III. TITLE III OF BCRA IS UNCONSTITUTIONAL.

A. By Conditioning The Cost Of Advertisements On Their Viewpoint, Section 305 Of BCRA Violates The First Amendment.

One of the most blatantly unconstitutional provisions of BCRA is section 305, which forces candidates either to pay a higher rate, or to engage in certain additional speech, if they wish to purchase broadcast advertisements that so much as refer to their opponents during a specified period before an election. This unabashedly viewpoint-discriminatory provision violates the First Amendment.

Section 305 of BCRA amends section 315(b) of the Communications Act, which had previously afforded candidates the opportunity to purchase broadcast advertisements at the "lowest unit charge" available to other advertisers within 45 days of a primary or 60 days of a general election. *See* 47 U.S.C. § 315(b). Under BCRA, a candidate is prohibited from taking advantage of this rate unless the candidate certifies, in writing, that he will not make any direct reference to another candidate for the same office — even in a *different* advertisement — or the candidate includes a four-second identification or visual statement in the advertisement (for television ads), or an audio statement (for radio ads). *See* BCRA § 305. The statute specifies in substantial detail what content the identification or statement must include. *See id.*

Courts have consistently struck down provisions like section 305 which compel or prohibit particular words from a speaker. *See, e.g., Cohen v. California*, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."). This is particularly true in the context of candidate speech. *See, e.g., Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("It is simply not the function of government to select which issues are worth discussing or debating in the

course of a political campaign.") (internal quotation omitted). Moreover, courts have consistently invalidated laws, like section 305, that impose unconstitutional conditions in exchange for public benefits. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. . . . Such interference with constitutional rights is impermissible."). On its face, section 305 impermissibly conditions a candidate's receipt of a public benefit (the lowest unit rate) on the relinquishing of a constitutional right (the right to utter speech referring to an opponent). And the variety of political speech that section 305 impels candidates to forgo is at the core of what is protected by the First Amendment. *See Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) ("We have recognized repeatedly that 'debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution.'") (quoting *Buckley*, 424 U.S. at 14).

The very title of section 305 — "Limitation on Availability of Lowest Unit Charge for Federal Candidates Attacking Opposition" — indicates that the section is intended, and *only* intended, to suppress direct criticism of officeholders and candidates. As the Supreme Court has made clear, however, speech critical of public officials — and, by extension, candidates — is at the core of the First Amendment. *See Brown*, 456 U.S. at 60; *New York Times Co. v. United States*, 403 U.S. 713, 723-24 (1971). And because section 305 is a viewpoint-based regulation, it is subject to the "most exacting" scrutiny. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *R.A.V. v. St. Paul*, 505 U. S. 377, 391 (1992). Clearly, Congress cannot articulate any constitutionally justifiable interest for treating "negative" advertising

differently from "positive" advertising. Yet even if the prevention of so-called attack ads were a permissible governmental objective, section 305 would fail because of its vast overbreadth, as it would apply to an advertisement that did no more than identify the opposing candidate. *See, e.g.*, *Thornhill v. Alabama*, 310 U.S. 88, 97-100 (1940) (laws implicating First Amendment must be narrowly tailored and cannot reach protected communications).

In sum, section 305 cannot withstand the slightest degree of scrutiny — let alone the required "most exacting" scrutiny under the First Amendment.

B. By Barring All Minors From Making Any Contributions To Candidates Or Political Party Committees, Section 318 Of BCRA Violates The First Amendment Right Of Free Speech And The Fifth Amendment Right Of Equal Protection.

Another of the most evidently unconstitutional provisions of BCRA is section 318 (adding new FECA § 324), which flatly prohibits any individual 17 years of age or younger from making a contribution, in any amount, to a federal candidate, or a contribution or donation, in any amount, to a national or state political party committee. Congress ostensibly enacted this provision in order to prevent parents from circumventing the limits on contributions applicable to them by making contributions through their children, *see* 148 Cong. Rec. S2145-48 (daily ed. March 20, 2002) (statement of Sen. McCain) — notwithstanding the fact that federal law already prohibits any person from making a political contribution in the name of another, *see* 2 U.S.C. § 441f, and notwithstanding the fact that this provision reaches so broadly as to ban *any* contribution by *any* minor. This bald restriction on the constitutional rights of minors cannot survive even the slightest scrutiny.

1. Minors Enjoy First Amendment Protection.

For almost six decades, the Supreme Court has repeatedly made clear that the First

Amendment applies to minors as well as adults. *See, e.g., Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Moreover, while most cases deal with minors' First Amendment rights in the school environment, the Court has emphasized that minors' First Amendment rights apply equally outside, as well as inside, the schoolhouse. *See Tinker*, 393 U.S. at 511.

To be sure, in certain limited circumstances, the Court has recognized that the government has broader authority to regulate minors than adults. For instance, the Court has upheld a statute prohibiting the sale of obscene materials to minors, *see Ginsberg v. New York*, 390 U.S. 629, 637-38 (1968); has upheld restrictions on indecent speech in the setting of public schools, *see Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682-83 (1986); and has upheld the restriction of minors' access to abortion services, *see Bellotti v. Baird*, 443 U.S. 622, 634 (1979). Unlike in those cases, however, Congress has articulated no such special interest applicable to minors to justify section 318, nor does such a special interest exist to justify a restriction on core political speech. As the affidavits of the various minors who are plaintiffs in this litigation make abundantly clear, minors are perfectly capable of deciding for themselves whether to give their own money to candidates or political parties. *See, e.g.*, 1 Echols ES, tab 6, ¶¶ 14-19 (Z. White); 1 Echols ES, tab 1, ¶¶ 14, 20-21, 32-34 (E. Echols); 1 Echols ES, tab 3, ¶ 19 (H. McDow); 1 Echols ES, tab 4, ¶¶ 15-17, 20-21, 26 (I. McDow); 1 Echols ES, tab 2, ¶¶ 17-19 (D. Solid), 27; 1 Echols ES, tab 5, ¶¶ 10-14 (J. Mitchell); 8 PCS/MC 21 (O'Brock); 8 PCS/MC 23-24 (Southerland). Moreover, there is not the slightest evidence that candidates or parties are somehow preying on minors and manipulating them into giving money. The cases in which courts have recognized that the government has broader authority to regulate minors than adults

are therefore wholly inapposite here.

2. Section 318 Is Not Sufficiently Tailored To Serve Any Governmental Interest.

In the absence of any governmental interest in protecting minors, Congress must articulate another compelling interest to justify section 318. Because section 318 not only *limits* contributions, but *bans* them altogether, it is subject to strict scrutiny under *Buckley v. Valeo*, 424 U.S. 1 (1976), since an outright ban on contributions, unlike a mere limitation, prevents a would-be donor from engaging in the "undifferentiated, symbolic act of contributing," *id.* at 21.

As with Title I, defendants have articulated a bewildering array of potential justifications for section 318, including avoiding actual or apparent corruption, assuring the legitimacy of the electoral system, preventing circumvention of campaign contribution limits, facilitating deterrence and detection of violations of federal campaign limitations, and restoring faith of the public in the system. *See, e.g.*, 1 Echols ES, tab 20, at 5-6 (Resp. of FEC to Echols' First Interrogs., June 17, 2002), 1 Echols ES, tab 21, at 4 (Resp. of Att'y Gen. to Echols' First Interrogs., June 17, 2002); 1 Echols ES, tab 22, at 5-6 (Resp. of Intervenors to Echols' First Interrogs., June 18, 2002). The only interest actually articulated in the legislative record, however, was an interest in preventing parents from circumventing the limits on contributions applicable to them by making contributions through their children. *See* 148 Cong. Rec. S2145-48. And as we have already demonstrated, *see supra* Part I.B.3, the only sufficiently important governmental interest recognized by the Supreme Court in the campaign-finance context is the government's interest in reducing actual or apparent corruption, *see FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985).

Even assuming that preventing circumvention of limits applicable to parents is a

cognizable governmental interest, section 318 is not even remotely tailored to serve that interest. Section 318 does not ban contributions by minors only when their parents have "maxed out" on their own contribution limits, the only circumstances in which the circumvention rationale would even come into play; instead, it bans *all* contributions by minors, even contributions by emancipated minors and orphans, to whom the circumvention rationale would be wholly inapplicable. Section 318 also bans all contributions, regardless whether the minor makes the contribution out of funds earned by the minor or given to the minor by others (as many of the Echols plaintiffs do, *see* 1 Echols ES, tab 3, ¶¶ 24-26 (H. McDow); 1 Echols ES, tab 5, ¶¶ 22-23 (J. Mitchell); 1 Echols ES, tab 1, ¶¶ 27-32 (E. Echols)), or whether the minor makes the contribution with funds given by the minor's parents, or at the direction of the parents (to the extent that parents could even do so consistent with the extant ban on the channeling of contributions, *see* 2 U.S.C. § 441f). Congress could simply have imposed a separate limit on contributions from a single family or could have employed a rebuttable presumption regarding the voluntariness of contributions by minors; instead, Congress adopted the constitutional equivalent of a bludgeon by banning contributions by minors altogether.

The net result of section 318 is thus to bar minors, such as the Echols and McConnell minor plaintiffs, from engaging in the "symbolic expression of support evidenced by a contribution" to a candidate or party committee. *Buckley*, 424 U.S. at 21. By imposing such restrictions on minors, even on minors as to whom there is no evidence (and not even the possibility) of circumvention of other existing campaign finance limits and rules regarding the

channeling of contributions, section 318 is woefully overbroad,[47] and thus fails any heightened level of First Amendment scrutiny.[48]

3. Section 318 Violates Core First And Fifth Amendment Rights By Discriminating Against Minors.

Finally, section 318 is unconstitutional because it regulates speech by minors but not identical speech by other entities. As we have already discussed, *see supra* Part I.B.4, "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and *the speakers who may address a public issue*," *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (emphasis added; citation omitted). This requirement of neutrality among speakers is embedded not only in the equal protection component of the Fifth Amendment, but also in the First Amendment itself. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). And, as we have also already discussed, *see supra* Part III.B.1, Congress has articulated no reason that minors are somehow differently situated from adults when making political contributions. In the absence of any such justification, section 318 impermissibly disadvantages minors and should therefore be declared unconstitutional.

C. The "Millionaire Provisions" Of Title III Serve Only To Protect Incumbents.

BCRA recognizes in a specific, targeted setting the need for enhancing the opportunities

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[47] Indeed, an argument could be made that section 318 is also woefully *underbroad*, to the extent that it regulates contributions by minors to candidates or party committees but not by minors to political action committees.

[48] To the extent that section 318 not only limits contributions of federally regulated funds to candidates and party committees, but also limits donations of *state-regulated* funds to party committees, it is also unconstitutional for the reasons given above in Part I.

for political speech. In the so-called "millionaire provisions" of Title III, BCRA allows a candidate facing an opponent using personal funds to receive much larger contributions than would otherwise be permissible under the extant campaign-finance regime. In further recognition of the flinty realities in political campaigns, especially with the now-familiar phenomenon of individuals of vast personal resources dedicating substantial amounts from those fortunes to their own campaigns, candidates of more modest means can benefit under these provisions from potentially unlimited coordinated expenditures. These provisions are manifestly a step in the right direction of more speech, rather than less. And for all their diversity of viewpoints, the McConnell plaintiffs are firmly of the view that, in our system of free expression, more speech, not less, is better.

Specifically, section 304(a) of BCRA (adding new FECA § 315(a)(1)(*i*)) and section 319 of BCRA (adding new FECA § 315A) contain provisions applicable when a candidate faces an opponent using personal funds in Senate and House races, respectively. Under BCRA, a candidate for the Senate or House may ordinarily receive contributions of $2,000 from an individual per election, indexed for inflation. *See* BCRA § 307(a) (amending FECA § 315(a)(1)(A) and adding new FECA § 315(c)(1)(B)). A candidate for the Senate or House may also benefit from a specified amount of coordinated expenditures from his or her political party: in Senate races, a political party committee may spend $20,000 or two cents times the State's voting-age population, whichever is greater, and in most House races, a party committee may spend $10,000. *See* 2 U.S.C. § 441a(d). Section 304(a) alters these generally applicable limits in Senate races in which an opponent's "personal funds amount" (as defined in sections 304(a) and 316) exceeds a "threshold amount" (which varies depending on the population of the State in

which the election is occurring). Where an opponent's "personal funds amount" is more than double the "threshold amount," a candidate may receive contributions of up to $6,000 from an individual per election, indexed to inflation. *See* BCRA § 304(a) (adding new FECA § 315(a)(1)(*i*)(1)(C)(i)(I)). Where an opponent's "personal funds amount" is more than four times the "threshold amount," a candidate may receive contributions of up to $12,000; where it is more than 10 times the "threshold amount," a candidate may also receive unlimited coordinated expenditures. *See* BCRA § 304(a) (adding new FECA §§ 315(a)(1)(*i*)(1)(C)(ii)(I), 315(a)(1)(*i*)(1)(C)(iii)(III)). Section 319 imposes similar rules for House candidates.

This laudable effort to provide a practical avenue for additional speech (in a particular, narrowly defined set of circumstances) points powerfully to what BCRA, at its core, is all about. It is an effort, elaborately conceived, to allow incumbent officeholders to have every practical benefit in their quest to remain in office. The millionaire provisions, which Senator McConnell supported during the legislative process, put in bold relief the poverty of the asserted governmental interest in preventing actual or apparent corruption. These provisions, while salutary in addressing a particular (and increasingly common) situation, demonstrate that what BCRA is fundamentally seeking is quite a different goal — to protect incumbent officeholders from competition in the marketplace of ideas, including (in this particular) wealthy challengers. In light of the McConnell plaintiffs' fundamental position that more speech, not less, should be encouraged, we emphatically do not challenge BCRA's new contribution limits. To the contrary, these modest improvements have been sorely needed, but the millionaire provisions in particular point to what Congress was truly seeking to accomplish in BCRA — fashioning a system that maximizes the possibilities for continuing electoral success by those already in office.