IV. TITLE V OF BCRA IS UNCONSTITUTIONAL.

D. By Imposing Onerous Recordkeeping And Disclosure Obligations On Broadcasters, Section 504 Of BCRA Is Unconstitutional.

Section 504 of BCRA (amending Communications Act § 315) compels broadcasters to collect and disclose records of all "requests" to purchase broadcast time for communications that "relat[e] to any political matter of national importance," including but not limited to communications relating to any "election to Federal office" or any "national legislative issue of public importance." Yet section 504 makes no effort whatsoever to define these terms or otherwise give guidance to broadcasters that are compelled to abide by it. Section 504 also imposes a high burden on broadcasters to maintain and disclose a wide range of information that is often sensitive and proprietary, without any rational relationship to a legitimate governmental objective. Section 504 therefore cannot pass muster under either the First Amendment or the Due Process Clause of the Fifth Amendment.

1. Section 504 Is Unconstitutionally Vague.

In an affidavit unopposed by any of the defendants, Jack N. Goodman, senior vice president and general counsel of the National Association of Broadcasters (NAB), testified that section 504 is so vague and ambiguous that NAB member stations are likely to have serious difficulty deciding what information to collect and disclose. *See* 10 PCS/JG 6 (Goodman). Broadcasters, for instance, would have difficulty in determining whether the requirements of section 504 — which refers to matters of "national importance" — are triggered by a regionally aired advertisement about a regional issue.

The vagueness of section 504 is particularly troublesome because a violation of the provision will subject a broadcaster to substantial fines and/or burdensome inquiries from the

FCC. Vagueness of this nature is intolerable under both the First Amendment and the Due Process Clause of the Fifth Amendment. *See, e.g., Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 624, 628, 631 (D.C. Cir. 2000) (vacating denial of broadcast license because regulation was "confus[ing]," "unclear," and "failed to provide fair notice" to broadcaster).

2. The Burdensome Requirements Of Section 504 Lack Any Rational Relationship To A Legitimate Governmental Objective.

Its vagueness aside, section 504 subjects broadcasters to burdensome requirements to maintain and disclose information that bears no relation to any governmental purpose. Specifically, section 504 requires broadcasters to maintain and disclose records of the acceptance or rejection of the request; the name of the person making the request and other contact information; a list of the chief executive officers or members of the executive committee or board of directors of an entity making the request; the date and time on which the communication is aired; the rate charged; the class of time purchased; and the issue to which the communication "refers." The disclosure of some of this information (especially proprietary information concerning advertising rates) will harm stations in the competitive market for advertising, and will require broadcasters to collect and disclose information concerning advertisers' identity and message that advertisers may be reluctant to divulge. *See* 10 PCS/JG 6-7 (Goodman).

Section 504 lacks any rational relationship to a legitimate governmental objective. Section 504 differs fundamentally from the disclosure requirements already imposed on broadcasters by the FCC, *see* 47 C.F.R. §§ 73.1940-73.1944, which are closely tied to the enforcement of specific statutory provisions, such as the requirement that broadcasters provide

equal opportunities for candidates, *see* 47 U.S.C. § 315(a); provide the lowest unit charge for candidates, *see* 47 U.S.C. § 315(b); and allow reasonable access for federal candidates, *see* 47 U.S.C. § 312(a)(7). The candidate-related disclosures currently compelled by the FCC directly advance these legislative objectives. Section 504, by contrast, does not advance any discernible statutory or regulatory objective. There is no law (and BCRA adds none) that prohibits advertisers from inquiring of a broadcaster as to the availability of airtime. There is no law (and BCRA adds none) limiting the amount of speech on issues of national importance in which a speaker may engage. Even in *Buckley*, the provisions of FECA requiring disclosure were upheld by the Court precisely because they were related to the goals of the statute and provided the means for enforcing specific statutory commands.

To be sure, defendants have asserted a plethora of potential justifications for section 504. *See* 10 PCS/JG 206-07 (Resp. of United States and FCC to NAB's First Interrogs., June 27, 2002) (claiming that section 504 facilitates deterrence and detection of violations of FECA's source-and-amount limitations, informs public of sources of support for candidates, and informs public of sponsors of "electioneering communications"). These purported objectives, however, cannot justify the operation of section 504, which requires disclosures about advertisements on *any* issue of "national importance," and is therefore plainly not limited to advertisements implicating FECA's source-and-amount limitations. Nor can the provision be justified by the vague wish to "inform the public," without some connection to a valid statutory scheme.

Section 504 is not an attempt to compel information that would support the enforcement of a legitimate statutory scheme. With its burdensome requirements, unconnected to any legitimate governmental interest, section 504 cannot survive any level of constitutional scrutiny.