INTRODUCTION

Our opponents rest their case on a tidal wave of anecdote and innuendo, propelled by the notorious "White House coffees" and "Lincoln Bedroom visits" that preceded the 1996 presidential campaign and subsequently formed the centerpiece of the 1997 Thompson Committee hearings. Their thesis is that politics has become infused with "soft money" raised in unlimited amounts, largely from corporate and union donors, which, in turn, is transferred to state parties and spent mostly on thinly disguised issue ads that in fact support the election of candidates for federal office. These ads, so the theory goes, have spawned competing ads from interest groups which attack or distort the positions taken by candidates and force them to respond with "hard money," thereby causing candidates, in Senator McCain's words, to "los[e] control of [their] campaigns." McCain dep. 100. It logically follows, say our opponents, that Congress must be given a free hand to take any and all steps it chooses to stamp out this new form of "corruption" and to impose any additional measures it deems necessary in order to avoid circumvention and achieve Congress' aim of lasting campaign finance reform.

As the opposition brief of the RNC effectively demonstrates, our opponents have egregiously distorted and exaggerated the record in order to bolster their case for "reform." Moreover, they deliberately lose sight of the forest by focusing on the trees: fully 80% of the combined total of "hard" and "soft" money raised for the 2000 federal elections came from individuals, and the total amount spent on federal campaigns has remained roughly constant as a percentage of national income throughout the 20th century. *See* 3 PCS/ER 985-87 (Snyder). Even so, it is true that "soft money" has grown as a proportion of the total, and, not surprisingly, broadcast media ads have gradually become a more prominent feature of political campaigns at all levels. The question whether that should give rise to legislation is for Congress to decide; the

question whether the legislation adopted by Congress is consistent with constitutional norms is for this Court, and ultimately the Supreme Court, to decide. As demonstrated in our opening brief and elaborated in this opposition brief, BCRA appears to view free and untrammeled public discussion and debate of issues and candidates during the period prior to a federal election as some sort of "loophole" and offers as a solution measures that criminalize speech protected by the First Amendment, override state sovereign choices, severely impair the speech and associational rights of parties, and impose "blackouts" on interest group broadcast media ads in order to "level the playing field" for incumbent politicians.

California offers a useful illustration of the constitutional flaws in Title I of BCRA. Under Proposition 34, the people of that State have decided to regulate contributions to candidates but not to parties on the ground that parties are insulated from candidates and play a critical mediating role in California's democratic system, which relies heavily on ballot initiatives as a means of deciding important public policy issues. BCRA effectively nullifies California's system, *inter alia*, by (1) characterizing virtually everything California party committees do as "federal election activity"; (2) superimposing a $10,000 limit on contributions for a certain subset of those activities; and (3) barring state and local parties from jointly raising funds for those activities or from contributing to nonprofit committees that participate in California's initiative process. Likewise, these same provisions bar the national party committees and their officers from (1) contributing funds lawfully raised under California law to candidates running for state office in that State or (2) soliciting or otherwise participating in the raising of state-regulated funds for such candidates. As demonstrated below in Part I, these and other constraints imposed by BCRA Title I violate Article I, Section 4, of the Constitution and the speech and associational rights of national, state, and local political party committees.

BCRA's treatment in Title II of third-party issue ads is a particularly stark example of the willingness of Congress to ignore First Amendment principles and act in direct contravention of governing Supreme Court precedents. As *New York Times*, *Buckley,* and *Republican Party of Minnesota* exemplify, free and untrammeled public debate about public issues — most particularly during election campaigns — lies at the heart of the First Amendment. As we discuss below in Part II, BCRA's "electioneering communications" restrictions would override this core First Amendment principle on the entirely specious ground that BCRA's sponsors — incumbent politicians all — view most interest-group issue ads during the election season as "sham" and thus unworthy of constitutional protection. Not since the Alien and Sedition Acts has the political class so overtly attempted to silence public debate and criticism of their actions.

None of this is to say that Congress is powerless to address "soft money," or even issue advertisements to the extent that their proliferation by political parties is spawned by the growth of "soft money." For the reasons stated in Parts I and II below, however, Congress' efforts to regulate the permissible uses and expenditures of funds validly raised under state law must be subjected to the most stringent judicial scrutiny. The sweeping provisions of BCRA do not remotely contain the level of tailoring required by the First Amendment and applicable principles of federalism, and so must be struck down as unconstitutional.

I. TITLE I OF BCRA IS UNCONSTITUTIONAL.

In their 137-page section on Title I, defendants offer an onslaught of anecdotal material about the role of state-regulated money in the political process. That overwhelming quantity masks an underwhelming quantity of law that could justify the constitutionality of Title I in the

face of plaintiffs' federalism, First Amendment, and equal protection challenges.[1]

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

Remarkably, although federalism arguments feature prominently in the counts of plaintiffs' complaints challenging Title I, *see, e.g.*, Second Am. Compl. of McConnell Pls., May 7, 2002, ¶¶ 101, 110, 115, 120, the government hardly addresses those arguments, *see* Br. of Defs. (hereafter "Br.") 96-98, 109-11, 126, and intervenors ignore them almost entirely. Whether defendants' virtual omission smacks of litigation gamesmanship or merely of disingenuousness, the few arguments that defendants do advance to defend Title I against principles of federalism are unavailing. Because Title I has such a direct and substantial impact on the ability of States to regulate their own elections, it is unconstitutional.

The government, for its part, at least recognizes that it must demonstrate that Title I is a valid exercise of Congress' power to regulate under the Elections Clause. *See id.* at 97. Yet the government seems to assume that, as long as Congress purports to be regulating federal elections, it can regulate state and local elections as well. None of the few cases cited in passing by the government, however, supports that view.

The government first cites *Burroughs v. United States*, 290 U.S. 534 (1934), which it says held that "regulation of national party committees in no sense invades any exclusive state power." Br. 98 (internal quotation omitted). *Burroughs* held no such thing. In *Burroughs*, the Supreme Court considered the constitutionality of certain statutory provisions imposing reporting requirements on political committees that accepted contributions in connection with presidential

[1] Because the "Madison Center" plaintiffs have unique perspectives on the issues presented by Titles I and II of BCRA, 12 pages of the omnibus brief have been ceded to those plaintiffs.

or vice presidential elections. *See* 290 U.S. at 541. The Court reasoned that these provisions constituted a valid exercise of Congress' power to regulate presidential elections under Article II, Section 1, of the Constitution. *See id.* at 544. Nothing in the statute indicated that it even applied to activities relating to state elections — and nothing in the Court's opinion therefore suggested that Congress somehow has plenary authority to regulate national party committees, even when they are engaged in election activity on the state or local level. Contrary to the government's insinuation, the Elections Clause gives Congress the authority to regulate only federal *elections*, not national *entities*.

The government next cites *Ex parte Siebold*, 100 U.S. 371 (1879), and *United States v. Bowman*, 636 F.2d 1003 (5th Cir. 1981), in support of the artfully worded proposition that "Congress' power to regulate elections in which federal candidates are on the ballot, even when state candidates are on the ballot as well, has long been upheld." Br. 110. Again, these cases are inapposite. *Siebold* involved statutory provisions barring fraud by, or interference with, congressional election officers. *See* 100 U.S. at 381-82. Far from holding that Congress could regulate state as well as federal elections when both occurred at the same time, the Court emphasized that, when a State holds its elections simultaneously with the federal government, Congress is not thereby deprived of its power to regulate *federal* elections. *See id.* at 393. Indeed, the Court noted that, if the congressional election officers were to take actions that "ha[d] exclusive reference to the election of State or county officers," Congress would *lack* the authority to regulate those actions. *See id.* Rather than giving Congress plenary power to regulate *both* federal and state elections when they appear on the same ballot, therefore, *Siebold* only authorizes Congress to regulate *federal* elections.

In *Bowman*, the Fifth Circuit considered an as-applied challenge to a provision of the

Voting Rights Act which prohibits vote buying and voter-registration fraud and is "applicable . . . to general, special, or primary elections held solely *or in part* for the purpose of selecting or electing any candidate [for federal office]." 42 U.S.C. § 1973*i* (emphasis added). The Fifth Circuit upheld the constitutionality of section 1973*i* against a challenge by an individual who claimed she lacked the specific intent to influence federal elections. *See Bowman*, 636 F.2d at 1012. As we noted in our opening brief, however, *see* McConnell Br. 14 n.4, *Bowman* is distinguishable. As a threshold matter, *Bowman* did not involve a facial challenge, but instead involved only an as-applied challenge in which the individual engaged in the buying of votes in *both* federal and state elections, but claimed (somewhat curiously) that her intent was solely to influence the *state* election. *See* 636 F.2d at 1009. Like *Siebold*, therefore, *Bowman* involved only the narrow question whether, when a State holds its elections simultaneously with the federal government, Congress retains the power to regulate *federal* elections. *See id.* at 1010. Second, to the extent that *Bowman* could be read to stand for any broader proposition that the federal government may regulate vote buying and voter-registration fraud even when that conduct affects only state elections (a question the Fifth Circuit expressly left unanswered, *see id.* at 1009), vote buying and voter-registration fraud are activities as to which there can be no conceivable conflict between federal and state policy interests. Nothing in *Bowman* suggests that, where States have reached divergent conclusions about the propriety (or even desirability) of certain behavior affecting state and local elections, Congress can simply override those conclusions because that behavior also affects federal elections.

Absent any serious attempt to address the abundant law affirming that Congress has the power to regulate only as to federal elections, defendants try to minimize the degree of BCRA's intrusion into state and local elections. Those efforts, too, are unavailing.

First, defendants repeatedly seek to justify BCRA's regulation of state and local party committees on the ground that BCRA regulates those committees only when they engage in "federal election activity" — therefore leaving them supposedly "free to . . . use unlimited quantities of [state-regulated funds] for activity unrelated to federal elections." Br. 58; *see also id.* at 104 (quoting Senator McCain's statement that BCRA "does not attempt to regulate State and local party spending . . . where State and local parties engage in purely non-Federal activities"); *id.* at I-58 (noting that BCRA "leaves wholly unregulated the use of soft money for purely state election activities").[2] The government, for its part, does not even bother to spell out how BCRA defines "federal election activity," *see id.* at 53, seeking instead to reassure this Court simply with the blithe assertion that "[the] term is defined to encompass only activity with a *substantial impact* on federal elections," *id.* at 109 (emphasis added); *see also id.* at 99 (same); *cf. id.* at I-61 (contending that the term "confines the effect of BCRA to those state party activities that *most clearly affect* federal elections") (emphasis added).[3] As for the particular activities that actually constitute "federal election activity," such as voter registration, voter identification, and get-out-the-vote activity, defendants merely state, in a generic fashion, that

[2] In support of the argument that BCRA somehow leaves state parties free to use state-regulated funds in state and local elections, defendants repeatedly cite new section 301(20)(B) of FECA (as added by BCRA § 101(b)). *See* Br. 99, 104, I-14. That provision, however, does not give state and local parties *carte blanche* to use state-regulated funds for activities that affect state and local elections; instead, it merely carves out certain narrow *categories* of such activities for which state-regulated funds can be used, such as paying for bumper stickers and yard signs that identify only a state or local candidate.

[3] Although intervenors, for their part, do supply the statutory definition of "federal election activity," *see* Br. I-13, they seek to provide reassurance of their own by repeatedly asserting that "[f]ederal campaign finance laws have long applied to the use of contributions by state parties for activities affecting federal elections," *id.*; *see also id.* at I-58 (same). That is certainly true, but it entirely begs the question whether federal campaign finance laws can *validly* be applied to the use of donations by state parties for activities affecting *state* elections.

such activities "can have significant effects" on federal elections, *id.* at 73; *see also id.* at 106 (same); *id.* at 126 (asserting that "voter registration and get-out-the-vote activities influence federal elections"); *id.* at I-61-62 (contending that "voter registration and voter mobilization activities . . . affect federal elections, regardless of whether the activities are expressly targeted to those elections"), or that such activities are *sometimes* expressly intended to benefit federal candidates, *see id.* at I-33-34.

As these assertions make clear, defendants all but refuse to recognize the degree of impact of "federal election activity" on *state*, as well as federal, elections. The FEC itself has long acknowledged these dual effects by allowing state parties to use an allocation of state-regulated funds and federally regulated funds for most of the activities now classified as "federal election activity." Although it is true that the mere fact that an activity has effects on state, as well as federal, elections "does not divest Congress of authority to regulate it," *id.* at 105, the mere fact that an activity has effects on *federal* elections does not give Congress *plenary* authority to regulate it. Unlike the FEC's allocation regulations, BCRA's supposed "modif[ication] of the previous allocation rules," *id.* at I-58 — which is to say, its 100% federal "allocation" scheme — makes no effort to accommodate the competing state interest in regulating activities that also affect state elections, and therefore violates the Elections Clause.

Moreover, defendants entirely ignore the fact that some "federal election activity" has *no* practical effect on federal elections. Plaintiffs have already identified get-out-the-vote activity that is directed toward state ballot initiatives and get-out-the-vote activity that features state candidates — activities that defendants have acknowledged constitute "federal election activity" under BCRA even absent any reference to a federal candidate. *See* McConnell Br. 18-19; CDP/CRP Br. 19-20. And defendants equally ignore the fact that some "federal election

activity" is driven exclusively by a desire to affect state and local elections. This is particularly true where the federal elections that are simultaneously taking place are either actually uncontested or uncontested as a practical matter — as has increasingly been the case in recent elections. In fact, in the just-concluded 2002 election, as a result of incumbent-protective redistricting by the two major political parties, only 40 to 50 of the 435 House races were considered to be closely contested. *See, e.g.*, Rhodes Cook, *Do the Math, and the Result Is: Not Much of a Contest*, Wash. Post, Oct. 6, 2002, at B3. In districts in which there are no contested federal elections, state and local parties will perversely be forced to use federally regulated money — that is, money which by definition has been contributed "for the purpose of influencing [an] election for Federal office," *see* 2 U.S.C. § 431(8)(A)(i) — if they wish to make disbursements for the entirely *different* purpose of influencing an election for *state* office. The plain impact of Title I is effectively to override state law allowing state and local parties to raise more money for purposes relating to state elections, and to force state and local parties to use federal funds even for non-federal purposes.

Defendants offer no valid justification for two additional limitations applicable to state and local committees, which have unquestionable effects on state and local elections. As to the provision of Title I banning state and local committees from soliciting *any* type of funds for, or donating any funds to, certain tax-exempt organizations or political committees, defendants attempt to justify that provision on the ground that, even if such funds are solicited or donated for use in state and local elections (and, as we have already demonstrated, they frequently are, *see* McConnell Br. 19-20), that activity can be regulated because the receipt of funds for use in state and local elections frees a corresponding amount of funds for the organization or political committee to use in federal elections, *see* Br. 120; *cf. id.* at 97 (making the same argument

regarding ban on national party committees). This argument about the fungibility of funds raised by tax-exempt organizations and political committees, however, is entirely question-begging: the mere fact that tax-exempt organizations and political committees will be able to spend more of their existing funds, which have presumably been raised in full compliance with any applicable federal law, on activities affecting *federal* elections does not somehow give Congress the power to regulate the donation of *state-regulated* funds by state parties to those organizations for activities affecting *state* elections — much less the power to bar state parties from even *soliciting* such funds for those organizations. Defendants' bootstrap theory, under which the mere fact that an entity uses some funds to affect federal elections allows the government to regulate any donation of funds to that entity, would render the Elections Clause a virtual nullity.

As to the provision of Title I barring state and local committee officials from raising state-regulated funds on behalf of their committees to the extent they are construed to be "officers or agents acting on behalf of" the national party committees, defendants make no attempt to justify any such restriction on federalism grounds, but instead claim only that the FEC's regulations on Title I resolve the issue by narrowing the definition of "agent." *See id.* at 98-99. The FEC's regulations, however, say nothing as to when a state and local committee official constitutes an "officer" of a national party committee, and the FEC could, of course, change its regulation defining "agent" at any time.[4] At a minimum, this Court should make clear that, to the extent that a state or local committee official is *ever* barred from raising state-regulated funds for a state or local committee, such a prohibition violates the Elections Clause.

[4] Indeed, some of the intervenors have brought suit to challenge the FEC's regulation defining "agent." *See* Compl. ¶¶ 36-38, *Shays v. FEC*, Civ. No. 02-1984 (CKK) (D.D.C. Oct. 8, 2002).

Second, defendants attempt to minimize Title I's effects on the involvement of national party committees in state and local elections. Unable to wrap themselves in the protective cloak of "federal election activity" as to national committees, defendants are forced to concede that the provisions of Title I applicable to national committees "cover[] *all* activities of the national parties, even those that might appear to affect only non-federal elections." *Id.* at 62 (internal quotation omitted; emphasis added). The most defendants can say is that the "solicitation, receipt, and transfer of soft money by national parties has a direct effect on federal elections," *id.* at 97, thereby neatly eliding the fact that the *use* of "soft money" by national committees — such as the use of state-regulated funds in off-year elections in which no federal candidates are on the ballot, *see* McConnell Br. 20-21 — unquestionably sometimes has effects *only* on state and local elections. Even defendants' insinuation that the solicitation, receipt, and transfer of state-regulated money by national committees *invariably* has an effect on federal elections is untrue: as we have demonstrated, a significant amount of state-regulated money transferred from national committees to state committees is used *solely* for the purpose of influencing state and local elections, *see id.* at 21,[5] and national parties have also given a substantial amount of state-regulated money directly to state and local candidates for use in their campaigns, *see id.* at 22. Moreover, defendants say nothing about the federalism implications of the Title I provisions banning national committees from providing funds to state and local committees for use in Levin activities and from assisting state and local committees in raising Levin funds.

[5] Indeed, one of the government's own fact witnesses has admitted that many transfers of state-regulated money by national committees appear to be intended to affect state elections. *See* Robert Biersack, *Hard Facts and Soft Money: State Party Finance in the 1992 Federal Elections*, in *The State of the Parties: The Changing Role of Contemporary American Parties* 107, 123 (Daniel M. Shea & John C. Green eds., 1994).

Defendants' only justification for the indiscriminate ban on national committees is that "fundraising by national party committees presents a serious threat to the integrity of the federal political system, *even where the fundraising is not ostensibly aimed at providing direct support for the election of a federal candidate.*" Br. 96 (emphasis added). Defendants' logic appears to proceed thus: national committees are closely linked to federal officeholders and candidates, who raise money on the committees' behalf; therefore, any donation of state-regulated funds, even for use in state elections, to a national committee creates an appearance of corruption as to the "federal political system"; therefore, Congress has the power to regulate any donation of state-regulated funds. Even assuming that defendants' first conclusion follows from their premise, their second conclusion does not follow from the first. The Elections Clause does not give Congress plenary power to police the "federal political system," but instead gives Congress only the power to regulate the "Manner of *holding Elections* for Senators and Representatives." U.S. Const., art. I, § 4, cl. 1 (emphasis added). Even if a donation of state-regulated money to a national committee for use in a state election were made at the specific request of a federal officeholder, the mere fact that the federal officeholder might one day run for reelection (or even be running for reelection at the same time as the state election) does not thereby convert an impermissible regulation of *state* election activity into a permissible regulation of *federal* election activity. Defendants' contorted justification for the wholesale ban on national committees therefore fails.

Third, defendants attempt to justify the provisions of Title I imposing limitations on the ability of federal officeholders and candidates to raise state-regulated funds, primarily on the ground that such funds can be used for "activity that influences federal elections." Br. 124. As a threshold matter, defendants once again ignore the evidence in the record that federal

officeholders and candidates also raise state-regulated funds for use in state and local elections — and that BCRA will prohibit much of this fundraising activity. *See* McConnell Br. 23-24.

As with the limitations on national committees, defendants suggest that the limitations on federal officeholders and candidates are justified because "the fundraising activities of federal officeholders and candidates affect federal elections and *the integrity of the federal government* even when the funds solicited are to be used for purposes other than federal election activity." Br. 126 (emphasis added). Again, however, this argument sweeps well beyond Congress' Elections Clause power to regulate the "Manner" of holding federal elections. As we noted in our opening brief, *see* McConnell Br. 24, BCRA would prohibit even a lame-duck federal officeholder from placing a phone call to a would-be donor asking him to give state-regulated funds to a candidate for governor. It is impossible to see how this quintessentially *state* election activity becomes activity relating to a *federal* election simply because a federal officeholder happens to be involved.

Fourth, defendants contend that Title I properly restricts state and local candidates from spending state-regulated funds on advocacy which "refers to" a clearly identified candidate for federal office and which "promotes," "supports," "attacks," or "opposes" a candidate for that office. Apart from the evident unconstitutional vagueness in using such undefined terms in a federal statute imposing criminal penalties, this provision contravenes core principles of federalism. Defendants claim that such communications "obviously have a direct effect on federal elections." Br. 128. Defendants, however, once again ignore the fact that such communications also have an effect — and indeed, *primarily* have an effect — on state elections; indeed, defendants cite no evidence for the fanciful proposition that state and local candidates are spending their state-regulated funds on "sham" ads that are principally designed to benefit

federal candidates. Moreover, defendants concede that this provision of BCRA effectively amounts to a *ban* on advertising with certain references to federal candidates, since there is no such thing as "federally regulated funds" for state candidates, and state candidates therefore can pay for such advertising only with "hard money . . . provided to them by a party committee, [as] state law permits." *Id.* By classifying such advertising as regulable "federal" election activity and effectively prohibiting it with no regard for underlying state law, Title I violates the Elections Clause.

In sum, Title I has a direct and substantial effect on the financing of state and local elections. The Elections Clause prohibits such an unprecedented intrusion into States' regulation of their own election activity.

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

In response to plaintiffs' First Amendment challenges to Title I, defendants adopt a four-prong strategy: minimize the speech and associational rights implicated by Title I, urge the most permissive and deferential level of scrutiny, define the governmental interests supporting Title I as broadly as possible, and lump together the provisions of Title I for purposes of tailoring analysis. All four prongs of defendants' strategy are foreclosed by governing case law. Title I is not sufficiently tailored to serve the government's interest in preventing actual or apparent corruption, and therefore must be struck down.

1. Title I Burdens Significant Speech And Associational Rights.

As a threshold matter, defendants play down the speech and associational rights implicated by Title I. Indeed, in their opening brief, they recognize only that Title I burdens the lesser speech and associational rights implicated by limits on *contributions*: in their discussion of

Buckley v. Valeo, 424 U.S. 1 (1976), defendants studiously avoid so much as citing the language in the Supreme Court's opinion on the greater speech and associational rights implicated by limits on *expenditures*, *see, e.g.*, Br. 17-18, I-51 — notwithstanding the fact that Title I bans national committees from *spending* soft money altogether and bans state and local committees *only* from spending soft money on "federal election activity."

Just as importantly, however, defendants virtually ignore the fact that Title I implicates additional speech and associational rights not at issue in *Buckley*. *First*, Title I, unlike the provisions of FECA challenged in *Buckley*, imposes numerous restrictions on *solicitations*, as well as on "contributions" and "expenditures." As the Supreme Court has noted, solicitations "involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment." *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). These speech interests are particularly strong when the solicitations are made in connection with political campaigns, where the First Amendment "has its fullest and most urgent application." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

Second, Title I imposes especially severe burdens on the associational rights of political parties and their members. No doubt aware of the long line of Supreme Court cases on the associational rights of political parties, the government does not deny that political parties have associational rights, but instead questions whether one committee of a political party has the right to associate with another, in light of case law suggesting that it is unclear whether organizations have the First Amendment right to associate with other organizations. *See* Br. 89. Even assuming, however, that organizations do not have such a First Amendment right — and the single case the government cites, *DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275

(D.C. Cir. 1989), offers no justification for treating organization-to-organization association any differently — the government's argument fails for the simple reason that political party committees are not discrete "organizations" for purposes of associational-rights analysis. As intervenors (but not the government) recognize, national, state, and local party committees are all components of a larger "organization" — namely, the political party with which they are affiliated. *See, e.g.*, Br. I-37 (conceding that "[a]ll parts of each 'party' share a common agenda"); *cf.* BCRA § 213 (treating "all political committees" established by a national political party and by a state political party as a "single political committee" for purposes of section). Moreover, even if this Court were somehow to conclude that party committees are discrete "organizations" and that organizations have no rights to associate with other organizations, Title I implicates not only the rights of one party committee to associate with another, but also the rights of a party committee to associate with individual party members — most notably, federal officeholders and candidates. *See* McConnell Br. 30.

As a fallback position, the government contends that, even assuming that party committees have the right to associate with one another, Title I does not interfere with that right. *See* Br. 89-90. For the reasons stated in our opening brief, however, *see* McConnell Br. 28-30, the government's argument is unavailing. Notwithstanding the government's claim that "[t]he national parties remain free to solicit money for, and transfer money to, state and local party committees," Br. 89, Title I imposes a host of crippling restrictions on the ability of national committees to engage in coordinated fundraising with their state and local counterparts — including an outright ban on transfers of state-regulated funds to state and local committees, a ban on the solicitation of Levin federally regulated funds for state and local committees, and a ban on providing any federally regulated funds for state and local committees to use for Levin

activities. And Title I similarly restricts the ability of state and local committees to solicit Levin federally regulated funds on behalf of, or jointly with, other state and local committees, and to transfer Levin federally regulated funds to those committees. Whether or not these provisions impose direct restrictions on the ability of party committees to "*confer[]* about spending priorities or any other issues," *id.* at 90 (emphasis added), the plain impact of these provisions is greatly to curtail the ability of party committees to coordinate fundraising on the national, state, and local levels. The government cannot seriously contend that these restrictions do not severely burden parties' associational rights.

2. Title I Should Be Subject To Strict Scrutiny.

Defendants repeatedly state that Title I should be subject to the lower form of heightened scrutiny seemingly applied in *Buckley* to limits on the amounts of contributions. *See id.* at 59-62 (noting that Supreme Court had applied lower level of scrutiny to "limitations on *campaign contributions*," but nevertheless asserting that "BCRA's restrictions on the *solicitation, use, and expenditure* of nonfederal funds are closely drawn to match a sufficiently important interest") (emphasis added; internal quotation omitted); *id.* at I-15-16 (noting that "contribution limits are . . . subject to a somewhat less stringent test than strict scrutiny") (internal quotation omitted). As a threshold matter, defendants fail to address the Supreme Court's assertion that a limitation on the amount of contributions by an individual to a third party effectively functions as a limitation on the amount of expenditures by the third party itself — at least where the contributions do not raise the specter of circumvention of limits on direct contributions to candidates. *See Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 299 (1981). Perhaps more importantly, however, defendants also make no effort to deal with the fact that Title I not only prohibits national committees from *receiving* state-regulated

funds, but also prohibits them from *spending* such funds — and, as to state and local committees, imposes limits *only* on the spending of such funds on "federal election activity." Because Title I regulates "expenditures" as well as "contributions," strict scrutiny is applicable. And to the extent that Title I regulates the *uses* for which money is raised and spent rather than imposing any new limits on the *amounts* of contributions or expenditures, the contributions-versus-expenditures dichotomy of *Buckley* arguably does not apply here at all. Because Title I severely impacts the associational rights of political parties, and because Title I imposes a host of other restrictions (such as its various bans on solicitation) of the kind to which strict scrutiny has traditionally been applied,[6] strict scrutiny is warranted here.

Aside from the portion of *Buckley* on contribution limits, the only authority intervenors cite for the proposition that Title I should receive less than strict scrutiny is a *lecture* by Justice Breyer, in which he contended that campaign-finance laws should *always* receive a lower degree of scrutiny because "important First Amendment-related interests lie on both sides of the constitutional equation." Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 253 (2002). Of course, this Court is not bound by the statement of a single Justice — much less a statement in a law-school lecture. In any event, it is clear that a majority of the Court has thus far rejected Justice Breyer's suggestion that *Buckley* be reconsidered and lower scrutiny applied across the board to campaign-finance regulations. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 405 (2000) (Breyer, J., concurring). Intervenors' reliance on Justice Breyer's lecture represents nothing less than a tacit concession that, absent a change in the

[6] The government applies less than strict scrutiny even to Title I's restrictions on solicitations, without any explanation for why it does. *See* Br. 125.

applicable governing standard, Title I merits strict scrutiny.

The government goes even further than intervenors and ambitiously contends that *Buckley* not only compels application of a lower standard of review, but in fact resolves the constitutionality of Title I altogether. *See* Br. 64. In essence, the government's argument is that *Buckley* was premised on an assumption that *all* (or, in the government's studied ambiguity, "virtually all," *id.* (emphasis omitted)) donations to a party committee constitute "contributions" within the meaning of FECA. That argument, however, scarcely passes the straight-face test. As the Court recognized in *Buckley*, FECA, then as now, defines "contributions" as *only those donations made for the purpose of influencing a federal election*. *See* 424 U.S. at 24. And in the footnote on which the government exclusively relies, the Court did not say that *all* "[f]unds provided to a candidate or political party or campaign committee either directly or indirectly . . . constitute a contribution," Br. 64 n.57; instead, restoring the government's omission, the Court said only that "[f]unds provided to a candidate or political party or campaign committee either directly or indirectly *through an intermediary* constitute a contribution," *Buckley*, 424 U.S. at 23 n.24 (emphasis added). That footnote therefore stands only for the proposition that funds that would otherwise constitute a contribution still constitute a contribution if provided through an indirect *source* — not that *state-regulated* funds constitute a contribution. Indeed, if the Court had interpreted the FECA definition of "contributions" in the manner defendants suggest, the FEC's allocation regulations, treating state-regulated funds as a discrete category from federally regulated "contributions," would have been flatly inconsistent with the language of the statute. *Buckley* does not dispose of plaintiffs' Title I claims, much less compel application of anything less than strict scrutiny.

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

Defendants devote the vast majority of their brief on Title I to various arguments regarding the federal government's interest in regulating state-regulated funds. Reduced to their essence, those arguments are twofold: an argument that the anti-corruption rationale first articulated in *Buckley* should be broadened, and an argument that this Court should recognize a broad governmental interest in imposing additional limits that prevent circumvention of current limits justified by the anti-corruption rationale. Both arguments ultimately fail.

Defendants do not contest the fact that the only governmental interest that the Supreme Court has thus far found to be compelling in the campaign finance context is the interest in reducing actual or apparent corruption. *See FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985). In light of defendants' apparent concessions that they cannot identify any specific instances of actual corruption of federal officeholders or candidates arising from the donation or spending of state-regulated funds, *see* Shays dep., exh. 15, at 2-3 (Resp. of FEC to RNC's First & Second Reqs. for Adm., Sept. 16, 2002); McCain dep. 170-71, and defendants' struggle to identify any *appearance* of corruption of particular federal officeholders or candidates relating to state-regulated funds, defendants instead argue that this Court should recognize a governmental interest in preventing the "*potential* for corruption," *see* Br. 71-81, or a governmental interest in preventing the actual or apparent corruption not of particular federal officeholders or candidates, but rather of the "*political process*" more generally, *see id.* at 81-84, I-20-50.

Whatever this extension of the anti-corruption rationale is dubbed, it ultimately rests on a mountain of anecdotal evidence regarding "the selling of access to federal officials as a reward

for making large soft money donations to the party." *Id.* at 75. This broad conception of "access" sweeps well beyond the idea that a donation influences a particular legislative action, to the idea that a donation will result in additional "legislative effort," *id.* at I-43 (internal quotation omitted), will lead to meetings with federal officeholders and candidates, *see id.* at 77, or will merely make an officeholder "psychologically beholden" to the donor (whatever that means), *id.* at I-38 (internal quotation omitted). Indeed, in defendants' view, a potential for corruption arises not just from the supposed fact that donations purchase "access," but also from the supposed fact that donors fear *lack* of "access" if they *fail* to give money. *See id.* at 124.

Defendants' efforts to frame this broader, "access"-based governmental interest fail as a matter both of law and of fact. As to the law, the government, at least, appears to concede, *see id.* at 78, as it must, that the Supreme Court in *Buckley* recognized an interest in preventing *only* actual or apparent corruption, and that the Court further defined "corruption" as arising only in situations in which contributions or expenditures are made, or appear to be made, as a *quid pro quo* to secure or influence a particular action by federal officeholders or candidates, *see, e.g.*, 424 U.S. at 26, 27, 45. Although defendants insinuate that, in *Shrink Missouri*, the Court somehow broadened the compelling governmental interest from *Buckley* in preventing actual or apparent *quid pro quo* corruption to a compelling governmental interest in addressing the "broader threat from politicians too compliant with the wishes of large contributors," Br. 78 (quoting *Shrink Missouri*, 528 U.S. at 389); *see also id.* at I-15 (same), the Court did no such thing: instead, in the portion of the opinion which defendants quote, the Court expressly relied on a passage from *Buckley* in which the Court discussed the governmental interest in preventing apparent, as well as actual, *quid pro quo* arrangements, *see Shrink Missouri*, 528 U.S. at 388-89 (quoting *Buckley*, 424 U.S. at 25-26). Nowhere has the Court recognized, much less applied, a broader

governmental interest (much less a compelling one) in preventing the "potential of corruption" or corruption of the "political process" more generally.

Moreover, as we noted in our opening brief, *see* McConnell Br. 35-36, defendants' "access"-based interest proves too much. To the extent that officeholders or candidates provide greater "access" to individuals who provide financial support not to the officeholders or candidates themselves, but instead via their political parties (or other indirect means), the only solution would be to ban private money from politics altogether, in order to afford equal "access" to all. In *Buckley*, the Court expressly rejected precisely this blank-check rationale for campaign finance regulation. *See* 424 U.S. at 48-49.

As to the facts, defendants' argument is no more availing. Plaintiffs have already set forth ample evidence rebutting defendants' claim that non-federal money purchases "access" to federal officeholders and candidates. *See* RNC Br. 18-19. Moreover, apart from their anecdotal evidence, defendants have no answer to the fact that "there is scant evidence in the political science literature that money secures access." 2 PCS/ER 956 (Primo). Indeed, defendants' own experts concede that there is insufficient data to allow political scientists to draw such a conclusion. *See* 1 DEV, tab 2, at 5 (Krasno & Sorauf). And to the extent that "access" resulting from the donation of state-regulated funds is said to give rise to "public cynicism about politics," Br. 82, as reflected in poll data regarding the level of trust in government, *see id.* at 83-84, I-4, I-45-46, plaintiffs have demonstrated that defendants' underlying data does not support a causal connection between the political parties' greater use of state-regulated funds and lower public trust in government, *see* 2 PCS/ER 961-71 (Primo). Indeed, insofar as there is any correlation at all between the two, it is a correlation between *higher* use of state-regulated funds and *higher* levels of public trust in government. *See id.* at 963-64. Defendants have therefore entirely failed

to establish a factual predicate for their newly minted interest in preventing the "potential of corruption" or corruption of the "political process" more generally.

In the alternative, defendants argue that the government has an interest in imposing additional limits that, while themselves not justified by the anti-corruption rationale, are necessary to prevent circumvention of existing limits that *are* justified by the anti-corruption rationale. Defendants repeatedly seek to justify various provisions of Title I as necessary to "ensure compliance" with current limits, Br. 20; "preclude evasion" of those limits, *id.* at 61; or "clos[e] . . . loopholes" in current law, *see id.* at I-19.

Defendants rely on three cases for the proposition that the Supreme Court has adopted the anti-circumvention rationale. *See FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) (*Colorado II*); *California Med. Ass'n v. FEC*, 453 U.S. 182, 198 (1981) (plurality opinion); *Buckley*, 424 U.S. at 38. To the extent that the Court has recognized an anti-circumvention rationale, however, it has only used it to justify limits on contributions that can be used for all of the same purposes as direct contributions to federal candidates themselves. Thus, in *Buckley*, the Court upheld a $25,000 limit on aggregate "hard money" contributions by an individual in a calendar year, on the ground that otherwise individuals could circumvent the $1,000 limit on contributions to a single candidate simply by contributing to the candidate's political party or sympathetic PACs. *See id.* And in *California Medical*, the Court similarly upheld the $5,000 limit on "hard money" contributions to PACs, on the virtually identical basis that otherwise individuals could circumvent the $1,000 limit on contributions to a single candidate and the $25,000 annual limit on aggregate contributions. *See* 453 U.S. at 198 (plurality opinion); *id.* at 203 (Blackmun, J., concurring). In *Colorado II*, the Court did not really apply an "anti-circumvention" rationale at all (despite some language in the Court's opinion to the

contrary), but instead upheld limits on coordinated expenditures on political parties on the basis of the rule, first applied in *Buckley*, *see* 424 U.S. at 46-47, that expenditures coordinated with federal candidates are the functional equivalent of direct contributions to the candidates themselves, *see Colorado II*, 533 U.S. at 442-43. Nowhere has the Court applied an anti-circumvention rationale to justify limitations on activities besides contributions (such as disbursements or transfers), or limitations on donations that could not be put to all of the same uses as contributions to candidates.

In reality, defendants' broader "anti-circumvention" rationale is really no rationale at all. *Any* currently lawful use of money to influence the political process could be characterized as an effort to "circumvent" or "evade" currently existing prohibitions on certain other uses, or an exploitation of a "loophole" that needs closing. If this Court were to uphold BCRA, defendants would likely justify future restrictions on campaign financing as "a loophole closing measure" necessary to prevent circumvention of *BCRA*, much as they have justified BCRA as necessary to prevent circumvention of *existing law*. Br. I-57. Indeed, defendants unwittingly demonstrate the utter pliability of the anti-circumvention rationale by justifying certain provisions of BCRA on the ground that they are necessary to prevent not circumvention of existing law, but rather as-yet-nonexistent circumvention of other provisions of BCRA itself. *See id.* 103 (restrictions on spending of state-regulated funds by state and local committees justified by desire to prevent evasion of ban on receipt and spending by national committees); *id.* at I-59 (same); *id.* at 118-19 (restrictions on solicitation or donation of funds by national committees to tax-exempt organizations justified by desire to prevent evasion of ban on receipt and spending of state-regulated funds by national committees); *id.* at I-124 (Title II restrictions on "electioneering communications" necessary to prevent circumvention of Title I restrictions). The ultimate result

of defendants' relentless advancement of their evergreen circumvention rationale will be simply to "force[] a substantial amount of political speech underground, as contributors and candidates devise ever more elaborate methods of avoiding [existing] limits." *Shrink Missouri*, 528 U.S. at 406 (Kennedy, J., dissenting). This Court should reject defendants' attempt to fashion such a limitless prophylactic justification for restrictions on core First Amendment speech.[7]

Once the government's interest in preventing actual or apparent corruption is properly cabined, all that remains is to determine whether Title I is sufficiently tailored to serve that interest. Notably, defendants all but concede that several provisions of Title I can only be justified either by defendants' broader version of the anti-corruption rationale, or by the anti-circumvention rationale. *See, e.g.*, Br. 106-08 (justifying prohibitions on transfers between party committees with anti-circumvention rationale); *id.* at 122-25 (justifying prohibitions on solicitations by federal officeholders and candidates with "access"-based "potential of corruption" rationale); *cf. id.* at 58-59 (suggesting that *all* of Title I is justified by anti-circumvention rationale); *id.* at 128 (citing *no* governmental interest for regulating advertising by state and local candidates).

As noted in our opening brief, *see* McConnell Br. 36-37, in order to show that Title I serves the government's compelling interest in preventing actual or apparent *quid pro quo* corruption *at all*, defendants must prove that the donation of any state-regulated funds to, or the spending of any state-regulated funds by, a *political party* is just as corrupting as a contribution

[7] As the Supreme Court has noted, "[b]road prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Indeed, far from accepting prophylactic justifications for *intrusions* into constitutional rights, the Court has seemingly applied prophylactic rules only for the *protection* of those rights. *See, e.g., Dickerson v. United States*, 530 U.S. 428 (2000).

directly to a *candidate*, and that a donation of state-regulated funds to be used for activities that do not exclusively serve to get a candidate elected (such as generic party activity), or the spending of state-regulated funds for such activities, is just as corrupting as a contribution to be used for activities that exclusively do so (such as express advocacy). As to the first proposition, intervenors contend that the Supreme Court's decision in *Colorado II* effectively equated contributions to parties with direct contributions to candidates for purposes of the corruption rationale. *See* Br. I-54. As we have already demonstrated, however, in *Colorado II*, the Court merely applied the longstanding rule that *coordinated expenditures* are treated as the functional equivalent of direct contributions to candidates, *see* 533 U.S. at 444 — and, crucially, emphasized that coordinated expenditures by political parties are no different from coordinated expenditures by individuals and PACs, *see id.* at 455. As to the second proposition, defendants entirely ignore the relevant language in the Supreme Court's decision in *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (*Colorado I*), in which the plurality expressly recognized the use of state-regulated funds for activities such as voter registration and get-out-the-vote activity, but stated outright that "the opportunity for corruption posed by these greater opportunities for contributions is, *at best, attenuated*," *id.* at 616 (emphasis added). In the absence of any explanation for *Colorado I* and *Colorado II*, defendants cannot show that Title I serves the anti-corruption rationale at all.

To the extent that defendants nevertheless persevere in attempting to apply the *quid pro quo* corruption rationale to Title I, they cannot demonstrate that Title I is sufficiently tailored to serve that rationale. At various points in their brief, defendants suggest that it is the large *amount* of donations of state-regulated funds which gives rise to actual or apparent corruption. *See, e.g.*, Br. 68 (noting that top 50 donors of state-regulated funds to national committees in 1996 cycle

gave more than $500,000 each); *id.* at I-17-18 (repeatedly noting that "*large* political contributions" give rise to actual or apparent corruption) (emphasis added). As to national committees, however, Title I contains no tailoring relevant to this supposed interest at all, instead banning donations of state-regulated funds of *any* amount, and further banning any *spending* of state-regulated funds. If Congress had truly been concerned with the *amount* of donations of state-regulated funds, it could simply have capped the amount that could be given, *see* 147 Cong. Rec. S2908 (daily ed. Mar. 26, 2001) (Hagel amendment proposing aggregate cap of $60,000),[8] or, as intervenors themselves unwittingly suggest, could simply have limited donations of state-regulated funds by those donors who have "maxed out" on contributions of federally regulated funds, *see* Br. I-32.[9] As to state and local committees, Title I contains minimal tailoring at best, banning donations of state-regulated funds of any amount for "federal election activity" and imposing a cap only on funds to be spent for the limited uses set out in the Levin amendment.

Defendants next suggest that it is the *source* of donations of state-regulated funds which creates actual or apparent corruption. *See, e.g., id.* at 68 (noting that national committees received 27,000 donations of state-regulated funds in the 1996 cycle from "federally prohibited sources": that is, corporations and labor unions). Title I, however, contains no tailoring relevant

[8] Intervenors imply at one point that the ban on donations of state-regulated funds to national committees is justified because Congress also raised (if modestly) the limits on contributions of federally regulated funds to those committees. *See* Br. I-57. By definition, however, federally regulated "contributions" are those made "for the purpose of influencing any election for federal office." 2 U.S.C. § 431(8)(A)(i). An increase in the limits on contributions of federally regulated funds is therefore not the functional equivalent of a cap on donations of state-regulated funds, since donors will effectively be foreclosed from giving money to national committees for the purpose of influencing a *state* election.

[9] The mere fact that "Congress expressly considered, and rejected," a cap on donations of state-regulated funds, Br. 87, does not magically eliminate a cap from the list of more narrowly tailored alternatives.

to this supposed interest at all, as to either national committees or state and local committees.

Finally, defendants repeatedly state that it is the *use* of state-regulated funds for *issue advocacy* which gives rise to actual or apparent corruption. *See, e.g., id.* at 69 (contending that the "primar[y]" way that party committees influence federal elections with state-regulated funds is through issue advocacy); *id.* at I-61 (suggesting that voter registration, voter identification, get-out-the-vote activity, and generic campaign activity "affect" federal elections, but that issue advocacy "*substantially* affect[s]" federal elections) (emphasis added). As to national committees, however, Title I again contains no tailoring relevant to this supposed interest at all, instead banning the receipt and disbursement of state-regulated funds no matter the purpose for which the funds are being given and spent. As to state and local committees, Title I contains hardly any tailoring, sweeping well beyond even the dubiously constitutional definition of "electioneering communications" in Title II and banning disbursements of state-regulated funds for issue advocacy transmitted at any time and by any means, as well as disbursements for concededly less corrupting activities such as voter registration, voter identification, get-out-the-vote activity, and generic campaign activity.

Moreover, regardless of what aspect of the donation or spending of state-regulated funds generates actual or apparent corruption, Title I is substantially overbroad for two additional reasons. *First*, to the extent that Title I applies at all to so-called "minor parties" such as the Libertarian Party, who have no federal officeholders and whose federal candidates are unlikely to be elected, *see* 9 PCS/MC 894-95, 904-05 (Dasbach *et al.*), no governmental interest in preventing actual or apparent corruption is implicated. Indeed, insofar as it is the *amount* or *source* of donations of state-regulated funds which gives rise to actual or apparent corruption, Title I is overbroad as applied to "minor" parties because such parties receive virtually no

donations of large amounts or from corporate sources. *See id.* at 893. *Second*, Title I is overbroad because it sweeps in activity relating only to state and local elections and therefore does not serve to get federal candidates elected at all. *See supra* Part I.A.

In the end, defendants are reduced to arguing that the comprehensive restrictions on state-regulated funds in Title I will not "render [political parties] useless," Br. 88 (internal quotation omitted), because the national parties did not start using state-regulated funds in sizable amounts until 1996 and therefore can live without them, *see id.* at I-70-71. First Amendment analysis, however, does not start from the baseline that restrictions on speech are valid unless they render a speaker effectively unable to speak at all, but rather that restrictions on speech are invalid unless they are sufficiently tailored to serve an appropriate governmental interest. Because defendants have failed to make the required showing, Title I should be declared unconstitutional.

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

Title I also violates principles of equal protection because it regulates speech by political parties but not identical speech by other entities. As we noted in our opening brief, *see* McConnell Br. 41-43, Title I will unquestionably place party committees at a severe disadvantage compared to interest groups. Whereas national party committees are banned outright from raising or spending state-regulated funds for contributions to state or local candidates, voter registration, voter identification, get-out-the-vote activity, or generic campaign activity, advocacy relating to ballot measures, or even administrative expenses or overhead, interest groups will be able to continue to raise and spend non-federally regulated funds for all of these purposes. Moreover, whereas national party committees are banned outright from raising or spending state-regulated funds for any issue advocacy (regardless of whether it refers to a

federal candidate, is transmitted by a broadcast medium, or occurs anytime near an election), interest groups will be able to continue to raise and spend non-federally regulated funds for issue advocacy subject only to the "electioneering communications" restrictions of Title II — and *MCFL* corporations and unincorporated organizations will be able to raise and spend such funds subject to no restrictions at all. Similar disabilities will attach to state and local committees, to the extent that they are barred from using state-regulated funds for "federal election activity."

Defendants seek to justify these restrictions on the ground that party committees were treated *more favorably* than interest groups in the pre-BCRA campaign finance regime. *See* Br. 90. It is true that party committees could receive modestly larger amounts of "hard money" than FECA-regulated political committees, *see* 2 U.S.C. § 441a(a)(1), and that party committees could make coordinated expenditures in larger amounts than other entities, *see* 2 U.S.C. § 441a(d)(3). It is also true, however, that party committees were treated *less favorably* than interest groups in other regards. As defendants concede, for example, party committees were required to use an allocation of federally regulated and state-regulated funds to engage in issue advocacy, voter registration, voter identification, and get-out-the-vote activities, whereas interest groups were free to use *only* state-regulated funds for such activities (provided they did not qualify as FECA-regulated political committees). *See* Br. 118.

Even assuming, however, that party committees *were* treated more favorably overall than interest groups under the pre-BCRA regime,[10] whatever advantages they enjoyed will be

[10] It could be argued that, to the extent political parties were previously treated more favorably than interest groups, that favorable treatment was constitutionally mandated by the special role political parties have traditionally played in our political process. *See, e.g., Davis v. Bandemer*, 478 U.S. 109, 144-45 (1986) (O'Connor, J., concurring).

overwhelmed by the disadvantages imposed by BCRA. As defendants themselves note, *see* Br. I-10, the national committees raised almost $500 million in state-regulated funds during the 2000 election cycle. That money will now inevitably flow into interest groups instead. Although defendants seek to justify the discriminatory application of these restrictions on party committees on the ground that parties enjoy an "extremely close relationship to federal officeholders and influential party leaders," *id.* at 92, defendants overlook the Supreme Court's pronouncement in *Colorado I* that there are no "special dangers of corruption associated with political parties that tip the constitutional balance in a different direction," 518 U.S. at 616 (plurality opinion). And defendants unwittingly acknowledge that party committees stand in the same position as interest groups by alleging, in their efforts to justify other restrictions in Title I, that interest groups have frequently "served as virtual arms of party committees," Br. 117, and that donations to interest groups, allegedly like donations to party committees, can lead to the "creation of obligated officeholders," *id.* at 118. Given these assertions, defendants cannot be heard to argue that the disabilities of Title I should attach only to party committees and not to interest groups as well.

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

RNC TITLE I OPPOSITION

Defendants' opening brief manifests a basic misunderstanding of both BCRA and its constitutional infirmities. Defendants fail to appreciate how BCRA interjects the Federal Government into purely state election activity, how in Senator McCain's words it erects "firewall[s]" between national and state political parties, or how it simultaneously enfeebles political parties and empowers special interest groups to the detriment of American democracy. In more than 135 pages of briefing on the Title I issues, Defendants inexplicably ignore all of the RNC's principal claims and respond instead to strawmen.

Defendants do not deny that "corruption" is a less serious problem now than ever before. Even so, they attempt through a parade of supposed horribles to persuade this Court that the American political system is so endangered by the corrupting influence of so-called "soft money" that Congress was within its sphere in doing almost anything – even passing a statute that will almost surely make matters worse. But Defendants' allegations are grossly exaggerated in many instances and, worse, downright distorted in others.[1] And even if Defendants' factual assertions were accurate, they would not justify a statute that is so offensive to dual sovereignty and, at once, so woefully underinclusive and overbroad as to be fundamentally irrational.

FACTUAL BACKGROUND

The RNC's opening brief described the central place political parties occupy in American democracy, and how weakened parties lead to more corruption, less public confidence and participation, and ineffective government. RNC Br. 3-5. None of this is disputed.

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[1] Given space limitations in this brief, we deal with other examples in the RNC Plaintiffs' Proposed Findings of Fact ("FoF"), to be filed in both hard-copy and interactive versions.

Having little to say about the applicable law, and less to say about the role of political parties, Defendants have resorted to trial by anecdote. But as shown below, many of Defendants' anecdotes are just wrong (pp. 3-5), and many more describe situations that BCRA will not remedy (6-7). Further, neither the available polling data nor the extensive empirical work on "corruption" or its appearance supports Defendants' claims (7-10). Finally, in more than a few instances, Defendants have materially misrepresented the record (11-14).

To begin with, it simply is not the case that the legislative record uniformly supports Defendants' version of the facts. Indeed, the House Committee on Administration issued an "Adverse Report" on BCRA, emphasizing that –

> "No evidence has been produced to this Committee of a 'corruption' problem stemming from soft money contributions to political parties. Even if there had been such a showing, H.R. 2356 does not even attempt to be a narrowly tailored remedy. If it were ever to become law, it would have precisely the opposite effect its proponents intend. Rather than diminish the power of 'special interest' groups, it would actually make those groups even more powerful than they are today. Independent advocacy groups, unions and corporations would see their power and influence rise, while our national political parties would be debilitated. The result would be destabilization and factionalism, neither of which is in the best interest of our country." H.R. Rep. No. 107-131(I), at 2 (2001).[2]

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[2] Because Congress made no specific findings of fact in support of BCRA, this Court must approach Defendants' carefully-selected statements by BCRA's sponsors, many of which are contradicted by statements from other legislators, with caution. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 90 (2000) (criticizing reliance on "assorted sentences ... cobble[d] together from a decade's worth of congressional reports and floor debates" and invalidating portions of Age Discrimination in Employment Act); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989). Moreover, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at state." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *accord Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994). Finally, we note that the Supreme Court has struck down numerous federal statutes in recent years based, at least in part, on the inadequacies of the record before Congress. *See, e.g., Ashcroft v. The Free Speech Coalition*, 122 S. Ct. 1389, 1402-04 (2002); *Board of Trustees v. Garrett*, 531 U.S. 356, 368-72 (2001); *United States v. Morrison*, 529 U.S. 598, 614-18 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 645-46 (1999); *United States v. Lopez*, 514 U.S. 549, 562-63 (1995).

Defendants' anecdotal evidence. In their effort to prove that nonfederal donations buy, or appear to buy, legislative results, Defendants simply ignore the FEC's binding admissions that (i) it has *no evidence* that any Senator or Congressman has changed a vote due to donations of nonfederal money to a party, and (ii) it has *no evidence* that the RNC ever even tried to change a vote on legislation due to such donations. RNC Br. 16.[3] Nor do Defendants deny that the much-touted "access" ostensibly provided to both federal and nonfederal donors at fundraising events is to all appearances worthless, because officeholders *do not even remember the donors' names, much less their policy preferences*. RNC Br. 18.

Instead, Defendants cobble together what they must perceive to be their most sordid anecdotes in an effort to link nonfederal donations to corruption. Let's look at just a handful:

1. Defendants repeatedly assert that the McCain tobacco bill failed as a result of the tobacco industry's nonfederal donations to the political parties. Def. Br. 80, I-19, I-41, I-49 n.199. But, as we have shown (RNC Br. 19), the tobacco industry's nonfederal donations actually *declined* dramatically at the very time the legislation was pending. Notably, while the industry was reducing its nonfederal donations, it was both (i) dramatically increasing its lobbying expenditures (to 15 times its nonfederal donations) and (ii) spending some $40 million on its own issue-advocacy campaign to turn public support against the bill. Defendants' claim that Senator McConnell encouraged fellow Republicans to vote against the bill because "major tobacco companies were promising to mount television ad campaigns to support them" (Def. Br.

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[3] *See also, e.g.*, 148 Cong. Rec. S2098 (Mar. 20, 2002) (Sen. Dodd) ("I have never known of a particular Member whom I thought cast a ballot because of a contribution."); 147 Cong. Rec. S3046 (Mar. 28, 2001) (Sen. DeWine) ("Proponents [of BCRA] made a flat out assertion that there is corruption, or there is the appearance of corruption. ... I think they have failed in their burden of proof.").

I-41) unraveled when investigated by the FEC and Justice Department. McConnell Reb. Decl. ¶1. But even if Defendants' claim were true, *it would serve only to prove our point*: the claimed "promis[e]" was *not* to make a donation to the party, but rather to *air advertisements* – and, even then, from April to July 1998, *outside* the 60 day window imposed by BCRA. Thus, even this urban legend would not be addressed by BCRA.

2. Defendants quote Senator Feingold's claim that the "'Telecommunications Act of 1996 would not have passed' had it not been for soft money donations," Def. Br. I-40 n.157, a claim echoed by Senator McCain (Decl. ¶9). The hollowness of this unsupported assertion is demonstrated by the lopsided margin by which the Telecommunications Act passed – *91 to 5.* Indeed, asked point blank whether "the 91 senators who voted for that bill did so as a result of soft money," Senator McCain candidly responded, "No." McCain CX 57.

3. Defendants also assert that a nonfederal donation led to favorable consideration of a bill benefiting Federal Express. Def. Br. 79-80, I-40. Defendants base this claim on the testimony of former Senator Simon – who, notably, faulted both federal *and* nonfederal donations[4] – and Senator Feingold, who identified the bill as 1996 "Federal Aviation Administration authorization legislation." Feingold Dep. 62. But, significantly, like the Telecommunications Act, the FAA legislation passed overwhelmingly – by a vote of *92 to 2*, with Senator Feingold himself in the majority.

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[4] Sen. Simon observed that, during the pertinent election cycle, Federal Express made $1.4 million in *federal* contributions to "incumbent members of Congress," but only $1 million in total *nonfederal* donations to the party committees. Simon FEC Decl. ¶13.

4. Defendants quote Congressman Shays' oblique hearsay assertion that "some Members" told him they were pressured to vote against BCRA by threats that the party would withhold campaign funding from them or deny them committee chairmanships. Def. Br. I-25 n.88. Asked to name the individuals, Shays retorted, "There is not a chance in hell that you will get the names of any individuals," Shays Dep. 183-84, thereby rendering investigation of his claim impossible. But a similar claim by Senator McCain (Decl. ¶7) did not withstand scrutiny. Confronted with FEC records showing that every single Republican Senator who had voted for cloture on an earlier version of BCRA – including himself – had received party campaign funding during their reelection bids, McCain CX 36-48, Senator McCain admitted that "political parties allocate their resources on the basis of competitiveness" of races. *Id.* at 47. Defendants' experts likewise reject the claim that parties use financial resources as leverage to affect legislation, acknowledging that any such threat would not be "credible" and would be "self-defeating" in any event, and calling the claim "politically naïve."[5]

5. Defendants invoke the specter of Enron in a transparent attempt to judge the whole system guilty by association. Def. Br. 82, I-10, I-11, I-46, I-49. Once again, however, the record cannot sustain their claim. Indeed, Congressman Shays himself confirmed that "any company as large as Enron 'is going to have access by the fact of what it is and what it does,'" and further testified that "a large corporation is an important player in our economic market and

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[5] Mann CX 113-15; *see also* Herrnson Dep. 185-86 ("The [congressional and senate campaign] committees do not provide or withhold campaign assistance to encourage legislators to support the policy positions of their party's congressional leadership."); *id.* at 43, 73, 158.

will have contacts in Washington, contacts on the state level and, as a large corporation, should have some influence in the political process by the nature of its financial size." Shays Dep. 266.[6]

Defendants' allegations concerning problems BCRA does not solve. A number of Defendants' anecdotes actually tend to undermine their own case and prove ours. For example, Defendants repeatedly invoke the names of several "unsavory" individuals investigated by the Thompson Committee: Roger Tamraz, Carl Lindner, and James Riady. Def. Br. 76, 77, I-29, I-32 n.115, I-33. In so doing, Defendants emphasize that "the contributions that earned Tamraz six meetings with the President were made in part to *state* Democratic parties," that "Riady[] funneled $410,000 to the Democratic parties of Ohio, Michigan, Louisiana, Arkansas, Georgia, and North Carolina," and that Lindner "contributed more than $500,000 to state Democratic Parties." Def. Br. I-33. But as Defendants themselves acknowledge, Def. Br. 58, BCRA does not in any way limit state parties' receipt of such large individual donations. Further, BCRA explicitly permits an individual, corporation, or union to give $10,000 in "Levin money" to *every state and local political party in the country* – totaling millions of dollars – wherever legal under state law. Ironically, Defendants tout a letter from the Chairman of the California Democratic Party thanking a union leader for a $10,000 contribution that was used for "voter registration, vote-by-mail and GOTV efforts" (Def. Br. I-33-34) – the *exact amount* and the *very uses* for which BCRA allows Levin money to be accepted and used.

Defendants also refer to activities of the pharmaceutical trade association, PhRMA, suggesting that it obtained a meeting with Senator McConnell in exchange for a $200,000

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[6] Presumably for tactical reasons, Defendants failed to ask any witnesses about documents on which they now rely. Defendants' discussion of an internal AT&T memorandum, Def. Br. I-26-27, an unauthorized letter from an RNC donor suggesting money for access, *id.* at I-23, an NRSC fundraising letter, *id.* at I-42, a Committee for Economic Development survey, *id.* at I-47, and other "evidence" is addressed at FoF ¶¶105(a), 110, 98(g), 115(b), respectively.

donation. Def. Br. 81 n.69, I-27. But in straining to link nonfederal money and legislative "access," Defendants misleadingly tie together (i) a February 1999 memorandum concerning a meeting with Senator McConnell (PH0053) with (ii) a memorandum dated June 2000 – 18 months later – concerning a $200,000 donation (PH0054). Defendants also fail to note that the pharmaceutical industry funded the largest single block of interest group issue ads ($65 million) – under the moniker "Citizens For Better Medicare" – during the 2000 election cycle. RNC Br. 69. There is every reason to believe that interest groups will continue their efforts to "curry favor" through issue ads and in other ways wholly unregulated by BCRA. *Id.* at 13, 20, 64.

Defendants' public opinion poll. Defendants' own expert has warned that the public "does not have a high degree of sophistication about the campaign finance system" and "probably" doesn't even understand that nonfederal money goes to parties rather than directly to candidates. Herrnson Dep. 103-04, 373. In such an environment, poll results are not probative.[7]

In any event, Defendants thoroughly mischaracterize the findings of their own public opinion poll, the Mellman & Wirthlin study (which was commissioned by the Justice Department at a cost of $70,000). That "carefully defined" study, in the Government's words, provides "overwhelming" evidence "that people view large ***soft money*** contributions to political parties as contrary to the democratic ideal of honest policy-making." Def. Br. 83 (emphasis added). The Intervenors likewise represent that the study shows that "large ***soft money***

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[7] Ayers Decl. ¶9. Pro-reform groups stoke the public's misunderstanding, sometimes manipulating data to suggest corruption. Green CX 96-98 ("to the extent they are making mistakes with respect to the disclosure about hard money facts now, there is no reason to expect that they wouldn't make mistakes in the future") Dr. Green agrees that pro-reform groups will continue alleging corruption resulting from federally-regulated money even after BCRA becomes effective. Green CX 95-96, 112. The only evidence in this record addressing whether BCRA will be effective in reducing any public perception of corruption indicates it will *not*. Ayres Reb. Decl. ¶3(f). *See also* Herrnson Dep. 405 ("I think no matter what we do in terms of changing [the campaign finance laws], [Congress] will never be viewed favorably.")

contributions to political parties distort the workings of government and compromise our elected officials." Def. Br. I-45 (emphasis added); *see also id.* at I-4 ("***soft money***"), 83 n.71 ("***soft money***"). In fact, Mellman & Wirthlin do not say word one about "soft" money, and certainly do not distinguish "soft" from "hard" money with respect to its capacity to corrupt. Instead, Mellman & Wirthlin asked questions like whether "the government is pretty much run by *a few big interests* looking out for themselves or ... for the benefit of all the people," and to what extent individuals think "*big contributions* to political parties" have an impact "on decisions made by the federal government." Mellman & Wirthlin Rep. at 26, 27. Consistent with those generically-worded questions, their "principal finding," as stated in the report itself, is that the public believes that "[t]he views of *large contributors* to parties improperly influence policy and are given undue weight in determining policy outcomes." *Id.* at 5. Tellingly, Dr. Ayers exactly replicated the Mellman & Wirthlin study but substituted the contribution amounts expressly allowable under BCRA for the word "big" or the number "$50,000," and found that "every conclusion that the Wirthlin-Mellman report reached about 'large' or 'big' contributions and contributors applies with equal force to the new, hard money limits in the BCRA." Ayres Reb. Decl. ¶3(f).

Defendants similarly mischaracterize the testimony of former DNC Chairman Don Fowler. In support of their assertion that "***soft money*** shapes and skews governmental decision making," Defendants quote Fowler as having testified in his declaration that "[m]any contributors of large sums of [soft] money ... gain access to party and government officials that they otherwise would not have." Def. Br. I-38. But Fowler said no such thing. The bracketed word "[soft]" was added by Defendants. Fowler's declaration, and even more specifically his cross-examination, show (contrary to Defendants' editorializing) that Fowler does *not* view

"soft" money as specifically likely to corrupt, but instead believes that "big money" generally has a tendency to corrupt.[8]

Defendants' statistical evidence. Defendants rely on the report of their statistical expert, Dr. Donald Green, to establish a statistical correlation between contributions and roll call voting, "legislative effort," and "access." *E.g.*, Def. Br. I-43 (citing Green Rep. at 23-25). On cross-examination, however, Dr. Green admitted that existing empirical data do not support such a link.[9] In fact, studies show no correlation between contributions to candidates and roll call voting behavior, and "some studies have even found a negative correlation." Green CX 55, 58 (no work before 1990; aware of no work that "is statistically valid since 1990 that correlates contributions to candidates to roll-call votes"). Nor does the existing statistical work show a "statistically sound" relationship between contributions and so-called "legislative effort." *Id.* at 55, 66-67, 70-71 (existing studies fail to consider the effect of lobbying on lawmakers' investment of effort). Finally, it turns out that studies billed as having found a correlation between contributions to candidates and "legislative access" do not really examine that connection at all; instead, they conclude (unremarkably) that a lawmaker is able to raise more money if he or she gains a more powerful position in Congress. *Id.* at 62-63 ("not part of the

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[8] *E.g.*, Fowler Decl. ¶¶6 ("large sums of money"), 8 ("large contributions," "large money donors"); 9 ("big money contributors"); Fowler CX 45 (most of the DNC's "big contributors" gave "both kinds of money," "a combination of hard and soft money"), 46 (no distinction between hard and soft money contributors when seeking to arrange meetings), 86 (acknowledging that soft money exacerbates the problem but denying "that the problems of access are unique to soft money"). Fowler also vigorously denies improper links between nonfederal donations and Indian casinos (Def. Br. I-24), an allegation investigated and rejected by Independent Counsel Carol Bruce. FoF ¶98(f).

[9] Indeed, the empirical work in this area is doubly irrelevant: it focuses exclusively on PAC contributions (i) of federal money (ii) directly to candidates, where the effect on voting (if any) would be most acute. There are no analyses of federal money contributions to parties, much less *nonfederal* donations to parties. *See* Herrnson Dep. 476 ("I'm not aware of any study that has correlated soft money with voting behavior."); *id.* 298-300.

design of the study" to determine "whether the increase in contributions from particular industry groups when Senator X becomes Chairman of the Commerce Committee have had any impact on the way in which he votes on the Commerce Committee"), 67, 94-95 (neither Romer & Snyder nor Cox & Magar truly studied "access"; not aware of any statistical studies that address the effects of contributions on access); Herrnson Dep. 300 (Langbein study on "access" was "kind of weak and wishy washy").

Defendants' claims about voter turnout. It is true, of course, that voter turnout has been declining since 1960, and fell most rapidly from 60.84% in 1968 to 50.11% in 1988.[10] Without any empirical support, Defendants suggest that declines in voter turnout are tied to nonfederal donations to parties. Def. Br. 82. But tellingly, only a few pages later, Defendants note that "throughout much of the 1970s and 1980s" – when voter turnout experienced its most rapid drop – "*soft money was mostly absent from party fundraising.*" Def. Br. 88 (emphasis added). *Compare* Ayres Decl. ¶11 & Ex. B (chart showing decline in public confidence in government going back to 1960s). Indeed, in spite of (or perhaps because of) unprecedented soft-money spending in the 2002 midterm elections, voter turnout actually *increased* to 39.3%, up from 37.6% in 1998. Edward Walsh, *Election Turnout Rose Slightly, to 39.3%*, WASH. POST, A10 (Nov. 8, 2002). That datum tends to confirm the view of Defendants' own expert that the use of nonfederal money for voter mobilization and GOTV is "very positive."[11]

Defendants' misleading claims about party issue advocacy. Defendants suggest that the primary use of nonfederal money by national political parties is for so-called "sham" issue

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[10] *The Constitution and Campaign Reform: Hearings on S.522 Before the Comm. on Rules and Admin.*, 106th Cong. 381 (2000) ("Const. & Reform Hrgs.").

[11] Herrnson Dep. 203; *see also id.* at 209 ("very good").

advocacy. Def. Br. 29-31, 69, I-31. As an initial matter, we reject Defendants' suggestion that party issue advocacy, which is often conducted in response to interest group advertising, RNC Br. 11, is inherently evil. Under the First Amendment, issue discussion is a good thing, not a bad thing. And indeed, Defendants' own expert has agreed that "a large part of the public policy debate in this country is driven by the political parties." Herrnson Dep. 337; *see also* RNC Br. 4-5, 52. In any event, as we have shown, only about a third (36%) of nonfederal funds raised by the RNC in the 2000 cycle went to issue advocacy. RNC Br. 20. As Dr. Herrnson has testified, other uses of nonfederal funds by national parties are equally, if not more, important:

> "National party money, *including soft money* that is raised outside the boundaries of the Federal Election Campaign Act, has been used *to revitalize state and local party organizations and to fund their voter mobilization activities. These activities are important because parties are more inclined than candidates to register and mobilize new voters*. National party money has also been used to pay for generic, party-focused election advertisements and issue-oriented public relations campaigns which give the parties greater visibility among voters.
>
> *The things that party organizations are now doing to help candidates, mobilize voters, and present opposing messages directly to the general public are consistent with what scholars have been urging parties to do for years. The parties should be encouraged to put even greater effort into these activities.*" Herrnson Dep. 230-31 (emphasis added).

Defendants' mischaracterizations of the evidence. The Mellman & Wirthlin and Fowler examples cited above (*see supra* at 7-9) are by no means Defendants' only embellishments:

1. In the course of emphasizing the supposed dangers posed by lawmakers' participation in fundraising efforts, Defendants selectively quote an RNC document explaining that "'Bristol-Meyers would consider joining Season Pass [$250,000] but would like to have a meeting ... prior to joining.'" Def. Br. I-22 n.77. Defendants' use of ellipses obscures the (inconvenient) fact that the requested meeting was with RNC Chairman Jim Nicholson – *not* a federal official. RNC 240565.

2. Defendants assert that Senator McConnell has himself "suggested that campaign contributions affect public policy." Def. Br. I-41. But in the very speech that Defendants purport to quote, Senator McConnell explicitly *rejected* this view: "I do not believe political donations dictate public policy." 148 Cong. Rec. S9685 (Oct. 1, 2002).

3. Defendants' treatment of Dr. Raymond La Raja's testimony is similarly misleading. Notably, Dr. La Raja is the *only* expert in this case who has published empirical research on parties' use of nonfederal funds. He concludes:

- State parties spent 44% of their nonfederal funds on all media, but spent *more* – 49% – on voter mobilization, grass roots activities, fundraising, and administrative overhead. La Raja Decl. ¶22.
- As transfers of nonfederal funds to state parties increased, so did spending on state-party work such as voter mobilization, which *quintupled* from $9.6 million in 1992 to $53.1 million in 2000. *Id.* ¶15(a).
- BCRA will weaken parties relative to interest groups, resulting in reduced support for challengers and less electoral accountability. *Id.* ¶¶24-26, 28.
- The close relationships among national, state, and local party committees have strengthened parties. By disrupting those relationships, BCRA weakens parties. *Id.* ¶¶12, 12(b), 22(c), 27.

Rather than confront Dr. La Raja's findings head-on, Defendants seek to discredit him by selectively misquoting his doctoral dissertation, which predates at least two of his major studies on nonfederal funds. For example, Defendants quote the dissertation ("La Raja Dis.") as saying that "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." Def. Br. at I-32 n.116 (quoting La Raja Dis. 54). But Defendants omit the pivotal concluding clause of the very sentence they purport to quote – which states that "there is no guarantee that the party leadership will direct the money back into the candidate's race." La Raja Dis. 54.

Defendants also quote Dr. La Raja as saying that "[s]tate and local parties, which used to be the traditional power centers, now occupy the unfamiliar role of branch organizations in the party infrastructure," and then, *skipping ahead 31 pages in his dissertation*, quote him as saying "this shift in power" (their words) "could tilt policy concerns away from local and state interests." Def. Br. I-68-69 (quoting La Raja Dis. 49, 80). But in so doing, without any acknowledgement, Defendants have attributed *someone else's* thoughts to Dr. La Raja, who was responding to an assertion made by another commentator:

> "As Heard (1960) argued in his seminal study of political finance in the United States: '.... If a national committee were able to channel funds selectively to lower levels, its role would be radically changed (p.294).' The scenario Heard imagined has arrived. National parties are wealthier than ever, funds flow downward to state and local organizations, and soft money is the principal currency. *Heard's proposition, however, has not been tested. There are no studies of intra-party relations demonstrating that national parties exert control over the activities of state parties through financial transactions.*
>
> There are several implications of changes in the authority relations among levels of party. The increasing strength of national parties relative to state parties *could* tilt policy concerns away from local and state interests ...." La Raja Dis. 80 (emphasis added).

Indeed, Dr. La Raja's recent work, as well as that of Defendants' own expert, indicates that state parties are *stronger* today than twenty years ago. La Raja Decl. ¶22(b); Herrnson Dep. 408-09.

In the sole instance in which Defendants actually quote Dr. La Raja's testimony in this case, they claim that he "concedes that [parties] 'will certainly adapt and make themselves players in the campaign process' after BCRA takes effect." Def. Br. 106 (quoting La Raja CX 154). While acknowledging that parties "will still be players," Dr. La Raja in fact testified – on the page immediately following the one Defendants purport to quote – that "based on my prior research about how [parties] use this money, how they raise it, they claimed a very important position in campaigns. *I think they're going to lose that position relative to other organizational*

actors, particularly relative to candidates, relative to interest groups." La Raja CX 154-55 (emphasis added).

4. Not even the RNC's lead counsel can escape Defendants' creative use of ellipses and contempt for context, in view of their statement (Def. Br. I-19) that –

> 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 ...." An effective soft money ban must "... seek to impose restrictions on State parties as well."

So the Court can judge for itself, we set forth a more complete excerpt of this testimony, italicizing in bold the portions that Defendants selectively misquote:

> The seriousness of these First Amendment issues is well demonstrated by recent efforts to modify the First Amendment itself to allow tighter campaign finance regulation. Thankfully, the efforts have been unsuccessful.
>
> Another constitutional defect in a soft money ban is its insult to the Tenth Amendment and the federalist system. The political parties located in Washington, D.C., are national parties not federal parties. In addition to supporting federal candidates, the national parties support candidates in state and local elections, in compliance with state and local law. Imposition of federal contribution limits on national parties would improperly arrogate authority over state campaign financing decision to the federal government.
>
> Again, recognizing that ***a prohibition of soft money donations to national party committees alone would be wholly ineffective***, legislative proposals to ban receipt of soft money often ***seek to impose soft money restrictions on state parties as well*** – even though state party activity not involving federal elections is thoroughly regulated by state campaign finance laws. Never before has the federal government taken the position that it can regulate such a basic element of state governance as how candidates for state office are allowed to campaign.
>
> A third constitutional infirmity in the soft money prohibition results from the proposed unequal treatment of political party speech in relation to speech of other entities. Whereas a corporation or labor union can use unregulated funds to engage in issue advocacy, the reform proposals would extensively regulate and burden political party issue advocacy. This unequal treatment is offensive to the due process clause of Fifth Amendment.

Const. & Reform Hrgs. 301 (emphasis added).

The testimony went on to analyze the activities of the five most influential organizations in Washington (as identified by *Fortune Magazine*) and showed that nonfederal donations to parties were a minimal part of their government-relations activities. Two of those five organizations made *no* nonfederal donations at all; each of the three that did spent less on nonfederal donations than on (i) federal donations, (ii) restricted class communications, (iii) lobbying disbursements, and (iv) for two entities, issue advocacy. *See id.* at 290-91, 297, 372-76. (For the Court's convenience, we attach the complete text of Mr. Burchfield's testimony with charts as Appendix A to this brief.)

Defendants' own expert, Dr. Herrnson, best summarizes one of the very points Mr. Burchfield was making:

> "Party soft money is used to help a large, rather than a small, group of candidates because party soft money is given to and spent by party committees, which are umbrella organizations that represent a broad range of interests. It does not create such strong policy-oriented IOUs between contributors and legislators as those created by narrowly-focused interest groups that spend soft money to help only a few candidates." Herrnson Dep. 208-09.

It should come as no surprise that defense expert Dr. Herrnson *opposes* "the blanket elimination of soft money." *Id.* at 481.

ARGUMENT

The RNC Plaintiff's opening brief reiterated and elaborated on the claims that we have consistently advanced – in the Complaint, during discovery, and in witness and expert statements and depositions. This Court has acknowledged those claims.[12] And yet Defendants studiously avoid joining issue on *any* of them, namely, that –

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12 *See, e.g.*, Order Denying in Part and Granting in Part FEC's Motion for a Stay of the Rule 30(b)(6) Deposition at 9-10 (Sept. 20, 2002) (instructing the FEC, *inter alia*, to "identify the (continued...)

- in pervasively regulating state and local election activity, Title I exceeds Congress' delegated power and invades an area of core state sovereignty, RNC Complaint ¶¶25-42;

- by rending one Republican Party entity from another, Title I infringes the Party's First Amendment right of association, *id.* ¶¶43-56;

- by prohibiting national parties or their agents from "solicit[ing]" nonfederal funds, Title I criminalizes pure speech in violation of the First Amendment, *id.* ¶¶45-46; and

- in singling out parties among all political actors for unfavorable treatment, Title I violates the equal protection component of the Fifth Amendment, *id.* ¶¶63-82.

Instead of addressing any of these claims in any sustained manner, Defendants proceed as if a proper constitutional analysis of Title I begins and ends with *Buckley*'s decision to sustain limits on contributions to individual candidates. *See, e.g.*, Defendants' Brief ("Def. Br.") I-14-19 (*Buckley* and its progeny provide "The Constitutional Framework" for this case). As we explained in our opening brief, and in greater detail below (Part IV), Defendants are simply wrong to view this as a typical "contribution-to-candidate" case. More fundamentally, they are wrong to assume that every campaign-finance statute can implicate only the issues addressed by *Buckley* and its progeny, and no others. Put simply, Defendants have fallen into the *Buckley* box and they can't get out.[13]

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government interest, if any, served by regulating" activities related to odd-year elections and to produce information "evaluating the effectiveness" of BCRA in dealing with certain problems that allegedly exist in the current electoral process).

[13] Defendants' suggestion that this is a "pre-enforcement facial challenge" subject to heightened proof requirements, Def. Br. 57, need not detain the Court. Defendants wrongly assume that every pre-enforcement challenge is *ipso facto* a facial challenge; it is not. BCRA is effective now, and is presently constraining the activities of all political party plaintiffs. Because BCRA "imposes present-day burdens," this is an as-applied, not a facial, challenge. *American Library Ass'n v. Reno*, 33 F.3d 78, 83 (D.C. Cir. 1994). Of course, even if this were a facial challenge, it would succeed because, as the various plaintiffs have shown, BCRA is indeed "substantially overbroad."

It is significant in this respect both (i) that Congress here clearly anticipated that BCRA would be challenged prior to enforcement; *see, e.g.*, H.R. Rep. 107-131(I), at 12 (2001); 148 Cong. Rec. S2142 (Mar. 20, 2002) (Sen. Feingold); and (ii) that a number of the Supreme (continued...)

I. TITLE I EXCEEDS CONGRESS' DELEGATED LAWMAKING POWER AND VIOLATES FUNDAMENTAL PRINCIPLES OF FEDERALISM.

As we have shown, Title I makes it a federal offense – punishable by up to five years in prison – for any RNC official to send a fundraising letter soliciting state-regulated money for a state candidate, even in an odd-numbered year when no federal candidate appears on the ballot. RNC Br. 25-26.[14] Thus, for instance, whereas RNC Deputy Chairman Jack Oliver legally sent a fundraising letter soliciting money for Brett Schundler's 2001 New Jersey gubernatorial campaign, a similar letter sent in 2003 could land Mr. Oliver in the federal pen. RNC Br. 26.

That, we repeat, is preposterous. With no federal candidate on the ballot, what conceivable interest could the Federal Government have in punishing Mr. Oliver for sending the Schundler letter? Defendants' brief offers no answer. Nor does Defendants' brief articulate any federal interest in regulating other national party activities that affect state and local candidates exclusively (*e.g.*, a direct donation to a state or local candidate), or in prohibiting a state party from using state-regulated money for a GOTV flyer that reads "Vote Republican: John Smith for Dogcatcher on November 6." RNC Br. 27-28. Even if Defendants had shown a legitimate and compelling federal interest in further regulating *federal* campaign activity, that interest cannot justify legislation that exceeds Congress' delegated power. Some problems, even if real, are simply not for the Federal Government to correct.

Court's leading election-related cases (including *Buckley* itself) have arisen from pre-enforcement challenges. *See also Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 229-31 (1989); *Tashjian v. Republican Party of Connecticut.*, 479 U.S. 208 (1986).

[14] We note that Defendants repeatedly refer to nonfederal money as "unregulated" money. *E.g.*, Def. Br. 2, 11, 35, 53, 81, 90, 91, 96. Nonfederal money is *not* unregulated: it is disclosed to the FEC (*id.* 28); and it is "regulated by State law." 67 Fed. Reg. 49064, 49064-65.

Inexplicably, having implicitly acknowledged that Title I is based on no enumerated congressional power other than the Federal Elections Clause, *see, e.g.*, Def. Br. 97 (citing "Elections Clause" alone as basis for congressional regulation), Defendants ignore:

- the origin of the Clause as an express "compromise" pursuant to which Congress and the States would share control of federal elections but States would retain *exclusive control* of their own elections, RNC Br. 29;
- *Federalist* No. 59, in which Alexander Hamilton wrote that a congressional power to regulate state elections would be quickly "condemn[ed] ... both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of State governments," and *their own expert's concession* that "BCRA goes a lot further than Hamilton indicated in Federalist Number 59," RNC Br. 29-30;
- Justice Black's controlling opinion in *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) – cited in the RNC's Complaint, ¶29 – which held that among the most "essential" features of a State's sovereignty is the power to determine "the nature of [its] own machinery for filling local public offices," RNC Br. 36.

* * *

The arguments that Defendants *do* offer (in roughly four pages) reveal a basic misunderstanding of the federalism issues implicated in this case.

A. Defendants Fail to Show that Section 323(a) Is Within Congress' Purview.

As shown, the RNC spends millions of nonfederal dollars every year for activities that cannot possibly have any effect on federal elections – *e.g.*, $15.6 million in 2001 in States where there were no federal candidates on the ballot; $5.6 million in direct contributions to state and local candidates in 2000; fundraising letters specifically for state and local candidates; and 82 trips to 67 cities this year by RNC Chairman Racicot, largely to assist state and local parties and candidates with fundraising. RNC Br. 6-7, 10, 20. The RNC also spends millions of nonfederal dollars for activities that have, at most, an attenuated relationship to federal elections, such as paying its utility bills. *Id.* at 45. Defendants deny none of this; rather, throughout their brief Defendants use vague terms like "most" or "the bulk" to describe the portion of national party

"soft" money that they claim is used to influence federal elections. Def. Br. 26, 28; *see also id.* at 28 ("primary" focus on federal elections), 36 ("enormous" quantities for federal elections), 102 ("most"), I-8 ("major" share), I-31 ("by and large"). Defendants cannot bring themselves to say that "all" national party nonfederal money affects federal elections, because it doesn't.

Even assuming (and we do not) that "most" of the RNC's nonfederal spending goes to federal elections, the Government would be empowered to regulate only "most" – *but not all* – nonfederal spending by national parties. That, of course, is *precisely* the system that existed pre-BCRA under the FEC's allocation regulations – the FEC required use of federal money for "most" (either 60% or 65%, depending on the year) of national parties' outlays for "mixed" activities that affect both federal and state elections. And this is the approach Congress at least purported to take in §323(b), requiring state parties to use nonfederal money for (the overbroadly-defined) "Federal election activity," but allowing them to use nonfederal money for other activities. In stark contrast to both of these approaches, §323(a) imposes a flat ban – it forbids *all* national party receipt or use of nonfederal money for *any* purpose. There is thus a fatal mismatch between Defendants' justification for §323(a) ("most") and §323(a)'s sweep (all).

Defendants are able to muster only two possible explanations for §323(a)'s patent overbreadth. Quoting Congressman Shays, Defendants argue that the Federal Government can regulate the national parties' financial involvement in purely state and local electoral activities because "the national parties [i] operate at the national level, and [ii] are inextricably intertwined with federal officers and candidates, who raise the money for the national party committees." Def. Br. 96 (quoting 148 Cong. Rec. H408-09 (Feb. 13, 2002)).

Congressman Shays' first point seems to derive from his misperception that *national* parties are instead *federal* parties engaged solely in *federal* election activity. RNC Br. 6 (citing

Shays CX). But that is false. Further, there is no logical stopping point to Defendants' argument that Congress has plenary authority over any entity simply because its activities, taken as a whole, might affect federal officeholders. Defendants' own expert conceded that such logic would allow the Federal Government to regulate *everything* the national – and, indeed, the state – parties do. Green CX 129-34 ("no limits in principle" on Congress' authority over national parties); *id.* 134-38 (logic extends to state parties by virtue of their role in redistricting).

Defendants' second justification – that national parties are "inextricably intertwined with federal officeholders" – also fails. Initially, as shown, the RNC rarely engages federal officeholders to solicit money; rather, as a matter of policy, RNC solicitations are conducted by the RNC's officers or by professional fundraising staff. RNC Br. 8. More fundamentally, Defendants' purported concern with federal officeholders' fundraising activity rings hollow given that Title I gives federal officeholders *more* freedom – not less – to engage in fundraising activity than it gives to national party officials.[15] If the Members of Congress were concerned with their own fundraising practices, they could have constrained their own ability to raise nonfederal money, while leaving party officials free to participate in state-related activity. But that is precisely the *opposite* of what Congress did.

B. Defendants Fail to Show that Section 323(b) Is Within Congress' Purview.

As shown, the Federal Elections Clause allocates shared responsibility to the States and Federal Government for Federal elections, but leaves with the States absolute authority over state elections. RNC Br. 29, 33-34. Thus, even when legislating with regard to *federal* elections,

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[15] Federal officeholders, for instance, may speak at state-party fundraising events, §323(e)(3), and may raise money for state parties and candidates, §323(e)(1)(B); read literally, Title I prohibits national party officials from doing either, §323(a). Further, federal officeholders may raise money for tax-exempt §501(c) organizations like the NAACP or the NRA, §323(e)(4); political parties and their officials may not, §323(d).

Congress has an affirmative obligation to legislate *around* and in deference to the state election activity.

Defendants claim that Congress carefully crafted the definition of "Federal election activity" in §323(b) to encompass only those state-party activities that have a "substantial impact" on federal elections. Def. Br. 109. As an initial matter, we reject Defendants' view that a *substantial* impact on a federal election would alone justify *full* federal regulation of an *entire* activity, with no adjustment for the state's sovereign interest. That premise was laid to rest in *Oregon v. Mitchell*, in which the Court found a federal interest in lowering the voting age in federal elections, but invalidated legislation lowering the voting age in simultaneously-occurring state elections. 400 U.S. at 118-19. Even *Ex parte Siebold*, 100 U.S. 371 (1879), the only major Federal Elections Clause case cited by Defendants, indicates that where state and federal elections are held simultaneously, Congress has the power only "to make regulations *in reference to the latter*." *Id.* at 393 (emphasis added).[16]

Even if defendant's "substantial impact" test were the law, §323(b) would fail.[17] Section 323(b) fully regulates the Smith for Dogcatcher flier, *see supra* at 17, as well as a slate card that lists 20 or more state candidates and referenda, but only a single federal candidate. But the effect of those activities, and others like them, on federal elections, is attenuated, *not substantial*.

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[16] *United States v. Bowman*, 636 F.2d 1003 (5th Cir. 1981), is likewise distinguishable, as it stands, at most, for the proposition that Congress may regulate "the federal aspects" (Def. Br. 110) of a joint state-federal election. Congress here has gone much farther.

[17] Defendants' reveal their true theory of federal power in explaining the Levin Amendment as an act of legislative grace: "Congress was not constitutionally required to provide state-level committees with the option of using Levin funds," but rather "could have required those committees to fund federal election activity *entirely* with hard money." Def. Br. 108. But while the activities that §323(b) euphemistically calls "Federal election activit[ies]" (*e.g.*, voter registration, voter identification, GOTV) might to some degree affect federal elections, they also affect (often to a greater degree) state and local elections.

II. TITLE I SPLINTERS THE VARIOUS ELEMENTS OF THE POLITICAL PARTY APPARATUS AND THEREBY INFRINGES THE FIRST AMENDMENT RIGHT OF ASSOCIATION.

A. Title I's Associational Restrictions Are Subject to Strict Scrutiny.

In our opening brief, we detailed the extensive cooperation and coordination among various individuals and party committees necessary to conduct a successful Victory Program. RNC Br. 6-10. We also catalogued the numerous ways in which Title I prevents the various elements of a political party from working together, and thereby prevents any exercise of a meaningful First Amendment right of association. *Id.* at 39-44. Because, we explained, the burdens imposed on political parties by Title I are not "insubstantial," *Healy v. James*, 408 U.S. 169, 182 (1972), but, rather, are "heav[y]" and "severe," *California Democratic Party v. Jones*, 530 U.S. 567, 582 (2000), Title I is subject to strict constitutional scrutiny. RNC Br. 39, 44.

Defendants' two arguments in response completely miss the boat. First, they claim that *Buckley* "forecloses plaintiffs' First Amendment challenge" to §323(a). Def. Br. 64. Defendants are wrong. *Buckley* dealt with a claim on behalf of *individual contributors*, who wished to "associate" with particular candidates by giving money. 424 U.S. at 22 ("Making a contribution, like joining a political party, serves to affiliate a person with a candidate."). With respect to *that* claim, the Court held that while FECA's contribution-to-candidate ceilings limited the degree to which an individual could associate (giving money), it was the act of contributing, not the amount, that carried associational implications. *Id.* at 22, 28.

The associational claim here is different, and more fundamental. This is not a case about merely preventing individuals from "associating" through financial contributions. This is a case about a statute that builds "firewall[s]" (McCain Dep. 223) – enforced by criminal sanction – within the existing structures of American political parties. Specifically, the statute here: has already required the Republican Governors' Association (quite literally) to move out of RNC

headquarters[18]; prohibits Republican Party officials, candidates, and campaign professionals from sitting down at a table to discuss the creation, funding, and implementation of Victory Plans (RNC Br. 9, 39-40); criminalizes an RNC officer's act of raising state-regulated money for a state or local party or candidate (RNC Br. 41); and prohibits two local parties within the same state from working together to raise Levin money for voter mobilization, *id.* The obvious effect is to restrict the ability of the Republican Party's component parts to associate with one another on political activities at the very core of the First Amendment.

Second, Defendants suggest that "[i]t is unclear whether organizations even have a First Amendment right to associate with other organizations" (Def. Br. 89) and that, in any event, Title I does not infringe any such right because (i) the national parties remain free to solicit for and transfer federally-regulated money to state and local parties, and (ii) national, state, and local parties remain free to "confer[] about spending priorities or any other issues." Def. Br. 89-90.

As an initial matter, the RNC Plaintiffs' principal argument here is *not* that the Republican Party is somehow precluded from associating with "other organizations" (although Title I clearly does inhibit the Party's association with tax-exempt and other allied groups, *see* RNC Br. 42); rather, our argument is that Title I precludes the *Republican Party itself* from functioning as a cohesive unit. RNC Br. 39-42. The Republican Party is a single, unitary organization that comprises various interrelated parts – the RNC, state and local parties, the RNC's 165 members, candidates identifying themselves as "Republicans," and so forth. Indeed, the state parties select the 165 voting members of the RNC, and the party through its convention and other mechanisms nominates candidates. Further, Defendants' argument is somewhat

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[18] Thomas B. Edsall, *New Ways to Harness Soft Money in Works,* WASH. POST., A1 (Aug. 25, 2002))("sever[] all ties").

disingenuous given that *BCRA itself* treats the Republican Party as a unitary association. BCRA §213 (national, state, and local party committees constitute single organization). Title I's defect is that it inhibits (or, in some cases, prohibits) one arm of the party from associating with another. Supreme Court precedent clearly protects a political party's right to determine and maintain its own internal processes, activities, and structure free from government interference. *See, e.g., Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 229-31 (1989); *Cousins v. Wigoda*, 419 U.S. 477, 489-91 (1975).

Moreover, it is simply not the case, as Defendants suggest, that national parties "remain free" to transfer federal money to state and local parties (Def. Br. 89), and that "BCRA does not prevent the national, state, and local parties from conferring about spending priorities and other issues" (Def. Br. 89-90). Rather, as shown (RNC Br. 22, 28, 40), and as Defendants ultimately concede (Def. Br. 107), the Levin Amendment requires that *all* money – federal and Levin money alike – that is used for critical grassroots activities be "home grown." §§323(b)(2)(B)(iv), 323(b)(2)(C). Accordingly, if the RNC transfers *even one* federal dollar into a state for GOTV, the entire program must be paid for with 100% federal money. Further, as shown (RNC Br. 40), §323(a)'s unqualified prohibition on RNC agents "spend[ing]" or "direct[ing]" nonfederal money will effectively preclude RNC participation in designing and implementing Victory Plans that use nonfederal money (including Levin money) – even in states holding off-year elections.

B. Title I's Associational Restrictions Cannot Satisfy Any Form of Heightened Scrutiny.

In our opening brief (RNC Br. 44-46), we showed that Title I's restrictions on associational activity cannot come close to satisfying strict judicial scrutiny and, indeed, that Title I could not survive any form of heightened scrutiny. Defendants' brief provides no basis

for concluding otherwise. Because the question whether Title I can survive heightened scrutiny is common to the remainder of the RNC's claims, we treat the issue at some length here.

Initially, we note that Defendants treat *Buckley*'s contribution-to-candidate rationale as controlling, and have defended the statute solely in terms of intermediate scrutiny. Def. Br. I-51 (repeating *Buckley*'s intermediate standard and arguing that §323(a) "satisfies *this standard*"); *id* at I-55 (asserting Title I's various restrictions are "closely drawn"). They offer no argument that Title I restrictions are "narrowly tailored," and have affirmatively refused any attempt to justify those limits as the "least restrictive means" available. *Id.* at I-16, I-55. Under strict scrutiny, they lose. In any event, Title I's restrictions cannot survive any meaningful scrutiny.

1. Defendants' Claim that Congress' "Prophylactic" Regulation in Title I Is Entitled to "Deference" Is Unfounded.

Defendants repeatedly claim that Congress' supposed "expertise" in dealing with the campaign finance system, and its attempt to establish "prophylactic measures," deserves "deference." *E.g.*, Def. Br. 1, 10-11, 60, 117, I-55. Ordinarily, of course, the sort of prophylaxis that Defendants acknowledge is at work here is patently impermissible when constitutional rights are at stake – prophylaxis being the antithesis of careful tailoring. *See, e.g., Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 798 (1988). The case that Defendants uniformly cite in support of their claim to deference is *FEC v. National Right To Work Committee*, 459 U.S. 197 (1982) ("*NRWC*"). What Defendants fail to reveal is that the Supreme Court in *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) ("*NCPAC*"), expressly distinguished *NRWC* in a way that bears directly on this case.[19] Specifically, in *NCPAC* the Court noted that the FEC – in terms materially identical to those

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[19] Notably, then-Justice Rehnquist authored both *NRWC* and *NCPAC*.

Defendants use here – had urged it "to uphold [the provision there at issue] as a prophylactic measure deemed necessary by Congress, which has far more expertise than the Judiciary in campaign finance and corrupting influences." 470 U.S. at 500. But the Court refused to defer, and distinguished *NRWC* as involving corporate "war chests," saying that "[h]ere ... the groups and associations in question ... are quite different from the traditional corporations organized for economic gain" because they are "designed expressly to participate in political debate." *Id.* at 500-01. Surely no entity is more "expressly" "designed to participate in the political debate" than a political party. All party activities, therefore, may not be "indiscriminately lump[ed]" together under a broad prophylactic rule. *Id.* at 500.

2. Defendants Have Not Demonstrated Any Overriding Government Interest.

The Supreme Court has held that "preventing corruption or the appearance of corruption" of federal officeholders and candidates – "are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *NCPAC*, 470 U.S. at 496-97. Further, the Court has said that "the hallmark of corruption is the financial *quid pro quo*, dollars for political favors." *Id.* at 497. *Compare FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431 441 (2001) ("*Colorado II*") ("undue influence on an officeholder's judgment, and the appearance of such influence"). As the FEC has admitted, there is no evidence here that political parties or their agents have engaged in any such *quid pro quo* corruption. RNC Br. 16-17, 62-63. Defendants' carefully selected anecdotes cannot un-ring that bell. Instead, to prevail, Defendants must push the appearance-of-corruption envelope even further – beyond even "undue influence" – to include (i) "access" to lawmakers and (ii) "circumvention" of FECA's contribution-to-candidate limits.

Access. If the frequency with which they invoke the concept is any indication, combating "access" to lawmakers is Defendants' principal theory of corruption. In view of the

millions spent by corporations, labor unions, and interest groups on lobbying activity, Defendants' claim that BCRA will equalize "access" is quite naïve. *See also* FoF ¶¶105-06.

In any event, Defendants have cited no case – nor are we aware of any – in which any court has accepted "access" to lawmakers as a stand-alone basis for campaign-finance regulation. More fundamentally, the "access" that Defendants decry is actually a component of the right of petition, which is protected by the plain language of the First Amendment and which the Supreme Court has held is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). Indeed, defense witness former DNC Chairman Don Fowler "insist[ed]" in his declaration, in the context of describing meetings between donors and lawmakers, "that party officials have a duty and responsibility to provide linkage between the people and the government." Fowler Decl. ¶9[20]; *see also* Herrnson Dep. 284-85, 302. Finally, as discussed in greater detail below, *see infra* at 31-32, 44-48, the fact that Title I leaves open so many other means by which interest groups may use "soft money" to obtain "access" casts doubt on the importance of the Government's interest in preventing it.

Circumvention. Although Defendants are unclear about exactly what they mean by "circumvention," the case on which they most heavily rely uses the term more precisely – and in a way that renders it inapplicable here. In *Colorado II*, the Court sustained a limit on coordinated party hard-money expenditures, in part, on the basis that it prevented

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[20] To be sure, Fowler urged party officials to facilitate this "linkage" both for contributors and non-contributors, and regrets that the system currently gives contributors a "disproportionate advantage." Fowler Decl. ¶9. But the Supreme Court in *Buckley* flatly rejected as illegitimate any supposed government interest in "leveling the playing field," so to speak, between wealthy and other speakers. 424 U.S. at 48-49 (no legitimate interest in "in equalizing the relative ability of individuals and groups to influence the outcome of elections").

"circumvention" of FECA's limitation on the amount that an individual may contribute directly to a candidate. 533 U.S. at 465. The Court found reason to suspect that the party may have been acting as a "conduit" between a contributor and a candidate. *Id.* at 464. But the Court carefully limited its "anti-circumvention" rationale to cases involving coordinated party spending where the spending by the party was most like a contribution to the candidate. It distinguished *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado I*"), for instance, as involving *independent* party spending and, thus, as not posing a problem of "corruption-by-conduit." *Colorado II*, 533 U.S. at 464. In contrast, Title I applies equally to money spent independently of in coordination with a particular candidate – and, even to money raised and spent to pay a party's utility bills.

Inasmuch as Defendants urge, as they seem to, a broader notion of circumvention, their arguments must be rejected. If the Government could regulate any activity merely by claiming that it "circumvents" existing law, with no further showing, the whole notion of narrow tailoring (or of closely drawing) would be meaningless. *Any* appropriately narrow regulation of liberty serving a truly "compelling interest" would become a platform for *pervasive* regulation of other liberty to preclude "circumvention." But that reverses the applicable presumption when constitutional rights are at stake: where allowable, campaign finance regulation is a narrow exception to the Constitution's provisions; it is *not*, as Defendants would have it, the other way around.[21]

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[21] Finally, any claim Defendants may make here about the "importance" of government interests is significantly – if not fatally – undermined by Congress' inclusion in BCRA of the so-called Millionaire's Provisions, which in certain instances (i) increase contribution limits six-fold and (ii) outright abolish coordinated expenditure limits – both of which the Government has for years insisted were absolutely *necessary* to prevent corruption. RNC Br. 73-75.

3. Far from Being Even Minimally Tailored, Title I's Restrictions Are Grossly Overbroad.

As shown (RNC BR. 44-45), §323(a) is not even minimally tailored. Indeed, Supreme Court precedent forecloses any argument that §323(a) is appropriately tailored. The Court has said that the "opportunity for corruption" posed by "unregulated 'soft money' contributions to a party for certain activities, such as electing candidates for state office or for voter registration and 'get out the vote' drives" is "*at best, attenuated.*" *Colorado I*, 518 U.S. at 616 (emphasis added). In other words, even assuming that some nonfederal money could appear to corrupt, *not all does*. Section 323(a), of course, makes no exception for any activity.

We have also shown that Title I's differential treatment of party officials and federal officeholders – allowing the latter *more* freedom to engage in fundraising than the former, *see supra* at 20 n.15 – defies rational explanation and precludes any determination that Title I's restrictions are narrowly tailored. RNC Br. 45-46. Indeed, in this respect (as in so many others), Title I gets matters precisely backwards: it is the corruption of public servants – not parties or their officials – with which campaign finance legislation is purportedly concerned. RNC Br. 46.

Asked point blank, neither Senator McCain nor Senator Feingold could come up with any reason for subjecting parties and their officials to *more* stringent fundraising restrictions than federal officeholders and candidates themselves. RNC Br. 46. And Defendants' brief only confirms Title I's utter arbitrariness and irrationality. Defendants, for instance, defend §323(d)'s absolute ban on party §501(c) solicitations on the ground that "the close relationship and identity of interests between party committees and federal candidates and officeholders present unique threats of corruption." Def. Br. 120. But if an officeholder's relationship to his party is "close," how much closer is the officeholder's relationship to *himself*? And why, if the Government is

concerned with candidate and officeholder corruption, does Title I permit the candidates and officeholders *themselves* to engage in the very solicitations that party officials may not?

Strikingly, Defendants claim that "the fundraising activities of federal officeholders and candidates affect federal elections and the integrity of the federal government *even when the funds solicited are to be used for purposes other than federal election activity*." Def. Br. 126 (emphasis added). If Defendants' premise is correct – and it must be if §323(a) is to be sustained in all its breadth – then it is corrupting for federal officeholders to raise any money whatsoever: for state and local parties and candidates, for politically active tax-exempt organizations, for the Red Cross, the opera, the church, or any other cause. Of course, BCRA allows all of this fundraising to continue (thus highlighting Title I's fatal underinclusiveness), but Defendants' argument logically implies that it, too, is all corrupting and could *all be prohibited*.[22] As it is, to the extent that lawmakers lean on special interests for, or that special interests curry favor through, donations to officeholders' favorite causes, ample opportunities will remain.

Finally, we have shown (RNC Br. 20) that Congress was concerned primarily with parties' use of nonfederal money for issue ads. *See, e.g.*, McCain Dep. 192-93 (grassroots activities are "the fundamentals of a democratic process" but "it's the broadcast television and radio ads that we believe are what is the problem"). Defendants' brief confirms this – it reports that in using nonfederal money to influence federal elections the parties have acted "primarily through 'issue ads,'" Def. Br. 69, and is replete with suggestions of the supposed evils of such

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[22] According to Defendants, the problem with solicitations by lawmakers is that those who are asked to donate do so "because they believe that if they do not, they will lose access to federal officials and may face adverse legislative consequences." Def. Br. 85. This problem, Defendants expressly state, "is not limited to solicitations made on behalf of national party committees" but extends also, for instance, to those made for tax-exempt organizations, Def. Br. 124 which, of course, Title I continues to permit.

ads. *See, e.g.*, *id.* at 29-30, 32, 69, I-8 to I-12, I-36. But, as shown, *see supra* at 11, party issue advocacy is not a bad thing, but a good thing. Moreover, only a little more than a third (36%) of the nonfederal money raised by the RNC in 2000 went to fund issue ads. The record also reflects that state parties spent less than half (44%) of their nonfederal money on issue ads; the rest went to overhead, voter-mobilization, grassroots activities, and the like. La Raja Decl. ¶22. But Title I prohibits national party committees from receiving or using nonfederal money not just for issue advertising, but *for any purpose whatsoever*, including for the very grass-roots activities (voter registration, get-out-the-vote, and the like) that Senator McCain says he wants to encourage.

Congress could have pursued its objectives by markedly less drastic means – perhaps by strictly limiting the fundraising activities of federal officeholders and candidates or by imposing on political parties an "electioneering communication" restriction similar to the one imposed on corporate- and union-funded ads under Title II. Even these alternatives would have raised serious constitutional questions, but both would have been decidedly less burdensome that Title I's blunderbuss approach.

4. Title I Is Fatally Underinclusive and Will Be Wholly Ineffective in Accomplishing Congress' Asserted Purpose.

If special "access" is a problem at all as it relates to political parties, we have shown that it is no more a problem among nonfederal donors than it is among federal donors, and that, in fact, in the RNC's experience the relatively few donors who have (unsuccessfully) sought special access to officeholders have tended to be donors of federally-regulated money. RNC Br. 63. BCRA, of course, does not purport to limit the influence of federal money donors. As shown, *see supra* at 7-8, the public simply doesn't appreciate these fine distinctions.

More troublesome, Title I leaves special interest groups free to raise and spend unlimited amounts of unregulated and undisclosed money however and virtually whenever they see fit.

BCRA can hardly be said to advance any interest in minimizing corruption when it leaves such an obvious, and gaping, hole exposed. RNC Br. 64-65.

The point, which Defendants' own experts seem to appreciate, RNC Br. 70 n.21, *is that Title I simply will not work.* Indeed, many of the very examples Defendants use to justify Title I will, in fact, remain permissible under BCRA. A few examples –

- Because §323(b) does not limit state parties' receipt of soft money, Def. Br. 58, Roger Tamraz can continue donating to "*state* Democratic parties." Def. Br. I-33 (Defendants' emphasis).

- By spending gobs and gobs of nonfederal money on voter mobilization and other grassroots activities, print ads, and broadcast ads outside the narrow 30/60 day window, corporations and unions will continue to "use their general treasury funds to influence federal elections." Def. Br. 2.

- Contrary to Defendants' assumption, BCRA will not "put[] an end" to the "spectacle" of lawmakers "raising soft money contributions from corporations, labor unions, and wealthy individuals who have important policy matters pending before the federal government." Def. Br. I-4. Instead, they will continue to raise unregulated money for tax-exempt organizations like the NRA and the Sierra Club.

Defendants say that it shouldn't matter that Title I won't solve the very problems that constitute the asserted "compelling" need for the statute because BCRA is merely part of Congress' "'careful legislative adjustment of the federal electoral laws, in a "cautious advance, step by step," to which the Supreme Court has accorded 'considerable deference.'" Def. Br. 1 (quoting *NRWC*, 459 U.S. at 209). Apart from the illogic of Defendants' effort to justify a statute by invoking problems it can't cure, Defendants' selective quotation masks what the *NRWC* Court actually said: that Congress' "'cautious advance, step by step,' *to account for the particular legal and economic attributes of corporations and labor organizations* warrants considerable deference." 459 U.S. at 209 (citation omitted and emphasis added). As shown, *see supra* at 25-26, the Court has expressly refused to extend *NRWC*'s "deference" rationale to

attempted regulation of entities, like parties, that are "designed expressly to participate in political debate." *NCPAC*, 470 U.S. at 500.

Indeed, the Supreme Court has repeatedly said that in the First Amendment context courts "'may not simply assume that [a regulation] will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity.'" *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986). Rather, as this Court previously stated in this very case, the Government bears the burden of demonstrating that its chosen regulation "will in fact alleviate [the recited] harms in a direct and material way." Ct.'s Order of Aug. 15, 2002, at 10 (citing *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)); *accord Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980).

The prohibition on substantially underinclusive (*i.e.*, substantially ineffective) statutes applies *a fortiori* in the strict scrutiny context, where "courts reject the facile one-bite-at-a-time explanation for rules affecting important First Amendment values." *News America Publishing v. FCC*, 844 F.2d 800, 815 (D.C. Cir. 1988). Rather, a statute's "facial underinclusiveness," the Supreme Court has held, "raises serious doubts about whether [it] is, in fact, serving ... the significant interests which" have been invoked in its support. *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). Indeed, time and time again the Supreme Court has rejected speech regulations as insufficiently effective to achieve their purported ends. *See, e.g., Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2537 (2002); *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978).

III. TITLE I BROADLY PROHIBITS POLITICAL PARTIES, THEIR AGENTS, AND FEDERAL CANDIDATES AND OFFICEHOLDERS FROM "SOLICIT[ING]" FUNDS FOR POLITICAL CAUSES AND THEREBY INFRINGES THE FIRST AMENDMENT RIGHT OF FREE SPEECH.

As shown (RNC Br. 46-47), Title I makes it a crime for an agent of the RNC to utter the words "contribute to the Jones for Governor campaign," even though such contributions are unquestionably legal and even though the words would be legal if uttered by anyone else. Again, Defendants do not join issue.

A. Title I's Solicitation Restrictions Are Subject to Strict Scrutiny.

While Defendants correctly perceive that Title I's solicitation restrictions raise First Amendment concerns, Def. Br. 98, they fail to address any of the Supreme Court's solicitation cases, *see* RNC Br. 47-49. The one-page defense Defendants do offer misses the point and, again, reveals a basic misunderstanding of Title I. Specifically, Defendants emphasize that BCRA allows "State party chairmen and chairwomen, who also serve as members of their national party committees" to "wear multiple hats" and raise nonfederal money for their state parties. Def. Br. 98-99.

But that explanation deals with only the tiniest sliver of the solicitation issue. Defendants have not explained, for example, why it is that RNC Chairman Marc Racicot should not be able to travel to 82 cities raising money for state and local candidates or parties (Josefiak Decl. ¶70); why RNC Co-Chairwoman Ann Wagner (of Missouri) cannot be the keynote speaker at the Shelby County, Tennessee, Republican Women's dinner (RNC Ex. 301); why RNC General Counsel Mike Duncan (who is not a state party chair) cannot raise money for a state senate candidate (Duncan Decl. ¶9); or, more vividly, why RNC Deputy Chairman Jack Oliver's 2001 letter soliciting money for a New Jersey gubernatorial candidate (RNC Ex. 292) would today subject Oliver to federal prosecution. Nor have Defendants explained why all party officials –

national and state – should be banned from soliciting money for any tax-exempt organization that engages in Federal election activity, §323(d).

B. Title I's Solicitation Restrictions Cannot Satisfy Any Form of Heightened Scrutiny.

Title I's solicitation restrictions cannot survive any form of judicial scrutiny. The evidence of "corruption" here nonexistent. Many of the restrictions do not even involve solicitations by federal officeholders, and Title I's solicitation restrictions are not even minimally tailored to address that issue. Section 323(a), of course, is the antithesis of tailored. And, as shown, *see supra* at 20, 29-30, Defendants' repeated warning that there is a heightened risk of corruption when federal officeholders and candidates personally participate in fundraising activities serves only to underscore the irrationality of Title I's solicitation restrictions, which give those very officeholders and candidates substantially more leeway to make solicitations than it gives to party officials.

IV. *BUCKLEY* AND ITS PROGENY CANNOT SALVAGE TITLE I.

A. *Buckley* Cannot Justify Section 323(a)'s Blanket Ban on National Party "Soft Money."

As expected, Defendants seek to sustain §323(a) on the ground that it is merely a "contribution limit" which, as they read *Buckley* and its progeny, is subject to only intermediate scrutiny. Strict scrutiny, not intermediate scrutiny, is appropriate here, however.

It is true that *Buckley* upheld certain limits on "contributions" while striking down limits on "expenditures." Defendants' first error is to assume that all contribution limits are treated the same. *Buckley* upheld the $1000 limit on contributions by individuals to *federal candidates*, the $5000 limit on contributions by political committees to *federal candidates*, and the $25,000 aggregate limit on an individual's *total* federal contributions. *See California Medical Ass'n v. FEC*, 453 U.S. 182, 194 n.15 (1981). Contrary to Defendants' suggestion (Def. Br. 64 n. 57),

Buckley did *not* sustain a $20,000 limit on an individual's contribution to a political party; indeed, that limit was not even added to FECA until the post-*Buckley* 1976 amendments. *See* Pub. L. No. 94-283 §320, 90 Stat. 475 (codified as amended at 2 U.S.C. 441a(a)(1)(B)).

Defendants' invocation of *Buckley* to sustain the restrictions here is thus misplaced because Title I in no way concerns contributions to federal candidates. Indeed, in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) – a case Defendants ignore – the Court with but one dissent struck down a city ordinance that imposed limits on contributions to a political organization engaged in non-candidate issue speech. The Court emphasized that "a Spartan limit – *or indeed any limit* – on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association." *Id.* at 296 (emphasis added). Addressing its holding in *Buckley*, the Court wrote that "*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate*." *Id.* at 296-97 (emphasis in original). Other decisions relied on by Defendants also addressed contributions directly to candidates, or expenditures coordinated with them. *See, e.g., Colorado II*, 533 U.S. 431; *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000).

But when the Court reviewed a state prohibition on an incorporated trade association's receipt and spending of corporate money for express advocacy, it explicitly applied strict scrutiny. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 657 (1990). Defendants concede, for purposes of Title II, that even restrictions on interest group spending of true "soft money" are subject to strict scrutiny. Title I is even *more restrictive* than Title II, prohibiting national parties from both receiving and spending nonfederal money. It is simply

inconceivable that a political party – engaged as its *raison d'etre* in core political speech – would be entitled to less protection than a corporation, union, or interest group.

Moreover, the use to which a contribution is put is also important. Although the plurality in *California Medical* upheld limits on contributions to a political committee established for the purpose of passing those contributions through to candidates, Justice Blackmun, who provided the determinative fifth vote, separately warned that "a different result would follow if [the limitation] were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates." 453 U.S. at 203 (Blackmun, J., concurring). And, indeed, later that same year, the Court in *Citizens Against Rent Control*, employing strict scrutiny, invalidated limits on contributions to a political committee to be used for referendum activity (rather than advocating election of candidates). 454 U.S. at 296.

Section 323(a) recognizes no such distinctions, even though national political parties engage in a wide array of activities – some supporting federal candidates directly or in coordination with them, and others having no relationship whatsoever (or only an attenuated relationship) to federal candidates. In this instance, *Buckley* and its progeny indicate, contributions to the entity may be regulated only to the extent the entity uses the contribution for regulable activity. Thus, to the extent (but only to the extent) that political parties use their money for contributions to federal candidates, coordinated expenditures on behalf of federal candidates, or independent expenditures expressly advocating the election or defeat of federal candidates, the money they receive for those purposes may constitutionally be subjected to a federal contribution limit. On the other hand, insofar as political parties use their funds for activities that involve neither express advocacy nor coordination with federal candidates, contribution limits cannot stand. This, ironically, was essentially the regime that existed pre-

BCRA, in which federal money had to be used for federal activity, but nonfederal money could be used for nonfederal activity and an allocable portion of overhead and other "mixed" activities.

Courts are quite familiar with organizations that engage in some regulable and some non-regulable activities. As one example, in *Austin*, the Court upheld a Michigan statute that required corporations to use regulated money for express advocacy. 494 U.S. at 660-61. On the other hand, "a corporation's payments into the Chamber's general treasury would *not* be considered payments to influence an election, so they would *not* be 'contributions' or 'expenditures' ... and would not be subject to the Act's limitations." *Id.* at 664 (emphasis added). Only if those general treasury funds were "funnel[ed]" into "corporate political spending" would they be prohibited. *Id.* Similarly, here, the RNC engages in some activities that may, consistent with the First Amendment as construed in *Buckley,* be regulated, but many of its activities may not. Defendants' error, and the fundamental error underlying BCRA, is the assumption that *all* funds received by the party can be subjected to a federal contribution limit just because *some* of the party's activities are regulable.[23] As *Austin* shows, even corporations may receive and use unregulated donations to pay overhead, even overhead for their regulated political actions committees. *See also NRWC*, 459 U.S. at 201-02 (corporations and unions may

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[23] On the basis of a passage in *Buckley* suggesting that spending by a "political committee" is "by definition, campaign related," 424 U.S. at 79, Defendants assert that any activity of a political party can be subjected to the most invasive regulation. Def. Br. I-65. Defendants are wrong. First, the Court was in that passage addressing only disclosure requirements – "the least restrictive means of curbing the evils," *id.* at 68 – not contribution limits. Second, the Court defined "political committee" as being "under the control of a candidate or the major purpose of which is the nomination or election of a candidate," whereas the RNC is neither under the control of a single candidate nor engaged in the major purpose of electing a single candidate. Finally, just as it is doubtful that the Court was saying that a gubernatorial candidate's campaign could be subjected to full federal regulation, it is not reasonable to assume that the Court was addressing the many and varied activities of political parties.

"establish and pay the administrative expenses of 'separate segregated funds'" to raise federal money). Surely, political parties may be treated no less favorably.

It is also material that political parties, although not incorporated, are "[v]oluntary political associations" of the type addressed by the Court in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986). There, the Court held that a corporation could not, consistent with the First Amendment, be prohibited from making express-advocacy communications under 2 U.S.C. §§ 441b because it more closely resembled an association engaged in political speech than a major corporation amassing wealth. Like MCFL, the RNC "was formed for the express purpose of promoting political ideas, and cannot engage in business activities," "has no shareholders or other persons affiliated so as to have a claim on its assets or earnings," and was neither established by a business corporation or a labor union nor receives a major portion of its revenue – just 13% in the most recent year (Knopp Decl. ¶9) – from corporations. *Id.* at 264.

In these circumstances, the strict scrutiny applied in *Citizens Against Rent Control* and *Austin* is appropriate. And as we have shown, because §323(a) is simply not narrowly tailored to serve any compelling government interest, it fails strict scrutiny.

B. *Buckley* Cannot Justify Section 323(b)'s Spending Restrictions on State Parties.

All the arguments set forth above for §323(a) also apply to §323(b), but §323(b) suffers from an additional fatal flaw: it is an expenditure limitation of the type the Supreme Court has never condoned. As previously shown (RNC Br. 21-23), and as Defendants themselves expressly acknowledge, §323(b) leaves state political parties "entirely free to continue to raise funds beyond the federal limits in accordance with state law." Def. Br. 58. Rather than prohibiting the contribution of such funds, §323(b) restricts the manner in which state parties may *spend* these funds. We agree with the implicit congressional recognition that the Federal

Government cannot constitutionally restrict such donations, but the point remains that the state parties will continue to receive such corporate, union, and large individual donations.

Having advanced no rationale for restricting spending by political parties of money already legally raised, Defendants cannot salvage §323(b) under the strict scrutiny that unquestionably applies to spending limits. Section 323(e) independently restricts the involvement of federal officeholders and candidates in raising nonfederal funds for state parties; accordingly, the use of such funds for activities such as voter registration or get-out-the-vote activities simply cannot be corrupting.

C. Title I Undermines Effective Political Advocacy.

Title I will deprive the RNC of $125 million in presidential election years and $48.5 million in other years; is requiring the RNC to lay off 40% of its staff and radically reduce its operations; will likely deprive the Republican Parties of Kentucky, Wisconsin, and Oregon of 60%, 64%, and 77% of their total funding by its restriction on national party transfers; will deprive Republican state parties of over half of their nonfederal receipts and Democratic state parties of 63%; and will in effect reduce many state parties to a "nominal" existence. RNC Br. 14-16. It is not realistic to believe national or state parties can bridge this shortfall. *Id.*

For their part, Defendants deny "that the parties will be silenced," Def. Br. I-57, rely on their own experts (none of whom has worked for or raised money for a political party) to speculate that parties "'might be better served by making campaign funds more difficult to raise,'" *id.* at I-70-71 (quoting Dr. Green), and even (mis)quote Dr. La Raja's dissertation for the proposition that "the parties will survive and possibly thrive," *id.* at I-71.

We have, of course, never claimed that parties will be "silenced" or will not "survive." Rather, we have shown severe restrictions on their "effective advocacy" and their participation in the political process. And at a time when interest group activity is increasing geometrically from

cycle to cycle, RNC Br. 10-13, it is nonsensical to assert that "making campaign funds more difficult to raise" would somehow "be better" for parties.

V. TITLE I SUBJECTS POLITICAL PARTIES TO UNIQUE DISABILITIES NOT IMPOSED ON SPECIAL INTEREST GROUPS AND THEREBY VIOLATES THE EQUAL PROTECTION COMPONENTS OF THE FIRST AND FIFTH AMENDMENTS.

A. Title I Subjects Political Parties to Onerous Burdens Not Imposed on Special Interest Groups.

As shown (RNC Br. 57-60), Title I places political parties at a serious disadvantage in relation to special interest groups. Defendants cannot deny the differential treatment, but instead assert that parties are "unique" and (in essence) deserve the additional burdens.

To begin with, Defendants studiously ignore *Colorado I*, which invoked the language of equal treatment to hold that "[w]e do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties," 518 U.S. at 618, and that "[w]e are not aware of any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction," *id.* at 616. *See also* RNC Br. 61 & n.16 (Supreme Court decisions clarifying that parties may not be treated worse than other political actors).

Moreover, none of Defendants' arguments concerning parties' "uniqueness" is persuasive. *First*, Defendants assert that parties are "unique" because they have "extremely close relationship[s] to federal officeholders and influential party leaders, which permit[] parties to offer access to federal officials" in exchange for large donations. Def. Br. 92. We rebutted this argument in our opening brief: (i) the notion that parties provide donors with any real "access" *at all* is greatly exaggerated and distorted, RNC Br. 18-19; (ii) to the extent that "access" is an issue it is no more an issue among donors of nonfederal money than among donors of federal money, *id.* at 63; and (iii) special interest groups, whose nonfederal money BCRA

leaves virtually unregulated, enjoy and provide the same, if not greater, "access" to public servants through "special meetings and receptions" that parties purportedly do, *id.* at 64-65. More fundamentally, the close relationship between parties and officeholders is not a bad thing. It results from the parties' speech and associational activities at the heart of the First Amendment. *See supra* at 27. It would be odd indeed if the exercise of these fundamental rights could serve as a basis to discriminate against parties by saddling them with unique speech burdens.

Second, as anticipated (RNC Br. 60 n.14), Defendants suggest that parties are unique because they enjoy certain advantages under FECA (*e.g.*, they may make and receive larger hard-money contributions, they may receive public funds for their quadrennial conventions), and that those advantages somehow purge Title I's equal protection defects. Def. Br. 90. But that argument fails on multiple levels. Most fundamentally, it ignores *Colorado I*, which expressly recognized the right of parties to make independent expenditures on the same basis as individuals, candidates, and other political committees – even though none of those enjoy the benefits touted by Defendants. 518 U.S. at 616-19. Further, as the Supreme Court there recognized, Congress has accorded political parties advantages because it has concluded, as has the Court itself,[24] that "a vigorous party system is vital to American politics ...." S. Rep. No. 93-689, 1974 U.S.C.C.A.N. 5587, 5593.[25]

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[24] *Jones*, 530 U.S. at 574; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357, 363 (1997); *Colorado I*, 518 U.S. at 618; *Eu*, 489 U.S. at 223-24; *Davis v. Bandemer*, 478 U.S. 109, 144-45 (1986) (O'Connor, J., concurring).

[25] *See also, e.g.*, S. Rep. No. 95-300, at 3 (1977) ("substantially strengthen and broaden the scope of permissible activity of the Nation's political parties"); Hearing Before the Senate Comm. on Rules & Admin., 96th Cong., at 21 (1979) (statement of FEC) ("Political parties have a central role to play in the political system."); 119 Cong. Rec. S5194 (Apr. 3, 1974) (Sen. Baker) ("I think that the party system in the United States is a blessing in many respects ....").

Even if relevant, these benefits are significantly overstated by Defendants. Convention funding comes only as part of a bargain – which a party may accept or reject every four years – in which public money is exchanged for the party's explicit agreement to a spending cap, restrictions on use of the funds, and a post-convention audit. 2 U.S.C. § 9008(c), (d), (h). Moreover, BCRA severely restricts the ability of parties to transfer federally regulated money through imposition of the "home grown" requirement. And parties, of course, confront far more extensive disclosure and reporting obligations than do interest groups. Further, whatever federal-money advantages political parties may enjoy over other political actors, those advantages are by definition *limited*, because contributions and expenditures of federal money are limited. Those advantages pale in comparison to the *unlimited* advantage in nonfederal money Title I confers on special interest groups. As special interests take in more and more nonfederal money that once went to parties – as they will (RNC Br. 13, 67) – they will quickly eclipse parties as the principal players in electoral politics.

Finally, it simply is not the law that any time government has accorded one entity certain advantages (*e.g.*, favorable tax treatment), it may single out that entity and saddle it with burdens not imposed on others. The D.C. Circuit's decision in *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978), is illustrative. The court there invalidated a provision of the Communications Act that required all noncommercial educational radio and television stations that received federal funding to make recordings of all broadcasts "in which any issue of public importance is discussed." The court held that by singling out noncommercial stations while leaving commercial stations alone the law violated the Fifth Amendment's equal protection component. Significantly, the court so held despite the fact that the Act provided many benefits and advantages to noncommercial stations – including, most notably, direct public

funding. *See also Minneapolis Star & Tribune Co. v. Minnesota Comm'n of Revenue*, 460 U.S. 575, 588-90 (1983); *cf. Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001) (government may not condition benefits on forfeiture of speech rights); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (same).

B. Title I's Differential Treatment of Political Parties and Special Interest Groups Is Subject to Strict Scrutiny.

In our opening brief, we showed that Title I is subject to strict scrutiny because it constitutes (i) a speaker-based regulation of expression and (ii) a statutory classification impinging on a fundamental right. RNC Br. 57-59. We also showed that Title I puts political parties at a *massive* disadvantage relative to special interest groups, which, quite unlike parties, will be able under BCRA to continue using nonfederal money for all manner of campaign-related activities. *Id.* at 59-60. Defendants' brief gives no reason to conclude to the contrary.

C. Title I's Differential Treatment of Political Parties and Special Interest Groups Cannot Satisfy Any Form of Heightened Scrutiny.

1. By Subjecting Political Parties to Unique Speech Disabilities Not Imposed on Interest Groups, Title I Runs Counter to Both Precedent and Logic.

The RNC's equal protection argument flows directly from the Supreme Court's two most recent decisions involving campaign finance restrictions on political parties – one of which Defendants conveniently ignore, and the other of which Defendants quote again and again but seem to misunderstand. In *Colorado I*, which Defendants ignore, the Court (i) held that parties could not be treated worse than individuals, candidates, or ordinary political committee, and (ii) said that the "opportunity for corruption" posed by "unregulated 'soft money' contributions to a party for certain activities such as electing candidates for state office or for voter registration and 'get out the vote' drives" is "*at best, attenuated.*" 518 U.S. at 616 (emphasis added). Thus, the Supreme Court itself has recognized that, *at the very least*, there are uses to which political

parties may put non-federally-regulated money that do not risk corruption. Nonetheless, §323(a) prohibits national parties from raising or spending nonfederal money in *any* amount for *any* purpose whatsoever.

In *Colorado II*, which Defendants cite but seem to misunderstand, the Court noted that "whether they like it or not, [political parties] act as agents for spending on behalf of *those* who seek to produce obligated officeholders." 533 U.S. at 452 (emphasis added). Defendants repeatedly quote this passage, *see* Def. Br. 4, 12, 71, 92, 111, I-45, I-54, but never stop long enough to ask who "those" are that the *Colorado II* Court said "seek to produce obligated officeholders." As the context of the quotation (which Defendants ignore) reveals, "those" are not the parties themselves but, rather, the *narrow special interest groups*. Thus, as we explained (RNC Br. 66), *Colorado II* holds that coordinated party spending may be limited only because parties sometimes act as unwitting "agents" or "conduits" through which special interests channel their own arguably corrupting contributions. By categorically prohibiting national parties from raising or spending nonfederal money for any purpose but leaving special interest groups largely free to use unregulated *and* undisclosed money, Title I flips the Supreme Court's reasoning on its head. Title I simply cuts out the middleman, all the while permitting – indeed encouraging – the special interests themselves to make their allegedly corrupting disbursements directly.

Accordingly, the chief failing of Defendants' equal protection argument is that it altogether fails to tell the proverbial "rest of the story." Indicative of this failing is Defendants' selective and misleading quotation of RNC lead counsel's testimony before a Senate panel considering an early version of BCRA. *See supra* at 14-15. Beyond the snippet that Defendants tried to twist for their own purposes, the testimony explains how any campaign finance law that

restricted political parties' use of nonfederal money but left corporations, unions, and other special interest groups free to use such money would harm the electoral process and violate equal protection principles.

The fact that interest groups will make out like bandits under BCRA may be lost on Defendants, but it is not lost on the rest of America. As shown, CNN and the *Washington Post* have both chronicled the coming "explosion" of interest group activity. Defendants' suggestion that Title II's partial restriction on "electioneering communications" (assuming it is upheld) will prevent interest groups from dominating the electoral landscape (Def. Br. 145) is utterly naïve. Title II restricts only one component of interest group spending (candidate-specific, broadcast issue advocacy) and, indeed, restricts that component only for only a limited time.[26] As Defendants themselves emphasize, Title II has "no application" to issue ads that (i) are run in print or other non-broadcast media; (ii) do not mention a specific candidate; (iii) are run outside the 30/60 day window; or (iv) are not targeted to a mentioned candidate's electorate. Def. Br. I-73. Further, as Defendants acknowledge (Def. Br. 158), BCRA leaves open to interest groups the ability to spend unlimited amounts of nonfederal money on grassroots "ground war" efforts such as mass mailings, phone banks, door-to-door canvassing, leafleting, and other voter mobilization activities. RNC Br. 10-13, 59-60. We have shown that while Congress was busy assaulting the Constitution in Title II – *i.e.*, fighting the "last war" by building a Maginot Line – interest groups were already busy rendering the statute obsolete. BCRA is a stillborn dinosaur, a beast too late for the problems it was designed to solve.

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[26] The RNC does not challenge Title II in this action and, in describing Title II and its effect, does not presume to speak for the plaintiffs who do.

2. Title I's Differential Treatment of Parties and Special Interest Groups Will Make Matters Worse, Not Better.

Our opening brief shows the many ways in which a post-BCRA political system dominated by special interest groups will undermine American democracy. In sum, we showed that ironically – and perversely – BCRA will have the effect of channeling nonfederal money away from political parties and toward special interest groups, which (i) serve narrow, extreme viewpoints, (ii) are not required to report or disclose their campaign fundraising and spending, (iii) are not accountable to the voters at the ballot box, (iv) reinforce the *status quo ante* by overwhelmingly supporting incumbent candidates at the expense of viable challengers, and (v) are responsible for the preponderance of, and the most negative, issue advertising. RNC Br. 67-70.

Defendants themselves repeatedly extol the virtues of disclosure. Def. Br. 116. The RNC Plaintiffs wholeheartedly agree – and, notably, do not challenge here any FECA or BCRA disclosure obligation imposed on parties. But BCRA will *frustrate* disclosure, not enhance it, because it will drive money into the hands of the special interest groups, which – quite unlike parties – are not required to disclose their donations and disbursements. *E.g.*, Def. Br. 43 (interest groups' "lack of disclosure"), 46 ("[e]vasion of FECA's disclosure provisions"), 47 ("they were not making any disclosures to the FEC"). Thus, as we said in our opening brief, BCRA will not push nonfederal money out of federal elections, it will simply push it under the table. RNC Br. 68.

Defendants also bemoan the lack of transparency that results from interest groups' uses of "nondescript pseudonym[s]," "guise[s]," and "front[s]" such as "The Coalition: Americans Working for Real Change," "Citizens for Reform," "Citizens for the Republic Education Fund," and "Citizens for Better Medicare." Def. Br. 38-44, 175. Through the use of these opaque

labels, Defendants say, "[i]nterest groups mask[] their identities, relationships, and private interests from voters" and "undermine[] FECA's policy of transparency in campaign-related spending." Def. Br. I-82. Again, Defendants are right to complain. Unlike the labels "Republican," "Democrat," and "Libertarian," which provide voters with informative signposts, Sorauf CX 130; McCain Dep. 178, the names that special interest groups employ often convey no meaningful information about the groups' identities or philosophies. By driving money out of the hands of parties and into the hands of often-secretive special interests, BCRA will only further muddy the waters.

For these reasons, as well as those identified and explained in our opening brief, by effectively funneling to narrow, secret, and often extreme special interest groups the nonfederal money that once went to broadbased, transparent, and moderate political parties, BCRA will most assuredly make matters worse, not better.

CONCLUSION AND REMEDY

Viewed through any lens – whether federalism (Part I), association (Part II), solicitation (Part III), equal protection (Part V), or even, as Defendants would have it, *Buckley* (Part IV) – Title I suffers from a fatal lack of "fit." Title I is at once so underinclusive and overbroad that its prohibitions border on the irrational.

With respect to remedy, Defendants repeatedly (and rightly) say that neither §323(a) nor §323(b) can meaningfully function without the other. *See, e.g.*, Def. Br. 53, 100, 103, I-13, I-59. Accordingly, to the extent that the Court finds either provision unconstitutional, it should invalidate Title I in its entirety.