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