No. 02-1674 & Consolidated Cases

IN THE

Supreme Court of the United States

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

v.

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

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

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BRIEF OF COMMON CAUSE AND AARP AS *AMICI CURIAE* IN SUPPORT OF THE CONSTITUTIONALITY OF THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002

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INTEREST OF THE AMICI CURIAE [1]

Common Cause is a nonprofit, nonpartisan citizens' organization with approximately 200,000 members and supporters nationwide. Common Cause has had a longstanding concern with the growing problem of soft money in the federal political process, and has publicly advocated for congressional action to ban soft money in order to restore integrity to the electoral system. Common Cause was a strong advocate for congressional enactment of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (BCRA).

AARP is a nonprofit membership organization with more than thirty-five million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. AARP is nonpartisan and does not support or oppose any candidate for public office. Nor does it contribute money to political candidates' campaigns or to political parties. Older Americans have made clear their interest in promoting and protecting the integrity of our nation's electoral processes. Because of the significance of campaign finance reform to its members, AARP was active in supporting enactment of the BCRA, including through grassroots efforts across the nation.

SUMMARY OF ARGUMENT

BCRA serves compelling governmental interests not only in "preventing corruption and the appearance of it that flows from munificent campaign contributions," *Nixon v. Shrink Missouri Gov't PAC,* 528 U.S. 377, 390 (2000), but also in closing the enormous loopholes in the law that have been used for "circumvention of [valid] contribution limits," *FEC v. Beaumont,* 123 S. Ct. 2200, 2207 (2003), quoting *FEC v.*

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[1] Letters of consent to the filing of this brief from all parties have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae,* made a monetary contribution to the preparation or submission of this brief.

Colorado Republican Federal Campaign Comm., 533 U.S. 431, 456 (2001) (*Colorado Republican II*).

The soft money system[2]--addressed by Title I of BCRA--grew over time into nothing less than a massive scheme for circumventing the contribution limits and source prohibitions of the federal campaign finance laws--measures that, over the last hundred years, have been enacted by Congress and sustained by this Court as necessary to preserve "the willingness of voters to take part in democratic governance." *Shrink Missouri*, 528 U.S. at 390.

Soft money was not created by Congress. Rather, it was a loophole opened in the law by the Federal Election Commission in 1978, through administrative interpretations that allowed first, state parties, and then national parties, to raise and spend funds not subject to federal contribution limits and source prohibitions for voter activities--such as voter registration and get-out-the-vote drives--that clearly affected federal elections.

The soft money system changed character and scale in 1988 when it became an integrated part of that year's presidential campaign. Both presidential candidates, working closely with their national party committees, organized $100,000 donor clubs, and incorporated the raising and spending of soft money into their presidential campaign strategies. This new organizing focus doubled the amount of soft money raised, and injected it directly into the presidential campaign in a major fashion.

The soft money system changed yet again in the 1996 election, this time even more catastrophically, when it mutated from paying for just the "ground" war of grassroots voter activities to also paying for the "air" war of multi-million dollar television campaigns that promoted the

[2] Soft money, simply put, is money that does not comply with the contribution limits, source prohibitions and reporting requirements of federal law.

presidential candidates. An unprecedented quarter of a billion dollars of soft money was raised by the national parties, much of it by the presidential candidates themselves. Tens of millions of dollars of soft money was channeled through state party accounts to pay for candidate-specific broadcast ads controlled by the presidential campaigns, in what amounted to a sophisticated scheme for evasion of the law. In so doing, the presidential candidates also dodged the spending limits they had agreed to as a condition of their receipt of public funds, thus undermining key aspects of the presidential public financing system as well.

During the 1990's, the soft money system spread also to the congressional level where, in an innovation that emerged by the end of the decade, "joint fundraising committees" were developed as vehicles for congressional candidates to raise soft money in their own names, and then funnel those funds through party accounts to be spent on candidate-specific ads promoting their congressional campaigns.

By 2002, the last election conducted prior to the effective date of BCRA, the soft money system had grown to *half a billion dollars*–all of it from sources or in amounts that may not be contributed or spent to influence federal elections. Soft money became not just a loophole in the law, but a systemic circumvention so massive as to virtually overwhelm the law.

The enactment of BCRA was a necessary congressional response to this evisceration of the federal election laws, not just as a step to address the corruption and appearance of corruption caused by soft money, but also as an anti-circumvention measure intended to repair and restore laws that this Court has deemed "critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Buckley v. Valeo,* 424 U.S. 1, 27 (1976),

quoting *Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973).[3]

ARGUMENT

I. Introduction

In 1997, in the midst of a major congressional investigation of the campaign finance abuses that occurred during the 1996 presidential election, Democratic National Committee (DNC) fundraiser Johnny Chung was quoted as saying, "The White House is like a subway: You have to put in coins to open the gates."[4]

Chung was in a position to know. According to the final report of the investigation conducted by the Senate Governmental Affairs Committee ("Thompson Committee"), Chung made soft money donations totaling $366,000 to the DNC from August 1994 through August, 1996.[5] And in the two year period ending in February, 1996, Chung obtained access to the White House *on 49 occasions*–"access that he used . . . to further his interests with foreign business clients . . . ."[6] Further, according to the Thompson Committee,

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[3] Although this brief focuses on the circumvention of the campaign finance laws caused by soft money, and addressed by Title I of BCRA, the *amici* also strongly support the other provisions of BCRA, including Title II, which responds to the equally serious problem of sham "issue" advocacy that has been used as a means for corporations and labor unions to circumvent, on a massive scale, the longstanding prohibition on the spending of corporate and labor treasury funds "in connection with" federal elections. 2 U.S.C. § 441b.

[4] Marc Lacey, *House Subpoenas Torrance Businessman*, L.A. Times, Nov. 8, 1997, at A12, *quoted in Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*, Final Report of the Committee on Governmental Affairs, S. Rep. No. 105-167, 105th Cong., 2d Sess. (1998) ("Thompson Committee Report") at 783.

[5] Thompson Committee Report, *supra* note 4, at 783, 795.

[6] *Id.* at 783. The Report notes that in a newsletter to his company's shareholders, Chung "boasted of his political clout, claiming that he had 'built up connections to easily arrange visitations to the White House and meetings with the President.'" *Id.* at 785.

> There can be no question that Chung's contributions to the DNC helped give him this access to the President and the First Lady. So close was the nexus between Chung's donations and his visits, in fact, that White House officials actually collected money from him in the First Lady's office in exchange for allowing him to bring a delegation of his clients to White House events.[7]

Johnny Chung's analogy of the White House to little more than a coin-operated gateway for the sale of access and influence is a fitting epitaph for the debasing effect of soft money on the American political process.

An equally dispiriting picture was painted by Roger Tamraz, another DNC donor who figured prominently in the Thompson Committee investigation. Described by the Committee as "an unrepentant access-purchaser," *id.* at 2907, Tamraz donated a total of $300,000 of soft money to the DNC and various state party committees or campaigns between July 1995 and March 1996, all at the DNC's request. *Id.* at 2913-14. In apparent exchange for these donations, Tamraz sought, and received, access to an array of DNC and government officials in an effort to win U.S. backing for an oil pipeline project he was promoting in central Asia.[8] DNC chairman Don Fowler personally interceded with officials at the Central Intelligence Agency and the National Security Council in an effort to help Tamraz, *id.* at 2917-18, who attended six events with President Clinton from September 1995 through June 1996. *Id.* at 2920. Tamraz spoke on several occasions with the President, who directed his chief of staff, Mack McLarty, "to follow up" on Tamraz's requests. *Id.* at 2920, 2929. McLarty did so in numerous ways,

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[7] *Id.* at 783.

[8] When asked at the hearings if "one of the reasons" he gave this money was to get access to government officials, Tamraz replied, "Senator, I'm going even further. It's the only reason--to get access. . . ." *Id.* at 2913, n.46.

enlisting officials from the Department of Energy in the effort to promote Tamraz's mission. *Id.* at 2925-28.

Although Tamraz clearly succeeded in buying access to the highest levels of government in exchange for his $300,000 of donations, he did not ultimately succeed in his goal of obtaining government support for his project. But his own conclusion was not that money fails to buy policy, but rather that he had not given *enough* money. He told the Thompson Committee, "I think next time, I'll give 600,000 [dollars]." *Id.* at 2930.

The Thompson Committee investigation followed months of front-page headlines about a wide range of scandals arising out of the fundraising practices of the 1996 campaign. These scandals included:

- The "sale" of White House access to major donors through "coffees," overnight stays in the Lincoln Bedroom and other presidential events. *Id.* at 191-499.
- The funneling of funds into U.S. elections from foreign nationals to influence U.S. policy through political contributions. *Id.* at 2499-2517.
- The influence that political donations may have had on federal review of Indian casino operations. *Id.* at 3165-3547.
- The use of non-profit groups as "fronts" for funneling party soft money into federal campaigns. *Id.* at 5974-81 (Minority Rpt.).

Although diverse stories, these scandals of the 1996 campaign are unified by a common thread–soft money.

Protections against the pernicious influence on federal elections of corporate and union donations, and of unlimited individual contributions, had been put in place by Congress over time since the beginning of the last century. These laws were enacted precisely in order to prevent the same reality and appearance of corruption and influence-peddling that were graphically on display in the 1996 campaign. But by that campaign, the rise of soft money as a means to

circumvent the federal campaign finance laws had become so dominant that the longstanding regulatory regime had all but collapsed. The result, as stated by the Thompson Committee, was that the President and his aides "left themselves open to strong suspicion that they were selling not only access to high ranking officials, but policy as well." *Id.* at 3.

II. This Court Has Long Recognized that Anti-Circumvention Measures Serve a Compelling Purpose in Ensuring that the Campaign Finance Laws Are Effective.

Last Term, in *Beaumont*, this Court once again recognized the important role played by anti-circumvention measures in protecting the integrity of the campaign finance laws. In upholding a ban on corporation contributions, the Court said that "[q]uite aside from war-chest corruption and the interests of contributors and owners," the restriction on corporations was separately justified because it "hedges against their use as conduits for 'circumvention of [valid] contribution limits.'" 123 S. Ct. at 2207, quoting *Colorado Republican II*, 533 U.S. at 456. As the Court noted in *Colorado Republican II*, "all Members of the Court agree that circumvention is a valid theory of corruption. . . ." 533 U.S. at 457.

Precisely because "substantial evidence demonstrates how candidates, donors and parties test the limits of the current law," *id.*, anti-circumvention measures are necessary. While corporations were the vehicle threatening circumvention in *Beaumont*, it was the political parties that posed the same danger in *Colorado Republican II*. There, the Court upheld limits on party coordinated expenditures in order to prevent the use of parties "as conduits for contributions meant to place candidates under obligation," *id.* at 452, and to forestall their "exploitation as channels for circumventing contribution and coordinated spending limits. . . . ," *id.* at 455.

Similarly, in *California Medical Ass'n. v. FEC*, 453 U.S. 182, 197-98 (1981), the Court upheld the limit on contributions to multi-candidate political committees, 2 U.S.C.

§ 441a(a)(1)(C), in order "to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*." And in *Buckley*, the Court sustained the aggregate annual limit on contributions by an individual, because it "serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through…huge contributions to the candidate's political party." *Buckley*, 424 U.S. at 38.

BCRA is, at bottom, an anti-circumvention measure. By 1996, the growth of soft money had caused, in the words of the Thompson Committee, "the erosion of safeguards in U.S. election law designed to guard against political corruption . . . ."[9] BCRA was enacted precisely to close the soft money loophole, to repair this erosion, and to prevent the continued evasion of current law.

III. Over the Last 25 Years, the Soft Money System Has Evolved into a Massive Scheme for Political Parties, Federal Candidates and Campaign Donors to Circumvent the Federal Campaign Finance Laws.

The enactment of the Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263 (FECA), was a milestone in the effort to limit the deleterious influence of large campaign contributions on the federal political process. Based on evidence of serious improprieties resulting from the flow of campaign contributions in the 1972 presidential election, and the concomitant public concerns arising out of the Watergate investigation,[10] Congress enacted FECA in order to, *inter alia*, limit the amount of money that donors

[9] Thompson Committee Report, *supra* note 4, at 33.

[10] The Final Report of the Senate Select Committee on Presidential Campaign Activities, S. Rep. No. 93-981, 93d Cong., 2d Sess. (1974).

could give to federal candidates,[11] and to political committees, including party committees.[12] These contribution limits were upheld in *Buckley* because they serve a compelling governmental interest in dealing "with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed." 424 U.S. at 28.

So too, FECA re-codified the longstanding prohibition on contributions and expenditures by corporations and labor organizations in connection with federal elections.[13] "The overriding concern behind the enactment" of this prohibition "was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted." *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982), quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n. 26 (1978); *see also Beaumont*, 123 S. Ct. at 2206. These provisions also seek "to eliminate the distortion caused by corporate spending" in the political process, *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1989), and to protect shareholders and union members from having their funds "used to support political candidates to whom they may be opposed," *Nat'l Right to Work*, 459 U.S. at 208.

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[11] 2 U.S.C. § 441a(a)(1)(A) (limit of $1,000 per election). This amount was increased by BCRA to $2,000 per election. *See* BCRA § 307(a)(1).

[12] 2 U.S.C. § 441a(a)(3) (2002) (aggregate individual limit of $25,000 per year to all candidates and committees). This limit was increased by BCRA to $95,000 per two-year election cycle. *See* BCRA § 307(b). In the 1976 FECA Amendments, contributions to national party committees were made subject to a limit of $20,000 per year, 2 U.S.C. § 441a(a)(1)(B), an amount now increased by BCRA to $25,000 per year. BCRA § 307(a)(2).

[13] 2 U.S.C. § 441b. For a history of this prohibition, s*ee generally FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208-09 (1982).

Shortly after the enactment of the 1974 FECA Amendments, the soft money system developed as a means to evade these contribution limits and source prohibitions.

Over the last 25 years, and until the effective date of BCRA, soft money donations have consisted of the unlimited sums--in some cases considerably more than $1 million from a single donor--given to the national or state political parties by corporations, labor organizations and wealthy individuals, and then spent by the parties, in conjunction with their federal candidates, on activities that were intended to influence, and that had the effect of influencing, federal elections.[14]

The soft money system, which began in 1978, just four years after passage of the FECA, developed slowly at first, but then grew with escalating velocity. By the 1996 presidential election cycle, the soft money system had become little more than a massive scheme for circumventing the federal election laws.

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[14] For instance, the American Federation of State, County and Municipal Employees (AFSCME) gave $7.4 million in the period January 1, 2001 through November 5, 2002, virtually all of it to the Democratic Party. The Pharmaceutical Research & Manufacturers of America (PhRMA) in the same period gave $3.4 million, virtually all to the Republican Party. The two major parties together collected a total of $470 million in soft money in that period. *See* Common Cause, *The Soft Money Finale!*, Follow the Dollar Report (April 7, 2003), *available at* http://www.commoncause.org/publications/april03/040703.htm.

The most cynical form of soft money comes from "double givers"--those who make large contributions to *both* parties in the same election cycle. In the 2002 cycle, there were 37 donors who gave $250,000 or more to both political parties. These included AT&T, which gave $1.5 million to the Democrats, and $1.7 million to the Republicans; the Philip Morris Companies, which gave $625,000 to the Democrats and $2.2 million to the Republicans, and Microsoft, which gave $2.7 million to the Democratic party committees and $852,000 to the Republican committees. *Id.*

A. Phase One: 1978-1988--The creation of the soft money system based on the fiction that soft money does not affect federal elections.

The soft money system was founded on a regulatory fiction promulgated by the Federal Election Commission–that spending by the political parties on "mixed" activities such as voter registration or get-out-the-vote drives which, by their nature, affect federal, as well as non-federal, elections, can be parsed into those separate components, and that the non-federal portion can be funded by soft money without those funds affecting federal elections.

This conclusion was first set out by the FEC in a 1978 advisory opinion that reversed a position the Commission had taken just two years earlier. In the earlier opinion, the FEC had held that state parties had to pay for "mixed" voter activities using solely hard money, *i.e.*, monies raised under the federal law rules, because those activities affected federal elections, even in part.[15]

But in its 1978 advisory opinion, the FEC opened the door to soft money in federal elections by reversing itself and holding that such mixed activities could be financed with a combination of federal and non-federal funds.[16] The Commission left it up to the discretion of the parties to decide on the proper mixture of such funds, requiring only that the allocation be made on a "reasonable basis."[17] This ruling allowed state parties to spend soft money on activities that would affect federal elections.[18]

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[15] Response to FEC Advisory Opinion Request 1976-72 (Oct. 6, 1976); s*ee also* Response to FEC Advisory Opinion Request 1976-83 (Oct. 12, 1976).

[16] *See* FEC Advisory Opinion 1978-10 (August 29, 1978).

[17] *See* 11 C.F.R. § 106.1(e) (1978) (permitting allocation to be made "in proportion to the amount of funds expended on federal and nonfederal elections, or on another reasonable basis").

[18] This included not only get-out-the-vote and voter registration drives, but also "generic" party activities, such as ads that say "Vote Republican."

Not surprisingly, the national parties soon followed suit. In 1979, the FEC opined that the national parties, as well, could open non-federal accounts to raise soft money, and that the same allocation principles would apply to national party expenditures.[19]

In November 1984, Common Cause petitioned the FEC to institute a rulemaking to reverse these administrative interpretations, arguing that soft money was being used in a wholesale manner to influence federal elections.[20] After a two-year consideration of the petition, the Commission denied the request.[21] Common Cause then sued the FEC for abuse of discretion.

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[19] *See* FEC Advisory Opinion 1979-17 (July 16, 1979). In 1979, Congress amended the FECA to encourage state parties to spend money on grassroots activities such as voter registration and get-out-the-vote drives. *See* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339. Contrary to the belief of some, these Amendments did *not* authorize the soft money system. Although the 1979 Amendments provided that money spent by state parties on certain grassroots activities was exempt from the definition of "expenditure," and thus exempt from the overall limit on party spending in 2 U.S.C. § 441a(d), the law expressly stated that the money spent for these activities is subject to federal contribution limits and source prohibitions. 2 U.S.C. § 431(9)(B)(viii), (ix) (exempting certain voter activities from the definition of "expenditure" provided "such payments are made from contributions subject to the limitations and prohibitions of this Act"). Thus, the importance of the 1979 amendments was to provide greater room for state parties to spend money on grassroots voter activities, but *not* to authorize that spending be done with non-federal funds. *See* Thompson Committee Report, *supra* note 4, at 4463-4.

[20] *See* FEC Rulemaking Petition: Notice of Availability, 50 Fed. Reg. 477 (Jan. 4, 1985) (citing Letter of November 5, 1984 from Fred Wertheimer, President of Common Cause, to Lee Ann Elliott, chair, Federal Election Commission).

[21] FEC Rulemaking Petition: Notice of Disposition, 51 Fed. Reg. 15,915 (April 29, 1986), *quoted in Common Cause v. FEC*, 692 F. Supp. 1391, 1393 (D.D.C. 1987).

The district court ordered the FEC to issue new regulations, finding that the agency had acted contrary to law by allowing the parties too much discretion in determining the mixture of hard and soft money to spend on mixed activities.[22] After a year passed without action by the Commission, the court again ordered the agency to act, noting that "it is undisputed that there is a public perception of widespread abuse, suggesting that the consequences of the regulatory failure identified a year ago are at least as unsettling now as then."[23] Finally, three years later, in 1991, the FEC promulgated new regulations on soft money, but in effect only codified the existing soft money system by establishing specific percentages for the allocation of hard and soft money in different scenarios.[24] In addition, the regulations, for the first time, required the national parties to disclose their soft money.[25]

B. Phase Two: 1988-1996--The integration of soft money into the presidential campaigns.

While the FEC was engaged in its protracted rulemaking process, the use of soft money in federal campaigns underwent dramatic change in the 1988 presidential campaign. The nascent soft money system had operated at a comparatively modest level in prior election cycles, with both national parties raising and spending a total of about $20 million in

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[22] 692 F. Supp. at 1396. In fact, the court noted that the Commission might reasonably conclude "that *no* method of allocation will effectuate the Congressional goal" that only hard money be spent on activities influencing federal elections. *Id.* (emphasis in original).

[23] *Common Cause v. FEC*, 692 F. Supp. 1397, 1399 (D.D.C. 1988).

[24] *See* Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting, 55 Fed. Reg. 26,058 (June 26, 1990) (codified at 11 C.F.R. § 106.5 (1991)) (establishing several methods and formulae for allocation that depend on whether the spending is by a national or state party committee, whether the spending is in a presidential or non-presidential election year, and whether the activity being funded is party administrative costs, generic voter drives, or fundraising).

[25] *Id.; see also* 11 C.F.R. § 104.8(e)(2002).

non-federal funds in each of the 1980 and 1984 campaigns.[26] In 1988, however, this amount doubled--to a total of $45 million.[27]

Soft money in the 1988 cycle for the first time became an integrated part of the major party presidential campaigns, organized and directed by the top strategists and fundraisers of those campaigns. Democratic nominee Governor Michael Dukakis and Republican nominee Vice President George Bush, in conjunction with their national parties, systematically solicited individuals for six figure contributions to their respective political parties--amounts far in excess of federal contribution limits.[28]

The spiral of soft money fundraising began with the Dukakis campaign which, led by its treasurer and chief fundraiser Robert Farmer, initiated a program to solicit $100,000 contributions from wealthy individual donors.[29] At

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[26] Expert Report of Thomas E. Mann, available in the record at DEV (Defendants' Evidentiary Volume) 1, Tab 1, at Table 1, *National Political Party Spending, 1976-2000.*

[27] *Id.*

[28] *See* Charles Babcock, *$100,000 Donations Plentiful Despite Post-Watergate Restrictions*, Wash. Post, Sept. 22, 1988, at A27 ("Spurred by competition between presidential fundraisers, the number of $100,000 donors in this election year has already surpassed that in the 1972 Watergate era, when alleged abuses triggered reform in federal election financing."); Brooks Jackson, *Democrats' Coffers Fill Up as Fat Cats Seek Bigger Role in Party*, Wall St. J., July 19, 1988, at 60 ("Fat cats are back, more numerous and playing a bigger role in Democratic politics . . . . More than 200 people have become Democratic Party 'trustees' by agreeing to give $100,000 for the fall campaign, or to raise such an amount from others.").

[29] Brooks Jackson, *GOP Is Aiming New Fund Drive at Big Donors*, Wall St. J., Aug. 17, 198, at 44 ("The see-sawing spending war was touched off weeks ago by Michael Dukakis's chief fundraiser, Robert Farmer . . . Mr. Farmer stunned the political community by announcing his intention to raise a total of $50 million in party funds, including much soft money, to be spent in addition to the $36 million in public funds to be spent directly by the Dukakis campaign."). *See also* Charles Babcock,

first, the Bush campaign attacked the Dukakis soft money operation as, according to deputy campaign manager Richard Bond, "illegal on its face."[30] Shortly thereafter, however, when it failed to stop the Dukakis soft money effort, the Bush campaign moved to match, and then out-raise it.[31] The Bush "Team 100" fundraising campaign of $100,000 soft money donors was headed by Robert Mosbacher, who had been serving as the chief fundraiser for the Bush presidential campaign.[32]

Thus, the chief fundraiser for each presidential candidate headed each party's soft money fundraising drive. According to *The Wall Street Journal*, 267 individuals and corporations made contributions of up to $100,000 to the Bush effort, while a top Dukakis fundraiser said "his $100,000 club numbered 130 individuals."[33] Ultimately, each presidential campaign raised more than $20 million in soft money.[34]

Fund-Raisers Gear Up for Fall Race, Wash. Post, June 27, 1988, at A1; Thomas Edsall, *'Victory Fund' Raises Millions for Party*, Wash. Post, July 19, 1988, at A21 (Edsall, *Victory Fund*).

[30] Thomas Edsall, *GOP Plans Big-Donor Drive*, Wash. Post, Aug. 16, 1988, at A1 (Edsall, *Big Donor Drive*). *See also* Brooks Jackson, *Broken Promise: Why the Federal Election Commission Failed* 52 (1990) (Jackson, *Broken Promise*).

[31] Richard Berke, *Big Money's Election Year Comeback*, N.Y. Times, Aug. 7, 1988, at E5 ("'The Democrats are saying that they're going for the big money,' said Robert A. Mosbacher, Jr., finance chairman of the Bush campaign. 'And I don't think there's much we can do about it but match them.'"); Thomas Edsall, *Soft Money Competition: GOP Seeking $50 Million from Big Donors*, Wash. Post, Aug. 16, 1988, at A1 (Edsall, *Soft Money*) ("For the GOP, the decision to go with Team 88 represents a major policy change. As recently as three weeks ago, top officials of Vice President Bush's campaign described the almost identical Democratic program as blatantly illegal. . . . According to Mosbacher, 'We intend to match the Democrats plus $1.'").

[32] Edsall, *Soft Money*, *supra* note 31.

[33] Brooks Jackson, *Bush, Dukakis Presidential Campaigns Each Spent More than $100 Million*, Wall St. J., Dec. 11, 1988.

[34] Jackson, *Broken Promise*, *supra* note 30, at 54.

The 1988 presidential campaigns were involved not only in raising soft money but in spending it as well. A spokesperson for the RNC soft money effort said "the decision on how to spend Team 88 money will be made primarily by key officials of the Bush campaign, including Lee Atwater, the campaign manager and [Richard] Bond [the deputy campaign manager] . . . [T]he basic criterion in picking states to benefit from the fund will be the closeness of the presidential race."[35]

Soft money was used in the 1988 election to perform vital "ground war" functions for the presidential campaigns--such as get-out-the-vote and other field operations.[36] In Illinois, for example, *The New York Times* reported that the Dukakis campaign had only five paid staff members. But it shared office space with Campaign '88, a "state party" operation organized by the DNC and employing 115 workers across the state, paid for with a budget of $2 million in soft money.[37] Peter Kelly, chairman of the California Democratic Party, told the *Times* that the "whole theory behind" the 1988 soft money effort was to raise enough money to help Dukakis win the state.[38] In short, the 1988 presidential campaigns were structured as two parallel operations--an official campaign receiving public funds and subject to a spending limit, and an

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[35] Edsall, *Big Donor Drive*, *supra* note 30.

[36] T. Edsall, *Victory Fund*, *supra* note 29 ("The money raised by the Victory Fund and Victory 88 will be used to finance what is known as the 'ground war' of the campaign: get-out-the-vote drives, voter registration, direct mail and voter list development. To the degree a soft money campaign is successful, it permits the presidential campaign to spend a high percentage of the $46.1 million in federal money each nominee receives on the 'air war'--television advertising and moving the candidates around the country.").

[37] Richard Berke, *In Election Spending, Watch Ceiling and Use a Loophole*, N.Y. Times, Oct. 3, 1988, at A23.

[38] Richard Berke, *Contributors Help Dukakis by Avoiding Limits He Set*, N.Y. Times, Oct. 31, 1988, at B5.

unofficial campaign raising and spending unlimited amounts of soft money.[39]

C. Phase Three: 1996-2002--The expansion of the soft money system from the "ground war" to the "air war."

If the 1988 campaign saw soft money being used to pay for presidential "ground war" activities, the 1996 campaign saw soft money spent to finance presidential "air war" efforts as well. Beginning in late 1995, President Clinton's reelection campaign used millions of dollars of soft money to fund so called "issue" ads run through the DNC or Democratic state parties. In reality, those ads were nothing more than candidate-specific campaign ads promoting the President's re-election effort. By early 1996, the presidential campaign of Senator Robert Dole followed suit.

The explosive growth of soft money in the 1996 cycle--from a total of $80 million in 1992 (itself a near-doubling from the amount in the 1988 cycle) to *more than triple that amount*, over $271 million, in 1996[40]--was fueled by the

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[39] This dichotomy illustrates another major harm caused by the soft money system--the subversion of not only the contribution limits and source prohibitions of federal law, but the spending limits of the public financing system as well. Under 26 U.S.C. § 9003(b), a major party nominee who receives public funds is prohibited from raising or spending any additional funds for his or her general election campaign. But since 1988, while party nominees have made a binding commitment to limit their general election spending to the amount of the public grant, they have then solicited soft money donations to their political parties and controlled the spending of that money through their parties to advance their campaigns. The spending limit on which the grant of public funds is conditioned has become largely meaningless. Thus, the injection of soft money into the middle of presidential campaigns has dramatically undermined key purposes of the presidential public financing law--"to reduce the deleterious influence of large contributions on our political process . . . and to free candidates from the rigors of fundraising." *Buckley*, 424 U.S. at 91.

[40] Mann Expert Report, *supra* note 26, at Table 1.

collision of the soft money loophole with the sham "issue" ad loophole, in a "perfect storm" that effectively destroyed the barriers between hard money and soft money spending in federal elections.[41] In short, the political parties, working in close conjunction with their presidential candidates, started to spend soft money to pay for the broadcast of candidate-specific campaign ads that simply avoided the use of express advocacy phrases like "vote for" or "vote against."

There was no foundation in law for this development. In *Buckley,* this Court made clear that the "express advocacy" test was intended to address a problem of vagueness encountered in regulating the political activities of "an individual other than a candidate or a group other than a political committee," *Buckley,* 424 U.S. at 79. Thus, the "express advocacy" test was *not* meant to apply to spending by candidates and political parties, whose expenditures, this Court said, do not present comparable issues of vagueness because their activities "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id.*[42]

Nonetheless, in late 1995, the DNC, working under the direction and control of the Clinton re-election campaign, began to use soft money to fund an aggressive nationwide program of TV ads promoting President Clinton and his

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[41] Sebastian Junger, *The Perfect Storm* (1997).

[42] The DNC claimed that its new use of soft money was permitted under FEC Advisory Opinion 1995-25 (Aug. 24, 1995), which held that "legislative advocacy media advertisements" run by a national party committee could be funded with an allocated mixture of hard and soft money. But this claim was wrong: the Commission's opinion was explicitly based on the condition that the ads would not refer to a federal candidate, or if they did so at all, would not contain any "electioneering message." *See* FEC Advisory Opinion 1995-25, n.1.

policies, or criticizing Senator Dole.[43] These ads were written, edited, produced, directed and targeted by Clinton campaign officials, and the President himself was personally involved in the effort.[44] The ads were run in key "battle-ground" states for the 1996 presidential election.[45]

By early 1996, Republican nominee Senator Robert Dole and the RNC began running a similar TV ad campaign, using soft money to promote Dole's candidacy.[46] That effort was coordinated by the Dole campaign.[47]

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[43] A typical Clinton/DNC soft money ad was called "Finish," and promoted President Clinton while criticizing Senator Dole:

> Head Start. Student loans. Toxic cleanup. Extra police. Anti-drug programs. Dole, Gingrich wanted them cut. Now they're safe. Protected in the '96 budget--because the President stood firm. Dole, Gingrich? Deadlock. Gridlock. Shutdowns. The president's plan? Finish the job, balance the budget. Reform welfare. Cut taxes. Protect Medicare. President Clinton says get it done. Meet our challenges.

See Thompson Committee Report, *supra* note 4, at 4478. See also *Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*: Hearings Before the Senate Committee on Governmental Affairs, 105th Cong., S. Hrg. No. 105-300 Part VIII (1997) ("Thompson Committee Hearings") 277-317 at 301 (letter from Ann McBride, President of Common Cause, to Attorney General Janet Reno (October 9, 1996) ("Common Cause Letter") at 25).

[44] *See* Thompson Committee Report, *supra* note 4, at 107-129.

[45] The evidence discussing the efforts by the Clinton and Dole campaigns to promote their candidates using ads run through their respective political parties and paid for with soft money is extensively discussed in the letter of October 9, 1996 sent by Common Cause to the Department of Justice seeking an investigation of these practices as violations of the campaign finance laws. *See* Common Cause Letter, *supra* note 43.

[46] *Id.* A typical Dole/RNC soft money ad was called "Stripes," and criticized President Clinton:

> Bill Clinton, he's really something. He's now trying to avoid a sexual harassment lawsuit claiming he is on active military duty. Active duty? Newspapers report that Mr. Clinton claims as commander in chief he is covered under the Soldiers and Sailors Relief Act of 1940, which grants automatic delays in lawsuits

The two presidential campaigns and their parties ultimately spent more than $60 million during the 1996 election on ads, funded in substantial part with soft money, that praised their candidate or criticized the opposing candidate by name. Much of this money was solicited by the presidential candidates or their campaign fundraisers, and donated to the national party committees, which then transferred a mixture of hard and soft money funds to particular state parties. The state parties immediately transferred the same funds back to the Washington, DC-based media consultants for the presidential campaigns, who then placed the ads in the name of the state party.[48]

This flow of funds highlights the integral role in the soft money system played by the state parties, which acted as little more than conduits for injecting soft money into the

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> against military personnel until their active duty is over. Active duty? Bill Clinton, he's really something.

Common Cause Letter, *supra* note 43, at 36.

[47] *See* Thompson Committee Report, *supra* note 4, at 8294-8305 (Minority Rpt.).

[48] To trace just two of several hundred similar transactions documented in the evidence compiled by Common Cause, the DNC on November 17, 1995 transferred $81,070 in soft money to the California Democratic Party, and on November 21, 1995 transferred $39,930 in hard money. On November 22, 1995, the California Democratic Party transferred $81,070 in soft money and $39,930 in hard money to Squier, Knapp, Ochs Communications, a media consultant for the Clinton presidential committee, to pay for a broadcast ad aired in the name of the state party. Similarly, on June 24, 1996, the RNC transferred $780,870 in soft money to the California Republican State Party, and on June 25, 1996, it transferred $384,608 in hard money. On June 25, 1996, the California state party sent $780,870 in soft money and $384,608 in hard money to Multi-Media Services Corp., a media buyer in Alexandria, Virginia that made the media buys for the Dole campaign and was headed by the chief pollster for Dole. *See* Common Cause, *The Money Trail: The Democrats* (1996) and *The Money Trail: The Republicans* (1996), in the record at DEV 36, Tab 9 and Tab 10; *see also* Thompson Committee Report, *supra* note 4, at 4467.

presidential campaigns. Most of the soft money deployed in the 1996 campaign by the national parties was routed through the state parties and then paid out to the media consultants for the presidential campaigns. This was done in order to maximize the amount of soft money that could be used to fund the ads.[49]

But substantial amounts of soft money also were donated directly to the state parties at the behest of national party officials, thus bypassing the national party accounts in order to avoid federal reporting requirements.[50] Thus, for instance, at the same time that "Vice President Gore was attacking the Republican National Committee as 'just about a wholly owned subsidiary of the tobacco industry,' DNC fundraisers asked R.J. Reynolds Tobacco Co. to make campaign contributions through state Democratic parties."[51]

And there are many other examples. Roger Tamraz, for instance, made most of his contributions directly to Democratic state parties, at the direction of DNC officials, including $100,000 to the Virginia state party and $25,000 to the Louisiana state party.[52] Another controversial DNC fundraiser, John Huang, solicited $482,500 in soft money that was

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[49] FEC allocation regulations more leniently regulated state parties, and allowed them to spend a greater proportion of soft money on an ad, than could the national party in airing the same ad. *Compare* 11 C.F.R. § 106.5(b) (2002) (allocation of expenses between federal and non-federal activities by national party committees) *with id.* at § 106.5(d) (2002) (allocation by state and local party committees).

[50] *See* Charles Babcock, *DNC Diverted Controversial Donations*, Wash. Post, April 13, 1997, at A1 ("Democratic National Committee officials channeled millions of dollars in campaign donations to state Democratic parties last year, effectively hiding big contributions from tobacco, gambling and other special interests . . . Because the money was not deposited in the accounts of the national party, the identities of the donors did not appear on the DNC's federal disclosure reports.").

[51] *Id.*

[52] *See* Thompson Committee Report, *supra* note 4, at 2913-14.

given directly to Democratic state parties in 1996.[53] Carl Lindner, chairman of Chiquita Brands and a longtime Republican donor, "quietly gave $415,000 to about two dozen Democratic state parties . . . in April 1996, only hours after the [Clinton] administration formally challenged European Union trade sanctions against Central American bananas grown by Chiquita."[54]

In October, 1996, Common Cause filed a complaint with the Justice Department that urged the appointment of an independent counsel to conduct a criminal investigation into the "knowing and willful" violation of the federal election laws arising from the use of soft money by both parties and both presidential campaigns in the 1996 election.[55] A parallel complaint was filed with the FEC, calling on the agency to pursue civil violations of the law.

After a two year criminal investigation, the Attorney General ultimately closed the Justice Department's inquiry without taking action,[56] and referred the matter for civil

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[53] *See* Ira Chinoy, *DNC Donors Also Gave to State Groups*, Wash. Post, Jan. 26, 1997, at A1.

[54] George Archibald, *Banana Baron Peeled off Half a Mil; White House Paid Back in WTO Fight*, Wash. Times, Aug. 25, 1997, at A1. According to *Time*, "DNC officials instructed Lindner to give directly to state party coffers, which are subject to far less public scrutiny than federal election accounts." Michael Weisskopf, *The Busy Back Door Men*, Time, March 31, 1997, at 40.

[55] *See* Common Cause Letter, *supra* note 43.

[56] Notification to the Court Pursuant to 28 U.S.C. § 592(b) of the Results of Preliminary Investigation *filed in In re William Jefferson Clinton* (D.C. Cir. Dec. 7, 1998) (Independent Counsel Division). The Attorney General did not conclude that the soft money advertising was lawful, but only that the campaigns acted pursuant to advice of counsel, and therefore lacked the requisite specific intent to commit a criminal violation of the law. *Id.* at 8.

enforcement to the FEC which also--contrary to the advice of its staff--failed to act.[57]

In the absence of *any* law enforcement action, the abuses of 1996 became the established practices of subsequent campaigns. Both presidential candidates in the 2000 election cycle raised soft money, which was funneled through national party accounts to state party accounts and then used to fund so-called "issue" ads promoting their campaigns.[58]

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[57] *See* Statement of Reasons of Comm. Scott E. Thomas in *In the Matter of Dole for President, Inc. et al.*, MURs 4553 and 4671 (FEC May 25, 2000) at 2-5, *available at* http://www.fec.gov/members/thomas/Thomasstatement05.htm (recounting procedural history of the FEC's consideration of the audit and enforcement actions involving the 1996 presidential campaign spending). On most of the series of votes about whether to proceed with the enforcement actions, the Commission deadlocked by a vote of 3-3, thus resulting in the closure of the matters. *Id.*

[58] *See e.g.*, Howard Kurtz, *DNC Issue Spot Touts Gore's Medicare Plan*, Wash. Post, June 8, 2000, at A4:

> The Democratic National Committee unveiled its first issue ad designed to boost Vice President Gore's campaign yesterday, featuring Gore calling for expanded Medicare benefits to shield the elderly from "ridiculously high prices for prescription medicines."
>
> While Democratic National Chairman Joe Andrew … described the commercial as a "party-building" spot, it never mentions the Democratic Party. Instead, the 30 second ad spotlights Gore and a Web site touting "the Gore Plan," and is produced by Gore's media consultants, including Carter Eskew and Robert Shrum. . . .
>
> The ad is financed in part by controversial "soft money" donations to the party that are supposed to be used to generate support for the party and not to explicitly promote a specific candidate.

See also Peter Marks, *Some Soft Money to Pay for Gore Ad Blitz*, N.Y. Times, June 7, 2000, at A28. The RNC shortly followed suit, running similar ads praising its nominee, George Bush. *See* Howard Kurtz, *GOP Launches Its First Salvo in 'Issue' Ad War*, Wash. Post, June 11, 2000, at A4.

Common Cause (joined by Democracy 21) again filed complaints with the Department of Justice and the FEC arguing that this use of soft money was illegal. Neil A. Lewis, *The 2000 Campaign: The Donations; 2*

During the 1990's, soft money also migrated from the presidential to the congressional level, where it was raised by congressional candidates and used, first, for grassroots activities and then, for broadcast ads to promote congressional candidates.

There is no clearer illustration of this point than in the growth of soft money raised by the congressional campaign committees of both parties. These committees are national party entities that consist *in their entirety* of sitting Members of Congress in both Houses, and that have the purpose of electing candidates of each party to the House and Senate.[59]

Notwithstanding this exclusively federal campaign function, all four congressional committees have raised and spent huge sums of soft money, exposing the myth that soft money is used only for non-federal purposes. In the 2002 election cycle, for instance, the DCCC raised $53.7 million in soft money, more than *three times* what it had raised in the 1998 cycle. The NRCC similarly tripled its 1998 soft money total, to $60.7 million in the 2002 cycle. The two Senate campaign

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Groups Ask Justice Dept. To Investigate Parties' Ads, N.Y. Times, July 28, 2000, at A16. Both complaints were ultimately dismissed without action.

[59] The Democratic Congressional Campaign Committee (DCCC), for instance, describes itself as "the only national party committee whose principal mission is to elect Democrats to the House of Representatives." *See* DCCC website at http://www.dccc.org/about/. Similarly, the Democratic Senatorial Campaign Committee (DSCC) describes itself as "the national committee of the Democratic Party formed to elect Democratic members of the United States Senate." *See* DSCC website at http://www.dscc.org/information/about/. To the same effect, the National Republican Senatorial Committee (NRSC) says on its website, "It is our sole responsibility to make sure that Republican Senate candidates are elected to the United States Senate." *See* NRSC.org website at http://www.nrsc.org/nrscweb/aboutus/. The National Republican Congressional Committee (NRCC) describes itself as "governed by its chairman, U.S. Rep. Tom Reynolds (NY-26), and an executive committee composed of Republican members of the U.S. House of Representatives." *See* NRCC website at http://nrcc.org/nrcccontents/issuesagenda/overview.shtml.

committees did even better. The DSCC raised a total of $85.9 million in soft money in 2002, over four times what it raised in 1998. The NRSC increased its soft money from $23.2 million to $54.1 million.[60] With regard to the soft money practices of the party congressional campaign committees, the Thompson Committee Minority Report noted:

> Like the national party committees, the parties' national senatorial and congressional campaign committees raise and spend soft money in ways that render prohibitions on corporate and union contributions virtually meaningless. Senatorial and congressional campaign committees are intended, as their names imply, to help elect United States Senators and Representatives. . . . The amounts of soft money raised [in 1996] by the House and Senate committees increased dramatically over previous years, demonstrating the greater importance of soft money in the last election cycle.[61]

But the apotheosis of the soft money infiltration into congressional campaigns came with the development of congressional "joint fundraising committees"--which were in essence nothing more than dedicated soft money accounts for specific congressional candidates. These joint committees, used by more than 20 Senate campaigns in 2000, were typically formed between the candidate's campaign committee and the senatorial campaign committee of the candidate's national party. A Senate candidate typically solicited both soft and hard money for his or her designated joint committee. The hard money contributions would be disbursed to the

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[60] *See* Common Cause, "National Parties Raise Record $470.6 Million In Soft Money During The 2001-2002 Election Cycle Before New Law Takes Effect" (Jan. 6, 2003), *available at* http://www.commoncause.org/news/default.cfm?ArtID=83.

[61] Thompson Committee Report, *supra* note 4, at 7518 (Minority Rpt.). The report also states: "Experts agree that soft money into the House and Senate campaign committees stretches to the limit the credibility of the argument that the money is being used only for party building and not to elect federal candidates." *Id.* at 7527, n. 27.

candidate's authorized campaign committee, and the soft money would be sent to the party senatorial committee, which would place the money in party soft money accounts. The party committee would then typically transfer the soft money to the state party of the Senate candidate who raised the money, which would then spend it for candidate-specific "issue ads" and other voter activities to support the Senate candidate.[62] In effect, these joint fundraising committees allowed Senate candidates to raise soft money in their own name and for their own campaigns. All pretense of doing anything else was dropped.[63]

The growing use of soft money in congressional races in the 2000 cycle, combined with its continuing use in the presidential campaign, resulted yet again in the near doubling of the soft money raised, from $271 million in 1996 to $498 million in 2000.[64] The soft money system had now mushroomed into a loophole of nearly half a billion dollars.

IV. Congress Crafted BCRA's Soft Money Ban To Ensure That It Would End the Circumvention of the Campaign Finance Laws.

Congress wrote Title I of BCRA in light of this history of how the soft money system actually evolved, and how it actually worked. Practical experience shows that the provisions of Title I are each necessary to close the soft money loophole. Three points in particular are crucial.

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[62] *See* John M. Broder, *Democrats Able to Circumvent Donation Limit*, N.Y. Times, Dec. 22, 1999, at A1.

[63] In April 2000, Common Cause and Democracy 21 filed a complaint with the FEC, alleging that these joint fundraising committees were illegal. The FEC ultimately dismissed the complaint without action. *See* Statement of Reasons of Comm. Scott E. Thomas in *In the Matter of Ashcroft Victory Committee et al.*, MUR 4994 (FEC Dec. 19, 2001) *available at* http://www.fec.gov/members/thomas/thomasstatement41.html.

[64] Mann Expert Report, *supra* note 26, at Table 1.

A. The total ban on national party soft money is necessary.

Experience shows, as this Court has recognized, that parties act as agents "on behalf of those who seek to produce obligated officeholders." *Colorado Republican II*, 533 U.S. at 452. The relationship between national parties and federal officeholders is so inextricably intertwined--as noted above, four of the six national party committees are in fact nothing more than associations of federal officeholders--that to serve anti-corruption purposes effectively, a soft money ban must preclude the national parties from raising or spending any soft money, for any purpose. Otherwise, national party officials will continue, as they have, to broker access to and influence with federal officeholders for those who donate large amounts of soft money to the national parties, even if the parties spend that money for purportedly non-federal purposes. Likewise, national party officials will continue, as they have, to direct donors like Roger Tamraz or Carl Lindner to make large contributions directly to state parties or candidates in a corrupt relationship that exchanges money for access to, or benefits from, federal officeholders. With regard to the national parties, Congress correctly recognized that the nub of the issue is how the money is *raised,* not how it is *spent.*

B. The ban on state party soft money for "Federal election activities" is necessary.

The history of the soft money system recounted above demonstrates why Congress was correct to extend Title I of BCRA to the state parties, which have been integral participants in the funneling of soft money into federal elections. The state parties have been the willing vehicles through which national parties and federal candidates have operated--to transfer, direct and spend soft money funds for federal electoral purposes. Indeed, as the flow of funds in the 1996 campaign shows, the state parties have been used as eager conduits to "game" the allocation rules *specifically in order to maximize* the amount of soft money that could be spent. If

Congress had failed to take account of the role of the state parties in this history, and had banned soft money only for national party committees, the entire soft money system would simply have shifted to the state party level and re-created itself there.

But this history also shows that the objections to BCRA by the Political Party Appellants are based on little more than hyperbole. BCRA is not the radical new regulatory regime they describe. State parties have *for decades* operated under federal rules that, *inter alia*, require them to use exclusively hard money for ads that expressly advocate the election of federal candidates, and to limit their contributions to, or spending in coordination with, federal candidates.[65]

Moreover, since 1978, the state parties had operated under a federal allocation system that required them to use hard money to pay at least part of the costs of voter mobilization activities that affected federal elections (even if these activities also affected state and local elections)--a federal regulatory regime that Congress ultimately found was inadequate to protect compelling federal interests**.**

Thus, BCRA does not suddenly impose federal rules on state parties where none had existed before. Instead, it simply defines, by statute, certain state party activities that Congress correctly deemed to affect federal elections, and substitutes one allocation system for another: instead of funding these activities with a mixture of hard money and soft money, the parties are now to fund them with a mixture of hard money and limited soft money funds raised pursuant to the Levin Amendment.[66] If a state party wishes to avoid the conditions

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[65] 2 U.S.C. § 441a(a)(2)(A) (contribution limit); 2 U.S.C. § 441a(d) (coordinated spending limit).

[66] 2 U.S.C. § 441i(b)(2) (added by BCRA § 101(a)) (Levin Amendment). The Levin Amendment illustrates the particular care that Congress took in balancing the need to protect federal interests in preventing corruption, against its concern that state parties continue to have adequate resources to engage in grassroots voter drive activities. Not only did

placed on the use of Levin funds, it is free to spend entirely hard money for these activities. The state party has the choice. And by the same token, Congress has left wholly unregulated by federal law a wide range of state party activities that are directed solely to state and local elections.[67]

C. The coverage of "voter mobilization" activities is necessary.

Prior to the 1996 campaign, the soft money system operated *exclusively* through party spending on voter mobilization activities such as voter registration and GOTV drives, and generic campaign ads. That kind of spending--as the vivid experience of the 1988 presidential campaign shows--was how the soft money system worked. If Congress had failed to cover these activities in BCRA, the reform law would do little more than codify the pre-1996 soft money system, which was already a system awash in "Team 100" type donors who were solicited by the presidential campaigns for donations then spent on the "ground war" to affect federal elections.

This history alone refutes the district court's conclusion that such voter mobilization activities do not directly or sufficiently affect federal elections. Common sense also

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Congress double the individual contribution limit on hard money donations to state parties, BCRA § 102 (codified at 2 U.S.C. § 441a(a)(1)(D)), but in the Levin Amendment, it also provided state parties with an option to raise funds under more liberal rules for certain voter mobilization activities, in order to ameliorate the impact of BCRA on state parties.

[67] BCRA itself expressly excludes from the definition of "Federal election activity" essential state party functions such as making contribuions to state and local candidates, all "public communications" (such as party-funded campaign ads) referring to state or local candidates if the communications are not otherwise "Federal election activity," the costs of state and local conventions, and the costs of grassroots campaign materials that name only state or local candidates. 2 U.S.C. § 431(20)(B)(i)-(iv). In addition, any other state party spending that is not within the definition of "Federal election activity," 2 U.S.C. § 431(20)(A), is also excepted, such as voter registration drives prior to 120 days before a federal election, or party administrative costs.

counsels that when state parties spend money to register their core voters and get them to the polling booth where they will cast votes on ballots that contain federal candidates, such spending will necessarily and substantially benefit federal candidates and affect those federal elections. Even if the party's "message" in turning out voters is a generic one that promotes the party without mentioning any candidates, or is one directed solely to state and local races, there is no doubt that the voters who are brought to the polls then cast their ballots in federal races as well. That *impact*, and the history of circumvention which is the defining characteristic of the soft money system, amply justify Congress' judgment to include such spending within the definition of "Federal election activity."[68]

CONCLUSION

The Court should sustain the constitutionality of BCRA as a measure necessary to address the dangers of corruption and the appearance of corruption caused by the rise of soft money in American campaigns, and as a necessary anti-circumvention measure to close the soft money loophole.

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[68] The Party Appellants erroneously equate a loss of soft money funding for their voter mobilization activities with a limit (or even, ban) on the activities themselves. Nothing could be further from the truth. Although the Party Appellants repeatedly refer to Title I as a "spending limit," *e.g.*, Br. at 48, 50, or even, a "pure expenditure limit," *id.* at 39, that is a clear mischaracterization. The state parties are free to engage in as much voter mobilization activity as they wish, and to spend as much as they want on such activities, so long as they use hard money, or funds otherwise permitted by the Levin Amendment. This is no "spending limit." *See Buckley*, 424 U.S. at 21-22 (contribution limits upheld because their effect "is merely to require candidates and political committees to raise funds from a greater number of persons . . .").

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