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SENATOR MITCH McCONNELL ET AL. , :

Appellants/Cross-Appellees :

V. : No. 02- 1674

FEDERAL ELECTION COMMISSION ET AL. , :

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Monday, September 8, 2003

APPEARANCES:

BOBBY R. BURCHFIELD, ESQ., Washington, D. C.; on
behalf of the Political Party Plaintiffs.

SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of
Intervenor-Defendants.

1 APPEARANCES (CONT):

2 FLOYD ABRAMS, ESQ., New York, New York; on behalf of
3 the McConnell Plaintiffs.

4 LAURENCE GOLD, ESQ., Washington, D.C.; on behalf of
5 AFL-CIO.

6 JAY ALAN SEKULOW, ESQ., Washington, D.C.; on behalf
7 of Minor Plaintiffs.

8 PAUL D. CLEMENT, ESQ., Deputy Solicitor General,
9 Department of Justice, Washington, D.C.; on
10 behalf of Federal Defendants.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: Today we'll
4 break for lunch and reconvene at 1:30 and the court
5 will be in recess from today until the first Monday
6 in October 2003, at which time the October 2002 term
7 of the court will be adjourned and the October 2003
8 term of the court will begin as provided by statute.

9 We'll hear argument now in the Bipartisan
10 Campaign Reform Act cases. Mr. Starr?

11 ORAL ARGUMENT OF KENNETH W. STARR
12 ON BEHALF OF THE MCCONNELL PLAINTIFFS

13 MR. STARR: Mr. Justice, and may it please
14 the Court:

15 Title I of BCRA, along with Section 213
16 intrudes deeply into the political life of the
17 nation, and does so in a way that not even the most
18 ardently nationalist of the founding generation would
19 have countenanced. The upshot is not only a Federal
20 intrusion into state and local activity at the
21 grassroots level, but a significant diminution in
22 speech and associational activity by parties,
23 activity that lies at the very core of the First
24 Amendment. BCRA's practical effect is to shift
25 resources and power away from political parties, which

1 have long been a source of stability for the nation,
2 and in the direction of First Amendment-protected,
3 but at times ideologically razor-sharp interest
4 groups.

5 BCRA, in a word, goes too far. There were
6 other ways before Congress that Congress could have
7 employed. Most relevantly, to the extent that the
8 concern of Congress was large contributions of
9 non-Federal funds, those regulated by the states,
10 then the Hagel amendment was before Congress, which
11 would have put a cap, a ceiling on the level of
12 contributions to the national parties, but preserving
13 the prerogatives of the state and local parties.

14 Secondly, to the extent that the concern
15 was contributions being directed toward issue ads,
16 Congress had before it the Ney amendment, which among
17 its terms provided specifically for the non-use of
18 such funds in connection with issue ads.

19 Thirdly, to the extent that Congress was
20 concerned as it clearly was with the abuses of the
21 recent past, as documented lavishly in the Thompson
22 committee hearings, Congress could and did respond in
23 BCRA, in unchallenged parts of BCRA, namely, 302 and
24 303, addressing specifically fundraising on Federal
25 property, clarifying what had been famously said to

1 be a lacuna, namely, no controlling legal authority.
2 Also, tightening the prohibitions on a common abuse
3 in the recent past, namely, the involvement and
4 contribution by foreign nationals, the James Riady
5 situation.

6 But Congress chose not to do this. It
7 rather, in 323(a), chose to ban, ban, not limit, but
8 ban, but also to regulate relationships and
9 associations among the different levels of the
10 parties. In 323(b), Congress went so far as to
11 regulate state and local political activity that is
12 at the most grassroots level and is documented
13 lavishly in this record, especially with respect to
14 the State of California. The record teems with
15 indications that there will be a diminution of
16 political activity by the political parties, both
17 parties, both of the major parties, the California
18 Democratic party and the California Republican party.

19 QUESTION: Do I understand your position
20 that Congress could have provided that there be a
21 strong wall between national and state and local
22 parties so that no funds could be transferred inter
23 se?

24 MR. STARR: No, Your Honor. It seems to
25 us that the firewall which was described by Senator

1 McCain does in fact intrude into associational
2 activity of parties and the structure of parties that
3 this Court has found protected in a variety of cases
4 such as *EU v. San Francisco County*, *Tashjian v.*
5 *Connecticut*.

6 QUESTION: But what -- what's the speech
7 interest if Congress says there can be no transfers
8 of funds between different levels of the party, what
9 is this First Amendment violation in that? And in
10 fact, I thought you were suggesting in your earlier
11 remarks that Congress might have done something like
12 this.

13 MR. STARR: Well, my point earlier was
14 simply to say there were other alternatives that were
15 more narrowly tailored before Congress, but with
16 respect to transfers themselves, the transfers this
17 record show go among to other things to enable voter
18 mobilization at the most fundamental level and
19 activity, and this again is documented most lavishly
20 in California, that is focused upon such as ballot
21 initiatives, quintessential state activity but
22 nonetheless which Congress sweeps in under the
23 rubric.

24 QUESTION: I don't -- I thought that your
25 response to Justice Kennedy's question was that the

1 right to speak includes the right to speak in
2 association with others. Isn't that the position
3 that your brief takes?

4 MR. STARR: That is our position. If I
5 failed to say that, I say it now. The whole idea --
6 and I clearly did fail to say it.

7 QUESTION: But my question was, could
8 Congress allow communications of all type, but not --
9 but forbid transfer of funds between different levels
10 of the party?

11 MR. STARR: Our position is not
12 non-Federal funds, which by definition are funds that
13 are either regulated or subject to regulation by
14 state law.

15 QUESTION: May I ask you if you are
16 talking about the right to speak in association with
17 others, does that apply to individuals or does a
18 group have a right to speak in association with other
19 groups?

20 MR. STARR: This -- I believe it does,
21 Your Honor, but this Court, I don't think has
22 authoritatively answered that question. Footnote 10
23 in Colorado Republican II notes that there are
24 indications in the Court's cases, including
25 California Democratic Party v. Jones to the effect

1 that there is in fact an associational right on the
2 part of those who have come together as an
3 association, and that certainly we think is
4 consistent with the teachings of this Court in cases
5 such as *Eu v. San Francisco County Democratic Party*
6 and *Tashjian v. Connecticut*.

7 QUESTION: It's consistent we have never
8 held that, have we?

9 MR. STARR: I think it's fair and accurate
10 to say that you have not expressly held it. That's
11 the reading, at least, of this Court in footnote
12 10 --

13 QUESTION: Mr. Starr?

14 MR. STARR: -- as I read it in *Colorado*
15 *Republican II*.

16 QUESTION: Mr. Starr, may I ask whether
17 you are attacking prior law that required an
18 allocation? It didn't say that the state parties
19 were home free. It did say when there were mixed
20 activities, there had to be an allocation and in
21 presidential election years, for example, that was
22 heavily weighted on the Federal side. Was that in
23 your view constitutional?

24 MR. STARR: Certainly an allocation
25 process, we think, can in fact be contemplated in

1 terms of assuring that those funds which are subject
2 to state law and state regulation are in fact free to
3 be regulated by the state, and I mean by way of
4 specific example, the people of California, the
5 people of New York have made other contrary
6 determinations than the Congress did with all respect
7 to Congress with respect to certain forms of
8 contributions.

9 QUESTION: But I don't -- I don't get in
10 what you have just said an answer to a question which
11 would affect New York, would affect California, would
12 affect every state, 65/35, to take a non-hypothetical
13 ratio when there are mixed activities, when there are
14 Federal and state candidates on the ballot. As I
15 understand the prior law, it didn't count how many.
16 It just made that allocation. Was that
17 constitutional?

18 MR. STARR: I'm not saying that the
19 specific allocation was constitutional or not. That
20 was not tested. But my answer to the question is a
21 process of accommodation of the state interests is
22 necessary in order, Your Honor, we believe to achieve
23 values of congruence --

24 QUESTION: I think -- I think the question
25 that Justice Ginsburg is getting at is, I gathered

1 the statute was passed because, let's call him Joe
2 Wealthy, wants to write a check for \$10 million to
3 help his favorite candidate Smith get elected. And
4 they figured out a way, who they is is named in the
5 lower court opinion, but we'll just say they. They
6 figured out a way despite the prior law to do it. It
7 would pay for Get Out the Vote, it would pay for
8 voter registration, and it would pay for issue ads
9 which didn't say vote for Smith. What they said was
10 Jones, his opponent, is a real rat, go tell him what
11 you think of him, okay.

12 I mean, all right, now, that was the
13 problem. And the solution is to say one, all pennies
14 spent by the Federal committee are Federal, and
15 though the limitations of \$50,000 a year in total
16 apply. Two, the state is home free, does anything it
17 wants where there are only state candidates on the
18 ballot, that where there are state and Federal both
19 on the ballot, we will allocate, and then it sets up
20 a highly complex system of allocation, so I think the
21 question that I heard was, if you thought the prior
22 system of allocation which happened to be 60 percent
23 Fed, 40 percent state or a ratio for the state
24 committee, depending on the number of state offices
25 versus Federal offices.

1 If you felt that was constitutional, then
2 why is this new allocation unconstitutional, because
3 as I read through it, it looked like the basic
4 problem is when you get a voter to the polls, you
5 have to have him there to vote for a state candidate,
6 you have to have him there for a Federal candidate,
7 and we are going to allocate the cost of getting him
8 there between hard money, Levin money and maybe some
9 other money.

10 All right. That's a long question, but I
11 want its addressing specifically what Justice
12 Ginsburg raised, which is why if that first
13 allocation is okay, why isn't this new allocation
14 okay?

15 MR. STARR: Several responses. First, let
16 me begin with the beginning of your hypothetical,
17 large contribution from the major donor, the Hagel
18 amendment addresses that. Now, with respect, that is
19 let's limit the contribution which, after all, is the
20 fulcrum of concern, namely, the possibility of
21 corruption, or as this Court articulated in Shrink
22 Missouri PAC in Colorado II, undue influence.

23 But there comes a point, Your Honor, where
24 Congress goes too far in failing to accommodate the
25 state interest. There is in short a necessary, under

1 this Court's jurisprudence, and we believe anchored
2 in the Federal Elections Clause for Congress to
3 assiduously be mindful of displacing state law, and
4 that is what has been done here by virtue of
5 essentially not even trying to effect an allocation,
6 but rather simply saying, including in context where
7 the flow of funds from the national party to the
8 state or local party is in an off-year election. The
9 value that we would have left up to the Court is that
10 of congruence, proportionality.

11 This goes much too far and Congress could
12 have calibrated much more carefully. When we're talk
13 -- we're talking about limits, by the way, I think
14 it's fundamental to bear in mind that the limits with
15 respect to Federal contributions are anchored on the
16 idea of a contribution as for the purpose of
17 influencing a state election. What the record shows
18 is that there is a substantial amount of donations in
19 the system that go for quintessential state election
20 activity, including ballot measures, initiatives, and
21 the like.

22 QUESTION: But to the extent that you are
23 challenging, your challenge is based on the First
24 Amendment, then state laws that are similar or even
25 more stringent than the Federal law would also form

1 So on the one hand, you're saying Congress paid
2 insufficient attention to state interests, but on the
3 other hand, your First Amendment argument would
4 require significant revision of some state laws.

5 MR. STARR: Well, I don't think so, Your
6 Honor, because what Congress has seen fit to do is
7 regulate activity throughout the system, including
8 then a Federal committee's or national committee's
9 relationship with a state and local committee that
10 ends up affecting what the national committee can do
11 in mayoral elections, including in off-year, that is
12 to say, non-Federal elections years.

13 QUESTION: Of course, some states might
14 choose to make no law abridging the freedom of
15 speech.

16 MR. STARR: Well, it's a quaint idea.

17 QUESTION: To coin a phrase.

18 MR. STARR: And the Commonwealth of
19 Virginia has that, and it is a very good system of
20 total transparency and it's a very vibrant system
21 that is not infected with corruption or the
22 appearance of corruption in the view of its Governor
23 and others. The Commonwealth of Virginia does in
24 fact embrace the idea of transparency. Why? Because
25 this court stated in Buckley that a contribution is a

1 First Amendment event. It does have significance.
2 But we have now gone beyond that which Congress has
3 held by this court in Buckley years ago to have an
4 interest in and that is the regulation of
5 contributions for the purpose of influencing --
6 that's the definition -- a federal election.

7 QUESTION: I'm still curious about the
8 response, Mr. Starr, to that inquiry about whether
9 your arguments would apply and lead you to think that
10 the pre-BCRA regime is invalid as well.

11 MR. STARR: No, we are not suggesting that
12 the FEC regime was invalid, and we think that --

13 QUESTION: That nothing about it was, the
14 allocation and so forth.

15 MR. STARR: We're not suggesting it. The
16 issue was never authoritatively resolved.

17 QUESTION: No, but would your argument
18 lead you to conclude that maybe that scheme that's
19 been there for 25 years is invalid?

20 MR. STARR: Not at all, because what the
21 FEC did for all those years, and they're settled
22 expectations that were built upon that system, was a
23 recognition of the state's prerogatives. This is
24 very powerfully expressed in the FEC's 20-year
25 report, which speaks about our Federal system and the

1 very idea, and therefore, declining to use the
2 pejorative term, quote, soft money, because other
3 states have different attitudes.

4 QUESTION: But as I understand it, your
5 criterion for drawing the line at what is a
6 legitimate state interest is the proportionality and
7 congruence criterion, is that correct?

8 MR. STARR: I think that is instructive as
9 to what --

10 QUESTION: And how do you factor into the
11 application of that criterion, the basic argument
12 made on the other side in this case, that if you do
13 not allow what Congress has done here, you are, in
14 effect, allowing a complete end run around the prior
15 law? How does that factor into congruence and
16 proportionality? Do we ignore it?

17 MR. STARR: No, Your Honor, because again,
18 Justice Souter, Congress had before it -- if the
19 problem was these large donations giving rise to the
20 appearance of corruption or undue influence --

21 QUESTION: Large donations or a thousand
22 smaller donations? The end run problem is exactly
23 the same. And one reason I suppose it's the same is
24 the argument that you made, and that is the close
25 association between the state and the national

1 committees. And I don't see how your argument
2 addresses that.

3 MR. STARR: But Your Honor, we think it
4 does in terms of simply recognizing the traditional
5 interests of the states that we think is, again,
6 anchored in the Elections Clause itself that Congress
7 simply does not have authority. And this Court's
8 teaching in terms limits I think is to the sane
9 effect, that Congress simply lacks authority even if
10 it, quote, sees a problem which it has seen in
11 Morrison and Lopez and a variety of cases that
12 Congress can go in our Federal system too far.

13 And that's even in the context of the
14 Commerce Clause. And here the Elections Clause goes
15 to a quintessential sovereign interest of the states.
16 I would like to reserve the remainder of my time.

17 QUESTION: Very well, Mr. Starr.
18 Mr. Burchfield, we'll hear from you.

19 ORAL ARGUMENT OF BOBBY R. BURCHFIELD

20 ON BEHALF OF THE POLITICAL PARTY PLAINTIFFS

21 MR. BURCHFIELD: Mr. Chief Justice, may it
22 please the Court:

23 Title I is both fatally overbroad in
24 achieving any Federal interest and nonsensically
25 underinclusive. To paraphrase the Court in National

1 Conservative PAC, we are not here quibbling about
2 fine-tuning prophylactic measures. We are here
3 challenging fundamental restrictions on core
4 political party activities. Indeed the Court noted
5 in Buckley that no societal interests would be
6 achieved if a loophole closing measure allowed
7 unscrupulous persons and organizations to spend
8 unlimited amounts to influence a Federal candidate.

9 Joe Wealthy is George Soros, Justice
10 Breyer, who the media reports --

11 QUESTION: \$10,000,000 and Get Out The
12 Vote --

13 MR. BURCHFIELD: And totally unregulated.

14 QUESTION: But we'll see how that works
15 because the second they start conferring with any
16 candidate or they start conferring with the political
17 party, they're going to be in a lot of trouble. So I
18 guess it still is possible that a person could have a
19 totally uncoordinated private effort to Get Out the
20 Vote and give a lot of money to it.

21 But the general rule of constitutional law
22 and every other law is Congress doesn't have to solve
23 every problem. And we don't know yet whether that
24 will turn out to be a big loophole.

25 MR. BURCHFIELD: Correct, Justice Breyer.

1 But we know from Colorado I that not all activities
2 of political parties are coordinated with their
3 candidates and we know from the current regime, from
4 the regime that has been in effect for more than a
5 decade, that all donations to political parties,
6 Federal money, non-Federal money or anything else, is
7 fully disclosed and reported. So at least under the
8 system that we have had with political parties, the
9 political parties are accountable and are
10 transparent.

11 Let me say a few words about the
12 allocation regulations, just to make sure that we're
13 all clear about what the allocation regulations do
14 and -- did and do not do. In the 15.6 million
15 dollars of non-Federal money that the Republican
16 National Committee spent in the 2001 off-year
17 election, when there were no Federal candidates on
18 the ballot --

19 QUESTION: When you say off-year, you mean
20 governor elections in Virginia and New Jersey and
21 like that?

22 MR. BURCHFIELD: Exactly, when there were
23 no Federal candidates on the ballot, odd-year
24 elections. The allocation regulations allowed the
25 RNC to spend whatever it could raise and whatever it

1 wanted to spend subject to state law. The allocation
2 regulations did not apply. That is a perfect
3 accommodation, in our view, of the state interest, of
4 the state interest in regulating its own electoral
5 affairs.

6 QUESTION: How did the 65 percent/35
7 percent in the Presidential year accommodate state
8 interests?

9 MR. BURCHFIELD: In a presidential year,
10 Your Honor, the FEC, after much deliberation, made
11 the determination that the national parties would be
12 presumptively more involved in Federal elections
13 those years than in state elections. But they still
14 recognized -- the FEC has still recognized that the
15 national parties are, in fact, national parties, not
16 Federal parties, and therefore, they can spend 35
17 percent on allocable activities, even in a Federal
18 election year as in 2000 when the RNC gave \$5.6
19 million of non-Federal money to state and local
20 candidates. That money is not subject to the
21 allocation regulations.

22 QUESTION: You assert the principle,
23 however, that the Federal government may regulate any
24 activity which has an effect on Federal elections?

25 MR. BURCHFIELD: Your Honor, I think the

1 Court put it well in Siebold over a century ago when
2 it said, for those activities that had exclusive
3 reference to a state election, the Federal government
4 has no role. But when there are joint activities
5 that have an effect on both elections, the regulating
6 entity, state government or Federal government,
7 cannot impair or nullify -- is the term the Court
8 used then -- impair or nullify the other sovereign's
9 interest.

10 QUESTION: I suppose getting a governor
11 elected or getting a state legislature elected, which
12 will establish electoral districts within the state
13 in a certain fashion, which will be used for the
14 Federal election as well, I suppose that that would
15 have an effect on the Federal election, wouldn't it?

16 MR. BURCHFIELD: Your Honor --

17 QUESTION: So every state election has an
18 effect on Federal elections.

19 MR. BURCHFIELD: Your Honor, that is the
20 Solicitor General's position here. It is a boundless
21 proposition that leaves the states no room to
22 legislate on their own elections because they
23 contend -- you're exactly right.

24 QUESTION: So in order to avoid that
25 boundless proposition, it seems to me you cannot

1 accept the view that whatever affects Federal
2 elections can be regulated.

3 MR. BURCHFIELD: I do accept that
4 proposition.

5 QUESTION: You do accept it?

6 MR. BURCHFIELD: I do accept that
7 proposition.

8 QUESTION: Well, then what the Solicitor
9 General says is quite correct. State elections
10 affect Federal elections, so state elections can be
11 regulated.

12 MR. BURCHFIELD: Well, there is a certain
13 point at which the effect becomes so attenuated that
14 the sovereign interests of the state becomes
15 paramount.

16 QUESTION: So you do not accept the
17 proposition that whatever affects Federal regulations
18 can be regulated.

19 MR. BURCHFIELD: I would say it has to be
20 exclusive reference under the Siebold regime, Your
21 Honor. If it's a direct donation to a state
22 candidate, if it is a Get Out the Vote phone bank
23 that advocates that the voters go to the poll and
24 vote for the governor, if it is a mailing, as under
25 the California -- as the California party affidavits

1 of Ms. Bowler and Mr. Irwin indicate, that they
2 send --

3 QUESTION: The reason that I take it that
4 (a) says that all money spent by a national committee
5 is hard money is because Congress is interested in
6 the contribution, not the expenditure. And what
7 they're saying is if you write a check for one penny
8 or you write a check for 50 billion to the Republican
9 or Democratic National Committee, we assume that that
10 money is going to be used to affect Federal
11 elections.

12 Now, you are right that a small portion
13 is, in fact, used just for state. A portion. 9
14 million out of 300 million, something like that. But
15 it's simply too hard for us to know, contribution by
16 contribution, what's going to do what. And the only
17 workable rule here is not to prevent the RNC from
18 using its money on state elections, but to say to the
19 RNC, every penny that you spend because you're a
20 national committee must follow Federal source and
21 amount limitations.

22 So it's an administrative reason, it
23 focuses on the contribution, and it focuses on the
24 nature of a national political committee. That's
25 their justification, I think.

1 MR. BURCHFIELD: Your Honor, allow me to
2 disagree with that justification. 323(a) prohibits
3 the solicitation, receipt, direction, transfer and
4 spending. It's a felony for the chairman of the RNC
5 today to send a fund-raising letter asking for \$100
6 donation to any of the California gubernatorial
7 candidates.

8 QUESTION: Can't they spend as much
9 money -- and here I'm not positive. I thought, but
10 it's complicated, that the RNC can write a check for
11 a million dollars if it wanted, or whatever the
12 amount is, as long as it's hard money. It's that
13 they're forbidden from soliciting or spending, et
14 cetera, money that isn't hard money. Am I right
15 about that or not?

16 MR. BURCHFIELD: The RNC can spend as much
17 hard money in state elections, consistent with state
18 law and in some states, in Connecticut, such as --
19 and that's set forth in Mr. Josefiak's affidavit,
20 where it's not even clear that the national parties
21 can participate because the national -- the Federal
22 limits are higher than the state limits. And there
23 are some states where the national party under this
24 regime is going to be constrained to participate even
25 in state elections --

1 QUESTION: And then the reason, I take it,
2 for that is the administrative reason I gave, we're
3 focusing on the contributions. And now what is your
4 response to that?

5 MR. BURCHFIELD: The response to that,
6 Your Honor, is that the statute speaks far more
7 broadly than contributions.

8 QUESTION: Isn't there also an answer to
9 that general line, that when you're talking about the
10 First Amendment, administrative considerations
11 ordinarily are not good enough.

12 MR. BURCHFIELD: Exactly, Your Honor. And
13 it's also worth noting here that the allocation
14 regulations that the senatorial or congressional
15 committees operate under are governed by the actual
16 amounts spent on state and local activity, subject to
17 a percentage of a 60 percent cap.

18 If they don't engage in at least 40
19 percent state election activity, their Federal
20 percentage is higher than 60 percent. So that the
21 allocation ratios are calibrated to address, in the
22 real world, what the parties are actually doing in
23 the state and local realm

24 QUESTION: That's an administrative
25 convenience.

1

2 MR. BURCHFIELD: It is an administrative
3 convenience.

4 QUESTION: And that's okay.

5 MR. BURCHFIELD: Well, Your Honor --

6 QUESTION: But there's other
7 administrative conveniences not okay.

8 MR. BURCHFIELD: Your Honor --

9 QUESTION: So you can't be relying on the
10 principle that administrative convenience is not
11 adequate.

12 MR. BURCHFIELD: Justice Scalia, we are
13 not here today to defend the constitutionality of the
14 allocation regulations, but I did sense that there
15 might be some misunderstanding about how they
16 operated, and I wanted to at least make clear that
17 the allocation regulations do not purport -- did not
18 purport to regulate purely state and local candidate
19 activity, at the national party level or at the state
20 party level.

21 A very large proportion of what the
22 California Democratic and Republican parties do was
23 not within the scope of the allocation regulations.
24 Here, under this statute, under section 323(b), the
25 only activities in even years that state and local

1 parties can engage in, according to Ms. Bowler's
2 affidavit -- she's the executive director of the
3 California Democratic Party -- are direct donations
4 to candidates, to state and local candidates, and
5 state party conventions.

6 Everything else, including a phone bank to
7 oppose a school voucher initiative such as Prop. 38
8 that was on the November 2000 ballot, and that's in
9 the Joint Appendix at 1721, the actual phone banks
10 clip, that is completely Federalized today. But the
11 National Education Association can run that very same
12 phone bank with totally unregulated money today.

13 QUESTION: In order to rule for you on all
14 of the issues that are presented in Title I -- let's
15 just talk about Title I. Do we have to cut back on
16 the second rationale given in Buckley, the
17 endorsement speech is of low value? Or can we accept
18 Buckley on its face for all that it says and still
19 rule for you on every one of these points?

20 MR. BURCHFIELD: Your Honor, we have
21 briefed this matter, and after due consideration, we
22 believe that this statute can and should be struck
23 down consistent with the Buckley line of cases.
24 Because it does go too far. Section 323(a) the
25 national party prohibition is a restriction

1 regardless of whether the amounts are coordinated or
2 uncoordinated, a principle from the Buckley cases.

3 Whether it's individual or corporate
4 money, whether it is -- whether it is a large
5 donation or a small donation, any, any amount of
6 money that the national parties are involved with
7 that is not subject to the limitations, prohibitions,
8 and reporting requirements of Federal law, FECA, is a
9 crime, it is a --

10 QUESTION: The -- the difficulty,
11 Mr. Burchfield, that I have with your argument, I
12 know where you are going, but the difficulty I have
13 is in determining what the criterion is going to be.
14 If we accept the Buckley standard, which you do, for
15 the purpose of your argument, then it seems to me
16 your criterion for applying the Buckley standard is
17 similar to what Mr. Starr was getting, getting at.
18 You say it goes too far. And we have said over and
19 over again when we are applying that standard, we
20 don't have a scalpel, and I don't know how we apply a
21 too-far or not-too-far standard.

22 MR. BURCHFIELD: Your Honor, under --
23 under strict scrutiny, which we believe is certainly
24 applicable here, because this is not a contribution
25 limit --

1 QUESTION: No, but with respect, I know
2 you are arguing that, but I also understood your
3 answer to Justice Kennedy's question to be that even
4 if we take the lesser, the more relaxed criterion
5 under Buckley, that you also win and you win on a
6 standard that it goes too far, and my problem is
7 assuming all of those things, I don't see how we
8 apply a too-far standard.

9 MR. BURCHFIELD: Well, Your Honor, first
10 of all, under strict scrutiny, the Government doesn't
11 even argue this statute can pass strict scrutiny, so
12 if the Court, as we submit that it should, since
13 these, since these restrictions go to the very
14 essence of what political parties do --

15 QUESTION: I -- I realize that argument.
16 I just want to get at the -- your answer to Justice
17 Kennedy, which was even if you apply the more
18 complacent standard, we win. That's the, that's the
19 assumption of my question.

20 MR. BURCHFIELD: And in fact, as we have
21 set forth in our reply brief, we believe that we do
22 win if even the more complacent standard is applied.

23 QUESTION: Because we have a too-far
24 standard that we apply under win under a too-far
25 standard?

1 MR. BURCHFIELD: Because Congress has to
2 make an effort, Justice Souter, to closely draw the
3 statute to address the ill that it is trying to
4 address. A \$100 donation solicited by the chairman
5 of the RNC to a California gubernatorial candidate is
6 not prohibiting that, making that a felony, is not
7 closely drawn. Prohibiting the Republican National
8 Committee from, from, from raising money consistent
9 with the state law in Virginia and donating millions
10 of dollars in 2001 in the state elections in
11 Virginia, there's no Federal interest in that.
12 That's --

13 QUESTION: But it doesn't, you see, it
14 doesn't prohibit their donating it. They can donate
15 what they want, I heard you say. It's just that they
16 have to donate it out of hard money and so what the
17 statute is actually saying is that any penny that you
18 give to a national political committee, we assume, is
19 a penny that will, or is intended to or will
20 influence a Federal election.

21 Now, now that's -- why is that an
22 unreasonable assumption to make? Because after all,
23 even if that committee were to take your money and
24 use it for the purposes you are talking about, that
25 would free up some other money for the other

1 purposes. And so Congress has made the assumption I
2 said.

3 Now, all I'm doing is going through all
4 the reply briefs because the reply briefs take each
5 of your examples and they try to explain what it was
6 that Congress had in mind. So it would help me if
7 you, you know, sort of start with the assumption. I
8 know your argument, I think. And I think I know the
9 reply, and what do you want to say about that?

10 MR. BURCHFIELD: There, it is, it shows no
11 esteem for the Commonwealth of Virginia regulating
12 its own state elections to tell a national political
13 party or anyone else that it must comply with Federal
14 standards in order to participate in a purely state
15 election activity when there are no Federal
16 candidates on the ballot.

17 QUESTION: The problem I'm having is it
18 seems to me that you are bringing out the Federalism
19 argument and we were talking about the speech
20 argument. Let's assume the Attorney General is going
21 to prevail and the Federal Government has power to
22 regulate. Still is a First Amendment problem.

23 MR. BURCHFIELD: Exactly.

24 QUESTION: Is there a First Amendment
25 answer that you can give to Justice Breyer?

1 MR. BURCHFIELD: The statute has to be
2 narrowly tailored, we contend, but at least closely
3 drawn to pursue the Federal interest.

4 QUESTION: Well, Mr. --

5 MR. BURCHFIELD: And here, and here --

6 QUESTION: But Justice Breyer's principal
7 point was that there, that there's no restriction on
8 the national parties expending funds. They just have
9 to expend Federal money, and not, not state money,
10 so-called hard money. Now, I assume that your
11 response to that is that it would be a restriction
12 upon my speech if a law were passed which said Scalia
13 can take out advertisements in newspapers, but not
14 with money from his salary. He has to use, he has to
15 use other funds. Would that not be a restriction of
16 my speech?

17 MR. BURCHFIELD: It would, Your Honor.
18 And --

19 QUESTION: But isn't it -- the reason it
20 is such a restriction is that Justice Scalia is
21 limited in what he can raise in money beyond his
22 salary, and the national parties are not?

23 MR. BURCHFIELD: The -- the national --

24 QUESTION: They can raise more money if
25 they want to.

1 MR. BURCHFIELD: The -- the national
2 parties are constrained by, are constrained by
3 Federal statute purportedly pursuing a Federal
4 interest in, in their activities relating to a
5 Federal, to a state and local election. It has been
6 a touchstone of the campaign finance statute since
7 the Tillman Act in 1907 that the activity, the
8 contribution even, has to be, has to be directed to
9 influencing or for the purpose of influencing or
10 directed to a Federal election.

11 QUESTION: Mr. Burch --

12 MR. BURCHFIELD: This is the first time
13 Congress has abandoned that touchstone.

14 QUESTION: Mr. Burchfield, can I ask kind
15 of a basic question, maybe it's assumed here, but
16 directing your attention to 323(a) in the general
17 point of 323(a), do you think a Federal statute would
18 be constitutional if it simply said national
19 political parties may not accept any contributions
20 from profit-making corporations?

21 MR. BURCHFIELD: I believe that would be
22 unconstitutional, Your Honor.

23 QUESTION: That would be unconstitutional?

24 MR. BURCHFIELD: Under the Federalism,
25 under our Federalism argument, that would be

1 unconstitutional, as well as --

2 QUESTION: I think that's the heart of
3 your position, and I think it's unsupported by our
4 cases.

5 MR. BURCHFIELD: Well, Your Honor, under
6 the Buckley line of cases, you have never addressed a
7 Federalism issue before because the currently, the
8 currently existing, the pre-existing campaign finance
9 statutes were by their terms limited to contributions
10 for the purpose of influencing a Federal election.

11 QUESTION: But in a sense, there is a
12 parallel argument there that Buckley says what are
13 the interests that the Government may rely on in
14 restricting speech, and it says the appearance
15 of corruption, corruption, and so in a way, to the
16 extent that the Government gets away from that at all
17 in going to some other interests, you can say it's a
18 Federalist -- Federalism argument, but it's also a
19 First Amendment argument in the sense that if those
20 exist, if those interests are not there, then it's a
21 First Amendment difficulty.

22 MR. BURCHFIELD: Exactly. It's a First
23 Amendment issue if the Federal Government is
24 purporting to pursue an interest, an interest that
25 isn't a legitimate Federal interest. Your Honor, if

1 I may say --

2 QUESTION: Again, Mr. -- Mr. Burchfield,
3 when I come back to the question I asked Mr. Starr,
4 to the extent that you are relying on the First
5 Amendment, you can't be waiving a Federalism banner
6 because that would affect, you spoke about some state
7 laws just a moment ago, I think you mentioned,
8 Connecticut --

9 MR. BURCHFIELD: Connecticut.

10 QUESTION: -- being more stringent than
11 the Federal regulation.

12 MR. BURCHFIELD: Your Honor, under the
13 prior regime, the Republican National Committee had
14 12 separate accounts that it ran that were in
15 compliance with the various permutations of state
16 law, so that when it wanted to participate in
17 Connecticut, for example, it had
18 Connecticut-compliant money to do so.

19 Under this regime, it has one account, and
20 one account only, and that is the Federal account,
21 and with that, when that account contains donations
22 that are, that are of a level higher than the, than
23 the state it wants to participate in, there is a
24 problem. Now, the states have not worked their way
25 through that.

1 QUESTION: But quite, quite apart from
2 the, the allocation problem, to pursue Justice
3 Ginsburg's inquiry because it's something I'm
4 interested as well, suppose that we rule for you on
5 all of these issues under Title I, and we do so on a
6 First Amendment rationale.

7 MR. BURCHFIELD: Right.

8 QUESTION: Are we then striking down the
9 laws of any states and if so, how many?

10 MR. BURCHFIELD: Your Honor, I do not
11 believe you would be striking down any states. We
12 have argued here that the, the problems with 323A,
13 the national party prohibition is that it is an
14 across-the-board criminal prohibition of all RNC
15 activity. No -- unless it's regulated by Federal
16 hard money contributions, if you will, no state in
17 the union has such a broad, has such a broad statute,
18 and if, if they did we would be in court the next day
19 challenging it. 323(b), the restrictions on state
20 parties, usurps state law by imposing this Orwellian
21 definition of Federal election activity which sweeps
22 in virtually, virtually all activities of the state
23 parties during even years, subjects it to a Federal
24 \$10,000 limit and then perhaps most invasively
25 imposes the homegrown requirement which makes it

1 difficult, if not impossible, for states to transfer
2 money among themselves.

3 QUESTION: All right. Now, the reason it
4 does that, I mean, on the first part, I guess if you
5 won, you would find a donor who was wanting to give
6 money to the RNC just to help the state. And you
7 want him to be able to write his check for 9 million.
8 Well, you are talking about 9 million I guess out of
9 several hundred million, so I don't know if you won
10 on that, it would help you that much, if you really
11 got just what you wanted there.

12 But now you are going to the second part,
13 and on the second part, the way Congress has done
14 this is it says, after all, we understand that state
15 parties in an election with Federal candidates on the
16 ballot, have an interest in getting state candidates
17 elected and Federal candidates, and so we will
18 allocate, and I, and then contrary, I think, to what
19 I heard Mr. Starr say, I think they produce one of
20 the most complex allocation systems I have ever read.

21 MR. BURCHFIELD: They have indeed.

22 QUESTION: Now, the fact that it's complex
23 doesn't mean it's wrong. What they are trying to do
24 is balance a lot of different interests, so now you
25 explain to me what's wrong with it, what they've

1 tried to do is allocate the cost of getting the voter
2 to the polls between some special state money and
3 between Federal hard money, and they have their
4 reasons, I think, as you have seen from the reply
5 brief, for each one of the special restrictions
6 that's in there.

7 MR. BURCHFIELD: Your Honor, I would be
8 happy to explain, to explain to you what's wrong with
9 Section 323(b) if that is what I understand your
10 question to be.

11 QUESTION: Well, no, you wanted to bring,
12 you wanted to discuss that. I'm saying if you want,
13 do want to discuss it, I'd certainly be interested.

14 MR. BURCHFIELD: I absolutely do, I
15 absolutely do. What is wrong with 323(b) in the
16 First Amendment realm is that it does restrict the
17 ability of state and local parties, as well as
18 national parties to pool their resources. There was
19 a question earlier about whether there's ever been,
20 whether there's ever been a recognition of the right
21 to pool resources. Absolutely. In Buckley at pages
22 65 and 66, the right to join together for the
23 advancement of beliefs and ideas, quote, is diluted
24 if it does not include the right to pool money
25 through contributions for funds are often essential

1 if advocacy is to be truly or optimally affected.

2

3 The state and local and national parties
4 annually pool their resources for voter mobilization
5 plans to get their voters to the polls. Under the
6 Levin amendment, which is immensely complicated,
7 under the Levin amendment, the committee that spends
8 the money has to raise 100 percent of it, both the
9 Federal component and the non-Federal component.
10 Under the Levin amendment, it is illegal for the
11 national parties to send even a Federal dollar to a
12 state or local party in order to, in order to
13 participate in a, in a joint Get Out the Vote program
14 that the state is funding in part with Levin.

15 QUESTION: Now, their reason for that,
16 their reason for that, I take it, is because Joe
17 Rich, who wants to write the check for 6 million,
18 when faced with this statute and the Levin amendment,
19 which allows him to give \$10,000 to each district
20 committee, the Western Sunset Block Association of
21 the Democratic Party. The -- there could be
22 thousands of such associations, and since there could
23 be thousands, if they did not have that restriction,
24 all that would happen is that the state committee
25 would write to Mr. Joe Rich and say write the check

1 for \$6 million to me, and then what he'd do is he
2 would divide that \$6 million up among our 10,000
3 local committees, and you see, it would be a hole
4 that is not just an inch wide, but 15 miles wide, and
5 so they threw some sand in those gears. And the sand
6 in those gears is just what you described.

7 MR. BURCHFIELD: Well, Your Honor, bear in
8 mind that the Levin Amendment, restricts, the homegrown
9 requirement not just Joe Wealthy's -- sending Joe
10 Wealthy's donation. It restricts sending Joe Poor
11 Person's
12 \$10 donation down to the states. It restricts sending
13 even

14 Federal money, noncorrupting Federal money down to the
15 states. In that sense, it certainly goes too far.

16 But I would also say -- point out with
17 regard to the Levin Amendment, Mr. Tamraz, who has
18 made his appearance in these briefs, as he did in the
19 Thompson committee, gave \$300,000 to state parties in
20 1996. And that's supposedly the reason they
21 passed -- one of the reasons they passed this
22 statute. He can give, in California, \$10,000 to each
23 of the 58 California county committees and \$10,000 to
24 the California state committee for a total of
25 \$590,000 in California. And that is wholly -- that

1 is not Federal money. That is Levin money.

2 But the national party committees cannot
3 transfer even down \$10 to the state party for a voter
4 mobilization plan. That is not -- I would
5 respectfully submit, Your Honor, that's neither
6 narrowly tailored nor closely drawn, not even
7 rational.

8 QUESTION: They're going to say -- there
9 is still -- the reason -- to get that 10,000 to each
10 of these things, at least they have to act
11 independently. And they're trying to make that local
12 committee independent, and independent even of the
13 Federal money.

14 MR. BURCHFIELD: But the consequence of
15 trying to make the local parties independent of each
16 other is that those 58 California parties cannot pool
17 their resources for a statewide Get Out the Vote
18 program, Justice Breyer. And the Democratic National
19 Committee on that side of the aisle, the Republican
20 National Committee on our side of the aisle is
21 sitting in the hallway.

22 And that is a fundamental wedge between
23 the associational rights, political parties in an
24 area that even Senator McCain admits is fundamental
25 to the democratic process.

1 That is -- if I may just for a moment to
2 expound upon that. For that reason alone, we believe
3 that strict scrutiny is absolutely essential in this
4 case, and the government confirms that they cannot
5 pass the strict scrutiny bar.

6 QUESTION: Mr. Burchfield, can I just be
7 sure that I understand one thing? You're saying the
8 Federal -- national committee may not transfer any
9 money to the local committee in that situation. But
10 doesn't the statute merely say it must transfer hard
11 money?

12 MR. BURCHFIELD: No, Your Honor. If the
13 state committee is using Levin money, they can accept
14 no transfers. 100 percent of their money for that
15 program must be homegrown.

16 QUESTION: Which provision -- you're not
17 relying on 323(b)(1).

18 MR. BURCHFIELD: It is 323 -- and pardon
19 me because the statute has --

20 QUESTION: (b)(1) just prohibits transfer
21 of anything except hard money.

22 MR. BURCHFIELD: It's (b)(2)(B)(iv), and
23 323(b)(2)(C). And (b)(4) and 323(b)(2)(B)(iv), it
24 says the amounts expended or disbursed are made
25 solely from the funds raised by the state, local or

1 district committee which makes such expenditure or
2 disbursement and do not include any funds provided to
3 such committee --

4 QUESTION: That's a condition to using
5
6 Levin funds.

7 MR. BURCHFIELD: Exactly, Your Honor.

8 QUESTION: But the basic prohibition in
9 (b) is just a prohibition on the use of any money
10 other than the hard money.

11 MR. BURCHFIELD: And Congress
12 recognizes --

13 QUESTION: So it's only if you get to the
14 Levin Amendment that your argument is relevant.

15 MR. BURCHFIELD: Your Honor, Senator
16 Levin, when he proposed the Levin Amendments --

17 QUESTION: Let me just be sure we're
18 understanding each other and what the statute
19 provides.

20 MR. BURCHFIELD: Exactly, Your Honor.

21 QUESTION: Is it not true that the basic
22 prohibition in (b) does not prevent a national party
23 from transferring hard money to local committees for
24 any purpose whatsoever?

25 MR. BURCHFIELD: So long as the local

1 parties are not using the Levin Amendment, that's
2 exactly right.

3 MR. BURCHFIELD: Correct.

4 QUESTION: But it does prohibit it when
5 they're using Levin money.

6 MR. BURCHFIELD: But if they are using
7 Levin money, it's a crime.

8 QUESTION: But the statute doesn't require
9 them to use Levin money, so they do have an option to
10 transfer hard money to local committees.

11 MR. BURCHFIELD: If the entire political
12 process at the state level is subjected to the hard
13 money limits, you're right, Your Honor. But Senator
14 Levin, on the day he introduced the Levin Amendment,
15 said that the statute would go too far. It would go
16 too far as written without the Levin Amendment in
17 regulating, quoting, some of the most core activities
18 that state and local parties engage in. So the Levin
19 Amendment is not --

20 QUESTION: So it still remains true that
21 the use of Levin funds is an option to the national
22 party, not a requirement.

23 MR. BURCHFIELD: Well, it was an option --

24 QUESTION: Is that not correct?

25 MR. BURCHFIELD: That is correct. But

1 Justice Stevens, it is an option that Congress
2 understood was essential to the vitality of the
3 statute.

4 QUESTION: Excuse me, is it an option for
5 the national party or for the state?

6 MR. BURCHFIELD: It's not an option for
7 the national party.

8 QUESTION: It's an option for the state
9 party.

10 MR. BURCHFIELD: Exactly.

11 QUESTION: So a state party could destroy
12 the --

13 QUESTION: It's an option for the national
14 party because 323(b) is directed at the national
15 parties.

16 MR. BURCHFIELD: 323(a) is directed to the
17 national parties.

18 QUESTION: I'm sorry, you're right, it's a
19 state thing.

20 MR. BURCHFIELD: And 323(a), as we've
21 indicated, is an across the board criminal ban on
22 national parties accepting any money that is not
23 strictly regulated by FECA.

24 QUESTION: Strictly regulated means that
25 they, in order to raise the same amount of money,

1 they couldn't rely on corporate treasuries, union
2 treasuries and rich donors. They would have to
3 spread their effort more widely to reach the ordinary
4 people who support a party.

5 MR. BURCHFIELD: They would have to file a
6 Federal committee, engage in Federal reporting and
7 comply with all the restrictions.

8 QUESTION: But what it would cut out is
9 the reliance on corporate funds, union funds and
10 wealthy individuals. The parties would have to
11 spread their efforts more widely, but that's
12 basically what it calls for. There is no limit,
13 there is no ceiling on the amount of the money that
14 they could raise.

15 MR. BURCHFIELD: Your Honor, if the only
16 word in 323(a) were receive, you would be right. But
17 I respectfully -- I respectfully refer you to the
18 fact that the statute prohibits soliciting,
19 receiving, transferring, directing or spending, and
20 Congress intended meaning to those other verbs --

21 QUESTION: But if you can't receive, how
22 can you solicit? If you can't receive, how can you
23 transfer?

24 MR. BURCHFIELD: You can solicit for
25 gubernatorial candidates, you can solicit for state

1 parties, you can collaborate with state parties in
2 spending money the way the political parties have
3 done heretofore in voter mobilization plans.

4 QUESTION: In which case, the limitation
5 on receiving is simply a formal limitation.
6 Everybody knows where the money comes from, everybody
7 knows what the money is supposed to be used for. So
8 that if your argument to Justice Ginsburg is good, I
9 think the argument for regulation is all over.

10 MR. BURCHFIELD: Well, Your Honor, I would
11 respectfully disagree. Under the Court's
12 contribution to candidate lines of cases, putting
13 aside the question that we're talking about
14 contributions to political parties, and not directly
15 to candidates here. But under the contribution to
16 candidate line of cases, those cases do not involve
17 solicitation of contributions to others, such as the
18 chairman of the RNC's ability to solicit money for
19 someone running in the California recall election
20 right now.

21 QUESTION: I don't want you to leave
22 without having a chance to -- but I've listed so far,
23 and so far it's not going to kill the statute. So
24 far you're upset about that Roman numeral II -- you
25 know what I'm talking about?

1 MR. BURCHFIELD: The homegrown
2 requirement?

3 QUESTION: Roman numeral II on the
4 homegrown which is the Federal contribution to hard
5 money. That's your strongest argument there, I
6 think. So you say strike that from the statute. All
7 right, we take out Roman numeral II, that's not going
8 to kill the statute.

9 And as far as the first point is
10 concerned, at worst, concerning you're completely
11 right -- assuming you're right, you could set up
12 totally segregated accounts for donors who want to
13 give to the Federal party to money that will be used
14 for purely state elections. Am I right about that?

15 MR. BURCHFIELD: National parties, Your
16 Honor.

17 QUESTION: Yes, national parties. You
18 could do that, right, and without hurting the statute
19 too much. Now, is there a third or fourth -- I want
20 to be sure I get down what you think are the biggest
21 three or four overly broad things.

22 MR. BURCHFIELD: May I answer as you go?
23 With regard to 323(b), the statute does pervasively
24 regulate state parties from section 323(a) on. In
25 our briefs, we set forward the overbroad definition,

1 the Orwellian definition of Federal election activity
2 which is fundamental to section 323(b). I don't
3 believe you can solve 323(b) without going to the
4 very core of the statute.

5 With regard to section 323(a) and setting
6 up separate accounts, you've described the situation
7 before the statute was formed. Now, are there
8 ways -- are there regulatory ways that Congress could
9 have gone in more closely or more narrowly and
10 limited the ability of national parties to spend
11 money coming out of those non-Federal accounts, those
12 non-Federal accounts? Perhaps, but that isn't
13 what Congress did here, Justice Breyer.

14 Congress here adopted an across the board
15 criminal prohibition on national political party
16 involvement with any money that is not regulated by
17 the Federal government. And that we contend goes too
18 far.

19 Now, as to the other overbreadths of the
20 statute, I would simply rely upon what we've set
21 forth in the briefs. Thank you, Your Honors.

22 QUESTION: Thank you, Mr. Burchfield.
23 General Olson, we'll hear from you. Sometime in your
24 argument, would you cover the question of whether, if
25 the Court were to strike down 323(a), 323(b) could

1 survive?

2 ORAL ARGUMENT OF THEODORE B. OLSON

3 ON BEHALF OF THE FEDERAL DEFENDANTS

4 MR. OLSON: Well, we believe it could,

5 Mr. Chief justice, but let me come back to that.

6 Thank you, Mr. Chief Justice, and may it please the

7 Court:

8 The issues the Court considers today,

9 every single one of them in connection with Title I,
10 are not new.

11 For a century, with the overwhelming
12 support of the public, Congress has struggled to curb
13 the corrupting influence of corporate, union and
14 large, unregulated contributions in Federal
15 elections. Time and time again, this Court has
16 agreed that achievement of that goal is critical to
17 avoid erosion of public confidence in representative
18 government to -- and I'm using the Court's words --
19 to a disastrous extent.

20 But concentrated wealth is nothing if not
21 creative. As this Court has observed, the history of
22 campaign finance reform has been a cycle of
23 legislation followed by the invention and
24 exploitation of loopholes, followed by more
25 legislation to cut off the most egregious evasions

1 and circumventions.

2 QUESTION: General Olson, is every problem
3 soluble?

4 MR. OLSON: Well, this Court hasn't found
5 every problem to be solvable.

6 QUESTION: If for example, the executive
7 should make a compelling case that it is really
8 impossible to eradicate crime if we continue with
9 this silly procedure of having warrants for searches
10 of houses? We wouldn't entertain the argument that,
11 you know, this is the only way to achieve this
12 result.

13 MR. OLSON: Of course not.

14 QUESTION: There are certain absolutes,
15 aren't there, even if problems subsist? There are
16 just some things that government can't do?

17 MR. OLSON: Of course, Justice Scalia.

18 QUESTION: And that's what we're arguing
19 here.

20 MR. OLSON: Of course it is.

21 QUESTION: Not whether there are problems.

22 MR. OLSON: Of course it is.

23 QUESTION: But whether this is something
24 that government simply can't do.

25 MR. OLSON: Of course it is, but this

1 Court has said over and over again, not only is it a
2 critical problem that's fundamental to the integrity
3 of our election system, but that the solutions that
4 the legislature has enacted before, the central
5 principles of which are embodied in BCRA, are
6 constitutional solutions to that problem.

7 QUESTION: Let me understand -- to be very
8 basic, let's start with the text. Congress shall
9 make no law abridging the freedom of speech.
10 Congress shall make no law abridging the freedom of
11 speech. These laws abridge the freedom of speech in
12 some sense.

13 Now, on what basis do you think that there
14 is somehow a way around that text? I can think of
15 several ones. You can say the freedom of speech
16 doesn't mean all freedom of speech. It means that
17 freedom of speech which was traditional at the time
18 the provision was adopted. So you could not libel,
19 you could not give information about the sailing of
20 troop ships and whatnot. But this wouldn't come
21 under that. There was no notion of restraining
22 expenditures for campaigning when the provision was
23 adopted.

24 A second alternative, I suppose, is that
25 the freedom of speech does not include freedom of

1 speech by malefactors of great wealth, corporations,
2 labor unions and other organizations don't have
3 freedom of speech. But our cases reject that. We
4 can't require The New York Times to be -- you know,
5 any organization that is funded by more than a
6 million dollars cannot say anything about elections.
7 We couldn't say that, could we?

8 So how do you get around the very simple
9 text of the First Amendment?

10 MR. OLSON: What Congress has done is read
11 the decisions of this Court from 1976, and including
12 the earlier decisions, that specifically said and
13 have said over and over again, that the regulations
14 of contributions, contributions where you're talking
15 about contributions, not expenditures. This Court
16 has said the regulations of contributions to the
17 Federal election process by unions and by
18 corporations may be controlled by Congress in Federal
19 legislation, in connection with Federal elections.
20 This Court has said that over and over again. And
21 this Court said in Buckley --

22 QUESTION: That's plausible, I suppose,
23 that a contribution to somebody else, to speak
24 whatever he wants, is not your speech. But what do
25 you do about expenditures? This law regulates a lot

1 of expenditures.

2 MR. OLSON: This law, referring to Title
3 I, makes certain contributions illegal to the
4 Federal -- to the national parties and to their
5 conduits and surrogates. Contributions from unions,
6 corporations in excess of certain limits. Of course
7 it says that once it said that the contribution is
8 illegal, the solicitation of the contribution is
9 comparably illegal. And the expenditure of that
10 contribution, not any amount of money that the
11 Federal or state committees might want to spend, but
12 the use of that money from that source in excess of
13 those limits.

14 QUESTION: But the reason for upholding
15 the contribution limits restriction was because of
16 the corruption or appearance of corruption between
17 the contribution and the candidate. I don't think
18 Buckley supports the proposition that Congress can
19 willy-nilly regulate any sort of contributions in
20 connection with an election campaign.

21 MR. OLSON: Of course not, Mr. Chief
22 Justice. What this Court has said over and over
23 again, that Congress can regulate contributions from
24 corporations -- the treasuries of corporations and
25 unions. Separate segregated funds still exist so

1 that those contributions from members can be made,
2 and that Congress can regulate the amount of those
3 contributions. That's all that Title I of BCRA does.
4 And that's -- all three of those aspects were
5 addressed by this Court in Buckley and have been
6 addressed again and again and again.

7 QUESTION: You say that is all that it
8 does. It regulates contributions to parties and the
9 argument is that's quite different from a
10 contribution to a candidate, which is one of the
11 issues here, it seems to me.

12 MR. OLSON: In fact, Buckley did regulate
13 the amount of the contributions by corporations and
14 unions and in excess of certain levels to parties as
15 well. There was not only a 1,000 contribution limit
16 to the candidate, but there were limitations in
17 Buckley with respect to the amount of expenditures
18 that an individual might make in consultation or
19 coordination with a candidate and there were
20 aggregate limits with respect to the \$25,000 limit
21 that was set for the precise reason, this Court
22 explained, to avoid circumvention of the limits in
23 connection with the --

24 QUESTION: Contributions to parties were
25 limited that way?

1 MR. OLSON: Yes, Justice Scalia. The
2 aggregate contribution by parties and the Court
3 talked in terms of the aggregate contributions that
4 could be made all together by the individual, and the
5 court specifically talked about that, that \$25,000
6 limit was for the very purpose of preventing the
7 individual to circumvent the contribution limit to a
8 candidate by giving money to the party which would
9 then be given to the same candidate, and the court
10 specifically said in Buckley that that would be
11 unearmarked money that would go to the party, which
12 would then go to the candidate.

13 QUESTION: But what about a contribution
14 to the party, we'll call it a payment to the party?

15 MR. OLSON: A contribution, Justice
16 Kennedy. I don't think I understand the question,
17 because the court specifically talked in terms of the
18 corrupting influence of corporate union and
19 uncontrolled large money contributions and what this
20 Court said then and has said over and over again that
21 Congress can attempt to avoid circumvention of those
22 permissible limits. Now, Mr. Starr spoke a moment
23 ago about the lavish evidence of abuses that were set
24 out and reported in the Thompson report. Among those
25 evidence of abuses is that enormous amounts of

1 so-called soft money, which is just another way of
2 saying money that is prohibited to go to Federal
3 elections, was going to Federal elections through
4 various surrogates, through the national party.

5 QUESTION: Is, is there evidence in the
6 record of access corruption, so to speak, using soft
7 money to fund purely state and local elections, as
8 opposed to Federal?

9 MR. OLSON: The evidence --

10 QUESTION: Is there evidence of that?

11 MR. OLSON: What the evidence, if I
12 understand your question correctly, is that the money
13 was going from, through the national parties and at
14 the direction of the national parties to the state
15 subordinate committees in order to fund various
16 activities that had to do with Federal elections, and
17 that's what, they were --

18 QUESTION: If I understand, evidence that
19 the money being used to fund purely state and local
20 election activities?

21 MR. OLSON: No, that was not what Congress
22 was concerned about. Congress was concerned --

23 QUESTION: But the ban extends to that,
24 apparently?

25 MR. OLSON: The -- the ban -- no. In the

1 sense that the state parties can raise un -- money
2 that's not regulated, provided that it's not used in
3 conjunction with Federal election activity. So in
4 that sense, the states are free to continue to do
5 that and spend all they wish.

6 QUESTION: Which is very broadly defined
7 Federal election activity.

8 MR. OLSON: Well, it is, it is broadly
9 defined, but it has been defined by the experts in
10 this country on elections, the corruption of big
11 money, the regulation and the potential abuses. This
12 Court has previous said over and over again, this is
13 an area where there is special expertise in Congress.
14 This legislation --

15 QUESTION: Special expertise and also
16 special interest. Do, do you know any provision of
17 this law that disadvantages incumbents? I can name
18 you several that disadvantage challengers. Is there
19 any provision of the law that you think puts
20 incumbents at a disadvantage?

21 MR. OLSON: Well, let me put it this way.
22 The incumbents were doing very well under the
23 existing system, 98.5 percent of the members of
24 Congress, the congressional, the House of
25 Representatives that ran for re-election in 2002 were

1 re-elected.

2 QUESTION: But they had to work very hard
3 for it.

4 MR. OLSON: Well, apparently not. The
5 evidence also shows that's in the record --

6 QUESTION: The record is, the legislative
7 record is full of complaints about how hard it is to
8 raise all this money and it's a lot of trouble.

9 MR. OLSON: Well, the evidence is that the
10 can -- the candidates --

11 QUESTION: Your answer to my question is
12 no, I gather?

13 MR. OLSON: No. The answer to --

14 QUESTION: Can you name any provision? I
15 can name several that disadvantages challengers.
16 Number one, the very existence of restrictions upon
17 money because if no money can be spent at all, the
18 incumbent is going to win. It's well-known that the
19 challenger needs more money. Number two, the
20 restrictions on parties that we were just talking
21 about. It is also well-known that where the national
22 party will generally spend its money in a Federal
23 election is in supporting a challenger in a district
24 or in a state where the, where the Representative or
25 the incumbent Representative or Senator is in

1 trouble.

2 MR. OLSON: Justice Scalia --

3 QUESTION: I can go on. The millionaire
4 provision, I think, advantages incumbents.

5 MR. OLSON: Let me -- let me -- there are
6 several answers to that. One, this Court's --

7 QUESTION: Let me finish my thought. What
8 I conclude from this is that perhaps we shouldn't be
9 so deferential to Congress in this matter. You know,
10 in the area of separation of powers, we do not defer
11 to Congress when Congress is in a head-to-head clash
12 with the executive branch on separation of powers
13 matters. Why? Because Congress is self-interested
14 in that area. Why is it not the case that Congress
15 is eminently self-interested in making laws that
16 restrict the manner in which people can challenge
17 their re-election?

18 MR. OLSON: There are several answers to
19 that question. First of all, that very issue was
20 addressed in 1976 in Buckley and the court said that
21 the rules are applying equally to anybody running for
22 office, and in that circumstance, the court will look
23 to evidence of invidious discrimination against
24 challengers. There is no evidence of invidious
25 discrimination against challengers.

1 Number two, the evidence supports
2 overwhelmingly that incumbents were able to get
3 re-elected under the old system just fine and that
4 overwhelming amount of evidence is not in the record,
5 in the testimony below, which is summarized in, in
6 various different sources that the repeated testimony
7 by Senator Thompson, Senator McCain, former Senator
8 Simon and over and over again abuses in the system
9 that were not benefiting incumbents but were tearing
10 down faith of the American people in a system of
11 government and making people believe that the more
12 money that you put in, to use the words of one
13 individual, the White House is like a subway. You
14 have to put money in the turnstiles.

15 QUESTION: Too much money. Too much
16 money. That's the problem. Too much money is being
17 spent on elections.

18 MR. OLSON: Justice Scalia, the evidence
19 shows and the Federal Election Commission came out
20 with a report earlier that year that candidates are
21 raising more money this year. It's not the amount of
22 money, but it's the source of money from potential
23 corrupting influences and that the hard money, in
24 fact, has benefits to the party and to the
25 candidates. The statistics showed that in, \$500

1 million was raised in the year 2000 for soft,
2 so-called soft money. Again, that's a euphemism for
3 money that's going around the system. That, that was
4 42 percent of the amount of money that the national
5 party spent on election activities, up from 9 percent
6 in 1984, 42 percent. Of that \$500 million, 60
7 percent came from just 800 donors. In that year, the
8 top 50 donors each gave between 950,000 and \$6
9 million a piece.

10 QUESTION: Is there any, anything in there
11 that says whether the bulk of that money you just
12 referred to by the 950 donors, that more went to
13 challengers than to incumbents? Or that more went to
14 incumbents than to challengers?

15 MR. OLSON: I don't have a breakdown of
16 that, Justice Breyer, but what the evidence does
17 show, if you go back election by election, every two
18 years, that incumbents under the old system, if a
19 member of the House of Representatives decided to
20 stand for re-election, the statistics year after year
21 are the same, 97 to 98 to 98.5 percent of the
22 incumbents were winning re-election. So to the
23 extent that Congress would devise this scheme --

24 QUESTION: General Olson --

25 QUESTION: Is that the problem you are

1 solving here?

2 MR. OLSON: No, no, Justice Scalia. But
3 it directly addresses the question that you raised to
4 the extent that Congress was looking for a scheme to
5 protect incumbencies, they were doing very well. It
6 would be hard to develop a scheme that could be
7 better for incumbents.

8 QUESTION: General Olson, I suppose
9 another reason why we should not defer to the
10 incumbents is they have an interest in spending their
11 time working for the public rather than raising
12 money, and this will save a lot of time so that we
13 shouldn't defer to them on it, no.

14 MR. OLSON: The -- that's, well, Justice
15 Stevens, that's a reason for deferring to them. The
16 evidence, as Mr. Starr put, was lavish, that the
17 abuses were enormous, and that Members of Congress
18 were spending --

19 QUESTION: Excuse me. You keep calling
20 them abuses. People were taking advantage of those
21 gaps in the law that existed. Is that an abuse,
22 every time -- we do it with the tax code all the
23 time. We don't say oh, it's an abuse. He took
24 advantage of --

25 MR. OLSON: It is -- the evidence --

1 QUESTION: And there will be abuses under
2 this law, too.

3 MR. OLSON: Of course, of course --

4 QUESTION: Water will run downhill, and if
5 you cannot make your voices heard in this fashion,
6 they'll find another fashion.

7 MR. OLSON: What this Court said in
8 Buckley, in Shrink Missouri Government, in every one
9 of the cases that this Court has considered is that
10 those are indeed abuses that those are corrupting
11 influences, and the word abuse was Justice Starr's
12 practically, Justice Starr's first word, I mean
13 General Starr's first word out of his mouth. That is
14 everybody's word when it comes to the system. I
15 guess you'll have to wait.

16 QUESTION: General Olson --

17 MR. OLSON: It was everybody's word when
18 they described this system, when you talk about the
19 enormous amount of money that was avoiding the direct
20 regulatory scheme and going through various
21 surrogates to accomplish the same thing.

22 QUESTION: One feature of this is puzzling
23 to me, and that is if the candidate corruption is
24 what, or the officeholder corruption is the heart of
25 it, we don't want candidates, officeholders to be

1 bought, then why did Congress, why was Congress more
2 generous to candidates and officeholders than it was
3 to the parties. A concrete example. A candidate for
4 Federal office can make a speech at a fundraising
5 event for a state or local candidate, if I read the
6 statute correctly, but an officer of the national
7 party could not.

8 MR. OLSON: Acting in his capacity, in the
9 words of the statute, on behalf of the national
10 committee. Acting as an individual that wouldn't be
11 the case, but when he is speaking in terms of the
12 party, that was the case. The, what Congress was
13 attempting to do is --

14 QUESTION: I don't understand what that
15 means.

16 MR. OLSON: What an individual --

17 QUESTION: What does that mean? Could he
18 be introduced at the event as the chairman of the
19 Republican National Committee?

20 MR. OLSON: That's -- I'm speaking now,
21 Justice Scalia, in the terms of the statute itself.
22 It talks in terms of his capacity as a member of the
23 chairman of the party.

24 QUESTION: Yeah, I want to know what that
25 means.

1 MR. OLSON: And an individual might do
2 something separately, and that's --

3 QUESTION: So you couldn't introduce him
4 as the chairman of the Republican --

5 MR. OLSON: Well --

6 QUESTION: Could just say Joe Dokes
7 endorses the Government and don't mention that this
8 is the chairman of the National Republican Committee.

9 MR. OLSON: I suppose that would be up to
10 some level of reasonable prosecution, prosecutorial
11 discretion.

12 QUESTION: Well, is this the sort of thing
13 we ordinarily have, I can see in the tax code, but
14 ordinarily we don't have in a connection with the
15 First Amendment some very debatable thing that might
16 be this, might be that.

17 MR. OLSON: Well, it's actually relatively
18 clear, Mr. Chief Justice, the regular -- not only are
19 the, is the statute relatively clear and not only
20 does the statute specifically address the abuses that
21 were well-documented and their evasions.

22 QUESTION: I'm talking about the official
23 versus individual capacity.

24 MR. OLSON: Well, that, that, probably
25 that language wouldn't even had to have been in the

1 statute, Mr. Chief Justice. I would presume that
2 would be presupposed that agents of the national
3 party acting on behalf of the national party can't do
4 the things that the national party can do.
5 Organizations subject to the control of the national
6 party can't do the same things that the national
7 party can do. That indeed is the same sort of
8 legislation that this Court has considered before.
9 Let me -- on this subject --

10 QUESTION: In any case, in his official
11 capacity, he can't do it. The candidate can.
12 Justice Ginsburg's question stands. What is the
13 answer to that?

14 QUESTION: And let me, let me add to that
15 that the same thing goes for contribution to a 501(c)
16 that the candidate for Federal office can make that
17 solicitation, but not an officer of the party.

18 MR. OLSON: There, there are indeed some
19 of those areas where there are refinements because
20 Congress was concerned with the -- this Court has
21 said repeatedly that political parties are, have
22 special advantages. Colorado II talks about that,
23 that there are special rights and special privileges,
24 and so Congress was concerned with the immense
25 possibility, the immense power of national political

1 parties to engage in abuses. So Congress was
2 particularly concerned and with abundant record of
3 the use of money going to the national parties to
4 circumvent these things.

5 QUESTION: I thought we were talking about
6 corruption. Surely the possibility of corruption is
7 much more direct when it's the candidate himself who
8 was soliciting for this organization, which will then
9 help him. Then it is indirect, where the national
10 party solicits and it may get to him or not. He
11 doesn't know what's going on.

12 MR. OLSON: It's entirely possible that
13 Congress has not solved every potential abuse of
14 Federal election law and that the lawyers will be
15 back before this Court with another piece of
16 legislation. Congress did not have before it
17 evidence of abuse of that nature, Justice Scalia.

18 QUESTION: But it went out of its way to
19 allow incumbents to do this. Went out of its way.
20 It didn't leave a gap. It said we're not going to
21 let the parties do this, but we will let the
22 candidates do it.

23 MR. OLSON: It made some, in my judgment,
24 perfectly understandable exceptions for individuals
25 acting in their own capacity or individuals engaging

1 in certain things, as opposed to the massive power of
2 the party.

3 QUESTION: If we found that this law had
4 the purpose or the effect of giving significant
5 advantage to incumbents, would we have to strike it
6 down under the First Amendment?

7 MR. OLSON: Well, the challenge was the
8 Equal Protection Clause was considered in Buckley. I
9 see no evidence of any invidious discrimination. I
10 guess we would be concerned.

11 QUESTION: Do you think there is a First
12 Amendment interest in protecting incumbency?

13 MR. OLSON: I think that that would be a
14 very serious concern, Justice Kennedy, but there is
15 not any evidence of invidious discrimination, to use
16 the language of this Court in Buckley.

17 QUESTION: But you say in your brief and
18 in Mr. Waxman's brief, you indicate that Buckley has
19 to be revised because speech has evolved in a way
20 that Buckley didn't anticipate. That seems to me to
21 be an argument for not allowing severe regulations,
22 such as this statute does, and allows speech to
23 develop on its own. So that parties, which are very
24 important entities in the system, have the capacity
25 to respond to other unregulated entities such as the

1 press. The press is exempt from all of these
2 restrictions and parties are not. That seems to me,
3 Mr. Olson, a very curious balance in a democratic
4 society.

5 MR. OLSON: Well, the Court has addressed
6 that very concern starting with Buckley up through
7 Colorado I and II. The fact that the party may be
8 used as a conduit for circumvention of the limits on
9 contributions to candidates. And let me add that the
10 Republican National Committee, in their brief below,
11 said that the Republican Party is a single unitary
12 organization. This is at page 23 of the RNC
13 opposition brief in the court below.

14 The Republican Party is a single unitary
15 organization that comprises various interrelated
16 parts. The RNC, state and local parties, the RNC's
17 165 members, candidates identifying themselves as
18 Republicans and so forth. And Mr. Burchfield, when
19 he testified on April 5, 2000 before the Committee on
20 Rules and Administration of the United States Senate,
21 said, legislative proposals to ban party receipt of
22 soft money also cannot seek to impose restrictions on
23 state parties -- also must seek to impose
24 restrictions on state parties as well. They cannot
25 be effective otherwise.

1 That's exactly what the understanding that
2 Congress had when it addressed this statute.

3 QUESTION: Step back for a second.

4 Because, say, looking at it more broadly, I think
5 we're hearing many arguments of this form, which is a
6 serious argument, it seems to me. When you look at
7 the statute, it becomes highly complex and really
8 quite restrictive in the many ways that have been
9 mentioned.

10 At the same time, there are no
11 restrictions on the press, and at the same time, you
12 can give as much money as you want to the NRA, to the
13 NRDC, to every interest group that supports both the
14 Republicans or the Democrats or whatever. And so all
15 that will happen is that the power and the money will
16 shift to those groups, and you will have precisely
17 what Madison called faction, because the parties act
18 as a tempering device. That if \$10 million can be
19 given to private groups to Get Out the Vote, and if
20 the election is about getting out the vote, you've
21 shifted the power from the party to the special
22 interest group.

23 And now the press was one example. We're
24 hearing arguments of that form, and so I would like
25 to hear a general response to that kind of an

1 argument.

2 MR. OLSON: The distinction was made by
3 this Court in Buckley and in the subsequent decisions
4 that there is a higher level of scrutiny and a
5 greater level of concern with respect to the amount
6 being given to an individual and a greater identity
7 and potential for abuse, because that money can then
8 be spent either directly by the individual or in
9 coordination with the political party on the
10 individual's reelection, if individuals go out and
11 affiliate with this group or that group and spend the
12 money.

13 That's not subject to the same kind of
14 level of control by the party or the candidates and
15 it is looked at --

16 QUESTION: You're equating the party with
17 the individual. And the party is no more the
18 individual candidate than is the National Rifle
19 Association the candidate who happens to ardently
20 oppose gun control. And the question that Justice
21 Breyer is posing is, why do you pick on the party as
22 this instrument for making public views, even the
23 public views of the wealthy, known and allow
24 contributions to these other groups?

25 MR. OLSON: Congress didn't pick on a

1 party, Justice Scalia. Congress focused on the fact
2 that the parties control, as in the words of the
3 segment from the brief that I quoted, the party and
4 the candidates are, in one extent, one and the same.

5 Secondly, the parties are given
6 considerable privileges, the power to put candidates
7 on the ballot. There is reasons that the exercise of
8 this enormous power can be subject to greater
9 restrictions. Congress wasn't picking on parties.
10 Congress was, one, looking at where the greatest
11 abuses were. And then number two, following the
12 guidelines set by this Court.

13 QUESTION: In Colorado I, we said that the
14 corruption rationale did not seem -- seemed quite
15 attenuated in connection with the parties.

16 MR. OLSON: With respect to independent
17 expenditures, the Court said that. And then the
18 Court addressed the coordinated expenditures and
19 approached it in quite a different way, and held that
20 coordinated expenditures in Colorado II could be
21 treated just like contributions.

22 And the difference is that the Court has
23 held, quite understandably, that the level of concern
24 that Congress might have over abuses from
25 contributions is greater, and the level of First

1 Amendment concern is more attenuated because that
2 contribution may be used in a different way,
3 depending upon the contributions.

4 QUESTION: There are two steps. Why is a
5 contribution or payment to the NRA any less a
6 contribution than a payment to the Republican Party
7 in certain instances with certain candidates? You
8 equate -- the statute equates, and so I think you
9 must. You equate parties and candidates.

10 MR. OLSON: In the first place --

11 QUESTION: This is a remarkable
12 proposition.

13 MR. OLSON: Well, it is the same
14 proposition that is discussed in Buckley in
15 connection with the aggregate contribution limit, and
16 is discussed several times in the cases that come
17 along since Buckley.

18 The party is a different entity. The NRA
19 or any other of the many organizations that might
20 spend their money for this in a way that the
21 candidate cannot control would not be focused in the
22 same way. This Court provides the guidance that says
23 that the parties, because they're so closely
24 identified with the individuals, and such a source of
25 potential circumvention, are something that the

1 Congress may legitimately be concerned with.

2 And this legislation was developed as a
3 result of six years of intense investigation, debate,
4 testimony, delicate compromises, all conducted in the
5 context of congressional elections and a presidential
6 election. This was a product of a lot of time by the
7 people who, over and over again, talked about the
8 level that abuses had come to.

9 QUESTION: All done by incumbents,
10 incidentally.

11 MR. OLSON: Well, we pass laws in the
12 United States, Justice Scalia, by people who already
13 hold office.

14 QUESTION: That's true, but they usually
15 don't pertain to what it takes to get them out of
16 office.

17 MR. OLSON: What this Court has repeatedly
18 said is that congressional judgments -- and I can
19 only quote the language of this Court in Buckley.
20 Congress could legitimately conclude, speaking in
21 terms of potential for corruption. In the NRWC case
22 in 1982, a unanimous Court said that careful
23 legislative adjustment of Federal electoral law in a
24 cautious, advanced, step-by-step, warrants
25 considerable deference. We accept -- this is a

1 unanimous Court -- Congress's judgment that it is the
2 potential for such influence that demands regulation,
3 nor will we second guess a legislative determination
4 as to the need for prophylactic measures where
5 corruption is the evil feared.

6 If the Court were to look at the long
7 series of the summary of abuses in Judge
8 Kollar-Kotelly's decision below, and to look at the
9 testimony given by former Senators Rudman and Simon
10 and Boren and the other individuals who describe what
11 it's like, the breakfasts, the lunches, the
12 receptions, the dinners, the endless cycle of
13 campaign finance.

14 QUESTION: The attack ads. The
15 legislative record is full of hostility toward these
16 attack ads.

17 MR. OLSON: Justice Scalia, the parties
18 and the candidates can spend all of the hard money
19 they want on attack ads or any other types of ads.
20 Congress was focusing there, with respect to specific
21 types of legislation, in connection with the use of
22 state money, soft money that comes to the state
23 parties, in conjunction with elections taking place
24 at which Federal officials are on the ballot.

25 QUESTION: General Olson, you said a

1 moment ago, referred to the testimony of Senators
2 Rudman and Simon and Boren about you know,
3 breakfasts, lunches. That I don't believe is a
4 permissible basis for a restriction, that you know,
5 we're tired of having to go to these breakfasts and
6 lunches.

7 MR. OLSON: Mr. Chief Justice, I didn't
8 mean to say that these numbers were saying it was too
9 much work. What they were saying is that the
10 relentless pursuit of big contributions was
11 innervating to the political process. The record --

12 QUESTION: That is not a -- that's what
13 the Chief was saying. That is not a valid complaint.
14 We've never said that's a valid justification.

15 MR. OLSON: The potential for
16 indebtedness, the feeling of indebtedness, the
17 selling of access.

18 QUESTION: That's why they didn't want to
19 go to breakfasts and lunches.

20 QUESTION: I don't understand why that --
21 by just saving time for government work is not a
22 valid interest anyway.

23 MR. OLSON: Of course it is a --

24 QUESTION: Why should they waste all their
25 time raising money.

1 MR. OLSON: Of course it is a valid
2 interest, Justice Stevens, but what all of these
3 individuals were talking about was the appearance and
4 the actuality that the system had been corrupted.
5 The access --

6 QUESTION: Is there a feeling of
7 obligation and access to an organization which
8 delivers a million votes on its own?

9 QUESTION: Of course there is, Justice
10 Kennedy, but the First Amendment considerations as
11 articulated by this Court address the infusion of
12 money from particular sources, either from wealthy
13 individuals or a corporation -- corporate treasuries
14 or unions differently.

15 And what all of this testimony was about
16 wasn't how much time it took, was that money had
17 become the number one operative driving force, not
18 only in the running for office, but for the entire
19 period that the individual was in office.

20 And that the political parties -- and the
21 evidence was abundant, lavish -- that the political
22 parties themselves were saying if you give this
23 amount of soft money, we will set up meetings with
24 these members of Congress or these leaders of the
25 party or this opportunity to spend a night in the

1 White House or whatever. The actual access which is
2 how things get done in Congress was something -- was
3 not only for sale, but also perceived to be for sale.

4 QUESTION: Of course many people think
5 that what produced that situation was the original
6 campaign finance law, which set individual
7 contribution limits so low that you indeed had to go
8 around scurrying for money, because you couldn't
9 accept greater amounts from more wealthy donors.

10 MR. OLSON: Well, there is two answers to
11 that. The contribution limits have been increased.

12 QUESTION: Insignificantly, if that is the
13 problem

14 MR. OLSON: But what this Court has said
15 in Buckley, and has also said over and over again is
16 to the extent that the candidates and the parties
17 have to reach out to more individuals for more
18 participation rather than relying on this 800 or so
19 individuals that give large amounts of money. That's
20 better for the candidates and it's better for the
21 parties and it's better for the political process.

22 QUESTION: Don't mind having to spend all
23 the time raising the money. I thought you just said
24 that that's bad. Now you say it's good.

25 MR. OLSON: What -- what I'm, what I'm

1 saying, Justice Scalia, is what this Court has said,
2 that to the extent that a larger numbers of smaller
3 contributors, that you don't need to spend all this
4 much time courting is a better process for the
5 political system. That's what this Court said, and
6 that's what this Court has said over and over again.

7 QUESTION: General Olson, could I ask you
8 to address the regulation of state parties and the
9 regulation of funds spent in state elections. What,
10 what basis is there for the Federal Government to do
11 that?

12 MR. OLSON: The, the legislation refers to
13 money that is spent in Federal election activity.
14 This Court has repeatedly said starting in the 19th
15 century that the control, the regulation of Federal
16 elections is quintessentially important to what
17 Congress does. What Congress had abundant evidence
18 that this money, that, that the individuals, my
19 opponents are talking about having to do with state
20 elections were when Federal candidates were on the
21 ballot and money was being used ostensibly for
22 neutral purposes, but for the primary purpose of
23 bringing out voters to vote in a Federal election and
24 to influence the outcome of that election.

25 QUESTION: But that isn't what the law

1 says, that when it's ostensibly for the -- if you're
2 using it in the best of good faith to get out the
3 vote for a state election, even when the Federal
4 election in this particular state is a forgone
5 conclusion. There is -- one party has it so locked
6 up that the Federal election is a nullity, and all of
7 the money is being spent on a state election.

8 MR. OLSON: What --

9 QUESTION: Nonetheless, the Federal
10 Government says these are the rules under which the
11 state party can spend money.

12 MR. OLSON: And the state party can spend
13 unlimited amounts of money that's, that's in
14 connection with an election. Congress reasonably
15 found that where there is a Federal official on the
16 ballot, that money spent in that election --

17 QUESTION: Not in my hypothetical. In my
18 hypothetical, it's not true.

19 MR. OLSON: Well, to the extent that under
20 some circumstances, there is -- it's inconceivable to
21 establish --

22 QUESTION: This is narrow tailoring?

23 MR. OLSON: Pardon me?

24 QUESTION: This is narrow tailoring?

25 MR. OLSON: No. I'm suggesting that where

1 this money has been spent in the past and as defined
2 by Congress in Section 323(b), Federal election
3 activity is relatively clearly defined. It's in
4 connection with -- Justice --

5 QUESTION: I didn't mean to interrupt you
6 in your sentence. But my question to you was going
7 to be, do you deny that a, that in a situation that
8 Justice Scalia describes, that there may be an
9 as-applied challenge whereas the possibility of that
10 situation does not necessarily carry a facial
11 challenge?

12 MR. OLSON: That's correct. And this
13 Court has said again and again to the extent that
14 there's an overbreadth challenged in the context of a
15 facial attack on a statute, the statute must be
16 substantially overbroad. There may be particular
17 as-applied challenges to particular aspects of this
18 legislation.

19 QUESTION: I think there are a lot of
20 situations like that. There is more than one. I
21 think that's, that's likely to be very common.

22 MR. OLSON: But Justice Scalia, what the
23 -- what Congress was looking at is that the huge
24 amounts of money being used at the time of elections
25 where Federal candidates were on the ballot,

1 political parties, and whether they be state parties
2 or national parties are going, are not going to pour
3 enormous amounts of resources into elections at which
4 there is not much of a context, a contest. State
5 parties can spend all of the Federal, the hard money
6 they want with respect to those activities and then
7 the Levin amendment, which was not required by the
8 Constitution, not necessary, but that gave an
9 additional ability of the state to use under certain
10 circumstances soft money, unregulated by the Federal
11 Government in those contexts.

12 The bottom, at the bottom, what this
13 legislation does is treat the very same abuses that
14 this Court was concerned about in Buckley v. Valeo,
15 and has said repeatedly are the types of concerns
16 that are legitimate for Congress to be concerned
17 about and to use the words of this Court, go to the
18 very fundamental integrity of our government. The
19 only thing in Title I that Congress did was to
20 control the source of contributions, unions and
21 corporate treasuries, and the amounts above a certain
22 amount, and a potential circumventions of those
23 limits. All three of those things this Court has
24 repeatedly said are constitutional, appropriate, and
25 necessary to protect the integrity of the Federal

1 electorate process. Thank you.

2 QUESTION: Thank you, General Olson.

3 Mr. Waxman, we'll hear from you.

4 ORAL ARGUMENT OF SETH P. WAXMAN

5 ON BEHALF OF INTERVENOR- DEFENDANTS

6 MR. WAXMAN: Mr. Chief Justice, and may it
7 please the Court:

8 The issues before the Court in connection
9 with Title I and the rest of this legislation raise
10 the most fundamental challenge for any, for any
11 representative democracy. It's a challenge that this
12 Court, beginning at least with Justice Frankfurter
13 and the United Auto Workers case and extending
14 through this Court's opinion in Shrink Missouri and
15 Beaumont, has recognized that is the imperative of a
16 representative democracy to retain the confidence of
17 the individual citizens with whom we all share the
18 franchise, that their vote counts, that big money
19 doesn't call the tune, and that when Members of
20 Congress and the President and Vice President make
21 decisions on our behalf, they do so because they
22 think it is in the best interest of their country and
23 our judgment as constituents and their own judgment.

24 And there was reference paid, reference
25 made to the testimony of members of this, of

1 Congress, respected members like Senator Simpson and
2 Senator Rudman, and it is very important to focus on
3 what those Senators said under oath. When Senator
4 Simpson testified, he testified that too often,
5 members' first thought is not what is right, or what
6 they will believe, but how it will affect
7 fundraising. Who, after all, can seriously contend
8 that a \$100,000 donation does not seriously alter the
9 way one thinks about and quite possibly votes on an
10 issue?

11 QUESTION: Was his testimony that others
12 thought that, or that he thought it?

13 MR. WAXMAN: He was -- his declaration is,
14 his sworn declaration is in the joint appendix,
15 Mr. Chief Justice, in the first volume. He was
16 speaking in general and about all of us, and so, too,
17 was Senator Rudman when he testified under oath that
18 large soft money contributions distort the
19 legislative process because they affect whom Senators
20 and House members see, whom they spend their time
21 with, what input they get, and make no mistake about
22 it, this money affects outcomes as well, and millions
23 --

24 QUESTION: Mr. Waxman, wasn't there
25 considerable dearth of evidence as to something a

1 little bit different, which are a quid pro quo?

2 MR. WAXMAN: There was, there was a
3 concession in this case that give, that there is no
4 specific evidence that a particular vote was changed
5 because of a particular donation, but of course,
6 that, too, was not true in Buckley v. Valeo. Buckley
7 v. Valeo, this Court made reference to the findings
8 of the D.C. Circuit which dealt exclusively with
9 excess access by the milk producers and others and
10 ambassadorships and the record in this case so
11 overwhelms the record before this Court in -- in
12 fact, it overwhelms by several orders of magnitude
13 the factual records that existed in Buckley and all
14 of its progeny. Now, Justice --

15 QUESTION: Talk is cheap. I mean, access
16 is not votes. Sure, Members of Congress are going to
17 give time to people who have given money to their
18 campaign. It doesn't mean they are going to vote
19 that way.

20 MR. WAXMAN: It certainly doesn't mean
21 they're going to vote that way, but --

22 QUESTION: So is this corruption?

23 MR. WAXMAN: The testimony --

24 QUESTION: Is the giving of more time to
25 them, is that corruption, or the appearance of

1 corruption?

2 MR. WAXMAN: The giving -- this Court has
3 said that corruption in the Buckley sense is the
4 influence of large donations on the judgment and
5 behavior of officeholders, and Justice Scalia, there
6 is a mountain of evidence from experts, members,
7 lobbyists, 60 pages of findings from Judge
8 Kollar-Kotelly and almost as many from Judge Leon
9 that access buys influence, and there are any number
10 of ways that cannot be statistically observed to
11 change outcomes besides a particular vote.

12 QUESTION: I think that's the bottom line.
13 That's the moment of truth. Do you get any votes for
14 the money that you contribute to the candidate? If
15 you don't get that, you are getting nothing.

16 MR. WAXMAN: You can go back and overrule
17 Buckley v. Valeo, and every other one of these cases
18 you have decided because that has never been proven.
19 It is very difficult to prove, and what Cong -- what
20 Congress needs to aim at, it needs to aim at the
21 willingness of the hundreds of millions of people out
22 there who think that their vote counts and think that
23 Members of Congress will be responsive to them and
24 who are justifiably cynical when they see that in the
25 last presidential election, \$500 million that law

1 does not permit to be used for Federal election
2 purposes was used for that purpose as the political
3 party's own expert, Professor La Raja acknowledged
4 that it almost all was used for Federal election
5 purposes.

6 This goes right to the question, it goes
7 right to Justice O'Connor's question about state
8 parties and I think the Chief Justice's question
9 about the national ban, and I'd like to address those
10 first.

11 QUESTION: Mr. Waxman, before you do, do
12 you have an answer to the argument put to General
13 Olson by Justice Breyer that if you don't allow the
14 parties to play in the soft money league, then the
15 money will go elsewhere. It will go to the
16 independent, sometimes highly ideological groups. It
17 will go to the NRA, for example. And that would make
18 things even worse than they are now.

19 MR. WAXMAN: Yes. I have, I have several
20 questions and that, that was my, the next point I was
21 going to address after the first two, which is, it is
22 wrong on about 10 different levels, but the bottom
23 line is if it turns out to be an abuse, that is, if
24 it turns out to be a phenomenon that creates
25 corruption as this Court defined it, either in the

1 case of individual contributions in Buckley or
2 through corporate and labor union for the principles
3 that were articulated by this Court in National Right
4 to Work and Austin and about which we'll be visiting
5 this afternoon, Congress can take care of the
6 problem. The one thing that --

7 QUESTION: Muzzle them, muzzle them, too.

8 MR. WAXMAN: The one thing --

9 QUESTION: That's the solution.

10 MR. WAXMAN: The one thing that we know
11 for certain, Justice Scalia, in this uncertain world,
12 there is at least one thing that is certain, and that
13 is that the people who enacted BCRA and the people
14 who populate the House and Senate, if they find that
15 the national political parties are being
16 disadvantaged or losing their central role, not only
17 in our political system, but in our system of
18 governance, they will be there to address it.
19 General Olson --

20 QUESTION: But that's just, that's just a
21 political calculation? There's no first, there's no
22 constitutional standing for parties to protect their
23 capacity to formulate policy?

24 MR. WAXMAN: To be sure, Justice Kennedy,
25 and if it were impaired, Congress could and would

1 address it. The data already shows that this year
2 the parties have raised more in hard money alone than
3 they raised in the last presidential election in hard
4 and soft money, and they are right on a trajectory to
5 raise \$1.5 billion in hard money for all of their
6 activities.

7 QUESTION: Well, your, your response to
8 Justice Kennedy suggests that the parties exist by
9 the leave of Congress. Surely that isn't the case?

10 MR. WAXMAN: Well, it, my argument doesn't
11 depend on if the, the parties, of course, aren't
12 mentioned in the Constitution, but they are a
13 fundamental aspect of our system of representative
14 government, and I, I meant to cast no aspersions on
15 the fact that they play a role not only in electing
16 candidates, but also in organizing in particular the
17 legislative process and the conduct of legislative
18 business.

19 My only point is that we can be certain
20 that if something comes to pass that our experience
21 so far shows is not going to come to pass, Congress
22 can come to their aid or someone can come to this
23 Court, but the fact --

24 QUESTION: But our experience in
25 Buckley was not --

1 QUESTION: Why do you say that? The
2 parties have opposed this legislation. They are on
3 the other side of this case, and you are coming here
4 and telling me that the Congress is more concerned
5 about the good of the parties than the parties
6 themselves are. They are on the other side. They
7 think it's hurting them

8 MR. WAXMAN: There is, there is no
9 question that the, that telling the national
10 committees of the, the national committees of the
11 national parties that you are now required to accept
12 only funds that are subject to the limitations,
13 restrictions, and reporting requirements of the
14 Federal election, Federal law is a limitation and it
15 requires them to accommodate it. I'm only saying
16 that you cannot strike this law down on its face
17 based on a Chicken Little prediction that something
18 that by all accounts is not happening at all does
19 happen.

20 And the notion that corporate and union
21 money is just going to flow from, these corporations
22 that gave a million dollars to each party at the same
23 time, is going to flow to the National Rifle
24 Association or the National Abortion Rights League, I
25 think mistakes the important laudable role that the

1 parties play, and mistakes the fact that the
2 evidence in this case is that those contributions
3 were strong-armed.

4 You look at the testimony in the record
5 and the amicus brief of the business officials, these
6 people were not dying to spend millions of dollars to
7 both political parties, in order to support
8 democracy. And the notion that they are going to go
9 running to the National Rifle Association or to
10 NARAL, I think has no basis in the record.

11 QUESTION: And it's also, I suppose,
12 unlikely that they would contribute both to the NRA
13 and also to a gun control organization, which they
14 do --

15 MR. WAXMAN: I'm not sure that that's
16 true, but however they choose to use their
17 shareholders' resources, I think is up to the
18 democracy of shareholders.

19 QUESTION: Mr. Waxman, these people, these
20 independent groups make independent expenditures. On
21 the party side, once a candidate has been nominated,
22 is there practically any such thing as an independent
23 expenditure, as opposed to a coordinated expenditure
24 by a party?

25 MR. WAXMAN: I have been told that there

1 are ways to read this court's opinion in Colorado
2 Republican I and II, to limit that distinction. That
3 is, the concept of an independent expenditure to the
4 one which the Court was presented, which is a
5 circumstance in which the party, in that case the
6 Colorado Republican Party, didn't have a nominee.
7 And therefore, it was rather difficult for it to be
8 coordinating. But I believe that --

9 QUESTION: There is another distinction,
10 too. That case, the prohibition on expenditures
11 there applied to both hard and soft money. We're
12 only talking about prohibitions that did not involve
13 hard money.

14 MR. WAXMAN: That is correct. And this
15 does go to the point that the Chief raised and
16 Justice O'Connor raised about 323(a) and 323(b) that
17 I hope I will be able to address. On the state
18 parties, you've heard the quote from Mr. Burchfield.
19 He was simply stating the obvious which is, we are
20 talking here, as the act defines it, about national
21 parties that organize themselves in national
22 committees, state committees and local committees.

23 And all of those parties, all of those
24 committees act together to elect their slate of
25 candidates. And it is my friends on the other side

1 of this case and not us that demean the role of the
2 state and local committees by essentially attaching
3 their activities to races for dogcatcher and state
4 assemblymen, when in fact, they play the central role
5 in our system in identifying, grooming and supporting
6 candidates for Federal office.

7 The candidate on the Ohio ballot for
8 Republican for Senate is nominated and placed there
9 by the Ohio Republican Party. And you asked about
10 the Tamraz or Riatti contributions and what evidence
11 there was about it. The evidence is that if 323(b)
12 were not in place, that is, there were just a
13 national -- the national committees are out of the
14 soft money business, most of the poster children in
15 the Thompson committee report, Mr. Riatti in '92,
16 Mr. Tamraz, Carl Lindner, the Hudson Indian gaming
17 casinos. All of the greatest hits that Senator
18 Thompson came up with.

19 Those were people that gave money to the
20 state and local parties in exchange for benefits that
21 they perceived from Federal officeholders.

22 QUESTION: You said a moment ago,
23 Mr. Waxman, that the Ohio Republican candidate was
24 placed there by the Republican state committee. Well,
25 what if a state has a primary? I mean, if a state

1 has a primary, it's the result of the primary
2 election that places them on the ballot, not the
3 state nomination.

4 MR. WAXMAN: Yes, to be sure. And my
5 point, Mr. Chief Justice, is that to understand why
6 Mr. Burchfield was correct in saying that this
7 problem, this massive loophole had to address the
8 state and local committees, you need to -- it simply
9 reflects the reality that those committees, at least
10 before they became under the big soft money regime,
11 what one expert called offshore banks of the national
12 committees, they play a very important role in
13 selecting who are going to be the Federal candidates.

14 QUESTION: Mr. Waxman --

15 QUESTION: A very minor detail while
16 you're on it. What is technically the reason why a
17 national committee can't give hard money to a local
18 district using Levin funds? And the second thing is,
19 why is it not possible to have a segregated account
20 for a national party in which a person would put in
21 money that was only going to be used to give to the
22 state for elections where there was no Federal
23 candidate on the ballot? Those are two detailed
24 matters I just want to get your response to.

25 MR. WAXMAN: As to the former, we don't

1 think that the contribution, the soft money
2 contribution ban is subject to strict scrutiny, and
3 therefore, the fact that there may be some other way
4 to sort of carve out money that's given to the
5 national committee purely for state elections is a
6 constitutional deficiency.

7 But the argument -- the complicated point
8 that Mr. Burchfield was making about how the Levin
9 Amendment works was simply mistaken. It was mistaken
10 in several respects.

11 First of all, there is no prohibition --
12 first of all, the Levin Amendment is an option. If
13 each state and local committee doesn't want to have
14 it, they don't have to use it. And if they do use
15 it, nothing prevents them from spending it together.
16 They just can't transfer money, this soft Levin
17 money, from one committee to another to essentially
18 recreate the problem that existed before, which is
19 phenomenal amounts of soft money all being
20 transferred to a few battleground elections.

21 This is important. A national committee
22 official may -- and the FEC has confirmed this
23 repeatedly -- may in his official capacity, under the
24 stationery of the national committee, solicit funds
25 up to the hard money limits for any state and local

1 candidate or any state and local committee.

2 That is, it is simply false that a member
3 of the Republican National Committee cannot raise \$25
4 to support Haley Barbour's candidacy. They can. And
5 they can do it in their official capacity up to the
6 hard money limits into an account that Haley Barbour
7 -- a Federal account that Haley Barbour has set up
8 and would need to set up in any event under 323(f)
9 and 323(b).

10 QUESTION: Even if the state committee has
11 chosen the option?

12 MR. WAXMAN: This is -- yes. This is hard
13 money. And in fact, the national committees, even
14 for a local committee that's chosen to use the Levin
15 soft money, the law permits the national committees
16 to send hard money to that local committee, provided
17 it is not the money that creates the specific match
18 for the allocation.

19 And the notion that -- a wedge is driven
20 in the midst that sort of creates a rift in this
21 integrated national organization is simply wrong.

22 QUESTION: It's a pretty big loophole, I
23 guess, isn't it? I mean, they write and say, Joe
24 Rich, give your 6 million to the following 500
25 committees. They write 50 checks of \$10,000 each.

1 MR. WAXMAN: No, the homegrown -- the
2 so-called homegrown requirement -- I realize the
3 Levin Amendment provisions are technical. There is a
4 reason that you are not allowed to do that, and that
5 goes again to the point --

6 QUESTION: That's not homegrown, my
7 example.

8 MR. WAXMAN: That's not homegrown. And it
9 goes to the point about why there couldn't be or
10 perhaps why didn't Congress just say let's create a
11 separate account for the national committees, which
12 is that the people who gave these huge contributions,
13 the corporations and unions, did not care where it
14 went. They cared what it bought them.

15 And the notion that if a member of the
16 national -- if Terry McAuliffe comes to somebody and
17 says, we really need \$6 million, it's just going to
18 be used for state and local elections, but we really
19 need it, that just recreates the problem that
20 Congress was trying to address.

21 Now, I believe, Mr. Chief Justice, that in
22 the course of that rambling discourse, I answered
23 your question about the national ban. But if I
24 didn't, I would love to address myself to it.

25 You asked, Justice Scalia, at the outset,

1 is every problem soluble. And the answer -- I hope
2 that was a rhetorical question. In any event, this
3 problem --

4 QUESTION: It is for me. I'm not sure it
5 was for you.

6 MR. WAXMAN: I believe it is, but out of
7 respect for the Court and in an effort to be
8 responsive, I won't treat it as such. No problem is
9 solvable and as this Court's jurisprudence shows in
10 this area, no solution is permanently solvable.

11 We have a dialectic going on here between
12 people who want to use money to influence people in
13 government, and the institutions that need to
14 preserve a sense of integrity and faith in the
15 process. And what my colleagues on the other side
16 are urging here -- there has been a lot of debate
17 about the sort of capillaries of the system, but very
18 little talk about the core of it.

19 What they are urging is that this law be
20 struck down on its face. And that is a counsel of
21 despair, and that is an approach that this Court and
22 this Congress and this people cannot countenance.
23 Thank you very much.

24 QUESTION: Thank you, Mr. Waxman.
25 Mr. Starr, you have two minutes remaining.

1 REBUTTAL ARGUMENT BY KENNETH W. STARR

2 ON BEHALF OF THE MCCONNELL PLAINTIFFS

3 MR. STARR: Thank you, Mr. Chief Justice.

4 Very briefly. Point 1. There has been a tendency in
5 much of the argument to equate candidates with a
6 political party. That is quite incompatible with
7 this Court's cases, Colorado I, Colorado II. It also
8 is inconsistent, I think, in a very fundamental level
9 with Citizens Against Rent Control.

10 Parties are very keenly interested -- I
11 cite California -- in ballot initiatives and the
12 like. Parties exist for a number of reasons. This
13 Court said as much in the principal opinion in
14 Colorado I. Parties exist for the purpose of
15 bringing people together to articulate a world view.
16 A vision of what, in fact, is good for society. And
17 political parties are now finding themselves -- and
18 we point to the record in California -- at
19 significant disadvantages because of the here and now
20 effect of this law.

21 There is less revenue flowing which, in
22 the California Democratic Party has spoken for
23 itself. You have that in the record. The California
24 Democratic Party has told the Court, respectfully but
25 firmly, that they depend upon, in that huge state,

1 large individual contributions. And the people of
2 California -- this is not just one party speaking --
3 the people of California spoke through the
4 proposition embraced in the year 2000, saying
5 political parties are insulators and buffers. They
6 are guards against corruption. That is a very
7 pivotal point in terms of the shift -- I thank the
8 Court.

9 QUESTION: Thank you, Mr. Starr. We'll
10 stand at recess until 1:30.

11 (Whereupon, at 12:00 p.m., oral argument
12 in the above-entitled matter was recessed, to
13 reconvene at 1:30 p.m., this same day.)

14 AFTERNOON SESSION

15 (1:30 p.m.)

16 CHIEF JUSTICE REHNQUIST: Mr. Burchfield,
17 we'll hear your rebuttal.

18 REBUTTAL ARGUMENT OF BOBBY R. BURCHFIELD

19 ON BEHALF OF THE POLITICAL PARTY PLAINTIFFS

20 MR. BURCHFIELD: Mr. Chief Justice, and
21 may it please the Court:

22 Time permitting, I'd like to make three
23 brief points. The first is Section 323(a), the
24 across-the-board criminal prohibition on national
25 parties can be well contrasted with Section 323(e),

1 which addresses Federal officeholder solicitation.
2 In 323(e)(1)(B), there is a specific allowance for
3 Federal officeholders to raise non-Federal money up
4 to the analogous Federal limit for state and local
5 candidates. There is no similar allowance for
6 national party officials, and the conclusion that all
7 of my clients have reached is that national party
8 officials are unable to raise non-Federal money, even
9 up to the analogous Federal limit if it goes into a
10 state party, a state candidate's campaign account
11 because that account is not regulated by Federal law.

12 Number two, and to go to Justice
13 O'Connor's question, the potential effect of
14 corruption, the potential corruptive effect of such
15 donations is minuscule, nonexistent, attenuated at
16 best, in the words of Colorado I. The \$15.6 million,
17 by the way, that the RNC spent in state and local
18 election activity in 2001 was 30 percent of the
19 non-Federal money the party raised that year, 30
20 percent. It's not an insubstantial amount in any, to
21 any degree.

22 Second point, with regard to Section
23 323(b), which is the restrictions on state parties,
24 the corruptive potential of donations to state and
25 local parties for use in Get Out the Vote activities

1 directed to state and local candidate elections is
2 again minuscule, at best attenuated, in the words of
3 Colorado I. But that activity, if it says go to the
4 polls on November 8th, is swept within the definition
5 of Federal election activity. The California parties
6 send out hundreds of different mailings every year
7 throughout their states urging voters to go to the
8 polls and those mailings mention only state and local
9 candidates. That activity is swept within the
10 definition of Federal election activity and is now
11 federally regulated activity and that, in that
12 respect 323(b) goes well beyond a congressional
13 interest in eliminating corruption of Federal
14 candidates and officeholders.

15 Final point, and that is with regard to
16 Section 213. The only illusion to that was with
17 regard to the coordination of activities among the
18 national parties and, and the candidates. 213
19 addresses two different uses of Federal money, hard
20 money. It puts the parties to a single unified
21 irrevocable choice to make coordinated expenditures
22 under the statute, Section 441a(d) or their
23 constitutional right to make independent expenditures
24 recognized by this Court in Colorado I. The
25 Government, and this is very important, the

1 Government has never advanced any anti-corruption
2 rationale to put the parties to that choice. The
3 only rationale we've gotten is Congress can condition
4 the statutory right simply because it's Congress.

5 There is no suggestion that using hard
6 money for one is more corrupting or is corrupting in
7 any way than using hard money for the other. If
8 there are no questions by the Court.

9 QUESTION: Thank you, Mr. Burchfield.

10 MR. BURCHFIELD: Thank you.

11 QUESTION: Mr. Abrams, we'll hear from
12 you.

13 ORAL ARGUMENT OF FLOYD ABRAMS

14 ON BEHALF OF MCCONNELL PLAINTIFFS ,

15 MR. ABRAMS: Mr. Chief Justice, and may it
16 please the Court:

17 As we turn from Title I to Title II, we
18 turn to efforts by Congress to limit, to regulate,
19 and ultimately to punish what are only expenditures,
20 expenditures not made in coordination with parties or
21 candidates which would result in them being treated
22 as contributions, but independently, and so we deal
23 here this afternoon in an area which as this Court
24 observed in Colorado II, it has routinely struck down
25 expend -- any limitations in this area. We are all

1 agreed here that strict scrutiny applies. There is
2 no dispute about that, and I think we're all agreed
3 that this is a content-based restriction on speech,
4 whether we're agreed or not, it is a content-based
5 restriction on speech.

6 I'd like to start with just a few
7 observations of --

8 QUESTION: Do you take the position that
9 no effective regulation of electioneering
10 communications is permissible?

11 MR. ABRAMS: I take the position that
12 electionary communications as defined in the statute
13 is so overbroad that the totality of what is
14 encompassed in it is not regulatable. Electionary
15 communications includes within it express advocacy,
16 what is now or what had been subject to regulation,
17 and to that extent, it is subject to regulation.

18 QUESTION: Beyond express advocacy, do you
19 concede that anything can be regulated?

20 MR. ABRAMS: I thought very hard about
21 that, Justice Souter, to see if there was something I
22 could give you in that respect. No, I do not concede
23 that there is anything beyond express advocacy.

24 QUESTION: Do you also recognize that
25 express advocacy is the easiest thing in the world to

1 avoid? You just say everything about how great your
2 candidate is or how terrible the opponent is, except,
3 and go to the polls and vote for X.

4 MR. ABRAMS: I understand that that
5 happens. I understand what this Court in Buckley
6 understood just as well, when it said almost the same
7 thing. The Buckley Court did not say that express
8 advocacy was going to catch most, not to say all --

9 QUESTION: But, but Buckley was dealing
10 with two words, relative to. It was not confronted
11 with this problem as all.

12 MR. ABRAMS: But Buckley Court was
13 prescient in understanding that what has happened was
14 going to happen. That is to say that what, what
15 express advocacy covers would not be enough to cover
16 the range of conceptions, people, and organizations
17 and unions and corporations and others could come up
18 with.

19 QUESTION: Well, I understand --

20 MR. ABRAMS: And when they balanced the
21 First Amendment interest against that --

22 QUESTION: I understand why you would want
23 to keep what one of the briefs calls this impregnable
24 line because then you are within Buckley, but it
25 seems to me that this distinction is just

1 meaningless, that the findings below, in Judge
2 Kollar-Kotelly's opinion make it clear that this is
3 just, this is just a silly distinction in many cases.
4 Why don't we just junk it and begin with there, begin
5 anew, and begin anew?

6 MR. ABRAMS: It seems to me that, that
7 there are only two choices, that I would urge on you
8 at least, are constitutional choices. One is to
9 adhere to Buckley and to do so, understanding that,
10 or accepting, excuse me, that express advocacy is as
11 far as the First Amendment will allow you to go in
12 terms of allowing regulation.

13 QUESTION: Mr. Abrams --

14 MR. ABRAMS: The other is to try to make
15 sense in the sense that you are using the word, Your
16 Honor, sense by scrapping it and in a sense starting
17 over. You don't have to scrap it in order to strike
18 down this statute.

19 QUESTION: But shouldn't you at least be
20 --

21 MR. ABRAMS: Because of its overbreadth.

22 QUESTION: -- able to answer, answer the
23 question, why should a speech urging expressly to
24 elect a particular candidate to the President of the
25 United States, why should that speech be entitled to

1 less constitutional protection than a speech urging
2 the ratification of the Panama Canal Treaty, for
3 example?

4 MR. ABRAMS: The only reason and the only
5 justification is that that speech becomes, as it
6 were, so much like a contribution, so much like a
7 final act of saying, vote for the candidate, not for
8 this reason, not by inference, not by suggestion, but
9 that by finally giving an unambiguous statement --

10 QUESTION: But you'd therefore get less
11 constitutional protection. That's what you're
12 saying, I think.

13 MR. ABRAMS: It was afforded that little
14 sliver, and it was intended to be a sliver, as I read
15 Buckley and MCFL was afforded less constitutional
16 protection.

17 QUESTION: But it's second-class speech
18 under your submission.

19 MR. ABRAMS: With respect -- that was your
20 submission. I mean, that, that --

21 QUESTION: You're saying the only reason
22 is that Buckley said so, and so we'll stick to it.

23 MR. ABRAMS: No, I'm not saying it's the
24 only reason. I am saying that a flat statement
25 saying vote for somebody can be distinguished not

1 only from how to vote on the Panama Canal.

2 QUESTION: I agree it can be distinguished

3 --

4 MR. ABRAMS: But --

5 QUESTION: -- but the question is, why
6 should it get less constitutional protection than the
7 other speech? That's what I don't understand.

8 QUESTION: Maybe it's more likely to
9 induce gratitude and hence more likely to lead to
10 the, quote, appearance of corruption.

11 MR. ABRAMS: I think the very unambiguous
12 nature of it might, as Justice Scalia suggests, might
13 be more like -- I'm sorry.

14 QUESTION: Excuse me. Nothing in the
15 record bears that out. The findings --

16 MR. ABRAMS: Yes.

17 QUESTION: -- of all of the district
18 judges, I think, were quite compelling on this point
19 that the really astute, sophisticated candidate
20 doesn't say vote for me either. He uses or she uses
21 some other means. I mean, the speech law has evolved
22 since Buckley, which is perhaps one reason this Court
23 shouldn't try to control its evolution.

24 MR. ABRAMS: Well, speech law has, if
25 anything, become more protective since Buckley in the

1 First Amendment area. And if, if you were to move in
2 either direction, I would certainly urge you to move
3 in the direction of affording more protection to the
4 direct advocacy that Justice Stevens asked me about,
5 rather than less protection for the ad that I
6 provided you with, Congressman Myrick, this is from
7 the AF of L, Congressman Myrick vote against most
8 favors nation's treatment for communist China.

9 Now, that is swept in as part of
10 electionary communication. And I would certainly
11 urge you if you have any inclination to move in the
12 direction of moving away from Buckley, and there's no
13 doubt that, that there are parts of Buckley
14 in tension with each other, that if you were you to
15 do that that you ought not to allow to be swept in
16 the unprotected area advertisements like that.

17 QUESTION: But it's not that they can't
18 run the ad. I mean, the unions can run the ad. The
19 corporations can run the ad. The ACLU can run the
20 ad. They all can run the ad. It's just that they
21 have to pay for it out of a PAC.

22 MR. ABRAMS: And that's an --

23 QUESTION: So why is that such, what is,
24 particularly, and I wanted to you to get to this, if
25 the disclosure regulations, the new ones, the new

1 provisions in the law on independent expenditure --

2 MR. ABRAMS: Yes.

3 QUESTION: -- are constitutional, if they
4 are constitutional, then it's pretty hard for me to
5 see any additional burden on any of these
6 organizations to make this expenditure on the ad you
7 are worried about through a PAC. What's the problem
8 of saying, go through the PAC, and what we achieve by
9 that is limiting the amount of money that any one
10 individual can give, and what we lose by it is
11 nothing.

12 MR. ABRAMS: You mean --

13 QUESTION: Now, what's your, what's your
14 response to that?

15 MR. ABRAMS: My first response is that you
16 lose a lot of speech.

17 QUESTION: Why?

18 MR. ABRAMS: Why? Because there much less
19 money we will be obtained. That was the idea of it
20 was to take money out of politics, if you will. PACs
21 don't raise as much money as the AF of L have. The
22 AF of L spent more, the record reveals on its
23 advertisements, than it raised with the entirety of
24 its PAC. Its PAC raised \$1.1 million --

25 QUESTION: And so what your point is --

1 MR. ABRAMS: -- and spent \$16 million.

2 QUESTION: -- that although it's all right
3 go to Joe Moneybags and say Joe Moneybags, you can
4 only give \$100,000 every two years to the Democratic
5 Party, it's not all right to go to Joe Moneybags and
6 say Joe Moneybags, you can only give \$100,000 a year
7 to the AFL-CIO or the pharmacies or somebody for the
8 purpose of running a similar ad.

9 MR. ABRAMS: Well --

10 QUESTION: In other words, you can limit
11 Joe Moneybags when he gives the money to a political
12 party, whose whole objective is speech and politics,
13 but you can't limit Joe Moneybags when he gives the
14 money for the same type of activity to another
15 organization.

16 MR. ABRAMS: Well, my side of the table,
17 Your Honor, has not exactly advocated limiting Joe
18 Moneybags and giving money to the Democratic Party.
19 That's what they're saying. What I'm saying to you
20 is that as regards an organization, either the, we
21 call the ACLU, the AF of L, whichever one you want to
22 pick, there are burdens that this Court has
23 recognized, serious burdens with having a PAC. There
24 is also in this case a level, a level of falsity that
25 the entity would have to engage in with respect to

1 what it was doing, because it is not true that this
2 is all about politics.

3 We have put before you advertisements
4 which are not simply political advertisements, and
5 yet to solicit someone for a PAC you must notify the
6 person of the political purposes of the PAC. You
7 must spend the money only for political purposes.
8 These are requirements in Section 441b with respect
9 to a PAC. It is not so that the ACLU when, if it
10 wants to run an ad in the last 60 days of the 2004
11 campaign criticizing President Bush for his position
12 on civil liberties, an ad that would be criminal
13 under this statute if it came from its treasury
14 funds, it is not true that that is a political ad.
15 Now, our friends here say, well, it might have
16 effect, and that's something I want to talk about.

17 QUESTION: Why couldn't the ACLU simply
18 call its PAC the non-partisan issue-oriented PAC? If
19 -- if the ACLU is worried about --

20 MR. ABRAMS: I'm not talking about the
21 name. Justice Ginsburg, it's not the name --

22 QUESTION: Misportraying what it's doing
23 --

24 MR. ABRAMS: -- of the PAC that I'm
25 worried about. I'm talking about the institution of

1 a PAC itself, a PAC pursuant to 441b(6)(3)(b) must
2 notify anyone solicited of its political purposes.
3 What I'm arguing to you is that --

4 QUESTION: And he couldn't say, our
5 political purpose is to be non-partisan, we are
6 interested in the issue, not the candidate?

7 MR. ABRAMS: No, I don't think it is
8 telling someone of political purposes if you say, we
9 are not, we don't have political purposes.

10 QUESTION: You mean the FEC would say,
11 ACLU, sorry, you can't do that, you have to otherwise
12 identify your PAC?

13 MR. ABRAMS: I don't know what they would
14 do under this criminal statute. I do not think that
15 the ACLU ought to have to run the risk of the FEC
16 passing judgment.

17 QUESTION: Would they get an advisory
18 opinion from the FEC and then they would avoid the
19 risk?

20 MR. ABRAMS: Two answers. First, that is
21 not usually the most satisfactory First Amendment
22 answer. If they want to run an ad in the middle of
23 the campaign, to have to go to the government to get
24 permission to run the ad --

25 QUESTION: Not in the middle of the

1 campaign. They could do it any time.

2 MR. ABRAMS: Yes, but --

3 QUESTION: If they want to clarify what
4 they have to say about their PAC, to make it clear
5 that they are not advocating the election of a
6 particular candidate, but that their concern is
7 at issue --

8 MR. ABRAMS: They can go -- they can seek
9 such a response from the Commission. I don't think
10 my friends here would argue with me that that's not
11 such an easy effort. It takes at least weeks and
12 weeks to get a response. There are new organizations
13 being formed all the time that would have to get that
14
15 response.

16 QUESTION: But your basic point is that
17 they're not going to be able to raise as much money
18 as the organization itself has at its disposal
19 anyway, whatever you call the PAC.

20 MR. ABRAMS: The NRA -- let me give you an
21 example. The NRA raised an enormous amount of money
22 in the last campaign. They were mentioned a lot on
23 the floor of Congress with great unhappiness by a lot
24 of people. They appealed to 80 million gun owners in
25 America. They have 4 million members. Under the

1 standard rules that apply with respect to a PAC, they
2 could only get money from the 4 million people, not
3 from the 80 million. They could not raise -- they
4 raised \$300 million.

5 QUESTION: Basically that -- I didn't
6 mean to interrupt you. Go ahead.

7 MR. ABRAMS: Sorry. I'm finishing it.
8 They raised \$300 million from their ads on television
9 and spent it on more ads to get out their views. And
10 number one, I think that's part of living in a
11 democratic society. Number two, to say that they are
12 to go down from the sort of level they were at, in
13 terms of the people they may appeal to, which is the
14 way PACs work and quite properly the way PACs work.

15 But that they must, as a matter of law,
16 abandon their general efforts to raise money from the
17 public, is a very significant burden on speech --

18 QUESTION: I'm not quite clear on that.
19 Why is that -- I thought all they had to do was, if
20 they want to raise money for these kinds of ads, 60
21 days before the election, mentioning the candidate's
22 name, is in their advertising, they say, please send
23 your check to the NRA Election Time PAC. Do they
24 have to do more than that?

25 I thought they had to open a bank account,

1 they have to appoint somebody a treasurer, they have
2 to make disclosure. And it's a slight difference
3 there between over \$250 rather than over \$10,000.
4 And that's it.

5 MR. ABRAMS: And they're only allowed to
6 solicit from their membership.

7 QUESTION: In other words, you can't go
8 and ask -- if I start a PAC or anybody here starts a
9 PAC, you can't go and just ask the general public to
10 belong?

11 MR. ABRAMS: No, the general public --

12 QUESTION: That's NRWC --

13 MR. ABRAMS: NRWC says --

14 QUESTION: Can you ask them to join the
15 PAC?

16 QUESTION: Can you ask them to join the
17 PAC?

18 MR. ABRAMS: No. The general public may
19 not belong to the PAC.

20 QUESTION: But can the NRA go out and say,
21 look, we want you to join the NRA, X dollars. We
22 also want you to give the PAC some money, Y dollars.
23 Can they do that?

24 MR. ABRAMS: Yes, they can get people to
25 join the NR --

1 QUESTION: If they can do that, then your
2 argument boils down to the fact that when people are
3 told that they have to join, and the money is going
4 to be used for this purpose, they're going to be less
5 interested in doing it. And I don't know why that
6 entitles you to a preferable advertising break, in
7 effect, in the name of the First Amendment.

8 MR. ABRAMS: Look at the burden on speech
9 that we are talking about imposing on an organization
10 like this. Instead of making general appeals to the
11 public, instead of having their say, their argument
12 in saying, send us money, et cetera --

13 QUESTION: Yeah, but your general appeals
14 to the public, it seems to me, are to join the NRA.
15 And therefore, the universe of people who are
16 financing the advertisement is limited to members of
17 the NRA.

18 MR. ABRAMS: It is limited to members of
19 the NRA.

20 QUESTION: So it's the same limitation as
21 on the PAC.

22 MR. ABRAMS: No, sir, the general appeal
23 to the public is not limited to the NRA.

24 QUESTION: But the appeal to the public is
25 not just to make this ad. It's to join the NRA and

1 get all the benefits of membership, which include a
2 magazine and all sorts of other things.

3 MR. ABRAMS: But people were free, until
4 this statute, to send contributions to the NRA. They
5 were free to send money, not just to join.

6 QUESTION: So what the interest at stake
7 here is the nonmembers of the NRA who want to support
8 the policies of the NRA?

9 MR. ABRAMS: Yes, the difference is
10 between the 80 million people who have guns and the 4
11 million who are now members.

12 QUESTION: I assume that there is a
13 membership fee that goes along with joining most
14 organizations. So if you want to contribute \$25 to
15 the campaign, you would have to contribute 50, in
16 effect, to join the NRA, plus the 25.

17 MR. ABRAMS: Yes.

18 QUESTION: So my impression is -- this is
19 a question of the record, really. And I see you have
20 the point. I mean, there could be burdens of the
21 kind you're recommending. And it also could be
22 overly broad because they're the genuine issue ads.
23 So I put this on the one side.

24 And then I put on the other side that if
25 we strike it down -- well, I mean, I wouldn't say

1 forget the whole statute, but it seems pretty close
2 because you get several hundred million dollars to
3 run exactly the same ads that are being run right now
4 which were about \$500 million worth of these ads
5 saying -- they don't say vote against Smith. They
6 say, tell Smith what a rat he is. That's what
7 they -- and it will just be a loophole about 50 miles
8 wide.

9 And all this money, instead of going to
10 the Democratic National Committee or the state
11 committee or something, go right to the NRA, right to
12 the environmental groups, right to the Right to Life
13 groups, right to the groups the opposite -- in other
14 words, everyone who has a cause will get the money
15 and run the same ads that really this was designed
16 to --

17 MR. ABRAMS: Well, everyone who has a
18 cause may get more money, yes. Will they run the
19 same ads as the political parties would have run?
20 No. Will they run the same ads as the candidates
21 would have run? I don't think you can assume that
22 either.

23 I mean, the only thing in your record,
24 incidentally, here, about a breakdown in this area,
25 and I think this may be of interest to you, is that

1 in the 2000 presidential campaign, of all the ads on
2 television, 51 percent were by candidates, 41 percent
3 were by parties and 8 percent by organizations of the
4 sort that we are talking about here now.

5 QUESTION: Would you clarify something in
6 the record for me? Because I was under the
7 impression with regard to the NRA, that there
8 basically were two pots of money, the PAC money and
9 its own money, and its own treasury, if it had wanted
10 to spend its own money.

11 You're telling me the real vice in this is
12 that there is a third category, namely money
13 solicited from gun owners who are nonmembers, but
14 could not belong to the PAC. Now you say that
15 that third --

16 MR. ABRAMS: No, I'm not. I'm saying that
17 what you call their own money includes money obtained
18 by solicitations.

19 QUESTION: But that's to join the NRA.
20 There is not a separate fund --

21 MR. ABRAMS: It's to join --

22 QUESTION: Contributed to by gun owners.

23 MR. ABRAMS: It's not a separate fund.

24 No, I'm not suggesting it's a separate fund. I'm
25 saying that the totality of the amount received by

1 the NRA includes membership fees and other amounts
2 contributed by people.

3 QUESTION: But it includes responses to a
4 request like this. You don't have to join the NRA to
5 give us money to run these ads. Please give us money
6 to run these ads. That's what goes into their
7 treasury now and you're saying they can't get that.
8 Is that it? Is that the way it works?

9 MR. ABRAMS: I'm not telling you that the
10 solicitations are made in those words. I'm telling
11 you that is what happens.

12 QUESTION: That's the functional result?

13 MR. ABRAMS: Yes.

14 QUESTION: Would you agree with the
15 implication of Justice Breyer's suggestion that in
16 order to save section 1, we have to abridge First
17 Amendment rights under section 2? I suppose it could
18 work the other way around. Section 2 must be
19 stricken because there is a First Amendment
20 violation, and Title I becomes meaningless.

21 MR. ABRAMS: We thought of putting section
22 2 first in the brief. I don't think that you can
23 justify, Justice Breyer, striking down or even
24 viewing more harshly, that is to say, our arguments.
25 That is to say, you ought not to reject our arguments

1 about Title 2, whatever you do about Title 1.

2 QUESTION: What is directly worrying me is
3 I think that Title II will make you go through PACs
4 to run certain ads. A handful maybe, maybe a little
5 bit more than a handful, that are genuine issue ads.

6 And to the extent that you have to go
7 through the PAC, that is an added burden and I've
8 been trying to pin that down that you've been very
9 helpful on. At the same time, there may not be too
10 many. And it may open a tremendous loophole in
11 what's been traditional, the corporations and labor
12 unions do not and cannot contribute to getting people
13 elected, at least not through spending money and
14 contributions at -- you know what I'm referring to.

15 And also, it might open a major loophole
16 where Joe Moneybags makes the contribution to the
17 labor union or to the corporation that he previously
18 is now forbidden to give to the party itself. Those
19 are the two things and you've got the first half
20 addressed, and I would like to hear the second two.

21 MR. ABRAMS: I would like to start by
22 saying that you mentioned the question of the amount
23 of ads in question. I'm not going to get involved in
24 the internecine warfare we've had about quite what
25 the number is. But I do want to indicate that we

1 have one judge, Judge Henderson, who has indicated
2 that it is at least 34 percent of all the ads are by
3 any standard, quote, genuine, unquote, and perhaps as
4 high as 64 percent.

5 You have other judges and entities on
6 their side of the line that have used figures like 14
7 percent and the like. Now, all this of course is
8 inconsistent with the notion of what express advocacy
9 is. But taking even their definitions, as it was,
10 we're talking about a statute which by any standard
11 ever used by this Court would be deemed to be
12 overbroad.

13 You can't - I mean to say -- you used the
14 14 percent number. 14 percent of these ads -- and I
15 think there are many more. 14 percent are ads which
16 in the ordinary course would be considered, quote,
17 genuine, unquote, however we define that. And yet
18 sustain a statute which would -- and I use the word
19 deliberately -- criminalize them

20 QUESTION: Is it plain from the record
21 that when a -- and I just don't remember this, but I
22 remember the terms. But I don't remember the answer
23 to this question. Is it plain that in these
24 discussions, the term genuine issue ad meant an ad
25 that dealt with issues to the exclusion of any

1 reasonable interpretation that it also dealt with
2 advocacy for candidates?

3 Because most of these ads, I think
4 everybody would agree, are hybrids. Sure, they
5 really do address issues, and there is also a very
6 clear implication about what they want you to do in
7 the ballot booth. So does genuine exclude the
8 possibility of a ballot booth implication?

9 MR. ABRAMS: Let me say the word genuine
10 comes from the study conducted by the Brennan Center,
11 in which they asked students from a particular
12 university to opine as to the intent, the state of
13 mind --

14 QUESTION: Was this a really good
15 university?

16 (Laughter.)

17 MR. ABRAMS: The state of the mind of the
18 people that did the ads.

19 QUESTION: And it was out of context, too.

20 MR. ABRAMS: That's all it was.

21 QUESTION: You just saw the ad.

22 MR. ABRAMS: Do you think -- you've
23 watched these ads, you've looked at these ads. Sorry,
24 they don't even look at the ads. You've looked at these
25 pictures like the ones that are at the back of my

1 brief and at the back of the intervenor's brief.

2 You've looked at these pictures.

3 Tell us, now, is this a genuine ad -- an
4 ad genuinely directed at an issue or is its purpose
5 electoral? They did not. To answer you directly
6 now -- did not permit for a moment an answer of both.

7 QUESTION: Yeah, it was a false dichotomy.

8 MR. ABRAMS: Absolutely.

9 QUESTION: And because it was a false
10 dichotomy, I don't know what to make of 7 percent or
11 14 percent.

12 MR. ABRAMS: What I think you can make is
13 this, is that if given no opportunity at all to say
14 both, they said that the purpose, in their mind, was
15 not electoral, but issue oriented. I think you ought to
16 give us at least that. I mean the both -- the both answer
17 --

18 QUESTION: This was the defendant's
19 evidence, wasn't it?

20 MR. ABRAMS: Yes, sir, yes. It was the
21 Defendant's evidence.

22 QUESTION: I must confess that I don't, I
23 don't really understand, it's more, what is the
24 purpose of an issue ad unless it is to persuade the
25 voter to take some action that will enable that issue

1 to carry the day, and the only action a voter can
2 take is to vote for one person or another person. I
3 mean, isn't every issue ad an appeal to voters?

4 MR. ABRAMS: No.

5 QUESTION: I mean, what -- what other
6 purpose does it have? Is it asking them to leave
7 money in their will, or what?

8 MR. ABRAMS: The very first issue ad that
9 we have at the back of our brief is one by a term
10 limits organization.

11 QUESTION: Like the Belotti situation, the
12 Belotti case.

13 MR. ABRAMS: Well, yes, and it brings that
14 to mind. It's a -- it's term limits organization
15 saying, we have our pledge, our term limits pledge.
16 There are two candidates. One has not signed it.
17 The other one has.

18 QUESTION: Right.

19 MR. ABRAMS: Call him and tell him to sign
20 it. Call David Wu, urge him to sign it. Now, I --

21 QUESTION: So it's designed to have an
22 effect upon the election, isn't it?

23 MR. ABRAMS: I think that one is probably
24 not. I think that one is a, is a group that cares
25 less about elections than about their cause, their

1 cause is term limits.

2 QUESTION: Boy, but you could have, you
3 could have fooled me. They want the term limit
4 because they want, they want somebody to vote for
5 someone other than Wu. I mean, how else can you read
6 that? I mean, I can understand a Belotti situation
7 in which you've got a, in effect a referendum going
8 on in which the voters are going to have a direct
9 choice, a ballot initiative kind of thing, but once
10 you get into a situation in which the so-called issue
11 ad is in the context of an election, I would suppose
12 you would have a tough road to hoe to prove a pure
13 non-electoral purpose.

14 MR. ABRAMS: People do call -- I'm sorry.
15 The record before you shows that when these ads run,
16 people do make the calls. I asked Senator Feingold
17 that in the deposition I took of him I asked him,
18 do you get calls? And the answer was yes, they do
19 get calls. Now there's no doubt, and I want to
20 respond to this very directly, that many of these ads
21 do have both qualities, that is to say, they speak
22 about an issue, and they have an electoral component
23 to them, and some of them don't, but many of them do.
24 And we would urge on you that for you to say that an
25 ad of that sort is not fully protected by the First

1 Amendment, not just in the abstract, but to be
2 applied as you consider a statute like this, the
3 David Wu ad.

4 Whatever one concludes the underlying
5 purpose was, and one can't know for sure to say that
6 a term limits organization cannot take an ad out in
7 the last 60 days of a campaign, and indeed it works
8 out to be over 120 days in a presidential contest in
9 the sense of 60 days with respect to the election
10 date, 30 days for the national convention, 30 days
11 also for state conventions, primaries, so you are
12 talking about 120 days minimum --

13 QUESTION: Mr. Abrams --

14 MR. ABRAMS: -- of silence.

15 QUESTION: Can I interrupt you with a sort
16 of a --

17 MR. ABRAMS: Yes.

18 QUESTION: -- basic question here? The
19 definition of electioneering communications appears,
20 I think, six or seven times in the statute and one
21 says there must be certain disclosures and other --

22 MR. ABRAMS: Yes.

23 QUESTION: There must be something in the
24 ad itself identifying the sponsor. It prevents
25 foreign nationals from contributing to these ads and

1 so forth. Do you contend that it's unconstitutional
2 in all its applications, specifically, for example,
3 the requirement that they disclose who paid for the
4 particular ad?

5 MR. ABRAMS: Your Honor, my client is not,
6 has not raised constitutional objections in this
7 Court to the disclosure requirements and, with the
8 exception of 504, which is a broadcast --

9 QUESTION: And how about the reporting
10 requirement, the requirement that they report to the
11 Commission who the sponsors are?

12 MR. ABRAMS: Similarly there --

13 QUESTION: No objection --

14 MR. ABRAMS: -- but that is not because,
15 since you ask, it's not because we don't think that
16 the definition is unconstitutional for the same
17 reasons every time it's used. I mean, if we're right
18 that this definition, put Buckley aside for the
19 moment, that this definition is fatally overbroad for
20 First Amendment reasons.

21 QUESTION: In all its applications.

22 MR. ABRAMS: Yes. If it sweeps in so much
23 more than the First Amendment --

24 QUESTION: But the requirement that is
25 imposed by the definition in some instances is merely

1 disclosing who paid for the ads.

2 MR. ABRAMS: That's true. And that's one
3 of the reasons that we did not raise in this Court an
4 issue about disclosure now. But you should --

5 QUESTION: Another requirement is that
6 foreign nationals may not pay for such things.

7 MR. ABRAMS: That's right. But that's not
8 challenged. The --

9 QUESTION: So it could be constitutional
10 in some applications and not others?

11 MR. ABRAMS: I think it is overbroad in
12 all respects. It, it could be constitutional.

13 QUESTION: But when you say overbroad, you
14 mean it's too broad to be constitutional.

15 MR. ABRAMS: Constitutionally overbroad,
16 yes. I think one can make a case, and again, we
17 didn't challenge the foreign part of it at all that
18 there may be different considerations afoot there
19 which would perhaps change the dynamics of your
20 decision making. I do want to point out that on the
21 basic disclosure matter that although we, that is to
22 say, Senator McConnell, does not challenging that,
23 the ACLU is challenging it, and they have made that
24 argument in their brief and they have made it at
25 length and powerfully to the effect that the

1 disclosure requirements as per Buckley should be the
2 same as the requirement or the viability of a
3 requirement not to say something, as well as certain
4 principles of anonymity. As I say, that's not the
5 argument that we're making.

6 QUESTION: Your principal challenge is to
7 the requirement that these ads be paid for with hard
8 money?

9 MR. ABRAMS: That's one way to say it,
10 Justice Stevens. The way I would say it is that our
11 principal objection is that this is a content-based
12 restriction on speech which punishes speech of --

13 QUESTION: Punishes it only to the extent
14 that it identifies who or who may not pay for it.

15 MR. ABRAMS: Well, to the extent that PACs
16 are asserted as an alternative --

17 QUESTION: I'm not talking about PACs,
18 using hard money as an alternative.

19 MR. ABRAMS: Well, hard money, it's really
20 the equivalent of PACs in this situation. I mean,
21 hard money when you talk about the AF of L, for
22 example, what is hard money when they spend their own
23 money on their own ad? It's one thing to say they
24 have to do it through a PAC. We think it's
25 unconstitutional to force that with respect to every

1 mention of the President of the United States. It's
2 something else to treat it as if somebody else is
3 giving the money. This is not a contribution
4 situation in which the concept of hard money comes
5 into play. That's why I was rephrasing it in terms
6 of PACs.

7 Let me say, in conclusion, one or two
8 final things. This is, this section, with what we
9 consider its overbreadth, is illustrative of the
10 failures and constitutional indifference by the
11 Congress to First Amendment norms as a whole. One of
12 the other sections we're challenging is Section 305,
13 which is the section which says under the title,
14 limitation of availability, of lowest unit charged
15 for Federal candidates attacking opposition. This is
16 a section which basically says in so many words,
17 candidates have to pay more money or make more
18 disclosure.

19 QUESTION: I don't think that's right. It
20 says they don't get a statutory entitlement to a
21 cheaper rate.

22 MR. ABRAMS: That's right.

23 QUESTION: That's what it says.

24 MR. ABRAMS: And therefore --

25 QUESTION: They don't necessarily have to

1 pay more money if the station doesn't charge them
2 more money.

3 MR. ABRAMS: I represent the National
4 Association of Broadcasters here. I think I can say
5 there is a chance they might have to pay more if the
6 statute -- if the statute did not require lowest unit
7 rate.

8 QUESTION: What the statute does is take
9 away a statutory entitlement, not require that they
10 pay a higher price.

11 MR. ABRAMS: It takes away a statutory
12 entitlement for what?

13 QUESTION: Which itself is content-based.

14 MR. ABRAMS: Yes, which is, which is
15 entirely content-based. They take them away --

16 QUESTION: But they're going to have to
17 make the disclosures anyway, aren't they? I'd like
18 to get clear on that. Even if this were
19 unconstitutional, the other provisions that require
20 them just about the same disclosures?

21 QUESTION: Specifically 311.

22 QUESTION: So we're talking about
23 basically nothing, is that right? I'd like an answer
24 to that, because I -- just to clarify it in my mind.

25 QUESTION: The section is 311 and it seems

1 to me to require virtually the identical disclosure
2 that 305 does.

3 MR. ABRAMS: You do not have to under 311
4 have a printed statement identifying that the
5 candidate approved and authorized the ad. You do not
6 have to have the image of a candidate for four
7 seconds.

8 QUESTION: Thank you, Mr. Abrams.

9 MR. ABRAMS: Thank you very much.

10 QUESTION: Mr. Gold, we'll hear from you.

11 ORAL ARGUMENT OF LAURENCE GOLD

12 ON BEHALF OF AFL-CIO

13 MR. GOLD: Mr. Chief Justice, and may it
14 please the Court:

15 Earlier this term in the Nike case, the
16 AFL-CIO took the unusual step of filing an amicus
17 brief arguing that the vital First Amendment interest
18 in public access to information and ideas leaves the
19 Government no room to inhibit business corporations
20 from speaking out on matters of public concern.
21 Today, we appear on our own behalf and aligned with
22 business corporations and non-profit incorporated
23 groups in support of that same principle. I would
24 like to pick up --

25 QUESTION: Are you Laurence Gold?

1 MR. GOLD: I am Laurence Gold. We're not
2 related.

3 QUESTION: Not the Laurence Gold I
4 expected.

5 MR. GOLD: I'm also instructed by your
6 rules not to introduce myself. I would like to first
7 revisit the PAC point, and then also address the
8 back-up definition of electioneering communications
9 in the distinct but very vital issue of coordination
10 in this case.

11 QUESTION: Would you at some point, if you
12 have the chance, deal with what is a genuine problem
13 for me? I think labor unions and corporations for
14 30, 40, 50, 60 years have been forbidden to make
15 expenditures in connection with a Federal election.
16 Now, unless you're attacking that whole thing, I take
17 it what this turns is what Mr. Abrams said,
18 overbreadth. It goes too far in defining the ads, an
19 added burden with the PAC. I have taken in both
20 those. I'll check them out.

21 I want to know the other half of the
22 equation, that is, I'd like you to spend one minute
23 explaining to me why I'm wrong in thinking that if
24 you win on this point, that thing that's been there
25 in the statute since 1919, we might as well throw it

1 away, and or, you know, they'll make expenditures in
2 connection with an election, namely these huge ads,
3 and they will collect loads of money from the same
4 wealthy people to help them along with those
5 expenditures. I'd just like one minute on that point
6 at your convenience.

7 MR. GOLD: I'll do it now, Justice Breyer.
8 The prescription of expenditures in the law which
9 dates back to the 1940s was first defined by this
10 court in Buckley and then in MCFL to mean express
11 advocacy, and that in fact is the only kind of
12 expenditure that the law has prescribed, and there is
13 only one instance where this Court has even approved
14 a restriction of those kinds of expenditures on any
15 party or any kind of organization that is subject to
16 203, and that was of course the Austin case. But the
17 notion that expenditures in an untrammelled sense or
18 an unbounded sense --

19 QUESTION: Well, they've given you a new
20 definition, and that's the issue, of course, is this
21 new definition okay, and we are back to where we
22 started. If the old one is okay given those problems
23 in the '40s, why isn't the new one okay given the
24 problems of the '90s? All right. But anyway, you go
25 ahead.

1 MR. GOLD: Well, it wasn't clear really in
2 the '40s what the term expenditure met. There were
3 two cases, the UEW case and the CIO case, that
4 explored that and pointed out that there was some
5 doubt there. In this case, the notion has been
6 brought into, way beyond anything that might affect
7 an election. The mere, the touchstone of this
8 statute is, if you refer to a candidate within a
9 certain time to a certain audience, you are
10 prescribed from doing so. And this record shows the
11 subjective aspect of it, I think, that the Buying
12 Time studies underscored, I think the defendants no
13 longer subscribe to.

14 But the evidence in the record is replete
15 with instances where groups use ads not even in the
16 mixed sense that Buckley said was very important, but
17 in the sense of doing something that's urgently
18 necessary for the organization at the time. For
19 example, three AFL-CIO ads that ran in quick
20 succession in September 1998 denied, in Barker and
21 Spearminnt, all addressed legislation that the
22 Republican majority on issues of grave concerns to
23 the AFL-CIO had hastily scheduled, and we came up, we
24 devised ads in a few days' notice and broadcast ads
25 in a number of states in order to pressure particular

1 Members of Congress in the Senate and the House on
2 how they should vote on that legislation on a vote
3 that was actually taking place five days later. It
4 was pure happenstance that that vote occurred in
5 September of 1998 rather than say September of 1999,
6 when this prescription would not have been upon us.

7 QUESTION: But could -- could I interrupt
8 again? You're not really prescribed for money in
9 them, you're really prescribed from using union
10 funds, and one of the reasons for that is that some
11 union members may disagree with your position.

12 MR. GOLD: Well, this makes -- there's a
13 tremendous difference between the union doing it and
14 the union having to do it from a PAC. And to force a
15 union, for example, to do this sort of spending out
16 of its PAC would reverse the notion that this court
17 has followed in a series of cases from *Machinists v.*
18 *Street* through *Beck* that the dissent of a union
19 member on matters is not to be presumed, that people
20 don't have to opt in to speaking, that they, at best
21 one can require somebody to opt out.

22 QUESTION: Yes, but from the Taft-Hartley
23 Act on, it's been understood, I thought, that one
24 objection to the union's spending its own money was
25 it may not reflect the views of all its members.

1 That's true of issue ads and election ads.

2 MR. GOLD: Well, in Austin, when the Court
3 addressed this in the context of business
4 corporations, it pointed out that there were crucial
5 differences between corporations and unions on
6 precisely this point, that the two governmental
7 interests.

8 And the only case where this Court has
9 ever approved an actual restriction on express
10 advocacy, the two interests identified there are the
11 two aspects of the entity there, namely aggregation
12 of wealth -- or the immense aggregation of wealth by
13 virtue of the corporate forum, not aggregation of
14 wealth alone. And whether or not the spending
15 reflected the views of members or shareholders this
16 Court pointed out were inapplicable to unions.

17 So the premise I think doesn't necessarily
18 apply. And the speech we're talking about here, of
19 course, goes well beyond even the express advocacy
20 expenditures at issue in Austin. Express advocacy is
21 different. Express advocacy, whatever the value of
22 whether or not it should be regulated, is certainly
23 unambiguous in two senses.

24 One, there is a specific request for
25 voting decision. And two, it is virtually certain

1 that the listener is going to take that into account
2 as to whether or not to make a voting decision. You
3 can't say that, I think, about any other kind of
4 speech, including speech that makes reference to
5 candidates.

6 And the burdens here, I think to pick up
7 on the discussion earlier, are very important with
8 respect to a PAC. It's one thing for an advocacy
9 organization, like the NRA and the ACLU, which can
10 and routinely do appeal for funds to the general
11 public to be restrained as Mr. Abrams described.

12 But unions and corporations don't have the
13 ability to seek contributions just from anybody.
14 There is the notion in the statute of a restricted
15 class.

16 QUESTION: They could seek them but they
17 wouldn't be very successful.

18 MR. GOLD: No, actually, Your Honor, they
19 't.

20 QUESTION: They can't seek --

21 MR. GOLD: They can to their general treasury, but
22 with
23 respect to a PAC, you are limited to soliciting only,
24 in the case of a union, your members or your
25 executive administrative staff and their families.

1 In the case of a business corporation,
2 only your shareholders and executive administrative
3 personnel. These are not organizations that can for
4 their PACs seek contributions from anybody else.
5 It's long been unlawful under the Federal Election
6 Campaign Act to solicit beyond those classes.

7 QUESTION: Is there any empirical
8 information on this problem in the record?

9 MR. GOLD: I'm sorry?

10 QUESTION: Is there any empirical
11 information on this? I think it's fairly
12 significant. You're saying it's really much, much
13 harder for us to get the money through the PAC. And
14 it either is or it isn't. And there either is some
15 empirical information or there isn't. I just want to
16 know the state-of-the-art.

17 MR. GOLD: Yeah, well, there is some. In
18 fact, the only judge below who made findings on this
19 was Judge Henderson. In her findings on this in the
20 Supplemental Appendix at pages 249, 50, 259 to 60,
21 270 to 71, which concern the AFL-CIO's difficulty in
22 raising PAC money. And page 347, note 142.

23 It refers -- there is an affidavit by the
24 then AFL-CIO political director describing the
25 difficulty of raising PAC money and how that would

1 not change, certainly perhaps be even worsened under
2 this new regime. And there are affidavits that
3 the -- I think as part of the RNC submission from
4 four other labor organizations that describe the
5 relative resources of their organizations and their
6 PACs.

7 QUESTION: Mr. Gold, I take it you are
8 arguing that a labor union or a corporation, for that
9 matter, has a First Amendment right to speak on
10 behalf of more than its membership or respectively
11 its stockholders. Why should that be?

12 MR. GOLD: Well, I think that's one way to
13 look at it, but I think what this Court has pointed
14 out in a number of cases, and Belotti is a
15 particularly -- a pertinent case for this, is that
16 it's not so much the speaker. The value of speech is
17 not so much from the source, whether it's a union or
18 corporation or some other group.

19 The value of speech is the informational
20 value that it gets to the public at large, the
21 enabling that that speech does for people to
22 participate in civic life. And the fact that it's
23 from a corporate source or for a union source does
24 not devalue that speech.

25 So it's not so much that the speaker has a

1 First Amendment right as such, but the value of that
2 speech to the populus as a whole --

3 QUESTION: Then you are saying, I think,
4 that there is a kind of First Amendment volume
5 requirement that goes well beyond what in the
6 contribution context we referred to as reducing the
7 speech to something that doesn't amount to anything
8 at all.

9 You're saying that when we're talking
10 about direct expenditures, when an organization is
11 speaking that way, that there really is a kind of
12 volume criterion, that has nothing to do with
13 membership.

14 MR. GOLD: In this case, there is a volume
15 criterion in the sense -- volume --

16 QUESTION: Volume, are you saying?
17 V-o-l-u-m-e?

18 QUESTION: That's what I meant.

19 QUESTION: Well, that's the way Justice
20 Souter pronounces it.

21 QUESTION: It's my distinct regional
22 accent again. I've just come back from New
23 Hampshire.

24 MR. GOLD: I think there is a volume
25 effect by this statute and I think that's clearly

1 part of the intention of this.

2 QUESTION: So the interest you're
3 vindicating here is all the television viewers during
4 election periods seeing all these 30 minute spots
5 over and over and over again, that's the interest.

6 MR. GOLD: Your Honor, that's --

7 QUESTION: That is part of the interest.

8 MR. GOLD: It certainly is part of the
9 interest. I mean, there is a tremendous interest in
10 people and groups and organizations being able to address
11 public issues. And the election period, which this
12 Court has identified and which the record supports,
13 including one of the -- at least one of the
14 Defendant's experts, Mr. Magleby, is that that's a
15 time when people are especially attentive to public
16 issues.

17 And the fact that some of this speech may
18 seem to have a, quote, effect on the election, which
19 is after all the standard that the Defendants now
20 justify this for, the fact that there might be some
21 effect can't possibly be a reason in order to stifle
22 it. If we start down that road --

23 QUESTION: Then why is that not true with
24 a political party? Why wouldn't you say the same
25 thing with a candidate? And why is it, if we can

1 limit the expenditure, the contributions made to the
2 candidate for this kind of thing or the party, why
3 couldn't we do it to organizations that have less to
4 do with political life, for corporations?

5 MR. GOLD: I think Title I has both
6 contribution and expenditure aspects. But here one
7 is talking about limiting the independent speech.
8 That's the premise of section 203 is that this is --

9 QUESTION: No, I think the premise is pay
10 for it out of your PAC. Not to limit the speech but
11 rather pay for it out of certain limited
12 contributions. And I understand your argument that
13 that's harder to do. It's also maybe harder to do
14 for a party.

15 MR. GOLD: It's not just harder to do, but
16 it really does, I think, distort the message. It
17 inherently is distorting a message that is
18 nonelectoral if you have to do out of a PAC. If you
19 have to tell people you're soliciting for this fund.
20 It's not enough I think to label it something.

21 The law has imposed a structure on these
22 committees. They are political committees. They
23 register with the Federal Election Commission.
24 Members of these organizations are used to the fact
25 that they are designed and used for making

1 contributions.

2 QUESTION: The reason -- my question was
3 the reason that the union or the corporation has a
4 greater right here than the political party itself or
5 the candidate is?

6 MR. GOLD: It's that it is -- it's not at
7 all connected with the concerns of corruption or
8 appearance of corruption that have animated and
9 underlie this Court's jurisprudence when it comes to
10 contributions. This is independent private speech.
11 And from Buckley on and New York Times versus
12 Sullivan, this Court has recognized the value of
13 speech, even about elections by these groups. There
14 is no rationale for muting their ability to speak on
15 public matters and speak on electoral matters.

16 QUESTION: One of the themes of Buckley
17 was it's not up to the government to decide there is
18 too much speech coming from one place and not enough
19 coming from another.

20 MR. GOLD: Well, that's correct, Mr. Chief
21 Justice. And I think one of the -- something that
22 seems to animate this is the thought that certain
23 voices do have to be muted. And I think the
24 principle in Buckley, the fact that speech --
25 inevitably speech on candidates, speech on issues,

1 that it's inevitably mixed in, inextricably linked,
2 is really at issue in this case.

3 Because what this statute says is when
4 that's the case, you silence it, you make it criminal
5 or you force people to raise money separately under a
6 separate rubric and call it electionary
7 communications, and call it --

8 QUESTION: If you're right, the prior law
9 goes down the drain, too, doesn't it?

10 MR. GOLD: Well, no, Your Honor, I don't
11 think that follows.

12 QUESTION: It's certainly muting, it's
13 been regulating for 60 years, longer than that in
14 corporations cases.

15 MR. GOLD: It's been regulating express
16 advocacy alone.

17 QUESTION: Yes. Why should express
18 advocacy be disfavored. Justice Stevens' question
19
20 all over again.

21 MR. GOLD: I think that's a fair question
22 that the Court does not have to reach in this case.

23 QUESTION: Well, I think we have to reach
24 it if we're going to accept your premise.

25 MR. GOLD: This case, in our view, turns

1 on the overbreadth, regardless of whether express
2 advocacy is regulable. This provision, we believe,
3 goes down -- and should go down on the basis of
4 overbreadth. One could assume that express
5 advocacy --

6 QUESTION: When you say overbreadth, you
7 say because it goes beyond express advocacy. Isn't
8 that all you mean.

9 MR. GOLD: It's because -- leaving express
10 advocacy aside --

11 QUESTION: No, but isn't that what you
12 mean? Isn't that your principal overbreadth point?

13 MR. GOLD: Yes, in the sense that it
14 goes -- express advocacy by definition is not an
15 electionary communication. The statute says that.
16 It's everything else. This is overbroad, not just
17 because some of the speech might influence -- might
18 affect an election, or influence an election, but
19 that it's criminalizing references to candidates --

20 QUESTION: Thank you, Mr. Gold.

21 Mr. Sekulow, we'll hear from you.

22 ORAL ARGUMENT OF JAY ALAN SEKULOW

23 ON BEHALF OF MINOR PLAINTIFFS

24 MR. SEKULOW: Mr. Chief Justice, and may
25 it please the Court:

1 The court below unanimously concluded that
2 section 318, the prohibition of contributions by
3 minors is unconstitutional. The statute suffers from
4 three constitutional defects. First, section 318 is
5 a ban, not simply a limitation. No symbolic or
6 associational speech rights are recognized under 318.

7 Second, the government failed to produce
8 sufficient evidence to show that there was corruption
9 or the appearance of corruption with regard to
10 conduit giving by minors. The fact of the matter is,
11 Judge Henderson called the evidence remarkably thin.
12 Judge Kollar-Kotelly called the evidence so minimal
13 as to, in her words, doom the statute.

14 Section 318 is not closely drawn in
15 support of the interests being asserted. In fact,
16 the government concedes that this statute is an
17 absolute ban and they also concede that, in fact, the
18 ban burdens more speech than a limitation.

19 QUESTION: Mr. Sekulow, could you have a
20 ban at any age? Is it 17 year olds that ban is
21 questionable. But say the Congress drew the line at
22 8 or 10.

23 MR. SEKULOW: Certainly that would be more
24 closely drawn, Justice --

25 QUESTION: Would that be constitutional?

1 MR. SEKULOW: I think so. The issue would
2 be could an 8 year-old make the voluntary decision to
3 make a contribution. I think it would be a closer
4 case. This is an absolute ban, though. This is the
5 exact opposite of that situation. Rather than
6 looking at a concern over --

7 QUESTION: I'm posing an absolute ban on
8 contributions by 10 and under.

9 MR. SEKULOW: I think it would be the same
10 argument. At a minimum, there would have to be --
11 they would have to establish that the ban was
12 justified by at least a -- closely drawn to the
13 concern. I think when you get -- the younger it gets
14 obviously it is more of a problem. But here you have
15 a ban actually --

16 QUESTION: I just want to be clear on what
17 your answer is. I thought you said that there would
18 be a line, a bright, clear line that could be drawn
19 at some age, only not 17.

20 MR. SEKULOW: All legislation is line
21 drawing. Here --

22 QUESTION: What's the answer? An 8
23 year-old? Nobody under the age of 8 can give a
24 contribution, period, end of the matter, that's it,
25 that's the law, constitutional or not.

1 QUESTION: In a sense, the problem
2 diminishes with the age. There aren't a great number
3 8 --

4 MR. SEKULOW: That's right.

5 QUESTION: -- year olds making contributions.

6 MR. SEKULOW: That's exactly correct, Mr.
7 Chief Justice. And the fact is, as Judge Leon
8 recognized, the younger the child gets, the less
9 likely are they to have resources. But here again,
10 as the government concedes, this is an absolute ban
11 for 17 and under. It is not worrying about just two-
12 year-olds or four-year-olds or eight-year-olds.

13 QUESTION: I'd still appreciate an answer.
14 Six month old, right?

15 MR. SEKULOW: I'll give you the six-month
16 old.

17 QUESTION: Wonderful. Now, once you give
18 me the six month old -- once you give me the six
19 month old, you've agreed that at some age, it's
20 reasonable to draw a line. And once you're down that
21 road, you have to deal with the obvious question that
22 the Constitution draws a line at 18 years old to
23 vote.

24 And after all, it was thought you needed a
25 constitutional amendment to get that result. And so

1 what's wrong with Congress saying, well, we think the
2 problem's about the same when you give money to a
3 candidate as when you vote for a candidate. And so
4 we're going to pick the same line. There are many 17
5 year olds who would be excellent voters and there are
6 many older people who are terrible, okay? So they
7 pick this line for that, we would like this line for
8 this. And what's wrong with that?

9 MR. SEKULOW: Justice Breyer, two things
10 are wrong with that proposition. First, the First
11 Amendment rights of speech and association are not
12 somehow contingent upon, dependent upon exercise of
13 the right to vote under the 26th.

14 Secondly -- and a perfect example of that
15 would be prior to the passage of the 19th Amendment,
16 women were denied the right to vote in the
17 United States but they certainly could still exercise
18 the rights of speech and association to obtain the
19 right of suffrage. And I think it would be exactly
20 the same argument.

21 Also, in fact, in 11 states, 17 year olds
22 actually can vote in primaries so long as they reach
23 the age of 18 by the next general election. So there
24 are states in which in fact it can be that the 17
25 year old can vote. But that I think also proves up

1 the problem here. And that is, if the government's
2 justification for the prohibition -- and here this
3 absolute prohibition -- is in fact that there is a
4 concern over conduit giving, the existing regulations
5 and existing law, 441(a) and (f), prohibit excess or
6 contributions given in the name of another, a conduit
7 gift.

8 That is absolutely prohibited.
9 Contributions given in the name of another within the
10 same provision, prohibited. And of course, 441(a)
11 prohibits gifts in excess of the contribution limits.
12 This statute doesn't say that a 17 year old who is --
13 actually under this statute, a 17 year old who has
14 her own means of support, who might even be
15 emancipated, whose parents may have never given \$1 to
16 a campaign are put in the situation where their gift
17 is banned. It's unauthorized and inappropriate,
18 illegal under the statute.

19 QUESTION: Mr. Sekulow, you said in your
20 brief that you would accept even a severe limitation,
21 but not an absolute ban, so among severe limitations,
22 would it be constitutional to say, yes, 16, 17 year
23 olds can give, but what they give is going to count
24 against how much the parent or parents who claim the
25 child as a dependent can give.

1 MR. SEKULOW: Actually, our -- our
2 discussion about that restrictions relates to what
3 some of the other states have done by allowing gift.
4 If no states bans gifts by minors, some stays do impose
5 what's called family contribution caps or
6 limitations. Again, certainly that would be more
7 closely drawn than an absolute prohibition.

8 QUESTION: I just wanted to know what you
9 meant in your brief by you would accept a limitation,
10 even a severe one. Is this one that you would
11 accept?

12 MR. SEKULOW: Well, we would accept this
13 fact. If the Government could establish through
14 evidence that in fact somehow a restriction on the
15 incremental amount allowed to be given would meet the
16 criteria of avoiding corruption or the appearance of
17 corruption, if the Government established that, sure,
18 but they haven't. I was using that as an --

19 QUESTION: I'm not asking you about
20 establishing proof in one by one in an individual
21 case, because that wouldn't be worth anybody's time.
22 Could the law say it will count against the parent or
23 parents who take the child as a deduction?

24 MR. SEKULOW: That would, I think it would
25 certainly make it more difficult, Justice Ginsburg,

1 to make a facial challenge if the gift, the symbolic
2 gift and the associational rights were recognized by
3 a cap. But again, this is a ban. It doesn't allow
4 that individual 17-year-old, 16-year-old, 15-year-old
5 to make that gift. We were trying to show through
6 that, those examples of what some of the states have
7 done to allow gifts to made by minors but at the same
8 time putting what's called family caps in place. It
9 would certainly make it more difficult as a facial
10 challenge, but again, this is a prohibition event.

11 QUESTION: Mr. Sekulow, is it necessary to
12 rely on the First Amendment to reach your conclusion,
13 or could you argue this an unreasonable restraint on
14 liberty?

15 MR. SEKULOW: Well, I would argue both.

16 QUESTION: You do argue both?

17 MR. SEKULOW: I would. And I certainly
18 would assert again that what the individuals planned
19 on giving here is a liberty interest, but it's a --
20 it's also speech, it's also association. The
21 underpinning of this Court's justifications for
22 limitations is the fact that an act of some type can
23 be given, a gift could be given. Here, it's a
24 complete, again, a complete prohibition.

25 QUESTION: Let's go to our jurisprudence

1 was where, where the restriction in question is
2 invalid or arguably invalid under a specific
3 constitutional guarantee, such as the First
4 Amendment.

5 MR. SEKULOW: Yes.

6 QUESTION: You don't resort to substantive
7 due process to create some general liberty interest?

8 MR. SEKULOW: Absolutely correct, Justice
9 Scalia.

10 QUESTION: So your answer should have been
11 no.

12 MR. SEKULOW: Well, okay. Then the answer
13 will be no. But it certainly is a First Amendment
14 interest, and that's what we've asserted throughout
15 this, that there is both the speech and the
16 association --

17 QUESTION: Giving money is the First
18 Amendment, yeah.

19 MR. SEKULOW: Yes, but that was -- the
20 hypothetical was assuming that that wasn't available.
21 However, the First Amendment --

22 QUESTION: You'd rather have his vote than
23 mine?

24 MR. SEKULOW: Well, I would certainly like
25 to have yours, Justice Stevens. The -- I think the

1 bottom line of this ban is what came up in, was one
2 of the opinions, is no one knows exactly where this
3 came from. There is no evidence that was submitted
4 of any significance justifying this prohibition.
5 Administrative convenience in enforcement is
6 certainly not a basis for curtailing speech or
7 associational rights.

8 QUESTION: Didn't the FEC have, didn't
9 they continuously write about this and say there
10 seemed to be an awful lot of tiny children who are
11 sending in money for your trust funds or something.

12 MR. SEKULOW: Actually, Justice Breyer,
13 they wrote in a --

14 QUESTION: What did they say? .

15 MR. SEKULOW: -- in the reports that there
16 was, they thought there was a concern, or evidence
17 that they said, there was concerns over conduit
18 giving. However, actually the FEC could never make
19 the conclusion, though, nor could Congress because
20 neither Congress or the FEC ever asked for the age of
21 the donor, so they could not determine whether in
22 fact there was a violation of conduit giving in and
23 of itself, that's already prohibited under 441a and
24 f. They don't even ask for the age of the
25 contributor, so to go from a situation, and by the

1 way, they never asked for a complete ban. The FEC in
2 all of its recommendations never asked for an
3 absolute ban on contributions by minors to be put in
4 place. They had a presumption issue for those that
5 were 15, 14, and 13, under 15 and under, but that was
6 a request for a presumption which was rebuttable,
7 rebuttable under voluntariness, rebuttable if in fact
8 it was from funds controlled by the minor and it
9 wasn't a gift directed by the parent.

10 For these reasons, the fact that this is a
11 ban, this is not a limitation, we would request the
12 Court affirm. Thank you.

13 QUESTION: Thank you, Mr. Sekulow.

14 Mr. Clement, we'll hear from you.

15 ORAL ARGUMENT OF PAUL D. CLEMENT

16 ON BEHALF OF FEDERAL DEFENDANTS

17 MR. CLEMENT: Thank you, Mr. Chief Justice
18 and may it please the Court:

19 In enacting Title II of the Bipartisan
20 Campaign Reform Act, Congress addressed a problem
21 that's been with us for 100 years, the corrosive and
22 distorting effects of aggregate corporate wealth on
23 candidate elections. In addressing that problem,
24 Congress did not adopt a revolutionary approach,
25 rather, Title II and its requirement that

1 corporations fund electioneering communications
2 through a separate segregated fund simply represents
3 a contemporary chapter in the century-long history of
4 regulation of corporate political giving.

5 QUESTION: But it makes a big change.
6 It's one thing to say the corporation is
7 affirmatively giving money to the candidate or naming
8 the candidate, but to say that a corporation cannot
9 take out an issue ad which happens to mention a
10 candidate, any candidate, Federal candidate during a
11 certain period, that goes far beyond whatever has
12 happened before, and what, you know, you talk about
13 corporations as though well, who needs corporations?
14 Is there any significant segment of our economy that
15 is not run by corporations? Can you think of any
16 significant segment of our economy?

17 MR. CLEMENT: No. There is no question
18 that corporations are very good at aggregating wealth
19 in the corporate --

20 QUESTION: Exactly. And if that segment
21 --

22 MR. CLEMENT: -- and in commerce, and the
23 concern --

24 QUESTION: -- if that segment of an
25 economy, of the economy is attacked by a certain

1 piece of legislation, which that segment of the
2 economy thinks is a very stupid piece of legislation,
3 and it will entirely wash out nuclear energy or
4 whatever it is, to say that the American people who
5 have organized themselves economically through
6 corporations cannot through the same mode defend that
7 segment of the economy against irrational legislative
8 action is to very much weaken, it seems to me, the
9 power of the people to, to have a real say in the
10 acts of the Government.

11 MR. CLEMENT: Well, as you say, Congress
12 has long been able to address express advocacy, and
13 what the evidence, the overwhelming evidence before
14 the district court showed is that in a modern
15 political campaign, the express advocacy test no
16 longer works. It no longer is -- it is a woefully
17 inexact proxy for the kind of speech that affects
18 candidate elections that this Court has said
19 corporations must make through segregated, separate
20 segregated fund. This Court has --

21 QUESTION: Any issue, any issue advocacy
22 affects elections. That's the purpose of it
23 ultimately, to get the people to agree with whoever
24 is making the issue ad about the issue and to elect
25 candidates who will come out that way. So it seems

1 to me a very artificial distinction you're making.

2 You're --

3 MR. CLEMENT: First of all, I don't --

4 QUESTION: You're essentially saying you
5 cannot have issue ads.

6 MR. CLEMENT: Justice Scalia, I don't
7 think it's artificial distinction. In any event,
8 it's not a distinction I'm drawing. It's a
9 distinction that this Court drew in Austin when it
10 distinguished the situation it had before it in
11 Belotti, where it said that a corporation facing an
12 absolute ban, not a separate segregated fund
13 requirement but an absolute ban in participating in a
14 referendum, this Court held that unconstitutional.
15 In Austin, this Court said that limits on express
16 advocacy in the context of a candidate campaign
17 triggered different interests, and in that context,
18 Congress has a legitimate ability to deal with the
19 corrosive and distorting effects of aggregate
20 corporate wealth and the problems with diverting
21 shareholder and member money to political causes with
22 which they disagree.

23 QUESTION: I think one of the -- one of
24 the dubious things about Austin is one of the things
25 it relied on was the fact that the corporation's

1 members or did not -- or owners did not necessarily
2 represent a large amount of public opinion, and it
3 seemed to me, I voted in the majority, but it seemed
4 to me since then that that's the whole purpose of the
5 First Amendment is to allow people who perhaps don't
6 have much in the way of public opinion try to change
7 public opinion.

8 MR. CLEMENT: Well, there are certainly
9 ways to do that, Mr. Chief Justice, but I think what
10 Austin represents incorrectly is the idea that when
11 corporate money is being aggregate for different
12 reasons, that there is an interest on the part of the
13 shareholders not to have that money diverted to
14 political causes with which they disagree. Now,
15 outside of the corporate context, the principle that
16 you are advocating certainly applies. Individuals
17 are able to advocate unpopular causes with their
18 money and that is not a concern of Title II, but in
19 the corporate context this Court has drawn a
20 distinction, and that's not a distinction this Court
21 just drew in the Austin decision. It's one that goes
22 through this Court's decisions. It goes, and it
23 starts really from the Tillman Act in 1907 which
24 recognized that corporations are different.
25 Corporations posed unique risks of corruption, so in

1 1907, corporations and corporations alone were barred
2 from making contributions to candidates.

3 Then in 1947, that ban was extended to
4 expenditures, and in Austin, this Court quite
5 correctly held up that as constitutional because of
6 the unique risks of the corporate context and what
7 the evidence before the district court showed is all
8 of those same interests that applied in Austin to
9 express advocacy equally apply to these kind of
10 electioneering communications.

11 QUESTION: And doesn't -- doesn't the
12 primary definition today, in effect, give a
13 corporation or a union that wants to run an issue ad
14 a safe harbor simply by virtue of not mentioning the
15 name? Say, let's hear it for nuclear power and don't
16 let anybody else tell you otherwise. That's safe,
17 isn't it?

18 MR. CLEMENT: That's exactly right. That
19 is safe, Justice Souter, and that's why all of the
20 evidence before the district court that looks at
21 retrospective ads running previous cycles has to be
22 read in the light that one of the virtues of the
23 clarity with which Title II defines electioneering
24 communications is that a corporation can avoid the
25 trigger and that similar to current law, under

1 current law as we pointed out in our brief, the NRA
2 put together two ads in the 2000 election cycle.
3 They were virtually identical, except one of them
4 finished with the tag line, vote for Bush. Now, the
5 NRA --

6 QUESTION: How, how, how do you -- how do
7 you protect it if what you're talking about is the
8 McCain-Feingold bill or the Roth IRA or something
9 like that, where the, where there is a candidate's
10 name attached to specific legislation?

11 MR. CLEMENT: Well, let's, Justice
12 O'Connor, let's take the McCain-Feingold provision,
13 for example. Now, first of all, one option, of
14 course, is to refer to it the way I have, as the
15 Bipartisan Campaign Reform Act. It's important to
16 remember, however, that the restrictions in this bill
17 don't restrict any corporation from talking about the
18 McCain-Feingold bill in 48 states or in fact all 50,
19 as long as Senators McCain and Senator Feingold are
20 not up for election.

21 Now, at the point that somebody wants to
22 make a reference to the McCain-Feingold, to one of
23 those Senators' voters in the immediate days running
24 up to the election then they may not be referring to
25 it in a way that has nothing to do with the election.

1 They may be referring to it as that no good
2 McCain-Feingold legislation, and it may clearly have
3 an electioneering purpose.

4 QUESTION: Now the Government has relied
5 very heavily this morning on the findings made by the
6 Congress and by the district court. And this
7 afternoon you are confronted with the fact that the
8 district court has said basically that the
9 distinction between express advocacy and issue ad is
10 essentially meaningless and everybody knows it, so
11 why should we base our decision on that distinction,
12 when the district court has found, and I think
13 there's very little evidence to the contrary that
14 it's simply ephemeral?

15 MR. CLEMENT: Well, Justice Kennedy, we
16 start from the same proposition, which that
17 distinction no longer holds up as a practical matter
18 of political reality. Now, I fear you may take the
19 conclusion from that that we should just end this
20 whole enterprise, but we take from that the
21 conclusion that Congress is not disabled from
22 addressing the serious problems that this Court found
23 that it could address in Austin.

24 QUESTION: Oh, so that you could come back
25 next year and say that the Congress, the pure issue

1 ads must also be prohibited?

2 MR. CLEMENT: I don't think so, Justice --

3 QUESTION: I mean, that must, that's the
4 necessary consequence of what you just said.

5 MR. CLEMENT: No, it's not, Justice
6 Kennedy. Just because the campaign finance laws need
7 to be adjusted from time to time doesn't mean there
8 are no limits and if you are looking for a limit in
9 keeping the distinction between this Court's decision
10 and Belotti and this Court's decision in Austin, one
11 clear limit is a reference to a candidate, because
12 that is one thing that clearly identifies an ad as
13 being tied to the interests of the candidate election
14 cycle.

15 QUESTION: You want one of us to write an
16 opinion for the Court sustaining the statute on a
17 ground which everyone knows is ephemeral and
18 meaningless?

19 MR. CLEMENT: Certainly not, Justice
20 Kennedy. What we want to have this Court do is write
21 an opinion that upholds a limitation on corporate and
22 union spending from direct treasury funds that
23 reflects the current reality. I can't tell you
24 whether the decision that you would, that such a
25 decision upholding this legislation would still work

1 25 years from now, but I can tell you that it will
2 work in the near term

3 And this Court has said, for example, in
4 footnote 11 in Massachusetts Citizens for Life, that
5 particularly in the First Amendment area, Congress
6 doesn't have to anticipate every problem. It can
7 respond to the observed realities and the observed
8 problems before it and try to address those and
9 that's what Congress did with this provision.

10 As you say, the express advocacy test no
11 longer works. The candidates themselves, who have
12 absolutely no regulatory incentive to avoid express
13 advocacy, still themselves don't make reference,
14 don't make their pleas in those express terms.

15 QUESTION: The observed reality, if
16 history teaches us anything, is that when you plug
17 one means of expression, the money will go to
18 whatever means of expression are left and that will
19 continue to be the observed reality and that means we
20 will continue to have new pieces of legislation that
21 close more and more methods of reaching the public.
22 This does not fill me with confidence and joy.

23 MR. CLEMENT: With all respect, Justice
24 Scalia, that's a formula for surrender in response to
25 what is clearly a problem that Congress has been

1 wrestling with for the most part successfully for a
2 hundred years, which is the corrosive and distorting
3 effects of corporate wealth on candidate elections.

4 QUESTION: I agree with you. You want us
5 to say just what Justice Kennedy said, that the
6 distinction is ephemeral, right? Now, we've heard
7 the distinction is ephemeral. And if you can ban the
8 express, you can ban the issue ad which mentions the
9 name. And now there were two, I thought, safe
10 harbors.

11 Safe harbor number 1 is what Justice
12 Souter said, don't mention the name of the candidate
13 60 days before election. Safe harbor number 2, which
14 I had been discussing before, which I wanted your
15 response to, was the PAC. Now, I thought it wasn't
16 too tough, say, for Philip Morris or Ciba Geigy, if
17 they really want to mention the candidate's name, to
18 set up a PAC.

19 Now, I've heard that that's not so, that I
20 was wrong about that. And the reason that I was
21 wrong, I've just been told, as you heard too, is
22 because it's going to be hard for these big
23 corporations and the labor unions to raise the money
24 through the PAC to run the very ad with the name of
25 the candidate in the last 60 days.

1 I would like your view about that. Do you
2 think that's right and not just subjectively, is
3 there any evidence about it?

4 MR. CLEMENT: Justice Breyer, the simple
5 answer is you were right all along. The separate --

6 QUESTION: I would like to think that
7 but --

8 MR. CLEMENT: The separate segregated fund
9 requirement is not an undue burden on corporate
10 political activity. This is, after all, not the
11 first case that this Court has dealt with the
12 separate segregated fund requirement. And of course
13 the requirement was made in Austin as well that, oh,
14 my, if we have to use the separate segregated fund,
15 that will be impossible. The Court rejected that
16 argument there and Justice Brennan in his concurrence
17 addressed it and made two very good points.

18 First, in footnote 7, he said that that
19 just doesn't reflect the observed reality, that the
20 Michigan Chamber of Commerce there was very
21 successful in raising funds for its PAC. At that
22 time, success was measured \$140,000. It seems quaint
23 because what this record says is that the NRA in the
24 Political Victory Fund was able to raise \$17 million
25 just for its PAC.

1 QUESTION: Did anyone else join Justice
2 Brennan's opinion in that case?

3 MR. CLEMENT: No, that was a concurrence
4 that reflected the views of the majority.

5 QUESTION: Did other people join his
6 opinion?

7 MR. CLEMENT: No, they didn't, Mr. Chief
8 Justice, but I think that it is certainly -- I'm not
9 suggesting that it binds this Court in any way. I'm
10 just suggesting that Justice Brennan's logic in
11 addressing that problem has persuasive force. It is
12 true also that the majority opinion of Justice
13 Marshall in that case, also noted, described the
14 Michigan Chamber of Commerce in that case as being
15 quite successful in its PAC. And also specifically
16 said in the majority opinion that they were success
17 as -- to the tune of \$140,000. That Justice Brennan
18 amplified that point in his concurrence.

19 QUESTION: Well, is there a way of writing
20 an opinion that would say, if a particular
21 organization otherwise covered does have some unusual
22 problem with a PAC, either because it doesn't want to
23 say it's political or because it can't raise the
24 money, that's a matter for an as-applied challenge
25 later?

1 MR. CLEMENT: The Court could certainly
2 say that, Justice Breyer, and I think should say
3 that. The remarkable thing about the challenge to
4 the separate segregated fund requirement here, if I
5 understand it, is that the gravamen of the concern
6 seems to be that the solicitation restrictions on the
7 separate segregated fund make it difficult to raise
8 enough money.

9 Now, the reason I find that so surprising
10 is there was a direct challenge to those solicitation
11 requirements before this Court in the National Right
12 to Work Committee case. And this Court unanimously
13 rejected that challenge.

14 So the solicitation requirements and the
15 separate segregated fund, which by the way were not
16 changed by BCRA and therefore really probably aren't
17 even jurisdictionally before this Court, those -- if
18 somebody has a problem with the solicitation
19 requirements either on their face or as applied,
20 that's open to them in an as-applied challenge.

21 QUESTION: It depends on whether -- the
22 fact that we said that it's okay in another context
23 doesn't mean that it's okay in this context. It
24 depends on what the consequence of not being able to
25 do it except through a PAC happens to be. And here

1 the consequence is very severe indeed.

2 MR. CLEMENT: Well, Justice Scalia, the
3 consequence is entirely speculative on this record.
4 As I say, some groups even under the current system
5 have been able to assemble massive amounts of money
6 in their political action committees. And that is
7 remarkable if for no other reason that as Justice
8 Kennedy pointed out, it's sort of no reason to do it
9 under the current system, because one of the main
10 reasons to put money in your political action fund
11 was so that you could engage in express advocacy
12 rather than issue advocacy.

13 QUESTION: It seems to me the burden ought
14 to be on you to demonstrate that it won't hurt them,
15 not on them to demonstrate that it will. You are
16 preventing them from using their money for speech.
17 You're saying this -- your normal money can't be used
18 for it. You have to get money from some other
19 source. And you want them to have to demonstrate
20 that this will harm them

21 MR. CLEMENT: Justice Scalia, with
22 respect, this issue is no different than the parallel
23 issue in the context of Austin. That was speech,
24 too. That was a burden of speech. And as some of
25 the Justices pointed out, there is not one word in

1 Buckley or in Austin that suggests that express
2 advocacy is somehow second class speech.

3 Indeed, there is no higher protected
4 speech than vote for Bush or vote for Gore, yet
5 nonetheless, the restrictions there were upheld by
6 the Court and there were not --

7 QUESTION: Five to four and don't blame it
8 on me.

9 (Laughter.)

10 MR. CLEMENT: Very well, Justice Scalia,
11 but I'll take the five to four. And many of the
12 arguments that are being raised in opposition to this
13 statute are the arguments of the dissenters in
14 Austin, not the arguments of the majority opinion in
15 Austin. And I think that's an important point.

16 This Court has approved the same basic
17 mechanism in the context of express advocacy. It has
18 worked well perhaps not with the definition of
19 express advocacy, but has worked well in terms of the
20 separate segregated fund requirement.

21 The other point I think that has to be
22 made about the separate segregated fund requirement
23 is that the idea that, okay, let's say that we now
24 have meaningful limits so there are going to be some
25 real incentives to put some money in your political

1 action committee or your separate segregated fund.

2 One of two things can happen.

3 With some organizations, it may very well
4 turn out that some of the people who were members of
5 the overall organization, turns out they really
6 weren't 100 percent interested in supporting the
7 political causes of that organization. They sort of
8 like some of the other benefits of membership. And
9 in that case, the amount of money that would be
10 raised will be reduced.

11 In some other organizations, it may be
12 that every member of the organization supports the
13 political cause and they give the money to the
14 separate segregated fund. In either event, the
15 purposes of the separate segregated fund are fully
16 vindicated because the resulting corporate political
17 activity at that point will reflect the views of the
18 underlying membership and the underlying union
19 members, which is precisely what this Court said was
20 a compelling interest in Austin.

21 QUESTION: Can a corporation spend any
22 money, whether for political speech purposes or
23 otherwise, that is not directed towards the fostering
24 of its business? Wouldn't they be leaving themselves
25 open to a lawsuit by the shareholders?

1 MR. CLEMENT: There is certainly a large
2 body of state law about corporate waste that is, if I
3 remember it from law school, fairly impenetrable and
4 doesn't provide a lot of specific guidance in
5 particular consequences, in particular cases.

6 But I would say that that same issue again
7 was raised in Austin, and this Court said that it was
8 not sufficient simply to leave everything to the
9 state law of waste, where you have the business
10 judgment rule, and everything's set up to make sure
11 that no corporation is ever held liable.

12 This Court said that in this particular
13 context, it was much more appropriate to use the
14 separate segregated fund requirement which has been
15 part of the law and functionally since 1947 --

16 QUESTION: I am raising the question to
17 respond to your point that shareholders don't agree
18 with every jot and tittle of what the corporation
19 does. They don't in the economic field either. Very
20 often some of the things that corporations should
21 divest itself of a certain business, others think
22 they shouldn't. They have ceded to the organization
23 -- this is part of belonging to an organization --
24 the responsibility to determine what is in the
25 interest of that corporation.

1 And it seems to me that is no less true
2 with respect to political, especially issue ads as to
3 what issues are important for that corporation's
4 survival. I don't know why all of a sudden we insist
5 on unanimity among the shareholders when it comes to
6 that very important issue.

7 MR. CLEMENT: Well, I think again, Justice
8 Scalia, the resort I would take is to the Austin
9 decision, which rejected that argument as well. And
10 it did so on the basis that candidate elections are
11 different than other situations. It may be a bit of
12 an affront for a shareholder to have their money
13 spent on an issue that they don't particularly care
14 for, or to have the corporation go into some new line
15 of business that the shareholder thinks, boy, that's
16 really not very smart, you should stick with what you
17 know best. That's an affront.

18 But it's a much greater affront to have
19 that individual's money spent on candidate elections
20 where that individual does not agree with the
21 position that the corporation has taken.

22 And let me just add --

23 QUESTION: You said any mention of the
24 candidate makes it a candidate ad and not an issue
25 ad.

1 MR. CLEMENT: I thought that's the
2 position you were taking earlier, because I think
3 there is a sense in which any time -- if you're
4 talking about ads within 60 days from election that
5 are targeted to a candidate's home district then I
6 think -- and mention that candidate, I think it's a
7 safe assumption to be made that they at least have a
8 mixed motive.

9 And one of the motives is to influence the
10 candidate election. And I think if the corporate
11 consciously decides to link its issue up to a
12 candidate election, then it's a perfectly appropriate
13 response to make that corporation funded through a
14 separate segregated fund.

15 QUESTION: Mr. Clement, I think just as a
16 matter of history, that the decision in the Belotti
17 against First National Bank of Boston invalidated the
18 statute that was really typical throughout the
19 United States at the time. Generally, there was in
20 the olden times a policy against using corporate
21 funds for political purposes at all. So the history
22 I think is consistent with the position here.

23 MR. CLEMENT: That's right. And this
24 Court took a different step over the Chief Justice,
25 among others' dissents and said no, we're going to

1 invalidate that traditional approach. But then in
2 Austin, this Court drew an important distinction
3 between the candidate election context and the issue
4 context.

5 I was talking a minute ago about the mixed
6 motives and I did want to be responsive to a question
7 that Justice Souter had asked earlier, which is this
8 question about in the specific studies that Congress
9 and the district court discussed, was mixed motive an
10 option for the people that were scoring the ads.

11 And as a matter of fact, it was not. The
12 students were asked whether or not the issue in the
13 particular ad had a tendency to support or go against
14 a candidate, or if it addressed an issue. There was
15 no mixed motive box, and I think the net effect of
16 that is that whatever overbreadth is estimated by the
17 studies, it actually overstates the overbreadth
18 because it didn't account for the mixed motive case.

19 And as I say, I think the mixed motive
20 case does reflect the reality in a number of
21 situations. But I do think that the point that a
22 corporation makes that conscious decision to link
23 some controversial issue to a candidate election, at
24 that point, the interest that this Court found
25 sufficient in Austin are fully implicated.

1 QUESTION: One of the briefs argues that
2 frequently these issues are before Congress almost at
3 the same time the election comes up, because the
4 Congress is catching up perhaps on things that it
5 didn't do earlier in the session.

6 And so it's not the corporation's
7 voluntary choice to put it up there. That's the time
8 it has to do it, if it's going to do any good.

9 MR. CLEMENT: Again, and the safe harbors
10 that we talked about earlier are still available in
11 that situation. And they are, as Justice Breyer
12 pointed out, twofold.

13 One, if all the corporation is really
14 concerned about is a pending legislative issue, it
15 doesn't need to make a reference to the candidate and
16 it can run the issue through treasury funds. On the
17 other hand, if they want to make a specific reference
18 to the candidate, tie that legislative issue to the
19 broader context of the campaign, then they're free to
20 do so as long as they do so through their separate
21 segregated fund.

22 QUESTION: Mr. Clement, why do you make an
23 exception for these corporations, these aggregations
24 of vast wealth that happen to own television
25 stations? General Electric, for example, which, if I

1 recollect correctly, owns NBC. Why is it perfectly
2 okay for them to have issue ads, name candidates,
3 oppose candidates? They're not covered, there's an
4 exception for that.

5 MR. CLEMENT: Well, first of all, Justice
6 Scalia, as I understand the media exemption, it
7 applies to the media corporation but not necessarily
8 to the entire corporation, so I don't think --

9 QUESTION: Well, just NBC, which is owned
10 by General Electric. So everybody should go out and
11 get himself a television station, right?

12 MR. CLEMENT: I don't know about that.
13 What I do know is that media corporations are
14 exempted for the same reason they've always been
15 exempted from the law, which is that they do pose a
16 different situation, a difference of kind. And this
17 Court --

18 QUESTION: And why is that? Why is that?
19 I don't understand that.

20 MR. CLEMENT: I mean, I think the
21 traditional role of media companies has been quite
22
23 different than the traditional role of other
24 companies.

25 QUESTION: What case do you have that we

1 can distinguish speech based on the identity of the
2 speaker? Outside of this area?

3 MR. CLEMENT: Well, I don't know. I've
4 been focused on this area for the last couple of
5 weeks, Justice Kennedy, and the case that comes to
6 mind is Austin, where the Michigan statute before
7 this Court --

8 QUESTION: You really like Austin, don't
9 you?

10 MR. CLEMENT: I love Austin. It's binding
11 precedent. I don't, I mean, as much as the
12 plaintiffs don't seem to like the case, I don't
13 really hear them asking this Court to overrule it.

14 QUESTION: Well, but this, this is a
15 serious question. A large part of -- of the
16 necessity, or at least the perceived necessity for
17 these ads is to counter the influence of the press.
18 This -- this is a very serious First Amendment issue.

19 MR. CLEMENT: I know it is, Justice --

20 QUESTION: And you have -- and you have no
21 authority for this distinction.

22 QUESTION: Well, isn't Buckley a point on
23
24 this? Wasn't there an exception in the statute in
25 Buckley?

1 QUESTION: It wasn't challenged, though.

2 MR. CLEMENT: Yes. I don't think that
3 particular provision --

4 QUESTION: They didn't challenge it.
5 That's the reason.

6 MR. CLEMENT: Right. But it was brought
7 into full focus in the Austin case, and the argument
8 was made there, as it's made here, that the statute
9 is somehow underinclusive because it doesn't include
10 media corporations, and I -- it is a difficult issue,
11 I will admit, but I think this is an area where
12 sometimes it is just as much a problem to treat
13 different entities the same as it is to treat similar
14 entities differently.

15 QUESTION: But you were -- you were going
16 to explain why this difference exists, and I don't
17 think you've done that yet.

18 MR. CLEMENT: I think the difference is
19 that because of the traditional role of what a media
20 corporation does, there is, there's an inherent
21 involvement in the political process. This Court
22 recognized that, I think at least implicitly in *Mills*
23 against *Alabama*, when you had a situation where there
24 was an effort to apply a statute to a newspaper, and
25 I think because of the role of the media, there is a

1 recognition that a different rule should apply to the
2 media, and again, this is -- this is no revolution in
3 the, in the Bipartisan Campaign Reform Act. This is
4 just carrying through --

5 QUESTION: Well, what, what about say the
6 National Rifle Association? It's against gun laws.
7 A media corporation is very much in favor of gun
8 laws, it prints editorials, perhaps it even slants,
9 God forbid, its coverage of the subject. There is a
10 substantial difference, substantial similarity there,
11 isn't there?

12 MR. CLEMENT: Well, there certainly is the
13 similarity in the sense that they're both addressing
14 the same issue, but I do think that again this Court
15 has drawn that distinction in the Austin case and
16 Congress has drawn that distinction throughout its
17 campaign finance reform. This is not some new
18 provision.

19 QUESTION: But what do you think should be
20 the underlying valid principle that allows that
21 distinction to be drawn?

22 MR. CLEMENT: I think the under --

23 QUESTION: Why is it that a group of
24 citizens concerned about what they consider to be
25 slanted press cannot get together, have a corporation

1 and take out issue ads on the other side of that
2 issue?

3 MR. CLEMENT: Oh, absolutely they can, and
4 I think if what you're talking about is running an
5 issue about the slanted press, I can't imagine how
6 that has to refer to a candidate, so I think you come
7 within both safe harbors that are available to
8 corporations. They could do it through a separate
9 segregated fund, but again, if what a corporation
10 wants to do is correct some nasty publication that's
11 been running some media corporation, they are
12 perfectly free to do that with treasury funds and
13 it's, it's harder for me to imagine how that would be
14 translated into the context of a candidate election.

15 QUESTION: Mr. Clement, Austin aside, do
16 you know of any case of ours that says that the
17 press, quote, has greater First Amendment rights than
18 Joe Mimeograph Machine?

19 MR. CLEMENT: I don't. I know there are
20 cases that address --

21 QUESTION: There are none.

22 MR. CLEMENT: Right.

23 QUESTION: There are none. In fact, we've
24 said just the opposite.

25 MR. CLEMENT: Well, this Court has talked

1 in various cases, Mills against Alabama is one, about
2 the freedom of the press, and suggesting maybe that
3 adds something, but I don't think there is a case
4 that draws that definitive distinction, but again,
5 this is a little bit different. This is not saying
6 that the Freedom of the Press Clause, although that
7 has been raised in this litigation obliquely, that
8 the Freedom of Press Clause is what makes the
9 difference. What makes the difference here is a
10 legitimate decision by Congress to treat these
11 different corporations differently, and again, I know
12 you don't want to hear me say it, but the Austin
13 Court heard the argument, it said that that argument
14 is invalid. And I don't think --

15 QUESTION: I think they want to know why.
16 And I suppose that what we are talking about is that
17 the Times or any radio station runs an editorial
18 saying, vote for Smith, or Jones is against labor,
19 for example, but if a union or corporation runs --
20 pays for the ad on the next page it falls right
21 within the ad. I thought that the reason had to do
22 with the traditional role of the newspaper where we
23 expect them to have reporters, some of whom will in
24 fact think one thing and some will think another and
25 the editorials may or may not make sense, but there

1 are considerable implications for regulating those
2 that don't exist when we talk about Philip Morris or
3 the municipal workers union.

4 MR. CLEMENT: No, I think that's exactly
5 right. It reflects that historical tradition. It
6 also reflects the reality that applying this kind of
7 limitation to the press would make it very difficult
8 for them to report anything.

9 QUESTION: Well, wouldn't it go further
10 than that? I mean, if, if the argument that the
11 press should be subject to the same limitations and
12 presumably have the same powers, then the press would
13 have to publish a separate newspaper through a PAC in
14 order to make the otherwise limited expression during
15 the 30-day period. I mean, that can't be done.

16 MR. CLEMENT: No. That can't be done, and
17 in --

18 QUESTION: That wasn't the argument, that
19 the press has to be subject to these limitations.
20 The argument is, since these limitations would
21 obviously be bad as applied to the press, they are
22 bad as applied to everybody else, because everybody
23 else has the same rights as the press. I don't know
24
25 why, why should it be that the corporation of great

1 wealth -- let me put the question this way. Could,
2 could Congress pass a law saying, we are concerned
3 about the influence of major media corporations,
4 Mr. Murdoch? We are going to pass a law that no
5 corporation can own more than two national
6 newspapers. Would that law be valid?

7 MR. CLEMENT: I'm sure that law would be
8 challenged. There might be a defense that you could
9 try to make on the law, but the point I'd like to
10 make is that I think that this effort is just another
11 effort to say that Congress is powerless in this
12 field, because all the problems you are raising about
13 electioneering communication and how you treat the
14 press differently apply a fortiori I to express
15 advocacy.

16 QUESTION: You mean, you mean, you think
17 I'm saying that Congress shall make no law
18 respecting, abridging the freedom of speech?

19 MR. CLEMENT: I think --

20 QUESTION: That is what I'm saying.

21 MR. CLEMENT: I think what you are saying
22 is that contrary to this Court's decisions in Austin,
23 in MCFL, in all the corporate, in all the cases
24 dealing with contributions, that the First Amendment
25 holds the Congress powerless to deal with this

1 problem And that is what this Court's cases say.

2 QUESTION: Haven't we held that --

3 QUESTION: Do you find it unusual that the
4 Congress is powerless to favor one speaker over
5 another? Is that such an astounding proposition?

6 MR. CLEMENT: No. What would be an
7 astounding proposition is in light of the 100-year
8 tradition of Congress' ability to regulate the
9 influence of corporate political activity and
10 corporate influence on political elections if all
11 they can do is limit express advocacy or as I
12 understand some members of this Court, they can't
13 even do that. That is a very difficult position to
14 swallow because Congress has been active in this
15 field since 1907. The abuses that they are
16 addressing today are not different in kind from the
17 abuses they have addressed for the past 100 years,
18 and I simply don't think that they are powerless to
19 deal with this situation.

20 QUESTION: Haven't we held that licensees
21 can be, radio licensees and television can be
22 compelled to give equal time to opposing points of
23 view but you can't compel the newspapers to do that?

24 MR. CLEMENT: No. That's a very good
25 point, and there are differences with respect to

1 broadcast media, and I think if I can digress for a
2 minute to talk about some of the other provisions
3 like Section 305, 311, and 504 --

4 QUESTION: You say there are differences
5 with respect to the broadcast media. You are not
6 relying on the scarcity of wavelengths, are you?

7 MR. CLEMENT: Well, I think with respect
8 to some of the other provisions, 504, 307, I'm sorry,
9 305 and 311, I do think that this Court's cases
10 suggesting that broadcast media are subjected to a
11 different regulatory regime remain good law, and I
12 think that there is certainly enough in this case
13 without trying to revisit Red Lion or some of these
14 other cases. I think one of the things that can
15 happen in this case and one of the unfortunate by
16 products of the en masse nature of the way this case
17 is litigated is that you look at some of the
18 provisions that are dealing with a very different
19 type of speech, and then you get to Section 504 and
20 you take a look at the broad terms that Congress has
21 used and it's easy to reach the conclusion that
22 that's an impermissible approach and those words are
23 too broad, but that ignores the reality of the way
24 the broadcast industry has been regulated.
25 That's, after all, an industry that

1 continues to be regulated on a public interest
2 standard. In CBS against FCC, this Court upheld a
3 statute that required individual stations to give
4 reasonable time to candidates and it's within that
5 background that a provision, the kind of provisions
6 that Congress added to Section 504 are not --

7 QUESTION: Was that the scarcity
8 rationale?

9 MR. CLEMENT: I don't think in the CBS
10 case that the court specifically addressed the
11 scarcity rationale. It may well have been building
12 on prior precedents, though, that were based on that.

13 One other point I'd --

14 QUESTION: But we are, we're not talking
15 about regulating the broadcast media. That's the
16 whole point. They are the only people here who
17 aren't regulated. It's people who are trying to get
18 their views across through these media who are
19 regulated. It's not the media who are regulated.

20 MR. CLEMENT: But that's the way that the
21 media has long been regulated, which is to say that
22 with respect to requests for candidate advertisement,
23 with requests to address a, quote, controversial
24 issue of public importance, which is the pre-existing
25 law, nothing added by BCRA, there has been a

1 requirement that if you make a request for air time,
2 that the station do some record-keeping in
3 conjunction with that and that's exactly what 504
4 carries over.

5 QUESTION: Why -- why did they ask for
6 record of requests as opposed to actual broadcast
7 deals?

8 MR. CLEMENT: I think one of the reasons,
9 Justice O'Connor, is so that they could enforce the
10 public interest standard, which has, which has
11 manifested itself not only in the fairness doctrine,
12 but also with the idea that stations have to give
13 appropriate amounts of time to things like discussion
14 of legislative issues. And so if you have the
15 requests before you, you can then make a judgment as
16 to whether or not one station is denying all the
17 requests.

18 QUESTION: Must the disclosure be made
19 before the ads are run? It's not clear.

20 MR. CLEMENT: Well, it depends on which
21 provision that you are asking about, Justice --

22 QUESTION: I'm talking about 504.

23 MR. CLEMENT: In 504, what triggers the
24 disclosure, the disclosure requirements is, is a
25 request and again --

1 QUESTION: Yes, I know. But I'm asking
2 about the time within which it has to be disclosed by
3 the broadcast stations.

4 MR. CLEMENT: I'm not positive about this.
5 I don't think that Section 504 has that kind of
6 advance notice principle to it. The advance notice
7 objections that have been raised have been raised to
8 Sections 201 and 214, and I think with respect to
9 those provisions, it's important and worthwhile to
10 note that the FC -- the FEC has cured the advance
11 notice issue by regulation, and what people seem to
12 have focused on is the idea that the statute requires
13 the disclosure of a contract to disburse, and that
14 language is not designed to get at advanced
15 disclosure in the sense of advanced disclosure before
16 the ad airs. It's simply to get away with, to avoid
17 the clear circumvention that would happen if somebody
18 could buy ads on credit and then only disclose them
19 after the fact, after the election when they had
20 actually made the disbursement at that point. I
21 think --

22 QUESTION: But that, that same objective
23 could be obtained simply by requiring disclosure by
24 the station as soon as they, as soon as they run, I
25 mean, file a report on the day that the ad runs.

1 MR. CLEMENT: I mean, I think that's
2 right, but again, that is the way that the FEC has
3 interpreted the provisions, which is to say there is
4 no advance disclosure requirement under 201 and 214
5 as interpreted by the FEC, because they trigger to
6 the definition of, for example, in 201 the
7 electioneering communication and you don't even know
8 for sure that it's an electioneering communication
9 until it's in fact it is run in the relevant district
10 that's been targeted and all the like, so in that
11 sense I do think that the FEC has cured any problem
12 with advance notice.

13 I'm not sure it was that much of a problem
14 in any event because what you are talking about is
15 forcing people to disclose the fact that they made
16 binding contracts. I think it's also --

17 QUESTION: What happens to the language,
18 or contracts to make?

19 MR. CLEMENT: Again --

20 QUESTION: The regulation just reads that
21 out of existence?

22 MR. CLEMENT: No, again, what contracts to
23 makes disbursement, or I don't know what language you
24 have in front of you, but contracts to make
25 disbursement.

1 QUESTION: It's in 202. Any person, if
2 any person makes or contracts to make any
3 disbursement for an electioneering communication.

4 MR. CLEMENT: Again, as I was explaining
5 to Justice O'Connor, that provision is necessary to
6 avoid the phenomenon where somebody contracts to make
7 a disbursement, i.e., buys an ad on credit and
8 doesn't make the disbursement until after the ad is
9 run or in fact after the election, so that's why
10 that's in there. It's also worth noting that the
11 statute --

12 QUESTION: But it goes on to say, such
13 disbursement or contracting shall be treated as a
14 contribution and as an expenditure. Such
15 disbursement or contracting, so I assume the
16 contracting immediately falls --

17 MR. CLEMENT: No, it doesn't fall within
18 the con -- the disclosure provision. I suppose if
19 you buy \$10,000 worth of ads on credit that does
20 become an expenditure the second you make that credit
21 purchase, but I don't think that renders a statute
22 unconstitutional. I think again it bears noting that
23 this advance sort of contract to purchase language
24 has been in the statute all along. It was in FECA
25 with respect to expenditures. In fact, I believe

1 that Justice Souter made note of that in footnote
2 one.

3 QUESTION: To challenged and upheld. I
4 mean, there's so much that was in FECA, and there's
5 so much more that's in this that hasn't been
6 challenged here. I mean, simply to say it's been
7 around for 30 years doesn't, doesn't convince me that
8 it's valid.

9 MR. CLEMENT: It depends on the nature of
10 the challenge with respect, Justice Scalia. If the
11 nature of the challenge that a provision is vague and
12 in fact a very similar provision has been in the
13 statute for 20 years and the regulated parties
14 working with the FEC in the context of 504 have
15 figured out how to live with it in a way that doesn't
16 have any chilling effects, then I think the fact that
17 there was a statutory prerequisite for it is quite
18 important and is valid and a valid basis for
19 interpreting the statute.

20 If I may say in closing as I said before,
21 I think the counsel of the other side in this case is
22 that, to borrow Justice Scalia's phrase, this problem
23 is insoluble. They fully admit that the express
24 advocacy test doesn't work. I think it is not a
25 proxy for speech designed to influence candidate

1 elections. I think one thing we can trust candidates
2 to do is to make speeches that are designed to
3 influence their own elections, yet almost 90 percent
4 of candidates' own advertisements don't use words of
5 express advocacy.

6 The remarkable thing about plaintiffs here
7 is that in the first, in the first, this morning we
8 heard a little bit from Mr. Starr about less
9 restrictive alternatives. You hear not one word
10 about that this afternoon because they offer nothing
11 as an alternative. They say it's express advocacy or
12 nothing, and they are all too willing to abandon even
13 express advocacy and I simply do not think that the
14 Constitution leaves Congress powerless to deal with
15 this problem. Strict scrutiny is not a formula for
16 corruption. When Congress is dealing with this kind
17 of corporate spending, a problem they have been
18 wrestling with since 1907, they can take reasonable
19 steps like Title II to address the problem. If there
20 are no further questions.

21 QUESTION: Thank you, Mr. Clement. We'll
22 hear from you, Mr. Waxman.

23 REBUTTAL ARGUMENT OF SETH WAXMAN

24 ON BEHALF OF INTERVENOR-DEFENDANTS

25

1 MR. WAXMAN: Mr. Chief Justice, and may
2 it please the Court:

3 Buckley v. Valeo taught not that the
4 so-called magic words test was a constitutional
5 immutable. It taught two lessons that are much more
6 enduring, that are profound, and that demonstrate
7 just exactly why the electioneering communications
8 definition and provision is constitutional. The
9 first thing that Buckley taught in this area is that
10 statutory requirements that cut right through core
11 political speech, nothing more core than vote for
12 Bush or Bush is a good guy the day before the
13 election.

14 Statutory requirements in this area must
15 be clear, they must be illusive so that they will
16 not, as this Court said, quote, dissolve impractical
17 application. No doubt about this case. No one on
18 the other side has suggested that there is any lack
19 of clarity in this objective test. The second test,
20 the second factor that this Court articulated in --

21 QUESTION: Excuse me. I don't want --
22 because this is important. No one has said,
23 suggested that what is less than clear?

24 MR. WAXMAN: I'm sorry, the four-part
25 primary definition, that is, it has to be at 60 days

1
2 before, targeted at the electorate, a specifically
3 identified candidate in an ad that is broadcast as
4 opposed to an ad that runs in a newspaper.

5 QUESTION: I thought there was
6 substantial suggestion that clearly identified
7 candidate is not clear. It is not at all clear to
8 me.

9 MR. WAXMAN: Well, the FEC took comments
10 on whether or not it covered, for example, the
11 McCain-Feingold regulation or Roth IRA. And it has
12 ruled. It considered whether or not an ad that is
13 run within the period but says call your Congressman
14 and has the Congressman's name without identifying
15 him by name is covered, and it ruled that it did.

16 Now, those applications -- one of those
17 applications, that is, the call your Congressman, my
18 clients, the sponsor of this bill, urged the Court to
19 the urge the FEC to adopt. It didn't because it
20 found that there were possibilities for circumvention
21 and not an established record to demonstrate that it
22 would cause a problem in any number of cases.

23 QUESTION: You clarified that. I didn't
24 mean to throw you off.

25 MR. WAXMAN: The second test, the lesson

1 that Buckley teaches that is enduring is that
2 standards in this area must be, quote, directed
3 precisely to that spending that is unambiguously
4 related to the campaign of a particular Federal
5 candidate.

6 And so many we are talking about whether
7 or not this law is overbroad or substantially
8 overbroad, I suggest that the Court look to the
9 standard that it articulated itself in Buckley, which
10 is are these expenditures for communications that are
11 unambiguously campaign related. And if the answer is
12 yes, in the vast majority of cases, then on its face,
13 the statute deserves to stand. There may be
14 particular applications that may be in fact ,
15 unconstitutional. The FEC can issue rules,
16 as-applied challenges --

17 QUESTION: Let me ask you, what did the
18 district court do in this case? Didn't they strike
19 down the primary definition?

20 MR. WAXMAN: The district court struck
21 down the primary definition and upheld an altered
22 version of the backup definition, Mr. Chief Justice.
23 And it did so, based on its understanding and it was
24 a misunderstanding of what the data showed with
25 respect to the answer that was given to, I think it's

1 question 6 in the Buying Time study. That is, our
2 data that showed that for one of the two years
3 involved, 14.7 percent of the ads, which constituted
4 a total of six ads, were issue-related, not
5 candidate-related.

6 QUESTION: This is the binary choice.

7 QUESTION: Didn't the district court
8 pretty well disbelieve the Buying Time study?

9 MR. WAXMAN: No, Mr. Chief Justice. In
10 fact, Judge Leon, who was the swing vote, so to
11 speak, specifically found that although there had
12 been some criticisms with respect to the methodology
13 with respect to this one question, he specifically
14 found that the Buying Time study was credible, and
15 that the results should be given credence.

16 And it was on the basis of his
17 interpretation of the answer to that one question
18 that he determined that, well, this is 14.7 percent
19 or 17 percent and that's overbroad. And what I would
20 like to address myself to is why -- first of all,
21 that analysis was incorrect. But more to the point,
22 even if there never had been a Buying Time study,
23 even if this question was never asked, Congress had
24 more than ample justification for doing this.

25 One of the wonderful things about a bright

1 line objective test is it invites hypotheticals. But
2 what Congress had before it, which is in strict
3 scrutiny, after all, what we're addressing ourselves
4 to, was the real world. And it had before it -- this
5 is Defense Exhibit 48 in the record below -- the
6 story boards of all of the ads that were captured by
7 the CMAG database. That is, in the 75 largest media
8 markets in the 11 months that led up to the 1998
9 campaign and the 2000 campaign.

10 And we urge the Court to look through this
11 volume because the real world of what these ads were
12 does not reflect the hypothetical instances in which
13 a corporation or a labor union is faced with an
14 imminent piece of legislation that's going to be
15 enacted the week before or the week after an election
16 and it's only about changing votes.

17 There may very well be instances, if that
18 occurs, in which an as-applied challenge can be made
19 and a court can determine whether or not the law can
20 constitutionally be applied to that. But what is an
21 amazing feature about this case is the remarkable
22 degree to which the four-part objective test that
23 Congress drew actually hits the observed reality of
24 what Congress knew these ads were about.

25 At page 11A of the appendix to our brief,

1 we've reprinted a chart that is also contained in
2 Judge Kollar-Kotelly's findings at special appendix
3 page 848. And what the chart shows is a graph that
4 shows, over the course of, I believe it's 2000. This
5 was 2000. Yes. Weeks prior to the 2000 election.

6 If you look at the dotted line which sort
7 of waves back and forth very close to the bottom
8 axis, those are the number of ads, issue ads, run
9 during 2000 that don't mention candidates. It stays
10 very constant throughout the year.

11 If you look at the hard line, you'll see
12 an enormous spike that comes right about week 9, nine
13 weeks before. That's 63 days before the election.
14 And what Congress found was that there was
15 substantial evidence, both the ads themselves and
16 through objective data that I'm now going to
17 describe, that what common sense leads you to
18 believe, that is, that ads that run just before an
19 election, that mention a candidate that are targeted
20 at that candidate's election, and that use broadcast
21 media, that is the most expensive kind of media
22 possible, are very likely intended to have, and
23 overwhelmingly likely will have, an effect on an
24 election.

25 Now, Justice Scalia, you're quite right.

1 You know, the hip bone is connected to the thigh bone
2 which is connected to the knee bone, and that doesn't
3 mean you can regulate the metatarsals. But we're
4 talking about a -- what a terrible metaphor.

5 We're talking about a test here that --
6 we're talking the test is spending that is
7 unambiguously related to a campaign. And what
8 Congress found, based on the ads, is that that was
9 the case. And if you don't want to read through all
10 of these direct ads, just look at the ones that the
11 Plaintiffs have attached to their brief.

12 QUESTION: The Congress found that these
13 ads made them feel very bad, and we would not accept
14 that they criticized the incumbents. We wouldn't
15 accept that rationale from a city council. Why
16 should we do it from the Congress?

17 MR. WAXMAN: Absolutely not. And that is
18 not the reason that -- there is a lot of talk about
19 attack ads. But the reality is they didn't ban
20 attack ads and they didn't even ban attack ads by
21 corporations and labor unions and nonprofits.

22 QUESTION: But you're saying that was not
23 any part of the rationale for the enactment of a
24 legislation?

25 MR. WAXMAN: That's correct. There were

1 individual statements by members of Congress who were
2 upset about this. But if you look at the test that
3 Congress crafted, and the fact -- and it is in the
4 record in this case that the vast majority of these
5 ads were attacking not incumbents. The vast majority
6 of these ads were attacking challengers. I don't
7 think it's fair --

8 QUESTION: Why do you say they haven't
9 banned attack ads? It's very hard to devise a good
10 punchy attack ad that doesn't name the person you're
11 attacking.

12 MR. WAXMAN: There is no doubt about the
13 fact that these ads -- there are ads here that both
14 attack and praise.

15 QUESTION: Well --

16 MR. WAXMAN: My point to Justice Kennedy
17 was, by and large, the incumbents made out very well
18 under the status quo ante. And it is -- Justice
19 Scalia --

20 QUESTION: If the price of getting rid of
21 the attack ads is that I have to ban some of the
22 praising ads as well, it's worth it.

23 MR. WAXMAN: The purpose of the
24 legislation, and it is manifest, we included it in an
25 appendix in our brief, and it's in the Thompson

1 committee report and the page is cited by Senator
2 Thompson's amicus brief, is that Congress was closing
3 a loophole. It was closing a loophole that the
4 political director of the National Rifle Association
5 called a line in the land drawn on a windy day.

6 She said that the express advocacy test
7 was a wall built of the same sturdy material as the
8 emperor's clothing. Everyone sees it. No one
9 believes it. It was, in other words, serving the
10 paramount interest in reducing a provision of law, a
11 provision of law enacted by Congress following this
12 Court's decision in Buckley that had made the law an
13 object of scorn.

14 And that is all over the record in this
15 case. That what this was about was replacing a line
16 in the sand drawn on a windy day with a line that
17 everybody can see and that no one would miss. And
18 the evidence before Congress was not just this
19 question 6, but the ads themselves, the way they ran.
20 There are statement after statement after statement
21 from witnesses in this case that are included in the
22 Joint Appendix. And objective studies from -- the
23 objective data from the Buying Time studies, the
24 Annenberg Center, Professor Magleby at Brigham Young
25 University.

1 And the internal documents -- and we have
2 some of these discussed in our brief -- the internal
3 documents of the corporations and unions that ran
4 these ads. They have documents that showed that they
5 were aiming at voters, they were using consultants
6 and pollsters to try and figure out how to get
7 voters. They tested these against voters.

8 These were electioneering in every sense
9 of the word. And here is -- just to put some
10 reality, I guess, the real world example behind that
11 chart, number 11A. Citizens for Better Medicare was
12 an organization that ran a large number of these ads
13 in 2000. Described itself as -- its official Web
14 site as a group of concerned seniors and companies
15 and associations concerned about Medicare.

16 It was in fact funded almost exclusively
17 by Pharma and the corporations that make up Pharma.
18 Nothing wrong with them running issue ads at all,
19 Justice Scalia. From January 1 until September 4,
20 that is, until the 60-day period cut in, they ran
21 23,867 issue ads about Medicare and not a single one
22 mentioned a candidate.

23 On September 4, until election day, they
24 ran 10,876 ads all mentioning candidates. And on
25 election day, they stopped cold. And in our brief,

1 we discuss this at page 50 and 52. That is a
2 particularly striking example of no requirement to
3 disclose to the public who's paying for this when it
4 is, in fact, corporate treasuries.

5 QUESTION: That disclosure thing is a
6 different problem, but why banning it?

7 MR. WAXMAN: Well, again, Justice
8 Scalia --

9 QUESTION: You've raised the risk of
10 corruption or the appearance of corruption, the fact
11 that they -- I mean, I agree with you that they named
12 candidates. What is wrong, so long as you disclose
13 who it is, that's a different issue. But so long as
14 you disclose who's doing it, what is wrong with their
15 naming a candidate?

16 MR. WAXMAN: Well, I -- Justice Scalia,
17 I'm right here with my brother, Clement, with Austin.
18 And with the very same rationale that this Court
19 adopted in Austin, which was explicated in the Auto
20 Workers case by Justice Frankfurter, which was
21 recited again by a unanimous opinion of the Court in
22 National Right to Work Committee.

23 The issue here is whether or not, when
24 we're talking about campaign-related speech, when we
25 are talking about who gets to speak when individual

1 citizens are exercising their constitutional
2 franchise to vote, the question is whether
3 corporations and labor unions have to do it the same
4 way all the rest of us do.

5 QUESTION: What about the --

6 MR. WAXMAN: With voluntary funds
7 contributed by individuals for that very purpose.
8 And the PAC issue that has been discussed -- you
9 probably have heard more than you want to hear about
10 this law in any event, and certainly about the PACs.
11 But the PAC issue that I want to address and the
12 media exemption.

13 On PACs, we've heard about that the labor
14 unions and how hard it is for the AFL-CIO and what
15 evidence there is in the record. Okay, in the 2000
16 election cycle, labor unions contributed \$53 million
17 from their PACs in contributions and expenditures.
18 And that's not including the treasury funds that they
19 use to run the kind of electioneering ads that are
20 included in our submission.

21 I guess the other two organizations that
22 were named were the National Rifle Association and
23 the ACLU. The National Rifle Association had so much
24 extra money left in its PAC in the last election
25 cycle that it ended up spending millions of dollars

1 on things that it wasn't even required to use PAC
2 money for. It has 4 million members. If each of
3 those 4 million members gives \$10 a year, they will
4 have one of the biggest -- probably the biggest PAC
5 in history, \$40 million.

6 And there is no showing whatsoever --
7 they've just raised their dues from \$25 to \$35. If
8 they just say the dues are still \$25. But if you
9 believe with us that political advocacy in this case
10 and talking to candidates and voters who are voting
11 the candidates about how precious the Second
12 Amendment is, please give us \$10. If and when a day
13 comes when they can't fund their advocacy in this
14 narrow window, with respect to broadcast ads targeted
15 at particular races, the courts will be open to them

16 This Court has announced an exception to
17 the PAC requirement in MCFL, and the courts are
18 available to any corporation that wants to -- or
19 labor union that wants to come in and say we don't --

20 QUESTION: But is that the way that we
21 would ordinarily construe a statute. To say, you
22 know, if this bothers you or affects you, come in and
23 we'll make an exception for you? That's usually the
24 legislative prerogative.

25 MR. WAXMAN: Indeed, Mr. Chief Justice,

1 but in MCFL itself, for example, we have an
2 as-applied exemption made by the Court in order to
3 satisfy constitutional concerns. And our only
4 submission is that on its face, this is in an area in
5 which the need for legislation is compelling, but the
6 drafting challenges are daunting. This effort by
7 Congress at least deserves a chance to protect
8 itself.

9 Now, just to clarify --

10 QUESTION: It's getting it now.

11 MR. WAXMAN: Well, it should have the
12 opportunity to prove that the parade of horrors
13 that our opponents, the type of hypotheticals, we
14 won't be able to fund a PAC, or we want to run --

15 QUESTION: Congress chose this course.
16 Congress said a three judge district court
17 immediately appealed to the Supreme Court, and 22
18 issues. I mean, it's not our fault.

19 MR. WAXMAN: How well I know. But in all
20 seriousness, Mr. Chief Justice, I will be one of the
21 happiest people on the face of the planet when I sit
22 down today, however you decide.

23 But we're talking about a facial
24 challenge, a facial challenge. And the express
25 advocacy test, the contribution limits and

1 expenditure limits were not declared unconstitutional
2 on their face when this Court found in MCFL that were
3 some PAC burdens for some types of corporations that
4 the First Amendment should not require to be borne.

5 Now, with respect to the media exception,
6 I think there may be a misunderstanding about what
7 this exception actually says. It's not an exception
8 for General Electric or people who own medias. It's
9 on page 29A of the government's jurisdictional
10 statement. It accepts a communication appearing in a
11 news story, commentary or editorial distributed
12 through the facilities of any broadcasting station.
13 It's not an exception for General Electric or even
14 the company that owns a broadcast --

15 QUESTION: Only for the subsidiary of
16 General Electric, right?

17 MR. WAXMAN: To the contrary. Anybody who
18 wants to run an issue ad, General Electric can run it
19 and it's going to have to run it through its PAC,
20 just like anything else.

21 QUESTION: But NBC can say whatever it
22 wants, right?

23 MR. WAXMAN: NBC on its editorial or news
24 story can say whatever it wants.

25 QUESTION: What else is there, besides --

1 I mean, it's going to be in a sit come?

2 MR. WAXMAN: May I answer? Thank you.

3 When Congress finds what there is no evidence
4 whatsoever to suggest exists, that companies that own
5 broadcasting stations are misusing that privilege,
6 Congress can and will address it. Thank you.

7 CHIEF JUSTICE REHNQUIST: Thank you,

8 Mr. Waxman. The case is submitted.

9 (Whereupon, at 3:55 p.m., the case in the
10 above-entitled matter was submitted.)

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