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4 LAURENCE GOLD, ESQ., Washington, D. C. ; on behalf of
5 AFL- CIO.

6 JAY ALAN SEKULOW, ESQ., Washington, D. C. ; on behalf
7 of Minor Plaintiffs.

8 PAUL D. CLEMENT, ESQ., Deputy Solicitor General,
9 Department of Justice, Washington, D. C. ; on
10 behalf of Federal Defendants.

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1 have long been a source of stability for the nation,
2 and in the direction of First Amendment-protected,
3 but at times ideologically razor-sharp interest
4 groups.

5 BCRA, in a word, goes too far. There were
6 other ways before Congress that Congress could have
7 employed most relevantly. To the extent that the
8 concern of Congress was large contributions of
9 non-Federal funds, those regulated by the states,
10 then the Hagel amendment was before Congress, which
11 would have put a cap, a ceiling on the level of
12 contributions to the national parties, but preserving
13 the prerogatives of the state and local parties.

14 Secondly, to the extent that the concern
15 was contributions being directed toward issue ads,
16 Congress had before it the Ney amendment, which among
17 its terms provided specifically for the non-use of
18 such funds in connection with issue ads.

19 Thirdly, to the extent that Congress was
20 concerned as it clearly was with the abuses of the
21 recent past, as documented lavishly in the Thompson
22 committee hearings, Congress could and did respond in
23 BCRA, in unchallenged parts of BCRA, namely, 302 and
24 303, addressing specifically fundraising on Federal
25 property, clarifying what had been famously said to

1 be a lacuna, namely, no controlling legal authority.
2 Also, tightening the prohibitions on a common abuse
3 in the recent past, namely, the involvement and
4 contribution by foreign nationals, the James Riatti
5 situation.

6 But Congress chose not to do this. It
7 rather, in 323A, chose to ban, ban, not limit, but
8 ban, but also to regulate relationships and
9 associations among the different levels of the
10 parties. In 323B, Congress went so far as to
11 regulate state and local political activity that is
12 at the most grassroots level and is documented
13 lavishly in this record, especially with respect to
14 the State of California. The record teems with
15 indications that there will be a diminution of
16 political activity by the political parties, both
17 parties, both of the major parties, the California
18 Democratic party and the California Republican party.

19 QUESTION: Do I understand your position
20 that Congress could have provided that there be a
21 strong wall between national and state and local
22 parties so that no funds could be transferred inter
23 se?

24 MR. STARR: No, Your Honor. It seems to
25 us that the firewall which was described by Senator

1 McCain does in fact intrude into associational
2 activity of parties and the structure of parties that
3 this Court has found protected in a variety of cases
4 such as University of San Francisco County, Tashjian
5 v. Connecticut.

6 QUESTION: But what -- what's the speech
7 interest if Congress says there can be no transfers
8 of funds between different levels of the party, what
9 is this First Amendment violation in that? And in
10 fact, I thought you were suggesting in your earlier
11 remarks that Congress might have done something like
12 this.

13 MR. STARR: Well, my point earlier was
14 simply to say there were other alternatives that were
15 more narrowly tailored before Congress, but with
16 respect to transfers themselves, the transfers this
17 record show go among to other things to enable voter
18 mobilization at the most fundamental level and
19 activity, and this again is documented most lavishly
20 in California, that is focused upon such as ballot
21 initiatives, quintessential state activity but
22 nonetheless which Congress sweeps in under the
23 rubric.

24 QUESTION: I don't -- I thought that your
25 response to Justice Kennedy's question was that the

1 right to speak includes the right to speak in
2 association with others. Isn't that the position
3 that your brief takes?

4 MR. STARR: That is our position. If I
5 failed to say that, I say it now. The whole idea --
6 and I clearly did fail to say it.

7 QUESTION: But my question was, could
8 Congress allow communications of all type, but forbid
9 transfer of funds between different levels of the
10 party?

11 MR. STARR: Our position is not
12 non-Federal funds, which by definition are funds that
13 are either regulated or subject to regulation by
14 state law.

15 QUESTION: May I ask you if you are
16 talking about the right to speak in association with
17 others, does that apply to individuals or does a
18 group have a right to speak in association with other
19 groups?

20 MR. STARR: This -- I believe it does,
21 Your Honor, but this Court, I don't think has
22 authoritatively answered that question. Footnote 10
23 in Colorado Republican II notes that there are
24 indications in the Court's cases, including
25 California Democratic Party v. Jones to the effect

1 that there is in fact an associational right on the
2 part of those who have come together as an
3 association, and that certainly we think is
4 consistent with the teachings of this Court in cases
5 such as *Eu v. San Francisco County Democratic Party*
6 and *Tashjian v. Connecticut*.

7 QUESTION: It's consistent we have never
8 held that, have we?

9 MR. STARR: I think it's fair and accurate
10 to say that you have not expressly held it. That's
11 the reading, at least, of this Court in footnote 10
12 --

13 QUESTION: Mr. Starr?

14 MR. STARR: -- as I read it in *Colorado*
15 *Republican II*.

16 QUESTION: Mr. Starr, may I ask whether
17 you are attacking prior law that required an
18 allocation? It didn't say that the state parties
19 were home free. It did say when there were mixed
20 activities, there had to be an allocation and in
21 presidential election years, for example, that was
22 heavily weighted on the Federal side. Was that in
23 your view constitutional?

24 MR. STARR: Certainly an allocation
25 process, we think, can in fact be contemplated in

1 terms of assuring that those funds which are subject
2 to state law and state regulation are in fact free to
3 be regulated by the state, and I mean by way of
4 specific example, the people of California, the
5 people of New York have made other contrary
6 determinations than the Congress did with all respect
7 to Congress with respect to certain forms of
8 contributions.

9 QUESTION: But I don't -- I don't get in
10 what you have just said an answer to a question which
11 would affect New York, would affect California, would
12 affect every state, 65/35, to take a non-hypothetical
13 ratio when there are mixed activities, when there are
14 Federal and state candidates on the ballot. As I
15 understand the prior law, it didn't count how many.
16 It just made that allocation. Was that
17 constitutional?

18 MR. STARR: I'm not saying that the
19 specific allocation was constitutional or not. That
20 was not tested. But my answer to the question is a
21 process of accommodation of the state interests is
22 necessary in order, Your Honor, we believe to achieve
23 values of congruence --

24 QUESTION: I think -- I think the question
25 that Justice Ginsburg is getting at is, I gathered

1 the statute was passed because, let's call him Joe
2 Wealthy, wants to write a check for \$10 million to
3 help his favorite candidate Smith get elected. And
4 they figured out a way, who they is is named in the
5 lower court opinion, but we'll just say they. They
6 figured out a way despite the prior law to do it. It
7 would pay for Get Out the Vote, it would pay for
8 voter registration, and it would pay for issue ads
9 which didn't say vote for Smith. What they said was
10 Jones, his opponent, is a real rat, go tell him what
11 you think of him, okay.

12 I mean, all right, now, that was the
13 problem. And the solution is to say one, all pennies
14 spent by the Federal committee are Federal, and
15 though the limitations of \$50,000 a year in total
16 apply. Two, the state is home free, does anything it
17 wants where there are only state candidates on the
18 ballot, that where there are state and Federal both
19 on the ballot, we will allocate, and then it sets up
20 a highly complex system of allocation, so I think the
21 question that I heard was, if you thought the prior
22 system of allocation which happened to be 60 percent
23 Fed, 40 percent state or a ratio for the state
24 committee, depending on the number of state offices
25 versus Federal offices.

1 If you felt that was constitutional, then
2 why is this new allocation unconstitutional, because
3 as I read through it, it looked like the basic
4 problem is when you get a voter to the polls, you
5 have to have him there to vote for a state candidate,
6 you have to have him there for a Federal candidate,
7 and we are going to allocate the cost of getting him
8 there between hard money, Levin money and maybe some
9 other money.

10 All right. That's a long question, but I
11 want its addressing specifically what Justice
12 Ginsburg raised, which is why if that first
13 allocation is okay, why isn't this new allocation
14 okay?

15 MR. STARR: Several responses. First, let
16 me begin with the beginning of your hypothetical,
17 large contribution from the major donor, the Hagel
18 amendment addresses that. Now, with respect, that is
19 let's limit the contribution which, after all, is the
20 fulcrum of concern, namely, the possibility of
21 corruption, or as this Court articulated in Shrink
22 Missouri PAC in Colorado II, undue influence.

23 But there comes a point, Your Honor, where
24 Congress goes too far in failing to accommodate the
25 state interest. There is in short a necessary, under

1 this Court's jurisprudence, and we believe anchored
2 in the Federal Elections Clause for Congress to
3 assiduously be mindful of displacing state law, and
4 that is what has been done here by virtue of
5 essentially not even trying to effect an allocation,
6 but rather simply saying, including in context where
7 the flow of funds from the national party to the
8 state or local party is in an off-year election. The
9 value that we would have left up to the Court is that
10 of congruence, proportionality.

11 This goes much too far and Congress could
12 have calibrated much more carefully. When we're talk
13 -- we're talking about limits, by the way, I think
14 it's fundamental to bear in mind that the limits with
15 respect to Federal contributions are anchored on the
16 idea of a contribution as for the purpose of
17 influencing a state election. What the record shows
18 is that there is a substantial amount of donations in
19 the system that go for quintessential state election
20 activity, including ballot measures, initiatives, and
21 the like.

22 QUESTION: But to the extent that you are
23 challenging, your challenge is based on the First
24 Amendment, then state laws that are similar or even
25 more stringent than the Federal law would also form

1 So on the one hand, you're saying Congress paid
2 insufficient attention to state interests, but on the
3 other hand, your First Amendment argument would
4 require significant revision of some state laws.

5 MR. STARR: Well, I don't think so, Your
6 Honor, because what Congress has seen fit to do is
7 regulate activity throughout the system, including
8 then a Federal committee's or national committee's
9 relationship with a state and local committee that
10 ends up affecting what the national committee can do
11 in mayoral elections, including in off-year, that is
12 to say, non-Federal elections years.

13 QUESTION: Of course, some states might
14 choose to make no law abridging the freedom of
15 speech.

16 MR. STARR: Well, it's a quaint idea.

17 QUESTION: To coin a phrase.

18 MR. STARR: And the Commonwealth of
19 Virginia has that, and it is a very good system of
20 total transparency and it's a very vibrant system
21 that is not infected with corruption or the
22 appearance of corruption in the view of its Governor
23 and others. The Commonwealth of Virginia does in
24 fact embrace the idea of transparency. Why? Because
25 this court stated in Buckley that a contribution is a

1 First Amendment event. It does have significance.
2 But we have now gone beyond that which Congress has
3 held by this court in Buckley years ago to have an
4 interest in and that is the regulation of
5 contributions for the purpose of influencing --
6 that's the definition -- a federal election.

7 QUESTION: I'm still curious about the
8 response, Mr. Starr, to that inquiry about whether
9 your arguments would apply and lead you to think that
10 the pre-BCRA regime is invalid as well.

11 MR. STARR: No, we are not suggesting that
12 the FEC regime was invalid, and we think that --

13 QUESTION: That nothing about it was, the
14 allocation and so forth.

15 MR. STARR: We're not suggesting it. The
16 issue was never authoritatively resolved.

17 QUESTION: No, but would your argument
18 lead you to conclude that maybe that scheme that's
19 been there for 25 years is invalid?

20 MR. STARR: Not at all, because what the
21 FEC did for all those years, and they're settled
22 expectations that were built upon that system, was a
23 recognition of the state's prerogatives. This is
24 very powerfully expressed in the FEC's 20-year
25 report, which speaks about our Federal system and the

1 very idea, and therefore, declining to use the
2 pejorative term, quote, soft money, because other
3 states have different attitudes.

4 QUESTION: But as I understand it, your
5 criterion for drawing the line at what is a
6 legitimate state interest is the proportionality and
7 congruence criterion, is that correct?

8 MR. STARR: I think that is instructive as
9 to what --

10 QUESTION: And how do you factor into the
11 application of that criterion, the basic argument
12 made on the other side in this case, that if you do
13 not allow what Congress has done here, you are, in
14 effect, allowing a complete end run around the prior
15 law? How does that factor into congruence and
16 proportionality? Do we ignore it?

17 MR. STARR: No, Your Honor, because again,
18 Justice Souter, Congress had before it -- if the
19 problem was these large donations giving rise to the
20 appearance of corruption or undue influence --

21 QUESTION: Large donations or a thousand
22 smaller donations? The end run problem is exactly
23 the same. And one reason I suppose it's the same is
24 the argument that you made, and that is the close
25 association between the state and the national

1 committees. And I don't see how your argument
2 addresses that.

3 MR. STARR: But Your Honor, we think it
4 does in terms of simply recognizing the traditional
5 interests of the states that we think is, again,
6 anchored in the Elections Clause itself that Congress
7 simply does not have authority. And this Court's
8 teaching in terms limits I think is to the sane
9 effect, that Congress simply lacks authority even if
10 it, quote, sees a problem which it has seen in
11 Morrison and Lopez and a variety of cases that
12 Congress can go in our Federal system too far.

13 And that's even in the context of the
14 Commerce Clause. And here the Elections Clause goes
15 to a quintessential sovereign interest of the states.
16 I would like to reserve the remainder of my time.

17 QUESTION: Very well, Mr. Starr.
18 Mr. Burchfield, we'll hear from you.

19 ORAL ARGUMENT OF BOBBY R. BURCHFIELD
20 ON BEHALF OF THE POLITICAL PARTY PLAINTIFFS

21 MR. BURCHFIELD: Mr. Chief Justice, may it
22 please the Court:

23 Title I is both fatally overbroad in
24 achieving any Federal interest and nonsensically
25 underinclusive. To paraphrase the Court in National

1 Conservative PAC, we are not here quibbling about
2 fine-tuning prophylactic measures. We are here
3 challenging fundamental restrictions on core
4 political party activities. Indeed the Court noted
5 in Buckley that no societal interests would be
6 achieved if a loophole closing measure allowed
7 unscrupulous persons and organizations to spend
8 unlimited amounts to influence a Federal candidate.

9 Joe Wealthy is George Soros, Justice
10 Breyer, who the media reports --

11 QUESTION: \$10,000,000 and Get Out The
12 Vote --

13 MR. BURCHFIELD: And totally unregulated.

14 QUESTION: But we'll see how that works
15 because the second they start conferring with any
16 candidate or they start conferring with the political
17 party, they're going to be in a lot of trouble. So I
18 guess it still is possible that a person could have a
19 totally uncoordinated private effort to Get Out the
20 Vote and give a lot of money to it.

21 But the general rule of constitutional law
22 and every other law is Congress doesn't have to solve
23 every problem. And we don't know yet whether that
24 will turn out to be a big loophole.

25 MR. BURCHFIELD: Correct, Justice Breyer.

1 But we know from Colorado I that not all activities
2 of political parties are coordinated with their
3 candidates and we know from the current regime, from
4 the regime that has been in effect for more than a
5 decade, that all donations to political parties,
6 Federal money, non-Federal money or anything else, is
7 fully disclosed and reported. So at least under the
8 system that we have had with political parties, the
9 political parties are accountable and are
10 transparent.

11 Let me say a few words about the
12 allocation regulations, just to make sure that we're
13 all clear about what the allocation regulations do
14 and -- did and do not do. In the 15.6 million
15 dollars of non-Federal money that the Republican
16 National Committee spent in the 2001 off-year
17 election, when there were no Federal candidates on
18 the ballot --

19 QUESTION: When you say off-year, you mean
20 governor elections in Virginia and New Jersey and
21 like that?

22 MR. BURCHFIELD: Exactly, when there were
23 no Federal candidates on the ballot, odd-year
24 elections. The allocation regulations allowed the
25 RNC to spend whatever it could raise and whatever it

1 wanted to spend subject to state law. The allocation
2 regulations did not apply. That is a perfect
3 accommodation, in our view, of the state interest, of
4 the state interest in regulating its own electoral
5 affairs.

6 QUESTION: How did the 65 percent/35
7 percent in the Presidential year accommodate state
8 interests?

9 MR. BURCHFIELD: In a presidential year,
10 Your Honor, the FEC, after much deliberation, made
11 the determination that the national parties would be
12 presumptively more involved in Federal elections
13 those years than in state elections. But they still
14 recognized -- the FEC has still recognized that the
15 national parties are, in fact, national parties, not
16 Federal parties, and therefore, they can spend 35
17 percent on allocable activities, even in a Federal
18 election year as in 2000 when the RNC gave \$5.6
19 million of non-Federal money to state and local
20 candidates. That money is not subject to the
21 allocation regulations.

22 QUESTION: You assert the principle,
23 however, that the Federal government may regulate any
24 activity which has an effect on Federal elections?

25 MR. BURCHFIELD: Your Honor, I think the

1 Court put it well in Siebold over a century ago when
2 it said, for those activities that had exclusive
3 reference to a state election, the Federal government
4 has no role. But when there are joint activities
5 that have an effect on both elections, the regulating
6 entity, state government or Federal government,
7 cannot impair or nullify -- is the term the Court
8 used then -- impair or nullify the other sovereign's
9 interest.

10 QUESTION: I suppose getting a governor
11 elected or getting a state legislature elected, which
12 will establish electoral districts within the state
13 in a certain fashion, which will be used for the
14 Federal election as well, I suppose that that would
15 have an effect on the Federal election, wouldn't it?

16 MR. BURCHFIELD: Your Honor --

17 QUESTION: So every state election has an
18 effect on Federal elections.

19 MR. BURCHFIELD: Your Honor, that is the
20 Solicitor General's position here. It is a boundless
21 proposition that leaves the states no room to
22 legislate on their own elections because they
23 contend -- you're exactly right.

24 QUESTION: So in order to avoid that
25 boundless proposition, it seems to me you cannot

1 accept the view that whatever affects Federal
2 elections can be regulated.

3 MR. BURCHFIELD: I do accept that
4 proposition.

5 QUESTION: You do accept it?

6 MR. BURCHFIELD: I do accept that
7 proposition.

8 QUESTION: Well, then what the Solicitor
9 General says is quite correct. State elections
10 affect Federal elections, so state elections can be
11 regulated.

12 MR. BURCHFIELD: Well, there is a certain
13 point at which the effect becomes so attenuated that
14 the sovereign interests of the state becomes
15 paramount.

16 QUESTION: So you do not accept the
17 proposition that whatever affects Federal regulations
18 can be regulated.

19 MR. BURCHFIELD: I would say it has to be
20 exclusive reference under the Siebold regime, Your
21 Honor. If it's a direct donation to a state
22 candidate, if it is a Get Out the Vote phone bank
23 that advocates that the voters go to the poll and
24 vote for the governor, if it is a mailing, as under
25 the California -- as the California party affidavits

1 of Ms. Bowler and Mr. Irwin indicate, that they
2 send --

3 QUESTION: The reason that I take it that
4 (a) says that all money spent by a national committee
5 is hard money is because Congress is interested in
6 the contribution, not the expenditure. And what
7 they're saying is if you write a check for one penny
8 or you write a check for 50 billion to the Republican
9 or Democratic National Committee, we assume that that
10 money is going to be used to affect Federal
11 elections.

12 Now, you are right that a small portion
13 is, in fact, used just for state. A portion. 9
14 million out of 300 million, something like that. But
15 it's simply too hard for us to know, contribution by
16 contribution, what's going to do what. And the only
17 workable rule here is not to prevent the RNC from
18 using its money on state elections, but to say to the
19 RNC, every penny that you spend because you're a
20 national committee must follow Federal source and
21 amount limitations.

22 So it's an administrative reason, it
23 focuses on the contribution, and it focuses on the
24 nature of a national political committee. That's
25 their justification, I think.

1 MR. BURCHFIELD: Your Honor, allow me to
2 disagree with that justification. 323(a) prohibits
3 the solicitation, receipt, direction, transfer and
4 spending. It's a felony for the chairman of the RNC
5 today to send a fund-raising letter asking for \$100
6 donation to any of the California gubernatorial
7 candidates.

8 QUESTION: Can't they spend as much
9 money -- and here I'm not positive. I thought, but
10 it's complicated, that the RNC can write a check for
11 a million dollars if it wanted, or whatever the
12 amount is, as long as it's hard money. It's that
13 they're forbidden from soliciting or spending, et
14 cetera, money that isn't hard money. Am I right
15 about that or not?

16 MR. BURCHFIELD: The RNC can spend as much
17 hard money in state elections, consistent with state
18 law and in some states, in Connecticut, such as --
19 and that's set forth in Mr. Josefiak's affidavit,
20 where it's not even clear that the national parties
21 can participate because the national -- the Federal
22 limits are higher than the state limits. And there
23 are some states where the national party under this
24 regime is going to be constrained to participate even
25 in state --

1 QUESTION: And then the reason, I take it,
2 for that is the administrative reason I gave, we're
3 focusing on the contributions. And now what is your
4 response to that?

5 MR. BURCHFIELD: The response to that,
6 Your Honor, is that the statute speaks far more
7 broadly than contributions.

8 QUESTION: Isn't there also an answer to
9 that general line, that when you're talking about the
10 First Amendment, administrative considerations
11 ordinarily are not good enough.

12 MR. BURCHFIELD: Exactly, Your Honor. And
13 it's also worth noting here that the allocation
14 regulations that the senatorial or congressional
15 committees operate under are governed by the actual
16 amounts spent on state and local activity, subject to
17 a percentage of a 60 percent cap.

18 If they don't engage in at least 40
19 percent state election activity, their Federal
20 percentage is higher than 60 percent. So that the
21 allocation ratios are calibrated to address, in the
22 real world, what the parties are actually doing in
23 the state and local realm

24 QUESTION: That's an administrative
25 convenience.

1 MR. BURCHFIELD: It is an administrative
2 convenience.

3 QUESTION: And that's okay.

4 MR. BURCHFIELD: Well, Your Honor --

5 QUESTION: But there's other
6 administrative conveniences not okay.

7 MR. BURCHFIELD: Your Honor --

8 QUESTION: So you can't be relying on the
9 principle that administrative convenience is not
10 adequate.

11 MR. BURCHFIELD: Justice Scalia, we are
12 not here today to defend the constitutionality of the
13 allocation regulations, but I did sense that there
14 might be some misunderstanding about how they
15 operated, and I wanted to at least make clear that
16 the allocation regulations do not purport -- did not
17 purport to regulate purely state and local candidate
18 activity, at the national party level or at the state
19 party level.

20 A very large proportion of what the
21 California Democratic and Republican parties do was
22 not within the scope of the allocation regulations.
23 Here, under this statute, under section 323(b), the
24 only activities in even years that state and local
25 parties can engage in, according to Ms. Bowler's

1 affidavit -- she's the executive director of the
2 California Democratic Party -- are direct donations
3 to candidates, to state and local candidates, and
4 state party conventions.

5 Everything else, including a phone bank to
6 oppose a school voucher initiative such as Prop. 38
7 that was on the November 2000 ballot, and that's in
8 the Joint Appendix at 1721, the actual phone banks
9 clip, that is completely Federalized today. But the
10 National Education Association can run that very same
11 phone bank with totally unregulated money today.

12 QUESTION: In order to rule for you on all
13 of the issues that are presented in Title I -- let's
14 just talk about Title I. Do we have to cut back on
15 the second rationale given in Buckley, the
16 endorsement speech is of low value? Or can we accept
17 Buckley on its face for all that it says and still
18 rule for you on every one of these points?

19 MR. BURCHFIELD: Your Honor, we have
20 briefed this matter, and after due consideration, we
21 believe that this statute can and should be struck
22 down consistent with the Buckley line of cases.
23 Because it does go too far. Section 323(a) the
24 national party prohibition is a restriction
25 regardless of whether the amounts are coordinated or

1 uncoordinated, a principle from the Buckley cases.

2 Whether it's individual or corporate
3 money, whether it is -- whether it is a large
4 donation or a small donation, any, any amount of
5 money that the national parties are involved with
6 that is not subject to the limitations, prohibitions,
7 and reporting requirements of Federal law, FECA, is a
8 crime, it is a --

9 QUESTION: The -- the difficulty,
10 Mr. Burchfield, that I have with your argument, I
11 know where you are going, but the difficulty I have
12 is in determining what the criterion is going to be.
13 If we accept the Buckley standard, which you do, for
14 the purpose of your argument, then it seems to me
15 your criterion for applying the Buckley standard is
16 similar to what Mr. Starr was getting, getting at.
17 You say it goes too far. And we have said over and
18 over again when we are applying that standard, we
19 don't have a scalpel, and I don't know how we apply a
20 too-far or not-too-far standard.

21 MR. BURCHFIELD: Your Honor, under --
22 under strict scrutiny, which we believe is certainly
23 applicable here, because this is not a contribution
24 limit --

25 QUESTION: No, but with respect, I know

1 you are arguing that, but I also understood your
2 answer to Justice Kennedy's question to be that even
3 if we take the lesser, the more relaxed criterion
4 under Buckley, that you also win and you win on a
5 standard that it goes too far, and my problem is
6 assuming all of those things, I don't see how we
7 apply a too-far standard.

8 MR. BURCHFIELD: Well, Your Honor, first
9 of all, under strict scrutiny, the Government doesn't
10 even argue this statute can pass strict scrutiny, so
11 if the Court, as we submit that it should, since
12 these, since these restrictions go to the very
13 essence of what political parties do --

14 QUESTION: I -- I realize that argument.
15 I just want to get at the -- your answer to Justice
16 Kennedy, which was even if you apply the more
17 complacent standard, we win. That's the, that's the
18 assumption of my question.

19 MR. BURCHFIELD: And in fact, as we have
20 set forth in our reply brief, we believe that we do
21 win if even the more complacent standard is applied.

22 QUESTION: Because we have a too-far
23 standard that we apply under win under a too-far
24 standard?

25 MR. BURCHFIELD: Because Congress has to

1 make an effort, Justice Souter, to closely draw the
2 statute to address the ill that it is trying to
3 address. A \$100 donation solicited by the chairman
4 of the RNC to a California gubernatorial candidate is
5 not prohibiting that, making that a felony, is not
6 closely drawn. Prohibiting the Republican National
7 Committee from, from, from raising money consistent
8 with the state law in Virginia and donating millions
9 of dollars in 2001 in the state elections in
10 Virginia, there's no Federal interest in that.
11 That's --

12 QUESTION: But it doesn't, you see, it
13 doesn't prohibit their donating it. They can donate
14 what they want, I heard you say. It's just that they
15 have to donate it out of hard money and so what the
16 statute is actually saying is that any penny that you
17 give to a national political committee, we assume, is
18 a penny that will, or is intended to or will
19 influence a Federal election.

20 Now, now that's -- why is that an
21 unreasonable assumption to make? Because after all,
22 even if that committee were to take your money and
23 use it for the purposes you are talking about, that
24 would free up some other money for the other
25 purposes. And so Congress has made the assumption I

1 said.

2 Now, all I'm doing is going through all
3 the reply briefs because the reply briefs take each
4 of your examples and they try to explain what it was
5 that Congress had in mind. So it would help me if
6 you, you know, sort of start with the assumption. I
7 know your argument, I think. And I think I know the
8 reply, and what do you want to say about that?

9 MR. BURCHFIELD: There, it is, it shows no
10 esteem for the Commonwealth of Virginia regulating
11 its own state elections to tell a national political
12 party or anyone else that it must comply with Federal
13 standards in order to participate in a purely state
14 election activity when there are no Federal
15 candidates on the ballot.

16 QUESTION: The problem I'm having is it
17 seems to me that you are bringing out the Federalism
18 argument and we were talking about the speech
19 argument. Let's assume the Attorney General is going
20 to prevail and the Federal Government has power to
21 regulate. Still is a First Amendment problem.

22 MR. BURCHFIELD: Exactly.

23 QUESTION: Is there a First Amendment
24 answer that you can give to Justice Breyer?

25 MR. BURCHFIELD: The statute has to be

1 narrowly tailored, we contend, but at least closely
2 drawn to pursue the Federal interest.

3 QUESTION: Well, Mr. --

4 MR. BURCHFIELD: And here, and here --

5 QUESTION: But Justice Breyer's principal
6 point was that there, that there's no restriction on
7 the national parties expending funds. They just have
8 to expend Federal money, and not, not state money,
9 so-called hard money. Now, I assume that your
10 response to that is that it would be a restriction
11 upon my speech if a law were passed which said Scalia
12 can take out advertisements in newspapers, but not
13 with money from his salary. He has to use, he has to
14 use other funds. Would that not be a restriction of
15 my speech?

16 MR. BURCHFIELD: It would, Your Honor.

17 And --

18 QUESTION: But isn't it -- the reason it
19 is such a restriction is that Justice Scalia is
20 limited in what he can raise in money beyond his
21 salary, and the national parties are not?

22 MR. BURCHFIELD: The -- the national --

23 QUESTION: They can raise more money if
24 they want to.

25 MR. BURCHFIELD: The -- the national

1 parties are constrained by, are constrained by
2 Federal statute purportedly pursuing a Federal
3 interest in, in their activities relating to a
4 Federal, to a state and local election. It has been
5 a touchstone of the campaign finance statute since
6 the Tillman Act in 1907 that the activity, the
7 contribution even, has to be, has to be directed to
8 influencing or for the purpose of influencing or
9 directed to a Federal election.

10 QUESTION: Mr. Burch --

11 MR. BURCHFIELD: This is the first time
12 Congress has abandoned that touchstone.

13 QUESTION: Mr. Burchfield, can I ask kind
14 of a basic question, maybe it's assumed here, but
15 directing your attention to 323(a) in the general
16 point of 323(a), do you think a Federal statute would
17 be constitutional if it simply said national
18 political parties may not accept any contributions
19 from profit-making corporations?

20 MR. BURCHFIELD: I believe that would be
21 unconstitutional, Your Honor.

22 QUESTION: That would be unconstitutional?

23 MR. BURCHFIELD: Under the Federalism
24 under our Federalism argument, that would be
25 unconstitutional, as well as --

1 QUESTION: I think that's the heart of
2 your position, and I think it's unsupported by our
3 cases.

4 MR. BURCHFIELD: Well, Your Honor, under
5 the Buckley line of cases, you have never addressed a
6 Federalism issue before because the currently, the
7 currently existing, the pre-existing campaign finance
8 statutes were by their terms limited to contributions
9 for the purpose of influencing a Federal election.

10 QUESTION: But in a sense, there is a
11 parallel argument there that Buckley says what are
12 the interests that the Government may rely on in
13 restricting speech, and it says there are appearance
14 of corruption, corruption, and so in a way, to the
15 extent that the Government gets away from that at all
16 in going to some other interests, you can say it's a
17 Federalist -- Federalism argument, but it's also a
18 First Amendment argument in the sense that if those
19 exist, if those interests are not there, then it's a
20 First Amendment difficulty.

21 MR. BURCHFIELD: Exactly. It's a First
22 Amendment issue if the Federal Government is
23 purporting to pursue an interest, an interest that
24 isn't a legitimate Federal interest. Your Honor, if
25 I may say --

1 QUESTION: Again, Mr. -- Mr. Burchfield,
2 when I come back to the question I asked Mr. Starr,
3 to the extent that you are relying on the First
4 Amendment, you can't be waiving a Federalism banner
5 because that would affect, you spoke about some state
6 laws just a moment ago, I think you mentioned,
7 Connecticut --

8 MR. BURCHFIELD: Connecticut.

9 QUESTION: -- being more stringent than
10 the Federal regulation.

11 MR. BURCHFIELD: Your Honor, under the
12 prior regime, the Republican National Committee had
13 12 separate accounts that it ran that were in
14 compliance with the various permutations of state
15 law, so that when it wanted to participate in
16 Connecticut, for example, it had
17 Connecticut-compliant money to do so.

18 Under this regime, it has one account, and
19 one account only, and that is the Federal account,
20 and with that, when that account contains donations
21 that are, that are of a level higher than the, than
22 the state it wants to participate in, there is a
23 problem. Now, the states have not worked their way
24 through that.

25 QUESTION: But quite, quite apart from

1 the, the allocation problem, to pursue Justice
2 Ginsburg's inquiry because it's something I'm
3 interested as well, suppose that we rule for you on
4 all of these issues under Title I, and we do so on a
5 First Amendment rationale.

6 MR. BURCHFIELD: Right.

7 QUESTION: Are we then striking down the
8 laws of any states and if so, how many?

9 MR. BURCHFIELD: Your Honor, I do not
10 believe you would be striking down any states. We
11 have argued here that the, the problems with 323A,
12 the national party prohibition is that it is an
13 across-the-board criminal prohibition of all RNC
14 activity. No -- unless it's regulated by Federal
15 hard money contributions, if you will, no state in
16 the union has such a broad, has such a broad statute,
17 and if, if they did we would be in court the next day
18 challenging it. 323(b), the restrictions on state
19 parties, usurps law by imposing this Orwellian
20 definition of Federal election activity which sweeps
21 in virtually, virtually all activities of the state
22 parties during even years, subjects it to a Federal
23 \$10,000 limit and then perhaps most invasively
24 imposes the homegrown requirement which makes it
25 difficult, if not impossible, for states to transfer

1 money among themselves.

2 QUESTION: All right. Now, the reason it
3 does that, I mean, on the first part, I guess if you
4 won, you would find a donor who was wanting to give
5 money to the RNC just to help the state. And you
6 want him to be able to write his check for 9 million.
7 Well, you are talking about 9 million I guess out of
8 several hundred million, so I don't know if you won
9 on that, it would help you that much, if you really
10 got just what you wanted there.

11 But now you are going to the second part,
12 and on the second part, the way Congress has done
13 this is it says, after all, we understand that state
14 parties in an election with Federal candidates on the
15 ballot, have an interest in getting state candidates
16 elected and Federal candidates, and so we will
17 allocate, and I, and then contrary, I think, to what
18 I heard Mr. Starr say, I think they produce one of
19 the most complex allocation systems I have ever read.

20 MR. BURCHFIELD: They have indeed.

21 QUESTION: Now, the fact that it's complex
22 doesn't mean it's wrong. What they are trying to do
23 is balance a lot of different interests, so now you
24 explain to me what's wrong with it, what they've
25 tried to do is allocate the cost of getting the voter

1 to the polls between some special state money and
2 between Federal hard money, and they have their
3 reasons, I think, as you have seen from the reply
4 brief, for each one of the special restrictions
5 that's in there.

6 MR. BURCHFIELD: Your Honor, I would be
7 happy to explain, to explain to you what's wrong with
8 Section 323(b) if that is what I understand your
9 question to be.

10 QUESTION: Well, no, you wanted to bring,
11 you wanted to discuss that. I'm saying if you want,
12 do want to discuss it, I'd certainly be interested.

13 MR. BURCHFIELD: I absolutely do, I
14 absolutely do. What is wrong with 323(b) in the
15 First Amendment realm is that it does restrict the
16 ability of state and local parties, as well as
17 national parties to pool their resources. There was
18 a question earlier about whether there's ever been,
19 whether there's ever been a recognition of the right
20 to pool resources. Absolutely. In Buckley at pages
21 65 and 66, the right to join together for the
22 advancement of beliefs and ideas, quote, is diluted
23 if it does not include the right to pool money
24 through contributions for funds are often essential
25 if advocacy is to be truly or optimally affected.

1 The state and local and national parties
2 annually pool their resources for voter mobilization
3 plans to get their voters to the polls. Under the
4 Levin amendment, which is immensely complicated,
5 under the Levin amendment, the committee that spends
6 the money has to raise 100 percent of it, both the
7 Federal component and the non-Federal component.
8 Under the Levin amendment, it is illegal for the
9 national parties to send even a Federal dollar to a
10 state or local party in order to, in order to
11 participate in a, in a joint Get Out the Vote program
12 that the state is funding in part with Levin.

13 QUESTION: Now, their reason for that,
14 their reason for that, I take it, is because Joe
15 Rich, who wants to write the check for 6 million,
16 when faced with this statute and the Levin amendment,
17 which allows him to give \$10,000 to each district
18 committee, the Western Sunset Block Association of
19 the Democratic Party. The -- there could be
20 thousands of such associations, and since there could
21 be thousands, if they did not have that restriction,
22 all that would happen is that the state committee
23 would write to Mr. Joe Rich and say write the check
24 for \$6 million to me, and then what he'd do is he
25 would divide that \$6 million up among our 10,000

1 local committees, and you see, it would be a hole
2 that is not just an inch wide, but 15 miles wide, and
3 so they threw some sand in those gears. And the sand
4 in those gears is just what you described.

5 MR. BURCHFIELD: Well, Your Honor, bear in
6 mind that the Levin Amendment restricts not just Joe
7 Wealthy's -- sending Joe Wealthy's donation. It
8 restricts sending Joe Poor Person's \$10 donation down
9 to the states. It restricts sending even Federal
10 money, noncorrupting Federal money down to the
11 states. In that sense, it certainly goes too far.

12 But I would also say -- point out with
13 regard to the Levin Amendment, Mr. Tamraz, who has
14 made his appearance in these briefs, as he did in the
15 Thompson committee, gave \$300,000 to state parties in
16 1996. And that's supposedly the reason they
17 passed -- one of the reasons they passed this
18 statute. He can give, in California, \$10,000 to each
19 of the 58 California county committees and \$10,000 to
20 the California state committee for a total of
21 \$590,000 in California. And that is wholly -- that
22 is not Federal money. That is Levin money.

23 But the national party committees cannot
24 transfer even down \$10 to the state party for a voter
25 mobilization plan. That is not -- I would

1 respectfully submit, Your Honor, that's neither
2 narrowly tailored nor closely drawn, not even
3 rational.

4 QUESTION: They're going to say -- there
5 is still -- the reason -- to get that 10,000 to each
6 of these things, at least they have to act
7 independently. And they're trying to make that local
8 committee independent, and independent even of the
9 Federal money.

10 MR. BURCHFIELD: But the consequence of
11 trying to make the local parties independent of each
12 other is that those 58 California parties cannot pool
13 their resources for a statewide Get Out the Vote
14 program, Justice Breyer. And the Democratic National
15 Committee on that side of the aisle, the Republican
16 National Committee on our side of the aisle is
17 sitting in the hallway.

18 And that is a fundamental wedge between
19 the associational rights, political parties in an
20 area that even Senator McCain admits is fundamental
21 to the democratic process.

22 That is -- if I may just for a moment to
23 expound upon that. For that reason alone, we believe
24 that strict scrutiny is absolutely essential in this
25 case, and the government confirms that they cannot

1 pass the strict scrutiny bar.

2 QUESTION: Mr. Burchfield, can I just be
3 sure that I understand one thing? You're saying the
4 Federal -- national committee may not transfer any
5 money to the local committee in that situation. But
6 doesn't the statute merely say it must transfer hard
7 money?

8 MR. BURCHFIELD: No, Your Honor. If the
9 state committee is using Levin money, they can accept
10 no transfers. 100 percent of their money for that
11 program must be homegrown.

12 QUESTION: Which provision -- you're not
13 relying on 323(b)(1).

14 MR. BURCHFIELD: It is 323 -- and pardon
15 me because the statute has --

16 QUESTION: (b)(1) just prohibits transfer
17 of anything except hard money.

18 MR. BURCHFIELD: It's (b)(2)(B)(iv), and
19 323(b)(2)(C). And (b)(4) and 323(b)(2)(B)(iv), it
20 says the amounts expended or disbursed are made
21 solely from the funds raised by the state, local or
22 district committee which makes such expenditure or
23 disbursement and do not include any funds provided to
24 such committee --

25 QUESTION: That's a condition to using

1 Levin funds.

2 MR. BURCHFIELD: Exactly, Your Honor.

3 QUESTION: But the basic prohibition in
4 (b) is just a prohibition on the use of any money
5 other than the hard money.

6 MR. BURCHFIELD: And Congress
7 recognizes --

8 QUESTION: So it's only if you get to the
9 Levin Amendment that your argument is relevant.

10 MR. BURCHFIELD: Your Honor, Senator
11 Levin, when he proposed the Levin Amendments --

12 QUESTION: Let me just be sure we're
13 understanding each other and what the statute
14 provides.

15 MR. BURCHFIELD: Exactly, Your Honor.

16 QUESTION: Is it not true that the basic
17 prohibition in (b) does not prevent a national party
18 from transferring hard money to local committees for
19 any purpose whatsoever?

20 MR. BURCHFIELD: So long as the local
21 parties are not using the Levin Amendment, that's
22 exactly right.

23 MR. BURCHFIELD: Correct.

24 QUESTION: But it does prohibit it when
25 they're using Levin money.

1 MR. BURCHFIELD: But if they are using
2 Levin money, it's a crime.

3 QUESTION: But the statute doesn't require
4 them to use Levin money, so they do have an option to
5 transfer hard money to local committees.

6 MR. BURCHFIELD: If the entire political
7 process at the state level is subjected to the hard
8 money limits, you're right, Your Honor. But Senator
9 Levin, on the day he introduced the Levin Amendment,
10 said that the statute would go too far. It would go
11 too far as written without the Levin Amendment in
12 regulating, quoting, some of the most core activities
13 that state and local parties engage in. So the Levin
14 Amendment is not --

15 QUESTION: So it still remains true that
16 the use of Levin funds is an option to the national
17 party, not a requirement.

18 MR. BURCHFIELD: Well, it was an option --

19 QUESTION: Is that not correct?

20 MR. BURCHFIELD: That is correct. But
21 Justice Stevens, it is an option that Congress
22 understood was essential to the vitality of the
23 statute.

24 QUESTION: Excuse me, is it an option for
25 the national party or for the state?

1 MR. BURCHFIELD: It's not an option for
2 the national party.

3 QUESTION: It's an option for the state
4 party.

5 MR. BURCHFIELD: Exactly.

6 QUESTION: So a state party could destroy
7 the --

8 QUESTION: It's an option for the national
9 party because 323(b) is directed at the national
10 parties.

11 MR. BURCHFIELD: 323(a) is directed to the
12 national parties.

13 QUESTION: I'm sorry, you're right, it's a
14 state thing.

15 MR. BURCHFIELD: And 323(a), as we've
16 indicated, is an across the board criminal ban on
17 national parties accepting any money that is not
18 strictly regulated by FECA.

19 QUESTION: Strictly regulated means that
20 they, in order to raise the same amount of money,
21 they couldn't rely on corporate treasuries, union
22 treasuries and rich donors. They would have to
23 spread their effort more widely to reach the ordinary
24 people who support a party.

25 MR. BURCHFIELD: They would have to file a

1 Federal committee, engage in Federal reporting and
2 comply with all the restrictions.

3 QUESTION: But what it would cut out is
4 the reliance on corporate funds, union funds and
5 wealthy individuals. The parties would have to
6 spread their efforts more widely, but that's
7 basically what it calls for. There is no limit,
8 there is no ceiling on the amount of the money that
9 they could raise.

10 MR. BURCHFIELD: Your Honor, if the only
11 word in 323(a) were receive, you would be right. But
12 I respectfully -- I respectfully refer you to the
13 fact that the statute prohibits soliciting,
14 receiving, transferring, directing or spending, and
15 Congress intended meaning to those other verbs --

16 QUESTION: But if you can't receive, how
17 can you solicit? If you can't receive, how can you
18 transfer?

19 MR. BURCHFIELD: You can solicit for
20 gubernatorial candidates, you can solicit for state
21 parties, you can collaborate with state parties in
22 spending money the way the political parties have
23 done heretofore in voter mobilization plans.

24 QUESTION: In which case, the limitation
25 on receiving is simply a formal limitation.

1 Everybody knows where the money comes from, everybody
2 knows what the money is supposed to be used for. So
3 that if your argument to Justice Ginsburg is good, I
4 think the argument for regulation is all over.

5 MR. BURCHFIELD: Well, Your Honor, I would
6 respectfully disagree. Under the Court's
7 contribution to candidate lines of cases, putting
8 aside the question that we're talking about
9 contributions to political parties, and not directly
10 to candidates here. But under the contribution to
11 candidate line of cases, those cases do not involve
12 solicitation of contributions to others, such as the
13 chairman of the RNC's ability to solicit money for
14 someone running in the California recall election
15 right now.

16 QUESTION: I don't want you to leave
17 without having a chance to -- but I've listed so far,
18 and so far it's not going to kill the statute. So
19 far you're upset about that Roman numeral II -- you
20 know what I'm talking about?

21 MR. BURCHFIELD: The homegrown
22 requirement?

23 QUESTION: Roman numeral II on the
24 homegrown which is the Federal contribution to hard
25 money. That's your strongest argument there, I

1 think. So you say strike that from the statute. All
2 right, we take out Roman numeral II, that's not going
3 to kill the statute.

4 And as far as the first point is
5 concerned, at worst, concerning you're completely
6 right -- assuming you're right, you could set up
7 totally segregated accounts for donors who want to
8 give to the Federal party to money that will be used
9 for purely state elections. Am I right about that?

10 MR. BURCHFIELD: National parties, Your
11 Honor.

12 QUESTION: Yes, national parties. You
13 could do that, right, and without hurting the statute
14 too much. Now, is there a third or fourth -- I want
15 to be sure I get down what you think are the biggest
16 three or four overly broad things.

17 MR. BURCHFIELD: May I answer as you go?
18 With regard to 323(b), the statute does pervasively
19 regulate state parties from section 323(a) on. In
20 our briefs, we set forward the overbroad definition,
21 the Orwellian definition of Federal election activity
22 which is fundamental to section 323(b). I don't
23 believe you can solve 323(b) without going to the
24 very core of the statute.

25 With regard to section 323(a) and setting

1 up separate accounts, you've described the situation
2 before the statute was formed. Now, are there
3 ways -- are there regulatory ways that Congress could
4 have gone in more closely or more narrowly and
5 limited the ability of national parties to spend
6 money coming out of those non-Federal accounts, those
7 12 non-Federal accounts? Perhaps, but that isn't
8 what Congress did here, Justice Breyer.

9 Congress here adopted an across the board
10 criminal prohibition on national political party
11 involvement with any money that is not regulated by
12 the Federal government. And that we contend goes too
13 far.

14 Now, as to the other overbreadths of the
15 statute, I would simply rely upon what we've set
16 forth in the briefs. Thank you, Your Honors.

17 QUESTION: Thank you, Mr. Burchfield.
18 General Olson, we'll hear from you. Sometime in your
19 argument, would you cover the question of whether, if
20 the Court were to strike down 323(a), 323(b) could
21 survive?

22 ORAL ARGUMENT OF THEODORE B. OLSON
23 ON BEHALF OF THE FEDERAL DEFENDANTS

24 MR. OLSON: Well, we believe it could,
25 Mr. Chief justice, but let me come back to that.

1 Thank you, Mr. Chief Justice, and may it please the
2 Court:

3 The issues the Court considers today,
4 every single one of them in connection with Title I,
5 are not new.

6 For a century, with the overwhelming
7 support of the public, Congress has struggled to curb
8 the corrupting influence of corporate, union and
9 large, unregulated contributions in Federal
10 elections. Time and time again, this Court has
11 agreed that achievement of that goal is critical to
12 avoid erosion of public confidence in representative
13 government to -- and I'm using the Court's words --
14 to a disastrous extent.

15 But concentrated wealth is nothing if not
16 creative. As this Court has observed, the history of
17 campaign finance reform has been a cycle of
18 legislation followed by the invention and
19 exploitation of loopholes, followed by more
20 legislation to cut off the most egregious evasions
21 and circumventions.

22 QUESTION: General Olson, is every problem
23 soluble?

24 MR. OLSON: Well, this Court hasn't found
25 every problem to be solvable.

1 QUESTION: If for example, the executive
2 should make a compelling case that it is really
3 impossible to eradicate crime if we continue with
4 this silly procedure of having warrants for searches
5 of houses? We wouldn't entertain the argument that,
6 you know, this is the only way to achieve this
7 result.

8 MR. OLSON: Of course not.

9 QUESTION: There are certain absolutes,
10 aren't there, even if problems subsist? There are
11 just some things that government can't do?

12 MR. OLSON: Of course, Justice Scalia.

13 QUESTION: And that's what we're arguing
14 here.

15 MR. OLSON: Of course it is.

16 QUESTION: Not whether there are problems.

17 MR. OLSON: Of course it is.

18 QUESTION: But whether this is something
19 that government simply can't do.

20 MR. OLSON: Of course it is, but this
21 Court has said over and over again, not only is it a
22 critical problem that's fundamental to the integrity
23 of our election system, but that the solutions that
24 the legislature has enacted before, the central
25 principles of which are embodied in BCRA, are

1 constitutional solutions to that problem

2 QUESTION: Let me understand -- to be very
3 basic, let's start with the text. Congress shall
4 make no law abridging the freedom of speech.
5 Congress shall make no law abridging the freedom of
6 speech. These laws abridge the freedom of speech in
7 some sense.

8 Now, on what basis do you think that there
9 is somehow a way around that text? I can think of
10 several ones. You can say the freedom of speech
11 doesn't mean all freedom of speech. It means that
12 freedom of speech which was traditional at the time
13 the provision was adopted. So you could not libel,
14 you could not give information about the sailing of
15 troop ships and whatnot. But this wouldn't come
16 under that. There was no notion of restraining
17 expenditures for campaigning when the provision was
18 adopted.

19 A second alternative, I suppose, is that
20 the freedom of speech does not include freedom of
21 speech by malefactors of great wealth, corporations,
22 labor unions and other organizations don't have
23 freedom of speech. But our cases reject that. We
24 can't require The New York Times to be -- you know,
25 any organization that is funded by more than a

1 million dollars cannot say anything about elections.

2 We couldn't say that, could we?

3 So how do you get around the very simple
4 text of the First Amendment?

5 MR. OLSON: What Congress has done is read
6 the decisions of this Court from 1976, and including
7 the earlier decisions, that specifically said and
8 have said over and over again, that the regulations
9 of contributions, contributions where you're talking
10 about contributions, not expenditures. This Court
11 has said the regulations of contributions to the
12 Federal election process by unions and by
13 corporations may be controlled by Congress in Federal
14 legislation, in connection with Federal elections.
15 This Court has said that over and over again. And
16 this Court said in Buckley --

17 QUESTION: That's plausible, I suppose,
18 that a contribution to somebody else, to speak
19 whatever he wants, is not your speech. But what do
20 you do about expenditures? This law regulates a lot
21 of expenditures.

22 MR. OLSON: This law, referring to Title
23 I, makes certain contributions illegal to the
24 Federal -- to the national parties and to their
25 conduits and surrogates. Contributions from unions,

1 corporations in excess of certain limits. Of course
2 it says that once it said that the contribution is
3 illegal, the solicitation of the contribution is
4 comparably illegal. And the expenditure of that
5 contribution, not any amount of money that the
6 Federal or state committees might want to spend, but
7 the use of that money from that source in excess of
8 those limits.

9 QUESTION: But the reason for upholding
10 the contribution limits restriction was because of
11 the corruption or appearance of corruption between
12 the contribution and the candidate. I don't think
13 Buckley supports the proposition that Congress can
14 willy-nilly regulate any sort of contributions in
15 connection with an election campaign.

16 MR. OLSON: Of course not, Mr. Chief
17 Justice. What this Court has said over and over
18 again, that Congress can regulate contributions from
19 corporations -- the treasuries of corporations and
20 unions. Separate segregated funds still exist so
21 that those contributions from members can be made,
22 and that Congress can regulate the amount of those
23 contributions. That's all that Title I of BCRA does.
24 And that's -- all three of those aspects were
25 addressed by this Court in Buckley and have been

1 addressed again and again and again.

2 QUESTION: You say that is all that it
3 does. It regulates contributions to parties and the
4 argument is that's quite different from a
5 contribution to a candidate, which is one of the
6 issues here, it seems to me.

7 MR. OLSON: In fact, Buckley did regulate
8 the amount of the contributions by corporations and
9 unions and in excess of certain levels to parties as
10 well. There was not only a 1,000 contribution limit
11 to the candidate, but there were limitations in
12 Buckley with respect to the amount of expenditures
13 that an individual might make in consultation or
14 coordination with a candidate and there were
15 aggregate limits with respect to the \$25,000 limit
16 that was set for the precise reason, this Court
17 explained, to avoid circumvention of the limits in
18 connection with the --

19 QUESTION: Contributions to parties were
20 limited that way?

21 MR. OLSON: Yes, Justice Scalia. The
22 aggregate contribution by parties and the Court
23 talked in terms of the aggregate contributions that
24 could be made all together by the individual, and the
25 court specifically talked about that, that \$25,000

1 limit was for the very purpose of preventing the
2 individual to circumvent the contribution limit to a
3 candidate by giving money to the party which would
4 then be given to the same candidate, and the court
5 specifically said in Buckley that that would be
6 unearmarked money that would go to the party, which
7 would then go to the candidate.

8 QUESTION: But what about a contribution
9 to the party, we'll call it a payment to the party?

10 MR. OLSON: A contribution, Justice
11 Kennedy. I don't think I understand the question,
12 because the court specifically talked in terms of the
13 corrupting influence of corporate union and
14 uncontrolled large money contributions and what this
15 Court said then and has said over and over again that
16 Congress can attempt to avoid circumvention of those
17 permissible limits. Now, Mr. Starr spoke a moment
18 ago about the lavish evidence of abuses that were set
19 out and reported in the Thompson report. Among those
20 evidence of abuses is that enormous amounts of
21 so-called soft money, which is just another way of
22 saying money that is prohibited to go to Federal
23 elections, was going to Federal elections through
24 various surrogates, through the national party.

25 QUESTION: Is, is there evidence in the

1 record of access corruption, so to speak, using soft
2 money to fund purely state and local elections, as
3 opposed to Federal?

4 MR. OLSON: The evidence --

5 QUESTION: Is there evidence of that?

6 MR. OLSON: What the evidence, if I
7 understand your question correctly, is that the money
8 was going from, through the national parties and at
9 the direction of the national parties to the state
10 subordinate committees in order to fund various
11 activities that had to do with Federal elections, and
12 that's what, they were --

13 QUESTION: If I understand, evidence that
14 the money being used to fund purely state and local
15 election activities?

16 MR. OLSON: No, that was not what Congress
17 was concerned about. Congress was concerned --

18 QUESTION: But the ban extends to that,
19 apparently?

20 MR. OLSON: The -- the ban -- no. In the
21 sense that the state parties can raise un -- money
22 that's not regulated, provided that it's not used in
23 conjunction with Federal election activity. So in
24 that sense, the states are free to continue to do
25 that and spend all they wish.

1 QUESTION: Which is very broadly defined
2 Federal election activity.

3 MR. OLSON: Well, it is, it is broadly
4 defined, but it has been defined by the experts in
5 this country on elections, the corruption of big
6 money, the regulation and the potential abuses. This
7 Court has previous said over and over again, this is
8 an area where there is special expertise in Congress.
9 This legislation --

10 QUESTION: Special expertise and also
11 special interest. Do, do you know any provision of
12 this law that disadvantages incumbents? I can name
13 you several that disadvantage challengers. Is there
14 any provision of the law that you think puts
15 incumbents at a disadvantage?

16 MR. OLSON: Well, let me put it this way.
17 The incumbents were doing very well under the
18 existing system, 98.5 percent of the members of
19 Congress, the congressional, the House of
20 Representatives that ran for re-election in 2002 were
21 re-elected.

22 QUESTION: But they had to work very hard
23 for it.

24 MR. OLSON: Well, apparently not. The
25 evidence also shows that's in the record --

1 QUESTION: The record is, the legislative
2 record is full of complaints about how hard it is to
3 raise all this money and it's a lot of trouble.

4 MR. OLSON: Well, the evidence is that the
5 can -- the candidates --

6 QUESTION: Your answer to my question is
7 no, I gather?

8 MR. OLSON: No. The answer to --

9 QUESTION: Can you name any provision? I
10 can name several that disadvantages challengers.
11 Number one, the very existence of restrictions upon
12 money because if no money can be spent at all, the
13 incumbent is going to win. It's well-known that the
14 challenger needs more money. Number two, the
15 restrictions on parties that we were just talking
16 about. It is also well-known that where the national
17 party will generally spend its money in a Federal
18 election is in supporting a challenger in a district
19 or in a state where the, where the Representative or
20 the incumbent Representative or Senator is in
21 trouble.

22 MR. OLSON: Justice Scalia --

23 QUESTION: I can go on. The millionaire
24 provision, I think, advantages incumbents.

25 MR. OLSON: Let me -- let me -- there are

1 several answers to that. One, this Court's --

2 QUESTION: Let me finish my thought. What
3 I conclude from this is that perhaps we shouldn't be
4 so deferential to Congress in this matter. You know,
5 in the area of separation of powers, we do not defer
6 to Congress when Congress is in a head-to-head clash
7 with the executive branch on separation of powers
8 matters. Why? Because Congress is self-interested
9 in that area. Why is it not the case that Congress
10 is eminently self-interested in making laws that
11 restrict the manner in which people can challenge
12 their re-election?

13 MR. OLSON: There are several answers to
14 that question. First of all, that very issue was
15 addressed in 1976 in Buckley and the court said that
16 the rules are applying equally to anybody running for
17 office, and in that circumstance, the court will look
18 to evidence of invidious discrimination against
19 challengers. There is no evidence of invidious
20 discrimination against challengers.

21 Number two, the evidence supports
22 overwhelmingly that incumbents were able to get
23 re-elected under the old system just fine and that
24 overwhelming amount of evidence is not in the record,
25 in the testimony below, which is summarized in, in

1 various different sources that the repeated testimony
2 by Senator Thompson, Senator McCain, former Senator
3 Simon and over and over again abuses in the system
4 that were not benefiting incumbents but were tearing
5 down faith of the American people in a system of
6 government and making people believe that the more
7 money that you put in, to use the words of one
8 individual, the White House is like a subway. You
9 have to put money in the turnstiles.

10 QUESTION: Too much money. Too much
11 money. That's the problem. Too much money is being
12 spent on elections.

13 MR. OLSON: Justice Scalia, the evidence
14 shows and the Federal Election Commission came out
15 with a report earlier that year that candidates are
16 raising more money this year. It's not the amount of
17 money, but it's the source of money from potential
18 corrupting influences and that the hard money, in
19 fact, has benefits to the party and to the
20 candidates. The statistics showed that in, \$500
21 million was raised in the year 2000 for soft,
22 so-called soft money. Again, that's a euphemism for
23 money that's going around the system. That, that was
24 42 percent of the amount of money that the national
25 party spent on election activities, up from 9 percent

1 in 1984, 42 percent. Of that \$500 million, 60
2 percent came from just 800 donors. In that year, the
3 top 50 donors each gave between 950,000 and \$6
4 million a piece.

5 QUESTION: Is there any, anything in there
6 that says whether the bulk of that money you just
7 referred to by the 950 donors, that more went to
8 challengers than to incumbents? Or that more went to
9 incumbents than to challengers?

10 MR. OLSON: I don't have a breakdown of
11 that, Justice Breyer, but what the evidence does
12 show, if you go back election by election, every two
13 years, that incumbents under the old system, if a
14 member of the House of Representatives decided to
15 stand for re-election, the statistics year after year
16 are the same, 97 to 98 to 98.5 percent of the
17 incumbents were winning re-election. So to the
18 extent that Congress would devise this scheme --

19 QUESTION: General Olson --

20 QUESTION: Is that the problem you are
21 solving here?

22 MR. OLSON: No, no, Justice Scalia. But
23 it directly addresses the question that you raised to
24 the extent that Congress was looking for a scheme to
25 protect incumbencies, they were doing very well. It

1 would be hard to develop a scheme that could be
2 better for incumbents.

3 QUESTION: General Olson, I suppose
4 another reason why we should not defer to the
5 incumbents is they have an interest in spending their
6 time working for the public rather than raising
7 money, and this will save a lot of time so that we
8 shouldn't defer to them on it, no.

9 MR. OLSON: The -- that's, well, Justice
10 Stevens, that's a reason for deferring to them. The
11 evidence, as Mr. Starr put, was lavish, that the
12 abuses were enormous, and that Members of Congress
13 were spending --

14 QUESTION: Excuse me. You keep calling
15 them abuses. People were taking advantage of those
16 gaps in the law that existed. Is that an abuse,
17 every time -- we do it with the tax code all the
18 time. We don't say oh, it's an abuse. He took
19 advantage of --

20 MR. OLSON: It is -- the evidence --

21 QUESTION: And there will be abuses under
22 this law, too.

23 MR. OLSON: Of course, of course --

24 QUESTION: Water will run downhill, and if
25 you cannot make your voices heard in this fashion,

1 they'll find another fashion.

2 MR. OLSON: What this Court said in
3 Buckley, in Shrink Missouri Government, in every one
4 of the cases that this Court has considered is that
5 those are indeed abuses that those are corrupting
6 influences, and the word abuse was Justice Starr's
7 practically, Justice Starr's first word, I mean
8 General Starr's first word out of his mouth. That is
9 everybody's word when it comes to the system. I
10 guess you'll have to wait.

11 QUESTION: General Olson --

12 MR. OLSON: It was everybody's word when
13 they described this system, when you talk about the
14 enormous amount of money that was avoiding the direct
15 regulatory scheme and going through various
16 surrogates to accomplish the same thing.

17 QUESTION: One feature of this is puzzling
18 to me, and that is if the candidate corruption is
19 what, or the officeholder corruption is the heart of
20 it, we don't want candidates, officeholders to be
21 bought, then why did Congress, why was Congress more
22 generous to candidates and officeholders than it was
23 to the parties. A concrete example. A candidate for
24 Federal office can make a speech at a fundraising
25 event for a state or local candidate, if I read the

1 statute correctly, but an officer of the national
2 party could not.

3 MR. OLSON: Acting in his capacity, in the
4 words of the statute, on behalf of the national
5 committee. Acting as an individual that wouldn't be
6 the case, but when he is speaking in terms of the
7 party, that was the case. The, what Congress was
8 attempting to do is --

9 QUESTION: I don't understand what that
10 means.

11 MR. OLSON: What an individual --

12 QUESTION: What does that mean? Could he
13 be introduced at the event as the chairman of the
14 Republican National Committee?

15 MR. OLSON: That's -- I'm speaking now,
16 Justice Scalia, in the terms of the statute itself.
17 It talks in terms of his capacity as a member of the
18 chairman of the party.

19 QUESTION: Yeah, I want to know what that
20 means.

21 MR. OLSON: And an individual might do
22 something separately, and that's --

23 QUESTION: So you couldn't introduce him
24 as the chairman of the Republican --

25 MR. OLSON: Well --

1 QUESTION: Could just say Joe Dokes
2 endorses the Government and don't mention that this
3 is the chairman of the National Republican Committee.

4 MR. OLSON: I suppose that would be up to
5 some level of reasonable prosecution, prosecutorial
6 discretion.

7 QUESTION: Well, is this the sort of thing
8 we ordinarily have, I can see in the tax code, but
9 ordinarily we don't have in a connection with the
10 First Amendment some very debatable thing that might
11 be this, might be that.

12 MR. OLSON: Well, it's actually relatively
13 clear, Mr. Chief Justice, the regular -- not only are
14 the, is the statute relatively clear and not only
15 does the statute specifically address the abuses that
16 were well-documented and their evasions.

17 QUESTION: I'm talking about the official
18 versus individual capacity.

19 MR. OLSON: Well, that, that, probably
20 that language wouldn't even had to have been in the
21 statute, Mr. Chief Justice. I would presume that
22 would be presupposed that agents of the national
23 party acting on behalf of the national party can't do
24 the things that the national party can do.
25 Organizations subject to the control of the national

1 party can't do the same things that the national
2 party can do. That indeed is the same sort of
3 legislation that this Court has considered before.
4 Let me -- on this subject --

5 QUESTION: In any case, in his official
6 capacity, he can't do it. The candidate can.
7 Justice Ginsburg's question stands. What is the
8 answer to that?

9 QUESTION: And let me, let me add to that
10 that the same thing goes for contribution to a 501(c)
11 that the candidate for Federal office can make that
12 solicitation, but not an officer of the party.

13 MR. OLSON: There, there are indeed some
14 of those areas where there are refinements because
15 Congress was concerned with the -- this Court has
16 said repeatedly that political parties are, have
17 special advantages. Colorado II talks about that,
18 that there are special rights and special privileges,
19 and so Congress was concerned with the immense
20 possibility, the immense power of national political
21 parties to engage in abuses. So Congress was
22 particularly concerned and with abundant record of
23 the use of money going to the national parties to
24 circumvent these things.

25 QUESTION: I thought we were talking about

1 corruption. Surely the possibility of corruption is
2 much more direct when it's the candidate himself who
3 was soliciting for this organization, which will then
4 help him. Then it is indirect, where the national
5 party solicits and it may get to him or not. He
6 doesn't know what's going on.

7 MR. OLSON: It's entirely possible that
8 Congress has not solved every potential abuse of
9 Federal election law and that the lawyers will be
10 back before this Court with another piece of
11 legislation. Congress did not have before it
12 evidence of abuse of that nature, Justice Scalia.

13 QUESTION: But it went out of its way to
14 allow incumbents to do this. Went out of its way.
15 It didn't leave a gap. It said we're not going to
16 let the parties do this, but we will let the
17 candidates do it.

18 MR. OLSON: It made some, in my judgment,
19 perfectly understandable exceptions for individuals
20 acting in their own capacity or individuals engaging
21 in certain things, as opposed to the massive power of
22 the party.

23 QUESTION: If we found that this law had
24 the purpose or the effect of giving significant
25 advantage to incumbents, would we have to strike it

1 down under the First Amendment?

2 MR. OLSON: Well, the challenge was the
3 Equal Protection Clause was considered in Buckley. I
4 see no evidence of any invidious discrimination. I
5 guess we would be concerned.

6 QUESTION: Do you think there is a First
7 Amendment interest in protecting incumbency?

8 MR. OLSON: I think that that would be a
9 very serious concern, Justice Kennedy, but there is
10 not any evidence of invidious discrimination, to use
11 the language of this Court in Buckley.

12 QUESTION: But you say in your brief and
13 in Mr. Waxman's brief, you indicate that Buckley has
14 to be revised because speech has evolved in a way
15 that Buckley didn't anticipate. That seems to me to
16 be an argument for not allowing severe regulations,
17 such as this statute does, and allows speech to
18 develop on its own. So that parties, which are very
19 important entities in the system, have the capacity
20 to respond to other unregulated entities such as the
21 press. The press is exempt from all of these
22 restrictions and parties are not. That seems to me,
23 Mr. Olson, a very curious balance in a democratic
24 society.

25 MR. OLSON: Well, the Court has addressed

1 that very concern starting with Buckley up through
2 Colorado I and II. The fact that the party may be
3 used as a conduit for circumvention of the limits on
4 contributions to candidates. And let me add that the
5 Republican National Committee, in their brief below,
6 said that the Republican Party is a single unitary
7 organization. This is at page 23 of the RNC
8 opposition brief in the court below.

9 The Republican Party is a single unitary
10 organization that comprises various interrelated
11 parts. The RNC, state and local parties, the RNC's
12 165 members, candidates identifying themselves as
13 Republicans and so forth. And Mr. Burchfield, when
14 he testified on April 5, 2000 before the Committee on
15 Rules and Administration of the United States Senate,
16 said, legislative proposals to ban party receipt of
17 soft money also cannot seek to impose restrictions on
18 state parties -- also must seek to impose
19 restrictions on state parties as well. They cannot
20 be effective otherwise.

21 That's exactly what the understanding that
22 Congress had when it addressed this statute.

23 QUESTION: Step back for a second.

24 Because, say, looking at it more broadly, I think
25 we're hearing many arguments of this form, which is a

1 serious argument, it seems to me. When you look at
2 the statute, it becomes highly complex and really
3 quite restrictive in the many ways that have been
4 mentioned.

5 At the same time, there are no
6 restrictions on the press, and at the same time, you
7 can give as much money as you want to the NRA, to the
8 NRDC, to every interest group that supports both the
9 Republicans or the Democrats or whatever. And so all
10 that will happen is that the power and the money will
11 shift to those groups, and you will have precisely
12 what Madison called faction, because the parties act
13 as a tempering device. That if \$10 million can be
14 given to private groups to Get Out the Vote, and if
15 the election is about getting out the vote, you've
16 shifted the power from the party to the special
17 interest group.

18 And now the press was one example. We're
19 hearing arguments of that form, and so I would like
20 to hear a general response to that kind of an
21 argument.

22 MR. OLSON: The distinction was made by
23 this Court in Buckley and in the subsequent decisions
24 that there is a higher level of scrutiny and a
25 greater level of concern with respect to the amount

1 being given to an individual and a greater identity
2 and potential for abuse, because that money can then
3 be spent either directly by the individual or in
4 coordination with the political party on the
5 individual's reelection, if individuals go out and
6 affiliate with this group or that group and spend the
7 money.

8 That's not subject to the same kind of
9 level of control by the party or the candidates and
10 it is looked at --

11 QUESTION: You're equating the party with
12 the individual. And the party is no more the
13 individual candidate than is the National Rifle
14 Association the candidate who happens to ardently
15 oppose gun control. And the question that Justice
16 Breyer is posing is, why do you pick on the party as
17 this instrument for making public views, even the
18 public views of the wealthy, known and allow
19 contributions to these other groups?

20 MR. OLSON: Congress didn't pick on a
21 party, Justice Scalia. Congress focused on the fact
22 that the parties control, as in the words of the
23 segment from the brief that I quoted, the party and
24 the candidates are, in one extent, one and the same.

25 Secondly, the parties are given

1 considerable privileges, the power to put candidates
2 on the ballot. There is reasons that the exercise of
3 this enormous power can be subject to greater
4 restrictions. Congress wasn't picking on parties.
5 Congress was, one, looking at where the greatest
6 abuses were. And then number two, following the
7 guidelines set by this Court.

8 QUESTION: In Colorado I, we said that the
9 corruption rationale did not seem -- seemed quite
10 attenuated in connection with the parties.

11 MR. OLSON: With respect to independent
12 expenditures, the Court said that. And then the
13 Court addressed the coordinated expenditures and
14 approached it in quite a different way, and held that
15 coordinated expenditures in Colorado II could be
16 treated just like contributions.

17 And the difference is that the Court has
18 held, quite understandably, that the level of concern
19 that Congress might have over abuses from
20 contributions is greater, and the level of First
21 Amendment concern is more attenuated because that
22 contribution may be used in a different way,
23 depending upon the contributions.

24 QUESTION: There are two steps. Why is a
25 contribution or payment to the NRA any less a

1 contribution than a payment to the Republican Party
2 in certain instances with certain candidates? You
3 equate -- the statute equates, and so I think you
4 must. You equate parties and candidates.

5 MR. OLSON: In the first place --

6 QUESTION: This is a remarkable
7 proposition.

8 MR. OLSON: Well, it is the same
9 proposition that is discussed in Buckley in
10 connection with the aggregate contribution limit, and
11 is discussed several times in the cases that come
12 along since Buckley.

13 The party is a different entity. The NRA
14 or any other of the many organizations that might
15 spend their money for this in a way that the
16 candidate cannot control would not be focused in the
17 same way. This Court provides the guidance that says
18 that the parties, because they're so closely
19 identified with the individuals, and such a source of
20 potential circumvention, are something that the
21 Congress may legitimately be concerned with.

22 And this legislation was developed as a
23 result of six years of intense investigation, debate,
24 testimony, delicate compromises, all conducted in the
25 context of congressional elections and a presidential

1 election. This was a product of a lot of time by the
2 people who, over and over again, talked about the
3 level that abuses had come to.

4 QUESTION: All done by incumbents,
5 incidentally.

6 MR. OLSON: Well, we pass laws in the
7 United States, Justice Scalia, by people who already
8 hold office.

9 QUESTION: That's true, but they usually
10 don't pertain to what it takes to get them out of
11 office.

12 MR. OLSON: What this Court has repeatedly
13 said is that congressional judgments -- and I can
14 only quote the language of this Court in Buckley.
15 Congress could legitimately conclude, speaking in
16 terms of potential for corruption. In the NRWC case
17 in 1982, a unanimous Court said that careful
18 legislative adjustment of Federal electoral law in a
19 cautious, advanced, step-by-step, warrants
20 considerable deference. We accept -- this is a
21 unanimous Court -- Congress's judgment that it is the
22 potential for such influence that demands regulation,
23 nor will we second guess a legislative determination
24 as to the need for prophylactic measures where
25 corruption is the evil feared.

1 If the Court were to look at the long
2 series of the summary of abuses in Judge
3 Kollar-Kotelly's decision below, and to look at the
4 testimony given by former Senators Rudman and Simon
5 and Boren and the other individuals who describe what
6 it's like, the breakfasts, the lunches, the
7 receptions, the dinners, the endless cycle of
8 campaign finance.

9 QUESTION: The attack ads. The
10 legislative record is full of hostility toward these
11 attack ads.

12 MR. OLSON: Justice Scalia, the parties
13 and the candidates can spend all of the hard money
14 they want on attack ads or any other types of ads.
15 Congress was focusing there, with respect to specific
16 types of legislation, in connection with the use of
17 state money, soft money that comes to the state
18 parties, in conjunction with elections taking place
19 at which Federal officials are on the ballot.

20 QUESTION: General Olson, you said a
21 moment ago, referred to the testimony of Senators
22 Rudman and Simon and Boren about you know,
23 breakfasts, lunches. That I don't believe is a
24 permissible basis for a restriction, that you know,
25 we're tired of having to go to these breakfasts and

1 lunches.

2 MR. OLSON: Mr. Chief Justice, I didn't
3 mean to say that these numbers were saying it was too
4 much work. What they were saying is that the
5 relentless pursuit of big contributions was
6 innervating to the political process. The record --

7 QUESTION: That is not a -- that's what
8 the Chief was saying. That is not a valid complaint.
9 We've never said that's a valid justification.

10 MR. OLSON: The potential for
11 indebtedness, the feeling of indebtedness, the
12 selling of access.

13 QUESTION: That's why they didn't want to
14 go to breakfasts and lunches.

15 QUESTION: I don't understand why that --
16 by just saving time for government work is not a
17 valid interest anyway.

18 MR. OLSON: Of course it is a --

19 QUESTION: Why should they waste all their
20 time raising money.

21 MR. OLSON: Of course it is a valid
22 interest, Justice Stevens, but what all of these
23 individuals were talking about was the appearance and
24 the actuality that the system had been corrupted.
25 The access --

1 QUESTION: Is there a feeling of
2 obligation and access to an organization which
3 delivers a million votes on its own?

4 QUESTION: Of course there is, Justice
5 Kennedy, but the First Amendment considerations as
6 articulated by this Court address the infusion of
7 money from particular sources, either from wealthy
8 individuals or a corporation -- corporate treasuries
9 or unions differently.

10 And what all of this testimony was about
11 wasn't how much time it took, was that money had
12 become the number one operative driving force, not
13 only in the running for office, but for the entire
14 period that the individual was in office.

15 And that the political parties -- and the
16 evidence was abundant, lavish -- that the political
17 parties themselves were saying if you give this
18 amount of soft money, we will set up meetings with
19 these members of Congress or these leaders of the
20 party or this opportunity to spend a night in the
21 White House or whatever. The actual access which is
22 how things get done in Congress was something -- was
23 not only for sale, but also perceived to be for sale.

24 QUESTION: Of course many people think
25 that what produced that situation was the original

1 campaign finance law, which set individual
2 contribution limits so low that you indeed had to go
3 around scurrying for money, because you couldn't
4 accept greater amounts from more wealthy donors.

5 MR. OLSON: Well, there is two answers to
6 that. The contribution limits have been increased.

7 QUESTION: Insignificantly, if that is the
8 problem

9 MR. OLSON: But what this Court has said
10 in Buckley, and has also said over and over again is
11 to the extent that the candidates and the parties
12 have to reach out to more individuals for more
13 participation rather than relying on this 800 or so
14 individuals that give large amounts of money. That's
15 better for the candidates and it's better for the
16 parties and it's better for the political process.

17 QUESTION: Don't mind having to spend all
18 the time raising the money. I thought you just said
19 that that's bad. Now you say it's good.

20 MR. OLSON: What -- what I'm, what I'm
21 saying, Justice Scalia, is what this Court has said,
22 that to the extent that a larger numbers of smaller
23 contributors, that you don't need to spend all this
24 much time courting is a better process for the
25 political system. That's what this Court said, and

1 that's what this Court has said over and over again.

2 QUESTION: General Olson, could I ask you
3 to address the regulation of state parties and the
4 regulation of funds spent in state elections. What,
5 what basis is there for the Federal Government to do
6 that?

7 MR. OLSON: The, the legislation refers to
8 money that is spent in Federal election activity.
9 This Court has repeatedly said starting in the 19th
10 century that the control, the regulation of Federal
11 elections is quintessentially important to what
12 Congress does. What Congress had abundant evidence
13 that this money, that, that the individuals, my
14 opponents are talking about having to do with state
15 elections were when Federal candidates were on the
16 ballot and money was being used ostensibly for
17 neutral purposes, but for the primary purpose of
18 bringing out voters to vote in a Federal election and
19 to influence the outcome of that election.

20 QUESTION: But that isn't what the law
21 says, that when it's ostensibly for the -- if you're
22 using it in the best of good faith to get out the
23 vote for a state election, even when the Federal
24 election in this particular state is a forgone
25 conclusion. There is -- one party has it so locked

1 up that the Federal election is a nullity, and all of
2 the money is being spent on a state election.

3 MR. OLSON: What --

4 QUESTION: Nonetheless, the Federal
5 Government says these are the rules under which the
6 state party can spend money.

7 MR. OLSON: And the state party can spend
8 unlimited amounts of money that's, that's in
9 connection with an election. Congress reasonably
10 found that where there is a Federal official on the
11 ballot, that money spent in that election --

12 QUESTION: Not in my hypothetical. In my
13 hypothetical, it's not true.

14 MR. OLSON: Well, to the extent that under
15 some circumstances, there is -- it's inconceivable to
16 establish --

17 QUESTION: This is narrow tailoring?

18 MR. OLSON: Pardon me?

19 QUESTION: This is narrow tailoring?

20 MR. OLSON: No. I'm suggesting that where
21 this money has been spent in the past and as defined
22 by Congress in Section 323(b), Federal election
23 activity is relatively clearly defined. It's in
24 connection with -- Justice --

25 QUESTION: I didn't mean to interrupt you

1 in your sentence. But my question to you was going
2 to be, do you deny that a, that in a situation that
3 Justice Scalia describes, that there may be an
4 as-applied challenge whereas the possibility of that
5 situation does not necessarily carry a facial
6 challenge?

7 MR. OLSON: That's correct. And this
8 Court has said again and again to the extent that
9 there's an overbreadth challenged in the context of a
10 facial attack on a statute, the statute must be
11 substantially overbroad. There may be particular
12 as-applied challenges to particular aspects of this
13 legislation.

14 QUESTION: I think there are a lot of
15 situations like that. There is more than one. I
16 think that's, that's likely to be very common.

17 MR. OLSON: But Justice Scalia, what the
18 -- what Congress was looking at is that the huge
19 amounts of money being used at the time of elections
20 where Federal candidates were on the ballot,
21 political parties, and whether they be state parties
22 or national parties are going, are not going to pour
23 enormous amounts of resources into elections at which
24 there is not much of a context, a contest. State
25 parties can spend all of the Federal, the hard money

1 they want with respect to those activities and then
2 the Levin amendment, which was not required by the
3 Constitution, not necessary, but that gave an
4 additional ability of the state to use under certain
5 circumstances soft money, unregulated by the Federal
6 Government in those contexts.

7 The bottom, at the bottom, what this
8 legislation does is treat the very same abuses that
9 this Court was concerned about in Buckley v. Valeo,
10 and has said repeatedly are the types of concerns
11 that are legitimate for Congress to be concerned
12 about and to use the words of this Court, go to the
13 very fundamental integrity of our government. The
14 only thing in Title I that Congress did was to
15 control the source of contributions, unions and
16 corporate treasuries, and the amounts above a certain
17 amount, and a potential circumventions of those
18 limits. All three of those things this Court has
19 repeatedly said are constitutional, appropriate, and
20 necessary to protect the integrity of the Federal
21 electorate process. Thank you.

22 QUESTION: Thank you, General Olson.
23 Mr. Waxman, we'll hear from you.

24 ORAL ARGUMENT OF SETH P. WAXMAN
25 ON BEHALF OF INTERVENOR-DEFENDANTS

1 MR. WAXMAN: Mr. Chief Justice, and may it
2 please the Court:

3 The issues before the Court in connection
4 with Title I and the rest of this legislation raise
5 the most fundamental challenge for any, for any
6 representative democracy. It's a challenge that this
7 Court, beginning at least with Justice Frankfurter
8 and the United Auto Workers case and extending
9 through this Court's opinion in Shrink Missouri and
10 Beaumont, has recognized that is the imperative of a
11 representative democracy to retain the confidence of
12 the individual citizens with whom we all share the
13 franchise, that their vote counts, that big money
14 doesn't call the tune, and that when Members of the
15 Congress and the President and Vice President make
16 decisions on our behalf, they do so because they
17 think it is in the best interest of their country and
18 our judgment as constituents and their own judgment.

19 And there was reference paid, reference
20 made to the testimony of members of this, of
21 Congress, respected members like Senator Simpson and
22 Senator Rudman, and it is very important to focus on
23 what those Senators said under oath. When Senator
24 Simpson testified, he testified that too often,
25 members' first thought is not what is right, or what

1 they will believe, but how it will affect
2 fundraising. Who, after all, can seriously contend
3 that a \$100,000 donation does not seriously alter the
4 way one thinks about and quite possibly votes on an
5 issue?

6 QUESTION: Was his testimony that others
7 thought that, or that he thought it?

8 MR. WAXMAN: He was -- his declaration is,
9 his sworn declaration is in the joint appendix,
10 Mr. Chief Justice, in the first volume. He was
11 speaking in general and about all of us, and so, too,
12 was Senator Rudman when he testified under oath that
13 large soft money contributions distort the
14 legislative process because they affect whom Senators
15 and House members see, whom they spend their time
16 with, what input they get, and make no mistake about
17 it, this money affects outcomes as well, and millions
18 --

19 QUESTION: Mr. Waxman, wasn't there
20 considerable dearth of evidence as to something a
21 little bit different, which are a quid pro quo?

22 MR. WAXMAN: There was, there was a
23 concession in this case that give, that there is no
24 specific evidence that a particular vote was changed
25 because of a particular donation, but of course,

1 that, too, was not true in Buckley v. Valeo. Buckley
2 v. Valeo, this Court made reference to the findings
3 of the D. C. Circuit which dealt exclusively with
4 excess access by the milk producers and others and
5 ambassadorships and the record in this case so
6 overwhelms the record before this Court in -- in
7 fact, it overwhelms by several orders of magnitude
8 the factual records that existed in Buckley and all
9 of its progeny. Now, Justice --

10 QUESTION: Talk is cheap. I mean, access
11 is not votes. Sure, Members of Congress are going to
12 give time to people who have given money to their
13 campaign. It doesn't mean they are going to vote
14 that way.

15 MR. WAXMAN: It certainly doesn't mean
16 they're going to vote that way, but --

17 QUESTION: So is this corruption?

18 MR. WAXMAN: The testimony --

19 QUESTION: Is the giving of more time to
20 them, is that corruption, or the appearance of
21 corruption?

22 MR. WAXMAN: The giving -- this Court has
23 said that corruption in the Buckley sense is the
24 influence of large donations on the judgment and
25 behavior of officeholders, and Justice Scalia, there

1 is a mountain of evidence from experts, members,
2 lobbyists, 60 pages of findings from Judge
3 Kollar-Kotelly and almost as many from Judge Leon
4 that access buys influence, and there are any number
5 of ways that cannot be statistically observed to
6 change outcomes besides a particular vote.

7 QUESTION: I think that's the bottom line.
8 That's the moment of truth. Do you get any votes for
9 the money that you contribute to the candidate? If
10 you don't get that, you are getting nothing.

11 MR. WAXMAN: You can go back and overrule
12 Buckley v. Valeo, and every other one of these cases
13 you have decided because that has never been proven.
14 It is very difficult to prove, and what Cong -- what
15 Congress needs to aim at, it needs to aim at the
16 willingness of the hundreds of millions of people out
17 there who think that their vote counts and think that
18 Members of Congress will be responsive to them and
19 who are justifiably cynical when they see that in the
20 last presidential election, \$500 million that law
21 does not permit to be used for Federal election
22 purposes was used for that purpose as the political
23 party's own expert, Professor La Raja acknowledged
24 that it almost all was used for Federal election
25 purposes.

1 This goes right to the question, it goes
2 right to Justice O'Connor's question about state
3 parties and I think the Chief Justice's question
4 about the national ban, and I'd like to address those
5 first.

6 QUESTION: Mr. Waxman, before you do, do
7 you have an answer to the argument put to General
8 Olson by Justice Breyer that if you don't allow the
9 parties to play in the soft money league, then the
10 money will go elsewhere. It will go to the
11 independent, sometimes highly ideological groups. It
12 will go to the NRA, for example. And that would make
13 things even worse than they are now.

14 MR. WAXMAN: Yes. I have, I have several
15 questions and that, that was my, the next point I was
16 going to address after the first two, which is, it is
17 wrong on about 10 different levels, but the bottom
18 line is if it turns out to be an abuse, that is, if
19 it turns out to be a phenomenon that creates
20 corruption as this Court defined it, either in the
21 case of individual contributions in Buckley or
22 through corporate and labor union for the principles
23 that were articulated by this Court in National Right
24 to Work and Austin and about which we'll be visiting
25 this afternoon, Congress can take care of the

1 problem The one thing that --

2 QUESTION: Muzzle them, muzzle them, too.

3 MR. WAXMAN: The one thing --

4 QUESTION: That's the solution.

5 MR. WAXMAN: The one thing that we know
6 for certain, Justice Scalia, in this uncertain world,
7 there is at least one thing that is certain, and that
8 is that the people who enacted BCRA and the people
9 who populate the House and Senate, if they find that
10 the national political parties are being
11 disadvantaged or losing their central role, not only
12 in our political system, but in our system of
13 governance, they will be there to address it.
14 General Olson --

15 QUESTION: But that's just, that's just a
16 political calculation? There's no first, there's no
17 constitutional standing for parties to protect their
18 capacity to formulate policy?

19 MR. WAXMAN: To be sure, Justice Kennedy,
20 and if it were impaired, Congress could and would
21 address it. The data already shows that this year
22 the parties have raised more in hard money alone than
23 they raised in the last presidential election in hard
24 and soft money, and they are right on a trajectory to
25 raise \$1.5 billion in hard money for all of their

1 activities.

2 QUESTION: Well, your, your response to
3 Justice Kennedy suggests that the parties exist by
4 the leave of Congress. Surely that isn't the case?

5 MR. WAXMAN: Well, it, my argument doesn't
6 depend on if the, the parties, of course, aren't
7 mentioned in the Constitution, but they are a
8 fundamental aspect of our system of representative
9 government, and I, I meant to cast no aspersions on
10 the fact that they play a role not only in electing
11 candidates, but also in organizing in particular the
12 legislative process and the conduct of legislative
13 business.

14 My only point is that we can be certain
15 that if something comes to pass that our experience
16 so far shows is not going to come to pass, Congress
17 can come to their aid or someone can come to this
18 Court, but the fact --

19 QUESTION: But our experience in
20 Buckley was not --

21 QUESTION: Why do you say that? The
22 parties have opposed this legislation. They are on
23 the other side of this case, and you are coming here
24 and telling me that the Congress is more concerned
25 about the good of the parties than the parties

1 themselves are. They are on the other side. They
2 think it's hurting them

3 MR. WAXMAN: There is, there is no
4 question that the, that telling the national
5 committees of the, the national committees of the
6 national parties that you are now required to accept
7 only funds that are subject to the limitations,
8 restrictions, and reporting requirements of the
9 Federal election, Federal law is a limitation and it
10 requires them to accommodate it. I'm only saying
11 that you cannot strike this law down on its face
12 based on a Chicken Little prediction that something
13 that by all accounts is not happening at all, does
14 happen.

15 And the notion that corporate and union
16 money is just going to flow from these corporations
17 that gave a million dollars to each party at the same
18 time, is going to flow to the National Rifle
19 Association or the National Abortion Rights League, I
20 think misstates the important laudable role that the
21 parties play, and misstates the fact that the
22 evidence in this case is that those contributions
23 were strong-armed.

24 You look at the testimony in the record
25 and the amicus brief of the business officials, these

1 people were not dying to spend millions of dollars to
2 both political parties, in order to support
3 democracy. And the notion that they are going to go
4 running to the National Rifle Association or to
5 NARAL, I think has no basis in the record.

6 QUESTION: And it's also, I suppose,
7 unlikely that they would contribute both to the NRA
8 and also to a gun control organization, which they
9 do --

10 MR. WAXMAN: I'm not sure that that's
11 true, but however they choose to use their
12 shareholders' resources, I think is up to the
13 democracy of shareholders.

14 QUESTION: Mr. Waxman, these people, these
15 independent groups make independent expenditures. On
16 the party side, once a candidate has been nominated,
17 is there practically any such thing as an independent
18 expenditure, as opposed to a coordinated expenditure
19 by a party?

20 MR. WAXMAN: I have been told that there
21 are ways to read this court's opinion in Colorado
22 Republican I and II, to limit that distinction. That
23 is, the concept of an independent expenditure to the
24 one which the Court was presented, which is a
25 circumstance in which the party, in that case the

1 Colorado Republican Party, didn't have a nominee.
2 And therefore, it was rather difficult for it to be
3 coordinating. But I believe that --

4 QUESTION: There is another distinction,
5 too. That case, the prohibition on expenditures
6 there applied to both hard and soft money. We're
7 only talking about prohibitions that did not involve
8 hard money.

9 MR. WAXMAN: That is correct. And this
10 does go to the point that the Chief raised and
11 Justice O'Connor raised about 323(a) and 323(b) that
12 I hope I will be able to address. On the state
13 parties, you've heard the quote from Mr. Burchfield.
14 He was simply stating the obvious which is, we are
15 talking here, as the act defines it, about national
16 parties that organize themselves in national
17 committees, state committees and local committees.

18 And all of those parties, all of those
19 committees act together to elect their slate of
20 candidates. And it is my friends on the other side
21 of this case and not us that demean the role of the
22 state and local committees by essentially attaching
23 their activities to races for dogcatcher and state
24 assemblymen, when in fact, they play the central role
25 in our system in identifying, grooming and supporting

1 candidates for Federal office.

2 The candidate on the Ohio ballot for
3 Republican for Senate is nominated and placed there
4 by the Ohio Republican Party. And you asked about
5 the Tamraz or Riatti contributions and what evidence
6 there was about it. The evidence is that if 323(b)
7 were not in place, that is, there were just a
8 national -- the national committees are out of the
9 soft money business, most of the poster children in
10 the Thompson committee report, Mr. Riatti in '92,
11 Mr. Tamraz, Carl Lindner, the Hudson Indian gaming
12 casinos. All of the greatest hits that Senator
13 Thompson came up with.

14 Those were people that gave money to the
15 state and local parties in exchange for benefits that
16 they perceived from Federal officeholders.

17 QUESTION: You said a moment ago,
18 Mr. Waxman, that the Ohio Republican candidate was
19 placed thereby the Republican state committee. Well,
20 what if a state has a primary? I mean, if a state
21 has a primary, it's the result of the primary
22 election that places them on the ballot, not the
23 state nomination.

24 MR. WAXMAN: Yes, to be sure. And my
25 point, Mr. Chief Justice, is that to understand why

1 Mr. Burchfield was correct in saying that this
2 problem, this massive loophole had to address the
3 state and local committees, you need to -- it simply
4 reflects the reality that those committees, at least
5 before they became under the big soft money regime,
6 what one expert called offshore banks of the national
7 committees, they play a very important role in
8 selecting who are going to be the Federal candidates.

9 QUESTION: Mr. Waxman --

10 QUESTION: A very minor detail while
11 you're on it. What is technically the reason why a
12 national committee can't give hard money to a local
13 district using Levin funds. And the second thing is,
14 why is it not possible to have a segregated account
15 for a national party in which a person would put in
16 money that was only going to be used to give to the
17 state for elections where there was no Federal
18 candidate on the ballot? Those are two detailed
19 matters I just want to get your response to.

20 MR. WAXMAN: As to the former, we don't
21 think that the contribution, the soft money
22 contribution ban is subject to strict scrutiny, and
23 therefore, the fact that there may be some other way
24 to sort of carve out money that's given to the
25 national committee purely for state elections is a

1 constitutional deficiency.

2 But the argument -- the complicated point
3 that Mr. Burchfield was making about how the Levin
4 Amendment works was simply mistaken. It was mistaken
5 in several respects.

6 First of all, there is no prohibition --
7 first of all, the Levin Amendment is an option. If
8 each state and local committee doesn't want to have
9 it, they don't have to use it. And if they do use
10 it, nothing prevents them from spending it together.
11 They just can't transfer money, this soft Levin
12 money, from one committee to another to essentially
13 recreate the problem that existed before, which is
14 phenomenal amounts of soft money all being
15 transferred to a few battleground elections.

16 This is important. A national committee
17 official may -- and the FEC has confirmed this
18 repeatedly -- may in his official capacity, under the
19 stationery of the national committee, solicit funds
20 up to the hard money limits for any state and local
21 candidate or any state and local committee.

22 That is, it is simply false that a member
23 of the Republican National Committee cannot raise \$25
24 to support Haley Barbour's candidacy. They can. And
25 they can do it in their official capacity up to the

1 hard money limits into an account that Haley Barbour
2 -- a Federal account that Haley Barbour has set up
3 and would need to set up in any event under 323(f)
4 and 323(b).

5 QUESTION: Even if the state committee has
6 chosen the option?

7 MR. WAXMAN: This is -- yes. This is hard
8 money. And in fact, the national committees, even
9 for a local committee that's chosen to use the Levin
10 soft money, the law permits the national committees
11 to send hard money to that local committee, provided
12 it is not the money that creates the specific match
13 for the allocation.

14 And the notion that -- a wedge is driven
15 in the midst that sort of creates a rift in this
16 integrated national organization is simply wrong.

17 QUESTION: It's a pretty big loophole, I
18 guess, isn't it? I mean, they write and say, Joe
19 Rich, give your 6 million to the following 500
20 committees. They write 50 checks of \$10,000 each.

21 MR. WAXMAN: No, the homegrown -- the
22 so-called homegrown requirement -- I realize the
23 Levin Amendment provisions are technical. There is a
24 reason that you are not allowed to do that, and that
25 goes again to the point --

1 QUESTION: That's not homegrown, my
2 example.

3 MR. WAXMAN: That's not homegrown. And it
4 goes to the point about why there couldn't be or
5 perhaps why didn't Congress just say let's create a
6 separate account for the national committees, which
7 is that the people who gave these huge contributions,
8 the corporations and unions, did not care where it
9 went. They cared what it bought them.

10 And the notion that if a member of the
11 national -- if Terry McAuliffe comes to somebody and
12 says, we really need \$6 million, it's just going to
13 be used for state and local elections, but we really
14 need it, that just recreates the problem that
15 Congress was trying to address.

16 Now, I believe, Mr. Chief Justice, that in
17 the course of that rambling discourse, I answered
18 your question about the national ban. But if I
19 didn't, I would love to address myself to it.

20 You asked, Justice Scalia, at the outset,
21 is every problem soluble. And the answer -- I hope
22 that was a rhetorical question. In any event, this
23 problem --

24 QUESTION: It is for me. I'm not sure it
25 was for you.

1 **MR. WAXMAN:** I believe it is, but out of
2 respect for the Court and in an effort to be
3 responsive, I won't treat it as such. No problem is
4 solvable and as this Court's jurisprudence shows in
5 this area, no solution is permanently solvable.

6 We have a dialectic going on here between
7 people who want to use money to influence people in
8 government, and the institutions that need to
9 preserve a sense of integrity and faith in the
10 process. And what my colleagues on the other side
11 are urging here -- there has been a lot of debate
12 about the sort of capillaries of the system, but very
13 little talk about the core of it.

14 What they are urging is that this law be
15 struck down on its face. And that is a counsel of
16 despair, and that is an approach that this Court and
17 this Congress and this people cannot countenance.
18 Thank you very much.

19 **QUESTION:** Thank you, Mr. Waxman.
20 Mr. Starr, you have two minutes remaining.

21 **REBUTTAL ARGUMENT BY KENNETH W. STARR**
22 **ON BEHALF OF THE MCCONNELL PLAINTIFFS**

23 **MR. STARR:** Thank you, Mr. Chief Justice.
24 Very briefly. Point 1. There has been a tendency in
25 much of the argument to equate candidates with a

1 political party. That is quite incompatible with
2 this Court's cases, Colorado I, Colorado II. It also
3 is inconsistent, I think, in a very fundamental level
4 with Citizens Against Rent Control.

5 Parties are very keenly interested -- I
6 cite California -- in ballot initiatives and the
7 like. Parties exist for a number of reasons. This
8 Court said as much in the principle opinion in
9 Colorado I. Parties exist for the purpose of
10 bringing people together to articulate a world view.
11 A vision of what, in fact, is good for society. And
12 political parties are now finding themselves -- and
13 we point to the record in California -- at
14 significant disadvantages because of the here and now
15 effect of this law.

16 There is less revenue flowing which, in
17 the California Democratic Party has spoken for
18 itself. You have that in the record. The California
19 Democratic Party has told the Court, respectfully but
20 firmly, that they depend upon, in that huge state,
21 large individual contributions. And the people of
22 California -- this is not just one party speaking --
23 the people of California spoke through the
24 proposition embraced in the year 2000, saying
25 political parties are insulators and buffers. They

1 are guards against corruption. That is a very
2 pivotal point in terms of the shift -- I thank the
3 Court.

4 QUESTION: Thank you, Mr. Starr. We'll
5 stand at recess until 1:30.

6 (Whereupon, at 12:00 p.m., oral argument
7 in the above-entitled matter was recessed, to
8 reconvene at 1:30 p.m., this same day.)

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1 corruption, the potential corruptive effect of such
2 donations is minuscule, nonexistent, attenuated at
3 best, in the words of Colorado I. The \$15.6 million,
4 by the way, that the RNC spent in state and local
5 election activity in 2001 was 30 percent of the
6 non-Federal money the party raised that year, 30
7 percent. It's not an insubstantial amount in any, to
8 any degree.

9 Second point, with regard to Section
10 323(b), which is the restrictions on state parties,
11 the corruptive potential of donations to state and
12 local parties for use in Get Out the Vote activities
13 directed to state and local candidate elections is
14 again minuscule, at best attenuated, in the words of
15 Colorado I. But that activity, if it says go to the
16 polls on November 8th, is swept within the definition
17 of Federal election activity. The California parties
18 send out hundreds of different mailings every year
19 throughout their states urging voters to go to the
20 polls and those mailings mention only state and local
21 candidates. That activity is swept within the
22 definition of Federal election activity and is now
23 federally regulated activity and that, in that
24 respect 323(b) goes well beyond a congressional
25 interest in eliminating corruption of Federal

1 candidates and officeholders.

2 Final point, and that is with regard to
3 Section 213. The only illusion to that was with
4 regard to the coordination of activities among the
5 national parties and, and the candidates. 213
6 addresses two different uses of Federal money, hard
7 money. It puts the parties to a single unified
8 irrevocable choice to make coordinated expenditures
9 under the statute, Section 441a(d) or their
10 constitutional right to make independent expenditures
11 recognized by this Court in Colorado I. The
12 Government, and this is very important, the
13 Government has never advanced any anti-corruption
14 rationale to put the parties to that choice. The
15 only rationale we've gotten is Congress can condition
16 the statutory right simply because it's Congress.

17 There is no suggestion that using hard
18 money for I is more corrupting or is corrupting in
19 any way than using hard money for the other. If
20 there are no questions by the Court.

21 QUESTION: Thank you, Mr. Burchfield.

22 MR. BURCHFIELD: Thank you.

23 QUESTION: Mr. Abrams, we'll hear from
24 you.

25 ORAL ARGUMENT OF FLOYD ABRAMS

1 ON BEHALF OF MCCONNELL PLAINTIFFS

2 MR. ABRAMS: Mr. Chief Justice, and may it
3 please the Court:

4 As we turn from Title I to Title II, we
5 turn to efforts by Congress to limit, to regulate,
6 and ultimately to punish what are only expenditures,
7 expenditures not made in coordination with parties or
8 candidates which would result in them being treated
9 as contributions, but independently, and so we deal
10 here this afternoon in an area which as this Court
11 observed in Colorado II, it has routinely struck down
12 expend -- any limitations in this area. We are all
13 agreed here that strict scrutiny applies. There is
14 no dispute about that, and I think we're all agreed
15 that this is a content-based restriction on speech,
16 whether we're agreed or not, it is a content-based
17 restriction on speech.

18 I'd like to start with just a few
19 observations of --

20 QUESTION: Do you take the position that
21 no effective regulation of electioneering
22 communications is permissible?

23 MR. ABRAMS: I take the position that
24 electionary communications as defined in the statute
25 is so overbroad that the totality of what is

1 encompassed in it is not regulatable. Electionary
2 communications includes within it express advocacy,
3 what is now or what had been subject to regulation,
4 and to that extent, it is subject to regulation.

5 QUESTION: Beyond express advocacy, do you
6 concede that anything can be regulated?

7 MR. ABRAMS: I thought very hard about
8 that, Justice Souter, to see if there was something I
9 could give you in that respect. No, I do not concede
10 that there is anything beyond express advocacy.

11 QUESTION: Do you also recognize that
12 express advocacy is the easiest thing in the world to
13 avoid? You just say everything about how great your
14 candidate is or how terrible the opponent is, accept,
15 and go to the polls and vote for X.

16 MR. ABRAMS: I understand that that
17 happens. I understand what this Court in Buckley
18 understood just as well, when it said almost the same
19 thing. The Buckley Court did not say that express
20 advocacy was going to catch most, not to say all --

21 QUESTION: But, but Buckley was dealing
22 with two words, relative to. It was not confronted
23 with this problem as all.

24 MR. ABRAMS: But Buckley Court was
25 prescient in understanding that what has happened was

1 going to happen. That is to say that what, what
2 express advocacy covers would not be enough to cover
3 the range of conceptions, people, and organizations
4 and unions and corporations and others could come up
5 with.

6 QUESTION: Well, I understand --

7 MR. ABRAMS: And when they balanced the
8 First Amendment interest against that --

9 QUESTION: I understand why you would want
10 to keep what one of the briefs calls this impregnable
11 line because then you are within Buckley, but it
12 seems to me that this distinction is just
13 meaningless, that the findings below, in Judge
14 Kollar-Kotelly's opinion make it clear that this is
15 just, this is just a silly distinction in many cases.
16 Why don't we just junk it and begin with there, begin
17 anew, and begin anew?

18 MR. ABRAMS: It seems to me that, that
19 there are only two choices, that I would urge on you
20 at least, are constitutional choices. One is to
21 adhere to Buckley and to do so, understanding that,
22 or accepting, excuse me, that express advocacy is as
23 far as the First Amendment will allow you to go in
24 terms of allowing regulation.

25 QUESTION: Mr. Abrams --

1 **MR. ABRAMS:** The other is to try to make
2 sense in the sense that you are using the word, Your
3 Honor, sense by scrapping it and in a sense starting
4 over. You don't have to scrap it in order to strike
5 down this statute.

6 **QUESTION:** But shouldn't you at least be
7 --

8 **MR. ABRAMS:** Because of its overbreadth.

9 **QUESTION:** -- able to answer, answer the
10 question, why should a speech urging expressly to
11 elect a particular candidate to the President of the
12 United States, why should that speech be entitled to
13 less constitutional protection than a speech urging
14 the ratification of the Panama Canal Treaty, for
15 example?

16 **MR. ABRAMS:** The only reason and the only
17 justification is that that speech becomes, as it
18 were, so much like a contribution, so much like a
19 final act of saying, vote for the candidate, not for
20 this reason, not by inference, not by suggestion, but
21 that by finally giving an unambiguous statement --

22 **QUESTION:** But you'd therefore get less
23 constitutional protection. That's what you're
24 saying, I think.

25 **MR. ABRAMS:** It was afforded that little

1 sliver, and it was intended to be a sliver, as I read
2 Buckley and MCFL was afforded less constitutional
3 protection.

4 QUESTION: But it's second-class speech
5 under your submission.

6 MR. ABRAMS: With respect -- that was your
7 submission. I mean, that, that --

8 QUESTION: You're saying the only reason
9 is that Buckley said so, and so we'll stick to it.

10 MR. ABRAMS: No, I'm not saying it's the
11 only reason. I am saying that a flat statement
12 saying vote for somebody can be distinguished not
13 only from how to vote on the Panama Canal.

14 QUESTION: I agree it can be distinguished
15 --

16 MR. ABRAMS: But --

17 QUESTION: -- but the question is, why
18 should it get less constitutional protection than the
19 other speech? That's what I don't understand.

20 QUESTION: Maybe it's more likely to
21 induce gratitude and hence more likely to lead to
22 the, quote, appearance of corruption.

23 MR. ABRAMS: I think the very unambiguous
24 nature of it might, as Justice Scalia suggests, might
25 be more like -- I'm sorry.

1 QUESTION: Excuse me. Nothing in the
2 record bears that out. The findings --

3 MR. ABRAMS: Yes.

4 QUESTION: -- of all of the district
5 judges, I think, were quite compelling on this point
6 that the really astute, sophisticated candidate
7 doesn't say vote for me either. He uses or she uses
8 some other means. I mean, the speech law has evolved
9 since Buckley, which is perhaps one reason this Court
10 shouldn't try to control its evolution.

11 MR. ABRAMS: Well, speech law has, if
12 anything, become more protective since Buckley in the
13 First Amendment area. And if, if you were to move in
14 either direction, I would certainly urge you to move
15 in the direction of affording more protection to the
16 direct advocacy that Justice Stevens asked me about,
17 rather than less protection for the ad that I
18 provided you with, Congressman Myrick, this is from
19 the AF of L, Congressman Myrick vote against most
20 favors nation's treatment for communist China.

21 Now, that is swept in as part of
22 electionary communication. And I would certainly
23 urge you if you have any inclination to move in the
24 direction of moving away from Buckley, and there's no
25 doubt that, that there are parts of Buckley

1 intentioned with each other, that if you were you to
2 do that that you ought not to allow to be swept in
3 the unprotected area advertisements like that.

4 **QUESTION:** But it's not that they can't
5 run the ad. I mean, the unions can run the ad. The
6 corporations can run the ad. The ACLU can run the
7 ad. They all can run the ad. It's just that they
8 have to pay for it out of a PAC.

9 **MR. ABRAMS:** And that's an --

10 **QUESTION:** So why is that such, what is,
11 particularly, and I wanted to you to get to this, if
12 the disclosure regulations, the new ones, the new
13 provisions in the law on independent expenditure --

14 **MR. ABRAMS:** Yes.

15 **QUESTION:** -- are constitutional, if they
16 are constitutional, then it's pretty hard for me to
17 see any additional burden on any of these
18 organizations to make this expenditure on the ad you
19 are worried about through a PAC. What's the problem
20 of saying, go through the PAC, and what we achieve by
21 that is limiting the amount of money that any one
22 individual can give, and what we lose by it is
23 nothing.

24 **MR. ABRAMS:** You mean --

25 **QUESTION:** Now, what's your, what's your

1 response to that?

2 MR. ABRAMS: My first response is that you
3 lose a lot of speech.

4 QUESTION: Why?

5 MR. ABRAMS: Why? Because there much less
6 money we will be obtained. That was the idea of it
7 was to take money out of politics, if you will. PACs
8 don't raise as much money as the AF of L have. The
9 AF of L spent more, the record reveals on its
10 advertisements, than it raised with the entirety of
11 its PAC. Its PAC raised \$1.1 million --

12 QUESTION: And so what your point is --

13 MR. ABRAMS: -- and spent \$16 million.

14 QUESTION: -- that although it's all right
15 go to Joe Moneybags and say Joe Moneybags, you can
16 only give \$100,000 every two years to the Democratic
17 Party, it's not all right to go to Joe Moneybags and
18 say Joe Moneybags, you can only give \$100,000 a year
19 to the AFL-CIO or the pharmacies or somebody for the
20 purpose of running a similar ad.

21 MR. ABRAMS: Well --

22 QUESTION: In other words, you can limit
23 Joe Moneybags when he gives the money to a political
24 party, whose whole objective is speech and politics,
25 but you can't limit Joe Moneybags when he gives the

1 money for the same type of activity to another
2 organization.

3 MR. ABRAMS: Well, my side of the table,
4 Your Honor, has not exactly advocated limiting Joe
5 Moneybags and giving money to the Democratic Party.
6 That's what they're saying. What I'm saying to you
7 is that as regards an organization, either the, we
8 call the ACLU, the AF of L, whichever one you want to
9 pick, there are burdens that this Court has
10 recognized, serious burdens with having a PAC. There
11 is also in this case a level, a level of falsity that
12 the entity would have to engage in with respect to
13 what it was doing, because it is not true that this
14 is all about politics.

15 We have put before you advertisements
16 which are not simply political advertisements, and
17 yet to solicit someone for a PAC you must notify the
18 person of the political purposes of the PAC. You
19 must spend the money only for political purposes.
20 These are requirements in Section 441b with respect
21 to a PAC. It is not so that the ACLU when, if it
22 wants to run an ad in the last 60 days of the 2004
23 campaign criticizing President Bush for his position
24 on civil liberties, an ad that would be criminal
25 under this statute if it came from its treasury

1 funds, it is not true that that is a political ad.
2 Now, our friends here say, well, it might have
3 effect, and that's something I want to talk about.

4 QUESTION: Why couldn't the ACLU simply
5 call its PAC the non-partisan issue-oriented PAC? If
6 -- if the ACLU is worried about --

7 MR. ABRAMS: I'm not talking about the
8 name. Justice Ginsburg, it's not the name --

9 QUESTION: Misportraying what it's doing
10 --

11 MR. ABRAMS: -- of the PAC that I'm
12 worried about. I'm talking about the institution of
13 a PAC itself, a PAC pursuant to 441b(6)(3)(b) must
14 notify anyone solicited of its political purposes.
15 What I'm arguing to you is that --

16 QUESTION: And he couldn't say, our
17 political purpose is to be non-partisan, we are
18 interested in the issue, not the candidate?

19 MR. ABRAMS: No, I don't think it is
20 telling someone of political purposes if you say, we
21 are not, we don't have political purposes.

22 QUESTION: You mean the FEC would say,
23 ACLU, sorry, you can't do that, you have to otherwise
24 identify your PAC?

25 MR. ABRAMS: I don't know what they would

1 do under this criminal statute. I do not think that
2 the ACLU ought to have to run the risk of the FEC
3 passing judgment.

4 QUESTION: Would they get an advisory
5 opinion from the FEC and then they would avoid the
6 risk?

7 MR. ABRAMS: Two answers. First, that is
8 not usually the most satisfactory First Amendment
9 answer. If they want to run an ad in the middle of
10 the campaign, to have to go to the government to get
11 permission to run --

12 QUESTION: Not in the middle of the
13 campaign. They could do it any time.

14 MR. ABRAMS: Yes, but --

15 QUESTION: If they want to clarify what
16 they have to say about their PAC, to make it clear
17 that they are not advocating the election of a
18 particular candidate, but that their concern is
19 at issue --

20 MR. ABRAMS: They can go -- they can seek
21 such a response from the Commission. I don't think
22 my friends here would argue with me that that's not
23 such an easy effort. It takes at least weeks and
24 weeks to get a response. There are new organizations
25 being formed all the time that would have to get that

1 response.

2 QUESTION: But your basic point is that
3 they're not going to be able to raise as much money
4 as the organization itself has at its disposal
5 anyway, whatever you call the PAC.

6 MR. ABRAMS: The NRA -- let me give you an
7 example. The NRA raised an enormous amount of money
8 in the last campaign. They were mentioned a lot on
9 the floor of Congress with great unhappiness by a lot
10 of people. They appealed to 80 million gun owners in
11 America. They have 4 million members. Under the
12 standard rules that apply with respect to a PAC, they
13 could only get money from the 4 million people, not
14 from the 80 million. They could not raise -- they
15 raised \$300 million.

16 QUESTION: Basically that -- I didn't
17 mean to interrupt you. Go ahead.

18 MR. ABRAMS: Sorry. I'm finishing it.
19 They raised \$300 million from their ads on television
20 and spent it on more ads to get out their views. And
21 number one, I think that's part of living in a
22 democratic society. Number two, to say that they are
23 to go down from the sort of level they were at, in
24 terms of the people they may appeal to, which is the
25 way PACs work and quite properly the way PACs work.

1 But that they must, as a matter of law,
2 abandon their general efforts to raise money from the
3 public, is a very significant burden on --

4 QUESTION: I'm not quite clear on that.
5 Why is that -- I thought all they had to do was, if
6 they want to raise money for these kinds of ads, 60
7 days before the election, mentioning the candidate's
8 name, is in their advertising, they say, please send
9 your check to the NRA Election Time PAC. Do they
10 have to do more than that?

11 I thought they had to open a bank account,
12 they have to appoint somebody a treasurer, they have
13 to make disclosure. And it's a slight difference
14 there between over \$250 rather than over \$10,000.
15 And that's it.

16 MR. ABRAMS: And they're only allowed to
17 solicit from their membership.

18 QUESTION: In other words, you can't go
19 and ask -- if I start a PAC or anybody here starts a
20 PAC, you can't go and just ask the general public to
21 belong?

22 MR. ABRAMS: No, the general public --

23 QUESTION: That's NRWC --

24 MR. ABRAMS: NRWC says --

25 QUESTION: Can you ask them to join the

1 PAC?

2 QUESTION: Can you ask them to join the
3 PAC?

4 MR. ABRAMS: No. The general public may
5 not belong to the PAC.

6 QUESTION: But can the NRA go out and say,
7 look, we want you to join the NRA, X dollars. We
8 also want you to give the PAC some money, Y dollars.
9 Can they do that?

10 MR. ABRAMS: Yes, they can get people to
11 join the NR --

12 QUESTION: If they can do that, then your
13 argument boils down to the fact that when people are
14 told that they have to join, and the money is going
15 to be used for this purpose, they're going to be less
16 interested in doing it. And I don't know why that
17 entitles you to a preferable advertising break, in
18 effect, in the name of the First Amendment.

19 MR. ABRAMS: Look at the burden on speech
20 that we are talking about imposing on an organization
21 like this. Instead of making general appeals to the
22 public, instead of having their say, their argument
23 in saying, send us money, et cetera --

24 QUESTION: Yeah, but your general appeals
25 to the public, it seems to me, are to join the NRA.

1 And therefore, the universe of people who are
2 financing the advertisement is limited to members of
3 the NRA.

4 MR. ABRAMS: It is limited to members of
5 the NRA.

6 QUESTION: So it's the same limitation as
7 on the PAC.

8 MR. ABRAMS: No, sir, the general appeal
9 to the public is not limited to the NRA.

10 QUESTION: But the appeal to the public is
11 not just to make this ad. It's to join the NRA and
12 get all the benefits of membership, which include a
13 magazine and all sorts of other things.

14 MR. ABRAMS: But people were free, until
15 this statute, to send contributions to the NRA. They
16 were free to send money, not just to join.

17 QUESTION: So what the interest at stake
18 here is the nonmembers of the NRA who want to support
19 the policies of the NRA?

20 MR. ABRAMS: Yes, the difference is
21 between the 80 million people who have guns and the 4
22 million who are now members.

23 QUESTION: I assume that there is a
24 membership fee that goes along with joining most
25 organizations. So if you want to contribute \$25 to

1 the campaign, you would have to contribute 50, in
2 effect, to join the NRA, plus the 25.

3 MR. ABRAMS: Yes.

4 QUESTION: So my impression is -- this is
5 a question of the record, really. And I see you have
6 the point. I mean, there could be burdens of the
7 kind you're recommending. And it also could be
8 overly broad because they're the genuine issue ads.
9 So I put this on the one side.

10 And then I put on the other side that if
11 we strike it down -- well, I mean, I wouldn't say
12 forget the whole statute, but it seems pretty close
13 because you get several hundred million dollars to
14 run exactly the same ads that are being run right now
15 which were about \$500 million worth of these ads
16 saying -- they don't say vote against Smith. They
17 say, tell Smith what a rat he is. That's what
18 they -- and it will just be a loophole about 50 miles
19 wide.

20 And all this money, instead of going to
21 the Democratic National Committee or the state
22 committee or something, go right to the NRA, right to
23 the environmental groups, right to the Right to Life
24 groups, right to the groups the opposite -- in other
25 words, everyone who has a cause will get the money

1 and run the same ads that really this was designed
2 to --

3 MR. ABRAMS: Well, everyone who has a
4 cause may get more money, yes. Will they run the
5 same ads as the political parties would have run?
6 No. Will they run the same ads as the candidates
7 would have run? I don't think you can assume that
8 either.

9 I mean, the only thing in your record,
10 incidentally, here, about a breakdown in this area,
11 and I think this may be of interest to you, is that
12 in the 2000 presidential campaign, of all the ads on
13 television, 51 percent were by candidates, 41 percent
14 were by parties and 8 percent by organizations of the
15 sort that we are talking about here now.

16 QUESTION: Would you clarify something in
17 the record for me? Because I was under the
18 impression with regard to the NRA, that there
19 basically were two pots of money, the PAC money and
20 its own money, and its own treasury, if it had wanted
21 to spend its own money.

22 You're telling me the real vice in this is
23 that there is a third category, namely money
24 solicited from gun owners who are nonmembers, but
25 could not belong to the PAC. Are you saying that

1 that third --

2 MR. ABRAMS: No, I'm not. I'm saying that
3 what you call their own money includes money obtained
4 by solicitations.

5 QUESTION: But that's to join the NRA.
6 There is not a separate fund --

7 MR. ABRAMS: It's to join --

8 QUESTION: Contributed to by gun owners.

9 MR. ABRAMS: It's not a separate fund.
10 No, I'm not suggesting it's a separate fund. I'm
11 saying that the totality of the amount received by
12 the NRA includes membership fees and other amounts
13 contributed by people.

14 QUESTION: But it includes responses to a
15 request like this. You don't have to join the NRA to
16 give us money to run these ads. Please give us money
17 to run these ads. That's what goes into their
18 treasury now and you're saying they can't get that.
19 Is that it? Is that the way it works?

20 MR. ABRAMS: I'm not telling you that the
21 solicitations are made in those words. I'm telling
22 you that is what happens.

23 QUESTION: That's the functional result?

24 MR. ABRAMS: Yes.

25 QUESTION: Would you agree with the

1 implication of Justice Breyer's suggestion that in
2 order to save section 1, we have to abridge First
3 Amendment rights under section 2? I suppose it could
4 work the other way around. Section 2 must be
5 stricken because there is a First Amendment
6 violation, and Title I becomes meaningless.

7 MR. ABRAMS: We thought of putting section
8 2 first in the brief. I don't think that you can
9 justify, Justice Breyer, striking down or even
10 viewing more harshly, that is to say, our arguments.
11 That is to say, you ought not to reject our arguments
12 about Title 2.

13 QUESTION: What is directly worrying me is
14 I think that Title II will make you go through PACs
15 to run certain ads. A handful maybe, maybe a little
16 bit more than a handful, that are genuine issue ads.

17 And to the extent that you have to go
18 through the PAC, that is an added burden and I've
19 been trying to pin that down that you've been very
20 helpful on. At the same time, there may not be too
21 many. And it may open a tremendous loophole in
22 what's been traditional, the corporations and labor
23 unions do not and cannot contribute to getting people
24 elected, at least not through spending money and
25 contributions at -- you know what I'm referring to.

1 And also, it might open a major loophole
2 where Joe Moneybags makes the contribution to the
3 labor union or to the corporation that he previously
4 is now forbidden to give to the party itself. Those
5 are the two things and you've got the first half
6 addressed, and I would like to hear the second two.

7 MR. ABRAMS: I would like to start by
8 saying that you mentioned the question of the amount
9 of ads in question. I'm not going to get involved in
10 the internecine warfare we've had about quite what
11 the number is. But I do want to indicate that we
12 have one judge, Judge Henderson, who has indicated
13 that it is at least 34 percent of all the ads are by
14 any standard, quote, genuine, unquote, and perhaps as
15 high as 64 percent.

16 You have other judges and entities on
17 their side of the line that have used figures like 14
18 percent and the like. Now, all this of course is
19 inconsistent with the notion of what express advocacy
20 is. But taking even their definitions, as it was,
21 we're talking about a statute which by any standard
22 ever used by this Court would be deemed to be
23 overbroad.

24 To say -- you used the 14 percent number.
25 14 percent of these ads -- and I think there are many

1 more. 14 percent are ads which in the ordinary
2 course would be considered, quote, genuine, unquote,
3 however we define that. And yet sustain a statute
4 which would -- and I use the word deliberately --
5 criminalize them.

6 QUESTION: Is it plain from the record
7 that when a -- and I just don't remember this, but I
8 remember the terms. But I don't remember the answer
9 to this question. Is it plain that in these
10 discussions, the term genuine issue ad meant an ad
11 that dealt with issues to the exclusion of any
12 reasonable interpretation that it also dealt with
13 advocacy for candidates?

14 Because most of these ads, I think
15 everybody would agree, are hybrids. Sure, they
16 really do address issues, and there is also a very
17 clear implication about what they want you to do in
18 the ballot booth. So does genuine exclude the
19 possibility of a ballot booth implication?

20 MR. ABRAMS: Let me say the word genuine
21 comes from the study conducted by the Brennan Center,
22 in which they asked students from a particular
23 university to opine as to the intent, the state of
24 mind --

25 QUESTION: Was this a really good

1 uni versi ty?

2 (Laughter.)

3 MR. ABRAMS: The state of the mind of the
4 people that did the ads.

5 QUESTION: And it was out of context, too.

6 MR. ABRAMS: That's all it was.

7 QUESTION: You just saw the ad.

8 MR. ABRAMS: Do you think -- you've
9 watched these ads, you've looked at these ads. Don't
10 even look at the ads. You've looked at these
11 pictures like the ones that are at the back of my
12 brief and at the back of the intervenor's brief.
13 You've looked at they pictures.

14 Tell us, now, is this a genuine ad -- an
15 ad genuinely directed at an issue or is its purpose
16 electoral? They did not. To answer you directly
17 now -- did not permit for a moment an answer of both.

18 QUESTION: It was a false dichotomy.

19 MR. ABRAMS: Absolutely.

20 QUESTION: And because it was a false
21 dichotomy, I don't know what to make of 7 percent of
22 14 percent.

23 MR. ABRAMS: What I think you can make is
24 this, is that if given no opportunity at all to say
25 both, they said that the purpose, in their mind, was

1 not electoral, but issue oriented. I think you ought
2 to give us at least that. The both answer --

3 QUESTION: This was the defendant's
4 evidence, wasn't it?

5 MR. ABRAMS: Yes, sir, yes. It was the
6 Defendant's evidence.

7 QUESTION: I must confess that I don't, I
8 don't really understand, it's more, what is the
9 purpose of an issue ad unless it is to persuade the
10 voter to take some action that will enable that issue
11 to carry the day, and the only action a voter can
12 take is to vote for one person or another person. I
13 mean, isn't every issue ad an appeal to voters?

14 MR. ABRAMS: No.

15 QUESTION: I mean, what -- what other
16 purpose does it have? Is it asking them to leave
17 money in their will, or what?

18 MR. ABRAMS: The very first issue ad that
19 we have at the back of our brief is one by a term
20 limits organization.

21 QUESTION: Like the Belotti situation, the
22 Belotti case.

23 MR. ABRAMS: Well, yes, and it brings that
24 to mind. It's a -- it's term limits organization
25 saying, we have our pledge, our term limits pledge.

1 There are two candidates. One has not signed it.

2 The other one has.

3 QUESTION: Right.

4 MR. ABRAMS: Call him and tell him to sign
5 it. Call David Wu, urge him to sign it. Now, I --

6 QUESTION: So it's designed to have an
7 effect upon the election, isn't it?

8 MR. ABRAMS: I think that one is probably
9 not. I think that one is a, is a group that cares
10 less about elections than about their cause, their
11 cause is term limits.

12 QUESTION: Boy, but you could have, you
13 could have fooled me. They want the term limit
14 because they want, they want somebody to vote for
15 someone other than Wu. I mean, how else can you read
16 that? I mean, I can understand a Belotti situation
17 in which you've got a, in effect a referendum going
18 on in which the voters are going to have a direct
19 choice, a ballot initiative kind of thing, but once
20 you get into a situation in which the so-called issue
21 ad is in the context of an election, I would suppose
22 you would have a tough road to hoe to prove a pure
23 non-electoral purpose.

24 MR. ABRAMS: People do call -- I'm sorry.
25 The record before you shows that when these ads run,

1 people do make the calls. I asked Senator Feingold
2 that in the deposition I took of him I asked him,
3 do you get calls? And the answer was yes, they do
4 get calls. Now there's no doubt, and I want to
5 respond to this very directly, that many of these ads
6 do have both qualities, that is to say, they speak
7 about an issue, and they have an electoral component
8 to them, and some of them don't, but many of them do.
9 And we would urge on you that for you to say that an
10 ad of that sort is not fully protected by the First
11 Amendment, not just in the abstract, but to be
12 applied as you consider a statute like this, the
13 David Wu ad.

14 Whatever one concludes the underlying
15 purpose was, and one can't know for sure to say that
16 a term limits organization cannot take an ad out in
17 the last 60 days of a campaign, and indeed it works
18 out to be over 120 days in a presidential contest in
19 the sense of 60 days with respect to the election
20 date, 30 days for the national convention, 30 days
21 also for state conventions, primaries, so you are
22 talking about 120 days minimum --

23 QUESTION: Mr. Abrams --

24 MR. ABRAMS: -- of silence.

25 QUESTION: Can I interrupt you with a sort

1 of a --

2 MR. ABRAMS: Yes.

3 QUESTION: -- basic question here? The
4 definition of electioneering communications appears,
5 I think, six or seven times in the statute and one
6 says there must be certain disclosures and other --

7 MR. ABRAMS: Yes.

8 QUESTION: There must be something in the
9 ad itself identifying the sponsor. It prevents
10 foreign nationals from contributing to these ads and
11 so forth. Do you contend that it's unconstitutional
12 in all its applications, specifically, for example,
13 the requirement that they disclose who paid for the
14 particular ad?

15 MR. ABRAMS: Your Honor, my client is not,
16 has not raised constitutional objections in this
17 Court to the disclosure requirements and, with the
18 exception of 504, which is a broadcast --

19 QUESTION: And how about the reporting
20 requirement, the requirement that they report to the
21 Commission who the sponsors are?

22 MR. ABRAMS: Similarly there --

23 QUESTION: No objection --

24 MR. ABRAMS: -- but that is not because,
25 since you ask, it's not because we don't think that

1 the definition is unconstitutional for the same
2 reasons every time it's used. I mean, if we're right
3 that this definition, put Buckley aside for the
4 moment, that this definition is fatally overbroad for
5 First Amendment reasons.

6 QUESTION: In all its applications.

7 MR. ABRAMS: Yes. If it sweeps in so much
8 more than the First Amendment --

9 QUESTION: But the requirement that is
10 imposed by the definition in some instances is merely
11 disclosing who paid for the ads.

12 MR. ABRAMS: That's true. And that's one
13 of the reasons that we did not raise in this Court an
14 issue about disclosure now. But you should --

15 QUESTION: Another requirement is that
16 foreign nationals may not pay for such things.

17 MR. ABRAMS: That's right. But that's not
18 challenged. The --

19 QUESTION: So it could be constitutional
20 in some applications and not others?

21 MR. ABRAMS: I think it is overbroad in
22 all respects. It, it could be constitutional.

23 QUESTION: But when you say overbroad, you
24 mean it's too broad to be constitutional.

25 MR. ABRAMS: Constitutionally overbroad,

1 yes. I think one can make a case, and again, we
2 didn't challenge the foreign part of it at all that
3 there may be different considerations afoot there
4 which would perhaps change the dynamics of your
5 decision making. I do want to point out that on the
6 basic disclosure matter that although we, that is to
7 say, Senator McConnell, does not challenging that,
8 the ACLU is challenging it, and they have made that
9 argument in their brief and they have made it at
10 length and powerfully to the effect that the
11 disclosure requirements as per Buckley should be the
12 same as the requirement or the viability of a
13 requirement not to say something, as well as certain
14 principles of anonymity. As I say, that's not the
15 argument that we're making.

16 QUESTION: Your principal challenge is to
17 the requirement that these ads be paid for with hard
18 money?

19 MR. ABRAMS: That's one way to say it,
20 Justice Stevens. The way I would say it is that our
21 principal objection is that this is a content-based
22 restriction on speech which punishes speech of --

23 QUESTION: Punishes it only to the extent
24 that it identifies who or who may not pay for it.

25 MR. ABRAMS: Well, to the extent that PACs

1 are asserted as an alternative --

2 QUESTION: I'm not talking about PACs,
3 using hard money as an alternative.

4 MR. ABRAMS: Well, hard money, it's really
5 the equivalent of PACs in this situation. I mean,
6 hard money when you talk about the AF of L, for
7 example, what is hard money when they spend their own
8 money on their own ad? It's one thing to say they
9 have to do it through a PAC. We think it's
10 unconstitutional to force that with respect to every
11 mention of the President of the United States. It's
12 something else to treat it as if somebody else is
13 giving the money. This is not a contribution
14 situation in which the concept of hard money comes
15 into play. That's why I was rephrasing it in terms
16 of PACs.

17 Let me say, in conclusion, one or two
18 final things. This is, this section, with what we
19 consider its overbreadth, is illustrative of the
20 failures and constitutional indifference by the
21 Congress to First Amendment norms as a whole. One of
22 the other sections we're challenging is Section 305,
23 which is the section which says under the title,
24 limitation of availability, of lowest unit charged
25 for Federal candidates attacking opposition. This is

1 a section which basically says in so many words,
2 candidates have to pay more money or make more
3 disclosure.

4 QUESTION: I don't think that's right. It
5 says they don't get a statutory entitlement to a
6 cheaper rate.

7 MR. ABRAMS: That's right.

8 QUESTION: That's what it says.

9 MR. ABRAMS: And therefore --

10 QUESTION: They don't necessarily have to
11 pay more money if the station doesn't charge them
12 more money.

13 MR. ABRAMS: I represent the National
14 Association of Broadcasters here. I think I can say
15 there is a chance they might have to pay more if the
16 statute -- if the statute did not require lowest unit
17 rate.

18 QUESTION: What the statute does is take
19 away a statutory entitlement, not require that they
20 pay a higher price.

21 MR. ABRAMS: It takes away a statutory
22 entitlement for what?

23 QUESTION: Which itself is content-based.

24 MR. ABRAMS: Yes, which is, which is
25 entirely content-based. They take them away --

1 QUESTION: But they're going to have to
2 make the disclosures anyway, aren't they? I'd like
3 to get clear on that. Even if this were
4 unconstitutional, the other provisions that require
5 them just about the same disclosures?

6 QUESTION: Specifically 311.

7 QUESTION: So we're talking about
8 basically nothing, is that right? I'd like an answer
9 to that, because I -- just to clarify it in my mind.

10 QUESTION: The section is 311 and it seems
11 to me to require virtually the identical disclosure
12 that 305 does.

13 MR. ABRAMS: You do not have to under 311
14 have a printed statement identifying that the
15 candidate approved and authorized the ad. You do not
16 have to have the image of a candidate for four
17 seconds.

18 QUESTION: Thank you, Mr. Abrams.

19 MR. ABRAMS: Thank you very much.

20 QUESTION: Mr. Gold, we'll hear from you.

21 ORAL ARGUMENT OF LAURENCE GOLD

22 ON BEHALF OF AFL-CIO

23 MR. GOLD: Mr. Chief Justice, and may it
24 please the Court:

25 Earlier this term in the Nike case, the

1 AFL-CIO took the unusual step of filing an amicus
2 brief arguing that the vital First Amendment interest
3 in public access to information and ideas leaves the
4 Government no room to inhibit business corporations
5 from speaking out on matters of public concern.
6 Today, we appear on our own behalf and aligned with
7 business corporations and non-profit incorporated
8 groups in support of that same principle. I would
9 like to pick up --

10 QUESTION: Are you Laurence Gold?

11 MR. GOLD: I am Laurence Gold. We're not
12 related.

13 QUESTION: Not the Laurence Gold I
14 expected.

15 MR. GOLD: I'm also instructed by your
16 rules not to introduce myself. I would like to first
17 revisit the PAC point, and then also address the
18 back-up definition of electioneering communications
19 in the distinct but very vital issue of coordination
20 in this case.

21 QUESTION: Would you at some point, if you
22 have the chance, deal with what is a genuine problem
23 for me? I think labor unions and corporations for
24 30, 40, 50, 60 years have been forbidden to make
25 expenditures in connection with a Federal election.

1 Now, unless you're attacking that whole thing, I take
2 it what this turns is what Mr. Abrams said,
3 overbreadth. It goes too far in defining the ads, an
4 added burden with the PAC. I have taken in both
5 those. I'll check them out.

6 I want to know the other half of the
7 equation, that is, I'd like you to spend one minute
8 explaining to me why I'm wrong in thinking that if
9 you win on this point, that thing that's been there
10 in the statute since 1919, we might as well throw it
11 away, and or, you know, they'll make expenditures in
12 connection with an election, namely these huge ads,
13 and they will collect loads of money from the same
14 wealthy people to help them along with those
15 expenditures. I'd just like one minute on that point
16 at your convenience.

17 MR. GOLD: I'll do it now, Justice Breyer.
18 The prescription of expenditures in the law which
19 dates back to the 1940s was first defined by this
20 court in Buckley and then in MCFL to mean express
21 advocacy, and that in fact is the only kind of
22 expenditure that the law has prescribed, and there is
23 only one instance where this Court has even approved
24 a restriction of those kinds of expenditures on any
25 party or any kind of organization that is subject to

1 203, and that was of course the Austin case. But the
2 notion that expenditures in an untrammelled sense or
3 an unbounded sense --

4 QUESTION: Well, they've given you a new
5 definition, and that's the issue, of course, is this
6 new definition okay, and we are back to where we
7 started. If the old one is okay given those problems
8 in the '40s, why isn't the new one okay given the
9 problems of the '90s? All right. But anyway, you go
10 ahead.

11 MR. GOLD: Well, it wasn't clear really in
12 the '40s what the term expenditure met. There were
13 two cases, the UEW case and the CIO case, that
14 explored that and pointed out that there was some
15 doubt there. In this case, the notion has been
16 brought into, way beyond anything that might affect
17 an election. The mere, the touchstone of this
18 statute is, if you refer to a candidate within a
19 certain time to a certain audience, you are
20 prescribed from doing so. And this record shows the
21 subjective aspect of it, I think, that the Buying
22 Time studies underscored, I think the defendants no
23 longer subscribe to.

24 But the evidence in the record is replete
25 with instances where groups use ads not even in the

1 mixed sense that Buckley said was very important, but
2 in the sense of doing something that's urgently
3 necessary for the organization at the time. For
4 example, three AFL-CIO ads that ran in quick
5 succession in September 1998 denied, in Barker and
6 Spearmin t, all addressed legislation that the
7 Republican majority on issues of grave concerns to
8 the AFL-CIO had hastily scheduled, and we came up, we
9 devised ads in a few days' notice and broadcast ads
10 in a number of states in order to pressure particular
11 Members of Congress in the Senate and the House on
12 how they should vote on that legislation on a vote
13 that was actually taking place five days later. It
14 was pure happenstance that that vote occurred in
15 September of 1998 rather than say September of 1999,
16 when this prescription would not have been upon us.

17 QUESTION: But could -- could I interrupt
18 again? You're not really prescribed for money in
19 them, you're really prescribed from using union
20 funds, and one of the reasons for that is that some
21 union members may disagree with your position.

22 MR. GOLD: Well, this makes -- there's a
23 tremendous difference between the union doing it and
24 the union having to do it from a PAC. And to force a
25 union, for example, to do this sort of spending out

1 of its PAC would reverse the notion that this court
2 has followed in a series of cases from *Machinists v.*
3 *Street through Beck* that the dissent of a union
4 member on matters is not to be presumed, that people
5 don't have to opt in to speaking, that they, at best
6 one can require somebody to opt out.

7 QUESTION: Yes, but from the Taft-Hartley
8 Act on, it's been understood, I thought, that one
9 objection to the union's spending its own money was
10 it may not reflect the views of all its members.
11 That's true of issue ads and election ads.

12 MR. GOLD: Well, in Austin, when the Court
13 addressed this in the context of business
14 corporations, it pointed out that there were crucial
15 differences between corporations and unions on
16 precisely this point, that the two governmental
17 interests.

18 And the only case where this Court has
19 ever approved an actual restriction on express
20 advocacy, the two interests identified there are the
21 two aspects of the entity there, mainly aggregation
22 of wealth -- or the immense aggregation of wealth by
23 virtue of the corporate forum, not aggregation of
24 wealth alone. And whether or not the spending
25 reflected the views of members or shareholders this

1 Court pointed out were inapplicable to unions.

2 So the premise I think doesn't necessarily
3 apply. And the speech we're talking about here, of
4 course, goes well beyond even the express advocacy
5 expenditures at issue in Austin. Express advocacy is
6 different. Express advocacy, whatever the value of
7 whether or not it should be regulated, is certainly
8 unambiguous in two senses.

9 One, there is a specific request for
10 voting decision. And two, it is virtually certain
11 that the listener is going to take that into account
12 as to whether or not to make a voting decision. You
13 can't say that, I think, about any other kind of
14 speech, including speech that makes reference to
15 candidates.

16 And the burdens here, I think to pick up
17 on the discussion earlier, are very important with
18 respect to a PAC. It's one thing for an advocacy
19 organization, like the NRA and the ACLU, which can
20 and routinely do appeal for funds to the general
21 public to be restrained as Mr. Abrams described.

22 But unions and corporations don't have the
23 ability to seek contributions just from anybody.
24 There is the notion in the statute of a restricted
25 class.

1 QUESTION: They could seek them but they
2 would n't be very successful.

3 MR. GOLD: No, actually, Your Honor, they
4 can't. They can to their general treasury, but with
5 respect to a PAC, you are limited to soliciting only,
6 in the case of a union, your members or your
7 executive administrative staff and their families.

8 In the case of a business corporation,
9 only your shareholders and executive administrative
10 personnel. These are not organizations that can for
11 their PACs seek contributions from anybody else.
12 It's long been unlawful under the Federal Election
13 Campaign Act to solicit beyond those classes.

14 QUESTION: Is there any empirical
15 information on this problem in the record?

16 MR. GOLD: I'm sorry?

17 QUESTION: Is there any empirical
18 information on this? I think it's fairly
19 significant. You're saying it's really much, much
20 harder for us to get the money through the PAC. And
21 it either is or it isn't. And there either is some
22 empirical information or there isn't. I just want to
23 know the state-of-the-art.

24 MR. GOLD: Yeah, well, there is some. In
25 fact, the only judge below who made findings on this

1 was Judge Henderson. In her findings on this in the
2 Supplemental Appendix at pages 249, 50, 259 to 60,
3 270 to 71, which concern the AFL-CIO's difficulty in
4 raising PAC money. And page 347, note 142.

5 It refers -- there is an affidavit by the
6 then AFL-CIO political director describing the
7 difficulty of raising PAC money and how that would
8 not change, certainly perhaps be even worsened under
9 this new regime. And there are affidavits that
10 the -- I think as part of the RNC submission from
11 four other labor organizations that describe the
12 relative resources of their organizations and their
13 PACs.

14 QUESTION: Mr. Gold, I take it you are
15 arguing that a labor union or a corporation, for that
16 matter, has a First Amendment right to speak on
17 behalf of more than its membership or respectively
18 its stockholders. Why should that be?

19 MR. GOLD: Well, I think that's one way to
20 look at it, but I think what this Court has pointed
21 out in a number of cases, and Belotti is a
22 particularly -- a pertinent case for this, is that
23 it's not so much the speaker. The value of speech is
24 not so much from the source, whether it's a union or
25 corporation or some other group.

1 The value of speech is the informational
2 value that it gets to the public at large, the
3 enabling that that speech does for people to
4 participate in civic life. And the fact that it's
5 from a corporate source or for a union source does
6 not devalue that speech.

7 So it's not so much that the speaker has a
8 First Amendment right as such, but the value of that
9 speech to the populus as a whole --

10 QUESTION: Then you are saying, I think,
11 that there is a kind of First Amendment volume
12 requirement that goes well beyond what in the
13 contribution context we referred to as reducing the
14 speech to something that doesn't amount to anything
15 at all.

16 You're saying that when we're talking
17 about direct expenditures, when an organization is
18 speaking that way, that there really is a kind of
19 volume criterion, that has nothing to do with
20 membership.

21 MR. GOLD: In this case, there is a volume
22 criterion in the sense -- volume --

23 QUESTION: Volume, are you saying?
24 V-o-l-u-m-e?

25 QUESTION: That's what I meant.

1 QUESTION: Well, that's the say Justice
2 Souter pronounces it.

3 QUESTION: It's my distinct regional
4 accent again. I've just come back from New
5 Hampshire.

6 MR. GOLD: I think there is a volume
7 effect by this statute and I think that's clearly
8 part of the intention of this.

9 QUESTION: So the interest you're
10 vindicating here is all the television viewers during
11 election periods seeing all these 30 minute spots
12 over and over and over again, that's the interest.

13 MR. GOLD: Your Honor, that's --

14 QUESTION: That is part of the interest.

15 MR. GOLD: That certainly is part of the
16 interest. There is a tremendous interest in people
17 and groups and organizations being able to address
18 public issues. And the election period, which this
19 Court has identified and which the record supports,
20 including one of the -- at least one of the
21 Defendant's experts, Mr. Magleby, is that that's a
22 time when people are especially attentive to public
23 issues.

24 And the fact that some of this speech may
25 seem to have a, quote, effect on the election, which

1 is after all the standard that the Defendants now
2 justify this for, the fact that there might be some
3 effect can't possibly be a reason in order to stifle
4 it. If we start down that road --

5 QUESTION: Then why is that not true with
6 a political party? Why wouldn't you say the same
7 thing with a candidate? And why is it, if we can
8 limit the expenditure, the contributions made to the
9 candidate for this kind of thing or the party, why
10 couldn't we do it to organizations that have less to
11 do with political life, for corporations?

12 MR. GOLD: I think Title I has both
13 contribution and expenditure aspects. But here one
14 is talking about limiting the independent speech.
15 That's the premise of section 203 is that this is --

16 QUESTION: No, I think the premise is pay
17 for it out of your PAC. Not to limit the speech but
18 rather pay for it out of certain limited
19 contributions. And I understand your argument that
20 that's harder to do. It's also maybe harder to do
21 for a party.

22 MR. GOLD: It's not just harder to do, but
23 it really does, I think, distort the message. It
24 inherently is distorting a message that is
25 nonelectoral if you have to do out of a PAC. If you

1 have to tell people you're soliciting for this fund.

2 It's not enough I think to label it something.

3 The law has imposed a structure on these

4 committees. They are political committees. They

5 register with the Federal Election Commission.

6 Members of these organizations are used to the fact

7 that they are designed and used for making

8 contributions.

9 QUESTION: The reason -- my question was

10 the reason that the union or the corporation has a

11 greater right here than the political party itself or

12 the candidate is?

13 MR. GOLD: It's that it is -- it's not at

14 all connected with the concerns of corruption or

15 appearance of corruption that have animated and

16 underlie this Court's jurisprudence when it comes to

17 contributions. This is independent private speech.

18 And from Buckley on and New York Times versus

19 Sullivan, this Court has recognized the value of

20 speech, even about elections by these groups. There

21 is no rationale for muting their ability to speak on

22 public matters and speak on electoral matters.

23 QUESTION: One of the themes of Buckley

24 was it's not up to the government to decide there is

25 too much speech coming from one place and not enough

1 coming from another.

2 MR. GOLD: Well, that's correct, Mr. Chief
3 Justice. And I think one of the -- something that
4 seems to animate this is the thought that certain
5 voices do have to be muted. And I think the
6 principle in Buckley, the fact that speech --
7 inevitably speech on candidates, speech on issues,
8 that it's inevitably mixed in, inextricably linked,
9 is really at issue in this case.

10 Because what this statute says is when
11 that's the case, you silence it, you make it criminal
12 or you force people to raise money separately under a
13 separate rubric and call it electionary
14 communications, and call it --

15 QUESTION: If you're right, the prior law
16 goes down the drain, too, doesn't it?

17 MR. GOLD: Well, no, Your Honor, I don't
18 think that follows.

19 QUESTION: It's certainly muting, it's
20 been regulating for 60 years, longer than that in
21 corporations cases.

22 MR. GOLD: It's been regulating express
23 advocacy alone.

24 QUESTION: Yes. Why should express
25 advocacy be disfavored. Justice Stevens' question

1 all over again.

2 MR. GOLD: I think that's a fair question
3 that the Court does not have to reach in this case.

4 QUESTION: Well, I think we have to reach
5 it if we're going to accept your premise.

6 MR. GOLD: This case, in our view, turns
7 on the overbreadth, regardless of whether express
8 advocacy is regulable. This provision, we believe,
9 goes down -- and should go down on the basis of
10 overbreadth. One could assume that express
11 advocacy --

12 QUESTION: When you say overbreadth, you
13 say because it goes beyond express advocacy. That's
14 all you need.

15 MR. GOLD: It's because -- leaving express
16 advocacy aside --

17 QUESTION: No, but isn't that what you
18 mean? Isn't that your principal overbreadth point?

19 MR. GOLD: Yes, in the sense that it
20 goes -- express advocacy by definition is not an
21 electionary communication. The statute says that.
22 It's everything else. This is overbroad, not just
23 because some of the speech might influence -- might
24 affect an election, or influence an election, but
25 that it's criminalizing references to candidates --

1 QUESTION: Thank you, Mr. Gold.

2 Mr. Sekulow, we'll hear from you.

3 ORAL ARGUMENT OF JAY ALAN SEKULOW

4 ON BEHALF OF MINOR PLAINTIFFS

5 MR. SEKULOW: Mr. Chief Justice, and may
6 it please the Court:

7 The court below unanimously concluded that
8 section 318, the prohibition of contributions by
9 minors is unconstitutional. The statute suffers from
10 three constitutional defects. First, section 318 is
11 a ban, not simply a limitation. No symbolic or
12 associational speech rights are recognized under 318.

13 Second, the government failed to produce
14 sufficient evidence to show that there was corruption
15 or the appearance of corruption with regard to
16 conduit giving by minors. The fact of the matter is,
17 Judge Henderson called the evidence remarkably thin.
18 Judge Kollar-Kotelly called the evidence so minimal
19 as to, in her words, doom the statute.

20 Section 318 is not closely drawn in
21 support of the interests being asserted. In fact,
22 the government concedes that this statute is an
23 absolute ban and they also concede that, in fact, the
24 ban burdens more speech than a limitation.

25 QUESTION: Mr. Sekulow, could you have a

1 ban at any age? Is it 17 year olds that ban is
2 questionable. But say the Congress drew the line at
3 8 or 10.

4 MR. SEKULOW: Certainly that would be more
5 closely drawn, Justice --

6 QUESTION: Would that be constitutional?

7 MR. SEKULOW: I think so. The issue would
8 be could an 8 year-old make the voluntary decision to
9 make a contribution. I think it would be a closer
10 case. This is an absolute ban, though. This is the
11 exact opposite of that situation. Rather than
12 looking at a concern over --

13 QUESTION: I'm posing an absolute ban on
14 contributions by 10 and under.

15 MR. SEKULOW: I think it would be the same
16 argument. At a minimum, there would have to be --
17 they would have to establish that the ban was
18 justified by at least a -- closely drawn to the
19 concern. I think when you get -- the younger it gets
20 obviously it is more of a problem. But here you have
21 a ban actually --

22 QUESTION: I just want to be clear on what
23 your answer is. I thought you said that there would
24 be a line, a bright, clear line that could be drawn
25 at some age, only not 17.

1 MR. SEKULOW: All legislation is line
2 drawing. Here --

3 QUESTION: What's the answer? An 8
4 year-old? Nobody under the age of 8 can give a
5 contribution, period, end of the matter, that's it,
6 that's the law, constitutional or not.

7 QUESTION: In a sense, the problem
8 diminishes with the age. There aren't a great number
9 of 8 year olds making contributions.

10 MR. SEKULOW: That's exactly correct, Mr.
11 Chief Justice. And the fact is, as Judge Leon
12 recognized, the younger the child gets, the less
13 likely are they to have resources. But here again,
14 as the government concedes, this is an absolute ban
15 for 17 and under. It is not worrying about just two
16 year olds or four year olds.

17 QUESTION: I'd still appreciate an answer.
18 Six month old, right?

19 MR. SEKULOW: I'll give you the six month
20 old.

21 QUESTION: Wonderful. Now, once you give
22 me the six month old -- once you give me the six
23 month old, you've agreed that at some age, it's
24 reasonable to draw a line. And once you're down that
25 road, you have to deal with the obvious question that

1 the Constitution draws a line at 18 years old to
2 vote.

3 And after all, it was thought you needed a
4 constitutional amendment to get that result. And so
5 what's wrong with Congress saying, well, we think the
6 problem's about the same when you give money to a
7 candidate as when you vote for a candidate. And so
8 we're going to pick the same line. There are many 17
9 year olds who would be excellent voters and there are
10 many older people who are terrible, okay? So they
11 pick this line for that, we would like this line for
12 this. And what's wrong with that?

13 MR. SEKULOW: Justice Breyer, two things
14 are wrong with that proposition. First, the First
15 Amendment rights of speech and association are not
16 somehow contingent upon, dependent upon exercise of
17 the right to vote under the 26th.

18 Secondly -- and a perfect example of that
19 would be prior to the passage of the 19th Amendment,
20 women were denied the right to vote in the
21 United States but they certainly could still exercise
22 the rights of speech and association to obtain the
23 right of suffrage. And I think it would be exactly
24 the same argument.

25 Also, in fact, in 11 states, 17 year olds

1 actually can vote in primaries so long as they reach
2 the age of 18 by the next general election. So there
3 are states in which in fact it can be that the 17
4 year old can vote. But that I think also proves up
5 the problem here. And that is, if the government's
6 justification for the prohibition -- and here this
7 absolute prohibition -- is in fact that there is a
8 concern over conduit giving, the existing regulations
9 and existing law, 441(a) and (f), prohibit excess or
10 contributions given in the name of another, a conduit
11 gift.

12 That is absolutely prohibited.
13 Contributions given in the name of another within the
14 same provision, prohibited. And of course, 441(a)
15 prohibits gifts in excess of the contribution limits.
16 This statute doesn't say that a 17 year old who is --
17 actually under this statute, a 17 year old who has
18 her own means of support, who might even be
19 emancipated, whose parents may have never given \$1 to
20 a campaign are put in the situation where their gift
21 is banned. It's unauthorized and inappropriate,
22 illegal under the statute.

23 QUESTION: Mr. Sekulow, you said in your
24 brief that you would accept even a severe limitation,
25 but not an absolute ban, so among severe limitations,

1 would it be constitutional to say, yes, 16, 17 year
2 olds can give, but what they give is going to count
3 against how much the parent or parents who claim the
4 child as a dependent can give.

5 MR. SEKULOW: Actually, our -- our
6 discussion about that restrictions relates to what
7 some of the other states have done by allowing if no
8 states bans gifts by minors, some states do impose
9 what's called family contribution caps or
10 limitations. Again, certainly that would be more
11 closely drawn than an absolute prohibition.

12 QUESTION: I just wanted to know what you
13 meant in your brief by you would accept a limitation,
14 even a severe one. Is this one that you would
15 accept?

16 MR. SEKULOW: Well, we would accept this
17 fact. If the Government could establish through
18 evidence that in fact somehow a restriction on the
19 incremental amount allowed to be given would meet the
20 criteria of avoiding corruption or the appearance of
21 corruption, if the Government established that, sure,
22 but they haven't. I was using that as an --

23 QUESTION: I'm not asking you about
24 establishing proof in one by one in an individual
25 case, because that wouldn't be worth anybody's time.

1 Could the law say it will count against the parent or
2 parents who take the child as a deduction?

3 MR. SEKULOW: That would, I think it would
4 certainly make it more difficult, Justice Ginsburg,
5 to make a facial challenge if the gift, the symbolic
6 gift and the associational rights were recognized by
7 a cap. But again, this is a ban. It doesn't allow
8 that individual 17-year-old, 16-year-old, 15-year-old
9 to make that gift. We were trying to show through
10 that, those examples of what some of the states have
11 done to allow gifts to made by minors but at the same
12 time putting what's called family caps in place. It
13 would certainly make it more difficult as a facial
14 challenge, but again, this is a prohibition event.

15 QUESTION: Mr. Sekulow, is it necessary to
16 rely on the First Amendment to reach your conclusion,
17 or could you argue this an unreasonable restraint on
18 liberty?

19 MR. SEKULOW: Well, I would argue both.

20 QUESTION: You do argue both?

21 MR. SEKULOW: I would. And I certainly
22 would assert again that what the individuals planned
23 on giving here is a liberty interest, but it's a --
24 it's also speech, it's also association. The
25 underpinning of this Court's justifications for

1 limitations is the fact that an act of some type can
2 be given, a gift could be given. Here, it's a
3 complete, again, a complete prohibition.

4 QUESTION: Let's go to our jurisprudence
5 was where, where the restriction in question is
6 invalid or arguably invalid under a specific
7 constitutional guarantee, such as the First
8 Amendment.

9 MR. SEKULOW: Yes.

10 QUESTION: You don't resort to substantive
11 due process to create some general liberty interest?

12 MR. SEKULOW: Absolutely correct, Justice
13 Scalia.

14 QUESTION: So your answer should have been
15 no.

16 MR. SEKULOW: Well, okay. Then the answer
17 will be no. But it certainly is a First Amendment
18 interest, and that's what we've asserted throughout
19 this, that there is both the speech and the
20 association --

21 QUESTION: Giving money is the First
22 Amendment, yeah.

23 MR. SEKULOW: Yes, but that was -- the
24 hypothetical was assuming that that wasn't available.
25 However, the First Amendment --

1 QUESTION: You'd rather have his vote than
2 mine?

3 MR. SEKULOW: Well, I would certainly like
4 to have yours, Justice Stevens. The -- I think the
5 bottom line of this ban is what came up in, was one
6 of the opinions, is no one knows exactly where this
7 came from. There is no evidence that was submitted
8 of any significance justifying this prohibition.
9 Administrative convenience in enforcement is
10 certainly not a basis for curtailing speech or
11 associational rights.

12 QUESTION: Didn't the FEC have, didn't
13 they continuously write about this and say there
14 seemed to be an awful lot of tiny children who are
15 sending in money for your trust funds or something.

16 MR. SEKULOW: Actually, Justice Breyer,
17 they wrote in a --

18 QUESTION: What did they say?

19 MR. SEKULOW: -- in the reports that there
20 was, they thought there was a concern, or evidence
21 that they said, there was concerns over conduit
22 giving. However, actually the FEC could never make
23 the conclusion, though, nor could Congress because
24 neither Congress or the FEC ever asked for the age of
25 the donor, so they could not determine whether in

1 fact there was a violation of conduit giving in and
2 of itself, that's already prohibited under 441a and
3 f. They don't even ask for the age of the
4 contributor, so to go from a situation, and by the
5 way, they never asked for a complete ban. The FEC in
6 all of its recommendations never asked for an
7 absolute ban on considerations by minors to be put in
8 place. They had a presumption issue for those that
9 were 15, 14, and 13, under 15 and under, but that was
10 a request for a presumption which was rebuttable,
11 rebuttable under voluntariness, rebuttable if in fact
12 it was from funds controlled by the minor and it
13 wasn't a gift directed by the parent.

14 For these reasons, the fact that this is a
15 ban, this is not a limitation, we would request the
16 Court affirm. Thank you.

17 QUESTION: Thank you, Mr. Sekulow.
18 Mr. Clement, we'll hear from you.

19 ORAL ARGUMENT OF PAUL D. CLEMENT
20 ON BEHALF OF FEDERAL DEFENDANTS

21 MR. CLEMENT: Thank you, Mr. Chief Justice
22 and may it please the Court:

23 In enacting Title II of the Bipartisan
24 Campaign Reform Act, Congress addressed a problem
25 that's been with us for 100 years, the corrosive and

1 distorting effects of aggregate corporate wealth on
2 candidate elections. In addressing that problem,
3 Congress did not adopt a revolutionary approach,
4 rather, Title II and its requirement that
5 corporations fund electioneering communications
6 through a separate segregated fund simply represents
7 a contemporary chapter in the century-long history of
8 regulation of corporate political giving.

9 QUESTION: But it makes a big change.
10 It's one thing to say the corporation is
11 affirmatively giving money to the candidate or naming
12 the candidate, but to say that a corporation cannot
13 take out an issue ad which happens to mention a
14 candidate, any candidate, Federal candidate during a
15 certain period, that goes far beyond whatever has
16 happened before, and what, you know, you talk about
17 corporations as though well, who needs corporations?
18 Is there any significant segment of our economy that
19 is not run by corporations? Can you think of any
20 significant segment of our economy?

21 MR. CLEMENT: No. There is no question
22 that corporations are very good at aggregating wealth
23 in the corporate --

24 QUESTION: Exactly. And if that segment
25 --

1 MR. CLEMENT: -- and in commerce, and the
2 concern --

3 QUESTION: -- if that segment of an
4 economy, of the economy is attacked by a certain
5 piece of legislation, which that segment of the
6 economy thinks is a very stupid piece of legislation,
7 and it will entirely wash out nuclear energy or
8 whatever it is, to say that the American people who
9 have organized themselves economically through
10 corporations cannot through the same mode defend that
11 segment of the economy against irrational legislative
12 action is to very much weaken, it seems to me, the
13 power of the people to, to have a real say in the
14 acts of the Government.

15 MR. CLEMENT: Well, as you say, Congress
16 has long been able to address express advocacy, and
17 what the evidence, the overwhelming evidence before
18 the district court showed is that in a modern
19 political campaign, the express advocacy test no
20 longer works. It no longer is -- it is a woefully
21 inexact proxy for the kind of speech that affects
22 candidate elections that this Court has said
23 corporations must make through segregated, separate
24 segregated fund. This Court has --

25 QUESTION: Any issue, any issue advocacy

1 affects elections. That's the purpose of it
2 ultimately, to get the people to agree with whoever
3 is making the issue ad about the issue and to elect
4 candidates who will come out that way. So it seems
5 to me a very artificial distinction you're making.
6 You're --

7 MR. CLEMENT: First of all, I don't --

8 QUESTION: You're essentially saying you
9 cannot have issue ads.

10 MR. CLEMENT: Justice Scalia, I don't
11 think it's artificial distinction. In any event,
12 it's not a distinction I'm drawing. It's a
13 distinction that this Court drew in Austin when it
14 distinguished the situation it had before it in
15 Belotti, where it said that a corporation facing an
16 absolute ban, not a separate segregated fund
17 requirement but an absolute ban in participating in a
18 referendum, this Court held that unconstitutional.
19 In Austin, this Court said that limits on express
20 advocacy in the context of a candidate campaign
21 triggered different interests, and in that context,
22 Congress has a legitimate ability to deal with the
23 corrosive and distorting effects of aggregate
24 corporate wealth and the problems with diverting
25 shareholder and member money to political causes with

1 whi ch they di sagree.

2 **QUESTION:** I think one of the -- one of
3 the dubious things about Austin is one of the things
4 it relied on was the fact that the corporation's
5 members or did not -- or owners did not necessarily
6 represent a large amount of public opinion, and it
7 seemed to me, I voted in the majority, but it seemed
8 to me since then that that's the whole purpose of the
9 First Amendment is to allow people who perhaps don't
10 have much in the way of public opinion try to change
11 public opinion.

12 **MR. CLEMENT:** Well, there are certainly
13 ways to do that, Mr. Chief Justice, but I think what
14 Austin represents incorrectly is the idea that when
15 corporate money is being aggregate for different
16 reasons, that there is an interest on the part of the
17 shareholders not to have that money diverted to
18 political causes with which they di sagree. Now,
19 outside of the corporate context, the principle that
20 you are advocating certainly applies. Indivi duals
21 are able to advocate unpopular causes with their
22 money and that is not a concern of Title II, but in
23 the corporate context this Court has drawn a
24 distinction, and that's not a distinction this Court
25 just drew in the Austin decision. It's one that goes

1 through this Court's decisions. It goes, and it
2 starts really from the Tillman Act in 1907 which
3 recognized that corporations are different.
4 Corporations posed unique risks of corruption, so in
5 1907, corporations and corporations alone were barred
6 from making contributions to candidates.

7 Then in 1947, that ban was extended to
8 expenditures, and in Austin, this Court quite
9 correctly held up that as constitutional because of
10 the unique risks of the corporate context and what
11 the evidence before the district court showed is all
12 of those same interests that applied in Austin to
13 express advocacy equally apply to these kind of
14 electioneering communications.

15 QUESTION: And doesn't -- doesn't the
16 primary definition today, in effect, give a
17 corporation or a union that wants to run an issue ad
18 a safe harbor simply by virtue of not mentioning the
19 name? Say, let's hear it for nuclear power and don't
20 let anybody else tell you otherwise. That's safe,
21 isn't it?

22 MR. CLEMENT: That's exactly right. That
23 is safe, Justice Souter, and that's why all of the
24 evidence before the district court that looks at
25 retrospective ads running previous cycles has to be

1 read in the light that one of the virtues of the
2 clarity with which Title II defines electioneering
3 communications is that a corporation can avoid the
4 trigger and that similar to current law, under
5 current law as we pointed out in our brief, the NRA
6 put together two ads in the 2000 election cycle.
7 They were virtually identical, except one of them
8 finished with the tag line, vote for Bush. Now, the
9 NRA --

10 QUESTION: How, how, how do you -- how do
11 you protect it if what you're talking about is the
12 McCain-Feingold bill or the Roth IRA or something
13 like that, where the, where there is a candidate's
14 name attached to specific legislation?

15 MR. CLEMENT: Well, let's, Justice
16 O'Connor, let's take the McCain-Feingold provision,
17 for example. Now, first of all, one option, of
18 course, is to refer to it the way I have, as the
19 Bipartisan Campaign Reform Act. It's important to
20 remember, however, that the restrictions in this bill
21 don't restrict any corporation from talking about the
22 McCain-Feingold bill in 48 states or in fact all 50,
23 as long as Senators McCain and Senator Feingold are
24 not up for election.

25 Now, at the point that somebody wants to

1 make a reference to the McCain-Feingold, to one of
2 those Senators' voters in the immediate days running
3 up to the election then they may not be referring to
4 it in a way that has nothing to do with the election.
5 They may be referring to it as that no good
6 McCain-Feingold legislation, and it may clearly have
7 an electioneering purpose.

8 QUESTION: Now the Government has relied
9 very heavily this morning on the findings made by the
10 Congress and by the district court. And this
11 afternoon you are confronted with the fact that the
12 district court has said basically that the
13 distinction between express advocacy and issue ad is
14 essentially meaningless and everybody knows it, so
15 why should we base our decision on that distinction,
16 when the district court has found, and I think
17 there's very little evidence to the contrary that
18 it's simply ephemeral?

19 MR. CLEMENT: Well, Justice Kennedy, we
20 start from the same proposition, which that
21 distinction no longer holds up as a practical matter
22 of political reality. Now, I fear you may take the
23 conclusion from that that we should just end this
24 whole enterprise, but we take from that the
25 conclusion that Congress is not disabled from

1 addressing the serious problems that this Court found
2 that it could address in Austin.

3 QUESTION: Oh, so that you could come back
4 next year and say that the Congress, the pure issue
5 ads must also be prohibited?

6 MR. CLEMENT: I don't think so, Justice --

7 QUESTION: I mean, that must, that's the
8 necessary consequence of what you just said.

9 MR. CLEMENT: No, it's not, Justice
10 Kennedy. Just because the campaign finance laws need
11 to be adjusted from time to time doesn't mean there
12 are no limits and if you are looking for a limit in
13 keeping the distinction between this Court's decision
14 and Belotti and this Court's decision in Austin, one
15 clear limit is a reference to a candidate, because
16 that is one thing that clearly identifies an ad as
17 being tied to the interests of the candidate election
18 cycle.

19 QUESTION: You want one of us to write an
20 opinion for the Court sustaining the statute on a
21 ground which everyone knows is ephemeral and
22 meaningless?

23 MR. CLEMENT: Certainly not, Justice
24 Kennedy. What we want to have this Court do is write
25 an opinion that upholds a limitation on corporate and

1 union spending from direct treasury funds that
2 reflects the current reality. I can't tell you
3 whether the decision that you would, that such a
4 decision upholding this legislation would still work
5 25 years from now, but I can tell you that it will
6 work in the near term

7 And this Court has said, for example, in
8 footnote 11 in Massachusetts Citizens for Life, that
9 particularly in the First Amendment area, Congress
10 doesn't have to anticipate every problem. It can
11 respond to the observed realities and the observed
12 problems before it and try to address those and
13 that's what Congress did with this provision.

14 As you say, the express advocacy test no
15 longer works. The candidates themselves, who have
16 absolutely no regulatory incentive to avoid express
17 advocacy, still themselves don't make reference,
18 don't make their pleas in those express terms.

19 QUESTION: The observed reality, if
20 history teaches us anything, is that when you plug
21 one means of expression, the money will go to
22 whatever means of expression are left and that will
23 continue to be the observed reality and that means we
24 will continue to have new pieces of legislation that
25 close more and more methods of reaching the public.

1 This does not fill me with confidence and joy.

2 MR. CLEMENT: With all respect, Justice
3 Scalia, that's a formula for surrender in response to
4 what is clearly a problem that Congress has been
5 wrestling with for the most part successfully for a
6 hundred years, which is the corrosive and distorting
7 effects of corporate wealth on candidate elections.

8 QUESTION: I agree with you. You want us
9 to say just what Justice Kennedy said, that the
10 distinction is ephemeral, right? Now, we've heard
11 the distinction is ephemeral. And if you can ban the
12 express, you can ban the issue ad which mentions the
13 name. And now there were two, I thought, safe
14 harbors.

15 Safe harbor number 1 is what Justice
16 Souter said, don't mention the name of the candidate
17 60 days before election. Safe harbor number 2, which
18 I had been discussing before, which I wanted your
19 response to, was the PAC. Now, I thought it wasn't
20 too tough, say, for Philip Morris or Ciba Geigy, if
21 they really want to mention the candidate's name, to
22 set up a PAC.

23 Now, I've heard that that's not so, that I
24 was wrong about that. And the reason that I was
25 wrong, I've just been told, as you heard too, is

1 because it's going to be hard for these big
2 corporations and the labor unions to raise the money
3 through the PAC to run the very ad with the name of
4 the candidate in the last 60 days.

5 I would like your view about that. Do you
6 think that's right and not just subjectively, is
7 there any evidence about it?

8 MR. CLEMENT: Justice Breyer, the simple
9 answer is you were right all along. The separate --

10 QUESTION: I would like to think that
11 but --

12 MR. CLEMENT: The separate segregated fund
13 requirement is not an undue burden on corporate
14 political activity. This is, after all, not the
15 first case that this Court has dealt with the
16 separate segregated fund requirement. And of course
17 the requirement was made in Austin as well that, oh,
18 my, if we have to use the separate segregated fund,
19 that will be impossible. The Court rejected that
20 argument there and Justice Brennan in his concurrence
21 addressed it and made two very good points.

22 First, in footnote 7, he said that that
23 just doesn't reflect the observed reality, that the
24 Michigan Chamber of Commerce there was very
25 successful in raising funds for its PAC. At that

1 time, success was measured \$140,000. It seems quaint
2 because what this record says is that the NRA in the
3 Political Victory Fund was able to raise \$17 million
4 just for its PAC.

5 QUESTION: Did anyone else join Justice
6 Brennan's opinion in that case?

7 MR. CLEMENT: No, that was a concurrence
8 that reflected the views of the majority.

9 QUESTION: Did other people join his
10 opinion?

11 MR. CLEMENT: No, they didn't, Mr. Chief
12 Justice, but I think that it is certainly -- I'm not
13 suggesting that it binds this Court in any way. I'm
14 just suggesting that Justice Brennan's logic in
15 addressing that problem has persuasive force. It is
16 true also that the majority opinion of Justice
17 Marshall in that case, also noted, described the
18 Michigan Chamber of Commerce in that case as being
19 quite successful in its PAC. And also specifically
20 said in the majority opinion that they were success
21 as -- to the tune of \$140,000. That Justice Brennan
22 amplified that point in his concurrence.

23 QUESTION: Well, is there a way of writing
24 an opinion that would say, if a particular
25 organization otherwise covered does have some unusual

1 problem with a PAC, either because it doesn't want to
2 say it's political or because it can't raise the
3 money, that's a matter for an as-applied challenge
4 later?

5 MR. CLEMENT: The Court could certainly
6 say that, Justice Breyer, and I think should say
7 that. The remarkable thing about the challenge to
8 the separate segregated fund requirement here, if I
9 understand it, is that the gravamen of the concern
10 seems to be that the solicitation restrictions on the
11 separate segregated fund make it difficult to raise
12 enough money.

13 Now, the reason I find that so surprising
14 is there was a direct challenge to those solicitation
15 requirements before this Court in the National Right
16 to Work Committee case. And this Court unanimously
17 rejected that challenge.

18 So the solicitation requirements and the
19 separate segregated fund, which by the way were not
20 changed by BCRA and therefore really probably aren't
21 even jurisdictionally before this Court, those -- if
22 somebody has a problem with the solicitation
23 requirements either on their face or as applied,
24 that's open to them in an as-applied challenge.

25 QUESTION: It depends on whether -- the

1 fact that we said that it's okay in another context
2 doesn't mean that it's okay in this context. It
3 depends on what the consequence of not being able to
4 do it except through a PAC happens to be. And here
5 the consequence is very severe indeed.

6 MR. CLEMENT: Well, Justice Scalia, the
7 consequence is entirely speculative on this record.
8 As I say, some groups even under the current system
9 have been able to assemble massive amounts of money
10 in their political action committees. And that is
11 remarkable if for no other reason that as Justice
12 Kennedy pointed out, it's sort of no reason to do it
13 under the current system, because one of the main
14 reasons to put money in your political action fund
15 was so that you could engage in express advocacy
16 rather than issue advocacy.

17 QUESTION: It seems to me the burden ought
18 to be on you to demonstrate that it won't hurt them,
19 not on them to demonstrate that it will. You are
20 preventing them from using their money for speech.
21 You're saying this -- your normal money can't be used
22 for it. You have to get money from some other
23 source. And you want them to have to demonstrate
24 that this will harm them

25 MR. CLEMENT: Justice Scalia, with

1 respect, this issue is no different than the parallel
2 issue in the context of Austin. That was speech,
3 too. That was a burden of speech. And as some of
4 the Justices pointed out, there is not one word in
5 Buckley or in Austin that suggests that express
6 advocacy is somehow second class speech.

7 Indeed, there is no higher protected
8 speech than vote for Bush or vote for Gore, yet
9 nonetheless, the restrictions there were upheld by
10 the Court and there were not --

11 QUESTION: Five to four and don't blame it
12 on me.

13 (Laughter.)

14 MR. CLEMENT: Very well, Justice Scalia,
15 but I'll take the five to four. And many of the
16 arguments that are being raised in opposition to this
17 statute are the arguments of the dissenters in
18 Austin, not the arguments of the majority opinion in
19 Austin. And I think that's an important point.

20 This Court has approved the same basic
21 mechanism in the context of express advocacy. It has
22 worked well perhaps not with the definition of
23 express advocacy, but has worked well in terms of the
24 separate segregated fund requirement.

25 The other point I think that has to be

1 made about the separate segregated fund requirement
2 is that the idea that, okay, let's say that we now
3 have meaningful limits so there are going to be some
4 real incentives to put some money in your political
5 action committee or your separate segregated fund.

6 One of two things can happen.

7 With some organizations, it may very well
8 turn out that some of the people who were members of
9 the overall organization, turns out they really
10 weren't 100 percent interested in supporting the
11 political causes of that organization. They sort of
12 like some of the other benefits of membership. And
13 in that case, the amount of money that would be
14 raised will be reduced.

15 In some other organizations, it may be
16 that every member of the organization supports the
17 political cause and they give the money to the
18 separate segregated fund. In either event, the
19 purposes of the separate segregated fund are fully
20 vindicated because the resulting corporate political
21 activity at that point will reflect the views of the
22 underlying membership and the underlying union
23 members, which is precisely what this Court said was
24 a compelling interest in Austin.

25 QUESTION: Can a corporation spend any

1 money, whether for political speech purposes or
2 otherwise, that is not directed towards the fostering
3 of its business? Wouldn't they be leaving themselves
4 open to a lawsuit by the shareholders?

5 MR. CLEMENT: There is certainly a large
6 body of state law about corporate waste that is, if I
7 remember it from law school, fairly impenetrable and
8 doesn't provide a lot of specific guidance in
9 particular consequences, in particular cases.

10 But I would say that that same issue again
11 was raised in Austin, and this Court said that it was
12 not sufficient simply to leave everything to the
13 state law of waste, where you have the business
14 judgment rule, and everything's set up to make sure
15 that no corporation is ever held liable.

16 This Court said that in this particular
17 context, it was much more appropriate to use the
18 separate segregated fund requirement which has been
19 part of the law and functionally since 1947 --

20 QUESTION: I am raising the question to
21 respond to your point that shareholders don't agree
22 with every jot and tittle of what the corporation
23 does. They don't in the economic field either. Very
24 often some of the things that corporations should
25 divest itself of a certain business, others think

1 they shouldn't. They have ceded to the organization
2 -- this is part of belonging to an organization --
3 the responsibility to determine what is in the
4 interest of that corporation.

5 And it seems to me that is no less true
6 with respect to political, especially issue ads as to
7 what issues are important for that corporation's
8 survival. I don't know why all of a sudden we insist
9 on unanimity among the shareholders when it comes to
10 that very important issue.

11 MR. CLEMENT: Well, I think again, Justice
12 Scalia, the resort I would take is to the Austin
13 decision, which rejected that argument as well. And
14 it did so on the basis that candidate elections are
15 different than other situations. It may be a bit of
16 an affront for a shareholder to have their money
17 spent on an issue that they don't particularly care
18 for, or to have the corporation go into some new line
19 of business that the shareholder thinks, boy, that's
20 really not very smart, you should stick with what you
21 know best. That's an affront.

22 But it's a much greater affront to have
23 that individual's money spent on candidate elections
24 where that individual does not agree with the
25 position that the corporation has taken.

1 And let me just add --

2 QUESTION: You said any mention of the
3 candidate makes it a candidate ad and not an issue
4 ad.

5 MR. CLEMENT: I thought that's the
6 position you were taking earlier, because I think
7 there is a sense in which any time -- if you're
8 talking about ads within 60 days from election that
9 are targeted to a candidate's home district then I
10 think -- and mention that candidate, I think it's a
11 safe assumption to be made that they at least have a
12 mixed motive.

13 And one of the motives is to influence the
14 candidate election. And I think if the corporate
15 consciously decides to link its issue up to a
16 candidate election, then it's a perfectly appropriate
17 response to make that corporation funded through a
18 separate segregated fund.

19 QUESTION: Mr. Clement, I think just as a
20 matter of history, that the decision in the Belotti
21 against First National Bank of Boston invalidated the
22 statute that was really typical throughout the
23 United States at the time. Generally, there was in
24 the olden times a policy against using corporate
25 funds for political purposes at all. So the history

1 I think is consistent with the position here.

2 MR. CLEMENT: That's right. And this
3 Court took a different step over the Chief Justice,
4 among others' dissents and said no, we're going to
5 invalidate that traditional approach. But then in
6 Austin, this Court drew an important distinction
7 between the candidate election context and the issue
8 context.

9 I was talking a minute ago about the mixed
10 motives and I did want to be responsive to a question
11 that Justice Souter had asked earlier, which is this
12 question about in the specific studies that Congress
13 and the district court discussed, was mixed motive an
14 option for the people that were scoring the ads.

15 And as a matter of fact, it was not. The
16 students were asked whether or not the issue in the
17 particular ad had a tendency to support or go against
18 a candidate, or if it addressed an issue. There was
19 no mixed motive box, and I think the net effect of
20 that is that whatever overbreadth is estimated by the
21 studies, it actually overstates the overbreadth
22 because it didn't account for the mixed motive case.

23 And as I say, I think the mixed motive
24 case does reflect the reality in a number of
25 situations. But I do think that the point that a

1 corporation makes that conscious decision to link
2 some controversial issue to a candidate election, at
3 that point, the interest that this Court found
4 sufficient in Austin are fully implicated.

5 QUESTION: One of the briefs argues that
6 frequently these issues are before Congress almost at
7 the same time the election comes up, because the
8 Congress is catching up perhaps on things that it
9 didn't do earlier in the session.

10 And so it's not the corporation's
11 voluntary choice to put it up there. That's the time
12 it has to do it, if it's going to do any good.

13 MR. CLEMENT: Again, and the safe harbors
14 that we talked about earlier are still available in
15 that situation. And they are, as Justice Breyer
16 pointed out, twofold.

17 One, if all the corporation is really
18 concerned about is a pending legislative issue, it
19 doesn't need to make a reference to the candidate and
20 it can run the issue through treasury funds. On the
21 other hand, if they want to make a specific reference
22 to the candidate, tie that legislative issue to the
23 broader context of the campaign, then they're free to
24 do so as long as they do so through their separate
25 segregated fund.

1 QUESTION: Mr. Clement, why do you make an
2 exception for these corporations, these aggregations
3 of vast wealth that happen to own television
4 stations? General Electric, for example, which, if I
5 recollect correctly, owns NBC. Why is it perfectly
6 okay for them to have issue ads, name candidates,
7 oppose candidates? They're not covered, there's an
8 exception for that.

9 MR. CLEMENT: Well, first of all, Justice
10 Scalia, as I understand the media exemption, it
11 applies to the media corporation but not necessarily
12 to the entire corporation, so I don't think --

13 QUESTION: Well, just NBC, which is owned
14 by General Electric. So everybody should go out and
15 get himself a television station, right?

16 MR. CLEMENT: I don't know about that.
17 What I do know is that media corporations are
18 exempted for the same reason they've always been
19 exempted from the law, which is that they do pose a
20 different situation, a difference of kind. And this
21 Court --

22 QUESTION: And why is that? Why is that?
23 I don't understand that.

24 MR. CLEMENT: I mean, I think the
25 traditional role of media companies has been quite

1 different than the traditional role of other
2 companies.

3 QUESTION: What case do you have that we
4 can distinguish speech based on the identity of the
5 speaker? Outside of this area?

6 MR. CLEMENT: Well, I don't know. I've
7 been focused on this area for the last couple of
8 weeks, Justice Kennedy, and the case that comes to
9 mind is Austin, where the Michigan statute before
10 this Court --

11 QUESTION: You really like Austin, don't
12 you?

13 MR. CLEMENT: I love Austin. It's binding
14 precedent. I don't, I mean, as much as the
15 plaintiffs don't seem to like the case, I don't
16 really hear them asking this Court to overrule it.

17 QUESTION: Well, but this, this is a
18 serious question. A large part of -- of the
19 necessity, or at least the perceived necessity for
20 these ads is to counter the influence of the press.
21 This -- this is a very serious First Amendment issue.

22 MR. CLEMENT: I know it is, Justice --

23 QUESTION: And you have -- and you have no
24 authority for this distinction.

25 QUESTION: Well, isn't Buckley a point on

1 this? Wasn't there an exception in the statute in
2 Buckley?

3 QUESTION: It wasn't challenged, though.

4 MR. CLEMENT: Yes. I don't think that
5 particular provision --

6 QUESTION: They didn't challenge it.
7 That's the reason.

8 MR. CLEMENT: Right. But it was brought
9 into full focus in the Austin case, and the argument
10 was made there, as it's made here, that the statute
11 is somehow underinclusive because it doesn't include
12 media corporations, and I -- it is a difficult issue,
13 I will admit, but I think this is an area where
14 sometimes it is just as much a problem to treat
15 different entities the same as it is to treat similar
16 entities differently.

17 QUESTION: But you were -- you were going
18 to explain why this difference exists, and I don't
19 think you've done that yet.

20 MR. CLEMENT: I think the difference is
21 that because of the traditional role of what a media
22 corporation does, there is, there's an inherent
23 involvement in the political process. This Court
24 recognized that, I think at least implicitly in *Mills*
25 against Alabama, when you had a situation where there

1 was an effort to apply a statute to a newspaper, and
2 I think because of the role of the media, there is a
3 recognition that a different rule should apply to the
4 media, and again, this is -- this is no revolution in
5 the, in the Bipartisan Campaign Reform Act. This is
6 just carrying through --

7 QUESTION: Well, what, what about say the
8 National Rifle Association? It's against gun laws.
9 A media corporation is very much in favor of gun
10 laws, it prints editorials, perhaps it even slants,
11 God forbid, its coverage of the subject. There is a
12 substantial difference, substantial similarity there,
13 isn't there?

14 MR. CLEMENT: Well, there certainly is the
15 similarity in the sense that they're both addressing
16 the same issue, but I do think that again this Court
17 has drawn that distinction in the Austin case and
18 Congress has drawn that distinction throughout its
19 campaign finance reform. This is not some new
20 provision.

21 QUESTION: But what do you think should be
22 the underlying valid principle that allows that
23 distinction to be drawn?

24 MR. CLEMENT: I think the under --

25 QUESTION: Why is it that a group of

1 citizens concerned about what they consider to be
2 slanted press cannot get together, have a corporation
3 and take out issue ads on the other side of that
4 issue?

5 MR. CLEMENT: Oh, absolutely they can, and
6 I think if what you're talking about is running an
7 issue about the slanted press, I can't imagine how
8 that has to refer to a candidate, so I think you come
9 within both safe harbors that are available to
10 corporations. They could do it through a separate
11 segregated fund, but again, if what a corporation
12 wants to do is correct some nasty publication that's
13 been running some media corporation, they are
14 perfectly free to do that with treasury funds and
15 it's, it's harder for me to imagine how that would be
16 translated into the context of a candidate election.

17 QUESTION: Mr. Clement, Austin aside, do
18 you know of any case of ours that says that the
19 press, quote, has greater First Amendment rights than
20 Joe Mimeograph Machine?

21 MR. CLEMENT: I don't. I know there are
22 cases that address --

23 QUESTION: There are none.

24 MR. CLEMENT: Right.

25 QUESTION: There are none. In fact, we've

1 said just the opposite.

2 MR. CLEMENT: Well, this Court has talked
3 in various cases, Mills against Alabama is one, about
4 the freedom of the press, and suggesting maybe that
5 adds something, but I don't think there is a case
6 that draws that definitive distinction, but again,
7 this is a little bit different. This is not saying
8 that the Freedom of the Press Clause, although that
9 has been raised in this litigation obliquely, that
10 the Freedom of Press Clause is what makes the
11 difference. What makes the difference here is a
12 legitimate decision by Congress to treat these
13 different corporations differently, and again, I know
14 you don't want to hear me say it, but the Austin
15 Court heard the argument, it said that that argument
16 is invalid. And I don't think --

17 QUESTION: I think they want to know why.
18 And I suppose that what we are talking about is that
19 the Times or any radio station runs an editorial
20 saying, vote for Smith, or Jones is against labor,
21 for example, but if a union or corporation runs --
22 pays for the ad on the next page it falls right
23 within the ad. I thought that the reason had to do
24 with the traditional role of the newspaper where we
25 expect them to have reporters, some of whom will in

1 fact think one thing and some will think another and
2 the editorials may or may not make sense, but there
3 are considerable implications for regulating those
4 that don't exist when we talk about Philip Morris or
5 the municipal workers union.

6 MR. CLEMENT: No, I think that's exactly
7 right. It reflects that historical tradition. It
8 also reflects the reality that applying this kind of
9 limitation to the press would make it very difficult
10 for them to report anything.

11 QUESTION: Well, wouldn't it go further
12 than that? I mean, if, if the argument that the
13 press should be subject to the same limitations and
14 presumably have the same powers, then the press would
15 have to publish a separate newspaper through a PAC in
16 order to make the otherwise limited expression during
17 the 30-day period. I mean, that can't be done.

18 MR. CLEMENT: No. That can't be done, and
19 in --

20 QUESTION: That wasn't the argument, that
21 the press has to be subject to these limitations.
22 The argument is, since these limitations would
23 obviously be bad as applied to the press, they are
24 bad as applied to everybody else, because everybody
25 else has the same rights as the press. I don't know

1 why, why should it be that the corporation of great
2 wealth -- let me put the question this way. Could,
3 could Congress pass a law saying, we are concerned
4 about the influence of major media corporations,
5 Mr. Murdoch? We are going to pass a law that no
6 corporation can own more than two national
7 newspapers. Would that law be valid?

8 MR. CLEMENT: I'm sure that law would be
9 challenged. There might be a defense that you could
10 try to make on the law, but the point I'd like to
11 make is that I think that this effort is just another
12 effort to say that Congress is powerless in this
13 field, because all the problems you are raising about
14 electioneering communication and how you treat the
15 press differently apply a fortiori I to express
16 advocacy.

17 QUESTION: You mean, you mean, you think
18 I'm saying that Congress shall make no law
19 respecting, abridging the freedom of speech?

20 MR. CLEMENT: I think --

21 QUESTION: That is what I'm saying.

22 MR. CLEMENT: I think what you are saying
23 is that contrary to this Court's decisions in Austin,
24 in MCFL, in all the corporate, in all the cases
25 dealing with contributions, that the First Amendment

1 holds the Congress powerless to deal with this
2 problem. And that is what this Court's cases say.

3 QUESTION: Haven't we held that --

4 QUESTION: Do you find it unusual that the
5 Congress is powerless to favor one speaker over
6 another? Is that such an astounding proposition?

7 MR. CLEMENT: No. What would be an
8 astounding proposition is in light of the 100-year
9 tradition of Congress' ability to regulate the
10 influence of corporate political activity and
11 corporate influence on political elections if all
12 they can do is limit express advocacy or as I
13 understand some members of this Court, they can't
14 even do that. That is a very difficult position to
15 swallow because Congress has been active in this
16 field since 1907. The abuses that they are
17 addressing today are not different in kind from the
18 abuses they have addressed for the past 100 years,
19 and I simply don't think that they are powerless to
20 deal with this situation.

21 QUESTION: Haven't we held that licensees
22 can be, radio licensees and television can be
23 compelled to give equal time to opposing points of
24 view but you can't compel the newspapers to do that?

25 MR. CLEMENT: No. That's a very good

1 point, and there are differences with respect to
2 broadcast media, and I think if I can digress for a
3 minute to talk about some of the other provisions
4 like Section 305, 311, and 504 --

5 QUESTION: You say there are differences
6 with respect to the broadcast media. You are not
7 relying on the scarcity of wavelengths, are you?

8 MR. CLEMENT: Well, I think with respect
9 to some of the other provisions, 504, 307, I'm sorry,
10 305 and 311, I do think that this Court's cases
11 suggesting that broadcast media are subjected to a
12 different regulatory regime remain good law, and I
13 think that there is certainly enough in this case
14 without trying to revisit Red Lion or some of these
15 other cases. I think one of the things that can
16 happen in this case and one of the unfortunate by
17 products of the en masse nature of the way this case
18 is litigated is that you look at some of the
19 provisions that are dealing with a very different
20 type of speech, and then you get to Section 504 and
21 you take a look at the broad terms that Congress has
22 used and it's easy to reach the conclusion that
23 that's an impermissible approach and those words are
24 too broad, but that ignores the reality of the way
25 the broadcast industry has been regulated.

1 That's, after all, an industry that
2 continues to be regulated on a public interest
3 standard. In CBS against FCC, this Court upheld a
4 statute that required individual stations to give
5 reasonable time to candidates and it's within that
6 background that a provision, the kind of provisions
7 that Congress added to Section 504 are not --

8 QUESTION: Was that the scarcity
9 rationale?

10 MR. CLEMENT: I don't think in the CBS
11 case that the court specifically addressed the
12 scarcity rationale. It may well have been building
13 on prior precedents, though, that were based on that.

14 One other point I'd --

15 QUESTION: But we are, we're not talking
16 about regulating the broadcast media. That's the
17 whole point. They are the only people here who
18 aren't regulated. It's people who are trying to get
19 their views across through these media who are
20 regulated. It's not the media who are regulated.

21 MR. CLEMENT: But that's the way that the
22 media has long been regulated, which is to say that
23 with respect to requests for candidate advertisement,
24 with requests to address a, quote, controversial
25 issue of public importance, which is the pre-existing

1 law, nothing added by BCRA, there has been a
2 requirement that if you make a request for air time,
3 that the station do some record-keeping in
4 conjunction with that and that's exactly what 504
5 carries over.

6 QUESTION: Why -- why did they ask for
7 record of requests as opposed to actual broadcast
8 deals?

9 MR. CLEMENT: I think one of the reasons,
10 Justice O'Connor, is so that they could enforce the
11 public interest standard, which has, which has
12 manifested itself not only in the fairness doctrine,
13 but also with the idea that stations have to give
14 appropriate amounts of time to things like discussion
15 of legislative issues. And so if you have the
16 requests before you, you can then make a judgment as
17 to whether or not one station is denying all the
18 requests.

19 QUESTION: Must the disclosure be made
20 before the ads are run? It's not clear.

21 MR. CLEMENT: Well, it depends on which
22 provision that you are asking about, Justice --

23 QUESTION: I'm talking about 504.

24 MR. CLEMENT: In 504, what triggers the
25 disclosure, the disclosure requirements is, is a

1 request and again --

2 QUESTION: Yes, I know. But I'm asking
3 about the time within which it has to be disclosed by
4 the broadcast stations.

5 MR. CLEMENT: I'm not positive about this.
6 I don't think that Section 504 has that kind of
7 advance notice principle to it. The advance notice
8 objections that have been raised have been raised to
9 Sections 201 and 214, and I think with respect to
10 those provisions, it's important and worthwhile to
11 note that the FC -- the FEC has cured the advance
12 notice issue by regulation, and what people seem to
13 have focused on is the idea that the statute requires
14 the disclosure of a contract to disburse, and that
15 language is not designed to get at advanced
16 disclosure in the sense of advanced disclosure before
17 the ad airs. It's simply to get away with, to avoid
18 the clear circumvention that would happen if somebody
19 could buy ads on credit and then only disclose them
20 after the fact, after the election when they had
21 actually made the disbursement at that point. I
22 think --

23 QUESTION: But that, that same objective
24 could be obtained simply by requiring disclosure by
25 the station as soon as they, as soon as they run, I

1 mean, file a report on the day that the ad runs.

2 MR. CLEMENT: I mean, I think that's
3 right, but again, that is the way that the FEC has
4 interpreted the provisions, which is to say there is
5 no advance disclosure requirement under 201 and 214
6 as interpreted by the FEC, because they trigger to
7 the definition of, for example, in 201 the
8 electioneering communication and you don't even know
9 for sure that it's an electioneering communication
10 until it's in fact it is run in the relevant district
11 that's been targeted and all the like, so in that
12 sense I do think that the FEC has cured any problem
13 with advance notice.

14 I'm not sure it was that much of a problem
15 in any event because what you are talking about is
16 forcing people to disclose the fact that they made
17 binding contracts. I think it's also --

18 QUESTION: What happens to the language,
19 or contracts to make?

20 MR. CLEMENT: Again --

21 QUESTION: The regulation just reads that
22 out of existence?

23 MR. CLEMENT: No, again, what contracts to
24 makes disbursement, or I don't know what language you
25 have in front of you, but contracts to make

1 disbursement.

2 QUESTION: It's in 202. Any person, if
3 any person makes or contracts to make any
4 disbursement for an electioneering communication.

5 MR. CLEMENT: Again, as I was explaining
6 to Justice O'Connor, that provision is necessary to
7 avoid the phenomenon where somebody contracts to make
8 a disbursement, i.e., buys an ad on credit and
9 doesn't make the disbursement until after the ad is
10 run or in fact after the election, so that's why
11 that's in there. It's also worth noting that the
12 statute --

13 QUESTION: But it goes on to say, such
14 disbursement or contracting shall be treated as a
15 contribution and as an expenditure. Such
16 disbursement or contracting, so I assume the
17 contracting immediately falls --

18 MR. CLEMENT: No, it doesn't fall within
19 the con -- the disclosure provision. I suppose if
20 you buy \$10,000 worth of ads on credit that does
21 become an expenditure the second you make that credit
22 purchase, but I don't think that renders a statute
23 unconstitutional. I think again it bears noting that
24 this advance sort of contract to purchase language
25 has been in the statute all along. It was in FECA

1 with respect to expenditures. In fact, I believe
2 that Justice Souter made note of that in footnote
3 one.

4 QUESTION: To challenged and upheld. I
5 mean, there's so much that was in FECA, and there's
6 so much more that's in this that hasn't been
7 challenged here. I mean, simply to say it's been
8 around for 30 years doesn't, doesn't convince me that
9 it's valid.

10 MR. CLEMENT: It depends on the nature of
11 the challenge with respect, Justice Scalia. If the
12 nature of the challenge that a provision is vague and
13 in fact a very similar provision has been in the
14 statute for 20 years and the regulated parties
15 working with the FEC in the context of 504 have
16 figured out how to live with it in a way that doesn't
17 have any chilling effects, then I think the fact that
18 there was a statutory prerequisite for it is quite
19 important and is valid and a valid basis for
20 interpreting the statute.

21 If I may say in closing as I said before,
22 I think the counsel of the other side in this case is
23 that, to borrow Justice Scalia's phrase, this problem
24 is insoluble. They fully admit that the express
25 advocacy test doesn't work. I think it is not a

1 proxy for speech designed to influence candi date
2 elections. I think one thing we can trust candi dates
3 to do is to make speeches that are designed to
4 influence their own elections, yet almost 90 percent
5 of candidates' own advertisements don't use words of
6 express advocacy.

7 The remarkable thing about plaintiffs here
8 is that in the first, in the first, this morning we
9 heard a little bit from Mr. Starr about less
10 restrictive alternatives. You hear not one word
11 about that this afternoon because they offer nothing
12 as an alternative. They say it's express advocacy or
13 nothing, and they are all too willing to abandon even
14 express advocacy and I simply do not think that the
15 Constitution leaves Congress powerless to deal with
16 this problem. Strict scrutiny is not a formula for
17 corruption. When Congress is dealing with this kind
18 of corporate spending, a problem they have been
19 wrestling with since 1907, they can take reasonable
20 steps like Title II to address the problem. If there
21 are no further questions.

22 QUESTION: Thank you, Mr. Clement. We'll
23 hear from you, Mr. Waxman.

24 REBUTTAL ARGUMENT OF SETH WAXMAN
25 ON BEHALF OF INTERVENOR-DEFENDANTS

1 MR. WAXMAN: Mr. Chief Justice, and may
2 it please the Court:

3 Buckley v. Valeo taught not that the
4 so-called magic words test was a constitutional
5 immutable. It taught two lessons that are much more
6 enduring, that are profound, and that demonstrate
7 just exactly why the electioneering communications
8 definition and provision is constitutional. The
9 first thing that Buckley taught in this area is that
10 statutory requirements that cut right through core
11 political speech, nothing more core than vote for
12 Bush or Bush is a good guy the day before the
13 election.

14 Statutory requirements in this area must
15 be clear, they must be illusive so that they will
16 not, as this Court said, quote, dissolve impractical
17 application. No doubt about this case. No one on
18 the other side has suggested that there is any lack
19 of clarity in this objective test. The second test,
20 the second factor that this Court articulated in --

21 QUESTION: Excuse me. I don't want --
22 because this is important. No one has said,
23 suggested that what is less than clear?

24 MR. WAXMAN: I'm sorry, the four-part
25 primary definition, that is, it has to be at 60 days

1 before, targeted at the electorate, a specifically
2 identified candidate in an ad that is broadcast as
3 opposed to an ad that runs in a newspaper.

4 QUESTION: I thought there was
5 substantial suggestion that clearly identified
6 candidate is not clear. It is not at all clear to
7 me.

8 MR. WAXMAN: Well, the FEC took comments
9 on whether or not it covered, for example, the
10 McCain-Feingold regulation or Roth IRA. And it has
11 ruled. It considered whether or not an ad that is
12 run within the period but says call your Congressman
13 and has the Congressman's name without identifying
14 him by name is covered, and it ruled that it did.

15 Now, those applications -- one of those
16 applications, that is, the call your Congressman, my
17 clients, the sponsor of this bill, urged the Court to
18 the urge the FEC to adopt. It didn't because it
19 found that there were possibilities for circumvention
20 and not an established record to demonstrate that it
21 would cause a problem in any number of cases.

22 QUESTION: You clarified that. I didn't
23 mean to throw you off.

24 MR. WAXMAN: The second test, the lesson
25 that Buckley teaches that is enduring is that

1 standards in this area must be, quote, directed
2 precisely to that spending that is unambiguously
3 related to the campaign of a particular Federal
4 candidate.

5 And so many we are talking about whether
6 or not this law is overbroad or substantially
7 overbroad, I suggest that the Court look to the
8 standard that it articulated itself in Buckley, which
9 is are these expenditures for communications that are
10 unambiguously campaign related. And if the answer is
11 yes, in the vast majority of cases, then on its face,
12 the statute deserves to stand. There may be
13 particular applications that may be in fact
14 unconstitutional. The FEC can issue rules,
15 as-applied challenges --

16 QUESTION: Let me ask you, what did the
17 district court do in this case? Didn't they strike
18 down the primary definition?

19 MR. WAXMAN: The district court struck
20 down the primary definition and upheld an altered
21 version of the backup definition, Mr. Chief Justice.
22 And it did so, based on its understanding and it was
23 a misunderstanding of what the data showed with
24 respect to the answer that was given to, I think it's
25 question 6 in the Buying Time study. That is, our

1 data that showed that for one of the two years
2 involved, 14.7 percent of the ads, which constituted
3 a total of six ads, were issue-related, not
4 candidate-related.

5 QUESTION: This is the binary choice.

6 QUESTION: Didn't the district court
7 pretty well disbelieve the Buying Time study?

8 MR. WAXMAN: No, Mr. Chief Justice. In
9 fact, Judge Leon, who was the swing vote, so to
10 speak, specifically found that although there had
11 been some criticisms with respect to the methodology
12 with respect to this one question, he specifically
13 found that the Buying Time study was credible, and
14 that the results should be given credence.

15 And it was on the basis of his
16 interpretation of the answer to that one question
17 that he determined that, well, this is 14.7 percent
18 or 17 percent and that's overbroad. And what I would
19 like to address myself to is why -- first of all,
20 that analysis was incorrect. But more to the point,
21 even if there never had been a Buying Time study,
22 even if this question was never asked, Congress had
23 more than ample justification for doing this.

24 One of the wonderful things about a bright
25 line objective test is it invites hypotheticals. But

1 what Congress had before it, which is in strict
2 scrutiny, after all, what we're addressing ourselves
3 to, was the real world. And it had before it -- this
4 is Defense Exhibit 48 in the record below -- the
5 story boards of all of the ads that were captured by
6 the CMAG database. That is, in the 75 largest media
7 markets in the 11 months that led up to the 1998
8 campaign and the 2000 campaign.

9 And we urge the Court to look through this
10 volume because the real world of what these ads were
11 does not reflect the hypothetical instances in which
12 a corporation or a labor union is faced with an
13 imminent piece of legislation that's going to be
14 enacted the week before or the week after an election
15 and it's only about changing votes.

16 There may very well be instances, if that
17 occurs, in which an as-applied challenge can be made
18 and a court can determine whether or not the law can
19 constitutionally be applied to that. But what is an
20 amazing feature about this case is the remarkable
21 degree to which the four-part objective test that
22 Congress drew actually hits the observed reality of
23 what Congress knew these ads were about.

24 At page 11A of the appendix to our brief,
25 we've reprinted a chart that is also contained in

1 Judge Kollar-Kotelly's findings at special appendix
2 page 848. And what the chart shows is a graph that
3 shows, over the course of, I believe it's 2000. This
4 was 2000. Yes. Weeks prior to the 2000 election.

5 If you look at the dotted line which sort
6 of waves back and forth very close to the bottom
7 axis, those are the number of ads, issue ads, run
8 during 2000 that don't mention candidates. It stays
9 very constant throughout the year.

10 If you look at the hard line, you'll see
11 an enormous spike that comes right about week 9, nine
12 weeks before. That's 63 days before the election.
13 And what Congress found was that there was
14 substantial evidence, both the ads themselves and
15 through objective data that I'm now going to
16 describe, that what common sense leads you to
17 believe, that is, that ads that run just before an
18 election, that mention a candidate that are targeted
19 at that candidate's election, and that use broadcast
20 media, that is the most expensive kind of media
21 possible, are very likely intended to have, and
22 overwhelmingly likely will have, an effect on an
23 election.

24 Now, Justice Scalia, you're quite right.
25 You know, the hip bone is connected to the thigh bone

1 which is connected to the knee bone, and that doesn't
2 mean you can regulate the metatarsals. But we're
3 talking about a -- what a terrible metaphor.

4 We're talking about a test here that --
5 we're talking the test is spending that is
6 unambiguously related to a campaign. And what
7 Congress found, based on the ads, is that that was
8 the case. And if you don't want to read through all
9 of these direct ads, just look at the ones that the
10 Plaintiffs have attached to their brief.

11 QUESTION: The Congress found that these
12 ads made them feel very bad, and we would not accept
13 that they criticized the incumbents. We wouldn't
14 accept that rationale from a city council. Why
15 should we do it from the Congress?

16 MR. WAXMAN: Absolutely not. And that is
17 not the reason that -- there is a lot of talk about
18 attack ads. But the reality is they didn't ban
19 attack ads and they didn't even ban attack ads by
20 corporations and labor unions and nonprofits.

21 QUESTION: But you're saying that was not
22 any part of the rationale for the enactment of a
23 legislation?

24 MR. WAXMAN: That's correct. There were
25 individual statements by members of Congress who were

1 upset about this. But if you look at the test that
2 Congress crafted, and the fact -- and it is in the
3 record in this case that the vast majority of these
4 ads were attacking not incumbents. The vast majority
5 of these ads were attacking challengers. I don't
6 think it's fair --

7 QUESTION: Why do you say they haven't
8 banned attack ads? It's very hard to devise a good
9 punchy attack ad that doesn't name the person you're
10 attacking.

11 MR. WAXMAN: There is no doubt about the
12 fact that these ads -- there are ads here that both
13 attack and praise.

14 QUESTION: Well --

15 MR. WAXMAN: My point to Justice Kennedy
16 was, by and large, the incumbents made out very well
17 under the status quo ante. And it is -- Justice
18 Scalia --

19 QUESTION: If the price of getting rid of
20 the attack ads is that I have to ban some of the
21 praising ads as well, it's worth it.

22 MR. WAXMAN: The purpose of the
23 legislation, and it is manifest, we included it in an
24 appendix in our brief, and it's in the Thompson
25 committee report and the page is cited by Senator

1 Thompson's amicus brief, is that Congress was closing
2 a loophole. It was closing a loophole that the
3 political director of the National Rifle Association
4 called a line in the land drawn on a windy day.

5 She said that the express advocacy test
6 was a wall built of the same sturdy material as the
7 emperor's clothing. Everyone sees it. No one
8 believes it. It was, in other words, serving the
9 paramount interest in reducing a provision of law, a
10 provision of law enacted by Congress following this
11 Court's decision in Buckley that had made the law an
12 object of scorn.

13 And that is all over the record in this
14 case. That what this was about was replacing a line
15 in the sand drawn on a windy day with a line that
16 everybody can see and that no one would miss. And
17 the evidence before Congress was not just this
18 question 6, but the ads themselves, the way they ran.
19 There are statement after statement after statement
20 from witnesses in this case that are included in the
21 Joint Appendix. And objective studies from -- the
22 objective data from the Buying Time studies, the
23 Annenberg Center, Professor Magleby at Brigham Young
24 University.

25 And the internal documents -- and we have

1 some of these discussed in our brief -- the internal
2 documents of the corporations and unions that ran
3 these ads. They have documents that showed that they
4 were aiming at voters, they were using consultants
5 and pollsters to try and figure out how to get
6 voters. They tested these against voters.

7 These were electioneering in every sense
8 of the word. And here is -- just to put some
9 reality, I guess, the real world example behind that
10 chart, number 11A. Citizens for Better Medicare was
11 an organization that ran a large number of these ads
12 in 2000. Described itself as -- its official Web
13 site as a group of concerned seniors and companies
14 and associations concerned about Medicare.

15 It was in fact funded almost exclusively
16 by Pharma and the corporations that make up Pharma.
17 Nothing wrong with them running issue ads at all,
18 Justice Scalia. From January 1 until September 4,
19 that is, until the 60-day period cut in, they ran
20 23,867 issue ads about Medicare and not a single one
21 mentioned a candidate.

22 On September 4, until election day, they
23 ran 10,876 ads all mentioning candidates. And on
24 election day, they stopped cold. And in our brief,
25 we discuss this at page 50 and 52. That is a

1 particularly striking example of no requirement to
2 disclose to the public who's paying for this when it
3 is, in fact, corporate treasuries.

4 QUESTION: That disclosure thing is a
5 different problem, but why banning it?

6 MR. WAXMAN: Well, again, Justice Scalia
7 --

8 QUESTION: You've raised the risk of
9 corruption or the appearance of corruption, the fact
10 that they -- I mean, I agree with you that they named
11 candidates. What is wrong, so long as you disclose
12 who it is, that's a different issue. But so long as
13 you disclose who's doing it, what is wrong with their
14 naming a candidate?

15 MR. WAXMAN: Well, I -- Justice Scalia,
16 I'm right here with my brother, Clement, with Austin.
17 And with the very same rationale that this Court
18 adopted in Austin, which was explicated in the Auto
19 Workers case by Justice Frankfurter, which was
20 recited again by a unanimous opinion of the Court in
21 National Right to Work Committee.

22 The issue here is whether or not, when
23 we're talking about campaign-related speech, when we
24 are talking about who gets to speak when individual
25 citizens are exercising their constitutional

1 franchise to vote, the question is whether
2 corporations and labor unions have to do it the same
3 way all the rest of us do.

4 QUESTION: What about the --

5 MR. WAXMAN: With voluntary funds
6 contributed by individuals for that very purpose.
7 And the PAC issue that has been discussed -- you
8 probably have heard more than you want to hear about
9 this law in any event, and certainly about the PACs.
10 But the PAC issue that I want to address and the
11 media exemption.

12 On PACs, we've heard about that the labor
13 unions and how hard it is for the AFL-CIO and what
14 evidence there is in the record. Okay, in the 2000
15 election cycle, labor unions contributed \$53 million
16 from their PACs in contributions and expenditures.
17 And that's not including the treasury funds that they
18 use to run the kind of electioneering ads that are
19 included in our submission.

20 I guess the other two organizations that
21 were named were the National Rifle Association and
22 the ACLU. The National Rifle Association had so much
23 extra money left in its PAC in the last election
24 cycle that it ended up spending millions of dollars
25 on things that it wasn't even required to use PAC

1 money for. It has 4 million members. If each of
2 those 4 million members gives \$10 a year, they will
3 have one of the biggest -- probably the biggest PAC
4 in history, \$40 million.

5 And there is no showing whatsoever --
6 they've just raised their dues from \$25 to \$35. If
7 they just say the dues are still \$25. But if you
8 believe with us that political advocacy in this case
9 and talking to candidates and voters who are voting
10 the candidates about how precious the Second
11 Amendment is, please give us \$10. If and when a day
12 comes when they can't fund their advocacy in this
13 narrow window, with respect to broadcast ads targeted
14 at particular races, the courts will be open to them.

15 This Court has announced an exception to
16 the PAC requirement in MCFL, and the courts are
17 available to any corporation that wants to -- or
18 labor union that wants to come in and say we don't --

19 QUESTION: But is that the way that we
20 would ordinarily construe a statute. To say, you
21 know, if this bothers you or affects you, come in and
22 we'll make an exception for you? That's usually the
23 legislative prerogative.

24 MR. WAXMAN: Indeed, Mr. Chief Justice,
25 but in MCFL itself, for example, we have an

1 as-applied exemption made by the Court in order to
2 satisfy constitutional concerns. And our only
3 submission is that on its face, this is in an area in
4 which the need for legislation is compelling, but the
5 drafting challenges are daunting. This effort by
6 Congress at least deserves a chance to protect
7 itself.

8 Now, just to clarify --

9 QUESTION: It's getting it now.

10 MR. WAXMAN: Well, it should have the
11 opportunity to prove that the parade of horrors
12 that our opponents, the type of hypotheticals, we
13 won't be able to fund a PAC, or we want to run --

14 QUESTION: Congress chose this course.
15 Congress said a three judge district court
16 immediately appealed to the Supreme Court, and 22
17 issues. I mean, it's not our fault.

18 MR. WAXMAN: How well I know. But in all
19 seriousness, Mr. Chief Justice, I will be one of the
20 happiest people on the face of the planet when I sit
21 down today, however you decide.

22 But we're talking about a facial
23 challenge, a facial challenge. And the express
24 advocacy test, the contribution limits and
25 expenditure limits were not declared unconstitutional

1 on their face when this Court found in MCFL that were
2 some PAC burdens for some types of corporations that
3 the First Amendment should not require to be borne.

4 Now, with respect to the media exception,
5 I think there may be a misunderstanding about what
6 this exception actually says. It's not an exception
7 for General Electric or people who own medias. It's
8 on page 29A of the government's jurisdictional
9 statement. It accepts a communication appearing in a
10 news story, commentary or editorial distributed
11 through the facilities of any broadcasting station.
12 It's not an exception for General Electric or even
13 the company that owns a broadcast --

14 QUESTION: Only for the subsidiary of
15 General Electric, right?

16 MR. WAXMAN: To the contrary. Anybody who
17 wants to run an issue ad, General Electric can run it
18 and it's going to have to run it through its PAC,
19 just like anything else.

20 QUESTION: But NBC can say whatever it
21 wants, right?

22 MR. WAXMAN: NBC on its editorial or news
23 story can say whatever it wants.

24 QUESTION: What else is there, besides --
25 I mean, it's going to be in a sitcom?

1 MR. WAXMAN: May I answer? Thank you.
2 When Congress finds what there is no evidence
3 whatsoever to suggest exists, that companies that own
4 broadcasting stations are misusing that privilege,
5 Congress can and will address it. Thank you.

6 CHIEF JUSTICE REHNQUIST: Thank you,
7 Mr. Waxman. The case is submitted.

8 (Whereupon, at 3:55 p.m., the case in the
9 above-entitled matter was submitted.)

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