IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, et al., Plaintiffs, v. FEDERAL ELECTION COMMISSION, et al., Defendants.	Civil Action No. 02-0582 (CKK, KLH, RJL) **CONSOLIDATED ACTIONS**

SUPPLEMENTAL BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION

Joel M. Gora
250 Joralemon Street
Brooklyn, NY 11201
Of Counsel

Mark J. Lopez
(Pro Hac Vice)
Steven R. Shapiro
American Civil Liberties Union
125 Broad Street 17th Floor
New York, NY 10004
212-549-2608
Attorneys for the American
Civil Liberties Union

SUPPLEMENTAL BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION

INTRODUCTION

The American Civil Liberties Union (ACLU) is aligned with a coalition of plaintiffs challenging Title II of the Bipartisan Campaign Reform Act of 2002 (BCRA). Title II § 203, prohibits labor unions and corporations from sponsoring broadcast and radio ads that refer to a clearly identified federal candidate within 60 days of a general election and 30 days before a primary. Referred to as "electioneering communications," these ads are made illegal without regard to the issues discussed in the ads, despite the Supreme Court's clear holding in *Buckley v. Valeo*, 424 U.S. 1 (1976). Related disclosure and coordination provisions are also adopted in Title II that further blur the distinction between communications that are fully protected speech and speech that has traditionally been regulated. Finally, the broad reach of Title II extends even to non-profit advocacy organizations like the ACLU, notwithstanding the Supreme Court's recognition that such issue advocacy groups, organized as corporations, are entitled to special First Amendment protection. *See FEC v. Massachusetts Citizens for Life (MCFL)*, 479 U.S. 238 (1986).

As set forth more fully below, the ACLU is a nonprofit and nonpartisan organization that is primarily funded by thousands of small contributors through their membership dues. The activities supported by these funds are not intended to influence the election or defeat of particular candidates; they are solely intended to promote the ACLU's position on the critical civil liberties issues facing the country today. While the ACLU fully endorses the arguments advanced in the main brief for enjoining enforcement of the broadcast ban based on well-settled

First Amendment principles, the ACLU writes separately to highlight the unconstitutionality of the BCRA by emphasizing its practical impact on the work of issue-oriented advocacy organizations like the ACLU.[1]

BACKGROUND AND FACTUAL STATEMENT

For almost a century, the American Civil Liberties Union has been a paradigm of the hundreds, if not thousands, of non-partisan, issue-oriented advocacy groups whose activities enrich and enable our democracy. In its 82-year history, the ACLU has given voice to and embodied the expressive association of hundreds of thousands and perhaps millions of individual Americans who share its beliefs and subscribe to its principles. With approximately 300,000 members nationwide today, most of whom contribute approximately $35 per year to support and affiliate themselves with it, the ACLU is perhaps the most well-known civil liberties organization in the country. Its work amplifies the voices of all of its members, supporters and contributors.[2]

---

[1] Although the ACLU is not directly affected by Title I's soft money ban, we agree that the provisions of Title I violate the First Amendment. The ACLU does not join the federalism challenge to Title I presented in the main brief.

[2] The ACLU is a voluntary membership organization. Membership dues to the ACLU are not tax deductible. The basic membership fee is $35, though many members contribute more than that. There is also a reduced-fee membership available for students and other low-income individuals. Membership dues accounted for $9,393,948 of the $13,625,051 contributed to the organization by individuals in 2001. Only 212 individuals contributed more than $1000. Although the ACLU does not maintain records on the corporate status of non-individual donors, less than $85,000 of the ACLU's total revenues was contributed by entities such as businesses and other organizations in 2001. This constitutes less than 1% of the ACLU's budget. None of the contributions from businesses exceeded $500. Total annual contributions from labor organizations over the last 10 years have never exceeded $5000. Total contributions from political parties over the same 10 year period were $330. In sum, contributions from non-individual donors represent an insignificant percentage of the ACLU's total annual funding. *See* Declaration of Anthony Romero, ¶ 6: 3 PCS, ACLU 3. Mr. Romero is the Executive Director of the ACLU.

The ACLU has never taken a position in a partisan political election, never contributed a dollar to a political campaign or party, never formed a political action committee or "PAC" or affiliated with one, and has gone to great lengths to maintain its rigorously non-partisan stature. Being subject to the Federal Election Campaign Act (FECA) would be fundamentally inconsistent with the ACLU's mission and identity as a nonpartisan organization and would also have serious ramifications for the organization's members and contributors whose identities would have to be disclosed. Many ACLU members and donors request explicit assurances that their membership will remain confidential and that their contributions will remain anonymous, and the ACLU has consistently defended their well-recognized First Amendment rights to remain anonymous. *See* Romero Declaration, ¶ 5: 3 PCS, ACLU 2 .

Because it is a non-partisan organization that does not endorse or support candidates, *all* of the ACLU's advocacy is focused on issues. Yet, ever since the enactment of FECA approximately 30 years ago, the ACLU has been forced to resist efforts to stifle its own speech and the speech of other issue organizations through the overzealous application of overbroad campaign finance laws. For three decades, the ACLU has been at the forefront of the public debate over campaign finance (including our support of a program of full and fair public financing), and has been involved in most of the major litigation testing the constitutional limits of the effort to restrict political speech in the name of campaign finance reform.[3]

---

[3]Most prominently, the ACLU was co-counsel in *Buckley*, and its New York affiliate appeared as a party. The ACLU, however, has participated in numerous other campaign finance cases, both before and after *Buckley*. *See United States v. National Committee for Impeachment*, 469 F.2d 1135 (2d Cir.1972); *American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973)(three-judge court) vacated as moot, *sub nom, Staats v. American Civil Liberties Union*,

That litigation has resulted in several fundamental principles of First Amendment law. Of particular relevance here, the government is barred from regulating political speech that does not expressly advocate the election or defeat of particular candidates. It may not prohibit issue advocacy corporations that are primarily supported by individual contributions from engaging in even express advocacy. The government is permitted to treat coordinated campaign expenditures as contributions but it may not treat every conversation with a legislator as a sign of coordination. And, it may not insist on overbroad disclosure rules that threaten the right of anonymous political speech. Each of these principles is violated by Title II in ways that work to the direct detriment of the ACLU.

A. <u>The Impact Of The Ban On Electioneering Communications</u>

On an almost daily basis, the ACLU engages in public commentary on the actions of federal officials, many of whom will be standing for election. *See* Declaration of Laura Murphy, ¶¶ 4-12: 3 PCS, ACLU 7-12. Like other advocacy groups, the ACLU conveys its message through multiple mediums, including the internet, direct mail campaigns, membership drives, press releases, news conferences, public appearances, pamphlets and other publications, that refer to, praise, criticize, describe or rate the conduct or actions of clearly identified public officials. ACLU communications referring to a candidate for elective office are not made for the purpose of influencing the election or defeat of that candidate. The timing of those communications is a

---

422 U.S. 1030 (1975); *California Medical Association v. FEC,* 453 U.S. 182 (1981);*Brown v. Socialist Workers '74 Campaign Committee* 459 U.S. 87 (1982); *FEC v. National Conservative Political Action Committee* 470 U.S. 480 (1985);*FEC v. Massachusetts Citizens for Life,* 479 U.S. 238 (1986); *Austin v. Michigan State Chamber of Commerce* 494 U.S. 652 (1990); *McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995); *Colorado Republican Federal Campaign Committee v. FEC* 518 U.S. 604 (1996); *Nixon v. Shrink Missouri Government PAC* 528 U.S. 377 (2000); *FEC v. Colorado Republican Federal Campaign Committee* 533 U.S. 431 (2001).

function of the timing of debate over the legislation or issue under consideration. *See* Romero Declaration ¶ 3: 3 PCS, ACLU 1-2.

The success of the ACLU is also dependant on broadcast media that report on the organization's activities on an almost streaming basis. The organization is at the front line of many controversial issues, and its views are often sought. But the ACLU cannot always rely on the news media to report its activities or to present its views accurately or completely. Because exclusive reliance on such "earned media" is not sufficient, the ACLU has turned to the use of paid media in an effort to ensure that the organization's views are heard in an accurate and balanced way. For example, the ACLU paid for a series of radio and newspaper ads directed at Speaker of the House Dennis Hastert during his March 2002 primary election. The ads had two purposes. First, they criticized the Speaker for failing to bring the Employment Non-Discrimination Act (ENDA) to the floor of the House of Representatives. At that point, ENDA was actively being considered in the Senate after the legislation had been stalled in the House for some time. The ACLU hoped the ad would be a catalyst to help bring the legislation up for a vote. The radio and print ad campaign also was intended to highlight the impact of Title II of the BCRA, which was then being debated in Congress, on groups like the ACLU and to dramatize that the ACLU's broadcast radio spots would become criminal once Title II was enacted. As the ACLU pointed out at the time, the Hastert broadcast ads would have been illegal under the BCRA because they referred to Speaker Hastert and were aired in his district within 30 days of his primary election, even though he was running unopposed. *See* Murphy Declaration, ¶ 10: 3 PCS, ACLU 10-11.

It is entirely foreseeable that future broadcast ads will target President George W. Bush

for violating civil liberties principles in fighting the War on Terrorism. Indeed, the ACLU has recently launched a media campaign to address the many civil liberties issues that have come under fire following the 2000 Presidential election and 9/11 attack on the World Trade Center. *See* Murphy Declaration ¶10:3 PCS, ACLU 10-11. Such broadcast and media efforts - paid and earned - are essential to creating a climate of opinion favorable to civil liberties protections and to persuading the public to contact their legislative representative or executive official and urge them to vote one way or the other on a bill or otherwise conform their official actions to civil liberties principles. Inevitably, many of the ACLU's communications involving legislative or executive branch policies, including print and broadcast communications, refer to a clearly identified candidate, Member of Congress, or executive branch official. High profile legislation, such as the "McCain-Feingold bill," is almost always publicly identified with its sponsor. Similarly, ACLU's public statements supporting or opposing the President's policies invariably refer to the President by name. *See* Murphy Declaration, ¶ 8: 3 PCS, ACLU 9. Title II's ban on "electioneering communications" would effectively mute much of this speech by the ACLU.

It is important to emphasize that the blackout periods imposed by the BCRA – 60 days before a general election and 30 days before a primary – are often periods of intense legislative activity. During election years, the candidates stake out positions on virtually all of the controversial issues of the day. Much of the electoral debate occurs against the backdrop of pending legislative action or executive branch initiatives. Some of the President's boldest initiatives are advanced during election years – often within 60 days of a general election. This year, for instance, legislation creating a new federal Department of Homeland Security is under consideration during this pre-election period. The ACLU took out a full page advertisement in

Congress Daily and CQ Monitor on September 30, 2002, urging Congress to safeguard civil liberties in connection with its consideration of the "Gramm–Miller" and "Lieberman" versions of the Homeland Security legislation. A copy of the ad is attached to the Declaration of Laura Murphy: 3 PSC, ACLU 19. During the fall 2000 elections, dozens of critical legislative issues were pending in Congress during the 60 day general election blackout period. *See* Chart summarizing "Bills of Interest to the ACLU in the 106th Congress During the 60 Days Prior to the November General Election." 3 PCS, ACLU 20-22. Thus, it is not unusual for the ACLU 's legislative and issue advocacy to be most intense during an election year, especially in the days leading up to the election. Yet this is precisely when Title II forces the ACLU to be silent.

Finally, Section 201 of the BCRA arguably requires organizations like the ACLU to disclose the identity of its contributors as the price for taking out broadcast ads. Applied to the ACLU, any such disclosure requirement would violate longstanding First Amendment rules designed to protect anonymous political speech and the right to associate with controversial political groups.

B. The Impact of the Coordination Rules.

Title II will wreak havoc on the ACLU's legislative advocacy in other ways. The organization's legislative efforts include many activities directly associated with lobbying. The ACLU regularly meets, speaks or corresponds with members of Congress and Executive Branch officials concerning proposed or pending legislation or executive action that may affect civil liberties. For instance, following September 11, 2001, the ACLU has had numerous direct contacts with members of both the House of Representatives and the Senate urging restraint in the rush to adopt legislation giving the Department of Justice and other federal agencies

sweeping law enforcement powers curbing important civil liberties. The ACLU also routinely testifies before Congress, conducts staff briefings for Congress and provides members with ACLU position papers. *See* Murphy Declaration, ¶¶ 3-4: 3 PCS, ACLU 6-7. The ACLU maintains a congressional score card on important civil liberties issues and periodically publishes different guides on these civil liberties issues. *Id.* at ¶ 5:3 PCS, ACLU 7-8.

Sometimes the ACLU is advancing legislation, sometimes it is opposing legislation. Its legislative activities are conducted through numerous different coalitions involving dozens of different coalition partner organizations. Typically, a campaign is undertaken with coalition partners and individual members of Congress who support the legislation being advanced or opposed by the ACLU. For instance, the legislative campaign opposing the BCRA involved many different organizations and individuals, including Senator Mitch McConnell (R. KY) and his staff. The ACLU, its coalition partners and Senator McConnell shared a common interest in educating the public about the First Amendment risks posed by the BCRA. Accordingly, ACLU staff met frequently with Senator McConnell's staff, as well as with others in Congress, during the debate over the BCRA. Senator McConnell's office also conferred with the ACLU during its early efforts to promote the election reform legislation following the debacle in Florida during the 2000 presidential election, and we worked closely with Senator Chris Dodd (D.CT) on that issue as well. Representative Bob Barr (R. GA), worked with the ACLU to oppose key provisions of the U.S.A. Patriot Act. The ACLU worked with these various members of Congress to ensure that proposed legislation is consistent with civil liberties principles. *See* Murphy declaration ¶ 6:3 PCS, ACLU 8.

Under the expanded coordination provisions adopted by the BCRA § 202 and§ 214, many

of these legislative activities with members of Congress might possibly serve as the basis for determining that any subsequent ACLU communications concerning those Senators or Representatives were somehow "coordinated" with them, thus triggering the punitive operation of the FECA. Even though the ACLU does not coordinate activities with elected officials for the purpose of influencing an election, the ACLU has worked with many legislators of both parties on many bills. If any of the ACLU's subsequent public statements refer to a Senator's or Representative's support for our position, the ACLU's expenditures on such communications might conceivably be treated as "coordinated" with these legislators and therefore a prohibited contribution or expenditure. *See* Murphy Declaration¶ 7: 3 PCS, ACLU 8-9.

SUMMARY OF ARGUMENT

Title II, which prohibits any broadcast communication that merely "refers to" an elected official, within 30 or 60 days of an election, goes so far beyond the valid area of permissible regulation of campaign speech as to render those provisions facially unconstitutional. The BCRA is an unprecedented effort to censor what is at the core of First Amendment's freedoms: political speech about public officials. The heart of that censorship machine is the attempt to ban - in the case of corporations and unions - and severely regulate - in the case of all other persons or entities, including individuals - election year speech that even mentions the name of a candidate. In condemning such speech by legislative fiat as "electioneering communications" when contained in any broadcast, cable or satellite communication, Title II flagrantly contravenes more than a quarter century of unbroken precedent.

In *Buckley v. Valeo*, and subsequent cases, the Supreme Court held that campaign finance laws can only regulate the funding of speech which "in express terms advocate[s] the election or

defeat of a clearly identified candidate for federal office." 424 U.S. at 44. By regulating spending for core political speech whenever it simply "refers to" such a candidate, Title II ignores *Buckley*'s express holding, sweeps well beyond the permissible scope of regulation under the First Amendment, and criminalizes vast quantities of fully protected speech engaged in by the ACLU and other non-partisan, issue-oriented groups. Similarly, Title II ignores the special First Amendment protection that the Supreme Court has given to issue advocacy corporations, like the ACLU. Finally, the coordination and disclosure provisions of the BCRA are likewise overbroad, as well as vague, and thus facially invalid under the First Amendment.

ARGUMENT

THE CHALLENGED PROVISIONS OF TITLE II OF THE BCRA PROHIBIT, DISRUPT, AND RESTRAIN THE ACLU'S CLASSIC ISSUE ADVOCACY IN VIOLATION OF THE CONSTITUTION

From the earliest cases brought under the FECA, the ACLU has consistently resisted the persistent attempts to use the Act to regulate and restrain issue advocacy in a manner violating time-honored First Amendment principles. *See United States v. National Committee for Impeachment*, 469 F.2d 1135 (2d Cir.1972); *American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973)(three-judge court), vacated as moot *sub nom. Staats v. American Civil Liberties Union*, 422 U.S. 1030 (1975); *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir.1975)(enbanc). Those cases helped fashion critical principles designed to limit the impermissible reaches of the FECA and to establish without doubt that non-partisan, issue-oriented organizations cannot be subject to campaign finance controls. Building on those principles, the Supreme Court and numerous lower courts have repeatedly affirmed, in *Buckley* and elsewhere, the bright line distinction between issue advocacy and express advocacy that the BCRA now seeks to obliterate.

A. The Broadcast Ban and Disclosure Requirements of Title II

In the very first case where the government used the FECA to prosecute a group for classic issue advocacy, a federal appeals court concluded that it would be "abhorrent" to allow the campaign finance laws to be used to suppress issue advocacy critical of the actions of elected officials. That first enforcement suit involved a handful of dissenters who had published a two-page advertisement in The New York Times in May 1972 urging the impeachment of President Richard Nixon and praising the few members of Congress who supported that view. *See United States v. National Committee for Impeachment, supra.* The Second Circuit held that issue advocacy could not be regulated under the Act and issue organizations could not be treated as "political committees." Drawing the now settled distinction between issue speech and partisan advocacy, that court ruled that it would be "abhorrent" and "intolerable" to permit the FECA to "regulat[e] the expression of opinion on fundamental issues of the day." *Id.* at 1142.

The *Impeachment* suit was followed by *American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973) (three judge court), *vacated as moot*, 422 U.S. 1030 (1975), which arose when the ACLU sought to sponsor a similar advertisement, shortly before the 1972 elections, criticizing the Nixon Administration's anti-busing policies and praising Members of Congress who had resisted the President on that issue. This Court ruled that the portion of the Act which deemed the ACLU advertisement as "on behalf of" the campaigns of members of Congress and "in derogation of" President Nixon, "establishe[d] impermissible prior restraints, discourage[d] free and open discussion of matters of public concern and as such must be declared an unconstitutional means of effectuating legislative goals." *Jennings*, 366 F. Supp. at 1051.

With respect to the provisions of the FECA that would have treated the ACLU as a "political committee," because it publicly criticizes politicians, this Court in *Jennings* ruled that issue-oriented groups whose major purpose is not the election of candidates, could not be covered by the Act: "We are satisfied that by so constricting the reaches of Title III, the fears of constitutional infringements expressed by plaintiffs will be eliminated. They and other groups concerned with the open discourse of views on prominent national issues may, under both this ruling and that of the Second Circuit, comfortably continue to exercise these rights and feel secure that by so doing so their associational rights will not be encroached upon." *Id.* at 1057.

Unfortunately, these assurances proved short-lived. In 1974, in enacting the major campaign finance controls challenged in *Buckley*, Congress included a special provision precisely designed to regulate issue-oriented groups in ways that had been ruled impermissible.[4] The provision which was triggered by publicly communicating any information "referring to a candidate," was challenged as part of the *Buckley* litigation. An *en banc* Court of Appeals in this Circuit, which upheld every other provision of the new law, unanimously struck that one down as an unconstitutional regulation of non-partisan discussions of campaign issues and candidate voting records, which are "vital and indispensable to a free society and an informed electorate." *Buckley v. Valeo*, 519 F.2d. 821, 873, 875 (D.C. Cir. 1975). The Court of Appeals observed:

---

[4] That provision, 2 U.S.C. Section 437a, provided, in pertinent part as follows:

Any person (other than an individual) who expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election, or who publishes or broadcasts to the public any material referring to a candidate (by name, description or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidates who holds or has held Federal office), or otherwise designed to influence individuals to cast their votes for or against such candidates or to withhold their votes from such candidate shall file reports with the Commission as if such person were a political committee.

"Public discussion of public issues which are also campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exercise some influence on voting at elections. In this milieu, where do "purpose" and "design[]" "to influence" draw the line." 519 F.2d at 875. In light of the unacceptable vagueness and overbreadth of this provision, the Court ruled it unconstitutional, and the provision was allowed to die when no appeal was taken from this part of the decision. Under that decision alone, the Title II ban on communications that merely "refer" to a candidate should be struck down. Of course, that same result is required by the Supreme Court's decision in *Buckley* as well.

A central tenet of the Court's campaign finance jurisprudence has been the imperative of protecting issue advocacy from campaign finance controls. The particular safeguard adopted in *Buckley* was the Court's clear ruling that the government's regulation of expenditures can only reach "communications that in express terms advocate the election or defeat of a clearly identified candidate...." 424 U.S. at 45. This express advocacy doctrine, which *Buckley* adopted "to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons..." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. at 249, protects and safeguards issue-oriented speech and has provided a bright line between permissible and impermissible government regulation.

The Court recognized that efforts to regulate campaign speech would present a serious risk of curtailing the capacity of citizens, as individuals and in association with others, to express freely their views on important matters of public policy and on the behavior of public officials in

the conduct of governmental affairs: "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.'" *Buckley v. Valeo*, 424 U.S. at 14. Accordingly, the Court in *Buckley* narrowed the reach of the FECA in important ways.

The Court observed that issue-oriented expression by advocacy organizations is both commonplace and vital to our constitutional democracy and that there has to be a clear and narrow demarcation between campaign-related speech subject to regulation and issue-oriented advocacy which has to remain unfettered. It is not that there is an inherent distinction between issue speech and electoral advocacy. Quite the contrary, as the Court recognized: "For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues but campaigns themselves generate issues of public interest." 424 U.S. at 43. If any mention of a candidate in the context of discussion of an issue rendered the speaker or the speech subject to campaign finance controls, the consequences for "free discussion" would be intolerable and speakers would be compelled "to hedge and trim." *Buckley* 424 U.S. at 23, quoting from *Thomas v. Collins*, 323 U.S. 516, 535 (1945). Consequently, the Court concluded that Congress could not regulate all speech "relative to" a candidate, but could only regulate expenditures that were for "communications that in express terms advocate the election or defeat of a clearly identified candidate...." 424 U.S. at 45.[5]

---

[5] In fashioning the express advocacy doctrine, the Court was not naive. It knew that groups could devise "expenditures that skirted the restriction on express advocacy of election or defeat

The common theme running through the *Buckley* decision and the cases since then is that the campaign finance regime should not encroach unnecessarily upon the speech and associational rights of issue-oriented advocacy organizations, even if their speech might influence the outcome of an election. Only "express advocacy" can be subject to regulation; issue advocacy is free from permissible regulation. The express advocacy doctrine has been an indispensable bulwark against regulation by the Federal Election Commission and others, and the courts have repeatedly condemned efforts to weaken the doctrine and control issue advocacy. [6]

Three decades of law have made it clear beyond a reasonable doubt that preventing organizations like the ACLU from engaging in the speech which Title II deems an illegal "electioneering communication" is a radical departure from settled First Amendment doctrine. To the extent this provision prevents the kind of ACLU speech described above, as epitomized in

---

but nevertheless benefitted the candidate's campaign." *Id.* at 46. But the Court was willing to take that risk for the First Amendment: "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." 424 U.S. at 45 (emphasis supplied). If the independent speech does not embody "express advocacy" of election or defeat, it is totally free from permissible regulation, including reporting and disclosure requirements as well. *See* 424 U.S. at 79-80.

[6]The unbroken line of Supreme Court and lower court decisions reaffirming the express advocacy doctrine is set forth in the main brief. Similarly, the Court has protected issue advocacy in a number of other critical ways. For example, the Court has protected the right not just of individuals and cause organizations, but also of business corporations and unions to engage in vigorous issue advocacy. See *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). (Media corporations, of course, can even engage in "express advocacy." See *Mills v. Alabama*, 384 U.S. 214 (1966)). Contributions to issue advocacy campaigns and organizations cannot be limited in any way either. See *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981). Finally, issue advocacy may not even be subject to registration and disclosure requirements. See *McIntyre v. Ohio Elections Commisison*, 514 U.S. 334 (1995); see also *Buckley v. Valeo*, 519 F.2d 821 , 843-44 (D.C. Cir. 1975)(enbanc) (holding unconstitutional the portion of the FECA which required disclosure by issue organizations that published information "referring to a candidate.").

the Hastert ad, it is flatly unconstitutional.[7]

B. The "MCFL" Defect

At the very least, the broadcast ban in Title II cannot be sustained in its present form because of its failure to recognize that the First Amendment protects the right of issue-advocacy corporations like the ACLU to engage in speech that refers to federal candidates without the fear of criminal sanction. To apply laws against corporate contributions and expenditures to groups like the ACLU lacks any compelling justification whatsoever. Purely voluntary membership organizations which take the form of non-profit corporations like the ACLU, which amplifies the voices of its 300,000 members, pose none of the concerns associated with business corporations or comparable entities. The ACLU does not seek to influence elections. It has no shareholders. It does not amass aggregations of wealth in the economic marketplace. In short, it bears no resemblance to the profit-making corporations that the FECA targets.

For that reason, the application of Title II to non-profit advocacy corporations like the ACLU is directly contrary to the Supreme Court's teaching in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). That case held that non-profit, issue advocacy corporations can nonetheless engage even in express advocacy, let alone issue advocacy merely "referring to" a political candidate. This "*MCFL* exception" to the FECA's prohibition on corporate and union express advocacy is a necessary safety valve to allow a wide variety of non-profit organizations

---

[7]The so-called "fallback" provision fares no better. To the extent it relies on concepts such as speech which "supports" or "opposes" a candidate, it is simply a rehash of the kind of overbreadth and vagueness which the courts even prior to *Buckley* found to be an unacceptable basis for regulating issue speech. See *American Civil Liberties Union v. Jennings, supra*; *United States v. National Committee for Impeachment, supra*, and see cases cited in the main brief.

to participate fully in the national debate on public issues. The BCRA's prohibitions on any such advocacy by non-profits, without exception, flies in the face of this guarantee. The failure of Congress, fully aware of the clash between *MCFL* rights and Title II's restraints, to exempt issue advocacy organizations from the ban on prohibited corporate expenditures renders the total ban facially unconstitutional. See *Ashcroft v. Free Speech Coalition*, — U.S. —, 122 S.Ct. 1389 (2002). Although the Commission has recently determined that certain *MCFL* corporations may engage in electioneering communications, the Commission's crabbed view of the scope of *MCFL* rights excludes organizations like the ACLU which receive an extremely modest, *de minimis* amount of contributions from non-individuals.[8] Many cause organizations do so, but remain overwhelmingly comprised of individual contributors and supporters who subscribe to the views and advocacy of the organization. Courts have held that the *MCFL* exemption cannot constitutionally be denied to groups that receive a modest amount of non-individual contributions, see *Minnesota Citizens Concerned for Life, Inc. v. FEC*, 936 F. Supp. 633 (D. Minn. 1996), *aff'd*, 113 F.3d 129 (8th Cir. 1997); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994). This Court should follow suit.

C. The Breach of Associational Privacy Triggered By The Disclosure Requirement For Electioneering Communications

The ACLU has strenuously fought to protect the right of associational privacy of itself and its members. Indeed, one of the reasons that we have long resisted efforts to enforce campaign finance laws against our issue advocacy is to protect our members and contributors

---

[8] In 2001, the ACLU received less than 1% of its contributions from sources other than individuals. *See n. 2, supra.*

from the violation of their privacy that would come with compelled disclosure under those laws. *See Buckley,* 424 U.S. at 64-68; *ACLU v. Jennings,* F. Supp. at 1055-56; *New York Civil Liberties Union v. Acito,* 459 F.Supp. 75 (S.D.NY 1978). The Supreme Court recognized this concern in *Buckley* by holding that speakers could not be required to disclose their identities or contributors unless the speech represents express advocacy. See 424 U.S. at 74-82. Both before and since *Buckley,* the Court has powerfully reaffirmed the importance of preserving a right to anonymous political speech. *Talley v. California,* 362 U.S. 60 (1960), *McIntyre v. Ohio Elections Commission, supra.* Furthermore, the *Buckley* Court recognized that association with controversial political organizations carries particular dangers of chilling political speech. 424 U.S. at 74. In *Brown v. Socialist Workers '74 Campaign Committee,* 459 U.S. 87 (1982), the Court ruled that campaign finance disclosure laws cannot be applied to controversial political parties, even those that engage in core campaign and electoral activities. This necessary safeguard is missing from Title II, as well.

To the contrary, the Title II § 201 disclosure requirements are imposed on qualifying non-profit corporations, not to mention individuals, committees, associations and all other persons or entities that are permitted to engage in "electioneering communications" so long as they pay the price of giving up their anonymity or their associational privacy. Even in the limited situations where a non-profit might be permitted to engage in such speech, they must nonetheless publicly disclose contributors who give more than $1,000 either to the "electioneering communication" or to the organization itself.[9] Indeed, the disclosures required by § 201 are almost as onerous and

[9] To the extent that Title II might otherwise require organizations like the ACLU to disclose the identity of its contributors as the price for taking out broadcast ads - either by compelling

burdensome as those required of regular partisan political committees. In the case of controversial groups, such threatened disclosure can have a deadly chilling effect on the group's advocacy. For just one example, supporters of a gay rights group engaged in advocacy on a gay rights bill in a conservative community might very well fear harassment and reprisals if their financial support were made public. The failure of Title II to include an *SWP*-type exemption from disclosure poses no lesser constitutional deficit than its ignoring the principles of *MCFL*.

D. The Coordination Provisions

Sections 202 and 214 of Title II significantly expand the rules prohibiting "coordination" of campaign activity with candidates. The fatal flaws in these provisions are amply demonstrated in the main brief. The much wider net cast by these new rules will so seriously disrupt the ACLU's legislative and issue advocacy work as to violate the First Amendment rights of speech, association and petition of the ACLU and its members.

Title II invades these rights by expanding the concept of "coordination" well beyond its core FECA meaning that the candidate and the third party were working hand in glove to further the candidate's cause. Rather than treat coordination as the absence of independence and the functional equivalent of candidate control or instigation, see *Buckley v. Valeo*, 424 U.S. at 47, and n. 53, the BCRA broadly deems merely any "substantial discussion" about public communication between a candidate and an issue group as a basis for a finding of "coordination." Such "coordination" then taints and disables later commentary by that citizen group about that politician by treating it as a prohibited "contribution" or "expenditure."

---

such groups to use a PAC (which would be antithetical to the ACLU's nonpartisan tradition) or by disclosure possibly accompanying an "MCFL" exception, any such disclosure requirement would violate such long standing First Amendment rules designed to protect anonymous political speech and the right to associate with controversial political groups.

The record shows how these new rules can chill and disrupt legislative and policy discussions by ACLU officials with Members of the Executive or Legislative branches. *See* Declaration of Laura Murphy ¶¶ 4-8: 3 PCS, ACLU 7-9. Section 214 thus may effectively impose a year round prohibition on all communications made by a corporation like the ACLU where there has been "substantial discussion" about the communication with a candidate. Likewise, the ACLU may not be able to discuss a civil liberties vote or position with a Representative or Senator if the ACLU will subsequently produce a box score that praises or criticizes that official's stand. This feature of the BCRA acts as a continuing prior restraint which bars the ACLU from engaging in core First Amendment speech for the lawmaker's entire two or even six year term of office.

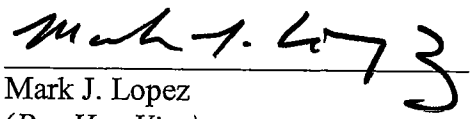
These coordination rules will impair the ability of the representatives of unions, corporations, non-profits and even citizen groups to interact in important ways with elected representatives for fear that the taint of coordination will silence the voices of those groups in the future. The First Amendment is designed to encourage and foster such face-to-face discussions of government and politics, see *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), not to drive a wedge between the people and their elected representatives.

CONCLUSION

For these reasons, the Title II of the BCRA and other pertinent provisions challenged here should be declared unconstitutional and their enforcement enjoined.

Dated November 5, 2002

Respectfully Submitted,



Mark J. Lopez
(Pro Hac Vice)
Steven R. Shapiro
American Civil Liberties Union
New York, NY 10004
Attorneys for the American
Civil Liberties Union

Joel M. Gora
250 Joralemon Street
Brooklyn, NY 11201
Of Counsel