IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Christopher Shays and Martin Meehan, Plaintiffs, v. United States Federal Election Commission, Defendant.	Civil Action No. 02-CV-1984 (Judge Kollar-Kotelly)

BRIEF *AMICUS CURIAE* OF THE AFL-CIO

This brief *amicus curiae* is submitted on behalf of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") with the consent of all parties. The AFL-CIO urges the Court to uphold the portions of the FEC's "coordination" regulation challenged by plaintiffs for the reasons stated below.

Interest of Amicus

The AFL-CIO is a national federation of 64 national and international unions, with collectively more than 13 million members. The AFL-CIO also includes 51 state labor federations, nearly 580 area and central labor councils, and numerous trade and industrial departments. A core function of the AFL-CIO and other labor organizations is to represent the interests of workers and their families in the legislative, political and policy arenas As Justice Frankfurter once observed, "When one runs down the detailed list of national and international problems on which the AFL-CIO speaks, ... [t]he notion that economic and political concerns are separable is pre-Victorian. ... It is not true in life that political

protection is irrelevant to, and insulated from economic interests. It is not true for industry or finance. Neither is it true for labor." *International Ass'n of Machinists v. Street,* 367 U.S. 740, 814-15 (1961) (dissenting opinion).

In carrying out unions' legislative and political programs, their officers, members and representatives are in regular and on-going communication with members of Congress, their staffs, and other federal officials. Most of the federal legislators with whom the labor movement interacts also are candidates under the Federal Election Campaign Act at all times. Moreover, members of the House and Senate, particularly those in leadership positions, often hold positions in national and state political party committees. Any rule restricting communications with federal candidates and party officials, therefore, necessarily restricts contacts with officeholders and other public officials, and interferes with the ability of unions and other groups to carry out their missions..

Unions and other citizen organizations from across the political spectrum strenuously opposed the overbroad coordination provisions in early versions of what became the Bipartisan Campaign Act of 2002, and they worked to ensure that the final provisions would not curtail legitimate legislative activity. Although the coordination provisions ultimately adopted by Congress are flawed in many respects, the legislative history nonetheless demonstrates the concern of many Members of Congress that the prohibition on coordinated expenditures should not interfere with the rights of citizens to communicate with their elected representatives concerning legislation and policy. Plaintiffs' challenge to the FEC's coordination regulation is a transparent attempt to override the carefully-crafted legislative compromise that they themselves embraced in order to enact campaign finance reform. The AFL-CIO appears in this case because it believes that the coordination regulations challenged here do not exceed the FEC's authority under the legislation actually enacted by Congress, as plaintiffs contend.

Statement of the Case

Under regulations adopted by the Federal Election Commission in December 2002, public communications that are coordinated with federal candidates or political parties are treated as in-kind contributions and, therefore, are either prohibited entirely, in the case of corporations and unions, *see* 11 C.F.R. §109.22, or subject to reporting requirements, in the case of individuals and political committees. *see* 11 C.F.R. §109.21(b)(3). A communication is "coordinated" for these purposes only if it satisfies each of three requirements: (i) the communication must be paid for by a person other than a candidate, the candidate's authorized campaign committee, a political party committee, or an agent of the foregoing, 11 C.F.R. §109.21(a)(1); (ii) the communication must satisfy at least one of four "content standards," 11 C.F.R. §109.21(a)(2); and (iii) the person paying for the communication must have engaged in certain "conduct" with a candidate or political party. 11 C.F.R. §109.21(a)(3). Plaintiffs in this case challenge several aspects of the FEC's regulations setting forth the content standards.[1] A brief history of the coordination rule is necessary in order to understand the critical importance of the content standard as both a constitutional and a regulatory matter.

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[1] Specifically, plaintiffs challenge the FEC's content standard insofar as it limits coordinated public communications to those that are disseminated within 120 days of an election, First Amended Complaint for Declaratory and Injunctive Relief, ¶¶ 93-95, and that include a reference to a political party or a clearly identified candidate for federal office. *Id.* ¶ 96. Plaintiffs also challenge the definition of "agent" as it applies to the coordination rules. *Id.* ¶ 99. And, plaintiffs challenge the exclusion of communications using the Internet and electronic mail from the definition of public communications. *Id.* ¶ 100. While plaintiffs describe this exclusion as part of the *conduct* standard, it does not relate to the kinds of contacts with candidates and parties that may result in a finding of coordination and, therefore, it is better understood as part of the regulation's *content* standard. Since plaintiffs do not challenge any other aspect of the conduct standard. there is no reason for the court to address it here. *Amicus* wishes to make clear for the record, however, that it has significant disagreements with the scope of the conduct standard adopted by the Commission and that nothing said in this brief in support of the Commission's *content* standard should be understood as endorsing the FEC's conduct standard on its face or as applied.

Initial Development of the Coordination Regulation

The concept of "coordination" as a core principle of federal election law has its genesis in the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). There, the Court construed the vague definition of "expenditure" in the Federal Election Campaign Act ("FECA") to include only communications that expressly advocate the election or defeat of a clearly identified candidate and then held that, as so construed, the statutory limitation on expenditures by individuals and groups was unconstitutional. *See id.* at 42-44. In reaching this conclusion, the Court rejected the argument that a restriction on the amount of individual expenditures on behalf of candidates was necessary to prevent circumvention of the statute's contribution limits "through prearranged or coordinated expenditures amounting to disguised contributions," *id.* at 47, because FECA already treated expenditures "authorized or requested" by a candidate as contributions to a candidate.[2] *Id.* at 47 n. 53. *See also McConnell v. FEC,* 540 U.S. ___, 124 S.Ct. 619, 705 (2003).

In response to the *Buckley* decision, Congress amended FECA by adding a new definition of the term "independent expenditure" which incorporated the coordination concept:

> The term "independent expenditure" means an expenditure by a person –
> (A) expressly advocating the election or defeat of a clearly identified

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[2] The Court in *Buckley* did not address the kinds of expenditures which should be treated as contributions if they are coordinated with a candidate. However, in its discussion of coordination, the Court illustrated the difference between "authorized or requested" expenditures and "independent expenditures" as follows: "[A] person might purchase billboard advertising endorsing a candidate. If he does so completely on his own, and not at the request or suggestion of the candidate or his agent's [sic] that would constitute an 'independent expenditure on behalf of a candidate'... However, if the advertisement was placed in cooperation with the candidate's campaign organization, then the amount would constitute a gift by the supporter... just as if there had been a direct contribution enabling the candidate to place the advertisement himself." 424 U.S. at 47 n.53 (quoting S.Rep. No. 93-689, 93d Cong., 2d Sess. 18 (1974)). A public billboard endorsing a candidate is, of course, a form of express advocacy.

> candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents.

Pub. L. No. 94-283, §102(g), 90 Stat.479 (1976) (codified as 2 U.S.C. §431(17)). At the same time, Congress added a new provision directing that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." *Id.* at §112, 90 Stat. 486 (codified as 2 U.S.C. §441a(a)(7)(B)(i)). Unfortunately, Congress did not clarify whether this new statutory prohibition on coordinated "expenditures" was limited to communications that expressly advocate the election or defeat of a candidate, as in the definition of independent expenditures, or whether the prohibition included a broader class of communications, including those that mention a federal candidate without, however, expressly advocating the candidate's election or defeat, or even communications that include no election-related content at all.

Congress' failure to define the content of coordinated communications left individuals and groups without clear guidance on a critical issue affecting their ability to speak on legislative and policy issues and to interact with federal candidates and officeholders. For more than twenty years, FEC regulations included the concept of coordination only in the definition of "independent expenditure," which by its terms was limited to communications expressly advocating the election or defeat of candidates. *See* Federal Election Commission, "The Commission's Proposed Regulations Governing Federal Elections, Pursuant to Section 316(a) of the Federal Election Campaign Act of 1971, As Amended," H.R..Doc. No. 95-44, 95th Cong. 1st Sess 54 (1977) (adopting 11 C.F.R. §109.1); *see also*, Federal Election

Commission, "Amendments to Federal Election Campaign Act of 1971; Regulations Transmitted to Congress," 45 Fed. Reg. 15080, 15087 (1980) (revising definition of independent expenditures to reflect 1979 amendments to FECA). It was never clear, however, whether this represented a conscious limitation on the Commission's enforcement authority.[3]

The 2000 Coordination Regulation

In the mid-1990s, the FEC began to challenge, on coordination grounds, corporate and union disbursements for communications that did not contain express advocacy and, therefore, were lawful unless they were coordinated with a candidate. In *FEC v. The Christian Coalition,* 52 F.Supp. 2d 45 (D.D.C. 1999), for example, the Commission claimed that a nonprofit corporation had unlawfully coordinated with federal candidates the preparation and distribution of voter guides at churches throughout the country. Although the voter guides "made clear which candidates the Coalition preferred," *id.* at 48, it was conceded that they did not expressly advocate the election or defeat of any candidate. *See id.* at 66, 86. But the FEC claimed nonetheless that they were unlawful because of contacts between the organization and the candidates.

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[3] In Advisory Opinion 1985-14, for example, the Commission suggested that it would not apply an express advocacy standard in determining whether communications by a political party committee were coordinated, but would instead determine whether the communications contained an "electioneering message." This vague test itself proved difficult to apply and four Commissioners subsequently issued a statement rejecting enforcement of coordination cases under an electioneering message standard. Statement of Reasons of Vice Chairman Darryl R. Wold and Commissioners Lee Ann Elliott, David M. Mason, and Karl J. Sandstrom on the Audits of "Dole for President Committee Inc." (Primary), "Clinton/Gore '96 Primary Committee, Inc.," "Dole/Kemp '96, Inc." (General), "Dole/Kemp '96 Compliance Committee, Inc." (General), "Clinton/Gore '96 General Election Legal and Compliance Fund" at 6 (June 24, 1999).

In another case, the Commission undertook an extensive investigation of organized labor's political and lobbying activities during the 1995-96 election cycle, including expenditures for broadcast advertisements that reflected candidates' positions on social and economic issues but did not, the Commission found, expressly advocate the election or defeat of those candidates. Matters Under Review 4291, *et al.*; *see also* Matter Under Review 4624 (FEC investigation of allegedly coordinated communications undertaken by a coalition of business groups in response to the AFL-CIO's broadcast ads).

The FEC's efforts to expand the scope of prohibited coordinated activity was brought to a temporary halt by this Court's July 1999 decision in the *Christian Coalition* case. After exhaustively reviewing the extensive evidence proffered by the Commission of the Coalition's contacts with federal officeholders and candidates over three election cycles, *see* 52 F. Supp. 2d at 66-81, Judge Joyce Hens Green concluded that the agency had failed, in all but a few instances, to demonstrate that the organization's conduct amounted to unlawful coordination. *See id.* at 92-97. Before reaching this conclusion, Judge Green found that coordinated corporate communications are unlawful even if they do not contain express advocacy. *See id.* at 86-89 . Apart from this narrow point, however, she provided no guidance concerning the content of coordinated public communications that are prohibited, although she apparently recognized that there must be some connection between the content of a communication and an election for federal office before it could be treated as a coordinated in-kind contribution. *See, e.g.*, *id.* at 88 (referring to "campaign-related communications that do not expressly advocate a

candidate's election or defeat," "gauzy candidate profiles prepared for television broadcast or use at a national political convention," and "coordinated attack advertisements, through which a candidate could spread a negative message about here opponent, at corporate or union expense").

The FEC did not appeal the *Christian Coalition* decision and elected instead to revise its coordination regulation to conform to the Court's opinion. *See* Final Rule, "General Public Political Communications Coordinated With Candidates and Party Committees; Independent Expenditures," 65 Fed. Reg. 76138 (2000). The revised regulation created a new term, "general public political communications," and, of particular relevance to the issues here, defined this term to mean any expenditure that "includes a clearly identified candidate." 11 C.F.R. §100.23(b) (2001). However, the Commission decided not to adopt any further "content standard," although it indicated that it might still conclude in the future that coordinated communications should be limited to those containing express advocacy. *See* 65 Fed. Reg. at 76141; *see also*, Matter Under Review 4624, Statement for the Record of Commissioner Bradley A. Smith (Nov. 6, 2001) at nn. 4, 9 (noting that the Commission had not reached a final decision against requiring an express advocacy content standard and stating that he "will no longer lend my vote to any matter that prolongs the legal agony of citizens and groups whose communications do not contain express advocacy").

BCRA and the 2002 Coordination Regulation

Coordination was one of the principal issues addressed by the proponents of amending FECA when it was considered in the 107th Congress. As originally introduced in the Senate by Senators McCain, Feingold and others, the Bipartisan Campaign Reform Act of 2001 created a new statutory term, "coordinated activity," which was very broadly defined to mean "anything of value" provided in

coordination with a candidate "regardless of whether the value being provided is in the form of a communication that expressly advocates a vote for or against a candidate." S. 27, 107th Cong., 1st Sess. §214(a)(1)(B)(as introduced on January 22, 2001). However, from the outset of the debate, concern was expressed about the broad scope of this provision, *see* 147 Cong. Rec. S2446 (daily ed. March 19, 2001)(statement of Sen. Feingold acknowledging concern about the bill's coordination provisions and indicating that a corrective amendment would be offered), and after extensive negotiations it was dropped by the bill's sponsors and replaced by more limited coordination provisions which were intended not to interfere with legitimate lobbying and similar activities. *See* 147 Cong. Rec. S3184 (daily ed. March 30, 2001) (statement of Sen. McCain noting that "all agreed [the original language] was not satisfactory to what we believe is a reasonable compromise"); *id.* (statement of Sen. Feingold that original version was overbroad because "it caught ... legitimate conversations between Members of Congress and groups about legislation without touching on a campaign"). For the same reasons, the Senate-passed version of the coordination provisions[4] was amended by the House of Representatives[5] in order to limit

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[4] Although the definition of "coordinated activity" was dropped in the version of S. 27 passed in the Senate, the Senate bill continued to modify the definition of "contribution" in 2 U.S.C. § 431(8) to include "any coordinated expenditure or other disbursement made by any person in connection with a candidate's election, regardless of whether the expenditure or disbursement is for a communication that contains express advocacy." S. 27, 107th Cong,. 1st Sess. §214(a)(1)(C)(as passed by the Senate April 2, 2001). As described in footnote 5, *infra*, this language was dropped in the House because it was still deemed to be overbroad.

[5] The version of BCRA introduced in the House contained the same coordination provisions as were introduced in the Senate. *See* H.R. 380, 107th Cong. 1st Sess. §§ 205, 206 (as introduced January 31, 2001). After passage of the bill in the Senate, plaintiffs Shays and Meehan introduced a revised version of their bill, including coordination provisions which were virtually identical to the Senate-passed bill. *See* H.R. 2356, 107th Cong. 1st Sess. §§ 202, 214 (introduced June 28, 2001). This bill was adversely reported by the Committee on House Administration in part due to its "expansive definition" of coordination that "would discourage (if not eliminate) communications between citizens and their elected representatives. ... With such a vague and sweeping definition, a simple meeting between an individual and his/her Member of Congress could trigger an FEC investigation into

their scope further, and Congress ultimately enacted this narrowed provision.

The final version of BCRA repealed the regulation on general public political communications adopted by the Commission in 2000, and directed the Commission to promulgate new regulations on "coordinated communications" which were not to "require agreement or formal collaboration to establish coordination." Pub.L. No. 107-155, §214(b)-(c), 116 Stat. 94-95 (2003). Further, "[i]n addition to any subject determined by the Commission," the agency was directed to "address" four specific areas in the new regulations: (i) payments for the republication of campaign materials; (ii) payments for the use of a common vendor; (iii) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and (iv) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party. *Id.* at §214(c)(1)-(4), 116 Stat. 95. Finally, BCRA provided that any communication that falls within the newly created category of "electioneering communications" and is "coordinated" with a candidate or

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the subject of the meeting and the issues discussed.... Unquestionably, this will have a chilling effect on the rights of citizens and citizen groups to speak and associate freely.... People who know that a simple meeting with a Congressman could trigger a costly and burdensome investigation will simply disassociate themselves from politics." H.Rep. No. 107-131, part 1, 107th Cong.,1st Sess. 4 (July 10, 2001) (referring to testimony of the AFL-CIO). In response to this criticism, plaintiffs later introduced a even narrower version of the coordination provision, dropping the overbroad language in section 214(a) quoted in footnote 4, *supra*. *See* 148 Cong. Rec. H396 (daily ed. Feb. 13, 2002). When the House-passed bill was passed by the Senate, Senator McCain made clear that "nothing in section 214 should or can be read to suggest, as some have said, that lobbying meetings between a group and a candidate concerning legislative issues could alone lead to a conclusion that ads that the group runs subsequently concerning the legislation that was the subject of the meeting are coordinated with the candidate.... We do not intend for the FEC to promulgate rules ... that would lead to a finding of coordination solely because the organization that runs such ads has previously had lobbying contacts with a candidate." 148 Cong.Rec. S2145 (daily ed. March 20, 2002).

political party shall be treated as a contribution to the candidate supported by the communication.[6] *Id. at* §202, 116 Stat. 90-91.

As noted earlier, the final coordination regulation adopted by the FEC in response to BCRA creates a three-prong definition of coordinated public communications, including both a content standard and a conduct standard. Under the content standard, a communication will be treated as an in-kind contribution to a federal candidate or political party only if it is (1) an "electioneering communication"; (2) a public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate; (3) a public communication that expressly advocates the election or defeat of a clearly identified candidate for federal office; or (4) a public communication that refers to a political party or a clearly identified candidate for federal office, is publicly distributed or otherwise publicly disseminated within 120 days before a general, special or runoff election, or within 120 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and the public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot. 11 C.F.R. §109.21(c)(1)-(4).

Plaintiffs challenge the fourth content standard as contrary to BCRA. In issuing this standard, the Commission stated that its purpose was to expand the provision in BCRA §202 treating coordinated electioneering communications as in-kind contributions to include communications in other forms of media, such as print media. *See* Final Rule, "Coordinated and Independent Expenditures," 68 Fed. Reg. 421, 429-30 (2003). The Commission also indicated that it had "focus[ed] as much as possible on the

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[6] In addition to these provisions, BCRA §214(a) codified the Commission's longstanding practice by expanding 2 U.S.C. § 441a(a)(7) to include coordination with political parties as well as candidates. *See id.* at §214(a), 116 Stat. 94 (codified at 2 U.S.C. §441a(a)(7)(B)(ii)).

face of the public communication or on facts on the public record ... [in order] to require as little characterization of the meaning or the content of communication, or inquiry into the subjective effect of the communication on the reader, viewer, or listener as possible." *Id.* at 430 (citing *Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976)). Finally, the 120-day window was adopted in order to "focus ... the regulation on activity reasonably close to an election, but not so distant from the election as to implicate political discussion at other times," and to serve as "a 'filter' or a 'threshold' that screens out certain communications from even being subjected to analysis under the conduct standards." *Id.*

Argument

The fourth content standard adopted by the FEC reflects Congress' intent to craft the prohibition on coordinated election activities so as not to interfere with citizens' protected right to meet and confer with their elected representatives on matters of legislation and policy.[7] Furthermore, the standard serves important constitutional goals by limiting the kinds of political communications that may be prohibited and allowing the agency to screen out complaints concerning communications that are not election-related without the necessity of an intrusive and chilling administrative investigation.

I. The Fourth Content Standard in the FEC's Coordination Regulation Is Consistent With and Supportive of Congress' Desire to Ensure that BCRA Did Not Interfere With Citizens' Rights to Meet and Communicate With Members of Congress and Other Federal Officials Concerning Legislation and Other Policy Matters.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), the Supreme Court delineated the analysis to be followed when reviewing an agency's construction of its enabling statute. Under the first step of *Chevron*'s formula, "the question [is] whether Congress has

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[7] In demonstrating that the FEC regulation challenged by plaintiffs is "consistent with" Congress' unambiguous intent in adopting the coordination provisions of BCRA, our purpose is to show that the regulation as adopted is not so narrow as to be inconsistent with Congressional intent. Whether the regulation was required to be more narrow still is not a question presented here and need not be addressed by this court.. See *infra,* note 9.

directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress."[8] 467 U.S. at 842. In determining whether Congress has spoken to an issue, courts "must first exhaust the traditional tools of statutory construction," *NRDC v. Browner,* 57 F.3d 1122, 1125 (D.C.Cir. 1995), including the statute's plain language, its legislative history and its objectives as expressed either explicitly or implicitly in the statute. *See American Bankers Assoc. v. National Credit Union Admin.,* 271 F.3d 262, 267 (D.C. Cir. 2001) (internal citations omitted) ("Although Chevron step one analysis begins with the statute's text, we must not confine [ourselves] to examining a particular statutory provision in isolation. . . . We must also exhaust the traditional tools of statutory construction including examining the statute's legislative history to shed new light on congressional intent ...."); *National Resources Defense Council v. Daley,* 209 F.3d 747, 752 (D.C. Cir. 2000) ("under the first step of Chevron, the reviewing court must first exhaust the traditional tools of statutory construction;" "such tools include examination of the statute's text [and] legislative history"); *Cleveland v. Nuclear Regulatory Comm'n,* 68 F.3d 1361, 1366 n.4 (D.C. Cir. 1995) ("we may consider a provision's

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[8] Under the second step of *Chevron* analysis, if a statute's meaning is ambiguous, then the court may not substitute its own judgment for that of the agency's unless it finds that the agency's interpretation is not a permissible reading of the statute. *See id.* In this case, the language of FECA, as amended in BCRA, as well as it legislative history unambiguously support the FEC's interpretation as expressed in the fourth content standard. *But see* note 10, *infra.* There is no need, therefore, for the court to invoke judicial deference in order to uphold the FEC's regulation against plaintiffs' challenge. Moreover, as we show in points II and III, the FEC's content standard also avoids significant constitutional questions raised by the broad language of the statute. Whether these constitutional questions are to be considered as part of *Chevron*'s first step, *see AFL-CIO v. FEC,* 333 F.3d 168, 180-84 (D.C.Cir. 2003) (Henderson, J. concurring in the judgment), or its second step, *see id.* at 172-75 (Tatel, J.), they provide ample additional support for the FEC's regulation. *See Chambr of Commerce v. FEC,* 69 F.3d 600, 604-05 (D.C.Cir. 1995) (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,* 438 U.S. 568, 575 (1988)); *University of Great Falls v. NLRB,* 278 F.3d 1335, 1341 (D.C.Cir. 2002) ("... the constitutional avoidance canon of statutory interpretation trumps *Chevron* deference").

legislative history in the first step of Chevron analysis to determine whether Congress' intent is clear from the plain language of a statute"). Here, Congressional intent with respect to avoiding a definition of "coordination" that would interfere with legislative activities is unambiguous and supports the fourth content standard adopted by the FEC.

As described above, While plaintiffs sought to overturn what they regarded as the overly permissive coordination regulation adopted by the FEC in 2000, others strenuously opposed the broad coordination provision originally proposed because it would interfere with legitimate communications between citizens and officeholders and candidates. In response to these concerns, BCRA's definition of coordination was twice narrowed by plaintiffs and the bill's other sponsors, first in the Senate and then in the House, to eliminate language which could have been interpreted to prohibit any coordinated corporate or union communication regardless of its content.

Just as significantly, while Congress in BCRA explicitly rejected the requirement of "formal agreement or collaboration" in the Commission's 2000 definition of general public political communications, *see* 11 C.F.R. §100.23 (c)(2)(iii) (2001), it did *not* reject that regulation's "clearly identified candidate" content standard.[9] *See* 11 C.F.R. §100.23(b) (2001). Indeed, in adopting BCRA §202, which provides that any communication fitting within the definition of "electioneering communication" shall be treated as a contribution if it is coordinated with a candidate or political party,

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[9] Congress did not even include the "clearly identified candidate" standard with the four other coordination issues that BCRA § 214(c) directed the Commission to address in its renewed rulemaking. Given the careful attention paid to the 2000 regulation by BCRA's supporters, the absence of any such specific direction to the Commission is highly instructive as to the compromise that was eventually struck with respect to BCRA's coordination provisions.

Congress endorsed a content standard that turns entirely on the content of a public communication.[10]

II. The Fourth Content Standard Protects Against Overbroad Regulation of Protected Political Speech and the Right to Petition Government Leaders.

In *McConnell v. FEC*, this court agreed that "'First Amendment clarity demands a definition of 'coordination' that provides the clearest possible guidance to candidates and constituents while balancing the Government's compelling interest in preventing corruption of the electoral process with fundamental First Amendment rights to engage in political speech and political association.'" 251 F.Supp. 2d 176, 257 (D.D.C. 2002) (three-judge court) (*per curiam* opinion)(quoting *Christian Coalition,* 52 F.Supp. 2d at 91) *aff'd* 540 U.S. ___, 124 S.Ct. 619 (2003). The Court nevertheless found that the McConnell plaintiffs' First Amendment challenge to BCRA's coordination provisions was not ripe because those challenges might be cured in the Commission's regulations, which could only be considered in a subsequent litigation before a single judge. *See id.* at 261-64. While this case does not present a First Amendment challenge to the Commission's regulations, constitutional considerations strongly support the content standard against the plaintiffs' attack here.

By defining the permissible scope of corporate and union communications, the Commission's regulation "marks the constitutional dividing line between corporate [and union] contributions subject to prohibition and protected issue-oriented expenditures." *Christian Coalition,* 52 F.Supp. 2d at 90. The regulation, therefore, directly implicates freedom of speech. *See Colorado Republican Federal Campaign Comm. v. FEC,* 518 U.S. 604, 615-16, 619-22 (1996). Insofar as the definition of

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[10] It may reasonably be argued, under the doctrine of *expressio unius est exclusio alterius*, that BCRA §202 evidences a Congressional intent to include within the definition of coordinated communications *only* expenditures that either contain express advocacy or are electioneering communications. Whether, in light of this history, the Commission went too far in including communications that do not fall within either of these categories is an issue not presented here. But it is clear that BCRA does not command a more restrictive regulation, as plaintiffs content.

"coordination" may have the effect of restricting a speaker's contacts with elected representatives and candidates, it also implicates the fundamental right of citizens "to make their wishes known to their representatives." *Eastern Railroad Presidents Conf. v. Noerr Motor Freight Inc.,* 365 U.S. 127, 137 (1961). *See also United States v. Harriss*, 347 U.S. 612, 635 (1954)(Jackson, J. dissenting). As the court of appeals for the First Circuit put it in striking down an analogous FEC regulation on grounds of constitutional overbreadth:

> We think [the FEC rule on voter guides and records] is patently offensive to the First Amendment in a different aspect: it treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office... It is hard to find direct precedent only because efforts to restrict this right to communicate freely are so rare. But we think that it is beyond reasonable belief that, to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues... It is no business of executive branch agencies to dictate the form in which free citizens can confer with their legislative representatives.

Clifton v. FEC, 114 F.3d 1309, 1314 (1st Cir. 1997). Finally, but no less importantly, insofar as the regulation may have the effect of restricting contacts between a speaker and a political party, it implicates the equally fundamental right "to associate with the political party of one's choice." *Kusper v. Pontikes,* 441 U.S. 51, 57 (1973). *See also Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 224 (1989); *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 214 (1986).

The "coordination" definition's impact on First Amendment rights does not necessarily mean it is unconstitutional; but it does mean that it must be "narrowly tailored" to serve a compelling governmental interest while not unnecessarily circumscribing protected expression and association. See, e.g., *Republican Party of Minn. v. White,* 536 U.S. 765, 774-75 (2002); *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 813-15, 827 (2000); *Austin v. Michigan Chamber of Commerce,*

494 U.S. 652, 657 (1990); *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978). Not every public communication[11] that is coordinated with an officeholder/candidate is intended to or will have the effect of influencing a federal election. Labor organizations and other groups regularly coordinate their communications about legislation and policy issues with supportive officeholders without any intention of influencing elections. By requiring a specific reference to a clearly identified candidate or a political party, the fourth content standard attempts to ensure that prohibited corporate and union communications have some relationship to an election, while protecting coordinated discussions of pure issues even during the 120-day period.

And, by restricting coordinated expenditures to the period within 120 days of an election, the regulation focuses on the period when corporations, unions and individuals are most likely to make "disguised contributions," while still permitting communications with officeholders and candidates to take place without fear of regulation prior to this period. As the Commission noted in adopting the regulation, the 120-day window is the same as the period adopted by Congress itself in BCRA in defining voter registration activities that may not be carried out by state political parties using so-called soft money, see 2 U.S.C. §431(20)(A)(i); nor has Congress used a longer period than 120-days in defining regulated campaign activity in any other provision of FECA or BCRA. There is no empirical evidence that a longer

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[11] Plaintiffs challenge the FEC's decision to rely on the definition of "public communication" which it had separately adopted in enforcing the coordination rules, since this definition excludes communications over the Internet. *See* 11 C.F.R. §100.26. As the Commission pointed out, however, limiting the definition of coordinated communications to "public communications" provides consistency throughout all of the regulations issued to implement BCRA. *See* 68 Fed. Reg. at 430. Moreover, BCRA's definition of "public communication," on which the regulatory definition is based, does not include the Internet in the list of media that are covered, *see* 2 U.S.C. §431(22), although Congress made numerous references to the Internet in other sections. *See* 2 U.S.C. §§ 434 note, 438a. In view of the insignificant cost of sending messages over the Internet in comparison to other forms of media, and the difficulty of enforcing BCRA's prohibitions and limitations in an almost limitless environment such as the Internet, the Commission's decision was permissible and should be upheld.

period is necessary with respect to coordinated communications by private citizens, corporations and unions. Moreover, the regulation still prohibits coordinated communications prior to the 120-day window if the communications expressly advocate the election or defeat of a clearly identified candidate or a political party. The "loophole" about which plaintiffs complain is a tiny one indeed, if it exists at all.

Finally, by providing an objective test for determining what communications are subject to the coordination standard, the fourth content standard enables the regulated community to comply with the statute and the agency to enforce it. Like BCRA's similar but narrower definition of "electioneering communications" on which it was based, the fourth content standard is "both easily understood and objectively determinable." *McConnell v. FEC,* 124 S.Ct. at 689. In the years since *Buckley* the FEC and the courts have struggled to confine the prohibition of coordinated communications to those that will influence federal elections but not unnecessarily restrict communications that are not campaign-related. The fourth content standard is a reasonable effort to do just that, although as noted *supra,* note 10, it may in fact be more restrictive than Congress intended.

III. The Fourth Content Standard Creates A Permissible Screen To Avoid Broadly Intrusive FEC Investigations Into Protected Political Activities.

In addition to avoiding overbroad regulation of political activities protected under the First Amendment, the FEC's fourth content standard also serves to limit the massive investigations into protected political activities that are an inevitable part of cases involving suspected coordination. Not only does this standard allow the Commission to focus its limited enforcement resources on cases involving the greatest likelihood of abuse, it also limits the unique chilling effect of such investigations on the fundamental rights of speech and association. *See AFL-CIO v. FEC,* 333 F.3d at 178 ("political opponents ... file [coordination] charges against their competitors to serve the dual purposes of 'chilling'

the expressive efforts of their competitor and learning their political strategy so that it can be exploited to the complainant's advantage.")

In contrast to many other allegations of prohibited election activity, which require only a limited factual inquiry to establish,[12] enforcement of the statutory coordination rules "'inevitably ... involves an intrusive and constitutionally troubling investigation of the inner workings of political [actors].'" *Colorado Republican Federal Campaign Comm. v. FEC,* 533 U.S. 431, 471 n. 3 (2001)(Thomas, J. dissenting)(quoting with approval from Brief for American Civil Liberties Union, *et. al.*, as *Amici Curiae* at 18); *see also FEC v. Machinists Non-Partisan League*, 655 F.2d 380 (D.C.Cir. 1987). In the *Christian Coalition* case, for example, the FEC conducted extensive discovery into the inner workings of the organization as well as private discussions between the leaders of the organization and numerous public officials, including the President and his senior advisors. *See* 52 F. Supp. 2d at 66-81. And, during the Commission's massive investigation of organized labor's campaign and lobbying activities during the 1995-96 election cycle, investigators sought evidence from more than 150 respondents and third-party witnesses, including the White House, the Clinton/Gore '96 campaign, and more than 100 members of Congress, and they subpoenaed more than 50,000 pages of "extraordinarily sensitive political information [including] plans and strategies for winning elections, materials detailing political and associational activities, and personal information concerning hundreds of employees, volunteers and members of the ... organizations." *AFL-CIO v. FEC,* 177 F.Supp. 2d 48, 51 (D.D.C. 2001), *aff'd,* 333 F.3d 168 (D.C. Cir. 2003).

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[12] Allegations that a corporation or union has engaged in prohibited express advocacy, for example, are usually confined to the fourcorners of the communication itself, without inquiry into external factors. This is a relatively limited investigation in comparison to the necessarily intrusive examinations of prohibited coordination.

The fourth content standard limits the chilling effect of such FEC coordination investigations by screening out complaints where the existence of actual coordination is least likely, before a formal investigation is opened. Under FECA's enforcement provisions, the Commission may not investigate a complaint unless it first finds, by an affirmative vote of four of its members, that it has "reason to believe" that a person has committed or is about to commit a violation of the statute. *See* 2 U.S.C. §437g(a)(2). The purpose of this provision is to ensure that the Commission's authority to examine otherwise protected political conduct is limited to cases where there is at least some evidence that a violation has occurred.[13] One of the most vexing questions facing the Commission over the years has been how to apply the "reason-to-believe" standard in the context of complaints that allege improper coordination of political activities with candidates and political parties.

Because complaining parties rarely possess any direct evidence of actual coordination, they frequently rely on circumstantial evidence that a respondent has had the *opportunity* to coordinate with a candidate through a variety of means. In order to avoid a full-blown investigation, respondents in such cases are then faced with proving a negative - - that while they had the opportunity to coordinate, they did not do so, an extremely difficult, if not impossible, task which effectively eliminates the statutorily mandated "reason-to-believe" threshold in such cases.[14] The fourth content standard adopted by the

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[13] There is no evidentiary standard in the statute or the regulations for finding reason-to-believe. Courts have stated that the Commission need not accept the allegations in the complaint as true, and that it should make a determination of reason-to-believe on the basis of all of the information submitted by both the complainant and respondent. *See Orloski v. FEC,* 795 F. 2d 156, 167-68 (D.C. CIR 1986); *In Re Federal Election Campaign Act Litigation*, 474 F.Supp. 1044, 1046 (D.D.C. 1979).

[14] As one FEC Commissioner has put it,

> The evidentiary threshold for finding 'reason to believe' that a violation

Commission avoids this conundrum by allowing some complaints to be resolved at an early stage of the enforcement process based solely on the communication's content and the objective fact of when it was disseminated. Rather than opening a wide loophole, as plaintiffs complain, the Commission's regulations allow it to focus on the cases that are most likely to involve violations while at the same time avoiding chilling investigations in this sensitive area of political activity.

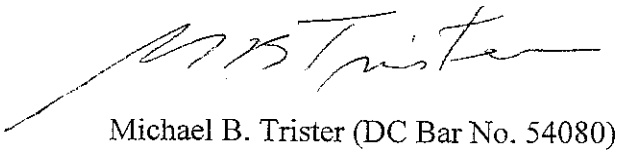
> of the Act has occurred may not demand a lot, but would here require some legally significant facts that distinguish these circumstances from every other independent situation. The trigger for a 'reason to believe' finding must be something more than a well-meaning desire to *insure* no violation occurred. At the 'RTB' stage, complaints certainly do not have to *prove* violations occurred, rendering investigation unnecessary, but the alleged facts must present something that is, in the broad sense, 'incriminating' and not satisfactorily answered by the respondents ... The Commission must recognize the need to require some evidentiary threshold for making an inference of coordination and upon which to base a 'reason to believe' finding of a violation - and recognize some limit to official curiosity. ... Absent some legitimate basis for a challenge, however, the making of independent expenditures should not bring an automatic penalty from the FEC in the form of a finding of a violation and a full-scale inquiry.

Matter Under Review 2766, Supporting Memorandum of Commissioner Josefiak for the Statement of Reasons 3-6 (June 13, 1990) (emphasis in original), *upheld in Democratic Senatorial Campaign Committee v. FEC*, 745 F.Supp. 742, 745-46 (D.D.C. 1990). *See also* Matter Under Review 2272, *upheld in Stark v. FEC,* 683 F.Supp. 836, 846 (D.D.C. 1988); Matter Under Review 1624 (1984).

Conclusion

For the foregoing reasons, the Court should uphold the fourth content standard against plaintiffs' challenge.

Respectfully Submitted,



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