I. INTRODUCTION OF CALIFORNIA PARTY PLAINTIFFS

Plaintiffs' opening briefs demonstrate that the scope of Title I of BCRA creates "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections," and is therefore substantially overbroad. *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11 (1988). Defendants have, in fact, made little factual effort to refute Plaintiffs' claims that BCRA prohibits or significantly restricts an extremely wide range of lawful conduct. To take but a few examples: it directly restricts state and local parties from spending funds lawfully raised under state law on activities lawful under state law; it prohibits state and local parties from jointly engaging in activities to raise funds lawful under state law, or from transferring those funds internally to reflect their collective priorities; and it restricts state and local parties from engaging in expressive conduct in support of state or local candidates or ballot measures *completely unrelated to federal candidates*.

In addition, BCRA has a chilling effect on many more lawful activities simply by virtue of its failure to define several of the operative words and phrases. In many instances, Defendants' response is simply to assert that Plaintiffs can request Advisory Opinions from the FEC to resolve questions about the application of the statute to a range of protected communications.[1]

The restrictions of Title I are not tailored in *any* attempt to protect constitutionally protected activities; rather, they reflect an effort to eradicate all possible "loopholes" -- both real and perceived, actual and potential. There is no apparent recognition that many of these "loopholes" are the product of careful balances wrought by the Constitution in the first instance, and by careful judicial interpretation in more recent years. Of course, among the most significant of these are the

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[1] *See, e.g.*, Br. 95 (definition of "entity, directly or indirectly....controlled by a national committee"), 114 (definition of "support," "promoted," or "oppose"), 115 (definition of "generic campaign activity"), and 120-21 (definition of "solicit" and "direct" regarding tax-exempt organizations).

constitutional "loopholes" that allows the states to govern themselves and the elections of their representatives, and the "loopholes" created by the constitutional guarantees of free speech and association.

While Congress may take *appropriate* action to address a demonstrated harm, the burden is on the government to clearly and fairly articulate the harm. Instead, Defendants and Intervenors have substituted hyperbole, opinion and innuendo for fact in an effort to salvage the provisions of a statute that is fundamentally at odds with some of our most cherished traditions. To read Defendants' briefs, one could only conclude that our elected officials are accountable only to special interests; that the political parties are little more than money-launderers and facilitators; and that the only value recognized in politics today is a cynical kind of "what have you done for me lately?" Although Defendants have admitted that they know of no instances of *actual* corruption, their briefs are filled with the kind of unproven opinion and speculation that our judicial system was designed to prevent.[2]

Plaintiffs have a different perspective. They see a political system in which differing views are strongly -- even passionately -- held. Year in and year out, the participants in that system try to figure out ways to get their message across to the largest number of people in the most effective ways. Many contribute time, money and resources in the hope that their message finds fruition in public policy.

Elected public officials are the most visible participants in this system, but their election is

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[2] The California parties concur in the observations of other Plaintiffs that in a disturbing number of instances, Defendants' and Intervenors' briefs unabashedly mischaracterize the provisions of BCRA or other relevant law, and make allegations unsupported by factual data or in which the citation provided does not in any way support the proposition for which it is identified. Moreover, both Defendants and Intervenors freely rely upon opinions of either individuals or self-styled "experts" for legal and factual conclusions that they have no demonstrated basis for making, and the acceptance of which runs contrary to normally accepted rules of evidence.

most often the culmination of the collective efforts of active party organizations. Since the process is a quintessentially open and public one, the candidates and parties find themselves involved to varying degrees with like-minded ideological groups and, yes, even persons with narrow self-interests. In a democracy, the decision-making of those public officials will necessarily be subject to support, criticism and pressures from many quarters. It is neither possible, nor desirable, to prevent this.

As has been said many times, the parties' candidates are its "standard-bearers," and they share, reflect and advance the parties' goals in the political process -- goals that are clearly broader than their own electoral victories. It is freely admitted in both the Defendants' and Intervenors' briefs that the participants in this process have acted "legally" -- although that term is curiously used as a sort of indictment, reflecting the view that compliance with the law is nothing but yet another way of exploiting available "loopholes."

Again, all this is not to say that Congress could not appropriately conclude that the existence of some disproportionately large contributors might have an unhealthy effect upon the process of electing federal officials. However BCRA, and in particular Title I, is not limited to addressing this identified "harm." In the name of restoring FECA's regulatory scheme, BCRA impairs the ability of the parties to function cohesively, and attempts to restrict campaign spending in absolute terms by extending the limitations on federal contributions to virtually all electoral activity. In so doing, it rides roughshod over state laws regulating their own elections, and makes it unlawful to use contributions specifically made lawful by the states, even where the use of those contributions is not demonstrably related to a federal candidate or, indeed, any candidate. It is because BCRA directly restricts such a broad range of lawful activity that a facial challenge is not only appropriate, but compelling.

II. DEFENDANTS HAVE MISCHARACTERIZED BOTH THE "PROBLEM" AND THE IMPACT OF BCRA UPON STATE AND LOCAL POLITICAL PARTIES

A. Defendants Have Not Demonstrated A State Soft Money Problem

Plaintiffs emphasize once again that all money raised by state and local parties that does not meet the amount or source restrictions of federal law is "non-federal" money. BCRA calls this "soft money" even though there is no question that it is money that is completely lawful in the state in which it is used. If, as in California, state law allows a contributor to make a $25,000 contribution to the state party, and federal law allows only $10,000, the remaining $15,000 is "soft money." This $15,000 is money the people of California have determined to be noncorrupting, and permissible for use in its elections. Defendants and Intervenors do not discuss this $15,000. Instead, they focus only on the $500,000 contributions. But, conceptually, both the $15,000 contribution and the $500,000 contribution are "soft money" under BCRA.

Although the judgment of Congress may differ from that of the various state legislatures that have spoken to the issue, it remains at the end of the day a judgment call. While this judgment must be respected for federal campaign activity, the Constitution also preserves the right of each state legislature to make its own judgment with respect to state campaign activity. Defendants' and Intervenors' use of the term "soft money" throughout their briefs to refer to what are actually state-regulated contributions is, in large part, an attempt to convince the Court that any state judgment that differs from the federal government's is somehow unsound and can therefore be disregarded.

"Soft money" is a value-laden term that is not defined in BCRA itself, and in fact, is used to describe funds from a variety of sources which are used for varying purposes.[3] In consciously

[3] Although the FEC uses the term throughout its brief, it specifically declined to do so in its rulemaking proceeding because the term lacked precise meaning. *See*, 67 FR 49064 (July 29, 2002).

using it, Defendants have attempted to "taint" a wide range of lawful activity by tarring it with the "soft money" brush, even though those activities share none of the characteristics with the "soft money" harms that BCRA purports to address.

Defendants' opening briefs also confirm that the "harm" sought to be addressed in Title I was *not* a state party's lawful raising and spending its own non-federal money -- it was disproportionately large non-federal contributions received by the national parties, and subsequently transferred to the state parties for various activities, including issue advocacy. BCRA's broad attempts to prevent the use of "soft money" obscures the significant difference between state-regulated money raised directly by the state and local parties (which has always occurred and has *not* been shown to present any threat to federal elections), and the large contributions which are the focus of Defendants' and Intervenors' briefs.[4] The core of Defendants' argument can be summarized in the following sentence from their brief:

> Congress recognized that allowing state-level party committees to continue to expend *unlimited* amounts of *unregulated* funds on activity that *influences federal elections* would leave a gaping loophole in federal law ... (Br. 100)

Each of the italicized words or phrases is based on an underlying assumption which fundamentally incorrect. As Plaintiffs have explained in their opening brief, the non-federal money raised and spent by state and local parties is neither unlimited nor unregulated. In virtually all cases it is limited by state law; the fact that the state limits may differ from the federal limits, or that state regulation may differ from federal regulation, does not render that money unlimited or unregulated.

In addition, state party non-federal money is not used to influence federal elections. This is, of course, the crux of Plaintiffs' challenge and is described in more detail below. Suffice it to say,

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[4]In fact, one of BCRA's principal sponsors acknowledged that "if it's State money generated within the State, and generated by the State, then the Federal government does not have a role [in regulating it]." McCain Dep. 226.

before BCRA, state-regulated funds could only be used for state election activities or the state portion of certain "generic" activities. Federal funds have always been required for the federal portion. Even if a party could accept a contribution in excess of the federal limits, it could only use that money for the non-federal portion of the expenditure.[5] However, state funds could be used for purely state activity, such as mail in support of a state candidate or for a state ballot measure. Only under the most attenuated interpretation could this state electoral activity be considered "influencing federal elections."

It should be noted at the outset that when Defendants talk about the states using non-federal money to "influence federal elections" they are really only talking about issue advocacy. Although Defendants themselves claim that the states engage in very little voter mobilization other than the issue ads, the restrictions of Title I are not limited to issue ads, but include virtually all campaign activity. Although Defendants' underlying claim about other voter mobilization activities is inaccurate, it serves to illustrate that the actual restrictions bear little relationship to the perceived problem.

B. Defendants Inaccurately Minimize The Impact Upon State Elections

The arguments of Defendants and Intervenors appear to be carefully crafted to mislead the court with respect to the scope of BCRA. Defendants claim that "BCRA leaves state and local party committees entirely free to raise and spend soft money...*for activity that has no impact on federal elections*" and that "Congress *carefully defined* 'Federal election activity' to reach *only activity that affects federal elections*." Br.104 (emphasis added). Intervenors similarly assert that "BCRA...*leaves wholly unregulated the use of soft money for purely state activities*." Br. I-58. These claims are, at best, disingenuous and, at worst, deliberate misstatements.

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[5] For example, in the 2000 election cycle, the California parties had to pay all administrative, generic GOTV and general party-building activities with at least 43% *federal* money.

Defendants' briefs obscure the difference between three broad categories of political party activities. First, there are activities specifically referencing the election of federal candidates. These have always been directly regulated by FECA, and the state and local parties have always paid for these activities with federal money. Second, there are "generic" activities which urge the public to support a party's candidates without mentioning particular candidates. These are activities that are usually addressed to voters at all levels -- federal, state and local. BCRA clearly defines all activities in this category as "federal election activity." Although highly-regulated Levin funds may be used in some circumstances, such use is allowed (according to Defendants) as a matter of "grace;" the use of Levin funds is a limited exception to the broad exercise of federal authority over these activities, even though a particular activity may have a clear state or local focus.

The third category of state or local party activity consists of activities or communications that exclusively reference state or local candidates, or state or local ballot measures. This typically includes mail advocating the election or defeat of these candidates, or support or opposition for a ballot measure. Similarly, election materials such as brochures, yard signs, bumper stickers, etc, may feature only state or local candidates or measures. Finally, much of the parties' local phone bank activity is directed at particular state or local candidates. All of these activities fall within the general rubric of "get-out-the-vote, " or GOTV, activity.

BCRA excludes *only* grassroots materials with the names of state or local candidates. Although Defendants and Intervenors both repeatedly assert that BCRA regulates only "federal" activities, they are extremely coy in identifying specifically which, if any, state activities are excluded. Plaintiffs believe that this is a deliberate attempt to obscure the real impact on state election activity.

First, BCRA itself makes clear that GOTV activity which mentions only a state or local

candidate is nevertheless "federal election activity" if it is "in connection with an election in which a candidate for Federal office appears on the ballot." 2 U.S.C. §431 (20)(B)(i). The FEC expressly declined to construe the latter phrase narrowly, and instead concluded that all GOTV, all voter identification and all generic party activity between the time federal candidates file to run in a primary through the date of the general election (as much as one year of each two year cycle) will be treated as "federal election activity." 67 FR 49110; 11 C.F.R. §100.24. In addition, although it was asked explicitly to exclude from the scope of federal election activities those activities exclusively in support of state candidates or ballot measures, the FEC declined to exclude such activity.[6] In fact, the FEC specifically defined "GOTV" activity as "including, *but not limited to*" any communication within 72 hours of an election that provides to individual voters "information such as the date of the election, the times when polling places will be open, and the location of particular polling places." 11 C.F.R. §100.24(a)(3)(i).[7] There simply is no doubt, then, that a state party expenditure for a mail piece sent out just before the election that states only, "Vote next Tuesday, November 5 for John Smith for Governor" is "federal election activity" under BCRA. Intervenors have admitted as much. *See* Resp. to Req. for Adm., 3 PCS/CDP/CRP 220-23, 248.

Second, Defendants' briefs confirm that the scope of "federal election activity" under BCRA extends, and is intended to extend, well beyond "generic" activities such as voter registration and generic GOTV, and includes specific state and local party activities in support of

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[6] *See* Remarks of Mr. Sandler and Mr. Josefiak, Transcript of FEC Public Hearing (June 5, 2002), *available at* http://www.fec.gov/pdf/nprm/soft_money_nprm/transcript_of_hearing 20020605.html.

[7] Far from being clearly defined, the "federal election activity" regulations engendered much controversy and are now the subject of a lawsuit filed by Congressmen Shays and Meehan challenging, *inter alia*, the FEC's failure to include the entire two year cycle; its failure to include any activities designed to "encourage" voter registration or voting; its failure to include the purchase of voter lists, and its exclusion for mail sent by state candidates. The lawsuit also challenges the definitions of "solicit," "direct," and "agent," claiming that those definitions are not broad enough to reflect statutory intent.

state and local candidates. Intervenors quote with approval the following:

> Because the partisan proclivities of the electorate express themselves toward both state and federal candidates, *state parties influence federal elections directly even when they mobilize their supporters on behalf of a candidate for state office...*

Br. I-62 (emphasis added). Defendants argue that because voters are statistically more likely to vote for candidates of the same party, activity in support of a state candidate has an "impact" on federal elections. Br. 105-06. Defendants even go so far as to argue that contributions to state parties for state candidates "influence activities affecting federal elections" since state legislatures affect the redistricting process, and redistricting may affect incumbent's chances of re-election. Br.102, fn. 83.[8]

To be clear, Plaintiffs are not arguing that "generic" voter mobilization activities may not affect federal elections; indeed, political parties engage in such activities because they hope that such activities will affect elections up and down the ticket. Their opposition to BCRA is two-fold: 1) it requires that activities intended to affect *both* state and federal elections, and which have that effect, be treated as completely "federal" activity; and 2) it requires that non-generic activities that are intended to influence *only* state or local elections (such as mail specifically focused only on state candidates or ballot measures, or phone banks only referring to state candidates) be treated as "federal election activity." Defendants mischaracterize Plaintiffs' position when they assert that "[s]tate and local parties have no constitutional entitlement to, or dire need for, soft money to spend on federal election activity." Br. 107. What Plaintiffs assert is a right to spend state-regulated money on *state and local election activity.*

Because the term "get-out-the-vote" can be loosely used to refer to a wide range of

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[8] The infinitely attenuated quality to Defendants' argument is demonstrated by their view that even contributions of non-federal money *for use in state elections* affects federal elections because it frees up federal money that would otherwise have to be used for those activities. Br. 97. Under this view, apparently having more money to spend on federal elections "affects" federal elections.

activities, Defendants point to supposed "admissions" by party officials and others that "GOTV" activities are intended to influence federal elections, when, in context, the comments refer only to generic activities long regulated by the FEC. In support of Intervenors' claim that "state parties themselves solicit soft money for the *express purpose* of using it for activities that affect federal elections" (Br. I-33; emphasis added), they provide as an "example" a letter from the Chairman of CDP. Intervenors excerpt portions of the letter stating that the money would go toward voter registration, vote-by-mail and GOTV efforts that would enable CDP "to increase the number of California Democrats in the United States Congress" – "and deliver California's 54 electoral votes for President Bill Clinton." The letter actually reads:

> As you know, our 1996 agenda is full of important programs. Our ambitious statewide effort includes – voter registration, vote-by-mail and get-out-the-vote efforts. With this agenda, the California Democratic Party will be able to increase the number of California Democrats in the United States Congress, *continue the leadership in the California State Senate, take back the State Assembly* -- and deliver California's 54 electoral votes for President Bill Clinton's and Vice President Al Gore's re-election. CDP 00859.

Intervenors deliberately omitted the references to the state candidates. Read in its entirety, it is clear that Chairman Torres was merely saying that the party's *generic* voter registration and GOTV efforts – paid with the prescribed ratio of federal and non-federal money – would benefit all candidates up and down the ticket.[9]

Similarly, both Defendants and Intervenors cite this Court's *Common Cause* decision ("FECA unambiguously requires that state party committee money spent for the limited purposes set forth in the 1979 amendment...must be paid for solely from [federal] funds...,") and characterize the court's comments as implying that all voter registration and GOTV activities must be funded

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[9] The letter from U.S. Senate candidate Matt Fong on the same page similarly describes CRP's generic activities – paid with both federal and non-federal money. Br. I-34. Statements of national party officers are also consistently taken out of context on this point.

with federal funds because they affect federal elections. Br. 105, I-62. Read in context, including the court's reference to a House Report discussing the "allocation" of joint federal/state activities, the court's comment is, at most, a reference to generic campaign materials and activities. There is no suggestion that the court contemplated that state or local activities were subject to FECA, and in fact the court concluded that "[n]othing in the language of these amendments suggests that they reach beyond federal elections and into the realm of state elections." *Common Cause v. Federal Election Comm'n,* 692 F.Supp. 1391, 1394 (D.D.C. 1987).

Defendants' claims about the parties' GOTV spending is also misleading insofar as they claim that virtually all of the parties' GOTV spending has been for candidate-related issue ads. *See, e.g.* Br. 69, 101. Since 1992, the FEC has required states to report their non-federal expenditures for allocated activities. Significantly, state and local parties do not report *all* non-federal expenditures – only those for *allocated* activities. Expenditures of non-federal money for state and local activities are reported at the state level, but not to the FEC. To the extent that Defendants and their experts rely on non-federal *allocated* expenditures for conclusions, these numbers reflect *generic* spending, but omit the state's own state and local spending. For example, in California, the state parties' expenditures for non-generic state mail and phone GOTV – as much as $7-8 million per election cycle – would not be reflected in the FEC reports.[10]

III. CONSTITUTIONAL AUTHORITY FOR BCRA'S EXTENSIVE INTRUSION UPON STATE ELECTIONS HAS NOT BEEN DEMONSTRATED

A. The Elections Clause Does Not Authorize BCRA's Interference With State Sovereignty

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[10] *See also* LaRaja Decl. 40 (Fig. 16), showing *additional* non-federal expenses made by state parties across the nation in 2000. Significantly, while those parties spent approximately $50 million from the allocated accounts (i.e., generic activities), they collectively spent approximately $80 million on purely state and local mobilizing and grassroots activities, excluding media. In addition, the percentage of expenditures for "media" in their "true" non-federal (non-allocated) accounts were substantially lower than media expenditures in the allocated accounts –by less than half.

BCRA regulates three types of party election activities: federal candidate-specific, state candidate or ballot measure-specific, and generic activities which mention no candidates but urge support for the parties' candidates generally. While it is clear that Congress has authority under the Elections Clause to regulate the first category of activities (within other applicable Constitutional constraints), the Tenth Amendment and federalism principles restrain Congress in its regulation of the second category and even, to some extent, the third.

Since Defendants do not even acknowledge the direct interference with state election activity, they make little attempt to justify it in Constitutional terms. They state (inaccurately) that BCRA only regulates conduct "that directly affects [federal] elections" and encompasses only activity "with a substantial impact on federal elections." Br. 109-10. Beyond that, Defendants state only that the Elections Clause provides Congress with authority to prevent the appearance and reality of corruption in federal elections, even when state offices are also on the ballot. *Id.*

First, Defendants completely fail to acknowledge that state sovereignty is a countervailing consideration in construing the scope of the Elections Clause in this circumstance. The Supreme Court's decision in *Oregon v. Mitchell*, 400 U.S. 112, 135 (1970) made clear that while the Elections Clause conferred broad authority to regulate federal elections, the Court was also mindful of saving for the States "the power to control state and local elections which the Constitution reserved to them and which no subsequent amendment has taken from them." Put another way, in construing the scope of the Elections Clause, the Court must determine whether the enactment "oversteps the boundary between federal and state authority." *New York v. United States,* 505 U.S. 144, 159 (1992). Defendants appear to believe that no such boundary exists if the states hold their elections on the same date as federal elections.

It is undoubtedly true that Congress' authority over federal elections extends to the

"prevention of fraud and corrupt practices...[and] numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Oregon v. Mitchell,* 400 U.S. at 122, citing *Smiley v. Holm,* 285 U.S. 355 (1932). The case cited by Defendants, *United States v. Bowman*, 636 F.2d 1003 (5th Cir. 1981), reflects this authority. However, it is one thing to argue that Congress has authority to prevent criminal acts that potentially undermine the entire legitimacy of the voting process (and with which no state would quarrel), and quite another to conclude that Congress may impose its own judgment as to what election activities and funds will be permitted in state and local elections even to the point of invalidating the states' own judgments on these matters. In this circumstance, Congress impermissibly "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise..." *United States v. Lopez*, 514 U.S. 549, 593 (1995) (Kennedy, J., concurring).

Again, California voters have determined that allowing an individual to contribute up to $25,000 to a political party is not likely to cause corruption, or the appearance of corruption. Congress has made a separate determination that only $10,000 of that contribution can be used in connection with a federal election. Until BCRA was enacted, the remaining $15,000 (or, indeed, the entire $25,000) could be used for state and local election activity. This is not a "soft money loophole" which Congress can simply "close;" it is the direct result of the state's legislative judgment to allow contributions for its own elections in amounts or from sources that differ from federal law.[11]

Defendants' use of the term "corruption" in an attempt to bring BCRA within the authority

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[11] In light of the government's admission that it can identify *no* instances of actual corruption, it must be assumed that Intervenors' assertion that "the record contains substantial evidence of actual and apparent corruption arising directly from the state soft money system" is simply another hyperbolic claim. Br. I-60.

described in *Oregon v. Mitchell* is inapt. Indeed, the Court has already indicated that the corruption potential of activities such as voter registration and generic GOTV activities is minimal:

> ...We also recognize that FECA permits unregulated "soft money" contributions to a party for certain activities, such as electing candidates for state office, see 431(8)(A)(i), or for voter registration and "get out the vote drives, see 431(8)(B)(xii). But the opportunity for corruption posed by these greater opportunities for contributions is, at best, attenuated.

Colorado Rep. Fed. Campaign Comm. v. FEC (Colorado I), 518 U.S. 604 (1996).

The Court's specific observation in *Colorado I* that non-federal money could be used to elect *state* candidates and its reference to 431(8)(A)(i) is telling -- that provision defines a "contribution" as "any gift...of anything of value made by a person *for the purpose of influencing any election for Federal office.*"[12] The current definition of "federal election activity" effectively writes this limitation out of federal campaign finance law. Although Defendants claim that "federal election activity" is "defined to encompass only activity with a *substantial impact* on federal elections" (Br. 109), this is patently untrue. BCRA in fact disclaims *any* required impact and assumes that all campaign activity is essentially "federal" if there is a federal race on the ballot. BCRA's failure to limit "federal election activity" in any way that accommodates the states' legitimate interest in regulating its own elections results in an impermissible interference with state sovereignty and improperly invalidates the states' legislative judgments in this area.

B. BCRA's "Soft Money" Provisions Are Not Sufficiently Tailored

Defendants appear to believe that virtually any campaign finance restriction can be justified under *Buckley*. This reflects an overly simplistic view of *Buckley*. *Buckley* clearly held that both contribution and expenditure limits implicated significant First Amendment concerns. *Buckley*,

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[12] This language in *Colorado I* is consistent with an important holding of *Buckley v. Valeo,* 424 U.S. 1 (1976) – that the phrase "for purpose of influencing a federal election" had to be narrowly construed in order to avoid problems of both overbreadth and vagueness. *Id.* at 24, 78-79.

424 U.S. at 14-15. The Court's conclusion that contribution limits imposed somewhat less severe restrictions on political expression than expenditure limits was based on its view that a contribution limit "entails only a marginal restriction upon the contributor's ability to engage in free communication...[and] does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.* at 21. Expenditure limits, however, were subject to strict scrutiny.

Unlike a contribution limit, the Levin limit on spending *does* act as a direct limit on the speech of the party itself. The party is not merely expressing "symbolic" support; it is directly involved in communicating its views on candidates and issues to the public. The Levin limit "restrict[s] the extent of the reasonable use of virtually every means of communicating information." *Id.* at 18, fn. 17. It is precisely the kind of expenditure limitation struck down in *Buckley* because it "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. *Id.* at 19.

Even if BCRA's restrictions on the use of non-federal money are viewed as traditional contributions limits requiring that they be "closely drawn," they fail. First, as discussed above, these restrictions apply to non-federal contributions lawfully raised by the state and local parties for state and local activities. Defendants' and their "expert" deliberately obscure this point by focusing almost exclusively on the *transferred* non-federal money and ignore the non-federal money that states have always raised for their own state activities. Their entire argument that the state parties did fine "before soft money" can only be understood as a reference to *transferred* non-federal money and not as a reference to money raised directly by the state party itself in accordance with state law. Manifestly, a state party raising its own $25,000 and using $15,000 of that money for state election activities (or, for that matter, for the non-federal portion of mixed federal/non-federal activities) does not present a "danger" that the *federal* limits are being "evaded by diverting funds" to the state committee. Br. 104. *See also,* McCain Dep. 226 (...if it's State money generated within

within the State... then the Federal government has no role.") It is apparent that Congressional concern was not with voter registration or GOTV activities as such, or even with the previous system of allocating these expenses between federal and non-federal money. The state "soft money" problem is almost entirely defined as one of large transfers of money (both federal and non-federal) for issue advertisements which the FEC itself determined should be treated as "generic" party-building or administrative activity. AO 1995-25. Rather than merely addressing the problem of large transfers (which could clearly be addressed by a limit on transfers rather than an outright ban) or directly addressing issue advocacy (as it did in Title II in the context of non-party actors[13]), BCRA has imposed a federally dictated clamp on the use of *all* state-regulated money, including the use of state-regulated money directly for state-regulated election activity.

Defendants implicitly understand that any harm from large transfers could have been addressed more narrowly because they next resort to the "circumvention" rationale: "If BCRA only regulated soft money contributed to national party committees, donors would simply funnel soft money in unlimited amounts to state and local party committees..." First, the idea that state contributions are unlimited is in itself a mischaracterization; these contributions may be limited by state law and, in any event, can only be used for state activities, and for the state portion of certain generic activities. But more fundamentally, the circumvention rationale is only valid *to the extent that it prevents violation of the underlying contribution limits*, which are based on the potential for corruption, or the appearance of corruption. While it is true that the Court has had occasion to

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[13] While the California Plaintiffs take no position on the "electioneering communications" provisions of Title II, it is clear that restrictions in this area raise significant constitutional questions. However, Plaintiffs note that Title I goes dramatically further than Title II and effectively prohibits the parties from engaging in *any* broadcast communications unless all federal money is used. Even non-broadcast communications must be paid with federal money if they "promote" or "oppose" a federal candidate. These terms are not defined in the statute or the regulations. The restrictions imposed in Title I reflect none of the attempts which Defendants claim to have made to tailor the restrictions in Title II. Nor do Defendants make any effort to claim that these provisions are narrowly tailored.

accept "circumvention" as an independent rationale, this has been limited to factual circumstances in which the expenditure to be limited could serve as the "functional equivalent" of a contribution to the candidate. *Colorado Rep. Fed. Campaign Comm. v. FEC (Colorado II)*, 533 U.S. 431 (2001). For the circumvention rationale to legitimately apply to state and local election activity, money spent by a state party on GOTV activity for state or local candidates would have be significant enough to, in effect, constitute a contribution to the federal candidate. *See Colorado II,* Id. at 444. While a coordinated party expenditure under 441a(d)[14] might be the "functional equivalent" of a direct contribution to the federal candidate, a mailer urging voters to vote for Joe Smith for the State Assembly, or a radio advertisement urging voters to defeat a statewide initiative cannot seriously be considered the "functional equivalent" of a contribution to a federal candidate.[15] Even the value to the federal candidate of state party spending for generic activities is, at best, "attenuated." *See Colorado I.*

Although Congress may have concluded that very large contributions of non-federal money to candidates or to the national parties undermine FECA's federal contribution limits, it is just plain wrong to conclude that every contribution of non-federal money to a state or local party has the same capacity for corruption of federal candidates, or that expenditures made for state or local elections have any capacity for circumvention. The definition of "federal election activity" and the imposition of the Levin limitation indiscriminately include within their scope restrictions on amounts and uses of non-federal money for lawful state election activities that neither create the

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[14] "In making a coordinated party expenditure, the party committee pays for goods or services to benefit the candidate but does not give the money directly to the candidate..." *FEC Campaign Guide For Political Party Committees* at 16.

[15] The illogic of the underlying reasoning is further illustrated by BCRA's provisions that treat voter registration or GOTV efforts conducted by *state candidates themselves* as "federal election activity." It simply defies common sense to believe that state candidates are engaging in these activities "for the purpose of influencing federal elections."

potential for corruption nor lead to circumvention of the federal contribution limits.

C. BCRA Will Reduce The Ability of The State and Local Parties To Effectively Participate in The Political Process

Defendants assert that "BCRA leaves open ample opportunity for state-level party committees to raise funds for federal or state activity." Br.103. Not only have Defendants failed to demonstrate this assertion, it is inconsistent with the record.

Defendants argue that the increases in the federal contribution limits will increase the amount of money available to the parties. However, the California parties have demonstrated that this is virtually impossible. The average federal contribution is $20-40. *See* Bowler Decl. 3 PCS/CDP/CRP 28; Erwin Decl. 3 PCS/CDP/CRP 18-19. The percentage of contributors at the $5,000 level (the former limit) is extremely small – less than 5% of the total. As a matter of common sense, the person contributing $20-40 is not now going to give $10,000 simply because he can; only the $5,000 contributors are likely to increase their contribution. Moreover, when national party transfers are factored out, federal money raised by the CDP has been relatively unchanged despite increased fundraising efforts. Bowler Decl. 3 PCS/CDP/CRP 7, 28.

Congress has not made any effort to quantify the impact of BCRA generally, or the Levin Amendment specifically, upon the non-federal income of the state and local parties. Unlike the Party Expenditure Limits, which reflect the size of the relevant voting population for a particular office, the Levin Amendment imposes a flat $10,000 limit for all contributions to be used for campaign activity. The California parties have estimated that this limit will reduce the amount of non-federal funds available by 76-86% (CDP) and 47-69% (CRP). Pl's Opening Brief, at 29-30. This information is uncontradicted in the record.

Defendants argue that the state and local parties can raise "unlimited" money for "activity that has no impact on federal elections." The trouble is, under the language of BCRA and

Defendants' reasoning in support of it, there may be little such activity. It must be assumed that all "generic" party campaign activities and virtually all state and local activity will require either 100% federal money, or a combination of federal money and federally limited Levin money. CDP has estimated that the shortfall between the increased "federal" expenditures resulting from BCRA and the availability of federally limited money, including Levin money, will be approximately $12 million. Again, this testimony is uncontradicted.

Finally, in lieu of any factual evidence about the impact on the state parties, Defendants and Intervenors simply assert that the parties will "adapt." Although they claim throughout their briefs that the national party transfers increased voter mobilization activities in the states to a degree that affected the "federal elections" taking place, they inexplicably seem to believe that these same activities will not be adversely affected by the substantial decrease in available money that will result from the loss of transfers, as well as the Levin limits. The state party officials have come to just the opposite conclusion and have demonstrated why voter mobilization and grassroots activities will be among the hardest hit by decreases in available income. *See* Bowler Decl. 3 PCS/CDP/CRP 20; Erwin Decl. 3 PCS/CDP/CRP 33. *See also* LaRaja Decl. 40, Fig. 16, demonstrating that state parties spent $232 million of non-federal money on non-allocated (i.e., non-generic) state and local activities, including approximately $80 million for state mobilization activities and $60 million for state media. These are amounts that would be directly affected by the Levin limits. If the impact on the California parties is typical, the Levin limit will reduce state-regulated money available for campaign activities nationally by approximately one-half to two-thirds. *See,* Pl's Opening Brief, at 29-30. Moreover, experience under FECA itself has demonstrated that changes in the campaign finance laws can have a direct and adverse effect on party activity. *See, e.g., Common Cause,* 692 F.Supp. at 1394 (discussing the adverse impact of the 1974 amendments on grassroots activities which led to the 1979 amendments).

IV. DEFENDANTS HAVE FAILED TO SHOW ANY MEANINGFUL EFFORT TO TAILOR OTHER PROVISIONS OF BCRA

The other provisions of Title I challenged by Plaintiffs are those that directly affect the rights of the parties, and their members, to enjoy the Constitutional protections afforded speech and association. Defendants never acknowledge the interference, nor the requirement that such restrictions are subject to strict scrutiny. The Supreme Court has been clear that the government may only regulate in this area with "narrow specificity" and that "broad prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Defendants assert precisely the opposite -- that a broad prophylactic rule is necessary to prevent all possible forms of "abuse."

While focusing on the rights of organizations to associate, Defendants ignore the parties' own associational rights, and particularly the "exacting judicial review" required when the government imposes limitations upon the rights of group association and the rights of individuals to band together "to make their voices heard on public issues." *Citizens Against Rent Control v. Berkeley,* 454 U.S. 290 (1981). When the government's legitimate interest in preventing corruption is rationally articulated, it becomes clear that the means employed by BCRA are not even "closely drawn to avoid unnecessary abridgment" of First Amendment freedoms. *Buckley*, 424 U.S. at 25.

A. BCRA Prohibitions on Transfers and Joint Fundraising Cannot Stand

To begin with, Defendants misstate the BCRA's transfer restrictions in several places, claiming that "[t]he national parties remain free to solicit money for, and transfer money to, state and local party committees...the soft money ban does not prevent the national parties from pooling their resources with their state and local counterparts 'in furtherance of common political goals...'" Br. 89. Defendants concede later, in a footnote, that *"hard and soft money* used pursuant to the