> Banning soft money without addressing issue advocacy will simply redirect the flow of undisclosed money in campaigns. Instead of giving soft money to political parties, the same dollars will be turned into "independent" ads. The issues of soft money and independent advertisements go hand in hand and one can not be addressed without the other.

145 Cong. Rec. S12661-62 (Oct. 15, 1999) (remarks of Sen. Feinstein); see also 145 Cong. Rec. S12617 (Oct. 14, 1999). Given the evidence canvassed above, it would be naïve to think that party officials and officeholders would be ignorant of, or not feel a sense of obligation to, those individuals and organizations that funnel large donations through sympathetic interest groups to pay for election ads.

[106] In sum, BCRA's regulation of electioneering communications furthers the compelling governmental interest in preventing corruption of elected officials, not only on its own terms, but also by helping to ensure that the new limits on soft money will not be easily evaded.

4. BCRA serves compelling governmental interests by preventing corporations and labor unions from using their treasuries as "war chests" to finance electioneering ads.

In the final analysis, the scope of political corruption and distortion arising from large-scale expenditures by labor unions and corporations on electioneering *qua* issue advocacy "can never be

[106] The evidence shows that candidates and parties have recommended to their supporters that they make donations to friendly interest groups to help finance issue ads on their behalf. Kirsch Decl. ¶¶ 9-10 [DEV 7-Tab 23] (the "national Democratic party . . . recommended that I donate to certain groups that were running effective ads in the effort to elect Vice-President Gore, such as NARAL"); Bumpers Decl. ¶ 27 ("Members or parties sometimes suggest that corporations or individuals make donations to interest groups that run 'issue ads.'"); CFG000208-09 (solicitation letter); The inducement of candidates, parties and their supporters to direct large donations to issue advocacy groups, as a means of circumventing BCRA's new strictures against soft money, "would almost certainly intensify" in the absence of effective regulation of electioneering communications. See Colorado II, 533 U.S. at 460.

reliably ascertained," but the record of this litigation "demonstrate[s] that the problem is not an illusory one." Buckley, 424 U.S. at 27. These problems arise because corporations and labor unions can spend unlimited general treasury funds on electoral advocacy outside FECA's regulatory framework, and now do so routinely, through the simple expedient of avoiding express advocacy.

Whatever may have been the case in 1976, or even 1986, by 1996 reliance upon "explicit words of advocacy of election or defeat of a candidate" was no longer the touchstone of electoral advocacy during the heat of a campaign, when the public is particularly conscious of its upcoming electoral decisions. See Bailey Decl. ¶ 5; Krasno & Sorauf Expert Rep. at 54.[107] In contemporary political campaigns, even candidates, whose advertising by definition is freighted with electoral purpose, no longer bother with express advocacy. In 1998 and 2000, candidate ads used words of express advocacy only 11 percent of the time. Goldstein Expert Rep. at 16; Krasno & Sorauf Expert Rep. at 53-54; Rudman Decl. ¶ 18 [DEV 8-Tab 34] ("Many, if not most, campaign ads run by parties and by candidates themselves never use such 'magic words.' It is unnecessary."); see also Selected Candidate Ads, App. A to Defs.' Mem., Tab 4 (video); DEV 48-Tabs 5, 6, 9, 10 (selected 1998 and 2000 storyboards of candidate and party ads without "magic words"). Media consultants do not consider it most effective or even advisable to use such "clumsy words as 'vote for' or 'vote against'" when creating political advertisements, Bailey Decl. ¶ 2, instead preferring advertising that makes a case for or against a candidate, but allows viewers to come to their own conclusions about how to cast their votes.[108]

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[107] In 2000, 96 percent of the electioneering ads sponsored by interest groups did not use "magic words" of express advocacy. Buying Time 2000 at 29 & Fig. 4-3; Goldstein Expert Rep. at 10, 31 (tables showing that, in 2000, less than 4% of group ads mentioning candidates contained express advocacy (2,876 / (3,663 + 74,204)) see also Krasno & Sorauf Expert Rep., App. Tbls. 1 and 7 (showing that, in 1998, only 7% of group ads mentioning candidates used express advocacy (517/7,377)); Magleby Expert Rep. at 26.

[108] Bailey Decl. ¶ 3 ("All advertising professionals understand that the most (continued...)

Because express advocacy is no longer the rule of campaign advocacy, and has become the rare exception, unions and corporations may now draw freely upon their treasuries to engage in electioneering activities to virtually the same extent as candidates, in disregard of § 441b, and in derogation of the government's compelling interests against distortion and corruption of the political process. Just as Congress passed the Taft-Hartley Act to close the "expenditure" loophole that labor unions, corporations and others had exploited to evade the long-established prohibition on contributions, see supra at 13-15; UAW, 352 U.S. at 580-83, BCRA closes the "issue advocacy" loophole in current law at its most widely exploited point, restoring vitality to the statutory scheme under FECA § 441b. It does so by putting an end to unlimited spending of general treasury funds on the most blatant form of electoral activity in which unions and corporations have recently engaged TV and radio advertisements that support or attack candida tes for office in the weeks immediately preceding a federal election. And in so doing, it serves compelling governmental interests that overcome plaintiffs' facial attack.

B. Buckley Does Not Prohibit Congress from Enacting Narrowly Tailored Anti-Corruption Measures Simply Because They Are Not Limited to Communications Containing Express Advocacy.

Notwithstanding the compelling governmental interests that are promoted by BCRA's regulation of electioneering communications, plaintiffs maintain that these portions of the statute are unconstitutional, per se, because they encompass communications that do not include express advocacy. E.g., McConnell Second Amend. Compl., ¶ 48; NRA Compl., ¶ 70; AFL-CIO Compl., ¶ 14. This claim necessarily rests on a particular view of Buckley, as holding that the First Amend-

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[108](...continued)
effective advertising leads the viewer to his or her own conclusion without forcing it down their throat."); Pennington Decl. ¶ 10 ("These final words [in ads], like 'tell,' have become the real 'magic words' in modern campaigning. . . . [T]he real audience for them is not the voters, but the courts who may be examining the ad after the election."); Becket Decl. ¶ 8 ("[N]o particular words of advocacy are needed in order for an advertisement to influence an election."); Lamson Decl. ¶ 6; Bloom Decl. ¶ 5; Bumpers Decl. ¶ 26.

ment categorically bars Congress from adopting any regulation of independent political spending that does not involve express advocacy, no matter what conceivable form that regulation might take, or how important it might be to the integrity of democratic institutions. But Buckley does not sustain that sweeping proposition.

What plaintiffs critically misperceive about Buckley's express advocacy holding is that it arose from statutory interpretation made necessary by the vague language of the 1974 amendments to FECA. The statutory criterion with which the Supreme Court grappled in Buckley rested on the undefined phrase "relative to." The Court found that "so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech." 424 U.S. at 41. The Court's primary concern was that the resulting vagueness about which communications would be considered "relative to" a candidate " 'blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.' " Id. at 43 (quoting Thomas v. Collins, 323 U.S. 516, 535 (1945)). The Court was similarly concerned that the vague phrase "relative to" "'puts the speaker . . . wholly at the mercy of the varied understanding of his hearers . . . .'" Id. In the face of this vast uncertainty, the Buckley Court adopted the express advocacy standard as a clarifying construction: to "preserve the provision against invalidation on vagueness grounds, § 608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." Id. at 44 (footnote omitted). In similar fashion, the Court construed FECA's requirement for disclosure of individual expenditures made "for the purpose of influencing" a federal election to include only those financial outlays made for communications containing express advocacy, to "avoid the shoals of vagueness" and to "insure that the reach of [the statute was] not impermissibly broad." Id. at 78-80.

Likewise, in MCFL, when the Court construed § 441b's prohibition on the use of a corporation's general treasury funds to finance independent expenditures "in connection with any election" for federal office, the Court found similar constitutional problems with this vague statutory language. Relying on its reasoning in Buckley, the Court held that this provision "requires a similar construction," 479 U.S. 248-49 (emphasis added), thus again making clear that it was construing particular, unclear statutory language, not ruling in the abstract on requirements of the First Amendment. Thus Buckley and MCFL themselves explained that the express advocacy requirement was an "exacting interpretation of . . . statutory language necessary to avoid unconstitutional vagueness," 424 U.S. at 45, not a substantive constitutional requirement applicable to any regulation of campaign-related expenditures.

In other words, a straightforward reading of Buckley (and MCFL) reveals that the Court was engaged in the familiar exercise of construing a statute in order to avoid deciding questions about its constitutionality, see Zadvydas v. Davis, 533 U.S. 678, 689 (2001); United States v. Harriss, 347 U.S. 612, 618 (1954), as the Supreme Court and lower courts, including this one, have recognized. Osborne v. Ohio, 495 U.S. 103, 120 n.14 (1990); FEC v. Survival Education Fund, Inc., 65 F.3d 285, 291 n. 2 (2d Cir. 1995); Faucher v. FEC, 928 F.2d 468, 470 (1st Cir. 1991); FEC v. Christian Coalition, 52 F. Supp. 2d 45, 87 n.50 (D.D.C. 1999). Nothing in the judicial act of placing a saving construction on particular statutory language prevents Congress from later determining, on the basis of experience, and careful deliberation, that a different approach to a problem with which the legislature may legitimately be concerned is necessary, and constitutional. To the contrary, the Supreme Court has repeatedly made a point of stating otherwise. In U.S. v. Thirty-Seven Photographs, 402 U.S. 363, 373 (1971) (plurality opinion), the Court examined a customs statute

that prescribed no time limits following the seizure of imported property for the initiation and completion of forfeiture proceedings. The Court found it constitutionally necessary to construe the law to require that "forfeiture proceedings be commenced within 14 days and completed within 60 days . . .." But the plurality also acknowledged Congress's power to revisit the limits it had inferred:

> Of course, we do not now decide that these are the only constitutionally permissible time limits . . . . We do nothing in the case but construe § 1305(a) in its present form, fully cognizant that Congress may re-enact it in a new form specifying new time limits, upon whose constitutionality we may then be required to pass.

Id. at 374. Similarly, in U.S. v. 12 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123, 130 n.7 (1973), the Court expressed serious constitutional misgivings about the definition of obscene material contained in the same customs statute, and explained its readiness to construe vague statutory terms "as limiting regulated material to patently offensive representations" of specific "hard core" conduct. "Of course," the Court added, "Congress could always define other specific 'hard core' conduct." Id.

Buckley's treatment of expenditures by independent political committees also refutes the plaintiffs' absolutist interpretation that political spending not involving express advocacy necessarily lies beyond the power of Congress to regulate. When the Court described the "line-drawing problems" posed by § 434(e), which required individuals and organizations to disclose their expenditures made "for the purpose of influencing" an election, it observed that placing that same disclosure requirement on political committees did not create similar difficulties. 424 U.S. at 78-79. Expenditures by political committees organizations whose major purpose is the election of candidates could safely be assumed to be "campaign related" without engrafting an "express advocacy" limitation onto the definition of expenditure in that context. Id. at 79. Other courts have held accordingly that an express advocacy limitation is unnecessary under circumstances where the

category of expenditures in question may confidently be viewed as "campaign related." See North Carolina Right To Life, Inc. v. Leake, 108 F. Supp. 2d 498, 505-07 (E.D.N.C. 2000) (registration and disclosure requirements may be placed on groups whose major purpose is electioneering without regard to Buckley's express advocacy standard); Christian Coalition, 52 F. Supp. 2d at 87-88 & n.50 (Buckley does not require that regulation of coordinated expenditures for political expression be limited to express advocacy). As discussed herein, "electioneering communications" defined under BCRA are also sufficiently "campaign related" to avoid any danger that substantial amounts of genuine issue discussion, unrelated to an electoral purpose, will be burdened.

Buckley did not purport, then, to announce a new rule of substantive constitutional law, namely, that the First Amendment prohibits any regulation of independent political spending for communications that do not involve words of express advocacy. Such a proposition would have been easy enough to state in so many words, but they are nowhere to be found in the Court's opinion. Indeed, for the Court to have issued such a sweeping pronouncement would have required that it break faith with a "cardinal rule[ ]" of adjudication to which it has "rigidly adhered: . . . never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Brockett v. Spokane Arcades, 472 U.S. 491, 501-02 (1985); Raines, 362 U.S. 17, 21 (1960); see also Clinton v. Jones, 520 U.S. 681, 690 n. 11 (1997).

To dispose of the controversy in Buckley, it was sufficient for the Court to rectify the problem of vagueness in the statute before it at the time. See Rescue Army v. Mun. Court of Los Angeles, 331 U.S. 549, 568-69 (1947) ("[C]onstitutional issues affecting legislation will not be determined . . . in broader terms than are required by the precise facts to which the ruling is to be applied."). There is no reason to believe that the Court meant to foreclose all future action by Con-

gress to readjust the federal election laws as needed to address continuing threats of corruption as they might later evolve, so long as Congress, in making the very sort of "cautious advance, step by step," to which the Court would later pledge deference in NRWC, 459 U.S. at 209 (citation omitted), avoided the vagueness problems of concern in Buckley. As the Fourth Circuit observed when reviewing an FEC regulation that defines express advocacy more broadly than the "magic words":

> The FEC ends its argument that 11 C.F.R. § 100.22(b) is constitutional with the following comment: "if the express advocacy requirement is read too narrowly, the prohibitions of 2 U.S.C. 441b will require little more than careful diction and will do almost nothing to prevent millions of dollars from the general treasuries of unions and corporations from directly influencing federal elections, and from doing so without disclosing to the public the source of the influence." That is a powerful statement, but we are bound by Buckley and MCFL, which strictly limit the meaning of "express advocacy." If change is to come, it must come from an imaginative Congress or from further review by the Supreme Court.

Virginia Soc'y for Human Life, Inc. v. FEC, 263 F.3d 379, 392 (4th Cir. 2001) (emphasis added). With BCRA, Congress has taken up that creative task.[109]

Thus, the question before this Court is one not presented to any other tribunal since Buckley issued its express advocacy ruling: whether Congress may apply the teachings of experience to establish a new paradigm, one that meets with the political realities of our times, or whether the nation must forsake its longstanding commitment to the proposition that the aggregated wealth of unions and corporations ought not to be used to unduly influence the outcome of federal elections, or to garner improper influence over democratically elected leaders. The plaintiffs maintain that Buckley prohibits Congress from making that decision, a proposition that ultimately depends on the analysis in Buckley itself, but, as seen, it is a proposition that Buckley will not sustain.

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[109] Since Buckley, there have been a number of lower court decisions analyzing the scope of permissible regulation under the Court's express advocacy construction of FECA. Other cases have involved the constitutionality of various state campaign finance laws that hinged on definitions of regulated activity that did not rely on an express advocacy test. To the extent these lower court cases have described the express advocacy standard as an absolute constitutional rule, they did so unnecessarily, and, for the reasons explained above, are simply contrary to the decision in Buckley.

C. BCRA's Definition of Electioneering Communications Satisfies *Buckley*'s Concerns, and Is Not Unconstitutionally Vague.

Given that Buckley's express advocacy construction of FECA rested on concerns about vagueness, BCRA is entirely consistent with the holding of Buckley, because BCRA's definition of electioneering communications is manifestly not vague. Plaintiffs' assertions to the contrary, McConnell Second Amend. Compl., ¶ 50; NRA Compl., ¶¶ 76-79; NAB Compl., ¶ 19, are misguided.

A statute is subject to a charge of facial vagueness if it requires compliance with "an unascertainable standard" of conduct, Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971), or "it operates to inhibit the exercise of [First Amendment] freedoms" through "[u]ncertain meanings" that "lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (internal quotation marks and citations omitted). By contrast, a statute cannot be condemned as unconstitutionally vague where on its face "it is clear what the [statute] as a whole prohibits." Hill v. Colorado, 530 U.S. 703, 733 (2000) (citing Grayned, 408 U.S. at 110).

The four criteria in the definition of an electioneering communication tautly define a narrow class of campaign ads, based largely on the time, place and manner in which they are disseminated. Under BCRA, communications are considered "electioneering" only if they: (1) are broadcast over television or radio, via broadcast, cable or satellite communications facilities (BCRA § 201(a), adding 2 U.S.C. 434(f)(3)(A)); (2) "refer[ ] to a clearly identified candidate for Federal office" (id., adding 2 U.S.C. 434(f)(3)(A)(I));[110] (3) are made within 60 days before a general election or 30 days before a primary election in which the clearly identified candidate seeks office (adding 2

[110] The Court found that this language was unambiguous when construing a nearly identical clause in Buckley, 424 U.S. at 43-44 n.51 (construing then § 608(e)(2), id. at 193-94, since recodified as 2 U.S.C. 431(18)).

U.S.C. 434(f)(3)(A)(II)); and (4) for House, Senate and presidential primary elections, can be received by at least 50,000 persons in the state or district where the election is being held (2 U.S.C. 434(f)(3)(A)(III) & (C)); see Final Rule, Electioneering Communications, 67 Fed. Reg. at 65,210-211 (promulgating new regulation to be codified at 11C.F.R. 100.29).[111/]

These criteria are absolutely clear, individually and collectively, and no one wishing to avoid violations of BCRA need guess at where these four defining characteristics have drawn the line. Any individuals or organizations intending to broadcast electioneering communications, or wishing, on the other hand, to engage in genuine issue advocacy, can easily determine in advance whether their advertisements meet BCRA's definition of electioneering communications, and thus encounter no realm of legal uncertainty from which they must steer clear. "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989). Yet "perfect clarity" and "precise guidance" are exactly what BCRA provides.

Congress enacted BCRA's electioneering communications provisions in response to both the Court's holding in Buckley regarding express advocacy, and the extraordinary exploitation of that construction by large moneyed interests. When it approached this task, Congress was acutely aware of its duty to "avoid the shoals of vagueness," Buckley, 424 U.S. at 78:

> What has been done with Snowe-Jeffords is a very careful effort to make sure the constitutional requirements of Buckley v. Valeo have been met. In fact, they have been met. It is not vague; it establishes a very clear bright-line test so we don't have a vagueness constitutional problem.

[111/] Under rules promulgated by the FEC on October 23, 2002, persons may consult the website of the Federal Communications Commission ("FCC") to learn whether a broadcast can be received by 50,000 persons or more, and may rely on that information for purposes of determining whether their communications meet BCRA's definition of electioneering. Final Rule, Electioneering Communications, 67 Fed. Reg. at 65,217 (amending 11 C.F.R. § 100.29(b)).

147 Cong. Rec. S2883 (March 26, 2001) (Sen. Edwards). As a result of the care with which Congress carried out its legislative duties, BCRA's definition of electioneering communication is simple, objective, and unambiguous a classic bright-line test that entirely avoids placing speakers "wholly at the mercy of the varied understanding" of their listeners, Buckley, 424 U.S. at 43 (quoting Thomas, 323 U.S. at 535), and therefore suffers from none of the vagueness that prompted the Court in Buckley to adopt the express advocacy construction.

D. BCRA's Definition of Electioneering Communications Is Narrowly Tailored.

The expenditure provisions construed in Buckley and MCFL were broadly applicable to communications made at any time, in any location, and through any medium. Section 608(e), examined in Buckley, prohibited all persons other than candidates themselves, or political party committees, from spending more than $1,000 a year on communications of any kind, whether broadcast, print, direct mail, or otherwise, deemed "relative to" a candidate for federal office. 424 U.S. at 39-40, 193-94. FECA § 441b, which the Court scrutinized in MCFL, is limited in its application to labor unions and corporations, and is narrowly tailored to allow unions and corporations to express themselves through their separate segregated funds, but still applies without geographic or temporal limitation, and regardless of the medium, to all communications by labor unions and corporations made for the purpose of influencing federal elections.

In sharp contrast to these provisions, BCRA's regulation of electioneering communications is surgically tailored to end the now rampant practice of broadcasting election ads artfully crafted to evade FECA's expenditure and disclosure requirements. Using the four criteria described supra, at 154-55, Congress has carefully targeted only those ads that identify a candidate for federal office and are broadcast on television or radio, in the final weeks before the election, to the very state or

district where the election is being held. Thus, the definition strictly limits the statute's reach to those circumstances that are most clearly election-related, presenting the greatest potential for distortion or corruption of political processes.

In the first instance, BCRA focuses exclusively on advertisements that refer to candidates for federal office, for both common sense and common practice teach that they are the best suited and therefore most likely vehicles for wielding influence over the course of an election, and, by extension, elected officials. See Goldstein Expert Rep. at 19 & Tbl. 4 (showing that 99.6% of candidate ads and 99.8% of party ads refer to federal candidates). Adding an even greater degree of precision to its scope, however, in Senate, House or presidential primary races, BCRA regulates only those advertisements referring to a candidate that are targeted to the relevant electorate those broadcast to at least 50,000 persons within the state or district where the candidate in question is running. Communications reaching substantial numbers of the electorate who will decide a candidate's political future are those best calculated to influence an election beforehand, and to earn the candidate's gratitude afterward. By regulating only those ads broadcast within a candidate's electoral jurisdiction, BCRA further ensures that advertising that is not designed as an appeal to relevant voters remains unaffected.

The statute also reflects careful tailoring on the part of Congress insofar as it addresses only those communications occurring within 30 days of a primary or 60 days of a general election that refer to clearly identified candidates running in that election. These periods not only correspond to traditional conventions of American politics that, for example, demarcate the Labor Day weekend as the "kickoff" of the general election season, they also coincide with the period when the vast majority of interest group advertisements referring to federal candidates as much as 80 percent

are broadcast. Goldstein Expert Rep. at 17; see also Krasno & Sorauf Expert Rep. at 57 & App. Tbl. 3. Thus, Congress focused on the time period of greatest concern, during the heat of a campaign for federal office, and refrained from regulating during other periods, farther removed Election Day, when the public's attention is not focused on the choices to be made in an imminent election, and advertisements referring to federal candidates are therefore less likely to have the purpose or effect of influencing the outcome.

Moreover, the electioneering communications definition only applies to TV and radio broadcasts, leaving similar communications in alternative media unregulated. Newspaper and magazine advertising, mass mailings, internet mail, public speeches, billboards, yard signs, phone banks, and door-to-door campaigning all fall outside its narrow scope, as do internal communications between a corporation or union and its stockholders or members.[112/] Although Congress could have defined electioneering communications to include other forms of communication, it chose instead to focus narrowly on what experience has shown to be the most widely exploited medium for the evasion of existing law. See Buckley, 424 U.S. at 105 ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." (internal quotation marks and citation omitted)).

Lastly, but no less importantly, § 203(a) of BCRA, as an amendment to FECA § 441b, permits corporations and labor unions to finance electioneering communications using their separate segregated accounts, allowing them to express their political views with funds, reflecting true political support for those ideas, that do not threaten corruption or distortion of the political process.

[112/] For example, in the 1998 Senate race in Nevada, ninety full-time shop stewards from the AFL-CIO went door to door visiting the homes of 40,000 labor union members. Magleby Expert Rep. at 18 n.26; see generally id. at 24-26, 42-44.

Austin, 494 U.S. at 660-61. Thus BCRA is "precisely targeted" to the compelling governmental interests that justify its regulation of electioneering communications. Id. at 660.

E. BCRA's Definition of Electioneering Communications Is Not Overbroad.

Because BCRA is narrowly tailored to the prevention of distortion and corruption in the political process, and relies on a permissible standard of regulation that operates with impeccable precision and clarity, plaintiffs cannot carry their burden of establishing that BCRA "could never be applied in a valid manner." New York State Club Ass'n, 487 U.S. at 11. Accordingly, they cannot prevail in this action unless they can show, in the alternative, that BCRA's electioneering communications provisions are substantially overbroad. Id.; Taxpayers for Vincent, 466 U.S. at 796-798.

The "traditional rule" is that a person "may not challenge [a] statute on the ground that it may conceivably be applied unconstitutionally . . . in situations not before the Court." Los Angeles Police Dept. v. United Reporting Pub. Corp., 528 U.S. 32, 39 (1999). This rule reflects the "incontrovertible proposition that it would indeed be undesirable for [a] [c]ourt to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation," rather than "focusing on the factual situation before [it]." New York v. Ferber, 458 U.S. 747, 767-68 (1982). Facial overbreadth challenges represent a narrow exception to this principle, Taxpayers for Vincent, 466 U.S. at 798, and "[b]ecause of the wide-ranging effects of striking down a statute on its face," invalidation on grounds of overbreadth is considered "strong medicine" that courts must apply "with hesitation, and then 'only as a last resort.'" LAPD, 528 U.S. at 39 (quoting Ferber, 458 U.S. at 767 (citing Broadrick, 413 U.S. at 613)).

Accordingly, only a statute that "reaches a substantial amount of constitutionally protected conduct" may be invalidated as facially overbroad. City of Houston v. Hill, 482 U.S. 451, 458

(1987); New York State Club Ass'n, 487 U.S. at 14; Broadrick, 413 U.S. at 615. "It is not enough for a plaintiff to show 'some' overbreadth," Ashcroft v. ACLU, 122 S. Ct. 1700, 1713 (2002) (plurality opinion), and "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." Taxpayers for Vincent, 466 U.S. at 800. Rather, the burden is on the plaintiff to "demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally." New York State Club Ass'n, 487 U.S. at 14 (emphasis added); see Colorado II, 533 U.S. at 456 n. 17 (refusing to consider overbreadth challenge to the party expenditure provision where the party did not "lay the groundwork for its overbreadth claim"); Regan v. Time, Inc., 468 U.S. 641, 651-52 & n. 18 (1984) (assuming statute's reach was not overbroad given "paucity of evidence to the contrary").

Plaintiffs challenge BCRA's definition of electioneering communications as overbroad, McConnell Second Amend Compl., ¶ 50; NAB Compl., ¶ 19, but the definition comports with reality and ends the masquerade of election advertisements professing to be the mere discussion of political issues. The definition successfully covers the vast majority of election ads, while simultaneously reaching as few actual issue ads as possible. See supra at 139-42. And by targeting with transparent clarity an extremely well-defined set of advertisements, BCRA has no ambiguous scope that would cause it to sweep substantially beyond its intended and legitimate scope of advertising intended to influence the outcome of federal elections. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 n. 6 (1982) (in determining the extent of a statute's overbreadth, a "court should evaluate the ambiguous as well as the unambiguous scope of the enactment . . . [as] the vagueness of a law affects overbreadth analysis").

The record of this action fully supports that conclusion. The databases prepared for the two Buying Time studies, and analyzed for present purposes by Drs. Goldstein and Krasno, demonstrate BCRA's insignificant overbreadth. Dr. Krasno found that only three genuine issue advertisements, accounting for just six percent of all broadcasts of genuine issue ads in 1998, would have met BCRA's definition of electioneering communications. Krasno & Sorauf Expert Rep. at 60 & App. § C. Professor Goldstein found that, in 2000, only six genuine issue ads would have been regulated as electioneering communications under BCRA, accounting for an even smaller fraction than in 1998, just 2.3 percent, of all broadcasts of genuine issue ads during the year. Goldstein Expert Rep. at 24-26 & Tbl. 7.[113/] Thus, these analyses not only prove that a "magic words" approach fails to identify a large number of campaign ads, see supra at 147 n.107, but also that BCRA's electioneering communications criteria would have safeguarded from any regulation whatsoever between 94 and almost 98 percent of all genuine issue advertisements broadcast in 1998 and 2000. In essence, the definition's overbreadth is no more than two to six percent a far cry from the substantial overbreadth necessary to invalidate a statute on its face. Even if a few genuine issue ads will be subject to BCRA's regulation of electioneering communications, the Court "cannot conclude that [BCRA] is substantially overbroad and must assume that 'whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, asserted-ly, may not be applied.'" New York State Club Ass'n, 487 U.S. at 14 (quoting Broadrick, 413 U.S. at 615-16).

[113/] These figures do not take into account issue advertising in non-election years such as 1997 and 1999, and to that extent they *overstate* BCRA's impact on genuine issue advocacy. See Goldstein Expert Rep. at 27 n. 22; Krasno & Sorauf Expert Rep. at 61-62; Krasno Rebuttal Expert Rep. at 14-15 (due to absence of ads from 1997 in database, figures reported in Buying Time 1998 should be understood as upper bounds); _____

There is, in addition, little basis here for permitting an overbreadth challenge out of concern that "those who desire to engage in [genuine issue advocacy] . . . may refrain from doing so . . .." Spokane Arcades, 472 U.S. at 503-04. Real issue ads are not concerned about why certain candidates should or should not be elected to office, which explains why, in 2000, they did not depict or mention a candidate 97 percent of the time. Buying Time 2000 at 31-32 & Fig. 4-6; see also DEV 48 at Tabs 4, 8 (storyboards for selected genuine issued ads).

see also Bailey Decl. ¶¶ 9-11 ("When we were creating true issue ads . . . it was never necessary for us to reference specific candidates for federal office . . . ."). The ease with which genuine issue ads can speak their message and remain outside BCRA's definition of electioneering communication thus means there is little reason to fear that BCRA will "chill" genuine issue advocacy. Corporations and unions can easily design effective ads to promote their views on issues that would not be regulated under BCRA, with minimal impact on their First Amendment rights.

On those rare occasions where it might be necessary to the effective promotion of an issue to run advertisements that refer to a candidate, are broadcast within 60 days of an election, and are targeted to that candidate's constituents, the alternative for corporations and labor unions is not silence, but merely to finance their advertisements with money from their separate segregated funds. See Austin, 494 U.S. at 660. Non-profit corporations entitled to the MCFL exception, for which the establishment of a separate segregated fund might represent an impermissible burden, may rely on their general treasury funds to pay for electioneering communications merely by certifying to the

FEC that they meet the criteria of "qualified non-profit corporations" under the FEC's rules. See Final Rule, Electioneering Communications, 67 Fed. Reg. at 65,211-12 (amending 11 C.F.R. § 114.10). As noted above, non-profit corporations operating under § 501(c)(3) of the Internal Revenue Code are exempted from BCRA's regulation of electioneering communications altogether. See Final Rule, Electioneering Communications, 67 Fed. Reg. 65,211 (to be codified at 11 C.F.R. 100.29(c)(6)); see also 67 Fed. Reg. 65,199-200.

In the final analysis, BCRA cannot be characterized as overbroad merely because it may place incidental regulatory burdens on a tiny percentage of genuine issue advocacy that might be broadcast in proximity to federal elections. In Austin, the Supreme Court deferred to the legislative judgment that it is the potential for distortion of the political process inherent in the corporate form that justifies the regulation of spending by corporations "without great financial resources, as well as those more fortunately situated," and concluded therefore that a restriction on electoral spending by both business and nonprofit corporations was not overbroad. 494 U.S. at 661 (citing NRWC, 459 U.S. at 209-10). BCRA reflects a like judgment on the part of Congress that the demonstrated potential for exploitation of electioneering ads by corporations and unions, as a means of exerting unfair and improper influence over the electoral process, and, potentially, elected officials, also demands regulation of such advertising when broadcast in close proximity to federal elections. This is, significantly, a judgment that Congress came to only after many years of deliberation over the constitutionality of the statutory provisions that it eventually adopted. See supra at 50-52 (discussing legislative history of the Snowe-Jeffords provisions). The "considerable deference" that courts must show to Congress's "adjustment of the federal electoral laws . . . to account for the particular legal and economic attributes of corporations and labor organizations," NRWC, 459 U.S.