

#### IV. TITLE V OF BCRA IS UNCONSTITUTIONAL.

##### A. By Imposing Onerous Recordkeeping And Disclosure Obligations On Broadcasters, Section 504 Of BCRA Is Unconstitutional.

As we noted in our opening brief, *see* McConnell Br. 97-100, section 504 of BCRA imposes burdensome and vague recordkeeping and disclosure requirements on broadcast licensees — requirements that are unconnected to any legitimate governmental objective. Defendants make no effort to come to grips with the vagueness inherent in section 504, which requires recordkeeping and disclosure whenever a would-be advertiser requests broadcast time for advertisements that discuss “matters of national importance.”<sup>32</sup>

Instead, defendants justify section 504 on the ground that it “provides public access to important information about political broadcasts” and is necessary because “[e]vidence suggests that voters currently have difficulty identifying the true sponsors of issue ads.” Br. 218. Defendants claim that this “lack of disclosure creates greater opportunities for political corruption.” *Id.*<sup>33</sup> Much of what section 504 requires, however, is wholly unrelated to these alleged objectives. Section 504 does not, as defendants claim, merely require the disclosure of the identity of speakers. Instead, in addition to unconstitutionally compelling “disclosure of

---

<sup>32</sup> Rather than deal head-on with the meaning of such a cryptic and ambiguous standard as “matters of national importance,” defendants merely compare the phrase to language in other existing disclosure requirements on broadcast licensees in the Communications Act and the FCC’s implementing regulations. *See* Br. 222. Notably, to our knowledge, no court has considered vagueness or overbreadth challenges to these provisions. At least one court has even recognized the constitutional uncertainty of compelling broadcasters to investigate the true sponsors of political speech under current FCC regulations. *See Loveday v. FCC*, 707 F.2d 1443, 1457-59 (D.C. Cir. 1983).

<sup>33</sup> On the one hand, defendants claim that the burdensome new requirements of sections 305 and 504 are necessary to promote full disclosure and to combat fraud and corruption. *See id.* at 211-13. Yet, at the same time, defendants cast doubt on the need for new disclosure requirements when they claim that sections 305 and 504 are in fact similar in both language and substance to existing requirements. *See id.* at 221-22.

affiliation with groups engaged in advocacy," McConnell Br. 99 (citing *NAACP v. Alabama*, 357 U.S. 449, 462 (1958)), section 504 also requires broadcasters to disclose the date and time on which communications are aired; the rate charged; the class of time purchased; and the issues to which the communications "refer." Moreover, section 504 requires broadcasters to maintain and disclose detailed information about requests for advertising time which are refused, as well as those which are granted. Defendants make no attempt to explain how any of this information is remotely relevant to the purported purposes of section 504.

Although defendants would have this Court believe that the requirements of section 504 are harmless and even run-of-the-mill, those requirements are in fact wide-ranging and unprecedented in their intrusiveness. They plainly trample on the First Amendment rights of broadcasters and political speakers alike.

## CONCLUSION

For the foregoing reasons, the above-cited provisions of BCRA should be declared unconstitutional.

*Floyd Abrams / E.M.D.*

Floyd Abrams (*pro hac vice*)  
Susan Buckley (*pro hac vice*)  
Brian T. Markley  
CAHILL GORDON & REINDEL  
80 Pine Street  
New York, NY 10005  
(212) 701-3000

*Attorneys for Senator Mitch McConnell and  
National Association of Broadcasters*

Kathleen M. Sullivan (*pro hac vice*)  
559 Nathan Abbott Way  
Stanford, CA 94305  
(650) 725-9875

*Attorney for Senator Mitch McConnell*

Valle Simms Dutcher (*pro hac vice*)  
L. Lynn Hogue (*pro hac vice*)  
Harry W. MacDougald (*pro hac vice*)  
SOUTHEASTERN LEGAL FOUNDATION, INC.  
3340 Peachtree Road, N.E.  
Suite 3515  
Atlanta, GA 30326  
(404) 365-8500

*Attorneys for Southeastern Legal Foundation,  
Inc.; Representative Bob Barr; Center for  
Individual Freedom; National Right to Work  
Committee; 60 Plus Association, Inc.; and U.S.  
d/b/a Pro English*

Respectfully submitted,

*Kenneth W. Starr / E.M.D.*

Kenneth W. Starr (Bar No. 273245)  
Edward W. Warren (Bar No. 88740)  
Kannon K. Shanmugam (Bar No. 474304)  
Grant M. Dixton (Bar No. 478221)  
KIRKLAND & ELLIS  
655 Fifteenth Street, N.W.  
Washington, DC 20005  
(202) 879-5000

*Attorneys for Senator Mitch McConnell;  
Southeastern Legal Foundation, Inc.;  
Representative Bob Barr; Center for Individual  
Freedom; National Right to Work Committee;  
60 Plus Association, Inc.; and U.S. d/b/a Pro  
English*

Jan Witold Baran (Bar No. 233486)  
Thomas W. Kirby (Bar No. 915231)  
Lee E. Goodman (Bar No. 435493)  
WILEY, REIN & FIELDING LLP  
1776 K Street, N.W.  
Washington, DC 20006  
(202) 719-7000

*Attorneys for Senator Mitch McConnell;  
Associated Builders and Contractors, Inc.;  
Associated Builders and Contractors Political  
Action Committee; Chamber of Commerce of  
the United States; National Association of  
Manufacturers; U.S. Chamber Political Action  
Committee; California Republican Party;  
Shawn Steel; Timothy Morgan; Barbara Alby;  
Santa Cruz Republican Central Committee;  
and Douglas R. Boyd, Sr.*

Alan P. Dye (Bar No. 215319)  
Heidi K. Abegg (Bar No. 463935)  
WEBSTER, CHAMBERLAIN & BEAN  
1747 Pennsylvania Avenue, N.W.  
Suite 1000  
Washington, DC 20006  
(202) 785-9500

*Attorneys for Representative Mike Pence;  
Alabama Attorney General Bill Pryor;  
Libertarian National Committee, Inc.; Club for  
Growth, Inc.; Indiana Family Institute, Inc.;  
National Right to Life Committee, Inc.;  
National Right to Life Educational Trust Fund;  
National Right to Life Political Action  
Committee; Trevor M. Southerland; and  
Barrett Austin O'Brock*

Jay Alan Sekulow (*pro hac vice*)  
THE AMERICAN CENTER FOR LAW AND JUSTICE  
1000 Regent University Drive  
P.O. Box 64429  
Virginia Beach, VA 23464  
(757) 226-2489

*Attorney for Emily Echols; Hannah McDow;  
Isaac McDow; Jessica Mitchell; Daniel Solid;  
and Zachary C. White*

G. Hunter Bates (*pro hac vice*)  
1215 Cliffwood Drive  
Goshen, KY 40026  
(502) 473-7557

*Attorney for Senator Mitch McConnell and  
Thomas E. McInerney*

James Bopp, Jr. (*pro hac vice*)  
Thomas J. Marzen (*pro hac vice*)  
Richard E. Coleson (*pro hac vice*)  
BOPP, COLESON & BOSTROM  
James Madison Center for Free Speech  
1 South Sixth Street  
Terre Haute, IN 47807  
(812) 232-2434

*Attorneys for Representative Mike Pence;  
Alabama Attorney General Bill Pryor;  
Libertarian National Committee, Inc.; Club for  
Growth, Inc.; Indiana Family Institute, Inc.;  
National Right to Life Committee, Inc.;  
National Right to Life Educational Trust Fund;  
National Right to Life Political Action  
Committee; Trevor M. Southerland; and  
Barrett Austin O'Brock*

James Matthew Henderson, Sr. (Bar No.  
452639)  
Colby M. May (Bar No. 394340)  
THE AMERICAN CENTER FOR LAW AND JUSTICE  
205 Third Street, S.E.  
Washington, DC 20003  
(202) 546-8890

*Attorneys for Emily Echols; Hannah McDow;  
Isaac McDow; Jessica Mitchell; Daniel Solid;  
and Zachary C. White*

Benjamin L. Ginsberg (Bar No. 370658)  
PATTON BOGGS LLP  
2550 M Street, N.W.  
Washington, DC 20037  
(202) 457-6000

*Attorney for Republican National Committee;  
Mike Duncan; Republican Party of Colorado;  
Republican Party of Ohio; Republican Party of  
New Mexico; and Dallas County (Iowa)  
Republican County Central Committee*

Thomas J. Josefiak  
Charles R. Spies  
REPUBLICAN NATIONAL COMMITTEE  
310 First Street, S.E.  
Washington, DC 20003  
(202) 863-8500

*Attorneys for Republican National Committee;  
Mike Duncan; Republican Party of Colorado;  
Republican Party of Ohio; Republican Party of  
New Mexico; and Dallas County (Iowa)  
Republican County Central Committee*

Charles H. Bell, Jr. (*pro hac vice*)  
Alison R. Hayward (Bar No. 449693)  
BELL, MCANDREWS, HILTACHK & DAVIDIAN,  
LLP  
455 Capitol Mall  
Suite 801  
Sacramento, CA 95814  
(916) 442-7757

*Attorneys for California Republican Party;  
Shawn Steel; Timothy Morgan; Barbara Alby;  
Santa Cruz Republican Central Committee;  
and Douglas R. Boyd, Sr.*

Bobby R. Burchfield (Bar No. 289124)  
Thomas O. Barnett (Bar No. 426840)  
Kevin C. Newsom  
COVINGTON & BURLING  
1201 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
(202) 662-6000

*Attorneys for Republican National Committee;  
Mike Duncan; Republican Party of Colorado;  
Republican Party of Ohio; Republican Party of  
New Mexico; and Dallas County (Iowa)  
Republican County Central Committee*

Michael A. Carvin (Bar No. 366784)  
JONES, DAY, REAVIS & POGUE  
51 Louisiana Avenue, N.W.  
Washington, DC 20001  
(202) 879-3939

*Attorney for Republican National Committee;  
Mike Duncan; Republican Party of Colorado;  
Republican Party of Ohio; Republican Party of  
New Mexico; and Dallas County (Iowa)  
Republican County Central Committee*

Lance H. Olson (*pro hac vice*)  
Deborah B. Caplan (*pro hac vice*)  
OLSON, HAGEL & FISHBURN LLP  
555 Capitol Mall  
Suite 1425  
Sacramento, CA 95814  
(916) 442-2952

*Attorneys for California Democratic Party; Art  
Torres; and Yolo County Democratic Central  
Committee*

Joseph E. Sandler (Bar No. 255919)  
Neil P. Reiff (Bar No. 448170)  
John Hardin Young (Bar No. 190553)  
SANDLER, REIFF & YOUNG, P.C.  
50 E Street, S.E.  
Suite 300  
Washington, DC 20003  
(202) 479-1111

*Attorneys for California Democratic Party; Art  
Torres; and Yolo County Democratic Central  
Committee*

Cleta Mitchell (Bar No. 433386)  
FOLEY & LARDNER  
3000 K Street, N.W.  
Suite 500  
Washington, DC 20007  
(202) 295-4081

*Attorney for National Rifle Association of  
America and National Rifle Association  
Political Victory Fund*

Brian S. Koukoutchos  
COOPER & KIRK, PLLC  
28 Eagle Trace  
Mandeville, LA 70471  
(985) 626-4409

*Attorney for National Rifle Association of  
America and National Rifle Association  
Political Victory Fund*

Steven R. Shapiro (*pro hac vice*)  
Mark J. Lopez (*pro hac vice*)  
AMERICAN CIVIL LIBERTIES UNION  
125 Broad Street  
New York, NY 10004  
(212) 549-2611

*Attorneys for American Civil Liberties Union*

Joel M. Gora (*pro hac vice*)  
BROOKLYN LAW SCHOOL  
250 Joralemon Street  
Brooklyn, NY 11201  
(718) 780-7926

*Attorney for American Civil Liberties Union*

Charles J. Cooper (Bar No. 248070)  
David H. Thompson (Bar No. 450503)  
Hamish P.M. Hume (Bar No. 449914)  
Derek L. Shaffer (Bar No. 478775)  
COOPER & KIRK, PLLC  
1500 K Street, N.W.  
Suite 200  
Washington, DC 20005  
(202) 220-9600

*Attorneys for National Rifle Association of  
America and National Rifle Association  
Political Victory Fund*

Michael B. Trister (Bar No. 54080)  
LICHTMAN, TRISTER, SINGER & ROSS  
1666 Connecticut Avenue, N.W.  
Suite 500  
Washington, DC 20009  
(202) 328-1666

*Attorney for the American Federation of Labor  
and Congress of Industrial Organizations and  
AFL-CIO Committee on Political Education  
Political Contributions Committee*

Larry P. Weinberg (Bar No. 129619)  
Robert D. Lenhard (Bar No. 406930)  
AMERICAN FEDERATION OF STATE, COUNTY  
AND MUNICIPAL EMPLOYEES  
1101 17th Street, N.W.  
Suite 900  
Washington, DC 20036  
(202) 775-5900

*Attorneys for the American Federation of  
Labor and Congress of Industrial  
Organizations and AFL-CIO Committee on  
Political Education Political Contributions  
Committee*

Jan Amundson (Bar No. 953083)  
THE NATIONAL ASSOCIATION OF  
MANUFACTURERS  
1331 Pennsylvania Avenue, N.W.  
Suite 600, North Lobby  
Washington, DC 20004  
(202) 637-3055

*Attorney for the National Association of  
Manufacturers*

November 20, 2002

Laurence E. Gold (Bar No. 336891)  
AFL-CIO  
815 Sixteenth Street, N.W.  
Washington, DC 20006  
(202) 637-5130

*Attorney for the American Federation of Labor  
and Congress of Industrial Organizations and  
AFL-CIO Committee on Political Education  
Political Contributions Committee*

Stephen A. Bokat (Bar No. 175919)  
Robin S. Conrad (Bar No. 342774)  
NATIONAL CHAMBER LITIGATION CENTER, INC.  
1615 H Street, N.W.  
Washington, DC 20062  
(202) 463-5337

*Attorneys for the Chamber of Commerce of the  
United States*

Sherri L. Wyatt (Bar No. 390314)  
Cherlyn Freeman-Watkins  
SHERRI L. WYATT, PLLC  
International Square Building  
1825 I Street, N.W.  
Suite 400  
Washington, DC 20006  
(202) 429-2009

*Attorneys for Representative Bennie G.  
Thompson and Representative Earl F. Hilliard*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**SENATOR MITCH McCONNELL, et al.,**  
Plaintiffs,

v.

**FEDERAL ELECTION COMMISSION, et al.,**  
Defendants.

Civ. No. 02-0582  
(CKK, KLH, RKL)

**CERTIFICATE OF SERVICE**

I hereby certify that, on November 20, 2002, I served true and correct copies of the foregoing (1) Consolidated Opposition Brief for Plaintiffs in Response to Defendants' Motion for Judgment and (2) Supplemental Appendix to the Opposition Brief of the National Rifle Association and the National Rifle Association Political Victory Fund on the following by electronic mail and hard copy by overnight delivery or by facsimile:

Floyd Abrams  
Cahill Gordon & Reindel  
80 Pine Street  
New York, NY 10005  
(212) 701-3621 – telephone  
(212) 269-5420 – fax

G. Hunter Bates (waived facsimile service)  
1215 Cliffwood Drive  
Goshen, KY 40026  
(502) 216-9625 – telephone  
(502) 473-8338 – fax

Jan Witold Baran (waived facsimile service)  
Thomas W. Kirby (waived facsimile service)  
Wiley Rein & Fielding  
1776 K Street, N.W.  
Washington, DC 20006  
(202) 719-7330 – telephone  
(202) 719-7049 – fax



James Bopp, Jr.  
Richard E. Coleson  
Bopp, Coleson & Bostrom  
1 South Sixth Street  
Terre Haute, IN 47807  
(812) 232-2434 – telephone  
(812) 235-3685 – fax

Cleta Mitchell (waived facsimile service)  
Foley & Lardner  
Suite 500  
3000 K Street, N.W.  
Washington, DC 20007  
(202) 295-4081 – telephone  
(202) 672-5399 – fax

Sherri L. Wyatt  
Sherri L. Wyatt PLLC  
1825 I Street, N.W.  
Suite 400  
Washington, DC 20006  
(202) 529-9450 – telephone  
(202) 429-9574 – fax

Charles J. Cooper  
Cooper & Kirk  
1500 K Street, N.W.  
Suite 200  
Washington, DC 20005  
(202) 220-9600 – telephone  
(202) 220-9601 – fax

Valle Simms Dutcher (waived facsimile service)  
Southeastern Legal Foundation, Inc.  
3340 Peachtree Road, N.E.  
Suite 3515  
Atlanta, GA 30326  
(404) 365-8500 – telephone  
(404) 365-0017 – fax

Laurence E. Gold (waived facsimile service)  
AFL-CIO  
815 Sixteenth Street, N.W.  
Washington, DC 20006  
(202) 637-5130 – telephone  
(202) 637-5323 – fax

William J. Olson (waived facsimile service)  
William J. Olson, PC  
8180 Greensboro Drive  
Suite 1070  
McLean, VA 22102  
(703) 356-5070 – telephone  
(703) 356-5085 – fax

Mark J. Lopez (waived facsimile service)  
ACLU Foundation  
125 Broad Street  
New York, NY 10004  
(212) 549-2608 – telephone  
(212) 549-2651 – fax

James Matthew Henderson, Sr.  
The American Center for Law and Justice  
205 Third Street, S.E.  
Washington, DC 20003  
(202) 719-7330 – telephone  
(202) 337-3167 – fax

Joseph E. Sandler  
Sandler, Reiff & Young PC  
50 E Street, S.E.  
Suite 3000  
Washington, DC 20003  
(202) 479-1111 – telephone  
(202) 479-1115 – fax

John C. Bonifaz (waived facsimile service)  
National Voting Rights Institute  
One Brodfield Street  
Boston, MA 02108  
(617) 368-9100, x10 – telephone  
(617) 368-9101 – fax

James J. Gilligan  
U.S. Department of Justice  
20 Massachusetts Ave, N.W.  
Room 7136  
Washington, DC 20001  
(202) 514-3358 – telephone  
(202) 616-8470 – fax

Stephen E. Hershkowitz  
Federal Election Commission  
999 E Street, N.W.  
4<sup>th</sup> Floor  
Washington, D.C. 20463  
(202) 694-1650 – telephone  
(202) 219-0260 – fax

Seth P. Waxman  
Roger M. Witten  
Randolph D. Moss  
Wilmer, Cutler & Pickering  
2445 M Street, N.W.  
Washington, DC 20037  
(202) 663-6640 – telephone  
(202) 663-6363 – fax

Frederick A.O. Schwarz, Jr. (waived facsimile service)  
E. Joshua Rosenkranz (waived facsimile service)  
Brennan Center for Justice  
161 Avenue of the Americas, 12<sup>th</sup> floor  
New York, NY 10013  
(212) 998-6730 – telephone  
(212) 995-4550 – fax

Bobby R. Burchfield (waived facsimile service)  
Covington & Burling  
1201 Pennsylvania Ave., N.W.  
Washington, D.C. 20004  
(202) 662-5350 – telephone  
(202) 778-5350 – fax

**Service via e-mail only:**

Richard O. Wolf  
Moore & Lee LLP  
1750 Tysons Boulevard  
Suite 1450  
McLean, VA 22102

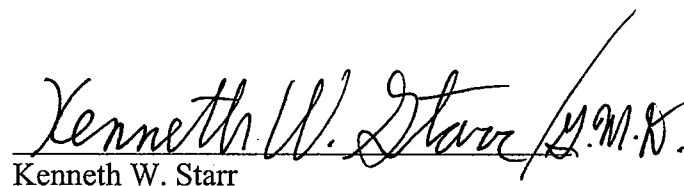
David J. Harth  
Heller, Ehrman, White & McAuliffe  
One East Main Street Suite 201  
Madison, WI 53703

Bradley S. Phillips  
Munger, Tolles & Olson LLP  
355 South Grand Avenue  
35th Floor  
Los Angeles, CA 90071

Donald J. Mulvihill  
Cahill Gordon & Reindel  
1990 K Street, N.W.  
Washington, DC 20006

Alan P. Dye  
Heidi K. Abegg  
Webster, Chamberlain & Bean  
1747 Pennsylvania Avenue, N.W.  
Suite 1000  
Washington, DC 20006

Lance H. Olson  
Olson, Hagel, Waters & Fishburn  
555 Capitol Mall  
Suite 1425  
Sacramento, CA 95814

  
Kenneth W. Starr