No. 02-1675

In The Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION, *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

REPLY BRIEF FOR APPELLANTS THE NATIONAL RIFLE ASSOCIATION, *ET AL.*

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INTRODUCTION

The central thesis of Defendants' Title II argument is that Congress has merely taken an "evolutionary step" to "plug a loophole" in the regulation of corporate participation in federal elections. Brief for Federal Election Commission, *et al.* (filed Aug. 5, 2003) ("SG Br.") 72-85; Brief for Intervenor-Defendants (filed Aug. 5, 2003) ("Int. Br.") 42-54. This defense rests on the premise that Congress may constitutionally prohibit any corporation from using general treasury funds to pay for electioneering through express advocacy: if that is so, Defendants argue, Congress must necessarily be able to prohibit any corporation from using general treasury funds to pay for communications that Congress has deemed to be substantively equivalent to express advocacy.

The fundamental flaw in Defendants' premise is that this Court has thrice rejected legislative restrictions on corporate political speech funded purely through individual donations. *See FEC v. MCFL*, 479 U.S. 238 (1986); *FEC v. NCPAC*, 470 U.S. 480 (1985); *Buckley v. Valeo*, 424 U.S. 1 (1976). And the only governmental interest ever held sufficiently compelling to justify a restriction on corporate independent expenditures was that of preventing the "use [of corporate] resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace." *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 658-59 (1990) (internal quotations omitted). This Court's campaign finance cases thus make clear that there is a fundamental constitutional line between the independent political expenditures of certain types of corporations: the electioneering expenditures of the Massachusetts Citizens for Life cannot be regulated, while those of the Michigan Chamber of Commerce can.

The question raised by the NRA here is where along that line it and other grassroots advocacy groups fall. We respectfully submit that it is clear from the reasoning that protected MCFL and doomed the Michigan Chamber of Commerce that the line falls between, on the one hand, corporate organizations funded by individual members

and defined by a political mission (*e.g.*, NRA, ACLU, Sierra Club), and, on the other, corporate organizations funded by business profits and defined by an economic mission (*e.g.*, business corporations, trade associations). The First Amendment guarantees individuals an unfettered right to engage in political discourse. Given the practical realities of modern mass media, however, individuals of ordinary means must pool their resources in order to exercise their speech rights in a meaningful way, and grassroots advocacy organizations spanning the political spectrum serve a vital role in allowing the voices of like-minded individuals to be joined, and heard.

BCRA's principal sponsors attempted in Section 203(b) to exempt 501(c)(4) organizations from Title II because they thought that such an exemption was likely required by this Court's decisions. *See* Brief for Appellants the National Rifle Association, *et al.* (filed July 8, 2003) ("NRA Br.") 6, 29-30. Their constitutional warnings against the Wellstone Amendment, however, were ignored (primarily by BCRA's *opponents*), and Section 203(b) was nullified (but preserved in the statute to ensure the severability of the Wellstone Amendment). We submit that the initial constitutional judgment of BCRA's main sponsors was sound, and that narrow tailoring requires the invalidation of the Wellstone Amendment and the restoration of Section 203(b).

But even if this Court accepts the premise that Congress may restrict the independent electioneering speech of individually funded advocacy groups like the NRA, Title II cannot survive. First, Defendants cannot rebut the overwhelming evidence demonstrating that the animating purpose of Title II was the impermissible desire to suppress speech because of its substantive content – the "negative attack ads" that Members of Congress denounced as a "nightmare." *See* NRA Br. 7-14; NRA Br. Appendix of Legislative History ("LH App. _a") 1a-57a. And while this impermissible purpose infects all of Title II, it is nowhere more evident – and nowhere more fatal – than it is in explaining why Congress passed the Wellstone Amendment. Second, the political speech that Title II

sweeps within its definition of "electioneering communications" includes a substantial quantity of speech that is *not* "electioneering." Using Defendants' own methodology, fully one-third of the speech that would have been covered by BCRA had it been in effect in 2000 was genuine issue advocacy – speech that even Defendants have never suggested may be constitutionally regulated. Accordingly, whatever regulations may be permissible with respect to express advocacy, Defendants cannot carry their heavy burden of sustaining Title II.

I. THE WELLSTONE AMENDMENT IS UNCONSTITUTIONAL.

Strikingly, the Government says *nothing* in defense of the Wellstone Amendment's curtailment of 501(c)(4) organizations' ability to run electioneering communications funded by individuals. Indeed, the Government does not disavow its representation below that the amendment was designed to "prevent large soft-money donations from individuals" from going toward independent electioneering communications. Reply Brief for Federal Election Committee, *et al.* (filed Nov. 27, 2002) 58-59, *McConnell v. FEC*, 251 F. Supp. 2d (D.D.C. 2003) (No. 02-582). Nor does the Government deny that such a purpose is patently impermissible and in any event readily achieved through the less restrictive alternative of capping the amount of an individual donation that may be used to fund such political speech. *See* NRA Br. 31 & n.27; *see also* NRA Br. 28-29. It likewise offers no account of why the original Snowe-Jeffords provision (Section 203(b)), by limiting the electioneering communications of advocacy organizations to the amount of their support from individuals, is not the less restrictive and thus constitutionally requisite means of addressing any genuine corruption concern behind Title II. *See* NRA Br. 31-33. The Wellstone Amendment is therefore unconstitutional on its face, both because it has an impermissible purpose and because it is not narrowly tailored.

Rather than defend the Wellstone Amendment, the Government seeks to avoid consideration of it. It reasons that *MCFL*-qualified entities remain free to speak and that the arguments of particular nonprofits that they so qualify should be resolved via separate, as-applied challenges. *See* SG Br. 112-13; *see also* Int. Br. 74-75. That is true, but irrelevant. The NRA agreed below to stay its as-applied arguments that, notwithstanding the FEC's contrary position, it qualifies for a special exemption under *MCFL*. *See* S.A. 833.[1] But the NRA did not thereby abandon its facial arguments that the Wellstone Amendment has an impermissible purpose and is not narrowly tailored.

Section 204 on its face restricts, in *any* conceivable application, the ability of all 501(c)(4) advocacy groups to fund independent expenditures with individual contributions – that is its *raison d'etre*. The question before this Court is whether that restriction, which deprives all such corporations of the ability they would otherwise have under Section 203(b) to draw upon individual donations in order to fund electioneering communications, satisfies strict scrutiny. Far from preserving the proper course of judicial review, upholding the Wellstone Amendment without rigorous analysis of its ends and means would be an abdication of strict scrutiny.[2]

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[1] Although the NRA has briefed its specific features as a political speaker, it has done so simply to illustrate the facial overbreadth and impermissible purpose of Title II, whose supporters trumpeted the NRA as the prototypical speaker they sought to muzzle. *See* LH App. 52a-59a.

[2] Contrary to half-hearted suggestions from the Defendants, *see* SG Br. 113; Int. Br. 73-75, this Court has never had occasion to undertake this analysis. MCFL did not offer a less restrictive alternative, as it mounted an as-applied challenge (in response to an enforcement action) and prevailed on narrower grounds, without regard for the rights of other nonprofits or alternatives for regulating them. *See* 479 U.S. at 245. Nor did the Michigan State Chamber of Commerce present the issue in *Austin*, for its challenge turned on its specific facts as a 501(c)(6) trade association funded overwhelmingly by business profits.

(Continued on following page)

The Intervenors, having been abandoned by the Government's lawyers, thus stand alone in attempting to justify the Wellstone Amendment.[3] *See* Int. Br. 74. None of their *post hoc*, hypothesized justifications for the statute is cognizable under strict scrutiny. *See* NRA Br. 15-16. And, in any event, each of the Intervenors' purported justifications for the Wellstone Amendment is substantively meritless, as explained in the NRA's opening brief. *See* NRA Br. 31-33. The Intervenors assert that "individuals who support a nonprofit's basic mission . . . do not necessarily want their funds to be used to support or oppose candidates," Int. Br. 73-74, but fail to answer any of the NRA's points that (i) there is no indication in the *legislative* record that Congress shared this concern, (ii) there is no evidence in the *litigation* record to substantiate it, (iii) it would apply equally to PACs and political parties, and (iv) it would enable Congress to deprive individuals of modest means of their ability to gain an effective voice in our democracy by "delegat[ing] authority" to nonprofit organizations that spend their donations "in a manner that best serves the shared political purposes of the organization and contributor," *MCFL*, 479 U.S. at 261; *see NCPAC*, 470 U.S. at 494-95. *See* NRA Br. 32-33, 29. Moreover, even if this concern had truly motivated Congress, it could "be met . . . by . . . simply requiring that contributors be informed that their money may be used for such a[n electioneering] purpose." *MCFL*, 479 U.S. at 261.

See 494 U.S. at 664. The Court's suggestion in *FEC v. Beaumont*, 123 S. Ct. 2200 (2003), that advocacy groups like the NRA may warrant regulation merely because they are "politically powerful organizations," *id.* at 2209, relates specifically to *contribution* limits, does not contemplate strict scrutiny, and therefore is untethered to a particular regulatory purpose or alternative means of achieving it.

[3] The irony of their predicament is exquisite: all four of the Senator-Intervenors voted *against* the Wellstone Amendment, *see* LH App. 41b-42b (appended hereto), and Senator Feingold expressly did so on constitutional grounds. *See* NRA Br. 29-30; LH App. 58a, 63a.

The Intervenors similarly posit that the Wellstone Amendment responds to the prospect that, under Section 203(b), "corporate . . . contributions could be used to fund *all* the organization's non-campaign activities, freeing individual contributions for electioneering communications." Int. Br. 74. Again, nothing in the legislative record suggests that this concern occurred to Congress. And Intervenors ignore that this "fungibility" phenomenon is built into existing law. *See* NRA Br. 31-32. Nor do they deny that, by limiting nonprofits' funding of electioneering communications to no more than the amount voluntarily donated by individuals, Section 203(b) would ensure the appropriate "correlation" between political expenditures and support from individuals, and wholly foreclose nonprofits from becoming mere "conduits" through which business corporations might spend their own general treasuries on electioneering. *Austin*, 494 U.S. at 660, 664; s*ee* NRA Br. 32; LH App. 15b-18b (appended hereto).

Finally, the Intervenors attempt to invent a compelling interest in avoiding the complexity of administering and enforcing Section 203(b). *See* Int. Br. 74. This hypothesized rationale would likewise suffice for Congress to abolish separate segregated funds, with all of the intricate and nettlesome rules that attend them; or the *MCFL* exception, with its much-controverted criteria; or, for that matter, any inconvenient aspect of a tailored speech restriction that could more simply and surely be replaced with an across-the-board ban on speech. Suffice it to say that if this rationale, without more, indeed satisfied strict scrutiny, it would be ruinous of First Amendment protections.

II. TITLE II WAS ENACTED TO STIFLE SPEECH.

Defendants do not dispute that, because Title II demands strict scrutiny, defense of it must be confined to Congress's *actual* purpose and cannot rest upon hypothesized or *post hoc* justifications. *See* NRA Br. 15-16. They nonetheless concoct a stew of purported rationales for Title II – *see* Part III, *infra* – that Congress never contemplated,

while eliding Congress's avowed and plainly impermissible objective: suppressing "negative attack ads" that criticize candidates and otherwise disrupt their well orchestrated campaigns. *See* NRA Br. 3-4, 7-14; LH App. 1a-51a.[4]

The Government does not deny that the legislative record manifests the impermissible intent behind Title II. Evidently, the Government's theory is that its recitation of the purposes behind *different* statutes regulating campaign finance by itself suffices, under strict scrutiny, to justify *any* law that might expand existing regulations. But a crucial role of strict scrutiny is to root out an impermissible purpose of the specific speech restriction under review. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 580 (1983). And here there is no doubt that the animating purpose of Title II was to insulate candidates against attack and thereby protect incumbents. *See* NRA Br. 7-11; LH App. 49a-51a. Title II can no more be justified as an anti-corruption measure than could the Sedition Act.

The Intervenors at least mention the legislative history of Title II. But they do not grapple with the litany of floor statements demonstrating Title II's impermissible purpose, *see* LH App. 1a-51a, apart from offering their own relatively meager selection of legislative statements said to be more "representative" of congressional intent. Int. Br. 59 n.48. In particular, they do not deny that Members of Congress passed Title II with the express intention of getting "'poison politics off television'" and "'making sure the flow of negative attack ads by outside interest groups does not continue to permeate the airwaves.'" NRA Br. 9

[4] The underinclusiveness of Title II confirms that Defendants' *post hoc* purposes did not animate Congress. Unlike the laws at issue in *Buckley* and *Austin*, Title II regulates electioneering only at certain times and in certain media, inexplicably leaving corporations free in all other respects to spend their treasuries on electioneering speech that may contravene contributors' wishes. *See* NRA Br. 8-9 n.5.

(citing LH App. 8a-9a); *see also* NRA Br. 10 n.6; LH App. 1a-45a, 49a, 56a.[5]

The scraps of legislative history cited by Intervenors are not remotely "representative" of a legitimate, let alone compelling, purpose for Title II. First, most of the 21 Members of Congress whose floor statements are carefully excerpted by the Intervenors *expressly avow* an impermissible purpose for Title II – be it the suppression of negative attack ads or the equalization of voices by restricting wealthy individuals from funding independent expenditures.[6] Second, only some four Members of Congress quoted by Intervenors specifically connected Title II's prohibition of corporate electioneering to an attempt to combat corruption as identified by this Court.[7] Those isolated remarks are overwhelmed by the chorus of impassioned speeches detailing how and why Title II would rid the airwaves of the negative attack ads that are the bane of incumbent politicians. Third, virtually all of the floor

[5] Indeed, the Intervenors themselves have been quite clear about this. *See*, *e.g.*, J.A. 915 ("if [critical ads are] run and you can't respond, which is one of the big purposes of our law, then you're defenseless") (Sen. Jeffords); J.A. 936 ("Candidate after candidate has said, 'We lost control of our campaigns.' . . . And that's what we're trying to take care of.") (Sen. McCain); LH App. 1a-6a.

[6] Appended to this brief are many of the relevant floor statements, including excerpts tellingly omitted by Intervenors, which, combined with the legislative history appended to the NRA's opening brief, offer a complete sense of the unconstitutional intendment they reflect. Portions of legislative history specifically appended to this brief are cited as "LH App. _b" as opposed to "_a." *See Sen. Bryan* at LH App. 1b-2b; *Sen. Collins* at LH App. 22a-23a, 2b-3b; *Sen. Dodd* at LH App. 24a-27a, 3b-5b; *Sen. Dorgan* at LH App. 18a-22a, 5b-12b; *Sen. Edwards* at LH App. 12b-13b; *Sen. Feinstein* at LH App. 19b-22b; *Sen. Glenn* at LH App. 42a; *Sen. Jeffords* at LH App. 4a-6a, 25b-29b; *Sen. Kennedy* at LH App. 15a; *Sen. Lieberman* at LH App. 15a, 31b-32b; *Sen. McCain* at LH App. 1a-4a; *Rep. Borski* at LH App. 35b-36b; *Rep. Nadler* at LH App. 37b-38b.

[7] *See Sen. Snowe* at Int. Br. 12a-13a; *Sen. Feingold* at Int. Br. 15a-16a; *Sen. Jeffords* at Int. Br. 16a; *Sen. Edwards* at Int. Br. 17a-18a.

statements subvert Defendants' case in at least one of two crucial respects: they focus on a need to require *disclosure*, which Title II does wholly apart from, and presumptively as a less restrictive alternative to, *prohibiting* corporate electioneering communications, *see* NRA Br. 16 n.12, and/or they identify an interest in suppressing the *overall volume* of electioneering communications, thereby belying Defendants' characterization of Title II as a source restriction indifferent to the quantity of speech.[8]

Finally, none of the statements compiled by the Intervenors even purports to justify the Wellstone Amendment, the impermissible purpose of which goes undisputed. *See supra* at 3-4; *see also* NRA Br. 28-31; LH App. 65a-68a. Nine of the twelve Senators quoted by the Intervenors, including all four relevant sponsors of BCRA (Senators Feingold, Jeffords, McCain, and Snowe), voted *against* the Wellstone Amendment. *See* LH App. 41b-42b. Indeed, Senator Feingold explained in the very statements quoted by Intervenors that Section 203(b), in contradistinction to the Wellstone Amendment, was the constitutionally requisite approach to addressing any corruption concerns. *See* LH App. 13b-19b. In sum, whatever purpose the Intervenors may drape over Title II generally, the unconstitutional design of the Wellstone Amendment remains naked before this Court.

III. DEFENDANTS' JUSTIFICATIONS FOR TITLE II CANNOT SURVIVE STRICT SCRUTINY.

A. The Government's main defense of Title II is that it protects the electoral process from *Austin*-style

[8] Although the Intervenors also cite some congressional reports and hearings, they cite no evidence that any Member of Congress relied upon those hearings and reports in addressing Title II. With respect to the Thompson Committee Report, its role in the legislative debates over BCRA was strictly limited to *Title I* and its regulation of *parties' use of soft money*, as apparent from Sen. Thompson's own *amicus* brief. *See*, *e.g.*, Thompson Br. 28-30 & n.24; *see also* LH App. 22b-25b.

"corruption." SG Br. 73-78, 86-87; *see also* Int. Br. 57, 73. This rationale was anticipated and answered in the NRA's opening brief. *See* NRA Br. 20-23. Defendants' principal authority for extending *Austin*'s rationale from businesses or trade associations funded by corporate earnings (*e.g.*, the Chamber of Commerce) to ideological nonprofit groups funded by small individual membership dues (*e.g.,* NRA, ACLU, Sierra Club), is this Court's recent decision in *Beaumont*. But *Beaumont* itself reaffirmed that *Austin*'s rationale for restricting independent political *expenditures* was limited to preventing businesses from "'us[ing] *resources amassed in the economic marketplace* to obtain an unfair advantage in the political marketplace.'" 123 S. Ct. at 2206 (quoting *Austin*, 494 U.S. at 659) (emphasis added). *See* NRA Br. 21-22.

Defendants offer three grounds for rehabilitating their *Austin* argument. First, they retreat to the proposition that even if 501(c)(4) advocacy groups lack business-generated wealth, they still enjoy a tax exemption. *See* SG Br. 75 n.34 (citing *Beaumont*, 123 S. Ct. at 2209). Regardless of whether that attenuated *post hoc* rationale might satisfy the minimal judicial scrutiny appropriate to laws restricting *contributions*, it cannot survive the strict scrutiny required for Title II's limits on *independent expenditures*. *See* NRA Br. 21-22 & n. 17. Title II makes no effort to connect the speech restrictions it imposes on 501(c)(4) corporations to the amount of their tax savings, nor permits them to forego their tax exemption in order to fund electioneering communications. That is, the one simply has nothing to do with the other.

Second, Defendants assert (again, without offering any evidence) that advocacy groups "could quickly become easy-to-use . . . conduits for unlimited campaign spending by unions and for-profit corporations." Int. Br. 73. But Title II itself, as previously detailed, contains a much less restrictive alternative for shutting down these supposed "conduits": Section 203(b) requires advocacy groups to fund their political speech exclusively with individual contributions. *See* NRA Br. 28; *supra* at 3-4; *see also* LH App. 15b-18b.

Third, Defendants assume (without explanation, let alone support in the legislative record) that grassroots advocacy groups like the NRA present the same danger as business corporations simply because the former, too, share the corporate form of organization. But the money that the NRA spends on political advocacy does not flow from the "'special advantages'" of incorporation such as "'perpetual life'" or "'favorable treatment of the accumulation and distribution of assets'" that allows the aggregation and transmission of wealth. SG Br. 74-75 (quoting *Beaumont*, 123 S. Ct. at 2206). Rather, the NRA annually receives voluntary donations from millions of individual members to support its efforts to protect their Second Amendment rights. If mere use of the corporate form, with its "special advantages," indeed sufficed to justify regulation, then the electoral speech of either NCPAC or MCFL could be silenced as well.

The reality, of course, is that Congress did not pass Title II (let alone the Wellstone Amendment) because it was concerned that the electioneering communications of advocacy groups might be amplified by business profits, but because it resented the political speech of such corporations and the individuals who support them. *See supra* at 7-9. Defendants nonetheless urge *deference* to the expert judgment of the Members of Congress, who are "uniquely positioned," we are told, by their personal experience as political candidates to determine the proper scope of regulation of electioneering speech. SG Br. 92; Int. Br. 56. But what Members of Congress are truly "expert" at is protecting their incumbencies. *See* NRA Br. 10-13. Title II is not about "corruption." It is about shutting down paid political ads that focus the electorate's attention, and that incumbents consequently loathe. NRA Br. 9-10 & n.6. Courts may not defer to legislators where such deference risks the "constitutional evil[ ]" of "permitting incumbents to insulate themselves from effective electoral challenge." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring).

B. Defendants' second rationale for Title II is the supposed need to protect members of advocacy organizations from having their dues "misused" for political purposes. SG Br. 86; Int. Br. 57, 73-74. Once again, this argument was anticipated and has been answered. *See* NRA Br. 23-24 & n.19, 32-33; *supra* at 5.

C. Defendants' third rationale for Title II is the "risk of real or apparent quid pro quo corruption" that supposedly arises if a candidate is "'appreciative'" of favorable independent electioneering communications by a nonprofit advocacy group. SG Br. 89, 83 (quoting S.A. 837); *see also* Int. Br. 57. Defendants acknowledge that this rationale has never been held to justify restrictions on *independent expenditures* as opposed to *contributions*. *See* SG Br. 88 (discussing *NCPAC*). And they do not deny that this rationale would apply equally to such political speech as candidate endorsements and fundraisers, and to such political speakers as PACs and wealthy individuals. A politician who is benefited is obviously as grateful for one, or to one, as the other. *See* NRA Br. 17-18 & n.13. The terms and stakes of this dispute are thus starkly laid out; either the ever-expanding notion of "corruption" or the tenets of our democracy must yield, for if Defendants' line of argument is accepted the former will inexorably engulf the latter.

Although the Government correctly observes that "gratitude for political support in the form of *contributions* directly from a corporate or union treasury has long been viewed as corruption," it is quite disingenuous in adding, "as has gratitude for political support in other forms." SG Br. 89. This "gratitude for political support in other forms" to which the Government refers in fact encompasses such things as "gifts," "bribes," or "illegal gratuities" – that is, money or its functional equivalent – given directly to candidates. *See* SG Br. 28-29. But this Court's jurisprudence establishes that the independent expenditures of outside groups cannot be equated with "bribes" or even contributions, either in terms of their corruption potential or their associational and expressive value under the First

Amendment. *See*, *e.g.*, *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440-41 (2001).

If independent political speech could *ever* be treated as direct contributions for purposes of government regulation, the requisite showing assuredly has not been made here. The "evidence" cited by Defendants to show the supposedly corrupting effect of independent expenditures consists of nothing more than conclusory generalizations that candidates "appreciate" issue ads that praise their positions or denigrate those of their opponents. *See* Int. Br. 55 & n.42. Title II obviously was not designed to combat *this* phenomenon, since candidates will "appreciate" issue ads whether they are paid for by PACs, by wealthy individuals, or by general treasury funds. *See* NRA Br. at 25 & n.20. The Congress that passed Title II was motivated not by a desire to curb "appreciation," but rather by its distaste for "negative" issue ads. *See* NRA Br. 7-10; LH App. 1a-3a, 35a, 40a-45a, 57a. And far from sharing the Defendants' supposed concern that gratitude and political debts would follow from these outside issue ads, Congress was convinced that "all of us should hate them," LH App. 8a, because the "candidates themselves disapprove of [them]," LH App. 1a, and they tend to "bring[ ] in other issues that the two candidates themselves do not even want to talk about." LH App. 40a. Therefore, when Defendants try to justify Title II with their notion that Congress deemed politicians *unduly grateful* for the independent expenditures of outside groups, they are not only departing from the legislative record, but affirmatively contradicting it.

The evidentiary record compiled in the district court bears out the fundamental difference between contributions and expenditures in terms of their corruption potential. *See* NRA Br. 18-19 & n.14. Defendants' briefs only further highlight this difference by touting the evidence of corruption that they claim supports their defense of Title I's soft money contribution limits. *See* SG Br. 22, 37-42; Int. Br. 8-9, 12-16. But there is no evidence – none – demonstrating even a remotely comparable system of gaining "more access and influence" in exchange for "more issue ads."

Votes may be *influenced* by large *contributions* to parties, *see* Int. Br. 15, but issue ads can be effective only through the *political accountability* that lies at the heart of democracy. Such ads "fan the flames," J.A. 1017-19, and appeal to the "grassroots." J.A. 837-39. Thus, where "candidates as well as elected officials would prefer not to have th[e] campaign focus on a particular hot button issue . . . a campaign of issue ads may have the effect of forcing them to talk about it," thereby "serv[ing] to inform voters about the particular office holders' or candidates' voting record on a particular issue." J.A. 850-52; *see also* Deposition Transcripts Unified Filing at Chapin Dep. 57 (admitting that issue ads about taxation and crime "changed the focus of the main issues that were being discussed between the candidates"); *see* NRA Br. 19-20 n.16. Thus, issue advocacy groups have power precisely because they *speak to the voters*, not because they add to partisan coffers. In contrast, Title I soft money is corrupting precisely because it does not have "an ideological motivation," but instead is explicable solely as an effort to "buy[ ] access." SG Br. 38 (quoting S.A. 621).[9]

In short, while Defendants must satisfy far stricter scrutiny in defending Title II than in defending Title I, they have far less in the way of concrete evidence. Their *post hoc*, generalized claim that politicians may be "grateful" for broadcasts aired by advocacy groups is sorely at odds with Congress's own view and cannot in any event suffice to meet the strict scrutiny applicable to Title II.

D. Defendants' fourth and final justification for Title II is that its limits on independent expenditures "prevent[ ] the circumvention of existing statutory limits." SG Br. 89-90; *see also* Int. Br. 58 & n.46. But this justification

[9] According to Defendants, the proof positive that soft money is intended solely to buy favors rather than to promote ideological causes is that most major donors systematically give to *both* parties. *See* SG Br. 38; Int. Br. 15. No comparable practice exists with respect to issue advocacy.

cannot stand by itself with respect to the independent expenditures that Title II would regulate. *See Buckley,* 424 U.S. at 44-47. And the Defendants have not identified a compelling corruption rationale for regulating the independent political speech, be it electioneering or otherwise, of nonprofit advocacy groups funded by individuals.[10]

E. The pretextual nature of the interests hypothesized by the Government is further confirmed by Title II's failure to regulate PACs, notwithstanding that their helpful ads would be no less appreciated by candidates, they enjoy the "'special advantages'" of the corporate form, SG Br. 74-75 (quoting *Beaumont*, 123 S. Ct. at 2206), and they are no less likely than advocacy organizations to fund political speech that may not reflect the views of every last contributor. *See* NRA Br. 25.

Conversely, the genuine purpose behind Title II, that of speech suppression, is reflected in the obvious reality that requiring issue advocacy organizations to fund electioneering communications through their PACs will muffle the collective voice of their members to a whisper. Defendants offer no answer to our demonstration that Title II's PAC requirement will significantly diminish the collective voice of the NRA's members. *See* NRA Br. 25-26. Defendants simply ignore Judge Henderson's finding, which was not contested by either of the other members of the panel below, that many of the NRA's members are unable both to pay membership fees and to contribute to the PAC. *See* S.A. 259.[11] Thus, the "individuals who . . .

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[10] The Intervenors offer as an aside that "Title II's rules help prevent circumvention of Title I," Int. Br. 58 n.46, but ignore inherent differences between political parties and outside groups in terms of their corruption potential that obviate any such interest. *See*, *e.g.*, SG Br. 32, 36-37, 71-72; Int. Br. 8-9.

[11] As for the Intervenors' suggestion that "nothing prevents the NRA from reducing its membership dues by some amount," such a response to Title II would diminish the funds available for the NRA's speech in two ways. First, under the FEC's regulations, the NRA would have to incur additional expenses to make a separate solicitation for

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remain free to use their own funds for electioneering communication," SG Br. 99, are not the millions of ordinary Americans who belong to the NRA and other grassroots organizations, but rather the few wealthy elite who can afford to purchase airtime on the mass media.

Wholly apart from the financial burden that the PAC requirement places on the speech rights of citizens of modest means, the limitations on PACs' fundraising activities will artificially diminish the political voices of grassroots organizations. The Government touts the fact that "the NRA is free to solicit funds from its members," SG Br. 98 (citing 2 U.S.C. 441b(b)(4)(C)), but this is a draconian limitation on the NRA's nationwide solicitation practices. And it entails a perverse Catch-22 whereby the NRA itself is foreclosed from running electioneering communications that proved so successful throughout 1999 and 2000 in attracting new members and raising funds, *see* J.A. 1964, while its PAC (which *can* run electioneering communications) is foreclosed from appealing to a national audience to fund this speech. Not surprisingly, the NRA is able to generate only a fraction – some five percent – of the amount of funds for its PAC that it generates for its general treasury. *See* S.A. 259; s*ee also* S.A. 656 (noting that non-PAC interest groups ran twenty times more ads than did interest group PACs).[12]

By artificially deflating the resources available to the NRA and other issue advocacy groups, Title II tilts the

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contributions to the PAC. *See* 11 C.F.R. §§ 114.5(g), 114.7(a), 114.1(e). Second, in response to the separate solicitation, an NRA member of modest means, who fully supports the NRA's political speech, might nevertheless naturally limit his support to the annual membership fee.

[12] Despite the Intervenors' unsubstantiated suggestion to the contrary, *see* Int. Br. 73, it is clear that the NRA's PAC could have funded only a fraction of the NRA's "electioneering communications," even if the NRA had paid the PAC's administrative expenses. *See*, *e.g.*, J.A. 2096, 2115.

playing field sharply in favor of politicians, who remain free to fundraise from any citizens who agree with their message, may spend unlimited amounts of their own money broadcasting references to outside groups in the periods preceding elections, and will invariably leverage their special access to media corporations that are left unfettered in their electioneering. Likewise, Title II cedes the airwaves to those wealthy individuals who can afford the steep price of admission, while impeding Americans of modest means from banding together into advocacy groups that would otherwise channel their collective voice.

IV. TITLE II IS OVERBROAD.

A. Defendants' discussion of overbreadth fails to come to grips with the central defect in all of their objective and subjective evidence: none of their studies takes into account the NRA's 30-minute news magazines, which totaled more than twice the amount of speech of all other groups combined. *See* NRA Br. 42. Nor do Defendants cast doubt on Judge Henderson's finding that if Defendants' studies had accounted for the NRA's speech, they would have demonstrated that 34 percent of the speech covered by Title II was "genuine" issue advocacy. *See* S.A. 257-58. Rather, Defendants now disavow the methodology of the very studies that form the centerpiece of their defense on the ground that they are "subjective" and the Court should assess the likely *effects* of the speech. *See* SG Br. 92-94, 106-07.

Even under this newly-minted "objective" inquiry, it is clear that Judge Henderson's finding is correct. Put simply, the undisputed evidence demonstrates that the vast majority of the airings of NRA's 30-minute programming in 2000 was not "likely to influence the outcome of federal elections." SG Br. 94. Specifically, it is uncontested that the "California" and "It Can't Happen Here" news magazines aired more than a thousand times during the two months prior to the 2000 presidential election. *See* S.A. 256-57. As the Intervenors effectively concede, the references to Vice-President Gore were "incidental." Int.

Br. 72. These incidental references in a 30-minute program plainly had no effect on the outcome of the presidential election in California, which was never competitive. *See* J.A. 367-68. Not surprisingly, there is no evidence that any of these airings in a landslide state in any way gave rise to "indebtedness" or "appreciation" on the part of any candidate, as the outcome plainly had nothing to do with this speech. Although Defendants focus considerable attention on the NRA's program detailing Vice President Gore's interpretation of the Second Amendment, this is a straw man – the NRA conceded that one of the purposes behind "Heston/Union" was electioneering, and thus Judge Henderson counted these airings as such. *See* S.A. 257-58; NRA Br. 42-43 n.34.[13] In short, a comprehensive analysis of the overbreadth of Title II conclusively demonstrates that it criminalizes speech that has neither the purpose nor the effect of influencing federal elections.

B. Defendants suggest that Title II's sweep is permissible because speakers "may easily avoid [its restrictions] by simply not referring to a candidate for federal office." SG Br. 92. In other words, government censorship of political speech is tolerable because of the "ease" of self-censorship. BCRA's removal of candidates' names from the political lexicon is a particularly acute form of censorship for a speaker such as the NRA, which *constantly* refers to federal officeholders, whether they are standing for reelection or not, for reasons wholly unrelated to electioneering. *See* NRA Br. 38-41. And Defendants do not dispute that

[13] Judge Henderson's overbreadth analysis did not quantify the effects of two other NRA 30-minute news magazines, "Million Mom March" and "Tribute." *See* NRA Br. 40-41 & n.33. Defendants do not deny that the airings of "Million Mom March" that would have been covered by Title II occurred in noncompetitive races and thus would not have had an effect on the outcome of those elections. *See* NRA Br. 41. Likewise, although Defendants argue that "Tribute" had electioneering content, a claim we dispute, Defendants fail to explain how the airing of this fundraising program in Texas and California in 2000 could possibly have effected the results of the elections in these two landslide states.

implementation of Title II will be a practical nightmare for the NRA as it attempts to sift through its unscripted footage for any reference to one of the thousands of candidates for federal office in an election year. *See* NRA Br. 43 & nn.35-36.

Moreover, a moment's reflection refutes Defendants' suggestion that the NRA's issue advocacy "would [not] be materially impeded" were it stripped of references to federal candidates. Int. Br. 72 n.57. In educating the public about threats to individual liberties, the NRA and other issue advocacy groups seek to identify officeholders that personify such threats. The First Amendment does not condemn Americans to the world of Harry Potter, where those who threaten liberty must be referred to as "He Whose Name Cannot Be Spoken." Nor would a response to an attack on the NRA be effective if the NRA could not reference the attacker by name. *See* S.A. 256-57; J.A. 420-21. And generic references to abstract threats to the Second Amendment are far less effective in fundraising messages than are references to specific politicians that openly espouse legislative restrictions on guns. *See* 11 PCS/NRA 42.

BCRA itself provides perhaps the best answer to the Government's ease of censorship defense. There would be no need for a media exception if wide-open discussion of political issues could be accomplished without naming particular federal candidates. Yet it was universally understood even by BCRA's supporters that the media companies could not perform their functions without naming candidates for federal office, and funding such speech out of their general treasuries. So too with the NRA and like advocacy groups.

V. TITLE II'S MEDIA EXCEPTION IS INVALID.

Defendants insist that "[n]othing has changed" in the media marketplace since this Court's decision in *Austin*, and that Title II therefore does not unconstitutionally discriminate in favor of media companies. In addition to defying the undisputed record, *see* NRA Br. 44-50, this

assertion contradicts the Government's own conclusions as set forth in a recent FCC decision, overhauling a variety of longstanding media regulations because "[t]he modern media marketplace is far different than just a decade ago," when "the world wide web was still nascent" and "there were far fewer choices for news and entertainment than there are today." FCC 03-127, Report and Order and Notice of Proposed Rulemaking (July 2, 2003) ("FCC Order"), at ¶ 87, ¶¶ 86-128. One Commissioner observed that the FCC was treating the media "like any other big business" and that broadcasters have become "more and more captives to Wall Street and Madison Avenue expectations." Statement of Michael J. Copps, Dissenting from FCC Order (June 2, 2003) at 1, 15. The evolving realities of the political marketplace emphasized by Defendants are thus equally observable with respect to media corporations; and if Congress's decision to specially exempt them from Title II is upheld in this case, it follows that, "[i]f and when" Congress reaches a contrary decision, Int. Br. 64 n.52, it may force, say, the NEW YORK TIMES and CBS to fund references to federal candidates in the periods preceding elections out of separate PACs.[14]

CONCLUSION

For the foregoing reasons, this Court should enjoin enforcement of Title II's prohibition of electioneering communications or, alternatively, the Wellstone Amendment.

[14] Given the undisputed fact that "the media industry is widely regarded as perhaps the most powerful special interest today in Washington," J.A. 1998, it is simply disingenuous to suggest, as Intervenors do, Int. Br. 64 n.52, that applying Title II to media companies could create an overbreadth problem that Title II itself does not. *See generally* J.A. 1997-99.

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SELECTED FLOOR STATEMENTS EXCERPTED BY INTERVENORS*

Statement of Sen. BRYAN:

"The McCain-Feingold proposal addresses two important issues that could begin to turn our campaign system around. **The legislation proposes** to ban soft money contributions to our national political parties and **to curb the use of attack advertisements** hidden behind so-called 'issue advocacy' campaigns.

. . . .

Mr. President, the recent explosion in the so-called 'independent expenditure or issue ads' also causes me great concern. *Independent expenditure ads are one of the very reasons the campaign system is out of control.* **During the last election cycle, a large number of television ads that saturated the media weeks before the elections were attack ads** on candidates, challengers and incumbents. No one is accountable for sponsoring the ad. **There is no disclosure requirement which is what I find most frustrating.** *We all know that these ads are really intended to defeat a candidate and are often coordinated with the opposition campaign. Simply put, these ads are not genuinely independent nor are they strictly concerned with issue advocacy*.

. . . .

While I am a cosponsor and a strong supporter of the McCain-Feingold legislation, I wish it included other

* All portions of a selected floor statement that Intervenors' quote in their appendix are italicized herein; salient portions are emphasized in bold.

important reforms. **It does not include what I believe is one of the most critical components of reform which is overall spending limits.** I have consistently supported legislation **to limit the amount candidates can spend** and have been a cosponsor since coming to the Senate of a proposal to limit spending offered by my good friend Senator Hollings. I believe this should be included in any effort to reform our campaign laws.

Last year, my distinguished colleague, the senior Senator from Arkansas, announced on the floor of the Senate that he too **would now support Senator Hollings's constitutional amendment to limit campaign spending despite his reservations about amending the Constitution.**"

144 CONG. REC. S1038-39 (Feb. 26, 1998). (Int. App. 20a).

Statement of Sen. COLLINS:

"**Why should this matter, we are asked by those all too eager to equate freedom of speech with freedom to spend?** It should matter **because political equality is the essence of democracy, and an electoral system driven by big money is one lacking in political equality.**

. . . .

To explain this aspect of the bill in more detail, and to share with my colleagues an experience that contributed to my becoming a cosponsor, I need to go back to the 1996 race for Maine's First Congressional District in the House of Representatives. In the course of that election, the AFLCIO spent $800,000 to defeat the Republican

candidate. **They did this by running a steady barrage of blatantly negative ads.**

. . . .

Mr. President, the situation I have described has led to the biggest sham in American politics. Nobody in Maine believed that the AFLCIO's ***negative ads*** *were for any purpose other than the defeat of a candidate.* Indeed, at least one newspaper which endorsed the Democratic candidate blasted the union ads against his opponent. *Ads of that nature make an absolute mockery out of the prohibition against unions and corporations spending money on Federal elections.*

The 'express advocacy' provision in McCain-Feingold is designed to do away with this sham. Contrary to what some have said, it would not affect independent ads financed other than by a union or corporation, except to enhance the reporting requirements, which everyone in this body purports to favor. It also would not stop unions and corporations from running the issue ads."

143 CONG. REC. S10,125 (Sept. 29, 1997). (Int. App. 22a).

Statement of Sen. DODD:

"[N]o democracy can thrive – if indeed survive – if it is awash in massive quantities of money:

Money that threatens to drown out the voice of the average voter of average means; money that creates the appearance that a wealthy few have a disproportionate say over public policy; and money that places extensive demands on the time of candidates – time that

they and the voters believe is better spent discussing and debating the issues of the day. The McCain-Feingold legislation before the Senate today is a good first start toward reform of a campaign system that is broken, plain and simple. I, for one, would like to have public financing of our Federal Campaigns. I would like to see free or reduced-rate TV and radio time for candidates during the peak of the campaign season. I would like for any negative ad to display the face and voice of the candidate on whose behalf that ad is aired.

The McCain-Feingold legislation is not as comprehensive as some of us would prefer. But it *does address two of the most pressing deficiencies in our system of campaign finance: Undisclosed soft money contributions, and sham issue ads*.

. . . .

Let me be clear – I cannot agree more that political speech should be unlimited. The free flow of information and ideas is the hallmark of a democracy. **But to equate speech with money is not only a false equation, it is also a dangerous one to our democracy.**

When that speech and those ideas are paid for overwhelmingly by a few wealthy individuals or groups or foreign nationals or anonymous groups or by undisclosed contributors, **the speech is neither free nor democratic**. It is encumbered by the unknown special interests who have paid for it. **And it minimizes or excludes the speech of those who lack substantial resources to counter it.**

This special interest speech – paid for with unlimited, undisclosed soft money – creates, at a minimum, the

appearance of undue influence, if not an implied quid pro quo by the contributor."

147 CONG. REC. S2435-36 (Mar. 19, 2001). (Int. App. 18a).

Statement of Sen. DORGAN:

"**Some say money is speech and we like free speech. That is the political golden rule. I guess those who have the gold make the rules.**

I suppose if I was part of a group that had a lot more money than anybody else I suppose there would be an instinct deep inside to try to persuade you to say this situation is great. We not only have more money but we have access to more money than anyone else in the history of civilization. **Why would we want to change the rules? We ought to change the rules** because this system is broken and everybody in this country knows it and understands it.

Let me go through some examples to describe what is happening in this system. And both political parties have had problems in these areas, both parties. Let me give one example. In 1996, $4.6 million of soft money went from the Republican National Committee to an organization called Americans for Tax Reform, $4.6 million. This soft money, then, comes from contributors whose identities are often unknown – they often do not need to be disclosed – contributing money in amounts that would be prohibited under our federal election laws, to influence a Federal election. $4.6 million from a major political party to this organization, Americans for Tax Reform. That was four times the total budget of this organization in the previous year.

How was the money spent, this soft money raised in large undisclosed chunks from sources in many cases prohibited from trying to spend money to influence Federal elections? How was it used? To influence Federal elections, 150 of them, to be precise – 17 million pieces of mail to 150 congressional districts.

You say the system isn't broken? Mr. President, $4.6 million? This is the equivalent of a political Swiss bank account. Large chunks of money, blowing into the system to a group that never has to disclose what it does with it.

And what about the issue ads which Senator Durbin mentioned as well? **These issue ads – are they ads that contribute to this political process? Eighty-one percent of them are negative. They represent the slash, burn and tear faction of the political system.** Get money, get it in large chunks from secret sources and put some issue ads on someplace **and try to tear somebody down.**

Let's discuss one group, and one ad in particular. Look at this scenario.

The Citizens for Republic Education Fund is a tax-exempt organization incorporated June 20, 1996, that raised more than $2 million between June and the end of the year in this election year – $1.8 million of which was raised between October 1 and November 15. They spent $1.7 million after October 11 and before the election in a matter of a couple of weeks. Remember, these funds are not intended to influence Federal elections, but here's all this money being spent in just three weeks before the election.

You be the judge. Consider the following, and then you tell me whether these were intended to influence a Federal election. The vast majority of the money was spent after October 11 in an election year. The group didn't come into existence until June of the election year. The group never had any committees or programs, had no offices, no staff, no chairs, no desks and no telephones. **All it had was millions of dollars to pump into attack ads.**

The ads did not advocate on behalf of any one set of issues. Instead, **the ads were almost universally tailored to a particular unfavored candidate's perceived flaws, just like any campaign attack ad would be.** In fact, you could ask whether they advocate any issues at all.

. . . .

A political ad, paid for with soft money from a political Swiss bank account. It's like a Swiss bank account because it is from a secret source, ***designed to be used to create attack ads, to be used at election time to influence Federal elections****, something that, frankly, is supposed to be prohibited by law. But this has now become the legalized form of cheating. In fact, we are not even sure it is legal, but it is being done all across this country and it is being done with big chunks of secret money.*

In fact, one secret donor put up, I'm told, $700,000 to spend on so-called issue ads to influence federal campaigns. We don't even know for certain the identity of that person. And that soft money, that big chunk of money prohibited from ever affecting Federal races was used in this kind of advertising to directly try and influence Federal campaigns.

Now, I just ask the question, is there anyone here who will stand in the Senate with a straight face and say that this isn't cheating? Anyone here who will stand with a straight face and say this isn't designed to affect a Federal election? Anybody think this is fine? Go to a friend someplace that has $40 million and say, will you lend us $1 million, we have these two folks we don't like – one in one State up north and one in a State down south. **We want to put half a million into each State and defeat them because they happen to be of a political persuasion we don't like, and we don't want them serving in the U.S. Senate.** If you give us $1 million we will package it in two parts, half a million into each State. Your name will never be used. No one will know you did it. **We will package up these kind of 30-second slash, tear and burn political ads** and claim they are issue ads and they can be paid for with soft money.

Does anybody in this body believe this is a process that the American people ought to respect? That this is a process the American people think makes sense? **Do we really believe that money is equal to speech and that anything that we would do to change the amount and kind of money spent in the pursuit of any campaign is somehow inhibiting the political process?**"

144 CONG. REC. S880-81 (Feb. 24, 1998). (Int. App. 21a).

Statement of Sen. DORGAN:

"This nearly $1 million, with other funds included, was brought into the system in the form of issue ads – **sham**

ads that were clearly direct 30-second advertisements expressly waged for one purpose, and that was to attack and destroy a candidate of the other party. *This was done, by the way, with a legal form of cheating made possible by today's campaign finance law and current court decisions permitting issue ads, not so thinly disguised, to be waged in unlimited quantity using unlimited corporate money, unlimited individual money and undisclosed so that no one, no one in this country, will discover where the money came from. That is what is wrong with this current system.*

. . . .

We are told somehow that money is speech in politics: The more money you have, the more speech you have, the more you are able to speak. Some of us believe that there ought to be in politics campaign finance reform that begins to set some reasonable limits on what kind of money is spent in political campaigns. We think that the current regime of campaign finance is just completely spiraling out of control, and **we think the McCain-Feingold bill, while not perfect, is a good piece of legislation for this Congress to enact**.

Mr. President, I also intend to offer, if I am allowed in the context of these debates, one additional piece of legislation I would like to mention just for a moment. Federal law currently provides that all television stations must offer candidates for Federal office the lowest rate on their advertising rate card for commercials for a certain amount of time preceding the election. To repeat, under current law, we say candidates are entitled to the lowest rate on

the rate card for political advertising for a certain period prior to the election.

Everyone has a right to put on the air what they wish to put on the air about their opponent. In politics, unlike most other forms of competition, the normal discourse is to say, 'There's my opponent. Look at what an awful person that opponent is. Let me tell you 18 awful things about my opponent.' Is that the way you see airlines advertise? 'Look at my competing airline over here. Let me tell you about how awful they are, how awful their maintenance record is.' I don't think so. Is that the way automobile companies advertise? No. It is the way people in politics advertise because it has worked.

My point is this. I am going to offer an amendment that says we will change the Federal law that requires the lowest rate on the rate card for the 60 days prior to elections. We will say that the television stations are required to offer that lowest rate only to television commercials that are 1 minute in length and only in circumstances where the candidate appears on the commercial 75 percent of the time.

Why do I do that? Because I would like candidates to start taking some ownership of their commercials instead of the 30-second slash-and-burn commercial that the candidate never appears on. Oh, everybody has a right to continue to run those. However, we are not required, in my judgment, to tell television studios they must offer the lowest rate for these kinds of ads.

Air pollution in this country is a problem. We have been concerned about air pollution for some long while. One form of air pollution in this country

is the kind of political commercial that has been very successful. I don't deign to suggest now we can ban it. We can't. Free speech in this country and free political speech allows anybody to do anything they want in their campaigns in a 30- or 60-second ad.

But I believe we ought to give an incentive for those who put commercials on the air during political campaigns that say to the American people, 'Here's what I stand for, here's what I believe, here's what I want to fight for as we debate the future of this country,' **in which the candidate himself or herself asserts positions that they think ought to be a part of public discourse and public debate.** It seems to me we ought to try to provide incentives for that by saying the lowest rate card in campaigns, the lowest rate on the bottom of the card, will go to commercials that are at least 1 minute in length and on which the candidate appears 75 percent of the time.

I don't know if we are going to get to that. I intend to offer it as an amendment.

First and foremost, I rise to say I support the McCain-Feingold bill. I think Senator McCain and Senator Feingold have done a good job. Is it perfect? No. It is an awfully good start to try to bring some order and establish some thoughtful rules to a campaign finance system that is now a mess.

I want to be involved in the debate in the coming hours, when I hear people stand on the floor of the Senate and say, 'Gee, we think the campaign finance system is wonderful,' because I want to ask them what they have been reading, **what they have been watching. Not the campaigns that I have seen,** not the reports that I have

seen about campaign finance awash in soft money, **awash in issue ads financed by soft money flying all over the country to pollute the air waves,** that never allow the American people to understand who was the donor, who put in half a million dollars to go after this or that candidate. That has become a perversion of fair rules and fair standards in campaign finance reform, and I hope when we pass McCain-Feingold we will finally begin to make some order and some thoughtful response to campaign finance reform."

144 CONG. REC. S805-06 (Feb. 23, 1998). (Int. App. 21a-22a).

Statement of Sen. EDWARDS:

"The second issue is these bogus sham issue ads. In addition to the fact folks see all this money flowing into the system, they feel cynical, they feel they do not own their Government anymore, and that they have no voice in democracy.

In addition to that, **they turn on their televisions in the last 2 months before an election and see mostly hateful, negative, personal attack ads posing as issue ads.** Any normal American with any common sense knows these are pure campaign ads. **Those are the ads we are trying to stop.**

Senator Snowe actually said it very well when she said these ads are a masquerade. *In fact, they are more than a masquerade, they are a sham, they are a fraud on the American people, and they are nothing but a means to avoid the legitimate election laws of this country.*

. . . .

We will talk about this issue later, but it is also clear that Snowe-Jeffords, under the constitutional test established in Buckley v. Valeo, is constitutional. There are only two requirements that have to be met: One, that there be compelling State interest under Buckley. *The Court has already held that what we are doing in these sham issue ads and with soft money is a compelling State interest because of the need to avoid corruption or, more importantly, in this case, the appearance of corruption.*" 147 CONG. REC. S2636 (Mar. 21, 2001). (Int. App. 17a-18a).

Statement of Sen. FEINGOLD:

"*I believe this is an extremely valuable addition to the bill. It is the second big loophole in the system. No. 1 is the soft money loophole. No. 2 is the phony issue ads. . . .*

. . . .

Snowe-Jeffords gets at the heart of the issue ad loophole. Right now wealthy interests are abusing this loophole at a record pace. They are flouting the spirit of the law, there is no question about it. They advocate for the election or defeat of a candidate, even though they don't say those 'magic words,' such as 'vote for,' 'vote against,' 'elect' or 'defeat.' These ads might side-step the law, Mr. President, but they certainly don't fool the public. . . .

. . . .

. . . The magic words test is completely helpless to stem the tide of sham issue ads, ads from the parties, ads from unions or corporations, or **ads from outside groups**

that are acting on behalf of those unions or corporations. We need to close the loophole, and Snowe-Jeffords does just that.

Here is how **Snowe-Jeffords navigates the difficult** political and **constitutional terrain** of this debate. **Here I am talking about the original Snowe-Jeffords provision, before adoption of the Wellstone amendment.** The first thing that the provision does is define a new category of communications in the law – we call them electioneering communications. . . .

The original Snowe-Jeffords provides that **for-profit corporations** and labor unions cannot make electioneering communications using their treasury funds. If they want to run TV ads mentioning candidates close to the election, they must use voluntary contributions to their political action committees. We believe that this approach will withstand constitutional scrutiny, because corporations and unions have long been barred from spending money directly on Federal elections.

. . . .

We are merely saying through this provision that that **actual public support**, shown by voluntary contributions to a PAC, **must be present** when corporations and unions want to run ads mentioning candidates near in time to an election.

The Snowe-Jeffords provision goes on to permit spending on these kinds of ads by non-profit corporations that are registered as 501(c)(4) advocacy groups, by 527 organizations, and by other unincorporated groups and individuals. **But it requires disclosure** of the spending and of the large donors whose funds are

used to place the ads once the total spending of the group on these 'electioneering communications' reaches $10,000.

. . . .

Mr. President, **I believe that these disclosure provisions will pass constitutional muster**. The Buckley case, it should be remembered, rejected limits on independent expenditures but upheld the requirement that the expenditures be disclosed. Rules that merely require disclosure are less vulnerable to constitutional attack than outright prohibitions of certain speech. The information provided by these disclosure statements will help the public find out who is behind particular candidates. **This disclosure can help prevent the appearance of corruption that can come from a group secretly spending large amounts of money in support of a candidate.**

. . . .

The incorporation of the Snowe-Jeffords amendment into the McCain-Feingold Bill is a well-reasoned attempt to define electioneering in a more realistic manner **while remaining faithful to First Amendment** vagueness and **overbreadth concerns**. . . . While no one can predict with certainty how the courts will finally rule if any of the these provisions are challenged in court, we believe that the McCain-Feingold Bill, as current drafted, is consistent with First Amendment jurisprudence.

. . . .

It is important to note that Snowe-Jeffords contains provisions designed to prevent the laundering of corporate and union money through non-profits. Groups that wish to engage in this

particular kind of advocacy must ensure that only the contributions of individual donors are used for the expenditures.

. . . .

I have discussed here the original Snowe-Jeffords provision. The Wellstone amendment, in effect, **broadens that provision** to cover ads run by corporations and unions. **I voted against adding that amendment. I thought and still think that it makes Snowe-Jeffords more susceptible to a constitutional challenge, but it passed when many Senators who oppose the bill and the Snowe-Jeffords provision voted for it.** In any event, the Wellstone amendment was written to be severable from the remainder of the Snowe-Jeffords provision. That gives even more significance to the vote we will have today on severability. But if we win that vote, Snowe-Jeffords will survive even if the Wellstone amendment is held to be unconstitutional."

148 CONG. REC. S3071-73 (Mar. 29, 2001). (Int. App. 14a).

Statement of Sen. FEINGOLD:

"**Let me talk for a moment how the Snowe-Jeffords amendment navigates the difficult** political and **constitutional shoals** that face us in this debate.

The first thing the amendment does is more clearly define a category of communications in the law. We call them electioneering communications.

. . . .

The Snowe-Jeffords amendment provides that **for-profit corporations** and labor unions **cannot make electioneering communications using their treasury funds.** If they want to run TV ads mentioning candidates close to the election, they must use voluntary contributions to their political action committees. *We firmly believe that this approach will withstand constitutional scrutiny because corporations and unions have for a very long time been barred from spending money directly on Federal elections.*

The Senator from Kentucky suggested we lack case law for these propositions, but the Supreme Court upheld the ban on corporate spending in the Austin v. Michigan Chamber of Commerce case. Mr. President, it is noted that a Michigan regulation that prohibited corporations from making independent expenditures from treasury funds prevented 'corruption in the public arena: 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.' According to the Court, the Michigan regulation 'ensured that the expenditures reflect actual public support for the political ideas espoused by the corporations.'

We are merely saying through this amendment that actual public support, shown by voluntary contributions to a PAC, must be present when corporations and unions want to run ads mentioning candidates near in time to an election.

The Snowe-Jeffords amendment goes on to permit spending on these kinds of ads by nonprofit corporations, if they are registered as 501(c)(4) advocacy groups, and other unincorporated groups and

individuals. **The rules about corporations and unions do not apply in the same way to these groups, but the amendment,** but it **makes one requirement.** It requires disclosure of the groups' large donors whose funds are used to place the ads once the total spending of the group on the electioneering communications reaches $10,000. It only applies if the total spending over a total amount of $10,000.

. . . .

Mr. President, it is also important to note that **the Snowe-Jeffords amendment contains provisions designed to prevent the laundering of corporate and union money through nonprofits.** Groups that wish to engage in this particular kind of advocacy must ensure that **only the contributions of individual donors are used for the expenditures.**

Because the prohibition in the Snowe-Jeffords amendment is limited to unions and corporations spending money from their treasuries on these kinds of ads, many of the concerns that opponents of McCain-Feingold voiced about the effect of the bill on speech by citizens groups are eliminated. Keep that in mind. One of the things people claimed was **the real problem of McCain-Feingold** – there has been sort of a shifting bottom line of what the real problem is – but that portion **has been modified in Snowe-Jeffords**.

Senators who oppose this amendment must be willing to stand on two positions now that I think are both unsupportable. First, Mr. President, those who still oppose McCain-Feingold, if it is amended by Snowe-Jeffords, must defend the rights of unions and corporations using treasury money – **not citizens groups like the**

National Right to Life Committee or the Christian Coalition or the Sierra Club – to run essentially campaign advertisements that dodge the Federal election laws by not using the magic words 'vote for;' or 'vote against' or to finance those ads through other groups. So that is the conclusion: Corporations and unions, apparently, should just be allowed to do this freely, despite the almost unanimous complaints by Members of the Senate with regard to this question.

Secondly, those who are still holding out, even though they represent a minority of the Senate, in terms of supporting McCain-Feingold as it will be amended, argue that the public is not entitled to know, **in the case of advocacy groups that run these ads close to an election**, what the identities of these people are. They say that they should not be known to those who are about to vote. Many opponents of McCain-Feingold have trumpeted the virtues of full disclosure and say that is what we need – disclosure; not McCain-Feingold. I have, at times, doubted how serious they were about disclosure because they would never acknowledge the **important advances our bill provides with regard to disclosure.**"

144 CONG. REC. S984-86 (Feb. 25, 1998). (Int. App. 15a-16a).

Statement of Sen. FEINSTEIN:

"**Campaigns simply cost too much and it is long past time that Congress does something about it.**

I believe very strongly that this will be the final real opportunity this millennium to make significant structural reforms to our campaign finance system. **Two of the**

fundamental changes that I believe must be made are a complete ban on soft money contributions to political parties and **making independent campaign ads subject to contribution limits** and disclosure requirements as are a candidate's campaign ads.

While I have a great deal of respect for the persistence the Senators from Arizona and Wisconsin have demonstrated in pushing the Senate to act on campaign finance reform, I am concerned that the underlying bill, S. 1953, is too narrow to constitute a real reform of the campaign finance system. *Banning soft money without addressing issue advocacy will simply redirect the flow of undisclosed money in campaigns. Instead of giving soft money to political parties, the same dollars will be turned into 'independent' ads.*

The issues of soft money ban and independent advertisements go hand in hand and one cannot be addressed without the other.

. . . .

The ability of corporations, unions, and wealthy individuals to give unlimited amounts of soft money to political parties is the largest single loophole in the current campaign finance structure. The lack of restrictions on soft money **enables anonymous individuals and anonymous organizations to play a major role in campaigns**. **They can hit hard** and no one knows from where the hit is coming. **The form that soft money is increasingly taking is negative, attack ads that distort, mislead, and misrepresent a candidates position on issues. These ads have become the scourge of the electoral process.**

. . . .

At some point this escalation of campaign spending has got to stop. We simply cannot continue down this path. A complete ban on soft money contributions to political parties is the first and most basic way to reduce the amount of money in our campaigns.

. . . .

That brings me to the other disturbing trend in the American political system: the rise of issue advocacy. *This campaign loophole allows unions, corporations, and wealthy individuals to influence elections without being subject to disclosure or expenditure restrictions.*

During last year's debate, I mentioned a study released by the Annenberg Public Policy Center that estimated that during the 1995-96 election cycle independent groups spent between $135 and $150 million on issue advocacy.

The Center has done a similar study for the 1997-98 cycle and **the result is quite disturbing**. **They estimate that the amount spent on issue advocacy more than doubled to between $275 million and $340 million.**

These ads do not use the so-called 'magic words" that the Supreme Court identified as express advocacy and, therefore, are not subject to FEC regulation. The Annenberg study found, however, that 53.4 percent of the issue ads mentioned a candidate up for election.

The Center found another unfortunate twist to issue advocacy. Prior to September 1, 1998, that is in the first 22 months of the election cycle, only 35.3 percent of issue ads

mentioned a candidate and 81.3 percent of the ads referred to a piece of legislation or a regulatory issue.

After September 1, 1998, during the last 2 months of the campaign, a dramatic shift occurred. The proportion of ads naming specific candidates rose to 80.1 percent and those mentioning legislation fell to 21.6 percent.

A similar shift can be seen in terms of attack ads. Prior to September 1, 33.7 percent of all ads were attack oriented. After September 1, over half were.

These findings clearly demonstrate that **as election day gets closer, issue ads become more candidate oriented and more negative. This kind of unregulated attack advertisements are poisoning the process and driving voters away from the polls.**"

145 CONG. REC. S12,661-62 (Oct. 15, 1999). (Int. App. 18a-19a).

Statement of Sen. GLENN:

"*It is beyond question that raising soft money and broadcasting issue ads are not, in themselves, unlawful. The evidence suggests that much of what* ***the parties and candidates did*** *during the 1996 elections was within the letter of the law. But no one can seriously argue that it is consistent with the spirit of the campaign finance laws for* ***parties to accept contributions of hundreds of thousands – even millions – of dollars****, or for corporations, unions and others to air candidate attack ads without being required to meet any of the federal election law requirements for contribution limits and public disclosure.* The evidence indicates that the soft-money loophole is

fueling many of the campaign abuses investigated by the Committee. **It is precisely because parties are allowed to collect large, individual soft-money donations** that fundraisers are tempted to cultivate big donors by, for example, providing them and their guests with unusual access to public officials. In 1996, **the soft-money loophole provided the funds both parties used** to pay for televised ads. **Soft money also supplied the funds parties used** to make contributions to tax-exempt groups, which in turn used the funds to pay for election-related activities. The Minority Report details, in several instances, how **the Republican National Committee deliberately channeled funds** from party coffers and Republican donors to **ostensibly 'independent'** groups which then used the money to conduct 'issue advocacy' efforts on behalf of Republican candidates.

Much was made the other day on the floor about the same thing happening on the Democratic side. That doesn't mean either one was excusable or right. But it happened, and it should not.

Together, the soft-money and issue-advocacy loopholes have eviscerated the contribution limits and disclosure requirements in federal election laws and caused a loss of public confidence in the integrity of our campaign finance system. By inviting corruption of the electoral process, they threaten our democracy. If these and other systemic problems are not solved, the abuses witnessed by the American people in 1996 will be repeated in future election cycles.

. . . .

The Committee's investigation also showed that the legal distinction between 'issue ads' and 'candidate ads' has proved to be largely meaningless. The result has been that

millions of dollars, which otherwise would have been kept out of the election process, were infused into campaigns obliquely, surreptitiously, and possibly at times illegally.

The issue of **soft money abuses is inevitably tied to the question of how access to political figures is obtained through large contributions of soft money.** It is also tied to the question of how tax-exempt organizations have been used to hide the identities of soft money donors. A system that permits large contributions to be made for partisan purposes, without public disclosure, invites subversion of the intent of our election law limitations.

Despite a highly partisan investigation, the Committee **has built a record of campaign fundraising abuses by both Democrats and Republicans.** This record will hopefully be useful to the Federal Election Commission, the Internal Revenue Service and to the Department of Justice as they investigate the 1996 campaign. Most importantly, the Committee's investigation should spur much-needed reform of the campaign finance laws and strengthening of the Federal Election Commission. Congress should provide the Federal Election Commission with the necessary resources to significantly enhance its investigative and enforcement staff. Ultimately, the most important lesson the Committee learned is that the abuses uncovered are part of a systemic problem, and that the system that encourages and permits these abuses must be reformed [if] not now, as a result of the legislative votes that we have had the last couple of days, sometime, and hopefully in the very near future.

The McCain-Feingold legislation that we are considering here today goes a long way to address these abuses. The

bill rids the system of soft money, and brings 'issue advertising' funded by corporate and union interests within the campaign finance system. . . .

. . . .

The ready availability soft money combined with **the national party's ability to air so called 'issue ads' also resulted in an explosion of advertising which clearly benefited both party's Presidential candidates.** This apparently legal activity will be halted if we simply act to get rid of the soft money that is raised to pay for these ads."

144 CONG. REC. S1048-49 (Feb. 26, 1998). (Int. App. 20a-21a).

Statement of Sen. JEFFORDS:

"**I can just imagine a candidate, and this happens now,** I am sure, **when they think they are running their campaign, they had it all organized** and they are watching carefully the amount of money their opponent has, **and then they wake up one morning thinking they are in fine shape and every channel they turn on on the television has this ad attacking them at the last moment, the last couple of weeks before the election**, and they don't know who it is coming from or what to do about it; they were not aware of it.

. . . .

That is the real world we are faced with. It happened last time. It happened to the tune of $135

million. The least we could do, the very least, is to say at least you ought to know it is coming, first; and No. 2, where it is coming from **so you have an idea when you get this last-minute flurry of advertising you are ready to do the best you can to protect yourself against it**.

. . . .

. . . The last few election cycles have shown the **spending has grown astronomically** in two areas that cause me great concern: First, issue ads that have turned into blatant electioneering; second, the unfettered spending by corporations and unions to influence the outcomes of elections.

As an example of how this spending has grown, a House Member from Michigan in 1996 faced nearly $2 million in advertisements alone before the fall campaigning season had begun. **Campaigning really starts early and then there is a big boost at the end. Early on you want to knock the candidate out before he has a chance to get on the scene, and at the end it is because you know a large percentage of the people who vote really don't pay much attention until the last couple of weeks.** The Snowe-Jeffords amendment addresses these areas in a reasonable, equitable, and, last but not least, constitutional way.

Mr. President, **citizens across this Nation have grown weary of the tenor of campaigns in recent years.** This disappointment is reflected in low voter participation and the diminished role of individuals in electing their representatives. Increasing the information available to the electorate will help return the power of this democratic aspect to the people who should have it –

the voters. **Expanded disclosure will bring daylight to this process.** Increased disclosure will rid corruption; more disclosure will protect the public and the candidates.

. . . .

The second part of our amendment considers an area Congress has long had a solid record on: imposing more strenuous spending restrictions on corporations and labor unions. Remember, under the law, these are not given the same freedom of speech rights that individuals are, and rightfully so. *Corporations have been banned from electioneering since 1907; unions, since 1947. As the Supreme Court pointed out in United States v. UAW, Congress banned corporate and union contributions in order to 'avoid the deleterious influences on Federal elections resulting from the use of money by those who exercise control over large aggregations of capital.'*

Our amendment would ban corporations and unions from using General Treasury funds to fund electioneering communications in the last 60 days of the general election and the last 30 days before a primary. They still have the right to foster and to approve PACs, organizations for their employees or members of the union, to contribute to, in order that they individually, working together in the PACs, can influence the election process.

The Snowe amendment takes a reasoned, incremental and constitutional step to address the concerns many of my colleagues have voiced on campaign finance reform proposals.

. . . .

As the Court declared in Buckley, the governmental interests that justified disclosure of election-related

spending are considerably broader and more powerful than those justifying prohibitions or restrictions on election-related spending.

Disclosure rules, the Court said, enhance the information available to the voting public. **Who can be against that? Disclosure rules, according to the Court, are 'the least restrictive means of curbing evils of campaign ignorance and corruption.'** "

144 CONG. REC. S974-75 (Feb. 25, 1998). (Int. App. 16a).

Statement of Sen. JEFFORDS:

"[T]he perseverance of Senators McCain and Feingold should be recognized as the reason we are here today. I would especially like to thank my colleague, Senator Snowe, for all her hard work and leadership in developing the language in this bill, **the so-called Snowe-Jeffords provisions,** which **is a full and fair solution to the proliferation of electioneering communications**.

. . . .

I am especially proud of the provisions in this legislation that reform the law concerning broadcast advertisements near an election that escape even minimal disclosure by not using the 'magic words.' These electioneering communications are cleverly and clearly seen by the electorate to be trying to influence their vote, ***but the true nature of the sponsors and funding for these advertisements remain cloaked in the veil of secrecy. The American public deserves to know who is trying to influence their vote, and the Snowe-Jeffords provisions will provide them this necessary information.***

. . . .

. . . In the 2000 elections approximately$629 million was spent on television advertising for federal elections. **This represents an all-time high.** Even looking at the amount spent just on Congressional races, **the $422 million spent in 2000 overwhelms the $177 million spent just 2 years earlier. That gives you an idea of what is occurring**.

. . . .

One of the most important findings of this comprehensive study of television advertising during the 2000 elections is that **the Snowe-Jeffords provisions are exceptionally well crafted and not too broad.**"

148 CONG. REC. S2117 (Mar. 20, 2002). (Int. App. 13a).

Statement of Sen. KERRY:

"I commend Senators Snowe, Jeffords and Chafee for their courage and for their serious effort to keep hope for real campaign finance reform alive. In the context of McCain-Feingold, it deserves our support. Their amendment, offered to replace the Lott-McConnell proposal, would, in essence, **prevent** both labor unions and **for-profit corporations from using their treasury funds** to run any broadcast ads which mention candidates within 30 days of a primary and within 60 days of a general election. The Snowe-Jeffords-Chafee amendment thereby places essentially the same limits on union and corporate spending as S. 25, the McCain-Feingold bill – but it takes the added step of specifically naming unions and corporations as the target of those limits.

It is important to note that the Snowe amendment would not restrict unions or corporate PACs from using 'hard money' – that is, funds regulated by federal campaign finance laws – to pay for such ads, but these PACs would be subject to all the reporting and contribution limits applying to all other PACs.

The ads which are the targets of this legislation are ads paid for with union and corporate soft money, and which clearly identify candidates and are aired close to the election, despite the phony claim that they are 'issue ads.' They are not now subject to federal election laws and their greatly expanded use was a major new development in the 1996 elections. The Annenberg Center for Public Policy estimates that all such soft money ads totaled at least $135 to $150 million. The political parties spent about $78 million of this amount for such soft money ads in the 1996 cycle. The AFL-CIO spent about $25 million. Big business groups, including the Coalition, the Coalition for Change, the Nuclear Energy Institute, the U.S. Chamber of Commerce and others, spent nearly $10 million dollars. *If we were simply to ban soft money contributions to the parties, the soft money expenditures made by Labor and corporations* ***would increase exponentially***.

The Snowe Amendment also makes it unlawful for corporations or unions to launder their treasury funds by contributing to the costs of such ads produced by outside groups, including the so-called non-profits which took a much more active, and largely negative, role in the last election.

. . . .

In considering what this amendment can achieve, we should remember that the McCain-Feingold substitute

itself, with its soft money ban, **would prohibit the national party ads** for which payment is made with soft money (that is, contributions not subject to regulation under the federal campaign laws) **that attack candidates.** The recent special election to replace the retiring Congresswoman from the 13th District of New York featured $800,000 of such ads paid for by the Republican Party – and all of them were broadcast in the last ten days of that election."

144 CONG. REC. S1039-40 (Feb. 26, 1998). (Int. App. 20a).

Statement of Sen. LIEBERMAN:

"The law says that corporations and unions cannot contribute from their treasuries for political purposes to affect elections. Some might say that was an abridgement, a violation of their free speech, but that has been upheld as constitutional.

But what has happened? *Soft money, issue ads, which are clearly ads for or against candidates have been used to evade those clearly constitutional restrictions on contributions to political campaigns. The current ability of parties and outside groups to disguise candidate-focused electioneering ads as issue ads undermines these longstanding and important Federal elections policies.*

A study by the Annenberg Public Policy Center found that in 1996, 29 groups spent as much as $150 million on what the groups called issue ads, but which the Annenberg study leaves little doubt were mostly aimed at electing or defeating particular candidates. Mr. President, $150 million, that is approximately one-third of the total spent for all ads by all candidates. That study found that over 85

percent of those so-called issue ads mentioned a candidate by name, almost 60 percent used a candidate's picture and, **worst of all, more than 40 percent of those were pure attack ads.**"

144 CONG. REC. S973 (Feb. 25, 1998). (Int. App. 21a).

Statement of Sen. SNOWE:

"We can't just shut off the flow of soft money to parties and call it a day. *We also must close off the use of corporate and union treasury money used to fund ads influencing Federal elections.* That's the only way we can claim to have enacted truly balanced and fair reform.

. . . .

What we are talking about are broadcast advertisements that are influencing our Federal elections and, in virtually every instance, are designed to influence our Federal elections. Every focus group and every study group that has been conducted over the last few years proves this, and I'll detail those studies later. And yet, no disclosure is required and there are none of the funding source prohibitions that for decades have been placed on other forms of campaigning.

Why is this so? Because they don't contain the so-called 'magic words' like 'vote for candidate x' or 'vote against candidate x' that make a communication what is called 'express advocacy,' and therefore, subject to Federal law requiring disclosure and requiring that the ad be paid for with hard money.

These ads must be extraordinarily effective, **because their use has exploded within the last decade.** According to a 2001 report from the Annenberg Public Policy Center, which has been studying this trend almost since its inception in the 1996 election cycle, in the past three cycles we have seen spending on issue ads go from about $150 million in 1996, to about $340 million in 1998, to over $500 million in 2000. One hundred million of that was spent in the last 2 months alone. **And there is not one dime of disclosure required on any of it.**

It's time we closed this loophole. ***It's time to remove the cloak of anonymity.*** *Otherwise, we are saying that it really doesn't matter to the election process. That we should not know who is behind these types of commercials that are run 60 days before the election, 30 days before a primary, whose donors contribute more than $1,000.* ***We ought to have disclosure on these ads where there currently is no disclosure.*** *And that's what the Snowe-Jeffords provision in this bill does, in simple, straightforward and unambiguous terms.*

. . . .

And second, it prohibits the use of union or corporate treasury money to pay for these ads, in keeping with longstanding provisions of law. Corporations have been banned from direct involvement in campaigns since the Tillman Act of 1907. Unions were first addressed in the Smith-Connally Act of 1943 and the prohibition was finally made permanent in 1947 with the Taft-Hartley Act.

And these laws have stood because the Court has recognized – as recently as 1990 as this quote from Justice Marshall in the Austin versus Michigan Chamber of Commerce decision shows – '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.'

. . . .

The most important, bottom line components to this legislation are **disclosure**, and **a requirement that** these so-called issue ads that are really **campaign ads be funded from voluntary, individual contributions** just like any other campaign ad."

148 CONG. REC. S2135 (Mar. 20, 2002). (Int. App. 12a).

Statement of Sen. SNOWE:

"*At the same time we address the soft money issue, I also think it is critical that we address* ***the ever burgeoning segment*** *of electioneering popularly known as sham issue advertising. We do so in a way carefully constructed as to pass constitutional muster. I am speaking of advertisements influencing the Federal elections in this country but get off scot-free when it comes to any degree of disclosure or any degree of prohibitions normally associated with campaigning.*

Let there be no mistake. The record I intend to outline will show these advertisements constitute campaigning every bit as much as any advertisements run by candidates themselves or any ad currently considered to be express advocacy and therefore subject to Federal election laws.

. . . .

I have spoken of the **exploding phenomenon** of the so-called issue advertising in elections. **That phenomenon continues unchecked and will continue unchecked if we turn a blind eye** to reality."

147 CONG. REC. S2455 (Mar. 19, 2001). (Int. App. 14a).

Statement of Rep. BORSKI:

"*Soft money is used to finance the second loophole in campaign finance law: sham issue advertisements. This loophole allows special interests to spend huge sums of money on campaign ads advocating either the defeat or election of a candidate. As long as these ads do not use the magic words 'vote for' or 'vote against' they are deemed 'issue advocacy' under current law and therefore not subject to campaign spending limits or disclosure requirements.*

During the 1996 elections, the television and radio airwaves were flooded with these sham issue ads – many of which were negative attack ads. Americans who see or here [sic] these ads have no idea who pays for them because no disclosure is required. **They drown out the voice of the average American citizen, and even sometimes of the candidates themselves. Without reform, we can certain expect a huge increase in these sham issue ads.**

. . . .

In an effort to ban campaign advertisements that masquerade is [sic] *'issue advocacy,' Shays-Meehan tightens the definition of 'express advocacy' communications. Under the bill, any ad that is clearly designed to influence an election is deemed 'express advocacy' and must therefore*

abide by federal contribution and expenditure limits and disclosure requirements. . . .

. . . .

The Meehan-Shays proposal will not cure our campaign finance system of all its evils – and **I certainly support more far reaching restrictions on campaign** contributions and **expenditures**. However, **the bill will take a modest but significant first step** toward restoring integrity in our political system. **It will limit the influence of wealthy special interests and help to restore the voice of average American citizens in our political process.** In short, enactment of this legislation is essential to the survival of American democracy."

145 CONG. REC. E1888 (Sept. 15, 1999). (Int. App. 19a).

Statement of Rep. KLECZKA:

"H.R. 2356, the Bipartisan Campaign Reform Act of 2001, is necessary if we are to remove the undue influence of soft money on our political process and the unregulated issue advertisements **that inundate our airwaves during each election season.**

. . . .

*An **equally troubling** aspect of today's campaign system **is the number of issue advertisements broadcast** on the television and radio. Although these ads technically adhere to federal campaign regulations, they violate the spirit of the law*."

148 CONG. REC. H410 (Feb. 13, 2002). (Int. App. 17a).

Statement of Rep. NADLER:

"Money does provide the ways and means for getting a candidate's message out, but **we should not live in a society where those with the most dollars can monopolize the debate**. We should not live in a society **where, in the name of free speech, one side has a megaphone with which to drown out everyone else.**

For those who are concerned about the proposals we have here before us, the onus is really on them, I think, to explain either why the current system is consistent with a healthy democracy, or else what other steps they would take to rectify the situation. Should we make greater demands on those who have been given control over the scarce public airwaves? Should we provide public financing to level the playing field? **Should we reconsider the Supreme Court's unfortunate decision in 1886 that corporations are persons under the meaning of the 14th amendment, from which I think a lot of the problems in our system flow?** What restrictions can we place on the use of money consistent with the first amendment to preserve the survival of our democracy?

. . . .

I must say parenthetically that I do not agree with the Supreme Court that the only justification for campaign finance regulation is to eliminate corruption or the appearance of corruption. It is also to preserve the ability of different voices to be heard so that the people, and not just those with huge amounts of money, can, in fact, be sovereign in our system.

. . . .

I just want to explore something you said a moment ago when in referring back to the question – to the ads that Mr. Meehan had talked about, *you said that of course incumbent politicians, many of them, some of them don't want to be criticized, so therefore there is an attempt to restrict the speech.*

But isn't it the case that really this has nothing to do with criticism? This bill is not saying you can't criticize the Congressman, or whatever; the bill is saying if you want to criticize the Congressman, one, do it with hard money and subject to the other – basically with hard money disclosure; and two, by implication, be honest about it and call him up and tell him to stop beating his wife, say don't vote for him, although that is not the requirement. *Isn't the issue really not that you can't criticize, but that if you want to criticize you can't do it with multimillion-dollar contributions?*"

Constitutional Issues Raised by Recent Campaign Finance Legislation Restricting Freedom of Speech: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 107th Congress 16-17, 151, 1st Sess. (2001). (Int. App. 17a).

Testimony of Donald J. SIMON:

"I appreciate the opportunity to testify on behalf of Common Cause regarding the role of so-called 'issue advocacy' in the 1996 campaign, and how advertisements run under the guise of 'issue ads' were used as a means to evade the federal campaign finance laws. Common Cause strongly believes there is a need for Congress to enact legislation to address this problem and to close what is

emerging as a major loophole in the system of federal campaign finance regulation.

This matter raises a question of fundamental importance to the continued viability of the Federal Election Campaign Act (FECA), as well as to the broader goal of regulating money in the political process: whether the Congress will permit the creation of a loophole in the FECA through which unlimited, unregulated and undisclosed money can flow into federal campaigns, thereby subverting the FECA's purpose of protecting the integrity of the electoral process from corruption and the appearance of corruption – interests which the Supreme Court found to serve compelling public purposes in Buckley v. Valeo, 424 U.S. 1 (1976).

The mechanism of this subversion is electioneering for candidates that takes place in the form of so-called 'issue advocacy.' The purpose of the FECA is to regulate money spent to advocate the election or defeat of candidates in federal campaigns. The FECA is not intended to regulate or limit money spent on the discussion of public issues.

. . . .

These are not speculative or hypothetical fears – such evasion occurred in the 1996 elections, involving tens of millions of dollars spent outside the scope of the FECA, simply because the ads were carefully crafted to avoid the use of 'magic words.' The Annenberg Public Policy Center, in a study released earlier this week, estimated that the two political parties and other groups spent $135 to $150 million on campaign ads in the guise of 'issue advocacy' during the 1996 campaign. *Bluntly speaking, this spending represented a means of massive cheating on the federal campaign finance laws.*

But even more is at stake in this matter than the evasion of the Nation's most fundamental anti-corruption laws. **The rise of so-called issue advocacy as a means to evade the campaign finance laws is changing the basic nature of our political campaigns.** It is making our political discourse less subject to public accountability.

Indeed, **candidates are losing the ability to control their own campaigns.** As Paul Taylor notes in his introduction to the Annenberg report:

'This [spending on issue advocacy] is unprecedented, and represents an important change in the culture of campaigns. **Candidates now share the election megaphone with a cacophony of other voices**. . . . To the naked eye, these issue advocacy ads are often indistinguishable from ads run by candidates. But in a number of key respects, they are different. Unlike candidates, issue advocacy groups face no contribution limits or disclosure requirements. Nor can they be held accountable by the voters on election day.' "

The First Amendment and Restrictions on Issue Advocacy: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 140-43, 1st Sess. (1997) (statement of Donald J. Simon, Executive Vice President and General Counsel, Common Cause). (Int. App. 27a).

BIPARTISAN CAMPAIGN REFORM ACT OF 2001 K

2001 Senate Vote No. 48
107th Congress
1st Session
03/26/2001

Amendment Sponsor: Senator Paul Wellstone D-MN

DESCRIPTION: The Senate agreed to Wellstone Amendment No. 145, to apply the prohibition on electioneering communications to targeted communications of certain tax-exempt organizations.

Tally 51-46
Democrats: 27-21
Republicans: 24-25

. . . .

VOTES BY STATE:

ARIZONA:

1 McCain (R)	**NAY**

. . . .

CALIFORNIA:

1 Feinstein (D)	NAY

. . . .

CONNECTICUT:

1 Dodd (D)	NAY
2 Lieberman (D)	NAY

. . . .

MAINE:

1 Snowe (R)	**NAY**
2 Collins (R)	NAY

. . . .

MASSACHUSETTS:

1 Kennedy (D)	AYE
2 Kerry (D)	AYE

. . . .

NORTH CAROLINA:

. . . .

2 Edwards (D)	NAY

NORTH DAKOTA:

. . . .

2 Dorgan (D)	AYE

. . . .

VERMONT:

. . . .

2 Jeffords (R)	**NAY**

. . . .

WISCONSIN:

. . . .

2 Feingold (D)	**NAY**