No. 02-A_____

In the Supreme Court of the United States

SENATOR MITCH MCCONNELL et al., ***Appellants***

v.

FEDERAL ELECTION COMMISSION et al., ***Appellees,***

Appeal from No. 02-581(and consolidated cases) in the
United States District Court for the District of Columbia

Application of Club for Growth, National Right to Life Committee, National Right to Life Educational Trust Fund, and Indiana Family Institute For Injunction Pending Appeal

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TO: THE CHIEF JUSTICE

Chief Justice of the United States and
Circuit Justice for the Fourth Circuit

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Application of Club for Growth, National Right to Life Committee, National Right to Life Educational Trust Fund, and Indiana Family Institute For Injunction Pending Appeal

To the Honorable William H. Rehnquist, Chief Justice of the United States and Circuit Justice for the District of Columbia Circuit.

This Application seeks to protect American citizens and citizen groups from immediate and short term harm to their First Amendment free expression rights. Due to the lower court's decision to uphold a provision imposing civil and criminal penalties for "promot[ing] or support[ing]" or "attack[ing] or oppos[ing]" a federal candidate in a broadcast ad (the truncated back-up definition of "electioneering communication"), one Applicant, Club for Growth, Inc., is already the subject of a complaint to the Federal Election Commission urging that civil penalties should be imposed on them for publishing advertisements in South Dakota urging its citizens to contact their Senator, who is currently a federal candidate, and to ask him to support the President's tax cut proposal, currently pending in Congress. Having to respond to FEC inquiries on this matter is immediate irreparable harm that can only be remedied by the injunction pending appeal requested in this Application. Further, other Applicants have suffered irreparable harm by declining to run ads regarding currently pending legislation in Congress.

The U.S. District Court for the District of Columbia decided *McConnell v. FEC*, No. 02-582, 2003 WL 2010983 (D.D.C. May 1, 2003) (and consolidated cases), dealing with constitutional challenges to the Bipartisan Campaign Reform Act of 2002 (BCRA).[1] BCRA provides for direct appeal to this Court. BCRA § 403(a)(3).

Certain other plaintiffs in the present case have already filed a Jurisdictional Statement in this Court (No. 02-M94). The Chief Justice has been introduced to the

[1]Court orders and opinions, party motions and memoranda, and the BCRA are available in PDF format at <http://www.law.stanford.edu/library/campaignfinance/>.

"electioneering communication" prohibition in dealing with a stay application by the National Rifle Association and a response by the present Applicants (No. 02-A951).

In the district court, the Applicants, represented by the James Madison Center for Free Speech (hereinafter "JMC Applicants"), moved for an *injunction* pending appeal against BCRA's backup "electioneering communication" definition, BCRA § 201(a)(3)(A)(ii) (as truncated by the district court) and opposed *stay* motions that would leave in place provisions found unconstitutional by the court below. On May 19, 2003, the district court denied the injunction motion and granted a blanket stay, leaving BCRA in effect as enacted, despite the lower court's holdings that many provisions violate the First Amendment rights of Plaintiffs and are unconstitutional. *See Memorandum Opinion* (May 19, 2003) (Order and Memorandum Opinion attached as *Exhibit A*).

In a companion application to the present Application, JMC Applicants and other JMC Plaintiffs-Appellants seek an order vacating the blanket stay below.

In the present Application, JMC Applicants move for protection from the harm caused to them by these decisions, asking the Chief Justice to grant an injunction pending appeal against the truncated *backup* "electioneering communication" definition.

Relevant BCRA Provision & District Court Disposition[2]

Prohibition of "Electioneering Communications"

BCRA § 203 adds a new prohibition to 2 U.S.C. § 441b(b)(2) for corporate and labor union communications that include "any applicable electioneering communication."

BCRA § 201(f)(3) defines "electioneering communication":

> ELECTIONEERING COMMUNICATION.—For purposes of this subsection—
> (A) IN GENERAL.—(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which—

[2]Pub. L. No. 107-155, 116 Stat. 81 (2002). Text of the BCRA inserted into the Federal Election Campaign Act is available at <http://www.bna.com/moneyandpolitics/bcra_feca.pdf> (prepared by the FEC).

> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within—
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.
>
> (ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

The district court declared the primary, 30/60-day blackout definition unconstitutional by a 2-1 vote and enjoined its enforcement. *Per Curiam Memorandum Opinion* (May 1, 2003) at 8, 2003 WL 2010983 at *3. It upheld the backup definition by a 2-1 vote, but without the final clause,[3] which Judge Leon found unconstitutionally vague. *Id.* Consequently, the operative definition of "electioneering communication" is a corporate or labor union broadcast communication that "promotes or supports . . . or attacks or opposes a candidate," without temporal, geographical, or contextual[4] limit and without any requirement that the candidate be clearly identified or even identified at all in the communication. To be a "candidate," one need only have received a $5,000 contribution or made a $5,000 expenditure.

[3]The excised clause was: "and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate."

[4]The removal of the final clause by the district court means there is no requirement that the "attacking" or "promoting" be linked to "an exhortation to vote" or even to an election.

The district court granted a stay, resurrecting the primary definition that it had held unconstitutional, but denied the JMC Applicants' motion for an injunction pending appeal against the truncated backup definition. *Order* (May 19, 2003) at 5.

Standard for an Injunction Pending Appeal

On injunction pending appeal or stay applications, a Justice is "to determine whether four Justices would vote to grant certiorari, to balance the so-called 'stay equities,' and to give some consideration as to predicting the final outcome of the case in this Court." *Gregory-Portland Indep. School Dist. v. United States*, 448 U.S. 1342 (1980) (Rehnquist, J., in chambers). Because BCRA provides direct appeal, the questions are whether there is a fair prospect that a majority will hold the appealed decision erroneous, whether irreparable harm would result from denial, and whether balancing the equities favors the injunction. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980).

Argument

The truncated backup "electioneering communication" definition was in effect for 17 days and would go back into effect if the stay of the district court opinion is vacated. As will be shown, this injunction is necessary to protect the JMC corporate Applicants from harm they have already suffered and from future harm, if the stay is lifted. While the district court's resurrection of the primary "electioneering communication" definition (30/60-day blackout) buys some time for some plaintiffs in some situations, it is already operational in a Texas Congressional runoff election and will be operational in December as rolling caucuses and primaries move around the country throughout 2004, long before this Court is likely to have decided this case.

And resurrection of the 30/60-day blackout definition does nothing to protect Club for Growth, Inc. now because the Club for Growth ran broadcast ads during the 17 days that the truncated backup definition was in effect and the Democratic National Senatorial

Committee (DSCC) has already filed an FEC complaint against CFG claiming that CFG violated the truncated backup "electioneering communication" ban when it was operative.

The Truncated Backup "Electioneering Communication" Definition Should Be Enjoined.

The blanket stay was sold to the district court largely on the notion that it would buy time before the BCRA would have any effect, since the stay would resurrect the 30/60 blackout period definition and thus suspend the truncated backup definition. That is not true, and any benefit from a delay is at best temporary. The district court ordered all motions for stays or injunctions pending appeal to be filed already, which suggests that the district court has foreclosed any further opportunity to revisit this issue when the 30/60-day blackout periods begin in December and follows the rolling caucuses and primaries across the country in 2004.

But Club for Growth, Inc, is affected *right now* by the truncated backup "electioneering communication" definition, and the resurrection of the 30/60-day blackout period gives it no solace. On May 13, 2003, the Democratic Senatorial Campaign Committee filed a complaint against CFG alleging that CFG had violated the BCRA by broadcasting an "electioneering communication," under the lower court's truncated backup definition that prohibits any broadcast communication that "promotes or supports . . . or attacks or opposes" a candidate. Letter from Robert F. Bauer & Marc E. Elias, Counsel for the Democratic Senatorial Campaign Committee (DSCC), to Lawrence Norton, FEC General Counsel, (May 13, 2003).

The advertisement at issue was broadcast in South Dakota and tells listeners to urge Senator Tom Daschle to support President Bush's pending tax cut plan. The complaint on behalf of the DSCC alleges that the advertisement "attack[s Daschle] for opposing the President's 'tax cut plan,'" in violation of the truncated backup definition. This advertise-

ment is part of a broader effort by CFG to gain public and Congressional support for the President's tax cut plan. CRG's costs in defending against this complaint will be unrecoverable, and the money consumed now will not be spent to broadcast additional advertisements. This is irreparable harm. And an investigation into First Amendment activities, and the resulting chill to CFG and others similarly situated, is of itself irreparable harm. *Cf. FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (1981).[5]

And this irreparable harm is not fixed by the general stay, that resuscitated the 30/60-day primary definition of "electioneering communication." The FEC can still enforce the "attack or promote" definition against CFG because CFG is alleged to have violated this ban in the few days that the "attack or promote" definition was in effect. Therefore, the general stay now issued by the district court does not protect CFG in any way. Further, if the general stay is lifted (*see Application of Club for Growth, National Right to Life Committee, Libertarian National Committee, et al. to Vacate the District Court's General Stay*), the truncated backup definition would go into effect and, therefore, must be enjoined.

As shown next, Applicants met all the requirements for an injunction pending appeal and one should have been issued.

I. Applicants Have a Substantial Likelihood of Success on the Merits.

Applicants have a substantial likelihood of success on the merits with their claim that the district court's truncated definition of "electioneering communication" is unconsti-

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[5]

> [W]here particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding . . . will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied . . . provide but shifting sands on which the litigant must maintain his position.

Speiser v. Randall, 357 U.S. 513, 526 (1948).

tutional for vagueness and overbreadth because (1) it is grossly overbroad and vague, (2) severance that broadened the backup definition was beyond congressional intent, (3) this Court decisions of *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*), establish that the express advocacy test is the "only" way to avoid vagueness and overbreadth when protecting issue advocacy, and (4) the great weight of authority in other courts interprets *Buckley* and *MCFL* as do Applicants.

A. The Truncated Backup Definition Increases Overbreadth and Vagueness.

In a splintered decision, the district court decided that "*'electioneering communication' means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate).*" BCRA, § 201(f)(3)(A)(ii) (last clause deleted)[6] (emphasis added).

By amputating the last clause of the backup definition, the lower Court made a vague definition vaguer, a broad definition broader. The last clause – "*and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate*" – surely had the vagueness problems that Judge Leon identified. *Leon Memorandum Opinion* at 93-95. But it at least required that any "attacking or promoting" of candidates have something to do with elections, i.e., "an exhortation to vote" for or against a candidate.

However, amputating this qualifier leaves the truncated definition with no language requiring that the candidate be "clearly identified" and with no language focusing the

[6]This Court entered judgment "for Defendants with regard to [Section 203's] applicability to the backup definition of "electioneering communication" as defined in Section 201 of BCRA, in accordance with Judge Leon's Memorandum Opinion." *Final Judgment* at 5; *see also Per Curiam Memorandum Opinion* at 8, 2003 WL 2010983 at *3. Judge Leon upheld the constitutionality of the definition of "electioneering communication" only without the final clause, which he held to be unconstitutionally vague. *Leon Memorandum Opinion* at 94-95.

communication on voting in elections. The result is that a broadcast communication is banned by corporations or labor unions only if it attacks or promotes someone who happens to be "a candidate" (whether or not known to be so),[7] and has nothing necessarily to do with any exhortation, voting, or even an election. This is confirmed by the parenthetical material of the truncated definition, which proclaims that "promotes or supports" or "attacks or opposes" is not compassed by the limitations of either express advocacy or voting , i.e., "(regardless of whether the communication expressly advocates a vote for or against a candidate)."

As a result, the truncated backup definition is entirely governed by four unqualified, undefined verbs: *promote*,[8] *support*,[9] *attack*,[10] and *oppose*.[11] The common dictionary

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[7]"Candidate" means only that the individual referenced (or her agent) transacted a "contribution" or "expenditure" of $5,000. Citizen groups might not even know a referenced person is a candidate, absent burdensome research (especially burdensome where a grassroots lobbying campaign is targeting numerous members of Congress).

[8]*Promote* means

> 1a. To raise to a more important or responsible job or rank. b. To advance (a student) to the next higher grade. 2. To contribute to the progress or growth of; further. . . . 3. To urge the adoption of; advocate: *promote a constitutional amendment*. 4. To attempt to sell or popularize by advertising or publicity: *commercials promoting a new product*. 5. To help establish or organize (a new enterprise), as by securing financial backing: *promote a Broadway show*. [*The American Heritage Dictionary of the English Language* (4th ed. 2000).]

[9]As a transitive verb, *support* means

> 1. To bear the weight of, especially from below. 2. To hold in position so as to keep from falling, sinking, or slipping. 3. To be capable of bearing; withstand: "*'His flaw'd heart . . . too weak the conflict to support*'" (Shakespeare, *King Lear* 5.3.197 1605). 4. To keep from weakening or failing; strengthen: *The letter supported him in his grief*. 5. To provide for or maintain, by supplying with money or necessities. 6. To furnish corroborating evidence for: *New facts supported her story*. 7a. To aid the cause, policy, or interests of: *supported her in her election campaign.* b. To argue in favor of; advocate: *supported lower taxes*. 8. To endure; tolerate: "*At supper there was such a conflux of company that I could scarcely support the tumult*" (Samuel Johnson, *OED (letter to Mrs. Thrale)* 1773). 9. To act in a secondary or subordinate role to (a leading performer). [*The American Heritage Dictionary of the English Language* (4th ed. 2000).]

[10]As a transitive verb, *attack* means:

> 1. To set upon with violent force. 2. To criticize strongly or in a hostile manner. 3. To start work on with purpose and vigor: attack a problem. 4. To begin to affect harmfully: *a*

(continued...)

definitions provided below in footnote reveal the breathtaking breadth of what is prohibited, as well as the vagueness inherent in choosing among the possible meanings.

Judge Leon declared that the phrase he excised "depends on a number of variables such as the context of the campaign, the issues that are the centerpiece of the campaign, the timing of the ad, and the issues with which the candidates are identified." *Leon Memorandum Opinion* at 93. The present four verbs depend on similar contextual, subjective vagaries for determination, but they have the further problem of having nothing to do with any election, election campaign or exhortation to vote. The truncated backup definition speaks not of supporting or opposing a candidate's *election*, only of supporting or opposing *a candidate*. Judge Leon declares that truncating the definition "assures that there will be no . . . effect on political discourse *unrelated* to federal elections," *id.* at 94, but his truncated definition leaves nothing to *relate* the governed communication to federal elections.

Judge Leon's view is that communicators needs only to stick to "neutral" statements to avoid opposing or supporting a candidate. *Id.* at 92. But what is "neutral" is subjective, too. Some would consider simply labeling a legislator, who happens to be a candidate as "pro-life" or "pro-choice" to be supporting or opposing the candidate. Others would declare that supporting or opposing a human cloning bill amounts to supporting or opposing the candidate. To solve just such problems and keep speakers from having to "hedge and trim," this Court created the "express advocacy" test as the "only" way to eliminate overbreadth

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[10](...continued)
disease that attacks the central nervous system. [*The American Heritage Dictionary of the English Language* (4th ed. 2000).]

[11]As a transitive verb, *oppose* means:
1. To be in contention or conflict with: *oppose the enemy force*. 2. To be resistant to: *opposes new ideas*. 3. To place opposite in contrast or counterbalance. 4. To place so as to be opposite something else. [*The American Heritage Dictionary of the English Language* (4th ed. 2000).]

and vagueness when legislating on the border of issue advocacy, as discussed *infra*, which the "electioneering communication" definition specifically disclaims.

Judge Leon also suggested that communicators could simply never use a candidate's name or they could get an FEC advisory opinion before communicating. *Leon Memorandum Opinion* at 95. This means a citizen group could never broadcast a communication encouraging citizens to call Senator X to vote for or against a certain bill. And the FEC could never issue advisory opinions fast enough to keep up with the fast-breaking, changing need for broadcasting grassroots lobbying communications during an active legislative session. Such limitations impose enormous burdens on core political speech,[12] and given the solicitude of this Court for issue advocacy, *infra*, there is a strong likelihood that Applicants will have success on the merits.

B. Truncating the Backup Definition of "Electioneering Communication" Violated Severance Rules.

Don Simon of Common Cause, a principle drafter of the BCRA, is quoted in a *USA Today* article entitled "Campaign finance hit by ruling" (May 4, 2003)[13] as saying of the truncated backup definition of "electioneering communication" that "[w]e got more from the court than we ever could have gotten from Congress" and that "people haven't come to grips with . . . how sweeping it is."

"'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *Buckley,* 424 U.S. at 108-09 (quoting

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[12]Similarly, Judge Leon's use of the AFL-CIO advertisement entitled "No Two Way" as an example of a communication that is not "neutral" because it "attacks [a legislator's] position on the federal budget" reveals how incredibly broad is the concept of oppose/attack in the truncated backup definition of "electioneering communication." Not only does it reach protected issue advocacy in the election context, in the truncated backup definition that is cut loose from the restraints of the election context the concept of oppose/attack (i.e., whatever is not "neutral") has enormous reach.

[13]*See* <http://www.usatoday.com/news/washington/2003-05-04-court-soft-money_x.htm> (*USA Today* website) (visited May 7, 2003).

Champlin Refining Co. v. Corporation Comm'n of Oklahoma, 286 U.S. 210, 234 (1932)).

Because the truncated backup definition is sweepingly more expansive than the definition Congress enacted, as described at length *supra* (i.e., Congress at least intended to anchor the definition to an exhortation regarding voting in elections), it is certain that Congress would not have enacted the definition as truncated. The language of BCRA was the subject of much debate and compromise, and, as Don Simon is quoted as saying, reform advocates could never have gotten from Congress anything so sweeping as the truncated backup definition. Therefore, it was improper to amputate the final clause of the backup definition, as this Court will likely hold, meaning that the whole backup definition is unconstitutional and should be enjoined.

C. This Court's Express Advocacy Test Is the "Only" Cure.

The final authority on vagueness and express advocacy is the mandate of this Court in *Buckley v. Valeo*, 424 U.S. 1 and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*").

Buckley set out the express advocacy test as the essential bright-line test to eliminate vagueness in the highly-protected First Amendment area of election-related speech and issue advocacy. 424 U.S. at 43, 44 n.52. A decade later, the Court reaffirmed in *MCFL* the necessity of the express advocacy test both to prevent vagueness and to protect issue advocacy.

It is important to note what this Court said is and is not permitted with respect to avoiding vagueness in statutes bordering on issue advocacy. *Buckley*'s vagueness analysis involved two steps.

First, to avoid vagueness, this Court in *Buckley* narrowly construed "any expenditure . . . relative to a clearly identified candidate" to mean "advocating the election of a candi-

date." 424 U.S. at 41-42. But the Court immediately declared that this construction merely "refocuses the *vagueness* question." *Id.* at 42 (emphasis added). More was needed because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.*

The importance of what the Court said must not be missed – it is *not* sufficient to avoid vagueness to even say "*advocating the election of a candidate*." Nor is it sufficient to avoid vagueness to (a) plug that construction into the statute being construed, (b) incorporate the opposite of "election," and (c) explain that the candidate is running for federal office, i.e., *advocating the election or defeat of a clearly identified candidate for federal office*. The problem was that the seemingly obvious term *advocating* is rife with ambiguity in the highly-protected area of First Amendment rights in the election context. In this context, this Court cuts no slack on the basis that all language has inherent ambiguities.

The second step addressed *advocating*. The Court noted a specific problem related to this continuing vagueness problem in "an analogous context" in *Thomas v. Collins*, 323 U.S. 516 (1945). *Buckley*, 424 U.S. at 43. The problem was that *advocating* involves "a question both of intent and effect," and could be defined to depend on "the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Buckley*, 424 U.S. at 43 (internal quotation marks and citation omitted). That inherent vagueness in *advocating* is constitutionally intolerable: "Such a distinction offers no security for free discussion . . . [because] it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." *Id.* (internal quotation marks and citation omitted).

Note that fixing the vagueness problem of *advocating* required a construction that did *not* rely in any way on questions of intent and effect, the varied understanding of hearers, and inferences drawn as to intent and meaning.

The *Buckley* court concluded that the "only" fix for this vagueness problem was an objective test that looked only at the words of the communication itself and did not in any way depend on the subjective understanding of the audience: "The constitutional deficiencies [of vagueness as to intent and effect] can be avoided ***only*** by reading [the statute] as limited to communications that include explicit words of advocacy of election or defeat of a [clearly identified] candidate . . . as part of the communication." *Id.* (emphasis added). In footnote 52, the Court called its test an "*express words of advocacy*" test, and indicated that it is not a so-called "magic words" test (i.e., involving only the words listed), because the examples are introduced by "such as." *Id.* at 44, n.52 (emphasis added). The fact that all the examples given in footnote 52 would occur within a communication itself without reference to external context, reemphasizes the Court's earlier insistence that the explicit words examined must be "part of the communication." *Id.* at 43.

Again it is important to note carefully what this Court said – the only addition to the formulation of the first step and the term *advocacy* is the requirement that advocacy be *express* – that is by *explicit* or *express words*. And this Court declared that the ***"only"*** way to avoid vagueness was by such express advocacy. In short, the requirement of *explicit or express words* is the essential and sole way to avoid the vagueness this Court identified in *advocating*. Anything short of the *express words of advocacy* test, or beyond it, reintroduces the vagueness this Court sought to avoid.

A decade later, in *MCFL*, 479 U.S. 238, this Court was again faced with the need to construe a statute that bordered on the protected ground of issue advocacy. The Court reiterated the discussion mentioned *supra* about how "[t]he distinction between discussion of issues . . . and advocacy of election or defeat . . . may often dissolve in practical application." *Id.* at 249 (internal quotation marks and citation omitted). In *Buckley*, the Court made the quoted statement in the context of a "refocuse[d] . . . vagueness question." 424 U.S. at

42. The *MCFL* opinion clarified that the vagueness problem in *Buckley* had to be resolved not only to avoid vagueness but also "to avoid the problems of overbreadth" that would occur if government were permitted to tread on issue advocacy's protected territory. 479 U.S. at 248. Plainly, wherever a regulation shares a border with issue advocacy, vagueness and overbreadth converge and the o*nly* resolution of the constitutional problem of protecting issue advocacy is the precise language of the express advocacy test.

MCFL reaffirmed that the express advocacy test governs all contexts that operate next to issue advocacy and was not simply a helpful way to identify "express advocacy" nor just one way of describing a vagueness resolution in *Buckley*. *MCFL* authoritatively declared the now broadly binding test to be precisely the one declared in *Buckley*. *MCFL*, 479 U.S. at 249. With *MCFL*, the test was no longer open to other constructions by the lower courts because the Court had itself authoritatively construed the express advocacy test as precisely what it had said before in *Buckley*.

MCFL also authoritatively demonstrated exactly how the test was to be applied. It declared that "a finding of 'express advocacy' *depended upon* the use of language such as 'vote for,' 'elect,' 'support,' etc." *Id.* (quoting *Buckley*, 249 U.S. at 44, n.52) (emphasis added). In examining the newsletter at issue, it found that "[j]ust such an exhortation appears in the 'Special Edition.'" *Id.* In examining just the language of the communication itself, the Court noted that the newsletter urged readers to vote pro-life and identified the pro-life candidates one should vote for. *Id.* The Court recognized the coupling of "vote pro-life" with "Candidate Smith is pro-life" is identical to saying "vote for Candidate Smith," an indisputable equation. *Id.*

This was not a broadening of the express advocacy test, because the Court clearly declared that this newsletter contained "[j]ust such an exhortation" as those described in footnote 52, which it had just cited. *Id.* The Court declared that because "this message is

marginally less direct than 'Vote for Smith' does not change its essential nature," but this is no invitation to go sniffing out "essences" beyond this Court's own express advocacy test because this Court said this communication plainly fits that plain, unvarnished test – "it provides in effect an explicit directive: vote for these (named) candidates." *Id.* Nor does the phrase "in effect" provide license to go beyond the actual words of the communication itself to see if they urges the election or defeat of a candidate. It merely refers to the effect of the equation described. After all, this Court created the express advocacy test precisely to resolve the vagueness problem identified as "a question both of intent and *effect*," as described above. *Buckley*, 424 U.S. at 43 (emphasis added). Finally, the Court looked at each term in the context of other terms in the communication at issue – an essential part of the express advocacy test – but the context did not extend beyond the words themselves.

Therefore, any legislation bordering on issue advocacy must, positively, conform to the precise language of the express advocacy test, which includes, negatively, not being dependent on factors external to the terms of the communication or on the subjective understanding of the hearer. In short, a bright line is required to eliminate hedging and trimming and to resolve the vagueness problem.

It is instructive to briefly compare the language this Court in *Buckley* found yet vague (so as to need the express qualifier) with the now truncated backup definition of "electioneering communication:

Too vague, per Supreme Court	**"Electioneering Communication"**
"advocating the election or defeat of a clearly identified candidate for federal office"	"promot[ing] or support[ing] . . . or attack[ing] or oppos[ing] a candidate for that office"

The stark difference in clarity between these two formulations readily reveals the vagueness of the latter, which conclusion is all the more profound in light of this Court's

conclusion that the one on the left is yet too vague and must be "express" -- requiring "explicit" or "express" words to pass constitutional muster.

D. The Weight of Authority Is Against the Truncated Definition.

The overwhelming weight of authority in the lower courts is contrary to the lower court's truncated backup definition and faithful to this Court's express advocacy test. These courts have recognized the binding nature of this Court's express advocacy test whenever legislation borders on the protected territory of issue advocacy.[14]

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[14]Lower federal court cases recognizing constitutional protection for unfettered issue advocacy and the Supreme Court's express advocacy test include: Me. Right To Life Comm. v. FEC, 98 F.3d 1 (1st Cir. 1996); Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991); Vt. Right to Life Comm. v. Sorrell, 221 F.3d 376 (2d Cir. 2000); FEC v. Cent. Long Island Tax Reform Immediately Comm., 616 F.2d 45 (2d Cir. 1980); Virginia Society for Human Life v. FEC, 263 F.3d 379 (4th Cir. 2001); Perry v. Bartlett, 231 F.3d 155 (4th Cir. 2000); N.C. Right To Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999); Va. Soc'y For Human Life v. Caldwell, 152 F.3d 268 (4th Cir. 1998); FEC v. Christian Action Network, 92 F.3d 1178 (4th Cir. 1996) (*CAN I*); FEC v. Christian Action Network, Inc., 110 F.3d 1049 (4th Cir. 1997) (*CAN II*); Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503 (7th Cir. 1998); Iowa Right to Life Comm. v. Williams, 187 F.3d 963 (8th Cir. 1999); FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987); Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 236 F.3d 1174 (10th Cir. 2000); Fla. Right to Life v. Lamar, 238 F.3d 1288 (11th Cir. 2001) (affirming Fla. Right to Life v. Mortham, No. 98-770CIVORL19A, 1999 WL 33204523 (M.D. Fla. 1999)). FEC v. Colo. Republican Fed. Campaign Comm., 839 F. Supp. 1448 (D. Colo. 1993), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded on other grounds*, 518 U.S. 604 (1996); FEC v. Christian Coalition, 52 F. Supp. 2d 45 (D.D.C. 1999); FEC v. NOW, 713 F. Supp. 428 (D.D.C. 1989); FEC v. AFSCME, 471 F. Supp. 315 (D.D.C. 1979); Kansans for Life, Inc. v. Gaede, 38 F. Supp. 2d 928 (D. Kan. 1999); Clifton v. FEC, 927 F. Supp. 493 (D. Me. 1996), *aff'd on other grounds*, 114 F.3d 1309 (1st Cir. 1997); Planned Parenthood Affiliates of Mich. v. Miller, 21 F. Supp. 2d 740 (E.D. Mich. 1998); Right to Life of Mich., Inc. v. Miller, 23 F. Supp. 2d 766 (W.D. Mich 1998); N.C. Right to Life, Inc. v. Leake, 108 F. Supp. 2d 498 (E.D.N.C. 2000); Right To Life of Dutchess County, Inc. v. FEC, 6 F. Supp. 2d 248 (S.D.N.Y. 1998); FEC v. Survival Educ. Fund, No. 98 Civ. 0347, 1994 WL 9658, (S.D.N.Y. Jan. 12, 1994), *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995); Oklahomans for Life v. Luton, No. CIV-00-1163, slip. op. (W.D. Okla. May 25, 2001); West Virginians For Life, Inc. v. Smith, 919 F. Supp. 954 (S.D. W. Va. 1996). *But cf. Wisconsin Realtors Ass'n v. Ponto*, No. 02-C-424-C, 2002 WL 31758663, at *b-8 (W.D. Wis. Dec. 11, 2002 (questioning whether the express advocacy test is "*the* definitive test" but noting that issue advocacy is plainly protected from regulators).

State cases recognizing constitutional protection of unfettered issue advocacy include: Governor Gray Davis Committee v. American Taxpayers Alliance, 125 Cal. Rptr. 2d 534 (2002); Alaska v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999); Conn. v. Proto, 526 A.2d 1297 (Conn. 1987); Doe v. Mortham, 708 So. 2d 929 (Fla. 1998); Brownsburg Area Patrons Affecting Change v. Baldwin, 714 N.E. 2d 135 (Ind. 1999); Klepper v. Christian Coalition, 259 A.D.2d 926 (N.Y. App. Div. 1999); Osterberg v. Peca, 12 S.W.3d 31 (Tex. 2000); Va. Soc'y for Human Life v. Caldwell, 500 S.E.2d 814 (Va. 1998); Wash. State Republican Party v. Wash. State Public Disclosure Comm'n,

(continued...)

While the "defendants contend that '*Buckley* does not prohibit Congress from enacting narrowly tailored anti-corruption measures simply because they are not limited to communications containing express advocacy,'" *Henderson Memorandum Opinion* at 208 (quoting Gov't Br. at 148), all federal appellate courts addressing the issue have concluded that *Buckley* established express advocacy as the constitutional standard for regulable political speech. "These courts rely primarily on *Buckley*'s emphasis on (1) the need for a bright-line rule demarcating the government's authority to regulate speech and (2) the need to ensure that regulation does not impinge on protected issue advocacy." *Chamber of Commerce v. Moore*, 288 F.3d 187, 193 (5th Cir. 2002). *See*, e.g. *Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379, 391-92 (4th Cir. 2001) (a regulation that "shifts the focus of the express advocacy determination away from the words themselves to the overall impressions of the hypothetical, reasonable listener or viewer . . . is precisely what *Buckley* warned against and prohibited"); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1187, 1193-95 (10th Cir. 2000) (Statutes unconstitutional where they could not be narrowly construed to apply "only to expenditures for communications that contain explicit words advocating the election or defeat of a clearly identified candidate."); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386 (2d Cir. 2000) (finding all the parties "in essential agreement that the disclosure provisions . . . and reporting provisions . . . *are necessarily unconstitutional* unless they apply only to [communications] 'that expressly advocate the election or defeat of a clearly identified candidate.'" (emphasis added) (quoting *Buckley*, 424 U.S. at 80)); *Iowa Right to Life Comm. v. Williams*, 187 F.3d 963, 969-70 (8th Cir. 1999) (To be regulable, "the communication must contain express language of advocacy with an exhortation to elect or defeat a candidate,"

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[14](...continued)
4 P.3d 808 (Wash. 2000); Elections Bd. v. Wisconsin Mfr. & Commerce, 597 N.W.2d 721 (Wisc. 1999).

and "[t]he Supreme Court has made clear that a 'finding of "express advocacy"depend[s] upon the use of language such as 'vote for,' 'elect,' 'support,' etc." (quoting *MCFL*, 479 U.S. at 249 (quoting *Buckley*, 424 U.S. at 44, n. 52)) ; *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 506 (7th Cir. 1998) (The Court [in *Buckley*] recognized the important First Amendment interest in protecting political speech, including discussions surrounding elections and candidates. . . . Because of the vital importance of protecting such speech, the *Buckley* Court articulated what has come to be known as the 'express advocacy' test . . . ."); *Faucher v. Fed. Election Comm'n*, 928 F.2d 468, 470 (1st Cir.1991) ("The Supreme Court, recognizing that such broad language . . . creates the potential for first amendment violations, sought to avoid future conflict by explicitly limiting the statute's prohibition to "express advocacy.")

Even the Ninth Circuit in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), recognized the binding nature of the express advocacy test, although in dicta it discussed the test in ways that seemed broader than the Supreme Court's articulation of the test.[15] However, the 9th Circuit has now affirmed that it fully embraces the *Buckley* formulation, by declaring that "a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit *words* of advocacy." *California Pro-Life Council v. Getman*, 2003 WL 21027288 at *7 (9th Cir. 2003) (emphasis in original). This ruling eliminates any arguable federal circuit court support for their contextual approach, which is contained in the two alternate definitions of "electioneering communication."

These other federal courts have understood, as did Judge Henderson, that "the express advocacy test is not simply this Court's interpretation of FECA but an irreducible

[15] *Cf. FEC v. Christian Action Network*, 110 F.3d 1049, 1054 (4th Cir. 1997) (*CAN II*) (*Furgatch* contains broad dicta, but the Fourth Circuit summarized the narrower *holding* of *Furgatch* as: "where political communications . . . include an explicit directive to voters to take some [unclear] course of action, . . . 'context' . . . may be considered in determining whether the action urged is the election or defeat of a . . . candidate . . . .").

constitutional minimum that no campaign finance restriction can diminish," *Henderson Memorandum Opinion* at 208 (citations omitted), and that this Court created the test to give breathing room to the First Amendment and "foresaw its costs and dismissed them as insufficient to justify overbroad restrictions on issue-driven speech at the core of the First Amendment." *Id.* at 210-211.

II. Applicants Will Suffer Irreparable Injury Without an Injunction Pending Appeal.

Plaintiff National Right to Life Committee, Inc. (NRLC) is in the midst of a congressional legislative battles to ban human cloning, to pass the Unborn Victims of Violence Act, and to pursue other legislative interests.[16] As part of these campaigns, NRLC plans to run broadcast advertisements in the congressional districts of key members of Congress, naming the members of Congress, many or all of whom are candidates, and could be viewed as attacking or promoting their positions on these legislative issues. The ads will be paid for with general corporate funds and will be similar to the AFL-CIO advertisement, "No Two Way," that Judge Leon found "not neutral," because "it attacks [the candidate's] position on the federal budget." *Leon Memorandum Opinion* at 92. Consequently, they will be "electioneering communications." Therefore, NRLC will not broadcast these communications unless it obtains the protection of the requested injunction pending appeal, if the truncated backup definition is restored by the lifting of the district court's stay, as requested herein (*see Application of Club for Growth, National Right to Life Committee, Libertarian National Committee, Libertarian National Committee, et al. to Vacate the District Court's General Stay*). Absent the requested protection, NRLC will suffer irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable

[16] *See*, *e.g.*, <http://www.capwiz.com/nrlc/issues/alert/?alertid=1366326&type=CO> (NRLC legislative action page urging contacts with legislators) (visited May 7, 2003).

injury."); *Virginia v. American Bookseller's Ass'n Inc.*, 484 U.S. 383, 393 (1988) (self-censorship "[i]s a harm that can be realized even without actual prosecution"); *Elam Construction, Inc. v. Regional Transportation District,* 129 F.3d 1343, 1347 (10th Cir. 1997) ("chilling effect" on "First Amendment rights" "constitutes irreparable harm").

If the requested relief is not granted, NRLC will likely forever lose its opportunity to promote its position on these legislative interests through such broadcast advertisements. It is not likely that this Court will be able to decide to accept this case before the last conference of this Term. In that event, briefing would occur throughout the summer, with oral argument in the fall. Thus a decision by this Court is unlikely before this winter or next spring. By that time, Congress may well have voted on these legislative issues, removing forever NRLC's opportunity to influence that vote.

Similarly, Club for Growth, Inc. (CFG) has been running broadcast advertisements in support of President Bush's proposed tax cut, one of which has become the subject of the complaint by the DSCC to the FEC described *supra*. An advertisement was also run in Ohio depicting Ohio Senator George Voinovich, during the 17 days that the truncated backup definition was in effect, and has the following text:

> President Kennedy cut income taxes and the economy soared.
> President Reagan cut taxes more, and created fifteen million new jobs.
> President Bush knows tax cuts create jobs, and that helps balance the budget.
> But senator George Voinovich opposes the president.
> Ohio has lost thousands of jobs, and president Bush has a plan to help.
> Tell George Voinovich to support the Kennedy, Reagan, Bush tax policy that will bring jobs back to Ohio.[17]

Senator Voinovich is a candidate for federal office.[18] While CFG believes that its advertisement is "neutral" and lawful, the advertisement depicts a federal candidate and could be

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[17] *See* <http://clubforgrowth.org/advertising/presidents-ohio-script.php> (visited May 7, 2003) (containing text of advertisement and permitting viewing of the video clip).

[18] *See* <http://herndon1.sdrdc.com/cgi-bin-cancomsrs/> and <http://herndon1.sdrdc.com/cgi-bin/fecimg/?C00309419> (visited May 7, 2003) (FEC websites showing recent contributions received by Sen. Voinovich).

considered by someone (as happened with the DSCC complaint to the FEC regarding the South Dakota ad), as not "neutral" under Judge Leon's criterion for the truncated backup definition. CFG decided to continue running these advertisements after the district court's decision despite fears that it would have to defend against unwarranted complaints and FEC investigations against, because otherwise they would irrevocably lose the opportunity to effect that vote. As noted, these fears have now materialized. Absent the relief presently requested, CFG will have to account for its core First Amendment to the FEC, spending valuable time and resources that would otherwise be used for advertisements. This is also irreparable harm.

III. An Injunction Will Not Cause Substantial Harm to Other Parties.

By contrast, if the requested protection is extended to Applicants, no other party will suffer any constitutionally cognizable harm. The status quo will simply be maintained while all await this Court's definitive resolution of the issues at stake. The FEC will suffer no cognizable harm if Applicants are free to engage in grassroots lobbying and the FEC is not able to enforce the FECA with the truncated backup definition of "electioneering communication." Nor will the Intervening Defendants suffer any cognizable irreparable harm if Applicants are permitted to engage in opposing human cloning or promoting a tax cut.[19]

IV. An Injunction Pending Appeal Is in the Public Interest.

An injunction pending appeal is appropriate to protect First Amendment rights to political speech. *See Homans v. City of Albuquerque,* 264 F.3d 1240, 1243-45 (10th Cir. 2001) (enjoining campaign spending limit pending appeal after district court held it was constitutional). Once substantial likelihood of success on the merits is established, "the

[19]In the context of the Defendants' requested stay, they claimed administrative convenience as a harm. This is discussed and rejected *supra*.

public interest is better served by following binding Supreme Court precedent and protecting the core First Amendment right of political expression." *Homans,* 264 F.3d at 1244. "The public interest favors the assertion of First Amendment rights and we believe this outweighs the interests served by regulating the kind of speech at issue in this case." *Kansans for Life v. Gaede*, 38 F. Supp. 2d 928, 938 (D. Kan. 1999) (citing *Elam Construction, Inc. v. Regional Transportation District,* 129 F.3d 1343, 1347 (10th Cir.1997)). Further, "the public interest . . . will be served by prohibiting the Commission from bringing . . . proceedings that impinge upon constitutional rights, demonstrating that constitutional rights are of the highest import." *Spargo v. New York State Commission on Judicial Conduct*, 2003 U.S. Dist. LEXIS 7073 at *6-*7.

The public interest will clearly be advanced if the protections of the First Amendment are construed broadly "'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v. Valeo,* 424 U.S. 1, 14 (1976) (quoting, *Roth v. United States,* 354 U.S. 476, 484, (1957))."'[D]ebate on public issues should be uninhibited, robust, and wide-open.'" *Id.* (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964)).

"Attacking or promoting" a candidate, as has been seen, goes to the heart of the First Amendment protections of speech and association. If the First Amendment freedoms mean anything, it is the right of citizens to criticize the government and public officials. This provision of the BCRA strikes directly at that right – immunizing public officials from criticism. The public interest clearly is advanced by protecting the public's participation in our democratic Republic.

CONCLUSION

Applicants have met their burden of proof on all elements of the standard for an injunction pending appeal concerning the truncated backup definition of "electioneering communication." Therefore, the relief requested should be granted pending the final determination of the merits of this case by this Court.

Respectfully submitted,

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No. 02-A_____

In the Supreme Court of the United States

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SENATOR MITCH MCCONNELL et al., ***Appellants***

v.

FEDERAL ELECTION COMMISSION et al., ***Appellees*****,**

_____

Appeal from No. 02-581(and consolidated cases) in the
United States District Court for the District of Columbia

_____

Certificate of Service

I, James Bopp, Jr., a member of the bar of this court, certify that on May 22, 2003, I served a copy of the *Application of Club for Growth, National Right to Life Committee, National Right to Life Educational Trust Fund, and Indiana Family Institute For Injunction Pending Appeal* by email, facsimile and first-class mail upon the following persons, per arrangements in an agreed order in the district court, and that all person required to be served have been served:

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