No. 02-1674 et al.

In The

Supreme Court of the United States

SENATOR MITCH MCCONNELL, et al.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,

Appellees.

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

BRIEF AMICUS CURIAE OF THE CENTER FOR GOVERNMENTAL STUDIES IN SUPPORT OF THE APPELLEES

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INTEREST OF THE *AMICUS CURIAE*

With the consent of the parties, the Center for Governmental Studies submits this brief *amicus curiae* in support of the Defendants. The letters of consent have been filed with the Clerk of the Court.[1]

The mission of the Center for Governmental Studies (CGS) is to use research, advocacy, technology, and education to improve the fairness of governmental policies and processes, empower the underserved to participate more effectively in their communities, improve communication between voters and candidates for office, and help implement effective public policy reforms.

Although CGS supports many aspects of the Bipartisan Campaign Reform Act, this brief limits its discussion to support the position that BCRA's "electioneering communications" provisions are constitutional. CGS is particularly interested in this aspect of the case because it drafts model campaign finance laws, including disclosure laws covering electioneering communications, that are considered and adopted by states and local jurisdictions. In recent years, the question of "issue ads" has increased in importance as interest groups attempt to find ways to skirt state and local campaign finance laws.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

The purpose of this brief *amicus curiae* is to alert the Court to the serious possibility that a decision by this Court regarding one aspect of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA"), may well impair the ability of federal, state, and

[1] Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amicus*, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

local governments to enforce comprehensive campaign finance disclosure and other laws. What is at stake in this Court's resolution of the dispute over the "electioneering communications" provisions of BCRA is nothing less than the ability of all levels of government to enforce *effective* campaign finance laws (1) requiring *disclosure* of the identity of political actors engaging in election-related activities and of the amounts and sources of money for those activities and (2) regulating the mechanics of *corporate and union* involvement in the political process.

In the last decade or so, this country has witnessed a sea change in the means by which campaigns for office are conducted. Corporations, unions, and individuals increasingly have skirted many disclosure requirements and other applicable campaign finance laws by eschewing the use of express words of advocacy, such as those contained in footnote 52 of *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976). Thus, by ending an advertisement with something like "Call Smith and tell her she's soft on crime" rather than with "Vote Against Smith," political actors have escaped the reach of most campaign finance laws.

One well-publicized example occurred during the 2000 Republican Party primary in New York, where a previously unknown organization, "Republicans for Clean Air," sponsored television advertisements without using words of express advocacy criticizing Senator John McCain, a primary opponent of then-Governor George W. Bush. *See* Richard Perez-Pena, *Air of Mystery Clouds Shot at McCain*, N.Y. Times, Mar. 3, 2000, at A15. The source of the advertisements remained a mystery until a supporter of Mr. Bush, Sam Wyly, volunteered that he had run the advertisements in the hopes of influencing the outcome of the primary. *See* Richard W. Stevenson & Richard Perez-Pena, *The 2000 Campaign: The Tactics; Wealthy Texan Says He Bought Anti-McCain Ads*, N.Y. Times, Mar. 4, 2000, at A1; Joint Supplemental Appendix to Jurisdictional Statements ("Supp. App.") at 97sa-98sa (per curiam opinion).

Congress chose to address the problem of unregulated electioneering communications by using a bright-line "electioneering communications" definition in BCRA section 201, bringing within the ambit of federal campaign finance laws those advertisements run within a short period before the election, featuring the name or likeness of a candidate for office, broadcast on television, radio, satellite or cable stations, and targeted to the relevant electorate. State governments have begun using similar bright-line approaches.

If this Court strikes down BCRA's bright-line test as applied to the statute's disclosure provisions, no government body in the United States will be able to engage in *effective* campaign finance regulation. Corporations, unions, and others will have the opportunity to escape disclosure laws by eschewing express words of advocacy. Inadequate disclosure in turn will (1) deny voters adequate information about the sources of funding so helpful in making decisions about whom to vote for; (2) raise the risks of corruption and the appearance of corruption; and (3) interfere with other campaign finance programs, such as voluntary public financing programs.

A decision striking down the law could have other, perhaps unintended, effects on state and local laws as well. For example, North Carolina's recently enacted public financing program for candidates for judicial office includes a "trigger" provision releasing additional public financing upon the filing of reports indicating that a certain amount of independent expenditures have been made in support of or in opposition to a judicial candidate. *See* N.C. Gen. Stat. § 163-278.67 (2003). Such triggers cannot work if those supporting or opposing judicial candidates can avoid filing reports of their expenditures.

In addition, at least twenty-five states and the District of Columbia have laws requiring the disclosure of information on expenditures on grassroots lobbying. *See infra* note 10. These laws could be called into question by a ruling by

this Court striking down the electioneering communications provisions of BCRA.

Moreover, the ease with which corporations and unions may eschew words of express advocacy means that any efforts by state or local governments to limit or prohibit excessive corporate and union influence over the political process will be doomed to fail as well. Thus, laws that have been in place for many decades aimed at preventing corruption of the electoral process and protecting shareholders and union members – laws that this Court effectively sanctioned in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) – will become dead letters.

Congress's decision to bring within the ambit of federal campaign finance disclosure laws and corporate and union segregated fund requirements those broadcast advertisements covered by the "electioneering communications" provisions of BCRA certainly passes constitutional muster. The rationales supporting the disclosure and segregated fund requirements apply equally whether or not the advertisements contain express advocacy.

Plaintiffs' main constitutional argument against the electioneering communications provision is that it is substantially overbroad because it reaches too many "issue advertisements" that are, in plaintiffs' view, constitutionally immune from regulation under this Court's opinion in *Buckley*. Plaintiffs are mistaken. The fact that BCRA's bright-line test might, in some applications, apply to instances of "genuine" issue advocacy that are not principally intended to influence candidate elections does not render the statute overbroad even in those applications, much less substantially overbroad. Whether or not intended to influence a federal election, an advertisement that specifically refers to a federal candidate and is broadcast soon before the candidate's election – which are advertisements BCRA reaches – will likely in fact influence the election. Congress has the power to require disclosure of such advertisements and limit the source of corporate and union expenditures for such advertisements to segregated funds.

ARGUMENT

I.

THIS COURT SHOULD AFFIRM THAT LEGISLATIVE BODIES MAY ENACT NARROWLY TAILORED DISCLOSURE LAWS GOVERNING COMMUNICATIONS THAT INFLUENCE ELECTIONS. STRIKING DOWN BCRA'S NARROWLY TAILORED DISCLOSURE PROVISIONS WOULD JEOPARDIZE VIRTUALLY ALL EFFECTIVE CAMPAIGN FINANCE LAWS.

A. This Court Has Recognized the Compelling Interests Served by Narrowly Tailored Disclosure Laws.

In *Buckley*, 424 U.S. at 60-84, this Court upheld the broad reporting requirements of the Federal Election Campaign Act ("FECA"). Under *Buckley*, "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. But . . . there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved." *Id*. at 66 (citation omitted).

The Court held that three compelling governmental interests justified reporting requirements:

(1) Disclosure provides the electorate with important information. The sources of financial support "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office," and a public "armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return." *Id.* at 67.

(2) "Disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id*. Disclosure of independent expenditures permits the legislature to reach "'every kind of political activity' in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." *Id.* at 76.

(3) "Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of . . . contribution limits. . . . " *Id*. at 67-68.

Buckley's approach to reporting requirements is notable for its deference to legislative judgments. The plaintiffs had challenged FECA's requirements that political committees maintain records with the name and address of those who make annual contributions in excess of $10 and report the name, address, occupation, and employer of those who contribute, in the aggregate, more than $100 annually. *See id.* at 63. The Court agreed that these thresholds were "indeed low," but concluded that "we cannot require Congress to establish that it has chosen the highest reasonable threshold." *Id*. at 83. To the contrary, it held that drawing the line was "best left in the context of this complex legislation to congressional discretion." *Id*.

The *Buckley* Court also rejected an overbreadth challenge based on the applicability of the requirements to minor as well as major political parties. The plaintiffs claimed that the First Amendment rights of minor parties were seriously burdened by the requirement that they disclose contributors, because their supporters were more susceptible to harassment. But the Court refused to carve out a blanket exemption for minor parties. *See id.* at 68-74. While rejecting the facial constitutional challenge, *Buckley* recognized that the federal reporting requirements would be unconstitutional as applied to those minor parties that could establish a reasonable probability of harassment. The Socialist Workers Party made the requisite showing in *Brown v. Socialist Workers '74 Campaign Committee*, and the Court recognized that party's right to an exemption. *See* 459 U.S. 87, 102 (1982).

Two years after *Buckley*, this Court briefly reaffirmed the voters' compelling interest in electoral information, this time in ballot measure elections. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), involved a Massachusetts criminal statute that prohibited banking and business corporations from making contributions or expenditures to influence the vote on ballot measure initiatives, unless the

initiatives materially affected corporate assets, property, or business. The Court invalidated the ban against giving and spending money on First Amendment grounds but found required *disclosure* of those activities to be different, recognizing that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id*. at 792 n.32 (citations omitted); *cf. Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 n.4, 298-99 (1981) (noting that the government's interest in identifying the sources of support for and opposition to ballot measures could be met by an existing law requiring pre-election publication of a contributor list).

Although this Court has divided in recent years in cases raising the constitutionality of certain campaign finance contribution limitations, *see, e.g., Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000), *FEC v. Beaumont*, 123 S. Ct. 2200 (2003), it has consistently and unanimously upheld the ability of the government to require the filing of reports disclosing information about contributions and expenditures in candidate and ballot measure campaigns.

Of course, support for contribution limits necessarily includes support for adequate disclosure laws to allow enforcement of those limits. But even Justices who have expressed skepticism of the constitutionality of contribution limitations have pointed to disclosure as a more narrowly tailored alternative to contribution limits. *See, e.g., Shrink Mo.*, 528 U.S. at 430 (Thomas J., dissenting) ("States are free to enact laws that . . . require the disclosure of large contributions. . . .").

In one of the most recent campaign finance cases, *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) ("*ACLF*"), there was substantial agreement among the Justices on the propriety of Colorado's law mandating the filing of reports disclosing the names of initiative sponsors and the amounts spent gathering support for their initiatives. *See id*. at 202-03; *see also id*. at 214 (Thomas, J., concurring); *id*. at 224 (O'Connor, J., joined by Breyer, J.,

concurring in the judgment in part and dissenting in part); *id*. at 233 (Rehnquist, C.J., dissenting).[2]

B. In Recent Years, Corporations, Unions, and Individuals Have Been Able to Avoid Disclosure on a Massive Scale in Candidate Campaigns, and Thereby Thwart Effective Campaign Finance Disclosure Laws, by Eschewing Express Words of Advocacy.

Consider two hypothetical broadcast advertisements intended to convince voters to vote against candidate Smith run in close proximity to the election. They are identical except one advertisement ends with the words "Vote against Smith," while the other ends with "Call Smith and tell her she is soft on crime." The compelling interests in disclosure previously identified by the Court – providing voters with valuable information, deterring actual and apparent corruption, and enforcing other campaign finance laws – are the same in the two cases. Yet in recent years only the first advertisement has been subject to disclosure laws. The second advertisement could be funded by millions of dollars from corporations, unions, or individuals, and no one would

[2] The Court, by contrast, has divided on the propriety of disclosure laws involving individual leafletters and others engaged in one-to-one communications about ballot measures. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *ACLF*, 525 U.S. at 199 (striking down requirement that initiative petition circulators wear an identification badge); *id*. at 203 (striking down requirement that initiative proponents list on reports the identity of paid circulators and their income from circulation). *But see Watchtower Bible & Tract Soc'y v. Vill. of Stratton*, 536 U.S. 150, 167 (2002) (noting that state "may well be justified" in requiring the disclosure of the identity of those involved in ballot measure campaigns to protect "the special state interest in protecting the integrity of a ballot-initiative process"). This body of law involving disclosure in one-to-one communications is not at issue in this case, which involves disclosure of large-scale political activity in reports filed with the government, required to be filed only if expenditures reach a specified monetary threshold.

ever know the source of funding unless the information was voluntarily disclosed.

The disparate treatment of these otherwise identical advertisements stems from this Court's discussion in *Buckley* of the FECA disclosure provisions. Section 434(e) of the FECA required "'[e]very person . . . who makes contributions or expenditures' . . . 'for the purpose of . . . influencing' the nomination or election of candidates for federal office" to disclose the source of such contributions and expenditures. *Buckley*, 424 U.S. at 77. This Court viewed the statute, as well as section 608(e), imposing limits on spending "relative to a clearly identified candidate [in federal elections]," *see id.* at 41, as presenting problems of unconstitutional *vagueness* as applied to persons other than political committees: people engaged in political speech might not know if the statutes covered their conduct. *Id*. at 42-44, 76-78.

To save both statutes from unconstitutional vagueness, the Court construed the term "expenditures" as reaching only "communications that in express terms advocate the election or defeat of a clearly identified candidate." *Id*. at 44; *see also id*. at 80. In footnote 52, *id.* at 44, the Court explained that such express advocacy required explicit words "of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [or] 'reject.'" So construed, the Court upheld the disclosure requirements, *see id.* at 80-81, though it struck down the spending limits as violating the First Amendment in the absence of any compelling government interest, *see id*. at 48-49.[3]

[3] Notably, the Court applied this narrowing construction only with respect to independent expenditures by individuals and groups *other than* candidates and political committees. By contrast, and because of their particular importance in election campaigns, political committees (*i.e.*, organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate, *see Buckley*, 424 U.S. at 79), were (and are) required to file regular reports of all of their receipts and disbursements, *including those pertaining to issue advocacy not directly related to election campaigns*. *See FEC v. Akins*, 524 U.S. 11,

(Continued on following page)

This Court in *Buckley* certainly recognized that its interpretation to avoid vagueness could allow for evasion of the FECA rules, *see id*. at 45, but neither the Court nor anyone else could have foreseen *the extent* of the evasions that would follow. Indeed, it was not until the 1990s that so-called "sham issue advocacy" (advertising influencing – and typically intended to influence – the outcome of elections but eschewing words of express advocacy) became a major feature of campaigns. Studies uncontradicted in the lower court have shown that approximately $135 to $150 million was spent on advertising referring to candidates for federal office but lacking words of express advocacy in the 1995-96 election cycle. That number rose to between $230 million and $341 million during the 1997-98 period and over $500 million in the 2000 election cycle. Supp. App. 230sa-231sa (Henderson), 806sa-807sa (Kollar-Kotelly), 1306sa (Leon). Indeed, the uncontradicted evidence further showed that express words of advocacy are not necessary for effective campaign speech: only four to 11.4 percent of advertising funded by *candidates* includes express words of advocacy. Supp. App. 229sa (Henderson), 659sa (Kollar-Kotelly); *see also* 1296sa-1297sa (Leon).

In response to the rise of electioneering communications lacking words of express advocacy, the Federal Election Commission ("FEC") crafted a regulation stating that an advertisement would be considered express advocacy when, among other requirements, "reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates." 11 C.F.R. § 100.22(b)(2) (2000). Most courts considering the constitutionality of "intent-based" tests such as the FEC regulation have held that they are impermissibly vague under *Buckley*. *See, e.g., FEC v. Christian Action Network*, 110 F.3d 1049,

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14-15 (1998). The reason for this broader requirement, the Court explained in *Buckley*, 424 U.S. at 79, is that the activities of candidates and of "political committees" "can be assumed to fall within the core area sought to be addressed by Congress" and "are, by definition, campaign related."

1055-57 (4th Cir. 1997) (collecting cases disagreeing with FEC's regulation of express advocacy through an intent-based test). *See also*, *e.g., Elections Bd. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721, 731 (Wis. 1999); *Chamber of Commerce v. Moore*, 288 F.3d 187, 196-98 (5th Cir. 2002).

C. This Court Should Recognize BCRA's Bright-Line "Electioneering Communications" Provision as a Narrowly Tailored Means of Enforcing Effective Disclosure Laws.

1. The district court failed to distinguish between use of the bright-line test for the disclosure requirement and for the segregated fund requirement.

To avoid the fate of intent-based tests in the lower courts, BCRA uses a newer means to require *effective* disclosure without raising the problem of unconstitutional vagueness. Section 201 of the law requires the filing of disclosure reports for those who spend at least $10,000 per year on "electioneering communications." It then defines electioneering communications as "any broadcast, cable, or satellite communication which – (I) refers to a clearly identified candidate for Federal office; (II) is made within [60 days of a general, special or runoff election or 30 days before a primary or preference election]; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate."[4] This bright-line test is the primary definition of electioneering communications in BCRA. A backup definition, to be used only in the event the primary definition fails constitutional muster, is a test that turns on "objective"

[4] The law defines "targeted to the relevant electorate" as capable of reaching 50,000 or more individuals in the relevant congressional district or state that the candidate for the House or Senate is seeking to represent. *See* BCRA § 201.

intent, i.e., what a reasonable person would necessarily perceive as the purpose of the communication. *See id.*

Plaintiffs' main constitutional argument against the primary definition in section 201 is that it is substantially overbroad because it reaches too many "issue advertisements" that are, in plaintiffs' view, constitutionally immune from all regulation, including but not limited to disclosure requirements. Two of the judges below, Judges Henderson and Leon, agreed with plaintiffs, while Judge Kollar-Kotelly rejected the overbreadth challenge. Supp. App. 864sa-865sa (Kollar-Kotelly). Judge Leon, joined by Judge Kollar-Kotelly, approved the definition under the backup provision,[5] as modified by Judge Leon to account for a vagueness problem he found in the definition. Supp. App. 1159sa-1166sa (Leon); *see also* Supp. App. 885sa-886sa (Kollar-Kotelly).[6]

The lower court judges' discussion of the overbreadth concerns with the primary definition unfortunately sheds

[5] These judges struck down one disclosure rule, BCRA § 201(a)(5), "which equates contracts to make disbursements with actual disbursements requiring disclosure of contracts to make electioneering communications prior to their public dissemination," as lacking a "relevant correlation" or a "substantial relation" to a legitimate governmental interest. Supp. App. 115sa (per curiam). We do not address the constitutionality of that specific provision in this brief.

[6] Judge Henderson also would have held the law "underinclusive" because it does not apply to print, direct mail, or internet advertisements, Supp. App. 364sa-366sa (Henderson). The other two lower court judges correctly rejected Judge Henderson's conclusion on this issue. Supp. App. 873sa-880sa (Kollar-Kotelly), 1159sa (Leon). This Court has recognized that in the context of alleged discrimination in campaign regulations, Congress "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Buckley*, 424 U.S. at 105; *see also FEC v. Mass. Citizens for Life*, 479 U.S. 238, 258-59 n.11 (1986) ("*MCFL*"). Judge Kollar-Kotelly emphasized that broadcast ads are more "potent" and "effective," Supp. App. 876sa, 878sa-879sa (Kollar-Kotelly), and Congress acted reasonably in tackling first advertisements in the media presenting the most pressing need for disclosure. Indeed, by not covering print and the Internet, Congress has made the statute much *less* onerous than it would otherwise be.

little light on the constitutionality of BCRA's *disclosure* provisions. In considering the constitutionality of the primary definition, the judges focused on how the bright-line test would extend the requirement that corporations and unions use segregated funds for election-related activities, s*ee* BCRA § 203, discussed in Part II *infra*. The lower court judges then simply applied their discussion of overbreadth in the segregated funds context to the disclosure context, without carefully distinguishing between the two. *See* Supp. App. 367sa n.149 (Henderson) (definition "would prohibit too much protected expression"); Supp. App. 1152sa (Leon) (definition "limit[s] and chill[s]" protected speech).

This case, however, does not concern the abstract constitutionality of a definition, but the constitutionality of specific substantive provisions of title II of BCRA – in particular, the disclosure requirements of section 201 and the segregated fund requirement of section 203. Each of those substantive provisions must be separately analyzed on their own terms, with due regard paid to the distinct requirements and justifications for each. Overbreadth concerns that are pertinent to one provision are not necessarily germane to another provision.

The disclosure rules in section 201 do not suffer from the concerns that troubled the lower court. They prohibit *no* political expression, and this Court's recognition of an as-applied exemption to disclosure requirements in the *Socialist Workers* case *cures* any concern over chilling speech. Moreover, and as we now show, as to disclosure it is not clear that there is *any* overbreadth, much less *substantial* overbreadth, created by section 201's primary definition.

2. The bright-line test as applied to disclosure regulations is not overbroad at all because virtually all issue ads covered by the test will influence federal elections.

The judges below debated the extent to which the evidence showed that the bright-line test would regulate too much protected speech. It is true that the substantial overbreadth test includes an empirical component requiring consideration of the relative frequencies of valid versus

unconstitutional applications of the law. *See Virginia v. Hicks*, 123 S. Ct. 2191, 2197 (2003) (under the overbreadth doctrine, the Court has "insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also *relative to the scope of the law's plainly legitimate applications* . . . before applying the 'strong medicine' of overbreadth invalidation") (emphasis added); *Massachusetts v. Oakes*, 491 U.S. 576, 589-90 (1989) (Scalia, J., concurring); *see also id*. at 598-99 (Brennan, J., concurring); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (the question is whether the overbreadth is "not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep"). *See generally* Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 Minn. L. Rev. 1773, 1781-89 (2001) (discussing the relevance of empirical evidence to the Court's substantial overbreadth doctrine). But answering the empirical question requires first *identifying* unconstitutional applications of the law. Regarding disclosure, there are very few, if any, such unconstitutional applications.

The lower court judges all agreed – and we do not dispute – that the bright-line test would require disclosure by some political actors who run advertisements that are not, in fact, *intended* to influence the outcome of a federal election. Indeed, there was considerable debate over the validity of two studies conducted by the Brennan Center for Justice aimed at measuring the extent of such "genuine" issue advocacy compared to issue advocacy that is in fact intended to influence the outcome of federal elections. *Compare* Supp. App. 762sa (Kollar-Kotelly) *with* Supp. App. 1154sa (Leon) *and* Supp. App. 367sa n.149 (Henderson). The two judges who gave the Brennan Center studies at least some evidentiary weight disagreed over whether the studies showed that section 201's bright-line test covered too much "genuine" issue advocacy. *Compare* Supp. App. 858sa-860sa (Kollar-Kotelly) *with* Supp. App. 1157sa (Leon).

At least with respect to disclosure, these arguments miss the mark completely. Unlike the FECA disclosure provision discussed in *Buckley*, the disclosure provisions of

BCRA are not dependent upon, and do not correspond to, the actual or perceived *intent* of the parties responsible for the expenditures. Rather, underlying the BCRA provisions is the government's recognition that "genuine" issue advertisements, when broadcast in the circumstances described in BCRA's "primary" definition, will almost invariably *influence the outcome of elections*, even if they were not specifically intended to do so. An advertisement about pending legislation, mentioning a candidate, targeted to the relevant electorate, and run immediately before the election (*see* Supp. App. 1147sa-1148sa (Leon)), even if not intended to influence the election, is at least intended to affect some *legislative action.* And, in so doing, the advertisement almost always influences a federal election, thereby triggering the concerns underlying BCRA's disclosure requirements.

By adopting the bright-line test in section 201, Congress demonstrated that its concern is with respect to advertisements that likely *will, in fact*, influence federal elections, rather than with advertisements that are intended, in whole or in part, to have such effect. Thus, the primary definition is precisely tailored to the congressional objectives, and there is *no* overbreadth.

3. Issue advocacy is not constitutionally favored over election-related speech.

Many of the plaintiffs appear to assume that "genuine" speech concerning legislative matters (or concerning political debates distinct from specific electoral decisions) are either entitled to greater First Amendment protection than "express" campaign-related speech, or are categorically immune under the First Amendment from any regulation, including disclosure requirements. But this assumption is fundamentally mistaken in both respects.

"Express" election-related speech – such as "Vote for Jones" – is, of course, political expression "'at the core of our electoral process and of the First Amendment freedoms,'" *Buckley*, 424 U.S. at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)). Accordingly, such "express advocacy" is

entitled to no lesser protection than speech concerning "issues."

Moreover, *issue*-related speech may be subject to carefully tailored disclosure requirements. For instance, the lobbying of legislators is the quintessential form of "genuine" issue advocacy. This Court has long recognized the constitutionality of laws requiring disclosure of expenditures for lobbying government officials. *See United States v. Harriss*, 347 U.S. 612 (1954). Disclosure is permissible to prevent corruption and its appearance, as well as to serve important informational purposes. In *Harriss*, the Court upheld the Federal Regulation of Lobbying Act, noting that through the Act Congress "has merely provided for a modicum of information from those who for hire attempt to influence legislation or collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much. It acted in the same spirit as for a similar purpose in passing the Federal Corrupt Practices Act – to maintain the integrity of a basic governmental process." *Id*. at 625-26.

Indeed, this Court has recognized the informational interest *alone* as sufficient to justify disclosure in large-scale political activity. In *Bellotti* and *ACLF*, this Court approved of laws allowing the government to require disclosure of financial information in *ballot measure* campaigns where the possibility of candidate corruption is absent. And in *Buckley* itself, the Court approved of disclosure requirements as to *all* of a candidate's or political committee's disbursements, including those pertaining to issue advocacy not directly related to election campaigns. *See supra* note 3.

Plaintiffs' argument that "genuine" issue advocacy is constitutionally immune from disclosure regulation therefore is untenable. In support of that argument, plaintiffs rely almost entirely on a few stray words in *Buckley*. In discussing why the definition of "expenditure" needed to be construed narrowly for disclosure purposes in order to avoid vagueness concerns, this Court stated that "[t]o insure that the reach of § 434(e) is not impermissibly *broad*, we construe 'expenditure' for purposes of that section in the same way as

we construed the term of § 608(e) – to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 80 (footnote omitted and emphasis added). Read in context, it is apparent that the Court adopted the narrowing construction largely, if not entirely, in order to cure a concern over *vagueness*, not overbreadth: the discussion appeared in a section of the opinion entitled "Vagueness Problems," *id*. at 76, and the discussion of the constitutional problems with section 608(e), referenced in the discussion of section 434(e), clearly stated that the Court adopted its narrowing construction "to preserve the provision against invalidation *on vagueness grounds*." *Id*. at 44 (emphasis added).

To the extent the Court was addressing a problem of "overbreadth," it appears to have been suggesting *not* that a broader definition of "expenditure" would reach speech *constitutionally immune from regulation*, but instead that, as applied to speech not expressly election-related, "the relation of the information sought *to the purposes of the Act* may be too remote." *Id.* at 80 (emphasis added).

Significantly, those purposes are quite different than BCRA's. Under the express terms of FECA, Congress was concerned only with "the use of money or other objects of value '*for the purpose* of . . . influencing' the nomination or election of any person to federal office.'" *Id*. at 63 (emphasis added); *id.* at 77. Because Congress's objectives in FECA were aimed only at speech *intended* to influence federal elections, any applications of the statute to speech that was *not* so intended would have been "overbroad" *relative to the purposes of the Act itself*.

By contrast, as we explained above, under BCRA Congress has not limited its concern, or the aim of its regulation, to speech *intended* to influence federal elections: instead, it has carefully crafted a statute to address only candidate-specific speech *likely* to influence such elections – and thus to bring within the scope of the Act a more comprehensive array of the speech that does, in fact, implicate the concerns underlying the disclosure (and segregated

fund) requirements. If *Buckley* were understood as holding that application of disclosure requirements to speech other than "express" advocacy is unconstitutional *regardless* of the legislature's objectives, such a holding would have been flatly inconsistent with the Court's holding in *Harriss*, and with the Court's subsequent discussions in, *e.g.*, *Bellotti*, *Citizens Against Rent Control*, and *ACLF*, in each of which the Court signaled its approval of the idea of disclosure requirements for "genuine" issue-related speech where such requirements are appropriately tailored to an important state interest, such as assisting voters to "evaluate the arguments to which they are being subjected," *Bellotti*, 424 U.S. at 792 n.32, and (in contexts where such speech may also affect officeholder conduct) to prevent "the appearance of corruption," *McIntyre*, 514 U.S. at 356 n.20 (describing *Harriss*). Indeed, such a holding would have been inconsistent with *Buckley*'s own approval of the broad disclosure requirements imposed on "political committees" with respect to *all* of their disbursements. *See supra* note 3.

Of course, in this case the Court need not identify the precise circumstances under which disclosure requirements may be imposed with respect to "pure" issue advocacy unrelated to candidate elections, such as was discussed in cases such as *Harriss*, *Bellotti*, and *ACLF*. BCRA does not attempt to reach lobbying speech, ballot-initiative speech, or any other speech that is unlikely directly to affect candidate elections. BCRA is, instead, aimed at speech that is likely to affect *candidate* elections, and thus is supported by additional compelling and powerful state interests that are not typically present in the context of, *e.g.*, ballot referenda. The fact that BCRA's bright-line test might, in some applications, apply to instances of "genuine" issue advocacy that are not principally intended to influence candidate elections does not render the statute overbroad even in those applications, much less substantially overbroad, because Congress has the power to require disclosure of basic financial information about the funding of broadcast advertisements that will likely

influence federal elections (regardless of intent) using a clear, non-vague statute.

4. Even if there is some overbreadth, it is not substantial.

Even if this Court disagrees with this analysis and would hold that it is impermissible for Congress to require any disclosure of expenditures for funding "genuine" issue advocacy, it should still uphold section 201's disclosure provisions because the provisions are not *substantially* overbroad. As this Court recently noted in *Virginia v. Hicks*, 123 S. Ct. at 2197, "there are substantial costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech."

To be sure, the parties and judges below vigorously debated the amount of "genuine" issue advocacy that would be covered by the bright-line test. But even if as much as 17% of the unique advertisements subject to disclosure are genuine issue advertisements (i.e., intended *solely* to influence matters other than elections) – as Judge Leon concluded was possible, Supp. App. 1157sa (Leon)[7] – the law is not substantially overbroad. In evaluating overbreadth, this Court should consider not only the empirical evidence regarding *the extent* of valid versus invalid applications of the law, but also *qualitative factors*, such as the state's strong interest in legislation of this kind, legislative inability to craft a more narrowly tailored law and the extent of the burden of the law in its invalid applications. *See* Hasen,

[7] The 17% figure depended upon the "'most conservative' estimate" of the studies' director, Dr. Ken Goldstein. Supp. App. 1360sa-1361sa (Leon), and in fact the actual percentage may be much lower. *See* Supp. App. 1361sa (Leon) (Dr. Goldstein would have coded five of the six advertisements initially coded as genuine advertisements as electioneering advertisements). Judge Kollar-Kotelly, contrary to the McConnell plaintiffs' misstatement, McConnell Br. at 54, emphatically did not "agree[]" with the 17% figure. Supp. App. 859sa-860sa (Kollar-Kotelly).

supra, at 1799-1804; Richard H. Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853, 894 (1991).

Here, Congress had a strong reason to act. The meteoric rise of electioneering communications lacking words of express advocacy (up to half a billion dollars in the 2000 election cycle) has threatened to undermine disclosure rules central to any *effective* set of campaign finance laws.

In addition, Congress could not craft a more narrowly tailored law. In order to avoid constitutional vagueness, Congress used a bright-line test under which anyone with "[a] copy of the proposed advertisement and a calendar" may "make a conclusive advance determination that the ad is subject to regulation." Supp. App. 803sa (Kollar-Kotelly) (emphasis omitted). It is hard to imagine a less vague test or one that could solve the problem of sham issue advocacy more directly. *See* Edward B. Foley, *"Narrow Tailoring" Is Not the Opposite of "Overbreadth": Defending BCRA's Definition of "Electioneering Communications*," 2 Election L.J. (forthcoming Oct. 2003), *available at* http://www.liebertpub.com/elj/Foley1.pdf.

Finally, the First Amendment burden is slight. Political actors who must file disclosure reports under BCRA for advertisements captured by the bright-line test may well be already filing such reports for their election-related activities that fund advertisements including words of express advocacy. Importantly, the disclosure rules *do not prevent any speech*, and anyone facing the threat of harassment from disclosure may always seek an as-applied exemption from disclosure under *Socialist Workers*. The rules will not chill any significant political activity.

D. If This Court Fails to Uphold BCRA's Bright-Line "Electioneering Communications" Provision, All Effective State and Local Campaign Finance Disclosure Laws and Public Financing Laws Are in Jeopardy.

As noted in Part I.B., above, state attempts to use intent-based tests to require disclosure of expenditures

funding issue advertisements that influence state elections have fared poorly in lower courts. In response, states have begun enacting bright-line tests similar to section 201 to ensure *effective* state campaign finance disclosure laws.[8] A decision by this Court striking down BCRA's bright-line test would do more than call into question these nascent efforts by states to write effective disclosure laws, however. The law would also doom efforts to provide effective voluntary public financing of campaigns, including *judicial* campaigns.

North Carolina's recently enacted public financing program for judicial candidates includes a "trigger" provision releasing additional public financing upon the filing of reports indicating a certain amount of independent expenditures in support of or in opposition to a judicial candidate. *See* N.C. Gen. Stat. § 163-278.67. Such triggers cannot work if those supporting or opposing candidates can avoid filing the reports of their expenditures simply by eschewing words of express advocacy. Other state and local laws have similar triggers for their public financing programs.[9]

In addition to these laws, twenty-five states and the District of Columbia have laws that require disclosure of expenditures funding grassroots lobbying.[10] These laws too

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[8] *See, e.g.,* Cal. Gov't Code § 85310 (West Supp. 2003); Conn. Gen. Stat. § 9-333c(a)(2) (2003); Vt. Stat. Ann. tit. 17 § 2883 (2002); Wis. Stat. § 11.12(6) (2002); *id.* § 11.01(16)(a).

[9] *See, e.g.,* Ariz. Rev. Stat. § 16-952 (2003); Me. Rev. Stat. Ann. tit. 21-A, § 1125(9) (2002); Austin, Tex., City Code § 2-9-12 (2003); L.A., Cal. Municipal Code § 49.7.14 (2003).

[10] *See* Alaska Stat. §§ 24.45.011, .051 (2002); Ark. Code Ann. §§ 21-8-402, -601 (Michie 2003); Cal. Gov't Code § 82045(e) (West. Supp. 2003); Colo. Rev. Stat. §§ 24-6-301, -302 (2002); Conn. Gen. Stat. §§ 1-91(k), -94, -96 (2003); D.C. Code Ann. § 1-1105.01 (2003); Ga. Code Ann. §§ 21-5-70, -71, -73 (2003); Haw. Rev. Stat. §§ 97-1 to -3 (2003); Idaho Code §§ 67-6602, -6617, -6619 (Michie 2003); Ind. Code Ann. §§ 2-7-1-9, -2-1, -3-3 (Michie 2003); Kan. Stat. Ann. §§ 46-225, -268 (2002); Md. Code Ann., State Gov't §§ 15-701, -704 (2003); Mich. Comp. Laws §§ 4-415, -418 (2003); Minn. Stat. Ann. §§ 10A.01, .03, .04 (2002); Miss. Code Ann. §§ 5-8-3, -9 (West 2003); Mont. Code. Ann. § 5-7-102 (2002); Neb. Rev. Stat. § 49-1433 (2002); Nev.

(Continued on following page)

could be subject to challenge should this Court strike down the electioneering provisions of BCRA on grounds that the government may not require disclosure of expenditures likely to influence government action.

II.

THIS COURT SHOULD AFFIRM THE CONSTITUTONALITY OF NARROWLY TAILORED LAWS REQUIRING CORPORATIONS AND UNIONS TO USE A SEGREGATED FUND FOR COMMUNICATIONS THAT INFLUENCE ELECTIONS.

A. This Court Has Recognized the Compelling Interests Served by Limits on Excessive Corporate and Union Involvement in the Electoral Process.

Since 1947, federal law has required corporations and unions to establish and administer segregated accounts for the purpose of making political contributions and expenditures using funds collected from stockholders, members, executive and administrative personnel, and their families. See 2 U.S.C.A. § 441b (West 1997 & Supp. 2003). Section 203 of BCRA extends that segregated fund requirement to "electioneering communications" defined in section 201. Section 203 is consistent with a long tradition of congressional and state attempts to limit undue corporate and union involvement in elections, and is constitutional.

In *FEC v. Beaumont*, 123 S. Ct. at 2205-08, this Court set forth a detailed "historical prologue" tracing a "century

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Rev. Stat. § 218.912 (2002); N.M. Stat. Ann. §§ 2-11-2, -6 (Michie 2002); N.Y. Legis. Law §§ 1-c, -j (McKinney 2003); Or. Rev. Stat. §§ 171.725, .745 (2001); 65 Pa. Cons. Stat. §§ 1303, 1305 (2002); Vt. Stat. Ann. tit. 2, §§ 261, 264 (2003); Va. Code Ann. §§ 2.2-419, -426 (Michie 2003); Wash. Rev. Code § 42.17.200 (2003); W. Va. Code § 6B-3-5 (2003).

of congressional efforts to curb corporations' potential 'deleterious influences on federal elections.'" *Id*. at 2205 (quoting *United States v. Auto. Workers*, 352 U.S. 567, 585 (1957)). The Court explained that federal law in this area began with the 1907 Tillman Act, followed by "periodic amendment . . . meant to strengthen the original, core prohibition on direct corporate contributions." *Id.* at 2206. While not mentioned in *Beaumont*, state efforts to limit excessive corporate involvement in the electoral process date back even further, to 1891.[11]

This Court has consistently supported special rules for corporation and labor union involvement in candidate elections. *Id*. at 2200 (upholding federal corporate contribution limitations applied to nonprofit ideological corporations); *Austin*, 494 U.S. at 669 (upholding Michigan requirement that corporations spend money on state candidate elections only through a segregated fund); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197 (1982) ("*NRWC*") (upholding federal requirement that corporations without shareholders restrict solicitations for segregated PACs to "members" of corporation).

This Court has recognized four interests that justify limits on corporate and union contributions and expenditures, three of which are relevant to BCRA § 203.[12]

(1) *Preventing Corruption and the Appearance of Corruption*. This Court has long recognized that "substantial aggregations of wealth amassed by the special advantages

[11] *See* Ky. Const. § 150; Act of June 2, 1891, ch. 4538, §§ 1-2, 1891 Fla. Laws 72, 72; Act of Apr. 19, 1905, ch. 291, § 1, 1905 Minn. Laws 436, 436; Act of Apr. 3, 1897, ch. 19, § 1, 1897 Neb. Laws 185, 185; Act of Apr. 6, 1911, ch. 109, § 1, 1911 N.H. Laws 113, 113; Act of Feb. 5, 1907, ch. 121, 1907 N.C. Sess. Laws 134; Act of May 29, 1908, ch. 31, art. 1, art. VII, § 9, 1907-1908 Okla. Sess. Laws 316, 348; Act of Apr. 5, 1897, ch. 18, § 1, 1897 Tenn. Pub. Acts 143, 143; Act of June 21, 1905, ch. 492, § 1, 1905 Wis. Laws 869, 869; Act of Feb. 17, 1911, ch. 41, § 10, 1911 Wyo. Sess. Laws 50, 53.

[12] The fourth interest is preventing circumvention of valid contribution limits, *see Beaumont*, 123 S. Ct. at 2207.

which go with the corporate form" may become "converted into political war chests which could be used to incur political debts from legislators." *Beaumont*, 123 S. Ct. at 2206 (quoting *NRWC*, 459 U.S. at 207, internal quotations omitted). No doubt, these "war chests" raise the possibility of corruption and the appearance of corruption as to campaign *contributions* by corporations and unions. In *Bellotti*, 435 U.S. at 788 n.26, this Court explicitly recognized that such war chests raise the same dangers as to *expenditures* as well: "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."[13]

(2) *Preventing the Corrosive Effect of Corporate Wealth on Politics*. In *Austin,* this Court held that a limit on corporate expenditures was justified by "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" but that result from "unique state-conferred" benefits. *Austin*, 494 U.S. at 660.

(3) *Shareholder and Union Member Protection.* In *NRWC*, 459 U.S. at 208, this Court recognized that the segregated fund requirement protects individuals "who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *See also Beaumont*, 123 S. Ct. at 2206; *United States v. Congress of Indus. Org.,* 335 U.S. 106, 113 (1948).

[13] In the later *Austin* case, this Court did not determine whether or not this interest justified the segregated fund requirement for corporate expenditures on express advocacy. *See Austin*, 494 U.S. at 659 ("*Regardless of whether* this danger of 'financial *quid pro quo*' corruption . . . may be sufficient to justify a restriction on independent expenditures . . . ") (emphasis added).

B. In Recent Years, Corporations and Unions Have Been Able to Skirt the Limits on Involvement in the Electoral Process by Eschewing Express Words of Advocacy.

As explained in Part I.B, interpretations of the Court's *Buckley* opinion have allowed corporations and unions to skirt limits on their involvement in the electoral process by eschewing words of express advocacy. Corporations and unions have made millions of dollars of "soft money" contributions to political parties to fund election advertisements that avoid words of express advocacy. *See, e.g.,* Supp. App. 1284sa (Leon). They also have spent millions more on independent expenditures lacking such words. Supp. App. 1316sa-1317sa (Leon). The result is a gutting of the long-standing segregated fund requirement of 2 U.S.C.A. § 441b.

C. This Court Should Recognize BCRA's Bright-Line "Electioneering Communications" Provision as a Narrowly Tailored Means of Limiting Corporate and Union Involvement in the Electoral Process.

Congress sought to deal with the evisceration of the controls on corporate and union involvement in the political process by extending the segregated fund requirement to electioneering communications as defined under the bright-line test of BCRA section 201. The government's interests in limiting corporate or union contributions and expenditures apply equally whether or not an advertisement that is intended or likely to influence the outcome of elections includes words such as "Vote for Jones." The provision merely insures that the existing federal segregated fund requirement is *effective.*

The connection between corruption – and the appearance of corruption – and corporate and union *contributions* to fund issue advertisements is obvious: large contributions can create political debts for legislators. In addition, the evidence presented below shows that corporate and union war chests also raise the possibility of corruption and the appearance of corruption as to *independent expenditures*. Judge Kollar-Kotelly detailed how federal candidates and political parties

"know and appreciate who runs candidate-centered issue advertisements in their races." Supp. App. 708sa-719sa (Kollar-Kotelly) (capitalization altered). No other judges made contrary findings.

BCRA's legislative change is simply the most recent of what this Court recognized are "periodic amendment[s] [to congressional laws regulating corporate political activity] . . . meant to strengthen the original core prohibition on direct corporate contributions." *Beaumont*, 123 S. Ct. at 2206. As this Court has done in its other recent campaign finance cases, it should show "respect for the 'legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.' " *Id*. at 2207 (quoting *NRWC,* 459 U.S. at 209-10).

Two of the lower court judges in this case rejected application of the bright-line test to the segregated fund limitation on corporate and union involvement in the electoral process on the ground that it "would prohibit too much protected expression." Supp. App. 367sa n.149 (Henderson); *see also* Supp. App. 1152sa (Leon).

This analysis misses the mark. As this Court explained in *Beaumont*, 123 S. Ct. at 2211, the segregated fund requirement should not be "characteriz[ed] . . . as a complete ban. . . . [T]he section 'permits some participation of unions and corporations in the federal electoral process by allowing them to establish and pay the administrative expenses of [PACs].' "

Nor is the law substantially overbroad. As explained in Part I.C., *supra*, "genuine" issue advertisements that must be funded through segregated funds under the new law, even if not intended to influence the outcome of elections, are intended to influence government decisions and in fact will almost inevitably – however intended – *influence the outcome of elections* if made under the circumstances described in BCRA's bright-line definition. The AFL-CIO acknowledges this point in its brief. AFL-CIO Br. at 21 (AFL-CIO broadcast advocacy "certainly might 'affect,' or be perceived to 'affect,' elections in the sense of influencing the electoral issue climate, forcing candidates to address union priority matters, informing the public and generating popular pressure on

candidates to embrace particular policies. In turn, the labor movement's impact on public policy is only enhanced when electoral considerations motivate office-holders").

Three of the same interests that this Court has recognized for limiting corporate and union attempts to influence elections through express advocacy apply as well to the government's interest in limiting excessive corporate and labor influence over the outcome of elections, whatever the *intention* of the corporations and unions paying for the advertisements.

Large amounts of corporate and union spending referring to a candidate for federal office and broadcast *around the time of elections* raise at least the appearance of corruption in voters' minds, not to mention the threat of actual corruption. The concern is neither novel nor implausible. *Cf. Shrink Mo.*, 528 U.S. at 391.

In addition, limiting the corrosive effect on elections of immense aggregations of wealth that are accumulated as a result of unique state-conferred privileges and benefits – an interest this Court found sufficiently compelling to justify a segregated fund requirement in *Austin* – applies equally whether or not a corporation or labor union *intends* to influence an election so long as large spending *is likely to have that effect*. Nor does that corrosive effect depend upon the presence of "express advocacy."

Importantly, plaintiffs in this case have not challenged the holding in *Austin* that the "corrosive effect" of immense aggregations of wealth through the corporate form justifies regulating corporate express advocacy.[14] *Cf. Beaumont*, 123 S. Ct. at 2212 (Kennedy, J., concurring) (declining to reconsider distinction between contributions and expenditures because the issue was not presented for review). The question

[14] The closest the plaintiffs come in their opening briefs to challenging *Austin* is the discussion of the media exemption in the National Rifle Association Br. at 47-48. The NRA does *not* attack *Austin*'s central holding on the corrosive effects of corporate wealth, but rather raises an equal protection attack based on BCRA's exemption of media corporations from the electioneering communications regulations.

then should be simply whether the same "corrosive effect" rationale for limits on corporate express advocacy applies as well to corporate and union advertisements lacking words of express advocacy but likely to influence the outcome of elections. It certainly does apply in that context, and plaintiffs offer no arguments to the contrary.[15] *See* Foley*, supra*, 2 Election L.J. (temporary pages 12-15).

Similarly, the government's interest in corporate shareholder and union feeholder protection applies equally whether or not an advertisement funded with shareholder or union member funds contains words of express advocacy. *Cf. Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521-22 (1991) (plurality opinion) (state may not compel its employees to subsidize legislative lobbying or other political union activities, including "discussion[s] of governmental affairs," outside the limited context of contract ratification or implementation).

Even if this Court were to hold that the government may not require unions and corporations to pay for broadcast advertisements through a segregated fund when the corporation or union does not *intend* to influence the outcome of elections and uses no words of express advocacy, the law is not substantially overbroad. The vast majority of candidate-specific issue advertisements that are broadcast to the relevant electorate in the period immediately before the election are intended to influence the outcome of federal elections. *See* Supp. App. 1315sa-1325sa (Leon); Supp. App. 678sa-708sa (Kollar-Kotelly). In addition, as noted in Part I.C., in evaluating overbreadth, this Court should consider not only the empirical evidence regarding *the extent* of valid versus

[15] *MCFL* is not to the contrary. In *MCFL*, this Court referred to the overbreadth language in *Buckley*, characterizing its construction of the express advocacy provision in *Buckley* as a means to "avoid problems of overbreadth." *MCFL*, 479 U.S. at 248. As explained above, *Buckley* found overbreadth in the context of the FECA's purposes. In contrast, in this case there is no overbreadth in the context of BCRA's purpose to control excessive corporate and union influence over the electoral process, whatever the intention of the corporate or union advertisers.

invalid applications of the law, but also *qualitative factors*, such as the state's strong interest in legislation of this kind, legislative inability to craft a more narrowly tailored law, and the extent of the burden of the law in its invalid applications.

Here, the government has a strong and longstanding interest in regulating corporate and union involvement in the electoral process; the government has no ability to craft a more narrowly tailored law that will materially address what this Court in *Austin* identified as the government's compelling interests; and the law requires only the use of a segregated fund – no speech is banned. The burden is particularly slight in the case of corporate activities. As this Court recently noted in the context of a corporate contribution ban, "[a] ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information." *Beaumont*, 123 S. Ct. at 2210 n.8. The same may be said of the segregated fund requirement: it leaves individual members of corporations free to make their own contributions or expenditures (including to the segregated fund), and deprives the public of little or no material information.[16]

D. If This Court Fails to Uphold BCRA's Bright-Line "Electioneering Communications" Provision, State and Local Government Will Be Unable to Enact *Effective* Laws Limiting Corporate and Union Involvement in the Political Process.

At least fourteen states impose segregated fund requirements on corporations, unions, or both types of

[16] The ACLU, NRA, and NRLC all argue that the *Austin* rationale should not apply to these organizations because they are ideological corporations. Those arguments are best addressed by the Court in the context of considering the proper scope of the *MCFL* exception to the law. They are not a reason to strike down the segregated fund requirement as applied to for-profit corporations such as General Motors or Exxon-Mobil or unions such as those comprising the AFL-CIO.

entities.[17] A number of cities have similar requirements.[18] If this Court fails to uphold BCRA's bright-line electioneering provision to the segregated fund requirements on the federal level, these states and municipalities will not be able to craft *effective* laws limiting corporate or union involvement in the political process. The laws will become a dead letter, thereby undoing historical practice going back many decades.

CONCLUSION

For the foregoing reasons, we urge this Court to affirm the constitutionality of the electioneering provisions of sections 201 and 203 of the BCRA.

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Respectfully submitted,

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[17] Ariz. Rev. Stat. §§ 16-919, 920 (2003); Conn. Gen. Stat. § 9-333o, p (2003); Mich. Comp. Laws §§ 169.254, 169.255 (2003); Mont. Code Ann. § 13-35-227 (2002); N.Y. Elec. Law § 14-116 (McKinney 2003); N.C. Gen. Stat. § 163-278.19 (2002); Ohio Rev. Code Ann. §§ 3599.03, 3517.082 (West 2002); Okla. Stat. tit. 21, § 187.2 (2003); 25 Pa. Cons. Stat. § 3253 (West 2003); R.I. Gen. Laws §§ 17-25-10.1(h), -15 (2002); S.D. Codified Laws § 12-25-2 (Michie 2002); Tex. Elec. Code Ann. §§ 253.094, .100 (2003); W. Va. Code § 3-8-8 (2003); Wis. Stat. § 11.38 (2002).

[18] For example, a number of California cities have such requirements. *See* Berkeley, Cal., Municipal Code § 2.12.440 (2003); Chula Vista, Cal., Municipal Code § 2.52.060 (2001); Coronado, Cal., Municipal Code § 1.84.40 (2003); Poway, Cal., Municipal Code § 2.28.030(B)(1) (2002); San Diego, Cal., Municipal Code § 27.2947 (2003); San Diego County, Cal., Municipal Code tit. 3, div. 2, ch. 9, § 32.924 (2002); Santee, Cal., Municipal Code § 2.40.070 (2002); Scotts Valley, Cal., Municipal Code § 2.60.040 (2003).