No. 02-1674 et al.

IN THE
Supreme Court of the United States

SENATOR MITCH MCCONNELL ET AL.,

Appellants/Cross-Appellees,

v.

FEDERAL ELECTION COMMISSION ET AL.,

Appellees/Cross-Appellants.

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

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INTRODUCTION

Defendants constantly seek to reassure the Court that BCRA represents nothing more than an incremental "adjustment" or "refinement" of our Nation's already labyrinthine campaign finance regulations. That claim, however, is utterly belied by the sprawling nature of the law, and indeed by the extraordinary nature of this litigation. Just as BCRA radically revamps our campaign finance laws, so too would upholding BCRA require this Court to overhaul settled constitutional jurisprudence. In order to uphold BCRA's central provisions, this Court would have to overturn the two cornerstone holdings of *Buckley v. Valeo*, 424 U.S. 1 (1976): its distinctions between contribution and expenditure limits, and between express advocacy and other types of political speech. The Court would also have to betray its commitment to the bedrock and uniquely American principle of dual sovereignty, in a context in which the States' competing regulatory interest could not be more fundamental. And the Court would have to create broad exceptions to the basic precept that similarly situated speakers be treated alike.

Defendants' submissions positively bristle with hostility toward any role for money in politics — and therefore toward the speech that money indisputably enables. What defendants derisively and pervasively characterize as "evasion" or "circumvention," however, is in fact nothing less than the exercise of one of our most cherished rights. The net effect of defendants' position, if accepted, will be to make regulation of political speech the rule, rather than the exception, and to "force[] a substantial amount of political speech underground," *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting) — a result directly at odds with our Nation's unrivaled constitutional commitment to robust and uninhibited debate. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). That debate sometimes may be unpleasant and undignified, but never is it unprotected. The challenged provisions of BCRA should be invalidated.

ARGUMENT

I. THE "SOFT MONEY" PROVISION OF BCRA IS UNCONSTITUTIONAL.

A. In attempting to sustain section 101 against First Amendment challenge, defendants would trivialize the speech and associational rights at issue, urge the most deferential level of scrutiny, and define the governmental interests in regulation in the most amorphous and unbounded terms. This Court's First Amendment jurisprudence rebukes them at every turn.

1. Defendants do not seriously question that section 101 burdens the speech and associational rights of donors and political parties much like the restrictions at issue in *Buckley*. Instead, defendants attempt to minimize the additional associational burdens that section 101 imposes on political parties. *See, e.g.*, FEC Br. 69-70; McCain Br. 22-23.

Although it is true that section 101 does not *ban* associations between party committees altogether, the associational burdens on party committees are far more than merely incidental. Section 101 imposes numerous restrictions on the ability of party committees to engage in coordinated fundraising, and thus to structure their affairs as they see fit. And, as defendants fail to recognize, section 101 also severely impairs the ability of party committees to associate with others — including, most notably, the parties' own federal officeholders and candidates. Those associational burdens are substantial and unprecedented.

2. Defendants next suggest that section 101 should be subject to the lower degree of scrutiny applicable to limitations on contributions. *See, e.g.*, FEC Br. 35-36, 45-46. In our view, section 101, which contains disparate restrictions, *inter alia*, on expenditures and solicitations,[1] should be treated as an

[1] Defendants suggest that limitations on solicitations should be subject to lesser scrutiny. *See, e.g.*, FEC Br. 51-52; McCain Br. 21-22. This Court has repeatedly noted, however, that a restriction on solicitations is the most direct form of restriction on speech. *See* McConnell Br. 15. The Court's

integrated whole and subject to strict scrutiny — the baseline level of scrutiny for restrictions on political speech. *See, e.g.*, *Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2565 (2003) (Breyer, J., joined by O'Connor, J., dissenting).

Defendants nevertheless urge that the subsection of section 101 applicable to national party committees should be reviewed under lesser scrutiny simply because it contains a limitation on contributions. *See, e.g.*, FEC Br. 35-36. But defendants virtually ignore *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981), which treated limits on the amount of contributions to *third parties* as the equivalent of limits on the amount of expenditures by those third parties. *See id.* at 299. Moreover, notwithstanding defendants' claim that the subsection "is directed solely at the *acquisition* of funds," FEC Br. 13, it plainly regulates *both* contributions to, and expenditures by, national party committees. And it does not impose any new limits on the *amounts* of contributions to national committees, but instead merely regulates the *uses* for which money is raised and spent. *Buckley* and its progeny hold only that a regulation that limits the amount of contributions, not any regulation that does *not* limit the amount of *expenditures*, is subject to lower scrutiny. Defendants' position would therefore turn *Buckley* on its head, and render meaningless *Buckley*'s bedrock distinction between contribution and expenditure limits.[2]

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decision in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), is readily distinguishable, because the solicitation restriction at issue there (the restriction on solicitations for corporate and union PACs) was directly intertwined with an underlying contribution restriction (the ban on contributions by corporations and unions).

[2] Defendants urge that even the subsection of section 101 applicable to state party committees should be subject to lesser scrutiny, even though it plainly regulates only expenditures, on the ground that the provision, by restricting the uses of certain types of contributions, is "functionally identical" to a limit on those contributions. McCain Br. 28 n.19; *see also* FEC Br. 45-46 (same). That reasoning, too, would gut *Buckley*'s distinction between contribution

3. Defendants make no serious effort to suggest that section 101 is sufficiently tailored to prevent actual or apparent *quid pro quo* corruption. *See* FEC Br. 39 n.15. Instead, defendants claim, notwithstanding the utter absence of legislative findings, that the core restriction on donations of state-regulated funds to national committees is necessary because large donations of such funds allow donors to buy "access" to officeholders, which can eventually be converted into influence over "policy" even if particular votes are not affected. *See id.* at 11, 22, 37-41; McCain Br. 1-2, 12-17.[3] Defendants then seek to justify the manifold other restrictions in section 101 on the ground that they are necessary to prevent hypothesized circumvention of the core restriction on donations to national committees. *See* FEC Br. 22-23, 51-60; McCain Br. 31, 39.

Defendants do not, because they cannot, articulate any limiting principle for these novel and breathtakingly broad governmental interests for campaign finance regulation. Defendants' anti-access and anti-circumvention rationales would support virtually *any* form of campaign finance regulation. *See* McConnell Br. 20-23. Moreover, in contending that section 101 is sufficiently tailored to these interests, defendants hardly so much as cite this Court's pathmarking decision in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) (*Colorado I*), which recognized, in the context of independent expenditures by political parties (and

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and expenditure limits. Indeed, under defendants' position, the application of strict scrutiny even to the expenditure limit at issue in *Buckley* would have been erroneous, since that provision, contrary to defendants' assertion, *see id.*, similarly limited only certain types of expenditures and not others, *see Buckley*, 424 U.S. at 41.

[3] The mere fact that some donors give to *both* parties, *see, e.g.*, FEC Br. 38-39; McCain Br. 15, is not surprising. As Judge Posner has noted, many "political hermaphrodites" support both parties because "the pervasive role of government in modern American life has made it important for business firms to be on good terms with the major political groupings in the society." *See LaFalce v. Houston*, 712 F.2d 292, 294 (7th Cir. 1983).

thus, by logical extension, contributions to political parties) that political parties serve as buffers between contributors and candidates, and squarely rejected the argument that there are "any special dangers of corruption associated with political parties" justifying the regulation of independent expenditures by those parties. *See id.* at 616 (plurality opinion). This Court has since recognized that political parties may act as "agents" of contributors, *see* FEC Br. 32, but only in the context of expenditures that are *coordinated* with candidates, *see FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 452 (2001) (*Colorado II*). And in *Colorado I*, the plurality observed that the opportunity for corruption posed by donations of state-regulated funds "is, at best, attenuated." 518 U.S. at 616. Because state-regulated funds may concededly be spent only on activities that have "less tangible benefits to a federal candidate or office-holder," FEC Br. 43, donations of state-regulated funds naturally will have less potential to corrupt than contributions of federally regulated funds.

Finally, defendants pointedly ignore the availability of more narrowly tailored alternatives. Defendants and their *amici* repeatedly state that section 101 was primarily targeted at *large* donations of state-regulated funds to *national* party committees. Whether the problem lay in donations over $50,000 (CED Br. 13), $100,000 (McCain Br. 30), or $1 million (Common Cause Br. 10), Congress could have merely imposed a cap on the amount of such donations, like the $60,000 aggregate cap proposed in the Hagel Amendment. *See* McConnell Br. 25. Alternatively, Congress could have limited donations of state-regulated funds only when a contributor had "maxed out" on federally regulated contributions to the same party committee — a situation in which, according to defendants, the potential for corruption is "magnified." *See* FEC Br. 43. And to the extent Congress was concerned about the transfer of state-regulated funds from national party committees to state committees in order to take advantage of the more generous

allocation formulas available to those committees, *see id.* at 11; McCain Br. 5, 29, Congress could have subjected state and national committees to the same allocation formulas. Congress did none of these things, but instead banned *all* donations of state-regulated funds to, and disbursements by, national party committees, and imposed a bewildering array of other restrictions with no evident nexus to Congress' supposed concern about large donations. Given the ready availability of more narrowly tailored alternatives, section 101 violates the First Amendment.[4]

B. Section 101 goes well beyond Congress' power to regulate the financing of federal elections.

1. Defendants almost entirely ignore the history of the Elections Clause and the long line of cases interpreting it, which make clear that the Elections Clause gives Congress the power to regulate the financing of only federal, not state, elections. Defendants contend that the Elections Clause gives Congress plenary power to regulate campaign financing whenever federal elections are being held, even if the activity

[4] *Amicus* former Senator Fred Thompson contends that section 101 of BCRA was justified by the notorious abuses uncovered by a congressional investigation in the wake of the 1996 presidential election. *See* Thompson Br. 6-27. Those abuses, however, were fully addressed by a number of other features of BCRA not challenged in this litigation, including the strengthened ban on foreign contributions, *see* BCRA § 303; the prohibition against fundraising on federal property, *see* BCRA § 302; and the extension of the concept of "coordination" to political parties, *see* BCRA § 214(a).

Defendants repeatedly claim that state-regulated funds were solicited and donated for the purpose of influencing federal elections. *See, e.g.*, McCain Br. 17-20, 25-26 & n.16, 27. In fact, *amici* quote at least one donor who freely admitted that he gave money for that purpose. *See* CRP Br. 16. Under preexisting federal law, however, *any* donation made "for the purpose of influencing any [federal] election" constitutes a "contribution" subject to FECA's source-and-amount limits. *See* 2 U.S.C. § 431(8)(A)(i). To the extent that donors were giving "non-federal" funds expressly for the purpose of influencing federal elections, or were asked to do so, the proper remedy is stricter enforcement of that requirement.

being financed affects *both* federal and state elections. *See, e.g.*, FEC Br. 66-67; McCain Br. 32-33. The few cases defendants cite, however, do not support that view. Most notably, in *Ex parte Siebold*, 100 U.S. 371 (1879), and *Ex parte Yarborough*, 110 U.S. 651 (1884), the Court recognized only that, when a State held simultaneous elections for state office, Congress retained its power to regulate federal elections — not that Congress thereby acquired the power to regulate *both* federal and state elections. *See Siebold*, 100 U.S. at 393; *Yarborough*, 110 U.S. at 662.[5]

While defendants wistfully maintain that the Elections Clause provides a "fully sufficient constitutional basis" for the enactment of section 101, they alternatively (and somewhat inconsistently) claim that Congress has a "more general power to superintend and protect the integrity of the federal work force." FEC Br. 30. Defendants, however, locate no constitutional home for this free-floating power.[6] Even assuming that Congress has the power to enact laws regulating the improper personal enrichment of government *officials*, there is no reason to think that such a power extends to laws regulating the conduct of federal officeholders *and candidates* even in connection with state elections — much less the conduct of political parties and state officeholders and candidates.

2. Section 101 impermissibly infringes on the ability of States to regulate their own elections.

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[5] In *Burroughs v. United States*, 290 U.S. 534 (1934), the Court suggested only that Congress had discretion to choose the appropriate means of protecting *federal* elections from corruption, not that it had the power to do so in a way that reached *state* elections as well. *See id.* at 547-48.

[6] The federal defendants cite a number of provisions of federal law that restrict contributions to state as well as federal candidates. *See* FEC Br. 67. Those provisions, however, can readily be justified on other constitutional grounds. *See, e.g.*, *Blount v. SEC*, 61 F.3d 938, 949 (D.C. Cir. 1995) (upholding restriction on securities professionals under Commerce Clause).

As to national party committees, defendants do not deny that section 101 prohibits those committees from receiving or spending any state-regulated funds, even if they are to be used solely for state and local elections (as in the case of "off-year" election activity). The primary argument defendants advance to justify this plain regulation of state election activity is that money is fungible, and therefore that a donation of state-regulated funds for activity relating to state elections "free[s] up" funds for activity relating to federal elections. *See, e.g.*, FEC Br. 42-43; McCain Br. 27-28. But the mere fact that national committees could spend more of their already federally regulated funds (which, by definition, are contributed "for the purpose of influencing [federal] election[s]") on activities affecting *federal* elections does not somehow give Congress the power to regulate the donation of *state-regulated* funds for activities that affect only *state* elections.[7]

As to state party committees, defendants freely concede that many activities defined as "federal election activity" have effects on *both* federal and state elections. *See, e.g.*, FEC Br. 8, 46. However, with their repeated claims that "federal election activity" "by its nature" affects federal elections, *e.g.*, *id.* at 22, and only "incidentally" affects state elections, *see*, *e.g.*, *id.* at 66, defendants willfully overlook the fact that many activities labeled as "federal election activity" either have *no* practical effect on federal elections at all, or are directed *only* toward state and local elections — as in the vast number of districts in which federal elections are actually or practically uncontested (because of redistricting, the advantages of incumbency, or both, *see* Ornstein Br. 11-12; Community Orgs. Br. 15). And even with regard to activities that affect *both* federal and state

[7] Defendants also suggest that Congress can regulate state elections because the activities of state officials, such as redistricting, can have an impact on subsequent federal elections. *See* FEC Br. 42-43. But any such effect on federal elections is surely too attenuated to allow Congress entirely to displace the competing state interest in regulating state election activity.

elections, section 101, by requiring state parties to pay for these activities *solely* with federally regulated funds, impermissibly overrides the laws of numerous States that had allowed unlimited donations, or donations from corporations and unions, to be used for those activities. *See* McConnell Br. 33.[8]

Finally, as to federal officeholders and candidates, section 101 plainly regulates their fundraising activities even solely in connection with state and local elections. The Elections Clause, however, gives Congress the power only to regulate *federal elections* — not plenary power to regulate the activities of federal officeholders or candidates even in connection with state elections. Here, as elsewhere, the Court should reject defendants' unbridled theory of Congress' Elections Clause power, and invalidate section 101 in full.

C. Defendants' arguments in response to our equal protection challenge are similarly unavailing.

Defendants seek to justify section 101's disparate treatment of political parties on the ground that the parties were treated more favorably than other groups in the pre-BCRA regime. *See, e.g.*, FEC Br. 71. Although that was true in some respects, it was not in others: party committees, for instance, were required to use an allocation of federally regulated and state-regulated funds for certain activities, whereas interest groups other than "political committees" were not. Even assuming,

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[8] Although defendants characterize the Levin amendment as restoring to the States some ability to regulate certain election activities by state party committees, *see* FEC Br. 49-51; McCain Br. 31-32 & n.24, that provision, like the rest of section 101, overrides state law, by imposing a new federal limit ($10,000) for funds used for the specified activities.

Remarkably, *amici* Iowa *et al.* contend that States can avoid the regulation of "federal election activity" simply by holding elections for state elections in off years. *See* Iowa Br. 18 n.7. There is no reason, however, that the ability of States to regulate their own elections should be conditioned on their willingness to forgo the many advantages of holding simultaneous state elections (most notably, higher voter turnout).

however, that the parties were treated more favorably than interest groups under the pre-BCRA regime, those advantages will be overwhelmed by the disadvantages imposed by section 101. Whether or not Congress' *purpose* in enacting section 101 was to "destroy" the party system, *see* McCain Br. 20, defendants (and their *amici* with responsibility for the equal protection issue, *see* Ornstein Br. 22-23) do not dispute that the *effect* of section 101 will be to divert the massive amount of state-regulated funds previously raised by the parties to interest groups, which will be able to use those funds for virtually all the same purposes that the parties did. Section 101 will thus empower narrowly focused interest groups at the expense of the parties, and indeed render officeholders and candidates more beholden to those groups. As defendants themselves recognize, "the parties' distinct role * * * demands distinct treatment." FEC Br. 71. By impermissibly disadvantaging our venerable political parties, section 101 is unconstitutional.

II. THE "ELECTIONEERING COMMUNICATIONS" PROVISIONS OF BCRA ARE UNCONSTITUTIONAL.

A. Attempting to uphold BCRA's sweeping prohibition on "electioneering communications," defendants have largely abandoned their approach below in favor of a new theory. They make little of their former claim — inaccurate as it was — that Title II will prohibit only a modest amount of supposedly "genuine" issue advertisements. Instead, defendants now seek to sustain the statute on the ground that *no* corporate- or union-sponsored speech broadcast in proximity to an election that contains the name of a candidate is worthy of First Amendment protection, *whatever it says*, since such speech by its nature "may influence," is "likely to influence," or "will in all likelihood have the effect of influencing" a federal election. *See* FEC Br. 14, 24, 84, 92-93, 94; McCain Br. 42-43.

Defendants make little effort to demonstrate that Title II will not significantly limit speech about "issues and candidates" —

speech that this Court has repeatedly insisted is entitled to the fullest protection of the First Amendment. *See* McConnell Br. 39-41. Instead, defendants urge that an entire category of close-to-election broadcast advertisements relating to "issues and candidates" may be criminalized. This is not only directly inconsistent with *Buckley* and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), but also with first principles of the First Amendment that have formed the basis of this Court's campaign finance decisions.

It was no accident that *Buckley* itself began with a discussion of core constitutional principles: namely, that FECA's "limitations operate in an area of the most fundamental First Amendment activities" because "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution," *Buckley*, 424 U.S. at 14; that "'a major purpose'" of the First Amendment "'was to protect the free discussion of governmental affairs * * * of course includ(ing) discussions of candidates,'" *id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); and that we have a "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'" *id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 270). From beginning to end, *Buckley*, particularly in its analysis of restrictions on independent expenditures, is rooted in the principle that "[i]n the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign." *Id.* at 57.

Defendants nonetheless insist that express advocacy is, after all, core political speech. If it can be regulated, the argument proceeds, so too can all other advocacy that *might* influence a federal election. *See* FEC Br. 85-86; McCain Br. 62-63. But that turns the constitutional principles that have driven this

Court's campaign finance jurisprudence on their head. *Buckley* did not offer a broad "roadmap" for restricting political speech. *See* McCain Br. 62. Instead, *Buckley* crafted a single and intentionally narrow exception to the otherwise indisputable proposition that, since speech about candidates and issues lies at the very heart of the First Amendment, it is not subject to governmental restriction. *See, e.g.*, *Citizens Against Rent Control*, 454 U.S. at 296-97.

B. In defense of their newly proffered standard, defendants and their *amici* criticize the express-advocacy test first adopted in *Buckley* and reaffirmed by this Court since. The formulation is, we are told, "impractical" (FEC Br. 103), "inflexible" (*id.*), and "worse than irrelevant" (McCain Br. 42). According to defendants, it simply fails adequately to identify speech that is "likely to influence" elections. *See, e.g.*, FEC Br. 14, 73, 80; McCain Br. 42-43, 58. Such arguments, however, cannot survive any fair reading of *Buckley*. *Buckley* is a decision about limiting governmental power to regulate expenditures, not expanding it. It is about protecting independent advocacy, not restricting it. And it most certainly did not reflect an effort to "identify" (much less criminalize) all speech engaged in "for the purpose of influencing a federal election"; indeed, that was precisely the statutory formulation that the Court *narrowed* in *Buckley* in order to comport with First Amendment principles, with full knowledge that doing so would permit speech that was virtually indistinguishable from express advocacy to flourish. *See* 424 U.S. at 45.[9] If *Buckley* is wrong, as defendants insist, it

[9] The Court adopted the express-advocacy test as its means of narrowing FECA's definition of "expenditures" as those made "for the purpose of * * * influencing" a federal election. *See Buckley*, 424 U.S. at 79-80 (narrowing FECA § 431(f)); *cf. MCFL*, 479 U.S. at 245-46, 249 (narrowing definition of "expenditure" under FECA § 441*b*). Defendants' effort to dispose of *MCFL* by urging that it was simply a case about statutory construction, *see* FEC Br. 101-02; McCain Br. 60-61, is disingenuous. Without even a mention of vagueness, the *MCFL* Court applied the express-advocacy test "in order to avoid problems of overbreadth." 479 U.S. at 248-49.

is because it restricts too much speech, not too little.[10] At the very least, it is no authority for restricting more.

C. Defendants' reliance on *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), in support of their new formulation is also misplaced. Although defendants choose to ignore the point altogether, there can be no dispute that *Austin* was a case upholding restrictions on express advocacy and nothing more, *see* McConnell Br. 48-49, and that it has always been understood to be so.[11] There can also be no dispute that this Court has drawn an impregnable line between contributions and express advocacy on the one hand and all other independent expenditures on the other. *See FEC v. Beaumont*, 123 S. Ct. 2200, 2208-09 (2003); *Shrink Missouri*, 528 U.S. at 386-88; *Colorado I*, 518 U.S. at 614-15.

Attempting to extend *Austin* beyond its express-advocacy context, defendants essentially contend that the government has an interest in regulating speech by corporations simply because they are corporations. *See, e.g.*, FEC Br. 86-88; McCain Br. 57. There is no justification, however, for subjecting *non-commercial* speech by corporations to more stringent regulation, especially speech that is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940).

In addition, *Austin*'s supposed recognition of a governmental interest in regulating corporations *qua* corporations rests on a problematic premise: namely, that corporations benefit from

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[10] *See* Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 Utah L. Rev. 311, 314-15.

[11] *See, e.g.*, 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, 1803 (2001); Bradley A. Smith, *Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban*, 24 J. Legis. 179, 197 (1998).

"special advantages" conferred by state law which justify additional regulation. 494 U.S. at 658. The necessary implication is that the right to engage in unfettered expenditures for political speech must be sacrificed as a prerequisite of incorporating in the first place — a classic example of an unconstitutional condition. *See, e.g.*, *Speiser v. Randall*, 357 U.S. 513 (1958). And the specific advantages to which *Austin* refers — "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets," 494 U.S. at 658-59 — are available to political committees and indeed to a wide range of other entities besides corporations, such as law firms and other partnerships. Whatever the continued viability of this rationale in the express-advocacy context at issue in *Austin*, the Court should not stretch it to apply here.

It is also inaccurate for defendants to say that corporations and unions have been relegated to the burdensome alternative of funding their expenditures through PACs for decades. *See* FEC Br. 76, 78; McCain Br. 3. As a consequence of this Court's holding in *MCFL*, corporations and unions (with the exception of certain non-profit corporations) have been forced to use PACs when they wish to engage in express advocacy, a difference in treatment that already takes into account the distinction defendants repeatedly seek to draw between *MCFL*-protected entities and other corporate and union speakers. This Court has never sanctioned spending through PACs as a constitutionally sufficient alternative to otherwise unhampered independent spending on speech. In fact, this Court has recognized that the PAC alternative significantly burdens the exercise of First Amendment rights and has only found that burden to be overcome in the context of contributions or their *de facto* equivalent, express advocacy. *See Austin*, 494 U.S. at 657-59; *id.* at 707-09 (Kennedy, J., dissenting); *MCFL*, 479 U.S. at 252 (plurality opinion); *id.* at 266 (O'Connor, J.,

concurring in part and concurring in the judgment).[12]

D. In a similar vein, defendants assert that BCRA's proscriptives can simply be avoided by omitting any reference to a candidate's name. *See* FEC Br. 92, 106; McCain Br. 64. Not only would such a limitation significantly limit the ability of organizations to have their say about "issues and candidates," but it would be flatly at odds with long-established authority. *See*, *e.g.*, *Cohen v. California*, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."). It would be difficult to devise a more effective statutory scheme to protect incumbents from criticism than by criminalizing the use of their names.

E. Having banished *Buckley* and its contribution/ expenditure distinction to the dustbin of legal history, defendants concede that the "electioneering communications" provisions are subject to strict scrutiny. *See* FEC Br. 85. At the same time, defendants eschew the burdens associated with that standard, urging that it is plaintiffs' burden to demonstrate that the statute is "substantially overbroad." *See id.* at 104-05; McCain Br. 62. In support of this argument, defendants cite a number of overbreadth cases in which litigants who engaged in unprotected activities were held to have standing to challenge a statute on the ground that it violated the rights of third parties. *See*, *e.g.*, *Virginia v. Hicks*, 123 S. Ct. 2191, 2196-97 (2003).[13] However, the term "overbreadth" is also used to describe

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[12] *See also* Sullivan, *supra*, at 312 (noting that expenditures for express advocacy are properly viewed as "*de facto* contributions"); *cf. Beaumont*, 123 S. Ct. at 2208 (characterizing *Austin* in similar fashion).

[13] One such case not cited by defendants is *Virginia v. Black*, 123 S. Ct. 1536 (2003), where the Court facially invalidated the *prima facie* evidence provision of a Virginia cross-burning statute, finding that it "would create an unacceptable risk of the suppression of ideas" because the "act of burning a cross * * * may mean only that [a] person is engaged in core political speech." *Id.* at 1551 (internal quotation omitted).

challenges by litigants such as plaintiffs here, who are engaged in protected activity and are challenging statutes that are "'overbroad' in the sense of restricting more speech than the Constitution permits." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 n.3 (1992). In such cases, even where (as here) the litigant brings a facial challenge, the *government* bears the burden of demonstrating that its restrictions survive constitutional scrutiny. *See, e.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000); *Reno v. ACLU*, 521 U.S. 844, 879 (1997).

F. Defendants finally turn to the task of demonstrating that the "electioneering communications" provisions are not overbroad and suggest that only a modest amount of speech at the fringes will be prohibited by the statute. *See* FEC Br. 105-06, 111; McCain Br. 10, 63.[14] The claim is belied by defendants' own behavior, their experts, and their examples.

As the intervenors note, *see id.* at 65, BCRA's sweep is so broad that even its sponsors petitioned the FEC in an effort to exempt speech that all would agree is prohibited by BCRA, but could not possibly be prohibited consistent with the Constitution. One request would have exempted any political communication that used a candidate's name in the context of specific legislation, such as a reference to the Helms-Biden Amendment or the Kennedy-McCain Bill. Another would have provided a carve-out for advertisements that urge support of, or opposition to, pending legislation, and urge the listener to contact a named official. The FEC (correctly) concluded that it had no authority to create such carve-outs in the face of the

[14] Defendants' solution to the problem presented by what they characterize as "marginal" ads is to invite plaintiffs to assert individualized claims through as-applied challenges. *See* FEC Br. 106; McCain Br. 64-65. To suggest that a speaker must commence litigation in the overheated pace of an election campaign anytime he or she may wish to criticize an elected official, however, is to offer little meaningful judicial recourse at all.

clear and contrary command of Congress. *See* Electioneering Communications, 67 Fed. Reg. 65,190, 65,200-65,202 (Oct. 23, 2002). For the same reason, the FEC declined to exempt ads regarding ballot initiatives or referenda, ads promoting local tourism, or paid public service announcements, feeling obliged to leave BCRA as Congress had drafted it. *See id.* The denied exemptions alone reveal BCRA's impermissible sweep.

Although they were the linchpin of defendants' failed effort in the district court to demonstrate that BCRA is not overbroad, defendants now largely abandon the two empirical studies relied on by Congress for that very proposition, and complain that plaintiffs should not now be permitted to rely on them affirmatively to demonstrate that BCRA *is* overbroad.[15] *See* FEC Br. 109-12; McCain Br. 67-69. Defendants' effort to flee from their own studies reveals more than any statistic can: as the district court concluded, these studies, biased as they are in favor of defendants, prove *plaintiffs'* overbreadth case. *See* Supp. App. 367sa n.149 (Henderson), 1157sa (Leon). Whether the percentage of what defendants characterize as "genuine issue ads" prohibited by BCRA is 17%, as defendants' expert conceded, or 64%, as their unadulterated data show, the studies themselves demonstrate that BCRA's primary definition of "electioneering communications" is irredeemably overbroad.[16]

Defendants also suggest that plaintiffs' proffered examples of

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[15] After criticizing the very question that formed the foundation of their flawed claims to Congress, *see* McCain Br. 68-70, the intervenor defendants urge that the studies could be read to suggest that many of the ads analyzed focused primarily on "electioneering," *see id*. at 70. That claim, however, is flatly incorrect. The *Buying Time* data actually revealed that 98% of the ads had "policy matters" as their "primary focus." *See* J.A. 1079.

[16] Even if one were to accept defendants' wildly understated estimate of BCRA's impact on what defendants characterize as concededly "genuine issue advocacy," had BCRA been in effect during the 1998 election, it would have banned core political speech that was seen by more than 30 million American households. *See* Supp. App. 1158sa (Leon).

specific ads banned by BCRA are unpersuasive. To make their point, the intervenor defendants cite, among others, the ad featuring congressional candidate David Wu, *see* McCain Br. 69-70, and the federal defendants cite the ad referring to senatorial candidate Debbie Stabenow, *see* FEC Br. 107. Both ads are included in the appendix to our opening brief, and both, along with many others in the record below, *see* Gibson decl., exhs. 10, 12, indisputably illustrate BCRA's sweeping overbreadth, notwithstanding any debate about numerators and denominators. An ad urging a candidate for Congress to sign a term-limits pledge, and another criticizing a candidate for the Senate for her position on estate-tax reform, are precisely the type of political speech that has always been accorded the highest level of First Amendment protection. Defendants' claim that this speech about issues may be banned because it "may," "might," or "in all likelihood" could influence an election simply indicates how far from the First Amendment BCRA has obliged its defenders to stray.

III. OTHER PROVISIONS OF BCRA ARE UNCONSTITUTIONAL.

Remarkably, the sponsors of BCRA have abandoned the field with respect to BCRA's other provisions, leaving the Solicitor General dutifully to defend their constitutionality. These egregiously unconstitutional provisions scarcely merit additional comment.

A. As to the "advance notice" provisions (section 201 and 212), defendants do not contest that the FEC's regulation "construing" section 212 so as *not* to require advance disclosure is flatly contrary to the language of the statute itself. *See* FEC Br. 122. And defendants offer no response to our argument that the governmental interests supporting disclosure requirements would be fully served simply by requiring disclosures after expenditures have actually been made. *See id.*

B. On "coordination" (section 214), defendants virtually

ignore our primary argument that, when considered as a whole, section 214 impermissibly treats expenditures as "coordinated" even absent agreement between a spender and a candidate or party. *See id.* at 124-25. Defendants note that, in *Colorado II*, this Court held that coordinated spending includes even "wink or nod" arrangements. *See* 533 U.S. at 442. But as we have noted, section 214 sweeps well beyond even implicit "wink or nod" agreements, and includes even mere discussions with a candidate or political party. *See* McConnell Br. 66. As such, section 214 will immediately chill protected petitioning activity.

C. Regarding BCRA's "attack ad" provision (section 305), although it is true, as defendants observe, that the FCC has long required disclosures in candidate ads, no attempt has ever previously been made to deny a benefit (here, the lowest unit charge) merely because a candidate has engaged in speech that does nothing more than criticize an opponent. Defendants cannot connect the viewpoint-based requirements of section 305 to any of its purported purposes. *See* McConnell Br. 68.[17]

D. As to BCRA's "forced choice" provision (section § 213), defendants repeatedly assert that the ability of political parties to make a greater amount of coordinated expenditures is not

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[17] Defendants claim that section 305 is content-based, not viewpoint-based, because it applies to "all * * * broadcasts that make a 'direct reference' to a candidate's opponent." FEC Br. 130. This ignores not only the title of the provision, which announces that it regulates "attack ads," but also common sense. As the NRA put it, "the world has never seen, and never will see, a law *aimed at praise* of the lawmakers." NRA Br. 8. Nor does a single ad surveyed in preparation for the *Buying Time* studies contain praise by a candidate for an opponent. As *amici* members of Congress have conceded, section 305 is concerned with "negative advertising." *See* Castle Br. 26.

Defendants also contend that Senator McConnell, who testified that he intends to run ads critical of his opponents in the future, nevertheless lacks standing under traditional standing requirements to challenge section 305. *See* FEC Br. 130. Senator McConnell's testimony, however, is at a minimum sufficient to satisfy this Court's relaxed requirements for standing *in First Amendment challenges*. *See* McConnell Br. 67.

constitutionally required. *See, e.g.*, FEC Br. 61. But it would be illogical to require that a "benefit" itself be constitutionally mandated before conditions on the ability to receive the "benefit" can be unconstitutional. Defendants' analogy to the public financing of presidential campaigns, *see id.* at 61-62, is inapposite because those provisions place conditions *on the receipt of public funds*. And the mere fact that Congress originally intended that parties could not make independent expenditures, *see id.* at 62-63, does not allow Congress to burden what this Court has since recognized, in *Colorado I*, is a constitutionally protected right.

E. On "minors" (section 318), it suffices to note that defendants offer no response to our arguments that *Buckley* itself requires that section 318 be subject to strict scrutiny, and that there were manifold more narrowly tailored alternatives short of an outright ban. *See* McConnell Br. 71-72.

F. Finally, as to BCRA's "broadcaster records" provision (section 504), defendants, in the face of a unanimous ruling concluding that this provision is unconnected to any valid government interest, still fail to identify a single valid government interest that justifies it. Instead, defendants' only argument is that section 504 is similar (although by no means identical) to certain existing FCC regulations that have never been challenged. *See* FEC Br. 133. Even if that were a legitimate defense to section 504's unconstitutionality, however, defendants' claim that section 504 is no more intrusive than these pre-BCRA regulations is simply erroneous. In fact, section 504 imposes unprecedented obligations, requiring, among other things, detailed disclosures of even *requests* by private citizens and groups to run ads about important, often controversial, issues. As such, section 504 cannot withstand exacting scrutiny, and should be struck down.

CONCLUSION

The challenged provisions of BCRA should be invalidated.

Respectfully submitted,

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