No. 02-1674 et al.

IN THE
Supreme Court of the United States

SENATOR MITCH MCCONNELL ET AL.,

Appellants/Cross-Appellees,

v.

FEDERAL ELECTION COMMISSION ET AL.,

Appellees/Cross-Appellants.

On Appeal From The United States District Court For The District of Columbia

BRIEF FOR APPELLANTS/CROSS-APPELLEES SENATOR MITCH McCONNELL ET AL. (PAGE-PROOF VERSION)

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QUESTIONS PRESENTED

This brief will address the questions presented in No. 02-1674, *McConnell v. FEC*; No. 02-1676, *FEC v. McConnell*; and No. 02-1702, *McCain v. McConnell*.

The questions presented in No. 02-1674, *McConnell v. FEC*, are as follows:

1. Whether the district court erred by upholding portions of the "soft money" provision (section 101) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, because it constitutes an invalid exercise of Congress' power to regulate elections under Article I, Section 4, of the Constitution; violates the First Amendment or the equal protection component of the Fifth Amendment; or is unconstitutionally vague.

2. Whether the district court erred by upholding portions of the "electioneering communications" provisions (sections 203, 204, and 311) of BCRA, because they violate the First Amendment or the equal protection component of the Fifth Amendment, or are unconstitutionally vague.

3. Whether the district court erred by holding nonjusticiable challenges to, and upholding, portions of the "advance notice" provisions of BCRA (sections 201 and 212), because they violate the First Amendment.

4. Whether the district court erred by holding nonjusticiable challenges to, and upholding, the "coordination" provisions of BCRA (sections 202, 211, and 214), because they violate the First Amendment.

5. Whether the district court erred by holding nonjusticiable challenges to, and upholding, the "attack ad" provision of BCRA (section 305), because it violates the First Amendment.

The questions presented in No. 02-1676, *FEC v. McConnell*, are as follows:

1. Whether the limitations on political parties imposed by

Section 101 of BCRA are constitutional.

2. Whether the funding limitations and disclosure requirements imposed by Sections 201 and 203 of BCRA with respect to "electioneering communications" are constitutional.

3. Whether the limitations imposed by Section 213 of BCRA on coordinated expenditures by a political party committee are constitutional.

4. Whether the prohibition imposed by Section 318 of BCRA on contributions to federal candidates or political party committees made by minors is constitutional.

5. Whether the reporting and record-keeping requirements imposed on broadcast stations by Section 504 are constitutional.

The questions presented in No. 02-1702, *McCain v. McConnell*, are as follows:

1. Whether the three-judge district court erred in invalidating on First Amendment grounds the provision addressing the raising, directing, transferring, and use of funds by political parties, federal candidates, and federal officeholders (BCRA § 101).

2. Whether the three-judge district court erred in invalidating on First Amendment grounds the provisions addressing the use of funds from corporate and labor union general treasuries to finance broadcast advertisements that are intended or likely to influence federal elections, and disclosure requirements for all such broadcast advertisements (BCRA §§ 201, 203, 204).

3. Whether the three-judge district court erred in invalidating on First Amendment grounds the provision addressing the ability of political parties to make both "independent" and "coordinated" expenditures to support the campaigns of candidates they have nominated to seek federal office (BCRA § 213).

PARTIES TO THE PROCEEDINGS

This brief is filed on behalf of the following plaintiffs below, who are appellants in No. 02-1674 and cross-appellees in No. 02-1676 and No. 02-1702: Senator Mitch McConnell; Southeastern Legal Foundation, Inc.; Representative Bob Barr; Center for Individual Freedom; National Right to Work Committee; 60 Plus Association, Inc.; U.S. d/b/a Pro English; the National Association of Broadcasters; and Thomas E. McInerney.

The "federal defendants," who are appellees in No. 02-1674 and/or cross-appellants in No. 02-1676, are the Federal Election Commission (FEC) and David W. Mason, Ellen L. Weintraub, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas, and Michael E. Toner, in their capacities as Commissioners of the FEC; John D. Ashcroft, in his capacity as Attorney General of the United States; the United States Department of Justice; the Federal Communications Commission; and the United States of America.

The "intervenor defendants," who are appellees in No. 02-1674 and cross-appellants in No. 02-1702, are Senator John McCain; Senator Russell Feingold; Representative Christopher Shays; Representative Martin Meehan; Senator Olympia Snowe; and Senator James Jeffords.

The following parties, many of whom are appellants in other consolidated cases, were also plaintiffs in the district court: Representative Mike Pence; Alabama Attorney General Bill Pryor; Libertarian National Committee, Inc.; Alabama Republican Executive Committee, as governing body for the Alabama Republican Party; Libertarian Party of Illinois, Inc.; DuPage Political Action Council, Inc.; Jefferson County Republican Executive Committee; American Civil Liberties Union; Associated Builders and Contractors, Inc.; Associated Builders and Contractors Political Action Committee; Christian Coalition of America, Inc.; Club for Growth, Inc.; Indiana

Family Institute, Inc.; National Right to Life Committee, Inc.; National Right to Life Educational Trust Fund; National Right to Life Political Action Committee; Martin Connors; Barret Austin O'Brock; Trevor M. Southerland; National Rifle Association of America; National Rifle Association Political Victory Fund; Emily Echols, a minor child, by and through her next friends Tim and Windy Echols; Hannah McDow, a minor child, by and through her next friends Tim and Donna McDow; Isaac McDow, a minor child, by and through his next friends Tim and Donna McDow; Jessica Mitchell, a minor child, by and through her next friends Chuck and Pam Mitchell; Daniel Solid, a minor child, by and through his next friends Kevin and Bonnie Solid; Zachary C. White, a minor child, by and through his next friends John and Cynthia White; Republican National Committee (RNC); Mike Duncan, as member and Treasurer of the RNC; Republican Party of Colorado; Republican Party of Ohio; Republican Party of New Mexico; Dallas County (Iowa) Republican County Central Committee; California Democratic Party; Art Torres; Yolo County Democratic Central Committee; California Republican Party; Shawn Steel; Timothy J. Morgan; Barbara Alby; Santa Cruz County Republican Central Committee; Douglas R. Boyd, Sr.; Victoria Jackson Gray Adams; Carrie Bolton; Cynthia Brown; Derek Cressman; Victoria Fitzgerald; Anurada Joshi; Peter Kostmayer; Nancy Russell; Kate Seely-Kirk; Rose Taylor; Stephanie L. Wilson; California Public Interest Research Group; Massachusetts Public Interest Research Group; New Jersey Public Interest Research Group; United States Public Interest Research Group; The Fannie Lou Hamer Project; Association of Community Organizers for Reform Now; Chamber of Commerce of the United States; National Association of Manufacturers; National Association of Wholesaler-Distributors; U.S. Chamber Political Action Committee; American Federation of Labor and Congress of Industrial Organizations; AFL-CIO Committee on Political Education Political Contributions Committee; Representative Ron Paul; Gun Owners of America, Inc.; Gun

Owners of America Political Victory Fund; Real Campaign Reform.org; Citizens United; Citizens United Political Victory Fund; Michael Cloud; Carla Howell; Representative Bennie G. Thompson; and Representative Earl F. Hilliard.

STATEMENT PURSUANT TO RULE 29.6

None of the appellants has a parent corporation, and no publicly held company owns 10% or more of the stock of any of the appellants.

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INTRODUCTION

Far from merely closing loopholes, the Bipartisan Campaign Reform Act of 2002 (BCRA) wholly rewrites our Nation's campaign finance laws and works nothing less than a fundamental reordering of our political process. While BCRA's details are complex, the principles that it upsets are basic. First and foremost is our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). However contentious the debate about the outer reaches of the First Amendment, there can be no question but that political speech and association lies at its core. With its encroachments on the activities of actors at all levels of the political process, BCRA cannot be justified without abandoning this first principle of uninhibited, robust debate. Nor can it be defended under this Court's campaign finance jurisprudence. Even assuming that Congress sought to solve a genuine problem by enacting BCRA — and the law's defenders have not identified a single example of actual "corruption" motivating its enactment — BCRA constitutes a wildly overbroad remedy.

BCRA also undermines other bedrock constitutional principles. It contravenes the core principle that federal law governs the conduct of federal elections, and state law the conduct of state elections. Prior to BCRA's enactment, federal law solicitously accommodated the competing state interest in regulating campaign activities that affect both federal and state elections. BCRA, however, imposes a sweeping federal regulatory scheme that reaches even activities that *solely* affect state elections. Even the great federalizer, Alexander Hamilton, recognized that federal intervention into state election processes is so blatantly violative that it "require[s] no comment."

Equally disturbing, BCRA regulates different actors in the

political process, and different types of speech, in disparate fashion, without advancing any legitimate justification for doing so. It disadvantages political parties in comparison with interest groups; television stations in comparison with newspapers; and so-called "attack ads" in comparison with other ads. These and other forms of differential regulation violate the basic principles of equality embodied in the First and Fifth Amendments.

Ultimately, the Constitution demands that this Court err on the side of protecting more speech, not less. As the Court noted almost two decades ago, "[t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages * * * can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985) (*NCPAC*). That rule provides a sufficient basis for holding the challenged provisions of BCRA unconstitutional.

OPINIONS BELOW

The district court's opinions are reported at 251 F. Supp. 2d 176 and reprinted in the joint Supplemental Appendix to the jurisdictional statements ("Supp. App.") at 1sa-1382sa.

JURISDICTION

The district court entered judgment on May 2, 2003. Appellants filed their notice of appeal and jurisdictional statement on the same day. This Court noted probable jurisdiction in these cases on June 5, 2003. This Court has appellate jurisdiction pursuant to section 403(a)(3) of BCRA.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, is reprinted in the Appendix to appellants' jurisdictional statement ("J.S. App.") at 7a-68a. Article I, Section 4, of the United States Constitution is

reprinted at J.S. App. 4a. The First Amendment of the Constitution is reprinted at J.S. App. 5a. The Fifth Amendment of the Constitution is reprinted at J.S. App. 6a.

STATEMENT OF THE CASE

A. Background

The historical facts preceding the enactment of BCRA are largely undisputed, and are set out at great length in the opinions below. *See* Supp. App. 16sa-40sa (Kollar-Kotelly and Leon), 168sa-186sa (Henderson). We summarize only the essential facts here.

1. In 1971, Congress enacted the Federal Election Campaign Act (FECA), the first comprehensive regulatory scheme governing federal election campaigns. *See* Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431-455). As amended in 1974, *see* Pub. L. No. 93-443, 88 Stat. 1263, FECA had three principal components. FECA limited the amount of money that could be contributed "for the purpose of influencing [federal] elections" — money that would come to be known as "hard money." Individuals could contribute up to $1,000 per candidate, and "political committees" (including political action committees, or PACs) could contribute up to $5,000.[1] FECA also limited the amount of money that could be spent in federal elections, restricting expenditures by any person "relative to a clearly identified candidate" to $1,000. And FECA limited "coordinated expenditures": that is, expenditures made on behalf of, and in agreement with, a federal candidate. FECA generally treated coordinated expenditures as "contributions" subject to the applicable contribution limits.

2. a. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court

[1] In 1976, Congress amended FECA to add further limits on the amounts that individuals could contribute to political committees and party committees, and the amounts that party committees could in turn contribute to candidates. *See* Pub. L. No. 94-283, 90 Stat. 475. BCRA contains provisions raising these contribution limits, which appellants are not challenging.

laid out the now-familiar framework for determining the constitutionality of campaign finance regulations. The Court recognized that both contributions and expenditures on behalf of political candidates implicate the First Amendment rights of free speech and association. *See id.* at 19-23. The *Buckley* Court also recognized that the government had a compelling interest in "the prevention of corruption and the appearance of corruption." *Id.* at 25. Although the Court did not explicitly define "corruption," it repeatedly referred to "quid pro quo" arrangements in which contributions or expenditures were made in exchange for some particular action. *Id.* at 26, 27, 45.

The *Buckley* Court upheld FECA's contribution limits, reasoning that such limits imposed lesser burdens on First Amendment rights — and were thus subject to a lower degree of scrutiny — than expenditure limits. *See id.* at 24-38. However, the Court struck down FECA's limits on independent expenditures. *See id.* at 39-59. Critically, before striking down the expenditure limits, the Court first narrowed those provisions to cover only expenditures for what has come to be known as "express advocacy": that is, advertising that "in express terms advocate[s] the election or defeat of a clearly identified candidate." *Id.* at 44. This narrowing construction excluded from FECA's reach so-called "issue advocacy": for instance, advertising that comments on positions taken by a clearly identified candidate, but does *not* expressly advocate the candidate's election or defeat. Even after narrowing these provisions, however, the Court struck them down on the ground that independent expenditures did not pose a sufficient threat of actual or apparent corruption. *See id.* at 45. In so doing, the Court expressed approval of FECA's treatment of coordinated expenditures as contributions. *See id.* at 47. The Court similarly narrowed a provision of FECA requiring the disclosure of certain expenditures, but ultimately upheld that provision. *See id.* at 74-82.

b. In the nearly three decades since *Buckley*, the Court has

remained faithful to *Buckley*'s dichotomous treatment of contributions and expenditures. It has consistently upheld federal limits on contributions, *see, e.g.*, *FEC v. Beaumont*, 123 S. Ct. 2200 (2003), and coordinated expenditures, *see, e.g.*, *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II*), but struck down federal limits on independent expenditures, *see, e.g.*, *NCPAC*, 470 U.S. at 480.

3. In the years following *Buckley*, the federal regulatory regime peacefully coexisted with the States' respective campaign finance regimes. Some States, such as Virginia, allowed unlimited contributions to, and expenditures by, state candidates and party committees; others, such as Vermont, imposed even more stringent limits than those imposed by federal law.

Questions quickly arose, however, as to who should regulate the financing of activities, such as voter registration, voter identification, and get-out-the-vote efforts, which had effects on *both* federal and state elections. In 1978, the FEC declared that state and local party committees could use a combination of federally regulated funds (so-called "hard money") and state-regulated funds (so-called "soft money") to fund those activities. *See* FEC Advisory Op. 1978-10. The FEC subsequently allowed national party committees to use a similar "allocation" of federally regulated and state-regulated funds. *See* FEC Advisory Op. 1979-17. Over the next two decades, the FEC extended the allocation regime to cover other activities, including administrative expenses, party-promoting (or "generic") campaign activities, and, perhaps most significantly, some so-called "issue advocacy." *See* FEC Advisory Op. 1995-25. During the 1990s, the raising and spending of state-regulated funds by political party committees, and the use of so-called "issue advocacy" by various groups, expanded significantly. By 2002, the major parties were raising a total of almost $500 million per election cycle in state-regulated funds. *See* Supp. App. 489sa (Kollar-Kotelly).

B. BCRA

BCRA is composed of a confusing, sometimes internally contradictory, patchwork of regulations, the most important of which are discussed below.

1. Title I of BCRA regulates the use of so-called "soft money": that is, funds that had previously been subject only to state regulation. Section 101 of BCRA bans national party committees from receiving or spending state-regulated funds for any purpose — even for activities that solely or primarily affect state and local elections. Section 101 also bans national party committees from soliciting state-regulated funds for, or transferring state-regulated funds to, any other entity, including state and local party committees.

In addition, section 101 bans state and local party committees from spending state-regulated funds for what BCRA euphemistically calls "federal election activity" — a category that includes voter registration, voter identification, get-out-the-vote activity, and party-promoting campaign activity whenever there is a federal election on the ballot, and advertising that refers to a federal candidate and "promotes," "supports," "attacks," or "opposes" the candidate. Because most States hold their state and local elections at the same time as federal elections, the practical effect of this provision is to ban state and local party committees from using state-regulated funds for covered activities even if those activities solely or primarily affect state and local elections.

Section 101 also severely restricts federal officeholders and candidates from raising state-regulated funds, and bans state and local candidates from spending state-regulated funds on advertising that refers to a federal candidate and "promotes," "supports," "attacks," or "opposes" the candidate.

2. Title II of BCRA is primarily directed toward the regulation of "electioneering communications," a new statutory term that embraces certain types of so-called "issue advocacy."

Sections 201 and 204 ban all corporations and unions, or entities using funds donated by corporations and unions, from making disbursements for "electioneering communications." Section 201 requires all persons who spend $10,000 on "electioneering communications" to make disclosures to the FEC regarding those disbursements. Section 203, in turn, defines an "electioneering communication" as any broadcast advertising carried within 30 days of a primary or 60 days of a general election which "refers to a clearly identified candidate for Federal office." Anticipating that this definition might be held unconstitutional, Congress included a "fallback" definition, which defines an "electioneering communication" as any broadcast advertising carried *at any time* which "promotes," "supports," "attacks," or "opposes" a federal candidate and "is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate."

Title II also contains a number of provisions relating to disclosure and coordination. Sections 201 and 212 impose disclosure requirements on persons who merely enter into a contract to make disbursements for electioneering communications or other regulated expenditures, even before those outlays are actually made. Section 202 treats coordinated disbursements for electioneering communications, like coordinated expenditures, as contributions to the "supported" candidates. Section 214 broadens the definition of "coordination," repeals the FEC's existing regulations on coordination, and orders the FEC to promulgate regulations in support of the new statutory definition of coordination. Finally, section 213 bans political parties from making both independent and certain coordinated expenditures on behalf of a nominated candidate, and instead forces them to choose between one and the other.

3. Title III of BCRA includes various miscellaneous provisions. Section 318 bans minors from contributing federally regulated money in any amount to a federal candidate, and from contributing either federally regulated or state-

regulated money to a political party committee. Section 305 requires a federal candidate who wishes to take advantage of the lowest available rate for broadcast advertising either to certify that he or she will not refer to another candidate in any advertising, or to include a specified identification or statement in the ad. Belying Congress' claim that the ordinarily applicable limits for contributions and coordinated expenditures are necessary to combat actual or apparent corruption, sections 304, 316, and 319 effectively protect incumbents by raising those ordinarily applicable limits when candidates face opponents using personal funds in their campaigns. And section 311 establishes detailed identification requirements for the sponsors of express advocacy or electioneering communications.

4. Title V of BCRA contains section 504, which requires broadcasters to collect and disclose records of requests to purchase broadcast time for communications "relating to any political matter of national importance," even if those communications are never actually made.

C. The District Court's Decision

Conceding that BCRA raised "serious constitutional concerns," President Bush nevertheless signed BCRA into law on March 27, 2002. Eleven complaints were promptly filed in the United States District Court for the District of Columbia, challenging various aspects of the law. Pursuant to the judicial-review provisions in section 403 of BCRA, those cases were expedited and consolidated before a single three-judge panel (Henderson, Circuit Judge, and Kollar-Kotelly and Leon, District Judges). More than a year later, in a series of fractured opinions, the district court struck down some of the contested provisions of BCRA and upheld others.

1. The district court invalidated most of section 101, BCRA's "soft money" provision. *See* Supp. App. 397sa-460sa (Henderson), 887sa-1008sa (Kollar-Kotelly), 1084sa-1146sa

(Leon). It struck down almost all of the restrictions on national party committees, with Judge Leon, in his controlling opinion for the court, rewriting the statute to ban national committees from spending state-regulated funds only for advertising that refers to a federal candidate and "promotes," "supports," "attacks," or "opposes" that candidate. The court also held unconstitutional the restrictions on state and local party committees, except insofar as the statute bans state and local committees from spending state-regulated funds for advertising referring to federal candidates. And the court struck down a provision banning party committees from soliciting funds for, or donating funds to, certain tax-exempt organizations or political committees. The court upheld the provisions limiting the ability of federal officeholders and candidates to raise state-regulated funds, and banning state and local candidates from spending state-regulated funds on advertising referring to federal candidates.

2. The district court also invalidated the core of BCRA's "electioneering communications" provisions, contained in sections 201, 203, 204, and 311. *See id.* at 106sa-128sa, 157sa-158sa (Kollar-Kotelly and Leon), 345sa-380sa (Henderson), 776sa-886sa (Kollar-Kotelly), 1146sa-1169sa (Leon). The district court agreed with plaintiffs that the "primary" and "fallback" definitions of "electioneering communications" were overbroad and vague, respectively. However, Judge Leon, in his controlling opinion for the court, again rewrote the statute in order to uphold it, severing the language in the "fallback" definition requiring regulated advertising to "be suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate" and then upholding the "fallback" definition as broadened. The court upheld virtually the entirety of the disclosure provisions in sections 201 and 311.

3. The district court also invalidated the provision of section 201 requiring advance disclosure of contracts to make disbursements for "electioneering communications," even

before they are made. Over Judge Henderson's dissent, however, the court refused to reach plaintiffs' challenge to section 212, which requires similar advance disclosure of contracts to make independent expenditures, on the ground that the FEC's implementing regulations construe section 212 not to require such advance disclosure. *See id.* at 106sa-128sa, 130sa-134sa (Kollar-Kotelly and Leon), 380sa-384sa (Henderson). Also over Judge Henderson's dissent, the court rejected plaintiffs' challenges to the coordination provisions in sections 202 and 214, holding that an agreement is not constitutionally required as a predicate for a finding of coordination and that some of plaintiffs' challenges were nonjusticiable on standing and ripeness grounds. *See id.* at 128sa-130sa, 134sa-157sa (Kollar-Kotelly and Leon), 384sa-396sa (Henderson). And the court held that plaintiffs lacked standing to challenge section 305, the provision imposing restrictions on federal candidates who wish to take advantage of the lowest available rate for broadcast advertising. *See id.* at 8sa (*per curiam*), 467sa-472sa (Henderson), 1008sa (Kollar-Kotelly).

The district court unanimously invalidated three other provisions. The court concluded that section 213, which forces political parties to choose whether to make independent or certain coordinated expenditures on behalf of a nominated candidate, is unconstitutional because it severely burdens parties' First Amendment right to make independent expenditures. *See id. at* 396sa-397sa (Henderson), 886sa (Kollar-Kotelly), 1169sa-1176sa (Leon). It invalidated section 318, which bans minors from making contributions or donations of any amount to a federal candidate or political party committee. *See id.* at 460sa-467sa (Henderson), 1009sa-1011sa (Kollar-Kotelly), 1176sa-1181sa (Leon). And it struck down section 504, the provision requiring broadcasters to collect and disclose records of requests to purchase broadcast time, with a majority concluding that defendants had failed to identify any evidence that the provision served a cognizable governmental

interest. *See id.* at 371sa-384sa (Henderson), 1011sa (Kollar-Kotelly), 1181sa-1184sa (Leon).

SUMMARY OF ARGUMENT

A. BCRA's "soft money" provision violates the First Amendment, and can be invalidated on that basis alone. The provision severely burdens speech and associational rights, and should therefore be subject to strict scrutiny. Under any applicable level of scrutiny, however, it is invalid. The provision cannot implicate the governmental interest in preventing actual or apparent *quid pro quo* corruption, since it regulates only donations to and disbursements by political parties, rather than federal officeholders or candidates. The Court should reject outright the defendants' effort to defend the provision on the theory that it is needed to avoid the mere "possibility of the appearance of corruption," or "circumvention" of existing limits. Such unbridled justifications would sweep far beyond *Buckley* and allow the regulation of virtually *any* activity in the realm of campaign financing. As this Court noted almost a decade ago, the use of state-regulated funds for activities such as voter registration and get-out-the-vote efforts presents only the most attenuated opportunity for corruption, and, to the extent that any such opportunity exists, Congress could readily have enacted more narrowly tailored alternatives, such as a cap on the amount of state-regulated funds that could be given to national parties.

BCRA's "soft money" provision is unconstitutional for two additional reasons. First, the provision trenches on the prerogatives of the several States by exceeding Congress' power under the Elections Clause. That clause allows Congress to regulate the financing of *federal* campaigns, but not *state* campaigns. The provision overrides longstanding state regulatory mechanisms by limiting the activities of political parties, officeholders, and candidates, even if those activities affect *both* federal and state elections, or have *no* practical effect on federal elections at all. Second, the provision curtails

speech by political parties but not identical speech by other entities engaged in the political process, in violation of the equality principle embodied in the First and Fifth Amendments. It will effect a massive transfer of funds from the political parties to narrowly focused interest groups, thereby detracting from the crucial role that parties have played in our political process.

B. BCRA's "electioneering communications" provisions also violate the First Amendment. Under this Court's landmark decision in *Buckley*, the government may regulate independent expenditures only for advertising that expressly advocates the election or defeat of a clearly identified candidate. To prevail, defendants must not only convince this Court to jettison *stare decisis* values and overrule *Buckley*, but also persuade the Court to promulgate a new rule prohibiting corporations and unions from engaging in core political speech about issues and candidates. Even if this Court were to agree with defendants in both respects, BCRA's "electioneering communications" provisions suffer from other constitutional infirmities, including overbreadth, vagueness, and underinclusiveness.

C. Finally, a number of BCRA's other provisions are likewise unconstitutional. BCRA's "advance notice" provisions require disclosures even before expenditures are made, absent any cognizable justification for doing so. The "coordination" provisions impermissibly broaden the definition of coordination, with the result that even mere discussions with a candidate or political party are sufficient to render an expenditure "coordinated" (and thereby subject to the limits applicable to contributions). The "attack ad" provision improperly conditions the availability of lower advertising rates on a candidate's agreement either that the candidate will not engage in "negative" advertising, or that the candidate will include certain content in his or her ad. The "forced choice" provision imposes a similarly unconstitutional condition, requiring political parties to choose whether to make

independent or certain coordinated expenditures on behalf of a nominated candidate. The "minors" provision bans minors from making contributions to candidates or political parties, in stark contravention of their undoubted constitutional rights. And the "broadcaster records" provision imposes onerous recordkeeping and disclosure obligations on broadcasters — obligations that are both substantially overbroad and decidedly vague. All of these provisions, too, should be invalidated.

ARGUMENT

I. THE "SOFT MONEY" PROVISION OF BCRA IS UNCONSTITUTIONAL.

For many decades before BCRA's enactment, federal law governed the financing of federal election campaigns, and state law the financing of state campaigns. Where activities had effects on both federal and state elections — such as voter registration — political party committees were allowed to use a combination of federally regulated funds (so-called "hard money") and state-regulated funds (so-called "soft money") to pay for those activities. This dual regime reflected an assiduous regard for our federal system.

BCRA changes all that. For the first time, Congress has enacted legislation that dramatically restricts the funding of political activity on *both* the federal and state levels. Section 101 of BCRA imposes stringent and unprecedented restrictions on the raising and spending of state-regulated funds by political parties. And it severely burdens the activities of federal and state officeholders and candidates.

As we will now explain, this new provision restricts the rights of free speech and association in violation of the First Amendment. The district court correctly struck down most of section 101 on First Amendment grounds, though it erred by upholding the remainder. Equally fundamental, section 101 is unconstitutional on two additional grounds that the majority below largely did not reach. First, section 101 trenches on the

prerogatives of the States by exceeding Congress' power to regulate federal elections under Article I, Section 4, of the Constitution. Second, section 101 impermissibly discriminates against speech by political parties in violation of the First and Fifth Amendments.

A. The "Soft Money" Provision Violates The First Amendment Rights Of Free Speech And Association.

In this section, we first demonstrate that section 101 burdens significant speech and associational rights, and should therefore be subject to strict scrutiny under this Court's settled jurisprudence. We then demonstrate that section 101 is not narrowly tailored to meet the government's compelling interest in preventing actual corruption or the appearance of corruption.

1. Section 101 affects the speech and associational rights of donors, political parties, and others in several pivotally important ways.

a. Like the contribution and expenditure limits at issue in *Buckley*, section 101 burdens the speech and associational rights of donors, who will no longer be able to give donations previously permitted by state law to national party committees, and of the parties themselves, which will no longer be able to spend state-regulated funds either at all (in the case of national party committees) or except for certain limited activities that do not qualify as "federal election activity" (in the case of state and local party committees). In *Buckley*, the Court noted (as to expenditures) that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19. The Court noted (as to contributions) that contributions, like expenditures, have a speech component, though it suggested that "the expression rests solely on the

undifferentiated, symbolic act of contributing." *Id.* at 21. And the Court noted that limitations on contributions and expenditures implicated not just the right of free speech, but the right of free association as well. *See id.* at 22.

b. Section 101 burdens speech rights in additional ways not at issue in *Buckley*. For instance, it imposes restrictions not just on contributions and expenditures, but also on *solicitations*. This Court has repeatedly affirmed that a restriction on solicitations is the most direct form of restriction on speech. *See, e.g.*, *United States v. Kokinda*, 497 U.S. 720, 725 (1990); *Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 788-89 (1988); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). That is unsurprising, for "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues," *id.*, and "without solicitation the flow of such information and advocacy would likely cease," *id.*

Section 101 aggressively regulates the solicitation of both state-regulated and federally regulated funds. It bans national committees outright from soliciting state-regulated funds, *see* BCRA § 101(a) (adding new FECA § 323(a)(1)), and from soliciting a new category of federally regulated funds known as "Levin" funds, which can be used for a narrow subset of "federal election activity" known as "Levin" activities, *see id.* (adding new FECA § 323(b)(2)(C)(i)). It bans state and local committees from soliciting Levin federally regulated funds on behalf of, or jointly with, other state and local committees. *See id.* (adding new FECA § 323(b)(2)(B)(iv)). It bans all party committees from soliciting *any* type of funds for certain tax-exempt organizations or political committees. *See id.* (adding new FECA § 323(d)). Finally, it bans federal officeholders and candidates from soliciting state-regulated funds in connection with any state or local election on behalf of party committees or candidates unless those funds comply with the source-and-

amount requirements of federal law, *see id.* (adding new FECA § 323(e)(1)(B)), and also bans them from soliciting Levin federally regulated funds, *see id.* (adding new FECA § 323(e)(1)(A)).[2] All of these restrictions deeply compromise the speech rights of the regulated actors.

c. In addition to speech rights, section 101 burdens associational rights in ways not implicated in *Buckley*. Specifically, by pervasively regulating the relationships among party committees, and between party committees and others, section 101 impermissibly interferes with the associational rights of political parties and their members. It is beyond question that "[t]he right to associate with the political party of one's choice is an integral part" of the First Amendment freedom of association. *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). It is also well established that the right of association inheres not only in the members of a political party, but also in the party itself. *See, e.g., Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989); *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). So too, when the government attempts to regulate the internal structure of political parties, it infringes on the parties' associational rights. *See California Democratic Party v. Jones*, 530 U.S. 567, 573 (2000); *Eu*, 479 U.S. at 229, 230-31.

i. Section 101 interferes directly with the ability of different committees within a single political party to associate freely with each other. Most significantly, it bans national committees from transferring state-regulated funds to state and local committees, *see* BCRA § 101(a) (adding new FECA § 323(a)(1)); from soliciting Levin federally regulated funds for state and local committees, *see id.* (adding new FECA

[2] Section 101 also imposes complex restrictions on federal officeholders and candidates in connection with the solicitation of state-regulated funds for tax-exempt organizations. *See* BCRA § 101(a) (adding new FECA § 323(e)(4)).

§ 323(b)(2)(C)(i)); and from providing *any* funds to state and local committees for use in Levin activities, *see id.* (adding new FECA § 323(b)(2)(B)(iv)). It also bans state and local committees from soliciting Levin federally regulated funds on behalf of, or jointly with, other state and local committees, *see id.*, and from transferring Levin funds to those committees, *see id.* (adding new FECA § 323(b)(2)(C)(ii)). As numerous witnesses testified below, the net effect of these provisions is to strip from political parties much of their traditional power both to engage in coordinated fundraising and to allocate funds on the national, state, and local levels. *See, e.g.*, Supp. App. 304sa-306sa (Henderson), 1222sa-1223sa, 1239sa (Leon). The provisions will also force political parties to shift their fundraising activities from the national committees, which have developed comparative expertise in fundraising, *see, e.g.*, *id.* at 1219sa, 1221sa-1222sa (Leon), to state and local committees.

ii. Section 101 also interferes with the ability of party committees to associate with others, including their own members. It severely restricts federal officeholders and candidates from participating in fundraising programs run by state and local committees. *See* BCRA § 101 (adding new FECA § 323(e)(1)). It bans party committees from soliciting funds for, or donating funds to, certain tax-exempt organizations and political committees. *See id.* (adding new FECA § 323(d)). Finally, to the extent that it treats certain federal officeholders or state and local party officials as "officers or agents" of the national committees, it bans those individuals from soliciting state-regulated funds or Levin federally regulated funds. *See id.* (adding new FECA §§ 323(a), 323(b)(2)(C)(i)). When considered as a whole, these associational burdens are both substantial and unprecedented.

2. Because of its severe burdens on free speech and association, section 101 should be subject to strict scrutiny.

It is well established that "exacting" or strict scrutiny is applied to limitations on independent expenditures, *see, e.g.*,

Colorado II, 533 U.S. at 440-41; limitations on solicitations, *see, e.g.*, *Riley*, 487 U.S. at 795-96; and any other limitations that impose a severe burden on associational rights, *see, e.g.*, *California Democratic Party*, 530 U.S. at 582; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Eu*, 489 U.S. at 231. Strict scrutiny therefore unquestionably applies to all of the provisions of section 101 that were upheld (as modified) by the district court. *See* BCRA § 101(a) (adding new FECA §§ 323(a), 323(b)(1), 323(e), 323(f)); BCRA § 101(b) (adding new FECA § 301(20)(A)(iii)).

Defendants may well urge, as they did before the district court, that a lower degree of scrutiny is appropriate because section 101 also contains a limitation on contributions: namely, the subsection that bars donations of state-regulated funds to national party committees. *See* BCRA § 101(a) (adding new FECA § 323(a)(1)). To be sure, this Court has applied a lower level of scrutiny to limitations on contributions. *See, e.g.*, *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000). But section 101 is far more than a contribution-limitation provision. Because section 101 was enacted as an integrated whole, this Court should treat section 101 accordingly, and subject its far-reaching requirements to strict scrutiny.[3] Even if the Court applies varying standards of review to different parts of section 101, however, it should still apply strict scrutiny to the subsection barring donations of state-regulated funds to national committees, for two reasons.

First, unlike the provisions of FECA at issue in *Buckley*, section 101 does not impose any new limits on the *amounts* of contributions to national committees: instead, it merely subjects funds used by national committees for a variety of previously unregulated purposes to the preexisting source-and-amount

[3] *Cf. Nike, Inc. v. Kasky*, 539 U.S. ___, ___ (2003) (slip op., at 12-13) (Breyer, J., joined by O'Connor, J., dissenting) (applying heightened scrutiny to mixture of commercial and non-commercial speech).

limitations of FECA, and requires that national committees raise and spend federally regulated, rather than state-regulated, funds for those activities. Because section 101 thereby effectively regulates the *uses* for which money is raised and spent, rather than imposing any new limits on the *amounts* of contributions or expenditures, *Buckley*'s dichotomy between contributions and expenditures is inapposite, and strict scrutiny is warranted.

Second, this Court has squarely concluded that limitations on the amount of contributions to *third parties*, unlike contributions to *candidates*, are subject to strict scrutiny. *See Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 299 (1981). That rule makes eminent sense, because a limitation on the amount of contributions to third parties effectively limits the amount of expenditures by the third parties themselves (and, by extension, by the contributors who associate through those third parties). *See id.*; Supp. App. 398sa-409sa (Henderson). To be sure, this Court has seemingly applied a lower degree of scrutiny to limitations on contributions to third parties where those contributions could be used to circumvent limits on contributions directly to candidates. *See California Med. Ass'n v. FEC*, 453 U.S. 182, 198 (1981) (plurality opinion); *Buckley*, 424 U.S. at 38. Because donations of state-regulated funds cannot be used for express advocacy or other activities that solely support a candidate for federal office, however, such funds are not interchangeable with federally regulated funds contributed directly to candidates. The donation limit in section 101 will effectively limit the amount that national committees can spend on a variety of activities that only indirectly and partially assist a candidate for federal office, such as voter registration, voter identification, and get-out-the-vote efforts. It should therefore be subject to strict scrutiny.

3. Section 101 violates the First Amendment because it fails strict, or even intermediate, scrutiny. We begin by

identifying the governmental interests implicated by section 101, then consider whether section 101 is sufficiently tailored.

a. This Court held in *Buckley*, and has since reaffirmed, that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985). "The hallmark of corruption," in turn, "is the financial *quid pro quo*: dollars for political favors." *Id.* at 497; *accord Buckley*, 424 U.S. at 26, 27, 45.

Section 101 cannot implicate the governmental interest in preventing actual or apparent corruption in the classic, *quid pro quo* sense, since a *political party* (unlike a current or future officeholder) cannot respond to a donation by taking some legislative action, but instead can act only through its officeholders. Unsurprisingly, defendants have failed, despite voluminous discovery, to identify a single instance of *quid pro quo* corruption attributable to the donation of state-regulated funds. *See* Supp. App. 325sa-328sa, 409sa-411sa, 425sa (Henderson), 1103sa-1111sa (Leon). Consequently, defendants contend that the donation of state-regulated funds can be corrupting because it allows donors to buy not some particular legislative action, but rather "access" to officeholders through their political parties. Defendants have suggested that this alleged purchasing of "access" gives rise not to actual corruption or the appearance of corruption, but rather to the "*possibility* of the appearance of corruption." Supp. App. 430sa, 433sa (Henderson) (emphasis added).

We recognize that language in some of this Court's most recent campaign finance opinions suggests that the government's interest in preventing corruption sweeps beyond preventing classic, *quid pro quo* corruption, to stemming the "broader threat from politicians too compliant with the wishes of large contributors," *Shrink Missouri*, 528 U.S. at 389, and barring "undue influence on an officeholder's judgment, and the

appearance of such influence," *Colorado II*, 533 U.S. at 441. However broad these formulations may be, they do not reach as far as defendants' "access"-based interest. Defendants' "unexamined, anecdotal accounts" aside, *Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 370 (2001), there are no legislative findings, and certainly no valid statistical evidence, that money secures access to officeholders, *see* Supp. App. 328sa-332sa (Henderson), 1081sa (Kollar-Kotelly), 1263sa-1264sa (Leon). Even if there were sufficient evidence of such a link, however, defendants' "access"-based interest proves too much. Assuming that officeholders naturally provide greater access to their supporters, and specifically to their financial supporters (whether or not that includes the financial supporters of their political parties), than to their opponents, the only solution would be to take all money (whether federally regulated and state-regulated) out of politics altogether — which BCRA does not purport to do. In any event, this Court has squarely rejected such a broad equality-based rationale as a justification for campaign finance regulation. *See*, *e.g.*, *Buckley*, 424 U.S. at 48-49.

In the alternative, BCRA's defenders have contended that the government has an interest in imposing additional limits that, while themselves not justified by the anti-corruption rationale, are necessary to prevent circumvention of existing limits that *are* justified by the anti-corruption rationale.

To the extent this Court has invoked such a rationale, it has done so only in a limited context: namely, to uphold limits on contributions that could be used for the same purposes as direct contributions to federal candidates themselves. Thus, in *Buckley*, the Court upheld the $25,000 federal limit on aggregate contributions by an individual in a calendar year, on the ground that otherwise an individual could circumvent the $1,000 limit on contributions to a single candidate simply by contributing to that candidate's political party or sympathetic PACs. *See* 424 U.S. at 38. Similarly, in *California Medical*,

the Court upheld the $5,000 federal limit on contributions to PACs, on the virtually identical rationale that otherwise an individual could circumvent the $1,000 limit on contributions to a single candidate and the $25,000 annual limit on aggregate contributions. *See* 453 U.S. at 198 (plurality opinion); *id.* at 203 (Blackmun, J., concurring in part and concurring in the judgment). In its recent decision in *Beaumont*, the Court suggested that a similar rationale could be used to justify the ban on contributions by corporations. *See* 123 S. Ct. at 2207. Finally, in *Colorado II*, the Court, while frequently referring to "circumvention," upheld limits on coordinated expenditures by political parties on the basis of the longstanding rule, dating from *Buckley*, that expenditures coordinated with federal candidates are the functional equivalent of contributions to the candidates themselves. *See* 533 U.S. at 442-43. Pivotally, however, the Court has never embraced an anti-circumvention rationale to justify limitations on donations that are not interchangeable with direct contributions to *candidates*, much less limitations on independent expenditures (which, of course, are entitled to the fullest First Amendment protection). Indeed, the fifth-vote concurrence in *California Medical* expressly disclaimed application of the anti-circumvention rationale to independent expenditures. *See* 453 U.S. at 203 (Blackmun, J., concurring in part and concurring in the judgment).

In reality, defendants' anti-circumvention rationale is no rationale at all. *Any* currently lawful use of money to affect the political process could be characterized as an attempt to "circumvent" currently existing prohibitions on other uses. If this Court were to uphold BCRA on the basis of the anti-circumvention rationale, defendants would likely justify future restrictions as necessary to prevent circumvention of BCRA, much as they have justified BCRA as necessary to prevent circumvention of existing law (and, indeed, have justified certain provisions of BCRA as necessary to prevent circumvention of *other* provisions of BCRA). This house of

cards cannot stand. The Court should reject defendants' perverse attempt to fashion a limitless "prophylactic" rationale for *suppressing*, rather than *protecting*, core constitutional rights. *See NAACP v. Button*, 371 U.S. 415, 438 (1963).

b. The remaining question is whether section 101 is sufficiently tailored to the government's interest in preventing actual or apparent corruption. It is not.

i. At the outset, it is questionable whether section 101 is tailored to the government's interest in preventing corruption *at all*. To conclude that it is, the Court would have to indulge two critical assumptions.

First, the Court would have to assume that the donation of state-regulated funds to, or the spending of state-regulated funds by, a political party is just as corrupting of a candidate as a contribution directly to the candidate. To make such an assumption would work a major departure from existing law. In *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (*Colorado I*), this Court held that Congress could not constitutionally limit independent expenditures of federally regulated funds by political parties. The plurality expressly rejected the argument that there are "any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction." *Id.* at 616. Indeed, the Court noted that expenditures by political parties were designed not only to get the party's candidates elected, but to promote the views of the party's members. *See id.* (plurality opinion); *id.* at 629 (Kennedy, J., concurring in part and dissenting in part); *id.* at 646 (Thomas, J., concurring in part and dissenting in part). Defendants advance no justification for treating the disbursement of state-regulated funds by political parties (or the donation of state-regulated funds to political parties for use in such disbursements) differently from expenditures of federally regulated funds by the same parties for

purposes of First Amendment analysis.[4]

Second, the Court would have to assume that a donation of state-regulated funds to be used for activities that do not exclusively serve to get a candidate elected, but instead benefit candidates up and down the party ticket (such as party-promoting campaign activity), or the spending of state-regulated funds for such activities, is just as corrupting of a candidate as a contribution to be used for activities that exclusively do so (such as express advocacy). Again, this Court's decisions counsel against such an assumption. In *Colorado I*, the plurality expressly recognized that "FECA permits unregulated 'soft money' contributions to a party for certain activities." 518 U.S. at 616. Nevertheless, the plurality stated outright that "the opportunity for corruption posed by these greater opportunities for contributions is, *at best, attenuated*." *Id.* (emphasis added); *see also id.* at 647 (Thomas, J., concurring in part and dissenting in part) (noting that "there is little risk that an individual donor could use a party as a conduit for bribing candidates"). As a matter of common sense, because state-regulated funds by definition can be used only for activities that influence state elections (or in combination with federally regulated funds, for activities that influence *both* state and federal elections), a candidate will feel less indebted, *ceteris paribus*, to a donor for contributing state-regulated funds, which will affect his own election only indirectly and partially (if at all), than to another donor who contributes federally regulated funds, which can be used directly and entirely to support his

[4] In upholding limits on *coordinated* expenditures by political parties, the Court did state that political parties "act as agents for spending on behalf of those who seek to produce obligated officeholders." *Colorado II*, 533 U.S. at 452. That makes our point. Since *Buckley*, the Court has treated coordinated expenditures as the functional equivalent of direct contributions to a candidate. *See id.* at 444. And the Court went on in *Colorado II* to emphasize that, in upholding limits on coordinated expenditures by political parties, it was treating political parties no differently from individuals or PACs, which are similarly limited. *See id.* at 455.

election. *See, e.g.*, Supp. App. 1105sa-1106sa (Leon).

ii. Even if the disbursement or donation of state-regulated funds could be corrupting in some circumstances, section 101 is substantially overbroad. If Congress were truly concerned with actual or apparent corruption, it could readily have enacted a more narrowly tailored alternative.

For instance, to the extent "large" donations of state-regulated funds are seen to be corrupting, *see Shrink Missouri*, 528 U.S. at 389, Congress could have imposed a cap on the amount of such donations. Indeed, the Hagel Amendment, which Congress considered and rejected, would have done just that. Specifically, it would have imposed a $60,000 aggregate limit on donations of federally regulated funds and state-regulated funds from any one donor to a national party committee. *See* 147 Cong. Rec. S2908 (daily ed. Mar. 26, 2001) (proposed amendment to S. 27, 107th Cong. (2001)). Instead, section 101 bans *any* donations of state-regulated funds to national committees, no matter how small, and further bans *disbursements* of state-regulated funds by national committees for any purpose (and by state and local committees for "federal election activity"). In addition, section 101 imposes a variety of restrictions with no evident connection to any concern about large donations, including (but not limited to) the ban on joint efforts by state and local committees to raise Levin funds; the ban on transfers of Levin funds between state and local committees; and the ban on solicitations by party committees for, or donations by party committees to, certain tax-exempt organizations and political committees.

Likewise, to the extent particular *uses* of state-regulated funds are seen as corrupting, Congress could have imposed narrower limits on the uses to which such funds could be put. Specifically, Congress could have limited the use of state-regulated funds only for those activities that arguably have a more direct effect on a federal candidate's election (such as advertising that refers to a federal candidate, assuming for the

moment that such disbursements could constitutionally be regulated),[5] and not for those activities whose effect on a federal candidate's election is concededly more attenuated (such as party-promoting campaign activity). Instead, section 101 bans *all* uses of state-regulated funds by national committees, and restricts a number of uses of state-regulated funds by state and local committees which primarily or only affect state elections. And section 101 imposes a variety of restrictions on the transfer and solicitation of funds, which cannot be justified by any concern about the use of state-regulated funds for certain activities. This is overkill in the extreme. Given the availability of more narrowly tailored alternatives, section 101 violates the First Amendment.

B. The "Soft Money" Provision Constitutes An Invalid Exercise Of Congress' Power To Regulate Elections Under Article I, Section 4, Of The Constitution.

Because the district court struck down most of section 101 on First Amendment grounds, it had almost no occasion to reach plaintiffs' Elections Clause arguments, though concerns about section 101's regulation of state and local activities seemed to animate the district court's decision that most of section 101 was overbroad. *See, e.g.*, Supp. App. 433sa (Henderson) (noting that provisions regulating state and local party

[5] In his controlling opinion, Judge Leon upheld provisions of section 101 that (1) restrict state and local party committees from making disbursements of state-regulated funds for certain advertising that refers to a federal candidate, *see* BCRA § 101(a) (adding new FECA § 323(b)(1)); BCRA § 101(b) (adding new FECA § 301(20)(A)(iii)), and (2) restrict state and local candidates from making disbursements of state-regulated funds for such advertising, *see* BCRA § 101(a) (adding new FECA § 323(f)(1)). Judge Leon also rewrote section 101 to add a similar restriction for national party committees. *See* Supp. App. 1111sa-1118sa. Whether as written by Congress or as rewritten by Judge Leon, however, all of these provisions violate the First Amendment for the simple reason that they impermissibly regulate expenditures for speech that does not constitute express advocacy. *See infra* Part II.

committees "apply wholesale to state and local party expenditures for state-focused election activities that barely affect federal elections"), 1101sa (Leon) (concluding that "the evidence, legal precedent, and common sense * * * do *not* support Congress' effort to regulate nonfederal funds used for nonfederal and mixed purposes"). Quite apart from First Amendment concerns, section 101 should fall in its entirety. Section 101 massively intrudes into a core area of state sovereignty — the ability of States to regulate their own elections. The Elections Clause authorizes Congress to regulate the financing of federal, not state, campaigns.

1. a. The Elections Clause states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. In *Buckley*, this Court assumed that the Elections Clause enabled Congress to regulate the financing of federal campaigns. *See* 424 U.S. at 13. But it added that none of the parties was challenging Congress' power to enact FECA. *See id.* at 13-14.

Whatever the merits of the Court's assumption in *Buckley* that the power to regulate the "Manner of *holding* Elections" entails the power to regulate the manner of *financing* election campaigns — which appellants, like the plaintiffs in *Buckley*, do not challenge — the text and history of the Elections Clause, and subsequent case law interpreting it, make clear that the Constitution does not empower Congress to regulate the financing of campaigns for *state* office.

b. The Elections Clause arose from a carefully crafted compromise between delegates to the Constitutional Convention who wanted the States to have plenary power over the election of federal officials, and delegates who wanted Congress to enjoy that power. *See Oregon v. Mitchell*, 400 U.S. 112, 119 n.2 (1970) (opinion of Black, J.); 2 Joseph Story,

Commentaries on the Constitution of the United States 280-92 (1st ed. 1833). Under that compromise, States were given the power to enact regulations concerning federal elections, but Congress was given the power to override those regulations. The latter power was designed to counteract the "potential for States' abuse" of the former. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808-09 (1995). Indeed, the Framers were concerned that, if States enjoyed unlimited power over the election of federal officials, they might refuse to provide for their election at all. *See, e.g.*, The Federalist No. 59, at 363 (Clinton Rossiter ed. 1961) (Alexander Hamilton).

What is abundantly clear, however, is that the Framers left untouched the power of the States to regulate *state* elections. As Hamilton wrote in spirited defense of the Elections Clause:

> Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments? The violation of principle, in this case, would have required no comment; and, to an unbiased observer, it will not be less apparent in the project of subjecting the existence of the national government, in a similar respect to the pleasure of the State governments. An impartial view of the matter cannot fail to result in a conviction that each, as far as possible, ought to depend on itself for its own preservation.

Id.; *see also* 2 Story, *supra*, at 284-85 (paraphrasing Hamilton).

c. In a series of cases after the Civil War, the Court confirmed what is plain from the text and contemporary understanding of the Elections Clause: namely, that it does not confer upon Congress power to regulate state elections, much less to regulate campaign financing in state elections. In *Ex*

parte Siebold, 100 U.S. 371 (1879), the Court considered the constitutionality of provisions of the Enforcement Act barring fraud by, or interference with, election officers in House elections. The Court noted that, while States often hold their elections at the same time as federal elections, Congress does not thereby acquire the power to regulate *state* elections in such cases; rather, Congress merely retains its power to regulate *federal* elections. *See id.* at 393; *Ex parte Yarborough*, 110 U.S. 651, 662 (1884). Indeed, the Court specifically added the disclaimer that, if election officers were to take actions that "ha[d] exclusive reference to the election of State or county officers," Congress would lack any authority to regulate those actions. *See Siebold*, 100 U.S. at 393. Likewise, in *United States v. Reese*, 92 U.S. 214 (1875), the Court held that the only possible source of congressional authority for Enforcement Act provisions regulating state elections was the Fifteenth Amendment, not the Elections Clause. *See id.* at 217-18. Finally, in *Blitz v. United States*, 153 U.S. 308 (1894), the Court ordered dismissal of an Enforcement Act indictment that failed to specify that the defendant impersonated another voter in voting *for a federal candidate*. The Court reasoned that "[v]oting, in the name of another, for a state officer, cannot possibly affect the integrity of an election for representative in congress," and added that "with frauds of that character the national government has no concern." *Id.* at 314-15; *see also Ex parte Clarke*, 100 U.S. 399, 404 (1879) (upholding punishment of election official for violation "in reference to an election of a representative to Congress").

More recent cases reaffirm the foundational principle that the Elections Clause gives Congress no power over state elections. Most notably, in *Oregon v. Mitchell*, the Court considered the scope of the Elections Clause in determining whether Congress had the power to give 18-year-olds the right to vote in state, as well as federal, elections. In his controlling opinion concluding that Congress lacked that power, Justice Black emphasized that

"the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." 400 U.S. at 124-25 (footnote omitted). Justice Black added that "[n]o function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices." *Id.* at 125. Finally, Justice Black noted that the States' power to regulate state elections is limited only by those constitutional amendments that operate directly on the States (such as the Civil War Amendments), "each of which has assumed that the States had general supervisory power over state elections." *Id.* at 125-26.

In a similar vein, other cases reaffirm the broad power of States to regulate their own elections. *See, e.g.*, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986); *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973); *Pope v. Williams*, 193 U.S. 621, 632 (1904). Even those Justices who have consistently dissented in the Court's recent federalism cases have agreed that "[a] State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty." *California Democratic Party*, 530 U.S. at 590 (Stevens, J., joined by Ginsburg, J., dissenting).[6]

2. Section 101 of BCRA impermissibly infringes on the ability of States to regulate state elections in four ways.

a. Section 101 severely limits the involvement of national party committees in state and local elections. Those committees are prohibited outright from receiving or spending any state-regulated funds — even if they are to be used solely

[6] Indeed, the FEC itself conceded, at least prior to this litigation, that "[t]he Constitution grants each state the right to * * * establish its own rules for financing the nonfederal elections held within its borders." Federal Election Commission, *Twenty Year Report* 19 (1995).

for state and local elections, and even if no federal elections are on the ballot (as in the States that hold "off-year" elections). *See* BCRA § 101(a) (adding new FECA § 323(a)(1)).

"National" party committees are known as such for good reason: their responsibilities extend beyond federal elections to state and even local elections as well. National party committees have given substantial amounts of state-regulated funds to, or spent state-regulated funds on behalf of, state and local candidates: for example, in the last two off-year election cycles, the RNC gave over $9.5 million to state and local candidates, and directly spent over $1 million on such candidates' behalf. *See* Supp. App. 1101sa n.31, 1214sa (Leon). National committees have also spent funds on grassroots activities in connection with state and local elections. *See, e.g.*, *id.* at 536sa-537sa (Kollar-Kotelly). And in addition to spending money directly on state and local elections, national committees have transferred state-regulated funds to state and local committees for use in those elections. Those transfers have constituted a sizable portion of the budgets of state and local committees in recent years. *See, e.g.*, *id.* at 520sa (Kollar-Kotelly). A substantial amount of that money was used solely for the purpose of influencing state and local elections: in the last two off-year election cycles, the RNC transferred over $10 million to state committees for use in those elections. *See id.* at 1101sa n.31, 1214sa (Leon).

Section 101 bans all of those activities, and indeed imposes additional restrictions on national committees. Section 101 prohibits national committees from soliciting state-regulated funds (or Levin federally regulated funds) for state and local committees. *See* BCRA § 101(a) (adding new FECA §§ 323(a)(1), 323(b)(2)(C)(i)). It bans national committees from transferring *any* funds to state and local committees to use for Levin activities, which include many activities that affect only state elections. *See* BCRA § 101(a) (adding new FECA § 323(b)(2)(B)(iv)). And it prohibits national committees, like

state and local ones, from soliciting funds for, or donating funds to, certain tax-exempt organizations and political committees, even if those funds are to be used for state and local elections. *See* BCRA § 101(a) (adding new FECA § 323(d)).

In sum, section 101 leaves national party committees in the unique and ironic position of being able to use only federally regulated funds for any activity affecting state and local elections. It thereby displaces the prior regulatory regime, which more adequately accommodated the competing state regulatory interest by allowing national committees to use a combination of federally regulated and state-regulated funds for activities affecting both federal and state elections, and only state-regulated funds for activities affecting state elections.

b. Section 101 has similarly draconian effects on the activities of state and local party committees. Those committees are banned from spending state-regulated funds for "federal election activity." *See* BCRA § 101(a) (adding new FECA § 323(b)(1)); BCRA § 101(b) (adding new FECA § 301(20)-(24)). State and local committees must now pay for these activities solely out of ordinary federally regulated funds — or, to the extent that these activities qualify as Levin activities, out of a combination of ordinary federally regulated funds and Levin federally regulated funds. *See* BCRA § 101(a) (adding new FECA § 323(b)(2)(A)).

BCRA purports to regulate spending by state and local committees only when they engage in what the statute deceptively calls "federal election activity." This is mere wordplay. The fact that campaign activity occurs when a federal election is on the ballot does not remotely render the activity itself "federal." In most States, state and federal elections are held simultaneously. As to those States, many activities are defined as "federal election activity" even if they have effects on *both* federal and state elections (such as voter registration and voter identification); if they have *no* practical effect on federal elections at all (such as certain get-out-the-vote

activity or party-promoting campaign activity); or if they are directed *only* toward state and local elections (such as any covered activity in a district in which the federal elections on the ballot are either actually or practically uncontested).[7]

By requiring state and local committees to pay for all of these activities exclusively with federally regulated funds,[8] section 101 effectively overrides the more generous laws of States, such as Missouri, that allow donations for such activities from corporations and unions (unlike federal law); States, such as Pennsylvania, that allow larger donations than federal law, or indeed in unlimited amounts; or States, such as Virginia, that allow both. *See*, *e.g.*, Supp. App. 424sa (Henderson). As a result, state and local committees will no longer be able to avail themselves of millions of dollars raised in full compliance with applicable state law. The California Democratic Party, for example, has historically received more than three-quarters of its donations of state-regulated funds from large donors, *see id.* at 1241sa (Leon) — donations that could not constitute ordinary or Levin federally regulated funds, and thus could no longer be put toward "federal election activity," if BCRA is upheld.

In sum, section 101 requires state and local party committees to use only federally regulated funds for many activities affecting state and local elections. It thus fails properly to accommodate the States' interest in regulating the involvement of state and local committees in their own elections.

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[7] In the 2002 elections in California, for example, there were no elections for the Presidency or the Senate, and only one of the 53 elections for the House of Representatives was closely contested. *See* Supp. App. 311sa (Henderson), 1228sa, 1229sa (Leon); *see generally id.* at 1106sa n.34 (Leon) (noting "practical reality that congressional races in many states are either noncompetitive[] or uncontested").

[8] Section 101(b) of BCRA (adding new FECA § 301(20)(B)) does allow state and local committees to use state-regulated funds for a few narrow categories of activities that affect state elections, including paying for bumper stickers and yard signs that identify only a state or local candidate.

c. In addition to political parties, section 101 imposes limits on the activities of federal officeholders and candidates in connection with state and local elections. Those individuals are banned from soliciting or directing state-regulated funds in connection with any state or local election unless those funds satisfy the source-and-amount requirements of federal law. *See* BCRA § 101(a) (adding new FECA § 323(e)(1)(B)). Further, they are banned from soliciting or directing Levin federally regulated funds for Levin activity, even if it affects state elections. *See id.* (adding new FECA §§ 323(b)(2)(C)(i), 323(e)(1)(A)). Although federal officeholders and candidates may speak at or attend fundraising events for state and local committees, *see id.* (adding new FECA § 323(e)(3)), they are otherwise greatly restricted in participating in fundraising programs for state and local committees and candidates.

The effects of this federal intrusion will be severe. State and local committees rely heavily on the participation of federal officials in their parties' integrated fundraising programs. *See, e.g.*, Supp. App. 1222sa-1223sa (Leon). For instance, federal officeholders and candidates will be prohibited from writing or calling donors to ask them to make donations otherwise permitted by state law to state and local committees and candidates, as Senator McConnell has frequently done in the past in his capacity as *de facto* leader of the Kentucky Republican Party. *See, e.g.*, 2 PCS/McC 1-4 (McConnell); MMc 0095. The involvement of federal officeholders and candidates in state and local elections, like that of national party committees, will therefore be greatly curtailed.[9]

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[9] Judge Henderson did address appellants' federalism claim as to the restrictions on federal officeholders and candidates, concluding that Congress does have the power to regulate the solicitation and transfer of non-federal funds "where a *federal candidate* is the one soliciting." Supp. App. 452sa n.174. The Elections Clause, however, gives Congress only the power to regulate *federal elections* — not plenary power to regulate the activities of federal officeholders or candidates even in exclusive connection with *state and local elections.*

d. Finally, section 101 intrudes even into the activities of state and local candidates. Those candidates are banned from spending state-regulated funds on any advocacy which "refers to" a clearly identified candidate for federal office and which "promotes," "supports," "attacks," or "opposes" a candidate for that office, regardless of how that advocacy is transmitted or when it occurs. *See* BCRA § 101(a) (adding new FECA § 323(f)(1)). For example, if a Democratic candidate for the California Legislature were to spend funds lawfully raised under state law on a print ad criticizing his opponent for supporting tax cuts, and linking his opponent's support of tax cuts to President Bush's, the state candidate could thereby violate BCRA — notwithstanding the fact that such an ad would primarily, perhaps exclusively, affect a state election. This is tantamount to an outright ban on such advocacy, since there is no such thing as "federally regulated funds" for state and local candidates. This restriction, like the other restrictions in section 101, fails properly to accommodate the competing state interest in regulating state and local elections, and should therefore be held invalid.

C. By Discriminating Against Political Parties, The "Soft Money" Provision Violates The First And Fifth Amendments.

Section 101 also fails constitutional muster because it limits speech by political parties but not identical speech by other entities. As this Court has observed, "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and *the speakers who may address a public issue*." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) (emphasis added; citation omitted). This requirement of neutrality among speakers is drawn not only from the equal protection component of the Fifth Amendment, but from the First Amendment itself. *See, e.g.*, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Discrimination among speakers is a species of

impermissible underinclusiveness, insofar as the government is prohibiting regulable speech by some speakers but not others. *See, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980).

Consonant with this fundamental principle, the Court, in its two most recent cases involving campaign finance and political parties, reaffirmed that nothing relating to the government's interest in preventing corruption justifies subjecting political parties to *worse* treatment than other entities. In *Colorado I*, in concluding that political parties (like other entities) could not be restricted in making independent expenditures, the plurality expressly rejected the argument that there are "any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction." 518 U.S. at 616. And in *Colorado II*, in concluding that political parties (like other entities) could be restricted in making coordinated expenditures, the Court reiterated that there is "no reason to see [political party] expenditures as more likely to serve or be seen as instruments of corruption than * * * expenditures by anyone else." 533 U.S. at 444.

It is indisputable that section 101 will place political party committees at a severe disadvantage compared to interest groups. Whereas national party committees are barred outright from raising state-regulated funds — or spending them on contributions to state or local candidates, voter registration, voter identification, get-out-the-vote efforts, party-promoting campaign activity, or even administrative expenses — interest groups will be able to continue to raise and spend non-federally regulated funds for all of these purposes. Moreover, whereas national party committees are barred outright from spending state-regulated funds on so-called "issue advocacy" (regardless of whether it refers to a federal candidate, or how and when it is disseminated), interest groups will continue to be able to raise and spend non-federally regulated funds for such advocacy,

subject to the restrictions contained in the "electioneering communications" provisions of BCRA, and unincorporated organizations (and qualified non-profit corporations, under the so-called "*MCFL*" exception) will be able to raise and spend non-federally regulated funds for such advocacy without restriction.[10] Similar disabilities will attach to state and local committees, which are barred from using state-regulated funds for many of the same purposes as national committees.

In the recently completed 2002 election cycle, the major parties collectively raised almost $500 million in state-regulated funds. *See* Supp. App. 489sa (Kollar-Kotelly). Unsurprisingly, interest groups have already been gearing up to fill the void and secure those funds themselves for use in many of the same activities previously funded by the political parties. *See, e.g.*,

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[10] In his controlling opinion below, Judge Leon seemingly recognized the equal protection problem, and attempted to cure it by rewriting the statute so as to impose similar restrictions on party committees under the "soft money" provisions as on interest groups under the "electioneering communications" provisions. *Compare* Supp. App. 1084sa-1142sa (rewriting section 101 to bar disbursements of state-regulated funds by party committees for a "public communication that refers to a clearly identified candidate for Federal office * * * and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office") *with id.* at 1159sa-1166sa (rewriting section 201 to bar disbursements of funds by corporations and unions for "any broadcast, cable, or satellite communication which promotes or supports a candidate for [federal] office, or attacks or opposes a candidate for that office"). Even under Judge Leon's procrustean version of BCRA, however, political party committees would still be at a disadvantage relative to unincorporated organizations and qualified non-profit corporations.

Conversely, if this Court holds the "electioneering communications" provisions of BCRA entirely unconstitutional, thereby allowing *all* interest groups to engage in such communications without restriction, the inequities between party committees and interest groups in their use of non-federally regulated funds will only grow. Indeed, if this Court strikes down the "electioneering communications" provisions, it should strike down the "soft money" provision as well, since Congress would likely not have enacted the latter provision in the former provisions' absence. *See, e.g., Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987).

id. at 415sa-416sa (Henderson). Indeed, interest groups have freely acknowledged that they expect their donations to increase as a result of section 101. *See, e.g.*, *id.* at 324sa (Henderson).

By effectively diverting funds from the political parties to interest groups, section 101 will empower narrowly focused interest groups at the expense of the political parties, and thereby detract from the central and unifying role that parties have played in our political process from the earliest days of the Republic. "The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change." *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring); *see also Colorado I*, 518 U.S. at 618 (plurality opinion) (noting "important and legitimate role" political parties have played in American political process). By impermissibly disadvantaging political parties, section 101 violates fundamental principles of free speech and equal protection.

II. THE "ELECTIONEERING COMMUNICATIONS" PROVISIONS OF BCRA ARE UNCONSTITUTIONAL.

Sections 201, 203, 204, and 311 of BCRA impose draconian restrictions on the most vital speech in our representative democracy: speech about public issues and public officials. In a nation that so highly values and so passionately protects political discourse, it is difficult to conceive of a more constitutionally threatening sort of legislative intrusion than one that so stifles debate at the very core of the First Amendment.

The district court correctly struck down the core of these provisions, letting stand a truncated and plainly unconstitutional scrap of an already unconstitutional congressional offering. This Court should finish the job and strike the "electioneering communications" provisions in their entirety.

A. Under *Buckley* and *MCFL*, The Government May Regulate Only Speech That Constitutes "Express Advocacy."

1. We begin with first principles. Speech about politics, issues, and elections is entitled to the most solicitous protection of the First Amendment. Just last year, this Court observed:

> [T]he notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. [D]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges.

White, 536 U.S. at 781 (internal quotation omitted). But abridging the right to speak out on issues and candidates is precisely what BCRA's "electioneering communications" provisions do, and that is precisely why they cannot withstand scrutiny under the First Amendment.

2. There can be no doubt that BCRA's "electioneering communications" provisions are subject to strict scrutiny. Defendants have conceded this, and the Court's precedents leave no room for debate on the subject. *See, e.g., id.*; *Colorado II*, 533 U.S. at 440. It is also indisputable that the "electioneering communications" provisions seek to prohibit core political speech on the basis of its content. As such, they come to the Court bearing a presumption of unconstitutionality. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible. Indeed, were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas. When First Amendment compliance is the point to be proved, the risk of nonpersuasion — operative in all trials — must rest with the Government, not with the

citizen.").

3. The Court's prior decisions in *Buckley* and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*), make clear that the government may constitutionally regulate only independent expenditures for speech expressly advocating the election or defeat of a candidate, known as "express advocacy." The rule that a statute regulating expenditures for speech beyond express advocacy is unconstitutionally overbroad is well-established, and defendants' attempts to recharacterize the cases supporting that rule are unpersuasive.

a. In *Buckley*, the Court considered a provision of FECA that imposed a $1,000 limit on expenditures by any person "relative to a clearly identified candidate," and an attendant provision requiring disclosures of certain expenditures made "for the purpose of * * * influencing" federal elections. In both instances, the Court narrowed the provisions at issue to reach only expenditures made for "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office": that is, "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley*, 424 U.S. at 44 & n.52, 80. The Court explained that it was narrowing these provisions both to cure vagueness in the statutory language and to eliminate constitutional overbreadth. *See, e.g.*, *id.* at 80 (giving "expenditure" in disclosure provision same construction as "expenditure" in spending-limit provision, and construing it to reach only expenditures for express advocacy "[t]o insure that the reach of [the disclosure provision] is not impermissibly broad").

Notably, the *Buckley* Court drew the constitutional line at express advocacy even though it explicitly recognized the very "problem" that BCRA purports to address — namely, that it would sometimes be difficult to distinguish between speech advocating the election or defeat of candidates and other speech

about issues and candidates:

> [T]he distinction between *discussion of issues and candidates* and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. at 42 (emphasis added). The Court added that "[i]t would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." *Id.* at 45. The Court nonetheless concluded that, "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." *Id.* The Court therefore recognized that, while the difficulty in drawing a clear line between express advocacy and other speech about issues and candidates was real, the danger of restricting core political speech by adopting a more expansive definition was more perilous.[11]

b. In *MCFL*, this Court considered a provision of FECA banning expenditures by corporations "in connection with" federal elections — the same provision that BCRA now amends to prohibit disbursements for "electioneering communications."

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[11] The Court ultimately struck down the FECA provision limiting expenditures on the ground that, even as narrowed, it failed to serve the governmental interest in preventing actual or apparent corruption, *see Buckley*, 424 U.S. at 47-48, 51, but upheld the provision requiring disclosures of expenditures, *see id.* at 81-82.

As with the provisions at issue in *Buckley*, the Court narrowed this provision to cover only expenditures for express advocacy. *See* 479 U.S. at 248-49. Critically, the Court did not narrow the provision on the ground that it was necessary to cure vagueness in the statutory language, but instead relied solely on the doctrine of constitutional overbreadth. *See id.* at 248. The Court reasoned that "*Buckley* adopted the 'express advocacy' requirement to distinguish *discussion of issues and candidates* from more pointed exhortations to vote for particular persons." *Id.* at 249 (emphasis added). The Court therefore accepted the corporation's argument that "the definition of an expenditure * * * necessarily incorporates the requirement that a communication 'expressly advocate' the election of candidates," *id.* at 248, though it proceeded to reject the further argument that the particular communication at issue did not constitute express advocacy, *see id.* at 249-50. The Court ultimately held that independent expenditures by qualified non-profit corporations (or so-called "*MCFL*" corporations), like independent expenditures by individuals, political parties, and political action committees, could not constitutionally be regulated. *See id.* at 263-65.

c. Congress also understood that *Buckley*'s express-advocacy test was constitutionally compelled. In revising FECA in the immediate aftermath of the Court's decision in *Buckley*, Congress amended the expenditure-disclosure provision at issue in *Buckley* to reach only express advocacy. In doing so, the Conference Committee Report observed that the amendment was necessary "to conform the independent expenditure reporting requirement * * * *to the requirements of the Constitution* set forth in *Buckley v. Valeo* with respect to the express advocacy of election or defeat of clearly identified candidates." H.R. Conf. Rep. No. 94-1507, at 40 (1976), *reprinted in* 1976 U.S.C.C.A.N. 946, 955 (emphasis added).

d. In the nearly three decades since this Court's decision in *Buckley*, courts and commentators alike have consistently

concluded that *Buckley*, and then *MCFL*, drew a constitutionally mandated line between speech that expressly advocates the election or defeat of a candidate and speech that does not. In a number of post-*Buckley* opinions rejecting the FEC's persistent efforts to expand the definition of express advocacy articulated by this Court, and therefore to do by regulation what BCRA now attempts to do by statute, the lower courts have consistently concluded that only express advocacy can constitutionally be regulated. *See, e.g.*, *Clifton v. FEC*, 114 F.3d 1309, 1312 (1st Cir. 1997) (noting that, "[i]n [*MCFL*], the Supreme Court not only narrowed section 441*b* by construction but also recognized a First Amendment right to issue advocacy"); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1064 (4th Cir. 1997) (observing that this Court has held that "express words of advocacy * * * are the constitutional minima") (internal quotation omitted); *Faucher v. FEC*, 928 F.2d 468, 472 (1st Cir. 1991) (concluding that *Buckley* and *MCFL* ensured "the right to engage in issue-oriented political speech" by "limiting the scope of the FECA to express advocacy").[12] Even the Ninth Circuit, the sole court of appeals to sanction the FEC's efforts to broaden the express-advocacy standard, has agreed that the line between regulable express advocacy and non-regulable political speech is a constitutionally mandated one. *See California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1097 (9th Cir. 2003), *FEC v. Furgatch*, 807 F.2d 857, 860 (9th Cir. 1987).

Similarly, the lower courts have invalidated a variety of state campaign finance laws, some containing starkly unambiguous statutory language, on the ground that they may not constitutionally restrict speech beyond express advocacy. *See, e.g.*, *Chamber of Commerce v. Moore*, 288 F.3d 187, 193 (5th Cir.) (agreeing with other circuits that, "under *Buckley* and

[12] Lower-court cases supporting the proposition that the express-advocacy line is constitutionally compelled are too numerous to list here. *See* Supp. App. 354sa n.145 (Henderson) (listing a selection of cases).

MCFL, the government may regulate only those communications containing explicit words advocating the election or defeat of a particular candidate"), *cert. denied*, 123 S. Ct. 536 (2002); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000) (asserting that, in *MCFL*, "the Court clarified that express words of advocacy were not simply a helpful way to identify 'express advocacy,' but that the inclusion of such words was constitutionally required"); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000) (noting that state statute that explicitly extended disclosure requirement to expenditures for speech other than express advocacy is "a violation of the rule enunciated in *Buckley* and its progeny"). These repeated conclusions of lower courts cannot be wished away as mere "dicta," as Judge Kollar-Kotelly attempted to do, *see, e.g.*, Supp. App. 794sa, 797sa, 798sa, 799sa, but instead reflect the settled understanding, as one commentator has put it, that "the *Buckley* bottom line" is that "[e]xpenditures for speech that does not expressly advocate the election or defeat of a candidate — i.e., expenditures for issue advocacy — may neither be limited in amount nor subjected to disclosure requirements," Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 Va. L. Rev. 1761, 1769 (1999).

In and of itself, the *Buckley* "bottom line" dooms BCRA's "electioneering communications" provisions. The primary definition of "electioneering communications" in section 201, which covers advertising that merely "refers" to a clearly identified candidate for federal office, sweeps well beyond express advocacy, as it fails to require that the advertising contain "express words of advocacy of election or defeat." *Buckley*, 424 U.S. at 44 & n.52. The statute's fallback provision fares no better. That provision encompasses any communication that "promotes or supports a candidate for that office, or attacks or opposes a candidate for that office

(*regardless of whether the communication expressly advocates a vote for or against a candidate*) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate" (emphasis added). By its very terms, the fallback provision is at odds with *Buckley* and *MCFL*, thus requiring that it be stricken as well.[13]

B. The Holdings In *Buckley* And *MCFL* Apply Equally To Corporations And Unions.

In addition to contending that *Buckley* and *MCFL* did not draw a constitutional distinction between express advocacy and all other speech about issues and candidates, defendants have urged in the alternative that such a distinction does not apply to corporations and unions. The argument is unavailing.

1. Contrary to the government's suggestion, *see* Fed. Defts. J.S. 4 n.2, the past century of American history is not replete with examples of Congress passing constitutionally sound restrictions on the election-related speech of corporations and unions. To the contrary, the federal campaign finance laws did not even purport to reach expenditures until 1947, with the enactment of the Taft-Hartley amendments to the Federal Corrupt Practices Act. *See United States v. CIO*, 335 U.S. 106, 107 (1948). This Court did not address the constitutionality of federal expenditure limitations until its decision in *Buckley* almost three decades later. In three decisions prior to *Buckley*, the Court expressly declined to reach questions regarding the constitutionality of Taft-Hartley's expenditure restrictions. *See Pipefitters v. United States*, 407 U.S. 385, 400 (1972) (finding "decision of the constitutional issues premature" in light of dismissal of petitioners' convictions); *United States v. Automobile Workers*, 352 U.S. 567, 591-92 (1957) (refusing to "anticipate constitutional questions" because of decision to remand case for prosecution); *CIO*, 335 U.S. at 110, 124

[13] The same is true for the modified fallback definition that the district court upheld as constitutional. *See* Supp. App. 1159sa-1166sa (Leon).

(dismissing indictment as beyond scope of statute and therefore "express[ing] no opinion * * * upon [statute's] constitutionality").[14] When the Court finally did consider the constitutionality of congressional expenditure restrictions, it struck them down on First Amendment grounds. *See Buckley*, 424 U.S. at 43-50.[15] In fact, every time this Court has addressed the constitutionality of a federal restriction on independent expenditures, it has either struck the challenged provision down, *see NCPAC*, 470 U.S. at 490-501; *Buckley*, 424 U.S. at 43-50, or significantly limited its scope through a narrowing construction, *see MCFL*, 479 U.S. at 248-49, 256-65. History therefore offers little support for BCRA's ban on "electioneering communications."

2. In *Buckley* and *MCFL* themselves, the Court insisted that only expenditures for express advocacy could be subject to regulation, without treating expenditures by corporations and unions differently. In *Buckley*, the expenditure provision at issue applied to individuals, groups, and corporations alike. *See* 424 U.S. at 23, 40 n.45 (quoting the statutory definition of

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[14] Aside from avoiding the constitutional questions raised by the federal restriction on campaign expenditures, these cases also revealed, through an exhaustive recitation of the legislative history, that the members of Congress who passed Taft-Hartley were not sure whether its expenditure limitation applied in a variety of circumstances, and had concerns about whether the Constitution would permit particular hypothetical applications of the law — such as to the corporate or union funding of radio broadcasts during a campaign that mentioned federal candidates. *See, e.g.*, *Automobile Workers*, 352 U.S. at 586-87 & n.1; *CIO*, 335 U.S. at 112. The historical ambiguity as to the scope of pre-FECA federal expenditure restrictions, considered together with the express-advocacy limitation articulated in *Buckley* and *MCFL*, makes plain that the Court has never endorsed the type of regulations contemplated by BCRA's ban on "electioneering communications."

[15] It is noteworthy that, in striking down FECA's expenditure restrictions, the *Buckley* Court cited the dissent of Justice Douglas in *Automobile Workers*, in which Justice Douglas excoriated the majority for failing to strike down the Taft-Hartley expenditure restrictions on First Amendment grounds. *See Buckley*, 424 U.S. at 43 (citing *Automobile Workers*, 352 U.S. at 595-96 (Douglas, J., dissenting)).

"persons"). Indeed, two of the plaintiffs in *Buckley* were corporations, including the New York Civil Liberties Union. *See id*. at 8. The Court struck down the provision in its entirety, drawing no distinction between the individual and corporate plaintiffs.

In *MCFL*, the Court drew the same constitutional line in the specific context of speech by a corporation. *See* 479 U.S. at 241. The Court construed 2 U.S.C. § 441*b*, the provision of FECA banning all expenditures by corporations and unions "in connection with" federal elections, to reach only express advocacy. *See* 479 U.S. at 247-49. The Court did not limit its statutory construction to expenditures by qualified non-profit corporations, but instead held categorically, with respect to *all* corporations, that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441*b*." *Id.* at 249. In fact, it was only after the Court proffered its narrowing construction of section 441*b*, and concluded that the speech at issue *was* express advocacy, that the Court even drew a distinction between qualified non-profit corporations and other corporations, in resolving the ultimate issue of whether expenditures for express advocacy by the defendant non-profit corporation could be regulated. *See id.* at 256-65.

3. Just two years after *Buckley*, the Court made clear yet again that corporations may not be restricted from making expenditures for political advocacy. In *Bellotti*, the Court held unconstitutional a Massachusetts statute that banned corporate expenditures in connection with referenda unless they "materially affect[ed] any of the property, business or assets of the corporation." 435 U.S. at 767-68. Such speech, the Court concluded, was "at the heart of the First Amendment's protection" and "indispensable to decision making in a democracy," adding that "this is no less true because the speech comes from a corporation rather than an individual." *Id.* at 776-77; *see also Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8 (1986) (noting that "[t]he identity of the speaker

is not decisive in determining whether speech is protected" and adding that "[c]orporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster") (internal quotation omitted). Similarly, in the recent case of *Nike, Inc. v. Kasky*, 539 U.S. ___ (2003), while there was disagreement as to whether the petition for writ of *certiorari* should have been dismissed as improvidently granted, there was no suggestion that non-commercial corporate speech relating to matters of public interest was without substantial First Amendment protection. *See id.* at ___ (slip op., at 10) (Stevens, J., joined by Ginsburg and Souter, JJ., concurring) ("Knowledgeable persons should be free to participate in * * * debate [about important public issues] without fear of unfair reprisal."); *id*. at ___ (slip op., at 12) (Breyer, J., joined by O'Connor, J., dissenting) ("[S]peech on matters of public concern needs 'breathing space' * * * in order to survive.").

4. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), is not, as the government suggests, *see* Fed. Defts. J.S. 24, to the contrary. In *Austin*, the Court held that a State could constitutionally restrict corporate independent expenditures for express advocacy. Nothing in *Austin*, however, even remotely hints that the Court intended to overrule *Buckley*, *MCFL*, and *Bellotti* so as to allow the government to regulate expenditures by corporations and unions for speech other than express advocacy. *Austin* itself involved a state statute modeled on the federal provision at issue in *MCFL*, *see id.* at 656 n.1, and an ad that urged voters, in large bold type, to "Elect Richard Bandstra" — an ad that plainly constituted express advocacy, *see id.* at 656; *id.* at 714 (appendix to opinion of Kennedy, J., dissenting). *Austin* held only that Michigan could regulate the Michigan Chamber of Commerce's expenditure for the express advocacy at issue, since the Chamber was not a qualified non-profit corporation under *MCFL*. *See id.* at 668-69. As Judge

Henderson observed, "the Court's holding in *Austin* was limited to corporate expenditures on *express* advocacy." Supp. App. 356sa; *see also The Supreme Court, 1989 Term, Leading Cases*, 104 Harv. L. Rev. 209, 217 (1990) ("[T]he [*Austin*] Court preserved for corporations the right to speak on any issue so long as they do not expressly advocate the election or defeat of specific candidates.").

5. In a related vein, defendants have urged that corporations and unions may be required to engage in "electioneering communications" through PACs (or "segregated funds"), as BCRA permits. *See* Fed. Defts. J.S. 23-24; Intervenor Defts. J.S. 24-25. Leaving aside the fact that many corporations and unions may have no desire to establish PACs — a point vividly illustrated in the brief of the American Civil Liberties Union, *see* ACLU Br. 17 — requiring a corporation to speak exclusively through a PAC substantially burdens its right to speak, *see, e.g.*, *MCFL*, 479 U.S. at 252-56; *id.* at 266 (O'Connor, J., concurring). It is simply no answer to say that these entities can "speak" by having a PAC speak for them. PACs provide neither a constitutionally sufficient nor practically workable alternative to speech by plaintiffs themselves. If the speech at issue is fully protected by the First Amendment — and it is nothing less — plaintiffs are permitted to utter it in their own name, and to pay for it with their own funds, without fear of governmental interference.

C. Even If This Court Were To Abandon *Buckley* And *MCFL*, The "Electioneering Communications" Provisions Could Not Survive Scrutiny.

Given the determinations in *Buckley* and *MCFL*, the "electioneering communications" provisions can be sustained only if the Court were to overrule those cases. The Court should decline to do so. The express-advocacy standard is both narrow and unambiguous, and is narrowly tailored to advance the compelling governmental interest in preventing actual or apparent corruption. In contrast, BCRA's primary definition of

"electioneering communications" is vastly overbroad. But even if this Court were to abandon *Buckley* and *MCFL* in favor of defendants' proffered standard, the "electioneering communications" provisions are so overbroad that they cannot be sustained under any theory consistent with the First Amendment.

1. Defendants' theory is that only speech that is "genuinely" about "issues" is constitutionally protected, while all other speech is subject to government regulation. This is, of course, precisely the opposite of what this Court concluded in *Buckley* and reaffirmed in *MCFL*: that only speech expressly advocating the election or defeat of a candidate is regulable, while all other speech about issues and candidates is not. Defendants' theory then proceeds to the dubious proposition that "most" speech that is "genuinely" about "issues" is not broadcast in close proximity to elections. Therefore, the syllogism marches on, by banning any reference to a federal candidate in any communication aired within 30 days of a primary or 60 days of a general election, BCRA will eliminate disfavored speech about issues and candidates — pejoratively referred to by defendants as "sham" issue ads — but not most "genuine" speech about issues. Defendants' theory is both legally and factually indefensible.

A review of actual advertisements aired in the 30- and 60-day periods before the 1998 and 2000 primary and general elections powerfully illustrates the sort of protected speech that would be criminalized by BCRA's regulation of "electioneering communications."[16] As would be expected (and as *Buckley* predicted, *see* 424 U.S. at 42), a vast majority of the ads covered by BCRA refer to incumbent officeholders who are running for re-election. One such ad, broadcast within 60 days of the 1998 general election in the district of Oregon

[16] The ads discussed in this section are included in an appendix to this brief ("Br. App."), as are eight other ads discussed below. Also included with the brief is a CD-ROM containing 10 ads that were submitted to the district court and discussed at length in the briefs and at oral argument.

Congressman David Wu, urged him as follows:

> The people of America should be running our government. That's the way it was set up in the first place. The problem is the special interests and the paid lobbyists who control the Washington politicians. The answer is term limits. Term limits replace Washington insiders with new people who reflect community interests, not politics as usual. Molly Bordonaro has signed the pledge to limit her terms in Congress. David Wu refused. Call David Wu and tell him to sign the US Term Limits Pledge.

Br. App. 1a. The ad thus informed the viewers that Congressman Wu had failed to sign a term-limits pledge, and attempted to pressure him to do so. Though it may seem unthinkable that such core political speech could be the subject of criminal sanctions, Americans for Term Limits (the group that sponsored the ad) would be subject to such sanctions for airing the same ad today.

Another good example of what is lost under BCRA is an AFL-CIO ad opposing permanent most-favored-nation status for China. This ad, which ran, *inter alia*, in the district of Representative Ron Paul (a plaintiff in this case) within 30 days of his primary election, stated in its entirety:

> Behind this label is a shameful story of political prisoners and forced labor camps, of wages as low as 13 cents an hour, of a country that routinely violates trade rules flooding our markets, draining American jobs. Now Congress is set to scrap its annual review of China's record and reward China with a permanent trade deal. Tell Congressman Paul to vote "No" and keep China on probation until this label stands for fairness. Paid for by the AFL-CIO.

Br. App. 2a.[17] The AFL-CIO could be indicted in 2004 for running a similar ad.

Finally, the federal defendants have identified the following ad, aired in Michigan within 60 days of the 2000 general election, as an example of a so-called "sham" issue ad:

> WOMAN: My mom started this business and my brother and I worked hard to make it grow. One day we hope to own it but because of the law, we can never be sure.
>
> ANNOUNCER: Because of the death tax, people like Melanie are always at risk of losing family businesses. Debbie Stabenow voted twice against getting rid of the death tax.
>
> WOMAN: Everything we have worked for can be taken away in an instant and that's not fair.
>
> ANNOUNCER: Call Debbie Stabenow. Tell her our working families need a break. Paid for by the Michigan Chamber of Commerce.

Br. App. 3a. Remarkably, far from acknowledging that this ad is speech fully protected by the First Amendment, defendants have viewed it as a perfect example of speech that should be criminalized.

These ads — sometimes using pointed, critical, and antagonistic speech — all sought to lobby and pressure federal officeholders on issues of unquestioned importance to the groups that sponsor them. They are fully protected by *Buckley*, to say nothing of the core principle of *New York Times Co. v. Sullivan* that "uninhibited, robust, and wide-open speech" is protected by the First Amendment. 376 U.S. at 270.

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[17] The storyboard included in the appendix refers to Congresswoman Sue Myrick. The ad referring to Congressman Paul was materially identical. *See* 6 PCS/Mitchell decl., exh. 1, at 92.

2. To counter these and the many other examples of BCRA's overbreadth, defendants relied almost exclusively on two reports by the Brennan Center for Justice, counsel to the intervenor defendants in this case, entitled *Buying Time 1998: Television Advertising in the 1998 Congressional Elections* (Jonathan S. Krasno & Daniel E. Seltz, Brennan Center 2000), and *Buying Time 2000: Television Advertisements in the 2000 Federal Elections* (Craig B. Holman & Luke P. McLoughlin, Brennan Center 2001). The reports were cited repeatedly by Members of Congress during the debates on BCRA. *See, e.g.*, 147 Cong. Rec. S3045 (daily ed. Mar. 28, 2001) (statement of Sen. Snowe); 148 Cong. Rec. S2117-18 (daily ed. Mar. 20, 2002) (statement of Sen. Jeffords); 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

The *Buying Time* reports surveyed ads aired during the 1998 and 2000 election cycles and concluded that the vast majority of ads that would have been banned by BCRA were "sham" issue ads, and thus speech that, in the authors' view, should not be entitled to First Amendment protection. The reports concluded that only a tiny fraction of so-called "genuine" issue ads — speech that defendants admit is entitled to full First Amendment protection — would have been covered by BCRA's primary definition of "electioneering communications."

Despite defendants' best efforts, however, the district court, after detailed and laborious consideration, *unanimously* rejected the conclusions of the *Buying Time* reports, finding that, if anything, the data demonstrated that BCRA would have criminalized a substantial amount of concededly protected speech in 1998 and 2000. Judge Henderson concluded that the *Buying Time* reports were "based on a flawed methodology and [are] therefore unreliable as evidence," Supp. App. 244sa,[18] but

[18] As Judge Henderson's opinion demonstrates, the *Buying Time* reports were entirely and irredeemably biased. Funding for the studies was solicited for the express purpose of furthering campaign finance "reform," *see* Supp. App. 239sa-240sa (Henderson); the academic who solicited the funding

that, in any event, "the record as a whole suggests that BCRA would prohibit too much protected expression — anywhere from 11.38 per cent to 50.5 per cent of (what even the defendants characterize as) 'genuine' issue ads broadcast during the 60 days before an election in a typical election year," *id*. at 367sa n.149. Judge Leon concluded that "14.7 percent and 17 percent of the ads" that would have been prohibited by BCRA in 1998 and 2000, respectively, were "genuine" issue ads by the Brennan Center's own definition, and that such percentages represented "substantial overbreadth." *Id.* at 1157sa. Even Judge Kollar-Kotelly, who would have upheld the "electioneering communications" provisions, refused to accept either report's findings about BCRA's effect on so-called "genuine" issue ads, although she agreed that, as to the 2000 study, the evidence demonstrated that 17% of the speech that BCRA would have banned was "genuine" speech about issues. *See id.* at 857sa. This is overbreadth by any standard.

The very premise of the *Buying Time* reports (and indeed, defendants' entire argument about BCRA's "electioneering communication" provisions) is itself fundamentally flawed. In insisting that BCRA will have only a modest effect on "genuine" issue advocacy, defendants and the *Buying Time* authors have sought to seize for themselves the role of determining — in a way wholly inconsistent with *Buckley* — what advocacy is "genuine." They have embraced the notion

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agreed that the studies were "design[ed] and execute[d] * * * in a way that would help move the campaign reform ball forward," *id.* at 240sa (Henderson); data for the studies were acquired in order to "fuel a continuous and multi-faceted campaign to propel reform forward," *id.* at 241sa (Henderson); and the authors agreed with their sponsors that the studies would be abandoned in midstream, and the results never published, unless the results were helpful to the reform "cause," *see id.* at 239sa (Henderson). Such conduct was so plainly dishonorable that defendants' expert Dr. Arthur Lupia was forced to admit that it was not "consistent with scholarly behavior of honor and seriousness as member of a learned profession." Lupia dep. 17.

that only speech about a bill or an issue is "genuine" and is protected by the First Amendment, while speech about candidates is rarely, if ever, protected. This view, as we have observed, is flatly at odds both with this Court's decisions and with fundamental First Amendment principles.

The core conclusions of the *Buying Time* reports are derived solely from surveys filled out by college students, who were asked to determine whether the "purpose" of an ad was to "provide information about or urge action on a bill or issue," or, alternatively, to "generate support or opposition for a particular candidate." *See id.* at 241sa (Henderson), 1043sa (Kollar-Kotelly), 1329sa (Leon). If students determined that an ad generated support or opposition for a candidate, the ad was classified as a "sham" issue ad. If it provided information, the ad was deemed to be "genuine." The survey form provided no way for a student to conclude that an ad's "purpose" was to do both. *See* Holman dep. 43; Seltz dep. 187. Tellingly, when Professor Kenneth Goldstein, a defense expert and the principal researcher for the *Buying Time* reports, was asked if he would have designed the reports differently had he known that speech about both issues *and* candidates was constitutionally protected, he conceded that he would have. *See* Supp. App. 247sa (Henderson).

In any event, it is now clear that the reports' conclusions about BCRA's insignificant effect on so-called "genuine" issue ads are insupportable. The 1998 report, on which BCRA's congressional supporters relied, indicated that only 7% of "genuine" issue ads aired in 1998 would have been prohibited by BCRA. *See id.* at 242sa (Henderson), 857sa (Kollar-Kotelly), 1345sa (Leon). However, using a more accurate methodology that the Brennan Center itself later adopted, defendants' experts and the report's authors now concede that the underlying data demonstrates that 14.7% of the ads that would have been prohibited by BCRA were "genuine." *See id.* at 243sa (Henderson), 1157sa (Leon).

A closer look at the documents underlying the 1998 report demonstrates that BCRA would have prohibited even more so-called "genuine" issue ads. The report claimed that, of the 30 ads that would have been prohibited by BCRA, only two were coded as "genuine" issue ads. *See id.* at 242sa (Henderson), 1333sa (Leon). However, a review of the actual handwritten coding sheets filled out by Professor Goldstein's students shows that, in fact, at least 10 ads met BCRA's criteria and were coded as "genuine."

At some point before the 1998 report went to press, someone re-coded at least eight ads from "genuine" to "sham." *See* Br. App. 7a-15a; Supp. App. at 243sa (Henderson), 765sa-766sa (Kollar-Kotelly). The impact of this re-coding on the numbers is telling. If the eight re-coded ads had been counted as "genuine" issue ads, *Buying Time 1998* would have reported that *64*% of ads mentioning a candidate in the 60 days before the 1998 general election were coded by the students as "genuine." *See id.* at 243sa-244sa (Henderson), 1349sa (Leon). Employing a different methodology used in the report of defendants' expert Dr. Jonathan Krasno, plaintiffs' expert Dr. James Gibson concluded that no less (and likely more) than 50.5% of the ads featuring candidates within 60 days of the 1998 election were coded as "genuine." *See id*. at 244sa (Henderson), 1349sa-1350sa (Leon). This is surely overbreadth at a level rarely seen in any case.

For its part, *Buying Time 2000* also drastically underreports the number of "genuine" issue ads that would have met BCRA's criteria. Two of the three judges below, after close and careful review, concluded that if the data had been correctly analyzed, 17% of the ads that referred to candidates in the last 60 days of the 2000 campaign were "genuine" issue ads, the broadcast of which would have been criminal. *See id.* at 767sa (Kollar-Kotelly), 1157sa (Leon). Judge Henderson did not specifically address the 17% figure, finding that "neither study has any significant evidentiary weight" and that "even if I

accepted the distinction [between 'genuine' and 'sham' issue ads], the record as a whole suggests that BCRA would prohibit too much protected expression." *Id.* at 367sa n.149.

D. The "Electioneering Communications" Provisions Are Overbroad Because They Regulate Speech By Qualified Non-Profit Corporations.

By its plain terms, section 204 of BCRA extends to *all* corporations and unions the ban on disbursements for "electioneering communications." BCRA therefore makes no accommodation for qualified non-profit corporations, or so-called "*MCFL*" corporations: that is, non-profit, ideological corporations that accept no more than *de minimis* funds from corporate sources. This Court has held that such corporations must be allowed to make expenditures even for express advocacy. *See MCFL*, 479 U.S. at 259, 264.

Judge Henderson would have struck down section 204 in its entirety. *See* Supp. App. 370sa. Judge Leon, in his controlling opinion, held section 204 to be unconstitutional insofar as it extends to *MCFL* corporations. *See id.* at 1166sa-1169sa. Defendants have conceded that BCRA's "electioneering communications" provisions cannot constitutionally be applied to *MCFL* corporations. *See* Fed. Defts. J.S. 24 n.8; Intervenor Defts. J.S. 14 n.16. In light of defendants' concessions, the Court should strike down section 204 as unconstitutionally overbroad.

E. The "Electioneering Communications" Provisions Are Vague And Underinclusive.

Finally, even if the Court accepts all of defendants' other arguments, BCRA's "electioneering communications" provisions are still unconstitutionally vague and underinclusive.

1. The "fallback" definition of "electioneering communications," which covers advertising that "promotes," "supports," "attacks," or "opposes" a federal candidate and is "suggestive of no plausible meaning other than an exhortation

to vote for or against a specific candidate," is as unconstitutional as the primary definition. First and foremost, the definition fails under — and indeed, flouts — *Buckley*, because it applies by its terms "regardless of whether the communication expressly advocates a vote for or against a candidate." This statutory provision, enacted notwithstanding the specific holding of *Buckley* to the contrary, once again puts political speakers "wholly at the mercy of the varied understanding of [their] hearers." *Buckley*, 424 U.S. at 43 (internal quotation omitted). Under the fallback definition, much as the Court warned in *Buckley*, speakers will be forced to "hedge and trim" their political speech to ensure that it is not perceived as promoting or attacking a candidate. *Id*. (internal quotation omitted).

Apart from its inconsistency with *Buckley*, the fallback definition is unconstitutional because it is so vague that people "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *accord Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). And an "even greater degree of specificity" is required in the First Amendment context. *Buckley*, 424 U.S. at 77 (internal quotation omitted). As Craig Holman, chief author of *Buying Time 2000*, acknowledged in his deposition, any effort to determine the "purpose" of a political advertisement is by its nature not a "black and white issue," but is instead a "subjective judgment" that "can be reasonably debated." Holman dep. 73, 80. Indeed, defendants' own expert Professor Goldstein noted that the students involved in coding ads for the *Buying Time* studies disagreed 25% of the time as to whether a particular ad was intended to "generate support or opposition for a particular candidate" or not. *See* Goldstein dep. 182.

Discovery confirmed that reasonable and intelligent people often disagree about whether political ads meet the criteria of the fallback definition. When shown particular ads during their

depositions in this case, the *Buying Time* authors, defendants' experts, and BCRA's sponsors routinely disagreed *with each other* as to whether a given ad was intended to promote, support, attack, or oppose a specific candidate. A criminal law that gives so little guidance as to its meaning cannot be sustained.

By way of example, an ad that ran within 60 days of the 1998 general election stated in part as follows: "Year after year the federal government takes a bigger piece of the pie. In fact in 1998 we'll pay more in federal taxes than at any time in American history except for World War II. And now with the budget surplus, in thirty years all the Washington politicians can talk about is getting their hands on more of your dough." The ad then asked viewers to "[c]all Harry Reid and John Ensign" and urge them to cut taxes. "Otherwise," the ad concluded, "there will be nothing left but the crumbs." Br. App. 4a. Luke McLoughlin, co-author of *Buying Time 2000*, opined that this ad was "genuine" because its "focus is on taxes." McLoughlin dep. 23. Senator McCain, however, testified that the ad "attacks both" candidates. McCain dep. 122. And Congressman Shays offered a third view, testifying that the ad supported "one person's position, but not the other" and that it was therefore "designed to influence the election." Shays dep. 111.

Another ad, sponsored by the Alliance for Quality Nursing Home Care broadcast within 60 days of the 2000 general election, referred to then-presidential candidate Al Gore. *See* Br. App. 5a. Senator Feingold was unsure whether the ad was pro-Gore or anti-Gore. *See* Feingold dep. 41. On the other hand, Senator McCain testified that the ad "implies that Al Gore was responsible for Medicare cuts, which is a pretty damning indictment." McCain dep. 139. But Representative Meehan concluded that that the ad "probably" was intended to promote Gore's candidacy, *see* Meehan dep. 124, and Representative Shays agreed, *see* Shays dep. 128.

A third example was this ad, aired with 60 days of the 2000 general election:

> GRADUATE: Dear high tech company, I'd like to send you my resume.
>
> ANNOUNCER: Dear Graduate, sorry, Congress is going to give your job to a foreign worker.
>
> GRADUATE: But I've just finished four hard years of technical studies.
>
> ANNOUNCER 1: Sorry, besides foreign workers will work for a lot less.
>
> ANNOUNCER 2: Is this any way to treat American workers? But based on her record, Congresswoman Northrup is likely to vote in favor of the Foreign Worker Bill. Call Congresswoman Northrup and tell her to save our best jobs for American workers. Ask her to vote no on the Foreign Worker Bill. This message paid for by the Coalition for the Future American Worker.

Br. App. 6a. Though the ad was treated in *Buying Time 2000* as a "genuine" issue ad (that is, one that does not "generate support or opposition for a particular candidate"), *see* Holman dep. 77-78, Senator McCain called the ad "exactly what I have in mind as a sham issue ad," McCain dep. 141.

With so much disagreement, it is plain that the fallback definition will inevitably lead candidates to "steer far wider of the unlawful zone than if the boundaries of the forbidden area were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (internal quotation omitted). In the end, Senator McCain said it best when he rose on the Senate floor to oppose the inclusion of materially identical statutory language:

> Boy, we better get out the dictionary because there is a great deal of ambiguity of words. * * * It says in the amendment: * * * [ads] can have no reasonable

> meaning other than to advocate the defeat of one or more clearly identified candidates. Who decides that? * * * Now you are asking a judge to look at every commercial, or you are asking the broadcast station to look at every commercial[,] and make some decision as to whether it is an attack ad or not. * * * I am not a lawyer, but I have been involved so long and so engaged in these issues that words do have meaning, and this amendment is very vague.

147 Cong. Rec. S3116 (daily ed. Mar. 29, 2001). The "fallback" definition in section 201 is unacceptably, and unconstitutionally, vague.[19]

2. Finally, by regulating only broadcast ads and not print ads or other forms of communication, both definitions of

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[19] The modified fallback definition that the district court upheld as constitutional, *see* Supp. App. 1159sa-1166sa (Leon), is not only vague, but also overbroad. As written by Congress, the fallback definition contained no temporal restrictions. Presumably, Congress determined that the 30- and 60-day limits of the primary definition were unnecessary in the fallback definition, because that definition would apply only to ads that are "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." Shorn of that final clause, however, the fallback definition upheld by the district court now covers *all* ads that "promote, support, attack, or oppose a Federal candidate." In its rulemaking, the FEC itself recognized that virtually *any* ad that refers to a federal candidate "could well be understood" to meet those criteria. Electioneering Communications, 67 Fed. Reg. 65,190, 65,201 (Oct. 7, 2002).

Moreover, by striking the definition's one narrowing characteristic, the district court not only concocted a statutory provision that there is no reason to believe Congress would have enacted, but also did nothing to overcome the inherent vagueness of the terms "promote," "support," "attack," and "oppose." In fact, the language found to be unconstitutionally vague in *Buckley* (even after the Court's narrowing construction) bears a strong resemblance to the language in the fallback definition. *Compare Buckley*, 424 U.S. at 42 ("advocating the election or defeat of a candidate") (internal quotation omitted), *with* BCRA § 201(a) ("promot[ing] or support[ing] * * * or attack[ing] or oppos[ing] a candidate for [federal] office").

"electioneering communications" in section 201 are underinclusive and violate basic First Amendment principles. This Court has frequently struck down laws on the ground that they apply only to certain forms of media and not to others. *See, e.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104-05 (1979).

At the time of BCRA's enactment, members of Congress sought to justify the restriction on only broadcast ads by resorting to the "scarcity rationale": that is, the argument that activities by broadcasters may be regulated because broadcast stations operate on a limited spectrum provided by the government. *See, e.g.*, 144 Cong. Rec. S978 (daily ed. Feb. 25, 1998) (statement of Sen. Levin); 147 Cong. Rec. S2611 (daily ed. Mar. 21, 2001) (statement of Sen. Torricelli). Even assuming, however, that the "scarcity rationale" is applicable to cable and satellite broadcasting (or, for that matter, retains any vitality at all), that doctrine has never been applied to justify restrictions on broadcasters that would have the effect of *decreasing* speech, rather than *increasing* it. Indeed, the very justification for the "scarcity rationale" was to ensure the dissemination of voices that "would otherwise, by necessity, be barred from the airwaves." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969).

There is simply no justification for allowing Congress to regulate an ad only when it is read over the radio, but not when it is printed in a newspaper. *See* Supp. App. 365sa (Henderson). Because the "electioneering communications" provisions of BCRA discriminate against broadcast ads, they fail constitutional scrutiny on this ground as well.

III. OTHER PROVISIONS OF BCRA ARE UNCONSTITUTIONAL.

The district court correctly struck down a number of other provisions of BCRA, and incorrectly upheld others. We address each in turn.

A. The "Advance Notice" Provisions Are Unconstitutional.

The district court properly struck down one of BCRA's two "advance notice" provisions, but erred by holding plaintiffs' challenges to the other nonjusticiable. Section 201 of BCRA imposes disclosure requirements on persons who merely enter into a "contract to make" disbursements for electioneering communications, even before those disbursements are made, and even if they are ultimately not made. Section 212 imposes similar requirements on persons who "contract[] to make" independent expenditures over a certain amount, again even before those expenditures are made.

As the district court unanimously held, the "advance notice" provision of section 201 violates the First Amendment. Section 201 cannot be said to serve any of the governmental interests recognized in *Buckley* as potentially supporting disclosure requirements: namely, preventing actual or apparent corruption, informing the electorate as to the source of campaign spending, and assisting in the enforcement of contribution limits. *See* 424 U.S. at 66-68. As the district court recognized, those interests would be fully served by requiring disclosures after the underlying expenditures have actually been made. *See* Supp. App. 114sa (Kollar-Kotelly and Leon). Indeed, requiring advance disclosures could have a chilling effect on would-be speakers. This Court has held that similar preconditions on speech are repugnant to First Amendment values. *See, e.g.*, *Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165-66 (2002) (striking down ordinance requiring permits for canvassers); *Thomas v. Collins*, 323 U.S. 516, 540 (1945) (invalidating registration requirement for labor organizers).[20]

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[20] In its rulemaking, the FEC itself freely acknowledged that mandating disclosure of expenditures before the relevant communications are aired could raise "constitutional issues." Electioneering Communications, 67 Fed. Reg. 51,137, 51,141 (Aug. 7, 2002).

The district court erred only by concluding that appellants' challenge to the analogous "advance notice" requirement in section 212 was unripe in light of the FEC's implementing regulation. *See* Supp. App. 130sa-134sa (Kollar-Kotelly and Leon). That regulation "construes" section 212 so as *not* to require advance disclosure. *See* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 452-53 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.10). As Judge Henderson suggested in dissent, *see* Supp. App. 383sa n.154, not only is section 212 not "easily susceptible" to such a saving construction, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975), but the construction advanced in the regulation is flatly contrary to the language of the statute itself. Section 212 expressly requires disclosures not just of independent expenditures themselves, but also of "contracts to make" such expenditures. The Court should accordingly conclude that appellants' challenge to the "advance notice" provision in section 212 is ripe, and that the provision is invalid for the same reasons as its counterpart in section 201.

B. The "Coordination" Provisions Are Unconstitutional.

The district court erred by rejecting appellants' challenges to BCRA's "coordination" provisions. The heart of those provisions is section 214, which broadens the definition of "coordination" to treat expenditures made in agreement or consultation with political party committees, like candidates, as coordinated, *see* BCRA § 214(a); repeals prior FEC regulations defining coordination, *see* BCRA § 214(b); and commands the FEC to promulgate new regulations that do "not require agreement or formal collaboration to establish coordination," BCRA § 214(c). Because those provisions allow an expenditure to be classified as "coordinated" (and thereby subject to the limits on contributions) even absent agreement between the spender and the candidate or party committee, they

violate the First Amendment.[21]

The district court erred by concluding that appellants' challenge to one subsection, section 214(c), was nonjusticiable. *See* Supp. App. 144sa-156sa (Kollar-Kotelly and Leon). Since appellants' contention is that agreement is *always* required before coordination can constitutionally be found, and since section 214(c) *commands* the FEC to promulgate a regulation that does *not* require agreement to establish coordination, *no* FEC regulation (including, as it turns out, the regulation subsequently promulgated) could pass constitutional muster. Appellants' challenge to section 214(c) is therefore appropriate for judicial resolution at this time, and appellants would suffer hardship absent review because of the risk that current activity could render future expenditures "coordinated." *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).[22]

When considered as an integrated whole, section 214 violates the First Amendment. Although this Court has upheld the constitutionality of treating coordinated expenditures as contributions, *see Buckley*, 424 U.S. at 47, it has never defined the constitutional outer bounds of coordination, though it has suggested that coordination turns on whether expenditures are "potential alter egos for contributions" or "functionally true expenditures," *Colorado II*, 533 U.S. at 463, and made clear that coordination means "actual coordination as a matter of fact," *Colorado I*, 518 U.S. at 619 (plurality opinion). In other words, "simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Id.* at 621-22.

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[21] Section 202 applies the BCRA's "coordination" provisions to disbursements for electioneering communications. If this Court strikes down the "electioneering communications" provisions of BCRA, it should strike down section 202 as well.

[22] Because of this risk, appellants plainly also have standing. *See, e.g.*, *Bigelow v. Virginia*, 421 U.S. 809, 816-17 (1975).

Section 214 redefines coordination to sweep well beyond even implicit "wink and nod" agreements between the spender and the candidate or political party, *see, e.g.*, *Colorado II*, 533 U.S. at 442; *Colorado I*, 518 U.S. at 614 (plurality opinion), and include even mere discussions with a candidate or political party. Defining coordination so broadly, however, would chill political actors from engaging in constitutionally protected petitioning of officeholders, officials, and candidates. As a lower court noted in the decision that inspired the FEC regulations BCRA purports to overrule, "*considerable* coordination will convert an expressive expenditure into a contribution[,] [but] the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in *some* consultations or coordination with a federal candidate." *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 91 (D.D.C. 1999) (emphases added).

As Judge Henderson noted in her dissent below, the net effect of BCRA's broadening of the definition of coordination will be to "tote the same impermissible restrictions [from other parts of BCRA] through the back door." Supp. App. 385sa. While the concept of coordination is readily defensible, BCRA's broadening of the definition of coordination is not. BCRA's "coordination" provisions should be invalidated.

C. The "Attack Ad" Provision Is Unconstitutional.

Section 305, entitled "Limitation on Availability of Lowest Unit Charge for Federal Candidates Attacking Opposition," is one of BCRA's most obviously unconstitutional provisions. It conditions the "lowest unit charge" (a lower advertising rate made available to candidates) upon a candidate's "written certification" that he or she will "not make any direct reference to another candidate for the same office" in the ad sought to be aired, or even in a different ad. Candidates can be exempted from these requirements, but only if they include specific disclosures in their ads — disclosures that are not required for ads that do not refer to (and therefore presumably "attack")

opponents.[23]

The district court held that plaintiffs — including Senator McConnell — lacked standing to challenge section 305. *See* Supp. App. 467sa-472sa (Henderson). However, as the court acknowledged, Senator McConnell testified without contradiction that he intended to run campaign ads critical of his opponents in the future. *See id.* at 470sa. And he further testified that he had run such ads in his most recent campaign. *See* 2 PCS/McC 8 (McConnell). At a minimum, that is more than sufficient to meet this Court's relaxed requirements for standing in First Amendment challenges. *See, e.g.*, *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984); *Gooding v. Wilson*, 405 U.S. 518, 520 (1972).[24]

On the merits, section 305 is a viewpoint-based regulation, subject to "most exacting" First Amendment scrutiny. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391

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[23] Under section 305, television ads referring to opponents qualify for the lowest unit charge only if they include an image of the candidate for four seconds and a printed statement identifying the candidate, indicating that the candidate approved the ad, and stating that the candidate's authorized committee paid for the ad. Radio ads referring to opponents qualify for the lowest unit charge only if they include a "personal audio statement by the candidate that identifies the candidate, the office the candidate is seeking, and indicates that the candidate has approved the broadcast."

[24] The district court contended that relaxed First Amendment standing rules "are applicable only to claims of First Amendment *overbreadth*." Supp. App. 471sa (Henderson). But relaxed standing rules have often been applied in cases involving claims other than traditional overbreadth. *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 445 n.5 (1972) (equal protection); *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965) (prior restraint). In any event, while a majority of the cases imposing relaxed standing requirements may involve claims of overbreadth, the basic rationale in all of these cases — that "the threat of enforcement * * * may deter or chill constitutionally protected speech," *Virginia v. Hicks*, 123 S. Ct. 2191, 2196 (2003) (internal quotation omitted) — is plainly applicable here.

(1992). Section 305 should be stricken because it imposes an unconstitutional condition (namely, the requirement that a candidate either engage in advertising that does not reference an opponent, or include governmentally required speech) on the receipt of a governmental benefit (the lowest unit charge). *See, e.g., Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547-48 (2001); *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674-75 (1996); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

In addition, the defendants have failed to articulate any legitimate governmental interest to justify stricter regulation of ads that "attack" (or even mention) one's opponent.[25] Although the federal defendants have proffered several governmental interests purportedly served by section 305 — including that it "provides voters with important additional information to consider in evaluating" a candidate, Fed. Defts. D. Ct. Opening Br. 218; that it generally serves the purpose of preventing fraud and corruption, *see id.* at 216-17; and that it requires candidates to "own up to" their sponsorship of ads, Fed. Defts. D. Ct. Reply Br. 89 — at no time have defendants been able to link these purported objectives to the actual requirements of the statute. Because section 305 punishes "vehement, caustic, and sometimes unpleasantly sharp attacks on * * * public officials," *New York Times Co. v. Sullivan*, 376 U.S. at 270, without serving any legitimate government interest, it should be struck down.

D. The "Forced Choice" Provision Is Unconstitutional.

The district court unanimously, and correctly, struck down BCRA's "forced choice" provision. That provision, section 213, forces a political party to choose, once a candidate is

[25] Even if the prevention of so-called "attack ads" were a permissible governmental objective, section 305 is unconstitutionally overbroad, because it would apply even to an ad that did no more than identify the opposing candidate. Defendants have not articulated, and cannot articulate, a governmental interest in regulating such ads.

nominated, whether to make independent expenditures on behalf of the candidate, or to make coordinated expenditures, subject to the statutory limits on coordinated expenditures applicable to political parties. For purposes of this provision, "all political committees established and maintained by a national political party * * * and all political committees established and maintained by a State political party" are treated as a single committee. Under section 213, therefore, if one committee of a political party chooses to make coordinated expenditures (subject to the relevant statutory limits) on behalf of a nominated candidate, all other committees of that party are barred from making independent expenditures, and vice versa.

As the district court noted, section 213 "flies in the face" of this Court's holding in *Colorado I*, and is therefore unconstitutional. Supp. App. 1170sa (Leon). In *Colorado I*, of course, the Court held that political party committees, like other entities, have an unfettered First Amendment right to engage in independent expenditures. *See* 518 U.S. at 614-19 (plurality opinion). Notably, in *Colorado I*, the party committee at issue not only was making independent expenditures, but had already effectively made the maximum permissible amount of coordinated expenditures as well. *See id.* at 612. The net effect of section 213 is to condition political parties' receipt of a "benefit" — specifically, the right to make a certain amount of coordinated expenditures, which is not constitutionally required, *see Colorado II*, 533 U.S. at 441-45[26] — on their agreeing to forgo their constitutional right to make independent expenditures. Such a rule severely burdens the political parties' constitutional rights, and indeed imposes an unconstitutional condition on them. *See, e.g., Perry*, 408 U.S. at 597.

These constitutional problems are only exacerbated by the fact that section 213 treats all of the committees of a political

[26] The provisions of FECA regarding the public financing of presidential campaigns, by contrast, place conditions on the *receipt of public funds*.

party as a single committee. Section 213 therefore *compels* party committees to work together to decide whether to make independent or coordinated expenditures — and potentially leaves a party committee at the mercy of another committee over which it has no control (if, for instance, one county committee decides to make coordinated expenditures without consulting with another county committee). As Judge Henderson noted, this *compelled* association "is especially perverse in light of the fact that [BCRA] elsewhere severely *restricts* [party committees] from working together to raise certain kinds of funds and to decide how such funds should be used." Supp. App. 397sa; *see generally supra* Part I.A.1.c (discussing Title I provisions barring joint fundraising). Section 213's forced association, no less than Title I's forced disassociation, violates the First Amendment. *See, e.g.*, *California Democratic Party*, 530 U.S. at 574-75.

Defendants have argued that section 213 is necessary because it is "tenuous" to claim that expenditures are truly independent when an entity is also making coordinated expenditures. *See, e.g.*, Intervenor Defts. J.S. 28. To the extent that is true, section 213 is woefully underbroad, since it continues to allow political parties to make simultaneous independent and coordinated expenditures (albeit subject to the lower limits applicable to individuals and PACs), and allows individuals and PACs to do so as well. Moreover, defendants' argument boils down to an argument that, where a political party makes *some* coordinated expenditures on behalf of a candidate, all *other* expenditures by that party should be presumed to be coordinated. This is little more than a variation on the contention that all expenditures should be presumed to be coordinated — a contention made by the FEC, and rejected by the Court, in *Colorado I*. *See* 518 U.S. at 619-23 (plurality opinion).

Like other provisions of BCRA, section 213 reflects Congress' disregard, even contempt, for this Court's campaign finance jurisprudence. It should be invalidated.

E. The "Minors" Provision Is Unconstitutional.

The district court also unanimously struck down section 318. That provision bans anyone under age 18 from contributing, in any amount, to a federal candidate, or giving federally regulated or state-regulated funds, in any amount, to a national, state, or local political party committee.

Section 318 is so plainly unconstitutional, it is difficult to know where to start. It is indisputable that minors, like adults, have First Amendment rights. *See, e.g., Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969). Although this Court has recognized that the government has broader authority to regulate minors than adults, it has done so primarily when the government is acting *in loco parentis* to safeguard children from harm. *See, e.g., Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682-83 (1986); *Bellotti v. Baird*, 443 U.S. 622, 634 (1979); *Ginsberg v. New York*, 390 U.S. 629, 637-38 (1968). Here, there can be no argument that section 318 is necessary to protect children: there is no evidence, for instance, that candidates or parties are somehow manipulating children into giving them money. For purposes of section 318, therefore, minors are fully protected by the First Amendment.

Because section 318 does not merely *limit* contributions by minors, but instead *bans* them altogether, it is subject to strict scrutiny. *See Buckley*, 424 U.S. at 21. Section 318 cannot survive that scrutiny, or indeed even the lower scrutiny applicable to limits on contributions. The only governmental interest on which defendants now rely is the supposedly compelling interest in preventing circumvention of contribution limits by parents who supposedly channel contributions through their children. *See* Fed. Defts. Opp. to Mot. of Echols Pltfs. to Aff. 4. As the district court noted, however, such channeling is already barred under preexisting law, *see* 2 U.S.C. § 441f, and defendants' evidence that channeling is nevertheless taking place is "remarkably thin." Supp. App. 463sa (Henderson); *accord id.* at 1011sa (Kollar-Kotelly). Moreover, to the extent

that channeling is actually occurring, it could be regulated by a host of more narrowly tailored means, including (1) banning contributions by minors only when their parents have "maxed out" on their own contribution limits; (2) banning contributions by minors only when the contributed funds were given to the minors by others, not earned by the minors themselves; (3) requiring disclosure of the age of donors, so as to facilitate enforcement of the preexisting anti-channeling law; (4) imposing a cap on contributions by minors, or on contributions by a single family; (5) employing a rebuttable presumption regarding the voluntariness of contributions by minors, as the FEC itself proposed; and (6) barring contributions only by those children too young to be capable of making knowing and voluntary contributions. Presented with this tray full of scalpels, Congress opted for a machete instead.[27]

Section 318 also violates constitutional principles of equal protection, to the extent that it regulates speech by minors but not identical speech by other entities, and federalism, to the extent that it regulates even donations of state-regulated funds. Above all, however, the complete ban on contributions by minors in section 318 "reflects a profound congressional disregard for the First Amendment and settled jurisprudence thereunder." Supp. App. 467sa (Henderson). The district court's decision to strike down section 318 should be affirmed.

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[27] Defendants argue that the right of minors to make contributions should be limited because minors lack the right to vote, *see* Fed. Defts. Opp. to Mot. of Echols Pltfs. to Aff. 2-3; the right to serve on juries or bring lawsuits, *see id.* at 3 n.1; and the right to enter into binding contracts or alienate property, *see id*. at 3-4. The First Amendment, however, is not somehow coextensive with the Twenty-Sixth Amendment, and does not contain a hitherto-undiscovered limitation to individuals with otherwise plenary legal capacity. Moreover, while it is true that Congress has prohibited contributions by foreign nationals (who, like minors, lack the right to vote), *see id.* at 9 n.4, that restriction, unlike the restriction on contributions by minors, is justified by the ordinary governmental interest in preventing actual or apparent corruption.

F. The "Broadcaster Records" Provision Is Unconstitutional.

The district court unanimously determined that section 504 of BCRA is unconstitutional. That provision compels broadcasters to collect and publicly disclose detailed records related to (1) requests by candidates to broadcast any ads and (2) requests by private citizens and groups to broadcast ads related to "any political matter of national importance," including but not limited to communications relating to any "election to Federal office" or any "national legislative issue of public importance."[28] As the district court unanimously found, section 504 serves no legitimate governmental interest and thus violates the First Amendment. In the alternative, as the district court suggested, section 504 is unconstitutionally vague.

As a preliminary matter, Judge Henderson recognized that section 504 is unconstitutional on its face because, like sections 201 and 311, it requires disclosure of expenditures for speech that does not constitute express advocacy. *See* Supp. App. 377sa-378sa. Indeed, defendants have freely conceded that, in terms of covered subject matter, section 504 sweeps even more broadly than the "electioneering communications" disclosure provisions in section 201. *See* Fed. Defts. Opp. to Mot. of NAB to Aff. 7 n.1.

Even if this Court were to conclude that the government could require disclosures related to speech other than express advocacy, section 504 would still not survive exacting scrutiny. Defendants have identified an ever-changing list of purported governmental interests served by section 504, including that it provides "public access to important information about political

[28] These records must include the acceptance or rejection of requests for advertisements; the name of the person making the requests and other contact information; a list of the chief executive officers or members of the executive committee or board of directors of the entity making the request; the date and time on which the communication is aired; the rate charged; the class of time purchased; and the issue to which the communication "refers."

broadcasts," Fed. Defts. D. Ct. Opening Br. 218; that it assists voters who have "difficulty identifying the true sponsors of issue ads," *id.*; and that it enables "the public to evaluate whether broadcasters are processing requests in an evenhanded fashion," Fed. Defts. J.S. 29. Yet defendants have never explained how such generalized interests satisfy the exacting scrutiny warranted by the First Amendment.

The district court found that defendants "provided *no evidence* that section 504 serves *any* of the government interests" that were deemed sufficient in *Buckley* to justify compelled disclosure of communications about federal candidates. Supp. App. 1182sa (Leon) (emphasis added); *accord id.* at 379sa (Henderson), 1011sa (Kollar-Kotelly). Moreover, the district court concluded that section 504's disclosure requirements for "noncandidate-focused" ads "are *even more* difficult to justify" and that "the defendants * * * provided *no* evidence" that interest groups posed a threat to justify the comprehensive disclosures mandated by section 504. *Id.* at 1183sa (Leon) (emphasis added); *accord id.* at 1011sa (Kollar-Kotelly).

Section 504 imposes a wealth of burdensome and invasive requirements upon broadcasters and political speakers alike. *See id.* at 1011sa (Kollar-Kotelly), 1184sa (Leon). In this regard, the provision is particularly intolerable under the First Amendment because it forces disclosure to the government of the identity and the message (even if it is never broadcast) of private individuals and groups engaged in advocacy about important, often controversial, social and political issues. *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958) ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute * * * a restraint on freedom of association * * *.").

Finally, all three members of the district court correctly suggested that section 504 is void for vagueness because its application turns on the wholly ambiguous phrases "political

matter of national importance" and "national legislative issue of public importance." Supp. App. 256sa (Henderson), 1011sa (Kollar-Kotelly), 1183sa n.141 (Leon). The inability of broadcasters to determine when the disclosure requirements of section 504 will apply is particularly troublesome because a violation of the provision will subject broadcasters to substantial fines or burdensome inquiries from the FCC. Such vagueness is plainly intolerable under both the First Amendment and the Due Process Clause of the Fifth Amendment. *See, e.g.*, *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 604 (1967); *Connally*, 269 U.S. at 391.

Section 504 represents a broad and aimless infringement of the rights of broadcasters and political speakers alike. The district court's decision to strike down section 504 should be affirmed.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed in part and reversed in part, and the challenged provisions of BCRA declared unconstitutional.

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