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 Duchess 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 441*b* 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."