IN THE SUPREME COURT OF THE UNITED STATES

- X

SENATOR MITCH McCONNELL ET AL., :

Apellants/Cross-Appellees :

V. : No. 02-1674

FEDERAL ELECTION COMMISSION ET AL., :

- X

Washington, D.C.

Monday, September 8, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at

APPEARANCES:

KENNETH W. STARR, ESQ., Washington, D.C.; on behalf of the McConnell Plaintiffs.

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

THEODORE B. OLSON, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of Federal Defendants.

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

APPEARANCES (CONT):

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

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

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

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

C O N T E N T S

P R O C E E D I N G S

(10:00 a.m.)

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

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

ORAL ARGUMENT OF KENNETH W. STARR

ON BEHALF OF THE MCCONNELL PLAINTIFFS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Mr. Starr?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: To coin a phrase.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORAL ARGUMENT OF BOBBY R. BURCHFIELD

ON BEHALF OF THE POLITICAL PARTY PLAINTIFFS

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

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

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

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

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

MR. BURCHFIELD: And totally unregulated.

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

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

MR. BURCHFIELD: Correct, Justice Breyer.

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

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

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

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

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

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

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

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

MR. BURCHFIELD: Your Honor, I think the

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

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

MR. BURCHFIELD: Your Honor --

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

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

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

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

MR. BURCHFIELD: I do accept that proposition.

QUESTION: You do accept it?

MR. BURCHFIELD: I do accept that proposition.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: That's an administrative convenience.

MR. BURCHFIELD: It is an administrative convenience.

QUESTION: And that's okay.

MR. BURCHFIELD: Well, Your Honor --

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

MR. BURCHFIELD: Your Honor --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BURCHFIELD: Exactly.

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

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

QUESTION: Well, Mr. --

MR. BURCHFIELD: And here, and here --

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

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

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

MR. BURCHFIELD: The -- the national --

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

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

QUESTION: Mr. Burch --

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

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

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

QUESTION: That would be unconstitutional?

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

unconstitutional, as well as --

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

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

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

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

I may say --

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

MR. BURCHFIELD: Connecticut.

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

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

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

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

MR. BURCHFIELD: Right.

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

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

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

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

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

MR. BURCHFIELD: They have indeed.

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

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

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

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

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

if advocacy is to be truly or optimally affected.

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

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

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

MR. BURCHFIELD: Well, Your Honor, bear in mind that the Levin Amendment, restricts, the homegrown requirement not just Joe Wealthy's -- sending Joe Wealthy's donation. It restricts sending Joe Poor Person's $10 donation down to the states. It restricts sending even Federal money, noncorrupting Federal money down to the states. In that sense, it certainly goes too far.

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

is not Federal money. That is Levin money.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BURCHFIELD: Exactly, Your Honor.

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

MR. BURCHFIELD: And Congress recognizes --

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

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

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

MR. BURCHFIELD: Exactly, Your Honor.

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

MR. BURCHFIELD: So long as the local

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

MR. BURCHFIELD: Correct.

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

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

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

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

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

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

QUESTION: Is that not correct?

MR. BURCHFIELD: That is correct. But

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

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

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

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

MR. BURCHFIELD: Exactly.

QUESTION: So a state party could destroy the --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BURCHFIELD: The homegrown requirement?

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

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

MR. BURCHFIELD: National parties, Your Honor.

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

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

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

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

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

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

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

survive?

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE FEDERAL DEFENDANTS

MR. OLSON: Well, we believe it could, Mr. Chief justice, but let me come back to that. Thank you, Mr. Chief Justice, and may it please the Court:

The issues the Court considers today, every single one of them in connection with Title I, are not new.

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

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

and circumventions.

QUESTION: General Olson, is every problem soluble?

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

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

MR. OLSON: Of course not.

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

MR. OLSON: Of course, Justice Scalia.

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

MR. OLSON: Of course it is.

QUESTION: Not whether there are problems.

MR. OLSON: Of course it is.

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

MR. OLSON: Of course it is, but this

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

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

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

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

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

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

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

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

of expenditures.

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

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

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

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

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

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

QUESTION: Contributions to parties were limited that way?

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

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

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

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

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

MR. OLSON: The evidence --

QUESTION: Is there evidence of that?

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

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

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

QUESTION: But the ban extends to that, apparently?

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

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

QUESTION: Which is very broadly defined Federal election activity.

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

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

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

re-elected.

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

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

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

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

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

MR. OLSON: No. The answer to --

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

trouble.

MR. OLSON: Justice Scalia --

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

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

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

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

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

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

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

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

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

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

QUESTION: General Olson --

QUESTION: Is that the problem you are

solving here?

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

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

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

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

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

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

MR. OLSON: Of course, of course --

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

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

QUESTION: General Olson --

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

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

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

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

QUESTION: I don't understand what that means.

MR. OLSON: What an individual --

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

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

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

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

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

MR. OLSON: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Step back for a second. Because, say, looking at it more broadly, I think we're hearing many arguments of this form, which is a serious argument, it seems to me. When you look at the statute, it becomes highly complex and really quite restrictive in the many ways that have been mentioned.

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

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

argument.

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

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

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

MR. OLSON: Congress didn't pick on a

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

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

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

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

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

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

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

MR. OLSON: In the first place --

QUESTION: This is a remarkable proposition.

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

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

Congress may legitimately be concerned with.

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

QUESTION: All done by incumbents, incidentally.

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

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

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

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

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

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

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

QUESTION: General Olson, you said a

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

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

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

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

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

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

MR. OLSON: Of course it is a --

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

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

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

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

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

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

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

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

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

QUESTION: Insignificantly, if that is the problem.

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

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

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

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

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

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

QUESTION: But that isn't what the law

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

MR. OLSON: What --

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

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

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

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

QUESTION: This is narrow tailoring?

MR. OLSON: Pardon me?

QUESTION: This is narrow tailoring?

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

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

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

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

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

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

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

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

electorate process. Thank you.

QUESTION: Thank you, General Olson. Mr. Waxman, we'll hear from you.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF INTERVENOR-DEFENDANTS

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

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

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

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

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

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

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

little bit different, which are a quid pro quo?

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

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

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

QUESTION: So is this corruption?

MR. WAXMAN: The testimony --

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

corruption?

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

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

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

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

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

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

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

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

QUESTION: Muzzle them, muzzle them, too.

MR. WAXMAN: The one thing --

QUESTION: That's the solution.

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

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

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

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

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

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

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

QUESTION: But our experience in Buckley was not --

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

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

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

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

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

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

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

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

MR. WAXMAN: I have been told that there

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

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

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

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

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

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

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

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

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

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

QUESTION: Mr. Waxman --

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

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

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

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

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

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

candidate or any state and local committee.

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

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

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

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

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

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

QUESTION: That's not homegrown, my example.

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

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

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

You asked, Justice Scalia, at the outset,

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

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

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

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

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

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

REBUTTAL ARGUMENT BY KENNETH W. STARR
ON BEHALF OF THE MCCONNELL PLAINTIFFS

MR. STARR: Thank you, Mr. Chief Justice. Very briefly. Point 1. There has been a tendency in much of the argument to equate candidates with a political party. That is quite incompatible with this Court's cases, Colorado I, Colorado II. It also is inconsistent, I think, in a very fundamental level with Citizens Against Rent Control.

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

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

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

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

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

AFTERNOON SESSION

(1:30 p.m.)

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

REBUTTAL ARGUMENT OF BOBBY R. BURCHFIELD

ON BEHALF OF THE POLITICAL PARTY PLAINTIFFS

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

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

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

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

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

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

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

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

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

QUESTION: Thank you, Mr. Burchfield.

MR. BURCHFIELD: Thank you.

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

ORAL ARGUMENT OF FLOYD ABRAMS

ON BEHALF OF MCCONNELL PLAINTIFFS

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Well, I understand --

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

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

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

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

QUESTION: Mr. Abrams --

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

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

MR. ABRAMS: Because of its overbreadth.

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

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

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

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

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

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

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

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

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

only from how to vote on the Panama Canal.

QUESTION: I agree it can be distinguished --

MR. ABRAMS: But --

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

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

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

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

MR. ABRAMS: Yes.

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

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

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

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

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

MR. ABRAMS: And that's an --

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

provisions in the law on independent expenditure --

MR. ABRAMS: Yes.

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

MR. ABRAMS: You mean --

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

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

QUESTION: Why?

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

QUESTION: And so what your point is --

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

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

MR. ABRAMS: Well --

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

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

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

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

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

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

QUESTION: Misportraying what it's doing --

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

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

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

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

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

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

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

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

QUESTION: Not in the middle of the

campaign. They could do it any time.

MR. ABRAMS: Yes, but --

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

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

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

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

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

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

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

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

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

I thought they had to open a bank account,

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

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

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

MR. ABRAMS: No, the general public --

QUESTION: That's NRWC --

MR. ABRAMS: NRWC says --

QUESTION: Can you ask them to join the PAC?

QUESTION: Can you ask them to join the PAC?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. ABRAMS: Yes.

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

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

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

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

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

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

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

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

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

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

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

MR. ABRAMS: It's to join --

QUESTION: Contributed to by gun owners.

MR. ABRAMS: It's not a separate fund. No, I'm not suggesting it's a separate fund. I'm saying that the totality of the amount received by

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

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

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

QUESTION: That's the functional result?

MR. ABRAMS: Yes.

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

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

about Title 2, whatever you do about Title 1.

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

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

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

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

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

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

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

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

reasonable interpretation that it also dealt with advocacy for candidates?

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

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

QUESTION: Was this a really good university?

(Laughter.)

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

QUESTION: And it was out of context, too.

MR. ABRAMS: That's all it was.

QUESTION: You just saw the ad.

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

brief and at the back of the intervenor's brief. You've looked at these pictures.

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

QUESTION: Yeah, it was a false dichotomy.

MR. ABRAMS: Absolutely.

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

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

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

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

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

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

MR. ABRAMS: No.

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

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

QUESTION: Like the Belotti situation, the Belotti case.

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

QUESTION: Right.

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

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

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

cause is term limits.

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

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

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

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

QUESTION: Mr. Abrams --

MR. ABRAMS: -- of silence.

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

MR. ABRAMS: Yes.

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

MR. ABRAMS: Yes.

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

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

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

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

MR. ABRAMS: Similarly there --

QUESTION: No objection --

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

QUESTION: In all its applications.

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

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

disclosing who paid for the ads.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. ABRAMS: That's right.

QUESTION: That's what it says.

MR. ABRAMS: And therefore --

QUESTION: They don't necessarily have to

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

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

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

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

QUESTION: Which itself is content-based.

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

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

QUESTION: Specifically 311.

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

QUESTION: The section is 311 and it seems

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

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

QUESTION: Thank you, Mr. Abrams.

MR. ABRAMS: Thank you very much.

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

ORAL ARGUMENT OF LAURENCE GOLD

ON BEHALF OF AFL-CIO

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

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

QUESTION: Are you Laurence Gold?

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

QUESTION: Not the Laurence Gold I expected.

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

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

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

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

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

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

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

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

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

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

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

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

That's true of issue ads and election ads.

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

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

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

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

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

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

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

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

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

QUESTION: They can't sekk --

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

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

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

MR. GOLD: I'm sorry?

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: That's what I meant.

QUESTION: Well, that's the say Justice Souter pronounces it.

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

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

part of the intention of this.

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

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

QUESTION: That is part of the interest.

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

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

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

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

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

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

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

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

contributions.

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

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

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

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

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

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

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

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

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

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

QUESTION: Yes. Why should express advocacy be disfavored. Justice Stevens' question

all over again.

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

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

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

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

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

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

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

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

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

ORAL ARGUMENT OF JAY ALAN SEKULOW
ON BEHALF OF MINOR PLAINTIFFS

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

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

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

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

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

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

QUESTION: Would that be constitutional?

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

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

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

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

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

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

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

MR. SEKULOW: That's right.

QUESTION: -- year olds making contributions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. SEKULOW: Well, I would argue both.

QUESTION: You do argue both?

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

QUESTION: Let's go to our jurisprudence

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

MR. SEKULOW: Yes.

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

MR. SEKULOW: Absolutely correct, Justice Scalia.

QUESTION: So your answer should have been no.

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

QUESTION: Giving money is the First Amendment, yeah.

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

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

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

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

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

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

QUESTION: What did they say?

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

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

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

QUESTION: Thank you, Mr. Sekulow. Mr. Clement, we'll hear from you.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF FEDERAL DEFENDANTS

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

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

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

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

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

QUESTION: Exactly. And if that segment --

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

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

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

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

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

to me a very artificial distinction you're making. You're --

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

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

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

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

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

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

1907, corporations and corporations alone were barred from making contributions to candidates.

Then in 1947, that ban was extended to expenditures, and in Austin, this Court quite correctly held up that as constitutional because of the unique risks of the corporate context and what the evidence before the district court showed is all of those same interests that applied in Austin to express advocacy equally apply to these kind of electioneering communications.

QUESTION: And doesn't -- doesn't the primary definition today, in effect, give a corporation or a union that wants to run an issue ad a safe harbor simply by virtue of not mentioning the name? Say, let's hear it for nuclear power and don't let anybody else tell you otherwise. That's safe, isn't it?

MR. CLEMENT: That's exactly right. That is safe, Justice Souter, and that's why all of the evidence before the district court that looks at retrospective ads running previous cycles has to be read in the light that one of the virtues of the clarity with which Title II defines electioneering communications is that a corporation can avoid the trigger and that similar to current law, under

current law as we pointed out in our brief, the NRA put together two ads in the 2000 election cycle. They were virtually identical, except one of them finished with the tag line, vote for Bush. Now, the NRA --

QUESTION: How, how, how do you -- how do you protect it if what you're talking about is the McCain-Feingold bill or the Roth IRA or something like that, where the, where there is a candidate's name attached to specific legislation?

MR. CLEMENT: Well, let's, Justice O'Connor, let's take the McCain-Feingold provision, for example. Now, first of all, one option, of course, is to refer to it the way I have, as the Bipartisan Campaign Reform Act. It's important to remember, however, that the restrictions in this bill don't restrict any corporation from talking about the McCain-Feingold bill in 48 states or in fact all 50, as long as Senators McCain and Senator Feingold are not up for election.

Now, at the point that somebody wants to make a reference to the McCain-Feingold, to one of those Senators' voters in the immediate days running up to the election then they may not be referring to it in a way that has nothing to do with the election.

They may be referring to it as that no good McCain-Feingold legislation, and it may clearly have an electioneering purpose.

QUESTION: Now the Government has relied very heavily this morning on the findings made by the Congress and by the district court. And this afternoon you are confronted with the fact that the district court has said basically that the distinction between express advocacy and issue ad is essentially meaningless and everybody knows it, so why should we base our decision on that distinction, when the district court has found, and I think there's very little evidence to the contrary that it's simply ephemeral?

MR. CLEMENT: Well, Justice Kennedy, we start from the same proposition, which that distinction no longer holds up as a practical matter of political reality. Now, I fear you may take the conclusion from that that we should just end this whole enterprise, but we take from that the conclusion that Congress is not disabled from addressing the serious problems that this Court found that it could address in Austin.

QUESTION: Oh, so that you could come back next year and say that the Congress, the pure issue

ads must also be prohibited?

MR. CLEMENT: I don't think so, Justice --

QUESTION: I mean, that must, that's the necessary consequence of what you just said.

MR. CLEMENT: No, it's not, Justice Kennedy. Just because the campaign finance laws need to be adjusted from time to time doesn't mean there are no limits and if you are looking for a limit in keeping the distinction between this Court's decision and Belotti and this Court's decision in Austin, one clear limit is a reference to a candidate, because that is one thing that clearly identifies an ad as being tied to the interests of the candidate election cycle.

QUESTION: You want one of us to write an opinion for the Court sustaining the statute on a ground which everyone knows is ephemeral and meaningless?

MR. CLEMENT: Certainly not, Justice Kennedy. What we want to have this Court do is write an opinion that upholds a limitation on corporate and union spending from direct treasury funds that reflects the current reality. I can't tell you whether the decision that you would, that such a decision upholding this legislation would still work

25 years from now, but I can tell you that it will work in the near term.

And this Court has said, for example, in footnote 11 in Massachusetts Citizens for Life, that particularly in the First Amendment area, Congress doesn't have to anticipate every problem. It can respond to the observed realities and the observed problems before it and try to address those and that's what Congress did with this provision.

As you say, the express advocacy test no longer works. The candidates themselves, who have absolutely no regulatory incentive to avoid express advocacy, still themselves don't make reference, don't make their pleas in those express terms.

QUESTION: The observed reality, if history teaches us anything, is that when you plug one means of expression, the money will go to whatever means of expression are left and that will continue to be the observed reality and that means we will continue to have new pieces of legislation that close more and more methods of reaching the public. This does not fill me with confidence and joy.

MR. CLEMENT: With all respect, Justice Scalia, that's a formula for surrender in response to what is clearly a problem that Congress has been

wrestling with for the most part successfully for a hundred years, which is the corrosive and distorting effects of corporate wealth on candidate elections.

QUESTION: I agree with you. You want us to say just what Justice Kennedy said, that the distinction is ephemeral, right? Now, we've heard the distinction is ephemeral. And if you can ban the express, you can ban the issue ad which mentions the name. And now there were two, I thought, safe harbors.

Safe harbor number 1 is what Justice Souter said, don't mention the name of the candidate 60 days before election. Safe harbor number 2, which I had been discussing before, which I wanted your response to, was the PAC. Now, I thought it wasn't too tough, say, for Philip Morris or Ciba Geigy, if they really want to mention the candidate's name, to set up a PAC.

Now, I've heard that that's not so, that I was wrong about that. And the reason that I was wrong, I've just been told, as you heard too, is because it's going to be hard for these big corporations and the labor unions to raise the money through the PAC to run the very ad with the name of the candidate in the last 60 days.

I would like your view about that. Do you think that's right and not just subjectively, is there any evidence about it?

MR. CLEMENT: Justice Breyer, the simple answer is you were right all along. The separate --

QUESTION: I would like to think that but --

MR. CLEMENT: The separate segregated fund requirement is not an undue burden on corporate political activity. This is, after all, not the first case that this Court has dealt with the separate segregated fund requirement. And of course the requirement was made in Austin as well that, oh, my, if we have to use the separate segregated fund, that will be impossible. The Court rejected that argument there and Justice Brennan in his concurrence addressed it and made two very good points.

First, in footnote 7, he said that that just doesn't reflect the observed reality, that the Michigan Chamber of Commerce there was very successful in raising funds for its PAC. At that time, success was measured $140,000. It seems quaint because what this record says is that the NRA in the Political Victory Fund was able to raise $17 million just for its PAC.

QUESTION: Did anyone else join Justice Brennan's opinion in that case?

MR. CLEMENT: No, that was a concurrence that reflected the views of the majority.

QUESTION: Did other people join his opinion?

MR. CLEMENT: No, they didn't, Mr. Chief Justice, but I think that it is certainly -- I'm not suggesting that it binds this Court in any way. I'm just suggesting that Justice Brennan's logic in addressing that problem has persuasive force. It is true also that the majority opinion of Justice Marshall in that case, also noted, described the Michigan Chamber of Commerce in that case as being quite successful in its PAC. And also specifically said in the majority opinion that they were success as -- to the tune of $140,000. That Justice Brennan amplified that point in his concurrence.

QUESTION: Well, is there a way of writing an opinion that would say, if a particular organization otherwise covered does have some unusual problem with a PAC, either because it doesn't want to say it's political or because it can't raise the money, that's a matter for an as-applied challenge later?

MR. CLEMENT: The Court could certainly say that, Justice Breyer, and I think should say that. The remarkable thing about the challenge to the separate segregated fund requirement here, if I understand it, is that the gravamen of the concern seems to be that the solicitation restrictions on the separate segregated fund make it difficult to raise enough money.

Now, the reason I find that so surprising is there was a direct challenge to those solicitation requirements before this Court in the National Right to Work Committee case. And this Court unanimously rejected that challenge.

So the solicitation requirements and the separate segregated fund, which by the way were not changed by BCRA and therefore really probably aren't even jurisdictionally before this Court, those -- if somebody has a problem with the solicitation requirements either on their face or as applied, that's open to them in an as-applied challenge.

QUESTION: It depends on whether -- the fact that we said that it's okay in another context doesn't mean that it's okay in this context. It depends on what the consequence of not being able to do it except through a PAC happens to be. And here

the consequence is very severe indeed.

MR. CLEMENT: Well, Justice Scalia, the consequence is entirely speculative on this record. As I say, some groups even under the current system have been able to assemble massive amounts of money in their political action committees. And that is remarkable if for no other reason that as Justice Kennedy pointed out, it's sort of no reason to do it under the current system, because one of the main reasons to put money in your political action fund was so that you could engage in express advocacy rather than issue advocacy.

QUESTION: It seems to me the burden ought to be on you to demonstrate that it won't hurt them, not on them to demonstrate that it will. You are preventing them from using their money for speech. You're saying this -- your normal money can't be used for it. You have to get money from some other source. And you want them to have to demonstrate that this will harm them.

MR. CLEMENT: Justice Scalia, with respect, this issue is no different than the parallel issue in the context of Austin. That was speech, too. That was a burden of speech. And as some of the Justices pointed out, there is not one word in

Buckley or in Austin that suggests that express advocacy is somehow second class speech.

Indeed, there is no higher protected speech than vote for Bush or vote for Gore, yet nonetheless, the restrictions there were upheld by the Court and there were not --

QUESTION: Five to four and don't blame it on me.

(Laughter.)

MR. CLEMENT: Very well, Justice Scalia, but I'll take the five to four. And many of the arguments that are being raised in opposition to this statute are the arguments of the dissenters in Austin, not the arguments of the majority opinion in Austin. And I think that's an important point.

This Court has approved the same basic mechanism in the context of express advocacy. It has worked well perhaps not with the definition of express advocacy, but has worked well in terms of the separate segregated fund requirement.

The other point I think that has to be made about the separate segregated fund requirement is that the idea that, okay, let's say that we now have meaningful limits so there are going to be some real incentives to put some money in your political

action committee or your separate segregated fund. One of two things can happen.

With some organizations, it may very well turn out that some of the people who were members of the overall organization, turns out they really weren't 100 percent interested in supporting the political causes of that organization. They sort of like some of the other benefits of membership. And in that case, the amount of money that would be raised will be reduced.

In some other organizations, it may be that every member of the organization supports the political cause and they give the money to the separate segregated fund. In either event, the purposes of the separate segregated fund are fully vindicated because the resulting corporate political activity at that point will reflect the views of the underlying membership and the underlying union members, which is precisely what this Court said was a compelling interest in Austin.

QUESTION: Can a corporation spend any money, whether for political speech purposes or otherwise, that is not directed towards the fostering of its business? Wouldn't they be leaving themselves open to a lawsuit by the shareholders?

MR. CLEMENT: There is certainly a large body of state law about corporate waste that is, if I remember it from law school, fairly impenetrable and doesn't provide a lot of specific guidance in particular consequences, in particular cases.

But I would say that that same issue again was raised in Austin, and this Court said that it was not sufficient simply to leave everything to the state law of waste, where you have the business judgment rule, and everything's set up to make sure that no corporation is ever held liable.

This Court said that in this particular context, it was much more appropriate to use the separate segregated fund requirement which has been part of the law and functionally since 1947 --

QUESTION: I am raising the question to respond to your point that shareholders don't agree with every jot and tittle of what the corporation does. They don't in the economic field either. Very often some of the things that corporations should divest itself of a certain business, others think they shouldn't. They have ceded to the organization -- this is part of belonging to an organization -- the responsibility to determine what is in the interest of that corporation.

And it seems to me that is no less true with respect to political, especially issue ads as to what issues are important for that corporation's survival. I don't know why all of a sudden we insist on unanimity among the shareholders when it comes to that very important issue.

MR. CLEMENT: Well, I think again, Justice Scalia, the resort I would take is to the Austin decision, which rejected that argument as well. And it did so on the basis that candidate elections are different than other situations. It may be a bit of an affront for a shareholder to have their money spent on an issue that they don't particularly care for, or to have the corporation go into some new line of business that the shareholder thinks, boy, that's really not very smart, you should stick with what you know best. That's an affront.

But it's a much greater affront to have that individual's money spent on candidate elections where that individual does not agree with the position that the corporation has taken.

And let me just add --

QUESTION: You said any mention of the candidate makes it a candidate ad and not an issue ad.

MR. CLEMENT: I thought that's the position you were taking earlier, because I think there is a sense in which any time -- if you're talking about ads within 60 days from election that are targeted to a candidate's home district then I think -- and mention that candidate, I think it's a safe assumption to be made that they at least have a mixed motive.

And one of the motives is to influence the candidate election. And I think if the corporate consciously decides to link its issue up to a candidate election, then it's a perfectly appropriate response to make that corporation funded through a separate segregated fund.

QUESTION: Mr. Clement, I think just as a matter of history, that the decision in the Belotti against First National Bank of Boston invalidated the statute that was really typical throughout the United States at the time. Generally, there was in the olden times a policy against using corporate funds for political purposes at all. So the history I think is consistent with the position here.

MR. CLEMENT: That's right. And this Court took a different step over the Chief Justice, among others' dissents and said no, we're going to

invalidate that traditional approach. But then in Austin, this Court drew an important distinction between the candidate election context and the issue context.

I was talking a minute ago about the mixed motives and I did want to be responsive to a question that Justice Souter had asked earlier, which is this question about in the specific studies that Congress and the district court discussed, was mixed motive an option for the people that were scoring the ads.

And as a matter of fact, it was not. The students were asked whether or not the issue in the particular ad had a tendency to support or go against a candidate, or if it addressed an issue. There was no mixed motive box, and I think the net effect of that is that whatever overbreadth is estimated by the studies, it actually overstates the overbreadth because it didn't account for the mixed motive case.

And as I say, I think the mixed motive case does reflect the reality in a number of situations. But I do think that the point that a corporation makes that conscious decision to link some controversial issue to a candidate election, at that point, the interest that this Court found sufficient in Austin are fully implicated.

QUESTION: One of the briefs argues that frequently these issues are before Congress almost at the same time the election comes up, because the Congress is catching up perhaps on things that it didn't do earlier in the session.

And so it's not the corporation's voluntary choice to put it up there. That's the time it has to do it, if it's going to do any good.

MR. CLEMENT: Again, and the safe harbors that we talked about earlier are still available in that situation. And they are, as Justice Breyer pointed out, twofold.

One, if all the corporation is really concerned about is a pending legislative issue, it doesn't need to make a reference to the candidate and it can run the issue through treasury funds. On the other hand, if they want to make a specific reference to the candidate, tie that legislative issue to the broader context of the campaign, then they're free to do so as long as they do so through their separate segregated fund.

QUESTION: Mr. Clement, why do you make an exception for these corporations, these aggregations of vast wealth that happen to own television stations? General Electric, for example, which, if I

recollect correctly, owns NBC. Why is it perfectly okay for them to have issue ads, name candidates, oppose candidates? They're not covered, there's an exception for that.

MR. CLEMENT: Well, first of all, Justice Scalia, as I understand the media exemption, it applies to the media corporation but not necessarily to the entire corporation, so I don't think --

QUESTION: Well, just NBC, which is owned by General Electric. So everybody should go out and get himself a television station, right?

MR. CLEMENT: I don't know about that. What I do know is that media corporations are exempted for the same reason they've always been exempted from the law, which is that they do pose a different situation, a difference of kind. And this Court --

QUESTION: And why is that? Why is that? I don't understand that.

MR. CLEMENT: I mean, I think the traditional role of media companies has been quite

different than the traditional role of other companies.

QUESTION: What case do you have that we

can distinguish speech based on the identity of the speaker? Outside of this area?

MR. CLEMENT: Well, I don't know. I've been focused on this area for the last couple of weeks, Justice Kennedy, and the case that comes to mind is Austin, where the Michigan statute before this Court --

QUESTION: You really like Austin, don't you?

MR. CLEMENT: I love Austin. It's binding precedent. I don't, I mean, as much as the plaintiffs don't seem to like the case, I don't really hear them asking this Court to overrule it.

QUESTION: Well, but this, this is a serious question. A large part of -- of the necessity, or at least the perceived necessity for these ads is to counter the influence of the press. This -- this is a very serious First Amendment issue.

MR. CLEMENT: I know it is, Justice --

QUESTION: And you have -- and you have no authority for this distinction.

QUESTION: Well, isn't Buckley a point on

this? Wasn't there an exception in the statute in Buckley?

QUESTION: It wasn't challenged, though.
MR. CLEMENT: Yes. I don't think that particular provision --
QUESTION: They didn't challenge it. That's the reason.
MR. CLEMENT: Right. But it was brought into full focus in the Austin case, and the argument was made there, as it's made here, that the statute is somehow underinclusive because it doesn't include media corporations, and I -- it is a difficult issue, I will admit, but I think this is an area where sometimes it is just as much a problem to treat different entities the same as it is to treat similar entities differently.
QUESTION: But you were -- you were going to explain why this difference exists, and I don't think you've done that yet.
MR. CLEMENT: I think the difference is that because of the traditional role of what a media corporation does, there is, there's an inherent involvement in the political process. This Court recognized that, I think at least implicitly in Mills against Alabama, when you had a situation where there was an effort to apply a statute to a newspaper, and I think because of the role of the media, there is a

recognition that a different rule should apply to the media, and again, this is -- this is no revolution in the, in the Bipartisan Campaign Reform Act. This is just carrying through --

QUESTION: Well, what, what about say the National Rifle Association? It's against gun laws. A media corporation is very much in favor of gun laws, it prints editorials, perhaps it even slants, God forbid, its coverage of the subject. There is a substantial difference, substantial similarity there, isn't there?

MR. CLEMENT: Well, there certainly is the similarity in the sense that they're both addressing the same issue, but I do think that again this Court has drawn that distinction in the Austin case and Congress has drawn that distinction throughout its campaign finance reform. This is not some new provision.

QUESTION: But what do you think should be the underlying valid principle that allows that distinction to be drawn?

MR. CLEMENT: I think the under --

QUESTION: Why is it that a group of citizens concerned about what they consider to be slanted press cannot get together, have a corporation

and take out issue ads on the other side of that issue?

MR. CLEMENT: Oh, absolutely they can, and I think if what you're talking about is running an issue about the slanted press, I can't imagine how that has to refer to a candidate, so I think you come within both safe harbors that are available to corporations. They could do it through a separate segregated fund, but again, if what a corporation wants to do is correct some nasty publication that's been running some media corporation, they are perfectly free to do that with treasury funds and it's, it's harder for me to imagine how that would be translated into the context of a candidate election.

QUESTION: Mr. Clement, Austin aside, do you know of any case of ours that says that the press, quote, has greater First Amendment rights than Joe Mimeograph Machine?

MR. CLEMENT: I don't. I know there are cases that address --

QUESTION: There are none.

MR. CLEMENT: Right.

QUESTION: There are none. In fact, we've said just the opposite.

MR. CLEMENT: Well, this Court has talked

in various cases, Mills against Alabama is one, about the freedom of the press, and suggesting maybe that adds something, but I don't think there is a case that draws that definitive distinction, but again, this is a little bit different. This is not saying that the Freedom of the Press Clause, although that has been raised in this litigation obliquely, that the Freedom of Press Clause is what makes the difference. What makes the difference here is a legitimate decision by Congress to treat these different corporations differently, and again, I know you don't want to hear me say it, but the Austin Court heard the argument, it said that that argument is invalid. And I don't think --

QUESTION: I think they want to know why. And I suppose that what we are talking about is that the Times or any radio station runs an editorial saying, vote for Smith, or Jones is against labor, for example, but if a union or corporation runs -- pays for the ad on the next page it falls right within the ad. I thought that the reason had to do with the traditional role of the newspaper where we expect them to have reporters, some of whom will in fact think one thing and some will think another and the editorials may or may not make sense, but there

are considerable implications for regulating those that don't exist when we talk about Philip Morris or the municipal workers union.

MR. CLEMENT: No, I think that's exactly right. It reflects that historical tradition. It also reflects the reality that applying this kind of limitation to the press would make it very difficult for them to report anything.

QUESTION: Well, wouldn't it go further than that? I mean, if, if the argument that the press should be subject to the same limitations and presumably have the same powers, then the press would have to publish a separate newspaper through a PAC in order to make the otherwise limited expression during the 30-day period. I mean, that can't be done.

MR. CLEMENT: No. That can't be done, and in --

QUESTION: That wasn't the argument, that the press has to be subject to these limitations. The argument is, since these limitations would obviously be bad as applied to the press, they are bad as applied to everybody else, because everybody else has the same rights as the press. I don't know

why, why should it be that the corporation of great

wealth -- let me put the question this way. Could, could Congress pass a law saying, we are concerned about the influence of major media corporations, Mr. Murdoch? We are going to pass a law that no corporation can own more than two national newspapers. Would that law be valid?

MR. CLEMENT: I'm sure that law would be challenged. There might be a defense that you could try to make on the law, but the point I'd like to make is that I think that this effort is just another effort to say that Congress is powerless in this field, because all the problems you are raising about electioneering communication and how you treat the press differently apply a fortiori I to express advocacy.

QUESTION: You mean, you mean, you think I'm saying that Congress shall make no law respecting, abridging the freedom of speech?

MR. CLEMENT: I think --

QUESTION: That is what I'm saying.

MR. CLEMENT: I think what you are saying is that contrary to this Court's decisions in Austin, in MCFL, in all the corporate, in all the cases dealing with contributions, that the First Amendment holds the Congress powerless to deal with this

problem. And that is what this Court's cases say.

QUESTION: Haven't we held that --

QUESTION: Do you find it unusual that the Congress is powerless to favor one speaker over another? Is that such an astounding proposition?

MR. CLEMENT: No. What would be an astounding proposition is in light of the 100-year tradition of Congress' ability to regulate the influence of corporate political activity and corporate influence on political elections if all they can do is limit express advocacy or as I understand some members of this Court, they can't even do that. That is a very difficult position to swallow because Congress has been active in this field since 1907. The abuses that they are addressing today are not different in kind from the abuses they have addressed for the past 100 years, and I simply don't think that they are powerless to deal with this situation.

QUESTION: Haven't we held that licensees can be, radio licensees and television can be compelled to give equal time to opposing points of view but you can't compel the newspapers to do that?

MR. CLEMENT: No. That's a very good point, and there are differences with respect to

broadcast media, and I think if I can digress for a minute to talk about some of the other provisions like Section 305, 311, and 504 --

QUESTION: You say there are differences with respect to the broadcast media. You are not relying on the scarcity of wavelengths, are you?

MR. CLEMENT: Well, I think with respect to some of the other provisions, 504, 307, I'm sorry, 305 and 311, I do think that this Court's cases suggesting that broadcast media are subjected to a different regulatory regime remain good law, and I think that there is certainly enough in this case without trying to revisit Red Lion or some of these other cases. I think one of the things that can happen in this case and one of the unfortunate by products of the en masse nature of the way this case is litigated is that you look at some of the provisions that are dealing with a very different type of speech, and then you get to Section 504 and you take a look at the broad terms that Congress has used and it's easy to reach the conclusion that that's an impermissible approach and those words are too broad, but that ignores the reality of the way the broadcast industry has been regulated.

That's, after all, an industry that

continues to be regulated on a public interest standard. In CBS against FCC, this Court upheld a statute that required individual stations to give reasonable time to candidates and it's within that background that a provision, the kind of provisions that Congress added to Section 504 are not --

QUESTION: Was that the scarcity rationale?

MR. CLEMENT: I don't think in the CBS case that the court specifically addressed the scarcity rationale. It may well have been building on prior precedents, though, that were based on that.

One other point I'd --

QUESTION: But we are, we're not talking about regulating the broadcast media. That's the whole point. They are the only people here who aren't regulated. It's people who are trying to get their views across through these media who are regulated. It's not the media who are regulated.

MR. CLEMENT: But that's the way that the media has long been regulated, which is to say that with respect to requests for candidate advertisement, with requests to address a, quote, controversial issue of public importance, which is the pre-existing law, nothing added by BCRA, there has been a

requirement that if you make a request for air time, that the station do some record-keeping in conjunction with that and that's exactly what 504 carries over.

QUESTION: Why -- why did they ask for record of requests as opposed to actual broadcast deals?

MR. CLEMENT: I think one of the reasons, Justice O'Connor, is so that they could enforce the public interest standard, which has, which has manifested itself not only in the fairness doctrine, but also with the idea that stations have to give appropriate amounts of time to things like discussion of legislative issues. And so if you have the requests before you, you can then make a judgment as to whether or not one station is denying all the requests.

QUESTION: Must the disclosure be made before the ads are run? It's not clear.

MR. CLEMENT: Well, it depends on which provision that you are asking about, Justice --

QUESTION: I'm talking about 504.

MR. CLEMENT: In 504, what triggers the disclosure, the disclosure requirements is, is a request and again --

QUESTION: Yes, I know. But I'm asking about the time within which it has to be disclosed by the broadcast stations.

MR. CLEMENT: I'm not positive about this. I don't think that Section 504 has that kind of advance notice principle to it. The advance notice objections that have been raised have been raised to Sections 201 and 214, and I think with respect to those provisions, it's important and worthwhile to note that the FC -- the FEC has cured the advance notice issue by regulation, and what people seem to have focused on is the idea that the statute requires the disclosure of a contract to disburse, and that language is not designed to get at advanced disclosure in the sense of advanced disclosure before the ad airs. It's simply to get away with, to avoid the clear circumvention that would happen if somebody could buy ads on credit and then only disclose them after the fact, after the election when they had actually made the disbursement at that point. I think --

QUESTION: But that, that same objective could be obtained simply by requiring disclosure by the station as soon as they, as soon as they run, I mean, file a report on the day that the ad runs.

MR. CLEMENT: I mean, I think that's right, but again, that is the way that the FEC has interpreted the provisions, which is to say there is no advance disclosure requirement under 201 and 214 as interpreted by the FEC, because they trigger to the definition of, for example, in 201 the electioneering communication and you don't even know for sure that it's an electioneering communication until it's in fact it is run in the relevant district that's been targeted and all the like, so in that sense I do think that the FEC has cured any problem with advance notice.

I'm not sure it was that much of a problem in any event because what you are talking about is forcing people to disclose the fact that they made binding contracts. I think it's also --

QUESTION: What happens to the language, or contracts to make?

MR. CLEMENT: Again --

QUESTION: The regulation just reads that out of existence?

MR. CLEMENT: No, again, what contracts to makes disbursement, or I don't know what language you have in front of you, but contracts to make disbursement.

QUESTION: It's in 202. Any person, if any person makes or contracts to make any disbursement for an electioneering communication.

MR. CLEMENT: Again, as I was explaining to Justice O'Connor, that provision is necessary to avoid the phenomenon where somebody contracts to make a disbursement, i.e., buys an ad on credit and doesn't make the disbursement until after the ad is run or in fact after the election, so that's why that's in there. It's also worth noting that the statute --

QUESTION: But it goes on to say, such disbursement or contracting shall be treated as a contribution and as an expenditure. Such disbursement or contracting, so I assume the contracting immediately falls --

MR. CLEMENT: No, it doesn't fall within the con -- the disclosure provision. I suppose if you buy $10,000 worth of ads on credit that does become an expenditure the second you make that credit purchase, but I don't think that renders a statute unconstitutional. I think again it bears noting that this advance sort of contract to purchase language has been in the statute all along. It was in FECA with respect to expenditures. In fact, I believe

that Justice Souter made note of that in footnote one.

QUESTION: To challenged and upheld. I mean, there's so much that was in FECA, and there's so much more that's in this that hasn't been challenged here. I mean, simply to say it's been around for 30 years doesn't, doesn't convince me that it's valid.

MR. CLEMENT: It depends on the nature of the challenge with respect, Justice Scalia. If the nature of the challenge that a provision is vague and in fact a very similar provision has been in the statute for 20 years and the regulated parties working with the FEC in the context of 504 have figured out how to live with it in a way that doesn't have any chilling effects, then I think the fact that there was a statutory prerequisite for it is quite important and is valid and a valid basis for interpreting the statute.

If I may say in closing as I said before, I think the counsel of the other side in this case is that, to borrow Justice Scalia's phrase, this problem is insoluble. They fully admit that the express advocacy test doesn't work. I think it is not a proxy for speech designed to influence candidate

elections. I think one thing we can trust candidates to do is to make speeches that are designed to influence their own elections, yet almost 90 percent of candidates' own advertisements don't use words of express advocacy.

The remarkable thing about plaintiffs here is that in the first, in the first, this morning we heard a little bit from Mr. Starr about less restrictive alternatives. You hear not one word about that this afternoon because they offer nothing as an alternative. They say it's express advocacy or nothing, and they are all too willing to abandon even express advocacy and I simply do not think that the Constitution leaves Congress powerless to deal with this problem. Strict scrutiny is not a formula for corruption. When Congress is dealing with this kind of corporate spending, a problem they have been wrestling with since 1907, they can take reasonable steps like Title II to address the problem. If there are no further questions.

QUESTION: Thank you, Mr. Clement. We'll hear from you, Mr. Waxman.

REBUTTAL ARGUMENT OF SETH WAXMAN

ON BEHALF OF INTERVENOR-DEFENDANTS

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

Buckley v. Valeo taught not that the so-called magic words test was a constitutional immutable. It taught two lessons that are much more enduring, that are profound, and that demonstrate just exactly why the electioneering communications definition and provision is constitutional. The first thing that Buckley taught in this area is that statutory requirements that cut right through core political speech, nothing more core than vote for Bush or Bush is a good guy the day before the election.

Statutory requirements in this area must be clear, they must be illusive so that they will not, as this Court said, quote, dissolve impractical application. No doubt about this case. No one on the other side has suggested that there is any lack of clarity in this objective test. The second test, the second factor that this Court articulated in --

QUESTION: Excuse me. I don't want -- because this is important. No one has said, suggested that what is less than clear?

MR. WAXMAN: I'm sorry, the four-part primary definition, that is, it has to be at 60 days

before, targeted at the electorate, a specifically identified candidate in an ad that is broadcast as opposed to an ad that runs in a newspaper.

QUESTION: I thought there was substantial suggestion that clearly identified candidate is not clear. It is not at all clear to me.

MR. WAXMAN: Well, the FEC took comments on whether or not it covered, for example, the McCain-Feingold regulation or Roth IRA. And it has ruled. It considered whether or not an ad that is run within the period but says call your Congressman and has the Congressman's name without identifying him by name is covered, and it ruled that it did.

Now, those applications -- one of those applications, that is, the call your Congressman, my clients, the sponsor of this bill, urged the Court to the urge the FEC to adopt. It didn't because it found that there were possibilities for circumvention and not an established record to demonstrate that it would cause a problem in any number of cases.

QUESTION: You clarified that. I didn't mean to throw you off.

MR. WAXMAN: The second test, the lesson

that Buckley teaches that is enduring is that standards in this area must be, quote, directed precisely to that spending that is unambiguously related to the campaign of a particular Federal candidate.

And so many we are talking about whether or not this law is overbroad or substantially overbroad, I suggest that the Court look to the standard that it articulated itself in Buckley, which is are these expenditures for communications that are unambiguously campaign related. And if the answer is yes, in the vast majority of cases, then on its face, the statute deserves to stand. There may be particular applications that may be in fact unconstitutional. The FEC can issue rules, as-applied challenges --

QUESTION: Let me ask you, what did the district court do in this case? Didn't they strike down the primary definition?

MR. WAXMAN: The district court struck down the primary definition and upheld an altered version of the backup definition, Mr. Chief Justice. And it did so, based on its understanding and it was a misunderstanding of what the data showed with respect to the answer that was given to, I think it's

question 6 in the Buying Time study. That is, our data that showed that for one of the two years involved, 14.7 percent of the ads, which constituted a total of six ads, were issue-related, not candidate-related.

QUESTION: This is the binary choice.

QUESTION: Didn't the district court pretty well disbelieve the Buying Time study?

MR. WAXMAN: No, Mr. Chief Justice. In fact, Judge Leon, who was the swing vote, so to speak, specifically found that although there had been some criticisms with respect to the methodology with respect to this one question, he specifically found that the Buying Time study was credible, and that the results should be given credence.

And it was on the basis of his interpretation of the answer to that one question that he determined that, well, this is 14.7 percent or 17 percent and that's overbroad. And what I would like to address myself to is why -- first of all, that analysis was incorrect. But more to the point, even if there never had been a Buying Time study, even if this question was never asked, Congress had more than ample justification for doing this.

One of the wonderful things about a bright

line objective test is it invites hypotheticals. But what Congress had before it, which is in strict scrutiny, after all, what we're addressing ourselves to, was the real world. And it had before it -- this is Defense Exhibit 48 in the record below -- the story boards of all of the ads that were captured by the CMAG database. That is, in the 75 largest media markets in the 11 months that led up to the 1998 campaign and the 2000 campaign.

And we urge the Court to look through this volume because the real world of what these ads were does not reflect the hypothetical instances in which a corporation or a labor union is faced with an imminent piece of legislation that's going to be enacted the week before or the week after an election and it's only about changing votes.

There may very well be instances, if that occurs, in which an as-applied challenge can be made and a court can determine whether or not the law can constitutionally be applied to that. But what is an amazing feature about this case is the remarkable degree to which the four-part objective test that Congress drew actually hits the observed reality of what Congress knew these ads were about.

At page 11A of the appendix to our brief,

we've reprinted a chart that is also contained in Judge Kollar-Kotelly's findings at special appendix page 848. And what the chart shows is a graph that shows, over the course of, I believe it's 2000. This was 2000. Yes. Weeks prior to the 2000 election.

If you look at the dotted line which sort of waves back and forth very close to the bottom axis, those are the number of ads, issue ads, run during 2000 that don't mention candidates. It stays very constant throughout the year.

If you look at the hard line, you'll see an enormous spike that comes right about week 9, nine weeks before. That's 63 days before the election. And what Congress found was that there was substantial evidence, both the ads themselves and through objective data that I'm now going to describe, that what common sense leads you to believe, that is, that ads that run just before an election, that mention a candidate that are targeted at that candidate's election, and that use broadcast media, that is the most expensive kind of media possible, are very likely intended to have, and overwhelmingly likely will have, an effect on an election.

Now, Justice Scalia, you're quite right.

You know, the hip bone is connected to the thigh bone which is connected to the knee bone, and that doesn't mean you can regulate the metatarsals. But we're talking about a -- what a terrible metaphor.

We're talking about a test here that -- we're talking the test is spending that is unambiguously related to a campaign. And what Congress found, based on the ads, is that that was the case. And if you don't want to read through all of these direct ads, just look at the ones that the Plaintiffs have attached to their brief.

QUESTION: The Congress found that these ads made them feel very bad, and we would not accept that they criticized the incumbents. We wouldn't accept that rationale from a city council. Why should we do it from the Congress?

MR. WAXMAN: Absolutely not. And that is not the reason that -- there is a lot of talk about attack ads. But the reality is they didn't ban attack ads and they didn't even ban attack ads by corporations and labor unions and nonprofits.

QUESTION: But you're saying that was not any part of the rationale for the enactment of a legislation?

MR. WAXMAN: That's correct. There were

individual statements by members of Congress who were upset about this. But if you look at the test that Congress crafted, and the fact -- and it is in the record in this case that the vast majority of these ads were attacking not incumbents. The vast majority of these ads were attacking challengers. I don't think it's fair --

QUESTION: Why do you say they haven't banned attack ads? It's very hard to devise a good punchy attack ad that doesn't name the person you're attacking.

MR. WAXMAN: There is no doubt about the fact that these ads -- there are ads here that both attack and praise.

QUESTION: Well --

MR. WAXMAN: My point to Justice Kennedy was, by and large, the incumbents made out very well under the status quo ante. And it is -- Justice Scalia --

QUESTION: If the price of getting rid of the attack ads is that I have to ban some of the praising ads as well, it's worth it.

MR. WAXMAN: The purpose of the legislation, and it is manifest, we included it in an appendix in our brief, and it's in the Thompson

committee report and the page is cited by Senator Thompson's amicus brief, is that Congress was closing a loophole. It was closing a loophole that the political director of the National Rifle Association called a line in the land drawn on a windy day.

She said that the express advocacy test was a wall built of the same sturdy material as the emperor's clothing. Everyone sees it. No one believes it. It was, in other words, serving the paramount interest in reducing a provision of law, a provision of law enacted by Congress following this Court's decision in Buckley that had made the law an object of scorn.

And that is all over the record in this case. That what this was about was replacing a line in the sand drawn on a windy day with a line that everybody can see and that no one would miss. And the evidence before Congress was not just this question 6, but the ads themselves, the way they ran. There are statement after statement after statement from witnesses in this case that are included in the Joint Appendix. And objective studies from -- the objective data from the Buying Time studies, the Annenberg Center, Professor Magleby at Brigham Young University.

And the internal documents -- and we have some of these discussed in our brief -- the internal documents of the corporations and unions that ran these ads. They have documents that showed that they were aiming at voters, they were using consultants and pollsters to try and figure out how to get voters. They tested these against voters.

These were electioneering in every sense of the word. And here is -- just to put some reality, I guess, the real world example behind that chart, number 11A. Citizens for Better Medicare was an organization that ran a large number of these ads in 2000. Described itself as -- its official Web site as a group of concerned seniors and companies and associations concerned about Medicare.

It was in fact funded almost exclusively by Pharma and the corporations that make up Pharma. Nothing wrong with them running issue ads at all, Justice Scalia. From January 1 until September 4, that is, until the 60-day period cut in, they ran 23,867 issue ads about Medicare and not a single one mentioned a candidate.

On September 4, until election day, they ran 10,876 ads all mentioning candidates. And on election day, they stopped cold. And in our brief,

we discuss this at page 50 and 52. That is a particularly striking example of no requirement to disclose to the public who's paying for this when it is, in fact, corporate treasuries.

QUESTION: That disclosure thing is a different problem, but why banning it?

MR. WAXMAN: Well, again, Justice Scalia --

QUESTION: You've raised the risk of corruption or the appearance of corruption, the fact that they -- I mean, I agree with you that they named candidates. What is wrong, so long as you disclose who it is, that's a different issue. But so long as you disclose who's doing it, what is wrong with their naming a candidate?

MR. WAXMAN: Well, I -- Justice Scalia, I'm right here with my brother, Clement, with Austin. And with the very same rationale that this Court adopted in Austin, which was explicated in the Auto Workers case by Justice Frankfurter, which was recited again by a unanimous opinion of the Court in National Right to Work Committee.

The issue here is whether or not, when we're talking about campaign-related speech, when we are talking about who gets to speak when individual

citizens are exercising their constitutional franchise to vote, the question is whether corporations and labor unions have to do it the same way all the rest of us do.

QUESTION: What about the --

MR. WAXMAN: With voluntary funds contributed by individuals for that very purpose. And the PAC issue that has been discussed -- you probably have heard more than you want to hear about this law in any event, and certainly about the PACs. But the PAC issue that I want to address and the media exemption.

On PACs, we've heard about that the labor unions and how hard it is for the AFL-CIO and what evidence there is in the record. Okay, in the 2000 election cycle, labor unions contributed $53 million from their PACs in contributions and expenditures. And that's not including the treasury funds that they use to run the kind of electioneering ads that are included in our submission.

I guess the other two organizations that were named were the National Rifle Association and the ACLU. The National Rifle Association had so much extra money left in its PAC in the last election cycle that it ended up spending millions of dollars

on things that it wasn't even required to use PAC money for. It has 4 million members. If each of those 4 million members gives $10 a year, they will have one of the biggest -- probably the biggest PAC in history, $40 million.

And there is no showing whatsoever -- they've just raised their dues from $25 to $35. If they just say the dues are still $25. But if you believe with us that political advocacy in this case and talking to candidates and voters who are voting the candidates about how precious the Second Amendment is, please give us $10. If and when a day comes when they can't fund their advocacy in this narrow window, with respect to broadcast ads targeted at particular races, the courts will be open to them.

This Court has announced an exception to the PAC requirement in MCFL, and the courts are available to any corporation that wants to -- or labor union that wants to come in and say we don't --

QUESTION: But is that the way that we would ordinarily construe a statute. To say, you know, if this bothers you or affects you, come in and we'll make an exception for you? That's usually the legislative prerogative.

MR. WAXMAN: Indeed, Mr. Chief Justice,

but in MCFL itself, for example, we have an as-applied exemption made by the Court in order to satisfy constitutional concerns. And our only submission is that on its face, this is in an area in which the need for legislation is compelling, but the drafting challenges are daunting. This effort by Congress at least deserves a chance to protect itself.

Now, just to clarify --

QUESTION: It's getting it now.

MR. WAXMAN: Well, it should have the opportunity to prove that the parade of horribles that our opponents, the type of hypotheticals, we won't be able to fund a PAC, or we want to run --

QUESTION: Congress chose this course. Congress said a three judge district court immediately appealed to the Supreme Court, and 22 issues. I mean, it's not our fault.

MR. WAXMAN: How well I know. But in all seriousness, Mr. Chief Justice, I will be one of the happiest people on the face of the planet when I sit down today, however you decide.

But we're talking about a facial challenge, a facial challenge. And the express advocacy test, the contribution limits and

expenditure limits were not declared unconstitutional on their face when this Court found in MCFL that were some PAC burdens for some types of corporations that the First Amendment should not require to be borne.

Now, with respect to the media exception, I think there may be a misunderstanding about what this exception actually says. It's not an exception for General Electric or people who own medias. It's on page 29A of the government's jurisdictional statement. It accepts a communication appearing in a news story, commentary or editorial distributed through the facilities of any broadcasting station. It's not an exception for General Electric or even the company that owns a broadcast --

QUESTION: Only for the subsidiary of General Electric, right?

MR. WAXMAN: To the contrary. Anybody who wants to run an issue ad, General Electric can run it and it's going to have to run it through its PAC, just like anything else.

QUESTION: But NBC can say whatever it wants, right?

MR. WAXMAN: NBC on its editorial or news story can say whatever it wants.

QUESTION: What else is there, besides --

I mean, it's going to be in a sit come?

MR. WAXMAN: May I answer? Thank you. When Congress finds what there is no evidence whatsoever to suggest exists, that companies that own broadcasting stations are misusing that privilege, Congress can and will address it. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Waxman. The case is submitted.

(Whereupon, at 3:55 p.m., the case in the above-entitled matter was submitted.)