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

Plaintiffs' briefs are long on rhetoric, but short on persuasive arguments to support their contention that Title II's electioneering communications provisions are facially unconstitutional. Title II is not a radical attack on freedom of speech by incumbent officeholders bent on self-preservation. The electioneering communications provisions do not "ban" any speech. They generally prohibit the use of corporate and union treasury funds to fund broadcast advertisements that refer to a candidate in a federal election, are targeted to reach that candidate's electorate, and air within the final weeks before the election. But they allow the same entities to run the same ads, at the same times, so long as they use PAC funds, which are voluntarily contributed by individuals to be used for political purposes. Title II also requires certain disclosures from individuals or entities that run such ads. Together these provisions address, in a measured way, the recent phenomenon of corporations, unions, and wealthy individuals exploiting the "express advocacy" standard to evade longstanding provisions of federal law.

Congress's adoption of a clear, objective statutory standard makes it possible for plaintiffs to raise predictable complaints that the new law does not achieve perfection at its margins. Those complaints fall well short of carrying the burden plaintiffs must carry in seeking to strike the electioneering provisions, on their face, as substantially overbroad. To the contrary, the evidence shows that Congress drew lines that are well tailored to serve its purposes, and are supported by controlling Supreme Court precedent. Plaintiffs' facial challenge therefore fails.

A. Title II Does Not Suppress Speech.

Plaintiffs argue that BCRA "bans" or "criminalizes political speech," imposing "blackout periods in which speech is effectively barred" for periods ranging up to "more than a full year

preceding a federal election."[159] The NRA further contends that this "ban" was enacted for the purpose of protecting incumbent officeholders from criticism or effective electoral challenge.[160] These contentions require only brief response.

First, the Act of course applies only to ads that fall within the definition of "electioneering communications": broadcast ads, referring to a clearly identified federal candidate, targeted to the relevant electorate, and aired within 60 days of a general election or 30 days of a relevant primary. Plaintiffs mischaracterize the Act when they claim that it "sweep[s] far beyond any single 30- or 60-day period" and "extend[s] for nearly a full year" for presidential candidates.[161] In particular, the FEC's regulations make clear that an ad referring to a presidential candidate during the primary season is covered only if it reaches more than 50,000 people in a state that will hold its primary within 30 days, or if it reaches more than 50,000 people nationwide within 30 days of the relevant party's national convention.[162]

In any event, as defendants' opening briefs make clear, BCRA does not "ban" any ad.[163] As to individuals and some groups, the Act requires only that certain disclosures be made with respect to covered ads. As to unions and most corporations, the Act also requires that such ads be paid for with PAC funds, rather than general treasury funds. That is not a ban — although it is an important restriction. Unlike treasury funds, PAC funds are contributed voluntarily by individuals, expressly

---

[159] *See, e.g.*, McConnell Br. at 44, 46, 47, 76-78; NRA Br. at 2-3, 8, 24-25. Plaintiffs lay rhetorical stress on the fact that BCRA, like FECA, provides for criminal as well as civil penalties. We note that the Act allows for prosecution only if a violation is "knowingly and willfully" committed. BCRA § 312(a). As the D.C. Circuit has explained, in this context that requirement means the criminal prohibition reaches only conduct involving "defiance or such reckless disregard of the consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act.'" *AFL-CIO v. FEC*, 628 F.2d 97, 101 (D.C. Cir. 1980) (quoting *Frank Irey, Jr. v. Occupational Safety and Health Review Comm'n*, 519 F.2d 1200, 1207 (3d Cir. 1975)).

[160] *See* NRA Br. at 3-9, 15-16.

[161] McConnell Br. at 46, 59. As to any Senate or House candidate in any state, the definition of electioneering communications covers only the 30-day period before a primary or convention and the 60-day period before the general election for the office sought by the candidate. 11 C.F.R. § 100.29(a)(2).

[162] 11 C.F.R. § 100.29(b)(3)(ii).

[163] *See* Intervenors' Br. at 111; Gov't Br. at 162-63.

for political use under the direction of corporate or union leaders. Accordingly, both the type and the amount of expenditures made from a corporate or union PAC should reflect, to some considerable extent, actual support for the organization's political speech on the part of its individual constituents. For some large organizations of the type that sponsor broadcast electioneering ads, the PAC-fund requirement should achieve its purposes without materially affecting the organization's ability to run whatever ads its management wishes. This is especially true for substantial nonprofit corporations with an ideological agenda and a broad base of individual contributors, many (but not all) of whom presumably do support such a use of their funds.[164] But if it turns out that some entities air fewer ads during future election cycles, that will be for the appropriate reason that market profits and union dues are easier to come by than individual contributions voluntarily made to fund corporate or union campaign spending, and thus current levels of spending do not reflect individuals' true support for the electoral positions that their organizations are using treasury funds to express.[165]

To be sure, the restriction to PAC funds imposes some burden on corporations' and unions' ability to engage in a certain kind of political speech — specifically, as the NRA puts it, "speech about whom to elect."[166] But that is not an innovation; Congress has long prohibited corporations and unions from using their treasury funds to support or oppose candidates for federal office — either through contributions (including coordinated expenditures), or through independent expenditures.[167] For the last quarter century, the statutory prohibition on expenditures has been limited to those that "expressly advocate" a candidate's election or defeat — and that prohibition, at a minimum, is constitutional, as the Supreme Court held in *Austin v. Michigan Chamber of*

---

[164] The NRA, for example, puts its 2000 revenues at more than $140 million. NRA Br. at 2. [REDACTED].

[165] *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257-59 (1986) ("MCFL").

[166] NRA Br. at 10; s*ee Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658 (1990).

[167] 2 U.S.C. § 441b; s*ee also* Intervenors' Br. at 2.

Commerce.[168] The Court's opinion in *Austin* begins, notably, by observing that "the use of funds to support a political candidate is speech," and that "independent campaign expenditures constitute political expression at the core of our electoral process and of the First Amendment freedoms."[169] It ends with the conclusion that, nonetheless, a legislature may prohibit corporations from using treasury funds to advocate the election of a candidate.[170] The decision rests not on some categorical devaluation of corporate political speech, but on the Court's conclusions that, in the context of candidate elections, the public has a compelling interest in avoiding "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas," and that this interest is served in a narrowly tailored way by a law that prohibits campaign spending from the corporate treasury "while . . . allowing corporations to express their political views" through their PACs.[171]

Plaintiffs' quarrel on this point, then, is not with BCRA, but with the Supreme Court — or, rather, with the century-long legislative tradition the Court has endorsed of prohibiting corporations

---

[168] 494 U.S. 652 (1990). The state statute upheld in *Austin* was not limited on its face to "express advocacy." *See id.* at 655-56. Although the ad at issue in the case did contain express advocacy, *see id.* at 714 (app. to opinion of Kennedy, J., dissenting), the Court's opinion did not advert to that fact. We also note that the *Austin* statute applied only to corporations, and the Court held that it was permissible for the state to distinguish between corporations and unincorporated unions. *Id.* at 665-66. A long line of Supreme Court decisions leaves little doubt, however, that Congress may also choose to treat corporations and all unions in the same way when it imposes restrictions on the use of treasury funds to influence federal candidate elections. *See, e.g.*, *MCFL*, 479 U.S. at 256-65 (1986); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209-10 (1982) ("NRWC"); *Pipefitters Local Union v. United States*, 407 U.S. 385, 414-16 (1972); *United States v. UAW-CIO*, 352 U.S. 567, 585-89 (1957).

[169] 494 U.S. at 657 (internal quotations omitted).

[170] *Id.* at 668-69.

[171] *Id.* at 660-61. Plaintiffs argue that "corporations and unions enjoy the full protection of the First Amendment when commenting on public issues." McConnell Br. at 50 n.19. Whatever the merit of that statement as an abstract proposition, the Supreme Court's cases make clear that corporations differ from individuals in ways that can materially affect First Amendment analysis. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 353-54 (1995) (distinguishing between corporations and individuals in the context of disclosure requirements for political speech); *Austin*, 494 U.S. at 658-60; *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 n.13 (1978); *id.*at 822-28 (Rehnquist, J., dissenting); *cf. Regan v. Taxation with Representation*, 461 U.S. 540 (1983) (upholding speech restrictions on tax-exempt corporation). In particular, *Austin* expressly upholds a restriction on campaign spending from corporate treasury funds even under the highest level of constitutional scrutiny, because of the increased governmental interest in regulating corporate electoral activity. *Austin*, 494 U.S. at 658.

and unions from using treasury funds to participate in candidate elections. Arguments similar to those made by plaintiffs were made and rejected in *Austin* — albeit in a case that, as it happened, involved an ad that used words of "express advocacy."[172] As we explained in our opening brief, the central question with respect to Title II in this case is whether Congress could properly conclude that ads covered by the new definition of electioneering communications are so likely to have the purpose or effect of influencing federal candidate elections that spending on them may be subjected to limitations similar to those that already apply to expenditures for "express advocacy."[173] That question is most usefully addressed by reference to directly applicable cases such as *Austin* — not by false comparisons to laws banning or chilling criticism of the government or public officials, or banning newspapers from running election-day endorsements.[174]

Similarly, the NRA's charge that the true "animating force" behind Title II was the protection of incumbents adds nothing to the real debate in this case.[175] Any improper incumbent-protection motivation is both improbable and irrelevant. It is improbable because, as Members of Congress no doubt realized from their own experience, where an incumbent is running, group issue ads (negative or positive) that would be covered by BCRA are more likely to *support* them than oppose them.[176] In any event, what matters in assessing this constitutional challenge are not the personal motives (real or imagined) of particular legislators,[177] but the general legislative purposes

---

[172] *See Austin*, 494 U.S. at 660-69, *see* n.67, *supra*.

[173] *See* Intervenors' Br. at 75, 104-09; Gov't Br. at 134-35.

[174] *See* NRA Br. at 5-8 (discussing the Sedition Act of 1798 and *New York Times v. Sullivan*, 376 U.S. 254 (1964)); McConnell Br. at 44 & n.17 (citing *New York Times* and *Mills v. Alabama*, 384 U.S. 214 (1966)).

[175] NRA Br. at 15; *see also id.* at 3-9, 15-17.

[176] A search of the CMAG database reveals that in the 60 days before the 2000 election, 44 percent of all group ad airings naming candidates targeted races for open seats — that is, seats where no incumbent was running. But of the ads run in races with an incumbent, some 76 percent attacked a challenger or otherwise favored the incumbent. For description of the CMAG database, *see* Intervenors' Br. at 79.

[177] *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."); *id.* at 384 ("We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech

and important public interests apparent from the face of the statute, recognized in the long line of Supreme Court cases considering similar campaign finance legislation, and amply discussed in our opening brief.[178]

B. *Buckley v. Valeo* Did Not Establish "Express Advocacy" as a Constitutional Test.

Plaintiffs' argue that BCRA's definition of a new category of "electioneering communications" is precluded by *Buckley v. Valeo*.[179] *Buckley* limited FECA's expenditure and disclosure requirements for speakers other than candidates or political committees to "communications that in express terms advocate the election or defeat of a clearly identified candidate."[180] Plaintiffs contend that the Supreme Court thereby established a constitutional dividing line between campaign speech that may be covered by campaign finance laws, and other political speech that may not. Defendants' opening brief explains in detail why that reading of *Buckley* is incorrect, and we will not repeat the full analysis here.[181] We do, however, highlight two key analytical errors that plaintiffs make, and address their reliance on lower-court decisions.

First, plaintiffs correctly recognize that *Buckley* adopted the "express advocacy" construction in order to avoid a constitutional problem with the vagueness of particular statutory language.[182] They also recognize that the Supreme Court did not believe the "express advocacy" test successfully defined exclusive categories of "campaign" and "other" speech, and that the Court was under no illusion that the line the Court drew to make Congress's statute clear would perfectly

---

about it."); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 401 (1940) ("Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts.") (internal quotations omitted); *McCray v. United States*, 195 U.S. 27, 56 (1904) ("The decisions of [the Supreme Court] from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.").

178 *See* Intervenors' Br. at 112-17; Gov't Br. at 133-48.

179 *See* McConnell Br. at 47-51.

180 *Buckley v. Valeo*, 424 U.S. 1, 44 & n.52 (1976).

181 Intervenors' Br. at 99-103; Gov't Br. at 148-53.

182 McConnell Br. at 47-48.

(or even adequately) serve the legitimate goals that Congress was pursuing.[183] They overreach, however, in concluding that the Court nonetheless meant to enshrine "express advocacy" as a generalized constitutional test. Nothing in *Buckley* (or later cases) suggests that the Court saw the express advocacy standard as anything more than a potentially serviceable judicial gloss to provide needed clarity to particular statutory provisions.

Second, plaintiffs correctly note that the *Buckley* Court "did not posit a bipolar world of issue advocacy and express advocacy."[184] From that premise, however, they reason incorrectly that the Court meant to create a constitutional test "permitt[ing] regulation only where it is unmistakably clear that the speech at issue can only be characterized as express advocacy," and forbidding the inclusion of any speech other than express advocacy.[185] As we pointed out in our opening brief, even advertisements that contain words of express advocacy will often (indeed, usually) address issues, as well as supporting or opposing candidates — and yet there is no dispute that they are covered, and may constitutionally be covered, by FECA as construed in *Buckley*.[186] Conversely, experience more than confirms that advertisements discussing issues and candidates, but not containing particular words of "express advocacy," may nonetheless also have in part the purpose and effect of supporting or opposing a federal candidate. There *should* be no dispute that Congress remains free to adjust its statutory lines to cover such ads — provided it can do so in a way that does not raise the vagueness concerns addressed in *Buckley*, and that is both effective and properly tailored.[187] That is what Congress has done in Title II.

---

[183] *Id.* at 48-50.

[184] *Id.* at 49.

[185] *Id.* at 49, 51.

[186] *See* Intervenors' Br. at 122.

[187] Plaintiffs' contrary position would convert a narrowing construction adopted to avoid a vagueness problem with a specific statute into a prohibition against further legislative attempts to refine or readjust the original law. That approach cannot be reconciled either with past practice or with a proper view of the proper functions of courts and legislatures. *See, e.g.*, Gov't Br. at 149-51; Intervenors' Br. at 121-22; *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 374 (1971) (plurality opinion) (establishing time limits for government seizures of property, but noting that

The same observation substantially answers plaintiffs' reliance on decisions by lower federal courts strictly construing the "express advocacy" test.[188] The important point for present purposes is that these cases were decided in a historical context in which (i) the Supreme Court had constructed FECA to incorporate the test, (ii) Congress had amended FECA's definition of "independent expenditure" to incorporate the phrase "expressly advocating" and (iii) Congress had *not* undertaken to define any new or different statutory test.[189] In that context, most courts held that neither they nor the FEC had much authority to expand or reconceptualize the reach of the express advocacy test, or of the statute.[190] As the Fourth Circuit observed, although the policy reasons for a broader standard might be "powerful," any change in FECA's coverage had to come, not from the lower courts, but "from an imaginative Congress or from further review by the Supreme Court."[191] The present case arises from just such a fresh legislative initiative.

There are also some cases more like this one, in which courts have considered efforts by state legislatures to go beyond the "express advocacy" line. Some such efforts have been upheld, while others have been struck down.[192] No statute that has been invalidated involved a statutory

---

"[o]f course, we do not now decide that these are the only constitutionally permissible time limits. . . . [We are] fully cognizant that Congress may re-enact [the relevant statute] in a new form specifying new time limits, upon whose constitutionality we may then be required to pass."); *see also United States v. 12 200-FT. Reels of Super 8MM Film*, 413 U.S. 123, 130 n.7 (1973).

188 *See* McConnell Br. at 51-53.

189 *See* 2 U.S.C. § 431(17).

190 *See, e.g., Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001) (invalidating regulation defining express advocacy to include ads whose electioneering purpose could be gleaned from context); *Maine Right to Life Comm. v. FEC*, 98 F.3d 1, 1 (1st Cir. 1996) (*per curiam*) (substantially adopting lower court's opinion, 914 F. Supp. 8 (D. Me. 1996)). *But see FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987) (adopting contextual standard).

191 *Virginia Soc'y for Human Life*, 263 F.3d at 392.

192 *Compare, e.g., Kromko v. City of Tucson*, 47 P.3d 1137, 1140 (Ariz. Ct. App. 2002) (declining to limit "influencing the outcomes of elections" to magic words, because "such a narrow construction of the statute leaves room for great mischief. Application of the statute could be avoided simply by steering clear of the litany of forbidden words, albeit that the message and purpose of the communication may be unequivocal."); *State ex rel. Crumpton v. Keisling*, 982 P.2d 3, 10 (Ore. Crt. App. 1999) (rejecting the contention that *Buckley* required narrowing the phrase, "in support of or in opposition to a candidate," to magic words, partially because "the narrow, 'magic words' approach...is not very satisfying as to either the realities of what an advertisement or flyer actually communicates or the purpose of the election laws"); *Klepper v. Christian Coalition*, 259 A.D.2d 926 (N.Y. A.D. 1999) (upholding a state law that applied to ads run with a "connection with any vote"), *with, e.g., Planned Parenthood Affiliates of Mich. v. Miller*, 21 F. Supp. 2d 740, 741, 744 (E.D. Mich. 1998) (striking down state campaign finance statute that applied to ads that "use . . . a

definition as narrow, as carefully crafted, or as well supported by experience and evidence as the definition of electioneering communications that Congress has adopted in BCRA. That definition embodies Congress's considered judgment about how best to address what had become the wholesale evasion of FECA's existing provisions, as corporations, unions, and others concluded that they could manipulate the "express advocacy" test to engage in campaign spending without complying with the law's longstanding source restrictions and disclosure requirements. That legislative judgment merits deferential consideration by this Court.[193]

C. BCRA's Electioneering Communications Provisions Are Not Overbroad.

Plaintiffs also argue that BCRA's electioneering communications provisions are so overbroad that they must be struck down on their face.[194] That course is not proper unless plaintiffs carry their burden of showing that the Act is "substantially overbroad" when "judged in relation to the statute's plainly legitimate sweep."[195] Plaintiffs' argument takes two forms. First, they argue that BCRA is unconstitutional because it applies to not-for-profit corporations with essentially ideological, rather than economic, agendas. Second, they argue that the Act's definition of "electioneering communications" sweeps in a substantial amount of pure issue advocacy that is not designed to influence elections. Neither argument justifies facial invalidation of the new Act.

---

candidate's name or likeness . . . forty-five days prior to an election" in part because the State presented "no evidence to support that this [45-day] period is 'critical' with respect to voters."); *Right to Life of Mich. v. Miller*, 23 F. Supp. 2d 766, 769 (W.D. Mich. 1998) (invalidating the same Michigan statute because "[t]he State has come forward with no authority in support of its proposition that the limited time period justifies the restriction on issue advocacy."); *Governor Gray Davis Comm. v. Amer. Taxpayers Alliance*, 125 Cal. Rptr. 2d 534, 544, 548, 552 (Cal. Ct. App. 2002) (striking law that required disclosure where ad "taken as a whole and in context, unambiguously urges a particular result in an election," because, without a narrowing construction, the law could apply to (1) a "television spot [which] did not incorporate any reference to a vote, a candidacy, [or] an election," and (2) an ad that aired when California's "primary and general...elections in 2002 were nearly 8 months and 18 months away"); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999) (striking a vague state law requiring disclosure by any group "the primary or incidental purpose of which is to support or oppose any candidate . . . or to influence or attempt to influence the result of an election.").

[193] *See* Intervenors' Br. at 120.

[194] McConnell Br. at 56-69; NRA Br. at 14-33.

[195] *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

1. BCRA Appropriately Applies to Most Nonprofit Corporations.

Plaintiffs, and particularly the NRA and the ACLU, argue that corporations that are not organized or run for economic profit, but rather pursue ideological agendas, should not be treated like other corporations under BCRA or the rest of FECA — and that BCRA's application to nonprofit corporations makes the entire statute unconstitutional.[196] That argument is incorrect as a general matter, and this facial-challenge litigation is not the place for essentially as-applied arguments relating to the status of particular nonprofits.

As we explained in our opening brief,[197] it was entirely reasonable for Congress not to exempt nonprofit corporations as a class from BCRA's restrictions on the general-treasury funding of electioneering communications. The restrictions must apply, in particular, to nonprofits that accept funds from for-profit corporations or unions, simply in order to prevent easy evasion. In the absence of such a rule, covered entities could easily create nonprofit adjuncts, or fund existing nonprofits, to, in the Supreme Court's words, "serv[e] as conduits for the type of [otherwise prohibited] direct spending that creates a threat to the political marketplace."[198]

Senator Glenn described one concrete example of such evasion under pre-BCRA law: "An organization called the Economic Education Trust, which seems to exist only as a bank account, hired its own political consultants, planned its own advertising campaign, then 'shopped' for suitable nonprofit organizations to funnel the money for the ad campaign through."[199] [REDACTED] [200] So, for that matter, is plaintiff the Chamber of Commerce. The same technique could just as easily be used by unions. There is, accordingly, no question that BCRA's general approach of covering nonprofits is not only reasonable, but indispensable.

---

196 *See* NRA Br. at 17-24; ACLU Br. at 16-17.

197 Intervenors' Br. at 125-126.

198 *MCFL*, 479 U.S. at 264.

199 144 Cong. Rec. S1046 (daily ed. Feb. 26, 1998). [REDACTED].

200 [REDACTED]

As to any argument that a specific nonprofit, such as the NRA or the ACLU, should not be subject to BCRA's source restrictions, two existing Supreme Court decisions properly frame the issue. On the one hand, *FEC v. Massachusetts Citizens for Life* establishes that FECA's (and now BCRA's) restrictions on the use of corporate treasury funds cannot constitutionally be applied to certain nonprofit corporations.[201] *MCFL*, and related FEC regulations, establish the following basic criteria for exemption:

> *First*, [the corporation] was formed for the express purpose of promoting political ideas, and cannot engage in business activities. . . . *Second*, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. . . . *Third*, [the entity] was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. *This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political market place.*[202]

On the other hand, the Court's later decision in *Austin* establishes both that *MCFL*'s requirements are to be strictly construed, and that FECA's requirements may properly be applied to most "nonprofit ideological corporations" — in *Austin*, the Michigan Chamber of Commerce.[203]

The exemption arguments advanced by the NRA and the ACLU in this case founder quickly on the merits, because each organization accepts corporate funding. Those amounts may be

---

[201] *MCFL*, 479 U.S. 238 (1986).

[202] *MCFL*, 479 U.S. at 264 (emphasis added); *see also Austin*, 494 U.S. at 664 ("Because the Chamber accepts money from for-profit corporations, it could, absent application of [statutory source restrictions], serve as a conduit for corporate political spending."). For the FEC's regulations, *see* 11 C.F.R. § 114.10(c) and 67 Fed. Reg. 65,190, 65,211(Oct. 23, 2002) (amending 11 C.F.R. § 114.10, which implements the *MCFL* exemption). The post-BCRA amendments to the regulations make clear that plaintiffs are simply wrong when they claim (McConnell Br. at 45) that advertising by "so-called *MCFL* corporations" is subject to BCRA's source restrictions. Those regulations properly implement BCRA by recognizing that its provisions were intended to be subject to the same as-applied exemptions that applied to FECA under *MCFL*. *See* 148 Cong. Rec. S2096, S2141 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) ("[BCRA] does not purport in any way, shape, or form to overrule or change the Supreme Court's construction of [FECA] in *MCFL*. Just as an *MCFL*-type corporation, under the Supreme Court's ruling, is exempt from the current prohibition on the use of corporate funds for expenditures containing 'express advocacy,' so too is an *MCFL*-type corporation exempt from the prohibition in the Snowe-Jeffords amendment on the use of its treasury funds to pay for 'electioneering communications.'").

[203] *Austin*, 494 U.S. at 661-64.

"negligible" or "modest," as the organizations argue,[204] when viewed as a percentage of overall fundraising or spending — an observation that suggests, of course, that neither organization would be terribly burdened if it were to forgo corporate donations in order to qualify for an exemption from restrictions on its political advertising. But the absolute amounts involved — $85,000 for the ACLU, and $385,000 for the NRA[205] — are not trivial, and could quickly increase if the organizations become conduits for corporate or labor electioneering. The entity at issue in *MCFL*, by contrast, had a straightforward "policy not to accept contributions from [for-profit corporations]."[206] *MCFL* and *Austin* do not suggest any "de minimis" exception from that requirement. And while the D.C. Circuit has held, in a case involving the NRA itself, that an organization may qualify for an *MCFL* exemption so long as any corporate funding it receives is "*de minimis*," it also held that the appropriate test is absolute, not relative, and that a mere *$7,000* in corporate contributions in one year precluded the NRA from taking advantage of the exemption.[207]

More fundamentally, however, given the holdings and applicability of *MCFL* and *Austin*, there is no room in this case to challenge BCRA's electioneering communications provisions as a whole on the ground that it might be inappropriate to apply their source restrictions to *some* nonprofit corporations. Any corporation that believes it should fall within *MCFL* may seek exemption under the FEC's regulations. If it believes those regulations are too restrictive in interpreting the Supreme Court's existing decisions, it may challenge them on that basis. If it believes that the Constitution provides a greater or different exemption, it may make that claim, or

---

[204] NRA Br. at 2; ACLU Br. at 2 n.2.

[205] NRA Br. at 2; ACLU Br. at 2 n.2.

[206] *MCFL*, 479 U.S. at 264; *see also Austin*, 494 U.S. at 662 (reiterating narrowness of the *MCFL* exception and the "essential" character of the "crucial features" enumerated in *MCFL*).

[207] *FEC v. NRA*, 254 F.3d 173, 192 (D.C. Cir. 2001) ("We disagree with the NRA that because these contributions [from 1978 and 1982 of $7,000 and $39,786, respectively] represented a small percentage of its total revenues, they were de minimis and thus beyond the Act's purview. The key issue here is the amount of for-profit corporate funding a nonprofit receives. The harm contemplated by the statute stems from the absolute amount of corporate money an organization has to spend in the political process, not from the relationship between corporate contributions and the organization's total revenues.") (citation and internal quotations omitted).

resist enforcement, on an as-applied basis — just as in *Austin* or *MCFL*. But *MCFL*, which *upheld* such a challenge, did not for that reason invalidate all of FECA. And in *this* litigation, which challenges BCRA's electioneering communication provisions on their face, the question is not whether the NRA, the ACLU, or any other organization falls on one side or the other of the permissible, as-applied line. The question is whether the new provisions added to FECA by BCRA may constitutionally be applied to the same set of corporations (and, of course, unions, other groups, and individuals) to which FECA's existing provisions have long applied, and continue to apply. In other words, a contention that the NRA, the ACLU, or any other organization should be constitutionally exempted from BCRA amounts to a contention that it should be constitutionally exempted from FECA. Whatever the merits of such a contention, it is out of place in this case.[208]

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

Plaintiffs' more pertinent overbreadth argument is that BCRA's definition of "electioneering communications" sweeps too broadly.[209] That argument fails, however, for at least three reasons. First, BCRA legitimately covers ads with an electioneering purpose or effect, even if they also address issues. Second, plaintiffs must show substantial overbreadth in order to prevail in this facial challenge, and they have failed to carry that burden. Third, the evidence demonstrates that the overwhelming majority of ads covered by BCRA have the purpose or effect of influencing federal candidate elections.

---

[208] Indeed, the NRA specifically stipulated with defendants in this case that its as-applied challenge to coverage based on *MCFL* would be stayed pending the outcome of the general facial challenge. *See* Joint Motion to Stay (filed on July 26, 2002), at 2 (granted by the Court on Aug. 13, 2002).

[209] McConnell Br. at 57-69; NRA Br. at 17, 24-31.

a) The Relevant Question Is Whether One Purpose Of a Covered Ad Is To Persuade Voters To Support or Oppose a Candidate.

Plaintiffs repeatedly suggest that so long as an ad discusses an issue, it cannot properly be considered electioneering.[210] In *Buckley*, however, the Supreme Court clearly understood that election advocacy and discussions of issues are often intertwined.[211] Thus, under the Court's "express advocacy" test, the fact that an electioneering ad will likely also discuss issues does not immunize it from coverage under FECA. The Court's focus was on clarity, and by that standard any communication containing one phrase of express advocacy may be covered, regardless of how much issue discussion it may also include. Put another way, what mattered to the Court was not whether election advocacy was the only purpose, the primary purpose, or even a major purpose of a communication, but rather whether the statutory definition of covered communications was clear enough to be readily applied, and covered communications that were "unambiguously related to the campaign of a particular federal candidate."[212]

Buckley's approach comports well with the reality of campaign activity. Most candidate ads — the epitome of electioneering — refer to issues.[213] So do most, if not all, ads containing express advocacy.[214] Even the NRA, in this case, describes its PAC's electioneering expenditures as having the dual purpose of "furthering the NRA's . . . views on the Second Amendment right to keep and

---

[210] *See, e.g.*, McConnell Br. at 49 (*Buckley* "permitted regulation only where it is unmistakably clear that the speech at issue can only be characterized as express advocacy."); ACLU Br. at 1 (electioneering communications "are made illegal without regard to the issues discussed in the ads, despite the Supreme Court's clear holding" in *Buckley*); *id.* at 13 ("A central tenet of the Court's campaign finance jurisprudence has been the imperative of protecting issue advocacy from campaign finance controls."); *id.* at 15 ("issue advocacy is free from permissible regulation."); NRA Br. at 24-25 (even though the "NRA often makes references to public officials and candidates for federal office," since the "three principal purposes" of NRA ads are "(a) to educate the public...(b) to defend itself against attacks... and (c) to recruit members and raise funds," the "vast majority of this speech is not intended to influence elections").

[211] *See Buckley*, 424 U.S. at 42.

[212] 424 U.S. at 80; *see also id.* at 80-81 (disclosure rules cover "spending that is unambiguously campaign related").

[213] Jonathan S. Krasno, Rebuttal to Professor James L. Gibson (Oct. 14, 2002) at 11 [DEV 5-Tab 3, hereinafter Krasno Rebuttal Report]; Goldstein Rebuttal Report at 30-31.

[214] *Cf.* Goldstein Rebuttal Report at 29 ("One would expect the bulk of electioneering ads to address policy matters.").

bear arms . . . [and] promoting candidates for federal office."[215] The reason is plain: the way to move voters at the polls is to strike a chord with voters on issues that are important to them, and to link those issues to the targeted candidate. Accordingly, a statutory test may plainly cover communications that address issues, so long as what it targets are communications that also support or oppose candidates.

b) The Standard for Facial Invalidation Is Substantial Overbreadth, Not Legislative Perfection

BCRA's electioneering communications provisions are not facially invalid unless plaintiffs can show that they are "substantially overbroad" when "judged in relation to the statute's plainly legitimate sweep."[216] That means plaintiffs must demonstrate a "substantial number of impermissible applications."[217] A showing of "'some' overbreadth" is not enough to invalidate a statute on its face.[218] Nor is "the mere fact that one can conceive of some impermissible applications of a statute."[219] Indeed, "[f]acial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'"[220]

In this case, the clarity of BCRA's definition of electioneering communications also sharply limits plaintiffs' ability to mount a facial challenge. "[T]he vagueness of a law affects overbreadth analysis. The Court has long recognized that ambiguous meanings cause citizens to 'steer far wider of the unlawful zone'. . . than if the boundaries of the forbidden areas [are] clearly marked."[221]

---

[215] NRA Compl. at 9.

[216] *Broadrick*, 413 U.S. at 615; *see also id.* at 618 ("[W]e do not believe that [the statute] must be discarded in toto because some persons' arguably protected conduct may or may not be caught or chilled by the statute.").

[217] *New York v. Ferber*, 458 U.S. 747, 771 (1982).

[218] *Ashcroft v. ACLU*, 535 U.S. 564, __, 122 S. Ct. 1700, 1713 (2002).

[219] *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984); *see also New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988) (burden is on plaintiff to "demonstrate . . . from actual fact that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally").

[220] *NEA v. Finley*, 524 U.S. 569, 580 (1998) (citing *Broadrick*, 413 U.S. at 613); *see also, e.g., Los Angeles Police Dept. v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999).

[221] *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495 n.6 (1982) (citations omitted).

Moreover, as we have discussed, the constitutional problem that originally led the *Buckley* Court to adopt the "express advocacy" test was the prospect of speakers censoring themselves because of uncertainty about what the statute covered. Plaintiffs have abandoned any attempt to argue vagueness with respect to BCRA's principal definition of electioneering communications. And when lines are clear and well justified, the Supreme Court in its campaign finance and related cases has accorded Congress appropriate latitude in deciding exactly where to draw them.[222]

It is worth noting that the overbreadth doctrine developed in part because laws that were not well drawn would have an unacceptable chilling effect on speech and might not be made the subject of as-applied challenges by those whose expressive rights were affected.[223] In that context, vague laws had an unacceptable chilling effect on speech, and might seldom or never be made the subject of as-applied challenges by those whose rights were most affected. *Broadrick*, however, made clear that overbreadth inquiries do not turn on whether a challenged statute might conceivably be applied to protected speech. Particularly when a statute regulates conduct "in the shadow of the First Amendment, but . . . in a neutral, uncensorial manner," courts should instead consider whether any threat to protected speech is so great that it would be inappropriate to rely on the ordinary course of case-by-case, as-applied review.[224] In this case, there is no risk that plaintiffs will not understand

---

[222] *Buckley* upheld FECA's $1,000 contribution limit, for example, even though the Court "assumed" that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29; *see also Austin*, 494 U.S. at 661 (rejecting overbreadth claim based on argument that prohibition against corporate treasury funds applied with equal force to corporations "without great financial resources"); *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 580-81 (1973) (rejecting overbreadth challenge to Hatch Act prohibition on political activities by federal employees; "[T]hese restrictions are clearly stated, [and] they are political acts normally performed only in the context of partisan campaigns by one taking an active role in them[.] . . . Even if the provisions forbidding partisan campaign endorsements and speechmaking were to be considered in some respects unconstitutionally overbroad, . . . [t]he remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable partisan conduct . . ., and the extent to which pure expression is impermissibly threatened, if at all, . . . does not in our view make the statute substantially overbroad and so invalid on its face.").

[223] *Broadrick*, 413 U.S. at 611-13.

[224] *Broadrick*, 413 U.S. at 614-15 (citing, *inter alia, United States v. Harriss*, 347 U.S. 612 (1959); *United States v. CIO*, 335 U.S. 106 (1948)).

the scope or meaning of the relevant statutory provisions.[225] Nor are these plaintiffs, or others like them, particularly vulnerable, likely to be chilled in their speech, or likely to find themselves unable to seek protection of their rights if and when a situation actually arises in which the Act might be applied to them in an arguably unconstitutional way. And it is far from clear when or how such a situation will arise, because some organizations will qualify for an *MCFL* exemption; many others will be able to run pure issue ads that fully serve their purposes without triggering the Act's restrictions; and all will be able to run whatever ads they want simply by using PAC funds and making reasonable disclosures. Under such circumstances, awaiting as-applied challenges arising in specific factual contexts is by far the wiser course.

Finally, despite their criticisms of the lines Congress has drawn, plaintiffs have not suggested any alternative approach to the threshold question of coverage that would satisfy the need for clarity while allowing Congress to take some action to stem the wholesale evasion of longstanding restrictions on corporate and union electioneering that has characterized recent federal elections. Their argument appears to be that the express advocacy test is the best that Congress can constitutionally do. As experience has shown, however, and as plaintiffs effectively concede, that is simply a counsel of despair.[226] We have explained why that counsel is incorrect as an interpretation of *Buckley* or other existing law.[227] Given Congress's considered decision to approach the demonstrated evasion problem with lines carefully drawn to be clear, effective, and yet highly respectful of First Amendment concerns — and given the paucity of actual evidence of potential overbreadth adduced here — it would be even more incorrect for the courts to condemn that legislative approach as facially invalid.

---

[225] *Cf. Broadrick*, 413 U.S. at 607 ("Whatever other problems there are with § 818, it is all but frivolous to suggest that the section fails to give adequate warning of what activities it proscribes or fails to set out explicit standards for those who must apply it." (internal quotations omitted)).

[226] *See, e.g.*, Intervenors' Br. at 99-103, 116-17; McConnell Br. at 48-50.

[227] *See* Part II.B.

c) The Vast Majority of Ads Covered by BCRA Are Intended to Influence Elections.

Plaintiffs argue generally that Title II is overbroad, and some identify a few ads they allegedly ran without any electioneering purpose, or flatly deny that their ads were intended even in part to influence elections.[228] As we have just discussed, however, the more common (and supportable) contention that an ad had some *non*-electioneering purpose is very different from denying that it was intended at least in part to influence an election, or would predictably have had that as one effect.

[REDACTED][229]

[REDACTED][230]

The NRA, for its part, admits some of its ads were intended to influence federal elections, although it now denies that others, particularly some of its longer "infomercials" referring to Al Gore, had that intent.[231] In his declaration, NRA Executive Vice President Wayne LaPierre said for the first time that some NRA infomercials that referred to Mr. Gore did not have electoral intent. This new assertion is, to say the least, curious, in light of LaPierre's admissions that the "overriding NRA objective" in 2000 was to defeat Al Gore[232] and that every ad aired by the NRA "that mentioned Al Gore" was run as part of a "battle" and would at least have had as "one byproduct"

---

[228] *See* NRA Br. at 1; [REDACTED].

[229] AFL-CIO Br. at 5 n.5.

[230] [REDACTED] ; *see also* Intervenors' Br. at 91-94, 97-98. [REDACTED]

[REDACTED].

[231] NRA Br. at 1-2 (asserting that speech serving various purpose was not intended to influence elections, but acknowledging that approximately 30,000 minutes' worth of ads criticizing Vice President Gore did have such a purpose); *id.* at 24-33 & n.17.

[232] LaPierre Dep. Tr. at 56.