a result of 100%, even if hundreds or thousands of other genuine issue ads aired unregulated either prior to the 60-day period, or inside that period but identifying no federal candidates.

Plaintiffs confuse these two very different comparisons and, indeed, appear to invent a new formula altogether. They wrongly contend that "the authors of Buying Time 1998 now acknowledge that using the same approach that the Brennan Center employed to report its findings in 2000 . . . , over 14% of 'genuine' issue advertisements aired during the last 60 days of the 1998 election would have been prohibited by BCRA." McConnell Br. at 67 (emphasis added). As discussed above, however, the percentage formula used in the 2000 study measures the percentage of all the ads that would have met BCRA's primary definition of "electioneering communications" that were also genuine issue ads: 2.33% in 2000 and 14% in 1998. By no means does it measure what plaintiffs claim it measures – that "14% of 'genuine' issue advertisements aired during the last 60 days of the 1998 election would have been prohibited by BCRA"(emphasis added).

Plaintiffs offer no reason why this Court should adopt one formula over the other, and do not contest in any way the explanation offered by defendants' experts that the estimates of BCRA's potential overbreadth generated by applying the formula used in the 1998 edition of Buying Time – namely, 6.1% in 1998 and 3.14% in 2000 – are the most relevant available estimates.[71] Instead, plaintiffs choose to muddy the waters even further by quoting out of context a statement by Brennan Center President and CEO Joshua Rosenkranz, see McConnell Br. at 67, regarding what discovery proceedings have demonstrated to be his mistaken impression that the 7% figure reported in Buying Time 1998 was derived using the 2000 formula. See Holman Dep. Tr. (Sept. 6, 2002) at 143-145.

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[71] Defendants have fully explained the various computations, and preferred methodology, used in the two reports and have provided the Court with the results of the application of both formulas to both the 1998 and the 2000 data sets. See Krasno & Sorauf Expert Rep. App. & Spreadsheets; Goldstein Expert Rep. at 25 (Tbl. 7).

What little remains of plaintiffs' attack on Buying Time does not constitute serious analysis. With respect to the 1998 study, plaintiffs object that eight advertisements were "recoded" from the "student coders' original assessments" that they were "genuine" (i.e., coded on Question 6 in the 1998 study as "providing information") to "electioneering" (i.e., coded on Question 6 in the 1998 study as "generating support or opposition for a particular candidate"). See McConnell Br. at 68-69. Plaintiffs argue that these eight ads should have been treated as genuine issue ads, and that if their number of airings are factored into the numerator of the 2000 formula, the estimate of BCRA's potential overbreadth rises to 64% percent.

This estimate is simply incorrect. First, plaintiffs use the 2000 formula for deriving their result, and, as we have explained, any calculation of BCRA's overbreadth is best made by determining the applicable percentage under the 1998 formula. More importantly, plaintiffs' estimates should be discounted because plaintiffs fail to explain any substantive basis for their objection to the manner in which these eight ads were ultimately treated for purposes of analyzing the 1998 data set. Plaintiffs fail to offer any analysis of the content of these advertisements, the races in which they were run, or the coding of other, similar advertisements in the database. An examination of these factors clearly demonstrates that the treatment of these advertisements as electioneering by the authors of Buying Time 1998 was correct. See generally Jonathan S. Krasno's Response to Professor Gibson's Supplemental Rebuttal; see also infra at 82-83 (discussing Look Out for the Lawyers); 83-84 (discussing AJS/Stabenow); 87-89, 93-94 (discussing AFL-CIO ads); 89 n.94 (discussing AFLT ads); and 92-93 (discussing NPLA ad).

Plaintiffs' analysis of the 2000 Buying Time study is equally flawed. With respect to the 2000 data set, six genuine issue ads were identified, see Goldstein Expert Rep. at 26 & n.21, which defendants' expert Professor Kenneth M. Goldstein used as the basis for his calculations of BCRA's potential overbreadth. See Gov't Br. at 161. As Dr. Goldstein explains, the published Buying Time 2000 study identified three genuine issue ads that would have met BCRA's electioneering communications definition.

Goldstein Expert Rep. at 26 n.21. Dr. Goldstein, in his effort to adopt a conservative approach when authoring his expert presentation to this Court, adjusted the published Buying Time results by treating as a genuine issue ad any ad that had ever been considered by any coder to be genuine, for a total of six, regardless of his agreement with that assessment or the treatment of other, similar ads. These six ads, which aired a total of 1,413 times in markets throughout the country, accounted for 3.14% of all genuine issue ad airings by interest groups during 2000 (using the 1998 formula), and for 2.33% of all ad airings by interest groups that mentioned a candidate and aired within 60 days of the general election (using the 2000 formula). Goldstein Expert Rep. at 25.

One of these six ads was an advertisement sponsored by Citizens for Better Medicare ("CBM"),

. See Gov't Br. at 33-34 (discussing AFL-CIO and CBM participation in the 2000 election cycle); see also infra at 87-89. The 2000 database contained six similar ads sponsored by CBM. See Goldstein Rebuttal Expert Rep. at 16-17 & n.8; Goldstein Cross Tr. (Oct. 24, 2002) Ex. 45. Each of these last six ads was coded as electioneering by the coders.[72] Nonetheless, because the one version of the ad listed in Dr. Goldstein's expert report had once been mistakenly coded as a genuine issue ad, Dr. Goldstein, out of an abundance of caution, treated that ad as such for purposes of his expert analysis. See Goldstein Expert Rep. at 26 n.21.

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[72] Plaintiffs make the wholly insupportable claim that Dr. Goldstein "inexplicably" treated these six ads as "sham ads." McConnell Br. at 69 n.34. As plaintiffs are fully aware, there is nothing whatsoever "inexplicable" about the treatment of these ads; Dr. Goldstein's rebuttal report, his deposition testimony, and documents introduced as exhibits by plaintiffs at their examination of Dr. Goldstein all clearly show that these six ads were treated as electioneering issue ads by both Dr. Goldstein and the authors of Buying Time 2000 because the coders coded them as such. See Goldstein Cross Tr. at 216-217; Id. Ex. 39, 42; Goldstein Rebuttal Expert Rep. at 16.

Without explanation, plaintiffs, who with respect to the 1998 data set castigated the Buying Time authors for deviating in the slightest from the judgment of the student coders, reverse their position when discussing this CBM ad from the 2000 data set.[73] In 2000, plaintiffs contend, Dr. Goldstein should have disregarded the student coders' judgment (as well as his own) that six advertisements aired by CBM were electioneering ads, and should have altered the coding on all six ads in light of his opinion that those ads were "not meaningfully distinguishable" from one advertisement by the same organization that one student coder determined to be a genuine issue ad. See McConnell Br. at 69 n.34. But if any recoding is to be done for the sake of uniformity, as plaintiffs suggest, it is certainly far more sensible and accurate to alter the coding on one ad that is mistakenly coded, as Dr. Goldstein did for purposes of assembling the data set that underlies Buying Time 2000, than to alter the coding on six similar ads in order to bring their coding into line with one. In other words, under their own reasoning, plaintiffs' suggestion is exactly, and indisputably, backwards.[74]

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[73] Plaintiffs' insistence that the student coders' assessments be rigidly adhered to (although plaintiffs apparently so insist only when it suits their purposes), is itself inconsistent with plaintiffs' expert's baseless contention that student coders cannot be trusted to offer their opinions on the purpose of political advertising. See Gibson Expert Rep. at 10. As defendants' experts have explained, the use of both student respondents and survey questions seeking opinions is routine in empirical political science research. Lupia Rebuttal Expert Rep. at 34-36; Lupia Cross Tr. (Oct. 25, 2002) at 36, 76-77; see also Krasno Response to Professor Gibson's Supplemental Rebuttal at 2 ("The point of having a combination of student coders and an expert like Dr. Goldstein working to prepare the data set is to take advantage of their disparate strengths, not to automatically confer authority on one over the others.").

[74] Plaintiffs' footnoted contention that "30 other ads" should be treated as "genuine" is similarly specious. McConnell Br. at 69 n.34. What plaintiffs fail to disclose in their description of these "30 other ads" is that these advertisements were selected by plaintiffs' counsel for their expert to factor into his calculations without any explanation whatsoever. See Gibson Cross Tr. (Oct. 21, 2002) at 179-80 ("Q: Now, you refer . . . to this mysterious group of 30 ads, and [your report] says, "This list was provided to me by counsel." What I wanted to know is how were these ads selected by counsel for you? A: I don't know. . . . 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 is correct. . . . Q: Did you have any understanding of the way in which the 30 ads were selected? A: No."). Indeed, Professor Gibson "never even looked at these storyboards," id. at 181, despite the fact that they were attached as an exhibit to his Expert Report and the airings attributed to these ads were used by him to perform various calculations of BCRA's impact. Professor Gibson thus has absolutely no basis for including these "30 other ads" in calculations of BCRA's potential overbreadth.

In sum, plaintiffs point to no valid reason for inflating the estimates of overbreadth that were obtained by careful analysis of the empirical data by the authors of Buying Time and then validated in a re-analysis of the relevant data sets by defendants' experts. Plaintiffs, therefore, fail to meet their burden of demonstrating, on the basis of the only empirical evidence that has been provided to the Court, that BCRA's electioneering communications definition is substantially overbroad. As Congress correctly determined, and as we demonstrated in our opening brief, it is not.

2. Plaintiffs' anecdotal evidence does not prove that BCRA is substantially overbroad.

In support of their argument that BCRA's definition of "electioneering communication" is overbroad, plaintiffs collectively discuss approximately sixty (60) specific television ads that they think would be unfairly captured by BCRA.[75] The product of months of culling through all of the available issue advertisements, these 60 ads (compared to the approximately 500 ads run by interest groups in 1998 and 2000,[76] purportedly represent plaintiffs' most "powerful illustrations" of BCRA's overbreadth. McConnell Br. at 61. As an initial matter, plaintiffs' anecdotal evidence cannot substitute for a comprehensive empirical analysis of BCRA's overall impact on genuine issue advocacy. Defendants recognize that a small amount of genuine issue advocacy will fall within BCRA's scope. What defendants deny, and what plaintiffs' anecdoctal evidence alone cannot prove, is that this amount will be so substantial as to warrant facial invalidation of the statute. In any event, plaintiffs' anecdotal evidence is overstated: plaintiffs overlook that many of the ads they cite as examples of BCRA's overbreadth would not have even fallen within BCRA's

[75] The McConnell plaintiffs have submitted with their opening brief a VHS tape containing 21 "issue ads." Several of these 21 ads are discussed in Plaintiffs' Opening Briefs, and an additional 38 ads are either referred to in the text of the plaintiffs' briefs, or the storyboards are appended to the back of the briefs. This section of our brief will address each of these ads.

[76] See Krasno & Souraf Expert Rep. App. (Spreadsheet: 2000 Formula); Buying Time 2000 at 59 [DEV 46].

scope; and they neglect substantial contextual evidence indicating that many of the remaining ads were in fact made for the purposes of influencing federal elections.

a. Plaintiffs' exaggerated claims of BCRA's impact should not be credited.

Before looking at a single storyboard or video clip, plaintiffs' list of 59 can be quickly cut by more than half to 25, because 34 ads would not have been covered by BCRA had it been in effect at the time the ads were run.[77] Plaintiffs' inability to limit their "most powerful" examples to advertisements that would have been covered by the statute belies their claim that BCRA will capture "an enormous amount of issue advocacy." McConnell Br. at 60. Of the 21 ads on the McConnell video tape, nine (9) fall outside of BCRA's limitations.[78] Similarly, twenty-five (25) of the particular advertisements cited by the NRA did not fall within the statute's 30/60-day window.[79] Given that the majority of the examples plaintiffs provide

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[77] For several of the remaining 25 ads, only a few of their many airings would have been captured by BCRA, infra at 93-94. Run dates referenced in this section can be found in App. D hereto (table containing selected CMAG data from Goldstein Expert Rep. [DEV-3-Tab 7 Ex.L (CD)]; Krasno & Sorauf Expert Rep. [DEV 1-Tab 1(CD App.)]

[78] The "Better World Campaign/Helms Biden Law" ad was run only in Washington, DC, and neither Jessie Helms nor Joseph Biden was a candidate for Senate in the DC television market. The other ads were run outside of the 30/60-day window: "Sierra Club/NC Faircloth Weaken" was run from 8/31 to 9/4/98, while the primary was held on 5/5/98 and the general election was held on 11/5/98; "Michigan Right to Life/Stabenow PBA" was run from 3/23 to 4/12/00, while the primary was held 8/8/00; "Sierra Club/Call McCain Grand Canyon" was run from 1/10-14/00, while the primary was held on 2/22/00; "AJS/Gorton A Magnificent River" was run from 6/14 to 7/18/00, while the primary was held on 9/19/00; "AJS/Gorton If We Lose the Dams" was run from 6/14 to 7/18/00, while the primary was held on 9/19/00; "Sierra Club/Protect Salmon Gorton," was run from 5/8-14/00, while the primary was held on 9/19/00; "PhARMA/Call Senator Gorton 60" was run on 7/19/00, while the primary was held on 9/19/00; and "Friends of the Earth/Asbestos Call Senator Grams" was run from 4/3/00 to 4/25/00, while the primary was held on 9/12/00.

[79] Thirteen (13) of the ads cited by the NRA are a series of television ads aired in March 2000, in response to President Clinton's Today Show "attacks on the NRA." NRA App. 914-16. The only individual named in these ads, Bill Clinton, was not a candidate for federal office in 2000. The NRA also cites to a series of eleven (11) television ads addressing a crime bill that aired sometime in 1994. NRA Br. at 26, LaPierre Decl. ¶ 21 (stating only that ads aired "in 1994," but providing no specific dates); NRA App. 886-88 (providing text of ads). The NRA has not provided any information that would allow the Court to find that these ads aired within the 30/60-day window and, thus, would have been covered by BCRA. The NRA has not provided the names of the Congressmen against whom this ad was run, or any details regarding which of the several crime bills that were debated up to mid-August 1994 to which the ad might have referred. The NRA has provided even less information regarding its Brady Bill ad, which is not ever mentioned in any of the NRA's testimony, and, therefore, the airing dates cannot be ascertained from the current record. NRA Br. at 26; NRA App. 885. In any event, the Brady Bill was passed on November 10, 1993, so it is odd that the NRA would be advertising about it in 1994.

would not have been covered by the statute, the Court should not indulge plaintiffs' implication that they are merely providing a few of the many available examples of ads that would be unfairly captured by BCRA.

The McConnell plaintiffs purport to catalogue the extent to which BCRA's electioneering communications provisions will "imperil" their speech, see McConnell Br. at 63-64; but, just as plaintiffs exaggerate the number of ads that would be regulated under BCRA, so, too, plaintiffs grossly overstate the statute's effect on the activities of non-profit corporations such as those that have joined this litigation.

Plaintiffs portray the Southeastern Legal Foundation, Inc. ("SLF") as a non-profit corporation that "regularly uses broadcast advertising to further its support" for limited government and individual economic freedom. Plaintiffs provide as a purported "example" a broadcast advertisement praising Senator McConnell for his stance on campaign finance reform, aired in September 2002. SLF co-sponsored this ad with plaintiffs 60-Plus Association, Inc. ("60-Plus"), the Center for Individual Freedom, Inc. ("CIF"), and the National Right To Work Committee, Inc. ("NRWC"). McConnell Br. at 63. In their discovery responses, plaintiffs SLF, 60-Plus, and CIF admit that they have never sponsored any other communications, beside the September 2002 advertisement, that would have been subject to regulation under BCRA. Their declarants identify not one electioneering communication that they will broadcast in the future. See Gov't Br. 130 n.95. Moreover, SLF is a 501(c)(3) organization that, as such, is exempt from BCRA's regulation of electioneering communications. 67 Fed. Reg. 65,199-200 (to be codified at 11 C.F.R. 100.29(c)(6)). BCRA "imperils" no speech in which these organizations engage.[80]

[80] It nevertheless merits observation that, in the fiscal year ending June 30, 2001, non-profit 60-Plus received nearly $300,000 in donations from pharmaceutical corporations, associations, and organizations as such Pfizer, Inc., Merck, Inc., the Pharmaceutical Research and Manufacturers of America ("PhRMA"), and Citizens for Better Medicare. 60+ 0040 (tax return of 60-Plus) [DEV 131-Tab 3].

Another McConnell plaintiff, the National Right to Life Committee ("NRLC"), while claiming that it "regularly makes disbursements for the direct costs of producing and airing 'electioneering communications,'" O'Steen Decl. ¶ 6 [8 PCS/MC 262-63], in fact, has hardly ever done so. Indeed, in all of 1998 and 2000, the NRLC ran only one radio advertisement that would have qualified as an electioneering communication under BCRA. See O'Steen Dep. Tr. (Sept. 30, 2002) at 59-61.[81] Another group appearing in plaintiffs' list, Associated Builders & Contractors, is represented as using radio ads "to promote issues, . . . which ads coincide with legislative sessions and elections and will now be banned because they name candidates." McConnell Br. at 64.

see also Gov't Br., App. A, Tab 6, Nos. 3-6 (audio);

Such "off-issue" advertisements can only be interpreted as electioneering in design. See Gov't Br. at 138-39.

The ACLU's claims of injury are particularly egregious. The ACLU admits that the sole advertisement it has ever sponsored that would meet BCRA's definition of an electioneering communication was a March 2002 ad that urged House Speaker Dennis Hastert to bring the Employment Non-Discrimination Act to the floor of the House for a vote. ACLU Resp. to Defs' First Set of Interrogs. (Nos. 10-11) [DEV 10-Tab 7]; ACLU Resp. to Defs' Second Set of Interrogs. (No. 1) [DEV 10-Tab 9].

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[81] That advertisement, which criticized Senator John McCain for his stance on campaign finance reform, was run only in New Hampshire during the New Hampshire presidential primary, at the same time that the NRLC was running several similar ads out of its PAC that also expressly called for McCain's defeat. O'Steen Dep. Tr. (Sept. 30, 2002) at 57 & Ex. 6. As an NRLC press release makes clear, the ad, much like the ACLU Hastert ad, infra, was specifically contrived to serve as an example of the sort of "issue advocacy" that would be captured by BCRA. See id. at 58-59 & Ex. 8.

see also USA-ACLU 00001-02 (press releases)

[DEV 130-Tab 4]. Notwithstanding this record, the ACLU would have the Court believe that it has now "turned to the use of paid media to ensure that [its] views are heard," and that BCRA "would effectively mute much of this speech by the ACLU." ACLU Br. at 5, 6. In fact, the ACLU's declarants also fail to identify a single specific ad that the organization will run at any time in the near or distant future that would qualify as an electioneering communication under BCRA. See Romero Decl. [3 PCS/ACLU 6-19]; Murphy Decl. [3 PCS/ACLU 1-6]. BCRA's impact on the ACLU's speech is none.

Thus, although Plaintiffs insinuate that there is a cornucopia of activity that the statute would wrongly reach, when put to the test, their harvest is lean. Plaintiffs' exaggeration and speculation cannot be accepted as evidence sufficient to meet their burden of demonstrating that BCRA is substantially overbroad.

b. The record reflects that most of plaintiffs' "powerful illustrations" of issue advocacy were broadcast for purposes of influencing federal elections.

Of the 25 or so ads chosen by plaintiffs that, in fact, would have been subject to BCRA had it been in effect at the time the ads were run, many provide compelling demonstrations of electioneering, and in some cases were cited as such in defendants' opening brief. See Gov't Br., App. A, Tab 1 (Interest Group "Issue Ads"). Both the plain language of these ads and an understanding of the context in which they were run demonstrate that they were designed and intended to influence the outcome of federal elections. Just as the Buying Time coders' perceptions of the advertisements are useful to demonstrate that BCRA's definition captures very few ads that are not calculated to affect the outcome of federal elections, so, too, the contextual information revealing the political climate in which a particular advertisement was run bolsters the conclusion that BCRA's objective properly limits regulation to those ads that have an impact on federal elections. Even with respect to those few ads identified by plaintiffs that some might find to be closer calls, it remains true that the particulars of the ads and their context provide some evidence of electioneering. And as we have discussed, the fact that some of these communications combine both electioneering and genuine issue advocacy in one does not exempt such a communication from regulation where Congress's compelling interests are implicated.[82]

By way of example, plaintiffs single out more than once in their submissions to the Court an advertisement run by the American Association of Health Plans ("AAHP") called "Trial Lawyers."[83] The ad was

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[82] Just as when express advocacy is combined with issue advocacy, the presence of the latter does not insulate the former from regulation. In MCFL, the Court explained that the publication at issue constituted express advocacy because it could "not be regarded as a mere discussion of public issues" but instead "provide[d] in effect an explicit directive" and went "beyond issue discussion to express electoral advocacy." 479 U.S. at 249. The same applies when electioneering is combined with issue advocacy.

[83] See McC 030 (storyboard); McConnell Tape, No. 4 (video); see also Gov't App. A, Tab 1, No. 52. CMAG has labeled the advertisement "Look Out for the Lawyers."

broadcast in North Carolina in 1998, where incumbent Senator Lauch Faircloth was engaged in an extremely close race against trial lawyer John Edwards:

> Worried about rising healthcare costs? Then look out for the trial lawyers. They want Congress to pass new liability laws that could overwhelm the system with expensive new healthcare lawsuits. Lawsuits that could make trial lawyers richer. That could make healthcare unaffordable for millions. Senator Lauch Faircloth is fighting to stop the trial lawyers' new laws. Call him today and tell him to keep up his fight. Because if trial lawyers win, working families lose.

At the time this ad was run, the airwaves in North Carolina were saturated with millions of dollars of ads run by Senator Faircloth's campaign, by the Republican party, and by interest groups portraying Edwards as a "deceptive," truth-stretching trial lawyer.[84] Edwards' own campaign ads trumpeted Edwards as a trial lawyer "fighting for the people." App. C, Tab 1. Thus, for even the most casual observer of the 1998 North Carolina Senate campaign, the mere mention of the words "trial lawyer" would immediately summon the image of John Edwards. The tag line of the "Trial Lawyers" ad above may as well have read, "if John Edwards wins, working families lose." For plaintiffs to place the spotlight on this unabashed electioneering ad as one of their prime examples of a "true issue ad that would be unfairly captured by BCRA" again exposes their tendency to overstate the evidence.

Other ads cited by plaintiffs are similarly revealed to be electioneering when viewed in the context of the competitiveness of the particular elections in which they were run, or in light of the recurrent "air wars" between labor and business organizations trying to elect Members of Congress sympathetic to their interests.

Battleground Races. CMAG estimates that interest groups spent approximately $4 million airing television ads some 8,000 times relating to the 2000 Senate election in Michigan between Debbie

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[84] Several storyboards of ads run by the campaign committees and the political parties are attached hereto as App. C, Tab 1; see also Joshua Green, "John Edwards, Esq.," The Washington Monthly, October 2001, available at www.washingtonmonthly.com/features/ 2001/0110.green.html (describing campaign memos linking trial lawyer attack ads to election strategy).

Stabenow and Spencer Abraham, one of the most hotly contested Senate races that year, which ultimately resulted in challenger Stabenow upsetting the incumbent Abraham. The Cook Political Report (Oct. 25, 2000) at 85 ("Cook Report") [DEV 38-Tab 17 at INT 15523]. The sponsors of ads in this exceptionally tight race include a "who's who" of electioneering interest groups: the AFL-CIO, Americans for Job Security,[85] Americans for Quality Nursing Home Care, the Business Roundtable, the Chamber of Commerce, the League of Conservation Voters, the NRA, National Right to Life, and the Sierra Club.

One ad from the Stabenow-Abraham race included in plaintiffs' video submission is "Debbie Death Tax."[86] This ad, sponsored by the Michigan Chamber of Commerce, began airing on September 20, 2000, and continued running until less than a week before the election. The ad was not timed to any particular upcoming legislative action, and it refers explicitly to two past votes cast by then-Congresswoman Stabenow. Revealing that the Chamber's true focus was on the outcome of the Senate race in Michigan, the Chamber of Commerce not only spent an estimated $250,000 on these estate tax "issue ads," but also between September 20 and November 6, 2000, spent an additional $125,000 on "issue ads" concerning Stabenow's education agenda, and more than $750,000 on "issue ads" concerning Stabenow's position on prescription drug benefits.

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[85] Americans for Job Security ("AJS") is a business-backed organization that picked up the mantle of The Coalition after the 1996 election cycle. See Gov't Br. at 38-42 (discussing the electioneering activities of The Coalition). AJS is funded with millions from the American Insurance Association, the American Forest and Paper Association, Microsoft, and several large pharmaceutical firms. See John Nichols, "Money Flows Into Anti-Wellstone Campaign," The Nation, October 23, 2002. AJS's election year ads have covered an incredibly diverse range of topics including taxes, education, social security, welfare, crime, clean water, dams, and the personal characteristics of candidates. App. C, Tab 2. AJS also sponsored an ad targeting Debbie Stabenow in her 1998 race for the House. See "Stabenow Turned Her Back," McC 033. This particular ad accuses Stabenow of tolerating gang violence and turning her back on small businesses and working families.

[86] The message of this ad is that, because Stabenow voted against ending the estate tax, "working families are suffering." McC Video Tape, Ad No. 9. For additional "issue ads" run in connection with the Stabenow-Abraham election, see Gov't Br., App. A, Tab 1, Nos. 12- 15 ("Thanks," "Who," "Prescription Drugs," and "Call Debbie."). See also App. C, Tab 3.

In another hotly contested election, the U.S. Chamber of Commerce aired an advertisement, entitled "UT/Matheson Can't Decide" in the 2nd Congressional District of Utah during the 2000 election. See Chamber/NAM Br. at 5. The Chamber correctly points out that this ad was considered "genuine" by the Buying Time 2000 coders, and, indeed, when viewed out of context, the ad appears neutral in the sense that it says that Jim Matheson has not yet decided between two competing prescription drug plans, and that he should not pick "the big government plan." This ad, however, was run exclusively between November 1, 2000, and November 6, 2000. Knowledge of the issue environment of the campaign in which it appeared is also useful in divining its true purpose.[87] The Chamber claims that its ads were intended to influence upcoming legislative votes, see Chamber/NAM Br. at 1, but at the time this ad was run, Congress was not in session, having adjourned so Members could campaign, and Matheson was not a Member of Congress in any event; he was a challenger in an open seat race that the Cook Report labeled a toss-up.[88] The Chamber also fails to explain that Matheson was a Democrat in a very conservative district, and that his opponent's strategy, and the Republican party's strategy, was to portray him as a fence-sitting Democrat trying to masquerade as a Republican.[89] Thus, the ad's tag line – "Tell Matheson to make a decision. This issue is too important to ignore." – played to the overall campaign theme that voters should elect someone who is decisive and who shares their values.

Like most "issue ads," except for those that focus exclusively on the personal character traits of candidates, "Debbie Death Tax," "Thanks," "Who," "Prescription Drugs," "Call Debbie," and "Matheson Can't Decide" all contain at least some reference to a genuine issue. The issue, however, is merely the lens through which the advertisement attempts to portray the candidate:

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[87] ; Bailey Decl. ¶ 6-7, 10 [DEV 6-Tab 2].

[88] Cook Report (10/25/00), at 71 [DEV 38-Tab 17 at INT 15509].

[89] Almanac of American Politics 2002, p. 1536; see also App. C., Tab 4 (various storyboards of other advertisements aired in the 2000 Matheson-Smith race in Utah's 2nd Congressional District).

> Contrary to what many people would like to believe, it is well known among campaign consultants that the "swing voters" who regularly determine the outcome of elections usually vote on candidate personalities, rather than issues. Regardless of the substantive topic of any particular ad, one of the single most important messages that a political ad can convey is the underlying sentiment that a candidate has values similar to or different than the target viewers of the ad. A campaign commercial is most effective if the candidate is perceived as likeable to the citizens relaxing in their living rooms, and if the viewers feel comfortable that the candidate shares their values. Often, the substantive issue is merely the vehicle used to demonstrate personal qualities.

Bailey Decl. ¶ 4; see also id. ¶¶ 5-6. Thus, the point of an ad that is seemingly about a vote against a minimum wage bill may in actuality have been designed as a vehicle to portray the named candidate as beholden to large corporations.[90] When such advertisements air during the course of hotly contested elections, or in battleground states where the control of Congress or the White House may be determined, it is unimaginable that they do not seek to influence the outcome of the pending election. See Goldstein Expert Rep. at 20-24; Krasno & Sorauf Expert Rep. at 51, 57 n.140, 69;

Air Wars Between Opposing Groups. The electioneering battles between opposing interest groups are now familiar stories: big labor vs. big business, environmental lobbyists vs. industrial coalitions, etc. See Gov't Br. at 37-49. The various ads cited by plaintiffs in their opening brief and attached video tape should be viewed in the context of these multi-million dollar, high-stakes battles for control of Congress and of the White House.

The AFL-CIO argues that it sponsors issue ads solely for the purpose of influencing pending legislation. AFL-CIO Br. at 9-11. However, based upon both their timing and content, the advertisements

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