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

accountable for how they vote on issues of importance to union members and working families.") *see also id.* ("[B]ased on my experience, advertisements on policy and legislative issues have far less impact when they do not mention a policymaker by name."). These ads, many of which would be banned under BCRA, are quite effective in furthering the AFL's issue-oriented goals. *See* 7 PCS, G. Shea decl. ¶ 33 (observing that "at least ten Republicans" who had voted not to bring up a minimum wage bill in the House later voted in favor of the bill after being "targeted by the AFL-CIO's advertisements and other lobbying activities"). The AFL's advertising strategy is discussed more fully in its separate submission. *See* AFL-CIO Br. 1-11.

- **Common Cause:** Common Cause, not a party to this action, is a section 501(c)(4) membership corporation that for years has urged the public to support passage of what ultimately became known as BCRA. In broadcast advertisements, the organization urged named Senators and Representatives to support the legislation. Common Cause testified that these advertisements were designed to "pressure" Members of Congress to vote in favor of campaign finance reform. With equal regularity the ads, which were regularly run within 30 days of federal elections, mentioned the popular name of the proposed bill — "Shays-Meehan" or "McCain-Feingold." These ads would be banned by BCRA.

- **The National Rifle Association:** The NRA is a section 501(c)(4) membership organization devoted to educating the public about the importance of maintaining Second Amendment rights, and to opposing or supporting legislation that infringes upon or enhances those rights. To inform its members and the general public about its ideals and pending legislation, the NRA utilizes broadcast media, print media, direct mailings and the Internet. For example, the NRA produces extended broadcast programming, in which it offers a 30-minute articulation of its views on various gun-related issues. One of these reports briefly showed the cover of a magazine featuring a picture of Al Gore. It would be prohibited "electioneering communication" under BCRA, because it was run within 60 days of the general election in which Vice President Gore was a candidate. *See* 11 PCS/NRA App. 5 (LaPierre). The NRA's broadcast activities are discussed more fully in its separate submission, *infra.*

- **Associated Builders & Contractors:** ABC is a nonprofit trade association exempt from federal income taxes pursuant to I.R.C. section 501(c)(6). *See* 10 PCS/ABC 1-2 (Monroe). Its 23,000 contractors support a merit shop philosophy and advocate market opportunities regardless of labor affiliation. *See id.* at 1-3. ABC uses radio ads to promote issues, including healthcare and taxes, which ads coincide with legislative sessions and elections and will now be banned because they name candidates. *See id.* at 3, 7; Monroe dep. 79, 84-85, 94-97.

The political speech described above concerns issues of the utmost importance to these and many other organizations, and their members. Much of this issue advocacy would be swept away by BCRA's vastly overbroad prohibitions.

C) Defendants' Own Data Demonstrates That BCRA Prohibits Protected Issue Advocacy.

Defendants have at various times suggested that even if some "genuine" issue advocacy is prohibited by BCRA, only a small amount of this protected speech will actually be barred. In support of this argument, defendants have placed considerable reliance on two reports by the Brennan Center, titled *Buying Time 2000: Television Advertisements in the 2000 Federal Elections* (Craig B. Holman & Luke P. McLoughlin, Brennan Center 2001) (*Buying Time 2000*), and *Buying Time 1998: Television Advertising in the 1998 Congressional Elections* (Jonathan S. Krasno & Daniel E. Seltz, Brennan Center 2000) (*Buying Time 1998*). Depositions of the authors of those reports have been taken and are before the Court.

Buying Time 1998 and *Buying Time 2000* were cited repeatedly by Members of Congress during the debates on BCRA. *See, e.g.*, 147 Cong. Rec. S3045 (daily ed. March 28, 2001) (statement of Sen. Snowe) (opining that BCRA's prohibitions were "narrow enough to satisfy the Supreme Court's overbreadth concerns" and stating that that conclusion "is supported by a comprehensive academic review conducted of television advertisements in the 1998 federal election cycle. See Buying Time: Television Advertising in the 1998 Congressional Elections (Brennan Center for Justice, 2000)."); 148 Cong. Rec. S2117-18 (daily ed. March 20, 2002) (statement of Sen. Jeffords) (directing document to be printed in record entitled "Campaign Finance Reform — Fact & Fiction (based on findings from Buying Time 2000: Television Advertising in the 2000 Federal Elections)"); 148 Cong. Rec. S2141 (daily ed. March 20, 2002) (statement of Sen. McCain) ("A comprehensive study of political ads by the Brennan Center for Justice [*Buying Time 2000*] shows just how parties and outside groups are financing campaign ads with soft money."). As discovery has revealed, that is no coincidence. From their

conception, the studies were designed to provide ostensible empirical support to propel the legislative plan that became sections 201 through 204 of BCRA, and they were executed to accomplish that single goal.

These "studies" were based on data obtained and analyzed by Professor Kenneth Goldstein with the help of his political science students at Arizona State University (for the 1998 report) and the University of Wisconsin (for the 2000 report). The students were shown "storyboards" of certain political ads broadcast during 1998 and 2000 which contained the text and selected frames of the video of the ad (usually six or so frames per 30-second ad); they were then asked to "code" the commercials based on their content. In a nutshell, the reports concluded that the vast majority of advertisements aired in the 60-day window before election day — 93% in 1998 and over 99% in 2000 — were not what the Brennan Center views as "genuine issue advocacy" but were instead what the Brennan Center chooses to characterize as "sham issue advocacy."[29] Thus, the argument goes, since such little speech truly worthy of constitutional protection would have been condemned under BCRA, no overbreadth problem arises.[30]

After extensive discovery, the Brennan Center's ballyhooed work has been thoroughly,

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[29] We reject the "genuine"-versus-"sham" dichotomy embraced in these reports because that distinction is subjective, immune to empirical proof, and totally antithetical to *Buckley*. But even on defendants' own terms and assumptions, their "studies" do not support their conclusions.

[30] The Brennan Center reports did not purport to analyze the impact of the 30-day ban on "electioneering communications" before primaries, a significant flaw in the analysis. The studies also failed to consider political advertisements broadcast on radio or those aired on local cable stations, and were limited to a non-comprehensive review of advertisements broadcast in the top 75 markets, thereby excluding the impact on more rural communities where broadcast ads are a more economical and efficient means of communication for candidates. *See* Goldstein dep. 51-52; Seltz dep. 180.

often embarrassingly discredited. From the start, we now know, the Brennan Center and those it retained were so dedicated to advancing campaign finance legislation that ordinary scientific standards were sacrificed. A grant for the studies was sought for the express aim of furthering "reform" and the scholar who sought it — Professor Goldstein — represented that his study would be "designed and executed" to achieve the cause of "reform." *See* Goldstein dep. 37-38 (admitting that he designed and executed the study in this manner).

As for the studies themselves, we now know that the *Buying Time 1998*'s claim that "only" 7% of "genuine" issue advertisements broadcast during the 1998 election would be barred by BCRA is — in the words of Brennan Center President and CEO Joshua Rosenkranz — "not just misleading," but "flat-out false." *See* Holman dep. 126. In an extraordinary concession, the authors of Buying Time 1998 now acknowledge that using the same approach that the Brennan Center employed to report its findings in 2000 (and the same approach used by yet another scholar it commissioned to analyze the 1998 data), over 14% of "genuine" issue advertisements aired during the last 60 days of the 1998 election would have been prohibited by BCRA. *See* FEC ES, Krasno decl. app. 3; FEC ES, Krasno rebuttal decl. 19. By any standard, 14% of protected political speech represents substantial overbreadth.

And we know still more. Based on the Brennan Center's own data (and documents produced by Professor Goldstein), we now know that the 14% figure is wildly off the mark. So-called "coding sheets" produced by Professor Goldstein and filled in by his students as they evaluated the advertisements demonstrate that *a full 64% of "genuine issue advertisements"*

aired during the last 60 days of the 1998 election would have been prohibited by BCRA.[31] The critical question asked of the coders was, "In your opinion, is the purpose of this ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?" Students were given three choices, "1. Provide information or urge action;" "2. Generate support/opposition for candidate;" or "3. Unsure/Unclear."[32] If the student chose answer 1, the ad was determined to be a "genuine issue ad"; if the student chose answer 2, the ad was determined to be an "electioneering" ad. According to the coding sheets, the students determined that at least 10 of the group-sponsored advertisements that aired during the last 60 days of the 1998 election and referred to a federal candidate were "genuine" issue advertisements. Nevertheless, *Buying Time 1998* reports that there were only two such ads. Incredibly, someone, either Professor Goldstein (who claims no knowledge of the facts); someone else who wrote the 1998 study (the authors also claim no knowledge of what happened); or some unnamed person at the Brennan Center *recoded* eight of these advertisements from "providing information" to "generating support or opposition for a candidate." According

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[31] The coding sheets were designed by a committee of campaign "reform" advocates and Brennan Center lawyers. Goldstein dep. 41-42.

[32] Of course, the students had no way to determine the "purpose" of the advertisements other than their speculations when viewing them (or, more precisely, when viewing the storyboards, for *the students never actually saw the actual video advertisements as broadcast*). The students were untrained; were given no guidance as to how to determine purpose; and were not told where or how often the ads were broadcast. To make matters worse, students were given no option to categorize an ad as one that focused on *both* issues and candidates, despite the fact that many issue ads do precisely that. In fact, in response to another question, the students concluded that over 98% of group ads studied in the 1998 election had issues as their "primary focus"; in 2000 the number was 96.4%. 1 PCS/ER 32-33, 57 (Gibson).

to the Brennan Center's and Professor Goldstein's own data and crediting the student coders' original assessments, the percentage of "genuine" issue ads broadcast in the last 60 days of the 1998 election that would have been barred by BCRA rises to 64%. *See* 1 PCS/ER 43 (Gibson). This is overbreadth and then some.[33]

The eight storyboards representing advertisements shown in the last 60 days of the 1998 campaign that Professor Goldstein's students determined were "genuine" issue ads are appended to this brief. *See* Exh. A, at McC 27-36. They speak for themselves. The storyboards make plain that, based on the Brennan Center's own documents, BCRA's overbreadth is stunning.[34]

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[33] The analysis is detailed in the expert report of Dr. James L. Gibson. *See* 1 PCS/ER 35-43 (Gibson). Although defendants found it necessary to file no less than three rebuttal reports in response to Dr. Gibson's, not one challenges this 64% finding. In his rebuttal expert report, Dr. Gibson reconsidered this analysis using the methodology offered in the expert report of Jonathan Krasno submitted by the FEC. Crediting the students' judgments again and employing Dr. Krasno's methodology, Dr. Gibson concluded that no less (and likely more) than 51% of "genuine issue ads" aired within 60 days of the 1998 election would have been banned by BCRA. 2 PCS/ER 816 (Gibson).

[34] The same was true of 2000. In his report filed with this Court, Dr. Goldstein credited as a "genuine" issue advertisement one by a group called Citizens for Better Medicare that — once again — the student coders had adjudged to be genuine but whose judgment was overridden by Dr. Goldstein in preparing Buying Time 2000. Six other storyboards by the same organization whose texts were viewed by Dr. Goldstein as "not meaningfully distinguishable" from the one he treated as "genuine" were inexplicably treated by him as "sham ads." At his deposition, Dr. Goldstein acknowledged that, for purposes of his analysis, it would have been fairer to treat all seven advertisements as "genuine," and that doing so would have led him to conclude that 17% of group ads broadcast within 60 days of the 2000 election were "genuine" and would have been swept within the criteria adopted in BCRA. Goldstein dep. 159-69. Additionally, Dr. James Gibson testified that if 30 other advertisements shown in 2000 had been treated as "genuine" — *all* advertisements that, as defendants' expert witness Sorauf acknowledged (a) dealt with a public issue; (b) involved criticism or commentary on the views of a public official or candidate with respect to that issue; and (c) did not tell the viewer who to vote for — the actual figure for that year would have increased by an additional 23%. Copies of the storyboards for the advertisements are included as Exhibit 15 to Professor Gibson's report. *See* 1A PCS/ER 761-792.

(ii) BCRA's Fallback Definition Of "Electioneering Communications" Is Unconstitutionally Vague.

If BCRA's primary definition of "electioneering communications" is struck down, either under *Buckley* and/or because of impermissible overbreadth, the statute's fallback definition should likewise fall because it is impermissibly vague. *See* BCRA § 201(a) (adding FECA § 304(f)). Discovery has shown that reasonable people can, and emphatically do, disagree about whether virtually any particular advertisement meets the criteria of BCRA's fallback definition.

A regulation is unconstitutionally vague if a person "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). The Supreme Court has articulated several reasons why vague laws cannot stand:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.

Taking the ads deemed "genuine" by Professor Goldstein, the ads that were virtually indistinguishable from them and the 30 ads Professor Sorauf testified about, the number of "genuine issue ads" that would have been prohibited if BCRA were then in effect is more than 39% of all group ads aired within the last 60 days of the 2000 election. *See* Gibson dep. 159-69; 1 PCS/ER 63 (Gibson).

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (footnotes and internal quotations omitted; alterations in original).

Grayned applies with force to the fallback definition. Dr. Craig Holman, the chief author of *Buying Time 2000*, repeatedly testified that such a decision is by its nature not a "black and white issue," but is instead a "subjective judgment" each one of which "can be reasonably debated." Holman dep. 73, 80. Defendants' own expert, Dr. Goldstein, demonstrated the point with great clarity in a test he conducted after being retained as an expert in this litigation. As he conceded at his deposition, Dr. Goldstein's study revealed that even his own political science students disagreed 25% of the time as to whether particular "issue ads" were "genuine" or not. Goldstein dep. 182.

The record also abundantly provides examples of the vagueness infecting the fallback definition. Throughout discovery, various deponents were shown storyboards representing advertisements aired in the 1998 and 2000 elections that: (i) referred to federal candidates, and (ii) did not contain words of express advocacy. Although the advertisements were indisputably covered by BCRA's primary definition, when the deponents were questioned about their own *subjective* views about the advertisements, their answers varied greatly. These disagreements over fundamental issues, such as: (i) whether a particular advertisement supported or opposed a candidate, or (ii) whether it was clearly an exhortation to vote, demonstrate that the fallback definition is unconstitutionally vague. The added (and ironic) fact that these deponents were the Senators who drafted BCRA, as well as some of the statute's chief proponents from the Brennan Center, is further reason to conclude that the fallback definition cannot survive constitutional scrutiny.

One example makes the point with force. An advertisement shown to several deponents was sponsored by the Alliance for Quality Nursing Home Care.[35] Airing in 2000, the advertisement referred to then-presidential candidate Al Gore. The spoken words were these:

> [Announcer]: There's a nursing home crisis in America. Despite record budget surpluses Medicare has been cut by billions. Seniors' access to quality nursing home care threatened. [Woman]: "Caring for the elderly: it becomes your life. But with Medicare cuts my job is much harder." [Announcer]: Call. Tell Al Gore to fight to restore the Medicare cuts. Keep the promise. [Woman]: "Help me help those who need it the most."

Exh. A, at McC 25. After being shown this ad at his deposition, Senator Feingold was unsure whether it was "pro-Gore or anti-Gore." Feingold dep. 41. His testimony was simply, "I don't know." *Id.* When pressed, Senator Feingold added: "Well, my understanding of the way these ads usually work is when you call the guy's office, you are usually attacking the guy. This certainly is not helpful to Al Gore because what it suggests is that he was somehow responsible for the Medicare cuts and it, in my view, it's sort of a sneaky way of trying to blame him without directly saying that he should be thrown out of office or not elected. . . . But I'm not absolutely certain." *Id.* For his part, Senator McCain testified that the ad "implies that Al Gore was responsible for Medicare cuts, which is a pretty damning indictment." McCain dep. 139. But Representative Meehan concluded that that the ad "probably" was intended to promote Gore's candidacy, Meehan dep. 124, and Representative Shays agreed, Shays dep. 128.[36] Not even

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[35] The advertisement was annexed to *Buying Time 2000* as illustrative of the advertisements coded by the students.

[36] Notably, the defendant-intervenor BCRA sponsors on August 23, 2002, urged the FEC in its Title II rulemaking to recognize an "exemption" from its broadcast ban for advertisements exactly like the ad quoted in the text, so long as it referred to the officeholder only by office and

BCRA's sponsors can agree.

Differences of opinion were not limited to sponsors of BCRA. Another advertisement that aired in Kentucky within 60 days of the 2000 election for Senate, used these words:

> [Graduate]: "Dear high tech company, I'd like to send you my resume." [Announcer]: Dear Graduate, sorry, Congress is going to give your job to a foreign worker. [Graduate]: "But I've just finished four hard years of technical studies." [Announcer 1]: Sorry, besides foreign workers will work for a lot less. [Announcer 2]: Is this any way to treat American workers? But based on her record, Congresswoman Northrup is likely to vote in favor of the Foreign Worker Bill. Call Congresswoman Northrup and tell her to save our best jobs for American workers. Ask her to vote no on the Foreign Worker Bill. This message paid for by the Coalition for the Future American Worker.

Exh. A, at McC 26. The particular undergraduate student at the University of Wisconsin who coded this advertisement concluded that it was aimed at providing information about or urging action on a bill or issue. *See* Holman dep. 77-78. Dr. Holman himself testified that this advertisement was a genuine issue ad. *See id.* at 80 ("[T]he emphasis really does seem to be on the bill that's pending before Congress so . . . I view this as an ad that is genuinely trying to influence legislation."). Yet, when asked about this same advertisement, Senator McCain testified that it "is exactly what I have in mind as a sham issue ad." McCain dep. 141.

A final example (the depositions in this case are filled with them) is an advertisement paid for by a pro-life group and broadcast in Wisconsin in 1998 and 2000, which stated:

> [Announcer]: America was outraged when two New Jersey teenagers checked into a Delaware hotel and delivered and disposed of their newborn baby in a

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not by name, *e.g.*, "Your Congressman." *See* Detailed Comments of BCRA Sponsors (August 23, 2002), *available at* www.fec.gov/pdf/nrpm/electioneering_comm/comments/us_cong-members.pdf. Assuming the sponsors consider such an ad "genuine," its distinction from the Medicare ad in the text surely has no constitutional significance.

> dumpster. Most Americans couldn't believe that this defenseless human life could be so coldly snuffed out. But incredibly, if a doctor had been present that day in Delaware and delivered the infant all but one inch from full birth and then killed him, it would have been perfectly legal. Instead of murder or manslaughter, it would have been called a partial-birth abortion. Killing late in the third trimester, killing just inches away from full birth. Partial-birth abortion puts a violent death on thousands of babies every year. Your Senators, Russ Feingold and Herb Kohl, voted to continue this grisly procedure. Contact Senators Feingold and Kohl today and insist they change their vote and oppose partial birth abortion. Their number in Washington is 202-224-3121. [PFB: Members of the National Pro-Life Alliance]

Exh. A, at McC 23-24. This advertisement was broadcast in the 1998 election in which Senator Kohl was a candidate and again prior to the 2000 election in which Senator Feingold was a candidate. As to this advertisement, Senator Feingold testified that, "I do question whether an ad like this as it was used in this context is really about banning later term abortion or whether it is simply a way to try to win an election." Feingold dep. 19-20. Yet, Luke McLoughlin, the co-author of *Buying Time 2000,* testified that the same advertisement "is a genuine issue ad," concluding that "[t]he ad's focus is primarily on the issue of partial birth abortion." McLoughlin dep. 42. Defendants' expert, Dr. Arthur Lupia, testified similarly. Lupia dep. 66. But Dr. Holman, the co-author of *Buying Time 2000*, disagreed with both his co-author's opinion and that of the defendants' own expert, concluding that this same advertisement was an "electioneering issue ad." *See* Holman dep. 67, 68-69. As if more were needed to illustrate this inherent subjectivity, Dr. Goldstein, having been so certain in 2000 that the advertisement was *not* "genuine" that he reversed a student determination that it was, has now concluded that the ad is in fact a "genuine" issue ad — a view he came to only during the course of this litigation. Goldstein dep. 135.

All this disagreement sharply exposes the profoundly unconstitutional vagueness of the

fallback definition. In *Buckley* itself, the Supreme Court held that a statute that "puts the speaker . . . wholly at the mercy of the varied understandings of his hearers" cannot pass muster under a vagueness analysis. *Buckley,* 424 U.S. at 43. Even BCRA's sponsors recognized in deposition, as they did in their comments to the FEC, the need for clarity in defining "electioneering communication." *See* McCain dep. 104 ("You and I may have a disagreement whether [an ad is] an attack or a support ad. That's why we had to set up the objective criteria."); Feingold dep. 31 ("I think the idea of the objective test as opposed to where you take into account all the other factors is a better test in terms of protecting the First Amendment and allowing groups clear notice of what is okay and what isn't okay in terms of how they fund their ads."). BCRA has failed in this regard. If the draftsmen of BCRA cannot themselves agree on the "meaning" of an advertisement, if co-authors Holman and McLoughlin cannot agree as to whether an advertisement possesses the characteristics that would subject its sponsor to criminal penalties, the statute's fallback definition cannot be viewed as sufficiently narrowly drawn to protect First Amendment rights.

(b) BCRA's Ban On Electioneering Communications Is So Woefully Underinclusive That It Fails To Serve A Compelling State Interest.

Not only are BCRA's "electioneering communication" provisions not narrowly tailored, they fail to serve a compelling state interest. The prohibition on "electioneering communications" is underinclusive because it prohibits issue advertisements that refer to federal candidates during the period 60 days before a general election or 30 days before a primary, but permits the very same advertisements without any regulation at all other times. Under BCRA, an advertisement criticizing a Senator for his support of the administration's Iraq policy or his

position on corporate fraud penalties could be aired, without regulation, continually throughout the year, but the very same advertisement would be criminal if aired *even once* during the 60 days before a general election or 30 days before a primary. The Supreme Court has held that this sort of underinclusiveness "diminish[es] the credibility of the government's rationale for restricting speech" and runs afoul of the First Amendment. *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994).

As recently as last March, in *Republican Party of Minnesota*, the Supreme Court struck down as underinclusive a ban on political speech remarkably similar to the ban embodied in BCRA. There, the Court invalidated a restriction prohibiting candidates for judicial office from announcing their views during the judicial campaign on legal or political issues. The Court concluded that the restriction was unconstitutional because it prohibited political speech during the campaign, but not before or after the campaign. *See* 122 S. Ct. at 2537. The Court reasoned:

> The short of the matter is this: In Minnesota, a candidate for judicial office may not say "I think it is constitutional for the legislature to prohibit same-sex marriages." He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected.

Id. The purported purpose of the statute was to "preserve the state judiciary's impartiality" and "the appearance of impartiality." But the Court found the announce clause to be "so woefully underinclusive as to render belief in [its stated purpose] a challenge to the credulous." *Id.*

The restriction in *Republican Party of Minnesota* did not deal with legislative campaigns, but judicial ones. The Court concluded that "*even if* the First Amendment allows greater regulation of judicial election campaigns than legislative election campaigns, the announce clause still fails strict scrutiny because it is woefully underinclusive, prohibiting announcements by judges (and would-be judges) only at certain times and in certain forms." *Id.* at 2539

(emphasis in original). The majority relied on legislative election cases "to make the obvious point that this underinclusiveness cannot be explained by resort to the notion that the First Amendment provides less protection during an election campaign than at other times." *Id.*

The same principle applies here. Defendants cannot demonstrate that ads referring to federal candidates during the 30- and 60-day windows are deserving of less protection than identical advertisements aired outside of those blackout periods. Nor can defendants demonstrate that Congress' stated purpose is sufficiently advanced by prohibiting electioneering communications only during the 30- and 60-day windows.[37] Title II of BCRA thus suffers from precisely the infirmity infecting the restriction at issue in *Republican Party of Minnesota.*

(c) BCRA Violates The First Amendment And The Equal Protection Component Of The Due Process Clause Of The Fifth Amendment By Discriminating Against Broadcast, Cable, and Satellite Media.

Not only does BCRA criminalize constitutionally protected speech broadcast on television and radio, it does so in a particularly unconstitutional manner — barring speech on television and radio that the statute permits to be published in print and other media. Congress lacks power under the First Amendment to bar such speech in any medium of communication and cannot, in any event, selectively choose to bar it in only one form of media.

[37] The same is true of yet another example of BCRA's underinclusiveness: While it applies to speech of all corporations and unions within 60 days of an election that even "refers" to a candidate within the requisite geographic area, it takes no account of how slight the reference might be. The 30-minute NRA advertisement discussed in its separate submission, *see* NRA Br. 27, which contained only a passing glimpse of Vice President Gore, would thus be swept within the statute's purview. At the same time, the statute applies not at all to *any* speech funded by individuals, however dominant the reference to a candidate may be in the advertisement.

(i) BCRA's Discrimination Against Broadcast, Cable, And Satellite Communications Should Be Subject To Strict Scrutiny.

BCRA's ban on electioneering communications criminalizes the funding of certain — but only certain — advertisements, favoring commercial ones over political ones and, in fact, disfavoring only political ads that refer to candidates for federal office. As Professor Akhil Amar recently observed, any statute that "treat[s] more restrictively . . . [a] TV spot detailing why challenger Smith is better than incumbent Jones on the key issues of our day" than an "ad pushing Pepsi over Coke," exhibits open discrimination against political discourse. Akhil Reed Amar, *Conspiracy of Silence*, The American Lawyer, October 2002. Because BCRA, on its face, is content based, its differential treatment of particular broadcast communications must be tested under the strictest scrutiny. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.").

Members of Congress sought to defend BCRA's prohibition against certain broadcast communications on the ground that television and radio stations operate on a limited spectrum and are thus subject to federal regulation.[38] But to the extent that Congress was relying on the

[38] *See, e.g.*, 144 Cong. Rec. S978 (daily ed. Feb. 25, 1998) (statement of Sen. Levin) ("Now, why radio and television? The answer is that the Supreme Court itself has held that, due to the fact that these media, radio and television, are regulated, are licensed, and that the spectrum is limited, you can regulate these media in ways in which you cannot regulate newspapers or the printed word. . . . Indeed, the FCC has regulations on what can be said on radio and television. . . . There are all kinds of rules for the regulated media of television and radio which do not exist relative to newspapers. So, it is not an uncommon distinction. It is a distinction which has been affirmed by the Supreme Court . . . ."); 147 Cong. Rec. S2611 (daily ed. March 21, 2001) (statement of Sen. Torricelli) ("Why indeed should broadcasters not bear some of the

more regulated nature of broadcasting to justify a content-based restriction on political speech aired by broadcasters, that reliance was unfounded. *See Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) ("It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media.").

We recognize that in *Red Lion Broad. Co. v. FCC,* 395 U.S. 367, 386 (1969), and its progeny, the Court held that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them," and that spectrum scarcity justified a level of government involvement with broadcasting that would have been impermissible with respect to the print press. *Compare id.* at 386, *with Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241, 254 (1974) (striking down right of reply law applied to print press). But whatever the continued validity of such distinctions,[39] the *Red Lion* line of cases involve regulations designed to *increase*

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responsibilities? Do they not have public licenses? Do they not have responsibility to air the news fairly, cover campaigns, to inform the public? Should they be allowed to price gouge? They make the argument: What about newspapers? Shouldn't newspapers bear this responsibility? I don't know a newspaper in America that deals with a Federal license, nor are newspapers under the same circumstance of a market that will only permit so many newspapers. The spectrum has limited the number of television stations; hence, the FEC's requirements and Federal law.").

[39] In long since abandoning the fairness doctrine for broadcasters, the FCC itself concluded (in pre-Internet times) that there no longer was any spectrum scarcity. *See In re Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), *reconsideration denied,* 3 F.C.C.R. 2035 (1988). From a judicial perspective, the very concept of spectrum scarcity is precarious. *See Telecommunications Research & Action Ctr.,* 801 F.2d at 508 n.4 ("Broadcast frequencies are much less scarce now than when the scarcity rationale first arose."); *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984) ("The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years."); *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 158 n.8 (1973) ("Scarcity

speech on the airwaves. *Red Lion* itself was justified as a way of enforcing a broadcaster's fiduciary role to the public of presenting voices "which would otherwise, by necessity, be barred from the airwaves." 395 U.S. at 390. *See also Columbia Broad. Sys. v. FCC,* 453 U.S. 367, 396 (1981) (statute requiring broadcasters to give "reasonable access" to federal candidates justified as a means for increasing "freedom of expression by enhancing the ability of . . . the public to receive" information).

What no case has ever done, and what no Congress has ever intended before BCRA, is to justify special restrictions on the broadcast media that would have the effect of *decreasing* speech, especially core political speech. *See League of Women Voters*, 468 U.S. at 378 (invalidating statute prohibiting noncommercial educational stations from editorializing and stating that regulations of the content of broadcast programming must be narrow so that broadcasters can maintain "a vital and independent form of communicative activity").[40]

Moreover, BCRA goes well beyond the regulation of broadcasters and directly impacts the rights of unregulated entities and their ability to speak utilizing the broadcast media. Surely, *Red Lion* and its progeny — which address the constitutionality of certain regulations imposed on broadcast licensees — cannot be interpreted as justifying a lesser level of judicial scrutiny for

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may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion.*").

[40] Nor is there any basis in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and its progeny for sustaining the constitutionality (or avoiding strict scrutiny) of BCRA. *Pacifica* justified greater restrictions on the broadcast media in the context of broadcasts deemed offensive to children because of the pervasiveness of the broadcast medium. *See id.* at 748-49. But while that notion may provide a basis for taking steps to assure that children are not continually subject to "offensive" speech, there is surely no analogy in that to affirming steps to assure that the public hears *less* about public issues and candidates for public office.

content-based restrictions on the rights of entities to speak via broadcast facilities. Thus, BCRA's ban on independent groups utilizing broadcast stations to speak about political matters before an election must be subjected to strict scrutiny.

(ii) BCRA's Regulation Of Broadcast Communications Is Not Narrowly Tailored To Serve A Compelling State Interest.

BCRA's ban on electioneering communications cannot begin to withstand strict scrutiny analysis because the ban is underinclusive insofar as it regulates broadcast communications but not other communications, including print, containing the same message. By way of example, BCRA would criminalize the ACLU radio broadcast, discussed above, that criticizes Speaker Dennis Hastert for not bringing the Employment Non-Discrimination Act up for a vote. Though the broadcast version of the advertisement would have been banned by BCRA, another actual ACLU sponsored advertisement — printed in newspapers in Speaker Hastert's district — discussing the same issue with nearly identical text, would not have been subject to any of BCRA's regulations. *See* 3 PCS/ACLU 10 (Murphy). Differential treatment of this sort is intolerable under strict scrutiny analysis precisely because it puts in doubt the supposedly compelling nature of the need for the statute in the first place. *See Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104-05 (1979) (statute prohibiting newspapers from publishing names of juvenile offenders struck down as underinclusive because it "does not restrict the electronic media or any form of publication, except 'newspapers'"); *B.J.F. v. Florida Star*, 491 U.S. 524, 540 (1989) (striking down statute that prohibited publication of names of victims by "instrument[s] of mass communication" because the statute did not also prohibit dissemination by other means, like "backyard gossip").

B. BCRA's Coordination Provisions Are Unconstitutional.

Expenditures that are "coordinated" with a candidate for office are deemed to be "contributions" to that candidate, and therefore subject to the full panoply of contribution restrictions and prohibitions contained in BCRA. Although the concept of "coordination" predates its enactment, BCRA has mandated a broader definition than under preexisting law. Apart from being more expansive, BCRA does not specify the new version of "coordination" in any meaningful way. As a consequence, political speakers will generally have no idea whether their speech will be deemed "coordinated," thus introducing still more overbreadth and vagueness. Simply put, BCRA's coordination provisions will criminalize protected speech, and have a chilling effect on those who would otherwise engage in protected First Amendment activity: many plaintiffs in this case who would routinely communicate with members of Congress must either (i) curtail the exercise of their right to associate and to petition the government, or (ii) refrain altogether from engaging in fully protected speech.[41]

BCRA specifically provides that any expenditure "made in concert or cooperation with or at the request or suggestion of" a candidate or his agent, BCRA § 211 (amending FECA § 301(17)), and any expenditure "made by any person . . . in cooperation, consultation, or concert, with, or at the request or suggestion of" a political party, BCRA § 214(a) (amending FECA § 315(a)(7)(B)), constitutes a contribution, rather than an independent expenditure. And Section 202 of BCRA renders the concept of coordination all the more important, making clear

[41] A more extensive discussion of BCRA's coordination provisions can be found in the separate submissions of the Chamber of Commerce plaintiffs, *see* Chamber Br. 6-18, and the ACLU, *see* ACLU Br. 7-9, 19-20.

that coordinated disbursements for electioneering communications are to be deemed contributions to the "supported" candidate.[42] *See* BCRA § 202 (amending FECA § 315(a)(7)). Finally, section 214 of BCRA repeals the FEC's existing coordination regulations, and requires the FEC to construe coordination broadly, specifying that "the regulations shall not require agreement or formal collaboration to establish coordination." BCRA § 214(b)-(c).

Given this statutory framework, no regulations promulgated by the FEC can solve the fundamental problem with BCRA's coordination provisions: by requiring that "agreement or formal collaboration" not be a prerequisite to deeming an expenditure "coordinated," BCRA exceeds the constitutional bounds established in *Buckley*.

In construing FECA to ensure that *independent* expenditures were not limited, *Buckley* defined as "independent expenditures" those disbursements not "authorized" or "requested" by the candidate. *Buckley*, 424 U.S. at 47 & n.53. In other words, for an expenditure to be categorized as not "independent," *Buckley* mandated that there exist the very agreement that BCRA expressly renders unnecessary. *See also Colorado I*, 518 U.S. at 619 (plurality opinion) (explaining that, for an expenditure to be "coordinated," there must be "*actual coordination as a matter of fact*") (emphasis added). So too this Court has made clear that the circumstances under which a contribution can be deemed "coordinated" are limited: "In the absence of a request or suggestion from the campaign, an expressive expenditure becomes 'coordinated' where the

[42] As explained above, BCRA's definitions of "electioneering communications" reach far beyond express advocacy, and are therefore unconstitutional under *Buckley* and *MCFL*. Because such communications are beyond Congress's reach, BCRA section 202, which imposes on such communications a regime of coordination regulation, likewise falls.

candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender. . . ." *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 92 (D.D.C. 1999); *see also id.* at 88-92 ("[The] standard for coordination must be restrictive, limiting the universe of cases triggering potential enforcement actions to those situations in which the coordination is extensive enough to make the potential for corruption through legislative *quid pro quo* palpable without chilling protected contact.").[43] *See generally* James Bopp, Jr. & Heidi K. Abegg, *The Developing Constitutional Standards for "Coordinated Expenditures": Has the Federal Election Commission Finally Found A Way To Regulate Issue Advocacy?*, 1 Election L.J. No. 2, at 209 (2002).

BCRA flouts this established line of precedent. Although BCRA may well permit a chance meeting or brief discussion between a candidate and an outside group or individual to give rise to the level of "coordination," the caselaw plainly requires actual agreement or a sort of "joint venture" between the candidate and the outside group. *Cf. Christian Coalition*, 52 F. Supp. 2d at 91 ("[T]he spender should not be deemed to forfeit First Amendment protections . . . merely by having engaged in some consultations or coordination with a federal candidate."); *Clifton,* 114 F.3d at 1314 (striking down FEC regulation on voter guides and holding that "it is beyond reasonable belief that, to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public

[43] While the "substantial discussion or negotiation" language of *Christian Coalition* might be taken, at first glance, to allow for something less than an "agreement" to serve as a predicate for coordination, this Court made clear that "substantial discussion or negotiation" occurs only where "the candidate and spender emerge as partners or joint venturers in the expressive expenditure." *Christian Coalition*, 52 F. Supp. 2d at 92.

issues"). By straying beyond what the courts have previously allowed to be considered "coordinated," BCRA has swept in disbursements that should properly be considered independent expenditures, with all the attendant First Amendment protections. *Buckley*, 424 U.S. at 14, 19; *Colorado I*, 518 U.S. at 615; *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 493-98 (1985).[44]

C. By Requiring Political Parties To Choose Between Independent And Coordinated Expenditures, Section 213 Of BCRA Violates The First Amendment.

Like Title I, Title II contains a provision directly regulating political party committees. Section 213 forces political parties to decide, as collective units, whether to make independent or coordinated expenditures on behalf of any given candidate at the time the candidate is nominated. In so doing, section 213 unconstitutionally infringes upon the parties' speech and associational rights.

The operative provisions of section 213 are relatively straightforward. Section 213 first states that, after a political party's candidate is nominated, no committee of the party may make

[44] BCRA's definition of "coordination" is also unconstitutionally vague. The requirement that an expenditure be deemed "coordinated" if undertaken "in concert or cooperation with or at the request or suggestion of" a candidate, or "in cooperation, consultation, or concert, with, or at the request or suggestion of" a political party, fails to "afford[] the precision of regulation that must be the touchstone in an area so closely touching our most precious freedoms," *Buckley*, 424 U.S. at 41 (internal quotation omitted); *see also Christian Coalition*, 52 F. Supp. 2d at 91 ("First Amendment clarity demands a definition of 'coordination' that provides the clearest possible guidance to candidates and constituents. . . ."). Leaving the matter to regulation is inadequate, as it renders the extent to which protected speech is regulated subject to the ebb and flow of administrative practice. Speakers will be uncertain whether their communication with a legislator will someday be deemed coordinated, and will thus be forced to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Buckley*, 424 U.S. at 41 n.48 (internal quotation omitted).

any coordinated expenditure "with respect to the candidate" after it makes any independent expenditure, and vice versa. BCRA § 213 (adding new FECA § 315(d)(4)(A)). For purposes of these prohibitions, "all political committees established and maintained by a national political party . . . and all political committees established and maintained by a State political party" are treated as a *single* committee. BCRA § 213 (adding new FECA § 315(d)(4)(B)). The statute also prohibits any transfers of funds between party committees that have made coordinated expenditures at any point in the election cycle and those that have made, or intend to make, independent expenditures. *See* BCRA § 213 (adding new FECA § 315(d)(4)(C)).

The primary effect of section 213, therefore, is either to ban party committees from making independent expenditures *at all* (if they choose to make coordinated expenditures first), or to ban them from making coordinated expenditures *at all* (if they choose to make independent expenditures first). *See* BCRA § 213 (adding new FECA § 315(d)(4)(A)). The Supreme Court has squarely held, however, that party committees, like other entities, have an untrammeled First Amendment right to engage in independent expenditures. *See Colorado I*, 518 U.S. at 614-19.[45] Indeed, the Court reached its holding in a case in which the relevant party committee had effectively made the maximum permissible amount of *coordinated* expenditures. *See id.* at 612. Conversely, although the Court has held that party committees may be *limited* in making *coordinated* expenditures (because such expenditures are the functional equivalent of contributions, *see FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 441-45

[45] In *Colorado I*, the Court rejected the FEC's efforts to apply a presumption treating all independent expenditures as "coordinated." *See* 518 U.S. at 619-23.

(2001) (*Colorado II*)), the Court has never held that party committees may be *banned* from making coordinated expenditures altogether. Indeed, to so hold would be tantamount to banning party committees almost entirely from making *contributions* to candidates, *see id.* at 438-39 & n.3, 455 n.16. The net result of section 213 is that party committees must consent either to an unconstitutional restriction on their independent expenditures as a price for engaging in coordinated expenditures, or to an unconstitutional restriction on their coordinated expenditures as a price for engaging in independent expenditures. Whether this restriction is viewed as an outright violation of party committees' speech rights or merely as a form of unconstitutional condition on those rights, *see, e.g.*, *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), section 213 violates the First Amendment.

The constitutional problems are exacerbated by the fact that section 213 treats all of the committees of a single party as one committee. *See* BCRA § 213 (adding new FECA § 315(d)(4)(B)).[46] In sharp contrast to Title I, which bars committees within a single party from working together to raise certain types of funds and to decide how funds should be allocated, *see supra* Part I.B, section 213 *compels* party committees to work together to decide whether funds should be used for independent or coordinated expenditures — and potentially leaves one party

[46] The FEC recently proposed a regulation that would treat all committees established and maintained by a national political party as one "committee" for purposes of section 213, and all committees established and maintained by each state political party as another. *See* Coordinated and Independent Expenditures, 67 Fed. Reg. 60,042, 60,054-60,055 (Sept. 24, 2002) (to be codified at 11 C.F.R. 109.35). As a threshold matter, it is hard to see how this regulation can be squared with the text of BCRA § 213, which provides that all such committees should be treated as *one* committee, not fifty-one committees. Regardless of how committees are aggregated under section 213, however, the implications for the associational interests of party committees are similar.

committee at the mercy of another committee over which it has no control (if, for example, one county committee decides to make coordinated expenditures immediately after a candidate is nominated without notifying, much less consulting with, another county committee). Much as the provisions of Title I force party committees to disassociate themselves from each other (in violation of their First Amendment rights of association), section 213 forces party committees to *associate* with each other, in violation of the corollary right *not* to associate. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567, 574-75 (2000).

In sum, section 213 forces political party committees to choose which type of constitutionally protected political speech they would prefer to forgo — and, in some circumstances, strips them even of that choice altogether. Because section 213 thereby imposes unprecedented restrictions on the ability of party committees to engage in expenditures on behalf of their candidates, it is unconstitutional.