broadcasts without identifying themselves in the broadcast and stating that they personally approved the broadcast. BCRA § 504 requires broadcasters to maintain and make publicly available complete records of requests to purchase broadcast time for a variety of political communications.

As we discuss in detail below, each of these provisions is fully consistent with the Constitution and was enacted in full accordance with Congress's well-established authority to regulate federal elections.

ARGUMENT

The Court's consideration of plaintiffs' constitutional challenges to BCRA must start with the recognition that plaintiffs have asserted their claims before any enforcement of the statute against them. The plaintiffs have abjured the usual and preferred judicial practice, particularly in cases "hav[ing] fundamental and far-reaching import," of adjudicating the constitutionality of statutes as applied to particular sets of facts before entertaining challenges to them on their face. See, e.g., Renne v. Geary, 501 U.S. 312, 323-24 (1991). By choosing instead to bring a pre-enforcement facial challenge, plaintiffs have taken on a most difficult burden. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223 (1990) (noting that "facial challenges to legislation are generally disfavored"). To prevail in this litigation plaintiffs "must demonstrate that [BCRA] either 'could never be applied in a valid manner,' or that even though it may be validly applied to the plaintiff[s] and others," it is nevertheless "'substantially' overbroad." New York State Club Ass'n, 487 U.S. at 11 (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 796-798 (1984)). As explained below, plaintiffs cannot discharge that heavy burden.

TITLE I

PRESENTATION BY THE GOVERNMENTAL DEFENDANTS

I. THE NATIONAL PARTY SOFT MONEY BAN IS CONSTITUTIONAL.

Congress enacted BCRA in response to widespread circumvention of longstanding statutory limits on federal campaign contributions. Title I of BCRA "shuts down the soft money system." 147 Cong. Rec. S2446 (Mar. 19, 2001) (Sen. Feingold). The primary mechanism by which BCRA accomplishes that goal is the national party soft money ban, which puts a stop to further evasion of FECA's limitations by the national parties, but without restricting how the national parties spend their money. At the same time, BCRA raises the limits on hard money contributions to the national parties to enhance their capacity to raise funds within the new regulatory framework.

To prevent state-level party committees from circumventing FECA's requirements in place of the national parties, BCRA generally requires state-level party committees to use funds contributed in conformity with the federal limits to finance "Federal election activity." But BCRA leaves those committees entirely free to continue to raise funds beyond the federal limits in accordance with state law, and to use unlimited quantities of such soft money, if permitted under state law, for activity unrelated to federal elections. BCRA also includes a provision (the "Levin Amendment") that authorizes state-level party committees to use limited amounts of soft money under specified conditions to fund certain types of federal election activity. And BCRA doubles the amount of hard money that persons can contribute to state party committees, from $5,000 to $10,000 per year.

Title I of BCRA also closes other soft money loopholes by prohibiting party committees from soliciting any funds for, or making or directing donations to, certain tax-exempt organizations

that may use such funds to influence federal elections, and by prohibiting federal candidates and officeholders from soliciting, receiving, directing, transferring, or spending any soft money in connection with a federal election. As explained below, each of these several interrelated provisions readily passes constitutional muster.

A. Congress Has Broad Latitude to Ensure That Federal Restrictions on the Sources and Amounts of Campaign Contributions Are Not Evaded.

"The constitutional power of Congress to regulate federal elections is well established . . . ." Buckley, 424 U.S. at 13. Article I, § 4 of the Constitution grants Congress the power to regulate congressional elections, and the Supreme Court has recognized "broad congressional power to legislate in connection with the elections of the President and Vice President." Buckley, 424 U.S. at 14 n.16. BCRA's soft money provisions ensure compliance with longstanding federal restrictions on the sources and amounts of campaign contributions that the Supreme Court has already upheld against constitutional challenge. As explained above, Congress has long prohibited corporations and labor organizations from making contributions to candidates and political committees. See NRWC, 459 U.S. at 208-09; Mariani v. United States, 212 F.3d 761, 770 (3d Cir. 2000) (en banc). The Supreme Court has also repeatedly upheld federal limits on the amounts of money that individuals and other organizations may contribute to candidates, political parties, and other political committees, finding that the limitation of "the actuality and appearance of corruption resulting from large individual financial contributions" provided a "constitutionally sufficient justification" not only for FECA's $1,000 limit on individual contributions to a particular candidate, 424 U.S. at 26, but also other, much lower limits, see Shrink Missouri, 528 U.S. at 390. See supra 18-21.

In upholding the constitutionality of these limitations on campaign contributions, the Supreme Court has considered whether the government demonstrated "a sufficiently important

interest" and employed "means closely drawn to avoid unnecessary abridgment of associational freedoms." Buckley, 424 U.S. at 25. While that test was established to evaluate First Amendment challenges based on the freedom of association, the Supreme Court has concluded that "a contribution limitation surviving a claim of associational abridgment would survive a speech challenge as well," inasmuch as contribution limits bear "more heavily on the associational right than on freedom to speak." Shrink Missouri, 528 U.S. at 388. Accord Colorado II, 533 U.S. at 456. The Court has established no "constitutional minimum" below which legislatures may not regulate. Shrink Missouri, 528 U.S. at 397. Rather, a contribution limitation will be upheld unless it is "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." Id.

The Supreme Court has also deferred to Congress "as to the need for prophylactic measures where corruption is the evil feared," NRWC, 459 U.S. at 210, and has repeatedly sustained provisions enacted to prevent evasion of the limits on campaign contributions upheld in Buckley. Thus, in Buckley itself, the Court upheld a $25,000 limitation on total contributions by an individual in any calendar year because the restriction "serve[d] 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." 424 U.S. at 38. Similarly, in California Medical Association v. FEC, supra, FECA's $5,000 limit on contributions to multicandidate political committees was sustained as a means of preventing the circumvention of the contribution limitations upheld in Buckley, which otherwise "could be easily evaded." Id. at 198 (plurality); see also id. at 203 (Blackmun, J., concurring).

In Colorado II, all members of the Court agreed that "circumvention is a valid theory of corruption," 533 U.S. at 456, and a majority upheld the limits on party coordinated expenditures because the evidence supported the "long-recognized rationale of combating circumvention of contribution limits designed to combat the corrupting influence of large contributions to candidates from individuals and nonparty groups," id. at 456 n.18. The Court concluded that "substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open." Id. at 457. The Court therefore held that "a party's coordinated expenditures . . . may be restricted to minimize circumvention of contribution limits."[55/] Id. at 465.

In this same vein, BCRA's ban on soft money donations to national political parties attempts to preclude evasion of, indeed, make absolute, FECA's limits on what persons can contribute to political parties. Under BCRA's revised contribution limits, individuals can give $25,000 per year to a national political party; corporations and unions can contribute $15,000 per year from their qualifying, separate segregated funds, although they can contribute nothing from their general treasury funds. BCRA § 307 (amending 2 U.S.C. 441a(a)(1)). As we demonstrate below, Title I of BCRA prevents the evasion of those contribution limits, which the Supreme Court has already recognized are necessary to prevent corruption and the appearance of corruption. Individuals, corporations, and unions will no longer be able to make additional donations to political parties under the pretense that such dollars are not used for purposes of influencing federal elections.

[55/] Likewise, in Colorado I, the Court, in overturning FECA limits on independent expenditures by parties, noted that donors could contribute up to $20,000 to a political party, which the party could then turn around and use for independent expenditures for the benefit of a particular candidate. In light of that fact, the Court stated, 518 U.S. at 617:

> We could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits were a serious matter, might decide to change the statute's limitations on contributions to political parties.

All that remains after this analysis, then, is to determine whether, from the parties' perspective, the contribution limits are "so radical in effect as to render political association ineffective . . . ." Shrink Missouri, 528 U.S. at 397. The political parties thrived before they began accepting hundreds of millions of dollars in soft money contributions, and there is no basis for finding that they will not continue to do so after BCRA takes effect. See infra at 106-07. In sum, BCRA's restrictions on the solicitation, use, and expenditure of nonfederal funds are "'closely drawn' to match a 'sufficiently important interest,'" Shrink Missouri, 528 U.S. at 387-88 (citation omitted), and therefore readily withstand scrutiny under the First Amendment.

B. The Ban on the Solicitation, Receipt and Use of Soft Money by National Political Parties Is Closely Drawn to Prevent the Appearance and Reality of Corruption in Federal Elections.

Section 101(a) of BCRA provides that the national committee of a political party "may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. 441i(a)(1).[56] The provision "[p]rohibits national party committees and entities controlled by the parties from raising, spending, or transferring money that is not subject to the limitations, prohibitions, and reporting requirements of the FECA (i.e., soft money)." 148 Cong. Rec. S1992 (Mar. 18, 2002) (Ex. 1 to statement of Sen. Feingold).

Congress enacted the provision to "put the national parties entirely out of the soft money business." 148 Cong. Rec. H408-09 (Feb. 13, 2002) (Rep. Shays). The ban "covers all activities of the national parties, even those that might appear to affect only non-federal elections," because "the national parties operate at the national level, and are inextricably intertwined with federal

[56] For simplicity, we cite the soft money provisions as they are slated to be codified in the United States Code. See Pub. L. No. 107-155, 116 Stat. 82 (Mar. 27, 2002).

officeholders and candidates, who raise the money for the national party committees." Id. at H409. As a result, "there is a close connection between the funding of the national parties and the corrupting dangers of soft money on the federal political process." Id. Accordingly, Congress concluded that "[t]he only effective way to address this problem of corruption is to ban entirely all raising and spending of soft money by the national parties." Id.

The soft money prohibitions in § 101(a) which do not impose any limitation on the amount of a national political party's expenditures, but, instead, merely require that such expenditures be financed by funds that are subject to the "contribution" limitations of FECA impose, in effect, a ban on the *contribution* of "soft money" to national political parties by individuals, corporations, unions, and other entities. As a result, individuals and entities are limited to the "hard money" contribution limitations of FECA with respect to the provision of funds to national political parties. Individuals, for instance, can give up to $25,000 annually to a national political party. See 2 U.S.C 441a(a)(1). Notably, this is much more than the contributions that an individual can give to other political committees (i.e., PACs). Id. In other words, the federal election laws give national political parties a much greater opportunity to obtain contributions than that enjoyed by comparable nonparty committees.

As explained below, both the legislative history and the record developed in this litigation make clear that the national party soft money ban is closely drawn to advance governmental interests that the Supreme Court has already held to be "sufficiently important" to justify regulation of campaign contributions and funding sources. Buckley, 424 U.S. at 25; see also NRWC, 459 U.S. at 207. Because the provision fully comports with constitutional requirements, plaintiffs' challenges fail.

1. The Supreme Court's decision in *Buckley v. Valeo* forecloses plaintiffs' First Amendment challenge to the national party soft money ban.

Plaintiffs' First Amendment challenge to the ban on national party soft money is fatally undermined by the Supreme Court's decision in Buckley. Under BCRA, "soft money" contributions to national parties are eliminated, leaving an individual with the ability to contribute up to $25,000 annually to such a party. As noted above, the Court in Buckley has already upheld FECA's $25,000 ceiling on the aggregate amount of contributions an individual could make during any calendar year. See 424 U.S. at 38. That aspect of Buckley was apparently premised on the Court's understanding that virtually all donations of value to a national political party were "contributions" within the meaning of FECA, and therefore subject to the $25,000 limit.[57] The Court reasoned that this "quite modest restraint" on political activity served to prevent circumvention of the statute's $1,000 limitation on individual contributions to a particular candidate "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." 424 U.S. at 38 (emphasis added). Thus, the limitation on aggregate contribution amounts was "no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid." Id.

[57] A footnote in Buckley suggests that the Court assumed that FECA would apply to all money raised by political parties. See Buckley, 424 U.S. at 23 n.24. In concluding that it was unnecessary to narrow the meaning of the phrase "for the purpose of influencing an election for Federal office" in the context of FECA's definition of "contribution," the Court stated that "[t]he use of the phrase presents fewer problems in connection with the definition of a contribution [than in other contexts] because of the limiting connotation created by the general understanding of what constitutes a political contribution. Funds provided to a candidate or political party or campaign committee either directly or indirectly . . . constitute a contribution. In addition, dollars given to another person or organization that are earmarked for political purposes are contributions under the Act." 424 U.S. at 23 n.24 (emphasis added); see also id. at 78 (similar definition of "contribution" as including, inter alia, "contributions made directly or indirectly to a candidate, political party, or campaign committee") (emphasis added).

If Congress can constitutionally impose a ceiling on the aggregate amount of contributions of hard money (as it surely can, see Shrink Missouri, 528 U.S. at 387-88, 391-97; Buckley, 424 U.S. at 20-38), and if, as in Buckley, that limitation is constitutional even on the assumption that all funds provided to a party are "contributions," it follows that Congress has the power to restrict or ban contributions of soft money to national political parties. The rationale is similar in both cases: the restriction or prohibition would serve to prevent FECA's limits on individual contributions to candidates from being circumvented, without at the same time unduly impairing the ability of donors to speak or associate freely, or the ability of parties to accumulate funds through permissible contributions. See Shrink Missouri, 528 U.S. at 404 (Breyer, J., concurring) ("Buckley's holding seems to leave the political branches broad authority to enact laws regulating contributions that take the form of 'soft money.'").

The Court's decision in Cal Med provides further, analogous support for the constitutionality of the soft money ban. Cal Med involved a challenge to FECA's limits on contributions to nonparty multicandidate political committees. The plaintiff, California Medical Association, a nonprofit association of California doctors, had formed a multicandidate political committee that was subject to FECA's $5,000 limit on the amount that individuals and unincorporated associations could contribute to it annually. See 2 U.S.C. 441a(a)(1)(C). The Court rejected the plaintiff's First Amendment claim that the danger of corruption (or its appearance) did not apply when the contributions flow to a multicandidate political committee instead of directly to a federal candidate. Noting that Congress had enacted the $5,000 limit on contributions to such committees "in part to prevent circumvention of the very limitations on contributions that this Court upheld in Buckley," 453 U.S. at 197-98, the plurality and the concurrence concluded that the limitation was valid because

"an individual or association seeking to evade the $1,000 limit on contributions to candidates could do so by channeling funds through a multicandidate political committee. Similarly, individuals could evade the $25,000 limit on aggregate annual contributions to candidates if they were allowed to give unlimited sums to multicandidate political committees." Id. at 198; see also id. at 203 (Blackmun, J., concurring in the judgment). The contribution limitation upheld in Cal Med obviously affects the ability of multicandidate political committees to engage in constitutionally protected speech and other activities. Indeed, the limitation on protected activities that results from the $5,000 limitation at issue in Cal Med is more severe than that caused by the $25,000 limitation on contributions to national political parties that is the result of BCRA's soft money ban. But the Court, nevertheless, upheld that contribution limitation in Cal Med based on an anticircumvention rationale. If, as Cal Med holds, the limitation on contributions to multicandidate political commitees is valid as a means of preventing the circumvention of FECA's limitations on contributions to candidates, then it follows that the ban on soft money contributions to parties which has a much less pronounced incidental impact on political expression should also be constitutional as an anticircumvention device.

2. The National Party Soft Money Ban Prevents the Appearance and Reality of Corruption.

Even if the validity of the national party soft money ban did not follow as a matter of law from Buckley and Cal Med, it is plainly constitutional. The national party soft money ban furthers several interrelated governmental interests of paramount importance. Most fundamentally, the ban prevents circumvention of the contribution limits and funding-source restrictions set forth in FECA and reduces the actual corruption and the appearance of corruption that the unlimited donation of soft money to the national political parties has created. The provision also reduces the pressure

placed on donors by federal officeholders and party officials to contribute large sums of money, pressure that contributes to the pervasive view that large financial contributions are a prerequisite to meaningful participation in the political process.

As the Supreme Court has explained, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." Shrink Missouri, 528 U.S. at 391. And "Buckley demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible." Id. As the Court explained:

> The opinion [in Buckley] noted that "the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem [of corruption] is not an illusory one." . . . Although we did not ourselves marshal the evidence in support of the congressional concern, we referred to "a number of the abuses" detailed in the Court of Appeals's decision, . . . which described how corporations, well-financed interest groups, and rich individuals had made large contributions, some of which were illegal under existing law, others of which reached at least the verge of bribery. . . . The evidence before the Court of Appeals described public revelations by the parties in question more than sufficient to know why voters would tend to identify a big donation with a corrupt purpose.

Id. (citations omitted). While the record in Shrink Missouri did not indicate that the Missouri Legislature relied upon the evidence and findings accepted in Buckley, the Supreme Court held that the evidence introduced by the parties or relied upon by the lower courts, including affidavits and newspaper articles, was sufficient to justify the challenged statute. 528 U.S. at 393. As with the statute in Shrink Missouri, the interests served by BCRA are neither "novel nor implausible," and there is accordingly no need for an elaborate record to establish the problems of actual and apparent corruption that the statute prevents. Here, however, there is a vast legislative and evidentiary record, and it confirms the strength and validity of the government's interests.

a. The national party soft money ban prevents evasion of federal source and contribution limits.

Soft money contributions to political parties have increased enormously over the past two decades. See supra at 29-36. As Congress recognized, the amount of soft money donated to and utilized by political parties increased from approximately $20 million during the 1980 and 1984 federal elections, to roughly double that amount in the 1988 federal elections, then skyrocketed to approximately $86 million during the 1992 election, to more than $260 million during the 1996 federal elections, and then close to $500 million during the 2000 elections. 147 Cong. Rec. S2445 (Mar. 19, 2001) (Sen. Feingold); see also Donald P. Green, Report on the Bipartisan Campaign Reform Act (Sep. 23, 2002) at 30 & Tbl. 1 [DEV 1-Tab 3, hereinafter D. Green Expert Rep.]. In the 1996 election cycle, the national party committees received approximately 27,000 donations from federally prohibited sources (corporations and labor unions), and the top 50 soft money donors gave donations to ranging from $530,000 to over $3.2 million. Thomas E. Mann, Expert Report of Thomas E. Mann (Sep. 20, 2002) at 22 & Tbl. 5 [DEV 1-Tab1, hereinafter Mann Expert Rep.]. By the 2000 election, donations in amounts of $100,000 or more constituted a "large and significant share" of the total soft money contributions received by the parties. David M. Primo, Rebuttal Expert Affidavit of David M. Primo (Oct. 7, 2002) ¶ 29 [SLF] [hereinafter Primo Rebuttal Expert Rep.]. Approximately 60 percent of the parties' total soft money receipts were donated by approximately 800 entities, with more than 400 of those corporations and unions. Mann Expert Rep. at 24-25.[58] Each of those entities gave at least $120,000, with the largest donor giving almost $6

[58] See, e.g., Luis Navarro Decl. [RNC] ¶ 14 (Service Employees International Union makes soft money donations to federal political parties); Robert Lenhard Decl. [RNC] ¶ 13 & Tab D (documents 000152, 000154-55) (tax filings showing that in 2001 the American Federation of State, County, and Municipal Employees made multiple donations to Democratic national party committees in amounts ranging from $100,000 to $300,000 each).

million. Id. Soft money spending by the national parties in the 1999-2000 election cycle comprised 42 percent of their total spending. Id.

Moreover, the parties have collected and used soft money to directly influence federal elections, primarily through "issue ads." The parties and candidates, in the period leading up to the 1996 election, transformed the soft money regime, Mann Expert Rep. at 17, to focus on this use of soft money. See supra at 30-35. In the 1998 midterm election, the national party congressional campaign committees were fully committed to raising and spending soft money to advance the election prospects of their candidates, and the practice continued in the 2000 election, with the parties making "issue ads, " paid for by state parties using a mix of hard and soft money transferred by the national party, a weapon of choice in promoting their federal candidates, both in the presidential campaign and in House and Senate races in competitive states.[59] These "issue ads" in congressional races typically praised or criticized a candidate for his or her actions or character, then asked the audience to "tell" or "ask" the candidate to do something.[60] Candidates and campaign consultants from both parties agree that these ads, typically run close to and preceding an election, are intended, and in fact do, influence federal elections. See Lamson Decl. ¶¶ 6, 17 [DEV 7- Tab 26] (consultant to Democratic candidates); Chapin Decl. ¶¶ 8, 11 [DEV 6-Tab 12] (Democratic congressional candidate); Bloom Decl. ¶¶ 10-11 [DEV 6-Tab 7] (Democratic congressional

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[59] See Mann Expert Rep. at 24-26; Krasno & Sorauf Expert Rep. at 30-31; see also Bumpers Decl. ¶ 4 [DEV 6-Tab 10];
La Raja Cross Tr. (Oct. 15, 2002) at 73-75, 169, 177-78 & Ex. 3 ( ) (plaintiffs' expert witness);

[60] & Ex. 2-1, 2-2, 2-3, 2-4, 3-1 [DEV 7-Tab 26] (Montana Cong. Dist.); Pennington Decl. ¶¶ 13-14 [DEV 8-Tab 31] (Florida 8th Cong. Dist.); Chapin Decl. ¶¶ 8-11 [DEV 6-Tab 12] (Florida 8th Cong. Dist.); Bloom ¶¶ 10-11 [DEV 6-Tab 7] (Florida 22nd Dist.); ; see also Selected Storyboards for Advertisements Sponsored by Political Parties in the 1998 & 2000 Elections that Did Not Use the "Magic Words"[DEV 48-Tabs 9 & 10]; Selected Party Soft Money Ads, App. A to Defs.' Mem., Tab 3 (video).

candidate); Pennington Decl. ¶¶ 13-14 [DEV 8-Tab 31] (Republican political consultant).[61] Indeed, the evidence demonstrates that donors make little distinction between donations of hard money and soft money; they understand that both types of donations can provide assistance to the campaigns of federal candidates whom they wish to support. See, e.g., supra at 35 & n.21; Mariani v. United States, 80 F. Supp. 2d 352, 386 (M.D. Pa. 1999) (citing affidavit of lobbyist Daniel Murray ¶ 3 [DEV 68-Tab 33]), certified question answered, 212 F.3d 761 (3d Cir. 2000). Further, as discussed supra at 34-35, the fundraising practices employed by the parties (i.e., using Members of Congress to raise soft and hard money simultaneously and participating with candidates in joint fundraising committees that raise both hard and soft money) only serve to confirm that the parties raise soft money for use in influencing federal elections.

Congress recognized that the enormous "soft money loophole has effectively destroyed" the contribution limits established in FECA and upheld by the Supreme Court in Buckley. 147 Cong. Rec. S2448 (Mar. 19, 2001) (Sen. Levin). Contributors can evade the limitations on contributions to a candidate by giving unlimited amounts to the party, which then "turns around and spends that money helping the candidate win election." Id.; see also

Thus, "[s]oft money has become the conduit through which wealthy individuals, labor unions and corporations have in many ways seized control of our political process." 147 Cong. Rec. S2449 (Mar. 19, 2001) (Sen. Collins).

[61] See also Bailey Decl. ¶¶ 9, 11 [DEV 6-Tab 2] (Republican campaign consultant: when creating true issue or party building ads, there is no need to reference a candidate; ads that do and are run near the election are designed to influence the election);