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

For decades, campaign finance law has rested on the twin pillars of disclosure and source restrictions. Steadfastly, Congress has insisted upon transparency and upon insulating elections from the corrosive and distorting effects of corporate and union treasury funds. And just as steadfastly, the Supreme Court has upheld the means Congress adopted to address those concerns.

As our earlier briefs demonstrated, these twin pillars have now eroded — largely over the past several years — to the point that our Nation's campaign finance laws no longer serve their constitutional, and compelling, purpose. The erosion is directly attributable to wholesale exploitation of the almost-complete inefficacy of the "express advocacy" test — a test designed to distinguish campaign speech from pure issue advocacy that one plaintiff's official has mocked as a "wall . . . built of the same sturdy material as the emperor's clothing. Everyone sees it. No one believes it."[115]

In response to this breakdown, Congress acted modestly and incrementally. For all plaintiffs' overwrought claims of "censorship" and "criminaliz[ing] speech," for all their repeated insistence that BCRA "bans" speech, Title II is a tailored amendment to an established regulatory framework that prevents corporations and unions from using their treasury funds to influence federal elections. It simply takes longstanding rules applicable to a category of campaign speech called "express advocacy" and applies them to a functionally equivalent category of campaign speech called "electioneering communications." That change in *standard* — from one proven to be impotent to one that is precisely targeted at the circumvention that produced the impotence — "does

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[115] INT 015986 (Tanya K. Metaksa, Executive Director, NRA-Institute for Legislative Action, Opening Remarks at the American Ass'n of Political Consultants Fifth General Session on "Issue Advocacy," at 2 (Jan. 17, 1997) [IER Tab 1.J].

not impose an absolute ban on all forms of corporate political spending"[116] any more than did its predecessor did.

For plaintiffs, though, this is all simply unavailing. In their view, however inefficacious the "express advocacy" standard may be, the Supreme Court has nonetheless established it as an immutable constitutional command. In any event, they assert, any substitute for "express advocacy" would be fatally overbroad, underinclusive, or both. In plaintiffs' view, Congress seemingly has no choice but to abandon enforcement of principles that have sustained the integrity and transparency of federal elections for decades.

The sheer implausibility of plaintiffs' counsel of despair should be enough to condemn it. Certainly the breadth of their position should render any court highly skeptical. And that skepticism is well-warranted, because plaintiffs' arguments are flawed in fundamental respects.

To begin, plaintiffs contort *Buckley* into something it never was. Where the Supreme Court undertook a cautious and tentative effort to advance congressional will by narrowing a statute that was otherwise unconstitutionally vague and overbroad, plaintiffs see a definitive, permanent constitutional barrier that would override all campaign finance statutes, passed by all legislatures, for all time, no matter how carefully drawn, how well supported by the evidence, and how critical to the functioning of fair elections.

Plaintiffs also largely ignore the controlling Supreme Court precedent on independent expenditures by corporations and unions. They profess to wonder how campaign spending by corporations and unions can corrupt the political process while spending by PACs and wealthy individuals does not, without acknowledging that what they critique in this regard is not BCRA, but longstanding Supreme Court precedent — precedent that has consistently enforced Congress's

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116 *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990) (emphasis deleted).

insistence that federal candidate elections be funded with money that comes voluntarily from individuals, not from corporations and unions. They insist that the Supreme Court has recognized only *quid pro quo* corruption as a justification for regulation,[117] when the Court explicitly recognized in *Austin* a "different type of corruption" that derives from the use of corporate funds in candidate elections — through independent expenditures as well as direct contributions.[118] They claim that "gratitude" for helping a candidate win an election cannot lead to corruption,[119] when the Supreme Court, speaking unanimously through then-Justice Rehnquist, has recognized that a principal threat of corruption in the corporate context is that politicians will repay with legislative favors "political debts" bought with corporate campaign expenditures.[120] And they continue to insist that if an ad addresses a substantive policy issue, it may not constitutionally be treated as campaign speech,[121] when the Supreme Court has already rejected precisely that claim — treating as campaign speech any ad that contains a word of express advocacy, even when that word is dominated by a discussion of issues.

Plaintiffs don the same blinders when they approach the facts laid before Congress and this Court. They disclaim any electoral intention in running their ads, while scarcely acknowledging that their conduct and statements before, during, and after their ad campaigns tell a very different story.[122] More importantly, while it is they who bear the heavy burden of proving that the definition of "electioneering communications" is "substantially overbroad," they cannot dispute the most compelling evidence that it is not — the objective data gleaned from the largest database of political advertising ever accumulated. That data irrefutably demonstrates that the vast majority of

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117 *See, e.g.*, NRA Opp. Br. at 8.

118 *Austin*, 494 U.S. at 660.

119 *See* NRA Opp. Br. at 8-12.

120 *FEC v. National Right to Work Comm.*, 459 U.S. 197, 207-08 (1982) ("NRWC").

121 *See, e.g.*, McConnell Opp. Br. at 34, 47; NRA Opp. Br. at 19-23.

122 *See, e.g.*, Intervenors' Br. at 75-99; Intervenors' Opp. Br. at 72-81; Gov't Br. at 135-39.

"electioneering communications" are run on the eve of elections, in close races, along partisan lines, and are directed almost entirely at candidates (but not at legislative colleagues who are *not* candidates). In the contrived world plaintiffs portray, it is an accident if an electioneering communication happens to influence an election.

Finally, those plaintiffs that have been among the major purveyors of electioneering communications bemoan the difficulties of raising money through PACs. In large part, their claims are out of place in this facial challenge.[123] In any event, their claim of hardship does not square with their notable success in raising huge sums of hard money to fund express advocacy and direct contributions to candidates. More importantly, though, plaintiffs blink the contradiction that lies at the core of their argument. They insist their electioneering communications reflect the true sentiments of their members,[124] yet they complain they could not possibly persuade enough members to support that speech to keep pace with previous years.

In the end, plaintiffs cannot escape what Title II really is: a modest, incremental reform, directed at stopping recent abuses that have threatened the integrity of a regulatory regime built on principles of democracy and accountability that have been in place for a century.

A. *Buckley* Did Not Permanently Handcuff Congress.

Our previous briefs demonstrated that the *Buckley* express advocacy test was not, as plaintiffs continue to insist, a constitutional rule for all seasons, but rather a cautious intervention to preserve a vague and overbroad statute from being struck entirely.[125] As we have said, *Buckley* provides a constitutional "roadmap" for regulating in this arena, requiring Congress to steer carefully and clearly, mindful of the important First Amendment proscriptions against vagueness

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123 *See, e.g.*, Joint Motion to Stay (filed on July 26, 2002), at 2 (granted by the Court on Aug. 13, 2002).

124 NRA Opp. Br. at 5; AFL-CIO Opp. Br. at 4.

125 *See* Intervenors' Br. at 117-23; Intervenors' Opp. Br. at 60-63.

and substantial overbreadth.[126] The legislative history of BCRA, and the legislative handiwork reflected in Title II, show just how mindful Congress was. The "electioneering communications" standard is one to praise, not bury.

Plaintiffs accuse us of treating *Buckley* as "a passing exercise in statutory construction" and a "vagueness-only" ruling that "reveal[s] nothing about the First Amendment."[127] Of course, we do no such thing. What we *do* maintain is that *Buckley* does not disable Congress from restoring the integrity of our election laws by supplementing the existing "express advocacy" test, which has become largely irrelevant, with another statutory standard that is clear, tailored, and well-crafted for efficacy. The constitutional handcuff plaintiffs contend *Buckley* has imposed reflects neither a plausible interpretation of the Supreme Court's decision nor a sensible approach to constitutional review of the federal election laws as they naturally evolve in light of history and experience — in this case, a documented history and experience of massive evasion.[128]

It is simply and fundamentally wrong to view "the express-advocacy line [as] a substantive limit on Congress' power," designed "to ensure that FECA did not reach 'discussion of issues and candidates.'"[129] As we have previously pointed out, even communications that include express advocacy almost invariably also include significant discussion of issues and candidates.[130] That was especially true in the *Buckley* era, when five-minute political ads, addressing multiple themes and issues, were common.[131] While the five-minute political ad is largely a thing of the past, mixing

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126 Intervenors' Br. at 122-23.

127 McConnell Opp. Br. at 33-34. In particular, because no for-profit corporations or unions challenged the independent expenditure rules in *Buckley*, and because those entities have long been forbidden from making any election-related contributions or expenditures, it surely makes no sense to assume that what the Court said in *Buckley* ties Congress's hands with respect to those types of entities that were not even before the Court in *Buckley*, yet now make massive expenditures of the kind shown by the record in this case.

128 *See* Intervenors' Br. at 121-22; Intervenors' Opp. Br. at 61-62 & n.187; Gov't Br. at 134-42.

129 McConnell Opp. Br. at 34 (quoting *Buckley v. Valeo*, 424 U.S. 1, 42 (1976); *see also* ACLU Opp.Br. at 2-5.

130 *See* Intervenors' Opp. Br. at 61-62.

131 Bailey Decl. ¶ 5 [DEV 6-Tab 2].

discussion of issues and electioneering remains commonplace, as is illustrated by so many of the examples already discussed in earlier rounds of briefing.[132] In short, the express advocacy test does not have the effect — and could hardly have been designed — to preclude FECA from covering any speech that includes such discussion.

Equally unavailing are plaintiffs' various efforts to mine *Buckley* and *MCFL* for random phrases that might support their picture of *Buckley* as a constitutional standard chiseled in stone.[133] Those passages simply confirm what we freely acknowledge and Congress well understood: that *Buckley*'s express advocacy test rested upon concerns of both vagueness *and* overbreadth. Not a single one of the passages to which plaintiffs repeatedly refer proves that *Buckley* intended to adopt a standard from which no legislature could ever depart.[134]

Plaintiffs, again, put much stock in non-binding lower court opinions,[135] to which we have already replied in our opposition brief.[136] Even the most emphatic of these cases — the Fourth Circuit's attorneys' fees award against the FEC — does not establish plaintiffs' view of "express advocacy" as a constitutional *diktat*.[137] In that case, like most of the others, the FEC sought to

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132 *See, e.g.*, Intervenors' Br. at 77-80.

133 *See* McConnell Opp. Br. at 33-39.

134 Plaintiffs correctly note that the Supreme Court later borrowed *Buckley*'s express advocacy test in *MCFL*, where it construed the different provision of FECA that prohibits corporations and unions from using their treasury funds to make "contribution[s] or expenditure[s] in connection with any [federal] election." *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 245-49 (1986) ("MCFL") (construing 2 U.S.C. § 441b). Noting that *Buckley* had adopted the express advocacy construction for the term "expenditure" in the provision requiring disclosure of independent expenditures, the Court accepted the argument that the same limiting construction should apply to the term "expenditure" in "the more intrusive provision that directly regulates independent spending." *Id.* at 249. There is nothing surprising in that adoption of a parallel construction of the same term construed in *Buckley*, appearing elsewhere in the same statute, in a context that suggested the need for at least as narrow a construction. But *MCFL* does not suggest that the Constitution prohibits Congress from writing a different provision, in very different terms, that draws lines different from "express advocacy." If anything, *MCFL* belies any wooden approach to the express advocacy test because in that case the Court *rejected* the argument that the express advocacy test itself was limited to specific words, instead holding that the use of "marginally less direct" terminology did not change the "essential nature" of the communication, which "in effect" urged voters to elect named candidates. *See id.* at 249-50.

135 McConnell Opp. Br. at 39-41.

136 Intervenors' Opp. Br. at 62-63; *see also* Gov't Opp. Br. at 61-62.

137 McConnell Opp. Br. at 39 (citing *FEC v. Christian Action Network*, 110 F.3d 1049, 1050 (4th Cir. 1997)).

enforce a regulation that defined "express advocacy" more broadly than the words of the statute taken directly from *Buckley*'s narrowing of its predecessor. The Fourth Circuit did not hold that Congress could never regulate beyond express advocacy — that question was not before the court — but rather that the FEC had no authority to extend FECA's reach.[138] That much becomes crystal clear upon reading a subsequent Fourth Circuit case which presciently proclaimed that any change in FECA's coverage must come, not from the lower courts or the FEC, but "from an imaginative Congress or from further review by the Supreme Court."[139]

B. The Electioneering Communications Provisions Advance Interests The Supreme Court Has Recognized As Compelling.

The touchstone for this constitutional case is Congress's justification for stanching the massive, unchecked flow of corporate and union treasury funds into electioneering communications. Plaintiffs, of course, disagree with Supreme Court decisions that condone the prohibition against corporations and unions funneling treasury funds into election-related messages — either directly or through coordinated expenditures and contributions.[140] That is, indeed, the true target of the NRA's professed bewilderment over doctrines they characterize as "at war with themselves":[141] the principle that Congress may constitutionally prohibit corporations and unions from funding electioneering messages, and the principle that individuals and PACs have a First Amendment right to engage in unlimited spending.[142]

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138 *Christian Action Network*, 110 F.3d at 1062 ("it is indisputable that the Supreme Court limited the FEC's *regulatory* authority" to "express advocacy") (emphasis added).

139 *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001).

140 *See, e.g., Austin*, 494 U.S. at 665; *MCFL*, 479 U.S. at 247; *id.* at 267 (Rehnquist, C.J., dissenting); *FEC v. National Conservative Pol. Comm.*, 470 U.S. 480, 501 (1985) ("NCPAC"); *NRWC*, 459 U.S. at 207; *Pipefitters Local Union v. United States*, 407 U.S. 385, 416-17 (1972); *United States v. UAW*, 352 U.S. 567, 570-84 (1957).

141 NRA Opp. Br. at 1.

142 *Id.* at 10-11.

What the NRA misunderstands as "war," however, is the premise and product of campaign finance laws that predate BCRA by several decades. The Supreme Court has resolutely upheld the longstanding precept that corporations may be precluded from spending even a penny to influence candidate elections, even while reaffirming the more general point that individuals and groups of individuals have a core First Amendment right to spend unlimited sums to influence elections.[143] Plaintiffs simply seek to re-litigate *Austin* and the long line of cases on which it rested. This Court, however, cannot avail them.[144]

Nor is their general objection well-taken. The Supreme Court has never asserted that independent spending can never corrupt a candidate[145] — only that, as applied to individuals and groups of individuals, the government's interest is not "sufficient to justify" expenditure limits.[146] But the Court, following decades of congressional practice, has ruled that corporations and unions are different from individuals and groups of individuals, in ways that are important enough that Congress is entitled to ban use of their treasury funds entirely from electoral activity.[147]

Relatedly, when it comes to spending by corporations (and, by analogy, unions) the Court has not felt obliged to focus narrowly on the "danger of 'financial *quid pro quo*' corruption."[148] The Court invoked what it called "a different type of corruption in the political 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

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143 *See Austin*, 494 U.S. at 658-61; *Buckley*, 424 U.S. at 26 n.26.

144 *See Agostini v. Felton*, 521 U.S. 203, 237-38 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484-85 (1989).

145 *Buckley*, 424 U.S. at 47 (noting that the absence of coordination "alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments," not that that the danger is eliminated entirely).

146 *Id.* at 55.

147 *See Austin,* 494 U.S. at 665 ("unincorporated unions, and indeed individuals, may be able to amass large treasuries, they do so without the significant state-conferred advantages of the corporate structure . . . [and] the desire to counterbalance those advantages unique to the corporate form is the State's compelling interest in this case.")

148 *Id.* at 659.

political ideas."[149] In short, the Supreme Court long ago rejected plaintiffs' argument that, in the context of corporate spending on elections, the government cannot regulate unless it proves that the spending will garner political favors.

That said, the evidence in this case proves exactly that — sponsors use electioneering communications to curry favor with officeholders and capitalize upon those favors when they seek legislative favors in return.[150] And, contrary to the NRA's allegation of "contrived . . . government purpose," Congress did focus on exactly this sort of actual and apparent corruption.[151] Plaintiffs are right that a politician's gratitude for financial support does not translate inevitably into a willingness to compromise principles.[152] But they are wrong when they claim the Supreme Court does not recognize this sort of potential indebtedness as the source of a portent of corruption that justifies regulation. That is exactly what the Supreme Court has meant when it has opined on several

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149 *Id.* at 660.

150 *See* Intervenors' Br. at 105-09; Gov't Br. at 143-46 (both discussing the evidence).

151 *See, e.g.*, 147 Cong. Rec. S2636 (daily ed. Mar. 21, 2001) (statement of Sen. Edwards) ("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."); *see generally* 147 Cong. Rec. S3072 (daily ed. Mar. 29, 2001) (statement of Sen. Feingold); 146 Cong. Rec. S4775 (daily ed. June 8, 2000) (statement of Sen. Feinstein); 146 Cong. Rec. S4778 (June 8, 2000) (statement of Sen. Lieberman).

The NRA also contends (NRA Opp. Br. at 6-7) that the anti-circumvention rationale was not on Congress's mind, but it plainly was. *See, e.g.*, 148 Cong. Rec. S2113 (daily ed. Mar. 20, 2002) (statement of Sen. Grassley) ("This article described a promise that was made, apparently, by the House minority leader to a group of Democratic Members. He assured them that he would help raise money for certain outside groups aligned with the Democrats . . . . . These groups can then turn around and use this money to run unregulated issue ads to the benefit of Democrat candidates. This example belies the contention that a soft money ban will solve the problem of money in politics."); 145 Cong. Rec. S12,661-62 (daily ed. Oct. 15, 1999) (statement of Sen. Feinstein) ("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."); 144 Cong. Rec. S1039-40 (daily ed. Feb. 26, 1998) (statement of Sen. Kerry) ("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.' If we were simply to ban soft money contributions to the parties, the soft money expenditures made by Labor and corporations would increase exponentially . . . ."); *see also* Thompson Comm. Rep. at 4568 ("several tax-exempt organizations spent millions of dollars on behalf of Republican candidates through purported 'issue ads' and other campaign support."); *id.* at 4569 ("The issue advocacy loophole was also exploited by Triad Management Services, a for-profit company that claims to be in the business of providing advice to conservative donors in exchange for fees. In fact, Triad was funded by a handful of wealthy Republican donors who used it as a mechanism to support the election of conservative Republican candidates . . . . Triad channeled millions of dollars from its backers to two tax-exempt groups it had established for the sole purpose of running attack ads against Democratic candidates under the guise of 'issue advocacy.'").

152 NRA Opp. Br. at 8-9.

occasions that the "overriding concern behind" campaign finance laws in the corporate context is "the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted."[153]

C. The Electioneering Communications Provisions Are Narrowly Tailored.

*1. An Ad Can Be Regulated As Electioneering So Long As One of its Purposes or Effects Is To Influence Elections.*

Rather than grapple with our actual argument about why the law is narrowly tailored, plaintiffs attack a straw man. We have never suggested, much less insisted, for example, that BCRA's constitutionality depends upon a claim that "political speech cannot discuss both candidates and issues without losing its constitutional protection,"[154] or that "electoral intent is the only significant explanation for running issue ads during the 60 days before an election."[155] We do not rely on "a myopic insistence that all advertising run within 60 days of an election and referential of a candidate in that election comprises 'electioneering' and nothing else."[156] And we have not characterized a single ad as "executed to serve *wholly* electoral goals."[157] Rather, as our opposition brief emphasizes,[158] a universe of advertising is constitutionally subject to regulation as electioneering if the vast majority of ads encompassed by the definition have a purpose or effect of influencing elections.

That is why the NRA is wrong to assert that the statute cannot be applied to ads "educating the public on Second Amendment issues, defending the NRA against attacks by politicians and the

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153 *NRWC*, 459 U.S. at 208 (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 788 n.26 (1978)); *see also Federal Election Comm'n. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 247 (1986) (noting that "the concern of [the ban on corporate and union expenditures] is "the use of corporation or union funds to influence the public at large to vote for a particular candidate or particular party'") (quoting *United States v. UAW-CIO*, 352 U.S. 567, 589 (1957)).

154 McConnell Opp. Br. at 47.

155 Chamber Opp. Br. at 1.

156 AFL-CIO Opp. Br. at 1 (emphasis added).

157 *Id.*

158 Intervenors' Opp. Br. at 68-69, 72.

media, and fundraising."[159] To be sure, if a statute covered only (or largely) ads that fell into that category *and that were not also about influencing elections*, the statute would not be tailored to advance BCRA's purposes. But just because an ad that runs just before an election and specifically identifies a candidate has any of those non-electoral purposes does not mean that it does not *also* have a purpose and effect of influencing elections.

One need go no further than a single ad run by the NRA to illustrate the point. There is no question that the following ad refers to recruiting NRA members and raising money, but that did not sanitize the ad of its blatant electioneering purpose:

> [Mr. LaPierre]: Did you know that right now, in Federal Court, Al Gore's Justice Department is arguing that the Second Amendment gives you no right to own any firearm? . . . . And when Al Gore's top government lawyers make it to the US Supreme Court to argue their point, they could have three new judges, hand-picked by Al Gore if he wins this election . . . . When Al Gore's Supreme Court agrees with Al Gore's Justice Department and bans private ownership of firearms, that's the end of your Second Amendment rights. So please call this number now to join the NRA or just find out how you can help.[160]

The NRA ran this "membership drive" for the 8-day period beginning October 28, 2000 in Tennessee, which the NRA had only discovered in September was in play.[161] The NRA cannot plausibly claim the ad had nothing to do with influencing voters to vote against Gore — not with its direct reference to the election, to "Al Gore's [as opposed to Clinton's] Justice Department," and to "Al Gore's Supreme Court," and with its electronic backdrop displaying an "Election 2000" logo growing ever larger.[162]

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159 NRA Opp. Br. at 19.

160 CMAG Storyboard NRA Gore No Guns 60 [DEV 48-Tab 3].

161 LaPierre Dep. Tr. (Sept. 3, 2002) at 201; search of CMAG Database.

162 CMAG Storyboard Gore No Guns GO; *see also* LaPierre Dep. Tr., Ex. 4 (letter from the Chairman of NRA's PAC seizing on the Justice Department's stance and declaring "this unusually candid admission *must* be communicated to . . . pro-freedom voters . . . . We can provide the margin of victory in states that will swing the election . . . .") (emphasis in original).

The Chamber of Commerce is certainly correct that it would be problematic to build a regulatory regime that inquires into "what is in a speaker's heart, as opposed to its ad."[163] That is precisely why Congress chose a purely objective standard that depends only upon verifiable facts. Thus, Title II requires the sponsor to know only (1) whether an ad specifically identifies a candidate and (2) where and when it will run — obviating any need to "police one another's motives."[164] Congress consciously fashioned an objective definition that it correctly understood would cover ads with the purpose and effect of influencing elections, without inadvertently capturing any significant amount of advertising truly not intended to influence elections. Senator Olympia Snowe, who crafted the "electioneering communications" definition, put it this way: "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."[165]

In arguing that the statute is substantially overbroad, plaintiffs contend that BCRA's objective, bright-line standard will prohibit corporations and unions from using their treasury funds to run thousands of ads "designed *solely* to advocate a particular position on a particular public policy issue."[166] In making that argument, of course, plaintiffs invoke their own subjective intentions. But their very own documents impeach that avowed single-minded purpose, and the uncontroverted objective data before Congress and this Court reveal just how accurately Senator Snowe identified the problem and how correct Congress was to conclude that professional advocacy groups, and the experts they enlist to design their messages, do not spend millions on ads without a good sense that those ads in fact accomplish at least one of their sponsors' goals — to elect and defeat candidates for federal office.

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163 Chamber Opp. Br. at 1.

164 *Id.*

165 148 Cong. Rec. S2135 (daily ed. Mar. 20, 2002).

166 NRA Compl. ¶ 22 (emphasis added).

### 2. *Plaintiffs' Own Admissions, and the Objective Data, Reveal How Well the "Electioneering Communications" Definition Captures Electioneering Intent.*

Two bodies of evidence confirm Congress's judgment that the vast majority of ads covered by BCRA have a purpose and effect of influencing elections. The first is evidence drawn from the statements and contemporaneous internal documents of plaintiffs and other sponsors of ads that Title II defines as "electioneering communications." The second is the objective data demonstrating patterns that can be explained only by an electioneering intent. Plaintiffs largely ignore most of the evidence in both categories.

As our opening brief reviews in detail, the major sponsors of ads over the past few election cycles that would now fall within the definition of "electioneering communications" left an impressive trail of public statements, internal memos, and strategic documents — supplemented by admissions in this case — proving that a material purpose in running those ads was to influence elections. Some declared publicly their goal to influence the elections with their ad campaigns.[167] Almost all strategized internally about how to achieve that goal.[168] The consultants who worked on the ads described their missions in electoral terms.[169] In designing their ads, they relied on focus groups and polling to determine how the ads would affect the likely votes of "swing voters."[170] And after the elections, plaintiffs' leaders celebrated electoral victories, often attributing their success to the ads themselves.[171] When confronted with this overwhelming evidence, some plaintiffs had no choice but to admit that they intend to influence elections, or at least that their ads had that effect.[172]

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167 Intervenors' Br. at 87-89.

168 *Id.* at 95-101.

169 *Id.* at 90-92.

170 *Id.* at 92-94.

171 *Id.* at 92.

172 *Id.* at 90; *see also* AFL-CIO Opp. Br. at 5.

Those who declined have a lot of explaining to do. Instead, they have almost entirely ignored the evidence.[173]

Nor have plaintiffs tried to refute the equally overwhelming *objective* evidence about patterns of electioneering communications, derived largely from the CMAG database, relating to the timing, targeting, and partisanship of electioneering communications. That objective data, presented in our opening brief, demonstrates that interest groups target battleground elections, and then run partisan ads right before the vote. To summarize:

- *Interest-group ads that mention candidates are heavily concentrated in the weeks leading up to the election.*[174] For example, Citizens for Better Medicare (funded by the pharmaceutical industry) ran 23,867 ads during the first nine months of 2000, never mentioning a candidate.[175] Then, for the two months before the 2000 election, it ran more than 10,000 ads mentioning candidates.[176]

- *Interest-group ads mentioning candidates are heavily concentrated in a handful of states and congressional districts with highly competitive elections.*[177] For example,

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173 The only exception is the AFL-CIO, which quibbles that *some* of the documents cited confirm their electoral purpose, but do not specifically link their candidate-centered ad campaigns to that purpose. *See* AFL-CIO Opp. Br. at 5-6. The only way to resolve the disagreement is to review the documents themselves. Upon review, it will be clear that the documents cited treat the ad campaigns as an integral part of an overall electioneering strategy. *See, e.g.*, Intervenors' Opp. Br. at 72, 75 (discussing documents); see also Intervenors' Br. at 89, 91, 92 (same); Gov't Opp. Br. at 89 n.92 (same); Gov't Br. at 37-43 (same). In any event, the AFL-CIO's intentions were readily recognized by those most concerned about the union's tactics — their traditional adversary (and co-plaintiff) the Chamber of Commerce. *See, e.g., infra* notes 182-184 and accompanying text (discussing the Chamber's involvement in efforts to respond to the AFL-CIO's campaign of ads to defeat a "pro-business Congress"); *see also* Gov't Opp. Br. at 89 (discussing response to AFL-CIO ads by Citizens for Better Medicare). The true goals of the AFL-CIO were also not lost on the media. *See, e.g.*, Frank Swoboda, *AFL-CIO to Target 75 House Districts*, Wash. Post, Jan. 25, 1996 at A16 (noting AFL-CIO's announcement that it planned to spend $35 million in 1996 on a campaign to win back Democratic control of the House of Representatives); James M. Perry & John Harwood, *Election '96: By Splitting Vote, Americans Back Status Quo*, Wall St. J., Nov. 6, 1996, at A8 (noting that in the 1996 election "Democrats benefited from a $35 million campaign of 'issue ads' produced by the suddenly energetic AFL-CIO to defeat Republican congressional candidates"); Paul West, *Flood of Money Drowns Election Finance Reform: Large, Legal Donations Obliterate Limits Imposed by 1974 Law*, Balt. Sun, Oct. 31, 1996, at 1A ("Perhaps the best known of these campaigns [of "issue ads" to "sway voters"] is a pioneering $35 million effort by the AFL-CIO aimed at defeating dozens of Republican senators and congressman . . . .").

174 Jonathan S. Krasno and Frank J. Sorauf, *Evaluating the Bipartisan Campaign Reform Act (BCRA)* (Sept. 23, 2002) at 57 [DEV 1-Tab 2, hereinafter Krasno & Sorauf Expert Report]; Kenneth M. Goldstein, *Expert Report of Kenneth M. Goldstein* (Sept. 19, 2002) at 17 [DEV 3-Tab 7, hereinafter Goldstein Expert Report]; Intervenors' Br. at 95-97.

175 *See* Goldstein Expert Report, App. A, Table 17A.

176 *See id.*; [REDACTED].

177 Goldstein Expert Report at 20-24; *see also* Krasno & Sorauf Expert Report, App., Tables 4, 5; Intervenors' Br. at 97-99.

the NRA's LaPierre conceded (and the NRA's opposition brief did not dispute)[178] that he could not "think of a single broadcast ad run in the 60 days prior to the 2000 election that mentions a candidate for the Senate or the House that did not involve an election that was believed to be close."[179]

- *Interest group ads are typically made on a partisan basis.* To take a single contrasting example, the manager of the AFL-CIO's ad campaign could not (with two insignificant exceptions) identify a single ad run in the 60 days before the 1996, 1998, or 2000 elections in which a Republican had been praised or a Democrat criticized,[180] [REDACTED].[181]

Plaintiffs offer no contrary evidence — only a few implausible alternative hypotheses for some (but not all) of these patterns. To take partisanship first, none of the plaintiffs deny the overarching pattern of partisanship among sponsors of electioneering communications. The Chamber of Commerce comes the closest, suggesting that the partisan pattern of its advertising, largely through a business group calling itself "The Coalition," was somehow unintentional — "[t]he Chamber displayed no interest in electoral effects"[182]

[REDACTED][183]

[REDACTED][184]

[REDACTED][185]

[REDACTED][186]

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178 NRA Opp. Br. at 25.

179 LaPierre Dep. Tr. at 158-59 (emphasis added).

180 *See, e.g.*, Mitchell Cross. Tr. (Oct. 24, 2002) at 174, 182; Mitchell Dep. Tr. (Sept. 18, 2002) at 57. [REDACTED] . The AFL-CIO's designated witness agreed that AFL-CIO staff "sometimes" expressed the view that they would "gladly sacrifice Republican moderates for Democratic control of Congress." *See* G. Shea Dep. Tr. (Sept. 27, 2002) at 21.

181 [REDACTED].

182 Chamber Opp. Br. at 4.

183 [REDACTED].

184 [REDACTED].

185 [REDACTED].

186 [REDACTED].

[REDACTED].[187] Perhaps most telling is The Coalition's "Report on Accomplishments," which pronounced: "The Coalition's strategy . . . had a positive impact on the 'undecided's' and 'swing voters' . . . . [I]t is clear by the re-election successes of attacked incumbents that Coalition advertising blunted early momentum built up by months of AFL-CIO ads."[188]

As to *timing*, plaintiffs continue to insist as an article of faith that election time is when the public pays more attention to public policy.[189] But in place of evidence, plaintiffs offer only self-serving declarations. Indeed, plaintiffs have not so much as acknowledged the contrary expert testimony: that there is "no evidence to support the position that interest in *public policy* issues rises" as the election draws near; that "with the flood of advertising taking place during the last two months before an election, an individual interest group's message on a public policy issue is likely to become lost"; and that "partisan attachments . . . harden during the last two months of a campaign," which in turn "make[s] it more difficult to persuade otherwise open-minded viewers of the merits of an interest group['s] policy stance."[190]

As to the *targeting* of close races, plaintiffs argue that they aim only to "exert[] influence on [officeholders] by taking advantage of electoral pressures they feel,"[191] and that targeting candidates in close races makes the candidate feel as if "embracing particular positions could cost votes."[192]

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187 [REDACTED].

188 [REDACTED]; *see also* General Counsel's Rep. at 35 [DEV 53-Tab 6].

189 Chamber Opp. Br. at 2.

190 Goldstein Expert Report at 32-33; *see also* Arthur Lupia, *Rebuttal Report of Dr. Arthur Lupia* (Oct. 14, 2002) at 9 [DEV 5-Tab 5, hereinafter Lupia Rebuttal Report] (agreeing with Goldstein's analysis); Intervenors' Br. at 95 (collecting similar views from political consultants).

[REDACTED]

Bailey Decl. ¶ 11 (explaining how "nearly all of the ads that I have seen that both mention specific candidates and are run in the days immediately preceding the election were clearly designed to influence elections. From a media consultant's perspective, there would be no reason to run such ads if your desire was not to impact an election.").

191 AFL-CIO Opp. Br. at 4; *see also* Chamber Opp. Br. at 2 n.2.

192 AFL-CIO Opp. Br. at 4; *see also id.* at 6 (claiming that labor ads targeting Bush as a liar were intended to influence his "campaign commitments," not his election, even though they ran through November 6, too late to plausibly affect a major campaign platform); search of CMAG database.

Plaintiffs' argument seems to be that sponsors of electioneering communications are not actually interested in influencing the election, but only in making the candidate feel as if their ads will do so, and that they will continue unless the candidate toes the sponsor's policy line. Of course, that threat is credible only if the ads actually *do* move voters, which is all that is necessary to demonstrate that they have an electioneering purpose or effect — and therefore that Title II's coverage is appropriate. In any event, this argument fails for the same reason that the argument about timing fails: The groups that invoke it routinely advertise in support of their staunchest allies or against their staunchest foes, and they talk about past votes — features that are hardly consistent with a professed intent *solely* to affect the future conduct of whoever happens to get elected.[193]

### 3. *BCRA Is Not Overbroad As Applied to the 30-Day Period Before the Primaries.*

Plaintiffs find it telling that defendants do not emphasize data about the primary season.[194] They take this supposed omission, ignoring testimony by three defense experts who did address these matters,[195] as a concession that BCRA must be overbroad as applied to that context.[196] That, of course, is a curious deduction since it is plaintiffs' burden to prove unconstitutional overbreadth.[197] For months, plaintiffs and their expert have had full access to the CMAG database. Much more revealing, then, is the fact that they have found no evidence to support their claim that BCRA is overbroad as applied to the primary period.[198]

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193 *See, e.g.*, Intervenors' Br. at 99.

194 *See* McConnell Opp. Br. at 44 n.18; Chamber Opp. Br. at 1; AFL-CIO Opp. Br. at 2.

195 *See, e.g.*, David B. Magleby, *Report Concerning Interest Group Electioneering Advocacy and Party Soft Money Activity* (Sept. 23, 2002) at 15 [DEV 4-Tab 8, hereinafter Magleby Expert Report] ("Genuine issue advocacy ... within a month of a presidential primary was rare."); *id.* at 88, App. F (describing the "Selection of the Five Presidential Primaries" studied in 1998 and 2000); Krasno & Sorauf Expert Report at 61.

196 AFL-CIO Opp. Br. at 2; McConnell Opp. Br. at 44 n.18.

197 *See New York State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988).

198 The NRA similarly argues that defendants have not come forth with "any persuasive evidence" demonstrating a need to restrict "radio ads." NRA Opp. Br. at 23. Of course, if Congress had *not* included radio ads, plaintiffs would complain that the law was thereby fatally underinclusive. But in any event, Dean Magleby's work, which was before

The reason is that the evidence does not support their thesis. The primary-season data for both 1998 and 2000 confirm that BCRA's electioneering communications definition accurately identifies ads that are electioneering in nature. Contrary to plaintiffs' claim, defense experts (Dr. Krasno and Dr. Sorauf) explicitly addressed the point and were "confident" that the primary period "would have little effect on the proportion of pure issue ads incorrectly captured by BCRA."[199] "Indeed," they continued, "our examination of 1998 shows this to be true: no pure issue ads would have been captured by the 30-day primary period."[200] The 2000 database yields similar results. There were 76 distinct ads naming candidates that aired outside the 60-day period.[201] Focusing only on those ads, a tiny 3 percent of airings even named a candidate and aired within 30 days of the candidate's primary,[202] but most of those were perceived as electioneering. So the "false positives"

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Congress, conclusively shows that radio ads are part of the problem. *See* Magleby Expert Report at 22 ("In Senate races, television *and radio* were also major components of the ... outside money campaigns."); *id.* at 23 (in 2000, "interest groups making use of radio for electioneering efforts included the NRA, Americans for Limited Terms, [and] U.S. Chamber of Commerce. . . . Of the 105 radio ads we recorded, only 20 ads contained the magic words."). While the NRA maligns Dean Magleby's highly respected work as "unscientific," NRA Opp. Br. at 23, it offers no expert testimony to that effect, and no evidence whatsoever to impeach Congress's own expert conclusion that radio was indeed part of the problem. *See, e.g.*, 148 Cong. Rec. S2151 (daily ed. Mar. 20, 2002) (statement of Sen. Kennedy) (corporations "dominate the airwaves with radio and TV ads"). Moreover, the NRA's LaPierre himself equates radio and TV advertising, stating that if you want to get your message out, it is "obvious that radio . . . and TV [are] the way to do it." LaPierre Dep. Tr. at 206.

Moreover, the radio ads produced through discovery confirmed patterns that match the patterns of television advertising. For example, the NRA's LaPierre conceded running one anti-Gore radio ad as many as 1,000 times in the following battleground states: Minnesota, Pennsylvania, West Virginia, Missouri, Washington, and Kentucky. LaPierre Dep. Tr. at 268-77 & Ex. 6A. Mr. LaPierre testified that ad "had the exact same substantive message" as a PAC radio ad critical of the "Clinton-Gore Justice Department" and of a potential Gore Supreme Court. LaPierre Dep. Tr. at 276; *see also id.* at 269, 257-59 & Ex. 5B.

[REDACTED]

199 Krasno & Sorauf Expert Report at 61.

200 *Id.* (footnote omitted).

201 Search of CMAG Database (16,916 airings).

202 Search of CMAG Database (522 out of 16,916).

represented only 1.2% of all issue ads aired that year.[203] In short, as defense experts testified, based on past experience BCRA's fit appears to be – if anything – even tighter as applied to the primary season than it is as applied to the general election.

*4. The Subjective Empirical Evidence Also Refutes Plaintiffs' Claim That BCRA Is Substantially Overbroad.*

As noted above, the objective data that comprise most of the CMAG database paint a vivid picture of the full motivation behind and the effect of the vast majority of candidate-centered ads that were run close to an election. The picture is so clear that the Court need not even resort to the more subjective data about the perceived purpose of the ads. In any event, that evidence too is both sound and overwhelming.

Plaintiffs press their attack on one feature of the subjective data produced by defendants — as if in the face of the unambiguous objective data, the evidence from plaintiffs' own contemporaneous documents, and the absence of any data of their own — that alone could sustain their heavy burden in this facial challenge. Even as to this single feature, though, plaintiffs fall short.

For one thing, it bears emphasis that *any* calculation of the proportion of pure issue advocacy that might be drawn from the CMAG data bases — whether it is the 3 percent the experts calculated for 2000 or the 14.7 percent drawn from the 1998 data — cannot be viewed as the actual figure, but only as a conservative outer limit. As we have previously explained, most of the figures that both plaintiffs and defendants reference are based only on a period of 11 months out of an election cycle of two, four, or six years.[204] Moreover, the students were asked whether

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203 Search of CMAG Database.

204 Krasno & Sorauf Expert Report at 61-62.

electioneering was "*the* purpose,"[205] even though, as we have demonstrated, it is permissible to regulate an ad so long as *any* material purpose or effect is to influence the elections. In addition, the students conducted their analysis isolated from the intense electoral context in which these ads were aired.[206]

Moreover, as the Government's brief amply demonstrates, plaintiffs' "analysis" of the subjective data is not a fair assessment but, rather, a statistical shell game.[207] As to the 1998 database, plaintiffs persist in claiming that it shows a 64 percent overbreadth, even though they can arrive at this number only by means of a one-sided manipulation of the data.[208] And for the 2000 database, plaintiffs are able to reach a "conclusion" they like only by doing precisely what they have (wrongly) accused Professor Goldstein of having done with respect to the 1998 data — and then some: re-coding the data themselves, overriding the judgment of both the original coders and respected political scientists.[209]

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205 *Buying Time 1998* at 193; Intervenors Opp. Br. at 84 n.292.

206 The coders of the 1998 data did not make their judgments during an election season and were not even told to assume an election was about to occur. As important, the coders for both years were removed from the cacophony of political ads that (as the sponsors of those ads no doubt fully understood) put the actual audiences in a frame of mind of expecting every ad about a candidate to trigger thoughts about the election. *See* Gov't Br. at 141 n.104.

Similarly, as the Government aptly demonstrates, Gov't Opp. Br. at 83-86, context is everything for borderline ads, so that a coder who is unaware of the political context in which an ad airs will not be attuned to manifestations of electioneering intent and impact that would be obvious to the actual viewer. For example, when coders examined the Chamber of Commerce's ad urging Jim Matheson, a candidate for an open seat in Utah's Second Congressional District in 2000, "to make a decision" on what position to take on a prescription drug plan, they coded it as issue advocacy. When viewed in context, the ad was clearly electioneering: Congress was out of session, Matheson was not in Congress and thus could not vote on the bill, the ad was run for the last six days of the election season, and the ad played on a general theme of Matheson's opponent, who characterizing him as a fence-sitting Democrat out of step with a conservative electorate. *See also* Gov't Opp. Br. at 85. Examples like this demonstrate why most of the claims plaintiffs make are far more readily adjudicated in as-applied challenges.

207 Gov't Opp. Br. at 70-77.

208 *See* Intervenors' Opp. Br. at 85; Gov't Br. at 74.

209 *Compare* McConnell Opp. Br. at 46 (insisting that correct percentage should be 17 percent) *with* Goldstein Expert Rep. at 25 (Table 7) (reporting a 2.3 percent figure) *and* Gov't Opp. Br. at 76-77 (refuting plaintiffs' analysis).

The NRA's challenge to the 2000 data is equally invalid. For that year, Professors Krasno and Sorauf calculated, 3.1 percent of all genuine issue ads would have been regulated by BCRA.[210] The NRA complains that this number does not include its 30-minute infomercials. If only these infomercials were included, the NRA assures the Court, the "false positives" would go up to 18 percent.[211]

There is, of course, nothing untoward about the exclusion of the NRA infomercials from the CMAG database. The satellite technology on which the database relies does not capture infomercials, only the more traditional 30- and 60-second spots that are the staple of political advertising. A study of 30-minute political infomercials might have been a valuable exercise. If the NRA had really wanted that analysis before this Court, it had plenty of time to enlist a political scientist to conduct such a study. But the NRA cannot credibly declare by fiat that its infomercials naming candidates were almost all pure issue ads, and then tack those ads onto the CMAG database without determining which infomercials would have been covered by BCRA in the first place.

In any event, a careful review of the little information the NRA provides about its infomercials undermines their claim. Since the NRA never broadcast an infomercial before the 2000 election cycle,[212] they could not have affected the 1998 data. In 2000, the NRA claims it broadcast a group of infomercials that were not covered by the database.[213] But two of the infomercials do not even mention a candidate.[214] And all of the others provided in the NRA Appendix mention Al Gore, whose defeat was, as Mr. LaPierre admitted, the "overriding NRA

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210 Krasno & Sorauf Expert Rep. at 60 (calculating 1,413/45,001); *see also* Gov't Opp. Br. at 72.

211 NRA Opp. Br. at 20.

212 LaPierre Dep. Tr. at 356, 194; [REDACTED].

213 NRA Opp. Br. at 20.

214 NRA Opp. Br. at 20 n.22; Supp. App. 978-99.

objective" in 2000.[215] As Mr. LaPierre also admitted, the defeat of Gore was a "byproduct" of every ad run by the NRA after September 2000 "that mention[ed] Al Gore."[216]

[REDACTED][217]

And the advertising firm that created the NRA's ads stated that its first objective was to "influence the outcome of presidential election."[218]

The NRA now says that only one infomercial, "Union/Gore," was designed to influence the 2000 presidential contest.[219] But ignoring its prior testimonial and documentary concessions does not make them magically disappear. And as the Government aptly demonstrates in its opposition brief, the other infomercials either (a) are blatant electioneering[220] or (b) contain only what Mr. LaPierre described as unimportant, "fleeting" references to candidates, which could readily have been deleted without impairing the NRA's message.[221]

In the final analysis, plaintiffs' overbreadth challenge is refuted by the ads themselves. At oral argument, the parties will undoubted display for the Court their favorites. But the Court should

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215 LaPierre Dep. Tr. at 56. The NRA, whose burden it is to prove overbreadth, includes only six infomercials in its brief and appendix. NRA App. D, E, F, G; NRA Supp. App. 978-999. It has not provided sufficient information to determine how many different infomercials it actually broadcast or whether they mentioned candidates. *Compare* NRA Opp. Br. at 24 (four ads were "*all* of the NRA's 30-minute broadcasts in 2000") *with* NRA Opp. Br. at 20 n.22 (discussing two additional 2000 infomercials).

216 *Id.* at 89.

217 [REDACTED] For an example of an NRA fundraising pitch, see the ad quoted at *infra* note 220.

218 NRA-ACK 17913-15 (McQueen Cross Tr.) (Oct. 20, 2002), Ex. 2 [IER Tab 16].

219 NRA Opp. Br. at 20 n.21.

220 *See* Gov't Opp. Br. at 90-92. "Tribute" is introduced with a backdrop highlighting "Election 2000," continues by referring to "the Clinton/Gore Administration's" "suppression" of Second Amendment speech as the "new McCarthyism," introduces a Heston speech by referring to "this critical election year," and features Heston raising a musket over his head while threatening "very serious trouble for a man named Gore," stressing "winning in November," and declaring he has these "fighting words" "especially for you Mr. Gore": "from my cold dead hands." *See* NRA App. 885-88, 914-16; Gov't Opp. Br. at 91. "MMM" contains 25 references to Clinton and Gore, multiple references to candidates Feinstein and Hillary Clinton, and an admonition to viewers to "go vote." *See* NRA App. at 930-42 and F. The references to Gore in two other infomercials, while more limited, make sense only in the context of the election. *See, e.g.,* NRA App. at 892-904 and D; 917-29 and E.

221 LaPierre Decl. ¶13.

review the complete set for itself. That review demonstrates that the vast majority of ads that would have been captured under Title II in effect either praise or criticize a candidate. And messages praising or criticizing a candidate at a time close to election day are overwhelmingly likely to be perceived by voters as messages supporting or opposing the candidate's election — thereby implicating the same governmental interests as the law sustained in *Austin*, and implicating those interests in the same way and for the same reasons. The few ads within the database that neither praise nor criticize a candidate, but merely urge an incumbent candidate to take certain action with respect to a pending legislative matter (and which are thereby less likely to be perceived by voters as supporting or opposing the incumbent's re-election), do not render the definition "substantially overbroad" — especially considering the separate constitutional value of avoiding vague or imprecise statutory terms in this sensitive area of regulation. In short, given the goal of drafting a statute that is both directed at candidate advocacy and precise in its scope of coverage, the definition that Congress enacted is appropriately tailored to serve its compelling interests and not facially invalid on overbreadth grounds.

D. Plaintiffs Vastly Overstate The Burdens Associated With The Electioneering Communications Standard.

Plaintiffs' opening briefs scarcely acknowledged that there are two alternate routes by which a corporate or union entity can continue to express its message: (1) all are free to use their existing PACs (or to set one up) to draw contributions from individuals who endorse the entities' speech, and (2) certain nonprofit ideological organizations that pose no danger of becoming conduits for corporate money or union dues — and therefore qualify for an *MCFL* exemption — can fund electioneering communications (indeed, even express advocacy) through their general treasury funds. In their opposition briefs, plaintiffs attempt to confront these alternative vehicles for corporate and union speech.

The nonprofit point, pressed mainly by the NRA, can be disposed of quickly.[222] Under the rulings of the Supreme Court and this Circuit, the NRA has a choice to make. It can continue to accept significant corporate funds — amounting in the most recent fiscal year to $385,000 — and run electioneering communications through its PAC. Or it can give up the corporate funds — funds that it considers *de minimis* anyway, in comparison to its enormous treasury revenues of $140 million a year — and thereby credibly argue, as it has done successfully once before, that it is entitled to bypass the PAC rules.[223] But having bargained for immunity from discovery in this case in return for relinquishing its as-applied challenge,[224] it cannot press the as-applied argument here.

The ACLU presents a variation on the NRA's theme. It argues that since it "does not seek to influence elections, . . . the *de minimis* contributions it accepts from non-individual sources" — $85,000 last year alone[225] — "cannot be viewed as a conduit for improper corporate

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222 *See generally* Intervenors' Opp. Br. at 64-67. Although plaintiffs appear resolutely to contend that *any* regulation of electioneering communications would be invalid, they seek to support their overbreadth challenge with an argument that a supposedly "less restrictive alternative" was submitted to Congress, in a proposal to allow electioneering communications by nonprofit corporations provided the ads themselves were funded directly by individuals. *See* NRA Opp. Br. at 15. While that approach would certainly have marked an improvement of the pre-BCRA status quo, it would not have been an equally effective alternative. As we previously explained, see Intervenors' Br. at 126 n.486, among other things such a regime would be significantly less effective and more difficult to enforce — for one reason, because money is fungible. Moreover, as we explain *infra*, by becoming a member of a nonprofit that offers certain services and other enrollment benefits an individual does not necessarily demonstrate agreement with that organization's political views. That is a key reason that corporations and unions have historically been prevented from spending general treasury funds on electioneering activities. *See infra* notes 234-239 and accompanying text; *see also Austin*, 494 U.S. at 660 ("[The Act] ensures that expenditures reflect actual public support for the political ideas espoused by corporations.").

223 *FEC v. NRA*, 254 F.3d 173, 192 (D.C. Cir. 2001) (holding that the NRA was entitled to an *MCFL* exemption for a single year in which its corporate contributions amounted to $1,000, but not for the years in which the corporate contributions were $7,000 or $39,786). The NRA urges this Court to overrule the D.C. Circuit on this score. *See* NRA Br. at 23 n.14. If anything, this Court should proceed in the other direction, adhering to *MCFL*'s actual language, and requiring a firm policy against accepting *any* corporate money, lest unscrupulous corporate entities achieve their electoral goals by proliferating contributions to large numbers of nonprofits. Moreover, whereas it is easy to implement and enforce a flat-ban rule, the D.C. Circuit's current rule requires the FEC and every nonprofit to litigate, year by year, an intensely factual dispute over the measurement of exactly how much corporate money it received in relation to non-corporate money. *See NRA*, 254 F.3d at 192 (holding that the NRA had accepted too much corporate money in 1978 and 1982, but not in 1980, after proceedings that ended nearly 20 years after the events in question, and involved more than a decade of litigation).

224 *See* Joint Motion to Stay (filed on July 26, 2002), at 2 (granted by the Court on Aug. 13, 2002).

225 ACLU Opp. Br. at 1 n.2.

expenditures."[226] The *MCFL* exemption, however, is not a "trust-us-we're-not-interested-in-using-corporate-money-to-influence-elections" test.[227] In light of Supreme Court precedent, the legislative record (which reveals numerous instances of nonprofits being used as conduits), and the sheer impossibility of monitoring the activities and intentions of over 1.6 million nonprofits,[228] Congress and the FEC were amply justified in concluding that it is appropriate to bar all nonprofits from using their treasury funds to pay for electioneering communications unless they eschew corporate funds entirely.[229]

The NRA, AFL-CIO, and ACLU all contend that a separate segregated fund is not an adequate vehicle for expressing electioneering communications. For their part, the NRA and the AFL-CIO approach the issue from a logistical perspective, arguing that they cannot raise as much for electioneering communications if they have to rely on members to make voluntary contributions earmarked for those communications.[230] To put that argument in perspective, consider that the NRA has more than four million members who pay at least $25 to $35 a year in membership dues (some pay much more) toward a total budget of $140 million;[231] the AFL-CIO has 13 million members and

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226 *Id.* at 5 n.3.

227 *See* Intervenors' Opp. Br. at 65-67.

228 *See The New Nonprofit Almanac: In Brief* 7 (Independent Sector 2001), *available at* http://www.independentsector.org/pdfs/inbrief.pdf.

229 The ACLU's lengthy discussion of the "major purpose" test (Opp. Br. at 5-9) is opaque, but appears to argue that the ACLU is entitled to some sort of wholesale exemption from election laws — an exemption that would presumably apply to all nonprofits (and indeed all business corporations, for that matter). The "major purpose" test is the standard for determining whether an *entire organization* should be treated as a "political committee" within the meaning of 2 U.S.C. § 431(4). The ACLU plainly is not in that category, and neither is any other plaintiff (except for those that are already formed as PACs). But that has nothing to do with the question whether the ACLU, or any other corporation, can be required to form a PAC if it wishes to run ads using express advocacy or otherwise engage in electioneering.

230 *See* NRA Opp. Br. at 4 (only "individuals with sufficient means to pay twice" will be able to support electioneering communications); AFL-CIO Opp. Br. at 7 (contending that the union "simply would be unable to make electioneering communications" through its PAC because it "historically has not raised sufficient funds to satisfy its contribution goals"); *id.* (a "separate political committee does not provide a constitutionally sufficient alternative means to make 'electioneering communications'").

231 LaPierre Decl. ¶ 56.

a budget of more than $150 million.[232] A priori, the notion that these organizations are incapable of amassing funds from their members seems far-fetched.

[REDACTED].[233]

Moreover, plaintiffs' claims must be evaluated in light of the cornerstone principle that federal candidate campaigns are to be funded through the voluntary contributions of *individuals*. By no means do all of plaintiffs' millions of members necessarily endorse the organizations' electioneering agendas.

[REDACTED].[234] But just as surely, there are sizeable numbers within each organization that do not share the organization's electoral agenda.[235] The NRA, for example, admits that many of its members are attracted more to their programs — including "competitive shooting programs," "hunter services," "safety programs," "shooting range services," "women's programs," and "youth programs"[236] — than their political activism.[237]

[REDACTED][238]

Similarly, a perennial theme in the congressional debate over campaign finance reform has been the perception of many members of Congress that rank-and-file union members (including some who decline to seek a refund of dues tied pro rata to the union's political speech) do not

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232 [REDACTED].

233 [REDACTED].

234 [REDACTED]

235 *See Austin,* 494 U.S. at 662 (describing the Michigan Chamber of Commerce's purposes as "varied," with "several . . . which are not inherently political").

236 NRA website, *available at* http://www.nra.org/frame.cfm?url=http://www.nrahq.org. NRA members also receive material benefits, including car rental and hotel discounts, all attractions that have nothing to do with politics. *See* http://www.nra.org/display_content/show_content.cfm?mod_id=64&id=0.

237 LaPierre Dep. Tr. at 86 (noting that the NRA's safety people always insist that "[w]hat we do is just as important"); LaPierre Dep. Tr. at 56 (stating that the importance of the NRA's political goals "depends on who you're talking to . . .; all the NRA programs are important, the safety, the training, the education, the police training, the 12,000 competitions, the child safety programs.").

238 [REDACTED].

endorse their union's electoral positions.[239] That is exactly why organizations like the NRA and the AFL-CIO are required to raise funds specifically earmarked for electioneering purposes.

This does not mean, as the NRA argues, that "the only potential contributors who can respond favorably to the [PAC's] fundraising requests are those individuals with sufficient means to pay twice."[240] Membership fees are not chiseled in marble. There is nothing in the statutory scheme or the FEC regulations that prohibits the NRA (or a union, for that matter) from adjusting its membership fees to stimulate PAC contributions, or from soliciting a PAC contribution every time a member is approached to renew.[241] When and if a nonprofit organization can actually demonstrate that it can neither forego corporate contributions nor solicit sufficient voluntary contributions from its non-corporate members for a segregated political advocacy fund (and based on the evidence in this case, that showing is most *unlikely* to be made by the NRA or the ACLU), the federal courts will be fully open to that as-applied challenge.

The AFL-CIO complains that its speech is inhibited by "affiliation rules," which effectively limit local affiliates of each national labor union to a single PAC.[242] But the AFL-CIO has not even offered a theory, much less evidence, as to why aggregating the funds contributed by local affiliates into a single national PAC dilutes the union's ability to speak. The PAC can still raise enormous sums from its millions of members, and can spend all that money on electioneering communications. The AFL-CIO has offered no evidence, and we are aware of none, that, prior to enactment of BCRA, any local affiliate sponsored candidate-centered ads that would now be

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239 *See, e.g.*, 147 Cong. Rec. S3225 (daily ed. Mar. 30, 2001) (statement of Sen. Nickles); 145 Cong. Rec. S12610 (daily ed. Oct. 14, 1999) (statement of Sen. Sessions).

240 NRA Opp. Br. at 4.

241 *See* 11 C.F.R. § 114.7(e) ("There is no limitation upon the number of times an organization under this section may solicit its members and executive or administrative personnel, and their families."); 11 C.F.R. § 114.7(f) ("There is no limitation under this section on the method of solicitation or the method of facilitating the making of voluntary contributions which may be used.").

242 *See* 2 U.S.C. § 441a(a)(5).

regulated under BCRA. That role has been relegated to the national offices precisely because they are more effective at protecting the union's collective interests. In any event, complaints about the longstanding affiliate rules are out of place in this challenge to a statute that makes no reference to them.[243]

In contrast to the NRA and the AFL-CIO, the ACLU does not argue that it will be incapable of raising significant funds from its 300,000 members through a separate segregated fund, or that its $13 million budget could not absorb the administrative burden of doing so.[244] The ACLU argues only that it does not want to — perhaps because it had never run an ad that would qualify as an electioneering communication until it manufactured one on the eve of BCRA's enactment.[245] More precisely, the ACLU argues that such a fund is not a viable option because it is strictly non-partisan.[246] But setting up a segregated fund does not obligate an organization to start engaging in partisan politics. It is simply a way for an organization to raise funds legally for ads that meet Congress's definition. The ACLU can call its fund the "ACLU Strictly Nonpartisan Advertising Fund," and it can air any messages it wants, however nonpartisan, out of that fund. All the law requires is that the fund be limited to individuals and comply with certain administrative and reporting rules.

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243 The AFL-CIO also assails an FEC regulation that, it says, prohibits the union from spending treasury funds to defray administration and solicitation expenses if it runs electioneering communications. *See* AFL-CIO Br. 9-10. That claim is mistaken, and in any event – because it is directed at a regulation, not BCRA – it has no place in this forum. In fact, the FEC's rule does permit corporations and unions to spend treasury funds to pay the costs of establishing, administering, and soliciting funds for their federal PACs that are used to finance electioneering communications. *See Electioneering Communications, Final Rules and Transmittal of Regulations to Congress*, 67 Fed. Reg. 65109, 65,204-65,205 (Oct. 23, 2002).

244 *See* ACLU Br. at 2.

245 *See* Intervenors' Opp. Br. at 76.

246 ACLU Br. at 1, 3.

The NRA is alone in bemoaning the "practical nightmare" it faces in complying with BCRA, focusing principally on its 30-minute infomercials.[247] That complaint rings truly hollow. The NRA makes only a handful of infomercials in any year.[248]

[REDACTED][249]

As we have seen, sometimes the infomercials name no political figure. When they do, if 2000 is any indication, the person is invariably someone so prominent that the producers surely need not strain to determine if that person is a candidate. Only if the answer is "yes" will the NRA's employees have to decide whether to include the reference, and if so, whether an election is imminent and how many people the medium will reach in the candidate's electorate. Or the NRA can avoid having to even think about the subject, just by deciding to air the ads using its PAC funds. In the end, the NRA will hardly need to adjust its routine for the ads that are truly not designed to influence federal elections.

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No one doubts either that the First Amendment requires Congress to legislate clearly and carefully in regulating speech in connection with federal candidate elections, or that corporations and unions have long been excluded from federal campaigns. No one *can* doubt that the "express advocacy" standard demonstrably fails to define electioneering advocacy, which Congress may regulate, and from which corporations and unions can be excluded. And based on the record before this Court, no one *should* doubt that in enacting Title II Congress has fashioned a standard that is both clear and clearly tailored to address the precise circumvention that caused the "express

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247 NRA Opp. Br. at 21-23.

248 *See supra* n. 215.

249 [REDACTED]