No. 02-1674 & Consolidated Cases

IN THE

Supreme Court of the United States

MITCH MCCONNELL, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF *AMICUS CURIAE* THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICUS CURIAE*[1]

The League of Women Voters of the United States (the "League") is a nonpartisan, community-based organization that encourages informed and active participation of citizens in government and seeks to influence public policy through education and advocacy. The League is organized in more than a thousand communities in every state and has more than 125,000 members and supporters nationwide. The League

[1] The Department of Justice has consented to the filing of this brief in a letter which accompanies this filing. All other parties have filed written consents to the filing of *amicus* briefs with the Court. No counsel for any party authored this brief in whole or in part and no person or entity other than the *amicus curiae*, its members, or counsel made any monetary contribution to its preparation or submission.

was organized in 1919 as an outgrowth of the 72-year struggle to win voting rights for women in the United States.

One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive, that protects individual liberties established by the Constitution, and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than two decades. The League thus has a strong and direct interest in this case.

SUMMARY OF ARGUMENT

In late October of 1996, the following television advertisement ran repeatedly in Arkansas:

> Senate candidate Winston Bryant's budget as Attorney General increased seventy-one 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's never opposed the parole of any convicted 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.

Deborah Beck, *et. al.*, Annenberg Public Policy Center, *Issue Advocacy During the 1996 Campaign* 24 (1997). Winston Bryant was running for an open seat in the United States Senate. The tax-exempt organization that sponsored the ad, Citizens for the Republic Education Fund, spent more than $300,000 on a last-minute television blitz of Little Rock and Jonesboro. Bryant lost. *Id.* Such advertisements come as little surprise, of course. They are a powerful part of many campaign strategies.

What is surprising is that until the enactment of the Bipartisan Campaign Reform Act (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (2002), such advertisements were not treated as electioneering speech under federal law. Despite their appearance on the eve of the election, their unmistakable mention of a particular federal candidate, their targeting of the candidate's electorate, and their appearance on television, the courts would have treated such ads as "issue" advocacy. By avoiding the use of "magic words"—express terms like "vote for," "elect," "support," "vote against," "defeat," and "reject"—they fell outside of coverage. Even if they were designed to promote a particular candidate, continuously featured that candidate, swayed voters to the candidate's favor, and did not even mention a traditional issue, they were treated as simple "issue" ads.

"Issue" advocacy thus became a peculiar term of legal art. It indicated nothing about what an advertisement said or concerned. It signified only that a few particular words were missing. An ad could educate on a burning social issue or shamelessly shill for a candidate. But whatever its content, so long as no magic words appeared, it was completely immune from the sort of reasonable source and disclosure rules that have long applied to campaign advocacy.

By making the absence of a few particular words all that mattered, the "magic words" approach undermined two of the longest-standing and most central architectural features of American campaign finance regulation: the disclosure of political spending and the bar against direct corporate and union spending to influence federal elections. By omitting a few particular words, individuals and entities could spend unlimited amounts to campaign for federal candidates without ever having to disclose their activities. In the Bryant blitz, for example, the citizens of Arkansas did not know the tax-exempt sponsor's identity, let alone the individuals or corporations or unions that may have funded the tax-exempt's

political activities. *See, e.g.,* Leslie Wayne, *A Back Door for the Conservative Donor*, N.Y. Times, May 22 1997 at B10. Only after much research by the press did the identity of the tax-exempt itself become clear. No research, however, was able to uncover the identity of any individuals, corporations, or unions that may have donated money to the tax-exempt for these particular advertisements. As this Court has repeatedly observed: "Publicity is justly commended as the remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting L. Brandeis, *Other People's Money* 62 (Nat'l Home Library Found. ed. 1933)). But the absence of "magic words" bars all disclosure.

Without "magic words," moreover, corporations and unions could have used the tax-exempt as a conduit to run this ad throughout the campaign season, or, indeed, have paid for it themselves. So long as they did not use "magic words" nothing stopped them from spending whatever they wanted to advocate the election or defeat of particular federal candidates. The addition of two words—"vote against"—at the end of the Bryant ad would have made all the difference. The "magic words" test would certainly have prevented a corporation or union from funding that. But that is of little concern to the corporate or union sponsor. If anything, using such words makes ads less effective.

Understanding this history—indeed, documenting it in a detailed factual record—Congress enacted BCRA, which sought to return campaign finance regulation to steadier footing. By applying an objective test which looked at whether a clearly identified federal candidate was mentioned, the medium, the targeting, and the timing of the communication, BCRA aimed to reach "issue" ads that looked the same as–and presumably were as effective as–the ads that candidates ran on their own behalf. This represented modest change. It merely sought to subject to longstanding dis-

closure and source requirements those advertisements that looked like the campaign ads candidates themselves run. Such a small and sensible step would prevent circumvention of this country's basic safeguards against corruption and the appearance of corruption.

A majority of judges on the district court found that several empirical studies supported this modest step. Of these studies, Plaintiffs challenge two: the *Buying Time* studies. These particular studies surveyed political television advertising from the 1998 and 2000 election cycles and concluded that very few issue ads would have been mistakenly caught by BCRA's primary definition of "electioneering communication." After carefully considering Plaintiffs' general claims that the *Buying Time* studies were biased and untrustworthy, a majority of the judges properly rejected those claims. Plaintiffs' more detailed methodological claims also fail. They complain first that some of the data underlying the *Buying Time* studies was improperly recoded. The recoding they complain of, however, was approved by their own expert and nothing suggests that the recoding they themselves propose and on which they base many of their own numbers more accurately reflects the actual judgments of the original coders, let alone the content of the ads themselves. The contrary, in fact, is more likely true. Their second complaint goes to the choice of metric employed by one of the studies. Although they assert it is unhelpful to overbreadth analysis, the opposite is the case. It strongly demonstrates the care and caution Congress took in entering this sensitive area.

ARGUMENT

I. BCRA'S REGULATION OF ELECTIONEERING COMMUNICATIONS, UNLIKE REGULATION UNDER THE PRIOR "MAGIC WORDS" TEST, PREVENTS CORRUPTION AND THE APPEARANCE OF CORRUPTION WITHOUT IMPERMISSIBLY BURDENING SPEECH.

A. Disclosing Election Spending and Stopping Corporations and Unions from Spending from Their General Treasuries to Influence Federal Elections Represent Two Central Safeguards Against Corruption and the Appearance of Corruption in Federal Elections.

Congress first required the disclosure of certain campaign contributions in 1910, and has since expanded this requirement to a much wider range of campaign spending.[2] This Court has recognized that such disclosure serves three important interests that underpin the "free functioning of our national institutions." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (quoting *Communist Party v. Control Board*, 367 U.S. 1, 97 (1961)). First, disclosure provides voters with information about where money comes from and how it is spent. Such information helps voters better evaluate candidates and determine where they stand. *Id*. at 66-67. Second, disclosure prevents actual corruption and the appearance of corruption. By giving voters information about the ties of elected officials to their financial supporters, it deters contributions made with an eye to special favors and, should any be made, allows voters more easily to detect them. *Id*. at 67. Third, disclosure is "an essential means of

[2] *See e.g.*, Act of June 25th, 1910, ch. 392, 36 Stat. 822; Federal Corrupt Practices Act, 1925, ch. 368, tit. 3, 43 Stat. 1053, 1070-79; Federal Election Campaign Act of 1971 (FECA), Pub L. No. 92-225, 86 Stat. 3.

gathering the data necessary to detect violations of . . . contribution limitations," *id*. at 68, which are independently necessary to prevent corruption. In short, disclosure represents one of the most important means of securing the public legitimacy of our political institutions because it provides voters important political information, because it directly deters corruption, and because it allows for the enforcement of independent safeguards, like contribution limits.

Source requirements preventing business corporations and unions from spending money from their general treasuries to influence federal elections are even longer-standing. Since 1907, Congress has carefully regulated corporate political activity. In that year, Congress passed the Tillman Act, which made it "unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office." Act of Jan. 26, 1907, ch. 420 34 Stat. 864. Over the years, this rule was extended to cover both contributions and independent expenditures by both business corporations and unions. *See, e.g., United States v. Auto. Workers*, 352 U.S. 567, 570-84 (1957) (recounting history). From the beginning, the law has focused on the "special characteristics of the corporate structure that threaten the integrity of the political process." *FEC v. Beaumont*, 123 S.Ct. 2200, 2206 (2003) (internal citations and quotation marks omitted). Because "[s]tate law grants corporations special advantages . . . that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments . . . corporations . . . [can] use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace." *Id*. (internal citations and quotation marks omitted). As this Court has long recognized, "barring corporate earnings from conversion into political war chests . . . prevent[s] corruption or the appearance of corruption," *id.* (internal citations and quotation marks omitted), the importance of which "has never

been doubted," *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978). Barring corporate contributions and expenditures also helps prevent the use of corporations "as conduits for circumvention of valid contribution limits." *Beaumont*, 123 S.Ct. at 2207 (internal citations, brackets, and quotation marks omitted). Together the disclosure and source requirements barring corporate and union spending to influence federal elections are two of the primary bulwarks against corruption.

B. Identifying Advertisements Designed to Influence Federal Elections Through "Magic Words" Undermines These Two Central Safeguards Against Corruption.

In *Buckley*, this Court considered the statutory meaning of "expenditures . . . advocating the election or defeat of [a clearly identified] candidate." 434 U.S. at 41-51. In order to avoid possible void-for-vagueness difficulties (in the case of spenders other than candidates and political committees, including political parties), this Court "limited [the term] to communications that include explicit words of advocacy of election or defeat of a candidate," *id*. at 43, and in a footnote "restrict[ed its] application . . . to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id*. at 44 n.52. Nowhere did this Court indicate that such "magic words" were constitutionally required for Congress ever to impose disclosure and source requirements. Rather, this Court narrowly held that given the uncertain reach of this particular term, it had to be given more objective contours. Otherwise, speakers would not know ahead of time what they could and could not say. They would always be at the mercy of their audience, for no matter how carefully they crafted their speech to avoid advocacy, their audience could interpret it differently. *Id*. at 42-44. The lesson of *Buckley*, in other

words, is not that the First Amendment requires the use of "magic words," but rather that covered spending must be defined objectively—just as BCRA's primary definition of "electioneering communications" does. Definitions that rely largely on subjective audience understanding or speaker intent are constitutionally problematic.

After carefully surveying the landscape of political advertising, Congress found that the "magic words" test did not work.[3] First, few modern campaign ads use any "magic words." Uncontroverted evidence before the district court[4] showed that only 11.4 percent of the 433,811 advertisements aired by candidates during the 2000 federal election met the express advocacy test laid down in *Buckley*. Supp. App. at 659sa, 763sa-764sa (Kollar-Kotelly, J.). Second, candidates and political consultants have found it very easy to evade magic words in their advertising. In 1996, for example, the Republican National Committee ("RNC") ran the following ad, called "The Story," on television before the election:

Audio of Bob Dole:	We have a moral obligation to give our children an America with the opportunity and values of the nation we grew up in.
Voice Over:	Bob Dole grew up in Russell, Kansas. From his parents he learned the value of hard work, honesty and responsibility. So when his

[3] *See, e.g.*, 148 Cong. Rec. S2116 (daily ed. March 20, 2002) (statement of Sen. Levin) ("magic words . . . are not a complete test of what constitutes electioneering ads"); *id.* at S2117 (statement of Sen. Jeffords) ("the 'magic words' standard . . . has been made useless"); *id.* at S2141 (statement of Sen. McCain) ("even a casual observer would concede that 'magic words' is a dramatically underinclusive test").

[4] The filing of a Joint Appendix in this case has been deferred. Citations to the original record are made where necessary pursuant to this Court's Rule 26.4(b). The opinions of the district court are reprinted in the Joint Supplemental Appendix to Jurisdictional Statements, cited herein as Supp. App. at 1sa-1382sa.

	country called . . . he answered. He was seriously wounded in combat. Paralyzed, he underwent nine operations.
Audio of Bob Dole:	I went around looking for a miracle that would make me whole again.
Voice Over:	The doctors said he'd never walk again. But after 39 months, he proved them wrong.
Audio of Elizabeth Dole:	He persevered, he never gave up. He fought his way back from total paralysis.
Voice Over:	Like many Americans, his life experience and values were as a strong moral compass. The principle of work to replace welfare. The principle of accountability to strengthen our criminal justice system. The principle of discipline to end wasteful Washington spending.
Voice of Bob Dole:	It all comes down to values. What you believe in. What you sacrifice for. And what you stand for.

Senate Comm. on Governmental Affairs, *Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*, S. Rep. No. 105-177, at 4014 (1998). "The Story" focused entirely on the personality traits and affect of Bob Dole, not on any issues. Although the RNC's political director thought that it "need[ed] to be run," he worried that "[m]aking this spot pass the issue advocacy test may take some doing." *Id.* at 4015. He need not have worried. As Bob Dole himself explained to Ted Koppel when asked why such an ad would be considered "generic," i.e., issue advocacy, "It doesn't say 'Bob Dole for president.' . . . [I]t talks about the Bob Dole story. It also talks about issues. It never mentions the word that I'm—it never says

that I'm running for president, though I hope that it's fairly obvious, since I'm the only one in the picture!" *Id*. at 4154. The audience laughed. The absence of four little words made all the difference.

Third, "magic words" make advertisements, if anything, less effective. The uncontroverted testimony of political consultants in the district court was that "magic words" were clumsy and weakened political advertisements. Republican political consultant Douglas L. Bailey, for example, testified that "[i]n the modern world of 30 second political advertisements, it is rarely advisable to use such clumsy words as 'vote for' or 'vote against.' . . . . All advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their throat." Supp. App. at 660sa (Kollar-Kotelly, J.). Likewise, Democratic political consultant Raymond Strother testified that

> media consultants prefer putting across electioneering messages without using words such as 'vote for.' Good media consultants never tell people to vote for Senator X; rather you make your case and let the voters come to their own conclusions. In my experience, it actually proves less effective to instruct viewers what you want them to do.

Id. at 662sa. In this respect, political advertising is just like commercial advertising. As two experts pointed out,

> the practices of political advertisers are not dissimilar from those of commercial advertisers. Car ads rarely exhort viewers to "buy" a Chevrolet, nor do soft drink ads urge people to "drink" their product. . . . This atmospheric approach to commercial advertising—where the product is presented in various tableaus—has become increasingly popular. It serves the general strategy of advertisers to present viewers with a variety of reasons to choose their product, hoping that they will latch onto one. Too heavy-handed an approach might

> interfere with this process by raising viewers' defenses. Political ads seem to follow the same strategy, hoping that citizens will grow to prefer a candidate without being told to troop to the polls.

Id. at 663-64sa (quoting Krasno and Soraf Expert Report at 54). Like any good advertiser, those advertising candidates avoid "magic words" because they want to make their pitch as effective as possible.

The "magic words" test, then, ironically identifies as campaign advertising those ineffective ads that candidates themselves seldom use. It classifies as pure issue advocacy, by contrast, exactly the kinds of effective campaign advertising the candidates themselves *do* use. It gets the real world backwards. In a sense, the "magic words" test works only to protect political advertisers from making stupid decisions. Because it compels disclosure of and keeps corporations and unions from using treasury funds to engage in the least effective forms of candidate advocacy, it encourages more effective forms. Can that be the purpose of the First Amendment?

By classifying nearly all campaign advocacy by independent spenders as issue advocacy, the "magic words" test clearly undermines ordinary disclosure requirements, which give voters important information and prevent corruption. In three 2000 Republican primaries, for example, an organization called "Republicans for Clean Air" sponsored ads praising then-Governor Bush and criticizing Senator McCain. After the first of these primaries, reporters discovered that "Republicans for Clean Air" consisted of two brothers, Charles and Sam Wyly, who were long-term friends of Governor Bush. One was, in fact, an authorized fundraiser for the Bush campaign. According to the press, the Wylys spent $2.5 million on the ads. When their identities were uncovered in a later primary, much bad publicity ensued and the Bush campaign felt compelled to distance itself from them. In short, the "magic words" test allowed this major

advertising campaign to be conducted in secrecy and the eventual public reaction shows how greatly the identity of the sponsors mattered to voters. *See* Supp. App. at 97-99sa (per curiam).

As political consultant Raymond Strother stated,

> one of the biggest problems that a candidate's media consultant now faces is the lack of disclosure associated with third parties running these ads. A few years ago, Jill Docking ran for the United States Senate against Sam Brownback in Kansas. . . . In the last two weeks of a very tight election, an unidentifiable group came in and poured a million dollars into the race. They ran [ads] throughout Kansas telling voters that Jill wasn't a Christian, and all we could find was a fax machine. We had no idea where the money came from. I have had similar experiences in other races as well. Without knowing who is funding the groups that run these ads, we are often unable to correct the distortions.

Id. at 93sa-94sa. Without disclosure, voters cannot evaluate candidates by seeing who supports them, cannot easily recognize corruption in any special favors given to the funders of these ads, and cannot tell whether the spending effectively represents a circumvention of the contribution limitations.

Similarly, the "magic words" test allows corporations and unions to evade the prohibitions against spending directly from their general treasuries to influence federal elections. By carefully avoiding "magic words," for example, the National Rifle Association ("NRA"), a § 501(c)(4) tax-exempt entity, successfully evaded the campaign finance law's source requirements. It sponsored much advertising to influence the 2000 federal elections. Executive Vice President of the NRA, Wayne LaPierre, stated in a fundraising letter that he "spent what it took [in 2000] to defeat Al Gore, which amounted to millions more than we had on hand." Supp. App. at 693sa-694sa (Kollar-Kotelly, J.). He later testified that "[w]e took some money out of the reserves to

cover the deficit . . . . [The Gore advertising] was probably … the main contributing factor." *Id.* The NRA ran several different Gore ads—some funded out of its general treasury funds and some funded by the NRA Political Victory Fund, its affiliated political action committee. The small differences between some of the ads run by the NRA and those run by its PAC show what little difference there is between advertisements that do and do not use "magic words." The ads were virtually identical. The ones paid for from the corporation's general treasury simply omitted a few express terms:

NRA PAC Advertisement	NRA Direct (Non-PAC) Advertisement
HESTON:	HESTON: Other issues may come and go, but no issue is as important as our freedom. And the day of reckoning is at hand.
Did you know that right now in federal court, Al Gore's Justice Department is arguing that the Second Amendment gives you no right to own *any* firearm? No handgun, no rifle, no shotgun.	Did you know that right now in federal court, Al Gore's Justice Department is arguing that the Second Amendment gives you no right to own *any* firearm? No handgun, no rifle, no shotgun.
And when Al Gore's top government lawyers make it to the U.S. Supreme Court to argue their point, they can have three new judges handpicked by Al Gore if he wins this election.	And when Al Gore's top government lawyers make it to the U.S. Supreme Court to argue their point, they can have three new judges handpicked by Al Gore if he wins this election.

Imagine . . . what would Supreme Court Justices Hillary Clinton, Charlie Schumer, and Dianne Feinstein do to your gun rights?	Imagine . . . what would Supreme Court Justices Hillary Clinton, Charlie Schumer, and Dianne Feinstein do to your gun rights?
And what *you* think wouldn't matter any more. Because the Supreme Court has the final say on what the Constitution means.	And what *you* think wouldn't matter any more. Because the Supreme Court has the final say on what the Constitution means.
When Al Gore's Supreme Court agrees with Al Gore's Justice Department and bans private ownership of firearms, that's the end of your Second Amendment rights.	When Al Gore's Supreme Court agrees with Al Gore's Justice Department and bans private ownership of firearms, that's the end of your Second Amendment rights.
Please, vote freedom first. Vote George W. Bush for President.	
ANNCR: Paid for by the NRA Political Victory Fund and not authorized by any candidate or candidate's committee.	**ANNCR: Paid for by the National Rifle Association.**

Id. at 695sa-696sa. (differences between ads bolded). NRA Executive Vice President Wayne LaPierce described the two scripts as "exactly the same" because, he admitted, the reference to "the day of reckoning . . . at hand" in the NRA ad was to the day of the 2000 election. *Id.* at 697sa.

Uncontroverted testimony in the district court showed, moreover, that candidates track these advertisements and who funds them. Lobbyist Wright Andrews testified that

> [s]ophisticated political donors—particularly lobbyists, PAC directors, and other political insiders acting on behalf of specific interest groups—are not in the business of dispensing their money purely on ideological or charitable grounds. Rather, these political donors typically are trying to wisely invest their resources to maximize political return. . . . [Issue ads] are noticed by the elected officials on whose behalf, or against whom, [they] are run. An effective advertising campaign may have far more effect on a member than a direct campaign contribution or even a large soft money donation to his or her political party that is used for political purposes in his or her district or state.

Id. at 709sa-710sa. So helpful are these ads, in fact, that politicians who benefit from this type of corporate and union general treasury fund spending often raise money for these organizations. *Id.* at 712sa. Congressman Ric Keller, for example, for whose 2000 campaign the Club for Growth had funded advertising, signed a Club for Growth fundraising letter which stated: "The Club for Growth selected my race as one of its top priorities. . . . . *Since the Club targets the most competitive races in the country, your membership in the Club will help Republicans keep control of Congress*." *Id.* (emphasis in original).

Although the number of entities funding these advertisements has grown, only a handful account for most of the influence. In the 1999-2000 election cycle, for example, the Republican and Democratic parties accounted for 31 percent of this spending; Citizens for Better Medicare, 13 percent; the Coalition to Protect America's Health Care, 6 percent; the U.S. Chamber of Commerce, 5 percent; AFL-CIO, 4 percent; NRA, 4 percent; and U.S. Term Limits, 4 percent. *Id.* at 655sa. Just the six leading nonparty entities accounted for 36

percent of the spending—more than the parties themselves (31 percent) and more than all other organizations combined (33 percent). Two of these six entities, in fact, represented the same type of special interest. Far from being "a grass-roots generated group of citizens," Citizens for Better Medicare was "an arm of the Pharmaceutical Research and Manufacturers Association" and the Coalition to Protect America's Health Care worked under the umbrella of the American Hospital Association, Erika Falk, Annenberg Public Policy Center, *Legislative Issue Advertising in the 107th Congress* 62, 64 (2003) (internal citations omitted). As these figures show, far from broadening the spectrum of political debate, the ability to spend from general treasury funds constricts it. It concentrates the threat of corruption.

The "magic words" test, then, has undermined two of the central protections against corruption and the appearance of corruption—the disclosure of campaign spending and the bar against funding electioneering activity from general union and corporate treasuries—that FECA was intended to support. The test paradoxically allows corporations and unions to use their treasuries to fund *only* the kinds of advertisements that candidates now usually employ to promote their own candidacy—those without "magic words." And it discourages *only* the kinds of advertisements that candidates themselves now seldom use because they think them ineffective—those with "magic words." The test, in short, allows corporate earnings and union dues to be easily converted into political "war chests," the influence of which is often invisible to voters.

II. THE *BUYING TIME* STUDIES ON WHICH A MAJORITY OF THE DISTRICT COURT RELIED IN UPHOLDING SEVERAL OF BCRA'S CENTRAL PROVISIONS ARE RELIABLE AND STRONGLY SUPPORT BCRA'S PRIMARY DEFINITION OF ELECTIONEERING COMMUNICTATIONS.

A. A Majority of the District Court Clearly Rejected the Plaintiffs' Attacks on the *Buying Time* Studies.

Plaintiffs rest much of their attack on BCRA's handling of "electioneering communications" on the supposed unreliability of parts of two particular reports. These reports, the *Buying Time* studies, surveyed television ads from the 1998 and 2000 election cycles and concluded that very few issue ads would be affected by BCRA's primary definition. BCRA's primary definition would, in the view of these studies, leave the vast majority of actual issue ads untouched. The 1998 study, for example, concluded, in part, that only 7% percent of all issue ads televised that year met BCRA's primary definition. Jonathan S. Krasno & Daniel E. Seltz, Brennan Center for Justice, *Buying Time: Television Advertising in the 1998 Congressional Elections*, 109 (2000); *see also* Supp. App. at 1348sa n.213 (Leon, J.) (noting that Dr. Krasno's current estimate is 6.1%).

Plaintiffs understandably attack these studies because they stand so powerfully against them. Among other things, Plaintiffs claim that "the district court, after detailed and laborious consideration, unanimously rejected the conclusions of the *Buying Time* reports," McConnell Br. at 53, that "the *Buying Time* reports were entirely and irredeemably biased," *id.* at 53 n.18, and that "the reports' conclusions about BCRA's insignificant effect on so-called 'genuine' issue ads are insupportable," *id*. at 55. Nothing could be further from the truth.

In their individual opinions, two of the three judges on the district court strongly rejected Plaintiffs' broad-brushed attacks. As Judge Leon put it, "I find that although the *Buying Time* studies contain some flaws and shortcomings, … those shortcomings do not detract from the studies' credibility and reliability." Supp. App. at 1335sa. Judge Kollar-Kotelly went even further. She described Plaintiffs' expert's attempts to discredit the studies as "a piñata party: if one hits the piñata enough, it will eventually crack apart." *Id*. at 764sa. In the Plaintiffs' case, however, the expert clearly failed to crack the piñata. Like Judge Leon, Judge Kollar-Kotelly extensively relied on the studies' central findings. She also thought the Plaintiffs' failure to do any independent studies or even to try to replicate the study they criticized highly significant:

> Although some of [the piñata] "hits" have merit, . . . neither Plaintiffs nor Dr. Gibson[, their expert,] have attempted to conduct their own similar study, or even replicate a discrete portion of the *Buying Time* studies, despite the fact that the underlying materials were provided to them by Defendants. Presenting the Court with contradictory results from such a study would have been far more persuasive than the recalculations of incorrect versions of the *Buying Time* data sets and the often conjectural and speculative criticism proffered by Plaintiffs and Dr. Gibson.

Id. In fact, the Plaintiffs' complete failure to offer their own studies puts them in an awkward position. Although they continually attack the *Buying Time* reports, they find themselves having to rely extensively on the underlying data—quarrelling with it in some places, changing it in others, but all the time using it to support their own arguments on overbreadth. *See, e.g.*, McConnell Br. at 56 (massaging data to argue that "64% of ads mentioning a candidate in the 60 days before the 1998 general election were coded . . . as

genuine"). Their own extensive reliance on the studies undermines their broadside attacks.

A majority of the judges on the district court also strongly rejected any claim of bias. Judge Leon, for example, found that "while . . . the primary purpose of the *Buying Time* studies was to further campaign finance reform, I do not find that this fact has skewed the results of the study." Supp. App. at 1335sa. Judge Kollar-Kotelly was even more forceful. "I would not," she found, "discount the [*Buying Time*] studies because they were approached with a particular result in mind. The testimony shows that policy perspectives and effective scientific research are not mutually exclusive." *Id.* at 764sa. And, as to the particular actions which Dr. Gibson pointed to as evidence of bias—the "cleaning" of data and recoding—Judge Kollar-Kotelly correctly noted that "[t]he 'cleaning' of the data that Dr. Gibson finds suspicious appears . . . to be a necessary function for databases of the size produced for the *Buying Time* reports and not a function of bias. Fixing miscodings and resolving the 'cookie cutter' issues required such actions." *Id*. at 764sa-765sa. Judges Leon and Kollar-Kotelly both noted, moreover, that one of Dr. Gibson's major complaints with the studies, his inability to reproduce their conclusions from the underlying data sets, resulted from his own use of the wrong data set. *Id.* at 1336sa (Leon, J.) ("[W]hile Dr. Gibson maintains that his inability to replicate the *Buying Time* . . . results 'undermines . . . any confidence one should place in the findings,' his inability seems attributable to his using the incorrect data set."); *id.* at 765sa (Kollar-Kotelly, J.) ("confusion . . . as to the correct database to use to analyze the studies' findings decreases the utility of Dr. Gibson's Expert Report") (internal citations omitted). Judge Kollar-Kotelly, in fact, found that this confusion also "undermines the notion that the *Buying Time* authors manipulated the data in order to achieve their desired results." *Id*. at 765sa. The charge of bias is simply empty of merit.

As a majority of judges pointed out, moreover, even if the Plaintiffs' attacks were all credible, they would leave many of the conclusions of the *Buying Time* studies untouched. *See* Supp. App. at 1333sa-1334sa (Leon, J.); *id.* at 765sa (Kollar-Kotelly, J.). First, as Dr. Gibson himself admitted, "Entirely objective characteristics of the ads . . . present few threats to reliability." Gibson Expert Report at 11. These include such central findings as (1) that "magic words" are rarely used in political advertising, (2) that group-sponsored ads that mention candidates tend to be concentrated before an election, and (3) that advertisements sponsored by parties and interest groups comprise a significant and increasing portion of political advertising broadcast in federal races. Supp. App. at 1333sa-1334sa (Leon, J.).

Second, Plaintiffs failed to challenge the validity of other authoritative studies, particularly the Annenberg studies, which support the central findings of the *Buying Time* reports. *Id*. at 763sa (Kollar-Kotelly, J.) ("The Annenberg studies . . . have not been challenged by anyone."). Even if Plaintiffs did manage to discount the *Buying Time* studies, these others would support many of the same conclusions. In particular, the Annenberg studies concluded that in the 1999-2000 election cycle, candidate campaign ads virtually dominated all types of issue ads in the last two months of the election:

> The type of issue ad that dominated depended greatly on how close we were to the general election. . . . Though candidate-centered issue ads always made up a majority of issue ads, as the election approached, the percent [of] candidate-centered spots increased and the percent of legislative and image ads decreased, such that *by the last two months before the election almost all televised issue spots made a case for or against a candidate*.

Annenberg Public Policy Center, *Issue Advertising in the 1999-2000 Election Cycle* 14 (2001), *quoted and emphasis added in* Supp. App. at 654sa (Kollar-Kotelly, J.). The

Annenberg studies, in fact, produced a bottom line for the 2000 election remarkably close to the one the *Buying Time* reports produced for the 1998 election: "Fully 94% of issue ads aired in after August[, 2000] made a case for or against a candidate. Just 3.1% were legislative [issue] ads, and 2.3% were general image ads." *Id.*, *quoted in* Supp. App. at 726sa (Kollar-Kotelly, J.).

The findings of the uncontroverted Annenberg studies not only bolster the conclusions of the *Buying Time* reports, but also underscore the perversity of the "magic words" test. Among the conclusions of the Annenberg studies were (1) the amount of money spent on "issue advocacy" is rising rapidly; (2) instead of creating the number of voices *Buckley v. Valeo* had hoped, issue advocacy allow[s] groups such as the parties, business and labor to use soft money or general treasury "war chests" to gain a louder voice; (3) the distinction between issue advocacy and express advocacy is a fiction; and (4) "issue" advocacy, as practiced in recent elections, masks the identity of some key players and so deprives citizens of information about source of messages which research tells us is a vital part of assessing message credibility. *Id.* at 2, *quoted in* Supp. App. at 657sa (Kollar-Kotelly, J.). In addition, the unrebutted findings of Dr. Goldstein about the 2000 election showed that (1) interest group advertising that mentioned candidates was highly concentrated in battleground states; (2) no more than 12% of candidate-sponsored advertisements in 2000 used "magic words"; and (3) interest group advertisements that identified a candidate in 2000 tended to be broadcast within the final 60 days of the election campaign, whereas those that did not identify a candidate were spread more evenly throughout the year. *See* Supp. App. 763sa-764sa (Kollar-Kotelly, J.). The authoritative studies Plaintiffs did not challenge, then, support BCRA's overall approach to electioneering communications just as strongly as do the studies they do attack. Even Judge Henderson, who criticized the *Buying Time* studies, relied on

these other studies in her opinion. *See* Supp. App. at 230sa-231sa, 233sa.

B. Plaintiffs Are Wrong in Claiming that the Authors of the *Buying Time* Studies Improperly Recoded Data.

In the district court, Plaintiffs made one central challenge to the integrity of the 1998 *Buying Time* study. They claimed that the authors had improperly recoded data to recharacterize eight "genuine" issue ads as campaign ads. They still do. *See* McConnell Br. at 56. Judge Leon, however, who of the three judges considered the *Buying Time* studies most closely, found no problem here. *See* Supp. App. at 1344sa. He rightly saw that "the changes [made] in the database reflect the gradual filling in of missing data and the discovery of internal contradictions." *Id*. What happened was that the original coders who had reviewed these eight ads had filled out their coding sheets in a way that was internally contradictory. Plaintiffs' expert Dr. Gibson acknowledged as much. Gibson dep. at 116-21. Since it was impossible from the original coding sheets to tell how the coders would have properly classified these ads, they were recoded. Dr. Gibson agreed that that was the proper course. In fact, when asked what he would have done under the circumstances, he answered directly "I probably would have fired [the coder] and had the cases re-coded," *id*. at 121, which—apart from the firing—is what the authors of the 1998 study did. When asked to review several of these internally contradictory coding sheets along with the ads they coded, Dr. Gibson himself indicated that it was "highly probable" that the original coders intended to categorize the ads as campaign advertising, not as issue ads. *Id.* at 112. Dr. Gibson, then, unlike the Plaintiffs themselves, did not believe that these eight ads should be counted as issue ads, an assumption upon which one of the most dramatic and misleading arguments of the Plaintiffs rest: "that 64% of ads mentioning a candidate in

the 60 days before the 1998 general election were coded by the students as 'genuine.'" McConnell Br. at 56. That number cannot stand in the face of the record and Plaintiffs' own expert's testimony.

Plaintiffs also attack the coding of the data underlying the *Buying Time 2000* study. They incorrectly claim that 17%, not 2.3%, of the television ads appearing within 60 days of the general election were actual issue ads. To get there, they must recode six of seven basically identical ads that were widely broadcast in the 2000 campaign. This is improper. In his expert report analyzing the *Buying Time 2000* study's methodology and use of data, Defendants' expert Professor Goldstein explained that one of these seven ads was originally coded by the students as an issue ad and the remaining six essentially identical ads were coded by them as campaign ads. *See* Goldstein Rebuttal Report at 16-17. Although the original *Buying Time 2000* investigators had then recoded the one ad to match the six others, Professor Goldstein had followed the original inconsistent coding in his analysis. But the Plaintiffs argued in district court that the six should be made to conform to the one. *See* Pls.' D. Ct. Reply Br. at 37. The Defendants and Intervenors, on the other hand, believed it more sensible to reclassify the one outlier rather than the large majority of advertisements. They did not object, however, to Dr. Goldstein's adhering to the original inconsistent coding, the approach that led to the figure of 2.3%. Although in deposition Plaintiffs pressed Professor Goldstein to reclassify the majority of ads, he agreed only that under the Plaintiffs' version of "the most conservative estimate" the six should be made to conform to the outlier.[5]

[5] Professor Goldstein's deposition testimony proceeded as follows:

> Q: [I]f you believe [the six ads] are virtually indistinguishable [from the one other], then wouldn't it have been fairer to include them in your analysis, your quote 'conservative analysis' in undertaking to prepare your expert report?

He nowhere stated that recoding six ads to conform to one would better reflect the ads' content or his own "conservative estimate." He merely confirmed that under "the most conservative estimate" any doubt—no matter how small—would place the ads in the genuine issue category. And it is this "most conservative estimate" that produces the figure of 17%. Supp. App. at 1353sa-1354sa, 1361sa (Leon, J.).

If anything, controversies over recoding reflect bias in the Plaintiffs' challenges to the *Buying Time* studies, not in the studies themselves. At one point in his report Dr. Gibson relied on a modified version of the 2000 database in which 30 ads had been selected for recoding from campaign ads to issue ads by Plaintiffs' counsel. *See* Gibson Expert Report 62-63. Based on that recoding, Plaintiffs argued that the actual number of issue ads BCRA's primary definition would have covered "would have increased by . . . 23%." Pls.' Omnibus Op. Br. (McConnell Pls.) at 69 n.34. But Dr. Gibson himself never understood why those ads should be recoded. He received no explanation from counsel and he could not see any reason himself.[6] Indeed, Dr. Gibson never

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> A: In retrospect, knowing that these [six] ads were originally coded as genuine issue ads [—a counterfactual assumption—] they should have been included in *the most conservative estimate* . . . . Having said that, . . . I don't know what they were originally coded as.

Goldstein dep. at 160 (emphasis added).

[6] His deposition testimony makes this clear:

> Q: Now, you refer . . . to this mysterious group of 30 ads and [your report] says, "[t]his list was provided to me by counsel." What I wan[t] to know is how were these ads selected by counsel for you?
>
> A: I don't know.
>
> * * *

even looked at the storyboards for the recoded ads. *Id.* at 181. He simply followed the directions of counsel.

C. The *Buying Time* Studies Strongly Support BCRA's Primary Definition of Electioneering Communications.

Because of a slight change of focus, the 1998 and 2000 *Buying Time* studies employ somewhat different measures to quantify BCRA's fit. The studies compare a single number, the numerator, to two other numbers, the different denominators. The common numerator consists of the number of pure issue ads mischaracterized as campaign advocacy under BCRA's primary definition of electioneering communications. The 1998 study compares this numerator to the overall number of issue ads televised in that year and thus offers up a ratio of how many "false positives" using BCRA's primary definition would create. For example, if BCRA's primary definition mistakenly tagged four issue ads as campaign ads out of 100 issue ads televised that year, the measure would produce 4/100 or four percent. For 1998, this measure produces a result of 6.1% false positives, Supp. App. at 1348sa n.213 (Leon, J.); for 2000, it produces a result of

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Q: [Were] these ads … selected to illustrate that changing the . . . coding on relatively few ads can produce a relatively large swing in the percentages?
A: Yes. . . . .
Q: I take it you didn't make any determination that these 30 ads should have been coded as genuine issue ads; is that correct?
A: That's correct.
Q: Do you know now (sic) the Plaintiffs' lawyers went about selecting the ads . . .?
A: No, I don't.
Q: Did you have any understanding of the way in which the 30 ads were selected?
A: No.

Gibson dep. at 179-81.

3.1%, *id.* at 1360sa. These numbers are uncontested by Plaintiffs, who rest their arguments on the other measure.

The 2000 study takes a somewhat different approach. It compares this same numerator to the total number of ads covered by BCRA's primary definition. This approach provides a measure of the proportion of ads BCRA's primary definition classifies as campaign ads that are actually pure issue ads. It measures not "false positives" but rather the inaccuracy of BCRA's primary definition just within the relatively small universe of ads it tags. Although both measures use the same numerator—the number of issue ads mischaracterized as campaign advocacy by BCRA's primary definition—they employ quite different denominators and thus lead to different results.[7]

Contrary to Plaintiffs, this denominator issue is no "problem" at all. These two different measures answer two

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[7] For 1998, the Defendants and Judge Leon believe that this second measure produces a result of 14.7%, while Plaintiffs, because they would recode eight campaign widely televised ads as issue ads for this year, believe it would produce a result of 64%. *Compare* Supp. App. at 1157sa *with* McConnell Br. at 56. As discussed earlier, however, their argument is specious. *Supra* at 23-24. When asked to review several of these ads and their internally contradictory coding sheets, Dr. Gibson, Plaintiffs' own expert, indicated that it was "highly probable" that the coder intended to categorize the ads as candidate campaign advertising. Gibson dep. at 112.

For 2000, the Defendants believe this same measure produces a result of 2.3%, while Plaintiffs and Judge Leon believe it produces a result of 17%. Supp App. at 1157sa. As discussed earlier, however, this higher figure takes seven essentially identical ads, six of which the original coders characterized as campaign advocacy and one of which they characterized as issue advocacy, and characterizes all seven as issue advocacy. *Supra* at 24-25. At best the 17% figure can serve only as an upper limit. Accepting the original inconsistent coding, which itself errs on the side of caution, produces the figure Defendants tendered: 2.3%. The more reasonable approach of reclassifying the one outlier to conform to the other six ads would, of course, produce a still lower figure.

different questions about BCRA's effect. The original, 1998 measure compares the number of issue ads covered by BCRA to all issue ads televised in that year and so measures the impact of BCRA on issue advertising generally. The later measure compares the number of issue ads covered by BCRA to all ads covered by BCRA and so measures the inaccuracy of the primary definition *within the restricted domain of those ads it captures*. Unlike the first measure, it says nothing at all about the accuracy of the primary definition in the total domain of political advertising.

Of these two measures, only the first bears on what proportion of total issue advocacy is mistakenly caught by BCRA's primary definition. On any view, that is a very small number—6.1 percent for 1998 and 3.1 percent for 2000. This ratio, however, actually *over*states the impact of BCRA on issue ads for several reasons. First, the coders were given a stark all-or-nothing choice—the ads had to be classified simply as issue or candidate ads, not some mixture of both. Hybrid ads touting or attacking candidates on particular issues could thus have been coded as pure issue ads even if a major purpose was electioneering. Second, the coders had no context for the ads. An ad that appears on its surface to be about issues can assume a quite different role in the context of an actual election. An ad attacking trial lawyers, for example, might not have coded as a candidate ad even if in a particular race that ad had been aimed at one candidate prominently identified with that profession. Third, the study did not consider print ads and mass mailings, which BCRA's primary definition excludes from coverage. Had they been included in the overall analysis, however, the proportion of issue advocacy covered by BCRA's primary definition would have fallen greatly. The same number of televised issue ads would have been coded as falling under BCRA's primary definition, of course, but they would have been among the much larger universe of televised, print, and mass mailing issue ads. For these reasons, then, the already low figures

that the 1998 measure produces for mischaracterized issue advocacy are upper limits. The actual numbers would be much lower. As the *Buying Time* studies show, BCRA's primary definition in no way impermissibly burdens speech.

CONCLUSION

For the foregoing reasons, this Court should uphold BCRA's primary definition of electioneering communications.

Respectfully submitted,

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