"Electioneering Communication" under the Bipartisan Campaign Reform Act of 2002: A Constitutional Reclassification of "Express Advocacy"

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Advertisements about public officials and public policy are an important form of political speech for people to express their views and to influence others. Political advertisements have a long history in the United States. In 1936, commercials ran criticizing President Franklin Roosevelt's proposal to create a Social Security system.1 Traditionally, speakers have complete First Amendment protection when discussing public issues.2

In 1976, the Supreme Court issued its landmark decision in Buckley v. Valeo,3 in which the Court clarified several constitutional issues regarding the Federal Election Campaign Act of 1971 ("FECA").4 The Court ruled that Congress could not, consistently with the First Amendment, regulate advertisements that discuss public issues.5 However, Congress could constitutionally subject advertisements that expressly advocate the election or defeat of a candidate, known as independent expenditures, to disclosure requirements because of the public's right to election information.6

Since 1996, individuals, interest groups, and political parties have spent millions of dollars to air so-called "issue" ads that criticize candidates by name.7 The candidates themselves criticize the content of these advertisements because they are often personal.

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2 See Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) ("The First Amendment affords the broadest protection to . . . political expression.").
3 Id.
5 Buckley, 424 U.S. at 43-44.
6 See id. at 81-82.
attacks rather than a substantive discussion of political issues.\(^8\) A more important concern may be that many of these ads run by anonymous interest groups and political parties are subject to no disclosure requirements because they intentionally and carefully avoid using words that expressively advocate the candidate's election or defeat. As a result, the public is robbed of vital election information.

On March 27, 2002, the 107th Congress passed the Bipartisan Campaign Reform Act of 2002 ("BCRA") to combat these concerns.\(^9\) On the same day, President George W. Bush signed it into law despite his misgivings.\(^10\) This legislation consists of comprehensive amendments to the FECA. Title II of the BCRA classifies election advertisements that occur immediately before an election as "electioneering communications" and subjects them to the same disclosure requirements as independent expenditures.\(^11\) Title II also places restrictions on corporations and labor unions that air electioneering communications.\(^12\)

Many members of Congress vigorously opposed the legislation, and it has been challenged in court on many fronts.\(^13\) On May 21, 2003, a three-judge panel of the United States District Court for the District of Columbia issued its lengthy decision in McConnell v. Federal Election Commission,\(^14\) upholding and invalidating various portions of the new law. Pursuant to a provision in the BCRA, the decision will be directly appealed to the United States Supreme Court.\(^15\) The Supreme Court significantly changed its usual schedule by agreeing to hear oral arguments on September 8, 2003, four weeks before the beginning of its new term.\(^16\)

In Buckley, the Supreme Court created the "express advocacy" standard to narrow the reach of the FECA. In the BCRA, Con-
gress reclassifies this standard by distinguishing a new form of speech called "electioneering communication." This Note discusses whether Congress can constitutionally do so. My conclusion is that it can.

Part I briefly outlines the relevant provisions of the BCRA. Part II discusses the Supreme Court’s creation and reaffirmation of the express advocacy standard and outlines the different categories of communication that resulted from the Court’s line drawing. Part III outlines the Federal Election Commission’s ("FEC") unsuccessful litigation strategy aimed at broadening the express advocacy standard. Part IV discusses modern issue advertisements from recent elections, outlines the harms these advertisements are thought to cause, and analyzes the justifications for regulation. Part V outlines in greater detail the relevant portions of the BCRA and Congress’ reasons for enacting it.

Part VI discusses whether the express advocacy standard from Buckley is constitutionally required under the First Amendment. I will argue that the express advocacy standard is not a constitutional requirement for two reasons. First, Congress amended the FECA in 1974 to address different concerns of campaign financing. As a result, the Court in Buckley created the express advocacy standard as a form of statutory construction to save a poorly drawn statute. Second, the federal court decisions upholding the express advocacy standard were merely constrained by the Court’s statutory interpretation of the FECA.

Part VII analyzes the two definitions of “electioneering communication” under the First Amendment principles outlined in Buckley. Two judges in McConnell held that the primary definition of electioneering communication was unconstitutional. Two judges held that the second definition was constitutional by severing its final clause. However, the Supreme Court should reverse both of these holdings. First, the primary definition of electioneering communication is consistent with First Amendment principles because it is a bright-line rule that is narrowly drawn to cover only one form of election advertisements. Second, the alternative definition of electioneering communication is unconstitutionally vague.

17 McConnell, 251 F. Supp. 2d at 185.
I. BRIEF OVERVIEW OF THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002

The BCRA distinguishes a new form of campaign advertising called electioneering communications and provides two alternate definitions. Under the first definition, an ad becomes an electioneering communication if it (1) airs 60 days before a general election or 30 days before a primary, runoff, or caucus, (2) refers to a specific federal candidate, and (3) is targeted to the relevant electorate. Under the alternative definition, the ad becomes an electioneering communication if it attacks, opposes, supports, or promotes a federal candidate and it has no other plausible meaning. However, news stories and editorials are exempt from the definition.\(^{18}\)

Electioneering communications are subject to disclosure requirements like independent expenditures. More specifically, individuals and groups producing independent expenditures must disclose the amount of money and to whom the expenditures pertain.\(^{19}\) However, corporations and labor unions are banned from using funds from their general treasuries to produce and air electioneering communications.\(^{20}\) Groups that qualify as tax-exempt and charitable organizations are exempt from the BCRA’s coverage.\(^{21}\)

II. THE ORIGINS OF THE “EXPRESS ADVOCACY” STANDARD

A. Campaign Finance Legislation

In 1971, Congress enacted the Federal Election Campaign Act. This legislation consisted of modest reforms, such as requiring candidates to fully disclose contributions and expenditures and placing limits on advertising expenditures. The successes of the new law were outweighed by the damage of the Watergate scandals of 1972, which illustrated illegal activities related to President Richard Nixon’s campaign contributions. As a result, Congress passed the 1974 Amendments to the Federal Election Campaign Act to implement further reform. These new regulations placed limits on contributions to candidates, placed limits on candidate and individual campaign expenditures, implemented disclosure requirements, provided for public funding of presidential elections,

\(^{18}\) § 201, 116 Stat. at 89-90.
\(^{19}\) § 201(a), 116 Stat. at 88. 
\(^{20}\) § 203, 116 Stat. at 91. 
\(^{21}\) § 203, 116 Stat. at 91-92.
and created the Federal Election Commission to enforce and administer election laws.\textsuperscript{22}

\textit{B. The Supreme Court’s Express Advocacy Standard}

\textit{1. Buckley v. Valeo}

In \textit{Buckley v. Valeo},\textsuperscript{23} the Supreme Court determined the constitutionality of the Federal Election Campaign Act. As a general principle, the Court stated that contribution and expenditure limitations strongly implicate the First Amendment because elections are fundamental First Amendment activities.\textsuperscript{24} According to the Court, a major purpose of the First Amendment is to protect the discussion of governmental affairs and candidates for election.\textsuperscript{25} Widespread debate allows people to make informed choices to effect desired political and social change. Therefore, the First Amendment provides broad protection to political expression.\textsuperscript{26}

In a portion of the opinion, the Court addressed the constitutionality of independent expenditure limitations. The statute prohibited all individuals and groups who made “any expenditure . . . relative to a clearly identified candidate” from spending more than $1,000 on expenditures during a calendar year.\textsuperscript{27} The Court stated that because First Amendment concerns are so important, the provisions regulating speech must be extremely precise to provide fair warning to speakers and to avoid a chilling effect on speech.\textsuperscript{28} The Court determined that the definition of independent expenditures was unconstitutionally vague because the phrase “relative to” did not clearly indicate permissible and impermissible speech.\textsuperscript{29} To cure the vagueness problem in this provision, the Court ruled that the phrase “relative to” must be construed to mean “advocating the election or defeat” of a candidate.\textsuperscript{30}

The Court’s reconstruction of the statute’s language, however, did not cure its unconstitutional vagueness. The Court noted that in application, the newly construed statute would erase the distinc-

\textsuperscript{23} 424 U.S. 1 (1976) (per curiam).
\textsuperscript{24} \textit{Id.} at 14.
\textsuperscript{25} \textit{Id.} (citing Mills v. Alabama, 384 U.S. 214, 218 (1966)).
\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{Id.} at 39.
\textsuperscript{28} \textit{Id.} at 41 n.48 (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)).
\textsuperscript{29} \textit{Id.} at 41.
\textsuperscript{30} \textit{Id.} at 42.
tion between issue discussion and advocacy of a candidate’s election or defeat.\textsuperscript{31} With this finding, the Court created the express advocacy standard. The Court recognized that candidates and campaigns were public issues. Yet, an audience’s understanding of a speaker’s intentions can differ widely. The Court, therefore, wanted to avoid distinguishing between advocacy and discussion based on the audience’s understanding of the speaker’s intentions. Otherwise, the statute provided no fair warning to speakers as to whether their speech was covered. As a result, speakers would chill their speech.\textsuperscript{32} Therefore, the Court held that to be an independent expenditure, a communication must use “explicit words” of advocacy or defeat.\textsuperscript{33} In a famous footnote, the Court offered the following examples of express advocacy of election or defeat: “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” and “reject.”\textsuperscript{34}

\section*{2. Federal Election Commission v. Massachusetts Citizens for Life, Inc.}

The Supreme Court has applied the express advocacy standard in only one case. In \textit{Federal Election Commission v. Massachusetts Citizens for Life, Inc.} (“MCFL”),\textsuperscript{35} a nonprofit corporation published and distributed a newsletter prior to a primary election.\textsuperscript{36} The corporation paid for the newsletter with funds from its general treasury. The front page of the newsletter contained the headline “EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE” and warned the audience “[n]o pro-life candidate can win in November without your vote in September.”\textsuperscript{37} The newsletter provided the photographs of only those candidates whose voting records or stated positions were favored by the organization. A complaint was filed with the FEC alleging that MCFL violated the FECA by paying for independent expenditures with its general corporate treasury funds.\textsuperscript{38}

The Court determined that MCFL’s activities fell within the scope of the statute.\textsuperscript{39} However, the Court reaffirmed that a com-
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munication’s language must meet Buckley’s express advocacy standard in order to qualify as an independent expenditure under the FECA. The Court recognized that the language in the newsletter was not as specific as the “vote for Smith” example used in Buckley. The newsletter, however, urged voters to vote for pro-life candidates and provided photographs of such candidates. Instead of a discussion of public issues, the newsletter contained an explicit directive: “Vote for these candidates”; thus, the newsletter constituted “express advocacy.”

C. Types of Communication after Buckley

1. Independent Expenditures

Independent expenditures are the first form of speech that Buckley’s distinction creates. These communications occur when an individual, without coordination with the candidate, spends money on an ad that expressly advocates a candidate’s election or defeat. The Court in Buckley ruled that individual expenditures could be constitutionally subjected to disclosure requirements, but could not be constitutionally limited in amount.

2. “Educational” Issue Advertisements

All other forms of election communication that do not expressly advocate the election or defeat of a candidate fall under the category of issue advocacy. However, this broad term can be further subdivided into separate subcategories. The first form of issue advocacy is called “educational” issue advocacy. In these instances, groups run ad campaigns to educate the public rather than to influence an election. For example, some groups air advertisements that encourage people to vote. Other educational ads publicize the voting records of elected officials to inform the public about their representatives. These ads are not subject to any form of regulation and probably cannot be regulated consistently with the First Amendment. Congress has not advocated regulating these and purposefully hopes to protect them under the BCRA.

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40 Id. at 249-50. The Court, however, found that the provision violated the First Amendment as applied to MCFL. Id. at 263.
41 See Buckley, 424 U.S. at 42.
42 Id. at 52, 84.
44 See John McCain & Russell Feingold, S. 25: Bipartisan Campaign Reform Act, in
3. “Legislative” Issue Advertisements

Another form of issue advocacy is called “legislative” issue advocacy, in which groups run advertisements advocating their position on pending legislation. The immediate goal of this type of advertisement is not to influence an election, although legislative ads often urge the audience to contact their representatives. For example, in 1993 an interest group called the Health Insurance Association of America ran ads depicting a couple named “Harry and Louise” criticizing President Clinton’s health care bill. These ads were run in congressional districts represented by committee members in charge of health care legislation. The tobacco companies used a similar approach by frequently running ads in many markets criticizing tobacco-free initiatives as a tax increase. Both of these ads were widely seen as extremely successful in framing the political debate. Although the success of these ads has been questioned, neither bill was enacted into law. Supporters of campaign finance reform have criticized these ads as being misleading. However, the BCRA would not cover this activity.

4. “Election” Issue Advertisements

A third form of issue advocacy has been called “election” advocacy. These advertisements often include the names and photographs of specific candidates and are played almost exclusively during an election year. A feature that distinguishes these from educational issue ads is that election issue ads often discuss the personal qualities of a candidate. These ads are often seen as designed to influence the outcome of an election. However, since most of these ads do not meet the express advocacy standards dictated by Buckley, they were not regulated under campaign law until the BCRA.

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45 Magleby, supra note 43, at 42.
46 Id. at 42-43.
47 Id. at 41.
49 Magleby, supra note 43, at 57.
III. THE FEC'S LITIGATION STRATEGY IN THE FEDERAL COURTS

After Buckley, the FEC created regulations to broaden the express advocacy standard to cover election issue advocacy that arguably was intended to influence elections. The FEC then instituted enforcement actions against individuals and interest groups. The remaining cases interpreting the express advocacy doctrine have appeared in the lower federal courts.

A. The First Application of Express Advocacy

In Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, a nonprofit association distributed a bulletin that reported the voting record of a specific congressional representative and included his photograph. The bulletin indicated which of his votes were consistent with the association's views but did not refer to any election, political affiliation, or opponent. The FEC argued that the bulletin met the express advocacy standard because its purpose was not to inform the public about an elected official's voting record, but instead to unseat the candidate. Therefore, the association violated the filing and disclaimer provisions for independent expenditures. The United States Court of Appeals for the Second Circuit, however, rejected this argument, stating that the words "expressly advocating" from Buckley "mean[] exactly what they say." Nothing in the bulletin called for anyone's election or defeat. The court refused to interpret Buckley as allowing an implied purpose of advocacy because to do so would ignore the distinction ordered in that case.

B. A Strict Interpretation of Express Advocacy: Faucher v. Federal Election Commission

The United States Court of Appeals for the First Circuit issued the most restrictive interpretation of the express advocacy standard in Faucher v. Federal Election Commission. The FECA prohibits corporations from using general treasury funds to make

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50 See generally, Trevor Potter, Issue Advocacy and Express Advocacy, in CAMPAIGN FINANCE REFORM: A SOURCEBOOK 227-39 (Anthony Corrado et al. eds., 1997). The structure of this section was influenced by Potter's article.
51 616 F.2d 45 (2d Cir. 1980).
52 Id. at 51.
53 Id. at 48, 53.
54 Id. at 53.
55 Id.
contributions or expenditures in federal elections. The FEC had issued regulations concerning voter guides, which are prepared by many political nonprofit corporations and organizations. The FEC's regulations stated that corporations could distribute "nonpartisan" voter guides. "Nonpartisan" was defined as "not suggesting... any position on the issues covered" and not expressing "editorial opinion concerning the issues presented." The Maine Right to Life Committee, Inc. ("MRLC"), a nonprofit corporation, sought an advisory opinion from the FEC regarding its voter guide. The voter guides in question featured candidate and party positions on pro-life issues and indicated when the committee agreed with the positions. The guide included a disclaimer which read: "The publication of... the Candidate Survey does not represent an endorsement of any candidate(s)." The FEC found that the MRLC voter guide's favoring of a pro-life position did not meet the regulation's definition of "nonpartisan." The MRLC challenged the FEC's authority to restrict issue advocacy with its regulation.

The First Circuit first ruled that the FEC did not have statutory authority under the statute to restrict issue advocacy through regulations. The court recognized that normally an executive department's construction of a statute must be given great weight. The First Circuit recognized that the Supreme Court, however, had already spoken on the issue in Buckley. Consequently, the First Circuit required a strict interpretation of the express advocacy test because the Supreme Court specifically meant to protect issue advocacy in Buckley. The court rejected the FEC's invitation to broaden the definition of express advocacy, noting that the Supreme Court is the "final authority" on statutory interpretation, and its interpretation "becomes the law and must be given effect."

Secondly, in addressing the FEC's alternative argument, the court held that the MRLC's voter guide did not constitute express advocacy. According to the court, this question would require "word games" and questions the Supreme Court hoped to avoid by adopting the bright-line express advocacy test in Buckley. There-

51 Id. at 469 (citing 2 U.S.C. § 441b(a)).
52 Id. at 470 (citing former FEC regulation 11 C.F.R. § 114.4(b)(5)).
53 Id. (citing former FEC regulation 11 C.F.R. § 114.4(b)(5)).
54 Id. at 469.
55 Id.
56 Id. at 471.
57 Id. at 472.
fore, the court invalidated the FEC’s regulation as unconstitutionally overbroad.64

C. A Broader Interpretation of Express Advocacy: Federal Election Commission v. Furgatch

The United States Court of Appeals for the Ninth Circuit issued a somewhat broader interpretation of the express advocacy standard in Federal Election Commission v. Furgatch.65 In this case, an individual published an advertisement in the New York Times during the 1980 presidential election that criticized President Jimmy Carter and urged readers “DON’T LET HIM DO IT.”66 The FEC argued that Furgatch’s ad expressly advocated the defeat of Jimmy Carter because it discussed the candidate rather than political issues. Therefore, Furgatch violated the FECA by failing to report this independent expenditure.67

The court deemed it a “close call” whether the advertisement constituted express advocacy.68 Contrary to Faucher, the court stated that Buckley did not establish a bright-line test. However, the court wanted to further the purposes of the FECA, so that speech that was “clearly intended” to affect an election would not escape regulation.69 As a result, the court stated that it had to fashion a “more comprehensive approach” to interpreting express advocacy by rejecting “overly constrictive rules.”70

The court ruled that an advertisement did not have to use any of the words listed in Buckley to be express advocacy because such words can be easily avoided.71 Citing “fighting words,” libel, and subversive speech, the court accepted the FEC’s argument that the context in which the speech was produced should be considered in determining express advocacy. The court concluded that the speech “when read as a whole” with “limited reference to external events” must be “susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.”72

64 Id.
66 Furgatch, 807 F.2d at 858.
67 Id. at 859-60.
68 Id. at 861.
69 Id. at 862.
70 Id.
71 Id. at 863.
72 Id. at 864.
The standard has three main components. First, speech is express if its message is "unmistakable and unambiguous, suggestive of only one plausible meaning." Second, advocacy requires a "clear plea for action," not just a request for more information. Third, the speech must make "clear what action is advocated." Reasonable minds cannot differ whether the speaker is urging them to elect or defeat a candidate, or urging them to do something else.

Applying this approach, the court held that the ad constituted express advocacy. The court focused on the “don’t let him” part of the ad, reasoning that these words were a simple and direct command urging the audience to take some kind of action. Even though the advertisement was “evasively written,” its meaning was clear because the only action open to the audience was to vote against Jimmy Carter. This conclusion was supported by the fact that the advertisement appeared less than a week before the election.

The *Furgatch* decision is considered notable among commentators on campaign finance jurisprudence. Former FEC Chairman Trevor Potter describes it as extremely “pro-regulatory.” One notable development was the court’s willingness to find express advocacy in an implied meaning, since Furgatch did not explicitly call for Carter’s defeat. A second notable development was the court’s holding that it is permissible to look at context rather than just the text of the ad to find express advocacy. The *Furgatch* decision can also arguably be seen as a not particularly broad reading of precedent. As the Fourth Circuit interpreted it, *Furgatch*’s simple holding was that when a communication contains an explicit directive to take action, but it is not clear what action is advocated, the court can consider context.

**D. Other Notable Express Advocacy Cases**

With its victory in *Furgatch*, the FEC issued a new regulation defining express advocacy that closely resembled the rule in that

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73 Id.
74 Id.
75 Id.
76 Id.
77 Id. at 866.
78 Id. at 865.
79 Id.
80 Potter, supra note 50, at 230.
81 Id. at 232.
In Maine Right to Life Committee, Inc. v. Federal Election Commission, the United States District Court for the District of Maine invalidated this regulation. The court noted that this regulation was reasonable and narrowly tailored. However, Buckley and Massachusetts Citizens for Life show that the Supreme Court considered issue advocacy to be a “special concern” of the First Amendment. As a result, the Court purposely drew lines to avoid restricting public discussion of issues and to ensure that speakers know exactly what is permitted and prohibited. While the Supreme Court’s bright-line rule could allow certain activities that affect elections, the Court wanted to err on the side of permitting speech. Therefore, the FEC’s reinterpretation of this rule was unconstitutionally overbroad. The United States Court of Appeals for the First Circuit affirmed the district court’s reasoning without an opinion.

The FEC found the United States District Court for the Western District of Virginia to be unreceptive to its regulatory arguments in Federal Election Commission v. Christian Action Network, Inc. In this case, a Christian advocacy organization produced television commercials critical of the Clinton/Gore ticket weeks before the 1992 presidential election. The commercial used imagery, music, and narration alleging the candidates’ support of “radical homosexual causes.” At the end, the narrator urged the audience to contact the Christian Action Network for “more information on traditional family values.”

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83 Former FEC regulation 11 C.F.R. § 100.22 defined express advocacy as: [A]ny communication that . . . when taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because – (1) the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

84 914 F. Supp. 8.
85 Id. at 11-12.
86 Id. at 12.
87 Id. at 12-13.
88 See Me. Right to Life Comm., Inc. v. FEC, 98 F.3d 1 (1st Cir. 1996) (per curiam).
90 Id. at 948.
91 Id. at 949.
The FEC argued that a different analysis is needed with television commercials because they use imagery and subtle nonverbal communication.\(^{92}\) It pointed out various aspects of the advertisement: the “visual degrading” of Clinton’s picture, the use of visual text and voiceovers, “ominous” music, “unfavorable” coloring, code words, editing, and the airing of the advertisement a few weeks before the election. According to the FEC, the advertisements sent a clear message to the audience to vote against Clinton/Gore.\(^{93}\)

The district court recognized that the advertisements were “openly hostile” to the candidates’ proposals.\(^{94}\) However, the advertisement did not use language that constituted express advocacy. Although the advertisements were negative and inflammatory, they did not use language directing the public how to vote. Instead the ads urged the audience to contact the organization.\(^{95}\) To accept the FEC’s definition of express advocacy, courts would be forced to interpret not only the words in the advertisement but its imagery. This type of analysis is completely at odds with the Supreme Court’s “express words” requirement. Further, the court noted how the Supreme Court wanted to avoid misinterpretation of the speaker’s intent so that individuals would have notice of when their speech will be regulated. Imagery is susceptible to even more misinterpretation than words. Therefore, allowing the court to consider imagery would result in a greater chilling effect.\(^{96}\) The United States Court of Appeals for the Fourth Circuit summarily affirmed the reasoning of the district court.\(^{97}\)

In a later action, the Christian Action Network sued for attorney fees and costs.\(^{98}\) In granting these, the Fourth Circuit stated that the FEC’s argument could not have been made in good faith, given clear guidance from the Supreme Court that “express” or “explicit” “words” are mandatory to find express advocacy.\(^{99}\)

While Furgatch offered the FEC some glimmer of hope in expanding the express advocacy standard, most federal courts have ruled in favor of Faucher and its line of reasoning.\(^{100}\)

\(^{92}\) Id. at 955.
\(^{93}\) Id. at 957.
\(^{94}\) Id. at 953.
\(^{95}\) Id. at 953-54.
\(^{96}\) Id. at 957-58.
\(^{99}\) Id. at 1064.
\(^{100}\) See, e.g., Chamber of Commerce v. Moore, 288 F.3d 187 (5th Cir. 2002) (applying a
IV. THE RISE OF "ELECTION" ISSUE ADVOCACY

A. Examples of Modern "Election" Issue Advocacy

1. 1996 Elections

Most commentators point to the 1996 elections as the year when interest groups, unions, corporations, and political parties began to spend massive amounts of money on "issue advocacy." Kathleen Hall Jamieson, a scholar of political advertising, told the Washington Post that she did not even tally party advertising in 1992 because there was not very much. In 1996, according to Jamieson, it was the dominant form of advertising. Also, the content of the ads seemed to change. Political scientist Anthony Corrado told the Washington Post that, in past election cycles, election ads were more "generic" in that they focused more on issues. One explanation for the widespread use of issue ads is that, as typified by the 1993 health care debate, television advertising is successful. Another explanation is that the FEC's court defeats have signaled to more interest groups that they can safely utilize issue ads.

Interest groups were very active during the 1996 elections. In 1996, the AFL-CIO announced it would spend $35 million on commercials that would mention the names of Republican representatives, attack their voting record on labor issues, and air immediately before the general election. As a response, thirty-five business groups announced they would spend $17 million on pro-business advocacy defending the candidates. Other groups such as the Sierra Club, the National Right to Life Committee, and the
National Abortion and Reproductive Rights Action League also announced their intentions to air commercials.\footnote{West, supra note 7, at 53.} Because these groups would not use words of express advocacy, their ads would qualify as issue ads and face no disclosure requirements.\footnote{See id.} The Annenberg Public Policy Center estimated that the twenty-seven organizations it studied for the 1995-96 election cycle eventually spent $135-150 million on election advertising.\footnote{Glenn Moramarco, Regulating Electioneering: Distinguishing Between "Express Advocacy" & "Issue Advocacy" 9 (1998).}

The major political parties also took advantage of issue advertising in 1996. Each party can spend $12 million supporting its presidential nominee. However, by producing commercials that avoided express advocacy terms, the party faced no limits. For example, the Republican National Committee aired commercials promoting its presidential candidate Bob Dole as part of a $20 million ad campaign before the Republican convention. Instead of telling the audience to vote for Dole, the ad instructed them to contact their representatives. Republican National Committee communications director Ed Gillespie contended that the ad talked about issues that Dole supported. The Democrats, while arguing that the Dole ad went over the legal line, responded by spending more than $20 million on their own "issue" advertising.\footnote{Holman & McLoughlin, supra note 48, at 29.}

2. 2000 Elections

The 2000 federal elections contained similar spending patterns. The Brennan Center for Justice issued a comprehensive report analyzing election advertisement spending in the 2000 elections. According to the Brennan Center, three groups made expenditures for election advertising: candidates, party committees, and interest groups. While interest groups spent $11 million to air ads in 1998, they spent $98 million in 2000.\footnote{Marcus, supra note 101, at A1.} Interest groups spent about $42 million on "true" issue ads which discussed legislative issues and were unrelated to campaigns. However, interest groups spent $49 million on "election" issue ads that mentioned candidates and aired in close proximity to elections. Apparently, most advertisements avoided using words of express advocacy, even candidate ads that are covered under election law.\footnote{Id. at 29, 31-32.} But, no
one knows for sure how much interest groups have spent on issue advertisements since they are not subject to any disclosure.\footnote{See H.R. REP. No. 107-131, pt. 1, at 36 (2001).}

\textbf{B. The Effects of “Election” Issue Advocacy and the Basis for Regulation}

1. Negative Tone of Campaigns

A major criticism of modern “election” issue advertisements is that they are less concerned with discussing campaign topics and more concerned with attacking opponents.\footnote{WEST, supra note 7, at 58-59.} The Annenberg Public Policy Center found that 41 percent of party-funded election ads were “pure attack” ads against federal candidates in 1996.\footnote{Marianne Holt, The Surge in Party Money, in OUTSIDE MONEY: SOFT MONEY AND ISSUE ADVOCACY IN THE 1998 CONGRESSIONAL ELECTIONS, supra note 43, at 17, 25.} One famous example aired in Montana at the end of an election season: “Who is Bill Yellowtail? He preaches family values, but he took a swing at his wife. Yellowtail’s explanation? He only ‘slapped her,’ but her nose was broken . . . Call Bill Yellowtail and tell him we don’t approve of his wrongful behavior.”\footnote{Mark Green, SELLING OUT 97 (2002); Richard Briffault, Issue Advocacy: Redrawing the Elections/Politics Line, 77 TEX. L. REV. 1751, 1751 (1999).}

It has been argued that these ads create a negative tone of the campaign, causing voters to become disgusted with the candidates, which decreases voter turnout.\footnote{Magleby, supra note 43, at 49.} The accuracy of these claims, however, is less than clear. In fact, some researchers have conducted studies that support the opposite conclusion.\footnote{See generally KATHLEEN HALL JAMIESON, EVERYTHING YOU THINK YOU KNOW ABOUT POLITICS . . . AND WHY YOU’RE WRONG (2000) (concluding that fair attack and its rebuttal can be politically useful).} Critics of the BCRA’s regulation of issue advocacy argue that members of Congress are neither genuinely concerned with changing the tone of campaigns nor with addressing voter concerns. Instead, the candidates actually want to restrict or punish their critics.\footnote{See H.R. REP. No. 107-131, pt. 1, at 3 (2001) (arguing that although “[s]ome Members of Congress may feel frustrated by the things being said about them . . . the First Amendment prevents Congress and its Members from using their powers to restrict, regulate or punish their critics”); see also Will, supra note 8, at B7 (comparing the BCRA to the Sedition Act of 1798).}

Election advertisements like the Yellowtail ad are certainly infuriating and most likely contribute little to the election process. First, while the ad may in fact be factually accurate, it is obviously designed to personally attack the candidate rather than to discuss the candidate’s policies or public record. The latter may actually
be of interest to the voting public. Second, it is also unfair that an anonymous group or person can produce such an insulting ad and disappear. Congress, however, enters into dangerous constitutional territory when it justifies speech regulation because it disapproves of the content. It is entirely settled that the material in the Yellowtail ad is protected First Amendment speech. As the Supreme Court noted in *New York Times Co. v. Sullivan*, 17 "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

Furthermore, the classic weapon against bad speech is not suppression, but more speech. 18

2. A Cesspool of Corruption

Another criticism of election issue advertisements is that they are just another aspect of a corrupt election system. Commentators point to the 1996 elections, in which the Clinton and Dole campaigns spent millions of dollars for television ad campaigns, arguing that it involved abuses far worse than Watergate. In fact, while unregulated "soft money" contributions are normally associated with large contributions from business interests, the political parties funded these election issue advertisements with the same unregulated soft money. 19

Supporters of advertisement regulations argue that restrictions on "election" issue ads are part of comprehensive campaign finance reform measures. 20 These restrictions, therefore, can be justified under the compelling governmental interest of preventing actual corruption and the appearance of corruption upheld by the Supreme Court in *Buckley v. Valeo*. 21

The need to control the election spending of public officials and their political parties is indeed a persuasive argument. Government officials have a duty to abide by ethical standards and have important responsibilities to the public. Less persuasive, however, is the need to prevent corruption or the appearance of corruption when an interest group with voluntary membership uses its dues and contributions for political advertisements. Critics of

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18 *Id.* at 270.
19 See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("*[T]he fitting remedy for evil counsels is good ones."*

21 *See id.*
22 424 U.S. 1, 26-27 (1976) (per curiam).
advertisement regulations like the National Rifle Association’s lead attorney, Charles Cooper, argue that such activity is democracy, rather than the corruption of it. While interest groups have benefited from the same “express advocacy” loophole, no one can seriously argue that they should be regulated as intensely as public officials and candidates for public office.

3. Lack of Compelled Disclosure

A final and perhaps more valid criticism leveled against interest groups is that by carefully avoiding express advocacy language, their ads face no disclosure requirements as to amount or individuals making the expenditures. Lack of disclosure can have serious consequences that affect the general voting public. First of all, the ads may mislead voters into believing that the candidates themselves are connected with ads produced by third parties. For example, some interest groups that support a specific candidate or state political parties hoping to aid a federal candidate virtually copy the candidate’s advertising to reinforce their message. Although issue ads do not specifically say whether to vote for or against a candidate, they share many characteristics with candidate advertisements. They refer to specific candidates and show their pictures, discuss campaign issues, are broadcast immediately before elections, and are often aired in close proximity to the candidates’ own commercials. The commercials are sometimes so similar that researchers have found that the public will blame the candidates when they object to interest groups’ and political parties’ negative advertising.

While interest groups do not always produce misleading advertisements, they often deliberately disguise their identities in their advertisements by creating obscurely named groups solely for the purpose of issue advertisements. For example, in the 1998 elections, the AFL-CIO created the group “The Coalition to Make Our Voices Heard,” and the National Association of Manufacturers created “The Coalition: Americans Working for Real Change.” Voters cannot discover who is actually funding these “election” issue advertisements. As a result, interest groups can avoid facing

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123 Will, supra note 8, at B7.
124 West, supra note 7, at 56; Magleby, supra note 43, at 57.
125 Holt, supra note 112, at 25.
126 West, supra note 7, at 56.
127 Magleby, supra note 43, at 49.
128 Id. at 53-54.
the reactions of voters after they have had an opportunity to evaluate the information and weigh the groups' credibility.\textsuperscript{129}

Compelled disclosure requirements for interest groups may infringe on their First Amendment right of association.\textsuperscript{130} Moreover, the Supreme Court has recognized the right of individuals to engage in anonymous political speech so that they will not face suppression over their unpopular ideas.\textsuperscript{131} In \textit{Talley v. California},\textsuperscript{132} the Supreme Court invalidated a city ordinance that prohibited distribution under any circumstances of handbills that did not contain the names and addresses of persons who prepared, distributed, or sponsored them.\textsuperscript{133} In \textit{McIntyre v. Ohio Elections Commission},\textsuperscript{134} the Court invalidated an Ohio statute that imposed a fine for distribution of publications that did not contain the name and residence of those issuing or creating them.\textsuperscript{135} The Court stated in \textit{McIntyre} that anonymous materials have played an important role in the progress of literature and politics. Furthermore, an advocate may believe that anonymity will make his ideas more persuasive or will limit prejudice of his message if he is personally unpopular.\textsuperscript{136} The Court stated that the interest in providing voters with additional relevant information does not justify forcing a speaker to make disclosures he would otherwise not provide.\textsuperscript{137}

The Court has also recognized the electorate's right to information. The Court upheld the disclosure requirements for federal independent expenditures in \textit{Buckley} because they served important informational interests; the disclosure requirements not only open the federal election system to public view, but they also increase the amount of information about candidates' supporters and help voters define the candidates' constituencies.\textsuperscript{138} Since "election" advertisements differ from independent expenditures only in terms of a few words, these same interests apply.

\textsuperscript{129} \textit{West}, supra note 7, at 58; Magleby, \textit{supra} note 43, at 53-54.

\textsuperscript{130} \textit{Buckley v. Valeo}, 424 U.S. 1, 64 (1976) (per curiam) ("\textit{[C]ompelled disclosure... can seriously infringe on privacy of association and belief guaranteed by the First Amendment.}").

\textsuperscript{131} \textit{Bradley A. Smith, Unfree Speech: The Folly of Campaign Finance Reform} 221-22 (2001) (citing \textit{McIntyre v. Ohio Elections Comm'n}, 514 U.S. 334 (1995)). Smith, a strong critic of campaign finance regulations, is currently vice-chairman of the FEC. See http://www.fec.gov/members/smith/smith.html (commissioner's home page, containing biographical information, opinions, commentary, etc.).

\textsuperscript{132} 362 U.S. 60 (1960).

\textsuperscript{133} \textit{Id.} at 60-61, 65.

\textsuperscript{134} 514 U.S. 334 (1995).

\textsuperscript{135} \textit{Id.} at 338, 357.

\textsuperscript{136} \textit{Id.} at 341-42.

\textsuperscript{137} \textit{Id.} at 348.

\textsuperscript{138} \textit{Buckley}, 424 U.S. at 81-82; see also \textit{West}, supra note 7, at 58 (commenting that without information on campaign finance, voters are in a weak position to evaluate candidates).
The factors that distinguish valid disclosure requirements from invalid disclosure requirements are the breadth of the statute and the circumstances of the speech. For disclosure requirements to be constitutionally valid, they must be narrowly limited to reach specific situations. In Buckley, the Court found the disclosure requirements valid for federal elections because they reached only expenditures that were unambiguously campaign related. In Talley, while the ordinance was supposed to combat fraud, false advertising, and libel, it was "in no manner so limited" because it reached handbills distributed under any circumstances. As a result, it covered an individual who distributed handbills urging readers to boycott certain businessmen. Similarly, in McIntyre, the statute applied without regard to the type of campaign activity involved, to the time period in which the speech occurred, or to the speaker's interest in anonymity. As a result, it covered an individual who distributed a leaflet expressing her opposition to a tax levy. As demonstrated below, the BCRA carefully classifies a specific form of speech and limits the disclosure requirements in terms of the type of campaign activity, the time period in which the speech occurs, and the individuals and groups who are covered.

V. CONGRESS AND THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002

A. Congress' Basis for Issue Advocacy Regulation

In an article about their McCain-Feingold bill, much of which was incorporated in the BCRA, Senators Russell Feingold and John McCain outlined their intentions for the new amendments. McCain and Feingold argued that statutory definitions like "express advocacy" have been exploited by recent federal campaigns so that attack ads disguised as issue advocacy are dominating. These ads are able to do so only because they purposefully avoid using the "magic words" of Buckley. Modern campaign tactics blur the distinction between issue advocacy and independent ex-

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139 See McIntyre, 514 U.S. at 358 (Ginsburg, J., concurring) (noting that the state may require the speaker to disclose its identity in "other, larger circumstances" with a "more limited identification requirement").
140 Buckley, 424 U.S. at 81.
141 Talley v. California, 362 U.S. 60, 64 (1960).
142 Id. at 61.
143 McIntyre, 514 U.S. at 351-52.
144 Id. at 337.
145 McCain & Feingold, supra note 44, at 234, 236-37.
penditures. Since these ads are campaign appeals for all practical purposes, they should be subject to election laws.\textsuperscript{146} Therefore, McCain and Feingold aim to regulate advocacy that attempts to affect the outcome of elections, while leaving untouched what they call "true" issue ads.\textsuperscript{147}

\textbf{B. Provisions of the Bipartisan Campaign Reform Act of 2002}

After debating campaign finance reform bills over several years, Congress finally passed campaign finance reform legislation on March 27, 2002. The BCRA\textsuperscript{148} consists of amendments to the Federal Election Campaign Act of 1971. Title II regulates non-candidate campaign expenditures.\textsuperscript{149} It differentiates among three distinct types of expenditures: independent expenditures, "true" issue advertisements, and electioneering communications.

1. Independent Expenditures

The BCRA retains \textit{Buckley}'s express advocacy standard for independent expenditures. They are defined as expenditures that "expressly advocat[e] the election or defeat of a clearly defined candidate," and that are not made "in concert or cooperation with or at the request or suggestion of . . . [the] candidate, the candidate's authorized political committee, . . . or a political party."\textsuperscript{150}

2. "True" Issue Advocacy

The BCRA implicitly retains the idea of issue advocacy in that it does not broaden the independent expenditure express advocacy standard, and the new electioneering communication category is too limited to cover all forms of issue advertisements.

3. Electioneering Communication

The BCRA creates a third class of expenditure activity called electioneering communication. This provision attempts to regulate a portion of issue advocacy that had previously been protected by the Court's constitutional line drawing in \textit{Buckley}. This provision eliminates \textit{Buckley}'s dichotomy that treats ads using express adv-

\textsuperscript{146} \cite{West, supra note 7, at 59.}
\textsuperscript{147} \cite{McCain & Feingold, supra note 44, at 236-37.}
\textsuperscript{149} Title I, the most well known provision, prohibits political parties from using unregulated soft money. \textsuperscript{See} § 101, 116 Stat. at 82-86.
\textsuperscript{150} § 201, 116 Stat. at 92-93.
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...cacy as independent expenditures, while treating everything else as issue advocacy.

Under the first definition, Congress classifies “electioneering communication” as “any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office” that is “made within 60 days before a general, special, or runoff election” or “30 days before a primary or preference election, or a convention or caucus.”\(^{151}\) If the communication refers to a candidate for office other than for President or Vice President, it must also be “targeted to the relevant electorate.” To be “targeted to the relevant electorate,” the communication must be able to be received by 50,000 or more people in a Representative candidate’s district or in a Senate candidate’s state.\(^ {152}\)

The BCRA includes an alternative definition of electioneering communication that will apply if the Supreme Court finds the first definition unconstitutional. This definition covers:

\[\text{Any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.}\]

The BCRA excludes from both definitions any communication from a “news story, commentary, or editorial distributed through the facilities of any broadcasting station” unless the candidate, a political party, or a political committee owns or controls the facilities.\(^ {154}\) Congress also excludes from both definitions independent expenditures and any FEC regulations issued under the BCRA.\(^ {155}\)

\(a.\) Disclosure Requirements for Electioneering Communications

The BCRA mandates that persons who spend over $10,000 in a calendar year to produce and air electioneering communications must file a disclosure form with the FEC within twenty-four hours of the first date such activity aggregates in excess of $10,000. The form must contain the person’s identifying information, place of

\(^{151}\) § 201(a), 116 Stat. at 89-90.
\(^{152}\) Id. at 90.
\(^{153}\) Id.
\(^{154}\) Id. at 89-90.
\(^{155}\) Id.
business, the amount of money spent, and the elections and candidates to which the expenditures pertain.\(^{156}\)

\(b\). Corporate and Labor Electioneering Communications

The BCRA also prohibits corporate and labor disbursements for electioneering communications from treasury funds.\(^{157}\) Corporations and unions can still produce or air electioneering communications using funds that individuals voluntarily contribute to the corporation, or to the union's political action committee. These expenditures, however, would now be subject to disclosure requirements. The BCRA exempts from these provisions tax-exempt corporations\(^ {158}\) and political organizations\(^ {159}\) that make electioneering communications with funds donated solely by individuals who are citizens or permanent resident aliens.\(^ {160}\) The FEC issued a controversial regulation that exempts charitable, religious, and educational groups.\(^ {161}\)

\[VI. \text{THE BCRA AND THE CONSTITUTION: IS THE "EXPRESS ADVOCACY" STANDARD CONSTITUTIONALLY REQUIRED?}\]

The first question to address regarding the BCRA and the Constitution is whether the express advocacy standard that the Court created in \textit{Buckley} is constitutionally required. If so, Congress can never constitutionally regulate forms of issue advocacy as electioneering communication. As a result, a court must find both definitions of "electioneering communication" under the BCRA unconstitutionally overbroad.

\(A. \text{Arguments in Support}\)

Many commentators see \textit{Buckley} as applying complete constitutional protection under the First Amendment for advertisements that do not contain express advocacy. They argue that the Supreme Court knew that creating the express advocacy standard would provide an opportunity for issue advertisements to be used to influence the outcome of elections. The Court, however, cre-

\(^{156}\) \textit{Id.} at 88, 90.

\(^{157}\) § 203(b), 116 Stat. at 91.

\(^{158}\) The corporations must meet the tax-exempt requirements under I.R.C. § 501(c)(1)-(3) (2000).

\(^{159}\) As defined in I.R.C. § 527(e)(1) (2000).

\(^{160}\) § 203(b), 116 Stat. at 91.

ated the distinction between issue and express advocacy for one very important reason: the First Amendment protects discussion of public issues, and candidates and campaigns generate public issues. The fact that issue ads may influence elections cannot justify the chilling of political speech that would occur otherwise. The "loophole" that regulators wish to close is called the First Amendment.

Only Judge Henderson of the United States District Court for the District of Columbia adhered to this view in her opinion in McConnell v. Federal Election Commission. As a result, Judge Henderson analyzed the legislation under Buckley's express advocacy standard. She immediately found both definitions of electioneering communication unconstitutionally overbroad because by proposing to regulate forms of issue advocacy, the legislation could not meet Buckley's express advocacy standard.

B. The Express Advocacy Standard Is Not Constitutionally Required

In McConnell, two judges held that the express advocacy standard is not constitutionally required under Buckley. The Supreme Court should affirm this holding for two reasons. First, in Buckley, the Court created the express advocacy standard as a form of statutory construction to cure unconstitutional vagueness. Congress must be allowed to address modern problems with the BCRA. Second, federal court rulings supporting the notion that express advocacy is constitutionally required were merely constrained by the Court's interpretation of the FECA.

1. The Court Was Construing a Flawed Statute

The Court in Buckley invalidated a portion of the FECA that imposed limitations on independent expenditures. The Court's holding, however, must be viewed in light of the context of the legislation. In Buckley, the Supreme Court was not faced with a clear, narrowly tailored statute enacted by Congress to regulate the millions of dollars spent on certain types of election advertisements. Instead, Congress amended the FECA in 1974 out of spe-
specific concerns from the Watergate scandal involving large, unreported individual and corporate donations that funded President Nixon’s 1972 reelection. In fact, campaign spending on election advertisements in the 1970s did not resemble our modern campaign finance system. As noted above, most commentators point to the 1996 elections as the point when the election advertising changed the system. Although the 1972 elections were more expensive than previous elections, spending for radio and television campaign advertising had actually dropped because candidates saw other modes of communication as more effective. While the 1974 Amendments included regulation of advertisement expenditures, Congress was more concerned with limiting campaign expenditures to make the reform comprehensive.

Since Congress was not specifically addressing the problems associated with election advertising, it made some mistakes in the clarity of the statutory language defining independent expenditures. However, as Judge Kollar-Kotelly stated for the court in McConnell, the Court in Buckley “invoked the express advocacy test only as a means of statutory construction” to cure the provision’s unconstitutional vagueness. First, the Court added precision to the phrase “relative to” by construing it to mean “advocating the election or defeat of” a candidate. Second, the Court held that such advocacy must be “express” so that speakers will know if their speech is covered.

The Court never stated that the express advocacy standard was constitutionally required if Congress chose to regulate election advertisements. Instead, the Court was protecting issue discussion from regulation in the best way available at the time. In doing so, the Court unwittingly created a dichotomy between express advocacy and all other forms of election communication. However, because the current problem did not exist in 1976, the Court could not address nor conceptually realize the subcategories that exist in other forms election advertising. As Judge Kollar-Kotelly stated in McConnell, the Supreme Court in Buckley was not “announcing an unalterable principle of constitutional law that would prohibit future congressional action directed toward express and issue ad-

167 CONG. QUARTERLY, INC., supra note 22, at 41, 43-44.
169 251 F. Supp. 2d at 597 (Kollar-Kotelly, J.).
170 Buckley, 424 U.S. at 42.
171 Id. at 44.
vocacy.” Congress must be given the opportunity to deal with specific, modern problems without irrelevant statutory constructions.

2. Constrained Federal Courts

Many argue that express advocacy is constitutionally required and cite for support the majority of federal court decisions upholding the express advocacy standard. These post-<i>Buckley</i> cases, however, do not establish that Congress can never regulate forms of issue advocacy. Instead, lower courts were constrained by the Supreme Court’s statutory interpretation of independent expenditures, no matter how impractical the interpretation became. The lower courts also recognized that the FEC did not have the authority to redefine the express advocacy test — only Congress or the Court can constitutionally do so.

In <i>Maine Right to Life Committee v. Federal Election Commission</i>,<sup>174</sup> a federal district court invalidated the FEC’s regulation defining express advocacy because it regulated issue advocacy, the court noted that the result in the case was not “satisfying” because it did not recognize the policy “to keep corporate money from influencing elections in this way.”<sup>175</sup> However, the FEC’s regulation did not “recognize the First Amendment interest as the Supreme Court has defined it.”<sup>176</sup> In <i>Faucher v. Federal Election Commission</i>,<sup>177</sup> in which the First Circuit invalidated the FEC’s regulation of voter guides, the court specifically stated that the Supreme Court has the final say on statutory interpretation.<sup>178</sup> The FEC is not supposed to second-guess the Supreme Court but is supposed to issue regulations consistent with legislation and the Court’s interpretation of legislation.<sup>179</sup>

VII. THE BCRA AND THE CONSTITUTION: ANALYSIS BEYOND “EXPRESS ADVOCACY”

Since the express advocacy standard is not constitutionally required, the Supreme Court does not need to adhere to the statutory interpretation in <i>Buckley</i>. Instead, the Court should determine

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<sup>172</sup> 251 F. Supp. 2d at 597-98. (Kollar-Kotelly, J.)
<sup>173</sup> Id. at 600 (Kollar-Kotelly, J.).
<sup>174</sup> 914 F. Supp. 8 (D. Me.), eff'd, 98 F.3d 1 (1st Cir. 1996).
<sup>175</sup> Id. at 12.
<sup>176</sup> Id.
<sup>178</sup> Id. at 471.
<sup>179</sup> Id.
if the BCRA’s provisions are consistent with the fundamental First Amendment principles that concerned the Buckley Court. These principles include: (1) requiring a bright-line rule to avoid vagueness, to avoid a chilling effect, and to provide fair notice to speakers; and (2) requiring narrow tailoring to restrict overbroad regulation of protected political speech. In McConnell v. Federal Election Commission,\(^\text{180}\) two judges held that the primary definition of electioneering was unconstitutional. Judge Henderson found the primary definition vague and overbroad.\(^\text{181}\) Judge Leon found the definition only overbroad, but for different reasons than Judge Henderson.\(^\text{182}\) Two judges held that the alternate definition was not unconstitutionally vague, but only after severing its final clause.\(^\text{183}\) However, the Supreme Court should rule that the primary definition of electioneering communication upholds First Amendment standards while the alternative definition does not.

A. The Primary Definition of Electioneering Communication Is Not Vague

As outlined above, the first portion of the preferred definition of electioneering communication involves “any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office” that is “made within 60 days before a general, special, or runoff election” or “30 days before a primary, . . . convention, or caucus.”\(^\text{184}\) When the communication refers to candidates running for offices other than President or Vice President, it must also be “targeted to the relevant electorate,” meaning it is receivable by 50,000 or more people in a Representative candidate’s district or in a Senate candidate’s state.\(^\text{185}\)

This definition is a bright-line rule that avoids vagueness concerns. In fact, the lines could not be brighter. First, the speaker has clear notice if the components of his ad are covered. Whether the ad is a broadcast, cable, or satellite communication, whether the ad refers to a clearly identified candidate, and whether the ad is targeted to the relevant electorate are completely objective determinations. The speaker will not engage in self-censorship because no interpretation of the statute is needed on his part. Second, the

\(^{181}\) Id. at 367 (Henderson, J).
\(^{182}\) Id. at 792 (Leon, J).
\(^{183}\) Id.
\(^{185}\) Id.
speaker has notice of when his speech is covered by the Act. The statute features a “delimited time period” approach in which an advertisement that occurs within a specific period of time is regulated the same as an election ad.\textsuperscript{186} It avoids any interpretation of reasonableness or intent. A speaker can know if his ad is covered by looking at a calendar. Third, the FEC, in its enforcement capacity, can objectively determine whether the BCRA covered certain speech.\textsuperscript{187}

Judge Henderson in \textit{McConnell}, however, argued that the phrase “refers to” was indeed vague because it was dangerously close to the phrase “relative to,” which the Supreme Court rejected in \textit{Buckley}.\textsuperscript{188} However, this argument is without substantial weight. First, as Judge Kollar-Kotelly countered, the word “refer” is much more precise than the phrase “relative to.” The dictionary definition of “refer” includes “by clear and specific mention.”\textsuperscript{189} Second, and more importantly, \textit{none} of the plaintiffs in \textit{McConnell} even argued to the court that the primary definition was unconstitutionally vague.\textsuperscript{190}

\textbf{B. The Primary Definition Is Not Substantially Overbroad}

The major concern for the Court will be whether the statute is overbroad. The Supreme Court has ruled that a statute must be “substantially overbroad” to be facially invalidated.\textsuperscript{191} Therefore, the determination of whether “electioneering communication” is substantially overbroad depends on how many “true” issue advertisements the BCRA will actually cover. The primary definition is not substantially overbroad for two reasons. First, a delimited time period approach, while novel, is not necessarily unconstitutional. Second, the definition of “electioneering communication” is narrowly tailored to cover only “election” advertisements.

1. A Delimited Time Period Approach

Unlike the alternate definition, the primary definition is based on the time and location of an ad rather than the ad’s effect on the

\begin{footnotesize}
\textsuperscript{186} \textsc{Moramarco}, supra note 106, at 14 (containing the origin of the phrase “delimited time period” for the purposes of this Note).
\textsuperscript{187} \textit{Id.} at 14-15.
\textsuperscript{188} \textit{McConnell}, 251 F. Supp. 2d at 367 (Henderson, J.).
\textsuperscript{189} \textit{Id.} at 604 (Kollar-Kotelly, J.) (citing \textsc{Merriam-Webster’s Collegiate Dictionary} (10th ed. 1997)).
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} See \textit{Broadrick v. Oklahoma}, 413 U.S. 601, 615 (1973) (“The overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”).
\end{footnotesize}
campaign. In McConnell, this aspect of the primary definition particularly troubled Judge Leon. Some critics contend that a "delimited time period" approach is clearly overbroad, arguing that advertisements occurring right before an election deserve the most protection because that is when the public interest in political speech is the highest. A delimited time period approach, while novel, is not necessarily unconstitutional.

In Mills v. Alabama, the Supreme Court invalidated a state statute that criminalized "any electioneering" supporting or opposing "any proposition" on election day. The state argued that the statute protected the public from last minute allegations on election day because a candidate could not answer such allegations until after the election. The Supreme Court rejected this argument. The statute allowed people to make allegations up to the last minute before election day. Yet, the statute made it a crime to answer those allegations on election day, the only day available. Therefore, the statute was ineffective in protecting the public from last minute allegations.

In Arizona Right to Life Political Action Committee v. Bayless, the United States Court of Appeals for the Ninth Circuit invalidated another time period regulation. This case involved a statute that required political action committees making independent expenditures to send a copy of the communication to the named candidate twenty-four hours before mailing or submitting it for broadcast or publication. As in Mills, the purpose of the statute was to limit negative advertising and to give candidates an opportunity to respond. The Ninth Circuit invalidated the statute because it imposed a twenty-four hour waiting period on political speech, prohibited political speech in situations where the notice requirement was not possible, and discriminated against speech from political action committees.

These rulings do not stand for the proposition that all delimited time period regulations are unconstitutional. One can distinguish the regulations at issue in the BCRA in three ways. First, the statute in Mills was so broad that an editor of a daily newspa-

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192 McConnell, 251 F. Supp. 2d at 796 (Leon, J.).
193 Id. at 795 (Leon, J.) ("[T]he crux of the problem with primary definition is that... it does not depend on the effect of the communication's message on a candidate's election.").
194 See Smith, supra note 162, at 192.
196 Id. at 219-20.
197 320 F.3d 1002 (9th Cir. 2003).
198 Id. at 1005.
199 Id. at 1009-13.
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Paper was arrested after writing an editorial urging people to vote for a certain issue.\textsuperscript{200} By contrast, the BCRA does not apply to print material, specifically exempts any communication in an editorial, and applies only to advertisements that mention federal candidates.\textsuperscript{201}

Second, unlike the statutes in Mills and Arizona Right to Life, the BCRA does not implement an outright ban or a prior restraint on speech. This is perhaps the most widely misconstrued aspect of the BCRA.\textsuperscript{202} Interest groups and individuals can broadcast their advertisements \textit{at any time}. However, if the ad airs 60 days before a general election or 30 days for a primary election, the ad is subject to the same disclosure requirements and corporate/labor restrictions as independent expenditures. While critics can argue that these restrictions are too burdensome under the First Amendment, they cannot argue that the restrictions create a total ban.

Third, one can rationalize the basis for regulation differently under the BCRA. The statutes in Mills and Arizona Right to Life were clearly intended to combat negative advertising and equalize the playing field in election advertising. Restrictions based on the dislike of the speech’s content will almost never be constitutional. Under the First Amendment, speakers, not the government, decide what they want to say and how they want to say it.\textsuperscript{203} While many members of Congress are critical of negative advertising, the BCRA can be seen as closing a loophole to subject election-related material to the same constitutional regulations as independent expenditures.

2. The Primary Definition Is Narrowly Tailored

\textit{a. Types of Communication}

The primary definition of “electioneering communication” under the BCRA only covers election advertisements disseminated from “broadcast, cable, or satellite.”\textsuperscript{204} Therefore, the definition excludes print and Internet election communication. The fact that

\textsuperscript{200} Mills, 384 U.S. at 215-16.
\textsuperscript{202} See Statement, supra note 10 (questioning “the constitutionality of the broad ban on issue advertising”); Russ Lewis, \textit{Foreign to the First Amendment}, WASH. POST, July 2, 2002, at A15 (referring to “issue advertising ban” in the BCRA); Will, supra note 8, at B7 (claiming the BCRA creates “30- or 60-day blackout periods” for advertisements).
\textsuperscript{204} § 201(a), 116 Stat. at 89.
Congress specifically regulated only the forms of media it found problematic indicates narrow tailoring.\textsuperscript{205}

\textit{b. Timing of Communication}

The primary definition only regulates advertisements that refer to a federal candidate 60 days before a general, special, or runoff election or 30 days before a primary.\textsuperscript{206} Therefore, if an interest group advertises 61 days before a general election or 31 days before a primary, it faces no regulation. The rationale behind this provision is that most "election" advertisements will air immediately before an election. By defining the ad according to its airtime, the regulation will catch these "election" advertisements.\textsuperscript{207}

Critics of the BCRA argue that Congress often debates important pieces of legislation 30 days before a primary or 60 days before a general election. The broad sweep of the legislation would capture ads that mention the names of federal candidates but are actually "legislative" advertisements.\textsuperscript{208} Judge Leon in \textit{McConnell} subscribed to this argument.\textsuperscript{209} He was persuaded by the \textit{McConnell} plaintiffs' experts who argued that periods immediately preceding elections are "the most effective times" to run advertisements discussing legislation because that is when the public is paying attention to politics.\textsuperscript{210} As support, he cited the period preceding the 2002 congressional elections in which Congress debated such important issues as a resolution authorizing the use of force in Iraq and the creation of a Department of Homeland Security.\textsuperscript{211}

Judge Leon's conclusion, however, is less than compelling. As Judge Leon himself admitted, the events of last year were probably not "typical."\textsuperscript{212} Political advertisements traditionally follow a more predictable course. According to the Brennan Center for Justice, "genuine" issue advertisements during the 2000 election occurred throughout the year along with debates in Congress. Congress holds most key votes before Labor Day. After

\begin{itemize}
  \item \textsuperscript{205} McConnell v. FEC, 251 F. Supp. 2d 176, 569 (per curiam) (Koller-Kotelly, J.).
  \item \textsuperscript{206} \S 201(a), 116 Stat. at 89.
  \item \textsuperscript{207} See \textsc{Moramarco}, supra note 106, at 15 (arguing that this approach is based on the "common sense" recognition that ads mentioning candidates close to an election aim to influence the election).
  \item \textsuperscript{208} See Smith, supra note 162, at 192-93.
  \item \textsuperscript{209} 251 F. Supp. 2d at 793 (Leon, J.) ("[T]he primary definition, which regulates communications . . . based upon when and where they are broadcast, rather than their effect on federal elections, sweeps so broadly that it captures too much First Amendment protected speech . . . .").
  \item \textsuperscript{210} Id. at 794 (Leon, J.).
  \item \textsuperscript{211} Id.
  \item \textsuperscript{212} Id. at 793 n.98 (Leon, J.).
\end{itemize}
Labor Day, Congress does not hold many votes, so interest groups do not advertise. If Congress does hold a vote during this period, many interest groups are driven off the air because of the increased flow of election advertising and higher rates. As a result, interest groups ran about 80% of “genuine” issue ads in the 2000 elections long before 60 days prior to the general election.  

**c. Target of Communication**

The primary definition covers only communications referring to candidates running for the Senate or the House and must be “targeted to the relevant electorate.” For example, a group producing an advertisement that refers to a specific candidate right before an election can avoid regulation by airing the ad nationally, rather than targeting it to a candidate’s district or state.

3. **Empirical Studies**

In *McConnell*, the plaintiffs had the burden of proving the BCRA was substantially overbroad. Therefore, empirical studies of election advertising were extremely important in the case. The Brennan Center for Justice studied advertisements in the 2000 elections. According to the Brennan Center, within 60 days of an election, interest group ads that featured a federal candidate aired 50,950 times. Only 331 of these ads were about pending legislation in Congress. Therefore, the BCRA would have covered only 0.65% of protected speech. While no one rejoices when protected First Amendment speech is regulated, such a small fraction shows that the primary definition of “electioneering communication” is not substantially overbroad.

The judges in *McConnell* held widely different views on how much weight to ascribe to the empirical evidence. Judge Henderson completely dismissed the Brennan Center’s studies as well as any attempt to differentiate between election advertisements. She concluded that “the record as a whole” suggested that the primary definition was substantially overbroad. Judge Leon was not quite as dismissive of the studies. He admitted that they deserved some evidentiary weight. Yet, he noted that it was impossible to specifically calculate the amount of protected speech the BCRA
would regulate. He also discussed how the two sides had argued about the exact method of calculation. However, he concluded that the plaintiffs had met their burden because the primary definition presented a realistic danger of infringement on protected speech.\textsuperscript{218}

Judge Kollar-Kotelly, however, presented the most persuasive insight regarding the empirical studies. The plaintiffs presented twenty-one advertisements from the 1998 to 2000 elections that they claimed were examples of issue advocacy that the BCRA would regulate. However, Judge Kollar-Kotelly determined that eight were not run within the time period, one was not targeted to the electorate, and four were examples of electioneering. Even assuming the remaining eight advertisements were “true” issue advertisements, eight ads covering over two election cycles, including primaries and general elections, did not constitute substantial overbreadth.\textsuperscript{219}

Furthermore, an event involving the American Civil Liberties Union (“ACLU”), a plaintiff in McConnell, is particularly informative. The ACLU ran issue advertisements in March of 2002. The ads were directed at Speaker of the House Dennis Hastert, urging him to bring the Employment Non-Discrimination Act to a full vote. It was broadcast in Speaker Hastert’s district within 30 days of a primary election. The ACLU argued that since their “issue” advertisement would have been covered by the BCRA, the statute was substantially overbroad. However, an internal email from the ACLU indicates the ad was carefully designed and aired to qualify as “electioneering communication” under the BCRA so that the ACLU could obtain standing to challenge the law. Two defense experts testified that if plaintiffs were correct that the BCRA sweeps so broadly as to catch “true” issue ads, then it should have been easy to find real-life examples of such occurrences.\textsuperscript{220}

C. The Alternative Definition of Electioneering Communication Is Unconstitutionally Vague

The alternative definition of electioneering communication covers:

\begin{quote}
[A]ny broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for office (regardless of whether the
\end{quote}

\textsuperscript{218} Id. at 797-99 (Leon, J.).

\textsuperscript{219} Id. at 574-75 (Kollar-Kotelly, J.).

\textsuperscript{220} Id. at 576-77 (Kollar-Kotelly, J.).
communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.\textsuperscript{221}

This definition resembles the interpretation of express advocacy promulgated by the Ninth Circuit in \textit{Federal Election Commission v. Furgatch}\textsuperscript{222} and the subsequent FEC regulations invalidated in \textit{Maine Right to Life Committee v. Federal Election Commission}.\textsuperscript{223} The provision is somewhat different because the ad must promote, support, attack, or oppose the candidate. It also omits any mention of the ad’s context or the reasonableness of the audience’s interpretation. It retains, however, the “suggestive of no other plausible meaning” standard. Despite these differences, the House Administration Committee Report indicates the definition was based on \textit{Furgatch}.\textsuperscript{224}

1. Promote, Support, Attack, or Oppose: Who Decides?

By the plain language of the statute, it is not clear how one determines whether an ad promotes, supports, attacks, or opposes a candidate. The statute does not include any reasonableness language. However, if one is supposed to infer such language, then the provision can be classified as a “reasonable person” approach.\textsuperscript{225} In \textit{McConnell}, Judge Leon inferred that a reasonableness standard applied in his holding for the court that the alternate

\textsuperscript{222} 807 F.2d 857 (9th Cir. 1987). Under this approach “[speech] must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.” \textit{Id.} at 864. Speech is express advocacy if “its message is unmistakable and unambiguous, suggestive of only one plausible meaning,” “it presents a clear plea for action,” and it is clear “what action is advocated.” \textit{Id.}
\textsuperscript{223} 914 F. Supp. 8, 10 (D. Me. 1996), \textit{aff’d per curiam}, 98 F.3d 1 (1st Cir. 1996). Former FEC regulation 11 C.F.R. § 100.22 defined express advocacy as:

\textit{Any communication that . . . [w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because – (1) the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.}

\textsuperscript{225} \textit{See} MORAMARCO, \textit{supra} note 106, at 13 (Moramarco’s article is the origin of the “reasonable person” approach for the purposes of this Note).
definition was not unconstitutionally vague. As Judge Leon pointed out, a "reasonable person" approach is not unheard of in First Amendment standards. The Court has ruled in the "fighting words" and obscenity contexts that such an approach is not unconstitutionally vague.

Judge Leon, however, ignores the fact that the "reasonable person" approach automatically raises vagueness concerns. The determination of whether the speech should be regulated is subjective. The Supreme Court, therefore, should rule that the reasonable person approach is unconstitutionally vague in this context. First, the Court has struggled with applying a reasonableness standard in obscenity cases, illustrating how undesirable they are. It is doubtful that the Court would wish to revisit a similar standard in election speech. Second, the Court has traditionally seen fighting words and obscenity as unprotected, while classic political speech like election-related speech receives the most protection. Third, a reasonableness standard gives little notice to speakers or to the FEC. Most importantly, a reasonableness standard violates the principles outlined by the Court in Buckley, because the Court specifically wanted to avoid putting the speaker "wholly at the mercy" of the audience's understanding of the speech.

Alternately, whether an ad promotes, supports, attacks or opposes may depend on what message the speaker intended his message to convey. Assuming this to be true, the approach would be classified as an "intent-based" approach. This definition creates the same vagueness problems as a reasonableness standard because of its subjective nature. Plus, it is the type of standard the Buckley Court hoped to avoid. Moreover, one wonders how the FEC is to determine whether a group intended to influence an election. If this means the FEC must investigate an organization's records, memoranda, and donor lists, then this approach creates a great

\[226\text{McConnell, 251 F. Supp. 2d at 801 (Leon, J.). Judge Kollar-Kotelly joined Judge Leon's conclusion, making this the holding of the court.}\]

\[227\text{Id.}\]

\[228\text{See Cohen v. California, 403 U.S. 15, 20 (1971) (defining "fighting words" as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction").}\]

\[229\text{See Miller v. California, 413 U.S. 15, 24 (1973) (stating that a basic guideline for the trier of fact must be "whether the average person applying contemporary community standards" would find material obscene).}\]

\[230\text{McConnell, 251 F. Supp. 2d at 814 (Leon, J.).}\]


\[232\text{See MORAMARCO, supra note 106, at 17 (Moramarco's article is the origin of the phrase "intent-based" for the purposes of this Note.).}\]
chilling effect on speech. Because of its vagueness and chilling effect, the Supreme Court should rule that this provision violates the First Amendment principles outlined in *Buckley*.

2. "Plausible Meaning": Who Decides?

It is also not clear how one determines the "plausible meaning" of the ad. While the statute does not contain the reasonableness language of *Furgatch* or *Maine Right to Life*, Congress, by basing the provision on *Furgatch*, may have intended to carry over its interpretive elements. Alternately, the plausible meaning may depend on the speaker's intentions. No matter which approach applies, both contain the same vagueness problems and chilling effect as illustrated above. Judge Leon found this portion unconstitutionally vague because the speaker would have difficulty determining whether his ad met the requirement. Therefore, Judge Leon severed this clause to make the remaining aspects of the definition constitutional. However, the Supreme Court should find the entire definition unconstitutionally vague, with or without the final clause.

**CONCLUSION**

Public discussion of political issues is a fundamentally important free speech right. During an election, however, the electorate also has substantial rights. In a democracy, elections occur so that the people can choose their system of government. To make an informed choice, the people must have access to all information. This includes information regarding who funds federal campaign advertisements and how much they spend. In our modern election system, however, groups, political parties, and individuals spend millions to influence elections through advertising. Sponsors of these ads intentionally make sure they remain out of reach of regulation that would provide crucial information to the public.

The Supreme Court must draw constitutional lines that pertain to the country's modern campaign finance system. The Supreme Court does not need to analyze the BCRA under the "express advocacy" standard because it is not constitutionally required. Instead, the Court must analyze it consistently with *Buckley*’s broad First Amendment principles. In doing so, the Court should rule that the primary definition of "electioneering communication" fulfills the principles outlined in *Buckley* because it is a bright-line

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233 Smith, supra note 162, at 191.
234 McConnell, 251 F. Supp. 2d at 802 (Leon, J.).
rule that is narrowly tailored to reach only a certain type of election advertisements. The Court should further rule that the alternative definition of “electioneering communication” is unconstitutionally vague.

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