III. TITLE III OF BCRA IS UNCONSTITUTIONAL.

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

Defendants do not seriously dispute that section 305 of BCRA is a blatantly viewpoint-based restriction, which must be subject to the strictest scrutiny. Instead, defendants simply gloss over the serious constitutional infirmities inherent in the provision by attempting to characterize the statute as nothing more than a harmless disclosure requirement.[28]

In their defense of section 305, defendants ignore its most critical aspects. Section 305 — entitled "Limitation on Availability of Lowest Unit Charge for Federal Candidates Attacking Opposition" — was plainly intended to shield sitting legislators from negative speech about themselves. Thus, the very title of section 305 demonstrates that its purpose was to regulate advertisements based on the viewpoint of the speaker. Defendants unconvincingly claim that section 305 "provides voters with important additional information to consider in evaluating" a candidate, Br. 218, and that section 305 generally serves the purpose of preventing fraud and corruption, *see id.* at 216-17. But defendants are unable to connect these purported objectives to the actual requirements of the statute. It is not at all apparent how campaign advertisements that criticize or even merely refer to one's opponent either require more disclosure than other ads or are any more likely to be the source of fraud and corruption. At a minimum, defendants are

[28] In an effort to avoid defending the unabashedly viewpoint-based restrictions of section 305 of BCRA, defendants contend that Senator McConnell lacks standing to attack the provision because he has never "stated whether [he] intend[s] to run ads referring to [his] possible opponents in future elections." Br. 216. That statement, however, is manifestly false. Senator McConnell has testified without contradiction that, during his 1996 Senate campaign, his campaign committee produced a number of ads that were critical of his opponent and that he "intend[ed] to run similar ads in campaigns in the future and will be subject to the BCRA's discriminatory penalty for doing so." 2 PCS/McC 8 (McConnell). Senator McConnell therefore plainly has standing to challenge section 305.

unable to cite any claimed governmental objective that comes close to justifying the extraordinary breach of section 305, which penalizes candidates engaged in fully protected speech that merely mentions their opponents. *See Free Speech Coalition*, 122 S. Ct. at 1404.

Section 305 cannot survive the "most exacting" scrutiny reserved under the First Amendment for viewpoint-based restrictions on speech. It should therefore be struck down.

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

Section 318 is one of BCRA's most plainly unconstitutional provisions. The government's arguments to the contrary are unavailing.[29]

As a threshold matter, the government does not even acknowledge that minors have First Amendment rights, but instead asserts, without elaboration, that section 318 should be subject to less than strict scrutiny. *See* Br. 199. As we noted in our opening brief, however, *see* McConnell Br. 92, section 318 not only *limits* contributions by minors, but *bans* them altogether, and should therefore be subject to strict scrutiny under *Buckley v. Valeo*, 424 U.S. 1 (1976), since it prevents a would-be donor from engaging in the "undifferentiated, symbolic act of contributing," *id.* at 21.

The government seeks to justify section 318 mainly on the ground that the government has an interest in preventing circumvention of existing campaign contribution limits by parents. *See* Br. 200-01.[30] As we have already demonstrated, however, *see supra* Part I.B.3, the Supreme

[29] The intervenors do not defend the constitutionality of section 318.

[30] In apparent support of this argument, the government cites FEC statistics regarding the amount of contributions supposedly typically made by minors. *See* Br. 202. Those statistics, however, are not actually statistics regarding contributions actually made by minors; instead, they are statistics regarding contributions made by those who list their occupation as "students" — a significant number of whom

Court has never recognized that interest as a compelling one, and indeed the Court has applied an anti-circumvention rationale to justify campaign finance regulations only in certain narrow circumstances — and never to ban contributions made by one person in the name of another.

Even assuming, however, that the prevention of circumvention is a compelling governmental interest, the government cannot demonstrate that section 318 is narrowly tailored to that (or any other) interest. As discussed in greater detail in our opening brief, *see* McConnell Br. 93-94, to the extent that Congress intended to prevent circumvention by parents who have "maxed out" on their own contribution limits, it could have banned contributions by minors only in those circumstances, rather than banning *all* contributions by minors. Section 318 also fails to differentiate between contributions made from funds earned by minors themselves, as opposed to contributions made from funds given to minors by others, and contributions made at minors' own initiative, as opposed to contributions made at the direction of their parents. And to the extent that Congress was concerned about contributions by "babies, toddlers, and other young children" who truly lack the capacity to make independent decisions, Br. 205, it could simply have banned contributions by pre-teens, rather than contributions by all minors.[31] The mere fact that existing

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(including virtually all college students) are likely to be 18 or older.

[31] The government suggests that this Court should defer to Congress' decision to "draw the line" at age 18 and ban contributions by all minors under that age. Br. 205. As a threshold matter, plaintiffs are not merely challenging Congress' decision to draw the line at age 18 as opposed to age 17 or 19 (say, on equal-protection grounds), but instead are making the broader argument that section 318 imposes restrictions on a fundamental right and therefore cannot survive strict scrutiny. Several of the cases the government cites are distinguishable on that ground alone. *See, e.g., Craig v. Boren*, 429 U.S. 190, 197-99 (1976); *Stiles v. Blunt*, 912 F.2d 260, 262-66 (8th Cir. 1990); *Gaunt v. Brown*, 341 F. Supp. 1187, 1189-90 (S.D. Ohio 1972). As for *Buckley*, it too is inapposite. While the Supreme Court upheld particular limits that triggered reporting and recordkeeping requirements, *see* 424 U.S. at 83 n.111, those requirements, unlike section 318, did not impose an outright *ban* on expressive activity.

restrictions on the direction of contributions by parents through minors, *see, e.g.*, 2 U.S.C. § 441f, may be either difficult to enforce or simply not enforced very often, *see* Br. 203-04; 2 Echols ES, tabs 41-45, 47-49; McCain dep. 297, does not justify such broad regulation when so many narrowly tailored alternatives were readily available. Because a total ban on contributions by minors is substantially broader than necessary to achieve the interests justifying it, *see, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 799 n.7 (1989), and because it entirely lacks the "[p]recision of regulation" that is required "in an area so closely touching our most precious freedoms," *NAACP v. Button*, 371 U.S. 415, 438 (1963), it is unconstitutional.

The government relies on the FEC's annual reports to Congress, in which the FEC suggested that Congress should enact legislation regulating contributions by minors. *See* Br. 200. Nowhere, however, do those reports recommend that Congress completely ban such contributions. *See* 2 Echols ES, tabs 30-39. Instead, the FEC itself suggested more narrowly tailored alternatives — including a rebuttable presumption regarding the voluntariness of contributions by minors. *See id.* Moreover, the FEC admitted that only 1% or less of its investigations involved contributions by minors, *see* 2 Echols ES, tab 26, at 17 — thus raising serious questions, notwithstanding defendants' usual parade of anecdotal evidence, *see* Br. 201, as to how serious a problem the direction of contributions through minors really is.

In the end, the government is left to argue that section 318 passes constitutional muster simply because the government can impose a variety of restrictions on minors in other contexts, such as restricting the sale of alcohol to minors and rendering their contracts voidable. *See* Br. 205-07. Minors, however, have First Amendment rights — and an outright ban on contributions represents a plain violation of those rights. Section 318, too, should be struck down.