SUPREME COURT OF THE UNITED STATES

Nos. 02–1674, 02–1675, 02–1676, 02–1702, 02–1727, 02–1733, 02–1734, 02–1740, 02–1747, 02–1753, 02–1755, AND 02–1756

MITCH MCCONNELL, UNITED STATES SENATOR, ET AL., APPELLANTS
02–1674 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

NATIONAL RIFLE ASSOCIATION, ET AL., APPELLANTS
02–1675 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

FEDERAL ELECTION COMMISSION, ET AL., APPELLANTS
02–1676 *v.*
MITCH MCCONNELL, UNITED STATES SENATOR, ET AL.;

JOHN MCCAIN, UNITED STATES SENATOR, ET AL., APPELLANTS
02–1702 *v.*
MITCH MCCONNELL, UNITED STATES SENATOR, ET AL.;

REPUBLICAN NATIONAL COMMITTEE, ET AL., APPELLANTS
02–1727 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

NATIONAL RIGHT TO LIFE COMMITTEE, INC., ET AL., APPELLANTS
02–1733 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

AMERICAN CIVIL LIBERTIES UNION, APPELLANTS
02–1734 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

VICTORIA JACKSON GRAY ADAMS, ET AL., APPELLANTS
02–1740 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

RON PAUL, UNITED STATES CONGRESSMAN, ET AL., APPELLANTS
02–1747 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

CALIFORNIA DEMOCRATIC PARTY, ET AL., APPELLANTS
02–1753 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, ET AL., APPELLANTS
02–1755 *v.*
FEDERAL ELECTION COMMISSION, ET AL.;

CHAMBER OF COMMERCE OF THE UNITED STATES, ET AL., APPELLANTS
02–1756 *v.*
FEDERAL ELECTION COMMISSION, ET AL.

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

[December 10, 2003]

CHIEF JUSTICE REHNQUIST, dissenting with respect to BCRA Titles I and V.*

Although I join JUSTICE KENNEDY's opinion in full, I write separately to highlight my disagreement with the Court on Title I of the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 81, and to dissent from the Court's opinion upholding §504 of Title V.

I

The issue presented by Title I is not, as the Court implies, whether Congress can permissibly regulate cam-

*JUSTICE SCALIA and JUSTICE KENNEDY join this opinion in its entirety.

paign contributions to candidates, *de facto* or otherwise, or seek to eliminate corruption in the political process. Rather, the issue is whether Congress can permissibly regulate much speech that has no plausible connection to candidate contributions or corruption to achieve those goals. Under our precedent, restrictions on political contributions implicate important First Amendment values and are constitutional only if they are "closely drawn" to reduce the corruption of federal candidates or the appearance of corruption. *Buckley* v. *Valeo,* 424 U. S. 1, 26–27 (1976) *(per curiam).* Yet, the Court glosses over the breadth of the restrictions, characterizing Title I of BCRA as "do[ing] little more that regulat[ing] the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders." *Ante*, at 28 (joint opinion of STEVENS and O'CONNOR, JJ.). Because, in reality, Title I is much broader than the Court allows, regulating a good deal of speech that does *not* have the potential to corrupt federal candidates and officeholders, I dissent.

The lynchpin of Title I, new FECA §323(a), prohibits national political party committees from "solicit[ing]," "receiv[ing]," "direct[ing] to another person," and "spend-[ing]" *any* funds not subject to federal regulation, even if those funds are used for nonelection related activities. 2 U. S. C. A. §441i(a)(1) (Supp. 2003). The Court concludes that such a restriction is justified because under FECA, "donors have been free to contribute substantial sums of soft money to the national parties, which the parties can spend for the specific purpose of influencing a particular candidate's federal election." *Ante*, at 36. Accordingly, "[i]t is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude." *Ibid.* But the Court misses the point. Certainly "infusions of money into [candidates']

campaigns," *Federal Election Comm'n* v. *National Conservative Political Action Comm.,* 470 U. S. 480, 497 (1985), can be regulated, but §323(a) does not regulate only donations given to influence a particular federal election; it regulates *all donations* to national political committees, no matter the use to which the funds are put.

The Court attempts to sidestep the unprecedented breadth of this regulation by stating that the "close relationship between federal officeholders and the national parties" makes all donations to the national parties "suspect." *Ante,* at 45. But a close association with others, especially in the realm of political speech, is not a surrogate for corruption; it is one of our most treasured First Amendment rights. See *California Democratic Party* v. *Jones,* 530 U. S. 567, 574 (2000); *Eu* v. *San Francisco County Democratic Central Comm.,* 489 U. S. 214, 225 (1989); *Tashjian* v. *Republican Party of Conn.,* 479 U. S. 208, 214 (1986). The Court's willingness to impute corruption on the basis of a relationship greatly infringes associational rights and expands Congress' ability to regulate political speech. And there is nothing in the Court's analysis that limits congressional regulation to national political parties. In fact, the Court relies in part on this closeness rationale to regulate *nonprofit organizations*. *Ante*, at 47–48, n. 51. Who knows what association will be deemed too close to federal officeholders next. When a donation to an organization has no potential to corrupt a federal officeholder, the relationship between the officeholder and the organization is simply irrelevant.

The Court fails to recognize that the national political parties are exemplars of political speech at all levels of government, in addition to effective fundraisers for federal candidates and officeholders. For sure, national political party committees exist in large part to elect federal candidates, but as a majority of the District Court found, they also promote coordinated political messages and partici-

pate in public policy debates unrelated to federal elections, promote, even in off-year elections, state and local candidates and seek to influence policy at those levels, and increase public participation in the electoral process. See 251 F. Supp. 2d 176, 334–337 (DC 2003) *(per curiam)* (Henderson, J., concurring in judgment in part and dissenting in part); *id.*, at 820–821 (Leon, J.). Indeed, some national political parties exist primarily for the purpose of expressing ideas and generating debate. App. 185–186 (declaration of Stephen L. Dasbach et al. ¶11 (describing Libertarian Party)).

As these activities illustrate, political parties often foster speech crucial to a healthy democracy, 251 F. Supp. 2d, at 820 (Leon, J.), and fulfill the need for like-minded individuals to ban together and promote a political philosophy, see *Jones, supra*, at 574; *Eu*, *supra*, at 225. When political parties engage in pure political speech that has little or no potential to corrupt their federal candidates and officeholders, the government cannot constitutionally burden their speech any more than it could burden the speech of individuals engaging in these same activities. *E.g.*, *National Conservative Political Action Comm., supra*, at 496–497; *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley,* 454 U. S. 290, 297–298 (1981); *Buckley*, 424 U. S., at 27. Notwithstanding the Court's citation to the numerous abuses of FECA, under any definition of "exacting scrutiny," the means chosen by Congress, restricting all donations to national parties no matter the purpose for which they are given or are used, are not "closely drawn to avoid unnecessary abridgment of associational freedoms," *id.*, at 25.

BCRA's overinclusiveness is not limited to national political parties. To prevent the circumvention of the ban on the national parties' use of nonfederal funds, BCRA extensively regulates state parties, primarily state elections, and state candidates. For example, new FECA

§323(b), by reference to new FECA §§301(20)(A)(i)–(ii), prohibits state parties from using nonfederal funds[1] for general partybuilding activities such as voter registration, voter identification, and get out the vote for state candidates even if federal candidates are not mentioned. See 2 U. S. C. A. §§441i(b), 431(20)(A)(i)–(ii) (Supp. 2003). New FECA §323(d) prohibits state and local political party committees, like their national counterparts, from soliciting and donating "any funds" to nonprofit organizations such as the National Rifle Association or the National Association for the Advancement of Colored People (NAACP). See 2 U. S. C. A. §441i(d). And, new FECA §323(f) requires a state gubernatorial candidate to abide by federal funding restrictions when airing a television ad that tells voters that, if elected, he would oppose the President's policy of increased oil and gas exploration within the State because it would harm the environment. See 2 U. S. C. A. §§441i(f), 431(20)(A)(iii) (regulating "public communication[s] that refe[r] to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that . . . attacks or opposes a candidate for that office").

Although these provisions are more focused on activities that may *affect* federal elections, there is scant evidence in the record to indicate that federal candidates or officeholders are corrupted or would appear corrupted by donations for these activities. See 251 F. Supp. 2d, at 403, 407, 416, 422 (Henderson, J., concurring in judgment in part and dissenting in part); *id.*, at 779–780, 791 (Leon, J.); see also *Colorado Republican Federal Campaign Comm.* v.

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[1]The Court points out that state parties may use Levin funds for certain activities. Levin funds, however, are still federal restrictions on speech, even if they are less onerous than the restrictions placed on national parties.

Federal Election Comm'n, 518 U. S. 604, 616 (1996) (plurality opinion) (noting that "the opportunity for corruption posed by [nonfederal contributions for state elections, get-out-the-vote, and voter registration activities] is, at best, attenuated"). Nonetheless, the Court concludes that because these activities *benefit* federal candidates and officeholders, see *ante*, at 59 or prevent the circumvention of pre-existing or contemporaneously enacted restrictions,[2] see *ante*, at 57, 67, 71, 78, it must defer to the "'predictive judgments of Congress,'" *ante*, at 57 (quoting *Turner Broadcasting System, Inc.* v. *FCC,* 512 U. S. 622, 665 (1994)).

Yet the Court cannot truly mean what it says. Newspaper editorials and political talk shows *benefit* federal candidates and officeholders every bit as much as a generic voter registration drive conducted by a state party; there is little doubt that the endorsement of a major newspaper *affects* federal elections, and federal candidates and officeholders are surely "grateful," *ante*, at 60, for positive media coverage. I doubt, however, the Court would seriously contend that we must defer to Congress' judgment if it chose to reduce the influence of political endorsements in federal elections.[3] See *Miami Herald*

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[2] Ironically, in the Court's view, Congress cannot be trusted to exercise judgment independent of its parties' large donors in its usual voting decisions because donations may be used to further its members' reelection campaigns, but yet must be deferred to when it passes a comprehensive regulatory regime that restricts election-related speech. It seems to me no less likely that Congress would create rules that favor its Members' reelection chances, than be corrupted by the influx of money to its political parties, which may in turn be used to fund a portion of the Members' reelection campaigns.

[3] The Court's suggestion that the "close relationship" between federal officeholders and state and local political parties in some way excludes the media from its rationale is unconvincing, see *ante,* at 24, n. 15 (THOMAS, J., concurring in part, concurring in result in part, and

Publishing Co. v. *Tornillo,* 418 U. S. 241, 247, 250 (1974) (holding unconstitutional a state law that required newspapers to provide "right to reply" to any candidate who was personally or professionally assailed in order to eliminate the "abuses of bias and manipulative reportage" by the press).

It is also true that any circumvention rationale ultimately must rest on the circumvention itself leading to the corruption of federal candidates and officeholders. See *Buckley,* 424 U. S., at 38 (upholding restrictions on funds donated to national political parties "for the purpose of influencing any election for a Federal office" because they were prophylactic measures designed "to prevent evasion" of the contribution limit on *candidates*). All political speech that is not sifted through federal regulation circumvents the regulatory scheme to some degree or another, and thus by the Court's standard would be a "loophole" in the current system.[4] Unless the Court would

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dissenting in part), particularly because such a relationship may be proved with minimal evidence. Indeed, although the Court concludes that local political parties have a "close relationship" with federal candidates, thus warranting greater congressional regulation, I am unaware of *any* evidence in the record that indicates that local political parties have *any* relationship with federal candidates.

[4] BCRA does not even close all of the "loopholes" that currently exist. Nonprofit organizations are currently able to accept, without disclosing, unlimited donations for voter registration, voter identification, and get-out-the-vote activities, and the record indicates that such organizations already receive large donations, sometimes in the millions of dollars, for these activities, 251 F. Supp. 2d 176, 323 (DC 2003) (Henderson, J., concurring in judgment in part and dissenting in part) (noting that the NAACP Voter Fund received a single, anonymous $7 million donation for get-out-the-vote activities). There is little reason why all donations to these nonprofit organizations, no matter the purpose for which the money is used, will deserve any more protection than the Court provides state parties if Congress decides to regulate them. And who knows what the next "loophole" will be.

uphold federal regulation of all funding of political speech, a rationale dependent on circumvention alone will not do. By untethering its inquiry from corruption or the appearance of corruption, the Court has removed the touchstone of our campaign finance precedent and has failed to replace it with any logical limiting principle.

But such an untethering is necessary to the Court's analysis. Only by using amorphous language to conclude a federal interest, however vaguely defined, exists can the Court avoid the obvious fact that new FECA §§323(a), (b), (d), and (f) are vastly overinclusive. Any campaign finance law aimed at reducing corruption will almost surely affect federal elections or prohibit the circumvention of federal law, and if broad enough, most laws will generally reduce some appearance of corruption. Indeed, it is precisely because broad laws are likely to nominally further a legitimate interest that we require Congress to tailor its restrictions; requiring all federal candidates to self-finance their campaigns would surely reduce the appearance of donor corruption, but it would hardly be constitutional. In allowing Congress to rely on general principles such as affecting a federal election or prohibiting the circumvention of existing law, the Court all but eliminates the "closely drawn" tailoring requirement and meaningful judicial review.

No doubt Congress was convinced by the many abuses of the current system that something in this area must be done. Its response, however, was too blunt. Many of the abuses described by the Court involve donations that were made for the "purpose of influencing a federal election," and thus are already regulated. See *Buckley*, *supra*. Congress could have sought to have the existing restrictions enforced or to enact other restrictions that are "closely drawn" to its legitimate concerns. But it should not be able to broadly restrict political speech in the fashion it has chosen. Today's decision, by not requiring tai-

lored restrictions, has significantly reduced the protection for political speech having little or nothing to do with corruption or the appearance of corruption.

II

BCRA §504 amends §315 of the Communications Act to require broadcast licensees to maintain and disclose records of any *request* to purchase broadcast time that "is made by or on behalf of a legally qualified candidate for public office" or that "communicates a message relating to any political matter of national importance," including communications relating to "a legally qualified candidate," "any election to Federal office," and "a national legislative issue of public importance." BCRA §504; 47 U. S. C. A. §315(e)(1) (Supp. 2003).[5] This section differs from other

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[5] Section 315(e), as amended by BCRA §504, provides:

"Political record

"(1) In general

"A licensee shall maintain, and make available for public inspection, a complete record of a request to purchase broadcast time that—

"(A) is made by or on behalf of a legally qualified candidate for public office; or

"(B) communicates a message relating to any political matter of national importance, including—

"(i) a legally qualified candidate;

"(ii) any election to Federal office; or

"(iii) a national legislative issue of public importance.

"(2) Contents of record

"A record maintained under paragraph (1) shall contain information regarding—

"(A) whether the request to purchase broadcast time is accepted or rejected by the licensee;

"(B) the rate charged for the broadcast time;

"(C) the date and time on which the communication is aired;

"(D) the class of time that is purchased;

"(E) the name of the candidate to which the communication refers and the office to which the candidate is seeking election, the election to which the communication refers, or the issue to which the communication refers (as applicable);

BCRA disclosure sections because it requires *broadcast licensees* to disclose *requests* to purchase broadcast time rather than requiring *purchasers* to disclose their *disbursements* for broadcast time. See, *e.g.*, BCRA §201. The Court concludes that §504 "must survive a *facial* attack under any potentially applicable First Amendment standard, including that of heightened scrutiny." *Ante*, at 15 (opinion of BREYER, J.). I disagree.

This section is deficient because of the absence of a sufficient governmental interest to justify disclosure of mere requests to purchase broadcast time, as well as purchases themselves. The Court approaches §504 almost exclusively from the perspective of the broadcast licensees, ignoring the interests of candidates and other purchasers, whose speech and association rights are affected by §504. See, *e.g.*, *ante,* at 5 (noting that broadcasters are subject to numerous recordkeeping requirements); *ante*, at 7 (opining that this Court has recognized "broad governmental authority for agency information demands from regulated entities"); *ante*, at 8–9 ("[W]e cannot say that these requirements will impose disproportionate administrative burdens"). An approach that simply focuses on whether the administrative burden is justifiable is untenable. Because §504 impinges on core First Amendment rights, it is subject to a more demanding test than mere rational-

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"(F) in the case of a request made by, or on behalf of, a candidate, the name of the candidate, the authorized committee of the candidate, and the treasurer of such committee; and

"(G) in the case of any other request, the name of the person purchasing the time, the name, and phone number of a contact person for such person, and a list of the chief executive officers or members of the executive committee or of the board of directors of such person.

"(3) Time to maintain file

"The information required under this subsection shall be placed in a political file as soon as possible and shall be retained by the licensee for a period of not less than 2 years."

basis review. The Court applies the latter by asking essentially whether there is any conceivable reason to support §504. See *ante*, at 8 (discussing the ways in which the disclosure "can help" the FCC and the public); *ante*, at 10 (noting that the "recordkeeping requirements seem likely to help the FCC" enforce the fairness doctrine).

Required disclosure provisions that deter constitutionally protected association and speech rights are subject to heightened scrutiny. See *Buckley*, 424 U. S., at 64. When applying heightened scrutiny, we first ask whether the Government has asserted an interest sufficient to justify the disclosure of requests to purchase broadcast time. *Ibid.;* see *ante*, at 89 (joint opinion of STEVENS and O'CONNOR, JJ.) (concluding that the important state interests the *Buckley* Court held justified FECA's disclosure requirements apply to BCRA §201's disclosure requirement). But the Government, in its brief, proffers no interest whatever to support §504 as a whole.

Contrary to the Court's suggestion, *ante*, at 7 (opinion of BREYER, J.), the Government's brief does not succinctly present interests sufficient to support §504. The two paragraphs that the Court relies on provide the following:

> "As explained in the government's brief in opposition to the motion for summary affirmance on this issue filed by plaintiff National Association of Broadcasters (NAB), longstanding FCC regulations impose disclosure requirements with respect to the sponsorship of broadcast matter 'involving the discussion of a controversial issue of public importance.' 47 C. F. R. 73.1212(d) and (e) (2002); see 47 C. F. R. 76.1701(d) (2002) (same standard used in disclosure regulation governing cablecasting). By enabling viewers and listeners to identify the persons actually responsible for communications aimed at a mass audience, those regulations assist the public in evaluating the mes-

> sage transmitted. See *Bellotti*, 435 U. S. at 792 n. 32 ('Identification of the source of advertising may be required . . . so that the people will be able to evaluate the arguments to which they are being subjected.').
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> "The range of information required to be disclosed under BCRA §504 is comparable to the disclosures mandated by pre-existing FCC rules. Compare 47 U. S. C. 315(e)(2)(G) (added by BCRA §504), with 47 C. F. R. 73.1212(e) and 76.1701(d) (2002). Plaintiffs do not attempt to show that BCRA §504's requirements are more onerous than the FCC's longstanding rules, nor do they contend that the pre-existing agency regulations are themselves unconstitutional. See generally 02–1676 Gov't Br. in Opp. to Mot. of NAB for Summ. Aff. 4–9. Because BCRA §504 is essentially a codification of established and unchallenged regulatory requirements, plaintiffs' First Amendment claim should be rejected." Brief for FEC et al. in No. 02–1674 et al., pp. 132–133; *ante,* at 7.

While these paragraphs attempt to set forth a justification for the new Communications Act §315(e)(1)(B), discussed below, I fail to see any justification for BCRA §504 in its entirety. Nor do I find persuasive the Court's and the Government's argument that pre-existing unchallenged agency regulations imposing similar disclosure requirements compel the conclusion that §504 is constitutional and somehow relieve the Government of its burden of advancing a constitutionally sufficient justification for §504.

At oral argument, the Government counsel indicated that one of the interests supporting §504 in its entirety stems from the fairness doctrine, Tr. of Oral Arg. 192, which in general imposes an obligation on licensees to devote a "reasonable percentage" of broadcast time to issues of public importance in a way that reflects opposing

views. See *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367 (1969). Assuming, *arguendo*, this latter-day assertion should be considered, I think the District Court correctly noted that there is nothing in the record that indicates licensees have treated purchasers unfairly. 251 F. Supp. 2d, at 812 (Leon, J.). In addition, this interest seems wholly unconnected to the central purpose of BCRA, and it is not at all similar to the governmental interests in *Buckley* that we found to be "sufficiently important to outweigh the possibility of infringement," 424 U. S., at 66.

As to the disclosure requirements involving "any political matter of national importance" under the new Communications Act §315(e)(1)(B), the Government suggests that the disclosure enables viewers to evaluate the message transmitted.[6] First, insofar as BCRA §504 requires reporting of "request[s for] broadcast time" as well as actual broadcasts, it is not supported by this goal. Requests that do not mature into actual purchases will have no viewers, but the information may allow competitors or adversaries to obtain information regarding organizational or political strategies of purchasers. Second, even as to broadcasts themselves, in this noncandidate-related context, this goal is a far cry from the Government interests endorsed in *Buckley*, which were limited to evaluating and preventing corruption of federal candidates. *Ibid.;* see also *McIntyre* v. *Ohio Elections Comm'n,* 514 U. S. 334, 354 (1995).

As to disclosure requirements with respect to candidates under the new Communications Act §315(e)(1)(A), BCRA §504 significantly overlaps with §201, which is today also upheld by this Court, *ante*, at 87–95 (joint opinion of

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[6] Communications relating to candidates will be covered by the new Communications Act §315(e)(1)(A), so, in this context, we must consider, for example, the plaintiff-organizations, which may attempt to use the broadcast medium to convey a message espoused by the organizations.

STEVENS and O'CONNOR, JJ.), and requires purchasers of "electioneering communications" to disclose a wide array of information, including the amount of each disbursement and the elections to which electioneering communications pertain. While I recognize that there is this overlap, §504 imposes a different burden on the purchaser's First Amendment rights: as noted above, §201 is limited to *purchasers'* disclosure of *disbursements* for electioneering communications, whereas §504 requires *broadcast licensees'* disclosure of *requests* for broadcast time by purchasers. Not only are the purchasers' requests, which may never result in an actual advertisement, subject to the disclosure requirements, but §504 will undoubtedly result in increased costs of communication because the licensees will shift the costs of the onerous disclosure and record-keeping requirements to purchasers. The Government fails to offer a reason for the separate burden and apparent overlap.

The Government cannot justify, and for that matter, has not attempted to justify, its requirement that "request[s for] broadcast" time be publicized. On the record before this Court, I cannot even speculate as to a governmental interest that would allow me to conclude that the disclosure of "requests" should be upheld. Such disclosure risks, *inter alia*, allowing candidates and political groups the opportunity to ferret out a purchaser's political strategy and, ultimately, unduly burdens the First Amendment freedoms of purchasers.

Absent some showing of a Government interest served by §504 and in light of the breadth of disclosure of "requests," I must conclude that §504 fails to satisfy First Amendment scrutiny.