No. 02-

IN THE SUPREME COURT OF THE UNITED STATES

MITCH McCONNELL et al.,

Appellants,

v.

FEDERAL ELECTION COMMISSION et al.,

Appellees.

On Appeal From The United States
District Court For The District Of Columbia

JURISDICTIONAL STATEMENT

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May 2, 2003

QUESTIONS PRESENTED

1. Whether the district court erred by upholding portions of the "soft money" provision (section 101) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, because it constitutes an invalid exercise of Congress' power to regulate elections under Article I, Section 4, of the Constitution; violates the First Amendment or the equal protection component of the Fifth Amendment; or is unconstitutionally vague.

2. Whether the district court erred by upholding portions of the "electioneering communications" provisions (sections 201, 203, 204, and 311) of BCRA, because they violate the First Amendment or the equal protection component of the Fifth Amendment, or are unconstitutionally vague.

3. Whether the district court erred by holding nonjusticiable challenges to, and upholding, portions of the "advance notice" provisions of BCRA (sections 201 and 212), because they violate the First Amendment.

4. Whether the district court erred by holding nonjusticiable challenges to, and upholding, the "coordination" provisions of BCRA (sections 202, 211, and 214), because they violate the First Amendment.

5. Whether the district court erred by holding nonjusticiable challenges to, and upholding, the "attack ad" provision of BCRA (section 305), because it violates the First Amendment.

PARTIES TO THE PROCEEDINGS

The appellants here, who were plaintiffs in two of the eleven cases consolidated in the district court, are Senator Mitch McConnell; Southeastern Legal Foundation, Inc.; Representative Bob Barr; Center for Individual Freedom; National Right to Work Committee; 60 Plus Association, Inc.; U.S. d/b/a Pro English; the National Association of Broadcasters; and Thomas E. McInerney.

The appellees here, who were defendants or intervenor-defendants in the district court, are the Federal Election Commission; the Federal Communications Commission; the United States of America; Senator John McCain; Senator Russell Feingold; Representative Christopher Shays; Representative Martin Meehan; Senator Olympia Snowe; and Senator James Jeffords.

STATEMENT PURSUANT TO RULE 29.6

None of the appellants has a parent corporation, and no publicly held company owns 10% or more of the stock of any of the appellants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

This case needs no introduction. It is the constitutional challenge to the "McCain-Feingold" law -- known officially, if somewhat misleadingly, as the Bipartisan Campaign Reform Act (BCRA). The statute represents the most comprehensive campaign finance legislation since the Federal Election Campaign Act (FECA), and this case represents the most significant constitutional challenge to such legislation since Buckley v. Valeo, 424 U.S. 1 (1976).

At its core, this is a case about the First Amendment. BCRA constitutes a frontal assault on First Amendment values, the likes of which have not been seen since the Republic's infancy. But BCRA also offends other constitutional principles -- principles that are no less fundamental. It purports to regulate the activities of political parties and candidates not just with respect to federal elections, but also with respect to state elections, notwithstanding Congress' lack of power so to regulate. It subjects a variety of players in the political process, and a variety of types of political speech, to disparate treatment, despite the absence of any justification for doing so. And it contains an abundance of vague provisions, thereby transforming the Federal Election Commission, the regulatory body tasked with enforcing those provisions, into a board of censors that decides which types of political speech are permitted and which are not.

Rarely has Congress acted with such utter disregard for so many constitutional limitations on its power.

Appellants urge this Court to note probable jurisdiction on the questions presented herein, and to reverse the district court on those questions.[1]

OPINIONS BELOW

The district court's opinions are not yet reported. See Appendix ("App.") 3a. Appellants' notice of appeal is reprinted at App. 1a-2a.

JURISDICTION

The district court entered judgment on May 2, 2003. Appellants filed their timely notice of appeal on May 2, 2003. This Court has appellate jurisdiction pursuant to section 403(a)(3) of BCRA.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, is reprinted at App. 7a-68a.

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[1] Other plaintiffs will likely be filing jurisdictional statements of their own, and it is anticipated that defendants will also do so. Where necessary, appellants will file prompt responses to those statements. In addition, appellants shortly intend to file a motion proposing procedures for the disposition of this appeal.

Article I, Section 4, of the United States Constitution is reprinted at App. 4a.

The First Amendment of the United States Constitution is reprinted at App. 5a.

The Fifth Amendment of the United States Constitution is reprinted at App. 6a.

STATEMENT OF THE CASE

1. The history of campaign finance regulation in the United States is relatively brief. In fact, Congress did not attempt systematically to regulate the financing of campaigns until 1971, when it enacted the Federal Election Campaign Act (FECA). See Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-455). As amended in 1974, see Pub. L. No. 93-443, 88 Stat. 1263, FECA had three principal components. First, and most fundamentally, FECA established limits on the amount of money that could be contributed for the purpose of influencing federal elections -- money that would come to be known as "hard money." Individuals could contribute up to $1,000 per candidate, and "political committees" (including political action committees, or PACs) could contribute up to $5,000.[2] Second, FECA also imposed

[2] In 1976, Congress amended FECA to add further limits. See Pub. L. No. 94-238, 90 Stat. 475. Under those amendments, individuals could contribute up to $5,000 per year to any

limits on the amount of money that could be spent in federal elections, restricting expenditures by any person "relative to a clearly identified candidate" to $1,000. Finally, FECA established limits on "coordinated expenditures": that is, expenditures made on behalf of, and in collaboration with, a federal candidate for express advocacy and related activities. FECA treated coordinated expenditures as "contributions" subject to the applicable limits, and set separate limits for coordinated expenditures by political party committees.

2. In Buckley, this Court considered challenges to these and numerous other provisions of FECA. The Court began by recognizing that both contributions and expenditures on behalf of political candidates implicate the First Amendment rights of free speech and free association, although it asserted that limitations on expenditures constituted "significantly more severe" restrictions on those rights than limitations on contributions. See 424 U.S. at

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particular political committee (including PACs and state political party committees), and up to $20,000 per year to any national party committee. Political party committees, in turn, could contribute up to $5,000 to a candidate's campaign, with national party committees allowed to contribute up to $17,500 to a senatorial candidate's campaign.

The BCRA raises a number of these contribution limits. See BCRA §§ 102, 307. Appellants are not directly challenging any of the contribution limits in this appeal.

19-23. The Court also recognized that the government had a compelling interest in "the prevention of corruption and the appearance of corruption." See id. at 25. Although the Court did not define "corruption," it repeatedly referred to "quid pro quo" arrangements in which contributions or expenditures were made in order to secure or "influence" a particular action. See id. at 26, 27, 45.

The Court upheld FECA's contribution limits as constitutional. See id. at 24-38. However, it struck down FECA's limits on independent expenditures. See id. at 39-59. In order to address both vagueness and overbreadth concerns, the Court first narrowly construed the expenditure limits to cover only those funds that were spent for what has come to be known as "express advocacy": that is, funds used "in express terms [to] advocate the election or defeat of a clearly identified candidate." Id. at 44. This narrowing construction therefore excluded from the reach of government regulation political advocacy that does not expressly advocate the election or defeat of a clearly identified candidate (so-called "issue advocacy"). Even after narrowing these provisions, however, the Court struck them down on the ground that independent expenditures did not pose a sufficient threat of corruption or the appearance of corruption. See id. at 45. In so

doing, the Court expressed approval of FECA's treatment of coordinated expenditures as contributions. See id. at 47. The Court applied a similar narrowing construction to a provision of FECA requiring disclosure of certain expenditures, but ultimately upheld that provision. See id. at 74-82.

3. In the wake of Buckley, the FECA regime for the financing of federal election campaigns peacefully coexisted with the States' regimes for the financing of their own election campaigns. Some States allowed virtually unlimited contributions to, and expenditures by, state candidates and party committees; others imposed even more stringent limits than those imposed by FECA on the federal level.

Questions arose, however, regarding the financing of activities that had effects on both federal and state elections, such as voter registration, voter identification, and get-out-the-vote activities. In 1978, the Federal Election Commission (FEC) declared that state and local party committees could use a combination of federally regulated funds (so-called "hard money") and state-regulated funds (so-called "soft money") to fund those activities. See FEC Advisory Op. 1978-10. The FEC subsequently allowed national party committees to use a similar "allocation" of federally regulated and state-regulated funds. See FEC Advisory

Op. 1979-17. Over the next two decades, the FEC extended the allocation regime to cover other activities by party committees, including administrative expenses, party-promoting (or "generic") campaign activities, and, perhaps most critically, issue advocacy. See FEC Advisory Op. 1995-25. During the 1990s, the raising and spending of state-regulated funds for party activities, and the use of issue advocacy by political parties and other groups, expanded significantly.

4. It was against this backdrop that BCRA was enacted. The relevant provisions of BCRA are contained in four titles.

a. Title I of BCRA effectively outlaws the use of so-called "soft money": that is, money which has not previously been subject to federal regulation, but which has been raised by political parties in full compliance with applicable state law.

Section 101 of BCRA bans national party committees from receiving or spending state-regulated funds for any purpose -- whether for activities affecting both federal and state elections, for which an allocation of state-regulated funds could previously be used, or for activities that affect only state elections. Section 101 also bans national party committees from soliciting state-regulated funds for, or transferring state-regulated funds to, any other entity, including state and local party committees.

In addition, section 101 bans state and local party committees from spending state-regulated funds for what BCRA euphemistically calls "federal election activity" -- a broadly defined phrase that encompasses voter registration, voter identification, get-out-the-vote activity, and generic campaign activity whenever there is a federal election on the ballot, and advertising that contains certain types of references to federal candidates. Because most States hold their state and local elections simultaneously with federal elections, the practical effect of this provision is to ban state and local party committees from using state-regulated funds for covered activities even if those activities solely or primarily affect state and local elections. Although section 101 creates a narrow subcategory of these activities that can be paid for with a new category of federally regulated funds (so-called "Levin" funds), it requires state and local party committees to raise funds for these activities on their own, without engaging in joint fundraising or receiving transfers of funds from other party committees.

Section 101 also severely restricts federal officeholders and candidates from raising state-regulated funds for state and local party committees and candidates. Moreover, it bans state and local

candidates from spending state-regulated funds on advertising that contains certain types of references to federal candidates.

b. Title II of BCRA contains a number of challenged provisions. Most notably, sections 201 and 204 ban all corporations and unions, or other entities using funds donated by corporations and unions, from making disbursements for "electioneering communications," which section 203 defines as any advertising, carried by a broadcast, satellite, or cable medium within 30 days of a primary or 60 days of a general election, which "refers to a clearly identified candidate for Federal office." In the event that this definition is held to be unconstitutional, section 203 also contains a "fallback" definition of "electioneering communications," which covers any broadcast advertising, at any time, which "promotes," "supports," "attacks," or "opposes" a federal candidate and "is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." In addition to banning corporations and unions from making "electioneering communications" altogether, section 201 requires all persons who spend $10,000 on "electioneering communications" to make disclosures to the FEC regarding those disbursements.

Several other provisions of Title II are also under challenge. Sections 201 and 212 impose disclosure requirements on persons who merely enter into a contract to make disbursements for electioneering communications or other expenditures, even before those outlays are actually made. Section 202 treats coordinated disbursements for electioneering communications, like coordinated expenditures, as contributions to the "supported" candidates, and sections 211 and 214 broadly define the concept of "coordination" and order the FEC to promulgate new regulations concerning that definition. Finally, section 213 bans political parties from making both independent and coordinated expenditures on behalf of any given candidate, and instead forces them to choose which type of expenditures to make.

c. Title III of BCRA is composed of "miscellaneous" provisions, several of which are at issue in this litigation. Section 318 bans minors from contributing federally regulated money in any amount to a federal candidate, and from contributing either federally regulated or state-regulated money to a political party committee. Section 305 requires a federal candidate who wishes to take advantage of the lowest available rate for a broadcast advertisement either to certify that he or she will not refer to another candidate in his or her advertising, or to include a

specified identification or visual statement in the ad. Sections 304, 316, and 319 raise the generally applicable limitations on contributions and coordinated expenditures for candidates who face opponents using specified amounts of personal funds in their campaigns. And section 311 establishes detailed identification requirements for the sponsors of advertising that qualifies as express advocacy or "electioneering communications."

d. Title V of BCRA contains one provision under challenge, section 504, which requires broadcasters to collect and disclose records of requests to purchase broadcast time for communications "relating to any political matter of national importance," even if those communications are never actually made.

5. Although noting that BCRA raised "serious constitutional concerns," President Bush signed BCRA into law on March 27, 2002. Eleven complaints were immediately filed in the United States District Court for the District of Columbia, challenging the constitutionality of various aspects of the law. Pursuant to the judicial-review provisions in section 403 of the BCRA, those cases were consolidated before a single three-judge panel (Henderson, Circuit Judge, and Kollar-Kotelly and Leon, District Judges). The court ordered the parties to conduct expedited discovery and a "paper trial," in which witnesses filed written statements and were

cross-examined outside court. On November 6, 2002, BCRA took effect. After a voluminous record was compiled and expedited briefing completed, the court heard oral arguments on December 4 and 5, 2002.

On May 2, 2003, the district court issued opinions upholding some provisions of BCRA, striking down other provisions, and holding that appellants' challenges to other provisions were nonjusticiable. See App. 3a. This appeal follows.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

In BCRA, Congress vested this Court with direct appellate jurisdiction over the district court's resolution of challenges to BCRA's constitutionality, and asked this Court "to expedite to the greatest possible extent the disposition of the * * * appeal." See BCRA § 403(a)(3). The district court's decision to reject some of appellants' constitutional challenges was erroneous, and this Court should note probable jurisdiction on those issues.

1. The district court largely struck down the "soft money" provision of BCRA (section 101), but upheld restrictions on the use of soft money by party committees for certain types of advertising, and also upheld restrictions on the solicitation and use of soft money by officeholders and candidates. To the extent the district

court held section 101 constitutional, that decision was erroneous and should be reversed.

a. Most significantly, section 101 violates the First Amendment. Section 101 imposes burdens on speech and associational rights that far outweigh those imposed by the contribution and expenditure limits at issue in Buckley. By limiting the mere solicitation of state-regulated funds by various actors, including officeholders and candidates (provisions upheld by the district court), section 101 directly restricts the speech of those actors. See, e.g., Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980). Section 101 also interferes with the ability of party committees to associate with other committees of the same party, officeholders and candidates, and other organizations. See, e.g., Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 230-31 (1989). Because of the substantial speech and associational interests implicated, and because the limits on donations of state-regulated funds to national party committees effectively serve as limits on the amounts that national party committees can spend, section 101 of BCRA should be subject to strict scrutiny. See Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 299 (1981).

Section 101 cannot survive strict scrutiny because it is not narrowly tailored to meet a compelling governmental interest. Although appellees will suggest that section 101 was justified to prevent donors of state-regulated funds from securing "access" to federal officeholders and candidates or to prevent circumvention of current campaign finance regulations, this Court has not recognized either of those potentially limitless justifications for regulation as compelling. Instead, the only interest that this Court has recognized as compelling in the campaign finance context is the interest in reducing actual or apparent corruption. See FEC v. National Conservative Political Action Comm., 470 U.S. 480, 496-97 (1985).

As a threshold matter, it is questionable whether restrictions on the donation of state-regulated funds to, or the spending of any state-regulated funds by, a political party serve that interest at all. As this Court has noted, there are no "special dangers of corruption associated with political parties." Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 616 (1996) (Colorado I) (plurality opinion).[3] Moreover, where funds are being used for activities that do not exclusively serve to get a candidate elected

[3] See also id. at 629 (Kennedy, J., concurring in part and dissenting in part) (same); id. at 646 (Thomas, J., concurring in part and dissenting in part) (same).

(such as generic party activity), rather than for activities that exclusively do so (such as express advocacy), "the opportunity for corruption * * * is, at best, attenuated." Id.

Even assuming that section 101 does serve the government's interest in reducing actual or apparent corruption, however, it is not narrowly tailored to serve that goal. To the extent that Congress was concerned that the amount of donations of state-regulated funds gave rise to corruption, it could simply have capped the amount that could be given. And to the extent that Congress was worried about the use of state-regulated funds for certain types of advertising, it could perhaps have banned only the disbursement of state-regulated funds for that purpose, as the district court suggests -- though, as we will shortly demonstrate, such advertising is in fact constitutionally protected speech.

b. Section 101 is constitutionally problematic for three other reasons. First, appellants intend to argue that Congress lacked the power to enact section 101, which restricts the activities of political party committees, officeholders, and candidates not only with respect to federal elections, but also with respect to state and local elections. The Elections Clause in Article I, Section 4, of the Constitution -- the traditionally cited source of authority to regulate campaign financing, see

Buckley, 424 U.S. at 13 -- gives Congress the power to regulate only the "Times, Places, and Manner" of holding federal elections. Both the contemporary understanding and subsequent case law demonstrate beyond doubt that the Elections Clause does not give Congress the power to regulate state elections as well. See, e.g., The Federalist No. 59, at 363 (Alexander Hamilton) (C. Rossiter ed. 1961); Oregon v. Mitchell, 400 U.S. 112, 124-25 (1970) (opinion of Black, J.); Ex parte Siebold, 100 U.S. 371, 393 (1879); cf. California Democratic Party v. Jones, 530 U.S. 567, 590 (2000) (Stevens, J., dissenting) (noting that "[a] State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty").

Section 101 of BCRA constitutes an improper exercise of Congress' Elections Clause power because it fails sufficiently to accommodate the competing state interest in regulating activities that affect state elections. Section 101 prohibits party committees from raising and spending state-regulated funds for many activities that have effects on both federal and state elections (including the use of state-regulated funds for advertising that refers to both federal and state candidates, the regulation of which the district court upheld), and other activities that have effects only on state elections. Similarly, in provisions upheld

by the district court, section 101 dramatically limits the ability of federal officeholders and candidates to raise money for state and local candidates, and imposes unprecedented restrictions on the speech of state and local candidates themselves.

Second, section 101 violates basic principles of equal protection to the extent that it regulates speech by political parties but not identical speech by similarly situated entities. The requirement that the government act neutrally 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). At least as originally written, section 101 unquestionably disadvantages political party committees compared to interest groups: whereas national party committees are banned outright from raising or spending state-regulated funds for contributions to state or local candidates, voter registration, voter identification, get-out-the-vote activity, generic campaign activity, advocacy relating to ballot measures, and even administrative expenses, interest groups will be able to continue to raise and spend non-federally regulated funds for all of these purposes. The predictable result is that interest groups will tend to supplant political party committees with regard to all of these activities, thereby diluting the

central role that political parties traditionally have played in our democratic process. See Davis v. Bandemer, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring).

Third, a number of terms in section 101 are unconstitutionally vague, including several terms in the definition of "federal election activity" (such as covered "communications" that "promote," "support," "attack," or "oppose" a federal candidate). Crucially, the FEC's rulemaking on section 101 has failed to cure the vagueness of many of these terms, and in some cases has introduced additional vagueness in the regulatory regime. This vagueness will force party committees and other actors either 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), or to seek prior approval from the FEC before engaging in political speech.

2. The district court partially upheld and partially struck down the "electioneering communications" provisions of BCRA.

As to those provisions, appellants intend to argue that the regulation of disbursements for political speech other than express advocacy violates the First Amendment, as this Court previously held in both Buckley and FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) (MCFL). In Buckley, the Court considered

a provision of FECA restricting expenditures by any person "relative to a clearly identified candidate" to $1,000, and an attendant provision requiring disclosures of certain expenditures made "for the purpose of * * * influencing" federal elections. In both instances, the Court narrowed the statutory provisions to reach only expenditures made for "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office": that is, "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.'" Buckley, 424 U.S. at 44 & n.52, 80. The Court made clear that it was narrowing these provisions not merely to cure vagueness in the statutory language, but also to eliminate constitutional overbreadth. See, e.g., id. at 80. Notably, the Court drew the constitutional line at express advocacy while recognizing that the distinction between express advocacy and other advocacy "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. In MCFL, the Court similarly narrowed a provision that banned corporate expenditures "in connection with" federal elections to cover only expenditures

for express advocacy, this time doing so solely on the basis of overbreadth. See 479 U.S. at 248-49.

Because both of section 203's definitions of "electioneering communications" -- including the fallback definition, as modified and then upheld by the district court -- extend far beyond constitutionally regulable express advocacy, the ban on disbursements for "electioneering communications" by corporations and unions in sections 201 and 204, and the attendant disclosure requirements in sections 201 and 311, should be struck down.

Appellees will likely argue that this Court should overrule Buckley and MCFL on the theory that many ads run in proximity to elections are "sham" issue ads, which are "intended" to influence elections, and therefore should be treated as the constitutional equivalent of express advocacy. As the Court recognized in Buckley, it is true that any discussion of issues and candidates "tend[s] naturally and inexorably to exert some influence on voting at elections." 424 U.S. at 42 n.50 (internal quotation omitted). As Buckley itself makes clear, however, the distinction between express advocacy and other advocacy was intended precisely to avoid efforts such as appellees' to divine the real "purpose" behind an ad. In any event, the evidentiary record before the district court demonstrates that BCRA reaches a substantial amount of fully

protected political speech, even under appellees' redefinition of express advocacy.

Finally, appellants intend to make further arguments regarding the constitutionality of BCRA's "electioneering communications" provisions. Appellants intend to argue that the "fallback" definition of "electioneering communications" in section 203, as modified and then upheld by the district court, is impermissibly vague because reasonable people can differ as to whether any given advertisement "promotes," "supports," "attacks," or "opposes" a federal candidate. Finally, appellants intend to argue that section 203 violates basic principles of equal protection because it regulates speech carried by broadcast media but not by other media, and because it exempts communications by media corporations themselves.

3. The district court struck down some of the "advance notice" provisions of BCRA (sections 201 and 212) and held that challenges to other of those provisions were nonjusticiable. Appellants intend to argue that all of their challenges are justiciable and that all of the "advance notice" provisions violate the First Amendment. Those provisions impose disclosure requirements on persons who merely enter into a contract to make disbursements for electioneering communications or other

expenditures, even before those disbursements or expenditures are actually made, and even if they are ultimately not made. Sections 201 and 212 therefore differ in kind from the FECA reporting provisions upheld in Buckley, which required only after-the-fact disclosure. See Buckley, 424 U.S. at 74-82.

By requiring disclosure of a mere intention to make disbursements or expenditures, regardless of whether they are actually made, sections 201 and 212 cannot be said to serve any governmental interest in preventing corruption or the appearance of corruption, informing the electorate as to the source of campaign spending, or assisting in enforcement of contribution limits -- much less to be narrowly tailored to those interests. These provisions will chill the exercise of free speech by forcing would-be speakers to disclose their plans in advance, thereby potentially subjecting them to harassment and giving their opponents the opportunity either to dissuade media organizations from running the ads at issue or to counter those ads with ones of their own. Such a restraint plainly violates the First Amendment. Cf. Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 165 (2002) (striking down ordinance requiring permits for canvassers).

4. The district court upheld some of the "coordination" provisions of BCRA (section 211 and 214) and held that challenges to other of those provisions were nonjusticiable. Appellants intend to argue that all of their challenges are justiciable and that all of the "coordination" provisions violate the First Amendment. Sections 211 and 214 give the concept of "coordination" a new, broader definition, with section 214(c) expressly stating that "agreement or formal collaboration" are not required in order to establish coordination, and ordering the FEC to promulgate new regulations consistent with this directive. This Court's prior cases on coordinated expenditures, however, make clear that some degree of actual agreement is necessary before an expenditure can be treated as coordinated and therefore as the legal equivalent of a contribution. See, e.g., Colorado I, 518 U.S. at 619 (plurality opinion); Buckley, 424 U.S. at 47 & n.53. Any definition of coordination that lacks some requirement of actual agreement is therefore unconstitutional.

Moreover, section 202 treats coordinated disbursements for electioneering communications, like coordinated expenditures for express advocacy, as contributions to the "supported" candidates. If this Court strikes down the "electioneering communications" provisions of BCRA, thereby reaffirming that Congress may not

regulate advocacy that does not constitute express advocacy, it should also strike down the "coordination" provisions of BCRA insofar as they reach disbursements for speech that does not qualify as express advocacy.

5. The district court next held that challenges to the "attack ad" provision of BCRA (section 305) are nonjusticiable. Appellants intend to argue that their challenges are justiciable and that section 305 violates the First Amendment. Section 305 requires a federal candidate who wishes to take advantage of the statutorily mandated lowest available rate for a broadcast advertisement either to certify that he or she will not refer to another candidate in his or her advertising, or to include a specified identification or visual statement in the ad. There is no question that this provision was designed to discourage, if not eradicate, so-called "negative advertising": the very title of the provision is "Limitation on Availability of Lowest Unit Charge for Federal Candidates Attacking Opposition."

Section 305 violates the First Amendment because it imposes an unconstitutional condition (namely, the requirement that a candidate either engage in "positive" advertising or include certain speech in his or her "negative" advertising) on the availability of a governmental benefit (namely, the "lowest unit"

rate). See, e.g., Perry, 408 U.S. at 597. Indeed, to the extent that section 305 favors "positive" over "negative" advertising, it constitutes an impermissible viewpoint-based regulation of speech. See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995). It is beyond question that "negative," like "positive," political speech enjoys the fullest constitutional protection. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction.

Respectfully submitted,

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May 2, 2003