No. 01-35666

United States Court of Appeals
For the NINTH Circuit

STATE OF ALASKA; and
STATE OF ALASKA, ALASKA PUBLIC OFFICES COMMISSION,

Appellants,

v.

KENNETH P. JACOBUS; KENNETH P. JACOBUS, P.C.;
WAYNE ANTHONY ROSS; ROSS & MINER P.C.; and
SCOTT A. KOHLHAAS,

Appellees.

On Appeal From the United States District Court
for the District of Alaska (No. A97-272-CV (JKS))

BRIEF OF AMICI CURIAE SENATORS JOHN McCAIN AND RUSSELL FEINGOLD AND REPRESENTATIVES CHRISTOPHER SHAYS AND MARTIN MEEHAN IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICI CURIAE*

With the consent of the parties, Senators John McCain and Russell Feingold, and Representatives Christopher Shays and Martin Meehan, submit this brief *amici curiae* in support of the appellant, State of Alaska. Letters of consent are attached hereto.

Senators McCain and Feingold are the principal sponsors of the Bipartisan Campaign Reform Act of 2001, commonly referred to as the McCain-Feingold Bill, which passed the U.S. Senate on April 2, 2001. Representatives Shays and Meehan are the principal sponsors of the companion legislation that is currently pending before the U.S. House of Representatives and is commonly referred to as the Shays-Meehan Bill. Both the McCain-Feingold Bill and the Shays-Meehan Bill would, among other things, eliminate soft money contributions to the national political party committees.

Amici are legislators who strongly believe that it is in the national interest to prevent the corruption and appearance of corruption that invariably result when individuals, corporations, labor unions, and other groups are permitted to make unlimited contributions to political parties. *Amici* contend that it is constitutional for state and federal governments to enact legislation that eliminates the soft money loophole and establishes reasonable limits on contributions to political parties.

INTRODUCTORY STATEMENT

The district court held, essentially, that political parties have a constitutional right to raise and spend unlimited amounts of soft money. In order to demonstrate the flaws in the district court's reasoning, it is useful to begin with a history of how the concept of soft money, which arose in the federal system, actually began. Soft money is not something that either Congress intended or the federal courts have heretofore endorsed. Rather, soft money arose as an unintended byproduct of some early Federal Election Commission (FEC) advisory opinions. Soft money is a historical accident, not a constitutional imperative.

In 1974, on the heels of President Nixon's resignation and public hearings on the Watergate scandals, Congress built upon reforms enacted initially in 1971, and amended the Federal Elections Campaign Act (FECA) to establish a comprehensive set of campaign reforms, including, among other things, contribution limits for donations to political candidates and parties. Corporations and labor unions were barred from making any political contributions, and individuals and political action committees (PACs) were subject to strict dollar limits on their contributions. The only exception contained in the original legislation governing contributions was that parties could receive unlimited funds (from any source) earmarked for the construction or purchase of a party office building. *See* 2 U.S.C. § 431(8)(B)(viii). Otherwise, all funds raised by political parties for

federal elections were to be “federal funds” subject to the strict FECA source restrictions and contribution limits. These “federal funds” area also commonly referred to today as “hard money.”

The FECA had some unintended consequences for political parties that first became apparent during the 1976 presidential election. Political parties had traditionally funded general party-building activities, such as producing bumper stickers, handbills, brochures, posters, and yard signs, or organizing volunteers to knock on doors or make telephone calls on behalf of the party’s ticket. However, because these types of activities frequently invoke the name of individual candidates, the FECA treated them as in-kind contributions to the candidate, which were subject to strict contribution and expenditure limits. Thus, the FECA had the unintended side-effect of limiting these traditional party-building activities.

In response to widespread criticism about how the FECA was diminishing the role of political parties, Congress acted in 1979 and loosened some of these restrictions. In the 1979 amendments to the FECA, Congress allowed political parties to engage in unlimited spending on certain enumerated general party-building activities, as described above. *See* 2 U.S.C. § 431(8)(B)(x) - (xii). However, although Congress loosened the law to allow unlimited spending on the specified activities, it nevertheless still required that they be paid for with funds subject to the

requirements of the FECA. Thus, political parties were required to raise and spend only "hard" dollars on these general party-building activities.

The soft money component of the problem arose not from the 1979 federal legislative amendments, but from a contemporaneous FEC decision. At that time, the Kansas Republican Party, seeking to conduct voter registration and get-out-the-vote drives on behalf of both federal and non-federal candidates, asked the FEC whether the entire cost for such activities would have to be paid using federal funds. The FEC responded that the party could allocate costs between federal and non-federal candidates, using money raised subject to the FECA requirements (i.e., hard money) for the federal portion and using any funds permitted under state law (i.e., soft money) for the local portion. Since Kansas law permitted corporate and union contributions to political parties, the Kansas Republican Party could use corporate and union contributions to pay for a portion of "party-building" activities that benefitted federal candidates. *See* 1978 Advisory Op. Fed. Election Commission 10 (1978).

Although this exception, allowing the political parties to pay for activities that partly assisted federal candidates with non-federal funds, was quite limited when it was first created, it has since grown enormously. In 1980, the national party

committees spent approximately $19 million in soft money.[1] By 2000, this figure had grown more than 25-fold, to $508 million.[2] Soft money today accounts for some 40 percent of all political party funding.[3]

The dramatic increase in political party soft money spending in recent years can be linked to the rise in candidate-specific "issue ads" sponsored by the political parties. In 1995, President Clinton's campaign committee decided to raise soft money funds for television advertisements that would praise the President, but not "expressly advocate" his election. The campaign concluded that these could be classified as "issue ads" rather than electioneering ads, and that they could be paid for with an allocation of soft and hard dollars. The following was a typical Democratic Party "issue ad" from 1996:

> 60,000 felons and fugitives tried to buy handguns — but couldn't — because President Clinton passed the Brady Bill — five-day waits, background checks. But Dole and Gingrich voted no. One hundred thousand new police — because President Clinton delivered. Dole and Gingrich? Vote no, want to repeal 'em. Strengthen school anti-

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[1] *See* Committee for Economic Development, Investing in the People's Business: A Business Proposal for Campaign Finance Reform 24 (1999), *available at* http://www.ced.org/projects/cfr.htm.

[2] *See* FEC, National Party Non-Federal Activity, *available at* http://www.fec.gov/press/051501partyfund/tables/nonfedsumm2000.html.

[3] *Id.*

> drug programs. President Clinton did it. Dole and Gingrich? No again. Their old ways don't work. President Clinton's plan. The new way. Meeting our challenges, protecting our values.

Associated Press, *Analysis of DNC Ad on Crime Issues*, April 20, 1996.

Although such "issue ads" were initiated by the Democrats, the Republican Party soon responded in kind. In May of 1996, the Republican Party began spending millions of dollars (allocated between hard and soft money according to the FEC's formula) on television advertisements extolling its presidential candidate, Senator Bob Dole, and attacking President Clinton. The following was a typical Republican Party "issue ad":

> (Announcer) "Three years ago, Bill Clinton gave us the largest tax increase in history, including a 4 cent a gallon increase on gasoline. Bill Clinton said he felt bad about it." (Clinton video) "People in this room still get mad at me over the budget because you think I raised your taxes too much. It might surprise you to know I think I raised them too much, too." (Announcer) "OK, Mr. President, we are surprised. So now, surprise us again. Support Senator Dole's plan to repeal your gas tax. And learn that actions do speak louder than words."

Associated Press, *Analysis of New GOP Ad on Taxes*, May 8, 1996.

In the 1996 Presidential campaigns, the money used to pay for these ad campaigns was raised largely by the candidates themselves and their campaign committees. Although the money was funneled through various Democratic and

Republican state and federal party committees, the ads were prepared, directed, and controlled by the Presidential campaigns. In the federal system, soft money has rendered virtually meaningless the source restrictions and contribution limits contained in the FECA. Corporations and unions, which are barred from making political contributions to candidates and parties for electioneering purposes, give unlimited funds for these so-called issue-ads, which are indistinguishable from the candidate's own advertising.

The problem extends well beyond the Presidential level. As the Supreme Court noted in its recent decision in *FEC v. Colorado Republican Federal Campaign Comm.*, 121 S. Ct. 2351, 2364 (2001), political parties "act as agents for spending on behalf of those who seek to produce obligated officeholders." House and Senate candidates instruct donors who have already contributed to their campaigns the maximum amount allowed under the FECA, to give additional contributions to the political party, on their behalf. The parties have developed informal bookkeeping devices to keep track of these directed contributions. "In the Democratic Party, at least, the method is known as 'tallying,' a system that helps to connect donors to candidates through the accommodation of a party." *Id.* at 2368.

The informal mechanisms that connect hard and soft money donors to political candidates, through the parties, get more sophisticated with each election cycle. The latest wrinkle on the tally system, which came into widespread use in the 2000 election cycle, is the joint fundraising committee, a vehicle that allows nominally separate political committees to act together and share funds. In virtually all of the close Senate races last year, the candidates from the two major political parties created joint fundraising committees with their respective political parties.[4] The joint fundraising committees were established with allocation agreements that were typically structured so that the first $2,000 ($1,000 for the primary and $1,000 for the general election) received from individuals went into the hard money account of the candidate's principal campaign committee, the next $20,000 went into the party's hard money account, and any remainder went into the party's soft money account. All corporate and union contributions went directly into the party soft money accounts. All of the party money was tallied or credited to the candidate who raised the funds. In this way, any corporation, union, or individual

[4] For example, in Pennsylvania, Rick Santorum set up the "Santorum Victory Committee," while Ron Klink established "Pennsylvania Senate 2000." In Missouri, John Ashcroft set up the "Ashcroft Victory Committee," while the late Mel Carnahan established "Missouri 2000." In Florida, Bill McCollum set up the "McCollum Victory Committee," while Bill Nelson established "Florida 2000." These were all joint fundraising committees that operated in addition to the candidates' principal campaign committees.

could effectively contribute any amount to any candidate. These joint fundraising committees are the most explicit vehicles existing today for evading the otherwise applicable FECA hard money contribution limits.

The McCain-Feingold Bill, which passed the Senate on April 2, 2001, and the Shays-Meehan Bill, which is pending in the House of Representatives, would close the soft money loophole and restore the integrity of the FECA contribution and source limitations. The bills require, in essence, that all contributions to political parties be subject to the source and dollar limitations contained in the FECA.

Alaska's campaign finance law, prior to the district court's decision, did not have a soft money loophole like the one that has arisen in the federal system. The State's statutory ban on corporate contributions to political parties has heretofore been assumed to be just that, a complete ban on all contributions, regardless of how the money is ultimately used. The loophole that the FEC opened under federal law (but which is nowhere written into federal law) has not been opened by any state administrative agency or judicial decision interpreting the will of the Alaska Legislature. The decision to allow political parties in Alaska to accept contributions in any amount, from any source, for non-electioneering purposes, is an exception

that was invented out of whole cloth by the district court, which portrayed it as a constitutional imperative.

As we shall demonstrate below, the ban on all corporate contributions to political parties serves the compelling government interest of preventing corruption and the appearance of corruption. If exceptions are permitted, as envisioned by the district court, the state system would no doubt quickly degenerate into the current federal system, which is rife with the appearance of corruption. Indeed, according to local reports in Alaska newspapers, within weeks of the district court's ruling, Alaska's corporate interests began making large contributions to the political parties in an attempt to gain influence:

> Corporate dollars are flowing into state Republican coffers in the wake of a federal judge's ruling that legalized so-called soft money contributions. The cruise ship industry has written the Republicans checks totaling $75,000 in the past month, the party chairman said. The insurance and oil industries have also contributed . . . Critics argue Singleton essentially gutted campaign finance reform in Alaska and gave individuals and groups with deep pockets undue influence over elected officials. "It's pretty amazing to me that the ink was barely dry on the ruling and the corporations are taking advantage of their superior status with the money they're able to donate to the political realm," said Steve Cleary, development director of the Alaska Public Interest Research Group. It's appalling, Cleary said, that within weeks of a special legislative session to tackle cruise ship pollution matters that the industry would be pouring tens of thousands of dollars into the treasury of the Republicans. "It doesn't take much of

> a sleuth to put those lines together. Corporate dollars are going to influence votes."

June Ruling Puts GOP in the Money, Anchorage Daily News, July 23, 2001, at A1. Because of the corruption and appearance of corruption that invariably result from allowing soft money contributions to political parties, Alaska's complete ban on corporate contributions to political parties is constitutional.

LEGAL ARGUMENT

The district court found, in essence, that corporations have a constitutional right to give unlimited sums of money to political parties, so long as that money is not used for "express advocacy." *Amici* agree with the district court that political parties have a First Amendment right to engage in unlimited *spending* for their political advocacy, regardless of whether it is characterized as express advocacy or issue advocacy. The question before this Court, however, is whether political parties also have a right to raise unlimited *contributions* for these activities. Because contributions to political parties, even if ear-marked for so-called issue advocacy spending, can lead to corruption and the appearance of corruption, Alaska's ban on corporate contributions to political parties is constitutional.

The district court held to the contrary. Unfortunately, the district court reached its decision without the benefit of the Supreme Court's opinion in *FEC v. Colorado Republican Federal Campaign Comm.*, 121 S. Ct. 2351 (2001) (*Colorado Republican II*), which was issued two weeks after the district court's decision. In *Colorado Republican II*, the Supreme Court found: (1) that candidates use political parties to evade otherwise valid contribution limits, and (2) that preventing the circumvention of valid contribution limits can serve as sufficient constitutional justification for political party coordinated spending limits. Similarly,

for purposes of this case, there can be little doubt that allowing corporations to give unlimited soft money contributions to Alaska's political parties would lead to circumvention of the State's current contribution limits. If corporations in Alaska are allowed to give unlimited sums to political parties, even if the sums are ostensibly given for non-electioneering purposes, there will arise the type of corruption and appearance of corruption that has become the hallmark of federal "soft money" political party fundraising.

POINT I

THE GOVERNMENT HAS A COMPELLING INTEREST IN PREVENTING THE CORRUPTION AND APPEARANCE OF CORRUPTION THAT CAN RESULT FROM UNLIMITED CONTRIBUTIONS TO POLITICAL PARTIES.

A. Contribution Limits Are Constitutionally Sound If They Are "Closely Drawn" To Match "Sufficiently Important" Governmental Interests.

Campaign finance regulation operates in an area of core First Amendment activities. Candidates and contributors express their political opinions and affiliate with like-minded persons by giving and spending money in connection with electoral campaigns. Thus, limitations on campaign contributions and expenditures invariably impose some burden on free speech and associational rights. Nevertheless, the Supreme Court has consistently recognized that the burden on free speech and associational rights imposed by limits on political contributions are

significantly less than the burdens imposed by limits on political expenditures. *See Colorado Republican II*, 121 S. Ct. at 2358; *Nixon v. Shrink Missouri Govt. PAC*, 528 U.S. 377, 386-88 (2000); *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 610, 614-15 (1996) (*Colorado Republican I*); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986) (*MCFL*); *Buckley v. Valeo*, 424 U.S. 1, 14-21 (1976).

Although a reviewing court applies "strict scrutiny" when determining the constitutional validity of limits on political expenditures, the inquiry for contribution limits is only "whether the restriction is 'closely drawn' to match what we have recognized as the 'sufficiently important' government interest in combating political corruption." *Colorado Republican II*, 121 S. Ct. at 2366 (quoting *Shrink Missouri*, 528 U.S. at 387-88). Thus, while the Supreme Court has routinely struck down limitations on independent expenditures by candidates, parties, individuals, and groups, *see FEC v. National Conservative Pol. Action Committee*, 470 U.S. 480, 490-501 (1985) (*NCPAC*); *Buckley*, 424 U.S. at 39-58, it has upheld contribution limits to political candidates and political parties, *see Colorado Republican II*, 121 S. Ct. at 2364-71 (coordinated expenditures treated as contributions); *Shrink Missouri,* 528 U.S. at 390-97; *California Medical Ass'n. v. FEC*, 453 U.S. 182, 193-99 (1981) (plurality opinion); *Buckley*, 424 U.S. at 23-36.

This is a case about contribution limits, not expenditure limits. No one disputes that any political party in Alaska can spend as much money as it wants to communicate its ideas, whether that spending is for express advocacy, issue advocacy, or anything else. The only question in this case is whether the political parties can be required to raise the funds for their spending under the dollar limitations and source restrictions promulgated by the Alaska Legislature.

B. Preventing Corruption And The Appearance Of Corruption Are Important Governmental Interests That Justify Banning Corporate Political Contributions.

The Supreme Court has consistently recognized that the prevention of corruption and the appearance of corruption are governmental interests that are sufficient to justify contribution limits. *Colorado Republican II*, 121 S. Ct. at 2366; *Shrink Missouri*, 528 U.S. at 387-88; *NCPAC*, 470 U.S. at 496-97; *Buckley*, 424 U.S. at 26. It is for the legislature, not the courts, to determine the appropriate contribution limits. "[I]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Buckley,* 424 U.S. at 30. Thus, a contribution limit adopted by the legislature will be accepted by the courts unless the limitation is "so radical in effect as to render political association ineffective, drive the sound of a candidate's

voice below the level of notice, and render contributions pointless." *Shrink Missouri*, 528 U.S. at 397.

Alaska has chosen, in line with the FECA and the laws of many other states, to enact a complete ban on corporate political contributions. Although it has never directly considered such a ban, the Supreme Court has implicitly endorsed the federal ban on corporate contributions through its decision upholding a ban on corporate *independent expenditures*, a far more difficult issue. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Supreme Court upheld Michigan's ban on corporations using their general treasury funds for independent expenditures in support of or in opposition to political candidates. The Court reasoned that, because state law grants corporations special advantages, such as limited liability, perpetual life, and favorable treatment for the accumulation and distribution of assets, these state-created advantages could give corporations "'an unfair advantage in the political marketplace.'" 494 U.S. at 659 (quoting *MCFL*, 479 U.S. at 257). Harkening back to *MCFL*, the Court noted that:

> [t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

Austin, 494 U.S. at 659 (quoting *MCFL*, 479 U.S. at 258).

Michigan's ban on corporate contributions was aimed at "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660. The Court further stated that, "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures*, just as it can when it assumes the guise of political contributions.*" *Id.* at 660 (emphasis added). The Court in *Austin* considered a ban on independent expenditures by corporations to be a harder case than a ban on corporate contributions, and it nevertheless upheld the expenditure ban. A ban on corporate contributions, which under long-standing Supreme Court precedent would be judged under a more deferential standard, is no doubt constitutional. *See Mariani v. United States*, 212 F.3d 761, 771-73 (3d Cir. 2000) (*en banc*) (upholding FECA ban on corporate contributions).

C. The Court's Recent Decision In *Colorado Republican II* Demonstrates That A Legislature May Enact Prophylactic Measures In Order To Prevent The Evasion Of Contribution Limits And That Political Parties Have A History Of Assisting Their Candidates In Such Evasion.

The Supreme Court has long recognized that some campaign finance restrictions can be justified as prophylactic measures that serve to prevent the evasion of other valid campaign finance restrictions, such as contribution limits. For example, in *California Medical Ass'n.,* 453 U.S. at 199, the Court held that the FECA's $5,000 limit on annual contributions to multi-candidate political committees was constitutional. Justice Marshall, writing for a plurality of the Court, reasoned that just as the Constitution permits restrictions on the amount that individuals and groups can contribute directly to political candidates, it is permissible to place restrictions on the amount that can be contributed to political groups.[5] *Id.* At 197. Justice Marshall noted that the challenged provisions did not limit the amount that groups and individuals could spend independently to advocate their political views, and he found that this sort of "speech by proxy" was not

[5] Justice Blackmun concurred in the judgment and provided the fifth vote for the majority. Although he disagreed with the proposition that political contributions are not entitled to full First Amendment protection, he nevertheless agreed that under even a more rigorous standard of review, the contribution limit should be upheld as constitutional. *California Medical Ass'n*, 453 U.S. at 202-03. The four dissenters objected on jurisdictional grounds.

entitled to full First Amendment protection. *Id.* at 195-96. Justice Marshall concluded that "this provision is an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*." *Id.* at 199.

This anti-evasion rationale was embraced by the Court as its guiding principle in its recent *Colorado Republican II* decision. The Court upheld the FECA's limits on coordinated expenditures by political parties, concluding that they were a reasonable and appropriate means for upholding the integrity of the FECA's contribution limits. "Coordinated expenditures of money donated to a party are tailor-made to undermine contribution limits. . . . We hold that a party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits." *Colorado Republican II*, 121 S. Ct. at 2371; *see also id.* at 2366 ("[A]ll members of the Court agree that circumvention is a valid theory of corruption").

But the importance of *Colorado Republican II* goes well beyond the Court's ringing endorsement of the anti-circumvention rationale. The opinion is also noteworthy for its steadfast refusal to "ignore [political] reality," *id.* at 2363, in reaching its conclusion that political parties contribute to corruption and the appearance of corruption, just as they often work directly with candidates to

undermine the contribution limits contained in the law. According to the Court, political parties "perform functions more complex than simply electing candidates; whether they like it or not, they act as agents for spending on behalf of those who seek to produce obligated officeholders." *Id.* at 2364. The political parties not only organize to elect candidates, but "also function for the benefit of donors whose object is to place candidates under obligation, a fact that parties cannot escape. Indeed, parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contribution and coordinated spending limits binding on other political players." *Id.* at 2366.

The Court rejected the notion that political parties are "in a unique position" and that they are entitled to be treated differently from other political actors under the FECA. *Id*. Political parties can be used as a corrupting influence on political candidates and office-holders, and targeting this corruption and appearance of corruption is a valid basis for the FECA's limits on political party contributions and spending. If the district court in this case had had the benefit of the Supreme Court's teachings in *Colorado Republican II*, it would doubtless have taken a very different view of the possibility that unlimited contributions to political parties can lead to corruption and the appearance of corruption.

POINT II

CONTRIBUTIONS TO POLITICAL PARTIES, EVEN IF THEY ARE NOT USED FOR "EXPRESS ADVOCACY," CAN LEAD TO CORRUPTION OR THE APPEARANCE OF CORRUPTION.

The district court held the view that individuals and corporations could contribute unlimited sums to the political parties without creating any corruption or appearance of corruption, as long as the contributions were not earmarked for electioneering activities. That view, however, is simply mistaken. Whether soft money donations can cause corruption is a question of constitutional fact, and this court should give no deference to the district court's mere *ipse dixit* that soft money presents no such opportunity. *See Bose Corporations v. Consumers Union*, *Inc.*, 466 U.S. 485, 508 & n.27 (1984) (First Amendment questions of "constitutional fact" require *de novo* review).

In *Shrink Missouri*, the Supreme Court made it clear that the amount of proof that the government is required to put forward to defend a campaign finance restriction depends, in large part, on the novelty of the claim. *Shrink Missouri*, 528 U.S. at 391 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. *Buckley* demonstrates that the dangers of

large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.").

It is neither "novel nor implausible" to believe that unlimited soft money contributions to political parties can create corruption or the appearance of corruption. If, for example, Alaska energy companies were to contribute $1 million in soft money to the Republican Party, that contribution inevitably would call into question the motivation of Republican lawmakers voting on any subsequent energy legislation. Similarly, if Alaska trial lawyers were to contribute $1 million in soft money to the Democratic Party, the public would likely see a vote against tort reform as a political payoff to that powerful group.

Large sums of money given to political parties raise this appearance of corruption, even if the contributions are earmarked for purposes other than "express advocacy." The district court cited things such as voter registration, get-out-the-vote drives, and "issue advocacy" as supposedly non-corrupting uses for soft money contributions. *See* Mem. Op. at 9-10 & n.8 (ER 46-47). But when a political party conducts a get-out-the-vote drive, it is not functioning like the League of Women Voters. A political party's get-out-the-vote effort is a partisan affair, designed to get only their own voters to the polls. Get-out-the-vote is a crucial component of any political campaign, and if a corporate group were permitted to

make a $1 million contribution to fund such essential efforts, there is no doubt that the corporation will have made itself into an influential player with the party and its office-holders.

The same result would obtain if a corporation were to contribute $1 million to a party to sponsor "issue ads." In the real world, there is little practical distinction between issue ads, which eschew the use of certain express words of advocacy, such as "vote for" or "vote against", and electioneering ads. Indeed, a recent academic study demonstrated that in the 1998 federal election cycle, only 4 percent of ads sponsored by political candidates themselves used such words. *See* Jonathan S. Krasno and Daniel Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections* 9 (Brennan Center for Justice 2000). As the examples from the Clinton and Dole Presidential campaigns provided earlier in this brief demonstrate, it takes little imagination to create political ads that are quite effective, yet avoid specific terms of express advocacy. Because they are indistinguishable from the candidate's own ads, political party issue ads that are funded with large contributions can create political debts. The district court erred when it failed to recognize these indisputable facts of political life. As the Supreme Court recognized in *Colorado Republican II*, the political parties and candidates

work hand-in-hand to exploit every conceivable loophole in campaign finance laws, and the closing of such loopholes is a compelling government interest.

Of course, Alaska state political campaigns have not yet had much direct experience with soft money abuses, since it was the decision of the district court in the instant case that first held that corporations have a right to make soft money contributions to political parties. Prior to that decision, it was assumed that corporations were banned from making any direct contributions to political parties. However, we have a wealth of experience with soft money contributions to political parties in the federal system, and there is no reason to believe that soft money contributors to Alaska's state parties will behave any differently from soft money contributors to the national political parties.[6] The federal experience demonstrates beyond any doubt that allowing soft money contributions to political parties is an enormous loophole that eviscerates the otherwise existing contribution limits in the system and leads to corruption and the appearance of corruption.

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[6] *See June Ruling Puts GOP in the Money,* Anchorage Daily News, July 23, 2001, at A1.

A. Congress Has Documented The Corruption And Appearance Of Corruption Created By Soft Money Donations To Political Parties.

In January of 1997, the Senate Governmental Affairs Committee, then under Republican control, began a year-long inquiry into "illegal and improper" fund-raising practices during the 1996 presidential campaign. The Committee, more commonly known as the Thompson Committee, issued 427 subpoenas, received 1,500,000 pages of documents, took 200 depositions, and conducted over 200 witness interviews. *See* Committee on Governmental Affairs, Final Report on the Special Investigation, Section 2 at 15 (1997) [hereinafter Thompson Committee Report], *available at* http://www.senate.gov/~gov_affairs/sireport.htm. Although the Committee was, to some extent, mired by partisan divisions between the Democratic and Republican members, the dueling majority and minority reports produced by the Committee together present a revealing picture of political party fund-raising practices.

According to the Majority Report, the "federal campaign finance system virtually collapsed" during the 1996 federal election cycle. *Id.*, Section 32, at 2. President Clinton, after accepting public funding for his presidential campaign, thereafter proceeded to supplement his public funding by raising soft money for the Democratic National Committee. *Id.* The soft money raised by President Clinton

for the DNC was used "to broadcast thinly disguised issue advertisements meant to advocate his election." *Id.* The money was funneled through Democratic state party committees that "operated as little more than a pass-through for the DNC to pay for the production and broadcasting of ads." *Id.* at 17.

The Majority Report documents how the Clinton campaign's search for large soft money donations led to an appearance of corruption. One such episode involved Roger Tamraz, an international businessman who was seeking U.S. backing for an oil pipeline project. *Id.,* Section 3, at 19. After he was rebuffed by career government officials at the National Security Council, Tamraz began making huge soft money contributions to the DNC. *Id.* at 19-20. "As Tamraz had intended — and as he admitted to the Committee in his remarkably candid testimony — these contributions enabled him to enlist senior party officials . . . in helping [him] gain the access to senior U.S. officials that a high-level inter-agency working group had determined to deny him." *Id.* at 20. His soft money contributions gained him "the DNC chairman's intercession in a series of *highly* inappropriate contacts with CIA officials." *Id*. Despite the fact that the NSC tried to deny him access to President Clinton, Tamraz's political contributions "bought him no fewer than *six* private meetings with the President." *Id.*

Tamraz discussed his pipeline deal directly with President Clinton at a White House Dinner, and the President instructed his advisor Mack McLarty to look into the matter. *Id.* at 21. McLarty asked an Energy Department employee "whether some reason could be found to support Tamraz's pipeline." *Id*.

> The nadir of the Tamraz episode occurred with [a] subsequent call to NSC staff member Heslin, who chaired the inter-agency working group that had sought to deny Tamraz access to senior government officials and who had determined that the U.S. should not support his pipeline. [An Energy Department employee] told Heslin that if she reconsidered her opposition to Tamraz, it "would mean a lot of money for the DNC" because "he's already given 200,000, and if he got [what he wanted] he would give the DNC another $400,000."

Id. The Tamraz affair received widespread coverage in the press and was portrayed as a prime example of the corruption that can result from soft money contributions. *See, e.g.*, *Politics & People: What We've Learned*, Wall St. J., Oct. 9, 1997 at A19; *White House Makes Best of Bad News in Probes*, Wash. Post, July 2, 1997, at A4.

The Thompson Committee Minority Report (produced by the Democratic Senators) fully concurs that the Democratic Party committed substantial soft money abuses during the 1996 campaign, but it emphasizes that *both* political parties must share the blame:

> *The most insidious problem with the campaign finance system involved soft (unrestricted) money raised by both parties.* The soft money loophole, though legal, led to a meltdown of the campaign finance system that was designed to keep corporate, union and large individual contributions from influencing the electoral process.
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> *Both parties went to significant lengths to raise soft money, including offering access to party leaders, elected officials, and exclusive locations on federal property in exchange for large contributions. Both parties used issue ads, which were effectively indistinguishable from candidate ads and which — unlike candidate ads — can be paid for in part with soft (unrestricted) money, to support their candidates.*

Thompson Committee Minority Report, Findings at 19. The Minority Report concludes that "[t]he appearance of corruption, in which large contributions appear to be traded for access to government officials or favored treatment, and the resulting loss of public confidence in government are two of the most serious consequences of the soft money system." *Id.* Section 23, at 5. The Congressional findings, as embodied in both the Majority and Minority Reports, leave no doubt that soft money at the federal level has led to corruption and the appearance of corruption.

B. Business Leaders Throughout The Nation Recognize That Soft Money Donations To Political Parties Create Corruption And The Appearance Of Corruption.

The corruption caused by soft money has been recognized not only by Congress, but also by the nation's business leaders. The Committee for Economic Development (CED) is a nonprofit, nonpartisan and nonpolitical independent research and policy organization composed of 250 of the nation's most prominent business leaders and educators.[7] In 1999, CED's Research and Policy Committee issued a widely-praised report on campaign finance reform, which concluded that a ban on soft money political party fundraising was the single most important reform needed for restoring integrity to the nation's campaign finance system:

> We are especially troubled by the growth of party 'soft money' financing and candidate specific 'issue' advertising. Instead of encouraging finance activity within the rules of FECA, the current system encourages financial activities beyond the law's authority. . . . In the 1996 election cycle, national party committees raised and spent over $250 million in 'soft money' exempt from federal contribution limits. . . . The parties used this money for such activities as party-building, candidate-specific issue ads, and voter registration and turnout drives. Much of this money was raised through contributions of $100,000 or more from individuals, PACs, corporations, and labor

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[7] The trustees of CED include, for example, the chief executive officers of Chase Manhattan, Corning, Federal Express, General Mills, International Paper, John Hancock, Merck, the New York Stock Exchange, Sara Lee, Sprint, UPS, and Xerox.

> unions, often with the overt assistance of federal officeholders. . . . These unlimited funding devices give a relatively small group of donors great influence in the electoral process. They facilitate relationships between monied interests and candidates that increase the possibility of corruption and undermine the accountability and transparency that safeguard against it. . . . *No reform is more urgently needed than a ban on national party 'soft money' financing.*

Committee for Economic Development, Investing in the People's Business: A Business Proposal for Campaign Finance Reform, at 3-4 (1999), *available at* http://www.ced.org/projects/cfr.htm.

Because soft money contributions to political parties are, by definition, not limited under the law, the demand from the parties for such contributions is escalating year after year. The business community is by far the most important source of soft money contributions in federal elections, and business leaders know first-hand the competitive pressures that lead businesses to make such contributions. *Id.* at 25. "One of the primary ways parties obtain very large [soft money] contributions is by providing donors with access to federal elected officials. . . . In recent years, both major parties have offered soft money donors access to elected leaders in exchange for contributions." *Id.* at 27.

In 1998, at least 218 corporations donated more than $100,000 to a political party, and 16 of these corporations gave in excess of $500,000. *Id.* at 25. "The largest soft money donors tend to be companies or industries that are heavily

regulated by the federal government or those whose profits can be dramatically affected by government policy." *Id*. Published reports of the access and privilege afforded soft money donors have "raised serious questions as to whether access . . . was for sale and fueled public cynicism about the influence enjoyed by wealthy contributors." *Id.* at 27.

Despite the public perception that there is a cozy relationship between corporate donors and party fundraisers, there is also a perception on the part of some business leaders that they are being "shaken down" by politically powerful officeholders and committee chairmen who exercise control over important legislative committees. According to the CED Report, federal officeholders participate in fundraising efforts "directed at donors whose interests are directly influenced by federal policy decisions. Such activities place undue pressure on potential donors. Businesses, in particular, are induced to contribute to keep up with their competitors or to ensure their own access to lawmakers." *Id*. Regardless of whether one views the problem as one of corporate leaders seeking undue influence with legislators or one of political candidates shaking down corporate leaders, the result is the same — a perception of corruption that undermines faith in our democratic government.

C. The National Media And Press All Recognize That Soft Money Corrupts And Appears To Corrupt The Political Process.

The public's perception of corruption is formed by what it sees in the media, and the national media has conveyed an unmistakable theme that soft money donations can and do corrupt our political parties and leaders. Virtually every major newspaper and periodical in the United States has decried the corruption and appearance of corruption that stems from soft money in the federal system. *See, e.g.*, *Soft-Money Travesties*, N.Y. Times, Sept. 16, 2000, at A14; *A Growing Addiction*, Wash. Post, Sept. 4, 2001, at A18; *Senate Would Do Well to End Resistence to 'Soft-Money' Reform*, USA Today, Oct. 19, 1999, at A16; Al Hunt, Jr., *Big Money Could Contaminate the Bush Years Too*, Wall St. J., January 11, 2001, at 23; *Dialing Back the Dollars*, Time, Sept. 6, 1999, at 42.

Public opinion surveys demonstrate that the American public has absorbed this information. According to a study conducted by Princeton Survey Research Associates, three out of four Americans believe that

> major campaign contributors from outside a congressional representative's district are granted more opportunity to make their views known on important issues than the people he or she was elected to represent. . . . Fully two-thirds (67%) think their own representative in Congress would listen to the views of outsiders who made large political contributions before a constituent's views.

Center for Responsive Politics, Money and Politics: A National Survey of the Public's Views on How Money Impacts Our Political System (1997) *available at* http://www.opensecrets.org/pubs/survey/s2.htm.

In sum, the views of Congress, business leaders, the national media, and the general public are all in accord. Soft money can and does corrupt the political parties and the political process. The view of the district court to the contrary should be rejected by this Court. Alaska's complete ban on corporate contributions to political parties is justified by the State's compelling interest in preventing the corruption and appearance of corruption that soft money donations have caused in the federal system.

CONCLUSION

The district court's order holding unconstitutional the prohibitions contained in Alaska Stat. § 15.13.074(f) on contributions to political parties should be reversed.

Respectfully submitted,

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