UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-582 (CKK, KLH, RJL)
NATIONAL RIFLE ASSOCIATION OF AMERICA, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-581 (CKK, KLH, RJL)
EMILY ECHOLS, a minor child, by and through her next friends, TIM AND WINDY ECHOLS, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-633 (CKK, KLH, RJL)

CHAMBER OF COMMERCE OF THE UNITED STATES, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-751 (CKK, KLH, RJL)

NATIONAL ASSOCIATION OF BROADCASTERS, Plaintiff, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-753 (CKK, KLH, RJL)

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-754 (CKK, KLH, RJL)

CONGRESSMAN RON PAUL*, et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-781 (CKK, KLH, RJL)
REPUBLICAN NATIONAL COMMITTEE, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.* Defendants.	Civ. No. 02-874 (CKK, KLH, RJL)
CALIFORNIA DEMOCRATIC PARTY*, et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-875 (CKK, KLH, RJL)

VICTORIA JACKSON GRAY ADAMS*, et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-877 (CKK, KLH, RJL)

REPRESENTATIVE BENNIE G. THOMPSON, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, *et al.*, Defendants.	Civ. No. 02-881 (CKK, KLH, RJL)

MEMORANDUM OPINION

(May 1, 2003)

PER CURIAM[1]: Presently before this three-judge District Court are eleven consolidated actions challenging as unconstitutional the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA") and seeking declaratory and injunctive relief to prohibit its enforcement. The wide range of legal challenges raised by this litigation are

[1] Judge Henderson does not join this opinion.

highly complex, interrelated, and raise issues of fundamental importance not only to the conduct and financing of federal election campaigns but to the other rights involved that we enjoy under the Constitution. Because of the complexity of our positions, this *per curiam* opinion, by Judge Kollar-Kotelly and Judge Leon, includes a schematic description of the three-judge panel's conclusions in regard to each of BCRA's challenged provisions and a chart as to the rulings on each provision's constitutionality. The *per curiam* opinion also includes: (1) a brief history of campaign finance regulation in the United States (pp. 16-42); (2) the legislative history behind BCRA's enactment (pp. 42-50); (3) a procedural history of the litigation in this case (pp. 50-57); (4) a description of the specific provisions in BCRA at issue in these lawsuits (pp. 57-80); (5) certain Findings of Fact relating to the identities of the parties and BCRA's disclosure provisions (pp. 80-106); and (6) conclusions of law relating to claims of the Paul Plaintiffs and most of BCRA's disclosure provisions (pp. 106-170). The separate opinions of each judge hearing this matter follow thereafter.

I. DESCRIPTION AND CHART OF THE COURT'S RULINGS

In light of the number of provisions in BCRA being challenged, the complexity of the issues presented by each challenge, and the variety of positions and voting combinations taken by the three judges on this District Court, we set forth a brief description and a chart, on a section by section basis, of the various rulings

A. *Title I*

Section 323(a) of BCRA bans national parties from soliciting, receiving, directing, transferring, and spending nonfederal funds (*i.e.*, soft money). Judge Henderson strikes this section down as unconstitutional in its entirety. Judge Leon, for different reasons, files a concurrence, joining with Judge Henderson, except with respect to the ban on national parties from using (*i.e.*, "directing," "transferring," and "spending") nonfederal funds (*i.e.*, soft money) for "federal election activity" of the type defined in Section 301(20)(A)(iii). As to that type of conduct, Judge Leon upholds the constitutionality of Congress's ban on the use of nonfederal funds by national parties for Section 301(20)(A)(iii) communications. Judge Kollar-Kotelly upholds Section 323 (a) in its entirety. Accordingly, Judge Leon's decision regarding Section 323(a) controls.

Section 323(b) prohibits state parties from using nonfederal money for "federal election activities" as defined in Section 301(20)(A) of BCRA. Judge Henderson strikes these sections down as unconstitutional in their entirety. Judge Leon, for different reasons, joins Judge Henderson in a separate concurrence, but only with respect to those party activities set forth in Subsections (i), (ii), and (iv) of Section 301(20)(A). As to Section 301(20)(A)(iii), Judge Leon upholds the constitutionality of Congress's prohibition on state and local parties from spending nonfederal funds for communications that promote, oppose, attack or support a specific federal candidate. In a separate opinion, Judge Kollar Kotelly finds Section 323(b) constitutional and concurs with Judge Leon's discussion of Section 301 (20)(A)(iii).

Section 323(d) prohibits national, state, and local parties from soliciting funds for, or making donations, to § 501(c) organizations that make expenditures, or disbursements, in connection with federal elections, or to § 527 national organizations. Judge Henderson strikes this section down as unconstitutional in its entirety. Judge Leon, for different reasons, joins in that conclusion in a separate concurrence. Judge Kollar-Kotelly files a separate dissent in which she finds the entire section constitutional.

Section 323(e) prohibits, but for certain enumerated exceptions, federal officeholders and candidates from soliciting, receiving, directing, transferring, or spending, nonfederal money in connection with any local, state, or federal election. Judge Henderson and Judge Kollar-Kotelly, for different reasons, in separate opinions uphold the constitutionality of this section in its entirety. Judge Leon concurs with respect to the restriction on federal officeholders and candidates receiving, directing, transferring or spending any nonfederal funds in connection with any federal or state election, but files a separate dissent with regard to any prohibitions on a federal candidate, or officeholder, from soliciting funds for the national parties.

Section 323(f) prohibits state officeholders and candidates from using nonfederal funds for public communications that refer to a clearly identified candidate for federal office and that promote, oppose, attack, or support a candidate for this office. Judge Leon upholds this section in its entirety. Judge Kollar-Kotelly concurs with Judge Leon's opinion. Judge Henderson, dissents and finds the entire section unconstitutional.

B. *Title II*

Section 201 of BCRA sets forth a primary, and "backup" definition, of an "electioneering communication" (*i.e.*, so-called "issue ads"). In addition, it sets forth certain disclosure requirements for those who fund these electioneering communications. Judge Henderson strikes down both the primary and backup definition as unconstitutional. Judge Leon, for different reasons, concurs in her judgment with respect to the primary definition. Judge Kollar-Kotelly dissents and upholds the primary definition as constitutional as discussed in her separate opinion. With respect to the backup definition, Judge Leon, who writes a separate opinion, upholds its constitutionality with its final clause severed. Judge Kollar-Kotelly, as expressed in her opinion, concurs in that conclusion solely as an alternative to this Court's finding that the primary definition is unconstitutional. Finally, with regard to Section 201's disclosure requirements, Judge Kollar-Kotelly and Judge Leon, for the reasons set forth in the *per curiam* opinion, uphold their constitutionality with one exception. Judge Henderson strikes down the disclosures requirements in a separate dissent.

Section 202 provides that disbursements by persons for electioneering communications, or contracts to purchase the same, that are coordinated with either a federal candidate or a candidate committee, or a political party committee will be treated as contributions to that candidate's campaign or political party committee. Judge Kollar-Kotelly and Judge Leon, for the reasons set forth in the *per curiam* opinion, find this section constitutional. Judge Henderson, in a separate dissent concludes that this Section is unconstitutionally overbroad.

Section 203 of Title II prohibits labor unions, corporations and national banks from using money from their general treasury to fund "electioneering communications," as defined by Section 201. Instead, under Section 203, such communications must be paid from a separately segregated fund ("SSF"). Section 203 also includes an exception from the SSF requirement for certain nonprofit corporations (*i.e.*, the "Snowe-Jeffords exception"). Judge Kollar-Kotelly upholds this section as constitutional. Judge Leon joins Judge Kollar-Kotelly's opinion upholding the constitutionality of this section as it applies to the backup definition in Section 201. Judge Henderson strikes down this Section as unconstitutional in its entirety. Judge Kollar-Kotelly and Judge Leon additionally uphold the disclosure and SSF requirements as well as the Snowe-Jeffords exemption provision for certain nonprofit corporations organized under Sections 501(c)(4) and 527 of the Internal Revenue Code in their respective opinions.

Section 204 ("The Wellstone Amendment"), in effect, withdraws the Snowe-Jeffords exception of Section 203. Judge Henderson strikes down Section 204 in its entirety. Judge Leon concurs in her result as it applies to MCFL exempt organizations only. As to nonprofit corporations that do not qualify for the MCFL exemption, Judge Leon concurs with Judge Kollar-Kotelly's conclusion, but for different reasons, in upholding Section 204 as it applies to non MCFL organizations.

Section 212 provides certain reporting requirements for independent expenditures.

Judge Kollar-Kotelly and Judge Leon, for the reasons set forth in the *per curiam* opinion, conclude that challenge to this provision is not ripe for review, and therefore hold that the Court does not have jurisdiction to resolve the plaintiffs' challenges at this time. Judge Henderson dissents from this view and finds Section 212 unconstitutional in its entirety.

Section 213 requires national parties, in essence, to choose between making coordinated expenditures under the Party Expenditures Provision or unlimited independent expenditures on behalf of their federal candidates. All three judges concur that this section is unconstitutional. Judge Henderson's opinion includes a discussion of her separate reasons. Judge Kollar-Kotelly concurs in Judge Leon's separate opinion on this section.

Section 214 addresses coordinated expenditures paid for by persons other than party committees and candidate committees. Section 214 repeals the current FEC regulations on coordinated expenditures, and directs the FEC to promulgate new regulations that do not require "an agreement or formal collaboration to establish coordination." Judge Kollar-Kotelly and Judge Leon, for the reasons set forth in the *per curiam* opinion, find that the plaintiffs' challenge under Section 214(b) and Section 214(c) is nonjusticiable and the Court therefore lacks jurisdiction to consider their challenge. As to Sections 214(a) and 214(d), however, they find those sections constitutional for the reasons set forth in the *per curiam* opinion. Judge Henderson dissents, finding the Section unconstitutional in its entirety.

C. *Title III and V*

Sections 304, 316, & 319, collectively known as the "Millionaire Provisions," allow opponents of self-financed candidates, and in certain circumstances, to raise money in larger increments and accept unlimited coordinated party expenditures. All three judges conclude, for the reasons set forth in Judge Henderson's opinion, that this Court lacks standing to entertain challenges to these provisions.

Section 305 denies a candidate the "lowest unit charge" for broadcast advertisements on radio and television unless the candidate promises not to refer to another candidate in his or her advertisements. For the reasons set forth in Judge Henderson's opinion, all three judges conclude that this Court lacks standing to entertain the plaintiffs' challenge at this time.

As explained in Judge Henderson's opinion, the Court similarly finds that the plaintiffs do not have standing to challenge Section 307, which increases and indexes contribution limits.

Section 311 establishes certain disclosure requirements for the sponsors of electioneering communications. Judge Kollar-Kotelly and Judge Leon, for the reasons set forth in the *per curiam* opinion, uphold this provision as constitutional. Judge Henderson, dissents, and finds this section unconstitutional for the reasons set forth in her opinion.

Section 318 prohibits donations by minors to federal candidates, or to a committee of a political party. All three judges agree that this section is unconstitutional. Each judge writes a separate concurrence setting forth his/her reasoning as to this section.

Section 504 requires broadcast licenses to collect and disclose records of any request to purchase broadcast time for communications that "is made by or on behalf of a legally qualified candidate for public office" or that relates "to any political matter of national importance," including communications relating to "a legally qualified candidate," "any election to federal office," and "a national legislative issue of public importance." Judge Henderson finds this section unconstitutional. Judge Leon and Judge Kollar-Kotelly, concur in that result, but not in her reasoning. Judge Kollar-Kotelly concurs in Judge Leon's separate opinion on this section.

Chart of the Court's Rulings

BCRA Provision	**Constitutional**	**Unconstitutional**	**Nonjusticiable**
323(a): nonfederal fund restrictions on national parties	**Judge Kollar-Kotelly** **Judge Leon** (only as to using nonfederal funds for 301(20)(A)(iii) activities)	**Judge Henderson** **Judge Leon** (except as to using nonfederal funds for 301(20)(A)(iii) activities)	
323(b): nonfederal fund restrictions on "federal election activity" by state and local parties	**Judge Kollar-Kotelly** **Judge Leon** (only as to 301(20)(A)(iii) activities)	**Judge Henderson** **Judge Leon** (only as to 301(20)(A)(i),(ii), (iv) activities)	
301(20): definition of "federal election activity"	**Judge Kollar-Kotelly** **Judge Leon** (only as to 301(20)(A)(iii))	**Judge Henderson** **Judge Leon** (only as to 301(20)(A)(i),(ii), (iv))	

BCRA Provision	**Constitutional**	**Unconstitutional**	**Nonjusticiable**
323(d): nonfederal fund restrictions on tax-exempt organizations	**Judge Kollar-Kotelly**	**Judge Henderson** **Judge Leon**	
323(e): nonfederal fund restrictions on federal candidates	**Judge Henderson** **Judge Kollar-Kotelly** **Judge Leon** (except solicitation of nonfederal funds)	**Judge Leon** (only as to solicitation of nonfederal funds)	
323(f): nonfederal fund restrictions on state candidates	**Judge Kollar-Kotelly** **Judge Leon**	**Judge Henderson**	
201: "electioneering communication" definition	**Judge Kollar-Kotelly** (primary definition and, in the alternative, backup definition) **Judge Leon** (backup definition only)	**Judge Henderson** (primary and backup definitions) **Judge Leon** (only as to primary definition)	
201: disclosure of "electioneering communications"	**Judge Kollar-Kotelly** (severing subsection (5)) **Judge Leon** (severing subsection (5))	**Judge Henderson** **Judge Kollar-Kotelly** (subsection (5) only) **Judge Leon** (subsection (5) only)	
202: coordinated "electioneering communications" as contributions	**Judge Kollar-Kotelly** **Judge Leon**	**Judge Henderson**	

BCRA Provision	**Constitutional**	**Unconstitutional**	**Nonjusticiable**
203: prohibition of "electioneering communications" by corporations and unions	**Judge Kollar-Kotelly** **Judge Leon** (as to backup definition)	**Judge Henderson**	
204: nonprofit organization exception ("Wellstone Amendment")	**Judge Kollar-Kotelly** **Judge Leon** (as to non-MCFL groups)	**Judge Henderson** **Judge Leon** (as to MCFL groups)	
212: disclosure of independent expenditures		**Judge Henderson**	**Judge Kollar-Kotelly** **Judge Leon**
213: choice between independent and coordinated expenditures		**Judge Henderson** **Judge Kollar-Kotelly** **Judge Leon**	
214: definition of coordinated communications	**Judge Kollar-Kotelly** (as to 214(a) and 214(d))) **Judge Leon** (as to 214(a) and 214(d))	**Judge Henderson**	**Judge Kollar-Kotelly** (as to remainder of 214) **Judge Leon** (as to remainder of 214)
304, 316, & 319: "Millionaire Provisions"			**Judge Henderson** **Judge Kollar-Kotelly** **Judge Leon**
305: limitation on lowest unit charge for candidates referring to other candidates			**Judge Henderson** **Judge Kollar-Kotelly** **Judge Leon**

BCRA Provision	Constitutional	Unconstitutional	Nonjusticiable
307: increased contribution limits and indexing of limits			**Judge Henderson** **Judge Kollar-Kotelly** **Judge Leon**
311: identification of sponsors	**Judge Kollar-Kotelly** **Judge Leon**	**Judge Henderson**	
318: prohibition of donations by minors		**Judge Henderson** **Judge Kollar-Kotelly** **Judge Leon**	
504: disclosure of broadcasting records		**Judge Henderson** **Judge Kollar-Kotelly** **Judge Leon**	

II. BACKGROUND

It is necessary to canvass the history of federal campaign finance regulation in order to provide the appropriate context for understanding the structure and practices of federal campaign finance that Congress confronted when it enacted BCRA. *See United States v. UAW-CIO*, 352 U.S. 567, 570 (1957) ("*UAW*") ("Appreciation of the circumstances that begot this statute is necessary for its understanding, and understanding of it is necessary for adjudication of the legal problems before us."). Following this overview, the Court will move to a discussion of the legislation enacted by Congress to resolve the perceived shortcomings of the pre-BCRA campaign finance structure and a procedural history of the litigation in this case.

A. *The Framework of Federal Campaign Finance Regulation*

One might be tempted to agree with Plaintiffs' assertion that the history of federal campaign finance regulation is "relatively short," McConnell Br. at 9, if one were comparing it to the history of Western civilization. In the judgment of Judge Kollar-Kotelly and Judge Leon, however, the history of federal campaign finance regulation, having its origins in the Administration of President Theodore Roosevelt, is a long-standing and recurring problem that has challenged our government for nearly half of the life of our Republic.

At the close of the nineteenth century, the concentration of the nation's wealth in the hands of a "small portion of the population" began to threaten the stability and integrity of the political system. *UAW*, 352 U.S. at 570 (quoting 2 Morrison and Commager, *The Growth of the American Republic* at 355 (4th ed. 1950)). At the time, the widely accepted view was that "aggregated capital unduly influenced politics, an influence not stopping short of corruption." *Id*. To that end, many states began experimenting with disclosure laws requiring candidates and their political committees to make public the sources and amounts of contributions to their campaigns and the amounts of their campaign expenditures. *Id.* at 570-571. These laws proved to be largely futile. *Id*. at 571.

Concern with both the size and source of campaign funds relating to the 1904 presidential campaign "crystallized popular sentiment for federal action to purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions." *Id*. at 571-72. President Roosevelt's presidential messages to Congress in both 1905 and 1906, strongly encouraged Congress to enact a law prohibiting political contributions by corporations. 40 Cong. Rec. 96 (1905); 41 Cong. Rec. 22 (1906). In response to these concerns, Congress enacted the Tillman Act, Ch. 420, 34 Stat. 864, which prohibited corporations from making any contribution in connection with any election for federal office and which represented "the first concrete manifestation of a continuing congressional concern for elections free from the power of money." *UAW*, 352 U.S. at 575 (internal quotation marks and citation omitted). The Tillman Act demarcates the beginning of the "modern era" of federal campaign finance regulation and is the predecessor of the prohibition on corporate and labor union contributions and expenditures in connection with any federal election from their general treasuries that appears in the Federal Election Campaign Act ("FECA"). *Buckley v. Valeo*, 519 F.2d 821, 904 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976).[2] The "underlying philosophy" of the Tillman Act was "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *UAW*, 352 U.S. at 575.

In 1909, Congress endeavored to broaden the Tillman Act by including within the Act's scope, state legislative races and in-kind contributions. *See id*. While this effort ended

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[2] The ban on corporate and labor union contributions and expenditures was eventually codified at 18 U.S.C. § 610, and later transferred to the Federal Election Campaign Act, 2 U.S.C. 441b, when Congress re-evaluated the Act in the aftermath of the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). Federal Election Campaign Act Amendments of 1976, P.L. 94-283, 90 Stat. 475. *See also* S. Rep. No. 677, 94th Cong., 2d Sess. 2-3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 929, 930-31.

in failure, in 1910, Congress "translated popular demand for further curbs upon the political power of wealth into a publicity law that required committees operating to influence the results of congressional elections in two or more States to report all contributions and disbursements and to identify contributors and recipients of substantial sums." *Id.* (citing Act of June 25, 1910, ch. 392, §§ 5-6, 36 Stat. 822, 823) (disclosure required of all transactions greater than $100). The 1910 law further directed the reporting of expenditures exceeding $50, made independently of a political committee for the purpose of influencing congressional elections in more than one State. Act of June 25, 1910, ch. 392, §§ 7, 36 Stat. 824. In 1911, Congress further amended the 1910 Act, and for the first time, included overall expenditure ceilings on campaigns for the House ($5,000) and for the Senate ($10,000). *Buckley*, 519 F.2d at 904-905 (citing Act of Aug. 19, 1911, ch. 33, § 2, 37 Stat. 26). Additionally, the 1911 provisions required all candidates for the Senate and the House of Representatives to make detailed reports with respect to their nominating and election campaigns. *UAW*, 352 U.S. at 576. Hence, candidate disclosures included primary, convention, and other pre-nomination periods. *Buckley*, 519 F.2d at 905. The 1911 law also prohibited candidates from promising employment for the purpose of securing an individual's support. *UAW*, 352 U.S. at 576 (citing 37 Stat. 25). In 1918, Congress again amended the law and added criminal penalties for offering anything of value to influence voting. *Id.* (citing Act of Oct. 16, 1918, ch. 187, 40 Stat. 1013).

In the only instance of a criminal prosecution under the Act, Truman Newberry was convicted in Michigan of violating the expenditure ceiling in his 1918 primary campaign for the United States Senate. Newberry's conviction was overturned by the Supreme Court in 1921. The Court invalidated the law insofar as it extended to Senate primary elections. *Newberry v. United States*, 256 U.S. 232, 258 (1921) ("We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections."). Four Justices of the Court held that primaries were intra-party affairs not amenable to congressional regulation under the Elections Clause. *Id*. Justice Joseph McKenna, who provided the crucial fifth vote for judgment, limited the reach of the decision to the facts by concluding that the statute under consideration was enacted prior to the Seventeenth Amendment and, therefore, left open the question of whether that Amendment gave Congress authority to regulate Senate primary elections. *Id*.

In 1925, in the wake of *Newberry*, Congress passed the Federal Corrupt Practices Act of 1925, ch. 368, tit. III, 43 Stat. 1070, which was a comprehensive amalgamation of the surviving provisions of the existing campaign finance laws. *UAW*, 325 U.S. at 576. The Federal Corrupt Practices Act strengthened the Tillman Act by broadening the definition of contribution, extending the ban on corporate contributions to Delegates and Resident Commissioners that were elected to Congress, and punishing the recipient of any illegal contribution in addition to the contributor. *Id*. at 577. The law also generally broadened disclosure provisions. *Buckley*, 519 F.2d at 905.

The Supreme Court upheld the Federal Corrupt Practices Act in the *Burroughs* case of 1934:

> The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted, and the end to be attained, are matters for congressional determination alone. Congress reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections. The verity of this conclusion reasonably cannot be denied. When to this is added the requirement contained in section 244, that the treasurer's statement shall include full particulars in respect of expenditures, it seems plain that the statute as a whole is calculated to discourage the making and use of contributions for purposes of corruption.

Burroughs v. United States, 290 U.S. 534, 547-48 (1934) (internal citation omitted). As is obvious from this language, the *Burroughs* opinion provided Congress with broad discretion to regulate federal elections including the financing of campaigns.

The next instance of congressional action in the area of campaign finance was in 1940 when Congress amended the Hatch Act, a law which placed restrictions on the political activities of the civil service, by making it unlawful for any political committee to receive contributions totaling more than $3,000,000 or to make expenditures of more than that amount in any calendar year. *UAW*, 352 U.S. at 577 (citing Act of July 19, 1940, ch. 640, 54 Stat. 767). The Hatch Act amendments also limited gifts to candidates or political committees to $5,000 in any calendar year. *Buckley*, 519 F.2d at 905 (citing Act of July 19, 1940, ch. 640, 54 Stat. 767).

One year later, the Supreme Court again returned to the question it had squarely addressed in *Newberry*: namely whether congressional power under the Elections Clause extended to the pre-election period. *United States v. Classic*, 313 U.S. 299 (1941). This time, the Court upheld the congressional enactment holding that "the authority of Congress, given by [Article I, section 4], includes the authority to regulate primary elections when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress." *Id*. at 317. The case involved a Louisiana Democratic primary for the House of Representatives, which history showed was the determinant of who would win the general election. *Id*. at 314. The Supreme Court in *Classic* disregarded *Newberry* because only four Justices in *Newberry* had adopted the view that the Elections Clause forbade congressional regulation of primary elections. Consequently, as the issue had never "been prejudged by any decision of [the Supreme] Court," *Classic* overruled the *Newberry* plurality. *Id*. at 317; *see also id*. at 325 n.8 ("No conclusion is to be drawn from the failure of the Hatch Act, to enlarge § 19 by provisions specifically applicable to primaries. Its failure to deal with the subject seems to be attributable to constitutional doubts, stimulated by *Newberry v. United States*, which are here resolved.") (internal citations omitted). Under *Classic*, Congress was given authority to impose criminal penalties for activities of state officials conducting a primary election for federal candidates under the auspices of state law. *See id*. at 307.

Following the rise of organized labor during World War II, in 1943, Congress passed the Smith-Connally Act which included a section that extended the Federal Corrupt Practices

Act to organized labor. *UAW*, 352 U.S. at 578 (citing War Labor Disputes Act (Smith-Connally Act), ch. 144, § 9, 57 Stat. 163, 167) ("Wartime strikes gave rise to fears of the new concentration of power represented by the gains of trade unionism. And so the belief grew that, just as the great corporations had made huge political contributions to influence governmental action or inaction, whether consciously or unconsciously, the powerful unions were pursuing a similar course, and with the same untoward consequences for the democratic process."). Congressman Gerald Landis, the author of this provision in the Smith-Connally Act observed that "[t]he public was aroused by many rumors of huge war chests being maintained by labor unions, of enormous fees and dues being extorted from war workers, of political contributions to parties and candidates which later were held as clubs over the head of high Federal officials." *Id.* at 579 (quoting Hearings before a Subcommittee of the House Committee on Labor on H.R. 804 and H.R. 1483, 78th Cong., 1st Sess. 1, 2, 4).

Despite the provision in the Smith-Connally Act tightening the reins on political activity of labor unions, Congress was prompted to investigate "enormous" financial outlays by some unions in connection with the 1944 national elections. *Id.* The Senate's Special Committee on Campaign Expenditures investigated and concluded that while there was "'no clear-cut violation of the Corrupt Practices Act,'" *id.* at 580 (quoting S. Rep. No. 101, 79th Cong., 1st Sess. 23), the law was being evaded by large scale spending by labor unions on expenditures (as opposed to contributions), which were not explicitly prohibited by the

Federal Corrupt Practices Act, *id*.[3] Congress, it appears, considered a prohibition on contributions to be equally applicable to expenditures. *Id*. at 582 ("'The committee is firmly convinced, after a thorough study of the provisions of the act, the legislative history of the same, and the debates on the said provisions when it was pending before the House, that the act was intended to prohibit such expenditures.'") (quoting H.R. Rep. No. 2739, 79th Cong., 2d Sess. 40). In commenting on how this exception threatened to eviscerate the Federal Corrupt Practices Act, the House Committee studying this problem stated that "'[t]he intent and purpose of the provision of the act prohibiting any corporation or labor organization making any contribution in connection with any election would be wholly defeated if it were assumed that the term 'making any contribution' related only to the donating of money directly to a candidate, and excluded the vast expenditures of money in the activities herein shown to be engaged in extensively. Of what avail would a law be to prohibit [directly] contributing to a candidate and yet permit the expenditure of large sums in his behalf?" *Id*. at 581 (quoting H.R. Rep. No. 2739, 79th Cong., 2d Sess. 40).

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[3] A sampling of the extraordinary size of the expenditures by labor on federal elections demonstrates that "One [labor organization] was found to have an annual budget for 'educational' work approximating $1,500,000, and among other things regularly supplies over 500 radio stations with 'briefs for broadcasters.' Another, with an annual budget of over $300,000 for political 'education,' has distributed some 80,000,000 pieces of literature, including a quarter million copies of one article. Another, representing an organized labor membership of 5,000,000, has raised $700,000 for its national organizations in union contributions for political 'education' in a few months, and a great deal more has been raised for the same purpose and expended by its local organizations.'" *UAW*, 352 U.S. at 580-81 (quoting H.R. Rep. No. 2093, 78th Cong., 2d Sess. 3).

Therefore, in order to prevent further "evasion" and to "plug the existing loophole," Congress "again acted to protect the political process from what it deemed to be the corroding effect of money employed in elections by aggregated power." *Id.* at 582 (internal quotation and citations omitted). Accordingly, in 1947, Congress passed the Taft-Hartley Act of 1947, ch. 120, 61 Stat. 136, which amended the Federal Corrupt Practices Act "to proscribe any 'expenditure' as well as 'any contribution' [and] to make permanent [its] application to labor organizations" in addition to corporations. *Id.* at 582-83. The Taft-Hartley Act implemented *Classic* by applying its provisions to primary elections. *Buckley*, 519 F.2d at 906.

Following the Taft-Hartley Act, from the late 1940's through the end of the 1950's, Congress sought unsuccessfully to amend the dollar expenditure limits to reflect more "realistic" costs, but no action was taken. *Id.* In 1960, the Senate passed a bill that strengthened reporting requirements for candidates and political committees, adopted individual contribution limits, rationalized current expenditure limits, and placed ceilings on Presidential campaigns. *Id.* The bill, however, died for lack of a companion in the House of Representatives. *Id.* In 1962, President Kennedy's Commission on Campaign Costs recommended "tax incentives and credits for small political contributions, realistic ceilings, and suspension of the equal time provision as to media debates." *Id.* In 1966, Congress passed a one dollar tax checkoff to provide public funding for Presidential general elections, which was later repealed in 1967. *Id.*

Late in 1971, Congress reinstituted the tax form checkoff to finance Presidential general elections and, in early 1972, passed the Federal Elections Campaign Act of 1971, Pub. L. No. 92-255, 86 Stat. 3 ("FECA"), requiring disclosure of all contributions in excess of $100 and disclosure of expenditures by all candidates and political committees spending more than $1000 per year. *Id.* The 1971 law also expressly provided corporations and unions with the ability to establish and administer separate, segregated funds for the purpose of making political contributions and expenditures. *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 410 (1972).

Despite passage of FECA, the "infinite ability" to "eviscerate[] statutory limitations on contributions and expenditures," which amounted to "wholesale circumvention" became a source of further congressional concern. *Buckley*, 519 F.2d at 837. Congress concluded that costs for federal elections had increased at an "'alarming'" rate. *Id.* (quoting H.R. Rep. No.93-1239, 93d Cong., 2d Sess. 3 (1974), U.S. Code Cong. & Admin. News 1974, p. 5587). Congress was further troubled by the "interaction" between large-scale campaign expenditures and a reliance "on large contributions from monied and special interests." *Id.* In *Buckley*, it was undisputed that "one percent of the people accounted for 90 percent of the dollars contributed to federal candidates, political parties and committees." *Id.* (citing agreed to Findings of Fact). It was also undisputed that illegal contributions to both parties were made in 1972 by Gulf Oil and by American Milk Producers, Inc., a large dairy cooperative. *Id.* at 838. Notably, the circuit court in *Buckley* concluded:

> Large contributions are intended to, and do, gain access to the elected official after the campaign for consideration of the contributor's particular concerns. Senator Mathias not only describes this but also the corollary, that the feeling that big contributors gain special treatment produces a reaction that the average American has no significant role in the political process.

Id.; *see also id.* n.32 ("Congress found and the District Court confirmed that such contributions were often made for the purpose of furthering business or private interests by facilitating access to government officials or influencing governmental decisions, and that, conversely, elected officials have tended to afford special treatment to large contributors.") (citations omitted). Indeed, the lower *Buckley* court documented the "lavish contributions by groups or individuals with special interests to legislators from both parties." *Id.* at 840 n.37.

In 1974, in direct response to the 1972 elections which were a "watershed for public confidence in the electoral system," *id.* at 840, and the "shock of its aftermath," *id.* at 837, Congress enacted and President Gerald Ford signed the sweeping FECA Amendments of 1974. *Id.* Broadly speaking, the amendments imposed dollar limitations on contributions by individuals and by political committees to candidates for federal office, to political party committees, and to independent political committees. 2 U.S.C. § 441a(a). The 1974 amendments also imposed limits on expenditures that individuals, candidates, political committees, and political parties could spend to help federal candidates win elections. Moreover, the law treated expenditures that were "coordinated" with a candidate as contributions. 2 U.S.C. 441a(a)(7)(B)(i) ("[E]xpenditures 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."). The amendments also included a variety of recordkeeping and disclosure requirements. *See* 2 U.S.C. §§ 432-434. The Federal Election Commission was also created by the amendments and tasked with monitoring and enforcing the campaign finance laws. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), 437g. Finally the law, as amended, provided public funding primarily for qualified presidential candidates and some public funding for nominating conventions of major political parties.

The first day after the FECA amendments went into effect, the law was challenged. *Buckley*, 519 F.2d at 901. In a lengthy opinion, the United States Court of Appeals for the District of Columbia Circuit found all but one of the provisions of FECA constitutional. *Id.* at 843-44 (striking down disclosure provision 2 U.S.C. § 437a). In 1976, the Supreme Court affirmed in part and reversed in part the D.C. Circuit's ruling in its decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). Generally speaking, in examining FECA's provisions against the free speech and association provisions of the First Amendment the Supreme Court found constitutional FECA's contribution limitations, *Buckley*, 424 U.S. at 23-38, and unconstitutional those provisions of FECA that imposed expenditure limitations, *id.* at 39-59. The contribution-expenditure dichotomy first developed in *Buckley* was grounded in the Supreme Court's view that "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."

Id. at 21 (observing that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing."). Expenditure restrictions, on the other hand, "while neutral as to the ideas expressed, limit political expression at the core of our electoral process and of the First Amendment freedoms." *Id*. at 39 (internal quotation marks and citation omitted).

In *Buckley*, the Supreme Court upheld as well the general disclosure provisions contained in FECA. *Id*. at 60-84.[4] The Supreme Court likewise found constitutional the public funding scheme for presidential candidates. *Id*. at 85-109. Finally, the Supreme Court struck down the structure of the FEC as it was constituted under FECA in violation of the Appointments Clause of the Constitution. *Id*. at 109-143.

Hence, in the aftermath of *Buckley*, it was FECA's contribution restrictions that remained intact, while its expenditure provisions were vitiated.[5] Under FECA, as it emerged from *Buckley*, no "person"[6] was permitted to contribute in excess of $1,000 to a candidate

[4] The D.C. Circuit's decision striking down 2 U.S.C. § 437a was not appealed to the Supreme Court. *Buckley*, 424 U.S. at 11 n.7.

[5] Following *Buckley*, there have been a number of important Supreme Court opinions that have addressed application of *Buckley* in other contexts. It is more appropriate to discuss these cases in the context of each Judge's separate opinion.

[6] FECA defines "person" as "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government." 2 U.S.C. § 431(11).

for federal office, 2 U.S.C. § 441a(a)(1)(A); no person could contribute to the political committees established and maintained by a national political party, in any calendar year which, in the aggregate, exceed $20,000, 2 U.S.C. § 441a(1)(B); and no person could contribute to any other political committee in any calendar year which, in the aggregate, exceed $5,000, 2 U.S.C. § 441a(a)(1)(C).[7] In addition, no multicandidate political committee could contribute in excess of $5,000 to a candidate for federal office, 2 U.S.C. § 441a(a)(2)(A); no multicandidate political committee could contribute in excess of $15,000 to the political committees established and maintained by a national political party, 2 U.S.C. § 441a(a)(2)(B); and finally, no multicandidate political committee could contribute to any other political committee in any calendar year which, in the aggregate, exceeded $5,000, 2 U.S.C. § 441a(a)(2)(C). In order to "prevent evasion" of these limitations *Buckley* upheld the Act's $25,000 limitation on total contributions during any calendar year. *Buckley*, 424 U.S. at 38. As a result, under 2 U.S.C. § 441a(a)(3), no individual was permitted to make contributions aggregating more than $25,000 in any calendar year. 2 U.S.C. § 441a(a)(3).[8]

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[7] Under BCRA, these contribution limits have been raised. Persons can now contribute $2,000 to candidates and $25,000 to national political party committees. BCRA §§ 307(a)(1), 307(a)(2); FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1). Also under BCRA, Congress has carved state party committees out of § 441a(a)(1)(C) and increased the contribution limit for state party committees from $5,000 to $10,000. BCRA § 102; FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1). Moreover, the contribution limits applicable to candidates and national party committees have been indexed to the consumer price index and will increase with inflation. BCRA § 307(d); FECA § 315(c); 2 U.S.C. § 441a(c).

[8] BCRA has increased the aggregate limit on individual contributions from $25,000 per year to $95,000 per two-year election cycle, of which $37,500 may be contributed to (continued...)

In addition, under 2 U.S.C. § 441b, corporations and labor unions are prohibited from using their general treasury funds to "make a contribution or expenditure in connection with any election to any political office." 2 U.S.C. § 441b(a). In sum, the Supreme Court found that:

> The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

Buckley, 424 U.S. at 21-22. Indeed, what emerged from *Buckley* was a tightly focused regime whereby contributions (and coordinated expenditures) to candidates and political parties and committees were limited or even banned (in the case of corporate and union treasury funds) and independent political advocacy was left unimpeded.

Contribution is defined in FECA as including, "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i).

Since the adoption of FECA, it is clear that the Commission has struggled with interpreting the phrase "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). In 1975, the FEC examined the case of a local party committee that had established separate accounts for federal funds and for corporate contributions which were permitted under state law, but which were prohibited by federal law for use in

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[8](...continued)
candidates. BCRA § 307(b); FECA § 315(a)(3); 2 U.S.C. § 441a(a)(3).

connection with federal elections. In Advisory Opinion 1975-21, the Commission determined that the appropriate course was to have the local party allocate both its administrative expenses and its voter registration drives between the two accounts, given that these expenses had an impact on both state and federal elections. FEC Advisory Op. 1975-21 (allocation based on the ratio of "the total amount which the [local party] directly contributes to and expends on behalf of Federal candidates, to . . . the total of all direct contributions to and expenditures on behalf of all candidates–Federal, State, and local"). The FEC slightly reversed course, in Informational Letter 1976-72, where it determined that voter registration efforts could not be paid for from an account containing funds raised from corporate and union general treasuries. FEC Informational Letter 1976-72 ("Thus, even though the Illinois law apparently permits corporate contributions for State elections, corporate/union treasury funds may not be used to fund any portion of a registration or get-out-the-vote drive conducted by a political party.").

However, in its 1977 rulemakings implementing FECA, the Commission permitted any political committee to make a choice between creating a separate federal account for its federal election activities, or to establish a single account containing only funds subject to the federal contribution limits to finance all of its activities with respect to both state and federal elections. 11 C.F.R. § 102.6(a)(2) (1977). To the extent that segregated accounts were created, the committees were required to "allocate administrative expenses on a *reasonable basis* between their Federal and non-Federal accounts in proportion to the amount of funds expended on Federal and non-Federal elections, or on another reasonable basis." 11 C.F.R. § 106.1(e) (1977) (emphasis added). The following year, the Commission essentially reversed its 1976 advisory opinion and in Advisory Opinion 1978-10, determined that "the costs of [voter] registration and get-out-the-vote drives" by a state party committee "should be allocated between" federal and nonfederal accounts "in the same manner as other general party expenditures" under the Commission's 1977 regulations. FEC Advisory Op. 1978-10. In Advisory Opinion 1979-17, the Commission extended the conclusions reached in Advisory Opinion 1978-10 regarding separate accounts to the national party committees. FEC Advisory Op. 1979-17 ("[Regulations] thus would permit the RNC to establish and administer separate, segregated bank accounts through an auxiliary organization of the national party which accounts could be used for the deposit and disbursement of funds designated specifically and exclusively to finance national party activity limited to influencing the nomination or election of candidates for public office other than elective 'Federal office.'") (citation omitted).

Accordingly, by the middle of 1979, the FEC permitted national and state party committees to solicit and accept donations outside of FECA's source and amount limitations ("nonfederal money")[9] provided that these monies were placed in separate accounts from the

[9] There is a degree of skirmishing in the briefs over the appropriate terminology for "nonfederal money." Defendants use the phrase "soft money." Plaintiffs refer to "soft money" as "state-regulated" or "nonfederal" money. The Court has, for the most part, adopted the nomenclature "nonfederal" money because that is the term that the FEC has used (continued...)

federal funds. In other words, political committees were permitted to establish two sets of accounts–one for federally-regulated money (federal accounts) and one for non-federally regulated money (nonfederal accounts).[10]

Essentially, the FEC's opinions and rulemakings permitted state and national party committees to pay for the nonfederal portion of their administrative costs and voter

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[9](...continued)
during the rulemaking process implementing BCRA, Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064 (July 29, 2002) ("Because the term 'soft money' is used by different people to refer to a wide variety of funds under different circumstances, the Commission is using the term 'non-Federal funds' in the final rules rather than the term 'soft money.'"), even though BCRA uses the term "soft money," BCRA § 101 (entitled "*Soft money* of political parties") (emphasis added) and even though on occasion the Supreme Court has also used the phrase "soft money," *see, e.g.*, *Colorado Republican Federal Campaign Committee v. FEC ("Colorado I")*, 518 U.S. 604, 616 (1996) ("Unregulated 'soft money' contributions may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute."). Despite the references in the case law and the statute to the term "soft money," for the sake of clarity in an area of law that demands absolute precision, the Court generally eschews the phraseology "hard money" or "soft money" in favor of "federal funds" or "nonfederal funds." Federal funds are those monies regulated under FECA, as amended, and nonfederal funds are those monies that may or may not be regulated under state law, but not federal law.

[10] In 1979 Congress again amended FECA to exempt two new sets of activities from the definition of contribution and expenditure. First, state and local party disbursements for campaign materials such as pins, bumper stickers, and yard signs used in connection with volunteer activities on behalf of the party's nominees were exempted from FECA's contribution limits provided that the activity was paid for with federal money. 2 U.S.C. §§ 431(8)(B)(ix), 9(B)(viii). The second exemption related to a state party's payment for "the costs of voter registration and [GOTV] activities" conducted on behalf of the party's presidential ticket. 2 U.S.C. §§ 431(8)(B)(xi), (9)(B)(ix). This exemption was also conditioned on the use of federal money for the activity. Hence, for both of these activities unlimited federal money could be used to pay for them because they were exempted from the definition of "contribution" and "expenditure." For state and local parties that opted to use nonfederal funds to pay for these activities, allocation was still permitted.

registration and turnout programs with monies raised under relevant state laws (not FECA), even if those state laws were in direct contravention of FECA, such as permitting contributions from corporate and labor union general treasury funds. As a result, national and state parties began to raise so-called "soft money," which described these nonfederal funds, not subject to FECA limits and restrictions, that were used to pay for these administrative and generic voter drive expenses.

With these developments, nonfederal funds became an increasingly important means of party financing. During the 1980 election, the RNC spent approximately $15 million in nonfederal funds and the DNC spent roughly $4 million, constituting 9% of the national parties total spending. Mann Expert Rep. at 12.[11] In 1984, the national parties spent collectively an estimated $21.6 million in nonfederal money, which accounted for 5% of their total spending. *Id.* By 1988, national party nonfederal money had increased to an approximate $45 million, or 11% of national party spending. *Id.*

In 1990, the FEC promulgated regulations to provide for some consistency in the methods used to determine the relative portions of federal and nonfederal money to be used

[11] As Defense Expert Mann plainly concedes, "Just what amount of soft money activity the parties pursued in the 1980s is less certain [because] '[n]onfederal' funds were not subject to federal disclosure requirements, only to the disclosure laws in states where soft money was spent." Mann Expert Report at 12. It was not until 1992 that the FEC began collecting official data on national parties use of nonfederal funds, so any attempts at pinpointing the amount of nonfederal funds spent by the national parties before 1992 are estimates. Notably, Plaintiffs do not challenge any of the pre-1992 estimates (or any of the post-1992 data collected by the Commission). Therefore, the Court relies on these statistics.

in financing these generic party activities. Prior to 1990, the regulations specified that the allocation rate between nonfederal and federal accounts was to be done on a "reasonable basis." 11 C.F.R. § 106.1(e) (1977). The regulations promulgated by the Commission were designed to give certainty to this subjective standard and were in response to a district court's decision which held that the allocation rules required specific guidance from the Commission. *Common Cause v. FEC*, 692 F. Supp. 1391, 1396 (D.D.C. 1987) ("Indeed, it is possible that the Commission may conclude that no method of allocation will effectuate the Congressional goal that all monies spent by state political committees on those activities permitted in the 1979 amendments be 'hard money' under the FECA. That is an issue for the Commission to resolve on remand.").[12] Under the new regulations, national party committees (other than Senate and House national party committees) were required to allocate at least 65% of their administrative and generic voter drive expenses[13] to their federal accounts in

[12] The Court observes that *Common Cause v. FEC* demonstrates that as early as 1984, before any official statistics on nonfederal funds were kept by the Commission, there was concern over the influence of these monies on federal elections. However, the Commission in 1984 determined that, "Common Cause has not presented evidence of instances in which 'soft money' has been used to influence federal elections sufficient to justify the stringent rules proposed in its petition." *Common Cause*, 692 F. Supp. at 1393 (citing the Commission's April 17, 1986, Notice of Disposition).

[13] The Commission permitted, *inter alia*, the following expenses to be allocated: administrative expenses, which included rent, utilities, office supplies, and salaries, 11 C.F.R. § 106.5(a)(2)(i) (1991); the direct costs of a fundraising program or event, where federal and nonfederal funds are collected by one committee, 11 C.F.R. § 106.5(a)(2)(ii) (1991); and "generic voter drives," which included voter identification, voter registration, and get-out-the-vote ("GOTV") drives where a specific candidate was not mentioned. 11 C.F.R. §106.5(a)(2)(iv) (1991).

presidential election years and 60% in non-presidential election years. 11 C.F.R. §§ 106.5(b)(2)(i), (ii) (1991). Senate and House committees were to allocate these expenses on the basis of the ratio of federal expenditures to total federal and nonfederal disbursements made by the committee during the two-year federal election cycle. 11 C.F.R. § 106.5(c)(i). For state and local parties, the allocation between the federal and nonfederal accounts for these expenses were determined by the proportion of federal offices to all offices on a state's general election ballot. 11 C.F.R. § 106.5(d) (1991). Generally, the state parties' allocation rate was substantially lower than the national party allocation rate. Mann Expert Rep. at 14. The new rules also mandated that the national party committees disclose the details of their nonfederal accounts. 11 C.F.R. §§ 104.8(e), (f) (1991) (requiring national parties to report for nonfederal and building fund accounts the donating individual's name, mailing address, occupation or type of business, and the date of receipt and amount of any such donation). State parties, however, were exempted from these disclosure requirements. 11 C.F.R. § 104.9(a) (1991) (reporting committees required to disclose information pertaining to "the committee's federal account(s) only"). The Commission's regulations, therefore, provided the national parties with an incentive to channel these expenditures through state party committees, since this approach generally permitted more nonfederal dollars to be spent than if a national party spent the money without disclosing the sources of the funds.

In 1992, spending on nonfederal money by the national parties reached $80 million, or 16% of the national parties total spending. Mann Expert Rep. at 15 (citing to official figures from the FEC). Of that total amount, the national parties contributed only $2 million directly to state and local candidates. Mann Expert Rep. at 16. In addition, the two national parties transferred over $15 million to state party committees–two thirds of which was transferred to presidential election battleground states. *Id.* Along these lines, the national parties expended $14 million in nonfederal funds for "generic" party advertising, consisting predominantly of television advertisements that did not mention candidates names, but urged viewers to simply vote for a particular party or stressed themes from the presidential campaigns. *Id.* Although the Commission had only approved the use of nonfederal funds by the national parties "for the exclusive and limited purpose of influencing the nomination or election of candidates for nonfederal office," by 1992, with the new allocation rules firmly in place, national parties were using nonfederal money to impact federal elections as permitted by the Commission. FEC Advisory Op. 1979-17.

With the 1996 election cycle, the national parties' total nonfederal funds spending reached $272 million, which was 30% of the national party committees' total spending. Mann Expert Rep. at 21. Starting in the Fall of 1995 and continuing through 1996, Democratic party committees used soft money to fund advertisements that either promoted President William J. Clinton by name or criticized his opponent by name, while avoiding words that expressly advocated either candidate's election or defeat.[14] *Id.* at 18. In May of

[14] The argument that such advertisements could be paid for with nonfederal funds had its origins in *Buckley*. The Supreme Court in *Buckley*, in an attempt to save from (continued...)

1996, the Republican National Committee announced its plans to spend $20 million on an "issue advocacy" campaign. *Id.* at 20.

Although many of the advertisements featured the presidential candidates, none of the costs of these advertisements were charged as coordinated expenditures on behalf of the candidate's campaign, which would have subjected the expenditure to FECA's contribution limits. Instead, the parties paid the full cost, with a mix of federal and nonfederal funds as permitted by FEC allocation rules.[15] Often the advertisements were paid for by state party committees, where the allocation rules permitted greater spending of soft money. Mann

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[14](...continued)
unconstitutional vagueness the independent expenditure prohibitions, narrowed them to apply "only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley*, 424 U.S. at 44. In a footnote, the *Buckley* Court found that "[t]his [narrowing] construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52. Even though the Supreme Court narrowed the provision of the law, it struck down the expenditure provision as unconstitutional as written and as narrowed by the Court. *Id.* at 44.

It was based on this language that the national parties in 1995 and 1996 argued that as long as they ran advertisements that did not mention "express words of advocacy of election or defeat," they could use nonfederal money to run advertisements that supported their presidential candidate or attacked his opponent.

[15] The FEC had previously ruled that party committees could sponsor issue advocacy advertisements that did not feature a federal candidate and pay for these advertisements with a combination of federal and nonfederal dollars as permitted under the allocation regulations. FEC Advisory Op. 1995-25 (discussing that allocation rules were permissible to allocate funding for "RNC plans to produce and air media advertisements on a series of legislative proposals being considered by the U.S. Congress, such as the balanced budget debate and welfare reform"). The national parties used this advisory opinion as justification for their issue advocacy campaigns featuring candidates for federal office and paid for with nonfederal money.

Expert Report at 22 (noting over $115 million was transferred from the national parties to the state party committees). In fact, state party nonfederal funds for political communication/advertising went from $2 million in 1992 to $65 million in 1996. *Id.* at 22; *see also* La Raja Expert Report at 18. A similar strategy was also used by the parties to support their candidates for congressional office. Mann Expert Report at 20. Following the 1996 election, the FEC began a series of investigations over the parties' 1996 election practices. Statement of Reasons of Commissioner Scott E. Thomas for MURs 4553 and 4671, 4713, 4407 and 4544 at 2-5 [DEV 51]. In 2000, the FEC deadlocked over whether there was reason to believe that the national parties advertising program constituted an excessive in-kind contribution to the presidential campaigns. *Id.* at 5.

The Senate and House also conducted extensive investigations into the 1996 federal elections. Both the majority and minority reports in the Senate investigation concluded that permitting nonfederal donations to political parties eviscerated FECA's longstanding ability to prevent corporate and labor union treasury funds from influencing federal elections. Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167 (6 vols.), Mar. 10, 1998, ("Thompson Committee Report"); *id.* at 4468 (majority report) ("[S]oft money spending by political party committees eviscerates the ability of the FECA to limit the funds contributed by individuals, corporations, or unions for the defeat or benefit of specific candidates."); *id.* at 4572 (minority report) ("The soft money loophole undermines the campaign finance laws by enabling wealthy private interests to channel enormous amounts of money into political campaigns."). In the House, the Committee on Government Reform and Oversight conducted a wide ranging investigation, which culminated in public hearings during 1997, into, *inter alia*, campaign fundraising by political parties from foreign sources. *See* Campaign Finance Investigation: Hearings Before the House Committee on Government Reform and Oversight, 105th Cong. 6 (October 8, 1997) (statement of Chairman Dan Burton) ("This Committee's hearings will cover many subjects . . . . Our initial focus has been how political parties took or raised contributions from foreign sources. I am gravely concerned about foreign governments, foreign companies or foreign nationals trying to influence our electoral processes."); Conduit Payments to the Democratic National Committee: Hearings Before the House Committee on Government Reform and Oversight, 105th Cong. 6 (October 9, 1997) (statement of Chairman Dan Burton) ("Today, marks the first day of hearings into illegal foreign fundraising and other violations of law during recent campaigns.").

Nevertheless, without any congressional action, nonfederal funds emerged as a significant source of party resources. With these strategies firmly in place, the national parties spent $221 million of nonfederal money on the 1998 midterm elections, or 34% of their total spending, which was more than double the amount of nonfederal funds spent during the previous midterm election. Mann Expert Report at 23. With the 2000 elections, the national parties spent $498 million worth of nonfederal funds, which was 42% of their total spending. *Id*. at 24.

The use of nonfederal funds by the political parties was paralleled to some degree by a similar development in the rise of issue advocacy by corporations and labor unions. Aside from the political parties making advertisements that supported their candidates or attacked the opponent without using words of direct "express advocacy," unions and corporations began to mount "issue advocacy" campaigns, particularly beginning with the 1996 election, that were paid directly from their general treasuries. For example, in 1996 the AFL-CIO ran the following advertisement from September 26 to October 9 in the district of House Republican incumbent Steve Stockman:

> [Narrator] What's important to America's families? [Middle-aged man] "My pension is very important because it will provide a significant amount of my income when I retire." [Narrator] *And where do the candidates stand*? Congressman Steve Stockman voted to make it easier for corporations to raid employee pension funds. Nick Lampson opposes that plan. He supports new safeguards to protect employee pension funds. When it comes to your pension, there is a difference. Call and find out.

AFL-CIO 000593; [DEV 124] (emphasis added); *see also* AFL-CIO 000602.

Advertisements such as the above illustration were permitted by the Supreme Court's ruling in *FEC v. Massachusetts Citizens for Life, Inc*. In that case, the Supreme Court found that the prohibition on corporate and union treasury spending on expenditures found in 2 U.S.C. § 441(b) needed to be narrowly construed to only apply to express advocacy. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) ("*MCFL*") ("We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b."). As a result, corporations and labor unions were free to use general treasury funds to finance issue advocacy campaigns. It does not appear that prior to 1996, the practice of using issue advertising to influence federal elections was a widespread practice.

In addition, the issue advocacy campaigns by corporations and labor unions were free from the disclosure provisions upheld in *Buckley* because they were considered outside of FECA's regulatory purview. This lack of disclosure permitted various interest groups to conceal the true identity of the source behind the advertisement. Thus, following both the 1996 and 2000 elections, corporations and unions used their general treasury funds to run advertisements apparently aimed at influencing federal elections and avoiding FECA's longstanding disclosure provisions.

With regard to both political party spending of nonfederal funds and political party, corporate, and labor union issue advocacy, there does not appear to be any dispute among the litigants to the fact that much of this behavior was not regulated or was permitted by the FEC. Rather, the dispute between the parties centers around the effect of engaging in these tactics, whether the measures needed addressing, and how Congress ultimately remedied what it perceived to be a problem. It is the congressional response to which the Court now turns.

B. *The Bipartisan Campaign Reform Act of 2002*

In response to what it perceived were burgeoning problems with federal campaign finance laws, Congress began to consider reform legislation over six years ago, during the

105th Congress.[16] The overhaul of our Nation's existing campaign finance laws – culminating with the enactment of BCRA – would consume the attention of three separate Congresses[17] and require navigation through atypical parliamentary procedures.

During the 105th Congress, the House of Representatives considered House Bill 2183, the Bipartisan Campaign Integrity Act of 1997, offered by Representative Asa Hutchinson. The bill was first considered on May 22, 1998.[18] 144 Cong. Rec. H3774 (daily ed. May 22, 1998). On August 3, 1998, during consideration of Representative Hutchinson's bill on the House floor, the Committee of the Whole[19] adopted an amendment in the nature of a

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[16] *See* Bipartisan Campaign Finance Reform Act of 1998, H.R. 2183, 105th Cong. (1998), *available at* http://thomas.loc.gov.

[17] *See id.*; Bipartisan Campaign Reform Act of 1999, H.R. 417, 106th (1999); Bipartisan Campaign Finance Reform Act of 2002, H.R. 2356, 116 Stat. 81 (2002).

[18] According to *Congressional Quarterly* reporter David Mark, the House Leadership only allowed floor consideration of House Bill 2183 after it appeared that supporters of the bill had nearly secured the requisite 218 signatures on a discharge petition to automatically bring the bill to the floor, which did not require the consent of the leadership. *See* David Mark, *Campaign Finance Discharge Petition Off to Fast Start*, Congressional Quarterly Daily Monitor (July 31, 2001).

[19] When considering most major legislation, the House of Representatives typically adopts a rule, in the form of a House Resolution, that governs, and generally limits, debate on the underlining bill. In order to expedite consideration of the underlining bill, the rule suspends the proceedings of the House of Representatives, and the body operates as one large committee, the Committee of the Whole House on the State of the Union ("Committee of the Whole"). Walter J. Oleszek, *Congressional Procedures and the Policy Process* 151-53 (5th ed., CQ Press 2001). This parliamentary mechanism enables the House to act with a quorum less than the requisite 218 members; only 100 members are needed to constitute a quorum in the Committee of the Whole. *Id.* at 152. (There are numerous other technical distinctions between the Committee of the Whole and the House of Representatives that enable (continued...)

substitute offered by Representatives Christopher Shays and Martin Meehan.[20] 144 Cong. Rec. H6947 (daily ed. Aug. 3, 1998). Finally, on August 6, 1998, the House passed House Bill 2183, as amended (the Bipartisan Campaign Reform Act of 1998), by a vote of 252-179. 144 Cong. Rec. H7330 (daily ed. Aug. 6, 1998). The bill was referred to the Senate on September 9, 1998, 144 Cong. Rec. S10,114 (daily ed. Sept. 9, 1998), but was not considered prior to adjournment, *sine die*, on October 21, 1998. As a result, the Bipartisan Campaign Reform Act of 1998 died in the Senate during the 105th Congress.

On January 19, 1999, during the 106th Congress, Representative Shays introduced House Bill 417, the Bipartisan Campaign Reform Act of 1999, which attracted the support of 96 original cosponsors. *See* H.R. 417, 106th Cong. (1999). Upon introduction, the bill was referred to the Committee on House Administration, where it received an unfavorable report. H.R. Rept. 106-297, pt. 1, at 17 (1999). Nonetheless, the proponents of campaign finance reform secured floor consideration through the threat of a discharge petition. *See* David Mark, *Campaign Finance Discharge Petition Off to Fast Start*, Congressional Quarterly Daily Monitor (July 31, 2001). When the Bipartisan Campaign Reform Act of

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[19](...continued)
expeditious consideration of legislation). *Id.* at 152-53. After the Committee of the Whole considers the underlining legislation, generally, the rule governing debate automatically dissolves the Committee of the Whole, and the House of Representatives reconvenes to vote on the underlining bill for final passage.

[20] Beyond making numerous substantive changes to the underling bill, the Shays-Meehan substitute amendment changed the title of the bill from the "Bipartisan Campaign Integrity Act of 1997," 144 Cong. Rec. H3774 (daily ed. May 22, 1998), to the "Bipartisan Campaign Reform Act of 1998," 144 Cong. Rec. H4790-96 (daily ed. June 18, 1998).

1999 reached the floor for a vote, it passed comfortably, by a vote of 252-177. 145 Cong. Rec. H8286 (daily ed. Sept. 14, 1999). On September 16, 1999, the Senate received House Bill 417, and on September 29, the Senate referred it to the Senate Committee on Rules and Administration, 145 Cong. Rec. S11,638 (daily ed. Sept. 29, 1999), where it would remain for the balance of the 106th Congress. The Senate responded to the House's action by considering Senate Bill 1593, also titled the Bipartisan Campaign Reform Act of 1999, which was introduced on September 16, 1999, by Senators McCain and Feingold, shortly after House Bill 417 secured passage. S. 1593; *see also* 145 Cong. Rec. H8286 (daily ed. Sept. 14, 1999). The Senate, however, failed to invoke cloture,[21] thereby failing to limit debate on two separate amendments to Senate Bill 1593, and the bill floundered. 145 Cong. Rec. S12,800 (daily ed. Oct. 19, 1999); *id.* at S12,803. As a result, for the second time in as many years, the campaign finance reform bill died in the Senate.

Circumstances changed during the 107th Congress; this time it was the Senate that

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[21] While debate on the Senate floor does not always lead to an all-out filibuster, on controversial legislation, the Senate typically invokes cloture to end the threat of unlimited debate or simply to gauge support for the underlining bill. *See* Walter J. Oleszek, *Congressional Procedures and the Policy Process* 231-34 (5th ed., CQ Press 2001). Under Rule XXII of the Standing Rules of the Senate, if "three-fifths of the Senators duly chosen and sworn" (60 Senators if the Senate is at its full membership) vote in the affirmative on a motion for cloture, further debate on the question shall be limited to no more than one hour for each Senator, and the time for consideration of the matter shall be limited to 30 additional hours, unless increased by another three-fifths vote. *See* Standing Rules of the Senate, Rule XXII, *available at* http://rules.senate.gov/senaterules/rule22.htm.

acted first and passed campaign finance reform legislation, Senate Bill 27,[22] by a vote of 59-41. 147 Cong. Rec. S3258 (daily ed. Apr. 2, 2001). The bill was then transferred to the House of Representatives.

Representatives Shays and Meehan had already introduced House Bill 380, the Bipartisan Campaign Reform Act of 2001, when the Senate secured passage of Senate Bill 27. *See* H.R. 380, 106th Cong. (1999). On June 28, 2001, in an effort to make their legislation conform with the Senate-passed bill,[23] Representatives Shays and Meehan introduced new legislation, House Bill 2356, also titled the Bipartisan Campaign Reform Act of 2001. The House Leadership, which, through the Speaker of the House, controls access to the House floor,[24] agreed to consider House Bill 2356. However, in a last minute effort

[22] Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. (2001).

[23] Faced with the fact that Senate Bill 27 was unlikely to garner the support of a majority of the House, and given the fact that House Bill 380 differed from Senate Bill 27, Representatives Shays and Meehan met with members of the Senate to work out a compromise bill. The agreement they reached was reflected in House Bill 2356. *See* David Mark & John Cochran, *House Panel to Mark Up Dueling Campaign Finance Bills*, Congressional Quarterly Daily Monitor (June 27, 2001) ("The revisions are designed to encourage the Democratic-controlled Senate to accept a House-passed bill, thus avoiding the need for a conference committee. 'We're trying to pre-conference with supporters of the bill, rather than going to conference with opponents,' Shays said.").

[24] The Speaker of the House picks the 9 majority-party members that serve on the powerful House Committee on Rules – the gateway to the House floor. The Rules Committee writes the rules that govern debate and determines which amendments will be considered. The committee currently consists of 13 members, 9 majority-party members chosen by the Speaker of the House and 4 minority-party members chosen by the House Minority Leader. *See* Walter J. Olsezek, *Congressional Procedures and the Policy Process* 119 (5th ed., CQ Press 2001).

to tweak the legislation, Representatives Shays and Meehan proposed several amendments. John Cochran, *Not Victory but Vitriol for Campaign Finance Bill*, Congressional Quarterly Weekly (July 13, 2001). The package of amendments offered by Shays and Meehan reflected the need for additional changes to ensure that House Bill 2356, if passed by the House, would be considered without amendment by the Senate, thereby eliminating the need for a conference committee.[25] *See id.* In addition, Shays and Meehan requested that the Rules Committee write a rule for consideration and debate on the House floor that would treat this package as a single amendment, which could be considered in one vote. *Id.* The Rules Committee refused, drafting a resolution for consideration and debate that would treat each change, fourteen in total, as separate amendments. *Id.*; *see also* H.R. Res. 188, 107th Cong. (2001). Shays, Meehan, and their supporters opposed the rule, claiming that the House Leadership used "technicalities" to defeat the bill, and called upon their colleagues to reject the rule. 147 Cong. Rec. H3984 (daily ed. July 12, 2001) (statement of Rep. Meehan). The

[25] Members of a conference committee are formally appointed by the Speaker of House and the presiding officer of the Senate. Walter J. Oleszek, *Congressional Procedures and the Policy Process* 252-54 (5th ed., CQ Press 2001). In the House, after initial appointment, the Speaker retains the authority to add and remove members. *Id.* at 254. Although the House rules provide that the Speaker shall "appoint no less than a majority [of conferees] who generally supported the House position [on the legislation] as determined by the Speaker," Rules of the House of Representatives, 108th Cong. (2003) *available at* http://www.house.gov/rules/house_rules.htm, in practice, the Speaker is vested with significant discretion to ensure that the House delegates are amicable to the leadership's position. *See* Walter J. Oleszek, *Congressional Procedures and the Policy Process* 252-54 (5th ed., CQ Press 2001).

House voted and the rule failed.[26] In the aftermath, however, the bill's proponents and the House Leadership were unable to come to an agreement over a compromise rule for the consideration and debate of House Bill 2356, John Cochran, *Not Victory but Vitriol for Campaign Finance Bill*, Congressional Quarterly Weekly (July 13, 2001), and the bill was pulled from the House Floor.

On July 30, 2001, Representative Jim Turner filed a discharge petition to bring House Bill 2356 to the floor for consideration. H.R. Discharge Pet. No. 3, *available at* http://clerkweb.house.gov/107/lrc/pd/Petitions/Dis3.htm. As congressional procedure scholar Walter J. Oleszek noted:

> [t]he discharge procedure, adopted in 1910, provides that if a bill has been before a standing committee for thirty legislative . . . days, any member can introduce a motion to relieve the panel of the measure. . . . If the requisite number of members (218) sign the petition, this procedure permits a majority of the House to bring a bill to the floor even if it is opposed by the committee that has jurisdiction over the measure, the majority leadership, and the Rules Committee.

Walter J. Oleszek, *Congressional Procedures and the Policy Process* 138 (5th ed., CQ Press 2001). While the discharge petition permits a majority of the House to circumvent a stacked committee or the House Leadership, it has not been a highly effective tool for passing legislation, let alone securing its enactment into law. As Walter Oleszek went on to observe:

> Few measures are discharged from committee. From 1931 through 1994

[26] This marked the first occasion in which Speaker J. Dennis Hastert lost a vote on a rule during his first two years as Speaker of the House. Karen Foerstel, *A Bitter Day for the GOP*, Congressional Quarterly Weekly (July 13, 2001).

> (approximately the period during which the modern version of the rule has been in effect), more than five hundred discharge petitions were filed, but only forty-six attracted the required signatures and only nineteen bills were discharged and passed by the House. Of those, only two became law: the Fair Labor Standards Act of 1938 and the Federal Pay Raise Act of 1960.

Id. at 139. Despite this history of failure, on January 24, 2002, Representative Turner's petition attracted 218 signatures, the requisite number to achieve discharge. *See* H.R. Discharge Pet. No. 3. Consequently, the bill was sent to the floor and scheduled for debate. *See* H.R. Res. 203, 107th Cong. (2001); H.R. Res. 344, 107th Cong. (2002); 148 Cong. Rec. H266 (daily ed. Feb. 12, 2002). On February 13, 2002, the House began to consider House Bill 2356. During consideration, the House rejected three substitute amendments – one offered by House Majority Leader Dick Armey[27] and two offered by House Administration Committee Chairman Robert Ney[28] – before agreeing to Representative Shays' substitute amendment by a vote of 240-191, 148 Cong. Rec. H411 (daily ed. Feb. 13, 2002). Like the earlier amendment package, the Shays Substitute was designed to avoid a conference committee, where opponents would have another opportunity to scuttle the bill,[29] by making

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[27] The Armey Substitute, Amendment 415, failed by a vote of 179-249. 148 Cong. Rec. H376-77 (daily ed. Feb. 13, 2002).

[28] The first Ney Substitute, Amendment 416, failed by a vote of 53-377. 148 Cong. Rec. H392 (daily ed. Feb. 13, 2002). The second Ney Substitute, Amendment 430, failed by a vote of 181-248. *Id.* at H464-65.

[29] The process of going to conference creates three additional hurdles to the enactment of legislation. First, the conferees must come to an agreement, and in addition, the Conference Report must pass both the House and the Senate. Moreover, the House and Senate Leadership appoint members to the conference committee and enjoy considerable (continued...)

changes likely to garner the support of a majority of the Senate without forcing them to alter the text of the House-passed bill. *See* 148 Congr. Rec. H402 (daily ed. Feb. 13, 2002) (statement of Rep. Shays) (observing that the Shays substitute amendment was drafted after having "met with Senators from both sides of the aisle to learn what was needed in that bill in order to pass [BCRA]").[30] After considering a series of amendments to the newly amended, underlining bill (House Bill 2356), the House passed BCRA by a vote of 240-189. 148 Cong. Rec. H465-66 (daily ed. Feb. 13, 2002). On March 20, 2002, the Senate followed suit, passing BCRA by a vote of 60-40. 148 Cong. Rec. S2160-61 (daily ed. Mar. 20, 2002).

On March 27, 2002, President George W. Bush signed BCRA into law; the first major overhaul of the Federal Election Campaign Act since the 1974 Amendments and their revision following *Buckley*. Broadly speaking, Title I attempts to regulate political party use of nonfederal funds, while Title II seeks to prohibit labor union and corporate treasury funds from being used to run issue advertisements that have an ostensible federal electioneering purpose.

C. *Procedural History of the Litigation of this Case*

On the morning of March 27, 2002, President Bush signed BCRA into law. Within

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[29](...continued)
discretion over its composition. *See* Walter J. Oleszek *Congressional Procedures and the Policy Process* 252-54 (5th ed., CQ Press 2001); *see also supra* note 25.

[30] The Shays Substitute, Amendment 417, also amended the title of the bill to its present form: the "Bipartisan Campaign Reform Act (BCRA) of 2002." 148 Cong. Rec. H393 (daily ed. Feb. 13, 2002).

hours, Senator McConnell and the National Rifle Association ("NRA") filed complaints challenging the constitutionality of various provisions in BCRA. On April 16, 2003, pursuant to Congress's directive, BCRA § 403(a)(1),[31] those cases were assigned to a district court of three judges consisting of District Court Judge Colleen Kollar-Kotelly, District Court Judge Richard J. Leon, and Circuit Court Judge Karen LeCraft Henderson. A week later, on April 23, 2002, the three-judge court held a status conference, in which it heard the parties' proposals on consolidation, intervention, discovery, and the filing of motions.

The primary issue confronting the Court at the status conference was the scope of discovery required to develop a satisfactory factual record. The defendants, in their pleading, argued that "wide-raging discovery" was necessary "even in the context of a facial challenge, . . . [in order to] look to the record of the case for evidence substantiating the governmental interests asserted in support of legislation said to violate the First Amendment." Def.'s Report in Response to the Court's Order of April 16, 2002, at 9 (quoting *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 664-68 (1994); *Colorado Republican Fed. Campaign Comm. v. FEC ("Colorado I"),* 518 U.S. 604, 618-19 (1996) (plurality opinion)).[32] Mindful that the Supreme Court remanded a First Amendment case to a three-

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[31] BCRA § 403(a)(1) states: "The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code."

[32] The plaintiffs did not disagree that some discovery was necessary:
JUDGE KOLLAR-KOTELLY: So, as I understand it, then, everybody wants to do depositions, everybody wants to do some exchange of expert reports, and everybody
(continued...)

judge district court in *Turner Broadcasting* to "permit the parties to develop a more thorough factual record," 512 U.S. at 668,[33] this Court agreed with the defendants that extensive discovery was necessary[34] to review the evidentiary grounds for BCRA, and in part, to avoid the "disaster" of remand. Status Conference Tr., April 23, 2002, at 51 (statement of James

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[32](...continued)

wants to have some sort of lay statement, affidavits or statements. Is that accurate? . . . If somebody disagrees with that, let me know.

MR. ABRAMS: That's entirely accurate from our point of view, Your Honor.

Status Conference Tr., April 23, 2002, at 13; see also Status Report and Proposed Schedule of Plaintiffs Senator Mitch McConnell et al., April 22, 2002 (stating that their proposed schedule "is designed to ensure that a full record is compiled for submission to this Court, and ultimately to the United States Supreme Court").

[33] At issue in *Turner* was a constitutional challenge to the "must-carry" provisions that required carriage of local broadcast stations on cable systems. The Supreme Court remanded the case to the three-judge district court, explaining that in order to assure that Congress drew "reasonable inferences based on substantial evidence" that a harm truly existed, the Court needed "substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, *or the introduction of some additional evidence.*" *Id.* at 667 (emphasis added). Because of the "paucity of evidence" and "lacking" of findings on the effect of the regulations, the Court could also not undertake the narrow tailoring step: "unless we know the extent to which the must-carry provisions in fact interfere with protected speech, we cannot say whether they suppress 'substantially more speech . . . than necessary' to ensure the viability of broadcast television." *Id.* at 667-68. What followed was "another 18 months of factual development on remand" to the three-judge panel, *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 187 (1997) (citation and internal quotations omitted), and, here, the defendants in this case warned that "[t]he factual inquiry . . . could be on a scale similar to that of *Turner*," Status Conference Tr., April 23, 2002, at 48 (statement of James Gilligan).

[34] This Court recognizes that "we've got to have an adequate factual record." Status Conference Tr., April 23, 2002, at 10 (statement of Judge Henderson).

Gilligan).[35] Notwithstanding Congress's directive "to expedite to the greatest possible extent the disposition of the action and appeal," BCRA § 403(a)(4), it was also clear from the legislative record that Congress did not want this Court to "compromise informed and deliberate judicial decisionmaking in the process." *See* Def.'s Report in Response to the Court's Order of April 16, 2002, at 8. Indeed, Senator Feingold, one of the principal Senate sponsors, explained during the Senate debate:

> Finally, and most importantly, although [Section 403(a)(4)] provides for the expedition of these cases to the greatest possible extent, we do not intend to suggest that the courts should not take the time necessary to develop the factual record . . . This case will be one of the most important that the Court has heard in decades, with ramifications for the future of our political system for years to come. By expediting the case, we in no way want to rush the Court into making its decision without the benefit of a full and adequate record.

147 Cong. Rec. S3189 (March 30, 2001) (statement of Sen. Feingold); *see also id.* at S3189-

[35] In *Colorado I*, the Supreme Court remanded the issue of whether coordinated party expenditures are constitutional, *Colorado I,* 518 U.S. at 623-26; *see also* 2 U.S.C. § 441a(d)(3), and the Tenth Circuit subsequently passed the case on to the district court, stating that

> [T]he issues are too important to be resolved in haste. It seems inevitable that not only this court but the Supreme Court itself will have to address these issues. We will both benefit by the parties fleshing out the record with any evidence they and the district court deem relevant to the issues' resolution.

FEC v. Colorado Republican Fed. Campaign Comm., 96 F.3d 471, 473 (1996). The district court then allowed the parties to conduct discovery for eleven and a half months, significantly longer than our total discovery schedule for many issues of similar complexity. Status Conference Tr., April 23, 2002, at 63 (statement of James Gilligan); *cf. FEC v. Colorado Republican Fed. Campaign Comm.*, 41 F. Supp.2d 1197 (D.Co. 1999); *see also* 213 F.3d. 1221, 1225 (10th Cir. 2000) (stating that the parties "compiled an extensive record").

90 (statement of Sen. Dodd) (supporting the expedition provision, but stating "I do not want to suggest that the Court should not take adequate time to review any such challenge").[36]

Accordingly, the next day, the Court issued a unanimous order outlining a discovery and briefing schedule, which allowed for over five months of discovery and almost an additional month for cross-examination of fact and expert witnesses; set May 7, 2002, as a deadline by which all other actions would be filed; and decided that briefing was to take place between November 4 and November 25, 2002. In a highly unusual accommodation to Congress's request for expedition, the Court set oral arguments to begin on December 4, 2002, just over a week after the parties submitted their final briefs. *See* Scheduling Order of April 24, 2002. By May 10, 2002, 101 parties were involved in the consolidated action, with the eighty-four plaintiffs challenging twenty-three provisions of BCRA.[37] After the

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[36] Judge Henderson maintains that the *Buckley* case was handled with much greater efficiency than the three-judge panel here. Henderson Op. at 6 n.1. In *Buckley v. Valeo*, the lawsuit was filed on January 2, 1975, but a decision was not issued by the D.C. Circuit until seven and a half months later on August 15, 1975. *Buckley*, 519 F.2d at 821, 901. While this case required thirteen months from filing to disposition, the parties also undertook six months of discovery–at least four months of discovery and fact-finding more than that undertaken in *Buckley*. *Id*. at 902-03. That four months of discovery alone accounts for most of the discrepancy in the two expedited, yet complicated, campaign finance cases. Moreover, given the vast record developed through the six months of discovery in this case, it is not surprising that this Court required a few more months than the *Buckley* court to arrive at a decision after the arguments–for only careful consideration of the record before us could reduce the risk of committing clear error in our findings. *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

[37] On May 10, 2002, the Court consolidated all cases that were not consolidated on April 24, 2002, *see* Order, May 10, 2002; Order Consolidating Cases, April 24, 2002, and also permitted Senator John McCain, Senator Russell Feingold, Representative Christopher (continued...)

Court dismissed seven plaintiffs from the suit without prejudice, *see infra* note 55, seventy-seven plaintiffs and seventeen defendants remained. *See id*. (listing all plaintiffs and defendants).

During the discovery process, the parties filed a total of twenty-three motions with the Court, including motions to compel responses to document requests, motions to compel responses to interrogatories, and motions for protective orders. At a hearing on July 25, 2002, the Court heard arguments as to many of the discovery disputes. Thereafter, the Court resolved the disputes with memorandum opinions. *See, e.g.,* Order Denying Federal Election Commission's Motion for Entry of Protective Orders, August 12, 2002; Order Denying in Part and Granting in Part Plaintiffs' Motions to Compel Interrogatory Responses, August 15, 2002; Order Denying Adams Plaintiffs' Motion to Compel Intervenors to Respond to Interrogatories and Produce Documents, September 10, 2002.

On October 7, 2002, the Court ordered the parties to meet and confer and to deliver a proposed format on the briefing and proposed findings of fact. *See* Order, October 7, 2002. In their joint response, the plaintiffs (absent the Adams and Thompson plaintiffs) requested 751 pages, the Adams Plaintiffs requested 115 pages, and the defendants requested 750 pages. *See* Joint Submission in Response to the Court's Order of October 7, 2002. The

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[37](...continued)
Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords to intervene as defendants supporting the constitutionality of BCRA, *see* Order, May 10, 2002.

Court ordered that the plaintiffs, including the Adams and Paul plaintiffs, submit three rounds of briefs not to exceed 840 pages and that the defendants' briefs submit three rounds of briefs (*i.e.*, opening, opposition, and reply) not to exceed 820 pages.[38] The Court also directed the plaintiffs collectively, and the defendants collectively, to each submit proposed findings of fact of no more than 300 pages. Briefing Order, October 15, 2002; Order, October 19, 2002.

On November 25, 2002, a little over a week before oral arguments were scheduled to begin, the parties filed their last round of briefs, bringing the total briefing to 1,676 pages (not including *amicus curiae* briefs). A day later, the parties submitted 576 pages of proposed findings of fact. The evidentiary submissions themselves included forty-one boxes (plus thirteen additional binders), which, by a conservative estimation, comprised the testimony and declarations of over 200 fact and expert witnesses and over 100,000 pages[39] of material.[40] With the record and pleadings before it, the Court commenced oral arguments

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[38] Each side was originally given an aggregate of 820 pages, however, the Court, in an Order dated October 29, 2002, granted the Adams and Thompson Plaintiffs the ability to file their own independent briefing which increased the aggregate page amount for Plaintiffs.

[39] *See* Joint Submission in Response to the Court's Order of October 7, 2002.

[40] The record in this case was described by one advocate during the oral argument as "elephantine." Oral Argument Tr. at 152 (statement of Floyd Abrams); *see also id.* at 279-80. We agree. Both sides should be commended for their extraordinary efforts in gathering and organizing the evidence in such a short period of time. We agree with Seth Waxman, attorney for the Intervenor-Defendants, who urged us to carefully review the record before us:

I think it's very, very important for the court to look carefully at the record. . . . We (continued...)

on December 4, 2002. The Court heard six hours of arguments that day, and three hours of oral arguments the following day, from a total of twenty-four attorneys.[41]

D. *Description of the Specific Provisions in BCRA At Issue in These Lawsuits*

The Court briefly next sets forth the provision of the law that are at issue in the litigation.

1. Title I: Reduction of Special Interest Influence

a. The National Party Soft Money Ban: Section 323(a)

The first provision of Title I involves the addition of a new section to FECA, section 323, entitled "Soft Money Of Political Parties." Section 323(a) states that national party committees (including national congressional campaign committees) "may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and

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[40](...continued)

> have worked, all of us on both sides of this case have worked harder than I ever believed I could be made to work in order to give you this record. . . . I think the ads itself and the reports and affidavits that have been submitted I think are very, very important. I know everybody feels that way.

Id. at 279-80 (statement of Seth Waxman).

[41] We disagree with Judge Henderson's statement that "there was a consensus [at the hearing] that the [Supreme] Court had to receive the case no later than early February." Henderson Op. at 6 n.1. A fair reading of former Solicitor General Waxman's colloquy with Judge Henderson, prompted by her questions, in our judgment, would be that the Supreme Court has the ability to adjust the briefing and oral argument schedule, and has done so in the past, to hear cases exactly such as this one. In short, neither former Solicitor General stated his conclusion in categorical terms, and neither provided an estimate of how long after a hearing the Supreme Court would need to issue its opinion. *See generally* Tr. at 18-20; 277-280.

reporting requirements of this Act." BCRA §101(a); FECA § 323(a)(1); 2 U.S.C. § 441i(a)(1). The law applies to "any . . . national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee." BCRA §101(a); FECA § 323(a)(2); 2 U.S.C. § 441i(a)(2). The clear import of this provision is that national party committees are banned from any involvement with nonfederal money.

b. The State and Local Party Soft Money Ban: Section 323(b)

In summary terms, Section 323(b) provides, that subject to certain exceptions, a State, district, or local committee of a political party may not use nonfederal funds to pay for "Federal election activity." BCRA §101(a); FECA § 323(b); 2 U.S.C. § 441i(b).

In general, section 323(b)(1) prohibits state and local political parties from spending any money not raised in accordance with FECA on "Federal election activity." BCRA §101(a); FECA § 323(b)(1); 2 U.S.C. § 441i(b)(1). Federal election activity is defined by the Act as:

> (i) voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election; (ii) voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot); (iii) a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office

> (regardless of whether the communication expressly advocates a vote for or against a candidate); or (iv) services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

BCRA §101(b); FECA § 301(20)(A); 2 U.S.C. § 431(20)(A). Federal election activity does not include:

> (i) public communication that refers solely to a clearly identified state or local candidate (unless the communication otherwise qualifies as Federal election activity, for instance, as GOTV); (ii) a contribution to a state or local candidate (unless designated to pay for some other kind of Federal election activity); (iii) a state or local political convention; or (iv) grassroots campaign materials (stickers, buttons, etc.) that name only a state or local candidate.

BCRA §101(b); FECA § 301(20)(B); 2 U.S.C. § 431(20)(B).

1) *The Levin Amendment*

Section 323(b)(2)–commonly referred to as the "Levin Amendment"–carves out an exception to the general rule in section 323(b)(1). BCRA §101(a); FECA § 323(b)(2); 2 U.S.C. § 441i(b)(2). Section 323(b)(2) permits state and local parties to use an allocation of nonfederal money ("Levin money" or "Levin funds") for voter registration, voter identification, and GOTV activities provided that certain specified conditions are met. First, the permitted activities may not refer to a clearly identified federal candidate. Second, those activities may not involve any broadcast communication except one that refers solely to a clearly identified state or local candidate. Third, no single donor may donate more than

$10,000 to a state or local party annually for those activities. Finally, all money (federal and Levin money alike) spent on such activities must be "homegrown"–i.e., raised solely by the spending state or local party–and may not be transferred from or raised in conjunction with any national party committee, federal officeholder or candidate, or other state or local party. *See* BCRA §101(a); FECA §§ 323(b)(2)(B), 323(b)(2)(C); 2 U.S.C. §§ 441i(b)(2)(B), 441i(b)(2)(C).

c. Fundraising Costs: Section 323(c)

Section 323(c) requires national, state, and local parties to use federally-regulated funds to raise any money that will be used on "federal election activities," as defined in the statute. BCRA §101(a); FECA § 323(c); 2 U.S.C. § 441i(c).

d. Tax Exempt Organization Soft Money Ban: Section 323(d)

Section 323(d) prohibits any political party committee–national, state, or local–or its agents from "solicit[ing]" funds for or "mak[ing] or direct[ing]" any donations to either: (i) any tax-exempt section 501 organization, *see* 26 U.S.C. § 501(c), that spends any money "in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)"; or (ii) any section 527 organization, *see* 26 U.S.C. § 527, (other than a state or local party or the authorized campaign committee of a candidate for state or local office). BCRA §101(a); FECA §§ 323(d)(1), 323(d)(2); 2 U.S.C. §§ 441i(d)(1), 441i(d)(2). A section 501(c) organization is an organization that is tax exempt as described in that section of the tax code–a good example of which is a charity. A section 527 organization is a political committee that is exempt from taxation. *See* 26 U.S.C. § 527(a) ("A political organization shall be subject to taxation under this subtitle only to the extent provided in this section. A political organization shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes."); *see also* 26 U.S.C. §§ 527(e)(1) and (2) (defining a "political organization" as an organization that is "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for . . . the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice- Presidential electors").

e. <u>Federal Officeholder and Candidate Soft Money Ban: Section 323(e)</u>

Section 323(e) generally prohibits federal officeholders and candidates from soliciting, receiving, directing, transferring, or spending any soft money[42] (i) in connection with a federal election or (ii) in connection with a state or local election. BCRA § 101(a); FECA § 323(e)(1); 2 U.S.C. § 441(e)(1). There are, however, several exceptions to the

[42] If the federal candidate or officeholder is soliciting, receiving, directing, transferring, or spending funds in connection with an election for federal office, the funds must "be subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. § 441(e)(1)(A). However, if the candidate is doing so in connection with a state or local election, then the funds must be "not in excess of the amounts permitted with respect to contributions to candidates and political committees" and "not from sources prohibited by the Act from making contributions in connection with an election for Federal office." 2 U.S.C. § 441(e)(1)(B).

general prohibition in section 323(e). First, a federal officeholder or candidate may solicit money for state and local candidates from sources and in amounts that would be allowed by Federal law. BCRA § 101(a); FECA §§ 323(e)(1)(B)(i), 323(e)(1)(B)(ii); 2 U.S.C. §§ 441i(e)(1)(B)(i), 441i(e)(1)(B)(ii). Second, the federal officeholder or candidate ban on nonfederal funds does not apply to the solicitation, receipt, or spending of funds by an individual who is also a candidate for state or local office solely in connection with such election. BCRA § 101(a); FECA § 323(e)(2); 2 U.S.C. § 441i(e)(2). Third, a federal officeholder or candidate may attend or speak at a fundraising event for a state or local political party. BCRA § 101(a); FECA § 323(e)(3); 2 U.S.C. § 441i(e)(3). Fourth, a federal officeholder or candidate may solicit such funds on behalf of any tax-exempt section 501 organization that spends money in connection with federal elections in either of two instances: (i) he or she may solicit unlimited funds for a section 501 organization whose "principal purpose" is not voter registration, voter identification, or GOTV activity, so long as the solicitation does not specify how the funds will be spent; and (ii) he or she may solicit up to $20,000 per person per year specifically for voter registration, voter identification, or GOTV activity, or for an organization whose "principal purpose" is to conduct any or all of those activities. *See* BCRA § 101(a); FECA §§ 323(e)(4); 2 U.S.C. § 441i(e)(4).

f. <u>State Candidate Soft Money Ban: Section 323(f)</u>

Lastly, Section 323(f) generally prohibits state officeholders or candidates from spending soft money (that is, money not raised pursuant to FECA's regulations) on any public communication that "refers" to a clearly identified candidate for federal office and "promotes," "supports," "attacks," or "opposes" a candidate for that office. BCRA § 101(a); FECA § 323(f); 2 U.S.C. § 441i(f).

2. **Title II: Noncandidate Campaign Expenditures**

a. Definition of Electioneering Communication: Section 201

Section 201[43] of BCRA amends section 304 of FECA by adding the following definition of an "electioneering communication":

> (i) The term "electioneering communication" means any broadcast, cable, or satellite communication which–
>
> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within–
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A).[44] Under this definition, in order to constitute an electioneering communication, therefore, the communication (a) must be disseminated by cable, broadcast, or satellite, (b) must refer to a clearly identified Federal

[43] Section 201 also contains disclosure provisions which are discussed *infra*.

[44] The regulations implementing this definition clarify that the operative event for making an electioneering communication is the "dissemination of the communication, rather than the disbursement of funds related to creating a communication." Electioneering Communications, 67 Fed. Reg. 65190, 65191 (Oct. 23, 2002).

candidate, (c) must be distributed within certain time periods before an election, and (d) must be targeted to the relevant electorate. *Id*. The fact that the communication must be "targeted to the relevant electorate," means that, in the case of House and Senate races, the communication will not constitute an "electioneering communication" unless 50,000 or more individuals in the relevant congressional district or state that the candidate for the House or Senate are seeking to represent can receive the communication. BCRA § 201; FECA § 304(f)(3)(C); 2 U.S.C. § 434(f)(3)(C). For example, if a broadcast advertisement refers to a federal House candidate within 60 days of the general election, but can only be received by 30,000 individuals, it is not an electioneering communication and permissibly could be made with funds from the general treasury of a corporation or labor union.

In the event that a court of competent jurisdiction finds the definition of electioneering communication to be constitutionally infirm, the statute provides a backup definition:

> (ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

BCRA § 201(a); FECA § 304(f)(3)(A)(ii); 2 U.S.C. § 434(f)(3)(A)(ii). With the exception of the final clause, the fallback definition essentially tracks the language found in section 301(20)(A)(iii) of FECA which addresses one of the four activities which fall within the definition of the term Federal Election Activity. BCRA § 101(b); FECA § 301(20)(A)(iii);

2 U.S.C. § 431 (20)(A)(iii).

b. Prohibition of Corporate and Labor Union General Treasury Fund Disbursements for Electioneering Communications: Section 203 Rules Relating to Certain Targeted Electioneering Communications: Section 204

Section 203 of BCRA extends the prohibition on corporate and labor union general treasury funds being used in connection with a federal election to cover electioneering communications. BCRA § 203; FECA § 316(b)(2); 2 U.S.C. § 441b(b)(2) ("[T]he term 'contribution or expenditure' includes a contribution or expenditure, as those terms are defined in [FECA], and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section *or for any applicable electioneering communication*.") (emphasis added). The prohibition on electioneering communications only applies to the general treasury funds of national banks, corporations, and labor unions, or any other person using funds donated by these entities.

Like the original prohibition in section 441b, Section 203 of BCRA, is not an absolute ban on corporate and labor union spending on "electioneering communication." FECA expressly permits corporations and labor unions to create "separate segregated fund[s] to be utilized for political purposes." 2 U.S.C. § 441b(b)(2)(C). These segregated funds are known as political committees under the Act (or PACs). 2 U.S.C. § 431(4)(B) (A political committee is "any separate segregated fund established under the provisions of section

441b(b) of this title."). These segregated accounts are subject to the source and amount limitations contained in FECA. *See, e.g.*, 2 U.S.C. § 441a(a)(1)(C) (providing that no person shall make contributions "to any other political committee in any calendar year which, in the aggregate, exceed $5,000"). To fund the segregated account, a corporation is permitted to solicit contributions from "its stockholders and their families and its executive or administrative personnel and their families." 2 U.S.C. § 441b(b)(4)(A)(i).[45] Likewise, in establishing their segregated funds, labor unions are allowed to solicit contributions to the fund from their members and their families. 2 U.S.C. § 441b(b)(4)(A)(ii). From these accounts, corporations and labor unions are permitted to make contributions to federal candidates and spend unlimited amounts of segregated funds on electioneering communications and independent expenditures, provided that federal funds are used to pay for these activities.

Snowe-Jeffords Provision

BCRA Section 203 provides an exception to certain types of nonprofit corporations from the requirement that corporations, labor unions, and national banks must use separately segregated funds[46] — and not general treasury funds — to pay for electioneering

[45] For membership organizations, cooperatives, or corporations without capital stock, solicitations of the membership are permitted to fund the segregated account. 2 U.S.C. § 441b(b)(4)(C).

[46] As discussed *supra*, FECA section 304(f)(2)(E) refers to a segregated bank account made up of contributions for electioneering communications from United States citizens, nationals, or permanent residents where all the names and addresses of all contributors who (continued...)

communications. However, this exception, commonly known as the "Snowe-Jeffords Provision" after its sponsors, was later, in effect, withdrawn by Section 204, known as the "Wellstone Amendment," *see infra* at 69; *compare* BCRA § 203; FECA § 316(c)(2); 2 U.S.C. § 441b(c)(2) (Snowe-Jeffords Provision) *with* BCRA § 204; FECA § 316(c)(6)(a); 2 U.S.C. § 441b(c)(6)(A) (Wellstone Amendment).

The Snowe-Jeffords Provision permits nonprofit organizations to use their general treasury funds to pay for electioneering communications if they are incorporated under Section 501(c)(4) and/or Section 527(e)(1) of the Internal Revenue Code. This exception for nonprofit corporations is an expansion of the law as it existed prior to BCRA. While FECA did not provide an exception from its separately segregated fund requirement for nonprofit corporations, the Supreme Court in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)("*MCFL*") had provided an as-applied exception for nonprofit corporations which satisfied certain criteria set forth by the Supreme Court.[47] Under BCRA, it is not necessary

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[46](...continued)
contribute an aggregate amount of $1,000 or more to the account is disclosed. Also as discussed *supra*, FECA section 304(f)(2)(F) refers to electioneering communications paid from a general treasury. If an electioneering communication is paid for with general treasury funds under section 304(f)(2)(F), then all contributors of more than $1,000 in a calendar year have to disclose their name and address. Hence, under the Snowe-Jeffords Provision, 501(c)(4) organizations and 527(e)(1) organizations, who are permitted to make electioneering communications with money contributed by individuals, must disclose the names and addresses of those individuals who contributed the funds to pay for the electioneering communication. BCRA § 203; FECA § 316(c)(2); 2 U.S.C. § 441b(c)(2).

[47]That is, 1) whether the corporation is "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; 2) "has no shareholders or other (continued...)

that a nonprofit corporation establish that it has met the three criteria of *MCFL* in order to use its general treasury funds to pay for electioneering communications; instead, it may do so under Snowe-Jeffords simply by virtue of being incorporated under Sections 501(c)(4) or 527(e)(1).

While a nonprofit corporation under Snowe-Jeffords is permitted to use general treasury funds for electioneering communications, it is important to note that these corporations are not permitted to use funds donated by a corporation, labor union, or national bank to purchase them. Under Snowe-Jeffords, a nonprofit corporation may only use funds donated by individuals to pay for electioneering communications. If a nonprofit corporation, for example, has accepted corporate contributions and mixed those contributions with general treasury funds that contained individual donations, the nonprofit corporation would not be permitted to use their general treasury funds to engage in electioneering communications.

Finally, although Snowe-Jeffords exempts nonprofit corporations from the separately segregated fund requirement, they are not similarly exempted from the disclosure requirements set forth in Section 201. Nonprofit corporations, like any other entity engaging in electioneering communications, must make public the names and addresses of all contributors who contributed over $1,000 to the account from which the corporation paid for

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[47](...continued)
persons affiliated," so that members have "no economic disincentive for disassociating with it if they disagree with its political activity; and 3) the corporation "was not established by a business corporation," and has a policy of refusing "contributions from such entities." *MCFL* at 264.

the communications.

The Wellstone Amendment

Despite drafting and including the Snowe-Jeffords' provision in the Act, an amendment offered by Senator Paul Wellstone and adopted by the Senate effectively eviscerates the Snowe-Jeffords' Provision from the Act. The "Wellstone Amendment," codified in section 204 of BCRA states that the exemption created by the Snowe-Jeffords Provision for section 501(c)(4) corporations and section 527(e)(1) corporations is inapplicable "in the case of a targeted communication." BCRA § 204; FECA § 316(c)(6)(A); 2 U.S.C. § 441b(c)(6)(A). The Wellstone Amendment describes a "targeted communication" as "an electioneering communication" that is "distributed from a television or radio broadcast station or provider of cable or satellite television service and, in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate." BCRA § 204; FECA § 316(c)(6)(B); 2 U.S.C. § 441b(c)(6)(B). The direct consequence of the Wellstone Amendment is that organizations organized under section 501(c)(4) and section 527(e)(1) of the Internal Revenue Code, or those entities who have received funds from corporations, are not permitted to use their general treasury funds for electioneering communications.

The Wellstone Amendment was codified in a separate section of BCRA in order to preserve severability: hence, if the Court finds the inclusion of section 501(c)(4) organizations and section 527 organizations within the ban on electioneering communications to be unconstitutional, the Wellstone Amendment can be cleanly struck from the law and the original Snowe-Jeffords exception for these groups will be restored. *See* BCRA § 401 (discussing that BCRA is subject to severability).

* * *

To briefly summarize, section 201 provides two definitions of "electioneering communication," a primary one and a backup definition in the event a court finds the main definition unconstitutional. Section 203, in conjunction with section 204, prohibits corporations and unions from using general treasury funds to pay for an electioneering communication. Corporations and unions need to establish political action committees if they want to engage in electioneering communication.

c. <u>Disclosure of Electioneering Communications: Section 201</u>

Section 201 amends Section 304 of FECA, 2 U.S.C. § 434, by requiring disclosures related to electioneering communications. Section 201's disclosure requirements mandate the reporting of "disbursements" for the "direct costs of producing and airing electioneering communications" aggregating more than $10,000 during any calendar year. BCRA 201(a); FECA § 304(f)(1); 2 U.S.C. § 434(f)(1). The reports must be made to the Commission within 24 hours of each "disclosure date." *Id.* The statute defines "disclosure date" as the first time during the calendar year a person's electioneering communication disbursements exceed $10,000, and each subsequent aggregation of $10,000 in electioneering communication disbursements made in the same calendar year. BCRA § 201(a); FECA §

304(f)(4); 2 U.S.C. § 434(f)(4). "Disbursements" under Section 201 include executed contracts to make disbursements for electioneering communications. BCRA 201(a); FECA § 304(f)(5); 2 U.S.C. § 434(f)(5).[48]

The section requires the reports, made under penalty of perjury, to include the following information:

- the identities of the person making the disbursement, any person sharing or exercising direction or control over that person, and the custodian of the books and accounts of the person making the disbursement;
- the person's principal place of business, if not an individual;
- the amount of each disbursement over $200 during the statement's period and the identity of the person who received the disbursement;
- the elections to which the electioneering communications pertain and the names of the candidates identified in the communications, if known;
- if the disbursements are made from a segregated account funded solely by direct contributions by individuals for the purpose of making electioneering communication disbursements, the names and addresses of all persons who contributed over $1,000 to the account during the calendar year; and
- if the disbursements are made from a different source, the names and addresses

[48] The provision states, "For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement." BCRA 201(a); FECA § 304(f)(5); 2 U.S.C. § 434(f)(5).

of all contributors to that source who contributed over $1,000 during the calendar year.

BCRA 201(a); FECA § 304(f)(2); 2 U.S.C. § 434(f)(2).

d. Coordinated Communications as Contributions: Section 202

Section 202 of BCRA amends Section 315(a)(7) of FECA, 2 U.S.C. 441a(a)(7) by adding the following language:

> if—
> (i) any person makes, or contracts to make, any disbursement for any electioneering communication . . .; and
> (ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee;
> such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party

BCRA § 202; FECA § 315(a)(7)(C); 2 U.S.C. § 441a(a)(7)(C). Section 202 essentially makes clear the import of the definitions of "electioneering communication" and "coordination" in Sections 201 and 214; coordinated electioneering communications constitute contributions.

e. Reporting Requirements for Certain Independent Expenditures: Section 212

Section 212 amends Section 304 of FECA (2 U.S.C. § 434) by adding certain disclosure requirements for independent expenditures.[49] The provision requires persons, including political committees, to report independent expenditures, or contracts to make such expenditures, aggregating $1,000 or more after the twentieth day before the date of an election.[50] BCRA § 212; FECA § 304(g)(1)(A); 2 U.S.C. § 434(g)(1)(A). These reports must be made within 24 hours of making the expenditure or the contract to make the expenditure. *Id.* Such reports must be supplemented within 24 hours of making additional expenditure contracts or expenditures aggregating an additional $1,000 toward the same election. BCRA § 212; FECA § 304(g)(1)(B); 2 U.S.C. § 434(g)(1)(B). For expenditure

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[49] Section 211 defines "independent expenditure" as:

> an expenditure by a person--
> (A) expressly advocating the election or defeat of a clearly identified 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, or a political party committee or its agents.

BCRA § 211; FECA § 301; 2 U.S.C. § 431(17).

[50] The reports must be filed with the FEC and must include "the name of each candidate whom an expenditure is intended to support or oppose," BCRA § 212; FECA § 304; 2 U.S.C. § 434(g)(3)(B), as well as the name and address of each

> person who receives any disbursement during the reporting period in an aggregate amount or value in excess of $200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), in connection with an independent expenditure by the reporting committee, together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate, and a certification, under penalty of perjury, whether such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such committee

2 U.S.C. § 434(b)(6)(B)(iii).

contracts or expenditures made more than twenty days before an election, persons must also file reports but only after the expenditures aggregate to $10,000 or more and they have 48 hours in which to file their disclosure. BCRA § 212; FECA § 304(g)(2)(A); 2 U.S.C. § 434(g)(2)(A). These reports must also be supplemented whenever additional expenditure contracts or expenditures aggregate an additional $10,000 toward the same election. BCRA § 212; FECA § 304(g)(2)(B); 2 U.S.C. § 434(g)(2)(B).

f. Coordination with Candidates or Political Parties: Section 214

The Supreme Court has found treating coordinated expenditures as contributions constitutionally justifiable under the rationale of preventing circumvention. *Buckley*, 424 U.S. at 47 ("[C]ontribution ceilings . . . prevent attempts to circumvent [FECA] through prearranged or coordinated expenditures amounting to disguised contributions."). Section 214 makes changes to FECA's coordinated expenditure regime.

Section 214(a) amends Section 315(a)(7)(B) of FECA, 2 U.S.C. § 441a(a)(7)(B), by adding the following provision:

> (ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee

BCRA § 214(a); FECA § 315(a)(7)(B)(ii); 2 U.S.C. § 441a(a)(7)(B)(ii). This language is virtually identical to that in 2 U.S.C. § 441a(a)(7)(B)(i)[51], passed in 1976 as an amendment

[51] In *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431 (2001) (continued...)

to FECA, which defines expenditures made in coordination with candidates.[52]

Section 214 also repeals the FEC's regulations "on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees," and requires the FEC to promulgate new regulations. BCRA § 214(b), (c). Congress instructed that the new regulations "shall not require agreement or formal collaboration to establish coordination." BCRA § 214(c); 2 U.S.C. § 441a note. Congress also instructed that the regulations should address

> (1) payments for the republication of campaign materials;
> (2) payments for the use of a common vendor;
> (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and
> (4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.

Id.

Lastly, Section 214 amends Section 316(b)(2) of FECA, 2 U.S.C. 441b(b)(2), to include within the meaning of "contributions or expenditures by national banks, corporations, or labor organizations," the definitions of "contribution or expenditure" found in Section 301

[51](...continued)
("*Colorado II*"), the Supreme Court considered the applicability of Section 441a(a)(7)(B)(i) to political party expenditures. Despite the fact that four Justices found the provision overbroad, *Colorado II*, 533 U.S. at 467 (Thomas, J., dissenting), the majority found that Section 441a(a)(7)(B)(i) applied to political party expenditures coordinated with candidates, *id* at 465.

[52] As presently codified, the provision states: "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". 2 U.S.C. § 441a(a)(7)(B)(i).

of FECA, 2 U.S.C. § 431(8), (9). BCRA § 214(d).

3. Title III: Miscellaneous

a. Use of Contributed Amount for Certain Purposes: Section 301

Section 301 sets forth the permitted and prohibited uses of contributions. For example, a candidate can transfer contributions to political parties but cannot convert contributions to personal use. BCRA § 301; FECA § 313; 2 U.S.C. § 439a.

b. "The Millionaire Provisions": Sections 304, 316, & 319

In Sections 304, 316, and 319 of BCRA, Congress allowed opponents of self-financed candidates to raise money in larger increments and, in certain circumstances, to accept unlimited coordinated party expenditures. Specifically, the provisions state that if a self-financed candidate's "opposition personal fund amount"[53] exceeds a threshold amount,[54] then the candidate's opponent can raise funds through increased contribution limits. BCRA § 304(a); FECA § 315(i); 2 U.S.C. § 441a(i); BCRA § 319; FECA § 315A; 2 U.S.C. § 441a-1. Moreover, if the opposition personal fund amount is ten times the threshold amount in Senate

[53]The "opposition personal funds amount" is not simply the amount of personal funds expended by a self-financed candidate. It also takes into account the gross receipts advantage of both candidate's authorized committees so that incumbents with large war chests will not be able to take advantage of the new law unless the self-financed candidate expends an even greater amount of personal funds. BCRA §§ 304(a)(ii); FECA § 315(i)(1)(D); 2 U.S.C. § 441a(i)(1)(D); BCRA § 316; FECA § 315(i)(1)(E); 2 U.S.C. § 441a(i)(1)(E); *see also* BCRA § 319(a); FECA § 315A(a)(2); 2 U.S.C § 441a-1(a)(2).

[54]The threshold amount in Senate races is equal to the sum of $150,000 plus $.04 multiplied by the voting age population in the candidate's state, BCRA § 304(a)(2); FECA § 315(i)(1)(B); 2 U.S.C. § 441a(i)(1)(B), while in House races the threshold amount is simply $350,000. BCRA § 319(a)(1); FECA § 315A(a)(1); 2 U.S.C. § 441a-1(a)(1).

races, or merely exceeds the $350,000 threshold for House races, the self-financed candidate's opponent can also be exempted from limits on coordinated party expenditures imposed by 2 U.S.C. § 441a(d). Any contributions or party expenditures under the increased limits is capped to the amount spent by the self-financed candidate: the enhanced contributions cannot exceed 110% and 100% of the opposition personal funds amount for Senate and House races respectively.

c. Lowest Unit Charged: Section 305

In the 1972 FECA legislation, Congress added the "lowest unit charge" provision to the Communications Act of 1934. The provision states that, for forty-five days before a primary or sixty days before a general election, the broadcast stations have to sell a qualified candidate the "lowest unit charge of the station for the same class and amount of time for the same period." 47 U.S.C. 315(b)(1). BCRA Section 305, however, denies a candidate the lowest unit charge for broadcast advertisements on radio and television unless the candidate "provides written certification to the broadcast station that the candidate (and any authorized committee of the candidate) shall not make any direct reference to another candidate for the same office" in any broadcast. BCRA § 305; FECA § 315(b); 47 U.S.C. § 315(b). The candidate can be exempted from this provision, and thus be eligible for the lowest unit charge without such a promise, if the candidate clearly identifies himself at the end of the broadcast and states that he approves of the broadcast. In a television broadcast, this message must include the candidate's image for at least four seconds. *Id.*

d. Increased Limits for Contributions and Indexing of Limits: Section 307

Section 307(a)(1) increases the amount individuals can contribute to candidates per election from \$1000 to \$2000. BCRA § 307(a)(1); FECA § 315(a)(1)(A); 2 U.S.C. § 441a(a)(1)(A). It also changes the aggregate amount of contributions a donor can give to candidates and political committees (including parties) from \$25,000 in a calendar year to \$37,500 in a two-year period to candidates and \$57,500 in a two-year period to political committees. BCRA § 307(b); FECA § 315(a)(3)(A); 2 U.S.C. § 441a(3)(A). Congress also increased the limits to a national party committee by \$5,000 and doubled the amount of money individuals can donate to a state party committee, so that individuals may now contribute no more than \$25,000 per calendar year to a national party committee, no more than \$10,000 per calendar year to a state committee, and no more than \$5,000 per calendar year to a local committee. BCRA §§ 102, 307(a)(2); FECA § 315(a)(1)(B), (D); 2 U.S.C. 441a(a)(1)(B), 441a(a)(1)(C), 441a(a)(1)(D). Finally, Congress also indexed all contributions for inflation, except for limits on contributions to state and local party committees. BCRA § 307(d); 2 U.S.C. § 441a(c).

e. Identification of Sponsors: Section 311

Section 311 requires that "whenever any person . . . makes a disbursement for an electioneering communication," the communication, if it was authorized by a candidate or the candidate's political committee, must clearly identify the candidate or the candidate's political committee. If the communication was not authorized by the candidate or the candidate's political committee, then the communication "shall clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee." BCRA § 311; FECA § 318(a)(3); 2 U.S.C. § 441d(a)(3).

f. Prohibition of Donations by Minors: Section 318

In Section 318, Congress prohibited minors, defined as any children under eighteen years of age, from making donations, regardless of the amount, to candidates or political parties. BCRA § 318; FECA § 324; 2 U.S.C. § 441k.

4. Title V: Additional Disclosure Provisions

a. Public Access to Broadcasting Records: Section 504

In Section 504, Congress requires broadcast licensees to collect and disclose records of any "request to purchase broadcast time" that "is made by or on behalf of a legally qualified candidate for public office" or that relates "to any political matter of national importance," including communications relating to "a legally qualified candidate," "any election to Federal office," and "a national legislative issue of public importance." BCRA § 504; FECA § 315(e)(1); 47 U.S.C. § 315(e)(1). The record must include whether the request to purchase was accepted or rejected; the rate charged for the broadcast; the date and time on which the communication aired; the class of time that is purchased; the name of the candidate to which the communication refers and the office to which the candidate is seeking election, the election to which the communication refers, or the issue to which the communication refers; in the case of a request on behalf of a candidate, the name of the candidate, the authorized committee, and the treasurer of the committee; and in the case of any other request, the name of the person purchasing the time, the name and contact information for such person, and a list of chief executive officers or members of the executive committee or board of directors. *Id.*

III. FINDINGS OF FACT

The Findings of Fact include a description of the identities of the parties and include findings related to the disclosure provisions included in this *per curiam* opinion.

A. *Parties to the Litigation*[55]

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[55] As of the May 7, 2002, deadline for amendment of pleadings, intervention or joinder of additional parties and consolidation of additional cases, *see* Scheduling Order of 4/24/02, 84 plaintiffs were parties to the consolidated actions. Since then, seven plaintiffs–the Alabama Republican Executive Committee, Martine J. Connors, the Jefferson County Republican Executive Committee, the Christian Coalition of America, Inc., the Libertarian Party of Illinois, Inc., the DuPage Political Action Council, Inc., and the National Association of Wholesaler-Distributors–have been dismissed from the suit without prejudice. *See generally* Orders of 8/15/02, 9/13/02, 9/18/02, and 9/30/02 Dismissing Pls. Without Prejudice.

Remaining in the suit are 77 plaintiffs in 11 actions: in No. 02-CV-0582 are Senator Mitch McConnell, Representative Bob Barr, Representative Mike Pence, Alabama Attorney General William H. Pryor, the Libertarian National Committee, Inc., the American Civil Liberties Union, Associated Builders and Contractors, Inc., Associated Builders and Contractors Political Action Committee, the Center for Individual Freedom, Club for Growth, Inc., Indiana Family Institute, Inc., the National Right to Life Committee, Inc., National Right to Life Educational Trust Fund, National Right to Life Political Action Committee, the National Right to Work Committee, 60 Plus Association, Inc., Southeastern Legal Foundation, Inc., U.S. d/b/a ProEnglish, Thomas McInerney, Barret Austin O'Brock
(continued...)

[55](...continued)
and Trevor M. Southerland (collectively, the *McConnell* plaintiffs); in No. 02-CV-0581 are the NRA and National Rifle Association Political Victory Fund (collectively, the *NRA* plaintiffs); in No. 02-CV-0633 are Emily Echols, Hannah McDow, Isaac McDow, Jessica Mitchell, Daniel Solid and Zachary C. White (collectively, the *Echols* plaintiffs); in No. 02-CV-0751 are the Chamber of Commerce of the United States, the National Association of Manufacturers, National Association of Wholesaler-Distributors, and U.S. Chamber Political Action Committee (collectively, the *Chamber of Commerce* plaintiffs); in No. 02-CV-0753 is the National Association of Broadcasters; in No. 02-CV-0754 are the American Federation of Labor and Congress of Industrial Organizations and AFL-CIO Committee on Political Education Political Contributions Committee (collectively, the *AFL-CIO* plaintiffs); in No. 02-CV-0781 are Congressman Ron Paul, Gun Owners of America, Inc., Gun Owners of America Political Victory Fund, RealCampaignReform.org, Citizens United, Citizens United Political Victory Fund, Michael Cloud and Carla Howell (collectively, the *Paul* plaintiffs); in No. 02-CV-0874 are the Republican National Committee, Mike Duncan, Republican Party of Colorado, Republican Party of Ohio, Republican Party of New Mexico, and Dallas County (Iowa), Republican Central Committee (collectively, the *RNC* plaintiffs); in No. 02-CV-0875 are the California Democratic Party, Art Torres, Yolo County Democratic Central Committee, California Republican Party, Shawn Steel, Timothy J. Morgan, Barbara Alby, Santa Cruz County Republican Central Committee, and Douglas R. Boyd, Sr., (collectively, the *CDP* plaintiffs); in No. 02-CV-0877 are Victoria Jackson Gray Adams, Carrie Bolton, Cynthia Brown, Derek Cressman, Victoria Fitzgerald, Anurada Joshi, Nancy Russell, Kate Seely-Kirk, Peter Kostmayer, Rose Taylor, Stephanie L. Wilson, California Public Interest Research Group, Massachusetts Public Interest Research Group, New Jersey Public Interest Research Group, United States Public Interest Research Group, the Fannie Lou Hamer Project, and Association of Community Organizers for Reform Now (collectively, the *Adams* plaintiffs); and in No. 02-CV-0881 are Representative Bennie G. Thompson and Representative Earl F. Hilliard (collectively, the *Thompson* plaintiffs).

The 17 defendants in these consolidated actions are the Federal Election Commission; the United States of America; the United States Department of Justice; the Federal Communications Commission; John Ashcroft, in his official capacity as Attorney General of the United States of America; David M. Mason, Karl J. Sandstrom, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas and Michael E. Toner, in their official capacities as Commissioners of the FEC; and Senators John McCain, Russell Feingold, Olympia Snowe and James Jeffords and Representatives Christopher Shays and Martin Meehan (collectively, the Intervenors), as intervening defendants.

The Court finds it unnecessary to make findings with respect to all 77 Plaintiffs and (continued...)

1. Senator Mitch McConnell is the senior United States Senator from the Commonwealth of Kentucky and is a member of the Republican Party. McConnell Aff. ¶ 1. He has long been active in the Republican Party at the national, state and local levels. *Id*. ¶ 2. Senator McConnell was first elected in 1984, was reelected in 1990, 1996, and was a candidate for election in 2002. *Id*. ¶ 7.

2. William H. Pryor, Jr. is Alabama Attorney General and was a candidate for reelection as Alabama Attorney General in 2002. Pryor Decl. ¶ 2.

3. The Libertarian National Committee, Inc. ("LNC") is the governing body of the Libertarian Party at the national level. Dasbach Decl. ¶ 4. The LNC is a non-profit corporation incorporated in the District of Columbia and governed by section 527 of the Internal Revenue Code. *Id*. The LNC represents and advocates the principle that all individuals have the right to live in whatever manner they choose so long as they do not forcibly interfere with the right of others to do the same. *Id*.

4. The American Civil Liberties Union ("ACLU") is a tax-exempt corporation incorporated in the District of Columbia and is governed by section 501(c)(4) of the Internal Revenue Code. Romero Decl. ¶ 1. The ACLU is a nationwide, non-profit, non-partisan organization with approximately 300,000 members "dedicated to the principles of liberty and equality embodied in the Constitution." *Id*.

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[55](...continued)
17 Defendants in these actions and therefore the Findings of Fact reflect the primary parties in this litigation.

5. Associated Builders and Contractors, Inc. ("ABC") is a non-profit tax-exempt organization governed by section 501(c)(6) of the Internal Revenue code, incorporated in Maryland, and is funded primarily by membership dues. Monroe Direct Test. ¶ 3. It is a national trade association representing more than 23,000 contractors and related firms in the construction industry. *Id.* ABC's members, which include both unionized and non-union employers, "share the philosophy that construction work should be awarded and performed on the basis of merit, regardless of labor affiliation." *Id.*

6. Associated Builders and Contractors Political Action Committee ("ABC PAC") is a connected political committee governed by 2 U.S.C. § 431(4) and section 527 of the Internal Revenue Code and is a separate segregated fund of ABC pursuant to 2 U.S.C. §441b(b). *Id.* ¶ 22. ABC PAC makes contributions to federal candidates who support the principles of ABC and funds independent expenditures for communications on their behalf. *Id.*

7. The Club for Growth, Inc. ("The Club") is a nationwide membership organization dedicated to advancing public policies that promote economic growth. Keating Decl. ¶ 5. The Club is a Virginia corporation organized under section 527 of the Internal Revenue Code. McConnell Second Am. Compl. ¶ 29. The Club "is dedicated to promoting the election of pro-growth, pro-freedom candidates through the bundling of political contributions and issue advocacy campaigns." Keating Decl. ¶ 6. The

Club for Growth advocates tax rate reduction, fundamental tax reform, tax simplification, capital gains tax reduction, estate tax repeal, overall reduction in government spending, school choice, and personal investment of Social Security. *Id.* ¶ 5.

8. The National Right to Life Committee ("NRLC") is a tax-exempt corporation incorporated in the District of Columbia and is governed by section 501(c)(4) of the Internal Revenue Code. O'Steen Decl. ¶ 4. The NRLC is a nationwide, non-profit, non-partisan organization with approximately 3,000 local chapters and fifty state affiliates dedicated to "promoting respect for the worth and dignity of all human life from conception to natural death." *Id.* ¶¶ 5, 3.

9. The National Right to Life Educational Trust Fund ("NRL-ETF") is an organization governed by section 501(c)(3) of the Internal Revenue code. *Id.* ¶ 16. NRL-ETF sponsors educational advertising and develops materials detailing "fetal development, abortion's impact on America, and the threat of euthanasia." *Id.* ¶ 17.

10. The National Right to Life Political Action Committee ("NRL PAC"), organized in 1979, is an internal § 527 fund of NRLC that is registered with the FEC as a PAC subject to FECA. O'Steen Decl. ¶ 24.

11. Thomas E. McInerney is a U.S. citizen, a registered voter in the State of New York and a member of and contributor to various Republican Party organizations and committees at the national, state and local levels. McInerney Aff. ¶ 1.

12. Barret Austin O'Brock is a U.S. citizen and a resident of the State of Louisiana. O'Brock Decl. ¶ 1. He is fourteen years of age and intends to make contributions to federal candidates in future elections, including the 2004 election. *Id.* ¶¶ 2-3.

13. The National Rifle Association ("NRA") is a tax-exempt corporation governed by section 501(c)(4) of the Internal Revenue Code and incorporated in the State of New York. NRA Compl. ¶ 8. The primary purpose of the NRA is to preserve and protect the Second Amendment's guarantee that individuals shall have the right to "keep and bear arms." LaPierre Decl. ¶ 2. In addition, the NRA promotes public firearm safety, trains law enforcement agencies in the use of firearms, sponsors shooting competitions, and advances hunter safety. *Id.* The NRA has approximately four million members and represents their views on legislative and public policy issues before federal, state and local officials and the general public. NRA Compl. ¶ 8.

14. The National Rifle Association Political Victory Fund ("NRA PVF") is a connected political committee governed by 2 U.S.C. § 431(4) and section 527(e)(1) of the Internal Revenue Code and is a separate segregated fund of the NRA pursuant to 2 U.S.C. § 441b(b). NRA Compl. ¶ 9.

13. Emily Echols, Hannah and Isaac McDow, Zachary White, Daniel Solid and Jessica Mitchell are U.S. citizens who range in age from twelve to sixteen. Echols Pls.' Proposed Findings of Fact ¶ 45. They intend to seek out and contribute to federal candidates "who represent their views and beliefs on important questions like the right

to life of children before birth, and on the size of government." *Id*. ¶ 44.

14. The Chamber of Commerce ("The Chamber") is a tax-exempt corporation governed by section 501(c)(6) of the Internal Revenue Code. Josten Direct Trial Test. ¶ 3. The Chamber is the world's largest not-for-profit business federation, representing over 3,000,000 businesses and business associations. *Id*.

15. The U.S. Chamber Political Action Committee ("U.S. Chamber PAC") is a connected political committee organized under section 527(e)(1) of the Internal Revenue Code and is registered with the FEC. Josten Direct Trial Test. ¶ 26. U.S. Chamber PAC is funded by contributions voluntarily made by individual Chamber of Commerce executives, administrative employees, members and their families. *Id*. ¶ 27.

16. The National Association of Manufacturers ("NAM") is a tax-exempt corporation governed by section 501(c)(6) of the Internal Revenue Code and is the oldest and largest broad-based industrial trade association in the United States. Huard Direct Trial Test. ¶ 2. Its membership comprises 14,000 companies and 350 member associations. *Id*.

17. The National Association of Broadcasters ("NAB") is a non-profit corporation that serves as a trade association of radio and television stations and broadcasting networks in the United States. Goodman Decl. ¶ 3. NAB serves and represents the American broadcasting industry, composed of approximately 7,300 member stations. *Id*. All of NAB's voting members are broadcast licensees within the meaning of the

Communications Act. *Id*.

18. The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a national labor federation comprised of 66 national and international labor unions that, collectively, have a total of approximately 13 million members. G. Shea Decl. ¶ 3. The AFL-CIO is a tax-exempt organization under Section 501(c)(5) of the Internal Revenue Code. *Id*. The AFL-CIO also includes 51 state labor federations, nearly 580 area and central labor councils and numerous trade and industrial departments. *Id*. ¶¶ 6,7, 9. One of the four major missions of the AFL-CIO is to provide "an effective political voice to workers on public issues that affect their lives." *Id*. ¶ 4b.

19. Congressman Ron Paul is a Member of the United States House of Representatives from the Fourteenth Congressional District of Texas and is a member of the Republican Party. Paul Decl. ¶ 1. He was first elected to represent the Fourteenth Congressional District of Texas in 1996, *id.*, and also served as a Member of the House of Representatives for the Twenty-Second Congressional District of Texas, first elected in 1976 and to successive terms until 1984, *id.* ¶ 2. Congressman Paul is a registered voter in the state of Texas, a donor to the campaigns of candidates for federal office, and a fundraiser and recipient of campaign contributions. Paul Pls.' Compl. ¶ 11. He will face reelection in 2004. Paul Decl. ¶ 1.

20. Gun Owners of America, Inc. is a not-for-profit, tax-exempt corporation governed by

section 501(c)(4) of the Internal Revenue Code. Pratt Decl. ¶ 2. It is dedicated primarily to defending the rights that its members believe are guaranteed by the Second Amendment to the Constitution; its principal function is the dissemination of information concerning such rights through educational programs and advocacy. *Id.* ¶ 3.

21. Gun Owners of America Political Victory Fund is a connected political committee governed by 2 U.S.C. § 431 and is a separate segregated fund of Gun Owners of America. *Id.* ¶ 4.

22. RealCampaignFinance.Org is a not-for-profit, tax exempt corporation governed by section 501(c)(4) of the Internal Revenue Code. Babka Decl. ¶ 2. It is dedicated to defending the campaign and election-related rights its members believe are guaranteed by the First Amendment to the Constitution through educational programs and advocacy. *Id.* ¶ 3.

23. Citizens United is a not-for-profit, tax exempt corporation governed by section 501(c)(4) of the Internal Revenue Code. Bossie Decl. ¶ 2. It is dedicated to the principles of limited government and national sovereignty and to defending the rights its members believe are secured in the United States Constitution; its principal function is the dissemination of information concerning such beliefs and advocacy. *Id.* ¶ 3.

24. Citizens United Political Victory Fund is a connected political committee governed

by 2 U.S.C. § 431 and is a separate segregated fund of Citizens United. *Id.* ¶ 4.

25. Michael Cloud was the Libertarian Party's candidate for United States Senate from the Commonwealth of Massachusetts in the 2002 election and is a registered voter. Cloud Decl. ¶ 1.

26. Carla Howell was the Libertarian Party's candidate for Governor of the Commonwealth of Massachusetts in the 2002 election and is a registered voter. Howell Decl. ¶¶ 1-2. She was also the Libertarian Party's candidate for election to the United States Senate for the Commonwealth of Massachusetts in the 2000 election. *Id.* ¶¶ 2-3.

27. The Republican National Committee ('RNC") is an unincorporated association created and governed by The Rules of te Republican Party. Josefiak Decl. ¶ 13. It consists of three members from the Republican Party in each of the fifty States, the District of Columbia, Puerto Rico, American Somoa, Guam, and the U.S. Virgin Islands. Duncan Decl. ¶ 4; *see also* Josefiak Decl. ¶ 15. Each state and territorial Republican Party elects a national committeeman and a national committeewoman. Duncan Decl. ¶ 4; Josefiak Decl. ¶ 15. In addition, the state and territorial Republican Party chairmen serve as members of the RNC. Duncan Decl. at ¶ 4; Josefiak Decl. ¶ 15.

28. Mike Duncan is a member of the RNC from the State of Kentucky and currently serves as the General Counsel of the RNC. Duncan Decl. ¶ 5. Prior to becoming

General Counsel, he was Treasurer of the RNC and in that capacity signed all RNC reports filed with the FEC. *See id.* In both his official capacity as an officer of the RNC and in his personal capacity, Duncan has participated in and (unless prohibited by BCRA) will continue to participate in national, state and local political party activities. *Id.* ¶¶ 6, 9. He will also (unless prohibited by BCRA) continue to solicit, receive, or direct non-federal funds to other persons. *See id.* ¶¶ 8-9.

29. The Republican Party of New Mexico is the state party committee of the Republican Party in New Mexico. *See* Dendahl Decl. ¶¶ 3-4. It supports federal, state and local candidates for office in New Mexico and promotes Republican positions on public policy issues. *Id.* Under New Mexico law, the Republican Party of New Mexico is permitted to raise and spend corporate, labor union and individual funds in unlimited amounts in support of state and local candidates. *See* N.M. Stat. Ann. §§ 1-19-25 to 1-19-36 (1978); Dendahl Decl. ¶¶ 5-7.

30. The Dallas County (Iowa) Republican County Central Committee is a local political party committee that the FEC has deemed independent of any state or national political party committee. Josefiak Decl. ¶ 21. It is actively involved in supporting state and local candidates for office in Iowa. *Id.*

31. The California Democratic Party ("CDP") is an unincorporated association of approximately seven million members and is the authorized Democratic Party of the State of California. Bowler Decl. ¶ 2. The CDP performs many functions, among

them providing financial and material support to federal, state and local candidates; taking positions on public issues (including state and local ballot measures) and publicizing those positions; engaging in voter registration, get-out-the-vote and generic party-building activities; and maintaining an administrative staff and administrative structure to support these goals and activities and to comply with extensive federal and state regulation. *Id.* The CDP is required by state law to govern itself through the Democratic State Central Committee (DSCC). *Id.* ¶ 3. The DSCC is made up of approximately 2,710 members, about 849 of whom are elected by the 58 county central committees. *Id.* Other members serve on the DSCC because of their status as federal or state officials, as nominees of the CDP, as members of the Democratic National Committee (DNC) from California or as elected representatives of 80 Assembly District Committees (AD Committees). *Id.* CDP bylaws provide for local party AD Committees, which elect delegates to the DSCC and are the district-level organizational blocks of the CDP. *Id.* ¶ 4. The AD Committees are primarily involved in local voter registration, get-out-the- vote and grassroots activities and they act as liaisons with the campaign organizations of Democratic candidates in their area. *Id.*

32. Art Torres is the elected Chair of the CDP. Torres Decl. ¶ 1. Torres also serves on the DNC and has been elected by the DNC to serve on the DNC Executive Committee. *Id.* ¶ 3. As Chair of the CDP, Torres assists the CDP and county central

committees in fundraising efforts by meeting and talking regularly with potential donors and attending fundraising events. *Id.* ¶ 2; *see also* Bowler Decl. ¶ 5

33. The Yolo County Democratic Central Committee is one of the 58 county central committees authorized and governed by the California Elections Code. CDP Pls.' Compl. ¶ 11; *see also* Bowler Decl. ¶¶ 3-4. Members of the county central committees are elected at each statewide primary election. Bowler Decl. ¶ 4. All members of the CDP who are also state senators, members of the state assembly or Members of the Congress serve as *ex officio* members of their respective county central committees. *Id.* The county central committees are primarily involved in local voter registration, get-out-the-vote and grassroots activities and act as liaisons with the campaign organizations of Democratic candidates in their area. *Id.*

34. The California Republican Party ("CRP") is an association of over five million members and is the authorized Republican Party of the State of California. Morgan Aff. ¶¶ 3-4. The CRP performs many functions, among them providing financial and material support to federal, state and local candidates; taking positions on public issues (including state and local ballot measures) and publicizing those positions; engaging in voter registration, get-out-the-vote and generic party-building activities; and maintaining an administrative staff and administrative structure to support these goals and activities and to comply with extensive federal and state regulation. *Id.* ¶ 4. The CRP is governed by the Republican State Central Committee (RSCC). *Id.* ¶

5. The RSCC consists of about 1,500 regular and appointive members. *Id.* The regular members include federal and state officeholders as well as the CRP's nominees for governor, seven other state constitutional offices, United States Senate, 52 congressional districts, 40 state senate districts, 80 state assembly districts and four State Board of Equalization districts. *Id.* The RSCC also includes the chairmen of the 58 county central committees and the chairmen of volunteer party organizations. *Id.* ¶ 6. The CRP operates as well through (1) a 100-member Executive Committee, which includes federal and state office holders and 16 representatives of county central committees; and (2) a 25-member Board of Directors, which includes a Member of Congress appointed by the delegation, three state elected officeholders and representatives from an association of Republican county central committee chairmen. *Id.* Under the CRP's bylaws and the RNC's rules, the CRP is part of the RNC. *Id.* ¶ 8. The CRP's elected chairman is a member of the RNC. *Id.* The CRP elects two other representatives to the RNC – a national committeeman and national committeewoman, each of whom is a member of the CRP Executive Committee and Board of Directors. *Id.*

35. Timothy J. Morgan is (1) a member of the RNC; (2) a member of the CRP Executive Committee; and (3) a member of the CRP Board of Directors; he also served as (4) Chairman of the Santa Cruz County Republican Central Committee. Morgan Aff. ¶ 1.

36. The Santa Cruz County Republican Central Committee is one of the 58 county central committees authorized and governed by the California Elections Code. CDP Pls.' Compl. ¶ 19; *see also* Morgan Aff. ¶ 6. Federal officials and candidates who were nominated as party nominees for partisan offices, including State constitutional and legislative offices, the Board of Equalization, and federal offices, including nominees for U.S. Senate and U.S. House of Representatives who represent all or a portion of the area within the county's jurisdiction are *ex officio* members of the Republican county central committee, and participate in its decision-making, either personally or through designated alternates or agents. *Id*.

37. The Federal Election Commission ("FEC") is a government agency headquartered in Washington, D.C., created pursuant to FECA, 2 U.S.C. § 437(c), and is charged with enforcing the Act as amended by BCRA. David M. Mason, Karl J. Sandstrom, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas, and Michael E. Toner serve as the commissioners of the FEC.

38. The United States, through the Department of Justice ("DOJ"), is charged with enforcement of the criminal provisions of the Act as amended by BCRA, and has an interest in defending the constitutionality of duly enacted laws of the Nation. United States Mot. to Intervene at 5. John Ashcroft is Attorney General of the United States.

39. The Federal Communications Commission ("FCC") is a government agency headquartered in Washington, D.C., and is charged with enforcing the FECA as

amended by BCRA.

40. The intervenors are Members of the Congress who were principal sponsors and authors of BCRA. Senator John McCain is a Republican United States Senator from the State of Arizona. Senator Russell Feingold is a Democratic United States Senator from the State of Wisconsin. Senators McCain and Feingold face reelection in 2004. Senator Olympia Snowe is a Republican United States Senator from the State of Maine. Senator James Jeffords is an Independent United States Senator from the State of Vermont. Senators Snowe and Jeffords face reelection in 2006. Congressman Christopher Shays is a Republican member of the House of Representatives from the Fourth Congressional District in Connecticut. Congressman Martin Meehan is a Democratic member of the House of Representatives from the Fifth Congressional District in Massachusetts.

B. ***Findings Regarding BCRA's Disclosure Provisions***

41. The NRA presents evidence that some people have been reluctant to give money to the organization or the NRA PVF, the NRA's PAC, fearing that such contributions would be publicly reported. LaPierre Decl. ¶ 62 [NRA App. at 24-25] ("Throughout the years, hundreds, if not thousands, of NRA members have told me that they do not wish to disclose their contributions to the NRA. . . . If . . . members are forced to disclose their identities, I firmly believe that many will not make contributions that trigger such disclosure."); Adkins Decl. ¶¶ 4-6 [NRA App. at 50] ("A conspicuous

and disproportionate number of contributors" to the NRA PVF "contribute just below the $200 disclosure level."). Members who have expressed their desire to keep their contributions confidential have provided a variety of reasons. LaPierre Dep. at 306 ("A lot over the years have said, I donate to you, but gee, I just don't want my neighbors to know. I don't want my school board to know. I don't want my employer to know. . . . I might lose my job. I might not get my school board thing. I might have – I mean, they fear– I mean, when you have as much hate as people have put out on this issue, it's natural for people to fear repercussions."); Adkins Dep. at 15-19 (testifying that notes received from individuals refusing to provide information for disclosure to the FEC did not give the reasons for their objections, or just stated they did not wish to have the information disclosed to the FEC); *id*. at 21-23 (testifying that she had received 3 telephone calls in the previous five or six years from individuals who feared their employer would find out that they donated to the NRA PVF). The NRA does not know the amount those who did protest disclosure gave to the organization. LaPierre Dep at 309; LaPierre Cross at 91; Adkins Dep. at 23. Of the between five and 50 persons estimated to have voiced disclosure concerns to LaPierre in 2000, LaPierre believes "not a lot" of those persons gave the NRA more than $1,000 in 2000 "[b]ecause we don't . . . get a lot of contributions more than $1,000." LaPierre Dep. at 306-309. The average NRA donor donates approximately $30 per year. LaPierre Cross at 92. Beginning in 2003, the NRA's policy is to "pay for [their] television and broadcast programming exclusively out of funds provided by individual members." *Id*. at 93. Mr. LaPierre states that "NRA's position . . . . is that . . . it ought to be disclosed who is running those ads [run with funds from anonymous donors]. . . . [a]nd who pays for the ads." LaPierre Dep. at 294-95 [JDT Vol. 14].

42. Edward Monroe, Director of Political Affairs for the Associated Builders and Contractors ("ABC") and the Treasurer of ABC's PAC, testifies that he had been told that a number of ABC contributors had suffered substantial vandalism after their names were disclosed and that the contributors believed the vandalism was the result of labor unions learning of their contributions. Monroe Cross at 86. He also testified that two corporations refused his solicitations due to their "policy of not supporting [ABC] based on previous incidents. . . . [T]hey did not elaborate." *Id*. at 87. Some contributors to ABC's PAC "specifically donate" less than $200. *Id*. at 88. Monroe believes this practice is the result of the contributors' desire to prevent public disclosure of the contributors' names. *Id*. Two corporations declined Mr. Monroe's solicitations because of "previous incidents," but did not elaborate. *Id*. at 87. Monroe also "believe[s]" that some companies do not contribute because they "do not trust [ABC's] ability to keep . . . information confidential." *Id*. at 89.

43. Stephen Sandherr, Chief Executive Officer of Associated General Contractors of America ("AGC"), testifies in a deposition that between a dozen and two dozen

members had expressed concerns to him about their contributions being publicly disclosed. Sandherr Dep. at 43-44. He believes that the number of members who share this concern is much higher but, because the AGC has made an effort to publicize the fact they do not disclose the names of contributors, concerned members do not feel the need to bring the issue up. *Id*. These members expressed two reasons for concern. Some were concerned that if their contributions were made known, "their local building trades would take offense and would threaten actions on the job site or would threaten to make life miserable for them." *Id*. at 45. Others were concerned that if their union became aware of their contribution, they would "cease bargaining over industry advancement funds," that local chapters depend on to support their activities. *Id*. at 46. The non-unionized members who expressed their concerns about disclosure to Sandherr did not express their reasons for wanting to remain anonymous. *Id*. at 48. No contributor to AGC's PAC ever told Sandherr that they planned to contribute less than $200 in order to prevent disclosure of its identity, and no contributor to the AGC's PAC ever reported being subjected to retaliation from unions for giving money to the PAC. *Id*. at 55-56.

44. Bruce Josten, Executive Vice President for Government Affairs, U.S. Chamber of Commerce, gave deposition testimony that some contributors to "Americans Working for a Real Change," a coalition established to respond to AFL-CIO issue advertisements, did not want to be publicly identified. Josten Dep. at 13-14, 27. The

reason these entities gave for not wanting to be identified was that they feared becoming "targets or recipients of corporate campaigns or other types of what some would call union harassment activities." *Id.* at 28.

45. Mr. Romero, the ACLU's legislative director, attests that "[m]any ACLU members and contributors request explicit assurances that their membership will remain confidential and that their contributions will remain anonymous. The ACLU has consistently defended the First Amendment right of its members and donors to remain anonymous if they so choose." Declaration of A. Romero ¶ 5. Mr. Romero notes that "[o]nly 212 individuals contributed more than $1,000 to the organization. *Id.* ¶ 6.

46. A poll conducted by Mark Mellman and Richard Wirthlin, two reputable political pollsters, found that 61 percent of Americans want to know who is paying for political advertisements, while 24 percent say knowing such information does not matter to them. Mark Mellman & Richard Wirthlin, *Research Findings of a Telephone Study Among 1300 Adult Americans* (Sept. 23, 2002) at 20 [DEV 2-Tab 5].

47. At least one study has found that the public has a difficult time determining who is responsible for issue advertisements that identify candidates.

> In response to the question asking who paid for an ad, just over 60 percent of survey participants correctly attributed the candidate ads and the pure issue ads to their actual sponsors. Identification of the sponsors of the candidate-oriented issue ads was much more scattered, with most people (38 to 48 percent) assuming in each case that they came from candidates and fewest (9 to 18 percent) assuming that they were paid for by an interest group. These results, of course, suggest that the disclaimers that appear on these ads are almost completely

ineffective.

Krasno & Sorauf Expert Report at 78-79 (summarizing results from David B. Magleby, Dictum Without Data: The Myth of Issue Advocacy and Party Building, available at http://www.byu.edu/outsidemonev/dictum/index.html).

48. The problem of determining the true sponsors of issue advertisements is not only experienced by the general public; politicians and political strategists also have difficultly determining the source of these commercials. For example, former Senator Dale Bumpers, relates that

> [o]ne of the most insidious things about soft money "issue ads" is that the ordinary viewer doesn't have a clue as to who paid for the ad. I first noticed this problem in 1996, when I saw several issue ads before it ever dawned on me that those ads were not being paid for by the candidate. . . . At first I just assumed that the ads were paid for by the opposing candidates' campaign funds, though I did think it was very strange that the opposing candidates' names were never mentioned. In those ads, everything is honed in on the candidate the ad is trying to defeat. At that time, I did not know that they were soft money spots.

Declaration of Senator Dale Bumpers ¶ 29 [DEV 6-Tab 10]. Democratic political consultant Terry S. Beckett testifies that

> [t]he Republican Leadership Council ("RLC") also ran so-called "issue ads" on television in the 2000 Congressional campaign. . . . [Two of t]hese ads accuse [Republican Candidate Ric] Keller of acting "like a liberal." I found it [] ironic, not to mention unsettling, to learn of reports that the hundreds of thousands of dollars the RLC spent on these ads trying to defeat Mr. Keller were actually provided by the Florida sugar industry. . . . . And the fact that I, a general consultant in this same race with long high-level experience in Florida politics, was not aware until earlier this year of whose money was behind these ads strongly underlines the need for disclosure of this kind of stealth

> electioneering financed with corporate funds.

Declaration of Terry S. Beckett ("Beckett Decl.") ¶ 14 [DEV 6-Tab 3].[56] Similarly, political media consultant Raymond Strother comments that

> one of the biggest problems that a candidate's media consultant now faces is the lack of disclosure associated with third parties running these ads. A few years ago, Jill Docking ran for the United States Senate against Sam Brownback in Kansas. . . . In the last two weeks of a very tight election, an unidentifiable group came in and poured a million dollars into the race. They ran television, radio, direct mail, and push polls throughout Kansas telling voters that Jill wasn't a Christian, and all we could find was a fax machine. We had no idea where the money came from. I have had similar experiences in other races as well. Without knowing who is funding the groups that run these ads, we are often unable to correct the distortions.

Declaration of Raymond D. Strother ¶ 15 [DEV 9-Tab 40]. Joe Lamson, campaign manager for Bill Yellowtail's 1996 campaign, testified that

> The Yellowtail campaign had trouble finding out who was running the 1996 Citizens for Reform ads in Montana [which portrayed Yellowtail in a negative light]. As I recall, a local television station pointed us to a group in New Orleans. That group said they didn't know anything, but gave us a telephone number in Oklahoma that turned out to be connected to the J.C. Watts campaign. I believe someone there then flipped us to a phone number in Washington, D.C., and we finally

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[56] The following is an audio transcript from one of these "Florida sugar industry"-sponsored advertisements:

> Ric Keller has become an embarrassment. He claims to be a conservative but got caught getting help from liberal Democrat Linda Chapin, and Keller's law firm coughed up campaign contributions for liberal Democrat Buddy McKay. Ric Keller even supported the Clinton-Gore billion dollar tax on food. Ric Keller, who proclaims to be a conservative but gets caught acting like a liberal. How embarrassing. How wrong. How Clinton.

Beckett Decl. Ex. 5 [DEV 6-Tab 3].

> found Citizens for Reform. We later learned that Citizens for Reform was actually a front for Triad, a group that ran broadcast attack ads against many Democrats nationwide in the 1996 election cycle.

Declaration of Joe Lamson ¶12 [DEV 7-Tab 26]; *see also* Declaration of Larry LaRocco (former Member of Congress, stating he was never able to find the source of attack advertisements run against him in the 1994 campaign because none of the sponsoring organizations were registered with the FEC); Magleby Expert Report at 29 [DEV 4-Tab 8] (providing examples illustrating the point that "even candidates and their campaign managers are unable to ascertain who some of the groups running ads [in the 2000 campaign] were").

49. Krasno and Sorauf find that:

> Secrecy is one of the outstanding characteristics of issue advertisements, especially those financed by interest groups. As a result, we - and regulators - are hampered by a remarkable paucity of information about them. The media tracking data we have referred to throughout our report fill in some of the blanks, but many key factual questions remain unanswered or may only be answered after painstaking investigation. . . . This secrecy, by itself, creates enormous opportunities for wrongdoing, for favors to be exchanged between issue advocates and public officials. . . . Among its various advantages, disclosure is thought to combat corruption by illuminating the dark corners in which undue influence may be exerted far from public view. The idea is that politicians eager for popularity and votes will be loath to enter into situations that cast doubt on their probity; thus, the more these situations are revealed, the stronger the politician's impulse to avoid them. One of the ironies of this litigation is that many of BCRA's opponents are otherwise champions of disclosure. . . . The public's interest in revealing these transactions is countered by the private interest of many groups and donors to keep them secret. Thus, the ability to route money to groups for candidate-oriented issue ads without disclosure has attracted an increasing amount of money to this

> activity. In the growing opaqueness of campaign financing, the opportunity for donors and officeholders to forge close relationships or strike deals without risk of detection increases, too.

Krasno & Sorauf Expert Report at 73-75 [DEV 1-Tab 2 at 146]. According to Plaintiffs' expert Sidney Milkis, a professor at the University of Virginia, "the names of these [issue advertising] groups did little to tell viewers who the sponsors of these messages were; indeed, in some cases they were misleading." Milkis Decl. ¶ 49.

50. Defendants' Expert Report, produced by Professor David Magleby, finds that

> [t]he current system places an unreasonable burden on voters to ascertain who is attempting to persuade them in an election. Our focus groups and survey data from 2000 show that to voters, party and interest group electioneering advertisements are indistinguishable from candidate advertisements. (See Table 2.) Even the candidates and their campaign managers are unable to ascertain who some of the groups running ads were. . . . And in the CSED national survey, I found that respondents were often confused as to whether party ads were paid for by candidates or parties. More than 40 percent of the time, the respondents thought the party ads were paid for by a candidate. . . . Voters, when asked, have consistently indicated that they would like to know who it is that is conducting electioneering. In 2000 voters in Montana faced a competitive U.S. Senate and a competitive U.S. House race. A late October Montana State University-Billings Poll found that, "78 percent of the survey respondents reported that it was 'very' or 'somewhat important' for them to know who 'pays for or sponsors a political ad.'" Our focus group participants in 2000 had very similar views on the question of the importance of their knowing who is paying for or sponsoring an ad. More than four-fifths (81%) said it was very or somewhat important to know the identity of the sponsor. In the national Knowledge Networks Survey in 2000, 78 percent said the same thing.

David B. Magleby, *Report Concerning Interest Group Electioneering Advocacy and Party Soft Money Activity*, at 29-30 [DEV 4-Tab 8].

51. The Annenberg Public Policy Center finds that

> [b]ecause issue ads are not federally regulated, sponsors are not subject to disclosure requirements. As a result, who paid for an ad may not be apparent to viewers when they see it. Some organizations do identify themselves in the course of an advertisement, but their names may be unfamiliar to viewers and/or deliberately vague. For example, "Citizens for Better Medicare" is not a grass-roots generated group of citizens, but an arm of the Pharmaceutical Research and Manufacturers Association (PhRMA).

Annenberg Report 2001 at 18; *see also id*. at 3 (commenting that "[t]racking spending on issue advocacy is far from an exact science" because of the lack of disclosure). One of the conclusions the Center has reached after seven years of study is that "[i]ssue advocacy masks the identity of some key players and by so doing, it deprives citizens of information about source of messages which research tells us is a vital part of assessing message credibility." *Id*. at 2.

52. A prominent example of an organization running advertisements that influenced a federal election but were able to skirt FECA's disclosure provisions is the "Republicans for Clean Air" campaign. The issue advocacy campaign sponsored by Republicans for Clean Air during the 2000 Republican primary highlights how groups can use candidate-centered issue advocacy to avoid FECA's disclosure requirements. Defendants' experts Krasno and Sorauf provided uncontroverted testimony that:

> [a]mong the mysterious groups sponsoring issue ads or the mysterious donors funding various organizations–all without making information known to the public–the example of "Republicans for Clean Air" stands

> out. This group sponsored ads praising then-Governor Bush and criticizing Senator McCain before the 2000 Republican presidential primaries in three states. Eventually, after the first of these primaries (South Carolina's) reporters uncovered that Republicans for Clean Air consisted of two brothers, Charles and Sam Wyly, long-time friends and supporters of Governor Bush. Charles Wyly, in fact, was an authorized fundraiser for the Bush campaign. . . . According to press estimates, the Wylys spent $25 million on their ads for Governor Bush . . . . When the Wylys' involvement was later uncovered during the New York primary, the news qualified as a small bombshell and led to a wave of publicity critical of the brothers and the Bush campaign, which in turn distanced itself from "Republicans for Clean Air." . . . In sum, we have a major campaign conducted in secrecy during a key part of the 2000 Republican primary campaign, and a marked change in the level of scrutiny once its sponsors became known. Much as we applaud the ingenuity of the reporters who eventually broke the story, we strongly believe that there is a compelling governmental interest in making these facts known to all from the start.

Krasno and Sorauf Report at 75-76 (footnotes omitted) [DEV 1-Tab 2]; *see also* FEC MUR 4982, Statement of Reasons, Comm'rs Thomas and McDonald, April 2002, INT 003684 [DEV 133-Tab 1] ("The week before the 'Super Tuesday' primaries, a $2 million advertising campaign praising presidential candidate George W. Bush and attacking his opponent, John McCain, ran in the important primary states of California, New York, and Ohio. The ads stated that they were paid for by a group calling itself 'Republicans for Clean Air.' In actuality, the ads apparently were financed mostly by two brothers, both of whom were strong financial supporters of then Governor Bush and one of whom was an authorized fundraiser for the Bush presidential campaign. At issue in MUR 4982 was whether there should have been some disclosure to the voting public of who really paid for the ads; whether the ads were coordinated with any agent of the Bush campaign and, thus, should be viewed as an in-kind contribution to the Bush campaign, and finally, whether the advertising effort should have registered with the Federal Election Commission as a 'political committee' subject to the reporting requirements and funding restraints."). Even Plaintiffs' expert agrees that the candidate-centered issue advocacy of the Republicans for Clean Air highlights the fact that this technique can be used to influence federal elections without complying with FECA's disclosure provisions. La Raja Decl. ¶ 25(b) ("We could not determine the sponsors of this ad until reporters in Washington discovered that brothers from Texas, who strongly supported George W. Bush, paid for the advertisements using a P.O. Box in Herndon, Virginia. . . . This direct personal experience trying to monitor outside electoral activity revealed to me the potential difficulties of identifying the source of interest group campaign activities, including issue ads.").

IV. CONCLUSIONS OF LAW

As part of the *per curiam* opinion, the Court resolves the Paul Plaintiffs' discrete claims and most of the new disclosure provisions of BCRA.

A. *Paul Plaintiffs' Press Clause Challenge*

Paul Plaintiffs[57] focus their complaint on the guarantees of free press embodied in the

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[57] "Paul Plaintiffs" include: United States Representative Ron Paul, Gun Owners of America, Inc., Gun Owners of America Political Victory Fund, RealCampaignReform.Org, (continued...)

First Amendment. Paul Pls.' Br. at 8. Specifically, Paul Plaintiffs contend that BCRA imposes certain restrictions on their "press" activities, which violate the basic tenets on which the freedom of the press rests.[58] *See id*. at 10, 13-18. In doing so, Plaintiffs advance a new, if not novel, challenge – a tack that has not been used in the campaign finance realm. *See id*. at 11 ("To date, however, [campaign finance challengers] that are engaged in non-exempt press activities have not invoked the freedom of the press in their numerous challenges to the constitutionality of federal campaign finance regulations . . . .").[59] While the Court recognizes the import of Paul Plaintiffs' innovative legal theory, it finds their arguments unpersuasive.

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[57](...continued)
Citizens United, Citizens United Political Victory Fund, Michael Cloud, and Carla Howell.

[58] According to Paul Plaintiffs, BCRA imposes unconstitutional licensing restrictions, economically burdensome regulations, editorial control, and prior restraint on their "press" activities.

[59] As discussed at oral argument:

> MR. TITUS: Now, if that's true of the institutional press, that a prior restraint has to be tested by such a high standard, all the more true for the Paul plaintiffs who in this particular case are indicating to you, Your Honors, that what they are engaged in are press activities, they are entitled to the same immunity from prior restraint as the institutional press.
> JUDGE LEON: Is that a novel theory?
> MR. TITUS: No, I don't believe it's a novel theory. I don't think it has ever been pressed.
> JUDGE LEON: Do you have any Supreme Court cases that support it or Circuit cases?
> MR. TITUS: In financial campaign law cases, no. No one has argued this claim in any campaign finance case that I know of.

Tr. at 340-41 (Titus).

In essence, Paul Plaintiffs characterize their activities (for example, candidate press releases, broadcast and radio advertisements, and campaign literature)[60] as falling under the constitutional protections afforded to the press. The freedom of the press, as Plaintiffs contend, "was never designed as a special privilege of the institutional media," Paul Pls.' Br. at 11; rather it extends to "every freeman," *see id*. at 12 (citing *Near v. Minnesota*, 283 U.S. 697, 713-14 (1931)). They argue further that while other First Amendment rights – of speech and association, for example – may be limited by a compelling governmental interest, the freedom of the press is insulated from such limitations.[61] *Id*. at 9 n.3. Under Plaintiffs' theory, the same governmental interests that survive a constitutional challenge in *Buckley v.*

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[60] The vast majority of activities cited by Paul Plaintiffs fall well-outside the scope of BCRA's prohibition on "electioneering communications." *See* BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A) (not applying to press releases or campaign literature). Moreover, Paul Plaintiffs bring a facial challenge to the constitutionality of this statute, and have clearly not met their burden of demonstrating that the law is substantially overbroad.

[61] Paul Plaintiffs fail to provide the Court with a standard to apply where the government obstructs "press" activities, nor do they delineate the additional, substantive rights provided under the First Amendment Freedom of the Press Clause. Plaintiffs contend that "[t]he freedom of the press provides guarantees that are distinct from, and significantly greater than, the guarantees of free speech and association, and of equal protection . . . ." Paul Pls.' Br. at 9 n.3. Moreover, they note that "[w]hile the compelling government interest test has been applied to free speech, association, and equal protection claims, it is not applicable to the freedom of the press." *Id*. Plaintiffs do not, however, explicitly state instances where the freedom of the press has been found to be superior to the other guarantees provided under the First Amendment. Nonetheless, Paul Plaintiffs ask – although not explicitly – that the Court review any government interference with "press" activities under a more stringent standard than "exacting scrutiny," which would normally be applied where a law burdens core political speech. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (holding that state restrictions on political speech are subject to "exacting scrutiny"). Without guidance from the parties, the Court, therefore, assumes that Paul Plaintiffs request the application of a standard on par with strict scrutiny.

Valeo, 424 U.S. 1 (1976), may not be used to justify any limitation on the general press, which includes all persons and organizations disseminating information. *See id.* at 28 ("[T]he Paul Plaintiffs urge this Court not to follow *Buckley v. Valeo* here, because the press guarantee lays down a different and more stringent standard . . . .").

In order for Paul Plaintiffs' arguments to prevail, however, they must demonstrate that the freedom of the press provides rights superior to those under the Speech and Association Clauses of the First Amendment. If Paul Plaintiffs cannot demonstrate that their claims warrant separate and unique guarantees – guarantees that are not provided under the other clauses of the First Amendment – then there is no need for the Court to treat their grievances separately.

The Supreme Court has not explicitly stated whether the freedom of the press affords greater protections than that of speech or association; two leading First Amendment scholars have observed, however, that the Press Clause provides no greater rights. 2 Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech*, § 22:10 (2002) ("Does the Press Clause today have jurisdictional significance distinct from the Speech Clause? For the most part, the answer appears to be 'no.'"); *see also* Laurence H. Tribe, *American Constitutional Law* § 12-1, at 785 n.2 (2d ed. 1988).[62] Part of the problem, as Professor Smolla has observed,

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[62] Professor Tribe, in his chapter on "Rights of Communication and Expression," does not allude to any greater or distinct rights afforded by the First Amendment Freedom of the Press Clause. In fact, Tribe states: "Throughout this chapter, 'freedom of speech' will be employed as shorthand for the entire collection of freedoms (other than those pertaining (continued...)

is that "in modern First Amendment jurisprudence, the Press Clause has largely been subsumed into the Speech Clause." *Id*. at § 22:6.

The Supreme Court's treatment of the First Amendment in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), illustrates this point. In *Bellotti*, the Supreme Court considered a Massachusetts criminal statute that prohibited corporations "from making contributions or expenditures for the purpose of influencing or affecting the vote on any question submitted to the voters." *Bellotti*, 435 U.S. at 768 (internal quotations and ellipses omitted). The plaintiff-bank wanted to spend money to publicize its views on a proposed state constitutional amendment that was to be submitted to the voters as a ballot question in an upcoming election. *Id*. at 769. After being informed that the state Attorney General would enforce the statute, the bank sought declaratory relief. *Id*. The case was not exclusively framed around the Press Clause, *see id*. at 779, yet the Supreme Court engaged in a careful discussion of the freedom of the press and entertained whether media corporations enjoy superior rights as compared to those of general corporations. *Id*. at 781. The majority deemed that the "institutional" media "does not have a monopoly on the First Amendment," *id*. at 781-82, but went on to consider whether the state could "show[] a subordinating interest which is compelling" to justify the statute's impact on First Amendment rights, *id*. at 786. The Supreme Court then determined that the state's concern

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[62](...continued)
specifically to religion) secured from government interference by the first amendment." Laurence H. Tribe, *American Constitutional Law* § 12-1, at 785 n.2 (2d ed. 1988).

failed to meet the compelling interest test.[63] *Id.* at 788-91.

Bellotti is significant because, despite considering rights under the Press Clause, the Supreme Court nonetheless applied the compelling interest test. *Id.* In other words, in the context of an election law statute, as it applied to a non-media corporation, the Supreme Court treated the Press and Speech Clauses as indistinct.[64] What is more, the Supreme Court alluded to no rights under the Press Clause that are superior to or different than those under the other clauses of the First Amendment.

Even if the Court were to find that the Press Clause provides greater or different protections than the other provisions of the First Amendment, Plaintiffs' arguments must fail.[65] As noted above, Paul Plaintiffs have failed to identify any case that has applied

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[63] The Supreme Court distinguished the statute in *Bellotti* from traditional campaign finance laws, which involve expenditures directed towards or otherwise contributed to *candidates. Bellotti*, 435 U.S. at 790. "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involved in candidate elections simply is not present in a popular vote on a public issue." *Id.* (citation omitted).

[64] The Supreme Court did not, however, consider whether the media exemption under most campaign finance laws, *see, e.g.*, BCRA § 201(a); FECA § 304(f)(3)(B)(i); 2 U.S.C. § 434(f)(3)(B)(i), violates the First Amendment or the Equal Protection Clause. That is, by exempting the "institutional" media, do such provisions unfavorably discriminate against the rights of the general press? The Supreme Court settled this question in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), when it simply stated: "Although the [institutional] press' unique societal role may not entitle the [institutional] press to greater protection under the Constitution, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations." *Austin*, 494 U.S. at 668.

[65] If the Press Clause affords greater or different rights, it might force the courts to make a distinction between the "institutional" and "general" press. The difficulty in making (continued...)

"press" guarantees in the campaign finance context. Tr. at 341 (Titus); *see also* Paul Pls.' Br. at 11. To hold for Paul Plaintiffs would be to invite a new and wholly unsupported theory of First Amendment jurisprudence; litigants could besiege the courts with a host of challenges to laws previously upheld by the Supreme Court on First Amendment grounds, merely by characterizing themselves in their complaints as members of the "press" because their purpose is to disseminate information to the public. As Chief Justice William Rehnquist and Associate Justice Antonin Scalia observed in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), "of course, if every partisan cry of 'freedom of the press' were accepted as valid, our Constitution would be unrecognizable." *McIntyre*, 514 U.S. at 373 (Scalia, J., dissenting).[66]

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[65](...continued)
this distinction compelled Chief Justice Burger to write his concurring opinion in *Bellotti*. *See Bellotti*, 435 U.S. at 796 (Burger, C.J., concurring) (noting the "difficulty, and perhaps impossibility, of distinguishing, either as a matter of fact or constitutional law, media corporations from [non-media] corporations"). Nonetheless, this Court refuses to resolve Plaintiffs' Press Clause claims in this context.

[66] In *McIntyre*, the Supreme Court applied the *Speech Clause* to invalidate an Ohio statute that prohibited the anonymous distribution of campaign literature on general, referendum questions. *McIntyre*, 514 U.S. at 336-37, 349-51. Justice Thomas concurred in judgment, but "would [have applied] . . . a different methodology to [the] case." *Id*. at 358-59. According to Justice Thomas, the "practices and beliefs held by the Founders" provided for an author's right to publish anonymously under the Press and Speech Clauses. *Id*. at 360. Justice Scalia, with whom Chief Justice Rehnquist joined, was not persuaded by Justice Thomas's arguments. *Id*. at 373. As Justice Scalia observed, "not every restriction upon expression that did not exist in 1791 or in 1868 is *ipso facto* unconstitutional, or else modern election laws such as those involved in *Buckley v. Valeo*, 424 U.S. 1 (1976) would be prohibited, as would . . . modern antinoise regulation . . . , and modern parade permitting regulation." *Id*. (citations omitted).

Paul Plaintiffs can cite no precedent in support of their claims. Since the Supreme Court has not affirmatively provided superior rights under the Press Clause, and has suggested that such claims fall under the general First Amendment compelling interest test, this Court rejects the argument that Paul Plaintiffs' claims under the Press Clause warrant a higher level of constitutional protection.[67] Therefore, this Court will apply the same scrutiny to all First Amendment claims, whether presented under the Speech or Press Clauses, and subsumes all of Paul Plaintiffs' Title I, and essentially all of their Title II, arguments into the First Amendment challenges advanced by the other litigants in this case.[68]

B. *BCRA's Disclosure Provisions*

Section 201: Disclosure Provisions

1. *Introduction*

With one exception, the Court also finds the disclosure provisions relating to "electioneering communications" constitutional. The factual record demonstrates that the

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[67] Given this conclusion, the Court holds that there is no reason to remand the Paul Plaintiffs' separate challenges to FECA's pre-BCRA provisions under this theory to a single-judge court. *See* Paul Pls.' Compl. ¶ 1 ("This is an action for declaratory and injunctive relief with respect to certain provisions of [BCRA] as it amends the [FECA], *as well as certain related provisions of the FECA* . . . on the grounds that these integrally related provisions deprive the Plaintiffs of the Freedom of the Press in violation of the First Amendment of the Constitution of the United States.") (emphasis added) (citations omitted).

[68] Paul Plaintiffs briefly challenge the constitutionality of section 301 of Title III in their pleadings – most notably and independent of their Press argument, that section 301 discriminates against non-incumbent office holders by placing limitations on personal use expenditures. Paul Pls.' Br. at 25. However, the Court is not able to discern any basis for these arguments in their Amended Complaint. Accordingly, the Court does not address this issue.

abuse of the present law not only permits corporations and labor unions to fund broadcast advertisements designed to influence federal elections, but permits them to do so while concealing their identities from the public. BCRA's disclosure provisions require these organizations to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections. Plaintiffs' disdain for BCRA's disclosure provisions is nothing short of surprising. Plaintiffs challenge BCRA's restrictions on electioneering communications on the premise that they should be permitted to spend corporate and labor union general treasury funds in the sixty days before the federal elections on broadcast advertisements, which refer to federal candidates, because speech needs to be "uninhibited, robust, and wide-open." McConnell Br. at 44 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: "The Coalition–Americans Working for Real Change" (funded by business organizations opposed to organized labor), "Citizens for Better Medicare" (funded by the pharmaceutical industry), "Republicans for Clean Air" (funded by brothers Charles and Sam Wyly). Findings ¶¶ 44, 51, 52. Given these tactics, Plaintiffs never satisfactorily answer the question of how "uninhibited, robust, and wide-open" speech can occur when organizations hide themselves from the scrutiny of the voting public. McConnell Br. at 44. Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace. As a result, the Court finds Section 201 facially constitutional, with the exception of one subsection which the Court determines to be broader than necessary to achieve the legitimate governmental interest at stake.

2. *Discussion*

The provision's disclosure requirements are challenged by the McConnell, AFL-CIO, Chamber of Commerce, NAB, NRA, and Paul Plaintiffs. Plaintiffs' challenge to Section 201's disclosure provisions focuses on two aspects of the law: (1) its requirement of disclosure prior to the airing of electioneering communications; and (2) its requirement that disbursers disclose the names of contributors who gave over $1,000 to the disbursing fund. The Court addresses each in turn.

a. Prior Disclosure

The McConnell Plaintiffs, AFL-CIO, Chamber of Commerce, and NAM object to Section 201's disclosure requirements on the ground that they mandate disclosure of not only actually aired electioneering communications, but also contracts to make such communications. *See* McConnell Br. at 56 n.22; AFL-CIO Br. at 14-17; Chamber/NAM at 20 n.13. This advance disclosure, Plaintiffs argue, "serve[s] no governmental interest and will chill the exercise of free speech by forcing groups . . . to disclose ongoing and confidential political strategies and decision-making processes, and by giving adversaries the opportunity to try to thwart broadcasts or counter them with their own messages." AFL-CIO

Br. at 16.[69]

Defendants argue that the then-pending (and now final) regulations interpret the notice requirements as not mandating disclosure until after the advertisements have been publicly distributed. Gov't Opp'n at 111. The content of the regulations, argue Defendants, "moot plaintiffs' concerns, [make] plaintiffs' claims to injury . . . wholly speculative[,] and their challenge to this aspect of BCRA's disclosure provisions is therefore unfit for judicial resolution." *Id.*

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[69] McConnell Plaintiffs, the Chamber of Commerce and NAM make a passing suggestion that Section 201 might constitute a "prior restraint" in violation of the First Amendment. McConnell Plaintiffs Br. at 55-56 ("But if this Court agrees that the electioneering communications provisions cannot stand, the attendant disclosure provisions should likewise fall, because the disclosure provisions constitute a regulation of–and in some cases a prior restraint on– speech that the government may not regulate in the first place."); Chamber/NAM Br. at 20 n.13 ("The timing of the BCRA's electioneering communication disclosure requirement is an unconstitutional prior restraint.").

This argument cannot be squared with the Supreme Court's definition of "prior restraint." *See Ward v. Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989) ("[T]he regulations we have found invalid as prior restraints have 'had this in common: they gave public officials the power to deny use of a forum in advance of actual expression.'") (*citing Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)); *see also Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1123 (7th Cir. 2001) ("By 'prior restraint' . . . modern courts . . . mean censorship--an effort by administrative methods to prevent the dissemination of ideas or opinions thought dangerous or offensive. The censor's concern is with the content of speech, and the ordinary judicial safeguards are lacking. 'Prior restraints' that do not have this character are reviewed under the much more permissive standard applicable to restrictions merely on the time, place, or manner of expression.") (citations omitted); *Wisconsin Realtors Ass'n v. Ponto*, No. 02-C-424-C, 2002 WL 31758663 * 12 (W.D. Wis. Dec. 11, 2002) (subjecting Wisconsin statute's prior reporting requirements to "time, place, or manner of expression" analysis); FEC Opp'n at 112.

Given the paucity of Plaintiffs' briefing on this matter and the precedent cited above, this Court believes further analysis of "prior restraint" in this context is not warranted.

The Court cannot agree that Plaintiffs' challenge to the disclosure requirements in Section 201 is not ripe for review. Unlike the situation confronted by the Court in examining the disclosure requirement of Section 212, discussed *infra* at 140, the regulations promulgated for Section 201 do not eliminate Plaintiffs' prior disclosure concerns. The regulations, despite the FEC's explanation of the provision,[70] appear to still require prior disclosure of electioneering communications that have not yet aired. Specifically, the definition of "disclosure date" leaves uncertain what must be disclosed after the airing of an electioneering communication when the disburser has executed contracts for electioneering communications aggregating over $10,000.[71] The regulations suggest that if a person has

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[70] In issuing the final regulations, the FEC noted that

> All of the commenters who addressed this issue . . . advocated adopting a final rule that would define ''disclosure date'' as the date of the public distribution of the electioneering communication. They argued that there is no electioneering communication, and therefore no reporting requirement, until the communication is actually publicly distributed. . . .
>
> This [adopted definition of disclosure] date reflects the Commission's concerns that there are legal and practical issues associated with compelling disclosure of potential electioneering communications before they are finalized and publicly distributed, and premature disclosure may require reporting entities to divulge confidential strategic and political information about their possible future activities.

Explanation and Justification of 11 C.F.R. 104.20, Reporting Electioneering Communications, 68 Fed. Reg. at 404, 409 (Jan. 3, 2003).

[71] The regulations provide in part:

(1) Disclosure date means:

> (i) The *first date* on which *an* electioneering communication is *publicly distributed* provided that the person making the electioneering communication has made one or more disbursements, *or has executed one or more contracts to make disbursements*, for the direct costs of producing or airing one or more

(continued...)

executed $10,000 in electioneering communications contracts, 24 hours after the first such communication is aired, the disburser must make a disclosure encompassing all of the electioneering communications under the contract(s). The Court notes that its jurisdiction does not extend to the FEC's BCRA regulations, *see* BCRA § 403 (providing this Court with jurisdiction to hear challenges to "the constitutionality of any provision of this Act or any amendment made by this Act"), and therefore it makes no determination on their validity or proper construction. However, given the uncertainty it finds with regard to the scope of the regulations, the Court cannot conclude that Plaintiffs' challenge is not ripe.[72] "[T]he extent of the chill upon first amendment rights induced by vague or overbroad statutes is the most significant factor in determining whether an otherwise premature or abstract facial attack . . . is ripe for decision." *Martin Tractor Co. v. FEC*, 627 F.2d 375, 384 (D.C. Cir. 1980).

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[71](...continued)

> electioneering communications aggregating in excess of $10,000; or
> (ii) Any other date during the same calendar year on which *an* electioneering communication is *publicly distributed* provided that the person making the electioneering communication has made one or more disbursements, *or has executed one or more contracts to make disbursements*, for the direct costs of producing or airing one or more electioneering communications aggregating in excess of $10,000 since the most recent disclosure date during such calendar year.

BCRA Reporting; Coordinated and Independent Expenditures; Final Rules, 68 Fed. Reg. 404, 419 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 104.20) (emphasis added).

[72] In analyzing Section 212, *infra* at 140, the Court finds that the FEC's final regulations completely and unequivocally address Plaintiffs' concerns and therefore renders their challenge to that provision unripe for adjudication at this time. In the analysis of Section 214(c), *infra* at 155, the Court finds that the regulations related to Section 214, promulgated after briefing and oral argument in this case, have affected the contours of the dispute between the parties to such an extent that the challenge is not ripe for review.

Where other cases have found facial First Amendment challenges ripe for review, "either the activities in which the complainants wished to (or had) engaged or the enforcing authority's particular intent to enforce the statute, or both, were clear enough to show the adversarial posture assumed by the parties and the contours of their dispute." *Id.* at 387. Here, Plaintiffs have clearly engaged in "electioneering communications" in the past, and the FEC regulations promulgated on January 3, 2003, indicate that the agency intends to enforce BCRA Section 201, including its "contracts" provision. Given these facts, the Court finds that Plaintiffs "have alleged an actual and well-founded fear that the law will be enforced against them," which threatens the danger of "self-censorship; a harm that can be realized even without an actual prosecution." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988).[73]

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[73] The Court notes that arguments could be made that the FEC's regulations do render Plaintiffs' challenge unripe. For example, under the regulations, to be an "electioneering communication" the broadcast must be "publicly distributed within 60 days before a general election." BCRA, FCC Database on Electioneering Communications; Final Rules, 67 Fed. Reg. 65190, 65210 (Oct. 23, 2002) (to be codified at 11 C.F.R. § 100.29(a)(2)). Therefore, it could be argued that a broadcast is not an "electioneering communication" until it is aired, and therefore contracts to make broadcasts are not contracts to make electioneering communications unless and until the broadcasts have been publicly disseminated.

This reasoning leads to the conclusion that one cannot have $10,000 in electioneering communications contracts to disclose until $10,000 worth of advertisements have been publicly disseminated. However, as this analysis demonstrates, such a conclusion is not unequivocally apparent, and therefore could lead to the chilling of First Amendment rights. Again, had the FEC promulgated regulations which clearly addressed this issue as it did for Section 212, the Court's ripeness determination for Section 201 would likely have been different. Given the possibility of different interpretations of the regulations, the chilling effect of that uncertainty, and the fact this Court lacks jurisdiction to rule on the regulations,

(continued...)

Analysis of Section 201 commences with the guidance that disclosure provisions "in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption." *Buckley*, 424 U.S. at 68. However, disclosure provisions are subject to exacting scrutiny analysis "because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Id*. at 66. The Supreme Court has found three categories of "governmental interests sufficiently important to outweigh the possibility of infringement." *Id*. The Supreme Court stated:

> First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return . . . .
> Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

Id. at 66-68 (citations omitted). *Buckley* upheld the constitutionality of Section 434(e) of

[73](...continued)
the Court has determined that Plaintiffs' challenge to Section 201's disclosure provisions is ripe.

FECA, which required disclosure of independent expenditures, although the Supreme Court did limit the provision to only those expenditures used for "communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. The provision was found to be "part of Congress' effort to achieve total disclosure . . . in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence as possible." *Id.* at 76 (footnote and quotation marks omitted). The Supreme Court deemed the measure "responsive to the legitimate fear that efforts would be made, as they had been in the past, to avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions of FECA." *Id.* at 76 (footnote omitted). The Supreme Court also determined that

> it is not fatal that [section] 434(e) encompasses purely independent expenditures uncoordinated with a particular candidate or his agent. The corruption potential of these expenditures may be significantly different, but the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies.

Buckley, 424 U.S. at 81.

Addressing Plaintiffs' prior disclosure concerns, Defendant FEC maintains that even with the "contracts" language, Section 201 is constitutional because it "does not prevent anyone from speaking," and "[t]he reports themselves would not have to reveal the specific content of the advertisements, yet they would perform an important function in informing the public about various candidates' supporters <u>before</u> election day." FEC Opp'n at 112 (emphasis in original). Although the Court agrees that the function cited is a substantial one, *see Buckley*, 424 U.S. at 67 ("[F]ull disclosure during an election campaign tends to prevent the corrupt use of money to affect elections.") (citation and quotation marks omitted), the FEC does not explain how this goal is any less served by requiring disclosures only after the expenditures for electioneering communications have been publicly disseminated. Information concerning contracts that have not been performed, and may never be performed, may lead to confusion and an unclear record upon which the public will evaluate the forces operating in the political marketplace. By limiting disclosures to expenditures actually made, the government's legitimate interest is served without the constitutional and practical shortcomings implicated by requiring prior disclosures. This is so because Section 201 requires disclosure within 24 hours of the disbursement.[74] The Court finds that Section 201,

[74] The Court does not address the question of whether or not the 24-hour disclosure deadline included in Section 201 is constitutional, as this provision was not challenged nor its constitutionality briefed by Plaintiffs and consequently not responded to by Defendants. *See* McConnell Plaintiffs Br. at 56 n.22; AFL-CIO Br. at 14-17; ACLU Br. at 17-19; Chamber/NAM Br. at 18-20; NRA Br. at 48-50; FEC Opp'n at 112 n.116 ("In *Citizens for Responsible Gov't State Political Action Comm.* . . the court invalidated a 24-hour notice requirement because it believed 'such immediate notice' was unduly burdensome– *claim* [*sic*] *not raised by plaintiffs here* . . . .") (emphasis added); *McConnell v. FEC*, No. 02-582 (D.D.C. Oct. 15, 2002) (Briefing Order) ("*All* legal arguments shall be presented on a title-by-title basis, with a discrete section of each brief devoted to each title.") (emphasis added); *see also Tri-State Hosp. Supply Corp. v. United States*, 142 F. Supp. 2d 93, 101 n.6 (D.D.C. 2001) ("The court makes no ruling on such acts, however, because the United States has not briefed the issue."); *Carter v. Cleland*, 472 F. Supp. 985, 989 n.4 (D.D.C. 1979) ("This issue was not briefed by the parties. No decision will be rendered on it."); *cf. Kattan v. District of Columbia*, 995 F.2d 274, 276 (D.C. Cir. 1993) ("[T]his Court has recognized that a losing party may not use a Rule 59 motion to raise new issues that could have been raised previously."). Circuit Courts of Appeal routinely consider issues that are not briefed as "abandoned." *United States v. Wade*, 255 F.3d 833, 839 (D.C. Cir. 2001) (*citing Terry v.*
(continued...)

by including subsection 5 of Section 201, BCRA § 201(a); FECA § 304(f)(5); 2. U.S.C. § 434(f)(5), which equates contracts to make disbursements with actual disbursements requiring disclosure of contracts to make electioneering communications prior to their public dissemination, lacks a "relevant correlation" or "substantial relation," *Buckley*, 424 U.S. at 64, to a legitimate governmental interest.

This constitutional flaw, however, does not render Section 201 unconstitutional in its entirety. BCRA provides that "[i]f any provision of this Act . . . or the application of a provision . . . to any person or circumstance[] is held to be unconstitutional, the remainder of this Act . . . and the application of the provisions . . . to any person or circumstance, shall not be affected by the holding." BCRA § 401; 2 U.S.C. 454 note. As the Supreme Court noted in *Buckley*, "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley*, 424 U.S. at 108-09 (quoting *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932)); *see also Consumer Energy Council of America v. Federal Energy Regulatory Comm'n*, 673 F.2d 425, 441 (D.C. Cir. 1982) ("The presence of a severability clause, which expressly sets forth congressional intent that a statute stand in the event one of its provisions is struck down, makes it extremely difficult for a party to demonstrate inseverability."), *aff'd*, 463 U.S. 1216

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[74](...continued)
Reno, 101 F.3d 1412, 1415 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997)).

(1983); *Buckley*, 424 U.S. at 108-09 (finding that unconstitutional provisions did not render all of Subtitle H of FECA unconstitutional); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 560-61 (2d Cir. 1988) (finding that "the words 'or indecent' are separable so as to permit them to be struck and the statute otherwise upheld. . . . [T]he invalid part of section 223 may be dropped and . . . the remainder of the statute is fully operative."), *cert. denied*, 488 U.S. 984 (1988). Given this guidance and the clear import of Section 401 of BCRA, the Court holds that the remainder of Section 201 is severable from subsection (5). It is clear that the value of disclosing electioneering communications disbursements is not dependent on their disclosure prior to broadcast, and the Court cannot say that it is "evident that the legislature would not have enacted" the remaining disclosure provisions of Section 201 in the absence of subsection (5). *Buckley*, 424 U.S. at 108-09. The remainder of Section 201 adequately serves the purpose of "informing the public about various candidates' supporters before election day," FEC Opp'n at 112 (emphasis in original), without requiring advance disclosures that could potentially chill the exercise of free speech rights.

The Court therefore finds that Section 201's requirement that electioneering communications that have not yet aired but have been contracted for is unconstitutional, but that by severing subsection (5), the provision's prior disclosure concerns are remedied and the remainder of the section is constitutional.

b. Disclosure of $1,000 Contributors

Plaintiffs ACLU, Chamber of Commerce, NAM, and NRA challenge Section 201's requirement that electioneering communications disbursers disclose the names of persons who have given $1,000 or more to the disbursing fund. Plaintiffs argue that for "controversial groups, such threatened disclosure can have a deadly chilling effect on the group's advocacy." ACLU Br. at 19; *see also* Chamber/NAM Br. at 19; NRA Br. at 50. The NRA argues that the provision suffers from the same infirmities as those in FECA struck down by the D.C. Circuit, as BCRA's "disclosure requirements reach the very same outside 'groups engaging in nonpartisan discussion.'" NRA Br. at 49-50 (quoting *Buckley*, 519 F.2d at 873). Finally, the Chamber of Commerce argues that Section 201's disclosure requirements are overbroad, because at least "[w]hen the advertiser is the Chamber [of Commerce], the interest served by the ad is reasonably clear." Chamber/NAM Br. at 20 (quoting Deborah Goldberg & Mark Kozlowski, *Constitutional Issues in Disclosure of Interest Group Activities*, 35 Ind. L. Rev. 755, 757 (2002)).

Defendants argue that the disclosure of individual contributors is necessary because many sponsors of issue advertisements conceal "their identity from the public by electioneering pseudonymously, through front organizations such as 'The Coalition: Americans Working for Real Change,' [*sic*] 'Citizens for Reform.'" FEC Br. at 173.[75]

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[75] In justifying the provision, one Senator commented:

> We deter the appearance of corruption by shining sunlight on the undisclosed expenditures for sham issue advertisements. Corruption will be deterred when the public and the media are able to see clearly who is trying to influence the election. In addition our provisions will inform the voting public of who is sponsoring and paying for an electioneering communication.

(continued...)

Indeed, the Supreme Court has observed that "when individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) (rejecting the argument that a limit on contributions to committees formed to support or oppose ballot measures was necessary "to make known the identity of supporters and opponents" of such measures, given that another provision of the ordinance "requires publication of lists of contributors in advance of the voting"). This observation has been buttressed by the evidence presented in this case. *See* Findings ¶¶ 48-52. For example, PhRMA, a pharmaceutical industry trade group, the Chamber of Commerce, and two brothers from Texas, have produced issue adds under the names "Citizens for Better Medicare," "Americans Working for a Real Change," and "Republicans for Clean Air," respectively. *Id.* ¶¶ 51, 44, 52. A recent poll showed that 61 percent of Americans want to know who is behind these issue advertisement organizations. *Id.* ¶ 46. Plaintiffs' briefs

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[75](...continued)
147 Cong. Rec. S3034 (daily ed. Mar. 28, 2001) (Sen. James Jeffords). In a similar vein, a Representative stated:

> No one is trying to gag anybody. If they want to do a political ad that essentially wants people to vote for or against, what they say is [*sic*] fall within the independent expenditure and other provisions of the law, which has limits on what can be expended and has requirements for disclosure, which is not true of these ads that are clearly campaign ads, that are clearly political ads. But the people do not know who put the money up. They are hidden. They are endless. There is a flood of hidden, in terms of its support, of hidden money. That is what we say should not happen.

144 Cong. Rec. H4866 (daily ed. June 19, 1998) (statement of Rep. Sander Levin).

provide no evidence to the contrary and do not attempt to argue that the government lacks a legitimate interest related to the disclosure requirements; in fact, many of their experts voice the same concerns. *Id*. ¶¶ 49 (Milkis), 52 (La Raja). The Court finds that the evidence presented establishes that a legitimate governmental interest is served by the donors disclosure requirement, and reaffirms the *Buckley* observation that "[t]he corruption potential of [independent uncoordinated] expenditures may be significantly different [than coordinated expenditures], but the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters to define more of the candidates' constituencies." *Buckley*, 424 U.S. at 81. Without disclosure of donors, it is difficult, if not impossible for the voting public to know who is sponsoring political advertisements under amorphous and nondescript pseudonyms. *See* Findings ¶¶ 47, 50-51. Indeed, even those experienced in politics, political scientists, and members of the media find it difficult to know who is behind some political advertisements. *Id*. ¶¶ 48, 52. Without Section 201's disclosure requirements, it will continue to be extremely difficult for the public to learn that groups, such as PhRMA, or individuals, like the Wylys, are the true source of millions of dollars in potential advertisements run under banners such as "The Coalition" or "Citizens for Better Medicare." *Id*.

This conclusion, however, does not end the inquiry. The Supreme Court has been mindful of the chilling effect disclosure can have on associational rights, and has declared that "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 460-61(1958). "The strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 66. Although disclosure requirements are often "the least restrictive means" of regulating campaign finance practices, "[i]n some instances disclosure may even expose contributors to harassment or retaliation." *Buckley*, 424 U.S. at 68.

In *Buckley*, the Supreme Court considered the argument that contributions made to independent candidates and minor parties should be exempt from FECA's disclosure requirements. The Supreme Court rejected the challenge, concluding that the evidence presented was "not of the sort proffered in *NAACP v. Alabama*."[76] *Buckley*, 424 U.S. at 71.

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[76] In *NAACP*, the NAACP challenged a court order forcing the group "to reveal to the State's Attorney General the names and addresses of all of its Alabama members and agents." *NAACP v. Alabama*, 357 U.S. 449, 451 (1958). The State had obtained a restraining order, enjoined the group from operating in Alabama due to its failure to file a corporate charter with the Secretary of State. *Id*. In response, the NAACP sought to dissolve the restraining order, but refused to comply with Alabama's request for the production of documents including the NAACP's "records containing the names and addresses of *all* Alabama members and agents of the Association." *Id*. at 453 (quotation marks omitted) (emphasis added). The court then ordered the NAACP to comply. *Id*. The evidentiary record before the Supreme Court consisted of uncontroverted evidence "showing that on past occasions revelation of the identity of [the NAACP's] rank-and-file members has exposed these member to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id*. at 462. Based on this evidence, the Court found that

> compelled disclosure of [the NAACP's] membership is likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which, they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and

(continued...)

The evidence that was presented in *Buckley* was found by the Supreme Court to be "at best . . . the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure," and therefore failed to persuade the Supreme Court that "the substantial public interest . . . outweighs the harm generally alleged." *Id*. *Buckley* instructs that when a legitimate government interest is served by a disclosure provision, constitutional challenges claiming the disclosure will chill associational rights must be accompanied by evidence which shows

> a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either government officials or private parties. The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient.

Buckley, 424 U.S. at 74; *see also Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (finding Ohio disclosure provisions could not be constitutionally applied to the Socialist Workers Party ("SWP") due to the "substantial evidence of both governmental and private hostility toward and harassment of SWP members and supporters").[77]

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[76](...continued)

> dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure."

Id. at 462-63. As such, the Supreme Court found that Alabama's interest in the information was insufficient to justify the disclosure. *Id*. at 466.

[77] In *Brown*, the Supreme Court examined an Ohio election campaign law which required "every candidate for political office to file a statement identifying each contributor (continued...)

For this reason, the ACLU's facial challenge to Section 201 is unavailing. Neither *NAACP* nor *Brown* stand for the proposition that disclosure laws that apply to organizations "whose positions are often controversial and whose members and contributors frequently request assurances of anonymity" are facially unconstitutional. ACLU Opp'n at 10. Rather, as explained above, the statutes in those cases were held inapplicable to the groups in question based on the facts presented, not invalid on their face. *See NAACP*, 449 U.S. at 462-63 ("[W]e think it apparent that compelled disclosure of *petitioner's* Alabama membership is likely to affect adversely the ability of *petitioner and its members*" to engage in their freedom to associate.") (emphasis added); *Brown*, 459 U.S. at 102 ("Ohio's campaign disclosure requirements cannot be constitutionally applied *to the Ohio SWP*.") (emphasis added). The Court is given no information as to why these donors wish to maintain their

[77](...continued)
and each recipient of a disbursement of campaign funds." *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 89 (1982). The District Court in the case had found "substantial evidence of both governmental and private hostility toward and harassment of [Socialist Workers Party ("SWP")] members and supporters." *Id*. at 98-99. The evidence presented included specific incidents which took place within four years of the trial, and included "threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office. There was also evidence that in the 12-month period before trial 22 SWP members, including four in Ohio, were fired because of their party membership." *Id*. at 99. This evidence was found to present a reasonable probability that disclosing the names of contributors and recipients will subject them to threats, harassment, and reprisals. *Id*. at 100. The Supreme Court concluded that "[i]n light of the substantial evidence of past and present hostility from private persons and government officials against the SWP, Ohio's campaign disclosure requirements cannot be constitutionally applied to the Ohio SWP." *Id*. at 102.

confidentiality and no indication is given that revelation of their affiliation with the group would result in harassment, threats or reprisals. Since the ACLU has presented the Court with no facts that place it in the same category of threatened associations such as the NAACP or the Socialist Workers Party ("SWP"), *see* Finding ¶ 45[78] the Court finds no basis for invalidating the statute on its face or as applied to the ACLU based on the present record.

Plaintiffs have also provided evidence regarding the effect disclosure under Section 201 would have on four other organizations. The Court considers each in turn.

The NRA provides testimony that some of its members do not wish to have their contributions to the group disclosed, and estimates that between five and 50 persons voiced their concerns in the year 2000. *Id.* ¶ 41. The group also provides testimony that a "conspicuous and disproportionate number of contributors" to its PAC contribute "just below the $200 disclosure level." *Id.* Although Mr. LaPierre testified that one reason given for members not wanting their contributions disclosed was fear of losing one's job, many other reasons were given as well, such as a desire not to have one's neighbors or school board know about their affiliation with the organization. *Id.* Some simply stated that they did not wish to have such information provided to the government. *Id.* No evidence of the basis for these fears is presented to the Court, only speculations. Nor is any evidence presented to the

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[78] The ACLU provides no information as to why ACLU's donors wish to maintain their confidentiality and no indication is given that revelation of their affiliation with the group would result in harassment, threats or reprisals. As an aside, the Court notes that according to the ACLU, "[o]nly 212 individuals contributed more than $1,000 to the organization. Findings ¶ 45.

Court of actual instances of retaliation due to the disclosure of someone's membership in the NRA. These fears are the result of conjectures by those expressing them, but unless there is a reasonable probability that these fears will be realized as a result of disclosure, *Buckley* instructs that such worries do not overcome the state's legitimate interest in disclosure.

Edward Monroe, Director of Political Affairs for the Associated Builders and Contractors ("ABC") and the Treasurer of ABC's PAC, testified that *he had been told* that a number of ABC contributors had suffered substantial vandalism after their names were disclosed and that the contributors *believed* the vandalism was the result of labor unions learning of their contributions. *Id.* ¶ 42. This evidence is essentially hearsay and no evidence is presented showing that the vandalism was actually retaliation in response to the disclosure as opposed to speculation on the part of contributors. Although some contributors to ABC's PAC donate less than $200, the Court has no way of knowing why they donate at this level other than Mr. Monroe's belief that it is to prevent disclosure of their names. *Id.* The same is true for the two companies that declined Mr. Monroe's solicitations. *Id.* On the basis of this evidence alone, the Court cannot find that ABC meets the *Buckley* standard.

The Court also considers evidence regarding the membership of the Associated General Contractors of America ("AGC") and the Chamber of Commerce's coalition titled "Americans Working for a Real Change." Between a dozen and two dozen AGC members expressed concern to its Chief Executive Officer, Stephen Sandherr, that if their contributions to AGC are disclosed publicly they will be subjected to union action that "would threaten to make life miserable for them." *Id.* ¶ 43. Although this testimony demonstrates that AGC members may "fear" the potential consequences of their names being disclosed in connection with AGC, there is no evidence before the Court that these feared consequences have been, or would be, realized. Similarly, the Chamber of Commerce provides evidence that some contributors to its coalition, "Americans Working for a Real Change," did not want to be publicly identified due to fears of "what some would call union harassment activities." *Id.* ¶ 44. Once again, the Court was not presented with evidence of a reasonable basis for these fears. Furthermore, no member ever told Mr. Sandherr they were contributing $200 or less to AGC's PAC in order to avoid disclosure, and no contributor to AGC's PAC has reported union retaliation in response to their contribution to the PAC. *Id.* ¶ 43. Neither group's evidence meets the *Buckley* standard.

In sum, although many deponents relate what they believe, or have been told, were the reasons contributors did not want to have their names disclosed, that is union retaliation or employment termination, the lack of specific evidence about the basis for these concerns leaves the Court unable to find there exists "a reasonable probability that the compelled disclosure of [any of these organizations'] contributors' names will subject them to threats, harassment, or reprisals from either government officials or private parties." *Buckley*, 424 U.S. at 74. Furthermore, no Plaintiff cited to evidence, and the Court has found none, that their organization, as opposed to the organization's members or contributors, has been subjected to threats, harassment or reprisals. Although these groups take stands that are controversial to segments of the public, and may believe that they are targeted because of the positions they take, none has provided the Court with a basis for finding that their organization, and thereby their membership, faces the hardships that the NAACP and SWP were found to suffer by the Supreme Court. However, nothing in this Court's decision affects the ability of groups in the future from challenging, as the NAACP and the SWP did in the past, the application of Section 201's disclosure provisions to their organization.

The Court addresses next the NRA's argument that the D.C. Circuit's invalidation of FECA's Section 437a, *Buckley*, 519 F.2d at 878, renders Section 201's requirements invalid as well. In *Buckley*, the D.C. Circuit found FECA's independent expenditure disclosure provision[79] unconstitutional. The Court of Appeals stated that "issue discussions unwedded to the cause of a particular candidate hardly threaten the purity of elections . . . . [and] are vital and indispensable to a free society and an informed electorate. Thus the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes." *Buckley*, 519 F.2d at 873. Even so, the D.C. Circuit rested its decision on the overbreadth of Section 427a's "crucial terms[:]

[79] Section 437a's "demand for disclosure is activated–without any expending of any funds whatever–(1) by any act directed to the public for the purpose of influencing the outcome of an election; or (2) by any material published or broadcast to the public which refers to a candidate (by name, description, or other reference) and which (a) advocates the election or defeat of such candidate, or (b) sets forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidate who holds or has held Federal office), or (c) is otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their votes from such candidate." *Buckley*, 529 F.2d at 870 (paraphrasing FECA § 427a) (internal punctuation and footnotes omitted).

'purpose of influencing the outcome of an election' and 'design[] to influence' individuals in voting at an election." *Buckley*, 519 F.2d at 875. Unable to find a "readily available narrowing interpretation" of the crucial terms in light of Congress's manifested intent, *Buckley*, 519 F.2d at 877, the Court of Appeals held the section unconstitutional, *id*. at 878.

Given that the basis for the D.C. Circuit's invalidation of Section 427a rested on the provision's language and legislative history, the Court does not accept the NRA's suggestion that the Court of Appeals's decision controls this Court's analysis of Section 201's disclosure requirements. NRA Br. at 50. Section 201 only requires disclosure of "electioneering communications," the definition of which this Court finds is constitutional. The disclosure trigger is much narrower and more definite than that of FECA Section 427a, and does not include its invalidating "crucial terms." In addition, the record before the Court clearly demonstrates that contrary to the situation facing the Court of Appeals in 1975, where "issue discussions" were indeed "unwedded to the cause of a particular candidate," the evolving present use of issue advertisements, specifically the use of "issues" to cloak supportive or negative advertisements clearly identifying a candidate for federal office, "threaten the purity of elections." *Buckley*, 519 F.2d at 873.[80] For these reasons, the Court declines to find the Court of Appeals's decision on FECA Section 427a binding on this Court's disposition

[80] For example, as mentioned above, the "group" "Republicans for Clean Air" spent $2 million the week before the "Super Tuesday primaries" in advertisements supporting presidential candidate George W. Bush and attacking his opponent John McCain. Findings ¶ 52. "Republicans for Clean Air" was actually a front for two brothers who had ties to the Bush campaign. *Id*.

of the challenges to BCRA Section 201's disclosure requirements.

Finally, the Chamber of Commerce argues that Section 201 as applied to its electioneering communications, is overbroad because the public knows that the Chamber represents the interests of American business. Chamber/ NAM Br. at 20. The Court interprets the Chamber's position, encompassing all of three sentences, to mean that under BCRA it should be sufficient that the Chamber report that it is behind advertisements sponsored by, for example, "Americans Working for a Real Change" and that listing its $1,000 contributors would be unnecessary for the voting public to know the interest behind the advertisement. The Court first notes that the Chamber does not provide, and the Court cannot formulate, a disclosure rule that would take into account the notoriety of the groups involved (for example, a law that exempts "well-known" groups from disclosing the names of their $1,000 contributors, while "less well-known" groups would be required to make the disclosures). In addition, the Chamber provides no legal support for its theory, and the Court declines to consider its argument based on a record comprised of a single quotation from the Indiana Law Review and the Chamber's statement that it "is a well-known association of American businesses that has been in existence for 90 years." Chamber/NAM Br. at 20. The Court therefore rejects the Chamber of Commerce's argument.

In conclusion, the Court states what Section 201's disclosure requirements do and do not require. First, they apply only to electioneering communications, which we find constitutional. Second, Section 201 does not prevent anyone from making electioneering communications; it only requires that when persons do make such advertisements that they disclose the source of the communication's funding after they are broadcast. Lastly, the provision does not require the wholesale disclosure of all donors to the sponsoring organization, rather only donors contributing $1,000 to the disbursing account must be disclosed. Organizations are free to set up "segregated bank account[s]," funded by individuals' contributions, for electioneering communication disbursements. BCRA §201(a); FECA § 434(f)(2)(E); 2 U.S.C. § 434(f)(2)(E). If electioneering communication disbursements made from such segregated accounts then reach the $10,000 threshold, only the names of the segregated account's $1,000 contributors will have to be disclosed. Lastly, any group can file suit to challenge the constitutionality of the *application* of Section 201's disclosure provisions to their contributors based on a showing such as "threats, harassment, or reprisals from either government officials or private parties." *Buckley*, 424 U.S. at 74.

In conclusion, the Court finds Section 201 constitutional on its face, with the exception of subsection (5), which the Court determines to be broader than necessary to achieve the legitimate governmental interest at stake because of its inclusion of future contracts for electioneering communications. For that reason, the Court severs subsection (5) and finds the remainder of Section 201 constitutional.

Sections 202, 212, and 214[81]

1. *Section 202*

Section 202 is challenged by the Chamber of Commerce, NAM, and the McConnell Plaintiffs. Plaintiffs' arguments with regard to Section 202 relate to those made with respect to Sections 201 and 214.[82] For example, Plaintiffs argue that the definition of "electioneering communication" is unconstitutional, and for that reason Section 202 must also be found unconstitutional. Chamber/NAM Br. at 12; McConnell Br. at 83 n.42. As this argument was addressed and rejected in this Court's examination of Section 201's definition of "electioneering communication," it is rejected here as well.

Plaintiffs also contend that "the First Amendment limits the coordination concept to express advocacy," and for that reason Section 202 should be found unconstitutional. Chamber/NAM Br. at 12. Although Plaintiffs cite to FEC Commissioner Smith for support, *id*., this view has been rejected by courts in this Circuit. *See Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986) (finding the "express advocacy" limitation "not constitutionally required for those statutory provisions limiting contributions"); *Christian Coalition*, 52 F.

[81] Although Plaintiffs ask for judgment as to BCRA's Section 211, described *supra*, at oral argument they stated that they were not challenging the provision. *See* Tr. at 341-42 (Judge Henderson: Mr. Starr, I've got down that you all are challenging [Section] 211. Am I wrong about that? . . . . Baran: We are not challenging section 211. . .). Furthermore, other than a description of the provision, McConnell Br. at 82, Plaintiffs' briefs are silent on the provision.

[82] In addition, the Court observes that Plaintiffs' arguments blur Section 202's provisions with those of Sections 201 and 214, making the Court's task of discerning and addressing their arguments more difficult.

Supp. 2d at 86-87 & n.50 (finding the argument that "the 'express advocacy' limitation must apply to expressive coordinated expenditures" to be "untenable" in light of *Orloski* and *Buckley*).

Finally, the AFL-CIO contends that "the BCRA § 202 ban on coordinated 'electioneering communications' inevitably will criminalize efforts by the AFL-CIO to coordinate legislative public advocacy with Members of Congress, and interfere with ordinary and necessary lobbying contacts and the AFL-CIO's use of them to plan broadcast and other advocacy. For that reason alone, § 202 violates the First Amendment." AFL-CIO Br. at 14 (citing to the Declaration of Gerald M. Shea ¶¶ 57-59). The Court notes first that Section 202 *bans* nothing. What the Court presumes the AFL-CIO complains of is the effect of Section 202 on some entities as read in conjunction with BCRA Section 203. This issue is dealt with in this Court's examination of Section 203. The group's allegation that Section 202 will criminalize AFL-CIO contacts with Members of Congress and subsequent advocacy activities is conclusory and is asserted without any legal support. Similarly, the declaration of Gerald M. Shea, the AFL-CIO's Assistant to the President for Governmental Affairs, does nothing to help the Court discern the legal basis for its argument. Mr. Shea states that "[a]ny legal restrictions on the ability of an organization like the AFL-CIO to coordinate legislative and policy communications and activities with federal officeholders who happen to be candidates could substantially interfere with our ability to maintain ordinary and necessary working relationships with Members of Congress and their staffs." Shea Decl. ¶ 58. The fact that Mr. Shea believes that the AFL-CIO's current activities *may* be affected by Section 202 does not provide the Court with a legal basis for invalidating the provision. Furthermore, to the extent that the AFL-CIO challenges the scope of activities covered by BCRA's definition of "coordination," the Court finds, *infra*, that such arguments are not ripe given the statutory construction of Section 214 and the recent promulgation of final regulations on coordination by the FEC.[83]

The Court therefore finds that Plaintiffs' arguments are unavailing and the Court has been presented with no basis for finding Section 202 unconstitutional.

2. *Section 212*

Section 212 is challenged by the AFL-CIO and the McConnell Plaintiffs. Plaintiffs object to Section 212 on the grounds that it requires disclosure of not only actual expenditures, but also contracts to make independent expenditures. *See* McConnell Br. at 56 n.22; AFL-CIO Br. at 14-17. This advance disclosure, Plaintiffs argue, "serve[s] no governmental interest and will chill the exercise of free speech by forcing groups . . . to disclose ongoing and confidential political strategies and decision-making processes, and by giving adversaries the opportunity to try to thwart broadcasts or counter them with their own

[83] In the Court's discussion of Section 214, *infra*, it is noted that the regulations contain an explicit "safe harbor for responses to inquiries about legislative or policy issues." *See* Final Rules; Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 455 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.21(f).

messages." AFL-CIO Br. at 16.[84]

A Court may not entertain a suit that is not ripe for review. The basic rationale behind the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977). Furthermore, "[t]he power of courts . . . to pass upon the constitutionality of acts of Congress arises only when the interests of the litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough." *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89-90 (1946); *see also id.* at 90 n.22 ("It has long been this Court's 'considered practice not to decide abstract, hypothetical or contingent questions, . . . or to decide any constitutional question in advance of the necessity for its decision, . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . . .'") (*citing Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945)). In situations

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[84] As they did for Section 201, McConnell Plaintiffs, the Chamber of Commerce and NAM make a passing suggestion that Section 212 might constitute a "prior restraint" in violation of the First Amendment. The Court addresses this argument in its discussion of Section 201. *See supra* note 69.

where a statute is challenged on First Amendment grounds, the Supreme Court has found that litigants need not wait for actual enforcement if the existence of the law would chill the exercise of First Amendment rights "even without an actual prosecution." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). However, in those cases, plaintiffs must "allege[] an actual and well-founded fear that the law will be enforced against them" in order to assuage the troubling aspects of "the preenforcement nature of [such] suits." *Id*; *see also Wisconsin Right to Life, Inc. v. Paradise*, 138 F.3d 1183, 1185 (7th Cir. 1998) (Easterbrook, J.) (observing that if a group's concern that a law will be enforced is not well-founded, "Article III of the Constitution precludes a federal court from ruling."), *cert. denied*, 525 U.S. 873 (1998); *Nat'l Treasury Employees Union v. Kurtz*, 600 F.2d 984, 988 (D.C. Cir. 1979) ("[E]ven where allegations of unconstitutionality on the face of a regulation are made, a concrete factual dispute is required to make the case justiciable."); *Nat'l Student Ass'n v. Hershey*, 412 F.2d 1103, 1113-14 (D.C. Cir. 1969) ("[W]e are not persuaded that every plaintiff who alleges a First Amendment chilling effect and shivers in court has thereby established a case or controversy.").

The Court finds that Plaintiffs' challenge to Section 212 is not ripe for review. At the time of briefing in this case, the FEC had proposed regulations that required disclosure only *after* independent advertisements have been "publicly disseminated." These proposals were recently promulgated as final regulations. *See* BCRA Reporting; Coordinated and Independent Expenditures; Final Rules, 68 Fed. Reg. 404, 452 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.10).[85] This fact makes the challenge unfit for judicial resolution, as the regulations provide Plaintiffs with the exact remedy they seek: the FEC will not require disclosure of independent express advocacy expenditures prior to their "public[] disseminat[ion]." This situation presents the Court with the question Judge Easterbrook posed in *Wisconsin Right to Life*: "How can a suit present a 'case or controversy' when all the litigants are on the same side?" *Wisconsin Right to Life*, 138 F.3d at 1185.

This conclusion is bolstered by the decisions of other courts faced with similar circumstances. For example, the Seventh Circuit Court of Appeals rejected a group's claim that it had a "well-founded" fear of prosecution under Wisconsin campaign finance laws, where an advisory opinion of the Attorney General of Wisconsin and the Election Board's regulations codified the interpretation of the law the group sought. *Wisconsin Right to Life*, 138 F.3d at 1185-86; *see also Citizens for Responsible Gov't State Political Action Comm.*

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[85] The regulations provide in part:

> The person making the independent expenditures [more than 20 days before an election] aggregating $10,000 or more must ensure that the Commission receives the report or statement by 11:59 p.m. Eastern Standard/Daylight Time on the second day *following the date on which a communication is publicly distributed or otherwise publicly disseminated*. . . .
>
> Every person making, after the 20th day, but more than 24 hours before 12:01 a.m. of the day of an election, independent expenditures aggregating $1,000 or more with respect to a given election must report those independent expenditures and ensure that the Commission receives the report or signed statement by 11:59 p.m. Eastern Standard/Daylight Time on the day *following the date on which a communication is publicly distributed or otherwise publicly disseminated.*

68 Fed. Reg. at 452 (to be codified at 11 C.F.R. § 109.10(c), (d)) (emphasis added).

v. Davidson, 236 F.3d 1174, 1193 (10th Cir. 2000) (describing the *Wisconsin Right to Life* holding and distinguishing the case from the one before it, which lacked "such administrative regulations"). Similarly, in *Shoemaker v. Handel*, the Third Circuit Court of Appeals upheld the lower court's determination that amended regulations, put into effect before becoming final, cured the challengers' privacy concerns, and thus made "[t]heir privacy contentions . . . not ripe for adjudication." *Shoemaker v. Handel*, 795 F.2d 1136, 1144 (3d Cir. 1986), *cert. denied*, 479 U.S. 986 (1986). There was no need to enforce the amendments through injunctive or declaratory relief, because "[i]f the Commission cease[d] to comply with the proposed confidentiality rules, the [challengers could] return to court with a new lawsuit." *Id*.

Plaintiffs do not contest the import of the regulations. Instead, Plaintiff AFL-CIO argues that the FEC regulations do not remedy BCRA's alleged constitutional defect, as the regulations "may not be approved by Congress[,] [a]nd there is nothing to prevent the Commission itself from reversing its position as soon as this litigation is over, as part of a litigation settlement or independently." AFL-CIO Reply at 10; *see also* AFL-CIO Br. at 17 n.16 ("[G]iven the statutory text at issue plaintiffs have no assurance as to how the FEC will interpret or enforce it in the future."). These uncertainties amount to a "hypothetical threat" which the Supreme Court has stated "is not enough" to warrant judicial consideration. *United Public Workers of America*, 330 U.S. at 89-90. Should this hypothetical threat manifest itself as a "concrete factual dispute," *Nat'l Treasury Employees Union*, 600 F.2d at 988, nothing prevents Plaintiffs from "return[ing] to court with a new lawsuit," *Shoemaker*, 795 F.2d at 1144.

As Plaintiffs have presented "a controversy that has not yet arisen and may never arise," *Wisconsin Right to Life*, 138 F.3d at 1187-88, the Court lacks jurisdiction to resolve their challenge to Section 212 at this time.

3. *Section 214*

Section 214 is challenged by the McConnell Plaintiffs, the Chamber of Commerce, NAM, the RNC and the AFL-CIO. Plaintiffs' basic argument is that Section 214, "[b]y repealing the FEC's current regulation and failing to supply any clear statutory definition of what constitutes prohibited coordination, . . . will chill First Amendment speech and association." Chamber/NAM Br. at 11; *see also* ACLU Br. at 19-20; AFL-CIO Br. at 13 ("BCRA's vague and overbroad coordination standards will inevitably spur . . . wide-ranging and burdensome investigations" by the FEC.). Plaintiffs also charge that the directive of Section 214(c) that "'agreement or formal collaboration' not be a prerequisite to considering an expenditure 'coordinated,' . . . exceeds the constitutional bounds established in *Buckley*." McConnell Br. at 83; *see also* Chamber/NAM Opp'n at 8; RNC Br. at 72 (Section 214 "can only be understood as an impermissible effort to overrule this court's decision in *FEC v. Christian Coalition* . . . which warned against overbroad definitions of 'coordination.'"). The Chamber of Commerce and NAM, in their Opposition brief, argue that Section 214(a)(2), by classifying coordinated expenditures with parties as contributions, will "chill both party contacts, and contacts with legislators," and that Section 214(d) expands the definition of what may constitute a coordinated contribution or expenditure. Chamber/NAM Opp'n at 8.[86]

a. Section 214(a)

Under Section 214(a)(2), expenditures by a person, other than a candidate or a candidate's authorized committee, made in "cooperation, consultation, or concert with, or at the request or suggestion of, a national, State or local committee of a political party," are considered to be contributions to those party committees. BCRA § 214(a)(2); FECA § 315(a)(7)(B)(ii); 2 U.S.C. § 441a(a)(7)(B)(ii).[87] As noted *supra*, this same definition has been applied to expenditures coordinated with political candidates for over 25 years and was recently found by the Supreme Court to apply to political party expenditures. *See* 2 U.S.C. § 441(a)(7)(B)(i); *Colorado II*, 533 U.S. at 467.

Plaintiffs argue that the definition of coordination in Section 214(a) is "unconstitutionally vague." McConnell Br. at 85 n.44. This lack of precision, Plaintiffs allege, violates the First Amendment's "demand[] that the conduct that constitutes

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[86] The Court notes at this juncture that Plaintiffs' Section 214 arguments, especially those involving Defendants' justiciability arguments, were sparse and in many instances difficult to discern. Although the Court understands that the page limitations imposed on the parties may have been a contributing factor, the lack of clarity has made the Court's task more difficult.

[87] For the sake of clarity, the Court points out that contrary to Plaintiffs' description, Section 214(a) does not establish a "ban" on coordination, Chamber/NAM at 8, or a "year round prohibition on all communications made by a corporation," ACLU Br. at 20. Section 214(a) classifies such contacts as contributions, but does not prevent coordination from taking place.

coordination be precisely, objectively, and narrowly defined," and leaves citizens unsure of what contact they may have with political parties without having future speech regulated as "coordinated." Chamber/NAM at 12. Plaintiffs discount the fact that BCRA orders the promulgation of clarifying regulations because regulations are "subject to the ebb and flow of administrative practice," and speakers "will thus be forced to 'steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.'" *Id.* (quoting *Buckley*, 424 U.S. at 41 n.48).[88] Finally, Plaintiffs maintain that the existence of an "agreement" is a constitutional prerequisite to finding an expenditure to be "coordinated"

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[88] The Chamber of Commerce and NAM also allege that regulations cannot save Section 214(a)

> for four key reasons: (i) some unconstitutional aspects such as its inclusion of 'electioneering communication' are clearly mandated and are beyond the FEC's power to change; (ii) the vagueness as to what conduct may constitute coordination, and hence make future speech unlawful, is chilling association and petitioning activities right now; and [sic] (iii) there is no assurance that the FEC will be able to agree on new regulations at all, [sic] and (iv) there is no assurance that any regulations that may be adopted will survive Congressional and judicial review.

Chamber/NAM Br. at 13. These arguments can be disposed of with expedition. First, the Court does not understand how Section 214(a), on its face, includes "electioneering communication" and Plaintiffs have not explained their statement. Second, alleged chilling of rights incurred prior to the promulgation of the FEC's regulations, as well as the uncertainty over whether the FEC would be able to agree on new regulations, are rendered moot by the promulgation of the final regulations in early January 2003. FECA also provides protection for those who act in good faith reliance on FEC regulations. *See* 2 U.S.C. § 438(e). Finally, the possibility that the regulations may be struck down by Congress or a court is the type of speculative injury that does not rise to the level of a present case or controversy required for Article III standing. *See infra* at 155.

with political parties.[89] The Court analyzes each concern in turn.

1) Vagueness

As the Court noted above, the campaign finance system has been functioning for over 25 years despite the presence of the very same "vague" language to which Plaintiffs object. *See* 2 U.S.C. § 441a(a)(7)(B)(i). Plaintiffs have provided no explanation as to why the application of this coordination formula to the context of political parties chills political speech any more than when applied to expenditures coordinated with political candidates. Furthermore, the Court notes that the FEC's regulations have now been promulgated in final form. It is therefore possible that many, perhaps even all, of Plaintiffs' vagueness concerns have been remedied by the regulations' contents. *See* Chamber/NAM Br. at 13 (stating that while the FEC's now-repealed regulations on coordination "did not solve all the vagueness problems, it took useful steps toward alleviating them").[90] Although Plaintiffs discount the

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[89] Although Plaintiffs have not directed this argument specifically at Section 214(a) (it is directed more explicitly at Section 214(c)), it is a central theme of the McConnell Plaintiffs' briefing and the Court presumes that they intend for it to be applied to Section 214(a) as well.

[90] The regulations promulgated by the FEC define coordinated communications as those not paid for by the candidate or the political party, that meet one content and one conduct standard. Final Rules; Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 453 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.21). The conduct standards include: (1) communications made, produced, or distributed at the request or suggestion of the candidate or party, or at the request or suggestion of a payor who receives the candidate or party's assent; (2) material involvement by the candidate or party in decisions regarding the content, intended audience, means or mode, media outlet used, the timing or frequency, or the size or prominence of the communication; (3) one or more substantial discussions about the communication between the payor and the candidate clearly identified in the (continued...)

value of such regulations because of the "ebb and flow of administrative practice," they provide no support for their theory that laws restricting speech cannot be shaped by regulations because of the nature of administrative practices. In addition, as described in more detail below, *see infra* at 167, any issues arising from the enforcement of these regulations can be challenged via lawsuit under the Administrative Procedure Act (APA), or clarified through the advisory opinion procedure codified at 2 U.S.C. § 437f.[91]

2) Agreement

The Court addresses next Plaintiffs' argument that Section 214(a) violates the Constitution because it does not require the existence of an "agreement" as a predicate to the finding of coordination. Plaintiffs cite to four cases in support of their theory that an agreement is required for an expenditure to be coordinated. The Court addresses each in turn, finding that none support Plaintiffs' argument.

In *Buckley*, the Supreme Court found that Congress could limit coordinated

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[90](...continued)
communication which concern the candidate's or political party committee's campaign plans, projects, activities, or needs that are material to the creation, production or distribution of the communication. *Id*. at 454. The regulation also creates a safe harbor for responses to inquiries about legislative or policy issues. *Id*. at 455. The content standards can be found at 68 Fed. Reg. 421, 453 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.21(c)).

[91] The statute provides in part:

> *Not later than 60 days* after the Commission receives from a person a complete written request concerning the application of [FECA] . . . or a rule or regulation prescribed by the [FEC], with respect to a specific transaction or activity by the person, the [FEC] *shall* render a written advisory opinion relating to such transaction or activity to the person.

2 U.S.C. § 437f(a)(1) (emphasis added).

expenditures to "prevent attempts to circumvent [FECA] through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley*, 424 U.S. at 47. In rejecting FECA's limitation on independent expenditures, the Supreme Court distinguished independent from coordinated expenditures, noting that expenditures "made *totally* independently of the candidate and his campaign . . . . may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Id*. (emphasis added). The Supreme Court noted that "[t]he absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Buckley*, 424 U.S. at 47. The coordinated expenditure provision *Buckley* upheld defined coordinated expenditures as those "authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate." *Id*. at 47 n.53 (quoting FECA § 608(c)(2)(B)). The Supreme Court cited to the House and Senate reports, especially the more detailed Senate report which included the following "example illustrating the distinction between 'authorized or requested' expenditures . . . and independent expenditures":

> "(A) person might purchase billboard advertisements 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' under section 614(c) of the bill. The person making the expenditure would have to report it as such.
> "However, if the advertisement was placed in cooperation with the candidate's campaign organization, then the amount would constitute a gift by the supporter and an expenditure by the candidate just as if there had been a direct

> contribution enabling the candidate to place the advertisement himself. It would be so reported by both."

Id. (quoting S.Rep. No. 93- 689, p. 18 (1974), U.S. Code Cong. & Admin. News 1974, p. 5604) (alteration in original). Based on this guidance, the Supreme Court found that "the 'authorized or requested' standard of the Act operates to treat all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate as contributions." *Id*.

In *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604 (1996) ("*Colorado I*"), the Supreme Court found that an advertisement made by a political party was not a coordinated expenditure, in part because of "uncontroverted evidence that this advertising campaign was developed by the Colorado Party independently and not pursuant to any general or particular understanding with a candidate." *Colorado I*, 518 U.S. at 614 (plurality opinion) ("[W]e therefore treat the expenditure, for constitutional purposes, as an 'independent' expenditure, not an indirect campaign contribution.").

This District Court grappled with the troublesome First Amendment line between coordinated and independent expenditures in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). In her decision, which was not subjected to appellate review, Judge Joyce Hens Green explained:

> This Court is bound by both the result and the reasoning of *Buckley*, even when they point in different directions. While Buckley confidently assured that coordinated expenditures fell within the Act's limits on contributions, it also reasoned that spending money on one's own political speech is an act entitled to constitutional protection of the highest order. Expressive coordinated

> expenditures bear certain hallmarks of a cash contribution but also contain the highly-valued political speech of the spender. I take from *Buckley* and its progeny the directive to tread carefully, acknowledging that considerable coordination will convert an expressive expenditure into a contribution but that the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some consultations or coordination with a federal candidate.

Christian Coalition, 52 F. Supp. 2d at 91 (citations omitted). In addressing "coordination as it applies to expressive coordinated expenditures by corporations," *id.*, Judge Green noted that "[t]he fact that the candidate has requested or suggested that a spender engage in certain speech indicates that the speech is valuable to the candidate, giving such expenditures sufficient contribution-like qualities to fall within the Act's prohibition on contributions." *Id.* at 92. However, the absence of such overtures would not, in Judge Green's view, prevent an expenditure from being coordinated.

> In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is 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. This standard limits § 441b's contribution prohibition on expressive coordinated expenditures to those in which the candidate has taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign's needs or wants.

Id. Judge Green acknowledged that this standard still left "room for factual dispute," which in turn could "chill some speech." *Id.* But such deficiencies were deemed acceptable given that "expressive coordinated expenditures present real dangers to the integrity of the electoral process." *Id.*

In *Colorado II*, the Supreme Court expounded on the difficulty in determining the point at which an expenditure becomes a coordinated expenditure. The Supreme Court also commented on the functional approach which Congress had adopted, and the *Buckley* Court accepted, to balance First Amendment rights and the state's interest in preventing campaign finance corruption.

> The First Amendment line between spending and donating is easy to draw when it falls between independent expenditures by individuals or political action committees (PACs) without any candidate's approval (or wink or nod), and contributions in the form of cash gifts to candidates. But facts speak less clearly once the independence of the spending cannot be taken for granted, and money spent by an individual or PAC according to an arrangement with a candidate is therefore harder to classify. As already seen, Congress drew a functional, not a formal, line between contributions and expenditures when it provided that coordinated expenditures by individuals and nonparty groups are subject to the Act's contribution limits, 2 U.S.C. § 441a(a)(7)(B)(i). In *Buckley*, the Court acknowledged Congress's functional classification, and observed that treating coordinated expenditures as contributions "prevent[s] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley*, in fact, enhanced the significance of this functional treatment by striking down independent expenditure limits on First Amendment grounds while upholding limitations on contributions (by individuals and nonparty groups), as defined to include coordinated expenditures.

Colorado II, 533 U.S. at 442-443 (citations omitted). Also, in that case, the Supreme Court found that "coordinated spending . . . covers a spectrum of activity." *Id.* at 445.

This Court agrees 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." *Christian Coalition*, 52 F. Supp. 2d at 91. However, the Court finds nothing in the cited precedent, or Plaintiffs' arguments, demanding that for an expenditure to be coordinated there must be an agreement. The Court's reading of these cases suggests the very opposite. At the very least, the cases state that substantive requests and suggestions, or "wink or nod" arrangements, can render subsequent expenditures to be "coordinated," a standard that does not equate to agreement.[92] Therefore, the Court rejects the argument that agreements are a constitutional prerequisite to the finding that an expenditure is coordinated, and finds that Plaintiffs have not demonstrated that Section 214(a) violates the Constitution.

b. Section 214(b)

Section 214(b) repealed the FEC regulations on coordination in effect at the time BCRA was enacted. BCRA § 214(b). Plaintiffs concede that Congress has the power to repeal the regulations. What Plaintiffs argue, however, is that "Congress had a duty to provide a narrow, precise, and objective definition for the coordination concept" but failed

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[92] Defendants offered this hypothetical to illustrate the type of coordination the "request or suggestion" standard is intended to cover:

> A candidate suggests to a wealthy individual, "If you want to help, you might finance some political advertisements advocating my election"; the individual does not reply, but a week later, buys $100,000 worth of air time to advocate the candidate's election.

Gov't Br. at 185. According to the Chamber of Commerce, this hypothetical "is realistic . . . . Candidates and their parties routinely make general requests for public support." Chamber/NAM Opp'n at 6.

to do so and "by repealing the FEC's regulatory definition, Congress substantially aggravated the constitutional violation." Chamber/NAM Br. at 13 n. 6. Since the FEC promulgated regulations on January 3, 2003, this "aggravation" claim is moot.

c. Section 214(c)

Because Defendants argue that Plaintiffs' challenge to Section 214(c) is nonjusticiable, Gov't Br. at 183-85; Int. Br. at 139-40, the Court will address this issue first as its resolution may preclude consideration of the merits of the Plaintiffs' other arguments. Preliminarily, the Court notes that BCRA provides this Court with jurisdiction to hear "any action brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act," and instructs it to "expedite to the greatest possible extent the disposition of the action." BCRA § 403; 2 U.S.C. § 437h note. This grant does not extend to the consideration of FEC regulations, and it does not permit the Court to go beyond its Article III powers to address claims that are nonjusticiable. *Clark v. Valeo*, 559 F.2d 642, 650 n. 11 (D.C. Cir. 1977) ("To the extent [the dissent's] language may be read as suggesting a view that Congress may 'command' the judiciary to act contrary to the rules relative to ripeness the Supreme Court has developed 'for its own governance in the cases confessedly within its jurisdiction,' we respectfully disagree.") (citations omitted). Cognizant of its authority, the Court now turns to each of Defendants' justiciability claims.

1) Article III Standing

Plaintiffs have the burden of establishing standing to bring their suit by demonstrating that they have: (1) suffered an "injury in fact;" (2) which is "fairly traceable to the conduct complained of;" and (3) is capable of judicial redress. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In the First Amendment context, the standing requirements are somewhat relaxed. Parties have

> standing to challenge a statute on grounds that it is facially overbroad, regardless of whether [their] own conduct could be regulated by a more narrowly drawn statute, because of the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.
> Of course, in order to have standing, an individual must present more than allegations of a subjective chill. There must be a claim of specific present objective harm or a threat of specific future harm.

Bigelow v. Virginia, 421 U.S. 809, 816-17 (1975) (citation and internal quotation marks omitted).

In terms of the "injury in fact" prong, it is true that Plaintiffs have "not alleged any concrete and particularized injury from [Section] 214(c)'s instructions to the Commission to promulgate a new regulation." Gov't Br. at 184. However, *Bigelow* instructs that Plaintiffs do not have to allege a particularized injury, they must only show a specific objective harm. *Bigelow*, 421 U.S. at 816-17. Plaintiffs allege that the Constitution requires an agreement before an expenditure may be considered coordinated. McConnell Br. at 84; Chamber/NAM Opp'n at 8 n. 10 (stating that Section 214(c) "fairly read, rejects the constitutional holding" that the "First Amendment demanded a narrow agreement standard of coordination"). The fact that Section 214(c) directs that the FEC's regulations on coordination not require “agreement or formal collaboration,” from Plaintiffs’ perspective, presents a specific future harm of impermissibly overbroad regulations. McConnell Opp’n at 53 n.24 (arguing that “since” no constitutional regulation consistent with BCRA can be promulgated (because of the statute’s disavowal of an ‘agreement’ standard)” it would be futile to delay “litigation until regulations are promulgated, litigation is appropriate now”).[93] This argument was addressed above and found to be inconsistent with the holdings of *Buckley* and its progeny.[94]

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[93] Plaintiffs, despite purporting to have standing to challenge Section 214(c), have not clearly articulated the basis for their position. This theory represents what the Court has gleaned from their terse briefings. *See* Chamber/NAM Opp’n at 7-8; Chamber/NAM Reply at 7-10; McConnell Opp’n at 53 (“For reasons discussed fully in the submission of the Chamber of Commerce Plaintiffs . . . this assertion [that plaintiffs’ coordination arguments are not justiciable at this time] are meritless.”).

[94] McConnell Plaintiffs argue that the language of Section 214(c) violates the Constitution because it does not require “*some form of agreement* with the candidate [to] be present to find coordination. BCRA, of course, forbids the FEC from requiring that any sort of agreement – *formal or otherwise* – be required.” McConnell Opp’n at 54 n.26. The Court disagrees with Plaintiffs, interpreting Section 214(c) under the doctrine of *noscitur a sociis*. “The maxim noscitur a sociis, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.” *Jareki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Given that “agreement” in Section 214(c) is immediately followed by the words “or formal collaboration,” narrows the Court’s reading of the term to cover formal agreements. This interpretation also appears to match the intent of Congress. *See* 148 Cong. Rec. S2144 (daily ed. Mar. 20, 2002) (Sen. Russ Feingold) (“Unfortunately, based on a single district court decision, the Federal Election Commission’s current regulation defining when general public political communications funded by outside groups are considered coordinated with candidates or parties fails to account for certain types of coordination that may well occur in real-world campaigns. The FEC regulation is premised on a very narrowly defined concept of ‘collaboration or agreement’ between outside groups and candidates or parties. This current FEC regulation fails to cover a range of *de facto* and *informal* coordination between outside groups and candidates or parties that, if permitted, could frustrate the purposes of the bill.”).

Therefore, Plaintiffs' allegation that they will be injured by regulations which by Congressional direction will be constitutionally overbroad, is not an injury-in-fact.[95]

Even if this Court were to find that Plaintiffs have alleged an injury-in-fact, Plaintiffs would still lack standing to bring their Section 214(c) challenge because their claim lacks redressability. To establish standing, Plaintiffs are required to show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 167 (1997). Even if this Court were to strike Section 214(c) from BCRA, other provisions dealing with coordinated expenditures to candidates and parties would still govern and count contributions as any expenditures made at the request or suggestion of a candidate–covering behavior which falls short of formal collaboration or

[95] The AFL-CIO, the Chamber of Commerce and NAM assert that "BCRA's vague and overbroad coordination standards will inevitably spur more . . . wide-ranging and burdensome investigations." AFL-CIO Br. at 13; Chamber/NAM at 14 ("[T]he Chamber and NAM[] know from painful, first-hand experience how a vague and overbroad concept of 'coordination' permits unfounded charges and investigations that seriously burden and chill participation in legislative initiatives.") These Plaintiffs point to the FEC's investigations into their broadcasts made in 1995 and 1996 (the Chamber of Commerce's advertisements were run in response to those aired by the AFL-CIO) to support this proposition. The Court finds a harm that may be caused by potential future investigations to be the type of speculative injury *Lujan* rejects as a basis for standing. Furthermore, the Court notes that the regulatory regime under which these investigations were conducted was far broader than that which BCRA appears to endorse. *See Christian Coalition*, 52 F. Supp. 2d at 89-91 (rejecting the FEC's "insider trading" or "conspiracy" standard for coordination). The regulations in place prior to 2000 considered expenditures to be coordinated when they were "[m]ade by *or through* any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent." 11 C.F.R. § 109.1(b)(4)(i)(B) (1999 ed.) (*repealed* 2001) (emphasis added).

agreement. *See* 2 U.S.C. § 441a(a)(7)(B)(i), (ii). As the Court explained above in finding Section 214(a) constitutional, there is nothing inherently unconstitutional about the "cooperation, consultation, or concert with, or at the request or suggestion of" language found in FECA § 441(a)(7)(B)(i) or (ii), 2 U.S.C. § 441(a)(7)(B)(i), (ii). Therefore, Plaintiffs' challenge to Section 214(c) cannot redress their claimed injury of having coordination defined as something broader than an agreement.

Based on the foregoing, the Court concludes that Plaintiffs have failed to establish the injury in fact and redressability elements required for Article III standing with regard to their challenge to Section 214(c).

2) Ripeness

In the alternative, the Court examines Defendants' assertion that Plaintiffs' Section 214(c) claims are not ripe for judicial review at this time. Defendants maintain that since Section 214(c) does not require or prohibit any actions by Plaintiffs, but merely directs the FEC to promulgate new regulations which were not final until after briefing and oral arguments in this case were completed, "neither the Court nor plaintiffs can know how the revised regulations will affect plaintiffs or have any basis for evaluating whether those regulations will contravene constitutional principles." Gov't. Br. at 183-84; *see also* Int. Br. at 140 ("[T]here is nothing meaningful for this Court to review . . . until there is actually a new definition in place."). This defect, Defendants argue, renders Plaintiffs' claims not yet ripe.

It is presumed that "federal courts lack jurisdiction unless the contrary appears affirmatively from the record," and "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Renne v. Geary*, 501 U.S. 312, 315 (1991). In commencing the ripeness analysis, the Eighth Circuit provides guidance:

> In order for a claim to be justiciable under Article III, it must be shown to be a ripe controversy. Ripeness is peculiarly a question of timing, intended to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. In short, the doctrine of ripeness is intended to forestall judicial determinations of disputes until the controversy is presented in clean-cut and concrete form. . . .
> [The] ripeness inquiry in the context of this [First Amendment] facial challenge . . . focuses on three elements: (1) hardship to the parties by withholding review; (2) the chilling effect the challenged law may have on First Amendment liberties; and (3) fitness of the controversy for judicial review. Our ripeness inquiry is not to be applied mechanically but rather, with flexibility.

New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499-1500 (10th Cir. 1995) (citations and quotation marks omitted).

Plaintiffs' arguments focus on the first two prongs of the ripeness analysis. They allege that Section 214 creates a situation whereby it is unclear what actions may render an expenditure "coordinated" under BCRA. This predicament, Plaintiffs claim, chills their speech and associational rights, which is the direct and immediate hardship they assert. *See* Chamber/NAM Opp'n at 10. Since BCRA is "self-enforcing," in that "it can be used against people in its current form," Plaintiffs maintain that the case is fit for judicial review. Tr. at 296 (Baran).

In light of the authority presented by the D.C. Circuit, the Court disagrees with Plaintiffs and finds their challenge to Section 214(c) not ripe for review. In *Martin Tractor Co. v. FEC*, a number of parties sought declaratory and injunctive relief from certain provisions of FECA. *Martin Tractor Co. v. FEC*, 627 F.2d 375, 377 (D.C. Cir.), *cert. denied sub nom. Nat'l Chamber Alliance for Politics v. FEC*, 449 U.S. 954 (1980). Limited to "soliciting" its hourly employees twice a year, the Martin Tractor Company complained that Section 441b(b)(4)(B) of FECA had restricted, in a constitutionally impermissible manner, its ability to communicate with its hourly employees about its PAC. *Id*. at 382. Neither the statute nor the regulations defined "solicit" or "solicitation." *Id*. at 383. The Court of Appeals determined, despite the vagueness of the undefined term "solicit" and the lack of clarifying regulatory language, that "the extent of the chill induced by the statutory provision at issue . . . is a very limited one." *Id*. at 384. This conclusion was based on two factors. First, the statute provided an "advisory opinion (AO) mechanism . . . authorized to give advice concerning the Act's application to specific factual situations," and mandated that such counsel be provided within 60 days of a request for advice. *Id*. 384-86. Second, the D.C. Circuit found that the legal rights alleged by Martin Tractor were "uncertain," *id*. at 386, and that unlike cases which had found ripeness in similar circumstances, the "adversarial posture assumed by the parties and contours of their dispute" were not clear, *id*. at 387. Specifically, the fact that the FEC "has said or done nothing . . . to indicate how it construes the term 'solicit,'" left the court "without substantial guidance to decide this case or even to frame the constitutional issues at stake." *Id*. at 387.

The situation this Court faces is virtually identical to that of *Martin Tractor*. Plaintiffs here similarly complain about the chilling effect of an ambiguous term. Plaintiffs, like those in *Martin Tractor*, have the option of seeking a chill-reducing AO if they fear their actions may be construed as "coordination."[96] In addition, since briefing and oral argument in the case occurred prior to the FEC's promulgation of final regulations and the regulations affect the vagueness alleged, the Court does not know the "contours of [the] dispute." In other

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[96] Plaintiffs' argument that *Buckley* should be construed as rejecting the opportunity for AO guidance as a factor in determining ripeness is completely incorrect, and in their own words, is "[n]onsense." Chamber/NAM Reply at 8. *Buckley* found that since the AO procedure in FECA *at that time* was available *only* to "candidates, federal officeholders, and political committees," the AO mechanism did "not assure that the vagueness concerns will be remedied prior to the chilling of political discussion by individuals and groups in this or future years." *Buckley*, 424 U.S. at 41 n. 47. This is no longer the case. *See Martin Tractor*, 627 F.2d at 386 n.44 (explaining why *Buckley* rejected the AO rationale and noting that "[b]oth of these aspects of the AO mechanism have been amended and the susceptibility of the FECA to challenge on the grounds of vagueness has consequently been reduced.").

Section 437f of FECA requires the FEC to provide an advisory opinion within 60 days of receiving a "written request concerning the application of [FECA] . . . or a rule or regulation prescribed by the" FEC. 2 U.S.C. § 437f(a)(1). The advisory opinions may be relied upon by the requester or any other person involved in an "identical transaction or activity with respect to which such advisory opinion is rendered." *Id*. at § 437f(c)(1). Such persons who "act[] in good faith in accordance with the provisions and findings of such advisory opinion, shall not, as a result of any such act, be subject to any sanction provided by" FECA. *Id*. § 437f(c)(2).

Plaintiffs also assert that it is "wildly implausible" and "impractical" to believe that the FEC could handle the thousands of AO requests they envision would result from the Court's decision today. Chamber/NAM Reply at 8. Whether or not there would be such an influx of requests, and whether or not the FEC would be in a position to handle them, are not questions before this Court and Plaintiffs have provided the Court with no basis, other than their unsupported assertion, for finding that the AO mechanism would be unworkable for solving coordination problems.

words, the Court does not know to what extent the regulations have clarified the vagueness Plaintiffs contend would chill their rights. Regulations in the past have clarified this very issue, Chamber/NAM Br. at 13 (stating that the FEC's now-repealed regulations on coordination "took useful steps toward alleviating" vagueness problems), and it is therefore likely that some, if not all, of Plaintiffs concerns have been addressed. For example, the ACLU maintains that because of Section 214 it "may not be able to discuss a . . . vote or position with a Representative or Senator if the ACLU will subsequently produce a box score that praises or criticizes the official's stand. This feature of BCRA acts as a continuing prior restraint . . . ." ACLU Br. at 20. However, the FEC's recently promulgated regulations appear to assuage this fear, creating a safe harbor for "inquiries about legislative or policy issues." Final Rules; Coordinated and Independent Expenditures, 68 Fed. Reg. at 455 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.21(f)). To decide Plaintiffs' claims at this juncture would entangle the Court in a dispute that has not been "presented in a clean-cut and concrete form," the exact situation the ripeness doctrine is designed to avoid. *Gonzales*, 64 F.3d at 1499.

The Chamber of Commerce and NAM seek to distinguish *Martin Tractor* from the current case on its facts. Chamber/NAM Reply at 8. First, they state that "[p]laintiff there did not claim immediate injury." *Id*. This is not the case. Martin Tractor alleged that "but for the [section] 441b restrictions and the threat of sanctions, [it] would resume the extent and manner of communication [it] engaged in previously." *Martin Tractor*, 627 F.2d at 382.

Second, Plaintiffs presume, based on the fact the court stated that the AO mechanism "argues against constitutional adjudication on a barren record," *Id.* at 385, that the appellants in that case had "provided no factual record." Chamber/NAM Reply at 8. If the Plaintiffs had referred to the footnote immediately following the court's statement, they would have seen that the court meant a record bare of any indication of how the FEC planned to enforce the provision, as opposed to a barren factual record. *See Martin Tractor*, 627 F.2d at 385 n.39 (citing cases holding "equitable relief inappropriate where administrative intent has not come to fruition or is unknown" and "case ripe where pertinent regulations *and AO* have been issued") (emphasis added). Next, the Chamber of Commerce and NAM appear to suggest that the *Martin Tractor* decision was the product of prudential concerns, and not an Article III ripeness determination. Chamber/NAM Reply at 8. Although the court stated, "we find the cases nonjusticiable as a constitutional matter and inappropriate for adjudication as a prudential matter," if Plaintiffs had looked at the footnote immediately following that statement, they would have read the Court's conclusion that "[s]ince we hold that these appellants present no justiciable 'case or controversy' we need not decide or consider the circumstances under which a court might decline for prudential reasons alone to reach the merits of a constitutional challenge to FECA." *Martin Tractor*, 627 F.2d at 378 & n.5. Lastly, the Chamber of Commerce and NAM point out that *Martin Tractor* discounted *Buckley*'s ripeness holding for "lack of a broad package of expedited challenges such as exist here." Chamber/NAM Reply at 8. The *Martin Tractor* court did note that the case before it provided "no similar urgency of decision . . . that outweighs the inadvisability of premature constitutional adjudication," although its decision was also informed by "the comparative speed with which an advisory opinion on specific conduct can be secured." *Martin Tractor*, 627 F.2d at 388.[97] Accordingly, the Court finds that *Martin Tractor* is applicable to the pending cases.

The cases at bar do differ from *Martin Tractor*, in one material respect. Unlike the case before the *Martin Tractor* court, where there was no indication the FEC would ever promulgate regulations to reduce the vagueness of the undefined term, Congress in this instance has explicitly ordered the FEC to promulgate regulations on this very matter in an expedited fashion, and the FEC did so on January 3, 2003. This fact argues against finding these cases ripe for adjudication. As the Eighth Circuit explained,

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[97] The Court also notes that although the *Martin Tractor* court took *Buckley*'s statement that "ripeness is peculiarly a question of timing," *Buckley*, 424 U.S. at 114, to describe the timing of that case in relation to the 1976 Presidential election, *Martin Tractor*, 627 F.2d at 388, a close reading of *Buckley* shows that the Supreme Court was referring to developments that had taken place in "the passage of months between the time of the decision of the Court of Appeals and our present ruling," *Buckley*, 424 U.S. at 114. The Supreme Court made its ripeness determination in the context of a separation of powers challenge to FECA's establishment of the FEC. *Id*. at 113. The Court finds that the challenge considered here differs greatly from that *Buckley* faced when it conducted the ripeness analysis described above. The separation of powers concerns raised in *Buckley* did not depend on the future promulgation of regulations, but focused solely on the constitutionality of the powers granted to the FEC. *See id.* at 113. The *Buckley* defendants could not claim that future regulations would shape the contours of the plaintiffs' claims. As such, this Court finds that the *Buckley* ripeness determination was made under circumstances that distinguish it from the case at bar and that its reasoning does not require the Court to forego Article III justiciability requirements in this case.

> [m]any ripeness cases require finality of the government action that is challenged. This requirement is intended, in part, to guard against courts passing on the legality of actions that do not, in and of themselves, alter or burden the rights, duties or obligations of the claimant. For example, orders that merely embody a precursor to the later formulation of actual regulations will, as a general rule, not support a finding of ripeness.

Gonzales, 64 F.3d at 1504 n.5 (citations omitted) (finding that, unlike the cases presented here, since the "challenged provision itself delineates the proscribed conduct and neither directs nor requires further administrative or legislative enactments for its effect" the case was ripe for adjudication); *see also El Dia v. Hernandez Colon*, 963 F.2d 488, 496 (1st Cir. 1992) (finding the "policies that underscore the ripeness doctrine militate strongly against granting discretionary (declaratory) relief" where the executive order challenged was "merely a precursor to the later formulation of actual regulations"). Moreover, as long as Plaintiffs abide by the regulations in good faith, they will not be subject to sanctions under FECA. 2 U.S.C. § 438(e) ("[A]ny person who relies upon a rule or regulation proscribed by the [FEC] . . . and who acts in good faith in accordance with such rule or regulation, shall not, as a result of such act, be subject to any sanction provided by [FECA].").

The Court acknowledges that the regulations may still be vetoed by Congress[98] or face

[98] Under the Administrative Procedures Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), the FEC's regulations must be submitted to Congress and do not take effect until 60 days after Congress receives the FEC's report on the regulations or the rule is published in the Federal Register, whichever is later. 5 U.S.C. § 801(a)(3). The regulations were transmitted to Congress on December 18, 2002 and published in the Federal Register on January 3, 2003. Final Rules; Coordinated and Independent Expenditures, 68 Fed. Reg. 421 (Jan. 3, 2003). Congress can veto the (continued...)

a court challenge. Regardless, the regulations shape the "contours" of Plaintiffs' complaints regarding Section 214(c). However, since the regulations are not properly before this Court, Plaintiffs' claims in this regard are not ripe. Again, it is possible that many, perhaps all, of Plaintiffs' concerns have been remedied by the recently promulgated regulations. The proper venue for any complaints Plaintiffs believe have not been addressed by the new regulations is not this special court, but in a single-judge court pursuant to a lawsuit brought under the Administrative Procedure Act (APA). *See* BCRA § 403. Although Plaintiffs decry the lengthy nature of suits brought under the APA, the Court lacks the jurisdiction to rule on the regulations and cannot ignore the absence of Article III ripeness in order to provide Plaintiffs with the forum they prefer.[99]

Accordingly, the Court does not reach the merits of Plaintiffs' challenges to Section 214(c), as they are not ripe for adjudication.

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[98](...continued)
regulations within 60 days by passing a joint resolution disapproving the regulations. *See* 5 U.S.C. § 802.

[99] Plaintiffs should also be aware that should they challenge the FEC's regulations, they may seek a stay from the FEC or a court to prevent the application of the rule pending its review. 5 U.S.C. § 705. The law provides: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a 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." *Id.*

d. Section 214(d)

In their Opposition Brief, the Chamber of Commerce and NAM claim that Section 214(d)

> specifies that coordination applies not only to a "contribution or expenditure" in the defined sense that requires express advocacy, but "*also* includes any direct or indirect payment . . . ." (emphasis added). BCRA § 214(d) extends coordination to an "electioneering communication." These provisions remove express advocacy as a *content* standard and give no substitute.

Chamber/NAM Opp'n at 8 (emphasis in original). The Court does not find Section 214(d) to have the effect on FECA that Plaintiffs assert. Section 214(d) amends FECA Section 441b, which limits contributions or expenditures by national banks, corporations, or labor organizations, so that the definition of "contribution or expenditure" under that section "includes a contribution or expenditure, as those terms are defined in section 301" of FECA, 2 U.S.C. § 431(8), (9). BCRA § 214(d); FECA § 441b(b)(2); 2 U.S.C. § 441b(b)(2). The definitions of "contribution" and "expenditure" in FECA Section 301 have not been amended by BCRA.[100] Plaintiffs' complaints about the definition's inclusion of "direct or indirect payment" are also misplaced as this provision preexisted BCRA and is therefore not subject to this Court's review.

Given the fact that Plaintiffs' understanding of Section 214(d) is mistaken, the Court has no basis upon which to review the provision, cannot fathom the nature of their claims,

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[100] BCRA Section 203 adds "electioneering communication" to FECA Section 441b(b)(2)'s definition of "contribution or expenditure."

and therefore does not find the provision unconstitutional.

C. *BCRA Title III*

Section 311: Clarity Standards for Identification of Sponsors of Election-Related Advertising

Section 311 amends Section 318 of FECA, 2 U.S.C. 441d, adding details and requirements for the identification of sponsors of political advertising. Included in the provision is the extension of FECA's requirements to electioneering communications, as defined in BCRA Section 201. BCRA § 311(1); FECA § 318(a); 2 U.S.C. § 441d(a). Pursuant to Section 318 of FECA, such communications must clearly state information about the sponsor, 2 U.S.C. § 441d(a); Section 311 adds various requirements related to the identification of the sponsor in the communication itself which are not challenged in the present litigation. *See* BCRA § 311(2), FECA § 318(c)-(d); 2 U.S.C. § 441d(c)-(d).

Plaintiffs' briefing on Section 311 is limited to a single sentence in a footnote in the McConnell Plaintiffs' Opening Brief:

> BCRA's requirement that political ads contain information identifying the candidate supported by the communication,[101] the party responsible for the content of the information, and/or an indication that the candidate approves the content of the communication . . . is . . . invalid, at least when applied to electioneering communications (and, for that matter, anything other than express advocacy).

McConnell Pls.' Br. at 56 n.22; *see also* Tr. at 303 (Baran).[102] This argument is presented

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[101] It is not clear to the Court where the Plaintiffs find this purported requirement from the text of Section 311.

[102] JUDGE HENDERSON: . . . Jumping to 311, only because I think this is the (continued...)

as a corollary to Plaintiffs' contention that "if the Court agrees that the electioneering communications provisions cannot stand, the attendant disclosure provisions should likewise fall, because the disclosure provisions constitute a regulation of . . . speech that the government may not regulate in the first place. *Id*. at 55-56. Given that the Court finds BCRA's electioneering communication definition constitutional, Plaintiffs' argument is rejected.

V. CONCLUSION

Accordingly, the Court finds that the Paul Plaintiffs' challenge is without merit. The Court finds that the disclosure requirements in Section 201, with one exception, are constitutional, as well as Sections 202, 214(a), 214(d) and 311. The Court concludes that a challenge to Sections 212 and the remainder of Section 214 is not justiciable.

In contrast with Judge Henderson's characterization of our approach, we believe that the resolution of these eleven suits required a careful and judicious review of all the evidence, pleadings, and arguments in a fair manner to all the parties. We are satisfied that we accomplished this goal in an as expedited a manner as possible and thereby served "the strong public interest in election law clarity and stability." Henderson Op. at 6 n.1.

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[102](...continued)

> last time we're going to hear from the omnibus [Plaintiffs], and I think you all are the only ones challenging 311, and it's not down here to be argued in Title 3 and I just want to make sure that it has been challenged. . . .
>
> MR. BARAN: I'd have to rely on the briefs on that, Your Honor. I'm not in a position to address that today.

TR. at 303 (Baran).

Three separate opinions by the members of this three-judge panel follow this *per curiam* opinion. Given the complexity of the rulings, and the fact that not any one opinion is fully dispositive, the opinions are presented in order of seniority of the members of this three-judge panel. Accordingly, Judge Henderson's opinion appears first, followed by Judge Kollar-Kotelly's opinion and then Judge Leon's opinion.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

/s/
RICHARD J. LEON
United States District Judge

May 1, 2003