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.

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RNC TITLE III OPPOSITION

DEFENDANTS HAVE PROVIDED NO COMPELLING JUSTIFICATION FOR BCRA'S MILLIONAIRE'S PROVISIONS.

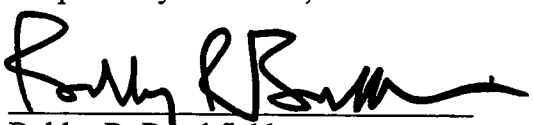
The so-called "Millionaire's Provisions" (i) undermine the Government's asserted justifications for FECA's contribution and coordinated-expenditure limits, and (ii) impermissibly prescribe different treatment of similarly situated candidates. RNC Br. 73-75.

1. Defendants concede, and indeed tout, that the Millionaire's Provisions is an effort by Congress to "level the playing field" between wealthy and not-so-wealthy candidates, and to enable candidates of modest means to "compete on a more equal footing." Def. Br. 192, 198. Indeed, Senator McCain testified candidly in this case that the Millionaire's Provisions were intended to "level the playing field." McCain Dep. 152. But, of course, *Buckley* rejected any asserted interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections" and stressed that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 48-49.

2. Defendants contend that by "partially relax[ing]" the contribution limits from $2000 to $12,000, Congress merely signaled that it was willing to "tolerate somewhat more risk of corruption" in order to serve its competing interest in leveling the playing field between candidates. Def. Br. I-155, I-158. Defendants pass this off as a careful "[b]alancing of competing goals" – a little extra corruption here in exchange for leveling the playing field there. Def. Br. I-158. Even if Defendants' explanation worked for the higher contribution limits, it does *not* work for the party coordinated-expenditure limits, which the Millionaire's Provisions lift altogether. As shown RNC Br. 73 (quoting Pet. Br. 24 in *Colorado II)*, the Government has already represented – successfully – to the Supreme Court that "*unlimited* coordinated

expenditures pose the same danger – *i.e.*, the risk of actual or perceived 'improper influence' based upon financial largess – as unrestricted campaign contributions by individuals or non-party committees." By now permitting those very same "*unlimited* coordinated expenditures," Congress has cast serious doubt on the genuineness of the Government's interest in coordinated-expenditure limits, but also has called into question whether BCRA was truly intended to fight corruption at all.

Respectfully submitted,



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Capítulo 3

THOMPSON TITLE III ARGUMENT

SECTION 318 OF BCRA, PROHIBITING CERTAIN POLITICAL CONTRIBUTIONS AND DONATIONS BY MINORS AGE SEVENTEEN AND YOUNGER IN UNCONSTITUTIONAL

The government argues that its prohibition of minors under the age of seventeen from contributing to a candidate, or donating to a committee of a political party shall be sustained against any First Amendment constitutional challenges because it "...demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of [First Amendment] freedoms." *Buckley*, 424 U.S. 1 (1976) at 25. The Court in *Buckley* held that the contribution provisions, along with those covering disclosure, are appropriate legislative weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions, and the ceilings imposed accordingly serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion. Pp. 23-38. The government's interest in safeguarding the integrity of the electoral process was balanced with the individual citizens' and candidates' rights to engage in political debate and discussion. Similarly, a balance must be found for young Americans who want to contribute to the candidate or donate to the committee of their choice, against the interest of the government to safeguard the electoral process. The Court in *Buckley* did not take away the rights of all large contributors by prohibiting them from making contributions. Thus, *Buckley* does not support the government's attempt to prohibit all minors from contributing or donating. The Court in *Buckley* upholds that contribution and disclosure provisions are legislative

weapons that can be used to protect the electoral process without impinging upon the rights of the individual. There are no such legislative weapons protecting the rights of the minor who wants to contribute or donate and have a First Amendment Constitutional right to express their support of their candidate. Section 318 of BCRA, if considered a legislative weapon, can only be likened to a weapon of mass destruction.

A. The Restriction Does Not Serve the Important Governmental Interest in Preventing the Use of Children to Evade FECA's Contribution Limits

The government recognizes that *some parents* (emphasis added), use their influence over their children and their control over their children's assets to circumvent the limits on contributions to candidates and parties. However, there is no evidence that this is the prevailing behavior of parents. There has been no quantitative evidence presented which explains why Congress felt compelled to ban minors completely. Granted, the government correctly states that "...one need not find that most parents seek to evade the limits to conclude that prophylactic measures are warranted..." See *Buckley*, 424 U.S. at 30. However the government should be able to define what "*some*" actually is.

According to 2000 Census reports, there are 72,293,812[1] minors in the United States. Yet, relatively few examples of parents using their children to evade FECA's contribution limits have been provided. It is an important government interest to protect the rights of minors. This governmental interest must be balanced against the governmental interest to protect the integrity of the electoral process.

[1] *See* Thompson Opp. Br. Appendix, Tab B, 1-2.

B. **The Prohibition of Certain Contributions by Children is not Carefully Drawn to Prevent Circumstances of the Statutory Dollar Limits by Other Individuals**

If the goal of section 318 of BCRA is to "...restore the integrity of the individual contribution limits..." 148 Cong. Rec.S2145- S2146, then it has missed its mark. Section 318 does not address the illegal behavior of *some* parents. It does not restore integrity because it only responds to those who ignore the law. Section 318 in no way acknowledges those parents who teach their children to do the right thing and participate in the electoral process lawfully. Integrity is restored when constitutional rights are protected and those who ignore and disrespect the constitution and our laws are punished for doing so.