REPLY BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION

INTRODUCTION

Even the most casual reading of the main arguments made by the defending parties in support of the broadcast ban and disclosure requirements contained in Title II of the BCRA shows how thoroughly they have lost sight of the forest for the trees. The regulation of expenditures for political speech runs head long into numerous Supreme Court decisions that have held time after time that the First Amendment forbids the imposition of expenditure limits on candidates, individuals, and groups -- including political parties and political committees. The only departure from this steadfast rule is the prohibition against expenditures that exhort the listener to vote for or against a candidate when paid for from corporate treasury funds in the narrow circumstances present in \textit{Austin v. Michigan Chamber of Commerce} 494 U.S. 652 (1990). That case provides no support for expanding FECA's coverage to the immensely broader goal of prohibiting all broadcast communications that simply "refer[ ] to" a clearly identified candidate if paid for from corporate treasury funds. \textit{Austin} provides even less support for regulating the speech of groups like the ACLU during the 60 days prior to a general election or 30 days before a primary. Yet, the defending parties maintain, \textit{Austin} provides the very source of the power to regulate the ACLU's activities. This argument distorts the holding in \textit{Austin} and ignores the fundamental interest at stake in the Supreme Court's cases striking down expenditure limits as a violation of the First Amendment.

In addition, the defendants critically misperceive the substantial reach of Title II and its impact on heretofore constitutionally protected speech. The ban on electioneering communications unapologetically targets issue advocacy and brushes aside the bright line distinction between words of express advocacy and all other speech that merely refers to a
candidate. In an ill-conceived effort to avoid the vagueness problems present in *Buckley v. Valeo* 424 U.S. 1 (1976), the defendants have targeted the very speech that the Court sought to protect in *Buckley* when it drew a distinction between contributions which could be limited, and expenditures which could not. For the ACLU, and groups like it, the gravity of the situation is even greater because of the weightier free speech and associational interests that are threatened by Title II’s temporal limits and compelled disclosure. While Congress unquestionably sought to include non-profit advocacy groups within the statute’s reach, when it opted for the “Wellstone” Amendment over the “Snowe–Jeffords” alternative, the ACLU is not the type of non-profit corporation that was established or functions as a conduit for large corporate contributions. The ACLU does not present the evil that purportedly concerned Congress.

ARGUMENT

A. The ACLU’S Right to Engage In Broadcast Communications Cannot be Restricted Under the Terms of Title II and Cannot be Conditioned on the Establishment of a Segregated Fund or PAC.

In crafting the argument that Congress may legitimately place temporal limits on the ACLU’s broadcast communications during the period before federal elections, the defending parties cast aside the clear import of the Supreme Court’s numerous decisions involving expenditure limits imposed on candidates and non-candidates alike. We know from *Buckley* that expenditure limits of any kind may not be imposed on individuals, groups, or candidates. We know from *FEC v. National Conservative PAC*, 470 U.S. 480 (1985) that they may not be imposed on political committees (in that case one which was a nonmembership, nonprofit corporation), and we know from *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) (*Colorado I*) that they may not be imposed on political parties. Indeed, direct or temporal limits have never been upheld, except in the narrow circumstances presented
in *Austin*. The defendants would extrapolate from *Austin* that the ACLU's communications can be prohibited during the period before elections because it is organized as a corporation. Under the defendants' theory, the ACLU is subject to less protection than candidates, individuals, political action committees, political parties, and unincorporated organizations and associations, even though like those groups, it is an aggregation of individuals who believe in a common cause. The defendants have lost sight of the First Amendment principles at work in the Supreme Court's political expenditure cases. If anything, the ACLU merits greater—not less—protection than these other individuals and organizations seeking to influence electoral outcomes. For this reason, neither Title II's ban on electioneering communications nor its disclosure requirements can be constitutionally applied to the ACLU and organizations like it.¹

In *Buckley* the Supreme Court could not have been more clear that independent expenditures rated the highest First Amendment protection. "The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech. The most drastic of the limitations restricts individuals and groups...to an expenditure of $1,000 'relative to a clearly identified candidate during a calendar year.' The restrictions, while neutral as to the ideas expressed, limit political expression 'at the core of our electoral process and of the First Amendment freedoms.' 424 U.S. at 39. The limit on independent expenditures was struck down because it "heavily burdens core First Amendment expression." *Id.* at 48.

¹We recognize that political parties and PACs are subject to regulation—although they may not be subject to restraint. We also recognize that individuals and groups which in engage in "express advocacy" are subject to regulation but not restraint. The ACLU does not have the characteristics of either a political party or a PAC nor does it seek to influence federal elections—much less engage in electioneering communications. For this reason, the organization is subject to neither restraint nor regulation of its activities. See *ACLU v. Jennings* 366 F. Supp. 1041 (D.D.C. 1973)(3 judge court), *vacated as moot sub nom Stats v. American Civil Liberties Union* 422 U.S. 1030 (1975).
In _NCPAC_ the Court reaffirmed this principle in no uncertain terms – despite the ability of PACs to aggregate tremendous amounts of money for political purposes. That case involved independent expenditures for radio and television broadcasts supporting Ronald Reagan’s 1980 Presidential bid. Relying heavily on _Buckley_, the Court stated: “There can be no doubt that the expenditures at issue in this case produce speech at the core of the First Amendment.” 470 U.S. at 493. The Court also reaffirmed the vital associational interests at stake as well: “The First Amendment freedom of association is squarely implicated in these cases. NCPAC and FCM are mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to ‘[a]mplify the voice of their adherents.’” 470 U.S. at 494 (quoting _Buckley_). The expenditure restrictions were struck down.

In _Colorado I_, these principles were once again reaffirmed by the Court: “A political party’s independent expression not only reflects its member’s views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure.” 518 U.S. at 615-16. The independent expression of the ACLU’s views is ‘core’ First Amendment activity “no less than is the independent expression of [political parties], individuals, candidates, or other political committees.” _Id._

In the intervening years between _NCPAC_ and _Colorado I_, the Court was twice called upon to decide the permissible reach of expenditure limits. See _FEC v. Massachusetts Citizens For Life, Inc._ 479 U.S. 238 (1986); _Austin v. Michigan Chamber of Commerce, supra_. In those cases, the Court drew the critical distinction between the permissible regulation of certain types of traditional business corporations and other corporations that are more like political advocacy
organizations and that do not function as a conduit for the types of corporations subject to regulation under *Austin*. The distinction is justified by, among other things, the absence of plausible concerns over concentrated corporate wealth, and the fact that membership in the organization is both voluntary and based on ideological agreement with the organization's views and activities. *MCFL*, 479 U.S. at 257-58. This of course perfectly describes the ACLU, which is a voluntary membership organization.

The principles at work in *NCPAC* and *Colorado I*, which invalidated independent expenditure limits for those who participate directly in the partisan electoral process, are even more powerfully at work here, and the ACLU is entitled to at least as many protections as those organizations. Indeed because the ACLU’s activities are not political or partisan, and it does not seek to influence electoral outcomes, it is entitled to even greater protection First Amendment protection. See *ACLU v. Jennings*, supra. To quote the intervenors, “the ACLU can credibly claim that ‘all of the ACLU’s advocacy is focused on issues.’” Intervenors’ Response at I-75. For this reason, the ACLU cannot be treated as a political committee subject to disclosure and other administrative burdens.

Moreover, the defendants do not contend, nor is there any basis to believe, that the ACLU is a shill or conduit for large corporate contributions. No single business entity gave the ACLU more than $500 in 2001 even though in aggregate more than $85,000 was contributed from sources other than individuals. Our records do not allow us to determine if a $250 contribution from “Bennington Pottery” or “Kathleen’s Bake Shop” is a corporate contribution or not. In any event, that is besides the point. We are simply not and have never been a pass through or conduit for large corporate donations. There is nothing in the record to suggest
otherwise. The government defendants’ claim the ban on “electioneering communications” “carefully limits BCRA’s reach to those ads sponsored by unions and corporations that present the greatest potential for distortion or corruption of the political process.” Gov’t Resp. Br. at 67. Where the ACLU is concerned there could not be a less apt description or a regulation wider of the mark. The ACLU simply does not present the type of problems that Congress purportedly sought to remedy by adoption of the BCRA. Conversely, the effort to apply the BCRA to the ACLU and similar groups is ample proof of the statute’s constitutional overbreadth.

Ever since the development of modern campaign finance laws, the Supreme Court and the lower courts have taken pains to protect groups like the ACLU from regulation of their non-partisan activities when those activities have been swept up in overzealous attempts at campaign finance reform. Whether analyzed in terms of the express advocacy requirement, an MCFL exception for ideological organizations, or the major purpose test articulated in Buckley and reaffirmed in MCFL itself, the non-partisan speech activities of groups like the ACLU are not subject to limits in terms of what they may say, where they may say it, when they may say it, how they may say it, or how much money they can spend saying it.

Nor can Congress circumvent these limitations by requiring the ACLU to finance these protected activities by creating a segregated fund or PAC. This would compel us to adopt a partisan form in order to speak which is prohibited by our corporate charter, at fundamental odds with our 82-year tradition of non-partisan advocacy of civil liberties and would cast us in false light of partisanship. It would also subject the organization to impermissible disclosure and

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3In response to discovery in this case, the ACLU has produced financial records for the last ten years. The defending parties do not allege – nor can they – that the ACLU is a conduit for large individual corporate contributions.
burdensome compliance regulations. See *FEC v. MCFL; supra; ACLU v. Jennings, supra*, as well as hard money limits for engaging in pure issue advocacy.

**B. Title II is Substantially Overbroad and Should be Invalidated on its Face.**

The defendants unpersuasively argue that the ban on electioneering communications is not fatally overbroad. The argument is remarkable for its simplicity. According to the defendants, the vagueness problems present in *Buckley* – which threatened to capture more speech than constitutionally permitted – have been fully cured by the expedient of banning all broadcast ads that refer to a candidate for federal office within the blackout period. This may ease the vagueness problems but at the price of creating enormous overbreadth, which was why the *Buckley* Court struck the vague statutory definitions there in the first place. Like the BCRA their uncertainty gave them a substantively impermissible sweep, reaching speech that could not be controlled. Under the defendants’ theory, one could cure a vague statute making it a crime to speak disrespectfully to a police officer by enacting a new statute making it a crime to speak to a police officer at all in the performance of his duties. *But see, Houston v. Hill*, 482 U.S. 451 (1987); *Board of Airport Commissioners v. Jews for Jesus* 482 U.S. 569 (1987). Similarly, under the defendant’s theory, one could cure the problem with a vague “indecency internet statute” by prohibiting all speech with any sexual content on the internet. *But see, Reno v. ACLU* 521 U.S. 844, 882 (1997)(striking down Communications Decency Act in part because it “burn[s] up the house to roast the pig”); *Butler v. Michigan* 352 U.S. 380, 383 (1955) (banning speech for adults to protect children).

The defendants’ second line of defense against the plaintiffs’ overbreadth challenge is that the statute only targets communications that are in most cases thinly veiled attempts to circumvent *Austin*’s ban on corporate expenditures. Without repeating the arguments stressing
the importance of the distinction drawn in Buckley and reaffirmed in MCFL between express and issue advocacy, it is enough to note that the statute unambiguously seeks to bridge that constitutional divide by treating all speech that refers to a candidate the same as an exhortation to vote for or against that candidate. By definition, the statute broadens FECA’s reach and represents a frontal assault on the express/issue advocacy doctrine.

More critically, Title II broadly extends to communications by the ACLU and organizations like it – even though these types of organizations do not present the types of problems Congress purportedly sought to rectify by adoption of the broadcast ban. The defendants’ have no answer for this except to cast doubt on the ACLU’s intention to engage in future broadcast communications. See Gov’t Resp. Br. at 81. The record on this however, is clear and uncontroverted. See Declaration of Anthony Romero, ¶ 8:3 PCS, ACLU 4 (stating clear intention to sponsor future broadcast issue advocacy advertisements subject to the Act’s prohibitions).3 Defendants also question the ACLU’s reasons for running the Hastert Ad. But

3Following the 2000 Presidential election and the 9/11 attack on the World Trade Center, civil liberties have come under fire like no other time since the McCarthy period. In an effort to curb the assault on civil liberties the ACLU has stepped up its fundraising and media campaigns. Membership in 2001 increased by 30% or 70,000 members. Contributions to the organization also increased 30% or almost 3 million dollars. Projections for 2002 are in line with these numbers. See Declaration of A. Romero ¶ 7-8:3 PCS, ACLU 4. According to the unchallenged testimony of Mr. Romero, “this money will be used to finance the ACLU’s large, growing legislative operation and its many activities. The increased revenues will also be used to launch an aggressive media campaign that will involve the paid media. The ACLU’s activities will always be heavily reliant on earned media, but hundreds of thousands of dollars have been budgeted to finance a paid media campaign targeting the constituents of elected officials on important civil liberties issues. The Hastert ad campaign that ran in March 2002, and which is described in the ACLU’s complaint filed in this case, is just the first of many ads that the organization intends to launch in the future.” Id. With the success of our recent fundraising efforts, the ACLU is in a much stronger position to sponsor paid advertisements focusing on issues like the Department of Homeland Security and immigration reform. This year, for instance, legislation creating a new federal department of Homeland Security is under consideration during this pre-election period. The ACLU
here too, their argument misses the mark. The ACLU has made clear from the beginning that its reason for running the Hastert Ad included both a desire to prompt legislative action on the Employment Non-Discrimination Act, and a desire to highlight the unconstitutionality of the BCRA. Taken together, the impact of the BCRA on the ACLU’s past and future activities is more than sufficient to confer standing. It is axiomatic that the ACLU, like other advocacy groups, has a First Amendment right to use litigation as a sword to protect its rights and the rights of others. See NAACP v. Button, 371 U.S. 415 (1963); In Re Primus, 436 U.S. 412 (1978).4

Contrary to the position advanced by the defendants, overbreadth does not turn on the frequency of any individual’s or organization’s speech but on the breadth of the category of protected speech that is swept up in the reach of the BCRA. As stated in the previous section, the intervenors concede that the ACLU can credibly claim that “all of the ACLU’s advocacy is focused on issues.” See Intervenor’s Resp.Br. at I-75. Nonetheless, the ban on electioneering communications sweeps the ACLU within its reach, and groups like us, even though we are engaging in pure issue advocacy. This is a textbook example of the First Amendment overbreadth doctrine which the defendants can only hope the Court overlooks.

One final point: It has been suggested variously by the defendants that the plaintiffs could avoid any problems with Title II simply by not mentioning the name of the elected official being

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took out a full page advertisement in Congress Daily and CO Monitor urging Congress to safeguard civil liberties in connection with its consideration of the “Gramm – Miller” and “Lieberman” versions of the Homeland Security legislation. Id.

*In ACLU v. Jennings, supra, this Court permitted the ACLU to challenge vague and overbroad provisions of the FECA on the basis of our having sponsored one advertisement in The New York Times and rejected a motion to dismiss based on lack of justiciability or standing. See 366 F.Supp at 1046-47.
discussed or addressed. The government made a very similar suggestion in a vain attempt to spare a similarly defective statute in the *Buckley* case. Here was the Court's reply: "Such watered-down and cautious discussion is hardly the 'uninhibited, robust and wide-open' debate on public issues which the First Amendment was designed to foster." *Buckley v. Valeo*, 519 F. 2d 871, 877, n.141 (D.C. Cir. 1975) (*en banc*), *aff'd in part, rev'd in part, on other grounds*, 424 U.S. 1 (1976).

**Conclusion**

The relevant provisions of Title II should be declared unconstitutional.

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3In the event that Section 203’s ban on electioneering communications is struck down, on its face or in its application to groups like the ACLU, the intervenors have contended that the disclosure provisions of Section 201 might still be enforceable. In our view, the primary reason to strike down both the prohibition and the disclosure is the express advocacy doctrine and other rules courts have fashioned to protect issue advocacy from being subject to campaign finance regulations and controls. Despite occasional dicta, the Court has never upheld such disclosure of issue advocacy nor identified what that advocacy might properly entail. Finally, for controversial groups like the ACLU, compelled disclosure of contributors as the price of speaking is tantamount to forced silence.
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I. CONTRARY TO DEFENDANTS' ARGUMENTS, AUSTIN DEMONSTRATES WHY ANY LIMITS ON CORPORATE SPEECH MUST BE CLEAR, PRECISE, TAILORED, AND JUSTIFIED BY COMPPELLING NEED.


In Austin the Michigan Chamber of Commerce wanted to distribute independently "an advertisement supporting a specific candidate." 494 U.S. at 656. That ad, in bold letters, urged readers to "Elect Richard Bandstra State Representative." Id. at 714. MCFL already had held that such express advocacy was clearly and directly related to an election. The issue in Austin was whether the state could suppress a corporation's express but independent advocacy of a candidate.

Austin made clear that regulating political speech by business corporations triggers First Amendment strict scrutiny. Id. at 657. For that proposition, Austin relied upon First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978), which applied strict scrutiny to strike down restrictions on the right of a business corporation to oppose a non-candidate referendum. 494 U.S. at 657; see also Consol. Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 & n.1 (1980) (even a highly regulated public monopoly corporation has the constitutional right to free political speech).

Austin held that "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form" justified restricting corporate speech in connection with "candidate elections." Id. at 659-60. Since Austin did not question Bellotti's holding that a business corporation's advocacy of a public referendum could not be regulated, the fact that the Michigan Chamber's speech advocated the election of a candidate clearly was critical to the outcome. Justice Brennan's concurrence stressed that the Court's ruling reflected the "especially sensitive context" of expenditures to support or oppose a candidate. Id. at 677.
By establishing a special rule for corporate speech in candidate elections, *Austin* posed, but did not answer, the next key question: When is corporate speech sufficiently connected to the election or defeat of a candidate that it may be forbidden? Nor did *Austin* discuss how the answer should be formulated in a way that satisfies the First Amendment's demands for precision and narrow tailoring.

*Austin* really did not need to answer those questions because they already had been resolved by *Buckley* and *MCFL*, which held that speech concerning issues is sufficiently related to a candidate election to receive special regulation if, and only if, it expressly advocates the election or defeat of a clearly identified candidate. Defendants attempt to shrug off the express advocacy test, asserting that it was just the way the Supreme Court elected to clarify the language of FECA to avoid vagueness. But that is only part of the story. *Buckley* applied the express advocacy standard to two very different statutory phrases: “relative to a clearly identified candidate,” 424 U.S. at 41, and “for the purpose of . . . influencing” an election, *id.* at 79. Moreover, *Buckley* made plain that the express advocacy formula was crafted to avoid overbreadth as well as vagueness. *Id.* at 80. A decade later, *MCFL* held that yet a third distinct statutory phrase was limited to express advocacy, this time using the test to define when corporate speech is “in connection with any election.” 479 U.S. at 248-49. *MCFL* also noted that the express advocacy standard was intended “to avoid problems of overbreadth.” *Id.* at 248.

It is hard to believe that when the Supreme Court imposed the same meaning on three very different statutory phrases, it was merely trying to clarify particular vague language. Certainly, the U.S. Courts of Appeals have not understood the express advocacy test as a simple exercise in construing particular words. To the contrary, they have imposed the same express advocacy
standard on *state* statutes.\(^1\) Moreover, they have struck down attempts by the FEC to adopt an alternative but supposedly clear formulation. *See Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Me. Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996), aff'g, 914 F. Supp. 8 (D. Me. 1996). Like *Miranda* warnings, the express advocacy test grew out of substantive constitutional concerns and now is ingrained constitutional law.\(^2\)

And certainly Defendants have not demonstrated that corporate issue speech actually is overwhelming other voices during elections. The Chamber Plaintiffs pointed out that less than 15 percent of all political advertising studied by the Brennan Center would be subject to a BCRA type ban. CHAMBER/NAM Br. at 6. The remaining 85 percent was sponsored by candidates or political parties. *Id.* Unable to refute this figure, Defendants erroneously suggest that the figure is different when “advertising” is typically concentrated in a small number of tight races.” Defs.’ Opp. at 102 n.107. The Defendants surprisingly cite their expert, Professor Magleby, who contradicts the Defendants and confirms Plaintiffs’ point. Specifically, Professor Magleby estimated that in 17 “competitive races” in 2000, interest groups spent only “two-thirds as much as candidates. And political parties exceeded either candidates or interest groups in spending on television and radio.” Magleby Expert Rep. at 22.

Professor Magleby does not say how much more political party advertising exceeds that of candidates and interest groups. But assuming that it is merely one-third more than candidates’ advertising, simple calculation shows that the percentage of interest group advertising would be approximately 22 percent in the so-called “competitive races.” This further corroborates the fact


\(^2\) *See Dickerson v. United States*, 530 U.S. 428 (2000) (although *Miranda* warnings first may have been formulated as a prophylactic exercise of supervisory power, they implement constitutional values and now are recognized as a constitutional command).
that interest group advertising of the sort targeted by BCRA is a distinctly minor percentage of all politically related advertising. An even smaller percentage of that advertising is sponsored by business corporations or labor unions. Accordingly, Defendants’ own studies and experts undermine any claim that corporate or union money is “distorting” the political process.

Importantly, Defendants consistently fail to mention that such advertising must be independent speech which is afforded the greatest constitutional protection. Claims that candidates will express “gratitude” for independent speech by altering or reaffirming their own positions is not a basis for curtailing First Amendment rights. See FEC v. Nat’l Conservative Political Action Comm., 470 U.S. 480, 498 (1985) (“The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages...can hardly be called corruption”). Moreover, Plaintiffs have already exposed the inaccuracies and exaggerations in Defendants’ claims that sponsors of independent advertising curry favor with policymakers. Chamber/NAM Opp. at 2-5.

Although Austin allowed regulation of independent express advocacy by corporations, it went no further. It did not disturb the strong protection of independent non-express corporate speech recognized in Bellotti. Nothing offered by Defendants justifies expanding Austin beyond the express advocacy line drawn by Buckley and MCFL.

II. DEFENDANTS MISCONSTRUE THE “OVERBREADTH” TEST IN AN IMPERMISSIBLE ATTEMPT TO EVADE THE DEMANDS OF STRICT SCRUTINY.

Defendants mistakenly assert that Broadrick v. Oklahoma, 413 U.S. 601, 616 (1973), and its progeny impose a burden on Plaintiffs to prove and quantify BCRA’s “overbreadth.” Defs.’ Opp. at 68, 78, I-63-64. This gets the burden exactly backwards as a result of confusing two different situations in which “overbreadth” issues arise.

Broadrick’s “overbreadth” analysis applies where a plaintiff attacks a statute because of its injury to third parties. 413 U.S. at 613-14. Because First Amendment rights are so precious and
delicate, this extraordinary exception to normal rules of standing is permitted, but the price to the plaintiff is the burden of showing that the proportion of speech that is wrongfully suppressed is “substantial” (though seldom quantified). Id. at 614-15.

Although the core concern is similar, “overbreadth” receives different treatment where, as here, a plaintiff invokes its own First Amendment rights in a way that subjects a statute to strict scrutiny. In that situation, the defensors face a heavy burden to prove that the presumptively invalid statute satisfies all of the strict scrutiny standards, including proof that the statute is precise and narrowly tailored. See R.A.V. v. City of St. Paul, 505 U.S. 377, 381 & n.3 (1992) (a plaintiff need not meet the Broadrick burden where strict scrutiny demands narrow tailoring); Sec’y of State of Md. v. Joseph H. Munson,Co., 467 U.S. 947, 965-66 & n.12 (1984). Because FEC v. Colorado Republican Federal Campaign Committee, 533 U.S. 431 (2001), was not a strict scrutiny case and did not squarely discuss burden, its footnote 18 comment, is inapplicable.

Plaintiffs here rely on their own First Amendment rights to subject BCRA to strict scrutiny. “Under the strict scrutiny test, [defendants] have the burden to prove that the [challenged statute] is (1) narrowly tailored, to serve (2) a compelling state interest. In order for [defendants] to show that the [statute] is narrowly tailored, they must demonstrate that it does not unnecessarily circumscribe protected expression.” Republican Party of Minn. v. White, 122 S.Ct. 2528, 2534-35 (2002) (citations and internal quotation marks omitted); Eu v. San Francisco Cty. Democratic Cent. Comm., 489 U.S. 214, 222 (1989). Defendants bear a “heavy burden.” Burson v. Freeman, 504 U.S. 191, 217 (1992). Defendants’ attempt to shift this heavy burden to the Plaintiffs is fundamentally contrary to law.

III. DEFENDANTS HAVE MISSED THE FUNDAMENTAL POINT OF THE OVERBREADTH INQUIRY.

In addition to reversing the burden of proving overbreadth, Defendants misstate the test for substantial overbreadth. They argue that what is compared is a matter of free choice. Defs.’ Opp.
at 70. But *Broadrick* is specific that the substantiality of the wrongfully suppressed speech or conduct is to be “judged in relation to the statute’s plainly legitimate sweep.” 413 U.S. at 615. Since this same formula appears in dozens of subsequent cases, *e.g.* City of Chicago v. Morales, 527 U.S. 41, 52 (1999), it should be taken seriously. The proper comparison is of the speech wrongfully suppressed to speech it is “plainly legitimate” to suppress.

Hence, to evaluate BCRA’s electioneering communication provision, one first must identify the set of issue ads that it is “plainly legitimate” for BCRA to suppress. Assuming for the sake of argument that it is legitimate to suppress “sham” issue ads, even if they lack express advocacy, the set will contain only those ads that (i) are broadcast within 60 days of an election, (ii) refer to a candidate, and (iii) *plainly* are “sham” rather than genuine. That set constitutes the “plainly legitimate sweep” of the statute. Next one must identify the set of wrongfully suppressed ads. This set contains only ads that (i) are broadcast within 60 days of an election, (ii) refer to a candidate, and (iii) are “genuine” issue advocacy. Then one judges whether the set of wrongfully suppressed issue ads is substantial when judged in relation to the set that it was plainly legitimate for BCRA to suppress.

Defendants’ experts never make such a comparison. Instead, they compare the set of wrongfully suppressed ads (as they narrowly define them after considerable back room revision) to either (i) a set containing all issue ads run at any time in the same year, or (ii) a set containing all ads that it would be “plainly legitimate” to suppress, plus those as to which suppression is arguable, plus the ads for which suppression would be improper. Using these inflated bases of comparison results in a percentage that is as small as possible. Yet, as Plaintiffs’ McConnell Omnibus Opening Brief (at 65-69) and Opposition Brief (at 43-46) demonstrate, even these inflated comparisons show

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3 We focus on the 60-day pre-election period because Defendants have made no real effort to defend the 30-day blackout periods before all of the various nominating events that may precede an election to federal office.
that the wrongfully suppressed set is as high as 64%. The overbreadth is greater using the formula dictated by *Broadrick*.

It is important, however, not to let this discussion of formulae and sets create the false impression that assessing substantial overbreadth typically is carried out with mathematical precision. Nor could it be since the real question is how the statute will operate in the future, not the past. And this brings us to a final and critical flaw.

A final and critical flaw in Defendants’ overbreadth analysis is that they test a statute that will govern for the indefinite future against events in election years during which (i) our domestic and international situation was relatively calm, compared to the sweep of history, and (ii) the use of issue ads and other electoral behavior was, by Defendants’ own accounts, rapidly evolving. This will not do. BCRA must work in bad times as well as good, in times of war and peace, prosperity and depression, labor strife and labor peace. When the government moves to seize the steel mills or oust the unions from the West Coast docks, there will be no time to craft a new BCRA. Defendants’ heavy burden is to show that BCRA is sufficiently precise and tailored that, even when bad times arise during an election, there will be no substantial burden on protected speech. They have not met that heavy burden.

**IV. DEFENDANTS ARE UNABLE TO JUSTIFY THE LACK OF A CLEAR STATUTORY COORDINATION STANDARD.**

Defendants’ do not deny that “First Amendment clarity demands . . . the clearest possible guidance” as to what conduct constitutes coordination. *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 91 (D.D.C. 1999). They do not deny that BCRA’s coordination provisions fail to provide the narrow, objective, and precise guidance that First Amendment clarity requires. Nor do they deny that a clearer and more precise standard than BCRA provides is possible. Instead, their core argument is that these obvious constitutional defects of BCRA are not ripe because of the speculative possibility that the FEC might in the future adopt coordination regulations.
Defendants cannot deny, however, that the statutory coordination provisions impose immediate constraints, whether regulations later are adopted or not. The Intervenors try to wish away Buckley’s holding that a vagueness challenge to such a statute is ripe, asserting that Buckley relied on a deficiency in the advisory opinion process that since has been fixed. Nonsense. Buckley held that possible clarification by “advisory opinions or a rule” does not defeat ripeness unless the procedures “assure that the vagueness concerns will be remedied prior to the chilling” effects of the statute. 424 U.S. at 41 n.47 (emphasis added).

The only “assurance” Defendants offer is that “[n]o incumbent federal lawmaker will be running for reelection before 2004.” Defs.’ Opp. at 117. But unless the vagueness challenge to BCRA is decided in this expedited case, the problem may well persist far past 2004. Moreover, a charge of coordination in 2004 may be based on supposedly coordinating conduct occurring today. Only a clear statement today of the boundaries of the statutory coordination concept can alleviate the chill on legislative and policy contacts and assure fee speech in 2004 and beyond.

Defendants’ reliance on Martin Tractor Co. v. FEC, 627 F.2d 375 (D.C. Cir. 1980), is misplaced. Defs.’ Opp. at I-98. Martin Tractor did not “suggest[] that resort to the advisory opinion mechanism . . . is required in all cases,” and its facts are readily distinguished. 627 F.2d at 390. Plaintiff there did not claim immediate injury, id. at 382-83, and had provided no factual record, id. at 385. Buckley’s ripeness holding was discounted for lack of a broad package of expedited challenges such as exist here. Id. at 388. FECA’s mandate of prompt review was discounted due to erroneous doubts that Congress may relax prudential factors. Compare id. at 378

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4 The FEC will enforce statutory restrictions even if its implementing regulations are invalidated. See Minn. Citizens Concerned for Life v. FEC, 113 F.3d 129 (8th Cir. 1997).

5 Intervenors’ suggestion that every time representatives of the Chamber, NAM, the AFL-CIO or thousands of other groups want to discuss a particular subject with a legislator or political party they should file a request for an advisory opinion as to whether future speech may be precluded is wildly implausible. The FEC and the other Governmental Defendants perhaps have a better sense of the limitations of such a process and so made no such claim. In addition to being impractical, such a process under a vague statute would amount to licensing speech.
n.5, 383, with *Dep’t of Commerce v. United States House of Representatives*, 525 U.S. 316, 328 (1999) ("Congress has eliminated any prudential concern"). Here, by contrast, there is immediate and ongoing injury, a full record has been compiled, a broad range of challenges is under expedited review, and prudential constraints have been removed by BCRA § 403.

Moreover, Defendants’ focus on races in which “incumbents” seek “reelection” ignores two facts. First, special elections occur frequently, including congressional elections in Hawaii on November 30, 2002, and January 4, 2003. Second, because BCRA § 214(a)(ii) now restricts speech that is coordinated with political parties – a provision not found in FECA – party contacts today may restrict speech within the next few weeks.6

Defendants argue that a growth in total reported lobbying expenditures from 1997 to 1999 somehow shows that FECA’s vague coordination standard is harmless. Defs. Opp. at 116. This misses the point at many levels. First, a growth in total lobbying is fully consistent with substantial interference in the quality of associational activity and with the amount of public speech that otherwise would have occurred. Second, it was not until the FEC’s massive and multi-year coordination proceedings against The Coalition and the AFL-CIO became public knowledge that the true chill set in.7 Third, BCRA now makes the coordination standard much less clear and simultaneously expands its coverage to political parties causing greater chill now than in the recent past. Plaintiffs’ *uncontested* evidence is that BCRA’s vague coordination standard unfairly is

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6 Obviously no one anticipated these specific special elections when the record was compiled here. However, our earlier briefs show that Plaintiffs regularly work with political parties and often support public speech on issues during elections.

7 We previously described the experience of members of The Coalition. The parallel experience of the AFL-CIO is described by its witnesses. *See Rosenthal Dec. ¶ 31; Mitchell Dec. ¶¶ 15, 21. See also AFL-CIO v. FEC, 177 F. Supp. 2d 48 (D.D.C. 2001).*
forcing them to choose between working closely with legislators, political parties, and allied groups
now and foreclosing public speech later. 8

Defendants’ position on the need for a content standard for coordination of expression
remains almost completely opaque. Defendants address the point only to deny that the constitution
requires contributions to be defined in terms of “express advocacy.” Defs.’ Opp. at 118. Yet surely
a great deal of speech that is closely coordinated with a candidate – e.g., helping a candidate to raise
funds for a new YMCA or to promote a local rodeo – is not a contribution to an election. Thus,
there must be some standard for judging whether the speech is sufficiently connected to a federal
campaign. BCRA gives no hint as to what that standard might be other than express advocacy, nor
do Defendants. For the reasons stated by Commissioner Smith in MUR 4624, express advocacy is
the constitutionally required standard. 9

History is not always a true guide to the present. The FEC’s grinding pursuit of The
Coalition and the AFL-CIO on ethereal coordination charges followed by BCRA’s coordination
amendments now put the coordination concept front and center. Intervenors have been clear they
will press the FEC to take an aggressive and expansive posture toward coordination theories.
Defendants today are constitutionally entitled to a clear, narrow, and objective standard for both the
content and the conduct constituting coordination.

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8 This evidence is not limited to the testimony of business association witnesses summarized in previous
briefing. The AFL-CIO witnesses also attest that they have regular contacts in pursuit of legislative and policy matters
that risk being characterized as coordination with the result that the present legal uncertainty threatens a substantial
chilling of First Amendment activity. Shea Dec. ¶¶ 57-59; Shea Dep. 82-85. Despite these contacts, the AFL-CIO in
fact has been at considerable pains to isolate its public speech from coordination charges. It has not discussed broadcast
ad content or placement with candidates. Mitchell Dec. ¶ 16; Mitchell Dep. 229-32, 235, 238; Shea Dep. 91-92. Its
political department is largely excluded from ad planning. Rosenthal Dec. ¶ 30; Mitchell Dec. ¶ 16-19. On the few
occasions candidates have made requests relating to ads, they have been rebuffed. Mitchell Dec. ¶ 16, 22 and Exhibit

9 Defendants’ argument that the statement of Commissioner Smith has not been adopted by the FEC largely
misses the point. Defs.’ Opp. at 118 n.125. That statement sets out the entire case for requiring express advocacy.
Plaintiffs rely on that presentation, not simply on the existence of the statement. Interestingly enough, that statement
shows that, at least at one time, the FEC seemed to have accepted the express advocacy standard.
Respectfully submitted,

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I. BCRA § 203'S PROHIBITION OF "ELECTIONEERING COMMUNICATIONS" IS UNCONSTITUTIONAL

A. The Government Can Restrict Only "Express Advocacy," Not Less Explicit Messages

Defendants contend that the category of union- and corporate-paid speech defined in BCRA § 201 as "electioneering communications" is a constitutionally viable measure of electoral advocacy that, like express advocacy, the government can prohibit. Plaintiffs have shown that it is not. The Supreme Court in Buckley v. Valeo, 424 U.S. 1, 39-52, 74-82 (1976) and FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 248-49 (1988), identified express advocacy as the speech that is "unambiguously related to [a] campaign," and did not so identify other discussions of elections or of candidates qua candidates. The Court drew its line because those subjects must be freely subject to any commentary -- by any source -- absent an explicit call for a specific voting result; the government lacked both a compelling interest to restrict or condition such commentary and any means to define it with constitutionally sufficient clarity.

Defendants fail persuasively to deny that the BCRA category "electioneering communications" inherently encompasses, and in fact to date has encompassed, a substantial range of speech that either does not concern elections at all or does so in the zone that the Court has deemed inviolable; or that it is woefully under-inclusive in reaching the messages that, defendants contend, it was enacted to prohibit.

B. The "Effect" or "Intent" of Speech Cannot Provide Grounds for Its Prohibition and § 203 Does Not Even Prohibit What Defendants Claim It Does

Even at this late date, defendants fail consistently to explain what the § 203 proscription...

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reaches: "BCRA properly limits regulation to those ads that have an impact on federal elections," Gov. Br. 82; "BCRA legitimately covers ads with an electioneering purpose or effect, even if they also address issues," Int. Br. I-68; "the legally relevant question for determining whether BCRA is overbroad is whether an ad has any electioneering intent," Int. Br. I-84 n.292 (all emphases added). Regardless, none of these categories describes speech that lawfully can be precluded, and "electioneering communications" fails reliably to embrace any of them.

First, as to "effect" or "impact," we certainly concede the possibility, as did Buckley, 424 U.S. at 42 and n.50, that issue- and candidate-related speech could influence voting. Regardless, the Court made clear that those consequences -- whether possible, likely or certain -- do not themselves warrant censorship. Id. Rather, Buckley and MCFL tolerate some interference only with speech that explicitly advocates a voting decision. And, "electioneering communications" provides no reliable measure of advertising that "affects" an election. It would take little "ingenuity and resourcefulness," Buckley, 424 U.S. at 45, to devise an ad that does not refer to a candidate but is as likely to "affect" an election as one that does;¹ and, it is most reasonable to assume that such ads will follow if the § 203 proscription is upheld. Accordingly, § 203 utterly fails to eliminate ads because of their "impact" on voting.

If § 203's purpose is, instead, to eliminate ads bearing an "electioneering intent," it fares no better. Buckley and its progeny authorize limited regulation of some electoral speech on the basis of its language, not the motives behind it. Yet the record overflows with efforts by the

¹ Suppose, for example, an ad that said: "There's a Congressman who opposes a raise in the minimum wage but voted for his own cost-of-living increase. The House will vote on a minimum wage hike next Wednesday. We can't say the Congressman's name, but call 1-800-555-5555 and find out." Or, in the middle of a House election dominated by the Social Security privatization issue, an ad saying: "The choice is clear: preserve Social Security as it is or privatize it through private accounts. Vote to preserve Social Security as it is."
Brennan Center and the defendants' "experts" to "prove" that almost all ads broadcast within 60
days of a general election\(^2\) that refer to candidates have "electioneering intent," and so, using the
intervenors' favorite epithet, are "sham issue ads."

In their opposition briefs, the defendants continue their stubbornly misleading effort to so
paint virtually all of the AFL-CIO's broadcast advocacy since 1995. So, for example, the
Government asserts that "[t]he AFL-CIO argues that it sponsors issue ads solely for the purpose
of influencing pending legislation, AFL-CIO Br. at 9-11," and then cites AFL-CIO ads that,
instead, referred to *previous* congressional action. See Gov. Br. at 87-88. Of course, the
AFL-CIO has *never* argued what the Government claims it does; rather, as we have thoroughly
demonstrated, pending legislation has been the focus of *some* AFL-CIO ads, but others describe
prior legislative votes in order to shape ongoing public debate and public policy, especially
concerning recurring issues reflected in prior votes. See, e.g., Mitchell Dec. ¶¶ 37-39, 48.\(^3\)

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\(^2\) It again bears strong emphasis that no such analysis exists as to ads broadcast within 30 days of
primaries or conventions, and defendants appear to have abandoned any contention that there is any basis in
experience to prohibit such advertisements. Indeed, given the variable scheduling of primaries, the non-competitive
nature of most House and Senate primaries, their coincidence with the full run of the ordinary legislative calendar,
and showings, such as the AFL-CIO's, of what particular speakers have done during these 30-day periods, none of
defendants' arguments with respect to the 60-day prohibition apply to the 30-day prohibition.

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\(^3\) The Government, at pp. 87-89, inaccurately depicts the record about every AFL-CIO ad it discusses.

"Jobs" was broadcast while the high-profile ergonomics issue was still pending in the appropriations
process, Mitchell Dec. ¶ 61, and Exh. 142, and the AFL-CIO broadcast was part of its overall effort "to make
working families issues front and center in this season, and to hold our representatives accountable around the
issues crucial to working people's lives." Mitchell Dec., Exh. 143. (The quote is from a 1998 memorandum from
the AFL-CIO Public Affairs Director, Denise Mitchell, to the President of the Pennsylvania AFL-CIO. The
Government utterly mischaracterizes it by seizing upon the word "grassroots" that elsewhere appears in it and
linking it, as if from the same document, to the same word as it is used in the unrelated concluding paragraph 70 of
Ms. Mitchell's declaration. See Gov. Br at 89 n.92.)

"Protect," "Sky" and "Help" were broadcast in an effort to prompt congressional support for the House-
passed, AFL-CIO-preferred version of a "patients bill of rights" bill while it and the inferior Senate-passed versions
were before a conference committee. Mitchell Dec. ¶¶ 58-60; Shea Dec. ¶¶ 52-53.
That the record provides no actual support for defendants' insistence that the AFL-CIO's advertising was suffused with "electioneering intent" is evident from defendants' reliance not on AFL-CIO documents and witnesses, but on reactions to AFL-CIO advertising by other groups. Remarkably, the Government identifies "respons[ive]" ads of an organization unconnected with the AFL-CIO, Citizens for Better Medicare, as "perhaps the best evidence" that two AFL-CIO ads ("Protect" and "Sky") were "electioneering ads." Gov. Br. 89. And, defendants have drawn similar conclusions about the AFL-CIO's "intent" behind its 1996 advertising from the reactions it prompted among national business organizations. Int. Opening Br. I-92-93.

Defendants do acknowledge what they disparagingly refer to as the AFL-CIO's "alternate hypothesis" for its sometime targeting of ads in "close races," namely, that candidates in such races are "most likely to make policy concessions"; defendants' rebuttal is to assert that the AFL-CIO "almost exclusively targets candidates with the worst ratings on the issues the union [sic] cares most about, and who are accordingly the least likely to convert to its position." Id. at I-75 (footnote omitted). But, when some ads have referred to some poorly-rated legislators, the AFL-CIO has selected them in order to expose their records to working families, and particularly to union members, and has considered which legislators "would be particularly vocal in responding to an ad, whether they would scream and shout when ads were run, naming them,

"Save" was broadcast in order to influence the urgent and ongoing struggle over whether the federal budget surplus would be dedicated to the Social Security program. Mitchell Dec. ¶ 52 and Exhs. 113-115. (Defendants ignore the explanatory Exh. 115. See Gov. Br. 88.)

"No Two Way" was broadcast in order to influence the "upcoming budget fight on education programs" and referred to related past votes to make its point. Mitchell Dec. ¶ 41 and Exhs. 59-61; see also Shea Dec. ¶ 39.

4 In a half-hearted attempt to attribute to the AFL-CIO itself an admission of an "electioneering" purpose for its broadcast program, defendants deceptively point to an AFL-CIO reference to the accomplishments of its non-broadcast membership mobilization efforts in 1996. See Int. Br. I-72 at n.230.
names [sic] their records, thereby creating more press attention and more of an impact on their overall caucus.” Mitchell Cross 197-99. Defendants’ characterizations are simply contrary to the testimonial and documentary evidence.⁵

The AFL-CIO’s explanations of the issue and policy focus of its advertising strategies are set forth in many contemporary internal and public documents since 1995. See, e.g., Shea Dec., Exhs. 22, 24-37; Mitchell Dec., Exhs., passim; Rosenthal Dec., Exhs., passim. Nonetheless, the defendants ask this Court to find “electioneering intent” everywhere. Thus, even as to the September 1998 AFL-CIO advertisement “Deny,” which urged 13 Senators not up for reelection and four who were to vote against a specific “patients’ bill of rights” bill, and which even Buying Time 1998, after much confusion among its drafters, scored as “genuine,” see Int. Br. I-85 n.294, intervenors say:

Even if these ads were not intended to influence federal elections in places where the named incumbent was not a candidate, that does not mean they were devoid of electioneering purpose as to targets who were candidates. A voter could reasonably perceive an ad berating “Republicans in Washington” as signaling disapproval for a particular Republican candidate named, and the voter would need to know more about the AFL-CIO’s advertising and electioneering behavior before concluding that these ads were never intended to influence elections.

⁵ In this instance defendants cite only 1996 AFL-CIO advertising. As we have already explained, the 1995-96 AFL-CIO broadcast advocacy dealt with an aggressively hostile, newly Republican Congress led by Speaker Newt Gingrich at the height of his legislative ambition. Many of the targeted House Members first took office in 1995, and their voting records were just beginning to register on AFL-CIO legislative rankings. Defendants also fail to acknowledge our showing that AFL-CIO ads broadcast during the politically polarized 1996 congressional session did contribute to changes of position, and votes, of 10 Republican Members on the proposed minimum wage increase. See Shea Dec. ¶¶ 31-33. And, it is the AFL-CIO’s experience that some legislators’ records improve over time. Mitchell Dec. ¶ 36.
Int. Br. I-80. Even with respect to those few ads identified by plaintiffs that some might find to be closer calls, it remains true that the particulars of the ads and their context provide some evidence of electioneering.” Gov. Br. 82. Indeed, under the Intervenors’ “original-sin” approach, every reference to a candidate should be assumed to be “electioneering” unless, only, the speaker in fact has little or no history of “electioneering.” This view willfully disregards the actual text of a message, its actual legislative context and every other conceivable factor. Plainly, as defendants’ labored and convoluted dissections of various ads show, defendants are unwilling to concede that any ad is “genuine” -- that is, devoid of “any” electioneering intent -- and deservent of being spared the censor’s scythe.

Even if “electioneering intent” were as easily discernible in ads that refer to candidates as defendants describe, nonetheless the “electioneering communications” formulation falls woefully short of capturing ads bearing that intent. Consider the Government’s analysis of a 1998 ad broadcast by the American Association of Health Plans (AAHP). Because this ad, in lauding Senate candidate Lauch Faircloth, discussed “trial lawyers,” said “if trial lawyers win, working families lose,” and ran during a campaign when Mr. Faircloth’s opponent, John Edwards, was

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6 “Deny” broadcast between September 10 and 23, 1998. Mitchell Dep. ¶ 21 and Exh. 1, pp. 82-84. The Government asserts that “the CMAG satellite detected” this ad, somewhere, until October 22. Gov. Br. 93. The Government cites no record source for this assertion. CMAG data is not conclusive in any event; we have already pointed out a host of such errors, as reflected in Prof. Goldstein’s report. See Mitchell Dec. ¶¶ 64-66. Defendants have not rebutted this.

7 The report of the FEC General Counsel to the Commission recommending that it close its investigation of the AFL-CIO concerning various 1995-96 activities with the Government, see Gov. Br. 88 n.91, was not the product of an adversarial evidentiary process; the contents of the investigation beyond the report itself are confidential pursuant to 2 U.S.C. § 437g(a)(12)(A); as the report itself shows, the quoted comment was completely gratuitous; and, the FEC has pursued its fresh opportunity in this case at bar to assemble and discover a record anew as to the AFL-CIO’s broadcast advertising.

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emphasizing his experience as a trial lawyer, the Government concludes that this is an
“unabashed electioneering ad” because “[t]he tag line . . . may as well have read, “if John
Edwards wins, working families lose.”” Gov. Br. 83. But if an ad can be so crafted to capitalize
only on context (Mr. Faircloth’s name could easily be excised as well), then § 203 leaves far too
much potential speech with “electioneering intent” unregulated to achieve the precision the First
Amendment requires. Again, the “ingenuity and resourcefulness of persons and groups” that
spelled doom for the independent expenditure cap in Buckley, 424 U.S. at 45, likewise warrants
invalidation of the § 203 proscription.8

Moreover, as the McConnell plaintiffs have shown, the Buying Time studies are deeply
flawed and predicated on manipulated and subjective judgments. It hardly matters that the
“electioneering communications” standard is precise and “objective” on its face if it is grounded
in highly subjective evaluations of advertising “intent” and cannot reliably measure what speech
has the “intent” or “effect” of “electioneering.” The § 203 prohibition is itself the illegitimate
product of placing the speaker wholly “at the mercy of the varied understanding of [their]
hearers and consequently of whatever inference may be drawn as to [their] intent and meaning.”
which the First Amendment will not tolerate. See Buckley, 424 U.S. at 43, quoting Thomas v.

Finally, because § 203 bans spending on substantial speech that Buckley and its progeny
protect, there is no governmental interest in interference with expression paid for by group
sources of wealth. See Austin v. Michigan Chamber of Commerce, 494 U.S. 656, 659-60

8 In so stating, we stand by our evidence that for legislative and other non-electoral purposes naming an
officeholder in an ad is far more effective than not doing so.
Rather, the principles enunciated in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), control here, and compel the invalidation of § 203.

C. “Electioneering Communications” Are Not Susceptible to a Conclusive Judgment That § 203 Is Not Overbroad

BCRA declares a rule criminalizing spending on speech for all time. Yet to rebut plaintiffs’ overbreadth challenge defendants rely upon the two deeply flawed Brennan Center reports that analyzed only some ads broadcast in some media markets during a single 60-day period during two election cycles, excluding consideration of the ad-rich 1996 cycle and the most recent 2002 cycle, and unmindful of the novel and rapidly changing nature of such broadcasting. Even if the Brennan reports’ bottom-line “sham”-“genuine” percentages were objectively accurate, those ratios are susceptible to significant fluctuation depending upon the random decisions of a single actor. For example, had the AFL-CIO decided not to broadcast its “Deny” ad 2,808 times in multiple markets in September 1998 – a decision that might have resulted by happenstance from a Senate leadership decision to postpone the vote, AFL-CIO budget constraints or otherwise -- then, according to defendants, only 2.2% of all “genuine issue ads” aired during 1998 would have been banned by BCRA, not the 6.1% that “actually” would have been banned. See Def. Br. 72 n.70. By the same token, had the AFL-CIO happened to double its ad buy for “Deny,” the “banned” figure would be around 10%. See also Expert Report of Dr.

9 In so stating, we do not concede the validity of FECA’s similar treatment of unions and non-ideological corporations in light of Austin’s discussion of the distinctions between their treasuries as reflectors of the views of their respective constituencies. See 494 U.S. at 655-56. But that issue is not presented here.

10 Defendants themselves posit a non-competitive federal election where no “electioneering ad” and one “genuine issue ad” referring to a candidate is broadcast, so BCRA’s improper reach would be 100%; they say, perhaps without realizing the significance, that the key formula in Buying Time 2000 is “a calculation that will vary enormously depending upon the volume of candidate-focused ads in any given election year.” Gov. Br. 72. That is exactly the point.
James L. Gibson 22-23 (September 23, 2002) (analyzing volatility of Goldstein ad database).

Defendants’ data “prove” far too little for a related reason, namely, the narrowness of the field of speech at issue. The overbreadth cases typically discern the presence or absence of overbreadth upon common-sense considerations of longstanding and ordinary behavior of individuals. See, e.g., Watchtower Bible and Tract Society v. Village of Stratton, 122 S. Ct. 2080, 2089-91 (2002); Federal Communications Commission v. League of Women Voters of California, 468 U.S. 364, 387-96 (1984); U.S. Civil Service Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548, 557-72 (1973). There is simply no basis, at least not yet, for commensurate predictive confidence about the nature of future “electioneering communications.”

D. The “Fallback” Definition of Electioneering Communications Is Internally and Fatally Contradictory

If the primary definition of “electioneering communication” is invalidated, then the “fallback” definition, 2 U.S.C. § 434(f)(3)(A)(ii), must be stricken as well, for reasons expressed in the McConnell plaintiffs’ briefs. Additionally, defendants fail to explain why the fallback is not internally contradictory on its face. It covers any broadcast communication that “promotes or supports...or attacks or opposes a candidate...regardless of whether [it] expressly advocates a vote for a candidate”; however, “[t]he term “electioneering communication’ does not include...an independent expenditure,” § 434(f)(3)(B)(ii), of which express advocacy itself is an essential element. See § 431(17)(A). Moreover, the fallback specifically disclaims that it “affect[s] the interpretation or application of [11 C.F.R. §] 100.22(b),” the FEC’s alternative definition of “express advocacy” whose text is similar to that of the fallback. Thus the fallback is utterly contradictory as to whether it includes, excludes or is the functional equivalent of express

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II. **BCRA’S ADVANCE DISCLOSURE REQUIREMENTS ARE UNCONSTITUTIONAL**

Defendants and intervenors attempt to defend BCRA’s advance disclosure requirements on the ground that any statutory infirmity will be cured by regulations the FEC will adopt. Gov. Br. 111; Int. Br. I-95-96. Although the FEC has *proposed* regulations that would, if adopted, make it clear that electioneering communications and independent expenditures need not be reported until after these communications have been aired, see “Bipartisan Campaign Reform Act of 2002; Reporting,” 67 Fed. Reg. 64555, 64559 (October 21, 2002), the agency’s possible action cannot cure the statute’s own infirmity. The proposed regulations may never be adopted, or, if adopted, they may not be approved by Congress. And, there is nothing to prevent the Commission itself from reversing its position as soon as this litigation is over, as part of a litigation settlement or independently.

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11 Defendants deny that the fallback is unconstitutionally vague, but in the recent FEC rulemaking on electioneering communications defendants acknowledged that one of its key phrases -- “promotes or supports...or attacks or opposes” -- defies meaningful precision. The FEC declined to adopt any regulation exempting from the primary definition communications that do not “promote,” “support,” “attack” or “oppose” a candidate, as 2 U.S.C. §§ 434(f)(2)(B)(iv) and 431(20)(A)(iii) permit, because it could not be certain whether any reference to a candidate could be immune from such an interpretation. See “Electioneering Communications,” 67 Fed. Reg. 65190, 65200-02 (Oct. 23, 2002). For their part, the intervenors urged the FEC not to include this phrase in any exception because it was “subjective,” would “create[ ] uncertainty about whether a communication will be covered by the law,” and would “undermine[] the bright line test” of the primary definition, which Congress enacted “because entities that are not political committees must be able to easily tell whether their communications will be covered.” Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe and Senator James Jeffords, at 8, 6 (August 23, 2002). [www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf](http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf). Certainly, if this phrase is inadequate to provide a sufficient “bright line” for corporations, unions and membership organizations if included in an exception to the principal definition of “electioneering communications,” then its presence at the very core of the fallback definition renders the latter unconstitutionally vague.
RNC TITLE II REPLY

BCRA SECTION 213 VIOLATES THE FIRST AMENDMENT.

Before BCRA, parties could make (i) unlimited independent expenditures, (ii) limited contributions to candidates, 2 U.S.C. §§441a(a)(2)(A) ($5,000 generally), 441a(h) ($17,500 to Senate candidates), and (iii) substantial coordinated expenditures, 2 U.S.C. §441a(d) (up to $1.6 million in 2000, see Def. Br. 177). Section 213 requires political parties to make a choice between exercising their First Amendment right to make unlimited independent expenditures, see Colorado I, 518 U.S. at 616, and their statutory right to make large coordinated expenditures, see 2 U.S.C. §441a(d). Thus, §213 imposes an unconstitutional condition. McConnell Br. 85-87; RNC Br. 72. Notably, §213 also treats the entire party structure – from the RNC on down to the Dallas County (Iowa) Republican Party – as a single entity for purposes of that choice.21 Because it will be practically impossible to monitor all party activity, §213 will likely force parties to forego independent expenditures altogether, effectively overruling Colorado I.

Defendants respond that, like other political committees (which could never take advantage of §441a(d)), political parties will be able to make unlimited independent expenditures and coordinated expenditures up to the $5,000/$17,500 contribution limits. Def. Opp. 112. But that leaves parties able to do only two of the three things they were able to do before. Thus, as the "price" of making even a dollar in independent expenditures, parties are unconstitutionally coerced to forego as much as $1.6 million worth of coordinated expenditure authority. Thus, the unconstitutional condition.

21 As shown (RNC Br. 72), the RNC has often made coordinated expenditures while the Republican Party of Michigan was making independent expenditures, and in 1996, made $4.3 million in coordinated expenditures in 17 states where the National Republican Senatorial Committee was separately making $10.5 million in independent expenditures.
IV. SECTION 213 IS UNCONSTITUTIONAL

Defendants’ arguments in defense of the section 213’s "either/or" provisions similarly evade Plaintiffs’ arguments that the statute fundamentally overrules *FEC v. Colorado Republican Fed. Camp. Comm.*, 518 U.S. 604 (1996) ("*Colorado I*") and imposes a punishment for the exercise of the parties’ right to expend funds truly independent of their nominees. *Id.* at 618.

Defendants fail to respond to the Plaintiffs’ argument that section 213 re-imposes a "conclusive presumption" that political parties cannot make independent expenditures (the obvious object of the statute), and that the holding of *Colorado I* prescribes recreating such a conclusive presumption, in whatever form. Rather, they shift focus to what they view as a limiting principle of *Colorado I* - its possible limitation to a political party’s pre-nomination independent expenditure activities. However, this begs the question. Section 213 reestablishes the "conclusive presumption" by recasting it as a requirement that political parties make a "choice" either to forego their constitutional right to make independent expenditures or the right to engage in any coordinated expenditure activity. *Id.* at 619.

Defendants contend the forced choice of section 213 is akin to the choice approved in *Buckley*, in which Congress conditioned the acceptance of public funding by a Presidential candidate upon agreement by the candidate to the limitation of expenditures. *Buckley*, 424 U.S. at 82, fn. 65. The public funding considered in *Buckley* is not analogous to the parties’ rights to make expenditures on behalf of their candidate. If the interest to be advanced is "[e]nsuring that an expenditure is ‘truly independent’" (Int. Opp. I-103, fn. 382), this goal is already advanced by the provisions defining independent expenditures. The virtual proscription of independent expenditures is excessively broad and specifically precluded by *Colorado I*.  

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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.

The government has now had two opportunities to deal with the central constitutional flaw of section 305, but has failed on both occasions even to address it. That problem, as we have noted, see McConnell Br. 89; McConnell Opp. Br. 58, is that the statute unconstitutionally requires candidates who wish to broadcast advertisements that "refer" to their opponents to pay a higher rate than they would if their advertisements refrained from any such reference, and the only way those candidates can obtain the lower rate is by engaging in additional speech.

Defendants have responded with a series of sometimes accurate, but always irrelevant, responses. 28 It is true that other provisions of law require certain disclosures to be made and impose a variety of other burdens on broadcasters. See Opp. Br. 130-31. What is not true is that Congress has ever come near to denying a benefit — here, the lowest unit rate — simply because a candidate has engaged in speech that does nothing more objectionable than referring to his opponent in an advertisement. Nor is there any justification for imposing burdensome disclosure requirements only with regard to such advertisements.

Nothing in the government's brief even offers a guess as to why Congress would choose to deprive speakers who "refer" to their opponents in their advertisements of less expensive

28 The government's continued reliance on the doctrines of ripeness and standing, see Opp. Br. 130, to avoid judicial resolution of the constitutional challenge to section 305 misapprehends the nature of both doctrines. Entirely aside from the fact that ripeness requirements are relaxed with regard to First Amendment challenges, see Martin Tractor Co. v. FEC, 627 F.2d 375, 380 (D.C. Cir. 1980), the challenge is ripe because the statute is already fully in effect. It will govern, for example, in the special elections to be held in Hawaii later this week and in January. As for standing, Senator McConnell not only unambiguously has standing to challenge the statute on his own behalf, see McConnell Opp. Br. 58 n.28, but to do so on a facial basis with respect to all its unconstitutional applications, see Gooding v. Wilson, 405 U.S. 518, 520 (1972). In fact, section 403(b) of BCRA specifically provided that such challenges could be made by members of the Senate, and here, just as was true of the right of Senators McCain and his colleagues to intervene to defend the statute, Senator McConnell's right to challenge it is more than sufficiently alleged in his complaint. See Order Granting Motion to Intervene, May 3, 2002, at 6.
broadcast rates or why it would selectively impose disclosure requirements only on candidates who do so. But Congress has told us why in the very title it chose for the section: “Limitation on Availability of Lowest Unit Charge for Federal Candidates Attacking Opposition.”

The underlying legal reality remains the same: Congress may not disfavor speakers simply because, in the words of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), they engage in speech that is “uninhibited, robust and wide open” or because the speech includes “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,” *id.* at 270. Yet that is precisely what Congress has done here.30

The statute thus not only punishes speech based on its content, but also imposes unconstitutional conditions on speech because of Congress’ disapproval of it. There is no basis on which section 305 can withstand constitutional challenge.

**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.**

The government makes no real effort to defend the constitutionality of section 318. Its few arguments to the contrary are unavailing.

*First*, the government again suggests that section 318 should be subject to less than strict scrutiny. *See* Opp. Br. 123-24. As we have already noted, *see* McConnell Br. 93; McConnell Opp. Br. 59, section 318 not only limits contributions by minors, but bans them altogether.

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29 The government’s assertion that the title of a statute cannot change the terms of its text, *see* Opp. Br. 131 n.142, is true but irrelevant. The statute’s text makes plain that it applies to all advertisements that “refer” to an opponent; the statute’s title and legislative history make plain why Congress so acted.

30 A small sample of the repeated statements made in the Senate and by the intervenors in depositions in this case denouncing “negative” advertisements and supporting BCRA as a way to reduce such advertising is set forth in the NRA’s brief. *See* NRA Br. 3-4 nn.1, 2. Senator McCain’s deposition testimony is illustrative: “The real world is that the overwhelming majority of ads that we see running today are attack ads . . . which are direct, blatant attacks on the candidates . . . . We don’t think that’s right.” McCain dep. 100.
Under *Buckley v. Valeo*, 424 U.S. 1 (1976), therefore, it should be subject to strict scrutiny because it prevents a would-be donor from engaging in the “undifferentiated, symbolic act of contributing,” *id.* at 21.

Second, the government seeks to justify section 318 on the ground that it is necessary to prevent circumvention of existing campaign contribution limits by parents. *See* Opp. Br. 125. As a threshold matter, there is no evidence, either in the legislative record or in the record developed before this Court, that such circumvention is a genuine problem. Even leaving that aside, however, the government makes no real effort to demonstrate that section 318 is narrowly tailored to that (or any other) interest. Although the government claims that requiring minor contributors to disclose their ages or their family relationship with other contributors would be more burdensome than an outright ban on contributions by minors, the government does not address the numerous other more narrowly tailored alternatives that we have suggested. *See* McConnell Br. 93-94; McConnell Opp. Br. 60-61. As the government’s silence amply demonstrates, an outright ban on contributions by minors is wildly overbroad.

Third, the government asserts that the only dispute in this case is “about the age at which to draw the line,” claiming that some of the plaintiffs have conceded that Congress may constitutionally prohibit contributions by young children. *See* Opp. Br. 124 (citing Thompson Br. 16). As a threshold matter, plaintiffs have made no such concession. *See* Thompson Br. 16. Even if we had, however, the government’s assertion is incorrect. Far from merely challenging Congress’ decision about where to draw the line, plaintiffs are contending more broadly that section 318 imposes restrictions on a fundamental right and therefore cannot survive strict scrutiny. *See* McConnell Opp. Br. 60 n.31. The fact that Congress might have chosen to regulate contributions solely by young children suggests only that Congress had before it more narrowly tailored alternatives, which it refused to adopt. *See id.* at 60.

An outright ban on contributions by minors represents a plain violation of their First Amendment rights. Section 318 should be invalidated.
RNC TITLE III REPLY

THE MILLIONAIRE’S PROVISIONS DEMONSTRATE THE ABSENCE OF ANY COMPELLING-GOVERNMENT INTEREST HERE.

Defendants persist in ignoring the facts (i) that only two years ago the Government successfully represented to the U.S. Supreme Court that coordinated party-expenditure limits were absolutely necessary to prevent corruption, and (ii) that the Millionaire’s Provisions altogether abolish those very limits in certain circumstances. RNC Br. 73; RNC Opp. 49. The Supreme Court has held that where, as here, Congress has indicated that it “no longer considers [a] statute necessary” to accomplish a stated objective, that statute cannot survive heightened constitutional scrutiny. Boos v. Barry, 485 U.S. 312, 329 (1988).

Further, Defendants are at a loss to explain how the anti-corruption rationale is served, rather than undermined by the Millionaire’s Provisions, or how a provision intended to “level the playing field” survives scrutiny under Buckley. RNC Br. 73-75; RNC Opp. 49-50.

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TITLE III ARGUMENT:

SECTION 318 OF THE BCRA, PROHIBITING CONTRIBUTIONS AND DONATIONS BY CHILDREN UNDER THE AGE OF EIGHTEEN VIOLATES THE FIRST AMENDMENT OF THE CONSTITUTION

The government states that its interest in “foreclosing evasion of the individual contribution limits”, survives a First Amendment challenge because it is “closely drawn to match a sufficiently important interest.” See Gov’t. Reply Br. at 123. Silencing the voices of potentially millions of young Americans and disallowing them the ability to financially support the candidate of their choice, is not in the interest of the government (emphasis added). Again, as we stated in our opening brief, the government should put in place the necessary mechanisms to enforce the laws that they already have on the books before stripping any American of his or her any constitutionally guaranteed rights. The rights of those who attempt to evade the law should be modified or changed, not the rights of a collective group who are in essence, victims of those evading the law. To give permission to young Americans to contribute their time and effort to a candidate and to make unlimited independent expenditures but disallow them the opportunity to make financial contributions of their own money is questionable logic, and we submit, unconstitutional.

The government consistently argues that the age of eighteen is the age when the Constitution recognizes the right to vote, thus eighteen should be the age when a minor should be allowed to contribute or donate to a candidate or committee of his or her choice. The government is dismissive of the importance of the right to vote. To cast a vote for the candidate of one’s choice is the culmination of the political process.

1 Thompson Opening Br. at 16.
Thousands of African-Americans and women fought, and even died, for the right to vote. However, the act of casting a vote is very different from making a financial contribution.

Unless and until the government can show that an overwhelming amount of minors are behaving illegally and thus, should be stripped of their 1st Amendment constitutional rights, should laws like BCRA 318 be even considered. Section 318 of the BCRA corrects a problem but creates a much bigger one. It is a governmental response that is among other things unconstitutional, should not be enforced, and, we contend, should be stricken in its entirety from the BCRA.
IV. TITLE V OF BCRA IS UNCONSTITUTIONAL.

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

The government's defense of the constitutionality of section 504 has changed markedly as the case has progressed. Initially, the government claimed that section 504 facilitated deterrence and detection of violations of FECA's source-and-amount limitations, informed the public of sources of support for candidates, and informed the public of sources of sponsors of "electioneering communications." See 10 PCS/JG 206-07 (Resp. of United States and FCC to NAB's First Interrog., June 27, 2002). Then, once it was clear that those objectives could not possibly justify a statute which required extensive disclosures about any advertisement on any issue of "national importance," the government switched course and defended the statute on the ground that it would provide voters with "important information about political broadcasts," assist voters who had difficulty in "identifying the true sponsors of issue ads," and combat "political corruption." Br. 218. Finally, when it was undeniable that the great bulk of section 504 is wholly unrelated to those supposed objectives, the government changed course again, claiming that "public disclosure" is, in general, beneficial to the public and that it is useful to give the public "access to information" about requests made by individuals and groups who seek to purchase time for advertising on television and cable (even if they ultimately do not). Opp. Br. 134.

For all its shifting focus, the government still overlooks the basic problems of the statute. As the government points out, the NAB may seek to advise its members on how to comply with section 504, notwithstanding its vagueness. See Opp. Br. 133 n.144. But pervasive vagueness remains. It is thus perfectly true, as the government asserts, that the NAB has posited Medicare reform and gun control to its members as two potential "political matters of national importance" to which the statute may apply. Id. But what of other, less obvious "national" issues? Is an advertisement criticizing a candidate from Arkansas for the United States Senate for increasing the budget of the state's Attorney General's office by 71% a "message" relating to a "political
matter of national interest”? See id. at 138. What of an advertisement criticizing a Montana candidate for Congress for slapping his wife? See id. at I-78. Or an advertisement criticizing a New York senatorial candidate for her supposed lack of familiarity with the state’s geography? See id. at I-79. A trade association can do what it can to assist its members in dealing with a vague statute. But it can hardly provide full or even substantial comfort to a broadcaster subject to substantial fines by the FCC for misapprehending which advertisements the Commission may ultimately view as dealing with issues of “national importance.”

Nor has the government offered any justification for extending the current obligation of broadcasters to disclose who pays for political advertisements into a continuing obligation of broadcasters to disclose enormous detail about private citizens and groups who merely request the purchase of broadcast airtime, even if they do not ultimately purchase it. As we have previously observed, there is no law, including BCRA itself, that prohibits prospective advertisers from inquiring of broadcasters as to the availability of airtime. The disclosures required under section 504 thus advance no governmental purpose other than deterring advertisers and broadcasters from engaging in constitutionally protected speech. Requiring broadcasters to serve the continuing function of informers by disclosing all requests to do so, however tentatively made and notwithstanding that the requester ultimately decided not to broadcast an advertisement, would not only unduly burden broadcasters but significantly inhibit the willingness of prospective advertisers even to discuss the possibility of running such advertisements.31

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31 The government misses the point when it says that “there is no right to make an anonymous broadcast.” Opp. Br. 135. The issue here is the anonymity of even a “request” for broadcast time, notwithstanding that it is not by a candidate and that it did not lead to any broadcast.
CONCLUSION

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

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SENATOR MITCH McCONNELL, et al.,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, et al.,
Defendants.

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

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