No. 02-1755

IN THE

Supreme Court of the United States

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

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

REPLY BRIEF OF AFL-CIO APPELLANTS/CROSS-APPELLEES

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A. BCRA's Primary Definition of "Electioneering Communication" Is Not Narrowly Tailored to Serve a Compelling Governmental Interest and Is Unconstitutionally Overbroad

The Government defends the definition of "electioneering communication" in § 201 of the Bipartisan Campaign Reform Act of 2002 ("BCRA") as a "clear and objective" "bright-line, readily administrable test" that avoids the "pitfalls" of "attempting to distinguish between advertisements based on subjective and manipulable inquiries such as the intent of speakers or understanding of listeners" that *Buckley v. Valeo*, 424 U.S. 1 (1976), eschewed in construing provisions of the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*, to reach only express advocacy. See FEC Br. at 91. But the Government premises the constitutional sufficiency of this definition as narrowly tailored on overreaching assumptions about speaker intent and listener understanding, and its proposed "test" for proscribable speech charts a sharp and dangerous new direction in First Amendment jurisprudence.

1. The Government asserts that in § 201 Congress "identif[ied] the factors that separate communications that are intended to influence the outcome of . . . elections and communications that are simply intended to promote debate on particular issues." FEC Br. at 92. The Government reasons that "'most advertisements designed to influence federal elections refer to a federal candidate,'" *id.* at 93, quoting S.A. 847sa and n. 129 (Kollar-Kotelly), but the proposition that would support § 201's demarcation of speech with electoral intent is quite different: that most advertisements that refer to a federal candidate are designed to influence the outcome of federal elections. However, both the Government and the intervenor-defendants now disclaim

reliance upon the "subjective" conclusions of the *Buying Time* studies, namely, the student coding of candidate-referential ads as either "issue" or "electoral" in purpose that produced the assertedly low percentages of so-called "genuine" issue advertisements that figured so prominently in both the congressional debates and the briefing below. See FEC Br. at 110-11; Intervenors Br. 67.[1] *See also* S.A. 768sa (Kollar-Kotelly) (rejecting retrospective evaluations of nature of particular advertisements because "one person's genuine issue advertisement is another's electioneering commercial").

The Government otherwise justifies its contention that § 201 defines ads with electoral intent with the claim that "the uncontroverted evidence shows that it is not necessary to refer to 'specific candidates for federal office in order to create effective [issue] ads.'" See FEC Br. at 93, quoting S.A. 846sa (Kollar-Kotelly). But such evidence in fact *was* vigorously controverted below—for example, the AFL-CIO's public affairs director testified that naming a federal *officeholder* (who is a "candidate" within the meaning of § 201 at virtually all times, see AFL-CIO Br. at 25 n.16) in broadcast advertisements is often necessary in order effec-

[1] The defendants' shift in emphasis on this appeal from the subjective aspects of the *Buying Time* studies marks a highly significant tactical retreat that implicitly acknowledges both the empirical flaws inherent in the students' uninformed and context-free review of printed storyboard versions of broadcast ads, and the dramatic impact a few changes in the evaluation of advertising would have on the bottom-line results, where recoding just eight distinct ads in 1998 would cause the 14.7% "genuine" figure to leap to 64%, and recoding just six ads in 2000 would trigger a rise from 3.1% "genuine" to 17.0%. *See* FEC Br. at 111-12; McConnell Br. at 54-56. As one of defendants' *amici* aptly observed, "no study—especially a study that asks college students to discern the purpose of a political advertisement completely devoid from context—can provide a court with a precise percentage of hypothetical future speech that will raise significant First Amendment concerns." Brief of *Amici Curiae*, Former Leaders of the American Civil Liberties Union ("Former ACLU Leaders Br.") at 12-13.

tively to influence his or her conduct and the issue debate. See Denise Mitchell Dec. ¶¶ 11-12 (J.A. 428-30); Mitchell Dep. 19-20, 205-06; Mitchell Cross 122-23, 127-28, 141-42, 199. And, even if such references were "not necessary," it hardly follows that their use reflects *electoral* intent rather than a variety of other possible considerations and judgments, including even ill-informed and poorly considered ones that speakers are nonetheless privileged to make.

2. The Government variously expresses a second principal argument as to why § 201 is narrowly tailored: that the advertisements it covers "will influence candidate elections," FEC Br. at 95; are "likely to have the same effect on the outcome of federal candidate elections" as express advocacy, *id*. at 96; or "can be expected to influence federal elections." *Id*. at 15. See also Intervenors Br. at 43 ("almost certainly will convey . . . an electioneering message"), 64 ("very likely to have some actual effect on an election".)[2] But

[2] The defendants' insistence that plaintiffs' facial challenge be rejected because they may pursue as-applied claims later offers an alternative with little value. Due to the rigidity of the definition, "it is difficult to imagine that the [statute] could be limited by anything less than a series of adjudications, and the chilling effect of the [statute] on protected speech in the meantime would make such a case-by-case adjudication intolerable." *City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987). And, those who "abstain from protected speech" "rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation . . . harm[] not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 123 S.Ct. 2191, 2196 (2003).

The inadequacy of as-applied challenges is especially acute with respect to broadcast messages, which are often extremely time-sensitive, particularly when aimed at imminent legislative action. And, notwithstanding the Government's downplaying of the risk of criminal prosecution, see FEC Br. at 104 n. 43, given the clarity (if overbreadth) of the primary definition, a speaker's "knowing and willful" *mens rea*, see 2 U.S.C. § 437g(a)(5)(C), might be easy to prove, strongly deterring a union or corporation from hazarding a communication in the hope that its First

predicating censorship on a presumed impact on voter behavior of particular messages that contain no express advocacy—and, under § 201 need not refer to individuals as candidates or to elections at all—cannot be squared with the Court's consistent and steadfast protection of speech on matters of public concern that can affect election outcomes.

Thus, the Court in *New York Times Co. v. Sullivan*, made clear that our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open" includes tolerance for "vehement, caustic and sometimes unpleasantly sharp attacks on government officials," 376 U.S. 254, 270 (1964), and "'breathing space'" for its expression. *Id.* at 272, *quoting NAACP v. Button*, 371 U.S. 415, 433 (1963). In *Buckley* itself the Court's identification of express advocacy as the category of regulable public speech was premised on its analysis that issues, candidates and political campaigns are inextricably connected, and that "[p]ublic discussion of public issues which are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct," and "tend[s] naturally and inexorably to exert some influence on elections." 424 U.S. at 42 & n.50 (interior quotation marks omitted).[3] As these decisions teach, the fact that speech may have some indeterminate impact on elections is not a constitutionally sufficient reason to restrict it.

Defendants, however, consign these vital, longstanding and controlling First Amendment principles to the sidelines with barely a nod, and they fail to acknowledge that if "likely-to-influence-an-election" suffices as a predicate for the proscription of categories of union and corporate speech on

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Amendment claim would prevail in defending against enforcement of the § 203 ban.

[3] BCRA's sponsors admit that this is precisely the speech §§ 201 and 203 were intended to encompass. See Intervenors Br. at 66.

matters of public concern, or on any matter at all, then Congress is empowered to impair or extinguish speech well beyond even § 201's broad parameters. Indeed, defendants' proposed First Amendment test is equally applicable to print advertisements, leaflets, and letters within the 30-and 60-day periods, or to such references in *any* communications medium for even longer periods of time. Or, constituent-targeted messages that refer to *no* candidate at all but that discuss issues or themes central to ongoing electoral campaigns in a manner that influences how voters evaluate the candidates are just as, or even more, "likely to influence" voter behavior than are stray legislative or other references to candidates that are devoid of election-related issue content. And, the same is true of union and corporate speech that is explicitly directed at elections concerning referenda that appear on the same ballot as elections concerning candidates. Such elections are often caught up with each other in public debates and voter perceptions, yet corporate and union treasury spending aimed at referenda, protected under *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), is vulnerable to prohibition under the Government's theory in the case at bar.

3. The AFL-CIO's broadcast advocacy experience, summarized at AFL-CIO Br. at 1-7, illustrates both the utility of broadcast communications to achieving organizational policy goals and the ordinary and inherent interplay between legislative policymaking and electoral pressures. Defendants, however, misportray the AFL-CIO's broadcasts as a single-minded ruse to elect Democrats to federal office. Thus the Government ascribes to the AFL-CIO (and other plaintiffs) only "post hoc account[s] of the purpose behind [their] advertisements." FEC Br. at 106 (emphasis omitted). In fact, there is a significant record, adduced in discovery, of contemporary AFL-CIO documents – many of which were internal to the organization – that explained that the broadcast advertising was aimed at influencing congressional action and

public opinion about the labor movement's legislative and policy priorities.[4]

The defendant-intervenors quote the AFL-CIO's public affairs director, Denise Mitchell, as testifying below that ads were targeted where they could have a "'big impact" in "'marginal districts,'" Intervenors Br. at 51, implying that the intended "impact" was an electoral outcome; but Ms. Mitchell's actual testimony described that "impact" entirely otherwise, and well summarized the range of goals served by the AFL-CIO's broadcast efforts: "chang[ing] laws"; "creating an environment where positive changes would happen and negative changes wouldn't happen, so elevating working family issues like Medicare and Social Security and minimum wage"; "provid[ing] information to constituents, to television viewers"; "positioning the AFL-CIO" as "championing for working families while we were doing real things"; and "hav[ing] an impact on the officeholders themselves by putting them on notice that somebody is watching what they are doing, and we would aim to sort of set the agenda for the legislative and political environment," which could be more influential when broadcast where an officeholder had been elected with "52 or 55 percent of the vote" rather than "70 percent." See Mitchell Dep. 17-20. See also *id*. at 46-47, 165, 170, 204-06.[5]

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[4] See, e.g., Denise Mitchell Dep. Exhs. 24, 32, 34, 40, 52, 55, 56, 58, 60, 79, 81, 89, 93, 104, 106, 110, 115, 119, 121, 122, 126, 135, 136, 143, 151, 157; Steven Rosenthal Dep. Exhs. 1, 4, (514-937); Gerald Shea Dep. Exhs. 2, pp. 50-51; 4, p. 11; 18, 24-27, 30, 35, 36, 38, 40, 43, 46. The Government's discussion of two AFL-CIO 1996 ads, "Job" and "No Two Way," similarly implies that they were divorced from any current legislative struggle, see FEC Br. at 107-08, but in fact the record is to the contrary. See Mitchell Dec. ¶¶ 41 and 61 (J.A. 446-47, 457).

[5]The defendant-intervenors also distort a November 1996 speech by AFL-CIO President John J. Sweeney, linking as if they comprised a single quotation two phrases that in fact were distinct and two pages apart. *Compare* Intervenors Br. 48 *with* Denise Mitchell Dep. Exh. 12, pp. 2-4. Other comments attributed to Mr. Sweeney are taken from newspaper

Indeed, it bears emphasis that § 201's reach to "refer[ences]" to "candidates" is tantamount to reaching references to all federal officeholders, and of 76 distinct AFL-CIO advertising "flights" (substantially identical clusters of advertisements run during the same period of time and differing only by the name of the person referred to) that were broadcast between 1995 and 2001, only two referred to no incumbent officeholders. See Mitchell Dep. Exh. 1 (J.A. 464).

4. The Government asserts that the overbreadth inquiry should focus on whether the § 201 definition of "electioneering communication" "will impermissibly chill protected expression on a *prospective* basis." FEC Br. at 110 (emphasis

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articles, including one (Mitchell Dep. Exh. 5) that addressed only the AFL-CIO's member-oriented electoral program, not AFL-CIO advertising. And, the National Public Radio interview with AFL-CIO Political Director Steven Rosenthal that the defendant-intervenors quote, see Intervenor Br. 48 and n. 38, was not produced below and is not in the record, and, at Mr. Rosenthal's deposition, defendants asked him only about a *different* portion of the same interview. See Rosenthal Dep. 12-13. In any event, Mr. Rosenthal played no role at all in the AFL-CIO's broadcast efforts in 1996 (or 1998) due to a "Chinese wall" arrangement that the AFL-CIO adopted due to its uncertainty at the time about the application of coordination principles under FECA. See Rosenthal Dec. ¶¶ 30-32 (J.A. 734-36); Rosenthal Dep. 35-40, 45-46, 67-68; Mitchell Dec. ¶¶ 9, 15-19 (J.A. 427, 431-33); Mitchell Dep. 15-17.

The intervenors also emphasize documents prepared not by the AFL-CIO but by two AFL-CIO consultants in 1996. See Intervenors Br. at 46, 47. As the unrebutted record discloses, however, the comments at issue of the consultant who evaluated prospective advertising firms did not reflect the AFL-CIO's description to him of its goals, and they were neither invited nor endorsed by the AFL-CIO. See Mitchell Dec. ¶ 20 (J.A. 434); Mitchell Dep. 108-11, 122-23, 143, 217; Mitchell Cross 76. As for the AFL-CIO's fall 1996 "electronic voter guides" (a format not repeated since), which compared candidate positions on key AFL-CIO issues, they were designed to promote those issues, portray the candidates' positions fairly while conveying the AFL-CIO's viewpoint on them, and pressure the candidates to embrace that viewpoint. See Mitchell Dec. ¶¶ 42-44 (J.A. 447-49); Mitchell Dep. 137-38.

in original). The answer is surely yes. Speech on matters of public concern is the lifeblood of an open and democratic society, supplying information and argument from all quarters so the people and their elected representatives and leaders may knowledgeably decide policy and engage in self-government. *New York Times Co. v. Sullivan*, 376 U.S. at 269-72. Thus, at stake here is not so much whether particular speakers enjoy the full panoply of First Amendment rights, but the provision to the public of information and ideas about public matters, which are "indispensable to decisionmaking in a democracy." *First National Bank of Boston v. Bellotti*, 435 U.S. at 777 (footnote omitted). *See also id.* at 781-83; *Virginia v. Hicks*, 123 S.Ct. at 2196; *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 8-9 (1986).

The defendants hardly advert to this core First Amendment function, and they attribute to the government the authority to override it with respect to union and corporate speakers wherever a likely electoral intent or effect may also be discerned. But only the people are "entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments," including "the source and credibility of the advocate," *First National Bank of Boston v. Bellotti*, 435 U.S. at 791-92 (footnotes omitted); and, "in the free society ordained by the Constitution, it is not the government, but the people—individually as citizens and candidates and collectively as associations and political communities—who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley*, 424 U.S. at 57 (footnote omitted). *See also Thornhill v. Alabama*, 310 U.S. 88, 104-05 (1940). BCRA § 203 cuts too deeply into core political speech and deprives the public of information and debate that the First Amendment was intended to guarantee.

5. The Government justifies § 203 in part on the contention that it serves the compelling governmental interest of protecting union members and corporate shareholders from

contributing to the support of political candidates whom they may oppose. See FEC Br. at 86. But members of voluntary organizations such as unions and incorporated membership groups understand and expect that their dues are used in part for legislative and public advocacy that further the organization's goals, see AFL-CIO Br. 20-21, and "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . ." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The First Amendment protects the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). This "right to associate for expressive purposes" is protected from all "[i]nfringements" save those "adopted to serve compelling state interests, *unrelated to the suppression of ideas*, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623 (emphasis added). BCRA § 203, however, on the basis of the content of associational speech, compels union and other groups' members, who are typically of ordinary means,[6] to make a separate payment distinct from their dues if they wish to continue to fund that speech together, and despite the fact that they had considered it to be an ordinary function of the organization's regular, dues-funded activities. Prohibiting unions and other organizations from spending member dues when they broadcast references to candidates thus directly impairs the associational rights and democratic choices of

[6] In this regard, the Government's suggestion that "individuals who are affiliated with corporations or labor unions remain free to use their own funds for electioneering communications," FEC Br. 99, is as plausible as the original utterance of "let them eat cake"—for, as all agree, broadcast is a costly medium inaccessible to all but the very wealthy. The government relies upon *Federal Election Commission v. Beaumont*, 123 S. Ct. 2200, 2210 n. 8 (2003), for this suggestion, but that case was concerned with *contributions*, which entail no minimum amount.

their members, while only in the most attenuated sense protects members from an undesired support of political candidates. See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 665-66 (1990). And, in so doing, § 203 further contravenes the First Amendment by depriving organizations and their members of the "right . . . to advocate their cause" by "what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

B. That Unions and Corporations Retain the Option of Financing "Electioneering Communications" Through Their Separate Political Action Committees Does Not Render BCRA's Ban on Their Use of Treasury Funds For This Purpose Constitutional.

The governmental and intervenor defendants, as well as several of their supporting *amici*, repeatedly assert that Title II of BCRA does not "ban" unions and corporations from undertaking electioneering communications because these entities instead may raise funds from their members or shareholders to finance political action committees that could pay for these communications.[7] In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, ("MCFL"), 479 U.S. 238 (1986), however, the Court enumerated the burdensome FECA solicitation, administration and reporting requirements applicable to group-sponsored political committees and concluded that while a ban on treasury funding of express-advocacy independent expenditures "is not an absolute restriction on speech, it is a substantial one," *id*. at 252, whose "practical effect on MCFL in this case is to make engaging in protected speech a severely demanding task." *Id.* at 256. The Court therefore refused to compel ideological non-profit corporations, whose political activities posed no serious risk of corrupting the electoral process, to use separately funded federal political committees to engage in

[7] Only Judge Henderson addressed this argument below, and she rejected it on the basis of the factual record. See S.A. 347sa n.142.

independent expenditures and held that they must be allowed to use their regular corporate treasury funds to finance them.[8] *See also id.* at 265-66 (O'Connor, J., concurring).

Just as *MCFL* involved little or no risk of corruption because of the nature of the group involved, corporate and union electioneering communications entail no risk of corruption or the appearance thereof because of the nature of the speech that is being regulated. As the Court found in striking down a state prohibition on corporate contributions and expenditures in connection with ballot measures, "[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. at 790 (citations and footnote omitted). *See also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981). Requiring unions and corporations to conduct "electioneering communications" through their PACs rather than with their ordinary treasuries is therefore no more justified here than it was in *MCFL*. *See also Austin v. Michigan Chamber of Commerce*, 494 U.S. at 658.

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[8] *Federal Election Commission v. Beaumont*, *supra*, is not to the contrary. There, the Court upheld application of FECA's ban on corporate contributions to federal candidates as applied to an *MCFL* corporation. In doing so, the Court distinguished limits on independent expenditures from limits on corporate contributions in light of "the risks of harm posed by corporate political contributions, of the expressive significance of contributions, and of the consequent deference owed to legislative judgments on what to do about them." *Id*. at 2209. Although *Beaumont* pointed to the "PAC option" as evidence that FECA does not completely ban corporate contributions, *id.* at 2211, the Court echoed *MCFL's* recognition of "PAC regulatory burdens." *Id.* That burden is less justifiable with respect to union and corporate "electioneering communications," which, as described above, exert a far more attenuated effect on elections than do either contributions or independent expenditures, and comprise core First Amendment-protected speech on matters of public concern.

Moreover, forcing unions and corporations to sponsor electioneering communications through their political action committees is constitutionally inadequate because it imposes a regime of compelled speech that the First Amendment does not tolerate. *See generally Buckley v. American Constitutional Law Foundation,* 525 U.S. 182, 197-200 (1999); *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 341-42 (1995); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988); *Pacific Gas & Electric Co. v. Public Utilities Commission,* 475 U.S. at 11. Requiring unions and corporations to identify their non-electoral broadcast communications as having been paid for by their political committees, see 2 U.S.C. § 441d(a)(1), and to report to the FEC "[t]he elections to which the electioneering communications pertain," 2 U.S.C. § 434(f)(2)(D), labels those communications as having an electoral purpose regardless of their true nature. The so-called PAC option thus violates the "principle of autonomy to control one's own speech." *Hurley v. Irish-American Gay, Lesbian And Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995). This distinguishes the PAC option for electioneering communications from the same requirement for union and corporate independent expenditures, which by definition expressly advocate the election or defeat of candidates, and union and corporate contributions to candidates, which likewise are explicitly and inherently electoral in nature.

Further, because the definition of "electioneering communication" includes broadcast advertisements made for legislative and educational purposes, rather than for the purpose of influencing the outcome of elections, using a political committee to pay for these broadcasts could cause the committee to lose its tax-exempt status under 26 U.S.C. § 527 with respect to either the costs of those communications or all of its activities. Section 527(e)(2) requires that a political committee expend its resources on "the function of influencing or attempting to influence the selection, nomi-

nation, election or appointment of any individual" to any public office or to any political organization office, and § 527(c)(3) imposes a tax on all other political committee spending. And, if a political committee commits most of its spending to "electioneering communications" that are not for the purpose of influencing elections, the political committee would no longer satisfy § 527(e)(1)'s "primary purpose" definition of a political committee and could lose entirely the tax exemption § 527 otherwise affords.

Finally, union and corporate political action committees are unable as a practical matter to raise sufficient funds from voluntary contributions to support a fraction of the "electioneering communications" that unions and corporations can and do undertake with treasury funds. Thus, for example, Judge Henderson found that if the AFL-CIO is prohibited from so using its general treasury funds, it will "be unable to finance such ads to the same degree" with separately contributed funds to its political action committee because the amount of money that can be raised from union members or employees "is generally limited and unlikely to increase to the extent necessary to replace the treasury funds now spent on issue advocacy." S.A. 270sa (Finding 53f). Defendants make no attempt to rebut Judge Henderson's findings. And, union political action committees that typically are unable now to raise sufficient hard money contributions to adequately support the core political activities they engage in, namely, contributions and independent expenditures, should not be forced to divert those resources to fund other communications whose electoral purpose or effect may be non-existent or highly attenuated.[9]

[9] Moreover, there are over 30,000 labor organizations in the private sector alone, most of which are small organizations with modest treasuries. See "Record-Keeping Under the Labor Management Reporting and Disclosure Act (LMRDA): Do DOL Reporting Systems Benefit the Rank and File?", Joint Hearing Before the Subcommittee on Workforce Protections and the Subcommittee on Employer-Employee

C. BCRA's Backup Definition of "Electioneering Communication" Is Unconstitutionally Vague.

The government defendants make no attempt to defend the truncated version of BCRA's backup definition of "electioneering communication" endorsed by a majority of the district court.[10] See FEC Br. at 116. Indeed, defendants virtually ignore the first prong of the definition and appear to rely upon the second "no plausible meaning" prong of that definition, which was invalidated by the majority below, to cure any vagueness in the first prong. See *id.* at 119.[11] But, defendants fail to demonstrate that the second prong of the backup definition meets constitutional standards.[12]

Relations of the House Committee on Education and the Workforce, 107th Cong., 2d Sess. 115-16 (2002). The FECA "affiliation" rule provides that, for purposes of political committee sponsorship, fundraising and spending, all affiliates of a national labor organization are collectively considered to comprise a single entity, see 2 U.S.C. § 441a(a)(5); 11 C.F.R. §§ 110.3(a)(2)(ii) and (iii), meaning that every national union and all of its local unions and other affiliates collectively are effectively confined to sponsoring a *single* federal PAC, self-evidently impairing the ability of any one union affiliate to access and direct the spending of funds for the speech defined by § 201 that § 203 now precludes it from undertaking.

[10] Intervenors do not address the backup definition at all. Only one of the *amicus* briefs supporting defendants attempts to defend its constitutionality, and it does so in a short and conclusory passage that neither treats the actual text nor supports the district court's conclusion. See Former ACLU Leaders Br. at 13-14.

[11] Furthermore, the government makes no argument in support of the majority's conclusion that the second prong of the backup definition is severable from the first, and fails to address our showing that neither prong is severable from the other. See AFL-CIO Br. at 31-33. Thus, if the Court finds that either prong of the definition is unconstitutionally vague, it should strike down the entire backup definition without regard to whether the other prong independently would satisfy constitutional requirements.

[12] Defendants' assertion that the Court is especially reluctant to invalidate a law for vagueness when the challenge is made to a law on its face, FEC Br. at 117, is not supported by the cases cited. The Court's

Defendants ignore the language of the second prong and simply assert that it is not unconstitutionally vague because "[a]ny degree of uncertainty in a standard designed to protect speech . . . is not the kind of vagueness that should condemn a statute." See FEC Br. at 117. The logic of this argument is hard to fathom: the second prong *restricts* speech rather than "protect[s]" it, and it does so in a manner that neither the regulated community nor law enforcement officials can comprehend, thereby unacceptably leaving speakers to "'hedge and trim,'" *Buckley*, 424 U.S. at 43, *quoting Thomas v.* Collins, 323 U.S. 516, 535 (1945), in order to navigate the restrictions imposed by the statute.[13]

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rejection of the vagueness challenge in *National Endowment For the Arts v. Finley*, 524 U.S. 569, 588-90 (1998), did not even mention the facial nature of the challenge and relied entirely on the fact that the case involved a grantmaking statute. In *Hill v. Colorado*, 530 U.S. 703 (2000), the Court did refuse to facially invalidate a statute on vagueness grounds, but it did so only after finding that the statute was clear in the vast majority of its intended uses and that any possible vagueness existed only in hypothetical situations not before the Court. *Id.* at 733. Such is not the case here, where the backup definition eschews the express advocacy standard and cannot confidently be applied to the great majority of broadcast communications that mention candidates or address issues of legislation and public policy.

[13] The principal decision cited by defendants in support of this novel theory does not support it. In *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357 (1997), the provision in question defined an *exception* to an otherwise broad injunction that allowed certain "sidewalk counselors" to approach persons seeking the services of abortion clinics. Here, however, the "savings clause" is not an exception in the sense that it attempts to define *permissible* conduct; it is an additional element of the basic *prohibition* in BCRA's backup definition. Furthermore, the prohibition involved in *Schenck* was not content-based and therefore was subject to a lesser level of judicial scrutiny than the backup definition here.

Defendants' reliance on *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), is also of little avail. Unlike the second prong of the backup definition, which permits a finding of "exhortation" based entirely on the communication's context and without regard to the words used, the Ninth Circuit stated that

Defendants also argue, that the second prong is not unconstitutionally vague because "a corporation or labor union preparing to broadcast such an advertisement would have [no] difficulty in determining" whether an ad falls within the second prong "based on its understanding of the context in which its own advertisement will be aired." FEC Br. at 118. But an advertisement's "context" involves a broad range of circumstances, including all of those identified by Judge Leon, see S.A. 1164sa, and a union or corporation cannot know which of these contextual elements will matter to the "reasonable person" or "ordinary observer" whose judicially determined perspective the government says would be dispositive.[14] See FEC Br. at 118 and n. 49. Like the

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"[c]ontext remains a consideration, but an ancillary one, peripheral to the words themselves," *id.* at 863, and it held that the express advocacy standard permits only "a limited reference to external events." *Id.* at 864. Moreover, the Ninth Circuit recently made clear that "a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit *words* of advocacy." *California Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1098 (2003) (emphasis in original). Other courts of appeal have refused to go as far as *Furgatch,* finding even its limited reliance on a communication's context to be "too vague," *Chamber of Commerce v. Moore,* 288 F.3d 187, 194 (5th Cir.), *cert. denied,* 123 S.Ct. 536 (2002), and "unpredictable." *Virginia Soc'y for Human Life, Inc. v. Federal Election Comm'n,* 263 F.3d 379, 392 (4th Cir. 2001). *See also Federal Election Comm'n v. Christian Action Network, Inc.,* 110 F.3d 1049, 1052-1057 (4th Cir. 1997).

[14] Defendants' reliance on the standards used by the Court to define obscene materials subject to government regulation is also misplaced. See FEC Br. at 118 n. 49. Obscene communications are not protected by the First Amendment, whereas political speech, even speech containing express advocacy, is. See *Miller v. California,* 413 U.S. 15, 35-36 (1973). Moreover, under the Court's jurisprudence, whether the average person, applying contemporary community standards would find that a work, taken as a whole, appeals to the prurient interest, is only one prong of a three-part test, the other prongs of which rely on the content of the material itself and not on the perception of reasonable listeners or viewers. *Id.* at 24. *See also Ashcroft v. ACLU,* 535 U.S.564, 578 (2002). Here, both prongs of BCRA's backup definition of electioneering communi-

"neutral[ity]" standard of the first prong, the "no plausible meaning" standard of the second prong unconstitutionally "'puts the speaker wholly at the mercy of the varied understanding of his hearers.'" *Buckley*, 424 U.S. at 43, *quoting Thomas v. Collins*, 323 U.S. at 535.

II. BCRA'S COORDINATION PROVISIONS ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Regarding BCRA's coordination provisions, the Government does not even address BCRA §202, which provides that "coordinated" electioneering communications shall be treated as contributions, and makes only a half-hearted attempt to defend BCRA § 214(a), which provides that expenditures made "in cooperation, consultation, or concert with, or at the request or suggestion of" a political party committee shall be considered contributions to that committee.[15]

Without even discussing the statutory language itself, defendants argue that §214(a) is not vague or overbroad because similar language already existed in FECA to define expenditures coordinated with *candidates*. See FEC Br. at

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cations depend upon the perceptions of listeners and viewers. And, the context in which allegedly obscene materials must be evaluated is largely created by the speaker himself, such as the manner in which the material is advertised, whereas under the common observer standard advanced by defendants for BCRA political speakers may not even be aware of many of the contextual factors under which their communications will be evaluated. The same is true of the contextual factors relied on in the Court's Establishment Clause cases, such as *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), to determine whether governmental use of religious symbols constitutes an endorsement of religion, and the Establishment Clause test is also inapposite because the question presented in such cases is whether government action, not protected private speech, is permissible.

[15] The AFL-CIO plaintiffs do not question *Buckley*'s conclusion that coordinated expenditures may be treated as in-kind contributions; we challenge only the expansive manner in which Congress sought to *define* coordinated expenditures in BCRA when it overturned a narrower and more explicit definition fashioned by the lower federal courts and the FEC itself.

123. But this is no answer at all, both because FECA's language was subject to limiting judicial and agency interpretations that Congress in BCRA has now rejected, and because vague and overbroad language in one statute can hardly validate its repetition elsewhere. The FEC itself has acknowledged with respect to coordination under FECA that "[t]he statutory terms are not inherently clear," Final Rule, "General Public Political Communications Coordinated With Candidates and Party Committees; Independent Expenditures," 65 Fed. Reg.76138, 76141 (Dec. 8, 2000), and four Justices of this Court recently concluded that FECA's definition of coordination is unconstitutionally overbroad. See *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 467-68, 471 (2001) (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.). Thus, incorporating the same overly broad language into BCRA's general coordination provisions cannot warrant upholding the decision below.

Defendants further argue that "any uncertainty that regulated entities may feel regarding the scope of BCRA § 214(a)" may be "alleviated" by BCRA's provision mandating the FEC to issue new coordination regulations, see FEC Br. at 124, a view embraced by the district court. The problem with this argument is that the FEC has *already* issued new coordination regulations that do *not* cure the statute's vagueness or overbreadth; and, the district court incongru-ously refused even to consider those regulations in upholding § 214(a). The government's position—that the mere *possibility* of curative administrative regulations is sufficient to defeat an otherwise meritorious vagueness or overbreadth challenge—has never been adopted by this Court and ignores the important First Amendment rights jeopardized by the statute challenged here. Just as the Court has long permitted pre-enforcement facial challenges to statutes on First Amendment grounds rather than requiring plaintiffs to face the risks of enforcement actions, it should

not allow the government to defend a facially unconstitutional statute because it *might* be saved some day by agency regulations.[16]

III. BCRA'S ADVANCE DISCLOSURE REQUIREMENTS VIOLATE THE FIRST AMENDMENT.

Although the governmental defendants discuss BCRA's disclosure requirements for electioneering communications in general, see FEC Br. at 119-22, they make only a cursory attempt to justify the advance disclosure aspect of those requirements that the district court unanimously struck down. See *id*. at 121-22. Significantly, they do not contend that *any* of the governmental interests relied on in *Buckley* to support after-the-fact disclosure are also served by compelled disclosure of communications *before*, and irrespective of *whether*, they are ever disseminated. Moreover, their defense that prospective disclosure of communications "would neither prevent any person from speaking nor require disclosure of the specific content of any advertisement," *id*. at 122, ignores both that "compelled disclosure [of political activities], in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," *Buckley*, 424 U.S. at 64, and the uncontroverted evidence in this case concerning the chilling and confusing effects of this requirement. See S.A. 114sa (*per curiam*); 271sa (Henderson). Finally, there is no basis for defendants' suggestion that the constitutional infirmity in the statute has been cured by regulation, FEC Br. at 122, an argument that the district court accepted with respect to advance disclosure of

[16] This is especially true here because Congress mandated expedited judicial review of BCRA's provisions and the statute's coordination provisions are impairing political actors even while this case is pending. Defendants' argument that BCRA § 214(b)-(c) "imposes no substantive obligation upon any private party, but simply requires the promulgation of rules by an Executive Branch agency," see FEC Br. at 125 n. 52, has no application to BCRA §§ 202 and 214(a), which manifestly *do* impose immediate, substantive constraints on private parties.

independent expenditures but rejected with respect to electioneering communications in a careful analysis, see S.A. 108sa-111sa, that defendants similarly fail to address.

CONCLUSION

The decision of the district court concerning BCRA's prohibition against union and corporate spending for the primary definition of "electioneering communication" should be affirmed; its decisions upholding the backup definition and BCRA's coordination provision should be reversed; and its decision striking down BCRA's advance disclosure provision should be affirmed.

Respectfully submitted,

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