acute to the legislative mind."[311] Indeed, incremental reform "represents the careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to which [the Supreme Court has] said [the courts] owe considerable deference."[312]

The limitations on coverage about which plaintiffs complain neither vitiate Title II's effectiveness nor call its important purposes into question. Indeed, most of them are longstanding features of campaign finance law, and several have been specifically sustained by the Supreme Court. The principle of allowing individuals to make expenditures that corporations or unions cannot make, for example, is a longstanding feature of the law, and one the Court specifically upheld as to corporations in *Austin*.[313] The Court has also expressly rejected the argument that it is improper to treat corporations differently from other sorts of business enterprises, both because such entities do not receive the significant benefits that the government confers on corporations,[314] and because corporations "are by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth," which they may then seek to use to influence elections.[315] Similarly, the complaint that exempting news stories and editorials from the scope of

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[311] 424 U.S. at 105 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966)) (citations and internal quotation marks omitted). *See also MCFL*, 479 U.S. at 258 n.11 ("That Congress does not at present seek to regulate every possible type of firm fitting this description does not undermine its justification for regulating corporations.").

[312] *MCFL*, 479 U.S. at 259 (internal quotation marks omitted) (in part quoting *FEC v. National Right to Work Comm.*, 459 U.S. 197, 209 (1982)). One reason the Supreme Court has been skeptical of underinclusiveness challenges in the context of campaign finance reform may be that campaign finance rules generally do not ban speech. This distinguishes, for example, the Court's recent decision in *Republican Party v. White*, which involved direct regulation of what words candidates could utter — rather than merely disclosure, or the sources of money to pay for particular sorts of communications. In *White*, a judicial candidate was never allowed to announce a position on a matter that might come before the court — except through judicial opinions, which also gave incumbents a notable advantage.

[313] 494 U.S. at 665.

[314] 494 U.S. at 666 ("[T]he State's decision to regulate only corporations is precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effect of political 'war chests' amassed with the aid of the legal advantages given to corporations.").

[315] *MCFL*, 479 U.S. at 258 n.11.

the statute makes it underinclusive was faced and squarely rejected in *Austin*, and cannot be successfully renewed in this Court.[316]

As to the decision to limit BCRA's reach to broadcast media, that was undoubtedly a difficult decision for Congress. The original bill had no such limitation, but Congress self-consciously evaluated ways to limit the reach of the law without sacrificing its purposes, so as to leave unregulated as many avenues of speech as possible. Senator Snowe, a principal drafter of the provision in question, explained her logic: "We also know that most of the money in campaigns is particularly in television, rather than radio, because it has the greatest impact. It can have the greatest effect. So as a result, we do narrowly target those two mediums."[317] The NRA, which is leading this underinclusiveness charge, should appreciate Senator Snowe's reasoning as much as anyone. As one high-level NRA official put it, "broadcast communications are the single most effective method for candidates to win support from undecided voters."[318] Another said it this way: "[I]f you want to be heard by America, radio and TV are the way to do it."[319] As the Supreme Court has repeatedly observed, a legislature is not disabled from acting simply because it does not solve an entire problem at once. Especially in an area fraught with First Amendment sensitivities, Congress should be applauded, not criticized, for proceeding with such caution.

E. BCRA's Disclosure Provisions Are Valid.

As Defendants' opening brief demonstrates, BCRA's disclosure requirements serve compelling governmental interests, and are equivalent to requirements the Supreme Court has

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316 *Austin*, 494 U.S. at 666-68 (observing that while the news media may not be entitled to greater protection under the Constitution, their unique societal role does provide the state with a compelling reason to treat them differently).

317 144 Cong. Rec. S972, S973 (daily ed. Feb. 25, 1998) (Statement of Senator Snowe); *see also* Magleby Expert Report at 22 (in Section IV, C, 2) ("Broadcast advertising is the most visible mode of communicating an electioneering message and is also widely believed to be the most effective for reaching a mass audience.")

318 NRA-PVF 01556 (James Baker, NRA PVF).

319 LaPierre Dep. at 197; *see also* AFL-CIO Br. at 11 ("[B]roadcast is the most potent medium available in this electronic age . . . and other forms of non-broadcast communications pale in comparison as mass communications outlets.").

previously upheld.[320] Plaintiffs briefly advance various arguments against those requirements, but none is persuasive.

Plaintiffs' joint brief addresses disclosure issues in one paragraph, most of which is descriptive.[321] It argues that if the Court strikes the remainder of the electioneering communications provisions, then the law may not require disclosure concerning "speech that the government may not regulate in the first place."[322] That argument is unavailing, both because the remainder of Title II's provisions are valid, and because even if they were not, disclosure provisions impose a smaller burden than the law's source restrictions, and would continue to be constitutionally justified by the interests described in our opening brief.[323]

The ACLU argues separately[324] that Title II's disclosure provisions must be invalidated, apparently on their face and in their entirety, because they do not expressly include an exemption of the sort long recognized by the Supreme Court when a particular organization can make a particularized, as-applied showing of hardship under cases such as *Brown v. Socialist Workers '74 Campaign Committee*[325] and *NAACP v. Alabama*.[326] That argument suffers from the same flaw as

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[320] *See* Gov't Br. at 172-77, Intervenors' Br. at 114-17.

[321] McConnell Br. at 55-56.

[322] *Id.* The joint brief also joins the AFL-CIO's argument concerning "advance" disclosure (*id.* at 56 n.22), which we address below.

[323] *See, e.g., Bellotti*, 435 U.S. at 792 n.32 (striking restriction on corporate funding of advertising on referendum measure, but noting that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected"); *Buckley*, 424 U.S. at 81-82 (where "the information sought has a substantial connection with the governmental interests sought to be advanced," disclosure requirements relating to "spending that is unambiguously campaign related" are "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view"). Indeed, full disclosure would be even *more* important in "insur[ing] both the reality and the appearance of the purity and openness of the federal election process," *Buckley*, 424 U.S. at 78, if corporations and unions were wrongly left free to spend unlimited amounts of their treasury funds on campaign advertising.

[324] ACLU Br. at 17-19.

[325] 459 U.S. 87, 99 (1982) (extensive evidenciary record of harrassment, including "threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harrassment of a party candidate, and the firing of shots at an SWP office").

[326] 357 U.S. 449, 462 (1958) ("an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threatof physical coercion, and other manifestations of public hostility").

the argument, addressed earlier, that Title II's source restrictions are invalid because they do not reflect *on their face* the applicability of the type of as-applied exception for a limited subset of nonprofit organizations that the Supreme Court recognized in *MCFL*. Like *MCFL*, neither *Brown* nor *NAACP* struck down the statute in question on its face; each merely recognized — as did *Buckley*[327] — that there were special circumstances in which the Constitution might prohibit application of an otherwise valid law to a particular organization or its members. If circumstances arise in which the ACLU believes that it qualifies for (and has any actual reason to need) such an exemption from the disclosure provisions relating to electioneering communications, it will be free to make that case. But it does not even purport to make such a case here, and its argument for facial invalidity lacks merit.

The NRA makes a similarly broad argument based on the D.C. Circuit's opinion in the *Buckley* litigation, arguing that BCRA's disclosure provisions are inconsistent with that opinion's condemnation of a FECA provision that, in the court's view, required reporting by groups "whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance."[328] Whatever the authority of that decision here, its reasoning is inapposite. As the NRA points out, the court of appeals interpreted the statutory provision to cover, among other things, any material disseminated in any medium, at any time, that named a candidate and "set[] forth the candidate's position on any public issue."[329] The court concluded that such a statute would reach "issue discussions unwedded to the cause of a particular candidate."[330] By contrast, as we have demonstrated, BCRA's provisions are carefully drawn to cover advertisements run close to candidate elections, with the purpose or effect of influencing those elections —

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[327] *See Buckley*, 424 U.S. at 68-74.

[328] NRA Br. at 49 (quoting *Buckley*, 424 U.S. at 11 n.7, in turn quoting *Buckley v. Valeo*, 519 F.2d 821, 832 (D.C. Cir. 1975)) (internal quotation marks omitted).

[329] NRA Br. at 49 (quoting *Buckley*, 519 F.2d at 832 (internal quotations omitted)).

[330] 519 F.2d at 873 (quoted at NRA Br. 49).

advertisements that constitute, as the NRA elsewhere stresses, "*electoral* speech."[331] As discussed above, Title II, with perhaps marginal exceptions insufficient to support a facial challenge, does not reach ads run by the NRA (or any other group) when it is "engaging in nonpartisan discussion."[332]

The NRA also argues briefly that it has made the factual showing necessary to invalidate BCRA's disclosure requirements as applied to it.[333] The Chamber of Commerce and the National Association of Manufacturers include a similar paragraph in their brief.[334] No plaintiff, however, comes close to adducing the sort of "specific evidence" they would need to show "a reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties."[335]

The Chamber and NAM plaintiffs rely on broad statements (including statements from *other* organizations)[336]

[REDACTED] [337] They also note a story that the Associated Builders and Contractors "lost members who were subjected to acts of vandalism after their contributions were publicly disclosed."[338] These claims would be insufficient to support a constitutional exemption under any circumstances, but questioning revealed their hollowness.

[REDACTED][339]

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331 NRA Br. at 9 (emphasis in original).

332 NRA Br. at 50 (quoting *Buckley*, 519 F.2d at 873).

333 NRA Br. at 50.

334 Chamber/NAM Br. at 18.

335 *Buckley*, 424 U.S. at 74.

336 Chamber/NAM Br. at 19.

337 [REDACTED]

338 Chamber/NAM Br. at 19 (citing Monroe Decl. ¶ 12). [REDACTED].

339 [REDACTED]

[REDACTED][340]

[REDACTED][341]

REDACTED][342]

The NRA's purported showing is no more persuasive. It offers two pieces of evidence: A declaration by Executive Vice President LaPierre that "hundreds, if not thousands of individuals" have told him they would be harassed if their identities were disclosed,[343] and testimony by the organization's Fiscal Officer that "many contributors [to their PAC] carefully limit their donations in order to avoid disclosure."[344] Again, that showing is not enough to support a constitutional exemption from an otherwise valid law. But in addition, the evidence shows that the NRA's average non-PAC contributor gives only $30 — well below BCRA's *$1,000* disclosure threshold (or even a PAC's $200 threshold).[345] Indeed, the NRA in fact does not "get a lot of contributions more than $1,000."[346] Moreover, under cross-examination, LaPierre conceded that he did not have any idea what amounts were given to the NRA by people who expressed confidentiality concerns.[347] [REDACTED] [348]

[REDACTED] [349]

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340 [REDACTED]

341 [REDACTED]

342 [REDACTED]

343 NRA Br. at 50 (quoting LaPierre Decl. ¶ 62); *but see* LaPierre Dep. Tr. at 307 (for year 2000, not sure if number was five or 50).

344 NRA Br. at 50 (quoting Adkins Decl. ¶¶ 4-6 & NRA App. 884).

345 LaPierre Cross Tr. at 91-92.

346 LaPierre Dep. Tr. at 308-09.

347 LaPierre Cross Tr. at 91.

348 [REDACTED].

349 [REDACTED]

[REDACTED].[350]

In short, in this case, as in *Buckley*, "[N]o [plaintiff] . . . has tendered record evidence of the sort proffered in *NAACP v. Alabama*. . . . At best they offer . . . testimony . . . that one or two persons refused to make contributions because of the possibility of disclosure."[351] That sort of showing did not suffice in *Buckley*, and it does not suffice here.

Finally, the AFL-CIO, which does not join the other plaintiffs' challenge to most of BCRA's disclosure rules, argues that those rules are unconstitutional "insofar as they require disclosure to take place *before* — and irrespective of whether — an electioneering communication . . . is aired."[352] The short answer to this argument is that, as the AFL-CIO notes, the FEC has proposed to issue regulations making clear that disclosure of amounts spent on or obligated for an electioneering communication is required only after the communication is aired.[353] That proposed regulation adopts the correct interpretation of BCRA's provisions in this regard.[354] Accordingly, plaintiffs' expressed concerns about "advance disclosure" under Title II's disclosure provisions are at best premature.[355]

III. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT ANY OF BCRA'S COORDINATION PROVISIONS ARE UNCONSTITUTIONAL.

1. Plaintiffs' Challenges to Section 214's Rulemaking Provisions Are Nonjusticiable and Fail on the Merits.

Plaintiffs complain that § 214 fails to define "coordination" in "any meaningful way," so that "political speakers will generally have no idea whether" they are engaging in prohibited

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[350] [REDACTED].

[351] *Buckley*, 424 U.S. at 71-72.

[352] AFL-CIO Br. at 14.

[353] 67 Fed. Reg. 64,555, 64,559 (Notice of Proposed Rulemaking) (Oct. 21, 2002) (proposed 11 C.F.R. § 104.20).

[354] *See* Comments on Proposed Regulations of Sen. McCain, Feingold, Snowe, and Jeffords and of Rep. Shays and Meehan, at 13, *available at* http://www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf.

[355] AFL-CIO Br. at 15; *see* McConnell Br. at 56 n.22 (joining this argument).

conduct or not.[356] Plaintiffs only barely acknowledge that the whole point of § 214 is to require the FEC to promulgate new rules that will provide *precisely* this kind of guidance based on "the real world of campaigns and elections."[357] Plaintiffs refer only to "the *possibility* that the FEC *may* ultimately adopt regulations" on this subject, even though Congress instructed the Commission to do so by December 22 of this year and the FEC is now in the midst of its expedited rulemaking proceedings (in which several plaintiffs are active participants).[358]

As demonstrated in the opening defense briefs, plaintiffs attempt to end run the rulemaking process mandated by Congress and violate the most elementary principles of ripeness, standing, and related doctrines. *See especially Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 437-38 (1977) (rejecting judicial challenge where Congress had repealed agency rules and instructed the agency to try again); *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1504 n.5 (10th Cir. 1995) ("orders that merely embody a precursor to the later formulation of actual regulations will, as a general rule, not support a finding of ripeness." These cases are on point and require dismissal of all § 214 claims.[359]

If anything, many of plaintiffs' arguments underscore the prematurity and impropriety of their § 214 claims. Plaintiffs admit that Congress has the power to repeal agency regulations and order new rulemaking proceedings,[360] but they complain that the future regulations "may well,"

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[356] McConnell Br. at 82.

[357] 148 Cong. Rec. S2096, S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

[358] Chamber/NAM Br. at 13 (emphasis added). Among others, the AFL-CIO, the Chamber of Commerce, and the Republican National Committee have all participated and submitted comments in the FEC's pending rulemaking proceedings. *See* http://www.fec.gov/pdf/nprm/coor_ind_expenditures/comments/html.

[359] *See generally* Gov't Br. at 182-90; Intervenors' Br. at 139-42. The plaintiffs' opening submissions demonstrate that their § 214 claims not only violate ripeness and standing principles, but also the principle of finality embodied in 5 U.S.C. § 704 and the doctrine of exhaustion of administrative remedies. *See Public Citizen Health Research Group v. Comm'r*, 740 F.2d 21, 29-30 (D.C. Cir. 1984) (invoking ripeness, finality, and exhaustion principles in rejecting judicial review during pending rulemaking proceeding); *Seafarers Int'l Union v. United States Coast Guard*, 736 F.2d 19, 29 (2d Cir. 1984) (invoking ripeness and exhaustion principles in concluding that "[f]or a court to interfere in this ongoing [rulemaking] process on the basis of abstract and broad allegations such as these would be most unwise").

[360] Chamber/NAM Br. at 13 n.6 ("To be clear, plaintiffs do not contend that Congress could not repeal the 2000 FEC regulation.").

"might possibly" and "might conceivably" violate the First Amendment.[361] Plaintiffs' own words demonstrate the conjectural character of their claims. The correct approach is for plaintiffs to direct their arguments to the Commission (as many of them have) and then await the outcome of the rulemaking. Until there are final rules specifying what is and is not included within the scope of regulated "coordination," plaintiffs' arguments amount to nothing more than an invitation to the Court to engage in rank constitutional speculation.

Plaintiffs also concede that the Commission's final rules will "be subject to APA review," but they contend that immediate review in this Court is required because APA review is "a process that can take years."[362] This argument cannot supply subject matter jurisdiction to review rulemaking issues where no such jurisdiction has been granted by Congress. *See* BCRA § 403(a); *see also* Intervenors' Br. at 140 n.516. Moreover, anyone who challenges the Commission's final rules under the APA will be able to seek a stay either from the Commission or the reviewing court, may seek injunctive relief pending review, and may seek expedited review of the rules.[363]

Plaintiffs claim, however, that *Buckley* itself "calls for review" in a First Amendment challenge like this even where further clarification is available from the FEC "through rulemaking or advisory opinions."[364] The cited passage of *Buckley* said no such thing. At issue was a claim by

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[361] McConnell Br. at 84 ("BCRA may well permit a chance meeting or brief discussion between a candidate and an outside group or individual to give rise to the level of 'coordination' ..." [*sic*]); ACLU Br. at 9 ("legislative activities with members of Congress might possibly serve as the basis for" a finding of coordination; group's expenditures "might conceivably" be treated as coordinated); *see also* ACLU Br. at 20 (group "may not be able" to engage in protected activities); Chamber/NAM Br. at 7 (present contacts with legislators "may lead to claims" of coordination in the future); *id.* at 13 ("there is no assurance" that the new rule will be constitutional). The plaintiffs' key supporting declarations on this point engage in the same speculation. *See, e.g.*, Murphy Decl. ¶ 7, *cited in* ACLU Br. at 20 ("Under the coordination provisions adopted by the BCRA many of the . . . legislative activities coordinated with members of Congress engaged in by the ACLU *could be treated as contributions* to the candidate . . . .") (emphasis added); [REDACTED].

[362] Chamber/NAM Br. at 13-14 n. 7.

[363] Title 5 U.S.C. § 705 provides in part that "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." *See also Cuomo v. NRC*, 772 F.2d 972, 974-78 (D.C. Cir. 1985) (discussing standards for stay of agency action).

[364] Chamber/NAM Br. at 14, *citing* 424 U.S. at 41 n.47.

some defendants that any vagueness concerns with one provision of FECA "could be handled by requesting advisory opinions from the Commission." 424 U.S. at 41 n.47. The Supreme Court held that, given the narrow advisory opinion mechanism then in effect, "reliance on the Commission is unacceptable" because the "vast majority" of affected persons could not secure an advisory opinion and thus were left without sufficient guidance as to the meaning of arguably ambiguous statutory language. *Id.* Congress revised the advisory opinion ("AO") procedures in 1979, and the D.C. Circuit held the following year that, given the expanded AO mechanism, "the susceptibility of the FECA to challenge on the grounds of vagueness has consequently been reduced." *Martin Tractor Co. v. FEC*, 627 F.2d 375, 386 n.44 (D.C. Cir.), *cert. denied sub nom. Nat'l Chamber Alliance for Politics v. FEC*, 449 U.S. 954 (1980).[365] This litigation presents an even more compelling case for dismissal than did *Martin Tractor*, given the pendency here of expedited rulemaking proceedings that are expected to result in new rules within the near future.

Plaintiffs argue, however, that immediate judicial intervention is imperative because the uncertainty about what the *future* rules will provide "is chilling association and petitioning activities right now" and "already is causing injury"; plaintiffs claim they are not sure whether their *present* legislative contacts "will *someday* be deemed coordinated."[366] Plaintiffs offer no evidentiary support for any of these assertions of present chill. There is no basis either in the draft rules or the Commission's prior practice to speculate that the agency might for some reason attempt to give retroactive force to its revised rules once they take effect. Plaintiffs' *present* conduct is governed by the current rules, which remain in effect through December 22. Although it is possible that there may be a gap in coverage after that date if the new rules have not yet become effective, plaintiffs

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[365] *Martin Tractor* involved a challenge to the absence of a definition of "solicitation" in FECA. The D.C. Circuit held the challenge was not ripe where the Commission had not yet definitively construed the challenged provisions and the plaintiffs could obtain prompt, binding AOs. "When a means like this one is available to reduce uncertainty or narrow the statute's reach and that means can be pursued at little risk to the rights asserted, the chill induced by facial vagueness or overbreadth is pro tanto reduced." 627 F.2d at 386.

[366] Chamber/NAM Br. at 13-14; McConnell Br. at 85 n.44 (emphasis added).

have no basis for claiming that they "might" be prosecuted for conduct that occurs during the period when no coordination rules are in effect or that the Commission "might" seek to apply its new rules retroactively to cover the gap period.[367]

Plaintiffs repeatedly mischaracterize § 214's language and legislative history in claiming that the new rules will "treat every conversation with a legislator as a sign of coordination" and "seriously disrupt" routine legislative and issue advocacy work.[368] As discussed in Intervenors' Opening Brief,[369] § 214's sponsors repeatedly stressed that they did *not* wish to regulate genuine lobbying and that any rules finding "coordination" based on such contacts would be *unauthorized* and *contrary* to Congress's intent. As Senator McCain summarized, "[w]e 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."[370]

In an effort to avoid the obvious ripeness problems, plaintiffs make what is, in effect, a futility argument. Thus, they claim that "*no* regulations promulgated by the FEC can solve the fundamental problem with BCRA's coordination provisions: by requiring that 'agreement or formal collaboration' not be a prerequisite to deeming an expenditure 'coordinated,' BCRA exceeds

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[367] Because we are at least a year away from the beginning of significant campaign activity in the next federal election cycle, it is hardly surprising that none of the plaintiffs has offered any evidence that the new coordination provisions are having any concrete, present impact.

[368] ACLU Br. at 4, 19; *see also id.* at 20 ("[T]he ACLU may not be able to discuss a civil liberties vote or position with a Representative or Senator if the ACLU will subsequently produce a box score that praises or criticizes that official's stand. This feature of the BCRA acts as a continuing prior restraint which bars the ACLU from engaging in First Amendment speech for the lawmaker's entire two or even six year term of office."); McConnell Br. at 82; Chamber/NAM Br. at 10 (new rules may "forc[e] citizens to choose between petitioning their representatives and subsequent political speech"); AFL-CIO Br. at 14 (BCRA will "interfere with ordinary and necessary lobbying contacts and the AFL-CIO's use of them to plan broadcast and other advocacy").

[369] Intervenors' Br. at 141-42.

[370] 148 Cong. Rec. S2145; *see also* 147 Cong. Rec. S3183, S3184-85 (daily ed. Mar. 30, 2001) (statement of Sen. Feingold); *see generally* Intervenors' Br. at 141-42. Plaintiffs' reliance on *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998), is similarly misplaced. That case holds the FEC may not find "coordination" based on "a mere inquiry as to the position taken by a candidate on an issue." *Id.* at 1311; *see id.* at 1312 (striking down regulation that "expressly prohibits a simple oral inquiry by the [plaintiff] as to a candidate's position"). Intervenors are in full agreement that mere issue inquiries should not be regulated as "coordination," and there is no basis to believe the Commission is about to promulgate rules that attempt to do so.

the constitutional bounds established in *Buckley*" and subsequent decisions.[371] Here again, plaintiffs fundamentally mischaracterize the governing decisions. *Buckley* framed the inquiry as whether an expenditure is "*totally* independent[]," the antithesis of an approach that demands evidence of formal "agreement" or "collaboration." 424 U.S. at 47 (emphasis added). The Court more recently has recognized the need to reach not only formal agreements, but also more *"general . . . understanding[s]"* and "*wink or nod*" arrangements. *Colorado I*, 518 U.S. at 614 (plurality opinion) (emphasis added); *Colorado II*, 533 U.S. at 442 (emphasis added). It is hardly unconstitutional for Congress to tell the Commission to define "coordination" within the limits allowed by the Supreme Court. Thus, because plaintiffs can point to no provisions of § 214 that will require the FEC to violate any constitutional principle applicable to coordinated expenditures, it is plainly not futile to require plaintiffs to await the outcome of the FEC's rulemaking, which may well resolve their concerns without litigation. And if not, they can then bring an APA challenge and litigate it just like any other challenge to Commission rules.[372]

Nor are plaintiffs correct in contending, in the RNC's words, that § 214 "can only be understood as an impermissible effort to overrule by simple legislative action" the district court's unappealed decision in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999).[373] It should be underscored that the "agreement or formal collaboration" standard that is rejected by § 214 emanated from the FEC, not *Christian Coalition* — this language appears nowhere in the decision. The standard used by Judge Green in *Christian Coalition* is susceptible to a broader, more

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[371] McConnell Br. at 83 (emphasis added).

[372] Portions of BCRA restate and extend the "made in concert or cooperation with or at the request or suggestion of" standard first enacted by Congress in 1976. *See* BCRA §§ 211, 214(a). Plaintiffs claim this standard is "unconstitutionally vague." McConnell Br. at 85 n.44; *see id.* at 82; Chamber/NAM Br. at 9-10, 13. They fail to acknowledge that this has been the governing statutory standard for the past 26 years, and that Congress took this standard straight from *Buckley*. Here again, plaintiffs purport to be following *Buckley* and settled law while in fact doing just the opposite.

[373] RNC Br. at 72. As previously discussed, the district court in *Christian Coalition* invited an "immediate appeal" of its decision under 28 U.S.C. § 1292(b), and the Office of General Counsel recommended that the FEC do so, but a divided Commission decided against pursuing an appeal. *See* Intervenors' Br. at 138 n.511.

"functional" interpretation than the language of "agreement or collaboration" used by the Commission.[374]

Moreover, even to the extent that Intervenors and others have taken issue with some aspects of the unappealed decision in *Christian Coalition*, there is a great deal in that decision with which Intervenors agree and which is directly contrary to plaintiffs' own contentions. Plaintiffs claim without any sustained analysis, for example, that there is a "strong argument that the First Amendment limits the coordination concept to express advocacy."[375] *Christian Coalition*, however, concluded after careful analysis that this position is "untenable," "fanciful," "unpersuasive," "pernicious," and "would frustrate both the anti-corruption and disclosure goals of the Act." 52 F. Supp. 2d at 87-88 & n.50.[376] Similarly, the ACLU attacks § 214's direction that the FEC "address" communications made after a "substantial discussion" as incompatible with the First Amendment.[377] The ACLU apparently does not appreciate that the "substantial discussion" standard was introduced

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[374] *Cf. Colorado II*, 533 U.S. at 443 (following a "functional" rather than "formal" approach in distinguishing between contributions and independent expenditures). *Christian Coalition* concluded that one method of demonstrating "coordination" was to show "substantial discussion or negotiation between the campaign and the spender" with respect to the communication, "such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners." 52 F. Supp. 2d at 90, 92. One can be an implied joint venturer or partner without being a "formal" collaborator or entering into a specific "agreement." It should be noted that *Christian Coalition* relied heavily on *Colorado I, see id.* at 85-86, 91, 97, a decision that recognized the "general understanding" standard of coordination (which plaintiffs completely ignore). *See also* Intervenors' Br. at 142 n.521.

[375] Chamber/NAM Br. at 12; *see also id.* at 8-9.

[376] *Christian Coalition* concluded, among other things, that "importing the 'express advocacy' standard into § 441b's contribution prohibition would misread *Buckley* and collapse the distinction between contributions and independent expenditures in such a way as to give short shrift to the government's compelling interest in preventing real and perceived corruption that can flow from large campaign contributions. Were this standard adopted, it would open the door to unrestricted corporate or union underwriting of numerous campaign-related communications that do not expressly advocate a candidate's election or defeat." 52 F. Supp. 2d at 88. *Buckley* made clear that restrictions on coordinated expenditures apply to payments "directly for media advertisements *or for other portions of the candidate's campaign activities*." 424 U.S. at 46 (emphasis added). Thus, for example, coordinated expenditures for a candidate's hotels, meals, and automobile rentals are deemed to be contributions. If non-advocacy expenses like these are covered, surely there is no bar to extending the restrictions on coordination to issue ads run on a candidate's behalf whether or not they include "express advocacy." The FEC itself has long adhered to the interpretation that express advocacy is not required in order for a coordinated expenditure to be regulated. *See* Scott E. Thomas & Jeffrey H. Bowman, *Coordinated Expenditure Limits: Can They Be Saved?*, 49 Cath. U. L. Rev. 133, 152-60 (1999) (collecting numerous FEC examples and concluding that "[t]he Commission's current approach is sound not only from a constitutional and statutory viewpoint, but also as a matter of policy") [DEV 40-Tab 8].

[377] ACLU Br. at 19.

by *Christian Coalition*, *see* 52 F. Supp. 2d at 92, and incorporated into the very rules whose repeal by Congress the ACLU now opposes, *see* 11 C.F.R. § 100.23(c)(2)(iii). Though plaintiffs attack the "substantial discussion" standard, it is part of the existing law they claim they wish to preserve. In any event, § 214 merely requires that the FEC regulations "address" this issue and does not compel any particular result.[378]

2. *Plaintiffs' Challenges to the Section 213 "Either/Or" Provision Misconstrue the Statute and Governing Precedent.*

Plaintiffs devote only a few paragraphs in their collective briefing to the § 213 challenges, which can be disposed of with relative dispatch.[379] Plaintiffs completely mischaracterize the choice imposed by § 213: they claim the effect of the section "is either to ban party committees from making independent expenditures *at all* (if they choose to make coordinated expenditures first), or to ban them from making coordinated expenditures *at all* (if they choose to make independent expenditures first)."[380] This is untrue. Section 213 does not reach the contributions and coordinated expenditures that a party may make under 2 U.S.C. § 441a(a)(2), in common with any other multicandidate political committee. Rather, § 213 applies only to what the Supreme Court has called the "special privilege" of making large "party coordinated expenditures" under § 441a(d) -- a "special privilege [that] others do not enjoy." *Colorado II,* 533 U.S. at 455. As shown in

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[378] The Chamber of Commerce and AFL-CIO sharply criticize the FEC's investigations into their own alleged coordination activities during the 1996 campaign. *See* Chamber/NAM Br. at 14-18; AFL-CIO Br. at 12-14. Contrary to their claims that there was "no evidence" of any potential violations, *see, e.g.*, Chamber/NAM Br. at 16, these groups were investigated because, as discussed in Intervenors' opening submission, there was significant evidence uncovered by the Thompson Committee, the FEC, and the media that they had engaged in massive impermissible coordination with the candidates and parties they supported. *See* Intervenors' Br. at 145 & nn.528-529. The General Counsel's Reports in these proceedings demonstrate that there were ample grounds to believe there may have been numerous violations of the coordination rules in effect at the time of the events in issue, but that the investigations were dropped because of the more lenient standards embraced by the Commission in its 2000 rule. *See* General Counsel's Reports in MUR 4624 (Apr. 20, 2001) [DEV 53-Tab 6] (The Coalition) and MURs 4291 *et al.* (Jun. 9, 2000) [DEV 52-Tab 3] (AFL-CIO). Some Commissioners have charged that, far from being "too aggressive in applying [the old] regulations to the regulated community," the FEC "has been reluctant to proceed on a coordination theory in even the most obvious cases." Statement of Reasons of Commissioners Thomas and McDonald in *In re Republicans for Clean Air*, MUR 4982, at 10 n.3 (FEC Apr. 23, 2002) [IER Tab 19].

[379] See McConnell Br. at 85-88; RNC Br. at 72; CDP/CRP Br. at 47-49.

[380] McConnell Br. at 86.

defendants' opening brief, it is entirely permissible for Congress to condition a party's exercise of such a "special privilege" to engage in huge coordinated spending on behalf of its nominee on an agreement by the party that it will not purport to make "independent expenditures" on behalf of the same nominee during the same election cycle. This is no different from offering to give a candidate public financing if she agrees to forgo her constitutional right to engage in unlimited spending, a choice that was sustained in *Buckley*. None of the plaintiffs has offered any basis for distinguishing the § 213 choice from the public financing choice.[381]

The only other issue warranting discussion is plaintiffs' attack on the provision in § 213 that requires, for purposes of the either/or choice, that "all political committees *established and maintained* by a national political party . . . and all political committees *established and maintained* by a State political party . . . shall be considered to be a single political committee" (emphasis added). Plaintiffs claim this unified treatment somehow "forces party committees to *associate* with each other, in violation of the [First Amendment] right *not* to associate."[382] This argument is spurious. The national and state parties already are closely intertwined in supporting party nominees for federal office. Treating them as one for purposes of § 213 serves an obvious and necessary anti-evasion function. As Senator McCain explained, treating "all the political committees of a party at both the state and national levels" as one "will prevent one arm of the party

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[381] *See generally* Gov't Br. at 177-82; Intervenors' Br. at 146-50. The purpose of the choice is to ensure that party spending is "truly independent," in the words of *Colorado II*, 533 U.S. at 465. Congress made a reasonable judgment in § 213 that a party cannot be "truly independent" of its nominee at the same time it is making large coordinated expenditures on behalf of that nominee. *See* Intervenors' Br. at 147-48. Plaintiffs are equally wrong in contending that § 213 "can only be understood as an impermissible effort to overrule by simple legislative action the U.S. Supreme Court's decision in" *Colorado I*. RNC Br. at 72; *see also* CDP/CRP Br. at 48. As discussed on pages 148-50 of Intervenors' Opening Brief, *Colorado I* does not address coordination between a party and its chosen nominee, and in any event BCRA § 213 does not "ban" independent expenditures – it merely requires a party to choose between its right to make such expenditures on behalf of its nominee and the "special privilege" of making huge coordinated expenditures on behalf of that same nominee.

[382] McConnell Br. at 88 (emphasis in original); *see also* CDP/CRP Br. at 47-49.

from coordinating with a candidate while another arm of the same party purports to operate independently of that candidate."[383]

Moreover, § 213 by its terms only reaches committees that are "established and maintained" by a national or state party, and which thus are already "associated" with the party. Plaintiffs offer no explanation why a party should not be held accountable for the committees that it has "established and maintained." State party committees already are aggregated with their "subordinate committee[s]" in determining compliance with the § 441a(d)(3) party coordinated spending limits that were approved by the Supreme Court in *Colorado II*. Thus, a state party already is required to monitor and be accountable for its subordinates' expenditure activities, and § 213's compliance burdens are no different in degree or kind from those upheld in *Colorado II*.[384]

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[383] 148 Cong. Rec. S2144 (statement of Sen. McCain). [REDACTED] *See, e.g.*, CRP 07381; [REDACTED] ; CRP 00366-00373; [REDACTED] ; *see also* Part I.A.2.b. and Part I.C of this brief. Moreover, the national parties have long asserted the authority to regulate state party activities bearing on the selection and support of nominees for federal office. If as a result of § 213 a national party will now require state parties to check with the national party before beginning to spend money on behalf of the party's nominees for federal office, this hardly seems any more intrusive than national party rules regulating, for example, state parties' timing of delegate selection, use of open primaries, anti-discrimination principles, open-meeting rules, or the like. *See, e.g.*, Republican National Committee Rules 11, 14-16 (available at http://www.rnc.org/gopinfo/rules/2000rules_1_5.htm); Charter & Bylaws of the Democratic Party of the United States, Arts. 8-10 (available at http://democrats.org.about/). The First Amendment does not prohibit Congress from enacting campaign finance laws that "prompt[] parties to structure their spending in a way that they would not otherwise choose to do." *Colorado II*, 533 U.S. at 450 n.11.

[384] Many of plaintiffs' coordination arguments focus on BCRA § 202, which provides that a "coordinated" disbursement for an electioneering communication is a contribution by the person who makes it and an expenditure by the candidate beneficiary. As with Intervenors' Opening Brief, the defense of § 202 is subsumed in the defense of Title II's electioneering communications provisions. Intervenors' Br. at 509.