IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al., Plaintiffs, FEDERAL ELECTION COMMISSION, et al., Defendants.	**CONSOLIDATED ACTIONS** **Civ. No. 02-0582** **(CKK, KLH, RLL)**
NATIONAL RIFLE ASSOCIATION, et al., Plaintiffs, v. FEDERAL ELECTION COMMISSION, et al., Defendants.	**Civ. No. 02-0581** **(CKK, KLH, RLL)**

BRIEF OF THE NATIONAL RIFLE ASSOCIATION AND THE NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND

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

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

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

Dated : November 6, 2002

STATEMENT

The National Rifle Association (the "NRA") is a nonprofit voluntary membership corporation organized under the laws of New York and qualified as tax-exempt under 26 U.S.C. § 501(c)(4). Its 4.3 million members are individual Americans bound together by a common desire to ensure the preservation of the Second Amendment right to keep and bear arms. As announced in its bylaws, the organization's defining purpose is "[t]o protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen . . . to . . . enjoy the right to use arms." NRA Appendix 106 ("App."). Additionally, the NRA sponsors numerous gun safety programs, shooting competitions, and other activities designed to foster the exercise and enjoyment of the rights it seeks to protect. *See* App. 1 (LaPierre Decl.) at ¶ 2. The NRA Political Victory Fund (the "PVF") is a political committee within the meaning of 2 U.S.C. § 431(4) and is a separate segregated fund of the NRA.

As discussed in detail in the pages that follow, the NRA, in the course of defending the constitutional rights of its members, constantly engages in political speech on issues of vital importance to its mission. In 2000, it paid for more speech on television – over 300,000 minutes – than all other issue advocacy groups and unions combined. *See* App. 4 (LaPierre Decl.) ¶ 10. The NRA's speech furthers a variety of purposes: the NRA educates and informs its members and the public on specific legislative threats to Second Amendment rights as well as broader political and cultural pressures on gun rights; the NRA also defends itself against attacks on its positions and reputation made by the media and anti-NRA politicians; and the NRA recruits members and raises funds throughout the year. In almost all of this speech, the NRA refers to federal officeholders and candidates. And yet none of the speech that furthered these purposes in 2000 was intended to influence a federal election. *See* App. 5-6, 17, 21-22 (LaPierre Decl.) ¶¶ 14-15,

40, 50. To be sure, in 2000 the NRA also aired approximately 30,000 minutes of speech documenting Vice President Gore's hostility to the Second Amendment. *See* App. 108. In airing this political speech the NRA sought, among other purposes, to inform the public of the grave threat that Mr. Gore's presidential candidacy posed to Americans' Second Amendment rights. *See* App. 20 (LaPierre Decl.) ¶ 45.

The NRA funds its speech almost exclusively with dues and contributions from individual members. The organization does not accept business corporations as members, and the contributions that it receives from such corporations are negligible (approximately $385,000 in 2000), especially in relation to its income from the dues and contributions of individual members (approximately $140 million in 2000). *See* App. 198; App. 23 (LaPierre Decl.) ¶ 56. The average annual contribution to the NRA is $30. App. 23 ¶ 6. In short, the NRA is an organization comprised of ordinary Americans of moderate means who join their voices in a common effort to defend a freedom that is precious to them.

The Bipartisan Campaign Reform Act ("BCRA") is designed to eliminate the collective voice of NRA members from the public debate on issues of vital importance to them during the period when their speech matters most — the period immediately preceding elections for federal office. The NRA challenges only Title II of BCRA, which criminalizes the expenditure of corporate or union treasury funds for "electioneering communications." Specifically, corporations and unions are prohibited from paying for any television or radio broadcast that airs 30 days before a primary or 60 days before a general election and that "refers to a clearly identified candidate for Federal office." *See* Section 201(a) of BCRA. The prohibition extends to any communication targeted to more than 50,000 persons residing within the electoral district in which the election is to take place. *See id.*

ARGUMENT

I. THE "ELECTIONEERING COMMUNICATIONS" BANNED BY BCRA ARE ABSOLUTELY PROTECTED BY THE FIRST AMENDMENT.

> *These groups often run ads that the candidates themselves disapprove of. Further, these ads are almost always negative attack ads and do little to further beneficial debate and a healthy political dialog. To be honest, they simply drive up an individual candidate's negative polling numbers and increase public cynicism for public service in general.*
>
> -- Senator John McCain (App. 54)

Thus did Senator McCain urge enactment of BCRA's provision prohibiting "these groups" from ever again airing an advertisement critical of him during an election campaign. Title II of BCRA creates a new crime and a new class of felons: corporations and unions that engage in "electioneering communications," which are defined as "[a]ny broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for federal office . . . 60 days before a general, special, or runoff election for the office sought by the candidate; or . . . 30 days before a primary or preference election . . . ." BCRA § 201(a) (adding new FECA § 304(f)). To be sure, BCRA's ban on electoral speech is indifferent to whether the ads seek to bury Caesar or to praise him; it criminalizes positive ads as well as negative. But the sponsors and supporters of Title II in Congress made no bones about their design. One supporter after another openly echoed Senator McCain's complaint against "negative attack ads":

- Senator Wellstone: "I think these issue advocacy ads are a nightmare. I think all of us should hate them . . . . We could get some of this poison politics off television." (App. 55-56).

- Senator Cantwell: "[Title II] is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves." (App. 57).

- Senator Jeffords: "[Issue ads] are obviously pointed at positions that are taken by you saying how horrible they are . . . . The opposition comes forth with this barrage [of ads] and you are totally helpless." (App. 58).

- Senator Daschle: "The 'issue ads' are more attack-oriented and personal." (App. 59). "I believe that negative advertising is the crack cocaine of politics." (App. 60).[1]

And in defending the measure as an intervening party to this case, Senator McCain confirmed that Congress specifically targeted speech critical of candidates for federal office: "The real world is that the overwhelming majority of ads that we see running today are attack ads that are called issue ads, which are direct, blatant attacks on the candidates . . . . We don't think that's right." App. 92 (Sen. McCain Depo.) at 100.[2]

---

[1] This is but a small sampling of Senators' floor statements decrying "negative" and "sham" issue ads. *See, e.g.*, App. 61-62 (*Sen. McCain*: Issue ads have "demeaned and degraded all of us because people don't think very much of you when they see the kinds of attack ads that are broadcast on a routine basis."); App. 63 (*Sen. McCain*: "I hope that we will not allow our attention to be distracted from the real issues at hand – how to raise the tenor of the debate in our elections and give people real choices. No one benefits from negative ads. They don't aid our Nation's political dialog."); App. 58 (*Sen. Jeffords:* "We are talking about a system which has developed over the past couple of years which has seriously imposed upon us unfairness as far as candidates are concerned who find themselves faced with ads . . . to change the election. . . ."); App. 64 (*Sen. Jeffords*: Ads mentioning him "totally distort the facts and say terrible things. You watch a 20 percent lead keep going down and you do not know who is putting them on. You know what they are saying is totally inaccurate, but you have no way to refute it . . . ."); App. 65 (*Sen. Wellstone*: "Overwhelmingly they are negative, they can be vicious, they are poison politics."); App. 66 (*Sen. Collins*: "[I]t is no surprise that bogus issue ads almost always carry a negative message, something which all in this body purport to decry."); App. 67 (*Sen. Bingaman*: "Many of these ads will contain misrepresentations, distortions, and outright untruths."); 143 CONG. REC. S10,271 (daily ed. Oct. 1, 1997) (*Sen. Kennedy*: "Election campaigns have become more and more negative, with misleading TV spots that traffic in half-truths or outright falsehoods."); App. 68 (*Sen. Reed*: "Phony issue advertisements are unconstrained, cropping up suddenly, without attribution, to strike at candidates."); App. 69 (*Sen. Dodd*: "[T]he overwhelming majority of these ads are the so-called attack ads. Usually, they are very vicious . . . ."). The House legislative history, though less extensive, is of the same piece. *See, e.g.*, App. 70 (*Rep. Allen*) ("If one is a TV viewer and they like endless streams of deceptive issue anonymous issue ads in election years, oppose reform; but if one prefers honest and less frequent ads, support Shays-Meehan"); App. 71 (*Rep. Edwards*); App. 72 (*Rep. Capps*); App. 73 (*Rep. Roukema*); App. 74 (*Rep. Baird*); App. 75 (*Rep. Baird*); App. 76 (*Rep. Borski*); App. 77 (*Rep. Allen*); App. 78 (*Rep Hoeffel*).

[2] The intervening defendants consistently echoed this theme. *See, e.g.*, App. 95 (McCain Depo.) at p. 127 ("What's relevant here is what happens in American politics, as I keep going back to. And what's happening in America today as we speak is that the airwaves, both television and radio, are flooded with negative attack ads in the guise of being issue ads."); App. 89

When viewed against the long and largely doleful history of governments among men, BCRA's ban on "electioneering communications" is entirely unremarkable — just another example of the "standard practice" of the governors "us[ing] the criminal law to insulate themselves from disagreement" by the governed. Anthony Lewis, *Make No Law* 52 (Random House, 1991). As Professor Harry Kalven, Jr., observed, the idea of seditious libel has always been "the hallmark of closed societies throughout the world. Under it criticism of government is viewed as defamation and punished as a crime. The treatment of such speech as criminal is based on an accurate perception of the dangers in it; it is likely to undermine confidence in government policies and in the official incumbents. But political freedom ends when government can use its powers and its courts to silence its critics." Harry Kalven, Jr., *A Worthy Tradition* 63 (1988).

Even in our open democratic society, BCRA's ban on electoral speech is not without its chilling historical antecedents. The infamous Sedition Act of 1798, like Title II of BCRA, was specifically aimed at stifling speech critical of the government and its elected members.[3] Propo-

---

(Jeffords Depo.) at p. 76 ("And if [attack ads are] run and you can't respond, which is one of the big purposes of our law, then you're defenseless."); App. 84 at p. 7 ("I know my campaigns had a barrage of ads that was very close to the election, for which I had no opportunity to respond and realized that this was a serious problem."); App. 85 at p. 15 ("**Q:** What does ['sham issue ads'] mean, Senator? **A:** 'Sham' means incorrect or misleading, in my mind. Probably both.); App. 87 at p. 22 ("**Q:** Is it your understanding that the disqualification applies to only inaccurate or misleading information? . . . . **A:** Yes."); App. 97 (Meehan Depo.) at p. 54 ("An ad that's designed to throw mud at a candidate is of concern to anyone who is a federal officeholder. **Q:** But is the reason they are concerned . . . that their constituents may find the message of the ad persuasive? **A:** In some instances, yes, the constituents may believe the information that's contained in the ad. Oftentimes, in a 30-second ad it is very difficult to get across any substance. It is very easy to take bits and pieces of information, say something negative about anyone."); App. 101 (Shays Decl.) ¶ 13 ("I personally feel that some of the ads run in 2000 attacking the character of President George W. Bush were inappropriate, including some that insinuated that he is a racist.")

[3] *See* App. 109-10. The Act made it a crime, punishable by a $5000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . with intent to defame . . . or to bring them, or either of them, into con-

nents of the Sedition Act in the 5th Congress, like BCRA's supporters in the 107th, decried "malicious calumnies against Government," speech designed to "inflame . . . constituents against the Government," publications "calculated to destroy . . . every ligament that unites . . . man to society and to Government," and "representations [that] are outrages on the national authority, which ought not to be suffered." App. 111-13. Opponents of the Sedition Act in Congress, like opponents of BCRA, argued then, as we do now:

> This bill and its supporters suppose, in fact, that whoever dislikes the measures of Administration and of a temporary majority in Congress, and shall, either by speaking or writing, express his disapprobation and his want of confidence in the men now in power, is seditious, is an enemy, not of Administration, but of the Constitution, and is liable to punishment . . . . If you put the press under any restraint in respect to the measures of members of Government; if you deprive the people of the means of obtaining information of their conduct, you in fact render their right of electing nugatory; and this bill must be considered only as a weapon used by a party now in power, in order to perpetuate their authority and preserve their present places.

App. 114.[4]

---

tempt or disrepute; or to excite against them, or any of them, the hatred of the good people of the United States." 1 Stat. 596, *quoted in New York Times Co. v. Sullivan*, 376 U.S. 254, 273-74 (1964).

[4] Opponents of BCRA in Congress arrestingly made the same points. *See, e.g.*, App. 79 (*Rep. DeLay*: "[Title II] shuts down political speech. It shuts down the opportunity to participate in elections. In a country the size of the United States, an individual citizen has very little chance of joining the political debate without banding together with others, so by blocking citizens' groups from participating in days leading up to an election, Shays-Meehan removes a very vital tool that citizens can use to hold elected officials accountable."); App. 80 (*Sen. DeWine*: Under Title II "[i]t would be illegal for citizens of this country, at the most crucial time, when free speech matters the most, when political speech matters the most--that is, right before an election--this Congress would be saying, and the 'thought police' would be saying, the 'political speech police' would be saying that you cannot mention a candidate's name; you cannot criticize that candidate by name . . . . It restricts citizens' ability to use the broadcast media to hold incumbents accountable for their voting records."); App. 81-82 (*Sen. Santorum*: "If you do not think this is an incumbent protection plan, I guarantee you have not been listening. This is all about protecting incumbents. Do my colleagues think we are going to pass something which helps folks who run against us? How many folks are going to say: I like being here, but I want to give the guy who takes me on a better shot at me? . . . All you bothersome people out there in America who believe you have some right to participate in my election, it keeps you at home . . . . That is the first thing this does -- it shuts you up because you know what?--you are an annoy-

The Sedition Act never reached the Supreme Court, but in *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964), the Court unanimously acknowledged that the Act, "because of the restraint it imposed upon criticism of government and public officials," had been universally condemned "in the court of history" as a blatant and shameful infringement on the freedom of speech at a time when the First Amendment's ink was barely dry. If history's judgment on the Sedition Act is correct, then BCRA's modern version of it must fall.

Nor can BCRA's ban on electoral speech be reconciled with the Supreme Court's decision in *New York Times v. Sullivan*. At the heart of that case was a political advertisement run in the New York Times by an "interest group" — the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South." The ad was found to refer to an elected official and to falsely criticize his handling of civil rights protests in Montgomery, Alabama. The issue was whether the First Amendment "limit[s] a State's power to award damages in a libel action brought by a public official against critics of his official conduct." *Id.* at 256. Emphasizing that "[i]t is as much [the citizen's] duty to criticize as it is the official's duty to administer," *id.* at 283, the Court held that the First Amendment prohibits such an action unless the public official can show that the defamatory statement was made with actual malice. The *Sullivan* Court's reasoning is equally dispositive of Title II of BCRA.

At the heart of the Court's unanimous ruling was its recognition that *political speech* is the lifeblood of our representative democracy and that "debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270. That the political speech at issue was contained in a paid advertisement was irrelevant; the First Amendment protects "persons who do not them-

---

ance. You guys go out there and say things I do not like, I do not agree with, and it may not be true, so we are just going to shut you up. That is the first thing this bill does.")

selves have access to publishing facilities" no less than it protects the press. *Id.* at 266. Nor did the advertisement's false and defamatory nature suffice to deprive it of First Amendment protection, for "erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.' " *Id.* at 272 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). And the *Sullivan* Court emphasized, over and over again, that speech concerning the conduct of public officials and candidates for public office is essential to the vitality of democracy itself. Quoting Mr. Madison's Report on the Virginia Resolutions denouncing the Sedition Act, the Court said this:

> Let it be recollected ... that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.

Id. at 275.[5]

In the record before this Court are hundreds, perhaps thousands, of the "negative attack ads" that BCRA seeks to silence. To dispose of this case, it is enough to note simply that *every single one of them* would be protected by the First Amendment from a libel action brought by the attacked candidate. But BCRA cuts even deeper into the heart of the First Amendment than did the defamation action invalidated in *Sullivan.* BCRA goes beyond just rendering speech actionable in tort; it *bans* speech outright and punishes the speaker with imprisonment. BCRA goes

---

[5] The Court has consistently held "that legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 50 (1976), citing *Mills v. Alabama*, 384 U.S. 214 (1966), and *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). In *Tornillo*, the Court invalidated a state law requiring newspapers to make space available for political candidates to reply to criticism. If Congress cannot constitutionally mandate a right to commandeer the Nation's airwaves to reply to criticism broadcast during an election campaign, then surely it cannot order that the criticism be removed from the airwaves altogether.

beyond just reaching and restraining false speech; it reaches and bans *the truth*. BCRA goes beyond just restraining political speech, it targets *electoral* speech about candidates for public office during the weeks before citizens go to the polls. Indeed, if the very political advertisement at issue in *Sullivan* were broadcast today by a political advocacy organization, say the NAACP, during an election campaign by Mr. Sullivan for federal office, that organization would be guilty of a crime and subject to criminal liability under BCRA.

Thus, it simply could not be clearer that BCRA's ban on electioneering communications violates the most fundamental postulates of the First Amendment. The same conclusion flows from the Supreme Court's campaign finance cases, as we demonstrate in detail below.

II. THE NRA'S "ELECTIONEERING COMMUNICATIONS" POSE NO DANGER OF ACTUAL OR PERCEIVED CORRUPTION OF FEDERAL OFFICEHOLDERS.

Before discussing the Supreme Court's campaign finance cases,[6] we turn first to an analysis of the compelling government purpose offered by BCRA's supporters to justify enactment of it ban on expenditures for "electioneering communications": the prevention of actual or perceived corruption of federal officeholders.[7] As noted, *Sullivan* was predicated on the self-evident proposition that unfettered discussion of the merits of political issues and candidates is so vital to our representative democracy that to engage in such speech is not only the citizen's constitutional right, but his civic duty. Yet the sole premise of BCRA's speech restriction is that electoral speech poses the threat of actual or perceived corruption of the political process because

[6] The McConnell Plaintiffs have exhaustively and compelling demonstrated that Title II of BCRA is in fatal conflict with *Buckley*, *see* McConnell Br. at II.C.1, and so we will not reiterate that analysis here.

[7] "[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting) (quoting *FEC v. NCPAC*, 470 U.S. 480, 496-97 (1985)). "The hallmark of corruption is the financial '*quid pro quo*': dollars for political favors." *NCPAC*, 470 U.S. at 497.

it could obligate the benefited elected official to the speaker. Given that the First Amendment bars government from enforcing a common-law libel action by a political candidate because such a cause of action may chill public discussion of matters vital to the democratic process, how can the First Amendment permit government to criminalize speech about political candidates on the sole basis that the speech may render the benefited candidate, if elected, beholden to the speaker?

BCRA's notion of corruption is nothing the Framers would recognize. Although the Framers understood and feared genuine "cabal, intrigue and corruption," their antidote was not *less* debate and democracy -- it was *more*: to make elected officials directly dependent upon "an immediate act of the people of America." THE FEDERALIST No. 68 (Hamilton) at 459. This is what elections are all about:

> Is it not natural that a man who is a candidate for the favour of the people and who is dependent on the suffrages of his fellow-citizens for the continuation of his public honors should take care to inform himself of their dispositions and inclinations and should be willing to allow them their proper degree of influence upon his conduct?

THE FEDERALIST No. 35 (Hamilton) at 221. The Framers believed that a "dependence on the people" is a *good* thing: it is "the primary control on the government." THE FEDERALIST No. 51 (Madison) at 349. Therefore, electioneering communications that promote or denounce candidates, that seek to hold those candidates accountable to their constituents, are the most important form of political expression. If political speech is the core of the First Amendment, then speech about whom to elect is the axis about which that core rotates.

And the best way for citizens to ensure that candidates for office are informed of the electorate's "dispositions and inclinations" is for those ordinary citizens to band together to make themselves heard. In "democratic nations" where the "equality of conditions has swept away" the aristocracy as leaders of public life, the role of "circulati[ng]" "opinions or sentiments" to

"the multitude" naturally falls to "associations" of the people that pool their resources to access the means for mass communication. 2 A. de Tocqueville, DEMOCRACY IN AMERICA 109 (P. Bradley ed. 1948). Such "associations" are essential for vigorous public debate, for otherwise the government itself would have the only voice loud enough to be heard, and that would be profoundly "dangerous" to democracy. *Id.*

It is therefore not surprising that the Supreme Court has distinguished in this regard between political contributions and political spending, holding in *Buckley* and its progeny that FECA's "limitations on contributions to a candidate's election campaign [are] generally constitutional, but that limitations on election expenditures [are] not." *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 437 (2001) ("*Colorado II*"). The reasons for this distinction are twofold: (1) "[r]estraints on expenditures generally curb more expressive and associational activity than limits on contributions do," *id.* at 440; and (2) *independent* political expenditures do not carry the same danger that they will be made "as a *quid pro quo* for improper commitments from the candidate." *Id.* at 441, quoting *Buckley*, 424 U.S. at 47.

There is an additional reason counseling in favor of extreme judicial skepticism of the claim that a restriction on electoral speech is warranted to prevent actual or perceived corruption, especially if corruption is "understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence." *Colorado II*, 533 U.S. at 440. An elected official, simply by voting his conscience, can open himself to a charge of corruption or undue influence any time his vote is in harmony with the wishes of his supporters.

Political support, whether by an individual or an organization, is generally given or withheld based upon an assessment of the compatibility of the competing candidates' (or political

parties') positions and views on issues of importance to the would-be supporter. The NRA, like most everyone else, supports the candidates that it believes are in the closest agreement with its views on issues that are central to its political mission of preserving Second Amendment rights. The natural consequence of that support is an expectation that the supported candidate, if elected, will vote in a way that inspired the support in the first place. But the natural consequence of political agreement between an elected official and his supporters — namely, favorable votes and other legislative action — is also a necessary predicate of any claim that the supporter has actually or apparently corrupted or unduly influenced the officeholder's judgment. A charge of corruption or undue influence, and especially a charge of the *appearance* of corruption or undue influence, can therefore be leveled *whenever* an officeholder takes a position or legislative action that is in harmony with the views of his supporters. But as the Supreme Court explained in *NCPAC*, "[t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." 470 U.S. at 498. Thus, absent an explicit *quid pro quo* arrangement, the point at which the natural functioning of the democratic process becomes real or perceived undue influence or even corruption is extremely difficult, if not impossible, to discern.

Accordingly, the Supreme Court has only once upheld a government restriction on independent expenditures for political speech. In *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), which upheld the State of Michigan's prohibition on independent corporate expenditures of treasury funds for express advocacy supporting or opposing any candidate for state office, the Supreme Court recognized "a different type of corruption in the political arena: The corrosive and distorting effects of immense aggregations of wealth that are accumulated

with the help of the corporate form and that have little or no correlation to the public's support for the corporation's ideas." 494 U.S. at 660. BCRA could at least purport to address *that* type of corruption if it restricted only corporate expenditures from treasury funds that "reflect . . . the economically motivated decisions of investors and customers" rather than "popular support for the corporation's political ideas." *Id.* at 659 (quoting *FEC v. MCFL*, 479 U.S. 238, 258 (1986)). Even so, no such corruption concern extends to a voluntary political association like the NRA. As demonstrated below, *infra* at 21-23, it is categorically untrue that the NRA's general treasury funds result from its success in the economic marketplace rather than in the marketplace of political ideas. And those who contribute to the NRA are not surprised when the NRA aggregates members' dues and donations to fund speech supporting the Second Amendment and does so specifically in reference to politicians who support or oppose that fundamental right.

Indeed, if Congress cannot limit the major political parties' independent expenditures, as the Supreme Court held in *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615 (1996) ("*Colorado I*"), it follows that it cannot limit those of the NRA. "It is the accepted understanding that a party combines its members' power to speak by aggregating contributions and broadcasting messages more widely than individual contributors generally could afford to do, and the party marshals this power with greater sophistication than individuals generally could . . . ." *Colorado II*, 533 U.S. at 453. In this regard, issue advocacy organizations like the NRA are materially indistinguishable from political parties, except that the major political parties have far more members and vastly greater sums of aggregated wealth.[8] Yet the Court in *Colorado I*,

[8] The Court in *Colorado I* also noted that "[a] political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subse-

saw no reason "that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system." 518 U.S. at 617-18 (plurality opinion). Nor is a limitation on the NRA's independent expenditures necessary to combat a substantial danger of corruption of the electoral system.[9]

In any event, the NRA satisfies every criterion identified by the *Austin* Court for extending the First Amendment's protection to the independent political expenditures of a nonprofit political advocacy corporation, as we discuss in detail below, *infra*, at 19-24.

III. BCRA IS AN ARBITRARY PENAL CODE FOR POLITICAL SPEECH THAT IS BOTH OVERBROAD AND UNDERINCLUSIVE.

To sustain BCRA's ban on "electioneering communications," the government " 'must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.' " *FEC v. NRA*, 254 F.3d 173, 191 (D.C. Cir. 2001) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)). BCRA's alleged statutory "purpose is belied . . . by the provisions of the statute, which are both underinclusive and overinclusive." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 793 (1978). Under BCRA, nonprofit membership corporations and unions funding their political speech entirely with individual membership dues cannot speak the name of a federal candidate in the weeks before an election, but wealthy individuals, limited liability companies, partnerships, unincorporated associations, and

---

quent success or failure." 518 U.S. at 615-16. The same, of course, may be said of the NRA and other issue advocacy organizations.

[9] Indeed, as Justice Marshall, the author of *Austin*, has explained, *Austin's* rationale is wholly inapplicable to endorsements by a political party because "whatever influence a party wields results directly from the trust it has acquired among voters" and reflects the party's "*political* capital." *Renne v. Geary*, 501 U.S. 312, 348 (1991) (Marshall, J., dissenting). Precisely the same is true of the NRA with respect to its membership, and therefore no reading of *Austin* could justify Congress' decision to bring the NRA within Title II's reach.

PACs can make unlimited independent expenditures to influence the outcome of an election. Corporations and unions are banned from buying a broadcast ad urging constituents to call their representatives about specific pieces of legislation pending before Congress, but they can spend unlimited sums on direct mail and newspaper ads attacking specific candidates. Corporations and unions are prohibited from educating the public on legislation using the popular names of bills (such as McCain-Feingold), but they can flood the internet with attacks on specific candidates. Giant media corporations such as Disney, General Electric, Microsoft, Viacom, and AOL Time Warner can make unlimited use of their radio and TV networks to promote or attack specific candidates, but a nonprofit advocacy group funded by individual membership dues cannot purchase time to broadcast a message mentioning a candidate, including a candidate who has attacked the organization by name in his own campaign ads. This patchwork of confusing and contradictory restrictions constitutes an arbitrary speech code that is not narrowly tailored to advance a legitimate, let alone a compelling, governmental purpose.

A. BCRA's Purpose Is Incumbency Protection, Not Corruption Prevention.

As indicated earlier, the threat that "negative attack ads" pose to *incumbents*, rather than to the integrity of the electoral process, was the animating force behind the passage of BCRA. The transparently self-serving nature of BCRA's ban on speech comes into sharp focus when viewed against the operation of the statute as a whole. All the parties to this action agree that money plays a pivotal role in the American political system given the necessity and enormous expense of communicating political speech through the broadcast media, especially television. In a thinly veiled effort to protect their own incumbencies, BCRA's proponents sought to dry up every source of funds for such political speech except funds raised from individuals and PACs ("hard money"), the two sources of funds in which incumbents have a gigantic advantage over

challengers.[10] Indeed, that advantage in raising hard money will increase dramatically under BCRA, which doubles the limits on individual contributions to candidates. The soft money that the political parties can, and in fact have, spent on supporting challengers is eliminated, leaving challengers at a distinct disadvantage. *See* App. 116-17.

With candidates and parties confined to spending hard money, there were only two remaining threats for BCRA's supporters to quash. First, "outside interest groups," with their "negative attack ads," remained a threat to entrenched incumbents. *See* n.3, *supra*. Title II silences these organizations. Second, incumbents continue to face the prospect of challenges from wealthy, self-funded candidates. But here too the proponents of BCRA girded themselves against such attacks by increasing the limits on individual contributions to candidates who face a self-funded opponent. This poison pill dilutes the equalizing force of a challenger's personal resources. Thus, BCRA as a whole ensures that incumbents will have a significant financial advantage over their challengers and that other groups will be severely limited in their ability to speak out in favor of challengers. This reality was fully grasped by Congress when it passed BCRA.[11] The claims that BCRA's speech code is designed to avoid an "appearance of corruption" ring hollow and should not be credited. *See, e.g., Nixon v. Shrink Missouri*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) (courts should not defer to Congress "where that deference . . . risk[s] such constitutional evils as, say, permitting incumbents to insulate themselves against effective electoral challenges.").

[10] The FEC statistics on contributions from PACs and individuals for 1998 are revealing: in the House, on an aggregate basis, incumbents raised four times more money than challengers, and, on a per candidate basis, outraised challengers by more than 6 to 1. App. 119. In the Senate, on an aggregate basis, incumbents outraised challengers by more than 2 to 1, and, on a per candidate basis, outraised challengers by more than 7 to 1. App. 120.

[11] *See, e.g.*, App. 130-31 (*Sen. McConnell*); App. 129 (*Rep. Whitfield*); App. 132 (*Sen. McConnell*); App. 128 (*Sen. Bennett*).

B. BCRA Is Fatally Overbroad.

BCRA's prohibition on electioneering communications is fatally overbroad both because it silences *speakers* that pose no threat of the harms allegedly sought to be prevented and because it criminalizes *categories of speech* that are wholly divorced from the statute's purposes. "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1404 (2002). *Ashcroft* struck down the Child Pornography Prevention Act as overbroad on the basis of *hypothesized* applications of the law. *See id.* at 1406; *id.* at 1414 (Rehnquist, C.J., dissenting). Here, by contrast, there is *compelling evidence* that the NRA is a speaker whose conduct does not implicate the statute's purpose and whose speech falls outside the ambit of the restriction's purported rationale.

1. BCRA Criminalizes the Speech of Organizations That Pose No Threat of Corrupting The Political Process.

The Supreme Court has repeatedly held that core political speech is protected by the First Amendment even when corporations are the speakers. *See, e.g., Buckley*, 424 U.S. at 45, 50, 187; *Bellotti*, 435 U.S. at 777; *MCFL*, 479 U.S. at 259. Indeed, in *Massachusetts Citizens for Life*, the court upheld a nonprofit voluntary membership corporation's First Amendment right to make unlimited independent expenditures to fund its political speech, including express advocacy. As noted earlier, only once has the Supreme Court upheld an independent expenditure restriction on core political speech. The specific danger identified in *Austin*, corruption of the political process through the aggregation of wealth generated by business corporations, has no application to nonprofit membership organizations that are devoted to the advancement of specific

rights and ideas and are funded almost exclusively by the dues and donations of individual members. Title II of BCRA must therefore be struck down.

In *MCFL*, 479 U.S. 238 (1986), the Supreme Court held that a voluntary membership organization committed to a political purpose does not lose its First Amendment rights simply by taking the corporate form:

> The resources in the treasury of a *business corporation* . . . are not an indication of popular support for the corporation's political ideas. . . . Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed *to disseminate political ideas, not amass capital.* The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace.

479 U.S. at 259 (emphasis added). The *Austin* Court, in contrast, upheld a state law restricting expenditures on express advocacy by the Michigan Chamber of Commerce because 75 percent of the Chambers' funding came from for-profit corporate members and, thus, "resources amassed in the economic marketplace" could have been used by the Chamber "to provide an unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257. The "corrosive and distorting effects" of the Chamber's corporate wealth had "*little or no correlation* to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660 (emphasis added).

MCFL and *Austin* thus draw a line between advocacy organizations that fund their speech with individual dues and contributions, and business or trade associations that fund their speech largely with contributions from business corporations. The former, unlike the latter, pose no danger of *corrupting* the political process through wealth generated in the economic marketplace.

The NRA is the archetypal issue advocacy group protected by the First Amendment. Like MCFL, it "was formed to disseminate political ideas, not amass capital," App. 106, and its members are "fully aware of its political purposes." *See* App. 133-56 (NRA fundraising materi-

als urging potential members to join "in the final, decisive battle for the future of our precious Second Amendment freedoms" and promising to fight Bill Clinton, Al Gore, Janet Reno, Bill Bradley, and other "anti-gun politicians"). Thus, the NRA's resources "are not a function of its success in the economic marketplace, but its popularity in the political marketplace." 479 U.S. at 259.[12] If a group of individuals organized in the corporate form and united by their common devotion to the protection of their Second Amendment rights can be prosecuted for speaking the names of political candidates it deems a threat to those rights, then the First Amendment has become a "promise to the ear to be broken to the hope; a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941).

BCRA condemns the NRA to just such a plight. As the McConnell Plaintiffs' brief makes clear, the statute contains no exception for any nonmedia corporate entities, even MCFL itself. *See* McConnell Br. at II.C.1. Indeed, Senator Wellstone, whose amendment foreclosed any such exception, specifically singled out the NRA as an organization whose voice he sought to muffle.[13] This failure alone dooms the statute because there are numerous *MCFL* entities that

---

[12] The NRA derives *de minimis income* from business corporations. Although the NRA derives substantial *revenue* from advertising in its magazines and the sale of NRA memorabilia, it *loses* money on these activities. *See* App. 23-24 (LaPierre Decl.) ¶ 58. Additionally, the NRA generates about $1.7 million a year in rental income from leasing its building space. Finally, the NRA receives minimal contributions from for-profit businesses. See App. 198.

[13] *See* 147 CONG. REC. S2847 (daily ed. Mar. 26, 2001) (*Sen. Wellstone*). The NRA was the whipping boy for numerous Members of Congress urging passage of Title II. *See, e.g.*, 145 CONG. REC. H3174 (daily ed. May 14, 1999) (*Rep. Schakowsky*) ("If my colleagues care about gun control, then campaign finance is their issue so that the NRA does not call the shots."); 144 CONG. REC. H4821 (daily ed. June 18, 1998) (*Rep. Meehan*); 145 CONG. REC. H4029 (daily ed. June 10, 1999) (*Rep. Meehan*); 147 CONG. REC. S2851 (daily ed. Mar. 26, 2001) (*Sen. Reed*); 147 CONG REC. S2931 (daily ed. Mar. 27, 2001) (*Sen. Frist*); 144 CONG. REC. H4045 (daily ed. June 3, 1998) (*Rep. Shays*); 143 CONG. REC. H1382 (daily ed. Apr. 9, 1997) (*Rep. DeLauro*); 143 CONG. REC. S10,122 (daily ed. Sept. 29, 1997) (*Sen. Durbin*). As Rep. Pickering said in the House: "Let me use the words of those who advocate this reform to tell what this is all about. They are very clear about their purposes. Scott Harshberger, the president of the Washington D.C.-based Common Cause says, 'We need to make the connection with every person who cares

engage in speech that will be criminalized. *See* App. 157-95 (League of Conservation Voters and NARAL are MCFL-qualified entities); App. 196 (LCV and NARAL factored prominently in 2000 electioneering). Although the FEC's regulations provide relief for a limited subset of "qualified nonprofit corporations," its procrustean criteria create an exception so narrow that it conflicts with the Supreme Court's decisions in *MCFL* and *Austin* and, in any event, does not cure the overbreadth that infects this statute. The FEC's regulations exalt certain dicta in *MCFL* to the status of constitutional law at the expense of the very principle that animated the case's holding. *See* 479 U.S. at 264; *id.* at 271 (Rehnquist, C.J., dissenting).

The FEC has imposed four requirements based on the *MCFL* dicta, each of which unnecessarily limits the universe of speakers afforded the protections of the First Amendment. The FEC seems to have forgotten that in America, political speech is the rule — the *overwhelmingly, presumptively* valid rule — not the narrow exception.

First, the FEC would deny First Amendment protection to any voluntary membership corporation that did not have as its "*only* express purpose . . . the promotion of political ideas." 11 C.F.R. 114.10(c)(1) (emphasis added). In turn, the "promotion of political ideas" is confined to those activities that are "expressly tied to the organization's political goals." 11 C.F.R. 114.10(b)(1). Of course, many nonprofit issue groups, including the NRA, not only advocate the preservation of certain fundamental rights, but also sponsor programs designed to further the exercise and enjoyment of those rights. The NRA, for example, sponsors shooting competitions, gun safety programs, and similar activities that both serve and complement its political goals.

---

about gun control that there is a need for campaign finance reform because that is how you are going to break their power.' He goes on to say, 'The equation . . . is a simple one. A vote for campaign finance reform is a vote against the second amendment gun lobby.' . . . . It is very clear that their intent here is to gut and defeat those who want to advocate and defend the second amendment." App. 53.

App. 1. And unlike the Chamber of Commerce in *Austin*, whose informational services related to "politically neutral . . . business and economic issues," 494 U.S. at 662, virtually all of the NRA's activities arouse political controversy and opposition. Nor can it be said of the NRA, as the *Austin* Court said of the Chamber, that it's "political agenda is sufficiently distinct from its educational and outreach programs that members who disagree with the former may continue to pay dues to participate in the latter." *Id.* at 663. The vast bulk of the NRA's educational and outreach programs are premised upon and suffused with the NRA's belief in Second Amendment rights. Indeed, the D.C. Circuit in *FEC v. NRA*, 254 F.3d 173, 191 (D.C. Cir. 2001), specifically accepted the proposition that "all NRA activities are enmeshed in the organization's core political purpose — defending the constitutional right to bear arms." The FEC's regulations nonetheless foreclose the NRA from engaging in electioneering communications.

Second, the FEC denies the protection of the First Amendment to any nonprofit that "engage[s] in business activities." 11 C.F.R. 114.10(c)(2). Such activities are defined to include "*any* provision of goods or services that results in income to the corporation." 11 C.F.R. 114.10(b)(3)(i)(A) (emphasis added). Although the NRA sells numerous items that bear its name, such as hats and shirts, those who purchase such items are plainly supporters of the organization. Thus, its "political resources reflect political support," and do not present the dangers identified in *MCFL* or *Austin*, *MCFL*, 479 U.S. at 264, even though it falls within the FEC ban. Moreover, the NRA *loses money* on the sales of these items; therefore these "business activities" drain corporate wealth rather than amass it. The FEC also maintains that "advertising or promotional activity which results in income to the corporation other than in the form of membership dues or donations" deprives a nonprofit of its First Amendment rights. The NRA derives substantial revenue from the placement of advertisements in the magazines it distributes to its

members. *See* App. 198. Given that these advertising revenues are tied directly to readership levels of the magazines themselves, they are "an indication of popular support for the corporation's political ideas," unlike revenues realized by business corporations. *See MCFL*, 479 U.S. at 258. And the NRA *loses money* on its magazines such that the advertising revenues it realizes do not in any way fund its electioneering communications. *See* App. 23-24; App. 198 n.3.

Third, the FEC denies First Amendment rights to any corporation whose members "receive *any* benefit that is a disincentive for them to disassociate themselves with the corporation on the basis of the corporation's position on a political issue." 11 C.F.R. 114.10(c)(3)(ii) (emphasis added). The FEC would silence corporations that provide "training" and "education" that are not "necessary to enable recipients to engage in the promotion of the group's political ideas." 11 C.F.R. 114.10(c)(3)(ii)(B). As noted earlier, however, the *Austin* Court asked whether an advocacy organization's "political agenda is sufficiently distinct from its educational and outreach programs," 494 U.S. at 663 -- not whether the organization's educational programs are designed to teach recipients how to advance the group's political agenda. And while not all of the NRA's training and educational programs satisfy the FEC's requirement, they plainly satisfy the *Austin* Court's. Likewise, the FEC fails to exempt any organization that issues "affinity" credit cards or insurance policies to its members. No one joins the NRA to get a credit card, and certainly NRA members can easily obtain credit or insurance from countless providers should they decide to disassociate from the organization. Indeed, the very reason that NRA members sign up for credit cards emblazoned with the NRA insignia is to support the interests of the organization. *See* App. 24 (LaPierre Decl.) at ¶ 59. Thus, this provision of the regulation is again wholly divorced from the underlying rationale of *MCFL* and *Austin* that sought to ensure that political expenditures were a "rough barometer" of support for the organization's political ideals. 479 U. S. at 268.

Fourth, the FEC regulations deny *MCFL* status to any nonprofit that "accept[s] donations of anything of value from business corporations, or labor organizations." 11 C.F.R. 114.10(c)(4)(ii). The lower courts have consistently rejected this ironclad prohibition on the acceptance of corporate donations, which precludes advocacy groups, however large they may be, from engaging in express advocacy if they accept a penny of corporate contributions.[14] The issue under *Austin* is "the organization's independence from the influence of business corporations" and the touchstone of the constitutional analysis is whether the advocacy organization is really just a "conduit" for business corporations to "funnel[] money through the [nonprofit's] general treasury, 494 U.S. at 664, not whether it accepts a minimal amount of corporate contributions. The NRA does not accept corporate members, and at least 98% of the NRA's political speech is funded by contributions from individual members. App. 24. The organization's independence from the influence of corporate America is not in doubt.

By restricting the speech of voluntary membership organizations, BCRA frustrates the ability of ordinary citizens to participate fully in the political process. The NRA serves as a vehicle through which "large numbers of individuals of modest means can join together . . . to 'am-

---

[14] In *FEC v. NRA*, 254 F.3d 173, 192 (D.C. Cir. 2001), the D.C. Circuit accorded *MCFL* status to the NRA for the year 1980 because its $1,000 in corporate contributions were "de minimis," but it denied *MCFL* status for the years 1978 and 1982 because the NRA had received $7,000 and $39,786, respectively, in those years from for-profit corporations. The Court concluded that although the NRA's revenue from corporate contributions was miniscule in comparison to its total revenues, the "harm contemplated by the statute stems from the absolute amount of corporate money an organization has to spend in the political process . . . ." *Id.* In so holding, the Court acknowledged that it was departing from the reasoning of both the Fourth and Second Circuits. *See North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000) (nonprofit corporation that received 8 percent of its revenues from corporate contributions was entitled to full First Amendment protections); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 292-93 (2d Cir. 1995). We respectfully submit that the Second and Fourth Circuits have the better of it, and that this Court is free to follow them.

plif[y] the voice of their adherents.' " *NCPAC*, 470 U.S. at 494 (quoting *Buckley*, 424 U.S. at 22).

> To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.

NCPAC, 470 U.S. at 495. And the aggregated wealth that the NRA accumulates corresponds with its members' support for its political ideas. If the NRA's voice is loud and reverberates through the halls of Congress, it is precisely because the organization is the *collective voice* of millions of Americans speaking in unison. That "is not a *corruption* of the democratic political process; it *is* the democratic political process." *Renne v. Geary*, 501 U.S. at 319 (Marshall, J. dissenting) (emphases in original).

2. BCRA Criminalizes Speech That Is Not Intended To Influence Elections.

BCRA's restriction on electioneering communications also fails the narrow tailoring standard because it unfairly criminalizes *numerous categories of speech* that are not intended to, and will not have the effect of, influencing federal elections. Like a commercial fishing vessel's nets that indiscriminately ensnare all forms of undersea life, BCRA's provisions silence innumerable categories of political speech that are divorced from the statute's avowed purposes.

The NRA's extensive independent expenditures on television and radio broadcasting are designed to serve three principal purposes: (a) to educate the public about Second Amendment and related firearm issues, including pending legislative initiatives; (b) to defend itself against attacks aired by the broadcast media, including attacks by politicians opposed to the NRA's views on the Second Amendment and related issues; and (c) to recruit members and raise funds. When engaging in such speech, the NRA often makes references to public officials and candi-

dates for federal office. The vast majority of this speech is not intended to influence elections, and BCRA's criminalization of this speech demonstrates the statute's dramatic overbreadth.

(a) Educating the Public on Second Amendment Issues. The Supreme Court has repeatedly struck down statutes that unnecessarily restrict categories of speech with educational content. *See, e.g., Reno v. ACLU,* 521 U.S. 844, 877-78 (1997). Informing the Nation's citizens about the threats to their Second Amendment rights ensures that they will be in a position to act effectively to mobilize and to make their opposition to such policies known. Such core political speech serves a critical role in urging NRA members to pressure federal officeholders to oppose legislative encroachments on Second Amendment rights. Broadcasts that urge viewers and listeners to oppose or support pending legislation do not implicate the concerns that allegedly animate BCRA. Just as the Supreme Court has recognized that speech pertaining to referenda does not implicate any concern about corruption, so too speech urging the passage or defeat of pending legislation does not carry any threat of corrupting the political process. *See Bellotti,* 435 U.S. at 790 ("The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.") (internal citation omitted). Even the Act's sponsors proposed to the FEC a regulatory exception to allow "entities concerned about legislation to run true issue ads with a legislative objective and a request to contact an elected official during the 30 or 60 day windows." *See* App. 209-10. Senator Jeffords, one of the two cosponsors of the provision restricting electioneering communications, has acknowledged that "there's nothing wrong with" the AFL-CIO running an ad urging Senators to vote on legislation affecting its members. *See* App. 88 (Jeffords Depo.) ¶ 30. But, of course, the Wellstone Amendment and the FEC regulations now criminalize such speech.

For example, the NRA ran a series of TV ads criticizing the so-called Brady Bill and urging viewers to call their congressional representatives in support of an alternative legislative proposal. *See* App. 885 (transcript); App. A (video). These ads fall within even the Intervenors' conception of a "true issue ad," though BCRA now criminalizes them. Likewise, in 1994 the NRA ran a series of broadcast ads in opposition to President Clinton's Crime Bill. The broadcasts urged viewers to "Call your congressman" to oppose passage of the bill. *See* App. 886-88 (transcript); App. A (video). All of these messages were quintessential political speech that was not intended to influence an election, regardless of when the ads might have been broadcast. The references to federal officeholders were necessary to urge Second Amendment supporters to pressure their representatives to defend this freedom.

The NRA also airs more general educational programming to offset the mainstream media's biased coverage of news relating to Second Amendment rights. In response to a virtual blackout on coverage of issues important to the NRA and its members, the NRA in 2000 ran a series of in-depth, half-hour broadcasts modeled on TV news magazines such as 60 Minutes. *See* App. 3-4 (LaPierre Decl.) ¶¶ 9-11. The topics included: gun registration and confiscation in England, Australia, and Canada; the impact of the Clinton administration's failure to pursue vigorous prosecution of existing gun laws; the identities and hypocrisy of the sponsors of the "Million Mom March"; and an analysis of Vice President Gore's position on the Second Amendment. *See* App. 5-7 (LaPierre Decl.) ¶¶ 12-18; App. 16-20 (LaPierre Decl.) ¶¶ 39-46. These broadcasts ran over 11,000 times at an expense of more than $13 million, and were aired both on national cable channels and in targeted markets in virtually every state in the Union. *See* App. 4 (LaPierre Decl.) ¶ 10; App. 107.

One such NRA broadcast covered the increasing efforts to restrict private ownership of firearms in California. *See* App. 892-904 ("California" Infomercial transcript); App. D (video). During the 30-minute program, a poster bearing a likeness of President Clinton and the words "TWO YEARS LEFT TO GET YOUR GUNS" appears while the reporter states that California's legislation banning semi-automatic weapons was "the first in the country and the model used for the 1994 Clinton-Gore assault weapons ban." App. at 892.[15] This single reference to Mr. Gore would have sufficed to trigger BCRA's criminal penalties for each of the more than 800 airings that occurred in California alone between August 29, 2000 and November 5, 2000. *See* App. 216. None of these airings was intended to influence a federal election. App. 5-6 (LaPierre Decl.) ¶ 14. Indeed, in California the outcome of the 2000 presidential election was never in serious doubt, and the NRA would not have wasted its scarce resources on such a contest if influencing the election had been its objective.

The NRA also aired a broadcast in 2000 entitled "It Can't Happen Here." *See* App. 917-29 (transcript); App. E (video). This program was substantially similar to the "California" program and was run throughout the United States from August through October of 2000. *See* App. 217-20. Although Vice President Gore's image on the cover of the NRA's magazine appears three times on the screen during this 30 minute broadcast and a single reference is made to the Clinton-Gore administration, this program was not intended to influence a federal election in any way. *See* App. 917, 920, 924, 929; App. 6 (LaPierre Decl.) ¶ 15.

[15] There were three versions of this program that the NRA aired in the 60 days prior to the 2000 general election; an "in-state" version for California, another for battleground states, and a third for non-battleground states. Text of the reports in all three versions is the same, but the three differ in the brief promotional appearances made by Charlton Heston and Wayne LaPierre. In the non-battleground version, there are three segments urging the viewers to join the NRA and depicting a cover of an issue of the NRA's magazine FIRST FREEDOM, reading "Clinton to the Gore" and depicting Bill Clinton morphing into Al Gore for several seconds. *See* App. 895, 899, 904. That magazine cover did not appear in the other versions.

(b) (i) Defending The NRA Against Political Attacks. On March 2, 2000, President Clinton appeared on NBC's Today Show ostensibly to address a tragic shooting in Flint, Michigan. Although the 15-minute interview began with a series of comments about the case in Flint, the President quickly turned his attention to the NRA. *See* App. 905-10 (transcript); App. C (video). In response to friendly questioning, he made several pejorative, false statements, including that "the NRA is against anything that requires anybody to do anything as a member of society that helps to make it safer." App. 909. Wayne LaPierre, the Executive Director of the NRA, was granted a short responsive interview the next day on the Today Show, but was not given equal time and was subjected to hostile questioning. *See* App. 911-13 (transcript); App. C.

In order to get its side of the story out, the NRA developed a series of paid television advertisements that responded to President Clinton's misrepresentations about the NRA. App. 12 (LaPierre Decl.) ¶ 29. The NRA did not have the funds to launch a nationwide advertising campaign that would reach the same audience that heard President Clinton's interview. *Id.* Instead, the NRA designed the ad campaign to elevate the controversy between the NRA and President Clinton to such a degree that Mr. LaPierre would be invited onto national media outlets and would thus gain a forum to defend the NRA before a national audience. App. 36-38 (McQueen Decl.) ¶ 25(c)-(f). To that end, the NRA aired a series of thirteen 30- and 60-second ads featuring Charlton Heston. *See* App. 914-16 (transcript); App. B (video). Critical to framing an effective response was the NRA's ability to refer to specific misrepresentations made by President Clinton and to refer to him by name. The media strategy succeeded, and Mr. LaPierre was invited to appear on several nationwide news shows. Without access to paid media and without the ability to refer to President Clinton by name, the NRA would not have been able to gain access to the national television audience that had heard President Clinton's gross and derogatory

misstatements. App. 36-40 ¶ 25. Although the NRA's ads would not have been prohibited by BCRA because President Clinton was not running for reelection, they illustrate the critical role that paid programming plays in allowing the NRA to defend itself.

Politicians also use their campaign ads to attack the NRA. There are dozens of recent examples of such ads. *See* App. 223-44. Just this year, for example, Mark Shriver, a candidate in the Democratic primary for the 8th congressional district in Maryland, and his opponent, Chris Van Hollen, attacked the NRA in a series of TV ads. *See* App. 226-29. The most egregious attack was run by Shriver:

> I stood up on the floor of the House of Delegates this year and defeated a piece of legislation backed by the NRA that would have allowed convicted felons to own handguns. That's bad public policy. We shouldn't allow people who are convicted of domestic violence to own a handgun. . . . So I welcome the fight from the NRA because nothing would give me more pleasure than defeating the NRA.

App. 226. This broadcast grossly misstates the NRA's views, yet BCRA would forbid the NRA to defend itself by responding directly to its attacker through the same medium.

(b)(ii) Defending The NRA Against Media Attacks. Entrenched hostility to Second Amendment rights and the NRA pervades the major media companies and biases their coverage of the news relating to firearms issues. *See* App. 15-16 (LaPierre Decl.) ¶¶ 37-38. The NRA's paid broadcasts allow it to defend against and rebut such biased reporting. The media's coverage of the Million Mom March is illustrative. In the spring of 2000, the sponsors of that event worked closely with the Clinton White House and were able to gain enormous exposure (through free national media coverage) for their attacks on the NRA. App. 16-17 ¶ 39. In response, the NRA aired a 30-minute paid program that examined the forces and influences behind the Million Mom March. *See* App. 17; *see also* App. 930-42 ("MMM" Infomercial transcript); App. F (video). The program criticized the Clinton administration for pursuing new gun control meas-

ures rather than prosecuting criminal violations of laws already on the books. It also criticized celebrities (such as Rosie O'Donnell) and politicians (such as Senator Feinstein) who advocate confiscation of handguns from ordinary citizens while ensuring that they (or their personal bodyguards) retain their guns. *See* App. 931. The program also includes a short statement from Senator Orrin Hatch noting the hypocrisy of Rosie O'Donnell's position.[16] Additionally, during a solicitation for new members, the program shows a cover of the NRA's magazine FIRST FREEDOM reading "Clinton to the Gore" and depicting President Clinton morphing into Vice President Gore. App. 934, 937, 942. The program contained references to other candidates for federal office: in addition to the reference to Senator Feinstein, the reporter stated that "President Clinton, Hillary [then a candidate for the Senate], and Schumer" were at the Million Mom March "for their own political gain," *id.* at 933; and another segment chastised the "Clinton/Gore White House" for having "turned its back on real justice" by allowing the number of federal firearm prosecutions to drop by 44 percent between 1992 and 1998. *Id.* at 937.

This news magazine was broadcast throughout the country from July to November 2000. For two months prior to the 2000 election, all of the airings nationwide would have been prohibited under BCRA because of two references to the "Clinton/Gore" administration's record on prosecution of federal firearms laws and the depiction of a magazine cover. The program aired dozens of times in California in the 60 days prior to Senator Feinstein's reelection. App. 245-48. It also aired in Rome, New York in the 30 days prior to Hillary Clinton's primary race for the Democratic nomination for Senate, App. 249, 251, and in Utah in the 60 days prior to Senator Hatch's reelection. App. 973 (NRA-ACK 11415.) But in defending itself against the attacks

[16] Senator Hatch stated: "It's wrong for you or me to have arms to protect our family but her detective that's with her -- there's nothing wrong with him having a gun to protect her children? Now why is that double standard. It's hypocritical." App. 931, 939. The statement was aired twice as the first segment of the report was repeated at the end of the broadcast.

launched at the Million Mom March, the NRA had no intention of influencing a federal election. *See* App. 17 (LaPierre Decl.) ¶ 40. This is confirmed by the facts that (1) Senator Clinton's primary election and Senators Hatch's and Feinstein's general elections were not competitive, and (2) the ad ran heavily in states that Mr. Gore had no chance of winning.

(c) Membership Drives. The NRA also broadcasts programs that are designed to increase its membership and to raise funds. An integral part of such speech is identifying the threats posed to Second Amendment rights by anti-gun politicians. In making fund raising appeals, the NRA repeatedly refers to Senators Schumer and Feinstein, and Hillary Clinton, as well as President Clinton and Vice President Gore, and their efforts to undermine Second Amendment rights. *See, e.g.*, App. 133-156. These fundraising activities are not designed to influence federal elections. Rather, they are targeted at communities that the NRA believes are concerned about preserving the Second Amendment and already have very negative impressions of the federal officeholders named in the fundraising appeal.

Consider a 30-minute tribute to NRA President Charlton Heston, aired by the NRA throughout the country in June through September of 2000. App. 17. The first segment of the program focused on Mr. Heston's life and political involvement, touting him as an inspiration to all Americans. *See* App. 943-50 ("Tribute" Infomercial transcript); App. G (video). The second segment consisted of Mr. Heston's unedited acceptance speech upon being elected as NRA President for a third term. During the short membership appeals that preceded and followed each segment, the program urged viewers to join the NRA and described the benefits of membership. For several seconds, the screen displayed an issue of the NRA's magazine "First Freedom" with Vice President Gore clearly depicted on the cover. App. 945, 947, 949-950. In addition, the first segment, in praising Charlton Heston's personal courage, says that he has proved his willingness

to debunk the hypocrisy and lies of the Clinton-Gore administration. *See id.* at 944. The second segment, consisting entirely of Mr. Heston's unedited acceptance speech, includes his comments that increasing sentiment against gun control "spells very big trouble for a man named Gore," *id.* at 946, and his closing remark, while holding a musket over his head, is "from my cold, dead hands, Mr. Gore." *Id.* at 947. Despite these limited references, the program was not intended to influence the outcome of a federal election. App. 22 (LaPierre Decl.) ¶ 50. Indeed, on the occasions in which the ad was run within the 60 days prior to the election, it aired in markets such as Dallas, Texas, and Los Angeles, California, where the outcome of the presidential election was not in doubt. App. 252, 253. Additionally, during the appeals for new members, Senator Feinstein's name is briefly mentioned in text at the bottom of the screen in a ticker format. App. 945, 947 ("National Gun Registration plan from Sen. Dianne Feinstein -- Campaign Centers on Gun Photo ID's."). Again, although this program ran in September of 2000 in California, it was not intended to influence Senator Feinstein's reelection contest, which was not competitive. *See* App. 21-22.

As the foregoing reflects, in the year 2000 alone, the NRA engaged in issue advocacy on hundreds, if not thousands, of occasions when it had no intent to influence a federal election but nonetheless would face criminal penalties under BCRA. The criminalization of "a large amount of speech" that is cherished under the First Amendment demonstrates that the statute is fatally overbroad. *See Reno v. ACLU*, 521 U.S. at 874. And even if the Court rests its overbreadth analysis on the percentage of "innocent" political speech that is prohibited by BCRA, the NRA's speech alone demonstrates the palpable flaws in the *Buying Time 2000* study authored by the Brennan Center. By design, the study excluded all of the 330,000 minutes of the NRA's speech that took the form of half-hour news magazines, for the study only considered ads that lasted less

than two minutes on television. Indeed, the amount of NRA speech neglected by the study is more than twice that which its authors considered. *See* Expert Report of Kenneth Goldstein, Table 4 (interest groups ran 133,335 political ads in 2000). As explained above, most of the NRA's infomercials, including those that referenced candidates, were devoted solely to issue advocacy and were not intended to influence an election. Although the NRA cannot document all of the airings of its half-hour programs in the final 60 days prior to the 2000 election, the NRA has identified at least 1,450 such broadcasts that would have been covered by BCRA and aired in one of the top 75 television markets -- at least 60 percent of which were not intended, even in part, to influence an election.[17] When these airings are added to the proper numerator and denominators identified in the McConnell Plaintiffs' brief, *see* McConnell Br. at II.A.2.a.i.C, BCRA is shown to be at least 18 percent overbroad and thus plainly constitutionally invalid.

C. BCRA Is Fatally Underinclusive.

The dramatic overbreadth of Title II's ban on "electioneering communications" is matched in degree by its glaring underinclusiveness. Congress has drawn haphazard lines and indulged arbitrary distinctions that prohibit electoral speech "only at certain times and in different forms," *Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2539 (2002), and that "depend upon the identity of its source." *Bellotti*, 435 U.S. at 777. "It would naively underestimate the ingenuity and resourcefulness of . . . groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted th[is] restriction . . . but nevertheless benefited the candidate's campaign." *Buckley*, 424 U.S. at 45. The palpable underinclusiveness

[17] Based on summary sheets, App. 108, the "Heston/Union" program, which was intended in part to influence an election, ran approximately 574 times in top 75 markets (the summary sheet lists 81 markets in which the program aired, 36 of which were top 75 markets — as a conservatism, the NRA estimates that half of the airings ran in top 75 markets). The "California" In-State program aired hundreds of times in top 75 markets at the same time. App. 216.

of BCRA's speech regulations fatally "diminish[es] the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 45 (1994).

1. Alternate Modes Of Communication: BCRA Incoherently Permits In Print Media And On The Internet What It Criminalizes In Broadcast Media.

BCRA's definition of restricted "electioneering communications" is conspicuously limited to "broadcast, cable, or satellite communication[s]." Section 201(a)(3). Thus, BCRA alternatively gives a free pass to, or *criminalizes*, the very same political speech directed at the very same public audience, depending on whether that speech travels on paper or over the airwaves. No corruption rationale explains this naked preference for print versus broadcast media, making "belief in th[e statute's] purpose a challenge to the credulous." *White*, 122 S. Ct. at 2537.

(a) Print Advertisements. Any broadcast advertisement that refers to a clearly identified candidate for federal office (other than President) and is run within 60 days of a general election or 30 days of a primary is prohibited as an "electioneering communication" so long as the advertisement is targeted to reach at least 50,000 people. *See* § 201(a). But a printed ad with identical text that is disseminated at the same time will *never* constitute an electioneering communication, even if it reaches and influences *millions* of people within the relevant geographic area. This categorical distinction makes no sense if Congress's true aim is to combat corruption. Congress may well have concluded that print advertisements generally reach a smaller audience than do broadcast ads. But even assuming that is true, any difference in audience size would be fully captured elsewhere in Congress's definition of "electioneering communications": the definition sets a threshold requirement, applicable to any communication referring to a non-presidential candidate, that such an ad be "targeted to the relevant electorate," *id.*, meaning the communication is capable of reaching at least 50,000 persons within the relevant geographic area. *See id.* Having made the "congressional judgment that [government] officials . . . can en-

force the statute when it includes a [numerical] test" for determining whether *broadcast* advertisements will reach such an audience, *United States v. National Treasury Employees Union*, 513 U.S. 454, 474 (1995), Congress should apply that test evenhandedly to *print* advertisements that have equal public reach and impact.[18]

Newspaper advertisements often dwarf radio advertisements in terms of their expense, potency, and overall impact upon the public, particularly the *voting* public; they therefore promise to "spread by other means" the same electioneering speech, to the same mass audience, that was supposedly of utmost concern to Congress. *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). Thus, a corporation such as the Campaign for America may run a full-page political ad in the *New York Times* at a cost of $65,000,[19] whereas a radio broadcast reciting the same text in a small market such as Peoria would cost a grand total of $75.[20] The notion that only the latter expenditure implicates a concern about political corruption is preposterous.

(b) Direct Mail. Congress has likewise categorically omitted from "electioneering communications" all direct mailings — no matter their scale, cost, sophistication, or impact. Direct mail has for years been at the forefront of mass advertising campaigns designed to influence elections. The NRA spent $29 million on its direct mailings in 2000, more than it spent on TV

---

[18] "Electioneering communications" referring to candidates for President and Vice President are not subject to any targeting requirement. *See* § 201(a). If Congress were concerned that print ads referring to presidential candidates generally reach too small an audience to qualify automatically as "electioneering communications," it could have crafted a threshold targeting requirement specifically for print ads. Similarly, if Congress for some reason believed that print advertisements generally have a lesser impact on their audience than do broadcast ads, it could have set the targeting requirement for the former higher than the 50,000 threshold applicable to the latter. In any event, it makes no sense for Congress to offer print ads a blanket exemption without *any* regard for their demonstrated reach and impact upon the public.

[19] *See* App. 256-57 (Berman Decl.) ¶ 12.

[20] *See* App. 34 (McQueen Decl.) ¶ 24.

ads during that period,[21] reflecting the NRA's abiding conviction that direct mail is an extremely efficacious means through which to persuade the American public. The defendants' witnesses agree.[22] The exclusion of newspaper and direct mail from Title II's definition of "electioneering communications" is particularly baffling insofar as Congress recognized the need to regulate these media as part of the parallel restrictions it imposed in Title I. *See* § 101(b).

(c) The Internet. BCRA leaves electioneering communications on the internet wholly unregulated. *See* § 201(a); 11 C.F.R. 100.29(c)(1). That omission is positively anachronistic. The Supreme Court recognized years ago that, from the point of view of "advocacy groups," the internet "constitutes a vast platform from which to address" an "audience of millions of readers [and] viewers." *Reno v. ACLU*, 521 U.S. at 853. Through the internet, "any person with a phone line can become" a "pamphleteer" or "a town crier with a voice that resonates farther than it could from any soapbox." *Id.* at 870. Indeed, the internet is the functional equivalent of any broadcast medium in terms of its ability to reach and influence the public.[23]

The NRA hosts its own daily internet news show called *NRA Live!*, *see* App. 321, through which the NRA broadcasts six-to-eight minute segments covering current events that implicate the Second Amendment and rights of gun owners. *See* App. 31-33 (McQueen Decl.) ¶¶ 14-17. As with the NRA's radio and television broadcasts, webcasts of *NRA Live!* frequently criticize or laud candidates for federal office. For example, *NRA Live!* repeatedly referred to

---

[21] *Compare* App. 23 (LaPierre Decl.) ¶ 54, *with* App. 4 (LaPierre Decl.) ¶ 10.

[22] *See* App. 282 (Magleby Report) at p. 25 ("Campaign mail can be very effective"); *id.* 310 at p. 53 (describing how direct mail, in conjunction with phone-banking and get-out-the-vote efforts swung close elections); App. 316 (Larocco Decl.) ¶ 6 (describing Christian Coalition's distribution of 370,000 voter guides designed to frustrate his 1994 bid for reelection to Congress); App. 319-20 (Pennington Decl.) ¶ 3 (explaining the vital role direct mail plays in campaigns he orchestrates as a political consultant).

[23] *See, e.g.*, App. 32-33 (McQueen Decl.) ¶ 17.

candidates George W. Bush, Al Gore, and others during the 60 days preceding the 2000 election.[24] The audience that downloads segments of *NRA Live* dwarfs that of many radio shows, averaging well above 100,000 people in a particular month.[25] Given that a web audience must "opt-in" by downloading a particular segment, it is presumably paying more attention and is better primed to be influenced than is the audience of an ordinary radio or television advertisement. Yet BCRA leaves *NRA Live* and any other internet broadcast completely unregulated, thereby permitting corporations to use the internet "to broadcast a wide variety" of the same speech that supposedly warrants prohibition. *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984).

2. Alternate Time Of Communication: BCRA Incoherently Excludes Most of the Election Cycle From "Electioneering Communications."

As the McConnell Plaintiffs explain, *see* McConnell Br. at II.A.2.b, there is no principled justification for restricting the temporal reach of "electioneering communications" to those communications broadcast within 60 days of a general election or 30 days of a primary, and it simply is absurd for Congress to leave a political speaker such as the NRA free to "say the very same thing the day before [the relevant window]" that will suddenly become criminal once the period commences. *White*, 122 S. Ct. at 2537.

These technological and temporal gaps in the definition of "electioneering communication" are "potential loophole[s]," *National Treasury Employees*, 513 U.S. at 474, through which otherwise banned political speech can reach the public and thereby frustrate Congress's supposed purpose. If mere "potential loopholes" can be fatal to a challenged statute, then BCRA is utterly doomed. There is nothing "potential" about the impact and availability of the internet, print me-

[24] *See* App. I (*NRA Live!* Archives).

[25] *See* App. 322-23.

dia, direct mail, or broadcast ads outside the statutory window. And these are not mere "loopholes" – they are gateways so wide you could drive a campaign bus through them.

3. Alternate Speakers: BCRA Incoherently Prohibits Only Nonmedia Corporations and Labor Unions From Engaging In "Electioneering Communications."

BCRA's prohibition on electioneering communications stifles the collective voices of corporations and labor unions, while permitting wealthy individuals and organized groups, including PACs, of comparable means to speak whenever and however much they want, subject only to disclosure limitations. *See* § 203(a). "Excluded from its provision and criminal sanctions are entities and organized groups in which numbers of persons may hold an interest or membership, and which often have resources comparable to those of large corporations." *Bellotti*, 435 U.S. at 793. Many of these entities have resources on par with those of some Fortune 500 corporations, thereby raising *quid pro quo* corruption concerns no less acute than any cited with respect to corporations and unions. Surely political "corruption" is more easily planned, executed, and hidden when wrought by individual potentates than by bureaucratic organizations. In particular, BCRA does nothing to control expenditures by wealthy private individuals, despite the reality that their wealth has been accumulated primarily, if not exclusively, through corporate sources and is therefore of the same origin as the corporate treasury funds that Congress has targeted for prohibition.[26] BCRA "cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star*, 491 U.S. at 541-42 (Scalia, J., concurring) (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)).

---

[26] *See, e.g.*, Kirsch Decl ¶¶ 4-6. App. 324-25 (Hiatt Decl.) ¶¶ 1-5, App. 329-31 (Hassenfeld Decl.) ¶¶ 1-2, 8-9, App. 338-40 (Geschke Decl.) ¶¶ 1-8.

4. BCRA Unjustifiably Leaves Media Corporations Free To Broadcast "Electioneering Communications."

Finally, and perhaps most egregiously, Congress has specifically exempted from its ban any "communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station." § 201(a). This means that the Disney Corporation may through its subsidiary ABC (or General Electric through NBC) broadcast the very same "electioneering communications" that Congress has forbidden the NRA from funding. BCRA's differing treatment of identical corporate speech not only is grossly underinclusive,[27] it violates the Equal Protection Clause of the Fourteenth Amendment, as explained below.

IV. BCRA UNCONSTITUTIONALLY EXEMPTS MEDIA CORPORATIONS FROM ITS BAN ON ELECTIONEERING COMMUNICATIONS

Again, BCRA's ban on "electioneering communications" does not extend to any "communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcast station." During the period when all other organizations are muzzled, media companies may air as many of *their own* electioneering programs as they wish. Unlike other

---

[27] In *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Court condemned the "patent underinclusiveness" of a law providing that "the very same opinions that cannot be expressed by [a broadcast] station's management may be aired so long as they are communicated by a commentator or guest appearing at the invitation of the station." *Id.* at 396. In striking the law down, the Court aptly said:

> If it is true, as the Government contends, that noncommercial stations remain free, despite [the federal statute under review], to broadcast a wide variety of controversial views through their power to control program selection, to select which persons will be interviewed, and to determine how news reports will be presented, . . . then it seems doubtful that [the statute] can fairly be said to advance any genuinely substantial governmental interest in keeping controversial or partisan opinions from being aired by noncommercial stations. . . . [The statute] clearly provides only ineffective or remote support for the government's purpose.

468 U.S. at 396 (citations omitted). Of course, Title II's underinclusiveness is far more glaring: It prohibits some corporations from opining with "electioneering communications" while letting *media* corporations broadcast the same opinions or even utter them in their own voice.

corporations, they can endorse candidates for election and name candidates while editorializing on particular issues. But BCRA's media exception does more than give the broadcast companies a special license to discuss candidates for federal office. By banning advocacy groups from buying their own advertising time, BCRA puts those broadcasters in the position of being able to grant (or deny) speech licenses to advocacy groups whose only remaining hope for air time is to be chosen by a broadcaster for inclusion on one of its programs. An eighteenth century British Colonial censor armed only with the Stamp Act would salivate at the prospect of wielding the speech-licensing power BCRA confers on the broadcast media.

Because BCRA makes the purchase of broadcast "electioneering communications" a federal crime, the public will now hear only those viewpoints that the broadcast media, as super-gatekeepers, judge to be worthy of consideration. The media exception thus stands for the perverse proposition that it is wrong to use corporate money to pay for a discrete amount of broadcast time to air electioneering communications, *unless* the amount of money used is so enormously large that it purchases an *entire station's worth* of broadcast time. During future elections, the NRA will be prohibited from broadcasting any communication that even refers to a candidate; by contrast, Rupert Murdoch's News Corporation, for example, will be free to endorse or blackball candidates at will. Indeed, News Corporation will be free to produce a weekly television program such as "American Candidate," slated for the 2004 election season on its FX cable channel, that will interview, analyze, and promote presidential candidates who have been selected by the News Corporation. App. 343-47. In other words, a multinational conglomerate that happens to own a TV network and cable channels can use its general treasury funds to produce a weekly hour-long program that effectively launches its very own political candidate, while the NRA – funded by millions of regular Americans with annual dues of $30 each – would

commit a federal crime if it purchased a 30-second commercial spot during that program that so much as *referred* to that candidate.

This is unconstitutional. The Supreme Court has rejected the proposition that "communication by corporate members of the institutional press is entitled to greater protection than the same communication by non-media companies." *Belotti*, 435 U.S. at 782 n.18. *See also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 784 (1985) ("[T]he rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities."); *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972); *Austin*, 494 U.S. at 668. The First Amendment does not enshrine the press, *for its own sake*, as a favored institution *apart* from the public. In this *Republic,* there is no favored Fourth Estate any more than there is a First Estate (the clergy) or a Second Estate (the aristocracy). The press is protected only because of its ability to serve the interests of "We the People" in self-government. *Mills v. Alabama*, 384 U.S. at 219 ("[T]he press serves . . . as a constitutionally chosen means for keeping officials *elected by the people* responsible to all the *people* whom they were elected to serve.") (emphasis added); *Austin*, 494 U.S. at 668 (same). The rights of the press are derivative of the rights of the people.

The Equal Protection Clause prohibits the Government from discriminating between classes of speakers without a compelling governmental purpose. *See Austin*, 494 U.S. at 667; *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972). In *Austin,* the Court identified a purpose sufficient to survive this strict scrutiny. The "unique role that the press plays in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate,'" provided Michigan with a compelling interest for exempting the media from a prohibition against corporate political expenditures that "conceivably could be interpreted to encompass election-

related news stories and editorials." 494 U.S. at 667-68. "[M]edia corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public." *Id.* at 667.

Austin cannot save BCRA's media exception because its factual predicates – the assumptions that media corporations (1) occupy a "unique societal role" in disseminating information and (2) devote their resources to the news business – are no longer true. The emergence of the internet and the absorption of the broadcast networks by non-media conglomerates have profoundly altered the nature of the traditional media companies and the role that they play. Thus, BCRA's media exemption violates the Equal Protection Clause. In addition, the media exception also underscores why the prohibition on electioneering communications violates the First Amendment, both because it is fatally underinclusive, and because it creates a content-based restriction on broadcast programming that is intended to *diminish*, rather than to increase, the diversity of viewpoints broadcast to the public.

A. Congress Does Not Have A Compelling Interest For Providing Special Speech Rights To The Media.

In 1976, when Michigan enacted the statute challenged in *Austin*, perhaps the news media generally occupied a "unique role" in "disseminating information" in our society, and perhaps the government had a compelling interest in preserving that role. But today one cannot say that the subset of the media exempted from BCRA's prohibitions (the broadcast media) are "unique" in the same way.

(a) The Internet Has Changed The Way In Which The Public Is Informed. Over the past decade, the role of the traditional media in "informing and educating the public" has been profoundly altered. When *Austin* was decided, the internet was essentially non-existent. Now, more than 168 million Americans use the internet. *See* App. 348-49. More Americans use the

internet than read a daily newspaper, *id.*, and internet usage is growing rapidly. *See* App. 352. An enormous amount of this activity reflects the internet's use as a source of news and information that is displacing the broadcast media.[28] In particular, the internet has become an extremely popular source of political news during election periods.[29] "It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country -- and indeed the world -- has yet seen." *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996), *aff'd,* 521 U.S. 844 (1997). *See also* App. 356.

As explained above, the rise of webpages and internet news webcasts makes it difficult if not impossible to differentiate the traditional broadcast media from other groups that disseminate information.[30] *See* § III, *supra*. The daily broadcasts of stories on such internet programs as NRA Live! "offer an example of how organizations like the NRA are using the internet to essentially become mini-media companies, amplifying and adding to the role previously played by major media companies in disseminating news and information throughout our society." App. 31-32 (McQueen Declaration) ¶ 14. None of this was true in 1986, when the factual record in *Austin* was closed. The traditional broadcast media are no longer "unique." Because the internet

---

[28] A recent report of the Pew Research Center For The People And The Press credits the rapid growth in internet usage as one of the reasons for the dramatic decline in viewers for broadcast news programs. *See* App. 443-99.

[29] *See generally* App. 408 (Pew Research Center) ("Campaign 2000 firmly established the internet as a major source of election news and information"); App. 427 (in 2000 the internet was "jockeying for [the] lead in convention coverage").

[30] Numerous websites provide an alternative source of daily news and challenge the market dominance previously enjoyed by the traditional media. *See e.g.* App. 500-01 (Yahoo.com); App. 505-08 (Drudge Report). Some of these independent news sources have become enormously popular. For example, the Drudge Report, an internet news service started by a single individual unaffiliated with any media company, receives approximately 5 million visits *per day*, and has received approximately 917 million visits over the past year. App. 507. It was the Drudge Report, after all, not the traditional broadcast media, that broke some of the biggest stories on the Clinton impeachment.

has changed forever the way news and information are disseminated, the fundamental factual premise for *Austin*'s decision to uphold Michigan's media exception no longer applies.

(b) The Absorption Of The Broadcast Media By Other Businesses Has Eroded Its Unique Role. A closely divided Supreme Court in *Austin* concluded that, as of 1986, "[a] valid distinction . . . exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public." 494 U.S. at 668. The "media corporations differ significantly" because "their resources are devoted to the collection of information and its dissemination to the public." *Id.* at 667. While this view was controversial even then, *see id.* at 690-92 (Scalia, J., dissenting); *id.* at 712-13 (Kennedy, J., joined by O'Conner and Scalia, J.J., dissenting), it plainly is no longer valid. The broadcast media companies have been merged into larger, multinational conglomerates that engage in businesses having nothing to do with journalism, news, or the dissemination of information. *See* App. 511-16.[31]

Why should the speech rights of such capitalist corporate behemoths be greater than the rights of nonprofit, grass-roots advocacy organizations like the NRA? Why should a corporation that operates a nuclear power plant or a titanium mine be prevented from engaging in electioneering communications *unless* it also owns a television network? Surely a multi-billion dollar

[31] CBS has been acquired twice in the past decade, first by Westinghouse and then by Viacom, and is now a subsidiary of a conglomerate that runs oil companies, farms, theme parks, and mining companies. App. 546-50; App. 554-56. ABC is now part of the Walt Disney Corporation, an entertainment empire that makes money-making movies and running theme parks and cruise ships. App. 522-26. NBC was acquired in 1985 by General Electric, which has grown into perhaps the largest corporation on the planet, comprising businesses ranging from refrigerators and jet engines to financial services and nuclear power plants. App. 541-45. Finally, Fox Television, which was not even a major network when *Austin* was decided, is part of Rupert Murdoch's global News Corporation empire, which owns not only newspapers and magazines, but also transportation companies and sports teams. App. 532-38.

multinational conglomerate is not vaulted into a "unique role" in our society the moment it decides to absorb a TV station into its vast panoply of business assets.

Furthermore, there is a growing sense among the general public, among political leaders, and among both members of the press and professional observers of the press, that the megamedia trend has led the media to be increasingly focused solely on profits, has caused journalistic standards to fall, has created serious conflicts of interest, and has diminished the diversity of viewpoints heard through the media. All of this points to the erosion, if not complete destruction, of the "unique societal role" invoked by *Austin*. For example, the Columbia Journalism Review recently reported that over the past fifteen years "the public has gotten more, not less distrustful of the press," and that "many Americans today think the press is too concerned with the interests of the companies that own them." App. 625-26.[32] The "megamedia" trend has left broadcast journalists hamstrung by corporate conflicts of interest and unable to report on the misconduct of the vast corporate interests that now control the broadcast networks.[33] BCRA's own supporters, including the late-Senator Wellstone, have argued that one can no longer rely on the media to fulfill their traditional function of "hold[ing] concentrated power – whether public or private power – accountable to the people." App. 628. "Big Media" has become part of Big

---

[32] *See also* App. 620, excerpts from DEAN ALGER MEGAMEDIA: HOW GIANT CORPORATIONS DOMINATE MASS MEDIA, DISTORT COMPETITION, AND ENDANGER DEMOCRACY (1998) ("Several polls . . . from 1992 through 1996 found that a large majority of Americans think the news media are much too fixated on sensationalism and less and less concerned with giving them the meaningful news they need."); App. 671-72 (quoting Carl Bernstein arguing that the megamedia's profit-orientation has created an "idiot culture" of "sleazoid info-tainment").

[33] *See generally* App. 861-79 (*Self-Censorship: How Often and Why?*); App. 880-81 (*Self-censorship is still censorship*). Broadcast companies have refused to cover stories because they may compromise the interests of parent or affiliated companies. *See* App. 687-89 (*The GE Boycott: A Story NBC Wouldn't Buy*) (describing how NBC refused to report on a customer boycott against GE); App. 690-93. Media subsidiaries have been pressured by their nonmedia parent corporations: for example, a GE executive, after being installed as President of NBC, vented his displeasure at independent news reporting by jabbing his finger in the chest of an NBC News employee and shouting, "You work for GE!". App. 600.

Business, and there is no qualitative distinction between the two that can justify giving General Electric a special license to comment on federal elections while muzzling political advocacy groups whose defining corporate purpose is not profit but the dissemination of ideas.

B. The Media Exception Demonstrates The Unconstitutionality of BCRA's Ban On Electioneering Communications

Congress's attempt to provide the broadcast media with greater speech rights than those provided to all other corporations demonstrates the profound constitutional infirmity of BCRA's ban on electioneering communications. First, as explained above, the media exemption makes BCRA underinclusive to the point of incoherence and does not combat any "appearance of corruption" associated with the influence of large corporations on elections. *See supra*, at 39. Moreover, the broadcast media are now perceived by the public as doing *even more* than other companies to influence politicians so as to protect their substantial economic interests. Thus, the Columbia Journalism Review reports that "the media industry is widely regarded as perhaps the most powerful special interest today in Washington." App. 697.[34] The public is immensely distrustful of the media, because "many people worry that the press may be a lap dog, rather than a watchdog, when bosses' interests are involved." App. 626.[35]

---

[34] *See generally* App. 696-713 (*Media Money: How Corporate Spending Blocked Ad Reform & Other Stories of Influence*) (cataloguing the lobbying and political expenditures by big media and describing its influence); App. 851-56 (*Payments to the Powerful: Which Media Companies Are Getting What From Whom For How Much*) (describing how media industry is last special interest group to maintain lavish spending, stating that "media companies are quick to report on flaws in our system of financing politicians' campaigns, but slow to cover their own role in perpetuating it").

[35] Of course, in addition to being economically self-serving, the broadcast media are also pervaded by a liberal, anti-Second Amendment bias. *See generally* excerpts from GOLDBERG, BIAS, App. 714-803 (in New York Times bestseller, former CBS news correspondent describes deep-seated and often unconscious bias held by the overwhelming majority of journalists and reporters working in the media); App. 15-17 (LaPierre Decl.) at ¶¶ 36-40; App. 806-08, 811-13, 817-20 (Cloud Decl.) ¶¶ 4-8, 13, 23-28; App. 826-33 (Howell Decl.) ¶ 8-23. The NRA itself is repeatedly a victim of this bias: a recent study reports that from 1997 to 1999, television news

Second, the media exception highlights the fact that BCRA is, in essence, a regulation of the content of television programming. BCRA's ban on references to a candidate within 60 days of an election is a content-based restriction on programming, akin to regulations that burden the editorial discretion of TV companies by requiring them to carry certain programming content. The Supreme Court has upheld this sort of government editorial control over content *only* when the Government can demonstrate a compelling need to enhance the diversity of viewpoints available to the public and to counteract the restrictive gatekeeper power of the broadcaster.[36]

BCRA turns this rationale on its head. It regulates the content of broadcast television not to *enhance* the "multiplicity of viewpoints" by requiring the broadcast of programming the mass media might otherwise not carry, but to *diminish* such diversity by forbidding media companies from selling their air time to other speakers. And the content that BCRA forbids is *electoral speech,* which is the core of *political speech,* which is the core of *all speech.* Indeed, BCRA *exacerbates* precisely the danger that the FCC sought to ameliorate when it instituted the fairness doctrine upheld in *Red Lion.* Rather than requiring the media to provide access to groups with competing views, thereby reducing the danger of media bias, BCRA increases the danger of that bias by forbidding outside groups from buying time from the media to broadcast different viewpoints. This reinforces the station owners' "unfettered power to communicate only their own views on public issues, and to permit on the air only those with whom they agree." *Red Lion,* 395 U.S. at 392. *See also FCC v. League of Women Voters*, 468 U.S. at 398 (striking down ban

---

programs were approximately *ten times* more likely to favor gun control than to oppose it. App. 835-50 (*Outgunned: How The Network News Media Are Spinning The Gun Control Debate.*).

[36] *See Turner Broad. Co. v. FCC*, 512 U.S. 622, 664 (1994) (refusing to strike down cable must-carry rules because "it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public") (internal citations and quotations omitted); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (upholding FCC fairness doctrine because, "It is the right of the viewers and listeners, not the rights of the broadcasters, which is paramount.").

on editorializing by noncommercial broadcasters because it reduced diversity of viewpoints and speakers, which was "precisely the opposite remedy" of that endorsed in *Red Lion*).

Supporters of BCRA in Congress exempted media corporations from their ban on "electioneering communications" not because they welcome criticism from the press. To the contrary, even they presumably grasped that "[i]t is beyond per-adventure that the media could not be prohibited from speaking about candidate qualifications. The First Amendment would not tolerate a law prohibiting a newspaper or television network from spending on political comment because it operates through a corporation." *Austin*, 494 U.S. at 712 (Kennedy, J., joined by O'Connor and Scalia, J.J. dissenting). When *Austin* was decided over a decade ago, it was a close call whether media corporations differed enough from other corporations, especially political advocacy corporations like the NRA, to provide a compelling government interest to exempt them from an otherwise sweeping ban on corporate electoral speech. Indeed, even then a powerful case could have been made, and was made, that "[a]massed corporate wealth that regularly sits astride the ordinary channels of information is much more likely to produce the New Corruption (too much of one point of view) than amassed corporate wealth that is generally busy making money elsewhere." 494 U.S. at 691 (Scalia, J., dissenting.) But whether *Austin* was correctly decided or not, its rationale plainly will no longer support extending a unique statutory speech license to the multinational business conglomerates that control the Nation's airwaves today.

V. TITLE II OF BCRA IMPOSES DISCLOSURE REQUIREMENTS THAT VIOLATE THE FIRST AMENDMENT.

Should the NRA fund an "electioneering communication," as is its constitutional right, it would then be forced to disclose the "names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to [it]" during the preceding calendar year. § 201(a). This requirement severely burdens the first amendment rights of the NRA and its members and is pat-

ently unconstitutional under existing law. In *Buckley*, the Supreme Court explained that such disclosure requirements run contrary to the First Amendment in that they "deter some individuals who might otherwise contribute" and "may . . . expose contributors to harassment or retaliation," burdens that "must be weighed carefully against the interests which Congress has sought to promote." 424 U.S. at 68. The Court upheld forced disclosure of contributions made to candidates and political parties because, with respect to them, the Government's interest in combating corruption was sufficiently strong. At the same time, however, the Supreme Court did not disturb the D.C. Circuit's invalidation of a disclosure requirement " 'necessitating reporting by groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance.' " 424 U.S. at 11 n.7 (quoting *Buckley v. Valeo*, 519 F.2d 821, 832 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976). No appeal was ever taken from that aspect of the D.C. Circuit's decision. *Id.*

The disclosure regime that the D.C. Circuit struck down would have reached any organization responsible for "any material published or broadcast to the public which refers to a candidate (by name, description, or other reference) and which (a) advocates the election or defeat of the candidate, or (b) sets forth the candidate's position on any public issue." *Buckley*, 519 F.2d at 832 (quotations omitted). The D.C. Circuit recoiled from the overbreadth of such a regime, which "may affect group activity extending from one end of the spectrum of public issue-discussion to the other," *id.* at 871, and "work a substantial infringement of the associational rights of those [individuals] whose organizations take public stands on public issues." *Id.* at 872.

> [U]nlike contributions and expenditures made solely with a view to influencing the nomination or election of a candidate, . . . issue discussions unwedded to the cause of a particular candidate hardly threaten the purity of elections. Moreover, . . . such discussions are vital and indispensable to a free society and an informed electorate. Thus the interest of a group engaging in nonpartisan discussion as-

> cends to a high plane, while the government interest in disclosure correspondingly diminishes.

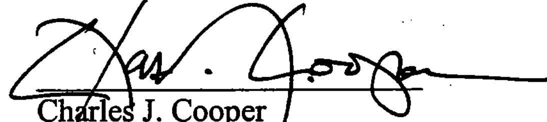
Id. at 873. The same reasoning applies in force here. Title II's disclosure requirements reach the very same outside "groups engaging in nonpartisan discussion," including the NRA. Accordingly, this Court cannot sustain them.

Moreover, the Supreme Court in *Buckley* forbade application of a disclosure requirement to any group that shows "a reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." 424 U.S. at 74. The NRA has made the requisite showing in this case. Specifically, Wayne LaPierre has testified that hostility toward the NRA is so high in certain circles and parts of the countries that "hundreds, if not thousands of individuals," including Government employees, have told him of the harassment and retaliation they would suffer if their identities as NRA members were disclosed. App. 24-25 (LaPierre Decl.) ¶ 62. Mary Rose Adkins, the Fiscal Officer of the NRA, has further testified that many contributors carefully limit their donations in order to avoid disclosure and introduced documents demonstrating the retaliation that those contributors would face. *See* App. 50 (Adkins Decl.) ¶¶ 4-6; App. 884.

CONCLUSION

For the foregoing reasons, the NRA and the PVF respectfully request entry of judgment on their claims and entry of the relief specified in their complaint.

Respectfully submitted,



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

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

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

Dated: November 6, 2002