IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al., Plaintiffs,	**CONSOLIDATED ACTIONS**
	Civ. No. 02-0582 (CKK, KLH, RLL)
FEDERAL ELECTION COMMISSION, et al., Defendants.	

NATIONAL RIFLE ASSOCIATION, et al., Plaintiffs,	
v.	**Civ. No. 02-0581 (CKK, KLH, RLL)**
FEDERAL ELECTION COMMISSION, et al., Defendants.	

BRIEF OF THE NATIONAL RIFLE ASSOCIATION AND THE NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND

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STATEMENT

The National Rifle Association (the "NRA") is a nonprofit voluntary membership corporation organized under the laws of New York and qualified as tax-exempt under 26 U.S.C. § 501(c)(4). Its 4.3 million members are individual Americans bound together by a common desire to ensure the preservation of the Second Amendment right to keep and bear arms. As announced in its bylaws, the organization's defining purpose is "[t]o protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen . . . to . . . enjoy the right to use arms." NRA Appendix 106 ("App."). Additionally, the NRA sponsors numerous gun safety programs, shooting competitions, and other activities designed to foster the exercise and enjoyment of the rights it seeks to protect. *See* App. 1 (LaPierre Decl.) at ¶ 2. The NRA Political Victory Fund (the "PVF") is a political committee within the meaning of 2 U.S.C. § 431(4) and is a separate segregated fund of the NRA.

As discussed in detail in the pages that follow, the NRA, in the course of defending the constitutional rights of its members, constantly engages in political speech on issues of vital importance to its mission. In 2000, it paid for more speech on television – over 300,000 minutes – than all other issue advocacy groups and unions combined. *See* App. 4 (LaPierre Decl.) ¶ 10. The NRA's speech furthers a variety of purposes: the NRA educates and informs its members and the public on specific legislative threats to Second Amendment rights as well as broader political and cultural pressures on gun rights; the NRA also defends itself against attacks on its positions and reputation made by the media and anti-NRA politicians; and the NRA recruits members and raises funds throughout the year. In almost all of this speech, the NRA refers to federal officeholders and candidates. And yet none of the speech that furthered these purposes in 2000 was intended to influence a federal election. *See* App. 5-6, 17, 21-22 (LaPierre Decl.) ¶¶ 14-15,

40, 50. To be sure, in 2000 the NRA also aired approximately 30,000 minutes of speech documenting Vice President Gore's hostility to the Second Amendment. *See* App. 108. In airing this political speech the NRA sought, among other purposes, to inform the public of the grave threat that Mr. Gore's presidential candidacy posed to Americans' Second Amendment rights. *See* App. 20 (LaPierre Decl.) ¶ 45.

The NRA funds its speech almost exclusively with dues and contributions from individual members. The organization does not accept business corporations as members, and the contributions that it receives from such corporations are negligible (approximately $385,000 in 2000), especially in relation to its income from the dues and contributions of individual members (approximately $140 million in 2000). *See* App. 198; App. 23 (LaPierre Decl.) ¶ 56. The average annual contribution to the NRA is $30. App. 23 ¶ 6. In short, the NRA is an organization comprised of ordinary Americans of moderate means who join their voices in a common effort to defend a freedom that is precious to them.

The Bipartisan Campaign Reform Act ("BCRA") is designed to eliminate the collective voice of NRA members from the public debate on issues of vital importance to them during the period when their speech matters most — the period immediately preceding elections for federal office. The NRA challenges only Title II of BCRA, which criminalizes the expenditure of corporate or union treasury funds for "electioneering communications." Specifically, corporations and unions are prohibited from paying for any television or radio broadcast that airs 30 days before a primary or 60 days before a general election and that "refers to a clearly identified candidate for Federal office." *See* Section 201(a) of BCRA. The prohibition extends to any communication targeted to more than 50,000 persons residing within the electoral district in which the election is to take place. *See id.*

ARGUMENT

I. THE "ELECTIONEERING COMMUNICATIONS" BANNED BY BCRA ARE ABSOLUTELY PROTECTED BY THE FIRST AMENDMENT.

> *These groups often run ads that the candidates themselves disapprove of. Further, these ads are almost always negative attack ads and do little to further beneficial debate and a healthy political dialog. To be honest, they simply drive up an individual candidate's negative polling numbers and increase public cynicism for public service in general.*
>
> -- Senator John McCain (App. 54)

Thus did Senator McCain urge enactment of BCRA's provision prohibiting "these groups" from ever again airing an advertisement critical of him during an election campaign. Title II of BCRA creates a new crime and a new class of felons: corporations and unions that engage in "electioneering communications," which are defined as "[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 . . . ." BCRA § 201(a) (adding new FECA § 304(f)). To be sure, BCRA's ban on electoral speech is indifferent to whether the ads seek to bury Caesar or to praise him; it criminalizes positive ads as well as negative. But the sponsors and supporters of Title II in Congress made no bones about their design. One supporter after another openly echoed Senator McCain's complaint against "negative attack ads":

- Senator Wellstone: "I think these issue advocacy ads are a nightmare. I think all of us should hate them . . . . We could get some of this poison politics off television." (App. 55-56).
- Senator Cantwell: "[Title II] is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves." (App. 57).
- Senator Jeffords: "[Issue ads] are obviously pointed at positions that are taken by you saying how horrible they are . . . . The opposition comes forth with this barrage [of ads] and you are totally helpless." (App. 58).

- Senator Daschle: "The 'issue ads' are more attack-oriented and personal." (App. 59). "I believe that negative advertising is the crack cocaine of politics." (App. 60).[1]

And in defending the measure as an intervening party to this case, Senator McCain confirmed that Congress specifically targeted speech critical of candidates for federal office: "The real world is that the overwhelming majority of ads that we see running today are attack ads that are called issue ads, which are direct, blatant attacks on the candidates . . . . We don't think that's right." App. 92 (Sen. McCain Depo.) at 100.[2]

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[1] This is but a small sampling of Senators' floor statements decrying "negative" and "sham" issue ads. *See, e.g.*, App. 61-62 (*Sen. McCain*: Issue ads have "demeaned and degraded all of us because people don't think very much of you when they see the kinds of attack ads that are broadcast on a routine basis."); App. 63 (*Sen. McCain*: "I hope that we will not allow our attention to be distracted from the real issues at hand – how to raise the tenor of the debate in our elections and give people real choices. No one benefits from negative ads. They don't aid our Nation's political dialog."); App. 58 (*Sen. Jeffords:* "We are talking about a system which has developed over the past couple of years which has seriously imposed upon us unfairness as far as candidates are concerned who find themselves faced with ads . . . to change the election. . . ."); App. 64 (*Sen. Jeffords*: Ads mentioning him "totally distort the facts and say terrible things. You watch a 20 percent lead keep going down and you do not know who is putting them on. You know what they are saying is totally inaccurate, but you have no way to refute it . . . ."); App. 65 (*Sen. Wellstone*: "Overwhelmingly they are negative, they can be vicious, they are poison politics."); App. 66 (*Sen. Collins*: "[I]t is no surprise that bogus issue ads almost always carry a negative message, something which all in this body purport to decry."); App. 67 (*Sen. Bingaman*: "Many of these ads will contain misrepresentations, distortions, and outright untruths."); 143 CONG. REC. S10,271 (daily ed. Oct. 1, 1997) (*Sen. Kennedy*: "Election campaigns have become more and more negative, with misleading TV spots that traffic in half-truths or outright falsehoods."); App. 68 (*Sen. Reed*: "Phony issue advertisements are unconstrained, cropping up suddenly, without attribution, to strike at candidates."); App. 69 (*Sen. Dodd*: "[T]he overwhelming majority of these ads are the so-called attack ads. Usually, they are very vicious . . . ."). The House legislative history, though less extensive, is of the same piece. *See, e.g.*, App. 70 (*Rep. Allen*) ("If one is a TV viewer and they like endless streams of deceptive issue anonymous issue ads in election years, oppose reform; but if one prefers honest and less frequent ads, support Shays-Meehan"); App. 71 (*Rep. Edwards*); App. 72 (*Rep. Capps*); App. 73 (*Rep. Roukema*); App. 74 (*Rep. Baird*); App. 75 (*Rep. Baird*); App. 76 (*Rep. Borski*); App. 77 (*Rep. Allen*); App. 78 (*Rep Hoeffel*).

[2] The intervening defendants consistently echoed this theme. *See, e.g.*, App. 95 (McCain Depo.) at p. 127 ("What's relevant here is what happens in American politics, as I keep going back to. And what's happening in America today as we speak is that the airwaves, both television and radio, are flooded with negative attack ads in the guise of being issue ads."); App. 89

When viewed against the long and largely doleful history of governments among men, BCRA's ban on "electioneering communications" is entirely unremarkable — just another example of the "standard practice" of the governors "us[ing] the criminal law to insulate themselves from disagreement" by the governed. Anthony Lewis, *Make No Law* 52 (Random House, 1991). As Professor Harry Kalven, Jr., observed, the idea of seditious libel has always been "the hallmark of closed societies throughout the world. Under it criticism of government is viewed as defamation and punished as a crime. The treatment of such speech as criminal is based on an accurate perception of the dangers in it; it is likely to undermine confidence in government policies and in the official incumbents. But political freedom ends when government can use its powers and its courts to silence its critics." Harry Kalven, Jr., *A Worthy Tradition* 63 (1988).

Even in our open democratic society, BCRA's ban on electoral speech is not without its chilling historical antecedents. The infamous Sedition Act of 1798, like Title II of BCRA, was specifically aimed at stifling speech critical of the government and its elected members.[3] Propo-

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(Jeffords Depo.) at p. 76 ("And if [attack ads are] run and you can't respond, which is one of the big purposes of our law, then you're defenseless."); App. 84 at p. 7 ("I know my campaigns had a barrage of ads that was very close to the election, for which I had no opportunity to respond and realized that this was a serious problem."); App. 85 at p. 15 ("**Q:** What does ['sham issue ads'] mean, Senator? **A:** 'Sham' means incorrect or misleading, in my mind. Probably both.); App. 87 at p. 22 ("**Q:** Is it your understanding that the disqualification applies to only inaccurate or misleading information? . . . . **A:** Yes."); App. 97 (Meehan Depo.) at p. 54 ("An ad that's designed to throw mud at a candidate is of concern to anyone who is a federal officeholder. **Q:** But is the reason they are concerned . . . that their constituents may find the message of the ad persuasive? **A:** In some instances, yes, the constituents may believe the information that's contained in the ad. Oftentimes, in a 30-second ad it is very difficult to get across any substance. It is very easy to take bits and pieces of information, say something negative about anyone."); App. 101 (Shays Decl.) ¶ 13 ("I personally feel that some of the ads run in 2000 attacking the character of President George W. Bush were inappropriate, including some that insinuated that he is a racist.")

[3] *See* App. 109-10. The Act made it a crime, punishable by a $5000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . with intent to defame . . . or to bring them, or either of them, into con-

nents of the Sedition Act in the 5th Congress, like BCRA's supporters in the 107th, decried "malicious calumnies against Government," speech designed to "inflame . . . constituents against the Government," publications "calculated to destroy . . . every ligament that unites . . . man to society and to Government," and "representations [that] are outrages on the national authority, which ought not to be suffered." App. 111-13. Opponents of the Sedition Act in Congress, like opponents of BCRA, argued then, as we do now:

> This bill and its supporters suppose, in fact, that whoever dislikes the measures of Administration and of a temporary majority in Congress, and shall, either by speaking or writing, express his disapprobation and his want of confidence in the men now in power, is seditious, is an enemy, not of Administration, but of the Constitution, and is liable to punishment . . . . If you put the press under any restraint in respect to the measures of members of Government; if you deprive the people of the means of obtaining information of their conduct, you in fact render their right of electing nugatory; and this bill must be considered only as a weapon used by a party now in power, in order to perpetuate their authority and preserve their present places.

App. 114.[4]

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tempt or disrepute; or to excite against them, or any of them, the hatred of the good people of the United States." 1 Stat. 596, *quoted in New York Times Co. v. Sullivan*, 376 U.S. 254, 273-74 (1964).

[4] Opponents of BCRA in Congress arrestingly made the same points. *See, e.g.*, App. 79 (*Rep. DeLay*: "[Title II] shuts down political speech. It shuts down the opportunity to participate in elections. In a country the size of the United States, an individual citizen has very little chance of joining the political debate without banding together with others, so by blocking citizens' groups from participating in days leading up to an election, Shays-Meehan removes a very vital tool that citizens can use to hold elected officials accountable."); App. 80 (*Sen. DeWine*: Under Title II "[i]t would be illegal for citizens of this country, at the most crucial time, when free speech matters the most, when political speech matters the most--that is, right before an election--this Congress would be saying, and the 'thought police' would be saying, the 'political speech police' would be saying that you cannot mention a candidate's name; you cannot criticize that candidate by name . . . . It restricts citizens' ability to use the broadcast media to hold incumbents accountable for their voting records."); App. 81-82 (*Sen. Santorum*: "If you do not think this is an incumbent protection plan, I guarantee you have not been listening. This is all about protecting incumbents. Do my colleagues think we are going to pass something which helps folks who run against us? How many folks are going to say: I like being here, but I want to give the guy who takes me on a better shot at me? . . . All you bothersome people out there in America who believe you have some right to participate in my election, it keeps you at home . . . . That is the first thing this does -- it shuts you up because you know what?--you are an annoy-

The Sedition Act never reached the Supreme Court, but in *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964), the Court unanimously acknowledged that the Act, "because of the restraint it imposed upon criticism of government and public officials," had been universally condemned "in the court of history" as a blatant and shameful infringement on the freedom of speech at a time when the First Amendment's ink was barely dry. If history's judgment on the Sedition Act is correct, then BCRA's modern version of it must fall.

Nor can BCRA's ban on electoral speech be reconciled with the Supreme Court's decision in *New York Times v. Sullivan*. At the heart of that case was a political advertisement run in the New York Times by an "interest group" — the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South." The ad was found to refer to an elected official and to falsely criticize his handling of civil rights protests in Montgomery, Alabama. The issue was whether the First Amendment "limit[s] a State's power to award damages in a libel action brought by a public official against critics of his official conduct." *Id.* at 256. Emphasizing that "[i]t is as much [the citizen's] duty to criticize as it is the official's duty to administer," *id.* at 283, the Court held that the First Amendment prohibits such an action unless the public official can show that the defamatory statement was made with actual malice. The *Sullivan* Court's reasoning is equally dispositive of Title II of BCRA.

At the heart of the Court's unanimous ruling was its recognition that *political speech* is the lifeblood of our representative democracy and that "debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270. That the political speech at issue was contained in a paid advertisement was irrelevant; the First Amendment protects "persons who do not them-

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ance. You guys go out there and say things I do not like, I do not agree with, and it may not be true, so we are just going to shut you up. That is the first thing this bill does.")

selves have access to publishing facilities" no less than it protects the press. *Id.* at 266. Nor did the advertisement's false and defamatory nature suffice to deprive it of First Amendment protection, for "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.' " *Id.* at 272 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). And the *Sullivan* Court emphasized, over and over again, that speech concerning the conduct of public officials and candidates for public office is essential to the vitality of democracy itself. Quoting Mr. Madison's Report on the Virginia Resolutions denouncing the Sedition Act, the Court said this:

> Let it be recollected . . . that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.

Id. at 275.[5]

In the record before this Court are hundreds, perhaps thousands, of the "negative attack ads" that BCRA seeks to silence. To dispose of this case, it is enough to note simply that *every single one of them* would be protected by the First Amendment from a libel action brought by the attacked candidate. But BCRA cuts even deeper into the heart of the First Amendment than did the defamation action invalidated in *Sullivan.* BCRA goes beyond just rendering speech actionable in tort; it *bans* speech outright and punishes the speaker with imprisonment. BCRA goes

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[5] The Court has consistently held "that legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 50 (1976), citing *Mills v. Alabama*, 384 U.S. 214 (1966), and *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). In *Tornillo*, the Court invalidated a state law requiring newspapers to make space available for political candidates to reply to criticism. If Congress cannot constitutionally mandate a right to commandeer the Nation's airwaves to reply to criticism broadcast during an election campaign, then surely it cannot order that the criticism be removed from the airwaves altogether.

beyond just reaching and restraining false speech; it reaches and bans *the truth*. BCRA goes beyond just restraining political speech, it targets *electoral* speech about candidates for public office during the weeks before citizens go to the polls. Indeed, if the very political advertisement at issue in *Sullivan* were broadcast today by a political advocacy organization, say the NAACP, during an election campaign by Mr. Sullivan for federal office, that organization would be guilty of a crime and subject to criminal liability under BCRA.

Thus, it simply could not be clearer that BCRA's ban on electioneering communications violates the most fundamental postulates of the First Amendment. The same conclusion flows from the Supreme Court's campaign finance cases, as we demonstrate in detail below.

II. THE NRA'S "ELECTIONEERING COMMUNICATIONS" POSE NO DANGER OF ACTUAL OR PERCEIVED CORRUPTION OF FEDERAL OFFICEHOLDERS.

Before discussing the Supreme Court's campaign finance cases,[6] we turn first to an analysis of the compelling government purpose offered by BCRA's supporters to justify enactment of it ban on expenditures for "electioneering communications": the prevention of actual or perceived corruption of federal officeholders.[7] As noted, *Sullivan* was predicated on the self-evident proposition that unfettered discussion of the merits of political issues and candidates is so vital to our representative democracy that to engage in such speech is not only the citizen's constitutional right, but his civic duty. Yet the sole premise of BCRA's speech restriction is that electoral speech poses the threat of actual or perceived corruption of the political process because

[6] The McConnell Plaintiffs have exhaustively and compelling demonstrated that Title II of BCRA is in fatal conflict with *Buckley*, *see* McConnell Br. at II.C.1, and so we will not reiterate that analysis here.

[7] "[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting) (quoting *FEC v. NCPAC*, 470 U.S. 480, 496-97 (1985)). "The hallmark of corruption is the financial '*quid pro quo*': dollars for political favors." *NCPAC*, 470 U.S. at 497.

it could obligate the benefited elected official to the speaker. Given that the First Amendment bars government from enforcing a common-law libel action by a political candidate because such a cause of action may chill public discussion of matters vital to the democratic process, how can the First Amendment permit government to criminalize speech about political candidates on the sole basis that the speech may render the benefited candidate, if elected, beholden to the speaker?

BCRA's notion of corruption is nothing the Framers would recognize. Although the Framers understood and feared genuine "cabal, intrigue and corruption," their antidote was not *less* debate and democracy -- it was *more*: to make elected officials directly dependent upon "an immediate act of the people of America." THE FEDERALIST No. 68 (Hamilton) at 459. This is what elections are all about:

> Is it not natural that a man who is a candidate for the favour of the people and who is dependent on the suffrages of his fellow-citizens for the continuation of his public honors should take care to inform himself of their dispositions and inclinations and should be willing to allow them their proper degree of influence upon his conduct?

THE FEDERALIST No. 35 (Hamilton) at 221. The Framers believed that a "dependence on the people" is a *good* thing: it is "the primary control on the government." THE FEDERALIST No. 51 (Madison) at 349. Therefore, electioneering communications that promote or denounce candidates, that seek to hold those candidates accountable to their constituents, are the most important form of political expression. If political speech is the core of the First Amendment, then speech about whom to elect is the axis about which that core rotates.

And the best way for citizens to ensure that candidates for office are informed of the electorate's "dispositions and inclinations" is for those ordinary citizens to band together to make themselves heard. In "democratic nations" where the "equality of conditions has swept away" the aristocracy as leaders of public life, the role of "circulati[ng]" "opinions or sentiments" to

"the multitude" naturally falls to "associations" of the people that pool their resources to access the means for mass communication. 2 A. de Tocqueville, DEMOCRACY IN AMERICA 109 (P. Bradley ed. 1948). Such "associations" are essential for vigorous public debate, for otherwise the government itself would have the only voice loud enough to be heard, and that would be profoundly "dangerous" to democracy. *Id.*

It is therefore not surprising that the Supreme Court has distinguished in this regard between political contributions and political spending, holding in *Buckley* and its progeny that FECA's "limitations on contributions to a candidate's election campaign [are] generally constitutional, but that limitations on election expenditures [are] not." *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 437 (2001) ("*Colorado II*"). The reasons for this distinction are twofold: (1) "[r]estraints on expenditures generally curb more expressive and associational activity than limits on contributions do," *id.* at 440; and (2) *independent* political expenditures do not carry the same danger that they will be made "as a *quid pro quo* for improper commitments from the candidate." *Id.* at 441, quoting *Buckley*, 424 U.S. at 47.

There is an additional reason counseling in favor of extreme judicial skepticism of the claim that a restriction on electoral speech is warranted to prevent actual or perceived corruption, especially if corruption is "understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence." *Colorado II*, 533 U.S. at 440. An elected official, simply by voting his conscience, can open himself to a charge of corruption or undue influence any time his vote is in harmony with the wishes of his supporters.

Political support, whether by an individual or an organization, is generally given or withheld based upon an assessment of the compatibility of the competing candidates' (or political

parties') positions and views on issues of importance to the would-be supporter. The NRA, like most everyone else, supports the candidates that it believes are in the closest agreement with its views on issues that are central to its political mission of preserving Second Amendment rights. The natural consequence of that support is an expectation that the supported candidate, if elected, will vote in a way that inspired the support in the first place. But the natural consequence of political agreement between an elected official and his supporters — namely, favorable votes and other legislative action — is also a necessary predicate of any claim that the supporter has actually or apparently corrupted or unduly influenced the officeholder's judgment. A charge of corruption or undue influence, and especially a charge of the *appearance* of corruption or undue influence, can therefore be leveled *whenever* an officeholder takes a position or legislative action that is in harmony with the views of his supporters. But as the Supreme Court explained in *NCPAC*, "[t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." 470 U.S. at 498. Thus, absent an explicit *quid pro quo* arrangement, the point at which the natural functioning of the democratic process becomes real or perceived undue influence or even corruption is extremely difficult, if not impossible, to discern.

Accordingly, the Supreme Court has only once upheld a government restriction on independent expenditures for political speech. In *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), which upheld the State of Michigan's prohibition on independent corporate expenditures of treasury funds for express advocacy supporting or opposing any candidate for state office, the Supreme Court recognized "a different type of corruption in the political arena: The corrosive and distorting effects of immense aggregations of wealth that are accumulated

with the help of the corporate form and that have little or no correlation to the public's support for the corporation's ideas." 494 U.S. at 660. BCRA could at least purport to address *that* type of corruption if it restricted only corporate expenditures from treasury funds that "reflect . . . the economically motivated decisions of investors and customers" rather than "popular support for the corporation's political ideas." *Id.* at 659 (quoting *FEC v. MCFL*, 479 U.S. 238, 258 (1986)). Even so, no such corruption concern extends to a voluntary political association like the NRA. As demonstrated below, *infra* at 21-23, it is categorically untrue that the NRA's general treasury funds result from its success in the economic marketplace rather than in the marketplace of political ideas. And those who contribute to the NRA are not surprised when the NRA aggregates members' dues and donations to fund speech supporting the Second Amendment and does so specifically in reference to politicians who support or oppose that fundamental right.

Indeed, if Congress cannot limit the major political parties' independent expenditures, as the Supreme Court held in *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615 (1996) ("*Colorado I*"), it follows that it cannot limit those of the NRA. "It is the accepted understanding that a party combines its members' power to speak by aggregating contributions and broadcasting messages more widely than individual contributors generally could afford to do, and the party marshals this power with greater sophistication than individuals generally could . . . ." *Colorado II*, 533 U.S. at 453. In this regard, issue advocacy organizations like the NRA are materially indistinguishable from political parties, except that the major political parties have far more members and vastly greater sums of aggregated wealth.[8] Yet the Court in *Colorado I*,

[8] The Court in *Colorado I* also noted that "[a] political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subse-

saw no reason "that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system." 518 U.S. at 617-18 (plurality opinion). Nor is a limitation on the NRA's independent expenditures necessary to combat a substantial danger of corruption of the electoral system.[9]

In any event, the NRA satisfies every criterion identified by the *Austin* Court for extending the First Amendment's protection to the independent political expenditures of a nonprofit political advocacy corporation, as we discuss in detail below, *infra*, at 19-24.

III. BCRA IS AN ARBITRARY PENAL CODE FOR POLITICAL SPEECH THAT IS BOTH OVERBROAD AND UNDERINCLUSIVE.

To sustain BCRA's ban on "electioneering communications," the government " 'must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.' " *FEC v. NRA*, 254 F.3d 173, 191 (D.C. Cir. 2001) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)). BCRA's alleged statutory "purpose is belied . . . by the provisions of the statute, which are both underinclusive and overinclusive." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 793 (1978). Under BCRA, nonprofit membership corporations and unions funding their political speech entirely with individual membership dues cannot speak the name of a federal candidate in the weeks before an election, but wealthy individuals, limited liability companies, partnerships, unincorporated associations, and

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quent success or failure." 518 U.S. at 615-16. The same, of course, may be said of the NRA and other issue advocacy organizations.

[9] Indeed, as Justice Marshall, the author of *Austin*, has explained, *Austin's* rationale is wholly inapplicable to endorsements by a political party because "whatever influence a party wields results directly from the trust it has acquired among voters" and reflects the party's "*political* capital." *Renne v. Geary*, 501 U.S. 312, 348 (1991) (Marshall, J., dissenting). Precisely the same is true of the NRA with respect to its membership, and therefore no reading of *Austin* could justify Congress' decision to bring the NRA within Title II's reach.

PACs can make unlimited independent expenditures to influence the outcome of an election. Corporations and unions are banned from buying a broadcast ad urging constituents to call their representatives about specific pieces of legislation pending before Congress, but they can spend unlimited sums on direct mail and newspaper ads attacking specific candidates. Corporations and unions are prohibited from educating the public on legislation using the popular names of bills (such as McCain-Feingold), but they can flood the internet with attacks on specific candidates. Giant media corporations such as Disney, General Electric, Microsoft, Viacom, and AOL Time Warner can make unlimited use of their radio and TV networks to promote or attack specific candidates, but a nonprofit advocacy group funded by individual membership dues cannot purchase time to broadcast a message mentioning a candidate, including a candidate who has attacked the organization by name in his own campaign ads. This patchwork of confusing and contradictory restrictions constitutes an arbitrary speech code that is not narrowly tailored to advance a legitimate, let alone a compelling, governmental purpose.

A. BCRA's Purpose Is Incumbency Protection, Not Corruption Prevention.

As indicated earlier, the threat that "negative attack ads" pose to *incumbents*, rather than to the integrity of the electoral process, was the animating force behind the passage of BCRA. The transparently self-serving nature of BCRA's ban on speech comes into sharp focus when viewed against the operation of the statute as a whole. All the parties to this action agree that money plays a pivotal role in the American political system given the necessity and enormous expense of communicating political speech through the broadcast media, especially television. In a thinly veiled effort to protect their own incumbencies, BCRA's proponents sought to dry up every source of funds for such political speech except funds raised from individuals and PACs ("hard money"), the two sources of funds in which incumbents have a gigantic advantage over

challengers.[10] Indeed, that advantage in raising hard money will increase dramatically under BCRA, which doubles the limits on individual contributions to candidates. The soft money that the political parties can, and in fact have, spent on supporting challengers is eliminated, leaving challengers at a distinct disadvantage. *See* App. 116-17.

With candidates and parties confined to spending hard money, there were only two remaining threats for BCRA's supporters to quash. First, "outside interest groups," with their "negative attack ads," remained a threat to entrenched incumbents. *See* n.3, *supra*. Title II silences these organizations. Second, incumbents continue to face the prospect of challenges from wealthy, self-funded candidates. But here too the proponents of BCRA girded themselves against such attacks by increasing the limits on individual contributions to candidates who face a self-funded opponent. This poison pill dilutes the equalizing force of a challenger's personal resources. Thus, BCRA as a whole ensures that incumbents will have a significant financial advantage over their challengers and that other groups will be severely limited in their ability to speak out in favor of challengers. This reality was fully grasped by Congress when it passed BCRA.[11] The claims that BCRA's speech code is designed to avoid an "appearance of corruption" ring hollow and should not be credited. *See, e.g., Nixon v. Shrink Missouri*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) (courts should not defer to Congress "where that deference . . . risk[s] such constitutional evils as, say, permitting incumbents to insulate themselves against effective electoral challenges.").

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[10] The FEC statistics on contributions from PACs and individuals for 1998 are revealing: in the House, on an aggregate basis, incumbents raised four times more money than challengers, and, on a per candidate basis, outraised challengers by more than 6 to 1. App. 119. In the Senate, on an aggregate basis, incumbents outraised challengers by more than 2 to 1, and, on a per candidate basis, outraised challengers by more than 7 to 1. App. 120.

[11] *See, e.g.*, App. 130-31 (*Sen. McConnell*); App. 129 (*Rep. Whitfield*); App. 132 (*Sen. McConnell*); App. 128 (*Sen. Bennett*).

B. BCRA Is Fatally Overbroad.

BCRA's prohibition on electioneering communications is fatally overbroad both because it silences *speakers* that pose no threat of the harms allegedly sought to be prevented and because it criminalizes *categories of speech* that are wholly divorced from the statute's purposes. "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." *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1404 (2002). *Ashcroft* struck down the Child Pornography Prevention Act as overbroad on the basis of *hypothesized* applications of the law. *See id.* at 1406; *id.* at 1414 (Rehnquist, C.J., dissenting). Here, by contrast, there is *compelling evidence* that the NRA is a speaker whose conduct does not implicate the statute's purpose and whose speech falls outside the ambit of the restriction's purported rationale.

1. BCRA Criminalizes the Speech of Organizations That Pose No Threat of Corrupting The Political Process.

The Supreme Court has repeatedly held that core political speech is protected by the First Amendment even when corporations are the speakers. *See, e.g., Buckley*, 424 U.S. at 45, 50, 187; *Bellotti*, 435 U.S. at 777; *MCFL*, 479 U.S. at 259. Indeed, in *Massachusetts Citizens for Life*, the court upheld a nonprofit voluntary membership corporation's First Amendment right to make unlimited independent expenditures to fund its political speech, including express advocacy. As noted earlier, only once has the Supreme Court upheld an independent expenditure restriction on core political speech. The specific danger identified in *Austin*, corruption of the political process through the aggregation of wealth generated by business corporations, has no application to nonprofit membership organizations that are devoted to the advancement of specific

rights and ideas and are funded almost exclusively by the dues and donations of individual members. Title II of BCRA must therefore be struck down.

In *MCFL*, 479 U.S. 238 (1986), the Supreme Court held that a voluntary membership organization committed to a political purpose does not lose its First Amendment rights simply by taking the corporate form:

> The resources in the treasury of a *business corporation* . . . are not an indication of popular support for the corporation's political ideas. . . . Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed *to disseminate political ideas, not amass capital.* The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace.

479 U.S. at 259 (emphasis added). The *Austin* Court, in contrast, upheld a state law restricting expenditures on express advocacy by the Michigan Chamber of Commerce because 75 percent of the Chambers' funding came from for-profit corporate members and, thus, "resources amassed in the economic marketplace" could have been used by the Chamber "to provide an unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257. The "corrosive and distorting effects" of the Chamber's corporate wealth had "*little or no correlation* to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660 (emphasis added).

MCFL and *Austin* thus draw a line between advocacy organizations that fund their speech with individual dues and contributions, and business or trade associations that fund their speech largely with contributions from business corporations. The former, unlike the latter, pose no danger of *corrupting* the political process through wealth generated in the economic marketplace.

The NRA is the archetypal issue advocacy group protected by the First Amendment. Like MCFL, it "was formed to disseminate political ideas, not amass capital," App. 106, and its members are "fully aware of its political purposes." *See* App. 133-56 (NRA fundraising materi-

als urging potential members to join "in the final, decisive battle for the future of our precious Second Amendment freedoms" and promising to fight Bill Clinton, Al Gore, Janet Reno, Bill Bradley, and other "anti-gun politicians"). Thus, the NRA's resources "are not a function of its success in the economic marketplace, but its popularity in the political marketplace." 479 U.S. at 259.[12] If a group of individuals organized in the corporate form and united by their common devotion to the protection of their Second Amendment rights can be prosecuted for speaking the names of political candidates it deems a threat to those rights, then the First Amendment has become a "promise to the ear to be broken to the hope; a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941).

BCRA condemns the NRA to just such a plight. As the McConnell Plaintiffs' brief makes clear, the statute contains no exception for any nonmedia corporate entities, even MCFL itself. *See* McConnell Br. at II.C.1. Indeed, Senator Wellstone, whose amendment foreclosed any such exception, specifically singled out the NRA as an organization whose voice he sought to muffle.[13] This failure alone dooms the statute because there are numerous *MCFL* entities that

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[12] The NRA derives *de minimis income* from business corporations. Although the NRA derives substantial *revenue* from advertising in its magazines and the sale of NRA memorabilia, it *loses* money on these activities. *See* App. 23-24 (LaPierre Decl.) ¶ 58. Additionally, the NRA generates about $1.7 million a year in rental income from leasing its building space. Finally, the NRA receives minimal contributions from for-profit businesses. See App. 198.

[13] *See* 147 CONG. REC. S2847 (daily ed. Mar. 26, 2001) (*Sen. Wellstone*). The NRA was the whipping boy for numerous Members of Congress urging passage of Title II. *See, e.g.*, 145 CONG. REC. H3174 (daily ed. May 14, 1999) (*Rep. Schakowsky*) ("If my colleagues care about gun control, then campaign finance is their issue so that the NRA does not call the shots."); 144 CONG. REC. H4821 (daily ed. June 18, 1998) (*Rep. Meehan*); 145 CONG. REC. H4029 (daily ed. June 10, 1999) (*Rep. Meehan*); 147 CONG. REC. S2851 (daily ed. Mar. 26, 2001) (*Sen. Reed*); 147 CONG REC. S2931 (daily ed. Mar. 27, 2001) (*Sen. Frist*); 144 CONG. REC. H4045 (daily ed. June 3, 1998) (*Rep. Shays*); 143 CONG. REC. H1382 (daily ed. Apr. 9, 1997) (*Rep. DeLauro*); 143 CONG. REC. S10,122 (daily ed. Sept. 29, 1997) (*Sen. Durbin*). As Rep. Pickering said in the House: "Let me use the words of those who advocate this reform to tell what this is all about. They are very clear about their purposes. Scott Harshberger, the president of the Washington D.C.-based Common Cause says, 'We need to make the connection with every person who cares