United States District Court
For the District of Columbia

SEN. MITCH McCONNELL, *et al.*,	)	
	)	
Plaintiffs,	)	Case Nos. 02-582, 02-581,
v.	)	02-633, 02-753, 02-754,
	)	02-781, 02-874, 02-875,
FEDERAL ELECTION COMMISSION, *et al.*,	)	02-877, 02-881
	)	
Defendants.	)	

BRIEF OF AMICUS CURIAE
THE MEDIA INSTITUTE

The Media Institute (the "Institute"), by its counsel, submits the instant brief amicus curie in support of the plaintiffs. The Institute is an independent, nonprofit research foundation in Washington, D.C., specializing in issues of communications policy. The Institute advocates and promotes three principles: First Amendment freedoms for both new and traditional media; deregulation of the media and communications industries; and excellence in journalism. The Institute has participated in regulatory proceedings and in select cases before federal courts of appeal and the Supreme Court of the United States. The Institute also conducts research projects and sponsors publications relating to the First Amendment and other issues of consequence to the communications media.

PRELIMINARY STATEMENT

It is an understatement to say that campaign finance reform in America has satisfied no one. The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) ("FECA") created the Federal Election Commission ("FEC" or "Commission") and imposed limits on both campaign contributions and expenditures "to promote fair practices in the conduct of election campaigns for Federal political offices." However, the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) sharply limited the government's ability to regulate expenditures for political advocacy, explaining that such measures "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.* at 19. The decision left only part of the congressional scheme in place, allowing the FEC to regulate contributions to federal candidates and to require disclosures only for money spent on "express advocacy" for such candidates. *Id.* at 80-82.

The *Buckley* compromise has been criticized sharply by participants on both sides of the campaign regulation debate, both on and off the bench. The focus of much criticism has been the claim that *Buckley* equates money – spending on political campaigns – with speech. 1/ As Justice Stevens wrote most pointedly in a recent campaign regulation case, "[m]oney is property; it is not speech." *Nixon v.*

1/ *E.g.*, J. Skelly Wright, *Is Money Speech?*, 85 YALE L.J. 1001, 1007 (1976); Burt Neuborne, *Buckley's Analytical Flaws*, 6 J.L. & POL'Y 111, 115 (1997); E. Joshua Rosenkranz, *The Dangers, and Promise, of* Shrink Missouri, 24 HARV. J.L. & PUB. POL'Y 71 (2000); Alan B. Morrison, *What if . . . Buckley Were Overturned?*, 16 CONST. COMMENT. 347 (1999).

Shrink Missouri PAC, 528 U.S. 377, 398 (2000) (Stevens J., concurring). Even Justices that are more skeptical of the proposition that government can impose campaign restrictions in a manner that comports with the First Amendment have expressed dissatisfaction with the *Buckley* analysis. *See id.* at 405-07 (Kennedy, J., dissenting) (Court should reconsider *Buckley* but should not "abandon the rigors of our traditional First Amendment structure"); *id.* at 410-12 (Thomas, J., dissenting) (*Buckley* is flawed and has led to "enfeebled constitutional protection" for campaign speech). Yet even Justices who are more comfortable with campaign regulation acknowledge that "a decision to contribute money to a campaign is a matter of First Amendment concern – not because money *is* speech (it is not); but because it *enables* speech." *Id.* at 400 (Breyer, J., concurring) (emphasis in original).

Whatever position one takes in the ongoing debate about *Buckley*, it is undeniable that direct expenditures on speech in the form of political issue advertisements are protected by the First Amendment. However, in an attempt to plug what its sponsors called "loopholes" in FECA created by *Buckley*, the Bipartisan Campaign Reform Act, Pub. L. No. 107-155 ("BCRA"), errs on the side of regulation by restricting such speech directly. It imposes an unprecedented blanket restriction on issue advertisements that refer to candidates in "blackout" periods 60 days before elections and 30 days before primaries. 2/ The new law perversely treats pure speech as if it were money (it is not) and consequently violates bedrock

---

2/ Although the BCRA is a comprehensive rewrite of FECA and has many provisions, this amicus brief focuses on the BCRA's prohibition of issue advertisements by independent groups.

First Amendment principles. Accordingly, the Media Institute respectfully asks this Court to find these provisions of the BCRA unconstitutional.

ARGUMENT

The BCRA's restrictions on "electioneering communication" are a direct attack on the *Buckley* analysis, which recognized full First Amendment protection for the advocacy of political issues. *Buckley* distinguished express advocacy for candidates and issue advocacy through its analysis of one of the FECA's expenditure restrictions, section 608(e)(1), which prohibited any person from making "an expenditure of more than $1000 'relative to a clearly identified candidate during a calendar year.'" *Buckley*, 424 U.S. at 39 (quoting § 608(e)(1)). The Court held that in order to avoid unconstitutional vagueness, § 608(e)(1) had to be construed to encompass only communications that expressly advocated the election or defeat of a candidate. 3/ Any communication that did not fall within this narrow definition amounted to what the Court described as "issue discussion" (now commonly referred to as issue advocacy) and could not be reached by the provision. *Id.* at 78-79.

Although *Buckley* permitted disclosure and reporting requirements for express advocacy, it struck down as unconstitutional limits on the amount of political speech devoted to campaign issues. *Id.* at 44. The Court held that "the First Amendment denies government the power to determine that spending to

---

3/ *Id.* at 43-44. It defined such "express advocacy" as communications containing words such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." *Id.* at 44 n.52.

promote one's political views is wasteful, excessive, or unwise." *Id.* at 57. In a free society, "it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign." *Id.* *See also Beaumont v. FEC*, 278 F.3d 261, 267 (4th Cir. 2002) ("Making expenditures and funding campaigns are essential means by which citizens in a democracy can make themselves heard.").

The BCRA was adopted, in part, to provide what its proponents described as "a reasonable solution to the problem of unlimited and undisclosed advertising that fails to qualify as 'express advocacy' under federal election law." H. Rep. No. 107-131, Pt. 1, at 50 (2001). The problem, in this view, is simply that too much unregulated speech is taking place, and its solution is to extend more federal control over political expression. As BCRA co-sponsor Representative Meehan explained, the law was fashioned to ensure that "campaign ads masquerading as *issue discussion* are subject to the same laws that . . . campaign ads should be." 148 Cong. Rec. H260 (daily ed. Feb. 12, 2002) (emphasis added). "Since these ads stop just short of using the magic words, their sponsors are not subject to full public disclosure, the ads need carry no disclaimer, and they may be paid for with unlimited dollars from any source." H. Rep. No 107-131, at 50. Accordingly, the solution was to limit speech during political campaigns, or, as the BCRA's supporters explain, to impose "modest burdens" on groups and individuals seeking

to engage in issue advocacy. *Id.* at 51. However, as explained below, the burdens imposed by the BCRA are anything but modest.

I. THE BCRA IMPOSES SWEEPING RESTRICTIONS ON CORE POLITICAL SPEECH

The BCRA restricts the essence of political advocacy – speech providing expression relevant to democratic elections. *E.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-47 (1995). Specifically, Title II of the Act, "Noncandidate Campaign Expenditures," impacts a vast array of private political speech through significant restrictions on the sponsors of such advertisements and increased disclosure requirements. In effect, the new regulations, which target what it calls "electioneering communications," cast a wide net across political speech, unconstitutionally broadening the existing restrictions on political issue advocacy. Ominously, the BCRA increases the maximum prison sentence for FECA violations from one to five years and it eliminates statutory limits on the amount of fines. It creates a new crime that Plaintiff National Association of Broadcasters ("NAB") aptly calls an "incitement to political action." NAB Compl. ¶ 4. But in the words of *Buckley*, such speech restrictions are "wholly foreign to the First Amendment." 424 U.S. at 48-49.

A. The BCRA Broadly Restricts "Electioneering Communication"

Title II of the BCRA prohibits corporations, labor unions and others from using funds not subject to FECA's limitations for a category of political speech it labels "electioneering communications." 2 U.S.C. § 441b. This new class of restricted advocacy includes any broadcast, cable, or satellite communication made

within 60 days of any general, runoff, or special election and within 30 days of a primary, convention, caucus, or preference election that "refers to a clearly identified candidate for Federal office" and is "targeted to the relevant electorate" of the candidate if that person is not running for President or Vice President. *Id.* § 434(f)(3).

Previous FECA disclosure requirements and contribution limits governing issue advertising regulated only "express advocacy," referring to explicit language asking the audience to vote or refrain from voting for a particular candidate. *Id.* § 431(17). By contrast, the BCRA's more expansive definition of "electioneering communication" does not require these "magic words" to trigger the broader regulation. Rather, to be subject to the BCRA's regulations, the communication must merely "refer[] to a clearly identified candidate for Federal office." While the term "refer" is not defined in the statute, a communication refers to a "clearly identified" candidate when it projects the name or appearance of the candidate or the identity of the candidate is "apparent by unambiguous reference." 4/ Thus, any advertisement that somehow touches on an individual candidate (*e.g.*, showing a picture, implying a relationship with an issue,

---

4/ 2 U.S.C. § 431(18). *See also* 11 C.F.R. § 100.17 (providing examples of "unambiguous reference" such as "the President," "your Congressman," or "the incumbent" or any "unambiguous reference to [an individual's] status as a candidate").

commenting about all incumbents) could be considered an "electioneering communication." 5/

Given the BCRA's direct application to political speech, a cautionary House amendment was proposed that would have prevented construing the law so as to restrict constitutionally protected expression. 6/ That amendment was defeated, but, presumably aware of the tenuous constitutional ground on which the law rests, Congress instead adopted an alternative definition of "electioneering communication" to be used if the primary meaning is found to be unconstitutional. This extraordinary "second bite" definition construes electioneering communication as:

> any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office *(regardless of whether the communication expressly advocates a vote for or against a candidate)* and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

5/ The BCRA excludes those communications appearing in a news story, commentary, editorials, or candidate debates and forums from its definition of an "electioneering communication," as well as outright "expenditures" as defined by the act. 2 U.S.C. § 434(f)(3). Further, the Act excepts "any other communication exempted under [the FEC's] regulations." *Id.*

6/ The full text of the amendment reads: "Notwithstanding any provision of this Act, and in recognition of the First Amendment to the United States Constitution, nothing in this Act or in any amendment made by this Act may be construed to abridge those freedoms found in that Amendment, specifically the freedom of speech or of the press or the right of people to peaceably assemble, and to petition the government for a redress of grievances." *See* H.R. 2356, 107th Cong. § 602, 148 Cong. Rec. H335 (daily ed. Feb. 12, 2002) (Amendment No. 52).

2 U.S.C. § 434(f)(3) (emphasis added). This definition highlights the expansion of speech regulation inherent in the BCRA – the Act ensnares communications that relate to political candidates regardless of whether they use language of express advocacy.

Title II of the Act generally expands the regulation on contributions made by corporations and labor organizations to include expenditures for issue advertising. The previous statutory restriction prohibited "any corporation . . . or any labor organization [from making] a contribution or expenditure in connection with any [Federal] election." *Buckley*, 424 U.S. at 196 (quoting § 610 of FECA). The BCRA redefines "contribution or expenditure" to include any "direct or indirect payment, distribution, loan, advance, deposit, or gift of money . . . for any applicable electioneering communication." 2 U.S.C. § 441b(b)(2). Thus, by imposing restrictions on "electioneering communications," the BCRA precludes corporations and labor unions from funding political advertising during the crucial months immediately preceding a federal election or primary.

B. The BCRA Imposes Significant New Disclosure Requirements on "Electioneering Communication"

The BCRA imposes significant disclosure requirements on expenditures for political speech. It requires disclosure requirement by any individual who "makes a disbursement for the direct costs of producing and airing electioneering communications [or contracts for such a disbursement]" of more than $10,000 during any calendar year. 2 U.S.C. § 434. Within twenty-four hours of

contributing this dollar amount (and every $10,000 thereafter), the individual must file a report, under penalty of perjury, with the FEC with the following information:

- the identity of the person making the disbursement or contracting to make a disbursement;
- the identity of any person who shares or exercises direction or control over the individuals making the disbursement;
- the identity of the custodian of the books and accounts of the individual making the disbursement;
- the principal place of business of the person making the disbursement;
- the amount of each disbursement more than $200 during the period covered by the statement;
- the identity of the persons to whom each of these disbursements of over $200 was made;
- the names (if known) of the candidates identified;
- the election to which the communication pertained; and
- if the disbursement was paid out of a segregated bank account solely for electioneering communications, the names and addresses of all contributors of $1,000 to that account or to the person making the disbursement between the first day of the preceding calendar year and the disclosure date.

2 U.S.C. § 434. Virtually all "electioneering communication" is subject to these disclosure requirements which have the effect of eliminating any anonymity for a great deal of election-related speech.

II. THE BCRA's RESTRICTIONS ON ELECTIONEERING COMMUNICATION ARE UNCONSTITUTIONAL

The BCRA's new category of "electioneering communication" is the latest attempt to restrict the practice of issue advocacy – independent political speech that is inextricably bound to our traditions of free expression and essential to American democracy. From *Common Sense* and *The Federalist Papers* to *Uncle Tom's Cabin* and the more contemporary "Harry and Louise" advertisements, political views delivered through the various media have had a profound effect on this nation's past and continue to affect its future. Issue advocacy, whether delivered over the airwaves, through print media, via satellites, or through cyberspace, is the modern manifestation of old-fashioned political discussion and debate. Issue advocacy conveys the same messages once penned in tracts and pamphlets or spoken by a town crier; they are just dressed in modern technology and delivered in a way that resonates with the contemporary ear.

In constitutional terms, the fact that issue advertisements often refer to candidates does not convert them from speech that is protected by the First Amendment to the equivalent of money, and regulable as "electioneering communication." The Supreme Court in *Buckley* explained that express advocacy and ordinary political discussion are intertwined:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

424 U.S. at 42. Thus, any attempt to subject issue advertising to greater government oversight simply because a candidate is mentioned threatens to dampen a great deal of political speech. *Id.* at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

Although proponents of campaign regulation argue that intervention is needed to prevent one-sided domination of political dialogue, the facts show that citizens with political views falling on opposite ends of the ideological spectrum and from vastly different socio-economic backgrounds engage in issue advocacy. The Annenburg Public Policy Center reported that independent organizations of all stripes use the broadcast media to express their views on public policy issues, including healthcare, the environment, education, social security, international affairs, national defense, abortion, taxation and gun control. 7/ In fact, by the 1999-2000 election cycle, experts estimated that 130 groups aired more than a 1,000 issue advertisements. 8/

These groups are not homogenous; they do not uniformly advance the same political agenda; "liberals" and "conservatives" alike sponsor issue advertisements. Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 Va. L. Rev. 1761, 1780-81 (1999).

7/ Erika Falk, *Ad Content* in *Issue Advertising in the 1999-2000 Election Cycle* 21 (Feb. 1, 2002), *at* http://www.appcpenn.org/political/issueads/1999-2000issueadvocacy.pdf.

8/ Kathleen Hall Jamieson, *Introduction* to *Issue Advertising in the 1999-2000 Election Cycle* 1 (Feb. 1, 2002), *at* http://www.appcpenn.org/political/issueads/1999-2000issueadvocacy.pdf.

Moreover, issue advertising represents a way for the less wealthy to voice their opinions and be heard too. Professor Lillian Bevier has noted, "it is important to remember that many of the groups that spent money on issue advocacy in 1996 are voluntary associations of individuals who had to pool their (relatively insignificant individual) resources in order to amplify their individual voices." *Id.*

A. Restrictions on Political Speech Are Subject to Strict Scrutiny

Any attempt by the government to shape or "reform" political debate must be subjected to the strictest constitutional review. This is particularly true where, as here, transgressors face criminal penalties for speech that is disallowed. Such regulation of the political arena rests most uneasily with America's First Amendment traditions, which reflect a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Consequently, constitutional protections for free expression have their "fullest and most urgent" application in the context of campaigns for political office. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

The Supreme Court recently reaffirmed that speech that relates to the qualifications of candidates for public office lies "at the core of our First Amendment freedoms." *Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2534 (2002). There, the Court strictly scrutinized, and invalidated, a state restriction that barred

judicial candidates from announcing their positions on "disputed legal or political issues." *Id.* at 2532. Of course, such protections are no greater for candidates than for average citizens. The Court historically has limited sharply the regulation of issue-related expression on the understanding that "advocacy of . . . politically controversial viewpoint[s] . . . is the essence of First Amendment expression." *McIntyre*, 514 U.S. at 347. That such speech takes place in the heat of a political campaign "only strengthens the protection" provided by the Constitution. *Id.*

The appropriate level of constitutional scrutiny is not weakened for the BCRA because its regulation of electioneering communication is couched as a restriction on "expenditures." The "intermediate scrutiny" reserved for regulations of "communicative action" or "symbolic speech" does not apply in this instance. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *United States v. O'Brien*, 391 U.S. 367 (1968). The BCRA's noncandidate campaign expenditure provisions do not qualify for more relaxed scrutiny, as a threshold matter, because they do not further an interest unrelated to the suppression of free expression. *Buckley*, 424 U.S. at 15-20 ("We cannot share the view that [FECA's] contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O'Brien*."). Quite to the contrary, the very purpose of the BCRA's noncandidate expenditure provisions is to limit speech about political issues and candidates exactly when it is most salient. *See, e.g.*, 148 Cong. Rec. H260 (daily ed. Feb. 12, 2002) (comments by Rep. Meehan). *See also Buckley*, 424 U.S. at 17 ("[T]he

governmental interests advanced in support of the Act involve 'suppressing communication'").

By framing the restrictions on "electioneering communication" as necessary to close a "loophole" created by *Buckley*, the BCRA's proponents show their hand. Their demand for a seamless campaign finance regime is reprising a battle that was decided long ago. The *Buckley* Court recognized that "virtually every means of communicating ideas in today's mass society requires the expenditure of money," *id.* at 19, and "[t]he First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 49. In any event, the distinction between express and issue advocacy made in *Buckley* over a quarter of a century ago was reaffirmed by the Supreme Court, *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-49 (1986) ("*MCFL*"), and has withstood various attempts in the lower courts to nullify it. The *MCFL* Court applied strict scrutiny and held that FECA's restrictions on independent spending must be limited sharply. *Id.* at 249. Lower courts similarly have treated harshly efforts by regulators to redraw the line *Buckley* established between express and issue advocacy. 9/

9/ *See, e.g.*, *Beaumont v. FEC*, 278 F.3d 261, 268 (4th Cir. 2002) ("[A]n interest of the highest First Amendment order attaches to independent expenditures"); *Chamber of Commerce v. Moore*, 288 F.3d 187, 192 (5th Cir. 2002) (regulation of political expenditures is subject to "exacting scrutiny"); *Citizens for Responsible Government State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1064 (4th Cir. 1997) (imposing fees and costs on FEC for prosecuting action based on claim that "no words of advocacy

The Supreme Court similarly rejected an argument to apply diminished scrutiny when it invalidated a Colorado prohibition on the use of paid circulators for political petitions. The state defended the measure as a content-neutral measure designed to protect the integrity of the initiative process by limiting certain expenditures of petition proponents. 10/ But the Supreme Court rejected this reasoning, and held that the state measure restricted activities in "an area in which the importance of First Amendment protections is 'at its zenith.'" *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (citation omitted). Consequently, it noted that "the burden that Colorado must overcome to justify this criminal law is *well-nigh insurmountable*." *Id.* (emphasis added). Here, the federal government faces a comparable burden in order to support the BCRA's restrictions on electioneering communication.

B. The BCRA's Blackout Period for Electioneering Communication Violates the First Amendment

The BCRA significantly restricts speech in the periods that are most relevant to political campaigns. By prohibiting many of the current expenditures

---

are necessary" to qualify as express advocacy); *FEC v. Furgatch*, 807 F.2d 857, 860, 862 (9th Cir. 1987) (rejecting FEC's expansive interpretation of express advocacy); *Maine Right to Life Committee, Inc. v. FEC*, 914 F. Supp. 8, 13 (D. Me. 1996) (granting declaratory judgment for plaintiffs because FEC's regulation expanded "express advocacy" beyond meaning given to term by Supreme Court), *aff'd*, 98 F.3d 1, 1 (1st Cir. 1996) (per curium) (court affirmed for "substantially the reasons set forth in the district court opinion" without further discussion).

10/ The district and circuit courts accepted the state's argument, finding that petitioners' "ability to spend money on every other form of thought-dissemination is totally unfettered." *Grant v. Meyer*, 828 F.2d 1446, 1450-51 (10th Cir. 1987), *aff'd*, 486 U.S. 414 (1988).

for issue advertising in the 30-day period before a primary and 60 days before a general election, the BCRA exacts a huge First Amendment price. The characterization of the burden as "modest" by the Act's sponsors cannot be squared with controlling First Amendment precedent.

In *Mills v. Alabama*, for example, the Supreme Court voided the conviction of a newspaper editor under the state Corrupt Practices Act for publishing an editorial on election day urging readers to vote a certain way on a referendum. Under the same logic as that employed by the BCRA's proponents, the state law at issue in *Mills* was quite modest: it prohibited "any electioneering or . . . solicit[ing] any votes . . . in support of or in opposition to any proposition that is being voted on *on the day on which the election affecting such candidates or propositions is being held.*" 384 U.S. at 216 (emphasis added). The Alabama Supreme Court upheld the law, finding it to be "within the field of reasonableness" under the state's police power. *Id.*

The Supreme Court disagreed, finding that the election day ban "silences [speech] at a time when it can be most effective." *Id.* at 219. Like the speech that is targeted by the BCRA's electioneering communication blackout, the editorial at issue in *Mills* was focused on a campaign issue, but it specifically named (and attacked) a public official in making its point. *Id.* at 215 n.1. Nevertheless, the Court held that "no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime

for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election." *Id.* at 220.

One difference between the facts presented in *Mills* and the BCRA restrictions is that the federal statute exempts communications appearing in a news story, commentary, editorial, or candidate debate and forum from its definition of "electioneering communication." But this distinction does not save the BCRA, which restricts political speech not just on election day, but for 30 and 60 days before votes are cast. Without question, the BCRA's constitutional infirmities would be even more grave if it captured both paid issue ads and press commentary, as did Alabama's general Corrupt Practices Act. But it is sufficient for this Court's analysis to note that the BCRA restricts core political speech on campaign issues. *See, e.g., McIntyre*, 514 U.S. at 346-347.

In this regard, it is instructive to compare the campaign speech restrictions imposed by the BCRA with the limited geographic limitations on election day campaigning upheld in *Burson v. Freeman*, 504 U.S. 191 (1992). In one of the few cases in which political speech restrictions were upheld following strict scrutiny review, the Court held 5-3 that a Tennessee ban on campaign materials within 100 feet of polling places was consistent with the First Amendment. In doing so, however, the Court rejected the state's argument that the regulation was merely a content-neutral time, place, or manner regulation. *Id.* at 197. *See also id.* at 207 ("[D]istinguishing among types of speech requires that the statute be subjected to strict scrutiny"). And it upheld the "campaign free zone" only because

it was: (1) supported by a long tradition of limiting campaigning at polling places; (2) applied only on election day, and (3) imposed only a "minor geographic limitation." *Id.* at 210-211. With regard to the scope of the restriction, the majority conceded that "[a]t some measurable distance from the polls, or course, governmental regulation of vote solicitation could effectively become an impermissible burden akin to the statute struck down in *Mills v. Alabama*." *Id.* at 210 (citation omitted).

Obviously, the BCRA's restrictions on political speech are far broader than the Tennessee law upheld in *Burson*. The limitation on "electioneering communication" is not limited to "campaign material" as was the state law, but applies to issue advertisements that refer to clearly identified candidates. Nor is the restriction on electioneering communication so "limited" as the Tennessee ban, either geographically or temporally. 11/ As the Supreme Court noted in analyzing the Tennessee law, it takes approximately 15 seconds to walk 75 feet, and it was not unreasonable for the state to require "that these last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible." *Id.* By stark contrast, the BCRA imposes blanket restrictions on affected speech for the critical months of the election process. For the states with primaries in September, including New York, Florida, and Wisconsin, the statute implicates issue advocacy from August through election day. For the many states that hold

---

11/ Electioneering communications includes any broadcast, cable, or satellite communication that meets the statutory criteria and is "targeted to the relevant

their primaries in May and June, three of the five months preceding the election would trigger the "electioneering communication" restrictions. Many candidates participate in conventions and run-off nominations, which would subject relevant speech to even more months of regulation. Thus, while the BCRA blackout periods vary across the nation, the one constant is that political speech is restricted by the BCRA during the most important period before an election. 12/

Finally, and unlike the limited measure upheld in *Burson*, the United States has no longstanding tradition upholding governmental regulation of issue advertising. Far from it. Courts have struck down such regulations in order to preserve this nation's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Buckley*, 424 U.S. at 14 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). The sponsors of the BCRA have provided no justification for this Court to break with that tradition.

C. The BCRA's Disclosure Requirements for Electioneering Communication Violate the First Amendment

The BCRA's extension of disclosure requirements to "electioneering communications" is a significant infringement of First Amendment rights. The new provision is not limited to corporate or labor union contributions, but extends to any

---

electorate" of the candidate if that person is not running for President or Vice President. 2 U.S.C. § 434(f)(3).

12/ For a list of dates for primaries, conventions, and other relevant events, see http://www.fec.gov/pages/primary02.htm.

individual who spends more than $10,000 per year (or who contributes $1,000 toward a segregated bank account) for electioneering communication. 2 U.S.C. § 434. Such communication includes any message transmitted by broadcast, cable, or satellite during the blackout periods that refers to a federal candidate. The new provision runs headlong into the holding in *Buckley*, where the Supreme Court found that compelled disclosure of political expenditures is subject to strict scrutiny because such requirements "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64.

The Court has long recognized that bedrock constitutional principles protect from public exposure group membership and the sponsorship of political messages. *See, e.g., Talley v. California*, 362 U.S. 60, 64-66 (1959) ("Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind."); *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1957). It reaffirmed these principles in *McIntyre*, 514 U.S. at 357, noting that "[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent." The Court there invalidated an Ohio law that prohibited the distribution of campaign literature that fails to disclose the name of the speaker. Citing *Buckley*, it held that the state's interest could not support compelling identification of those who support referenda or other issue-based ballot measures. *Id.* at 356. Indeed, in *Buckley* the Court only upheld disclosure requirements for direct advocacy expenditures "unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 80. *Cf. Buckley v.*

American Constitutional Law Found., Inc., 525 U.S. 182, 202-04 (1999) (striking down identification requirement for petition circulators).

By seeking to plug *Buckley's* "loopholes" and thereby expanding the types of expenditures that must be reported, the BCRA imposes significant burdens on political speech. The practical effect of such compelled disclosures "is to make engaging in protected speech a severely demanding task." *Massachusetts Citizens for Life*, 479 U.S. at 256. *See Beaumont*, 278 F.3d at 268-271. Here, the BCRA extends reporting requirements beyond the category of express advocacy approved in *Buckley* and applied in subsequent cases. Even if such an expansion in coverage could be justified – which it cannot – the intrusive nature of the disclosure requirements imposes too great a burden on First Amendment rights. *E.g.*, *Citizens for Responsible Government State PAC*, 236 F.3d at 1197 (finding 24-hour notice requirement for independent expenditures "patently unreasonable" because it "severely burdens First Amendment rights"). Under established law, the BCRA's disclosure requirements for electioneering communications are both overly broad and excessively burdensome.

D. The BCRA's Restrictions on Electioneering Communication Are Unconstitutionally Vague

It is a basic principle of constitutional law that "[c]lose examination of the specificity of the statutory language is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests." *Buckley*, 424 U.S. at 40-41. Indeed, the Supreme Court in *Buckley* held that FECA's definition of expenditures "relative to" a candidate failed to "clearly mark the

boundary between permissible and impermissible speech," and the Court fashioned the concept of express advocacy to deal with this deficiency. *Id.* at 41-44. Although the BCRA manifests evident dissatisfaction with the choice the Supreme Court made, it falls far short of the constitutional requirement of statutory precision.

The new law's definition of "electioneering communications" sweeps over a broad spectrum of core political speech. The statute vaguely tags communications that "refer[] to a clearly identified candidate" as falling within its regulatory scope. 2 U.S.C. § 434. Thus, the disclosure requirements, the restrictions on political speech by corporations and other entities, and the newly expanded contribution limitations reach any type of expression via broadcast, satellite, or cable that somehow touches on a federal candidate in any way. *Id.* For example, even an issue advertisement seeking to objectively inform its audience with a description of the pros and cons surrounding all candidates for a particular office would be subject to the "electioneering communication" laws. An advertisement that merely uses a photograph of a sitting senator in a montage of patriotic images would also face these restrictions. By indiscriminately implicating all such private speech that involves a federal political candidate in any way, the BCRA's restrictions are impermissibly overbroad and vague. *Buckley*, 424 U.S. at 44, 80. *See City of Houston v. Hill,* 482 U.S. 451, 458 (1982).

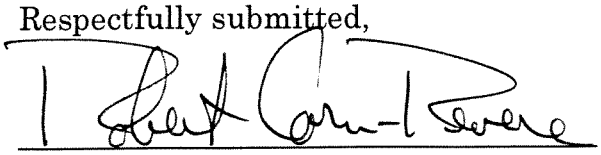
Even the BCRA's alternative definition of "electioneering communication" is vague and overbroad. 2 U.S.C. § 434. The statute does not define how speech "promotes or supports" and "attacks or opposes" candidates. *Id.*

Further, no explanation is offered for how a communication would be "suggestive of no plausible meaning other than the exhortation to vote for or against a specific candidate." *Id.* Without any intelligible standard constraining the application of these phrases, the statute allows unbridled discretion for anyone determining what political expression triggers the BCRA restrictions. Even an unflattering picture in an otherwise innocent communication could be classified as "attack[ing]" and "suggestive of no plausible meaning" other than to seek votes against the candidate. Further, the alternate definition provides no limiting dates, creating a year-round regulation of this type of political speech. Although this secondary definition represents a statutory fall-back in case the primary definition "is held to be constitutionally insufficient by final judicial decision," *id.*, it is also unconstitutionally vague and overbroad. *Buckley*, 424 U.S. at 44, 80; *Hill*, 482 U.S. at 458.

CONCLUSION

For the foregoing reasons, and for those set forth in plaintiffs' briefs, the noncandidate campaign expenditure provisions of the BCRA should be held unconstitutional under the First Amendment.

Respectfully submitted,



Robert L. Corn-Revere (Bar No. 375415)
Robert B. Mahini
Paul A. Werner III
Hogan & Hartson LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

Counsel for Amicus Curiae