[REDACTED]
Nos. 02-1674 et al.

IN THE
Supreme Court of the United States

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

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

AND CONSOLIDATED CASES

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR INTERVENOR-DEFENDANTS SENATOR JOHN MCCAIN, SENATOR RUSSELL FEINGOLD, REPRESENTATIVE CHRISTOPHER SHAYS, REPRESENTATIVE MARTIN MEEHAN, SENATOR OLYMPIA SNOWE, AND SENATOR JAMES JEFFORDS

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QUESTIONS PRESENTED

The Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, is designed to protect the integrity of the federal election process, to guard against the corruption and appearance of corruption of federal officials and candidates for federal office, and to prevent a recurrence of the massive circumvention of longstanding regulations of campaign finance in the Federal Election Campaign Act (FECA) that occurred before enactment of BCRA.

In light of the fact that the Solicitor General will comprehensively address the various plaintiffs' constitutional objections to BCRA, the intervenor-defendants will address only the following questions in this brief:

1. Whether Title I of BCRA—which prohibits national political parties, federal officeholders, candidates for federal office, and officers of national political parties from soliciting and using "soft money" (donations from prohibited sources such as corporations and labor unions or in amounts exceeding statutory contribution limits), and which restricts state and local political parties, state candidates, and state officials from using unlimited "soft money" for "federal election activity"—is constitutional.

2. Whether Title II-A of BCRA—which prohibits the use of funds from corporate and labor union general treasuries for "electioneering communications," and which imposes disclosure requirements with respect to "electioneering communications"—is constitutional.

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City Council v. *Taxpayers for Vincent*, 466 U.S. 789 (1984) 35
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FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978) 35
FEC v. *Beaumont*, 123 S. Ct. 2200 (2003) .... *passim*
FEC v. *Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) .... *passim*
FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) 61, 74, 75
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First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) 54, 57, 58
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11 C.F.R. § 114.10(c), (d) 75
11 C.F.R. § 300.37(a)(3)(iv) 7, 38
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144 Cong. Rec. S977 (Feb. 25, 1998) (Sen. Levin) 39
144 Cong. Rec. S898 (Feb. 24, 1998) (Sen. Ford) 39
145 Cong. Rec. S12,661 (Oct. 15, 1999) (Sen. Feinstein) 58
147 Cong. Rec. S252 (Apr. 2, 2001) (Sen. Thompson) 66
148 Cong. Rec. H409 (Feb. 13, 2002) (Rep. Shays) 20
S. Rep. No. 105-167 (1998) .... *passim*
The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 .... *passim*
The Constitution and Campaign Reform: Hearings on S. 522 Before the Sen. Comm. on Rules and Admin., 106th Cong. 301, 2d Sess. (2000) 29

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Beck, D., et al., *Issue Advocacy Advertising During the 1996 Campaign* (Annenberg Pub. Pol'y Ctr. 1997) 48
Buying Time 1998 67
Buying Time 2000 67

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Common Cause, *You Get What You Pay For* (2000)........... 12

Cook & Co. Political Analysis, *The Cook Political Report 2000: The Race for the White House* (2000).. 51

Foley, *"Narrow Tailoring" Is Not the Opposite of "Overbreadth,"* 2 Elec. L. J. (forthcoming Oct. 2003), *available at* http://www.liebertpub.com/ELJ/Foley1.pdf... 59

La Raja, R., *Sources and Uses of Soft Money,* in *A User's Guide to Campaign Reform* (G. Lubenow ed., 2001).. 19

Root, Elihu, Political Contributions By Corporations (Sept. 3, 1894), in *Addresses on Government and Citizenship* (R. Bacon & J. Scott eds., 1916)... 1

INTRODUCTION

More than a century ago, Elihu Root decried massive donations to political parties and candidates as

> a constantly growing evil in our political affairs, which has . . . done more to shake the confidence of the plain people of small means in our political institutions[] than any other practice which has ever obtained since the foundation of our government. And I believe that the time has come when something ought to be done to put a check upon the giving of $50,000 or $100,000 by a great corporation toward political purposes, upon the understanding that a debt is created from a political party to it; a debt to be recognized and repaid with the votes of representatives in the legislature and in Congress, or by the actions of administrative or executive officers who have been elected in a measure through the use of the money so contributed.[1]

The concerns about the vitality of our democratic system that lie at the heart of this case are thus "neither novel nor unfamiliar." SA 479(K).[2] Congress and the States have long wrestled with the problem that "aggregated capital [can] unduly influence[] politics, an influence not stopping short of corruption." *FEC* v. *Beaumont*, 123 S. Ct. 2200, 2205 (2003). To protect democracy, they have limited the size of campaign contributions; mandated public disclosure of contributions and expenditures; and required corporations and unions to use only funds voluntarily raised from individuals to make campaign-related contributions and expen-

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[1] Elihu Root, Political Contributions By Corporations (Sept. 3, 1894), in *Addresses on Government and Citizenship* 143-44 (R. Bacon & J. Scott eds., 1916).

[2] Citations to "SA" refer to the district court's opinions reprinted in the supplemental appendix to the jurisdictional statements. We use the judges' initials (H, L, K) to refer to their individual opinions, and "PC" for the per curiam opinion. "DEV" refers to the defendants' exhibit volumes in the court below, and "IER" to the intervenors' excerpts of record.

ditures. This Court has sustained many such measures. *See id.*; *FEC* v. *Colorado Repub. Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II*); *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam); *Burroughs* v. *United States*, 290 U.S. 534 (1934).

In the 1970s, after the public learned that its government officials had granted favors, positions, and preferential access to campaign donors, Congress acted to restore integrity to a system that had suffered a dramatic loss of public confidence. Congress did not attempt to remove private money from politics. But it did seek to ensure that federal officials would not be induced to heed the wishes of $100,000 donors, donors would not feel compelled to make massive contributions as insurance against official retaliation, corporations and unions would not use their war chests to advance the election of federal candidates in the hope of gaining influence with them, and citizens would not lose faith in their representatives out of concern that they were more responsive to the large moneyed interests that had assisted their election than to their constituents—or the public interest.

Yet history teaches that political actors and those who control aggregations of wealth are always "test[ing] the limits of the current law," *Beaumont*, 123 S. Ct. at 2207, and a generation later, Congress recognized that its work was on the brink of collapse. Although the Federal Election Campaign Act (FECA) worked well for a time, its effectiveness was undermined when the Federal Election Commission (FEC) created significant loopholes, which players of the political money game relentlessly exploited. By the 2000 elections, political actors had ceased to observe anything like a prohibition against contributions or expenditures from corporations or unions, or against contributions in excess of statutory limits, for the purpose of influencing federal elections. The Bipartisan Campaign Reform Act (BCRA) is Congress's attempt to restore FECA to working order.

The plaintiffs' position is that FECA, having fallen (or, more accurately, having been pushed), must, like Humpty Dumpty, remain forever smashed. They argue that the

Constitution permits only rules that would be ineffectual to counteract either the reality or the perception of a system in which donors give massive assistance to political parties on the understanding that they create—as Elihu Root stated—"a debt to be recognized and repaid." In their view, Congress, this Court, and the public must accept a political system in which an overwhelming majority of Americans believe that Members of Congress disproportionately heed the views of large donors to political parties—even if those views do not coincide with what most constituents want, or what a Member thinks is best for the country. *See* SA 626-28(K), 1289-92(L); Mellman/Wirthlin Rep. 6-9 (JA 1564-69).

As this Court has observed, "[l]eave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000). Nothing in BCRA casts the least doubt on "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). But BCRA serves public interests every bit as profound: "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process. This case thus raises issues not less than basic to a democratic society." *United States* v. *UAW*, 352 U.S. 567, 570 (1957).

STATEMENT

1. *The Problem Congress Faced.* FECA carried forward provisions, first enacted between 1907 and 1947, prohibiting corporations and unions from using their general treasury funds to make contributions or expenditures in connection with federal election campaigns. FECA permitted corporations and unions to establish separate segregated funds (PACs), to solicit voluntary contributions to those PACs from related individuals, and to use the PAC funds in federal campaigns. It limited other campaign contributions

and expenditures, required expanded disclosure of both, and established the FEC to enforce the law.

In *Buckley* v. *Valeo*, this Court generally upheld FECA's limits on contributions to candidates and political committees, 424 U.S. at 23-38; struck down its limits on expenditures, *id.* at 39-51; and upheld its disclosure requirements, *id.* at 60-84. In sustaining disclosure of expenditures by persons other than candidates or political committees (such as political parties), the Court construed the term "expenditure" to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 79-80. As examples, the Court pointed to words of "express . . . advocacy" such as "vote for" or "vote against." *Id.* at 80 n.108 & 44 n.52.

a. *Soft Money.* Two years after *Buckley*, the FEC embraced a legal fiction under which political parties effectively became able to use funds raised directly from corporations and unions and from individuals in amounts exceeding FECA's contribution limits ("soft money") for activities affecting federal elections. Under this loophole, political parties could use a combination of "hard" (FECA-compliant) and soft money for mixed-purpose activities that influenced both federal and state elections. FEC Adv. Op. 1978-10. This fiction allowed political parties to raise and use unlimited soft money to influence federal elections.[3]

National-party soft money spending grew from $19 million in 1980 to $80 million in 1992, by which time a significant

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[3] Plaintiffs object to the term "soft money." Congress, however, used that term to refer to funds that are not subject to the limitations, prohibitions, and reporting requirements of FECA. 2 U.S.C. § 441i ("Soft money of political parties"). Members of this Court have used the term the same way. *Colorado Repub. Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 616 (1996) (opinion of Breyer, J.) (*Colorado I*); *Shrink Mo.*, 528 U.S. at 398 (Stevens, J., concurring). Plaintiffs prefer terms such as "state" or "state-regulated" money, but those locutions are premised on the very fiction that BCRA was enacted to address—that the hundreds of millions of dollars donated to parties' "non-federal" accounts were not used to influence federal elections. *See* pp. 17-19, 25-26.

share was being spent to influence federal elections. SA 32-35(PC); Mann Rep. 15-17 (JA 1548-51). The trend accelerated in the 1996 elections, when the national parties ran so-called "issue" ads prominently featuring presidential candidates, but funded in large part with soft money on the theory that they used no words "expressly advocating" any candidate's election. SA 35-37 & nn.14-15(PC), 494-95(K), 1191(L). By the 2000 election cycle, their soft money activity reached $498 million—42% of their total spending. SA 38(PC).

The FEC's rules permitted state parties to use a greater percentage of soft money than national parties in funding mixed-purpose activities. The parties gained leverage by raising soft money at the national level, but transferring it to state parties to fund activities—including "issue" ads—that influenced federal elections. SA 33-37(PC), 517-19(K), 1231-34(L). In 1996 the national parties transferred to state parties $115 million in soft money—two thirds of state-party soft money expenditures. By 2000, the amount rose to $280 million—more than half the soft money the national parties raised. SA 490-91(K), 1188-89(L).

To raise a half-billion dollars, the national parties turned to large donors. In the 2000 election cycle, 60% of their soft money came from just 800 donors—including 435 unions, corporations, and other organizations, and 365 individuals—each contributing at least $120,000. SA 287(H), 1189(L). These developments struck at the fundamental principle, sustained by this Court, that the threat of actual or apparent corruption can be minimized by regulating the source and amount of contributions made to influence federal elections.

b. *"Issue" Advocacy.* Like the parties, corporations, unions, and others began sponsoring advertisements that supported or opposed federal candidates but avoided words of "express advocacy." Following the lead of the AFL-CIO, corporations, unions, and interest groups spent millions of dollars in 1996 from their treasury funds and dues (not PAC funds) to pay for broadcast ads directed at specific federal candidates and aired in their districts in the final weeks before their elections. SA 38-40(PC), 678-99(K), 1316-17(L).

The record "unequivocally establishes" that despite the absence of "magic words," such ads "not only [were] crafted for the specific purpose of directly affecting federal elections, but [were] very successful in doing just that." SA 1161(L); *see* SA 810-21(K). Like soft money donations to parties, candidate-focused "issue" ads undermined core aspects of the campaign finance regime upheld in *Buckley*. They allowed corporations and unions to intervene in federal elections using general treasury funds rather than PAC funds, and enabled groups and individuals to make campaign expenditures without meeting FECA's disclosure requirements. SA 39(PC), 657-58(K), 1306-08(L).

2. *Congress's Response*. BCRA responds to these wholesale evasions in a direct but tailored way. The details of BCRA are covered elsewhere. We note, however, that plaintiffs' attacks on BCRA studiously ignore its core function of restoring public confidence in federal officials and elections by closing the soft money and "issue" ad loopholes. Instead, they imagine obscure applications of BCRA, and then suggest those applications lie at the heart of the law; they stretch to find the most draconian possible interpretation of the law, only then to complain of its harsh effect; and most significantly, they repeatedly mischaracterize the law's provisions, and thus attack something that does not exist.

For example, the political parties highlight their four most compelling examples of BCRA's supposed excesses on the first page of their brief. None is addressed to BCRA's core provisions, and each is premised on a misstatement of the law. First, the parties assert it is a crime under BCRA for "the Chairman of the RNC . . . to send a fundraising letter on behalf of his party's . . . gubernatorial candidate in [an] off-year election." But the FEC and Justice Department have made clear that national-party officials may solicit hard money on behalf of any candidate—federal, state, or local—and their parties also remain free to contribute

hard money to federal, state, and local candidates.[4] Second, they assert that California state parties may not donate even hard money to PACs formed to support or oppose the current effort to recall the Governor. In fact, the relevant restriction has no application to the recall election, which the State of California has scheduled for October 7, 2003, five months away from any federal election.[5] Third, they assert that BCRA subjects to "pervasive federal regulation voter registration and get-out-the-vote . . . efforts by state and local parties." Actually, BCRA does not regulate—much less "pervasive[ly]" regulate—these activities, but merely addresses the size and source of contributions used to finance them, when they are conducted in connection with federal elections.[6] Most bewilderingly, plaintiffs assert that BCRA makes it a crime for the national parties to work with their state counterparts "to design, fund, and implement statewide voter mobilization programs." In truth, BCRA does not prevent national and state parties from coordinating their activities for such efforts, so long as the national parties do not *solicit* soft money or *control* its expenditure.[7]

Plaintiffs' characterizations of BCRA's new definition of "electioneering communications" are equally flawed. They persistently contend (*e.g.*, McConnell Br. 39) that the electioneering communications provisions "seek to prohibit core political speech." These provisions ban no speech. Corporations and unions remain free to run federal campaign ads, as

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[4] 2 U.S.C. § 441i(a)(1), (2) (national parties and their officers prohibited from soliciting funds that are not "subject to the limitations, prohibitions, and reporting requirements of this Act"); *see* pp. 36-37.

[5] 11 C.F.R. 300.37(a)(3)(iv) (state parties may transfer funds to state political committees supporting only state or local candidates and not engaging in federal election activity); *see* p. 38 n.29.

[6] 2 U.S.C. § 441i(b)(1) (amounts expended for federal election activity "shall be made subject to the limitations, prohibitions, and reporting requirements of this Act"); *see* pp. 27-28.

[7] 2 U.S.C. § 441i(a)(1) (national party may not "solicit, receive, or direct to another person . . . or spend" soft money).

long as they pay for the ads from PAC funds voluntarily contributed by individuals for that purpose.

Most fundamentally, plaintiffs mischaracterize BCRA as representing an epochal change in the law. In truth, BCRA merely strives to restore the efficacy of longstanding federal campaign finance laws, and to put an end to the evasion that has made a mockery of the law and left the public to believe that democracy is for sale.

SUMMARY OF ARGUMENT

BCRA's aim is to restore public faith in federal officeholders and elections by closing the soft money and "issue" ad loopholes that had, in recent years, eviscerated the federal campaign finance laws. Prior to enactment of BCRA, corporations, unions, individuals, and political parties routinely evaded long-established contribution limits and source restrictions. Hundreds of millions of dollars of contributions were used to influence federal elections without complying with federal standards. Similarly, by running campaign ads that avoided words of "express advocacy," corporations and unions routinely evaded federal restrictions on the use of their general treasury funds to influence federal elections, injecting many millions of dollars more of unregulated money into federal elections. BCRA responded to the collapse of the FECA regime in a considered and measured way. The law should be sustained in its entirety.

I. Title I restores efficacy to the FECA structure of source prohibitions, amount limits, and disclosure requirements for contributions used to influence federal elections. It does so by banning soft money contributions to national political parties, regardless of how the money is used, and restricting state parties' use of soft money for specified "federal election activity." It imposes no spending limits on anyone, but rather addresses the risk that large political contributions will foster actual or apparent corruption of federal officeholders. Upholding Title I thus requires no more than reaffirming the principle of *Buckley* v. *Valeo* that Congress may limit contributions in a real and effective manner.

The Members of Congress who enacted BCRA correctly concluded, based on a substantial record and their own experiences, that the corrupting potential of soft money donated to national parties stems from the way in which it is raised, and from the close relationship between national parties and federal officeholders and candidates. Rather than insulating their officeholders from this corrupting potential, national parties acted as the conduit for that corruption, bringing soft money donors and officeholders together and urging officeholders to raise soft money and to entertain the policy wishes of the donors. Congress recognized that this system generated enormous damage to public confidence in our democratic system and public officials, and enabled candidates to engage in massive circumvention of FECA's limits on sources and amounts of contributions.

Congress knew that national parties had used state affiliates to deploy soft money for activities affecting federal elections. It understood that any effective reform measure had to address state-party use of soft money in federal elections, lest the problem immediately regenerate at the state party level. Congress delineated four categories of activities undertaken by state parties with the largest impacts on federal elections and determined they should be paid for with FECA-compliant money. Congress may protect the integrity of federal elections and officeholders in this manner, particularly since BCRA leaves state parties otherwise free to spend whatever money they may raise under state law. The balance of Title I guards against corruption and avoidance of the soft money restrictions by other well-tried devices known to Congress.

II. Title II addresses the problem of candidate-focused "issue" ads. It bans no speech. It only restricts the source of the funds used for those ads and requires disclosure in certain circumstances.

Before BCRA, unions, corporations, and others routinely created ads to support or oppose specific candidates, while avoiding "magic words" of "express advocacy." They hired campaign consultants and pollsters to refine electioneering messages in these ads, and made clear in their own

statements what they were doing. These ads shared characteristics with parties' and candidates' ads that confirm their electioneering nature: they named specific candidates; they were concentrated in the last weeks before an election; and they were targeted to close races in a partisan way. The sponsors of these ads fundamentally undermined FECA's source and disclosure rules for independent campaign expenditures—in reality, they conducted electioneering with unlimited corporate and union treasury funds, and without disclosing the sources of the funds. Their techniques also created opportunities for corruption in the exchange of "issue" ad campaign support for political favors.

Title II responds narrowly and objectively to these problems by defining a new category of "electioneering communications" with specific reference to the demonstrated dimensions of the problem. Imposing source and disclosure rules on such ads serves the same compelling interests that sustain those rules as applied to "express advocacy": preventing the distortions that arise when corporate and union treasuries become political "war chests"; providing information to the voting public; and preventing circumvention of other rules. Title II also serves the compelling First Amendment interest in using clear, objective statutory lines in this sensitive area. And it imposes only modest burdens—disclosure rules, and the requirement that corporations and unions fund some ads during the immediate pre-election period with PAC funds.

Buckley did not codify "express advocacy" as a constitutional test; it held only that a statutory line defining independent campaign spending should be clear, and directed at advocacy relating to the campaigns of particular federal candidates. Title II satisfies those precepts. Nor is Title II overbroad. It imposes only limited burdens of a sort this Court has already recognized may, in appropriate circumstances, be imposed even on political speech entitled to stringent protection under the First Amendment. That Title II applies only to limited categories of speech during the period just before elections is a virtue, not a tailoring flaw. Plaintiffs' attack on a small portion of the empirical evidence

supporting Title II is misguided and irrelevant, and their examples of past ads supposedly demonstrating overbreadth offer them little support. Additional arguments raised by ideological nonprofit organizations do not support either the facial invalidation of any part of Title II or a blanket exemption.[8]

ARGUMENT

I. TITLE I OF BCRA IS CONSTITUTIONAL

A. Soft Money Has Undermined Democratic Institutions And Public Confidence In Government

Since the Tillman Act of 1907, which prohibited corporate campaign contributions, Congress has endeavored to prevent the corruption and appearance of corruption of federal elected officials by reducing their dependence on large campaign contributions. Congress's concerns, as relevant now as they were in the time of Theodore Roosevelt, are that public officials will be particularly attentive to the interests of those who make large contributions to candidates and their political parties, and that citizens will perceive such official responsiveness to large donors as characteristic of a degraded system that does not deserve public confidence. Whether or not officeholders in fact yield to the temptation to assist large donors, "the opportunity for abuse inherent in the process of raising large monetary contributions" is plain. *Buckley*, 424 U.S. at 30.

The 1990s made clear that the temptation facing politicians to assist large donors is not limited to helping those who have contributed directly to their own campaigns. The political fortunes of officeholders and candidates are intertwined with the fortunes of their parties. Green Rep. 7-10 (JA 1195-1200). The Members of Congress who enacted BCRA learned through personal experience that office-

[8] The NRLC plaintiffs argue (Br. 45-49) that intervenor-defendants lack Article III standing to defend the constitutionality of BCRA. The Court should reject that contention for the reasons set forth in the district court's order of May 3, 2002. NRLC Reply Br. App. 4a-6a.

holders also have a powerful incentive to assist those who have contributed generously to their closest allies—their national and state political parties.

1. The Soft Money System In Operation

The political parties argue that Title I responds to a phantom—that the spectacle of 93 entities contributing $100,000 or more in soft money to *both* major national political parties in the 2000 election cycle alone does not even raise an appearance of corruption.[9] Although this Court has recognized that little evidence is required to support the self-evident proposition that "large contributions" pose a threat of actual or apparent corruption, *see Shrink Mo.*, 528 U.S. at 391, the record overwhelmingly establishes the reasonableness of Congress's conclusion that soft money had fundamentally undermined public confidence in our democratic system and elected officials. That evidence includes testimony from current and former Members of Congress, current and former party officials, and experts, as well as many thousands of pages of documents, press reports, and studies chronicling how those exploiting the soft money loophole made a mockery of federal campaign finance laws and their goal of minimizing actual or apparent corruption of federal officeholders.

There was no mystery in the way the soft money system worked. As Members of Congress who voted to end that system knew from personal experience, political parties routinely offered donors more extensive and more personal access to federal officeholders in exchange for larger donations. Often the parties explicitly offered donors opportunities to exchange views with officeholders on matters of policy in return for large contributions. On other occasions, the parties offered donors the opportunity to introduce themselves to officeholders for later follow-up. The most no-

[9] Common Cause, *You Get What You Pay For* (2000) (analysis of FEC reports showing 93 donors gave $100,000 or more to both Democrats and Republicans between January 1, 1999 and June 30, 2000), DEV 31, Tab 52.

torious examples may be the "White House coffees" with President Clinton that the DNC facilitated for particularly generous contributors, but instances of such preferential access were numerous, if generally occurring in more prosaic settings. S. Rep. No. 105-167, at 191-224 (1998) (Thompson Comm. Rep.); SA 603-15(K), 1268-76(L).

Party officials commonly offered to pass on the concerns of generous donors to appropriate persons on Capitol Hill, and asked Members to meet with donors to hear their proposals on pending issues. In that way, party officials directly linked donors' generosity to Members' willingness to entertain their positions. SA 603-07(K), 1269-71(L). And as former Senator Warren Rudman recounted (Rudman Dec. ¶ 7 (JA 742)), the ensuing conversations between Members and donors were "not idle chit-chats about the philosophy of democracy":

> Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way. No one says: "We gave money so you should do this to help us." No one needs to say it—it is perfectly understood by all participants in every such meeting.

Plaintiffs argue that there is no proof of a direct connection between large donations and floor votes on specific legislation. That can hardly be the test for actual corruption, and in any event, the evidence is to the contrary. Senator Feingold testified, for example, that a fellow Democrat (and member of the Senate leadership) urged him to end a filibuster of a pending bill because it contained a provision sought by Federal Express, which had made a $100,000 soft money contribution to their party. Feingold Dep. 62. Former Senator Paul Simon similarly recounted that members of his party caucus knew who was "buttering our bread" and acted accordingly. Simon Dec. ¶¶ 13-18 (JA 805-07). The legislative record, as well as testimony in this case by Members of Congress, connected soft money to Congress's failure to enact generic drug legislation, tort reform, tobacco-control measures, and new accounting rules for stock options. Fein-

gold Dep. 62; McCain Dec. ¶¶ 8-11 (JA 392-94); Meehan Dep. 11-14; Shays Dep. 63-65, 228.

As former Senator Alan Simpson explained (Simpson Dec. ¶ 10 (JA 811)):

> Too often, Members' first thought is not what is right or what they will believe, but how it will affect fundraising. Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about—and quite possibly votes on—an issue? Donations from the tobacco industry to Republicans scuttled tobacco legislation, just as contributions from trial lawyers to Democrats stopped tort reform.

There are also many ways other than floor votes, less open to public scrutiny, in which Members influence the legislative process—especially through control of the legislative calendar—and soft money often had its effect long before the votes were cast. McCain Dec. ¶ 5 (JA 390-91); Simon Dec. ¶¶ 13-14 (JA 805). Experts confirmed that, even if only a small proportion of actual votes are directly influenced, contributions may have "a significant impact on legislative outcomes." Green Rep. 24-25 (JA 1218-20); *see* Bok Rep. 3-5.

Donors understood that soft money was "essential for developing relationships with Members of Congress, which in turn lead[s] to access, which in turn lead[s] to influence over policy." SA 589(K); *see* SA 1265, 1277-81(L). A prominent lobbyist explained that, under the soft money system, traditional lobbying activities are "alone insufficient to be effective .... To have true political clout, the giving and raising of campaign money for candidates and political parties is often critically important." Andrews Dec. ¶ 5 (JA 2); SA 589-95(K).

Donors therefore viewed soft money contributions as a necessary investment toward favorable policy outcomes. As observed in one representative internal document from a Fortune 100 company, soft money donations were a "key to [the company's] increased role and ability to get [its] views heard by the right policy makers on a timely basis; in other words, a smart investment." SA 599(K), 1280(L). An execu-

tive of another large company explained the need to contribute $1.4 million by noting that both parties believed soft money was "critical to their success in coming elections" and were "especially sensitive to which companies contribute soft money, and which don't." SA 618(K); *see* 1284(L). Many other documents in the record are to the same effect; corporate employees justified soft money donations because they would "strengthen our relationship" with a Member, "get our relationship" with a Member "off to a good start," or "establish[] goodwill." SA 587-88(K); *see* SA 1280-81(L).

The most striking evidence on this point is that many corporations made massive soft money donations to *both* major political parties. *See* Mann Rep. tbls. 5-6 (App. 52a-55a). Donors who felt "increased pressure from party and congressional leaders" and who knew that "direct competitors and potential competitors are weighing in with big soft money donations" wanted to ensure that they had access to "both sides of the aisle." SA 618(K), 1284-85(L). Indeed, the soft money system evolved to the point that donors feared retaliation unless they made contributions to both parties. Greenwald Dec. ¶ 9 (JA 282-83); Hassenfeld Dec. ¶ 23; SA 584, 599(K). The parties promoted this fear; when they learned a donor had given to the other side, they would "get a message" to the donor asking, "Are you sure you want to be giving only to one side? Don't you want to have friends on both sides of the aisle?" SA 619-23(K), 1284-86(L); Randlett Dec. ¶ 12 (JA 715). As former Senator Dale Bumpers stated, massive donations turned into a coercive kind of "insurance." Bumpers Dec. ¶ 14 (JA 174-75).

Soft money also gave rise to a widespread perception of corruption. A study conducted by two leading experts in public opinion (one Democrat, one Republican) found that 71% of the public believed Members of Congress sometimes voted the way large donors to their parties wanted, even when that was not what people in their districts wanted or what Members thought best for the country. Similarly, 84% believed that Members of Congress would be more likely to listen to those who gave money to their political party in response to their solicitations for large donations, and 68% be-

lieved that big donors sometimes blocked official decisions that could have improved the everyday lives of the public. Mellman/Wirthlin Rep. 7-9 (JA 1566-69). A 2000 survey of leading corporate executives likewise found that 74% believed businesses were pressured to make large political donations; half stated that businesses feared adverse legislative consequences if they turned down requests from high-ranking party officials and their surrogates; and 75% believed their donations gave them an advantage in shaping legislation. When asked why corporate America contributed to political campaigns, the surveyed executives' most frequent answer was "to avoid adverse legislative consequences" (31%), followed by "to buy access to influence the legislative process" (23%). Kolb Dec. ¶ 9 & Ex. 6 (JA 349); SA 574(K).

But the testimony of the true experts about public opinion—Members of Congress—is the most remarkable. Both in the legislative debates on BCRA and in sworn testimony in this case, Members reported that their constituents had become "as cynical about government as they have ever been because of the corrupting effects of unlimited soft money donations." Simpson Dec. ¶ 14 (JA 812); *see* SA 630-33(K), 1278, 1294-95(L) (quoting numerous Members of Congress). Members themselves described the soft money system as corrupting. Senators Boren, Brock, Bumpers, Feingold, Jeffords, McCain, Rudman, Simon, Simpson, Snowe and Wirth, and Representatives Meehan and Shays, among others, detailed the baneful effects of soft money on the working of our government.[10] Former Senator Rudman described large soft money contributions as "inherently, endemically, and hopelessly corrupting," and stated, "You can't swim in the ocean without getting wet; you can't be part of this system without getting dirty." Rudman Dec. ¶ 10 (JA 743). Given that senior elected officials perceived the

[10] *See also* DEV 32, Tab 70 (chart of statements in the Congressional Record by Sen. Feingold identifying ways in which soft money donors had apparently secured influence over legislation).

political system in which they operated as "dirty," it is scarcely surprising that the public overwhelmingly agreed, or that Congress saw that BCRA was needed to restore public confidence.

2. Circumvention Of FECA And The Use Of Soft Money To Influence Federal Elections

Not only does the judicial and legislative record amply demonstrate that the raising of soft money—regardless of how that money was ultimately used—gave rise to both actual and apparent corruption, it also shows how the soft money system eviscerated FECA's core restrictions on the size and source of contributions to influence federal elections. This Court has long recognized the danger of circumvention of contribution restrictions, noting only a few months ago that "experience demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced." *Beaumont*, 123 S. Ct. at 2207. In light of that experience, the Court has consistently given effect to Congress's judgment that these limits must be reinforced by related restrictions. *See Buckley*, 424 U.S. at 38; *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 197-99 (1981) (plurality) (*CalMed*); *id.* at 203 (Blackmun, J., concurring in part and in the judgment).

The Court and Congress have found a particularly serious danger of circumvention in the prospect that a donor might effectively "contribute massive amounts of money to a particular candidate through . . . huge contributions to the candidate's political party." *Buckley*, 424 U.S. at 38. The soft money system was exactly that form of circumvention. Although the parties and many donors were aware that outright earmarking of donations for the benefit of particular candidates would run afoul of FECA, they engaged in every activity short of express direction to ensure that federal candidates could receive the benefit of soft money. There was scarcely any pretense that soft money would not be used to assist in electing the parties' federal candidates, in-

cluding in many cases the candidates who actually solicited the funds.

Indeed, soft money was largely *not* used for so-called "party building" functions, but rather was directed to activities related to the election of the parties' candidates. SA 495-501(K), 1198-1212(L). Lawmakers commonly asked donors who had reached their federal contribution limits to make soft money donations to national and state parties "solely in order to assist federal campaigns," including their own.[11] Parties kept close track of soft money raised by lawmakers, and "the amount of money a Member of Congress raise[d] for the national political party committees often affect[ed] the amount the committees g[a]ve to assist the Member's campaign." SA 555(K). Donors often requested that their soft money contributions be credited to particular candidates, and the parties obliged. It was of little significance to the donor whether funds were "hard" or "soft," as long as it was understood that the funds were to benefit particular parties and candidates. SA 558-61(K), 1198-1202, 1245-46(L); *see* SA 561-62(K), 1246-47(L) ("joint fundraising committees" established by parties and candidates). Just as the Court noted in *Colorado II* regarding hard money, so too with soft money: "[w]hat a realist would expect to occur has occurred. Donors give to the party with the tacit understanding that the favored candidate will benefit." 533 U.S. at 458.

The importance of soft money in influencing federal elections was confirmed by current and former party officials and the RNC's own soft money expert. Former RNC Chair Brock acknowledged that "the parties by and large use [soft] money to help elect federal candidates." Brock Dec. ¶ 6 (JA 170). The RNC's soft money expert has similarly explained that "[n]ational parties allocate soft money to state organizations primarily with the intent to help federal

[11] Randlett Dec. ¶ 9 (JA 714); *see* SA 550-53, 565-66, 1237-38(L) (Members asked donors to contribute to state parties "to help that officeholder or other federal candidates").

candidates in close races," and that soft money "permits candidates, contributors, and parties to circumvent federal laws limiting campaign contributions."[12] In short, as congressional investigative reports on abuses in the 1996 federal elections found, "permitting [soft money] donations to political parties eviscerated FECA's longstanding ability to prevent corporate and labor union treasury funds from influencing federal elections." SA 37(PC).

B. The Soft Money Restrictions Properly Respond To The Dangers Of Unlimited Contributions

1. The Court Should Defer To Congress's Judgments Underlying Soft Money Restrictions

Title I reflects Congress's determination that FECA's regulatory structure had been undermined to the point of collapse by the parties' burrowing at its vulnerable points. Members of Congress understood from personal and institutional experience how the soft money system functioned and what was needed to save FECA. This experience is particularly relevant in three respects, for "[w]here a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments." *Shrink Mo.*, 528 U.S. at 402 (Breyer, J., concurring).

First, Congress's experience establishes a strong basis for its judgment that officeholders and candidates understand that their political fortunes are intimately connected to their political parties. Members of Congress knew that, as federal officeholders, they cannot be expected to ignore their party's need for money or the expressed wishes of their party, including the wish that Members heed the concerns of large donors. Plaintiffs propose a theoretical construct in which parties shield their officeholders from the corrupting potential of large donations to the party. The

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[12] La Raja Cross, Ex. 3 at 74; La Raja, *Sources and Uses of Soft Money*, in *A User's Guide to Campaign Reform* 83, 105 (G. Lubenow ed., 2001); SA 519-20(K), 1206, 1234, 1237(L).

Members who enacted BCRA knew otherwise. At the same time, given the close bonds between Members and their parties, it cannot be seriously maintained that Congress enacted BCRA to destroy the party system.

Second, Members knew from personal experience that donations for certain campaign activities, although purportedly not used to influence federal elections, were intended to and did in fact do so. The indisputable record was that, through the 1990s, parties had used soft money for generic campaign advertising, voter registration drives, get-out-the-vote (GOTV) activity, and "issue" ads mentioning federal candidates, with the intent to affect federal elections.[13] Although the FEC treated these donations as though they were not used to influence federal elections, Congress saw through this loophole and closed it.

Third, Title I includes anti-circumvention provisions that rest on Congress's judgment about how political actors will inevitably test the limits of the law—a judgment informed by an extensive factual record demonstrating how they had behaved in the past. In the First Amendment context, as elsewhere, this Court has deferred to Congress's predictive judgment about the need for regulation. *See Turner Broad. Sys.* v. *FCC*, 520 U.S. 180, 195-96 (1997). The case for deference is yet stronger here, where the law reflects how Members of Congress expect *they* (and their parties) would act in the future.

2. Only Limited Judicial Scrutiny Is Applicable To The Soft Money Provisions Of Title I

It is "settled" that regulations designed to buttress contribution restrictions need only be "closely drawn" to match the "sufficiently important" government interests in combating corruption and the appearance of corruption. *Colorado II*, 533 U.S. at 456. Plaintiffs nonetheless contend that Title

[13] *E.g.* Fowler Dec. ¶ 17 (JA 264); 148 Cong. Rec. H409 (Feb. 13, 2002) (Rep. Shays); SA 525-26(K).

I is a restraint on speech and association that requires strict scrutiny. This assertion is meritless.

After *Buckley*, it cannot be seriously contended that Title I's reinforcement of the FECA structure abridges any *contributor's* right of free speech. *Buckley* establishes that reasonable contribution restrictions work no impermissible restriction on the donor's right to speak, for "the transformation of contributions into political debate involves speech by someone other than the contributor." 424 U.S. at 21. Nor does Title I restrain anyone from engaging in "direct political expression" on his or her own rather than (or in addition to) through parties and candidates. *Id.* at 22.

Title I also does not burden a *political party's* free speech rights in any constitutionally problematic way. Although plaintiffs devote much effort to arguing that Title I acts as a limit on campaign spending, it in fact leaves political parties free to spend as much money as they wish on federal or state election activity, be it for advertising, GOTV activity, or voter registration drives.[14] Title I regulates only the sources and amounts of funds that the parties may raise and use for federal election activities. Like the contribution limits in FECA to which they are tied, the soft money restrictions merely require parties "to raise funds from a greater number of persons," and do not "reduce the total amount of money potentially available to promote political expression." *See Buckley*, 424 U.S. at 22; *id.* at 29 (FECA contribution limits "do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues").

That some of BCRA's provisions are necessarily framed in terms of mirror-image restrictions on "solicitations" rather than "contributions" does not occasion strict scrutiny.

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[14] BCRA separately limits coordinated expenditures by national parties on behalf of their nominees to federal office, if they also make independent expenditures for the same nominees during the general election. 2 U.S.C. § 441a(d). That provision is discussed by the Solicitor General.

These solicitation provisions merely ensure that the contribution restrictions are not readily evaded, as they were in the past, and thus operate functionally as a reinforcement of the contribution limits. *Cf. Colorado II*, 533 U.S. at 438 (noting that FECA employs a "functional," not formal, understanding of contributions). The Court has previously sustained a provision of FECA that limits corporations and unions to soliciting contributions for their segregated PAC funds from certain persons, without suggesting that the statute's focus on solicitations was important (and indeed FECA does not separately prohibit contributions from other individuals). *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 206-11 (1982) (*NRWC*). Nor did the Court apply strict scrutiny to that solicitation restriction in *NRWC*. *See Beaumont*, 123 S. Ct. at 2211 (discussing *NRWC* on this point). Rather, the Court upheld the solicitation restriction as a legitimate "prophylactic measure[]." *NRWC*, 459 U.S. at 210.[15]

Nor does BCRA impermissibly burden any right of association. BCRA leaves parties and candidates free to coordinate campaign plans and activities, political messages, and

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[15] Plaintiffs invoke *Citizens Against Rent Control/Coalition for Fair Housing* v. *City of Berkeley*, 454 U.S. 290 (1981), in support of strict scrutiny, but nowhere in that decision did the Court state that it was applying strict scrutiny. *See id.* at 299 (challenged contribution limit "does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights"); *id.* at 301 (Marshall, J., concurring) ("the Court is following our consistent position that this type of governmental action is subjected to less rigorous scrutiny than a direct restriction on expenditures"); *id.* at 302 (Blackmun & O'Connor, JJ., concurring in the judgment) (appropriate level of scrutiny requires only "a sufficiently important governmental interest" and "means 'closely drawn to avoid unnecessary abridgment' of First Amendment freedoms"; quoting *Buckley*). Moreover, that case involved a restriction on donations to groups promoting ballot measures, which the Court distinguished from *Buckley* on the ground that ballot measure groups had no nexus to corruption or appearance of corruption of officeholders or candidates. 454 U.S. at 296-97. The record in *this* case demonstrates that political parties have a close connection to officeholders and candidates, which enables them to serve as highly efficient conduits of corruption.

fundraising goals with one another. The parties invoke a purported unlimited right to pass funds among one another, but no decision of this Court suggests this right has the elevated constitutional status that plaintiffs claim. *See Beaumont*, 123 S. Ct. at 2210 (restrictions on contributions subject to "relatively complaisant review"). In any event, nothing in BCRA prevents national and state parties from transferring unlimited amounts of hard money among one another. *See* 2 U.S.C. § 441a(a)(4).

Title I also does not abridge any party's right to associate with its donors. Contributions to candidates and political committees "lie closer to the edges than to the core of political expression." *Beaumont*, 123 S. Ct. at 2210. Any associational right of political parties to solicit donations is surely no more weighty than the right of would-be contributors to make them. Indeed, unlike donors, who make a "symbolic expression of support" to a party by making a contribution, *Buckley*, 424 U.S. at 21, a political party generally does not signal support for, or even a desire to be associated with, its donors when it solicits funds—especially when the donors give to *both* parties (as was often true with soft money).

3. The National-Party Soft Money Ban

BCRA provides that a national committee of a political party may not solicit, receive, direct to another person, or spend funds that are not subject to the source prohibitions and amount restrictions of FECA. 2 U.S.C. § 441i(a)(1). This across-the-board prohibition against the national parties' use of soft money is based on the judgment of Members of Congress, drawn from personal experience, that national political parties had acted as conduits of influence between party donors and the federal candidates and officeholders with whom the parties were connected, and that in consequence national parties had to be removed from the soft money business altogether. That judgment is amply supported by the legislative and judicial record.

a. Contrary to plaintiffs' contention, under the soft money system, political parties did not insulate their officeholders from importuning contributors or sanitize the effect

of large contributions. Quite the reverse: the parties frequently encouraged their officeholders to be attentive to their soft money donors' positions on matters of policy, and brought their donors and officeholders together to meet privately. SA 603-15(K), 1269-76(L). Federal officeholders and candidates were routinely informed of the identities of large donors to their parties. In many cases, Members of Congress personally solicited large soft money donations; in other cases, the parties distributed lists of potential and actual donors to officeholders. SA 579-82(K), 1258-61(L). Donors also often informed officeholders that they had made contributions to their party. "[F]or a Member not to know the identities of these donors, he or she must actively avoid such knowledge as it is provided by the national political parties and the donors themselves." SA 581(K); *see* SA 1258(L).

Indeed, in the soft money context, it is futile to look for any meaningful separation between federal officeholders and their national parties. *All* the members of four of the six major national-party committees (DCCC, DSCC, NRCC, and NRSC) are federal officeholders. The DSCC and NRSC also established "joint fundraising committees" with the official campaigns of federal candidates, effectively enabling candidates to raise both hard and soft money simultaneously, in their own names and for their own races. SA 561-62(K), 1246-47(L); Krasno/Sorauf Rep. 13 (JA 1286).

The other major national committees—the DNC and RNC—are also tightly connected to their parties' federal officeholders. As former RNC Chair Haley Barbour stated, during presidential election years they make election of the President their "highest priority." SA 1197(L); *see* SA 545(K) (national committees assume "subsidiary role" to presidential candidate's campaign committee). The DNC's "issue" ad campaign on behalf of President Clinton in 1996 forcefully bears that out, but that episode is merely illustrative of the point that the central function of the major national-party committees is to promote the election of the parties' federal candidates. Any elected official also benefits considerably from a donor's generosity to his or her party,

for an official's power depends greatly on whether that party is in the majority or minority, and whether it controls another branch of the government or legislative chamber. Parties and their federal officeholders and candidates are thus connected by powerful bonds, and Congress recognized that elected officials are likely to be attentive to the concerns of generous donors to their parties.

b. Although Judge Leon accepted the basic premise of Title I—that *raising* unlimited soft money from corporations, unions, and wealthy individuals creates the potential for corruption and appearance of corruption, SA 1132-35—he mistakenly concluded that the validity of the national soft money ban turns on how the soft money is *spent*. Judge Leon believed that the interests of preventing corruption and appearance of corruption do not sustain BCRA in the absence of "any perceived, or actual, benefit to a federal candidate." SA 1103. He therefore concluded that, while Congress could prohibit national parties from using soft money to finance "public communications" that promote or attack clearly identified federal candidates, it could not ban the use of soft money for activities that do not "directly" affect federal elections, including disbursements for voter registration and GOTV activities undertaken within days of a federal election. SA 1119.

Even on its own terms, Judge Leon's theoretical demarcation between activities that do and do not provide a "perceived" or "actual" benefit to federal candidates does not support the line he drew. Congress reasonably determined that many activities undertaken by both national and state parties with soft money beyond "public communications"—including *all* the activities that Congress defined as "[f]ederal election activity," such as generic campaign activity and GOTV (even when it makes no express reference to a federal candidate)—actually benefit candidates in federal elections. Indeed, contrary to the picture drawn by the plaintiffs, soft money was generally not used for "party building" activity several steps removed from election cam-

paigns, but was used in just these ways to affect federal elections. Green Rep. 14 n.17 (JA 1205).[16]

But Judge Leon's approach is also misguided in a more fundamental respect: it fails to apprehend that, for national parties, the potential for corruption comes from *raising* soft money and the close connections between the party and its federal officeholders and candidates, regardless of how the national party spends that money. Title I does not rest on any notion that voter registration or GOTV activity is suspect; national parties may continue to spend unlimited hard money on such activities, or may transfer unlimited hard money to state and local parties if they prefer. Rather, Title I is predicated on Congress's well-supported recognition that, absent regulation to the contrary, corporations, unions, and individuals who want to obtain favors from federal officials will make large donations to be used by those officials and their parties as they perceive to be most advantageous to their political fortunes. And because of the close bonds between federal officeholders and their parties, unlimited donations threaten to corrupt federal officeholders even when they are made, not to assist the officeholders directly, but to help their political allies in the party. "[W]hether they like it or not, [parties] act as agents for spending on be-

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[16] Representatives of all four major congressional campaign committees acknowledged, for example, that their committees targeted GOTV efforts paid for with soft money in states where there were close federal races, and that those efforts did affect federal elections. SA 525(K). The parties also told donors that their soft money would be used for GOTV efforts to help the parties' candidates in federal elections. SA 526(K). Similarly, the parties used soft money to conduct voter registration efforts that assisted federal as well as state and local candidates. SA 529-30(K). Expert testimony confirmed that, when a political party conducts GOTV and voter registration efforts, as well as generic advertising, the effect on the federal election is not "indirect," even when those activities do not expressly mention the federal candidate. In that situation, the parties expect and intend that efforts to mobilize voters "will produce a harvest of votes for [that party's] candidates for both state and federal offices." Green Rep. 14 (JA 1205-06); SA 527-29(K).

half of those who seek to produce obligated officeholders." *Colorado II*, 533 U.S. at 452.[17]

c. Plaintiffs suggest there is no danger of corruption or appearance of corruption if national parties raise soft money only for the purpose of spending those funds on state races (or transferring those funds to state parties for use in state races). This argument suffers from the same flaw as Judge Leon's analysis: it fails to apprehend that the risk of corruption stems from the *raising* of the money. Moreover, in the past, the FEC allowed national parties to raise and use soft money purportedly for non-federal activity, but in fact that soft money was routinely used for activities affecting federal elections. Congress is not required to repeat that mistake.

Nor does the Constitution require Congress to permit an earmarking regime under which national parties could accept unlimited donations for some purposes, but not others. Just as Congress may bar a group that receives only a small part of its funds from corporations from making any campaign contributions, and need not consider whether any of the group's funding is earmarked for campaign purposes, *Beaumont*, 123 S. Ct. 2210 & n.7, Congress acted within its discretion in concluding that the only effective means to prevent the national parties from continuing to circumvent the law is an across-the-board rule against soft money. Indeed, given the fungibilty of money, if national parties could accept unlimited contributions purportedly for state purposes alone, donors could easily evade FECA's restrictions by making large soft money contributions to national parties simply to free up hard money for the party to use for federal

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[17] Plaintiffs have stressed that Justice Breyer's lead opinion in *Colorado I* stated that "[w]e are not aware of any special dangers of corruption associated with political parties." 518 U.S. at 616. The issue here, however, is not whether political parties *themselves* commonly seek to corrupt their own candidates and officeholders with *lawfully* raised money, as had been argued in *Colorado I*. Rather, the point in this case is that political parties can serve as effective instruments of corruption by *others*—a point the Court strongly endorsed in *Colorado II*, 533 U.S. at 452.

candidates, who could then owe a debt of gratitude to the soft money donors.

In any event, the supposed impairment of the national parties' ability to assist their state affiliates is minimal. Even though national parties may not themselves spend soft money on state elections, they may spend unlimited hard money on state races, and may consult with state parties about how the state party might spend its own soft money on purely state races (as long as the national party does not control the use of the soft money, 441i(a)(1)). Thus, although plaintiffs characterize BCRA as driving a wedge between national and state parties, that is simply not the case.

4. The State-Party Soft Money Restrictions

a. Whereas BCRA precludes national parties from raising and spending soft money at all, Title I restricts state parties from using soft money only for specific "[f]ederal election activity." 2 U.S.C. § 441i(b)(1).[18] This restriction reflects Congress's determination—amply supported by the legislative and judicial record—that state parties had been pervasively used as conduits for soft money in federal elections.[19] Even leading opponents of campaign finance reform

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[18] "Federal election activity" includes voter registration activity during the 120-day period before a federal election, GOTV, voter identification, and generic campaign activity conducted "in connection with" an election in which a federal candidate is on the ballot, and "public communications" that promote or attack a "clearly identified candidate for Federal office." 2 U.S.C. §431(20)(A). The definition excludes a broad range of state party activity. For example, Title I does not reach state party GOTV activity for elections with only state races on the ballot, state party contributions to state candidates, or "public communications" at any time that refer only to state and local candidates (other than GOTV and voter registration), because they are not "[f]ederal election activity."

[19] Plaintiffs strain to find fault in the fact that the state party provision is framed in terms of activities on which state parties *spend* money. But Congress obviously framed § 441i(b)(1) in terms of funds "expended or disbursed for Federal election activity" to make clear that BCRA does *not* prohibit state parties from raising or using soft money, so long as state parties use such funds only for state or local election purposes. Section 441i(b)(1) is thus functionally identical to a limit on soft money contribu-

recognized that "a prohibition of soft money donations to national-party committees alone would be wholly ineffective."[20]

State parties played a central role in the soft money system. Indeed, state parties became the preferred conduits of soft money funds in federal elections, because FEC allocation regulations permitted them to spend a greater percentage of soft money on supposedly non-federal activity (such as GOTV, voter registration, and "issue" ads) than could be done if the national party spent the money. SA 516-22(K), 1231-38(L); Magleby Rep. 37 (JA 1510). For that reason, in the 2000 election cycle alone, the national parties transferred $280 million in soft money to the state parties. SA 490-91(K), 1188-89(L).

State parties told their soft money donors that their generosity had "delivered Ohio for President George W. Bush," *see* RNC OH 0410155 (IER, Tab 10), enabled the California Democratic Party to "increase the number of Californian Democrats in . . . Congress" and "deliver[ed] California's 54 electoral votes for President Bill Clinton[]," SA 526(K). National parties and federal candidates also routinely directed donors to contribute soft money to state parties for deployment in federal elections. Many state parties were effectively reduced to "offshore banks" for national parties, useful principally to inject soft money into federal elections in compliance with the national parties' directions—a phenomenon well documented by the Thompson Committee that investigated abuses in the 1996 elections (and discussed in the amicus brief for former Senator Thompson, at 24-26).[21]

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tions to state parties for federal election purposes. *Cf. Colorado II*, 533 U.S. at 438.

[20] *The Constitution and Campaign Reform: Hearings on S. 522 Before the Sen. Comm. on Rules and Admin.*, 106th Cong., 2d Sess. 301 (2000) (statement of Bobby R. Burchfield, Partner, Covington & Burling).

[21] Green Rebuttal Rep. 10 (JA 1239); Thompson Comm. Rep. 4467-68 (state parties acted as conduits to pay for DNC issue ads); *id.* at 8300 (minority views) (RNC memo described buying ads through state parties as "simply a book keeping hassle"); SA 522-25(K), 1234(L) (national parties

The record also shows that massive soft money donations to state parties gave rise to the familiar risks of actual and apparent corruption. For example, Carl Lindner, chair of Chiquita Brands and a longtime Republican donor, gave more than $500,000 to *Democratic* state parties only hours after the Clinton administration asked the World Trade Organization to examine European Union trade barriers against Chiquita bananas.[22] The Thompson Committee found that, in exchange for $300,000 in soft money given to Democratic state parties and candidates and the DNC, the DNC assisted Roger Tamraz in his effort to win backing for an oil pipeline in the Caucasus by arranging meetings with government officials and with President Clinton—against the recommendation of National Security Council staff. Thompson Comm. Rep. 43-44, 2907-31; *id.* at 7519 (minority views). That Committee also found that Native American tribes that operated casinos gave significant soft money contributions to national and state Democratic committees after the DNC Chair contacted Clinton White House officials about those tribes' opposition to the casino application of a rival tribe, and the Department of the Interior denied that casino application (overturning a contrary staff recommendation). Thompson Comm. Rep. 44-46, 3167-94.

b. Plaintiffs implausibly suggest there is no danger of corruption or appearance of corruption when a corporation or union makes a $100,000 donation to a state party to engage in federal election activity supporting a federal candidate, and argue that Congress was not justified in bringing state parties within the prohibition of use of soft money in federal elections. But there is no reason to believe that a federal officeholder would be less willing to heed the wishes of a donor that generously funded activities assisting his election merely because the funds happened to be deployed

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retained control over soft money after it was transferred to state parties); La Raja Cross, Ex. 3 at 49 (state parties became "branch organizations" implementing "strategic decisions of party professionals in Washington").

[22] McCain Dec., Ex. I (Weisskopf, *The Busy Back Door Men*, Time, Mar. 31, 1997, at 40 [INT 001289-90]).

through a state party. If, as plaintiffs suggest, Congress is constitutionally barred from regulating state parties that engage in federal election activity, then in the future, soft money donors will simply write their checks to state parties for use in federal election activity and make their generosity known to federal candidates. Thus it was essential for Congress to bring state parties' federal election activity within the soft money restrictions, as opponents of the ban recognized. Congress's constitutional authority to protect the integrity of federal elections is not diminished merely because the threat comes through state-party activity that indisputably affects federal elections.[23]

Congress has also limited the effect of the soft money restrictions on state parties. First, BCRA's definition of "[f]ederal election activity" in § 431(20)(A) excludes a broad range of state election activity, thus ensuring that the restrictions do not intrude too far into state-party activity (*see* p. 28 n.18). Second, Congress has allowed state parties to make some use of soft money even in federal elections. Just as, before BCRA, the FEC allowed state parties to use a combination of soft and hard money for activities that could affect both federal and state elections, the Levin Amendment, 2 U.S.C. § 441i(b)(2), authorizes a new kind of allocation formula permitting use of combinations of limited soft and hard money in federal elections. This authorization, however, is subject to provisos designed to prevent a resurgence of the pre-BCRA system in which state parties were

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[23] Indeed, if Congress has no constitutional authority to regulate soft money used by state parties in connection with federal elections, then it is difficult to see how the FECA regime before BCRA could have been constitutional. Even then, both national and state parties that conducted GOTV, voter registration, and generic campaign activity in connection with an election in which a federal candidate was on the ballot were required to allocate their disbursements for such activity between hard and soft money, under the rationale that both federal and state interests were implicated by elections featuring both federal and state races. 11 C.F.R. §§ 106.1, 106.5 (2001).

used as conduits of unlimited soft money into federal elections.[24]

When States opt to hold state elections simultaneously with federal elections, Title I incidentally restricts state parties from using soft money for some activities that affect state races. That does not establish, however, that Title I *regulates* the state elections or otherwise exceeds Congress's Article I powers. Once Congress has balanced the competing policy considerations and has determined that the use of soft money in "[f]ederal election activity" so affects the integrity of federal elections as to warrant the exercise of its Article I powers, the courts have no warrant to reweigh the federal regulations against any incidental effect on the funding of state campaign activity. The necessary and proper scope of laws to ensure the integrity of federal elections "are matters for congressional determination alone." *Burroughs* v. *United States*, 290 U.S. 534, 547-48 (1934). Thus, as the Court held more than a century ago, "[i]f for its own convenience a State sees fit to elect state and county officers at the same time and in conjunction with the election of [federal officials], Congress will not be thereby deprived

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[24] Although plaintiffs have sought to portray the Levin Amendment as an onerous restriction on state parties, in fact it accommodates state parties by creating an exception to BCRA's restrictions on their use of soft money for federal election activity. Like the provision upheld in *Buckley* that allowed individuals to contribute more to political committees than to candidates, the Levin Amendment thus "enhances the opportunity . . . to participate in the election process." 424 U.S. at 35.

Under the Levin Amendment, a state or local party committee may use combinations of hard money and soft money (including money obtained from corporations and unions), under allocation formulas established by the FEC, for certain kinds of federal election activity, such as voter registration and GOTV activity that does not refer to a clearly identified candidate for federal office. "Levin funds" (soft money used in the allocation) must be raised locally—*i.e.*, by the state or local committee that makes the disbursements, and not solicited by or received from another party committee or a federal officeholder; a donor may not contribute more than $10,000 per year in Levin funds to any particular party committee; and Levin funds may not be used for any activity referring to a clearly identified federal candidate. 2 U.S.C. § 441i(b)(2)(B), (C).

of the right to make regulations in reference to the latter." *Ex parte Siebold*, 100 U.S. 371, 393 (1879). Nor does Title I intrude on state sovereignty in any manner implicating the Tenth Amendment or other structural features of the Constitution. Unlike statutes this Court has found to contravene principles of state sovereignty, BCRA does not require the States to do or not do anything.[25]

c. As with the national-party ban, Judge Leon concluded that the restrictions on state-party use of soft money could be validly applied only to those activities that, in his view, "directly" benefit candidates for federal office. SA 1118-42. Again, Judge Leon's reasoning is flawed. Congress determined, based on its experience, that GOTV, voter registration, and generic campaign activity conducted in connection with or close proximity to federal elections often are intended to and in fact do influence the outcome of such elections. Congress was therefore justified in acting to protect the integrity of federal elections by restricting state parties' use of soft money for federal election activity.

The parties point to an advertisement run by the California Democratic Party opposing Proposition 209 as an example of the purportedly excessive coverage of Title I. The parties do not dispute that such advertisements could well affect the outcome of a federal election, but they nonetheless contend that such advertisements cannot create a risk of corruption or appearance of corruption of a federal candidate. But Congress recognized that a donor can secure undue influence with a federal candidate by making a massive donation to a state party, intending that the state party then use those funds for "[f]ederal election activity" (such as GOTV activity or generic party advertising) in connection with that candidate's election. It is not significant whether (for example) the state party's GOTV activity funded with that soft money highlights a ballot initiative or a gubernatorial race; either form of GOTV activity affects a federal elec-

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[25] *Cf. Printz* v. *United States*, 521 U.S. 898 (1997); *New York* v. *United States*, 505 U.S. 144 (1992); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

tion on the same ballot—as the press understood in the context of Proposition 209.[26] The risks of corruption and appearance of corruption inhere in both, and stem from the fact that the donor can make it known to the federal candidate that his election was assisted by the donor's generosity.

The parties contend (Br. 54-56) that even that part of the soft-money restrictions that Judge Leon would have left intact, which prohibits parties from using soft money for any "public communication" referring to a clearly identified candidate for federal office (§ 431(20)(A)(iii)), is unconstitutional because it applies even when parties do not engage in "express advocacy" for or against a candidate, and thus could intrude on pure issue advocacy. That argument is meritless. This Court made clear in *Buckley* that political parties exist for the purpose of engaging in campaign activity, and so there is no need to differentiate between their campaigns and other activity. In *Buckley*, the Court construed a provision limiting independent expenditures by *individuals and interest groups* to cover only express advocacy. 424 U.S. at 40-42. But when the Court considered a separate provision requiring reporting and disclosure by *political committees* (including political parties) making campaign-related expenditures, the Court noted that the term "political committees" in that context reached only "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," not groups "engaged purely in issue discussion." *Id.* at 79. The Court explained that "[e]xpenditures of candidates and of 'political

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[26] Press reports indicated that the state parties' political activity over Proposition 209 was closely connected to their efforts to affect the 1996 presidential election, which was on the same ballot. "[P]olitical partisans promoted [Proposition 209 and similar measures] as a way of getting 'their' voters to the polls," and "the California Republican Party subsumed backing of [Proposition 209] into a get-out-the-vote drive for Bob Dole." Stall & Morain, *Prop. 209 Wins, Bars Affirmative Action Initiatives*, L.A. Times, Nov. 6, 1996, at A1; *see* Wooster, *California Fights The Race Wars*, Am. Enter. 54 (2000). The ad in question decried Proposition 209 as a "Republican Scheme," urged voters not to "let the Republicans get away with it," and exhorted voters to go to the polls. Feingold Dep., Ex. 15.

committees' so construed . . . are, by definition, campaign related." *Id. Buckley* thus establishes that, because political parties are presumed to engage in campaign activity, regulation of their financing does not intrude on pure issue advocacy.

5. Related Anti-Corruption And Anti-Circumvention Provisions

Congress enacted further measures in Title I to ensure that political actors do not continue established means of circumventing FECA's hard money restrictions. Plaintiffs devote a significant portion of their briefing to challenging these measures. The pattern in their briefs is to urge the broadest imaginable construction of each provision, posit its application to a remotely conceivable situation, and then contend that that application would be unconstitutional, and so the entirety of Title I must fall. The irony in this position is striking: one can imagine the reaction of one of the political party plaintiffs if the FEC advanced such expansive readings of the statute in an enforcement action against it—in contrast to this case, where it serves the parties' goals to make Title I seem draconian. And of course, the duty of the courts is to save the law, not to adopt constructions that might imperil it. *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500 (1979).

Plaintiffs are essentially attempting to convert a pre-enforcement facial challenge to BCRA into an as-applied challenge to factual scenarios that may never arise. Even under the relatively generous standards of First Amendment doctrine, statutes are not to be invalidated based on "hypothetical application to situations not before the Court." *FCC* v. *Pacifica Found.*, 438 U.S. 726, 743 (1978); *see Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985). Rather, to prevail in their facial challenge, plaintiffs must demonstrate "a substantial risk that application of the provision will lead to the suppression of speech." *NEA* v. *Finley*, 524 U.S. 569, 580 (1998); *see City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) (stressing that a statute is not facially invalid merely because "one can conceive of some

impermissible applications"). Plaintiffs have not made that showing.

a. *Solicitations By Federal Candidates.* BCRA added 2 U.S.C. § 441i(e), which imposes fundraising restrictions on federal candidates (including federal officeholders). Section 441i(e)(1)(A) prohibits federal candidates from raising, transferring, or spending soft money (whether for a national or a state party or otherwise) in connection with a federal election. Section 441i(e)(1)(B) then extends to non-federal elections the requirement that federal candidates solicit only funds subject to FECA's rules on sources and amounts. Thus, a federal candidate may raise money for others to use in federal and state races as long as the funds raised would not contravene the federal contribution limits or the prohibitions on contributions by corporations and unions.[27]

These provisions are aimed at the core problems of corruption and appearance of corruption that underlie FECA in general and the party contribution limits of Title I in particular. Large donations made at the request of federal candidates and officeholders create the risk that the donor will acquire (or appear to acquire) undue influence as a result of

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[27] Congress further narrowed these quite reasonable restrictions with three exceptions that accommodate competing policy considerations. Section 441i(e)(2) makes the general rule against solicitation of soft money inapplicable if the money is to be used only for a state race in which the federal officeholder is running. Under § 441i(e)(3), a federal candidate may "attend, speak, or be a featured guest at a fundraising event for a State, district or local committee of a political party." Under § 441i(e)(4)(A), federal candidates may solicit unlimited funds for organizations that are tax exempt under IRC § 501(c)—even groups that engage in some "federal election activity," so long as that is not their principal purpose—if the solicitation does not specify how the funds will be spent. Under § 441i(e)(4)(B), candidates may explicitly solicit funds for use by IRC § 501(c) groups for voter registration or GOTV activity, or for 501(c) groups principally organized to engage in such activity, if the solicitation is made only to individuals and the amount solicited from any individual does not exceed $20,000 in a calendar year. These closely drawn measures serve the valid goal of eliminating the appearance of corruption of federal candidates through contributions that are excessive or from impermissible sources, while avoiding overreaching into state political activity.

the requester's gratitude. Indeed, when soft money was solicited, links were often drawn between massive donations and pending legislation—as demonstrated by national-party documents in the record, including "call sheets" prepared for fundraising calls, which emphasized legislative and regulatory matters of interest to solicitation targets. *See* IER, Tabs 1.A., 1.E., 3. These risks are also present when a federal officeholder asks a corporation or union to donate $100,000 to a state party or candidate. A federal officeholder cannot be expected to ignore the fact that a donor has made a substantial contribution at his request to a political ally.

b. *Solicitations By National-Party Officers*. Plaintiffs spill much ink over § 441i(a)(2), which extends the national-party soft money solicitation ban to the national parties' officers. This provision recognizes that political parties, like all artificial entities, necessarily act through their officers and agents. It thus ensures that a national party may not circumvent the basic soft money solicitation ban by claiming that the fundraising was done by its officers, not itself.

The parties strain to manufacture a constitutional flaw in this provision by arguing that it broadly prohibits national-party officers from soliciting even *hard* money for state candidates, even in a year in which no federal candidate is on the ballot (*see* Br. 1). This construction is, to say the least, not compelled by the language of § 441i(a), which bars national-party officers from soliciting only funds that are not "subject to the limitations, prohibitions, and reporting requirements of this Act"—much as § 441i(e) applies to bar solicitation of soft money by federal officeholders. Although some of the intervenors gave differing responses in their depositions when asked about the reach of § 441i(a)(2),[28] the Justice Department and the FEC, which are responsible for enforcing the campaign finance laws,

[28] *Compare* Feingold Dep. 166-67 (appearance of corruption when party officer is "in a position to seek unlimited contributions") *and* Meehan Dep. 236 (party officer may not "ask[] for unlimited amounts of money for a local election"), *with* Shays Dep. 237-40 (solicitation ban more restrictive for party officers than federal officeholders).

have made clear § 441(a)(2) does *not* prevent the national parties or their officers from soliciting hard money for state parties or candidates. Gov't D.Ct. Opp. Br. 25-26, 38 n.37; Gov't D.Ct. Reply Br. 30 n.34. Nor does the provision limit the amount of hard money a national party may raise and contribute to state candidates. It is quite revealing that the very first example of the supposed excesses of BCRA contained in the political parties' brief relies on a reading of the law that has been rejected by those responsible for enforcing it.

c. *Solicitations For And Transfers To Tax-Exempt Groups.* Section 441i(d) prevents political parties and their officers and agents from soliciting money for, or directing money to, certain organizations that are tax-exempt under § 501(c) and § 527 of the Internal Revenue Code. In the case of § 501(c) organizations, the prohibition applies only if the organization makes expenditures in connection with federal elections, including "[f]ederal election activity" as defined in § 431(20). Section 527 groups by definition are involved in election activities, and § 441i(d) forbids party fundraising for them only if they do not qualify as candidate committees or "political committees."[29]

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[29] Plaintiffs contend that § 441i(d) prevents state parties from donating funds to state groups formed to support or oppose the impending California gubernatorial recall election. In fact, § 441i(d) has no such application. California has scheduled the election for Oct. 7, 2003, which is not simultaneous with or near any federal election. Any activity undertaken by such § 527 groups concerning the recall therefore would not constitute "[f]ederal election activity," and § 441i(d) would accordingly not apply. *See* 11 C.F.R. § 300.37(a)(3)(iv). But even if California chose to hold the recall election with or near a federal election, § 441i(d) would impose only minimal burdens. To support or oppose the recall, state parties could themselves use soft money for many activities (including ad campaigns directed at the recall), Levin funds on other activities, and hard money on any remaining activities. State parties could also donate funds to § 527 groups formed to support or oppose the recall, provided those groups do not engage in "[f]ederal election activity" or are subject to FECA's reporting requirements. In short, all § 441i(d) prevents state parties from doing is funding federal election activity in a manner that evades FECA's contribution limits and reporting requirements.

Section 441i(d) prevents circumvention of FECA's disclosure requirements by ensuring that national and state parties do not direct or transfer hard or soft money to outside groups that are not subject to those disclosure rules, for use in federal election activities. In the past, Congress had witnessed exactly such evasions.[30] It also prevents circumvention of the requirement that state parties use only hard money and Levin funds for federal election activities. Absent § 441i(d), state parties could sidestep that requirement by soliciting soft money for, or directing or transferring soft money to, tax-exempt groups that undertake voter mobilization campaigns concentrated on core party voters.

d. *Public Communications About Federal Candidates By State Candidates And Officeholders*. Finally, § 441i(f) deals with the very narrow situation in which a candidate for state office or state officeholder makes a "public communication" that refers to a clearly identified candidate for federal office and either promotes or opposes that candidate.[31] In that instance, hard money must be used to finance the communication, for the obvious reason that it relates directly to a federal election. This provision is analogous to the state-party hard money requirement for "public communications" of this type. It also serves to close a potential loophole: without it, state parties could shift soft money to their closely allied state candidates and officeholders to use for "public communications" promoting or attacking federal candidates.

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[30] 144 Cong. Rec. S1048 (Feb. 26, 1998) (Sen. Glenn), S977 (Feb. 25, 1998) (Sen. Levin), S898 (Feb. 24, 1998) (Sen. Ford); Thompson Comm. Rep. 4013; *id.* at 4568, 5974-81 (minority views).

[31] The restriction in § 441i(f) presumably does not apply when a state officeholder makes a communication in his public capacity with public funds. Section 441i(f)(2) also provides an exception if the federal candidate or officeholder referred to is also a candidate for state office and the communication refers to such person in connection with the state election in which he or she is participating.

C. Political Parties Will Remain Vibrant

Although the First Amendment affords protection to the right to "amass[] the resources necessary for effective advocacy," that right is not infringed by contribution limits unless they are "so radical in effect as to render political association ineffective . . . and render contributions pointless." *Shrink Mo.*, 528 U.S. at 397; *see Buckley*, 424 U.S. at 21-22. Plaintiffs have not made even a colorable showing that the soft money restrictions will impair the ability of political parties to engage in effective advocacy, or to assist their candidates in doing so. Their Chicken Little assertions about the impending demise of political parties are implausible and contrary to experience.

As former DNC Chair Donald Fowler (who was also a state party chair) and former RNC Chair William Brock stated, restricting soft money is likely to strengthen both national and state parties—by encouraging them to reinvigorate their support among numerous smaller contributors and volunteers, rather than rely on a few donors who are willing to write massive checks but who are often more interested in promoting particular federal candidates than in the party's long-term health. *See* Fowler Dec. ¶¶ 12, 17 (JA 262, 264); Brock Dec. ¶¶ 6-7 (JA 170-71). Former Senator Brock explained (JA 170):

> The reliance of the major national parties on soft money donations does not in fact strengthen the parties, it weakens them. The focus on raising and spending soft money to affect federal elections divorces both the national and state parties from their roots. The money by and large is not used for "party building." To the contrary, the parties by and large use the money to help elect federal candidates . . . . Far from reinvigorating the parties, soft money has simply strengthened certain candidates and a few large donors, while distracting parties from traditional and important grassroots work.

Moreover, political parties are highly flexible organizations that have successfully adapted to previous regulations and can adapt to new ones. La Raja Cross, Ex. 3 at 37, 148;

Green Rep. 5-6, 30 (JA 1193-95, 1226). In many States, political parties have long been subject to restrictions far more stringent than those imposed by federal law, yet state parties have thrived. *Id.* at 33-34 (JA 1229-32).

Nor will the soft money restrictions starve the parties of funds needed for effective campaigning. Soft money represented a small percentage of the national parties' resources before the mid-1990s, yet they performed robustly. SA 32-35(PC); Mann Rep. 18 (JA 1551), tbl. 2 (App. 51a); *id.* at chart 1; Brock Dec. ¶ 7 (JA 170-71); Fowler Dec. ¶ 12 (JA 262). The parties have also been very successful at increasing their hard money receipts. The national parties almost doubled their hard money between the 1992 elections and the 2000 elections, and raised $741 million in hard money in the 2000 election cycle. Green Rep. 30 (JA 1226). State parties' hard money receipts rose from $111.2 million in 1991-92 to $309.6 million in 2000. Biersack Dec. tbl. 11.

The parties will continue to have access to enormous financial resources. BCRA expands their access to hard money: it increases the amount an individual may contribute to any national-party committee by 25%, to $25,000 per year, and to any state party committee by 100%, to $10,000 per year. 2 U.S.C. § 441a(a)(1)(B), (D). There is no reason to doubt the parties will take advantage of these increased limits and step up their efforts to raise hard money from a broader array of individuals, instead of the narrow group of corporations, unions, and large donors that provided soft money in the past. Green Rebuttal Rep. 5-6 (JA 1193-95). As Mark Twain might have said, then, plaintiffs' reports of the death of the political parties are greatly exaggerated.[32]

[32] Indeed, information from FEC disclosure reports from the first half of 2003 confirms that the six major national-party committees raised more hard money ($160 million) in those six months than they raised in *combined hard and soft money* ($138 million) in the first six months of the last presidential election cycle (January-June 1999). This hard money take in 2003 is *double* the $80 million in hard money that the parties raised in the first half of 1999. If the parties continue to double their hard money

II. Title II Of BCRA Is Constitutional

Unlike political parties, whose expenditures "are, by definition, campaign related," *Buckley*, 424 U.S. at 79, corporations, unions, and other interest groups sponsor both communications that *are* related to federal election campaigns, and others that are *not*. As to the former, Congress may impose both disclosure rules and requirements that corporations and unions use only money voluntarily contributed by individuals for political use. *Id.* at 74-75; *Austin*, 494 U.S. at 668-69. For many years, the "express advocacy" test that *Buckley* fashioned to identify which communications were campaign-related worked reasonably well. Despite isolated instances of circumvention, it was generally understood that ads praising or criticizing federal candidates were required to honor FECA's disclosure and source restrictions.

Beginning in 1995, however, that understanding completely changed. A trickle of marginal abuses became a tidal wave of circumvention. "Express advocacy" as a standard for electioneering became worse than irrelevant: it became an object of public derision. Here, for example, is the chair of the NRA's PAC, speaking in 1997 SA 673-74(K):

> Today, there is erected a legal . . . wall between issue advocacy and political advocacy. And the wall is built of the same sturdy material as the emperor's clothing. Everyone sees it. No one believes it.

Title II of BCRA seeks to re-clothe the emperor by supplying an effective, objective standard for whether an ad is campaign-related. Under Title II, an ad is subject to disclosure and source requirements if it is broadcast, mentions a candidate, is geographically targeted to the candidate's electorate, and is run in the 60 days before a federal general election or the 30 days before a primary. That bright-line test is the product of objective data and experience, which confirm the common-sense reality that in these carefully limited circumstances, ads naming a candidate are very likely

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take, they will raise $1.5 billion in hard money during the 2004 cycle. *See* http://www.opensecrets.org/parties/index.asp.

intended to convey—and almost certainly will convey—an electioneering message.

Plaintiffs contend that any test other than "express advocacy" is invalid on its face. The Court should evaluate that contention in the light of the overwhelming evidence that in recent years interest groups, prominently including several of the plaintiffs, utterly buried the test they now come to praise. Nothing in the Constitution required Congress to resign itself to the open evasion of FECA's source and disclosure rules. In Title II, it made another "'cautious advance'" in the long history of "careful legislative adjustment of the federal electoral laws" to reflect ongoing experience. *NRWC*, 459 U.S. at 209. It drew new lines that respond directly to the demonstrated problem, in a way that honors First Amendment values of clarity and objectivity, and does not "unnecessarily circumscrib[e] protected expression." *Brown* v. *Hartlage*, 456 U.S. 45, 54 (1982).

Plaintiffs' rhetoric notwithstanding, nothing in Title II "bans" any speech. For individuals it requires only disclosure, and only when expenditures for campaign ads exceed $10,000 per year. Corporations and unions remain entirely free to run any ad at any time—even in the targeted circumstances addressed by Title II, so long as they use funds raised by their PACs. As the Court recently reiterated, it is "simply wrong" to characterize that limitation as a "complete ban." *Beaumont*, 123 S. Ct. at 2211. The Court has upheld just such modest burdens on independent campaign expenditures as narrowly tailored to serve compelling public interests in informing the electorate and preventing corruption of the electoral process. It should similarly reject plaintiffs' facial challenge to reforms carefully designed to make FECA's source and disclosure rules effective once again.

A. Plaintiffs Aggressively Exploited The "Express Advocacy" Test To Circumvent Longstanding Source And Disclosure Rules

The record shows that beginning in earnest with the 1996 election, corporations and unions found that under the "express advocacy" test they could easily design broadcast

campaign ads that focused on candidates and swayed elections, while avoiding FECA's source and disclosure rules.[33]

1. The Ads Themselves

The most direct evidence is the ads themselves. The district court quoted the following ad, run by the AFL-CIO during the 60 days before the 1996 election in the district of a targeted Republican Congressman, as just one example of the type of "issue" ads run by unions and corporations:

> [Narrator] What's important to America's families? [Middle-aged man] "My pension is very important because it will provide a significant amount of my income when I retire." [Narrator] And where do the candidates stand? Congressman Steve Stockman voted to make it easier for corporations to raid employee pension funds. Nick Lampson opposes that plan. He supports new safeguards to protect employee pension funds. When it comes to your pension, there is a difference. Call and find out.

SA 38-39(PC). There is no doubt this was a campaign ad, specifically intended to influence votes in the upcoming election. Yet because it did not actually say "Vote for Lampson," the AFL could pay for it with general treasury funds, and make no disclosures under FECA.

Here are a few more examples. Each avoids the "magic words" of "express advocacy," and each could be said to address some "issue"—yet each was also clearly intended to influence a federal election:

- An ad run by "Citizens for Reform" during the 1996 Montana congressional race involving candidate Bill Yellowtail: "Who is Bill Yellowtail? He preaches

[33] The history and nature of the "issue" ad problem, the need for reform, and related evidence are discussed in the opinions below at SA 38-40, 92-99, 106-128(PC); 651-770, 776-886(K); 1146-1159, 1296-1379(L). The expert discussions of Kenneth Goldstein, Jonathan Krasno and Frank Sorauf (testifying jointly), and David Magleby are excerpted at JA 1150, 1272, 1476, and may be found in the record at DEV 1, Tabs 2 and 7, and DEV 4, Tab 8.

family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values." Thompson Comm. Rep. 6304-05 (minority views).

- An ad run on the eve of the 2000 presidential election, alleging that Myanmar used "slave labor to assist the building of an oil pipeline by American company Haliburton" under Dick Cheney's leadership. The tag-line: "[W]e just can't trust Dick Cheney a heartbeat away from the presidency."[34]
- An Americans for Job Security ad, run close to the 2000 election in Washington State, criticizing Senate candidate Maria Cantwell's legislative voting record on taxes from 1993, even though she was not in office in 2000, and could not vote on any issue unless elected to the Senate. The tag-line: "Can we afford politicians like Maria Cantwell?" App. 2a.

There are many, many more. We have included "storyboards" for some others in an Appendix to this brief (at 1a-10a). In addition, Volume 48 of the defendants' exhibits below contains audio and video copies of some ads, and storyboards for virtually every distinct television ad sponsored by an interest group in 1998 and 2000 that referred to a federal candidate and ran within 60 days of the general election. By way of comparison, it also includes examples of the very different ads that do *not* mention candidates, and of the very similar ads run *by* candidates. This volume by itself demonstrates the problem Congress faced.

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[34] App. 1a. Data about ads from 1998 and 2000 are generally derived from the "CMAG database." *See* Goldstein Rep. 5-8 (JA 1157-61).

2. "Issue" Ads Were Designed To Influence Federal Elections

This case might have a different cast if plaintiffs could credibly claim that the candidate-centered ads they ran before BCRA, and that would now be covered by Title II, were designed only to spread their views on public issues—with perhaps some dim awareness that they "[might] in some cases indirectly influence election outcomes by addressing issues of interest to the electorate." AFL Br. 7. Instead, the record demonstrates that plaintiffs and other sponsors of candidate-specific "issue" ads designed, tested, and ran them with an unmistakable electioneering purpose. *See* SA 678-99(K), SA 1315-26(L).

a. *Consultants And Pollsters*. The seasoned professionals that sponsors hired for their "issue" ad campaigns understood the mission: Devising hard-hitting *electioneering* messages that would sway the conduct of *voters* in federal elections. For example, as part of the AFL's pioneering "issue" ad campaign in 1996, which involved a series of ads criticizing Republican incumbents for having cast votes contrary to the AFL's positions, a firm called "Campaign Consulting" assessed potential political advertising agencies. SA 680(K). It assured the union

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Mitchell Dep., Ex. 6 (JA 2169).

In evaluating "political media consultants," the same advisor noted that

REDACTED Mitchell Dep., Ex. 7 (JA 2166); SA 680(K).

Business interests

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Josten Dep. 20 -21. They formed "The Coalition: Americans Working for Real Change" to respond in kind. SA 685-86(K); *see* 1320-23(L). The consultant who landed the job of assisting The Coalition opened his proposal, "Thank you for the opportunity to present two 30 second television and one 60 second radio scripts, as requested, to your campaign to re-elect a pro-business Congress." SA 686(K), 1321(L). Similarly, in Au-

gust 2000 the NRA's media consultant produced a memo entitled "NRA National Election Media Recommendations," listing, as the first objective, "influence outcome of presidential election and . . . key congressional seats in 10 'battle ground' states." SA 693(K), 1324(L).

Sponsors' polling tells the same story. Before running its 1996 "electronic voter guides," the AFL evaluated possible ads comparing an incumbent (identified as a Republican) and a challenger (identified as a Democrat).

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Mitchell Dep., Ex. 9 (JA 2176).

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Id. (JA 2176).

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Mitchell Dep., Ex. 10 (JA 2178); *see* SA 679(K). Likewise, The Coalition surveyed "voter attitudes nationwide," measuring reactions to "the AFL-CIO's claims."[35] A survey of "swing voters" showed that test "response ads" moved "25% of participants . . . closer to voting for a Republican candidate."[36]

b. *Sponsors' Statements.* Ad sponsors' own statements confirm that influencing voters was a prominent goal of their candidate-centered "issue" ads. In 1996, the AFL-CIO did not hide its objectives. As the press reported:

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[35] Huard Dep., Ex. 2, at TC513 (JA 2153); *see id.* at TC514 (JA 2154) ("Most voters view the AFL-CIO as first and foremost a political entity . . . ."); *id.* at TC538 (JA 2158)

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[36] SA 687(K); Huard Dep., Ex. 4, at AV139 (JA 2127) (purpose of research is "[f]inding a message for" an "outside voice" to "come to the[] defense" of Republicans "under attack by AFL-CIO advertising," to "even [the] playing field during the 1996 election"); *see* Huard Dep. 37-38, 103, Ex. 6B (JA 2159-60), REDACTED Ex. 18 (JA 2131-32).

> [U]nion leaders . . . said they believe they have a legitimate chance to reverse the Republican majority in the House. . . . AFL-CIO President John Sweeney, who presented the election plans to a closed-door meeting of the federation's ruling executive council, said unions would spend $35 million in the election campaign.[37]

Much of that $35 million was spent on broadcast "issue" advertising. SA 681-82(K). After the election, the AFL's political director reiterated that one of its "major [campaign] goals" in running the ads had been "to try to help defeat some of those members of Congress and replace them with some members who would be more friendly to working people."[38] AFL President Sweeney boasted that by spending "our money on an independent, *issue-based television*, direct mail, and door-knocking campaign, rather than donating it to any political party," the AFL had "defeated 17 of the ugliest Americans ever to serve in the United States House of Representatives." Mitchell Dep., Ex. 12 (emphasis added).

Similarly, the NRA's Executive Vice President agreed that defeating Al Gore was the "overriding NRA objective" in 2000. LaPierre Dep. 55-56; *see id.* at 237-42. An NRA fundraising letter declares: "If the NRA had remained silent during the final 60 days of the last election, Al Gore would be president today." NRA02586 [DEV 120]. And another explains that the "millions" the NRA "spent . . . to defeat Al Gore . . . got our message out, drove our supporters

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[37] Mitchell Dep., Ex. 5 (Swoboda, *AFL-CIO to Target 75 House Districts*, Wash. Post, Jan 25, 1996, at A16); *see also, e.g.*, Gugliotta, *Interest Groups' Spending Had Varied Success*, Wash. Post., Nov. 7, 1996, at A28 ("'Incumbents with anti-working family records were defeated in 19 congressional districts where the labor movement ran aggressive ground and/or ad campaigns around working family issues,' said AFL-CIO President John Sweeney. 'Working families are back as a political force.'").

[38] Talk of the Nation (NPR radio broadcast, Nov. 27, 1996) (quoting AFL's political director, Steven Rosenthal); D. Beck et al., *Issue Advocacy Advertising During the 1996 Campaign* 11-13 (Annenberg Pub. Pol'y Ctr. 1997).

to the polls, and changed history." LaPierre Dep., Ex. 3 (JA 924); *see* LaPierre Dep. 100 (indicating that spending referred to included money for "infomercials and spot ads, both on television and radio"); SA 693-97(K) (discussing evidence that NRA used "issue" ads to influence 2000 election).

A major Democratic contributor also testified:

> I have been approached by interest groups, such as NARAL and the League of Conservation Voters, with appeals for large donations to be used for broadcast advertisements that will help federal candidates whom the groups know I support. Groups like these know of my interest in the Senate, and they can be opportunistic in saying things like, "We think we can get Bill Bradbury elected in Oregon," or in talking about how they're going to go in and really help Debbie Stabenow.

Buttenwieser Dec. ¶ 19. Another recounted how "[t]he [Democratic] party recommended that I donate to certain groups that were running effective ads in the effort to elect Vice-President Gore, such as NARAL. The assumption was that the funds would be used for television ads or some other activity that would make a difference in the Presidential election." Kirsch Dec. ¶ 10.

c. *Naming Candidates*. Certain common features of candidate-centered "issue" ads also demonstrate that they are intended—and overwhelmingly likely—to convey an electioneering message. They also help explain the choices Congress made when it framed Title II. Most obviously, such ads "almost always refer to specific candidates." SA 1312(L); *see id.* at 719(K). This is significant in part because, particularly in conjunction with other factors such as timing and targeting, it ties each ad directly to an upcoming election. Moreover, as veteran campaign consultants testified, "there is usually no reason to mention a candidate's name unless the point is to influence an election." SA 1312(L); Strother Dec. ¶ 7 (JA 2148); *see* Bailey Dec. ¶ 9 (JA 26). Rather, if the aim were only to address an issue, "invoking [candidates] might unnecessarily politicize the underlying

message . . . and undermine [an ad's] effectiveness." Krasno/Sorauf Rep. 63 (JA 1345).

A related feature of many candidate-centered ads was a tag-line exhorting the viewer or listener to call and "thank" the named candidate, or "ask" or "tell" the candidate something. Campaign professionals know that, in context, these exhortations are equivalent to urging a vote for or against the named candidate. Beckett Dec. ¶ 8; Pennington Dec. ¶ 10 (JA 672-73); Lamson Dec. ¶ 6. As a senior NRA political operative put it, discussing an ad that urged viewers to call and "thank [a Congressman] for fighting crime":

> Guess what? We really hoped people would vote for the Congressman, not just thank him. And people did. . . . [T]hree months away from an election, there's not a dime's worth of difference between "thanking" elected officials and "electing" them.

SA 674(K); *see* Josten Dep. 230; G. Shea Dep. 46.

d. *Timing*. "Issue" ads naming candidates were heavily concentrated in the final weeks before an election. SA 725-28(K). The appendix to this brief includes (p. 11a) a graph from Judge Kollar-Kotelly's opinion vividly illustrating how ads mentioning federal candidates spiked in the weeks immediately before the 2000 election. The data confirm that 78% of interest group ads mentioning a federal candidate—and 85% of ads mentioning a presidential candidate—were aired within 60 days of the general election. Goldstein Rep. 19 tbl. 4 (JA 1169-71). In contrast, group ads that did *not* mention candidates were distributed fairly evenly throughout the year. *Id.* at 3 (JA 1155). Equally tellingly, candidate-specific ads *stopped*—cold—on Election Day. *Id.*

As an election nears, interest groups substitute ads that mention a candidate for ads that do not. SA 721-26(K). From January 1, 2000, through September 4, 2000, for example, a pharmaceutical industry-funded group called Citizens for Better Medicare (CBM) aired 23,867 television ads, without once mentioning a candidate. SA 690, 722(K). Between September 4 and the election, it ran 10,876 candidate-specific spots. SA 721(K). A similar pattern appears in the advertising of other groups, including the Chamber of Com-

merce, Planned Parenthood, EMILY's List, the Business Roundtable, and the League of Conservation Voters. SA 722-25(K).

Former consultant Douglas Bailey sums up: "In my decades of experience in national politics, nearly all of the ads that I have seen that both mention specific candidates and are run in the days immediately preceding the election were clearly designed to influence elections. From a media consultant's perspective, there would be no reason to run such ads if your desire was not to impact an election." SA 720(K); *see* Bailey Dec. ¶ 12 (JA 27); Pennington Dec. ¶ 10 (JA 672-73); Goldstein Rep. 33 (JA 1186-87).

e. *Targeting.* Interest groups that ran candidate-specific ads close to elections also targeted candidates in close contests—and almost invariably in a partisan manner. SA 728-31(K). The AFL-CIO, for example, targeted its "legislative issue ads" in part based on whether they could have a "big impact" in "marginal district[s]"—that is, districts where races were likely to be close.[39]

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Huard Dep., Ex. 7; *id.* at 45-46 (JA 2172-73).

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Josten Dep. 269, 298 & Ex. 25. The NRA "target[ed] states . . . where they intended to hopefully have an impact on the election." LaPierre Dep. 24-25; *see id.* Ex. 3 ("critical swing states") (JA 923).

The AFL's 1996 campaign targeted 32 freshman Republicans, SA 681(K), aiming to "reclaim the Congress from the extremists that snatched control in 1994."[40] The AFL's ad

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[39] Mitchell Dep. 17-20. The AFL's ads targeting then-Governor Bush ran in the nine states rated as "toss-ups" that had the most electoral votes at stake. CMAG Database; Cook & Co. Political Analysis, *The Cook Political Report 2000: The Race for the White House* (2000) [DEV 38 Tab 17].

[40] Mitchell Dep., Ex. 11. *See, e.g.*, Mitchell Cross 174, 178-79, 182 (no Democrat targeted in a broadcast ad in the 60-day period in 2000 or 1996).

campaigns also generally targeted candidates to whom it assigned the lowest lifetime voting "scores" on its issues. *Compare* G. Shea Cross, Ex. 2 (ratings), *with* Mitchell Dec., Ex. 1 (targeting).

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Monroe Cross 13-15.

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Monroe Cross 25, 26. A group intent on changing legislators' minds would not likely choose the hardest targets—nor focus its ads on candidates' *past* votes.

3. "Issue" Ads Concealed Sponsorship

The use of "issue" ads allowed sponsors to avoid FECA's disclosure requirements. *See* SA 91-99(PC) (summarizing evidence), 675-77(K), 1308(L). One prominent example is the Bill Yellowtail ad quoted above (p. 43-44), which was part of a campaign focused on various congressional races, mounted by a group calling itself "Citizens for Reform." Thompson Comm. Rep. 6305 (minority views). Recently organized as a nonprofit corporation, the group had "no . . . offices, staff [or] telephones," and it never disclosed under FECA the identity of its principals, what it spent on electioneering ads, or the sources of funds. *Id.* at 6301-05.

Similarly, CBM spent $65 million on television advertising in 1999 and 2000. SA 655(K), 1307(L). It held itself out as "a broad-based, bipartisan group representing the interests of patients, seniors, pharmaceutical research companies, doctors, caregivers, hospitals, employers, health care experts and many others concerned with . . . our Medicare system."[41] But its fundraising was conducted by the Pharmaceutical Research and Manufacturers of America, and almost all its funds for the 2000 elections came from corporate interests. SA 690-91(K), 1323(L). Yet before BCRA, no dis-

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[41] Citizens for Better Medicare, Who We Are, *available at* http://web.archive.org/web/20000815061032/www.bettermedicare.org/who (archiving the CBM website as of Aug. 15, 2000).

closure was required so long as CBM's ads did not use the "magic words."

There are many other examples of identities, relationships, and interests masked from voters by ad sponsors using names such as "American Family Voices," "Voters for Campaign Truth," or "American Seniors, Inc." Krasno/Sorauf Rep. 71-72 (JA 1355-56); *see also*, *e.g.*, SA 97-99(PC) ("Republicans for Clean Air"), 643-44(K), 1252-53(L); Magleby Rep. 18-19 (JA 1484-85). Where ads named candidates, in their districts, just before elections, that practice deprived voters of just the sort of information that disclosure provisions are intended to provide. *See Buckley*, 424 U.S. at 66-68, 81-82.

4. Widespread Circumvention Destroyed The Efficacy Of The "Express Advocacy" Test

The development, long after *Buckley*, of candidate-centered "issue" ads quickly destroyed the efficacy of the "express advocacy" test as a means of identifying independent campaign expenditures. It is now clear that words of express advocacy are not necessary, or even necessarily desirable, to frame a campaign message. SA 658-64(K), 1296-99(L). Indeed, candidates, whose advertising is *all* electioneering, hardly ever use such words in their own ads, any more than companies tell consumers to "buy" their products. SA 1033(K), 1160 n.114(L). The *absence* of "express advocacy" thus indicates nothing about whether an ad is intended to or does convey an electioneering message. SA 664-75(K), 1299-1306(L). That is why the AFL's political director could comment, during the 1996 campaign, "If somebody handed me a magic wand and said there is no election law, I would do exactly what I am doing now." Clymer, *System Governing Election Spending Found in Shambles*, N.Y. Times, June 16, 1996, at A1 (quoting Steven Rosenthal). And it is why by early 1997 the Chair of the NRA's PAC could characterize the legal standard separating "issue advocacy and political advocacy" as "a line in the sand drawn on a windy day." SA 673-74(K), 1305(L).

Not surprisingly, groups' use of electioneering "issue" ads began "to rival, and in some cases outpace, advertising by federal candidates," Krasno/Sorauf Rep. 51 (JA 1331), and political parties themselves, Magleby Rep. 20 (JA 1487). One study of 17 competitive congressional races in 2000 found that interest-group spending on candidate-specific ads amounted to as much as two-thirds of what candidates themselves spent on radio and television ads. Magleby Rep. 22 (JA 1491). In the 60 days before the 2000 election, in eight battleground States, groups aired more than half as many ads about presidential candidates as did the candidates themselves. Goldstein Rep. 12 (JA 1164). And groups ran 20 "issue" ads naming candidates for every such ad run by their PACs. SA 656(K). In sum, as Judges Leon and Kollar-Kotelly concluded, widespread manipulation of the "express advocacy" test thoroughly sapped the force of the type of source and disclosure rules for independent expenditures that this Court approved in *Buckley* and *Austin*. SA 657-58(K), 1296-1302(L).

5. The Potential For Corruption

This Court has recognized that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 788 n.26 (1978). Although the Court has previously found it unnecessary to rely on that specific type of corruption in order to uphold source restrictions on corporate expenditures, *see Austin*, 494 U.S. at 659-60, the record here shows just such a threat. *See* SA 708-19, 835-40(K), 1161-62(L).

"[T]he people who admit to running these ads will later remind Members of how the ads helped get them elected." Simpson Dec. ¶ 13 (JA 812). Indeed, any reminder may be superfluous:

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Huard Dep. 92.

From the candidates' point of view, "[a]n important element running through modern campaign plans is consideration of

what role political parties and interest groups are going to play in your campaign." Pennington Dec. ¶ 4 (JA 669). In 1996, for example,

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Josten Dep. 19-21.

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Josten Dep. 270; *see* SA 711-13(K).

Independent ad campaigns can thus be used to seek access and influence in much the same way as contributions. Candidates "pay very close attention to the political advertisements broadcast in their districts," and "keep track of who is helping them."[42] Former legislators confirm that "members realize how effective these ads are, and they may well express their gratitude to the individuals and groups who run them."[43] Lobbyist Wright Andrews, who advises a broad array of corporations and other groups, describes candidate-specific "issue" ads as simply "[a]nother practice used to secure influence in Washington." Andrews Dec. ¶ 17 (JA 6). In his well-informed view, "[a]n effective advertising campaign may have far more effect on a member than a direct campaign contribution or even a large soft money donation to his or her political party." *Id.*

Thus, candidates can be as beholden to corporations or unions for an ad campaign as for a check. Yet before BCRA,

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[42] SA 709(K); Strother Dec. ¶ 13 (JA 2150); *see* Magleby Rep. 15; Pennington Dec. ¶ 8 (JA 671-72) ("In addition to trying to elect candidates, these groups are often trying to create appreciation or even obligation on the part of successful candidates."); Beckett Dec. ¶ 16 ("Of course candidates often appreciate the help that these interest groups can provide, such as running attack ads for which the candidate has no responsibility."); Chapin Dec. ¶ 16 ("Federal candidates appreciate interest group electioneering ads . . . that benefit their campaigns, just as they appreciate large donations that help their campaigns."); Bloom Dec. ¶ 17 (JA 54-55); Lamson Dec. ¶ 19.

[43] Simpson Dec. ¶ 13 (JA 811-12); *see* Bumpers Dec. ¶ 27 ("Members will also be favorably disposed to those who finance these groups when they later seek access to discuss pending legislation.") (JA 178).

expenditures on ads, unlike direct contributions, could be made with treasury funds, and without public disclosure. That situation "create[d] enormous opportunities . . . for favors to be exchanged between issue advocates and public officials." Krasno/Sorauf Rep. 74 (JA 1357). And whether or not any actual exchange takes place, the appearance of corruption can be just the same. SA 713(K) (80% of poll respondents believed that a Member of Congress would likely give "special consideration" to the views of an individual, group, corporation, or union that spent $50,000 on broadcast political ads benefiting the Member).

B. Title II Is Narrowly Tailored To Serve Compelling Public Interests

Confronted with the collapse of the "express advocacy" test as an effective regulatory dividing line, Congress had a choice. It could accept that source and disclosure rules had been rendered a dead letter—despite this Court's decisions upholding the constitutionality of such rules when applied to campaign spending. It could create a new statutory definition of "campaign" spending that depended on some finding of electoral intent or effect—but that would surely be attacked as too vague and subjective in application. Or it could rely on available data, and its Members' experience, to frame an objective definition that would address the problem, without imposing even the modest burden of source and disclosure rules on any more speech than was necessary to restore the effectiveness of longstanding rules.

Title II responds narrowly and objectively to the circumvention problem. It does not "ban" any speech, and neither its disclosure rules nor its requirement that corporations and unions use their PAC funds imposes any great burden. Its definition of "electioneering communications" is limited to broadcast ads, because that is where abuse was most prevalent. It is further limited to candidate-specific ads that are targeted to the candidate's electorate, because those are the ads sponsors used in their electioneering campaigns. And it is still further limited to ads run in the final weeks before an election, because the objective empirical

evidence makes clear that, so limited, it will reach the vast majority of candidate-specific issue ads, at the time when they are almost certain to convey an electioneering message—while imposing even its modest burdens only during the carefully circumscribed period when they are most clearly necessary to serve compelling public interests.

This careful, experience-based adjustment of the definition of which advertising expenditures are campaign-related serves precisely the same interests that the Court has recognized in sustaining source and disclosure rules as applied to "express advocacy." Source restrictions prevent the conversion of organizational treasuries into political "war chests" that could be used to incur political debts from legislators. *Beaumont*, 123 S. Ct. at 2206.[44] They protect the individuals "'who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates whom they may oppose.'" *Id.* And they address the "corrosive and distorting effects" on elections that could otherwise arise when corporations and unions amass "aggregations of wealth" that may have "little or no correlation to [individuals'] support for the [organization's] political ideas." *Austin*, 494 U.S. at 660. Rules that permit campaign spending only from PAC funds are "precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views." *Id.*; *see also Beaumont*, 123 S. Ct. at 2211.[45]

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[44] *Beaumont* dealt with a limitation on contributions, but its discussion of the interests served by source restrictions draws on cases involving expenditures (including *Austin*), and those interests are largely the same in both situations. *See* 123 S. Ct. at 2206-07.

[45] Plaintiffs argue (McConnell Br. 47) that under *Bellotti*, which involved corporate spending on an issue referendum, these interests do not support source rules for "political advocacy." Apart from distinctions between Title II and the law at issue in *Bellotti* which had, for instance, no temporal limitation, applied to all media, and did not provide for PAC spending, *see* 435 U.S. at 767-68 & n.2, that argument begs the question at issue here: How Congress may *identify* expenditures that relate to *candidate* elections. *See id.* at 788 n.26 ("[O]ur consideration of a corpora-

Disclosure rules, for their part, "shed the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported because it takes the form of independent expenditures." *Buckley*, 424 U.S. at 81. Knowing who is spending money to support or oppose candidates "allows voters to place each candidate in the political spectrum more precisely," "alert[s] the voter to the interests to which a candidate is most likely to be responsive" while in office, and "deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large . . . expenditures to the light of publicity." *Id.* at 66. Disclosure thus provides "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id.* at 82; *see also, e.g.*, *Bellotti*, 435 U.S. at 792 n.32. And both source restrictions and disclosure serve the interest in preventing circumvention of other campaign finance rules. *Beaumont*, 123 S. Ct. at 2207; *Buckley*, 424 U.S. at 67-68.[46]

Source and disclosure rules serve these interests not only when an ad is run with the express or principal *purpose* of affecting an election, but also when it is likely to have such an *effect*. The record shows how Title II addresses widespread, conscious circumvention, involving ads run with unmistakable electioneering intent. Plaintiffs, however, focus on potential applications of BCRA's objective definition at its margins, where intent might be difficult to discern, or in a

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tion's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for public election to office").

[46] Title II's rules help prevent circumvention of Title I, which prohibits the raising of soft money that parties spent in part on campaign "issue" ads. That reform would be undermined if corporations or unions could substitute their own ad spending for party contributions, or if parties could divert contributions to nominally independent groups that would design and run such ads. *See* 145 Cong. Rec. S12,661-62 (Oct. 15, 1999) (Sen. Feinstein) ("Instead of giving soft money to political parties, the same dollars [could] be turned into 'independent' ads."); *see also* Thompson Comm. Rep. 5927 (minority views) (RNC contributions to nonprofit groups), 5967, 5974-79 (RNC cooperation with such groups).

few cases might even be absent. It is therefore important to recognize that an ad's likely electoral effect is as salient as its sponsor's subjective motives in determining whether the burdens imposed by source and disclosure rules are constitutionally proportionate to the public benefits they provide. *See* Center for Gov'tl Studies Br. 13-15, 26-28.

It is also important to recognize that Title II's standards for defining which ads will be treated as campaign-related squarely serve a compelling interest in using clear and objective lines to frame any rule that affects speech. It was, after all, principally a concern for clarity that first led this Court to adopt the "express advocacy" test as a gloss on FECA's language. *Buckley*, 424 U.S. at 40-44, 79-80; *see* pp. 60-62. Twenty years later, that test proved too open to manipulation to remain effective. In responding, Congress heeded the Court's admonitions concerning vagueness. Plaintiffs have conspicuously failed to suggest any way in which Congress could better have reconciled the twin compelling goals of adequate coverage and necessary clarity.[47]

Finally, the nicety with which legal requirements must be tailored depends in part on the magnitude of the burdens they impose. *See, e.g.*, *Beaumont*, 123 S. Ct. at 2211 ("the difference between a ban and a limit" on speech is to be considered "when applying scrutiny at the level selected"); *Buckley*, 424 U.S. at 68 (in determining whether disclosure requirements are justified by the interests they serve, "we must look to the extent of the burden that they place on individual rights"). The burdens imposed by source and disclosure rules are modest—as this Court has recognized. *See Beaumont*, 123 S. Ct. at 2211 ("the PAC option allows corporate political participation without the temptation to use corporate funds for political influence"); *Austin*, 494 U.S. at 660-61; *Buckley*, 424 U.S. at 68, 82 (disclosure is "minimally restrictive"). Particularly in light of that circumstance, Title

[47] *See* Foley, *"Narrow Tailoring" Is Not the Opposite of "Overbreadth,"* 2 Elec. L. J. (forthcoming Oct. 2003), *available at* http://www.liebertpub.com/ELJ/Foley1.pdf (temporary pp. 7-12).

II's requirements are narrowly tailored to serve their compelling public goals.[48]

C. *Buckley* Did Not Establish "Express Advocacy" As A Constitutional Straitjacket

Plaintiffs argue that however ineffective the "express advocacy" test may have become, *Buckley* established it as a constitutional limit. The district court properly rejected that argument. SA 783-799(K), 1147(L). *Buckley* adopted a practical, limiting construction of particular statutory language that was impermissibly vague—not a constitutional standard that would foreclose Congress from redrawing the statutory lines as necessary to reflect experience and to make them effective.

Buckley explained that a provision imposing an absolute cap on independent campaign expenditures "'relative to' a candidate fail[ed] to clearly mark the boundary between permissible and impermissible speech." 424 U.S. at 41. Similarly, a provision for disclosure of independent expenditures made "for the purpose . . . of influencing" nominations or elections raised "serious problems of vagueness," because it "could be interpreted to reach groups engaged *purely* in is-

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[48] Appending a supposedly "representative" sample of legislative history, the NRA argues at length that Congress's purpose in enacting Title II was not, as in Title I, to prevent corruption and circumvention, but to protect incumbents from public attack. That is incorrect. As reflected in the excerpts from the legislative history collected in the appendix to this brief (at 12a-27a), Congress enacted Title II to serve the very purposes that underlie the preexisting independent expenditure provisions: bringing campaign spending of the "issue" ad variety within the scope of longstanding source and disclosure rules. *See, e.g.*, App. 14a (Sen. Snowe: "The record . . . will show these advertisements constitute campaigning every bit as much as any advertisements run by candidates themselves or any ad currently considered to be express advocacy and therefore subject to Federal election laws."); *id.* (Sen. McCain: "This bill would simply subject soft money-funded campaign ads that masquerade as issue discussion to the same laws that have long governed campaign ads."). As Senator Thompson's amicus brief confirms (26-28), his Committee's path-marking investigation resulted in similar conclusions. *See* App. 22a-26a.

sue discussion," as well as those whose speech also involved "advocacy of a political result." *Id.* at 76, 79 (emphasis added). In each instance, the Court addressed the vagueness problem by construing the statutory language to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80 (footnote omitted); *see id.* at 44 & n.52.

In adopting the "express advocacy" construction, *Buckley* never purported to render all "issue" speech immune from source or disclosure rules. Even campaign speech that uses "express advocacy" typically also conveys issue messages—and, conversely, the Court recognized that electoral advocacy could be effective without being "express." 424 U.S. at 45 (noting that "express advocacy" test could permit circumvention of expenditure caps). Thus, the principal virtue of the "express advocacy" test was its clarity, not any perfect differentiation between campaign speech and pure "issue" speech.[49] Title II shares that same cardinal virtue—and does a much *better* job of identifying campaign speech, in light of extensive experience with the realities of the political marketplace. Such periodic statutory repair is a normal process—and the natural province of legislatures, not of courts. *See Beaumont*, 123 S. Ct. at 2205-06; *NRWC*, 459 U.S. at 209-10. It would make no sense to read any of this

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[49] As plaintiffs point out (McConnell Br. 40, 42), both *Buckley* and the Court's later opinion in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), which extended the "express advocacy" construction to the provision that imposes source restrictions on corporate and union campaign expenditures, linked the problem of statutory vagueness with that of overbreadth. That is hardly surprising. *See* p. 63. *MCFL*'s decision to adopt a parallel construction of two statutory provisions is equally unremarkable—particularly given Congress's own adoption of the "express advocacy" standard, after *Buckley*, in FECA's definition of "independent expenditure." *See* 2 U.S.C. § 431(17). Nothing in *Buckley* or *MCFL* suggests that any different congressional approach to defining campaign-related spending is automatically invalid.

Court's cases in a way that would disable Congress from acting on the lessons of experience.[50]

To the contrary, *Buckley* is more a roadmap than a constitutional stop sign. Two general concerns emerge from the Court's discussion: Statutory requirements in this area should be clear rather than vague, in part so they will not "dissolve in practical application," 424 U.S. at 42; and they should be "directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate," *id.* at 80; *see id.* at 76-82. Those are precisely the precepts to which Congress adhered in framing Title II.

D. Facial Invalidation Of Title II Would Be Especially Inappropriate

Plaintiffs contend that Title II is "overbroad under the First Amendment, and cannot be applied to [them]—or anyone else." *Virginia* v. *Hicks*, 123 S. Ct. 2191, 2196 (2003). They attack Congress's use of an objective definition of "electioneering communications," pointing to a few marginal examples of ads that would fall within the definition, yet might have no electioneering purpose or likely effect.

Such a challenge cannot succeed unless *plaintiffs* carry "the burden of demonstrating, 'from the text of [the law] and from actual fact,'" that Title II, "*taken as a whole*, is substantially overbroad judged in relation to its plainly legitimate sweep." *Hicks*, 123 S. Ct. at 2198. They must show that the "substantial social costs *created* by the overbreadth doctrine," when it results in the facial invalidation of a law that would have many valid applications, are outweighed by any potential "chilling effect" on speech in circumstances that might support an as-applied challenge. *Id.* at 2196-97;

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[50] *Buckley* did not discuss independent expenditure provisions as applied to corporations or unions. In light of the long history of special treatment of these entities in campaign finance law, it surely makes no sense to read *Buckley*, or the simple adoption of a parallel construction in *MCFL*, to preclude Congress from taking further action to address the sort of massive corporate and union expenditures on campaign advertising that began in earnest ten years after *MCFL*.

see Broadrick v. *Oklahoma*, 413 U.S. 601, 614-15 (1973). "Facial invalidation 'is, manifestly, strong medicine,'" to be used "'sparingly and only as a last resort.'" *NEA* v. *Finley*, 524 U.S. at 580.

That cautious approach is particularly appropriate here. Plaintiffs argue as though source and disclosure rules may be applied only to conduct or to "unprotected" speech, and the question is whether Title II might stray beyond that line. *See* McConnell Br. 50. That approach is fundamentally misconceived. "Discussion of public issues," while surely protected speech, cannot be any *more* protected than speech, including "express advocacy," that relates directly to "'the conduct of campaigns for political office.'" *Buckley*, 424 U.S. at 14-15. Yet this Court has already made clear that it is consistent with the First Amendment for Congress to impose source and disclosure rules on independent campaign speech—in part because such rules involve no censorship, but only the source and transparency of campaign funding.

At the margins, Congress's new, objective definition of campaign-related speech might result in source and disclosure rules applying in a few situations in which the public interests they serve are not strongly implicated. But the manifestly compelling need for clear line-drawing in this sensitive area counsels deference to Congress's placement of the line—especially where, as here, its application never *prohibits* any speech, and imposes only limited burdens that are acceptable even as applied to fully protected speech.[51] In these special circumstances, the cost of facially invalidating rules of a sort this Court has previously held to be justified would be particularly high, while the benefits to be gleaned in terms of speech protection would be unusually low.

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[51] *See, e.g.*, *Burson* v. *Freeman*, 504 U.S. 191, 208-10 (1992) (upholding, under strict scrutiny, a *ban* on campaign-related speech within 100 feet of polling places); *Storer* v. *Brown*, 415 U.S. 724, 736 (1974) (recognizing "compelling" interest in bright-line one-year disaffiliation rule for candidates seeking to switch party sponsorship for ballot access).

Similarly, Title II poses little risk of the sort of chilling effect that can justify the facial invalidation of an overbroad law. *See Hicks*, *supra*. That effect is of most concern when a law is vague. *See, e.g.*, *Village of Hoffman Estates* v. *Flipside, Hoffman Estates*, 455 U.S. 489, 494 n.6 (1982) ("[T]he vagueness of a law affects overbreadth analysis."). Here, Title II was specifically designed to *avoid* vagueness. *Cf. Broadrick*, 413 U.S. at 607. Moreover, at most, the law requires only that groups like the Chamber of Commerce, the AFL, and the NRA pay for some ads using PAC funds, rather than treasury funds. These corporate and union plaintiffs, which have or can easily establish PACs, are not likely to be chilled in their speech, or to be unable to assert their rights if and when there is a realistic threat that the Act may be applied to them in some unconstitutional way. In these circumstances, awaiting as-applied challenges, arising in specific factual contexts, is by far the wiser course.

1. Plaintiffs Have Not Demonstrated Substantial Overbreadth

In addressing plaintiffs' overbreadth challenges, we address first arguments of more general applicability, and then those involving the special situation of ideological nonprofit corporations such as the NRA and ACLU (*see* pp. 73-75).

a. *The Period Just Before Elections*. One conspicuous virtue of Title II is its narrow, evidence-based focus on the final weeks leading up to a specific federal election, involving the specific candidate named in a covered ad. *See* pp. 49-51, 56. Remarkably, plaintiffs attempt to use that important aspect of narrow tailoring as evidence of overbreadth. They argue that Title II would restrict their ability to address legislative issues that might arise in the period just before elections. Yet, any ad that triggers Title II is very likely to have some actual *effect* on an election, whatever its intent. In any event, BCRA does not stop anyone from speaking during the covered period. Sponsors may run even candidate-specific ads, targeted at the relevant electorate, so long as they disclose their sponsorship and funding, and use no corporate or union treasury funds. They can also craft ads addressing

legislative issues in ways that do not trigger Title II—avoiding candidate references, or using non-broadcast media, or avoiding the districts of mentioned candidates in the final weeks before their elections.[52]

It might be possible to describe a small category of ads that are facially covered by Title II, but have no likely electioneering intent or effect—for instance because they refer only to pending legislative issues, and refer to candidates only by saying, generically, "Call your Congressman." BCRA expressly authorizes the FEC to adopt regulatory exemptions if it is satisfied that they can be framed in a way that meets statutory criteria and does not open paths for abuse. 2 U.S.C. §434(f)(3)(B)(iv). Indeed, as the NRA points out (Br. 36), the intervenor-defendants suggested to the FEC a narrow exemption of the sort just noted. The FEC determined, however, that the proposed exemption would leave room to design ads that nonetheless promoted or opposed candidates. 67 Fed. Reg. 65,201-02. No plaintiff appealed that decision. In any event, even without an exemption, plaintiffs cannot show that the burden of complying with Title II will be disproportionate to the compelling interests it serves in anything like enough cases to justify striking the law on its face.

Plaintiffs also argue that the public is most receptive to issue advocacy just before elections. If they mean that election time is ideal for public policy discussions wholly divorced from the electoral context, their argument is both

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[52] The NRA argues (Br. 44-50) that the statutory exemption for broadcast news and editorials is unconstitutional, because the world has changed so much in 13 years that this Court should revisit its rejection of that argument in *Austin*, 494 U.S. at 666-68. If and when Congress concludes that corporations are abusing their ownership of media outlets to interfere in federal elections using their treasury funds, it may consider whether it is necessary to adopt some statutory adjustment. Nothing in the NRA's submissions concerning the growth of the internet or changes in corporate ownership calls into serious question the unique role of the institutional press, or the permissibility of a media exemption as a matter of constitutional law. Indeed, an important purpose of that exemption is to avoid the sort of overbreadth concerns that plaintiffs otherwise voice.

implausible and contrary to the testimony of an expert and two experienced practitioners. *See* pp. 50. A period when airtime is particularly expensive and the airwaves are crowded with campaign ads is generally *not* the best time to address the public with issue messages that in fact have nothing to do with elections. If instead plaintiffs mean that broadcasting ads discussing issues *and referring to a candidate*, targeted to the candidate's electorate, at the time that voters are deciding whom to elect, best allows them to "influenc[e] the electoral issue climate" and "generat[e] popular pressure on candidates," because especially at that moment "electoral considerations motivate officeholders" (and their challengers), *see* AFL Br. 21, then they are simply restating the rationale for Title II.

b. *The Empirical Evidence*. Congress knew from Members' own experience that the vast majority of ads BCRA covers have an electioneering purpose or effect. It also considered empirical evidence, including studies by the Annenberg Public Policy Center (which plaintiffs have never contested), SA 652-57(K); Professor Magelby's study "Dictum Without Data," *see* 147 Cong. Rec. S252-53 (Apr. 2, 2001) (Sen. Thompson); and the CMAG database of political advertising, in the form of the 1998 and 2000 *Buying Time* studies much discussed below, *see* SA 1031-73(K), 1327-56(L), 238-48(H). Apart from an *ad hominem* attack (McConnell Br. 53 n.18), plaintiffs do not dispute that the CMAG data represent the most comprehensive body of research on political television advertising ever conducted.[53]

Indeed, plaintiffs do not challenge the vast majority of the findings based on the CMAG data—including the central findings, summarized above and in the opinions below, that: the extent of political advertising by interest groups grew

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[53] With regard to plaintiffs' personal aspersions, we note only that Judge Leon, after carefully reviewing the matter, concluded that any interest the *Buying Time* authors had in campaign finance reform did not "skew[] the results" of their research, and that any "flaws and shortcomings ... do not detract from the studies' credibility and reliability." SA 1335; *see also* League of Women Voters Br. 18-29.

explosively during and after the 1996 election cycle; candidates and political parties, whose electioneering purposes are undisputed, do not use "express advocacy" in their ads; candidate-centered "issue" ads run by interest groups are overwhelmingly concentrated in the final weeks before elections; groups target such ads at close campaign races and in a partisan manner inconsistent with protestations that they mean to address *only* "issues"; and these patterns are different for ads that do *not* name candidates. *See, e.g.*, pp. 49-53; SA 678-708(K), 1315-26(L). These unchallenged findings, based entirely on objective data, refute plaintiffs' wishful assertion that the defense of Title II "relie[s] almost exclusively" on the single aspect of the empirical evidence that they attack. McConnell Br. 53.

Plaintiffs focus on one question in each *Buying Time* study, in which student coders were shown ads (out of the context in which they ran) and asked whether, in their view, "the purpose" of each ad reviewed was to provide information about or urge action on an issue, or to generate support for or opposition to a candidate. *Buying Time 1998* at 193 (Q. 6); *Buying Time 2000* at 99 (Q. 11). Responses to that question allowed researchers to estimate the percentage of issue-focused ads aired by interest groups over the whole year that BCRA would have covered, and the percentage of all interest group ads covered by BCRA that were classed by the student respondents as issue-focused rather than campaign-focused. The first test explores how much issue-focused speech over the course of an election year BCRA leaves completely unaffected, while the second seeks to get at how effective BCRA is in covering what it intends to cover. Defendants' expert witnesses estimated that of all airings of issue-focused ads by interest groups in the two election years studied, only 6.1% in 1998 and 3.1% in 2000 would have been treated as "electioneering communications." The estimated proportion of ads BCRA would have covered that were coded as issue-focused was 2.3% in 2000; 14.7% in 1998 (when there was no presidential election); and 3% for the two years combined. Krasno/Sorauf Rep., App. at

C (for 1998), 60 n.143; Goldstein Rep. 25 (for 2000) (JA 1383, 1342, 1179).

Although both plaintiffs and the opinions below discuss these particular figures at some length (*see, e.g.*, McConnell Br. 53-57), only four essential points need be made. First, experts defend the disputed subjective component of the empirical evidence as one instructive measure strongly suggesting that Title II "does a good job hitting what it is aiming at . . . and missing what it is not." Krasno/Sorauf Rep. 60-61 (JA 1343). Nonetheless, given all the *objective* evidence defining the problem of candidate-centered "issue" ads and demonstrating the tailoring of Congress's response, the subjective evidence is in no way essential. Indeed, the dispute over it supports Congress's decision to adopt an entirely objective definition of what constitutes "electioneering."

Second, Judge Leon based his overbreadth analysis in part on the misunderstanding that defendants' expert Dr. Goldstein "testified on cross examination that he had reevaluated the results of the [2000] study . . . and concluded that, in fact, 17 percent" of ad airings that would have been covered by BCRA in 2000 "were genuine issue advocacy." SA 1157(L); *see* SA 767(K). As the amicus brief filed by the League of Women Voters demonstrates (24-25), it simply misreads the record to attribute to Dr. Goldstein a figure generated by plaintiffs, and only through an implausible recoding of the underlying data.[54]

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[54] Briefly, the 2000 study included seven similar CBM ads. Student respondents originally coded six of them as campaign-focused and one as issue-focused. *See* Goldstein Rebuttal Rep. 16-17; Goldstein Cross 159, 216. During cross-examination, Dr. Goldstein explained that although all the ads should have been classified as electioneering, his report adopted the conservative approach of honoring the original, anomalous coding of the seventh ad. *See* Goldstein Cross 127, 159, 217-20. Plaintiffs' counsel demonstrated that if one instead treated all seven as "issue" ads, one could mathematically generate the 17% figure. *Id.* at 160-69. Dr. Goldstein never suggested that, given the actual original coding of the ads, that approach would make any sense. *See id.* at 216-20 (confirming he had "[no] doubt at all that these ads should be classified as electioneering").

Third, plaintiffs, who bear the burden of proving that Title II is so overbroad that it should be struck down on its face, produced no empirical evidence of their own. *See* SA 764, 856(K). Nor have they challenged *any* of the objective evidence put forward in support of Title II.

Fourth, and most important, whatever their real or imagined flaws, the subjective research results cannot demonstrate the *in*validity of Title II. They are based on questions that asked respondents to identify "the purpose" of each ad. Respondents were not allowed to answer "both." Yet, as both sides have emphasized, many if not most campaign ads—including ads run by candidates, and ads that use "express advocacy"—*also* discuss issues. Source and disclosure rules serve their purposes so long as *one* material purpose *or effect* of an ad is to influence a federal election. Thus, if the survey results presented by defendants' experts correctly identify the percentage of ads whose *principal* focus was electioneering, then they are strong evidence of extremely narrow tailoring. But even if some or all of plaintiffs' criticisms are correct, then whatever recomputation is justified would identify only a larger percentage of ads whose *principal* focus was on issues. Because ads with that focus might nonetheless have influencing elections as another material purpose or effect, such results would neither support plaintiffs' claim of overbreadth, nor undercut any of the record's other evidence of proper tailoring.

c. *Plaintiffs' Examples.* Finally, plaintiffs offer a few examples—presumably the best they could find—of ads they claim "powerfully illustrate[]" the overbreadth of Title II. McConnell Br. 50. Their examples are, indeed, telling.

One ad featured by the McConnell plaintiffs (Br. 51, 1a) complains about "Washington politicians," advocates term limits, points out that one candidate has "signed the pledge to limit her terms" but that the other "refused," and ends by urging viewers to "[c]all David Wu and tell him to sign" the pledge. What really "seem[s] unthinkable" (Br. 51) about this ad is that plaintiffs would seriously suggest that when broadcast in Wu's district, just before an election, it might

have had no electioneering purpose or effect. *See* p. 49 (discussing use of “call” or “tell” tag-lines).

The McConnell plaintiffs also feature (Br. 52, 3a) an ad run by the Michigan Chamber of Commerce naming Senate challenger Debbie Stabenow. The ad aired between September 20 and five days before the 2000 election. It says families risk losing their businesses “[b]ecause of the Death tax”; criticizes Stabenow for “vot[ing] twice against getting rid of the Death tax”; and asks viewers to “Call Debbie Stabenow” and “[t]ell her our working families need a break.” It highlights past votes in the House, not an upcoming vote. A Chamber official acknowledged that voters “would negatively perceive” Stabenow in light of such ads, and that the reason for running them was that “she was in that time . . . a candidate for public office and we felt that the people of . . . Michigan needed” the ad as “necessary information” for their “decision-making process.” LaBrant Dep. 34-35, 37. The “decision” in question was what Senator to elect.

We certainly agree with plaintiffs that this ad, and the others like it that are attached to the McConnell plaintiffs' brief, are “speech fully protected by the First Amendment.” McConnell Br. 52. They also serve quite well to illustrate just the sort of obviously *campaign-focused* ads that interest groups were airing before BCRA—without complying with the FECA provisions meant to preclude groups like the Chamber of Commerce from using *treasury* funds to run *campaign* ads, and without disclosing to the public just who was funding the *campaign* activities of groups with names like “Coalition for the Future American Worker” (Br. 6a) or “Americans for Job Security” (Br. 12a).

There are a few examples of spot ads that may have been designed and run without any material electioneering purpose, despite naming candidates, reaching a targeted electorate, and running close to an election.[55] The AFL, for

[55] The ACLU submits (Br. 10-11) one example of an ad that it claims falls in this category. As Judge Kollar-Kotelly explained, this is the only

instance, ran two "cookie cutter" ads that targeted numerous Members of Congress, only some of whom were candidates. One urged opposition to granting China permanent most-favored-nation status. *See* McConnell Br. 51, 2a. Another alleged denial of benefits by HMOs, and criticized "Republicans in Washington" for "pushing an empty HMO proposal that won't stop these abuses." AFL Br. 6 ("Deny") (included in DEV 48, Tab 3 as "HMO Said No"). When targeted at incumbents not then running for reelection, these ads would not have been covered by BCRA. (The China ad, for example, would have triggered Title II in only two of fourteen market locations in which it ran. *See* Mitchell Dec., Ex. 1 at 92-93.) Where the target *was* a candidate, there is every reason to assume that the ads *did* have an electoral effect—and quite possibly some electoral purpose as well.

Plaintiffs make much of any uncertainty concerning actual electoral intent or effect in such marginal cases. Similarly, in their discussion of Title II's back-up definition (Br. 59-61), the McConnell plaintiffs argue that reasonable people could disagree about whether some ads "support or oppose" a candidate. Avoiding subjective judgments in individual cases is, of course, one principal reason Congress chose to enact an *objective* primary definition to define the coverage of Title II—a choice that honors this Court's emphasis on avoiding vagueness in regulations that touch on speech. But if one attempts such judgments, then as the AFL itself emphasizes (Br. 18), evaluation of the likely intent or effect of a particular ad requires consideration of the full context surrounding its use.[56] Accordingly, a court would need to have

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ad in the ACLU's history that satisfied Title II's criteria—and the ACLU *manufactured* it just so it could be a plaintiff in this case. SA 748-51.

[56] The ad "AAHP/Look Out for the Lawyers" (McConnell Br. 9a), for example, praises then-incumbent Senator Lauch Faircloth for "fighting to stop the trial lawyers," who "want[ed] Congress to pass new liability laws" that would "make trial lawyers richer" but "make healthcare unaffordable for millions." As Judge Kollar-Kotelly explains, in context, that ad clearly conveyed an electioneering message supporting Faircloth against his opponent, prominent trial lawyer John Edwards. SA 733-34.

a more complete and focused picture of all relevant circumstances before concluding that applying source and disclosure rules to a particular ad like any of those cited by plaintiffs would be constitutionally invalid.

As this discussion underscores, Congress could have achieved greater precision of the sort plaintiffs profess to seek only by using a flexible statutory standard—one inevitably tied to more subjective factors, such as those that plaintiffs criticize in attacking the back-up definition. In effect, plaintiffs seek to create a legal dead zone in which Congress cannot, as a practical matter, avoid either facial overbreadth or facial vagueness. The Court should not tolerate that cynical contention. It would be an odd Constitution that theoretically allowed Congress to impose source and disclosure rules on independent campaign spending, but restricted it to means that have proven wholly ineffective.

Finally, the NRA refers to some of its 30-minute "infomercial" ads, in which some references to candidates might be deemed incidental. *See* Br. 37-43. (Among plaintiffs, only the NRA runs such ads. In a 30- or 60-second ad, *no* image or word is "incidental.") Understandably, it does not focus on any of its unabashedly partisan infomercials, such as the one that led with Charlton Heston's observation that "[t]his election could come down to battleground states," and continued with repeated references to Al Gore. *See* McQueen Dep. 113-30 (JA 960-70) (text of ad). Nor does it dwell on ads such as the two spots set out side-by-side at SA 695-96(K), one funded from the NRA's treasury and the other by its PAC. The difference? The PAC ad ends with "Vote George W. Bush for President," while the "issue" ad makes do with Charlton Heston observing—just before the 2000 election—that "the day of reckoning is at hand." *See also* SA 697(K). Whatever Title II's impact on the exceedingly small universe of 30-minute ads with truly incidental candidate references run just before elections, it cannot support a

claim that Title II is facially invalid as to all ads to which it applies.[57]

2. Title II Properly Reaches Nonprofit Corporations Unless They Qualify For An As-Applied Exemption under *MCFL*

The NRA and the ACLU argue that nonprofit, ideological corporations should not be treated like other corporations for purposes of campaign finance regulation. That argument is incorrect as a general matter, and this litigation is not the place for as-applied challenges by these plaintiffs.

To begin with, neither organization demonstrates that compliance with Title II would impose any great burden. The NRA claims that BCRA would reduce its members' "collective voice" to a "whisper" (Br. 25), but there is no reason that should be so—if, in fact, the members do support the group's *electoral* speech. Nothing prevents the NRA from reducing its membership dues by some amount, and asking its four million members to contribute that amount to its Political Victory Fund. In any event, during the 2000 election cycle, the PVF's own fundraising was already so successful that it used its own funds to pay for administrative expenses that could legally have been paid with NRA treasury funds. Adkins Cross 41-43. The ACLU, meanwhile, complains principally (Br. 17) that it does not want to set up a segregated fund to comply with BCRA, because it "is not a partisan organization and does not choose to present itself as one." It never explains why there is any "presentation" issue. FECA does not require that segregated funds adopt a partisan name, make political contributions, or engage in partisan conduct. No one need misunderstand the purposes of the "ACLU Election-Period Non-Partisan Legislative Advocacy Fund."

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[57] The NRA also argues (Br. 38-41) that it uses broadcast advertising to respond to public attacks and raise funds. It does not demonstrate that these efforts would be materially impeded by complying with Title II, or explain why such ads would not raise source and disclosure concerns if they name candidates and run in their districts just before elections.

In contrast to these imagined burdens, the risks posed by an "issue" advocacy exemption for nonprofits are very real. This Court has expressly recognized that the basic reasons for limiting corporate and union campaign spending to segregated funds apply to ideological nonprofits—specifically including the NRA. *Beaumont*, 123 S. Ct. at 2209-10. Such organizations, "like their for-profit counterparts, benefit from significant 'state-created advantages,'" and their fundraising and political prowess "show that 'political "war chests"' may be amassed simply from member contributions." *Id.* at 2209 & n.6. If exempt from source and disclosure rules, they could quickly become easy-to-use, hard-to-police conduits for unlimited campaign spending by unions and for-profit corporations. *Id.* at 2209-10; *Austin*, 494 U.S. at 664; *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986) (*MCFL*) (nonprofits could "serv[e] as conduits for the type of direct spending that creates a threat to the political marketplace"). And individuals who support a nonprofit's basic mission—or join because membership provides various benefits—do not necessarily want their funds to be used to support or oppose candidates. *See Beaumont*, 123 S. Ct. at 2209 n.5. BCRA's coverage of nonprofits is not only reasonable, but indispensable.

As the NRA emphasizes (Br. 28-33), BCRA contains superseded provisions that would have required simply that nonprofit corporations pay for electioneering communications only out of funds contributed by individuals. *See* 2 U.S.C. §§ 434(f)(2)(E)-(F), 441b(c)(2), *superseded by* 2 U.S.C. § 441b(c)(6). That approach would have been significantly more complicated to administer and enforce—and significantly less effective. Money is fungible, so corporate or union contributions could be used to fund *all* the organization's non-campaign activities, freeing individual contributions for electioneering communications. *See Beaumont*, 123 S. Ct. at 2210 n.7 (rejecting argument that "earmarking" rules adequately addressed conduit problem in contribution context).

As to any argument that specific organizations should not be subject to Title II, *MCFL* already establishes that restrictions on the use of treasury funds cannot be applied to

certain nonprofits. *MCFL* and the FEC's regulations establish the basic criteria for exemption—including that the corporation engage in no "business activities," not be "established by a business corporation or a labor union," and have "a policy not to accept contributions from such entities." 479 U.S. at 264; *see* 11 C.F.R. § 114.10(c), (d) (recognizing that Title II is subject to the same as-applied exemption under *MCFL*). Later decisions reaffirm, however, both that *MCFL*'s requirements are to be strictly construed, and that FECA's requirements may properly be applied to most "nonprofit ideological corporations." *See Austin*, 494 U.S. at 661-65; *Beaumont*, 123 S. Ct. at 2204, 2207-11.

These requirements suggest that neither the NRA nor the ACLU is entitled to a constitutional exemption, because each accepts corporate funding.[58] More fundamentally, given *MCFL* and *Austin*, BCRA's electioneering communications provisions may not be challenged on their face on the ground that *some* nonprofit corporations might be entitled to an as-applied exemption. After all, *MCFL*, which *upheld* such a challenge, did not therefore invalidate the application of FECA's source restrictions to all corporations. A corporation that believes it falls within *MCFL*, or that the *MCFL* exemption should be expanded, may pursue that claim on an as-applied basis, before the FEC and then in the courts. Whatever the merits of such arguments, they are out of place in this case.

CONCLUSION

BCRA should be sustained in its entirety.

Respectfully submitted,

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[58] Each argues that its corporate funding is comparatively modest—which suggests that neither would be terribly burdened by forgoing corporate donations to qualify for an exemption. *See* SA 834 n.123(K). But the absolute amounts involved—$85,000 for the ACLU (Br. 9 n.8, 17), and $385,000 for the NRA (Br. 3)—are not trivial, and could quickly increase if the organizations became conduits for corporate or labor electioneering.

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