

II. TITLE II OF BCRA IS UNCONSTITUTIONAL.

A. BCRA's Electioneering Communications Provisions Are Invalid.

Defendants discuss Title II as if there is no relevant, let alone governing precedent at all — as if *Buckley v. Valeo*, 424 U.S. 1 (1976), does not exist, should not exist, or is, at most, a barely recalled ruling that addressed some problem of statutory vagueness. Defendants fail to acknowledge the commanding degree of reliance in *Buckley*, and then in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), on deeply rooted First Amendment principles. Nor do they cite, much less answer, any of the repeated rulings of federal courts of appeals which doom BCRA's electioneering communications provisions as unconstitutional.

As to those portions of their brief which catalog the "facts," defendants fare no better. The anecdotal evidence they offer — examples of advertisements they deem "sham" — establishes nothing. Far less "worthy" speech has repeatedly been held entitled to the highest level of First Amendment protection. *Buckley* and its progeny have made clear that precisely this speech cannot be regulated, much less criminalized, by Congress.

1. BCRA's Electioneering Provisions Flatly Contradict *Buckley* And Its Progeny.

(a) *Buckley* Condemns Both The Principal And Fallback Definitions Of "Electioneering Communications."

BCRA's electioneering communications provisions must be struck down as entirely inconsistent with the Supreme Court's seminal decision in *Buckley*. See McConnell Br. 44-56. As defendants' expert witness Frank Sorauf put it, under *Buckley*, government may regulate only express advocacy, while speech that "mention[s] specific candidates or political parties but does not 'expressly advocate' the election or defeat of a clearly identified candidate" is "by definition . . . completely unregulated." Sorauf dep., exh. 2, at 19-20. Or, as another of the government's

experts, David Magleby, explained:

The U.S. Supreme Court . . . in *Buckley v. Valeo* drew a distinction between election related activity and other forms of political communication. The Court defined express advocacy communications as those that used words like “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” “reject.” These “magic words” of electioneering have become the standard to determine whether or not a communication falls under the disclosure, source limitations, and other provisions of the FECA.

4 DEV, tab 8, at 10 (Magleby).

What seems so obvious to defendants experts about *Buckley* — in fact, what makes them so disapprove of *Buckley* — now seems to escape the defendants themselves. Defendants do not contest that BCRA sweeps well beyond express advocacy. But *Buckley*, until now universally regarded as *the* fundamental pronouncement by the Supreme Court on campaign financing, is read by the defendants to reveal nothing about the First Amendment. They view *Buckley*’s now-famous distinction between express and issue advocacy as a passing exercise in statutory construction, designed to clarify a particular statute. *See* Br. 148-49, 152, I-117-23.

This reading utterly ignores the substance, let alone the language, of *Buckley*, not to mention the Supreme Court’s subsequent exposition of *Buckley* in *MCFL*, and the uniform interpretation of countless federal courts that have invalidated a wide array of state and federal campaign finance regulations based on the premise that *Buckley* actually announced a rule of constitutional law. Defendants’ effort to emasculate *Buckley* by stripping it of its constitutional underpinnings is baseless. *Buckley* and BCRA’s electioneering communications provisions simply cannot coexist.

**(i) *Buckley* Announced A Substantive Rule Of
First Amendment Law That Controls Here.**

Defendants’ vision of *Buckley* cannot withstand a reading of *Buckley* itself. Indeed, although they seek to skirt the point, defendants’ efforts to confine *Buckley* to the realm of

vagueness-only statutory construction begin to unravel in their own presentations. Thus, the government tellingly notes that the *Buckley* Court applied its express-advocacy line to the disclosure provision there at issue both “to ‘avoid the shoals of vagueness’ and to ‘insure that the reach of [the statute was] not impermissibly broad.’” Br. 149 (quoting *Buckley*, 424 U.S. at 78-80) (emphasis added; alteration in original). And the intervenors are likewise compelled to mention, if only in passing, that the “express advocacy” discussion in *Buckley* teaches both that statutes effecting political speech must not be vague and that such statutes “are more readily sustained to the extent they regulate ‘advocacy of a political result’ in the context of specific federal elections.” *Id.* at I-119-20 (quoting *Buckley*, 424 U.S. at 76-80) (emphasis added).

Defendants’ admissions are but the tip of the iceberg. As *Buckley* makes clear, the express-advocacy line is a substantive limit on Congress’ power. *Buckley* first applied the express-advocacy test to a provision limiting expenditures “relative to a clearly identified candidate,” 18 U.S.C. § 608(e)(1). The notion that only express advocacy may be regulated was born of a constitutional requirement that regulation be limited. The Court explained:

[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Buckley, 424 U.S. at 42. Thus, the express-advocacy line was designed to ensure that FECA did not reach “discussion of issues and candidates.” This demarcation was not merely an exercise in statutory construction. Rather, the Court found it necessary to draw a line that protected discussion of issues and candidates precisely because such discussion “tend[s] naturally and inexorably to exert some influence on voting at elections.” *Id.* at 42 n.50. The Court’s choice of

this line — as opposed to the many it could have drawn, if clarity were its only goal — stemmed only from the First Amendment. *See FEC v. Christian Action Network*, 110 F.3d 1049, 1052 (4th Cir. 1997) (“The Court could have drawn the line between permissible and impermissible expenditures differently, but a different line would have come at the cost of expanded regulatory authority in a sphere where government regulation, if it is to be permitted at all, must be viewed with the utmost suspicion — a cost the Court had no difficulty concluding was too high . . .”).

That *Buckley* drew the express-advocacy line as a substantive limit on Congress’ power to regulate was made even clearer the second time the Court embraced the express-advocacy test in its opinion. Considering language from FECA (very different from the language of § 608(e)(1)) requiring disclosure to the FEC of certain “expenditures” made “for the purpose of . . . influencing” the nomination or election of candidates for federal offices, *see* 2 U.S.C. §§ 431(f), 434(e), the Court observed that the literal application of that text could well “encompass[] both issue discussion and advocacy of a political result.” *Buckley*, 424 U.S. at 78-79. To avoid this unconstitutional result, the Court applied the express-advocacy limitation to the disclosure provision.¹¹ The Court made clear that the express-advocacy limit was necessary to keeping the statute within constitutional bounds:

To insure that the reach of § 434(e) is not impermissibly broad, we construe

¹¹ Defendants have little to say with respect to plaintiffs’ claims that BCRA’s disclosure requirements are unconstitutional, apart from the claim that, because electioneering communications are regulable, disclosure requirements on such communications are also permissible. *See* Br. 173-74. Of course, this argument hinges entirely on defendants’ erroneous interpretation of *Buckley*. Defendants do briefly suggest that BCRA’s disclosure requirements are sustainable independent of the electioneering communications provisions, *see id.* at 176-77, but this claim cannot withstand a careful reading of *Buckley* itself, *see* McConnell Br. 55-56. A more extensive discussion of BCRA’s unconstitutional disclosure provisions, and the prior restraints those provisions impose on protected speech, is offered in the separate submissions of several plaintiffs. *See* ACLU Opp. Br. 9-10; AFL-CIO Br. 14-17.

“expenditure” for purposes of that section in the same way we construed the terms of section 608(e) to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.

Id. at 80 (emphasis added; footnote omitted). It is unfathomable that defendants could read this passage and still question the First Amendment underpinnings of the express-advocacy limitation.¹²

It should not be surprising, then, that *Buckley* has long been understood as having announced a fundamental principle of First Amendment law. Defendants’ newfound blindness to the essence of *Buckley* is telling. In a book published by defendants’ counsel at the Brennan Center for Justice at NYU School of Law, urging reversal of *Buckley*, one author grudgingly but accurately summarized the rationale for *Buckley*’s express-advocacy standard, making plain that far more than a desire for clarity was at issue:

This definition [in *Buckley*] of regulable election-related speech appears to reflect three concerns. First, despite, or perhaps because of, the close connection between election-related and other political speech, *Buckley* sought to establish a standard that clearly distinguishes election-related spending from other political spending. To avoid vagueness *Buckley* requires the line between elections and politics to be sharply drawn. Otherwise the definition would yield the sort of chilling effect the First Amendment abhors — self-censorship by speakers who stay far clear of the line for fear of unwittingly crossing it.

Second, the Court seemed worried about unwelcome administrative or judicial probing of the intentions of speakers. Extensive intrusion into the internal

¹² It is just as unfathomable that in the face of *Buckley*’s observation that “[i]t would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate’s campaign,” *Buckley*, 424 U.S. at 45, defendants nonetheless continue to express shock that any advertisements that do *not* contain express advocacy nonetheless could “benefit” a campaign. Yet the co-author of the Brennan Center’s *Buying Time 2000* study himself observed after reading this passage of *Buckley* that he had not previously “realize[d] that the Justices knew full well that sham issue advocacy would result from their decision.” McLoughlin dep., exh. 33.

communications of an organization or the inner workings of a speaker's mind — to determine, for example, whether the sponsor intended to influence an election — would raise serious First Amendment problems. That is one of the reasons *Buckley* grounded its standard on the content of the communication. Whether a message is campaign-related must be assessed according to its words.

Third, the Court's definition of election-related speech appears intended to maximize the protection of general political speech and minimize the degree to which election regulation may encroach on political speech. Election-related speech must be defined very narrowly, even though this will enable some election-related speech to evade regulation, in order to ensure that no general political speech is restricted. Defining election-related speech as speech that expressly advocates the election or defeat of clearly identified candidates creates the narrowest possible exception to the general immunity of political speech from regulation.

Richard Briffault, *Drawing the Line Between Elections and Politics*, in *If Buckley Fell* 121, 124-25 (E. Joshua Rosenkranz ed. 1999).

As this analysis suggests, the foundation on which the *Buckley* opinion is built renders it nonsensical to read the opinion as merely addressing statutory vagueness. Indeed, the opinion begins not with statutory specifics, but with a discussion of core constitutional principles: that FECA's "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities" because "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution," *Buckley*, 424 U.S. at 14; that "a major purpose" of the First Amendment "was to protect the free discussion of governmental affairs . . . of course includ(ing) discussions of candidates," *id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)) (alterations in original); and that we have a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). From beginning to end, *Buckley* is rooted in the principle that "[i]n the free society ordained by our Constitution it is not the Government, but the people

individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.” *Id.* at 57.¹³

(ii) **The Supreme Court Confirmed In *MCFL* That The Government May Not Regulate Political Speech Beyond Express Advocacy.**

Buckley thus leaves no doubt that its express-advocacy test is a constitutional requirement. But even assuming that any question remained, the Supreme Court settled the matter in *MCFL*. In that case, the Court explicitly applied the express-advocacy limitation to avoid First Amendment overbreadth — without any reference to vagueness.

The provision at issue in *MCFL* prohibited “expenditures” by corporations, paid from treasury funds, “in connection with” any federal election. 2 U.S.C. § 441*b*. *MCFL* argued that, under *Buckley*, this ban on expenditures “in connection with” elections necessarily was limited to express advocacy. *See MCFL*, 479 U.S. at 248. The Court clearly read *Buckley*’s express-advocacy line as a substantive limit on the speech that Congress might regulate, and just as clearly applied the express-advocacy test in *MCFL* as a substantive limit on the reach of Congress’ power. Thus, the Court noted that, in *Buckley*, “in order to avoid problems

¹³ *Buckley*, of course, applies with full force to unions and corporations, and defendants marshal no authority to the contrary. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), permitted the regulation of only *express advocacy* by corporations, *see* McConnell Br. 50 n.19. Not surprisingly, since *Austin*, courts addressing challenges to corporate expenditure limitations have repeatedly invalidated laws that constrained speech beyond express advocacy. *See, e.g., Chamber of Commerce v. Moore*, 288 F.3d 187, 196, 198 (5th Cir. 2002), *cert. denied*, ___ U.S. ___ (Nov. 12, 2002); *Perry v. Bartlett*, 231 F.3d 155, 161-62 (4th Cir. 2000). And the Supreme Court has made clear that issue advocacy by corporations is fully protected by the First Amendment. *See First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 (1978); *see also Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1057-58 (9th Cir. 2000); *Elam Constr., Inc. v. Regional Transp. Dist.*, 129 F.3d 1343, 1347-48 (10th Cir. 1997); *Let’s Help Florida v. McCrary*, 621 F.2d 195, 199-200 (5th Cir. 1980); *Vote Choice, Inc. v. Di Stefano*, 814 F. Supp. 195, 197-98 (D.R.I. 1993).

of overbreadth, the Court held that the term ‘expenditure’ encompassed ‘only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.’” *Id.* at 248-49 (quoting *Buckley*, 424 U.S. at 80) (emphasis added); *see also id.* at 249 (“*Buckley* adopted the ‘express advocacy’ requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons.”). Applying these principles to section 441*b*, the Court concluded that, as with the provisions at issue in *Buckley*, the First Amendment required that section 441*b* be limited to express advocacy. *Id.*

Notably, the Court arrived at this holding, construing statutory language altogether different from that at issue in *Buckley*, without even a hint that its concern was vagueness. It is therefore mystifying that the government could seriously contend before this Court that *MCFL* constituted an exercise in statutory construction that did not set forth any “substantive constitutional requirement.” Br. 150 (emphasis in original). In fact, defendants’ position is so frivolous that the FEC has been ordered to pay attorneys’ fees in separate litigation for taking the position that it may regulate more than express advocacy. *See Christian Action Network*, 110 F.3d at 1050 (“[W]e conclude that the Commission’s position, if not assumed in bad faith, was at least not substantially justified. . . .”) (internal quotation omitted).

**(iii) The Uniform Rulings Of The Federal Courts
Make It Abundantly Clear That Only Express
Advocacy May Be Regulated.**

Virtually every federal court to consider the issue has recognized that the Supreme Court’s limitation of FECA to “express advocacy” was based on a First Amendment limit on Congress’ power. Defendants’ failure meaningfully to confront *any* of this massive body of case law is revealing. *See, e.g., Clifton v. FEC*, 114 F.3d 1309, 1312 (1st Cir. 1997) (“In *Massachusetts Citizens*, the Supreme Court not only narrowed section 441*b* by construction but

also recognized a First Amendment right to issue advocacy”); *Christian Action Network*, 110 F.3d at 1062 (“[E]xpress words of advocacy,’ the [Supreme] Court has held, are the constitutional minima. To allow the government’s power to be brought to bear on less, would effectively be to dispossess corporate citizens of their fundamental right to engage in the very kind of political issue advocacy the First Amendment was intended to protect”); *Faucher v. FEC*, 928 F.2d 468, 472 (1st Cir. 1991) (holding that the Court ensured “the right to engage in issue-oriented political speech” “by limiting the scope of the FECA to express advocacy”).¹⁴

In short, *Buckley* “opted for the clear, categorical limitation, that only expenditures for communications using explicit words of candidate advocacy are prohibited, so that citizen participants in the political processes would not have their core First Amendment rights to political speech burdened by apprehensions that their advocacy of issues might later be

¹⁴ The case law supporting the proposition that the express-advocacy line is constitutionally compelled is too voluminous to permit a complete cataloging here. But additional examples abound. See, e.g., *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248, 253-54 (S.D.N.Y. 1998) (“The bright-line requirement of ‘express’ or ‘explicit’ words of advocacy . . . is necessary to avoid prohibitions on ‘issue discussions,’ which are plainly protected from regulation by the First Amendment.”); *FEC v. Christian Action Network*, 894 F. Supp. 946, 951 (W.D. Va. 1995) (“In reaching its decision to adopt an ‘express advocacy’ standard, the Court recognized the severe impingement on political speech that would occur if the Act was interpreted too broadly.”), *aff’d per curiam*, 92 F.3d 1178 (4th Cir. 1996); *FEC v. National Org. for Women*, 713 F. Supp. 428, 433, 435 (D.D.C. 1989) (“By spending its corporate funds to advocate issues and criticize political opponents, NOW produced speech broadly protected by the First Amendment.”); *FEC v. American Fed’n of State, County and Municipal Employees*, 471 F. Supp. 315, 316 (D.D.C. 1979) (holding that *Buckley*’s “express advocacy” standard “is based on long recognized principles: (1) political expression, including discussion of candidates, is afforded the broadest protection under the first amendment; and (2) discussion of public issues which are also campaign issues unavoidably draws in candidates and tends to inexorably exert influence on voting at elections”). Even *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), the only federal court decision to offer any support to the FEC’s efforts to broadly construe “express advocacy” (support that is erroneous, see McConnell Br. 52-53), made clear that the express-advocacy standard is a substantive First Amendment issue. See *Furgatch*, 807 F.2d at 860 (explaining that, in limiting FECA to express advocacy, “the Court was particularly insistent that a clear distinction be made between ‘issue discussion,’ which strongly implicates the First Amendment, and the candidate-oriented speech that is the focus of the Campaign Act.”) (emphasis added).

interpreted by the government as, instead, advocacy of election result.” *Christian Action Network*, 110 F.3d at 1051. The lower courts have had no trouble interpreting the Supreme Court’s command.¹⁵

**(b) The Electioneering Communications Provisions Of
BCRA Unconstitutionally Apply To All Corporations,
In Clear Contravention of *MCFL*.**

In *MCFL*, the Supreme Court held that certain corporations must be allowed to engage in unfettered political speech, including even express advocacy. There, the Court invalidated section 441b as applied to Massachusetts Citizens for Life, a nonprofit political corporation dedicated to promoting pro-life causes. As in *Buckley*, the Court narrowed the statutory provision to regulate only express advocacy. *MCFL*, 479 U.S. at 249. Nevertheless, the Court held that even a ban on express advocacy alone could not be applied to *MCFL*, explaining that, although “[d]irect corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide [corporations] an unfair advantage in the political marketplace,” *id.* at 257, corporate advocacy groups “such as *MCFL* . . . do not pose that danger of corruption,” *id.* at 259. *MCFL* thus clearly holds that qualifying

¹⁵ The same is true of the federal courts’ treatment of the express-advocacy standard in assessing state campaign finance regulation. See, e.g., *Moore*, 288 F.3d at 192 (“To ensure that the mandatory disclosure provision in the federal statute did not encroach on protected political speech by individuals and groups, the Court held that the provision must be *narrowly construed to be consistent with the First Amendment*.”) (emphasis modified); *Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000) (holding that “express words of advocacy were not simply a helpful way to identify ‘express advocacy,’ but that *the inclusion of such words was constitutionally required*”) (emphasis added); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386 (2nd Cir. 2000) (“The Court adopted the ‘express advocacy standard’ to insure that these regulations were neither too vague *nor intrusive on protected ‘issue discussion.’*”) (emphasis added; citation omitted); *Virginia Soc’y for Human Life, Inc. v. Caldwell*, 152 F.3d 268, 273 (4th Cir. 1998) (holding that, absent an express-advocacy limitation, statutes regulating political speech were “unconstitutionally overbroad”).

organizations must be allowed to engage in unfettered express and issue advocacy.

Defendants make no effort to defend BCRA's wholesale disregard of *MCFL* and its progeny in section 203, which unqualifiedly prohibits *all* corporations from sponsoring any "electioneering communication," and in section 204, which makes clear that electioneering communications by section 501(c)(4) and 527 corporations fall within the BCRA's scope. *See* BCRA § 203 (amending 2 U.S.C. § 441*b*); BCRA § 204 (amending 2 U.S.C. § 441*b*).¹⁶ Instead, they point out that so-called *MCFL* entities have been exempted from BCRA by an FEC regulation (wholly inconsistent with the text of the statute), and argue that the regulation renders the statute constitutional. *See* Br. 166-67, I-126. But the regulation provides no protection for the future and simply betrays the FEC's own realization that the statute is facially unconstitutional. *See* Electioneering Communications, 67 Fed. Reg. 51131, 51137 (Aug. 7, 2002) (noting that BCRA "may go further than allowed by *MCFL*, in that it bans electioneering communications from all section 501(c)(4) corporations").

2. Wholly Apart From *Buckley* And Its Progeny, BCRA's Electioneering Communications Provisions Must Be Invalidated.

(a) The Definition of "Electioneering Communications" Is Patently Overbroad.

¹⁶ The provision's legislative history reveals that it was indeed meant to cover section 501(c)(4) organizations such as the Sierra Club, the NRA, and the Club for Growth to assure that they were treated no differently than any other corporation. 147 Cong. Rec. S2847 (daily ed. Mar. 26, 2001) (statement of Sen. Wellstone). Senator Wellstone, who proposed what became section 204, also made plain that the amendment was offered to avoid "bitter, personal, poison politics," citing the Brennan Center's conclusion that "70 percent of the money spent by these sham ads by these groups and organizations is personal, negative and going after people's character." *Id.* at S2849. Not only is this conclusion false — over 95% of *all* issue ads have conclusively been determined to relate to policy issues, not supposed personality traits, *see* 1 PCS/ER 32, 57 (Gibson) — but there is, of course, no warrant in the First Amendment for providing less protection to speech critical of candidates for public office, *see Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 227-28 (1989).

Once defendants are through explaining away BCRA's blatant disregard of *Buckley*, they argue that the definition of electioneering communications set forth in Title II is not overbroad in any event. See Br. 156-64. In support of that claim, defendants point to the definition of "electioneering communication" itself and urge that the only speech prohibited by BCRA is (1) speech that is broadcast; (2) that refers to a candidate for federal office; (3) that airs within 30 or 60 days of a primary or general election; (4) in the candidate's district. From that, defendants conclude, BCRA is "surgically tailored" and "carefully targeted." *Id.* at 156. That is like saying that a statute that bans editorials about candidates on election day is "surgically tailored" and "carefully targeted" because it only bans editorials about candidates on election day. See *Mills*, 384 U.S. at 218-19. BCRA's condemnation of core political speech is sweeping and unconstitutionally so.¹⁷

Defendants' only effort to address the serious overbreadth of the "electioneering communications" provisions is to retreat to the "findings" of the Brennan Center's *Buying Time*

¹⁷ Defendants would have this Court believe that BCRA's electioneering communications provisions are no cause for concern because corporations and unions can still make "hard money" contributions through PACs. But, assuming this Court agrees that "electioneering communications" are constitutionally protected, there is no warrant for forcing any entity to clear elaborate procedural hurdles to make speech through mechanisms not truly reflective of the entity itself. If a communication contains no express advocacy, it is not regulable, and speakers should not have to jump through the myriad procedural hoops required to engage in "political action." In addition, speaking through PACs is not a viable option for many plaintiffs. The ACLU, for example, has *never* in its 82-year history taken a position in a partisan election, and has never formed a PAC because it simply is not a political organization. See ACLU Br. 3; see also 3 PCS/ACLU 2 (Romero). Moreover, using federal PACs is utterly impractical for labor unions, because FECA's affiliation rule limits a national labor organization, with hundreds of affiliates, to a single PAC (or, if the affiliates have many PACs, those PACs are collectively treated as one). See AFL-CIO Opp. Br. 8. Thus, while there are over 30,000 labor organizations in the private sector, only 313 union-sponsored PACs currently exist. See *id.* See generally NRA Opp. Br. 3-6; AFL-CIO Opp. Br. 7-10; ACLU Opp. Br. 2-3, 5-9.

reports.¹⁸ As noted in plaintiffs' opening brief, however, *see* McConnell Br. 71-76, if BCRA's overbreadth is to be determined by the data gathered for those reports, there can be no doubt at all that the statute must fall. Far from advancing defendants' cause, the data provides still more proof positive that the statute is overbroad.

At the outset, it is important to bear in mind that in insisting that there will be little impact on "genuine" issue advocacy, defendants have seized for themselves the role of determining what issue advocacy is and is not "genuine," and that they do so in a way that is wholly inconsistent with *Buckley*. The vision that drove the authors of the *Buying Time* reports (and now defendants' experts) is that speech about a bill or an issue is protected, while speech about a candidate can rarely, if ever, be. *See, e.g.*, Goldstein dep. 217 ("[L]ooking at lobbying ads and election ads [this ad] looks more like an election ad, and specifically, although it does talk about an issue, the focus — the star of the ad, if you will, is [a] Member of Congress."); Lupia dep. 59 (AFL-CIO ad "certainly provides information about social security and it also names a particular candidate, which for me is a red flag"); *id.* at 65 ("No, from the storyboard, all I get is the red flag. They are talking about this issue but they have named a person.") But the Court in *Buckley* made no distinction between speech about issues and speech about candidates. *Buckley* and *MCFL* held that "discussions of issues *and* candidates" was entitled to the fullest protection of the First Amendment; only express advocacy is subject to regulation. *MCFL*, 479 U.S. at 249 (emphasis added). Indeed, when asked if he would have designed his study any

¹⁸ Even this effort does *nothing* to establish a basis for applying BCRA in the 30 days prior to a primary election — the *Buying Time* studies simply do not address that issue. Defendants have thus all but conceded that there is no support in the record for BCRA's encroachments on First Amendment freedoms with regard to speech leading up to primary elections.

differently had he known that speech about both candidates and issues was constitutionally protected, Professor Goldstein conceded that he would have. Goldstein dep. 188-89. Although defendants may think they know “genuine” issue advocacy when they see it, what they “see” has no basis in law.¹⁹

Having laid out their own playing field, defendants are nevertheless forced to concede that BCRA will criminalize some “genuine” issue advocacy (even by their own definition) and then proceed to minimize BCRA’s impact. For this they turn again to the *Buying Time* reports, and insist that little “genuine” issue advocacy will be banned, hardly enough for plaintiffs’ to sustain a facial overbreadth challenge. *See* Br. 160-61. It is difficult to see how defendants can make this argument when we know from their *uncorrupted* data that BCRA would have barred the 64% of group issue ads that aired within 60 days of the 1998 election that were “genuine,” *see* McConnell Br. 69, a staggering number that defendants can do nothing more than ignore.

To recap what discovery revealed about the *Buying Time* reports:

- *Buying Time 1998* and *Buying Time 2000* were based on data obtained by Professor Kenneth Goldstein from “student coders” who viewed political advertisements from the 1998 and 2000 elections. *Id.* at 66.
- Money to fund the study was solicited on the basis of the explicit promise that it would be abandoned midstream if the results being obtained were not helpful to the “reform” cause and that the study would be “designed and executed” to

¹⁹ Defendants also repeat the senseless claim by Professor Goldstein that BCRA is narrowly tailored because it only targets ads aired at election time. They tell us that “common sense and common practice teach” that ads aired near elections are the “most likely vehicles for wielding influence over the course of an election, and, by extension, elected officials.” Br. 157. Here, defendants make an important concession. They acknowledge the point made by plaintiffs and our expert, Dr. James Gibson, that speech about public officials that is designed to affect them is most successful at election time when they, and their constituents, are paying the most attention. *See* 1 PCS/ER 35 (Gibson). By inhibiting discourse about the actions of public officials — particularly when it matters most — BCRA tramples on fundamental First Amendment rights.

achieve “reform.” Goldstein dep., exh. 2, at 6; McConnell Br. 67.

- The authors of *Buying Time* themselves now concede that, of all group ads aired during the last 60 days of the 1998 election, 14% were “genuine” issue ads that would have been prohibited by BCRA. *See id.* Defendants’ expert has also admitted that, if calculated fairly, the corresponding figure for the 2000 election is 17%. *See* Goldstein dep. 169.
- Consistent with the mandate to ensure that the *Buying Time* reports would be “helpful to the reform cause,” ads that students had coded as “genuine” issue ads were *re-coded* as “sham” issue ads. McConnell Br. at 68-69.
- If the original student codings were not disregarded, *Buying Time 1998* would have shown that 64% of all group-sponsored issue ads aired during the last 60 days of the 1998 election were “genuine,” but would have been banned by BCRA. *See id.*

In the face of this daunting evidence, defendants — apparently for lack of a better argument — cite the *Buying Time* reports for the proposition that, “[e]ven if a few genuine issue ads will be subject to BCRA’s regulations of electioneering communications,” the Court cannot invalidate the statute on overbreadth grounds. Br. 161. But whether the percentage of genuine issue ads prohibited by BCRA is 14%, as defendants now concede, or 64% as their unadulterated data show, the definition of “electioneering communications” is clearly and decisively overbroad.

Defendants also have no answer to the numerous examples of obviously protected issue speech set forth in plaintiffs’ brief that would be banned under BCRA. In fact, many of the examples cited in defendants’ brief and included as part of their evidentiary submission actually demonstrate plaintiffs’ point: that BCRA will *prohibit and criminalize* ads containing protected speech about significant public issues. Three examples illustrate the point.

First, the videotape of so-called “sham” issue ads produced by the government includes an ad, titled by defendants as “Call Debbie,” that was aired in Michigan within 60 days of the 2000 election, and contained the following text:

[Woman]: “My mom started this business and my brother and I worked hard to

make it grow. One day we hope to own it but because of the law, we can never be sure.” [Announcer]: Because of the Death tax, people like Melanie are always at risk of losing family businesses. Debbie Stabenow voted twice against getting rid of the Death tax. [Woman]: “Everything we have worked for can be taken away in an instant and that’s not fair.” [Announcer]: Call Debbie Stabenow. Tell her our working families need a break. [PFB Michigan Chamber of Commerce]

Br., app. A, tab 1.

Second, the intervenors decry as “sham” an ad sponsored by the Chamber of Commerce (also broadcast within BCRA’s blackout period) criticizing the Clinton Administration’s proposed prescription drug plan and Senator Robb’s support thereof. That ad states:

[Announcer]: “Senator Robb supports a big-government prescription drug plan that could be costly for seniors. This plan requires seniors to pay up to \$600 a year plus a 50/50 co-payment. In this big-government plan, seniors have a one time chance to sign up, otherwise they face penalties to join later. And who would decide which medicines are covered and which aren’t? Tell Senator Robb to stop scaring seniors. Tell him to stop supporting a big-government prescription drug plan.” [PFB: The US Chamber of Commerce]

Id.

Third, the government defendants’ videotape also includes an advertisement they refer to as “HMO-Charlie Bass,” which states:

[Man]: “I refer to my experience with my mother’s HMO as a battle. They just hope to wear you out, so you give up and go away.” [Announcer]: Today, there is no law to hold HMO’s accountable for withholding needed care. Yet, Congressman Charles Bass sided with the insurance companies and voted no to a real patient’s bill of rights. Call Bass and tell him he’s on the wrong side. [Man]: “I just wanted to make sure she had the best care possible.”

Id.

All of these ads are fully protected by *Buckley*. And all relate to significant public issues. Yet all would be criminalized by BCRA. By citing these ads as examples of speech that *ought to be* banned, defendants apparently take the position that political speech cannot discuss both candidates and issues without losing its constitutional protection. This position is wholly

inconsistent with the First Amendment.

Defendants cite several other ads that they claim exemplify the problem. This is not, however, a contest of who can offer more or better examples. If defendants' brief contained 100 examples of speech that they contend (wrongly) should not be protected, it would not alter the fact that all of plaintiffs' and defendants' examples are fully protected speech under *Buckley*; and that, in any event, "government may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1404 (2002).²⁰

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

BCRA's fallback definition of electioneering communications — restricting political speech that "promotes or supports a candidate . . . or attacks or opposes a candidate" — is unconstitutionally vague, as the numerous instances of disagreement among defendants' own witnesses attest. *See* McConnell Br. 70-75. Rather than come to grips with the fallback definition, defendants urge that, because the provision regulates only speech that is "suggestive of no plausible meaning other than an exhortation to vote," there is not even a "possibility" that the provision could restrict genuine issue advocacy. Br. 170-71.

Defendants' untenable conclusion that it will be "impossible" for protected speech to be swept within the fallback definition begs the question of *how* speakers will know that a communication is capable of no meaning other than an exhortation to vote. As with any

²⁰ Faced with BCRA's massive overbreadth, defendants retreat to the position that the Court should nonetheless sustain Title II on its face. *See* Br. 159-60. Not only is the overbreadth of Title II pervasive, but, as in *Reno v. ACLU*, 521 U.S. 844 (1997), "[p]articularly in the . . . absence of any detailed findings by the Congress, or even hearings addressing the special problems of [the new law], we are persuaded that [it] is not narrowly tailored if th[e] requirement has any meaning at all," *id.* at 879.

vagueness analysis, the question is not only whether the fallback definition will *actually* prohibit protected speech, but whether it will chill protected speech because potential speakers will be unsure of its application. *See Reno v. ACLU*, 521 U.S. 844, 871 (1997).

In defendants' hypothetical world, the sponsor of the advertisement described on page 73 of our opening brief (imploring Congresswoman Anne Northrup to "save our best jobs for American workers") would likely conclude, as did Craig Holman, that the ad would *not* be covered by the fallback definition because it was, in Dr. Holman's words, "genuinely" about issues. In reality, that speaker would surely be more concerned that others, like Senator McCain, might conclude that the ad could be interpreted as an electioneering communication. *See McCain* dep. 141 (stating that the ad "is exactly what I have in mind as a sham issue ad"). Defendants have failed to explain how prospective speakers are to determine whether their ads are "suggestive" of more than one meaning, and have made no effort to answer the practical concern that without such knowledge, political speakers — facing stern criminal penalties — will be chilled. *Buckley* underscored this very problem, concluding that a speaker may not be placed "wholly at the mercy of the varied understandings of his hearers." *Buckley*, 424 U.S. at 43 (internal quotation omitted).

Ironically, Senator McCain recognized this very problem in addressing a proposed (and later defeated) amendment to the Communications Act sponsored by Senator Bingaman which would have provided free television time to certain federal candidates. That amendment, like the fallback definition of electioneering communications, would have covered ads that "attack or oppose . . . a clearly identified candidate . . . for Federal office." *See* 147 Cong. Rec. S3111 (daily ed. Mar. 29, 2001). Like BCRA's fallback definition of "electioneering communication," the amendment defined "attack or oppose" as "(A) any expression of unmistakable and

unambiguous opposition to the candidate”; or “(B) any communication that . . . can have no reasonable meaning other than to advocate the defeat of one or more clearly identified candidates.” *Id.* Senator McCain’s observation is directly on point with regard to the vagueness at issue here:

Boy, we better get out the dictionary because there is a great deal of ambiguity of words. I have “concerns” about the candidacy of Senator Smith. Well, is that in opposition to? . . . Again, I get back to my fundamental point. It says in the amendment: . . . [ads] can have no reasonable meaning other than to advocate the defeat of one or more clearly identified candidates. Who decides that? . . . Now you are asking a judge to look at every commercial, or you are asking the broadcast station to look at every commercial and make some decision as to whether it is an attack ad or not. . . . How do you stop these attack ads without infringing on freedom of speech and not being so vague that it is very difficult to stand constitutional muster? . . . I am not a lawyer, but I have been involved so long and so engaged in these issues that words do have meaning, and this amendment is very vague.

147 Cong. Rec. S3116 (daily ed. Mar. 29, 2001) (statement of Sen. McCain). Senator McCain apparently understands something that his lawyers do not. Congress may not avoid the vagueness associated with regulating ads that “attack” or “oppose,” by applying the regulation to advertisements that are “suggestive of no plausible meaning other than an exhortation to vote.”²¹

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

In response to plaintiffs’ showing that BCRA’s regulation of “electioneering

²¹ Defendants’ logic defies not only reality, but also their own expert. Professor Goldstein stated that he recently selected 50 ads that had been coded for the 2000 study and asked 10 new students to code them on three attributes, one of which was whether the ads “generate support or opposition for a particular candidate” or “provide information or urge action.” 5 DEV, tab 5, at 35 (Goldstein). Professor Goldstein found that 25% of the time, the coders disagreed as to whether an ad was “genuine.” *See* Goldstein dep. 181. Once again defendants’ own data vividly demonstrate the constitutional infirmities that permeate Title II’s effort to restrict “electioneering communications.”

communications” unconstitutionally favors non-broadcast media over broadcast media, McConnell Br. 77-81, defendants completely miss the point. Rather than come to grips with BCRA’s discriminatory impact, defendants make the extraordinary claim that “Congress could have included non-broadcast communications within BCRA’s scope,” but chose to address less of the “problem” rather than more. See Br. 169. Defendants’ cavalier disregard for such seminal cases as *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), and *Mills*, 384 U.S. 214, which made clear that the government may not exercise any control over the print media, reveals both the depths of defendants’ misapprehension of the government’s ability to restrict political speech and the degree to which defendants’ defense of BCRA deviates from First Amendment norms.²²

Elsewhere in its brief, the government cites *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), and *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994), for the proposition that “[c]ourts have upheld more intrusive regulation of [broadcast] media than any other form of communication.” Br. 219. But *Red Lion* and its progeny have *never* been cited to countenance a regulation that, like BCRA, decreases speech. See McConnell Br. 79-80. Instead, the spectrum-scarcity rationale from *Red Lion* and subsequent cases has only been invoked to uphold regulations designed to *increase* speech on the airwaves. See *id.* (citing *Red Lion*, 395 U.S. at 390); *Columbia Broad. Sys. v. FCC*, 453 U.S. 367, 396 (1981)). Here, defendants would have this Court, for the first time, invoke *Red Lion* and the spectrum-scarcity rationale to support a

²² In fact, even if defendants are correct and Congress could have applied BCRA’s prohibitions to the print press and other non-broadcast media, then the statute’s failure to do so renders it all the more clearly unconstitutionally underinclusive. See *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 105 (1979); *B.J.F. v. Florida Star*, 491 U.S. 524, 540-41 (1989).

statute that decreases the amount of political speech broadcast on American airwaves. Such an extension of the spectrum scarcity rationale, particularly at a time when its very existence is so questionable, *see* McConnell Br. 79-80 n.39, is wholly unwarranted.²³

As for *Turner*, while that case observed that more intrusive regulation of broadcast communications has been upheld, the Court also stressed that the government may not interfere with broadcasters' editorial judgments:

The FCC is forbidden by statute to engage in censorship or to promulgate any regulation which shall interfere with the [broadcasters'] right of free speech. . . . The FCC is well aware of the limited nature of its jurisdiction, having acknowledged that it has no authority and, in fact, is barred by the First Amendment and [§ 326] from interfering with the free exercise of journalistic judgment. . . . [F]or although the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.

Turner, 512 U.S. at 650 (internal quotations omitted; first and second alterations in original).

Certainly, BCRA imposes on the public the government's "private notions" of what broadcast viewers and listeners "ought to hear."

B. BCRA's Coordination Provisions Are Unconstitutional.

BCRA imposes a far broader definition of coordination than the First Amendment allows, *see* McConnell Br. 82-85, directing the FEC not to require "agreement or formal collaboration to establish coordination," BCRA § 214(c). Defendants' contention that governing law requires no

²³ Defendants wholly misapply the *Red Lion* line of cases. Specifically, defendants fail to recognize that BCRA's prohibition of "electioneering communications" is no mere regulation of broadcast licensees. Instead, BCRA's ban on electioneering communications most directly affects the ability of various groups that utilize the broadcast media to speak about political issues. Thus, even if the spectrum-scarcity rationale were applicable here (and it is not), it could not justify BCRA's content-based regulation of such entities.

such agreement as a prerequisite to coordination is unfounded.²⁴

Defendants' principal argument is that the Supreme Court's decisions in *Buckley*; *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (*Colorado I*); and *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II*), all look to the circumstances of the communications at issue, rather than drawing a clear line between activities that are coordinated, and those that are not. *See* Br. 185-89, I-142. But *Buckley* made clear that an expenditure is "independent," rather than "coordinated," if it is not "authorized" or "requested" by the candidate. *Buckley*, 424 U.S. at 47 & n.53. Although the government characterizes *Buckley* as taking a "practical" approach, *see* Br. 187, *Buckley* did nothing more than cite a series of hypothetical examples from FECA's legislative history, offering determinations as to whether the candidate agreed to each hypothetical expenditure; that is, whether the expenditure was authorized or requested by the candidate, *see Buckley*, 424 U.S. at 47 n.53. The government's examples are thus wholly consistent with plaintiffs' contention

²⁴ Defendants assert that plaintiffs' coordination arguments are not justiciable at this time. *See* Br. 183-85, I-139-41. For reasons discussed fully in the separate submission of the Chamber of Commerce Plaintiffs, *see* Chamber/NAM Opp. Br. 7-10, this assertion is meritless. The intervenors have all but conceded that, to the extent plaintiffs are contending that no constitutional regulation consistent with BCRA can be promulgated (because of the statute's disavowal of an "agreement" standard), thereby rendering futile a delay of litigation until regulations are promulgated, litigation is appropriate now. Br. I-140-41. Moreover, it is unquestionable from even a cursory review of the record that many plaintiffs engage in regular discussion with legislators on policy issues, rendering very real and immediate their fear that discussions with legislators (in which no agreement is consummated) may lead to a finding of "coordination." *See, e.g.*, 10 PCS/COC 1 (Josten); 10 PCS/NAM 1 (Huard); 10 PCS/ABC 1-2 (Monroe); 7 PCS, G. Shea decl. ¶¶ 57-59; 3 PCS/ACLU 7-9 (Romero). Moreover, the problem facing these groups is only underscored by the government's suggestion, *see* Br. 184, that they employ the FEC's advisory-opinion procedure. The government would have entities refrain from engaging in protected activity while waiting for the FEC's permission to speak. The First Amendment will not tolerate such an "ask first, speak later" regime. *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969).

that the First Amendment requires agreement as a prerequisite to a finding of “coordination.”²⁵

Defendants fare no better as to *Colorado I* and *Colorado II*. With regard to *Colorado I*, they merely point out that the Court described the circumstances of the communication that it found was not coordinated, *see* Br. 187-88, and that the Court noted that the communication at issue there was not the product of a general understanding with a candidate, *see id.* at I-142. That the Court set forth the nature of the communication says nothing, however, about the legal standard the Court applied, and defendants have offered no indication from *Colorado I* that anything less than an agreement is required. And the reference to “general or particular understanding” only underscores the First Amendment’s requirement that some understanding — that is, some agreement — between the parties actually exist.²⁶ As to *Colorado II*, that opinion did not even take up the question of what characteristics render an expenditure “coordinated”; rather, the case dealt with the question whether expenditures by political parties were at all susceptible to regulation based on a finding of coordination. *See Colorado II*, 533 U.S. at 439-40.

²⁵ Intervenors, for their part, simply misconstrue *Buckley*. They assert that *Buckley* observed that “the question is whether an expenditure is ‘totally independent[,]’ an inquiry that cannot be limited to formal ‘agreement’ or ‘collaboration.’” Br. I-142 (quoting *Buckley*, 424 U.S. at 47 (emphasis and alteration in original)). This passing comment — intervenors lone analysis of *Buckley* with respect to coordination — is the intervenors’ own, not the Supreme Court’s. *Buckley* nowhere suggests that “total independence” and “agreement or collaboration” are mutually exclusive characteristics of an expenditure.

²⁶ Defendants’ juxtaposition of the “understanding” discussed in *Colorado I* and the “agreement” that BCRA precludes as a prerequisite to coordination may point to the root of their misapprehension of the statute. Defendants seem to believe that plaintiffs are arguing that a *formal* agreement or *formal* collaboration is a constitutionally required prerequisite to a finding of coordination. In fact, plaintiffs are taking the much more modest position that, at minimum, *some sort of agreement* with the candidate must be present to find coordination. BCRA, of course, forbids the FEC from requiring that any sort of agreement — *formal or otherwise* — be required. *See* BCRA § 214 (forbidding the FEC from requiring “agreement or *formal* collaboration”) (emphasis added).

Intervenors make two additional claims, both of which lack merit. First, they argue that the lead complaint was incorrect in alleging that BCRA permits a finding of coordination based on a passing discussion between a legislator and an outside group about legislation, followed by an ad by the group about the legislation, simply because Senator McCain said on the Senate floor that such conduct should not constitute coordination. *See* Br. I-141. But would-be participants in discussions with legislators will take cold comfort from one Senator's statement (that the FEC has not been ordered to codify). Second, in a tacit acknowledgment of the lack of any *legal* support for BCRA's understanding of coordination, intervenors follow their single paragraph on the legal merits of plaintiffs' argument, *see id.* at I-142, with several pages on the policy reasons for that understanding, *see id.* at I-143-46. Of course, neither defendants nor this Court are free to put such policy considerations ahead of the First Amendment, as interpreted by the Supreme Court in *Buckley* and *Colorado I.*²⁷

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

Defendants attempt to put the best light on section 213 of BCRA, which requires political parties to choose whether to make independent or coordinated expenditures on behalf of any given candidate at the time the candidate is nominated, by arguing that it provides political parties with a choice that is "available to no one else." *Id.* at 178; *see also id.* at I-149 (same). Section 213, however, constitutes nothing more than a bald effort by Congress to scale back, if not overrule altogether, the Supreme Court's decision in *Colorado I.*, in which the Court

²⁷ A more extensive discussion of BCRA's coordination provisions is offered in the separate submission of the Chamber of Commerce Plaintiffs. *See* Chamber/NAM Opp. Br. 5-10.

expressly recognized that party committees have an unfettered First Amendment right to engage in independent expenditures, *see* 518 U.S. at 614-19 (plurality opinion). The net effect of section 213 is simply to condition political parties' receipt of a "benefit" — that is, the right to make greater amounts of coordinated expenditures than individuals or PACs can make — on political parties' willingness to forgo their First Amendment right to make independent expenditures. At a minimum, section 213 imposes an unconstitutional condition on the rights of political parties, *see, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972), and thereby violates the First Amendment.

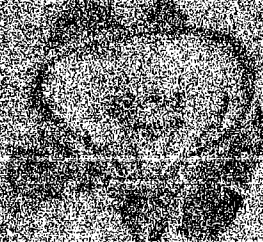
Perhaps recognizing the apparent inconsistency between section 213 and *Colorado I*, intervenors attempt to limit the reach of *Colorado I* by stating that it "turned on the particular facts of that case": specifically, the fact that the independent expenditure in question occurred before the party had nominated its candidate, rather than after. Br. I-148-49. Nothing in *Colorado I*, however, suggests that the Court attached any significance to that distinction. Moving on quickly from that argument, intervenors next contend that Congress, in enacting section 213, reached some sort of "expert judgment that, when a party chooses to coordinate efforts with its nominee, it cannot claim at the same time to be making expenditures that are truly independent of that nominee." *Id.* at I-149. However, this argument — namely, that once a coordinated expenditure is made, all other expenditures should be conclusively presumed to be "coordinated" — constitutes little more than a variation on the argument made by the FEC and rejected by the Court in *Colorado I* — namely, that *all* expenditures should be treated as "coordinated." *See* 518 U.S. at 619-23 (plurality opinion). Intervenors' efforts to evade *Colorado I* are ultimately unavailing.

Finally, defendants make no efforts to come to grips with the problems created by the fact

that section 213 aggregates committees of a single party for purposes of deciding between independent and coordinated expenditures. In sharp contrast to Title I, section 213 *compels* party committees to work together to decide whether funds should be used for independent or coordinated expenditures — or risk having the decision made for them by another party committee. This forced association is unconstitutional. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567, 574-75 (2000).

In sum, section 213 imposes unprecedented restrictions on the ability of party committees to engage in expenditures on behalf of their candidates. As such, it cannot withstand constitutional scrutiny.

COPIES



INTRODUCTION

Both the Government and the Intervenors (collectively “Defendants”) concede that to sustain BCRA’s restriction on “electioneering communications,” the Government must show that the restriction is “ ‘narrowly tailored to serve a compelling state interest.’ ” Br. 133 (quoting *Austin*, 494 U.S. at 657-58); *see* Br. I-134. This means, of course, that the Government “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)). The arguments marshaled by Defendants to sustain this heavy burden, however, are at war with themselves. The harm threatened by the NRA’s independent “electioneering communications” is, we are told, the *corruption* of elected officials. Yet, in the next breath Defendants insist that “BCRA does not prohibit the airing of any electioneering communication,”¹ but rather allows the NRA and like groups to engage in “electioneering communication” (and thus in corrupting elected officials) to their hearts’ content, so long as they do so through their PACs. Obviously, these points cannot both be true: Congress surely did not intend Title II of BCRA to result in nothing more than an act of institutional ventriloquism, with organizations like the NRA simply throwing from the mouths of their PACs the very same “electioneering communications” that allegedly threaten to corrupt federal officeholders. Indeed, as we demonstrate below, neither of Defendants’ points is true. Title II is not designed to combat corruption, nor is its ban on speech a harmless fiction.

¹*See, e.g.*, Br. 9 (BCRA’s “regulations of electioneering communications ban no speech whatsoever . . . [U]nions and corporations may still speak their minds using segregated funds. . . .”); Br. 129 (BCRA “is not a ban on speech”); Br. I-73 (“*BCRA does not ‘ban’ such communications*”) (emphasis in original); Br. I-75 (Title II “extends source-of-fund limitations and disclosure rules” “[w]ithout ‘banning’ any speech”).

Defendants' paradoxical defense of Title II of BCRA both belies that the measure was designed to prevent official corruption and reveals that Congress' true purpose was to minimize, if not eliminate, political speech by "outside groups" during the critical weeks before a federal election. And, as detailed in our opening brief, *see* NRA Br. 3-5, BCRA's principal proponents were frank to admit, both as Members of Congress and as Intervenors in this case, that they specifically targeted "negative attack ads" critical of federal candidates -- most particularly *themselves*. While politicians, particularly incumbent officeholders, may have a compelling interest in minimizing competing voices during an election campaign, the *Government* certainly does not. Indeed, just such congressional restraints on the freedom of political speech were precisely what the Founders feared, and designed the First Amendment to prevent.

I. BCRA BANS POLITICAL SPEECH.

Time and again, Defendants insist that "BCRA's "regulations of electioneering communications ban no speech whatsoever. . . ." Br. 9; *see supra* at n.1. Never mind that Title II *in terms* makes it "unlawful" for a corporation or labor organization to make any "expenditure" from its treasury funds on "any applicable electioneering communication." 2 U.S.C. § 441b. And never mind that it does so under threat of *criminal penalties*. Defendants prefer to contend that Title II does not say what it says than squarely to defend its constitutionality. It is certainly true, as Defendants point out, that Title II still permits specially created and regulated PACs to make expenditures on electioneering communications. It is equally true, however, that Title II's avowed purpose is to severely restrict the quantity and content of core political speech, a purpose that is "wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 49 (1976).

We know this from the plain words of the statute itself. We know it from the floor statements of those who passed BCRA.² We know it from the testimony of the Intervenors in this litigation.³ And we even know it from the Intervenors' own brief, which candidly blames "the amount of general treasury funds at the disposal" of "interest groups" like the NRA for the "explosion" of issue ads in recent years. Br. I-104 (emphasis added). Indeed, Defendants go to great lengths to establish that this explosion in political speech was the predicate for, and target of, Title II of BCRA. BCRA bans speech to precisely the extent that it succeeds in its goal of muffling this explosion.

And as to *that*, BCRA will succeed. The record in this case confirms that issue advocacy groups are incapable of funding through their PACs the "electioneering communications" in which they currently engage. The record also makes clear, however, something that has evidently been lost on both Congress and Defendants. By channeling the NRA's political speech through PACs, Title II not only artificially impedes the ability of individuals of ordinary means to participate effectively in our democracy, it also ensures that the political speech that the NRA is still permitted to utter will fall far short of reflecting its support in the political marketplace.

² See App. 57 (*Sen. Cantwell*) ("This bill is about slowing the ad war It is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves."); 147 CONG. REC. S3034 (*Sen. Snowe*) ("The other part of the problem that we seek to address is through these provisions is the glut of advertisements in elections -- close to election time, close to election day -- that seek to influence the outcome of Federal elections."); 147 CONG. REC. S2694 (*Sen. Levin*) ("The bill before us is aimed at trying to close a soft money loophole, which fueled the kind of negative TV ads which do not do justice to our democracy."); 144 CONG. REC. S898 (*Sen. Kohl*) ("The McCain-Feingold bill seeks . . . to level the playing field a bit in federal campaigns and reduce the amount of special interest money in elections."); see also NRA Br. 3-4 & n.1.

³ See McCain Depo. 234 ("Q: [Y]our expectation is, in light of this statute, there will be fewer of these attack ads, or sham issue ads as you call them, aired during election campaigns? . . . A: Yes."); see also NRA Br. 4-5 & n.2.

Defendants blithely posit that organizations like the NRA “may still speak their minds using segregated funds that reflect the true power of political association,” Br. 9, but they well understand that a battery of regulatory and practical hurdles precludes such groups from using their PACs to make independent expenditures commensurate with public support for their political ideas.⁴ Most fundamentally, as Wayne LaPierre has testified in this case, “[t]he NRA’s members are overwhelmingly comprised of ordinary middle class Americans” who, though “they would like to do more to further the NRA’s political agenda, . . . simply cannot afford to give anything more than their membership dues of \$25 a year.” App. 15. The NRA’s PAC, the Political Victory Fund (“PVF”), is strictly barred from soliciting beyond the NRA’s membership for contributions, and no portion of an NRA member’s membership fees may be allocated to PVF. *See* 11 C.F.R. 114.7; 11 C.F.R. 114.1. As a result, the only potential contributors who can respond favorably to the PVF’s fundraising requests are those individuals with sufficient means to pay twice -- first to become NRA members and second to donate money specifically to the PVF. Title II thus deprives individuals who cannot afford this increased financial burden of their ability to join collectively in making “electioneering communications” to support and preserve the Second Amendment.

Although some would justify restricting independent expenditures on political activity as necessary “to democratize the influence that money itself may bring to bear upon the electoral process,” *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring with Ginsburg, J.), Title II stands that reasoning on its head. By requiring a group’s political speech to be channeled through its PAC, BRCA ensures that the voices of members of moderate means will be left behind, callously pricing them out of the marketplace of political expression.

⁴ *See* App. 14-15 (LaPierre Decl.) ¶¶ 34-35; Pratt Decl. ¶ 13; Boos Decl. ¶ 10; Keating Decl. ¶ 53; Shields Depo. 60-62.

Likewise, BCRA works a similar inversion of the *Austin* Court's reasoning. There the Court upheld a limit on corporate independent expenditures as justified to prevent wealth generated in the economic marketplace from unfairly *inflating* the strength of the corporation's political voice beyond the "public's support for the corporation's ideas." *Austin*, 494 U.S. at 660. As demonstrated in our opening brief, *see* NRA Br. 18-24, however, the NRA's wealth, like that of typical advocacy groups, is attributable to its success in the political marketplace, not the economic marketplace, and its general treasury "accurately reflects members' support for the organization's political views" *Id.* at 666. By requiring the NRA's political speech to be channeled through the PVF, BCRA ensures that the strength of the organization's voice in the political marketplace is *deflated* vastly below its "contributors' support for the corporations' political views." *Id.* at 660-61. Thus, far from ensuring that "resources amassed in the economic marketplace [are not] used to provide an unfair advantage in the political marketplace," Br. 133 (quoting *MCFL*, 479 U.S. at 257), BCRA ensures that resources amassed in the political marketplace cannot be put to use in the very place from whence they came.

Finally, as explained in our opening brief, the vast bulk of the NRA's "electioneering communications" have nothing to do with getting candidates elected; instead, they serve to educate Americans about political developments that bear upon the Second Amendment, to defend the NRA against attacks by the media and politicians, and to generate membership and raise funds. *See* NRA Br. 1-2, 24-33. The mission of PVF, however, is solely "to influence the outcome of federal elections. That is the sole purpose for which donors contribute to the Political Victory Fund." App. 14 (LaPierre Decl.) ¶ 34. Using PVF resources on "electioneering com-

munications” that serve various other purposes pursued by the NRA would violate the direction of PVF’s donors themselves as to how they want their money spent.⁵

In sum, the record makes clear that BCRA was designed to and will reduce the NRA’s torrent of varied and multi-purpose “electioneering communications” to a halting trickle upon being forced through the narrow pipes of the PVF. BCRA accordingly, must fall, for “[i]n the free society ordained by our Constitution it is not the government, but the people -- individually as citizens and candidates and collectively as associations and political committees -- who must retain control over the quantity and range of debate on public issues in a political campaign.”

Buckley, 424 U.S. at 57.

II. BCRA’S BAN ON “ELECTIONEERING COMMUNICATIONS” CANNOT BE JUSTIFIED AS PREVENTING CORRUPTION.

Defendants are well aware that “preventing corruption or the appearance of corruption are the only legitimate and compelling Government interests thus far identified for restricting campaign finances.” *FEC v. NCPAC*, 470 U.S. 480, 496-97 (1985). Accordingly, they attempt to cast Title II of BCRA as designed to achieve just this purpose. Conspicuously absent from Defendants’ discussion of Title II’s purpose, however, is any reference to BCRA’s legislative record in which Members of Congress either (1) blamed “sham” issue ads by advocacy groups

⁵ Siphoning PVF’s funds is especially costly. As Defendants note, corporations and unions are currently forbidden from engaging in express advocacy. Because of that, PVF is the sole means through which NRA members can engage in speech exhorting the public to “vote for” or “against” specific candidates. PVF devotes its precious resources to funding precisely such speech. Despite Defendants’ irrelevant observation that candidates’ themselves tend not to use the so-called “magic words” of express advocacy, *see* Br. 147, Br. I-101-02, from PVF’s perspective as a group, it is vital to actually *endorse* candidates by urging election or defeat in terms, as evinced by the fact that it does so in virtually every ad it runs. *See, e.g., LaPierre Depo. Ex. 5-6, at 266-67, 270-71.* Forcing the PVF now to fund the NRA’s “electioneering communications” would necessarily result in a trade off with the express advocacy it currently funds, further abridging core political speech at the heart of the First Amendment and decreasing the volume of speech.

for corrupting (or appearing to corrupt) elected office holders or (2) justified the ban on electioneering communications as a measure to protect Members from the corrupting influence of such ads. We have found no such references either.⁶ To the contrary, BCRA's supporters, as we have established, *see* NRA Br. 3-4 & n.1, made clear that Title II was aimed at "negative attack ads" that have "demeaned and degraded all of us" and "do little to further the official debate."

To make up for this void in the *legislative* record, Defendants have attempted to create a post-enactment *litigation* record, comprised of solicited testimony from political consultants, lobbyists, and former Members of Congress, that conjures an anti-corruption rationale for Title II. *See* Br. 142-46; Br. I-24-25. But the Government cannot sustain BCRA's restriction on electioneering communications by masking Congress' avowed, albeit illegitimate, purpose (suppression of negative ads) with a contrived, albeit compelling, government purpose (prevention of corruption) established after-the-fact by the Government's lawyers in the course of litigation. To sustain a content-based restriction on political speech, the Government must establish that *the purpose that actually animated enactment* of the measure is compelling and is narrowly served by the restriction.⁷ Neither the Government nor this Court, accordingly, can go beyond BCRA's text and its legislative history in the effort to discern and to evaluate "the disease sought to be

⁶ To be sure, a few Members sprinkled the word "corruption" into their floor statements concerning Title II like so much constitutional fairy dust. But the "corruption" they described is none that the *Buckley* or *Austin* Courts would recognize, or that Defendants now cite. Thus, "systemic corruption" was attributed to unequal speaking power, "when too few people have too much wealth, power and say, and too many people are left out." 144 CONG. REC. S871 (Feb. 24, 1998) (*Sen. Wellstone*). The term was also used to describe the negative content of "sham issue ads [that] are corrupting our election system and are not better informing the voters about the candidates." 147 CONG. REC. S2813 (Mar. 23, 2001) (*Sen. Jeffords*). Similarly, it was invoked to denounce a Sierra Club ad "saying that I was for dirty water. This is the kind of corrupting influence, saying something like that which is, by the way, libelous [T]his is the kind of thing that should be stopped." 146 CONG. REC. H6441 (July 18, 2000) (*Rep. Tancredo*).

⁷ *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.").

cured” by BCRA’s ban on electioneering communications. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).⁸ And Congress’ avowed purpose in banning electioneering communications -- to minimize the airing of “negative attack ads” during an election campaign -- is not even a legitimate, let alone a compelling, governmental purpose.

But even if Defendants’ arguments advancing an anti-corruption rationale for Title II were not foreclosed as a matter of law, they fail as a matter of fact. Defendants offer three anti-corruption theories, none of which withstands scrutiny.

A. Gratitude Is Not Corruption.

Defendants’ opening briefs bring into sharp and startling focus just how far removed the Government’s concept of political corruption is from the record of *quid pro quo* arrangements that concerned the Supreme Court in *Buckley*. See 424 U.S. at 26 & n.28 (contribution limits justified to prevent “coercive influence” of “large contributions . . . given to secure a political *quid pro quo* from current and potential office holders”). To Defendants, a grateful politician is a politician on the take. They express this view in a variety of formulations, but perhaps none is plainer than this:

Elected officials are well aware and keep track of who runs “issue” ads on their behalf, and they are naturally grateful to the unions and corporations who provide such assistance to their campaigns. Indeed, corporations and labor unions run “is-

⁸ In *Turner*, the Court examined what Congress itself said in “unusually detailed statutory findings” to determine the legislative purpose proffered to justify a law restricting speech. 512 U.S. at 646. Accordingly, the Court’s remand was designed to give the Government an opportunity to put on new evidence *not* about the legislative purpose needed to justify the speech restriction, but rather about the subsidiary questions of (1) whether Congress’ purpose, stated in the legislative record, was *in fact* advanced by the statute, and (2) whether the statute was no more restrictive than necessary to advance that purpose. Indeed, in *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997), the Court noted that on remand “both sides . . . advanced new interpretations” of the congressional purposes “in an attempt to recast them in forms ‘more readily proven.’” 520 U.S. at 190. The Court flatly rejected these attempts to recast and re-prove Congress’ legislative purposes: “These alternative formulations are inconsistent with Congress’ stated interests in enacting must-carry.” *Id.* at 191.

sue” ads for or against federal candidates with an expectation that investing hundreds of thousands if not millions of dollars in this fashion will pay off when it comes to legislation that concerns them.⁹

We cannot deny the general validity of these points, but they do not describe corruption. They describe the democratic process itself. Elected officials are indeed naturally grateful for any assistance to their campaigns, whether that assistance takes the form of the ballot of a single constituent, or the formal endorsement of an organization with millions of members, or the public speech of supporters extolling the candidate’s virtues or decrying the opponent’s vices. And those who provide such support do indeed expect, or hope, that if the campaign is successful, the elected official will perform his functions, including casting votes, in a way that reflects the shared political ideals that inspired the support in the first place. Make no mistake, the NRA supports candidates who it believes will likely cast favorable votes on issues that are central to its mission. And the NRA opposes candidates who likely will not. The organization’s political support is often important, indeed decisive, in elections, and candidates are typically glad to have it. This is the natural functioning of our representative democracy.

Defendants, however, see corruption in the natural functioning of our representative democracy, and if their concept of political corruption is allowed to take root in our First Amendment jurisprudence -- if it is allowed to justify silencing the political speech of the NRA in this case -- then no political activity is safe from congressional regulation. One need not think long

⁹ Br. 6; *see also id.* at 143 (“ ‘Nowadays, candidates ‘pay very close attention to who is helping them . . . and who is attacking them,’ and they are ‘especially grateful to those issue groups [that] run ads on [their] behalf.’ ”); Br. I-107 (“Communications reaching substantial members of the electorate who will decide a candidate’s political future are those best calculated to influence an election beforehand, and to earn the candidate’s gratitude afterward.”); Br. I-107 (“The latter point -- conscious gratitude -- is as critical as it is obvious The key similarity is that these ad campaigns are deposits in the political favor bank, and deposits for which candidates are very grateful. Candidates and consultants acknowledge this phenomenon, and interest groups celebrate it.”); Br. I-107 (“Conversely, interest groups acknowledge that . . . congressional ‘allies of the group running ads appreciate support for their legislative position.’ ”).

to grasp that if a candidate's natural gratitude to the NRA for helpful "electioneering communications" is corruption enough to justify silencing such political speech, then what is to stop the Government when it trains its sights on, say, the NRA's speech endorsing a candidate and urging its membership to rally behind him?

Indeed, Defendants themselves vividly, albeit unwittingly, illustrate this point. As noted earlier, *supra*, at 1, Defendants repeatedly assure this Court that BCRA's "regulations of electioneering communications ban no speech whatsoever," for organizations like the NRA are still free to speak through their PACs. Yet they do not suggest, nor could they, that a candidate is any less grateful for, and thus any less corrupted by, an issue ad aired with PAC money than an identical ad aired with an organization's general funds.¹⁰ Defendants' own witnesses concede that the public's perception of such ads is not affected in the slightest by whether they are purchased with general treasury funds or with PAC money.¹¹ It follows, then, that under Defendants' conception of corruption, advocacy organizations may speak freely through their PACs only as a matter of legislative grace, not of First Amendment right. The Supreme Court, however, has held otherwise, specifically rejecting the Government's notion of corruption: "The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to

¹⁰ Defendants make much of two largely identical radio ads aired in 2000, an "issue" ad run by the NRA and an "express advocacy" ad using the "magic words" run by the PVF. *See* Br. 47-48; Br. I-88. This proves, Defendants say, that the NRA's issue ad was intended to influence the outcome of the presidential election. Of course, the NRA has never denied that influencing elections is among the purposes that a small portion of its vast amounts of paid issue advertising is designed to achieve. These two largely identical radio ads also demonstrate, however, that the gratitude of the benefited candidate does not depend in the slightest on the source of the funds used to pay for a helpful ad.

¹¹ As Senator Simpson stated, drawing a distinction between the "appearance of corruption [depending upon] whether the ad is paid for by the NRA or whether it is paid for by the NRA's PAC" is like "dancing on the head of pin," since "[t]here's no difference to the American public of who that is." Simpson Depo. 50-51. *See also id.* at 52; Andrews Depo. 16; Strother Depo. 223-24.

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.” *FEC v. NCPAC*, 470 U.S. 498.

Acceptance of the Government’s proffered anti-corruption rationale for Congress’ enactment of the Title II requires the conclusion that Congress sought not to prevent corruption of federal candidates through issue ads, but merely to channel such corruption through ads purchased with PAC funds. For that reason alone, “belief in the [statutes proffered] purpose [is] a challenge to the credulous.” *Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2539 (2002). It is thus not surprising that Defendants can offer nothing from Title II’s legislative history in support of their sweeping conception of political corruption, but rather must content themselves with the post-enactment testimony of lobbyists, media consultants, and former politicians. *See* Br. 142-46; Br. I-106-09. As previously demonstrated, *supra* at 7-8, the Government’s *litigation* record cannot substitute for the *legislative* record in establishing the harm that Congress sought to prevent with Title II. But even taking Defendants’ witnesses at face value, they undermine rather than support the Government’s theory of corruption.¹²

Media consultant Strother, for example, candidly agreed that there is “nothing in any way corrupt or undemocratic about the enterprise . . . of airing these political broadcasts.” Strother Depo. 19. Nevertheless, as a consultant strictly for *candidates*, *id.* at 45, he is against advocacy

¹² Much of Defendants’ evidence about “corrupting” advocacy group issue ads posits “prearrangement and coordination of an expenditure with the candidate.” *Buckley*, 424 U.S. at 47. *See, e.g.*, Br. I-105 (“candidates asked [interest groups] to run ads on their behalf”; groups “offered to provide campaign support” in exchange for a vote pledge); Br. I-106 (interest group met with officeholders to discuss ad campaign in support of them). Such “controlled or coordinated expenditures are treated as contributions rather than expenditures” and therefore cannot justify further restrictions on independent expenditures. *Buckley*, 424 U.S. at 45-47; *FEC v. NCPAC*, 470 U.S. at 498; *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 617 (1996).

groups “interfering in the election process,” and thus supports any “legislation that keeps special interests out of the election process . . . *regardless of whether they use hard or soft money.*” Strother Depo. 223-24 (emphasis added). And Senator Simpson, when asked whether advocacy groups should be entitled to run electioneering communications, stated that “[a]s long as people know who they are and what they’re doing, yes, I think that’s all right. Then you’re into the First Amendment.” Simpson Depo. 22-23; *see also id.* at 42, 79. Indeed, he testified that it is “the essence of politics” to try to influence legislators, and that organizations like the NRA are powerful because “they send letters, and they send scorecards” to the constituents of the legislators, which can “fan the flames” among the voters. Simpson Depo. 27-30. None of Defendants’ declarants could testify to an instance in which a candidate or office holder had changed his or her vote in exchange for campaign support, *see* Andrews Depo. 49, 57, 63-66; Strother Depo. 40; Simpson Depo. 13-14, nor did they provide any specific examples even of politicians showing “gratitude” to an advocacy group. *See* Andrews Depo. 26-32; Strother Depo. 140-43. Indeed, lobbyist Andrews could not recall *any instance* of a politician expressing gratitude for issue ads that supported the politician or attacked an opponent, Andrews Depo. 65-66, and his only recollection of politicians commenting on issue ad campaigns was of “members complaining, member staff complaining that groups are running ads attacking them.” Andrews Depo. 64-65.¹³

¹³ In the *only* concrete example of an issue group influencing a candidate, Strother related how a candidate decided to return money to an anti-gun group in order to avoid negative publicity from the NRA. In his deposition, however, he conceded that the reason the candidate made the decision was that he was running in a pro-gun state, and feared how “the voter would react if it was disclosed where the check came from.” Strother Depo. 146 (emphasis added). Thus, the “influence” was based upon the power of the voter, hardly improper in a democracy. *See also* Andrews Depo. 20-21 (admitting that the “grass roots” capability of issue groups will “give influence in the legislative process”); *id.* at 66-68 (agreeing that issue ads may “bring back attention to a public policy issue that the politicians are for whatever reason not devoting much time to talk about” and that such ads may “serve to inform voters about the particular office holders on candidates voting record on a particular issue”).

B. Title II Cannot Be Justified as Essential To Prevent Circumvention of Title I.

Defendants contend that Title II's restrictions on expenditures by advocacy groups are necessary to prevent circumvention of Title I's restrictions on "soft money" contributions to political parties. Br. 145-46; Br. I-112, I-124-25. They say that without Title II's restriction on electioneering communications, "large soft money donors could simply donate the money they would have given to political parties to nonprofit corporations and other organizations, instead, which in turn could run the same kind of ad that the parties would have run." Br. 145. But here again, Defendants do not cite anything in *the legislative record* to indicate that this was *Congress'* purpose in enacting Title II. Rather, they rely upon the speculative opinion testimony of political consultants and lobbyists solicited for this litigation.¹⁴

Moreover, Defendants' hypothesis that "corrupting" soft money previously donated to the parties would, in the absence of Title II, flow from business corporations to nonprofit advocacy groups like the NRA is undermined by Defendants' own evidence that interest groups do not, even in theory, pose the corruptive potential of the political parties and the soft-money regime over which they preside. First, advocacy groups cannot similarly employ the coercive leverage of federal officeholders. As BCRA sponsor Senator Feingold himself admitted, soft

¹⁴ The only "evidence" from the contemporaneous legislative record offered by Defendants to establish Congress' supposedly overriding purpose to enact Title II as a backstop to Title I is a passing comment by Senator Feinstein in 1999. Br. 146. Her stated concerns were not with "corruption," however, but rather with the facts that (1) campaigns cost too much (S12661) and (2) "negative attack ads . . . distort, mislead" and "poison[] the process." (S12662). Her proposed remedy was disclosure requirements and contribution limits, not expenditure limitations. (S12661). Indeed, Senator Feinstein could not have been addressing a need for Title II to prevent corporate soft money from flooding campaigns through interest group ads, because at that time (1999) the original Snowe-Jeffords provisions already barred interest groups from running ads with corporate contributions. Defendants actually concede this legislative history, although they relegate it to a footnote. Br. 164 n.115. Defendants' other cite, 145 CONG. REC. S12617, is equally inapposite: it is a letter from the League of Women Voters, also in 1999, arguing that the ability of corporations to circumvent the soft money ban in Title I made it essential that Congress adopt Snowe-Jeffords.

money “extortion” works only because “we in the Congress are doing the asking.” Br. 84. In the words of Senator Zell Miller, Members of Congress are uniquely situated to “extort” big contributions for their parties because of “what [we] can do *for* them and what [we] can do *to* them.”¹⁵ Nor do advocacy groups, unlike the political parties, carefully synchronize their independent expenditures to further the agendas of candidates’ campaigns.¹⁶ Indeed, the independent expenditures of advocacy groups frequently frustrate the candidate’s campaign interests and agenda, as the Supreme Court noted in *Buckley*, 424 U.S. at 47.¹⁷ Accordingly, such groups are categorically distinct from parties and make, by Defendants’ own analysis, very poor vehicles for the corruption that Defendants identify with soft money contributions to political parties.

In any event, even if closing a loophole in Title I truly were Congress’ purpose in enacting Title II, that rationale was expressly rejected in *Buckley* as legally insufficient to justify *expenditure* limits. The *Buckley* Court held that “[t]he markedly greater burden on basic freedoms caused by [expenditure limits] thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations.” *Buckley*, 424 U.S. at 44; *see California Medical Ass’n v. FEC*, 453 U.S. 182, 197-99 & n.17 (1981); *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. at 617. Indeed, the Court was particularly alarmed that such expenditure limits would stifle speech by membership advocacy groups: the statute’s “limitation on independent expenditures ‘relative to a clearly identified candidate’ precludes most as-

¹⁵ Br. 84-85, Br. I-22 (quoting Sen. Feingold’s floor statement citing op-ed piece by Sen. Miller) (emphases added).

¹⁶ *See* Br. I-32-38.

¹⁷ *See, e.g.,* Magleby, *Outside Money and the Ground War in 1998*, at pp. 16-17 (“Some groups indicated that they would continue to press their agendas through ads, even if . . . polls showed that they were hurting the candidate when they presumably were trying to help. Other contests showed that despite a candidate’s request that an interest group not join the campaign, the outside campaign goes ahead.”); App. 81 (Sen. McCain at S2132) (“These groups often run ads that the candidates themselves disapprove of.”).

sociations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association.” *Buckley*, 424 U.S. at 22. *See also Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. at 387 (same).

Finally, a less restrictive alternative to banning political speech is readily available for staving off circumvention of Title I. Indeed, as initially proposed, Title II of BCRA (in the original Snowe-Jeffords provisions) allowed electioneering communications of nonprofit advocacy groups provided that they were “paid for exclusively by funds provided directly by individuals.” *See* BCRA, § 203(b) (adding 2 U.S.C. § 441b(c)(2)); *see* Br. 164 n.115. The presence of this less restrictive means for controlling corporate circumvention of Title I dooms the expenditure limitations in Title II.

C. The Corruption Rationale Identified in *Austin* Cannot Justify Title II.

Only once, in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), has the Supreme Court upheld a restriction on independent political expenditures. The Government expressly recognizes that *Austin*’s corruption rationale is specifically limited to a concern that business corporations might “use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace.” Br. 134 (quoting *Austin*, 494 U.S. at 659). As previously demonstrated, *see* NRA Br. 17-24, the NRA’s resources are not amassed in the economic marketplace, but rather reflect support for its ideas in the political marketplace. Yet Congress made a considered decision in BCRA flatly to prohibit the NRA and like organizations from funding “electioneering communications.” *See* 147 CONG. REC. S2847 (Mar. 26, 2001) (*Sen. Wellstone*); NRA Br. 19 & n.13. Therefore, even crediting the *Austin* rationale with full strength, it cannot carry the weight of Title II.

Recognizing as much, the Government conscripts a single word from *Austin* -- “potential” -- in the hope *it* can shoulder the burden. The Government maintains that, according to *Austin*, “the potential for distortion of the political process inherent in the corporate form justifies” regulating corporations across the board, from grassroots issue groups to business giants (save for the media conglomerates, which get a pass). Br. 163 (citing 494 U.S. at 661). But *Austin* said no such thing. It simply explained, in a paragraph, that the potential of closely held business corporations to accumulate wealth in the economic marketplace meant that they could be regulated accordingly. *See* 494 U.S. at 661. The key was that both rich and not-so-rich business corporations share the same vice: they speak with dollars that are “not an indication of popular support for the corporation’s political ideas,” but “reflect instead the economically motivated decisions of investors and customers.” *Id.* at 659 (quoting *MCFL*, 479 U.S. at 258). This argument about “potential” risks of corruption was inadequate by itself to extend the speech restriction to the nonprofit Chamber of Commerce in *Austin*. But because the Chamber was controlled and funded by business corporations and was, by its very nature, positioned to serve as a “conduit” for their independent expenditures, the *Austin* Court concluded that it too could be regulated. 494 U.S. at 661-64.

By no means did the Court hold that a grass-roots membership association such as the NRA can be regulated on the sole basis that it might *potentially* change its bylaws prohibiting corporate membership or might otherwise become a passive mouthpiece for business corporations. Again, even if that farfetched potentiality could suffice to justify regulation, a far less restrictive alternative to banning speech is available -- namely, to require, as BCRA originally did, that such nonprofit membership corporations fund their “electioneering communications” only through contributions from individuals. *See* Br. 164 n.115. Yet Congress in Title II specifically

and unconstitutionally opted against this more narrowly tailored approach. *See id.* Thus, on *Austin*'s own terms, mumbling about "potential" threats is insufficient to justify BCRA's extension of business corporation spending restrictions to advocacy groups such as the NRA.

* * * *

What the Supreme Court said in *Buckley* is no less true today: "The absence of pre-arrangement and coordination of an expenditure with the candidate . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." 424 U.S. at 47; *see also* *FEC v. NCPAC*, 470 U.S. at 498 (same), *Colorado Republican Fed. Campaign Comm.*, 518 U.S. at 615 (same). Contrary to the Government's claim, Congress did not enact Title II of BCRA because it feared that advocacy groups' independent expenditures on issue ads had become a tool of corruption, whether of the old-fashioned *quid pro quo* variety or of the Government's modern "gratitude" variety. Congress enacted Title II of BCRA because it feared, in the words of the Government's own witness, "groups . . . running ads attacking them." Andrews Depo. 64-65. This purpose is illegitimate, and Title II of BCRA therefore must fall.¹⁸

III. BCRA'S CRIMINAL PENALTIES SWEEP FAR TOO BROADLY.

Defendants concede that Title II must be stricken as fatally overbroad if it reaches " 'a substantial amount' " or "a substantial number of instances" of protected speech. *See* Br. 159 (quoting *City of Houston v. Hill*, 482 U.S. 451, 458 (1987); *New York State Club Ass'n v. City of New York*, 487 U.S. 1,14 (1998)). The NRA has engaged in political speech on thousands of occasions that would give rise to criminal liability under BCRA even though such speech was not

¹⁸ "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds [it] offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). *See also* *Schaefer v. United States*, 251 U.S. 466, 495 (1920) (Brandeis, J., joined by Holmes, J., dissenting) ("The constitutional right of free speech" is most important for speech "with which [the government] disagrees.").

intended to influence a federal election. *See* NRA Br. 1-2, 26-33. This fact alone condemns BCRA as fatally overbroad.

A. BCRA Targets The Wrong Speakers.

Defendants seek to justify BCRA on the ground that corporate funds spent in connection with election ads should “reflect the true power of political association rather than the might of the commercial marketplace.” Br. 9. As previously discussed, *supra* at 15-17, however, application of this principle compels the conclusion that the NRA and other advocacy groups are entitled to engage in unfettered political speech. The NRA’s fundraising practices demonstrate that prospective members are put on full notice of the organization’s political agenda, *see* NRA Br. 18-23, and thus there is no danger that there will be “*little or no correlation* to the public’s support for [its] political ideas.” *Austin*, 494 U.S. at 660 (emphasis added). Member support for the NRA’s speech is indisputable: in 2000, most of the NRA’s speech -- some 78 percent of the cost of the airing of its 30-minute news magazines -- was paid for by the programs’ viewers, who signed up as members in response to the programs’ solicitations. App. 199 (filed under seal).¹⁹ In many instances, the membership dues received as a result of an airing more than paid for the program. *See id.* Such support for the *very message* aired by the NRA obliterates Defendants’ contention that the NRA’s speech does not reflect the views of its members. Yet, under BCRA, it will be illegal for the NRA to fund its speech in this manner given that solicitations for its PAC cannot be made to the general public. *See* 11 C.F.R. 114.7. Indeed, the NRA cannot even ask

¹⁹ This percentage reflects a weighted average of the returns that the NRA generated from airing its 30-minute news magazines in 2000. Given that many of the NRA’s 30-second spots were derived verbatim from the news magazines, it necessarily follows that the message of these shorter segments was also supported by the NRA’s members. In any event, the NRA’s 30-minute news magazines constituted the overwhelming volume of its speech in 2000.

new members to allocate a portion of their dues to its PAC. *See* 11 C.F.R. 114.1. No defense of these shackles on NRA's ability to fund its speech has been offered by Defendants.²⁰

B. BCRA Criminalizes The Wrong Types Of Speech.

As we demonstrated in our opening brief, the NRA engages in a wide range of political speech that does not implicate the statute's alleged purposes but would nonetheless fall within its blackout provisions: educating the public on Second Amendment issues, defending the NRA against attacks by politicians and the media, and fundraising. NRA Br. 25-33. Without disputing that the statute is overbroad as applied to these categories of speech, Defendants seek to minimize the impact of BCRA's reach by advancing both a novel understanding of the First Amendment and a flawed empirical analysis of the patterns of political discourse that prevailed in 2000. At a conceptual level, Defendants attempt to salvage BCRA by invoking "the ease with which genuine issue ads can speak their message and remain outside BCRA's definition of electioneering communications" Br. 162. This is a truly stunning proposition: Government censorship of political speech is tolerable because of the "ease" of self-censorship.

BCRA's removal of candidates names from the political lexicon is a particularly acute form of censorship for a speaker such as the NRA, which *constantly* refers to federal officeholders, whether they are standing for reelection or not. In 2000, for example, almost *all* of the NRA's voluminous broadcast speech contained references to federal officeholders, a fact that squarely contradicts the Government's contention that "real issue ads . . . did not depict or men-

²⁰ Defendants claim that individual donors do not necessarily know or approve of the electioneering communications purposes to which their funds will be put. Br. I-125-26 n.486. This claim is unsupported by any facts in the record -- even Defendants' own witnesses concede that issue groups seek to raise funds to support specific ad campaigns to promote an explicit political agenda. *See* Br. I-90; Simpson Depo. 53-54; Hickmott Depo. 53-56; Shields Depo 53-54. And, in any event, even this justification does not explain the FEC's prohibition on members' consciously allocating dues to advance the overt political agenda of an issue group.

tion a candidate 97 percent of the time.” Br. 162.²¹ The *Buying Time 2000* study that the Government cites studied only references to federal candidates as opposed to *officeholders*; yet any officeholder an advocacy group wishes to reference may also happen to be a candidate in an upcoming election, thereby requiring that the group go through the laborious process to check whether the reference violates BCRA, as described below. *See infra* at 21-22. Once the NRA’s airings of over 10,296 news magazines that constitute genuine issue ads -- each of which references at least one federal officeholder and each of which was excluded from *Buying Time* -- is properly factored into the analysis, it becomes apparent that *18 percent* of the genuine issue ads aired in 2000 would have been threatened by BCRA.²²

Moreover, a moment’s reflection refutes Intervenor’s suggestion that there is “little or no need to refer specifically to candidates [when speakers] are not seeking to influence an election.” Br. I-128. Indeed, the NRA believes that referencing federal officeholders is critical to the effectiveness of each category of its speech that is criminalized under BCRA. First, in educating the public about threats to individual liberties, the NRA and similar issue advocacy groups seek to identify officeholders that personify such threats. Just as it would have been impossible to decry McCarthyism without mentioning McCarthy’s name, so too the NRA cannot inform the public

²¹ The NRA broadcast its news magazines around the country on 11,443 occasions in 2000. *See App.* 107. Of those, only one -- *Heston/Union* -- was intended in part to influence an election, and it aired 1,147 times, *see App.* 108 -- leaving 10,296 genuine issue ads that were run and should have been added to the 55,933 considered by the Brennan Center.

²² In the NRA’s news magazine addressing the motives of the Million Mom March, President Clinton was named 16 times, Vice President Gore 10 times, Senator Hatch was interviewed twice, and two references each were made to Senator Feinstein, Senator Schumer, and First Lady Hillary Clinton. *See App.* 930-42. Likewise, in the tribute to Charlton Heston, President Clinton is mentioned 11 times, Vice President Gore 9 times, Senator Feinstein twice, and Representative Gephardt twice. *See App.* 943-950. In *The Truth About Prosecution*, President Clinton is referenced to more than 60 times. *See Supp. App.* 978-86; *see also* Transcript of *California* at App. 892-904; Transcript of *It Can’t Happen Here* at App. 917-29 (referencing Mr. Clinton and Mr. Gore). None of these broadcasts was intended to influence a federal election. *See App.* 5-6, 17, 21-22 (LaPierre Decl.) ¶¶ 14-15, 40, 50.

about the true dangers to Second Amendment rights without naming politicians who have led the opposition to those rights. *See* Supp. App. 987, 999 (*Banned in Canada*) (warning viewers that “powerful people like Senator Charles Schumer, the most anti-gun politician in history, have a very different future in mind for you”). The First Amendment does not condemn Americans to the world of Harry Potter, where those who threaten liberty must be referred to as “He Whose Name Cannot Be Spoken.” Nor would a response to an attack on the NRA be effective if the NRA could not reference the attacker by name. App. 12 (LaPierre Decl.) ¶ 29; App. 39 (McQueen Decl.) ¶ 25(j). And generic references to abstract threats to the Second Amendment are far less effective in fundraising messages than are references to specific politicians that openly espouse gun confiscations. App. 42 (McQueen Decl.) ¶ 32.

BCRA itself provides perhaps the best answer to the Government’s ease of censorship defense. There would be no need for a media exception if wide-open discussion of political issues could be accomplished without naming particular federal candidates. Yet, it was universally understood even by BCRA’s supporters that the media could not perform its functions without naming candidates for federal office. So too with the NRA and like advocacy groups.

Beyond the evils inherent in this censorship regime, BCRA creates a practical nightmare for issue advocacy groups that wish to continue to engage in political discourse without running afoul of the statute’s criminal sanctions. In 2004, such groups will have to censor their broadcasts in no fewer than 1,505 markets at varying times.²³ And there will be thousands of candidates whose names must be cleansed from broadcasts reaching the relevant markets. *See* App.

²³ In 2004, there will be as many as 870 primaries for the House of Representatives (a Republican and Democratic primary for each House race), 66 primaries for Senate races, 100 primaries for the Republican and Democratic nominations for the presidency, 435 general elections for the House, 33 Senate general elections, and one general presidential election. These calculations exclude, of course, the primaries for third party candidates and thus represent a conservative estimate of the number of races that will trigger BCRA’s requirements.

118-19 (indicating that there were 2,100 candidates for the House and Senate in 1998). In attempting to comply with BCRA, the NRA must first identify the precise time that each primary occurs for all political parties in each state. Then, the NRA will have to ascertain the names of each and every candidate for federal office. The database will have to be constantly updated to reflect candidates dropping in and out of all the races. Having completed these tasks, the NRA will then have to cross check its speech for any reference to any candidate within the proscribed markets and times. Even the Defendants' own experts concede that "[t]he hodgepodge of different primary dates makes it difficult" to identify speech which is covered by BCRA. *See* Expert Report of Krasno and Sorauf at 61.

It will be especially onerous for the NRA to purge references to candidates for federal office from its 30-minute news magazines. Much of this programming is devoted to unscripted interviews with ordinary citizens. The NRA will have to transcribe these interviews so that it can compile the names of all those who are referenced during the program. Additionally, some of the interviews contain references to officeholders, such as the attorney general of a particular state, without including his name. *See, e.g.,* App. 919 ("And when gun owners call ATF directly or the California Attorney General's Office they can't get a straight answer from them either."). The NRA will have to identify each unnamed officeholder given that BCRA covers references to specific offices. *See* 11 C.F.R. § 100.29(b)(2). Many of the NRA's programs include footage of protests against anti-gun measures, so the NRA will have to scan and transcribe the text of all the placards carried by the protesters to ensure that none contains the name of candidates or references a specific office. And the NRA will face the daunting, if not impossible, task of making sure that no candidates appear in these protests or any of its news footage. Once all of these names have been compiled, then the NRA must match them against the database of list of candi-

dates for federal office. The complexity of this process and the many pitfalls inherent in this exercise of self-censorship belie Defendants' claims that issue advocacy groups can cleanse their speech of references to candidates for federal office "with ease."

C. Defendants' Empirical Analysis Is Fatally Flawed.

Defendants' efforts to defend the sweep of BCRA on empirical grounds are equally flawed for several reasons. First, the record is devoid of evidence justifying the imposition of a blackout on corporate speech in the 30 days prior to primaries. *None* of the studies before Congress even considered the impact of BCRA's restrictions on speech in the 30 days prior to primaries. Given that, as Defendants themselves acknowledge, most "genuine" issue ads occur outside the 60-day window prior to general elections (and thus within the blackout period for most primaries),²⁴ it necessarily follows that BCRA's provisions will criminalize in that period a greater percentage of "innocent" political speech. And because most primary candidates do not have sharp differences, there is less likelihood that interest groups will name candidates in an effort to influence the primary. For example, when the NRA referred to Vice President Gore in broadcasts in early 2000, it was certainly not trying to influence his primary contests against Bill Bradley, an equally committed foe of the Second Amendment. *See, e.g., App.* 889.

Second, the record is devoid of any persuasive evidence demonstrating a need to restrict speech on the Nation's radio airwaves. Neither the Brennan Center studies nor the Annenberg Center study considers any aspect of radio advertisements. Indeed, the only evidence in the record relating to radio ads is an unscientific sample of some of the radio ads aired in sixteen congressional races in 1998 and seventeen congressional races in 2000. *See Magleby, The Other Campaign* at 14-15. Professor Magleby makes no effort to quantify the percentage of genuine

²⁴ *See Br.* 140; *Buying Time 2000* at 31.

issue ads that would have been unfairly silenced in these elections. And even if he had, the selection bias of his methodology -- he concededly selected those races that he thought would be heavily contested -- would skew the results and render them unreliable. Additionally, Professor Magleby's report makes no reference to radio ads run in the 30 days prior to a primary. *See id.*

Third, the very premises of Defendants' empirical analysis are flawed. Defendants maintain that "the vast majority of interest group advertisements referring to federal candidates -- as much as 80 percent -- are broadcast" within the 60 days prior to general election. Br. 157-58. The enormous volume of NRA news magazines that aired in 2000 and that Defendants' experts ignored disproves this hypothesis. All of the NRA's 30-minute broadcasts in 2000 referred to federal officeholders, most of whom were candidates for reelection. App. 892-904, 914-50. The NRA spent significant sums airing these broadcasts throughout 2000, and 64 percent of these funds were expended outside the 60-day window prior to the general election. *See Supp. App.* 1050. This speech alone demonstrates that issue advocacy groups refer to federal officeholders and candidates throughout the year. Indeed, in 1999, well after the 1998 election and before the 2000 election, the NRA was running broadcasts that pointedly referenced Senator Charles Schumer as an exemplar of the anti-gun forces aligned against it. *See Supp. App.* 987, 999.

Defendants also rest their claim that BCRA is narrowly tailored on the faulty assumption that "electioneering advertisements" are "heavily concentrated in the few jurisdictions with the most competitive election contests." Br. 141. Here again, their conclusion cannot be squared with the evidence in the record. The NRA's 30-minute news magazines were aired in virtually every state in the Union. *See App.* 107 (documenting that NRA news magazines ran both nationwide and in 46 specific states). Indeed, approximately 40 percent of the total funds spent to air these programs was allocated to *national* broadcasts, which represented approximately 20

percent of the total airings. *See* Supp. App. 1050; App. 107 (indicating nationwide airings on numerous cable channels). Such communications cannot in any meaningful way be understood as “targeted.” Much of the remainder of these airings were not aimed at geographic areas with competitive races, but rather at areas where the NRA’s message was likely to be well received and viewers were likely to sign up as members. *See* App. 107; Supp. App. 974-77.²⁵ Given these patterns and the volume of the NRA’s speech, Defendants’ sweeping generalizations about the timing and location of paid political broadcasts simply cannot be credited.

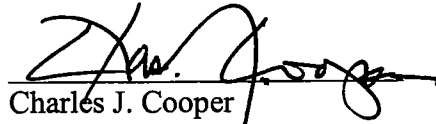
Defendants try to undermine this criticism by plucking out of context Mr. LaPierre’s admission that he could not remember “ ‘a single broadcast ad run in the 60 days prior to the 2000 election that mentions a candidate for the Senate or House that did not involve an election that was believed to be close.’ ” Br. I-98 (quoting LaPierre Depo. 158-59). It is hardly surprising, however, that the head of a large organization could not recall the details of ads aired years before. In fact, Mr. LaPierre could not recall that the NRA itself had aired any “spot” ads during the 2000 cycle. *See* LaPierre Depo. 214-15. In any event, as the records cited above reflect, the NRA’s paid programming referring to congressional candidates and presidential candidates alike in fact ran throughout the country and throughout the year.

CONCLUSION

For the foregoing reasons, the NRA and the PVF respectfully request entry of judgment on their claims and entry of the relief specified in their complaint.

²⁵ This pattern of political programming in areas with noncompetitive races continued in the 60 days prior to the general election in 2000, as evidenced by the fact that the program documenting gun confiscation in California aired more than 800 times in California in that period. App. 216. Indeed, even the program that criticized Vice President Gore’s claimed devotion to the Second Amendment, which was intended in part to influence the presidential election, aired in numerous locations where the presidential election was not competitive. *See* App. 108.

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Dated: November 20, 2002

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INTRODUCTION AND SUMMARY OF ARGUMENT

The ACLU submits this Opposition Brief to highlight the constitutionally impermissible burden the BCRA places on the ACLU.¹ The gravamen of our position in this litigation is that the courts have made clear for three decades that the kind of issue-oriented advocacy engaged in by non-partisan, voluntary, membership organizations like the ACLU cannot be subject to the prohibitory and regulatory regime of the campaign finance laws. The challenged provisions of Title II grossly trammel that constitutional understanding. Under Title II of the BCRA, on its face, any group or organization organized as a § 501(c)(4) corporation, no matter how large or small, no matter how non-partisan or issue oriented, is subject to the ban on broadcast communications.² To avoid the reach of the statute, the ACLU must either forgo covered speech or be compelled to create and speak through a political committee and comply with extensive regulations imposed by the Federal Election Campaign Act, including potential disclosure of members and contributors. Title II's provisions are thus fundamentally at odds with a central

¹Several former ACLU officials have submitted a brief in support of the BCRA. To avoid any confusion, it is important to note that their personal views do not represent the views of the ACLU, that the ACLU's position as a plaintiff in this case is based on organizational policy that has been repeatedly debated and reaffirmed by the ACLU's national board of directors, and that the ACLU has asserted this position in numerous cases over the past three decades, including *Buckley v. Valeo*, 424 U.S. 1 (1976), where the ACLU was co-counsel and its New York affiliate was a plaintiff.

²Under recently adopted FEC regulations, a § 501(c)(4) corporation that receives no funds whatsoever from corporate or union sources may be removed from the ban on broadcast communications. The ACLU does not appear to qualify for the exception because it accepts contributions from businesses and unions – although in *de minimis* amounts. In 2001, \$85,000 (less than 1%) of the ACLU's total contributions came from sources other than individuals. None of the contributions from businesses exceeded \$500. Since the ACLU does not collect or maintain records of the corporate status of its non-individual donors, we cannot determine precisely how much of this *de minimus* amount was actually contributed by incorporated entities. See Declaration of Anthony Romero, ¶ 6: 3 PCS, ACLU 3.

tenet of the Supreme Court's campaign finance jurisprudence: the imperative of protecting issue advocacy from such campaign finance prohibitions or regulations. Rather than using the least restrictive means, Title II sweeps more broadly than permitted by the First Amendment or necessary to achieve compelling interests in a narrowly tailored fashion.

ARGUMENT

THE FIRST AMENDMENT'S CORE PROTECTIONS FOR ISSUE ADVOCACY PRECLUDE ENFORCEMENT OF THE BCRA'S BROADCAST BAN AND DISCLOSURE REQUIREMENT AGAINST NONPARTISAN GROUPS LIKE THE ACLU.

The Court's opinion in *Buckley* repeatedly stressed that campaign finance laws must be narrowly tailored to avoid "unnecessary abridgement of [First Amendment] freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25, 64 (1976). In several respects, the BCRA fails that test. Two restrictions adopted in *Buckley* are particularly critical here. First, *Buckley* held that the government's regulation of expenditures must be limited to "communications that in express terms advocate the election or defeat of a clearly identified candidate...." *Id.* at 45. This "express advocacy" doctrine, which *Buckley* adopted to "distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons...." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986), has played a critical role for more than two decades in protecting issue-oriented speech by providing a bright line between permissible and impermissible government regulation.

Second, the *Buckley* Court also concluded that the statutory definition of a "political committee" must be narrowed to avoid constitutional difficulties. Specifically, the Court held that "[t]o fulfill the purposes of the Act [the disclosure and other obligations of political

committees] need only [apply to] organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” 424 U.S. at 79. While this case does not represent a direct attempt by the FEC to designate the ACLU as a political committee, defendants contend that ACLU must establish a segregated fund, i.e., a political committee, in order to continue to engage in “electioneering communications.”³ *Buckley* makes clear, however, that the major purpose test was fashioned by the Court to protect issue organizations that are not political committees from being treated as if they were. To the extent BCRA forces issue advocacy groups whose major purpose is not partisan politics to be treated as political committees in order to speak, then the Act likewise transgresses *Buckley*’s teachings.

Both the express advocacy test and the major purpose test thus reflect a single, overriding principle of First Amendment jurisprudence: “When a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.” *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347 (1995). As first articulated in *Buckley* and later reaffirmed in *MCFL*, the express advocacy and major purpose tests are constitutionally compelled limits on the otherwise fatal reach of FECA. They mark the boundaries where permissible campaign finance regulation ends and unfettered issue speech begins. Title II ignores those and other limitations and thereby undermines the First Amendment safeguards that this Court has so carefully erected. The opening briefs of the defending parties give short shrift to these essential elements of *Buckley*.

³A segregated fund is a political committee under FECA. 2 U.S.C. § 431 (4)(B). As a consequence, organizations that use a segregated fund must adhere to extensive reporting requirements, staffing obligations, and other administrative burdens. These burdens stretch far beyond the more straightforward disclosure requirements on unincorporated associations. See *MCFL*, 479 U.S. at 252-253.

A. The Express Advocacy Doctrine

Contrary to the defendants' view, the express advocacy doctrine reflects more than a concern about vagueness. It embodies a substantive and fundamental principle of First Amendment law. If any mention of a candidate in the context of a discussion about issues subjected the speaker to campaign finance controls, the consequences for "free discussion" would be intolerable and speakers would be compelled to "hedge and trim." *Buckley*, 424 U.S. at 43, quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945). Accordingly, while candidate-focused contributions, expenditures and express advocacy can be regulated, all speech that does not "in express terms advocate the election or defeat of a clearly identified candidate" is outside the scope of permissible regulation. *Id.* at 44.

In articulating the express advocacy rule, the Court clearly understood that the distinction between discussion of issues and advocacy of election or defeat of candidates "may often dissolve in practical application" because candidates, especially incumbents, "are intimately tied to public issues involving legislative proposals and governmental actions." *Id.* at 43. The Court nevertheless recognized the need for a bright line to ensure a safe harbor for protected political speech. "So long as persons or groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views," *id.* at 45, and they are also free from reporting and disclosure requirements. *Id.* at 79-80. See also *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238. By controlling speech which merely mentions a federal candidate, BCRA grossly

transgresses the express advocacy rule.³

The problem with casting aside the bright line distinction between words that exhort the listener to vote for or against a particular candidate and issue advocacy is best exemplified by the impact Section 203's ban on broadcast communications will have on legislative advocacy, i.e., speech that addresses legislation pending before the Congress. This kind of classic grass roots advocacy, urging people to contact their Representative or Senator about this or that bill, is sterilized by the fact that an organization cannot even tell the audience the name of their Representative or Senator to contact. Similarly, efforts to urge citizens to contact their Representative to support or oppose bills known by the name of their sponsors - the McCain-Feingold bill comes to mind - are likewise silenced by Title II, subject to whether either of the named sponsors is running for federal office at the time. That is an effective veto of such speech.

B. The Major Purpose Test

Just as the express advocacy doctrine was fashioned to protect issue-oriented speech from being treated as partisan advocacy unless it meets a bright line test, the major purpose test adopted in *Buckley*, and reaffirmed in *MCFL*, protects issue-oriented speakers from being treated

³*Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), is not to the contrary. Although *Austin* upheld a state law prohibiting independent expenditures for express advocacy by corporations, that decision must be read in light of *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which protects a corporation's right to engage in issue advocacy. We are aware of no decision decided since *Buckley* that has upheld spending or temporal limits on issue-advocacy expenditures by organizations - regardless of their corporate status. *Austin* must be read further in light of *Massachusetts Citizens for Life*, which carved out an exception for non-profit corporations formed to promote political ideas. 479 U.S. at 662-664. The application of *MCFL* to this case is discussed fully in the ACLU's opening brief and in the opening and opposition briefs of the *omnibus* plaintiffs. Because the ACLU does not seek to influence elections, and does not have an associated PAC, the *de minimis* contributions it accepts from non-individual sources, *see* n.1, *supra*, cannot be viewed as a conduit for improper corporate expenditures. *Cf. FEC v. National Rifle Association*, 254 F.3d 173 (D.C. Cir. 2001).

as political committees subject to FECA's broad regulatory regime, even if an incidental amount of their advocacy or activity can be characterized as campaign related or partisan. It is a second line of defense against official encroachment on issue organizations.

That is why the defendants' various suggestions that groups like the ACLU can avoid the impact of the ban on electioneering communications by forming a political committee to speak instead is unavailing. These cases make clear that groups like the ACLU cannot be exposed to the rigors of compliance with the panoply of political committee requirements when engaging in allegedly election-related speech that is only one minor part of their activities. Congress' effort to evade the express advocacy test by adoption of the ban on electioneering communications makes the major purpose test even more important to protect issue advocacy groups that merely mention political figures from being regulated like political committees. Title II ignores that safeguard and poses a serious threat to the issue advocacy of such groups.

As discussed in the ACLU's opening brief, the major purpose test originated in *United States v. National Committee for Impeachment* 469 F.2d 1135 (2d Cir. 1972), and *ACLU v. Jennings* 366 F. Supp. 1041 (D.D.C. 1973)(three judge court), *vacated as moot*, 422 U.S. 1030 (1975). Indeed, *Jennings* invalidated a system of prior restraint that threatened to stifle print communications on behalf of or in derogation of a candidate by issue organizations – including the ACLU, 366 F. Supp. at 1053. These early cases powerfully highlight the danger of trying to extend campaign finance regulation to pure issue advocacy organizations like the ACLU. By the time the matter was taken up by the *en banc* District of Columbia Circuit in *Buckley*, it was settled law that “a group will be considered a political committee only if it makes its expenditures under the control or with the consent of a candidate, or if the major purpose of its

expenditures is the nomination or election of candidates. Nonpartisan issue groups are therefore not covered.” 519 F.2d, 821, 864 (D.C. Cir. 1975)(*en banc*), *aff’d in part and rev’d in part*, 424 U.S. 1 (1976) .

These cases formed the backdrop for the Supreme Court’s adoption of the major purpose test as a constitutionally-indispensable limit on the otherwise impermissible reach of the “political committee” designation when applied to nonpartisan and non-campaign groups. The *Buckley* Court was animated by three key concerns: First, the extremely broad reach of the term “political committee,” which the Act defines in terms of the problematically vague notion of activities undertaken “for the purpose of . . .influencing” an election; second, the extraordinary series of burdens imposed on those entities deemed “political committees;” and third the fact that the Act mandates compelled disclosure of contributors and supporters.

The *Buckley* Court noted that FECA’s broad statutory definition of a “political committee” had the dangerous potential “for encompassing both issue discussion and advocacy of a political result.” 424 U.S. at 79. In crucial language, the Court continued:

The general requirement that “political committees” and candidates disclose their expenditures could raise [serious] vagueness problems, for “political committee” is defined only in terms of amount of annual “contributions” or “expenditures,” and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words “political committee” more narrowly. To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and “political committees” so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Id.

In the very next paragraph, the Court further protected such nonpartisan issue groups from

even the less demanding reporting requirements imposed by §434(e) on groups other than “political committees,” *i.e.*, groups whose major purpose is *not* the nomination or election of a candidate. The Court did so by holding that §434(e)’s requirements only applied to “funds used for communications that expressly advocate the election or defeat of a clearly defined candidate.” 424 U.S. at 80 (footnote omitted). The Court in *Buckley* thus created a clear and sensible regime for protecting nonpartisan issue advocacy groups from government overreaching and its chilling effect on First Amendment expression.

The soundness of this approach was reaffirmed in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, where the Court revisited the regulation of issue advocacy groups whose major purpose is not the partisan election of candidates. The Court repeatedly stressed the importance of the major purpose test as a protection for advocacy organizations.

First, upholding the right of an incorporated anti-abortion group to engage in express advocacy, the Court first noted that if the group were not incorporated yet made certain express advocacy “expenditures,” the major purpose test would protect the group from being regulated as a political committee.

Second, the Court highlighted in a footnote, *id.* at 252 n.6, the fact that MCFL was not primarily a partisan political organization:

In *Buckley*....this Court said that an entity subject to regulation as a “political committee” under the Act is one that is either “under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” *Id.* At 79. It is undisputed on this record that MCLF fits neither of these descriptions. Its central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates.

Third, the Court noted with disapproval that the FEC’s effort to equate ideological

corporations with for-profit corporations under the Act would mean that “all MCFL independent expenditure activity is, as a result, regulated as though the organization’s major purpose is to further the elections of candidates.” *Id.* At 253.

Finally, the Court concluded that the government’s legitimate interests could be adequately served by a more narrowly tailored regulation:

[S]hould MCFL’s independent spending become so extensive that the organization’s major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. *See Buckley*, 424 U.S. at 70. As such it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns.

479 U.S. at 262.

Buckley and *MCFL* make clear that the major purpose test was adopted by the Court to protect issue organizations that are not political committees from being treated as if they were. The force of that doctrine is fully applicable here even though the ACLU’s status as a political committee is not at issue. To the extent that BCRA would require the ACLU to form a political committee in order to sponsor an occasional “electioneering communication,” the safeguards of the major purpose test are overridden.⁴

C. The Perils of Reporting and Disclosure

For similar reasons, compliance with disclosure requirements – either the full panoply of disclosure required of political committees or the more focused disclosure required by Section

⁴ This Court’s decision in *Akins v. FEC* 101 F.3d 731 (D.C. Cir. 1997)(*en banc*), *rev’d on other grounds* 524 U.S. 11 (1998) reaffirmed its position in *Jennings* that issue advocacy organizations like the ACLU (which do not contribute to candidates or make expenditures on behalf of candidates) can not be treated as political committees if the organization’s primary purpose is to not influence elections. See also *FEC v. Machinists Non-partisan Political League* 655 F. 2d 380 (D.C. Cir.1981).

201 of the Act for those who engage in electioneering communications (assuming the ban on such speech is struck down in whole or in part) – is too steep a price to impose on organizations like the ACLU, whose positions are often controversial and whose members and contributors frequently request assurances of anonymity. *See* Declaration of A. Romero ¶ 5:3 PSC, ACLU 2. The protection of their rights go back to cases such as *NAACP v. Alabama*, 357 U.S. 449 (1958), and the ACLU has resisted the application of campaign finance laws to its nonpartisan activities in considerable degree to protect the privacy of those who associate with it. *See ACLU v. Jennings, supra*. That Congress manifested such complete indifference to the plight of such organizations and to their recognized rights to associational privacy in enacting Title II is yet another example of the failure of precision of the BCRA. *See Buckley* 424 U.S. at 79-80; *MCFL* 479 U.S. 238.⁵

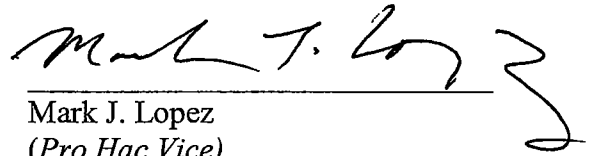
CONCLUSION

For the reasons stated herein, and in the opening briefs submitted by the ACLU and the *omnibus* plaintiffs, the challenged provisions of the BCRA should be declared unconstitutional and their enforcement enjoined.

⁵The defendants also assert that groups like the ACLU have no standing at this point to challenge the new coordination provisions set forth in Sections 202 and 214. Precisely the opposite is true. At this very moment, our legislative officials are having conversations with members of Congress concerning legislation like the Department of Homeland Security Bill. Every one of such conversations is taking place in the shadow of whatever coordination rules will be promulgated and without the assurance that the absence of a formal agreement or arrangement will not per se defeat a charge of coordination. And the coordination trap applies not just to potential future electioneering communications, but to any future expenditure that might retroactively be deemed coordinated with a legislator. This is yet another example of the impermissible reach, as well as uncertainty, of Title II of the BCRA.

Dated November 19, 2002

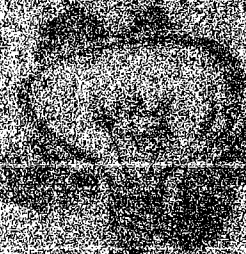
Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Mark J. Lopez", with a long, sweeping flourish extending to the right.

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OPPOSITION BRIEF OF THE CHAMBER PLAINTIFFS

I. DEFENDANTS' DISCUSSION OF THE SUBJECTIVE INTENT OF SOME SPEAKERS IS BOTH LEGALLY IRRELEVANT AND FACTUALLY INACCURATE.

Like Captain Renault in the movie *Casablanca*, Defendants feign shock that politically active groups broadcast issue ads near elections with occasional hope that the ads may influence how people vote. Far overstating the evidence, Defendants then assert that electoral intent is the only significant explanation for running issue ads during the 60 days before an election. (They largely ignore the 30 day blackout before each nominating convention, caucus, primary, or other event). These claims are legally irrelevant and factually misleading.

A. A Speaker's Subjective Intent Is Irrelevant And Impossible To Reliably Determine.

A key premise of Defendants' argument is that the subjective intent of the sponsors of issue ads is critical. They justify many of BCRA's new provisions as necessary to reach speech that is motivated to some extent by a desire to influence elections. But Defendants do not explain how a subjective electoral intent impairs any governmental interest. Neither actual nor apparent corruption turns on what is in a speaker's heart, as opposed to its ad. Nor is intent a workable standard for regulating speech. *Buckley* flatly rejected an intent-based standard because the prevalence of mixed purposes and risk that intent will be misjudged inherently preclude the certainty and precision the First Amendment demands. *Buckley v. Valeo*, 424 U.S. 1, 42-43 (1976).

The practical problems identified in *Buckley* are even greater with respect to speech by coalitions or other groups. Members can monitor what a group's ads say and try to avoid coordinating conduct, but they cannot hope to police one another's motives, which often are mixed. For just such reasons, the Fourth Circuit held that whether the sponsor of an issue ad intends to affect an election is constitutionally irrelevant. *Perry v. Bartlett*, 231 F.3d 155, 161-63 (4th Cir.

2000). Similarly, this Court should decline to join Defendants in their speculations about the intent behind various ads.

B. Defendants Exaggerate Their Evidence Of Electoral Intent.

Plaintiffs' Omnibus Brief (at 60-64) identifies many previously aired ads that would be banned by BCRA even though they clearly discuss issues. It also shows (at 66-69) that Defendants' *Buying Time* reports, which sought to minimize the number of such ads, distort data that, fairly presented, demonstrate that "genuine" issue ads were common in 1998 and 2000. We focus here on Defendants' discussion relating to the Chamber, NAM, and similar groups.

Defendants argue (at 139-40, I-195) that because broadcast time is more expensive and other ads are more common in the sixty days before an election, issue ads run then must have an electoral intent, and doubly so if the ads do not run after the election. In fact, other important reasons favor the pre-election period: (i) that is when the public focuses on political issues;¹ (ii) candidates then closely attend to what is being said to their constituents and how their constituents respond;² (iii) elections are when the public's policy views have immediate impact;³ and (iv) issue ads often respond to events, including the end-of-session flurry of legislation.⁴ Conversely, after an election the public is fatigued with political issues, newly elected candidates shift their focus, urgency fades,

¹ Huard Decl. ¶ 9, 10 PCS/NAM 0002; La Pierre Dep. at 22-23. Defendants' expert, Dr. Mann, conceded a "modest" increase. Mann Cross at 201-02. Because the public is most aware of particular candidates and their positions prior to an election, it makes sense for issue ads then to refer to specific candidates and their positions.

² That candidates focus on constituent views during elections is common knowledge. The use of constituent education to persuade candidates was described by ABC's Mr. Monroe. Monroe Dep. at 90 ("with education of their constituents . . . we may be able to persuade them on our legislation"). Term limit proponents run election-time ads identifying candidates who have not signed term limit pledges, not to elect candidates, but to encourage signing.

³ Josten Decl. ¶ 13, 10 PCS/COC 0003; Huard Decl. ¶ 9, 10 PCS/NAM 0002. Limited resources may dictate focusing educational efforts on close races where mistaken policy views may have the most immediate impact. De Francis Dep. at 50 (a tight race meant "the public was paying attention to the issues").

⁴ Monroe Decl. ¶ 18, 10 PCS/ABC 0018; Mann Cross at 176 ("part of the cycle of Congress"). It happens that 1998, 2000, and even 2002 were relatively stable and prosperous years. But that will not always be so. Momentous events involving incumbents seeking reelection easily may occur near elections and nominating events. After all, the presidential blackout period extends for nearly a full year. BCRA's rules must be constitutional for those times as well.

and the holidays distract. Huard Decl. ¶ 9, 10 PCS/NAM 0002; Monroe Decl. ¶ 18, 10 PCS/ABC 0018. Prof. Gibson explained that elections are when the most persuadable citizens are paying attention to public policy while those who pay attention to policy ads at other times already have strong views. Gibson Rebuttal Report at 26-28. Issue ads are run before elections, despite higher costs and competition, for the same reason that performances of the *Nutcracker* and *A Beautiful Life* precede Christmas. It is the season.

Defendants' assertion that The Coalition's 1996 activities show that pre-election issue ads are merely candidate ads in disguise is mistaken. First, participants in The Coalition were unanimous that its ads were intended to respond to issue ads being run by the AFL-CIO.

The purpose of this coalition specifically, only, uniquely was to respond to [Mr. Sweeny's] ads and the false statements in them, in some cases That was the mission of this coalition.

Josten Dep. at 165; Josten Decl. ¶ 9, 10 PCS/COC 0002; Huard Decl. ¶ 5 10 PCS/ABC 0002; Sandherr Dep. at 7, 17-20; Huard Dep. at 24-25, 45, 50 ("the purpose of the coalition was to counter . . . the misimpressions . . . being created by the AFL-CIO"). Reports that the AFL-CIO expected its issue ads to lead voters to reject pro-business candidates naturally produced unusual attention to possible electoral effects. But The Coalition "did not in a single ad . . . encourage any viewer to vote a certain way on behalf of a certain candidate." Josten Dep. at 25.

Second, to respond to the AFL-CIO's reported \$35 million, The Coalition raised only about \$5 million – from thousands of supporters. Josten Dep. at 29-32; Sandherr Dep. at 38-41. It hoped to respond to the AFL-CIO ad for ad and ran ads wherever the AFL-CIO did. Josten Dep. at 44, 63. But, given its limited funds, the site selection committee ultimately gave emphasis to areas where

the public's policy views threatened immediate adverse effects for business legislation – i.e., where races were close.⁵

Third, members of The Coalition had varied motives. The Chamber displayed no interest in electoral effects. Josten Dep. at 48, 52, 85, 87-88, 119 (“It was irrelevant”). ABC habitually instructs those responsible for its issue ads “we are not targeting voters.” Monroe Dep. at 43, 81.

Defendants' claim (at 144) that Mr. Huard said that The Coalition's goal was “some gratitude . . . when it came to voting.” Not so. He spoke not about The Coalition's goals, but about why some members, *after* the election, suggested visiting the 40 legislators in whose districts ads had run. Huard Dep. at 86-87. He opposed such visits but said that, if he had favored visits, he might have hoped to generate gratitude. *Id.* The Management Committee neither approved nor forbade visits. Josten Dep. at 173; Huard Dep. at 89-90, 92 (“enthusiasm . . . was mixed and there was no concerted effort”). If any meetings occurred – a disputed point – it was a “miniscule” number. Huard Dep. at 90; Josten Dep. at 175-77. During MUR 4624 the FEC claimed to have found only one person – an aide – who had been visited. GC Report at 34.

Defendants offered much less evidence of electoral intent for issue ads arising outside the unusual clash between the AFL-CIO and The Coalition. However, they asserted (at 139) that many ads were distant from policy concerns of the sponsors, using Associated Builders and Contractors as an example. In fact, ABC's witness explained that the ABC ads reflected public policy concerns of ABC membership. For example, many small and family-owned construction businesses want to reduce the marriage tax penalty, simplify the estate and tax laws, and return money to citizens. Monroe Cross at 57-58, 63, 99. The industry also favors flexible, market-directed health care, Monroe Cross at 66-67, and elected public school boards. Monroe Dep. at 56-58 and 96.

⁵ Sandherr Dep. at 35-36; Huard Dep. at 46. Also, because the AFL-CIO's policy positions targeted Republican candidates, the responsive ads defended the policies of Republican candidates. Josten Dep. at 63.

Moreover, ABC's membership has a distinctive ethos: "very strong, patriotic red white and blue God and country association," so that issues like children and pornography are important and pushed by state affiliates. Monroe Cross at 100-01; Monroe Dep. at 66, 69.

In short, Defendants go too far in asserting that most issue ads are subjectively intended to influence elections. More importantly, such intent does not matter. *Buckley* recognized that those who care about issues often care about candidates and that "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions ...[and] ... campaigns themselves generate issues of public interest." 424 U.S. at 42. Hence, the Supreme Court restricted regulation to speech that objectively and clearly contains electoral advocacy.

II. BUCKLEY'S "ROADMAP" REQUIRES THAT BCRA'S COORDINATION PROVISIONS BE STRUCK DOWN AS OVERBROAD AND VAGUE.

Defendants claim (I-122) that *Buckley* provides a "roadmap" to sustaining BCRA's vague and overbroad "coordination" provisions. In fact, *Buckley* shows why those provisions fail.

A. Defendants Confirm That "Coordination" Is Broad And Vague.

In seeking to show that the construction of "coordination" adopted in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 91 (D.D.C. 1999), and the repealed FEC regulations was much too narrow, Defendants end up showing that the BCRA's coordination provisions are exceptionally broad and vague. Intervenors argue (at I-143, I-138 & n.512) that the statutory language sweeps broadly enough to encompass an "informal ... 'wink or nod' theory," as well as the "insider trading" theory held unconstitutional by *Christian Coalition*, 52 F. Supp. 2d at 90. They assert (at I-141) that BCRA is not intended to permit "a finding of coordination *solely* because [of] lobbying" (emphasis added), but they are unable to identify anything in the statutory text to support that view, nor are they able to identify the plus factors that will convert a lobbying contact into coordination.⁶

⁶ We invite the Court to review pages 3-4 of the October 11, 2002, comments of the Intervenors in the FEC's coordination rulemaking, available at www.fec.gov/pdf/nprm/coor_and_ind_expenditures/mccain.pdf. Intervenors

By arguing (at 183) that the now-repealed FEC regulatory definition of coordination was “far too narrow,” the Governmental Defendants unavoidably acknowledge that the wide range of possible meanings that fall between the construction adopted by the FEC and the much broader (though never clearly specified) meaning that Defendants prefer.⁷ Moreover, Defendants observe that the phrase “request or suggestion” – which appeared both in the FEC regulation and the statute – has many possible meanings, which they illustrate (at 185) by this hypothetical:

A candidate suggests to a wealthy individual, “If you want to help, you might finance some political advertisements advocating my election”: the individual does not reply, but a week later, buys \$100,000 worth of air time to advocate the candidate’s election.

Defendants say (at 185) that this conduct “*could* be treated as coordination under the plain language” of the statute (emphasis supplied), but they are unable to say whether it *would* be so treated, nor can they identify any statutory factors that would control the determination.⁸

In short, Defendants agree that the statutory concept of coordination is broad and vague.

B. *Buckley*’s “Roadmap” To The First Amendment Demands That Restrictions On Core Activities Be Narrowly Drawn Using Bright Lines, Even At The Expense Of Achieving Less Than Complete Coverage.

Intervenors argue (I-122) that *Buckley* gives a “roadmap” for this case. If they mean that the holdings of *Buckley* – e.g., the express advocacy standard is necessary to avoid overbreadth – are mere guides or suggestions, they are wrong. But if they mean that *Buckley*’s analytical approach

(Continued . . .)

construe BCRA to compel a broad, open-ended, context-dependent analysis in which candidate contacts, proximity to an election, and importance of an ad’s subject matter to a candidate’s campaign are stirred together with no clear guidelines.

⁷ Defendants do not pretend that even the FEC regulations achieved clarity. To the contrary, they recognize (at 184 n.126) that the terms “agreement or formal collaboration” are “subject to interpretation.” Plaintiffs do not claim that the FEC regulation met First Amendment standards, but only that it substantially reduced uncertainty.

⁸ The “hypothetical” is realistic. Coordination charges against The Coalition in FEC MUR 4624 were based, in large part, on a public call by Congressman Boehner for some response to the AFL-CIO ads. Candidates and their parties routinely make general requests for public support. Josten Dep. at 262.

should guide resolution of similar issues in this case, they are exactly right. In particular, *Buckley*'s explanation of what the First Amendment demands of standards that define regulated speech is squarely applicable to evaluating the statutory concept of coordination.

Defendants make the misleading assertion (at I-142) that the Supreme Court has taken a "functional" approach to defining coordination. In truth, the Court never has considered a claim that the coordination standards are vague and overbroad, nor has it ever purported to define the concept for First Amendment purposes. Instead, the Court has explained the role of coordination in FECA's structure, *Buckley*, 424 U.S. at 46, and has held particular speech to be clearly independent. *See Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996).

"Functional analysis" is not *Buckley*'s roadmap for valid speech restrictions. Instead, *Buckley* demanded narrow and precise objective definitions, even at the cost of reduced effectiveness. 424 U.S. at 45. *Buckley*'s roadmap is drawn with bright lines defining narrow areas of regulation; Defendants' gauzy impressionism will not do.

C. Plaintiffs Have Standing Because BCRA's Coordination Provisions Today Are Chilling And Deterring Plaintiffs' Core First Amendment Activity.

Defendants make a peculiar attack on Plaintiffs' standing to challenge BCRA's coordination provisions. They do not question that (i) Plaintiffs' legislative and policy activities involve ongoing interaction with legislators and political parties; (ii) such contacts expose Plaintiffs' future speech to charges of coordination; and (iii) to preserve future free speech, Plaintiffs thus must limit their First Amendment associational and petitioning activities.⁹ Rather, Defendants argue (at I-141) that

⁹ See, e.g., Decl. Josten ¶ 4, 10 PCS/COC 0001 ("To advance the interests of its members, the Chamber must and does regularly consult with Members of Congress, officers of the Executive Branch, and others, including political party officials and current or likely candidates for election to Federal Office."); Josten Dep. at 286 ("My job requires me to meet with [the RNC or Republican members of Congress] and many members of the Democratic party on a pretty much daily basis."); Huard Decl. ¶ 3, 10 PCS/NAM 0001 (same); Monroe Decl. ¶ 3, 10 PCS/ABC 0001 (same). These statements also describe the burden that a vague coordination standard imposes. Josten Decl. ¶ 4, 10 PCS/COC 0001; Huard Decl. ¶ 3, 10 PCS/NAM 0001; Monroe Decl. ¶ 9, 10 PCS/ABC 0003-0004 ("ABC will have to either be considerably more limited in its contacts . . . or it must eschews spending on issue advertisements Similarly, ABC

Plaintiffs' injury is not due to BCRA because § 214 is "simply an instruction to study the coordination issues further and 'favors neither one side nor the other.'" They assert that Plaintiffs' injury flows from FECA's substantive coordination provisions that, under BCRA § 403, this Court has no jurisdiction to address. They are wrong.

To begin with, BCRA § 214(a)(2) establishes a new ban on "coordination with any 'national, State, or local committee of a political party,'" even if the party is not acting for a candidate or campaign. AFL-CIO Complaint ¶ 24; Chamber Complaint ¶ 30. Because many legislators have party positions (McConnell Decl. ¶ 4, 5, 2 PCS/McC 002), this new provision chills both party contacts, and contacts with legislators who are not candidates (e.g., a retiring Senator).

Moreover, BCRA gives "coordination" an expanded and vaguer meaning for all purposes, including the new § 214(a)(2). BCRA § 214(d) specifies that coordination applies not only to a "contribution or expenditure" in the defined sense that requires express advocacy but "*also* includes any direct or indirect payment ..." (emphasis added). BCRA § 214(d) extends coordination to an "electioneering communication." These provisions remove express advocacy as a *content* standard and give no substitute. At the same time, BCRA § 214(b) increases uncertainty as to what *conduct* constitutes coordination by eliminating without replacement FEC regulations that gave some guidance. Likewise BCRA § 214(c) undercuts the guidance once provided by *Christian Coalition*¹⁰ by legislatively disapproving a requirement of "agreement or formal collaboration." Thus, BCRA compels a broader and vaguer meaning for coordination.

(Continued . . .)

will have to be far more cautious in associating to fund issue advertising with allies whose conduct . . . are not in ABC's control.").

¹⁰ *Christian Coalition* held that the First Amendment demanded a narrow agreement standard of coordination. 52 F. Supp 2d at 92. BCRA § 214(d) forbids any new FEC regulations to "require agreement or formal collaboration." This provision, fairly read, rejects the constitutional holding of *Christian Coalition*.

This Court can consider these claims. BCRA § 403(a) gives jurisdiction if “any *action* is brought for declaratory or injunctive relief to challenge the constitutionality of any provision” of BCRA (emphasis added). Clearly this language encompasses Plaintiffs’ challenge to the new restriction on coordination with political parties imposed by BCRA § 214(a)(2). Because BCRA’s vague and overbroad definitional provisions are subject to constitutional challenge, *see Charles v. Carey*, 627 F.2d 772, 788, 789 (7th Cir. 1980) (entertaining vagueness and overbreadth challenges to definitional provisions); *Wynn v. Scott*, 449 F. Supp. 2d 1302, 1331 (N.D. Ill. 1978) (declaring a definition void for vagueness), the plain language of § 403(a) also reaches them. Finally, to the extent that FECA provisions are intertwined with BCRA, those claims are part of this “action” and both the language and purpose of § 403(a) permit review.¹¹ Plaintiffs have standing.

D. Plaintiffs’ Challenges To BCRA’s Self-Enforcing Provisions Are Ripe Without Regard To Speculation About Possible Future Regulations.

Defendants’ ripeness challenge claims that Plaintiffs seek anticipatory review of possible future regulations. In truth, Plaintiffs challenge existing and *self-enforcing* statutory provisions that Plaintiffs must steer far clear of today so that future speech is not deemed coordinated.¹² *Buckley* holds that challenges to such a statute are ripe immediately. 424 U.S. at 40 n.47.

Defendants’ cases confirm that statutes with immediate effect are ripe for review. *Nixon v. Adm’r of Gen. Services*, 433 U.S. 425, 437-38 (1977), held that provisions giving the government immediate possession of records were ripe for review, but that provisions having no effect until

¹¹ Since *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), it has been clear that jurisdiction over an “action” encompasses all closely related legal and factual issues that reasonably should be decided in one case. Plaintiffs challenged the “vague and overbroad standard of ‘coordination’ that deprives corporations and labor organizations of prospective direction.” AFL-CIO Complaint ¶ 30; Chamber Complaint ¶ 36. If FECA’s coordination provisions necessarily are put in issue by that claim, this Court has ample power to decide it.

¹² The Governmental Defendants confirm (at 185) that the FEC is prepared to enforce the statutory provisions quite apart from any regulations, as does the FEC’s June 10 response to McConnell Interrogatory 10 (no provision of BCRA requires regulations to be enforced).

regulations were adopted were unripe.¹³ *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1988), is similar holding that a challenge to an agency's general plan was not ripe because the plan did "not command anyone to do anything or to refrain from doing anything" and would have no immediate legal or practical impact until later implementation.

Defendants say (at I-140 n.516) "it is entirely speculative whether any particular conduct that a plaintiff wishes to engage in will be covered by the revised [FEC] rules." Equally speculative is whether and when the Commissioners will agree on new coordination regulations, whether and when Congress would permit any such regulations to take effect, and whether and how any such regulations would affect the vagueness and overbreadth of the statute.¹⁴ Nor is it clear that such regulations would provide a safe-haven for Plaintiffs' current conduct, which is guided only by the statutory text. Neither Plaintiffs nor Defendants here should be speculating about future regulations.¹⁵ Rather, the proper focus is on existing BCRA provisions that chill First Amendment activity. Challenges to those provisions are ripe and BCRA § 403(a) mandates a prompt resolution.

¹³ The cases in Intervenor's footnote (at I-140 n.515) forbid anticipatory review of regulations not yet issued. They do not forbid review of self-enforcing statutory provisions under which an agency also may issue regulations.

¹⁴ *Nixon* provides an example of regulations that were repeatedly rejected by Congress. 433 U.S. at 437. Because BCRA § 214(c) specifies no consequences for failing to issue timely regulations, the "deadline" it establishes is merely directory, rather than mandatory, despite the use of the word "shall." *Gottlieb v. Pena*, 41 F.3d 730 (D.C. Cir. 1994) (collecting authority). It is not unusual for agencies to be years late in meeting such deadlines. *E.g., Friends of the Aquifer, Inc. v. Mineta*, 150 F. Supp. 2d 1297 (N.D. Fla. 2001) (six year delay). BCRA's sponsors already are challenging the FEC's soft money and electioneering communication regulations and they have been publicly quoted as saying that they likewise plan to challenge other regulations of which they disapprove. If such regulations were to be relied upon by Defendants to defend BCRA's coordination provisions, the adequacy and validity of the regulations would become issues *in this action*, subject to Congress' mandate in BCRA § 403(a) to achieve the quickest possible resolution.

¹⁵ Interestingly, Defendants' opening briefs elected not to propose a narrowing construction that Plaintiffs could address. While courts have the power to consider narrowing constructions *sua sponte*, they also may refuse to consider such constructions that were not timely proposed. *See United States v. A Parcel of Land*, 507 U.S. 111, 131 (1993). The failure to propose a narrowing construction suggests there is none. *Planned Parenthood of Central N.J. v. Farmer*, 220 F.3d 127, 140 (3d Cir. 2000). Moreover, where the drafters of the statute preferred "a vaguer term, intended to be broader," it would be an act of "judicial hubris" to impose a narrowing construction. *Id.* at 141.

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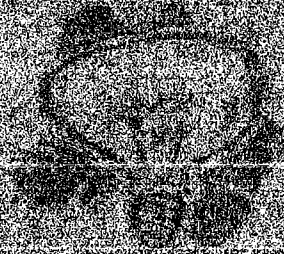
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AFL-CIO PLAINTIFFS' OPPOSITION BRIEF: TITLE II ISSUES

I. DEFENDANTS MISREPRESENT THE SCOPE AND PURPOSE OF THE AFL-CIO BROADCAST ADVERTISING PROGRAM IN ORDER TO MINIMIZE HOW BCRA CENSORS PROTECTED SPEECH

In support of BCRA's rejection of express advocacy as the touchstone for regulation, defendants paint a dismal picture of broadcast advocacy that purports empirically to distinguish election-motivated or -affecting messages, which defendants contend the Government can prohibit, from "pure" "issue discussion," which defendants concede the Government cannot. Defendants falsely portray the AFL-CIO's broadcast advertising as crassly and deceptively executed to serve wholly electoral goals. Their presentation, at once both overly simplistic and grossly exaggerated, serves a myopic insistence that all advertising run within 60 days of an election and referential of a candidate in that election comprises "electioneering" and nothing else. The record refutes that view and provides no warrant for defendants' rhetorical assault on the AFL-CIO, let alone the other organizations that BCRA § 203 so grievously disfavors.

First, defendants completely ignore virtually all of the AFL-CIO's broadcast advertisements, which from 1995 to 2001 ran virtually year-round during both election and non-election years and addressed without exception major legislative and other policy issues of undeniable importance to workers and their families. AFL-CIO advertising broadly sought to "set the agenda for the legislative and political environment," put lawmakers "on notice that somebody is watching what they are doing," and make the AFL-CIO a "visible . . . champion[] for working families." Mitchell Dep. 18, 19; see also id. at 46-47.

During this 7-year period the AFL-CIO sponsored under its own name¹ approximately 76

¹ During this period the AFL-CIO also co-sponsored seven flights of radio ads with other established groups under a coalition or coalition partner's name. See Mitchell Decl. ¶¶ 58 and 67, and Exh. 1, second pp. 1-2 (at end of exhibit). Five of these seven ads referred to no candidate (except for two that referred to then-Speaker Newt Gingrich), and comprised get-out-the-vote messages broadcast between October 27 and November 3, 1998.

distinct “flights” of ads that referred to incumbent federal officeholders or non-incumbent federal candidates; only two flights (referring to George W. Bush; see below) referred to no federal incumbents. The other 74 flights almost universally consisted of clusters of advertisements differing only by the name of the person referred to and his or her office telephone number, and included 7 such flights in 1995; 25 in 1996 (including 6 within 60 days of the general election); 10 in 1997; 12 in 1998 (including 5 within 60 days of the general election); 6 in 1999; 13 in 2000 (including 7 within 60 days of the general election); and 4 in 2001. See Mitchell Dec., Exh. 1.

BCRA § 203 would have taken rendered significant portions of this program criminal offenses. It would have banned all 18 flights broadcast within 60 days of the 1996, 1998 and 2000 general elections, with the sole exceptions of some ads that named Senators not then up for election. And, within 30 days of various primaries and conventions, it would have banned from one to 12 versions of an AFL-CIO ad in 18 of 34 flights aired.² Thus BCRA would have arbitrarily criminalized substantial segments of the AFL-CIO’s broadcast advocacy during 1996, 1998 and 2000, and solely as a mechanical function of the calendar.

Second, defendants repeatedly and deceptively conflate the AFL-CIO’s overtly electoral activities involving union members and its separately administered broadcast program, which distinctly sought to influence, variously, the issue debate and legislative product of the 1996

These five ads were sponsored by the Coalition to Make Our Voices Heard. *Id.*; Mitchell Dec., Exh. 20. BCRA would ban none of these ads (other than the Gingrich-referent ads at locations within the hearing of 50,000 persons in his district). Yet defendants falsely claim the AFL-CIO’s purpose in these ads was to conceal its identity, relying solely upon a supposed quotation of AFL-CIO Political Director Steven Rosenthal that he did not authenticate. See Rosenthal Dep. 20-25. In fact, as the record reflects, the AFL-CIO has co-sponsored ads with others under a coalition name only when doing so was the only practical way to cite sponsorship. Mitchell Dep. 100-06.

² In 1996: “Too Far” (1 of 19 versions); “1991” (3 of 10); “Raise” (1 of 2); “People” (2 of 21); “Couple” (2 of 30); “Wither” (4 of 26); “5.15” (1 of 4); “Edith” (12 of 31); “Another” (6 of 26); and “No Two Way” (10 of 31; and the 60-day rule would have banned all 31). In 1998: “Call” (12 of 16) and “Soon” (1 of 3). In 2000: “Label” (2 of 14, including one Democrat); “Endure” (1 of 16, a Democrat); “Trust (3 of 15, including one Democrat); “Sky” (1 of 12); “Protect” (2 of 14); and “Help” (3 of 12). See Mitchell Dec., Exh. 1. Defendants are tellingly silent about the BCRA ban on broadcasts containing candidate references within 30 days of a primary or convention, and so appear unable to muster any plausible explanation why it can sustain strict scrutiny.

session of Congress and the issue debate and policy commitments of candidates. For example, defendants' key proposition that "the AFL-CIO admitted [and] declar[ed] its intent to launch a broadcast advertising campaign to win back Democratic control of the House of Representatives" relies solely upon a January 1996 newspaper article and deposition testimony that addressed only the member-oriented electoral program, not AFL-CIO advertising. See Gov. Br. 37-38, 136, citing DEV 10-Tab 40 and Gerald Shea Dep. 22.³ See also Mitchell Dep. 115-20. In fact, the AFL-CIO has never "admitted" or "declared" any such thing, and a host of contemporary documents, including many internal to the AFL-CIO, make this utterly clear. See, e.g., Shea Dec., Exhs. 24, 27, 29-37; Rosenthal Dec., Exhs. 1-14.

Third, defendants erroneously depict the AFL-CIO's advertisements as solely directed at

³ The Government otherwise repeatedly plays fast and loose with the record. For example, it misleadingly refers to a letter from AFL-CIO President John J. Sweeney as proclaiming an electoral "object" of the ads. Gov. Br. 41. In fact, that memorandum, dated October 1, 1996, focused on union member get-out-the-vote efforts, and also enclosed information about the AFL-CIO "electronic voter guides" that compared candidate positions on some key issues of concern to working families that had been covered in "earlier education and lobbying ads," and nowhere made the assertion characterized by the Government. See Mitchell Dec., Exh. 11. And, defendants' characterization of a November 1996 Sweeney speech is pure distortion, linking as if they comprised a seamless quotation sentence two phrases that in fact are two pages apart and discuss distinct matters (defendants cite the exhibit but not the pages). *Compare* Int. Br. I-92 and n.337 *with* Mitchell Dep., Exh. 12, pp. 2, 4.

Defendants also rely on ostensible quotations or paraphrases in the press or at public events by the AFL-CIO's Political Director, Steven Rosenthal. See Int. Br. I-89, 100. But Mr. Rosenthal challenged the accuracy and context of one report at his deposition, see Rosenthal Dep. 48-54, and the other item is an ostensible quote from a National Public Radio interview on November 27, 1996, see Int. Br. I-89 and n.326, but the transcript of this interview is *not* in the record, and Mr. Rosenthal was *not* asked about this alleged comment at his deposition (although he *was* asked about another comment he ostensibly made in the *same* interview, see Rosenthal Dep. 12-13). In fact, Mr. Rosenthal played no role at all in the AFL-CIO's broadcast efforts in 1996 due to a "Chinese wall" arrangement that the AFL-CIO adopted due to its uncertainty at the time about the application of coordination principles in federal election law. Mitchell Dec., ¶¶ 9, 15-19; Mitchell Dep. 15-17; Rosenthal Dec., ¶¶ 30-32; Rosenthal Dep. 35-40, 45-46, 67-68.

Defendants also point to a few comments by several AFL-CIO consultants in documents they prepared during 1996. The record reflects that the AFL-CIO never invited or endorsed the phrases that defendants seize upon. See Mitchell Dec., ¶ 20; Mitchell Dep. 108-11, 122-23, 143, 217; Mitchell Cross 76. And, defendants mischaracterize the AFL-CIO pollsters' analysis of a draft version of the AFL-CIO's electronic voter guides. See Int. Br. I-93-94. Those ads were designed to portray candidate positions fairly while conveying the AFL-CIO's point of view on them, to promote that issue in the campaign, and to generate pressure on the candidates to embrace the AFL-CIO position. See Mitchell Dec., ¶¶ 42-44; Mitchell Dep. 137-38 and Exh. 10. Defendants may viscerally dislike this advocacy, but it is squarely protected by Buckley v. Valeo, 424 U.S. 1, 14, 42-45 (1976).

electing or defeating candidates (in defendants' phrase, bearing illegitimate "electioneering intent") because they frequently referred to officeholders and candidates involved in close election races. See Def. Br. 40, 142; Int. Br. I-97. But, as we earlier showed, the AFL-CIO's election year broadcasting efforts have been dedicated to pursuing specific policy and legislative goals of fundamental importance to the workers it represents, and naming officeholders in marginal districts at almost any time of the year exerts influence on them by taking advantage of the electoral pressures they feel and those felt by other Members of Congress who consider that they might be so targeted as well. See AFL-CIO Br. 3-8. See also Mitchell Dep. 19-20, 205-06; Mitchell Cross 122-23, 127-28, 141-42, 199. As AFL-CIO witnesses testified with respect to this advertising, an effective way to influence an elected official's positions on issues is to make the official believe that embracing particular positions could cost votes. Mitchell Cross 183, 189-90, 201; Shea Cross 14. Even so, other factors considered in devising and placing ads included the nature of the issue; whether immediate legislative votes might be influenced; a lawmaker's voting record, committee assignments and legislative role; whether the lawmaker's vocal response to the ad would influence other Members and generate further publicity; cost-effectiveness; and the union density of the audience. Mitchell Dec. ¶ 12; Mitchell Dep. 17-20, 27-30, 165, 204-06, 209-12; Shea Dep. 52-53; Mitchell Cross 102, 198-200.⁴ Yet defendants acknowledge none of this.⁵

⁴ BCRA, of course, drastically curtails the AFL-CIO's ability to act on such strategic judgments throughout every election year. And, it surely invites legislators to seize upon the new advantages resulting from the reduced broadcast options of groups affected by congressional action. For example, congressional leaders could schedule a vote on a national "right-to-work" law or a state opt-out from the federal minimum wage during the 60-day period knowing that neither the AFL-CIO nor any union could effectively broadcast messages to influence the vote. Or, during this period a federal candidate could campaign -- including via broadcast advertising -- on a platform to outlaw the allegedly undesirable activities or influence of the AFL-CIO, and the organization could not respond in kind.

⁵ Defendants instead offer various supposedly empirical distinctions between "genuine" and "sham" issue advocacy, but they defy both experience and common sense. For example, it is emphatically *not* the case that a group "typically ha[s] little or no need to refer specifically to candidates when they are not seeking to influence an

Fourth, defendants' elaborate effort to demonstrate that broadcast advertising "affects" the outcome of elections simply "proves" far too much. The AFL-CIO readily acknowledges that its broadcast advocacy, like any of its public communications and legislative work, may in some cases indirectly influence election outcomes, see Mitchell Dec. ¶ 70; Mitchell Dep. 184, although whether any particular ad is "likely" to have exerted such an effect is a matter of opinion, and whether any such ad actually did so is not the subject of any empirical evidence in the record. See Shea Cross 7, 12, 17-20; Mitchell Cross 93, 173, 197; Gov. Br. 142, and declarations and reports cited therein. Surely, the Buckley Court gave voice to common sense when it approvingly related the D.C. Circuit's observation that discussion of candidates and persuasion on issues during campaigns "tend[s] naturally and inexorably to exert some influence on voting at elections." 424 U.S. at 42 n.50, quoting Buckley v. Valeo, 519 F. 2d 821, 875 (D.C. Cir. 1975) (en banc). Defendants' conclusion from this -- that such speech must be banned -- is precisely opposite that reached by the Buckley Court -- that it urgently merits protection.

Fifth, and relatedly, defendants strive to prove a partisan, pro-Democratic party purpose in AFL-CIO broadcast target selection. But, throughout this period, and particularly in 1995 and 1996, AFL-CIO ads focused on Republican Members and Speaker Newt Gingrich because the newly Republican 104th Congress posed an aggressive threat to a host of policies and programs favored by the labor movement, and Congress was so polarized that few Republicans ended up

election," Int. Br. I-128; Gov. Br. 162; for, virtually all Representatives, one-third of the Senate, and often the President and Vice President are candidates in the next election (and "candidates" at all times within the meaning of FECA, see 2 U.S.C. § 431(2), and naming them is by far the most effective means to use broadcasts to advance legislative and policy objectives. See Mitchell Dec. ¶ 11-12. Equally preposterous is the notion that "genuine" issue ads "typically focuses on a single issue" whereas "electioneering" ads "refer to multiple themes." Gov. Br. 138 n.101. In fact, many AFL-CIO ads broadcast long before an election have dealt with multiple topics, e.g., Mitchell Dec. Exhs. 1, pp. 1-4 ("Sparkler," July 1995), 88-90 ("Voice," September 1999), and ads broadcast within 60 days of an election have dealt with single themes. E.g., id., pp. 82-84 ("Deny," September 1998), 101-02 ("Job," September 2000).

voting “right” and few Democrats voted “wrong” by AFL-CIO policy standards. Mitchell Dec. ¶¶ 13, 30-44; Mitchell Dep. 163; Mitchell Cross 12, 101, 127-28, 198; Shea Dec. ¶¶ 20-35, 38-39, 42, 55 and Exh. 18. In contrast, the record is clear that on important issues where Democrats’ vote inclinations were suspect, the AFL-CIO has regularly targeted them.⁶

Sixth, defendants misleadingly describe the eight ad flights (out of 76) upon which they focus their legally irrelevant quest to divine so-called “electioneering intent.” The five “electronic voter guides” in September and October 1996 (a format not used by the AFL-CIO since) comprised video versions of candidate position comparisons that the First Amendment plainly protects. See, e.g., Faucher v. FEC, 928 F. 2d 468 (1st Cir.), cert. denied, 502 U.S. 820 (1991). See fn. 3, supra.

The ads concerning presidential candidate George W. Bush broadcast in October and November 2000 directly addressed claims and policies he promoted regarding longstanding core concerns of the AFL-CIO that had been the subject much of its previous advertising: a patient’s bill of rights,⁷ and Social Security privatization and tax fairness.⁸ The ads were broadcast in competitive states where and when the public was most engaged and the Bush campaign was most sensitive to public opinion, and they sought to influence both the issue debate and Mr. Bush’s campaign commitments. See Mitchell Dec. ¶ 62; Mitchell Cross 136-37, 139-41; Shea Dep. 41-43; Shea Cross 18-20. Similarly, the ad concerning Senator Spencer Abraham in October 2000 capitalized on his tight reelection race to highlight his voting record on worker issues throughout

⁶ See, e.g., “Call” (July 1998, patient’s bill of rights: 5 Democrats out of 16 Members named); “Barker” (September 1998, “fast track” trade policy: 2 of 8); “Trust” (April-May 2000, trade relations with China: 7 of 15); “Now” (October-November 2001, fast track: 17 of 25).

⁷ See Mitchell Dec., Exh. 1, pp. 79-84, 88, 100-01, second pp. 1-2 (eleven other flights in 1998, 1999 and 2000).

⁸ See Mitchell Dec., Exh. 1, pp. 1-20, 23-25, 28-31, 35-49, 56-60, 63-67, 69-76, 84-90 (22 other flights in every year from 1995 to 1999).

his term, urged voters to contact him, and pressured him to modify his positions while under immediate electoral pressure. See Mitchell Dec. ¶ 63; Mitchell Dep. 46-47.

In sum, the AFL-CIO, like other groups, engages in an environment, fully recognized and accepted by the Buckley Court, in which electoral politics and legislative tactics are inevitably interdependent - - where “[candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government action, 424 U.S. at 43; where “campaigns themselves generate issues of public interest,” id.; and where a group must be free, at least short of using express advocacy, “to promote [a] candidate and his views,” id. at 45, because “a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates.” Id. at 14, quoting Mills v. Alabama, 384 U.S. 214, 218 (1966).

II. A LABOR ORGANIZATION’S OR CORPORATION’S HARD MONEY SEPARATE POLITICAL COMMITTEE DOES NOT PROVIDE A CONSTITUTIONALLY SUFFICIENT ALTERNATIVE MEANS TO MAKE “ELECTIONEERING COMMUNICATIONS”

Defendants contend that BCRA’s prohibitions of union- and corporate-funded electioneering communications “ban no speech whatsoever” because these institutions “may still speak their minds using segregated funds that reflect the true power of political association rather than the might of the commercial marketplace.” Def. Br. 9; see also id. at 158-59. But this supposed alternative is far more phantom than real and does not alleviate the constitutional infirmities of the broadcast ban.

In FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 252-54 (1986), the Supreme Court enumerated the burdensome FECA solicitation, administration and reporting requirements applicable to group-sponsored political committees and concluded that the “practical effect on

MCFL in this case is to make engaging in protected speech a severely demanding task.”⁹

Comparable requirements on unions for electioneering communications, a much broader field of speech than was at issue in MCFL, will be predictably even more onerous. There are over 30,000 labor organizations in the private sector alone, most of which are small organizations with modest treasuries.¹⁰ Meanwhile, there are only 313 union-sponsored federal PACs (and just 1,514 corporate-sponsored PACs out of approximately 5.6 million corporations in the United States, see www.sba.gov/advo/stats/sbei98). See www.fec.gov/press/20020715paccount.html. This is attributable in large part to the FECA affiliation rule, which provides that, for purposes of political committee sponsorship, fundraising and spending, all affiliates of a national labor organization are collectively considered a single entity. See 2 U.S.C. § 441a(a)(5); 11 C.F.R. §§ 110.3(a)(2)(ii) and (iii).

This means, for example, that plaintiff AFL-CIO COPE PCC -- limited by FECA as to the size of its solicitable class, the contributions it can receive and the contributions it can make, see 2 U.S.C. §§ 441a(a)(1)(C) and (a)(2), 441b(b)(4)(A) -- exclusively serves not only the AFL-CIO but also its 51 state federations and its nearly 580 area and central labor councils. See Shea Dec. ¶¶ 3, 6, 7. The same FECA affiliation rule likewise effectively confines every national union and all of its local unions and other affiliates to a single federal PAC.¹¹

⁹ The speech at issue in MCFL consisted of “independent expenditures” -- express advocacy communications. See 479 U.S. at 248-50. In order for unions (and non-MCFL corporations) to undertake independent expenditures (or contributions), of course, unions must utilize such FEC-regulated separate funds, a requirement unchanged by BCRA.

¹⁰ “Record-Keeping Under the Labor Management Reporting and Disclosure Act (LMRDA): Do DOL Reporting Systems Benefit the Rank and File?”, Joint Hearing Before the Subcommittee on Workforce Protections and the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce, 107th Cong., 2d Sess. 115-16 (2002).

¹¹ So, for example, the 1.6 million-member American Federation of State, County and Municipal Employees’ single federal PAC, AFSCME-PEOPLE, serves over 3,700 affiliated bodies and in 2001 raised \$4.2 million and undertook no independent expenditures; AFSCME’s own revenues were \$139 million. Declaration of Robert Lenhard ¶¶ 3, 5, 6, 22-25. Similarly, the 1.4 million-member Service Employees International Union’s

The AFL-CIO itself is severely constrained now in its ability to raise funds for AFL-CIO COPE PCC, historically has not raised sufficient funds to satisfy its contribution goals, and at least since 1995 has made no independent expenditures other than via the AFL-CIO website. Rosenthal Dec. ¶¶ 19-20, 22-24; Rosenthal Dep. 63-64. The un rebutted evidence is that the AFL-CIO simply would be unable to make electioneering communications via AFL-CIO COPE PCC. Rosenthal Dec. ¶ 22.¹² Similarly, other labor organizations typically cannot now raise sufficient PAC funds to meet their contribution goals. *Id.*; Rosenthal Dep. 64-65.¹³

Even so, BCRA adds another significant barrier to deployment by the AFL-CIO and other labor organizations (and corporations) of their federal PACs for “electioneering communications.” For, although FECA allows a union (or corporation) to spend its treasury money for the costs of establishing, administering and soliciting funds for its sponsored federal PAC, see 2 U.S.C. § 441b(b)(2)(C) (and the AFL-CIO so supports AFL-CIO COPE PCC, see Rosenthal Dec. ¶ 27), as the FEC interprets BCRA § 203(b) (codified at 2 U.S.C. § 441b(c)(3)(A)), union and corporate treasuries *cannot* so support any entity that makes electioneering communications, *including* a sponsored separate segregated fund. See “Electioneering Communications, Final Rules and Transmittal of Regulations to Congress,” 67

single federal PAC, SEIU COPE, serves over 220 affiliates and in 2001 raised \$3.6 million; SEIU’s own revenues were \$154 million. Declaration of Luis Navarro ¶¶ 3, 5, 6, 24-26. The 2.7 million-member National Education Association’s single federal PAC, NEA Federal Account, serves 15,000 affiliated bodies of public sector workers, and in 2001 raised \$3.0 million; NEA’s own revenues were \$245 million. Affidavit of Diane Shust ¶¶ 4, 6, 10, 14-18, 38. And, the 150,000-member National Treasury Employees Union’s single federal PAC, TEPAC, serves 242 affiliates and raised \$198,000 in 2001; NTEU’s own revenues were \$17 million. Declaration of Maureen Gilman ¶¶ 5-7, 22-25.

¹² During 1998 and 2000 the AFL-CIO spent \$8.4 million and \$17.9 million, respectively, on its broadcast advertising program, Mitchell Dec. 27, while AFL-CIO COPE PCC raised only \$1.8 million and \$1.1 million during those years. Rosenthal Dec. ¶ 11.

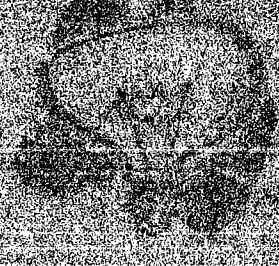
¹³ Meanwhile, BCRA has only exacerbated the pressure on non-candidate, non-party multicandidate federal PACs like AFL-CIO COPE PCC to assist candidates and party committees, by leaving in place the circa 1975 un-indexed limits on what multicandidate PACs can receive while, in § 307, substantially increasing and indexing for inflation the amounts that individuals can contribute to candidates and party committees.

Fed. Reg. 65190, 65204 (Oct. 23, 2002). So, in order to undertake electioneering communications, an existing union-sponsored, treasury-supported federal PAC either would be disqualified from paying from them at all, or at best it would have to spend its hard money prospectively for all of its administration and solicitation costs, further diminishing its ability to finance "electioneering communications." Rosenthal Dec. ¶ 27.¹⁴

In sum, BCRA § 203 most certainly bans speech, and its "segregated fund" alternative is a mere chimera that affords it no refuge under the First Amendment.

¹⁴ It is possible, but unclear, that under BCRA a union could establish and administer a separate segregated fund for electioneering communications distinct from its federal PAC. But even if the start-up funding conundrum created by BCRA's prohibition of the use of union treasury money and treasury-supported federal PAC hard money could be solved, the organization would confront all of the problems described above in raising funds, and it would confront the further obstacle that it would be competing for contributions with its own federal PAC.

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I. The "Choices" Forced on Political Parties Under Section 213 Are Unconstitutional

The Government contends that Section 213 of BCRA is constitutional because it simply offers party committees a "choice" between (i) making coordinated expenditures, in excess of the limits on contributions from a non-party political committee to a federal candidate; and (ii) making independent expenditures on behalf of that candidate. Br. 178-80. That of course is *not* what BCRA does. For a quarter of a century, political party committees have been able to make coordinated expenditures greater than the regular limit on a non-party political committee to a federal candidate. 2 U.S.C. §441a(d)(2)&(3). An honest accounting of Section 213 would reveal its obvious purpose: to punish a party committee for exercising its right to make independent expenditures by forcing that committee to forego its ability to make coordinated expenditures.

Further, Section 213 treats all national, state and local committees of a political party as a single committee for purposes of this prohibition. Thus, if any committee at any level of the Democratic Party, for example, makes a coordinated expenditure for a candidate, all other committees of the Democratic Party are prohibited from making any independent expenditure for that candidate. 2 U.S.C. §441a(d)(4)(B). The Government suggests that this "may not be the case" (Br. 181) because the FEC has proposed regulations treating the national and state parties as two different groups for purposes of Section 213. 11 C.F.R. §109.32(b)(1), 67 FR 60,042 at 60,047 (Sept. 18, 2002). The FEC conveniently overlooks that their co-defendants in this litigation, Senators McCain, Feingold, *et al.*, have expressly told the FEC that its proposed regulation "contradicts that clear statutory command" of Section 213 that all party committees at all levels be treated as a single unit. Letter from John McCain, Russ Feingold, *et al.* to FEC. And the Government's alternative suggestion—that national, state and local committees of a political party could simply disaffiliate from each other in order to avoid the effect of Section 213 (Br. 182)—is too silly to warrant serious discussion. For these reasons Section 213 is manifestly unconstitutional.

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Madison Center Plaintiffs' Opposition Brief: Title II Issues⁴

I. "Reformers" Advocate as Other Groups, But Swear It Is Not Corrupting.

Common Cause and Campaign for America promoted BCRA with the same style of issue advocacy Plaintiff National Right to Life Committee, Inc. ("NRLC") used to oppose BCRA.⁵

These "reformers" say issue advocacy is corrupting, but under oath they insist that their activity is noncorrupting, done with legitimate legislative purpose. This story is told for its telling irony and the proposition that assertions under oath are more credible – there is no corruption.

NRLC has a long history of opposing the sort of campaign finance legislation that became BCRA. *Declaration of David N. O'Steen, Ph.D., Executive Director, National Right to Life Committee, Inc.*, MC 271-82 and referenced Exhibits ("*NRLC Declaration*").⁶ Since 1996, NRLC has scored congressional votes against BCRA-style campaign finance legislation along with votes against as abortion, infanticide, assisted suicide, and euthanasia as votes aligned with NRLC's position. MC 293-94 (and referenced exhibits). In 1998, Dr. O'Steen and Douglas

⁴Madison Center Plaintiffs adopt the arguments made in the omnibus briefing.

⁵The League of Women Voters of the United States ("LWV") has similarly advocated for BCRA-style legislation and run ads advocating it. For example, on October 2, 1997, the LWV issued a press release entitled "League Ads Target Maine for Key Campaign Finance Vote" and an ad transcript entitled "One Simple Message/Maine." *Affidavit of Lloyd Leonard on Behalf of League of Women Voters*, MC 1427-28 (and referenced exhibit). The press release explained that the radio ad targeted "Maine Senators Snowe and Collins [who were] regarded as key swing votes on the Lott amendment," which LWV wanted to defeat as a "'poison pill' amendment." *Id.*

⁶For example, in November 1995, NRLC sent a letter to Senators explaining that the Senate Campaign Finance Reform Act of 1995 (S. 1219) would "almost entirely eliminate involvement in the political process for ordinary citizens who are not independently wealthy" and its definition of "express advocacy" would include "issue advocacy" so that non-PAC citizens groups could not inform the public about candidates' positions and voting records. *NRLC Deposition*, MC 272 (and referenced exhibit); *see also id.* at MC 272, 275, 280-81 (and referenced exhibits; letters to Congress opposing campaign finance legislation). Dr. O'Steen testified before Congressional committees in 1996 and 1997 in opposition to BCRA-style legislation. *Id.* at MC 272, 274 (and referenced exhibits). He and NRLC's Legislative Director, Douglas Johnson, published articles, critiques, memoranda, and press releases analyzing and criticizing BCRA-style legislation. *Id.* at MC 273-76, 278-79, 281-82 (and referenced exhibits).

Johnson authored a letter to Sen. McCain, explaining their opposition to his campaign finance legislation and refuting his assertion that such opposition was “ancillary” to NRLC’s mission:

[W]e emphatically disagree with your statement that these questions are “ancillary (if that)” to NRLC’s main mission. In our view, if citizen groups’ communications to the public had been restricted over the past 25 years in the ways that you have proposed in successive versions of your legislation, abortion would not be anything like the major *public policy* issue that it is today. Indeed, there are other nations which have elected legislatures, but in which elites of the political parties and news media have vastly more power to collectively exclude undesired issues from the political realm. Efforts to impose such false “consensus” have failed in this nation in large part because groups such as NRLC have been free to transmit to the public very specific information about specific politicians’ positions and votes.

MC 277 and referenced Exhibit.

NRLC has aired advertisements in opposition to BCRA-style campaign finance legislation, and NRL-PAC has aired express-advocacy ads opposing candidates supporting such legislation. MC 276-80 and referenced Exhibits.

In January 2000, Gov. Bush and Sen. McCain were seeking the Republican presidential nomination. NRLC used the occasion of national attention on these candidates to continue its long-term battle against BCRA-style legislation, just as Sen. McCain used his national attention to promote McCain-Feingold legislation.⁷ On January 10, 2000, New Hampshire Citizens for Life and NRLC issued a press release declaring that their PACs were “launch[ing a] new radio ad campaign highlighting John McCain’s Attacks on free speech about politicians” and urging voters to “[l]et John McCain know that freedom of speech about politicians is not a joke. Vote

⁷NRL-PAC also opposed Sen. McCain on the ground that he had an inferior pro-life record to the other Republican candidates, declaring no endorsement for any of the other candidates because all had “good pro-life positions.” MC 279 (and referenced exhibit). Sen. McCain promptly turned the issue into a campaign-finance debate issuing a press release erroneously claiming that these *PAC* ads were paid for with “soft money” and that his “campaign finance proposals would eliminate this kind of money from politics.” *Id.* (and referenced exhibit). NRL-PAC promptly issued a press release rejecting McCain’s claim that a *PAC* ad could be paid for with “soft money.” *Id.* (and referenced exhibit).

for somebody else.” MC 280 (and referenced exhibit) (Exhibit B-36 includes supporting materials and a similar press release of January 19). In the same press release, these two organizations announced that they were also doing a non-PAC ad entitled “You Have a Right to Remain . . . Silent” that focused on McCain-Feingold legislation that would ban mentioning a federal candidate in a broadcast communication for 60 days before an election, as became law in BCRA. *Id.* The press release clearly noted the distinction between the express advocacy the PACs were doing and the issue advocacy done in the non-PAC ads. *Id.*

NRLC believes its activities are non-corrupting:

NRLC does not believe any of its activities corrupt or appear to corrupt any federal, state or local candidates or officeholders. NRLC and its members have various interests that are served through communications and other activities with its members and the general public, and these political activities are necessarily funded with money. Indeed, NRLC believes that its activities, rather than creating an appearance of corruption, instill in the general public a sense of confidence that avenues for pursuing legitimate common interests are available to all. [MC 298.]

Common Cause (“CC”) has had “Campaign Finance Reform . . . at the heart of what [it] does since its inception” in 1970. *Deposition of Matt Keller* (CC Legislative Director) at 17-18 (“*Common Cause Deposition*”). “While it has done no *broadcast* ads -- so it did no “electioneer-ing communication” -- CC has engaged in activities that could be interpreted as opposing or promoting candidates around election time. These should clearly be “corruption” under Defendants’ broad definition of “corruption” (discussed *infra*) because favored candidates might feel “gratitude” for CC’s hard work. Yet CC insists, under oath, that its activities are noncorrupting.

As the 2000 New Hampshire primaries approached, CC, “staged an event with Senator[s] McCain and . . . Bradley around the issue of Campaign Finance Reform generally” and a pledge to support BCRA-style legislation particularly. *Id.* at 105. An op-ed piece published on CC’s website, extolled McCain and Bradley as the presidential candidates who understood the need for

BCRA-style legislation and pledged to enact it. *Id.* at Exhibit 20. The “purpose was to raise the visibility of the issue of Campaign Finance Reform,” not to influence a federal election. *Id.* at 106. CC acknowledged that it was “possible” that the op-ed piece could influence the federal election, but declared “that was not [its] intent.” *Id.* at 107. It disavowed any “intention to support . . . candidates,” only “the issue,” although it acknowledged that “[a] possible effect of the support of the issue could be interpreted as support of the candidate.” *Id.*⁸

Within 30 days of a primary election and while Gov. Bush and Sen. McCain were presidential candidates, CC distributed nationwide a press release about Bush’s campaign finance proposals subtitled “Proposal ‘Fails Test of Reform.’” *Id.* at Exhibit 22. The document described Bush’s proposal as “flawed,” “fail[ing] the test of reform,” “not even-handed,” and “a hodge-podge of half-steps which would do nothing to further real reform..” *Id.* “The purpose . . . was to encourage Governor Bush to propose a . . . package that was . . . truly reform,” said CC, and “it’s possible that this could influence[] a federal election.” *Id.* at 111-12. The statement did not “promote[] or support[] a candidate for federal office,” said CC, although a voter could so interpret it, and “it’s possible to read that as opposing or . . . attacking the proposal put forth by then Governor Bush. . . . It’s an attack on the proposal itself.” *Id.* at 113. But, declared CC, it was not an attack on Governor Bush. *Id.*

Within 30 days of a primary election, while Sen. Gore was a presidential candidate, CC

⁸CC, in its own name or through its Americans4Reform.com project, financed a number of “Town Hall Meetings” or “Town Hall Forums” in New Hampshire and other states to promote campaign finance legislation, at least one event happening to coincide with active primary campaigns and several mentioning (and some having present) members of Congress who would be candidates in the next election, but CC stated there was no intent to influence any election or promote or oppose candidates (although in some cases it admitted the activity might be so viewed). *Id.* at 116- 117 & Exhibit 23, p.2 (N.H., Jan. 13, 2000); *id.* at 132-36 & Exhibit 30 (Ark., Jan. 29, 2001); *id.* at 136-39 & Exhibit 31 (Ill., Feb. 12, 2001); *id.* at 139-42 & Exhibit 32 (Tenn., Sep. 7, 2001).

distributed nationwide a press release about Gore's campaign finance proposals subtitled "Gore Sets Forth Innovative Plan for Reform." *Id.* at 113-15 & Exhibit 23. The release described Gore's proposal as "sending a strong statement," "innovative and promising," and "seek[ing] to seriously address [campaign finance legislation]." "Gore is putting forth strong reform proposals in contrast to . . . Bush," CC declared. *Id.* at Exhibit 23. "The purpose of the press release," declared CC, "was to highlight . . . that . . . yet another candidate . . . was making . . . Reform a primary issue in his campaign," not to influence the election, although it "could" affect the election." *Id.* at 115. CC didn't think the release promoted or supported Gore. *Id.*⁹

In March or April 2000, within 30 days of a primary, while Gov. Bush was a presidential candidate, CC distributed nationwide on its website an op-ed piece entitled "Bush's Campaign Finance Plan Too Weak." *Id.* at 130-32 & Exhibit 45. The plan derided Bush's plan as "keeping up with the Jones" and "rearranging the deck chairs on the Titanic," but CC affirmed no intent to influence the election (acknowledging the communication would possibly do so) or attack or oppose candidate Bush (although it believed it could be so interpreted). *Id.* at 131-32.¹⁰

On October 18, 2000, shortly before the general election, CC issued nationwide a press release announcing a "Reform Report Card" (grading members of congress on support for BCRA-style legislation) and listing signors of CC's "Public Integrity Pledge" (thereby promising

⁹After the 2000 Democratic and Republican conventions and while Senators Gore and Lieberman were presidential and vice-presidential candidates, CC released nationwide a press release extolling their commitment to campaign finance legislation and describing Lieberman as "a consistent and effective champion of campaign finance reform." *Id.* at 117-20 & Exhibit 24. There was no purpose to influence the election or promote the named candidates, said CC, but this would possibly happen. *Id.* at 119-20.

¹⁰CC also engaged "50 [to] 70 volunteers who c[a]me in to [CC] every week," *id.* at 151, in making phonebank calls to get CC members to call legislators about pending legislation. *Id.* at 151-52 & Exhibits 41-43. Calls were made employing one phonebank memo into Delaware, in March 1998, urging Rep. Mike Castle to oppose a certain amendment. *Id.* at 152 & Exhibit 42. Rep. Castle was a candidate for reelection in November 1998 in the general election. The declared purpose was opposing a "phony" bill and supporting a proper one, not influencing an election (but CC admitted it possibly do so). *Id.* 152.

to support CC's favored legislation). *Id.* at 119-21 & Exhibits 25 & 27.¹¹ The scorecard included an "honor roll" of legislators voting CC's way. *Id.* at 127 & Exhibit 27. CC affirmed the scorecard's purpose was informing people about how legislators voted, *id.* at 122, and "encourag[ing] . . . Members of Congress to vote [right] in the next vote," *id.* at 122-23, not influencing elections or promoting candidates, but it could be so interpreted. *Id.* at 122-125.

Were all these communications discussing legislation and legislators (sometimes candidates) that sometimes coincided with election campaigns corrupting to the political system? CC declared that it did not "believe that if a Member of Congress, as a result of [CC's] communications, supported Campaign Finance Reform or whatever [CC] w[as] advocating" that "that [would] give rise to an appearance of corruption." *Id.* at 155. Could these activities affect federal elections? CC declared "they could . . . impact . . . how people vote." *Id.* at 156. Could they be viewed "as either attacking or defending or promoting an individual candidacy?" *Id.* "Yes." *Id.*

Campaign for America's ("CFA") purpose is promoting BCRA-style legislation. *Telephonic Deposition of Cheryl Perrin* (CFA Executive Director) at 9 ("*CFA Deposition*"). CFA is funded primarily or solely by its founder, Jerome Kohlberg, Jr. *Id.* at 10. CFA has broadcast numerous ads promoting BCRA-style legislation that mentioned elected officials, some of whom were candidates in the next election. *See, e.g., id.* at Exhibit D (joint press release and radio ad scripts by CC and CFA). CFA even filed FEC independent expenditure reports for two ads mentioning federal candidates in Kentucky within 60 days of the November 1998 election,

¹¹CC communicated to the public on a "case-by-case basis" who signed the integrity pledge, including communications about who signed and didn't vote as CC wanted. *Id.* at 127. Such communications were issued around the time of votes of campaign finance legislation, which could coincide with election campaigns. *Id.* at 128. The declared purpose of such tactics was not to influence elections or promote or attack candidates, but to "try to get somebody's vote." *Id.* CC acknowledged that such activity could influence elections and could be interpreted as promoting or opposing candidates. *Id.*

one entitled “That Dog Don’t Hunt”¹² and the other entitled “Again.”¹³ *Id.* at 14-24 & Exhibits A & F (at 2-3; Bates-stamped 437-38). In regard to “Dog,” CFA believed it could “probably” affect a federal election and that “it supported . . . [] Candidate Baesler because we . . . our sole purpose was to have Campaign Finance Reform.” *Id.* at 20 (ellipses in original to indicate pauses). CFA intended to influence a federal election with “Again,” believed it would do so, and declared the ad did not “expressly advocate against Candidate Bunning” but “advocate[d] a lack of support from Candidate Bunning for Campaign Finance Reform.” *Id.* at 22-23. CFA said on the FEC website printout showed \$466,029 in expenditures for “Dog” and “Again.” *Id.* at 24 & Exhibit B.

CFA published a “Legislative Report Card” giving “Thumbs Up” to advocates of BCRA-style legislation, including Senators McCain and Feingold and Rep. Scotty Baesler. *Id.* at Exhibit C. CFA didn’t intend to influence an election and didn’t believe the report could do so. *Id.* at 26.

¹²The text of “That Dog Don’t Hunt” follows:

Scotty Baesler, a leader for campaign finance reform.

Jim Bunning? Hunting for money to fund his campaign.

After big HMOs gave him thousands in contributions, Bunning flipped-flopped and opposed HMO reform.

Now Bunning is Hunting for more money – still listening to special interests, not the people of Kentucky.

Maybe that’s why Bunning voted no on campaign finance reform.

When you vote on November 3rd, show Jim Bunning that, in Kentucky, that dog don’t hunt.

Id. at Exhibit A (Bates-stamped 039).

¹³The text of “Again” follows:

Remember how Jim Bunning took money from HMOs, then opposed a patients protection act?

Well he’s at it again. Hunting for campaign money, rolling over for special interests.

Now we learn, Bunning took thousands from health care interests, then voted to slash Medicare. Forcing senior into expensive private health insurance.

With all this special interest money, no wonder Bunning voted “no” on campaign finance reform.

On November 3rd, send Jim Bunning and his hungry dogs, back to the pound.

Id. at Exhibit F (Bates-stamped 438). CFA did not believe it “clear cut” that this ad “was solely to defeat Mr. Bunning and to support Scotty Baesler,” but that “[the ad] related to Campaign Finance Reform and mak[ing] the issues known or the candidates’ positions known and that is the basis, supporting Campaign Finance Reform and Jim Bunning did not support Campaign Finance Reform.” *Id.* at 21.

CFA has also broadcast grass-roots-lobbying radio ads mentioning federal legislators by name and encouraging listeners to call these legislators and vote for BCRA-style legislation or to pressure leaders, e.g., Sen. Lott, to hear CFA's favored legislation. *See, e.g., id.* at 28-31 & Exhibit D (press release and text of ads); *see also Declaration of Cheryl Perrin* (declaring which ads in the *CFA Deposition* exhibits were actually published). CFA's said that its purpose was educating the public and seeking support for BCRA-style legislation, not influencing elections, that these ads could not affect federal elections, and that the ads did not attack or support any named candidate. *Id.* at 30. CFA declared that, if a legislator did what CFA urged in its ads, there was no corruption because "[t]here would be no gain for that on either side." *Id.* at 59-60.

If all the above activity sounds like the busy marketplace of ideas in a vibrant democracy, it is because it is. Some of it fell within the BCRA blackout periods, but any of it could have, depending on when legislative action was occurring. Some of this vital political activity would be lost if BCRA were upheld. And the fact that "reform" groups and Plaintiffs engage in the same sort of activity belies any claim that the public perceives corruption in these activities. Indeed "reform" groups themselves do not view such activity as corrupting.

II. Defendants' "Corruption" Would Even Justify Banning Elections.

The government concedes that *Buckley* controls this case: "Under the Supreme Court's construction of FECA in *Buckley* and, in 1986, *MCFL*, so long as political communications did not include express advocacy, expenditures for those communications could go undisclosed under *Buckley*, and they could be financed directly from union or corporate treasuries." Brief of Defendants at 37 (internal citation omitted). But in an effort to justify BCRA, Defendants stretch the concept of quid pro quo corruption beyond recognition, so that it would justify banning public funding of elections and even elections. In *Buckley*, the Supreme Court indicated that

“quid pro quo” required a formal collaboration or agreement when it held that independent expenditures posed no corruption risk:

Unlike contributions, such independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive. *The absence of prearrangement and coordination* of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also *alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.*

424 U.S. at 47 (emphasis added).¹⁴ This language echos the conceptually similar holding of this Court that there can be no “coordination” unless there is at least such “[s]ubstantial discussion or negotiation . . . that the candidate and spender emerge as partners or joint venturers in the expressive expenditure.” *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 92 (D.D.C. 1999).¹⁵

In an effort to broaden “corruption” to justify BCRA, Defendants insist it can simply be “special treatment . . . for past or future donations.” Defendants’ Opening Brief at 78. But this temporal uncoupling fails the Supreme Court’s contemporaneous “prearrangement” requirement.

Then Defendants insist that quid pro quo corruption exists if an elected official might be “grateful.” *Id.* at 6, 41, 71, 143-45, I-106-07. If “gratitude” is corrupting, then surely the practice

¹⁴This was reaffirmed in *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), which struck down a \$1,000 cap on PACs for independent expenditures supporting candidates electing public funding. The Court cited the *Buckley* quote, *supra*, and declared that legislative responsiveness was “democracy,” not corruption:

The 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.

Id. at 498. The Court noted the “hypothetical[] possibil[ity] . . . that candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages,” but dismissed such speculation for the same reasons it did so in *Buckley*: “the absence of prearrangement and coordination . . . alleviates the danger.” *Id.*

¹⁵*Cf. Black’s Law Dictionary* 1123 (5th ed. 1979) (“Quid pro quo” “is nothing more than the mutual consideration which passes between the parties to a contract, and which renders it valid and binding.”).

of vote swapping, a.k.a. logrolling, in Congress must be outlawed, which BCRA fails to address.

But the Framers already thought of “gratitude,” and it cuts the wrong way for Defendants. A *Federalist* paper dealt with the charge that Members of Congress would “be most likely to aim at the ambitious sacrifice of the many to the aggrandizement of the few.” *The Federalist* No. 57 (Alexander Hamilton or James Madison) . But the author specifically listed “gratitude” as one of the reasons this would *not* happen.¹⁶ “[W]hat is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? . . . Duty, *gratitude*, interest, ambition itself, are the chords by which they will be bound to fidelity and sympathy with the great mass of the people.” *Id.* (emphasis added). The Framers already considered gratitude and undue influence. They answered those “who profess the most flaming zeal for republican government, yet boldly impeach the fundamental principle of it,” *id.*, with a confidence in “the vigilant . . . spirit which actuates the people of America” and the belief that legislators who would remain in office will be those who are grateful to the “great mass of the people” who put them in office. *Id.* The checks and balances are already built into “the genius of the whole system.” *Id.* BCRA disrupts this genius.

Defendants similarly insists that corruption exists if people who support a candidate get “access” to the official. Defendants’ Brief at 80. But if that were true, then lobbying would be corrupting unless officials provide equal time for all views. And people get access for many reasons besides giving money. Celebrities from entertainment and sports, as well as the editorial boards of prominent news organizations, get special access to elected officials. And some of

¹⁶ “[T]hey will enter into the public service under circumstances which cannot fail to produce a temporary affection at least to their constituents. There is in every breast a sensibility to marks of honor, of favor, of esteem, and of confidence, which, apart from all considerations of interest, is some pledge for *grateful* and benevolent return.” *Id.* (emphasis added).

these people use non-monetary influence to promote candidates with endorsements, slanted movies and television programs, editorials, and so on.¹⁷ If access is evil, then BCRA is unconstitutionally underinclusive, vitiating any asserted interest in preventing corruption. *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002) (judicial candidate rules underinclusive).

What Defendants really want to do is to make our government non-representative. They don't want to be accountable to the people who band together in expressive associations to amplify their voices. *Buckley*, 424 U.S. at 22. Defendants want to make elected officials like the unelected judiciary, with lifetime appointments, no ex parte access, and no discussion without all sides represented. But elected officials are not platonic guardians to govern the people. In our representative republic, they are accountable to the people. *Minnesota Republican Party*, 122 S. Ct. at 2551 (Ginsburg, J., dissenting, joined by Stevens, Souter, and Breyer, JJ.) ("Legislative and executive officials serve in representative capacities. They are agents of the people . . ."). And that means the rough and tumble of the public's issue advocacy encroaching on legislators' carefully planned legislative agendas and campaign plans.

¹⁷There are "forms of 'association' that can be fully as corrupt as a contribution intended as a quid pro quo such as the eleventh-hour endorsement by a former rival, obtained for the promise of a federal appointment." *Buckley*, 424 U.S. at 246 (Burger, CJ, concurring in part and dissenting in part).

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