TITLE II

PRESENTATION BY THE GOVERNMENTAL DEFENDANTS

I. BCRA'S REGULATION OF ELECTIONEERING COMMUNICATIONS IS CONSTITUTIONAL.

The essence of BCRA's regulation of electioneering communications is two-fold. First, it ensures that labor unions and corporations pay for campaign-related ads that are broadcast shortly before an election with funds voluntarily contributed by individuals for that purpose. Second, it achieves full disclosure of whose dollars are spent when unions, corporations, and other individuals and organizations pay for such ads. But it is not a ban on speech. BCRA allows corporations and unions to spend unlimited amounts of funds voluntarily contributed by their constituents to run electioneering ads, and fits comfortably within the long, constitutional tradition, discussed above, of regulating corporate and union spending in the electoral process. Indeed, its fundamental purpose is to restore integrity to the statutory scheme by which Congress has traditionally furthered the compelling governmental interests in preventing the "corrosive and distorting effects of immense aggregations of wealth" on the electoral process, Austin, 494 U.S. at 660 (upholding constitutionality of restriction on corporate independent expenditures), and the potentially corrupting influence of large-scale expenditures by labor unions and corporations on the elected officials who are aided by them. NRWC, 459 U.S. at 209-10 (sustaining proscription of corporate campaign contributions). It also vindicates the interests of voters in knowing who is responsible for the messages they receive about candidates at the height of an election campaign. Buckley, 424 U.S. at 66-68.

Congress designed BCRA's definition of "electioneering communication[s]" to meet the Supreme Court's concerns about the vagueness of certain language in FECA's regulation of independent expenditures. It draws a clear line in the right place, matching the contours of real

campaign speech as it has developed since Buckley. It is narrowly tailored to serve compelling interests, and is constitutional.

In advancing a contrary view of the matter, the Title II plaintiffs, like their co-plaintiffs, assume the burdens associated with bringing a pre-enforcement facial challenge to an act of Congress. The trial declarations submitted by the Title II plaintiffs describe no specific advertisements, referring to particular candidates in specific races, that these plaintiffs intend to produce or air at any specified time or place in the future, that would qualify as electioneering communications under BCRA.[95] For that matter, according to their discovery responses, many of the Title II plaintiffs have never sponsored television or radio broadcasts that would qualify as electioneering communications.[96] Still others, as non-profit organizations operating under § 501(c)(3) of the Internal Revenue Code,[97] are exempted from BCRA's regulation of electioneering communications altogether. See Final Rule, Electioneering Communications, 67 Fed. Reg. 65,190, 65,199-200 (Oct. 23, 2002) (to be codified at 11 C.F.R. 100.29(c)(6)).

Only the AFL-CIO, Chamber of Commerce plaintiffs, NRA, NRWC, and Club for Growth have histories of spending significant sums of money on "issue" ads that would meet BCRA's

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[96] See Interrogatory Responses of 60-Plus (Interrog. No. 11) [DEV 10-Tab 13]; RealCampaignReform.org (Interrog. No. 11) [DEV 11-Tab 27]; Center for Individual Freedom (Interrog. No. 10) [DEV 10-Tab 12]; National Association of Broadcasters (Interrog. No. 4) [DEV 10-Tab 21]. The only political ad in the ACLU's history that would meet BCRA's criteria for an electioneering communication is a 30-second radio advertisement aired in March 2002, just prior to the commencement of this litigation.

— see also USA-ACLU 00001-2 (press releases) [Tab 3].

[97] See McConnell Second Amend. Compl. ¶¶ 30, 32, 36, 37 (identifying the Indiana Family Institute, the National Right To Life Committee Education Trust Fund, the Southeastern Legal Foundation, and U.S. d/b/a Pro-English as 501(c)(3) organizations).

criteria for electioneering communications. See supra at 37-49. But none of these plaintiffs, either, has described particular advertisements, referring to clearly identified candidates for federal office, that they plan to run in proximity to one or more federal elections, to which they contend BCRA's application would be unconstitutional. Accordingly, to prevail, the Title II plaintiffs must establish that BCRA's regulation of electioneering communications "could never be applied in a valid manner," or is substantially overbroad. New York State Club Ass'n, 487 U.S. at 11; Taxpayers for Vincent, 466 U.S. at 796-798. As discussed herein, their efforts to shoulder that burden all fail.

In support of their position, plaintiffs assert that Buckley announced a rule of substantive constitutional law that prohibits any regulation of independent political spending on communications that do not involve express advocacy, even though experience has proven that regulation of express advocacy alone is no longer an effective means of preventing free-wheeling electioneering by labor unions and corporations. Plaintiffs argue, in other words, that Buckley leaves Congress no choice but to abandon its century-long commitment to safeguarding the Nation's democratic institutions from the corrupting "influence of political war chests funneled through the corporate [and labor union] form," Austin, 494 U.S. at 659, and to accept the resulting distortion and corruption of the political process as a permanent feature of our democracy.

Nothing in Buckley requires that outcome. As is plain on the face of the decision, Buckley adopted the express advocacy standard as a saving construction of several ambiguous FECA provisions that raised serious questions of unconstitutional vagueness. That standard was never meant to be etched in constitutional stone as an unyielding limitation on the power of Congress to combat emergent threats of corruption of the political process. As discussed herein, the four criteria

by which BCRA defines electioneering communications are perfectly clear, and suffer from none of the vagueness that concerned the Court in Buckley.

Nor can plaintiffs carry their burden of demonstrating that the criteria defining electioneering communications are substantially overbroad. The four criteria that Congress adopted work together to ensure that the statute does not sweep substantially beyond its intended scope of advertising designed to influence the outcome of federal elections, a conclusion that is supported by empirical studies considered by Congress and which have been validate d for purposes of this action showing that BCRA's definition of electioneering communications applies to only two to six percent of the genuine issue advocacy in which labor unions, corporations and other interest groups engage. As a result of BCRA, labor unions and corporations such as the AFL-CIO, or the Chamber of Commerce, may end up financing some tiny percentage of genuine issue advocacy, involving federal candidates, with funds from their separate segregated accounts, and on equally rare occasions other groups engaged in genuine issue advocacy may have to comply with modest disclosure requirements, but this is an insufficient basis for invalidating the statute as overbroad.

Plaintiffs' quarrels with BCRA's disclosure provisions are equally meritless. BCRA's requirements for disclosure of electioneering communications serve the same voter information, anti-corruption, and enforcement interests that the Supreme Court found sufficiently important in Buckley to sustain FECA's requirements for disclosure of expenditures made by independent groups and organizations. Moreover, the disclosures required under BCRA are less intrusive than the disclosures required under FECA § 434(c), regarding independent expenditures by individuals and groups.

A. BCRA's Requirement That Corporations and Labor Unions Finance Electioneering Communications Using Separate Segregated Funds Serves Compelling Governmental Interests.

1. Independent campaign spending by corporations and labor unions can unfairly distort and influence the electoral process.

BCRA § 203 prohibits corporations and labor unions from making financial outlays of general treasury funds for the purpose of sponsoring electioneering communications, but allows them to support such communications through payments made from their separate segregated funds. While these requirements "do not stifle corporate [and labor union] speech," as regulations touching on political expression they must nevertheless be "narrowly tailored to serve a compelling state interest." Austin, 494 U.S. at 657-58. Section 203 of BCRA is not vulnerable to a facial challenge because it serves a variety of governmental interests that the Supreme Court has often acknowledged to be compelling.

The Supreme Court has repeatedly recognized that the "compelling governmental interest[s] in preventing corruption support[ ] the restriction of the influence of political war chests funneled through the corporate form." Austin, 494 U.S. at 659 (internal quotation marks and citation omitted). "Th[e] concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas." MCFL, 479 U.S. at 257. "Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." Id.

Austin upheld the constitutionality of restricting independent corporate expenditures when it reviewed a Michigan statute modeled on § 441b, see 494 U.S. at 655 n. 1, explaining that

> State law grants corporations special advantages such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets that enhance their ability to attract capital and to . . . maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace."

494 U.S. at 658-59 (citation omitted). The Court found this potential for unfair influence sufficient to uphold a ban on financing independent electoral expenditures from corporate treasuries, in the interest of preventing "the corrosive and distorting effects [on the political process] 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 political ideas." Id. at 659-60. The Austin Court also found that the limit on corporate independent expenditures was narrowly tailored, indeed, "precisely targeted," because it "eliminate[d] the distortion caused by corporate spending" and "ensure[d] that [corporate] expenditures reflect actual public support for the political ideas espoused by corporations," while at the same time allowing corporations to express their political views through a separate segregated fund. 494 U.S. at 660-61; see also MCFL, 479 U.S. at 258-59 (by "requiring that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending, § 441b seeks to ensure that competition among actors in the political arena is truly competition among ideas.").

2. Corporations and labor unions have recently engaged in systematic evasion of FECA's restrictions on campaign expenditures to influence the outcome of federal elections.

Campaign expenditures by corporations and labor unions have been regulated for more than 50 years, and for most of this time these entities have abided by the intent of the law that they refrain from using their general treasury funds to influence federal elections. See supra at 37. In recent

years, however, the effectiveness of these statutory limits has been seriously eroded as a flood of unregulated corporate and union campaign expenditures has surged through the "issue advocacy" loophole onto the field of electoral politics. As discussed above, in Buckley, the Supreme Court adopted the "express advocacy" standard as a narrowing construction of two FECA provisions in order to avoid problems of vagueness. 424 U.S. at 39-44, 80-84; see also infra at 148-53. In its discussion, the Court gave examples of "express words of advocacy," including phrases "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject' " id. at 44 n. 52 what have come to be known popularly as the "magic words." MCFL adopted this same "express advocacy" test in its construction of § 441b. 479 U.S. at 249. By taking advantage of this statutory construction of FECA, and simply omitting words of express advocacy, corporations and unions have begun routinely to pay for campaign-related ads about federal candidates with tens of millions of dollars in general treasury funds that these organizations are supposedly barred from using for the purpose of influencing federal elections.

From June through November, 1996, the AFL-CIO spent $20 million in union dues on broadcast television advertisements attacking incumbent Members of the House. The Coalition, an ad-hoc association representing corporate enterprise, spent another $5 million in corporate treasury funds for advertisements defending these same House Members. See supra at 37-42.

See supra at 43-46. Together, Citizens for Better Medicare, the Chamber of Commerce, and the AFL-CIO, spent more than $17 million on candidate-centered "issue" ads in the 60 days preceding the November 2000 election, according to conservative estimates. Kenneth H. Goldstein, Amended Expert Report at 14 & Tbl. 3 [DEV 3-Tab 7, hereinafter Goldstein Expert Rep.]. Total spending by corporations, unions, and interest groups on candidate-centered "issue" ads, according to the same estimates, approached $50 million in 2000; nearly 80 percent of these ads were broadcast within 60 days of the November elections. Id. at 17 & Tbl. 1B.[98/]

The record overflows with evidence that the purpose of these corporate and labor union expenditures was to influence federal elections. In 1996, the AFL-CIO admitted as much, declaring its intent to launch a broadcast advertising campaign to win back Democratic control of the House of Representatives. See supra at 37-38. Internal documents and testimony establish that the Coalition intended just as firmly to maintain the House Republican majority, as investigations by Congress found. See supra at 40.

Indeed, in 1997, Tanya Metaska, the Executive Director of the NRA Institute for Legislative Action, admitted with remarkable candor that:

> Today, there is erected a legal, regulatory wall between issue advocacy and political advocacy. And the wall is built of the same sturdy material as the emperor's clothing. Everyone sees it. No one believes it. It is foolish to believe there is any practical difference between issue advocacy and advocacy of a political candidate.

[98/] These estimates are based on data from the nation's top 75 media markets serving 80 percent of the population, but do not include spending for issue advertisements in media markets serving the remaining 20 percent of the populace. Furthermore, the figures do not attempt to account for the increased cost of advertising time during the peak season of political campaigns. Hence, they understate the actual totals spent on televised issue advocacy. See Goldstein Expert Rep. at 8; see also Annenberg Pub. Policy Ctr., Issue Advocacy Advertising During the 1999-2000 Election Cycle ("Annenberg 2000 Study") at 9 [DEV 38-Tab 22]

> What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day. We engaged in issue advocacy in many locations around the country. Take Bloomington, Indiana, for example. Billboards in that city read,
>
> > "Congressman Hostettler is right. Gun laws don't take criminals off Bloomington's streets. Call 334-1111 and thank him for fighting crime by getting tough on criminals."
>
> Guess what? We really hoped people would vote for the Congressman, not just thank him. And people did. When we're three months away from an election, there's not a dime's worth of difference between "thanking" elected officials and "electing" them.

FEC101 0249-52 [DEV 45-Tab 108].[99/]

With an equal lack of inhibition, in 2000 the web page of the Business-Industry Political Action Committee ("BIPAC") publicly advised BIPAC's members on the use of issue ads to help elect their preferred candidates:

> The following pages illustrate the ways the business community can become more involved during the last few weeks of the campaign. There are three areas where business can be most effective in mobilizing its assets for November: Volunteer Involvement, Corporate Communications, and Issue Ads . . . .
>
> **Issue Advocacy.** Corporate dollars, unlimited and unreported. Not limited to TV and radio, this technique urges action on an issue but does not advocate the election or defeat of a candidate, although it mentions the name of a candidate or incumbent and may urge the viewer/reader to call.

FEC101 0245-48 (emphasis added) [DEV 45-Tab 107].

Even when the sponsors of these advertisements are not so forthcoming, their electoral message is unmistakable. No description can substitute for seeing and hearing the ads themselves, and the Court has been provided with a videotape of several dozen illustrative ads. See Selected

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Interest Group Electioneering Ads, App. A to Defs.' Mem., Tab 1.[100] By way of example, in October 1996 a tax-exempt organization called Citizens for Reform broadcast the following ad in Arkansas, where Winston Bryant was running for the Senate:

> Senate candidate Winston Bryant's budget as Attorney General increased 71 percent. Bryant has taken taxpayer-funded junkets to the Virgin Islands, Alaska, and Arizona. And spent about $100,000 on new furniture. Unfortunately, as the State's top law enforcement official, he has never opposed the parole of any convicted criminal, even rapists and murderers. And almost 4,000 Arkansas prisoners have been sent back to prison for crimes committed while they were out on parole. Winston Bryant: Government waste, political junkets, soft on crime. Call Winston Bryant and tell him to give the money back.

Thompson Comm. Rep. at 4007.

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In the context of an election, interest groups may run ads wholly ungermane to the issues they exist to promote clear indication that their purpose in so doing is to promote candidates, not issues. For example, EMILY's List, a pro-choice group, ran ads during the 2000 election supporting

[100] The record also contains copies of "story boards" of most of the political ads aired in the 1998 and 2000 election cycles; they include a transcription of the words spoken in each ad with snapshots of every fourth second of the accompanying video. See DEV 48.

[101] The two advertisements reproduced above illustrate a common feature of electioneering ads they each refer to multiple themes (e.g., government waste, political junkets, and crime), suggesting their true purpose is to provide voters with a variety of reasons either to support or to oppose a candidate. Genuine issue ads typically focus on a single issue that their sponsors wish to bring to the public's attention. See Krasno & Sorauf Expert Rep. at 56-57 & n.138.

a candidate's stance on gun control. Beckett Decl. ¶ 13 [DEV 6-Tab 3]; Chapin Decl. ¶ 13 [Tab 12].

see also App. A to Defs.' Mem., Tab 6, Nos. 3-6 (audio).

see also App. A to Defs.' Mem., Tab 1, No. 4 ("Yankee Baby" video). The lack of any nexus between these ads and the legislative agendas of their sponsors shows that they were designed instead to advance an election agenda.

Additional facts about the timing, placement, and content of electioneering ads eliminate any possible doubt that their purpose is to influence federal elections. The Buying Time studies that Congress considered prior to BCRA's enactment,[102] examined all political ads televised by network affiliates and national cable networks in the top 75 media markets, encompassing 80 percent of American households.[103] Under the supervision of Professor Kenneth Goldstein of the University of Wisconsin, teams of students reviewed each ad in the 1998 and 2000 databases, capturing a variety of data such as whether a candidate was identified in the ad, whether "magic words" were

[102] See 148 Cong. Rec. S2116-18, S2136, S2141 (Mar. 20, 2002); 148 Cong. Rec. S1996 (Mar. 18, 2002); 147 Cong. Rec. S3249-55 (Apr. 2, 2001); 147 Cong. Rec. S3112-13 (Mar. 29, 2001); 147 Cong. Rec. S3036, 3042 (Mar. 28, 2001); 147 Cong. Rec. S2847 (Mar. 26, 2001); 147 Cong. Rec. S2457 (Mar. 19, 2001); 146 Cong. Rec. S6046 (Jun. 29, 2000).

[103] See Craig B. Holman & Luke P. McLoughlin, Buying Time 2000 [DEV 46]; Jonathan S. Krasno & Daniel E. Soltz, Buying Time ("Buying Time 1998") [DEV 47]. Both studies were based on data supplied by the Campaign Media Analysis Group ("CMAG"), which monitors local television advertising in the country's top 75 media markets. The CMAG system differentiates between programming and advertising, and when it detects a commercial advertisement it downloads the ad, creating a "storyboard" including the complete text of the audio track and snapshots of every fourth second of the video. Thereafter, the CMAG system automatically recognizes each particular commercial when it is re-broadcast, and maintains a log of when and where it airs. In 1998, the CMAG database included 2,100 political advertisements aired over 300,000 times by candidates, parties, and interest groups. The year 2000 database included almost 3,000 unique ads aired on approximately 840,000 occasions. Buying Time 1998 at 7; Buying Time 2000 at 18-19; see also Goldstein Expert Rep. at 5-6, 8 & n. 4; Krasno & Sorauf Expert Rep. at 53.

used, and whether the purpose of the ad was to provide information about or urge action on a bill or issue, or to generate support for or opposition to a particular candidate. Buying Time 2000 at 18-21; Buying Time 1998 at 6-8; Goldstein Expert Rep. at 6-7 & n. 4; Jonathan S. Krasno & Frank J. Sorauf, Evaluating the Bipartisan Campaign Reform Act (BCRA) (Sep. 23, 2002) at 53 & n.124 [DEV 1-Tab 2, hereinafter Krasno & Sorauf Expert Rep.]. Defendants' experts, Drs. Goldstein and Krasno (the latter the principal author of Buying Time 1998) have reviewed the databases used to generate Buying Time 1998 and 2000, and, after reconciling minor discrepancies they discovered, Goldstein Expert Rep. at 7; Krasno & Sorauf Expert Rep. at 60 n.142 & App. § B, have reproduced the analyses conducted in both Buying Time studies. As a result of these minor reconciliations, their figures differ slightly from the results reported in the two Buying Time studies, but they similarly reveal the unvarnished truth about electioneering ads.

In 1998 and 2000, 78-85 percent of interest group ads referring to candidates ran during the 60 days before the election (as did most of the candidates' own ads). Goldstein Expert Rep. at 17 & Tbl. 4; Krasno & Sorauf Expert Rep. at 57 & App. Tbls. 3, 6. In stark contrast, 82 percent of interest group ads in 2000 that did *not* refer to a candidate ran *outside* the 60-day period before the election. Goldstein Expert Rep. at Tbl. 4. In 1998, 62 percent of such ads ran outside the 60-day period. Krasno & Sorauf Expert Rep., App. Tbl. 3. The prevalence of ads that focus on candidates in the 60 days before an election, and their comparative rarity outside that period, reveal that their sponsors' motives are based on electoral concerns. Further supporting that conclusion, more than 70 percent of the interest group ads in 2000 that the Buying Time coders perceived as electioneering in nature were broadcast within 60 days of the election. Goldstein Expert Rep. at 27-28 & Tbl. 8. Ads actually focusing on issues in the 60 days before the election were uncommon: nearly 80

percent of the group ads that coders viewed as genuine issue ads ran outside that period. Id. In other words, as stated in Buying Time 2000, while groups do pay to air genuine issue ads, they "are rather evenly distributed throughout the year," while their "electioneering ads make a sudden and overwhelming appearance immediately before elections . . .." Id. at 56; see also Krasno & Sorauf Expert Rep. at 57 & App. Tbl. 6; David B. Magleby, Report Concerning Interest Group Electioneering Advocacy and Party Soft Money Activity (Sep. 23, 2002) at 33 [DEV 4-Tab 8, hereinafter Magleby Expert Rep.] ("In 2000, 58% of the interest group electioneering advocacy came in the last two weeks of the election."); cf. Annenberg 2000 Study at 14 (finding that 94% of "issue ads" aired on or after September 1, 2000 "made a case for against a candidate").[104]

Electioneering advertisements are not only heavily concentrated in the few weeks before federal elections, but, like the AFL-CIO's and the Coalition's advertisements in 1996, they are also heavily concentrated in the few jurisdictions with the most competitive election contests, where a small change in public opinion could tip an election one way or the other. This repeated convergence of "issue ads" on a handful of closely contested races sheds further light on the electoral motives of the organizations that pay for them. In the last 60 days before the 2000 election, 85-90 percent of group ads referring to candidates for the House or the Senate aired in competitive districts or states. Goldstein Expert Rep. at 20-21. In the last 60 days before the 1998 election, all group ads referring to Senate candidates ran in five races, four of which were rated "toss ups"; all group ads referring to House candidates ran in 12 races, eight of which were rated "toss ups."

[104] There are significant practical disadvantages to running genuine issue ads during the height of an election campaign, not only because the cost of advertising time rises as the election nears, but also "because an individual interest group's message on a public policy issue is likely to become lost" in the "flood of advertising . . . during the last two months before an election." Goldstein Expert Rep. at 32; Bailey Decl. ¶ 12 [DEV 6-Tab 2];

Therefore, in the absence of an electoral purpose, interest groups can be expected to avoid large-scale issue advertising at the height of an election campaign.

Krasno & Sorauf Expert Rep. at 57 & App. Tbls. 4 and 5. As various interest group personnel explained in interviews conducted in a study by defendants' expert, Professor David Magleby, groups run ads in competitive contests where their "investment" is most likely to make a difference. Magleby Expert Rep. at 31.[105]

Not only do candidate-focused ads in the last two months before an election exhibit a (frequently conceded) electioneering intent, but that is their effect as well. Magleby Expert Rep. at 52-54; Beckett Decl. ¶¶ 11-12, 15; Bloom Decl. ¶¶ 6, 12-17 [DEV 6-Tab 7]; Chapin Decl. ¶¶ 8, 12, 15; Lamson Decl. ¶¶ 10-11, 17 [DEV 7-Tab 26]; Pennington Decl. ¶¶ 17 [DEV 8-Tab 31];

Thus, over the course of the last several federal elections, unions and corporations have brought millions of dollars of their aggregated wealth to bear on the course of the electoral process, threatening the same distortion of the political marketplace by economic might, unrelated to the power of ideas, that supplied a compelling justification for regulation in Austin, 494 U.S. at 659-60.

3. Independent campaign spending by corporations and labor unions can be used to create political debts and to evade limits on soft money donations to political parties.

In NRWC, the plaintiff, a non-profit corporation, asserted that § 441b burdened rights of free association by prohibiting contributions to its separate segregated fund from persons other than its "members." The Court rejected this argument, focusing on the historical purpose of the statute: the prevention of corruption by ensuring that "substantial aggregations of wealth" amassed by labor unions and corporations "are not converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions." 459 U.S. at 207 (citing Bellotti, 435 U.S. at 788 n. 26). Applying the "closest scrutiny," the Court concluded that these interests

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[105] See also

CFG000223 [DEV 130-Tab 5] (Club for Growth explaining that its "issue advocacy campaigns can make all the difference in tight races.").

outweighed the rights asserted by the plaintiff, and that the limitation on corporate contributions was "sufficiently tailored to these purposes to avoid undue restriction" upon First Amendment freedoms. Id. at 207. It refused, moreover, to "second-guess a legislative determination as to the need for prophylactic measures where corruption," in the form of improper corporate and labor union influence, "is the evil feared." Id. at 210.

Based on the record available in Buckley, the Supreme Court remarked at that time that independent advocacy by groups and individuals "d[id] not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." 424 U.S. at 46 (emphasis added). The record before this Court concerning corporate and labor union spending now shows otherwise. See Bellotti, 435 U.S. at 788 n.26 ("Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." (citing Buckley, 424 U.S. at 46)).

see Simpson Decl. ¶ 13 [DEV 9-Tab 38].

Organizations that sponsor issue ads on behalf of elected officials "will later remind Members of how the ads helped get them elected." Simpson Decl. ¶ 13; see Bumpers Decl. ¶¶ 26-27 [DEV 6-Tab 10].

The potentially corrupting uses and influence of corporate or union "issue" advocacy are visible throughout the record. In 1996, the AFL-CIO made certain that officials at the Clinton White House knew of its plans "to ensure that the Democrats could take back the House," and the extent of the resources that organized labor would devote to the task. Thompson Comm. Rep. at 4001.

Similarly, in 1998, prior to a vote on the proposed National Tobacco Policy and Youth Smoking Reduction Act, legislators were advised that major tobacco companies had promised to mount a television ad campaign to support those who voted against the bill. McCain Decl. ¶ 8 [DEV 8-Tab 24]. In a Club for Growth fundraising letter, a freshman congressman expressed his appreciation for the support he received from the Club in his successful 2000 campaign, support which included TV advertising during the final days before the election: "I was a non-establishment candidate who, thanks to . . . the Club for Growth, was able to afford to overcome the attacks from the left by using TV ads to spread our message." CFG000208-09; see also CFG000239 [DEV 130-Tab 5]. According to recent accounts, the rising influence of the National Federation of Independent

Business ("NFIB") is due in part to the gratitude of officeholders it has aided. Juliet Eilperin, Small Business Group Sticks to One Side of Political Fence, Wash. Post, May 16, 2002 [DEV 45-Tab 103]. One newly elected Congressman reportedly told the president of NFIB, which had just spent $100,000 in support of his candidacy, "If it hadn't been for your people, I wouldn't have won." Id.

Moreover, as explained above, see supra at 68-69, the political parties have raised tens, if not hundreds, of millions of dollars from business corporations and unions, and much of that money has then been spent on electioneering ads to influence federal elections. Although Title I of BCRA will eliminate the national parties' ability to raise and spend such soft money in the future, without effective regulation of candidate-centered "issue" advocacy, such as that contained in Title II of the statute, much of this money could simply flow through a different channel but with much the same destination. See Krasno & Sorauf Expert Rep. at 82 ("The history of campaign financing is a story of evolution as participants have sought out and exploited weaknesses in the system."); Randlett Decl. ¶ 17 [DEV 8-Tab 32] ("[O]ne potential method of evading the national party soft money ban . . . would involve a political consultant, working with some level of pre-arrangement with an office holder, say a Senator, and persuading a corporate donor that the Senator wants the donor to run a lot of 'issue ads' that will help him. . . . That kind of proxy, "wink and nod" scenario takes the core soft money transaction as it works today and adds one layer of complexity. But it's not a big layer.").

In other words, without a restriction on corporate and union electioneering ads, large soft money donors could simply donate the money they would have given to political parties to nonprofit corporations and other organizations, instead, which in turn could run the same kind of ads that the parties would have run. As Congress recognized: