II. TITLE II OF BCRA IS UNCONSTITUTIONAL.

Under the guise of "reforming" our campaign financing system, Title II of BCRA criminalizes political speech. In a manner flatly at odds with the constitutional command of the First Amendment that speech be "uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964), it imposes a comprehensive scheme of prohibitions, limitations, and prior restraints on the most vital speech in our representative democracy: speech about public issues and the performance of public officials. That BCRA regulates and, to a great degree, *bans* political speech during the period immediately before an election (precisely at the time when the public is paying the most attention) renders the statute all the more obviously contrary to the First Amendment. *See Mills v. Alabama*, 384 U.S. 214, 219 (1966).[17] But this Court need not go beyond *Buckley v. Valeo* to determine that Title II cannot possibly stand under the First Amendment.

A. BCRA's Electioneering Communications Provisions Are Unconstitutional.

1. BCRA's "Electioneering Communications" Provisions Cannot Be Reconciled With *Buckley v. Valeo.*

At the core of Title II is its criminalization of "electioneering communications." Section 201(a) of BCRA defines an "electioneering communication" as:

[17] *Mills,* cited prominently in *Buckley v. Valeo,* 424 U.S. 1, 14, 45, 50 (1976), is a particularly apposite case with respect to Title II. There, an Alabama statute barred newspapers from publishing certain editorials on an election day, in the supposed service of "protect[ing] the public from confus[ing] last-minute charges and countercharges . . . in an effort to influence voters on election day." Notwithstanding the limited time period in which the statutory ban applied — election day only — and its purpose of avoiding misleading voters, the Court unanimously held the statute to be unconstitutional. *See id.* at 219.

> [A]ny broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office . . . 60 days before a general, special, or runoff election for the office sought by the candidate; or . . . 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 . . . 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.

BCRA § 201(a) (adding new FECA § 304(f)).

And in an apparent acknowledgment of the manifest constitutional infirmity of banning such communications, BCRA provides a fallback definition of "electioneering communication," to be substituted in the event the principal definition is invalidated:

> [A]ny 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.

BCRA § 201(a) (adding new FECA § 304(f)).

BCRA prohibits electioneering communications by labor unions and all corporations, including charitable corporations (under I.R.C. § 501(c)(3)), nonprofit corporations (under I.R.C. § 501(c)(4)), so-called *MCFL* corporations (*nonprofit* ideological corporations that accept no more than *de minimis* contributions from non-individual sources), and incorporated political committees (under I.R.C. § 527). *See* BCRA § 203(a) (amending FECA § 316(b)(2)). BCRA also prohibits all other entities from using any corporate or union money toward electioneering communications. *See* BCRA § 203(b) (amending FECA § 316(b)(3)).

Although section 203(a) of BCRA applies on its face to all corporations, including section 501(c)(4) and 527 entities, section 203(b) appears, at first blush, to create a narrow exception, allowing section 501(c)(4) and 527 organizations to make "electioneering communications" paid for exclusively out of funds provided directly by individuals. *See* BCRA

§ 203(a). But what section 203(b) gives, section 204 effectively takes away, by providing that such communications cannot be "targeted," or broadcast to potential voters for or against the named candidate. *See* BCRA § 204 (adding new FECA § 316(c)(6)). Because targeting is itself a prerequisite for an ad to constitute an "electioneering communication," the "exception" in section 203(b) provides no real exception at all to the ban on electioneering communications by section 501(c)(4) and 527 groups. As Senator McCain acknowledged in his deposition, it would be a crime for the Sierra Club or any other section 501(c)(4) corporation to finance any ad on television within 60 days of a federal election which, by name or picture, refers to a candidate for the Presidency. *See* McCain dep. 107-08.

The blackout periods in which speech is effectively barred by Title II sweep far beyond any single 30- or 60-day period. In actuality, for a period that may range from 30 days to more than a full year preceding a federal election, BCRA makes it a crime for for-profit and nonprofit corporations and labor organizations to "fund any advertisements that refer[] to a clearly identified candidate" in broadcast, cable, and satellite communications received by 50,000 or more "persons" in the "relevant electorate." In federal elections, the candidates to whom reference may not be made during the blackout periods and in substantial geographic blackout zones will include virtually the entire membership of the United States House of Representatives, about one-third of all United States Senators, often the President and Vice President, and all non-incumbent individuals who are candidates for federal office.

During the blackout period, all corporations from Microsoft and General Electric to the section 501(c)(4) corporations of the American Civil Liberties Union ("ACLU") and the National Rifle Association ("NRA") and the section 501(c)(6) incorporated trade associations of the

Chamber of Commerce and the Associated Builders and Contractors, will face civil or criminal penalties for broadcasts that inform the public that elected officials and candidates support or oppose pending legislation, address public policy issues, or otherwise comment on their official conduct. The same is true of the AFL-CIO and all unions. This severe regulation and, indeed, outright prohibition, of core political speech takes effect notwithstanding that an enormous amount of legislation is considered at the very times the statutory bans are in effect.[18]

(a) *Buckley* Forbids Governmental Regulation Of Any Political Speech That Does Not Qualify As "Express Advocacy."

Buckley condemns Title II. In *Buckley*, the Court struck down FECA's expenditure limits. As originally enacted, FECA restricted expenditures by any person "relative to a clearly identified candidate" to $1,000. *See* FECA § 608(e)(1). Stressing the sanctity of the "[d]iscussion of public issues and debate on the qualifications of candidates," *Buckley*, 424 U.S. at 14, the Court made clear that the First Amendment affords such speech the "broadest protection" from government regulation, *id.* And the Court noted that such speech is "at the core of [our] electoral process and our First Amendment freedoms." *Id.* at 39 (internal quotation omitted).

Based on these principles, *Buckley* held that section 608(e)(1) could not withstand First Amendment scrutiny. Seeking to construe the provision in a manner that could save it from unconstitutional vagueness, the Court first narrowed the provision to "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office,"

[18] The ACLU has prepared a chart setting forth a list of pending legislation during the 60-day

id. at 44, which it further clarified to mean "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject,'" *id.* at 44 n.52.

Significantly, the *Buckley* Court recognized that this construction would not capture all electorally-motivated or related advocacy. The Court explained that the distinction between regulated express advocacy and all other speech "may often dissolve in practical application" because "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Id.* at 42; *see also id.* ("Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest."). Nevertheless, the Court explained, the vagueness problem inherent in the statute could not be solved by anything but a bright-line test:

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question of both intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject might be misunderstood by some . . . . In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> *Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.*

Id. at 43 (emphasis added; internal quotation omitted).

In adopting a bright-line test — referred to (and often ridiculed by) BCRA proponents as

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period prior to the 2000 election. *See* 3 PCS/ACLU 20-21.

"*Buckley's* magic words" — the Supreme Court recognized that "[i]t would naively underestimate the ingenuity and resourcefulness" of speakers who choose to "skirt[] the restriction on express advocacy" to believe that they "would have much difficulty" in doing so. *Id.* at 45. Nonetheless, the Court concluded, the First Amendment requires that speakers be permitted to do just that as the price of preserving robust debate about candidates and issues. *Id.* ("So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views.").

In other words, Buckley's definition of express advocacy was not meant to be all-encompassing. Rather, the definition constituted a judicial attempt to draw a line that would significantly limit the scope of federal regulation or suppression of speech by permitting regulation only of express advocacy. *Buckley*'s message is clear: the government must err on the side — the First Amendment side — of leaving protected political speech unregulated. The Court thus did not posit a bipolar world of issue advocacy and express advocacy which required analysis of precisely what issue or candidate was being discussed and why. Instead, it permitted regulation only where it is unmistakably clear that the speech at issue can only be characterized as express advocacy. As summarized by Professor BeVier, "the Buckley bottom line" is that "[e]xpenditures for speech that does not expressly advocate the election or defeat of a candidate — i.e., expenditures for issue advocacy — may neither be limited in amount nor subjected to disclosure requirements." Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis,* 85 Va. L. Rev. 1761, 1769 (1999); *see also* Joel M. Gora, *Buckley v. Valeo, A Landmark of Political Freedom,* 33 Akron L. Rev. 7, 22 (1999) (observing

that, under *Buckley,* "[a]ll speech which does not in express terms advocate the election or defeat of a clearly identified candidate must remain totally free of any regulation").[19]

Even under its narrowing construction, the Court ultimately struck down section 608(e)(1), holding that the provision could not survive strict scrutiny. *See id.* at 44. Rejecting the district court's conclusion that restrictions on expenditures were necessary to prevent circumvention of restrictions on contributions, *see id.,* the Court explained that the governmental interest in preventing corruption and the appearance of corruption was not implicated by independent expenditures and that, even if it was, the limitation on independent expenditures was necessarily underinclusive, *see id.* at 45-46. "The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or office-holder [by running ads that do not 'in express terms advocate the election or defeat of a clearly identified candidate']." *Id.* at 45.

[19] The Supreme Court's decision in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), provides no basis for a different conclusion with regard to corporations. Although *Austin* allowed the regulation of corporate political speech, only express advocacy was at issue there. *See id.* at 656 ("[T]he Chamber . . . sought to use its general treasury funds to place in a local newspaper an advertisement supporting a specific candidate."); *see also id.* at 714 (appendix to the opinion of Kennedy, J., dissenting) (reproducing the Chamber's advertisement exhorting voters to "Elect Richard Bandstra State Representative"). Thus, *Austin* cannot be read to dim the bright line between express advocacy and all other speech drawn in *Buckley.* Indeed, *FEC v. Massachusetts Citizens For Life,* 479 U.S. 238 (1986) ("*MCFL*"), reiterated that "an expenditure must constitute 'express advocacy' in order to be subject to" regulation, *id.* at 249. A contrary reading of *Austin* would be illogical. As defendants and their allies have repeatedly acknowledged, corporations and unions enjoy the full protection of the First Amendment when commenting on public issues. *See, e.g.,* Sorauf dep. 82 (testifying that the First Amendment protects the right of a union to speak without limit to urge an increase in the minimum wage). *See generally* Chamber of Commerce Br. 2-4.

In the aftermath of *Buckley*, Congress amended FECA and the provision prohibiting contributions or expenditures by corporations and unions in connection with any federal election. *See* 2 U.S.C. § 441b(a). As to this provision, the Supreme Court, in *MCFL,* drew from *Buckley*'s narrowing construction of section 608(e)(1) the need to limit section 441b(a) expenditures to "express advocacy," viewing that narrowing as necessary to avoid First Amendment overbreadth (*i.e.,* the inclusion of *any* speech other than express advocacy), *see MCFL,* 479 U.S. at 248-49.

No decision of the Supreme Court since *Buckley* and *MCFL* has reconsidered or modified these rulings, and they thus bind this Court. *Buckley* and *MCFL* condemn Congress' regulation of speech that does not constitute express advocacy.

(b) The Lower Courts Have Remained Faithful to *Buckley*'s Distinction Between Express Advocacy and Other Expression.

Notwithstanding *Buckley* and *MCFL*, the FEC has for years obstinately insisted on defining the permissible scope of regulation far more broadly than did the Supreme Court. Under the FEC's most recent regulation, "express advocacy" includes communications that:

> when taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because — (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b); *see also FEC v. Christian Action Network*, 110 F.3d 1049, 1056 (4th Cir. 1997) (observing that the FEC has long defined express advocacy without reference to *Buckley's* limitation on regulation to communications that include "'words' or 'language' 'expressly' or 'explicitly' 'advocating' the election or defeat of a particular candidate").

The federal courts have been unanimous in rejecting the FEC's efforts to ignore *Buckley* and *MCFL*. *See, e.g., Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 392-93 (4th Cir. 2001) (invalidating 11 C.F.R. § 100.22(b) on ground that it "shifts the focus of the express advocacy determination away from the words themselves to the overall impressions of the hypothetical, reasonable listener or viewer," which "is precisely what *Buckley* warned against and prohibited"); *Christian Action Network*, 110 F.3d at 1064 (awarding attorney's fees against FEC on ground that FEC's interpretation of "express advocacy" "cannot be advanced in good faith . . . much less with substantial justification" (internal quotation omitted)); *Maine Right to Life Comm., Inc. v. FEC*, 98 F.3d 1, 1 (1st Cir. 1996) (summarily affirming district court opinion invalidating 11 C.F.R. § 100.22(b)); *Right to Life of Duchess Cty., Inc. v. FEC*, 6 F. Supp. 2d 248, 253-54 (S.D.N.Y. 1998) (invalidating 11 C.F.R. § 100.22(b)); *cf. Clifton v. FEC*, 114 F.3d 1309, 1317 (1st Cir. 1997) (invalidating FEC regulations on voter guides); *Faucher v. FEC*, 928 F.2d 468, 470-72 (1st Cir. 1991) (invalidating prior version of FEC regulation on voter guides); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980) (*en banc*) (rejecting FEC's efforts to apply statutory disclosure requirements to issue advocacy on the ground that the words "'expressly advocating' mean[] exactly what they say"); *FEC v. Survival Educ. Fund*, No. 89 Civ. 0347, 1994 WL 9658 (S.D.N.Y. Jan. 12, 1994 (reaffirming that 2 U.S.C. § 441b(a) covers only express advocacy), *aff'd in relevant part*, 65 F.3d 285 (2d Cir. 1995); *FEC v. American Fed'n of State, County & Mun. Employees*, 471 F. Supp. 315, 316-17 (D.D.C. 1979) (same).

Only the Ninth Circuit has provided even arguable support for the FEC's non-*Buckley* rooted definition of "express advocacy." *See FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987).

The *Furgatch* court suggested that "express advocacy" includes communications that are "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *Id.* at 864. Notably, *Furgatch* did not so much as cite *MCFL*, which, in turn, read *Buckley* to bar any restriction on third-party speech other than express advocacy. Not surprisingly, *Furgatch* has been rejected by all six other courts of appeals to consider the issue, and has most recently been rejected in California itself in *Governor Gray Davis Committee v. American Taxpayers Alliance*, 125 Cal. Rptr. 2d 534 (Cal. Ct. App. 2002), as being inconsistent with *Buckley, see id.* at 548-51 ("The 'Ninth Circuit's approach in *Furgatch*' is inconsistent with 'the bright-line rule' announced by *Buckley* and followed unvaryingly by the other federal courts.") (quoting *Chamber of Commerce v. Moore*, 288 F.3d 187, 194 (5th Cir. 2002) (citing cases)). *See also FEC v. Christian Coalition,* 52 F. Supp. 2d 45, 62 (D.D.C. 1999); *see generally* Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 Utah L. Rev. 311, 314 (1998) ("[L]ower courts . . . have consistently reined in the FEC's attempts at an expansive definition of express advocacy; they have construed express advocacy as narrowly limited to ads that in express terms advocate the election or defeat of a clearly identified candidate.") (internal quotation omitted).

Furthermore, in light of *Buckley* and *MCFL*, federal courts have consistently rejected attempts by state legislatures to regulate speech that did not "expressly advocate" the election or defeat of a candidate for public office.[20]

[20] *See, e.g., Moore,* 288 F.3d at 196-98 (rejecting *Furgatch* test in holding invalid application of Mississippi disclosure statute to issue advocacy); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999) (invalidating North Carolina statute imposing disclosure

(c) BCRA's "Electioneering Communications" Provisions And Attendant Disclosure Requirements Cannot Be Reconciled With This Mountain Of Precedent.

There should be no question that the definitions of "electioneering communication" in BCRA sweep far beyond the narrow category of express advocacy carefully defined in *Buckley* and its progeny. BCRA's primary definition of electioneering communication encompasses any communication that "refers to a clearly identified candidate for Federal office," so long as the communication otherwise falls within the provision's timing and targeting requirements. BCRA § 201(a) (adding FECA § 304(f)). On its face, this standard is utterly inconsistent with *Buckley*'s requirement that only words of express advocacy can be regulated.

The statute's fallback provision fares no better. That provision encompasses any communication that "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." *Id.* By its very terms, this fallback provision flouts *Buckley*. Any statute so written after *Buckley*, after *MCFL*, and after consistent rulings by six Federal Courts of Appeals, that blithely criminalizes speech "*regardless of whether*

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requirements on "political committees," which were defined to include groups whose activities extended beyond express advocacy); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1193-94 (10th Cir. 2000) (invalidating Colorado statute limiting expenditures that refer to a candidate for public office); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) (invalidating Iowa disclosure regulation modeled on 11 C.F.R. § 100.22(b)); *cf. Brownsburg Area Patrons Affecting Change v. Baldwin*, 1999 U.S. App. LEXIS 23325, at *5-*6 (7th Cir. 1999) (upholding Indiana disclosure statute after Indiana Supreme Court certified that statute applied only to organizations engaging in express advocacy).

the communication expressly advocates a vote for or against a candidate" can only be understood as both unconstitutional and ultimately insulting to the Supreme Court.[21]

BCRA's provisions requiring disclosure of information related to electioneering communications must fall for the same reasons. Section 201(a) requires any person spending more than $10,000 on electioneering communications in a year to disclose any disbursement over $200, the recipient of the disbursement, the election to which the communication pertains, and the candidate to be identified in the communication. Section 201(a) also requires that an organization making disbursements for electioneering communications identify every individual who donated $1,000 or more toward that communication. Finally, section 201(a) provides that its required disclosures must be made as soon as a contract to make a disbursement has been entered into; that is, the disclosures must be made *prior to* the speech, even if no speech occurs. But if this Court agrees that the electioneering communications provisions cannot stand, the attendant disclosure provisions should likewise fall, because the disclosure provisions constitute a regulation of — and in some cases a prior restraint on — speech that the government may not

[21] Indeed, by its plain language, the statute prohibits not only section 501(c)(4) and 527 organizations, but also so-called "*MCFL* corporations," from engaging in electioneering communications. *See* BCRA §§ 203, 204 (amending FECA § 316) (banning all corporations, without qualification, from sponsoring electioneering communications). *MCFL* corporations are nonprofit, ideological corporations that accept no more than *de minimis* funds from non-individual sources. The statute's broad sweep in preventing all corporations, including *MCFL* corporations, from engaging in electioneering communications is staggering, and blatantly unconstitutional, given that the Supreme Court has expressly held that *MCFL* corporations must be allowed to engage in even express advocacy. *See MCFL,* 479 U.S. at 249, 259, 264; *cf. Right to Life of Mich., Inc. v. Miller,* 23 F. Supp. 2d 766 (W.D. Mich. 1998) (striking down rule prohibiting corporations, unions, and similar entities from funding advertisements using a candidate's likeness within 45 days of an election because it limited issue advocacy); *Planned Parenthood Affiliates of Mich., Inc. v. Miller*, 21 F. Supp. 2d 740 (E.D. Mich. 1998) (same).

regulate in the first place. *See Buckley*, 424 U.S. at 78-80 (construing FECA's disclosure provision, section 434(e), to apply only to express advocacy, just as the Court had so limited section 608(e) of FECA, the expenditure limit, "[t]o insure that the reach of § 434(e) is not impermissibly broad"); *cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342-43 (1995) (holding that the First Amendment protects anonymous speech every bit as much as conspicuous speech); *see generally* ACLU Br. 17-19.[22]

2. Wholly Apart From *Buckley*, BCRA's Electioneering Communications Provisions Must Be Invalidated.

Buckley's bright-line approach constitutes the authoritative decision for this Court in evaluating BCRA's electioneering communications provisions. But even apart from *Buckley*,[23] both the principal and fallback definition of "electioneering communications" set forth in BCRA are constitutionally infirm.

We begin with first principles. Speech about elections, politics, and issues is at the core of the First Amendment. Just a few months ago, the Supreme Court observed:

[T]he notion that the special context of electioneering justifies an *abridgment* of

[22] BCRA's requirement that political ads contain information identifying the candidate supported by the communication, the party responsible for the content of the information, and/or an indication that the candidate approves the content of the communication, *see* BCRA § 311 (amending FECA § 318), is likewise invalid, at least when applied to electioneering communications (and, for that matter, anything other than express advocacy). And BCRA contains still further unconstitutional disclosure requirements. Specifically, BCRA sections 201(a) and 212(a) impermissibly impose certain advance disclosure requirements on independent expenditures. For the reasons explained in the brief of the AFL-CIO, these provisions must be invalidated. *See* AFL-CIO Br. 14-17.

[23] Indeed, there are powerful reasons, in terms of basic First Amendment principles, to conclude that *all* political speech, including express advocacy, should be fully protected. *See infra* NRA Br.

> the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. "[D]ebate on the qualifications of candidates" is "at the core of our electoral process and of the First Amendment freedoms," not at the edges.

Republican Party of Minnesota v. White, 122 S. Ct. 2528, 2538 (2002) (emphasis in original; internal citations omitted).[24]

But that is precisely what Title II does. Like the statute at issue in *Republican Party of Minnesota*, BCRA "both prohibits speech on the basis of its content and burdens a category of speech that is 'at the core of our First Amendment freedoms' — speech about the qualifications of candidates for public office." As such — and again identically with *Republican Party of Minnesota* — Title II is subject to strict scrutiny.

(a) BCRA's Ban On Electioneering Communications Is Unconstitutionally Overbroad And Vague.

(i) The Definition Of Electioneering Communications Is Unconstitutionally Overbroad.

Title II's sweep into areas of fully protected speech is vast. It is well settled that laws implicating core First Amendment interests must be narrowly tailored and may not include within their scope protected communications while at the same time regulating unprotected communications. *See Thornhill v. Alabama,* 310 U.S. 88, 97-98 (1940). Overly broad statutes cannot be reconciled with the First Amendment:

[24] *Republican Party of Minnesota* itself raised the difficult issue of the degree to which judicial elections are sufficiently akin to general elections to warrant analogous, if not identical, First Amendment protections. The majority held that they were. *Every* statement about First Amendment law in the Court's opinion thus applies, *a fortiori*, to this case. *See Republican Party of Minnesota,* 122 S. Ct. at 2251 (Ginsburg, J., dissenting) (distinguishing "elections for political offices, in which the First Amendment holds full sway" from the election of judiciary).

> The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . ."

Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1404 (2002) (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973)). BCRA's primary definition of "electioneering communications" covers a vast amount of speech fully entitled to First Amendment protection.

The FEC's recent rulemaking provides a useful starting point. The Commission considered several proposed exemptions to the definition of "electioneering communications," including one for advertisements that refer to legislation — such as the Helms-Biden Amendment or Kennedy-McCain Bill — by its popular name. *See* Electioneering Communications, 67 Fed. Reg. 65,190, 65,200-65,201 (October 23, 2002). The Commission rejected this exemption because it (correctly) concluded that it lacked authority to create such a carve-out.[25] *See id.* The FEC thus left in place a provision that, as Senator Feingold acknowledged, criminalizes references to "McCain-Feingold" within the blackout period. Feingold dep. 33.

The FEC also rejected a carve-out for advertisements that urge support of or opposition to pending legislation where the communication merely urges the viewer to contact an official. *See id.* at 65,201-65,202. The Commission acknowledged that "some communications that are devoted exclusively to pending public policy issues before Congress or the Executive Branch may not be intended to influence a Federal election," but concluded — again correctly — that it

[25] The final rules concerning electioneering communications may be found at 67 Fed. Reg.

lacked authority to create such an exemption in the face of clearly contrary congressional commands. *Id.* Among those considered but ultimately rejected was an exception that would have exempted communications that promote ballot initiatives or referendums, local tourism, and public service announcements ("PSAs"). *See id.* at 65,202. Again, the FEC acknowledged that "many worthy causes use PSAs for purposes wholly unrelated to Federal elections," but the FEC nonetheless felt obliged to leave the statute as Congress had drafted it.

The staggeringly overbroad sweep of BCRA's "electioneering communications" provisions is magnified by the extraordinary periods during which the statute would regulate (and often criminalize) speech. While the blackout periods referred to in the statute are 60 days (for general, special, or runoff elections) and 30 days (for primaries, preference elections, conventions, and caucuses), those periods can consume much of the year prior to the nomination and election of candidates. With regard to presidential nominations, for example, the blackout period will extend for nearly a full year, since primaries and caucuses are generally conducted between January and June of an election year. Each one will trigger a 30-day blackout, followed by the 60-day blackout before the election itself. For the entire period in which presidential nominations are being determined, the blackout will bar political advertising praising or condemning the leading figures in political life, including a sitting President.[26]

65,190 (Oct. 23, 2002).

[26] And the overbreadth of the statute does not end there. For example, BCRA's electioneering communications provisions apply even when elections are uncontested. It is difficult to see what function the provisions serve in such circumstances, other than to suppress speech.

The overbreadth of BCRA's coverage of specific advertisements is best illustrated by a review of actual political advertisements aired in recent elections that refer to candidates for office but do not contain words of express advocacy. Many such advertisements, several of which are discussed below in section (A), have been furnished to this Court by the parties in this litigation in the form of so-called "storyboards" (documents purporting to contain the full text of advertisements, along with still-shot images captured every 3-4 seconds), videotapes, and compact discs. There has also been extensive testimony, discussed below in section (B), about the nature and quantity of protected speech that would be lost under BCRA. A remarkable array of ideologically disparate plaintiffs and non-parties in this action, including, among others, the ACLU, the Chamber of Commerce, the AFL-CIO, the NRA, and Common Cause, have offered testimony demonstrating with crystalline clarity that BCRA's "electioneering communication" provisions criminalize an enormous amount of issue advocacy. Each of these entities engages in political speech about important issues lost under BCRA. This endangered speech deserves the highest First Amendment protection.

A) Examples Of Newly Prohibited Speech From Storyboards And Videotapes.

Video recordings of 21 advertisements aired in the 1998 and 2000 elections, some of which are discussed below and others of which will be shown to the Court during oral argument, are included in Plaintiffs' Consolidated Evidentiary Submission, together with copies of storyboards produced in this litigation by the Brennan Center.[27] These videos and storyboards

[27] The parties have stipulated to the authenticity of videos and storyboards of advertisements. Storyboards quoted herein are annexed to this consolidated brief as Exhibit A, as are eight

offer powerful illustrations of the amount and type of issue advocacy that would be prohibited by BCRA's primary definition of "electioneering communications."

Some of these advertisements simply refer to a Representative or Senator who was a candidate for re-election in the course of advocacy about one or another issue. Consider the AFL-CIO advertisement opposing permanent most-favored-nation status for China. In its entirety, the spoken portion of the advertisement, which ran in 2000, was as follows:

> [Announcer] Behind this label is a shameful story of political prisoners and forced labor camps, of wages as low as 13 cents an hour, of a country that routinely violates trade rules flooding our markets draining American jobs. Now Congress is set to scrap its annual review of China's record and reward China with a permanent trade deal. Tell Congresswoman Myrick to vote "No" and keep China on probation until this label stands for fairness. [DIS]: Paid for by the AFL-CIO.

Exh. A, at McC 20. The only spoken reference to Representative Myrick was the importuning of viewers to urge her to vote "no" on China's permanent most-favored-nation status. The only material seen on screen about the Congresswoman stated "CALL CONGRESSWOMAN MYRICK" and gave her telephone number. Yet the AFL-CIO could be indicted in 2004 for running a similar ad in Representative Myrick's district within 30 days of a primary or 60 days of election day itself.[28]

Another advertisement, broadcast within 60 days of the 1998 election, in the district of

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advertisements broadcast in 1998 discussed below.

[28] In fact, identically worded AFL-CIO television ads broadcast on the same days but naming Representatives Silvestre Reyes and Ron Paul (coincidentally another plaintiff in this litigation) *did* run within 30 days of their respective primaries and *would* have been banned by BCRA. 6 PCS, Mitchell decl., exh. 1, at 92.

Oregon Congressman David Wu, urged him to support term limits in the following terms:

> [Announcer]: The people of America should be running our government. That's the way it was set up in the first place. The problem is the special interests and the paid lobbyists who control the Washington politicians. The answer is term limits. Term limits replace Washington insiders with new people who reflect community interests, not politics as usual. Molly Bordonaro has signed the pledge to limit her terms in Congress. David Wu refused. Call David Wu and tell him to sign the US Term Limits Pledge.

Exh. A, at McC 21. The advertisement thus informs the viewer that Congressman Wu has failed to sign a term limits pledge and implores viewers to call him to pressure him to do so. Under BCRA, the term limits group that funded it would be subject to criminal sanctions. See McCain dep. 118-21.

An ad sponsored by the Michigan Chamber of Commerce that was broadcast in Michigan within 60 days of the 2000 election criticized the position of Democratic Senate candidate and then-Congresswoman Debbie Stabenow with regard to the estate tax. It stated:

> [Announcer]: Twenty-two years ago, Pat Walykow founded this business and guided it through some tough times. Now it provides a living for thirty-five families. Pat wants to leave her companies to her daughters but because of death taxes, she won't be able to. Debbie Stabenow voted twice against ending the death tax. Now if anything happens, the family will have to sell this business and maybe their home. [Walykow]: "We've all worked too hard to see this go to the government. Tell Debbie Stabenow to end the death tax. Working families are suffering." [PFB the Michigan Chamber for Commerce]

Exh. A, at McC 22. Once again, the ad makes clear its disagreement with a candidate's position but is nowhere near the sort of express advocacy required by the Supreme Court for regulation to be permitted. Yet under BCRA its broadcast, too, would subject its corporate sponsor to potential criminal liability.

B) Examples Of Newly Prohibited Speech From Plaintiff And Non-Party Testimony.

The record developed in this case reveals the extent to which BCRA's electioneering

communications provisions will imperil protected speech. Contrary to the picture defendants would paint of entities airing ads only to elect or defeat candidates, these groups are deeply engaged in an ongoing basis in advocating governmental policies concerning issues affecting its members. Just a few of many examples from the record will amply illustrate the point:

- **The Southeastern Legal Foundation:** SLF is a nonprofit corporation founded for the purpose of promoting limited government, individual economic freedom, and the free-enterprise system. It regularly uses broadcast advertising to further its support of these issues. For example, during Senator McConnell's 2002 bid for reelection to the United States Senate, SLF, along with co-plaintiffs the National Right to Work Committee, 60 Plus, and the Center For Individual Freedom, ran an ad critical of BCRA and supportive of Senator McConnell's leadership of this litigation against it. *See* 8 PCS/SLF 185 (Hogue). That ad would be banned by BCRA.

- **National Right To Life Committee:** The National Right to Life Committee, Inc. ("NRLC") has been involved in a wide spectrum of educational and legislative advocacy concerning its issues of special concern, as fully set out in the Declaration of David N. O'Steen, Executive Director of the NRLC. 8 PCS/MC 262-889. Sometimes its legislative activity falls within the 60 days before a general election or 30 days before a primary, a factor beyond NRLC's control. *See id.* at 262-63. Legislative advocacy commonly mentions the names of legislators — because bills are known by sponsor names and efforts are made to get the votes of targeted legislators — and sometimes the named legislators are candidates for election, another factor beyond NRLC's control. *See id.* The purpose of this advocacy is to bring about legislation favorable to NRLC's positions. *See id.* at 263.

- **The American Civil Liberties Union:** The ACLU is a nationwide, nonprofit organization that works to protect civil rights and civil liberties in a variety of ways, including legislative advocacy, and that has never has contributed to candidates, political parties, or political committees. Instead, the ACLU educates its members and the public, occasionally through broadcast advertisements, about issues important to civil rights and civil liberties. For example, in March 2002, it sponsored a radio advertisement urging viewers to "[s]end Speaker Hastert a letter urging him to support fairness and bring ENDA [the Employment Non-Discrimination Act] to the floor by going to www.aclu.org/enda." This ad was broadcast in Speaker Hastert's district within 30 days of his unopposed primary. *See* 3 PCS/ACLU 14-15 (Murphy). The ACLU's activities are discussed in its separate submission. *See* ACLU Br. 2-7.

- **AFL-CIO:** The AFL-CIO is a national labor federation with 13 million members that sponsors broadcast advertising on issues important to working families, in which the name of a congressman is almost always included. *See* 6 PCS, Mitchell decl. ¶ 11 (noting the AFL's "strong belief that Members of Congress and Senators must be held