TITLE II

PRESENTATION BY THE GOVERNMENTAL DEFENDANTS

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

The regulation of electioneering communications enacted under Title II of BCRA is aimed at accomplishing two fundamental objectives: preventing distortion and corruption of the political process when unions and corporations convert their aggregated wealth into "war chests" for political spending, and informing voters, before they cast their ballots, of the interests to which candidates would be most responsive if elected to office. See generally Gov't Br. at 129-48, 172-77. BCRA accomplishes these objectives by adopting a narrow and precise definition of "electioneering communication[s]," attaching segregated financing requirements to these communications when they are sponsored by unions or corporations, and, in general, requiring disclosure of large-scale expenditures for communications of this kind. As we discussed at length in our opening brief, BCRA's electioneering communications provisions serve compelling government interests, and withstand plaintiffs' facial constitutional challenge.

A. BCRA's Regulation of Electioneering Communications Is Not a Ban on Speech.

The Title II plaintiffs, like their Title I counterparts, mount their facial attack on these provisions by mischaracterizing the statute's objectives, overstating its impact, and disregarding what the evidence plainly shows: that federal election campaigns in the last decade have been awash in corporate, union, and other undisclosed spending intended to influence the outcome of those elections, contrary to the design and intent of the nation's long-standing campaign finance laws. Nowhere is plaintiffs' exaggeration of BCRA's impact more obvious than in their refrain that BCRA "bans political speech." See McConnell Br. at 44; see also id. at 46; NRA Br. at 47. As we have previously explained, neither FECA § 441b nor BCRA § 203 is a ban on speech. Neither statute prevents corporations or unions from framing political messages in any

way they choose, or limits the amount of money they can spend to make their messages heard. Instead, both statutes seek to ensure that such spending "reflect[s] actual public support for the political ideas espoused by corporations" and unions, rather than their success in the economic marketplace, Austin, 494 U.S. at 660, by regulating the source of funds such entities can use to pay for independent campaign-related communications. Under the two statutes, corporations and unions "are allowed . . . to make such expenditures from segregated funds used solely for political purposes." Id. at 654-55.

The same neglect of precedent undermines plaintiffs' contention that "Title II of BCRA criminalizes political speech." McConnell Br. at 44. Plaintiffs ignore the fact that the Supreme Court has upheld the very same kind of "criminalization," id., when that criminalization involves restrictions on how corporations and unions may finance express advocacy, Austin, 494 U.S. at 657-661; FEC v. Mass. Citizens for Life ("MCFL"), 479 U.S. 238, 248-49 (1986), which like issue advocacy, "constitute[s] political expression at the core of . . . First Amendment freedoms." Austin, 494 U.S. at 657.[56] Although the dissent in Austin – like the plaintiffs here – characterized the Michigan statute in question as a "content-based law which decrees it a crime for a nonprofit corporate speaker to endorse or oppose candidates for . . . public office," id. at 695 (Kennedy, J., dissenting), the majority upheld the statute's requirements for financing corporate independent expenditures as "precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views." Id. at 660. Because corporate and union wealth can just as unfairly influence elections and corrupt elected officials when it assumes the guise of "issue advocacy" as when it is deployed as express advocacy, see Gov't Br. at 134-46, a requirement that

[56] It is important to note that criminal prosecutions for independent expenditures under § 441b are unusual and require proof of a "knowing and willful" violation of the Act. 2 U.S.C. 437g(a)(5)(C). By empowering the FEC to bring civil enforcement actions to remedy unlawful campaign spending from the general treasuries of corporations and unions, Congress provided for a less severe enforcement mechanism than criminal prosecution. See 2 U.S.C. 437d(e), 437g. Plaintiffs have cited no cases involving criminal prosecutions arising from corporate or union expenditures since the FEC was given civil enforcement authority over such violations.

such expenditures be made from separate funds, contributed by individuals for electoral purposes, is likewise a narrowly tailored measure supported by compelling governmental interests.

Under Austin and MCFL, it is well established that the following ad must be financed through a separate segregated fund in order to be a lawful expenditure by a corporation or union:

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

See Thompson Comm. Rep. at 4007. [Adding last sentence to the text of an actual ad]. Despite plaintiffs' rhetoric about BCRA's effect on political speech, they do not challenge Supreme Court precedent upholding financing restrictions for advertisements like that above under FECA § 441b. But, while plaintiffs appear to accept, as they must, what they call the "criminalization" of ads like this one (if knowingly and willfully paid for with corporate or union general treasury funds), they predict dire consequences for democracy if the same ad were subject to the same financing restriction if broadcast to the relevant electorate 60 days before the election, but without the last eight words. BCRA, however, does nothing more.

It is clear, therefore, that rather than bringing a new or grandiose type of regulation to political speech, BCRA simply builds upon the financing structure upheld by the Court in Austin, and incrementally amends FECA § 441b to apply the same financing restrictions – still applicable only to corporations and unions – to a narrow category of election advocacy defined as "electioneering communications." It does so in the recognition that there is no meaningful distinction between the ad quoted above, and the same ad without the final eight words, if the latter is broadcast to the relevant electorate in the heat of a federal campaign. See Gov't Br. at 146-48. Plaintiffs' extravagant comparisons between BCRA and "chilling

historical antecedents" such as the "infamous Sedition Act of 1798, " NRA Br. at 5, thus, make no sense. BCRA's definition of electioneering communications is fully consistent with relevant Supreme Court precedent, and is constitutional.

B. *Buckley* Announced No Rule of Constitutional Law That Prohibits Anti-Corruption Regulation of Independent Political Spending That Does Not Involve Express Advocacy.

1. Nothing in *Buckley*'s clarifying construction of FECA suggests that Congress may only regulate express advocacy.

As the centerpiece of their attack on BCRA's regulation of electioneering communications, plaintiffs assert that Buckley laid down a rule of substantive constitutional law that precludes any governmental regulation of independent political spending for communications that do not entail express advocacy. McConnell Br. at 47-49; ACLU Br. at 13-15. The Supreme Court did no such thing, however. See Gov't Br. at 19-21, 148-53. Buckley's express advocacy construction of FECA was just that, a matter of statutory interpretation, and had nothing to do with fixing new constitutional bounds on the power of Congress to do battle against corruption. The Court merely resolved difficulties of vagueness in former FECA § 608(e)(1), which restricted independent expenditures "relative to" federal candidates, "by reading § 608(e)(1) as limited to communications that include explicit words of advocacy of election or defeat of a candidate." 424 U.S. at 41-44 & n.52. Similarly, to "avoid the shoals of vagueness" the Court construed then-FECA § 434(e), requiring disclosure of independent expenditures "made for the purpose of influencing" federal elections, to encompass only those expenses incurred for communications containing express advocacy. Id. at 78-80.

As we have explained, Gov't Br. at 154-56, Congress designed BCRA's regulation of electioneering communications to avoid the vagueness problems that led the Buckley Court to adopt narrowing constructions of then §§ 608(e)(1) and 434(e). The four criteria in BCRA's definition of electioneering

communications are crystal clear, and no serious argument can be made suggesting otherwise. Indeed, in their roughly 400 pages of opening argument, not a single plaintiff has argued or suggested that BCRA's definition of electioneering communications is vague in any respect. This concession of BCRA's clarity not only forecloses any challenge to the statute on grounds of vagueness, but also establishes, as shown below, that Buckley's analysis is inapplicable in this instance.

The plaintiffs' repeated statements that Buckley "permit[s] regulation only of express advocacy," McConnell Br. at 49, have no foundation in the pages of that decision. Plaintiffs embellish their argument with partial quotations to Buckley to give the appearance of fidelity to the text, but in fact the Court's stated meaning was entirely different from that ascribed to it in plaintiffs' briefs. For example, the ACLU describes Buckley's "clear ruling" to be that "government[ ] regulation of expenditures can only reach 'communications that in express terms advocate the election or defeat of a clearly identified candidate . . . .'" ACLU Br. at 13 (quoting Buckley, 424 U.S. at 44). In point of fact, the Court stated, in full: "We agree that in order to preserve the provision against invalidation on vagueness grounds, § 608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." Buckley, 424 U.S. at 44 (emphasis added). In short, such bald assertions as "only words of express advocacy can be regulated," McConnell Br. at 54, and "the Court concluded that Congress . . . could only regulate expenditures that were for [express advocacy]," ACLU Br. at 14, all fail for the simple reason that Buckley never said anything of the kind.

Again quoting selectively from the Court's decision, plaintiffs insist that, in striking down § 608(e)(1), Buckley held that "the First Amendment requires" that speakers be permitted "to 'skirt [] the restriction on express advocacy,'" and to "'spend as much as they want'" on federal campaigns, "as the price of preserving robust debate about candidates and issues." McConnell Br. at 49 (quoting Buckley, 424 U.S. at 45); ACLU Br. at 14-15 n.5. Once again, plaintiffs have disengaged the Court's remarks from

their context in order to distort their meaning. The relevant passage concerning § 608(e)(1) is as follows:

> We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify § 608(e)(1)'s ceiling on independent expenditures . . . . Unlike the contribution limitations' total ban on the giving of large amounts of money to candidates, § 608(e)(1) prevents only some large expenditures. So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views. The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or office-holder. It would naïvely underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefitted the candidate's campaign.

424 U.S. at 45 (emphases added). It is plain to see from the foregoing passage that the freedom claimed by plaintiffs "to spend as much as they want to promote candidate[s] and [their] view[s]" so long as they "eschew expenditures that in express terms advocate the election or defeat" of those candidates, arose from Buckley's "exacting interpretation of the statutory language" in FECA "necessary to avoid unconstitutional vagueness," and not as an absolute guarantee that emanates directly from the First Amendment itself. If anything, the Court's analysis supports Congress's authority to combat corruption of the political process by regulating electioneering communications, because it recognizes that unlimited spending on communications other than express advocacy could be exploited to benefit a candidate's campaign, and, thereby, to "obtain improper influence over candidates for elective office." Id. at 45.[57]

2. No later decision of the Supreme Court endorses plaintiffs' reading of *Buckley*.

[57] As we have noted, Buckley upheld provisions requiring disclosure of independent campaign spending by political committees, 424 U.S. at 79-80, which included no express advocacy limitation. Thus, Buckley itself demonstrated that it was never meant to foreclose all regulation of independent campaign spending that does not involve express advocacy. Similarly, as we have explained, Gov't Br. at 151-52, see infra at 118-19, coordinated spending need not contain express advocacy to be subject to regulation.

Plaintiffs find no backing for their interpretation of Buckley in any of the Supreme Court's subsequent decisions. They first cite MCFL, McConnell Br. at 51, but as the Court explained therein, MCFL merely applied the same rationale relied upon in Buckley – namely, curing vagueness in statutory language that defined "expenditures" in terms of a speaker's "purpose to influence an election" – and placed a "similar" express advocacy "construction" on FECA § 441b. 479 U.S. at 248-49. Thus, MCFL places no constitutional imprimatur on the express advocacy standard.

The ACLU cites First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978), Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981), and McIntyre v. Ohio Elec. Comm'n, 514 U.S. 334 (1995), as support for the proposition that "issue advocacy" enjoys absolute First Amendment protection, see ACLU Br. at 15 n.6, but these cases did not involve candidate elections or advocacy, and explicitly said so. In Bellotti, the Court distinguished statutes like FECA and stated:

> Appellants do not challenge the constitutionality of laws prohibiting or limiting corporate contributions to political candidates or committees, or other means of influencing candidate elections.... and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.

435 U.S. at 788 n.26 (emphasis added); see also Citizens Against Rent Control, 454 U.S. at 297-98 (distinguishing Buckley as involving candidate elections, not ballot measures); McIntyre, 514 U.S. at 352 n.15 ("risk of corruption perceived in cases involving candidate elections ... simply is not present in a popular vote on a public issue") (citations omitted). Moreover, in Bellotti, 435 U.S. at 789-92 & n.32, and Citizens Against Rent Control, 454 U.S. at 298-99, the Supreme Court endorsed some regulation of genuine issue advocacy – in particular, the imposition of disclosure requirements – even in campaigns involving voter referenda. Similarly, in McIntyre the Court observed that a restriction on political speech – in that case, a restriction on anonymous handbilling that was not limited to express advocacy – could be upheld "if it is narrowly tailored to serve an overriding state interest." Id. (citing Bellotti, 435 U.S. at 786).

3. No lower court precedent precludes anti-corruption legislation such as BCRA's regulation of electioneering communications.

Although the Supreme Court's jurisprudence provides no basis for plaintiffs' view that Congress may regulate only express advocacy consistent with the First Amendment, plaintiffs claim to have found a "mountain" of supporting precedent, McConnell Br. at 54, in decisions by the courts of appeals. Id. at 51-53. Plaintiffs have misconstrued these cases, and none of them, in any case, can change the fact that Buckley did not limit congressional regulation of independent campaign spending to express advocacy.

As an initial matter, the lower courts have repeatedly and accurately described Buckley's express advocacy test as a saving construction of a potentially unconstitutional statute, not itself a standard of constitutional law. See Gov't Br. at 150 (citing cases); see also FEC v. Colorado Republican Fed. Campaign Comm., 59 F.3d 1015, 1020 (10th Cir. 1995), rev'd on other grounds, 518 U.S. 604 (1996); Clifton v. FEC, 114 F.3d 1309, 1311 (1st Cir. 1997). For their part, plaintiffs string-cite cases from a number of courts (the D.C. Circuit is not among them) for the asserted proposition that "[t]he federal courts have been unanimous in rejecting the FEC's efforts to ignore Buckley and MCFL." McConnell Br. at 52. Plaintiffs' characterization of these decisions serves only to cloud the fact that these cases offer no support for plaintiffs' legal position.

In Right to Life of Duchess Cty., Inc. v. FEC, 6 F. Supp. 2d 248 (S.D.N.Y. 1998), and Maine Right to Life, Inc. v. FEC, 914 F. Supp. 8 (D. Me. 1996), aff'd 98 F.3d 1 (1st Cir. 1996) (per curiam) (adopting district court's opinion) ("MRTL"), the courts rejected the FEC's regulatory definition of express advocacy insofar as it includes communications that "[w]hen taken as a whole . . . could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)" See MRTL, 914 F. Supp. at 10. They based their decisions on the conclusion that this definition of express advocacy "is not authorized by FECA . . . as that statute has been interpreted" by the

Supreme Court. Duchess Cty., 6 F. Supp. 2d at 253 (emphases added); see MRTL, 914 F. Supp. at 13.[58] Virginia Soc'y for Human Life, Inc. v. FEC, 263 F.3d 379 (4th Cir. 2001) ("VSHL"), held the FEC's regulation unconstitutional, on the ground that, in the court's view, the regulation shifted the focus away from the speaker's words themselves to the inferences drawn by the listener, giving rise to the very uncertainty, unpredictability, and resulting chill that Buckley adopted the express advocacy construction of FECA to avoid. VSHL, 263 F.3d at 391-92; see also MRTL, 914 F. Supp. at 11-13.[59]

FEC v. Christian Action Network, Inc., 110 F.3d 1049, 1050 (4th Cir. 1997); FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45,52-53 (2d Cir. 1980); FEC v. Survival Educ. Fund, Inc., No. 89-0347, 1994 WL 9658, *3 (S.D.N.Y. Jan. 12, 1994); and FEC v. AFSCME, 471 F. Supp. 315, 16-17 (D.D.C. 1979), all concerned FEC enforcement actions where the courts simply held that the various advertisements, bulletins, letters, and posters in question did not contain express advocacy, and, therefore, did not fall within the scope of regulation under FECA as the Supreme Court had defined it. At bottom, then, the disputes in all these cases involving FEC regulations and enforcement actions turned on the meaning of the express advocacy standard itself, and had nothing to do with the authority of Congress to adopt a different standard for regulation that does not give rise to the vagueness and overbreadth concerns that Buckley identified.

Plaintiffs also cite a number of decisions where, as they see it, the courts of appeals "rejected attempts by the state legislatures to regulate speech that did not 'expressly advocate' the election or defeat

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[58] Similarly, in Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991), the First Circuit considered whether an FEC regulation of voter guides "f[ell] within the scope of [FECA] section 441b(a)," id. at 471, and held that the regulation "overstepped the regulatory boundaries imposed by the FECA as interpreted by the Supreme Court." Id. at 472; see also Clifton, 114 F.3d at 1311.

[59] The lower court decisions that have invalidated the FEC's regulation defining express advocacy, 11 C.F.R. 100.22(b), were mistaken. In any event, this regulation was explicitly left undisturbed by BCRA § 201 (creating new 2 U.S.C. 434(f)(3)(B)), which states "Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations."

of a candidate for public office." McConnell Br. at 53 & n.20. But these cases do not support the conclusion that, under Buckley, express advocacy is the only form of independent political communication that may be subject to campaign finance or disclosure laws. The cited precedents dealt with state election laws, unlike BCRA, that in the courts' eyes disregarded the principles of vagueness and overbreadth articulated in Buckley. See Citizens for Responsible Government State Political Action Comm. v. Davidson, 236 F.3d 1174, 1187-88 (10th Cir. 2000) (disclosure requirement for political messages referring to any "specific public office" except those made in the "regular course and scope of... business," delivered by telephone or "any print or electronic media"); Iowa Right to Life Comm., Inc. v. Williams, 187 F.3d 963, 969-70 (8th Cir. 1999) (disclosure statute encompassing communications that, "[w]hen taken as a whole... could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)"); North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705, 712-13 (4th Cir. 1999) (state election law's definition of a political committee held "void for vagueness" without benefit of a narrowing construction). The "rejection" in these cases of standards the courts viewed, rightly or wrongly, as vague and overbroad does not establish that regulation limited to express advocacy is the only constitutionally acceptable alternative. Indeed, in Iowa Right to Life, the Eighth Circuit explicitly acknowledged that the protection afforded to discussion of candidates and issues under Buckley "does not mean that government cannot regulate at all or subject such speech to some amount of scrutiny," so long as vagueness and overbreadth are avoided. 187 F.3d at 968.

We acknowledge that, in some of these decisions, the courts made remarks that plaintiffs might view as endorsing their reading of Buckley. But the fact remains that it was unnecessary to the decision of any of these cases to opine that Buckley ordained the express advocacy standard as the sole permissible standard for regulating independent campaign spending. If, in fact, these lower courts meant to say as much, then they disregarded the established rule of constitutional adjudication that courts should not

"ordinarily reach out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground." Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 184 (1999).[60] At the same time, these courts improvidently, and, as shown, erroneously, imputed a similar design to the Supreme Court to break faith with this "cardinal rule[ ]" in Buckley, see Gov't Br. at 152 (quoting, inter alia, Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501-02 (1985)),[61] in order to make far-reaching and pre-emptive decisions in a legal realm where Congress enjoys special expertise to which the Supreme Court has repeatedly deferred. See Shrink Missouri, 528 U.S. at 393 n.5. As we observed in our opening brief, no case since Buckley has squarely presented the question arising in this case: whether Congress, consistent with the First Amendment, may enact narrowly tailored legislation of independent political spending for communications that do not involve express advocacy.

Congress enacted BCRA's regulation of electioneering communications because regulating express advocacy alone no longer prevents unions and corporations from converting their aggregated wealth into "war chests" for political spending that can distort the electoral process, and corrupt the politicians who benefit as a result. Thus, a nearly century-old legal tradition in this country, and the commitment to democratic ideals on which it is based, have been rendered largely irrelevant. According to plaintiffs, Buckley forever "condemns" our democratic institutions to this state of affairs, see McConnell Br. at 47, but they

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[60] For example, in U.S. Chamber of Commerce v. Moore, 288 F.3d 187 (5th Cir.), cert. denied, ___ U.S. ___, 71 U.S.L.W. 3163 (Nov. 12, 2002), see McConnell Br. at 53, the Fifth Circuit wrote that, under Buckley, "the government may regulate only those communications containing explicit words advocating the election or defeat of a particular candidate." Id. at 193. In Moore, however, the plaintiff sought a declaratory judgment that its political advertisements were not subject to Mississippi's disclosure law, id. at 190, which already incorporated the "express advocacy" standard articulated in Buckley. Id. at 196. Therefore, the court's discussion concerning the constitutional footing of the express advocacy standard was unnecessary to its decision that the plaintiff's advertisements, which avoided terms of explicit advocacy, see id. at 190-91 & n.1, were not covered by Mississippi's disclosure law. Id. at 196-97. Thus, the court's remarks must be taken as dicta.

[61] See also Garner v. Louisiana, 368 U.S. 157, 163 (1961) ("In the view we take of the cases we find it unnecessary to reach the broader constitutional questions presented."); United States v. Rumely, 345 U.S. 41, 47 (1953) ("Grave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication. Until then it is our duty to abstain from marking the boundaries of congressional power or delimiting the protection guaranteed by the First Amendment.") (emphasis added).

are mistaken in that point of view. While plaintiffs are largely correct that "the vagueness problem inherent in [FECA] could not be solved by anything but a bright-line test," id. at 48, Buckley never anointed express advocacy as the only bright-line test acceptable to the First Amendment.

C. BCRA'S Definition of "Electioneering Communications" Is Not Overbroad.

As we explained in our opening brief, BCRA's definition of "electioneering communications" is a bright-line test that is narrowly tailored to end the now rampant evasion of FECA's segregated fund and disclosure requirements through broadcast advertising crafted to omit the "magic words" of express advocacy. BCRA prohibits corporations and labor unions from using their general treasury funds to make "electioneering communications," which are specifically defined as TV or radio communications that "refer[] to a clearly identified candidate for federal office," made within the 60 days before a general election or the 30 days before a primary. Additionally, in the case of communications that refer to a House, Senate, or (under rules adopted by the FEC)[62] presidential primary candidate, the communications must be "targeted to the relevant electorate," meaning that they can be received by at least 50,000 persons in the state or district in which the election is being held.[63] This precise definition carefully limits BCRA's reach to those ads sponsored by corporations and unions that present the greatest potential for distortion or corruption of the political process. See Gov't Br. at 156-159, 163-164; see also infra at 98-103.

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[62] See Final Rule, Electioneering Communications, 67 Fed. Reg. 65,211 (Oct. 13, 2002) (to be codified at 11 C.F.R. 100.29(b)(3)).

[63] Plaintiffs overstate the nature of what they misleadingly characterize as the "blackout" period, see McConnell Br. at 59, by ignoring the targeting requirements contained in BCRA and clarified in the FEC regulations relating to electioneering communications. As those rules state, BCRA is not to be interpreted in a manner "that would lead to nationwide application of the electioneering communication provisions with respect to presidential primaries." 67 Fed. Reg. 65,194. Instead, the FEC has interpreted BCRA's regulation of ads broadcast within 30 prior to any State's presidential primary as limited to those ads which "can be received by 50,000 or more persons within the State holding the primary election." Advertisements can continue unregulated in States where no primary is scheduled within the next thirty days, or in media markets that reach smaller audiences.

As we also described, two empirical studies of political advertisements in the 1998 and 2000 election cycles determined that 78-85 percent of interest group ads referring to candidates ran during the 60 days before the election (as did most of the candidates' own ads), and that the majority of interest group ads that did not mention candidates ran outside the 60-day period before the election. See Gov't Br. at 140. These studies concluded that application of an "electioneering communications" definition like that contained in BCRA would have had only an insubstantial effect on genuine issue advertising, and that 94 to almost 98 percent of such advertising would have remain unregulated had BCRA been in effect during those election years. See Gov't Br. at 161.

Despite the demonstrated narrowness of BCRA's electioneering communications definition, plaintiffs contend that Title II is unconstitutionally overbroad, and attempt to meet their burden of demonstrating substantial overbreadth, see Gov't Br. at 160 (citing, inter alia, New York State Club Ass'n, 487 U.S. at 14), without offering the Court any empirical studies of their own. Despite the years of legislative debate leading up to the enactment of BCRA and the considerable resources plaintiffs are devoting to this litigation, plaintiffs neither mention nor rely upon any studies of political advertising comparable to those presented in Buying Time or the work of Professor Magleby, a body of work that was before Congress when it debated BCRA. Instead, plaintiffs merely mount an attack on the only empirical evidence of the potential impact of BCRA provided to the Court, but succeed only in demonstrating their own fundamental misunderstanding of the analysis performed. Second, plaintiffs cite examples of advertisements that they believe will be improperly captured by BCRA without paying the slightest attention to whether the sponsors or advertisements in question are regulated by BCRA, or to the substantial contextual evidence that demonstrates that the vast majority of those advertisements were made for the purpose of influencing federal elections. As explained below, none of these arguments is sufficient to meet plaintiffs' burden of proving that BCRA is substantially overbroad.

1. The empirical evidence proves that BCRA is not substantially overbroad.

Plaintiffs fail to offer any empirical data of their own to meet their burden of demonstrating that BCRA suffers from substantial overbreadth. Even with respect to their "starting point" for discussion of their overbreadth claims – various proposed regulatory exceptions that the FEC declined to enact in recent rulemaking proceedings, see McConnell Br. at 58-59 – plaintiffs fail to offer any empirical evidence whatsoever regarding the extent to which genuine issue ads that might have qualified for these proposed exemptions[64] would nevertheless be captured by BCRA.[65] Nor do plaintiffs even attempt to take issue with the results of the Buying Time studies showing that 75-80% of interest group ads that mention candidates run during the 60 days before a federal elections and that 85-90% of these candidate-focused ads that aired in the last 60 days before an election were broadcast in the midst of the most closely contested races. Gov't Br. at 140-41. Instead, as explained below, plaintiffs mount a personal attack on the respected political scientists who authored the Buying Time studies, mischaracterize both the results of those studies and the evidentiary record in this litigation, and take varying meritless, and ultimately inconsistent, positions

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[64] As the Explanation and Justification accompanying the FEC's issuance of the electioneering communications makes clear, each of these proposed exemptions was rejected because the FEC could not conclude, on the basis of the rulemaking record before it, that they categorically described communications not intended to influence a federal election. See generally 67 Fed. Reg. 65,200-65,203.

[65] Plaintiffs most egregiously complain that public service announcements ("PSA's") will be subject to BCRA. McConnell Br. at 59. They fail to disclose, however, that billions of dollars worth of PSA's are aired at no expense to their sponsors. See NPR, Morning Edition, "Analysis: Small amount of time commercial broadcasters allot for public service announcements," 2002 WL 3167200 (quoting plaintiff National Association of Broadcasters regarding its survey finding that the broadcast industry donated $5.6 billion of airtime in one year alone). Since BCRA's definition of electioneering communications encompasses only paid political advertising, see 67 Fed. Reg. 65,193 (to be codified at 11 C.F.R. 100.29(b)(3)(i)), none of this billions of dollars worth of advertising would be regulated, even where it refers to clearly identified federal candidates and is timed and targeted in the manner specified by BCRA. In the same vein, plaintiffs fail to offer any empirical evidence that ads sponsored by corporations and labor unions (and paid for with their aggregated wealth) that refer to proposed legislation by popular name; have lobbying goals relating to prospective legislation; or promote ballot initiatives, referendums, or local tourism; and have no electoral purpose, see 67 Fed. Reg. 65,200-65,203, constitute any substantial portion of ads that would be subject to BCRA's financing restrictions and disclosure rules.

regarding the appropriate treatment of the political advertisements evaluated in the two Buying Time reports.

Without offering any evidence that alleged personal bias played any role in skewing the results of either Buying Time report, plaintiffs launch a personal attack on the political scientists responsible for the studies by casting them as proponents of "reform." See McConnell Br. at 67. That attack is meaningless. To point out that political scientists who study political campaigning and fundraising as a matter of professional interest acted with awareness that the campaign finance system that existed prior to BCRA was seriously broken and badly in need of repair, see Gov't Br. at 37-49, does no more to undermine the integrity of the Buying Time studies than the accusation that medical researchers studying diseases do so in an effort to cure diseases, not perpetuate them. See Lupia Rebuttal Expert Rep. at 11 [DEV 5]. What plaintiffs have failed to establish is that there was any effort on the part of those scholars to tilt the results of the studies in ways that would be used to support the precise language of BCRA's provisions. See Goldstein Rebuttal Expert Rep. at 9 [DEV 5] ("Like any conscientious observer, I was careful not to compromise my academic reputation by involving myself in any results-oriented research project."); Krasno Rebuttal Expert Rep. at 2 [DEV 5] ("Scholars rarely embark upon research without some expectation as to its results. But more than most scholars, we had a compelling reason to insure that our results could withstand allegations of bias."); Lupia Rebuttal Expert Rep. at 11, 40 (failing to find evidence of any such effort).

Plaintiffs also mischaracterize the results of the Buying Time studies.[66] To understand plaintiffs' mistake, it is necessary to explore briefly the mathematical computations that generated the results reported in the two studies. Both the studies and the parties discuss the number of genuine issue ads that might be regulated by BCRA as a percentage, but the real dispute is, as a percentage of what? Specifically, should the number of genuine issue ads that meet BCRA's definition of electioneering communication be compared with (1) the number of all genuine issue ads run in a given year, or with (2) all advertisements that meet BCRA's definition of electioneering communications? The first comparison, used in the 1998 Buying Time study, measures the percentage of all genuine issue ads that would be regulated by BCRA; the second comparison, used in the 2000 Buying Time study, measures the percentage of all BCRA-regulated ads that are genuine issue ads. A graphical representation of the differences between these two measurements is shown in Figure 1. The intersection of the two boxes represents the numerator, which is the same in each calculation: all genuine issue ads that also met BCRA's criteria; the denominators are, as is apparent from the illustration, quite different.

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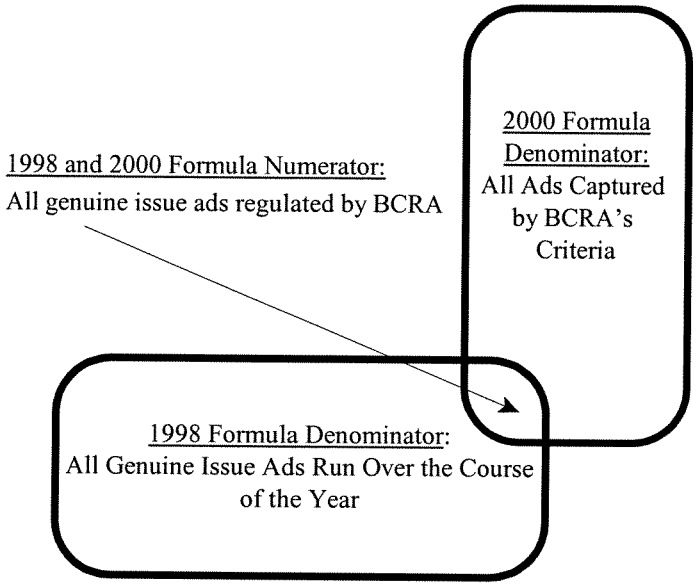
[66] Plaintiffs also object to the coverage of the two data sets that underlie the Buying Time studies. See McConnell Br. at 66 n.30. The two studies, however, are quite clear as to their scope – they evaluate broadcast television advertisements in the nation's top 75 media markets which serve approximately 80 percent of the nation's television viewing public. Neither plaintiffs nor plaintiffs' expert makes any attempt to meet their burden of explaining how, or whether, additional data from the nation's smaller media markets might have changed the results. See Goldstein Rebuttal Expert Rep. at 23-25; Krasno Rebuttal Expert Rep. at 5; Lupia Rebuttal Expert Rep. at 28. The NRA also argues that Buying Time is "palpably flawed" because it failed to include the NRA's half-hour newsmagazines in its calculations. The Buying Time studies, however, included no half-hour shows of any kind. Thus, the NRA cannot simply selectively add the airings of its own half-hour shows to the Buying Time data, see NRA Br. at 33, without wildly skewing the results. In any event, the NRA, which offers no expert testimony regarding the percentage figure it offers up in its brief, fails to describe how that percentage was derived, and absent any such explanation, it is entitled to no weight.

Figure 1.



As defendants' experts have explained, the best inquiry for purposes of evaluating BCRA's potential overbreadth is the first formula above, the one used in the 1998 edition of Buying Time, i.e., the percentage of all genuine issue ads aired in a given year falling within BCRA's scope.[67] See Krasno & Sorauf Expert Rep. at 60 n.43 & App. [DEV 1-Tab 2]; Krasno Rebuttal Expert Rep. at 14-16. This is so because the 1998 formula measures the impact of BCRA on the universe of genuine issues ads aired

[67] See City of Houston v. Hill, 482 U.S. 451, 459 (1987) (a statute may be invalidated for facial overbreadth if it "make[s] unlawful a substantial amount of constitutionally protected conduct").

in any particular calendar year and, thus, answers the critical question at the heart of any analysis of BCRA's potential overbreadth, i.e., the amount of genuine issue advocacy that BCRA would subject to regulation.[68] The small percentage of ads that would be affected by BCRA under this proper analysis – 6.1% in 1998 and 3.14% in 2000[69] – is insufficient to support a judgment that BCRA is substantially, and thus, facially, overbroad.[70] See Gov't Br. at 161.

The 2000 formula, on the other hand, as an empirical matter, combines both genuine issue and electioneering advertisements run within the 60 days prior to a federal election in its denominator, resulting in a calculation that will vary enormously depending upon the volume of candidate-focused ads in any given election year. Thus, if, hypothetically, in a non-competitive federal election, no electioneering ads were aired within 60 days of the election that mentioned a federal candidate, but a single genuine issue ad with those characteristics was aired, the measurement of BCRA's impact using the 2000 formula would yield

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[68] As we have explained, and as plaintiffs' expert appears to concede, the 1998 formula overestimates the impact of BCRA on genuine issue ads, because the denominator includes only the number of genuine issue ads run during a single calendar year — not an entire election cycle — in which federal elections were held. If the calculation were to include data regarding genuine issue ads aired in non-election years but during the same election cycle – whether it be two years, four years, or six years – the estimates would be significantly lower, since none of these non-election year ads would be subject to regulation under BCRA. See Gov't Br. at 161 n.113; Gibson Expert Rep. at 38 [1 PCS/ER 00001] ("Why use January 1, 1998, as the starting date for the total pool of issue ads (i.e., the denominator)? Why not include ads from December 1997, or even the entire election cycle beginning in November 1996?").

[69] As Dr. Krasno described in his expert report, he made some minor adjustments in his re-analysis of the 1998 data set, such that the estimate of BCRA's potential overbreadth that is correctly derived from that data set is 6.1%. See Krasno & Sorauf Expert Rep. at 60 n.142 & App.

[70] It is important to note that all calculations of the potential effect of BCRA generated by analyzing the 1998 data set are affected by a large number of airings of just one ad by the AFL-CIO, which named different senators and aired in multiple markets a total of 2,808 times. Thus, because some of the mentioned Senators were candidates for election in the districts in which the ad was aired, several airings of the ad were determined to be genuine issue ads that would have been subject to regulation had BCRA been in effect. See Krasno & Sorauf Expert Rep. App. This advertisement, referred to by the Buying Time authors as "HMO Said No"
that merely instructed viewers to call their (unnamed) Senators, a form of advertising that would not be subject to regulation under BCRA. See . Had all airings of this ad been of the generic kind, and, thus, been considered unregulated, only 2.2% of all genuine issue ads aired in 1998 would have been subject to BCRA. See Krasno & Sorauf Expert Rep. App. (Spreadsheets)