No. 01-35666

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Defendants-Appellants,

v.

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

Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA (No. A97-272-CV (JKS))

BRIEF OF *AMICUS CURIAE* NATIONAL VOTING RIGHTS INSTITUTE IN SUPPORT OF APPELLANTS STATE OF ALASKA AND THE ALASKA PUBLIC OFFICES COMMISSION URGING REVERSAL OF THE JUDGMENT BELOW

DAVID A. WILSON
JAMES M. DOWD
HALE AND DORR LLP
1455 Pennsylvania Avenue , N.W.
10th Floor
Washington, D.C. 20004
(202) 942-8400

BRENDA WRIGHT
JOHN C. BONIFAZ
NATIONAL VOTING RIGHTS INSTITUTE
One Bromfield Street
Third Floor
Boston, MA 02108
(617) 368-9100

Attorneys for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

Amicus National Voting Rights Institute is a non-profit organization dedicated to protecting the constitutional right of all citizens, regardless of economic status, to an equal and meaningful vote and to equal and meaningful participation in every phase of electoral politics. Through litigation and public education, the Institute works to ensure that those who do not have access to wealth are able to participate fully in the political process.

Wealth is far too important in modern elections—so much so that without meaningful regulation of campaign finance, including restrictions on contributions to political parties, the ability of average citizens to participate meaningfully in the political process is threatened. Because of the compelling interests in the integrity of the political process that are at stake, the Institute respectfully urges reversal of the District Court's ruling invalidating Alaska's limitations on contributions to political parties.[1]

SUMMARY OF ARGUMENT

The District Court's decision rests on a critical misapprehension of the Supreme Court's campaign finance decisions. The soft-money loophole that exists at the federal level – which the District Court used as its model for analyzing the constitutionality of Alaska's contribution limits – simply is not constitutionally

mandated. The District Court's decision, if not reversed by this Court, would enshrine a permissive regulatory loophole[2] as a permanent and unalterable requirement of First Amendment law, preventing the states as well as Congress from limiting contributions made to parties for so-called "soft money" purposes.

This Brief focuses upon two principal errors underlying the District Court's invalidation of Alaska's political party contribution limits. First, the District Court erred when it analyzed the constitutionality of the contribution limits as if they restricted the expenditures made with those contributions. Under *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam) and its progeny, limits on contributions do not significantly interfere with rights of speech and association and are a constitutionally permissible means of deterring corruption and its appearance. The challenged limits regulate only *contributions to* political parties, and do not in any way limit the amount that a party may *spend* on soft-money activities or any other activities. Accordingly, they do not run afoul of the First Amendment.

Second, the creation of a constitutionally mandated loophole for unlimited contributions to political parties constitutes an unwarranted expansion of the "issue advocacy" doctrine first recognized in *Buckley.* The District Court erroneously

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[1] The parties have consented to the filing of this brief *amicus curiae.* These consents are appended to the Institute's Rule 29(b) motion.

believed that limiting contributions to political parties when such contributions are used for any purpose other than direct electoral advocacy is an impermissible infringement on protected "issue advocacy." This is a misreading of *Buckley*. The express advocacy/issue advocacy distinction established in *Buckley* is not the touchstone for regulation of candidates and entities – such as political parties – whose major purpose is the nomination and election of candidates. Because political parties are formed for the very purpose of electing candidates to office, there is no First Amendment impediment to treating all of their activities as election-related and, accordingly, no First Amendment impediment to maintaining reasonable limits on the size of the contribution that any one individual may make to a political party.

Reversal is also warranted because unlimited contributions to political parties threaten the integrity of campaign finance regulations that the U.S. Supreme Court has determined are appropriate to deter corruption and the appearance of corruption. Absent reasonable limits, contributions to parties will be used to circumvent restrictions on contributions to candidates.

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[2] *See* Note, *Soft Money: The Current Rules and the Case for Reform*, 111 HARV. L. REV. 1323, 1325 (March 1998) (describing creation of hard-soft money distinction in 1978 FEC ruling).

For all these reasons, *amicus* respectfully urges reversal of the decision below. This Court should reverse the judgment below and affirm that the states and Congress have authority to limit soft-money contributions to political parties.

BACKGROUND

A. The Alaska Campaign Finance Reform Act

In May 1996, the Alaska Legislature responded to a citizens' initiative on campaign finance reform by enacting legislation designed to "revise Alaska's election campaign finance laws in order to restore the public's trust in the electoral process and to foster good government." House CS for CSSB 191 (FIN) am H § 1(b) (the "Act"). Based in part on the Legislature's finding that "organized special interests are responsible for raising a significant portion of all election campaign funds and may thereby gain an undue influence over election campaigns and elected officials . . . ,"[3] the Act, *inter alia*, imposed a $500 restriction on direct contributions to candidates, limited individual contributions to political parties to $5000 per year,[4] and prohibited corporations and certain other organizations from contributing to political parties.[5] In taking this action, the Legislature was responding to the reality that vital public trust in the integrity of the Legislature had been substantially undermined by, among other things, "calculated evasions of

[3] *Id.* §1(a)(3).
[4] AS 15.13.070(b)(2).

the purpose and spirit of campaign laws." Josephson Institute for the Advancement of Ethics, *The State of Legislative Ethics In The State Of Alaska* (Apr. 2, 1990) (Report to The Alaska State Senate) at 8 (ER 125).

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[5] AS 15.13.074(f).

B. The Growth Of Soft Money And Of Public Cynicism

The public cynicism that the Legislature sought to address with the Act exists across the United States. The last fifteen years have seen massive increases in unregulated contributions of so-called "soft money" to political parties[6] that the Act seeks to regulate. The public's confidence in the integrity of the political process has plummeted as the public watches corporations and wealthy interests making unlimited soft-money donations to the parties, and receiving access and influence in return.

The explosion in soft money contributions began in 1988 as a means of circumventing limits on hard money contributions. When Robert Farmer, chief fundraiser for 1988 Democratic presidential candidate Michael S. Dukakis, proposed the first major soft money fundraising program, a top George H.W. Bush

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[6] "Soft money" is a term originating in the distinction, under federal law, between regulated and unregulated funds that may be donated in federal elections. The Federal Election Campaign Act Amendments of 1974 ("FECA") place limits on the amounts of funds that can be donated to federal candidates and political parties, as well as limitations on the kinds of entities permitted to make such donations. These are so-called "hard-money" limits. However, a series of rulings and regulations issued by the Federal Election Commission permit political parties to receive unlimited donations, regardless of the source, for certain activities deemed "nonfederal," such as the election of non-federal candidates and certain get-out-the-vote activities. These latter, unregulated donations to political parties have become known as "soft-money" contributions. *See* Note, *Soft Money: The Current Rules and the Case for Reform*, 111 HARV. L. REV. 1323, 1324-25 (March 1998).

fundraiser declared that it was "illegal on its face."[7] But soon both parties had developed major soft money campaigns. In 1988, the national parties raised and spent just $45 million in soft money. In 1992, the national parties combined raised $75 million in soft money; they raised $260 million in 1996;[8] and during the 2000 campaign cycle, they received a record $463 million from soft money contributors.[9] Also in 2000, state and local political committees took in $610 million.[10]

Soft money contributions are not limited in federal elections, and the decision below striking down the Act's soft money restrictions would deem the perverse dichotomy that presently exists in federal elections to be constitutionally required for Alaska. While all citizens' hard money contributions would be capped to limit the risk of corruption and undue influence from those contributions, those with the financial ability to contribute more could channel huge additional sums

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[7] Rich Bond, deputy campaign manager for then-Vice President Bush, *quoted in* Ruth Marcus and Sarah Cohen, *The Loophole Lesson in 'Soft Money,* WASHINGTON POST, Mar. 18, 2001, at A1.

[8] Karen Gullo, *Once Illegal 'Soft Money' Taints Political Climate*, ROCKY MOUNTAIN NEWS, Oct. 12, 1997, at 14A, *quoted in* Donald J. Simon, *Beyond Post-Watergate Reform: Putting an End to the Soft Money System*, 24 J. LEGIS. 167, 176 (1998).

[9] Common Cause, "National Parties Raise Record $463 Million in Soft Money during 1999-2000 Election Cycle," (Feb. 7, 2001) <http://www.commoncause.org/publications/feb01/020701st.html>.

[10] *See* Jim Drinkard, *State, Local Parties rake in 'Soft Money' millions*, USA TODAY, Jul. 27, 2001, at 4A.

into the electoral process in the form of soft money contributions. That such contributions provide the giver with a disproportionate voice in government is demonstrated by the willingness of contributors to make those contributions in ever-increasing amounts. Where hard money restrictions exist, soft money contributions have become the preferred method of distinguishing oneself from other contributors in a candidate's mind. Plainly, those who make a $25,000 soft money contribution to a candidate's party stand a better chance of gaining the candidate's attention than someone who gives a $500 hard money contribution to the candidate's campaign organization.

Unregulated contributions of soft money create at least the appearance of a corrupt political process. The last five years have produced scores of stories of candidates (particularly incumbents) seeking huge amounts of soft money for their parties and of office-holders taking actions that favor soft money contributors.

For example, President Clinton's veto of a tort reform bill was closely timed with a wealthy Texas trial lawyer's donation of $100,000 to the Democratic National Committee in 1995. On a "call sheet" prepared for then-Vice President Albert Gore listing party donors and suggesting ways the Vice-President could approach them, Gore was informed that the trial lawyer "is closely following tort

reform."[11] Two weeks later, a call sheet prepared for then-DNC chairman Donald Fowler to use in making follow up calls suggested Fowler say "I know [sic] will give $100K when [sic] the President vetos Tort reform, but we really need it now. Please send ASAP if possible."[12] President Clinton did veto the bill, and the trial lawyer's law firm contributed over $800,000 to national Democrats in the following two years. The trial lawyer explained his reasoning, stating "In order to protect our philosophies and in order to protect our law practice and do what I think is right for our clients, contributions are necessary."[13]

Trial lawyers are not alone in this approach to soft money contributions. Three-fourths of the business executives who participated in a 2000 Committee for Economic Development survey said that they view their own soft money gifts to the Democratic and Republican parties more as protection payments than as civic contributions.[14] A substantial majority of those executives said that soft money contributions are injurious to democracy, but that they made their "gifts" in order to provide their companies an opportunity to help shape legislation.[15]

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[11] Susan Schmidt, *1995 Documents Appear to Link Lawyer's Contribution to Veto*, WASHINGTON POST, Sept. 14, 2000, at A9.
[12] *Id.*
[13] *Id.*
[14] *See* Edward Zuckerman, *Business group's poll blasts soft money*, THE POLITICAL FINANCE AND LOBBY REPORTER, Oct. 25, 2000, <http://www.pacfinder.com/Articles/102500.html>.
[15] *Id.*

Confirming the perception of these business people is the evidence that large soft money contributors are frequent beneficiaries of favorable governmental action. For example:

- In 1996, Senator Alfonse D'Amato threatened to cut aid to Zimbabwe by more than half unless it repealed a law unfavorable to American International Group, who had given $300,000 in soft money to the Republican Party since 1990.[16]
- In February 1997, the Department of Housing and Urban Development (HUD) selected Energy Capital Partners as its first pre-approved lender for a $200 million housing project. Controlling partners Alan Leventhal and Fred Seigel had helped raise $3 million for the Democratic National Committee (DNC), and Leventhal, his family, and his companies had given $185,000 to President Clinton's reelection campaign.[17]
- Nursing home executive and later DNC finance chairman Alan Solomont contributed $160,000 to the DNC and helped raise another $1.1 million from nursing home executives. Correspondingly, the

[16] *See* Richard Lacayo, *Meanwhile, on the Other Side of the Aisle. . .* , TIME, Nov. 11, 1996 at 34.

Clinton administration altered certain nursing home regulations to which the industry objected.[18]

- During President Clinton's 1996 re-election campaign, 350 donors purchased invitations to coffees with President Clinton in exchange for $27 million of contributions to the Democratic Party.[19] Business consultant Pauline Kanchanalak made an $85,000 soft money contribution to the DNC on the same day she and five clients met with President Clinton.[20]

These and many other reports show that those who are able to make substantial soft money contributions are likely to have, at a minimum, disproportionate access to elected officials and decisionmakers. Public cynicism about the ability of elected officials to act in the public interest has grown to disturbing levels in the wake of these abuses. In one national poll, for example, 77

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[17] *See* Michael K. Frisby, et al, *How Clintonites Built Fund-Raising Machine of Breadth and Power*, WALL STREET JOURNAL, Feb. 7, 1997, at A1.
[18] *See* Mimi Hall, *Two New Reports Increase Scrutiny of Fund-Raising*, USA TODAY, Feb. 3, 1997, at 9A.
[19] Don Van Natta, Jr., *Some Democratic Fund-Raisers Say They Sold Access to Clinton,* NEW YORK TIMES, Feb. 26, 1997, at A1.
[20] David Willman, et al, *What Clinton Knew: How a Push for New Fund-Raising Led to Foreign Access, Bad Money, and Questionable Ties*, L.A. TIMES, Dec. 21, 1997, at A1.

percent said they think campaign fund raising practices are corrupt or unethical.[21] In another, 72 percent of respondents said they favor a limit on soft money contributions.[22]

C. Contributors And Candidates Use Soft Money To Circumvent Hard Money Limits

It is also beyond serious doubt that unregulated soft money contributions are used by contributors, candidates and parties to circumvent limits on hard money contributions. Candidates increasingly focus on soft money fundraising because the payoff is greater – wooing a single contributor for hard money can, under the Act, produce, at most, a $500 contribution, while a soft money solicitation can produce far more. As soft money pours in, the parties can then use such funds for activities that directly foster the election of particular candidates – phone banks, turnout efforts directed toward the candidate's supporters, so-called "issue ads" that support the candidate's election – and other activities that would otherwise be funded from hard money contributions.

For example, President Clinton specifically asked donors for soft money to pay for television advertisements during his 1996 campaign. Republican candidate

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[21] The Pew Research Center for The People and The Press, *Why Americans Aren't Stirred by Campaign Finance Reform*, POLL ANALYSIS, Mar. 27, 2001, <http://www.people-press.org/aol32701.html>.

Robert Dole also solicited soft money.[23] Both Clinton and Dole admitted that their parties' issue advertisements aimed to advance their campaigns.[24] These soft money expenditures on advertisements allowed the candidates to save their hard money for other purposes, effectively circumventing campaign finance limits. President Clinton personally directed how DNC soft money was spent, and the Dole campaign wrote and produced ads paid for with RNC soft money. The Democrats spent $44 million on these "issue ads," and the Republicans spent $36.7 million. The DNC also funneled soft money to state parties, who then paid President Clinton's media team, and ran ads produced by the team.[25]

The same thing, albeit on a smaller scale, had begun in Alaska prior to the Act. According to a former member of the Alaska State House who had been active in the House Democratic Campaign Committee ("HDCC"), the HDCC and its Republican counterpart raised hundreds of thousands of dollars in each election:

> Nearly all the money came from large contributors who had already given the maximum amount in many races and wanted to see additional money (beyond the limits of the law) go to these candidates. In a number of cases business interests went even further and attempted to direct their contributions as pass-throughs to specific

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[22] Wendy W. Simmons, *Majority of Americans Favor Limiting "Soft Money,"* GALLUP NEWS SERVICE, October 18, 2000 <http://www.gallup.com/poll/releases/pr001018b.a>.
[23] *See* Note, *Soft Money: The Current Rules and the Case for Reform*, 111 HARV. L. REV. 1323, 1332–33 (1998).
[24] *See id.* at 1334–36.
[25] *Id.* at 1336.

> candidates. We didn't allow any such illegal direct pass-throughs, but the undirected pass-throughs still achieved their goals of exceeding the contribution limits to candidates.

Affidavit of David Finkelstein ¶14 (ER 158).

Similarly, a former Governor of Alaska testified that among the abuses he had observed was that "[m]oney given to a political party by a contributor was earmarked for pass-through to a specific candidate. This made a mockery of contribution limits and turned political parties into money launderers." Affidavit of Steve Cowper (former Alaska Governor) ¶5 (ER 162).

ARGUMENT

I. THE ACT'S LIMITS ON CONTRIBUTIONS TO POLITICAL PARTIES ARE JUSTIFIED BY COMPELLING GOVERNMENTAL INTERESTS AND DO NOT VIOLATE THE FIRST AMENDMENT

A. The District Court Improperly Analyzed The Act's Contribution Limits As If They Constituted Limits On The Amounts That Political Parties May Spend

The District Court erred when it analyzed the constitutionality of the Act's contribution limits as if they restricted the expenditures made with those contributions. The District Court's ruling is premised on the flawed reasoning that because a political party may use some contributions for so-called "soft-money" purposes, the Act's contribution limit "significantly interferes with the protected rights of speech and association" (ER 47). However, the Supreme Court has

consistently rejected the argument that a contribution limit constitutes a significant interference with the rights of speech and association. The District Court erred in determining otherwise and in treating Alaska's contribution limit as if it required the heightened scrutiny applicable to limits on expenditures.[26]

Under *Buckley* and its progeny, restraints on campaign contributions are justified to prevent "corruption and the appearance of corruption." *Buckley*, 424 U.S. at 26-27; *Nixon v. Shrink Missouri Gov't PAC*, 538 U.S. 377, 385-389 (2000). The *Buckley* Court upheld the Federal Election Campaign Act's $1,000 limit for individual contributions to a candidate or his authorized committee, finding that there was "public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." "[T]he problem of large campaign contributions," the Court declared, is that such contributions "have been identified" with "the actuality and potential for corruption. . . ." *Id.* at 28. *Buckley* also upheld FECA's $25,000 aggregate limit on the amount that an individual could contribute to all federal candidates, national political parties, and political committees in any

[26] At one point in its opinion, the District Court indicated that the Act's contribution limits were invalid "under either the compelling interest or the significantly important interest test." Apr. 10 2001 op at 10 (ER 47). Notwithstanding this statement, the District Court clearly analyzed the contribution limits on the assumption that they "significantly interfere[]" with the right of speech and association. *Id.* As shown below, this analysis is fundamentally mistaken. Under the level of scrutiny applicable to contribution limits set forth in *Buckley* and *Shrink*, the limits clearly pass constitutional muster.

given year, reasoning that this aggregate limit was necessary to deter evasion of the $1,000 individual limit. 424 U.S. at 25-26.

While upholding these limits on contributions, the *Buckley* Court struck down the FECA's limits on the amounts that candidates could spend on their campaigns, as well as its limits on the amounts that could be independently spent to promote a candidate. This distinction between limits on contributions and limits on expenditures was justified, the Court held, because limits on contributions do not act as significant restraints on speech:

> A limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

424 U.S. at 20-21; *see also Shrink*, 528 U.S. at 386-87.

Thus, *Buckley* recognized that limitations on expenditures and contributions have different impacts on the First Amendment's association right. *Shrink,* 528 U.S. at 387 (citing *Buckley*, 424 U.S. at 22, 28). Because contribution limits have a lesser impact on associational rights, such limits are not subject to the full strict

scrutiny review which the Court has applied to expenditure limits. *Shrink*, 528 U.S. at 387 (" 'We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.'") (quoting *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986)). *See also California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182 (1981) (upholding $5,000 limit on individual contributions to political committees ("PACs")); *FEC v. Colorado Republican Federal Campaign Comm.*, 121 S. Ct. 2351, 2356 (2001) (hereinafter "*Colorado II*") (noting constitutional distinction between limits on contributions and limits on expenditures). Instead, limits on contributions may be upheld when they are "'closely drawn' to match a 'sufficiently important interest,' though the dollar amount of the limit need not be 'fine tun[ed].'" *Shrink,* 528 U.S. at 387-88 (quoting *Buckley*, 424 U.S. at 25 & 30).

The mere fact that a contribution limit may affect the overall amount of funds available for particular types of expenditures does not convert a contribution limit into an expenditure limit, and does not justify the heightened scrutiny applicable to direct limits on expenditures. The Supreme Court rejected just such an argument in *California Medical Ass'n v. FEC*, 453 U.S. at 195-97 (plurality opinion). There, a contributor who wished to make unlimited donations to a

multicandidate PAC complained that the FECA's $5,000 limit on donations to PACs "is akin to an unconstitutional expenditure limitation because it restricts the ability of [the donor] to engage in political speech through a political committee." 453 U.S. at 195 (plurality opinion). The Court disagreed, declaring that "[n]othing in [the statute] limits the amount [the donor] or any of its members may independently expend in order to advocate political views; rather, the statute restrains only the amount that [the donor] may contribute to [the PAC]." 453 U.S. at 195. As the Court further explained "the 'speech by proxy' that [the donor] seeks to achieve through its contributions to [the PAC] is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection." 453 U.S. at 196 (plurality opinion).[27]

Thus, the District Court clearly misapprehended Supreme Court precedent by assuming that the Act's limits on contributions to political parties "significantly interfere[]" with speech and associational rights (ER 47). Under the Act, an

[27] Sitting on the Court of Appeals panel that decided *Cal-Med*, then-Judge Kennedy wrote that the effect of contribution limits in restricting even the funds spent by independent expenditure PACs should not be given serious consideration in evaluating the constitutionality of the contribution limits. 641 F.2d 619, 626 n.5 (9th Cir. 1980) (Kennedy, J.), *aff'd*, 453 U.S. 182 (1981). *See also North Carolina Right to Life v. Leake*, 108 F. Supp. 2d 498, 514-517 (E.D. N.C. 2000) (rejecting argument that limits on contributions to PACs that are solely engaged in making independent expenditures were constitutionally suspect because of their impact on protected speech).

individual may contribute up to $5,000 to a party, which certainly allows for "the symbolic expression of support evidenced by a contribution." *Buckley*, 424 U.S. at 21. The contributor also remains free to discuss the political party's platform, participate in party issue forums or get-out-the-vote activities, and otherwise associate him or herself with the party. The party's rights are not infringed, because the party remains free to choose how to spend the contributed funds – whether on direct electoral advocacy or on so-called "soft money" purposes (get-out-the-vote activities, advertising the party platform, and the like). Indeed, the Act's contribution limits leave the party free to spend as much money as it wishes on these "soft-money" activities, without any upper limit on the amount of such expenditures. It merely requires the parties to raise such funds from individuals in amounts of $5,000 or less.

Hence, although the Supreme Court has not yet had occasion to rule directly on the specific question of limiting soft-money contributions to political parties, the principles established in *Buckley* and its progeny inescapably point to the constitutionality of such limits. Where a legislature determines that a contribution ceiling of a particular size is necessary to prevent "an unscrupulous contributor [from] exercis[ing] improper influence over a candidate or officeholder," *Buckley*,

424 U.S. at 30, courts should defer to that determination.[28] The factual discussion above, *supra* at 6-15, and in the Opening Brief of Appellants State of Alaska and the Alaska Public Offices Commission (hereafter, "Brief of the State of Alaska") at 6-13, 20-29, fully document how the Act's limits on contributions to political parties are necessary to deter corruption and the appearance of corruption and to deter evasion of limits on contributions to candidates. Further, and as the Brief of the State of Alaska fully explains, the Supreme Court's decision in *Colorado II,* which squarely recognizes the corrupting potential of contributions to political parties (*see* 121 S. Ct. at 2363-65), has directly undermined the District Court's conclusion that donations to political parties lack "a sufficient connection with any specific elected official to satisfy the tests imposed by the United States Supreme Court on political finance reform" (ER 47); *see* Brief of the State of Alaska at 33, 43-45.

B. All Contributions To Political Parties May Be Regulated Because A Party's "Major Purpose" Is The Election And Nomination Of Candidates To Office

The plaintiffs' effort to create a constitutionally mandated loophole for unlimited contributions to political parties also constitutes an unwarranted expansion of the "issue advocacy" doctrine first recognized in *Buckley.* The

[28] As in *Buckley* itself, there is nothing in the record to suggest that "the contribution limitations imposed by [AS 15.13.070] would have any dramatic

District Court erroneously believed that limiting contributions to political parties when such contributions are used for any purpose other than direct electoral advocacy is an impermissible infringement on protected "issue advocacy" (ER 47-48). To understand the District Court's error, it is necessary to review the origin of the "issue advocacy" doctrine in *Buckley*.

The "issue advocacy" doctrine derived from the *Buckley* Court's concern about vagueness and overbreadth in certain FECA provisions relating to the activities of groups or individuals who might not be principally engaged in electoral activity. In Section 608(e)(1), the statute imposed limits on expenditures "relative to a clearly defined candidate," which applied to individuals and groups *other than* candidates, political parties and political organizations. 424 U.S. at 39-40. In Section 434(e), FECA imposed disclosure obligations on "political committees" and candidates for, *inter alia*, expenditures "for the purpose of . . . influencing" the nomination for election, or the election, of candidates for federal office. *Id.* at 80.

To avoid unduly chilling protected speech, the Court narrowed the scope of § 608(e)(1) to cover only communications that "*in express terms advocate* the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 44 (emphasis added). Similarly, the Court narrowed the definition of

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adverse effect on the funding of [political parties]." *See Buckley*, 424 U.S. at 21.

"expenditures" subject to the reporting requirements of § 434(e) so that it protected the rights of individuals and groups whose major purpose is *not* the election or nomination of candidates and reached "only funds used for communications that *expressly advocate* the election or defeat of a clearly defined candidate." 424 U.S. at 80. Since *Buckley*, advocacy falling outside the category of such "express advocacy" has often been referred to as "issue advocacy."

From the premise that "issue advocacy" is constitutionally protected, the plaintiffs and the District Court have drawn the erroneous conclusion that donations to political parties may not be limited if the donations are used for some purpose other than directly advocating the election or defeat of a candidate. *See* Apr. 10, 2001 op. at 10 (ER 47) (citing authorities discussing protected "issue advocacy"); *see also id.* ("it is clear that restricting donations to political parties for purposes unrelated to nominating or electing candidates (*i.e.*, issue advocacy, voter registration, *etc.*) significantly interferes with the protected rights of speech and association"). This reasoning overlooks a key step in the *Buckley* analysis, however. In fact, *Buckley* directly refutes the notion that political parties are entitled to special protection when engaging in activities other than direct electoral advocacy.

The express advocacy/issue advocacy distinction applies to restrictions on activities of individuals or groups *other than* candidates and entities principally engaged in electoral activities. In *Buckley*'s discussion of §434(e) of FECA, which required political committees to disclose their expenditures, the *Buckley* Court construed the definition of "political committee" narrowly in order to exempt *groups* largely engaged in issue advocacy.

> To fulfill the purposes of the Act [the words "political committee"] need only encompass organizations that are under the control of a candidate *or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed* can be assumed to fall within the core area sought to be addressed by Congress. They *are, by definition, campaign related.*

424 U.S. at 79 (emphasis added). Thus, the emphasis is on the "major purpose" of the group, not the particular expenditures made by the group. Only if the entity making the expenditure was *not* such a "major purpose" organization was it necessary, according to *Buckley*, to add a further gloss to the statute to distinguish whether activities conducted by that organization were "issue advocacy" or "express advocacy." 424 U.S. at 79-80.

Thus, *Buckley* itself drew a clear distinction, for First Amendment purposes, between organizations whose "major purpose" was nominating and electing candidates (which were subject to broader regulation) and other entities or

individuals (who were entitled to greater protection when engaging in potentially protected issue advocacy). *Buckley*, 424 U.S. at 79-80. "Major purpose" organizations, the Court held, could be required to disclose *all* of their contributions and expenditures irrespective of whether any *particular* contribution or expenditure was made for "express advocacy" or "issue advocacy." *See Buckley*, 424 U.S. at 78-79. The activities of "major purpose" organizations "are, by definition, campaign related." *Id.* at 79. *See also Massachusetts Citizens for Life v. FEC,* 479 U.S. at 262 (noting that if political committee's activities met "major purpose" test it would become subject to full panoply of regulations); Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 U.C.L.A. L. REV. 265, 271 & n. 32 (December 2000) (noting that *Buckley* Court found no vagueness problem under § 434(e) with respect to candidates and "major purpose" organizations).

Thus, as explained in cases such as *North Carolina Right to Life, Inc. v. Leake,* 108 F. Supp. 498, 505 (E.D.N.C. 2000), " 'campaign-related' groups, whose major purpose is electioneering, may be regulated without regard to *Buckley's* 'express advocacy' standard." *See also Federal Election Comm'n v. GOPAC,* 871 F. Supp. 1466 (D.D.C. 1994) (holding that relevant inquiry in determining if political committee was subject to regulation was not "express

advocacy" test, but "major purpose" test). *Cf. Akins v. Federal Election Comm'n,* 101 F.3d 731, 742 (D.C. Cir. 1996) (en banc) (applying "major purpose" test and noting that when organization whose major purpose is election-related makes disbursements, those disbursements are presumptively considered "expenditures" subject to applicable FECA provisions), *vacated on other grounds*, 524 U.S. 11 (1998).[29]

Of course, political parties in Alaska are organizations whose major purpose is the nomination and election of candidates. *See* Brief of State of Alaska at 28-29. Indeed, the notion of political party activities that are not election-related is nothing more than a fiction. The activities of a political party that are funded by soft money contributions are all incidental to the goal of getting the party's preferred candidates elected. For example, party "get-out-the-vote" and voter

[29] The District Court relied upon *Washington State Republican Party v. Washington State Public Disclosure Comm'n*, 4 P.3d 808 (Wash. 2000), which held that a political party's "issue" ad could not be regulated in light of the protections extended to issue advocacy in *Buckley*. The court's analysis in that case, however, simply overlooked the fact that *Buckley*'s issue advocacy doctrine was created to protect groups and individuals that do not have the "major purpose" of electing or nominating candidates for office. For the same reasons discussed in this Brief, the *Washington State Republican Party* decision is not faithful to the Supreme Court's campaign finance precedents, and should not be followed by this Court. *See also* Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 U.C.L.A. L. REV. at 278 & n. 56 (implicitly criticizing, as overly simplistic, the Washington Supreme Court's holding that " 'under Buckley issue advocacy is not subject to

registration activities are designed to promote the election of the parties' candidates, not to boost voter turnout in general. Similarly, party "issue advocacy" is designed to promote the positions of the parties' candidates and discredit those held by the candidates of opposing parties, not to advance general public awareness of an issue. Thus, even where political parties engage in activities other than directly advocating the election of their candidates by name, their activities are still aimed principally at influencing and ultimately achieving the election of their candidates to office.[30]

As the Supreme Court recognized in *Colorado II*, the way that "the power of money actually works in the political structure" is that parties are "necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to the contributors." 121 S. Ct. at 2363-

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regulation.'") (quoting *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 4 P.3d at 824).

[30] The scope of activities included within the category of "soft money" activities by the District Court is not entirely clear. At one point, the District Court cited voter registration, 'get out the vote' drives, issue advocacy, and the purchase of campaign items such as slate cards, bumper stickers, and yard signs, as examples of "soft-money" activities (ER 46). Although these "soft-money" activities include a far greater range of activities than "issue advocacy," the District Court treated them all as exempt from regulation under *Buckley* -- a further unwarranted extension of *Buckley*.

64. Creating a loophole for unlimited contributions to political parties for so-called "soft-money" activities would destroy the efficacy of any "hard-money" limits, because contributors wishing to purchase influence with a party's candidate could easily do so through huge donations which clearly support the party's effort to elect the candidate. That, indeed, is precisely what has happened at the federal level because of the soft-money loophole created by the FEC for federal elections.[31]

The District Court's reliance on *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), as authority for its conclusion that contributions for "soft money activities" may not be limited (ER 46) is misplaced. That case holds only that contributions to a committee formed to support ballot measures cannot be limited, because ballot measure campaigns (unlike campaigns for elective office) do not implicate the governmental interest in stemming corruption and the appearance of corruption. Nothing in *Citizens Against Rent Control* suggests that

[31] In *Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604, 616 (1996), the three-member plurality opinion noted in dicta that soft-money activities pose a lesser threat of corruption than other party-funded activities. The plurality opinion clearly did not hold, however, that contributions for soft-money activities are constitutionally immune from regulation. Moreover, in its more recent *Colorado II* opinion upholding the constitutionality of limits on coordinated party expenditures, a majority of the Court again confirmed the potential for corruption presented by large contributions to political parties and noted the importance of recognizing "how the power of money actually works in the political structure." 121 S. Ct. at 2363.

contributions to an entity which engages *primarily* in promoting candidates for office, such as a political party, are exempt from limits depending on the particular use the party may make of the contribution. Indeed, the unincorporated association whose rights were at issue in *Citizens Against Rent Control* was formed strictly to engage in advocacy concerning one ballot measure. *See* 454 U.S. at 292. The prospect of unlimited contributions to such an entity simply does not involve the same potential for *quid pro quo* corruption of candidates as do contributions to entities, such as political parties, that are deeply and primarily engaged in electoral politics.

More on point is the Supreme Court's decision in *California Medical Ass'n,* in which the Court rejected the contention, identical to that made by plaintiffs here, that contribution limits could not extend to funds used for administration of the PAC because such administrative expenses lacked the potential for fostering corruption. 453 U.S. at 199 n.19 (plurality opinion). There, the Court recognized that a donor's payment of a PAC's administrative expenses, no less than its direct electoral activities, could readily lead to undue donor influence over the activities of the PAC. *Id.* There, as this Court should find here, there is no basis for distinguishing between the types of activities for which an entity might make

expenditures; limitations must be evaluated based on the "major purpose" of the organization as a whole.

Indeed, if the District Court's reasoning were correct, it would follow that a candidate for elective office should be free to accept unlimited contributions from interested donors so long as he or she pledges to use the contributions for "soft-money" activities such as get-out-the-vote drives or so-called "issue advocacy." After all, a candidate – just like a political party – is capable of running voter registration activities and airing political ads that tout the candidate's position on an issue without expressly calling for the candidate's election. It is self-evident, however, that no system of campaign finance regulation could be effective if candidates were entitled to receive contributions of unlimited size merely because the candidate pledges to use them for get-out-the-vote drives and "issue ads."

Consistent with the "major purpose" doctrine announced in *Buckley*, all contributions to a political party may be regulated irrespective of the use to which they may be put, because the major purpose of political parties is the election and nomination of candidates for office. It was improper for the District Court to parse the purpose for which these "major purpose" organizations (political parties) spend any particular contributions they may receive. Rather, under *Buckley* – and under any realistic view of how political parties operate – contribution limits are both

necessary and constitutionally justified as applied to all activities of a political party, irrespective of whether the political party spends any given contribution pursuing its "major purpose" rather than incidental goals.

To the extent that political parties wish to engage in non-election-related activities, nothing in the Act prevents them from doing that. There is no limit on the ability of political parties to spend any funds they wish on such activities. Indeed, the $5000 limit on individual contributions to political parties is ten times higher than the $500 limit that applies to individual contributions to candidates, allowing party activities to be funded at a far higher level than candidate activities. The Legislature acted reasonably in allowing this much higher level of support of political parties, and should not be required to accept a system of unlimited contributions that would undermine the state's compelling goal of protecting against corruption and the appearance of corruption.

C. Unlimited Contributions To Political Parties Promote Circumvention Of Individual Contribution Limits

Finally, the District Court ignored the prospect and reality that donors and candidates use soft money contributions to circumvent hard money limitations that pass constitutional muster. As noted above, the *Buckley* Court upheld FECA's yearly limitation on total contributions to all federal candidates, national political parties, and political committees because it served "to prevent evasion" of the

limitation on direct contributions to candidates "by a person who might otherwise contribute massive amounts of money to a particular candidate through . . . huge contribution to the candidate's political party." *Buckley*, 424 U.S. at 38 (emphasis added); *id. (*yearly ceiling is "no more than a corollary of the basic individual contribution limitations that we have found to be constitutionally valid"). More recently, the Court in *Colorado II* recognized that limits on coordinated expenditures by parties were acceptable, in part because those expenditures were used to circumvent hard money limits. "Individuals and nonparty groups who have reached the limit of direct contributions to a candidate give to a party with the understanding that contribution to the party will produce increased party spending for the candidate's benefit." 121 S.Ct. at 2361.

The evidence in the record below showed that circumvention of hard money limits was taking place in Alaska prior to the Act. *Supra* at 14-15. The District Court erred by ignoring this evidence, and by overlooking the Supreme Court's blessing of restrictions on campaign finance that are designed, at least in part, to avoid circumvention of hard money limits.

II. ALASKA MAY BAN CORPORATE CONTRIBUTIONS TO POLITICAL PARTIES AND MAY TREAT PROFESSIONAL VOLUNTEER SERVICES AS IN-KIND CONTRIBUTIONS CONSISTENT WITH THE FIRST AMENDMENT

Amicus joins in the State of Alaska's arguments establishing that the Act's ban on corporate contributions to political parties, and its treatment of professional volunteer services as in-kind contributions, are fully constitutional under the First Amendment.

CONCLUSION

Amicus respectfully requests that the decision of the court below be reversed.

DATED this 4th day of October 2001.

Respectfully submitted,

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DAVID A. WILSON
JAMES M. DOWD
HALE AND DORR LLP
1455 Pennsylvania Avenue N.W.
10th Floor
Washington, D.C. 20004
(202) 942-8400

BRENDA WRIGHT
JOHN C. BONIFAZ
NATIONAL VOTING RIGHTS INSTITUTE
One Bromfield Street
Boston, MA 02108
(617) 368-9100

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(A)(7)(C) and 32-1, I certify that the Brief of Amicus Curiae National Voting Rights Institute in Support of Appellants contains 6,904 words as counted by the word processing program used to prepare that brief and therefore complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i).

Date: October 4, 2001 _____

PROOF OF SERVICE

I hereby certify that on October 4, 2001, I caused two copies of the Brief of Amicus Curiae National Voting Rights Institute in Support of Appellants to be served by pre-paid overnight mail delivery upon:

Kenneth Jacobus, Esq.
425 G Street
Suite 920
Anchorage, Alaska 99501-2140

Wayne Anthony Ross, Esq.
327 East Fireweed Lane
Suite 201
Anchorage, Alaska 99503

Martin T. Schulz, Esq.
Assistant Attorney General
State of Alaska, Department of Law
1031 W. Fourth Avenue
Suite 200
Anchorage, Alaska 99501

and a courtesy copy to:

Brooke Miles, Executive Director
Alaska Public Offices Commission
2221 East Northern Lights Boulevard
Room 128
Anchorage, Alaska 99508

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