No. 02-1734

IN THE
SUPREME COURT OF THE UNITED STATES

AMERICAN CIVIL LIBERTIES UNION,

Appellant,

-v-

FEDERAL ELECTION COMMISSION, et al.,

Appellees.

On Appeal from the United States District Court for the District of Columbia

JURISIDICTIONAL STATEMENT

Joel M. Gora
Brooklyn Law School
250 Joralemon Street
Brooklyn, NY 11201
718-780-7926

Mark J. Lopez
(Counsel of Record)
Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
125 Broad Street
New York, NY 10004
(212) 549-2608

May 29, 2003

QUESTIONS PRESENTED

1. Whether the district court erred by upholding broad new restrictions on so-called "electioneering communications" embodied in sections 201, 203, and 204 of the BCRA?
2. Whether the district court erred by upholding aspects of the broad new "coordination" rules embodied in sections 202 and 214 of the BCRA, and dismissing the challenge to other aspects of those rules as non-justiciable?

PARTIES TO THE PROCEEDING

The American Civil Liberties Union, appellant here, was a co-plaintiff below in *McConnell, et al. v. Federal Election Commission, et al.*, Civ. No. 02-582. The appellees here, who were defendants or intervenor-defendants in the district court, are the Federal Election Commission, the Federal Communications Commission, the United States of America, Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page

Page

Statutes

Miscellaneous

INTRODUCTION

This case presents a challenge to key provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub.L. No. 107-155, 116 Stat. 81, which impose new and unprecedented restrictions on core political speech in the guise of revising this nation's campaign finance laws.

The constitutional issues presented by this litigation are obviously substantial and just as clearly merit this Court's attention. Congress recognized as much when it provided an expedited appeal process to ensure prompt review by this Court. And, if nothing else, the staggering length of the lower court opinions in this case is surely a testament to the importance of the constitutional issues at stake. So, too, is the sheer number and scope of the parties to this litigation.

Despite its size and complexity, the BCRA was designed to achieve two principal goals. Title I prohibits the use of so-called soft money by political parties, even for traditional party building activities such as voter registration and get-out-the-vote drives. Title II makes it a crime for even nonprofit, nonpartisan, membership organizations like the ACLU to broadcast an ad that mentions the name of a federal candidate in the period preceding an election.

The district court correctly recognized that neither of these broad provisions could be reconciled with our constitutional traditions. It therefore declined to uphold the law that Congress had written. It nevertheless upheld a rewritten version of the law that continues to pose severe constitutional problems. Because the ACLU is not directly affected by the soft money ban, we will leave it to others to explain why the continued prohibition on the use of soft money for issue advocacy is unconstitutional. We do, however, have a very direct stake in the lower court's interpretation of Title II.

If that interpretation is upheld, it will now be a crime for the ACLU to broadcast an ad on radio or television advocating its views on a particular civil liberties dispute if the ad could be construed as attacking, supporting, promoting, or opposing a candidate for federal office. To place that dilemma in more concrete terms, President Bush has just announced his intention to run for a second term. There have also been press reports that the Administration is on the verge of convening a military commission to try at least some of the detainees now being held at Guantanamo, and that the Administration may be seeking enhanced surveillance powers from Congress as part of a new legislative package. If the ACLU chose to oppose either of these steps on civil liberties grounds in a broadcast ad that referred to the President, we would be risking criminal prosecution based on the lower court's decision in this case.

That result would dramatically transform the rules of political debate in this country and go far beyond anything this Court has ever permitted under the First Amendment. The ACLU urges this Court to note probable jurisdiction and to reverse the district court on the questions presented in this jurisdictional statement.

OPINIONS BELOW

The district court's opinions are not yet reported. Pursuant to this Court's order of May 15, 2003, the opinion will be reproduced in a single appendix that will serve as an appendix to all the jurisdictional statements in this case. The ACLU's notice of appeal is reprinted in the appendix to this jurisdictional statement.

JURISDICTION

The district court entered judgment on May 2, 2003. The ACLU filed its timely notice of appeal on May 7, 2003. This Court has appellate jurisdiction pursuant to § 403(a)(3) of the BCRA.

PERTINENT STATUTORY PROVISIONS

The Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, is reprinted in full in the appendix to the jurisdictional statement of appellants McConnell, et al. Sections 201, 202, 203, 204, and 214 of the BCRA are set forth in the appendix to this jurisdictional statement.

STATEMENT OF THE CASE

1. This litigation arises from plaintiffs' challenge to various provisions of the BCRA, including the soft money restrictions embodied in Title I and the issue advocacy restrictions embodied in Title II. As part of the *McConnell* complaint filed in the district court, the ACLU specifically alleged that its First Amendment right to speak out on issues of concern to the organization and its members was violated by the broad definition of "electioneering communications" set forth in the BCRA.

Prior to passage of the BCRA, corporations and unions were free to engage in political speech so long as the speech did not expressly advocate the election or defeat of a clearly identified candidate. *See Buckley v. Valeo*, 424 U.S. 1, 45 (1976). Moreover, even this restriction did not apply to nonprofit, ideological corporations that satisfied the criteria set forth in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). The BCRA dramatically expanded this regulatory regime by extending the ban on corporate and union expenditures to all "electioneering communications."

Congress provided two definitions of the term "electioneering communications" in § 201. Under the primary definition, an "electioneering communication" means any broadcast, cable, or satellite communication that: (a) refers to a clearly identified candidate for federal office; (b) is made within 60 days of a general election or 30 days of a primary election; and (c) is targeted to the relevant audience (except in the case of the President or Vice-President where there is no targeting requirement). App. 4a.

Congress also anticipated that the primary definition might not be sustained. It therefore provided a fallback definition that applies only if the primary definition is invalidated. In contrast to the primary definition, the fallback definition is not limited to the period preceding an election. Rather, it prohibits at any time a broadcast, cable, or satellite communication that "promotes or supports a candidate for [federal] office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." In addition, the communication must be "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." App. 5a.

Under § 203(a), corporations and unions are barred from using their general treasury funds to engage in "electioneering communications." However, this apparently absolute prohibition is modified by § 203(b), the so-called Snowe-Jeffords Amendment. Pursuant to Snowe-Jeffords, nonprofit corporations that qualify under § 501(c)(4) of the Internal Revenue Code, like the ACLU, are permitted to engage in "electioneering communications" if those communications are funded entirely by individual contributions and if the organization discloses its donors of $1,000 or more and makes detailed financial disclosure reports once its expenditures for electioneering

communications exceed $10,000 in any calendar year. App. 8a.[1]

As the last piece of this statutory puzzle, Congress adopted § 204 of the BCRA, known as the Wellstone Amendment, which revokes the exception that the Snowe-Jeffords Amendment ostensibly provides. App. 10a.[2] In short, the statute that emerged from Congress prohibits all unions and corporations - including nonprofit and nonpartisan corporations like the ACLU - from using their general funds to pay for any broadcast ad that names a clearly identified candidate within the 30/60 day window preceding federal elections.

Finally, in § 214 of the BCRA, Congress tightened the rules on coordinated expenditures (which are treated as contributions) by repealing the existing FEC regulations and then instructing the FEC to issue new regulations that do not require "agreement or formal collaboration," and that specifically address "payments for communications made . . . after substantial discussion about the communication with a candidate or political party." App. 11a.[3] Pursuant to § 202 of the BCRA, moreover, this reconception of the coordination rules applies not only to express advocacy but to all speech now embraced by the expanded definition of "electioneering communications."

---

[1] The Snowe-Jeffords exception also applies to "political organizations" organized under § 527 of the Internal Revenue Code. BCRA § 203(c)(2).

[2] It is not clear why Congress did not simply repeal the Snowe-Jeffords Amendment when it adopted the Wellstone Amendment. The intent of the Wellstone Amendment is nonetheless plain. It states that the exemption authorized by the Snowe-Jeffords Amendment "shall not apply in the case of a targeted communication that is made by an organization described in" the Snowe-Jeffords Amendment. In other words, the Snowe-Jeffords Amendment is rendered a nullity because it no longer applies to the organizations it was meant to cover.

[3] The FEC published its new regulations on January 3, 2003. *See* 68 Fed. Reg. 421.

2. By a 2-1 vote, in a nearly 1700 page decision, the district court struck down the primary definition of "electioneering communications" contained in § 201 of the BCRA as an overbroad restriction on constitutionally protected speech. The district court also struck down a critical portion of the fallback definition as unconstitutionally vague. The district court nonetheless concluded that the remaining portion of the fallback definition could stand on its own, and was neither vague nor overbroad.

As a result, the district court wound up sustaining a definition of "electioneering communications" that is broader in many ways than the definition it struck down as overbroad, that is vaguer in many ways than the definition it struck down as too vague, and that does not resemble the test for "electioneering communications" that Congress adopted as either its primary or its fallback definition.[4]

Judge Leon's opinion was dispositive on the Title II questions.[5] While recognizing that a prohibition on broadcast ads that refer to a clearly identified candidate within 30 days of a primary election or 60 days of a general election has the benefit of clarity, he concluded that it "sweeps so broadly that it captures too much First Amendment protected speech . . ." Leon Mem. op. at 74. Quoting from a declaration submitted by Laura Murphy, director of the ACLU's Washington Office, Judge Leon noted that "[t]he 60 days before a general election and 30

[4] The district court also ruled on numerous other provisions of the BCRA, which we do not address here because they are beyond the scope of the questions presented in this jurisdictional statement. Those other rulings, however, have been presented to the Court in other jurisdictional statements filed by the numerous parties to this litigation.

[5] In Judge Henderson's view, both the primary and fallback definitions of "electioneering communications" are unconstitutional in their entirety. Judge Kollar-Kotelly, on the other hand, argued that the primary definition is consistent with the First Amendment and reluctantly endorsed the fallback definition only to ensure that at least some portion of Title II was sustained.

days before a primary . . . are often periods of intense legislative activity. During election years, the candidates stake out positions on virtually all the controversial issues of the day. Much of this debate occurs against the backdrop of pending legislative action or executive branch initiatives." *Id.* at 75. He further recognized that the electorate is often most attentive in the period preceding an election, *id.* at 76, and that the mere fact "that issue advertisements mention the name of a candidate . . . does not necessarily indicate, let alone prove, that the advertisement is designed for electioneering purposes." *Id.* at 77.

Having found the primary definition of "electioneering communications" to be unconstitutional, Judge Leon then turned his attention to the backup definition. He began his discussion by rejecting the claim that a prohibition on broadcasts ads that "promote," "support, "attack," or "oppose" a candidate for federal office is unconstitutionally vague. According to Judge Leon, a person of ordinary intelligence reading those words would understand what could or could not be said in a broadcast ad without running afoul of the criminal prohibitions of the BCRA. *Id.* at 91-92[6]

Congress, apparently, had more concerns about the scope and ambiguity of this fallback definition than Judge Leon. It therefore attached a limiting principle to its fallback definition of an electioneering communication, stipulating that it would only apply to broadcast ads that were "suggestive of no plausible meaning other than an

[6] Judge Leon reached this conclusion despite the fact that undisputed evidence in the record demonstrated that even the most avid advocates of the BCRA often disagreed on whether a particular ad should be characterized as a genuine issue ad or a so-called "sham ad." As Judge Kollar-Kotelly noted in her concurring opinion, "[t]he expert testimony in this case . . . illustrates how one person's genuine issue advertisement can be another's electioneering commercial." Kollar-Kotelly Mem. op. at 345 (Factual Finding 2.12.12).

exhortation to vote for or against a specific candidate." Paradoxically, Judge Leon was more troubled by this limiting language, which he found to be unconstitutionally vague and likely to produce a chilling effect on constitutionally protected speech. *Id.* at 93. Unable to uphold the fallback definition as written, Judge Leon chose to sever the offending language, *id.* at 94, leaving in place a definition of "electioneering communications" that Congress itself had felt constrained to narrow, and that lacks even the temporal limitations of the primary definition that he had previously declared unconstitutionally overbroad.

Judge Leon's approach to the fallback definition was reluctantly joined by Judge Kollar-Kotelly. But Judge Leon joined with Judge Henderson in ruling that the Wellstone Amendment, § 204 of the BCRA, was unconstitutional as applied to nonprofit organizations that engage in issue advocacy and that meet the criteria set forth in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)(MCFL). Corporations that qualify for the "MCFL" exception therefore retain the benefit of the Snowe-Jeffords Amendment under the district court's decision. As a result, they are free to engage in otherwise prohibited 'electioneering communications" if they comply with the strict and burdensome disclosure and reporting requirements of § 201, and if they pay for their "electioneering communications" entirely with individual contributions. *Id.* at 97. On the other hand, nonprofit corporations that do not qualify for an "MCFL" exception remain subject to the Wellstone Amendment, and thus are barred from engaging in "electioneering communications" unless they are willing to create a separate political action committee, or PAC. *Id.* at 97-98.

Lastly, the district court upheld the extension of coordination rules, which were originally intended to distinguish between express advocacy that is independent of a candidate and express advocacy that is coordinated with a

candidate and thus properly treated as a contribution, to all "electioneering communications." Accordingly, the district court found that § 202 of the BCRA is facially constitutional. *Per curiam op. at 138-40.* Plaintiffs remaining challenges to § 214 and its expanded conception of coordination were largely dismissed as premature and nonjusticiable. *Id.* at 145-68.

3. As construed by the district court, Title II of the BCRA will substantially abridge the First Amendment rights of the ACLU and the members it represents. Since it's founding in 1920, the ACLU has given voice to and embodied the expressive association of hundreds of thousands and perhaps millions of individual Americans who share its beliefs and subscribe to its principles. With over 400,000 members nationwide today, the ACLU is perhaps the most well known civil liberties organization in the country. Its work amplifies the voices of all of its members, supporters and contributors.[7]

---

[7] The ACLU is a voluntary membership organization constituted under 501(c)(4) of the Internal Revenue Code. Membership dues to the ACLU are not tax deductible. The basic membership fee is $35, though many members contribute more than that. There is also a reduced-fee membership available for students and other low-income individuals. Membership dues accounted for $9,393,948 of the $13,625,051 contributed to the organization by individuals in 2001. Only 212 individuals contributed more than $1000. Although the ACLU does not maintain records on the corporate status of non-individual donors, less than $85,000 of the ACLU's total revenues was contributed by entities such as businesses and other organizations in 2001. This constitutes less than 1% of the ACLU's budget. None of the contributions from businesses exceeded $500. Total annual contributions from labor organizations over the last 10 years have never exceeded $5000. Total contributions from political parties over the same 10 year period were $330. In sum, contributions from non-individual donors represent an insignificant percentage of the ACLU's total annual funding. *See* Declaration of Anthony Romero, ¶ 6: 3 PCS, ACLU 3. Mr. Romero is the Executive Director of the ACLU.

The ACLU has never taken a position in a partisan political election, never contributed a dollar to a political campaign or party, never formed a political action committee or "PAC" or affiliated with one, and has gone to great lengths to maintain its rigorously non-partisan stature. Being subject to the Federal Election Campaign Act (FECA) would be fundamentally inconsistent with the ACLU's mission and identity as a nonpartisan organization and would also have serious ramifications for the organization's members and contributors whose identities would have to be disclosed. Many ACLU members and donors request explicit assurances that their membership will remain confidential and that their contributions will remain anonymous, and the ACLU has consistently defended that right under the First Amendment. *See* Romero Declaration, ¶ 5: 3 PCS, ACLU 2.

Because it is a non-partisan organization that does not endorse or support candidates, *all* of the ACLU's advocacy is focused on issues. Yet, ever since the enactment of FECA approximately 30 years ago, the ACLU has been forced to resist efforts to stifle its own speech and the speech of other issue organizations through the overzealous application of overbroad campaign finance laws. For three decades, the ACLU has been at the forefront of the public debate over campaign finance (including our support of a program of full and fair public financing), and has been involved in most of the major litigation testing the constitutional limits of the effort to restrict political speech in the name of campaign finance reform.[8]

---

[8] Most prominently, the ACLU was co-counsel in *Buckley*, and its New York affiliate appeared as a party. The ACLU, however, has participated in numerous other campaign finance cases, both before and after *Buckley*. *See United States v. National Committee for Impeachment*, 469 F.2d 1135 (2d Cir.1972); *American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973)(three-judge court), *vacated as moot sub nom, Staats v. American Civil Liberties Union*, 422 U.S. 1030 (1975); *California Medical Association v. FEC,* 453 U.S. 182 (1981); *Brown v. Socialist*

On an almost daily basis, the ACLU engages in public commentary on the actions of federal officials, many of whom will be standing for election. *See* Declaration of Laura Murphy, ¶¶ 4-12: 3 PCS, ACLU 7-12. Like other advocacy groups, the ACLU conveys its message through multiple mediums, including the internet, direct mail campaigns, membership drives, press releases, news conferences, public appearances, pamphlets and other publications that refer to, praise, criticize, describe or rate the conduct or actions of clearly identified public officials. ACLU communications referring to a candidate for elective office are not made for the purpose of influencing the election or defeat of that candidate. The timing of those communications is a function of the timing of debate over the legislation or issue under consideration. *See* Romero Declaration ¶ 3: 3 PCS, ACLU 1-2.

The success of the ACLU is also dependent on broadcast media that report on the organization's activities on an almost streaming basis. The organization is at the front line of many controversial issues, and its views are often sought. But the ACLU cannot always rely on the news media to report its activities or to present its views accurately or completely. Because exclusive reliance on such "earned media" is not sufficient, the ACLU has turned to the use of paid media in an effort to ensure that the organization's views are heard in an accurate and balanced way. For example, the ACLU paid for a series of radio and newspaper ads directed at Speaker of the House Dennis Hastert during his March

---

Workers '74 Campaign Committee 459 U.S. 87 (1982); *FEC v. National Conservative Political Action Committee* 470 U.S. 480 (1985); *FEC v. Massachusetts Citizens for Life,* 479 U.S. 238 (1986); *Austin v. Michigan State Chamber of Commerce* 494 U.S. 652 (1990); *McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995); *Colorado Republican Federal Campaign Committee v. FEC* 518 U.S. 604 (1996); *Nixon v. Shrink Missouri Government PAC* 528 U.S. 377 (2000); *FEC v. Colorado Republican Federal Campaign Committee* 533 U.S. 431 (2001).

2002 primary election. The ads had two purposes. First, they criticized the Speaker for failing to bring the Employment Non-Discrimination Act (ENDA) to the floor of the House of Representatives. At that point, ENDA was actively being considered in the Senate after the legislation had been stalled in the House for some time. The ACLU hoped the ad would be a catalyst to help bring the legislation up for a vote. In addition, the BCRA was then being debated in Congress. The radio and print ad campaign was intended to highlight the impact of Title II on groups like the ACLU, and to dramatize that the ACLU's radio spots would become criminal once Title II was enacted. As the ACLU pointed out at the time, the Hastert broadcast ads would have been illegal under the BCRA because they referred to Speaker Hastert and were aired in his district within 30 days of his primary election, even though he was running unopposed. *See* Murphy Declaration, ¶ 10: 3 PCS, ACLU 10-11.

Since passage of the BCRA, the ACLU has launched a media campaign to address the many civil liberties issues that have arisen in the past twenty months as the country struggles to maintain our tradition of freedom while responding effectively to the threats posed by international terrorism. *See* Murphy Declaration ¶10:3 PCS, ACLU 10-11. As part of this campaign, the ACLU is prepared to take out additional broadcast ads consistent with a broader media strategy. Romero Declaration, ¶ 8: 3PCS, ACLU 4. Such media efforts - paid and earned, broadcast and print - are essential to creating a climate of opinion favorable to civil liberties. And because such communications typically concern legislative or executive policies, they frequently refer by name to current officeholders and candidates, including the President. *See* Murphy Declaration, ¶ 8: 3 PCS, ACLU 9. Title II's ban on "electioneering communications" would effectively mute much of this speech by the ACLU.

It is important to emphasize that whether measured by the 30/60 day rule struck down by the district court or the broader rule it upheld, election years are often periods of intense legislative activity, as the district court recognized. During the 2002 election cycle, for instance, legislation creating a new federal Department of Homeland Security was under consideration during this pre-election period. The ACLU took out a full page advertisement in Congress Daily and CQ Monitor on September 30, 2002, urging Congress to safeguard civil liberties in connection with its consideration of the "Gramm–Miller" and "Lieberman" versions of the Homeland Security legislation. A copy of the ad is attached to the Declaration of Laura Murphy: 3 PSC, ACLU 19. During the fall 2000 elections, dozens of critical legislative issues were pending in Congress during the 60 day general election blackout period. *See* Chart summarizing "Bills of Interest to the ACLU in the 106th Congress During the 60 Days Prior to the November General Election." 3 PCS, ACLU 20-22. Thus, it is not unusual for the ACLU 's legislative and issue advocacy to be most intense during an election year, especially in the days leading up to the election. Yet this is precisely when Title II forces the ACLU to be silent.

The impact of Title II on the ACLU goes beyond the harm caused by the direct ban on broadcast communications. Even if the ban on "electioneering communications" violates the First Amendment, facially or as applied to the ACLU, § 201 of the BCRA still requires organizations like the ACLU to disclose the identity of their $1,000 donors as the price for taking out broadcast ads. Any such disclosure requirement not linked to candidate contributions or express advocacy would violate longstanding First Amendment rules designed to protect anonymous political speech and the right to associate with controversial political groups.

Finally, Title II will negatively affect the ACLU's legislative advocacy in other ways, as well. The

organization's legislative efforts include many activities directly associated with lobbying. The ACLU regularly meets, speaks or corresponds with members of Congress and Executive Branch officials concerning proposed or pending legislation or executive action that may affect civil liberties. For instance, following September 11, 2001, the ACLU has had numerous direct contacts with members of both the House of Representatives and the Senate urging restraint in the rush to adopt legislation giving the Department of Justice and other federal agencies sweeping law enforcement powers curbing important civil liberties. The ACLU also routinely testifies before Congress, conducts staff briefings for Congress, and provides members with ACLU position papers. *See* Murphy Declaration, ¶¶ 3-4: 3 PCS, ACLU 6-7. By eliminating the link between express advocacy and coordination, §§ 202 and 214 of the BCRA have a chilling effect on these legislative activities even though the ACLU does not, and never has, coordinated its activities with elected officials for the purpose of influencing elections. *See* Murphy Declaration¶ 7: 3 PCS, ACLU 8-9.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Under any conception of the First Amendment, the ability of organizations like the ACLU to engage in public debate on critical issues of the day through any medium it deems appropriate, including broadcast ads, lies at the very core of constitutionally protected speech. In its zeal to close what they perceived to be loopholes in the current system of campaign financing, advocates of the BCRA attempted to address the problem of so-called "sham" issue ads by adopting a prophylactic rule that barred all broadcast ads by even nonprofit organizations in the period preceding an election if the ads simply mentioned the name of a federal candidate. The district court, to its credit, recognized that such prophylactic rules have no place in our First Amendment jurisprudence. Unfortunately, the solution crafted by the district court is equally flawed because it rests

on a definition of "electioneering communications" that is hopelessly vague, except insofar as it clearly prohibits advocacy groups like the ACLU from using broadcast ads to question the policy positions of public officials who also happen to be running for office. And, in an era of nearly perpetual campaigns, that means most public officials most of the time.

This Court has often stressed the need for "sensitive tools" when legislating in a First Amendment context. *E.g., Speiser v. Randall*, 357 U.S. 513, 525 (1958). Those sensitive tools are entirely missing from the restrictions on issue advocacy contained in Title II of the BCRA, and upheld by the district court. An ad by the ACLU criticizing a proposal put forward by President Bush or any of the announced Democratic candidates on civil liberties grounds is treated no differently than an ad by General Motors expressly advocating the election or defeat of a specific candidate. Both are equally prohibited despite the fact that the ACLU's funds are derived entirely from members and contributors rather than shareholders and customers, and we have never taken a partisan position in our eight-decade history.

Under the fallback definition of "electioneering communications" crafted by the district court, this prohibition would go into effect immediately and would remain in effect throughout the 2004 election cycle and thereafter. Under the primary definition of "electioneering communications" adopted by Congress, the blackout period would perhaps be shorter but it would cover the period preceding a primary or general election when almost everyone agrees the public is most attentive. Neither prospect is consistent with "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly

sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The response that the ACLU can continue to engage in whatever speech it wants by forming a PAC is no response at all. There is a reason that the ACLU has never created a PAC: we are not a partisan organization and do not choose to present ourselves as one. We cannot and should not be forced to recharacterize our organization or its basic mission in order to engage in constitutionally protected speech. *See Wooley v. Maynard*, 430 U.S. 705 (1977)(the First Amendment protects against both compelled speech and silenced speech). Nor is it a sufficient answer to say that the ACLU may qualify as a "MCFL" organization and thus be entitled, at least in the district court's view, to an exemption from the general ban against corporate "electioneering communications." It is not clear that the ACLU will in fact qualify as a "MCFL" corporation so long as we continue to receive even a de minimus amount of contributions from sources other than individuals.[9] Moreover, the "MCFL" exception was crafted to permit ideological organizations to engage in express advocacy, not to impose a regime of disclosure and reporting requirements when such organizations engage in issue advocacy.

---

[9] Under recently adopted FEC regulations, a § 501(c)(4) corporation that receives no funds whatsoever from corporate or union sources may be removed from the ban on broadcast communications. The ACLU does not appear to qualify for the exception because it accepts contributions from businesses and unions – although in *de minimis* amounts. In 2001, $85,000 (less than 1%) of the ACLU's total contributions came from sources other than individuals. None of the contributions from businesses exceeded $500. Since the ACLU does not collect or maintain records of the corporate status of its non-individual donors, we cannot determine precisely how much of this *de minimus* amount was actually contributed by incorporated entities. *See* Declaration of Anthony Romero, ¶ 6: 3 PCS, ACLU 3. *See FEC v. National Rifle Association*, 254 F3d 173 (D.C. Cir. 2001) (Denying MCFL status because of $7,000 in corporate contributions).

The decision below cannot fairly be described as an application of *Buckley* or even an extension of its core principles. To the contrary, it represents a return to the initial, imprecise efforts at regulating campaign speech that this Court emphatically rejected in *Buckley* and has continued to reject ever since. The Court's opinion in *Buckley* repeatedly stressed that campaign finance laws must be narrowly tailored to avoid "unnecessary abridgement of [First Amendment] freedoms." *Buckley v. Valeo*, 424 U.S. at 25, 64. Neither the BCRA nor the decision below measures up to that standard.

1. *Buckley* held that the government's regulation of expenditures must be limited to "communications that in express terms advocate the election or defeat of a clearly identified candidate . . ." *Id.* at 45. This "express advocacy" doctrine, which *Buckley* adopted to "distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons," *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. at 249, has played a critical role for more than two decades in protecting issue-oriented speech by providing a bright line between permissible and impermissible government regulation.

The district court's response to *Buckley* is that the fall-back definition, as modified, only targets communications that are thinly veiled attempts to circumvent the express advocacy standard announced in *Buckley* and reaffirmed in *MCFL*. But in adopting that rationale, the district court ignored the very purpose of the bright line that *Buckley* so carefully established. Long before the BCRA, the *Buckley* Court recognized that,

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially

> incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues but campaigns themselves generate issues of public interest.

Id. at 43.

Even more to the point, the *Buckley* Court understood that groups would always be able to devise "expenditures that skirted the restriction on express advocacy . . . but nevertheless benefited the candidate's campaign" under any system of campaign finance regulation. *Id.* at 46. Significantly, however, the *Buckley* Court also understood the converse proposition: that without a bright line between issue advocacy and express advocacy, speakers would inevitably "hedge and trim" their political message in an effort to avoid unwarranted government scrutiny. *Id*. at 23, quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945). Accordingly, this Court has insisted for more than twenty-five years that "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." *Id.* at 45.

The primary definition of "electioneering communication" set forth in the BCRA is plainly inconsistent with the express advocacy rule. The fallback definition is equally flawed, even as written by Congress. Without the limiting language that Congress inserted and that the district court severed, the fallback definition has not only become less precise, it is functionally indistinguishable from FECA's original reference to speech "relative to a candidate," which is what led the *Buckley* Court to develop the express

advocacy rule in the first place. And, because it targets "electioneering communications" only if delivered through the broadcast medium, the BCRA additionally raises serious equal protection issues. *See, e.g., Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

2. Both the BCRA and the decision below also ignore a second major holding of *Buckley* designed to ensure that the campaign finance laws do not sweep into their ambit genuine issue advocacy organizations. In *Buckley,* the Court held that the statutory definition of a "political committee" must be narrowed to avoid constitutional difficulties. Specifically, the Court held that "[t]o fulfill the purposes of the Act [the disclosure and other obligations of political committees] need only [apply to] organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79. While this case does not represent a direct attempt by the FEC to designate the ACLU as a political committee, defendants contend that ACLU must establish a segregated fund, i.e., a political committee, in order to engage in "electioneering communications."[10] *Buckley* makes clear, however, that the major purpose test was fashioned by the Court to protect issue organizations that are not political committees from being treated as if they were. To the extent BCRA forces issue advocacy groups whose major purpose is not partisan politics to be treated as political committees in order to speak, then the Act likewise transgresses *Buckley*'s teachings.

The soundness of this approach was reaffirmed in

[10]A segregated fund is a political committee under FECA. 2 U.S.C . § 431 (4)(B). As a consequence, organizations that use a segregated fund must adhere to extensive reporting requirements, staffing obligations, and other administrative burdens. These burdens stretch far beyond the more straightforward disclosure requirements on unincorporated associations. *See MCFL,* 479 U.S. at 252-253.

FEC v. Massachusetts Citizens for Life, 479 U.S. 238, where the Court revisited the regulation of issue advocacy groups whose major purpose is not the partisan election of candidates. The Court repeatedly stressed the importance of the major purpose test as a protection for advocacy organizations. Upholding the right of an incorporated anti-abortion group to engage in express advocacy, the Court first noted that if the group were not incorporated yet made certain express advocacy "expenditures," the major purpose test would protect the group from being regulated as a political committee.

Second, the Court highlighted in a footnote, *id.* at 252 n.6, the fact that MCFL was not primarily a partisan political organization:

> In *Buckley* . . . this Court said that an entity subject to regulation as a "political committee" under the Act is one that is either "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79. It is undisputed on this record that MCLF fits neither of these descriptions. Its central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates.

Third, the Court noted with disapproval that the FEC's effort to equate ideological corporations with for-profit corporations under the Act would mean that "all MCFL independent expenditure activity is, as a result, regulated as though the organization's major purpose is to further the elections of candidates." *Id.* at 253.

Finally, the Court concluded that the government's

legitimate interests could be adequately served by a more narrowly tailored regulation:

> [S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. *See Buckley*, 424 U.S. at 70. As such it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns.

479 U.S. at 262.

Buckley and *MCFL* make clear that the major purpose test was adopted by the Court to protect issue organizations that are not political committees from being treated as if they were. The force of that doctrine is fully applicable here even though the ACLU's status as a political committee is not directly at issue. To the extent that BCRA would require the ACLU to form a political committee in order to sponsor an occasional "electioneering communication," the safeguards of the major purpose test are overridden. Both the express advocacy test and the major purpose test thus reflect a single, overriding principle of First Amendment jurisprudence: "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347 (1995). As first articulated in *Buckley* and later reaffirmed in *MCFL*, the express advocacy and major purpose tests are constitutionally compelled limits on the otherwise fatal reach of FECA. They mark the boundaries where permissible campaign finance regulation ends and unfettered issue speech

begins. Title II ignores those and other limitations and thereby undermines the First Amendment safeguards that this Court has so carefully erected.

3. The reporting and disclosure requirements for broadcast communications cross the line between disclosure that can be compelled and expressive activities that are entitled to full First Amendment protection. Both before and after *Buckley,* the Court had powerfully reaffirmed the importance of preserving the right to anonymous political speech as well as the right to privacy of political association. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Talley v. California,* 362 U.S. 60 (1960), *McIntyre v. Ohio Elections Commission, supra.* *Buckley*, itself, limited the reach of disclosure rules to individuals and groups who contribute to a candidate or expressly advocate the election or defeat of a candidate. 424 U.S. at 74-80. The BCRA disturbs this careful balancing of interests. Even in the limited situations where a non-profit corporation might be permitted to engage in such speech, it must publicly disclose contributors who give a $1,000 or more either to the "electioneering communication" or to the organization itself. Indeed, the disclosures required by § 201 are almost as onerous and burdensome as those required of regular partisan political committees. In the case of controversial groups, such threatened disclosure can have a deadly chilling effect on the group's advocacy.

Thus, even in the context of express advocacy, the *Buckley* Court recognized that association with controversial political organizations carries particular dangers of chilling political speech. 424 U.S. at 74. And, in *Brown v. Socialist Workers Campaign Committee*, 459 U.S. 87 (1982), the Court ruled that campaign finance disclosure laws cannot be applied to controversial political parties, even those that

engage in core campaign and electoral activities. This necessary safeguard is missing from Title II, as well. [11]

4. Sections 202 and 214 of Title II significantly expand the rules prohibiting "coordination" of campaign activity with candidates. First, § 202 extends the coordination rules beyond express advocacy to "electioneering communications." Second, § 214 eliminates any requirement of "agreement or formal collaboration." In tandem, these provisions create a significant chilling effect on the ACLU's traditional expressive activities.[12]

Rather than treat coordination as the absence of independence and the functional equivalent of candidate control or instigation, see *Buckley v. Valeo*, 424 U.S. at 47 & n.53, the BCRA broadly deems any "substantial discussion" about public communication between a candidate and an issue group as a basis for a finding of "coordination." Such

---

[11] In discussing the issue of compelled disclosure, the district court held that the ACLU had not demonstrated a sufficient need in the record to safeguard the anonymity of its members. In fact, the ACLU submitted an uncontroverted affidavit by its Executive Director, Anthony Romero, stating that many of its members and contributors seek an explicit assurance that their anonymity will be preserved, and the ACLU has fought strenuously to do so throughout its history. Romero Declaration, ¶ 5: 3 PCS, ACLU 2-3. The district court criticized this showing as inadequate because it did not specify why the ACLU's members and contributors would want to preserve their anonymity. With due respect, we respectfully submit that the ACLU's defense of unpopular causes is well known and does not require extensive elaboration. Moreover, the connection between the ACLU's advocacy on controversial issues and the desire to preserve the privacy of its members and contributors has been recognized by other courts in analogous circumstances. *See, e.g., New York Civil Liberties Union v. Acito*, 459 F.Supp. 75 (S.D.N.Y. 1978); *ACLU v. Jennings,* 366 F.Supp. 1041 (D.D.C. 1975).

[12] The district court upheld the coordination provisions of § 202 but ruled that plaintiffs' challenge to the coordination provisions of § 214 was largely nonjusticiable because the final implementation of § 214 was dependent on the promulgation of new coordination rules by the FEC. While that is true, it is also true that § 214 establishes a specific set of guidelines for the FEC to follow in implementing its new rules.

"coordination" then taints later commentary by the issue group on the subjects discussed by treating it as a prohibited corporate contribution. The repeal of current FEC rules requiring agreement or formal collaboration directed by Title II casts the net further by eliminating a common sense understanding of what is required to satisfy the definition of coordination in this context.

The record shows how these new rules can chill and disrupt legislative and policy discussions by ACLU officials with Members of the Executive or Legislative branches. *See* Declaration of Laura Murphy ¶¶ 4-8: 3 PCS, ACLU 7-9. Read literally, § 214 can effectively impose a year round prohibition on all communications made by a corporation like the ACLU where there has been "substantial discussion" about the communication with a candidate. This feature of the BCRA acts as a continuing prior restraint which bars the ACLU from engaging in core First Amendment speech for the lawmaker's entire term of office.

More generally, these coordination rules will impair the ability of the representatives of unions, corporations, non-profits and even citizen groups to interact in important ways with elected representatives for fear that the taint of coordination will silence the voices of those groups in the future. The First Amendment is designed to encourage and foster such face-to-face discussions of government and politics, *see Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), not to drive a wedge between the people and their elected representatives.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction.

Respectfully submitted,

Joel M. Gora
Brooklyn Law School
250 Joralemon Street
Brooklyn, NY 11201

May 29, 2003

Mark J. Lopez
Counsel of Record
Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
125 Broad Street
New York, NY 10004
(212) 549-2500