No. 02-1674 & Consolidated Cases

IN THE

Supreme Court of the United States

SENATOR MITCH MCCONNELL, *et al.*,
Appellants/Cross-Appellees,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees/Cross-Appellants.

On appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICI CURIAE* INTERNATIONAL EXPERTS IN SUPPORT OF APPELLEES/CROSS-APPELLANTS

CHRISTOPHER J. WRIGHT *
TIMOTHY J. SIMEONE
YUL J. KWON
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, DC 20036
(202) 730-1300

THOMAS D. GRANT
LAUTERPACHT RESEARCH
CENTRE FOR INTERNATIONAL LAW
5 Cranmer Road
Cambridge CB3 9BL
United Kingdom
011 44 1223 691 664

* Counsel of Record

August 5, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

UNITED STATES JUDICIAL DECISIONS Page

FOREIGN JUDICIAL DECISIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE* [1]

Amici, who include recognized authorities on campaign finance laws within their respective countries, are legal academics, political scientists, and present and former officials and advisors (acting in their individual capacities) of national electoral commissions from around the world ("International Experts"):

Thomas D. Grant (Fellow, Lauterpacht Research Centre for International Law, and Senior Research Fellow, Wolfson College, Cambridge University);

Verena Blechinger-Talcott (Assistant Professor, Department of Government, Hamilton College, New York, and former Deputy Director, German Institute for Japanese Studies, Tokyo);

Manuel Lucas Durán (Profesor Titular de Derecho Financiero y Tributario Vicedecano de la Facultad de Derecho, Universidad de Alcalá, Madrid, Spain);

Zsolt Enyedi (Assistant Professor, Political Science Department, Central European University, Budapest, Hungary);

Keith Ewing (Professor of Public Law, King's College, London);

Colin Feasby (attorney, Osler, Hoskin & Harcourt LLP, Calgary, Alberta, Canada);

Stefano Grassi (Chaired Professor of Constitutional Law, University of Florence, Faculty of Law);

Andrew Geddis (Lecturer, Faculty of Law, University of Otago, Dunedin, New Zealand);

Omer Farul Genckaya (Department of Political Science and Public Administration, Bilkent University, Ankara, Turkey);

---

[1] Pursuant to Rule 37.6, counsel for *amici* state that no counsel for any party authored this brief in whole or in part. No persons other than *amici* or their counsel made a monetary contribution to the preparation of this brief.

Ellie Greenwood (Senior Registrar, UK Electoral Commission);

Gábor Juhász (doctor of laws and editor, political-economic weekly HVG, Budapest, Hungary);

Prof. Dr. Bart Maddens (Department of Political Science, Catholic University of Leuven, Belgium);

Prof. Dr. iur. Martin Morlok (Chair of Public Law, Sociology of Law, and Legal Theory, Director, Institute for German and European Law of Political Parties (PRUF), Heinrich-Heine-Universität, Düsseldorf, Germany);

Víctor M. Navarrete Villarreal (Advisor to the President of the Tribunal, Tribunal Superior de Justicia del Distrito Federal, Mexico City);

Graeme Orr (Lecturer in Law, Griffith University, Brisbane, Australia);

Federico Ortino (Lecturer, European Union Law, University of Siena, Italy);

Eugenia Perona (social scientist and private consultant, Buenos Aires, Argentina);

DDr. Hubert Sickinger (Faculty, Universität Wien/Institut für Konfliktforschung, Austria);

Surat Singh (constitutional lawyer, Bar of the Supreme Court of India, New Delhi);

Daniel Smilov (Adjunct Professor, Department of Legal Studies, Central European University, Budapest, Hungary);

Thilo Streit (Assistant Lecturer, PRUF, Heinrich-Heine-Universität, Düsseldorf, Germany); and

Daniel Treisman (Assistant Professor of Political Science, University of California at Los Angeles).

The substantial interest of *amici* in this case arises from their citizenship in nations forming a community of shared democratic values, and the unavoidable impact of legal developments in the United States upon representative democracy worldwide. *Amici* collectively possess a formidable breadth

of theoretical knowledge and practical experience in the field of campaign financing, and are uniquely qualified to assist the Court by situating the Bipartisan Campaign Reform Act of 2002[2] ("BCRA") within the broader international legal landscape.

PRELIMINARY STATEMENT

This brief examines campaign finance laws in foreign countries to inform the Court with respect to two central issues: (1) the constitutionality of BCRA's limitations on paid political advertising by third parties; and (2) the constitutionality of BCRA's prohibitions on "soft money." The information presented here was contributed by *amici*, and supplemented by data from a variety of publicly available sources, including a survey of foreign campaign finance regimes conducted by the Library of Congress on behalf of Congress in 2000.[3]

SUMMARY OF ARGUMENT

The United States is not alone in struggling with the problem of how to curtail inappropriate financial influence in electoral politics. Every major democracy recognizes that money can distort politics, and each restricts campaigning to mitigate corruption in the electoral system. A comparative understanding of such efforts may aid this Court's review of Congress's efforts to close loopholes in the American campaign finance regime. Considering parallel efforts by

---

[2] Pub. L. 107-155, 116 Stat. 81 (2002)

[3] In 2000, the Library of Congress surveyed eighteen countries—Argentina, Australia, Canada, the Czech Republic, France, Greece, India, Iran, Israel, Italy, Japan, Mexico, the Netherlands, the Russian Federation, Singapore, Taiwan, Turkey, and the United Kingdom. The results of that survey are provided in both a "Comparative Summary and Analysis," *see* Law Library of Congress, *Campaign Financing in Various Foreign Countries, Comparative Summary and Analysis* (Document No. 2002-14013) (2002) ("*LOC Comparative Summary*"), and reports on individual countries.

other countries around the world is consistent with the Court's established practice of drawing on foreign experiences to address issues of common constitutional concern.

Two pillars of BCRA are its limitations on third-party paid political advertising by unions and corporations, and its restrictions on so-called "soft money." With respect to paid political advertising, the United States has adopted a far more lenient regime than its peers. Most democracies, including all of the other members of the Group of Seven (G-7) nations, strictly limit or even prohibit the broadcast of paid political advertisements. An analysis of judicial opinions in other countries, moreover, suggests that the United States' isolated posture does not follow ineluctably from the American commitment to freedom of speech. To the contrary, other democracies with deeply ingrained traditions of free speech analogous to the First Amendment have recognized that preserving the integrity of the political process requires some restrictions on paid political advertising.

With respect to the American soft money problem, there is no direct analogue overseas. Nevertheless, it is instructive to consider this problem within the larger context of how other nations control the flow of money into political campaigns. Most major democracies, again including all of the other G-7 nations, have far more restrictive regulatory regimes than the United States. As a general rule, other countries have chosen to implement either public financing of elections, or strict limits on campaign expenditures, or both. The United States has, of course, taken the more permissive approach of merely limiting federal campaign contributions. While *amici* take no issue with that basic approach, we would urge the Court—in considering whether to uphold congressional efforts to plug the gaping soft money loophole—to be cognizant of the fact that the United States occupies an extreme end of the spectrum in regulating the flow of money in electoral politics. Upholding BCRA's limits on soft money would only

incrementally nudge the American system of campaign financing away from the fringe of international practice.

I. THE COURT SHOULD CONSIDER MEASURES TAKEN BY OTHER COUNTRIES TO LIMIT THE INFLUENCE OF MONEY IN ELECTORAL POLITICS.

The problem of how to limit "deleterious influences on federal elections"[4] arising from the political activities of corporations and other sources of aggregated wealth is not unique to the United States. In reviewing the constitutionality of BCRA, this Court should consider other countries' treatment of the issues underlying the statute.

A. Members Of The Court Increasingly Recognize The Value Of Considering The Work Of Foreign Decision-Makers.

The value of looking beyond our national boundaries on matters of common constitutional concern has been increasingly recognized and affirmed by members of the Court. Chief Justice Rehnquist spoke forcefully to this issue over a decade ago:

> For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. . . . But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.[5]

---

[4] *FEC v. Beaumont*, 123 S.Ct. 2200, 2205 (2003) (quoting *United States v. Automobile Workers*, 352 U.S. 567, 585 (1957)).

[5] William H. Rehnquist, "Constitutional Courts—Comparative Remarks" (1989) (reprinted in *Germany and its Basic Law: Past, Present and Future—a German-American Symposium* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993)).

Chief Justice Rehnquist's statement has been echoed and elaborated by other Justices. In 1999, Justice Ginsberg gave a lecture in which she stated the importance of comparative analysis in constitutional interpretation:

> Experience in one nation or region may inspire or inform other nations or regions . . . . In my view, comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights.[6]

Last year, Justice O'Connor similarly urged attention to the work of foreign decision-makers and the opportunities they afford the Court to learn from their well-considered opinions:

> [C]onclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts. . . . While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here.[7]

More recently, Justice Breyer correctly observed that the process of examining "our Constitution and how it fits into the governing documents of other nations . . . will be a challenge for the next generation."[8] Such comments by sitting Justices signal an appropriate interest on the part of this Court in expanding the universe of data upon which its deliberations rely.

Significantly, however, applying foreign law and experience to calibrate American constitutional norms is hardly a new practice. To the contrary, "this Court has long con-

---

[6] Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 281-82 (1999).

[7] Sandra Day O'Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 Am. Soc'y Int'l L. Proc. 348, 350 (2002).

[8] *This Week with George Stephanopoulos* (ABC television broadcast, July 6, 2003).

sidered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances."[9] Starting with the celebrated case of *The Paquete Habana*, in which the Court declared that "international law is a part of our law,"[10] the Court has regularly referenced decisions in kindred democracies to illuminate its understanding of shared democratic values and universal human standards.[11] Most recently, in *Lawrence v. Texas*,[12] the Court directly relied on the conclusions of the European Court of

[9] *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from denial of certiorari).

[10] 175 U.S. 677, 700 (1900).

[11] *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 710, 718 n.16, 785-87 (1997) (Rehnquist, C.J.) (declaring that "in almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide" and citing the Canadian Supreme Court, the British House of Lords Select Committee, New Zealand's Parliament, the Australian Senate, and the Colombian Constitutional Court); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (Stevens, J.) (stating that the execution of juveniles violates norms shared "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community"); *id*. at 868 n.4 (Scalia, J., dissenting) (noting that the "practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident"); *Miranda v. Arizona*, 384 U.S. 436, 488-89, 521-22 (1966) (comparing U.S. practice with that in India, Sri Lanka, and Scotland); *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) (delimiting notion of privacy in the home by looking to "common understanding throughout the English-speaking world"); *Malinski v. New York*, 324 U.S. 401, 413-14 (1945) (Frankfurter, J., concurring) ("The safeguards of 'due process of law' and 'the equal protection of the laws' summarize the history of freedom of English-speaking peoples . . . .").

[12] 123 S.Ct. 2472 (2003).

Human Rights and other foreign nations in overturning its prior holding in *Bowers v. Hardwick*.[13]

B. This Court's Opinions Have Examined Foreign Law And Practices When Dealing With Complex Issues In Campaign And Election Law.

Justices of this Court have frequently looked overseas to benefit from the real world lessons of foreign democracies in the specific context of campaign and election law.[14] For example, in *Wright v. Rockefeller*, the dissent by Justices Douglas and Goldberg examined a system for apportioning electoral districts used in Lebanon, Cyprus, and British India in order better to evaluate a similar system that had been implemented in Manhattan.[15] In *McIntyre v. Ohio Elections Commission*, Justice Scalia, joined by Chief Justice Rehnquist, dissented from an opinion striking down an Ohio statute that prohibited the distribution of anonymous campaign literature. Pointing to a number of foreign democracies that banned anonymous campaigning, Justice Scalia sharply criticized the majority's decision to ignore "the real-life experience of elected politicians" from "around the country and around the world."[16]

---

[13] *See id*. at 2475, 2481, 2483 (overturning *Bowers*, 478 U.S. 186 (1986).

[14] *See, e.g., Holder v. Hall*, 512 U.S. 874, 906 n.14 (1994) (Thomas, J., concurring) (mentioning the voting systems of Belgium, Cyprus, Lebanon, New Zealand, West Germany, and Zimbabwe in assessing race-consciousness in the U.S. voting system); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (finding the Court's First Amendment jurisprudence consistent with the decisions of the European Court of Human Rights and the Canadian Supreme Court).

[15] 376 U.S. 52, 63-66 (1964) (Douglas, J., dissenting).

[16] 514 U.S. 334, 381-82 (1995) (Scalia, J., dissenting) ("[R]elevant to our decision is whether the prohibition of anonymous campaigning is effective in protecting and enhancing democratic elections . . . . Australia, Canada, and England, for example, all have prohibitions upon anonymous campaigning. How is it, one must wonder, that all of these elected

Particularly relevant here is *Burson v. Freeman*, upholding the constitutionality of a Tennessee statute that prohibited both the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place.[17] The Court observed that "[s]everal other countries were attempting to work out satisfactory solutions to these same [election process] problems," [18] and embarked upon a detailed examination of the Australian electoral system, which had previously been adopted in England and Belgium.[19] The Court found it compelling that "all 50 States, *together with numerous other Western democracies*, settled on the same solution;" it therefore concluded that "this widespread and time-tested consensus [among the states and foreign countries] demonstrates that some restricted zone is necessary."[20] *Burson* confirms Justice Breyer's observation that the experiences of other countries may "cast an empirical light on the consequences of different solutions to a common legal problem," [21] and represents persuasive authority for looking to the international community in evaluating BCRA.

II. PREVAILING INTERNATIONAL NORMS SUPPORT BCRA'S RESTRICTIONS ON THE USE OF CORPORATE AND LABOR UNION TREASURY FUNDS FOR ELECTIONEERING COMMUNICATIONS.

Nearly every democracy acknowledges that significant restrictions on advertising are necessary to preserve the

---

legislators, from around the country and around the world, could not see what six Justices of this Court see so clearly [?]").

[17] 504 U.S. 191 (1992).

[18] *Id.* at 202.

[19] *See id.* at 202-205.

[20] *Id.* at 206 (emphasis added).

[21] *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

integrity of the political process.[22] When measured against those restrictions adopted in other countries, BCRA's sixty and thirty-day constraints on corporate and labor union advertising[23] are clearly located toward the extreme end of permissiveness. Most major democracies have implemented far stronger solutions—including categorical prohibitions on paid political advertisements—to prevent well-funded entities from dominating broadcast media during elections.

A. Other Democracies Restrict Paid Political Advertising Far More Aggressively Than BCRA.

Plaintiffs-Appellants in this case state that "unfettered issue advocacy enjoys international support."[24] If, in making this assertion, Plaintiffs-Appellants suggest that other countries do not generally impose restrictions on paid political advertising, they are simply wrong.[25] The substantial majority of

---

[22] In the United States, justifications for campaign finance reform have focused primarily on the "actuality and potential for corruption absent regulation." *Buckley v. Valeo*, 424 U.S. 1, 28 (1976). Notably, while other countries certainly recognize that interest, the need to "level the playing field"—so that a diversity of groups may express themselves and so that a single dominant group does not curtail the rights of others to political expression by overwhelming the most important channels of mass communication—also enjoys widespread recognition as a legitimate goal of an electoral system. *See, e.g.,* International Institute for Democracy and Electoral Assistance (IDEA) and the Office of Democratic Institutions and Human Rights of the OSCE, *International Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections* 65-66 (2002) ("[T]here should be a level playing field among the parties or candidates"); *see also* Council of Europe Recommendation No. (99)15 ("on measures concerning media coverage of election campaigns").

[23] *See* Pub. L. 107-155 (H.R. 2356, 107th Cong.) §§ 201, 203.

[24] Brief of Plaintiffs-Appellants/Cross-Appellees National Right to Life Committee et al., at 15 n.18.

[25] An alternative reading of Plaintiffs-Appellants' proclamation is that other countries do not restrict the advertisement of *issue-oriented* (and

developed nations, including all the other G-7 democracies—the United Kingdom, France, Canada, Germany, Italy, and Japan—impose burdens on paid political advertising that are much more restrictive than those mandated under BCRA. Some countries directly fetter paid political advertising by third parties, while others impose ceilings on third-party spending that indirectly but substantially curtail the ability of third parties to broadcast political advertisements.

1. *Direct Controls on Political Broadcasting During Election Periods Are Widespread Among Established Democracies.*

Even with the adoption of BCRA, the United States possesses by far the most permissive regime regulating paid political advertising within the G-7. In the United Kingdom, the Broadcasting Act of 1990 prohibits *all* paid political advertising in broadcast media—whether funded by candidates, political parties, or third parties.[26] Similarly, France proscribes *all* paid political advertising on television during the three months preceding an election.[27] Germany also imposes a general ban on paid political advertisement in broadcast media,[28] with one exception. During the six weeks leading up to a national or European Union election, public stations are required to provide free airtime to the political

---

non-election-related) political messages. Whether this claim is true or not, it is irrelevant to the case at hand. There is no question here as to whether BCRA may proscribe the use of such funds for true issue-oriented advertisements, because the statute does not attempt to limit such advertisements by unions and corporations. The degree to which other countries support issue-oriented, non-election-related advocacy therefore does not speak to the question before the Court.

[26] *See* Broadcasting Act, 1990, ch. 42, §§ 8(2)(a) and 92(2)(a).

[27] *See* C. élect. art. L. 52-1.

[28] *See* §§ 7, 42 *Rundfunkstaatsvertrag (RStV)*; § 11 cl. 1 *ZDF-Staatsvertrag für das Zweites Deutsches Fernsehen*.

parties.[29] National private stations may offer advertising time to the political parties during this period as well, but may charge no more than cost, which naturally discourages widespread paid advertising.[30] In Japan, political advertising is heavily regulated. Candidates cannot purchase television or radio airtime, although they are allowed to advertise free of charge during the campaign period on either the Japan Broadcasting Corporation (NHK) or at government expense on any privately owned radio or television station.[31] Political parties (and other qualified political groups) may purchase advertising time, but they may only broadcast advertisements emphasizing policy positions without reference to specific candidates.[32] Canada requires radio and television networks to provide free advertising time to registered parties.[33] Third parties are not prohibited from purchasing airtime in broadcast media, but they must conform to strict spending limits which, as a practical matter, foreclose meaningful third-party broadcast advertising.[34] Italy altogether prohibits

---

[29] *See id.*

[30] *See* §§ 7, 42 *RStV*. For all advertising, whether on public or private channels, the "principle of gradated equality of chances"—a balancing and fairness rule—obtains. § 5 cl. 1 *Parteiengesetz*.

[31] *See* Notice No. 165 of the Ministry of Home Affairs, Nov. 29, 1994, as amended by Notice No. 150, July 12, 1996; Law No. 100, art. 150, Apr. 15, 1950, as last amended by Law No. 54, May 8, 1998 (Japanese Election Law (Kôshoku Senkyohô—"JEL")). JEL arts. 150, 150.1, 150.2 and JEL Enforcement Order arts. 111.4, 111.6 provide for five advertisements of five and a half minutes each, plus a one-time advertisement presenting a candidate's biography.

[32] *See, e.g.*, JEL arts. 139-200; JEL Enforcement Order arts. 108-128.

[33] *See* 2000 S.C., ch. 9, § 345.

[34] Third-party advertising expenditures are capped at $150,000 during a general election, of which no more than $3,000 can be used in any one electoral district. *See id.* § 350.

paid political advertising in the national media while strictly regulating political advertisements in other media channels.[35]

Outside the G-7, limitations on paid political advertising during election periods are equally widespread. Sweden allows no paid advertising on its broadcast television channels and mandates impartiality in political reporting.[36] In Austria, paid political advertising is not permitted on the public network.[37] Israel has legislated a complex and restrictive regime governing political broadcasts, sustained under challenge before the High Court.[38] New Zealand limits political broadcasts on television and radio to state-funded timeslots near election day, and Australia imposes a complete ban on radio and television campaigning, including issue

---

[35] *See* Law No. 28 of February 28, 2000 (statute on equal access to media during election period and on political broadcasting); Italian Communications Authority Decision No. 200/00/CSP of June 22, 2000 (implementing Law No. 28 of February 28, 2000); and House of Parliament Scrutiny Committee on Public Broadcasting (RAI) Decision of December 18, 2002 (implementing Law No. 28 of February 28, 2000). Local private broadcasters, if they so elect, may allocate airtime to parties free of charge, but only on an equal access basis and not in excess of two advertisements per day per party. Local private broadcasters may also sell time for political advertisements, but they may not charge more than 50% of the normal commercial rate or sell more time than they have voluntarily allocated for free broadcasting. *See also* P. Barile, E. Cheli & S. Grassi, *Istituzioni di diritto pubblico*, Padova, CEDAM, 103- 104, 295-296 (2002).

[36] *See* Law on Radio and Television, S.F.S. 1996:844.

[37] *See Bundesgesetz über den Österreichischen Rundfunk* (as amended, *Bundesgesetzblatt*, I No. 83/2001), §§ 13 (1), 14-17 (enumerating exhaustive list of permitted advertising subjects).

[38] *See* High Court of Justice Cases Nos. 869/92 and 931/92 (1992) (M. Shamgar, Pres.): "But in the said periods before elections, there is a limitation on election propaganda that is broadcast on the radio or television . . . . This limitation is . . . an unavoidable necessity."

advocacy, for the three days prior to election day.[39] In Belgium, the limitation extends to *three months* before election day and encompasses virtually all paid media and all political matter.[40] Broadcast and electioneering limitations of shorter duration are also in place in Russia and Hungary,[41] as well as Grenada, Dominica, St. Vincent and the Grenadines, and Nepal.[42] Other countries that severely limit paid political advertising in broadcast media include Brazil,[43] the Czech

---

[39] *See* Broadcasting Act, 1989 §§ 69, 70 (N.Z.); Broadcasting Services Act, 1992 (Cth), Sch. 2, Part 2, cl. 3A (Austl.); Special Broadcasting Services Act 1991 (Cth) § 70(c) (Austl.). In *Australian Capital Television v. Commonwealth*, 177 C.L.R. 106 (1992), the High Court of Australia struck down an omnibus ban on the broadcast of political advertising on the ground that it unconstitutionally limited political expression. However, the court left intact a three-day blackout period. Justices Brennan, Deane, and Toohey volunteered positive views on the constitutionality of the three-day blackout period. S*ee id.* at 159, 175. No challenges have been made to the blackout period since this decision.

[40] The limitation extends to paid billboards, telephone campaigns, and television, radio, and cinema. *See* Loi du 4 juillet 1989 relative à la limitation et au contrôle des dépenses électorales engagées pour les élections des Chambres fédérales, ainsi qu'au financement et à la comptabilité ouverte des parties politiques, art. 5.

[41] *See* Federal Law No. 19 F-3, On Election of the President of the Russian Federation, art. 50, point 3; Federal Law No. 175-F3, On Elections of Deputies of the State Duma of the Federal Assembly of the Russian Federation, art. 58, point 3 (Russ.); Act C of 1997 on Electoral Procedure ¶¶ 40-41, § (2) (Hung.).

[42] These jurisdictions ban all or most forms of electioneering on polling day, or on polling day and the day before. *See* Electoral Law, 1958, ch. 160, §§ 63(1), (3) (Gren.); House of Assembly (Elections) Act, ch. 2:01, §§ 52, 54 (Dominica); Representation of the People Act, Electoral Law, 1982, § 41 (St. Vincent and the Grenadines); Election Code of Conduct, 2053 (1996) § A, ¶ 5 (Nepal).

[43] *See* Lei No. 9.504, que estabelece normas paras as eleições, arts. 26, 44 (1997).

Republic, Denmark, Ireland, Malta, Malaysia, Norway,[44] Portugal, Senegal, Seychelles, Singapore, Slovakia, Sri Lanka, Switzerland,[45] and Turkey.[46] In the Americas as a whole—with the exception of the United States, of course—election period restrictions on paid advertising are essentially ubiquitous.[47]

---

[44] In Norway, an advertisement paid for by the National Norwegian Union of Nurses was found to violate the advertising prohibition. *See* European Platform of Regulatory Authorities, *Working Group 2: Political Advertising*, Background Paper EPRA/2002/09, at 6-7, *available at* http://www.epra.org/content/english/index2.html.

[45] *See* Federal Law Concerning Radio and Television of 21 June 1991, § 4, art. 18, ¶ 5 ("La propagande religieuse ou politique est prohibée").

[46] *See* Michael Pinto-Duschinsky, *Financing Politics: A Global View*, 13 J. Democracy 69, 76-77 tbl.2 (2002); European Platform of Regulatory Authorities, *supra* note 44, at 1. Turkey prohibits all political broadcasting for seven days before elections. *See* Const., art. 32 (as amended by Law No. 4756, May 21, 2002) (Turk.).

[47] *See* Ley 25.610, Reforma Código Nacional Electoral, art. 3 (2002) (Arg.) (32-day ban on broadcasts with "the purpose of promoting the acquisition of votes by candidates for public office"); Ley Electoral de 1984, con reformas, incluyendo la Ley No. 2232 (2001), art. 120 (Bol.) (election day ban); Lei No. 4.737 Código Eleitoral de 1965, atualizado com as modificações da Lei 9504/97, art. 250 (Braz.) (2-day ban); Ley Orgánica Constitucional No. 18.700/88, sobre votaciones populares y escrutinios, actualizada a octubre de 2001, art. 30(6) (Chile) ("electoral propaganda" broadcasts allowed only from the 30th to the 3rd day before election); Ley No. 1536, Código Electoral, actualizado con las reformas de 1996, art. 79 (Costa Rica) (ban for day before election and month of December); Ley Electoral y de Partidos Políticos de 1985, art. 223(c) & Decreto 1-90 del Tribunal Supremo Electoral, 1990, art. 38 (Guat.) (36-hour ban); Ley electoral y de las Organizaciones Políticas del 19.05.1981, actualizada hasta DL No. 180-92, art. 74 (Hond.) (5-day ban on attack ads); Código Federal de Instituciones y Procedimientos Electorales de 1994, con reformas de 1996 ("COFIPE"), art. 190(2) (Mex.) (3-day ban); Ley Electoral de Nicaragua de 2000, art. 97 (Nicar.) (3-day ban); Ley No. 834/96 de 1996, Código Electoral Paraguayo, art. 290 (Para.) (political advertising allowed only for 60 days leading up to 2-day ban); Ley No. 26859/97, Ley Orgánica de Elecciones de 1997, art. 190 (Peru) (24-hour

2. *Indirect Limitations on Third-Party Political Advertising Through Spending Limits Are Also Widespread Among Democracies*.

While direct constraints on the use of broadcast media for political advertising are common, many countries also impose general ceilings on third-party spending that indirectly but effectively serve the same purpose. As noted earlier, Canada places a $3,000 limit on spending by third parties within each electoral district. This functions *de facto* as a near-complete ban on paid television advertising by third parties.[48] Italy, Japan, Mexico, and Costa Rica take a more extreme position—they simply bar independent expenditures altogether. An automatic and far-reaching ban on third-party advertising obviously follows in these countries from their prohibitions.[49] In still other jurisdictions, spending by third parties counts against the spending limits of the candidates they support, making it difficult for wealthy third parties to flood broadcast media with paid advertisements. The laws of

---

ban); Ley Orgánica de Sufragio y Participación Política, art. 209 (1997) (Venez.) (48 hours before start of elections, "all electoral publicity will cease").

[48] *See supra* note 34 and accompanying text.

[49] In Costa Rica, to undertake political-electoral publicity in any form, a person must be designated by a political party to the Supreme Tribunal of Elections. *See* Ley No. 1536, art. 85(d). Mexican law provides: "The contracting of advertising in radio and television, either in favor or against any party or candidate, by means of third persons, will not be allowed in any case." COFIPE, art. 48(13). Italian broadcasters may air paid political advertisements only if they clearly identify the political party paying for them—by direct implication, a ban on selling political airtime to independent individuals or groups. *See*, *supra* note 35. Under Japanese law, only groups and persons specifically permitted by statute to do so may engage in electioneering activities (*i.e.*, political parties, qualified political groups, and candidates). *See* JEL, art. 151.5.

New Zealand, Belgium, and Nepal are examples of this approach.[50]

Israel has been particularly proactive in recognizing that any effort to mitigate corruption or imbalance is undone if the regulatory ambit fails to reach independent expenditures. Israeli law regulates "election propaganda," and the High Court of Justice took pains to define the term broadly.[51] Widespread evasion of the intent behind campaign finance rules led State Comptroller and former Supreme Court Justice Eliezer Goldberg to emphasize in an official report after the 2000 Knesset elections that "extra-party propaganda" constitutes prohibited contributions under article 8 of the Financing Law.[52]

BCRA, of course, does not come close to imposing the far-reaching limitations on independent expenditures that are so common to the rest of the world. It is exponentially more selective, restricting *specific* entities (corporations and unions) from using *specific* funds (treasury funds) for *specific* activities (paid advertising) during *specific* time periods (thirty or sixty days prior to an election). Before the passage of BCRA, one scholar noted that although "[a]ccess to political television advertising is . . . a matter dealt with in

---

[50] *See* Electoral Act, 1993 §§ 210, 214B, 221 (N.Z.); Loi du 4 juillet 1989, art. 4, § 2 (Belg.); Election Code of Conduct, 2053 § B, ¶ 5 (1996) (Nepal). Notably, India does regulate campaign spending by candidates but *not* third parties; as a result, its Supreme Court has observed that the restrictions on candidates are "mere eye wash and no practical check on election expenses" as needed "to attain a meaningful democracy." *Godakh Yashwantrao Kankarro v. E.V. alias Balasaheb Vikhe Patil*, 1994 A.I.R. (S.C.) 678.

[51] *See* Case No. 869/92 (defining "electoral propaganda" as "[a] broadcast that contains direct preaching for parties or lists of candidates; an attack on a rival party or list; and also, any broadcast, whose dominant effect is propaganda-wise").

[52] *See Report on the Results of the Audit of the Party Groups for the Period of Elections for the Fifteenth Knesset* ¶¶ 7-8 (1997).

virtually all regulatory frameworks of campaigns[,] the *United States* is truly exceptional."[53] While BCRA's targeted limitations on paid advertising by corporations and unions during election periods represent very modest steps by international standards, they move the United States incrementally towards the mainstream of democracies that regulate third-party political advertising to safeguard the integrity of their electoral systems.

B. Other Democracies Have Found That Restrictions On Paid Political Advertising Are Compatible With Free Speech.

The United States is not the only jurisdiction whose courts have addressed restrictions on third-party paid political advertising within the framework of a constitutionally enshrined right to freedom of expression. Both Canada and many European nations enjoy a well-developed free speech jurisprudence, and courts in both places have asked whether free speech can accommodate restrictions on third-party political advertising. An analysis of Canadian and European judicial opinions yields a qualified answer in the affirmative.

1. *The Canadian Supreme Court Has Indicated That Restrictions on Paid Political Advertising by Third Parties Can Survive Constitutional Scrutiny.*

In Canada, rights to freedom of expression and freedom of association are protected under the Canadian Charter of Rights and Freedoms.[54] The Charter reflects a commitment to these freedoms similar in scope and vigor to that of the

---

[53] Fritz Plasser and Gunda Plasser, *Global Political Campaigning: A Worldwide Analysis of Campaign Professionals and Their Practices* 205, 216 (2002) (emphasis in original).

[54] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.), 1982*, ch. 11, §§ 2(b) and 2(d) (declaring as "fundamental" the "freedom of thought, belief, opinion and expression" and the "freedom of association").

U.S. Constitution. In the words of the Canadian Supreme Court:

> [This] Court has consistently and frequently held that freedom of expression is of crucial importance in a democratic society. . . . "It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized."[55]

Clearly, freedom of expression is deeply embedded in Canadian jurisprudence.

The seminal Canadian Supreme Court decision applying constitutional scrutiny to restrictions on paid political advertising by third parties is *Libman v. Quebec (A.G.)*.[56] In *Libman*, the court considered a constitutional challenge to Quebec's Referendum Act, which required groups wishing to participate in a referendum campaign to either join or affiliate with a national committee formed for the purpose of supporting one of the referendum options.[57] The Act also provided for the financing of national committees and allowed them and their affiliated groups to incur expenses (up to prescribed limits) for the purpose of promoting or opposing a referendum option. Groups that did not join or affiliate with a national committee, however, were permitted to incur only minor expenses, and were essentially banned from all paid

---

[55] *Libman v. Quebec (A.G.)*, [1997] 3 S.C.R. 569, 151 D.L.R. (4th) 385, ¶ 28 (quoting *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326, 1336).

[56] *Id.*

[57] *See* Referendum Act, R.S.Q., ch. C-64.1, §§ 402, 403, 404, 406, ¶¶ 3, 413, 414, 416, 417 of Appendix 2 (as cited in *Libman*, 3 S.C.R. 569).

advertising.[58] The appellant in *Libman* argued that this limitation unconstitutionally infringed his right to freedom of expression under the Charter.

The Canadian Supreme Court recognized the need for such restrictions and agreed with them in principle:

> Freedom of political expression, so dear to our democratic tradition, would lose much value if it could only be exercised in a context in which the economic power of the most affluent members of society constituted the ultimate guidepost of our political choices. Nor would it be much better served by a system that undermined the confidence of citizens in the referendum process.[59]

Nevertheless, the court reluctantly concluded that the Referendum Act's near-total ban on third-party spending by "individuals and groups who can neither join the national committees nor participate in the affiliation system" went too far.[60]

Significantly, however, in addition to evaluating the Referendum Act itself, the *Libman* court went out of its way to address a separate federal statute, the Canada Elections Act.[61] Like the Referendum Act, the Canada Elections Act imposed strict limits on third-party spending, but in a manner that *did* allow for limited paid political advertising. Specifically, the Act allowed third parties to spend up to $1,000 on political "advertising expenses," defined to include all costs incurred "for the production, publication, broadcast and distribution of any advertising for the purpose of promoting or opposing" a party or candidate during an election.[62] The statute also

---

[58] *See Libman*, 3 S.C.R. ¶ 12 (setting forth strictly limited permissible expenses).

[59] *Id.* ¶ 84.

[60] *Id.* ¶ 77.

[61] R.S.C., 1985, ch. E-2.

[62] *Id.* § 259.

designated certain "blackout" periods during which all persons were enjoined from election advertising.[63]

By the time the Canadian Supreme Court took up *Libman*, the Canada Elections Act's $1,000 limit on third-party advertising expenditures had been held unconstitutional by the Alberta Court of Appeal in *Somerville v. Canada*.[64] Because the Canadian government decided not to appeal the lower court judgment in *Somerville*, however, the Canadian Supreme Court could not review the lower court decision directly. As a result, it took the highly unusual step in *Libman* of expressing its clear disapproval of a ruling not before it:

> In *Somerville v. Canada (Attorney General)*, the Alberta Court of Appeal declared [the Canada Election Act's restrictions on third party advertising] to be unconstitutional. With respect, we have already mentioned that we cannot accept the Alberta Court of Appeal's point of view because we disagree with its conclusion regarding the legitimacy of the objective of the provisions.[65]

The court explained:

> We agree . . . with the analysis of the Lortie Commission [66] . . . regarding the need to limit spending both

---

[63] *See Somerville v. Canada* (A.G.) (1996), 136 D.L.R. (4th) 205, ¶ 6 (summarizing the black-out provisions codified as subsection 213(1) of the Canada Elections Act, R.S.C., 1985, ch. E-2). The black-out periods prohibited election advertising "for approximately the first 18 of 47 days of a federal election campaign. This is followed by a period of 28 days when advertising is permitted, up until the day prior to polling day, after which it is again prohibited." *Id.* ¶ 58.

[64] *See id.*

[65] *Id.* ¶ 79.

[66] The Royal Commission on Electoral Reform and Party Financing chaired by Pierre Lortie ("Lortie Commission") was appointed to analyze the role of money in the Canadian electoral process in response to concerns about the levels and sources of expenditures during the 1988 federal election. Many of the Lortie Commission's recommendations were adopted in the new Canada Elections Act, 2000 S.C., ch. 9.

> by the principal parties (the national committees in the case of a referendum) and by independent individuals and groups in order to preserve the fairness of elections and, in the present case, referendums.[67]

The court further suggested that the Canada Elections Act's limits on third-party advertising were tailored narrowly enough to pass constitutional muster, in contrast to the Referendum Act's more severe restrictions on third-party spending.[68]

Libman's potential contribution to this Court's analysis lies in its explicit recognition that campaign finance laws implicate multiple constitutional values, and that arriving at a sensible solution requires a careful balancing of those interests. In the context of third-party expenditures, this necessarily entails moderating the otherwise broad right to free speech in order to preserve the integrity of the democratic process. Of course, *Libman*'s premise is not foreign to this Court's deliberations. Rather, this Court has implicitly adopted a nuanced balancing framework in many of its own cases. As Justice Breyer noted during a discussion on contribution limits:

> [T]his is a case where constitutionally protected interests lie on both sides of the legal equation . . . . In such circumstances—where a law significantly implicates competing constitutionally protected interests in complex ways—the Court has … balanced interests. And in practice, that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others. . . This approach is that taken in fact by *Buckley*

---

[67] *Libman*, 3 S.C.R. ¶ 55-56.

[68] *Id.* ¶ 77 ("In our view, there are alternative solutions far better than [the Referendum Act's near-complete ban on unaffiliated third party spending]. . . . The Lortie Commission's recommendation on third party expenses [which was incorporated into the Canada Elections Act as the $1,000 spending limit] is one possible solution.").

> for contributions, and is found generally where competing constitutional interests are implicated, such as privacy, First Amendment interests of listeners or viewers, and the integrity of the electoral process.[69]

The Court should apply that approach in the present case, recognizing that the fundamental constitutional value of preserving the integrity of the democratic process justifies BCRA's modest imposition on speech.

In sum, *Libman* is a well-considered effort by the Canadian Supreme Court to accommodate third-party spending restrictions within constitutional parameters. It stands not only for the proposition that constitutionally protected free speech can tolerate restrictions on third-party political activities, but that such restrictions are integral to a robust democratic polity. In reviewing BCRA's restrictions on paid political advertising, this Court should take into account the Canadian Supreme Court's thoughtful analysis of a shared constitutional concern.[70]

2. *The European Court of Human Rights Has Indicated That Restrictions on Paid Political Advertising by Third Parties Are Compatible with the Right to Free Speech.*

In forty-four European countries, the right to freedom of expression is guaranteed under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention").[71] The Conven-

---

[69] *Nixon*, 528 U.S. at 400, 402-403 (2000) (Breyer, J., concurring) (internal citations omitted).

[70] The Canadian Supreme Court on June 27, 2003 cited *Libman* approvingly for its holdings on fairness in the electoral process. *See Figueroa v. Canada (A.G.)*, 2003 S.C.C. 37, ¶¶ 49, 51.

[71] 312 U.N.T.S. 222 (1950) (hereinafter "Convention"). The key provisions of Article 10 provide:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart

tion was the first document that gave "specific legal content to human rights in an international agreement, and combined this with the establishment of machinery for supervision and enforcement."[72] Violations of rights guaranteed under the Convention are adjudicated by the European Court of Human Rights (ECHR), which was established under the Convention. As in the United States and Canada, the right to free speech is considered by the ECHR to be of paramount importance: "According to the Court's case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment."[73] "The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy."[74]

---

information and ideas without interference by public authority and regardless of frontiers.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such . . . restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others . . . .

[72] Ian Brownlie, *Basic Documents in Human Rights* 338 (1971).

[73] *Unabhängige Initiative Informationsvielfalt v. Austria*, [2002] E.C.H.R. 28525/95, ¶ 34; *see also Wierzbicki v. Poland*, [2002] E.C.H.R. 24541/94, ¶ 31 (referring to "principles established in the case-law of the Convention organs concerning freedom of expression, which constituted one of the essential foundations of a democratic society"); *Surek and another v. Turkey*, (1999) 7 B.H.R.C. 339, ¶ 45 ("The court reiterates the fundamental principles under its judgments relating to art 10. . . . Freedom of expression constitutes one of the essential foundations of a democratic society."); *Fressoz and Roire v. France*, (1999) 5 B.H.R.C. 654, ¶ 45 (same).

[74] Özgür Gündem *v. Turkey*, [2000] E.C.H.R. 23144/93, ¶ 43 ("Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. . . . Such are the demands of the pluralism, tolerance and broadmindedness without which there is no "democratic society." *Id.* at ¶ 57).

Limitations on third-party spending were addressed by the ECHR in *Bowman v. United Kingdom*.[75] Bowman, a political activist, challenged a British statute that prohibited unauthorized third parties from spending more than five pounds ("GBP")—less than $10—during the period before an election to convey information "with a view to promoting or procuring the election or defeat of a candidate."[76]

Plaintiffs-Appellants in their brief cite *Bowman* to support their assertion that "unfettered issue advocacy enjoys international support."[77] Purporting to quote directly from *Bowman*, Plaintiffs-Appellants summarize the ECHR's opinion as follows:

> [The ECHR decided] that a London woman could not be charged with a campaign law violation for distributing 1.5 million copies of a voter guide . . . even though it was . . . "distributed with a view to promoting the election of the candidate with the stand on abortion most acceptable to the [plaintiff]" and "might in fact have the tendency to influence certain voters in different directions," because "freedom of expression constitutes one of the essential foundations of a democratic society, [sic] and the government had failed to prove that such "'single' issue campaigning . . . would distract voters [or] "'distort' election results."[78]

But that is *not* what the ECHR said in *Bowman*. In fact, these statements were never made by the ECHR at all. Plaintiffs-Appellants miscite and misattribute these quotes, which actually come from a report made by a now-defunct

---

[75] [1998] E.C.H.R. 24839/94, (1998) 4 B.H.R.C. 25.

[76] *Id.* ¶ 13 (quoting subsections 75(1) and (5) of the Representation of the People Act of 1983: "No expenses shall, with a view to promoting or procuring the election of a candidate . . . at an election, be incurred by any person other than the candidate, his election agent and persons authorized in writing by the election agent.").

[77] Brief of Plaintiffs-Appellants/Cross-Appellees National Right to Life Committee et al., at 15 n.18.

[78] *Id.*

investigative body that referred the case to the ECHR for adjudication.[79] What the ECHR *actually* said in *Bowman* was the following:

> Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system . . . . Nonetheless, in certain circumstances the two rights may come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the "free expression of the opinion of the people in the choice of the legislature."[80]

The ECHR ultimately did strike down the British statute, but on grounds similar to those articulated in *Libman*—that the spending limit of 5 GBP "operated, for all practical purposes, as a total barrier to Mrs. Bowman's publishing information with a view to influencing the [election]."[81]

Like *Libman*, *Bowman* is widely understood to affirm the principle that countervailing constitutional interests must be balanced in reviewing campaign finance limitations, and that such balancing *permits* restrictions short of a complete ban.[82] The United Kingdom, for example, has interpreted the ECHR's decision as allowing reformulated statutory restrictions on paid third-party expression; the Parliament recently enacted a comprehensive election reform bill that

---

[79] *See* European Commission of Human Rights, Bowman Against the United Kingdom, Application No. 24839/94, Report of the Commission (adopted Sept. 12, 1996).

[80] *Bowman*, [1998] E.C.H.R. 24839/94, ¶¶ 42-43.

[81] *Id.* ¶ 47.

[82] The High Court of Justice of Israel also has endorsed a balancing approach. *See* Cases Nos. 869/92 and 931/92 (*Nissim Zvili v. Chairman of the Ctrl. Elections Com., Ass'n for Human Rights v. Dir. Gen'l of the Broadcasting Service*) (Aharon Barak, J.) ("The solution is to be found in an appropriate balance among the contradictory purposes.").

modestly raises expenditure limits for third parties to meet the *Bowman* standard.[83]

III. NEARLY ALL MAJOR DEMOCRACIES IMPOSE RESTRICTIONS ON THE FLOW OF MONEY THAT ARE FAR MORE ONEROUS THAN BCRA'S RESTRICTIONS ON SOFT MONEY.

There is no obvious analogue to the American soft money problem overseas, for the problem relates to unique aspects of the relationship in the United States between federal and state political parties and between federal and state fundraising rules. As explained in detail in the record developed at the district court level, soft money relates to the unregulated raising, transfer, and expenditure of nonfederal funds to influence federal elections. Most other countries simply do not have a dual system of government that provides opportunities for funneling money from one level to the other in contravention of the spirit and purpose of the campaign finance laws.

The soft money problem, however, is one manifestation of a larger problem common to many democracies: how to prevent the massive influx of unregulated money into cam-

---

[83] *See* Political Parties, Elections, and Referendums Act (PPERA), 2000, ch. 41, § 131(3). PPERA amends a "permitted sum" exception to § 75(1) of RPA 1983, so as to elevate that sum from 5 GBP to 500 GBP, plus one half pence for each elector in the district, for independent expenditures supporting an individual candidate for Parliament. The limit applies both to an individual making such an independent expenditure and to groups of individuals acting as part of a "concerted plan of action." Part VI, § 94(5) of PPERA imposes a separate limit on spending money "supporting or opposing registered political parties or parties that put forward particular policies or unnamed candidates who hold particular views or advocate particular policies." The limit on such third-party expenditures is 10,000 GBP for England and 5,000 GBP each for Scotland, Wales, and Northern Ireland. *See also* Committee on Standards in Public Life, Fifth Report at 10.59 (1998) (proposing how to implement *Bowman* standards).

paigns from undermining the democratic process. Significantly, most foreign countries address that issue with a range of regulations far more proscriptive than the closing of the soft money loophole contemplated by BCRA.

First, as discussed above, nearly every major industrialized country has far-reaching restrictions or bans on paid advertising. Since advertising is an enormous component of campaign expenditures, such laws dramatically reduce incentives for introducing unregulated funds into the campaign process.

Moreover, most countries furnish public funds for campaigns, further reducing the incentive for candidates and parties to find fundraising loopholes. The G-7 nations generally provide public funds to parties and candidates for most or all national elections. Indeed, in the Library of Congress survey, *every* country except India, Iran, and Singapore had a system of direct public funding.[84] In a separate survey of sixty countries—including many less-developed countries with little regulatory infrastructure—fully 70% were found to provide some form of direct public funding.[85] The United States is thus again the exception to the rule insofar as, apart from presidential campaigns, it does not provide public funds for parties or candidates.

---

[84] *See LOC Comparative Summary*, *supra* note 3, at 4. Most calculate the amount of support using a flat-rate formula, while a minority base their calculation on a certain percentage of qualified expenditures. The countries using flat-rate formulas are: Argentina, Australia, the Czech Republic, France (with regard to parties), Israel, Italy, Japan, Mexico, the Netherlands, Taiwan, and Turkey, and the United Kingdom. The countries using a percentage of qualified expenditures are: Canada, Greece, and France (with regard to candidates). *See id.* at 4-5.

[85] *See* Michael Pinto-Duschinsky, *Handbook on Funding of Parties and Election Campaigns* (Stockholm: International Institute for Democracy and Electoral Assistance (IDEA), forthcoming 2003) (overview *available at* http://www.europexxi.kiev.ua/english/program/conference/007.html).

Finally, unlike the United States, most other major democracies limit campaign expenditures. By controlling campaign funding through the more aggressive means of expenditure limits rather than—or in addition to—contribution limits, other countries minimize incentives to pursue ways of overcoming contribution limits. Among the other Group of Seven nations, all with the exception of Germany establish ceilings on campaign expenditures. Canada places expenditure limits on candidates and political parties (based on the number of eligible voters) as well as on third parties.[86] Italy establishes limits on expenditures by candidates based on the number of citizens in a district, and for parties based on the number of eligible voters.[87] The United Kingdom imposes separate limitations for candidates, parties, and third parties for different types of expenditures.[88] In France, the law sets a general ceiling on campaign expenditures for candidates and also imposes special limitations on different types of expenditures to promote fairness and prevent runaway election costs.[89] Japan imposes spending limits for candidates according to a complex formula based on the number of registered voters and the number of seats in a district.[90] France, Italy, and Japan also impose a second layer of control by imposing contribution limits on top of expenditure limits.[91]

Widening the circle beyond the G-7 nations, the Library of Congress found in its comparative survey of campaign

---

[86] *See* 2000 S.C., ch. 9, § 441.

[87] *See* Law No. 515/1993, art. 7.

[88] *See* PPERA §85.

[89] *See* Law Library of Congress, *France: Campaign Financing of National Elections* (Document No. 2000-9042) at 6 (2000).

[90] *See* Law No. 100, art. 194, Apr. 15, 1950, as last amended by Law No. 54, May 8, 1998 (JEL); art. 194 JEL, arts. 126, 127 of JEL Enforcement Order.

[91] *See LOC Comparative Summary*, *supra* note 3, at 3.

finance laws in eighteen countries that expenditure limits are maintained by a substantial majority of those surveyed.[92] The expenditure ceilings are either set amounts, as in Greece, Israel, and Russia, or based on the number of voters or constituencies, as in Canada, India, France, Japan, Taiwan, and the United Kingdom.[93]

Amici do not recount these facts to urge this Court to disavow *Buckley v. Valeo* and uphold expenditure limits. *Amici* recognize that the United States' exceptionally permissive system is motivated by the laudable desire to protect First Amendment values and to promote political discourse and participation. Rather, *amici* seek to illustrate that the United States is located toward one extreme of the democratic continuum with respect to how it regulates money in its electoral system.[94] Against this backdrop, it is clear that BCRA's modest efforts to stem the flow of soft money that continues to erode the democratic process are both permissible and desirable. BCRA is a badly needed step that will begin to pull campaign finance in the United States back from the fringe of international practice.

CONCLUSION

For the foregoing reasons, the provisions of the Bipartisan Campaign Reform Act of 2002 relating to third-party political advertising and soft money should be affirmed.

---

[92] *See id.* at 4.

[93] *See id.*

[94] The United States is also located at one extreme in terms of voter participation—it ranked 140 out of 163 countries in voter turnout during the 1990s, behind Tanzania, Madagascar, Jamaica, Cameroon, and Chad, and just ahead of Botswana, Kenya, Haiti, Mauritania, Ivory Coast, and Pakistan. *See* International Institute for Democracy and Electoral Assistance (IDEA) Voter Turnout Website, *at* http://www.idea.int/vt/survey/voter_turnout_pop1.cfm.

Respectfully submitted,

CHRISTOPHER J. WRIGHT *
TIMOTHY J. SIMEONE
YUL J. KWON
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, DC 20036
(202) 730-1300

THOMAS D. GRANT
LAUTERPACHT RESEARCH
CENTRE FOR INTERNATIONAL LAW
5 Cranmer Road
Cambridge CB3 9BL
United Kingdom
011 44 1223 691 664

* Counsel of Record

August 5, 2003