No. 02-1756 *et al.*

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES, NATIONAL ASSOCIATION OF MANUFACTURERS, AND ASSOCIATED BUILDERS AND CONTRACTORS, INC. *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

OPENING BRIEF OF THE "BUSINESS PLAINTIFFS" CHAMBER OF COMMERCE OF THE UNITED STATES, NATIONAL ASSOCIATION OF MANUFACTURERS, AND ASSOCIATED BUILDERS AND CONTRACTORS, INC.

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QUESTIONS PRESENTED

1. Whether the "coordination" provisions of the Bipartisan Campaign Reform Act ("BCRA") (§§ 202 and 214), violate the First Amendment rights of business corporations and those who wish to hear their speech and associate with them.

2. Whether the "electioneering communications" provisions of BCRA (§§ 201, 203, 204, and 311), violate the right of business corporations and those who wish to hear their independent speech and associate with them under the First Amendment.

PARTIES TO THE PROCEEDINGS

The Appellants here, Plaintiffs in two of the eleven cases consolidated in the district court, represent the interests of American business and business corporations. The Appellants are the Chamber of Commerce of the United States, the National Association of Manufacturers, and the Associated Builders and Contractors, Inc. They are referred to herein as the "Business Plaintiffs."

- The Chamber of Commerce of the United States ("Chamber") is the world's largest not-for-profit business federation. Founded in 1912, the Chamber represents over 3,000,000 businesses and business associations. The Chamber is a corporation, as are many of its members and supporters, and it is exempt from taxation under section 501(c)(6) of the Internal Revenue Code.
- The National Association of Manufacturers ("NAM") is the oldest and largest broad-based industrial trade association in the United States. Its membership comprises 14,000 companies and 350 member associations, meaning that NAM represents about 18 million individuals. Like many trade associations, NAM is incorporated and is exempt from taxation under section 501(c)(6).
- The Associated Builders and Contractors, Inc. ("ABC") represents more than 23,000 contractors and related firms in the construction industry, both unionized and non-unionized, who share the view that work should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC is funded primarily by membership dues and is exempt from taxation under section 501(c)(6).[*]

[*] The Associated Builders and Contractors Political Action Committee (ABC PAC) and the U.S. Chamber Political Action Committee (U.S.

The Appellees here, who collectively were Defendants in the district court, fall into two categories: the Government Defendants, comprising the Federal Election Commission, the Federal Communications Commission, and the United States of America; and the Intervenor Defendants, comprising Senator John McCain; Senator Russell Feingold; Representative Christopher Shays; Representative Martin Meehan; Senator Olympia Snowe; and Senator James Jeffords. They are referred to collectively herein as Defendants.

CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement is included on page iii of the Business Plaintiffs' Jurisdictional Statement.

Chamber PAC) are separate segregated funds of their respective organizations under 2 U.S.C. § 441b(b)(2)(C), and are political organizations under section 527(e)(1) of the Internal Revenue Code. They receive contributions from individuals as authorized by federal law and make contributions to or expenditures in support of federal candidates. Because of the associated burdens and risks, NAM does not have a PAC. The two business PACs are relying upon arguments by other allied parties at this stage of the briefing.

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The district court's opinions are reported at 251 F. Supp. 2d 176 (D.D.C. 2003), and may be found in the Supplemental Appendix to Jurisdictional Statements that has been filed with the Court. *See* Supp. App. 1sa-1382sa. The district court's Order staying the effect of its decision and the accompanying Memorandum Opinions are reported at 253 F. Supp. 2d 18 (D.D.C. 2003), and are reprinted in the Appendix to the Business Plaintiffs' Jurisdictional Statement ("J.S. App.") at J.S. App. 4a-20a.

JURISDICTION

The district court entered judgment on May 2, 2003. Appellants filed their timely notice of appeal on May 7, 2003. Appellants' notice of appeal is reprinted at J.S. App. 1a-2a. This Court noted probable jurisdiction on June 5, 2003. This Court has appellate jurisdiction pursuant to section 403(a)(3) of BCRA.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), is reprinted at J.S. App. 22a-85a. Sections 201, 202, 203, 204, and 311 of BCRA all are relevant to this brief, but the two provisions on which this brief focuses are the following:

Electioneering Communications

Section 201(a) of BCRA amends the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431 *et seq*. ("FECA") by adding the following to 2 U.S.C. § 434 as part of subsection (f):

> (3) ELECTIONEERING COMMUNICATIONS. – For purposes of this subsection –
>
> [PRIMARY DEFINITION]
>
> (A) IN GENERAL. – (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.

[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.

Coordination

Section 214(a) of BCRA amended FECA, 2 U.S.C. § 441a(a)(7)(B), by inserting after existing clause (i) and before the former clause (ii) – redesignated as clause (iii) – the following new clause (ii):

(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; and

Section 214(b), (c), and (d) of BCRA provide as follows:

> (b) REPEAL OF CURRENT REGULATIONS. – The regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees adopted by the Federal Election Commission and published in the Federal Register at page 76138 of volume 65, Federal Register, on December 6, 2000, are repealed as of the date by which the Commission is required to promulgate new regulations under subsection (c) (as described in section 402(c)(1)).
>
> (c) REGULATIONS BY THE FEDERAL ELECTON COMMISSION. – The Federal Election Commission shall promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees. The regulations shall not require agreement or formal collaboration to establish coordination. In addition to any subject determined by the Commission, the regulations shall 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.
>
> (d) MEANING OF CONTRIBUTION OR EXPENDITURE FOR THE PURPOSES OF SECTION 316. – Section 316(b)(2) of the Federal Election Campaign Act of 1971 (2 U.S.C. § 441b(b)(2)) is amended by striking "shall include" and inserting "includes a contribution or expenditure, as those terms are defined in section 301, and also includes".

2. The First Amendment of the United States Constitution is reprinted at J.S. App. 21a.

INTRODUCTION

The success and vitality of American business, and of the corporations by which most of America's business is conducted, are central to the welfare and happiness of the American people, and to the security and stability of our nation. Corporations are primary employers, providing jobs, salaries, healthcare, retirement, and other benefits to most Americans; they produce much of our nation's goods and wealth; and their securities are central to retirement and investment plans.

Business corporations are profoundly affected by federal legislation, policy, and executive action on a wide range of issues, from tort reform to taxes, intellectual property to import controls, and employment standards to environmental protection. As a result, corporations are critically interested in the formulation and implementation of federal legislation and policy and in arguing that their knowledge and concerns are fully and effectively communicated to the public, federal legislators and other government officials, as well as to candidates and officials of the national political parties. At the same time, all Americans, including American voters and government officials, have a vital interest in hearing what corporations have to say on the key issues of the day.

The premise of the First Amendment is that we govern ourselves best when interested and informed parties are free to speak, associate, and petition, especially as to matters of legislation and public policy. This Court repeatedly has recognized the constitutional as well as the practical importance of corporate participation in the shaping of legislation and public policy. Although it has sustained some limits on express candidate advocacy, it has imposed a stringent standard of review, and has insisted that such limits be narrowly tailored and precisely defined, and has flatly rejected attempts to regulate corporate speech on matters of

public policy that does not expressly advocate the election or defeat of candidates.

BCRA threatens broad and vague new restrictions on the ability of corporations (and labor unions) to speak, associate, and petition the government. This brief focuses on two of BCRA's most damaging provisions.

First, BCRA seeks to expand the narrow and precise "express advocacy" standard, under which the First Amendment tolerates regulation of speech that explicitly advocates the election or defeat of clearly identified candidates. BCRA creates sweeping regulation of so-called "electioneering communications" that merely refer to a candidate or, alternatively, that may be thought to support or oppose a candidate. This new standard – intended to expand the "express advocacy" standard that this Court derived from the First Amendment – is applied throughout BCRA to impose disclosure, reporting, contribution and expenditure limits on individuals, unincorporated groups, corporations, political parties, and others. But it has particular effect on corporations and unions since the ban on their express advocacy is converted into a sweeping ban on a wide range of public speech. Incredibly, BCRA would forbid corporations to so much as mention President Bush, Vice President Cheney, or their Democratic rivals in broadcasts on the major television or radio stations in Washington, D.C., New York City, St. Louis, Chicago, and elsewhere during much of 2004!

Second, BCRA perverts the common sense "coordination" rule that agreeing with a candidate to finance specified speech in support of his or her campaign may constitute a forbidden contribution. By eliminating any requirement of agreement, BCRA imposes a vague coordination standard under which, on pain of criminal liability, corporations and others must choose between the types of routine communication and association with members of Congress and other allies by which federal legislation and policy is developed versus their core right to speak freely on legislative and policy issues.

The Business Plaintiffs who join in this brief – the Chamber, NAM, and ABC – are three of the major incorporated associations through which American business and business corporations communicate with Americans and American government officials and participate in the formulation of federal legislation and policy. For themselves and their members, and ultimately for the good of our democracy, the Business Plaintiffs urge the Court to adhere to the First Amendment limits it has set and to reject the coordination and electioneering communication provisions of BCRA.

STATEMENT OF THE CASE

The district court was deeply divided. Over Judge Henderson's strong dissent, Judges Leon and Kollar-Kotelly ruled that: (1) Neither of BCRA's alternative definitions of electioneering communication is valid, but the ambiguous Backup Definition could be made constitutional by severing a clause that narrows its scope, Per Curiam, Supp. App. 6sa; Leon, J., Supp. App. 1164sa-66sa; Kollar-Kotelly, J., Supp. App. 885sa-86sa; and (2) BCRA's coordination standard is not void for lack of tailoring, and whether it is vague cannot be decided until after judicial review of the FEC's new coordination regulations before a single-judge district court, Per Curiam, Supp. App. 134sa-56sa. However, when the district court stayed its rulings pending this Court's decision, Judge Leon announced that the broadened Backup Definition does not provide enough "guidance" to be enforced. J.S. App. 19a.

The district court compiled only a paper record, receiving no live testimony. The three judges sharply disagreed as to the meaning of that record. In any event, in First Amendment cases, this Court makes an "independent examination of the whole record [to prevent] a forbidden intrusion on the field of free expression," as well as deciding all legal issues *de novo*. *Bose Corp. v. Consumer Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). In these circumstances, and in light of this Court's Order of June 5, 2003, directing plaintiffs to submit

opening briefs on all of their claims, regardless of how they fared in the district court, the Business Plaintiffs focus on the record below, citing the district court opinions where relevant.

BCRA'S "Coordination" and "Electioneering Communication" Provisions.

BCRA is a complex and lengthy statute that amends the equally complex FECA. This brief focuses on BCRA's "electioneering communication" and "coordination" provisions, quoted *supra* at 1-4, because they directly and substantially burden core First Amendment activities of corporations.

Electioneering Communication: *Buckley v. Valeo*, 424 U.S. 1 (1976), construed the First Amendment to prohibit campaign finance regulation that restricts independent speech that does not use explicit words to expressly advocate election or defeat of clearly identified candidates. This same "express advocacy" standard was employed across the board to set constitutional bounds to expenditure limits, reporting and disclosure requirements, and other burdens on individuals, groups, and corporations. *Id.* BCRA rejects *Buckley*'s "express advocacy" standard and instead introduces a new category of "electioneering communications." BCRA § 203. BCRA provides a Primary Definition of electioneering communication and a very different Backup Definition, which takes effect only if the Primary Definition is struck down.

Primary Definition: Under the Primary Definition, an electioneering communication is any broadcast, cable, or satellite communication that (a) "refers to a clearly identified [federal] candidate," (b) is made within 30 days before a nominating caucus, convention, or primary or 60 days before any general, special, or runoff election for the office the candidate seeks, and, in the case candidates for Congress, (c) is "targeted" in the sense that it "can be received by 50,000 or more persons" in the relevant district or State. BCRA § 201. The FEC's new regulations provide that communications

referring to candidates for presidential and vice presidential nominations during state nominating events (e.g., a primary or convention) trigger a 30 day blackout period only in the involved state and only as to candidates seeking nomination by the involved party. 11 C.F.R. § 100.29(a)(2), (b)(3)(ii).

The FEC directed the Federal Communications Commission to create a database to answer the complex question of which broadcast, cable, and satellite signals can be received by 50,000 persons in particular jurisdictions. *See FCC Database on Electioneering Communications*, 67 Fed. Reg. 65,212, 65,215-16 (Oct. 23, 2002). This is necessary because electronic signals are not affected by political boundaries and often reach substantial audiences in multiple districts or states.

For example, major television stations in Washington, D.C., southern Maryland, and northern Virginia reach more than 50,000 persons in all three jurisdictions. *See, e.g.*, Warren Communications News, Television & Cable Fact Book (2002). Similarly, the principal New York City television stations reach more than 50,000 people in New Jersey, Pennsylvania, and Connecticut. *Id.*[1] Since radio and television broadcast signals often extend for a radius of 80 to 100 miles, there are many similar situations, ranging from large urban centers such as St. Louis, Missouri and East St. Louis, Illinois, or Chicago, Illinois and nearby Indiana communities, to population clusters such as Lake Charles and Sulfur, Louisiana which share radio and television coverage with Port Arthur and Beaumont, Texas, or Fargo, North Dakota and Morehead, Minnesota which lie on either side of the Red River. *Id.* And so on.

BCRA section 203 expands the former prohibition of express advocacy by corporations into a prohibition of electioneering communications. This means that in any given

[1] The coverage of at least 50,000 people in each such state can be confirmed by summing the population of towns within the stations' grade "B" contour, e.g., Levittown and Easton, Pa.; Greenwich and Stamford, Conn.

state, BCRA's Primary Definition blacks out any corporate broadcast reference to the presidential candidates for *at least 120 days* during an election year: 30 days before the state primary or other nominating event; 30 days before the relevant national convention; and 60 days before the general election. For congressional candidates, the minimum period is 90 days since there is no national convention. But because broadcast, satellite, and cable signals often reach more than 50,000 persons in multiple jurisdictions, blackouts can be much longer.

The 2004 primary schedule is not complete, but if the 2000 dates were followed, the audience of major television and radio stations in the nation's capital could not receive corporate references to President Bush or Vice President Cheney for 157 days during 2004, and residents of New York City would be deprived of such speech for 176 days.[2] References to Democratic challengers also would be blacked out for 176 days in New York, but in D.C. the period would be 187 days.[3] Of these half-year blackout periods, 56 days of the New York City blackout, 37 days of the D.C. Republican blackout, and 60 days of the D.C. Democratic blackout would be due to primaries in adjacent jurisdictions.[4]

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[2] But for overlaps in some of the blackout periods, the blackout periods would be longer. With respect to New York City, the relevant primary dates are: N.Y. and Conn. 3/7; Pa. 4/4; and N.J. 6/6. With respect to D.C., the relevant primary dates are: Va. Rep. 2/29; Md. 3/7; and D.C. 5/2. The Republican National Convention started 7/31, and the general election was 11/7. These dates can be verified at the FEC's website, www.fec.gov. That site does not list minor party nominating dates. However, in a state such as New York where multiple minor parties also often nominate major party candidates, the blackout period actually could be 60 to 90 days longer than stated.

[3] This greater length is because Virginia's Republican primary overlaps with Maryland's primary, while Virginia's June 6 Democratic convention does not overlap any D.C. or Maryland event.

[4] The blackout would not merely affect residents of D.C. or New York, but would burden the entire audience of affected stations. For example,

Backup Definition: Alternatively, if the Primary Definition is "held to be constitutionally insufficient," then the Backup Definition defines electioneering communication as (a) any broadcast, cable, or satellite communication that "promotes or supports . . . or attacks or opposes" a candidate for federal office, (b) "regardless of whether the communication expressly advocates a vote for or against a candidate," so long as it (c) "is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." BCRA § 201. The "suggestive of no plausible meaning" clause derives from *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), the only court of appeals decision to arguably relax *Buckley's* "express advocacy" standard.[5] In Senate debates,

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residents of Northern Virginia would suffer blackouts due to D.C. and Maryland nominating events. For the AM radio nighttime audience, the situation is much worse. Because AM radio waves bounce off of the ionosphere, which shifts after sunset, many local AM stations are required to sharply reduce power, or even to cease broadcasting, to clear the way for about fifty "clear channel" stations that use increased power and reflection from the ionosphere to serve wide regions – a range of approximately 750 miles in radius. *See* Audio Division, Federal Communications Commission, *Why AM Radio Stations Must Reduce Power, Change Operations, or Cease Operations at Night*, *at* http://www.fcc.gov/mb/audio/bickel/daytime.html (last visited July 1, 2003). Because these stations can be received in many states with different primary dates, their references to the president, vice president, and challengers may be banned for almost the entire election year. Listeners to subscription satellite radio, a newly emerging medium that reaches nationwide audiences and is required to use system-wide advertisements, face similar restrictions. *See* 2001 FCC LEXIS 4931, Para. 11 (Sept. 17, 2001).

[5] *Furgatch* overlooked this Court's then-recent decision in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 283 (1986) ("*MCFL*"). *Furgatch* was rejected by all other Courts of Appeals. *See Chamber of Commerce of the United States v. Moore*, 288 F.3d 187 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 536 (2002); *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *Me. Right to Life*

the Backup Definition was frequently referred to as the "*Furgatch*" standard. 147 Cong. Rec. S2706, S2710, S2712-13 (daily ed. Mar. 22, 2001) (statements of Sen. Specter). The FEC declined to issue regulations dealing with the Backup Definition. *See Electioneering Communications*, 67 Fed. Reg. 65,190, 65,191 (Oct. 23, 2002) (Explanation and Justification). *See also* J.S. App. 19a (Leon, J.).

The Backup Definition applies at all times and in all states whether or not any election is pending there. It applies to speech that does not expressly advocate an electoral outcome. Because many members of the House of Representatives are nearly perpetual federal candidates, the Backup Definition would regulate corporate references to them year-round.

Coordination: Since *Buckley*, spending for speech that was sufficiently "coordinated" with a federal candidate or campaign was classified as a "contribution." *See Buckley*, 424 U.S. at 46-47; s*ee also* 2 U.S.C. § 441a(a)(7)(B); 11 C.F.R. § 100.23 (repealed by BCRA section 214). Corporations were forbidden to contribute to federal candidates, campaigns, and political parties on pain of civil and criminal penalties. 2 U.S.C. § 441b(a). Individuals were allowed to contribute only limited amounts. *Id*. § 441a(a). Thus, a charge that an issue ad was coordinated with a candidate translated into a charge of making an unlawful contribution. This contribution doctrine arguably applied only to speech that contained "express advocacy," though such a limitation was controversial at best. *See* Statement For

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Comm., Inc. v. FEC, 98 F.3d 1 (1st Cir. 1996). *See also Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *Va. Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268 (4th Cir. 1998); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997); *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980); *see also Fla. Right to Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (affirming preliminary injunction). In addition, the Ninth Circuit recently gave its *Furgatch* opinion a sharply narrow meaning. *See Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003).

the Record by Commissioner Bradley A. Smith in FEC MUR 4624 (Nov. 6, 2001), J.A. 1822, 1827-29.

As issue ads became more common, so did charges of coordination, and the meaning of coordination received more attention. By the late 1990's, constitutional precedent and FEC regulation required some element of agreement between speaker and candidate before otherwise permissible independent speech was converted into a forbidden contribution. *See FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 91-92 (D.D.C. 1999); 11 C.F.R. § 100.23(c)(2)(iii) (repealed by BCRA section 214). BCRA section 214 rejects the constitutionally-based narrowing construction under which agreement was necessary, repeals the FEC regulations embodying the requirement of agreement, extends the coordination concept to political parties as well as candidates and campaigns, defines coordination as acting "in cooperation, consultation, or concert with, or at the request or suggestion of" a federal candidate, campaign, or party, and forbids construing this standard to require "agreement or formal collaboration."

The FEC has issued regulations implementing BCRA's coordination directives. *See Coordinated and Independent Expenditures*, 68 Fed. Reg. 421 (Jan. 3, 2003). They provide that "[a]greement or formal collaboration between the person paying for the communication and the candidate [or] political party" is not required to establish coordination. 11 C.F.R. § 109.21(e). "*Agreement* means a mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination." *Id*. Thus, speech is coordinated if it is "created, produced, or distributed at the *request* or *suggestion* of" or "after one or more *substantial discussions* about [it]" with, a candidate or political party or their agents, *even if there is no "mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination" between*

speaker and candidate or political party. *Id*. §§ 109.21(d)(1)(i), 109.21(d)(3), 109.21(e) (emphasis added).[6]

Under the FEC regulations a broad range of speech may be deemed coordinated, including: (i) express advocacy, (ii) electioneering communications, and (iii) any "refer[ences] to a political party or to a clearly identified candidate for federal office" that is "directed to voters in the jurisdiction" where the candidate or the party's candidates are running, and is "publicly disseminated 120 days or fewer before" either a nominating event or election. *Id*. § 109.21(c).

The Process Of Developing National Legislation And Policy Requires Ongoing Close Contacts With Candidates And Party Officials.

Federal legislation and policy arises from the complex, ever shifting, and often long-term efforts of individual citizens or businesses, associations representing interested groups, federal legislators and their staffs, federal executive officers at all levels, and the national political parties. Ad hoc alliances are formed, compromises are hammered out, drafts and position statements are circulated, resources are pooled, the public is informed and persuaded, and, ultimately, legislation or policy is made. Huard Test. ¶¶ 3, 6, 7, J.A. 285-87; Josten Test. ¶ 4, J.A. 328; Monroe Test. ¶ 3, J.A. 592.

A prototypical example of the formulation of federal policy and legislation was the Thursday Group that met weekly in the offices of Congressman John Boehner in 1995 and 1996 to advance pro-business aspects of the "Contract with

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[6] To facilitate preparation of accurate voter guides, *see* 68 Fed. Reg. 421, 440 (Jan. 3, 2003), the FEC carved out a narrow "safe harbor" under which a "*response* to an *inquiry* about that candidate's or political party committee's positions on legislative or policy issues," standing alone, does not establish coordination. 11 C.F.R. § 109.21(f) (emphasis added). Reflecting its limited purpose, if the information is volunteered or arises from anything other than the specified type of inquiry, or if a response includes any "discussion of campaign plans, projects, activities, or needs," then the safe harbor does not apply. *Id.*

America." Henderson, J., Supp. App. 282sa-83sa. Congressman Boehner was the fourth-ranking Republican House member – the Republican Conference Chair, *ex officio* board member of the National Republican Congressional Committee (NRCC), and a candidate for re-election. Henderson, J., Supp. App. 283sa. Regular participants included the Chamber and NAM and other similar organizations, along with Congressman Boehner and his staff. Henderson, J., Supp. App. 282sa-83sa. Other members of Congress would be invited to explain relevant activities or insights. Huard Test. ¶ 7, J.A. 287. The focus was on legislative strategy and policy, but of course that involves identification and evaluation of friends, foes, options, strategies, public opinion and the like. Henderson, J., Supp. App. 283sa.

Another example is the participation of the Chamber in long-term efforts regarding prescription drug benefits and Medicare. District Judge Kollar-Kotelly opined that ads by the Chamber addressing the prescription drug benefit issue that ran in the fall of 2000 could not have a legislative purpose because "the prescription drug issue … was not pending before Congress at the time the advertisement was aired." Kollar-Kotelly, J., Supp. App. 705sa. In fact, many conflicting proposals for comprehensive Medicare prescription drug coverage remained pending in Congress during the last half of the 2000 session.[7] When it became clear that a prescription drug benefit would not be enacted, involved legislators made clear that they would continue to press the issue.[8] And they did. Following the 2000 elections rival bills proposed by Senator Graham[9] and Senators Breaux and Frist[10]

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[7] *See, e.g.*, H.R. 4607, 106th Cong. (2000); S. 2753, 106th Cong. (2000); H.R. 4680, 106th Cong. (2000).

[8] *See* 146 Cong. Rec. S11521 (daily ed. Nov. 14, 2000); *see also* 146 Cong. Rec. H11754 (daily ed. Nov. 1, 2000); 146 Cong. Rec. H11803 (daily ed. Nov. 2, 2000).

[9] *See* S. 2625, 107th Cong. (2002).

[10] *See* S. 357, 107th Cong. (2001) and S. 358, 107th Cong. (2001).

were debated but failed to pass, along with other reform plans.[11] In June, 2003, Medicare prescription drug benefit bills passed both the House and the Senate.[12]

The long-term prescription drug benefit struggle illustrates why the Business Plaintiffs and thousands of similar incorporated associations, as well as individual business corporations, must be in ongoing contact and communication with members of Congress, their staffs, other federal and national party officials, and with one another as they participate in the formulation of federal legislation and policy. Josten Test. ¶ 4, J.A. 328; Huard Test. ¶ 3, J.A. 285-86; Monroe Test. ¶ 3, J.A. 592. Unavoidably, this requires contact with candidates and representatives of political parties, often on the issues with which they are closely identified and that may become prominent in future elections. Huard Test. ¶ 7, J.A. 287.

In a democracy, many officials and others who play leading roles in legislation and policy formation also are candidates much of the time. Every member of the House of Representatives who wants to retain office must stand for reelection every two years. U.S. Const., art. I, § 2. Similarly, a third of the Senate must seek reelection every two years. *Id*. art. I, § 3; amend. XVII. Every four years there is a presidential election, *id*. art. II, § 1, in which the President and Vice President often run. Other presidential candidates typically include leading members of the House and Senate and other politically prominent Americans. Similarly, members of the House and Senate, particularly those in leadership positions, often hold positions with national and state political party committees. *See, e.g.*, McConnell Test. ¶¶ 2-8, J.A. 401-03. The same is true of the President and Vice President. Thus, the close contacts and communication with

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[11] *See, e.g.*, H.R. 339, 107th Cong. (2001); H.R. 3626, 107th Cong. (2002); H.R. 3684, 107th Cong. (2002); S. Res. 269, 107th Cong. (2002); S. 2, 107th Cong. (2002).

[12] *See* H.R. 1, 108th Cong. (2003); S. 1, 108th Cong. (2003).

members of Congress and other leaders that are necessary to participation in formulating and implementing legislation and policy unavoidably involves close contacts and ongoing communications with candidates and political party leaders.

Legislative And Policy Development Requires Business Corporations To Communicate To The Public During Pre-Election Periods.

In addition to working closely with federal candidates and party officials, the Business Plaintiffs and similar incorporated associations and businesses, singly or in various groups or coalitions, regularly use television and radio advertisements to communicate with the American people about legislative and policy concerns. Henderson, J., Supp. App. 260sa-61sa. Such ads are broadcast year round, but are more common during election periods. Henderson, J., Supp. App. 234sa.

Judge Kollar-Kotelly suggested that "true" issue ads would not be run in the months leading up to elections, noting that broadcasters charge higher rates then and suggesting that candidate and other overtly electoral ads might prove distracting. Kollar-Kotelly, J., Supp. App. 757sa-58sa. However, as Judges Henderson and Leon observed, Americans tend to be most focused upon and receptive to discussions of public policy issues during the election period, and after elections there is a period of fatigue during which the public will pay little attention to such ads. Henderson, J., Supp. App. 236sa, 269sa; Leon, J., Supp. App. 1149sa. Public attention is even more focused in jurisdictions that are holding closely contested elections. Henderson, J., Supp. App. 266sa-67sa.

Furthermore, there often is a flurry of important legislative activity during the closing months of legislative sessions, which typically fall in the nomination and election period. Henderson, J., Supp. App. 263sa; Leon, J., Supp. App. 1148sa; *see also* United States House of Representatives and United States Senate Roll Call Votes for the 104th, 105th,

106th, and 107th Congresses, *at* http://clerk. house. gov/ histHigh/Congressional_ History/index.php (House) and http: //www.senate.gov/ pagelayout/legislative/ a_three_ sections_ with_teasers/votes.htm (last visited July 1, 2003) (Senate) (indicating 570 roll call votes taken within sixty days of the 1996, 1998, 2000, and 2002 November elections).

Issues of vital concern to business corporations arise during election periods. Major legislation often remains pending until the end of a session and, indeed, controversial legislation often is kept alive precisely to provide a campaign advantage. International and domestic crises that lead to seizure of steel mills, takeover of ports or transportation systems, enactment of draconian price or allocation controls, concessions relating to imports, exports, and assets and operations abroad, and so on are not excluded from election periods.

Effective issue ads often must refer to persons who happen to be candidates. Legislative and policy proposals often are publicly known by the names of leaders who are also candidates. Leon, J., Supp. App. 1150sa. For example, the Public Company Accounting Reform and Investor Protection Act was popularly known as "Sarbanes-Oxley." Representative Michael Oxley introduced Sarbanes-Oxley on February 14, 2002, and it was enacted on July 30, 2002. Pub. L. No. 107-204, 116 Stat. 745 (codified as amended at 15 U.S.C. §§ 7201 *et seq*. (2002)). During the period leading up to the enactment of Sarbanes-Oxley, Representative Oxley was a candidate in the Ohio Republican Primary held on May 7, 2002. Indeed, the bills that became BCRA were popularly known as "McCain-Feingold" and "Shays-Meehan."

Americans often understand issues based on their relationship to prominent leaders who also may be candidates. Identifying a tax or budget proposal as one supported by Gore or Gingrich gives many Americans information that they consider important. Henderson, J., Supp. App. 263sa; Leon, J., Supp. App. 1150sa; *see also* 11 C.F.R. § 100.29(b)(2) (including the phrases "the President" and "your Congress-

man" as examples of references to federal officeholders that are regulated as electioneering communications). Referring to such names also can be persuasive. For example, identifying legislation as supported by Gore or Gingrich may lead members of the public to support or oppose it. Henderson, J., Supp. App. 263sa; Leon, J., Supp. App. 1150sa.

An important purpose of issue ads is to persuade candidates, who are existing or potential officeholders, that an issue is of importance to their constituents and, hence, merits their attention. Josten Test. ¶ 13, J.A. 331; Huard Test. ¶ 9, J.A. 287. Thus, many issue ads conclude by asking viewers to contact candidates and express support for or opposition to legislation or policy positions. Leon, J., Supp. App. 1372sa-77sa (examples of ads). In fact, viewers do call in response to these ads. Kollar-Kotelly, J., Supp. App. 671sa (quoting deposition testimony of Senator Feingold).

The record contains many examples of corporate broadcasts that refer to candidates in the course of discussing public issues without express advocacy. One widely discussed series of such ads was broadcast in 1996 by a group of pro-business associations known as The Coalition which included the Chamber and NAM. Henderson, J., Supp. App. 260sa-61sa. Another example discussed in the district court opinions is the series of ads that the Chamber supported during the 2000 election concerning whether Medicare should include a prescription drug benefit. This question is important to business corporations that provide health care coverage for employees and retirees. An example of these ads includes the following:

> [Announcer] Senator Robb supports a big-government prescription drug plan that could be costly for seniors. This plan requires seniors to pay up to $600 a year plus a 50/50 co-payment. In this big-government plan, seniors have a one time chance to sign up, otherwise they face penalties to join later. And who would decide which medicines are covered and which aren't? Tell Senator

> Robb to stop supporting a big-government prescription drug plan. [Paid for by: The U.S. Chamber of Commerce].

Josten Dep. Ex. 23 (cited by Kollar-Kotelly, J., Supp. App. 705sa). Similarly, ABC and NAM regularly run ads discussing issues and candidates. Monroe Test. ¶¶ 3, 7, 8, J.A. 592-94; Huard Test. ¶ 4, J.A. 286.

The Experience Of "The Coalition" Illustrates The Risk That A Broad "Coordination" Definition Poses To Corporate Involvement In Federal Legislation And Speech.

In 1996 while the Business Plaintiffs and others were active in the Thursday Group and similar alliances, the AFL-CIO announced that it intended to spend up to $35 million on advertising to defeat the Contract With America and win control of the House for the Democrats. Henderson, J., Supp. App. 260sa-61sa. Pro-business groups, including the Business Plaintiffs, immediately recognized that the business community would have to respond. Henderson, J., Supp. App. 260sa. Accordingly, five prominent business associations, including the Chamber and NAM, organized "The Coalition: Americans Working for Real Change." Henderson, J., Supp. App. 260sa-61sa. Ultimately about 30 associations and similar groups became public members; many others provided support on condition that they would not be publicly identified due to fear of retaliation from organized labor or government officials who might not approve of the ads. Henderson, J., Supp. App. 261sa-62sa.[13]

Members agreed that the purpose of The Coalition would be to raise funds from pro-business sources to create and broadcast responses to the AFL-CIO ads. Kollar-Kotelly, J.,

[13] Judge Kollar-Kotelly erroneously found that The Coaltion was incorporated. Kollar-Kotelly, J., Supp. App. 817sa-18sa. Its money was largely corporate, however. The public members of The Coalition were identified on stationery and in press reports. *See, e.g.*, Richard W. Stevenson, *A Campaign to Build Influence*, N.Y. Times, Oct. 29, 1996, at A24.

Supp. App. 685sa-86sa (quoting deposition testimony of Bruce Josten). Because the AFL-CIO ads were run starting in 1995 and during the 1996 nomination and election period, the responding ads of The Coalition necessarily were to air during that same time.

Members of The Coalition also agreed that the ads were to be created and broadcast independently of any candidate or campaign, and that no participant in The Coalition was to discuss planned ads or broadcasts with any candidate or campaign or do anything else that might be thought to amount to "coordination" of the ads within the meaning of the federal election laws. Henderson, J., Supp. App. 282sa.

The Coalition raised and spent about $5 million in corporate funds to respond to the approximately $35 million spent by the AFL-CIO and its allies. Henderson, J., Supp. App. 260sa-61sa. Its ads endeavored to respond directly to the AFL-CIO's ads. Henderson, J., Supp. App. 260sa-61sa. The ads referred to candidates and issues, but did not expressly advocate the election or defeat of any candidate. Kollar-Kotelly, J., Supp. App. 685sa; Josten Test. ¶ 8, J.A. 329. They ran before the November election. Kollar-Kotelly, J., Supp. App. 685sa.

Despite The Coalition's care to avoid coordinating, the Democratic National Committee filed a complaint with the Federal Election Commission (FEC) charging that the ads had been coordinated and, as a result, the corporate funds spent on the ads constituted unlawful contributions. Henderson, J., Supp. App. 282sa-83sa. The DNC complaint offered no evidence of any element of agreement between The Coalition and any candidate or campaign. Instead, the charges of coordination were based primarily upon two things: *first*, founding members of The Coalition also were participants in the Thursday Group, which regularly met with Congressman Boehner, who himself was a candidate and who was an *ex officio* board member of the NRCC which was interested in assisting Republican candidates for election to the House; and

second, near the time The Coalition was being organized, Congressman Boehner was reported to have given a speech in which he stated that pro-business interests needed to respond to the AFL-CIO. Henderson, J., Supp. App. 283sa; Josten Test. ¶ 9, J.A. 329-30.

The FEC initiated Matter Under Review 4624 (MUR 4624) to investigate the DNC's complaint. Henderson, J., Supp. App. 283sa. At the very outset the FEC served highly intrusive and burdensome discovery demands on The Coalition's 28 Executive Committee members, Representative Boehner, his chief of staff Barry Jackson, Coalition consultants the Tarrance Group, National Media, Inc., Gannon, McCarthy and Mason, Ltd., American Viewpoint, Chuck Greener/Porter Novelli, Frank Luntz/Luntz Communications, and individual employees or principals of the consultants, the NRCC and the NRCC's Mario Cino and Ed Brookover, 37 candidate committees and their treasurers, and others. FEC General Counsel's Report at 4 (Apr. 23, 2001) ("General Counsel's Report") [DEV 53 Tab 6].[14]

The FEC's discovery requests required extensive document production, and answers to intrusive questions concerning contacts with Congressman Boehner and other candidates.[15]

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[14] Although most records relating to MUR 4624 are confidential under 2 U.S.C. § 437g(a)(12), the FEC's public file contains a General Counsel's Report (Apr. 23, 2001), a Statement for the Record by Commissioner Scott E. Thomas and Chairman Danny L. McDonald (Sept. 7, 2001), and a Statement for the Record by Commissioner Bradley A. Smith (Nov. 6, 2001). Henderson, J., Supp. App. 283sa. FEC General Counsel's Reports include uncorroborated information and testimony that is not subject to cross-examination. Respondents are denied access to the Reports before public release, to third party testimony, and to any third party documents.

[15] For example, item 64(a) to the Chamber demanded that it "identify all persons who were involved in any way … in communications, conferences, meetings or discussions between the Coalition or any of its Management Committee members, and each of the following persons or entities between January 1, 1996 and December 31, 1996: (1) RNC; (2) Haley Barbour … ; (3) NRCC; (4) Maria Cino … ; (5) Edward

They also required the production of individuals for questioning under oath by FEC counsel. The full scope of the investigation is not known because it was conducted on a confidential *ex parte* basis. However, the D.C. Circuit recently gave some detail on the burden and intrusion suffered by the AFL-CIO during a parallel FEC investigation of coordination charges. *AFL-CIO v. FEC*, No. 02-5069, 2003 WL 21414308 (D.D.C. June 20, 2003).

Buckley had described the coordination concept as based on "prearrangement or coordination," 424 U.S. at 46-47, and *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 614, 621-22 (1996) ("*Colorado I*"), had indicated that a "general or particular understanding" was necessary to constitute coordination "for constitutional purposes." The FEC espoused a much broader view and the first full consideration of how the First Amendment limited the coordination concept occurred in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 89-90 (D.D.C. 1999). That opinion held that, because the coordination standard marks the dividing line between protected and unprotected corporate speech and tends to chill legislative contacts, the definition "ultimately is drawn by reference to the First Amendment," and must provide the "clearest possible guidance," while balancing the competing interests. *Id*. at 90-91. *Christian Coalition* rejected the FEC's unilateral "insider trading" theories, and formulated standards such as: a "corporation's expressive expenditure becomes an illegal contribution when

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Brookover … ; (6) The Republican Conference of the United States House of Representatives … ; (7) Congressman John Boehner or any of his staff … ; (8) Congressman Bill Paxon or any of his staff … ; (9) Any candidate for United States Representative in the 1996 elections." Item 64(b) demanded a detailed description and summary of each such meeting, and item 64(c) demanded all related documents. Many other members of The Coalition received similar demands. Massive discovery disputes resulted.

the candidate … becomes a partner in the corporation's speech, though not necessarily an equal partner." *Id.* at 92.

The FEC elected not to appeal and, instead, attempted to codify *Christian Coalition*'s constitutional ruling. As paraphrased by Judge Henderson:

> Before BCRA became effective, an expenditure for a communication was "coordinated" under 11 C.F.R. § 100.23(c)(2) if the communication was created, produced or distributed (1) "[a]t the request or suggestion of" the candidate or party; (2) after the candidate or party had "exercised control or decision-making authority" over the content or distribution of the communication; or (3) after "substantial discussion or negotiation" resulting in a "collaboration or agreement" between the creator, producer, distributor or payer of the communication and the candidate or party regarding the content or distribution of the communication.

Henderson, J., Supp. App. 388sa; *see also* 65 Fed. Reg. 76138 (Dec. 6, 2000) (codified at 11 C.F.R. § 100.23, though subsequently repealed pursuant to BCRA § 214(b)); *Christian Coalition*, 52 F. Supp. 2d at 91-92.

After those regulations were promulgated, the FEC's General Counsel recommended that MUR 4624 and similar MURs be dismissed because they rested on a theory of "loose coordination" that lacked any element of agreement and could not be squared with the law. General Counsel's Report at 2. The FEC voted to dismiss, with various Commissioners writing to explain their votes. The Statement for the Record by Commissioner Bradley A. Smith (Nov. 6, 2001) ("Smith Statement") observed:

> [D]espite the fact that the Commission has now found no violations in this case, I strongly suspect that the original complainant, the Democratic National Committee, considers its complaint to have been a success. The complaint undoubtedly forced their political opponents to spend hundreds of thousands, if not millions of dollars in

> legal fees, and to devote countless hours of staff, candidate, and executive time to responding to discovery and handling legal matters. Despite our finding that their activities were not coordinated and so did not violate the [FECA], I strongly suspect that the huge costs imposed by the investigation will discourage similar participation by these and other groups in the future.

Smith Statement at 2, J.A. 1824; *see also* Henderson, J., Supp. App. 284sa.

Commissioner Smith's observations about the use of FEC charges based on vague standards to hinder and deter political opponents parallel findings by the D.C. Circuit, which recently explained that FEC charges are regularly employed to harass and burden political opponents. "[P]olitical opponents . . . file charges against their competitors to serve the dual purpose of 'chilling' the expressive efforts of their competitor and learning their political strategy so that it can by exploited to the complainant's advantage." *AFL-CIO*, 2003 WL 21414308, at *9.

The General Counsel's Report expressed a series of judgments critical of the activities of The Coalition. The Business Plaintiffs to this day have not seen the body of information on which these statements rested and had no opportunity to see or to respond to the Report before the FEC acted. Henderson, J., Supp. App. 283sa. The post-dismissal response to the report has not been made public, despite Coalition members' requests. The Coalition members dispute vast portions of the Report. The FEC did not adopt the General Counsel's Report's judgments and most are in the nature of obiter dicta based on one-sided secret files. The General Counsel's Report is public, though the underlying data is not.

To The Extent A Speaker's Purpose Is Relevant And Can Be Discerned, The Coalition's Speech Was Not Exclusively Or Primarily Electoral, And Many Who Contributed To The Speech Had No Electoral Intent.

Defendants argued, and Judge Kollar-Kotelly found, that one purpose of the examples of broadcast corporate speech discussed above was influencing federal elections. Kollar-Kotelly, J., Supp. App. 820sa. Neither Defendants nor Judge Kollar-Kotelly discussed why motive matters in this context. They did not deny that the speech also had the purpose of discussing public issues and public figures. Nor did they discuss how to apply purpose tests when multiple persons or entities support speech for multiple purposes.

Persons involved in The Coalition who testified in this proceeding were unanimous that the institutional purpose of its ads was to respond to and correct misperceptions being created by the AFL-CIO's issue ads. Huard Test. ¶ 5, J.A. 286; Josten Test. ¶ 9, J.A. 329-30; Sandherr Test. at AGC 0004, J.A. 748. The Chamber's representative, Mr. Josten, was unequivocal that this was The Coalition's sole purpose, and no evidence from members of The Coalition contradicts that testimony. Kollar-Kotelly, J., Supp. App. 685sa-86sa (quoting Josten deposition testimony). Instead, Judge Kollar-Kotelly discussed evidence deemed to suggest that "*one purpose* of the advertising campaign was to influence the 1996 general election." Kollar-Kotelly, J., Supp. App. 686sa-89sa (emphasis added). This view was based on evidence that some vendors and some members displayed some electoral interest, as well as on the timing of the ads, a factor already discussed.

When The Coalition was first being organized, a prospective advertising firm submitted a proposal stating "Thank you for the opportunity to present two 30 second television and one 60 second radio scripts, as requested, to your campaign to re-elect a pro-business Congress." Kollar-

Kotelly, J., Supp. App. 686sa. So far as appears, this was uninformed speculation by an outsider before it was retained.

Outside consultants tested proposed Coalition ads for their effect on voter attitudes toward candidates. Kollar-Kotelly, J., Supp. App. 686sa-88sa. However, no one disputed that this was a logical way to assess the persuasiveness of the ads in countering the AFL-CIO ads.

A memorandum from outside polling groups entitled "Key Findings from Post-Election Surveys in OH-6, IA-4, WA-1, WA-5, WA-9, and KY-1" was provided to The Coalition after the election. Kollar-Kotelly, J., Supp. App. 688sa-89sa. It claimed that the number of Republicans elected showed that the ads had been persuasive.

After the election, some members of The Coalition suggested visiting Congressmen to take credit for the ads. Kollar-Kotelly, J., Supp. App. 712sa-13sa. However, other members opposed or had no interest in the visits, and only one apparently may have occurred. Huard Dep. at 86-87, 90, J.A. 899-901; Josten Dep. at 175-76, J.A. 920-21; General Counsel's Report at 34 (the FEC claimed to have found one person – an aide – who had been visited).

In sum, while some vendors and members had some electoral concerns, there was no basis for dismissing Mr. Josten's sworn testimony that the only purpose of The Coaltion as an entity was to respond to the AFL-CIO.

Business Plaintiff ABC also often broadcasts ads to educate people on issues of importance to it. Monroe Test. ¶ 8, J.A. 594. Many times these ads mention public officials and candidates during election periods. Monroe Test. ¶ 3, J.A. 592. ABC's members are from the construction industry and tend to have "a distinctive ethos: 'very strong patriotic red, white and blue God and country association.'" Kollar-Kotelly, J., Supp. App. 701sa (quoting deposition testimony of Edward Monroe). On one occasion, ABC broadcast an ad near an election that discussed a public official having pushed for the "strongest possible penalties for child molesters who

attempt to lure children over the internet." Kollar-Kotelly, J., Supp. App. 700sa-01sa.

Because Mr. Monroe testified that child molestation was not a "particular concern" to ABC's membership, Judge Kollar-Kotelly incorrectly concluded that ABC must have selected the issue solely to affect an election. Kollar-Kotelly, J., Supp. App. 700sa-01sa. But, "particular" commonly means "distinctive," and Mr. Monroe's point, as he made clear, was that the concern was one that he believed ABC shared with many others. Kollar-Kotelly, J., Supp. App. 701sa. The fact that many people may share a common position about a particular issue does not diminish a particular person's or group's interest in the issue. According to Mr. Monroe's testimony, ABC members feel a very strong "God and country association," and are therefore likely to care about social issues like child molestation.

SUMMARY OF ARGUMENT

BCRA's electioneering communication and coordination provisions violate the First Amendment and are invalid.

Electioneering Communication: Congress cannot reverse this Court's constitutional holdings in *Buckley* and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), that only express advocacy may be limited by campaign finance laws. Thus, BCRA's attempt to regulate all electioneering communications is flatly invalid. But if Congress could impose a new standard, the First Amendment would require it to be as narrowly tailored and clear as the express advocacy standard, and neither the Primary nor the Backup Definition of electioneering communication comes close.

The Primary Definition's prohibition of corporate and union broadcasts that merely mention a candidate during much of an election year facially restricts more speech than the First Amendment allows. Discussions of candidates and issues are inextricably intertwined. Candidates, many of whom are incumbent officials, must be mentioned to identify

proposed bills, communicate their basic nature, and to persuade – e.g, a "Kennedy tax bill" or a "Gingrich budget proposal." Also, issue speech often asks the audience to communicate to named candidates – e.g., "tell candidate x to sign the term limit pledge." Indeed, Defendants' own data show that during the last two election cycles a substantial proportion of the political speech that the Primary Definition would have suppressed was "true" issue advocacy.

The Primary Definition's lack of tailoring is doubly impermissible because the minimum 90 to 120 day blackout period in each state and district is so lengthy, and the actual blackout periods are much longer in the many areas where major television and radio stations serve multiple jurisdictions with differing nominating dates, e.g., 187 days in the nation's capital, 176 days in New York City, etc. Forbidding corporations and unions to broadcast any reference to President Bush or his challenger for nearly half of 2004 in population centers nationwide is not a narrowly tailored response to the interests said to justify the new standard. Nor is there anything about the modest proportion of independent corporate and union speech during election periods that might justify such a serious First Amendment burden on both listeners and speakers.

The Backup Definition of electioneering communication is hopelessly vague and untailored. Speakers cannot be required, on pain of criminal penalty, to predict whether various audiences in changing circumstances will perceive broadcast communications (i) to "promote," "support," "oppose," or "attack" a candidate, and (ii) as "suggestive" of an exhortation to vote in a particular way. Nor can participants in public discourse be required to await advance FEC approval, under these vague standards, for each new broadcast statement – or for the same statement as circumstances change. This vagueness cannot be cured by a "broadening construction" under which the key narrowing

clause is stricken, thus banning speech that is not even suggestive of an exhortation to vote.

Coordination: BCRA's coordination provisions are equally untailored and vague. No one questions that if a candidate is given sufficient influence and control, third party speech functions as a contribution and may be so classified to prevent circumvention of contribution limits. But because this doctrine converts highly protected independent speech into restricted or prohibited contributions, it is subject to strict scrutiny and must be narrowly tailored and clearly defined. BCRA's provisions are neither. They reject prior constitutional holdings that some element of agreement is necessary, and they permit coordination to be found on the basis of a political candidate's or party's unilateral request, suggestion, or substantive communication or discussion, even if there is no mutual agreement of any kind as to any element of the speech or its creation and dissemination. Far from curing the problem, the FEC's new coordination regulations simply confirm the overbreadth and vagueness.

The broad and vague coordination provisions have bite right now. The Business Plaintiffs and many similar entities work on an ongoing basis with members of Congress and other government and political party officials to develop and implement federal legislation and policy. Yet, the Business Plaintiffs must curtail those speech, association, and petitioning activities now to avoid providing an arguable basis for claims that later public speech has been coordinated and, hence, constitutes an unlawful contribution. This is a classic controversy that is ripe for resolution, particularly in light of the command of BCRA section 403(a) that constitutional challenges to the statute be decided as expeditiously as possible.

The electioneering communication and coordination provisions regulate a wide range of activity by individuals, associations, and corporations. They were not tailored to the specific characteristics of corporate speech, nor is there

anything about corporate speech that would warrant the broad and vague restrictions they impose. Although *MCFL* and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), allow corporate express advocacy to be regulated, they authorize nothing further. A long line of this Court's holdings recognize the importance and highly protected status of corporate speech on matters of public policy that does not expressly advocate the election or defeat of a candidate.

ARGUMENT

I. LAWS THAT SIGNIFICANTLY BURDEN FIRST AMENDMENT POLITICAL ACTIVITIES OF CORPORATIONS MUST SATISFY STRICT SCRUTINY.

The First Amendment provides that "Congress shall make no law … abridging the freedom of speech, or the press; or the right of the people peaceably to assemble and petition the Government for a redress of grievances." U.S. Const. Amend. I. This strongly worded prohibition has its fullest and most urgent application to the political process. *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (collecting authority).

Corporate speech on public issues is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society," *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940), and contributes "to the free flow of information," *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). Thus, strict scrutiny applies with full force to significant restrictions on First Amendment activities of corporations that are important to public policy formation. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 540 (1980); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 19 (1986); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657, 699-701 (1990) (unanimous as to standard of review). As these cases hold, the defenders of a law that burdens politically important

corporate speech must prove that the specific restrictions imposed are "narrowly tailored" to a "compelling" government interest so that no less restrictive alternative will suffice. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813-15, 827 (2000).

Contribution limits are an exception. Perceiving lesser "importance of the political activity at issue," where only *contributions* are restricted, this Court applies a less strict but still "rigorous" requirement that they be "closely drawn to match a sufficiently important interest." *FEC v. Beaumont*, 123 S. Ct. 2200, 2210 (2003) (collecting authority; internal quotation marks omitted); *Buckley*, 424 U.S. at 20-21, 29 (contribution limits receive "rigorous" review). That the lesser standard for contribution limits demands that the restrictions be "closely drawn" to serve an "important purpose" underscores how demanding full strict scrutiny is.

Beaumont recently upheld a limit on *contributions* by corporations, applying the "less[] demand[ing]" standard of review established in prior cases. 123 S. Ct. at 2210. However, *Beaumont* stressed that "the level of scrutiny is based on the importance of the 'political activity at issue' to effective speech *or political association*," rather than on the corporate nature of the speaker. *Id.* (emphasis added). The same logic clearly extends to corporate involvement in petitioning the government.[16]

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[16] *See Christian Coalition*, 52 F. Supp. 2d at 91-92. Indeed, the *Noerr-Pennington* doctrine, which protects "the constitutionally protected right of petition," *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389, 399 (1978), has developed in cases involving corporations, and protects "groups" as well as individuals. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). *See* Aaron R. Gary, *First Amendment Petition Clause Immunity From Tort Suits*, 33 Idaho L. Rev. 67, 95 (1996) (collecting "innumerable" cases holding that *Noerr-Pennington* is grounded in the First Amendment's right to petition). *See Prof'l Real Estate Investors v. Columbia Pictures Indus., Inc.* 508 U.S. 49, 60-62 (1993) (establishing stringent objective showing necessary to defeat *Noerr-Pennington*).

In addition to being narrowly tailored, campaign finance legislation that "imposes criminal penalties in an area permeated by First Amendment interests" also must possess a high degree of clarity to assure that highly protected activity is not sacrificed to provide a margin of safety. *Buckley*, 424 U.S. at 40-41, n.48 (collecting authority). The First Amendment demands a considerably "greater degree of specificity" than due process generally demands of criminal statutes, *id.* at 77 (quoting *Smith v. Goguen*, 415 U.S. 566, 573 (1974)), because its goals extend beyond providing fair notice to avoiding chill and loss of protected speech as speakers hedge and trim to avoid doubtful areas, and to minimizing government discretion that may be used to favor some speakers or views over others.[17]

The exceptional tailoring and clarity required of campaign finance statutes with criminal penalties is vividly illustrated by the "express advocacy" standard announced in *Buckley* and reaffirmed as to coporations in *MCFL*. In *Buckley* the Court of Appeals had narrowed an expenditure provision to regulate only speech "advocating the election or defeat of" a candidate. 424 U.S. at 42. But that standard required the speaker to predict what message others might perceive, with the result that FECA might chill "discussion of issues and candidates" that it could not regulate directly. *Id.* at 42-43. Both to cure vagueness and to achieve precise tailoring, this Court held that the "only" solution was an objective bright-line standard regulating only "communications that include explicit words of advocacy [that] in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 43-44. A decade later, *MCFL* ratified

[17] *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497-99 (1982) (explaining that the minimum due process standard is that "person[s] of ordinary intelligence [have] a reasonable opportunity to know" what is forbidden, but that if a "law interferes with the right of free speech or of association, a more stringent vagueness test should apply").

and followed that holding to limit a separate provision restricting the spending of corporate funds "in connection with any federal election" to express advocacy. 479 U.S. at 248-51.

Buckley recognized that its objective, narrow, and precise "express advocacy" standard gave the statute less scope than Congress desired and that "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." 424 U.S. at 45. Yet the First Amendment's twin imperatives of narrow tailoring and clarity had to be respected, even though one provision was rendered so ineffective that it lacked constitutional justification and was struck down. *Id.* at 45-51.

II. BCRA'S "ELECTIONEERING COMMUNICATION" PROVISIONS FAIL STRICT SCRUTINY.

The express advocacy standard for decades has marked the constitutional boundary between speech that campaign finance law may regulate and speech that it may not. BCRA introduces a new concept – "electioneering communication." Like the express advocacy standard, the new electioneering communication standard applies across the board to BCRA's provisions on disclosure, section 201; coordinated contributions, section 202; corporate and union speech, section 203; "targeted" communications, section 204; activities of foreign nationals, section 303; and sponsorship disclosure, section 311. The Business Plaintiffs challenge the application of this new concept to business corporations. This brief focuses on section 203 which forbids corporations to engage in electioneering communications, but the same flaws infect the use of "electioneering communication" in defining the types of speech that may be deemed coordinated communications under section 202.

A. The First Amendment Forbids Campaign Finance Regulation Of Independent Speech That Does Not Expressly Advocate.

Buckley limited two different provisions of FECA to express advocacy, one restricting independent expenditures by individuals, 424 U.S. at 39-43,[18] and one imposing reporting requirements, *id.* at 79-81. *MCFL* limited FECA's ban on independent corporate speech to express advocacy. 479 U.S. at 248-49. And the courts of appeals have applied the "express advocacy" standard to distinguish constitutional from unconstitutional restrictions under a range of state and federal campaign finance regulation.[19]

Recognizing that Congress cannot reverse this Court's construction of the First Amendment, defenders of BCRA have claimed that the express advocacy standard was simply one of many possible ways to clarify vague statutory language. However, *Buckley* was explicit that, in addition to achieving clarity, the express advocacy standard assured that FECA was "not impermissibly broad," 424 U.S. at 80, saying that it was the "only" way to protect issue advocacy, *id.* at 43. Likewise, *MCFL* stressed that the express advocacy standard was adopted "to avoid problems of overbreadth." 479 U.S. at 248.[20]

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[18] When the FECA was subsequently amended, Congress explained that its purpose was "to conform the independent expenditure reporting requirement … to the requirements of the Constitution set forth in *Buckley v. Valeo*." H.R. Conf. Rep. No. 94-1507, at 38 (1976), *reprinted in* 1976 U.S.C.C.A.N. 946, 954.

[19] *See supra* note 5.

[20] These references to "overbreadth" deal with a lack of narrow tailoring under strict scrutiny, rather than to the type of overbreadth analysis that grants expanded standing in some First Amendment cases. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 n.3 (1992) (distinguishing types of overbreadth); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-04 (1985) (same); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 965, 966 (1984) (under strict scrutiny, defendants must disprove overbreadth).

Alternatively, BCRA's defenders have asserted that the express advocacy standard was merely intended to preserve FECA against constitutional doubt and did not actually determine that a broader restriction would be invalid. Such an argument, of course, concedes that any regulation beyond express advocacy is constitutionally doubtful. But the argument fails because *Buckley* did not adopt the express advocacy standard to save FECA's restriction on independent expenditures. To the contrary, having narrowed that restriction to express advocacy, *Buckley* held that it did so little to achieve its purpose that it was unconstitutional. 424 U.S. at 45-51. If the First Amendment had permitted a broader standard that might have saved the provision, *Buckley* would have been obliged to adopt it.

The express advocacy limit has been respected in this Court's decisions concerning corporate speech. In *MCFL* the Court applied the "express advocacy" standard to narrow FECA's ban on corporate speech "in connection with" an election. 479 U.S. at 248-49.[21] Then, in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 n.1 (1990), the Court upheld a state statute modeled on the FECA provision that *MCFL* had limited to express advocacy, holding that the state could forbid a corporate ad that expressly urged viewers to "Elect Richard Bandstra State Representative." 494 U.S. at 714.[22] However, when faced with restrictions on independent corporate political speech that did not expressly advocate a candidate vote – in *Bellotti*, *Consolidated Edison*, and *Pacific Gas & Electric* – this Court struck them down each time.

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[21] *MCFL* recognized that PAC speech does not substitute for free corporate speech. 479 U.S. at 252-56, 266.

[22] *Austin* is in serious tension with the First Amendment's prohibition on government regulation of "speakers who may address a public issue." *Bellotti*, 435 U.S. at 784-85; *see also Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 194 (1999). This is doubly so since many may assume – however inaccurately – that corporations tend to favor particular viewpoints.

Because the electioneering communication provisions seek to legislatively reverse this Court's authoritative construction of the First Amendment, they are void and there is no need for extended analysis. But even if Congress theoretically could enact a substitute standard, that new standard would have to be as narrowly tailored and as clear as the express advocacy standard it seeks to expand. And on these grounds as well, the electioneering communication standard fails.

B. The Electioneering Communication Standard Is Not Narrowly Tailored.

Consistent with the highly protected nature of the rights that it regulated, the express advocacy standard was *precisely* tailored. Inevitably, all speech that used explicit words to expressly advocate the election or defeat of a clearly identified candidate was directly and unequivocally related to an election. The electioneering communication standard, by contrast, eschews any such direct and unequivocal link. Instead, it uses factors such as timing, media, geography, and reference to a candidate as criteria that are supposedly associated with the type of speech that properly may be regulated. Obviously, those who seek to abandon a precisely tailored standard and regulate speech on the basis of such indirect and inferential criteria bear a heavy burden of demonstrating narrow tailoring – and defendants cannot carry that burden here.

Proponents of BCRA claimed to have studies showing that, during the last two election cycles, most of the broadcast advertising that referred to candidates was sufficiently electoral that it should have been subject to regulation.[23] Both studies were shown to be deeply flawed. Henderson, J.,

[23] This judgment rests on the perceived subjective purposes of the speech, even though the motives of a speaker generally do not affect First Amendment protection. *See, e.g.*, *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988). Moreover, trying to assess the subjective purposes of an organization is highly problematic. *See Perry v. Bartlett*, 231 F.3d 155, 161-62 (4th Cir. 2000).

Supp. App. 237sa-48sa. Moreover, despite their determined attempts to understate the amount of so-called "true" issue ads, the authors of the studies ultimately conceded that between 7% and 64% of the speech during the 60 days before the 1998 elections were not "sham" at all. Henderson, J., Supp. App. 242sa-44sa. *This Court has never sustained a statute that erroneously burdens such a proportion of core political speech.* In *Mills v. Alabama*, the Court struck down a one-day ban on speech which arguably would have affected "only" 1/365th of all speech. 384 U.S. 214 (1966).

More fundamentally, there have been and always will be periods of crisis and instability during which broadcast references to candidates will be critical. For example, presidents historically have seized basic industries, imposed wage and price controls, used armed federal employees as strike breakers, and entered into executive agreements with foreign countries concerning U.S. assets abroad. Nothing in nature excludes such periods from election years. Surely an industry whose assets are facing seizure by an incumbent president is entitled to independently broadcast its concerns to the American people without threat of criminal sanction. For that matter, an industry that faces confiscatory taxation under a bill or a campaign proposal being promoted by a member of Congress who is seeking re-election surely may independently tell the public why such taxation is a bad idea. Because the Primary Definition would prohibit such speech, it cannot satisfy First Amendment tailoring.

For the reasons above, the Primary Definition also would not be narrowly tailored even if its blackout periods only affected jurisdictions in which a nomination event or election was imminent. However, because electronic signals do not respect political boundaries, the blackouts extend much further. For example, in the coming election residents of the Nation's capital will find references to President/candidate Bush in certain ads excluded from their major television and radio stations not just during the 120 days attributable to D.C.

events, but also for a further 37 days because of primaries in Virginia and Maryland. *See supra* at 9. Similarly, residents of New York City will find such references excluded for 56 *additional* days by primaries in Pennsylvania, New Jersey, and Connecticut. *See supra* at 9. And similar consequences will follow wherever television and radio stations have audiences in more than one jurisdiction. For all of these reasons, the Primary Definition fails strict scrutiny and is void.

C. Corporate Speech Does Not Warrant The Overbreadth Of The Electioneering Communication Standard.

The electioneering communication standard controls a wide range of BCRA restrictions applicable to individuals, unincorporated organizations, and corporations. It was not specially tailored to regulate independent corporate issue speech. Nothing in the record shows that the criteria relied upon by the electioneering communication standard – e.g., timing, geography, media, and candidate reference – are any more reliable when applied to corporate speech than when applied to the speech of individuals or unincorporated associations. Nor is there any hint that corporate speech on important public issues needs less precision and clarity to avoid hedging, trimming, and chill.

BCRA's defenders have suggested that *Austin* supports applying a broad definition of electioneering communication to corporations. But *Austin* sustained a state statute that was directly modeled on a federal provision that this Court had narrowed to regulate only express advocacy, and the specific corporate speech at issue in *Austin* explicitly and unambiguously urged a vote for an identified candidate. 494 U.S. at 655 n.1, 714. Nothing in *Austin* suggests that regulation of corporate speech might properly extend beyond express advocacy, and certainly nothing there suggests the criteria used in the electioneering communication standard.

Nor does the record show that, under the express advocacy standard, independent corporate speech impairs the integrity of elections. Defendant's principal exhibit in support of BCRA is the Brennan Center's *Buying Time 2000*. *See* Craig B. Holman and Luke P. McLoughlin, *Buying Time 2000: Television Advertising in the 2000 Federal Elections* (Brennan Center for Justice 2001) ("*Buying Time 2000*") [DEV 46]. Although that report has been shown to be heavily biased in favor of BCRA, Henderson, J., Supp. App. 238sa-41sa, it recognizes that independent organizations are a small minority voice on television during campaigns: "Over all elections combined in 2000, candidates were the principal sponsors of most political television ads, with party committees running second, and independent groups third." *Buying Time 2000* at 29, 40-41. In the 2000 presidential campaign, the estimate was candidates 51%, parties 41%, and independent organizations 8%. *Buying Time 2000* at 40-41. In Senate races, the figures were candidates 71%, parties 22%, and independent organizations 6%. *Id.* In House races, the figures were 61%, 22%, and 17%. *Id.* Similarly, the Government Defendants' expert, Prof. Goldstein, estimated that federal candidates funded 52% of the ads, parties 27%, and independent groups, 16%. Goldstein Am. Rep. at 8 [DEV 3 Tab 7]. Of the independent groups whose speech was estimated at 8%, 6%, 17%, and 16% of the total, only a portion were incorporated, but Defendants do not show how many.

The Brennan Center report also concludes that candidates and their political parties speak dramatically more than independent organizations in more hotly contested elections. *Buying Time 2000* at 87-97. Across all races the Brennan Center deemed "competitive" in 2000, the candidates themselves funded 70% of all television advertising. *Buying Time 2000* at 47. Their respective political parties funded 23% while independent organizations funded only 6.7%. *Id.* Anecdotally, Virginia U.S. Senate candidate George Allen's own ads accounted for 56% of all ads the Brennan Center deemed favorable to his campaign, while the Republican

Party's ads accounted for 43% and independent organization ads accounted for a mere 1%. *Buying Time 2000* at 87. His opponent, incumbent Senator Charles Robb, aired 39% of ads favorable to him, the Democratic Party aired 51%, and independent organization ads accounted for only 10%. *Id.*[24] Indeed, in the most competitive race in recent American history, the 2000 presidential race, the Brennan Center concludes only 8% of all expenditures on television ads were funded by independent organizations. *Buying Time 2000* at 39.

Only some of the independent spending reported above was by corporations, and only some of those were business corporations.[25] Defendants offer no evidence. But taking these figures as the best showing that Defendants possibly can make, two things are clear: (i) there is no evidence that the criteria which define the electioneering communication standard are tailored as applied to corporate speech; and (ii) there is no evidence of a compelling need to reduce the amount of corporate speech that refers to individuals who are candidates.

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[24] *Buying Time 2000* cited just one example of a congressional race (Cal.-49) in which a bare majority of the spending was by independent groups. *Buying Time 2000* at 95. However, the group spending was roughly balanced ($1.49 million versus $2.21 million), and the voters rejected the candidate that the group spending was said to have favored. *Id*. The real "distorting" spending comes from wealthy candidates using their personal fortunes, such as Ross Perot who spent $70 million on his 1992 presidential race, Steve Forbes who spent $48.6 million on his 2000 presidential campaign, and John Corzine who spent $63 million in the 2000 New Jersey Senate race. *See* Michael Cooper, *At $92.60 a Vote, Bloomberg Shatters An Election Record*, N.Y. Times, Dec. 4, 2001, at A1.

[25] Of course, *Austin* held that, where adequate grounds existed for forbidding corporate express advocacy, the legislature was not obliged to carve out non-business corporations for different regulation. 494 U.S. at 661-65.

D. The Untailored And Vague Backup Definition Cannot Be Saved By Broadening It To Burden Speech That Congress Intended To Leave Free.

BCRA's Backup Definition also seeks to regulate speech that does not contain express advocacy and, hence, it is fatally overbroad. Moreover, Defendants have offered no explanation as to why the Backup Definition is unlimited in time and constituency when the Primary Definition is limited in both respects. For this reason as well, the Backup Definition obviously is untailored and void.

Beyond that, all aspects of the definition are fatally vague. *Buckley* considered and expressly rejected as constitutionally inadequate a standard that regulated speech "advocating the election or defeat of" a candidate. 424 U.S. at 42. It held that requiring a speaker to predict the messages listeners might derive from the speech "blankets with uncertainty" and "compels the speaker to hedge and trim." *Thomas v. Collins*, 323 U.S. 516, 535 (1945), *quoted in Buckley*, 424 U.S. at 43. The "only" solution, the Court ruled, was a standard that turned on the objective presence within the speech of explicit words of express advocacy. *Buckley*, 424 U.S. at 43.

Yet, the Backup Definition requires a speaker to predict whether a communication will be perceived to "promote or support" or "attack or oppose" a candidate for federal office. BCRA § 201(a). What does that mean? Does the statement that "X supports the right to choose" praise, condemn, or make a neutral statement of fact? Does the answer vary depending on where the statement is broadcast? What role do changing circumstances play? Does the statement "X supported the invasion of Iraq" veer from praise to condemnation and back depending on how quickly the troops are advancing at any given moment? Can statements praising or condemning legislation or a policy position promote or attack the candidate? These are precisely the types of questions that *Buckley* holds a speaker cannot be required to

consider.[26] Thus, this portion of the Backup Definition is unconstitutionally vague, as well as overbroad.

Congress sought to narrow the promote-support-attack-oppose standard by limiting it to speech that also "is suggestive of no plausible meaning other than an exhortation to vote." BCRA § 201. However, requiring a speaker to predict what plausible "suggestions" a listener may infer is just what *Buckley* forbids. Not surprisingly, therefore, all three district judges ruled that this aspect of the Backup Definition was void for vagueness. Henderson, J., Supp. App. 362sa; Kollar-Kotelly, J., Supp. App. 885sa-86sa; Leon, J., Supp. App. 1164sa-65sa.

Judges Leon and Kollar-Kotelly initially thought that the vagueness of the Backup Definition could be cured by (i) severing the narrowing clause concerning what the speech suggests, (ii) retaining the clause dealing with supporting, promoting, attacking or opposing, and (iii) requiring corporations and unions to seek an advisory opinion for any speech that arguably veered from neutrality. Leon, J., Supp. App. 1164sa-66sa; Kollar-Kotelly, J., Supp. App. 885sa-86sa. However, in his later opinion concerning a stay, Judge Leon recanted, stating that the support-promote-attack-oppose standard fails to give sufficient "guidance" in the absence of FEC regulations. J.S. App. 19a. The FEC expressly declined to adopt regulations construing the Backup Definition. *See* 67 Fed. Reg. 65190, 65191 (Oct. 23, 2002).

Judge Leon's recantation and the failure of any Defendant to support the proposed revision of the Backup Definition should dispose of the notion. But if further reasons were needed, they readily are available. The fundamental First Amendment vice of a vague statute is that it causes speakers

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[26] The FEC noted that its authority to craft exceptions to the definition of electioneering communication, which was limited by BCRA to speech that does not "promote or support" or "attack or oppose," was "significantly limit[ed]" by the "difficulties involved in" defining such speech. *See* 67 Fed. Reg. 65190, 65196 (Oct. 23, 2002).

to hedge and trim, thus suppressing speech that Congress has not actually forbidden. *Buckley*, 424 U.S. at 43. The clause that Judges Leon and Kollar-Kotelly propose to sever and discard *narrowed* the Backup Definition. Eliminating that clause thus expands the definition, flatly suppressing speech that the vague narrowing provision would have somewhat discouraged. Such a cure is worse than the disease. No doubt for this reason, this Court has never imposed such a "broadening construction" to cure First Amendment vagueness but, instead, has always imposed a *narrowing* construction, as in *Buckley*.

Moreover, the proposed severance defeats the primary intent of the Backup Definition. Congress intended for the severed clause to narrow the Backup Definition. Without the narrowing clause, the reference to any speech that supports, promotes, attacks or opposes a candidate is dramatically broader. Indeed, when the Backup Definition was proposed, the sponsor's stated rationale was that the final phrase – "suggestive of no plausible meaning other" than electoral advocacy – came from a court of appeals decision that purported to comply with this Court's constitutional ruling in *Buckley*, namely *FEC v. Furgatch*. During the debate, the Backup Definition repeatedly was described as adopting the *Furgatch* standard. 147 Cong. Rec. S2706, S2710, S2712-13 (daily ed. Mar. 22, 2001) (statements of Sen. Specter). Yet, Judges Leon and Kollar-Kotelly would throw out the language from *Furgatch* that Congress determined was as essential to the Backup Definition as the "promotes or supports" and "attacks or opposes" language. Severability is not proper where it serves to defeat legislative intent, *CFTC v. Schor*, 478 U.S. 833, 841 (1986), and this is doubly true where it burdens core protected speech.

III. BCRA'S COORDINATION PROVISIONS FAIL STRICT SCRUTINY BECAUSE THEY ARE NEITHER NARROWLY TAILORED NOR CLEAR.

Coordination "turn[s] a protected expenditure for issue advocacy into an unprotected contribution." *Clifton v. FEC*, 927 F. Supp. 493, 500 (D. Me. 1996), *modified on other grounds*, 114 F.3d 1309 (1st Cir. 1997). Moreover, the conduct that constitutes coordination, and thus strips issue advocacy of its protection, itself is highly protected speech and association with members of Congress and other government and political party officials. Thus, strict scrutiny applies, and every judge to focus on the issue has agreed that the First Amendment:

> [D]emands 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 association.

Christian Coalition, 52 F. Supp. 2d at 91; (internal quotation marks omitted); Per Curiam, Supp. App. 143sa; Henderson, J., Supp. App. 386sa-87sa. The standard is every bit as demanding as the standard that led *Buckley* to insist on a narrow, objective, bright-line standard of express advocacy.

A. BCRA's Definition Of Coordination, Which Excludes Any Element Of Agreement, Is Not Narrowly Tailored.

The rationale for converting spending for coordinated speech into a contribution is that sufficient "prearrangement and coordination" with a candidate or political party can achieve the same effects as a direct contribution and, hence, invites circumvention of the contribution limits. *Buckley*, 424 U.S. at 46-47. But this rationale fails in the absence of a sufficient "general or particular understanding with a candidate" or party. *Colorado I*, 518 U.S. at 614. In the absence

of the necessary agreement or understanding, "simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Id.* at 621-22.

In 1999, *Christian Coalition* undertook a comprehensive analysis of the constitutional issues raised by the coordination concept and held that some substantial element of agreement was essential to the coordination concept in order to "giv[e] such expenditures sufficient contribution-like qualities to fall within the [FECA's] prohibition on contributions." 52 F. Supp. 2d at 91-92 (coordination requires that "the candidate and spender emerge as partners or joint venturers in the expressive expenditure").

BCRA section 214 repeals the FEC regulations that codified *Christian Coalition* (previously codified at 11 C.F.R. § 100.23(c)(2)(iii)) and provides that the broad statutory definition (discussed *infra*) cannot be construed to require any "agreement or formal collaboration." By specifying that only "formal" collaboration be excluded, but conspicuously applying no modifier to "agreement," BCRA plainly excluded any element of agreement, formal or informal.[27] If there were any doubt – and there is not – it would be removed by the FEC's contemporaneous coordination regulations, which define "agreement" to mean any "mutual understanding or meeting of the minds on all or any part of the material aspects of the communication or its dissemination." 11 C.F.R.

[27] Judges Leon and Kollar-Kotelly suggested in a footnote that the maxim of *noscitur a sociis* justified reading the term "formal" as if it modified "agreement" as well as "collaboration." Per Curiam, Supp. App. 146sa. However, if that meaning had been intended, Congress would have referred to "formal collaboration or agreement." If a maxim were needed – and it is not – the decision to impose a limit on "collaboration" but not on "agreement" would involve *expressio unius est exclusio alterius*. 2A Norman J. Singer, *Sutherland Statutory Construction* §§ 47:23, 47:24, 47:33 (6th ed. 2001). Moreover, if BCRA sought only to exclude "formal agreement" from the standard, there would have been no need to repeal the FEC regulations, which did not require a formal agreement.

§ 109.21(e). Obviously, an agreement can be reached and manifested informally – a wink and a nod may do. But a wink standing alone will not.[28]

Because BCRA's coordination provisions eliminate any element of agreement, they restrict *independent* corporate speech. Hence, they are not narrowly tailored to their anti-circumvention purpose and fail strict scrutiny.

B. BCRA's Coordination Provisions Are Unconstitutionally Vague.

BCRA section 214 provides that speech is coordinated if it is made "in cooperation, consultation, or concert with, or at the request or suggestion of" a candidate or party, whether or not there is any "agreement or formal collaboration."[29] This language suggests a general concept or field of concern, but it certainly does not approach First Amendment clarity. Henderson, J., Supp. App. 384sa-96sa.

The new FEC coordination regulations do not solve the problem. They open by specifying that "whether or not," 11 C.F.R. § 109.21(d), there is any "mutual understanding or

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[28] *Christian Coalition* and the codifying FEC regulations stated without elaboration that speech occurring "at the request or suggestion" of a candidate is coordinated. 52 F. Supp. 2d at 91. Read in context, this language appears to have contemplated something similar to the formation of a "unilateral contract" which occurs when an offer is accepted by conduct. *Black's Law Dictionary* 326 (7th ed. 1999). However, BCRA's rejection of *any* element of agreement now converts the unilateral communication of a suggestion or request into a unilateral ban on subsequent speech of the type proposed, regardless of whether the speaker is accepting the proposal or acting for some other reason.

[29] By using the same language to define coordination with a party that existing provisions of FECA use to define coordination with a candidate or campaign, by repealing FEC regulations that narrowed the existing provisions by requiring an element of agreement, and by specifying that new regulations not require any element of agreement, section 214 operates as a whole to define the general concept of "coordination" under FECA as amended by BCRA. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (related statutory clauses must be understood as a whole).

meeting of the minds on all or any part of the material aspects of the communication or its dissemination," 11 C.F.R. § 109.21(e), is irrelevant. The statutory definition is said to be satisfied if the candidate or political party "request[s] or suggest[s]" or is "materially involved in decisions regarding" the communication, or if the communication "is created, produced, or distributed after one or more substantial discussions [that convey material] information about the candidate's or political party committee's campaign plans, projects, activities, or needs." *Id*. at 109.21(d).[30]

The Business Plaintiffs and many similar entities must attempt to apply these vague standards on a day-to-day or even hour-by-hour basis to avoid arguable coordination while, at the same time, they conduct ongoing communication and contact with members of Congress and other federal government and party officials about the same legislative and policy issues that those candidates or their opponents may stress during election campaigns.[31] Clearly the standards do

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[30] The FEC's so-called "content" standard expands the coordination concept to apply to a wide range of speech, including express advocacy, electioneering communications, and speech during much of an election year that mentions a candidate. 11 C.F.R. § 109.21(c). The record shows that much issue advocacy, particularly around elections, mentions candidates. Thus, this regulatory standard does not alleviate either overbreadth or vagueness of the content standard. Indeed, to the extent that this is a backdoor regulation that reaches beyond express advocacy, it is untailored and void for the reasons discussed by FEC Commissioner Smith. Smith Statement at 3-5, J.A. 1825-30. The FEC's "safe harbor" is very narrow indeed, *supra* note 6, and does not protect typical legislative and policy contacts.

[31] It would be specious to suggest that the FEC somehow could solve this problem by issuing hour-to-hour advisory opinions as to whether specific circumstances might constitute coordination. In the fluid political realm, the material circumstances would have changed before the request for an opinion could be prepared, not to mention the 60 day FEC response period. 2 U.S.C. § 437f(a)(1). Also, because advisory opinion requests are made public for comment before being issued, 2 U.S.C. § 437f(d), such a process would be very intrusive into often confidential activity.

not provide the type of precise guidance that the First Amendment demands, with the result that they are chilling communications and contacts with officials/candidates and will chill public communications about legislative and policy issues. Both ways, important First Amendment activity suffers.

The threat from a vague coordination standard is real. As the D.C. Circuit recently recognized, political opponents are quick to file FEC complaints for tactical advantage, and the FEC's ability to screen out baseless attacks is impaired by imprecise legal standards. *AFL-CIO*, 2003 WL 21414308, at *9. And as the experience of The Coalition demonstrates, FEC investigations into alleged coordination can be exceptionally intrusive, burdensome, and expensive. Indeed, as Commissioner Smith aptly observed, the Democratic National Committee no doubt viewed its complaint against The Coalition as a success, since it crippled and ultimately killed a strong pro-business voice. Henderson, J., Supp. App. 284sa.

C. The Constitutional Challenge To BCRA's Coordination Provisions Can And Should Be Decided Now, As BCRA Itself Mandates.

Because First Amendment values are so important, courts strain to find that arguable First Amendment claims are justiciable. 13A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3532.3 (2d ed. 1984) (collecting cases). Moreover, BCRA section 403(a) mandates that constitutional challenges be resolved as expeditiously as possible. Strikingly, this provision for expedited judicial review was considered immediately after the section 214 coordination provisions and was enacted on the very same day. *See* 147 Cong. Rec. S3184, S3189, S3190, S3194 (daily ed. March 30, 2001). But even under ordinary standards, the Business Plaintiffs' narrow tailoring and vagueness challenges to BCRA are justiciable and ripe for review.

The basic constitutional requirement for exercise of the judicial power is a genuine case or controversy presented by a

plaintiff with standing. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). Here the Business Plaintiffs are being forced to limit their present and ongoing communication and association with, and petitioning of, members of Congress and other candidates and party officials to preserve their future right to speak freely about issues and candidates, just as they have done in the past. They claim a First Amendment right to be free of this forced curtailment, and the Defendants contest that right. This is a classic case or controversy.

BCRA section 214 as a whole imposes an overbroad and vague standard of coordination. Striking down the section will eliminate the overbreadth and vagueness introduced by BCRA, providing substantial relief to the Business Plaintiffs. Also, striking down section 214(a)'s new ban on coordination with political parties will remove that burden, even if not fully eliminating all parallel issues presented by the coordination provisions of FECA. As a practical matter, this Court's opinion will guide construction of those provisions as well.

The Business Plaintiffs' challenge is to the statute itself. Failing to decide the challenge will subject the Business Plaintiffs and many other entities to ongoing injury to core First Amendment interests. And to the extent that the FEC is going to speak to the meaning of the statute, it has done so in its new coordination regulations.[32] Thus, this case is ripe. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).[33]

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[32] Ripeness turns on the regulatory situation at the time this Court rules. *Buckley*, 424 U.S. at 115-18; *Anderson v. Green*, 513 U.S. 557, 558-59 (1995) (per curiam).

[33] The Per Curiam Opinion's reliance on *Martin Tractor Co. v. FEC*, 627 F.2d 375 (D.C. Cir. 1980), is unfounded. Per Curiam, Supp. App. 150sa-55sa. There a corporation and its PAC challenged as vague a provision permitting them to "solicit" hourly employees only twice a year. 627 F.2d at 382. Plaintiffs alleged "that their behavior has thus far conformed to the statutory mandate [and] make no allegation of an intention imminent or otherwise to violate the statute, and the [FEC had]

Moreover, where Congress has directed swift action and a proper case or controversy exists, there is little room to refuse to proceed on prudential ripeness grounds. *See Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 328 (1999) ("Congress has eliminated any prudential concern").

Contrary to Judges Leon and Kollar-Kotelly, Per Curiam, Supp. App. 155sa-56sa, there is no lack of statutory jurisdiction here. Section 403(a) confers jurisdiction over any "action" that challenges the constitutionality of any provision of BCRA. The concept of "action" surely is broad enough to encompass a defense that the FEC's coordination regulations somehow cure the statute's lack of tailoring and vagueness. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The content of the regulations is known and, as is demonstrated above, they do not cure the problem.[34]

CONCLUSION

BCRA's electioneering communication and coordination provisions should be declared void under the First Amendment.

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no cause to commence enforcement, nor even to threaten enforcement, of the challenged statutory provisions." *Id*. at 382-83. The court concluded that, because there was no "urgency of decision," *id*. at 388, and the FEC's advisory opinion process "offer[ed] a prompt means of resolving doubts with respect to the statute's reach," *id*. at 384, that could "be pursued at little risk to the rights asserted," *id*. at 386, the doctrine of ripeness counseled "against constitutional adjudication on a barren record." *Id.* at 385. Here, by contrast, the problem is urgent, the advisory process offers no meaningful assistance, and the case is before this Court on a full record and under a statutory mandate of prompt resolution.

[34] Judge Leon and Kollar-Kotelly profess that, because the regulations issued on December 18, 2002, two weeks after argument, "the Court does not know . . . to what extent the regulations have clarified the vagueness." Per Curiam, Supp. App. 151sa. If the district court needed further briefing on that issue, there was ample time between December 18 and the ruling on May 2, 2003, for the court to have called for it.

Respectfully submitted,

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