OPENING BRIEF OF PLAINTIFFS CHAMBER OF COMMERCE OF THE UNITED STATES, NATIONAL ASSOCIATION OF MANUFACTURERS.

The Chamber of Commerce of the United States ("Chamber") and the National Association of Manufacturers ("NAM") challenge sections 201, 202, 203, 211, 214, 311, and 504 of the Bipartisan Campaign Reform Act of 2002 ("BCRA").[1] The U.S. Chamber Political Action Committee challenges BCRA § 212(a), but will rely on the Omnibus Brief.

I. THE CHAMBER AND NAM

Plaintiff Chamber is the world's largest not-for-profit business federation. Founded in 1912, it represents over 3,000,000 small and large businesses and business associations. The Chamber is a corporation, as are many of its members. Josten Decl. ¶ 3, 10 PCS/COC 0001. Plaintiff 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. Thus NAM represents about 18 million individuals. Huard Decl. ¶ 2, 10 PCS/ NAM 0001.

The Chamber and NAM regularly deal with Members of Congress, political parties, and executive officers. In pursuing their legislative and policy objectives, the Chamber and NAM often form coalitions or alliances with diverse groups that share particular positions or interests. A good example is the "Thursday Group" that is discussed in more detail below.

To build and maintain support for legislative and policy positions, the Chamber and NAM regularly produce and purchase television, radio, cable, and other public communications. Sometimes they will sponsor communications directly in their own names. For example, in 1999 the Chamber ran its own ads relating to Y2K, and its president, Tom Donohue, delivered a series

[1] Section 311 violates the First Amendment as it pertains to "electioneering communications" because that standard is overbroad, vague, or both. *See* Omnibus Br. at II. A. 1. (c). See AFL-CIO Brief regarding section 504.

of radio talks entitled "Speaking of Business." Josten Decl. ¶ 5, 10 PCS/COC 0001. NAM also has run its own ads. Twice during the later 1990's, NAM ran ads advocating the President's tax proposals, Huard Decl. ¶ 4, 10 PCS/NAM 0001, and in 1998 NAM ran ads advocating open markets and expanded world trade in the context of WTO meetings in the U.S. *See, e.g.*, Huard Decl. ¶ 23, 10 PCS/NAM 0185 ("We Will Do the Rest" TV ad). But, often the Chamber or NAM pool resources with coalitions to speak more effectively.[2] A good example is "The Coalition" discussed below.

II. CORPORATE SPEECH, ASSOCIATION, AND PETITIONING ARE PROTECTED BY THE FIRST AMENDMENT

The First Amendment strongly protects the rights of corporations to speak, associate, and petition the government. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776, 784 (1977), rejected the suggestion that "speech that otherwise would be within the protection of the First Amendment loses that protection simply because the source is a corporation." Emphasizing that First Amendment rights have "particular significance with respect to government," *id.* at 776 n.11, *Bellotti* struck down a statute forbidding corporate advocacy concerning a public referendum. Similarly, *Consolidated Edison Company v. Public Service Commission,* 447 U.S. 530, 537 (1980), held that not even a regulated corporate monopoly could be forbidden to use

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[2] For years, the Chamber, either singly or in association with various coalitions, ran issue ads throughout the country. In March 2000, the Chamber helped support ads by American Business for Legal Immigration and in December 2001, the Chamber supported ads by People for Common Sense Courts that urged Senator Daschle to schedule a Senate vote on Eugene Scalia's nomination as Solicitor of Labor. Josten Decl. ¶ 5, 10 PCS/COC 0001. In 1998, the Health Benefits Coalition, of which the Chamber was a member, ran a radio ad concerning a Patient's Bill of Rights that in many states fell within 30 days of a primary in which the Senator mentioned in the ad appeared on the ballot. *See* Chamber Designation of Docs. PN 04108 (text of ad) and PN 04107 (press release concerning ads). In 2000, the Health Benefits Coalition again ran ads concerning a Patient's Bill of Rights, often in close proximity to elections. *See, e.g.,* Chamber Designation of Docs. PN 04229 (script) and PN 04228 (press release) concerning ads run in Missouri, Michigan, and Virginia.

billing inserts to address "controversial issues of public policy." Stressing that the corporate nature of the speaker does not undermine "the inherent worth of the speech in terms of its capacity for informing the public," it ruled that any restriction on corporate speech must be "a precisely drawn means of serving a compelling interest." *Id.* at 533, 540. Indeed, *Greater New Orleans Broadcasting Ass'n v. United States,* 527 U.S. 173 (1999), reaffirmed that even "commercial speech" is highly protected, so that any regulation must be narrowly tailored, directly effective, and no more burdensome than necessary. The First Amendment similarly protects the right of corporations "to confer and discuss public matters with their legislative representative or candidates." *Clifton v. FEC,* 114 F.3d 1309, 1314 (1st Cir. 1997).

A provision of the Federal Election Campaign Act ("FECA") tracing back to the Tillman Act forbids corporate contributions or expenditures "in connection with" any federal election. 2 U.S.C. § 441b. This provision restricts only "express advocacy," however. *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 249 (1986); *Clifton,* 114 F.3d at 1311. *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 656 n.1 (1990), upheld such an express advocacy restriction, imposed by a state statute modeled on FECA,[3] on the theory that corporate "aggregations of wealth" posed a sufficient risk of corruption. *Id.* at 660. But that theory has not been expanded beyond express advocacy. Justice Brennan, who joined in the majority opinion, stressed that "a State cannot prohibit corporations from making many other types of political expenditures." *Id.* at 677 (concurring). Moreover, *Austin* stressed that strict scrutiny applied to regulation of corporate express advocacy, and "[t]he mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment." *Id.* at 657.

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[3] The corporation sought to use its treasury funds to place "an advertisement supporting a specific candidate." 494 U.S. at 656. The ad urged "Elect Richard Bandstra." *Id.* at 714.

In sum, the fact that the Chamber and NAM are and represent corporations does not deprive them of robust First Amendment protection. BCRA's restrictions and burdens on corporate speech, association, and petitioning must satisfy the First Amendment.

III. BCRA VIOLATES THE FIRST AMENDMENT BY ATTEMPTING TO OVERRULE THE "EXPRESS ADVOCACY" STANDARD (§§ 201 & 203)

The Chamber and NAM sponsor broadcast ads to advance legislative and policy initiatives and the interests of their members. But, because the Chamber and NAM are corporations and their funds come from corporations, BCRA forbids them to finance "electioneering communications," a new concept intended to overrule the "express advocacy" standard in *Buckley v. Valeo,* 424 U.S. 1, 44, 80 (1976), which was adopted to prevent overbreadth and vagueness.

The Chamber and NAM rely upon the Omnibus Brief for its discussion of the many legal defects in these provisions. Omnibus Br. at II. However, they wish to discuss the evidence that reflects why the statute impermissibly interferes with a corporation's right to discuss issues.

For example, the nursing home industry was severely and adversely injured by reduced government payments. The Omnibus Brief at II. A. 2. (a) (ii) notes that that industry's association ran ads about "a nursing home crisis in America." The ad asked "to restore the Medicare cuts." As thus far described, the association's advertising would not be banned by BCRA. The ad, however, further urges: "Call. Tell Al Gore to fight to restore the Medicare cuts." Under BCRA, the ad would now be banned because incumbent Vice President Al Gore also was a candidate. The consequence is that an industry can publicize a public policy "crisis" that it faces, but it may not publicize what the public or politicians can do about it. This directly interferes with a corporation's right to address matters of public concern.

Similar examples are found in health care advertising by the Health Benefits Coalition, of which the Chamber was a member, and Citizens for Better Medicare (CBM). *See supra* note 2; Goldstein Cross-Examination Ex. 45, 46. The CBM advertising, in fact, was deemed "genuine" issue ads by the student coders in Buying Time 2000. *See* Omnibus Br. at II. A. 2. (a) (i) C).

An additional issue ad considered "genuine" by the Buying Time coders was sponsored by the Chamber and aired in the 2nd Congressional District of Utah during the 2000 election. The voice-over in that advertisement was as follows:

> [Announcer]: Jim Matheson can't decide what position to take on prescription drug coverage for seniors. He doesn't support the common sense plan passed by the House of Representatives. He doesn't support Bill Clinton's big government plan. Tell Jim Matheson. Tell Jim Matheson a big government plan is the wrong way to go. It gives seniors no choice, and it could cause millions of seniors to lose the coverage they already have. Tell Jim Matheson to make a decision. This issue is too important to ignore. [PFB: US Chamber of Commerce].

Senator Feingold testified that this was "an electioneering ad" "directed at beating Mr. Matheson." Feingold Dep. at 73. But, Dr. Craig Holman, co-author of Buying Time 2000, testified that:

> [The ad] is neither supporting nor attacking Jim Matheson. As a matter of fact, it makes clear that Jim Matheson doesn't know what he's going to do . . . . I view it as a neutral ad trying to encourage Jim Matheson to vote a certain way on a public policy issue . . . . . [T]his doesn't lay out for me whether or not I should vote for Jim Matheson . . . .

Holman Dep. 81-82. Thus references to candidates provoke different subjective reactions. *See* Omnibus Br. II. A. 2. (a) (i) C). To Dr. Holman the name of a candidate can be in a "genuine" issue ad and is integral to effective speech about issues. This is the type of speech that *Bellotti* and *Buckley* protect from government prohibition, and that *Austin* did not prohibit.

IV. THE BROADCAST BLACKOUT PROVISION DOES NOT FURTHER THE ASSERTED GOVERNMENT INTEREST (§ 203)

Section 203 prohibits corporate messages on broadcast, cable or satellite during specified periods of time. The underinclusiveness of this blackout scheme undermines any assertion that the ban is needed to prevent "corruption" caused by "aggregations of wealth." *Austin,* 494 U.S. at 660. First, past issue ads which would be subject to a BCRA type ban were only 14.7% of all political advertising which includes ads sponsored by candidates and parties. Craig B. Holman and Luke P. McLoughlin, *Buying Time 2000: Television Advertising in the 2000 Federal Elections*, Brennan Center for Justice at New York University School of Law at 29 (2001). An unspecified fraction of the 14.7% consists of corporate ads. Thus, corporate ads are not "distorting" public policy debate.

More important, section 203 allows corporations to finance the same messages *at any time* via billboards, newspapers, magazines, direct mail or telemarketing and, outside blackout periods, via broadcast, cable and satellite. Thus, "aggregations of wealth" still can be deployed.

Moreover, section 203 is not narrowly tailored to express advocacy as *Buckley* and *Austin* mandate. *See* Omnibus Br. at II. A. 1. (a).

V. BY FAILING TO GIVE "COORDINATION" A NARROW, OBJECTIVE, AND PRECISE MEANING, BCRA VIOLATES THE FIRST AMENDMENT (§§ 202, 211, 214)

Spending for speech that is "coordinated" with a candidate, or political party is deemed a "contribution." Corporations and labor organizations cannot lawfully make contributions, and individuals are subject to contribution limits. Sections 202, 211, 214(a), and 214(b) of BCRA expand the applicability of the "coordination" concept, repeal FEC regulations that had begun to define the type of conduct necessary to establish coordination, reject any clear content standard, and provide no clear definitions. As a result, parties such as the Plaintiffs who both lobby and

engage in public speech must either (i) immediately curtail their rights to associate and petition the government or (ii) refrain from fully protected speech. The dilemma has bite right now because contacts with legislators or political party officials today may lead to claims that future speech is "coordinated" and, hence, is an unlawful contribution.

To illustrate further what is at stake, assume that in September of a presidential election year, a president who is seeking reelection has taken the country to the verge of war. His challenger is trying to avoid taking a clear position. A dozen Members of Congress, also seeking reelection, fervently believe that there is a better alternative that they have named after two of their number (Senators "X" and "Y") who are military heroes. They urgently convene advocacy groups with similar views and propose that the advocacy groups immediately begin broadcasting ads asking the public to (i) support the "X-Y Peace Plan"; (ii) urge the president to delay irreversible military action until after the election; and (iii) demand that the presidential challenger state a clear position in opposition to war. The Members state that they will make their own campaigns a referendum on the issue of war. If coordination is defined broadly, this entire effort will be illegal. If the definition is uncertain, speech on a vital public issue may be deterred. All parties, constitutionally, deserve clear and precise guidance on when they are engaging in illegal "coordination."

A. Before BCRA The Vague Concept Of Coordination Was Becoming Clearer

To prevent "contributors from avoiding the contribution limitations by . . . paying directly for media advertisements or other portions of the candidate's campaign activities," *Buckley* held that "controlled or coordinated expenditures are treated as contributions." 424 U.S. at 46. Because corporations and labor organizations cannot lawfully make "contributions" and even

individuals are subject to contribution limits, a charge of coordination often threatens substantial civil sanctions or even criminal liability. 2 U.S.C. § 437g.

Buckley did not define coordination. *FEC v. Christian Coalition,* 52 F. Supp. 2d 45, 85 (D.D.C. 1999) (*Buckley* "left this issue for another case"). In response to *Buckley,* Congress amended FECA to provide that "expenditures made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i). Congress also defined an "independent expenditure" as one made "without cooperation or consultation with any candidate . . . and which is not made in concert with, or at the request or suggestion of, any candidate." 2 U.S.C. § 431(17). But, the key terms -- "suggestion," "request," "consultation," "cooperation," and "concert" still were not defined.

Both *Buckley* and FECA spoke of coordinated "expenditures." *Buckley* had construed the concept of "expenditure" for expressive activity as limited to "express advocacy." 424 U.S. at 44. Logically, this meant that only express advocacy could be deemed coordinated. *See generally* Statement for the Record of FEC Commissioner Smith, MUR 4624 (November 6, 2001) ("Smith Statement").

The District Court's 1999 *Christian Coalition* opinion refused to limit coordination to express advocacy, but significantly clarified the conduct standard. *See also, Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997). In *Christian Coalition*, the Court rejected the FEC's sweeping theories of coordination which it likened to "insider trading." The Court held that "First Amendment clarity demands a definition of 'coordination' that provides *the clearest possible guidance.*" 52 F. Supp. 2d at 91 (emphasis added). It ruled that spending for "expressive

communication" is coordinated only if it occurs at "the request or suggestion of the candidate or an authorized agent" or in circumstances in which:

> the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's (1) contents; (2) timing; (3) location, mode, or intended audience (e.g. choice between newspaper or radio advertisement); or 'volume' (e.g. number of copies of printed materials or frequency of media spots). Substantial discussion is such that the candidate and the spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.

Id. at 92. *Christian Coalition* then rejected nearly all of the FEC's claims of coordination.

The FEC did not appeal. Instead, in December 2000, it promulgated a definition of "coordination for a general public political communication" closely modeled on the *Christian Coalition* opinion. 11 C.F.R. § 100.23(c).

B. BCRA Repealed The FEC's Definition, Provided No Definition Of Its Own, But Expanded The Scope Of The Coordination Concept

Sponsors of BCRA considered the FEC's coordination regulation much too narrow, but were unable to develop an alternative standard. Instead, BCRA repealed the FEC's regulatory definition, as of December 22, 2002, and directed the FEC to craft new standards that shall "not require agreement or formal collaboration to establish coordination" and that shall "address" several issues. BCRA § 214(b), (c). BCRA also rejected an "express advocacy" limitation, specifying that coordination applies to "any direct or indirect payment, distribution, or gift . . . in connection with any election . . . or for any applicable electioneering communication." BCRA § 214(c). Having thus deprived "coordination" of its emerging clarification, BCRA retained FECA's vague "in concert or cooperation with, or at the request or suggestion" of language and

used it to define "independent expenditure" (BCRA § 211, amending FECA § 431(17)), and to regulate dealings with political parties (BCRA § 214(a), amending FECA § 441a(a)(7)(B)).

C. Because It Regulates Core First Amendment Activity, The Coordination Provision Must Be Narrow, Objective, And Precise

As section II above demonstrated, spending on speech, public issues, associations for political purposes, and petitioning government are strongly protected by the First Amendment, even if the actors are corporations. Because, BCRA imposes a tradeoff between association, speech, and petition in dealing with officials on the one hand, and the right of public speech on the other, the definition of "coordination" must meet First Amendment standards. *Christian Coalition,* 52 F. Supp. 2d at 90.[4]

The First Amendment is demanding. *Buckley* stressed that both "precision of regulation" and "narrow specificity" are essential so that persons do not avoid fully protected activity by steering clear of what is forbidden. 424 U.S. at 41. It required an objective standard based on readily ascertainable facts because no one could be confident of what was permitted by a

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[4] In addition to forcing citizens to choose between petitioning their representatives and subsequent political speech, a loosely defined "coordination" prohibition subjects interest groups and individuals to intrusive government investigations that in themselves will chill the exercise of these rights. This is because, in contrast to allegations that a corporation or union has violated the prohibition on express advocacy, which can be decided quickly and inexpensively on the basis of the respondent's communications themselves, allegations of prohibited coordination by definition involve an inquiry into activities external to the communications themselves. It is for this reason that the definition of "coordination" applicable to general public communications "must be restrictive, limiting the universe of cases triggering potential enforcement actions to those situations in which the coordination is extensive enough to make the potential for corruption through legislative *quid pro quo* palpable without chilling protected contact between candidates and corporations and unions." *Christian Coalition,* 52 F. Supp. 2d at 88-89. *See also, Sweezy v. New Hampshire,* 354 U.S. 234, 245 (1957) (Frankfurter, J., concurring) ("It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas.") *FEC v. Machinist Non-Partisan Political League,* 655 F.2d 380, 388 (D.C. Cir. 1981) ("[T]he subject matter of materials [subpoenaed by the FEC] represents the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association concerning federal elections and officeholding ... release of such information to the government carries with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment."); *FEC v. Larouche Campaign,* 817 F.2d 233, 234 (2d Cir. 1987).

subjective standard. *Id.* at 43-44. Finally, *Buckley* insisted that the standard be narrowly tailored to encompass only activity that clearly justified regulation, *id.* at 79-81, even if the obvious effect would be to permit a considerable amount of activity to escape regulation. *Id.* at 45-46; *see also Orloski v. FEC,* 795 F.2d 156, 164-66 (D.C. Cir. 1986) (stressing need for objective and precise standard).

D. BCRA's Coordination Provisions Are Both Overly Broad and Unconstitutionally Vague.

BCRA's prohibitions on coordinated expenditures are unconstitutional in two distinct ways: (1) By adopting a per se rule under which any coordinated "electioneering communication" is deemed to be a contribution, section 202 of BCRA expands the scope of the prohibition to include communications that have nothing to do with elections and therefore are beyond Congress' authority to regulate. (2) By repealing the FEC's current regulation and failing to supply any clear statutory definition of what constitutes prohibited coordination, section 214 will chill First Amendment speech and association.

As is made clear in the Omnibus Brief's discussion of Title II, BCRA's primary definition of "electioneering communication" is overbroad. By using this overbroad concept to define the prohibition on coordinated expenditures, section 202 makes it unlawful for corporations and unions to coordinate their lobbying communications with Members of Congress and other officeholders in violation of both the right of free speech and the right to petition the government. As the Court of Appeals for the First Circuit recognized in rejecting an FEC regulation on voter guides and voting records:

> We think [the FEC rule prohibiting oral contact with candidates] . . . treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office . . . . It is beyond reasonable belief that, to prevent corruption or illicit coordination, the

> government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues . . . .

Clifton, 114 F.3d at 1314.

FEC Commissioner Smith has advanced a strong argument that the First Amendment limits the coordination concept to express advocacy. *See* Smith Statement; *but see*, *Christian Coalition*, 52 F. Supp. 2d at 87-88. However, this Court can invalidate section 202 on narrower grounds. BCRA's definition of "electioneering communications" includes not only communications that contain express advocacy but also communications that have no connection to an election, and section 202 makes both types of communications unlawful if they are coordinated with a candidate or political party. Under section 202 any broadcast communication made within 60 days of a general election or 30 days of a nominating event will be unlawful if the communication identifies a candidate and is coordinated with any other candidate or political party, whether or not the communication has any connection to an election.[5]

In addition to invalidating BCRA's overbroad content standard for coordination, the First Amendment also demands that the conduct that constitutes coordination be precisely, objectively, and narrowly defined. Otherwise, "persons speaking with legislative officials in the 2, 4 or 6 years between elections do so at their own risk." Smith Statement at 23 n.35. Section 214(a) of BCRA, however, fails to define in any meaningful manner what contact citizens may have with Members of Congress, other officeholders and party officials without jeopardizing their future right of free speech.

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[5] If "coordination" applies only to "express advocacy" or other communications having a demonstrable connection to an election, an effort like the hypothetical peace campaign discussed above (at 7) is permitted. The groups can spend money for ads that seek to convince the public of the need to support the X-Y Peace Plan and inform the public of the positions of candidates vis-à-vis the plan. The candidates themselves, using "hard money," then can directly appeal for votes. But if all communications constituting "electioneering communications" are restricted, the political process (and free speech) is stymied at a critical time. If the First Amendment forbids anything, it must forbid such an interference with basic democracy in action.

BCRA adopts and gives expanded scope to FECA's provision that expenditures shall be considered to be "contributions," and therefore prohibited entirely or at a minimum subject to regulation, if they are made "in cooperation, consultation, or concert with, or at the request or suggestion of," a candidate or political party. 2 U.S.C. § 441a(a)(7)(B)(i). As described above, this Court in *Christian Coalition* and the FEC in its 2000 regulations based on that decision recognized that the statutory language was vague and sought to narrow and clarify it to give clear guidance to the regulated community. While the FEC did not solve all the vagueness problems, it took useful steps toward alleviating them. By repealing the current FEC regulation, BCRA section 214(a) deprives plaintiffs and others who deal with government officials and political parties of any guidance as to what the vague statutory language might mean.[6]

Section 214(a) cannot escape review by the possibility that the FEC may ultimately adopt regulations clarifying the statutory language for four key reasons: (i) some unconstitutional aspects such as its inclusion of "electioneering communication" are clearly mandated and are beyond the FEC's power to change; (ii) the vagueness as to what conduct may constitute coordination, and hence make future speech unlawful, is chilling association and petitioning activities right now; and (iii) there is no assurance that the FEC will be able to agree on new regulations at all, and (iv) there is no assurance that any regulations that may be adopted will survive Congressional and judicial review.[7]

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[6] To be clear, plaintiffs do not contend that Congress could not repeal the 2000 FEC regulation. Instead, our position is that Congress had a duty to provide a narrow, precise, and objective definition for the coordination concept. Congress failed to provide a statutory definition and, by repealing the FEC's regulatory definition, Congress substantially aggravated the constitutional violation.

[7] BCRA's repeal of the FEC's coordination regulations is not conditioned on the promulgation of new regulations that in any event are subject to both congressional and judicial review. The FEC is attempting to meet BCRA's timetable, and has scheduled issuance of coordination regulations for December 12. However, four affirmative votes are necessary. Moreover, under the Administrative Procedures Act, 5 U.S.C. § 553(d) and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. § 801(a)(1), the FEC must submit its final rules to Congress. As a major rule, these regulations could not go into effect until the latest of (1) 60 days after the date the

Buckley decided vagueness and overbreadth challenges to FECA even though the FEC had not yet defined critical terms through rulemaking or advisory opinions. It held that such administrative remedies were inadequate because "the powers delegated to the Commission thus do not *assure* that the vagueness concerns will be remedied prior to the chilling of political discussion by individuals and groups." 424 U.S. at 41 n.47 (emphasis added). There is no such assurance here, nor could there be since BCRA's vague and overbroad coordination standard already is causing injury. Thus, *Buckley* calls for review now.

Moreover, BCRA section 403(a)(4) mandates that constitutional challenges to the statute be "expedit[ed] to the greatest possible extent." Thus, the Court should exercise its full judicial power, rather than deferring action for "prudential" reasons. The FEC would remain free to regulate within any constitutional sphere marked out by the statute.

E. Coordination Allegations Seriously Burden And Chill Speech

Associations, including the Chamber and NAM, know from painful, first-hand experience how a vague and overbroad concept of "coordination" permits unfounded charges and investigations that seriously burden and chill participation in legislative initiatives. A dramatic example is the FEC's sweeping proceeding against a group known as "The Coalition" in Matter Under Review 4624. Although the FEC ultimately dismissed the complaint, four years of intrusive, burdensome, expensive, and threatening litigation crippled and finally destroyed The Coalition and continues to chill similar activities by its members.

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Congress receives the required report on the rule or the rule is published in the Federal Register; (2) 30 session days after the date on which Congress receives a presidential veto of its joint resolution disapproving the rule or the date it fails to override the veto. *Id.* 801(a)(2). The new Congress is expected to re-convene in early January. If it allowed the rules to take effect, they then would be subject to ordinary APA review, a process that can take years, thus defeating BCRA's mandate that constitutional issues presented by the statute be resolved in a special, highly expedited proceeding.

The general background and procedural facts of MUR 4624 may be gleaned from the FEC's public file.[8] Briefly stated, when Republicans gained control of Congress in 1994, Representative John Boehner assumed leadership in shepherding pro-business aspects of the "Contract With America" through Congress. He invited various groups, including the Chamber and NAM, to meet regularly in his offices to "discuss legislative strategy to gain passage of provisions of the Contract with America and how to mobilize members of [participating] groups." GC Report at 12. Because of its customary meeting day, the group became the "Thursday Group."

In early 1996 the AFL-CIO announced that it would spend a large sum – allegedly $35 million – on issue advertisements attacking the Republican legislative agenda. It was immediately obvious to the business community that some type of response should be made. In April, 1996, five leading pro-business associations, including the Chamber and NAM formed The Coalition. These leading business groups also were members of the Thursday Group.

The Coalition recruited about 30 organizations as public members, plus many other members who provided financial support but who requested assurances that they not be publicly identified. The Coalition ultimately spent about $5 million on broadcast ads. The ads are in the record of this case, as are many of the AFL-CIO ads to which they respond.[9]

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[8] Most records relating to MUR 4624 are confidential under FECA § 437g(a)(12). However, the FEC's public file contains a Statement for the Record by Commissioner Bradley A. Smith (Nov. 6, 2001) ("Smith Statement"), a Statement for the Record by Commissioner Scott E. Thomas and Chairman Danny Lee McDonald (Sept. 7, 2001) ("Thomas/McDonald Statement"), and a General Counsel's Report (April 23, 2001) ("GC Report"). The Court may take judicial notice of these documents for information about the MUR. However, the information obtained by the Commission was never disclosed to the parties or subjected to adversary scrutiny, the "depositions" did not provide for either attendance or cross-examination by respondents, and the Commission made no findings. Therefore, the documents are not proper evidence or a reliable source of information on the merits.

[9] These ads did not expressly advocate the election or defeat of any candidate. During discovery in this case, Defendants devoted a great deal of time to questions about the subjective purpose of the ads. The witnesses were unanimous in stating that The Coalition's institutional purpose was to respond to the AFL-CIO ads. Witnesses varied in their perceptions as to whether members of The Coalition also had a subjective hope that the ads would

The Coalition's ads did not expressly advocate the election or defeat of any candidate. They were run in districts in which the AFL-CIO had run ads but not in all such districts because of more limited resources. No ads were run in Congressman Boehner's district.

From its outset The Coalition stressed to its members and vendors the importance of avoiding any appearance of coordination with candidates. Its ads were developed independently. The contents of the ads were not discussed with candidates or their campaigns. The Coalition decided for itself when and where to air the ads. However, members of The Coalition continued other legislative work including participation in the Thursday Group.

Despite all precautions, on June 9, 1998, eighteen months after the ads ran, the FEC instituted MUR 4624 to investigate charges by the Democratic National Committee that The Coalition, 28 of its members, and Mr. Josten (of the Chamber) had coordinated their efforts with the National Republican Congressional Committee and its treasurer ("NRCC") and seven candidate committees. GC Report at 3-4. Parallel charges were made against candidates and committees with which The Coalition allegedly had coordinated. *Id.*

There was no evidence that The Coalition communicated the contents of its ads to any candidate or campaign before the ads ran. Nor was there evidence of any consultation with any candidate or campaign as to when or where the ads would run. Instead, the crux of the coordination charge was that, because of participation in the Thursday Group, members of The Coalition had *the opportunity* to coordinate with Congressman Boehner who was "the fourth ranking Republican House member, the Republican Conference Chair, and *ex officio board*

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benefit the campaigns of candidates attacked by the AFL-CIO. Whatever the purpose of Defendants' inquiry, the subjective hopes of members of The Coalition have no bearing on whether the ads were coordinated.

member of the NRCC." Id. (emphasis in original).[10] Also, press reports had suggested that Congressman Boehner had been assigned by Republican leadership an active role in encouraging the business community to respond in some fashion to the AFL-CIO initiative. Reportedly he gave speeches calling in general terms for a response. There was no claim, however, that he called for specific action or that The Coalition entered into any agreement with him.

Lacking any narrow objective or precise standard for "coordination," the FEC launched a free ranging inquiry. It demanded that members of The Coalition describe in detail all contacts with members of Congress and their staffs, and produce all related documents, such as telephone records, for an extended period.[11] Indeed, in instituting the MUR:

> the Commission approved Subpoenas and Orders to the Coalition, the Coalition's 28 Executive Committee [public] members, House Republican Conference Chair Representative John Boehner, his chief of staff Barry Jackson, Coalition consultants the Tarrance Group ("Tarrance"), National Media, Inc. ("NMI"), Gannon, McCarthy and Mason, Ltd. ("GMM"), American Viewpoint ("AV"), Chuck Greener/Porter Novelli, Frank Luntz/Luntz Communications, and individual employees or principals of the consultants (collectively "consultants"), the NRCC and the NRCC's Mario Cino and Ed Brookover, 37 candidate committees and their treasurers, and others.

GC Report at 4.

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[10] The NRCC is the National Republican Congressional Committee, to which all Republican members of Congress belong. It is a national political committee that supports the election of Republican members of Congress. Based on the fact that Congressman Boehner had an ex officio position with the NRCC and was reported to have a special interest in business issues and the need for a business response to the AFL-CIO, there was speculation that "Mr. Boehner may have been acting as an agent of the NRCC and may have been the primary person through which coordination between the Coalition and the NRCC occurred." (Thomas/McDonald Statement at 3).

[11] No sample of the FEC's initial discovery demands appears in the public file, but some flavor can be gleaned from the negotiated and narrowed requirements discussed in the GC Report (at 6-7) and by the GC Report's discussion of an invoice for messenger delivery to a Senator's office that, unsurprisingly, was not recalled four years later (at 32). The highly intrusive nature of such FEC inquiries is confirmed by the Smith Statement (at 4) ("The investigation can include extensive rifling through the respondents' files, public revelations of internal plans and strategies, depositions of group leaders, and the like"), and by *Christian Coalition*, 52 F. Supp. 2d at 88-89. "Oddly, the less immediately obvious evidence there is that the conduct [is coordinated], ... the more intrusive the investigation is likely to be, as the Commission searches for evidence of the veracity of the complaint." (Smith Statement at 4).

After four years of discovery, the FEC's General Counsel claimed there was "circumstantial evidence that the activities of the Coalition were loosely coordinated with the Republican Party leaders, specifically Representative John Boehner and other candidates." GC Report at 2.[12] The General Counsel conceded, however, that "loosely coordinated" was not a viable standard in light of then recently enacted FEC regulations defining coordination. *Id.* Thus, reluctantly, he recommended that the case be dismissed.

The conflict was disruptive, burdensome, and expensive. As a result, willingness to participate in or support The Coalition evaporated. It financed only a few ads in 1998, and now is defunct. FEC Commissioner Smith trenchantly observed, Smith Statement at 2:

> Despite the fact that the Commission has 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 Act, I strongly suspect that the huge costs imposed by the investigation will discourage similar participation by these and other groups in the future.

VI. COMPELLED DISCLOSURE OF ELECTIONEERING COMMUNICATIONS IS UNCONSTITUTIONAL (§ 201)

The electioneering communication disclosure provision, the requirements of which are explained in Omnibus Br. at II. A. 1. (c), is unconstitutional for many reasons already provided in this and other briefs. Section 201 chills associational rights and is overbroad. *See NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958); *Buckley,* 424 U.S. at 64 (citing *NAACP*).

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[12] It bears repeating that the General Counsel's report is not the product of adjudication. It is based on secret information developed on an *ex parte* basis that was not shared with The Coalition and its members. If an opportunity had been given, The Coalition would have rebutted the report. It is relevant only to show that the best possible case for coordination was extraordinarily weak.

Testimony in this litigation confirms that the ability to associate with otherwise willing persons is seriously compromised if disclosure is required. In turn, the ability to collectively speak is necessarily diminished. The Chamber's Bruce Josten testified that members who support ads do "not want to be identified out of concerns that they may become targets or recipients of corporate campaigns or other types of what some would call union harassment activities." Josten Dep. at 28. Stephen Sandherr of the Associated General Contractors of America said his members "were concerned that if their contributions were publicly disclosed that their local building trades would take offense and would threaten actions on the job site or would threaten to make life miserable for them." Sandherr Dep. at 45. Edward Monroe testified that the Associated Builders and Contractors has lost members who were subjected to acts of vandalism after their contributions were publicly disclosed. Monroe Decl. ¶ 12, 10 PCS/COC 0005. Mr. Monroe also testified that potential members have declined to join the Associated Builders and Contractors because they "do not trust our ability to keep that information confidential." Monroe Cross-Examination at 88-89. In sum, the chilling effect on First Amendment rights caused by compelled disclosure is substantial.

Buckley stressed that the Supreme Court had "repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. at 64. Thus, "since *NAACP v. Alabama* [the Court has] required that the subordinating interests of the state must survive exacting scrutiny." *Id.*

Interestingly, the NAACP itself now runs issue ads. It ran an advertisement in 2000 critical of then-presidential candidate Bush's stance on hate crimes legislation. 10 PCS/COC 0148 (story board of the ad). It would be ironic indeed to allow the federal government to compel the NAACP to disclose information today that the Constitution protected 44 years ago.

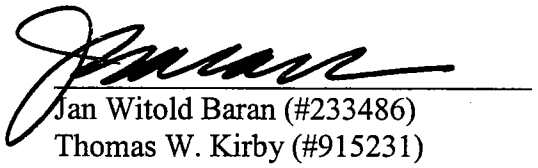
Moreover, even representatives of the Brennan Center, Counsel for the Intervenor-Defendants, acknowledge that these disclosure requirements are overbroad as applied to the Chamber. Brennan officials have written that, "[w]hen the advertiser is the Chamber, the interest served by the ad is reasonably clear." Deborah Goldberg & Mark Kozlowski, *Constitutional Issues in Disclosure of Interest Group Activities*, 35 Ind. L. Rev. 755, 757 (2002). The Chamber of Commerce is a well-known association of American businesses that has been in existence for 90 years.

Speech as well as associational First Amendment rights are at risk. The Supreme Court "has more than once recognized ... the close nexus between the freedoms of speech and assembly." *NAACP*, 357 U.S. at 460. Representatives of the Brennan Center have agreed saying: "Major donors might be willing to bankroll nasty advertising campaigns as long as their involvement can be concealed." Goldberg & Kozlowski, 35 Ind. L. Rev. at 757. They propose mandatory disclosure precisely to discourage nasty speech.

In sum, the electioneering communication disclosure provision is overbroad.[13]

[13] The timing of the BCRA's electioneering communication disclosure requirement is an unconstitutional prior restraint. The argument of the AFL-CIO presented in § III of its brief is hereby adopted by incorporation.

Respectfully submitted,



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