Nos. 02-1727, 02-1733, 02-1753

IN THE

SUPREME COURT OF THE UNITED STATES

REPUBLICAN NATIONAL COMMITTEE, CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN NATIONAL COMMITTEE, ET AL.,

Appellants/Cross-Appellees,

v.

FEDERAL ELECTION COMMISSION, ET AL.,

Appellees/Cross-Appellants.

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

REPLY BRIEF OF THE POLITICAL PARTIES

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MISCELLANEOUS

BCRA's restrictions on political parties are much more severe than its restrictions on either federal officeholders or special interests. The Government asserts that BCRA's restrictions on political parties are necessary to prevent actual or apparent corruption *by* special interests *of* federal officeholders and candidates. Even if this were true, the Government cannot explain why parties are treated so much more harshly than officeholders and candidates, or even interest groups themselves. This glaring discrepancy in treatment calls into question the purported justification for Title I, and at the same time proves that Title I is neither narrowly tailored nor even closely drawn, but is instead fundamentally irrational.

Members of Congress made sure that BCRA expressly allowed them to raise nonfederal funds for the very special interest groups whose efforts to buy influence are said to justify Title I.[1] *See* new § 323(e)(4) (permitting federal officeholders and candidates – but not party officials – to solicit nonfederal money for tax-exempt interest groups, including those engaged in "Federal election activity"). BCRA leaves those interest groups largely unfettered to spend nonfederal funds on activities ranging from voter mobilization to various kinds of broadcast advertising. Congress also allowed federal officeholders and candidates – but not national party officials – to raise nonfederal funds for state and local candidates. *See* new § 323(e)(1)(B). It allowed them – but not national party officials – to speak at

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[1] Like all three judges of the district court and even the Federal Election Commission itself, this brief employs the term "nonfederal funds" rather than the more pejorative "soft money." *See Per Curiam* 31sa n.9 (Kollar-Kotelly; Leon, J.J.); Henderson 182-183sa n.30; 67 Fed. Reg. 49,064, 49,064-65 (July 29, 2002). Also, whereas the factual statement in our opening brief drew from the findings of the lower court majority, s*ee* Pol. Parties Br. 7 n.4, the Government and Intervenors repeatedly invoke the findings of a single judge.

state-party fundraising events. *See* new § 323(e)(3). Neither the Government nor BCRA's sponsors can explain BCRA's preferential treatment of federal officeholders and candidates over political parties. *See* J.A. 854-55, McCain Dep. 205-15; J.A. 944-52, Feingold Dep. 189.

In our opening brief, ("Pol. Parties") Br. 1, we cited four paradigmatic examples of Title I's overbreadth. To lessen the force of these examples, Intervenors assert that they are "obscure" or only "remotely conceivable." Intervenors' ("Int.") Br. 6, 35. To the contrary, activities such as support of state and local candidates, campaigns for ballot measures, and full ticket voter mobilization are at the very heart of the American political process.

Defendants' dismissive tone cannot mask their inability to explain away these statutory flaws. *First*, we showed that new Section 323(a) makes it a felony for the Chairman of the RNC to send a fundraising letter on behalf of his party's gubernatorial nominees during the upcoming off-year elections. Intervenors confirm our point, asserting "the FEC and Justice Department have made clear that national party officials may solicit *hard money* on behalf of any candidate." Int. Br. 6 (emphasis added). As explained, Pol. Parties Br. 42, however, funds raised for a state candidate's campaign are regulated by and reportable under *state* law; they are *nonfederal* funds. New Section 323(a) makes it a *crime* for the RNC or its agents to raise nonfederal funds under any circumstances.

The Government, in turn, suggests that state candidates may simply "establish a *federal PAC"* for the sole purpose of accepting federal funds raised for their state campaigns by national party officials, since "*so far as federal law is concerned*" such money can be used for state election activity. Gov't Br. 54 n.22 (emphasis added). But as the FEC undoubtedly knows, a state candidate's formation of multiple campaign committees – that is, one subject to state

regulation and another to federal – is typically *illegal under state law*.[2] Even if it were not illegal, the gratuitous burden of establishing and running a federally-regulated PAC cannot be justified by any substantial *federal* interests in regulating national party solicitations for *state* candidates. This very suggestion discloses a disdain for the authority of states to regulate their own elections.[3]

Second, Intervenors correctly observe that the California Secretary of State has now (since our opening brief was filed) fortuitously scheduled the recall election for October 7, 2003, 160 days rather than 120 days before the next federal election. Although the California parties may donate money to PACs formed to support or oppose a recall occurring in October, so long as the donee PAC does not otherwise engage in "Federal election activity," *see* new § 323(d), the very same contribution by a state party for an election later in the year (after the November filing deadline for federal candidates) would be illegal, even though no federal candidate is involved in either. It would also be

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[2] *See, e.g.*, Cal. Fair Pol. Practices Comm'n Adv. Op. A-91-448, 1991 WL 772902 ("a candidate for elective office may have only one campaign bank account and one controlled committee for each specific election") (California); Colo. Const. art. XXVIII, § 2(3) (Colorado) ("A candidate shall have only one candidate committee."); Iowa Code Ann. § 56.5A (West 2003) (Iowa) ("Each candidate for state, county, city, or school office shall organize one, and only one, candidate's committee for a specific office sought. . ."); Ohio Rev. Code Ann. § 3517.10(J) (West 2003) (Ohio) ("A candidate shall have only one campaign committee at any given time for all of the offices for which the person is a candidate or holds office.").

[3] We have addressed the Government's unrealistic and constitutionally suspect assertion that national party officials solicit in their "individual capacities." Pol. Parties Br. 41. The Government's attempt to analogize national party officials to Executive Branch employees, charitable organizations, and municipal securities dealers fails because none of those persons has political speech as its core function.

illegal for the state parties to conduct their own get-out-the-vote ("GOTV") activities in a later recall election unless they used only federally permissible funds. Strikingly, Intervenors are silent about restrictions on national parties during the currently-scheduled recall campaign. *See* new § 323(a).

Third, new Section 323(b) and the definition of "Federal election activity" subject voter registration and GOTV activity by state and local parties to pervasive regulation during federal election years (including *monthly* reporting), even if only state or local candidates or ballot measures are named. *See* Henderson 311sa (major focus of state and local party activities is on state and local elections); Leon 1227sa (same). Nonsensically, Intervenors claim that "merely address[ing] the size and source of contributions used to finance [these activities] . . . *does not regulate*" them. Int. Br. 7 (emphasis added). But that is *exactly* how it regulates them.

Fourth, and perhaps most important, we showed that Title I criminalizes national party participation in traditional voter mobilization "Victory Programs" and "Coordinated Campaigns," even during years when there are no federal candidates on the ballot. According to Senator McCain, these "grassroots activities are the fundamentals of the democratic process." J.A. 943-44, McCain Dep. 192-93. As the district court found, prior to BCRA national party officials sat down with party officials in every state at the start of each election year and jointly decided how to raise and spend a mix of federal and nonfederal funds on voter mobilization. *See* Pol. Parties Br. 19-20; Henderson 305sa, 306sa; Leon 1222sa, 1223sa. Because the greatest emphasis was placed on state and local races, these plans relied most heavily on nonfederal funds. In 2000, for example, 60 percent of Republican Victory Program budgets were paid with nonfederal funds. *See* Henderson 306sa; Leon 1223sa.

Critically, neither the Government nor the Intervenors can deny that the essence of Victory Programs and Coordinated Campaigns is joint *decisionmaking* by national, state, and local parties concerning fundraising, fund allocation, and spending on voter mobilization programs. J.A. 296-97, Josefiak Decl. ¶¶ 31-32; J.A. 694-95, Peschong Decl. ¶¶ 5-7; J.A. 823-24, 825-26, Stoltz Decl.¶¶ 3, 9.[4] New Section 323(a) prohibits national party involvement in any such program unless it is funded with 100% federal dollars – even when there are no federal candidates on the ballot. Moreover, new Section 323(b)(2)(B)(iv) prohibits national parties from transferring even *federal* dollars into these programs if the state or local party is using any nonfederal "Levin" money. The Government confirms the statutory overbreadth by pointing out that the Levin Amendment's "homegrown" requirement is intended to prevent the national parties from "gain[ing] *influence* over how the [Levin] account is spent." Gov't Br. 50-51 (emphasis added).

Each of these four examples concerns traditional, core political party activities. The briefs describe many other examples of core party activity swept within the overbroad rubric of "Federal election activity." In their effort to close "loopholes," BCRA's drafters created a Rube Goldberg statute with effects so bizarre – and apparently unanticipated even by its proponents – that it cannot survive any level of scrutiny.

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[4] While Intervenors assert without citation that national parties may participate in these programs "so long as the national parties do not *solicit* soft money or *control* its expenditure," Int. Br. 7, they fail to explain how beginning-to-end collaboration on fundraising, budgeting, and spending for such programs does not constitute "solicit[ing], . . . transfer[ing] . . . or spend[ing]" nonfederal Funds. *See* new § 323(a)(1).

I. BCRA's RESTRICTIONS ON POLITICAL PARTIES OFFEND THE FIRST AMENDMENT.

A. Title I's Many Restrictions on Party Association, Spending, and Solicitation Call for Strict Scrutiny.

1. The Statute Is Subject to, and Fails, Strict Scrutiny.

As shown, Pol. Parties Br. 35-36, Title I's restrictions on intra-party communication and cooperation demand strict scrutiny under this Court's precedents addressing political party rights of association. *See California Democratic Party v. Jones*, 530 U.S. 567, 582 (2000) (law burdening political parties' right of free association is "unconstitutional unless it is narrowly tailored to serve a compelling governmental interest"); *see also Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 225 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986). Our showing that restrictions on party association activity are subject to strict scrutiny goes unrebutted and virtually unaddressed.[5] As the district court found, the relationships among national, state, and local party organizations have strengthened in the past three decades, have never been closer, and are generally healthy for American democracy. *See* Henderson 304sa; Leon 1221-22sa. By creating what Senator McCain called "firewalls" separating the national, state, and local parties, J.A. 952, McCain Dep. 223, Title I strikes directly at the parties' core associational functions.

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[5] The Government ignores *Eu* and *Tashjian* altogether, but meekly suggests that the broad holding in *California Democratic Party* should be limited to laws that allow nonmembers to participate in party affairs. Gov't Br. 65 n.32. The Intervenors ignore all three precedents.

See Leon 1082sa (BCRA "transforms [national, state, and local parties'] relationship with each other").

Title I drives wedge after wedge within and among the party organizations. For example:

- Title I penalizes state and local parties for associating with national parties in developing, funding, and implementing Republican Victory Programs and Democratic Coordinated Campaigns. *See* new § 323(a).

- If the state or local parties use any nonfederal funds or "Levin money" to pay for voter registration or GOTV, Title I bars the national parties from transferring even *federal* funds to state and local parties for those purposes. *See* new § 323(b)(2)(B)(iv) (the "homegrown" requirement).

- If they use "Levin money," Title I bars state and local party committees from transferring *among themselves*, even within the same state and with no national party involvement, *federal* funds for the broad range of activities that the statute defines as "federal election activity." *See* new §§ 323(b)(2)(B)(iv), 323(b)(2)(C).

- Title I requires the RNC and LNC to spend 100 percent federal funds for internal party communications aimed at party members and adherents, *see* new § 323(a), whereas corporations, unions, and membership organizations may spend unlimited nonfederal funds on even express advocacy directed to their stockholders, executives, and members. *See* 11 C.F.R. § 114.3 (2003).

Neither the Government nor the Intervenors explain why these restrictions deserve less than strict scrutiny.

Moreover, even under the *Buckley* "contribution/expenditure" dichotomy, strict scrutiny must apply. In its zeal to obtain the most "complaisant scrutiny," the Government is forced to mischaracterize the statute. While the very text of new Section 323(a) makes it a felony for the RNC or LNC to "solicit, receive, or direct . . . transfer . . . or spend" nonfederal money – not just for themselves but for anyone else – the Government claims the provision is "directed solely at the *acquisition* of funds," Gov't Br. 13 (emphasis in original); *see id.* 34 ("receiving funds," "receiving any donation"), 35 ("solely as a source and amount limit"). To the contrary, new Section 323(a) is, in Intervenors' words, an "across-the-board prohibition." Int. Br. 23. It prohibits national party fundraising for state and local candidates or allied interest groups, as well as national party participation in the spending of state parties' nonfederal funds, even though none of the money involved is "receiv[ed]" by the national party.

As for new Section 323(b), the Government admits that "the applicability of these restrictions turns on the *use* to which the relevant funds are ultimately put," Gov't Br. 45 (emphasis added), but again attempts to denominate the provision as a contribution limit. The Government's claim that state and local parties are free to spend as much *federal* money as they want on so-called "Federal election activity" misses the point: Title I restricts the right of state and local parties to *spend* nonfederal funds raised legally pursuant to state law on behalf of state and local candidates.

Similarly, new Section 323(d) prohibits national and state political parties from spending even a single penny, even of *federal* funds, to support tax-exempt I.R.C. Section 501(c) organizations, if those organizations spend any money for "Federal election activity." *See infra* pp. 25-28. That is a

flat ban on spending, without regard to the source and amount of funds involved. And, new Section 323(f) regulates the *spending* of campaign funds raised pursuant to state law. Try as they might, the Government and Intervenors simply cannot fit this multitude of interrelated restraints on spending into the contribution limit cubbyhole. Indeed, their semantic gymnastics confirm a very serious problem.

The solicitation restrictions are another component of this oppressive regime. The Government argues against strict scrutiny because "[t]he provisions at issue here . . . are directed not at the content of the fundraising appeal, but at the identity of the fundraiser." Gov't Br. 52. Again, the Government is wrong. The RNC or LNC can solicit money from any U.S. citizen if its message seeks a contribution to itself, but it cannot ask that very same individual to contribute the same amount to Jones for Governor. *See* new § 323(a). Likewise, the CDP can solicit Levin money from a labor union for itself, but it cannot ask that same labor union to give the same amount of Levin money to a county Democratic party. *See* new § 323(b)(2)(B)(iv).[6]

Although it is not precisely clear, the Government appears to be saying that intermediate scrutiny should be the rule for restrictions on political parties, whereas strict scrutiny is but an exception applicable only to limits on the *amount* of money parties can spend. The Government has it exactly backwards. Strict scrutiny is the rule; only when reviewing limits on contributions to candidates has the Court employed intermediate scrutiny. *See* Pol. Parties Br. 36. *Cf.*

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[6] *FEC v. National Right to Work Committee*, 459 U.S. 197, 200-01 (1982) ("*NRWC*"), applied intermediate scrutiny to solicitations that NRWC did *for itself* of funds that it was prohibited from receiving. The solicitation restrictions here are far broader.

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 296-97 (1981) ("contribut[ion] to a *candidate*" is "single narrow exception to the rule that limits on political activity [are] contrary to the First Amendment."). In *FEC v. Beaumont*, 123 S. Ct. 2200, 2210 (2003), the Court observed that "the level of scrutiny is based on the importance of the political activity at issue to effective speech or political association." As shown, Title I's pervasive restrictions impact the very core of political party speech and association.

If, as shown, strict scrutiny applies, the Government implicitly concedes the statute must fall. The asserted interest is not compelling (nor is it argued to be), the restrictions are not narrowly tailored (nor are they argued to be), and the Government's experts conceded that there is no evidence that Title I will reduce the appearance of corruption one whit. Henderson 337-38sa (*citing* J.A. 987-89, Shapiro CX 114-17 and Sorauf CX 191). This ends the inquiry.

2. The Statute Fails Even Intermediate Scrutiny.

Even applying intermediate scrutiny, Title I must fail. *See* Leon 1111sa. Both the Government and Intervenors repeatedly plead with the Court simply to defer to the legislators' personal experience in the realm of campaign finance. *See* Gov't Br. 27-28, 37, 42, 52, 72; Int. Br. 19, 20, 63. Doubtless legislators have greater personal experience in political debate than most judges, but this experience cannot insulate restrictions on political speech and association from the most searching First Amendment inquiry. A legislative decision setting the level of contribution limits, to which this Court might defer, is a far different matter from the novel and wide-ranging restraints at issue here.

The Record Rebuts the Existence of Any Substantial Corruption or Appearance of Corruption. The Government's exegesis on "the extensive network of laws" targeting corruption of federal officials, Gov't Br. 30, serves to confirm Dr. Morton Keller's undisputed testimony that "'[c]orruption or the appearance of corruption' . . . is less of a problem in American politics today than at any time in the past." J.A. 1267, Keller Decl. ¶ 55.[7] Indeed, the Government ignores this Court's observation in *Colorado I*, confirmed by the record here, that the "opportunity for corruption" posed by "unregulated 'soft money' contributions to a party for certain activities, such as electing candidates for state office or for voter registration and 'get out the vote' drives" is "*at best, attenuated*." *Colorado Republican Fed. Campaign Committee v. FEC*, 518 U.S. 604, 616 (1996) ("*Colorado I*") (emphasis added). Against this background, the factual case for BCRA is weak.

The Government concedes that it lacks evidence of actual *quid pro quo* corruption, Gov't Br. 39 n.15,[8] but

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[7] The Government's effort to analogize Title I to bribery and gratuity statutes, Gov't Br. 28-31, is of limited assistance here. Restrictions on political giving and spending implicate speech and associational values at the heart of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (*per curiam*) ("contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities"). In short, contributions for political speech and association are different from gratuities such as Super Bowl tickets.

[8] Intervenors continue to claim actual corruption, *see* Int. Br. 14, even though the district court flatly rejected their claim. Henderson 326sa; Leon 1256sa. Every Member who testified below denied being influenced by nonfederal money, and only two claimed to know a colleague who had been so influenced. *See* J.A. 918-19, Jeffords Dep. 106-07; J.A. 974-75, Meehan Dep. 171-72; McCain Dep. 170-71; Rudman Dep. 45-46; J.A. 1011-13, Simpson Dep. 13-15; J.A. 1026-28, Snowe Dep. 205-08; J.A. 405, McConnell Decl. ¶ 8; Barr Decl. 5; Shays Dep. 171, 176 (refusing to identify any specific incidents). Intervenors repeat vague allegations made by Senators Feingold and Simon that (...continued)

claims that federal officeholders inhabit "an environment" in which political parties "control the resources crucial to subsequent electoral success and legislative power," *id.* at 33. The Government's own political party experts unequivocally rejected the claim that parties use resources to pressure Members as not "credible," "self-defeating," and "politically naïve." Mann CX 113-15; *see also* Herrnson Dep. 185-86. The FEC admitted that there is no evidence of the RNC ever using contributions in an attempt to get a federal officeholder to change his or her position on legislation. *See* Henderson 325sa; Leon 1254sa.

According to Intervenors, it is the raising of the money, "regardless of how the national party spends that money," that creates "the potential for corruption." Int. Br. 26. The district court found, however, that it is "exceedingly rare" for the RNC to rely upon federal officeholders for personal solicitation of major donors. *See* Henderson 308sa; Leon 1245sa. Moreover, most RNC nonfederal money goes to purely state and local campaign activity, administrative overhead, and other uses besides the feared candidate-specific advertisements. Pol. Parties Br. 13. Lack of officeholder involvement in fundraising, coupled with spending for activity not affecting federal elections,

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nonfederal donations from Federal Express impacted legislation. *See* Int. Br. 13. *But see* Leon 1254sa (describing the testimony of Senators Feingold and Simon, among others, as, "at best, their personal conjecture"). Intervenors fail to mention that former Senator Wendell Ford, the subject of the claim, has denied the allegation. *See* James R. Carroll, *Court to Hear McConnell's Challenge to Campaign Finance Law*, The Courier-Journal (Nov. 25, 2002) (Sen. Ford stated, "I wouldn't be going to Russ Feingold asking him to vote for FedEx. . . . He just got his facts wrong."). Senator Feingold asserted that the legislation would not "have passed had it not been for soft money," Feingold Dep. 133-34, but it passed the Senate by a vote of 92 to 2, with Senator Feingold himself in the majority. *See* 142 Cong. Rec. S27158 (Oct. 3, 1996).

confirms that the potential for corruption for most nonfederal money is, indeed, "attenuated." *Colorado I*, 518 U.S. at 616.

The Government admits that officeholders do not raise money for the RNC, but speculates that a blanket prohibition is necessary "to guard against the possibility that the RNC *might begin* to employ" techniques used by other national party committees. Gov't Br. 41 (emphasis added). This response highlights the lack of tailoring in this one-size-fits-all statute, which inaccurately assumes that *every* national party committee *inherently* raises *all* its nonfederal money through *federal officeholders*, for use in *federal campaigns*. The Government cannot explain why a more limited measure directly restricting federal officeholders and candidates from raising nonfederal funds – such as new Section 323(e) standing alone – is insufficient to address this claimed possibility.

As for the observation that the RNC invites officeholders to events with donors, Gov't Br. 41, the FEC admitted that both federal and nonfederal donors attend those events. *See* Henderson 329sa; Leon 1263sa. Moreover, Senator McCain admitted to attending "numerous" such events, but could not recall the "individuals who were present," and none of the matters discussed "made enough of an impression on [him] to influence any legislative judgments." McCain Dep. 236-38. Likewise, presented with a list of persons with whom he dined at a recent major donor event, Representative Shays testified that he could not recall a single one. *See* J.A. 1004, Shays CX 20.[9]

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[9] The district court majority declined to credit Intervenors' anecdotes of apparent corruption. For example, Intervenors suggest that nonfederal donations affected congressional action on prominent legislation, including tobacco-control legislation. *See* Int. Br. 13. Yet the record shows that while the tobacco legislation was pending in 1998, the tobacco industry's nonfederal donations to political parties actually *declined*, (...continued)

Defendants repeatedly state that some corporate donors made nonfederal donations to both political parties, Gov't Br. 38; *see also* Int. Br. 12, but fail to note that the stated figures include donations not just by the listed corporations, but also by their affiliates and individual executives. Further, at a time of almost historical equipoise between the two political parties – the 2000 presidential election was the closest in over a century; the Senate comprises 51 Republicans, 48 Democrats, and 1 Independent; the House 229, 205, and 1 – it should not be surprising that many donors support both sides of the aisle. *See* Snyder Reb. Decl. at 11. A large corporation, with thousands of employees and perhaps millions of stockholders of varying political affiliations, may feel obligated to divide its political contributions between the two major parties.

Neither Narrowly Tailored Nor Closely Drawn, Title I Is Fundamentally Irrational. As shown without rebuttal, Pol. Parties Br. 44-48, the very structure of the statute demonstrates that its restrictions on political parties are neither narrowly tailored nor closely drawn. Indeed, as a scheme to protect officeholders from special interest influence, the restrictions are fundamentally irrational. The restrictions on political parties are far more severe than those imposed on both the feared influen*cors* (special interest

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while its spending on *lobbying* and *issue advocacy* dramatically *increased*. *See* FEC Resp. to Req. for Admis. Nos. 45-50 & 52-54 in *RNC v. FEC*, No. 98-CV-991 (D.D.C.).

Sadly, Intervenors cannot resist distorting congressional testimony by the RNC's counsel. Int. Br. 28-29. *Compare* Const. & Reform Hrgs., Sen. Comm. on Rules & Admin., 106th Cong., 2d Sess. 301 (2000) (testimony of Bobby R. Burchfield) ("*Again, recognizing that* a prohibition of soft money donations to national party committees alone would be wholly ineffective, *legislative proposals to ban receipt of soft money often seek to impose soft money restrictions on state parties as well*.") (material omitted by Intervenors italicized).

groups) and those who would be influenc*ed* (federal officeholders and candidates). Interest groups are permitted to engage in a wide array of federal election activities with unregulated and undisclosed funds. Officeholders and candidates are allowed to solicit nonfederal donations to interest groups engaged in those activities, new § 323(e)(4), as well as for state and local candidates, new § 323(e)(1)(B).

The Government simply does not and cannot explain why parties are subject to the most severe restrictions, or why the limits on federal candidates and officeholders in new Section 323(e) are by themselves insufficient to address the claimed evil. Nor does the Government deign to explain why state parties are subject to more severe restrictions than special interest groups engaged in the very same voter mobilization activities. *See* new § 323(b)(1).

The Government's view appears to be that once a proper subject of regulation is found, all manner of collateral restraints can be tacked on to prevent "circumvention" (mentioned 45 times by the Government and Intervenors), or to close "loopholes" (17 times). This reasoning is the very antithesis of narrow tailoring or close drawing. As the Court put it in *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 501 (1985), "[w]e are not quibbling over fine-tuning of prophylactic limitations, but are concerned about *wholesale restriction of clearly protected conduct*." (emphasis added). The number and breadth of the restraints here far surpass those struck down in *NCPAC*. *Compare NRWC*, discussed at n.6 above.

Title I Is Worse Than the Disease It Is Intended To Cure. In addition to showing "that the recited harms are real," it is the Government's burden to "demonstrate that the regulation will in fact alleviate these harms in a direct and material way." *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995). The Government's abject failure to show that Title I will reduce the alleged appearance

of corruption is exacerbated by its own experts' concessions that it probably won't. *See* J.A. 987-89, Shapiro CX 114-17, Sorauf CX 191. Indeed, the record compellingly shows Title I will have the opposite effect.

Whereas Intervenors refer to instances of donors directing their nonfederal donations to state rather than national parties in unsuccessful efforts to influence the Federal Government, the Levin Amendment continues to allow a single donor to donate an unlimited aggregate amount in increments of $10,000 to multiple state and local parties for use on "Federal election activity."[10] Although the parties dispute that such amounts were actually corrupting, the fact is that Title I continues to allow the very donations that were invoked to justify its passage. Under the Government's unsupported "premise" that "federal candidates are likely to regard large donations used to finance 'Federal election activity' within their States or districts as substantially assisting their own campaigns," Gov't Br. 47, the fundamental irrationality of Title I is apparent.

Nor does Title I restrict federal officeholders' importunings for corporations or unions to give unlimited amounts to any special interest group (such as the NAACP or NRA) that engages in, but whose principal purpose is not, "Federal election activity," *see* new § 323(e)(4)(A). If Intervenors are correct that "[a] federal officeholder cannot be expected to ignore the fact that a donor had made a substantial contribution at his request to a political ally," Int. Br. 37, the irrationality is complete. And, whether solicited by a federal officeholder or not, the donor may still tout the

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[10] Intervenors refer to Roger Tamraz and Carl Lindner, Int. Br. 30, who admitted donating, in smaller increments, aggregate amounts of $300,000 and $500,000 respectively to state parties.

aggregate amount of its donations to these "allies" – politically active tax-exempt entities – through the Halls of Congress. Whatever salutary, insulating benefit parties have had is now gone; to "test the limits of the current law," *Beaumont*, 123 S. Ct. at 2207, officeholders will surely go *directly* to corporations, unions, and interest groups to request donations to ideologically-friendly tax-exempt groups.[11]

Moreover, Title I channels non-federal funds *away* from parties and *toward* the very corporations, trade associations, and special-interest membership organizations that, according to the Government's own experts, seek to "curry favor" with candidates, J.A. 1561-62, Mann Decl. 33-34, and create "strong policy oriented IOUs between contributors and legislators." J.A. 877, Herrnson Dep. 208.

Even the Government's experts predicted that BCRA will drive some portion of the nonfederal donations previously made to political parties to special interests for use in the political process. *See* J.A. 928-29, Mann CX 164-65; J.A. 861, Green CX 24; Bok CX 55. That shift of resources is proceeding full throttle. The media are reporting, for example, the formation of an organization that intends to spend *$75 million* in nonfederal funds – including a reported $10 million donation raised from a single individual – on voter mobilization during the 2004 federal elections. *See* Thomas B. Edsall, *Liberals Form Fund to Defeat President*, WASH. POST, A3 (Aug. 8, 2003). According to the author, the new organization was formed in

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[11] Senator McCain testified that officeholders receive more requests to participate in such fundraisers for special interest groups "than they can shake a stick at." McCain Dep. 166-67. Gun Owners of America, Inc. ("GOA"), received more than $2 million in nonfederal donations as a result of solicitation letters sent by federal officeholders. *See* GOA's Resp. to Ds.' First Set of Ints. No. 4.

part because the national parties are now prohibited from raising nonfederal money to pay for such voter mobilization efforts as "'coordinated campaign' activities." *Id*.; *see also* Pol. Parties Br. 24-25.

While there is no evidence in the record of *quid pro quo* exchanges of nonfederal donations to parties for legislative action by federal officeholders, there *is* record evidence that *special interests* have offered to provide campaign support to federal candidates in exchange for legislative action. *See* Becket Decl. ¶ 7; Chapin Decl. ¶ 6; Strother Decl. ¶ 14. Congress's decision to shackle the political parties while leaving special interests largely unfettered simply defies reason.

B. New Section 323(a) Infringes the First Amendment.

As shown, new Section 323(a) is so broad that it prohibits or at least severely hampers national party participation in state and local elections, severely restricts the ability of national party committees to participate with state and local parties in full ticket voter mobilization plans, and in numerous other ways restricts the ability of national political parties to associate with their component state and local parties and members. Neither the record in this case nor common sense discloses a national crisis of officeholder corruption driven by the two major national political parties, or by minor parties such as the LNC, that would be sufficient to justify such a dramatic change in the democratic system.[12]

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[12] The Government misconstrues the "principal thrust" of the argument of the Libertarian National Committee ("LNC"), which it describes as claiming that no federal regulation should apply to LNC candidates because none has ever been elected to federal office. Gov't Br. 44, n.18. While the LNC reserves its right to argue this point elsewhere, the point here is that the BCRA is overly broad and restricts extensive nonfederal (...continued)

Moreover, the legislative record is clear that Congress intended the restrictions on national parties to be as broad-ranging and unequivocal as new Section 323(a) in fact is. On its face, new Section 323(a) is not narrowly tailored, closely drawn, or even rational. No mere striking of a word here or there could salvage it, and, in any event, Congress passed exactly what it intended. New Section 323(a) is invalid.

C. New Section 323(b) Infringes the First Amendment.

In order to justify the extensive regulation of state and local parties, the Government mischaracterizes them as mere extensions of the national parties pursuing the interests of federal candidates. In contrast, the district court found that state and local parties exist primarily to participate in state and local elections, and that they spend the majority of their resources on those elections. *See* Henderson 311-14sa; Leon 1227-31sa. Their voter registration and GOTV activities, in particular, are directed primarily at state and local elections. *See* Henderson 312-14sa; Leon 1228-31sa. Even if one assumes (contrary to fact) the parties "'never engage in public communication without regard to its electoral consequences'," Gov't Br. 48 (*quoting* D. Green), state and local parties place their principal focus and the majority of their resources on state and local "electoral consequences," not federal. These state and local election activities are regulated by state law.

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activity by the LNC that does not affect federal elections. The fact that no LNC candidate has been elected to federal office underscores that the party's nonfederal activities are legitimate efforts to participate in state and local elections and/or simply to educate the public independent of any election. Congress has no interest – and certainly no authority – to restrict such nonfederal LNC activities.

The Government claims new Section 323(b) regulates only "federal" election activities. It sweeps to regulate activities directed to state and local elections, we are told, because those activities may potentially have an incidental effect on federal elections. This possible incidental effect, in turn, raises a potential for the appearance of corruption of the federal candidates incidentally benefited. This chain of potential–incidental–possible was specifically rejected by the district court, confirming this Court's observation that any potential for corruption stemming from these activities is "at best, attenuated." *Colorado I*, 518 U.S. at 616.

Congress knew it was crossing the line. Although the Government asserts that the Levin Amendment was an exercise of legislative grace, the legislative history makes clear that Congress deemed the provision essential to avoid, as Senator Levin himself repeatedly said, going "too far" in regulating "some of the most core activities in which State parties are involved." 147 Cong. Rec. S3124 (Mar. 29, 2001); *see also* 147 Cong. Rec. S3247 (Apr. 2, 2001) (Sen. Levin) ("too far"); 147 Cong. Rec. S3240 (Apr. 2, 2001) (Sen. Nelson) (same). As shown, Pol. Parties Br. 60, 62-64, the Levin Amendment cannot salvage new Section 323(b), and in some respects (such as the "homegrown" requirement) it makes matters worse.

The Broad Scope of New Section 323(b) Cannot Be Justified By Any Anti-Corruption Rationale. As shown, Pol. Parties Br. 51-52, BCRA abandons any requirement that contributions or expenditures be made "for the purpose of influencing a *federal* election." Nor can new Section 323(b) be seen as simply another contribution limit. *See* p.8 above. After all, it restricts virtually all state and local political party activity in federal election years – even activities related to state and local *ballot measures*. This Court has previously held that restrictions on the funding of ballot measure campaigns cannot pass First Amendment challenge because these activities have no likelihood of corrupting a candidate.

See Citizens Against Rent Control, 454 U.S. at 296-99; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

By its clear terms, new Section 323(b) goes beyond activities related to federal candidates and specifically includes GOTV communications that refer *solely* to candidates for state or local office. Since GOTV activities typically include the parties' most basic election activities – direct mail, phone banks, and door-to-door canvassing with the distribution of doorhangers, flyers, and brochures – each of these activities is now "Federal election activity" whenever a federal candidate is on the ballot, even if conducted solely on behalf of state or local candidates or ballot measures.[13] Not surprisingly, the court below found that, under the rubric of "Federal election activity," new Section 323(b) actually regulates state and local party activities solely in support of state or local candidates. *See* Henderson 436-37sa; Leon 1118-22sa.

The district court similarly found that other state party activities unrelated to federal candidates do not give rise to actual corruption or the appearance of corruption of federal

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[13] In fact, Intervenors have *admitted* that Title I regulates each of the following communications: A radio advertisement urging voters to vote against a school voucher initiative; a phone bank supporting three state candidates; a newsletter mailed by a state party to its members; a mail advertisement in support of an Indiana mayoral candidate; a doorhanger supporting three Virginia state candidates; "generic" GOTV mail pieces (*e.g.*, "Our Vote is Our Voice...Vote Democratic"); and a vote-by-mail application supporting Republican candidates. They also agreed that it would be illegal for CDP to make a contribution to any ballot measure committee if the measure appeared on a ballot with a federal candidate, or a donation to the A. Phillip Randolph Foundation, which conducts *nonpartisan* voter registration. Int. Resp. to Req. for Adm., Nos. 4, 5, 6, 10, 13, 21, 22, 23, 24, 26, 28.

officeholders or candidates. *See* Henderson 438sa ("[n]othing in the record remotely suggests" that generic and noncandidate-specific activities "corrupt or appear to corrupt federal candidates"); Leon 1123sa ("mere conjecture" that "appearance of corruption arises from donations to state parties" used for "generic or noncandidate-specific activities"). It thus found the definition of "Federal election activity" unconstitutionally overbroad. *See* Henderson 438sa; Leon 1123sa.[14]

Since the prevention of corruption or the appearance of corruption is the only governmental interest that has been accepted by the Court as sufficiently compelling to justify substantial burdens upon freedom of speech and association, the findings by Judges Henderson and Leon effectively remove the only governmental justification that could support the restrictions imposed by new Section 323(b). The clear implication of the district court's findings is that donations for activities that are sufficiently removed from federal candidates (such as activities on behalf of state candidates) do not share the same potential for corruption and therefore cannot be justified by the anti-corruption rationale accepted in other contexts. Since new Section 323(b) indiscriminately includes all state and local party voter mobilization activities when federal candidates are on the ballot, it is neither narrowly tailored nor closely drawn. *See* Henderson 441sa; Leon 1123sa.[15]

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[14] Judge Leon found that new Section 301(20)(A)(iii) ("public communications") was the only exception to this conclusion. Leon 1123sa.

[15] The trial court found no likelihood of corruption arising from state party disbursements on behalf of state and local candidates. Thus, the need to avoid circumvention of the federal limits cannot independently justify restrictions on the state parties for disbursements that are unrelated to federal candidates.

The Restraints Imposed by Title I Directly on State and Local Parties Severely Restrict Their Direct Political Expression and Association. The Government asserts several times that parties are free to transfer funds among themselves, but the Levin Amendment plainly prohibits any transfers or joint fundraising – of even federal money – if the receiving party uses nonfederal funds (including Levin funds) for voter registration, GOTV (including for state candidates), or generic advertising. New §§ 323(b)(2)(B)(iv) & (C). Although a state or local party may elect to fund these activities with 100 percent federal funds, if it chooses not to do so (or, more probably, cannot do so), the price of using Levin funds is that it must forego all transfers and joint fundraising, as well as national party participation.

The restrictions on transfers and joint fundraising apply to *both* federal and nonfederal money, and at all levels of the party. The result is not only that the national party is prohibited from transferring federal money to a state with a hotly contested U.S. Senate race; the state party is prohibited from transferring money to a county committee for GOTV activities in a district with a particularly competitive State Assembly race, and county committees are prohibited from jointly raising money to support local voter registration efforts.

The Government claims that restrictions on joint fundraising and transfers are necessary to prevent donors from evading the limit by making the maximum $10,000 donation to multiple committees and earmarking those donations for transfer to a single party committee. Of course, this rationale is completely inapplicable to transfers or joint fundraising of *federal* money – which is subject to a strict aggregate limit and earmarking prohibitions. Nor does it explain why concerns about large transfers of Levin money could not be addressed by similar provisions.

The claim that the restriction on transfers of federal money is necessary to keep the national party from gaining "influence" over how Levin money is spent, Gov't Br. 51, fails because the ban applies not just to national parties, but to state and local party committees as well. Moreover, the bans on transfers and joint fundraising are imposed irrespective of the amounts involved. If the state or local party is using any nonfederal funds for "Federal election activity," all transfers to and joint fundraising for it – even of federal money – are banned.

New Section 323(b) Will Prevent State and Local Parties from Amassing the Resources Necessary for Effective Advocacy. We have submitted essentially unrebutted evidence that Title I's restrictions on state and local party activities will dramatically reduce the parties' ability to disseminate their messages and elect state and local candidates. *See* Pol. Parties Br. 61-64. Defendants argue that the parties will simply have to raise money from more people. The evidence shows that the federal revenues of the *state* parties have not significantly increased despite increased fundraising efforts, and the majority of their nonfederal revenues will be unavailable because of the Levin limits. *See* J.A. 124, Bowler Decl. ¶ 19; *see also* Henderson 315sa, 317sa; Leon 1240-41sa.

As the district court found, federalization of state party disbursements in support of state and local candidates and ballot measures will severely constrain the ability of the parties to reach voters with their messages. *See* Henderson 317sa; Leon 1242sa. CDP has raised approximately $4 million in federal money, and $12-16 million in nonfederal money per cycle in the last three election cycles. Henderson 315sa; Leon 1240-41sa. This federal money is primarily used for the federally-required share of administrative costs and, to a lesser extent, for expenditures relating to federal candidates. J.A. 130-31, Bowler Decl. ¶¶ 21-22. CDP spent the largest share of the nonfederal money ($7-8 million) on

its mail program in support of candidates for eight state constitutional officers, 120 legislators, and numerous statewide ballot measures. *Id.* ¶ 20b, J.A. 126-29. Even if all federal money were redirected to state candidate and ballot measure activities (and this would be impossible because of the required federal share of administrative costs), the mail program would still be reduced by almost half.

In short, the district court correctly found that requiring state parties to spend federal money for activities unrelated to federal candidates will result in a significant reduction in the parties' ability to perform traditional functions such as voter registration, party-building, and grassroots organizing. Henderson 315-317sa; Leon 1242sa.

D. New Section 323(d) Infringes the First Amendment.

New Section 323(d) prohibits the parties at all levels from soliciting on behalf of, or making a donation to, certain tax-exempt organizations. None of the Government's arguments support restrictions on political party solicitations for, or donations to, these organizations; in particular, none justify the restrictions on state party donations to state-based organizations such as ballot measure committees or local Democratic and Republican Clubs.[16]

The Government states (in another context) that restrictions on solicitation are "in the nature of conflict-of-interest regulations and serve to prevent individuals who have acquired power or influence . . . from utilizing it" in circumstances where corruption of federal officeholders may

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[16] As one *ex post facto* justification, the Government asserts that Congress can restrict the donations these tax-exempt entities may accept as a condition of their tax-exempt status. Gov't Br. 56 n.25. But new Section 323(d) restrains the political party *donors*, not the tax-exempt *recipients*.

result. *See* Gov't Br. 52; *see also* Int. Br. 36. Inexplicably, however, new Section 323(d) bans solicitation and donation by the political parties, but new Section 323(e)(4) allows federal officeholders to solicit up to $20,000 per donor for organizations primarily engaged in "Federal election activity," and unlimited amounts per donor for organizations that engage in "Federal election activity" as long as it is not their primary purpose.

Nor is new Section 323(d) limited to the solicitation of large donations. For example, it is perfectly legal for an individual to make a $5,000 contribution to a political party – national, state or local. Yet, new Section 323(d) makes it illegal for a representative of any political party to ask the same individual to give $5,000 to a Section 501(c)(4) organization that does nonpartisan voter registration. It is similarly legal for state parties (in California) to receive contributions from unions, but illegal for those parties to ask the same union to contribute to a ballot measure committee registered under Section 501(c)(4). In short, new Section 323(d) bans solicitation of funds for nonprofit organizations even when it would be completely legal for the party to solicit and accept such funds directly.

In a related argument, the Government urges that the parties will be tempted to circumvent contribution limits by setting up "sham" or "satellite" organizations that will accept "large" or "unlimited" donations. But the Government cannot explain why the concern about "sham" organizations could not be addressed by a provision that extends all restrictions applicable to the parties to organizations that are directly or indirectly established, financed, maintained, or controlled by any party committee. *See, e.g.*, new § 323(a)(2).

The Government contends that the parties donate to tax-exempt groups in order to "control" them. Gov't Br. 55 n. 24. Again, the statute is far too broad for this asserted

purpose. New Section 323(d) bans all such donations, regardless of whether the donation is of a size sufficient to allow such control. The average CDP donation to such groups was under $1,000, an amount within the federal limits and hardly likely to allow control of any organization. J.A. 166-67, Bowler Reb. Decl. ¶ 9.

The rationale that new Section 323(d) is necessary to force political parties to make disbursements in their own names rather than through "surrogates" is similarly disingenuous. Any disbursement by a political party to a tax-exempt group is reported by the donating party and sometimes by the group as well.

In advancing the "control" and "disclosure" theories, the Government pointedly ignores the central argument of the California parties that they have a right to participate in ballot measure advocacy both by their direct spending – such as by including an endorsement or opposition of the measure in party mail – and by their donations to allied groups. The ban on donations imposed by new Section 323(d) most definitely restrains the parties' "direct political expression" in the context of pure ideological advocacy.

As shown, Pol. Parties Br. 70, California ballot measure committees are typically registered under Section 501(c)(4). Since these committees normally engage in GOTV activity during federal election years, they meet the overbroad definition of "Federal election activity." There is surely no argument that the parties seek to "control" the nonfederal money of ballot measure committees, since those committees exist for only one election, and usually spend all the money they raise on the campaign itself. Nor can there be a disclosure issue, since all ballot measure donations and expenditures are reportable in California.

Intervenors apparently concede that *Citizens Against Rent Control* prohibits restrictions on donations to a ballot measure committee. Int. Br. 22, n.15. In a tortured reading

of that case, however, Intervenors distinguish *Citizens Against Rent Control* on the basis that the Court found "no nexus" to corruption of officeholders or candidates whereas "political parties have a close connection to officeholders and candidates, which enable them to serve as highly efficient conduits of corruption." *Id*. Intervenors fail to explain, however, how this reasoning justifies prohibiting the parties not from *receiving* donations, but from *making* them. There is no hint at how a donation to a ballot measure committee "corrupts" a federal candidate or officeholder, particularly when anyone seeking to use the party as a "conduit" could give an unlimited amount of money directly to the ballot measure committee.

Finally, while it is true that Section 527 committees are engaged in "political activity," they are not necessarily involved in *federal* political activity. The clearest illustrations in California are the local Democratic and Republican "Clubs." While not part of the official party structure, they are groups that provide much of the grass-roots support for the parties, and are often organized by city or university campus. They have historically received modest financial assistance from the state or county parties. The Government can advance no reason why the parties should be precluded from providing limited financial support to these groups.

E. The Government Raises No Issues that Were Not Rejected Unanimously by the District Court in Invalidating Section 213.

Section 213 has nothing to do with nonfederal money; rather, it forces political parties to choose between two uses of federal money – independent expenditures and coordinated expenditures. The district court unanimously and correctly rejected each argument to sustain the provision raised by the Government here. Gov't Br. 60-65; *see Per*

Curiam 7sa; Henderson 385sa, 396-97sa; Kollar-Kotelly 886sa; Leon 1170-76sa.

The Government's claim that Section 213 "provide[s] party committees an additional spending option [that] creates no constitutional infirmity" is without merit. Gov't Br. 61. To the contrary, Section 213 forces the parties to choose between two pre-existing "spending options."

The constitutional focus, as the district court recognized, must be on Section 213's requirement that party committees forego making constitutionally-protected independent expenditures if any single party committee – local, state or national – makes *any* coordinated expenditure of any amount *first*. One party committee's "choice" forecloses all other committees from making any independent or coordinated spending choice whatsoever. This burdening of the right to make independent expenditures strikes squarely at the holding of *Colorado I.*

BCRA withdraws a statutory right from political parties as punishment for engaging in constitutionally-protected activity. This removal of a protected "benefit" was rejected in the line of "unconstitutional conditions" cases, such as *Perry v. Sindermann*, 408 U.S. 593 (1972), which were not analyzed by the *Buckley* court in upholding the public funds provisions of FECA. *See also Elrod v. Burns*, 427 U.S. 347 (1976).

The Government cannot salvage Section 213 by asserting that Congress passed the coordinated expenditure provisions in 1976 because it failed to comprehend the right of parties to make independent expenditures. *See* Gov't Br. 62-63. As this Court made clear in *Colorado I*, this congressional intent is insufficient to limit independent spending by political parties. 518 U.S. at 621.

The Government's attempt, Gov't Br. 65 & n.32, to distinguish *California Democratic Party v. Jones* is

meritless. Section 213 requires a national party committee to consult with and control the activities of numerous state and local party committees, because the national party committee's decisions may be completely foreclosed by the separate and independent campaign spending decisions of state and local party committees. Apart from the irony of BCRA forcing collaboration on this issue while restricting collaboration on voter mobilization programs, this interference in the way political parties operate is, if anything, even more intrusive than that struck down in *California Democratic Party*.

Finally, the Government erroneously claims that Section 213 imposes no "forced choice," because party committees at the national, state, and local levels already are "affiliated." State and local party committees are not conclusively affiliated if those local party committees have not been "established, financed, maintained or controlled" by the state party committee, however. *See* 2 U.S.C. § 441a(a)(5).[17] Yet under BCRA Section 213(2), such affiliation is conclusively presumed for purposes of the "forced choice" provision. Moreover, the national committees and state committees have separate coordinated expenditure limits. *See* 2 U.S.C. §§ 441a(d)(2) & (3). The Levin Amendment prohibits parties from raising certain funds together, or sharing certain funds. New § 323(b)(2)(B). Thus, the conclusive presumption of affiliation is both factually inaccurate and at odds with other statutory provisions.

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[17] *See* FEC Advisory Op. 1978-9 (Dallas County (Iowa) Republican County Central Committee not affiliated with Iowa state party).

F. Section 214 Infringes the First Amendment.

As shown in our opening brief, Pol. Parties Br. 78-90, Section 214 violates the First Amendment because any definition of coordination that treats mere "consultation" with a candidate or political party as coordination, even where there is no agreement concerning an expenditure of funds, is fatally overbroad.

The Government defends Section 214 on the ground that the language of Section 214(a) is essentially the same as the definition of candidate coordination found in FECA since it was first enacted, *see* 2 U.S.C. § 441a(a)(7)(B)(ii). Gov't Br. 123.[18] But Section 214(c) now makes clear that nothing more than informal collaboration – whatever that means – is necessary to support a finding that otherwise independent expenditures were coordinated with the candidate. It is the nature of the political process for candidates to have discussions with their supporters and with their political parties. The very real threat here is that even the most casual and innocent discussions will lead to charges that independent spending is "informal collaboration," and thus an illegal contribution. There is no question that association and independent speech will be chilled.

Nor must the political parties await judicial review of the FEC's new coordination regulations to pursue their facial challenge to Section 214. This is not a case in which judicial review of the agency's regulations "might eliminate, limit, or

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[18] In *Colorado I* , the Court rejected the FEC's view that expenditures by political parties were *per se* coordinated with candidates. 518 U.S. at 619-23. Likewise, in *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.* ("*Colorado II*"), 533 U.S. 431, 465 (2001), the Court upheld the constitutionality of FECA's coordinated party expenditure provision. In neither case did the Court confront a challenge to the definition of coordination found in 2 U.S.C. § 441a(a)(7)(B)(ii).

cast" the constitutional claims "in a different light." *Nixon v. Adm'r Gen. Servs.*, 433 U.S. 425, 430 (1977). Here Congress *required* the FEC to adopt a definition of coordination that would necessarily be unconstitutional on its face. Because Section 403(a) of BCRA vests exclusive jurisdiction in the court below and this Court on appeal to consider any constitutional challenge to the statute, this case – not a challenge to the rulemaking – is the appropriate vehicle to advance this constitutional challenge to the statute.

II. CONGRESS EXCEEDED ITS POWER UNDER THE FEDERAL ELECTIONS CLAUSE AND INTRUDED UPON STATE SOVEREIGNTY.

As shown, Pol. Parties Br. 78-91, this Court has long recognized that the Federal Elections Clause, U.S. CONST. art. I, § 4, cl. 1, vests the power to regulate state and local elections in the sovereign states.[19] *Federalist 59* and Justice Story's *Commentaries* confirm that federal regulation of state elections was inconceivable to the Founding Fathers. Even the Government's lead expert, Dr. Donald Green of Yale, confirmed that BCRA "goes a lot farther" than the Founders envisioned. J.A. 868-69, Green CX 148-49. Whereas the Government cites Dr. Green at least eight times in its discussion of Title I, and Intervenors cite him at least twice, they ignore both *Federalist 59* and Dr. Green's accurate but fatal admission.

Every even-numbered year, state parties engage in purely state and local campaign activity. Indeed, the district

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[19] *See e.g., Tashjian*, 479 U.S. at 217; *Oregon v. Mitchell*, 400 U.S. 112, 134-35 (1970) (controlling opinion of Black, J.) ("Our judgments . . . save for the States the power to control state and local elections which the Constitution originally reserved to them and which no subsequent amendment has taken from them.").

court found that state and local parties exist *primarily* to engage in those activities and spend the majority of their resources on them. Henderson 311sa; Leon 1227sa. Those activities are now swept within the federal regulatory regime even though they are unrelated to any federal candidate.

Further, the district court unanimously found that during the 2001 off-year elections, the RNC spent $15.6 million of nonfederal money, not including associated overhead, on state and local races. *See* Pol. Parties Br. 11-12. The RNC engages in similar purely state and local election activities in even years. *Id*. 12. Section 323(a) federalizes all this activity.

Effectively repudiating the Federal Elections Clause, the Government (Br. 42-43) makes the case for full federal authority to regulate any and all state election activity.[20]

> Because money is fungible, a donation that defrays the costs of state electoral advocacy will free up funds for other activities that

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[20] The Government admitted that the Federal Elections Clause was the sole congressional basis for Title I. Pol. Parties Br. 79. Nevertheless, the Government invites the Court to sustain Title I as based on the Federal Government's "more general power to superintend and protect the integrity of the federal workforce." Gov't Br. 30. This "more general power" is derived, we are told, from the Necessary and Proper Clause, which this Court has aptly described as "the last, best hope of those who defend ultra vires Congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1997). Congress can no more use the Necessary and Proper Clause to override the limits of the Federal Elections Clause than it can to override the Commerce Clause: "When a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier . . . , it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" *Id*. at 923-24 (quoting *The Federalist No. 33* (A. Hamilton)).

> may directly and tangibly affect federal elections. . . . Because the decennial redrawing of congressional district lines is typically performed by state legislatures, a party's congressional candidates can expect to benefit if the party obtains a legislative majority within the State. . . . A presidential candidate's likelihood of winning a state's electoral votes may be increased if the State's Governor is a member of the candidate's own political party.

While we agree that such a broad view of federal power would be essential to uphold Title I, settled precedent unequivocally rejects the Government's view. For example, in *Blitz v. United States*, 153 U.S. 308, 314-15 (1894), the Court held that "[*v*]*oting*, in the name of another, *for a state officer, cannot possibly affect the integrity of an election for Representative in Congress*." (emphasis added).

The Government's invocation of the Supremacy Clause, Gov't Br. 66, 69, simply begs the question. Supremacy Clause issues arise only for "Laws of the United States which shall be *made in Pursuance*" of the Constitution. U.S. CONST., art. VI, cl. 2 (emphasis added). Because Title I exceeds the grant of power under the Federal Elections Clause, the Supremacy Clause is not at issue.

Equally odd is the Government's claim that the federalism arguments are completely subsumed within the First Amendment arguments, since (we are told) a federal interest sufficient to overcome the serious First Amendment problems would, *ipso facto*, be sufficient to justify federal intrusion into state election regulation as well. To the contrary, even an overriding federal interest (not present here) could not justify federal regulation of state election activity in contravention of the Federal Elections Clause. New Section 323(b) regulates virtually all state and local

party activity occurring proximate to federal elections even though the vast majority of that activity is directed solely at state or local elections and has no discernible effect on a federal election. And, a very substantial part of the RNC's activities relate exclusively to state and local elections. This effort to regulate activity having no effect on a federal election is, by itself, sufficient to invalidate the statute as exceeding Congress' Article I, § 4 powers.[21]

Moreover, it is offensive to our federal system for the Federal Government to supercede rather than accommodate the state regulatory structure, especially in an area so central to sovereignty and self-governance. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy:*

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[21] *None* of the FECA provisions cited by the Government as restricting state and local election activity, Gov't Br. 67, were enacted pursuant to the Federal Elections Clause. Although the Government asserts that FECA prohibits contributions by federal government contractors in state and local elections, the FEC's *own* regulations state that the prohibition "does not apply to contributions or expenditures in connection with State or local elections." 11 C.F.R. § 115.2(a). FECA's prohibition on contributions to federal or state candidates by national banks and federally-chartered corporations was first enacted as part of the Tillman Act of 1907, 34 Stat. 864, under Congress's unquestioned authority, recognized as long ago as *McCullough v. Maryland*, 4 Wheat. 316 (1819), to regulate creatures of the Federal Government. *See also* S. Rep. No. 59-3056, at 2 (1906) ("The Congress has the undoubted right thus to restrict and regulate corporations of its own creation."). FECA's ban on foreign national contributions to federal or state candidates originated in the 1966 amendments to the Foreign Agents Registration Act, Pub. L. No. 89-486, 80 Stat 244, *codified at* 22 U.S.C. § 611 *et seq.;* this provision is a valid exercise of Congress's plenary power over immigration. *See* Bruce D. Brown, *Alien Donors: The Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 Yale L. & Pol'y Rev. 503, 528 (1997). Municipal securities dealers are licensed and extensively regulated by the SEC, pursuant to the Commerce Clause, *see* 15 U.S.C. § 78o-4, 78q, 78u; regulation of political contributions by municipal securities dealers grew out of that regulation. *See Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995).

Federalism for a Third Century, 88 Colum. L. Rev. 1, 41 (1988) ("[S]tates should have the power to control the procedures by which their government officials are selected").[22] In this federal system, state regulation of state elections is more than a mere "policy choice" which can be "displac[ed]" by Congress. *See* Gov't Br. 66. For all their flaws, the FEC's allocation regulations allowed purely state activity to be funded with purely nonfederal dollars, and for "mixed" activities at least made an attempt to accommodate the state interests. Title I makes no such effort.

Finally, the Government claims Title I does nothing more than regulate "financial transactions" to prevent corruption of federal officeholders. Gov't Br. 66. As shown, Title I does much more than regulate financial transactions. Most pertinently here, it restricts or prohibits political parties from participating in state election activity on terms that the states expressly allow. Further, the record confirms that any potential corruptive effect on federal elections from political party participation in purely state and local election activities is, as *Colorado I* put it, "at best, attenuated."

III. TITLE I DENIES POLITICAL PARTIES EQUAL PROTECTION OF THE LAWS BY PLACING THEM AT A SEVERE DISADVANTAGE IN RELATION TO SPECIAL INTEREST GROUPS.

This Court has recognized, and the record in this case confirms, that "players" in the political process other than political parties "could marshal the same power and sophistication for the same electoral objectives as political

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[22] The Ninth Circuit's recent decision in *Jacobus v. State of Alaska*, No. 01-35666, 2003 WL 21911191 (9th Cir. Aug. 12, 2003), upholding Alaska's restrictions on contributions to state political parties' nonfederal accounts, confirms the authority of states to regulate nonfederal funds.

parties themselves," *Colorado II*, 533 U.S. at 455. Unlike parties, those players tend to be "most concerned with advancing their narrow interest[s]." *Id*. at 451. Even as they seek to "curry favor" with federal officeholders, J.A. 1561-62, Mann Decl. 33-34, special interests use those same federal officeholders to raise nonfederal funds, which they then spend, generally without public disclosure, on voter mobilization through direct mail, door-to-door canvassing, telephone banks, member communications, and both broadcast and non-broadcast advertising. *See* Pol. Parties Br. 92-93, 95-96. While severely restricting the activities of political parties, BCRA leaves corporations, labor unions, trade associations, and other special interest groups largely free to raise and spend nonfederal funds for all of these purposes at any time, with no disclosure.[23]

The Government cannot deny that Title I imposes on political parties uniquely burdensome restrictions. Its sole defense against the equal protection claim is that political parties receive certain "benefits" not available to other groups. As support, the Government cites *California Medical Association v. FEC*, 453 U.S. 182, 200-01 (1981), which did not, of course, address a political party. *See* Gov't Br. 70-72.

Strikingly, Defendants choose to ignore the relevant precedents cited in our opening brief. Pol. Parties. Br. 95. In those decisions, this Court uniformly struck down unique restrictions on political parties. *See, e.g., Colorado I,* 518 U.S. at 616; *California Democratic Party*, 530 U.S. at 582;

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[23] Even if upheld, Title II's restrictions on broadcast issue advertising would restrict and require disclosure of only *broadcast* advertising that refers to a federal candidate immediately prior to a federal election. BCRA §§ 201, 203. Interest groups remain free to spend 100 percent nonfederal funds for voter mobilization, non-broadcast advertising, and even cleverly-crafted broadcast advertising *during* the blackout period.

Eu, 489 U.S. at 225; *Tashjian*, 479 U.S. at 217. In none of these cases was the mere fact that political parties enjoyed some benefits relative to other players mentioned by the Court as supporting the challenged restrictions.

Indeed, in *Colorado I*, the Government cited *California Medical Association* to support its claim that parties could be precluded from making independent expenditures. *See* Gov't Br. in *Colorado I*, at 39-40. This Court disagreed, explaining in the principal opinion, "[w]e do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties." *Colorado I*, 518 U.S. at 618.

Ignoring *Colorado I*, the Government quotes the Court's observation in *Colorado II* that parties' coordinated expenditure limits afford them a "special privilege . . . others do not enjoy," Gov't Br. 71 (*quoting Colorado II*, 533 U.S. at 455). The question addressed, however, was the degree to which Congress could limit the "special privilege" of coordinated party expenditures, not whether that "privilege" could justify a plethora of wholly-unrelated restrictions.[24]

Finally, the Government's suggestion that parties' supposed closeness to federal officeholders justifies disparate treatment, Gov't Br. 71-72, makes little sense in view of the fact that Title I expressly permits close collaboration between officeholders and interest groups. Common sense suggests that the more "heightened risk that a federal candidate will regard a large donation . . . as a direct benefit to himself," *id*. 72, comes from a disbursement by a special interest directly

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[24] Public funding of political party conventions is provided only if the party agrees in writing to forego certain rights, 2 U.S.C. § 9008 *et seq*.; 11 C. F. R. § 9008.1 *et seq*., and obviously cannot be used by the Government's lawyers to justify additional, unrelated burdens.

benefiting the candidate, rather than a special interest donation to a party, which might or might not be used by the party in a manner beneficial to the candidate.

IV. THE APPROPRIATE REMEDY IS TO DECLARE TITLE I UNCONSTITUTIONAL.

The components of Title I are an integrated, interrelated whole. Defendants' experts have asserted that neither new Section 323(a) (governing national parties) nor new Section 323(b) (governing state and local parties) can meaningfully function without the other. *See* Mann CX 109-10 ("the whole effort would be lost" if new Section 323(a) were struck down); *id*. ("the objective Congress had in mind would be undermined" if new Section 323(b) were struck down); *see also* Green CX 118-19. Indeed, if this Court strikes down one of them as unconstitutional, the other must fall as well. The same is true for the other provisions of new Section 323, which make little sense without new Section 323(a) or (b), or vice versa.

Although BCRA includes a "severability clause," *see* § 401, a severability clause does not by itself require this Court to sever provisions of a statute. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 312-13 (1936) (refusing severance despite clause materially identical to BCRA § 401); *Hill v. Wallace*, 259 U.S. 44, 69-71 (1922) (same). Rather, severability depends in part on whether Congress would have enacted the remaining provisions without those invalidated and whether what remains "is fully operative as a law." *Buckley*, 424 U.S. at 108. The provisions of new Section 323 are so "mutually dependent," *Carter*, 298 U.S. at 313, that no single subsection would retain vitality absent the others.

CONCLUSION

For the reasons stated, the Court should hold Title I, Section 213, and Section 214 to be unconstitutional.

Respectfully submitted,

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