rec. S2138-39 (daily ed. Mar. 20, 2002) (statement of Sen. McCain); *see also* 144 Cong. Rec. S826 (daily ed. Feb. 23, 1998) (statement of Sen. Thompson) ("The President raises the soft money, runs it through the DNC and spends the soft money additionally to what he is allowed to spend through the public financing. Then you go to the States, and because the States can use more soft money than you can, you run the rest of it through the States and have the States run the same ads that you are running at the Federal level for the same purpose, of reelecting the President. Now, that is the system that we have today"); Krasno & Sorauf Expert Report at 10-12; Mann Expert Report at 22, 30; Chapin Decl. ¶ 9 [DEV 6-Tab 12] (noting that the "DCCC ran television advertising through the State Party in order to take advantage of the more favorable hard money-soft money allocation ratios enjoyed by state parties"). [REDACTED]

[113] Thus, as was noted during the congressional debate on BCRA, "in the 2000 election, the national Democratic Party funneled approximately $145 million and the Republican Party transferred $129 million to their affiliated State parties to take advantage of the States parties' ability to spend a larger percentage of soft money on advertisements featuring federal candidates." 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain); *see, e.g.*,144 Cong. Rec. S1049 (daily ed. Feb. 26, 1998) (statement of Sen. Glenn); 144 Cong. Rec. S826 (daily ed. Feb. 23, 1998) (statement of Sen. Thompson); *The Constitution and Campaign Reform: Hearings on S.522 Before the Committee on Rules and Administration*, 106th Cong. 87 (statement of Alan B. Morrison, Director Public Citizen's Litigation Group); *id.* at 149-150 (statement of Fred Wertheimer, President, Democracy 21, inserted into the record by Sen. Dodd); Thompson Comm. Rep. at 4466-67.

[114] D. Green Rebuttal Report at 10.

[115] As the Thompson Committee recognized, "[national party transfers to state parties] serve[d] to further obscure the already inadequate disclosure requirements imposed on national party committees," because "by transferring large sums to the state or local level, national parties can avoid effective disclosure." Thompson Comm. Rep. at 7520-21.

[116] La Raja Cross Tr., Ex. 3 at 68 ("Most state parties may spend considerably more soft money than hard money, which creates an incentive for the national party to funnel soft money to the states.").

In the 2000 election cycle, the national parties transferred over $169 million in soft money to the state parties,[117] and, as Professor La Raja states, the national parties allocated soft money to states with close federal races.[118] State parties, in turn, used most of that money to finance public communications (principally broadcast and cable advertisements) that supported or opposed a federal candidate.[119] For the most part, those ads were authorized, designed, and placed by the national parties, not by the state party nominally responsible for payment,[120] and as Professor La Raja acknowledges, those ads support the campaigns of federal candidates.[121]

In many instances, the national parties have also transferred soft money to the state parties specifically for voter registration and GOTV activities that support federal candidates.[122] Indeed, officials of both national parties have admitted that they regularly channel soft money to state parties to pay for "Federal election activities," with the clear understanding that the funds will assist federal candidates.[123] The state parties' own documents and witnesses confirm that soft money is transferred from the national parties to the state parties to pay for activities that

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[117] *See* http://www.fec.gov/press/051501partyfund/tables/nat2state.html. See also Tab 12 of Intervenors' Excerpts of Record for additional evidence that the national parties transfer soft money to state parties in order to affect federal elections.

[118] *See* La Raja Cross Tr., Ex. 3 at 74.

[119] *See* Wolfson Decl. ¶ 63; [REDACTED] Out of the estimated $25.6 million spent by political parties on ads in the 1998 election cycle, $24.6 million went to fund ads that referred to a federal candidate. *See* Krasno & Sorauf Expert Report, Table 1. Out of 44,485 ads, 42,599 referred to a federal candidate. *See id.* Viewers perceived 94 percent of these ads as electioneering in nature. *Id.* at Table 7. [REDACTED]

[120] As a matter of course, the money would be wired to the state party and then almost immediately thereafter routed back to the media firm at the behest of the national party. *See* Biersack Decl. at Tables 21-35 [DEV 6-Tab 6] (tracking patterns in state party receipts of national party funds and subsequent media expenditures); Thompson Comm. Rep. at 8336-37 (quoting an internal memo from RNC Campaigns Operation Director Curt [Anderson] to RNC Chairman [Haley Barbour] recommending that ads should be placed through state parties: "Some have voiced concern that buying through the state parties could result in a loss of control on our part. There is absolutely no reason to be concerned about this."); [REDACTED]; [REDACTED]

[121] *See* La Raja Cross Tr., Ex. 3 at 15, 101-04.

[122] *See* Wolfson Decl. ¶ 64 (noting that the DCCC transfers both hard and soft money to state parties to pay for voter identification, voter registration, and GOTV efforts, which "have a significant effect on the election of federal candidates"); Jordan Decl. ¶¶ 68-69 (same); Philp Dep. Tr. at 60-6.

[123] *See* Wolfson Decl. ¶ 63-64; Jordan Decl. ¶¶ 68-69; McGahn ¶ 56; [REDACTED]

will affect federal elections and that the state parties themselves solicit and use soft money contributions for the same purposes.[124]

Moreover, the danger of corruption posed by soft money at the state party level exists regardless of the fact that the contributions go to the parties rather than directly to candidates and regardless of whether or not Federal candidates or officeholders or even the national parties are directly involved in soliciting the contributions on behalf of the state parties.[125] This is the logical result of the close relationships between the national political parties and their state counterparts and between federal officeholders and their state party: All parts of each "party" share a common agenda — to elect as many of the party's candidates, state and federal, as possible — and the national and state parties closely coordinate both their fundraising and their election activities.[126] Because of overlapping relationships, any large contribution to a state party that may be used to benefit a federal candidate is likely to come to the attention of party officials and thus federal officeholders, even if neither are involved in its solicitation. As a result, these contributions give rise to actual or apparent corruption.

4. Soft Money Shapes and Skews Governmental Decision Making.

The soft money system shapes and skews government decision making.[127] Former chairmen of both major parties so testified. Senator Brock, a former chairman of the RNC, stated:

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[124] [REDACTED] ; [REDACTED] The testimony of experts and witnesses with experience in the political process confirms that the activities defined as "Federal election activities" under BCRA have direct and substantial effects on the electoral prospects of federal candidates. *See, e.g.*, D. Green Expert Report, at 13-15.

[125] *Cf.* Rudman Decl. ¶¶ 12, 19.

[126] *See* D. Green Expert Report at 10-13, 18-19; Krasno & Sorauf Expert Report at 10-11. See Tab 13 of Intervenors' Excerpts of Record for additional evidence of the close relationship between state parties and national parties and candidates.

[127] *See generally* Common Cause FEC Testimony (Oct. 2, 1998); *see also* Krasno & Sorauf Expert Report at 4-5 (summarizing results of studies, which "conclude that contributors may succeed in influencing policy in some areas,

> Large contributions — of $50,000, of $100,000, of $250,000 — made to political parties by corporations, labor unions, and wealthy individuals have an enormously negative impact . . . . These contributions compromise our elected officials. When elected officials solicit these contributions from interests who almost always have matters pending before the Congress, these elected officials become at least psychologically beholden to those who contribute. It is inevitable and unavoidable. . . . The contributors . . . give these large amounts of money to political parties so they can improve their access to and influence over elected party members. Elected officials who raise soft money know this.[128]

The DNC perspective is the same, as Mr. Fowler testified:

> Many contributors of large sums of [soft] money . . . gain access to party and government officials that they otherwise would not have. With this access, contributors are able to make their cases to people who make public policy and take official governmental action. . . . This easy access based solely on money creates a favored class, the members of which have much greater opportunity to make their case for their issues and their interests. Logically and factually, this tilts the American political system toward the rich and away from average citizens.[129]

Our most respected leaders agree. Former Presidents George H. W. Bush, Jimmy Carter, and Gerald Ford called for a soft money ban,[130] and President George W. Bush, of course, signed BCRA. Senators Rudman, Boren, Simpson, Simon, McCain, Feingold, Snowe, and Jeffords and Congressmen Shays and Meehan, and others, in their testimony in this case, have borne witness to the harmful effects of soft money on the workings of government.[131] Their testimony shows

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particularly on arcane questions of little interest to the broader public but of great import to a narrow group of involved citizens, corporations, unions and other organizations.").

[128] Brock Decl. ¶ 5.

[129] Fowler Decl. ¶ 6. The American public sees it just this way. *See infra* discussion of polling at footnotes 158-164 and accompanying text.

[130] *See* McCain Decl. ¶ 3.

[131] *See, e.g.,* Rudman Decl. ¶¶ 7-9; Boren Cross Tr. at 13-16; Simpson Decl. ¶ 2; Simon Decl. ¶¶ 13-17; McCain Decl. ¶¶ 1, 6-12; Feingold Dep. Tr. at 39-40; Shays Decl. ¶¶ 3, 6-9; Meehan Dep. Tr. (Sept. 25, 2002) at 12-14; Snowe Dep. Tr. at 9-10 ("Again, it gets back to the question of the way in which our system is financed and the reason for this legislation, and the fact of the matter is there are millions and millions and millions of dollars that are being channeled through various political entities that are unregulated, unlimited and in many instances undisclosed. So that does have the appearance of corruption. The perception, as you know, is as important in the political process and how people view their officeholders and the integrity of the process by which they get elected and by which

that this problem is not limited to preferred access and is not to be thought of only in terms of hard-to-prove incidents of an actual *quid pro quo*; rather, the problem pervades all aspects of the legislative process, such as what measures will or will not make it through committee and be brought to a vote.[132] As Senator Rudman testified:

> Large soft money contributions in fact distort the legislative process. They affect what gets done and how it gets done. They affect whom Senators and House members see, whom they spend their time with, what input they get, and . . . this money affects outcomes as well. . . . What I described . . . is inherently, endemically, and hopelessly corrupting. You can't swim in the ocean without getting wet; you can't be part of this system without getting dirty.[133]

In striking testimony, Senator Feingold told of a Senate colleague who privately urged him to end his filibuster of a pending Federal Aviation Administration conference report that contained a provision sought by Federal Express because, his colleague said, Federal Express had made a $100,000 soft money donation to the Democratic Party.[134] After this episode, Fred Smith, the founder of Federal Express, visited Senator Feingold and explained that, while he did not like giving soft money, he had no choice under the existing system "other than to pay to play."[135] In similar fashion, Senator Paul Simon testified about Federal Express's efforts to amend the same bill.[136] When Senator Simon opposed the amendment, a Senate colleague said, "I'm tired of Paul always talking about special interests; *we've got to pay attention to who is*

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they cast their votes."); Jeffords Dep. Tr. at 52 (stating that ". . . large contributions from anyone give the perception to the public of an intent to influence the election.").

[132] *See* Shays Decl. ¶ 8; Bok Expert Report at 3-4; McCain Decl. ¶ 5; Meehan Dep. Tr. at 12-13 (recounting how Congress's failure to pass tobacco legislation was due in part to large tobacco donations of soft money to the political parties).

[133] Rudman Decl. ¶¶ 9, 10; *see also* Simon Decl. ¶¶ 15-17.

[134] *See* Feingold Dep. Tr. at 62-63.

[135] Feingold Dep. Tr. at 226; *see also* 105th Cong. Rec. S820-21 (daily ed. Feb. 23, 1998) (statement of Sen. Feingold) (describing meeting with Fred Smith).

[136] *See* Simon Decl. ¶ 13.

buttering our bread."[137] Significantly, Federal Express contributed substantial amounts of soft money to both Democrats and Republicans in its effort to win favorable consideration of the legislation.[138]

Pointing to the impact of soft money contributions on the House's failure to vote on generic drug legislation,[139] on the shortcomings of the Telecommunications Act of 1996,[140] and on the Senate's refusal to vote on widely supported provisions concerning the expensing of stock options,[141] Senator McCain testified "based on my experience, that elected officials do act in particular ways in order to assist large soft money donors and that this skews and shapes the legislative process."[142] Senator Boren agreed that "soft money donations to political parties do affect how Congress operates."[143] He added, "I know from my first-hand experience and from my interactions with other Senators that they did feel beholden to large donors."[144]

Similarly, Senator McCain, in his declaration, describes attending a Republican Senators' policy lunch at which a Senator informed his colleagues, on the eve of the cloture vote on the National Tobacco Policy and Youth Smoking Reduction Act, that if they voted to kill the bill, major tobacco companies were promising to mount television ad campaigns to support them.[145] Linda Smith, then a Republican Congresswoman, described her outrage at learning that her party commonly held "up action on bills while milking interested contributors for more campaign

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137 *Id*. ¶ 14 (emphasis added).

138 Russell Feingold, *Special Interests and Soft Money*, 10 Stan. L. & Pol. Rev. 59, 59 (Fall 1998).

139 *See* McCain Cross Tr. at 26-27; McCain Decl. ¶ 11.

140 *See* McCain Cross Tr. at 15-17; McCain Decl. ¶ 9; *see also* Feingold Dep. Tr. at 134 ("Telecommunications Act of 1996 would not have passed" had it not been for soft money donations).

141 *See* McCain Cross Tr. at 21-23; McCain Decl. ¶ 10.

142 *See* McCain Decl. ¶ 5.

143 Boren Decl. ¶ 7.

144 *Id.* at ¶ 8.

145 *See* McCain Decl. ¶ 8. [REDACTED]

contributions."[146] And, Congressman Shays testified to his belief that "in the time that I have been in Congress, particularly since we have been in the majority, that certain bills were not allowed to reach the floor of the House because of large financial interests; and that certain amendments were not allowed in the Rules Committee because of certain financial interests."[147]

Even Senator McConnell, the lead plaintiff, has suggested that campaign contributions affect public policy. In a recent speech, Senator McConnell, while denying that big money purchases influence, at the same time attributed Democratic opposition to the President's homeland security bill to large union contributions to Democrats: "So why are our colleagues on the other side advancing the labor union's agenda? . . . Four of the five major public sector unions who are publicly pushing for the Lieberman bill have showered over 93 percent of their campaign contributions to Democrats. The fifth contributed 87 percent."[148]

[REDACTED]

[REDACTED]

Expert testimony fully supports this conclusion. As detailed in the Green Expert Report, evidence suggests that large contributions may purchase not only access, but also "legislative effort" and that "contributions predict the amount of effort that supporters exerted on . . . issues during the committee mark-up process."[149] More significantly, evidence shows that "contributions may . . . have a significant impact on legislative outcomes," even if only a small

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[146] 145 Cong. Rec. H4725 (daily ed. June 18, 1998) (statement of Rep. Menendez) (quoting remarks of Rep. Linda Smith from the previous day's Wall Street Journal).

[147] Shays Dep. Tr. at 228.

[148] 148 Cong. Rec. S9685 (daily ed. Oct. 1, 2002) (statement of Sen. McConnell).

[149] D. Green Expert Report at 23-24.

proportion of actual votes are influenced by contributions.[150] Furthermore, there is evidence to demonstrate that "donors favor the party in power, a clear indication that they see their donations as a means to gain access and influence, as opposed to a mere expression of ideological affinity."[151]

Derek Bok, the former President of Harvard whose recent academic work has focused on systemic problems in government, testified:

> It may be difficult to prove in particular cases that specific contributions actually caused individual legislators to make particular legislative changes. No one can be sure exactly what factors are decisive in causing legislators to vote as they do. Nevertheless, it strains credulity to suppose that contributions running into tens and hundreds of thousands of dollars — frequently given on the eve of important legislative deliberations — do not have an effect on the final outcome. Powerful interests would hardly give such large sums of money — often to strategically placed lawmakers from both major parties — if they were not persuaded by experience that their contributions were likely to have *some* significant effect.[152]

Of course, [REDACTED] prove this precise point.

The Mann Expert Report reaches similar conclusions. In particular, Dr. Mann debunks the notion that parties somehow protect elected officials from the corrupting effects of soft money: "parties do not dilute the influence of large donors or insulate elected officials from direct connections with those donors; they instead facilitate and broker such connections."[153] Professor Green similarly refutes the notion that "money given through parties is cleansed of its corrupting influence."[154]

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[150] *Id.* at 24.

[151] *Id.* at 24-25.

[152] Bok Expert Report at 3-4 (emphasis in original); *see also* D. Green Expert Report at 24-29; Derek Bok, *The Trouble with Government* (Harvard U. Press 2001); Derek Bok, *The State of the Nation* (Harvard U. Press 1997).

[153] Mann Expert Report at 34-35.

[154] D. Green Expert Report at 28-29.

The evidence that soft money contributions actually shape and skew public policy is both overwhelming and consistent with common sense. The Supreme Court concluded in *Nixon v. Shrink Missouri*, 528 U.S. at 395, that, even in the face of studies purporting to show a lack of corruption and an extremely limited legislative record, "there [was] little reason to doubt that sometimes large contributions will work actual corruption of our political system." Here, the evidentiary and legislative record overwhelm that which the Court found sufficient in *Shrink Missouri*.

5. Soft Money Creates the Appearance of Corruption and Erodes Citizens' Trust in Government.

In any event, the Supreme Court has repeatedly held that it is unnecessary to prove actual corruption in order to sustain the constitutionality of contribution limits.[155] Rather, as described, it suffices to show that Congress addressed itself to an appearance of corruption.[156]

When the Supreme Court observed in *Shrink Missouri* that there is "little reason to doubt that sometimes large contributions will work actual corruption of our political system," it further observed that there is "no reason to question the existence of a corresponding suspicion among voters." 528 U.S. at 395. This observation, made in a case about contributions to candidates, applies with equal force to the enormous contributions to political parties, which are often raised by elected officials and candidates. As the Supreme Court has observed, "[t]here is no question about the closeness of candidates to parties." *Colorado II*, 533 U.S. at 449. Political party committees are often led by elected officials and their primary function is to re-elect those

[155] *See Buckley*, 424 U.S. at 26-28, 30; *Colorado II*, 533 U.S. at 456; *Shrink Missouri*, 528 U.S. at 387-88; *NCPAC*, 470 U.S. at 496-97; *FEC v. Nat'l Right to Work Comm.*, 459 U.S. at 208.

[156] *Id.*

officials and to elect other candidates from the same party.[157] Even more significantly for present purposes, "whether they like it or not, [parties] act as agents for spending on behalf of those who seek to produce obligated officeholders" — or, put somewhat differently, act "as conduits for contributions meant to place candidates under obligation." *Id.* at 452; *see also id.* at 455 (parties "function for the benefit of donors whose object is to place candidates under obligation").

The results of public opinion research about soft money conducted for this case by two experts — one identified with Republican candidates (Dr. Wirthlin), the other with Democratic candidates (Mr. Mellman) — confirms what common sense already tells us: that the public perceives that large soft money contributions to political parties distort the workings of government and compromise our elected officials.[158] Their report's "principal finding is that the American public believes [that] the views of large contributors to parties improperly influence policy and are given undue weight in determining policy outcomes."[159] They point out that the level of public disaffection is very high:

> The strength of these findings is also important to note. In this study, we saw an unusually high number of 70% or more responses when it came to questions regarding the impact of large contributions to political parties. In public opinion research, it is uncommon to have 70% or more of the public see an issue the same way. When they do, it indicates an unusually strong agreement on that issue.[160]

The expert report of Professor Shapiro, Chair of Columbia's Political Science Department and an expert on public opinion and survey research, confirms these findings.[161]

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[157] D. Green Expert Report at 17 n.19 ("[P]arties are primarily and continuously concerned with acquiring power through electoral victory."); *see also* La Raja Cross Tr., Ex. 3, at 16 ("parties . . . exist to win elections"); Respondent's Brief in Colorado II, *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/00-191/00-191.mer.resp.pdf at 31("Parties exist precisely to elect candidates that share the goals of their party.").

[158] *See* Mellman & Wirthlin Expert Report at 5.

[159] *Id.*

[160] *Id.*

[161] *See* Shapiro Expert Report at 9-18.

Professor Shapiro performed an extensive search of public opinion survey data dating back to 1990 to determine whether the pre-BCRA campaign finance system creates an appearance of corruption in the minds of the public.[162] He testified that "the answer is unequivocally yes."[163] In particular, Professor Shapiro concluded:

> The available data show: that the public has seen the need to reform the campaign finance system in order to limit the influence of money in the political process; that the public has seen politics and politicians consumed and harmed by fundraising; that the public has perceived corruption in politics connected to the influence of political donations and campaign contributions; that the public has associated political contributions with the undue influence of "special interests"; that the public has been highly suspicious of substantial contributions in the form of soft money donations to political parties; that the public was deeply troubled by the undesirable influence they associated with political contributions in the Enron scandal, party fundraising during the Clinton and Gore election campaigns, and other incidents; that the public has been sensitive to certain aspects of campaign fundraising involving corporations and labor unions; and that the American public has supported and seen as warranted the proposed, and now legally enacted, restrictions on soft money contributions to political parties.[164]

A poll conducted by the Tarrance Group for the Committee for Economic Development ("CED"), a non-partisan group of prominent business leaders and educators, found that the vast majority of corporate executives, many of whom have direct experience with soft money, believe that the "campaign finance system is broken and should be reformed."[165] The poll found that "three in five top business executives back a soft money ban."[166] Even more strikingly, it found that 74 percent believe that businesses are pressured to make large political donations; half believe that business leaders fear adverse legislative consequences if they turn down requests

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[162] *See id.* at 2-3, 8.

[163] *Id.* at 2.

[164] *Id.* at 18; *see also* D. Green Report at 26-27; 147 Cong. Rec. S3107 (2001) (statement of Sen. Feingold).

[165] Kolb I Decl., Ex. 6, at 1 [DEV 7-Tab 24]; *see also* 147 Cong. Rec. S2954-55 (2001) (Committee for Economic Development survey inserted into the record by Sen. Feingold).

[166] Kolb I Decl. ¶ 9.

from high-ranking party officials and their operatives; and 75 percent agreed that their contributions, in fact, give them an advantage in shaping legislation.[167] When asked why corporate America contributes to political campaigns, the most frequent answer given was "to avoid adverse legislative consequences" (31 percent), followed by "to buy access to influence the legislative policy" (23 percent).[168]

The testimony of current and former elected officials fully supports the conclusions of these studies. Member after Member has described how their constituents have expressed frustration — and a sense of disenfranchisement — based on the access and influence that large donors purchase with their contributions.[169] As Congressman Meehan explains, "[My constituents] think the system in which I work is a system that is tainted by unlimited amounts of money contributed by special interests in the political process. They believe that the whole system is tainted."[170] Former Senator Boren, now President of the University of Oklahoma, reported that he sometimes begins his class with a poll finding that by 1994 trust in government

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[167] *Id.*

[168] *Id.*

[169] *See, e.g.*, Snowe Dep. Tr. (Sept. 30, 2002) at 11, 39-40, 135, 270 (discussing the "disenchantment and disappointment" of her constituents in the way campaigns are financed and citing a 1996 Portland Press Herald poll, which revealed that over 70 percent of people in Maine believed that "special interests had a disproportionate voice in their government," as part of the basis for her involvement in the campaign finance reform legislation); 144 Cong. Rec. H3786 (daily ed. May 22, 1998) (statement of Rep. Poshard) (". . . I speak to a lot of college students around the State of Illinois. Every time I stand in front of those students, they look me straight in the eye and they say to me, Congressman, we do not trust any of you guys anymore. You are all in it for yourselves. You are all in it for the special interests. No one is in it for us any longer. When I inquire of those students as to why they do not trust government, why the see their government as the enemy rather than their friend, they always look me straight in the eye and they say, Congressman, just follow the money, just follow the money."); 145 Cong. Rec. S12859 (daily ed. Oct. 19, 1999) (statement of Sen. Edwards) ("The simple reason for that is, average Americans, average North Carolinians, believe their voice is being drowned out by big money. These people who have good sense, their gut tells them that when somebody else writes a check for $100,000 — first of all, most them can't afford to write a check for $25 for a political candidate, much less $100,000 — that there is no way in their life experience they are going to be listened to, that they are going to have the access to their Senator or their Congressman that the person who writes these big money checks has."); 144 Cong. Rec. H1743 (daily ed. Mar. 30, 1998) (statement of Rep. Baldacci) ("Since I took office in 1993, I have been hearing from my constituents that campaign finance reform is an important issue to them. . . . Individual voters feel increasingly out of touch with their government, and believe that unless they can make significant contributions, they cannot access their elected officials.").

[170] Meehan Dep. Tr. at 45.

among Americans dropped to 19 percent and that 57 percent were dissatisfied with the political parties.[171] When asked why, Sen. Boren's students "[a]lmost unanimously" responded "that our government has been 'purchased' by special interests. They believe that their elected representatives . . . pander to large donors . . . ."[172] Senator Rudman put it bluntly: "The soft money system not only distorts the legislative process, it breeds deep cynicism in the minds of the public. . . . Make no mistake about the implications of this public attitude: when Americans believe overwhelmingly that their public servants are for sale, democracy is challenged at its roots."[173]

Senator Brock likewise concluded that large soft money contributions "have an enormously negative impact" because "[t]he appearance of corruption is corrosive and is undermining our democracy."[174] His DNC counterpart, Mr. Fowler, echoed this conclusion: "This process undermines our democratic processes and creates a lack of confidence in its fairness on the part of average citizens."[175]

The press documents the appearance of corruption on a daily basis,[176] and has chronicled Congress's failure to act on a prescription drug benefit,[177] its defeat of anti-smoking legislation,[178]

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171 Boren Decl. ¶ 11.

172 Boren Decl. ¶ 11; s*ee also* Rudman Decl. ¶ 15.

173 Rudman Decl. ¶¶ 13, 14.

174 Brock Decl. ¶ 5.

175 Fowler Decl. ¶ 8.

176 Rudman Decl. ¶ 11.

177 *See* Meehan Dep. Tr. at 8-9 ("The seniors that I represent in Massachusetts believe that the unlimited soft money — in this case, $12.8 million from the pharmaceutical industry — give the appearance or actually have influenced the lack of the Congress passing a Medicare prescription drug benefit for seniors."); *see also* INT 012801-02, Richard A. Oppel, Jr., *Drug Makers Sponsor Event for G.O.P. as Bill is Debated*, N.Y. Times, June 19, 2002, at A1 [DEV 34-Tab 27] ("As lawmakers battle over a prescription drug bill, pharmaceutical and health-care concerns are providing major support for a fund-raiser scheduled for Wednesday night that is expected to raise more than $20 million for Republican candidates in this year's Congressional election. Sponsors of the event, which features a speech by President Bush, include GlaxoSmithKline, the multinational drug giant, as well as others in the pharmaceutical industry, a Republican official said.").

and its passage of corporate tax breaks benefiting specific industries.[179] In the wake of the Enron scandal, the press recorded the role big donors in the energy industry played in forming the Administration's energy policies.[180] The media likewise questioned the link between large soft money donations to the Democratic Party and the presidential pardon of Marc Rich.[181] As mentioned in Senator Rudman's testimony, the *New York Times* ran an article linking an Executive Order to large contributions by the American Gas Association to the Republican Party,

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[178] *See* INT 016651-52, *Did Tobacco Company Money Kill the Anti-Smoking Bill?*, USA Today, June 22, 1998, at 16A [DEV 32-Tab 72] ("The 46 Senators who obliged their cancer-peddling patrons by voting to kill the anti-smoking bill last week have taken in more than $1.3 million in tobacco money since 1993 . . . the bulk of tobacco's 'investment' in politicians is in 'soft money,' a loophole that lets corporations, unions and wealthy individuals evade the legal curbs on contributions. Republican and Democratic committees served as money laundries for more than $3.2 million from tobacco (82% to Republicans) in the most recent 15 months reported. Phillip Morris has been the GOP's No. 1 sugar daddy for three years running."); *see also* 145 Cong. Rec. S9068 (daily ed., July 22, 1999) ("Calling of the Bankroll" statement of Sen. Feingold).

[179] *See* INT 012702-03, *Soft Money: Common Cause Links Corporate Breaks in Tax Bill to Soft Money Contributions*, Bureau of National Affairs, Sept. 8, 1999 [DEV 34-Tab 27]; *see also* 145 Cong. Rec. S9655-57 (daily ed., July 29, 1999) ("Calling of the Bankroll" statement of Sen. Feingold); 146 Cong. Rec. S11324-26 (daily ed., Oct. 29, 2000) ("Calling of the Bankroll" statement of Sen. Feingold); 148 Cong. Rec. S11931-32 (daily ed., Nov. 15, 2001) ("Calling of the Bankroll" statement of Sen. Feingold).

[180] INT 016875-77, Dana Milbank and Mike Allen, *Energy Contacts Disclosed; Consumer Groups Left Out, Data Show*, Wash. Post, Mar. 26, 2002 at A01 [DEV 33-Tab 21] ("Energy Secretary Spencer Abraham met with 36 representatives of business interests and many campaign contributors while developing President Bush's energy policy, and he held no meetings with conservation or consumer groups, documents released last night show."); *see also* INT 016803-06, Don Van Natta Jr., *Donors in Energy Industry Met Cheney Panel*, N.Y. Times, Mar. 1, 2002 at A1 ("Eighteen of the energy industry's top 25 financial contributors to the Republican Party advised Vice President Dick Cheney's national energy task force last year, according to interviews and election records.") [DEV 32-Tab 72]; INT 013249-53, Dan Morgan and Juliet Eilperin, *Campaign Gifts, Lobbying Built Enron's Power in Washington*, Wash. Post, Dec. 25, 2001 at A01 [DEV 32-Tab 72] (Enron officials say they have no regrets about their use of money. "It got us name recognition," company spokesman Mark Palmer said, "[g]iven the aggregation of our foes, we had to make sure that people knew what our argument was[.]"); INT 012797-98, Michael Weisskopf and Adam Zagorin, *How Bush Plays the Game*, Time, Apr. 1, 2002 at 42 [DEV 34-Tab 27] ("It was not just partisan zeal that sold tickets [to the Republican Gala]. Vice President Dick Cheney and his energy task force had been rewriting the industry's rules—and his proposals were unveiled just five days before the dinner. Three G.O.P. fundraisers told TIME that the R.N.C. consciously targeted the energy sector. 'Whoever has the hot issue is going to be the most responsive,' one money man says.").

[181] Associated Press, *Pardoned Man's Ex-Wife Donated $1 Million*, Cincinnati Post, Jan. 26, 2001 at 2A ("The pardon application of fugitive financier Marc Rich details an intensive behind-the-scene legal effort that began with futile meetings 14 years ago with federal prosecutors and ended with clemency from President Clinton in his final hours in office. What the application doesn't mention are more than $1 million in donations from Rich's ex-wife to the Democratic Party that Congress now wants to look into.") [INT016451; DEV 33-Tab 20]; James V. Grimaldi and Dan Eggen, *Criminal Probe of Pardon Begins; Gifts From Ex-Wife of Rich are Focus*, Wash. Post, Feb. 15, 2001 at A01 ("Federal prosecutors in New York have opened a criminal investigation into whether fugitive commodities broker Marc Rich in effect bought a pardon with political donations . . . .") [INT016463-66; DEV 33-Tab 20]; Donald Lambro, *Carter Calls Clinton's Rich Pardon 'Disgraceful,'* Wash. Times, Feb. 22, 2002, at A1 [INT016506-10; DEV 33-Tab 20].

and the *Los Angeles Times* comparably linked OSHA's choice of voluntary rather than mandatory ergonomics guidelines to contributions by large donors.[182] In a similar vein, the *Chicago Tribune* reported that the accounting industry successfully lobbied for legislation that would make it harder for investors to sue accountants after the industry made large contributions of soft money.[183] These stories, of course, are just a small fraction of the countless press accounts that tie government action or inaction to the influence of soft money. A further sampling of these reports is collected, for the Court's convenience, at Tab 21 of Intervenors' Excerpts of Record.

E. The Measures Congress Adopted To Constrain the Solicitation and Receipt of Soft Money Contributions by Federal Officials and National Parties Are Constitutional.

In upholding contribution limits in *Buckley*, the Court stressed that restrictions on contributions have only an indirect and "marginal" impact on political speech.[184] Echoing this conclusion in *Shrink Missouri*, the Court observed that "limiting contributions left communication significantly unimpaired." *Shrink Missouri*, 528 U.S. at 387. Accordingly, under *Buckley* and *Shrink Missouri*, even a contribution limit that involves "significant interference" with associational rights is constitutional if the government demonstrates that the regulation is "closely drawn" to further a "sufficiently important interest." *Shrink Missouri*, 528

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[182] *See* Rudman Decl. ¶ 11 and Attachments A and B.

[183] INT 016844-47 ($30 million from industry since 1989); Sam Roe, *Accounting Industry Counts on Its Clout*, Chi. Trib., Feb. 11, 2002, at 1 [DEV 32-Tab 72]; *see also* INT 012922-27, Jane Mayer, *The Accountant's War*, The New Yorker, Apr. 22, 2002 [DEV 29-Tab 20] (quoting former SEC Chair Arthur Levitt on the defeat of tougher accounting regulations: "'If there was ever an example where money and lobbying damaged the public interest, this was clearly it. . . . The money was enormous,' Levitt said. 'Look at the end result.'"). No wonder Senator Thompson lamented that "Many members are tired of picking up the paper every day and reading about an important issue we are going to be considering . . . and then the second part of the story reading about the large amounts of money that are being poured into Washington on one side or the other — the implication, of course being clear, that money talks and the large amounts of money talk the loudest." 147 Cong. Rec. S2958 (daily ed. Mar. 27, 2001) (statement of Sen. Thompson).

[184] *See Buckley*, 424 U.S. at 20-21.

U.S. at 387-388; *Buckley*, 424 U.S. at 25. There can be little doubt that the national soft money ban satisfies this standard.

1. The National Soft Money Ban Serves Sufficiently Important Interests.

It is well-settled that Congress has a strong interest in ensuring that public confidence in our elected officials and system of government is not undermined through actual or apparent corruption. *Shrink Missouri*, 528 U.S. at 388-389; *Buckley*, 424 U.S. at 26-30. Title I accomplishes this goal by requiring that the national party committees raise and spend only money subject to hard money source prohibitions — not from corporations and unions — and amount restrictions from individuals and PACs. As the Court wrote in *Shrink Missouri*, "[t]here is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." 528 U.S. at 395. Here, the legislative history and record evidence leave no doubt that the soft money loophole has given rise to precisely the type of corrosive influence that the Court has relied upon in sustaining contribution limits in the past. Soft money has skewed the political process; it has generated enormous public cynicism about our system of government; and it has left corporate America believing that a company "must pay to play." The evidence of actual and apparent corruption easily satisfies — and exceeds — the modest evidentiary requirements of *Buckley* and *Shrink Missouri*.

The national soft money ban, moreover, finds additional support in the consistent line of cases upholding the constitutionality of provisions designed to prevent an "end run" around campaign finance laws. *See, e.g.*, *Colorado II*, 533 U.S. at 455-65; *Buckley*, 424 U.S. at 38; *Cal. Med.*, 453 U.S. at 197-99; *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 664 (1990); *Kentucky Right to Life v. Terry*, 108 F.3d 637, 649 (6th Cir. 1997). This "preventing

circumvention" rationale first appeared in *Buckley* and has been consistently applied by the Supreme Court ever since. In *Buckley*, the Court sustained the constitutionality of FECA's $25,000 annual aggregate limit on individual contributions precisely because it prevented evasion of FECA's basic $1,000 contribution limit.[185] In so doing, the Supreme Court did not engage in any separate constitutional balancing — that is, it did not separately address whether the $25,000 limit was "closely drawn" to further a "sufficiently important interest" — but rather it upheld the constitutionality of the aggregate provision because it was "no more than a corollary of the basic individual contribution limitation" that the Court had already determined to be constitutional.[186]

The most expansive articulation of the anti-circumvention rationale came in *Colorado II*, in which the Court upheld FECA's limits on coordinated spending by state political parties solely on the grounds that such spending "raises the risk of corruption (and its appearance) through circumvention of valid contribution limits." 533 U.S. at 456-65. In addressing the sufficiency of the evidence to support Congress's judgment, the Court in *Colorado II* emphasized that, "[s]ince there is no recent experience with unlimited coordinated spending, the question is whether experience under the present law confirms a serious threat of abuse from the unlimited coordinated party spending as the Government contends." *Id.* at 457. In other words, because parties had for decades been prohibited from engaging in unlimited coordinated spending, neither Congress nor the litigants could be expected to marshal *actual* evidence of what happens

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[185] *Id.* at 38. The Court reasoned that the $25,000 limit "serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts to a particular candidate through the use of . . . huge contributions to the candidate's political party." *Buckley*, 424 U.S. at 38.

[186] *Id.*; *see also Cal. Med.*, 453 U.S. at 197-99 (plurality op.) (upholding FECA's $5,000 limit on contributions to multi-candidate political committees as "an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld [in Buckley]"); *Austin*, 494 U.S. at 664 (upholding state ban on corporate expenditures as applied to non-profit chamber of commerce as a means of preventing "[b]usiness corporations . . . [from] circumvent[ing] the Act's restriction by funneling money through the Chamber's general treasury").

when unlimited spending is allowed; instead the judgment was necessarily predictive, based on how the parties had behaved under the rules that did exist. Based on evidence of "how candidates, donors, and parties test the limits of the current law" and predictions by participants in the political process and experts, *see id.* at 457-61, the Court upheld Congress's predictive judgment that "contributions limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open." *Id.* Accordingly, the Court concluded, "Congress [was] entitled to its choice [of limiting coordinated expenditures]." *Id.* at 465.

As *Colorado II* shows, Congress — exercising its predictive expert judgment — would be entitled to close loopholes and to prevent evasion of the contribution restrictions and limits established in FECA and upheld in *Buckley* even in the absence of past abuses. Yet, here, the evidence of a massive system of evasion is overwhelming. BCRA thus falls well within settled precedent sustaining contribution limits on both anti-corruption and anti-circumvention grounds.

There is no reason in fact, logic, or precedent to reach a different conclusion simply because Title I of BCRA curtails contributions to parties rather than to their candidates. As the Court held in *Colorado II*, "[t]here is no question about the closeness of candidates to parties."[187] Even more significantly, the Court recognized that large contributions to parties can give rise to precisely the type of actual or apparent corruption that Congress sought to remedy in FECA:

> The money parties spend comes from contributors with their own personal interests. . . . Parties are thus necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a

[187] *Colorado II,* 533 U.S. at 449; *see also* Bumpers Decl. ¶¶ 4-6; McCain Decl. ¶ 23 ("The entire function and history of political parties in our system is to get their candidates elected . . . .").

> position on one, narrow issue, or even to support any candidate who will be obliged to the contributors.[188]

As the Court concluded, "whether they like it or not," political parties "act as agents for spending on behalf of those who seek to produce obligated officeholders." *Id.* at 452. Any attempt to argue that large soft money contributions to political parties do not give rise to the very type of actual or apparent corruption that formed the foundation of the Court's decision in *Buckley* simply blinks reality.

In any event, the Supreme Court has previously upheld limits on contributions to political committees, including parties. In *Buckley*, the Court upheld the $25,000 annual aggregate limit, which included contributions to political committees. *Id.* at 38. The Court held:

> [T]his quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, *or huge contributions to the candidate's political party*. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.[189]

Likewise, in *Cal. Med.,* 453 U.S. 182, the Court upheld FECA's $5,000 per year limit on contributions to political action committees. The plurality observed:

> If the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by limits on the amount he may give to a multi-candidate committee, . . . which advocates the views and candidacies of a number of candidates.[190]

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[188] *Colorado II,* 533 U.S. at 451-52 n.14 (quoting Senator Simon's "pay attention to who is buttering our bread" comment).

[189] 424 U.S. at 38 (emphasis added).

[190] 453 U.S. at 197. This language appears in the plurality opinion joined by four Justices. However, Justice Blackmun, who concurred in the judgment, also wrote that "contributions to multicandidate political committees may be limited to $5,000 per year as a means of preventing evasion of the limitations on contributions to a candidate or his authorized campaign committee upheld in *Buckley*." 453 U.S. at 203 (Blackmun, J., concurring); *see also*

This analysis applies to BCRA with even greater force.

2. BCRA Is Closely Drawn To Serve the Important Government Interests in Preventing Actual and Apparent Corruption and Evasion of Existing Laws.

Given the marginal effect on political speech posed by contribution limits, the courts have held that Congress need not adopt the "least restrictive means" available to serve the government's interest. *See Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1322 (9th Cir.) *cert. denied*, 505 U.S. 1230 (1992). It suffices if the limit is "closely drawn" to further the government's interest. *Shrink Missouri*, 528 U.S. at 387-88. Moreover, and importantly, the Court has consistently declined to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."[191] Supreme Court precedent firmly establishes that "courts must accord substantial deference to the predictive judgments" embodied in a statute. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994). Predictive judgments "should not be ignored 'simply because [the statute is challenged] under the umbrella of the First Amendment.'" *Id*. (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973)).

This deference axiom deserves particular weight in the context of campaign finance reform, an area in which Congress has a peculiar expertise. Each Member of Congress brings substantial personal experience to the issue. Virtually every Member has run for office, raised funds, seen soft money at work, and experienced its public taint. "Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments — at least where that deference does

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Cal. Med. Ass'n v. FEC, 641 F.2d 619, 629 (9th Cir. 1980) (*en banc*) (Kennedy, J.) (FECA "prohibits excessive contributions to candidates and the $5000 limit [on PAC contributions] properly viewed, is a proper mechanism to insure compliance with the prohibition . . . ."), *aff'd*, 453 U.S. 182 (1981).

[191] *Nat'l Right to Work Comm.*, 459 U.S. at 210.

not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge." *Shrink Missouri*, 528 U.S. at 402 (Breyer and Ginsburg, J.J., concurring).

In *Buckley*, the Court repeatedly emphasized that Congress's judgments about appropriate contribution limits were entitled to substantial deference. Rejecting plaintiffs' claim that the $1,000 contribution limit was "unrealistically low," the Court held that it should not second-guess Congress's "failure to engage in such fine tuning" or use a "scalpel" to scrutinize Congress's judgment about the appropriate limit. *Buckley*, 424 U.S. at 30. The Court similarly deferred to Congress's judgments about the dollar thresholds for disclosure of contributions. The thresholds, $10 and $100, were, in the Court's words, "indeed low" and "may well discourage participation by some citizens in the political process, a result that Congress hardly could have intended." 424 U.S. at 83. Moreover, there was "little in the legislative history to indicate that Congress focused carefully on the appropriate level at which to require recording and disclosure." *Id.* The Court nevertheless upheld the thresholds, because they represented a "decision best left in the context of this complex legislation to congressional discretion," and the Court could not say "that the limits designated are *wholly without rationality*." *Id.* (emphasis added). BCRA's national soft money restrictions easily satisfy these narrow tailoring requirements.

It cannot reasonably be suggested that the parties will be silenced without soft money, which they have only raised in large sums in recent years. Under FECA, as amended by BCRA, each national political party committee is allowed to receive contributions of up to $15,000 from political action committees, and up to $25,000 from individuals (subject to individuals' biannual

aggregate contribution limit).[192] In the 2000 election cycle, the national parties raised $741 million in hard money contributions, and BCRA has since *increased* the hard money limits.

Moreover, BCRA is a loophole closing measure and can only effectively avoid future evasions through a comprehensive set of rules. Given the central and pervasive role of the national parties in creating and exploiting the soft money loophole, Congress appropriately determined that anything other than a clean break by the national parties with soft money would invite further evasion. The Supreme Court has held that Congress has authority to anticipate and foreclose loopholes that might otherwise be used to undermine the law. As the evidence demonstrates, the pattern of evasion has been comprehensive, thus calling for an equally comprehensive remedy.

F. The Measures Congress Adopted To Constrain the Use of Soft Money by State and Local Parties For Activities that Affect Federal Elections Are Constitutional.

Congress enacted the state and local party soft money provisions to serve the same anti-corruption and anti-circumvention purposes that informed the national party restrictions. In so doing, Congress carefully circumscribed the state party rules so they would restrict only the source and amount of money state parties use to pay for activities that affect federal elections.

1. The State Soft Money Rules Serve the Same Important Purposes as the Corresponding Limits on National Soft Money.

Like national parties, state political parties have long been subject to federal campaign finance laws. Indeed, even when engaging in generic campaign activity — such as voter registration and GOTV efforts that do not mention candidates — state parties have long been required to allocate a portion of their expenditures to federal, hard money accounts, which are

[192] 2 U.S.C. § 441a(a)(2)(B); 2 U.S.C. § 441a(a)(1)(B) (contributions by individuals to national parties); 2 U.S.C. § 441a(a)(3) (aggregate limit); *see also* 11 C.F.R. § 110.2(c)(1)-(3) (regulations on PAC contributions); 11 C.F.R. § 110.1(c)(1)-(3) (regulations on individual contributions).

subject to FECA limits and restrictions. *See, e.g.*, Mann Expert Report at 9-10. These rules, and those added by BCRA, serve the same important government interests served by the corresponding national party rules: they avoid actual and apparent corruption in the federal political system and they guard against circumvention of federal law.

BCRA requires that state, district and local committees use hard money either in part or in whole to pay for activities that affect federal elections. At the same time, BCRA allows state parties to use soft money to pay for part of certain federal election activities, and it leaves wholly unregulated the use of soft money for purely state election activities.

In this manner, BCRA operates to modify the previous allocation rules for the express purpose of combating evasion and the actuality and appearance of corruption. As Senator Rudman testified:

> If state and local parties can use soft money for activities that affect federal elections, then the problem will not be solved at all. The same enormous incentives to raise money will exist; the same large contributions by corporations, unions, and wealthy individuals will be made; the federal candidates who benefit from state party use of these funds will know exactly who their benefactors are; the same degree of beholdenness and obligation will arise; the same distortion on the legislative process will occur; and the same public cynicism will erode the foundations of our democracy — except it will all be worse in the public's mind because a perceived reform was undercut once again by a loophole that allows big money into the system.[193]

When Congress enacted BCRA, the legislative record was replete with evidence of the propensity of the political parties to find ways to evade the law.[194] In particular, Congress considered the fact that, if the national parties were prohibited from raising and using soft money to influence federal elections but the state parties were not, the national soft money ban would be ineffective because the state parties could continue to use soft money to influence federal

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[193] Rudman Decl. ¶ 19.

[194] *See, e.g.*, 148 Cong. Rec. H409 (daily ed. Feb. 13, 2002) (statement of Rep. Shays).

elections.[195] As Senator Schumer put it, "regulating soft money without dealing with the soft money that goes to State parties is like the person who drinks a Diet Coke with his double cheeseburger and fries: It does not quite get the job done."[196] Congress was surely right in concluding that, without limits on the use by state parties of soft money, the national party limits (and, indeed, the existing limits in FECA) would be quickly nullified.

Here, the record contains substantial evidence of actual and apparent corruption arising directly from the state soft money system. Moreover, the Supreme Court has recognized that the risk of actual and apparent corruption arising from large political contributions does not abate when the contributions are made to state parties.[197] In *Colorado II*, the Supreme Court addressed a challenge to FECA's limits on coordinated expenditures in support of a federal candidate *by a state political party*. 533 U.S. at 437. The Court emphasized that state political parties (such as the plaintiff in that case, the Colorado Republican Party, also a plaintiff here) are uniquely situated to channel financial benefits to candidates and, as a result, to channel influence over those candidates to contributors. As the Court concluded, "whether they like it or not, [state political parties] act as agents for spending on behalf of those who seek to produce obligated officeholders." *Id*. at 452. As a result, state parties are "in a position to be used to circumvent

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[195] *See, e.g.*, 145 Cong Rec. H8275 (daily ed. Sept. 14, 1999) (statement of Rep. Kaptur) ("The Hutchinson substitute does not stop soft money from influencing our Federal elections. It only does half the job. While this amendment calls for a ban on Federal soft money, it does not stop State parties from spending soft money on Federal elections. That is like bolting the front door to protect yourself from burglars while hanging a neon sign on the back door that says, 'Come on in.' It is a shell game. You are only moving the soft money from the Federal parties to the State parties"); 144 Cong. Rec. H7323 (daily ed. Aug. 5, 1998) (statement of Rep. Roukema); 145 Cong. Rec. S2138 (daily ed. March 20, 2002) (statement of Sen. McCain); *see also Oversight of the Federal Election Commission: Hearing before the House Subcomm. on Gov't Mgmt., Info., & Tech.*, 105th Cong. at 140 (Mar. 5, 1998) (testimony of Lawrence Noble). See Tab 10 of Intervenors' Excerpts of Record for selected evidence that state parties solicit and spend soft money to affect federal elections.

[196] 147 Cong. Rec. S2928 (daily ed. Mar. 26, 2001) (statement of Sen. Schumer); *see also* Brock Decl. ¶ 8 ("It does no good to close the soft money loophole at the national level, but then allow state and local parties to use money from corporations, unions, and wealthy individuals in ways that affect federal elections").

[197] As the Colorado Republican Party itself argued in *Colorado II*, "[n]o other political actor shares comparable ties with a candidate," Resp. Brief at 20. As a result, no other political actor is better able — in actuality or appearance — to produce "obligated officeholders," 533 U.S. at 452.

contribution limits that apply to individuals and PACs, and thereby to exacerbate the threat of corruption and apparent corruption that those contribution limits are aimed at reducing."[198]

2. BCRA Is Closely Drawn To Serve the Important Government Interest in Limiting the Use of Soft Money by State and Local Parties To Influence Federal Elections.

BCRA's state party provisions are carefully tailored to strike a balance between Congress's anti-corruption and anti-circumvention interests and the states' interest in controlling their own elections.[199] That balance is reflected in the definition of "Federal election activity," which confines the effect of BCRA to those state party activities that most clearly affect federal elections; in the Levin Amendment, which permits state parties to use limited soft money to finance even most of those activities; and in the increase in the hard money contribution limits to the state parties.[200]

BCRA defines "Federal election activity" as (1) voter registration activity that occurs within 120 days of a regularly scheduled federal election; (2) voter identification, GOTV, and generic campaign activity conducted in connection with an election in which a federal candidate appears on the ballot; (3) services provided by state or local party employees who spend more than 25 percent of their time during a given month on activities in connection with a federal

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[198] *See also id*. at 453-54 (describing the state political party as "a party whose *very efficiency in channeling benefits to candidates threatens to undermine the contribution . . . limits to which . . . others are unquestionably subject"), id.* at 455 (*"parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation* as channels for circumventing contribution and coordinated spending limits binding on other political players") (emphasis added).

[199] "This bill represents a balanced approach which addresses the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties, which then use those funds for Federal election activity. At the same time, the bill does not attempt to regulate State and local party spending where this danger is not present, and where State and local parties engage in purely non-Federal activities. We will not succeed in closing the soft-money loophole unless we address the problem at the State and local level. We do this, however, while preserving the rights and abilities of our State and local parties to engage in truly local activity." 148 Cong. Rec. S2138 (daily ed. March 20, 2002) (statement of Sen. McCain).

[200] It is also reflected in the definition of those activities that are specifically excluded from the category of federal election activities. 2 U.S.C. § 431(20)(B).

election; and (4) public communications that support or oppose a clearly identified candidate for federal office.[201]

It is evident that public communications that promote, support, attack, or oppose a clearly identified candidate for federal office substantially affect federal elections.[202] And the plaintiff parties' own witnesses and documents, as well as defendants' experts, demonstrate that voter registration and voter mobilization activities (voter identification, GOTV, and generic campaign activities) affect federal elections, regardless of whether the activities are expressly targeted to those elections.[203] Based on analysis of actual voting data, opinion surveys, exit polls, and party behavior, Professor Green concludes:

> Because the partisan proclivities of the electorate express themselves toward both state and federal candidates, state parties influence federal elections directly even when they mobilize their supporters on behalf of a candidate for state office . . . . The evidence shows quite clearly that a campaign that mobilizes residents of a highly Republican precinct will produce a harvest of votes for Republican candidates for both state and federal office. A campaign need not mention federal candidates to have a direct effect on voting for such a candidate.[204]

Nor is the concept that state party activities of this sort affect federal elections a new one: "FECA unambiguously requires that state party committee money spent for the limited purposes set forth in the 1979 amendment — volunteer materials, voter registration and get-out-the-vote activities — must be paid for solely from funds subject to the limitations and prohibitions of the

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[201] 2 U.S.C. § 431(20)(A). Moreover, as to both (1) and (2), a state party could use soft money contributions so long as they were raised by the party making the expenditure in increments no greater than $10,000, and the Levin Amendment conditions were met. 2 U.S.C. § 441i(b)(2)(B) and (C).

[202] *See* McCain Decl. ¶¶ 15-18; Beckett Decl. ¶¶ 8-9 [DEV 6-Tab 3]; Chapin Decl. ¶¶ 8-10 [Dev 6-Tab 12]; Lamson Decl. ¶ 9; Pennington Decl. ¶¶ 10, 13-14; 148 Cong. Rec. S2138 (daily ed. March 20, 2002) (statement of Sen. McCain).

[203] *See, e.g.*, [REDACTED] *see also* Rep. Hilliard Dep. Tr. at 22-23 (stating that soft money efforts "definitely" aided his own campaign efforts "on a continuing basis"); D. Green Expert Report at 13-14 ("A campaign need not mention federal candidates to have a direct effect on voting for such candidate"); Erwin Dep. Tr. at 74 (GOTV, voter registration benefit all candidates); Philp Dep. Tr. at 49 (same); Bowler Dep. Tr. at 46-47 (same); Fowler Decl. ¶ 17.

[204] D. Green Expert Report at 13-14.

FECA" when the expenditures are related to a federal election.[205] There can be no doubt that, without the limits on using soft money for such activities, parties, unions, corporations, and wealthy contributors would continue to evade federal law by making soft money contributions to state parties for the purpose of affecting federal elections.[206]

Although Congress might well have stopped here, it took additional steps to accommodate the interests of the states and state parties. Most notably, the Levin Amendment allows state parties to continue to use soft money to pay for an allocated part of the expense of "Federal election activity," so long as the activity does not refer to a clearly identified candidate for federal office, the funds are not used for certain broadcast communications, and the funds are raised directly by the state or local party in increments of $10,000 or less.[207] By allowing "Levin

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[205] *Common Cause v. Federal Election Comm'n*, 692 F. Supp. 1391, 1396 (D.D.C. 1987); *see also id*. ("it is possible that the Commission may conclude that *no* method of allocation will effectuate the Congressional goal that *all* monies spent by state political committees on those activities permitted in the 1979 amendments be 'hard money' under the FECA").

[206] 2 U.S.C. § 441a(a)(1)(D). Congress, in its expert judgment, concluded that it would be wise to include "an association or similar group of candidates for state or local office" among the entities that are subject to BCRA's restrictions on the use of soft money for "Federal election activity." This loophole-closing measure is necessary because the leadership of the parties is inextricably intertwined with, and sometimes identical to, the parties' candidates and officeholders. *See* D. Green Expert Report at 9-10, 12. At both the national and the state levels, "leadership PACs," "caucus PACs," "candidate PACs," and other organizations have been formed by groups of Republican and Democratic officeholders or candidates for the purpose of raising soft money and supporting various candidacies. [REDACTED].

Were this practice to continue, the leaders of political parties could readily circumvent limits on soft money contributions by forming such PACs or organizations. Given the extensive experience of Members of Congress with the formation and uses of leadership PACs and other candidate organizations, Congress's judgment in this regard is entitled to special deference.

[207] Congress prohibited transfers among or joint fundraising by state and local political parties with respect to "Levin funds." 2 U.S.C. §§ 441i(b)(2)(B)(iv), (C). Were state and local parties free to transfer $10,000 contributions among themselves, contributors could multiply the amount of their permissible contribution to a particular party simply by funneling additional soft money through other party committees. *See Service Employees Int'l Union v. Fair Political Practices Comm'n*, 747 F. Supp. 580, 593 (E.D. Cal. 1990) (noting the "significant weight" of the argument that a "transfer ban is simply a device to prevent those who desire to avoid the contribution limits from doing so by the simple expedient of using another candidate as a conduit for the contribution"), *aff'd*, 955 F.2d 1312 (9th Cir. 1992). Joint fundraising by multiple state and local parties would substantially facilitate such circumvention, putting multiple parties in the same place (or on the same fundraising mailer) at the same time with the same donor. For general information on how state and local parties transfer money amongst themselves, see Tab 14 of Intervenors' Excerpts of Record.

money," Congress provided the state parties with substantial leeway to continue to raise funds not subject to FECA.

Moreover, Congress further tailored the state soft money rules by excluding certain election activity — such as certain public communications that refer only to state candidates and the purchase of grassroots campaign materials that name or depict only a candidate for state or local office — from the reach of the statute.[208] And finally, Congress increased the hard money contribution limits for contributions by individuals to state parties, making it easier for these party committees to raise hard money funds. These accommodations go well beyond any constitutional demand that contribution limits be "closely drawn" and, indeed, any broader exemptions would inevitably invite evasion of federal contribution limits.

3. BCRA's Definition of "Public Communication" Is Neither Overbroad Nor Vague.

The definition of "Federal election activity" includes "a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office or attacks or opposes a candidate for that office."[209] This definition plays an essential role in preventing circumvention of the other provisions of FECA and BCRA, and is neither overbroad nor vague. Congress knew that most of the hundreds of millions of dollars of soft money that have been funneled through state parties over the last several election cycles have been used to pay for media advertisements in support of or opposition to federal candidates.[210] Accordingly, if state parties could use soft money for such media advertisements, a massive loophole would exist to be exploited.

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[208] 2 U.S.C. § § 431(20)(B)(i), (iv).

[209] 2 U.S.C. § 431(20)(A).

[210] Indeed, in many instances, state parties used soft money to pay for advertisements that the national parties designed and placed. *See supra* note 120.

Plaintiffs assert that this definition is overbroad because it is not circumscribed as to time. But a state party public communication that promotes, supports, attacks, or opposes a clearly identified candidate for federal office is a "Federal election activity" whenever it occurs, because political parties exist to elect candidates.[211] "Unlike interest groups, which pursue an issue-based agenda that transcends the election of candidates, parties are primarily and continuously concerned with acquiring power through electoral victory. Parties never engage in public communication without regard to its electoral consequences."[212] Accordingly, as the Court held in *Buckley*, because the "major purpose of [a party] is the nomination or election of . . . candidate[s]," its expenditures "can be assumed to fall within the core area sought to be addressed by Congress. They are, *by definition, campaign related.*"[213]

Plaintiffs also argue that terms "refers to," "promotes or supports," and "attacks or opposes" in Section 101(b) are unconstitutionally vague.[214] These contentions are meritless. At its core, the test for vagueness inquires whether the provisions at issue "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," "provide explicit standards for those who apply them," and, where First Amendment rights are implicated, do not induce "citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[215] Courts will, accordingly, consider the statute as a

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[211] This view of political parties as entities devoted principally to furthering the electoral prospects of their candidates is confirmed by the testimony of numerous witnesses. *See* D. Green Expert Report at 17, n.19; Bumpers Decl. ¶¶ 4-6; Jordan Decl. ¶ 6; [REDACTED]

[212] D. Green Expert Report at 17, n. 19; *see also* Bumpers Decl. ¶ 4-6.

[213] *Buckley*, 424 U.S. at 79 (emphasis added).

[214] *See* McConnell Compl. ¶ 123; RNC Compl. at ¶86; CDP Compl. at ¶57.

[215] *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Buckley*, 424 U.S. at 41 n.48. The standard of "vagueness" should be less strict here than in *Buckley*, because here only the sources of funding to pay for ads is being regulated, not the legality of the expenditures themselves, so that any "chilling" effect from lack of clarity is substantially diminished. A political party that is uncertain whether a particular advertisement "promotes" or "attacks" a candidate remains free to pay for the ad with hard money. In *Buckley*, by contrast, an individual would risk violating the law simply by virtue of placing the ad, regardless of the source of funds to pay for it.

whole, the purposes behind the statute, and the context in resolving vagueness challenges. *See Grayned*, 408 U.S. at 110-111.

Consideration of the context, legislative history, and entire text of BCRA reveals unambiguously that the "public communications" provision is designed to regulate the permissible sources and sizes of contributions state and local parties use to pay for any mass communication that expresses a view, positive or negative, about a clearly-identified candidate for *federal* office. As demonstrated, state parties have solicited and spent non-federal money for the purpose of affecting *federal* elections, and one of the principal means of doing so has been through mass communications that express either positive or negative views about federal candidates. Accordingly, the provisions were written specifically for the context of federal campaigns, where the communications in question "are easily measured by their impact" on such elections; accordingly, "it is clear what the [statute] as a whole" covers. *Grayned*, 408 U.S. at 110-12.

The RNC complaint challenges the use of the phrases "promotes or supports" and "attacks or opposes," asserting that "what seems like 'promot[ing]' to one person may seem like 'attack[ing]' to another." RNC Compl. ¶ 86. But the protest is empty: whether a communication "promotes" or "attacks" a candidate is irrelevant; if it does *either*, it is within the statutory definition. If the communication manifests a substantive view about a clearly identified candidate, it falls within the statute.

Nor does the Supreme Court's adoption of the "express advocacy" test in *Buckley* mean that Congress may not permissibly legislate regarding the funding of communications by parties that, even if they "promote or support" or "attack or oppose" a candidate, do not "in express

terms advocate the election or defeat" of that candidate.[216] Whatever force such a claim might have as applied to advertisements by entities other than candidates and political parties, it has none as applied to political party advertisements.

As discussed, in *Buckley* the Supreme Court adopted the view that all the activities and expenditures of a political party (or other political committee or candidate) "are, *by definition*, campaign related." *Id*. at 79 (emphasis added). Accordingly, the Court imposed an "express advocacy" test on the disclosure requirements only as they applied to "individuals and groups that are *not* candidates or political committees*." Id*. at 80 & n.108. Addressing the constitutionality of the disclosure provisions of FECA, the Court emphasized that those provisions "share[d] the same potential for encompassing both issue discussion and advocacy of a political result" as the provisions prohibiting independent expenditures "relative to" a candidate. *Id.* at 78. But the Court held that no such vagueness problem existed with respect to the activities of "political committees" (which include political parties) because they comprise only "organizations that are under the control of a candidate *or the major purpose of which is the nomination or election of a candidate*."[217] Thus, any argument that BCRA is unconstitutional because it restricts funding for some hypothetical set of mass communications by a political party that both refer to a "clearly identified candidate" and are (supposedly) *not* intended to affect that candidate's electoral prospects — to "promote or support" or "attack or oppose" the candidate — ignores both the facts and Supreme Court precedent.

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[216] *Buckley*, 424 U.S. at 44. That test was adopted by the Court only with respect to regulations that governed independent expenditures by persons *other than candidates and political parties. See Buckley*, 424 U.S. at 39-40 (noting that provision at issue applied to "all groups*, except political parties and campaign organizations*") (emphasis added).

[217] *Id*. at 79 (emphasis added).

G. BCRA Will Not Prevent National and State Parties from Amassing the Resources Necessary for Effective Advocacy.

Plaintiffs' contention that BCRA will cripple the national or state parties fails on both the law and the facts.

As the Supreme Court has held, while First Amendment rights include the ancillary right to "amass the resources necessary for effective advocacy," those rights are infringed only where the limits in questions are "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink Missouri*, 528 U.S. at 397. The same principle holds for political parties, which — like candidates — have long been subject to limits on the amounts and sources of funds they may solicit or receive. In light of the $741 million in *hard money* the parties raised in the 2000 election cycle,[218] and the fact that BCRA increases national party contribution limits from individuals from $20,000 per year to $25,000 per year to a national party committee (and state party contribution limits from $5,000 per year to $10,000 per year),[219] it is difficult to fathom the argument that BCRA *soft money* provisions will drive the sound of party voices below the level of notice.

In any event, plaintiffs' argument depends on the assumption that soft money strengthens state parties. Yet, former RNC chair Bill Brock testified that "[t]he reliance of the major parties on large soft money donations does not in fact strengthen the parties, it weakens them. The focus on raising and spending soft money to affect federal elections divorces both the national

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[218] FEC Reports Increase In Party Fundraising For 2000, at http://www.fec.gov/press/051501partyfund/051501partyfund.html.

[219] 2 U.S.C. § 441a(a)(1)(D); 2 U.S.C. § 441a(a)(1)(B). BCRA also increases the aggregate limit on the amount an individual can give to political parties. Under the previous law, an individual could give $50,000 in a two year election cycle to candidates, political parties, and PACs. Under BCRA, individuals can give a total of $57,500 in a two year election cycle to parties and PACs, with a separate limit for contributions to candidates.

and state parties from their roots."[220] Former DNC Chairman Don Fowler agreed that the "intense focus on raising larger and larger amounts from relatively few special interest sources does not make for stronger or better parties."[221] Even the RNC's own expert witness on the effects of soft money on the state parties has observed,

> the financial power of the national committees has altered the party hierarchy. State and local parties, which used to be the traditional power centers, now occupy the unfamiliar role of branch organizations in the party infrastructure. Increasingly, campaign decisions are centralized at the national level, with local organizations carrying out the strategic decisions of party professionals in Washington.[222]

This shift in power "could tilt policy concerns away from local and state interests and toward national constituencies that are the financial backers of national parties"; "may reduce the opportunities for volunteer and activist participation in day-to-day affairs, further eroding the influence of local party members"; and may subordinate "the traditional interests of state organizations to the immediate campaign necessities of federal candidates."[223] As Professor La Raja points out, "[r]ather than use soft money to shore up weak state and local organizations, or enforce party discipline in government, parties invest primarily in issue ads that help candidates."[224]

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[220] Brock Decl. ¶ 6.

[221] Fowler Decl. ¶ 12.

[222] La Raja Cross Tr., Ex. 3, at 49.

[223] *Id.* at 80.

[224] La Raja Cross Tr., Ex. 3 at 15; *see also id.* at 25 (agreeing with the proposition that "soft money is being spent excessively on expensive media technology for political advertising, rather than on grassroots efforts that could generate genuine enthusiasm for party politics"); *id.* at 69 ("[t]he remarkable change in transfers to state parties suggests that soft money is used increasingly to support federal candidates rather than for state party building"); *id.* at 75 ("rather than use soft money to shore up weaker organizations . . .the national organizations use soft money like hard money — to pursue the short-term goal of winning elections"). In fact, based on his research, La Raja concluded, "I find *no direct evidence* that parties use soft money to increase ideological cohesion or to support the weakest parties through party building." *Id.* at 70.

Plaintiffs' argument also depends on flawed assumptions about future fundraising practices, assumptions that Congress did not accept. The parties will adapt to BCRA because they operate strategically and change their behavior to respond to changing conditions, including changes in the law. The First Circuit recognized this when rejecting comparably dire predictions that candidates in Maine would be unable to raise insufficient funds under a proposed $250 contribution limit:

> At present, only "worst-case" scenario statistics, which consider the historical funding pattern and discount any contribution made over the limit, are available. These statistics, however, do not account for adaptations in human behavior and the likelihood that patterns will change to recoup whatever may be lost. Thus, the only picture that we can create by utilizing past statistics is one which likely over predicts the resultant loss of contributions. Indeed, with such a bellwether, the flock would never go anywhere.

Daggett v. Comm'n on Govt'l Ethics and Election Practices, 205 F.3d 445, 460 (1st Cir. 2000).

Moreover, *Buckley* makes clear that speculation about the possible effects of a particular campaign reform is inherently suspect and an insufficient basis for invalidating the reform. The Supreme Court declined to engage in precisely the type of speculation that plaintiffs invite here, when considering the claim that FECA's $1,000 contribution limit would "prevent the acquisition of seed money necessary to launch campaigns." 424 U.S. at 34 n.40. The Court noted that FECA was being challenged before candidates had an opportunity to operate under its requirements and thus before a record could be built as to its actual effects. The Court declined for that reason to speculate about the impact of the contribution limits, explaining "the absence of experience under the Act prevents us from evaluating this assertion. . . . [I]t is difficult to assess the effect of the contribution ceiling on the acquisition of seed money since candidates

have not previously had to make a concerted effort to raise start-up funds in small amounts." *Id.*[225]

Furthermore, as described in the Mann Expert Report, soft money was a relatively small part of national political party budgets until 1996,[226] political parties performed robustly before it, and there is no reason to believe they will be unable to manage without it.[227] Political scientists for defendants and plaintiffs alike agree. After canvassing the available evidence relating to both national and state parties, Professor Green concluded:

> If recent trends in campaign spending should be halted or even reversed by the BCRA, it is unlikely that either democracy or the parties themselves will suffer the dire consequences that Plaintiffs allege. . . . [T]he parties . . . might actually be better served by making campaign funds more difficult to raise. The shift away from labor-intensive campaigning has caused local party activism to die out, with a resultant drop in face-to-face mobilization activity. . . . [T]his decline in personal contact between campaigns and voters, as distinct from impersonal contacts by way of mass media, mail, or commercial phone banks — accounts for the long-term decline in voter turnout that the U.S. has experienced since the 1960s. In the long run, the BCRA may well strengthen parties. First, by raising the marginal cost of fundraising, it provides incentives for parties to invest in local infrastructure rather than in the here-today-gone-tomorrow media campaigns that transfer large sums of money to commercial marketing firms but do little to inspire the ongoing loyalty and participation of the electorate. Second, by limiting the size of donations, it forces the parties to broaden their base of financial backers. Third, by eliminating the soft money donations that enable large donors to gain special access to officeholders, it reduces the mounting tension between parties and democratic accountability.[228]

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[225] *See also Buckley*, 424 U.S.. at 99-101 (rejecting challenge to FECA's public financing requirements as unjustifiably restrictive of minority political interests, because "[a]ny risk of harm to minority interests is speculative due to our present lack of knowledge of the practical effects of public financing. . . .").

[226] *See* Mann Expert Report at 18, Table 2 & Chart 1; *see also* La Raja Cross, Ex. 3, at 37-48.

[227] *See* Feingold Dep. Tr. (Sept. 9, 2002) at 86 (stating that "I believe that my own state party chair of our Democratic Party indicated her belief that this would have a positive impact on generating grassroots interest again. The party has gone a long way away from their roots in trying to get the grassroots people involved. They have become money making machines."); *id.* at 85-90.

[228] D. Green Expert Report at 35 (internal citations omitted); *see also* Mann Expert Report at 31.

Plaintiffs' expert, Professor La Raja, is in accord: "[i]f soft money is banned, there is little doubt that parties will adapt. They have done extraordinarily well raising hard money in recent years, and they will focus more intensively on this supply of money. . . . In the short term, . . . the parties will have less money, a fact that will reduce their presence in campaigns. *Nevertheless, the parties will survive and possibly thrive.*"[229]

[229] La Raja Cross Tr., Ex. 3 at 148 (emphasis added)*; see also id.* at 64 ("parties have adapted quite well to different circumstances and appear to re-invent themselves at different stages in American history, often in response to regulations intended to limit their influence"); D. Green Expert Report at 33- 35; Krasno & Sorauf Expert Report at 11, 33-34; 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) ("If anything, the bill will return the State and local parties to the grassroots and encourage them to broaden their bases and reach out to average voters"). For example, Senator Brock testified that the parties ably performed their functions without soft money before the loophole emerged and can do so again with the large amounts of hard money they raise. *See* Brock Decl. ¶ 7. Mr. Fowler agreed that "this intense focus on raising larger and larger amounts from relatively few special interests does not make for stronger or better parties," and that the parties can perform their important functions effectively without soft money. Fowler Decl. ¶ 12. Both Brock and Fowler debunk the "defunding" argument some plaintiffs advance, pointing out that the parties raised $741 million in *hard* money during the 1999-2000 election cycle and that they can raise substantially more hard money in the future due to BCRA's increase in the party contribution limits from $20,000 to $25,000 (§ 307(a)(2)). *See* Fowler Decl. ¶ 14; Brock Decl. ¶ 7. Practicing politicians reach the same conclusion. Senator McCain testified that "the parties were stronger and more vibrant when I first ran for Congress in 1982, when they relied on barbeques and volunteers as a way to get ordinary citizens involved in the political process." McCain Decl. ¶ 20. As soft money and hired consultants came to dominate party activities, voter registration for both the Democratic and Republican parties declined in Arizona while the numbers of those registering as independents increased. *See id.* ¶ 20.

II. BCRA's Electioneering Communications Provisions Are Constitutional.

Title I of BCRA addresses the development of the corrosive system of "soft money" contributions to political parties. The parties spent much of that soft money on broadcast advertising that supposedly addressed only "issues," but in fact was designed to influence the election of candidates for federal office.[230] In Title II, Congress addressed the related problem of corporations, unions, and other non-party interest groups using similar sham "issue" ads to support or oppose particular federal candidates, without complying with source restrictions and disclosure rules that have long applied to independent campaign spending.[231]

Beginning as recently as the 1996 election cycle, groups used such ads to evade rules included in FECA and upheld in *Buckley* and later cases, on the theory that the amounts spent fell outside FECA's definition of "independent expenditures." The result was wholesale evasion of two key aspects of campaign finance law. First, corporations and unions used the ads to deploy their treasury funds to participate directly in federal candidate elections — something otherwise prohibited since the 1940s.[232] Second, groups or individuals collected and spent unlimited amounts for federal campaign activity, without public disclosure of the source, nature, or amount of those expenditures.

In Title II, Congress acted to end these evasions of existing law. In addition, Title II's reforms help support Title I's measures to eliminate the soft money system, which could be undermined if soft-money-funded party ads could be replaced with similar ads run by corporations or unions themselves, or if corporate or union contributions that would have

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230 *See Report of Thomas E. Mann* (Sept. 23, 2002) at 18-26 [DEV 1-Tab 1, hereinafter Mann Expert Report]

231 Throughout this portion of our brief we often use the term "interest groups" to refer to individuals and entities (including corporations and unions) other than candidates and political committees (including parties).

232 *See* notes 3-7 and accompanying text, *supra*.

allowed the parties to run such ads could be diverted to nominally independent groups serving the parties' goals.

Title II addresses these problems by objectively defining a limited category of "electioneering communications" that Congress determined, and experience shows, are overwhelmingly likely to convey support for or opposition to the election campaigns of particular federal candidates: broadcast ads that refer to a clearly identified candidate for federal office, and are targeted to reach that candidate's electorate in the final weeks before the election. Despite plaintiffs' repeated suggestions to the contrary, *BCRA does not "ban" such communications*. It simply makes them subject to the same sort of rules that have long applied to federal campaign spending by persons other than candidates or parties: Corporations and unions may not use their treasury funds to create and air electioneering communications (although they may use funds that individuals have voluntarily contributed to the organization's PACs for political use), and anyone who spends more than $10,000 a year on such ads must make specified disclosures. What is more, these source requirements have no application to other types of spending — no application to ads run by corporations or unions in any non-broadcast medium; no application to ads that do not mention a candidate, or do mention a candidate but are aired at any time other than just before the election, or are not targeted to the candidate's electorate; and no application to any expenditure by a corporate or union PAC, even for a broadcast ad that mentions a candidate and is so targeted.

Plaintiffs' principal argument with respect to Title II is that Congress may not constitutionally treat money spent on electioneering communications as a form of campaign spending. That argument is wrong as a matter of law, logic, and history. It depends on two passages in *Buckley*, in which the Court adopted narrowing constructions of two provisions of

the original FECA in order to avoid constitutional vagueness problems, and articulated what became known as the "express advocacy" standard[233] — often characterized as the "magic words" test. As we explain below, *Buckley* never intended, and cannot reasonably be read, to establish "express advocacy" (let alone "magic words") as an inflexible constitutional constraint on Congress's ability to fashion workable campaign finance regulation. After *Buckley*, Congress did adopt "express advocacy" as a statutory test, and lower courts generally interpreted the test narrowly. It was that narrow statutory standard that corporations, unions, and others exploited to air advertisements plainly intended to influence federal candidate elections, while maintaining that they were not required to observe either FECA's disclosure requirements or its limitations on the campaign use of union dues or corporate treasury money. It is that evasion of an unworkable *statutory* standard that Congress has now addressed in Title II.

In this area as in many others, "a page of history is worth a volume of logic."[234] We therefore begin by describing what the record reveals about the post-*Buckley* developments to which Congress was responding in Title II. That discussion makes clear how, beginning in earnest just a few years ago, corporations, unions, and their surrogates exploited the "express advocacy" test. Among other things, the record shows that ads designed to promote or oppose candidates share certain common characteristics — the very characteristics that informed Congress's framing of Title II: They refer directly to a specific candidate; they are targeted to reach that candidate's electorate; and, unlike genuine issue ads, they are dramatically concentrated in the weeks leading up to federal elections in which the targeted candidate is running.

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[233] *See* 424 U.S. at 44 & n.52, 80 & n.108.

[234] *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921); *see also* Oliver W. Holmes, *The Common Law* 1 (1881) ("The life of the law has not been logic: it has been experience.").

Title II of BCRA is narrowly tailored to remedy the worst excesses wrought by the "express advocacy" loophole. Without "banning" any speech, it narrowly extends source-of-funds limitations and disclosure rules to a new category of "electioneering communications." That term covers only advertisements that (i) are broadcast on television or radio, (ii) air within 60 days before a federal general election or 30 days before a federal primary, (iii) refer to a clearly identified candidate for federal office, and (iv) are targeted to reach that candidate's electorate. Congress narrowly tailored these loophole-closing reforms to address specific problems demonstrated by the record. They do no more than restore FECA to vitality, so it can effectively serve important public goals that the Supreme Court has long recognized as constitutionally sufficient to justify the limited measures at issue here.

A. The Problem Congress Addressed: The Legislative History and Record Evidence Regarding Sham "Issue" Ads Run By Corporations, Unions, And Other Interest Groups.

In the pages that follow, we summarize some of the evidence showing how corporations, unions, and others used sham "issue" ads to evade FECA. We discuss the content of typical ads; the evidence that proves that ad sponsors fully intended to influence candidate elections; and the timing and targeting features that distinguish ads with an electioneering purpose. We explain how the evidence shows the inadequacy of the "express advocacy" test, and why Congress reasonably concluded that exclusive reliance on that test was allowing unchecked evasion and undermining the integrity of federal elections.

Space obviously limits our summary of the evidence. Many of these same issues are also treated in the reports of defendants' experts, including political scientists Kenneth Goldstein,[235]

[235] *Report of Kenneth Goldstein* (Sept. 9, 2002) [DEV1- Tab 7, hereinafter Goldstein Expert Report].

Jonathan Krasno and Frank Sorauf (testifying jointly),[236] and David Magleby.[237] We respectfully refer the Court to these reports for comprehensive expert discussion of the history and nature of the sham "issue" ad problem, the need for reform, and the empirical data that supports the approach adopted by Congress in Title II.

1. Sham "Issue" Ads And The Evasion Of FECA's Disclosure Requirements And Restrictions On Corporate And Union Spending.

After *Buckley* and the post-*Buckley* amendments, FECA's prohibition on the campaign use of corporate and union treasury money, and its disclosure requirements, applied to spending independent of a candidate only if the expenditure "expressly advocat[ed] the election or defeat of a clearly identified candidate."[238] For two decades, sponsors of political ads generally observed the spirit of these rules, complying with them when running ads that had an electioneering purpose.[239] As, however, with soft money and ads run by political parties, the 1996 election cycle marked a turning point. First the AFL-CIO, then corporate groups, and soon other interest groups (often funded by corporations and unions) evaded FECA's intent by running ads that were designed to support or attack particular federal candidates, but that omitted specific exhortations such as "vote for" or "vote against." Arguing that in the absence of such "magic words" their ads could not be treated as campaign spending, the ad sponsors neither

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[236] Jonathan S. Krasno and Frank J. Sorauf, *Evaluating the Bipartisan Campaign Reform Act (BCRA)* (Sept. 23, 2002) [DEV 1-Tab 2, hereinafter Krasno & Sorauf Expert Report].

[237] David B. Magleby, *Report Concerning Interest Group Electioneering Advocacy and Party Soft Money Activity* (Sept. 23, 2002) [DEV 4-Tab 8, hereinafter Magleby Expert Report].

[238] *See* 2 U.S.C. § 431(17) (defining "independent expenditure"); *MCFL*, 479 U.S. at 245-249.

[239] As former campaign consultant Douglas Bailey testified, "in the 1970s and 1980s, we operated under essentially the same set of [legal] rules that governed in 1996, but many of today's practices would have been considered dangerous and wrong then, both politically and legally." Bailey Decl. ¶ 14 [DEV 6-Tab 2].

complied with FECA's disclosure requirements nor limited corporate and union spending to PAC funds obtained from individual contributors.[240]

The record contains many examples of such ads, but a few examples will illustrate the type of evasion that prompted Congress to act. In the two weeks before the 2000 presidential election, plaintiff AFL-CIO deluged selected battleground states with the following ad:

> When Governor Bush said during the debate that he brought people together to pass the patient's bill of rights, he knew in his heart that that was absolutely false. Nurses worked long and hard to pass this legislation and hold the HMOs accountable for denying medical care to people. He fought it every step of the way. His constituency was the insurance industry. That is why he vetoed it.[241]

[REDACTED] Either way, running these ads just before the election, the AFL-CIO hardly needed to add "Don't vote for Bush" to make its point.

Nor did plaintiff Chamber of Commerce need to use "magic words" when it ran ads just before the 2000 election, in selected districts with close congressional races, using slogans like "Tell [Candidate X] to stop scaring seniors. Tell him to stop supporting a big government prescription drug plan."[242] The Chamber ran this ad against, [REDACTED] .[243] None of these challengers was in a position to vote on a federal prescription drug plan unless he or she was elected to federal office — a result the Chamber obviously opposed. The ads were just what they sounded like — campaign ads supporting the targets' opponents.

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[240] *See* Mann Expert Report at 18-19. Lower courts have generally construed *Buckley*'s "express advocacy" test very narrowly. *See, e.g.*, *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001) (invalidating federal regulation defining express advocacy to include ads whose electioneering purpose could be gleaned from context); *Maine Right to Life Comm., Inc. v. FEC*, 98 F.3d 1, 1 (1st Cir. 1996) (*per curiam*) (same). *But see FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987) (adopting contextual standard).

[241] [REDACTED]

[242] CMAG Storyboard AR COC Ross Big Gov't RX Plan [DEV 48 -Tab 3]. CMAG Storyboards discussed in this Part are collected at IER Tab 15.

[243] [REDACTED] CMAG Storyboard KY/COC Jordan Big Gov't Rx Plan [DEV 48 - Tab 3]; CMAG Storyboard OH/COC O'Shaugnessy Big Gov't Rx Plan [DEV 48-Tab 3].

Less well known groups also took advantage of the opportunity to support or attack candidates with so-called "issue" ads. In 1996, "Citizens for Reform," a Virginia-based nonprofit corporation with no previous record and "no . . . offices, staff [and no] telephones,"[244] spent $2 million on congressional races from Kansas to Texas to California to run television ads such as the following, which aired during the final weeks of the Montana congressional race between Bill Yellowtail and Rick Hill:

> Who is Bill Yellowtail? He preaches family values he took a swing at his wife. And Yellowtail's response? He only slapped her. But "her nose was not broken." He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments — then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.[245]

Although the group was credited with helping Hill beat Yellowtail, it never disclosed to the public how much it spent or the sources of its funds.[246]

There are many other examples; here are just a few more. The salient point is that while each avoids using words of "express advocacy," each was also clearly intended to influence an election:

- An ad run right on the eve of the presidential election of 2000, explaining that Myanmar used "slave labor to assist the building of an oil pipeline by American company Haliburton" under Dick Cheney's leadership. The tag line: "We just can't trust Dick Cheney a heartbeat away from the presidency."[247]

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[244] Thompson Comm. Rep. at 6301.

[245] Thompson Comm. Rep. at 6304-05; *see also* Richard Briffault, *Redrawing the Elections/Politics Line*, 77 Texas L. Rev. 1751, 1751 (1999); [REDACTED]

[246] *See* Richard Paul Meier, *The Darker Side of Nonprofits: When Charities and Social Welfare Groups Become Political Slush Funds*, 147 U. Pa. L. Rev. 971, 990 n.117 (1999). *See also* 144 Cong. Rec. S880 (daily ed. Feb. 24, 1998) (comments of Sen. Dorgan, discussing $2 million campaign by another organization, the "Citizens for Republic Education Fund": "The vast majority of the money was spent after October 11 in an election year. The group didn't come into existence until June of the election year. The group never had any committees or programs, had no offices, no staff, no chairs, no desks and no telephones. All it had was millions of dollars to pump into attack ads.")

[247] CMAG Storyboard NA Cheney Mynmar [DEV 48-Tab 3]. Some data cited herein are not provided in the Expert Reports, but generated from the CMAG databases that were appended to the Expert Reports of Dr. Goldstein and Drs. Krasno and Sorauf. *See* Goldstein Expert Report App. L (2000 database); Krasno & Sorauf Expert Report,

- An Americans for Job Security ad, run close to the 2000 election in Washington State, criticizing Senate candidate Maria Cantwell's voting record on taxes from 1993 and earlier, even though she was not at the time an officeholder and had left Congress six years earlier. The tag line: "Can we afford politicians like Maria Cantwell?"[248]

- An ad run in late October, 1996, in Arkansas, by Citizens for the Republic Education Fund, attacking Senate candidate Winston Bryant's record as state attorney general, for a 71 percent budget increase; "taxpayer funded junkets"; spending "about $100,000 on new furniture"; "never oppos[ing] the parole of any convicted criminal, even rapists and murderers." The tag line: "Winston Bryant: government waste, political junkets, soft on crime. Call Winston Bryant and tell him to give the money back."[249]

- An ad run by the Republican Leadership Council, an interest group, poking fun at Senate candidate Hillary Rodham Clinton, within 30 days before the Democratic primary, for supposedly confusing Erie, Pennsylvania with Erie County, New York, and asking, "How can Hillary Clinton help western New York if she can't even find it on a map?" The tag line: "Call Mrs. Clinton. Give her directions to Erie County in New York, but say it nicely. She's new around here."[250]

- An ad run by Americans for Limited Terms, aired 115 times in the six days immediately before the 1998 election, berating Congressman Bill Goodling because he allegedly "bounced over 430 checks in the House Bank scandal. He pledged not to raise taxes. Then he broke his pledge by voting to raise your taxes. Said he wouldn't take money from special interests. Then traveled the globe on their money." The tagline: "Call Goodling, ask him to apologize and stop his career politician ways. Ask him to be a true citizen legislator."[251]

- Two ads run by a group calling itself "Citizens for a Better America," targeted at New Jersey voters and aired between October 3 and November 2, 2000, criticizing Jon Corzine for "refusing to release his tax returns"; for "[n]ot being honest about his finances"; and for not voting in 1998 or "in 23 other elections too." One ad described Corzine's alleged behavior as "all part of a pattern of deception," and argued that "being rich doesn't excuse him from being accountable." The tagline for that ad: "Jon Corzine: Release your tax returns and always tell the truth."[252]

CD-ROM App. Data Sets. Data directly gathered from the CMAG databases are hereinafter cited as "search of CMAG Database."

[248] CMAG Storyboard WA AJS Judge Cantwell by her Record [DEV 48-Tab 3]; Goldstein Expert Report Table 14.

[249] 144 Cong. Rec. H5456 (daily ed. July 14, 1998) (quoted by Rep. Meehan).

[250] CMAG Storyboard NY RLC Clinton Talking to Erie PA [DEV 48-Tab 3]; Goldsten Expert Report Table 14.

[251] CMAG Storyboard PA AFLT Goodling [DEV 48-Tab 3]; search of CMAG Database.

[252] CMAG Storyboard NJ CBA Newspapers Criticize Corzine [DEV 48-Tab 3]; NJ CBA Corzine Didn't Vote in 1991 [DEV 48-Tab 3]; Goldstein Expert Report Table 14.

Among other things, these examples illustrate two common features of sham "issue" ads. First, virtually all such ads focus, often negatively, on a named candidate. This is particularly significant because, [REDACTED] To the contrary, "invoking [candidates] might unnecessarily politicize the underlying message of these ads and undermine their effectiveness."[253] Confirming the point, in a survey covering most of the political ads run in 1998 and 2000, the vast majority of ads perceived to be genuine issue ads did *not* mention candidates.[254]

Second, ads designed to affect the positions of government officials could direct "viewers . . . to contact their Representative or their Senators, not specific individuals."[255] This is especially true of advertising directed at House legislation, because many media markets encompass numerous House districts. By contrast, many ads that exploit the "express advocacy" test end with an exhortation to call a specific candidate and "tell" him or her something. "[T]ell him we expect our representatives to tell the truth and actually do something that helps"; "tell her we're proud of her efforts for our working families"; "tell him to vote for our families for a change";[256] "thank him for fighting for us and for them."[257] Campaign consultants and candidates alike know that these exhortations are — and are perceived by the viewer to be — equivalent to urging a vote for or against a candidate.[258] As consultant Rocky Pennington testified:

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253 Krasno & Sorauf Expert Report at 63.

254 Goldstein Expert Report at 29 (94.2% of genuine issue ads mentioned candidates in 2000); Krasno & Sorauf Expert Report at 55-56 (93.6% in 1998).

255 Krasno & Sorauf Expert Report at 63 & n.149.

256 Monroe Dep. Tr., Ex. 3, 4; [REDACTED]

257 CMAG Storyboard MO BRT Ashcroft from the Start [DEV 48 - Tab 3].

258 Lamson Decl. ¶ 6 [DEV 7-Tab 26] ("When political parties and interest groups run 'issue ads' just before an election that say 'call' a candidate and tell her to do something, their real purpose is typically not to enlighten the voters about some issue, but to influence the result of the election, and these ads often do have that effect."); Beckett Decl. ¶ 8 ("[M]any so-called 'issue ads' run by parties and interest groups just before an election attack a candidate, then end by supposedly urging the viewer to 'tell' or 'ask' the candidate to stop being that way. These ads are

> The usual final tag line for soft money electioneering is to "call" or "ask" or "tell" a candidate to stop or continue doing something, often something vague like fighting for the right priorities. This is pretty silly, because it's hard to imagine thousands of people calling the candidate in response to the ad and saying, keep doing this, this is wonderful.[259]

Most important, [REDACTED] and that [REDACTED] Similarly, the best way to "thank" a politician or to express approval is to vote for her. No one makes the point better than the NRA's chief political operative, explaining that the group "engaged in issue advocacy in many locations around the country," and citing an ad about Congressman Hostettler that closed with the tagline, "Call 334-1111 and thank him for fighting crime by getting tough on criminals." As she concludes:

> Guess what? We really hoped they would vote for the Congressman, not just thank him. And people did. When we're three months away from an election, there's not a dime's worth of difference between "thanking" elected officials and "electing" them.[260]

This discussion is limited to a few examples. But there may be no better way to understand the problem that vexed Congress in this area than to examine a larger sample of ads, applying ordinary experience and common sense. Volume 48 of the record submitted by the defendants contains storyboards — the script and photographic snapshots — of virtually all the television ads from 1998 and 2000 that would have been covered by Title II of BCRA because they referred to candidates and aired within 60 days of the general election. The full set includes just 154 distinct ads from 2000, and 37 from 1998, and we encourage the Court to look for itself.[261] For added nuance, the record also contains audio and video copies of numerous radio

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almost never really about issues. They are almost always election ads, designed to affect the election result, and many do affect the election result.").

[259] Pennington Decl. ¶ 10 [DEV 8-Tab 31].

[260] INT 015986 (Tanya K. Metaksa, Opening Remarks at the American Ass'n of Political Consultants Fifth General Session on "Issue Advocacy," at 2 (Jan. 17, 1997) [IER Tab 1.J].

[261] Storyboards for Advertisements Sponsored by Interest Groups within 60 Days of the 2000 Election that Mentioned a Candidate for Federal Office [DEV 48-Tab 3]; Storyboards for Advertisements Sponsored by Interest

and television ads.[262] In each medium, a comparison to the (very different) ads that do not mention candidates and to (virtually identical) ads that are run by candidates is especially instructive.[263] The examples we have cited, and the other ads in the record, illustrate how the "express advocacy" test allowed corporations and unions to evade the longstanding restrictions on their direct involvement in federal political campaigns.

In addition, as the "Citizens for Reform" example in particular shows, exploitation of the same test undermined FECA's policy of transparency in campaign-related spending. Interest groups masked their identities, relationships, and private interests from voters behind names such as "Committee for Good Common Sense," "Voters for Campaign Truth," or "American Seniors, Inc." — all "organizations about which literally nothing was publicly known."[264] As one Senator put it, "You do not know if they are funded by the tobacco companies, you do not know if they are funded by foreign money, you do not have a clue."[265]

One group called itself Citizens for Better Medicare ("CBM") [REDACTED] CBM held itself out as "a broad-based, bipartisan group representing the interests of patients, seniors, pharmaceutical research companies, doctors, caregivers, hospitals, employers, health care experts and many others concerned with the health of Americans and our Medicare

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Groups within 60 Days of the 1998 Election that Mentioned a Candidate for Federal Office [DEV 48-Tab 4]. Included in the record are all such ads captured by a sophisticated satellite technology that covers the top 75 media markets (encompassing 80 percent of the U.S. population), plus the national networks and the top 42 major national cable networks. *See* Goldstein Expert Report at 5-7.

262 [DEV 48-Tab 1-2].

263 [DEV 48-Tab 5-10].

264 Krasno & Sorauf Expert Report at 72 (citing website maintained by the Annenberg Public Policy Center); Magleby Expert Report at 18-19.

265 144 Cong. Rec. S880 (daily ed. Feb. 24, 1998) (statement of Sen. Durbin).

system."[266] [REDACTED] Information about the organization's funding would have been useful to the public in evaluating messages aired by CBM. Using the CBM name, however, "evokes [a] much more positive impression than advertising [in] the name of the pharmaceutical industry."[267]

Similarly, in 1996 a coalition of business groups calling itself "The Coalition: Americans Working for Real Change" ran a host of ads to counter the AFL-CIO's biggest broadcast ad campaign ever. [REDACTED] In 1998, the AFL-CIO's election strategy included an ad campaign under the alias "Coalition to Make Our Voices Heard," using the same ploy their opponents had used before. The purpose of these names was, of course, to hide their identity from the public.[268] Steven Rosenthal, the AFL-CIO's Political Director, explained that "in some places it's much more effective to run an ad by the 'Coalition to Make Our Voices Heard' than it is to say paid for by 'the men and women of the AFL-CIO.'"[269]

A final example of such conscious exploitation of the "express advocacy" test to avoid disclosure requirements involved "Republicans for Clean Air," which spent heavily on ads praising then-Governor Bush's environmental record and criticizing that of Senator McCain, shortly before the 2000 presidential primaries in California, New York, and Ohio.[270] Until a few

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[266] Citizens for Better Medicare, "Who We Are," *available at* <http://web.archive.org/web/20000815061032/www.bettermedicare.org/who> (archiving the CBM website as of Aug. 15, 2000).

[267] Magleby Expert Report at 19 (relying on interview with Tim Ryan, Executive Director of CBM).

[268] Magleby Expert Report at 18-19; *see also* [REDACTED] Tellingly, even plaintiffs were sometimes confused about the identities of various groups. In his deposition, the Executive Vice President of the NRA expressed confusion about whether the Campaign for a Progressive Future — an anti-gun group that ran hundreds of ads in 2000 — was "a liberal interest group" or "some Bush group." *See* LaPierre Dep. Tr. (Sept. 9, 2002) at 291-92; [REDACTED]

[269] Magleby Expert Report at 18-19 (citing lunchtime panel discussion, Pew Press Conference, "Outside Money: Soft Money and Issue Ads in Competitive 1998 Congressional Elections," National Press Club, Washington, D.C. (Feb. 1, 1999)).

[270] Search of CMAG Database; *see also Republicans for Clean Air*, MUR 4982 (FEC 2002) (Statement of Reasons, Vice Chairman Sandstrom, and Statement of Reasons, Comm'rs Thomas and McDonald).

days before the election, the public had no information about this group to aid it in evaluating the ads.[271] The sponsors for "Republicans for Clean Air" turned out to be brothers Charles and Sam Wyly from Texas, both longtime friends of Governor Bush.[272] When asked later, one of the Wyly brothers admitted that "of course" their goal had been to influence the elections in the states where they ran the ads.[273]

As Congress documented, the volume of "issue" advocacy soon threatened "to rival, and in some cases outpace, advertising by federal candidates."[274] Figure 1 vividly demonstrates the phenomenon:

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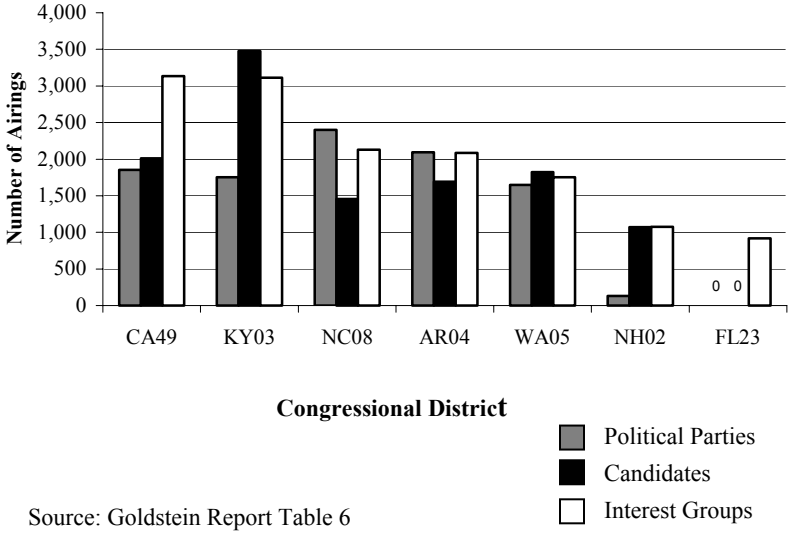
[271] *See* Adam Nagourney and Richard Perez-Pena, *The 2000 Campaign: The Tactics; Bush and McCain Trade Bitter Criticism As Campaigns in New York Gather Steam*, N.Y. Times, Mar. 3, 2000, at A15 ("Republicans for Clean Air was unknown to the Federal Elections Commission and to political professionals in both parties. It has no telephone listing in New York State or Washington and no Web site.").

[272] Krasno & Sorauf Report at 75. There is some evidence that Charles Wyly may have improperly coordinated the advertisements with the Bush Campaign. Commissioners Thomas and McDonald Statement of Reasons in MUR 4982 at 1-5.

[273] Richard W. Stevenson with Richard Perez-Pena, *Wealthy Texan Says He Bought Anti-McCain Ads*, N.Y. Times, Mar. 4, 2000, at A1.

[274] Krasno & Sorauf Expert Report at 51; *see also* Magleby Expert Report at 20 (several races "had as much campaign activity by interest groups as by candidates"); *see, e.g.*, Norman J. Ornstein, *Message to Members: Look Beyond Rhetoric Before Voting on CFR*, Roll Call, May 21, 1998 (entered into record at 144 Cong. Rec. H3729 (May 21, 1998) (by Rep. Kaptur) ("But the so-called issue-advocacy campaigns have provided a gigantic loophole to allow corporations and unions to use unlimited (and undisclosed) amounts of corporate funds and union dues to target candidates, violating the intent of those existing laws.").

Television Advertising Mentioning House Candidates Within 60 Days of the 2000 Election in Selected Races



Source: Goldstein Report Table 6

One study of 17 congressional races in 2000 found that aggregate interest group spending amounted to as much as two-thirds of what the candidates spent on radio and television.[275] Another study found that in the 60 days before the 2000 election, in the top eight battleground states, interest groups aired one ad targeting presidential candidates for every three run by the candidates themselves.[276] Likewise, in the 12 congressional races with the highest volume of interest group advertising in 2000, interest group advertising reached 81 percent of the total advertising by the candidates themselves.[277] Moreover, by the 2000 election cycle, interest groups ran 20 electioneering ads for every one they conceded was covered by FECA.[278] Much of this campaign spending came directly or indirectly from corporate and union treasuries — and virtually none of it was publicly disclosed under FECA.

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[275] *See* Magleby Expert Report at 22 & App. B.

[276] *See* Goldstein Expert Report at 12 (Table 2) (18,633 ad airings by interest groups versus 34,807 by candidates).

[277] *Id.* at 22 (Table 6) (21,764 interest group ads versus 26,737 ads done by candidates).

[278] *See* Goldstein Expert Report at 10 (Table 1B) (comparing 74,024 non-PAC interest group ads mentioning a candidate for federal office with 3,663 group PAC ads mentioning a federal candidate).

2. How The System Of Sham "Issue" Ads Functioned In Practice.

In considering how to address the exploding use of sham "issue" ads, Congress drew not only on its Members' own experience, but also on extensive evidence about how interest group advertising worked in practice. That evidence, which helped lead Congress to design Title II of BCRA in the way it did, is confirmed by the evidence independently adduced in this case.[279]

a) Corporations, Unions and Other Groups Admit That Their "Issue" Ads Are Intended To Influence Candidate Elections, And Have That Effect.

Under questioning in this case, NRA Executive Vice President Wayne LaPierre agreed that just like ads run by "the political parties," the NRA's candidate-centered ad campaigns "don't say vote for . . . or vote against Smith, don't say support Jones or don't support Smith . . . but, rather, deliver a message . . . that they hope will lead voters to vote against Jones or vote for Smith."[280] And he acknowledged that every ad aired by the NRA "that mention[ed] Al Gore" was run as part of a "battle" to counteract a perceived attack "leading up to an election cycle," and would, as at least "one byproduct" help defeat Gore[281] — which was, after all, the "overriding NRA objective" in 2000.[282] Moreover, with control of the House and Senate, as well as the White House, hanging in the balance, NRA President Charlton Heston considered the 2000 elections to be "the most important election since the Civil War."[283] As another NRA political operative declared, in comments reported by the press and confirmed by LaPierre, "if the GOP loses its razor-thin control of the House, it will seriously injure the NRA."[284]

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279 *See, e.g.*, Mann Expert Report at 24 (in 1998, "[t]he evidence of the explicit electioneering purpose of candidate-specific issue advocacy near the election was overwhelming").

280 LaPierre Dep. Tr. at 239-42.

281 LaPierre Dep. Tr. at 89.

282 LaPierre Dep. Tr. at 56; *see* LaPierre Dep. Tr. at 55 (one of NRA's "key objectives").

283 Joe Bauman, *Heston Calls 2000 Vote Vital*, N.Y. Times, June 3, 2000, at A1.

284 LaPierre Dep. Tr., Ex. 2; LaPierre Dep. Tr. at 78 (confirming remarks).

Motivated by that fear, and the overriding goal to defeat Al Gore, in the final days before the election, LaPierre conceded, "you're . . . using whatever arguments, whatever emotional points you can . . . to ultimately persuade people that they ought to vote in a certain way."[285]

[REDACTED] Indeed, in one ad broadcast in October, Heston referred to "the day of reckoning" being "at hand," which LaPierre concedes was "obviously" a reference "to the election which was about to take place in November."[286] Although the NRA broadcast that ad as an "issue advocacy" attack on candidate Gore, its PAC at the same time broadcast an ad that was identical, except for replacing the "day of reckoning" phrase at the beginning with an express advocacy tagline at the end.[287]

The NRA ads may have done double duty (as many political messages do), and no doubt they were part of a larger political battle. That does not change the fact that a significant purpose of the ads was to move voters to vote for or against candidates. Thus, for example, LaPierre spoke to the NRA Board about "powerful, provocative new NRA television infomercials [that] hit home across America," which had the effect of "recruiting members, *rallying voters and convincing the undecided.*"[288] He acknowledges that when the NRA runs ads featuring candidates close to an election, one purpose of those ads is to persuade voters to cast their votes for or against the named candidates.[289] [REDACTED]

To the same effect, the AFL-CIO, when it led the way in aggressively exploiting the express advocacy loophole in 1996, told the press that [REDACTED] As the press reported:

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[285] LaPierre Dep. Tr. at 112.

[286] LaPierre Dep. Tr. at 270-71.

[287] LaPierre Dep. Tr., Ex. 5; *id.*, Ex. 6 ; *id.* at 266-67.

[288] LaPierre Dep. Tr., Ex. 13 at 30 (emphasis added).

[289] *E.g.,* LaPierre Dep. Tr. at 176-77 (while an ad may have had multiple purposes, the NRA "hoped that it would impact the election").

> [U]nion leaders . . . said they believe they have a legitimate chance to reverse the Republican majority in the House. . . . AFL-CIO President John Sweeney, who presented the election plans to a closed-door meeting of the federation's ruling executive council, said unions would spend $35 million in the election campaign.[290]

[REDACTED] That explains why the AFL-CIO's political director continued to acknowledge the organization's purpose publicly after the election was over. One of the AFL-CIO's "major campaign goals" in running the ads, he recounted, "was to try to help defeat some of those [M]embers of Congress and replace them with some members who would be more friendly to working people."[291]

Other plaintiffs, while refusing to admit an intention to influence elections, concede that their ads would have that effect. [REDACTED]

The fundraising pitches of interest groups that run candidate-centered ads provide direct evidence of the groups' electioneering intent. One major supporter of Democratic candidates, for example, testified:

> I have been approached by interest groups, such as NARAL and the League of Conservation Voters, with appeals for large donations to be used for broadcast advertisements that will help federal candidates whom the groups know I support. Groups like these know of my interest in the Senate, and they can be opportunistic in saying things like, "We think we can get Bill Bradbury elected in Oregon," or in talking about how they're going to go in and really help Debbie Stabenow.[292]

Another recounted how "[t]he [Democratic] [P]arty recommended that I donate to certain groups that were running effective ads in the effort to elect Vice-President Gore, such as NARAL. The

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[290] Frank Swoboda, *AFL-CIO to Target 75 House Districts*, Wash. Post, Jan 26, 1996, at A16.

[291] Talk of the Nation (NPR radio broadcast, Nov. 27, 1996) (quoting AFL's Political Director, Steven Rosenthal); Deborah Beck et al., *Issue Advocacy Advertising During the 1996 Campaign* 11-13 (1997).

[292] Buttenwieser Decl. ¶ 19 [DEV 6-Tab 11].

assumption was that the funds would be used for television ads or some other activity that would make a difference in the Presidential election."[293]

Beyond fundraising pitches, purveyors of sham "issue" ads left an extensive paper trail proving that their actual purpose was to influence elections. Most of them, for example, enlisted seasoned campaign consultants, and charged them with the job of helping to devise hard-hitting electioneering messages that would move voters. [REDACTED]

Interest groups have also openly celebrated the electoral success of their ad campaigns. [REDACTED] The millions referred to were funds spent on "infomercials and spot ads, both on television and radio."[294] [REDACTED]

b) The Polling Conducted For Corporations, Unions And Groups Confirms That They Intended To Influence Elections.

When sponsors of electioneering communications enlist polling firms to test themes and advertising spots for their likely impact and actual effect, they enlist them to measure electoral impact, not impact on issues. Specifically, they assess the impact of their ads on *voters* — indeed, swing voters — and they assess the prospective and retrospective effect of the ads on voters' attitudes toward candidates, not their views on issues. In developing the ad campaign that it admits was designed in part to influence elections, for example, the NRA conducted polling and focus groups to craft messages that would have maximum impact on voting behavior.[295]

[REDACTED]

[293] Kirsch Decl. ¶ 10 [DEV 7-Tab 23].

[294] LaPierre Dep. Tr. at 100.

[295] LaPierre Dep. Tr. at 153-56.

c) The Timing And Targeting Of Ads By Prominent Corporate, Union, and Other Group Advertisers Confirm Their Electioneering Purpose.

The timing and targeting of sham "issue" ads also show patterns that are consistent only with an electioneering intent.

Timing. Interest groups that ran ads naming candidates almost invariably waited until the final weeks before an election — which, as they knew, was the most expensive time to run ads,[296] and the time when truly issue-focused messages "would likely get drowned out by the din of election-related ads.[297] That timing indicates a conscious strategy to influence elections.[298] As former campaign consultant Douglas Bailey, who founded one of the first national political consulting firms, testified: "In my decades of experience in national politics, nearly all of the ads that I have seen that both mention specific candidates and are run in the days immediately preceding the election were clearly designed to influence elections. From a media consultant's perspective, there would be no reason to run such ads if your desire was not to impact an election."[299]

Take the NRA, again, as the model, since it concedes that it intended to influence elections. In 2000, the NRA ran ads naming candidates almost entirely in the 60 days, and

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[296] *See* Goldstein Expert Report at 33; [REDACTED]

[297] Bailey Decl. ¶ 12 ("When I had a client who wanted to run a true issue ad to change or bolster public attitudes on an issue, I would recommend, if possible, avoiding the time period when the airwaves are saturated with electioneering ads. Such pure issue ads would likely get drowned out by the din of election related ads. Moreover, any ads that mention specific candidates that are aired during the height of an election season are almost certain to be perceived by the public as electioneering.").

[298] Pennington Decl. ¶ 10 ("Parties and interest groups would not spend hundreds of thousands of dollars to run these ads 15 days before an election if they were not trying to affect the result. These candidate-specific ads are not usually run the year before the election or the week after.").

[299] Bailey Decl. ¶ 11; *see also* Mann Expert Report at 24 ("almost every issue ad featuring the name of a candidate and running near an election was clearly designed to support or attack a candidate, not to express a view on an issue.").

especially in the 30 days, before the general election.[300] That makes sense because, as Executive Vice President LaPierre observed, "people tend to focus and pay attention more as they get closer to an election."[301] [REDACTED]

One particularly salient point emerges from comparing interest group ads that fall within BCRA's new definition of "electioneering communications" with ads that fall outside the definition: as the election nears, interest groups substitute ads that mention a candidate for ads that do not. Take CBM as an example. From January 1, 2000, through September 4, 2000, CBM ran 23,867 television spots.[302] Not a single one mentioned a candidate. Only after that date did CBM mention a candidate, and then came a deluge.[303] During the final three weeks before the election, CBM aired more than 6,000 spots that mentioned a candidate.[304] As is evident from Professor Goldstein's expert report, the same pattern — naming candidates only in the final 60 days — was followed by, for example, the Chamber of Commerce, Planned Parenthood, EMILY's List, and the League of Conservation Voters.[305]

Finally, possibly the most conclusive evidence that interest groups had a strong electioneering purpose when running ads about candidates is suggested by when the ads stopped — on Election Day.[306]

Targeting. The evidence also shows that interest groups running candidate ads close to an election intentionally target candidates in close electoral contests, and almost invariably target

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300 LaPierre Dep. Tr. at 23.

301 LaPierre Dep. Tr. at 22-23.

302 Goldstein Expert Report App. A, Table 17A.

303 [REDACTED] Goldstein Expert Report, App. A, Table 17A (no ads mentioning a candidate through Sept. 4, and 10,876 aired from Sept. 4 through the election).

304 *See* Goldstein Expert Report App. A, Table 17A; *see also* Krasno & Sorauf Expert Report at 63 n.149.

305 Goldstein Expert Report, App. A, Tables 17B, 17C, 17E & 17J.

306 Goldstein Expert Report at 3*; see, e.g.,* [REDACTED]

their ads in a purely partisan manner — hardly the patterns one would expect if groups were bent on affecting legislation, not elections.[307] [REDACTED] And that is why the [REDACTED] The nine "toss-up" states targeted had the highest number of electoral votes at stake.[308]

[REDACTED] the AFL-CIO ran a targeted media campaign in the districts of 29 freshman Republicans, spending upwards of $1 million in some districts.[309] [REDACTED]

[REDACTED]

Groups also typically targeted their ads not only to close races, but in a partisan manner, rather than based on the likelihood of changes legislators' views on issues. [REDACTED] If the union's objective were to change legislators' minds, it would not likely choose the hardest targets, nor would it focus entirely on candidates' past votes. [REDACTED]

3. The Inadequacy Of The "Express Advocacy" Test.

The record thus shows that, beginning in earnest with the 1996 elections, corporations, unions, other groups, and wealthy individuals self-consciously evaded the intent of FECA — and departed from the longstanding view of what it required. These evasions all depended on the provision of the law that used "express advocacy" as the test for whether an ad came under FECA's, and on an interpretation of that test that equated "express advocacy" with the use of the "magic words." As that interpretation gained acceptance, Congress was increasingly confronted with a situation in which the "express advocacy" test had become all but meaningless.[310] Literal

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[307] See Lamson Decl. ¶ 6 ("Parties and groups generally run these pre-election 'issue ads' only in places where the races are competitive.").

[308] Cook Political Rep. 2000. The AFL-CIO ran presidential ads in states that accounted for 88 percent of the 144 electoral votes rated "toss-up." Search of CMAG Database.

[309] *Talk of the Nation* (NPR radio broadcast, Nov. 27, 1996) (quoting AFL's Political Director, Steve Rosenthal).

[310] Thompson Comm. Rep. at 4564 ("The biggest of these loopholes involves so-called issue advocacy[.]").

compliance with the test became a ruse that facilitated evasion of congressional intent and undermined the integrity of the election laws.

The players who exploited this loophole knew just what they were doing. As the Executive Director of the NRA Institute for Legislative Action candidly admitted in 1997: "It is foolish to believe there is any practical difference between issue advocacy and advocacy of a political candidate. What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day."[311] The NRCC was similarly blunt in a complaint it filed with the FEC addressing a 1995 AFL-CIO ad campaign: "[I]t is obvious that any informed American clearly knows that the purpose of these ads is 'expressly advocating' defeat of the Republican who is the subject of the ad."[312] The AFL-CIO's own Political Director had conceded, during that campaign, that "[i]f someone handed me a magic wand and said there is no election law, I would do exactly what I am doing now."[313] Congress thus confronted a situation in which, again in the words of the NRA official, there was "a legal, regulatory wall between issue advocacy and political advocacy. And the wall is built of the same sturdy material as the emperor's clothing. Everyone sees it. No one believes it."[314]

Veteran campaign consultants of all political stripes agree. Former campaign consultant Douglas Bailey, who worked for Republican candidates in races at all levels, testified: "The notion that ads intended to influence an election can easily be separated from those that are not based upon the mere presence or absence of particular words or phrases such as 'vote for' is at

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311 *See* Metaksa, *supra* note 260.

312 Magleby Expert Report, App. G (appending *In re AFL-CIO Project '95*, MUR 4307, Complaint by the National Republican Congressional Comm., at 1).

313 Adam Clymer, *System Governing Election Spending Found in Shambles*, N.Y. Times, June 16, 1996, at A1 (quoting Steven Rosenthal).

314 Metaksa, *supra* note 260*; see also* Magleby Expert Report at 15 (quoting a state Republican Party executive, commenting on a party "issue" ad, as saying, "you would have to be an idiot, however, not to have understood who the ad implied was the preferred candidate.").

best a historical anachronism."[315] [REDACTED] Seasoned politicians echo this conclusion. As former Senator Dale Bumpers explained: "The 'magic words' test is completely inadequate; viewers get the message to vote against someone, even though the ad may never explicitly say 'vote against him.'"[316]

Perhaps the best proof of the inadequacy of the express advocacy test is the conduct of candidates themselves. A candidate runs campaign ads for one purpose only: to persuade voters to vote for him. Yet, as Congress recognized, even candidates' own ads rarely use the "magic words" of express advocacy.[317] According to expert testimony in this case, in 1998 a mere four percent of candidate ads used verbs like "vote for," "elect," or "defeat," and in 2000 only five percent did.[318] If other words of express advocacy are included (such as "Smith for Congress"), the 2000 figure rises to 10 percent.[319]

These results show that voters do not need to be commanded to "vote for" a candidate in order to understand what the sponsor of the ad is suggesting that they should do.[320] Indeed, confronting viewers with express exhortations could be counterproductive: "In the modern world of 30 second political advertisements, it is rarely advisable to use such clumsy words as

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315 Bailey Decl. ¶ 5 [DEV 9-Tab 40].

316 Bumpers Decl. ¶ 26 [DEV 6-Tab 10]; *see also* Chapin Decl. ¶ 8 [DEV 6-Tab 12] ("The only significant difference between these ads and the candidate ads [run in a 2000 House election in Florida] was how they were financed."); Bloom Decl. ¶ 5 [DEV 6-Tab 1] ("In my experience in campaigns for federal, state and local office, including my involvement in the television advertising we ran in my race for Congress, no particular words of advocacy are needed for an ad to influence the outcome of an election.").

317 See 147 Cong. Rec. S2457 (daily ed. Mar. 19, 2001) (statement of Sen. Snowe) (candidates "believed the nonmagic words . . . were more effective in getting their campaign message across"); 148 Cong. Rec. S2117 (daily ed. Mar. 20, 2002) (statement of Sen. Jeffords) ("Even in candidate advertisements, . . . only 10 percent of the advertisements used the 'magic words.'"); Selected Storyboards for Advertisements Sponsored by Candidates in the 2000 Election that Did Not Use the "Magic Words" [DEV48-Tab 7]; Selected Storyboards for Advertisements Sponsored by Candidates in the 1998 Election that Did Not Use the "Magic Words"[DEV 48-Tab 8].

318 Krasno & Sorauf Expert Report at 53.

319 *Id; see also* Goldstein Expert Report at 16 (reporting 11.4%).

320 *See* Krasno & Sorauf Expert Report at 54 ("Car ads rarely exhort viewers to 'buy' a Chevrolet, nor do soft drink ads urge people to 'drink' their product.").

'vote for' or 'vote against.' . . . All advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their throat."[321]

As Congress was aware, voters consistently perceive messages as electioneering even in the absence of express advocacy.[322] Congress had before it an extensive study by Dean David B. Magleby of Brigham Young University — also an expert in this case — that proves this point.[323] In a survey of over 2,000 voters, nearly 90 percent of respondents described interest group ads and similar party ads as having the "primary objective or purpose" of urging them to vote for or against a candidate, even though the ads omitted words of express advocacy.[324]

Congress also had before it two surveys that assessed virtually all political ads aired in 1998 and 2000, surveys that yielded similar results.[325] In the 2000 survey mentioned above, respondents believed that 100 percent of political party ads were intended to influence elections, even though only 2.2 percent of the ads used express advocacy.[326] Among interest-group ads that would have been covered by BCRA's regulation of candidate-focused ads aired within 60 days before a general election, respondents found 97 percent to be electioneering, even though none used words of express advocacy.[327]

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[321] Bailey Decl. ¶ 3.

[322] *See, e.g.*, 147 Cong. Rec. S2456-57 (daily ed. Mar. 19, 2001) (statement of Sen. Snowe).

[323] *See* Magleby Expert Report at 12-15 (reporting results of David B. Magleby, *Dictum Without Data: The Myth of Issue Advocacy and Party Building* (2000)); 147 Cong. Rec. S3251-3252 (daily ed. Apr. 2, 2001) (statement of Sen. Thompson, citing *Dictum*).

[324] Magleby Expert Report at 13, 58 (Table 1). Indeed, respondents were more certain about the electioneering purpose of the interest group ads (scoring 6.4 on a 1-7 scale measuring increasing degree of certainty) than they were about the purpose of candidate ads (scoring 5.8 and 6.0) or political party ads (scoring 6.3 and 6.4). Magleby Expert Report at 14, 59 (Table 2).

[325] *See* 147 Cong. Rec. S2457-2458 (daily ed. Mar. 19, 2001) (statement of Sen. Snowe) (citing statistics from *Buying Time* studies).

[326] Goldstein Expert Report at 30 & 31 (Table 9); *see also* 147 Cong. Rec. S3072 (daily ed. Mar. 29, 2001) (statement of Sen. Feingold) ("People didn't need to hear the so-called magic words to know what these ads were really all about.").

[327] Goldstein Expert Report at 31 (Table 9).

In sum, as several expert political scientists have testified in this case, the express advocacy standard has proven inadequate. Drs. Krasno and Sorauf say it best:

> Whatever its utility might once have been, th[e] standard is now irrelevant to how political ads are designed. We are left with a crucial distinction that no longer distinguishes, one that consequently created a loophole in FECA through which emerged a whole new form of unregulated campaigning in federal elections. The result has been to devastate the regulatory structure Congress established in 1974.[328]

Plaintiffs have not produced an expert who disagrees.

4. The Explosion Of Sham "Issue" Advocacy Allowed Evasion Of FECA's Source Restrictions And Disclosure Requirements For Independent Expenditures, Giving Rise To Unwarranted Opportunities For Actual Or Apparent Corruption.

On the basis of the record and Members' first-hand experience with electoral politics, Congress was justified in concluding that the development of sham "issue" advocacy as a principal mode of federal campaign spending by interest groups had allowed essentially unchecked evasion of FECA's provisions relating to independent expenditures made by interest groups to influence federal election campaigns. First, it allowed corporations and unions to spend money on federal campaigns directly from their treasuries, wholly avoiding the longstanding requirement that any such spending come instead from voluntary individual contributions to the organization's PAC. That development changed not only the nature but also the amount of funds at the disposal of corporate and union bosses. Second, it vitiated the congressional policy of requiring disclosure of expenditures to inform the public and facilitate enforcement of other provisions, such as those treating expenditures that are coordinated with a campaign as contributions to the campaign. For both reasons, Congress reasonably concluded

[328] Krasno & Sorauf Expert Report at 58; *see also* Goldstein Expert Report at 3 ("The 'magic words' defined in *Buckley v. Valeo* do not provide an effective way to identify political television ads that have the purpose or effect of supporting or opposing candidates for election to a public office."); *id.* at 15-16; Magleby Expert Report at 5-6, 16; *c.f.* Mann Expert Report at 27.

that exclusive reliance on the "express advocacy" test was undermining the integrity of the federal election system.[329]

Source restrictions and disclosure requirements are important in part because when private interests, and particularly those with power over amassed organizational wealth, can spend unlimited amounts to support a candidate without disclosing their own activities or affiliations, the potential for abuse is not so different from that involved in the Watergate-era abuse of handing over bags of unreported money. One powerful example took place in June 1998, only hours before the Senate was due to vote on the National Tobacco Policy and Youth Smoking Reduction Act, when the head of the National Republican Senatorial Committee, addressed his colleagues at a Republican Senators' policy lunch. According to press accounts, he reassured them "that if they voted to kill the tobacco bill, the major tobacco manufacturers were promising to mount a television ad campaign to support those who voted against the bill."[330] While such promises are inappropriate on any terms, they become harder to detect, and therefore more likely, if the promised "ad campaign" can be mounted without full disclosure. And when what is promised in exchange for legislative action (or inaction) is the electioneering use of corporate treasury funds, the promise violates federal legal restrictions dating back more than a half-century.

The opportunities for such abuse, and therefore the need for effective disclosure requirements and source restrictions, are common in the ordinary course of political business. Candidates make the rounds to interest groups hoping that the groups will provide support —

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[329] *See, e.g.*, 147 Cong. Rec. S3118 (daily ed. Mar. 29, 2001) (finding proposed by Sen. Specter: "If left unchecked, the explosive growth in the number and frequency of advertisements that are clearly intended to influence the outcome of Federal elections yet are masquerading as issue advocacy has the potential to undermine the integrity of the electoral process.").

[330] *See* McCain Decl. ¶ 8 [DEV 8-Tab 29]. But compare McConnell Cross Tr. at 324-28, 350-80.

support that can and does come in the form of ad campaigns on the candidates' behalf. One campaign manager testified that interest groups "offered to provide campaign support" — in the form of soft money and ad campaigns — "telling us all about what they would do for us, but only if [his candidate] would pledge to vote a certain way on their issues."[331] [REDACTED]

[REDACTED] The business community not only obliged with an ad campaign of its own (as described above), [REDACTED]

Whether these sorts of transactions are explicit or implicit, the political reality is that candidates can use the advertising campaigns of outside groups to leverage their own campaign activities. Republican political consultant Pennington describes the calculus: "An important element running through modern campaign plans is consideration of what role political parties and interest groups are going to play in your campaign. You write the plan thinking about which of these groups can help you and how they can do so most effectively."[332] The stakes being high, candidates inevitably keep score of the political favors they owe.

[REDACTED]

The latter point — conscious gratitude — is as critical as it is obvious. Legislative favors can be traded — explicitly or tacitly — for independent ad campaigns just as easily as they can be swapped for contributions. The key similarity is that these ad campaigns are deposits in the political favor bank, and deposits for which candidates are very grateful.[333] Candidates and consultants acknowledge this phenomenon, and interest groups celebrate it. Former Senator

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[331] Beckett Decl. ¶ 7.

[332] Pennington Decl. ¶ 4.

[333] *See* Magleby Expert Report at 15 ("the groups are often seen by those they intend to help as allies"); Pennington Decl. ¶ 8 ("In addition to trying to elect candidates, these groups are often trying to create appreciation or even obligation on the part of successful candidates. And candidates usually do appreciate this kind of help, even when they deny it publicly which they usually do."); Chapin Decl. ¶ 16 (congressional candidate in Florida observes, "In general, candidates in the midst of a hard-fought election like mine appreciate any help that comes their way.").

Alan Simpson observed, "[M]embers realize how effective these ads are, and they may well express their gratitude to the individuals and groups who run them."[334] Former Senator Bumpers echoes this sentiment: "[P]oliticians especially love when a negative 'issue ad' airs against their opponents. If these politicians did not feel that the issue ads were helping them, they would call the people sponsoring them and tell them to stop . . . ."[335] [REDACTED]

[REDACTED]

It is no surprise, then, that "the people who admit to running these ads will later remind Members of how the ads helped get them elected."[336] One consultant describes the practice of some business groups that conduct "a vetting process to decide if they will help a particular federal or state candidate."[337] They "actually videotape the interview so they can have it to show the candidate if they're successful and the issue comes up in the legislature, to remind them of what their position should be."[338] Of course, it is seldom necessary to write a letter or videotape a promise. [REDACTED]

The result is plain: candidates can be as beholden to corporations or unions that spend money to help them through ad campaigns as they would be if the same entities wrote a check

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334 Simpson Decl. ¶ 13.

335 Bumpers Decl. ¶ 28; *see also* Beckett Decl. ¶ 16 ("Of course candidates often appreciate the help that these interest groups can provide, such as running attack ads for which the candidate has no responsibility."); Bloom Decl. ¶ 17 (congressional candidate confirms, "I appreciated the ads . . . run by political parties and interest groups to assist my 2000 Congressional campaign, even though I had no advance knowledge of what they would say or where they would air."); Bumpers Decl. ¶ 27 ("Candidates whose campaigns benefit from these ads greatly appreciate the help of these groups."); Chapin Decl. ¶ 16 (candidate attests to the fact that "[f]ederal candidates appreciate interest group electioneering ads . . . that benefit their campaigns, just as they appreciate large donations that help their campaigns. I appreciated the ads run by EMILY's List on my behalf."); Lamson Decl. ¶ 19 ("In my experience as a federal elections campaign manager, if you're in a close race and there are interest groups out there helping you with things like broadcast 'issue ads,' you usually appreciate that support.").

336 Simpson Decl. ¶ 13.

337 Pennington Decl. ¶ 7.

338 *Id*.

directly to the campaign, or funneled the money through the political party.[339] And under pre-BCRA law, an important tactical difference was also plain: whereas contributions to a candidate had to be disclosed, were limited in amount, and could not come from corporate or union treasury funds, expenditures on sham "issue" ads designed to support or attack candidates could be produced and aired with treasury funds and without disclosure. Those advantages, based on exploitation of the "express advocacy" test, substantially undermined the longstanding federal restrictions on corporate and union treasury spending and, through the potential for secrecy, "create[d] enormous opportunities for wrongdoing, for favors to be exchanged between issue advocates and public officials."[340] Congress had sound reasons for taking action to respond to the development of a system that made previous disclosure and spending regulations ineffective, and gave rise once again to clear deficits in public information and a corresponding undermining of the integrity of the federal election process.

B. The Measures Congress Adopted to Solve the Problem: A Summary of BCRA's Electioneering Communications Provisions.

In light of the record we have discussed, Congress had more than ample reason to conclude that the regulation of independent campaign expenditures envisioned by FECA and upheld in principle by *Buckley* had fallen — or rather been pushed — into deep disrepair. Experience had shown that the "express advocacy" test articulated for a limited purpose in *Buckley*, and embodied in FECA through the 1976 amendments, could not adequately identify

[339] *See* Bumpers Decl. ¶ 27 ("Members will also be favorably disposed to those who finance these groups when they later seek access to discuss pending legislation.").

[340] Krasno & Sorauf Expert Report at 74; *see also* 147 Cong. Rec. S3072 (daily ed. Mar. 29, 2001) (statement of Sen. Feingold) ("And if a group is just a shell for a few wealthy donors, then we will know who those big money supporters are and be much better able to assess their agenda . . . . This disclosure can help prevent the appearance of corruption that can come from a group secretly spending large amounts of money in support of a candidate.").

advertising containing "advocacy of [the] election or defeat of candidates."[341] The traditional restriction on direct campaign spending by corporations and unions had thus become largely meaningless in the context of broadcast advertising; and corporations, unions, other interest groups, and wealthy individuals had all discovered how to pour money into campaigns for or against federal candidates — with the knowledge of those supported by their efforts, but without disclosing to the public either the extent and nature of their involvement or the sources of their funds.

In responding to these breakdowns in the law, Congress drew a new, clear and practical line to identify independent interest group ads that are covered by FECA. BCRA's new definition of "electioneering communications," set out in Section 201 of the Act and codified at 2 U.S.C. § 434(f)(3), comprises four elements, carefully designed to be clear, objective, limited in scope, and directly responsive to the evidence concerning recent campaign finance practices. An advertisement falls within the definition if, but only if, it satisfies each of the following four elements:

(1) *It is broadcast by television, radio, cable or satellite.* Communications by, for example, newspaper advertisements, direct mail, billboards, phone banks, internet ads, door-to-door canvassing, or leaflets are unaffected.

(2) *It refers to a "clearly identified candidate" for federal office.* Broadcast ads dealing with issues are completely unaffected, unless the proponent chooses to mention or show a particular federal candidate.

(3) *It runs in the 60 days before a general election, or the 30 days before a primary.*

(4) *The ad is targeted to that candidate's electorate*. Specifically, it must reach at least 50,000 voters in a relevant state or district.[342]

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[341] *Buckley*, 424 U.S. at 43.

[342] In the case of presidential primaries, the FEC's regulations make clear that the definition applies only to ads broadcast within a state within 30 days of the state's primary, or within 30 days of the party's national convention. *See* 11 C.F.R. § 100.29(b)(3)(ii). The statutory definition of "electioneering communication" also excludes news stories and editorials, communications that are required to be paid for with hard money under another provision of

BCRA does not prohibit the airing of any electioneering communication. The Act requires any person or group spending more than $10,000 on such ads in a calendar year to file reports with the FEC, identifying the sponsor of each ad and other information.[343] Where disbursements for a covered ad are coordinated with a candidate or party, they are, unsurprisingly, treated as contributions to (and expenditures by) that candidate or party.[344] Finally, while the Act leaves corporations and unions free to fund "electioneering communications" through sponsored PACs, it prohibits them from using their general treasury funds to produce or run covered ads, or to fund such ads run by others.[345] Accordingly, BCRA's only effect is to apply conventional disclosure rules and restrictions on the use of corporate and union treasury funds to a somewhat broader category of objectively defined electioneering messages.

C. BCRA's Electioneering Communications Provisions Are Constitutional.

There should be no dispute about Congress's ability to impose such source limitations and disclosure requirements on spending that is properly characterized as campaign spending. These are just the types of rules that FECA has long imposed on "independent expenditures" that "expressly advocat[e]" the election or defeat of a federal candidate.[346] Nor could they do so,

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the Act, and communications relating to certain candidate debates, and gives the FEC authority to exempt other communications under certain circumstances. *See* 2 U.S.C. § 434(f)(3)(B).

[343] 2 U.S.C. § 434(f)(1)-(2). The additional information includes the name of any person sharing direction or control of the ad sponsor's activities; the custodian of its books and records; the amount and recipient of covered disbursements of more than $200; the elections and candidates to which the ad relates; and the name and address of any person contributing $1,000 or more to the sponsor, or to a separate fund from which the sponsor paid for the ad, during a specified period. *Id*.

[344] BCRA § 202, amending 2 U.S.C. § 441a(a)(7).

[345] BCRA § 203, amending 2 U.S.C. § 441b(b)(2) and adding § 441b(c). Although BCRA § 203 enacts a provision, 2 U.S.C. § 441b(c)(2), that would grant a limited exemption for certain political and other nonprofit organizations that are organized as corporations, that exemption is effectively withdrawn by BCRA § 204 (sometimes known as the Wellstone Amendment), enacting 2 U.S.C. § 441b(c)(6).

[346] S*ee* 2 U.S.C. §§ 431(9) and (17), 434(c), 441b(a)).

given the Supreme Court's many decisions endorsing the legitimacy of such rules.[347] Instead, plaintiffs challenge Congress's ability to treat "electioneering communications" as a form of campaign spending subject to the same constitutional analysis the Supreme Court has endorsed for independent expenditures that involve "express advocacy."

That challenge fails. Congress was justified in concluding that it could not continue to achieve the longstanding aims of the campaign finance laws by addressing only funds used for "express advocacy." Neither *Buckley* nor the Constitution forbids Congress from responding to experience by adjusting the scope of FECA in a manner designed to address demonstrated evasion without unduly impinging on rights of speech and association. BCRA's electioneering-communications provisions do not "ban" any speech, but advance important public interests in a carefully tailored way, and help prevent undermining of the soft-money reforms in Title I. The Court should accordingly reject plaintiffs' facial challenge to Title II.[348]

1. Experience Since Buckley *Has Shown That The "Express Advocacy" Test Is Completely Inadequate To Serve Congress's Important Goals.*

The interests underlying Title II's disclosure requirements and its restrictions on the use of corporate and union treasury funds are familiar from *Buckley* and other cases. As to corporate

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[347] *See, e.g.*, *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990) (upholding state law barring corporations from spending treasury funds on elections); *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 262-64 (1986) *(MCFL)* (holding that usual expenditure restrictions could not be applied to a small class of corporations, but noting applicability of disclosure requirements even to those entities); *FEC v. Nat'l Right to Work Committee,* 459 U.S. 197, 207 (1982) (upholding restrictions on solicitation of contributions to corporate PAC); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) (striking down particular state limitation on corporate advertising with respect to referenda rather than candidate elections, but noting that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected"); *Buckley*, 424 U.S. at 74-82 (sustaining FECA's disclosure requirements for independent expenditures); *United States v. UAW,* 352 U.S. 567, 570-85 (1957) (tracing history of restrictions on corporate and union expenditures); *Burroughs v. United States*, 290 U.S. 534, 547-48 (1934) (sustaining disclosure provisions of Federal Corrupt Practices Act).

[348] In a facial challenge, plaintiffs have the "heavy burden" of demonstrating "a substantial risk that application of the provision will lead to the suppression of speech." *NEA v. Finley*, 524 U.S. 569, 580 (1998) (in part citing *Rust v. Sullivan*, 500 U.S. 173, 183 (1991)).

and union campaign spending, the Supreme Court has recognized that the special legal status of corporations and unions gives them the potential to amass large "aggregations of wealth" that have "little or no correlation to the public's support for the [organization's] political ideas."[349] The deployment of such organizational resources to make independent expenditures supporting or opposing candidates can lead to "corrosive and distorting effects" on the political system.[350] Campaign finance law may properly seek to avoid those effects by requiring that any such expenditures come not from the organization's general treasury, but from special-purpose political funds, contributed by individuals associated with the organization for the specific purpose of supporting political spending. Such organizational PACs are significantly different from the general funds built up from operating profits (or union dues), in large part because "persons contributing to such funds understand that their money will be used solely for political purposes," and therefore "the speech generated accurately reflects contributors' support for the corporation's political views."[351] Legal restrictions on the use of treasury funds thus address the problems inherent in organizational political spending while nonetheless "allowing corporations to express their political views" in a manner that the Supreme Court in *Austin* specifically held to be constitutionally sufficient.[352]

In addition, the general resources of corporate or union treasuries are controlled by officers who owe their duty to the direct business or employment interests of their shareholders or members. Deployment of substantial amounts of those resources directly to support

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[349] *Austin*, 494 U.S. at 660; *see also, e.g.*, *MCFL*, 479 U.S. at 256-59; *Pipefitters*, 407 U.S. at 414-16.

[350] *Austin*, 494 U.S. at 660.

[351] *Id*. at 660-61.

[352] *Id*. at 660 ("We find that the Act is precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views. . . . [T]he Act does not impose an *absolute* ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds.") (emphasis added).

candidates (or oppose their rivals) raises the possibility of "corruption of elected representatives through the creation of political debts" to those officers, their organizations, and a corresponding set of specific, concentrated interests — a longstanding and well-recognized problem, the importance of which "has never been doubted."[353] Accordingly, the Supreme Court has expressly recognized that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."[354] The same analysis applies to union expenditures.

Disclosure requirements of the sort at issue here "shed the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported because it takes the form of independent expenditures."[355] That light in turn "allows voters to place each candidate [supported or opposed by covered communications] in the political spectrum more precisely" and "alert[s] the voter to the interests to which a candidate is most likely to be responsive" while in office.[356] Indeed, disclosure rules provide "a reasonable and minimally restrictive method of *furthering* First Amendment values by opening the basic processes of our federal election system to public view."[357]

Disclosure requirements also "deter actual corruption and avoid the appearance of corruption by exposing large . . . expenditures [in support of candidates, or attacking their opponents] to the light of publicity," because "[a] public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that

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353 *Bellotti*, 435 U.S. at 788 n.26.

354 *Id*.; *Austin*, 494 U.S. at 659.

355 *Buckley*, 424 U.S. at 81.

356 *Buckley*, 424 U.S. at 66-67.

357 *Id*. at 82 (emphasis added); *cf*. *Bellotti*, 435 U.S. at 792 n.32 (striking down particular state prohibition on corporate spending to influence referendum proposals, but noting that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected").

may be given in return," and because potential "[c]urriers of favor will be deterred by the knowledge that all expenditures [to support a candidate] will be scrutinized" to determine whether the money was spent "as a *quid pro quo* for special treatment after the candidate is in office."[358] And they are "an essential means of gathering the data necessary to detect violations" of other provisions — such as, in this case, the ban on party soft money in Title I, which some might seek to circumvent through contributions to interest groups for spending on sham "issue" ads — and of "respon[ding] to the legitimate fear that efforts [may] be made, as they [have] been in the past, to avoid [other] disclosure requirements by routing financial support of candidates through avenues not explicitly covered" by the law.[359] In pursuing these various goals, disclosure requirements typically offer "the least restrictive means of curbing the evils of campaign ignorance and corruption."[360] Indeed, even vocal opponents of BCRA have agreed that the regulatory regime should include disclosure of amounts spent on electioneering ads.[361]

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[358] *Buckley,* 424 U.S. at 67; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 (1995); *Bellotti*, 435 U.S. at 792 n.32 ("[W]e emphasized in *Buckley* the prophylactic effect of requiring that the source of communication be disclosed."); *see also Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 202-203 (1999) (describing interests supporting disclosure requirements for proponents of initiative measures); 146 Cong. Rec. S4778 (daily ed. June 8, 2000) (statement by Sen. Lieberman) ("Here, there is the profound suspicion of corruption; but without information, we don't even have the ability to know whether there is corruption, let alone to have the appearance of corruption — big money, secret money, perhaps not even American money, raised by elected officials, raised by left-leaning, right-leaning ideological groups, raised by political groups, and trade and economic groups, do nothing but undermine our system. The least that we can ask is for disclosure.").

[359] *Buckley* at 67-68, 76; *see also McIntyre*, 514 U.S. at 356.

[360] *Buckley,* 424 U.S. at 68; *see also* 144 Cong. Rec. H4866 (daily ed. June 19, 1998) (statement of Rep. Levin) ("No one is trying to gag anybody. . . . But the people do not know who put the money up. They are hidden. They are endless. There is a flood of hidden . . . money. That is what we say should not happen.").

[361] *See, e.g.*, *The Constitution and Campaign Reform: Hearings on Constitutional Issues Impacting Campaign Reform Before the Senate Committee on Rules and Administration*, 106th Cong., 2nd Sess. 644-45 (2000) (statement of Sen. Hatch) ("A far better solution, one that I believe is both workable and is consistent with the dictates of the First Amendment, is a campaign system that requires complete disclosure of funds contributed to candidates or used to finance political speech by independent associations, political parties, unions, or individuals in connection with an election. A system of complete disclosure would bring the disinfectant of sunshine to the system."); AFL-CIO, AFL CIO Lawsuit Challenges Several Aspects of New Campaign Finance Statute (Apr. 22, 2002), *available at a*<http://www.aflcio.org/publ/press2002/pr0422a.htm> ("The AFL-CIO supports strong disclosure laws . . ."); U.S. Chamber of Commerce, Chamber Calls Senate Campaign Finance Bill A Hoax (Mar. 19, 2002), <http://www.uschamber.com/Press+Room/2002+Releases/March+2002/02-43.htm> ("The Chamber supports reasonable provisions for disclosure of political campaign contributions and expenditures by committees,

The record amply supports Congress's determination that Title II's reforms were needed to serve these traditional goals of campaign finance law. The evidence shows, for example, that existing statutory provisions limited to "express advocacy" lost their force when corporations and unions concluded that they could use treasury funds, rather than PAC funds voluntarily donated by individuals for political purposes, to create and broadcast campaign advertisements supporting or opposing particular candidates — typically beginning in the weeks immediately before an election and stopping cold on Election Day. That is why the list of entities exploiting the "express advocacy" provisions of pre-BCRA law in the 2000 federal election includes some of the most powerful corporate and union interests in the nation.[362] In that election, corporations, unions, or other groups that ran ads specifically mentioning federal candidates were 20 times more likely to use treasury funds than to use PAC funds.[363]

Similarly, Congress reasonably concluded that existing disclosure laws had become largely ineffective, because they allowed sponsors of political ads to avoid disclosing the sources and uses of millions of dollars of spending undertaken with the unmistakable purpose and effect of influencing federal candidate elections, just by avoiding use of the "magic words." Congress properly concluded that its statutory goals were not being served when interest groups could spend hundreds of millions of dollars on tens of thousands of ads specifically targeting federal candidates, not only using corporate or union funds, but without even revealing their identity, spending, or sources of support. Neither the public nor the press could adequately monitor whether the ad sponsors might later secure special favors in return for their support. And so long

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organizations and candidates."); LaPierre Dep. Tr. at 294-95 (Sept. 3, 2002) ("NRA's position . . . — and we've always been very public about it — is that, whoever is running ads, it ought to be disclosed who is running those ads. . . . And who pays for the ads.").

[362] *See* Goldstein Expert Report at 14-15 (Table 3).

[363] *See* Goldstein Expert Report at 10 (Table 1B) (database captured 3,663 candidate-centered interest-group ads run by PACs and 74,024 run by non-PACs).

as a candidate's allies could easily shield themselves from public view, it was unduly difficult for citizens, the press, or the FEC to investigate whether "independent" campaign advertisers were in fact unlawfully coordinating their efforts with the candidates they sought to support.

In short, since *Buckley*, nothing has occurred to reduce the public interest in requiring reasonable disclosure concerning campaign-related spending, and in prohibiting such spending from corporate and union treasuries. What changed materially just seven years ago is that corporations and unions that wanted to spend treasury funds to support or oppose federal candidates, and others who preferred to support or oppose candidates without disclosure, all learned that they could do so easily by designing advertisements that would fully serve their electoral goals, without "expressly advocating" such a result as a matter of pre-BCRA law. Title II is Congress's measured response to that development.

2. Neither Buckley *Nor The First Amendment Limits Congress To Measures That Have Proven Ineffective.*

In challenging that response, plaintiffs cite *Buckley*'s articulation of the "express advocacy" test, and seek to wrap the word games of their sham "issue" ads in the mantle of the First Amendment. That argument mis-reads both *Buckley* and the Constitution.

In *Buckley*, the Supreme Court considered two FECA provisions that applied to political expenditures by a person other than a candidate or political party: 18 U.S.C. § 608(e)(1) (1970), which generally prohibited any expenditure of more than $1,000 per year "relative to a clearly identified candidate," and 2 U.S.C. § 434(e) (Supp. IV 1974), which generally required disclosure of expenditures (and certain contributions) of more than $100 per year, with

"expenditure" (and "contribution") defined as the use of assets "for the purpose of . . . influencing" the nomination or election of federal candidates.[364]

In assessing Section 608(e)(1), the Court noted that its language required aggregating all expenditures "advocating the election or defeat of such candidate."[365] That language — taken in the first instance from the statute itself, not derived by the Court from the Constitution — provided one ready way to narrow the contextual meaning of expenditures "relative to" a candidate.[366] The Court remained concerned, however, that in the case of expenditures by individuals or groups other than candidates or political committees, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates [might] often dissolve in practical application," leaving speakers uncertain of the boundaries between speech that was covered by the provision and speech that was not.[367] To avoid that residual ambiguity, the Court construed the provision "to apply only to expenditures for communications that in express terms advocate the election or defeat" of a federal candidate, and noted that it had in mind "express words of advocacy . . . such as 'vote for,' 'elect,' support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [or] 'reject.'"[368] Having so narrowed Section 608(e)(1)'s application, the Court struck it down because it imposed what the Court concluded was an impermissible limit on independent political expenditures by individuals or groups.[369]

When it turned to consider the disclosure provisions of Section 434(e), the *Buckley* Court again found itself concerned by problems of vagueness, in that instance raised by the provisions'

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364 *See Buckley*, 424 U.S. at 39-51 (addressing § 608(e)(1)), 74-82 (addressing § 434(e)).

365 *Id*. at 41-42.

366 *Id*. at 42.

367 *Id*. at 42-43.

368 *Id*. at 43-44 & n.52.

369 *Id*. at 44-51.

"effort to be all-inclusive."[370] Focusing on the phrase "for the purpose . . . of influencing," the Court concluded that, in the absence of any greater congressional guidance, it should construe the Act in a way that would "precisely further[]" Congress's goal of "promot[ing] full disclosure of campaign-oriented spending to insure both the reality and the appearance of the purity and openness of the federal election process."[371] In deciding, however, what "expenditures" the provision should be construed to reach, the Court again faced "line-drawing problems of the sort [it had] faced" in construing Section 608(e)(1), because both provisions "share[d] the same potential for encompassing both issue discussion and advocacy of a political result."[372] To ensure that the information required to be disclosed would bear a sufficiently close relation to the purposes of the Act, the Court adopted the same limiting construction it had developed for purposes of Section 608(e)(1), construing Section 434(e) "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified [federal] candidate."[373] So construed, the provision was "directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate."[374] And as so directed, the Court concluded, the disclosure requirement was constitutional.[375]

These portions of *Buckley* responded in a focused and practical way to problems raised by particular provisions in the version of FECA the Court had before it. Two general concerns emerge from the Court's discussion: that statutory requirements in this area should be clear rather than vague, and that they are more readily sustained to the extent they regulate "advocacy

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370 *Id*. at 76.

371 *Id*. at 77-78.

372 *Id*. at 78-79.

373 *Id*. at 80 (footnote omitted).

374 *Id*.

375 *Id*. at 80-82.

of a political result" in the context of specific federal elections, rather than pure "issue discussion."[376] What does not emerge from a fair reading of *Buckley* is any sense that the Court intended its discussion, and its adoption of the "express advocacy" test as a limiting construction for Sections 608(e)(1) and 434(e), to establish an inflexible constitutional rule limiting any future congressional approach to campaign finance reform. Quite to the contrary, in construing Section 434(e), the *Buckley* Court expressly lamented the lack of specific congressional guidance, which left to the Court the task of construing the provision "to avoid the shoals of vagueness," drawing on "those common-sense assumptions that must be made in determining direction without a compass[377] Thus, *Buckley* indicates that the Court would give appropriately deferential consideration to a *congressional* determination of how best to draw clear lines to distinguish regulated from unregulated conduct — lines that do not "dissolve in practical application,"[378] and that are "directed precisely to . . . spending that is unambiguously related to the campaign[s] of . . . particular federal candidate[s]."[379]

In the one case in which the Supreme Court has itself applied the "express advocacy" test, its interpretation was realistic rather than wooden. In *Massachusetts Citizens for Life*, an interest group published a newsletter that listed every candidate for state and federal office in an upcoming primary election, and identified each candidate's view on various "pro-life" issues. The newsletter expressly declared that MCFL was not endorsing any particular candidate, but it urged readers to "vote pro-life."[380] The Court held that the newsletter amounted to "express advocacy": "it provides *in effect* an explicit directive: vote for these (named) candidates. The

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376 *See id*. at 76-80.

377 *Id*. at 77-78 (internal quotation marks and citations omitted).

378 *Id*. at 42.

379 *Id*. at 80.

380 *See MCFL,* 479 U.S. at 243-44.

fact that this message is *marginally less direct* than 'Vote for Smith' does not change its *essential nature*. The [newsletter] goes beyond issue discussion to express electoral advocacy."[381] Accordingly, even under the Court's "express advocacy" construction of FECA, evaluation of any given communication is meant to be sensible and purposive, rather than formalistic. There is even less reason to believe that the Supreme Court ever intended, or would endorse, rote use of the "express advocacy" standard as a constitutional straitjacket on Congress's ability to address the real-world issues of campaign finance reform.[382]

Finally, treating "express advocacy" as a constitutional standard would disable Congress from responding to what experience has shown about the breakdown of the pre-BCRA regulatory regime by repairing gaping holes recently opened in FECA's coverage. Such periodic statutory review and repair is a normal process — and the natural province of legislatures, not of courts.[383] The Supreme Court has repeatedly recognized that congressional reforms of the sort in question here — disclosure requirements and prohibitions on spending from corporate and union treasuries rather than from PACs — serve public purposes of exceptional importance, including limiting the "corrosive and distorting effects" of corporate and union treasury spending in candidate elections and "furthering First Amendment values by opening the basic processes of our federal election system to public view."[384] It would make no sense to read any of the Court's

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[381] *Id.* at 249 (emphasis added).

[382] The lower courts have divided on whether "express advocacy" defines a constitutionally mandated line between regulable and non-regulable speech. *See*, *e.g.*, *Chamber of Commerce of the United States v. Moore*, 288 F.3d 187, 193-96 (5th Cir. 2002) (discussing cases), petition for cert. pending, No. 02-305.

[383] *See Nat'l Right to Work*, 459 U.S. at 209 ("This careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference."); *see also, e.g.*, *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 n.5 (2000) (stressing deference to legislative judgments about what prophylactic campaign finance reform measures are necessary).

[384] *Buckley*, 424 U.S. at 82; *Austin*, 494 U.S. at 660; 144 Cong. Rec. H6938 (daily ed. Aug. 3, 1998) (statement of Rep. Campbell) ("But if one wishes to campaign and say things about a candidate 60 days before the election using

cases — including *Buckley* — as establishing constitutional limits that experience demonstrates would make it impossible to advance those goals.

To the contrary, in this regard *Buckley* is more a roadmap than a constitutional stop sign. It teaches not that "express advocacy" is the only constitutionally permissible standard for identifying campaign spending that may be subjected to regulation, but rather that Congress may act in this area so long as it does so cautiously and with proper regard for First Amendment concerns. It emphasizes that potential speakers should have clear notice of how a law applies, and that constitutional concern increases to the extent a law may affect pure issue advocacy. The Court recognized that communication about candidate elections will almost always be intertwined with communication about public issues.[385] Even "express advocacy" advertisements that contain "magic words" of exhortation often address issues as well as supporting or opposing candidates. The Court clearly understood this, and plaintiffs overreach to the extent they contend that *Buckley* sought, or suggested that Congress was required to find, a line that would separate speech about issues and communications "advocat[ing] a particular election result" into neat, mutually exclusive categories.[386] With the "express advocacy" test, the Court simply ensured that potential speakers would have clear notice of whether particular communications would or would not come within the scope of the Act, and that the focus of the law would be on spending that was "unambiguously campaign related."[387]

Accordingly, the lines Congress draws in this area should be clear rather than vague, and practical rather than theoretical; and they are easier to sustain to the extent they are "directed

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that candidate's name, Shays-Meehan says, 'Own up and tell us who you are.' That, I suggest, enhances first amendment freedoms.").

[385] *See Buckley,* 424 U.S. at 42.

[386] *Id*. at 80.

[387] *Id*. at 81.

precisely to . . . spending that is unambiguously related to the campaign of a particular federal candidate."[388] Those precepts are exactly the ones to which Congress adhered in framing Title II.

3. BCRA's Electioneering Communications Provisions Are Clearly Framed And Carefully Tailored To Serve Important Public Interests.

Considering Congress's goals, the need for clear and careful lines, and the evidence in the record, Title II should be sustained. Plaintiffs' facial challenge must fail unless they can carry the heavy burden of showing that the Act's provisions are "substantially overbroad" when "judged in relation to the statute's plainly legitimate sweep."[389] They cannot.

a) The Definition of Electioneering Communications Is Clear and Objective.

BCRA's definition of "electioneering communications" is objective and unambiguous. The sponsor of a political message should have no trouble in ascertaining whether it refers to a clearly identified candidate for federal office, will run in the 60 days before a general election or the 30 days before a primary, and will be broadcast in such a way that it could be received by at least 50,000 persons in the relevant electorate, or whether the sponsor has spent more than $10,000 on such communications during a given calendar year.[390] The definition does not require case-by-case evaluation of the subjective intent or effect of particular communications.[391]

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[388] *Buckley*, 424 U.S. at 42-44, 76-80.

[389] *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *see also id.* at 617-18 ("[W]e do not believe that [the statute] must be discarded *in toto* because some person's arguably protected conduct may or may not be caught or chilled by the statute."). A facial challenge is particularly inappropriate here because BCRA expressly gives the FEC authority to promulgate appropriate exemptions from the definition of electioneering communications. *See* 2 U.S.C. § 434(f)(3)(B)(iv). If potential ad sponsors believe that particular situations call for special treatment, they should present their arguments first to the Commission, and then in a challenge (which could include an as-applied constitutional challenge) to the Commission's action or failure to act.

[390] The FEC has adopted regulations that provide that persons may rely on information made available on the FCC's website to determine if a communication can reach 50,000 people in the relevant area, making the "targeting" determination simple. *See* 67 Fed. Reg. 65212, 65217 (Oct. 23, 2002) (promulgating Interim Final Rules, *to be codified at* 11 C.F.R. § 100.29(b)(6)-(7)).

[391] *See Buckley*, 424 U.S. at 43-44 (discussing *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

If anything, it is clearer than the "express advocacy" standard, which the Supreme Court made clear in *MCFL* extends beyond the use of "magic words," requiring inquiry into whether a communication includes express advocacy "in effect" or in its "essential nature."[392] In any event, the definition of "electioneering communication" provides just the sort of "narrow specificity" and "precision of regulation" called for by *Buckley*.[393] Congress has supplied a test that will not "dissolve in practical application."[394]

b) The Source Restrictions And Disclosure Requirements Serve Important Public Interests.

BCRA's provisions addressing "electioneering communications" are designed to serve important purposes. The principle purpose, as discussed, is simply to stop wholesale evasion of the prohibition on corporate and union campaign spending that FECA incorporated from laws in place since as early as 1907, and of the disclosure requirements that FECA imposed on independent campaign expenditures by any person (and that the Supreme Court upheld in *Buckley*). The underlying public interests supporting those longstanding provisions are discussed above.

In addition, Title II's provisions help prevent circumvention of the party soft-money restrictions in Title I. Title I aims to end a system under which the parties raised huge amounts of money, largely from corporate and union treasuries, which they spent largely on ads intended to support or oppose particular federal candidates. That reform could be undermined if corporations or unions could replace party ads funded by soft money with similar ads they ran themselves, or if their soft money contributions, which would have allowed the parties to run

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[392] *MCFL*, 479 U.S. at 249; *see* 148 Cong. Rec. S2118 (daily ed. Mar. 20, 2002) (statement of Sen. Jeffords, quoting "Campaign Finance Reform — Fact and Fiction," a report based on findings from *Buying Time 2000*) ("The magic words test is not nearly the bright line adherents believe it to be: Numerous ads in 2000 were hard to classify as express advocacy or not."); *see also Furgatch*, 807 F.2d at 864 (considering phrase "Don't let him do it"); Glenn Moramarco, *Magic Words and the Myth of Certainty*, 1 Election Law J. 387, 392-98 (2002).

[393] *See* 424 U.S. at 41 & n.48 (quoting *NAACP v. Button*, 371 U.S. 415, 433, 438 (1963) (internal quotation marks and alterations omitted)).

[394] *See id.* at 42.

such ads, could be diverted to groups nominally independent of the parties.[395] In any event, because there will be pressure to substitute new forms of spending for the party soft money that was being spent on political advertising, the public has an interest in requiring disclosure of how money is spent on electioneering communications, and by whom, as political players begin to operate under the new regime.

Similar concerns amply support Congress's decision to apply Title II's restrictions on the use of corporate treasury funds to most non-profit corporations, as well as to business corporations. Were non-profit corporations generally exempt from regulation, both for-profit corporations and unions could easily avoid BCRA's restrictions by directing their spending through an intermediate non-profit corporation. In *Austin*, the Supreme Court rejected the argument that restrictions on political expenditures could not be applied to the Michigan Chamber of Commerce because it was a "nonprofit ideological corporation."[396] As the Court observed, a non-profit organization that accepts contributions from for-profit enterprises could "serve as a conduit for corporate political spending," and allow for-profits to "circumvent the Act's restriction by funneling money through the Chamber's general treasury."[397] The same analysis applies to

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[395] *See Colorado II,* 533 U.S. at 456; *see also Cal. Med.*, 453 U.S. at 197-99 (plurality opinion) (restrictions on donations to multicandidate committees are "an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld . . . in *Buckley*"); *id.* at 203 (Blackmun, J., concurring). As Senator Feinstein explained, "[i]nstead of giving soft money to political parties, the same dollars [could] be turned into 'independent' ads." 145 Cong. Rec. S12,661-62 (daily ed. Oct.15, 1999). *See also* Thompson Comm. Rep. at 5927 ("For example, FEC records indicate that, in 1996, the RNC gave nearly $6 million to tax-exempt organizations, or 30 times more than the DNC which gave less than $185,000. Documents produced by the parties indicate that, while both asked supporters to make contributions to sympathetic groups, the RNC explicitly planned to raise millions of dollars for certain pro-Republican groups and actually collected and delivered specific checks to them.") (internal footnotes omitted); *id*. at 5967 ("Evidence before the Committee shows that the Republican National Committee closely coordinated with several ostensibly independent groups, channeled millions of dollars (from the RNC and from Republican donors) to such groups, and even established front organizations."); *id*. at 5975 ("In 1994, the NRSC contributed $175,000 to the National Right to Life Committee during the week before the November election. A few months later, Senator Phil Gramm of Texas, then chairman of the NRSC, told the *Washington Post* that the party made this donation because it knew the funds would be used on behalf of several specific Republican candidates for the Senate.").

[396] *Austin*, 494 U.S. at 653.

[397] *See id.* at 661, 664.

potential circumvention by unions. Even non-profits generally independent of business or union control could become easy-to-use, hard-to-police channels for business or union treasury spending.[398]

There is, moreover, no reason for concern on the part of ideological non-profit corporations that are not affiliated with and do not accept contributions from unions or business corporations, and therefore do not present a risk of circumvention. For such corporations, the Supreme Court has already recognized an as-applied exception to FECA's restrictions on the political use of treasury funds (though not to its disclosure requirements).[399] That limited exception applies equally to BCRA's restrictions on paying for electioneering communications, as the FEC has confirmed by regulation.[400]

c) The Definition of Electioneering Communications Is Carefully Tailored.

In drafting Title II of BCRA to address these goals, Congress considered not only the collective experience of its own members, but also extensive evidence of the sort also adduced in this case and discussed above. In repairing FECA, Congress tailored its response to what experience showed.

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[398] BCRA contains superseded provisions that would have sought to address these risks in a more elaborate and less effective way, by requiring non-profit corporations to pay for electioneering communications only out of funds contributed by individuals. *See* 2 U.S.C. §§ 434(f)(2)(E)-(F) and 441b(c)(2), superseded by 2 U.S.C. § 441b(c)(6) (all as added by BCRA). That approach would have been significantly less effective because money is fungible, so that corporate or union contributions could be spent on administrative or other costs, thereby freeing individual contributions for political use. It would also have been more difficult to enforce. Finally, we note that the basic reasons for prohibiting corporate and union political spending except through PACs apply in some measure to many non-profit corporations, because those individuals or entities who supply funds to a non-profit to support its general mission do not necessarily expect that their funds will be used to support or oppose particular federal political candidates, and would not necessarily approve of any such use.

[399] *See MCFL*, 479 U.S. at 263-64 (noting that refusal to accept corporate or union donations "prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace"); *see also Austin*, 494 U.S. at 664.

[400] *See* 11 C.F.R. § 114.10.

(1) The Definition Covers Only Broadcast Advertising.

First, Congress focused on the core abuse at issue: the use of large amounts of money, typically drawn directly or indirectly from corporate and union treasuries, to fund expensive and pervasive television and radio advertising. It accordingly drew the definition of "electioneering communications" to cover only broadcast advertisements (including those carried by cable or satellite), which have in recent years been the principle vehicle for unreported and unregulated campaign spending.[401] Among other benefits, that limit, like others in the definition, helps ensure that FECA addresses areas of core concern, while leaving ample alternative means of communication — in this instance, all print or other non-broadcast media — outside the scope of the statute.[402]

(2) The Definition Covers Only Ads that Refer to a Clearly Identified Federal Candidate.

Congress also drew its definition to capture only communications that refer to a clearly identified candidate for federal office. This limitation responds in large part to the evidence that interest groups (i) almost invariably (and for obvious reasons) refer specifically to a candidate

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[401] *See*, *e.g.*, Magleby Expert Report at 22 ("Broadcast advertising is the most visible mode of communicating an electioneering message and is also widely believed to be the most effective for reaching a mass audience."); [REDACTED] LaPierre Dep. Tr. at 206 ("[I]f you want to be heard by America, radio and TV are the way to do it.").

[402] *See* 144 Cong. Rec. S973-74 (daily ed. Feb. 25, 1998) (statement of Sen. Snowe) ("We are focusing on the most egregious abuses that have been identified in these campaigns in the past . . . . So we create a very narrow timeframe so that we do not engage in any possibilities of interfering with first amendment rights. We limit the medium to television and radio, again, so we do not invite any infringements on freedom of speech."). Another consequence of the limitation to broadcast advertising is that the incremental burden of disclosure on ad sponsors is particularly small, because sponsors of broadcast advertisements are already subject to various disclosure requirements under provisions of federal law unrelated to campaign finance regulation. *See* 47 C.F.R. § 73.1212(a) (sponsor of any advertisement broadcast on radio or television must be identified); 47 C.F.R. § 73.1212(e) (identification must "fully and fairly disclose the true identity of the" sponsor); 47 C.F.R. § 73.1212(e) (station must "require that a list of the chief executive officers or members of the executive committee or of the board of directors" of a non-individual sponsor "be made available for public inspection"); *see also* 47 C.F.R. §§ 76.1615, 76.1701 (comparable regulations for cable); 47 C.F.R. § 25.701 (comparable regulations for satellite). These existing regulations do not, however, adequately address the aims of FECA. Among other things, they require identification of an ad sponsor, but not its donors; they do not require interest groups to reveal how much they have spent on ads; and they do not require reporting to a central repository where the information is easily accessible to the public.

when they intend to influence an election, and (ii) conversely, typically have little or no need to refer specifically to candidates when they are not seeking to influence an election. Of course, the general threat to the integrity of the political process posed by corporate and union spending, and the specific potential evils addressed by disclosure requirements (such as influence-buying, disguised coordination, concealed connections with particular entities or factions, or simple favor-currying), are clearest when interest groups run advertisements that support specific candidates or attack their opponents.

(3) The Definition Covers Only Ads that are Targeted to a Candidate's Own Electorate.

For similar reasons, BCRA defines "electioneering communications" to apply only to ads broadcast in such a way as to reach substantial numbers of people in the relevant electorate. This limitation, again, precisely targets regulation at communications that experience shows are overwhelmingly intended to influence particular elections, while leaving the field open for a wide range of unregulated communications by groups — including corporations and unions — that may wish to pursue other purposes without pursuing a specific electoral agenda. The voters targeted by covered advertisements are, moreover, those whose support or opposition matters most to the candidates or officeholders with whom ad sponsors might seek influence, and the ones who have the greatest need to know who is spending money in their area in an effort to influence their selection of elected representatives.

(4) The Definition Covers Only Ads Aired in the Final Weeks Before an Election.

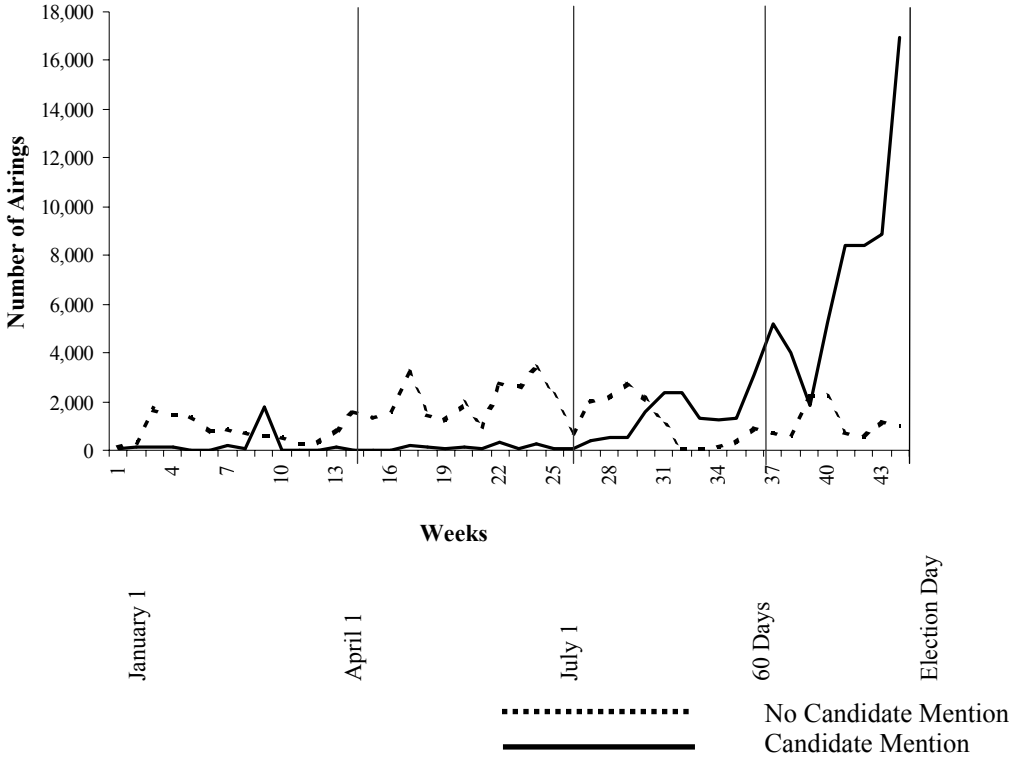
Finally, Congress drew the definition of "electioneering communications" to cover only advertisements aired within 60 days before a general federal election, or 30 days before a primary. In part, as discussed, this limitation adopts a clear line in order to respond to concerns about vagueness. As the record shows, the temporal lines that Congress drew are not only clear,

but also careful. In drawing them, Congress relied not only on its Members' extensive personal experience with electoral politics, but also on empirical research. The empirical evidence supports Congress's conclusion that those lines, in conjunction with Title II's other limits, will squarely address the great bulk of the problem of sham "issue" ads designed to evade FECA, while having little or no effect on sponsors who wish to make communications truly unrelated to advocating the election or defeat of particular federal candidates.[403]

First, interest groups exhibited remarkable consistency in when they ran candidate-targeted ads. As Figure 2 illustrates, ads that mentioned federal candidates spiked in the weeks

[403] The empirical evidence was before Congress principally in the form of two studies — *Buying Time 1998* and *Buying Time 2000*. *See* Goldstein Expert Rep. App. C & D. It is before this Court in the form of expert testimony from political scientists Kenneth Goldstein, Jonathan Krasno and Frank Sorauf, and David Magleby. The research is largely based on the so-called "CMAG Database," developed by Drs. Goldstein and Krasno. The largest database of political advertising ever accumulated, it encompasses every political television ad run in 1998 and 2000 in the "country's top 75 media markets (comprising approximately 80 percent of the nation's population)," Goldstein Expert Report at 5, as well as every political ad run on the top 42 cable channels or on national television. The CMAG Database records when and where each ad ran, as well as both objective and subjective information about each ad's content, from the identity and type of sponsor (such as candidate, party, or interest group) to the candidates named (if any) and subjects addressed. It offers an extraordinarily rich and detailed picture of the patterns of political broadcast advertising. *See generally* Goldstein Expert Report at 5-6.

Figure 2
All Interest Group Ads Over Time in 2000



Source: Goldstein Report Table 16

immediately before the 2000 election, whereas ads that did not mention or depict candidates for federal office were distributed fairly evenly throughout the year, "rising and falling with the ebb and flow of the legislative calendar."[404] The critical dividing line is close to the 60-day mark. Specifically, 78 percent of interest groups ads that mentioned a federal candidate -- and 85 percent of those that mentioned a presidential candidate -- were aired within 60 days of the general election.[405] By contrast, only 18 percent of interest group ads that did *not* mention a candidate were broadcast within 60 days of the election (corresponding to 16 percent of a calendar year).[406]

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404 Goldstein Expert Report at 3.

405 Goldstein Expert Report at 19 (Table 4).

406 *Id*. Another study found that only 6 percent of all issue ads aired by parties and interest groups in that same pre-election period failed to "make a case for or against a candidate." Magleby Expert Report at 15 (citing Erika Falk, Content and Tenor of Issue Ads, *in Issue Advertising in the 1999-2000 Election Cycle* 14 (2001)).

Tellingly, interest group ads that mentioned candidates within 60 days of the general election almost invariably targeted House or Senate candidates in hotly contested races, or presidential candidates in battleground states.[407] A remarkable 81 percent of all interest group ads naming Senate candidates targeted just five states.[408] These objective data support Congress's determination that ads covered by BCRA's 60-day rule have been used for electioneering purposes.

Second, the empirical evidence for both 1998 and 2000 also includes qualitative ratings concerning the nature of interest group ads. In the studies, for each ad in the database for each year, coders were asked to decide whether "the purpose of the ad [is] to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate."[409] Using such ratings, the fit between BCRA's coverage and viewer perceptions can be measured in at least two ways: by computing the proportion of all ads covered by BCRA's objective test that a subjective test would have classified as issue ads, or by computing the proportion of all ads aired over a defined period and subjectively-rated as issue ads that would be regulated under BCRA's objective test.[410] The first test measures whether BCRA captures mostly what it aims to capture, while the second measures how much genuine issue advocacy

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[407] Goldstein Expert Report at 3; Krasno & Sorauf Expert Report, App. (Tables 4 & 5).

[408] *See* Goldstein Expert Report at 21 (Table 5). In 2000, 89 percent of interest group ads naming Senate candidates ran in states where the Senate race was competitive. *Id*. at 20. Groups that ran ads naming House candidates within 60 days of the 2000 general election aired 85.3 percent in competitive races, covering a total of only 42 out of 435 districts. *Id.* at 21-22 (Table 6). More to the point, 72 percent of all ads mentioning or depicting a candidate within 60 days of the election were aimed at candidates in just 12 races. *Id*. at 22 (Table 6). Notably, 20.8 percent of the airings mentioning candidates within 60 days of the general election in 2000 mentioned challengers, most of whom were not even in a position to act on any issue mentioned. Search of CMAG Database. Similarly, a search of the CMAG Database reveals that even though only 7.9 percent of congressional races in 2000 were for open seats, 44.5 percent of interest group airings mentioning candidates within 60 days of the general election named a candidate for an open seat. Search of CMAG Database.

[409] Goldstein Expert Report, App. F at 2 (question 11 in 2000 Study); Goldstein Expert Report, App. C at KG 00000204 (question 6 in 1998 study).

[410] *See* Krasno & Sorauf Expert Report at 60 n.143 (comparing methods of calculation).

BCRA might affect. Using either measure, the studies in the record show a close fit between subjective classification of ads and BCRA's objective focus on candidate-centered ads run within the 60-day period before a general election.

According to the coders, the set of ads covered by BCRA's 60-day, candidate-centered test included only a small percentage of true issue ads.[411] Moreover, BCRA's coverage of candidate-focused ads run within 60 days of the general election would have captured virtually none of the advertising aired over the course of the entire election year that the coders perceived as educational or issue-oriented.[412]

Both the objective and the subjective evidence thus support Title II's temporal tailoring. As to adequate coverage, the evidence shows that a large proportion of the electioneering advertisements run by interest groups are broadcast in the 60 days before a general election. Thus, the new definition revives FECA's prohibition on corporate and union treasury spending, and disclosure requirements, with respect to the great bulk of ads that fall within FECA's

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[411] Specifically, of all airings of ads during 2000 that would have been covered by BCRA because of their proximity to the general election, the coders perceived only 2.3 percent as having the purpose of advocating about issues. Goldstein Expert Report at 3, 25 (Table 7); *see* 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (noting similar numbers reported in *Buying Time 2000*, which drew the data out of an earlier version of the same database); 148 Cong. Rec. S2116 (daily ed. Mar. 20, 2002) (statement of Sen. Levin) (same); 148 Cong. Rec. S2117-2118 (daily ed. March 20, 2002) (statement of Sen. Jeffords) (same). The comparable figure for 1998 is 14.7 percent, with the difference arising mainly from the larger volume of candidate-focused ads run close to the general election in a presidential election year. Krasno & Sorauf Expert Report at 60 n.143. For the two years combined, the figure is 3.3 percent. Krasno & Sorauf Expert Report, App. at 4-5.

[412] Specifically, out of all airings of interest-group ads during 2000 that were perceived as genuine issue ads, only 3.1 percent would have been covered by BCRA. Goldstein Expert Report at 3, 25 (Table 7), 27; *see* 147 Cong. Rec. S2458 (daily ed. Mar. 19, 2001) (statement of Sen. Snowe) (recounting 1 percent figure from *Buying Time 2000*, based upon an earlier version of database). The comparable figure for 1998 is 6.1 percent, and the figure for the two years combined is 3.7 percent. Krasno & Sorauf Expert Report at 60 & App. 4. Indeed, according to the experts, "the percentages of [genuine] issue ads affected by BCRA," as reflected in these calculations, "are likely too high, perhaps much too high," because the calculations account for only the period from January to Election Day of each election year — excluding the other 13-plus months in the election cycle. Krasno & Sorauf Expert Report at 60-62; Goldstein Expert Report at 8. Moreover, these figures represent numbers of airings, not numbers of distinct ads, which means that "false positives" — ads that BCRA would regulate even though viewers perceived them to be genuine issue advocacy — may be overstated. The 6 percent figure for 1998 represents over 700 airings of only three unique ads, *see* Krasno & Sorauf Expert Report at 60, one of which, a so-called "cookie-cutter" ad by the AFL-CIO ("HMO Said No"), ran 455 times urging three Senators up for reelection to vote against a pending "Republican" healthcare bill (in addition to targeting other Senators who were not up for reelection). S*ee* Krasno & Sorauf Expert Report, App. at 2-5.

intended scope, but that escaped regulation under the "express advocacy" test. By covering those ads run closest in time to candidate elections, BCRA's definition also targets those ads logically most likely to pose the recognized problems inherent in corporate and union treasury spending. Likewise, disclosure concerning the money spent for ads run in that period will supply the public with information about those who are supporting or opposing candidates at just the time when voters are most likely to be focusing on the upcoming elections, and making up their minds about which candidates to support.

As to incidental coverage of ads that do not have an electioneering purpose, the record shows that the overwhelming preponderance of interest group ads that name a candidate and are run within 60 days of an election are electioneering ads, rather than pure "issue advocacy." In addition, as with naming specific candidates or targeting their electorates, it should seldom be necessary (or even useful) for interest groups that wish to run non-electioneering ads to do so in the crowded and expensive period just before federal elections. And even within that period, Title II allows any amount or type of communication (other than "express advocacy"), by any party, if it is not broadcast; *or* does not name a federal candidate; *or* is not targeted to a named candidate's district; *or* is produced and aired with PAC money, rather than money from a corporate or union treasury. All in all, therefore, there is no reason to expect that Title II's reinvigoration of FECA's limits on corporate and union treasury spending, and the modest burdens imposed by its disclosure requirements, will have any significant impact on the timing or content of genuine "issue advocacy."

In sum, as confirmed by the expert analysis introduced in this case, "[i]t is clear that BCRA does a good job of hitting what it is aiming at . . . and missing what it is not . . . ."[413]

[413] Krasno & Sorauf Expert Report at 60-61.

Based in part on the foregoing data, and in part on their long study of politics, the experts confirm that the lines Congress drew in Title II "define[] campaign advertising in a way that makes sense both logically and empirically."[414]

To put the point in the terms of *Buckley*, Title II's disclosure requirements are "directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate," and "narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced."[415] They provide "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view."[416] In the language of *Austin*, BCRA's limits on corporate spending for "electioneering communications" are "precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views" by running any ads they choose through their PACs; the same analysis applies to union spending.[417] No doubt the Constitution requires just such tailoring of congressional reforms in this sensitive area. But it does not forbid reform altogether, or bind Congress to an "express advocacy" test designed by the Supreme Court for other purposes, and proven by experience to be wholly ineffective in advancing what the Court has long recognized as important public interests. Title II is, at bottom, an anti-circumvention measure, adopted in light of specific experience with the shortcomings of prior law. It represents a carefully considered, wholly reasonable, and fully constitutional response to that experience.

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414 Krasno & Sorauf Expert Report at 59; *see also id*. at 66 ("We are satisfied that BCRA has a minimal effect on genuine issue advocacy, offers advertisers clear guidance and an array of options that serve nonpartisan purposes, and is, in short, a reasonable response to a serious threat against the existing campaign finance system.").

415 *Buckley*, 424 U.S. at 80, 81.

416 *Id*. at 82.

417 *Austin*, 494 U.S. at 660.

III. BCRA's Coordination Provisions Are Constitutional.

The Supreme Court recognized in *Buckley* that, to be effective, any limits on campaign contributions must also govern third-party expenditures made in coordination with a candidate so as to "prevent attempts to circumvent [FECA] through prearranged or coordinated expenditures amounting to disguised contributions." 424 U.S. at 47. *Buckley* thus distinguished between those expenditures "made *totally independently* of the candidate and his campaign," and those made "*in cooperation with or with the consent of* a candidate, his agents or an authorized committee of the candidate." *Id.* at 46-47 & n.53 (emphasis added); *see also id.* at 78.[418]

The Court has consistently adhered to this distinction. *See Colorado I*, 518 U.S. at 617 ("the constitutionally significant" factor is whether there is a "lack of coordination between the candidate and the source of the expenditure"). The Court has also continued to emphasize that unrestricted coordinated expenditures on behalf of a candidate pose the same threats of corruption or the appearance of corruption as unrestricted direct contributions to a candidate. *See Colorado II*, 533 U.S. at 447, 464 (noting "the good sense of recognizing the distinction between independence and coordination," and concluding that "[t]here is no significant functional difference between" a coordinated expenditure and a direct contribution for purposes of First Amendment analysis).[419]

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[418] "The absence of *prearrangement and coordination* of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." 424 U.S. at 47 (emphasis added). But only the "absence of prearrangement" and the fact that expenditures are made "*totally independently*" of a candidate diminish the potential for corruption. *Id.* at 46-48 (emphasis added).

[419] Although coordinated expenditures are treated functionally the same as direct contributions, courts have recognized that in some circumstances such expenditures can be *more* dangerous than unlimited direct contributions. *See, e.g., FEC v. Christian Coalition,* 52 F. Supp. 2d 45, 88 (D.D.C. 1999) ("Even more pernicious would be the opportunity to launch coordinated attack advertisements, through which a candidate could spread a negative message about her opponent, at corporate or union expense, without being held accountable for negative campaigning. Coordinated expenditures for such communications would be substantially more valuable than dollar-equivalent contributions because they come with an 'anonymity premium' of great value to a candidate running a

BCRA seeks to repair two dangerous loopholes that have severely hampered the regulation of coordinated expenditures in recent years. Section 214 repeals the revised and narrowed definition of "coordination" recently adopted by the FEC and instructs the Commission to engage in a new rulemaking that addresses a number of specific definitional issues. Section 213 prohibits political parties from taking advantage of what the Supreme Court has called the "special privilege" (*Colorado II*, 533 U.S. at 455) of making coordinated expenditures under 2 U.S.C. § 441a(d) in support of their nominees — a privilege not available to anyone else — while at the same time purporting to make "independent" expenditures in support of those same nominees. For purposes of making these special § 441a(d) coordinated expenditures, Section 213 provides that parties may not simultaneously coordinate with, yet claim to be independent from, their nominees. Both of these repairs are fully consistent with the First Amendment. We address each in turn.[420]

A. Plaintiffs' Section 214 Challenges Are Nonjusticiable and Fail on the Merits.

Section 214 repeals what Congress deemed to be an under-inclusive definition of "coordination" adopted by the FEC in December 2000 and instructs the Commission to undertake a new rulemaking, which is presently underway.[421] Some background will help demonstrate why all of plaintiffs' challenges to this section should be rejected.

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positive campaign."); *see also* Beckett Decl. ¶ 16 (Sept. 12, 2002) [DEV 6-Tab 3] (Democratic political consultant stating that "[o]f course candidates often appreciate the help that these interest groups can provide, such as running attack ads for which the candidate has no responsibility. If some outside third party does that, you can distance yourself from them and the message gets across to the voters without you getting dirtied.").

[420] Many plaintiffs have included BCRA § 202 in their coordination challenges. That section simply makes clear that a "coordinated" disbursement for an "electioneering communication" qualifies as a contribution by the person who makes it and as an expenditure by the candidate beneficiary. The defense of § 202 is subsumed in the defense of BCRA's electioneering communications provisions set forth in Point II above.

[421] *See* Notice of Proposed Rulemaking, 67 Fed. Reg. 60042 (Sept. 24, 2002). The Commission received written comments through October 11, and held a public hearing on October 23-24. There is a December 22 deadline for issuing these rules, imposed by Congress and the President in BCRA § 402(c).

Following the Supreme Court's lead in *Buckley* and subsequent decisions, Congress and the FEC for the past generation have taken a highly realistic view of how coordination can occur through deliberately informal means. The 1976 amendments to FECA, codifying *Buckley*'s treatment of coordinated expenditures, provided that an expenditure made "*in cooperation, consultation, or in concert with or at the request or suggestion of a candidate*, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i) (emphasis added); *see also id.* § 431(17) (converse definition of "independent expenditure"). Under rules adopted by the Commission in 1980 and applied in a long line of Advisory Opinions over the past two decades, coordination was presumed to have occurred if, for example, an expenditure followed on the heels of receiving inside information about "the candidate's plans, projects, or needs" or was made "by or through any person who is, or has been," a fundraiser, employee, or consultant for the candidate.[422]

In December 2000, a divided FEC promulgated new regulations that redefined "coordination" much more narrowly in the context of "general public political communications." *See* 65 Fed. Reg. 76138 (Dec. 6, 2000); *see also* 66 Fed. Reg. 23537 (May 9, 2001) (final rule and effective date); 11 C.F.R. § 100.23. These narrowing regulations were adopted in response to a number of rulemaking petitions and to the district court's decision in *FEC v. Christian*

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[422] Under the Commission's rules that governed from 1980 to 2000, an expenditure was not considered "independent" if made pursuant to "any arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication. An expenditure will be presumed to be so made when it is –

> (A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made; or
>
> (B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent."

11 C.F.R. § 109.1(b)(4)(i)(A)-(B) (2000 ed.) (repealed eff. 2001); s*ee also* FEC Adv. Op. No. 1979-80 (Mar. 12, 1980); FEC Adv. Op. No. 1980-116 (Nov. 14, 1980); FEC Adv. Op. 1982-20 (Apr. 26, 1982); FEC Adv. Op. No. 1993-18 (Dec. 9, 1993); FEC Adv. Op. No. 1996-1 (Mar. 29, 1996).

Coalition, 52 F. Supp. 2d 45 (D.D.C. 1999), which rejected the Commission's conclusion that certain contacts rose to the level of "coordination." *See* 65 Fed. Reg. at 76138-40.[423] The Commission's new rules provided in material part that coordination could only be found between a candidate and a third party where the third party's communication was "created, produced or distributed" (1) "[a]t the request or suggestion of the candidate," (2) after the candidate "has exercised control or decision-making authority" over the communication, or (3) "[a]fter *substantial discussion or negotiation … the result of which is collaboration or agreement*" between third party and candidate. 11 C.F.R. § 100.23(c)(2)(i)-(iii) (emphasis added). The Commission superseded a number of its so-called "insider trading" AOs as no longer consistent with the narrowed focus of the coordination rules. 65 Fed. Reg. at 76145.

The new rules have been extensively criticized both on and off the Commission. A recurrent complaint has been that the rules are "far too narrowly drafted and will make evasion of the [FECA] commonplace," including through the use of inside information by consultants and employees who are able to achieve *de facto* coordination through informal means while purporting to avoid the more formalistic arrangements — "collaboration or agreement" — that trigger coverage under the rules.[424] Section 214 followed directly from these criticisms. It (a)

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[423] *Christian Coalition* rejected the FEC's "insider trading" approach as "sweep[ing] in all attempts by corporations and unions to discuss policy matters with the candidate while these groups are contemporaneously funding communications directed at the same policy matters." 52 F. Supp. 2d at 90. The district court instead held that "coordination" required either "a request or suggestion from the campaign," some kind of "control" over the communication by the candidate or her agents, or "*substantial discussion or negotiation* between the campaign and the spender" over the communication, "such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners." *Id.* at 90, 92 (emphasis added). The Court invited an "immediate appeal" of its decision under 28 U.S.C. § 1292(b), and the Office of General Counsel recommended that the FEC do so, but a divided Commission voted against pursuing an appeal. *See* Statement for the Record of Chairman Thomas and Commissioner McDonald in *FEC v. Christian Coalition* (Dec. 20, 1999) [DEV 133].

[424] Statement of Reasons of Commissioner Thomas and Chairman McDonald in *In re The Coalition, et al.,* MUR 4624, at 12 (FEC Sept. 7, 2001) [Intervenors' First Excerpts of Record, Tab 19, attached as App. B [hereinafter IER]]; *see also id.* at 8 (arguing that the narrowed definition of coordination "renders the coordination standard – and thus, the contribution limits – meaningless"); Statement of Reasons of Commissioners Thomas and McDonald in *In re Republicans for Clean Air*, MUR 4982, at 9-10 (FEC Apr. 23, 2002) (detailing various ways in which "[t]he

repeals the Commission's present rules, effective December 22, 2002; (b) provides that the Commission "shall promulgate new regulations on coordinated communications" addressing at a minimum four specific situations;[425] and (c) directs that the new rules "shall not require agreement or formal collaboration to establish coordination." As Senator McCain explained, "Section 214 represents a determination that the current FEC regulation is far too narrow to be effective in defining coordination in the real world of campaigns and elections and threatens to seriously undermine the soft money restrictions contained in the bill."[426]

Rather than giving the FEC the opportunity to carry out its rulemaking mandate and to promulgate new rules governing coordination — which will then be subject to judicial review under the Administrative Procedure Act — plaintiffs have flocked directly to this Court to insist that it will be impossible for the new, not-yet-promulgated coordination rules to comply with the First Amendment. All of plaintiffs' various challenges to § 214 should be rejected both on justiciability and jurisdictional grounds and on the First Amendment merits.

1. Plaintiffs' Challenges to Section 214 Are Premature and Improper.

Intervenors agree fully with the United States and the FEC that the § 214 challenges must be dismissed under the doctrines of ripeness and standing. The Supreme Court has squarely held that, where agency rules have been rejected by Congress and are undergoing further review and revision by the agency pursuant to congressional mandate, it is improper for courts to intervene

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Commission's new test for coordination weakens important provisions of the Act") [IER Tab 19]; 148 Cong. Rec. S2144-45 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold) (FEC's new rule "fails to cover a range of de facto and informal coordination between outside groups and candidates or parties"; providing detailed example of insider information problems).

[425] Section 214(c) directs the Commission to address (1) "payments for the republication of campaign materials"; (2) "payments for the use of a common vendor"; (3) "payments for communications directed or made by persons who previously served as an employee of a candidate or a political party"; and (4) "payments for communications made by a person after substantial discussion about the communication with a candidate or a political party."

[426] 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002); *see also id.* (statement of Sen. Feingold) ("These rules need to make more sense in light of real life campaign practices than do the current regulations.").

on the merits until the agency has been given an opportunity to revise its rules to address legislative concerns. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 437-38 (1977) (challenge to pending rules governing public access to presidential recordings and materials). Although plaintiffs claim the new definition of coordination will be unconstitutionally "vague," "overbroad," and "chilling" of protected speech, they have no basis for making such charges — and there is nothing meaningful for this Court to review — until there is actually a new definition in place.[427] Even when the Commission promulgates final rules (expected in the next several weeks), plaintiffs' § 214 claims must still be dismissed because any judicial review regarding the definition adopted by the final rules must be by a single-judge district court under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and be resolved on the rulemaking record rather than on a freshly constructed trial record in this Court.[428]

Nor is there any basis for claiming that it would be futile to await the outcome of the rulemaking process, on the ground that unconstitutional rules are inevitable. This argument

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[427] *See, e.g., MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 348 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.") (ripeness of takings claims); *EPA v. Brown*, 431 U.S. 99, 104 (1977) ("For [a court] to review regulations not yet promulgated, the final form of which has only been hinted at, would be wholly novel."); *Florida Power & Light Co. v. EPA,* 145 F.3d 1414, 1421 (D.C. Cir. 1998) (dismissing claim that was "not based on crystallized [agency] interpretations" in final promulgated rules, but rather on preamble statements contained in proposed rules); *Public Citizen Health Research Group v. Commissioner*, *FDA,* 740 F.2d 21, 29 (D.C. Cir. 1984) (judicial review improper where "the issue is currently the subject of an ongoing [agency] rulemaking procedure; judicial resolution of the issue would encourage disregard for the procedures Congress has established to resolve such questions and would undermine the autonomy of the administrative decisional process.").

[428] Under BCRA § 403(a), this Court's jurisdiction is limited to "any action . . . brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act . . ." There is no mention of challenges to administrative rules promulgated pursuant to the Act and thus no basis for challenging those rules outside the APA's framework. *See also FCC v. ITT World Communications, Inc.,* 466 U.S. 463, 468 (1984) (holding that "[t]he appropriate procedure for obtaining judicial review" of matters committed to an agency's rulemaking process is to challenge the agency's rulemaking decision rather than initiating a *de novo* challenge in district court and seeking "to enjoin action that is the outcome of the agency's order"). Plaintiffs' § 214 claims are also subject to dismissal for lack of Article III standing, which must have existed "*when suit was filed.*" *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (emphasis added). No plaintiff here had standing when the litigation began — and no plaintiff has standing now — because until there are final rules in place, it is entirely speculative whether any particular conduct that a plaintiff wishes to engage in will be covered by the revised rules or not.

depends on the view that the Constitution requires no less than a formal "agreement or collaboration" in order to find coordination. For the reasons discussed in Part III-A-2 below, this is clearly wrong. Moreover, BCRA's sponsors emphasized that § 214 was simply an instruction to study the coordination issues further and "favors neither one side nor the other."[429] Other than prohibiting the Commission from using a formalistic "agreement or collaboration" standard, Congress left the definitional issues wide open without "requir[ing] the FEC to come out any certain way or come to any definite conclusion one way or another."[430]

The lead complaint is flatly wrong in alleging that § 214 will require rules finding "coordination" between a Member of Congress and a citizen group "*simply because the Member met with the group about pending legislation and the group then took out an advertisement to promote that legislation*."[431] Just the opposite is true. In response to similar allegations during the legislative process, Senator McCain emphasized that the FEC was *not* authorized to treat such lobbying contacts as "coordination" and that contrary rules would *violate* Congress's intent:

> [N]othing . . . in section 214 should or can be read to suggest, as some have said, that lobbying meetings between a group and a candidate concerning legislative issues could alone lead to a conclusion that ads that the group runs subsequently concerning the legislation that was the subject of the meeting are coordinated with the candidate. Obviously, if the group and the candidate discuss campaign related activity such as ads promoting the candidate or attacking his or her opponent, then coordination might legitimately be found, depending on the nature of discussions. *We do not intend for the FEC to promulgate rules, however, that would lead to a finding of coordination solely because the organization that runs such ads has previously had lobbying contacts with a candidate*.[432]

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[429] 147 Cong. Rec. S3184 (daily ed. Mar. 30, 2001) (statement of Sen. McCain).

[430] *Id.* at S3185 (statement of Sen. Feingold) (Section 214 "gives some guidance to the FEC as to what issues it should address, without actually dictating the result").

[431] Second Amended McConnell Compl. ¶ 66 (emphasis added).

[432] 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (emphasis added).

Plaintiffs should wait until the final FEC rules have been adopted, and then bring a challenge under the APA if the rules depart from these instructions.

2. Congress Had Ample Grounds for Instructing the FEC To Develop Broader, More Effective Coordination Rules That Address Specified Concerns.

Even if there were jurisdiction and a justiciable controversy, plaintiffs' Section 214 claims would still fail. At the heart of plaintiffs' claims is the premise that it will be impossible for the Commission to draft coordination rules dealing with discussions between candidates and third party groups that comply with the First Amendment *unless* the only conduct regulated is undertaken pursuant to an "agreement or formal collaboration." This runs directly counter to the definition of "coordination" embraced by Congress and the Supreme Court, which have "*dr[awn] a functional, not a formal, line between contributions and expenditures*." *Colorado II*, 533 U.S. at 443 (emphasis added). As the Court observed a generation ago in *Buckley*, the question is whether an expenditure is "*totally* independent[]," an inquiry that cannot be limited to formal "agreement" or "collaboration." 424 U.S. at 47 (emphasis added). The Court has noted the need to reach not only actual "agreements," but also more "general . . . understanding[s]" and "wink or nod" arrangements. *Colorado I,* 518 U.S. at 614; *Colorado II*, 533 U.S. at 442. Section 214 merely directs that the FEC adopt a definition of "coordination" that is not limited to circumstances involving "agreement" or "formal collaboration." It is hardly unconstitutional for Congress to instruct the Commission to define "coordination" within limits allowed by the Supreme Court.[433]

[433] The Commission's "agreement or formal collaboration" test is materially more narrow than the "general understanding" and "wink or nod" approaches recognized in the *Colorado* decisions. As FEC Commissioner Scott E. Thomas has explained, "[t]o read the words 'any general … understanding' out of the opinion [in *Colorado I*] would create an unnecessarily narrow definition of coordination and open a large loophole in the statute. Under such a limited reading, an organization would be allowed to meet with a candidate's campaign team, discuss the candidate's campaign strategy and the development of issues crucial to the campaign, and then make 'independent'

Even if these issues were not controlled by the Supreme Court's prior decisions, there is abundant evidence supporting Congress's expert judgment that the coordination rules should be rewritten in order to reflect "the real world of campaigns and elections."[434] This evidence demonstrates that (1) an "agreement or formal collaboration" standard would permit informal though equally pernicious "wink or nod" coordination to go unregulated, and (2) the four factors that Congress instructed the FEC to "address" have historically offered opportunities for abuse. The evidence is found in the legislative record prior to BCRA's enactment (including the Thompson Committee investigations), in a number of FEC proceedings in recent years, and in the trial record. *See* Intervenors' Excerpts of Record at Tab 19 for key portions of this evidence.

For example, the Thompson Committee and FEC staff both found evidence of massive coordination between the DNC and RNC and their respective presidential candidates during the 1996 campaign, carried out under the guise of "independent expenditures." One of the enduring images is of President Clinton at work in the Oval Office editing the scripts of supposedly "independent" soft-money ads being run by the DNC.[435] As for the Republicans, the FEC's Office of General Counsel found that, after the Dole campaign ran short of funds and the RNC commenced an "independent" soft-money ad campaign, "[e]ssentially, the entire Dole media

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expenditures based on this detailed knowledge and information. The only apparent restriction would be that an organization could not reach a 'particular understanding' with the candidate's campaign team. In other words, the candidate could not himself approve the final, finished advertisement or authorize a buy for the timing and placement of the advertisement. Obviously, such a narrow, limited approach would render the coordination standard meaningless and allow 'prearranged or coordinated expenditures amounting to disguised contributions' [in contravention of *Buckley*]." Scott E. Thomas & Jeffrey J. Bowman, *Coordinated Expenditure Limits: Can They Be Saved?,* 49 Cath. U. L. Rev. 133, 141 (1999) [DEV 40-Tab 8].

[434] 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

[435] *See* Thompson Comm. Rep. at 107-29, 8281-83, 8294-304; Statement of Reasons of Commissioner Thomas in *In re Dole for President, et al.*, MURs 4553 *et al.*, at 10-11 (May 25, 2000) [DEV 51]; Thomas E. Mann, *Report of Thomas E. Mann* (Sept. 20, 2002), at 21 [DEV 1-Tab 1] (discussing President Clinton's "personal role" in scripting and approving these ads). President Clinton's principal media advisor acknowledged that, with respect to these "independent" ads, "the president became the day-to-day operational director of our TV-ad campaign. He worked over every script, watched each ad, ordered changes in every visual presentation, and decided which ads would run when and where. . . . Every line of every ad came under his informed, critical, and often meddlesome gaze. Every ad was *his* ad." Dick Morris, *Behind The Oval Office* 144 (1997) (emphasis in original) [IER Tab 19].

division shifted to the RNC and continued its work of producing advertisements in support of Senator Dole's campaign."[436] The evidence for both parties showed extensive overlap in employees, advisors, shared work product, and the exchange of inside information. The FEC's Office of General Counsel recommended finding "reason to believe" that both parties had violated the coordination rules, but the Commission decided not to pursue the matters.[437] As Senator Thompson concluded:

> Acceptance of this activity would allow any candidate and his campaign to direct and control the activities of a straw man through which the campaign could draft, revise, and place advertisements meant to benefit the particular federal campaign. For such activity, these straw men could use funds subject to no limit and derived from any source. . . . If the interpretation is that this is legal and this is proper, then we have no campaign finance system in this country anymore.[438]

The 1996 campaign also involved widespread coordination among candidates, parties, and supposedly "independent" third-party groups. Some of the most controversial examples included Americans for Tax Reform ("ATR"), "The Coalition," and the AFL-CIO. ATR hosted weekly meetings for Republican candidates, advisors, officials, and conservative activists to exchange information on specific races and election strategy.[439] The Coalition — a business

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[436] Quoted in Commissioner Thomas Statement of Reasons in MURs 4553 *et al.*, at 9; *see id.* at 9-10; *see also* Thompson Comm. Rep. at 8294-97 (discussing coordination by the Clinton and Dole campaigns).

[437] *See* Commissioner Thomas Statement of Reasons in MURs 4553 *et al.*, at 1, 17-19; *see also id.* at 9-11. Because of the pendency of *Colorado II*, the FEC ultimately decided in its 2000 rulemaking not to address the issues of coordinated expenditures between party committees and candidates "at this point," preferring instead to await further judicial guidance. 65 Fed. Reg. at 76142. The Commission's new proposed rule "would generally apply the same regulatory analysis to communications paid for by the political party committees that would be applied to communications paid for by other persons." 67 Fed. Reg. at 60057.

[438] *Investigation of Illegal or Improper Activities in Connection with the 1996 Federal Election Campaign – Part X: S. Hrg. 105-300 before the Senate Comm. on Governmental Affairs*, 105th Cong. 7 (1997) (statement of Sen. Thompson); *see also* 148 Cong. Rec. S2138-40 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

[439] *See* Thompson Comm. Rep. at 6049-50; *see also id.* at 6034-56 . As one account of these ATR sessions observed, "[t]he federal election law stipulates that interest groups aren't supposed to coordinate their efforts for or against a candidate, but what actually goes on appears to be a distinction without a difference. [One meeting participant] said, 'The Federal Election Commission says you can't coordinate, but everybody talks to each other.' He added, 'We make a practice of not talking specific amounts with each other. We talk about who's targeted, how

group formed at the request of Republican leaders to respond to the AFL-CIO's $35 million soft-money ad campaign in support of Democrats — mounted a supposedly "independent" media campaign using the RNC's pollsters, media consultants, and footage supplied by the RNC. The FEC dropped its investigation of The Coalition in May 2001 in direct response to the new coordination rules; the Office of General Counsel concluded that, although The Coalition's activities may have violated the old rules, "under the present state of the law the result is different."[440] The FEC likewise decided not to pursue further inquiry into the AFL-CIO's allegedly "independent" advertising, despite evidence that the union "had access to volumes of non-public information about the plans, projects, activities, and needs of the DNC, the DCCC, the state Democratic parties, and in some instances individual candidates for Federal office."[441]

Most recently, the new, narrowed rules led the FEC to decide not to investigate the Wyly Brothers/Republicans for Clean Air episode, in which a senior fundraiser and official of the 2000 Bush campaign joined with his brother in funding a $2 million "independent" ad campaign attacking Senator McCain in key primary states. The dissenting Commissioners charged that the "new coordination regulations create a large loophole" that will "simply permit cover for those not interested in enforcement of the Act as Congress intended."[442] The trial record in this Court contains extensive additional evidence reinforcing Congress's judgment that an "agreement or formal collaboration" standard does not reflect campaign realities and that the entire issue

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somebody's doing, but not in terms of 'Why don't you throw in three thousand and we'll throw in five thousand.' This is a very narrow interpretation of the law." Elizabeth Drew, *Whatever It Takes* 18-19 (1997) .

[440] Quoted in Commissioner Thomas and Chairman McDonald Statement of Reasons in MUR 4624 at 9; *see generally id.* at 1, 3, 8-10.

[441] FEC Office of General Counsel *quoted in* Statement for the Record of Commissioner Thomas in *In re AFL-CIO, et al.,* MURs 4291 *et al.*, at 8 (Sept. 25, 2000) [DEV 52-Tab 3]; *see also* Thompson Comm. Rep. at 128-29, 7235-40.

[442] Commissioners Thomas and McDonald Statement of Reasons in MUR 4982 at 5; *see also id.* at 1-4; Jonathan S. Krasno & Frank J. Sorauf, *Evaluating the Bipartisan Campaign Reform Act (BCRA)* (Sept. 23, 2002) at 74-76 [DEV 1-Tab 2].

requires further careful examination.[443] The Commission should be allowed to carry out its rulemaking mandate.

B. The Section 213 "Either/Or" Provision Is Entirely Consistent With the Supreme Court's Treatment of "Independent" and "Coordinated" Expenditures by Political Parties in *Colorado I* and *Colorado II*.

As the Supreme Court recognized last year in *Colorado II*, political parties are "in a unique position" under FECA. 533 U.S. at 455. Under 2 U.S.C. § 441a(a)(7)(B), "coordinated" expenditures are treated as campaign contributions subject to the limitations of § 441a(a). The so-called "Party Expenditure Provision" in § 441a(d), however, allows parties to make additional coordinated expenditures in amounts orders of magnitude larger than what anyone else can contribute — a "special privilege [that] others do not enjoy." 533 U.S. at 455. During the 2000 election cycle, political parties could spend over $13 million in coordination with their presidential candidates, and amounts ranging from $33,000 to over $1.6 million in coordination with *each* of their other federal candidates. *See* 2 U.S.C. § 441a(c)-(d).[444]

For many years the FEC took the position that, because political parties must of necessity work closely with their candidates and already are permitted to make large coordinated expenditures on behalf of those candidates, the parties could not also make *independent* expenditures on behalf of those same candidates. The Supreme Court concluded in *Colorado I*,

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[443] *See, e.g.*, [REDACTED] Beckett Decl. ¶ 13 (explanation by political consultant of how "under the current rules I was allowed to tell anyone what my plans were, as long as no one told me what their plans were"); McCain Decl. ¶ 24 [DEV 8-Tab 29] ("[Political] consultants can function as conduits of information between advocacy groups, the parties, and federal candidates – sharing polling data, opposition research and message advice among all three. In addition, staff from advocacy groups may sometimes leave to join campaigns of candidates for federal office, providing yet another back channel of information between the advocacy groups and candidates.").

[444] Under the provisions of § 441a(c)-(d), the coordinated expenditure limit for each party in the November 2000 presidential election was $13,680,292. *FEC Announces 2000 Presidential Spending Limits*, News Release (Federal Election Commission), Mar. 1, 2000 [IER-Tab 20]. The coordinated expenditure limit for each 2000 House race was $33,780 per party (with state and national parties treated separately for this purpose), and the limits for Senate races (using a formula based on voting age population) ranged up to $1,626,438 per party in the case of California. *See FEC Announces 2000 Party Spending Limits,* News Release (Federal Election Commission), Mar. 1, 2000 [IER-Tab 20].

however, that, where a party has not yet selected its nominee, it is possible for the party to make expenditures that are "independent" of any candidate seeking the nomination. 518 U.S. at 614. The Court in *Colorado II* emphasized the importance of the fact that the party expenditures found to be independent in *Colorado I* had been made "before" selection of the party's own nominee. 533 U.S. at 440. In *Colorado II,* the Court rejected a state party's First Amendment challenge to the (already-generous) FECA limits on coordinated party spending, concluding that "a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits." *Id.* at 465. The question whether a party may engage in *both* coordinated and independent spending at the same time and on behalf of the same candidate was not addressed in either case.

Section 213 provides that, after a political party has nominated its candidate, a party committee may not make coordinated expenditures for that candidate under 2 U.S.C. § 441a(d) while also purporting to make "independent expenditures" as defined in 2 U.S.C. § 301(17) on behalf of that same candidate during that same election cycle. Section 213 is limited to the "special" coordinated expenditures authorized by § 441a(d); a political party may still make contributions (or coordinated expenditures) of up to $5,000 pursuant to § 441a(a)(2), just like any other multicandidate political committee. For purposes solely of the "special privilege" of making § 441a(d) expenditures, a party committee may coordinate with its candidate or be independent from its candidate, but may not claim to be both. Senator McCain explained the purpose of § 213 this way:

> This provision fully recognizes the right of the parties to make unlimited independent expenditures. But it helps to ensure that the expenditure will be truly independent, as required by *Colorado Republican I*, by prohibiting a party from making coordinated expenditures for a candidate at the same time it is making independent expenditures for the same candidate. We believe that once a candidate has been nominated a party cannot coordinate with a

> candidate and be independent in the same election campaign. After the date of the nomination, the party is free to choose to coordinate with a candidate or to operate independently of that candidate. If it chooses the former, it is subject to the limits upheld in *Colorado Republican II*. If it chooses the latter, it is free to exercise its right upheld in *Colorado Republican I* to engage in unlimited hard money spending independent of the candidate.[445]

The RNC and some other plaintiffs take issue with Senator McCain's justification for the § 213 "either/or" requirement. Indeed, they characterize § 213 as nothing less than an "attempt[] to overrule" *Colorado I* on the theory that parties' rights "to engage in unlimited independent expenditures" may not be conditioned on their "forego[ing]" coordinated expenditures.[446] The McConnell plaintiffs allege that "restricting political party committees from making otherwise permissible expenditures . . . burdens the right of free speech and free association in violation of the First Amendment."[447]

There are at least two major flaws in these arguments. *First,* the plurality opinion in *Colorado I* turned on the particular facts of that case. The plurality emphasized that the Colorado Republican Party had not yet selected its senatorial nominee when it made the expenditure in question, and that there was "uncontroverted direct evidence" that there had been no coordination between the party and those vying for the nomination.[448] Under these circumstances, the plurality held there was "no 'genuine' issue of fact" that the expenditure in question was truly independent. 518 U.S. at 614. On that basis, the plurality held, the FEC

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445 148 Cong. Rec. S2144 (daily ed. Mar. 20, 2002).

446 RNC Complaint ¶ 60.

447 Second Amended McConnell Complaint ¶ 72.

448 518 U.S. at 614. The plurality gave considerable weight to the unrebutted testimony of the Colorado Republican Party chairman: "In a deposition, the Colorado Party's Chairman, Howard Callaway, pointed out that, at the time of the expenditure, the Party had not yet selected a senatorial nominee from among the three individuals vying for the nomination. He added that he arranged for the development of the script at his own initiative, that he, and no one else, approved it, that the only other politically relevant individuals who might have read it were the Party's executive director and political director, and that all relevant discussions took place at meetings attended only by Party staff." *Id.* at 613-14 (internal citations omitted).

could not, consistent with the First Amendment, "conclusively deem independent party expenditures to be coordinated." *Id.* at 625.

The Court in *Colorado I* did *not* address whether it is possible for a political party to make truly independent expenditures *after* the party has nominated its candidate, and *after* the party already has started making coordinated expenditures on behalf of that nominee. Under *these* circumstances, the evidentiary record before *this* Court amply supports Congress's expert judgment that, when a party chooses to coordinate efforts with its nominee, it cannot claim at the same time to be making expenditures that are truly independent of that nominee.[449]

Second, § 213 does not abrogate the unfettered right of a political party to make independent expenditures in support of its nominee. The provision gives a political party a choice. The party may choose to make independent expenditures on behalf of a candidate, thereby forgoing the "special privilege," *Colorado II,* 533 U.S. at 455, of engaging in party coordinated spending under § 441a(d). The Supreme Court *upheld* Congress's ability to limit coordinated spending by the parties in *Colorado II*, and, in this instance, § 213 does nothing more than that. As noted above, a political party subject to § 213 may still make contributions (or coordinated expenditures) subject to § 441a(a)(2), just like any other multicandidate political committee.

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[449] *See, e.g.*, McCain Decl. ¶ 23 (after a party has selected its nominee, they "generally communicate and coordinate on a regular basis on a variety of topics such as fundraising, strategy, opposition research, polling data, advertisements and message, and voter mobilization. The idea that a party could make both 'coordinated' and 'independent' expenditures once the party has nominated a candidate, is not sensible."); Bumpers Decl. ¶ 4 [DEV 6-Tab 10] ("Political parties' primary interest is in supporting and electing their candidates."); David B. Magleby, *Report Concerning Interest Group Electioneering Advocacy and Party Soft Money Activity* (Sept. 23, 2002) at 48-49 [DEV 4-Tab 8] (discussing parties' "coordination" with candidates' campaign themes and strategies in making "independent" expenditures in recent Virginia, New Mexico, and Nevada Senate and House races); *see also* the September 17, 2000 memorandum from Gore campaign manager Donna Brazile to DNC operative Michael Whouley [IER Tab 1.K], in which Ms. Brazile instructs Mr. Whouley exactly how, where and when to spend "DNC dollars" on advertising on behalf of their candidate.

Conversely, a party may choose to take advantage of the "special privilege" given it under § 441a(d) to make large coordinated expenditures on behalf of a candidate, but in that case it must give up its ability to make otherwise permissible independent expenditures on behalf of that candidate. This is just the sort of choice sustained by *Buckley*, which upheld Congress's conditioning of public financing on a candidate's agreement to abide by expenditure limits that otherwise would have run afoul of the First Amendment. *See* 424 U.S. at 95, 99. Under the same rationale, Congress may require political parties to forgo otherwise-permissible independent spending in return for the "special privilege" of engaging in coordinated spending in amounts far exceeding what any other "person" subject to FECA is permitted to contribute.

IV. BCRA's "Millionaire's Provisions" Are Constitutional.

Increasingly, the infusion of personal wealth into political campaigns deters qualified candidates without personal means from running for federal office and dissuades political parties from recruiting such candidates.[450] As one Senator explained:

> All of the problems associated with the immense role that money plays in the electoral system have been exacerbated in recent years by an increase in the number of wealthy candidates contributing outlandish sums to their own campaigns. . . . [T]he fact remains that the current system allows such candidates to drive up the costs of campaigns and make it more difficult for average citizens to contend for political office. If we allow this trend to continue, it won't be long before only the wealthiest Americans will be able to fully participate in the political process.[451]

Congress sought to address this problem though Sections 304, 316, and 319 of BCRA (the "Millionaire's Provisions"), which allow a candidate to raise hard money in increased amounts if his or her opponent spends large amounts of personal money. The statute provides for a series of staggered increases in the otherwise applicable contribution and coordinated expenditure limits. If the opponent spends "personal funds amount" over a certain sum,[452] then FECA's limits on coordinated expenditures by a state or national party are lifted. At all times, the amount of money that is raised under the increased limits and that candidates can spend is capped by an amount tied to the amount spent by their self-funded opponents.[453]

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[450] *See* 147 Cong. Rec. S2537-78 (daily ed. Mar. 20, 2001) (statement of Sen. DeWine).

[451] *See* 144 Cong. Rec. S894 (daily ed. Feb. 24, 1998) (statement of Sen. Moseley-Braun); *see also* Kolb I Decl., Ex. 1, *Investing in the People's Business* at 18-20 [DEV 7-Tab 24] (describing the increasing trend towards self-financing by Congressional candidates).

[452] This sum is $350,000 in the case of a House election; and 10 times the threshold amount in the case of a Senate election. *See* BCRA §§ 304, 319.

[453] A candidate may not accept any contribution or benefit from any coordinated party expenditure under the increased limit that, when added to the aggregate amount of contributions and coordinated party expenditures previously made under the increased limits for the election cycle, would exceed 110% (for Senate races) or 100% (House races) of the opposition personal funds amount. BCRA § 304(a) (2 U.S.C. § 441a(a)(1)(i)(2)(A(ii)) (Senate); BCRA § 319(a) (2 U.S.C. § 441a-1(a)(3)(A)(ii)) (House).

A. Plaintiffs Lack Standing to Challenge the Millionaire's Provisions.

No plaintiff alleges a legally cognizable harm from the Millionaire's Provisions. Thus, plaintiffs have failed to allege facts sufficient to establish standing.

Three elements constitute the "irreducible constitutional minimum" of standing: (1) an "injury-in-fact" that is "concrete and particularized," not "conjectural" or "hypothetical;" (2) "a causal connection between the injury and the challenged conduct . . . of the defendant;" and (3) a "likelihood," not mere "speculat[ion], that the injury will be 'redressed by a favorable decision of the court.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted); *accord, e.g., Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25 (D.C. Cir. 2002).[454]

No plaintiff alleges any injury from the Millionaire's Provisions that is not conjectural or hypothetical. The mere fact of running against a self-funded candidate is not itself a trigger for the lifting of the contribution limits. Rather, the threshold amount triggering the increased limits is calculated by reference to both sides' expenditures from personal funds and to the amount of money in both sides' campaign treasuries. BCRA § 316. To argue that the Millionaire's Provisions would apply and thus result in injury to plaintiffs depends on a number of variables, none of which plaintiffs assert will occur for them.

No plaintiff is a candidate in an election affected by the Millionaire's Provisions, and there is no reason, aside from rank speculation, to believe they ever will be.[455] Similarly, no individual plaintiff has alleged that he is or ever will be a self-funded candidate. Even a self-

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[454] "The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed*." *Lujan*, 504 U.S. at 571 n.4 (emphasis in original) (citation omitted). "[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (citations omitted). A plaintiff "must allege in his pleading the facts essential to show jurisdiction," *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936), and "'the necessary factual predicate may not be gleaned from the briefs and arguments[.]'" *FW/PBS*, 493 U.S. at 235 (citation omitted).

[455] The *Adams* plaintiffs' allegation that they may run in future elections against a self-funded opponent is plainly conjectural. *See Lujan*, 504 U.S. at 560, 571 n.4.

funded candidate would not automatically have standing, because, as seen, running as a self-funded candidate does not automatically trigger the lifting of the contribution limits. *See* BCRA § 316. The claims of the party plaintiffs are even more speculative, as they relate to predictions about the parties' responses to future political races that may or may not trigger the relevant BCRA provisions.[456]

B. Plaintiffs' Constitutional Claims Lack Merit.

Even if plaintiffs had standing, they cannot prevail on the merits of their First Amendment and equal protection challenges.

1. The Millionaire's Provisions Do Not Violate the First Amendment.

In enacting the Millionaire's Provisions, Congress relied on evidence that the ability of wealthy candidates to spend unlimited amounts on their own campaigns discourages well-qualified candidates who cannot finance their own campaigns from running for office, deters parties from recruiting non-wealthy candidates, and contributes to a public sense of disenfranchisement.[457] As one Senator put it, "[t]he reality is in the last several election cycles,

[456] The RNC plaintiffs allege that BCRA, in relaxing the limit on party coordinated expenditures in support of candidates who face self-funded candidates, precludes a political party from treating "similarly-situated candidates equally." RNC Complaint ¶ 74. In addition, the RNC plaintiffs allege that Section 304(a) "interferes with the right of political party committees to support and associate equally with their candidates, in the absence of any compelling government interest." *Id*. The McConnell political party plaintiffs as well as the RNC plaintiffs allege that sections 304 and 319 preclude them from providing "equivalent financial support, by way of coordinated expenditures," to all their candidates, and these "restrictions" on the political parties' rights of free speech and association "cannot be justified by any interest in preventing corruption or the appearance of corruption." These arguments do not establish any injury, since the only consequence for the parties is that the limits on their coordinated expenditures are relaxed in certain races, and nothing requires the parties to exercise their increased freedom.

[457] 147 Cong. Rec. S2537 (daily ed. Mar. 20, 2001) (statement of Sen. DeWine) ("the sad reality is in campaigns today we are moving down a road where personal wealth is becoming the qualification for a candidate seeking office"); 146 Cong. Rec. S3011 (daily ed. Apr. 27, 2000) (statement of Sen. Feingold) ("I wish fundraising skills and personal wealth weren't some of the most sought-after qualities in a candidate for Congress today, but everyone knows that they are."); 144 Cong. Rec. H6792-93 (daily ed. July 30, 1998) (statement of Rep. Rohrabacher) (noting that political parties enlist wealthy candidates); 147 Cong. Rec. S2464 (daily ed. Mar. 19, 2001) (statement of Sen. Sessions).

both parties have looked around the country to try to find wealthy candidates who can self-finance their own campaigns . . ."[458] This "phenomenon" creates public cynicism about our political system.[459]

Congress attempted to balance the problem of real or apparent corruption caused by large individual contributions with the separate concern that personal wealth should not become the principal factor in determining electoral outcomes.[460] As Senator McCain put it, Congress could reasonably determine that in such cases, the risk of actual or apparent corruption from higher, but still relatively low, contribution limits is small enough to permit candidates to raise greater contributions in those particular circumstances.[461]

Plaintiffs' First Amendment claim boils down to the unsustainable proposition that the political speech of a self-funding candidate is impaired if the law provides his opponent with the potential to raise more money and thus to fund more speech. The First Circuit has correctly rejected this notion. *See Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000) (there is "no right to speak free from response — the purpose of the First Amendment is to secure the 'widest possible dissemination of information from diverse and antagonistic sources'"). *Daggett* involved a constitutional challenge to the Maine provision that granted matching funds to candidates who participated in the state-financed

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458 *See, e.g.* 147 Cong. Rec. S2537 (daily ed. Mar. 20, 2001) (statement of Sen. DeWine).

459 *See* 145 Cong. Rec. S2153 (daily ed. Mar. 20, 2002) (statement of Sen. Domenici); s*ee also* 144 Cong. Rec. H3780 (daily ed. May 22, 1998) (statement of Rep. Bennett) ("Each year, the Pew Research Center does an analysis and a survey of young people in our country, and it asks young people 18, 19 years old what they are interested in for their future. . . . . Each year, it has a question asking how interested they are in our political process and in government. . . . . But this year, we have the lowest interest among 18 and 19-year-old people in this country in government, in politics, and in public policy than we have had in the last 30 years. There is a reason for that. The reason for that is that young people, in particular, feel disconnected from the system. They feel that this is a pay-as-you-go system. Unless they have money to get involved in this political process, they cannot be part of it.").

460 *See* 148 Cong. Rec. S2153 (daily ed. Mar. 20, 2002) (statement of Sen. Domenici).

461 *See* 148 Cong. Rec. S2142 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

candidate funding pool based on independent expenditures made either against them or for their opponent. The court held that such a provision

> in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures. These facts allow us comfortably to conclude that the provision of matching funds based on independent expenditures does not create a burden on speakers' First Amendment rights.

205 F.3d at 464. Accordingly, the First Circuit declined to find "a First Amendment right to outraise and outspend an opponent." *Id.*

These provisions do not "restrict the speech of some elements in order to enhance the relative voice of others," *Buckley*, 424 U.S. at 48, 49. Instead, the Millionaire's Provisions partially relax otherwise applicable constraints. *See Daggett*, 205 F.3d. at 465. Under the deference due such legislative determinations, Congress's efforts to calibrate the limits to accommodate competing interests should be upheld. *See Buckley*, 424 U.S. at 30.[462]

2. The Millionaire's Provisions Do Not Impose Impermissibly Differential Burdens on Challengers, Privately-Financed Candidates, Political Parties, or Contributors.

Plaintiffs further argue that these provisions impose a differential burden on First Amendment rights.[463] Plaintiffs argue that the provision imposes an impermissible burden on personally-financed candidates (and the parties and contributors that back them) by allowing their opponents the opportunity to raise money in larger increments. To make such an argument,

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[462] For example, in *Buckley*, responding to the plaintiffs' claim that the $1,000 contribution limit was "unrealistically low," the Court held that it could not second-guess Congress's "failure to engage in such fine tuning" or use a "scalpel" to scrutinize Congress's judgment about the appropriate limit. *Buckley*, 424 U.S. at 30.

[463] Although courts have "occasionally fused the First Amendment into the Equal Protection Clause," they do so "with the acknowledgement . . . that the First Amendment underlies its analysis." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 n.4 (1992). Accordingly, "[i]t is generally unnecessary to analyze laws which [allegedly] burden the exercise of First Amendment rights by a class of persons under the equal protection guarantee, because the substantive guarantees of the [First] Amendment serve as the strongest protection against the limitation of these rights." *Orin v. Barclay*, 272 F.3d 1207, 1213 n.3 (9th Cir. 2001) (quoting John E. Nowak, Ronald D. Rotunda & J. Nelson Young, Handbook on Constitutional Law (1978)).

plaintiffs must show that self-funded candidates are similarly situated to all other candidates, and that the Millionaire's Provisions unjustifiably burdens the two groups differently.[464]

The Constitution's guarantee of equal protection "is essentially a direction that all persons similarly situated should be treated alike."[465] In this instance, self-funded candidates are not similarly situated to candidates without the means to finance their own campaigns. Unlike the candidate who must rely on contributions raised under the applicable limits, the self-funded candidate, under *Buckley*, is subject to no limits on the amount of money he can contribute to his own campaign.[466]

Finally, even if one were to accept the proposition that these provisions create a differential burden, that burden is justified by the concern that, absent the provisions, candidates who cannot finance their own campaign would be discouraged from running and that parties

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[464] *Buckley*, 424 U.S. at 90-108 ("'[T]here are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other . . . .'") (quoting *Jenness v. Fortson*, 403 U.S. 431, 441-42 (1971)); *accord National Right to Work Comm.*, 459 U.S. at 210-11 (quoting *California Medical* language in refusing to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared" and observing that "[t]he governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives . . . [may] be accomplished by treating unions [and] corporations . . . differently from individuals.").

[465] *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)); *see, e.g., Cal-Med*, 453 U.S. at 200 (rejecting Equal Protection challenges and affirming congressional judgment that "individuals and unincorporated associations, on the one hand, and . . . unions and corporations, on the other, . . . have differing structures and purposes"); *Austin,* 494 U.S. at 667 (distinguishing not only between corporations and unincorporated associations, but between regular corporations and media corporations); *MCFL*, 479 U.S. at 252 n.6 (distinguishing between organizations whose "central organizational purpose is issue advocacy," and "political committee[s]" which *Buckley* defined as being "'under the control of a candidate or the major purpose of which is the nomination or election of a candidate'").

[466] Furthermore, to the extent that the party plaintiffs allege that BCRA, in relaxing the limit on party coordinated expenditures in support of candidates who face self-funded candidates, precludes a political party from treating similarly-situated candidates equally. But that is simply incorrect. The parties remain free to treat every candidate exactly the same; any differential treatments would be the result not of the statute (which merely *permits* later expenditures in some circumstances) but of the parties' own choices. Simply put, the Millionaire's Provisions allow, but do not require, parties to make increased coordinated expenditures on behalf of candidates facing a self-funded opponent. The decision to take advantage of those increased limits lies solely with the parties.

would be deterred from recruiting such candidates. As such, these provisions are constitutionally permissible in terms of both the ends and the means Congress chooses.[467]

C. Congress's Approval of Higher Contribution Limits for Candidates Who Face Wealthy, Self-Funded Opponents Does Not Render the Basic Contribution Limits Unconstitutional.

Some plaintiffs contend that, if the Millionaire's Provisions are not themselves unconstitutional, Congress's approval of higher contribution limits for candidates who face wealthy, self-funded opponents shows that the normal limits "are not necessary to achieve the purported goals of BCRA and FECA." McConnell Second Amended Complaint ¶ 87. This view – which would invalidate many contribution limit schemes around the nation – is based on a misstatement of the "Congress's judgment" and is inconsistent with common sense.

Congress, of course, intended that BCRA would reduce corruption and its appearance. But this was not Congress's only goal. As the legislative history makes clear, Congress was also concerned that candidates and potential candidates were being deterred from seeking office because another candidate had access to substantial personal financial resources.[468]

Plaintiffs leap from the fact that Congress approved higher contribution limits for candidates who face self-funded opponents to the conclusion that Congress made a "judgment that there is no corruption or appearance of corruption in a $12,000 contribution." McConnell Decl. ¶ 11(b). This leap wrongly assumes that any time Congress chooses a contribution limit, it has determined that any contribution at or below that limit carries *no* potential to corrupt or create the appearance of corruption. In fact, the legislative history demonstrates that Congress

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[467] *See, e.g., Daggett*, 205 F.3d at 469 (holding that legislature could permissibly enact variable limits in order to create a positive incentive for participation in the public funding system); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1551 (8th Cir. 1996) (accord); *Vote Choice v. DiStefano*, 4 F.3d 26, 38-40 (1st Cir. 1993); *Wilkinson v. Jones*, 876 F. Supp. 916, 926-28 (W.D. Ky. 1995) (accord); *see also Buckley*, 424 U.S. at 85-109.

[468] *See, e.g., supra* notes 450, 459, 460, 461.

was willing to endure some additional risk of corruption or the appearance of corruption in order to reduce the risk that candidates without personal wealth would be unduly discouraged from running for public office. As Senator McCain stated:

> Congress has concluded that contributions in excess of $2,000 present a risk of actual and apparent corruption. Section 304 does not take issue with this conclusion. In this limited context, however, Congress has concluded that the contribution limits – despite their fundamental importance in fighting actual and apparent corruption – should be relaxed to mitigate the countervailing risk that they will unfairly favor those who are willing, and able, to spend a small fortune of their own money to win election.[469]

Simply put, multiple interests were at stake when BCRA was crafted, and Congress was not required to eliminate all potential for corruption or the appearance thereof at the expense of all other interests. Balancing such competing goals is the essence of policy-making, and nothing in the Constitution prohibits Congress from determining that it is willing to tolerate somewhat more risk of corruption or its appearance in circumstances where competing interests exist.[470]

[469] 148 Cong. Reg. S2142 (daily ed. Mar. 20, 2002) (statement of Senator McCain).

[470] *See, e.g., Vote Choice, Inc. v. DiStefano,* 4 F.3d at 39 (upholding variable contribution limits as serving a "multifaceted network of interests," including prevention of corruption); *see also Buckley,* 424 U.S. at 28 (Congress was "surely entitled" to enact provisions of FECA as "a partial measure" to achieve its goals).